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UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON
OFFENSE SERIOUSNESS

APRIL 15, 1986

(THIS TRANSCRIPT WAS PREPARED FROM A TAPE RECORDING.)

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UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON
OFFENSE SERIOUSNESS

APRIL 15, 1986

CHAIRMAN WILLIAM W. WILKINS, JR., Presiding

(THIS TRANSCRIPT WAS PREPARED FROM A TAPE RECORDING.)

1 OMTbur

P R O C E E D I N G S

CHAIRMAN WILKINS: Let me call this public hearing to order.

Good morning to all of you. I am William Wilkins, Chairman of this Sentencing Commission, and you can see the names of the other Commissioners here with me.

I welcome you to this public hearing on the subject of the relative seriousness of criminal offenses.

We have available on the table just outside this hearing room a packet of information about the Sentencing Commission for anyone who may be interested in that.

During our break and at the conclusion of our hearing, I am sure that our Commission members will enjoy the opportunity to visit with you and probably exchange ideas.

This Commission and our public hearing today is in response to the Congressional mandate contained in the Comprehensive Crime Control Act of 1984. The Sentencing Commission is charged with the task of formulating sentencing policies pursuant to that guideline for our federal criminal system.

These policies and guidelines will be designed, as I am sure you know, to create a determinant sentencing system which may be appropriately entitled Truth in Sentencing, with the aims of certainty, fairness, and the

1 OMTbur 1 avoidance of unwarranted disparity among similar defendants
2 who commit similar crimes.

3 Unwarranted disparity I believe is the single
4 major problem in our system, which resulted in the creation
5 of the Sentencing Commission. This disparity is vividly
6 represented when similar defendants commit similar crimes,
7 be it bank robbery or mail fraud or weapons violation or
8 drug violation or whatever, and yet these defendants receive
9 greatly disparate sentences due to one single factor --
10 which federal judge happened to rap the gavel on that
11 particular case.

12 Unwarranted sentencing disparity undermines
13 public confidence in our system, and it breeds disrespect
14 for the rule of law.

15 As the Commission proceeds with its work, we
16 invite public participation in our efforts and seek input
17 from a wide range of individuals and groups with expertise
18 and with concern about our federal criminal justice system.
19 Although not required by law, the Commission recently
20 unanimously adopted a policy of an open door policy as far
21 as all of our Commission meetings are concerned, and we
22 invite anyone who is interested to participate with us in
23 these meetings.

24 A notice to this effect was recently published in
25 the Federal Register.

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1 Our hearing today focuses on the topic of offense
2 seriousness. In this area the Commission is required by
3 statute to consider public concern and views in formulating
4 sentencing guidelines and policy statements.

5 In constructing guidelines, the Commission is
6 required to carefully consider factors inherent in each
7 criminal offense and the manner in which the criminal
8 conduct occurred. In other words, what is it about a
9 particular crime, the way in which it is committed, the
10 impact upon others which we should consider as a Commission
11 in drafting our guidelines?

12 In addition to developing a determinant
13 sentencing system which will reduce unwarranted disparity,
14 this Commission must not only formulate appropriate
15 sentences for criminal conduct involved, but we must also
16 formulate sentences which are rational and explainable.

17 The resulting system will be open and
18 understandable, and it must articulate -- the judges who
19 impose sentences -- to victims who suffer crimes, to
20 defendants who are punished, and to the American public in
21 general why a particular sentence is appropriate. It is not
22 enough for us to come up with just sentencing guidelines
23 that give a sentence; we must also say why this sentence is
24 being given and, most importantly, why is this the
25 appropriate sentence in this particular case.

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In conjunction with this hearing, the Commission has received more than 130 responses from individuals and groups on the issue of offense seriousness. I assure all of you here and those who are unable to attend that this Commission appreciates the thoughtful consideration and the hard work which went into these responses.

Our hearing agenda today includes ten presentations with 15 minutes allotted to each participant. In order to allow time for the Commissioners to pose questions, we request that to the extent possible all witnesses summarize your testimony in your presentation.

We have carefully studied those statements that have already been received. They were earlier distributed to all Commissioners. Your full written statements will be included within this record, and indeed the record will remain open for 30 days from today to allow any amendment to your remarks or for the receipt of other testimony from individuals who are unable to attend today.

We have a recording system in operation now. I might add that the microphones that you see are not for amplification but only for recording. So if you would please speak loudly and clearly so that we can all hear.

The first witness today is Peter Walsh, who represents the Association of the Bar of the City of New York.

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Mr. Walsh, we are delighted to have you with us.

TESTIMONY OF THE ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK BY MR. PETER WALSH

MR. WALSH: Thank you, Mr. Chairman.

On behalf of the Association, we would like to
thank you very much for the opportunity to testify. I would
also like to say to all of you thank you very much for being
(inaudible) come up to New York and chat with us a couple of
weeks ago. It was very helpful, and we admire your courage
in undertaking this task on the timetable you have got
(inaudible).

I know you have both gone over the letter I
submitted earlier which summarizes the results of our
group. So I won't repeat that.

I would like to say that this is not an official
opinion from the Association of the Bar but rather the
efforts of a committee concerned with criminal justice to
assist you directly as we can in response to your
questionnaire.

We do not attempt in doing this to arrive at any
hierarchy by category of crimes, nor did we attempt to work
out a philosophy of sentencing on which we could agree. We
leave that to you. I hope we can.

But we did talk about the questions that were
posed, Mr. Chairman, and very briefly it was our feeling

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1 that clearly the manner of the commission of a crime should
2 affect its punishment, almost to the point where it would
3 seem unnecessary to articulate that. But beyond that very
4 general principle, we found as a result substantial disarray
5 as to how it should be done.

6 When it came to the question of robbery, which
7 you posed, with or without a gun, it seemed to us that the
8 monetary difference in the example you posed was not so
9 great that it would bring the unarmed robbery up to a level
10 of disparity (inaudible) done with a gun. At the same time,
11 a lot of discussion noting that many robberies (inaudible)
12 victim and that there is always a potential for injury
13 (inaudible) others even if the perpetrator is not directly
14 armed.

15 As to the questions of theft and forgery versus
16 the counterfeiting, the best I could say is that we were
17 clearly undecided. It seemed to us very difficult to
18 determine (inaudible) separate out the questions of the
19 character of the offender, and we had a group of experienced
20 criminal practitioners sitting around the table, and they
21 immediately assumed that the person who was engaging in
22 counterfeiting was likely to be a worse character than the
23 person who is initially forging checks (inaudible) order.

24 So that became a very difficult thing, and I know
25 you are going to have the same sort of problem (inaudible).

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1 As to the question of the linkage between type of
2 crime and a particular sanction, that was one area where we
3 did feel very strongly, although it was only just briefly,
4 and the feeling of the group that we had was that there
5 ought not be some (inaudible) linkage between the type of
6 crime and the type of sanction, and the feeling basically
7 was that to make such a linkage would improperly in some
8 cases prevent the judge from taking account of the
9 mitigating factors or other ameliorative aspects of the
10 crime that he normally and properly would, and we didn't
11 think that that was a particularly fine idea (inaudible).

12 With respect to the ranking of crimes, the
13 examples you gave, basically we sat down and each having
14 individually ranked them compared notes to see where we
15 stood, and we, not surprisingly, came up with a fairly broad
16 range in certain cases. Others produced a consensus almost
17 from the start, and I guess what I would like to do is very
18 briefly discuss those cases that presented difficulties for
19 us on the assumption that (inaudible).

20 We began by striking off the outliers, top and
21 bottom, among those rankings given and concluded that if we
22 could get to within two placement in this separation top to
23 bottom, we would call that consensus. I don't know if you
24 will be able to settle for that (inaudible), but that is how
25 we went about it. And those ones which, after striking off

1 OMTbur

1 the top and bottom, had a spread of more than two places
2 were (inaudible) toxic substances (inaudible) the murder,
3 the bank robbery, the assault on a ranger -- which
4 ultimately we did not rank, concluding we did not have
5 sufficient information about it in the description to
6 effectively place it -- the commercial (inaudible) in
7 obtaining federal funds.

8 Going specifically to the point you discussed, on
9 the toxic substances it seemed to us decisive that there was
10 no indication of human harm and, similarly, there wasn't any
11 indication in the description that we had a situation in
12 which there was irreversible damage. Clearly, there was
13 damage to the environment. Clearly, it was done for
14 commercial purposes. It was a corporate act, but it did not
15 seem from the description that there had been (inaudible),
16 for example, of the species or something like that
17 (inaudible). It was something that was ultimately curable
18 by money, and it was the feeling as a consequence that
19 (inaudible), depending on the circumstances.

20 The murder example you posed was the subject of
21 the sharpest discussion among our members. It was pointing
22 out that this is likely to have been processed as a state
23 crime in the ordinary course (inaudible), and it was the
24 belief by many of our group that murder was the highest
25 crime bar none (inaudible) should not be put first rank.

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1 There was an immediate disagreement on that
2 point, and the counter argument of course was that in the
3 federal system there are more severe crimes than murder;
4 namely, treason, espionage, or assassination of the
5 President, something of that order, and there had to be a
6 placement which would take account of that and allow even
7 more severe treatment by way of example for those crimes.

8 Having said that, it was still the feeling that
9 an actual murder had to be ranked very highly, and I think
10 our ranking (inaudible).

11 We did spend some attention on the question of
12 the assault on a ranger. Understanding that we (inaudible)
13 ranking, it was felt that if that represented a true
14 attempted murder, an intentional assault (inaudible), the
15 feeling that that should also have a very high ranking in
16 the scheme of things.

17 The bank robbery (inaudible). It would perhaps
18 give you a flavor (inaudible) New York when immediate
19 characterization of it was that this was not a good robbery,
20 and by that they meant that there was no gun, that the
21 amount of money was relatively low. Indeed, their feeling
22 was that as bank robberies go it was probably as low as a
23 bank robbery can get.

24 But nonetheless, more serious (inaudible) crimes
25 (inaudible) placement on that, again noting the fear

1 OMTbur 1 instilled in the victim, which may be very considerable
2 despite (inaudible) gun, and the obvious potential for
3 injury when a guard (inaudible) said stop (inaudible) run,
4 somebody gets hit.

5 The commercial fraud by the auto dealer,
6 odometers, it was a little bit of a puzzlement (inaudible)
7 out of New York as to why this might figure so prominently
8 in your scheme as being not likely in many cases to be
9 prosecuted as a federal crime at all. It was sensed that it
10 just wasn't that important in the scheme of things.

11 (Inaudible) with the New York sentencing group I
12 handed to counsel, a woman who was prosecuting the crime
13 (inaudible), and when she discovered that auto thefts were
14 regularly indicted by the state she was surprised, shocked
15 (inaudible) people who had stolen Corvettes and were
16 indicted despite the obvious value of cash to the Corvette.
17 A difference in geography, and I would suppose it is
18 possible that something like this (inaudible) different
19 parts of the country (inaudible).

20 The fraud by the college president, it would seem
21 to be for a good purpose in some respects, trying to save
22 his college, no apparent indication of (inaudible) to the
23 individual, but then again we had a substantial discussion
24 of this kind of thing occurring on a regular basis in some
25 places.

1 OMTbur

1 (Inaudible.)

2not too distant past in which a whole series
3 of schools had regularly put in false statements to extract
4 federal money.

5 But again the conclusion that the individual had
6 not benefitted from that, we put it down in the lower
7 category.

8 The firearm incident you posed to us was a puzzle
9 in some respects, and in part because of the lack of further
10 information, no evidence as to the nature of the
11 (inaudible), no indication of present intent as to the use
12 of the weapon, recognizing at the same time that in a crime
13 of this nature it may often be the case that all you have is
14 the firearm (inaudible) and no indication or certainly no
15 provable matter of intent. So that seems to figure. People
16 regarded it as relatively serious except again the fact
17 (inaudible) 410 gauge shotgun. There is something about a
18 410 gauge, and I don't know if you were picking a weapon for
19 criminal purposes (inaudible) typically to the 16 or 12
20 gauge which does a lot more damage (inaudible).

21 So that suggests to us that it was intended for
22 sporting and other purposes and that this was relatively
23 (inaudible).

24 The comment that we had overall looking at this
25 array of crimes that you quoted was one of regret, and

1 OMTbur 1 recognizing the extreme limitations of time and the
2 limitation of (inaudible), but a regret nonetheless that the
3 survey did not include some of the more prominent federal
4 crimes which are prosecuted (inaudible) serious fraud,
5 antitrust (inaudible) and what one of our members, a former
6 U.S. Attorney in the Southern District, characterized as the
7 middle America crimes which are prosecuted on a widespread
8 basis -- false statements to banks, for example, dire acts,
9 thefts (inaudible), postal fraud, and then, perhaps most
10 appropriate for today, tax evasion.

11 Those things seemed to us to be the kinds of
12 crimes that are going to figure on a regular basis in the
13 diet of any federal attorney's office, and it seemed to us
14 that reconsideration should be given to that and that those
15 things were more likely to figure in the great middle range
16 among the crimes that you had given us.

17 I would conclude with that. That was the central
18 lack we saw in this, but we do recognize obviously the
19 extreme limitations which you were working with.

20 I am happy to try and answer questions.

21 CHAIRMAN WILKINS: Thank you very much. Of
22 course, that was the questionnaire. The questions we posed
23 in the letter was merely primarily done to generate comment,
24 (inaudible) to some of those crimes that you mentioned
25 (inaudible) need professional consideration.

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1 You mention the attempt (inaudible) perhaps
2 attempted murder by a forest ranger. I wondered if you
3 would comment just generally about the relationship, in your
4 judgment, between the attempt to commit a crime and the
5 actual commission of the crime and how we should rank the
6 two; for example, attempted armed robbery being stopped by
7 alert police officers prior to the defendant's entering the
8 bank as opposed to the completed crime. In the scheme of
9 things, should we treat attempt just as seriously as the
10 bank robbery itself, or is it less serious, or how would you
11 compare the two?

12 This is the serious question you must answer, the
13 attempt to commit a crime as compared to (inaudible).

14 MR. WALSH: I understand the problem, and there
15 are some cases where the attempt (inaudible) completed
16 crime, such as conspiracy (inaudible), and you want to use
17 that opportunity to denounce that crime to the public.
18 Nonetheless, the feeling, I think, (inaudible) that the
19 completed crime is somehow (inaudible) even if (inaudible)
20 intelligence or alerting the officer, something like that.

21 I would say that the feeling among our group was
22 that it ought to receive some discount but not a very great
23 one, and that the completed crime would be much more severe
24 than the attempt if it is a crude attempt, and that is why
25 with respect to the assault on the ranger I think the

1 OMTbur 1 feeling among our group was that if this was truly a shot
2 aimed at or certainly with real forethought on the part of
3 the actor, then we put it very close to murder. The murder
4 itself in the scheme of things (inaudible) the accident that
5 occurred in a federal building, estranged husband, and
6 things of that order, and although it would be a federal
7 crime, it just didn't rank in the (inaudible), and assault
8 specifically on a federal officer such as (inaudible).

9 CHAIRMAN WILKINS: Would you rank conspiracy,
10 treat conspiracy the same way as attempts?

11 MR. WALSH: We did not discuss that particular
12 point, although I think the feeling generally was that it
13 will have to be regarded in much (inaudible). Essentially,
14 it is equivalent to that because again that may be
15 (inaudible).

16 CHAIRMAN WILKINS: (Inaudible) conspiracy or a
17 completed conspiracy.

18 MR. WALSH: I mean a completed conspiracy.

19 CHAIRMAN WILKINS: All right, thank you.

20 Any questions from other Commissioners on the
21 left?

22 VOICE: Well, I know (inaudible), comments that
23 maybe some people who don't know something you know, which
24 is that we have listed all these crimes here, 300 of them or
25 more, in this book, and I know that your organization is

1 OMTbur 1 responding to this more detailed list.

2 MR. WALSH: Yes.

3 VOICE: Which will include the security events,
4 the antitrust events, all the different ones you named, and
5 of course we all appreciate your putting in here, and I am
6 flagging -- I am glad that you would want to express views
7 on those other things because we have sent this not just to
8 your group but others, and there may be other people here
9 who are willing to do it who don't know about its existence,
10 and so there are other copies of this here, and it is simply
11 a very, very detailed list of -- which is in our
12 computer -- of all the different type of crimes there are
13 which we have classified and we are soliciting views on
14 people's opinions about how they should be ranked.

15 MR. WALSH: A fairly massive undertaking all by
16 itself (inaudible).

17 VOICE: Yes.

18 MR. WALSH: One thing that I might perhaps touch
19 upon. But when (inaudible) talked to us, we were made aware
20 that you were functioning at least for organizational
21 purposes on (inaudible), and our immediate concern went to
22 the question of fact finding.

23 Whenever (inaudible) response beyond the
24 statutory definition, you are going to be finding yourself
25 in a (inaudible) process, whether it is done in securing

1 OMTbur

1 (inaudible) conviction or (inaudible), and this whole area
2 struck us as perhaps one of the most problematic areas that
3 you would encounter.

4 (Inaudible.)

5 VOICE: Well, I hope that you will say something
6 about that when you respond because -- I mean, you may have
7 something you want to say right now.

8 One of the greatest problems is the extent to
9 which the offense for which the person is being punished
10 reflects the person's actual behavior and the extent to
11 which it should reflect the charged behavior, and my
12 impression is that those commissions that have gone into
13 this in the states have ended up always compromising that,
14 and there are some instances where it should reflect charged
15 behavior, and inevitably there are some where it will
16 reflect actual behavior, even if only, for example, this
17 person stole \$100,000 rather than \$5,000.

18 And precisely where that should be the one and
19 where the other is something I hope that you would address
20 in your responses to this and, in addition, the problem of,
21 if it reflects the actual rather than the charged behavior,
22 how does one find out what was the actual behavior?

23 MR. WALSH: That is precisely my point.

24 VOICE: Exactly. Well, any ideas that you have
25 (inaudible). I mean, there are various states that have

1 OMTbur 1 looked into that, where they leave up to the judge to find
2 disputed questions of fact on a more probable than not
3 standard, and then there are questions of the evidentiary
4 rules (inaudible).

5 So if you would like to say something about that
6 now, that would be excellent, and if not, I hope that you
7 will include comments on that in your comments on this more
8 comprehensive finding.

9 MR. WALSH: I can tell you what the experience we
10 have had in New York was.

11 VOICE: What?

12 MR. WALSH: Working on (inaudible).

13 But given the enormous number of plea bargains
14 which run through the system, it was felt that it was
15 virtually impossible to suggest that having an actual
16 factual adjudication in most cases and that necessarily
17 meant that (inaudible) conviction, which obviously
18 we have got a great deal of power in prosecuting. I think
19 that that is the balance we are striking.

20 How much of that (inaudible) applies here in
21 terms of what we give up or what will be not say before the
22 court.

23 (Inaudible.)

24 But that is a very delicate balance, and I don't
25 think (inaudible) resolved all (inaudible), and I expect

1 OMTbur 1 that we will try and make suggestions, suggest something on
2 that because it seems to us really the critical point
3 (inaudible).

4 VOICE: Have you ever had any experience with
5 forgers?

6 MR. WALSH: I have not personally.

7 VOICE: Of course, you put counterfeiters above
8 them. Forgery is a disease, incurable. A counterfeiter
9 might counterfeit a couple of items and might have a very
10 skilled talent, but once you catch him, well, he is pretty
11 well caught. But a forger goes on forever.

12 MR. WALSH: And the question is why should we
13 rank them --

14 VOICE: You said counterfeiter is more injurious
15 than a forger.

16 MR. WALSH: I think, sir, that it is the feeling
17 that the counterfeiting goes -- because he (inaudible)
18 currency (inaudible) has some affect much broader than
19 forgery which affects only (inaudible) particular incident.
20 Counterfeiting can undercut the entire system.

21 VOICE: Potential (inaudible).

22 MR. WALSH: (Inaudible.)

23 VOICE: You said about tax (inaudible).

24 MR. WALSH: Not that it didn't affect the public
25 (inaudible), sensitive to the fact that it was .

1 OMTbur 1 environmental funds and it is much more (inaudible). But
2 the feeling we had from the description given that there was
3 not an indication that human health in a direct sense
4 (inaudible). It was not like release of dioxin in a town
5 which had contaminated and completely obliterated the town.
6 It was something that from the description appeared to be
7 apparently visited upon the wildlife.

8 VOICE: Now, we are talking about pollution,
9 toxic substances.

10 Now on the amount of money. Two men go into a
11 bank one day to rob it (inaudible) \$100,000 there and walk
12 out with 10. The next town down the road, the robbers went
13 in and walked out with \$100,000.

14 Should the amount of money that they got relate
15 to the crime? They are after everything they could get.

16 MR. WALSH: I think in the circumstances as you
17 pose it the amount of money (inaudible) than the fact of how
18 they got it.

19 VOICE: (inaudible) same way.

20 MR. WALSH: Exactly, but I think that the
21 likelihood is that the theft of \$200,000 is likely -- will
22 attract (inaudible) attention and has more --

23 VOICE: No question about it.

24 MR. WALSH: -- there is more to be deterred in
25 the public's eye if people see that somebody has gotten away

1 OMTbur 1 with something. I think that that is an important
2 (inaudible).

3 VOICE: The failure to accomplish the maximum
4 amount justifies a lesser sentence?

5 MR. WALSH: I think it might be taken into
6 account, but in a minor way under the circumstances.

7 CHAIRMAN WILKINS: Any other questions?

8 VOICE: Mr. Walsh, you mentioned that there
9 was -- you would recommend no per se linkage between the
10 crime and the type of sanctions or the decoupling of the
11 crime and the sanctions.

12 Could you expand on that just for a moment?

13 MR. WALSH: Our thought was that -- and as I took
14 the question, or we took it -- we do not wish to see a
15 limitation, for example, in which you invariably (inaudible)
16 certain (inaudible) crimes that might be properly addressed
17 with a fine or supervision or something on that order. I
18 would suspect that there are certain crimes we would
19 probably in virtually every case wish to impose a sentence
20 of a particular type.

21 Fraud (inaudible) is unlikely to result in
22 (inaudible). At any rate, to try and put (inaudible)
23 situation (inaudible) as well as responsibility of
24 imprisonment, but the feeling was that you don't necessarily
25 wish to impose a sanction of imprisonment. There might very

1 OMTbur 1 well be some reason why it wouldn't be appropriate, and we
2 thought that your selection of other factors and (inaudible)
3 together might do that rather than (inaudible) that the type
4 of crime (inaudible).

5 VOICE: Actually, you (inaudible) characteristics
6 or characteristics of the environment would be important?

7 MR. WALSH: Well, I think that there was quite a
8 bit of concern (inaudible) about the offender
9 characteristics, and they are not all the same and they
10 shouldn't be treated the same. I think that that is part of
11 the task you have got before you.

12 (Inaudible.)

