



AMERICAN BAR ASSOCIATION

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STATEMENT OF

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COMMITTEE ON THE U.S. SENTENCING GUIDELINES

SECTION OF CRIMINAL JUSTICE

On Behalf of

THE AMERICAN BAR ASSOCIATION

Before the

UNITED STATES SENTENCING COMMISSION

Concerning

SENTENCING GUIDELINE AMENDMENTS

March 18, 1994

My name is Mary Lou Soller, and I am the Chairperson of the ABA Criminal Justice Section's Committee on the United States' Sentencing Guidelines. The members of this committee include professionals involved in all aspects of the criminal justice system, including the judiciary, prosecutors, public and private defense practitioners, academics, and criminal justice planning professionals.

I appear before you today at the request of ABA President R. William Ide, III, to convey the ABA's views on the proposed amendments to the Sentencing Guidelines. Our comments are made in the context of the Third Edition of the ABA Standards for Sentencing Alternatives and Procedures that were finalized last year.

The Amendment Process

As in prior years, we remain interested and concerned about the process employed by the Commission in the amendment of the Guidelines.

First, we are aware of a concern that has been expressed by some practitioners that the Guidelines should not be amended when the Commission does not have a full complement of members. Last year several commissioners expressed concern about taking action with a bare quorum of members. This year, that problem is potentially compounded by the fact that there are even more positions waiting for appointment. We urge the Commission to postpone its consideration of all proposed amendments until it is at full strength.

On a related point, we note that the Commission has sought comment in a number of areas in which we believe the experience of those who see examples of these cases in practice could be useful. Thus, we urge the Commission to consider holding hearings in the field after its current

vacancies have been filled. Specifically, we believe that this would be appropriate for discussions of the Commission's proposals and concerns set forth in Issues 16 (aging prisoners), 29 (criminal organizations), and 30 (criminal history).

Administrative Procedures

We would like to take this opportunity to provide comment on the procedures employed by the Commission in conducting its business.

In previous years we have recommended that the Commission adopt rules of procedure and work toward a more accountable process. We renew those recommendations. We believe the Commission's effort to systematize its process is an important part of any effort to improve federal sentencing.

As we have noted before, the Sentencing Reform Act envisioned an expert sentencing commission acting as an informed and responsive administrative agency. Although located in the Judicial Branch, the Commission has important substantive rulemaking responsibility. Because that responsibility is being exercised by unelected individuals, it is critical that those officials actually be -- and appear to be -- both open to input and accountable to the public.

We applaud the steps already taken by the Commission. However, even with the changes that have been made, the Commission remains significantly less accountable than other federal rulemaking agencies. This difference contributes unnecessarily to the controversial nature of Commission decisions. While many of the policy decisions of the Commission will of necessity be unpopular with some, Commission policy decisions become even harder to accept

when the decision makers have not provided adequate access to information, sufficient opportunity to comment, or an adequate explanation of the decisions reached.

We believe that, as a general matter, the Commission should use those procedures followed by other administrative agencies that issue substantive rules as a model for procedural regularity. While these procedures are by no means perfect, they do represent an accommodation that has been reached over time between the need for agency efficiency and the need for public accountability. The ABA Criminal Justice Section (through our Committee) and the Administrative Law and Regulatory Practice Section are currently involved in a study of Commission procedures that may ultimately lead to recommendations by the ABA House of Delegates for Congressional action to change certain aspects of the Commission's mandate.

What follows are recommendations consistent with our previous suggestions to the Commission which could be implemented without any changes in its statutory mandate. In making these suggestions, we do not intend that they would alter or expand any rights of review that may currently exist.

1. The Commission Should Promulgate Rules of Procedure.

We note that 28 U.S.C. § 994 (a) envisions that the Commission will promulgate and amend its Guidelines pursuant to "its rules and regulations." However, the Commission has not, as yet, brought together those procedures it now follows into a unified and published set of standards. We urge the Commission to publish a set of the rules and procedures to govern all aspects of its rulemaking process and to make those procedures available to the interested public.

2. The Commission Should Provide a More Detailed Statement of Basis and Purpose When Adopting Rules.

Section 553(c) of the Administrative Procedures Act ("APA") requires that an agency incorporate "a concise statement of basis and purpose" in the rules adopted. For most agencies, that requirement poses a more elaborate burden than the term "concise statement" implies. As the Supreme Court has explained, "an agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"¹

In the past, the Commission's explanations have not met this standard. For example, the Commission has often failed to account for factors Congress required to be considered, such as the impact of Guideline changes on prison overcrowding. It has also rarely responded to public requests to explain why a comment was being accepted or rejected. For some issues, such as the decision to make Commission changes retroactive, the Commission has supplied no explanation at all.

