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March 16, 1987

BY HAND-DELIVERY

The United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W., Suite 1400  
Washington, D.C. 20004

Dear Members of the Commission:

This letter presents the views of the Food Marketing Institute (FMI) as to how the final Sentencing Guidelines should treat offenses under 18 U.S.C. § 1365, the section of the federal criminal code dealing with "Tampering with consumer products." For the reasons set forth below, FMI supports tough sentences for tampering offenses -- sentences that, in some respects, are more onerous than those the Commission has proposed in its January 1987 Revised Draft Sentencing Guidelines.

FMI is a nonprofit association that conducts programs in research, education and public affairs on behalf of its 1,500 members -- food retailers and wholesalers and their customers in the United States and overseas. FMI's domestic member companies operate more than 17,000 retail food stores with a combined annual sales volume of \$150 billion -- half of all grocery sales in the United States. More than three-fourths of FMI's membership is composed of independent supermarket operators or small regional firms. Its international membership includes more than 100 members from 40 nations.

I. Tampering is a Serious Offense

We begin by emphasizing FMI's view that product tampering is one of the most serious offenses covered by the federal criminal code. FMI fully concurs in the observation of the Food and Drug Administration that "tamperings, such as in the case of the Tylenol incident, represent another version of terrorist activity, not unlike planting a bomb in some public place."<sup>1/</sup> In the 1982 Tylenol incident, seven persons in the Chicago area died after ingesting cyanide-laced Tylenol capsules.

While this incident remains the most heinous tampering event, other egregious acts have occurred, for example:

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<sup>1/</sup> Food and Drug Administration "Report on Tampering," July 9, 1986, at p. 3.

- ° Earlier this year two people in Washington State died after taking Excedrin capsules containing cyanide.
- ° Also this year, a Los Angeles stockbroker was charged with putting rat poison in Contac, Dietac and Teldrin capsules and planting them in stores in Houston, Texas, and Orlando, Florida. His apparent aim was to profit when the stock of Smith Kline, the maker of the products, plummeted. He now has been convicted of a federal crime and sentenced to 27 years in prison.
- ° In 1985 a Peekskill, New York, woman died after taking Tylenol capsules treated with cyanide.

Not only has there been tampering, there also have been incidents of extortion and serious threats to tamper, for example:

- ° In February 1986, a man attempted to extort \$2 million dollars from Tylenol's manufacturer, Johnson & Johnson Products, Inc., by falsely claiming that he was responsible for the Peekskill, New York, death and threatening to strike again.
- ° In Nashville, Tennessee, a man was convicted in 1985 of attempting to extort \$100,000 from a local food retailer by threatening to put cyanide in food it sold.
- ° In Atlanta a man recently was sentenced to 40 years in prison after he attempted to extort \$650,000 by threatening to poison food sold in a restaurant with cyanide and arsenic.
- ° In Pueblo, Colorado, a man was convicted in 1984 for attempting to extort \$500,000 from a grocery chain by claiming he had put cyanide in the retailer's products.

Furthermore, there have been tampering hoaxes, some of which also sought monetary gain, for example:

- ° A North Carolina mother was arrested in April 1986 for feeding bits of wire in baby food to her infant, who was hospitalized.
- ° In March 1986 two women were arrested in Louisville, Kentucky, for falsely reporting a pin in baby food.
- ° Also in March 1986, a woman in Galesburg, Illinois, falsely reported finding glass in baby food.

- ° In April 1986, a Waterbury, Connecticut, woman was arrested and accused of falsely reporting that she cut her mouth on a razor blade embedded in a chocolate Easter bunny.
- ° Also in April of this year, a woman in Jacksonville, Florida, was arrested because she falsely reported finding staples in Girl Scout cookies.
- ° In March 1986 an Idaho Falls man told a television station that he had poisoned Skippy peanut butter in local supermarkets, a hoax for which he received a prison sentence.<sup>2/</sup>

In fiscal year 1986, the FDA received a record 1720 tampering complaints. Recent reports have involved a wide variety of food products, including Jell-o, soft drinks, dairy products, meat, fish and fresh produce.

Reports of tampering incidents usually produce many "copycat" acts or threats. Even bare threats are not mere pranks; there are often significant costs connected with them since products must be pulled from shelves and tested. Moreover, publicity surrounding such events creates doubts about the integrity and safety of our food supply.

## II. The Statute Treats Tampering as a Serious Crime

Most or all of the events described above are federal crimes. Section 1365 of Title 18 generally makes the following acts criminal, if the product involved affects interstate or foreign commerce:

- ° Tampering with a product with reckless disregard for the safety of others
- ° Attempting to tamper with a product
- ° Tampering with a product with the intent seriously to injure a business
- ° Falsely labeling a consumer product with the intent seriously to injure a business
- ° Rendering false information that a product has been tainted

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<sup>2/</sup> The above events are discussed in "Tamperings, False Reports Bring Arrests, Jail", FDA Consumer, September 1986.

- ° Threats to tamper
- ° Conspiring to tamper

As you are aware, the statute imposes stiff penalties for these offenses.

- ° If death results from tampering, imprisonment for life
- ° If serious bodily injury results, imprisonment for not more than 20 years
- ° For an attempt to tamper, imprisonment for not more than ten years
- ° For communicating false information that tampering has occurred that could result in death or bodily injury, imprisonment for not more than five years
- ° For attempting to injure a business by tampering or spreading false information, imprisonment for not more than three years
- ° For falsely labeling a consumer product, imprisonment for not more than five years
- ° For threatening to tamper, imprisonment for not more than five years
- ° For conspiring to tamper, imprisonment for not more than ten years.

In addition, all of the offenses listed above now can be penalized by a fine of up to \$250,000. See 18 U.S.C. §§ 3623, 3571 (the latter section becomes effective on November 1, 1987).

There must be harsh sentences for such acts of domestic "terrorism". Deaths have resulted from intention or reckless and wanton acts taken in total disregard of human life and safety. Manufacturers and retailers have been forced to spend huge sums to recall products or develop anti-tampering packaging. The 1982 Tylenol incident reportedly cost Johnson & Johnson -- which recalled, tested and destroyed the product involved -- more than \$100,000,000. Over-the-counter drug makers reportedly have spent between \$500 million and \$1 billion on tamper-resistant packages since that disaster. Anxious consumers, at immeasurable costs, have foregone needed medication or been forced to switch from effective products.

III. Stringent Sentences Should be Prescribed for Tampering Offenses

The Food Marketing Institute supports the general approach to Tampering found in the Sentencing Commission's January 1987 Revised Draft Sentencing Guidelines, Sections N211, N212, and N213, and the related Commentary. However, the Commission's recommendations are insufficient in several respects and should be further modified.

FMI, of course, agrees with the Commission's Commentary statement that: "Product tampering is a very serious offense, as evidenced by cases in recent years where tampering with over-the-counter drugs resulted in several deaths, widespread public concern, and significant losses by pharmaceutical manufacturers." FMI also agrees that: "Protection of the health and safety of the individual and the integrity of the marketplace are of paramount importance."

The Commentary states that a court may refer to the general provisions of Part Y if "death or injury" results from product tampering or if the target suffers "significant monetary losses." Under Part Y, "departures" from the guidelines are permissible, inter alia, where death results, where there is extreme, unusually heinous conduct, or where "public health . . . was significantly endangered". See Sections Y211, Y213 and Y215. In these circumstances, courts may impose a sentence that reflects the seriousness, nature and extent, or circumstances of the conduct. In appropriate situations, therefore, a court could impose the maximum sentence allowed by the federal statute.

FMI submits that the Commentary also should specifically state that Part Y is applicable in tampering situations where death, injury or significant monetary losses have not resulted. An illustration demonstrates the need for this modification. Assume that cyanide is placed in baby food on a supermarket shelf, but that the crime is detected by a store clerk before any harm is caused. Surely in that circumstance, a court should be able to go beyond the sentence permitted for a base offense level of 25, which could be as low as 57 months. We note in this regard that Section Y215 provides for a "departure" from the guidelines "where public health . . . was significantly endangered". Public health, of course, could be "significantly endangered" even where death, injury or significant monetary loss

does not result, as the hypothetical just presented illustrates.<sup>3/</sup>

FMI also believes that reference to Part Y is appropriate where an unsuccessful attempt to tamper occurs, and death, injury or significant monetary losses thus do not result. Indeed, the Commentary itself indicates that tampering attempts should be treated like completed acts, stating: "Attempts are treated with the same severity as completed acts, pursuant to Commission decision and guidance from 18 U.S.C. § 1365, which provides for maximum sentences of ten years for both attempted and completed tamperings". However, unless Part Y applies to attempts, the maximum ten-year sentence for attempted tampering would not be possible, unless the offender is in a high Criminal History Category. For example, the maximum sentence for an offender in Criminal History Category I would be 71 months.

There is another anomaly that should be mentioned. Under the Draft Guidelines (Section N212) actual tampering with intent seriously to injure a business carries only a base offense level of 12, but providing false information or threats to tamper with consumer products (Section N213) carries a base offense level of 16. We see no reason why actual tampering intended to cause serious business injury should generally be penalized to a lesser degree than threats or the provision of false information, where no tampering has in fact occurred. We also believe the base offense levels for all these crimes should be higher.

Finally, FMI wishes to comment on Section A542, Fines for Individual Defendants. In the situation where a tampering offense has occurred, but there has been no monetary loss to the victim or monetary gain to the defendant, the Fine Table determines the fine. Use of the Fine Table could result in deficient fines for serious tampering crimes. For example, where there is an attempt to tamper but no monetary loss, the minimum fine would be \$10,000 and the maximum fine only \$100,000, as opposed to the \$250,000 fine allowed by law. See 18 U.S.C. §§ 3571, 3623. If attempts truly are to be treated as completed offenses as the Commentary states, this disparity is inappropriate.

Even more troubling, where there has been actual tampering with intent seriously to injure a business, but no serious injury results, the fine could be as low as \$3,000 and not more than \$30,000, instead of the maximum \$250,000 fine allowed by law. We

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<sup>3/</sup> The Commentary to § N221, which deals with adulteration of food products, allows reference to Part Y for any "property damage" or "harms", even though the crime may be non-volitional.

The United States Sentencing Commission  
March 16, 1987  
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believe a court in appropriate situations should be permitted to impose the maximum fine allowed for tampering offenses, even where there has been no monetary loss to the victim or monetary gain to the defendant.

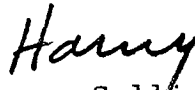
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FMI hopes these views will prove useful. We will be pleased to provide any further information or comment that the Commission desires. We appreciate the opportunity to present our views.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry".

Harry Sullivan  
Senior Vice President  
Public Affairs  
General Counsel



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March 16, 1987

BY HAND-DELIVERY

The United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W., Suite 1400  
Washington, D.C. 20004

Dear Members of the Commission:

This letter presents the views of the Food Marketing Institute as to Section N221 -- Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product -- found in the January 1987 Revised Draft Sentencing Guidelines. As discussed below, FMI believes these sections take a proper approach, with one significant exception.

FMI is a nonprofit association that conducts programs in research, education and public affairs on behalf of its 1,500 members -- food retailers and wholesalers and their customers in the United States and overseas. FMI's domestic member companies operate more than 17,000 retail food stores with a combined annual sales volume of \$150 billion -- half of all grocery sales in the United States. More than three-fourths of FMI's membership is composed of independent supermarket operators or small regional firms. Its international membership includes more than 100 members from 40 nations.

Section N221 relates, inter alia, to adulteration or misbranding of foods, drugs and cosmetics, and other items prohibited by 21 U.S.C. § 331, a section that affects the retail and wholesale food industry. In apparent recognition that Section N221 applies in part to "strict liability" offenses where there is no mens rea component, the base offense level is level 4. However, if intentional conduct or fraud is involved, the base offense value is raised 2 to 3 levels or 3 to 6 levels, respectively. See Section N221 (1 & 2).

This is a sensible approach. Section 331 has been applied against persons having no criminal intent or specific knowledge of the violation, only management responsibility. See, e.g., United States v. Park 421 U.S. 658 (1975). While the law allows a conviction for such non-volitional conduct, onerous sentences should not be imposed for this type of violation. If knowing

The United States Sentencing Commission  
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conduct or fraud is present, a more stringent sentence is appropriate.

However, FMI believes that the offense level should not automatically be raised 2 to 6 levels "if the offense involved ... distribution of any product". While there is ambiguity here, any food item shipped at some time to a warehouse or retail store might be said to "involve ... distribution" in some way. In many conceivable circumstances where "distribution" is involved, a higher offense level would not be appropriate for a wholly non-volitional crime. Section N221 (3) should be deleted both because of its lack of clarity and because it might result in penalties not warranted by the offense.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", written in dark ink.

Harry Sullivan  
Senior Vice President  
Public Affairs  
General Counsel

WASHINGTON LEGAL FOUNDATION

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

March 16, 1987

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

Dear Paul:

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

Thank you for your assistance.

Sincerely,



Paul D. Kamenar

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TESTIMONY OF THE WASHINGTON LEGAL FOUNDATION

PRESENTED BY PAUL D. KAMENAR

EXECUTIVE LEGAL DIRECTOR

BEFORE THE

UNITED STATES SENTENCING COMMISSION

WASHINGTON, D.C.

MARCH 12, 1987

WASHINGTON LEGAL FOUNDATION  
1705 N STREET, N.W.  
WASHINGTON, DC 20036  
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Mr. Chairman and Members of the Commission:

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

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

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

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

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

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

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

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

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

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

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

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

Thank you for the opportunity to present our testimony today.

LAW OFFICES

## ROSS &amp; HARDIES

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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March 20, 1987

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VIA MESSENGER

Paul Martin  
Communications Officer  
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Washington, D.C. 20004

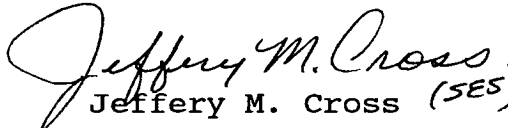
Re: Statement Commenting On The Revised Draft  
Sentencing Guidelines

Dear Paul:

Enclosed is our Statement commenting on the Revised Draft Sentencing Guidelines.

Unfortunately, due to logistics we were not able to contact all of the signators to the October 31, 1986 Statement. The lack of those signators reflects the fact rather than disagreement.

Sincerely,

  
Jeffery M. Cross (SES)

**STATEMENT TO THE  
UNITED STATES SENTENCING COMMISSION  
COMMENTING ON THE  
REVISED DRAFT SENTENCING GUIDELINES**

MARCH 16, 1987

The undersigned practitioners of antitrust law have previously commented on the preliminary draft of sentencing guidelines published by the Commission in September, 1986. Those comments were set forth in a written statement dated October 31, 1986 and Mark Crane appeared before the Commission to present those comments on November 5, 1986. In addition, we have commented on other occasions both collectively and individually on specific issues raised by the Commission and some of us have met informally with members of the Commission and staff during the Commission's early deliberations to provide the Commission with our input.

This statement is directed to the Revised Draft Sentencing Guidelines published in the Federal Register on February 6, 1987. As with our previous comments, this statement does not reflect the position of the Section of Antitrust Law of the American Bar Association, although we are active members in the leadership of that Section. Rather, we are presenting our personal views of the Revised Draft based on our individual experience in the prosecution and defense of criminal antitrust cases.

At the outset, we want to commend the Commission and its staff for the progress that we feel has been made in the Revised

Draft Guidelines. The Revised Draft contains several changes which meet many of our concerns regarding the preliminary draft as set forth in our October 31, 1986 statement, while at the same time continuing with certain important features which we feel are crucial in order to fulfill the mandate of the Sentencing Reform Act of 1984.

These comments are intended to focus on those portions of the Revised Draft which we feel need further modification along the lines articulated in our October 31, 1986 statement. We refer the Commission to our October 31, 1986 statement for amplification of these comments.

#### MINIMUM MANDATORY JAIL TERM

We continue to believe, as we stated in our October 31, 1986 statement, that setting a minimum jail term for individuals convicted of an antitrust crime is appropriate for "hard core" cartel activity such as price fixing and market allocation.

Of the various factors considered in imposing a sentence for violators of the antitrust laws, we believe that deterrence of future antitrust violations is by far the most significant. Except in the most egregious circumstances, such as perhaps a bid rigging conspiracy involving the bribing of public officials, our sense is that there is minimal societal interest in extracting harsh punishment of an antitrust offender by a long jail term. Furthermore, because we doubt that there is likely to be significant recidivism on the part of antitrust offenders, there is little need for a sentence to protect the public from further

crimes. In addition, there is little need to use incarceration as a means to retrain the antitrust offender.

As we have previously stated, we believe that a mandatory jail sentence is the most effective deterrent against further antitrust offenses. We recognize that mandatory jail sentences represents a significant departure from historical practice. As the Commission itself pointed out in its Commentary to the Antitrust Guidelines in the Revised Draft, historically only 20 percent of all individuals convicted of antitrust violations are imprisoned. Nevertheless, we believe that the certainty of time in jail is a powerful deterrent for the antitrust offender who neither is a minor participant in the conspiracy charged or has no mitigating circumstances which would warrant a sentence which does not include incarceration.

We continue to be concerned, however, with the rapid escalation of minimum sentences. In our comments to the preliminary draft, we recommended that, absent aggravating circumstances, the minimum jail sentence for an antitrust offense should not exceed six months regardless of the amount of commerce involved. We believe that there is little or no additional deterrent effect to a business executive from jail sentences in excess of six months. The certainty of time in jail rather than the length of time is the principal deterrent. As we stated in our previous comments, if the sentencing judge decides that a sentence higher than the minimum is warranted in a particular case, so be it. However, the judge should not be required to sentence an individual to more than six months.

In our comments to the preliminary draft, we proposed a series of base offense values for the relevant dollar amount of commerce in order to meet the goal of a minimum never to exceed six months. We recognize that the Revised Draft has reduced the minimum mandatory jail sentences substantially, but we do not believe the reductions go far enough. In order to put into practice our recommendation, we propose jail sentences using the Offense Levels of the Revised Draft as follows:

| <u>VOLUME OF COMMERCE</u>  | <u>OFFENSE LEVEL</u> |
|----------------------------|----------------------|
| Up to \$3 Million          | 8                    |
| \$3 Million - \$25 Million | 9                    |
| Over \$25 Million          | 10                   |

DETERMINATION OF THE VOLUME OF  
COMMERCE FOR INDIVIDUALS

In our comments to the preliminary draft, we stated that the amount of commerce used to determine the sentencing range for an individual executive convicted of an antitrust violation should be determined by the amount of commerce that was within the individual's control, not necessarily by all of his employer's commerce affected by the offense. We gave as an example the regional sales manager convicted of a conspiracy to fix prices whose responsibility over pricing and sales was limited to a narrow market. We believe that the commerce involved in this narrower market rather than the national volume of commerce of his employer should be used absent compelling reasons to apply the larger figure. For a national sales vice president, on the other hand, the commerce involved would be the employer's commerce for it is all under the sales vice president's control.

The Revised Draft merely states that the volume of commerce "attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in the goods or services that are the subject of the violation." This statement is vague in terms of the particular volume of commerce a court should apply. We would urge the Commission to include in its Commentary some guidance for the sentencing court regarding the situation where a convicted offender's responsibility was much narrower than his employer's national volume of commerce. In such a situation, we believe that the volume of commerce should be that done by the individual absent compelling circumstances which would make the larger number appropriate.

#### FINES FOR ORGANIZATIONS

We continue to believe that the fines for organizations are too high. The Revised Draft sets fines at 20 to 50 percent of the volume of commerce involved. At a 20 percent rate, the volume of commerce needed to reach the statutory maximum of \$1,000,000 is only \$5,000,000. At the 50 percent rate, the volume of commerce needed to reach the statutory maximum is only \$2,000,000. The result is that, in most antitrust cases, the fine for an organization would be at the statutory maximum. As we pointed out in our October 31, 1986 statement, applying the standards literally, the suggested fine would be the same whether the conspiracy involved only two million dollars of commerce or several billion dollars. We continue to believe that this inequity will bring disrepute upon the guidelines and will cause

the sentencing judge to ignore the guidelines fines for corporate antitrust offenders.

The Sentencing Reform Act of 1984, of course, places a limit on the aggregate of multiple fines of "twice the amount imposable for the most serious offense" when a defendant has been convicted of "different offenses that arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage...." 28 U.S.C. § 3572 (as proposed). Our experience has been that antitrust cases rarely have multiple counts that do not fall within this definition. We believe that the use of a high percentage rate applied to the volume of commerce in order to set a fine to avoid this statutory limit would be inappropriate.

Mark Crane, Esq.  
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Three First National Plaza  
Chicago, Illinois 60602

Robert A. McNew, Esq.  
Eaton Corporation  
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52 East Gay Street  
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Columbus, OH 43216

PCB 00076

UNITED STATES COURTHOUSE  
NEW YORK, NEW YORK 10007

WILLIAM C. CONNER  
UNITED STATES DISTRICT JUDGE

March 16, 1987

Honorable William W. Wilkins, Jr.,  
Chairman  
The United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W. - Suite 1400  
Washington, D.C. 20004

Dear Judge Wilkins:

Chief Judge Wilfred Feinberg of the Court of Appeals for the Second Circuit asked me to perform in connection with the January 1987 Revised Draft Sentencing Guidelines the same function which I performed in connection with the September 1986 Draft -- that is, review the revised Draft, discuss it with other district judges in the Second Circuit and prepare a proposed Joint Statement which the other district judges could sign if they wished and which they could supplement by individual letters to the Commission if they wished.

Enclosed herewith are seven copies of a Joint Statement which has been signed by a number of district judges of the Second Circuit. I believe that more would have signed it if the time had not been so limited. I was not able to mail out the original draft of the proposed joint statement until March 9, 1987 and today was still receiving letters from judges asking to be listed as signatories to the Joint Statement.

I think you and the other members of the Commission deserve a great deal of credit for the substantial improvements which have been made over the original Draft and that the relatively minor changes which are suggested in the enclosed Joint Statement will result in a sentencing structure with which we can live comfortably.

With best personal regards.

Sincerely,



William C. Conner  
United States District Judge

WCC:lt  
Enclosures (7)

SPECIAL DELIVERY

JOINT STATEMENT ON  
REVISED SENTENCING GUIDELINES

This is a joint statement of the undersigned district judges of the Second Circuit commenting on the January 1987 Revised Draft Sentencing Guidelines proposed by The United States Sentencing Commission.

First, we commend the obviously sincere and painstaking effort of the Commission to respond to the various criticisms of the original draft and the suggestions for improvement, including our own. And we are delighted to see that the present draft represents a major improvement over the original. However, we believe that further changes should be made, particularly in the respects of giving the sentencing court discretion to take into account additional factors which have traditionally been relied upon in granting leniency and greater latitude in the use of probation.

We recognize that the Commission is now engaged in analyzing data collected from a large sample of cases to compare the sentences actually imposed with the sentencing ranges prescribed by the guidelines, and that such analysis may lead to changes in the numerical values assigned to various offenses and modifying factors, with consequent

effect on guideline sentencing ranges. However, because we cannot foresee what changes will be made and because only one brief period is allowed for comment on the revised draft, we felt impelled to speak now to insure, if possible, that the guidelines are not effectuated without further revision.

We further appreciate that the intent of Congress in passing the Comprehensive Crime Control Act of 1984 was not merely to achieve more uniformity in sentencing, but also to insure the imposition of sufficient punishment to serve as an effective deterrent to crime. And we realize that the Commission is bound by the minimum sentencing provisions of the Anti-Drug Abuse Act of 1986. However, we believe that the present draft guidelines go substantially beyond what is required.

#### Increase in terms of imprisonment

The guidelines as presently constituted will result in sentences of incarceration which substantially exceed the average sentences which have heretofore been imposed in comparable situations. For example, assume the case of a young woman who is arrested as a "mule" carrying three ounces of heroin. She immediately pleads guilty to one count of possession of heroin with intent to distribute it. She has no prior criminal record, speaks only Spanish, has little education and no job skills. She is unmarried, with

a two-year-old child and is expecting another baby in two months. The fathers of both children have abandoned her and have contributed nothing to their support. She was introduced to the drug dealer by a friend who knows she is having trouble subsisting on welfare. She expected to be paid \$50 for delivering the drugs. It appears that she is genuinely remorseful and that there is little chance that she will ever become involved in such activity again. There is no one to provide long-term care for her children in the event of her incarceration.

We believe that most judges would suspend the imposition of sentence and place her on probation with appropriate special conditions, such as that she learn to speak English, obtain vocational training and use her best efforts to get a job and support herself and her family. The minimum sentencing provisions of the Anti-Drug Abuse Act of 1986 would not apply because less than 100 g. of heroin was involved.

Under the present guidelines, because 60-99 g. of heroin was involved, the base level of the offense would be 24. Even deducting the maximum of three levels for a guilty plea and the maximum of six levels for a minor participant in the offense, the final offense level would

be 15, which would require incarceration for a minimum of eighteen months. While we realize that in appropriate circumstances the Court will have the power to impose sentences below the guideline range, sentences which are substantially below that range will probably lead in many cases to appeals by the government. If the guideline ranges are inordinately high, the courts of appeals will be swamped with more new cases than they can properly handle.

We believe that an appropriate way of shifting the guideline sentencing ranges downwardly would be to amend § D316 to give the court discretion to reduce the offense level by, say, one to three levels, in cases of extreme hardship to innocent persons, for example, where the defendant has primary responsibility for the care of small children or an invalid spouse. We also believe that § D314 should be amended to give discretion to reduce the offense level where the defendant became involved in the crime because of drug addiction. These sections now specifically provide that family responsibilities and drug dependency may not be relied upon in reducing the punishment, although the latter factor may increase it.

### Diminished use of probation

A related change which would be effected by the present guidelines is the reduction, almost to the point of elimination, of the use of probation as a sentencing alternative. Under the guidelines, probation may be substituted for incarceration only where the minimum term of imprisonment specified in the sentencing table is not more than six months. The minimum sentence, even for a defendant with no prior criminal record, is eight months for any offense level of eleven or more. The base offense level for most offenses exceeds eleven. Even where the offense has a base level less than eleven, increases in the offense level for such factors as the amount of money involved frequently promote the offense level above the cutoff point for probation.

To allow the sentencing court greater discretion in the use of probation in appropriate circumstances, we urge that the maximum length of incarceration for which probation, with suitably punitive or rehabilitative conditions, may be substituted, be substantially increased from six months to, say, eighteen months.

### Impact on the prison system

Unless the guideline sentencing ranges are shifted downwardly, and/or the courts are given additional discretion to grant leniency, as proposed above, there will in time be an enormous increase in the inmate population of a federal prison system which is already filled in excess of capacity. We do now know what plans are being made to provide additional facilities to accommodate such a massive influx of prisoners. But we are concerned that even if the implementation of such plans began immediately, it would be a number of years before the needed facilities would be available. In the meantime there might be such overcrowding as would violate the eighth amendment and require early release of many prisoners, as has already happened in several state prison systems.