13 VOICE: Thank you.

14 VOICE: Counsel, is securities fraud a crime in
15 New York?

16 MR. WALSH: Yes, it is, sir. It violates the
17 Martin Act.

18 VOICE: I know it is the Martin Act, but also
19 there is a federal statute. But do you ever see it
20 prosecuted?

21 MR. WALSH: Yes, we do.

22 VOICE: Is it (inaudible) --

23 MR. WALSH: Believe it or not.

24 VOICE: -- to the extent that it exists?

25 MR. WALSH: I am not certain I would say how

1 OMTbur 1 extensive its existence could go, but as to whether it is
2 prosecuted, yes, it certainly is. It may not --

3 VOICE: (Inaudible.)

4 MR. WALSH: Yes. I would not say that prominence
5 (inaudible) federal securities prosecution is, but we would
6 not normally get into that level of activity prosecuting at
7 the state level. I don't think there is any question about
8 that.

9 But the Attorney General is active in prosecuting
10 securities fraud, even in my small upstate town.

11 VOICE: I am talking about the Southern
12 District.

13 MR. WALSH: I think that most of the securities
14 fraud of any consequence is probably prosecuted (inaudible).

15 VOICE: I think there must be any number of
16 security frauds every day (inaudible). Now, how can you
17 rectify that?

18 MR. WALSH: I am not certain I can tell you how
19 to rectify that, sir.

20 (Inaudible) prosecute those cases you can find,
21 and in fact you may find that you can't prosecute more than
22 a handful of them, you can't make a case on more than a
23 handful of them. Under the circumstances I would guess that
24 one, in fact, that you would be after is the deterrent
25 (inaudible) of the sentence imposed. So a prison term.

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1 A white collar crime like that may have, even if
2 it is of a relatively brief nature, a far broader deterrent
3 factor than some other sanction and be consequently more
4 useful.

5 CHAIRMAN WILKINS: Commissioner Baer?

6 COMMISSIONER BAER: Mr. Walsh, I would like to
7 refer back to your comments about the car thefts.

8 MR. WALSH: Certainly.

9 COMMISSIONER BAER: If I understood you
10 correctly, upstate New York considers car theft very
11 seriously, the New York City area not so serious.

12 Now, the question is: what are the implications
13 of that, assuming it is true, for this Commission, which has
14 to adopt guidelines across the nation?

15 MR. WALSH: When New York was working on a
16 sentencing body, its proposal (inaudible) said, well, there
17 isn't any proof of the disparity or whatever there exists,
18 it is probably a good thing. And I guess the fact that some
19 crimes are more seriously regarded in one place than
20 another, if you are going to promulgate a uniform set of
21 guidelines such that anything is going to be prosecuted in
22 the name of the United States of America and you are not
23 going to be prosecuting in the name of the United States of
24 America as modified by Southern Oregon or as people see
25 (inaudible). I think you are going to have to have

1 OMTbur 1 something that is seen to be fairly uniform across the
2 country.

3 That means that the standards which may be
4 modified by geography are going to have to give
5 somewhere, at least in my view.

6 COMMISSIONER BAER: So let me follow up.

7 Being a victim. Now, you live upstate New York
8 and I gather the citizens there consider it pretty serious
9 to have his car stolen.

10 MR. WALSH: Yes.

11 VOICE: In Manhattan it is not considered to
12 serious to have my car stolen?

13 MR. WALSH: I wouldn't suggest that it is not
14 considered serious, but my remark was only intended to
15 indicate that the likelihood of their being indicted in New
16 York City was substantially less than would be the case if
17 you were in upstate New York.

18 COMMISSIONER BAER: Yes, but putting yourself in
19 the shoes of the victim, the person who owns the car and has
20 it stolen, that victim is -- you know, no punishment.

21 I don't quite understand why --

22 MR. WALSH: I am certain that the victim regards
23 it as equally serious, and perhaps the point is that we
24 ought to arrive at a reasonable estimate of what the
25 seriousness of it is so the person who steals a car in

1 OMTbur 1 Southern Oregon or in Tijuana is treated approximately the
2 same. I think that is the omission and that the fact that
3 somebody steals a car in Syracuse as opposed to Manhattan
4 does not mean that one person gets a misdemeanor and walks
5 and the other one spends a year and a half in the state
6 prison, which is the situation as it exists presently.

7 CHAIRMAN WILKINS: What you are saying,
8 Mr. Walsh, is that regional perceptions of crime may somehow
9 explain disparity but it doesn't make it right?

10 MR. WALSH: I am not even certain I would go so
11 far as to say that explains it. I think there is an awful
12 lot more disparity in the results other than regional
13 differences, but I don't think that (inaudible) there is any
14 question that there are regional differences enter into it.

15 In our work we found that certain counties in the
16 state were far, far out of line with the rest of the state
17 because of a very few individuals sitting on the bench. You
18 could predict, and it was so strenuous that the strongest
19 efforts by the parole board to shorten the time served by
20 individuals serving in those counties did not bring them
21 into line with the state average. I suspect that in certain
22 (inaudible) areas you may find the same on a national
23 basis.

24 I wouldn't say it justifies it at all, in my
25 personal view, but this is not something our committee

1 OMTbur 1 discussed as to whether there might ever be justification
2 for regional differences or sufficient breadth of sentence
3 possible to allow for that, but I don't think (inaudible).

4 CHAIRMAN WILKINS: Thank you very much,
5 Mr. Walsh.

6 VOICE: Well, I have one statement about your car
7 theft.

8 If the FBI went through the same situation and
9 they found a lot of cases that should have been prosecuted
10 on some other basis for being (inaudible) and they weren't
11 car thefts at all -- they were what we would call joy
12 riding, just temporary. A fellow would pick up a car and
13 take it to a temporary space, and so on. Now, you could
14 say that is stealing it, but he didn't intend to permanently
15 appropriate it.

16 And I presume -- is that somewhat the basis of
17 your distinction, the distinction that is being made between
18 your community and some of those communities and some of the
19 others?

20 MR. WALSH: No, sir. I was thinking of Park
21 Avenue. I am sorry perhaps if I (inaudible). In the cases
22 I am talking about, you are talking about true theft, and
23 true thefts on the streets of New York City are likely not
24 to be regarded as seriously the first time in terms of what
25 the results by way of sanctions to the defendant as it would

1 OMTbur 1 be if it was upstate.

2 I am not speaking about a distinction between
3 theft and joy riding.

4 VOICE: You are talking about true theft, right.

5 MR. WALSH: Yes, sir.

6 CHAIRMAN WILKINS: Mr. Walsh, we appreciate not
7 only your testimony today, which was very informative, but
8 the responses that you and your association have previously
9 made, and we look forward to a continuing working
10 relationship with your association.

11 MR. WALSH: Thank you very much, Mr. Chairman.
12 We are pleased to help.

13 CHAIRMAN WILKINS: Thank you.

14 Our next speaker is a probation officer
15 representing the Federal Probation Officers Association,
16 Susan Smith.

17 Ms. Smith, we are delighted to have you with us
18 this morning.

19 I might add that Don Damley is here, the Chief of
20 the Probation Division of the Administrative Office of the
21 Courts, and, Don, I just want to say to you publicly how
22 much we appreciate the work that you and all of your
23 probation officers, including Ms. Smith, throughout the
24 nation indeed, have done already, and we are going to
25 continue to call upon you for information and opinions and

1 OMTbur 1 views and work product during our tenure here.

2 MR. DAMLEY: Thank you, sir.

3 CHAIRMAN WILKINS: Thank you.

4 TESTIMONY OF THE FEDERAL PROBATION OFFICERS

5 ASSOCIATION BY MS. SUSAN SMITH

6 MS. SMITH: You have the statement that I have
7 this morning (inaudible) here by the President of the
8 Federal Probation Officers Association. Because it is
9 brief, I would like to ask your indulgence to allow me to
10 read this.

11 CHAIRMAN WILKINS: Certainly.

12 MS. SMITH: Thank you.

13 I am Robert L. Simon, President, Federal
14 Probation Officers Association and Chief Probation Officer
15 of the District of Arizona.

16 I wish to thank Chairman Wilkins and all members
17 of the United States Sentencing Commission for this
18 opportunity to address the Commission on the question of
19 offense disparity.

20 The Commission's instant task is indeed
21 formidable, the genesis of which will (inaudible) the
22 federal probation officers to (inaudible) investigate,
23 evaluate, and recommend for a given individual or
24 organization charged with a criminal violation sanctions.
25 Even those probation officers (inaudible).

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(Inaudible) severity on a daily basis, they too experience sanctions by (inaudible) when it comes to ranking specific crimes and categories of crimes.

It has been said a serious crime is one that affects me, my family, or loved ones directly (inaudible) seriousness of crime (inaudible).

(Inaudible) criminal, including the severity of their crimes, are embedded in our (inaudible) institutions. These judgments are further colored by consideration of race, ethnic origin, socioeconomic status, geographic (inaudible), occupational (inaudible) host of other variables (inaudible).

Too often when we speak of crime we speak of legal categories and definitions (inaudible). Judicial sanctions (inaudible) resolution about what was done but rather how, when, where, and (inaudible). These variations have found their way into the penal code in a wide range of possibilities (inaudible) further compounds (inaudible).

For most Americans who only wish to be safe on the street and secure in their homes, violence and threat of violence is considered (inaudible) serious crime.

(Inaudible) degree of murder, voluntary or involuntary manslaughter, et cetera.

(Inaudible.)

The question of crime (inaudible) deal with its

1 OMTbur 1 outcome has driven so much (inaudible) after Adam and Eve
2 purloined the forbidden fruit. We are no closer to a
3 conclusive answer and our attempts at after-the-fact
4 resolution continue full circle.

5 Society dictates how its institutions will
6 address any given problem. We (inaudible) treatment
7 modality and are entering the realm of the just deserts
8 (inaudible), but these artificial and short-lived responses
9 to crime and the criminal fail for the most part to grasp
10 the reality that people want to be safe.

11 People rank severity of crime primarily on the
12 basis of injury and suffering (inaudible) conclusion
13 tendered by the U.S. Department of Justice (inaudible) 1985
14 national survey of crime (inaudible).

15 (Inaudible.)

16 Violation of public trust occurs after
17 (inaudible) organized crime involved. These crimes mandate
18 confinement with little or no regard for how the illegal act
19 is perpetrated.

20 The question of sanctions goes to the heart of
21 the security question, but when does legitimate judicial
22 discretion become disparity?

23 (Inaudible) both prosecutor and judge, which in
24 turn (inaudible) and accountability legitimately, reasonably.

25 (Inaudible.)

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1 The window of opportunity is open. That is
2 reexamination of sanctions and the (inaudible).

3 (Inaudible) establishing the priorities and
4 reaffirming the basic values (inaudible).

5 The Federal Probation Officers Association and
6 the 1,942 officers it represents appreciates this
7 opportunity to work for and with the Commission (inaudible)
8 in an endeavor to keep our feet on the ground.

9 Thank you again for allowing (inaudible). I will
10 be glad to respond to any questions that the Commission
11 members may have (inaudible).

12 CHAIRMAN WILKINS: Thank you very much,
13 Ms. Smith.

14 I wondered if your Association has done any
15 thinking about probation revocation. One of the
16 requirements we have under the law is to draft policy and
17 guidelines for probation revocation, and it strikes me that
18 this may be as difficult an area as the sentencing
19 guidelines themselves.

20 You go from one extreme where a probationer
21 commits a crime while on probation, and that may be an
22 easier decision to make as far as revocation is concerned,
23 but how about the probationer that moves from one residence
24 to another without notifying you or travels outside the
25 district without notifying the probation officer or fails

1 OMTbur 1 to make a monthly report -- those types of things? I won't
2 call them administrative, but at least they are noncriminal
3 in the traditional sense.

4 Has there been any thought about how we should
5 handle this problem?

6 MS. SMITH: I think probation officers
7 traditionally and daily give thought to that very question.
8 We have what we call general terms and conditions of
9 probation and have what we call special conditions of
10 probation which are imposed by the court for specific
11 offenses and specific offenders.

12 I think perhaps that what we are calling now as
13 the general conditions of probation (inaudible), and we need
14 to determine how applicable they are in this day and time to
15 the offenders that we are dealing with.

16 When we are talking about obeying all laws,
17 federal, state, and local, do we mean traffic violations?
18 Do we mean traffic violations? Do we mean running a stop
19 sign, do we mean having a bad exhaust on our car? What
20 exactly is meant by law violations?

21 (Inaudible.)

22 Oftentimes we see that there is a -- if not
23 disregard but an overlooking of the juvenile court process
24 and the orders that come out of the juvenile court
25 oftentimes (inaudible) orders that are in place, which are

1 OMTbur

1 legal orders, a violation of the state law (inaudible), and
2 we are overlooking that (inaudible).

3 I think perhaps that instead of having the
4 general conditions of probation that we have today that the
5 conditions of probation need to be revamped and in effect
6 tailormade to this offender.

7 At least one district that I am aware of is
8 looking very seriously at compiling (inaudible) conditions
9 of probation which they (inaudible) are starting to use in
10 that (inaudible).

11 (Inaudible) what is termed technical violation,
12 but in fact when you write them down and have them defined
13 and tell offenders that they are conditions of probation, if
14 they are terms and conditions of probation they should be
15 dealt with (inaudible) and not be given (inaudible).

16 CHAIRMAN WILKINS: It is a difficult problem
17 probation officers have, and you have a term of probation
18 and it is not complied with. What should our guidelines say
19 the court should do about it?

20 That is the issue. Of course, you recognize the
21 issue. But we hope that your association will give us
22 (inaudible). We are very interested in having your views.

23 Any questions of my right?

24 VOICE: Ms. Smith, as a probation officer you
25 have prepared some presentence reports? You have prepared .

1 OMTbur 1 presentence --

2 MS. SMITH: Yes, sir.

3 VOICE: Yes, okay.

4 In doing that, have you had any difficulties or
5 any problems ranking the offense severity according to the
6 United States Parole Commission guidelines, and, if so --
7 while you think about that -- and, if so, what suggestions
8 do you have to the Sentencing Commission so we can make the
9 probation officer's job -- I don't want to say a little bit
10 easier, but I mean more practical?

11 MS. SMITH: I don't believe your question -- if I
12 can answer your question (inaudible) -- I don't believe that
13 we have full information about the offense and that that
14 full information has been reported in the presentencing
15 report, that we would have difficulty in rating the offense
16 severity. If we had more information where we have a
17 problem (inaudible).

18 And if I could just deviate for just a moment, I
19 think I can speak for probation officers across the nation,
20 that we are certainly hoping that the presentence report
21 will be able to address the total offense severity
22 regardless of the conviction (inaudible).

23 VOICE: Will that prove very difficult for you in
24 your separation of the report, the determination of the
25 actual offense behavior?

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1 MS. SMITH: With my limited experience, I
2 initially began working in a large metropolitan area, Los
3 Angeles, and (inaudible), although it is designated a large
4 area (inaudible), and my experience (inaudible). I think
5 the more valuable the information we get, the more accurate
6 (inaudible).

7 We have to let the prosecutors and the agents
8 know why we need the information, what (inaudible), and they
9 can help us put together the (inaudible).

10 CHAIRMAN WILKINS: Any questions from my left?

11 VOICE: You have very interesting ideas and
12 testimony, and I wondered to what extent you are in the
13 process of making it practical.

14 As I look at the statute, it seems to me that the
15 intent of Congress vis-a-vis probation in the new law is to
16 make probation a kind of punishment, not simply a
17 rehabilitation but also aiming at certain conditions, such
18 as you have to impose a condition in the new law (inaudible)
19 restitution, community service, or day and evening stay in
20 jail, for example, confinement.

21 Well, has the Probation Association gone through
22 or is it able to go through the -- let's say -- 300 crimes
23 and tried to figure where and when in respect to each of
24 these alternatives, these alternative punishments if you
25 would like, might be practical or preferable?

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1 What I am thinking of specifically is we are
2 going to end up with a large number of crimes where the
3 appropriate punishment is prison, and there will be a large
4 number of other crimes and offenders where the appropriate
5 punishment is not prison. So that isn't the end of this.
6 That is the beginning.

7 And in trying to organize that beginning in
8 respect to the crimes where the person will not go to
9 prison, the probation officers who have this experience
10 could be -- will be, I would hope -- amazingly useful simply
11 going through each of them and saying, all right, very few
12 postal fraud defendants who are convicted in fact go to
13 prison.

14 Can you go through in an organized way and figure
15 out what should happen to them in terms of punishment
16 imposed by probation?

17 That is a question of your resources. It is a
18 question of your views of seriousness. It is a question of
19 your views of what is practical, and you have the
20 information.

21 I wonder if you have begun to address that
22 problem or if you can.

23 MS. SMITH: We have not as an organization
24 (inaudible), but I think (inaudible) even to a limited
25 degree (inaudible).

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VOICE: Commissioner Baer I think addressed it.

2

MS. SMITH: (Inaudible.)

3

CHAIRMAN WILKINS: You had a question

4

(inaudible)?

5

Thank you very much, Ms. Smith. We appreciate

6

you and what your organization has been doing. There is no

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question that probation officers under the guideline system

8

that we implemented (inaudible) will play a major role in

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making our system work.

10

Thank you very much.

11

MS. SMITH: Thank you.

12

CHAIRMAN WILKINS: Our next participant is Owen

13

Walker. Owen represents the Federal Public Defenders

14

Association.

15

I might say that this association, too, has been

16

most responsive to our requests for their opinions, input

17

and assistance, and we look forward to a continuing

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relationship with you, Mr. Walker.

19

TESTIMONY OF THE FEDERAL PUBLIC DEFENDERS

20

ASSOCIATION BY MR. OWEN WALKER

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MR. WALKER: Thank you, Judge Wilkins.

22

We, the Federal Public Defenders, on whose behalf

23

I am speaking today, appreciate this opportunity to address

24

the Commission (inaudible).

25

When we got your letter, Judge Wilkins,

1 OMTbur 1 requesting (inaudible) after all the various Federal Public
2 Defender offices around the country, we received responses
3 from most of them and we tabulated them and submitted to the
4 Commission -- and it probably just arrived yesterday here --
5 the results of all of our various views about the various
6 offices and our attempt to rank the crimes.

7 We found that overall there was a great deal of
8 consistency in the rankings of the various offices arrived
9 at of which crimes were the most serious, which were middle
10 level, and which were the least serious, with a few
11 exceptions, and those few exceptions were mostly cases in
12 which we did not really present what we (inaudible) group
13 that went through the same process.

14 For example, (inaudible) we varied all over the
15 lot because we didn't really know exactly what was going on
16 there, and so as a result we couldn't rank it.

17 The main considerations in the rankings of course
18 were things like violent (inaudible), the extent of the
19 planning, the level of the offenders involved in the
20 (inaudible), although that wasn't so much (inaudible), the
21 amount of money which was likely to be gained by the crime,
22 and things of that sort, (inaudible) trust, and other
23 factors which are pretty much taken into account on a
24 day-to-day basis by most judges and other individuals
25 involved in the sentencing process.

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I think if there is any overall conclusion from this exercise it is that the ranking of crimes is something which can be done, even by people that have very different philosophies about the criminal justice system, and even though we are all public defenders we certainly don't share the same views about the philosophy, the philosophy of punishment or indeed the length of punishment (inaudible) cases.

I think, however, another main point that we want to make is that even though it is possible to rank offenses in a way that a lot of people would pretty much agree with, we are strongly of the view that that should not be the end of the offense characteristics task, particularly in any given case. Ranking we see as only a starting point, and we feel that the guidelines should, after a rank is determined for a particular case, then go into the more difficult questions which the statute and certainly the legislative history requires the guidelines to consider -- such things as whether an offense was on the spur of the moment or after extensive planning, the level of involvement of an offender in the offense. If you have five people all convicted of the same crime, same series of acts, you run the scale from the person that organized the whole thing down to the person that committed one minor act to further the whole enterprise, and you simply cannot fairly sentence the two

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1 people or the five people in the same manner, and the
2 guidelines cannot in ranking crimes take into account the
3 level of involvement in an offense, for example, or the
4 amount of planning.

5 These have to be the subject, we feel, of
6 separate guidelines that really allow one to move around the
7 grid or whatever preliminary target the offense calls for,
8 and this is a matter which I am not sure that we believe
9 that even probation officers can do.

10 Once -- the question of judging the offender's
11 level of involvement in and/or amount of planning is a
12 matter of judgment, and that is something judges will be, we
13 feel, required to do, and we are not sure that -- we have
14 suggested in one of our papers allowing -- having a system
15 of more flexible guidelines which allow a case to be moved
16 around from the original target within a certain range
17 according to some of these more difficult to pin down
18 factors, and it is hard to do this in a manner which is fair
19 and which under the present system judges of various sorts
20 would all agree should be done.

21 In other words, I guess what we are saying is it
22 is very hard to put into writing results which a lot of
23 people would agree should take place in a given case.

24 Just for an example, to take the example of the
25 person purchasing firearms, that sounds -- we might have an

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1 initial picture of what that offense calls for when we first
2 read it, but that example, given other facts, could call for
3 very different sentences.

4 If the person was a member of some kind of
5 paramilitary, terrorist organization that was building up an
6 arsenal and was trying to buy any weapons he could get, that
7 act would call for a very severe sentence.

8 If it was -- and we have cases where people do
9 not even know that they have been convicted of a felony.
10 They know they have been convicted of a crime and gotten
11 probation, and then they still have the -- they possess the
12 firearm with a felony record not knowing that actually they
13 have committed a crime, and even though it sounds like a
14 serious crime to purchase it for it to be a felony,
15 possession of a firearm, or to lie on the statement,
16 sometimes these cases are not in fact as serious as they
17 might otherwise seem.

18 So this is just an example of how a particular
19 case runs -- could run the gamut from a very serious one to
20 one that is not serious at all, and it is difficult to
21 prepare guidelines that properly and fairly take that into
22 account.

23 Mail fraud is another example. Mail fraud is --
24 as everyone here knows, wire fraud is very commonly used in
25 the federal court, and basically it is a catchall charge

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1 which does not really describe the activity. Mail fraud can
2 be very, very serious, and even if with small amounts of
3 money involved, and other mail frauds, depending on the kind
4 of level of involvement, for example, or the amount of
5 planning, even with a great deal of money involved, it is
6 not a very serious offense.

7 I think the \$64 question that has been posed at
8 this point is how should the Commission compare the relative
9 seriousness of different kinds of crimes, and I think we
10 have -- I don't think that in the abstract that is as
11 difficult a task as it might otherwise seem, that it is
12 (inaudible) I think in the particular cases in the crime
13 guidelines is where the gravest difficulty lies
14 (inaudible).

15 VOICE: Do you want to submit a list?

16 MR. WALKER: I beg your pardon, sir?

17 VOICE: Do you want to submit a list?

18 MR. WALKER: Well, for example, the Parole
19 Commission guidelines, the present Parole Commission
20 guidelines -- now, this may be my own view, and I
21 shouldn't --

22 VOICE: We could go there, too.

23 MR. WALKER: I shouldn't speak for all of us, but
24 I don't have a great many problems with the actual ranking
25 of offenses in the parole guidelines. But the place where

1 OMTbur 1 the parole guidelines are devastating in particular cases
2 where they are not sensitive enough to take into account
3 what actually occurred, and I think that really is our theme
4 at this point.

5 Basically, our feeling is we are anxious to see
6 how the Commission ranks crimes, and we will certainly have
7 comments, as we do with particular offenses in the ranking.