We urge the Commission to provide a more thorough explanation of its amendments to the Guidelines and policy statements, to explain why it chooses one option over others considered, and to explain why it rejects public comment opposed to its suggestion. If the requirement of producing this statement of basis and purpose is difficult to accomplish under the Commission's current timetable, we believe that the Commission should seriously consider moving to a two-year amendment cycle.

¹ Bowen v. American Hospital Ass'n, 476 U.S. 610, 626 (1986).

3. The Commission Should Publish a More Detailed Regulatory Agenda.

The Commission now publishes a notice in the Federal Register identifying the issues on which it seeks comment and those on which it may adopt amendments, and we commend you for doing so. However, that notice is generally far less detailed than the notice published in the United Agenda of Federal Regulations and required of other agencies. We recommend that, to the extent feasible, the Commission should model its agenda on the United Agenda. The more information the Commission can provide to the public, the better the feedback it can expect.

4. The Commission Should Adopt Procedures for Petitions.

At present, the Commission has no written procedures concerning the solicitation and disposition of petitions. It also does not maintain a public petition file. The Commission should consider adopting procedures regarding petitions.

5. The Commission Should Comply Voluntarily With FACA and FOIA.

Conventional rulemaking agencies are subject to the requirements of the Federal Advisory Committee Act ("FACA") and the Freedom of Information Act ("FOIA"). The Commission's failure to operate under these open-government provisions, or to construct acceptable analogies, frustrates legitimate public efforts to influence and learn from the Commission.

FACA requires open advisory committees. Most other, more traditional, agencies have learned to operate with open meetings. An open meeting rule would permit the public

better access to the Commission's committee action and would improve the quality of its deliberations by permitting public input. Compliance with FOIA, or a Commission analogue, would permit the public easier access to Commission documents with relevance to sentencing questions.

6. The Commission Should Comply With the Sunshine Act.

Although the Commission's meetings are open to the public, the lack of notice and lack of formality concerning the meetings limits the usefulness of any open meeting policy. The Commission's current policy does not require a week's prior notice of the meeting or publication of the notice in the Federal Register, nor does the policy define what meetings are to open or limit the circumstances under which a meeting may be closed. In addition, the Commission does not make tape recordings of prior meetings available to the public. We urge the Commission to amend its meetings policy to provide greater notice of the time of its meetings, access to a record, and standards for those rare circumstances when decisions will not be made in public.

Specific Amendments

In addition to our general comments, we also have comments on several of the proposed amendments and have set forth our positions below.

I. Public Corruption

Proposed Amendment 2(A):

This proposal would result in the consolidation of § 2C1.3 (Conflict of Interest) and § 2C1.4 (Payment or Receipt of Unauthorized Compensation). For the reasons stated in the synopsis of the proposal, the ABA does not object to this proposed consolidation. However, it should be noted that for many of the statutes covered by the Guidelines, the proposal does not distinguish between non-intentional violations (which are classified as misdemeanors) and willful violations (which are classified as felonies). We recommend that the Commission add an application note to alert the court that a downward departure may be appropriate if the offense does not involve willful conduct.

Proposed Amendment 2(B):

For the reasons stated in the synopsis of the proposal, the ABA does not object to the proposed consolidation of § 2C1.2 and § 2C1.6. However, for the reasons set forth in more detail in response to Proposed Amendment 4(A) below, the ABA seeks the elimination of the specific offense characteristic that increases the offense level under § 2C1.2 "if the offense involved more than one gratuity." Additionally, the ABA is opposed to increasing the offense levels for gratuity offenses by eight (8) levels if the gratuity was given to an elected or high level decision-making official. We discuss the reason for our opposition to this specific offense characteristic in our response to Proposed Amendment 5(A).

Issue for Comment 2(C):

The ABA opposes the consolidation of the bribery (§ 2C1.1) and gratuity (§ 2C1.2) Guidelines. Any consolidation would serve only to blur the distinction between the offenses for sentencing purposes. Consolidation will neither simplify the determination of the appropriate Guideline nor ensure similar punishment for similar conduct. The definitions of the separate offenses covered by these separate Guidelines are already contained in the statutes and interpretive case law.

