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THE UNITED STATES SENTENCING COMMISSION

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TRANSCRIPT OF PROCEEDINGS

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held in the Ceremonial Courtroom of the Dirksen Federal
Building, 219 South Dearborn Street, Chicago, Illinois on
the 17th day of October, 1986, commencing at the hour of
10:00 o'clock with the HONORABLE WILLIAM W. WILKINS, JR.
presiding.

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23 Court Reporter: Carol Raber

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1 CHAIRMAN WILKINS: Let me call this public
2 hearing to order. I want to welcome all of you to this
3 first regional public hearing the Sentencing Commission is
4 holding and we will get started in just a minute.

5 I first would like to thank Chief Judge John
6 Grady for all the assistance that he and his staff has
7 given to the Commission in providing all of the
8 administrative and logistical assistance that is necessary
9 to organize and prepare for this first public hearing.

10 I would like to introduce the members of the
11 Commission here who are with us today. On my extreme
12 right is Commissioner Michael Block, Commissioner Helen
13 Corrothers, Commissioner Paul Robinson; and then to my
14 immediate left is Commissioner Ilene Nagel, Commissioner
15 Stephen Breyer and Commissioner George MacKinnon. And my
16 name is Billy Wilkins and I am the chairman of this
17 Commission.

18 Today's hearing is the first in a series of six
19 public hearings the Sentencing Commission will hold
20 throughout the United States over the next two months.

21 Just a few weeks ago, we published what we have
22 entitled "A Preliminary Draft of Guidelines" which shows
23 one approach which may be taken in drafting guidelines for
24 the federal courts as well as identify specific key issues
25 which must be addressed and resolutions provided when our

1 final guidelines are submitted to the Congress by April of
2 1987.

3 We have approached this very complex task with a
4 feeling that we need to involve as many people -- not only
5 just from the family of justice, lawyers and probation
6 officers and the like, but others who are interested in
7 the administration of justice. And so we have conducted
8 hearings in Washington, we have solicited position papers
9 from hundreds of individuals and organizations, we have
10 conducted our meetings in an open policy, and we have
11 published this preliminary draft at this early stage to
12 provide a vehicle for extensive public comment. We feel
13 like extensive public comment involving all of those who
14 are interested is the best way to ultimately arrive at
15 guidelines which will truly serve the administration of
16 justice in our federal courts.

17 This public hearing today has a lot of
18 witnesses and a lot to say. We have written statements
19 from all of the witnesses and they will be made a part of
20 the record. It may be best -- each witness judge for
21 yourself -- but it may be best for the witnesses certainly
22 to confine their testimony to not more than 10 to 15
23 minutes and allow some time for questions and answers from
24 the Commission.

25 In any event, I want to express on behalf of the

1 Commission our appreciation to the witnesses who will
2 testify today. It is evident from the written submissions
3 and in the discussions with witnesses that a great deal of
4 thought and effort and work has gone into preparation for
5 your testimony and we are most appreciative for your
6 assistance in helping us reach final decisions on these
7 complex issues which are so important to our system of
8 justice.

9 Our first witness this morning is Mr. Tony
10 Valukas, a very distinguished United States Attorney from
11 the Northern District of Illinois.

12 Mr. Valukas, we are delighted to have you with
13 us. We appreciate not only your appearing today, but the
14 work that you have done with the Commission in the past.
15 We will be glad to hear from you at this time.

16 MR. VALUKAS: Judge Wilkins, thank you very much
17 for having me here this morning. Welcome to Chicago. I
18 hope the accommodations were appropriate.

19 I have some brief comments I would like to
20 address to the Commission. These comments are made on my
21 own behalf and do not reflect the views of the Department
22 of Justice. I am not here as their spokesman.

23 There are two issues which I believe are
24 essential to your consideration on the proposed
25 guidelines. The first deals with the deterrence as a

1 factor in the sentencing process and the second deals with
2 the role of sentencing in vindicating the values of our
3 community.

4 Let me begin first with the deterrent function.
5 Currently, a substantial amount of the resources expended
6 by the federal government in law enforcement activities
7 are focused in two areas. The first is white collar
8 crime, the second is drug and drug-related offenses. And
9 I think before you leave here this afternoon, you will see
10 how much in the way of resources have been focused, for
11 instance, in this district.

12 These two areas of prosecution and law
13 enforcement share a common denominator. They are crimes
14 committed in a rational, calculating manner by individuals
15 who weigh the potential benefits against the risk of
16 possible punishment. Simply translated, they are
17 deterrable criminal acts. Turning first to the problem of
18 white collar crime. The United States Attorney's office
19 in Chicago has had considerable experience in the last 15
20 years in the prosecution of white collar crimes such as
21 mail fraud, bank fraud and securities fraud. These and
22 other types of economic crime are typically predicated
23 upon the abuse of trust or the abuse of a fiduciary
24 relationship.

25 Similarly in the public sector, unfortunately in

1 Chicago, we have had numerous prosecutions involving the
2 abuse of public trust by elected officials at the federal,
3 state, local levels, as well as by law enforcement
4 personnel and government employees, including judges in
5 this district.

6 It could be said with few exceptions that each
7 of these cases involved a criminal defendant who
8 calculated that he could abuse his position for his own
9 gain without significant risk of prosecution or a
10 substantial jail sentence. In my opinion, this has
11 undermined the public's confidence in the institutions of
12 government as well as the law enforcement process itself.

13 This same theme is evident in other areas of
14 white collar crime; for example, the national statistics
15 involving bank fraud reveal an appalling situation. The
16 vast majority of bank failures that have occurred in the
17 last few years in the United States -- and they are a
18 significant number of failures -- involve some element of
19 abuse by bank employees or those associated with it which
20 stands as sharp distinction to the bank failures, for
21 instance, which occurred during the Depression, which did
22 not have this element, this criminal element.

23 This can only serve to undermine the public's
24 perception of the entire banking and financial community.
25 Similarly, we have seen an increasing number of cases

1 involving the abuse of fiduciary relationships within the
2 securities industry, cases that underscore the fact that
3 privileged and intelligent individuals often believe that
4 they can commit criminal acts and abuse their trust and
5 positions of responsibility without ultimately having to
6 pay the consequences.

7 I believe that you will find in the course of
8 your hearings that this is a common theme voiced by law
9 enforcement officials in all of the major metropolitan
10 areas in the United States.

11 If the sentencing function is to deter criminal
12 activities as well as to punish the individuals who have
13 committed the crimes, then it must serve that function
14 realistically.

15 When individuals engage in this type of
16 criminal activity, they obviously believe that they will
17 not get caught. The crimes that they commit are
18 frequently so complicated that the likelihood of detection
19 and successful prosecution may appear remote.

20 Equally important, I believe, is that many
21 white collar criminals come to believe that these crimes,
22 even if detected and even if prosecuted at great expense
23 by the government will not result in substantial jail
24 sentences or severe financial consequences, and the record
25 will bear them out.

1 All of this serves to emphasize that sentences
2 that we currently impose in white collar criminal
3 cases do not deter people from committing these
4 crimes.

5 In part, this is due to the heightened
6 prospects for material gain through criminal activity.
7 Because of modern computer technology and the ability of
8 individuals to control vast amounts of money or have
9 access to large resources, the magnitude of white collar
10 crime is significantly greater today than it has been in
11 the past. This means that the rewards garnered through
12 criminal activity are all the more tempting to those who
13 would consider such activity.

14 Similarly, the complexity of modern business and
15 financial transaction often makes the detection of these
16 crimes much more difficult and may delay the successful
17 prosecution of the individuals involved. Thus, while the
18 rewards of white collar crime are increasing, the risk of
19 detection is often decreasing, and this makes the deterrent
20 function of sentencing all the more important to the
21 effective prevention of white collar crime.

22 The second type of criminal activity that I
23 wish to address is the problem of drugs. The potential
24 profits available to the would-be drug dealer are so
25 enormous that only the most severe sentences will have any

1 deterrent effect at all. Assistant United States
2 attorneys across this country will tell you that they
3 frequently re prosecute individuals who have been
4 previously prosecuted by earlier generations of Assistant
5 United States attorneys within the same district.

6 These defendants are part of a newly emerging
7 class within our society, a cadre of individuals whose job
8 in life is to deal drugs or to be involved in drug-related
9 activities.