### Increase in monetary penalties

We also believe that the guidelines require the imposition of monetary penalties which are unnecessary and excessively punitive. Under the guidelines, which implement 18 U.S.C. § 3663, the Court must order restitution to the extent that it is "fair to the victim \* \* \* and will not unduly complicate or prolong sentencing."

In addition, the guidelines provide that unless the defendant establishes that he would be unable to pay, even on an installment schedule, or that it would unduly burden his dependents, the Court must not only impose a substantial fine (for example, for an offense level of twelve, the prescribed range is \$3,000 to \$30,000) but also must increase the fine by an additional amount sufficient to pay the cost of imprisonment (at \$1,500 per month) or probation (at \$50 to \$300 per month depending on the degree of supervision).

This last provision, which was apparently not mandated by statute but conceived by the Commission itself, seems particularly draconian, not unlike requiring a man condemned to hanging to pay for the rope.

#### Recommendations

We therefore respectfully recommend that the guidelines be revised to effect substantial reductions in the upper and lower limits of the ranges of sentences of incarceration; to increase substantially the length of a term of incarceration for which probation may be substituted (for example, from six months to eighteen months); to allow reductions of from one to three levels for those

having primary responsibility for the care of young children or invalid spouses, or for those who became involved because of drug addiction; to make fines discretionary in all cases; and to eliminate entirely the requirement that every defendant who is financially able to do so be ordered to pay the cost of his or her imprisonment or probation.

We further recommend that there be a delay period, for example one year, between congressional approval of the guidelines and their going into binding effect. During this period, judges would be asked to report to the Commission, through their district court executives, court clerks or probation officers, the sentences actually imposed and those that would have been imposed under the guidelines. This will allow evaluation of the impact of the guidelines on prison population and on probation departments and perhaps suggest revisions of the guidelines to avoid problems which might arise from the abrupt implementation of a radically different and untested sentencing scheme.

Dated: New York, New York  
March 16, 1987

Respectfully submitted,

Franklin S. Billings, Jr., D.Vt.

M. Joseph Blumenfeld, D. Conn.

Vincent L. Broderick, S.D.N.Y.

Ellen Bree Burns, D.Conn.  
Miriam Goldman Cedarbaum, S.D.N.Y.  
Albert W. Coffrin, D. Vt.  
William C. Conner, S.D.N.Y.  
T. F. Gilroy Daly, Chief Judge, D. Conn.  
Peter C. Dorsey, D. Conn.  
David N. Edelstein, S.D.N.Y.  
Warren W. Eginton, D. Conn.  
James T. Foley, N.D.N.Y.  
Gerald L. Goettel, S.D.N.Y.  
Thomas P. Griesa, S.D.N.Y.  
James S. Holden, D. Vt.  
John F. Keenan, S.D.N.Y.  
Whitman Knapp, S.D.N.Y.  
Shirley Wohl Kram, S.D.N.Y.  
Morris E. Lasker, S.D.N.Y.  
Peter K. Leisure, S.D.N.Y.  
Lloyd F. MacMahon, S.D.N.Y.  
Charles M. Metzner, S.D.N.Y.  
Alan H. Nevas, D. Conn.  
Leonard B. Sand, S.D.N.Y.  
John E. Sprizzo, S.D.N.Y.  
Louis L. Stanton, S.D.N.Y.  
Robert W. Sweet, S.D.N.Y.

John M. Walker, S.D.N.Y.

Edward Weinfeld, S.D.N.Y.

Jack B. Weinstein, Chief Judge, E.D.N.Y.

Inzer B. Wyatt, S.D.N.Y.

UNITED STATES COURTHOUSE  
NEW YORK, NEW YORK 10007

WILLIAM C. CONNER  
UNITED STATES DISTRICT JUDGE

March 25, 1987

Honorable William W. Wilkins, Jr.,  
Chairman  
The United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

Dear Judge Wilkins:

As I told you in my letter of March 16, 1987, because of the brief time between my sending out of a draft of a proposed Joint Statement on behalf of the district judges of the Second Circuit, I was still receiving requests from judges to have their names listed as signatories on the Joint Statement.

Since my letter to you was written, the following additional judges have asked to have their names listed as signatories:

John R. Bartels, E.D.N.Y.

Dudley B. Bonsal, S.D.N.Y.

John M. Cannella, S.D.N.Y.

John T. Curtin, W.D.N.Y.

Lee P. Gagliardi, D. Vt.

Thomas Murphy, S.D.N.Y.

Edmund L. Palmieri, S.D.N.Y.

Charles E. Stewart, S.D.N.Y.

Sincerely,



William C. Conner

ADDITION TO:  
PCB 00076

**UNITED STATES DISTRICT COURT**

WESTERN DISTRICT OF NEW YORK

624 U. S. COURT HOUSE

BUFFALO, NY 14202

CHAMBERS OF  
**JOHN T. CURTIN**  
CHIEF JUDGE

(716) 846-4221  
FTS 437-4221

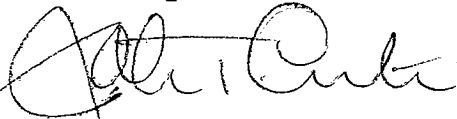
March 20, 1987

Honorable William W. Wilkins, Jr.  
Chairman  
The United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, DC 20004

Dear Judge Wilkins:

Please add my name to the list of those judges  
endorsing Judge Conner's comments to you concerning the  
January 1987 revised draft.

Sincerely,

A handwritten signature in dark ink, appearing to read "John T. Curtin", written over a large, loopy circular flourish.

JOHN T. CURTIN  
United States District Judge

## UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CHAMBERS OF  
JON O. NEWMAN  
U. S. CIRCUIT JUDGE  
450 MAIN STREET  
HARTFORD, CONN. 06103

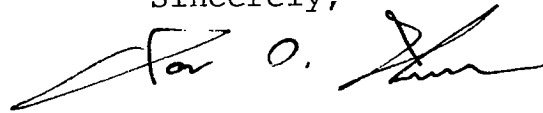
March 13, 1987

Honorable William W. Wilkins, Jr.  
Chairman, United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W., Suite 1400  
Washington, D.C. 20004

Dear Judge Wilkins:

Concerning the invitation of the Sentencing Commission to receive comments by March 16, 1987, on its January 1987 Revised Draft of Sentencing Guidelines, I enclose seven copies of a statement to which all thirteen active judges of the Court of Appeals for the Second Circuit have subscribed.

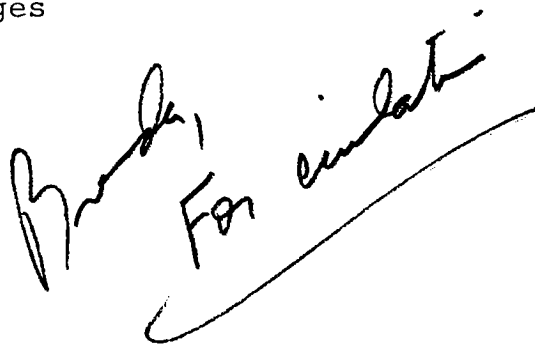
Sincerely,



Jon O. Newman  
Second Circuit liaison to  
the Sentencing Commission

Encls.

cc: Second Circuit Judges



STATEMENT OF THE ACTIVE JUDGES OF THE SECOND CIRCUIT  
CONCERNING JANUARY 1987 REVISED DRAFT OF SENTENCING GUIDELINES

The active judges of the Court of Appeals for the Second Circuit have reviewed the January 1987 "Revised Draft Sentencing Guidelines" and consider them in general to be a significant improvement over the September 1986 "Preliminary Draft." We welcome those changes that simplify the application of the guidelines and that accord increased discretion to sentencing judges.

We have three principal concerns. First, we urge the Commission to change the approach taken with respect to "Adjustments" in Chapter 2. These adjustments should all be stated as variations within appropriate ranges up to specified limits, rather than as increases or decreases at precise levels, and all such adjustments should be entirely within the discretion of the sentencing judge.

Second, while we recognize that the Commission may wish to exercise its discretion so as to increase somewhat the severity of sentencing for some offenses, we urge the Commission, at least in its initial guidelines, not to precipitate the imposition of sentences significantly higher than the time served under sentences currently being imposed by federal judges.

Third, we urge the Commission to preserve the usefulness of probation by permitting its use not only when the minimum term specified by the Sentencing Table is not more than six months, as now set forth in § A511(a)(2), but also when such term is somewhat greater,

7

perhaps one year.

We also urge the Commission to consider carefully the views expressed by Judge William C. Conner on behalf of many of the judges of the Southern District of New York.

March 13, 1987

DEPARTMENT OF THE TREASURY  
UNITED STATES SECRET SERVICE



WASHINGTON, D.C. 20223

OFFICE OF THE DIRECTOR

March 17, 1987

Mr. William W. Wilkins, Jr., Chairman  
United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

Dear Mr. Wilkins:

Thank you for this opportunity for the Secret Service to offer comments regarding the Revised Draft of the Sentencing Guidelines published by the Sentencing Commission in January, 1987. First, I would like to state that the monumental task of standardizing the sentencing procedures throughout the Federal Judicial System is not an enviable one. I applaud the diligent work of the Commission members and staff in your efforts thus far.

As you are aware, the Secret Service has enforcement responsibilities concerning numerous Federal violations. These include laws pertaining to physical security and threats regarding individuals under the protection of this Service as well as laws pertaining to obligations of the United States and private financial organizations. These laws include counterfeiting, forgery, computer fraud, food stamp fraud, false identification fraud, and electronic funds transfer fraud.

In reviewing the Sentencing Guidelines, there are many criminal violations for which this Service has either a major or minor responsibility that are not mentioned. The Guidelines explain this by stating that violations not specifically noted will be added at a later date as appropriate. As an attachment, you will find a listing of the criminal code violations for which this Service has a prosecutive interest which should be included in the future.

As mentioned in the Guidelines, if available, an analogous offense already listed can be used to determine sentencing guidelines for unspecified violations. However, of major concern to the Secret Service is the fact that none of the felony threat statutes

(18 USC 871, 878 and 879), as well as the Temporary Residence of the President statute, are referenced in the Guidelines and there are no clear analogous offenses. These statutes concerning protectees of this Service are used extensively in our protective mission and we believe they must be included at this time to denote the extraordinary seriousness of those offenses.

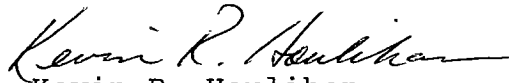
In addition, the Food Stamp Act of 1977 and the Electronic Funds Transfer Act of 1978 are also violations that this Service investigates. As the Guidelines are presently written, it is unknown to what offense level these violations will be assigned or to what analogous violation they will be associated.

Upon reviewing the Fraud Section of the Guidelines it is noted that offense level points are assigned based upon the number of occurrences, victims, and the dollar amount involved. The Guidelines do not address the issue of using or possessing device-making equipment (e.g., credit card imprint machine) or the number of false identification documents or access devices involved. Title 18, U.S. Code, Sections 1028 and 1029, specifically state that special penalties be imposed for the use or possession of device-making equipment and the production or transfer of more than five (5) identification documents or fifteen (15) access devices. It is the recommendation of this Service that the Commission include both possession and control of device-making equipment and the number of false identification documents or access devices in the special offense characteristics of the Fraud Section as is presently being considered in the Counterfeiting Section.

One final point I would like the Commission to review is the offense level at which the crimes of counterfeiting, forgery and fraud are assigned. As presently written, the crime of forgery has a base offense value of four and the crimes of counterfeiting and fraud have base offense values of six. In reviewing the Guidelines, I notice that removing the I.D. number from a motor vehicle has a base offense value of ten and the crime of burglary of an unoccupied dwelling has a base offense value of fourteen. Mailing obscene matter and the crime of eavesdropping have a base offense level of six. As a result, I believe the Commission should review the offense levels assigned to counterfeiting, fraud and forgery with a view toward raising their values to a level commensurate with the seriousness of those offenses.

I would invite the Committee to review and consider the comments of this letter before your final report is submitted to Congress in April, 1987. Representatives of this Service would like the opportunity to personally discuss the Guidelines, as they relate to this organization, at your convenience. Please contact Assistant Special Agent in Charge Jim Cool of this office (535-5716) should you have any questions and to arrange a personal meeting.

Sincerely,

A handwritten signature in cursive script, reading "Kevin R. Houlihan".

Kevin R. Houlihan  
Assistant Director  
Office of Investigations

Attachment

## ATTACHMENT

Criminal code violations for which the U.S. Secret Service has a prosecutive interest which have not yet been mentioned in the Sentencing Guidelines:

### 18 USC

|     |                                                                               |
|-----|-------------------------------------------------------------------------------|
| 35  | Imparting or conveying false information                                      |
| 331 | Mutilation, diminution, and falsification of coins                            |
| 332 | Debasement of coins; alteration of official scales or embezzlement of metals  |
| 333 | Mutilation of national bank obligations                                       |
| 336 | Issuance of circulating obligations of less than \$1                          |
| 372 | Conspiracy to impede or injure officer                                        |
| 474 | Plates or stones for counterfeiting obligations or securities                 |
| 475 | Imitating obligations or securities; advertisements                           |
| 476 | Taking impressions of tools used for obligations or securities                |
| 477 | Possessing or selling impressions of tools used for obligations or securities |
| 478 | Foreign obligations or securities                                             |
| 479 | Uttering counterfeit foreign obligations or securities                        |
| 480 | Possessing counterfeit foreign obligations or securities                      |
| 481 | Plates or stones for counterfeiting foreign obligations or securities         |
| 482 | Foreign bank notes                                                            |
| 483 | Uttering counterfeit                                                          |
| 484 | Connecting parts of different notes                                           |
| 485 | Coins or bars                                                                 |
| 486 | Uttering coins of gold, silver or other metal                                 |
| 487 | Making or possessing counterfeit dies for coins                               |
| 488 | Making or possessing counterfeit dies for foreign coins                       |
| 489 | Making or possessing likeness of coins                                        |
| 490 | Minor coins                                                                   |
| 491 | Tokens or paper used as money                                                 |
| 492 | Forfeiture of counterfeit paraphernalia                                       |
| 493 | Bonds and obligations of certain lending agencies                             |
| 499 | Military, naval, or official passes                                           |
| 502 | Postage and revenue stamps of foreign governments                             |
| 505 | Seals of courts; signatures of judges or court officers                       |

508       Transportation requests of Government  
509       Possessing and making plates or stones for  
          Government transportation requests  
642       Tools and materials for counterfeiting purposes  
643       Accounting generally for public money  
644       Banker receiving unauthorized deposit of public  
          money  
648       Custodians, generally, misusing public funds  
649       Custodians failing to deposit moneys; persons  
          affected  
651       Disbursing officer falsely certifying full payment  
653       Disbursing officer misusing public funds  
701       Official badges, identification cards, other  
          insignia  
709       False advertising or misuse of names to indicate  
          Federal agency  
871       Threats against President and successors to the  
          Presidency  
878       Threats and extortion against foreign officials,  
          official guests, or internationally protected  
          persons  
879       Threats against former Presidents and certain other  
          persons protected by the Secret Service  
914       Creditors of the United States  
1701       Obstruction of mails generally  
1705       Destruction of letter boxes or mail  
1706       Injury to mail bags  
1716       Injurious articles as nonmailable  
1752       Temporary residence of the President  
1907       Disclosure of information by farm credit examiner  
2073       False entries and reports of moneys or securities  
2075       Officer failing to make returns or reports

7 USC

2024       Food Stamp Act of 1977

15 USC

1693n       Electric Funds Transfer Act of 1978

26 USC

7206       Fraud and false statements  
7207       Fraudulent returns, statements, or other documents



YALE LAW SCHOOL  
NEW HAVEN, CONNECTICUT 06520

THE DANIEL AND FLORENCE GUGGENHEIM  
PROGRAM IN CRIMINAL JUSTICE

March 11, 1987

United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Washington, DC 20004

Re: Revised Draft Sentencing Guidelines

Dear Chairman Wilkins and Members of the Commission:

This letter summarizes the reactions of members of our Sentencing Principles program to your Commission's Revised Draft guidelines. Our purpose is to offer a brief canvass of problems and issues whose resolution ought to precede the submission of Initial Guidelines to the Congress. At the conclusion of this letter, we suggest a standard by which the Commission ought to determine thirty days hence whether or not its work product is ready to become a Federal statute.

We submit these comments against the background of more than a decade of study of sentencing guidelines, their conceptual and practical challenges, and problems in their administration.<sup>1</sup>

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<sup>1</sup> For example, the original draft of the legislation that established your Commission grew out of a year-long workshop here in 1974-75. It included Federal judges and representatives of the Parole Commission, the Justice Department and the Bureau of Prisons. The product of that workshop is recorded in O'Donnell, Churgin & Curtis, Toward a Just and Effective Sentencing System: Agenda for Legislative Reform (1977). See also Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810 (1975).

(continued)

The United States Sentencing Commission  
March 11, 1987  
Page 2

Our most recent work has focused on your Commission. Students and graduates of our program began last Fall to assist more than a dozen Federal judges in five districts to test the Commission's Preliminary Draft guidelines on cases previously sentenced by each judge. Several of the judges subsequently shared with you their reactions to that experience, and it is clear that the Commission has thus far responded generously to judicial critiques.

Last week, we tested your Revised Draft in a sentencing exercise based on six Federal presentence investigation reports. On Friday, we convened an extended session here to review the results with Judge Gerald W. Heaney of the Eighth Circuit and a number of law students, faculty members and attorneys with Federal prosecution or defender experience. The comments that follow are informed by that meeting.

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<sup>1</sup> (cont.) In the early 1980's, we began to review the formulation and implementation of the Minnesota Sentencing Guidelines. When your Commission was established, we shared the manuscript of our forthcoming book on the Minnesota experience, authored by Dale Parent, its first staff director. Over the past four years, we have conducted an intensive series of seminars with state felony court judges from seven states, and Federal judges from three districts, seeking to identify common law principles and processes that inform judicial discretion in sentencing. Judges from that group included sentencing reform leaders or critics from Minnesota, Ohio, New York, New Jersey, Connecticut, Massachusetts, and the District of Columbia. Four members of your Commission have participated in sessions here, and we look forward to seeing other members in the coming months.

Our inquiries into common crime sentencing have been aided by a very substantial and high quality research inquiry into the sentencing of Federal white collar offenders by Professor Stanton Wheeler and colleagues. Their book, Sitting in Judgment, is now nearing publication by Yale University Press.

A. The Revised Draft: Compared to What?

It is evident that the Commission has made notable headway in draft #2 compared with draft #1. That progress is being widely applauded by judges and others who lamented the straitjacket approach of the Preliminary Draft. In a period of two months following the close of the first public comment period, the Commission made an important turnaround in recognizing the indispensability of preserving some judicial discretion in criminal sentencing.

But compared to current sentencing practices and norms, we believe that the latest draft fails to come close to an adequate set of Initial Guidelines that can command respect in the courts. Under your statute, the guidelines you submit to Congress in April are to be accepted without amendment unless new legislation is enacted and signed by the President. There is no middle ground. We think it unlikely that the present range of deficiencies can be redressed so definitively in the next 30 days that the Initial Guidelines will require no further scrutiny by bench and bar, and no amendments by Congress before becoming law. The preferable course is to produce a new draft and test it in at least a few courts to ascertain its workability before telling Congress it is ready.

B. Deficiencies in the Revised Draft.

Here are a few illustrative problems that in our view require thoughtful reconsideration by the Commission.

1. Disparity.

The Commission has a statutory duty to reduce the current level of sentencing disparity. Tests of the Revised Draft conducted by our seminar last week, and earlier by several probation officers in the Eighth Circuit, revealed extraordinary levels of disparity among decisionmakers who were familiar with the guidelines and attempted to apply them in good faith. Sentencers applying the guidelines to the same offender not only arrived at different sentences, but failed to agree on the proper criminal history category or offense level, even in seemingly straightforward cases.

The surprising discrepancies that this small exercise produced lead us to wonder how attentive the Commission has been to the ambiguities in its guidelines. Did you intend that there be more than one "right" way to sentence every case? How wide an ambit for tolerable discrepancies do you intend before they amount to unwarranted disparity?

Conducting this initial test and analyzing its results confirms our belief that the Commission ought to carry out extensive pretesting of its guidelines before considering them ready for submission to Congress and promulgation as law. We suggest that Commissioners themselves apply the guidelines to a wide array of actual Federal cases, and compare the results with one another, in order to discover those areas in which disparity is likely to occur. We think that each Commissioner has a

personal responsibility to be certain that the guidelines fulfill the statutory mandate to reduce disparity before voting to approve them. To prepare for such a judgment, we urge that each of you undertake the personal, time-consuming and sometimes troublesome experience of trying to make the guidelines work in real cases. We think it likely that Judiciary Committee hearings will carefully inquire into the process each Commissioner pursued in testing the guidelines to assure their practicability and soundness.

2. Severity.

Our second concern is with the magnitude of unacknowledged, unexplained, and possibly unintended increases in sentence severity reflected in the guideline numbers.<sup>2</sup> That concern is based on the very limited data made available several weeks ago in Research Director William Rhodes' memorandum of February 2, coupled with studies Judge Heaney shared with us, and with our own small test last week. All three sources suggest that the sentences prescribed in your Revised Draft--if literally complied with by Federal judges and plea negotiators--would increase the length of many current prison sentences by two and threefold

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<sup>2</sup> We have not yet had the opportunity to compare the Revised Draft base offense level guideline for each crime with the Commission's printouts on current sentencing practices, which we received today from the Commission. We expect to review those materials with great care, but their volume and complexity will require several weeks of study. We hope that others will be given a similar opportunity to analyze the same data.

(and, on occasion, more). In addition, information assembled by Judge Becker, as well as our own review, suggests that this draft would transform a great many Federal probationary sentences into mandatory sentences of imprisonment.

Such discrepancies between current practice and proposed guidelines constitute a powerful inducement for litigants in the Federal courts to resist the guidelines. They are certain to push toward making departures the norm rather than the exception. It is difficult to understand why the Commission would wish its Initial Guidelines to invite such a disparaging response, or why Congress should ratify such guidelines.

### 3. Criminal History.

Draft #2 significantly distorts the impact of an offender's criminal history by its use of a sharply accelerating point scoring system. Without explanation, comparatively minor criminal records quickly jump an offender to level V or VI on your Sentencing Table. The sentences of serious Federal offenders will easily go to the top of the chart and become eligible for departures under §A315. Yet every time a guideline unnecessarily encourages a departure, it in effect manufactures disparity.

Under the Revised Draft structure, an offender with four jail sentences of sixty days for petty offenses, all within the past ten years, must be placed in criminal history category V, the next to highest level. If one of those four crimes drew an 18 month sentence, the offender would land in category VI, the

highest possible category. That does not match an experienced judge's picture of a serious recidivist or a dangerous offender. How did the Commission arrive at such a result?

If the Commission's purpose behind its criminal history scheme is incapacitation, it is a mistake to treat all felony sentences as of equal seriousness. If the purpose is retribution, it is a mistake to perpetuate past disparities by accepting sentence length as the sole criterion of seriousness. One illustration of a more sophisticated system for evaluating offenders was developed over more than a decade in the Parole Commission's salient factor score, designed to predict recidivism. Was that a choice you considered? Why was it rejected? What other models were considered?

Your Commission sets forth a number of rules for dealing with criminal history. But nowhere do you adequately set out the issues you confronted, the research you conducted, the principles you adopted, or the goals you are seeking by your criminal history point system. As in other parts of the volume, the Commission announces its decisions regarding rules, but fails to inform its readers of the reasons for the decisions.

#### 4. Offender Characteristics.

Draft #2 incorporates, on pages 170-171, an extraordinary set of prohibitions against judicial consideration of offender characteristics that judges everywhere, for generations, have conscientiously taken into account. Examples are age, education,

vocational skills, employment, and family responsibilities. The absence of any explanation for these prohibitions suggests that those who drafted them may not have observed sentencing judges in action, or may not understand the rationale behind current Federal practice. Nor does the rule in §D314 that limits the permissible impact of physical condition, drug dependence and alcohol abuse on sentences make sense in the light of how judges sensitively consider such disabilities in difficult cases today.

There is certainly much room for useful guidance in these areas. Prohibition, however, is not useful guidance.

The Commission may wonder whether these comments were derived by observing the practices of "lenient" or "liberal" judges. Throughout our work we have sought and found a spectrum of sentencing philosophies and practices. Our recent work with Federal sentencers includes a number of judges who are former prosecutors and judges who were appointed by several Presidents.

##### 5. Plea Agreements.

Draft #2 sets out, in Chapter Four, a set of plea agreement guidelines and "ethical standards." By these two pages (173-174), announcing rules without commentary or data, the Commission devotes 1% of its 201 pages to issues that today govern 85-90% of all convictions in Federal courts. Our detailed examination of these rules last week surprisingly produced two

tenable but diametrically opposing interpretations of the Commission's intent.

One group read Chapter 4 as prohibiting the sentence after a guilty plea from departing in any respect from the guideline sentence required after trial, and as sharply limiting the discretion of the prosecutor to enter into plea agreements he believes are appropriate. The second group sees Chapter 4 as issuing a wholesale invitation to litigants and judges to ignore the guidelines and agree on any sentence they please, with no one left to file an appeal. If this ambiguity remains unresolved, disparity will prevail.

Former prosecutors and others who have worked with us read the guidelines as prohibitions, and believe the impact on plea bargaining will be disastrous. They think that court dockets will be flooded by criminal cases that have to go to trial. That spectre, in their judgment, will lead to a powerful inducement for pre-investigation and mid-investigation bargaining between prosecutors and defense attorneys that will largely remove the crime and the sentence from judicial view.

If the second interpretation prevails, on the other hand, departures will become the rule rather than the exception, without parole (which is being abolished) to moderate their differences and without an appellate process to supervise their conformity or nonconformity to guideline policies.

These problems with Chapter 4 are aggravated by our earlier point about severity. The possibility of probation, for example, is a powerful inducement to guilty pleas today. If probation is displaced by mandatory imprisonment under the guidelines, many defendants will not plead. The gross discrepancy between the Commission's proposed sentence levels and today's norms will make it unattractive for lawyers and judges to comply with the guidelines. If an escape hatch is available, and appears better calculated to serve the interests of justice, it will be elected.

6. Proportionality.

The Commission's introduction to the Revised Draft states that "[r]elated conduct not included in the offense of conviction may still be used to aggravate or mitigate a sentence, but it does not carry the weight of a separately charged and convicted offense" (p.3). This assertion was not borne out by our guidelines exercise last week. In a number of instances, the amount of imprisonment resulting from special offense characteristics equalled or exceeded imprisonment assigned to the base offense. No sense of proportionality between charged conduct and uncharged conduct was apparent in our small test. We suggest that the Commission carefully reexamine this disturbing issue in a larger test. And if unadjudicated conduct continues to play a significant role, the Commission will have to assure fair fact-finding procedures. The Revised Draft is weak and confusing in regard to this critical aspect of sentencing. See

Pope, How Unreliable Fact-finding Can Undermine Sentencing Guidelines, 95 Yale L.J. 1258 (1986).

