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March 17, 1994

UPS NEXT DAY AIR

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Attention: Public Information Office

Dear Members:

I see that you are inviting public comment on your latest proposed round of amendments. Here goes.

I am enclosing a copy of my letter of April 15, 1992. If you find nothing redeeming in that letter, you can dispense with considering this one as well.

In six years, you have enacted 502 Amendments to the Guidelines. So far as I can tell, the only thing useful to be produced by these Amendments is more Amendments.

There is no elimination of disparity; there has been a proliferation of disparity in many cases from application of the Guidelines.

There has been no diminution in crime. Very few of the Guidelines, or the 502 Amendments, are carefully considered by those contemplating the commission of a federal offense.

No restraint on our country's unprecedented experiment in incarceration rates has been achieved.

If anything, the Guidelines and their Amendments have only added to pushing up the price of drugs, and thus the stakes of drug dealing and the seriousness of the crimes some people are willing to commit.

Improvement in America's sobriety would better be served by government telling the public the truth--that there is no supply-side answer (or any other government answer) to drug abuse. Armed with this indispensable piece of sober wisdom, we would be shocked at the millions of users who would take responsible steps on their own behalf.

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I can't help but wonder about the Sentencing Commission's past and present criticisms of Congressional legislation that is in no important respect different from its own work. The Commission's criticism of mandatory minimums is especially hard to understand if one appreciates that the Commission's Guidelines are the largest and most unwieldy set of mandatory minimums ever enacted by any sovereign.

This country does not need any more Amendments to the Sentencing Guidelines. It needs someone to step forward to say that all of these penological measures (and even other appeals to government such as calls for federal treatment plans), are the problem--not the solution.

I am also enclosing a copy of a letter sent today to the Drug Policy Foundation. It might help to explain what I think is the growing view of middle America.

I really don't write a lot of letters taking positions on anything, and I don't want to be critical.

I am just wondering whether the silliness of all of this couldn't finally produce something extraordinarily healthy for this country.

Thanks kindly.

Sincerely,



Charles A. Asher

cd

Enclosures

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April 15, 1992

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
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Attention: Public Information Office

Dear Members:

I am a sole practitioner with about 25 percent of my work concentrated in federal criminal defense. I am writing regarding what I see as an emergency presented by the Sentencing Guidelines. Although I draw on experiences and comments of judges, probation officers, prosecuting attorneys, and other defense attorneys, these opinions are mine alone.

I offer these thoughts with high regard for what obviously has been a tremendous commitment of time and energy on your part.

As you probably know, it was with considerable uneasiness that practitioners received the first draft of the Sentencing Guidelines that went into effect on November 1, 1987. It is with horror, however, that we are left to receive the dizzying number of amendments to the Guidelines, now totalling 434. Many of these separate amendments carry on for paragraphs and even pages of small print. Some of the amendments actually include separate amendments to dozens of separate Guidelines.

These amendments have been spread out over six separate effective dates. The 1987 West edition of the Guidelines was in about 300 pages. The 1991 edition covers over 800 pages. With each new edition, the West publisher now routinely, and correctly, warns that all prior editions of the Federal Sentencing Guidelines Manual "should be retained . . . in the event there is a need to refer to the text of a specific Guideline, Commentary, or Policy Statement at a particular point in time."

For our further direction, you suggest a doctrine of "selective retroactivity" for usually, but not always, applying the Guidelines in effect on the date of sentencing, not the date of the offense. (Even more mind-stimulating is the place where that doctrine is announced. It seems to be found in the answer to Question Number 71 of your list of "One Hundred Questions Most Frequently Asked

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About the Sentencing Guidelines." With all due respect, this looks like a David Letterman Top Ten List run riot.)

Most of the separate Guidelines by this time have been amended. The most important of them seem to have been amended at least twice, often three or four times.

I wish to put aside for the moment substantive objections to the entire concept of the Guidelines. Surely you have heard them all, and obviously they are not a deterrent to this large-scale experiment in reflex penology.

I have a more limited suggestion, but one that I think is absolutely critical.

Stop. You must stop.

I am not recommending that you do anything or that you undo anything. You must simply stop.

I harbor no harsh thought about the members of the Commission or any of their support staff. Quite the opposite. I am personally struck that this pace of amendments could only be indulged by well-intentioned persons whose humility over past mistakes has regrettably caused them to embark on an endless mission to fix what very possibly is not fixable.

I am sure that you are mindful of the concerns for settledness in the sentencing law, thus that you would not have enacted 434 amendments unless you thought they were of genuine substantial importance in correcting serious earlier errors.