Issue for Comment 3:

The empirical evidence developed by the Commission's Working Group Report does not justify increasing offense levels for public corruption offenses. As reported by the Working Group, bribery defendants already have a median total offense level of 14 and thus -- absent departures -- are not normally eligible for a non-imprisonment sentence. Furthermore, an increase in offense levels that does not allow for a distinction between sentences to be imposed in public corruption cases and sentences to be imposed in non-public corruption cases is not justified. Indeed, even within public corruption cases, we suggest that a distinction be made between the sentences to be imposed on public officials and those imposed on non-public officials. Regardless, we suggest that the matter be subjected to further study. While the

Working Group report is an excellent start, a more careful review of the sentencing data is necessary before the enactment of amendments that restructure base or adjusted offense levels.

With regard to harmonizing the existing public corruption Guidelines, we generally favor equalizing base offense levels for bribery, regardless of the context, and gratuities, regardless of the context. However, we suggest that this matter be submitted to the Working Group for further evaluation.

Proposed Amendment 4(A):

The ABA favors option 2 if the proposals that address the issue of the adjustments in § 2C1.1 and § 2C1.2 for more than one incident, for the reasons stated in the Commission's synopsis. The adjustment based on "value of benefit" adequately measures the relative culpability. There is no good reason to sentence an individual whose financial condition results in his paying bribes in multiple installments more harshly than the individual whose financial condition allows him to pay the same amount in a single payment.

Proposed Amendment 4(B):

Consistent with the adoption of option 2, as noted above, the commentary discussion of the adjustments for multiple payments should be eliminated.

Proposed Amendment 5(A):

We oppose making the adjustment for value of the payment cumulative to the adjustment for high level or elected officials. Our position is influenced by the fact that the current increase for conduct involving an elected or high level government officials is eight (8) levels.

We have several objections to this provision. First, in the case of a gratuity, the eight (8) level increase results in abnormally harsh sentences, even in cases involving very minor gratuities. The payment of a meal for a high level official would presumptively be sentenced at between 18 and 24 months. Second, for any offense involving any amount of money over \$2,001, the presumptive sentence would be above the statutory maximum. Thus, non-similarly situated offenders (those paying or receiving gratuities of \$1,000,000 or more and those paying or receiving gratuities of between \$2,001 and \$5,000) are treated similarly -- *i.e.*, they are sentenced to the statutory maximum. Finally, the adjustment for elected officials does not make any distinction between a locally elected sheriff serving a small town and a United States Senator. Not all elected officials are alike simply by virtue of the fact that they are elected; not all elected officials are "high level."

Issue for Comment 5(B):

The ABA favors modification of the eight (8) level adjustment for high level officials. Without commenting on the appropriateness of any specific range of levels, we favor a sliding-scale approach that would allow the court to distinguish between different types of truly "high level" officials. In connection with the sliding-scale approach, the maximum adjustment should be less than eight (8) levels, with truly extraordinary cases, such as those involving presidential appointees, handled by way of departure. While the Commission should set forth certain objective standards that might be added to facilitate application of this adjustment, we suggest that this be adopted as commentary and not as part of the Guideline.

Proposed Amendment 6(A):

The proposed clarifications are consistent with the definitions contained in the relevant statutes. The ABA supports the three definitional clarifications proposed.

Issue for Comment 6(B):

Regardless of which rule is the better rule of law, we question whether the Commission must act whenever a conflict of interpretation develops among the circuits. This task has generally been the duty of the United States Supreme Court. While Congress amends statutes to "overrule" Supreme Court rulings interpreting Congressional enactments, Congress generally does not so act until the Supreme Court rules. Taking guidance from this, the ABA believes the Commission should await further judicial action before amending its "legislation" to overrule decisions with which it disagrees.

Proposed Amendment 6(C):

Consistent with its standards, the ABA opposes the proposed application note authorizing an upward departure for ongoing harm. First, the phrase "risk of ongoing harm" is ambiguous. Second, there is generally little need to direct departures -- the court has authority to depart upward for any factor not adequately considered, pursuant to § 5K. Finally, in this case, a court already has departure authority under § 5K2.7 (Disruption of Governmental Function).

II. Drugs

Proposed Amendment 8(A):

This proposed amendment would revise the Drug Quantity Table to provide for offense levels that encompass the statutory mandatory minimums at the top, rather than the bottom, of the guideline range. This amendment was before the Commission last year, and the ABA continues to urge its adoption.

There are several reasons for our support. First, we have long believed that the current Guidelines overemphasize the quantity of drugs in determining an offender's culpability. Second, consistent with ABA policy, we oppose the mandatory minimum provisions themselves. This amendment would reduce the extent to which the Guidelines are distorted by the ill-considered statutes.