7. Resources.

The Commission's statute demonstrates concern about the implications of guidelines for prison capacity. There is widespread interest in the extent to which your Initial Guidelines will send more offenders to prison and increase the duration of prison sentences. Your data on that subject have yet to be published.

Beyond prisons, the Revised Draft raises grave questions--only some of which are illustrated above--about other resource implications: e.g., the probability of a radical redesign of presentence reports, coupled with a sudden transformation of probation officers into fact-finding mediators; a potentially vast increase in defendant elections to go to trial rather than plead guilty; frequent presentence fact-finding hearings in district courts; and an awesome increase in appeals from guidelines departures or the dubious use of guideline ranges. These possibilities suggest substantial increases in the manpower requirements of probation, prosecution, defender and judicial offices under the Revised Draft. Yet those requirements could be dramatically altered by changes in the next draft, making budgetary requests premature.

The six months from April to October, while Initial Guidelines sit before Congress, may not be nearly enough time to

address resource requirements if substantial energy is devoted instead to controversy over whether Congress should accept or reject the guidelines. The Commission has a responsibility to consider the substantive elements and resource implications of its guidelines as a package. It should disclose, prior to going to the Congress, the degree of care it has given to these issues.

C. The Standard for Submission to Congress.

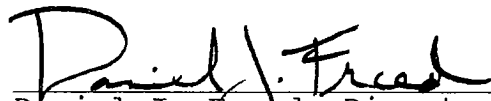
When the Commission meets to decide what Initial Guidelines it will submit to Congress, or whether a request for extension would be more prudent, it ought to adopt a Congressional standard with which some members are familiar. It ought to ask: Is this volume ready for enactment by the Senate and House without further amendment? Have these guidelines been adequately reviewed by staff, subjected to hearings, drafted into statutory language and debated by members? And is this legislation supported by a report that details the process by which it evolved, the changes it makes in current law and practice, the data that support it, the impact it is expected to have on the system, and the tests to which it has been subjected? Does the report demonstrate the guidelines' conformity to law and their feasibility in practice?

Absent affirmative responses to such questions, the Commission should submit its current draft as an exhibit, request an extension of time, and detail the issues remaining to be resolved. It may be useful in this connection for the Commission

The United States Sentencing Commission  
March 11, 1987  
Page 13

to study the Initial Report of the Superior Court Sentencing Guidelines Commission, entitled "The Development of Felony Sentencing Guidelines for the Superior Court of the District of Columbia" (February 1987). In both process and accountability, the D.C. Commission offers a useful illustration of a report to the public in advance of adoption or enactment of guidelines.

Sincerely,



Daniel J. Freed, Director  
Daniel and Florence Guggenheim  
Program in Criminal Justice



John L. Pottenger, Jr.  
Professor (Adjunct) of Law  
Director, Danbury Prison Project



Kate Stith  
Associate Professor of Law



Ruth Wedgwood  
Associate Professor of Law



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF ILLINOIS  
U.S. COURTHOUSE  
SPRINGFIELD, ILLINOIS 62705

March 13, 1987

RICHARD MILLS  
JUDGE

(217) 492-4340  
FTS 955-4340

The Honorable William W. Wilkins, Jr.  
Chairman  
United States Sentencing Commission  
Suite 1400  
133 Pennsylvania Avenue, N.W.  
Washington, D. C. 20004

In Re: Revised Draft -- Sentencing Guidelines

Dear Judge Wilkins:

Judge Mihm's 3-5-87 comments on the revised draft of the sentencing guidelines are well taken and I am in substantial agreement with his opinion that the revised draft shows a marked improvement over the original proposed draft. Only a couple of points I would flag.

The elimination of the "modified real offense system" is probably the key improvement over the initial draft. Not only did this system raise pragmatic problems, it also had the potential to ignite a number of due process issues. It occurs to me that raising conduct beyond what the defendant was convicted of as part of his base sentence was fundamentally unfair. A return to the use of non-offense conduct as a factor in either aggravation or mitigation is much more appropriate.

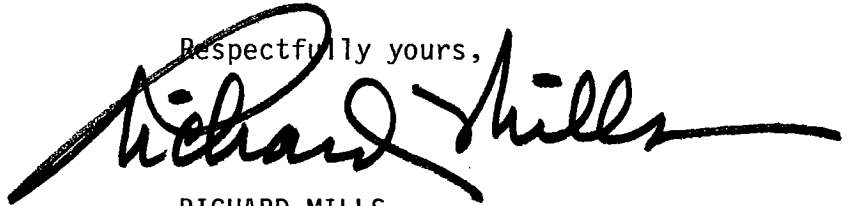
A continuing objection that needs highlighting regards the proposal (still part of the current draft) whereby the judge should make tentative findings prior to the sentencing hearing if the application of the guidelines is disputed. As Judge Mihm points out, this could turn into a time-consuming and cumbersome process. (See p. 3 of his letter.) It would clearly involve a duplication of efforts which can best be made at the sentencing hearing itself.

Hon. William W. Wilkins, Jr.  
March 13, 1987

Further, it would also encourage defense counsel to raise such objections for delay and/or for creating error on an appeal of the sentence.

Other than these points of emphasis, I concur in the comments made by Judge Mihm.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Richard Mills", with a long horizontal flourish extending to the right.

RICHARD MILLS  
United States District Judge

RM/jmk

cc: Hon. Joel M. Flaum  
Hon. Michael M. Mihm

L. RALPH MECHAM  
DIRECTOR

JAMES E. MACKLIN, JR.  
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

WASHINGTON, D.C. 20544

March 17, 1987

DONALD L. CHAMLEE  
CHIEF OF THE DIVISION  
OF PROBATION

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

Dear Judge Wilkins:

In response to the January 1987 draft sentencing guidelines the Probation Division has prepared the following comments which supplement the comments made to you by the Probation Committee at its February 1987 meeting. This letter represents the work of staff and largely reflects concerns that were not raised at the Committee meeting.

We recommend that the Commission carefully study the impact of the draft guidelines on the eligibility for a sentence to probation. As we have indicated previously, it is our view that probation will be available only for a smaller percentage of persons than is the case under current law, and prison will be used more frequently for the remainder. The thrust of the guidelines is also decidedly more punitive in nature for those offenders who do come under supervision. The guidelines apply the sanctions of intermittent confinement, community confinement, and home detention as punishments that are connected to a sentence to probation. Many defendants assigned to these conditions currently receive only low activity supervision. The change will require a commitment of resources to ensure that the court orders are enforced. Not to do so would breed disrespect for the law. Such commitment of probation staff may not be the best allocation of resources, if high level surveillance is not justified by the specific needs of the offenders.

We have several concerns about the Commission's use of the defendants' prior criminal record. First, the guidelines, in increasing the sentence on the basis of a prior criminal record, do not establish the relevance of that increase to the statutory purposes of sentencing set forth in the Sentencing Reform Act. We recommend the Commission prescribe sentencing purpose(s) to be achieved by incarcerating an offender on the basis of his prior criminal record. Second, the Commission should clarify its instructions for determining prior criminal record. For example, under sec. A312, pp. 159-162, there are four different time intervals for the decay of prior criminal records - depending on the circumstances - of 3, 5, 10, and 15 years. We recognize the need for different considerations and only ask that the

Commission be sensitive to the difficulty of achieving reliable scoring across the nation when the categories are complicated. Also, in sec. 312(c)(2), we recommend the term "minor traffic" receive further definition. Does the Commission intend that speeding, reckless driving, or other aggravated violations be included or excluded? Finally, in sec. A313(a)(2), we recommend the Commission give further definition to the term "similar adult criminal conduct not resulting in a criminal charge or conviction." Absent further guidance, this will be subject to a variety of interpretations.

The Division asked a number of probation officers to apply the current guidelines draft to a set of cases. Although we recognize that the officers were not thoroughly trained in the application of the guidelines, we were nevertheless disturbed at the variations which occurred in the officers' assessments. The guidelines presented difficulty for probation staff in two ways: (1) ensuring all salient aspects of sentencing are addressed, and (2) the amount of time needed to apply the guidelines. We believe both of these problems can be remedied by changing the format of the guidelines and carefully reviewing how the guidelines read from a practitioner's viewpoint. As the guidelines are presented, a probation officer must refer to several sections for each offense. The officer must compute the criminal history score, determine the base offense level, adjust the offense level by referring to Departures and Adjustments in General Provisions (Chapter Two), Role in the Offense (Chapter Two), Obstruction of Justice and Perjury, Acceptance of Responsibility, Cooperation, and Other Offender Characteristics (Chapter Three). Then the officer must refer to a Sentencing Table and a Fine Table.

The guidelines would be easier to use if each offense discussion included the applicable general provisions and adjustments. We realize that this would increase the length of the instructions. If the Commission finds this too cumbersome we suggest that the worksheet for computing sentences be enlarged to include each element covered in Chapters Two and Three. Such an enlargement of the worksheet would better assure that probation staff address all salient items.

Departures allow the court to sentence outside the guidelines. Organizationally, both in the guidelines as now constructed and on the draft worksheet, departures appear within Chapter Two. It is suggested that departures are more appropriately considered last and presented as distinct from the other calculations.

Another suggestion is that the draft highlight major principles. On pages 167-168, C323, for example, (A defendant who enters a guilty plea is not entitled to a sentence reduction as a matter of right) the principle is stated in the middle of the commentary. On page 150, paragraph two states that "Departures should be no more than necessary to reflect the seriousness of the offense conduct." This should be stated at the beginning of the commentary or at the beginning of that guideline. A glossary of terms would also be helpful in distinguishing the difference between such items as policy statements, commentary, guidelines, and the various terms used in the guidelines.

Our reading of the guidelines at sec. A413, p. 174 leads to the conclusion an important point needs to be reemphasized. The probation officer, acting as the court's independent investigator, has the responsibility to include in the presentence investigation report the full circumstances of the offense conduct. A reference to the probation officer's responsibilities as set forth in Rule 32, Federal Rules of Criminal Procedure, would be constructive.

In Chapter 5, the revised draft refers to "recommended conditions" (A513(b), p. 176) which are then set forth in the commentary (p. 177). The commentary also indicates the conditions are "generally recommended for both probation and supervised release." In referring to the same recommended conditions on p. 199 the draft requires inclusion of both recommended and statutorily required conditions. We believe this is a drafting error. Also, in Chapter 5, the Commission provides the conditions of probation and supervised release (pp. 176-179, 181-182). Although the Commission provides conditions which "may be warranted in specific circumstances" (pp. 178-179), there is no mention of any outpatient or inpatient treatment conditions for the statutorily authorized drug and alcohol treatment programs for persons on probation and parole. The Probation Division recommends the Commission include such treatment conditions along with conditions for psychological or psychiatric treatment and such other conditions as may be warranted in specific circumstances.

In Chapter 6, the draft deals with violations of probation and supervised release by establishing four categories of violations with specific instructions for reporting the violations to the court. The commentary extends over five pages (pp. 197-201), which is reflective of its complicated nature. The Probation Division believes this will be difficult to apply uniformly and recommends the draft be given another review. As we have indicated previously, this chapter deals with the administration of violations of conditions. We do not believe this is required by the Sentencing Reform Act.

There are a few points in Chapter 6 that could be better defined. Sec. A611(a) calls "new criminal conduct," a category one violation. We question whether the Commission intends to include in the term criminal conduct such matters as minor traffic offenses. And in sec. A614(a)(5), it is a requirement that no credit be given for time spent in custody. We do not believe there is a lawful means of taking away that credit. The draft does not address conditions of probation and violations of probation involving organizations. The draft also does not provide special release procedures for cases of supervised release. In both instances we refer to our recommendations in the December 17, 1986 letter.

I extend my appreciation on behalf of the Probation Division for the opportunity of responding to the revised draft. This staff response, however, does not carry the imprimatur of the Probation Committee of the Judicial Conference.

Sincerely,

A handwritten signature in cursive script that reads "Donald L. Chamlee". The signature is written in dark ink and is positioned above the printed name.

Donald L. Chamlee

cc: Honorable Gerald Bard Tjoflat  
Peter G. McCabe  
Christy Massie



## Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 17 1987

The Honorable William W. Wilkins, Jr.  
Chairman  
United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

Dear Judge Wilkins:

This letter responds to the Sentencing Commission's invitation for comments on the revised draft of the Sentencing Guidelines published in January, 1987. The Antitrust Division strongly supports the work of the Commission. We have sought to provide assistance in that work to the greatest extent possible and we will continue to join with the Commission in its efforts to build a new framework for sentencing that fully and fairly meets the needs of the criminal justice system.

The revised Guidelines represent a refinement of the preliminary draft in many respects. With respect to the sentencing recommendations for criminal violations of the antitrust laws, the Division fully endorses the primary thrust of the Sentencing Guidelines: that sentences should be designed to deter offenses, and that short, mandatory prison sentences coupled with substantial fines are necessary to deter antitrust offenses. We applaud the Commission for its continued adherence to this important law enforcement goal.

Our comments are directed toward ways in which the revised draft guidelines may fall short of this goal. We are concerned that certain provisions in the current draft could actually undermine, rather than promote, deterrence.

#### IMPRISONMENT

We are particularly concerned that the certainty of imprisonment for antitrust offenses has been greatly reduced in the revised draft guidelines. Although the range of imprisonment has been lowered somewhat for antitrust offenses involving large volumes of commerce, and the special, tough

antitrust recidivist penalty has been eliminated, 1/ the sentencing ranges in the current draft are acceptable provided that they are actually imposed. There are, however, a number of provisions in the revised Guidelines that make this problematical.

#### Complementary Bidders.

We note that the Commission has deleted the concept of apportioning the volume of commerce among antitrust defendants contained in its earlier draft. We understood that this apportionment scheme was intended to provide appropriate base offense values to complementary bidders in bid-rigging conspiracies since actual sales may not reflect adequately such bidders' participation in or benefit from a conspiracy.

In earlier comments to the Commission, we supported apportionment in concept, but we noted certain problems with determining (or disclosing) the number of conspirators during the early rounds of prosecuting a bid-rigging conspiracy. By completely deleting apportionment, however, the current draft of the Guidelines would apparently place all complementary bidders in the category of "under \$1,000,000" in commerce in all cases. Consequently, the role of complementary bidders is likely to be understated in many cases. We recommend that, with respect to complementary bidders, the offense level be set at no less than one level below the level of the bidder that actually received or would have received the contract, but in no case at less than the offense level for offenders with a volume of commerce under \$1,000,000.

#### Permissible Offense Level Reductions.

Given the present proclivity of judges not to send antitrust offenders to prison, any element of the Sentencing Guidelines that permits judges to arrive at a sentencing range with a minimum sentence of zero months of imprisonment creates a substantial risk of no term of imprisonment being imposed. We believe that this possibility exists with respect to section C321--Acceptance of Responsibility and section Z214--Role in the Offense. Giving judges broad discretion to reduce offense levels by 1 to 3 levels in the first instance and 1 to 6 levels in the second raises the possibility that participation in an

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1/ In its commentary to revised §R211, the Commission suggests that recidivism in the antitrust area may warrant harsher treatment than that afforded by the prescribed adjustments for general criminal history. It does not, however, make recommendations regarding specific circumstances or adjustments.

antitrust crime may not entail a significant risk of incarceration. This result is at least implicitly acknowledged in the commentary to §R211 which seems to suggest that fines may be sufficient when such adjustments apply. We strongly urge that adjustments for such factors not be permitted to reduce the sentencing range below a minimum of two months.

We do not believe that an indication of rehabilitative potential through the acceptance of responsibility, no matter how sincere, should mitigate antitrust sentences. Such a reduction would undercut seriously the primary goal of the Guidelines in the antitrust area: deterrence of antitrust crime generally, not merely repeat offenses by the same individual. We recommend that §R211, or the commentary to that section, be amended to state that it is inappropriate for acceptance of responsibility for an antitrust crime to make applicable an offense level that does not carry a minimum term of imprisonment.

We also believe that a "role in the offense" reduction for antitrust violations should not reduce an offense level below that which would require a short but certain term of imprisonment. While it may be appropriate to increase levels for ringleaders, all conspirators are necessary parties to an antitrust violation since it is the aggregation of market power that makes the conspiracy successful. Even a pliant, totally reactive individual with relatively little to gain thus may be a key conspirator. Deterrence of his or her participation would be inappropriately reduced by calling into question the likelihood of imprisonment upon conviction.

We agree with the Commission that substantial reductions in offense levels are appropriate, even below mandatory jail levels, for cooperation. Deterrence is enhanced by rewarding cooperation with government investigations of antitrust offenses. The ability successfully to build an antitrust case often depends on gaining the cooperation of individuals involved in the violation under investigation. Moreover, when the rewards of cooperation are significant, potential violators may be deterred by the likely inability to maintain a united front in the face of an investigation.

#### Alternative Sentences.

Section A511 of the revised draft Guidelines permits courts to sentence an offender whose minimum term of imprisonment is not more than six months to probation. This alternative thus applies to all antitrust offenders whose volume of commerce is \$15 million or less (or even more if the offense level is otherwise lowered, e.g., for acceptance of responsibility). Although probation must include intermittent confinement, community confinement, or home detention if the minimum term of

imprisonment is greater than zero, these options do not carry the same deterrent force as an equal or perhaps lesser amount of straight prison time. While alternative sentences such as these are no doubt effective and appropriate for certain offenders, the possibility that an antitrust offender merely may have to stay in his or her comfortable home or, at worst, spend weekends in confinement while going about normal activities during the week, is not likely to be sufficient to deter violations. We recommend that § R211 be strengthened to make plain the Commission's intention that the short prison sentences called for in that section are actually to be imposed and that probation is not generally warranted for antitrust offenders.

### FINES

The Antitrust Division concurs in the Commission's conclusion that substantial fines for both individuals and corporations must complement jail sentences in order to adequately deter antitrust crime. Antitrust violations are committed to achieve supra-competitive profits and often result in very substantial overcharges to consumers or procurement agencies. Deterring such potentially lucrative conduct requires very substantial penalties. For an organization, incarceration is not an option, so a fine is clearly the proper penalty. For an individual, both a substantial fine and a certain jail sentence are appropriate. The certainty of a substantial fine if caught will help counter the financial incentives that are the sole cause of antitrust violations.

We support the proposals for determining antitrust fines based on a percentage of the volume of commerce. However, as we discussed in connection with imprisonment, the revised Guidelines will result in many complementary bidders having a volume of commerce under \$1,000,000 attributed to them even though they were crucial to a conspiracy involving much higher amounts. Fines based on the relatively low volume of commerce may not be adequate to deter such conspiracies. We recommend some alternative basis for determining fines for complementary bidders; perhaps giving the court discretion to set a fine that is appropriate in relation to the volume of commerce attributed to the winning bidder.

\* \* \*

To summarize, we support the Commission's proposed sentencing ranges in section R211 and its conclusion that short, mandatory prison sentences coupled with substantial fines are necessary to provide adequate deterrence of antitrust violations. We are concerned, however, that certain aspects of the proposed Guidelines may result in antitrust offenders routinely avoiding the imposition of prison sentences. We

recommend that the Commission clarify the application to .  
antitrust offenses of these provisions and of certain  
provisions relating to fines.

Sincerely,

A handwritten signature in cursive script, appearing to read "Charles F. Rule".

Charles F. Rule  
Acting Assistant Attorney General

PCB00086

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT  
UNITED STATES COURTHOUSE AND FEDERAL BUILDING  
450 MAIN ST.  
HARTFORD, CT 06103

CHAMBERS OF  
ALAN H. NEVAS  
DISTRICT JUDGE

March 20, 1987

TELEPHONE:  
203-722-2953  
FTS 244-2953

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

Dear Commissioners:

Since last September I have, with the assistance of two students from the Yale Sentencing Workshop, followed the Commission's work quite closely. In evaluating it, I have tried to draw not only upon my own sentencing experience as a judge, but also upon the experience which I gained in my four years as United States Attorney for the District of Connecticut. I was an early supporter of sentencing guidelines as a result of my exposure to wide disparity in sentencing in this small district.

The Commission has gained my respect in going about its difficult and politically unpleasant task. The substantial changes in the Revised Draft (January, 1987) leave little doubt that you have remained flexible as well as sensitive to the concerns of those who have offered comment. But in my view, the guidelines are still far from a point where they can be reasonably put into effect.

Simply put, Congress has asked you to overhaul the engine, but has given you insufficient time in which to do it. Rather

than simply allowing the next guideline draft to take effect, I urge you to request an extension of time from Congress. The final draft should be implemented only for observation on a limited scale. For the reasons that follow, I believe full-scale application of the most recent draft would wreak havoc within the federal system of criminal justice.

I. The Issue of Resources

In my view, the Revised Draft will greatly overextend the resources of the federal courts and detention facilities. This will unquestionably create an enormous problem of administration, and may also lead to a lessened quality of justice in the courts and to unconstitutional conditions in the prisons.

A. Plea-Agreements

Currently, over 85% of all convictions in the federal courts result from plea agreements. Thus, there is nothing of more importance to a rational guideline system than a careful evaluation of the role of plea agreements. This is a complex issue, requiring both careful thought and extensive research. With due respect, there is nothing in the cursory provisions of Chapter IV (pgs. 173-174) of the Revised Draft to suggest that the Commission has engaged in either.

In my opinion, the Revised Draft virtually destroys any incentive a defendant may have to plead guilty. Under Section A413, as well as Rule 11 of the Federal Rules of Criminal Procedure, the government and defense counsel must set all relevant facts before the court. The court is then required,

based on these facts, to impose a sentence within the guideline range. But the guideline sentences are generally so severe that - even with the allowable three level deduction under Section C321,<sup>1/</sup> - few defendants are likely to accept plea agreements.

Moreover, it has been my experience that a significant percentage of defendants who enter into plea agreements are motivated by at least the possibility that a sentence of probation may be imposed. This is particularly true with first offenders. By abolishing the use of probation for all but the most minor offenses, see Section A 511, the Revised Draft further undercuts any incentive for a defendant to enter into a plea agreement.<sup>2/</sup>

The increased burden on the United States Attorneys' offices creates an incentive for prosecutors to omit relevant facts in order to get defendants to enter into plea agreements. This practice would, of course, not only violate Section A413, but would also require prosecutors and defense counsel to be less than truthful during the Rule 11 inquiry prior to sentencing. It is difficult to believe that United States Attorneys would consistently, and as a matter of course, engage in such a

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1. According to Section C323, offenders who plead guilty are not to receive this reduction as a "matter of right." In my opinion, however, judges will grant this reduction to virtually all offenders who plead guilty, because it is the only incentive which the guidelines provide to encourage guilty pleas.

2. A further discussion of the virtual elimination of probation by these guidelines is contained in Section I, B of this letter.

practice. But unless they do, I see no escape from their being buried in pending cases. The Speedy Trial Act may cause wholesale dismissals of cases which should be prosecuted, but which the government has insufficient resources to bring to trial in a timely manner.

Whether one likes it or not, the plea agreement is the oil which keeps the engine of the American Criminal Justice System running. Without it, that engine will come to a grinding halt.

#### B. Imprisonment v. Probation

Two other related concerns are the vast increase in the average term of imprisonment for most offenses, as well as the virtual elimination of the use of probation. By even the most conservative estimate, these changes will result in (1) a monumental increase in the number of offenders who are sentenced to prison; and (2) a 200-300% increase in the length of time most offenders will be incarcerated. Congress may be forced to appropriate hundreds of millions of dollars for the construction of new prisons. Without such funding, overcrowding in federal prisons will mandate wholesale release of convicted offenders.<sup>4/</sup>

The Revised Draft guidelines will work a fundamental change - in terms of increased severity - in current sentencing practice. This change will have an enormous effect on the

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4. The problem of overcrowding has already arisen in many state systems. As an example, United States District Judge William Wayne Justice of the Northern District of Texas found that overcrowding in the Texas state prisons violated the Eighth Amendment. See, e.g., Ruiz v. Estelle, 503 F. Supp. 1265 (1980).

federal prison system. But there is nothing in the guidelines to suggest that the Commission has done an impact study, or in any other way considered the effect that these guidelines will have on the prisons.

Moreover, it is difficult to understand the Commission's reasons for the virtual abolition of probation. Currently, nearly 48% of convicted federal offenders receive sentences of probation. Recidivism among these offenders is less than 5%.<sup>5/</sup> While there is much about federal criminal justice to be criticized, the use of probation has been one area of success. The low rate of recidivism among offenders sentenced to probation seems consistent with the Commission's goal of seeing that "sentences should aim to control crime." Revised Draft, p.2. In my view, the Commission's virtual abolition of probation is likely to be counter-productive.

## II. Other Issues of Concern

Quite aside from resources, I believe that the Guidelines fail to accomplish their most basic task, and that sentences imposed under them will not only be disparate for similar offenders, but have the potential for being unjustly severe.

### A. Complexity and Disparity

Based on three separate exercises, one involving members of the Yale Sentencing Workshop, one involving federal probation officers in the Eighth Circuit, and a third undertaken by the

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5. These figures were supplied by United States Circuit Judge Gerald W. Heaney of the Eighth Circuit. They are consistent with my personal experience.

two students who have been assisting me, I have found that application of the guidelines will result in disparity based not upon rational differences among offenders, but rather upon who is doing the calculations. In each exercise, the participants used identical sets of Pre-Sentence Reports ("P.S.I.") to sentence the same offenders. Yet in each case the participants arrived at vastly different results. For one offender, criminal history scores ranged from II to VI. For another, offense levels ranged from 12 to 25. Based on these limited exercises, I believe the complexity of the guidelines will make uniform application of them very difficult.

In the first exercise, the participants included a Federal Circuit Judge and three members of the Yale faculty, two of whom are former Assistant United States Attorneys. The second group was comprised of federal probation officers - precisely the people who will be doing the initial calculations in actual practice. The two students involved in the third exercise will both be law clerks to federal district judges next year - precisely the people who are likely to be checking the probation officer's calculations prior to actual sentencing. The wide disparity in sentences imposed by these participants suggests that similarly disparate results will occur among those who will be applying the guidelines once they have been adopted.

#### B. Criminal History Score

One area in which participants had particular difficulty achieving consistency was in the area of criminal history score. This calculation is based on the previous criminal

record contained in the P.S.I. As anyone who has worked extensively in the field of criminal justice knows, the criminal history information contained in P.S.I.s is often sketchy, and often inaccurate.<sup>6/</sup> Under present sentencing practice, the judge uses this information merely to get a general idea of the offender's previous criminality. Thus, sketchy information or even minor inaccuracies are inconsequential. But the guidelines require exact calculations based on inadequate information. It is not realistic to require that such calculations be based on the criminal history information contained in the average P.S.I.