There are those more judgmental souls (people genetically disqualified to be good criminal defense attorneys) who would accuse you of runaway hubris.

But whether motivated by extreme humility or extreme hubris, much is said about how fine an idea the original Guidelines were if they have required hundreds of amendments, in thousands of important distinct parts, covering hundreds of pages of small print in a bare four years.

Indeed, if achieving predictability and avoiding disparity are the chief goals, it is especially hard to understand this pace of change.

I am not here complaining about the fact that we have departed from a system where defendants and their lawyers (and often prosecutors) went into sentencing hearings armed with realistic and sincere

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programs to turn a person's life around, only to have embarked on a system that sees defendants, their lawyers, and their prosecutors enter sentencing hearings armed only with pocket calculators and bromo seltzers. Perhaps those criticisms are mistaken. Perhaps the fact that modern-day federal sentencing has virtually nothing to do with 95 percent of the significant information about the person being sentenced is appropriate, or at least it's the way Congress may have wanted it.

What I am talking about here is a crisis in the day-to-day adjudicative process. I am reminded of David Mellinkoff's observation in The Language of the Law of an insurance policyholder trying to figure out where he stands.

By the time he has found his way to the end of an insurance policy, the alert and unusual householder (layman or attorney) cannot know what he is covered for--because there is more in his policy than he can read and retain even if he understood every word as he read it. The reading has left him--nay, made him--ignorant.

Your hard work has made us ignorant.

Not all of us practicing federal criminal law are brilliant. Approximately half of us graduated in the bottom half of our law school classes.

I would venture that the majority of us practice without large litigation budgets, much if any research assistance, regular access to legislative history, or even computerized research. Regardless of our resources, we are practicing under a flood of case law and amendments to the statutory law that are also burying us. (The Guidelines directly contribute to these explosions as well as evidenced by Appendix I to West's 1991 Guidelines edition showing over 5,000 case law treatments of the Guidelines since 1987.)

And for us, sentencing is not the only consideration. There is often the matter of defending the charge. The same penological aggressiveness that has brought about the Guidelines, endless mandatory minimum sentencing, bills to punish by death killers of federal egg inspectors, and what can fairly be called a federal infatuation with incarceration can, if unopposed, take innocent victims. Some of our clients are indeed innocent, and many are at the very least seriously over-charged.

We are called upon often to study thousands of pages of exhibits in a single case, wrestle with niggardly rules of discovery that were

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written with witness-killing defendants in mind but which are applied indiscriminately against even the most non-violent defendants, study rapidly changing statutory and case law, and, yes, even actually try cases.

My most respected colleagues spend hours and hours getting to know their clients, including a sketch of their lives, their educational and vocational skills, their mental and physical conditions (including drug or alcohol dependence or abuse), employment history, family ties, community ties, and even the areas of their lives where they have shown strength and success in contributing to society such as military, civic, charitable, or public service. In other words, a good attorney expends a great deal of time and effort learning about the matters that the Commission has determined "are not ordinarily relevant in determining whether a sentence should be outside the applicable Guideline range."

That same attorney, even when there is no defense to the material elements of the charge, seeks to make his participation in the case an effective intervention against the parts of a client's life that are not working either for the client or for the community. He is part expert at client confrontation, part friend, part lay counselor, and part a referral source to experts who can interrupt a defendant's mismanagement (only part of which is normally criminal mismanagement) of his life.

The reader of the excellent article by Judge Sally H. Gray and Dr. Timothy J. Kelly, Counseling the Alcoholic--An Opportunity to Make a Difference, "Res Gestae" (March, 1989), will find a rare blueprint for what the responsible attorney regularly spends enormous efforts trying to accomplish with his clients, and often with great success.

For all of the rhetorical flights in modern-day politics that would lead the public to believe that judges are spineless, prosecutors incompetent, and defendants versions of Willie Horton (whatever we are lead to believe Mr. Horton represents), as you know, most people succeed on probation and respond favorably to these efforts.

But back to the emergency. Because only about a quarter of my practice (or perhaps less) is devoted to federal criminal defense, I would normally anticipate that studying, interpreting, and advocating regarding the Sentencing Guidelines would be a very small part of my practice. About federal sentencing I now feel lost. No, I am lost. I experience my clients' sentencing hearings in federal court as something of a lottery where the result is announced to me by people who, although themselves professing to be lost, know a little bit more by attending seminars, retreats, and structured readings of manuals.

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But among my fellow criminal defense lawyers, I am what is called an expert. My colleagues call me. They think that I know something and can tell them something to advocate for their clients, or failing that, at least more deftly observe for human rights violations.

