Written Statement of
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on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
before the
Subcommittee on Criminal Justice Oversight
Senate Committee on the Judiciary
Re: Oversight of the United States Sentencing Commission
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Mr. Chairman and Distinguished Members of the Subcommittee:

The Sentencing Reform Act and the Sentencing Guidelines were born of a noble concept that federal sentencing should be fair and certain and honest. You set up a system that in theory at least was designed to avoid unwarranted disparity among persons convicted of similar crimes. At the same time you wisely built into the system through the departure mechanism the flexibility to permit individualized sentencing -- a venerable tradition in the federal system -- so that a United States District Court Judge when he or she imposes a sentence can account for factors that the Sentencing Commission had not considered, and indeed no commission sitting in Washington, D.C. could ever consider, those factors that Justice Kennedy so eloquently referred to as "the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." Koon v. United States, 518 U.S. 81, 116 S. Ct. 2035, 2053 (1996).

As in so many things, theory and reality diverge.

I. Transfer of Discretion from Article III Judges Leaves Unfettered Discretion In Federal Prosecutors

The reality of the Sentencing Guidelines is that they are flawed at their very core. The Guidelines have transferred discretion and authority and responsibility from constitutional officers, the men and women who have been appointed by the President and confirmed by you to serve as judges of the lower federal courts to persons who have no express constitutional role, the prosecutors, who are hired without the careful scrutiny given to federal judges. And history has taught us time and again, and continues to teach us -- and the founding fathers knew this well when they set up our system of checks and balances -- that you cannot leave such power unchecked in the hands of anyone, least of all in the hands of men and women whose decisions are made in the privacy of their offices, who are caught up in an adversarial role, and whose public function often serves as a stepping stone to higher political or judicial office.

Indeed, although Congress intended to take sentencing decisions away from the darkness of the Parole Commission into the openness of the courtroom, sentencing decisions are now mostly resolved in the darkness of the prosecutor's office and the probation department rather than in a public courtroom at the time that the person convicted of a crime appears for sentencing by a federal judge.

Very recently for example, you held hearings in the case of Wen Ho Lee to determine whether federal prosecutors were doing the right thing. These hearings were no doubt held because of the case's notoriety, the issues involved and because the ultimate resolution -- a guilty plea to a single count with an agreement to time served of some 10 months -- seemed completely out of proportion to the charges which involved a multi-count indictment with potential life sentences. The judge in the Lee case was without authority to hold such a hearing.

In the run-of-the-mill drug case where the process runs its course without the light of media scrutiny, a defendant is much less fortunate. Defendants are left at the mercy of the prosecutor's good will in most cases because of the operation of the Guidelines. The burden at sentencing requires merely proof by a preponderance of the evidence. Judges must consider drug quantities not proved at trial, quantities not charged, and even quantities that are not part of the same offense but merely part of a similar scheme as the offense of conviction. The information presented at sentencing is often based upon the stories of other defendants who seek to have their own sentences reduced in return for offering "substantial assistance" in the prosecution of others. Somewhere in a federal prison sits a man serving a sentence of life for his involvement in a marijuana conspiracy. Under the federal system, that means he will not be released from jail until he dies. There is no reduction in sentence for doing "good time," nor early parole, nor is a motion to reduce the sentence available to him. At trial the government introduced evidence that the man sold 10 ounces of marijuana. The jury had so much difficulty with the evidence that twice, the judge had to deliver to the jury an Allen charge, a statement which tells the jury, after it has informed the court that it is having difficulty reaching a verdict, to try harder to reach a verdict. Only after the second Allen charge did the jury convict and then it convicted of a single count of conspiracy and acquitted of all the remaining charges. At sentencing, the government claimed that the conspiracy involved 1000 kilograms of marijuana – despite having only proved 10 ounces at trial – and that the defendant was therefore subject to a mandatory life sentence of life based on his two prior convictions. In dissent from the 7th Circuit's decision that it would not review the case en banc, Chief Judge Posner eloquently stated what should be obvious:

[T]he difference between the standard of proof by a preponderance of the evidence, a standard that in this case permitted the judge to send the defendant away for life if he thought the odds 51-49 in favor of the defendant's having sold the 1,000 kilograms, and proof beyond a reasonable doubt, is so large that there is room for an intermediate standard that can be practically, not merely conceptually, distinguished from the extremes.
. . .
Conceivably the intermediate standard of proof would reduce the number of errors both in favor of and against defendants, for it would induce the government to conduct a more thorough investigation in preparation for the sentencing hearing, thus putting before the judge a more complete and accurate picture of the facts. More thorough investigation implies, I acknowledge, a cost to the government, a cost that might in turn reduce the government's ability to prosecute the guilty or obtain adequate sentences in every case. Few benefits come without a cost. But to imprison for life a person who sells 10 ounces of marijuana is a miscarriage of justice of sufficient magnitude to warrant some expenditure of resources to prevent. United States v. Rodriguez, 73 F.3d 161, 163 (7th Cir. 1996).

United States v. Rodriguez, 73 F.3d 161, 163 (7th Cir. 1996). Furthermore, these procedural rules worsen the problem because the guideline system for scoring drug, fraud and other offenses focuses on the amount of drugs almost to the exclusion of all other factors relating to culpability. This has resulted in the imposition of disproportionately harsh sentences on those who are merely peripheral agents of the drug kingpins and middlemen whom Congress sought to punish harshly with mandatory minimum sentences. Thus, a person, who quite often is young, poor, undereducated or addicted to drugs, and increasingly female, and is paid $200 by a drug trafficker for transporting 50 grams of crack from one city to another is subject to the same mandatory minimum 10-year sentence as the trafficker who controls the drug organization and will receive the bulk of the profit. The emphasis of quantity to determine the mandatory minimum penalties flows from the statutory scheme established in 21 U.S.C. § 841. The Sentencing Guidelines follow this scheme without sufficiently reducing the sentence of those persons who are much less culpable.

Congress cannot hold hearings in every one of the 55,408 federal convictions obtained last year. Yet by transferring so much sentencing power to federal prosecutors, the Sentencing Guidelines prevent federal judges from asserting any check on the almost unfettered discretion that prosecutors hold over the life and liberty of persons accused of crimes in this country. In so doing, the Sentencing Guidelines have also limited our ability as citizens to defend ourselves from unwarranted charges that result from unscrupulous, or vindictive or ill-founded prosecutions.

A. The Racial Disparity of the Federal Prison Population Has Increased Since the Guidelines Went Into Effect

At the same time, the Sentencing Guidelines are not accomplishing the ideals of uniformity and fairness. Since 1987 when the Guidelines went into effect, there has been an increase in the racial disparity of the federal prison population. That is what the Sentencing Commission found and stated in its 1995 Annual Report. "Traced over time, the relative proportion of Whites in the defendant population has steadily declined since 1990, while increasing considerably for

Hispanics, and to a lesser degree for Blacks." U.S.S.C. Annual Report 46 (1995). See also U.S.S.C. Annual Report 33 (1996). That trend continues into today:

Whites, Blacks & Hispanics 1995 39.2% 29.2% 27.3% 1996 35.9% 28.4% 31.0% 1997 34.7% 27.1% 33.7% 1998 32.0% 26.5% 37.0% 1999 30.8% 26.2% 39.0%

This is the exact opposite of the uniformity and fairness that Congress set out to obtain under the Sentencing Reform Act of 1984. It is wrong and needs to be corrected.

1. Mandatory Minimum Penalties Are Being Disproportionately Applied

One of the causes of this racial disparity again seems to lie at the transfer of power to federal prosecutors that allows them to control departures below mandatory minimum sentences, a power which Senior Circuit Judge (and former Senator from New York) James Buckley has referred to as an "extraordinary power." United States v. Jones, 58 F.3d 688, 691-92 (D.C. Cir.), cert. denied, 116 S.Ct. 430 (1995) (Buckley, J.) In a 1991 Report to Congress, the Sentencing Commission found that mandatory minimum penalties were being applied disproportionally to Blacks and Hispanics. The Commission found that substantial assistance departures that allow judges to sentence below the mandatory minimum were more likely to be granted to Whites than to Blacks or Hispanics. This disparity could not be accounted for by considerations related to the nature of the offense and the prior criminal record of the defendant. United States Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System ii, 82, 89 (1991). In fact, the Sentencing Commission was unable to identify any relevant factors -- such as the severity of the offense or the extent of the cooperation -- that would explain the disparity. These findings were confirmed in a subsequent study conducted in 1998 by staff at the Sentencing Commission.