Moreover, under Section A312(b), the calculations are based on "the maximum sentence imposed." This ignores the fact that judges generally impose sentence with a full understanding that the offender will be paroled after one-third to one-half of that sentence has been served. Thus the "maximum sentence imposed" often bears no relation to the seriousness of the offense - in either the court's or anyone else's eyes. In my view the Criminal History provisions (pgs. 159-164) of the Revised Draft are simply not realistic.

Finally, I believe these provisions are unjust. Even a few minor offenses can push one into Category VI. I do not believe

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6. There may be several reasons for this. First, there may be mistakes made in copying the offender's F.B.I. "rap sheet" into the P.S.I. Secondly, state criminal convictions often contain only rudimentary information. In either case, it is unrealistic to make exact calculations based on P.S.I. versions of criminal history.

that minor offenders - even with three or four convictions - should be considered in the same category as violent offenders or serious recidivists. By making the sentence imposed rather than the crime of conviction the yardstick, the Commission fails to recognize that different states may have differing conceptions of the seriousness of an offense. Under the Guidelines, a one year state sentence for passing bad checks receives the same score as a twenty-five year sentence for armed robbery, rape, or even murder. What is the rational basis for this determination? I believe the Commission should carefully rethink its entire approach to criminal history.

C. Other Offender Characteristics

With due respect, I believe the provisions of Sections B311, 312, 314, 315, 316 border on the incredible. (Generally, they prohibit consideration of age, education, vocational skills, physical condition, previous employment record, family ties and responsibilities, and community ties.) In one fell swoop the Commission has abolished precisely those factors which, in my view - both as a prosecutor and a judge - are the best indicators of whether a person is likely to engage in future criminality, or whether he or she can be successfully returned to the community as a law abiding citizen.

I do not question the need for some type of guidance for judges on how these factors may be considered. But the Revised Draft has - with minor exceptions - simply outlawed consideration of these factors. The Revised Draft offers no clue as to why this was done. I believe that guidance to judges

on consideration of these characteristics is one of the most difficult, but most essential aspects of a practical guideline system. The wholesale prohibition is ill-considered, and will almost certainly lead to significant opposition within the court system.

### III. Conclusion

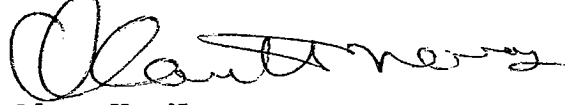
As the foregoing discussion suggests, I believe the Guidelines are far from a point where they can reasonably be implemented. As currently constituted, they are unduly severe, fail to reduce disparity, and do not account for individual factors which should be considered in sentencing. Moreover, their implementation would overburden the federal courts and prisons to a degree that may result in dismissal of charges under the Speedy Trial Act, and prison overcrowding which may violate the Eighth Amendment to the United States Constitution. These are, of course, predictions. But they are predictions based on experience. If even some of them are accurate, the effect of the guidelines on federal criminal justice will be severe.

I have offered a great deal of criticism, but precious few solutions. In fact, that is precisely the point. The complexity of each of the issues I have addressed (as well as many others I have not addressed) demands careful thought and research over an extended period of time. I believe the Commission has made an impressive beginning, but the task is far from completion. I urge the Commission to undertake trial

application of the guidelines on a limited scale, and to ask Congress for an extension of time within which to complete a careful impact analysis. Your task is monumental, and it cannot be completed in the next 30 days.

Thank you for your consideration of these comments.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Alan H. Nevas". The signature is fluid and cursive, with the first name "Alan" being more prominent and the last name "Nevas" following in a similar style.

Alan H. Nevas  
United States District Judge

AHN:j

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
UNITED STATES COURT HOUSE  
NEW YORK, NEW YORK 10007

THOMAS P. GRIESA  
DISTRICT JUDGE

March 16, 1987

The United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

Dear Sirs:

I have reviewed the January 1987 draft of the Sentencing Guidelines, and have joined with many other judges in the Second Circuit in a statement being mailed to the Commission today.

I would like to submit certain of my own comments, which go beyond the reservations and suggestions in the joint statement.

I do not believe that the revised draft goes nearly far enough to remedy the problems with the original draft. The most fundamental difficulty was and is the attempt to give a numerical value to most of the factors which are to be considered in connection with sentencing. This is simply not rational or realistic. No sentencing judge in an actual case would ever attempt to take the relevant factors and assign some kind of numerical rating to each one. He knows that he must assess these factors in their relationship with each other, and as a totality. He further knows that these matters must be weighed with some intelligent judgment, rather than being dealt with according to a mechanical formula.

What I am suggesting is that an attempt be made to establish guidelines which will recognize the inescapable reality that fair and just sentencing depends heavily upon the exercise of intelligent judgment by the judge. An attempt to turn the process into one of aggregating a series of numerical values is not consistent with a rational system of justice. Also, it will have the courts spinning their wheels in controversy over endless minutiae, for no purpose that has to do with justice or the public good.

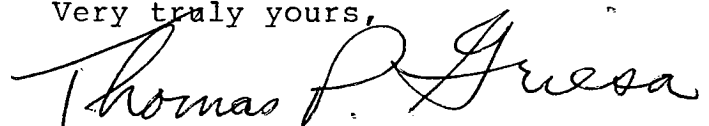
In my view, the complexity of the mechanism proposed by the Sentencing Commission goes far beyond any legitimate need in handling disparity of sentencing in the federal courts. It approaches the proverbial use of an "elephant gun to kill a fly."

A great many of the offenses we deal with involve statutes with a maximum prison term of five years. Of course, we often deal with indictments charging multiple counts, but for a variety of reasons we often end up considering the matter as involving a single crime. I doubt that there is any great problem of disparity among the judges in handling these cases. Of course, we apply the relevant individual factors, but that is not, in and of itself, the kind of disparity which is thought to be a problem. What I am getting at is that on these five-year counts, the federal judges probably are producing a rational pattern of sentencing without any need for an elaborate mechanism.

Of course, there are a number of crimes for which the maximum penalties are 15 or 20 years or more. Congress has already stepped into the narcotics area in the 1986 statute, and has limited judicial discretion to a certain extent. However, the theoretical opportunity for disparity in sentencing for narcotics offenses, and for other offenses such as bank robbery, is still substantial. Yet, the proposed sentencing guidelines do not seem to reflect any real attempt to discover the extent to which there are norms in the sentencing practices of the federal judges in respect to these areas of the criminal law. The Commission's proposals seem not so much related to the curing of disparity as to the establishment of entirely new norms, much higher in the narcotics area, and perhaps lower in other areas.

With respect to probation, the Commission's guidelines appear to have very little to do with rationalizing disparity. They ignore the practices which may well be rather consistent with respect to probation and create wholly new norms which would drastically reduce the granting of probation. Unless the past practices of the federal judges are deemed wholly lacking in wisdom, there would not seem to be a sound reason for such a change.

Very truly yours,



THOMAS P. GRIESA

United States District Judge

TPG/fm



INSPECTOR GENERAL  
DEPARTMENT OF DEFENSE  
400 ARMY NAVY DRIVE  
ARLINGTON, VIRGINIA 22202

(Criminal Investigations  
Policy and Oversight)

17 MAR 1987

United States Sentencing Commission  
Attn: Guidelines Comments  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

Dear Sirs:

I have reviewed the Revised Draft Sentencing Guidelines, issued by the Commission in January 1987, and offer the following comments for consideration by the Commission prior to its submission of the initial set of Sentencing Guidelines to Congress in April 1987.

While not intending to diminish the importance of the other aspects of the commission's guidelines, my comments are limited to what I believe to be an inadequacy of sentencing in the area of so called "white collar" and procurement fraud related crimes. Where possible, I have referenced particular sections of the Guidelines which relate to, or are the focus of, my comments.

I. EMBEZZLEMENT BY GOVERNMENT EMPLOYEES (SECTION B211)

In considering potential sentencing of a Government employee convicted of embezzlement, one basic assumption (although not an absolute certainty) should be made, i.e., as a Government employee, the individual has no prior criminal history. Such being the case, the guidelines indicate sentencing ranging from no imprisonment to a maximum (where the embezzlement is under \$5 million) of 51 months, calculated as follows:

|                                 | <u>Under \$1,000</u> | <u>Over 2 Million</u> |
|---------------------------------|----------------------|-----------------------|
| Base Offense                    | 4                    | 4                     |
| Complexity (Section B211(a)(4)) | -                    | 3                     |
| Value (Section B211(a)(6))      | -                    | 11*                   |
| Role in Offense (Section Z212)  | <u>1</u>             | <u>4</u>              |
| Offense Level                   | 5                    | 22                    |
| Imprisonment                    | 0-5 months           | 41-51 months          |

\* (While the value table states, over \$2 million adds 11 or more, the table progression implies any amount under \$5 million would be not more than 11)

Congress provided for imprisonment for up to ten years for the embezzlement of public monies (18 U.S.C. 641), and I see no justification for establishing guidelines which realistically set the maximum at less than half the statutory maximum.

## II. COMMERCIAL BRIBERY AND KICKBACKS (SECTIONS B242 AND B243)

This section appears to be an addition from the Commission's Preliminary Draft and fails to consider passage of the Anti-Kickback Act of 1986 (Public Law 99-634). This law, which amended 41 U.S.C. Sections 51-54, provides for imprisonment for not more than 10 years, rather than two years as stated in your revised draft, (in addition to other criminal and civil sanctions). Passage of this legislation in 1986 should be considered by the Sentencing Commission as a clear signal from Congress on the seriousness of the problem of kickbacks in the Federal procurement process and the Sentencing Guidelines should reflect such concern. Additionally, I believe that violations of 41 U.S.C. Sections 51-54 would more properly be grouped with the statutes contained in Section B242, rather than Section B243.

I am also concerned about the applicability, if any, of Part Z, Role in the Offense adjustments under Sections Z211 and Z212. The language in these sections and their following Commentary is unclear as to their application in Commercial Bribery and Kickback situations.

Therefore, the Guidelines for Commercial Bribery and Kickbacks should be rewritten to:

- o Include 41 U.S.C. Sections 51-54 under Section B242;
- o Recognize the provisions of P.L. 99-634; and
- o Clarify applicability of Part Z adjustments.

## III. BRIBERY OF GOVERNMENT EMPLOYEE (Sections C211 and C212)

The Guidelines narrative under this part recognizes the seriousness of bribery of public officials and the need to provide adequate and certain punishment; however the provisions of Sections C211 and C212 stop short of providing this adequate punishment. Title 18 U.S.C. Section 201 provides for imprisonment for up to 15 years upon conviction of bribery (18 U.S.C. Sections 201(b) thru 201(e)). However, the Commission Guidelines provide for a maximum imprisonment on first offense of under 5 years (57 months) and an absolute maximum, Criminal History Category VI, of under 10 years (115 months). In the case of a Government employee who demands a bribe (as with embezzlement discussed above, we can assume no prior criminal record), the sentencing guidelines provide for a sentence

maximum which is less than 1/3 the statutory provision (18 U.S.C. 201(c)). Again, I see no justification for the Commission to set guidelines which provide maximum sentencing far below the statutory provisions.

Although an additional offense level adjustment, under Part Z, Role in the Offense (Section Z212), might be applicable for a Government employee convicted of receiving a bribe, it would appear that "public position" has already been considered in the Section C212 offense level calculations and no further adjustment is warranted (no other Part Z adjustments would appear to apply in most bribery offenses). If such is not the case, the Guidelines should be rewritten to clarify the applicability of Part Z adjustments.

#### IV. CONFLICTS OF INTEREST (Section C214)

This Section carries a base offense level of 8 to 12, with no adjustments (again, we can assume a first offense for a Government employee). As such the maximum imprisonment under the Guidelines is 16 months, compared to the statutory two years. Again, I see no reason to establish guidelines which effectively reduce the statutory provisions.

#### V. FRAUD AND DECEPTIONS (Section F211)

This Section would encompass the bulk of the sentencing activity relating to Department of Defense (DoD) procurement fraud cases. The criminal activity which falls in this general category include: (1) defective pricing, (2) cost mischarging, and (3) product substitution. Defective pricing and cost mischarging are frauds committed by a contractor when he falsely certifies cost data either in the preaward contract negotiation phase (defective pricing) or the postaward contract execution phase (cost mischarging). Product substitution fraud, which poses the biggest potential threat to the operations of the Department of Defense, occurs when a contractor provides an inferior or otherwise non-conforming product to the Department. We have recently obtained convictions in cases relating to defective rifle barrels, artillery ammunition, aircraft wing bolts and similar life threatening situations.

Application of the various provisions of the Guidelines in the area of fraud and deceptions appears very cumbersome and confusing; i.e.,

- o Is the Federal Government one victim or more than one victim (base offense level 6 or 8)?
- o Is a contractor's set of books with multiple entries which support one defective pricing statement, one transaction, or a scheme to defraud more than one victim (base offense level 6 or 8)?

- o Is maintaining business records a special skill, etc., under Section Z212 (thereby increasing base offense by 1 to 4 levels)?
- o If an owner of a business alters employee time cards in a cost mischarging scheme, does the Section Z211 provision apply because the crime is "one of organization, leadership, direction or supervision of others..., making him more culpable than other participants, ..." (thereby increasing base offense 1 to 6 levels), or is he a sole participant under Section Z213?
  - oo What if he directed others to indicate an improper job number on their time cards?
- o In that the court may use Section F211(a)(2) to increase the base offense level, based upon an evaluation of the nature, sophistication, and duration of the offense, can the court still use either Sections Z211 or Z212 based upon the individual's role in the offense (thereby increasing base offense 1 to 6 levels), or, would this constitute a duplication in considering the nature of the criminal activity?

As can be seen from the type of questions which might be raised in applying various provisions of the Guidelines (each of which could cause significant changes in the offense level), I believe the Guidelines as written will be the cause of extensive and burdensome litigation and every effort should be made to eliminate this confusion.

Additionally, Section F211(a)(2) provides that where the gravity of the offense is not reflected by the amount of financial loss or gain, the base offense level may be increased by 3 to 9 levels depending upon the nature, sophistication and duration of the offense. While this provision would appear justified, it has the effect of eliminating the General Provisions Sections relating to death (Section Y211), disruption of Government function (Section Y212), and significant endangerment of National security, public health, or safety (Section Y215). These General Provisions Sections are necessary to ensure that the courts have the needed flexibility in sentencing Defense contractors who endanger National security and public safety in their commission of frauds against the Government. Section F211(a)(2) would typically be relied upon by the courts in sentencing individuals in production substitution fraud schemes. However, it is just these types of schemes where the courts need the greatest degree of flexibility in sentencing. When a Defense contractor, motivated by pure greed, provides inferior products which endangers the security of this nation and the lives of

its servicemen, the courts must be allowed maximum flexibility to provide sentences in line with the egregiousness of the offense.

Under the General Provisions Sections, the court could depart from the basic Guidelines in these cases and increase the offense level as it deemed appropriate. However, Section F211(a)(2) acts to limit this flexibility of the court, as it provides a gravity consideration factor which overrides the general provisions. I recommend the Guidelines be restructured so as to allow the courts the greatest latitude possible in dealing with these serious offenses.



Michael C. Eberhardt  
Assistant Inspector General for  
Criminal Investigations Policy and Oversight

## UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

624 U. S. COURT HOUSE

BUFFALO, NY 14202

CHAMBERS OF  
JOHN T. CURTIN  
CHIEF JUDGE

(716) 846-4221  
FTS 437-4221

March 12, 1987

The United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, DC 20004

Attention: Guideline Comments

Dear Commission Members:

There are many details which could be discussed in the Proposed Guidelines, and I am sure that you have received comments on a number of them. Therefore, my comments will be brief and will address only a few of the issues.

The Commission has done a better job in the Revised Draft in bringing about more simplicity to a very complicated approach. However, complexity still remains a serious problem. I have been working through the process with some of our Probation Officers, and it appears that there is a minimum of at least eight steps before the appropriate Guideline can be determined. This is a process required for each offense of conviction. It is true that fewer calculations are now necessary, but there are still too many.

The comments made by Dissenting Commissioner Paul H. Robinson should be taken seriously. Until Congress takes in hand the whole sentencing process, serious injustices will arise because Congress has imposed very serious sentences for relatively minor offenses but has only a gentle slap in the wrist for some serious crimes. The present five-year limit on mail fraud violations is an obvious example.

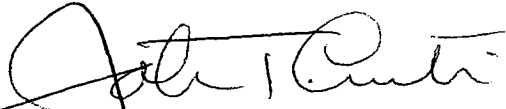
The proposal that there be weekend and intermittent confinements has been tried by this court in the past. Weekend sentences pose many problems with the local authorities which they do not want, and frankly will not stand for.

The United States Sentencing Commission  
Page 2  
March 12, 1987

I realize that you have the mandate from Congress which you must live with, but I believe that before the plan can become workable, there is much left to be done.

I have enclosed comments from our Probation Office which are worthwhile. I join in the comments sent to you by Honorable William Conner of the Southern District of New York.

Sincerely,

A handwritten signature in dark ink, appearing to read "John T. Curtin". The signature is fluid and cursive, with a large loop at the beginning and a long horizontal stroke extending to the right.

JOHN T. CURTIN  
United States District Judge

Enclosure

cc Hon. Charles L. Brieant, Chief Judge, U.S.D.C., S.D.N.Y.  
Daniel J. McMorro, Chief Probation Officer, W.D.N.Y.

## memorandum

DATE: March 10, 1987

REPLY TO  
ATTN OF: DANIEL J. McMORROW, Chief U.S. Probation Officer  
RODNEY C. EARLY, Supervising U.S. Probation Officer

SUBJECT: SENTENCING GUIDELINES  
REVISED DRAFT COMMENTS

TO: HONORABLE JOHN T. CURTIN  
Chief U.S. District Judge

R 10 1987

JOHN T. CURTIN  
UNITED STATES DISTRICT JUDGE  
DISTRICT OF NEW YORK

As requested, we offer these comments which reflect our observations and opinions regarding the content of the Sentencing Commission's revised draft of sentencing guidelines.

When a comparison is made between the preliminary and revised drafts, it becomes readily apparent that the Commission has made many substantial changes. The revised draft is simplicity itself when compared to the complex approach employed originally. However, complexity remains a serious problem. The procedure requires working through a minimum of eight steps before the appropriate guideline can be determined, a process required for each offense of conviction.

We concur with the Commission's decision to use the offense of conviction approach in determining the proper guideline range. This aspect, coupled with use of specific offense characteristics and aggravating/mitigating factors, seems quite sensible.

Fewer arithmetical calculations are now necessary, an advantage which lessens the possibility of an incorrect application of the guidelines.

Although the revisions, and the Commission's decision to utilize a matrix system to establish guideline categories, allows the courts greater flexibility in imposing probation as a sentence, the expanded availability of discretion weakens the goal of determinate sentencing. We have always believed in our courts having broad discretion in imposing criminal sanctions while recognizing the difficult problems associated with disparity which is inherent in such a system. The Sentencing Reform Act seeks to abolish our present system and impose a more rigid, determinate type system. It is our opinion that the revised draft only acts to perpetuate the system which now exists.

In virtually every case, the court will have the ability to individualize each sentence regardless of the guideline range computed. Commissioner Paul H. Robinson is the only Commission member who dissented regarding the contents of the revised draft. Commissioner Robinson's observations and comments are quite revealing and have obvious merit. We find ourselves sharing his opinions and concerns. If Your Honor has not already done so, we strongly suggest review of his dissent.

Commissioner Robinson's views raise many substantial questions and is suggestive that the revised draft may encounter difficulties in obtaining the blessing of Congress. The likelihood of any sentencing revisions taking effect on schedule appears remote.

Regardless of what is ultimately adopted, we see a need for substantial training before implementation, a factor which appears to have gone unnoticed by Congress.

Although we believe this draft has many shortcomings, we see much value in other aspects. Establishing ethical standards of plea agreements (p. 174) has merit. The revised terms of probation are more realistic (p. 176) and the expanded and better defined conditions of probation (p. 177) will give us greater enforcement capability. At the appropriate time, we will urge the court to adopt the expanded conditions of probation and supervised release as standing conditions in all cases. Of course, we have some minor modifications we would recommend.

Perhaps minor in the scheme of things, we nevertheless would recommend changing slightly the wording of the one mandatory condition of probation (p. 176). We believe the word "crime" should be dropped in favor of "offense" to avoid definition conflicts which exist between and among the various states. Weekend and intermittent confinement sentences could pose problems locally and elsewhere for the U.S. Marshal because of the unavailability of local contract institutions.

In summary, we see the revised draft as a definite improvement over the Commission's first effort, but one which falls short of easy application and the intent of Congress. We do not view the present draft as being workable as a whole.

**ETHYL CORPORATION**

LAW DEPARTMENT

March 17, 1987

ETHYL TOWER  
451 FLORIDA  
BATON ROUGE, LA. 70801

United States Sentencing  
Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

Attention: Guidelines Comments

RE: Guidelines Published at  
52 F.R. 3920 (Feb. 6, 1987)

Dear Commissioners:

Ethyl Corporation appreciates this opportunity to comment on the Sentencing Guidelines and Policy Statements for the U.S. Courts, as proposed at 52 F.R. 2930 et seq.

Enclosed are detailed comments on Q211 and Q214. It should be apparent from these comments that the proposed guidelines paint with too broad a brush in a very complex area. The proposed guidelines try to lump together things that Congress has made quite diverse. Although it may be highly desirable and conceptually simple to lump together offenses related to toxic pollutants, the guidelines gloss over too many complicating factors.

Although I recognize your time constraints, I suggest that Part Q be revised to create categories that adhere more closely to the Congressional enactments. For instance, the knowing endangerment of 42 U.S.C. §6928(e) should be put in a separate classification reflecting the unusually severe punishment (15 years maximum) Congress has provided for this heinous crime. The remainder of 42 U.S.C. §6928's criminal provisions could be treated together since they have maximum penalties of 2 or 5 years compared with the general 1 year maximum in the other environmental crimes. The falsification penalties may be lumped together as similar crimes even though their maximum penalties may vary slightly. It is far easier to provide a guideline that distinguishes between falsification involving toxic pollutants on one hand, and falsification involving other pollutants on the other other hand.

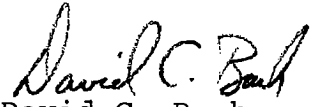
United States Sentencing  
Commission  
March 17, 1987  
Page 2

RE: 52 F.R. 3920 (Feb. 6, 1987)

If there are any questions, I would be pleased to try  
and answer them.

Respectfully yours,

ETHYL CORPORATION

  
By: David C. Bach  
Assistant Counsel

DCB/c

Enclosure

cc: David F. Zoll, CMA  
E. W. Elmore, Vice President  
and General Counsel

## Part Q

Introduction. The introduction should, in addition to the statement proposed, recognize that some cases may indeed be de minimis or not culpable to the degree suggested in the introduction. There are more than 10,000 pages regarding hazardous waste rules promulgated under Subtitle C of the Solid Waste Disposal Act that have appeared in the Federal Register since 1980. Title 40 of the Code of Federal Regulations (the rules of EPA) occupies over a foot of shelf-space. Many of these provisions are conflicting or vague, or highly technical, and such technical violations do not merit severe criminal punishment.

1. Environment. Since most of the environmental laws provide for civil or criminal penalties or both, the listing of statutes should be consistently narrowed to the criminal provision. There are also errors in the proposed listing. The listing should be as follows:

| <u>Proposal</u>           | <u>Should be</u>                               |
|---------------------------|------------------------------------------------|
| 7 U.S.C. §§136j, 1361     | 7 U.S.C. §136j, 1361(b)                        |
| 15 U.S.C. §§2613, 2615(b) | 15 U.S.C. §2614, 2615(b)                       |
| 33 U.S.C. §403            | deleted                                        |
| 33 U.S.C. §406-7          | 33 U.S.C. §§407, 411                           |
| 33 U.S.C. §411            | deleted                                        |
| 33 U.S.C. §1319           | 33 U.S.C. §1319(c) (1)                         |
| 33 U.S.C. §1321           | 33 U.S.C. §1321(b) (5)                         |
| 33 U.S.C. §1344(s)        | 33 U.S.C. §1344(s) (4) (a)                     |
| 33 U.S.C. §1415           | 33 U.S.C. §1415(b)                             |
| 33 U.S.C. §1517(d)        | 33 U.S.C. §1517(b)                             |
| 33 U.S.C. §§1907-1908     | 33 U.S.C. §§1907, 1908(a)                      |
| 42 U.S.C. §§300i, 300j-4  | 42 U.S.C. §§300i(b), 300j(e) (2),<br>300j-4(c) |
| 42 U.S.C. §4912           | 42 U.S.C. §4912(c)                             |
| 42 U.S.C. §6929(d), (e)   | 42 U.S.C. §6928(d), (e), (f)                   |
| 42 U.S.C. §7413           | 42 U.S.C. §7413(c)                             |
| 42 U.S.C. §9603           | 42 U.S.C. §9603(b), (c), (d)                   |
| -----                     | 43 U.S.C. §1350(c)                             |
| 43 U.S.C. §1816(a)        | 42 U.S.C. §1816(a), 1822(b)                    |
| 43 U.S.C. §1822(b)        | deleted                                        |

## Q211-Commentary

The listing of the relevant statutes in the first paragraph should be specific to the criminal portions: 7 U.S.C. §§136j, 1361(b); 15 U.S.C. §§2614, 2615(b), 33 U.S.C. §1319(c) (1); 42 U.S.C. §6928(d), (e), (f) and §7413(c), and 42 U.S.C. §1350(c).

The criminal portion of the statutes cited are narrower than the "situation" to which "the guideline applies." For instance, Q211(a)(1), as noted later in the commentary, to violations of 42 U.S.C. §6928(e), (f). Similarly, Q211(a)(3) applies to violations of 42 U.S.C. §6928(d)(1) and §6928(d)(2). The guidelines do not apply to other subsections of 42 U.S.C. §6928 (i.e. §6928(a-c) which involve administrative compliance orders and penalties for violation thereof, and §6928(g), which establishes civil penalties.) Similarly, 33 U.S.C. §1319(c)(1) provides criminal penalties for violation of §§1311, 1312, 1316, 1317, 1318, 1328 or 1345 or any NPDES or "dredge and fill" permit issued under §1342 or §1344. Only 33 U.S.C. §1317(a) and rules pursuant thereto deals specifically with toxic pollutants. Many of the pollutants regulated under the Clean Water Act are by definition, "conventional" and not "toxic" pollutants.

Most sections cited provide for imprisonment of not more than one year (i.e., 7 U.S.C. §1361(b), 15 U.S.C. §2615(b), 33 U.S.C. §1319(c)(1), and §7413(c)). However, 42 U.S.C. §6928 provides for higher maximum sentences (2 years, 5 years or 15 years). One "falsification" offense (33 U.S.C. §1319(c)(2)) carries a maximum sentence of only 6 months, and should not be included in this category as the increase of 3 to 12 levels puts the matter past the statutory maximum of 6 months.