10 These individuals would not under any
11 circumstances be able to garner the type of money that
12 they would make in their drug activity in any legitimate
13 form of work.

14 It is critical that we not blind ourselves to the
15 economic facts of life in dealing with the drug problem.
16 To suggest that an individual who is making hundreds of
17 thousands of dollars dealing in drugs is going to refrain
18 from that type of activity because he faces a moderate
19 jail sentence is not realistic.

20 This point applies, however, not just to the
21 dealer who peddle drugs on the streets of our city, but
22 to the other individuals who play a critical role in the
23 narcotics trade.

24 Currently, the success of many large-scale
25 narcotics operations is fundamentally dependent on those

1 who would launder the profits of the narcotics trade or
2 who would provide a legitimate business front for narcotics
3 trafficking.

4 While such individuals are often insulated from
5 the actual business of drug dealing, they are no less
6 important to the success of the over-all operation.

7 I recently spoke to a group of individuals,
8 young students, in talking to them about drug education
9 and they asked a question which I found difficult to
10 answer. They asked me why it was that a drug dealer in
11 the city of Chicago who was involved in a major drug
12 operation received a sentence of 30 years in prison while
13 the police officers who took payoffs in order to protect
14 that drug operation received a sentence of 10 years
15 imprisonment, and that a judge who had admittedly taken
16 payoffs in cases including drug cases, for fixing those
17 cases similarly received a sentence of only 10 years in
18 prison. They asked me to explain that and I could not.

19 These individuals often share in the enormous
20 profits of the drug activity and thus have a powerful
21 motive to continue their criminal ways.

22 Accordingly, if sentencing is to play any role
23 in the reduction of narcotic crimes, the sentencing
24 process must satisfy two criteria. First, the sentences
25 must be sufficiently severe to outweigh the attractiveness

1 of the potential profits. And second, such sentences
2 must be meted out to all participants in the narcotics
3 trade, the money launderers no less than the drug peddlers
4 themselves.

5 Let me turn finally from deterrents to another
6 function of the sentencing process: the vindication of
7 shared values within our community. While this function
8 is much more abstract than deterrent, it is important
9 nevertheless.

10 Every time a convicted defendant is subjected to
11 punishment, the sentence stands as a vindication of the
12 values underlying the criminal law. In addition, the
13 severity of the sentence reflects to some extent the
14 importance of the underlying value itself. Thus, if a
15 corrupt politician is sentenced to a substantial period of
16 incarceration, the sentence serves to reinforce the
17 importance of honesty and integrity in a democratic
18 government and society.

19 Conversely, if the politician receives only a
20 light sentence or a fine, the sentence does little to
21 strengthen the values of public integrity.

22 On another level, the sentencing process
23 implicates certain values of fairness and equality.

24 If a white collar criminal defrauds the public
25 of hundreds of thousands of dollars and yet receives only

1 a sentence or probation, the sentence cannot be squared
2 with the stiff jail sentence imposed on the street
3 criminal who do not occupy a position of privilege or
4 status.

5 The obvious disparity can only contribute to
6 perceived inequities in the criminal justice system.

7 Finally, there is another value served by the
8 sentencing process which I think should be considered by
9 the Commission. It forces the convicted defendant to
10 suffer consequences that approximate the harm done to the
11 victims. In many crimes, the wrongdoer not only causes
12 physical or economic harm, but also inflicts psychological
13 damage on the victims of the crime. This is true not only
14 of crimes of violence, but of white collar crimes such as
15 fraud and corruption.

16 Recently we had a case in Chicago in which an
17 individual was involved in a massive fraud involving a
18 commodities transaction. Literally hundreds of
19 individuals who knew and trusted this individual or knew
20 and trusted individuals who were put into the original
21 investment by friends and associates came forth and sent
22 us letters; some of them testified in court. And it was
23 pathetic. These were individuals of some substance in the
24 community who has been defrauded out of thousands of
25 dollars. And it was not only the loss of the money which

1 was the damage which was done to them, but the damage
2 which was done to them insofar as the violation of their
3 trust, their own feeling about the system and how they had
4 been dealt with.

5 That should be considered in determining what is
6 the appropriate sentence. Accordingly in such a case the
7 sentencing process serves to balance the scale by imposing
8 punishment on the wrong-doer for the harms done to the
9 victims of his act, whatever those harms may be.

10 In short, the sentencing process not only plays
11 an important role in the deterrence of crime, but should
12 also operate to vindicate the values of our community and
13 our society.

14 I appreciate the opportunity of speaking to you
15 today and expressing my views. I applaud the work that
16 you have done. I think it is -- my personal opinion is it
17 is magnificent and I look forward to its enactment. Thank
18 you very much.

19 CHAIRMAN WILKINS: Thank you, Mr. Valukas.

20 You mentioned this problem of unwarranted
21 disparity existing in our system. Of course, that is one
22 of the primary reasons that Congress created the United
23 States Sentencing Commission, and it is one of the
24 problems of our system of justice that we have committed
25 to correct. Of course, the question is how exactly do we

1 correct it.

2 You mentioned white collar offenses. I am
3 interested to know do you think it is the length of the
4 sentence given or the certainty about which it is given to
5 white collar offenders that we should concentrate on?

6 MR. VALUKAS: Both. I think that the certain --
7 I think that one of the things that is most attractive
8 about your record is the fact that 10 years means 10
9 years insofar as the sentence itself is concerned.

10 I also think that you have to consider if you are
11 considering these questions involving the psychological
12 damage, the magnitude of the crime, that you are going to
13 have to look at that and not shy away from the fact that
14 when the crime is a massive crime or a significant crime,
15 it deserves significant punishment. Otherwise, you are
16 going to be dealing -- we are going to continue to deal
17 with this risk-reward process. And you can ask the
18 question of every United States attorney across this
19 country as to the size and magnitude of the white collar
20 crimes being committed in the district and whether or not
21 that in fact, isn't increasing.

22 The sentences are not increasing in these areas
23 and frankly do not serve as a deterrent.

24 CHAIRMAN WILKINS: All right. Thank you, Mr.
25 Valukas.

1 Let me ask if any of the commissioners to my
2 right have any questions of Mr. Valukas.

3 Any questions to my left? Commissioner Nagle.

4 COMMISSIONER NAGLE: Yes, Mr. Valukas. You made
5 reference to drug offenses in whether or not we should
6 discriminate among a variety of drug offenders, including
7 the money launderers, drug dealers, et cetera.

8 Could you elaborate just a moment on that how
9 you would treat the different drug offenders, or would you
10 distinguish among them?

11 MR. VALUKAS: If you review carefully what takes
12 place in drug prosecutions, you will see the following
13 scenario: You will have wholesalers who have been -- it
14 is big business. Let's start out from that premise. And
15 you have to look at it for what it is.

16 You will have wholesalers who will bring it in
17 who will sell it to retailers who will then sell it to
18 sub-retailers, who will then ultimately sell it downstream
19 so that a 100,000 or let's that a ton of cocaine which
20 comes into Miami will ultimately come to Chicago in the
21 form of 20 or 30 kilos of cocaine, which will be a large
22 amount of money here.

23 The money is moved to our society. It is
24 invested in our society. We have videotapes in
25 prosecutions showing bankers being told that the money

1 they are now laundering is drug money, and they will
2 continue to launder that money.

3 They are an integral part of the whole process.
4 They are engaged in this activity because they think that
5 they can make money at it, and the sentences that they
6 would typically face would be misdemeanor type of
7 sentences, maybe a year in jail at the most. This is a
8 deterrable aspect of the drug trafficking if a banker, a
9 lawyer, an accountant, a business advisor understood that
10 he would not only face a sentence, but a substantial and
11 certain jail sentence, a 10-year sentence, it seems to me
12 that he would think twice about taking that cash into his
13 bank and laundering it through the system. And that is a
14 deterrable activity.

15 And the way that we approach it is if we have got
16 a drug dealer on the street, that is a heinous
17 individual, but the banker who is laundering his money is
18 merely a member of society who has gone astray for a day
19 or two. It is just not true. And that is what we ought
20 to be looking at. That is one part of what we ought to be
21 saying: Give the same sentence. If you are participating
22 in the activity in one form or the other, you are entitled
23 to the same sentence.