8 VOICE: I mean, you have this list.

9 MR. WALKER: Well, I am not sure that -- yes, we
10 are going to work on that, although I am not quite sure what
11 the questions are that would be asked and whether
12 (inaudible).

13 But we will do that. But that basically is
14 (inaudible) our views at the moment on this particular
15 question.

16 CHAIRMAN WILKINS: Mr. Walker, in your past
17 statement you listed draft dodgers as the least serious
18 offender or offense of those that we had presented to you,
19 and I think primarily you said because the crime was
20 motivated perhaps by a political or moral or ethical
21 reasons.

22 Do you recall?

23 MR. WALKER: I am not -- I don't think we took
24 that view. At least, I wouldn't have taken that view. I
25 think that in the rankings we regarded it as in the lower

1 OMTbur 1 category.

2 CHAIRMAN WILKINS: Well, let me ask you, what
3 about tax -- the tax protester? Today is a good day, I
4 guess.

5 (Laughter.)

6 A fellow that says I am not going to file my
7 taxes because the government is using my money in an
8 unconstitutional manner, so I am not going to pay. Now, he
9 is doing that for what he perceives to be some political or
10 moral reason.

11 Do you think if we put significant sanctions on
12 that conduct that we would motivate the majority of people
13 who might otherwise pursue that course of conduct to comply
14 with the law and pay their taxes?

15 MR. WALKER: Well, I tend to doubt it. The few
16 tax protester cases that I have been involved in (inaudible)
17 I am not sure we are dealing with rational people who would
18 be deterred if the punishment were that much greater. On
19 the other hand, I don't for one minute suggest that tax
20 protesters shouldn't get a (inaudible). We can't have
21 (inaudible) society just marching to the tune of their own
22 drummer on April 15th.

23 So I think the matter has to be treated seriously
24 even though (inaudible).

25 CHAIRMAN WILKINS: Any questions on my left?

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1 VOICE: You have two very interesting points that
2 you raised, important ones. But one problem is the problem
3 of we will have a crime, let's say mail fraud, and that
4 label isn't sufficiently definitive to pick up the important
5 variations that might affect punishment. There are a number
6 of ways in which they might be picked up.

7 I gather that the State of Washington has
8 guidelines that specifically state a judge can take them
9 into account when he looks for aggravating or mitigating
10 features.

11 Another way to do it was what you were flirting
12 with. You know, you have several (inaudible). Another way
13 to do it might be to break down the offense into different
14 categories. Another way to do it might be to qualify, you
15 know, sets of sentences with qualifiers such as he is the
16 big cheese or a small.

17 Now, when you go through this, will you do that?
18 That is, will you give us your ideas as to which way -- and
19 you may not have specific ideas. You might say either --
20 when you think about the ways in which in particular
21 instances one might make these more sensitive and suggest
22 some.

23 MR. WALKER: Yes.

24 VOICE: I am not saying -- I mean, you may not
25 have the right suggestions. Neither may I and neither may

1 OMTbur 1 anyone, but I think it would be helpful to have the concrete
2 suggestions.

3 MR. WALKER: I think one problem is who is going
4 to use the rankings, and the problem is if you give to a
5 probation officer the task of deciding whether somebody was
6 the big cheese or not, it is going to make things very
7 difficult and there could be all kinds of arguments, and it
8 might be -- I think the way we see it as being done -- is
9 having the (inaudible) a definite system of easily
10 determinable effects done by the probation officer is to get
11 a target sentence or target spot in the guidelines and then
12 say that is where the target is, but, Judge, it is up to you
13 to decide on the more intangible factors.

14 VOICE: You can, or you can say, all right, it is
15 18 to 20 months for the typical person with this offense,
16 typical involvement, right, and, Judge, if you think
17 involvement is significantly greater than typical; i.e.,
18 master mind, then take that into account as an aggravating
19 feature.

20 Or you could say, and/or raise the offense, raise
21 the level, go into a different box.

22 Or if he was just somebody spur of the moment,
23 move it down, mitigating, or you might say go to a different
24 box.

25 And so I am just interested in getting you to

1 OMTbur

1 think in part which offenses one should do that for and
2 specifically how should we do it.

3 I don't know, you may be indifferent. I mean,
4 you may end up thinking, well, there is no obviously better
5 way to do it or worse way to do it, but I think it is worth
6 trying to looking at things --

7 MR. WALKER: Yes.

8 VOICE: And somebody out in the State of
9 Washington may know how that system is working there.

10 VOICE: Everybody is going to use this -- the
11 lawyer that defends the man in the initial incidence; the
12 prosecutor, trial judge, probation officer, right straight
13 down the line. Everybody is going to use this to enter
14 their calculations somewhere along the line.

15 MR. WALKER: I agree with you completely. It is
16 just now, as you know, the probation officer attaches to the
17 presentence report a parole guideline range, and it is a
18 fairly easy job to do comparatively and there usually isn't
19 too much argument about it, and it is a useful thing for the
20 judge to have.

21 But it won't be useful if the probation officer
22 has to take into account things which the probation officer
23 is not in a position to finally decide.

24 But I agree with you, the guidelines -- I think
25 we would like a system where we can in some way quantify

1 OMTbur 1 these intangible factors, such as level of involvement, but
2 leaving a certain amount of flexibility so that if the
3 numbers really don't fit the case that the judge can go even
4 further.

5 VOICE: But it isn't the probation officer that
6 can impose the sentence. It is the judge. He will look
7 over that probation report. If he doesn't agree with it, he
8 won't follow it.

9 MR. WALKER: I think that is right. It is --
10 maybe what the probation officer should do is come to a
11 final evaluation and say I have determined that he was the
12 big cheese, but there is going to be a lot -- so much
13 controversy about that among the lawyers and the
14 prosecutor.

15 VOICE: All probation officers have slants,
16 judges have slants, and they generally adjust to those
17 things when they come up.

18 MR. WALKER: But it is, I think -- I guess the
19 point of this exercise (inaudible) is to eliminate or reduce
20 these slants to the extent possible.

21 VOICE: No, it is to make it available to reflect
22 them to a reasonable extent, the extent that they are
23 reasonable.

24 CHAIRMAN WILKINS: Any questions to my right?

25 VOICE: Yes. Mr. Walker, I think all of us

1 OMTbur 1 agree that generally offenders should be held accountable
2 for their illegal behavior.

3 Could we sort of agree on that?

4 Then in your statement in a footnote you said,
5 sentencing judges should look only at the offense of
6 conviction, and then you went on and made a -- sort of
7 modifier -- and such other facts that are established in
8 accordance with the procedures proposed in the federal
9 defender position paper.

10 Now, I haven't read that, so I am not sure what
11 that is, but it sort of follows up the earlier discussion,
12 and you know.

13 MR. WALKER: Yes.

14 VOICE: I think it is -- I mean, you know, do we
15 want to look at what the person actually did?

16 MR. WALKER: I think that we --

17 VOICE: And should we hold him accountable for
18 what he really did. The truth.

19 MR. WALKER: By and large, we do want to do
20 that. However, there are problems if you just say that in
21 the abstract, I believe.

22 For example, let's say a person is charged with a
23 crime which has a higher punishment if it is done with a
24 weapon than if it isn't done with a weapon, which is
25 generally the case. Well, let's say armed bank robbery has

1 OMTbur 1 a different punishment from unarmed bank robbery. If the
2 prosecutor charges the defendant with unarmed bank robbery,
3 and then in the sentencing phase of the case says, well,
4 really, your Honor, he was using a gun and we just charged
5 him with unarmed bank robbery, it is actually armed bank
6 robbery, we don't think the guidelines should be allowed to
7 take into account the fact that actually a gun was used or
8 if the prosecutor so alleges.

9 And in this respect we adopt what we understand
10 to be the position or we urge the position that both
11 Minnesota by case law and Washington by statute seem to have
12 obtained.

13 On the other hand, for factors which the presence
14 or absence of which do not create a different crime, another
15 statutory crime, we think those factors have to be decided
16 in some cases by the judge; for example, the amount of money
17 involved. If the guidelines but not the statute creates a
18 difference between greater than \$50,000 or less than
19 \$50,000, we think that the judge will have to determine that
20 fact if there is a dispute, and we urge the use of the rules
21 of evidence and other fair procedures.

22 So to that extent and these other factors like --
23 that were involved -- if we are acting under duress or
24 something of that sort, we also believe that a judge after a
25 hearing from both sides should apply the rules of evidence

1 OMTbur 1 and should make a decision, and in this respect we think
2 that the statute offers a -- has to reform the present
3 procedures where the prosecutor will get up and say
4 something, the defendant will get up and say that the facts
5 are completely different, and the judge basically doesn't
6 have to make a decision. He can just decide what he wants,
7 which way his feeling is.

8 And so it offers an opportunity for a certain
9 amount of fairness in sentencing which didn't use to exist.
10 On the other hand, I believe none of us can deny the fact
11 that it is going to make sentencing in a great many cases a
12 very, very complicated process with all kinds of
13 opportunities for appeal, and many of us are rather worried
14 about the effect of this whole enterprise on the tort system
15 and even in its ability to process civil cases and other
16 court cases.

17 VOICE: Back to the bank robber for just a
18 second.

19 Can you imagine a prosecutor, when he has a case
20 where it is clear that the bank robber had a gun --
21 oftentimes it is not clear, but in cases where it is clear
22 -- I mean he pulled out the revolver and maybe there is a
23 photograph -- now can you imagine in a case like that where
24 a prosecutor for -- can you think of any reason why he
25 wouldn't charge robbery with a weapon?

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MR. WALKER: I can actually.

2

VOICE: You can?

3

MR. WALKER: I can think of reasons where, if

4

there was some doubt --

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VOICE: Well, there is no doubt.

6

MR. WALKER: Right.

7

VOICE: But can you still think of a reason where

8

he may not?

9

MR. WALKER: No, I can't.

10

VOICE: Cannot think of any.

11

MR. WALKER: Well, perhaps, but in the normal

12

case, if it is a clear case with a gun, he will charge a

13

gun. But if it is not a clear case and he has some doubts

14

about whether he can prove it, we certainly don't want to be

15

a -- and the present system offers a way of -- sort of a

16

back door.

17

VOICE: What about the same bank robber and

18

instead of one bank robbery there were 10 bank robberies,

19

everyone documented, he can be indicted on them, there were

20

surveillance photographs, you have the witnesses? There

21

were 10 bank robberies.

22

MR. WALKER: Well, that, as you know,

23

Commissioner, is one of the most difficult problems in

24

sentencing and even with the parole guidelines. The parole

25

guidelines have a rather artificial system of adding up

1 OMTbur 1 multiple offenses, so called, and that -- all I can say to
2 that is that that is a very, very difficult problem. I
3 think the parole guidelines attempt is a pretty good one,
4 but it is (inaudible).

5 VOICE: I am not interested in the parole
6 guidelines. I am interested in what we are going to do in
7 the future when a guy robs 10 banks and most of them, 95
8 percent of the cases are plea bargained. I mean, if you
9 believe that offenders should be held accountable, are we
10 going to hold them accountable? You know, if you really
11 did it, do we hold him accountable?

12 That is the question.

13 CHAIRMAN WILKINS: Mr. Walker, if you can solve
14 the issue of consecutive concurrent sentencing today, there
15 will be no Commission --

16 (Laughter.)

17 VOICE: Counsel, you may be the closest person we
18 are going to get to be able to answer the question as to how
19 you are going to get around the United States Attorney
20 charging the sentence and taking this -- imposing a charge
21 and thereby more or less sabotaging or not reflecting a
22 proper sentence that might be -- that a person might
23 consider proper.

24 Have you any ideas about that?

25 MR. WALKER: Well, one hears a lot about the

1 OMTbur 1 power of the prosecutor and oppression by the prosecutor.
2 But I am not perhaps as troubled by some of that as perhaps
3 I should be, but if the prosecutor can prove that somebody
4 committed 50 crimes, even though they are just 50 separate
5 telephone calls as part of one overall scheme, he has every
6 right to bring an indictment.

7 I do think, though, that the guidelines should be
8 able to reflect the fact that the actual behavior in a case
9 like that is similar to a case where a prosecutor charged
10 maybe five incidences of -- five separate acts of fraud but
11 that the scheme had been going on for the same length of
12 time, so that the sentence will end up to be the same.

13 In other words, I don't think you can just
14 multiply. If there are 50 fraudulent telephone calls, one
15 sentence by 50. Obviously, you can't, and the -- but some
16 of the factors like length of planning or the amount of time
17 devoted to the activity are the things that really should
18 resolve that or help resolve the disparity that might come
19 from different prosecutorial factors.

20 But it is similar to the question about multiple
21 offenses and how you treat those. If you can solve the
22 multiple offenses problem, you may go a good part of the way
23 toward solving whatever problem might exist from different
24 prosecutorial factors.

25 VOICE: Wouldn't you solve it by letting him

1 OMTbur 1 charge a representative group of offenses, say whatever was
2 involved -- car theft, bank robbery, mail fraud -- and us
3 give the judge enough latitude to impose a reasonable
4 sentence for what he had done, even though they had engaged
5 in some other criminal activity?

6 MR. WALKER: I think --

7 VOICE: Judges and juries sort of resent and you
8 don't get too good a results sometimes when you are bringing
9 54 indictment -- count indictments.

10 MR. WALKER: I agree with you completely, Judge.
11 I just think with the present Parole Commission guidelines
12 there really is not that much -- if one prosecutor charges
13 50 and another 10 counts for the same case, the parole
14 guidelines usually come out with largely the same result, I
15 would think.

16 VOICE: Well, I am talking about sentencing.

17 MR. WALKER: Well, and we would hope that the
18 guidelines would --

19 VOICE: Men on the Hill don't want us to let the
20 U.S. Attorney bypass these sentencing guidelines.

21 MR. WALKER: And I guess what I am saying is that
22 I think the parole guidelines don't let them do that, and I
23 would hope of course that your guidelines would not.

24 VOICE: That is too far down the line for the
25 fellows on the Hill. They want to avoid it at the outset.

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1 MR. WALKER: Well, I am not sure that this
2 Commission has the power to tell prosecutors what they can
3 and can't charge. I suppose the prosecutors can charge
4 every offense that he can prove, even if there are a
5 thousand of them.

6 VOICE: Or not prove or not charge any offense
7 that he doesn't want to charge, decides not to charge?

8 MR. WALKER: Right. I agree with that.

9 VOICE: That is the fly in the ointment.

10 MR. WALKER: Well, given the maximum sentences
11 which exist, I suppose there are instances where a
12 prosecutor could charge a misdemeanor with a low max for a
13 very serious crime, but then he is presumably doing it for
14 some rational reason, and if he isn't, I mean, there are
15 those procedures other than sentencing guidelines
16 (inaudible).

17 CHAIRMAN WILKINS: Thank you, Mr. Walker. We are
18 going to move on. I will tell you we do appreciate, again,
19 the work that you and your association have done, and we
20 look forward to working with you.

21 MR. WALKER: Thank you.

22 CHAIRMAN WILKINS: Thank you.

23 Our next participant is David Conover, who
24 represents the National Rifle Association. We are glad to
25 have you with us.

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1 TESTIMONY OF THE NATIONAL RIFLE ASSOCIATION

2 BY MR. DAVID CONOVER

3 MR. CONOVER: Thank you very much, sir.

4 I would like to just run over some highlights of
5 our written testimony and not give the entire thing. I
6 will be glad to answer any questions you may have later on,
7 especially about the three firearms incidents in your
8 (inaudible) questionnaire.

9 On behalf of the more than 3 million members of
10 the National Rifle Association, I thank you for giving me
11 this opportunity to contribute to your valuable efforts
12 (inaudible) purposes and objectives of our association, and
13 second among those purposes is to promote public safety, law
14 and order, and the national defense.

15 I wish to address sentencing and sentencing
16 procedures in three perspectives -- first, the armed
17 criminal and weapons of choice; second, the armed career
18 criminal and drug trafficking; and, finally, violators of
19 regulatory firearm laws.

20 Since 1958, the NRA has advocated mandatory terms
21 of imprisonment for persons who use firearms and other
22 weapons to commit violent crimes. The hard evidence from
23 states that support this public policy proves conclusively
24 the merit of imposing strict jail time on violent
25 criminals.

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1 Throughout the nation, mandatory penalties show
2 particular effectiveness in reducing predatory crimes like
3 murder and robbery that crimes research shows are most
4 feared by citizens.

5 While these strides in crime control are
6 significant, I submit that they are limited by targeting
7 firearms as the only crucial weapon carried by dangerous
8 criminals.

9 We would encourage this Commission to adopt
10 policy guidelines for judges and parole boards that take
11 into account the importance of minimizing the disparity in
12 sentencing between violent criminals who use firearms and
13 those who use other weapons.

14 Violence is a common denominator, but the tool
15 used to commit that violence should not be treated
16 selectively or focused solely on firearms, as federal law
17 currently mandates.

18 Second, the effectiveness of mandatory penalties
19 on armed career criminals and drug traffickers must be
20 weighted. The mass of evidence indicates that if armed
21 career criminals who commit vastly more than their share of
22 serious crimes are subjected to mandatory penalties, dozens
23 of crimes per year will be prevented.

24 The importance of adding armed drug traffickers
25 to those subject to mandatory terms of imprisonment in the

1 OMTbur 1 new federal law is clear. Drug trafficking is a crime which
2 disproportionately involves the federal government.

3 Most violent crimes are state offenses and such
4 criminals comprise the bulk of state prisons. That is not
5 the case with drug traffickers, who represent a relatively
6 small percentage of state felons but a relatively large
7 proportion of federal prisoners.

8 The increasing federal role in trying to curtail
9 the problem of drug trafficking and the crimes associated
10 with the business justifies stringent penalties for armed
11 drug traffickers.

12 In any consideration of mandatory penalty
13 legislation it must be noted that these provisions can only
14 be effective to the extent that they are requested by
15 prosecutors and imposed by judges. It is incumbent on this
16 Commission in our estimation that you encourage a sentencing
17 policy and guidelines which call on judges to be faithful to
18 the law regarding mandatory penalties.

19 Finally, the NRA derives a sharp distinction
20 between mandated jail terms of those violent criminals that
21 pose a threat to society and those individuals who commit
22 technical violations of regulatory firearm laws. Judicial
23 discretion and leniency may be called for when dealing with
24 persons who have committed minor, victimless, technical, and
25 paperwork violations of federal gun laws. In general, we

2 OMTbur 1 oppose stringent or mandatory sentencing of persons whose
2 only transgression was to carry or transport firearms in
3 violation of federal, state, or local law.

4 For an example of this, Massachusetts adopted a
5 mandatory prison term for carrying a firearm without a
6 license. The result, the Bay State has seen its violent
7 crime rate skyrocket and its homicide rate near a national
8 trend, but its prisons incarcerate persons who had never
9 before committed crime and who were not arrested attempting
10 to commit a violent crime.

11 Indeed, the most recent egregious case involved a
12 citizen who used an unlicensed firearm in self-defense and
13 now faces a one-year mandatory jail sentence. Authorities
14 had previously refused to act against the man's antagonist
15 despite threats the citizen had received from his assailant,
16 a man with a police record.

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1 -- had received from his assailant, a man with a
2 police record.

3 The State Supreme Court recently upheld that
4 sentence for carrying, under the Bartley-Fox Mandatory
5 Sentencing Law, although the use of the ground was found by
6 the jury to be justifiable self-defense, saying that before
7 the days of the mandatory one-year sentence, the special
8 circumstances involving the accused could be reflected
9 reasonably in the sentencing. That option is no longer
10 available.

11 The mandatory penalty provision was imitated in
12 New York, and now a subway employee working in a system
13 where courts have ruled the police have no obligation to
14 protect citizens from violent crime, faces a potential
15 mandatory penalty for carrying a handgun with which he saved
16 his life from violent assault inflicted by two robbers.

17 Although carrying a firearm without a permit was
18 not on the Offense Seriousness questionnaire sent out by
19 this Commission, when it appears in Justice Department
20 surveys of perceived offense seriousness, the public at
21 large tends to rank it as relatively inconsequential.

22 We urge this Commission to establish a policy and
23 guidelines with regard to technical violations of the
24 federal gun laws.

25 Congress is currently considering the Firearms

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1 Owner Protection Act which, if passed, would make it
2 necessary to prove that violations of the federal gun law
3 were willful for many of the technical, paperwork violations
4 of the law, which would reduce some of the offenses to
5 misdemeanor level.

6 I hope that reform legislation passes. It would
7 not, however, entirely solve the problems faced by gun
8 owners.

9 Beside the mandatory penalties for committing
10 violent or drug-trafficking crimes with guns, most of the
11 offenses possible under the Gun Control Act, whether felony
12 or misdemeanor, would remain malum prohibitum rather than
13 malum in se offenses.

14 We believe that sentencing guidelines should be
15 aimed at swift and certain punishment for serious, violent
16 and dangerous armed criminals, but at a policy of leniency
17 for technical, paperwork and malum prohibitum violations of
18 law regarding firearms acquisition, transfer, transportation
19 and disposition among the generally honest gun owners of
20 this country.

21 Thank you very much.

22 And I would like to add that I was pleased to
23 hear Mr. Walker and Mr. Walsh express reservations about the
24 question regarding the individual with a prior felony record
25 attempting to buy the shotgun. That tends to be the main

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1 fellow bought d with regulatory firearms laws, is that they
2 catch those individuals, as Mr. Walker indicated, who are
3 not aware that they have a prior felony conviction, who have
4 a relative old felony conviction and have since lived
5 basically law-abiding lives. They catch those individuals,
6 but they do not affect the hard-core, violent criminals that
7 should be the target of such laws.

8 CHAIRMAN WILKINS: Well, that is a common federal
9 offense, a felon in possession of a firearm, as you know.

10 MR. CONOVER: It is, unfortunately, an offense
11 that is rarely prosecuted on top of other crimes, however.
12 You rarely see an armed robber with a prior conviction also
13 tried for possession of the firearms.

14 CHAIRMAN WILKINS: That's correct. Because most
15 of the prosecutors feel with the armed robbery charge, the
16 possession of the firearm, piling in significance to that
17 major charge.

18 But what about the fellow who has a state felony
19 conviction, housebreaking, and he goes into the pawn shop or
20 he goes to the local K-Mart, and he buys a pistol? And he
21 fills out the forms, and of course, he must falsify by
22 saying he does not have a record. And of course, the
23 computer spits him back out, and they go pick him up.

24 99 times out of 100, you'll never be able to
25 prove -- at least, the FBI could not prove AGF, that this

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1 fellow bought it for the purpose of committing a crime.

2 And usually, the defendant can explain a reason
3 why, self-defense or 410 shotgun, rabbit hunting. How do we
4 view this? Or shouldn't we make a difference between a
5 pistol and a shotgun versus an automatic weapon, or is there
6 some distinction to be made there?

7 MR. CONOVER: Well, that was one of the problems
8 I had with one of the earlier coments that -- Mr. Walsh
9 saying that the nature of the firearm was such that he did
10 not believe that it was a crime gun or something along those
11 lines.

12 We would prefer not to draw distinctions between
13 firearms, and we would prefer that the convictions or
14 charges result from actual criminal activity and that
15 leniency, or at least a high level of discretion on the part
16 of individual judges rule, when the offense is only the
17 regulatory firearms violation.