Finally, we adhere to the principle stated both in our Standards and in 18 U.S.C. § 3553 that punishment should be sufficient -- but not greater than necessary -- to fulfill the statutory purposes of sentencing. A recently released study from the Department of Justice documented the shocking extent to which federal prisons are populated with low-level, non-violent drug offenders. This result is caused largely by mandatory sentencing statutes and their interaction with Guideline § 2D1.1. Adoption of this proposed amendment would be a small but necessary step toward rationalizing the use of scarce prison space.

Proposed Amendment 8(B):

This amendment adds a specific offense characteristic in § 2D1.1 to address the use or possession of a weapon in drug offenses. We believe this amendment is unnecessary, because such conduct generally will be separately charged in federal drug prosecutions. If the purpose of the amendment is to relieve the prosecution of the need to prove weapons use beyond a reasonable doubt, we oppose the amendment. This burden-shifting is contrary to the ABA Standards. It also constitutes an unjustified shift from a charge-based to a real offense approach to this conduct. If there is some other purpose of the amendment, the Commission has not adequately expressed or explained it.

Proposed Amendment 8(C):

This amendment caps the offense level for defendants with a mitigating role in the offense. Consistent with the reasons of support for Proposed Amendment 8(A), we support this amendment.

The ABA does not take a position on any specific offense levels, so we will not comment on whether the cap should be set at 30 or 32.

Issue for Comment 8(D):

As noted, the ABA believes that the current Guidelines overemphasize the role of drug quantity in determining a defendant's culpability. We believe that adoption of Proposed Amendments 8(A) and 8(C) would begin to redress this flaw in the Guidelines.

Proposed Amendment 9:

This amendment sensibly clarifies the operation of the aggravating role Guideline, and we urge its adoption. We note, however, the phrase "or was otherwise extensive" in the current Guideline may no longer be necessary now that the commentary defines the meaning of the term "participant" with greater specificity. While we support judicial discretion, we believe the Commission should not employ or retain Guideline terms that are so vague they provide no guidance to judges, and thus may cause unwarranted disparity.

Proposed Amendment 10:

This amendment clarifies the operation of the mitigation role Guideline. In the past, we have urged its adoption, and we continue to support it. We believe the examples inserted in the introductory commentary to Chapter Three, Part B of the Guidelines seem to provide useful guidance to courts.

Proposed Amendment 24:

The purpose of this amendment is to address the situation in which an individual involved in a drug transaction inflates the amount of drugs he intends to buy or is capable of buying or selling in the transaction. Since the Guidelines are so driven by drug quantity, this "puffing" has led to bizarre and unjust results producing unwarranted disparity, and thus should be corrected.

Consistent with our view on the role of quantity in determining a defendant's culpability and our interest in minimizing unwarranted disparity, the ABA supports adoption of the amendment.

Issue for Comment 33(A):

The Commission seeks comment on whether it should modify the Guidelines that provide for a 100 to 1 ratio distinguishing crack cocaine from powder cocaine cases.

First, we understand that the Commission staff has completed a comprehensive review of this subject. We strongly urge prompt publication of this report. If, as we suspect,

the report suggests that the current ratio is unjustified -- or at least overstated -- we would support amendments to rectify this error.

The fact that the current ratio is based on a statutory mandatory sentence should not be a bar to improvement of the Guidelines. In a related situation last year, the ABA supported an amendment to rationalize the definition of "mixture or substance" in LSD cases. The Commission commendably adopted that amendment because it recognized its independent obligation to ensure just sentences in cases not covered by the mandatory minimum sentencing laws.

III. Money Laundering

Proposed Amendment 11:

We strongly support the adoption of this amendment to § 2S1.1 and § 2S1.2, with several modifications.

We agree with the Commission's Money Laundering Working Group that where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same for the underlying offense."

Many of our members have reported to us their experience that the current Guidelines encourage prosecutors to seek money laundering convictions in cases not related to narcotics money laundering, because the resulting sentences are significantly higher than for the underlying offenses. We have also become aware of instances in which the government can influence plea bargaining negotiations merely by threatening to include a "money laundering" count in the indictment.

The proposed Amendment seems to recognize that 18 U.S.C. §§ 1956 and 1957 are so broad that they encompass cases which are not normally thought to be "money laundering" -- and indeed, in some cases, in which the underlying offense is virtually indistinguishable from the underlying crime. Adoption of the amendment would go a long way towards addressing the problems this overreaching creates.