24 CHAIRMAN WILKINS: Any other questions?

25 COMMISSIONER BREYER: If you want, if have the

1 chance to write out some of your views on this in any
2 detail that you would like, I think that it would be well
3 worth our reading.

4 MR. VALUKAS: I will.

5 COMMISSIONER BREYER: What I am thinking of in
6 particular, the two things that you mentioned, the one
7 that you just mentioned comes under in my mind the
8 category of regulatory offense because much of the bank's
9 money -- criminal law concerns regulations promulgated
10 under statutes that make it a crime to violate
11 regulations.

12 And one of the problems for us is how
13 specifically to deal with the sentences that accrue to a
14 person who violates one of those regulations. And if you
15 can think your way through that in some detail, I'm sure
16 that -- I would appreciate your views very much.

17 And the other related area that you talked about,
18 when you talked about the judge or the policeman, also is
19 a difficult substantive area. To what extent should the
20 fact that a person has a position of special
21 responsibility or trust, or that the person is in the
22 public eye -- what about a famous baseball player; a
23 football player who people look up to and children look up
24 to -- to what extent should that fact that children look
25 up to such a person as a role model enter into the

1 sentencing process by, for example, directly implying a
2 tougher sentence?

3 Again that is a matter of detail and I would
4 very much appreciate your views on that. I mean it might
5 be a very good idea to do that, provided that it could be
6 worked out.

7 MR. VALUKAS: I will submit my views in writing
8 otherwise to the Commission on this matter. I appreciate
9 that opportunity.

10 CHAIRMAN WILKINS: Thank you very much, Mr.
11 Valukas.

12 MR. VALUKAS: Thank you, your Honor.

13 CHAIRMAN WILKINS: We appreciate not only
14 your work today but all of the assistance that you and
15 your office have given us in the past.

16 MR. VALUKAS: Thank you.

17 CHAIRMAN WILKINS: Our next witness is one who is
18 no stranger to the United States Sentencing Commission,
19 Mr. Terence F. MacCarthy, the director of the Federal
20 Defender Program here in Chicago.

21 Mr. MacCarthy, we are delighted to see
22 you again today and we appreciate that you have taken your
23 time to assist us again in trying to find the right
24 solutions.

25 MR. MAC CARTHY: Thank you, Judge Wilkins,

1 distinguished members of the United States Sentencing
2 Commission. I will sit down in an uncomfortable position.
3 I usually stand here. It has been my privilege to have
4 been invited by you and to have submitted to you written
5 materials from time to time. And now, of course, I think
6 it is a distinct honor to personally appear before the
7 Commission.

8 I think first off, however, Judge Wilkins, that
9 I should do a little bit of confession -- it is usually
10 good for the soul -- and confess a bias, an obvious bias
11 and a few prejudices that you may not be aware of.

12 My obvious bias is that I am a criminal defense
13 lawyer and have been one for some 20 years, so I find
14 myself in the not too popular position of being an
15 apologist for future federal felons, if you will.

16 Secondly, I confess to you that I was not
17 particularly elated when the Congress passed the enabling
18 legislation that created your august commission.

19 And I wasn't elated frankly because I have for
20 some 25 years been involved with this particular court
21 here in the Northern District of Illinois -- and this may
22 come as a shock to you, but speaking as a defense
23 attorney, I think that the federal judges in the Northern
24 District of Illinois in the 25 years I have been
25 associated in one way or another with them have done an

1 exceptionally good job of sentencing federal defendants.

2 And so, of course, we come then to the old addage
3 "If it is not broke, why fix it?" And I guess that was the
4 position that I adopted.

5 And frankly -- and this is a personal
6 observation and I would imagine it goes against the views
7 of most people in the country today, certainly the United
8 States Congress -- I don't think that uniformity of
9 sentencing is really entirely possible. And I question
10 frankly -- and this is a personal observation -- as to
11 whether or not it is necessary. I say that because
12 so long as we have dissimilar defendants, we are
13 going to have or should have dissimilar sentences.

14 My own biases and prejudices aside, I don't
15 think that they are particularly important. The fact of
16 the matter is that the Congress of the United States has
17 acted. The Congress of the United States has appointed,
18 or the President actually has appointed you as a
19 Commission and has given you a task or a responsibility.
20 And as I have already, I think, impliedly suggested, I
21 think -- and I think that others do -- that the task or
22 responsibility that has been placed upon your shoulders is
23 a very, very difficult, maybe impossible one.

24 In any event, your task is to set guidelines.
25 A couple of real quick comments, too. Because of the

1 openness -- and I commend the openness of your proceedings
2 -- I have followed what you have been doing. Of course, I
3 have been invited and have participated in what you have
4 been doing.

5 More recently, you have sent me a copy of your
6 draft report. I have read it. I will not confess that I
7 have totally digested it, but I have certainly read it.
8 And on the basis of what I have seen of the work of this
9 Commission and particularly in reading the detailed report
10 that you had prepared, I commend you. I commend you on
11 your thoroughness, I commend you on the scholarship of
12 your report, on the professionalism, the dedication of
13 your report.

14 If I might give a little comment here
15 that in a word if anybody is going to make a silk purse
16 out of a sow's ear, it is going to be this Commission.
17 And I say that in all due respect to you.

18 You didn't invite me, of course, to come here and
19 tell you what you have already done to possibly make a
20 silk purse out of things. I think in fairness, you
21 probably invited me here to try and suggest to you what I
22 think is still a sow's ear, and that is what I would like
23 to do.

24 Well, for little things -- and I will just
25 start off -- this is a starter and then we will get into

1 the four points I would make. I am a little concerned in
2 -- just in a naive way -- why it would be worse to commit
3 a homicide if you are drunk than to commit homicide with a
4 weapon. And I think you may want to look at that.

5 In the time afforded to me, and obviously the
6 time is limited --

7 I will, incidently, accept your kind invitation
8 to submit written comments. They will be far more
9 thorough and better than what I would say today.

10 But in any event, what I would like to do is
11 cover four points, time permitting, this morning.

12 First of all, I want to very briefly comment on
13 the real touchstone of your work, the modified real
14 offense sentencing concept that you are using.

15 Secondly, I want to express my concern about what
16 I see as an almost total elimination of the sentence of
17 probation.

18 Thirdly, I want to address to you my concerns
19 about the practical burdens that your draft may impose
20 upon the criminal justice system and upon criminal defense
21 attorneys, in particular.

22 And finally, I am going to try and make a strong
23 plea to this Commission that you consider recommending to
24 the Congress the retention of Rule 35. That is the rule
25 that allows a defendant to move for a reduction of

1 sentence.

2 Very briefly, modified real offense
3 sentencing. The silk purse about it, if you will --

4 Let me commend you for three things. Number one,
5 I think that in modified real offense sentencing -- and by
6 the way, this may come as a shock to you as a defense
7 attorney -- I like the concept. And I am sure that may
8 surprise some of you.

9 I like it because first of all, you have put in a
10 proof requirement which is I think is a salutary
11 improvement in the sentencing concept.

12 Secondly, you have limited the facts to be
13 considered to those related to the offense. Again I
14 commend you.

15 And thirdly, you have somewhat minimized my
16 fears, the fears of others on my side of the aisle, that
17 prosecutors and not federal judges would start doing the
18 sentencing. I say that as one major exception to that,
19 and if time permits -- obviously I will cover it in my
20 written materials -- but that, of course, is the
21 cooperation aspect.

22 I am a little disturbed by the fact that when we
23 get to the area of cooperation, you have literally removed
24 the federal judges from any determination and you have
25 literally allowed the prosecutor to effect 40 percent of

1 the sentencing without any action by the federal judge, if
2 you will.

3 The problem, however -- and with every silk purse
4 there is a sow's ear, maybe -- but the problem, of course,
5 with the modified real offense sentencing is a problem
6 that I as a defense attorney will face, and the problem
7 is simply this: I think that we will now be pleading our
8 clients in a blind, unknowledgeable way. We will have far
9 less available to us at the time we tender a plea on
10 behalf of a client than we do under the present situation.

11 Now, sure we will know the maximum for the
12 offense which we know now. We all know what the maximum
13 of that offense will be. The problem, however, is at the
14 time that we plead our clients that we will not in most
15 cases know the activities or the facts which the
16 prosecutor feels are related to this particular offense of
17 whether or not the victim was vulnerable, whether or not
18 there was psychological injury, whether or not there was a
19 substantial loss, whether or not the prosecutor's view is
20 that this was a kingpin vis-a-vis a minor participant.
21 These are things that we will not know and it will create
22 a tremendous problem for a criminal defense lawyer.