Again, the lack of any check on the prosecutor's discretion in this area is problematic. Federal prosecutors have chosen to exercise this extraordinary power in a very secretive and effectively unreviewable manner. In plea agreements, federal prosecutors reserve onto themselves the absolute power to determine whether the defendant has provided substantial assistance. At the same time, federal prosecutors refuse to spell out in writing the magical quantum of assistance which will satisfy them that a defendant has sufficiently cooperated and is to be rewarded with the departure motion. In some districts, the decision is further insulated from review and disclosure because it is made by Departure Committees made up of prosecutors whose names are not disclosed and whose deliberations are kept secret. A defendant can only challenge the decision if he can prove that it was made with unconstitutional motive or in bad faith. Such claims are nearly impossible to prove in any case but are particularly difficult to prove where the decision is made behind closed doors. Once again, it is difficult to reconcile this reality with Congress' intent to make sentencing fair and uniform and open.

2. Recent Sentencing Policies Increase Disparity

Congress must address the growing racial and ethnic disparity in the federal prison population. During the past decade Congress has continued to increase penalties for certain crimes in the face of the indisputable evidence that the majority of persons convicted of these crimes are

Blacks and Hispanics. As in the criminal law, it is no defense that Congress had deliberately ignored the problem.

The enhanced penalties for the crack form of cocaine continue to be one of the primary reasons for the disparate increase in the number of Blacks imprisoned in federal institutions. Last year, 84.7% of persons convicted of these offenses were Black. United States Sentencing Commission, Annual Report 69 (1999). Seventy-eight percent of these offenses did not involve a gun possession, id. at 74, and thirty-one percent of these offenders were in the lowest criminal history category. Id. at 72. These numbers are particularly stark because federal statistics reflect that more than 40% of crack users are white. In 1995, at Congress' direction, the Sentencing Commission published a book detailing the problem, including the fact that this form of cocaine is the only drug where the penalties are inverted so that bulk importers and distributors of the powder form of cocaine, the basic ingredient for making crack cocaine, receive more lenient sentences than the street dealer. Congress has yet to act on the recommendations made by the Commission.

Penalties for immigration offenses have become so harsh that in many cases they exceed the penalties for violent offenses. Congress continues to increase the penalties for immigration offenses. The Sentencing Commission, at the express direction of Congress and in the exercise of its own discretion, has also increased the offense levels and other enhancements for immigration offenses. This is a major cause for the disparate increase in the number of Hispanics in the federal prison population.

As with addiction in drug offenses, it is clear that at the core of many immigration offenses are issues of poverty and persecution in the home country of these persons that are not present in other criminal offenses. Persons who act out of such desperate circumstances are not as likely to be deterred and are not as deserving of harsh punishment as others whose criminal conduct is motivated by more mundane reasons. Equally important, this seems to be an expensive exercise in futility. Enhanced penalties do not seem to be reducing the violation of our immigration laws.

It has been clear for some time that these enhanced penalties are merely filling our jails and costing us greatly without reducing the conduct which we seek to prevent. Jonathan P. Caulkins et al., Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money? (RAND 1997).

Congress and the Sentencing Commission need to look at this problem and act to correct the racial and ethnic disparity in the federal prison population which is being created.

II.Federal Sentences Continue to be Ratcheted Up to Require Prison Terms in an Increasing Number of Cases and Longer Sentences of Imprisonment

The Sentencing Commission has amended the Guidelines approximately 600 times since 1987. Fewer than a dozen of those amendments have involved reductions in (1) the term of the prison sentence to be imposed for a given offense, (2) the enhancement value of a given fact or circumstance, or (3) the likelihood of imprisonment for any given offense. Indeed, when it comes

to federal sentencing, Congress and the Commission seem to have a single tool -- a ratchet that permits sentences to be increased but never reduced.

The “upward ratcheting” of federal sentences may explain why the United States recently reached the 2 million mark in the number of persons in prison. Our rate of incarceration is greater than the rate of incarceration in South Africa at the height of apartheid. We have the highest per capita rate of incarceration of any industrialized nation in the world. It should be clear, therefore, that the Sentencing Commission has been no slouch when it comes to requiring the imprisonment of persons convicted of federal criminal offenses.