The Toxic Substances Control Act, 15 U.S.C. §2601, is a misnomer inasmuch as it regulates every chemical substance regardless of toxicity. For instance, the chemical inventory established pursuant to 15 U.S.C. §2607(b) contains essentially every chemical substance distributed in commerce without regard to toxicity. PCBs, which are widely reputed to be toxic, are covered only by 15 U.S.C. §2605(e). In fact, 15 U.S.C. §2605 and §2606 are the principal sections of the Act that regulate use of "hazardous" chemical substances or "imminent" hazards. The rest of the Act does not necessarily deal with hazardous chemical substances.

In the third paragraph of the commentary, the statutory reference to RCRA (i.e. 42 U.S.C. §9601) is incorrect. I assume that 42 U.S.C. §6901 was intended. However, even a reference to 42 U.S.C. §6901 is incorrect. Section 2 of the Resource Conservation and Recovery Act (RCRA) of 1976 (P.L. 94-580, 90 Stat. 2796) completely rewrote the Solid Waste Disposal Act. The revised Solid Waste Disposal Act, 42 U.S.C. §6901 et seq., contains 9 subchapters, only subchapter 3 (§§6921-6934) of which deals with hazardous waste management.

#### Q214-Commentary

Inclusion of 33 U.S.C. §§403 and 406 is inappropriate. These sections are limited to obstructions to navigation,

§406 establishing the penalty for violation of §403. To the extent §403 can be construed to extend to dredge and operations, the more specific provisions of 33 U.S.C. §§1344 and 1371(a) make §§403 and 406 little more than historical curiosities. Dredge and fill regulations, in any event, seem inappropriately included in discussions of control of chemical discharges.

Reference to 33 U.S.C. §§407 and 411 is also largely a matter of historical curiosity. Prior to enactment of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500), §407 (which was Section 13 of the Rivers and Harbors Act of 1899) had been dusted off and used effectively, but inefficiently to foster water pollution abatement. Indeed, the cumbersomeness of enforcing this section was one of the prime moving forces behind enactment of the 1972 amendments. However, §402(k) of the FWPCA, 33 U.S.C. §1342(k), has obviated the necessity of an action under 33 U.S.C. §411 in most cases.

Consistent with my comments on Q211, each statutory reference should be to the criminal portion of the statute.

The second paragraph of this commentary notes the possibility of a negligent violation of the Clean Water Act (33 U.S.C. §1319(c)(1)) as well as a knowing violation. Since Part Q does not discuss "scienter" in any other manner, it is appropriate to restate basic legal principles, which have not been articulated in Part Q, here. The environmental statutes (and other regulatory statutes) generally make distinction in punishment between "knowing", "willful" or "negligent" violations on the one hand and other violations not requiring this higher degree of "scienter." Because the "scienter" requirements for criminal charges already represent a greater extent of culpability than civil actions, it seems in general inappropriate to increase the sentences based on the distinction between toxic and non-toxic substances.

The final paragraph of this commentary discusses prior convictions. Although prior convictions could be a serious sentencing consideration, such situations in environmental enforcement are quite rare. Of more practical concern are the situations involving multiple offenses brought in a single action under statutes that provide that each day of violation constitutes a separate offense. In the case of continuing operation of major industrial facilities, the potential criminal sentences for, say, 30 consecutive days of discharge are staggering. The sentencing guidelines should consider such potential multiple offenses in a way such that the necessity for deterrence is balanced against fundamental fairness for legitimate businessmen who undertake significant enterprises with known operating risks which

cannot ever be entirely avoided. We hope that such balancing is done in the exercise of prosecutorial discretion. But in situations where prosecutorial discretion is abused, the judge can bring to bear his own discretion under the guidelines.

2007 Harton Rd.  
San Diego, Ca.  
March 5, 1987

U.S. Sentencing Commission  
Att'n. Guidelines Comments  
1331 Penn. Ave., N.W.  
Suite 1400  
Washington, D.C., 20004

Dear Commission Members:

I write to oppose the new proposed sentencing guidelines that would make longer prison stays and higher fines probable for young men convicted of draft law violations.

These suggested excessive fines and prison terms hurt the low income and the most intelligent conscientious young people.

These excessive fines and prison terms would hasten the militarization of our society. Why can't we seek diplomatic solutions to problems with other nations rather than using military force?

To repeat, I oppose the new proposed guidelines for sentencing convicted draft law violators.

Sincerely,

A handwritten signature in cursive script that reads "Maxine Cheever".

Maxine Cheever



DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
WASHINGTON, D.C. 20226

MAR 18 1987

Mr. Paul Martin  
The United States Sentencing Commission  
1331 Pennsylvania Avenue, NW.  
Washington, DC 20004

Dear Mr. Martin:

A review of your Revised Draft Sentencing Guidelines has revealed an apparent omission. There is no reference to 18 U.S.C. section 924(e), which provides an enhanced penalty for possession of firearms by a felon who has three previous convictions for violent felonies or serious drug offenses. A further explanation is contained in Public Law 99-570, dated October 27, 1986.

This letter is in confirmation of your discussion of this subject with Joseph M. Wilson of my staff on March 16, 1987. If we can be of further assistance, please contact Mr. Wilson at 566-3021.

Sincerely yours,

Phillip C. McGuire

7709 Old Boonville Highway  
 Evansville, Indiana 47715  
 March 20, 1987

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

Dear Sirs;

May I respectfully urge the U.S. Sentencing Commission to reverse its stand in regard to proposed longer prison stays and higher fines for those convicted of draft law violation. Sentencing guidelines of the present are severe considering no violent crime has been committed. Furthermore with the ever present threat of nuclear extinction of the earth by way of a mistake, conscripted troops cannot prevent a holocaust or administer help to the country after one.

May all efforts be made to negotiate while there is still time.

Sincerely,

*Ruth Stahl*  
 Mrs. L.E. Stahl

COMMENTS ON PROPOSED SENTENCING GUIDELINES  
FOR U.S. COURTS, PART Q - OFFENSES  
INVOLVING THE ENVIRONMENT

Although the imposition of criminal penalties for offenses involving the environment generally arises only in the case of willful and knowing violations, the courts should be given more flexibility in determining the type of sentence to be imposed. Admittedly, some environmental offenses are so heinous that the imposition of a term of imprisonment may be an appropriate penalty and serve to deter future violations; however, the Commission should bear in mind that imprisonment is not always the best, or the only type of acceptable deterrent, especially in the case of environmental offenses.

Thus, it is urged that the Commission further examine its guidelines on Imposition of a Term of Imprisonment, Chapter 5, § A521. According to this section, if, under the guidelines, the minimum term for the offense is from one to six months, the court is required to sentence the offender to prison or to some type of alternate confinement (e.g., halfway house, county jail). Furthermore, where the minimum term as determined by the guidelines is more than six months, the court is given no alternative but to impose a term of imprisonment. The court is stripped of authority to impose a probationary sentence in all cases except where the minimum term is determined to be zero months. It is urged that these requirements are harsh and severely limit the discretion of the court. The sentencing judge should not be bound by such hard and fast rules, especially in light of the way in which the guidelines determine the minimum term. The court should be given broader authority to determine when a probationary sentence is appropriate. Therefore, it is suggested that § A521 be amended to provide broader authority to the court, especially in determining the appropriateness of a probationary sentence.

Examining § A521 in terms of sections Q-211 and Q-214 of Part Q, Offenses Involving the Environment, further highlights the harshness of the guidelines.

Section Q-211 deals with the mishandling of hazardous or toxic substances. The base offense level for such an offense is 9. Even where the offender has the best historical record and has committed no previous violations, the base guideline range is 4 to 10 months imprisonment. At a minimum term of 4 months, according to § A521, no probationary sentence may be imposed. Moreover, section Q-211 further dictates that the offense level is to be increased from 9 by at least 3 levels, i.e., to at least 12, where (1) a community is evacuated, or (2) a public utility is disrupted, or (3) cleanup required a substantial public expenditure, or (4) there was an ongoing repetitive release of the hazardous substance, or (5) an environmental offense was concealed, or (6) transportation, treatment, storage or disposal without or in violation of a permit was involved. Thus, in most instances, some other occurrence will invariably trigger an increase in the base offense level.

Once the offense level moves beyond 6, the minimum sentence for the offender with even the cleanest of records is 6 months. With a 6-month minimum, the offender faces a term of imprisonment or some alternative confinement. Probation is not permitted. Arguably, it should be. At an offense level of 12, the minimum sentence is 10 months and in this case, § A521 dictates that the court sentence the offender to prison--no probation, no alternative confinement, no discretion. Arguably, a mandatory prison term of 10 to 16 months is too great a sentence for an offender with no prior violations. The court should be given broader discretion to prevent such harsh results.

Turning to Section Q-214, Mishandling of Other Pollutants, the rules for environmental offenses involving non-toxic or non-hazardous pollutants are no less harsh or restrictive than the guidelines for hazardous or toxic substances. Although the base offense level is 6 and at this level the minimum sentence is 0 months (thus permitting a probationary sentence) the escalator clauses in the guidelines will generally cause the minimum sentence term to rise above 0 months as the offense level is increased. Starting with a base offense level of 6, the court is instructed to add 4 levels anytime the pollutant is discharged into the water, air or land and to add at least 3, and up to 5 levels where public utilities are disrupted, a community is evacuated, the cleanup cost the public a substantial sum of money, the release was on-going, or where another offense was concealed. Thus, the escalator clause will have a substantial impact on the sentence imposed.

In addition to covering knowing violations, Section Q-214 also covers negligent violations that may involve criminal liability. Thus negligence by the cleanest of offenders could result in imprisonment, without possibility for a probationary sentence. The threshold at which imprisonment is mandated by the Guidelines is an offense level of 11 and this level is not difficult to reach once the court starts escalating the offense level in accordance with the various provisions. Invariably, some event will cause the offense level to be raised and, with an already high base level of 9, the resultant sentence is overstated.

On the other hand, the court is given little discretion insofar as decreasing the offense level to reflect the offender's acceptance of responsibility for the offense. The guidelines permit the court to adjust the offense level downward by 1-3 levels for an offender who affirmatively accepts responsibility for an offense. There is no obligation to reduce, and the available reduction is limited.

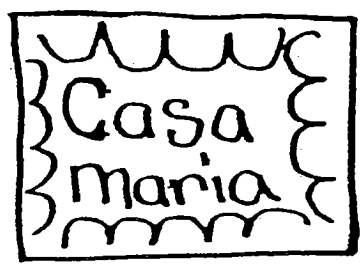
It is urged that the Commission modify this provision to 1) require a reduction in offense level where an offender affirmatively accepts responsibility and 2) give the court wider latitude to reduce the offense level by more than 3 levels. The rules for reduction of offense levels should be at least as broad as the currently proposed escalator provisions; the reduction range should perhaps be set at 3 to 5 levels, instead of 1 to 3. The court would then be free to evaluate the offender's conduct and reward positive action. This should encourage more responsibility on

the part of offenders. There would be a greater incentive to accept responsibility. This acceptance will only serve to reduce the overall costs of investigating the offense, determining the cause and taking action against the appropriate party. Time will be better spent resolving the problem.

Moreover, the post-offense conduct section of the guidelines should be likewise modified. Under this section, an offender who obstructs or impedes an investigation or interferes with the administration of justice is subject to an increase of 1 - 4 offense levels. This increase is required, not discretionary. The presumed goal is to deter such post-offense misconduct. However, any corresponding provision to reward and encourage cooperation with the authorities is not as forcefully written. The guidelines merely say that the court may decrease the sentence as appropriate when an offender is cooperative with the authorities. If the real purpose of examining post-offense conduct is to deter any further wrongdoing and encourage cooperation, then the rules should coincide. Thus, if increased offense levels are required for misconduct, decreased offense levels should be similarly required for good conduct. Moreover, the court should be free to appropriately award responsible cooperative conduct. This discretion should be broad.

Recommended Changes in Guidelines:

1. Reduce base offense level for section Q-211 and Q-214 environmental offenses.
2. Leave escalation of offense level to discretion of the court, and provide merely considerations, not mandates for use by the court when deciding whether to increase the offense level. Remove mandatory nature of increased offense levels.
3. Modify guidelines to allow court further discretion concerning the imposition of probationary sentences in the case of environmental offenses.
4. Encourage post offense cooperation by increasing authority of court to reduce offense levels, especially in the case of environmental offenders or offenders with otherwise reasonably clean records.
5. Reward and encourage responsible conduct on the part of environmental offenders by requiring decreased offense levels upon affirmative acceptance of responsibility, especially when coupled with remedial action on the part of the offender.



CATHOLIC WORKER HOUSE  
OF HOSPITALITY

1131 N. 21st St., P.O. Box 05943  
Milwaukee, Wi. 53233 Ph. 344-5745

U.S. Sentencing Commission  
Attention Guidelines Comments  
1331 Penn. Ave. N.W. Suite 1400  
Washington, D.C. 20004

3-17397

Dear Friends,

We have heard that your commission has submitted proposed sentencing guidelines that would make longer prison stays and higher fines likely for those convicted of draft law violations. We still feel that conscience has a role to play in people's lives. Any person who penalized for following his or her conscience is having his or her basic rights violated. This is unfortunate in a country like our's which prides itself on protecting the rights of people.

We know of several young men who are Christians and feel that to register for the draft is to promote violence as a solution to the problems between other countries and our's. They believe in the precept of Christ of loving the enemy and not doing harm to those who do harm to us. It seems that our country does not believe in this precept and still claims to be part of Christian civilization. We are Christians and will do what we can to stop all young people from joining the forces of those who believe that might is right and killing the enemy is the solution to the world's problems. It is better to die doing the right thing than to live a long life doing the wrong thing.

Please consider these points listed above in deciding to prolong prison stays and increase fines for those who, in conscience, refuse to cooperate with the draft registration. Thank you for your time and attention.

Peace,  
*Don Timmerman*  
Don Timmerman

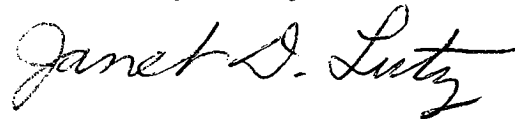
R. D. 1 Box 467  
New Wilmington, PA 16142  
March 19, 1987

United States Sentencing Commission  
1331 Pennsylvania Avenue, N. W.  
Washington, D. C. 20004

Gentlemen:

Please support more victim-restoring, restitution-oriented sentencing approaches for the criminal justice system. Sentence violent and serious, repeating offenders to prison or death for public protection, but non-violent criminals should pay restitution to victims and perform free community service. This would save the tax payers money by not having to build more penitentiaries. Also, I believe it would be more fair to the victims and society. It would probably prevent some repeat offenders.

Yours very truly,

A handwritten signature in cursive script that reads "Janet D. Lutz". The signature is fluid and elegant, with the first letters of each word being capitalized and prominent.

(Mrs. Glen A. Lutz)

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
PROBATION OFFICE

ROBERT M. LATTA  
CHIEF PROBATION OFFICER

600 U.S. COURT HOUSE  
312 N. SPRING STREET  
LOS ANGELES 90012

March 13, 1987

Honorable William W. Wilkins, Jr., Chairman  
United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W., Suite 1400  
Washington, D. C. 20004

Re: **Comments on Revised Draft  
Sentencing Guidelines**

Dear Judge Wilkins:

I was asked by Chief Probation Officer Robert M. Latta to respond specifically to those aspects of the revised draft guidelines that relate to the supervision of probationers and supervised releasees in the community.

Having responded in similar manner to the initial draft guidelines, I am compelled at the outset to express relief and gratitude that the Commission listened to the cumulative comment on guidelines for conditions of supervision and violations for probationers and supervised releasees. The resulting revision has produced practical guidelines for supervision with necessary structure but sufficient flexibility to respond to differing case needs and local judicial policy.

I found the proposed conditions of supervision for probationers and supervised releasees to be clear and comprehensive. Generally, these conditions provide more structure and limits than current conditions set forth by the Courts or Parole Commission. While some conditions remain essentially the same, the conditions related to substance abuse and third-party risk provide more guidance for the supervisee than do general conditions currently. In an era when the sophistication of offenders in drug traffic and white-collar crime continues to increase, the limits placed on these individuals need to be more definitive.

The revised guidelines for violation of probation or supervised release are much more practical and workable, in terms of current experience, than the initial

guidelines. The method of categorizing violations is reasonable; and the flexibility provided to the Court to modify conditions, short of revocation, allows sufficient room for rehabilitation, where possible, to occur. At the same time, requiring that all violations be reported to the Court for some action is consistent with the spirit of the Crime Control Act. This lets the offender know that there are firm expectations for law-abiding behavior.

While I endorse the changes made to the guidelines, as they relate to supervision, I am greatly concerned about the impact of the guidelines on our supervision workload. I have been told that statements have been made to the effect that no significant impact will occur to the workload of probation officers when guidelines are implemented. Speaking directly to the impact on supervision, perhaps the most notable impact will result due to increase use of community service and the new condition for home detention. As required by the Crime Control Act, community service will have to be imposed in all felony probation cases where a fine or restitution is not ordered. Presently, only 16% of probation orders nationwide require community service. It seems likely that there will be a greater number of cases in which the Court will, of necessity, be imposing community service because of this requirement. The Probation Division has prepared a monograph on community service which should be released to the field shortly. This policy document encourages greater attention to the implementation and monitoring of community service. This has occurred since workload was last measured, and any increase in the amount of community service to be overseen by the probation officer will significantly impact upon workload.

A review of the guidelines appears to indicate that a larger number of defendants granted probation will be required to serve some custody component (jail, community treatment center, home detention) as a condition of probation. Since jail space and funds for community treatment centers are already limited, it seems likely that increased needs for custody will have to be satisfied by home detention. Since your revised guidelines state that home detention may be imposed in lieu of imprisonment, if the circumstances of home confinement are sufficient to ensure compliance, including detection of any violation, it will be necessary to supervise these individuals in a much more staff intensive manner than is performed under

current staffing for high activity supervision. In addition, it seems likely that funding will be necessary to procure electronic monitoring systems if methods are required to "ensure compliance."

If probation offices are to be properly staffed and equipped to provide these additional services, the Sentencing Commission should acknowledge the impact upon resources early on so that sufficient additional funding can be secured from Congress before guidelines are implemented.

Sincerely,

A handwritten signature in dark ink, appearing to read "Richard J. Westman". The signature is fluid and cursive, with a long horizontal stroke at the end.

RICHARD J. WESTMAN, Supervising  
U. S. Probation Officer

RJW/arg

cc: Robert M. Latta, Chief Probation Officer

L. Russell Burris, Probation Officer  
U.S. Sentencing Commission

# SENTENCING AND PAROLE PLANNING

*National Legal Services, Inc.*

**Marcia G. Shein, M.S.**  
President  
Sentencing and Parole Consultant

**National Office:**  
710 Lake View Avenue, N.E.  
Atlanta, Georgia 30308  
(404) 874-9553

**District Office:**  
941 N.E. 19th Ave., Suite 209  
Ft. Lauderdale, Florida 33304  
(305) 764-6970

**Barbara A. Taylor, M.A.**  
Vice President  
Sentencing and Parole Consultant

**Debbie A. Turner**  
Sentencing and Parole Consultant

**Jana L. Jopson, M.S.**  
Research and Development

**Jay L. Shein**  
Sentencing Investigator  
District Office

March 19, 1987

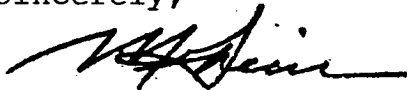
Senator Sam Nunn  
SD-303 Dirksen Senate  
Office Building  
Washington, DC 20510

Dear Senator Nunn:

It is with a most sincere concern that I forward to you my response to the United States Sentencing Commission's latest sentencing guidelines draft. Somehow word is not getting through to the Commission that they are preparing to propel us into the Dark Ages through a system which guarantees confinement for all and sponsors continual expansion of our prison capacity in this country.

Your conscientious moves on behalf of intelligent sentencing reform have been followed and applauded by many, our office staff included. Thank you for taking the time to review the enclosed concerns.

Sincerely,



Marcia G. Shien, President  
Sentencing and Parole Consultant  
NATIONAL LEGAL SERVICES

MGS/sd

cc: Robert W. Kastenmeier-Chairman House Judiciary Committee  
Carlos J. Moorhead-Ranking House Judiciary Committee  
William J. Hughes-Chairman House Judiciary Committee  
Bill McCollum-Ranking House Judiciary Committee  
John Conyers-Chairman House Judiciary Committee  
Joseph R. Biden-Senate Judiciary Committee  
Edward M. Kennedy-Senate Judiciary Committee  
William W. Wilkens-Chairman, US Sentencing Commission  
Scott Wallace-Legislative Director, NACDL  
Sentencing Alternatives/Guidelines • Legal Research  
Parole Commission Rules and Regulations • Bureau of Prison Policies

**STATEMENT OF CONCERN REGARDING THE NEW FEDERAL  
SENTENCING GUIDELINES**

by  
**Marcia G. Shein**

I am the president of National Legal Services, a sentencing alternative planning organization. Our main purpose is to help relieve overcrowding in the prison system by developing constructive sentencing alternative proposals for use in the sentencing of first offenders of non-violent crimes and youthful offenders. This includes drug offenses and offenses that will be otherwise precluded from alternative sentencing programs under the new sentencing draft guidelines. The purpose of this correspondence is to voice my urgent concern regarding the Sentencing Commission's guidelines and related issues. My distress is founded on our diligent review of the guidelines juxtaposed with the present parole system guidelines, and the potential for the new sentencing guidelines to create more problems rather than diminish the ones that are already plaguing the judicial system.

It is evident from the Commission's original draft and the present re-draft of the guidelines that no clear cut sentencing philosophy has been addressed in establishing sentencing guidelines. More importantly every aspect of humanity has been eliminated from the sentencing process. It is all too often that deterrence of others against major crime is being used as an excuse for increased incarceration. This is the only "philosophy" readily apparent in the guidelines.

**SENTENCING AND PAROLE PLANNING**

*National Legal Services, Inc.*

Deterrence has never been nor will it ever be a prime factor in reducing crime in this country or any other country. Research on deterrence suggests otherwise. For example, picture a 30 year old man, first offender, who has never been in any trouble before, who takes possession of less than 1 kilogram of cocaine. Consequently he is handed a 15 year sentence, the statutory maximum. That aspect of the case alone is outrageous. What is even more outrageous is that the excuse being used in imposing such exorbitant sentences on first offenders is deterrence to others. This excuse mirrors the judicial system's lack of responsibility for taking control of sentencing decisions. We have inundated our judicial system with images of a public crying out for more incarceration and lengthier sentences. That is not the story we see in our work. Politically that may be the perceived impression, but it is not accurate.

We cannot justify a 15 year imprisonment for an offender such as the above mentioned. No person on this earth will be deterred from engaging in illegal drug activity by knowing the sentence this man received. The only people affected are his family who were horrified by the inexorable sentence. This, of course, is just one example of hundreds in our experience of the system's blindness to the needs of humanity. If these needs were met with appropriate justice, the results would not only reduce overcrowding and disparity, but start to change the system and the way the system is perceived. Although the offender in this example received the short end of things as permitted under current sentencing practices, **possibilities** for a more lenient handling of his case existed which will not exist under the

new sentencing guidelines. Are we shifting our stance under these new guidelines so as to endorse the very worst aspects of our current system and annihilate all of the constructive possibilities it now offers? Even if the design of the new sentencing guidelines provides certainty and fairness pursuant to each individual's background, **it conspicuously lacks any evidence of humane treatment of offenders.** It looks like everyone's going to jail and for a good long time. A person who makes a mistake and commits a crime is still a human being and has the same standards of recovery that each of us has when we make a mistake in our lives which does not happen to be punishable by incarceration.

No where in the guidelines is the situation of overcrowding addressed and there is no sense that the cold, harsh guidelines reflect one iota of the original Senate bill. The sense of the Senate resolution in the Sentencing Reform Act of 1984 was an intention that more alternatives to incarceration would be used and more alternatives would be used for the purpose of reducing overcrowding. This would also mean alternatives in the direction of lesser periods of incarceration for appropriate offenders. However, the guidelines promulgated seem to have taken the bad and made it worse. Surely this is the very opposite of what Congress and conscientious criminal justice professionals envisioned as coming from the Act. The long-standing problems that plague the system at present cannot worsen the situation if left in effect until such time as a clear, rational sentencing alternative philosophy is addressed by the Commission.

Conspicuously absent from the guidelines is any consideration for the youthful offender. To suggest

that our young people from ages 18 to 25 should not be given a second chance with their age as a factor in recovery reflected in shorter periods of incarceration, is incomprehensible. We have taken the Youth Corrections Act provisions out of the system which would have allowed for some leniency with youthful offenders and have replaced it with cold, calculated guidelines for adult offenders only.

In researching the many states in the Union who have worked to establish sentencing guidelines it is evident that those guidelines were designed to be more lenient to reduce overcrowding. Those states in which the guidelines are working to any small degree are those in which the guidelines are considered lenient and practical. Though some of the proposed new guidelines represent a slackening of incarceration for certain types of offenses we cannot preclude drug offenses in proposing more realistic guidelines. This country is, in fact, inundated with a narcotics problem. However, each individual should be treated in relationship to their personal background as regards to the offense. These things are not being considered as strongly as they should be in order to accomplish the goals of justice. I think it would behoove the Commission to speak to family members of individuals who have gotten into trouble for the first time in their lives and have been devastated, the person and the family, by the torment of lengthy incarceration. I think if the Commission were to talk to family members who are the silent victims in criminal cases there would be more compassion inherent in the Sentencing Commission's guideline draft.

We must look to more sentencing alternative work

to accomplish the goals of the Commission. We must also look for an open-minded sentencing philosophy that encompasses not only justice and public safety, but humane treatment of the offender. Our criminal justice system is afflicted with an uncontrolled use of confinement. It is an established fact that the United States has some of the longest sentences in the world and one of the highest crime rates. In 1985 the prison population in the United States reached an all-time high passing the half-million mark. When I look at the extensive use of incarceration guaranteed under the new guidelines coupled with moves to continue expanding our prison capacity, I cannot help but think that we are moving in the wrong direction, namely backwards. Overflowing prison populations across the country are not a sign to me that deterrence is worth beans. We are applying band-aid solutions to our criminal ills. Once parole is abolished there will be no safeguards at all against the overcrowding of our prison system. The pendulum of the judicial system continues to swing in a handicapped fashion, but somewhere in the middle is a compromise of the swing to the right and the swing to the left.

**If the House and Senate Judiciary Committee are interested in hearing further examples of the realities surrounding the sentencing and incarceration of individuals we would be more than happy to testify from our personal experiences as sentencing and parole consultants.**

The full scope of the human problems touched upon in the justice system at the time of sentencing is largely unseen by those who participate in the process. We would also like to be considered a part of any effort to make the sentencing guidelines more consistent

with humane and economic need as well as help design a sentencing philosophy and sentencing alternatives. In addition to the above comments I want to note that there are no guidelines within the latest draft for specific sentencing alternatives and practically nonexistent latitude for the application of alternatives to incarceration.

