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

Re: Alternative to Confinement

Dear Judge Wilkins:

Thank you for your letter dated 17 June 1986 concerning the various options for the federal trial judge in determining the appropriate sentence for any individual offender. Although a structure which will provide uniform sentencing is desirable, it must also recognize the goal of individualizing the sentence. To this end, I strongly urge that you provide federal trial judges with reasonable discretion within the statutory frame work.

Our experience in the California state courts has been difficult: one of the few saving features of the 1976 Determinate Sentence Law was that it continued discretion to judges in the grant of probation. The federal approach would now seem to adopt the California approach. Given that orientation, I hope the U.S. Sentencing Commission will focus on a structured approach on commitments to prison (i.e., in excess of one year) and provide judges the maximum range of discretion on those offenses for which probation would be available.

Probation

Probation should be provided on the basis now available. It would be horrendous if the new "reform" system provided a "back-handed" approach to accelerated and increased confinement. The Senate consensus was that there should be consideration of the existing rates of probation now, so that there would be no radical change in the denial of probation causing an increase in our over-taxed prison facilities.

To adapt a phrase from the U.S. Supreme Court, I would suggest that there be a "cost-benefit" analysis of the use of intensive supervised probation. An argument could be made that

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the alcoholic who passes bad checks or the shoplifter on a military reservation could be subjected to intensive probation supervision, but in many cases this would be a waste of federal funds.

Rather than create an intensive supervision unit that would Balkanize the already divided resources of local probation offices, the scheme of probation supervision should be adaptable to the individual. Monthly reports seem to be the standard technique now with occasional visits in many cases. Perhaps this is appropriate in the majority of instances.

Something more should be required for those who have committed a very serious or violent offense. In addition to "supervision" there should be some official assistance so that the individual will not be propelled back into the circumstances in which he committed the offense.

In a borderline case where the court has reservations about the grant of probation, the court should have the discretion to structure more intensive requirements (i.e., weekly contacts with the probation officer, daily phone calls, weekly visits by the probation officer to place of residence or work, drug tests, etc.). The intensive probation program should not be for those who are on parole, as we often have this in "mixed sentences" where the court imposes a term of confinement on one count and followed by a term of probation. This means the prisoner will be on parole and probation at the same time. That is an unnecessary use of probation (in California it is illegal to impose probation after a term of confinement because it is inconsistent with the purposes of probation and parole). It is a clear duplication of federal services.

The probation conditions now listed are so extensive, I would not see the advantage of listing other novel conditions. More importantly, the program should be structured to carry out the existing conditions in an effective and efficient fashion. Many of the probation offices are overloaded with cases and too ill-funded to provide even the simplest types of control. If the defendant needs psychiatric counseling, for example, the local probation officer should be funded to provide psychiatric care for those who cannot afford it (this is probably very prevalent among those convicted of the offense of threatening the President).

Before structuring regulations, I would urge a survey and evaluation of the resources available within the federal

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probation system. Also, I cannot emphasize and repeat often enough that you should survey the type of federal offenses and gear your techniques of probation to that category of offense.

Fines

Fines have traditionally been imposed where there is little or no incarceration. The fine option should be maintained, but the U.S. Sentencing Commission has a serious responsibility to see that the enormous fine maximums are tailored to the wrongs done. There should be some type of review to insure proportionality of any fine to a particular offense. Approximately 70 percent of those charged with federal crimes are financially unable to employ counsel, and they receive the services of a federal defender or appointed attorney under the Criminal Justice Act (18 U.S.C. 3006A).

For those without funds, it would be a useless gesture to impose a fine, and it could be very counter-productive in seeing the individual become financially self-sufficient. Again I would suggest a survey of the fines now imposed as a general guideline of information for the imposition of such fines. I would be slow to recommend regulations which would interfere with the trial judge's discretion in this matter. However, I have some ideas as guidelines.

If the offender has counsel appointed under the Criminal Justice Act there should be a regulatory presumption that the individual does not "have the ability to pay." If the defendant has the funds for counsel, the court may direct such payment by the defendant. (18 U.S.C. 3006A(f).) The court now has to imposed the mandatory penalty assessment which, at \$50, is too much for the poor Mexican charged with an immigration violation.

The machinery on fines has not yet been fully refined, but I think a great deal of relief could be provided if a certain category of cases were excluded presumptively from fines. This might ease the administrative burden of collecting fines in those cases where they are appropriate.

Many of those who are now subject to fines would have to litigate their "ability to pay" in either civil or criminal proceedings, which is a counter-productive use of our limited judicial resources. I would urge an administrative mechanism similar to that used by the Bureau of Prisons for those charged with fines that would permit offenders to establish their inabil-

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ity to pay and thereby offset the mandatory statutory enforcement or in the alternative be a basis for asking the court to re-evaluate the imposition of the fine. This may cause a problem after the 120 days runs on Rule 35.

Restitution

Restitution should have priority over any fine. In addition to a determination of a specific loss related to the offense there should be some general guidance that if the cause of the loss or the amount of the loss is beyond efficient determination, then the limited resources of the court should not be exhausted in satisfying what might otherwise be the basis for civil litigation. If the loss is easily recognized, then the court can make it a requirement to be combined with probation and short terms of confinement. Protracted confinement usually precludes effective restitution enforcement.

If the individual has no assets or they are limited to support his or her family, then community service should be preferred if it would permit the individual to maintain or obtain employment. Restitution should be highly favored by the regulations, and should even take priority over the need for confinement save in serious and violent offenses.

Community Service

For the U.S. Sentencing Commission to devise regulations on community service is a classic example of putting the cart before the horse. You should sit down and talk to the Bureau of Prisons to determine the type of facilities that are now used and the available appropriations. The Gramm-Rudman legislation has seriously curtailed the use of community services by the Bureau of Prisons. Many contractors have lost their contracts with the Government to operate these essential and vital alternatives to confinement.

As a goal, 50 percent of all federal inmates should be in community treatment facilities. This is not an unreasonable expectation given the number that are already in federal prison camps (Level 1 security -- lowest level). The principle resistance has been from communities which do not want these facilities.

Again, I would strongly urge that a survey be done of the facilities operated by the Bureau of Prisons to get some insight as to those which are effective. Community Service

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needs to be substantially expanded, but not at the cost of taking those who would otherwise receive probation and placing them into "token confinement." It provides effective supervision and in a sense is a form of "intensive probation supervision."

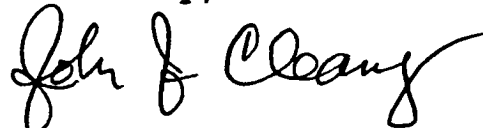
House Arrest

This alternative to incarceration is being explored by many local and state jurisdictions. The federal government could learn much from the experiment, and some innovative federal judges have already used it. It is very applicable in the case of mothers with children, invalids, those with serious medical problems, the elderly and others. The difficulty is in insuring that there is a form of "deterrence" attached to this "loss of liberty." The public would not take lightly the advantage of a corporate official living in a palatial estate while under "house arrest." The military has used this mechanism for many years, and much could be learned from their use of it.

The U.S. Sentencing Commission is in a unique position to reformulate the direction of our federal correctional system. Before it can go forward, it has to know what exists today and what was previously tried. It is also very important to identify the class of federal offenders in determining the rules and regulations that you will propose.

Thank you for the opportunity to comment.

Sincerely,



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JJC:dd