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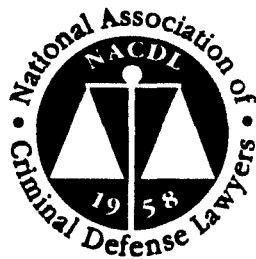
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EXECUTIVE DIRECTOR

Stuart M. Stalter



February 4, 1997

The Honorable Richard P. Conaboy  
and Commissioners  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Washington, D.C. 20002-8002

Dear Chairman Conaboy and Commissioners:

We write on behalf of the National Association of Criminal Defense Lawyers to comment on the proposed Emergency Amendments.

The NACDL is a nationwide organization comprised of 9000 attorneys actively engaged in defending criminal prosecutions, including private attorneys and public defenders; our membership also includes judges, law professors and law students. NACDL is also affiliated with 78 state and local criminal defense organizations, allowing us to speak for more than 25,000 members nationwide. Each of us is committed to preserving fairness within America's judicial system.

We commend you for your forthright attempts to assure that federal sentences "provide just punishment". As you embark on this year's amendment cycle, we ask you to be cognizant that: (a) our rate of incarceration in the United States is the greatest of any civilized nation; (b) federal criminal laws are impacting and being applied disproportionately on minorities; and (c) sentences must be "sufficient, but not greater than necessary" to meet the purposes of sentencing.

### Disturbing Rate of Incarceration

First and foremost, we want to express our alarm at the "disturbing state of affairs," to quote the Honorable Richard A. Posner, Chief Judge, United States Court of Appeals for the Seventh Circuit, in which our criminal justice system finds itself.

Our retention, indeed our expanding use, of capital punishment, our other exceptionally severe criminal punishments, (many for intrinsically minor, esoteric, archaic, or victimless offenses), our adoption of pretrial

detention, as a result of which some criminal defendants languish in jail for years awaiting trial, and our enormous prison and jail population, which has now passed the one-million mark, mark us as the most penal of civilized nations. . . .

[W]e have had slavery, and segregation, and criminal laws against miscegenation ("dishonoring the race"), and Red Scares, and the internment in World War II of tens of thousands of harmless Japanese-Americans; and most of our judges went along with these things without protest. . . .

[J]udges on the one hand should not be eager enlists in popular movements, but on the other hand should not allow themselves to become so immersed in a professional culture that they are oblivious to the human consequences of their decisions, and in addition should be wary of embracing totalizing visions that . . . reduce individual human beings to numbers or objects. . . .

Richard A. Posner, Overcoming Law 157-58 (Harvard U. Press 1995). Chief Judge Posner's advise to judges applies equally well to you, Sentencing Commissioners who have been entrusted with establishing federal sentencing guidelines.

### **Disparate Application & Impact of Criminal Penalties**

Second, we also express alarm at the unwarranted and increasing racial disparity of the prison population. This pernicious reality seems to have developed "between 1986 and 1988" but continues into today.<sup>1</sup> U.S.S.C., Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 82 (1991). This troubling disparity results not merely from a disparate impact but from a disparate application of the harshest federal penalties.

The Commission has reported the disparate racial application of the penalties for federal drug and gun offenses.

The disparate application of mandatory minimum sentences in cases in which available data strongly suggest that a mandatory minimum is applicable appears to be related to the race of the

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<sup>1</sup> "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).

defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum; and to the circuit in which the defendant happens to be sentenced. . . . This differential application on the basis of race and circuit reflects the very kind of disparity and discrimination the Sentencing Reform Act, through a system of guidelines, was designed to reduce.

Id. at ii.

The Commission has also reported the disparate racial impact of the penalties for cocaine use and trafficking. U.S.S.C., Special Report to the Congress: Cocaine and Federal Sentencing Policy 192 (1995) ("To the extent that a comparison of the harms between powder and crack cocaine reveals a 100-to-1 quantity ratio to be an unduly high ratio, the vast majority of those persons most affected by such an exaggerated ratio are racial minorities. Thus, sentences appear to be harsher and more severe for racial minorities than others as a result of this law, and hence the perception of unfairness, inconsistency, and a lack of evenhandedness.").