18 CHAIRMAN WILKINS: Any questions to my right?

19 VOICE: I had a question about the NRA's position
20 on the seriousness of, say, a robbery with or without a
21 weapons. I mean, would you summarize evaluation of the
22 differential seriousness, when a weapon is used in a crime
23 and when a weapon is not used?

24 MR. CONOVER: In general, any dangerous weapon or
25 weapon with which the offender could inflict serious bodily

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1 harm, we would view as much more serious an offense than an
2 unarmed robbery.

3 Now in the written testimony, we refer to the
4 Georgia statute, which covers all deadly weapons. And we
5 look at that as a very good example of a mandatory
6 sentencing law which applies to a wide range of of weapons
7 which may be used to inflict harm.

8 VOICE: So I were to summarize, my understanding
9 of your position is that, while you would deemphasize the
10 seriousness of these, what you call "technical violations,"
11 you would focus on violations using weapons --

12 MR. CONOVER: Oh, yes, the misuse of weapons.

13 CHAIRMAN WILKINS: Any questions from over there?

14 VOICE: Since I am from Massachusetts, I tend to
15 react a little -- I don't agree that our gun control law has
16 led to an increase in the murder range, but --

17 MR. CONOVER: I didn't mean to imply that.

18 VOICE: But the -- I'll leave that aside.

19 Also, you realize, for our purposes, all --
20 everything we do is mandatory, in a sense. And in another
21 sense, it's not mandatory. We have fixed sentences, but the
22 judge will be able to go outside the fixed sentence for
23 aggravating or mitigating circumstances. And that is going
24 to be true for all the offenses.

25 So with that in mind, it seems to me, you've put

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1 your finger on a rather good point.

2 With the gun control -- not the -- with the
3 registration offense here. You lie about a prior felony.
4 In some of the cases -- the cases which I've seen on appeal,
5 if you look at the presentence reports, the ones that were
6 brought, these people were probably people involved in a
7 serious gang. They might have had a long history of very
8 undesirable unactivity, and they were caught for this.

9 On the other hand, sometimes, as you point out,
10 it could be some poor guy who just made a mistake once.

11 MR. CONOVER: Exactly.

12 VOICE: All right. Now, since both are possible,
13 how do we, in the guideline, reflect that difference?
14 What's your idea? I don't expect you to be answer that. I
15 think it's a difficult question, but I would be interested
16 in having your thoughts about it.

17 MR. CONOVER: Well, I'm not sure we can give you
18 an answer, but I can say that the mandatory, such as the
19 Bartley-Fox or the Dodge-Carey --

20 VOICE: Well, that isn't up to us, you see.

21 MR. CONOVER: I understand that, but you can set
22 a precedent, and that is the wrong way to go about it,
23 because you do not allow the judge to make those kind of
24 determining factors on whether there's some previous history
25 of violence, or that the individual is essentially a

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1 law-abiding citizen, who is caught up in this net.

2 In terms of that, I think that -- in terms of the
3 regulatory, which do not involve an actual criminal offense
4 or during the commission of some crime, that there should be
5 a wide range of discretion on the part of the judge.

6 Now in terms of carrying, using, transporting
7 during the commission of the crime or in a conspiracy to
8 commit a crime, in those cases, we believe a mandatory
9 should kick up, because those are clear-cut cases.

10 CHAIRMAN WILKINS: Thank you very much.

11 We appreciate your appearing today, and we look
12 forward to working with you in the future.

13 Mr. Alvin Bronstein. Mr. Bronstein represents
14 the American Civil Liberties Union.

15 We are delighted to have you with us. We
16 appreciate the work that has gone into the responses that we
17 have already received from your organization.

18 TESTIMONY OF ALVIN BRONSTEIN, ON BEHALF
19 OF THE AMERICAN CIVIL LIBERTIES
20 UNION - NATIONAL PRISON PROJECT.

21 MR. BRONSTEIN: Thank you, Judge. Members of the
22 Commission.

23 Unlike the previous speaker, I represent slightly
24 in excess of a quarter of a million members, only three of
25 whom own firearms.

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1 (Laughter.)

2 All of three being early 17th century muskets.

3 (Laughter.)

4 Let me briefly summarize my written testimony,
5 the focus of which was that we, I think, have to look at the
6 elements or issues that go into the particular offense in
7 establishing offense severity rather than the cold facts.
8 The best illustration of that is in my own office, where I
9 circulated the Commission's questionnaire. We got great
10 disparity on a couple of the offenses, because people were
11 outraged by a particular offense, the estrange husband going
12 into a federal building and shooting his wife, without
13 thinking it through and looking at the elements.

14 Those elements, as we see them are the number of
15 persons that are actually injured or potentially injured.
16 Therefore, the organized crime head, the heroin importer,
17 have the potential for great injury to a great many people.

18 Rank them high.

19 The estranged spouse, the Social Sercurity
20 forgery, don't cause injury to a lot of people. Great
21 injury to one person but not to a lot of people.

22 On that element, you rank low.

23 The degree of personal gain involved.

24 Again, in organized crime, you have corrupt
25 officials. Great personal gain.

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1 Rank high.

2 The person who gives a false alibi, illegal
3 camper, apparently -- apparently on the facts, no personal
4 gain involved.

5 For that element, you rank low.

6 Are there multiple elements?

7 For example, most of the people in my office
8 ranked the bank robber without the weapon, who was a \$10,000
9 robber, higher than the bank embezzler, who was also a
10 \$10,000 robber.

11 I see another element in the latter. It's not
12 only a violation of the law, in terms of robbing a bank of
13 \$10,000, but a violation of personal trust. Second
14 element.

15 I would rank that (inaudible) high.

16 CHAIRMAN WILKINS: You would put the embezzler
17 higher?

18 MR. BRONSTEIN: Yes, sir.

19 Are there -- what is the possibility of
20 achieving general deterrence?

21 And that was a very trick thing, because,
22 generally, I don't believe in general deterrence, except the
23 data that I've seen, mostly in Europe, which suggest that in
24 two areas, we can achieve general deterrence.

25 One, which has no application to this, is drunk

1 LIVEbw 1 driving, can work.

2 The other, which does, and that is economic or
3 white collar crime. There is data that you can achieve
4 general deterrence with the degree of thought that goes
5 into the economic crime. That is possible, when you write
6 that more severely.

7 The bank robber who goes -- the street criminal,
8 the estranged spouse. There is really no possibility of
9 general deterrence. That doesn't involve the same kind of
10 thought process.

11 So that -- so that particular element, you rank
12 low.

13 The likelihood of repeated criminality without a
14 severe sanction, individual deterrence, if you will.

15 Again, the economic criminal, the organized
16 crime, and if they get away with it, they go on and on and
17 on.

18 The estranged spouse, the draft evader. There is
19 no likelihood of repeating that without or with a severe
20 sanction.

21 So for that purpose, you rank it low.

22 The element that is most difficult to define and
23 which I consider the most important, and that is, does the
24 offense constitute a threat to the fabric of our society,
25 generally or sort of a general lawlessness?

1 LIVEbw

1 I disagree with a lot of people that street crime is the most
2 serious thing facing our society. I just don't believe it
3 threatens the fabric of our society. It changes some
4 behavior. It is serious in this country, and we need to do
5 a lot about it, but I don't see that as threatening as the
6 corrupt official.

7 VOICE: What about around here, where you can't
8 go in certain areas?

9 MR. BRONSTEIN: Well, that changes habits and
10 behavior. It doesn't create, in my mind, a fear that our
11 society is collapsing. If I hear about a -- excuse me,
12 judges(?) -- judge who takes a bribe or a high government
13 official or a corporate official that commits an act of
14 lawlessness, that I find very serious, because it creates an
15 atmosphere, a feeling that it's okay to break the law,
16 because, after all, look, those people do it, why not
17 everyone else?

18 That's not what happens when somebody breaks into
19 20 liquor stores in Southeast Washington. People don't
20 think, well, anyone can do it, because they won't get away
21 with it. They think those people will be punished.

22 They don't think the high corrupt official will
23 be punished.

24 VOICE: You can go in areas in this town, and
25 they will be selling dope like playing cards.

1 LIVEbw

1

MR. BRONSTEIN: Yeah, but I don't think the

2

person who is selling the dope on the street --

3

VOICE: Any person that goes in there is

4

susceptible to some involvement.

5

MR. BRONSTEIN: That's right.

6

VOICE: Those are serious people. Serious

7

criminals, congregating in certain areas.

8

MR. BRONSTEIN: That's true, but I don't think

9

that the person on the street engaged in selling heroin

10

threatens the fabric of our society. The person who's

11

bringing it in, the perhaps corrupt officials who are

12

allowing it to come in, they are threatening.

13

VOICE: Under our law, the principal is liable

14

the same as the other guy.

15

MR. BRONSTEIN: Well, we're not disputing what

16

our law is. I am telling you what the elements ought to

17

be, in my opinin.

18

I think that those acts which generate in the

19

public mind a feeling that anyone can get away with crime

20

because high officials do it, those, I think, are very

21

threatening.

22

If I may be presumptive for a moment, let me

23

share some admonitions with you. I think one of the things

24

you have to keep in mind is that deprivation of liberty is

25

an enormous exercise of state power. Prison is harsh. It

2 LIVEbw

1 is often counterproductive, and we know it is costly.

2 There are other democracies in the Western world
3 who recognize that as a matter of policy. The Scandinavian
4 countries in their statutes say, we recognize that a prison
5 is a harmful sanction. Therefore, we will use it
6 parsimoniously.

7 I think the Commission ought to keep that in
8 mind.

9 Imprisonment -- and scarce prison beds is a
10 scarce resource -- ought to be utilized for the people who
11 really deserve it. People who injure large numbers of
12 people.

13 VOICE: Don't you recognize a difference between
14 comparing us to the Scandinavian countries? I come from
15 Minnesota, where we also compare everything to
16 Scandinavian.

17 (Laughter.)

18 VOICE: And --

19 MR. BRONSTEIN: (Inaudible) with Scandinavian --
20 Minnesota has a greater predominance of German ethnics than
21 they do Scandinavian.

22 VOICE: (Inaudible) more Germans than Swedes.
23 More Germans than Norewegians, but not more Germans than
24 Swedes and Norwegians.

25 (Laughter.)

1 LIVEbw

1 MR. BRONSTEIN: Of course, you cannot make all
2 comparisons. They are a smaller country. They're not as
3 homogeneous as they used to be. But there are things they
4 can learn from us. Their pretrial detention is outrageous
5 compared to ours. They have no presumption of innocence.

6 And there are things we can learn from them. And
7 that's all I'm suggesting.

8 It seems to me that, except for those people who
9 we can clearly identify as meeting the serious criteria, we
10 ought to reserve imprisonment and try other sanctions.

11 The last thing I want to say is that don't expect
12 to come up with a perfect system. If you set that as your
13 goal, it will be very frustrating.

14 We don't live in a perfect society. If we did --
15 or a perfect world. If we did, we wouldn't need prisons in
16 the first place.

17 I don't know what the answer is for many people,
18 other than prisons. I can't come up a better answer for
19 you.

20 Don't expect perfection. I think if you are
21 guided by a sense of justice, a sense of equity, a sense of
22 fairness, a sense of reality, you'll do a good job, which
23 hopefully, will be a mode for the rest of the country.

24 If you have any questions, I'll be --

25 CHAIRMAN WILKINS: Thank you very much.

2 LIVEbw

1

COMMISSIONER CORROTHERS: Mr. Chairman?

2

CHAIRMAN WILKINS: Go ahead.

3

COMMISSIONER CORROTHERS: A couple of questions

4

back to the case involving the husband who shoots the wife.

5

I was concerned that there was no mention of the

6

fact that it was a public building as compared to the

7

privacy of their own home, so to speak.

8

Would you have differentiated with your ranking,

9

had the shooting occurred in the home or was that

10

considered?

11

MR. BRONSTEIN: I would have, and I have to admit

12

that I didn't consider that factor.

13

COMMISSIONER CORROTHERS: I thought you didn't.

14

MR. BRONSTEIN: It came out in my staff's

15

post-ranking conversations. Someone pointed out, did you

16

forget that this person going into the public building could

17

have injured other people?

18

COMMISSIONER CORROTHERS: Right.

19

MR. BRONSTEIN: I forgot that element.

20

COMMISSIONER CORROTHERS: I could see that that

21

was totally not there.

22

MR. BRONSTEIN: The other thing that was

23

interesting was that people immediately assumed -- the women

24

in my office immediately assumed that because it was a

25

husband killing a wife, that there was an element of the

2 LIVEbw

1 abuse of women involved --

2 COMMISSIONER CORROTHERS: I could see that that
3 would --

4 MR. BRONSTEIN: -- and admitted that they would
5 have felt differently in ranking it, if it had been -- the
6 estranged spouse had been a woman that shot the husband.
7 And I think that's something that will have to be
8 considered.

9 But you are right. I neglected to look at the
10 public feature of it.

11 COMMISSIONER CORROTHERS: One other comment, is
12 that having been a prison warden, I agree with you that the
13 deprivation of liberty is, in fact, the most serious
14 sanction. And you already said that you didn't have the
15 answers, in terms of what the other sanctions ought to be or
16 the options.

17 I would just stated from a personal perspective
18 that I certainly would be interested in your organization
19 giving some thought, in fact, to those options and that at
20 such time in the future when we have a hearing addressing
21 that, that we could deal with that.

22 MR. BRONSTEIN: I think you may have slightly
23 misunderstood me, or I didn't make it clear, Commissioner
24 Corrothers, that I can -- certainly will provide a range of
25 other sanctions. What I was trying to say is that a
26 substitute for prison, I don't know what the answer is.

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2 LIVEbw

1 For those people that we want to sort of really
2 protect society from, I don't know what the answer is, other
3 than prison, but for those that don't need imprisonment,
4 there are a range of sanctions, some of which the Federal
5 Government is already using -- fines, restitution, halfway
6 houses, probation.

7 COMMISSIONER CORROTHERS: I am not sure that we
8 are, in fact, using all of the options that are available,
9 and I am not sure that there can't be suitable -- well,
10 options from the point of a better protection of society
11 than what we have.

12 MR. BRONSTEIN: That's true.

13 COMMISSIONER CORROTHERS: And so I would
14 certainly be interested in your organization looking at
15 options in terms of, from a protection of the public
16 standpoint and options that would, in fact, reflect
17 punishment rather than what we have currently.

18 MR. BRONSTEIN: We certainly will be doing that,
19 and I have indicated to Commissioner Baer, who heads the
20 Subcommittee on Alternatives, that we will be compiling
21 advice to put to Commissioner Baer's subcommittee.

22 CHAIRMAN WILKINS: Commissioner Block.

23 COMMISSIONER BLOCK: Yes. I want to return to
24 this question of seriousness, because maybe I don't
25 understand what you mean by "society," when you claim that

1 LIVEbw

1 violent crime is not a threat to the fabric of society.

2 I'd like you to expand on that a little bit
3 further. I guess -- it's hard for me to understand how --

4 MR. BRONSTEIN: What I was talking about is the
5 individual criminal act. The person who shoots somebody on
6 the street. That is a serious offense, but I don't think it
7 is threatening to the general fabric of our society, the
8 same way that the Under Secretary of Defense accepts a bribe
9 or a high law enforcement official accepts a bribe to cover
10 something up. I find that much more threatening in a
11 general sense, because it creates the feeling that we really
12 have no laws in this society, because, look, here are
13 respected people who are violating the public trust, who are
14 undermining our system of law. The people who are supposed
15 to uphold the law.

16 The street criminal, I just don't see in the same
17 light. I don't think when people stop and think about it,
18 seriously, carefully, feel the same way. We react
19 immediately and emotionally to the street criminal. That's
20 a horrible crime. It is a crime that usually is on the
21 front page of the tabloids or even, you know, The Washington
22 Post. Carried on the third page is another kind of story,
23 but that is the one that I think people really worry about.

24 COMMISSIONER BLOCK: Let me return to that. It
25 seems to me that -- and I am only doing this intuitively,

1 LIVEbw

1 that if you have criminals loose, and you have no security
2 of life and property, the government officials seem to me to
3 be superfluous at that point.

4 MR. BRONSTEIN: I don't think our society is like
5 that. I mean, we have a lot of predators out there. I
6 believe that you can walk in most parts of this city and
7 every other city in this country without a great deal of
8 fear, as long as you exercise a reasonable amount of
9 caution.

10 COMMISSIONER MC KINNON: Not at nighttime.

11 (Laughter.)

12 MR. BRONSTEIN: I do it, Judge McKinnon, and I
13 think it is more in the --

14 COMMISSIONER MC KINNON: There are places here at
15 nighttime, you'd want protection.

16 MR. BRONSTEIN: I've lived in the city for 14
17 years now. I have not changed my behavior just from fear of
18 being mugged or assaulted.

19 COMMISSIONER MC KINNON: Well, I'll tell you the
20 general impression is that you should be feared -- that you
21 should be afraid. That's what people generally say in this
22 town.(?)

23 MR. BRONSTEIN: Well, I think that is part of the
24 mythology that we have perpetrated on the public, that is,
25 that those are the things we really have to worry about and

1 LIVEbw

1 not worry about the problems in the very highest places.

2 COMMISSIONER MC KINNON: With the killing rates
3 on the streets here every day?

4 MR. BRONSTEIN: Which are going down all the
5 time.

6 COMMISSIONER MC KINNON: Well, they were high
7 enough to begin with.

8 (Laughter.)

9 MR. BRONSTEIN: And they are still too high. One
10 killing, a killing a year is too high.

11 COMMISSIONER MC KINNON: Yes.

12 MR. BRONSTEIN: And you know, I'm not trying to
13 say that the crime problem is not serious. It's very, very
14 serious.

15 VOICE: Do y u think these headlines that you
16 mentioned contributed to this misguided perception?

17 MR. BRONSTEIN: I think so. I mean, it is like
18 the media reporting a person who is out on parole committing
19 -- or on a work release program -- committing an offense.
20 And that is all the story talks about. They don't tell you
21 in the story, the way most other Western European
22 publications will, that -- in the second paragraph -- that
23 983 other people went through this program without
24 committing and offense.

25 COMMISSIONER BLOCK: Isn't it true, though, that

1 LIVEbw 1 the single largest cause of death among young blacks is
2 homicide?

3 MR. BRONSTEIN: That's right. And if --

4 COMMISSIONER BLOCK: And that's not a problem?

5 MR. BRONSTEIN: -- the previous speaker's
6 organization would ease up a little, we could something
7 about that.

8 (Laughter.)

9 Canada. Canada abolished the death penalty and
10 simultaneously established very rigid gun control 14 years
11 ago. The rate of homicides has gone down every year since.

12 CHAIRMAN WILKINS: Commissioner Nagel.

13 COMMISSIONER NAGEL: Is it your position that if
14 we fix the sentence for a spouse murder at probation or
15 suspended sentence, that would have no impact on the
16 behavior of others? Is that it?

17 MR. BRONSTEIN: That proposition, although I
18 don't think that would be the appropriate sanction, I think
19 a person who takes another person's life ought to be given
20 some -- some part of the harshest sanction we have. I think
21 that person ought to be imprisoned for a relatively short
22 period of time, to make the statement that he cannot, in our
23 society, solve your emotional problems by killing someone.

24 COMMISSIONER NAGEL: But if you set it a
25 suspended sentence --

2 LIVEbw

1 MR. BRONSTEIN: But I don't think -- whatever you
2 did -- whatever you did, I don't think would have any effect
3 on others, because I don't think people think about
4 sanctions when they are going through that kind of emotional
5 crime of passion we've just contemplated.

6 VOICE: Would you say a short term for murder?

7 MR. BRONSTEIN: For that kind of murder.

8 VOICE: For what we might typically call
9 manslaughter. Is that what you're referring to?

10 MR. BRONSTEIN: All right(?)

11 VOICE: This was first degree murder.

12 COMMISSIONER BREYER: Mr. Bronstein, I know you
13 have considerable experience with -- in working with people
14 in prison -- in prisons, in general. And I am really
15 addressing this question to you, but also other people who
16 have testified and who are likely to testify.

17 I'd like you to think about it -- you may have no
18 answer now -- to about what sources of information we turn
19 to when we eventually rank these 300 or so crimes in this
20 book in order of seriousness.

21 Now I can think -- I want to be certian we don't
22 leave something out. And I can think of seven different
23 sources we are turning to. I mean, we will turn to public
24 opinion as expressed in yours and other people's answers to
25 this type of questionnaire and the Justice survey and

1 LIVEbw 1 newspaper surveys that Wolfgang -- Professor Wolfgang
2 surveyed several.

3 That is just one category.

4 We will have the rankings of specific crimes by
5 groups who have worked and have considerable experience, as
6 you do, in different areas of law enforcement.

7 That's two.

8 We looked at model penal code rankings.

9 That's three.

10 We will look to maximum and minimum in the
11 individual statutes set by Congress.

12 That's four.

13 We looked at the parole guidelines.

14 That's five.

15 We will look to actual time served now in prison,
16 as determined by surveys, with the help of the probation
17 people who will get us some of this information.

18 That's six.

19 And we will look to relevant state experience.

20 That's seven.

21 All right, somehow having looked to that, we will
22 then eventually have to make our rankings.

23 So while I don't expect an answer now, I want you
24 and other people to realize that we have those seven areas
25 in mind, and you may be able to think of an eighth specific

1 LIVEbw 1 source of information, or a ninth or a tenth, in which case,
2 you may produce it for us.

3 You may have an answer to that right now or you
4 may not.

5 MR. BRONSTEIN: I'd rather reserve on that,
6 Mr. Breyer and get back to you.

7 COMMISSIONER BREYER: Right.

8 COMMISSIONER MC KINNON: I want to say this, just
9 generally. It is generally considered that the loss of
10 baseball in the nation's capital is due to the fact of its
11 location.

12 MR. BRONSTEIN: Well, I don't know. I haven't
13 followed that controversy, Judge. I stopped being a
14 baseball fan many years ago. I prefer basketball now

15 COMMISSIONER MC KINNON: To follow our prior
16 discussion.

17 MR. BRONSTEIN: But I don't see -- why do we
18 still have a hockey team that has risen to great heights.
19 We have a football team, and we have a basketball team.

20 COMMISSIONER MC KINNON: One's in the daytime and
21 the other one isn't in the same place.

22 (Laughter.)

23 MR. BRONSTEIN: I'm not an expert on that. I'll
24 take your word for that.

25 CHAIRMAN WILKINS: Thank you very much for

1 LIVEbw

1 assisting us today. We look forward to working with you.

2 We're going to take just a ten-minute break at
3 this time. At 10 minutes after the hour, we'll start back.

4 (Recess.)

5 CHAIRMAN WILKINS: Our next participant in this
6 hearing is the Rev. L. William Yolton, representing the
7 National Interreligious Service Board for Conscientious
8 Objectors.

9 Rev. Yolton, we appreciate your appearance here
10 today. I note that you notified us that you have a chart
11 that you wish to be included with your written testimony.

12 REV. YOLTON: Yes.

13 CHAIRMAN WILKINS: Let the record show that chart
14 was just delivered to me, and I have distributed it to all
15 the other Commissioners, as well as a copy has been
16 delivered to the reporter, and it will be made a part of
17 your testimony in this record.