More often than not, federal criminal defendants in our mid-sized city are represented by attorneys appointed under the Criminal Justice Act, attorneys who may have only one or two federal criminal cases a year. These attorneys, although well-intentioned, are heard to ask laughable questions like "But if they're only guidelines, why would the judge get reversed if he doesn't follow them?" Studying five versions in four years of what constitutes "more than minimal planning" or "relevant conduct" is never reached.

None of this is to detract from the incredible effort all of you have expended on your amendments. It is simply too great an effort for the mortal practitioner (by which I include judges, prosecutors, and probation officers who, in my experience, also cannot keep up) to handle.

In all sincerity, I pause from my work to tell you that your commitment to amendments is not working.

As you know, many responsible observers have doubted that this attempt to mathematize the criminal justice system is even possible. Can even the grinding of the teeth between the statutory wheels and the Guideline wheels ever cease? Just last month I had a sentencing in a criminal contempt case under 18 U.S.C. § 401. As you know, that statute authorizes a sentencing court to fine a defendant or imprison him, but not both. Under Guideline 5E1.2(a), the Court is required to impose a fine in all cases (except where a defendant establishes that he is not able to pay). Did you mean the Guidelines to require a fine and thus preclude consideration of any imprisonment? (Please promise me you won't enact an amendment to answer this.)

The people with whom I work (criminal defense colleagues and others) may not be geniuses but they are serious-minded people. I think that it is fair to say that the consensus among them is that there is more disparity and more inexplicable sentencing under the Guidelines than there ever was before, and that all the tinkering in the world is not going to change that. The disparate sentences often required by the mechanistic approach of the Guidelines very often leave us wondering, or muttering, whether we should believe "science" or our lying eyes.

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Worst of all, there is no accountability. Defense lawyers tell their clients that the prosecutor names the charge that pretty much determines the penalty. Prosecutors say they are just bringing the charges and that the judges sentence. Judges say that their hands are tied by the Guidelines. No one even asks what the right sentence should be--or what a right sentence is.

We used to have people who asked just that, and we called them judges. Right or wrong, they had the courage and responsibility to look at the facts, hear the arguments, and actually decide that a particular sentence was the most allowable under the law.

I offer even that observation advisedly because it invites the opposite of what I am recommending. I recommend absolute, unqualified, exceptionless, aggressive inertia. The Guidelines should be left alone long enough so that reasonable people (yourselves included) can try to see what we have and what the effect is on the criminal justice system, crime, and the general respect for law in society.

The punishment-oriented model of the Sentencing Guidelines seems to be either far behind, or perhaps far ahead, of the learning curve elsewhere. I ask that you please each, if you have not already done so, find a copy of the Winter, 1992 issue of "Criminal Justice," the publication of the Section of Criminal Justice of the American Bar Association. The articles there, particularly Americans Behind Bars: Why More People are Locked Up Here Than in Any Other Nation, seem now to reflect not just the opinion of criminal defense lawyers but the opinion of prosecutors as well. More and more people seem now at least vaguely suspicious that imprisonment has no more helpful effect over crime than an attempt to make sentencing a science has over the justness of sentencing.

Instead of amending 250 Guidelines this year I suggest you study these questions and any connection you can see between them and the Guidelines.

Consider also that if this large-scale experiment called the Sentencing Guidelines is to be evaluated, some of the variables need to be isolated. There cannot be 100, or even ten, amendments a year. No responsible social scientist could stop laughing at the idea of a review of your work that never sits still and thus presents as a kind of man-made instance of the Heisenberg uncertainty principle. By the time you look at it, it's gone.

Perhaps if the Guidelines could be left alone for a reasonable period (which in my opinion would be a minimum of three years given all the necessary judicial construction), the entire idea would then be seen as brilliant. Perhaps each of the 434 amendments

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would be regarded as having made the whole idea incrementally even more brilliant. Perhaps the punishment model of reacting with an intentionally reflexive sanction to a certain class of misconduct (however much it seems most of our clients were raised by such ego-dismantling models) would be shown to bear fruit.

My own suspicion is that we would find that successful crime control and successful drug control require abandoning the notion "more government is the answer"; that we have been asking all the wrong questions (e.g., Does a one-time small-time marijuana seller's "relevant conduct" include the quantities of marijuana sold by thrice-removed drug dealers he never met but whose larger dealings were objectively foreseeable, but not subjectively foreseen, by him? or, as the Eleventh Circuit actually addressed in a published opinion on March 20, 1992, does the Sentencing Commission's amendments to a Guideline commentary, as opposed to a Guideline itself, nullify earlier contrary judicial interpretations of the Guidelines?); that we have been asking virtually none of the right questions (e.g., Why are our children poisoning themselves?); and that the greatest service that the Commission could perform would be to report to the public that there never has been and never will be much of a penological solution to these problems, only a penological response.