A young man removed six bags of dirt from a national forest. The judge, instead of using a sentencing alternative, imposed a 6 month term of incarceration, one month for each bag of dirt. This is not an example of judicial cleverness it is a sad pronouncement of judicial thoughtlessness. This young man took up scarce prison space at the tax payers expense instead of paying back the tax payers through community service in our national parks which have been under funded for quite some time. It is these very real, day to day situations in our courts that are not being addressed by the Commission. **The conspicuous absence of sentencing alternatives seriously limits the effectiveness of the original sense of the Senate resolution.** Surely in its process of promulgating the guidelines the Commission has been made aware of countless other similar situations. Why aren't these situations addressed in the guidelines? Are they being ignored because they fail to fit into the current atmosphere wherein nothing short of incarceration will serve the ends of justice? If we cannot move forward, let's at least not move backward. Thank you for your consideration of these comments.

PCB000101

# HARTZ®

THE HARTZ MOUNTAIN CORPORATION, 700 SOUTH FOURTH ST., HARRISON, N.J. 07029 TEL. 201/481-4800

JAMES D. PROUD  
SENIOR VICE PRESIDENT  
SALES AND MARKETING

March 25, 1987

United States Sentencing Commission  
1331 Pennsylvania Avenue N.W.  
Suite 1400  
Washington, DC 20004

Gentlemen:

I am pleased to know that our government is taking action toward correcting the present unfair and deplorable conditions surrounding the invocation and punishment for crimes against the state.

My purpose in writing is to urge your task to go beyond mere uniform treatment to look for alternative sentencing methods.

Our present overcrowding in prisons is not only non-productive in terms of rehabilitation, it is a financial disaster. I believe there are better ways to punish some non-violent offenders that would save the state money and help the problem of overcrowding. Making the offenders pay back the victim or do free work in the community not only holds that person responsible but also restores the victim.

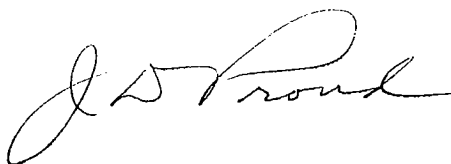
Because of my strong beliefs in the ineffectiveness of our present system, I have joined the Justice Fellowship, POB 17181, Washington, DC 20041, 703/759-9400. This organization has studied our prison problems in great depth. Their recommendations make a great deal of sense to me and I urge you to consider them during your deliberations.

You gentlemen have an opportunity to make some changes

United States Sentencing Commission  
March 25, 1987  
Page Two

which would affect all Americans financially, morally  
and spiritually. Please don't let the opportunity pass.

Very truly yours,

A handwritten signature in cursive script, appearing to read "J. D. Roud".

cc: Senator Frank Lautenberg  
Senator Bill Bradley  
Congressman Matthew Rinaldo

Atlantic  
Industries, Inc.

P.O. Box 216  
Nutley, NJ 07110

Tel. 201 235-1800  
Cable: Anildye-Passaic

TWX 710-989-1468  
TLX 6853089 Achem UW

March 27, 1987

United States Sentencing Commission  
Suite 1400  
1331 Pennsylvania Avenue, N.W.  
Washington, DC 20004

**Atlantic**

Gentlemen:

Atlantic Industries, Inc has just been made aware of the proposed Sentencing Guidelines and Policy Statements for the United States Courts. 52 Fed.Reg. 3919 et seq. (February 6, 1987).

We address these coments specifically to Chapter 2, Part Q which deals with conviction for offenses under certain environmental laws.

We are particularly concerned with the proposed mandatory prison sentences for conviction of offenses that amount to nothing more than unintentional clerical errors or reporting errors resulting from differences in interpretation of a large number of very complex regulations, inadvertent omissions and other situations where no intent or willful action to commit a violation is involved. We believe that for first time offenders in particular the base level of 9 in Part Q should which leads to the presumption of imprisonment should be reduced to a level allowing a presumption that no imprisonment may be allowed and that for some of these minor violations the same should apply for repeat offenders.

We do not believe it is possible for anyone, even Government, to achieve 100% perfection in dealing with complex recordkeeping and reporting requirements and these Guidelines need to recognize this.

We support the more extensive comments submitted by CMA dealing with this issue and urge the Commission to reconsider the harshness of the proposed Guidelines for environmental offenses.

Thank you for your consideration of our comments.

Very truly yours,



M.B.Bochner, Ph.D.  
Vice President

MBB/lrs



P.O. Box 17181  
Washington, D.C. 20041-0181  
(703) 834-3650

March 30, 1987

Honorable William W. Wilkins, Jr.  
Chairman  
United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W., Suite 1400  
Washington, D.C. 20004

Dear Judge Wilkins:

Enclosed is the testimony of Justice Fellowship on the revised draft of the Sentencing Guidelines. We recognize the tight deadlines of the Commission and applaud your hard work.

However, the draft contains several serious flaws which could jeopardize the Guidelines if they are not corrected before the final draft is submitted to Congress. Specifically, the revised Guidelines will have a significant detrimental effect on prison overcrowding, will discourage the use of alternative punishments for nonviolent offenders and will not reduce existing sentencing disparity.

As always, we are willing to assist the Commission in any way possible.

Sincerely,

Daniel W. Van Ness  
President

DWV:jhs

Enclosure

Testimony of Justice Fellowship  
before the  
United States Sentencing Commission  
on  
Revised Draft  
Sentencing Guidelines

March 1987  
Washington, D.C.

As a national lobbying and public education organization which advocates reforms in the criminal justice system, Justice Fellowship is deeply interested in the content of the federal sentencing guidelines. Not only will they have a profound effect on federal courts and prisons, but they will also serve as a model for states to emulate. For these reasons, we carefully analyzed the preliminary draft of guidelines issued in September 1986 and provided written and oral testimony on December 3, 1986 in Washington, D.C.

Our testimony on the preliminary draft raised six specific concerns:

1. Although the legislation setting forth the duties of the Sentencing Commission stated that the sentencing guidelines were to be formulated to minimize the likelihood that the federal prison population would exceed federal prison capacity, it appeared that the draft guidelines would significantly increase prison overcrowding. We urged the Commission to conduct the impact analysis required by Congress before drafting the final guidelines in order to fulfill the statutory duty to consider impact.

2. The guidelines did not encourage the use of alternative punishments for nonviolent offenders as Congress intended.

3. The modified real offense approach was too complex and raised concerns about the standard of proof required at sentencing.

4. Relative sentences received for various offenses did not reflect current sentencing practices and produced anomalies in sentencing.

5. The guidelines did not require that a specific portion of the sentence be served on supervised release.

6. Basing the criminal history score upon the length of prior imprisonment and including juvenile records in this determination would only perpetuate existing sentencing disparity.

Our comments were echoed during the public hearings by judges, attorneys, victims rights advocates and other criminal justice professionals. Commission members had expressed a commitment to seriously consider these comments.

While the revised draft issued in January 1987, addressed several of these concerns, it continued to contain fatal flaws. Not only does it fail to address the two most significant problems generated by the preliminary guidelines (increased prison

overcrowding and insufficient use of alternative punishments for nonviolent offenders) it also unleashes a fundamental new concern.

In attempting to correct the complexity and inflexibility which characterized the preliminary draft, the Commission may have thrown the baby out with the bath water. The revised draft incorporates so much judicial discretion that it offers few of the benefits, but most of the problems, of sentencing guidelines.

If this draft were submitted to Congress, it would be a disappointing conclusion to more than fifteen years' work to establish federal guidelines. Our current reservations are so deep that we would be compelled to oppose its adoption. However, the Commission has demonstrated that it takes its responsibility seriously and is able to work hard under tight deadlines to fulfill it. Toward that end, we offer the attached recommendations and comments.

Further, we would encourage the Commission to consider requesting an extension of its April 13 deadline. We were impressed with the wisdom of your decision to conduct national hearings on the preliminary draft. Given the dramatically different character of the revised draft, it would be advisable, after considering responses to the January draft, to conduct similar hearings on the third draft prior to submitting it.

### Use of Alternatives for Nonviolent Offenders

It is apparent that Congress intended that the guidelines encourage the use of alternative punishments for nonviolent offenders. In the authorizing legislation, imprisonment is viewed as appropriate for offenders who require incapacitation [Chapter 58, subsections 994(h), (i), and (j)], but punishments other than prison are prescribed for those who do not pose a significant risk to the community [Chapter 58, subsections 994(j), (k), and (l)]. The Commission explicitly recognizes its statutory duty to ensure that the guidelines reflect the general appropriateness of imposing a non-incarcerative sentence on some property offenders [p. 175]. However, as in the preliminary draft, the revised guidelines continue to fail to adequately use such alternatives for nonviolent offenders.

There is no offense which is not imprisonable under the guidelines. A first-time offender convicted of possessing an eavesdropping device could be sent to prison, as would an individual who masterminded a chain of vicious killings. A judge is permitted to order probation only for offenders whose minimum term of imprisonment under the guidelines is zero months. Other alternative punishments are completely unavailable for offenders whose minimum sentence is greater than six months under the guidelines.

This narrow view does not reflect current sentencing practices and is inconsistent with an important aspect of existing federal law. At present, federal law prescribes that all offenders be held responsible to their victims by paying restitution [Chapter 227, section 3553(c)]. In programs such as the pilot Federal Reporative Work Project instituted by the Bureau of Prisons and the U.S. Parole Commission, offenders are assigned to carefully-supervised settings to perform community service. The guidelines' emphasis on imprisonment would severely restrict the ability of offenders to pay restitution and would limit community service to relatively few offenders.

In our December 3, 1986 testimony, we recommended a solution to this problem. We suggested a three-fold approach to sentencing. The judge would calculate an offense score to determine length of sentence, a reparation score to determine the amount of victim restitution or community service, and a risk score to calculate the amount of control over the offender necessary to protect the public. The judge would then determine sentence length and sentencing option by comparing the three scores. We continue to advocate this approach as a means to promote just sentencing which is consistent with Congressional intent.

Recommendation: The Commission should modify the sentencing table in the guidelines to significantly increase the numbers of nonviolent offenders eligible for sentencing to alternative

punishments. Alternatively, the Commission should adopt an approach similar to that suggested above which separates the determination of sentence length and sentencing option in order to increase the number of nonviolent offenders who are punished by alternatives.

#### Effect on Prison Overcrowding

There are a number of indications that the sentencing guidelines would dramatically increase the burden of overcrowding in the federal prison system. First, the revised draft offers judges virtually all the discretion they now exercise, but without the mitigating influence of the Parole Commission. This not only raises issues concerning sentencing disparity (see discussion which follows), but promises to increase prison overcrowding.

The Parole Commission currently may act to curtail excessive sentences. However, when the guidelines become effective and the U.S. Parole Commission is abolished, parole will no longer be available to mitigate such overly harsh sentences. As a result, federal prisons, which are currently operating at 150% of capacity, will become even more severely overtaxed.

Second, the draft places a heavy emphasis on those offender characteristics which generally increase sentence length and

much less emphasis on those which generally decrease sentence length. For example, criminal history substantially increases sentence length under the guidelines. It determines where an offender falls within a sentencing level and thus, greatly enhances the overall sentence. [pages 5, 10, 159-162]. Similarly, the offender's role in the offense and degree of dependence upon criminal activity for a livelihood are also significant factors in the sentencing decision. [pages 157, 163].

On the other hand, the other eight characteristics which the Commission is required by statute to consider [Chapter 58, subsection 994(d)], some of which might compensate by decreasing sentence length, are by and large considered irrelevant. An offender's education and vocational skills are not relevant in determining sentence length unless these factors can be used to increase the sentence by a determination that the individual misused special training or education to facilitate criminal activity. [page 170]. The offender's previous employment record, which might indicate an ability to pay restitution, will not influence the sentence except in the rare instance where the sentence is low enough that the individual qualifies for an alternative. [page 171].

It is impossible for us to predict just how dramatically the revised draft would increase prison overcrowding. However, the

Commission has both the means and the mandate to do so. As we pointed out in our earlier testimony, the Commission is required to draft guidelines which will minimize the likelihood of overcrowding [Chapter 58, Subsection 994(g)], and to conduct an impact analysis to guide its deliberations. Perhaps the most serious procedural error the Commission has made in its work has been its failure to conduct such impact studies with each draft. Had it done so on the preliminary draft, we are convinced that the revised draft would have been much more responsive to current and future correctional resources.

Recommendation: The Commission should immediately conduct an impact study of the revised draft, and should revise the relative sentence lengths of its final draft to minimize the likelihood of overcrowding.

#### Reduction of Unwarranted Disparity

One of the primary purposes of the federal sentencing guidelines was to reduce unwarranted disparity of sentences between similar offenders who had committed similar offenses [Chapter 58, subsection 991(b)(1)(B)]. And this appeared to be one of the hallmarks of the preliminary draft.

That attempt was criticized as so complicated and inflexible that confusion about how to interpret it might actually create disparity.

The revised draft has moved too far in the other direction. It has discarded the modified real offense approach for a very loose set of guidelines which judges may depart from under fairly broad conditions. This flexible approach will grant judges almost free reign in sentencing. As a result, the unwarranted disparity which currently characterizes sentencing will continue under the guidelines, unmitigated by parole.

Judicial discretion comes from a variety of sources. First, in following the guidelines, judges have a wide range of sentence lengths from which to choose. In fact, as Commissioner Paul Robinson notes in his dissent, the guideline ranges for specific offenses are frequently in excess of the 25% permitted by statute.

In addition, judges may depart from these already broad ranges in a myriad of circumstances (i.e. in determining the criminal history score, the judge may depart if there is a "likelihood of future crime" -- arguably, such a likelihood is present in every case). Finally, the judge is not bound by the guidelines when there has been a plea agreement.

Recommendation: The Commission should develop narrower guidelines ranges to provide more direction for judges and should limit the circumstances under which judges may depart from the guidelines.

#### Review of Recommendations

1. The Commission should modify the sentencing table in the guidelines to significantly increase the numbers of nonviolent offenders eligible for sentencing to alternative punishments. Alternatives, the Commission should adopt an approach similar to that suggested above which separates the determination of sentence length and sentencing option in order to increase the number of nonviolent offenders who are punished by alternatives.

2. The Commission should immediately conduct an impact study of the revised draft, and should revise the relative sentence lengths of its final draft to minimize the likelihood of overcrowding.

3. The Commission should develop narrower guidelines ranges to provide more direction for judges and should limit the circumstances under which judges may depart from the guidelines.

\* \* \* \* \*



John F. Hall  
President

March 30, 1987

United States Sentencing Commission  
Attention: Guidelines Comments  
Suite 1400  
1331 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

RE: AWPI Comments on Proposed Sentencing Guidelines  
for United States Courts

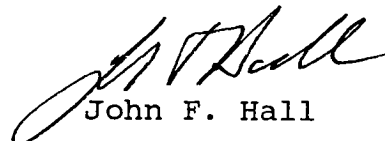
Dear Commissioners:

The American Wood Preservers Institute (AWPI) hereby submits its comments on the "Proposed Sentencing Guidelines and Policy Statements for United States Courts," which were published in the Federal Register on February 6, 1987. These comments were prepared for AWPI by Walter G. Talarek of the law firm of Walter G. Talarek, P.C.

AWPI is a national trade association representing 82 companies in the wood preserving industry. AWPI's membership includes both manufacturers and formulators of wood preserving chemicals, that are considered to be pesticides, and wood treating companies that use these chemicals. The members of AWPI are subject to the nation's many environmental statutes and regulations, the violation of which is addressed in Part Q of the Guidelines. AWPI, therefore, feels that it is appropriate to take this opportunity to comment on the unduly harsh and severe nature of the sentences and fines proposed for offenses involving the environment.

If you have any questions about AWPI's comments on the proposed Guidelines, please feel free to telephone me at (703) 893-4005.

Sincerely,



John F. Hall

**American Wood Preservers Institute**

Tyson's International Building, Suite 405  
1945 Old Gallows Road, Vienna, VA 22180 (703) 893-4005

BEFORE THE  
UNITED STATES SENTENCING COMMISSION

THE AMERICAN WOOD PRESERVERS INSTITUTE  
COMMENTS ON THE PROPOSED GUIDELINES  
AND POLICY STATEMENTS FOR THE  
UNITED STATES COURTS

John F. Hall, Esq.  
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Vienna, VA 22180

Counsel:  
Walter G. Talarek, Esq.  
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Suite 300  
Reston, VA 22091

March 30, 1987

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## I. Introduction

On February 6, 1987, the United States Sentencing Commission published in the Federal Register, at page 3920, "Proposed Sentencing Guidelines and Policy Statements for the United State Courts" (Guidelines). Included in these Guidelines are base offense levels, specific offense characteristics and commentaries on offenses involving the environment. See Chapter 2, Part Q. In addition, the Guidelines contain a table and criteria by which fines for environmental, as well as other, offenses are to be calculated. See Chapter 5, Guideline A542.

For the reasons discussed below, the American Wood Preservers Institute (AWPI) believes the sentences and fines that would result from the application of these guidelines are unduly severe, unwarranted, and do not reflect Congressional intent as embodied in the criminal penalties provisions of the environmental statutes.

AWPI strongly urges the Commission to amend the environmental guidelines to reduce the base offense levels, the specific offense characteristics additions to base offense levels, and the fines to reflect more accurately the range of sentences and fines specified by Congress in the various environmental statutes, to recognize the different types of crimes and mens rea elements for these crimes contained in the environmental statutes, to assess the real, rather than potential, harm to the environment caused by the offense, and to take into account the differences between misdemeanors and felonies and between major and minor felonies.

## II. The Guidelines Do Not Adequately Differentiate Between the Many Environmental Statutes and the Many Major and Minor Felonies and Misdemeanors Contained Therein

The Commission has proposed five guidelines for the Environment section of Part Q, "Offenses Involving the Environment." Two of these guidelines address only one criminal penalty provision of the Safe Drinking Water Act (SDWA), i.e., 42 U.S.C. §300i, while the other three guidelines address nineteen criminal penalty provisions contained in eleven environmental statutes, including the SDWA. By lumping so many environmental statutes and violations into only three gross guidelines, the Commission has not differentiated adequately among the many environmental statutes and among the many major and minor felonies and misdemeanors contained in these statutes. This result is undesirable because it does not carry out Congressional intent as expressed in each individual statute, and because it will lead to the imposition of more stringent sentences than warranted.

A good example of where the gross classification of offenses can lead to the imposition of inappropriate or more stringent sentences than warranted is Guideline Q211, which would assign a base offense level of 9 to all violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Toxic Substances Control Act (TSCA), the Resource Conservation and Recovery Act (RCRA), and the Clean Water Act (CWA) involving hazardous or toxic substances or pesticides. Violations of FIFRA and TSCA are misdemeanors, which are punishable by imprisonment for no more than one year. Violations of RCRA include both minor and major felonies, which are punishable by maximum terms of imprisonment of no more than 5 years and 15 years, respectively. Violations of the CWA can be misdemeanors, minor felonies, or major felonies, which are punishable by maximum terms of imprisonment of no more than 1 year, 3 years, and 15 years, respectively. Yet, Guideline Q211 would initially lump all of these violations together and treat them the same by imposing a prison sentence of between 4 to 10 months on first time offenders. This result is inappropriate.

In enacting FIFRA and TSCA Congress intended pesticides and toxic substances to be addressed in a manner different from other substances. Both FIFRA and TSCA are risk/benefit statutes in which all of society's interests are balanced before allowing a pesticide or toxic substance into the marketplace. Moreover, these statutes address consumer products that are used virtually by everyone in our society, including farmers, ranchers and homeowners. On the other hand, RCRA is a health-based statute in which EPA only considers the risk that a hazardous waste or hazardous waste management activity presents to the environment; and the CWA is a health and technology-based statute in which EPA ascertains what water discharge standards, limitations, and guidelines are technologically feasible. Moreover, the CWA and RCRA address industrial wastes that are managed by a relatively small universe of people.

Another good example of where Guideline Q211 does not adequately differentiate between misdemeanors, minor felonies and major felonies is 33 U.S.C. §1319. This section contains four distinct offenses. Negligent violations are dealt with in §1319(c)(1) and constitute misdemeanors. Knowing violations are addressed in §1319(c)(2) and constitute minor felonies punishable by imprisonment for up to three years. Section 1319(c)(3) makes violations that entail knowing endangerment major felonies punishable by imprisonment for up to 15 years. And, §1319(c)(4) makes false statements minor felonies punishable by imprisonment for up to two years. However, Guideline Q211 would impose a base offense level of 9 for all of these offenses despite the facts that the mens rea elements and the maximum sentence lengths of these offenses are different.

### III. Comments on Guidelines Q211, Q214, and Q215

#### A. The Base Offense Levels Are Too High for the Minor Felonies and Misdemeanors Addressed

Guidelines Q211 and Q215 specify a base offense level of 9 for a broad range of environmental misdemeanors, minor felonies, and major felonies specified in FIFRA, 7 U.S.C. §1361, TSCA, 15 U.S.C. §2615, CWA, 33 U.S.C. §§1319 and 1321, RCRA, 42 U.S.C. §6928, the Clean Air Act (CAA), 42 U.S.C. §7413, the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §1350, and the Comprehensive Environmental Response, Compensation and Liability Act, as amended, (CERCLA) 42 U.S.C. §9603. Under these proposed Guidelines, an individual with no prior criminal record who is convicted of an offense under any of these statutes would presumptively receive a term of imprisonment or other confinement of 4 to 10 months. Moreover, Guideline Q211 would increase the base offense level by 3 to 6 levels for offenses involving 42 U.S.C. §6928(d)(1) and (d)(2). Thus, a first-time offender of one of the minor felony RCRA permitting provisions would start with a base offense level of between 12 and 15 and, therefore, could be sentenced to a prison term of between 10 and 24 months. For the reasons discussed below, AWPI believes these results are unwarranted and unduly harsh.

The base offense level of 9 would take away the option of probation for a first time offender. As mentioned earlier, this base offense level would impose a prison sentence of between 4 to 10 months on first time FIFRA, TSCA, CWA and RCRA misdemeanor and minor felony offenders. Yet, in enacting FIFRA, TSCA, CWA and RCRA, Congress allowed, in most cases, a potential minimum sentence of no time in prison. Thus, the proposed guidelines would act to preclude a judge from exercising the full range of discretion that Congress meant him to have under these statutes.

The environmental statutes and regulations are numerous, complex and difficult to understand, particularly for small businessmen who cannot afford to have part or full-time environmental specialists on staff. There are eleven major environmental statutes and EPA's regulations are contained in eleven volumes of the Code of Federal Regulations. Considering the enormous task of keeping up with the large number of constantly changing environmental regulations, it would be very unfair to require the imposition of a prison sentence on a first-time misdemeanor or minor felony offender.

The environmental guidelines prescribe a base offense level of 9 for violations of 33 U.S.C. §1319(c), i.e., the criminal penalties provision of CWA, that involve hazardous

or toxic substances or pesticides and a base offense level of 6 for violations of 33 U.S.C. §1319(c) that involve other environmental pollutants (See Guidelines Q211 and Q214.) However, the criminal penalties provision of the CWA does not provide for this distinction. Rather, it specifically treats violations of sections 1311, 1312, 1316, 1317 and 1318 the same. These sections address conventional, non-conventional and toxic pollutants.

The environmental misdemeanors and minor felonies addressed in Guidelines Q211, Q214, and Q215 should be assigned base offense levels similar to those assigned to offenses involving food, drugs, agricultural products, and consumer products by Guidelines N221 and N231 of Part N. These two categories of offenses are similar in that they (1) derive from regulatory statutes, (2) in the case of pesticides and toxic substances, involve goods entered into commerce for public consumption, (3) prescribe similar prison terms and fines, (4) include similar mens rea elements, and (5) present similar risks to human health. AWPI believes the Commission was correct when it assigned base offense levels of 4 to violations of statutes and regulations dealing with food, drugs, biological products, devices, cosmetics, or agricultural products, and a base level of 6 to misbranding or mislabeling consumer products. AWPI believes the Commission should revise the environmental guidelines to impose similar base offense levels for environmental misdemeanors and minor felony offenses. In particular, AWPI recommends that the Commission revise (1) Guideline Q211 to divide the misdemeanor provisions of FIFRA, TSCA, CWA and CAA, i.e., 7 U.S.C. §1361, 15 U.S.C. §2615, 33 U.S.C. §1319(c)(1) and 42 U.S.C. §7413, into one guideline with a base offense level of 4 and the minor felony provisions of RCRA and CWA, i.e., 42 U.S.C. §6928(d) and 33 U.S.C. §1319(c)(2) and (c)(4), into another guideline with a base offense level of 6, and (2) Guideline 215 to reduce the base level offense for hazardous substances to 6.

In the case of the "knowing endangerment" provisions of RCRA and CWA, i.e., 42 U.S.C. §6928(e) and 33 U.S.C. §1319(c)(3), AWPI believes that these major felonies should be dealt with more harshly than the other types of environmental offenses. Thus, AWPI recommends that a separate guideline be established for these two offenses and that it be assigned a base offense level of 12. This will ensure that the specific mens rea elements of this crime are addressed and adequate punishment will be imposed on first time offenders.

B. Sections Q211(a)(1) and Q214(a)(2) Should Be Revised to Impose Additional Offense Levels Only for Violations of 42 U.S.C. §6928(e) and 33 U.S.C. §1319(c)(3)

The only two "knowing endangerment" offenses specified by the environmental statutes are 42 U.S.C. §6928(e) and 33

U.S.C. §1319(c)(3). None of the other environmental statutes have offenses with this specific mens rea, nor do they provide for the imposition of a more severe sentence when this mens rea is found linked to specified offenses. Therefore, calculation of a sentence based on this section is inappropriate for all offenses but for 42 U.S.C. §6928(e) and 33 U.S.C. §1319(c)(3). The commentaries on sections Q211(a)(1) and Q214(a)(2), therefore, should be modified to (1) strike the sentences which allow the addition of 6 to 12 offense levels to offenses involving other statutes and (2) clarify that this specific offense characteristic only applies to 42 U.S.C. §6928(e) and 33 U.S.C. §1319(c)(3).

C. Section Q211(a)(3) Should Be Revised to Impose Additional Offense Levels Only When There Is a Specific Mens Rea Or the Offense Presents a Significant Risk to the Environment

The commentary to section Q211(a)(3) states that this section applies to 42 U.S.C. §6928(d)(1) and (d)(2), for which Congress has prescribed more stringent levels of imprisonment than for other violations under 42 U.S.C. §6928(d). In essence, 42 U.S.C. §6928(d)(1) and (d)(2) cover violations of the permitting provisions of RCRA. The result of applying section Q211(a)(3) to first-time offenders of RCRA's permitting requirements is that they would be subject to a potential prison term of between 10 and 24 months. (See offense levels 12 to 15.)