18 REV. YOLTON: Thank you, sir.

19 CHAIRMAN WILKINS: Thank you.

20 TESTIMONY OF REV. L. WILLIAM YOLTON ON BEHALF
21 OF THE NATIONAL INTERRELIGIOUS SERVICE
22 BOARD FOR CONSCIENTIOUS OBJECTORS.

23 REV. YOLTON: I am a Presbyterian minister and
24 trained in the field of traffics(?). And I am now the
25 Executive Director of the National Interreligious Service

1 LIVEbw

1 for Conscientious Objectors.

2 I will summarize the written testimony.

3 Our organization represents the principal
4 religious bodies in the United States on the narrow issues
5 of conscientious objection and selective service practice.

6 Basically, the position of the National
7 Interreligious Service Board has been opposition, in
8 general, to the conscription law, but I think probably we
9 are capable of responding to what we think, from a secular
10 point of view might be feasible in terms of administering
11 the law as it now stands.

12 As we see it, little is accomplished by
13 incarceration of those who object by reasons of conscience
14 to participation in wars.

15 Would rehabilitation amount to changing your
16 beliefs because of prison violence, but then you would do
17 violence?

18 On the contrary, the experience of conscientious
19 objectors of one sort or another over the years has been, in
20 World War I, 17 dies in prison. At other times, there has
21 been very repressive treatment of such prisoners. They're
22 not the popular ones in jail.

23 And at other points, however, they have been the
24 source often of change within the prison system, sometimes
25 to the difficulties of the prison system, in terms of

1 LIVEbw

1 leading work stoppages or efforts to change the rules inside
2 the prison, because, for the most part, the conscientious
3 objector does not see that they will do their own time,
4 which is the standard rule inside the prison system that
5 each person does his own time, but in fact, they are
6 concerned about the situation of others.

7 So that very often, the leaders, a person of the
8 movement for prison reform, leaders, a person of the
9 movement for prison reform after they get out of jail are
10 the persons who have been conscientious objectors, as is the
11 case now in several major prison reform movements(?).

12 It is our opinion that the finding of the
13 sentencing judge as to sincerity ought to be a significant
14 factor in the sentencing procedure.

15 In general, the person who is since in objection,
16 whether it be on the qualifying grounds in the present
17 statute or on other grounds, probably will not benefit at
18 all from incarceration. That person might more usefully be
19 engaged in service that they've pledged themselves to in the
20 society. So that, for instance, Allan Thomas, the brother
21 of Norman Thomas, who was one of those convicted draft
22 violaters in the First World War, ended up being one of the
23 leading specialists on the cure of venereal disease. So
24 that there is this pattern of persons who have been involved
25 in these issues, who, in a sense, dedicated themselves in

1 LIVEbw 1 one way or other to service in society. They don't see
2 service simply in terms of two years in the military
3 service, but, in fact, of a religious devotion to a lifetime
4 of service.

5 So that we see that these persons probably would
6 be assigned, perhaps within the range of the sentencing
7 severity to probation during that time in some meaningful
8 service in the society.

9 On the other hand, we do recognize that there are
10 those who commit violations of the Selective Service Act
11 purely on selfish reasons. And that determination is not
12 often easy to find on the basis of the trial record, because
13 the lay character of selective service procedure and the
14 failure to provide due process or counsel along the way
15 means that you have a very mixed up product by the time you
16 get to the end. And there is no opportunity for the courts
17 to review, on the basis of fact, whether or not this person
18 is a conscientious objector, whether they are, in fact,
19 properly treated.

20 Britain, for instance, found in the Second World
21 War that they could accept, through a tribunal proceeding,
22 which had counsel present, the adjudication of all
23 conscientious objector cases, assigning some to no duties at
24 all in the society -- they were the absolutists -- and
25 assigning others to some form of public service during that

1 LIVEbw

1 time.

2 They accepted all categories of conscientious
3 objectors, not only just as our statute provides, those who
4 opposed to participation in war in any form, but also what
5 we now call "selective objectors," that is, those who have a
6 just war principle and did object to particular wars.

7 So that Britain was able to accommodate that
8 within their society, and I think, probably our society
9 could too, on the basis of a sentencing judge's
10 determination of severity.

11 As we see it, the incarceration of conscientious
12 nonresistant persons like the conscientious Mennonite,
13 serves no particular purpose. Their function would be to
14 return to society and continue in their peaceful agrarian
15 pursuits.

16 And for this reason, we think that, as we
17 approach a new draft law process, that we expect that we are
18 going to have more persons opposed to this draft law itself.
19 The modifications have been made administratively by this
20 Administration will probably mean that upon the institution
21 of a draft law in the future, we will once again have a
22 flood of persons who are unable to cooperate even with the
23 registration process.

24 So already in the chart, I've shown the 19 of the
25 20 prosecutions. We just had a new prosecution this year

1 LIVEbw 1 for nonregistration.

2 And these include now, traditional peace church
3 people. They used to not do this This is a new phenomenon
4 in their perception of the use of the Selective Service
5 System itself as a part of the war apparatus. And this
6 perception will probably increase the numbers of person who
7 are objectors to the Selective Service's process.

8 Changes in the administration of Selective
9 Service eliminating many of the due process rules that had
10 been built in will also mean there will be many more persons
11 objecting to the system itself. Increasing contact with the
12 military, which is part of the new system, will also mean
13 the traditional objector will find it difficult to
14 cooperate.

15 So I suspect that with the institution of an
16 active draft, we will again have arise a number of persons
17 who are conscientious objectors or objectors in some way to
18 the operation of the Selective Service. 1971, it was the
19 largest single category of prosecustions by the Justice
20 Department. So that we think that this, once again, will be
21 a problem, should it be necessary to return to an active
22 draft.

23 I have no problems with the grading of the
24 offenses that have been discussed by the successive
25 revisions of the proposed Federal Penal Code, and thiis

1 LIVEbw 1 is Felony B and Felony E and Misdemeanor A.

2 Obviously, there is a different circumstance in
3 wartime, a different circumstance when there is a peacetime
4 draft operating, and still a different circumstance now when
5 there is only a registration required.

6 At this moment, the sentences, as they are
7 administered by the Parole Board, are running about four
8 months maximum. They are treating it as a period of six
9 months penalty, and with good time, people are getting out
10 at four months.

11 I think that probably for much of the time that
12 we will need the Selective Service System, for many
13 infractions, this would be the maximum.

14 There is one particular problem, which I mention
15 in my written testimony, is the problem of they are
16 infractions by Selective Service personnel themselves. They
17 are infractions by Selective Service personnel themselves.
18 The penalty has been so draconian, that the Selective
19 Service System and prosecutors have dropped charges against
20 Selective Service personnel.

21 Were the grading to be adjusted and specification
22 adjusted to such a low level that it would not be a
23 significant penalty for such persons, you might have a
24 deterrent to their continuing in the abuse of the process.

25 Now we know of one case where Selective Service

1 LIVEbw 1 went in an dissolved an entire local board. That was their
2 remedy for dealing with what otherwise would have been
3 demoralizing to the whole system.

4 So that I think that there could be some
5 distinction between the types of offenses within the system,
6 some distinction between whether a person has refused
7 induction or simply has failed to report and address. Same
8 penalty.

9 There ought to be some kind of distinction
10 between the types of offense under the Military Selective
11 Service Acts.

12 And finally, of course, I think that probably the
13 extreme ones, even in wartime than are necessary.

14 The Soviet Union, which is now engaged in war in
15 Afghanistan, has a statute which allows for two years
16 incarceration for offenses against their constriction.

17 South Africa, which, in 1983, for the first time
18 instituted conscientious objection as a right, has an
19 offense -- has a punishment of up to six years, but they've
20 only had sentences so far, one month and one year.

21 So that it seems to me that our sentence level is
22 much higher for selective service violations than anywhere
23 in the rest of the world. Certainly, much higher than
24 Western Europe.

25 So I would hope that there would be a general

1 LIVEbw 1 reduction in the length of sentence, and taking account of
2 the practices as it has actually existed within the
3 sentencing process and trying to level out what has
4 probably, for Selective Service, been the greatest disparity
5 of sentencing of any of the crimes in the middle(?) of the
6 Code.

7 CHAIRMAN WILKINS: Well, thank you very much.

8 Any questions to my right?

9 (No response.)

10 Any questions to my left?

11 VOICE: How do you think it should work -- what
12 do you think we -- how do you think we should categorize
13 these, for purposes of sentencing the conscientious
14 objector?

15 REV. YOLTON: I would assume that if you once
16 decide that this person has a serious --

17 VOICE: He has a conscientious --

18 (Simultaneous voices.)

19 REV. YOLTON: -- then I would say, keeping the
20 grading in mind for equity with other persons --

21 VOICE: Right.

22 REV. YOLTON: -- they should be put on a
23 probationary sentence, and that is the question of diversion
24 from the criminal justice, from out of the prison system.

25 • VOICE: To include community service, you --

1 LIVEbw

1

REV. YOLTON: That's right.

2

Now my assumption is that they are willing, for the most part to do community service.

3

4

VOICE: And they are willing to engage in community service.

5

6

REV. YOLTON: Yes. Several of those who have now been sentenced, have been engaged in community service.

7

8

VOICE: Now what are these offenses? Just signing?

9

10

REV. YOLTON: At this stage, the offense -- some of them have not been willing to supply -- willingly supply the information; however, that is obtainable.

12

13

In the case of Charles F., he was unwilling to sign the card. He was willing to supply all other information which was available. Most of them -- of 18 of the 20 that have been indicted, they have been public about their refusal to register for the draft. They've been public about who they are; their Social Security numbers are known; they have not concealed their addresses; they've written letters to the President and to their congressman and to general attorney(?).

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VOICE: They've been somewhat advocates of others not doing the same, haven't they?

23

24

REV. YOLTON: It depends. Some have; some have not.

25

1 LIVEbw

1 VOICE: Yeah.

2 REV. YOLTON: Schlossberg, a religious objector,
3 has been very quiet about his. So it varies a great deal as
4 to whether or not they've been advocates of others doing
5 it.

6 VOICE: That ought to call for some
7 additinal penalty, don't you think?

8 REV. YOLTON: Well, I have a question as to
9 whether they advocate others breaking the law. That's one
10 question. The Act itself provides for punishment of those
11 who aid and abet. There is a provision for that, but if it
12 is simply free speech, as in the case of Spock and Coffin,
13 who opposed the war and opposed the draft system that
14 supported it, it seems to me that to use the Selective
15 Service law to infringe upon free speech and suppress
16 dissent in the society, is a gross misuse of Selective
17 Service.

18 VOICE: Even during a war?

19 REV. YOLTON: Even during a war.

20 As a matter of fact, Professor Johnson at Rutgers
21 has written a whole book on just war, and it just come out
22 from Yale University Press. And he argues that there ought
23 to be provision, even in our society for selective
24 objective, because this is a test of sensitive consciences
25 within the society of the acceptability of that particular

1 LIVEbw 1 wa and its prosecution.

2 VOICE: Of course, I'm not talking about the
3 conscientious objector per se but his going on the stump
4 during a war. He is promoting, in fact, other people to
5 join him.

6 You do not see that as an aggravating factor to
7 the Act?

8 REV. YOLTON: I would say that you have to
9 separate that completely. You have to ask whether or not yo
10 wish to infringe upon free speech.

11 Thoreau, obviously, would be jailed much longer
12 than he was for not paying his taxes, because he was
13 advocating that the Mexican War was an unconstitutional
14 war and his taxes used for that war were improperly being
15 administered.

16 So, yes, I would argue that there should be
17 complete separation in the use of the Selective Service Act
18 as free speech(?).

19 VOICE: So you would not utilize it as an
20 aggravating factor, is what you're saying?

21 REV. YOLTON: No, I would not. My feeling is, if
22 you feel deep enough about your convictions being about the
23 wrongness of participation in war, certainly, it ought to be
24 a part of what you are publicly willing to express.

25 VOICE: Uh-hum.

2 LIVEbw

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VOICE: And if that were the case, the problem

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would be, what -- how -- are you going to put all the

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Mennonite preachers in jail?

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VOICE: A part of our system, the criminal

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justice system that we must create is to utilize aggravating

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and mitigating factors with all offenses.

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My question to you was, in regard to this

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offense, would you see that as an aggravating factor? Would

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you see any factor be aggravating and/or mitigating?

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REV. YOLTON: Oh, I would say, certainly, and

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aggravating factor is always the encouragement of people to

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use deceitful means to obtain exemption. This abuse is much

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greater, in terms of persons who deceived the government

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about their exemption and deferment possibilities than those

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who opening said "I am opposed to participation in the

16

war."

17

CHAIRMAN WILKINS: Thank you very much.

18

VOICE: Just a minute.

19

CHAIRMAN WILKINS: Yes.

20

VOICE: Lincoln also said that "Do you mean to

21

tell me that some person that advocates desertion, I can't

22

touch the air on his head, but the man that deserts, I have

23

to shoot him?"

24

REV. YOLTON: It seems to me, this is one of the

25

problems of civil liberties in a wartime situation.

1 LIVEbw

1 VOICE: Now we're talking about -- we're not --
2 we're talking about your problem, your conscientious
3 objector. He doesn't only work on -- the militant one not
4 only works on some people who haven't signed up yet or who
5 were going to sign up, maybe, but don't, but he also works
6 on people who are in the service.

7 Now we had them here, I sat on the case, where
8 they were running what they called "coffee houses." You get
9 the personnel in and induce them to desert.

10 Now is that to be winked at?

11 REV. YOLTON: The question as to whether people
12 are directly aiding and abetting or whether, in fact, they
13 are, themselves expressing free speech about the situation.

14 VOICE: Well, they're aiding and abetting and
15 they're --

16 REV. YOLTON: There was widespread dissent within
17 the society about the Vietnam War.

18 VOICE: It's all -- it's all --

19 REV. YOLTON:(?) We never would have gotten out.

20 VOICE: It's all speech, and all speech is free.
21 But the consequences are pretty severe sometimes.

22 REV. YOLTON: Let me -- James Luther Adams has
23 done a study of dissent in Nazi Germany.

24 Nazi Germany had free speech. The only
25 difficulty is, you could not associate to exercise your

1 LIVEbw

1 free speech. You could stand on a street corner and say
2 whatever you wanted, but you could not organize with others
3 to advocate that position.

4 VOICE: That's like Hyde Park.

5 REV. YOLTON: But it seems that this stage, I
6 think one of the things about America is that you can, in
7 fact, organized with others to express dissent in the
8 society, and that we have to look at the question as to how
9 great the danger is in time of war, in order to decide how
10 much limitation freedom of speech there will be.

11 VOICE: Did you give the statistics during the
12 war on conscientious objectors? How many there were?

13 REV. YOLTON: 3000 that were imprisoned.

14 VOICE: How many?

15 REV. YOLTON: 3000. The statistics are in
16 there. Not the number of total conscientious objectors. In
17 fact, that's not possible for us to get that number
18 completely.

19 VOICE: How many?

20 REV. YOLTON: 3000 were imprisoned.

21 VOICE: Imprisoned.

22 REV. YOLTON: For draft law violations. Most of
23 them conscientious objectors.

24 VOICE: Did any of them go back into the service
25 after they got out?

LIVEbw

1 REV. YOLTON: There were a few instances of such
2 cases. I'll give you a prime example of someone just going
3 back --

4 VOICE: If you need one, I can give you one
5 myself.

6 REV. YOLTON: Max Kampelman is an example of a
7 conscientious objector who's gone back and leading the
8 negotiations in disarmament. A Morman(?) conscientious
9 objector.

10 VOICE: I gave a blue jacket three months in the
11 brig, and when he came out, he walked over and he says, "I
12 made a mistake," and he shipped out.

13 REV. YOLTON: No, there's no question but what
14 there are persons who are in the military who make a
15 decision.

16 David Fletcher, who is a Quaker physician, who
17 was serving in the armed forces at the time of the invasion
18 of Grenada. And what he saw there made him a conscientious
19 objector, and he became a Quaker out of that. At the
20 moment, we're still trying to get him out of the military.

21 CHAIRMAN WILKINS: Thank you very much,
22 Rev. Yolton. We appreciate your comments and all the solid
23 work that went into the submissions that you made.

24 REV. YOLTON: Thank you.

25 CHAIRMAN WILKINS: Paul Kamenar represents the

LIVEbw

1 Washington Legal Foundation.

2 We are delighted to have you with us.

3 TESTIMONY OF PAUL KAMENAR, WASHINGTON LEGAL
4 FOUNDATION.5 MR. KAMENAR: Thank you, Mr. Chairman, members of
6 the Commission.7 My name is Paul Kamenar, and I am Executive Legal
8 Director of the Washington Legal Foundation.9 I will just briefly summarize my testimony. I
10 submitted along with it certain other exhibits.11 The Foundation is a public interest law firm that
12 has about 200,000 members nationwide. We devote a
13 substantial amount of our resources to promoting the rights
14 of crime victims rather than the rights of the criminals.
15 We think that they certainly have enough rights in society
16 as it is, and there's been certainly not much attention paid
17 to the rights of the crime victim.18 While we believe that government has a
19 fundamental duty to protect society's citizens from violence
20 from others -- I think that Commissioner Block had it
21 exactly right a few witnesses ago, when he said, in essence,
22 that if society can't do that, everything else is
23 superfluous.24 We also believe very strongly in the fundamental
25 principles of punishment as regards to deterrent and

LIVEbw 1 retribution.

2 We have a court watch program, where we monitor
3 lenient sentences by judges around the country, and it is
4 really a said commentary that we even have to be here
5 today. In essence, if the judges were doing their jobs
6 properly, we wouldn't have to be sitting around deciding
7 what crime is more serious than other crimes.

8 Congress has made that decision in terms of what
9 the sentencing decision should be. Unfortunately, the
10 judges across this country have not been sensitive to
11 victims' rights, and you have now mandatory sentencing in
12 many cases by state legislatures, recognizing this fact.

13 A couple of examples real quick, we have in our
14 testimony.

15 Right here in the District of Columbia, a man
16 broke into a house, shot a woman in the head three times
17 with a gun, blew her brains out, and the Chief Judge of the
18 District of Columbia sentenced the man to weekends only in a
19 halfway house for a year.

20 Now that was sort of comparable to the suggestion
21 on the hypothetical about somebody shooting his estranged
22 wife in a federal building. In this case, the woman turned
23 out to be his estranged girl friend.

24 But that is irrelevant from our point of view. A
25 human life was viciously taken. The man pleaded guilty.

LIVEbw 1 VOICE: Did he qualify for welfare?

2 MR. KAMENAR: No, he did not. As a matter of
3 fact, he had a government job and was making about \$30,000 a
4 year, and it was through our Foundation's efforts that got
5 the man fired from the Defense Department, because he was
6 still back in his job during the week drawing federal tax
7 dollars for his salary with a murder conviction on his
8 record. And there is some regulations that no one knew
9 about until I dug them out that allows a convicted felon to
10 be fired from a government job.

11 And in essence, I would think that's probably
12 more aggravating than the one of coming into a public
13 building, in a sense, because a public building is open to
14 the public. A private home has an other societal interested
15 state. In fact, when you go into that home, you are
16 violating two laws. One, breaking and entering. When you
17 enter a dwelling for a felonious purpose, that in itself is
18 burglary in many states, and to the actual murder, there is
19 a more societal interest in protecting the privacy of one's
20 home, and -- although I would say both of them deserve the
21 most serious punishment, both the federal building
22 and the private home.

23 The other example was a child molestation that
24 occurred at a federal facility at West Point. The man
25 molested at least five kids, pled guilty. It was his

LIVEbw 1 second convicted offense, and a federal judge sentenced the
2 man to probabtion, and as part of his so-called "therapy" or
3 whatever, he was ordered to live in the area, where he could
4 be integrated into society again.

5 Meanwhile, the major whose son was molested,
6 contacted me -- what can we do about this, because he's
7 threatening other people in the neighborhood.

8 It shows that our whole system is breaking down,
9 and I think for us to sit around here and decide whether or
10 not a first degree murder is more serious than rolling back
11 odometers on a car, really, I think that the system is so
12 bad that that's not going to cure it. It's already beyond
13 repair in many cases. I think, again, what we need to do is
14 to focus again on the deterrent aspect.

15 We believe, unlike the ACLU, that deterrence
16 strongly is effective for street crime, and if you don't
17 believe that, I suggest you have a fine for burglary rate
18 in line with a \$10 parking ticket, and what the incidence of
19 that crime go up.

20 Obviously, as the cost of crime goes up, you're
21 going to have the incidence of crime going down.

22 The ACLU talked about the fabric of society. I
23 don't think people lock their doors at night fearing that
24 someone is going to take a \$10,000 bribe the next day at the
25 Department of Defense.

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(Laughter.)

That's absolute nonsense.

They're worried about the street crime out, about going out in the street and having the children being able to go to school and not be mugged and molested. That's the real fabric of society that we're worried about. And we think, again, the focus of this Commission should be not, towards what's called in some your literature, the "just desert model," but rather the deterrent model. The "just desert model" has a nice ring to it. I thought it meant retribution, retribution being that society expresses more (inaudible) to the crime, but it's defined as a actual harm by the crime and, two, the moral culpability of the criminal.

Now the actual harm, I'm not sure whether you really intended that. Obviously, if a terrorist plants a bomb in an airport and the police catch it in time, no one was injured.

Does that mean that, since no harm's done, so to speak, we're not going to punish that person or punish that person as much?

Moral culpability is the other criteria of the just desert model. It seems to me, once someone is found guilty by a judge and a jury, that ends it. He's is morally culpable. To then go back after that and say, well, let's

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1 see, did his dad take him to a baseball game when he was
2 three years old, and he lost his dog, and he's been injured
3 by society. In effect, putting the victim -- I mean,
4 society as the perpetrator and the criminal as the victim is
5 twisting the whole telescope around here. I think that's
6 the wrong way to go, and we, again, to summarize, believe
7 that this Commission should focus on the deterrent aspect of
8 crime as well as punishment for punishment's sake, and our
9 definition should be really the just deserts of what this
10 Commission should be doing.

11 Thank you very much. I'll take some questions,
12 if you all have any.

13 CHAIRMAN WILKINS: Is there much -- you know, as
14 a federal judge, I deal with a lot of defendants, and I deal
15 with a lot of violent people who committed nonviolent
16 crimes, because our federal system is more geared toward
17 what we might call the nonviolent crime as opposed to street
18 crime, although we do have some street crime in the federal
19 system.

20 So we need to focus on the street crime, but I
21 think one reason so much emphasis has been given to the
22 bribing of public officials and fraud and white collar
23 crime, is because that is what makes up the great majority
24 of the criminal acts that are prosecuted in our federal
25 courts, as opposed to our state courts, where the great

LIVEbw 1 majority of that is the more violent acts.

2 In turn, I think we agree with you that we've got
3 to put the violent acts in focus. But we're going to be
4 dealing with a lot more nonviolent acts, as far as on a
5 case-by-case basis.