23 Judge Wilkins has gone around the country -- and
24 I might add, most commendably, and talked. And every time
25 you have talked, you have said, "Give us some ideas."

1 So I respect that and I will give you my
2 suggestions. I think what you might want to consider in
3 this regard is requiring where a defense attorney notifies
4 the prosecutor of an intention to plead, that there is a
5 belief that we are going to plead, that the prosecutor be
6 required to, in writing, give us a list of the factors,
7 the adjustments if you will, the upward adjustments that
8 they are going to urge at the time of sentencing.

9 And unless we have that, we cannot, in my
10 opinion, make an intelligent plea of guilty with our
11 client. And then, of course, the corollary to that would
12 be a provision which would allow us to withdraw a plea if
13 something comes up that is later included as an adjustment
14 that was not known at the time that the plea is entered.

15 Secondly, my second point, I want to express my
16 serious concern about what I consider to be, as I read
17 these standards, an almost total elimination of the
18 sentence -- of course now it is not a sentence, but
19 under you people it will be -- the sentence of probation.

20 The American Bar Association, as I know you are
21 well familiar, has taken an unalterable position against
22 minimum mandatory sentencing. You have, of course,
23 minimum mandatory sentencing. You not only have minimum
24 mandatory sentencing, you have it for all practical
25 purposes in almost every offense.

1 The problem with minimum mandatory sentencing,
2 the three problems that I have with what is going to
3 happen to the system if this draft becomes law are
4 threefold. Number one, what it is going to do to increase
5 the number of trials; secondly, what it is going to do to
6 the sentencing hearing which is going to become complex;
7 and thirdly, what it is going to do to appeals. And let me
8 briefly touch on those.

9 First off -- I am sorry. I apologize. I have
10 got off of my point. And if you will bear with me. This
11 happens to old criminal defense lawyers from time to time.

12 Okay, I am talking about the elimination of
13 probation. I apologize. I was going over to the problems
14 with the thing.

15 As I read this, I see this elimination of
16 probation -- let me me give you two examples that I think
17 might help you. This is the kind of thing that some of
18 you have might find helpful. The types of cases that we
19 in the defender office in a large metropolitan community,
20 a Federal Defender office would get -- the two types of
21 cases we would normally get: one type of case would be the
22 postal employee, the postal employee who steals from the
23 mail.

24 These are traditionally -- well, as a matter of
25 fact, in many instances, they are diversion cases. We

1 divert the case before it ever comes into the system. The
2 prosecutors are quite often willing to do that with this
3 kind of a case.

4 The second situation is -- usually it is a
5 probation case. And what we are talking about is the
6 employee of the postal office who steals something from the
7 mail.

8 As I read your draft, that particular
9 individual will be required to go to jail. I don't know
10 if you want me to go into this, but your base offense
11 value is a 2, which is very low obviously. But the
12 problem is, of course, he stole from the mail. So we add
13 an additional 6 adjustment. And the problem also is that
14 he embezzled, so we add another 6. Now, he is up to 14 and
15 he is no longer eligible for probation.

16 And these are the typical cases that are all
17 probation cases almost in this particular district.

18 The second case which I think you may want to
19 consider is the bank employee who embezzles.

20 Now, we are not talking as Mr. Valukas did
21 before about the one that causes the bank to go under.
22 We're talking about the 19-year old who just graduated
23 from high school last year, now working at the bank earning
24 more money than she has ever seen in her life, and her
25 boyfriend encourages her to take some money so they can

1 buy a new car. And she goes in and unlawfully purloins
2 money from the bank.

3 That teller, unless the amount of money that she
4 steals is less than \$1,000 will under your guidelines go
5 to jail. And I can suggest to you that there are few
6 judges in the Northern District of Illinois given those
7 circumstances who would send that person to jail.

8 I have looked at our statistics, by the way.
9 These are not published. They are not for publication. I
10 do not publish them. But I keep statistics every year on
11 the sentences given on Criminal Justice Act cases, those
12 are appointed cases in the Northern District of Illinois.
13 We receive probation in most of the cases in CJA-type
14 cases, as a matter of fact, and overwhelmingly the
15 sentence is probation.

16 I suggest to you if you all but eliminate
17 probation, you will have in the Northern District of
18 Illinois an additional 500 people visiting Norm Carlson's
19 hotels each year. And that is a pretty staggering amount
20 when you stop and think of it.

21 Incidentally, I think that an excellent argument
22 can be made, and I will do this really in the written
23 materials rather than now, but an excellent argument can
24 be made that the elimination of probation was not intended
25 by the United States Congress. As a matter of fact, your

1 enabling legislation tells you specifically to take into
2 consideration the overcrowding in the prisons.

3 You know now, of course, that our federal prisons
4 are one-third overcrowded right now. Add to it the
5 additional, just from northern Illinois, 500 or so people
6 that you will put in it every year and that will have an
7 impact.

8 Secondly, I think that the -- well, not think,
9 I know the United States Congress in effect tells you
10 that nonviolent, nonserious first offenders should not be
11 put in jail. And I think that is my concern: that these
12 types of people still have available to them the sentence
13 of probation.

14 We also have, of course, Senator Nunn's sense
15 of the Senate resolution. That is to affect federal judges
16 now in their sentencing unless and until you people have
17 come down with your final report and it has been adopted
18 by the Congress. And I think interestingly in that sense
19 in the Senate resolution, there was a strong
20 recommendation that we start thinking about or considering
21 alternatives to incarceration. And, of course, the high
22 recommendation there, I think, is community service is what
23 they are talking about for the nonviolent, the
24 nonhabitual criminal, the nonprofessional criminal, the
25 criminal who does not violate a public trust or a public

1 office, that type of a person.

2 Again to a silk purse, if you will. I commend
3 you for what I have read in there about your sanction unit
4 conversion idea. I think this is the area you may want to
5 go in here where you are going to in effect say, "We are
6 going to allow --" depending upon whether or not it is a
7 crime to personal property -- "We are going to allow a
8 transfer of some of these units over to probation or the
9 community service."

10 Maybe that is the answer. And I commend you to
11 maybe do some additional work with that. I think that you
12 are certainly on the right track there, but the point
13 being that we have to preserve probation as a viable
14 sentence in the federal district courts.

15 Now, I was confused a little bit before. I
16 just wanted to talk briefly about the burden on the
17 system. The burden on the system is threefold: number
18 one, trials. I think that we are going to have far more
19 trials. Number two, the sentencing hearing. It is going
20 to be longer and more complex. And thirdly, of course, we
21 are going to have many, many more appeals because of the
22 -- if the draft goes through.

23 Let me talk briefly about that. I think that
24 if your draft goes through as it is prepared right now,
25 you are going to be creating a incentive, if you will, for

1 defendants to go to trial in many cases. The -- and I
2 say this particularly so if maybe the trial might be
3 used to explore or to develop an issue that a
4 defendant wants explored.

5 Example: Let's assume that the issue is whether
6 or not the defendant is or is not a minor participant.
7 Well, as a criminal defense lawyer, it may be better for
8 me to air that issue or try that issue in the context of a
9 trial rather than wait for the sentencing hearing which
10 would be more limited. I wouldn't have the availability
11 of the one tool the defense attorneys have, the cross-
12 examination. And it may be better to do that.

13 So we have a conspiracy case. The probability of
14 conviction in the conspiracy case is real. But we are
15 concerned about getting the minor participant reduction in
16 the sentence, so we go to trial. If we happen to win, so
17 we're lucky. What difference does it make? We're not
18 going to win, but at least we will prove to the judge that
19 unalterably this was a minor participant. And it is
20 easier for us probably to prove it in the context of a
21 trial than to wait for the sentencing hearing.

22 I am concerned a little bit about that. Let me
23 mention also to you in practical terms the bank robbery as
24 it is now construed. Bank robbery carries -- we are
25 talking unarmed bank robbery minimum mandatory five-year

1 sentence.

2 I respectfully suggest to you that this does not
3 appreciate the realities of who commit unarmed bank
4 robberies in the metropolitan cities of our country.