III. Departures Preserve Some Measure of Fairness in the Guidelines

Departures are the one area of the Sentencing Guidelines where Congress granted federal judges discretion to adjust sentences to take into account individual aspects of the crime and the person committing it that the Commission did not. The discretion is not unlimited. It is cabined by a number of restrictions imposed by the Commission. For example, the Commission has established that a person’s diminished capacity may warrant a departure unless “the defendant’s criminal history ... indicate[s] a need for incarceration to protect the public.” U.S.S.G. § 5K2.13.

Without the discretionary authority to depart, all crimes regardless of the circumstances would have to be sentenced exactly the same. The secretary who aids her boss in processing the fraudulent claim for fear of losing her job must receive the same sentence as the boss who profited and devised the fraudulent scheme because she is responsible for the same amount of loss as he is. The Guidelines permit district courts in such a case to depart downward in recognition of the fact that the amount of loss in her case overrepresents the severity of her offense. Without the authority to depart, one size must fit all, predetermined by the body of experts sitting in Washington, D.C.

The national downward departure rate of 15.8% is well within the level envisioned by Congress when it first enacted the Sentencing Reform Act. It is misleading, moreover, to include departures for substantial assistance in the general departure rates. Substantial assistance departures are within the sole discretion of prosecutors and were enacted by Congress as a tool for prosecutors. One must also be careful in comparing departure rates across states or circuits because of the unique mix of cases and circumstances. A case in point is the departure rate in immigration cases in some of the border states. The increased departure rate reflects the overwhelming number of cases in those districts. Such overwhelming case load increases have required district courts and prosecutors to fashion a remedy to keep the system afloat. For example, approximately half the cases in the District of Arizona involved immigration cases. In the District of Arizona with 1,483 immigration cases, district courts granted departures at a rate greater than the norm for other districts.

But one cannot ignore the impact of immigration cases on those statistics both in terms of caseload and in terms of the unique circumstances that were not likely to be considered by the Commission in formulating the guidelines. For example, the number of immigration cases in that one district exceeds the number of all cases in the entire First Circuit (1,337 total cases in 1999). The immigration cases in Arizona also exceed the number of all federal cases in the combined

two districts in the state of Virginia (1,305 total case in 1999). I am told that in some of the border districts, federal sentencing of immigration offenses resembles the procedures that are used in municipal courts to deal with traffic offenses in state courts throughout the United States. Sixty immigrant defendants are brought into a courtroom and mass sentencings are conducted. To compare departure rates in Virginia's districts or the First Circuit with those in the District of Arizona is to compare apples and oranges.

Moreover, the number of immigration cases in Arizona almost tripled since 1997 (608 cases in 1997). Knowing the pace at which new federal judges are appointed, I am quite certain that judicial resources did not keep pace with the exploding case load.

Lastly, departures are the one area of the Guidelines where the Commission can see if its sentencing policies are working or whether an adjustment needs to be made. The high departure rate in immigration cases generally and in Arizona in particular reflects a problem with the most commonly applied immigration guideline. The guideline for cases involving reentry after deportation (U.S.S.G. § 2L1.2) includes a 16-level bump if the defendant was previously deported based on an aggravated felony. This is such a gross measure that it encourages departures. The 16-level bump -- the most severe in the Guidelines -- does not differentiate between a prior murder conviction, for example, or a $20 sale of a small amount of marijuana. Moreover, when Congress broadened the definition of an "aggravated felony" in the immigration code (in its attempt to address immigration policy), it tacitly changed the scope of the enhancement in the § 2L1.2 guideline. Yet that enhancement has not been modified by the Sentencing Commission to address unintended consequences of the immigration amendment. In light of the statutory mandate in 18 U.S.C. § 3553(b) to depart where circumstances are not adequately considered by the guidelines, a district court would be derelict if it did not depart in such cases.

The drug cases in Arizona also tend to involve circumstances unique to such border states, such as a higher percentage of defendants who merely served as "mules." A combination of the application of the relevant conduct guidelines and the particular circumstances of these offenses tend to generate more downward departures.

For these reasons, the high departure rates in the few districts such as Arizona provide the Commission with the type of information that Congress intended the Commission to amass and use to adjust the guidelines. These departure rates do not reflect an avoidance of the law by federal judges but rather their conscientious compliance with the Congressional mandate to impose a guideline sentence unless the court finds a circumstance not adequately considered by the Commission that warrants departures.