6 MR. KAMENAR: I appreciate that comment, Judge,
7 but I think part of the problem is defining what is
8 violent. There are some judges who think that the boy or
9 girl that was molested was not a violent crime, because
10 there were no physical injuries. And some judges have
11 justified that to me by saying that, ignoring the fact, the
12 traumatic, psychological damage done to that person.

13 Too, the area of drug dealing and heroin, the
14 violence that comes from the drug problem in this country is
15 enormous. The President's Commission on Organized Crime
16 recognized that very well in their recent report. I think,
17 when I read the statistics in the brochure to the amount of
18 sentences given to drug dealers was -- it just boggled my
19 mind. I could not believe that they're treated, almost as
20 if they're committing some parking violation was the essence
21 of the kind of treatment and the jail terms that are being
22 passed out.

23 So I think that the judges have to realize that
24 violence is not just where someone comes and shoots
25 somebody, but potential violence and the violence that is

LIVEbw 1 wreaked by the drugs that are introduced into this country.

2 CHAIRMAN WILKINS: Absolutely. Q

3 VOICE: I have a quick question.

4 CHAIRMAN WILKINS: Go ahead.

5 VOICE: Do you think that plea negotiations is
6 the culprit here, as in the example of the case where a man
7 entered the house and shot the woman? Was it it the plea
8 bargaining process that caused him to get the slap on the
9 wrist for killing another human being?

10 MR. KAMENAR: Well, plea bargainiang generally
11 does, of course, reduce the nature of the offense to a lower
12 or lesser included offense.

13 In this case, he was indicted on first degree
14 murder. He was there; the police picked him up. He had the
15 gun in his hand. A first year law student can get a
16 conviction. Nevertheless, the man pled guilty to second
17 degree murder, and the prosecutor asked for "substantial
18 time," without explaining what they meant by that. And the
19 judge imposed just the weekends only in jail.

20 Now --

21 VOICE: What did the judge say as the rationale?

22 MR. KAMENAR: Believe it or not, the judge said,
23 "Hey, the victim's did. We can't bring the victim back,
24 which, if anything, that should be the more aggravating
25 circumstance.

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Two, it was the man's first offense.

(Laughter.)

Okay. The first offense, in terms of --

VOICE: He only had one wife.

(Laughter.)

MR. KAMENAR: And it wasn't even a wife(?). It was an estranged girl friend.

And I had women call in my office afterwards, because -- complaining about this, as well, because there is a lot of violence out there that we tend to cover underneath the rug and say, well, it's domestic violence. It's a jealous boyfriend killing a woman, et cetera. Precisely the kind of violence that affects the society every day. And if we don't start addressing it in real terms, you're going to get an increase of that, and yet women call us up saying, you know, I'm worried about this, because my boyfriend, who's estranged, has been calling me and borrowing me, might think, well, gee, weekends only in jail for -- halfway house for a year. I can take that and maybe induced to go ahead and commit the crime where he otherwise would not, if he had stricter sentences.

VOICE: Do the judge did use: the victim is dead, first offense? These were the mitigating factors actually used?

MR. KAMENAR: That's right. That's right.

LIVEbw 1

VOICE: Okay.

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CHAIRMAN WILKINS: Commissioner Baer.

3

COMMISSIONER BAER: Do you have any opinion

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about, to what extent this Commission should consider prison

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overcrowding, in reference to the guidelines it establishes?

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MR. KAMENAR: I think it should not consider

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that at all, because what you're doing when you consider

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prison overcrowding is, again, focusing on the criminal and

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not the offense or the crime. You're focusing on the

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welfare of the criminal. Will this prison overcrowding --

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which, by the way, is judicially defined -- I've been to

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prisons and so-called "double bunking," where the court has

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ruled that it's overcrowded, not because, in fact, it is. I

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mean, some of our -- if you go on a naval submarine, our men

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are certainly (inaudible) more cramped quarters than those

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in many of these prisons.

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So I think, first of all, that it is a myth here

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that the prisons are overcrowded. Certainly, some of them

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may be -- you know, physically may very well be in certain

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cases.

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But secondly, I don't think this Commission

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should consider that at all. I think that is a red

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herring. I think what you are doing then is looking at the

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propitious or fortuitous time that somebody's convicted,

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that, oops, well, today, the prisons are overcrowded,

LIVEbw 1 therefore, even though, if they weren't overcrowded, you'd
2 get a more serious sentence, because -- you lucked out
3 today, because there was a high crime rate this month, and
4 you get to go at a lesser sentence.

5 I don't think that should impact at all. And if
6 it does, I think what this Commission should do is make a
7 recommendation to Congress that we need more prisons, if that
8 is the case, if you think they are overcrowded, rather than
9 work from a -- stated prison reform work backwards. And I
10 think that that's going in the wrong direction.

11 VOICE: I think the law permits us to, in effect,
12 do that.

13 MR. KAMENAR: Well, not really.

14 CHAIRMAN WILKINS: I think it requires us to
15 consider it, but how much weight we give to it is another
16 matter.

17 VOICE: Yes.

18 VOICE: Yes.

19 CHAIRMAN WILKINS: Any other questions?

20 VOICE: Yes. Now I have three.

21 (Laughter.)

22 My first is a comment, that you might want to
23 comment on.

24 The comment is that, I have heard a lot about
25 these deterrents and just deserts theory since I got on

LIVEbw 1 this Commission, and every so often I can sort them out in
2 my mind, but not too often. I'm just not certain which way
3 they cut. I mean, it sounds to me like this estranged
4 husband who kills his wife. The reason you might want to
5 send that person to jail is because they've done something
6 very wrong. They've taken a human life.

7 MR. KAMENAR: Precisely.

8 VOICE: And I wouldn't be terribly interested
9 whether other estranged husbands would or would not be
10 deterred under the circumstances.

11 And so it seems to me, given your examples, that
12 on the other hand, you'd think of a white collar criminal
13 and maybe the fact they only catch one tax evader out of a
14 thousand means that if you hike the penalty a little bit,
15 there would be less tax evasion.

16 So I'm just not certain that one of the other of
17 those theories matches up with the basic thrust of your
18 testimony.

19 MR. KAMENAR: No, I -- (inaudible) my testimony
20 that we believed in both principles of justice --
21 retribution and deterrence.

22 VOICE: So you have to figure out where they
23 belonged, and so forth.

24 MR. KAMENAR: Right.

25 VOICE: It isn't all one or all the other.

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MR. KAMENAR: It's not one or the other. And the

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two may balance. I think that with the estranged husband,

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estranged wife situation, the underlying principle there is

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retribution, the seriousness of the crime, (inaudible) human

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life is taken. But I don't discount that there may not be

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any deterrent effect from that, as well. I think that

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there's always a general deterrent effect when society

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imposes punishment in a swift and severe way. It just

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permeates a notion out there that if you do something wrong,

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you're going to get caught.

11

VOICE: Well, that may not be deterrence; that

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may be just deserts or retri -- or whatever. But the other

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thing, in light of prison capacity, it sounds quite nice to

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say, well, it doesn't matter how many prisons are necessary,

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but what worries me a little is, if you say, we come up with

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sentences that treble the prison population, you're putting

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60,000 or 70,000 more people in prison. If you were to do

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that, and prison cells causes \$33,000 a prisoner, and if you

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go to Congress and say, we'd like \$400 billion extra next

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year to build new prisons, one might face the practical

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question of what happens if they say no.

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So I'm just not certain that one can proceed, as

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a practical matter on the theory that prison space will, in

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fact, be built at the cost of \$33,000 per additional

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prisoner. And while, of course, it isn't an absolute

LIVEbw 1 constraint, et cetera, I'll --

2 VOICE: \$33,000 per prisoner.

3 VOICE: Yeah. Per prisoner. That's what I'm
4 saying, per prisoners of 33 times 66,000 extra prisoners
5 seems to me like a big number, since I'm not a
6 mathematician, but it's many, many, many billions. And I've
7 heard there's this thing called "Gramm-Rudman," which -- I
8 don't know if that's real, but --

9 (Laughter.)

10 VOICE: I'll assure you.

11 (Laughter.)

12 (Simultaneous voices.)

13 VOICE: Is it?

14 VOICE: Right.

15 VOICE: Right. But I mean, I don't know. It's
16 no absolute constraint absolutely, but I mean, I wonder if
17 you really mean we shouldn't take into account the
18 likelihood of whether or not there will be billions and
19 billions of dollars additionally appropriated.

20 MR. KAMENAR: Well, I'm not sure whether the
21 federal system current overcrowding is comparable to what it
22 is in some states, but --

23 VOICE: But we've seen -- we went to several
24 prisons, and we saw in several -- in fact, quite a lot of
25 what I would call overcrowding. I mean, people were in

LIVEbw 1 dormitories, and they didn't have a separate space, and they
2 were pushed quite close together, and they had two bunks one
3 on top of another with a space about like that. And -- I
4 mean, it looked pretty crowded to me.

5 MR. KAMENAR: Well, sure, you're used to living
6 in a home and not being --

7 VOICE: Well, we saw several different --

8 MR. KAMENAR: The point being that, I think you
9 should not be basically intimidated by the situation, in
10 terms of deciding how to treat criminals in terms of the
11 just punishment that is due them. Again, if there is a
12 problem of certain overcrowding, I would think that the ones
13 that would be more apt to be sent to prison would be the
14 ones that are not involved in violent crime or crimes that
15 involve potential violence. Someone rolling back an
16 odometer on a car, certainly, I would not sentence him to
17 ten years of hard labor. They are the ones that are
18 likely(?) to engage in things like restitution and other
19 things like that, where they have the means, and the crime
20 is more of an economic type crime. And I think maybe we can
21 solve some of the overcrowding problems about which --

22 VOICE: I also have a practical thought for you.
23 I don't know if you've thought of it, but since you are
24 interested in a very important problem, the problem of the
25 victims of the crime, you might not have noticed, or you

LIVEbw 1 might have, that in the new statute, fines that are going to
2 be collected, are going to be sent to a fund which will be
3 used to help victims of crime. And this is, in a way, a new
4 area, because at the same time, the level of fine that can
5 be imposed has been raised dramatically.

6 MR. KAMENAR: Sure.

7 VOICE: And so it might be -- if your
8 organization -- you and your organization wanted to focus on
9 that, make some suggestions about where fines might usefully
10 be imposed that could then, in turn, flow back to the
11 victims of crime, I think that might be helpful.

12 CHAIRMAN WILKINS: Any other questions?

13 VOICE: Billy.

14 CHAIRMAN WILKINS: Yes, sir.

15 VOICE: You talk about violence.

16 Does that really cover it? Isn't the threat of
17 violence and fear, the equivalent of it?

18 MR. KAMENAR: Absolutely, Judge. I define
19 violence in a very broad way. In other way, if a burglar
20 breaks into your house, and you're upstairs sleeping, there
21 are a lot of people that say, well, that's not a violent
22 crime, but all too often -- and I can give you examples --
23 where that leads to violence, potential violence, very
24 easily.

25 VOICE: Well, the circumstances lead to fear.

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MR. KAMENAR: Fear is psychological violence,
which is just as reprehensible.

VOICE: Continual fear, of when you're going to
come home the next time, there's going to be somebody in the
house.

MR. KAMENAR: Exactly. Exactly. And I think,
again, that's all too often ignored by the sentencing
authorities around the country, where they do not consider
the victims, the impact of the crime on the victim. And as
you know, some states have what are called "victim impact
statements," where they require the victim -- to allow that
person to address the judge in sentencing, to let them know
what kind of physical, psychological trauma, et cetera, was
imposed on them by the criminal before the judge sentences
that that person

CHAIRMAN WILKINS: Thank you very much,
Mr. Kamenar. We appreciate your comments.

MR. KAMENAR: Thank you.

CHAIRMAN WILKINS: Our next witness is Mr Patrick
McGuigan. He represents the Institute for Government and
Politics.

We're glad to have you.

MR. MC GUIGAN: Thank you.

LIVEbw

1 TESTIMONY OF PATRICK MC GUIGAN, ON BEHALF
2 OF THE INSTITUTE FOR GOVERNMENT AND
3 POLITICS.

4 MR. MC GUIGAN: Judge Wilkins and members of the
5 Sentencing Commission.

6 I appreciate the opportunity to present my views
7 on some of the important issues, you face as you try to
8 develop firm and effective sentencing guideliness for the
9 federal system.

10 I'll summarize my testimony which I've submitted,
11 and I will add some revisions to the thing I gave you last
12 week(?).

13 The primary goal of the Commission, I believe,
14 should be to establish sentencing guidelines which are
15 designed first and foremost to promote truth in sentencing,
16 policy goals.

17 The American people deserve to have a sentencing
18 policy which is open and known and understood and not a
19 sentencing policy masked by sociological goobledook.

20 It sound to me, from communications with these
21 folks earlier, that you are looking at masses of
22 complicated, sometimes irrelevant criteria

23 As Jack Kress put it in his (inaudible) book on
24 determinate sentencing, "Prescription for Justice, the
25 central purpose of sentencing guidelines is "to open a

LIVEbw 1 system too long shielded from public scrutiny."

2 It does not appear to me that your functional
3 committee structure facilitates that central purpose.
4 Rather, it allows and even encourages a mindset that gives
5 great weight to issues of relative insignificance. Indeed,
6 I note that not one of your several committees even mentions
7 the primary issue of underlying and consistent policy
8 setting.

9 There is no need for you to waste money in a
10 period of already excessive federal spending.

11 VOICE: Doesn't do what?

12 MR. MC GUIGAN: Pardon?

13 VOICE: Our subcommittee doesn't do what?

14 MR. MC GUIGAN: Mentions the primary issue of
15 underlying consistent policy setting.

16 VOICE: That's all we talked about.

17 VOICE: We're all policy.

18 VOICE: That's all we talk about.

19 MR. MC GUIGAN: Why don't we talk about it after
20 I get done?

21 CHAIRMAN WILKINS: Let's let Mr. McGuigan finish
22 his comments.

23 VOICE: Yeah.

24 CHAIRMAN WILKINS: Go ahead.

25 MR. MC GUIGAN: Thank you, sir.

LIVEbw

1 There is no need for you to waste money in a
2 period of already excessive federal spending.

3 The Commission should learn from the
4 already-existing state and local sentencing guidelines that
5 the Commissioner can build on the models of intelligent and
6 successful programs and learn from errors already made.

7 There is one important exact of the latter. The
8 Commission must avoid the error made in Minnesota. That
9 Commission implicitly decided that providing larger living
10 quarters for serious felony offenders was more important
11 than protecting decent citizens from criminal predators.

12 For all intents and purposes, Minnesota adopted a
13 purely "just deserts model," which was discussed earlier
14 with no concern for deterrence, crime controls or public
15 safety in the formation of sentencing guidelines.

16 This approach is absolutely antithetical to
17 everything the U.S. Congress believes, members of the
18 Congress believed when they passed this legislation.

19 As an aside, I might also stress that the
20 existing Parole Commission is invalid as a model for the
21 Sentencing Commission's work.

22 Leave the determination of moral blameworthiness,
23 justice for the offender and other aspects of just deserts
24 theory to the Almighty.

25 Your job is to develop sentencing guidelines

LIVEbw 1 designed to promote deterrence of crime through the
2 punishment of criminals.

3 Frankly, this kind of thing, the use of
4 sociological data and other things to obscure sentencing
5 issues is starting to get obscene.

6 Americans communicated very effectively in 1984
7 their determination that criminals be incarcerated. It will
8 be a tragedy, if those who described the Comprehensive Crime
9 Control Act of 1984 as "dead on arrival" in the House of
10 Representatives, wind up being the ones who manage and
11 implement its provisions.

12 The mentality that ferrets out rehabilitationist
13 minutia instead of concentrating on simple policy goals, may
14 lead the Commission to repeat just such errors in its work,
15 should the Commissioners proceed on the path that I, from my
16 impressions, believe they're already following.

17 Placed in this context, I can deal with some of
18 the specific issues you asked people that were testifying to
19 address.

20 The topic of this hearing is the ranking of
21 offenses by seriousness.

22 While your area is crucial, I also believe it is
23 more limited. Congress placed the Commission within the
24 Judicial Branch for a reason. You are not to legislate. As
25 I see it, this is not a matter of choice. It is a

LIVEbw

1 constitutional imperative.

2 The Federal Criminal Code, for that matter, the
3 Constitution, states the policy of the Judicial and
4 Legislative Branches of Government on these issues. Your
5 limited and proper function is not to redefine those roles,
6 even by your most brilliant insights or even by a consensus
7 of the many experts whom you asked to rank order offense
8 scenarios.

9 These law school hypotheticals may be fun to play
10 with and will doubtless provide days of entertaining and
11 intellectually engaging activity for the staff, but they are
12 not what the task of sentencing guidelines is all about.

13 Your first task in ranking offense seriousness is
14 to go to the Criminal Code and ascertain how Congress has
15 preliminarily rank ordered the offense in question, then, to
16 try to flush out the differences of gradation.

17 VOICE: Have you heard the description that I've
18 been giving of what we've been doing?

19 MR. MC GUIGAN: I wasn't here.

20 VOICE: Oh, you weren't here. You don't know
21 about --

22 MR. MC GUIGAN: I've been reading all the stuff
23 you guys put out.

24 VOICE: Oh, you say you've read this book then?
25 You've read this book? I mean, you're coming up here and

LIVEbw 1 saying a whole lot of things, you know, that just aren't
2 so. And so it is -- when I've gone through all this, and
3 we've done precisely what you just now described and have
4 given and made public, and you're welcome to comment on just
5 that kind of listing.

6 MR. MC GUIGAN: (Inaudible.)

7 VOICE: Right. Well -- but it would be helpful,
8 if you -- you know, if you wanted to find out, and you
9 didn't know, because you didn't get the information, just
10 call me. I'll be happy to tell you that.

11 MR. MC GUIGAN: Well, as long as this issue has
12 been raised, Mr. Chairman, do you want me to stop with my
13 testimony and address this?

14 CHAIRMAN WILKINS: Go ahead with your testimony.

15 MR. MC GUIGAN: All right.

16 The first task in ranking offense seriousness is
17 to go to the Criminal Code and ascertain how Congress has
18 rank-ordered the offense in question, then try to to flesh
19 out the interstices between the Code provisions.

20 Now I would probably, for a generic ranking of
21 crimes, putting crimes against the individual first,
22 followed by crimes against the state, among which I would
23 include drug offenses, and then crimes against property.

24 But I wonder if my ranking, even if my views are
25 accompanied by those of numerous experts really matter

LIVEbw 1 anywhere near as much as those of a congressional
2 enactment.

3 Of course not.

4 It is my belief that your methodology is leading
5 you down a slippery slope of you defining the gradations of
6 crime rather than following the intent of Congress.

7 The questions presented to me concerning the
8 matching of sanctions against crime is incomprehensible in
9 isolation. Until you set policy, you cannot answer it.
10 Assuming the primacy of protecting the public, I can answer
11 the question, but otherwise, none of your respondents, here
12 or later, will be talking the same language.

13 A Marxist concerned with state monopoly of
14 property, would give an altogether different response, as
15 would anyone more concerned with redistribution of wealth,
16 than the reduction of violent crimes.

17 As to the questionnaire, I attached my rank
18 ordering response, but I emphasized the reluctance with
19 which I do that, because, again, I'm struck that the
20 methodology could only result in spurious interpretations.
21 it begs the most important question and contains numerous
22 and dubious assumptions.

23 Perhaps the most glaring methodological flaws in
24 the assignment we had is the hidden assumption of equal
25 spacing between the ranks. The most immense gap will be

LIVEbw 1 viewed as equal in this analysis, unless your research staff
2 decides to insert their own biases into the results.

3 A second flaw is how the example were chosen.
4 You can see they are not representative, and yet they will
5 clearly be treated as such in your discussions.

6 Among the most important questions begged by the
7 choices is whether or not the Commission's task is to create
8 working guidelines for the federal system or instead, if
9 your task is to put forward a model ignoring the fact of the
10 uniqueness of the federal caseload.

11 Now while the Commission's work will undoubtedly
12 be closely monitored by people in the states, I opt for the
13 former approach, because of my federalist leanings, which
14 tell me that the models already exist in the states.

15 I urge the Commission to restructure and organize
16 its approach to these questions, so that you can meet your
17 timne schedule, reduce your expenditures, and most
18 importantly, meet the goals assigned by the both the
19 Congress, who created you, and the President who appointed
20 you.

21 Thank you for the opportunity to address, and I
22 assume Judge Breyer might have some questions.

23 CHAIRMAN WILKINS: Well, we'll see.

24 Thank you very much. Appreciate your comments.

25 Let me address one thing. The committees that

LIVEbw 1 we have formed are working committees, and they were formed
2 for management purposes, and indeed, the Crime Control Act
3 that creates the Sentencing Commission authorizes this
4 approach to our responsibilities, but one thing that the law
5 does say is that the committees may not establish policies.
6 So our working committees are prohibited by the law from
7 getting into the policy making(?), and that is something on
8 which the entire Commission is working.

9 What would be the policy that you would suggest
10 to us to be our guiding goal while we're were at work?

11 MR. MC GUIGAN: Well, I think that what I
12 described in my testimony from, you know, researching in
13 victims(?) for four years, it seems to me that more or less
14 -- that's my personal opinion, but I also think it more or
15 less coincides with what the Congress has already done,
16 which is, crimes against individuals, violent crimes, what
17 we categorize as violent crimes, are at the upper end of the
18 sanctions, and the middle echelon are crimes against the
19 state, including drugs offenses, although there, you again
20 drift into the violent crime area. And then finally, at the
21 bottom, white collar crime or economic crime.

22 That's, I think, is a central policy choice, and
23 my impression is, from everything I've read, and I have read
24 that binder, that essential first step hasn't been made.

25 COMMISSIONER BREYER: What will you divide it(?)?

LIVEbw 1 Offenses against property, offenses against the person,
2 offenses against government processes, offenses against
3 public order, safety and health?

4 I mean, now, I don't know -- if you've read the
5 binder, then I am puzzled, 'cause I first was seeing red
6 (laughing), because I thought that -- look, a lot of people
7 listen to your organization. I mean, you represent
8 Congressman Gingrich, and there are a lot of people out
9 there who listen to what you say, so criticism, based on
10 what is actually going on, is very well-taken, but then why
11 I was worried, because it seemed to me that you had made a
12 very sound suggestion, and I thought that what's we're
13 trying to do. You go to the Code, and you try to list all
14 the crimes, and you try to list all the crimes, and you
15 try to get the names that will describe them, and then --
16 that's what this binder is, isn't it?

17 MR. MC GUIGAN: Have you made the policy choice?

18 COMMISSIONER BREYER: No, the next step, the next
19 step before deciding how to order those crimes is to get the
20 views of people who are far more knowledgeable than I,
21 people who have spent their lives working in various areas
22 of the criminal law, and that's why we asked you and lots of
23 other people to take this binder and to go through it,
24 applying your policies and experience and tell us how those
25 things should be labeled, how they should be ordered, how

LIVEbw 1 they should be qualified, but without that, without that
2 serious work, I can't --

3 MR. MC GUIGAN: Now we're getting in kind of a
4 discussion of, you know, what does the Judicial Branch do?
5 What do judges do? I think, to sum it, you all are in the
6 judicial branch. You have a certain limited policy-setting
7 role, but it is limited, and it strikes me that talking
8 about, you know, sociological data and looking at reams of
9 information, that can be useful, but it is only useful at
10 the margin. The essential thing is, most policy choices
11 have already been made for you-all.