5 In a word, the unarmed bank robberies, most of
6 them -- and that is a shocking statement -- but most
7 of them in the metropolitan cities are committed by people
8 who are listening to radio stations that you and I do not
9 hear. The problem is going to be this simply stated, if
10 you will -- we are not talking about Dillingers or people
11 going in like that with the guns. We are talking about
12 the average federal bank robbery.

13 Now, what is going to happen with a five-year
14 minimum mandatory sentence is that you are going to see, I
15 suspect, a lot of trials. And you know what the issue is
16 going to be in the trial, it is the only issue available:
17 It is going to be a mental health issue and we are going
18 to be trying insanity cases back and forth on trials,
19 cases that are now well handled by the prosecutor's
20 offices and by the judges. And we have no problem with
21 it. But can I, as a criminal defense lawyer, reasonably
22 plead a man guilty when I know he is going to get five
23 years and I know the judge, given his own druthers, would
24 not otherwise give him that five years. I suggest that
25 you may want at that reconsider that.

1 Secondly, the problem of the sentencing hearing
2 -- and I know that you have thought about this, but let me
3 give you some practical comments on this. The sentencing
4 hearing is going to become tremendously complex and
5 enormously time consuming, and I am sure that you well
6 appreciate that. We are going to suddenly find ourselves
7 in a sentencing hearing litigating all of the issues that
8 you are now creating. We are going to litigate, for
9 instance whether or not -- in some cases obviously --
10 whether or not the defendant knew the victim was
11 vulnerable. We are going to litigate whether or not there
12 was a quote, "substantial," end quotes, loss; whether or
13 not the victim was indebted, became indebted because of
14 this investment.

15 By the way, are we going to now get the victim's
16 tax returns to do this? I would think we are probably are
17 if we are going to find out all of these things at the
18 time of the sentencing hearing. We are going to litigate
19 the amount of gain or loss. We are going to litigate
20 whether or not or not perjury by the defendant at the time
21 that he or she testified. We are very going to very
22 importantly going to litigate the role in the offense of
23 the defendant. We are going to litigate whether or not he
24 or she was a supervisor, whether or not they had a special
25 trade or skill that was involved in the use of this. .

1 These are all litigatable facts. We are going to
2 litigate whether or not they did or did not accept
3 responsibility. And I won't go into it, but you have got
4 several little points under that that raise very
5 interesting issues when you come to litigating. We are
6 not, according to your guidelines and I would speak to
7 this now, we are not -- it is not proposed that you
8 litigate cooperation. I suggest to you to the contrary
9 that if we are going to litigate all the rest of these
10 things, you might want to consider that we litigate
11 cooperation, also. I don't think the prosecutor should
12 have the unabridged option of reducing a sentence 40
13 percent. I think sentencing is the function of a judge.
14 Charging is the function of a prosecutor.

15 I have another problem with cooperation. Simply
16 stated, the way that you have set it down now a
17 prosecutor may certify that cooperation exists and that is
18 the end of the game.

19 What happens in the instance where a defendant
20 says, "I cooperated"? The prosecutor says, "No, no. I
21 don't think you cooperated."

22 Well, should not we be able to litigate it?
23 Agreed, we have the burden now under these circumstances,
24 but show what the defendant did and let a judge make a
25 determination whether or not we did or did not cooperate.

1 One other great problem with cooperation. I
2 know that you are familiar with it but I mention it to you
3 again: The problem, of course, with cooperation is that
4 only the worst of the defendants profit from this, one of
5 the biggest discounts you are given. I know we're all
6 familiar with that.

7 What about prior drug use? This is a major,
8 major problem. This will be litigated right now.

9 And finally, and I would speak very briefly to
10 it, the issue of psychological harm. I am very concerned
11 with the psychological injury provisions that you have
12 here. And I respectfully -- I will start off by telling
13 you my conclusion. I respectfully suggest you consider
14 them for more policy than guideline.

15 If you don't, the sentencing hearing in this
16 area is going to be a -- it is going to be an elaborate
17 circus. We are going to be bringing mental health experts
18 in. Let's face it. That's what is going to happen.
19 These are the same mental health experts we are trying to
20 get out of the courtroom in the context of insanity or
21 mental health defense cases.

22 If the claim is that the psychological injury
23 is significant, of course, the prosecutor need not bring in
24 a mental health expert. But as a matter of fact and
25 common sense, isn't the defense attorney going to want to

1 bring somebody in? Of course they are. They are going to
2 want to bring somebody in if that's an issue.

3 And as soon as the defense attorney wants to
4 bring one in, you can rest assured that the prosecutor in
5 many cases is going to want to bring a mental health
6 expert in as well.

7 An extreme? Of course, we are going to have to
8 have the mental health experts.

9 Now, the -- I would imagine in these instances,
10 by the way, that the victim will have to be tested by the
11 defense psychiatrists. I would think that that is common
12 sense that we are going to have to do that. We are going
13 to have him examined. We're going to cross-examine him.
14 Some of this might be embarrassing in what we are going to
15 go into with the victim. I just don't think that this is
16 the place to do this kind of a thing.

17 Incidentally, I ask the question of you -- I am
18 sure that you are going to have to consider it: Are you
19 going to let that mental health expert testify to the
20 ultimate issue?

21 There is a proscription as we all know now in
22 the Rules of Evidence against them testifying to the
23 ultimate issue. If they don't testify to the ultimate
24 issue, I suggest that their testimony is going to be very,
25 very limited. The issue is going to be whether it was a

1 direct or indirect result. In a way, by the way, I think
2 that we are doing here -- we're bringing civil concepts
3 into criminal law, respectfully. We are bringing
4 Fallsgraff and whatever Felden -- that train station into
5 the criminal law field.

6 Criminals should be found guilty for the things
7 that they intend the mens rea. But now we are talking
8 about something else. I have no problem with addressing
9 victims wounds. To the extent that a defendant can do it
10 financially, I think it is a wonderful idea. But I don't
11 believe that litigating these psychological issues in the
12 context of a sentencing is a good idea for the federal
13 courts and I respectfully would suggest that you might
14 consider guidelines.

15 Finally very quickly, appeals of sentencing:
16 you know, of course that you are going to get appeals.
17 You expect them. And there is no problem with this. This
18 is not what I am talking about. The appeals where the
19 judge goes over over the guidelines or under the
20 guidelines, that we know is coming. Everybody
21 anticipates it.

22 But what about the numerous appeals, the more
23 complex appeals of whether or not the district courts did
24 right procedurally, whether or not they used the right
25 thing in determining the status of this particular

1 defendant? You are going to get numerous appeals on those
2 issues alone, if you will.

3 Finally, and then I will conclude -- I think
4 that I spoken more than long enough -- I have already
5 suggested this to you. I would urge respectfully that
6 this Commission suggest to the Congress a retention of
7 Rule 35, the motion to reduce.

8 I suggest to you that Rule 35 -- there is no
9 suggestion that Rule 35 has ever been abused. As a matter
10 of fact, many judges -- in my experience, many judges not
11 only welcome it, but they want Rule 35 motions filed.
12 This gives them a time for reflection. And though you are
13 trying to put objective standards in, the fact of the
14 matter is there is still some subjectivity going to be
15 left in any sentencing structure, and judges oftentimes
16 like that time to reflect, if you will.

17 I am not sure -- I tried to find out why Rule
18 35
19 was eliminated. I read as much as I could on it. And
20 I confess to you I have not been able to find a reason
21 save for this: It appears that the reason Rule 35 was
22 eliminated was that Congress or somebody was concerned
23 that if a judge, a sentencing judge reduced the sentence
24 below the guidelines, could the prosecutor appeal?

25 And if that is the issue, the issue is easily

1 resolved. You recommend yes, the prosecutor can appeal,
2 certainly the prosecutor. I am not trying to deny them
3 the rights. But what I am trying to say is that it
4 appears a little unfair to be giving the right to reduce
5 only to the prosecutor, number one; and secondly,
6 circumstances do change. A person sentenced to jail, his
7 wife may die, the children may have psychological
8 problems. On a lesser ground, they may get a job of some
9 sort. And the judge may on reflection decide that this
10 was not -- within the discretion -- was not the appropriate
11 sentence and they want a second look at this thing. And I
12 think it might be is a good idea if they had this
13 opportunity. I respectfully suggest that you consider
14 making that recommendation.