While it is true that Congress has provided for a greater potential maximum prison sentence for violations of 42 U.S.C. §6928(d)(1) and (d)(2), i.e., five years, than for other violations of 42 U.S.C. §6928(d), i.e., two years, Congress also has provided for a potential minimum prison term of no years for all violations of 42 U.S.C. §6928(d). Moreover, both types of offenses would be classified as minor felonies, given the potential maximum prison sentence for each. In addition, there are varying degrees of permitting violations. Some violations are very minor, e.g., some recordkeeping requirements, while others are major, e.g., failure to manage a hazardous waste properly. Therefore, it would seem to be unduly harsh to require the imposition of a prison term on a first-time offender of a minor RCRA permitting requirement. AWPI urges the Commission to revise this section to impose additions to base offense levels only where the offenses presents a significant risk to the environment.

There is another problem presented by this specific offense characteristic. EPA's RCRA regulations are large in number and quite complex. In particular, the regulations which list and characterize hazardous wastes are difficult to understand. Therefore, it is not always easy for a generator to determine if his wastes are hazardous and

should be managed under a RCRA permit. (EPA's enforcement personnel often have this problem.) This problem was brought home recently to the wood treating industry when EPA announced in a draft of a proposed listing rule that many wood preserving wastes are hazardous wastes and should have been managed as such in past years. (See the February 19, 1987 draft titled "Hazardous Waste Management System: Identification and Listing of Hazardous Waste; CERCLA Hazardous Substance Designation; Reportable Quantity Adjustments.") However, since wood treaters have not been managing, nor has EPA required the management of, these wastes as hazardous wastes, wood treaters would be subject to immediate enforcement action and imprisonment if this section is promulgated.

The mens rea element of 42 U.S.C. §6928(d)(1) and (d)(2) is the offender must "knowingly" commit the act. The offender need not know the act he committed was wrong. Given that the RCRA permitting requirements are not always readily recognizable, AWPI also believes that an unduly harsh sentence would be imposed by this section absent a specific mens rea. Therefore, AWPI also urges the Commission to revise this section to add 3 to 6 levels to the base level offense only where the offender knows that his conduct is wrong.

D. Sections Q211(a)(4) and Q214(a)(4) Should Be Revised to Impose Additional Offense Levels Only If the Violation Concealed Is Major and Presents a Significant Risk to the Environment

Sections Q211(a)(4) and Q214(a)(4) address the "false statement" offenses of the environmental statutes. Most of these offenses are presently classified as misdemeanors or minor felonies. In the case of the misdemeanors, most offenses are punishable by a term in prison of no more than year. What the base level additions of sections Q211(a)(4) and Q214(a)(4) would do is impose on first-time misdemeanor and minor felony offenders minimum sentences of between 10 to 24 months and 4 to 16 months, respectively, when their conduct conceals an environmental offense violation. AWPI believes that this result is unduly harsh where the violation concealed is either a minor offense or a major offense that does not present a significant risk to the environment. AWPI recommends that these sections be revised to increase the base offense level only where the concealed violation is major and it presents a significant risk to the environment.

E. Section Q214(a)(1) Should Be Revised to Impose Additional Offense Levels Only When the Discharge Presents a Significant Risk to the Environment

Section Q214(a)(1) would increase the base offense level by 4 where the defendant discharged or emitted "other"

pollutants into the water, air, or land. Since the base offense level for Guideline Q214 is 6, this equates to an offense level of 10 and a potential prison sentence of between 6 to 12 months for a first-time offender. The commentary on section Q214(a)(1) states that the increase to the base offense level attaches whether environmental contamination is detectable or not.

AWPI believes that the above result is unduly harsh for a number of reasons. First, most of the offenses covered by this Guideline are misdemeanors or minor felonies with maximum prison sentences not exceeding one year. Second, these violations are "knowing" violations and do not require a specific mens rea. Third, offenders who intentionally cause discharges with significant environmental impacts should be treated more harshly than those who through omission or oversight cause discharges with little or no environmental impact. Therefore, AWPI recommends that this section be revised to impose the specific offense characteristic only when the discharge presents a significant risk to the environment.

F. Section Q215(a)(3) Should Be Revised to Impose Additional Offense Levels Only When There Is Significant Harm to the Environment, Wildlife, or the Public

Section Q215(a)(3) would increase the base offense level by 2 to 5 levels where a failure to report a spill results in harm to the environment, wildlife, or the public. This means that a first-time offender could be sentenced to a prison term of between 8 to 24 months where he fails to report in a timely manner, i.e., one day, a hazardous substance spill and the spill causes any harm, no matter how minor, to the environment, wildlife, or the public. AWPI believes that this result is unduly harsh given the short timeframe within which one must report, the difficulty in determining the necessary reporting information when the spill is gradual rather than sudden, and the fact that all spills cause some damage to the environment, albeit minor. AWPI recommends that this section be revised to impose the specified additions to the base offense level only when the failure to report causes significant harm.

IV. Fines for Individual, First-Time Offenders Are Too High

Guideline A542 prescribes the method by which fines are to be calculated for environmental, as well as other, offenses. This Guideline contains a table with minimum and maximum fines associated with the various offense levels. AWPI believes the fines that would be imposed for environmental offenses through use of this table are inappropriate and unduly harsh.

As an illustration, most violations of FIFRA and TSCA may be addressed through the imposition of fines ranging up to \$10,000 per offense. In the case of private applicators under FIFRA, a fine of no more than \$1,000 per offense may be imposed. Yet the base offense level for FIFRA and TSCA violations is 9, which would cause the imposition of a fine ranging between \$1,000 and \$10,000 for a first offense. Moreover, if specific offense characteristics are met and offense levels are added (for example, where the offense concealed an environmental offense), the first-time offender would be faced with a fine ranging between 3,000 and \$40,000.

Clearly, these fines are too large for first time offenses of these statutes. Most likely they result from assigning base offense levels that are too high for the statutory offenses. Therefore, AWPI recommends that the Commission either reduce the base offense levels for the statutory offenses or revise the fine table in section A542 to reflect more accurately the fines that Congress wanted to impose for violations of FIFRA, TSCA and the other environmental statutes.

### Conclusion

In general, the proposed environmental sentencing guidelines would impose sentences and fines that are much higher than warranted for environmental crimes. This is particularly true with regard to the sentences and fines that would be imposed on first-time offenders. Therefore, AWPI strongly urges the Commission (1) to revise the guidelines to comport more closely with Congress's intent in enacting the nation's many environmental laws, as reflected in the criminal penalties provisions of these laws, (2) to treat misdemeanors less harshly than minor felonies and minor felonies less harshly than major felonies, (3) to provide for no prison term for first-time misdemeanor and minor felony offenders, and (4) to impose reasonable fines. In order to achieve these goals, the Commission should reduce the proposed base offense levels for Guidelines Q211 and Q215.



COMMONWEALTH OF PENNSYLVANIA  
THE PENNSYLVANIA COMMISSION ON SENTENCING

P.O. BOX 1200  
STATE COLLEGE, PA 16804  
(814) 863-2797

John W. O'Brien  
Chairman

John H. Kramer  
Executive Director

March 20, 1987

The Honorable William W. Wilkins, Jr.  
Chairman  
United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1200-A  
Washington, D.C. 20004

Dear Commissioner Wilkins:

Thank you for providing me a copy of the Revised Draft Sentencing Guidelines. As you will note in my comments that follow, I think that there are several issues that the Commission must yet address. I must also note that despite my expressions of concern, I am very impressed with the painstaking work that you have put into the guideline development.

My basic recommendation is that the current proposal still requires significant attention to several issues. I do not believe that these issues can be given adequate attention in the few short weeks available before the guidelines must be submitted to Congress. Therefore, I recommend that you request an extension from Congress to continue your work.

One major problem with the proposed guidelines is their failure to incorporate systematically the relative seriousness of the offense. Commissioner Robinson makes the point that "the Commission never systematically ranked offenses." This results in inconsistencies such that some clearly less serious offenses are treated more severely than their more serious counterparts and vice versa. I think that the Commission has evolved an implicit ranking based on sentence recommendations including enhancements. In ranking offenses in Pennsylvania we first ranked all offenses, and as a result of the ranking decisions we developed a sentence severity rationale. I think that this worked very well in Pennsylvania and think that such a process would be helpful to the Commission as it writes its guidelines. I understand that the ranking of federal offenses would be a more complex task than we confronted, but I am sure that you would find it enlightening and helpful. Moreover, it

may help you in disseminating the guidelines. If you are able to explicitly demonstrate your rationale as to why one form of criminal behavior receives a harsher recommendation than another form of criminal behavior, the acceptance of the guidelines may be enhanced.

A second major difficulty with the Commission's work is the failure to specify the impact of the guidelines on prison populations. While I do not believe that prison population should be the driving force of the sentence recommendations, I do believe that the sentence recommendations should be grounded in the reality of capacity. It would at least inform the public of the potential costs involved in the proposal. Although it is politically acceptable to ignore such an important ingredient in the criminal justice equation, it is not good social policy. I am fearful that the report generated by the General Accounting Office may find the impact excessive and jeopardize the approval of the guidelines by Congress. This problem may well have arisen as the result of the Commission's attempting to meet deadlines which are next to impossible. If this is the case, I would recommend that the Commission not risk its hard work by prematurely submitting its work to Congress.

Another issue raised in the dissent, and with which I concur, is the inordinate amount of disparity that may result from the current proposal. Although my work with the Pennsylvania Commission on Sentencing has resulted in my general view that guidelines may become overly rigid and narrow, it is my view that the current proposal allows too much discretion. The ranges in the sentencing grid itself are fine. Where I have problems is the adding or subtracting of levels for various factors. Often the court is given a range of levels from which to select depending on its view of the appropriate increase or decrease. This often seems to give the judge an excessive degree of discretion. Obviously such discretion is also provided to the United States Attorney to bring such factors to the courts' attention. I would recommend the Commission explore ways that it might specify the appropriate level more clearly rather than leaving the choice totally to the court.

Based on my work in Pennsylvania, I think it is important to caution the Commission regarding its detail work. It is important that the Commission specify such issues as the definition of prior conviction, the add on for sale of drugs to a minor, and numerous other factors that are not now clearly defined in the proposed guidelines. I would recommend that draft guidelines be "experimented" with in several diverse jurisdictions prior to the

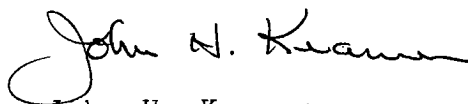
March 20, 1987

final submission to Congress. Only through such testing will many of the difficulties arise that will require revision and clarification. I think that Congress would be amenable to such a testing so as to minimize any legal difficulties in the future.

Although my comments seem very negative, I want to say that in general I am pleased with the progress that the Commission made from September to this draft. I think that the shift of focus to offense of conviction rather than the previous standard of modified real offense sentencing is significant. Establishing the Sentencing Table is also an important step forward over the earlier proposal and the ranges in the table are appropriate. The explicit section dealing with plea agreements is similarly an advancement. I am amazed at the number of accomplishments over such a very short period of time. However, I think that the Commission needs more time. Time to assess the impact of the guidelines, time to develop a seriousness ranking of all offenses, and time to allow for field testing.

I commend the Commission for its hard work and its progress. It is clear that the Commission will never please everyone, and it should not. Having worked with the development of sentencing guidelines, I appreciate the difficulty and complexity of your task and respect the quality of your product.

Very truly yours,



John H. Kramer  
Executive Director

JHK:seb

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
225 CADMAN PLAZA EAST  
BROOKLYN, NEW YORK 11201

March 16, 1987

JACK B. WEINSTEIN  
CHIEF JUDGE

Honorable William W. Wilkins, Jr.  
Chairman  
The United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

My dear Chairman:

I have had an opportunity to discuss with most of the judges of the United States District Court for the Eastern District of New York your revised draft, dated January, 1987, but only recently received by us. I believe that most of our judges support the conclusions set out below.

While substantially improved, such serious problems remain with the methodology and the substance of the Commission's Revised Draft Guidelines that it would be irresponsible to permit them to become operative this year. At least a year and one-half is required to observe and make precise estimates of the effects on prisons, probation services, trial court hearings, appeals and individual defendants -- some of whom would be treated with unnecessary cruelty, and some with excess leniency.

1. Lack of Adequate Published Statistics

A grave problem with the Revised Draft Guidelines is the lack of adequate statistical and other research data to support the offense levels selected and the additional criteria relied upon for enhancement or reduction of sentences. The published materials of the Commission do not provide sufficiently useful and reliable statistics on current sentencing practices.

The Commission's use of data on current average sentences imposed after conviction at trial to design levels for minimum sentences on pleas and convictions at trial causes gross distortions. The Commission's data is based, as I understand the matter, on an

analysis of sentences of incarceration imposed on first offenders after trial and conviction on the offenses charged. To assume that these sentences can be used to develop Sentencing Guidelines is fallacious because the reality is that cases going to trial represent on the order of a mere 10% of all convictions. Convictions on pleas to one or more of the lesser offenses charged are the rule, not the exception. For purposes of analysis, trials and pleas must be separated. The Commission's published data also appears to ignore the vital fact that a very large proportion of cases result, at least in part, in probation. Inadequate or no effect is given to negotiated pleas, negotiated charges, the effect of cooperation and the like.

The statistics published do not show any breakdown sufficient to permit intelligent analysis. How many cases were used in each category? What is the spread? What are the statistical measures of reliability? Without further details we cannot check your figures against your proposals or our experience.

## 2. Excessive Sentences to Prison

To extrapolate from this inapplicable and unreliable data a matrix of minimum sentences for all offenders may result in a vast increase in our prison population and the imprisonment for extended periods of time of people who should receive probation or other forms of alternative punishment.

An example -- one of many -- illustrates the exceptional cruelty which may result from use of the Revised Guidelines. A first offender "mule" -- a drug courier from Africa or Latin America who is paid a few hundred dollars to smuggle drugs into the United States -- is typically sentenced, in this district, to three years with time served about two years. (Two judges of the court do typically sentence such "mules" to six to ten-year terms.) Under the Guidelines, if she carried between 500 and 999 grams of heroin, punishment would be imposed at Level 30 with a minimum sentence of eight years and one month (97 months). Of course the courts must follow the changes made by the new drug laws which

require high minimum sentences, but the minimums set by the Guidelines are, in many cases, in excess of the statutory minimums and far in excess of sentences required under plea bargains.

I have attached a chart from your study dealing with drugs. The heavy lines were added by me to indicate the changes from current sentence levels which would be required by the Revised Draft Sentencing Guidelines, while the "X"s mark your studies of average sentences after trial. The underlying chart was prepared by your research staff and graphs average sentences of imprisonment for first time offenders on drug charges based on the amount (in pounds) of the drug involved. Since your study is based on the English system of measurements and the Revised Draft Sentencing Guidelines are written in terms of the metric system, there is no perfect correspondence between offense levels and amounts. This creates the range of sentence levels represented by the heavy lines I have superimposed on your chart. For the smallest quantities of drugs the term of imprisonment would decrease but would be mandatory in all cases, whereas under present practice only one-third to three-quarters (depending on the offense) of these offenders are sentenced to imprisonment. For larger amounts of drugs, sentences would have to be very greatly increased by most of our judges. The net effect would, in our district, result in an extremely large increase in prison space required.

By contrast, I have checked sentences and proposed sentences of a selected group of white collar political defendants. Your proposals seem quite light compared to current New York metropolitan sentences. Of course this may be due to the fact that political crimes may be unusually prevalent in this area at this time.

### 3. Virtual Elimination of Probation

The Guidelines virtually eliminate probation as a sentence in any serious case by providing that probation is not available in any case where the sentence for the base offense is more than six months' imprisonment. Yet, the Commission's own study shows that only 35% of first offenders convicted of a heroin offense involving less than an ounce of heroin are currently sentenced to prison. Under the Guidelines,

imprisonment for 15 - 21 months would be required with no provision for probation.

As already indicated to you in my earlier communications, our court finds probation highly useful in many cases. Our community service and probation training and control programs are, we believe, useful in our district. We doubt that we have the prisons to hold the long-term prisoners the proposals would generate. Moreover, we doubt whether we should emphasize prison so much. Home detention, half-way houses, strictly supervised probation, community service and the like should be utilized in more, not fewer, cases. Revision of the Guidelines to provide for probation across the whole spectrum of offenses (except where statutorily prohibited) is necessary. Where probation is allowed by the Guidelines, detailed conditions are imposed on its use which must be left to the discretion of the courts and the probation departments.

The Guidelines also require that virtually all probationers serve intermittent periods of incarceration, detention in a half-way house or home detention. See pages 179-180. We do not have, in the Eastern District of New York, the facilities or personnel to supervise a large number of such short-term detainees. Nor do we deem them desirable in many cases. Limits on the form of probation in the Commission's proposals should be eliminated.

#### 4. Split Sentences

The Commission should recommend to Congress that Congress reinstate split sentences. Accordingly, the Guidelines should be designed to permit split sentences. All our judges believe that, in a significant number of cases, a short term in jail with a long prison term suspended and strict long-term probation is highly useful in deterring further crime.

#### 5. Delay of One and a Half Years

Given the enormity of the problem posed by the lack of adequate data on which to base the Guidelines, it is clear that even if Congress allows the Guidelines to go into effect in November (which I oppose), operation must be stayed for at least one and a half

years. A minimum of half a year is necessary for training and education of our judges, the bar and Probation and other services in the application and effects of the Guidelines.

An additional year, at a minimum, is required to allow for a controlled field experiment in actual sentencing as compared with sentencing under the Guidelines. During that year judges should be required to indicate both the actual sentence imposed and what the sentence would be under the Guidelines. This simple experiment is the only method available to generate quickly more reliable data on the divergence between current sentencing practices and the sentences the Guidelines envision. At the end of the year a full review should be made. Only then can the impacts that sentencing under the Guidelines would have on the size and make up of prison populations, on the Probation Departments and other services, the number of hearings required under the Guidelines and the effect on the volume of appeals, both by the Government and by defendants, be assessed.

Federal judges would be willing, I believe, to take on the extra work involved in such an experiment during a transition year. Additional support from our Probation Departments will be required; I urge the Commission to recommend that funds be allotted to cover the extra paperwork required. The cost -- both in terms of delaying the operational date of the Guidelines and in dollar terms -- of such a study would be slight in comparison to the savings that having adequate data will produce.

Implementation of such a scheme and the subsequent adjustment of the Guidelines, up or down, as needed, would avoid flooding our courts with hearings. More importantly, adjustments based on realistic data are needed to prevent our prison system from being overwhelmed -- to the point of possible Eighth Amendment violations -- with an influx of prisoners, many of whom should not be incarcerated. The impact on Probation and other services is also, at present, incalculable, but obviously considerable. The Court of Appeals would doubtless find such data useful in considering the myriad issues which will be raised on appeal once sentencing under the new Guidelines begins.

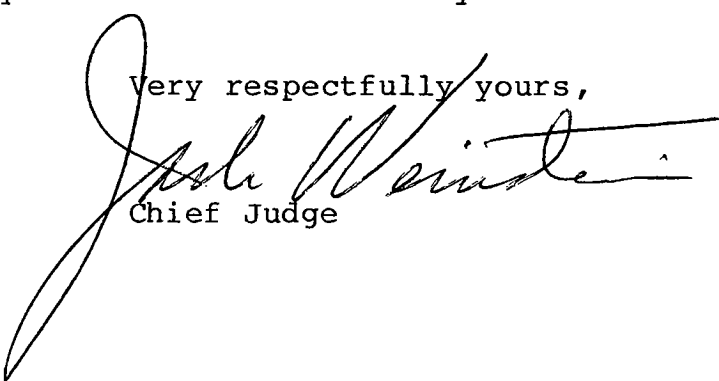
In the meantime, the necessary adjustments will prevent a huge increase in the volume of appeals.

6. Excessive Expenditure of Court Time

While the second draft is more flexible than the first, for much the same reasons indicated in my comments on the first draft, there will be many extensive factual hearings on sentences. This will require much of the judges' time. Will Congress authorize the new judges and facilities required? Inducements to plead and cooperate will be substantially reduced. This will result in more trials and require still more judges.

On behalf of all the judges, we wish to express our thanks to your consultant, Kenneth Feinberg. He met with us at considerable personal inconvenience to himself to answer questions and to defend your revised draft.

Very respectfully yours,



Chief Judge

Enc.

Estimated Time Served for Baseline Offenses: 1st Time Offenders, Convicted at Trial, Sentenced to Prison, Adjusted for Good Time

ATTACHMENT

See p 44 Page 2

over 10 years!!

Sentence Levels

Estimated  
% Sentenced  
To Prison

6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35

Other bribery offenses  
\$100/less  
\$101/3,000  
\$3,001/25,000  
\$25,001 +

Heroin offenses

1 oz/less  
1 oz  
2/5 oz.  
6/20 oz.  
21/50 oz.  
51/200 oz.  
201/700 oz.  
701/1,000 oz.  
1,001/10,000 oz.  
10,001/50,000 oz.  
50,001 + oz.

Cocaine offenses

1 oz/less  
1 oz.  
2/5 oz.  
6/20 oz.  
21/50 oz.  
51/150 oz.  
151/500 oz.  
501/1,500 oz.  
1,501/6,000 oz.  
6,001/25,000 oz.  
25,001 + oz.

Marijuana offenses

1 lb/less  
1 lb  
2/10 lbs  
10/35 lbs  
35/200 lbs  
201/1,000 lbs  
1,001/3,000 lbs  
3,001/10,000 lbs  
10,001/40,000 lb  
40,001 + lbs

Civil rights, involving:

Electron 12/8  
Arson  
Violence  
Victim death  
Other

note  
p 175  
of 2nd report  
no prob  
if in  
time  
same  
then  
C. case

Notes: X indicates the sentence severity level (see Chapter 5) for the corresponding offense.

UNITED STATES DISTRICT COURT

PCB

00106

NORTHERN DISTRICT OF ILLINOIS

219 SOUTH DEARBORN STREET

CHICAGO, ILLINOIS 60604

CHAMBERS OF  
JAMES B. MORAN

JUDGE

March 19, 1987

Hon. William W. Wilkins, Jr., Chairman  
United States Sentencing Commission  
133 Pennsylvania Avenue, N.W., Suite 1400  
Washington, D.C. 20004

Dear Judge Wilkins:

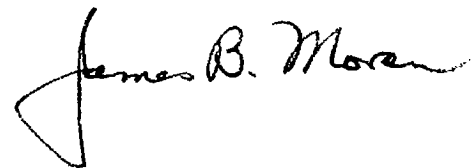
I do not pretend to be very conversant with the draft sentencing guidelines. I recognize it has been an immense and extremely complicated task and that even a superficial knowledge requires more time than I have devoted to that task.

I was, however, struck by a comment to the Commission by Judge Michael M. Mihm in his letter of March 5, 1987, respecting Section A521 on page 180. That comment referred to confinement in a community treatment center for reasons of addiction for 30 days, if there was a reasonable likelihood that completion of a treatment program would eliminate the dependence. It raised a concern which I would like to share with you.

For almost 20 years I have been involved in drug abuse treatment programs. During that entire period I have been an officer and/or director of Gateway Foundation in Illinois, which is a drug treatment program providing residential therapeutic treatment. It is similar to Day Top Villages in New York, Phoenix House, and various other programs around the country. They have provided a means, for some, of breaking a chronic dependence on drugs, which has been reflected in the past in a history of "junkie" crimes such as mail theft and fencing checks. The residential status is lengthy, often over a year, although the daily cost is very modest. The goal, and in a high percentage of cases the result, is absence from drug use. The benefits to the individual and to society of changing that person from a chronically drug-dependent individual with a propensity to commit crimes to support his habit to a self-supporting individual no longer involved with the criminal justice system is obvious. Such programs are not confinement in the traditional sense, but they do require a long term individual commitment and involve serious restrictions on individual liberty. Indeed, in the initial phases of such programs the resident generally may not even leave the facility briefly without an established purpose and without being accompanied by a staff person.

I do not know whether or how such programs fit into the guidelines. I do know that they are used to a considerable extent by the probation people under contract programs and that they are looked upon as very helpful and constructive alternatives to incarceration in a facility like Lexington. I would hope that the guidelines would leave room for the use of such an approach in appropriate cases.

Sincerely yours,

A handwritten signature in cursive script, reading "James B. Moran". The signature is written in dark ink and is positioned to the right of the typed name "James B. Moran".

JBM:ay

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
PROBATION OFFICE

ROBERT M. LATTA  
CHIEF PROBATION OFFICER

March 16, 1987

600 U.S. COURT HOUSE  
312 N. SPRING STREET  
LOS ANGELES 90012

William W. Wilkins, Jr., Chairman  
The United States Sentencing Commission  
1331 Pennsylvania Avenue, NW, Suite 1400  
Washington, D. C. 20004

Re: SENTENCING GUIDELINES

Dear Mr. Wilkins:

Robert Latta, Chief U. S. Probation Officer for the Central District of California, has asked me to prepare a response to the sentencing guidelines draft, from the perspective of a presentence investigator. I scored the ten Presentence Reports that were part of the Sentencing Guidelines Project, and I have reviewed the results from the other participating districts.

As the scoring results of the recent Sentencing Guidelines Project reflect, application of the guideline rules by different scorers result in markedly different sentencing ranges. Many key variables affecting the final offense level are open to subjective assessments that inevitably create this disparity. While the Courts need some room for discretion, the purpose of the guidelines are defeated when they allow for such wide interpretive differences. The variable of "cooperation" alone can reduce the sanction by 100 percent, based on the scorer's perception of the extent of cooperation and how much weight it should carry with respect to sentencing. I find myself in agreement with Commissioner Robinson's statement as written in Appendix B of the current draft, and those of us preparing Presentence Reports in the Central District of California are also concerned with the significant impact of these guidelines on our day-to-day functioning.

Although the draft states that, "An increase or decrease of one or even two levels will not necessarily result in a different sentence...", we do not believe this to be an accurate assessment of what will occur when a variable, such as "role in the offense," can result in an increase or decrease of one to six levels. Even today, defense counsel in the Central District of California frequently attempt to modify or delete information contained in the Presentence Report which they find will adversely affect the offense severity level determined by the

U. S. Parole Commission. I do not think it is unrealistic to anticipate that there will be innumerable controverted issues when there is such a high degree of flexibility afforded in determining the final offense level. Furthermore, with so many variables subject to interpretation, there are bound to be delays in sentencing while the interested parties prepare and argue their positions with respect to the relevant issues.