12 It is not clear to me, and I understand
13 everything I've read(?) --

14 VOICE: What is the "sociological goobledegook"
15 that you referred to in your testimony? Tell me what that
16 is, will you? I'd be very interested to find out what that
17 is.

18 MR. MC GUIGAN: Well, I'm referring to a lot of
19 material I've had to read over the several years which talk
20 about the reasons people commit crimes, and whether or not
21 --

22 VOICE: We've only been in existence a little
23 while(?).

24 (Laughter.)

25 Now you say that --

LIVEbw

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(Simultaneous voices.)

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VOICE: Now you see, Mr. McGuigan, let's assume

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we have some chromosome disorder, a factor, and you can find

4

that in the material, you may be referring to that (?). I

5

don't pay much attention to the chromosome disorders, but it

6

is a factor that some people would consider.

7

Now if we did not consider that as a factor and

8

then dismiss it as being irrelevant to our mission, some

9

judge somewhere along the line could deviate from my

10

guidelines, based upon a chromosome disorder.

11

So we must consider every possible factor,

12

aggravating and mitigating, that could possibly apply, and

13

then find those that are relevant, in our judgment, and

14

say, this is the basis of our guidelines. And we've

15

considered these others, and they're not relevant, so you

16

may not use that as a basis to deviate to what we say.

17

That's why we have to go through what happens,

18

even to me, as an exercise that I know the answer in

19

advance, but I still must give it consideration, because

20

that's what the statute says, and we're trying to build

21

guidelines that are tight enough, so that some judges who

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may wish to, in the future, may not be deviating under the

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law.

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MR. MC GUIGAN: What you just described sounds

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very reasonable.

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COMMISSIONER BREYER: See, that's -- you sounded from your tone that you are annoyed at something we're doing, and I want to pin that down, because I want to know what it is, because when I heard the details it sounded to me like our procedure was what you were advocating.

MR. MC GUIGAN: Oh, I'm very fearful that you're heading -- in particular, I think that you're heading towards the Minnesota model.

(Simultaneous voices.)

VOICE: Let me ask you this.

VOICE: Tell us what you know that makes you think that? I'd really like to know?

MR. MC GUIGAN: (Inaudible) that you brought up, who, was invited to some of the earliest discussions, earliest meetings of the Commission and who was not informed about those early meetings --

VOICE: We've had a lot of people invited.

What difference does that make?

VOICE: You're invited. You want to come?

VOICE: What are the problems with the Minnesota guidelines that you would want us to avoid, the major points?

MR. MC GUIGAN: Thanks. The essential one is taking -- to the extent they do in Minnesota, taking prison overcrowding into account, as a factor in (inaudible) in

LIVEbw 1 determining the seriousness or the length of sentence. I
2 think it is a fatal flaw.

3 Now the legislation does explicitly require a
4 factor that you take into account, and that's a factor, it
5 doesn't say how strong a factor or anything else. Frankly,
6 I hope you put it at the bottom of the factors you take into
7 account.

8 Maybe when you get -- if all your numbers are
9 triggered, I don't think it would be as dramatic even as you
10 indicate, but even if it was, maybe you could establish a
11 guideline that once prison overcrowding was at 350 percent,
12 rather than the -- I think the present levels, what is it --
13 140(??)

14 VOICE: They stack people vertically.

15 MR. MC GUIGAN: 140 percent of capacity.

16 Well, I am a lot more worried about the impact of
17 those people, whether they're being stacked into cells or
18 not, if they're back out on the streets than if they're in
19 that prison. That's a --

20 VOICE: So the first thing, then, that we should
21 avoid is the utilizing -- utilization of the prison capacity
22 as a cap?

23 MR. MC GUIGAN: Oh, absolutely.

24 VOICE: Okay. And what were the other problems
25 that you would want us to avoid?

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MR. MC GUIGAN: That's the essential one.

VOICE: Okay.

VOICE: Could I ask a question about your position when you mentioned policy.

Would you advocate, for example, imprisonment for all prisoners or would you advocate prison for some, restitution for others, alternative sentences for others?

You mentioned separating the crime categories -- the crime against the individual, against the state, property.

Do you see a range of sentences being appropriated?

MR. MC GUIGAN: Yeah. I am a member of a board of advisers to the Restitution Project out of the Office of Juvenile Justice in the Department of Justice, and I see a lot of -- I've seen a lot of very positive --

VOICE: Give me that again? You're a what?

MR. MC GUIGAN: I'm a member of the Board of Advisers for the Restitution Project. It's called the RESTTA Project -- R-E-S-T-T-A -- out of the Department of Justice, and we recently just had a --

VOICE: Are you on salary on that or --

MR. MC GUIGAN: Oh, no. No. It's on my own, as a lecturer(?). Went down there about two weekends ago, to advise the people that have been working in the field in

LIVEbw 1 developing restitutionary models for certain categories of
2 juvenile crime.

3 In the adult criminal system, federal system, I
4 would say there is a lot of possibilities, positive use of
5 restitution and alternatives to incarceration. You've got
6 to have sufficient sanctions for it to mean something, but
7 clearly for a person who's committed an economic crime, it
8 may be best both for that person and for the victim and for
9 the societal interests, because of things like overcrowding,
10 to have some sort of a diversion, but with meaningful
11 sanctions that involve, you know, dollars and cents.

12 MR. MC GUIGAN: Counsel(?), I have a number of
13 questions.

14 First of all, you said -- you referred to some
15 people who said this program was dead on arrival.

16 Who are they; do you know?

17 MR. MC GUIGAN: I believe that one was Bill
18 Hughes.

19 VOICE: Bill Hughes.

20 MR. MC GUIGAN: Yeah. Congressman Bill Hughes.

21 VOICE: Where is he from?

22 MR. MC GUIGAN: He represented the sentiment of a
23 number of folks over on the Hill.

24 VOICE: Where's he from?

25 MR. MC GUIGAN: New Jersey.

LIVEbw

1 VOICE: You're talking about when this bill,
2 bill, the Conference Crime Program(?) came to the House.
3 That's what you're talking about, isn't it?

4 MR. MC GUIGAN: (Inaudible.)

5 VOICE: Okay.

6 VOICE: The one that passed?

7 MR. MC GUIGAN: Ultimately, it did pass.

8 (Simultaneous voices.)

9 VOICE: (Inaudible.)

10 VOICE: Yes.

11 MR. MC GUIGAN: Probably went around Congressman
12 Hughes. That's the reason.

13 VOICE: You sort of intimated, it seemed to me,
14 that Congress had arranged these dissents -- these sentences
15 for the crimes, and that we shouldn't be required to define
16 them.

17 MR. MC GUIGAN: Well, no. No. The statute --
18 don't misunderstand. I think -- I hope I made that clear in
19 the more lengthy version of my testimony.

20 There is a very clearly defined and explicit role
21 that you-all have to play. My assumption for how you should
22 look at this is to look at how Congress, under the existing
23 structure had rank-ordered offenses, categories of offenses
24 and use that as a guiding light, because they're
25 legislators. You are quasi-judges -- and some of you are

LIVEbw

1 actual judges.

2 VOICE: That's in the book.

3 MR. MC GUIGAN: You're fulfilling a judicial
4 function.5 VOICE: And you don't think that -- but you do
6 think that we should go back and look at what Congress has
7 done?

8 MR. MC GUIGAN: I think you should; yes.

9 VOICE: Yo think we should.

10 MR. MC GUIGAN: Absolutely. You have to.

11 VOICE: It seemed to me, you were objecting to
12 the fact that we were ranking them in a certain way.

13 MR. MC GUIGAN: I'm not quite --

14 VOICE: Well, you said our committees were set up
15 wrong and --16 MR. MC GUIGAN: I think there's a degree of --
17 you're doing more work than you have to in the way you've
18 created the structure of the Commission. You're talking
19 about lack of time and other things, and it's all true, and
20 I'm sure you're all trying to do a good job. I'm just
21 offering the input of a guy that watches these things from
22 the outside.23 VOICE: That's just what I was talking about.
24 And we were doing too much work, and one of the things we
25 were doing was going back too much in what had happened in

LIVEbw 1 the past. Right?

2 MR. MC GUIGAN: As far as data.

3 VOICE: Yeah.

4 MR. MC GUIGAN: The first essential step, what

5 legislators have said.

6 VOICE: Now let me ask you this.

7 VOICE: That's what we've done.

8 VOICE: It's right here.

9 VOICE: Let me ask you this.

10 What do you think is the first question that

11 Congress and the United States is going to ask when this

12 project becomes effective?

13 MR. MC GUIGAN: They're going to ask, they'll

14 probably be asking all across the level(?) spectrum, are you

15 tough enough?

16 VOICE: No, they aren't. They're going to ask,

17 how does it affect what's happened before?

18 MR. MC GUIGAN: Uh-hum.

19 VOICE: How does it change it?

20 MR. MC GUIGAN: Okay.

21 VOICE: That's what they're going to ask.

22 MR. MC GUIGAN: I'm not a member of Congress, but

23 that seems reasonable.

24 VOICE: If we don't collect that data, we can't

25 have an answer. And they say, you're just legislated in or

LIVEbw 1 wrote your rules in the dark.

2 MR. MC GUIGAN: I think most members of Congress
3 will look, they'll compare sentences recommended by the
4 Commission --

5 VOICE: Yeah, but they would -- if we don't --

6 MR. MC GUIGAN: -- to the existing actual
7 sentences served under the --

8 VOICE: Well, they can't do that, unless we
9 collect it.

10 MR. MC GUIGAN: Right.

11 VOICE: That takes us months to collect it.
12 That isn't out there just for the having.

13 VOICE: It's hard to know what to do(?).

14 VOICE: You can get at what it was two, three,
15 four, five years ago. We're dealing with now.

16 So let me ask another thing.

17 You said something about the Minnesota system.

18 You're aware that the Congress said, in their
19 report, that the Minnesota system was to be highly
20 commended.

21 Are you aware of that?

22 MR. MC GUIGAN: I think they said that about
23 several (inaudible).

24 VOICE: They did.

25 MR. MC GUIGAN: About 11.

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VOICE: They did.

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And it's also a fact that this is the first one ever written by a Commission in the world. And it has attracted world attention from Canada -- I can show you the white paper in Great Britain -- Australia, New Zealand. They're all examining it and trying to do something like it.

Now you say in your letter, or you say in your testimony:

"As one important example of the latter, the Commission must avoid the gross error made in Minnesota, where the commission implicitly decided that providing larger living quarters for serious felony offenders was more important than protecting decent citizens from criminal predators."

What was the basis for that statement?

MR. MC GUIGAN: The (inaudible) says that prison overcrowding is explicitly a part of the determination of sentencing at the front end in the guidelines developed by the Minnesota commission.

VOICE: You mean you ought to throw them in like sardines?

MR. MC GUIGAN: Well, I would do that before I would turn them loose, and I think that that is the same

LIVEbw 1 policy prescription you will encounter, if you talk to
2 members of Congress involved in this legislation, and
3 certainly, if you talk to -- if you polled the American
4 people on whether they would choose prison overcrowding or
5 choose turning them out, they would choose the
6 overcrowding.

7 VOICE: Who are the people in Minnesota who you
8 talked to who gave you this view of what the commission has
9 done?

10 MR. MC GUIGAN: It's my view, based on --

11 VOICE: Did you talk to people in Minnesota?

12 MR. MC GUIGAN: No.

13 VOICE: No. So you don't know how the people in
14 Minnesota, in fact, feel about their guidelines. This is
15 your view on the outside.

16 You haven't talked to anybody in Minnesota about
17 how the guidelines were set up or what they --

18 MR. MC GUIGAN: I've read the material(?).

19 VOICE: Oh. All right.

20 VOICE: (Inaudible) I talked, the latest, an hour
21 ago, to the Chief Justice --

22 VOICE: Of Minnesota.

23 VOICE: Who served on the commission from the
24 time it started, and he said it was completely in error.

25 MR. MC GUIGAN: (Inaudible) to a buzz saw.

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(Laughter.)

The other thing is this, (inaudible), you are imputing to the Commission something that might have been imputed to the legislation. And there's a big difference. A Commission is appointed to carry out a legislative act, just as we are. There are some things where our hands are going to be tied. We can't do everything. We've got to read and reread the legislative history of the Act and everything else, in order to pull out from it, a congressional intent. And that isn't easy. And it's going to control our actions.

CHAIRMAN WILKINS: Thank you. Thank you very much.

VOICE: That's all I have.

CHAIRMAN WILKINS: Just one more question.

VOICE: 'Cause this is conceptual thing, and I want you to think if you really mean this.

Look. Remember our case of the man who shoots his estranged wife?

Wouldn't you want that person to be sent to jail, even if sending him to jail does not deter other people? I mean, don't you think a person who shoots somebody deserves to be in jail, even if, in fact, they do it because it's for an emotional reason, and it wouldn't be deterrence?

VOICE: Yeah. Sure.

LIVEbw

1 VOICE: Yeah. Well, that's -- you see, that's
2 what -- of course, you see what I'm thinking of. It isn't
3 -- no theory, the deterrence theory, the just deserts theory
4 doesn't give all the answers to these things.

5 Don't you agree with that?

6 VOICE: That's essentially true.

7 VOICE: Well, that's my impression.

8 CHAIRMAN WILKINS: We appreciate your testimony,
9 and if there has been some misunderstanding about the
10 openness with which this Commission is going to do this
11 work, I hope we would have corrected it today.

12 MR. MC GUIGAN: I certainly (inaudible) --

13 CHAIRMAN WILKINS: And we welcome you --

14 (Simultaneous voices.)

15 (Laughter.)

16 MR. MC GUIGAN: -- reactions here.

17 CHAIRMAN WILKINS: We welcome you and members of
18 your organization and everyone else to come participate with
19 us, because only through the wide participation by those who
20 share our concerns, will we have guidelines that will truly
21 serve the interests of justice, once we submit them to the
22 (inaudible).

23 Thank you very much.

24 We have two -- two other witnesses.

25 Next is David Jones. Mr. Jones, we will be to

LIVEbw 1 have you. We appreciate you bearing with us through this
2 morning.

3 TESTIMONY OF DAVID JONES AND STEPHEN JENNINGS,
4 CRIME MAGAZINE.

5 MR. JONES: Thank you, Mr. Chairman, members of
6 the Commission.

7 CHAIRMAN WILKINS: Is this Mr. Jennings?

8 MR. JONES: Mr. Jennings.

9 CHAIRMAN WILKINS: Very good.

10 MR. JENNINGS: (Inaudible.)

11 CHAIRMAN WILKINS: All right. Very good.

12 MR. JONES: (Inaudible) to that, Judge.

13 Judge, we did submit two different written
14 testimony, one that addressed some of the issues that were
15 of primary concern to us, which were largely procedural as
16 to how the Commission might commence its task, based
17 somewhat, in my experience in five years as a member of the
18 Pennsylvania Sentencing Commission, but then when we heard
19 that the Commission preferred to concentrate only on the
20 seriousness of the offense issue today, we modified those,
21 and I think that is what is being handed out to you now.

22 If you would quickly permit me to summarize this
23 seriousness issue.

24 I think that what we are urging the Commission to
25 do by "seriousness," is to take into account more than

LIVEbw 1 simply some type of a hierarchy, simply an order of crime,
2 but to give some weighting to different crimes within that
3 order. In other words, we could have an ordinal scale, we
4 could have an integral scale, or we could have something
5 more, and it's largely -- especially with the more serious
6 offenses, there's something more that I would like to urge
7 upon the Commission.

8 For instance, if we were to follow what many
9 states -- those states that have embarked upon guideline
10 sentencing, if we were to follow what many have done, we
11 would be putting offenses into certain categories for
12 purposes of convenience, if for no other purpose.
13 Pennsylvania, for instance, had ten categories, based upon
14 seriousness of the offense, although the lower two
15 categories were rather amorphous.

16 But regardless of whether it had 10 or 20 or 30
17 or five, or whatever categories, one question that would
18 arise is the difference between any one category and the one
19 below it or above it.

20 The same is the difference between the other
21 group of categories, and we've argued that -- that perhaps
22 not, that unlike the keys for the piano, for instance, it's
23 not necessarily possible that we can arrange the seriousness
24 of crime into neat categories. We have to be prepared for
25 large jumps, especially, as we start off at the bottom and

LIVEbw

1 rise to the more serious crimes, maybe there's a jump of
2 more than double the punishment, especially, if we're
3 equating seriousness with some type of monthly increase in
4 punishment.

5 For instance, if we were to go from, say, a
6 number of 5 on a 10 point scale and maybe number 5 had 60
7 months, would number 6 have simply 72 months or something
8 like this, or would we maybe double between 5 and 6 and
9 double again between 6 and 7, so that we're reaching the
10 very highest parameters of permissible sentencing by the
11 time we get to the top.

12 Other questions that have arisen in our minds
13 would be, under what circumstances this Commission should
14 concoct specific examples of aggravation and mitigation, and
15 if at all, what those examples should be. And I would turn
16 you, for example, to Gregg v. Georgia, similar types of
17 court litigation, where various legislative specifications,
18 at least for aggravation, in that case, in capital
19 punishment, have been seemingly approved, and invite you to
20 to consider specific examples of what aggravation and
21 mitigation might be and have provided some in the
22 testimony.

23 I think that to overlap some of what we've
24 written with what we've heard today, I would like to urge
25 the Commission to do several additional things. One is to

LIVEbw

1 pay particular attention to violence. Violence in the
2 street, violence in the home, violence in general, because
3 we certainly feel this is actually the type of conduct that
4 does hit hard at the roots of American society.

5 I disagree with the representative of the
6 American Civil Liberty Union. I can't imagine how
7 corruption in government, unless it were all-pervasive,
8 which I shudder to think is not the case here, in this
9 country, how it could possible be equated, in terms of
10 seriousness, with the kinds of street crimes that we find in
11 the streets of most large cities, nowadays, largely
12 drug-related.

13 So I would ask the Commission to think very
14 carefully about not only those people who do the crimes in
15 the streets and who use drugs, but those who deal in them
16 and those bankers who launder the money. These are all
17 violent criminals, and they should be severely punished
18 under these kinds of guidelines.

19 Judge MacKinnon? I thought you (inaudible). I'm
20 sorry.

21 And then finally I think that it's important for
22 this Commission to recognize a rule -- and I'm not sure, any
23 more than Mr. McGuigan, if I have entirely understood how
24 the Commission chose to recognize its role -- I certainly
25 will offer my thoughts.

LIVEbw

1 I really think that obviously Congress, being the
2 organ that supposedly expresses the will of the people,
3 should, in the initial analysis, establish sentencing
4 criteria and seriousness of sentencing.

5 I think it's probably done this, at least to a
6 quotation standard.

7 I would think the role of this Commission would
8 be, then, to take into account the will of Congress and
9 implement this congressional intent into tangible form.

10 I think that to clear up a few misunderstandings,
11 what my correspondence with the Commission earlier, what my
12 concerns have been, some of which have been alleviated, is
13 that I'm not sure that the role of the Commission needs to
14 be to ask questions of every segment of American society,
15 and you must forgive me, but I didn't submit the answer to
16 your (inaudible) --

17 VOICE: It wouldn't hurt, though, would it?

18 MR. JONES: Well, it wouldn't hurt if we could do
19 it, Judge.

20 VOICE: Go ahead.

21 MR. JONES: The problem is, it's difficult to
22 do. If we could call in people to tell us what they
23 think, but I'm not sure that these chunk samples of people
24 will reflect any more of what the average person in society
25 thinks that probably the product of your own individual

LIVEbw

1 experiences.

2 And I would think that a Commission of this sort,
3 by -- obviously, it's comprised of people from very
4 different backgrounds, by pulling its resources, would be
5 able to come up with probably a pretty viable sentencing
6 plan, largely by itself.

7 Now Judge Wilkins' comment this morning, I do
8 agree with. I think certainly the Commission has to be --
9 Judge McKinnon's also -- has to be prepared to report to the
10 Congress and to the American people the differences between
11 traditional sentencing and what it proposes, and to
12 accomplish that goal should take certain testimonies.

13 I'm not sure, though, that we should delude
14 ourselves into believing that these chunk testimines,
15 including, of course, my own, especially my own (laughing)
16 -- I don't know if these are indicative of any wider
17 audience, simply indicative of interest on my part and the
18 part of the other people who presented the evidence.

19 I will be more than happy to answer any questions
20 that the Commission may have of either or both of us.

21 CHAIRMAN WILKINS: Thank you very much.

22 Mr. McGuigan believes that, initially, anyway,
23 that we were not receiving enough public input, and you
24 think we're receiving too much. So --

25 (Laughter.)

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VOICE: (Inaudible.)

CHAIRMAN WILKINS: -- then we're doing something that neither side agrees with, which usually means, like in a settlement, it's probably a just thing.

(Laughter.)

MR. JONES: Judge Wilkins, I'm not -- I think that probably the Commission's role is going to be very similar to an arbitrator kind of fashion and settlement. I am not sure that I disagree with Mr. McGuigan. The difference between our perception, his and mine, is that perhaps the Commission was inviting selective testimonies, secret testimonies on the one hand and perhaps what I understand today, accurately or not, to be the Commission's desire to kind of get -- feel out a cross section of the American people, I personally don't think that's necessary, but if the Commission were to try to feel out a cross section of the American people, I doubt if it would succeed by sending out questionnaires to selected groups. And I think it is the selectivity that bothers me. And I suspect it's bothered others too, though I can't speak for them, forthwith.

CHAIRMAN WILKINS: We kind of hated to use the New York phone book, and so we used a list of people, and we've sent out about 200. And we received over 130 responses. Now these went to judges, they went to

LIVEbw

1 organizations, people like yourself. There were probation
2 officers, defense attorneys. A broad spectrum of the
3 American public, as the law requires us to obtain public
4 perception.

5 But I agree with you, this is not subject where
6 we need to spend all of our time doing. And indeed, we're
7 spending, perhaps not enough doing that, because we're
8 involved in some other areas.

9 We need to have this balance. We do want you
10 your input, though. We really do, because you have ideas
11 that we can take and use and perhaps implement into our
12 guidelines. And I am not sure that if we met in a dark room
13 somewhere that we could come up with something that was
14 rally the right thing to do.

15 MR. JONES: And we certainly appreciate the
16 opportunity to make this testimony, and I think the other
17 witnesses do too, as long as the Commission understands that
18 the feedback that it gets from selected witnesses, probably
19 any major witness with expertise should be heard, but that
20 this input may not be representative. Somehow I get the
21 feeling, and I think that -- although I'm not perhaps as
22 concerned about the economics as Mr. McGuigan was, I am
23 concerned, nevertheless, that there can be a tendency on the
24 part of a public commission to go to far and to try to speak
25 -- pry out input from every last source, which would be a

LIVEbw 1 phenomenally difficult and expense and probably ultimately
2 fruitless task.