Interestingly, a typical federal drug case in Indiana often involves dealing in "ditch weed"--marijuana plants descended from massive crops planted by the federal government a half century ago. With no disrespect for the good intentions that are driving all of today's "policy," it may also turn out to be much more problem than solution.

The most intoxicating, addictive, simple, and wrong notion of all may turn out to be that attempted federal regulation of drug supply is a substitute for teaching our children one-by-one to love and esteem themselves, and thus not to ingest poison. My personal opinion--based on hundreds of cases of clients who have abused drugs, many of whom today spread the contagion of recovery--is that the simplistic appeal to federal criminal regulation to solve this problem is ultimately a dangerous hoax that worsens the problem immeasurably.

But we can never know any of this--one way or the other--unless and until the blizzard of amendments stops. We can never know anything unless and until the Commission distinguishes itself as one of the rare examples of government regulation that paused long enough from its mad pace of internal workings to invite objective evaluation of its original purpose and its ensuing degree of success.

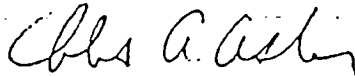
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Thank you for considering these thoughts.

And remember, please stop.

Sincerely,



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March 17, 1994

Arnold S. Trebach, J.D., Ph.D.
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Dear Dr. Trebach:

With one extremely grave reservation, I recently renewed my support for the Drug Policy Foundation with a check and with the return of your recent questionnaire.

The Foundation is quite right that the criminal war on drugs should be abandoned as a dismal failure.

Now for the reservation. I think that the Foundation fails to appreciate that the criminal war on drugs was supposed to be a failure. A free society--not to mention a sober society--cannot in any measure entrust its sobriety to its government. The Foundation fails to appreciate this when it calls for a government treatment war on drugs.

The Foundation must get off this insane kick of calling for federal support for drug treatment programs.

I know that you mean well. My experience (as an attorney for 16 years representing many impaired clients, as a person who uses no drugs including alcohol or nicotine, and as a member of a family with several drug and alcohol issues), however, convinces me that this "new" appeal to government will be just as disastrous as the criminal war on drugs.

We have to overcome our own addictive thinking that government is the answer, or has the answer, to our problems. We need to start to realize that there is virtually no serious social problem in this country that our reliance on government did not in fact create.

Just as the federal criminal law enforcement assault on drugs pushed prices up to the point that more crime (and more serious crime) resulted, federal prevention and treatment efforts will create more addiction--and worse.

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Let me ask you to look at just three reasons that reliance on government has necessarily, and will necessarily, make matters worse.

I.

As in all other things, the government's effort at treatment would be a picture of inefficiency.

With all due respect, has the Foundation thought about the math involved? What are the addictions that will be covered? If alcohol and tobacco addictions are covered (and it is hard to find a principled reason that they should not be if others are--they injure and kill hundreds of times more people than federally "controlled substances"), your pool of eligible patients would number in the tens of millions.

What about sexual addictions? Gambling addictions? Over-eating? Codependency?

But, ignore most of these. Even taking the most arbitrary and narrow definition of what is an addiction, federally funded "treatment" would have to be available to perhaps 25,000,000 addicts. At \$35,000 per patient (a conservative sum, I would suggest), federal health care for addictions alone would approach \$1,000,000,000,000 (as in trillion) a year.

I saw Dr. Lee Brown, the nation's Drug Czar (shouldn't our terminology alone alert us to a threat or two?), on C-Span a couple of months ago speaking to the National Conference of Mayors. This nice gentleman was introduced with a statement of solemn appreciation for his attempts to coordinate the work of 53 federal agencies fighting drugs. Venturing into treatment should get the number up over 100 in no time.

How good a job does the Foundation believe government will really do in providing treatment? Some of the finest programs in the country--ones run with standards far surpassing what government will ever be able to observe--can claim success in only about 25% of their cases.

II.

Believe it or not, just as the federal criminal war on drugs has created more crime, a federal treatment program for drugs would create more drug abuse and addiction.

There are always going to be people in government anxious to claim that if they were only given enough money, power, and prestige, they would be able to make others get sober. These people need to go to Al Anon. It sounds funny, but it's the truth.