On page 173 of the draft it is stated, "...In all cases, the court shall confirm that within a reasonable time before sentencing the attorney for the government and the attorney for the defendant or the pro se defendant have exchanged written statements of sentencing factors each party intends to rely on at sentencing.... Copies of all sentencing statements shall be filed contemporaneously with the court and submitted to the Probation officer assigned to the case. This provision may be satisfied through a stipulation or plea agreement that complies with A413 ...." I do not believe that it is farfetched to expect a trial-type proceeding at the time of sentencing, for even if some agreement is made between defense counsel and the government with respect to all the variables in a particular case, the independent assessment of the probation officer as to specific increases or decreases in offense levels will be subject to dispute. As stated on page 174 of the draft, "...In all cases, the court shall resolve disputed factors 'important to the sentencing determination' in accordance with Rule 32(a)(1), Federal Rules of Criminal Procedure (effective November 1, 1987)." This means that the presentence investigator will be assisting the court in resolving the disputed factors and as such even further delays are anticipated. This is particularly evident when one considers the provision in the draft regarding notice of tentative findings, also on page 174. "In cases involving significant disputed sentencing factors, the commission recommends that the court notify the parties of its tentative findings and provide a reasonable time for the submission of written objections before imposition of sentence." Particularly in districts such as the Central District of California, where there are many complex cases with a multitude of sentencing issues, the number of those cases resulting in further litigation at sentencing will be extremely high; I believe to the extent that will dramatically impact upon the resources of the Probation Office and the court.

As indicated in our previous response to the first guideline draft, we think probation officers should be mandated to compute the scores determining the guideline range, since it will be a function assigned to us by the court in any event. However, with the wide range of potential adjustments to the offense level, I foresee many extra hours of discussions with defense counsel and the government and review of their written sentencing statements, in addition to the increased time spent in

assisting the court to resolve the disputed factors and then providing the court with a rationale for our specific scoring results. Resources are not at their peak even now and to reiterate part of our response to the first guideline draft, "To impose such a responsibility upon the presentence investigator would be a dilution of the Probation Officer's historical role of determining any circumstances or offender characteristics that might particularize a case."

Respectfully,



NANCY REIMS  
U. S. Probation Officer

NR:alt

cc: Robert M. Latta  
Chief U. S. Probation Officer

L. Russell Burress  
U. S. Probation Officer

24 March, 1987

U.S. Sentencing Commission  
Attention: Guidelines Comments  
1331 Pennsylvania Ave. N.W.  
Suite 1400  
Washington, D.C. 20004

Dear Sentencing Commission Members:

I wish to address the proposed new guidelines of punishment for violators of draft registration. It is my belief that these guidelines are extremely harsh, and fail to provide for adequate allowance of conscientious objector status. The burden of proof lies upon the violator, by these new proposals, to show 'altruistic purpose' in having violated the draft law, in order to avoid being fined and/or jailed. Since altruistic purpose is not legally defined, and is an otherwise subjective acknowledgement of an individual of a recognized personal state of ethics and morality of an undefined religious basis which supercedes the legal system, the possibility of forming positive proof of holding true 'altruistic purpose' in having violated the draft law is, for all practical purposes, nil, as a person's case would rest almost solely upon subjective and wholly intangible material, the order of which generally has no sway in a court of law. The only known exception to this is the individual who, usually by virtue of his parents' religion and gifted forethought, has been a practicing Quaker throughout his life. For those individuals who have not been formally associated with a commonly known and accepted religion which opposes war and the action of killing, there does not exist a method of objective proof for whatever intrinsic beliefs or religious convictions other young men may hold which belong to that widely interpretable, and as yet undefined, 'altruistic purpose'. Is this not a violation of one of the basic tenets of our constitution, which guarantees for all citizens 'the freedom to practice one's own religion'? Since a person's personal religion may not include a known church or commonly recognized organization, the burden of proof in establishing 'altruistic purpose' rests upon the individual unconstitutionally. What is already guaranteed under 'freedom of religion' does not need to be re-established as such. Because of this, conscription itself of conscientious objectors, those with 'altruistic purpose', is essentially illegal. Removing the method of recourse under these new guidelines, by which violators can even attempt to successfully fight fines and jail sentences, the imposition of which assumes guilt before innocence, is a flagrant violation of one's right to religious freedom, as the new guidelines leave no secure channel providing for the continued guarantee of this freedom.

I urge you, as members of the Commission, to seriously reconsider the new guidelines, and to ask yourselves if this does not violate the Constitution itself. Could you personally place yourselves in the positions that these young men are in? What would you do, each one of you, if your personal 'altruistic purposes'

for not registering for the draft were deemed 'unacceptable, innapplicable, or inadequate', just because you didn't have the support of the Quakers, or a similar religious organization, to back you, and validate your conviction?

The act of conscription itself is outrageously unfair and abominable, and has been used to support historically unpopular wars, which speaks for the true lack of support that Americans have shown for such wars; the newly proposed changes in draft violation sentencing, however, nearly nullifies all possibility of showing C.O. or 'altruistic purpose' status successfully, and imposes highly unfair legal punishment on violators, the caliber of which reflects the worst element of the American spirit. With such stiff fines and the threat of imprisonment, in terms of the many thousands of violators at large, the new sentencing arrangements may very well succeed in underhandedly coercing a great majority of violators to simply step forward 'early', and, pleading 'nolo contendere', to join the forces of those who have already agreed to have their lives interrupted so that they could take a few years off to learn how to kill. Indeed, the results from the sentencing changes may be so effective that soon, we will not know our own government from that of the Contras.

Yours truly,

*Betsy A. Bradshaw*

Betsy A. Bradshaw  
P.O. Box 1197  
Ashland, OR. 97520

27 March 1987

TO: Sentencing Commission

RE: Revised Draft of Federal Sentencing Guidelines (2-5-87)

I submit to the Commission my written comments as regards the 1984 Crime Bill (Public Law 98-473) and subsequent efforts of the Sentencing Commission to date.

The Bill that Congress passed in October of 1984, had been around in one form or another for some time. Therefore it would have seemed that the Bill would have been a well reasoned legislation. Yet it becomes more and more evident that Congress, under a "get tough on crime" panic, have adapted what is a complex, patchwork, ambiguous law.

I believe this observation is correct and substantiated. I wrote to several Congressmen and asked each of them four questions regards the new Bill. Some of the questions were as simple as inquiring when certain parts of the Bill took effect. Notably, not one of the Congressmen could answer any of the questions. Clearly the legislatures have made a law and do not know what it is. So they are leaving it to the courts to determine their intent (at a cost of how many millions to the taxpayers?). If, as we are led to believe, the subjects of the government are entitled to know what the laws are, then this Bill fails.

If the new law is to end disparity in sentencing, then it is terminally flawed. Even at first glance one can see that Judges may "depart from the guidelines" in many instances. Some will, some won't.

Worse, many, if not most, accused have more than one charge (count). As it is up to the Judge to determine if sentences are to run concurrent or consecutive, there can be no end to disparity.

As in the case of Commercial Bribery (B242) of less than \$1,000. If two persons are each charged with 6 counts, in different districts, one may receive a sentence of 10 months and the other 60 months. Bear in mind that these two separate and different sentences are for the very same offenses.

After all of Congresses efforts and the work of many in the two and a half years since the Bill was passed, the only accomplishment seems to be that the wheel has been re-invented.

While all of this work has been done in an era of drug hysteria, still, the laws and sentencing should be tempered with some realism. For example:

A person gets more time for selling your 13 year old daughter marijuana (21-17 months) then to have sexual misconduct with her (12-18 months).

A person gets more time for selling your mother a quantity of marijuana (121-151 months) than if he kidnaps her (51-63 months).

If someone sells your daughter a quantity of marijuana he will receive a sentence of 121-151 months. But if he FORCES your daughter to travel for the purpose of prostitution his sentence is 27 - 33 months.

For selling your daughter a quantity of marijuana a person would be sentenced to 121-151 months. But (get this) if he KIDNAPS her and SELLS her into SLAVERY he gets a sentence of 18-24 months.

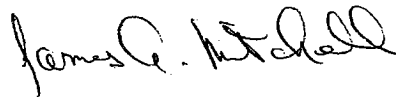
I make no argument that marijuana should not be illegal but, I think there are worse things and that the punishment should be applied accordingly.

I am a father and I think it would be more offensive to me to have someone kidnap my daughter and sell her into slavery then for someone to sell her some marijuana. All of the fathers that I have surveyed agree. Frankly I can hardly believe that the fathers in Congress and on the sentencing commission think otherwise.

Under D217 the Sentencing Commission states that 21 U.S.C. 848 offenders are involved with one of the most serious ongoing criminal activity. I disagree. Having been sentenced pursuant to that statute, I am aware that if you sell some marijuana on 3 different occasions and 5 people are involved, you are guilty of that offense. Most rational persons are able to understand that there are more serious and grievous crimes.

21 U.S.C. 848 statute allows for a 10 year minimum sentence for first offenders. Yet the Sentencing Commission now madates that the minimum sentence be the sum of the predicate offenses running consecutive. Under these conditions, my minimum sentence for selling marijuana would have been 5,215 months or, 434 years (and 5 months) without parole for the first offense. I believe that such sentences (if such there must be) should be reserved for crimes of a more severe nature. then selling marijuana.

All in all I believe that you, as well as Congress, should rethink this entire issue of sentencing.



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Marion, Illinois 62959

United States District Court  
Western District of Wisconsin  
120 N. Henry St.  
P. O. Box 591  
Madison, Wisconsin 53701

March 24, 1987

Chambers of  
Barbara B. Crabb  
Chief Judge

The Honorable William W. Wilkins, Jr.  
Chairman  
United States Sentencing Commission  
Suite 1400  
1331 Pennsylvania Ave., N.W.  
Washington, D.C. 20004

Dear Judge Wilkins:

Although it is a few days after the deadline, I have a few comments on the second draft of the sentencing guidelines that I wanted to send you. I hope that it might not be too late to have them considered.

I have discussed the new proposals with the probation officers in our court. They and I are concerned that the revised guidelines are considerably more complicated in application than the first guidelines (and, as you know, we thought the first guidelines were pretty complicated). The biggest source of complication seems to be the sheer numbers of difficult areas that must be considered in computing the guidelines. Additionally, in some instances the court is told how many points are to be added or subtracted to the base score, while in other areas, that information is not provided. Also, the adjustments and departures from the guidelines are subjective and somewhat confusing.

Because I generally favor having greater flexibility, I am not necessarily concerned over the fact that these new guidelines provide for greater flexibility. However, I tend to agree with Commissioner Robinson that the commission could be subject to criticism if it issues guidelines that purport to provide more predictability in sentencing, when in fact they may not.

A major concern of mine and of the probation officers is the severe restriction on the use of probation. First of all, the instances in which probation may be utilized are very few (too few in my opinion). Second, there are only a few instances in which probation can be used in and of itself. I can understand the theory of adding some deterrent effect to a sentence of probation, but the practical reality is that in many instances such an additional restriction is inappropriate or simply unavailable. For example, community service is not always an appropriate requirement for a particular offender, and even when it is appropriate, few opportunities for well-supervised work exist, particularly in a large rural district such as ours.

Requiring weekend confinement in jail would be very difficult to

implement in our district, where the local jails are already overcrowded during the week. It's hard to imagine even asking them to take additional prisoners over the weekends when they have their own work-release prisoners to accommodate as well as the usual weekend offenders.

The concept of home detention is wholly unproven as an effective sentencing option. Further, it is no real deterrent unless it is monitored very closely and carefully. Such monitoring would require a significant amount of probation staff resources. I question whether it makes sense to commit significant resources to such a purpose.

I disagree with the concept that the length of the term of probation must be dictated by the offense severity category. There is no obvious reason to correlate the two. There are many instances in which an extended period of probation makes sense, if only to provide an opportunity for making restitution under supervision.

I am not clear why you have chosen to preclude probation as an alternative sentence. I have found it effective to impose a consecutive term of probation following a relatively short prison sentence, to provide an opportunity for after-care follow-up for offenders with alcohol or drug problems or for supervision of offenders with restitution obligations.

Overall, I continue to be concerned about implementing the enormous changes contemplated under the sentencing commission legislation without greater knowledge of the impact on prison populations, on probation office costs, and on judicial resources. I hope that Congress will contemplate an extension of the present deadlines to permit additional research and perhaps, additional drafts of sentencing guidelines.

Very truly yours,

*Barbara B. Crabb*

Barbara B. Crabb  
Chief Judge

BBC:jmd

cc:

The Hon. Joel Flaum  
The Hon. Michael Mihm

PCB00113

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK  
UNITED STATES COURT HOUSE  
NEW YORK, NEW YORK 10007

CHAMBERS OF  
JOHN E. SPRIZZO  
DISTRICT JUDGE

March 26, 1987

Honorable William W. Wilkins, Jr.  
Chairman  
The United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

Dear Judge Wilkins:

I have reviewed the second draft of the proposed Sentencing Guidelines and wish to commend the Commission for its efforts in producing a much more workable draft. Nevertheless, there are still some substantial problems with respect to those guidelines that warrant further corrective action by the Commission.

I am aware that you are receiving and will continue to receive an abundance of comments from the bench and bar with respect to the second draft. More particularly, I have reviewed the letter sent to your Commission by Judge Conner on behalf of the Judges of this Court as well as the letter sent to you by Chief Judge Weinstein on behalf of the Judges of the Eastern District of New York. I fully subscribe to all of the thoughts expressed therein. However, there are certain specific aspects of the guidelines which are particularly troublesome to me and which, therefore, warrant special comment.

My most serious objection to the proposed sentencing guidelines is that they still do not adequately deal with pleas of guilty. Although the second draft does permit departure from the guidelines in situations where there is cooperation with the government, it does not adequately deal with the ordinary garden variety plea in which the defendant is unable to provide any useful information to the government and where the government may not even be seeking such cooperation. As I indicated in my previous letter, pleas of guilty are essential to the smooth functioning of the system and any increase in the sentences imposed on such pleas will of necessity result in an increased number of trials that will further burden a judicial system which is already straining under an ever increasing civil and criminal case load. The maximum reductions in sentences set forth in the second draft

of the proposed sentencing guidelines in cases where a defendant acknowledges responsibility for his offense, are simply not sufficient to induce a substantial number of defendants to plead guilty.

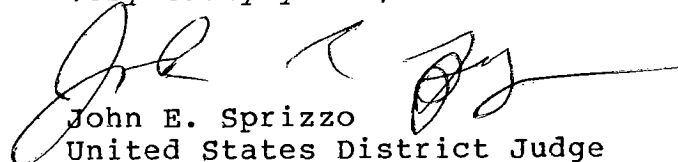
This is especially true since, as Judge Weinstein's letter indicates, the sentencing levels set forth in the guidelines do not reflect the present practice with respect to those who plead guilty as opposed to those who go to trial. I also share Judge Weinstein's view that the sentencing levels set forth in the guidelines will result in incarceration for much longer times than is presently the present practice. I think that is a further objection to the proposed sentencing guidelines. I don't think that Congress intended that we should eliminate sentencing disparity by increasing the jail time served by all defendants who are processed through the system.

It is also significant that we do not have the jail facilities to accommodate the ever increasing numbers of persons who will be sentenced to jail under the proposed guidelines. While it is conceivable that Congress may address this problem by providing appropriate funding for increased prison facilities, it is more likely that there will be a substantial time lag between the effective implementation of the guidelines and the funding necessary to provide the needed jail space, especially in view of the present deficit crisis. It is, therefore, highly probable that we will be presented with the rather unseemly prospect of eighth amendment claims being brought in the federal courts challenging overcrowding in federal institutions.

Another particularly disturbing aspect of the guidelines is that matters which are very frequently taken into account by sentencing judges as mitigating factors such as drug addiction, will for the most part be treated as aggravating circumstances warranting increased periods of incarceration. I do not think such an approach corresponds with a present judicial practice to which neither the bench, the bar nor the prosecution has ever voiced any strong objection.

In short, while I commend the Commission on its efforts to produce a much improved draft there is still much to do. I, therefore, do not believe that the implementation of the guidelines, even with slight modifications in sentencing levels is desirable, a sentiment, that I am sure will be echoed by most segments of the legal community in future correspondence directed to the Commission.

Very truly yours,

  
John E. Sprizzo  
United States District Judge

## UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

500 CAMP STREET

NEW ORLEANS, LOUISIANA 70130

CHAMBERS OF  
GEORGE ARCENEUX, JR.  
DISTRICT JUDGE

March 23, 1987

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

Dear Mr. Chairman:

My colleague, the Honorable Jack B. Weinstein, Chief Judge of the United States District Court for the Eastern District of New York, has favored me with a copy of his letter of March 16, addressed to you, relative to the Revised Draft Guidelines.

I have been attempting, over the pass several days, to frame a comment in connection with the guidelines, but after reviewing Judge Weinstein's letter, I find there is no way in which I could improve upon his cogent and thoughtful analysis, nor could I come up with a more constructive suggestion than his recommendation for a "controlled field experiment in actual sentencing."

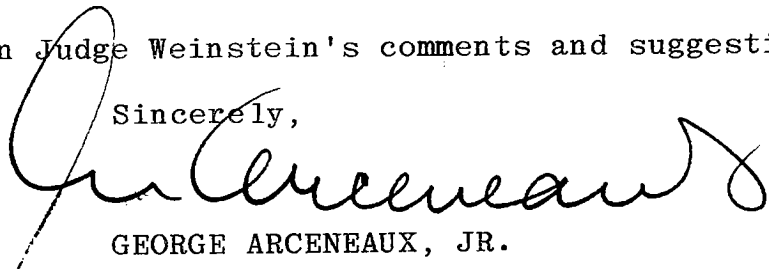
We must never forget that we are dealing with the lives of, in many instances, our fellow citizens, and, in all instances, our fellow human beings. It behoves us, as responsible public officials, and particularly as judges, to be as certain as possible of the consequences of our acts before we undertake them.

The anomalies pointed out by Judge Weinstein, and the possible hurtful consequences as to the individuals involved, to say nothing of the sanctity of our entire social fabric, cry out for as much certainty as possible under the circumstances.

Let us, then, be as certain as we reasonably can of what we are about to do - let us create the laboratory suggested by Judge Weinstein, and in this environment, test the new formulae, before we drink deeply from what may be a poisonous cup.

I concur thoroughly in Judge Weinstein's comments and suggestions.

Sincerely,



GEORGE ARCENEUX, JR.

GA:RGM

cc: Hon. Jack B. Weinstein  
Hon. Frederick J. R. Heebe



## NATIONAL TROOPERS COALITION

112 STATE STREET, SUITE 1212, ALBANY, N. Y. 12207 518-462-7448

March 16, 1987

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Mr. William W. Wilkins, Jr.  
Chairman  
The United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

Dear Mr. Wilkins:

The National Troopers Coalition is composed of State Police and Highway Patrol Agencies throughout the United States. Our organization represents approximately forty thousand (40,000) police officers of all ranks.

Our philosophy in regard to the purpose of sentences being implemented, is to prevent the furtherance of crime and to protect the public from criminal activity. Sentences should be commensurate with the seriousness of the offense, reflecting the physical, economic and psychological harms to the victim and the victim's family. Sentences need be sufficiently punitive so as to cause a deterrent effect and in conjunction making it clear to criminals and would-be criminals that crime does not pay. At present, there is too much of a disparity in sentences. In too many instances, the sentence does not fit the crime. We applaud the Commission for attempting to correct this imbalance, however, after a thorough review of the 'Revised Draft Sentencing Guidelines', we find the revised draft as a conduit for a soft posture on crime.

The second draft is weak in the following areas: The blanket ability to continually utilize probation, plea bargaining, loop holes, sentencing ranges are too vague. Offenses need to be systematically ranked. (Sentences must be consistently and rationally distinguished according to the relevant offense and offender characteristics).

In summation, we feel the Sentencing Reform Act of 1984, which created the United States Sentencing Commission, had two main objectives. First, the Commission's guidelines must provide a



## NATIONAL TROOPERS COALITION

112 STATE STREET, SUITE 1212, ALBANY, N. Y. 12207 518-462-7448

rational and structured sentencing system that will further the purposes of just punishment and crime control. Second, the guidelines must reduce unwarranted disparity among sentences for similar offenders who commit similar offenses.

If the proposed second draft can be modified to close the gap in the above noted inequities, we feel it would have satisfied the Legislative Mandate.

Thank you for the continued opportunity to comment.

Sincerely,

Johnny L. Hughes  
Legislative Director  
National Troopers Coalition

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April 3, 1987

BY FEDERAL EXPRESS

The United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

Attention: Guideline Comments

Gentlemen:

The Tax Section of the New York State Bar Association has approximately 3,000 members actively engaged in the practice of tax law. Through its 100 member Executive Committee and 30 standing committees, it regularly provides comments of a technical nature to various legislative and administrative bodies on matters involving federal and New York local taxation. Although the vast majority of the Tax Section membership deal with problems of a purely civil nature, the Tax Section has committees devoted to the administrative problems associated with civil and criminal penalties and with unreported income. It is also not uncommon for an active tax practitioner from time to time to become involved in the representation of, or advice to, a taxpayer involved with potential or actual prosecution for an alleged violation of the various tax laws.

We realize that the public comment period on the revised draft expired on March 16, 1987 and that the Commission must submit its sentencing guidelines to Congress on or before April 13, 1987. Our comments,

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which are directed to those portions of the guidelines pertaining to tax matters, are being submitted with the hope they can be taken into account by the Commission in its final submission.

We endorse the goal of greater consistency in sentencing practices, especially as regards federal tax crimes. We also believe that tax crimes are at least as susceptible to deterrence as other "white collar" crimes by the availability and predictable use of appropriate sanctions, including incarceration as well as monetary penalties. To that extent we endorse the revised draft of the guidelines.

At the outset we note that the revised draft and accompanying report do not deal with a critical issue which must be evaluated in considering the appropriateness of incarceration as a sanction for tax crimes and other white-collar crimes. This unaddressed issue relates to the type of incarceration facilities and the nature of unintended risks to which inmates may be subject by virtue of contact with other inmates. Since the report does not discuss this topic, we do not deal with it further in this letter.

With respect to matters addressed in the report, our principal questions relate to whether the severity of the sanction may have been tied too closely to the amount of tax evaded and the extent to which other extenuating circumstances can be considered.

The revised draft, in general, focuses on traditional offense categories, and assigns a certain point value to the offense. The sentencing judge is then permitted discretion to add or subtract further numerical points based upon other acts committed with the crime. However, the judge can only consider those acts listed specifically in the guidelines as relevant to the specific offense for which sentencing is to be imposed.

The judge further has some discretion to adjust the numerical point total, upwards or downwards, based upon "offender characteristics" including a defendant's criminal history, cooperation with the investigating authorities, and his recognition and acceptance of personal responsibility. After considering these relevant

offender characteristics and making numerical adjustments, the sentencing judge would then use a chart to calculate the sentence based upon the numerical total. As a general rule, the guideline would permit the sentencing judge to substitute non-incarcerative options for imprisonment only where the maximum term of imprisonment on the numerical chart comes out to six months or less. Under these standards, an offense that carries a numerical point count of 11 or more contemplates incarceration even after subtractions to recognize a person with the best criminal history.

Given that background, Part T, as a general rule, establishes a base offense level corresponding with the amount of the tax deficiency. (If the amount of the deficiency is not established, the base offense level is 9.) In the case of an offense which results in a tax deficiency, the tax table (at page 138 of the revised draft) would establish a level of 10 offense where the deficiency is \$20,001, or more. Level 11 is attained at \$20,001, level 12 at \$70,001, and the table continues upward to a level 17 when the deficiency is in excess of \$1,000,000.

Based on our experience, it would appear that the Department of Justice normally prosecutes a tax offense only if the deficiency is more than \$20,000, and further that, in many cases, the IRS will urge prosecution only if there is a "pattern" of two or three years of substantial omission of income. In practice, this would mean that conviction for a criminal tax evasion would in most cases produce a level of offense which would call for a period of incarceration under the standards set forth in the report.

We question whether the use by the guidelines of a quantitative scale of tax evaded (or attempted to be evaded) should be as significant a measure of the severity of the sentence to be imposed as appears to be the recommendation. We question whether in most cases the amount of tax evaded (or sought to be evaded) bears a direct relationship to the nature of egregiousness of the tax evasion conduct and, accordingly, is a truly relevant guide for appropriate sanctions. We therefore question whether the detailed schedule tied to levels of tax evaded (or sought to be evaded) should be made more

flexible. Such a change would recognize that incarceration might well be appropriate for evasions of relatively small amounts of tax in order to act as a deterrent for the type of potential broad-scale evasion which could have a serious adverse effect on the revenues and public perception of compliance. Furthermore, we question whether there should be a significantly lower standard of penalty for filing false statements under penalties of perjury (not tax returns) or the aiding, procuring or counseling or advising tax fraud.

On the other hand, uncoupling of the severity of the penalty and amount of tax evaded would support the ability to preserve room for adjusting sanctions for exceptional circumstance, particularly in the direction of allowing judicial evaluation for leniency in exceptional cases. Further, in considering such adjustments, we believe in appropriate cases the sentencing judge should be permitted to consider additional offender characteristics, not included in the guidelines, that may well require case-by-case judicial discretion: the offender's age, education and vocation skills, mental and emotional conditions, physical conditions (including drug dependence and alcohol abuse), employment record, family ties and responsibilities and community ties.

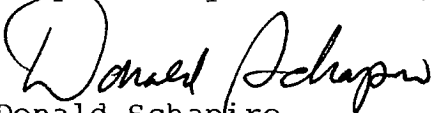
While suggesting the need to preserve some room for adjusting sanctions for exceptional circumstances, we recognize that such flexibility can be at odds with the goal of consistency. In balancing the factors of flexibility and consistency, we would not oppose an approach that would place on a judge a special intellectual and administrative onus to justify more than a limited adjustment for extenuating consideration, trusting then to judicial integrity to implement the guideline without allowing the exceptions to become the rule.

We also believe that a full assessment of the effects of increased emphasis on incarceration should recognize and accept the collateral effects on the justice process. Since the sentencing guideline generally would not apply to plea agreements, there will be a corollary increase in pressure on an accused to engage in plea negotiations to the extent that administrative practice does not adjust to require a suitably increased (and consistently applied) sanction in the cases of plea

agreement. Similarly, if a trial does result, it should be expected that the accused will make greater efforts to establish whatever factors may be relevant for reducing the severity of the usually expected sanction, with the correspondingly increased burden on judicial time and attention.

To summarize, whether on any objective or absolute scale, incarceration should be the normal sanction for tax evasion involves more than technical expertise in matters of taxation. Without expressing a view on that question, we do think that tax evasion by potential offenders is particularly susceptible of deterrence through application of appropriate sanctions, and that a structure that leads to an expectation of incarceration clearly would have a strong deterrent effect in that respect. Thus, we support both the objective of greater sentencing consistency and the relevance of deterrent effect on other possible offenders in fashioning a sentencing program for tax crimes. However, we question whether those objectives are best achieved by adopting a system that is tied so closely to a detailed schedule of the amounts of tax involved. Further, we believe that relevant extenuating personal factors must be taken into account to reflect an inherently human problem which does not lend itself to ready solutions tied to mechanical schedules.

Respectfully submitted,

  
Donald Schapiro