3 CHAIRMAN WILKINS: Well, I appreciate that.

4 The expense of doing this. It cost us 22 cents,
5 and it took some time to put the mailing together. But we
6 had used the resources existing in our Judicial Center and a
7 great deal of data from existing resources using the prison
8 information, probation information, Justice Department
9 information, put it together. So we're not trying to
10 (inaudible). We don't have time to do that. But I
11 appreciate your concerns. And we don't need to spend any
12 more money than necessary to give us the data that can give
13 us the information to make, hopefully, the right decision.

14 MR. JONES: That is certainly one of our
15 concerns.

16 CHAIRMAN WILKINS: Thank you.

17 Any questions on my right?

18 COMMISSIONER BLOCK: Is there anything we can
19 learn from the Pennsylvania experience on grading offenses
20 that would be useful?

21 MR. JONES: Well, Commissioner Block, there's a
22 couple of points that I did mention in the written
23 testimony, and that is that I think that concerns with
24 seriousness now, one of the major points is, I don't think
25 you can properly codify the seriousness on a 10 point

LIVEbw

1 scale, where you're dealing with some several hundred
2 crimes, and you're dealing with more crimes than
3 Pennsylvania, since you're dealing not only with common law
4 crimes but with a variety of specialized federal statutes,
5 but you need more room than that. That's one point.

6 There are several other points. For instance, on
7 offender background, but they are probably better saved for
8 a subsequent hearing, largely, that those should be fewer
9 rather than more categories.

10 COMMISSIONER BLOCK: So your advice is, the scale
11 needs to be larger than the (inaudible) --

12 MR. JONES: If you're going to use a scale, and I
13 would think that you're going to, unless you're going to try
14 to codify every crime individually, but if you're going to
15 utilize a scale, I think one of the pitfalls of the
16 Pennsylvania system has been that it's really an eight-point
17 scale. Call it 1 to 10, but the first two don't really
18 count. And on that scale, there's just not enough room for
19 leeway. You're spending -- a judge is spending a lot of
20 time distinguishing between -- assume he wants to stay
21 within the guidelines, he's spending a lot of time
22 distinguishing between a matter of two or three weeks.

23 What the devil does two or three weeks matter?
24 Maybe to the individual who is in prison, granted, but in
25 the overall balance of interests that have to be served,

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1 I am not sure that the paperwork is well-spent for a judge
2 to be debating on this type of a level. You need a larger
3 scale going towards a larger number of years in sentencing.
4 Pennsylvania only took into account a minimum, not maximum
5 sentencing. And that's a short one.

6 CHAIRMAN WILKINS: Any questions on my left?

7 (No response.)

8 Mr. Jennings, do you have any statement you'd
9 like to make?

10 MR. JENNINGS: No, I don't. He is talking for me
11 today. I have some throat problems. But one of the things
12 that has occurred to me as I came in here this morning is
13 that crime is a problem. Violence is a problem. There are
14 two sides to it. One is the criminal, one is the victim.

15 One of the things that makes me very, very happy
16 is that there are people here and -- out here that are
17 making an effort to do something about it. And as long as
18 we have the dialogue and the input of all sides, you know,
19 sooner or later, all of these brains are going to come up
20 with some way to deal with this matter effectively, equally,
21 in the matter of violent crime.

22 I have heard a whole lot of talk today about what
23 is violent, and, you know, what is not. What affects
24 society; what doesn't.

25 I was born and raised on the Hill in

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1 Washington. In 1970, we had three doors in our home, two of
2 which were barred. We had a home in Virginia, which we
3 stayed at most of the time, and only kept beds in the home
4 on the Hill.

5 Things got better, thank God.

6 I went out to watch the Senators play one night.
7 At that particular time I was assigned to 8th and I. So I
8 was armed. I carried a gun that night, but I had a box of
9 shells in the car. The car was broken into that night. The
10 shells taken, and when I drove home, the house had been
11 broken into the same night.

12 Things like that went on for a long, long time
13 during the, I guess, early '70s, and things like that, when
14 we had the riots in '68.

15 CHAIRMAN WILKINS: Sure. Sure.

16 MR. JENNINGS: So, you know, I don't care, you
17 know, who thinks that it's worth, you know, for George
18 Shultz to take 10,000 bucks under the table than to have me
19 mugged on the street. I think it is worse to have me mugged
20 on the street. And I think it affects society more. Just
21 like the man said, no one locks their doors, you know,
22 because George Shultz or somebody else -- and I don't mean
23 to pick on George Shultz -- I just saw him a lot, and he
24 sticks in my mind.

25 But anyway, those are the kinds of things that

LIVEbw 1 I've heard all day today, and I'm glad you're hearing them.
2 I am glad you're hearing their input(?). The input means
3 that we can come out, hopefully, with a means to an end.

4 We are trying to set some guidelines, and that is
5 what you are doing.

6 I am glad to see these folks here today, and I
7 thank you for having us.

8 VOICE: This is very helpful, thoughtful. Thank
9 you.

10 CHAIRMAN WILKINS: Thank you.

11 Benson Weintraub represents the National
12 Association of Criminal Defense Lawyers.

13 TESTIMONY OF BENSON WEINTRAUB, ON BEHALF
14 OF THE NATIONAL ASSOCIATION OF CRIMINAL
15 DEFENSE LAWYERS.

16 CHAIRMAN WILKINS: It's kind of like waiting all
17 morning for your case to be called, I guess.

18 MR. WEINTRAUB: This is the first time that the
19 organized defense bar has the last word.

20 CHAIRMAN WILKINS: Have you worked out a plea?
21 (Laughter.)

22 MR. WEINTRAUB: I am accompanied today by Bruce
23 Lyons, who is the President-Elect of our Association, and
24 Scott Wallens, our Legislative Director, is also in the
25 audience.

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1 I will summarize the salient points of our
2 testimony.

3 The principal issue that we wish to focus your
4 attention on, really, is to holding the individual
5 accountable for his or her actions only and not for the
6 actions of other codefendants or coconspirators, over whom
7 that person has no ability to control.

8 We've had this experience come up with the Parole
9 Commission, and the Commission has attempted to address that
10 in several ways, but I believe in focusing our attention on
11 the issue of offense severity today, it would be helpful,
12 from our perspective, to establish a broad range of
13 subcategories within each offense severity level, in order
14 to distinguish the offense characteristics of one type of
15 offender from another.

16 For example, in drug cases, we frequently find
17 offenders performing different functions.

18 Under our experience with the Parole Commission,
19 it's apparent that there should be some delineation between
20 the offense characteristics exhibited by an offender who,
21 for example, is the primary organizer or someone who owns
22 the shipment of drugs, as opposed to a person who is perhaps
23 the least culpable in the form of a worker or a courier.

24 And the Parole Commission has acted through its
25 definition of these peripheral, nonperipheral roles, to

LIVEbw 1 distinguish between the relative culpability among
2 offenders; however, we would suggest to the Commission that
3 in formulating sentencing guidelines, that the Commission
4 take into account offense characteristics through the use of
5 grading factors or features within each level of offense
6 severity to properly reflect the role of other types of
7 offenders within the broad range of a drug offense itself.

8 For example, we feel that there should be at
9 least four subcategories of culpability with respect to
10 drug offenses, specifically.

11 For example, there should be the highest level of
12 culpability of that person occupying the position of primary
13 organizer, with the next most culpable level being a
14 position played by a person exercising high managerial
15 functions. The third most culpable classification would
16 include persons who we call "facilitators." And then the
17 least culpable category of offender being the courier or
18 worker.

19 We feel that the present --

20 VOICE: You mean the seller?

21 MR. WEINTRAUB: Not necessarily the seller. I am
22 speaking more in terms of an importation type case, where
23 the least culpable person is a courier.

24 VOICE: You don't bring the thing up to the
25 sale(?)?

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VOICE: Well, we mean a conspiracy.

MR. WEINTRAUB: Yes.

VOICE: Yeah. Mule.

MR. WEINTRAUB: Exactly.

Under our experience with the Parole Commission, we found it inherently unfair to hold offenders accountable only through the peripheral/nonperipheral distinction. And we feel that the Sentencing Commission can benefit from our experience before the Parole Commission in expanding upon their recognized distinction between various levels of offender culpability. And we believe that this can also properly apply to other forms of offenses or offense behavior, as well.

For example, in fraud cases, we believe that there should be a number of factors going into the offense severity table, incorporated as rating factors or features to distinguish among levels of relative culpability between offenders in the case.

We can measure the degree of offense severity, for example, in terms of the dollar amount, as the Parole Commission presently does.

I think this Commission should focus more specifically on the offense characteristics of the individual. That is, how much could the individual realize as a result of the fraud offense rather than how much did

LIVEbw 1 the overall conspirators realize in connection with the
2 offense behavior itself.

3 And we feel that these types of factors should be
4 incorporated into the offense severity level itself rather
5 than being used as an aggravating or mitigating factor. We
6 feel that sentencing judges should be given a great deal of
7 flexibility in the exercise of the guidelines, not only
8 within the guidelines but, of course, reserving the
9 discretion to go above or below, when there are particularly
10 aggravating or mitigating circumstances or offense
11 characteristics.

12 One reason which we feel the Parole Commission's
13 guideline system has not been a total success is because the
14 guidelines tend to be applied rather mechanically, and by
15 building into the system of offense severity levels, more
16 features or subcategories, we feel that the Sentencing
17 Commission, and in turn, sentencing judges, can exercise
18 much greater flexibility, according to the offense behavior
19 exhibited by the individual offender, him or herself.

20 In terms of rating the relative seriousness of
21 other offenses, NACDL has established a Sentencing
22 Commission Liaison Committee, and we have met, and we have
23 reviewed the black book prepared by the Commission
24 containing its tentative classification of offenses, and we
25 have not been able to reach, thus far, any unanimous

LIVEbw 1 consensus with respect to the relative severity of offenses,
2 which is a point which we found rather significant of
3 itself.

4 We did, in a general way, agree that violent
5 offenses and offenses involving matters pertaining to
6 national defense should be rated the most serious on a
7 relative scale.

8 The middle range of offenses, which might include
9 property offenses, would occupy, for example, a middle
10 level, with weapons offenses and drug offenses in that
11 general range, as well.

12 And in weapons offenses, as in any other type of
13 offense behavior, we feel that the scale of the offense
14 itself is most important in determining the individual's
15 specific role in the offense, because we don't want to lose
16 sight of the traditional judicial caveat that sentences are
17 to be individualized. The person is to be judged on the
18 basis of his conduct and not necessarily the conduct of
19 others over whom he may not have had any ability to
20 control.

21 On the lower severity range, we would include
22 those offenses which are generally referred to as white
23 collar offenses.

24 In addition to the white collar offenses, which
25 might include tax offenses, regulatory agency violations

LIVEbw 1 or acts of form omission, we would include offenses
2 generally against government process, including perjury,
3 obstruction of justice, and the like.

4 Our decision to recommend to the Commission that
5 white collar offenses have a lower degree of offense
6 severity than other forms of offenses which we are
7 discussing today, is predicated in large measure upon the
8 assumption that the traditional white collar or business
9 type offender does not require long periods of supervision
10 to carry out the Sentencing Commission's mandate, including
11 an assurance that the guidelines reflect a general
12 appropriateness of imposing a sentence other than
13 imprisonment, in cases in which the defendant is a first
14 offender or who has not been convicted of a crime of
15 violence.

16 There are, of course, other types of white collar
17 offenses, which may be more severe than others, and we've
18 been asked to rate the relative seriousness of such
19 offenses, and we join the other witnesses today, who have
20 determined that offenses involving a breach of the public
21 trust, for example, an act of official or public corruption,
22 might be considering an aggravating offense characteristic,
23 to warrant a decision above the guideline range, which would
24 otherwise be indicated for this type of white collar
25 offense.

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1 One area of concern that our subcommittee has
2 focused on, is the designation of the racketeering type
3 offenses, in RICO offenses, specifically, in an offense
4 severity level table. In many cases, prosecutorial charging
5 decisions alone have determined, under our present patrol
6 system, what the minimum offense severity rating will be.

7 For example, in RICO offenses, the Parole
8 Commission uses Category 5 as a minimum offense severity
9 level, indicating a range of 24 to 36 months.

10 And the societal evil that the RICO statute was
11 designed to eliminate, really refers to organized crime and
12 to differentiate between the organized crime offender and
13 the business offender, who happens to commit two predicate
14 acts of racketeering, like mail fraud or wire fraud, we feel
15 that type of business offender more accountable to society
16 than might otherwise be necessary.

17 In following up on the issue of organized crime,
18 we feel that that presents a very difficult problem to
19 society today, which must be addressed. It is often
20 addressed today in presentencing reports, and some courts
21 have developed sentencing procedures designed to ensure that
22 a defendant receives certain due process safeguards and the
23 presentence report for the government identifies that
24 person, for example, as being a "made member of organized
25 crime."

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1 We would urge the Sentencing Commission to
2 develop a policy statement which specifically addresses the
3 use of this type of information, membership in a large scale
4 criminal organization, to require, at a minimum, that the
5 government demonstrate at the sentencing hearing, by clear
6 and convincing evidence, that the fact in the presentencing
7 report is factually correct.

8 We would urge you to consider the teaching of the
9 United States v. Vatico, which does not stand for that
10 standard of evidence, but it does indicate a procedure to be
11 followed.

12 Finally, as representatives of the organized
13 defense bar, we would encourage the Commission --

14 VOICE: What is the citation for that case?

15 MR. WEINTRAUB: 579 2nd 707 2nd Circuit 78.

16 VOICE: Page 10.

17 MR. WEINTRAUB: We would urge the Commission, in
18 developing the guidelines, to be ever mindful of the sense
19 of the Senate Resolution, section 239, urging that prisons
20 be used only in cases calling for incapacitation and not
21 where the primary purpose of sentencing would be retribution
22 or deterrence. We feel that there are a number of
23 alternative type sentences available, both under our present
24 Criminal Code and the new Criminal Code, which would be
25 taken advantage of, and I believe this was addressed this

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1 morning in the questions directed to the representative from
2 the Federal Probation Officers Association.

3 In my own contact with the Chief Probation
4 Officer in Miami, we are working together to make increased
5 use of probation, of community service and restitution, to
6 make it a meaningful element of sentencing which can present
7 the court with a meaningful alternative to incarceration.

8 We feel that we have to be cost effective in
9 proceeding today with the future of sentencing, and the
10 primary purpose should be accountability, holding that
11 offender accountable to society for the nature and type of
12 offense which was committed, but only using incarceration as
13 a matter of last resort, and we should consider, first, as
14 sentencing judges, whether incarceration is indicated at
15 all, because we believe that through the use of creative or
16 imaginative sentencing schemes, the sentencing goals
17 selected to be (inaudible) in any particular case, can be
18 furthered through the use of these types of sentences, which
19 would not be devoid of any real meaning and would, in fact,
20 have some symbolic deterrence, which taken in conjunction
21 with finds and restitution, could be meaningful in carrying
22 out the purposes of the Commission.

23 My own practice is limited to representing
24 offenders in post-conviction proceedings, including
25 sentencing and parole, and drawing from that experience,

LIVEbw 1 in conjunction with the other members of the NACDL
2 subcommittee, we hope to participate in the future with this
3 Commission in determining a future course of sentencing
4 reforms in this nation.

5 And if Mr. Lyons or I could answer questions, we
6 would be pleased to.

7 CHAIRMAN WILKINS: Thank you very much.

8 Any questions on my left?

9 VOICE: It think it is very good (inaudible). (An
10 aside.)

11 CHAIRMAN WILKINS: Any questions?

12 Yes, sir.

13 VOICE: Do I hear you saying that if the purpose
14 of sentencing is deterrence, that you shouldn't go to
15 prison, if a certain type of offense is such that going to
16 prison is a (inaudible) from deterrence, knowing that?

17 MR. WEINTRAUB: I'm sorry. I didn't get the last
18 part.

19 (Laughter.)

20 VOICE: Well, I mean, let's take --

21 (Simultaneous voices.)

22 VOICE: This is April 15th. There are a certain
23 amount of citizens in this country who are prosecuted for
24 fraud in reference to their income, Internal Revenue
25 Court(?) okay?

LIVEbw 1 Now if it is shown that giving some jail time 'to
2 that type of person -- because, first of all, that type of
3 person is not a person who is underprivileged; right,
4 generally?

5 So if it is shown that that -- that going to
6 prison would be a deterrent, a general deterrent, you say,
7 you wouldn't advocate going to prison for that -- that we
8 shouldn't --

9 MR. WEINTRAUB: No, I wouldn't. I am suggesting
10 that incarceration be used only in cases requiring specific
11 incapacitation of the offender and shifting the correctional
12 priorities from deterrence and retribution to other
13 correctional purposes which can be achieved in other forms
14 of sentencing. I don't believe that prison, of itself is
15 the only form of a deterrent sanction in a criminal justice
16 system.

17 I think for an offender involved in a tax evasion
18 case, assuming that this is the first offense, and that the
19 person leads an otherwise law-abiding life, that there are
20 other forms of sanctions that can be imposed by a federal
21 court to insure that that person is held accountable to
22 society for his failure to pay taxes.

23 Moreover, through the use of creative sentences,
24 including community service, we believe that in appropriate
25 cases, tax evasion offenders should be held accountable by

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1 performing a certain measured amount of hours of community
2 service, working for a charitable agency, for example,
3 putting something back into the community, something which
4 he deliberately withheld through his failure to pay taxes.

5 VOICE: Well, maybe that ought to be added, but,
6 you know, it is hard to understand that if you say that it's
7 agreed that that would be a deterrent, that you think that
8 there shouldn't be a just punishment for that type of
9 offense, if it is a deterrent.

10 There are a lot of people in prison that we
11 sentence three, four or five times, when going to prison is
12 not a deterrent, and we have to figure out some other kind
13 of deterrent for that type of person, but if the offense --
14 if going to prison is a deterrent for a particular type of
15 offense and offender, and not using it -- I mean, I don't
16 understand that.

17 MR. WEINTRAUB: You're assuming, Mr. Baer, that
18 it is a deterrent, that prison is a deterrent for a tax
19 evasion case, and I'm not quite certain that I agree with
20 that.

21 VOICE: Antitrust -- we used to say in the
22 Antitrust Division, in sometimes blatant cases of price
23 fixing, where people, say, bilk the public of billions of
24 dollars on drugs or concrete, or something like that, you
25 take one of those business executives who have done this,

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1 knowing that it was completely wrong and illegal and had
2 profited enormously, and just put them in jail for one day,
3 for one day, that would have -- that would lead people to
4 take the price fixing laws more seriously than if they get
5 enormous fines.

6 So the Division used to say, just give us one day
7 in prison for any of these defendants, and that will have a
8 very salutary lesson on others.

9 MR. WEINTRAUB: That is a very valid point, Judge
10 Breyer, because under the Probation statute, the grant of
11 probation can be conditioned upon some partial period of
12 confinement and perhaps in appropriate cases, that would be
13 the best sanction under the circumstances, depending upon
14 the aggravating or mitigating factors of that particular
15 case.

16 (Simultaneous voices.)

17 VOICE: In these days, would be even more(?).

18 (Laughter.)

19 VOICE: Would you use imprisonment for
20 retribution? I notice that you exclude retribution, and I
21 am wondering what you would use in place of imprisonment for
22 retribution.

23 MR. WEINTRAUB: I don't think that sentencing
24 should be purely retributive in any respect, and that the
25 other traditional purposes of sentencing could be served

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1 by realigning retribitional(?) priorities.

2 VOICE: Counsel, no sentence, as I view it, is
3 ever on one theory, and I think what every judge tries to do
4 is to mold all sentencing objectives into one, dependent
5 upon the effect it is going to have on the individual, his
6 offense, whether it is going to deter others, the effect on
7 the community and whether it is going to be received.

8 So you can't say, well, you got to -- (inaudible)
9 tax cases, for instance. You don't want that first offender
10 to go to prison for a substantial tax offense?

11 MR. WEINTRAUB: It is difficult to generalize,
12 Judge.

13 VOICE: Extending over, say, three years?

14 MR. WEINTRAUB: Depending upon the fact of any
15 particular case.

16 VOICE: \$50,000, three years.

17 MR. WEINTRAUB: Personally, I would not recommend
18 a sentence of imprisonment in that type of situation. And I
19 feel that there are other sanctions available, considering
20 the combination of sentencing goals which you alluded to
21 before, which would be accomplished through a less
22 restrictive form of a sentence.

23 VOICE: I'm awful glad you're not on the
24 Commission.

25 (Laughter.)

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1 CHAIRMAN WILKINS: We're going to address this
2 interesting alternative in a later hearing, and perhaps we
3 could call upon you at that time to give us your views.

4 Mr. Lyons, is there anything you'd like to offer?

5 MR. LYONS: The only thing I would offer, Steve
6 referred to the Minnesota role model. You should -- I think
7 it is important that you be guided by not only by the
8 Minnesota state sentencing guidelines but the other states
9 that have gone into their own processes, like my own state
10 of Florida.

11 And we've had debates. We've had prosecutors in
12 our state, when they first were passed, were chagrined, were
13 screaming and yelling. It appears that over the years,
14 empirically, the researchers told us that they are not as
15 upset, because sometimes when the government or the state
16 moves to aggravate, they seem to get what they want, and
17 unless you are reasonable and you weigh both sides of the
18 picture, you're going to have the government moving to
19 aggravate, or you are going to have -- and defense attorneys
20 saying to clients, you've got nothing to lose to go to
21 trial, or you're going to have a public clamor, and you've
22 got a very difficult task. And I pray that you do look at
23 both sides of the picture.

24 We appreciate the opportunity not only to be here
25 but to be last.

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VOICE: -- We've looked at them all. Washington and Pennsylvania (inaudible.)

MR. LYONS: I might address you, sir, with regard to -- see, we differ too. \$50,000 is substantial to me. And I am not saying that jail is not necessarily the answer in that case, but what Benson is indicating is, is we can do it in the form of probation by having that person being incarcerated, because I'll be honest with you, I represent people that would just as soon go to jail than be restricted in community-controlled environments. Believe me when I tell you that.

VOICE: Well, the ordinary criminal much prefers going to jail than being on paper.

MR. WEINTRAUB: Absolutely. I agree with you.

But I appreciate this opportunity. I am not on the agenda, and the fact that you gave me an opportunity to speak, I do appreciate.

VOICE: Well, we (inaudible) coming back.

Thank you very much.

Anyone in the audience wish to testify?

(Laughter.)

VOICE: Sir, I should say -- my name is Kurt Wolfcam(phonetic) here representing the National District Attorneys Association. We had planned to bring a speaker down from New York. Today he is not able to attend.

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1 Hopefully, we can have them input at some of the later
2 hearings (inaudible).

3 (Simultaneous voices.)

4 CHAIRMAN WILKINS: Of course, we've asked your
5 organization, and if you would go ahead and send us your
6 comments -- do you intend to do that?

7 MR. WOLFCAM: I will.

8 VOICE: -- we will distribute them to the
9 Commission to make them part of this record. And of course,
10 we are in communication with your organization on everything
11 we do, and I am sure you will have another opportunity to
12 participate in another hearing. And I think I am going to
13 speak to your organization in about two weeks, and I'll look
14 forward to seeing you there.

15 Anyone else?

16 (No response.)

17 We stand adjourned.

18 (Whereupon, the Public Hearing was adjourned.)

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