Although this Amendment would go a long way toward correcting the current problems, we suggest that the ultimate goal of achieving fairness in sentencing would be more clearly advanced by modifying the proposal so that the base offense level for an underlying offense would be applied in all cases, not just in cases where that level would exceed the base offense level in § 2S1.1(a)(2) or (3). Further, if the Commission is intent on achieving uniformity among Guidelines by conforming § 2B1.1 and § 2T1.1 with § 2F1.1, we suggest that § 2S1.1(a)(3) should also be assigned the same base offense level as § 2F1.1.

IV. Fraud

Proposed Amendments 12 and 20:

We support the change proposed in Amendment 12(A) that would eliminate "more than minimal planning" as a guideline specific offense characteristic. By changing the definition of the specific offense characteristic to "sophisticated planning," we believe the structure of the Guidelines will be improved in two respects.

First, the continued recognition of planning (independent of actual harm), as an important factor for judging relative culpability, is consistent with the empirical analysis of pre-Guidelines sentencing practices. (See § 2F1.1 comment (background).) By refining the definition, however, the Commission has made an attempt to capture this factor more precisely. Because courts have found that "more than minimal planning" applies in virtually all cases, the concept of the heartland case -- as one in which the base offense level applies without the application of specific offense characteristics -- has been lost in the past. Adoption of proposed amendment 12(A) would advance the original concept of the Guidelines and promote fairness by allowing courts to rationally distinguish between offenders.

Proposed Amendment 12(B) seeks to raise the base offense level in § 2B1.1 to that found in § 2F1.1. We oppose this change. The ABA Standards seek to foster uniformity of sentences for similarly situated individuals charged with the same crimes. As we testified last year, the decision to sentence larceny and theft cases exactly the same as fraud and deceit cases is contrary to prior practice and appears to increase disparity by treating dissimilar offenders in a similar manner.

If the Commission believes that there is an unrecognized need to conform the base offense levels of these two Guidelines, we support the formation of a working group to study this issue. Without a thorough examination of the circumstances of the cases that has arisen under these two Guidelines, it is impossible to determine whether a change would be made solely for the sake of facial consistency, whether such a change would result in unwarranted disparity by imposing the same sentence for truly disparate conduct, or whether such a change would be justified. If a need for harmonizing these two Guidelines is found, we would support the reduction of the base offense level for § 2F1.1 rather than increasing that for § 2B1.1.

Similarly, the Commission has sought comments on changing the increments in the loss tables for § 2B1.1, § 2F1.1, and § 2T1.1. The purported reason for such a change is that "[s]ome commentators have noted that the slope of the current loss tables is not uniform throughout the range of loss in the tables." This reason does not provide compelling justification for changing the current structure of the Guidelines. Again, we believe that before any action is taken on these proposals, the Commission should establish a working group to determine whether there is, in fact, a need or justification for the proposed changes.

Finally, we support Proposed Amendment 20A, which revises the Commentary to § 2F1.1 to provide greater consistency § 2B1.1. This revision would cure an anomaly that currently exists and, consist with the ABA Standards, would promote more fairness in sentencing.

V. Acquitted Conduct

Proposed Amendment 18:

Consistent with our position on a similar amendment last year, we support this proposed amendment because it is conforms with the ABA Standards. As set forth in Standard 18-3.6, we believe that sentences imposed should be based on the offense of conviction. We disapprove of the practice of "real offense" sentencing. We would prohibit the enhancement of sentences based on a finding by a court that -- despite the acquittal of the defendant -- he or she committed the additional offense.

We believe that any argument for basing a sentence on acquitted conduct is outweighed by the need to promote both perceived and actual fairness in the sentencing process of the criminal justice system. In our view, it is inappropriate for an individual to be punished for a criminal offense despite having been acquitted of it.

In addition, the fact that the uneven consideration of acquitted conduct at sentencing promotes disparity is also a compelling justification for enactment of this amendment. The preclusion of its consideration may actually promote uniformity.

V. Imposition of Sentence for Defendant Serving Undischarged Term of Imprisonment

Proposed Amendment 23:

The Committee opposes this proposal to revise § 5G1.3. This amendment was proposed for the stated purpose of facilitating the job of the probation department. The ABA does not believe that the mere difficulty in obtaining information is a valid justification for increasing the severity of sentences. Moreover, the better approach is found in the present state of the Guideline -- as opposed to the proposed revision -- which does not allow for differences in sentences based merely on the time of the imposition of the sentence.