We commend you for your forthright actions in discovering, reporting and attempting to correct these injustices. In particular in promulgating the immigration amendments, the Commission should be mindful of the Supreme Court's recognition that there may be unwitting or invidious discrimination against "races or types which are inimical to the dominant group" and that therefore "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (invalidating on equal protection grounds a statute that required sterilization of habitual felony offenders excluding felonies involving embezzling, revenue act violations, and political offenses while including larceny).

We ask you to continue to perform your proper statutory function in leading the fight to eradicate the unwarranted disparate application and impact on minorities of federal sentencing laws.

### **Just Punishment**

Third, we ask you to keep in mind the congressional mandate that sentencing courts must impose "a sentence sufficient, but not greater than necessary" to comply with the purposes of sentencing, the first of which is "just punishment". 18 U.S.C. § 3553(a); see also 28 U.S.C. § 991(b)(1)(A). Absent empirical evidence to support increased penalties, the Commission should not devise guidelines that increase the term a convicted person must spend in prison.

Three other matters are also of concern.

### **Emergency Amendments**

We question the Commission's promulgation of emergency amendments when the congressional grant of authority requires only that you promulgate amendments "as soon as practicable". These emergency amendments came at a time when the Commission was already considering a substantial number of issues as it implements its simplification project. The Commission has had less than three months from the passage of the methamphetamine (October 3, 1996) and immigration (September 30, 1996) bills until it voted to publish these emergency amendments at its December 17, 1996 meeting. It is not practicable for the Commission to promulgate amendments if it has not had adequate time to gather empirical evidence and study the issues. Amendments promulgated under the abbreviated emergency procedures lack the reasoned and empirical base necessary to provide certainty and fairness. The Commission's exercise of this emergency authority seems particularly debatable when there has been no Congressional finding that an emergency in fact exists.

The four emergency amendments under consideration illustrate the problem with this abbreviated procedure. In publishing multiple options for a number of the adjustments, the Commission has seemingly selected numbers willi-nilly without any empirical or other reasoned basis. While the power of Congress to make such political judgments as it pertains to criminal laws may be subject to few restraints beyond the will of the electorate, the Commission does not have such unchecked authority. Both by virtue of the enabling legislation and of its function as an agency in the judicial branch, the Commission may act only pursuant to reasoned judgment.

In light of the shortcomings of the abbreviated emergency procedures, we ask the Commission to promulgate only those options that are directly required by the legislation. The Commission should not exceed the congressional directive unless and until the Commission is able to provide due consideration to the issues raised by these amendments.

### **Vacancies on the Commission**

We are troubled that the Commission is undertaking such serious amendments to the sentencing guidelines without its full seven-person membership. Of concern is the fact that the Commission is missing one of its three vice-chairs. Of greatest concern is the fact that at present the Commission has only two federal judges rather than the "[a]t least three" that Congress considered necessary for the proper functioning of the Commission. 28 U.S.C. § 991(a).

The opinion of a single Commissioner, especially a federal judge, speaking with the considered judgment gained from experience, knowledge and wisdom cannot easily be discounted. Indeed, a single Commissioner may well sway the whole Commission on any one or a number of issues. We urge the Commission to defer action on any of the amendments until such time as it at least has three federal judges, appointed by the President and confirmed by the Senate, able to consider and vote on the amendments.

### Congressional Directives

Lastly, we are troubled that the increasing use by Congress of specific directives to the Commission threatens to undo the cohesiveness of the sentencing guidelines and thereby undermine the congressional purpose of securing "certainty and fairness, [while] avoiding unwarranted sentencing disparities". 28 U.S.C. § 991(b)(1)(A). Congressional directives are aimed at troubleshooting in limited areas but fail to consider the interrelated complexity of the guidelines which may already account for factors which Congress is attempting to address. Congress established the Sentencing Commission as an expert body to develop sentencing policies and practices. The enabling legislation provides for a dynamic process, permitting fine tuning as warranted by empirical evidence.

We urge the Commissioners to persuade Congressional leaders to refrain from undermining the structure and purpose of the sentencing guidelines through the increasing use of such specific directives. We intend, with other interested individuals, to petition our representatives in Congress on this issue.

Thank you for your consideration of NACDL's concerns. Attached are our particularized comments on the proposed emergency amendments. If the Commission desires additional information on any of these matters, we welcome the opportunity to provide it.

Very truly yours,



Judy Clarke  
President

Alan Chaset  
Carmen Hernandez  
Benson Weintraub  
Co-Chairpersons  
Post-Conviction and Sentencing Committee