



Office of the Attorney General
Washington, D.C. 20530

27 January 1988

Honorable John C. Stennis
President Pro Tempore
U.S. House Senate
205 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Stennis:

This is written to advise you of litigation challenging the constitutionality of the Sentencing Reform Act of 1984, Pub. Law No. 98-473 (the "Act"), and to provide you full information on the position of the Department of Justice in these cases.

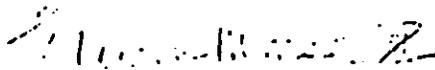
In Federal Defenders of San Diego, Inc., et al. v. United States Sentencing Commission, C.A. No. 87-2156 (D.D.C.), plaintiffs allege that the sentencing guidelines adopted by the Sentencing Commission are invalid because the composition of the Commission and its placement in the judicial branch violate the constitutional principle of separation of powers. They argue that the functions assigned to the Commission are not judicial ones and that, in any event, the inclusion on the Commission of judicial and non-judicial members removable by the President for cause takes the Commission outside the judicial branch even if its powers are properly viewed as judicial powers. In addition to this case, we are aware of several criminal cases in which defendants have filed pretrial motions challenging the validity of the guidelines on grounds similar to those alleged in Federal Defenders.

We plan to defend the Act as constitutional. However, the circumstances of Federal Defenders and the other cases place certain limitations on the manner in which the Department of Justice can proceed in this litigation. It is our view that plaintiffs, two offices of federal public defenders, lack standing to initiate the Federal Defenders case, and it is our intention to seek dismissal of the suit on jurisdictional grounds. If the court does not grant our motion to dismiss, we will defend the validity of the guidelines in Federal Defenders as well as in any pending criminal matter in which we are required to address the issue. It will be our position that the function of formulating general rules, such as the sentencing guidelines, once delegated by Congress, can only be delegated to the executive branch. The Department has previously expressed this view. See Memorandum for Judge William W. Wilkins, Chairman, United States Sentencing Commission from

Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, January 8, 1987.

With respect to preserving the work of the Sentencing Commission, this position does not pose any serious difficulties, since members of the Commission are appointed by the President, with the consent of the Senate, and are removable by him for specified reasons. However, it does mean that we will, at a minimum, urge the courts to give less than full effect to a phrase in 28 U.S.C. § 991(a), which labels the Commission as an independent Commission in the judicial branch. In the event that we are put to a choice between the invalidation of the sentencing guidelines that the Commission has promulgated and the severance of these few words from the statute, we will urge severance.

Sincerely,



EDWIN MEESE III
Attorney General