15 CHAIRMAN WILKINS: Thank you very much, Mr.
16 MacCarthy for these excellent remarks and presentation.

17 I take it from reading the preliminary draft --
18 it is very preliminary in nature and one that we published
19 simply to generate public comment as we are doing
20 today -- that overall as far as the approach is concerned,
21 you think that the approach is pretty sound?

22 MR. MAC CARTHY: Excepting the fact that I have
23 a problem philosophically. But I think what you have done
24 with it is a marvelous job, yes.

25 CHAIRMAN WILKINS: There are a lot of ways you

1 can write guidelines, of course, and a lot of ways you can
2 look, and we were really concerned on a number of issues.
3 But one is does this -- is the presentation of this
4 guideline -- is the approach or the steps that you take in
5 going through the process of arriving at a summit a good
6 process, laying aside the issue of whether or not the
7 sentence is too high or low at this time?

8 MR. MAC CARTHY: Yes. A little complex. But
9 other than that -- you are going to tax the minds of a few
10 defense attorneys with this. But say for that, yes,
11 excellent.

12 CHAIRMAN WILKINS: Well, of course, you should
13 have seen it before we simplified it. It is very
14 difficult. The more complex, the more ability of the
15 Commission to take into account the unique characteristics
16 that your clients would bring to the courtroom; the
17 simpler you make it, of course, sometimes unfairness in
18 justice can result because people with distinct
19 characteristics are lumped into the same category. So it
20 is a balance that we are trying to seek.

21 I want to ask you about psychological injury. It
22 is something that judges consider today, you would agree?

23 MR. MAC CARTHY: Oh, that's why I say the policy
24 statement: Tell the judge, "If you want to consider it,
25 fine." And leave it up to the individual judge as opposed

1 to making it a guideline that must be considered in every
2 case where it is present, yes.

3 CHAIRMAN WILKINS: So you are suggesting put
4 that in a separate chapter that says, "Judge, you may
5 deviate from the guidelines if you find that extreme
6 psychological --"

7 MR. MAC CARTHY: Absolutely. And if the judge
8 wants to do it in a given case, fine. And, you know, we
9 -- I have a lot of respect for the ability of federal
10 judges. But I think they can do a real good job there and
11 I would rather leave that to their discretion than
12 imposing upon us in every case. We are going to be three
13 and four days running just the psychological aspect of the
14 sentence here.

15 CHAIRMAN WILKINS: Thank you.

16 Any questions to my right?

17 COMMISSIONER CORROTHURS: I have one point, Mr.
18 MacCarthy. I believe you stated at the very beginning that
19 you do not think that uniformity of sentencing is possible
20 or necessary.

21 So since that involves, for me at least, a
22 concern about fairness, perhaps a bit of clarification. As
23 I understand our mandate, it is not disparity that we
24 would hope to eliminate or minimize to the extent
25 possible, but unwarranted disparity, the disparity that

1 would exist when events or circumstances and offenders are
2 similar that a similar sanction would be expected.

3 MR. MAC CARTHY: Well, I certainly appreciate --
4 and that is what Congress has spoken on. And any views, by
5 the way, that I would have to the contrary -- which
6 obviously are, are really not important. And by the way,
7 I mention them only --

8 COMMISSIONER CORROTHERS: Your views are
9 important.

10 MR. MAC CARTHY: Well, I mention them only so
11 that you know from where I was coming from.

12 COMMISSIONER CORROTHERS: Yes.

13 MR. MAC CARTHY: I just have -- I have a real
14 problem with the dissimilarities of individuals. It is a
15 difficult task. I am shocked. I confess to you I am
16 shocked at how well I think you have taken on a -- well,
17 to me an almost impossible task.

18 CHAIRMAN WILKINS: Any questions to my left?

19 COMMISSIONER BREYER: Just a couple of things
20 that maybe --

21 MR. MAC CARTHY: Yes, your Honor.

22 COMMISSIONER BREYER: You obviously can't do this
23 now, but I was struck by a number of things that you said
24 that I found very interesting.

25 One thing that you are doing is you are going

1 through catching what I call "glitches."

2 MR. MAC CARTHY: Pardon me? I am sorry.

3 COMMISSIONER BREYER: You are catching what I
4 would call "glitches," like you discovered homicide and
5 alcohol --

6 MR. MAC CARTHY: That I said in a --

7 COMMISSIONER BREYER: I know. But it is very
8 important, it seems to me, that you continue to do that
9 and provide a list of glitches because unless we have the
10 list, we won't be able to correct them even though each
11 one looks trivial and obviously mistaken, we have to have
12 the list.

13 MR. MAC CARTHY: If you would have as few of
14 them -- anybody who would as few of them as you do in what
15 you have done here, I think they should be commended --

16 COMMISSIONER BREYER: That is fine. But I would
17 like the list.

18 And the second thing which I think is also
19 useful is in your experience, you go through and discover
20 even though we have said which is absolutely the case
21 that these numbers are not only tentative, but they are
22 simply put there for people -- they have no or very little
23 significance because there has been no decision made as to
24 the numbers because the research of the numbers is
25 incomplete. We have to put in some numbers; otherwise

1 people won't focus on the intent of the draft --

2 MR. MAC CARTHY: I well understand.

3 COMMISSIONER BREYER: -- and therefore it is very
4 useful, as you have been doing, as you go through and find
5 areas where you think in your experience the numbers don't
6 make sense, such as your example of the unarmed bank
7 robbery, most of whom you think represent people who have
8 mental problems. I would say a list there of not just the
9 bank problems --

10 MR. MAC CARTHY: I well understand.

11 COMMISSIONER BREYER: -- but others, would be
12 useful.

13 And the third and this I am rather most
14 interested in is you say, "Well, there are going to be a
15 lot of hearings that may become unmanageable."

16 There I wonder well, why more than now? After
17 all, there is a pre-sentence report now. And probably you
18 think now that if the pre-sentence report says, "Joe
19 Smith, the defendant was a kingpin," that Joe Smith is
20 going to get a bigger sentence than if it says he was a
21 mule. But the hearings don't take place now, so why will
22 they?

23 MR. MAC CARTHY: May I give you an example?

24 COMMISSIONER BREYER: Please, yes.

25 MR. MAC CARTHY: I think that the best example is

1 in the drug abuser aspect where right now, for instance,
2 it is certainly possible -- and I don't mean to go over
3 it, but maybe I should answer this -- it is certainly
4 possible from the drug abuser aspect that the prosecutor
5 in the present sentencing says, "Judge, we think he is a
6 drug abuser." This finds its way in the pre-sentence
7 report up to the judge. Okay, I have no problem with that
8 today. I can handle that today, but I can't handle it
9 under your system. I can handle it today because I can go
10 up to the judge at the time of allocution and say, "Your
11 Honor, sure he was a drug user. He was a junkie
12 eight years ago. But he stopped. He hasn't had anything
13 in eight years." And I am confident that the judge would
14 sit back and say, "Yeah, I am not going to punish him
15 because eight years ago he was a drug user."

16 Under under your system, however, the mere fact
17 that he was a drug user, now the judge has no discretion.
18 He must add a additional two years to that sentence.

19 COMMISSIONER BREYER: So some of that can be
20 taken as reasons for departures from the guideline
21 because eight years ago you say that -- with that in
22 mind.

23 Well, how do we deal with this problem? You said
24 at the beginning you were worried about being a spokesman
25 -- we might think that you were a spokesman for felons.

1 MR. MAC CARTHY: Future federal felons.

2 COMMISSIONER BREYER: Well, the actual thing is
3 you are not. But you do have at interest is the fairness
4 of the procedure. I think that is the case.

5 MR. MAC CARTHY: Thank you.

6 COMMISSIONER BREYER: And now you have identified
7 a problem and I think maybe institutionally you might
8 think, "Well, let's have lots of procedure. It would be
9 more fair." But you also see the practical problem of
10 having too much procedure.

11 Before a person goes to jail he has procedure
12 before a magistrate, a suppression hearing, a trial, an
13 appeal and then a long sentencing hearing. The system has
14 to be workable. So insofar as your organization can
15 address itself directly to the necessary procedural
16 compromise and tell us how to get better than present
17 procedure that won't be so complex that it will destroy
18 the court system -- I mean, that is a challenge.