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Consider the model of the alcoholic family. Capable addictionologists (ones not looking for a federal hand-out themselves) know that the best way to treat an alcoholic family is to begin with the "least sick" people. Behind every drunk or otherwise addicted husband is a wife who is trying to "help" him. (The genders are often reversed.) The capable addictionologist will point out to the well-meaning wife that everything--everything--that she is doing is necessarily making matters worse.

The co-addicts even have slogans to learn. Things like "I didn't cause this, I can't fix this, all I can do by being involved is to make it worse." The addictionologist tells her to just stop all efforts on his behalf--stop hiding the booze, stop pleading, and stop yelling.

The entire lesson she must learn is "detach with love." And it is one tough lesson.

When the husband is left to assume responsibility for the consequences of his own behavior, lo and behold he goes to A.A. and becomes sober.

Government must also learn to stop hiding the drugs (interdicting), stop pleading (treating), and stop yelling (incarcerating).

People stay away from dangerous drugs (including the two drugs that are by far the most dangerous--alcohol and nicotine) by assuming responsibility for themselves, their own health, and their own children. The very notion that the government is going to be able to help people with these private choices is a horribly cruel hoax.

People with addictions get well in one place, and one place only. They get well in A.A. or one of its brother programs. The cost is zero. The emphasis is entirely upon two things--a real desire to stay sober and the fellowship of those who have achieved sobriety. Even for those able to come up with the \$15,000 to \$50,000 necessary to go through some fancy program in a "clean, well-lit place," if such a program works well, it lands the individual (where else?) in A.A.

In fact, I think that there is only one way to stop the great power of A.A.--government assistance.

In part because life is difficult, all of us (particularly addicts) are invariably prone to diminish our own efforts when we have been led to believe that the government is taking care of a problem.

In short, one of the reasons that government treatment efforts would necessarily fail is that their very existence puts off the day that impaired individuals are confronted with the stark reality that they are solely responsible for their sobriety.

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III.

**The non-financial costs of government
treatment would be overwhelming.**

We can have our government take responsibility for our sobriety, or we can have our freedom. We just can't have both.

From John Stuart Mill's interesting inclusion of the discussion of temperance laws in On Liberty to today's mad reality of an ever-burgeoning government, it should be plain that the attempt to transform a matter of personal responsibility into one of government responsibility would destroy constitutional limitations on government. There is no more personal decision than whether one is going to take an intoxicant into his body.

While the sovereign may punish a constable for being drunk on duty, it may not, if we are to value liberty at all, punish someone for being drunk. Or for eating pork. Or, as some like to do in Indiana, for picking from the thousands of acres of marijuana descended from crops planted by (who else?) the federal government 50 years ago in an earlier brilliant campaign.

If government treatment programs are enacted (or, in some cases, continued), they will fail miserably. And the inevitable failure of these programs to achieve less drug use will create a new bunch of hard-liners intent on "getting tough on drugs" with a new criminal war, and playing fast and loose with the Bill of Rights to get the job done.

The cycle will go on and on, but with even higher stakes and worse excesses.

I wonder if there isn't at least one additional cost that the Foundation should consider. Recovery programs are in large part spiritual. They recognize that the addict is suffering not merely physically, but spiritually as well. By my count, seven of the 12 steps of A.A. (and any of the other 12-Step programs) refer to God, a Higher Power, or prayer.

Has the Foundation given any thought to the constitutional and social implications of hundreds of billions of dollars of taxpayer money being used to subsidize spirituality?

Perhaps, just as constitutionally corruptly, the federal government could go about reinventing A.A., deleting the spiritual Steps, and spending hundreds of billions of dollars in service of the secularization of America.

If the Foundation thinks that this is an illusory threat, consider the recent comments of the Surgeon General Dr. Jocelyn Elders on

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the need for government to tap the resources and influence of churches to implement her medical plan for America. "We always talked about the separation of church and state. I want to forget about the separation. Let's try to integrate church and state so we can come together and begin to do things that make a difference to people in our community." New York Times, February 26, 1994, p. 7. (You may recall this as the "White Male Slave Owner" speech, and this should give the Foundation serious pause when considering, as it did in its recent Survey, making Dr. Elders a spokesperson for an agenda of less government.)

Let's get sober together. How about this for the First Step of a new recovery movement--"We admitted we were powerless over thinking of Big Brother as our savior, and our lives had become unmanageable."

Thanks for considering these thoughts. I assure you that I am not as nuts as I may sound. Outside the Beltway, I'm really a middle-of-the-road, ordinary kind of sober guy.

Sincerely,



Charles A. Asher

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