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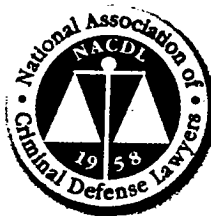
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STATEMENT OF GERALD H. GOLDSTEIN, ESQUIRE

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Public Hearing United States Sentencing Commission

March 5, 1998
San Francisco, California

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The Sentencing Commission proposes to "raise penalties for economic offenses." This is wrong for three very obvious reasons.¹

- **First**, it flies in the face of Congress' mandate to the Commission. Congress directs us to impose a sentence that does not involve imprisonment when dealing with a "first offender who has not been convicted of a crime of violence or an otherwise serious offense."² There's the rub. The overwhelming majority of these nonviolent offenders who will be covered by the proposed sentencing amendments have no prior criminal history. Yet, the proposal insists on a longer prison term. This is not a rational sentencing policy.³ Given the plainly worded mandate of Congress, I ask you how the Commission can amend the loss table to require imprisonment for a new universe of first time fraud offenders?⁴ Given this same congressional mandate, how can the Commission possibly justify limiting the discretion of a federal judge to implement that mandate? How can the Commission limit a judge's ability to impose a sentence of home-detention and community confinement when in his or her considered judgment that is the appropriate sentence, and that sentence would plainly appear to be what Congress envisioned for this class of defendants?

Second what we have here is one bad policy begetting a worse sentencing policy. The Commission's stated reason for contravening Congress and for limiting judicial discretion is to achieve better proportionality. For what, for the sake of proportionality? The primary source of that disproportionality is the penalties for crack cocaine offenses. The Commission is on record, with a 242-page report followed by shorter report, that crack cocaine penalties were, and still are, too severe.⁵ The Commission recommended that the crack cocaine penalties should be reduced. But they haven't been. So now you propose to increase the penalties for fraud and other so-called "white-collar" offenses "to achieve better proportionality with the guideline penalties for other offenses of comparable seriousness." But that makes no sense, particularly if the relationship between other crimes, at least when it comes to sentencing is arbitrary. While Congress, as a legislative body, is free to act for political reasons this Commission is not. Two wrongs have never added up to a right, and they still don't.

- **Third**, and perhaps this is a corollary of my first and second reasons, increasing penalties and the likelihood of imprisonment without good reason to do so is not justified. Indeed, it is shameful. The Commission is charged with developing sentencing guidelines that "provide certainty and fairness"

on rational distinctions. 18 U.S.C. § 991. As the Supreme Court explained just last summer:

The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.

Koon v. United States, 116 S. Ct. 2035, 2053 (1996). Anecdotal reports that may be driving the concern about an unjustified disproportionality between fraud and other offenses should not form the basis for the Commission's proposed enhancements when the empirical evidence does not justify the enhancements.

The Commission's own data reflect that most fraud defendants are being sentenced at the low end of the range calculated under the current guidelines. If judges in fact believed that current penalties for fraud defendants were too lenient, they would sentence at the high end of the range. In fact, 70% of fraud defendants who are eligible for non-prison sentences are being sentenced to sentences that do not include imprisonment.⁶ Judges are also not departing up in cases involving fraud.⁷

In addition, fraud sentences were set disproportionately higher

ances for other offenses when the Commission first formulated guidelines. In 1989, the Commission once again raised the penalties for fraud offenses, without any intervening congressional action or other empirical evidence. This will have been the third time that these sentences have been raised without empirical support. This is not the role Congress entrusted to the Commission.

The Commission should not increase the loss table or otherwise enhance the penalties for fraud and the related theft and tax offenses.

ENDNOTES

1. This year, the Sentencing Commission is proposing substantial increases in the penalties for white collar offenses. Half of the amendments the Commission has published this year for public comment relate to theft, fraud and tax offenses.

During the 1997-98 amendment cycle, the Sentencing Commission has identified as a priority issue for consideration the definition of "loss" and the weight it is given in the theft, fraud, and tax guidelines. **The purpose of both options is to raise penalties for economic offenses that have medium to high dollar losses in order to achieve better proportionality with the guideline penalties for other offenses of comparable seriousness.**

U.S.S.C., Synopsis of Proposed Amendment 1, 63 Fed. Reg.--- (Jan. 6, 1998) (emphasis added).

2. In relevant part, 28 U.S.C. § 994(j) provides:

The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other

than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . .

3. The Commission's statistics reflect that 62% (2360/3801) of fraud offenders sentenced to terms of imprisonment are in Criminal History Category I. U.S. Sentencing Commission, 1996 Sourcebook of Federal Sentencing Statistics, Table 14 at 24 (1996). It would appear, furthermore, that an additional 10 to 15% of fraud offenders, those who receive no sentence of imprisonment, also have limited or no prior criminal history. Compare Id. at n.1 with Table 3 at 7. The statistics also reflect that an even higher percentage of tax offenders who are sentenced to terms of imprisonment, (77% or 255/331) are in Criminal History Category I.

Generally, the percentages for 1995 were the same as those for 1996. U.S. Sentencing Commission, Annual Report, Table 19 at 62 (1995) (62 % (2262/3638) of fraud offenders sentenced to terms of imprisonment were in Criminal History Category I; 73% (195/266) of imprisoned tax offenders were in Criminal History Category I).

4. The proposed loss tables will require a full term of imprisonment (zone D) for all first time offenders engaged in fraud offenses involving a loss in excess of \$70,000 (option 2) or \$80,000 (option 1) down from the current amount of \$120,000 or more. Similarly, to obtain home detention or community confinement without requiring that any part of the sentence be satisfied by imprisonment (zone B), currently the loss cannot exceed \$40,000; under the proposed amendment (option 2), the loss cannot exceed \$30,000 to obtain a sentence in zone B.

5. U. S. Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy, (as directed by § 280006, Pub. L. 103-322), Feb. 1995; U. S. Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy, (as directed by § 2, Pub. L. 104-38), Apr. 1997.

6. U. S. Sentencing Commission, 1996 Sourcebook of Federal Sentencing Statistics, Figure F, at 28 (1996).

7. Upward departure were imposed in only 1.3% of fraud cases. U. S. Sentencing Commission, 1996 Sourcebook of Federal Sentencing Statistics, Table 27, at 44 (1996).