19 MR. MAC CARTHY: That is a tremendous
20 challenge.

21 COMMISSIONER BREYER: And the final thing that
22 I would really like help on is the relationship of the
23 plea bargain to the problems that you have raised. That
24 is, one of the things that might help with plea bargains
25 is it might, of course, help with some of the procedural

1 complexity and the administrative problems.

2 On the other hand, as you have pointed out, you
3 don't want the prosecutor himself to make all of the
4 decisions; and therefore, with the use of Rule 11, we have
5 an opportunity of saying what a proper plea bargain is at
6 the same time that that plea bargain might be allowed to
7 -- the guidelines.

8 But that would work only if you could tell us
9 what the elements of a proper plea bargain and the
10 elements of an improper plea bargain are. So I would ask
11 you to think about that question. So I have listed a set
12 of questions which I don't expect you to answer --

13 MR. MAC CARTHY: I certainly will try to address
14 them, your Honor. How well, I don't know, but we will
15 try to address them.

16 CHAIRMAN WILKINS: Any other questions?

17 COMMISSIONER MAC KINNON: Yes, I have one.

18 Counsel, from your very substantial experience,
19 you talked about first-degree non-violent -- or first
20 offense non-violent bank robbers.

21 How many of your cases get into that category?
22 Of the bank robbers that you have defended or people that
23 get money from banks with slipping a note to a cashier or
24 something, how many of them are first offenders to your
25 knowledge?

1 MR. MAC CARTHY: First offender bank robbers,
2 almost all of them. First offenders, not necessarily not
3 all of them. I remember not too many years ago making an
4 eloquent plea to a judge in this building where my bank
5 robber, this was his first bank robbery, had 17 prior
6 convictions. And my plea to the judge at the time --

7 COMMISSIONER MAC KINNON: He was --

8 MR. MAC CARTHY: -- was that they had done the
9 wrong thing in 17 prior instances by putting him in jail,
10 and why don't you do the right thing and put him on
11 probation. And eventually, we did get him on probation,
12 by the way, and it was the best thing that ever happened
13 to him. We got him over at Northwestern and they took
14 wonderful care of him. And still to this day he has not
15 had any -- and that was about six or seven years ago -- he
16 has not had any problems because they have taken care of
17 him mentally as best they can.

18 But most of them are first -- in answer to your
19 question, most bank robbers in this area -- I am talking
20 about the nuts -- it is a first offense. It it is a
21 second offense, that is a different situation. That is a
22 totally different situation.

23 COMMISSIONER MAC KINNON: And you said that those
24 cases ought to get probation?

25 MR. MAC CARTHY: No, I did not. They cannot get

1 probation, as a matter of fact.

2 COMMISSIONER MAC KINNON: You said that they
3 couldn't get it, and I assumed that you anticipated that
4 they should get it.

5 MR. MAC CARTHY: Well, I didn't say that one way
6 or the another because as a matter of fact, what I would
7 like doesn't really matter. Congress has already spoken,
8 as you well know. You must give them time in jail in
9 those instances because it is a 20-year sentence, so you
10 have got to give them time in jail. Congress has spoken.
11 I don't think you have discretion there.

12 COMMISSIONER MAC KINNON: You mean under the
13 sentencing guidelines?

14 MR. MAC CARTHY: Well, under the Congressional
15 Act, they must go to jail. How long they will spend in
16 jail depends on your Commission.

17 Now, you have set it down to five, and I think
18 that the five is somewhat a little too high or unrealistic.

19 COMMISSIONER MAC KINNON: And why do you think
20 that they ought to consider probation more often and make
21 it available in so many instances?

22 MR. MAC CARTHY: Because -- well, you have the
23 head of the Bureau of Prisons, the Federal Bureau of
24 Prisons, saying that two-thirds of the people in his
25 prisons right now probably don't have to be there.

1 I think that we can sentence people respectfully
2 in ways or punish them in ways other than sending them to
3 prison.

4 When we send people to prison, as you well know,
5 it costs the taxpayer an awful lot of money. It seems to
6 me that where we have a individual who is not a threat to
7 society and the crime is not what we would call a quotes
8 "serious" end quotes crime -- and admittedly that is
9 debatable -- that wouldn't it be much better if we imposed
10 upon this person some community service, had them repay
11 society rather than take further from society by being
12 incarcerated in one of our overcrowded institutions?

13 COMMISSIONER MAC KINNON: Well, yes, I can
14 appreciate that. But I wondered if you were leading up to
15 the fact that the severity of the punishment exceeded the
16 severity of the crime, recognizing what conditions are in
17 some prisons where these people serve.

18 Now, I come from the District of Columbia where
19 the -- one of prisons there is no place for altar boys
20 and conditions are very severe. And I think that in some
21 of those sentences that they enter into -- the judges that
22 impose them -- do so very, very reluctantly because of the
23 very severe conditions and the threats and the personal
24 injury and the abuse that is inflicted upon them not by
25 any operation of law, but by the inmates.

1 Now, is that a factor that you think that we
2 ought to consider or should be considered some way in
3 these particular guidelines?

4 MR. MAC CARTHY: I -- I do not like to answer the
5 question the way I have to honestly answer it, but I will.
6 I think that the Bureau of Prisons, Federal Bureau of
7 Prisons, Norm Carlson's Federal Bureau of Prisons are
8 very, very well run. Sure you are going to get some of
9 that -- necessarily get some of that, but I don't think
10 that is a major factor.

11 COMMISSIONER MAC KINNON: Now, you commented on
12 one offense with respect to the homicide or the-- I think
13 it was the homicide or by drunkenness as against the gun.
14 That was a comment on the real offense aspects of the
15 sentence.

16 MR. MAC CARTHY: Yes, yes.

17 COMMISSIONER MAC KINNON: What did you think
18 generally -- well, no, that was a comment on the severity
19 aspect of the sentencing.

20 Generally, I wondered what you thought about
21 the evaluations of the severity of the offenses throughout
22 the draft that you saw?

23 MR. MAC CARTHY: Okay. Well, thank you. I was
24 giving my input and, of course, I wrote in my comments on
25 it. And I think that you did exceptionally well. I think

1 in terms -- you are talking about in terms of gradation of
2 offense --

3 COMMISSIONER MAC KINNON: Yes. The severity --
4 the initial figure that went with the original crime.

5 MR. MAC CARTHY: Sure. Judge MacKinnon, I think
6 that you did a exceptional job. My only complaint, if you
7 will, is I think that you are a little high all of the way
8 through. But other than that, in terms of the relative
9 merits of the offenses, I think that you did a excellent
10 job and I think that is your question.

11 COMMISSIONER MAC KINNON: Thank you.

12 CHAIRMAN WILKINS: Thank you very much, Mr.
13 MacCarthy.

14 MR. MAC CARTHY: Thank you.

15 CHAIRMAN WILKINS: We look forward to continuing
16 a working relationship with you and your staff and your
17 office.

18 MR. MAC CARTHY: Thank you, your Honor.

19 CHAIRMAN WILKINS: Our next witness is a
20 distinguished attorney from Chicago, a partner in the law
21 firm of Kirkland & Ellis, Mr. Fred H. Bartlit, Jr.

22 Mr. Bartlit, we are delighted to have you with us
23 today and appreciate that you have taken your time to
24 share your thoughts and comments with us.

25 MR. BARTLIT: Thank you, Judge Wilkins.

1 My practice for 26 years has been about 30 to 40
2 percent white collar criminal defense: antitrust, mail
3 fraud, securities fraud, fraud in government contracting,
4 that sort of thing. The people that I represent have
5 money. I have never represented anybody who -- where the
6 evidence was a bloody shirt or anything like that. These
7 are economic crimes, and they are people that can hire
8 hire lawyers and pay them well.

9 I am going to talk about two things today:
10 first, about deterrence of white collar crimes; and second,
11 about the mechanisms which the draft puts into place.

12 There are two kinds of white collar crimes and
13 the issues of deterrents are different. The first kind of
14 white collar crime -- and I am putting drugs out of the
15 thing. I do no drug work at all that I know of. The
16 first kind is sort of the antitrust type offense, the
17 corporate offense where the corporation is to a certain
18 extent unknowingly, as a enterprise, going into risky
19 territory.

20 Antitrust is a good example; some kinds of
21 securities fraud; failures to disclose the value of
22 certain assets in different kinds of transactions which
23 believe it or not now start to trespass into criminal
24 areas. There are those kinds of transactions.

25 Rarely do people go into those transactions

1 making a risk-reward judgment. Most of the time my
2 experience has been they are sort of caught up in doing
3 better for the corporation, making more money for the
4 corporation. I do not believe that antitrust and
5 corporate-type crimes are deterred by criminal punishment.
6 I think that the history of antitrust is classic.

7 I started practicing law in 1960. For ten years
8 or more almost every major American corporation was
9 involved in criminal indictments and there were criminal
10 trials and there were convictions and sentences. Grand
11 juries were active all over the country. Indeed throughout
12 the '50s there was a tremendous amount of criminal
13 activity.

14 Today I know of one or two -- there are probably
15 more -- but I know of one or two price fixing grand juries
16 of any magnitude going on around the country, apart from
17 the regional highway cases and regional electrical
18 contracting cases. And I have counseled corporations for
19 the last 25 years when we were going through this change.

20 Why don't major corporations commit antitrust
21 violations anymore, criminal antitrust violations?
22 Private Attorney General, treble damages, the overwhelming
23 exposure to private treble damage actions is what has
24 stopped these antitrust violations plain and simple.

25 The carrot that was out there for the most

1 brilliant private lawyers caused focuses on these
2 activities and they caused these activities to stop.

3 I don't believe that because -- because I
4 don't believe that the activities in the first place were
5 done with a calculated decision as to whether we will get
6 away with it criminally or not, I believe it was only the
7 overwhelming sanction of almost corporate destruction that
8 stopped it.

9 And why is that? Because what stopped antitrust
10 violations are corporate compliance programs. Every major
11 company I have worked for is loaded with bright, young
12 in-house lawyers that go around the country from division
13 to division from part of the company to another part
14 telling the story of how to avoid violating the antitrust
15 laws. Don't meet with competitors, don't do this, don't
16 do that. And they have done it to the point where it
17 would be a surprise to me to see a real hard-core criminal
18 antitrust case involving a major U.S. corporation because
19 they got wise, they learned that the economic gain wasn't
20 worth the candle, and they put in compliance programs. And
21 it was the threat of treble damage that I believe stopped
22 antitrust.

23 Now, let's look at the other broad kind of
24 white collar crime. That is the area of the SEC
25 violations, mail fraud, securities fraud, that sort of

1 thing.

2 In my experience, those crimes are not done by
3 large corporations who are attempting to gain some kind of
4 an economic advantage. They are often engaged in by a
5 very entrepreneurial, smart, bright, fast-moving person or
6 group of persons who has a idea. And in America today
7 frequently the difference between a good competitive idea
8 that is perhaps touched by a hint of hucksterism and a
9 scam is not always that great. It is not always easy to
10 tell when you are going into something whether it is a
11 scam or just a great idea that somebody has never thought
12 of before, the difference between a Ponzi scheme and some
13 investment decision. It is not that great, frankly.

14 These people are so caught up by a vision -- and
15 I have represented these people, and afterwards they all
16 look like the most awful kind of crooks and they have done
17 awful things and people have lost their life savings. But
18 looking back at the records, when they were getting into
19 it, they may have been overly entrepreneurial, too quick by
20 double, too smart by double. But they weren't thinking,
21 "This is the sort of criminal thing that I can get away
22 with." They weren't making a value judgment as to what
23 they could get out of it.

24 I think that again in that area that the
25 private attorney general concept, the treble damages, the

1 lawyers fees for the lawyer who is willing to give three
2 and four years of his life to developing a case, a
3 complicated case against somebody like this, I think that
4 is the best deterrent of that kind of white dollar crime.

5 And I guess what I am saying is that I have no
6 particular objection to the way the criminal penalties
7 have been laid out and obviously the emphasis on economics
8 rather than jail sentences is supportive of my view, I
9 still tend to believe that long-term private attorney
10 general concept with a bounty -- I'm a defense lawyer. I
11 have never received a contingent fee in my life. I don't
12 see anything wrong with idea of a bounty for somebody to
13 who brings to book somebody who has done bad
14 economic things.

15 The second thing that I would like to talk
16 about is this -- the horse may be out of the barn by now,
17 but my overall reaction when I read the report -- and I
18 did read it cover to cover -- was that it is like a lot of
19 great ideas. It is a great concept. Every time I thought
20 of a tricky little aspect to it and I read further, I saw
21 that somebody had already thought of that. There has been
22 a lot of back and forth between the different sections.
23 People have weighed the by-play of the sections and that
24 is all good.

25 It reminded me a little bit of something that we

1 used in the civil litigation field called the Manual of
2 Complex Litigation. That was supposed to move cases
3 along. I believe it was also, I think, called the Manual
4 of Protracted Litigation. I think it was aptly named. I
5 think it was aptly named because very intelligent people
6 did rational things. What you have done here is rational,
7 totally rational. They did rational things like saying,
8 "Why don't we have two waves of discovery. The first wave
9 will be we will identify witnesses and identify documents;
10 and then the second wave will come along and we will get
11 to the merits. And then maybe we will have a wave on
12 jurisdiction and then we'll have a wave on damages."

13 And those of us -- and I know that the members
14 of the Bench here went through that -- know that there
15 were endless arguments about what wave you were in. There
16 were endless arguments at depositions about what questions
17 you could ask. And a lot of real smart federal district
18 judges have now learned that the best way to get one of
19 these cases to trial is to set a trial date and say, "Take
20 your depositions. Come in when you are done; we will try
21 the case."

22 It seems to me that this -- the approach that
23 you have has the seeds of that sort of a problem. I read
24 it sort of -- when I read through it, I thought "This is
25 like the Internal Revenue Code." I told Suzanne Conlon

1 Secondly, the problem of the sentencing hearing
2 -- and I know that you have thought about this, but let me
3 give you some practical comments on this. The sentencing
4 hearing is going to become tremendously complex and
5 enormously time consuming, and I am sure that you well
6 appreciate that. We are going to suddenly find ourselves
7 in a sentencing hearing litigating all of the issues that
8 you are now creating. We are going to litigate, for
9 instance whether or not -- in some cases obviously --
10 whether or not the defendant knew the victim was
11 vulnerable. We are going to litigate whether or not there
12 was a quote, "substantial," end quotes, loss; whether or
13 not the victim was indebted, became indebted because of
14 this investment.

15 By the way, are we going to now get the victim's
16 tax returns to do this? I would think we are probably are
17 if we are going to find out all of these things at the
18 time of the sentencing hearing. We are going to litigate
19 the amount of gain or loss. We are going to litigate
20 whether or not or not perjury by the defendant at the time
21 that he or she testified. We are very going to very
22 importantly going to litigate the role in the offense of
23 the defendant. We are going to litigate whether or not he
24 or she was a supervisor, whether or not they had a special
25 trade or skill that was involved in the use of this. .

1 this morning that it reminds me of the IRS Code. Each
2 section is logical, and then it goes to another section
3 and that is logical. And what happens?

4 What happens is that the Internal Revenue Code
5 has become a document which is a good thing for rich
6 people with good lawyers. Rich people with good lawyers
7 have found all kinds of loopholes and made money. A
8 ordinary person can't afford a \$250 an hour lawyer. He
9 either pays his taxes or he doesn't. And if he doesn't,
10 he gets sanction and that sort of thing.

11 But the more complex something becomes and the
12 more levels of argument there are and the more inputs
13 that are and the more different things that you are
14 considering, the more it becomes a useful tool of very-
15 well represented people and the less it becomes a tool of
16 the poor guy that walks in and robs a bank with a candle
17 in his pocket.

18 And I wrote down here that these mini-trials,
19 these sentencing hearings with the wealth of things here to
20 consider, would be be a bonanza for a lawyer like me
21 because we switch from discussing what the sentence ought
22 to be, to arguing about what niche or pigeon hole the wrong
23 belongs in. And from that flow all kinds of consequences.

24 We don't know -- we no longer stand up and look
25 the judge in the eye and say, "This is what happened." And

1 if we misrepresent, the next time the judge knows that he
2 is not going to trust us. It becomes a trial. You have
3 got preponderance of the evidence. Legitimately in an
4 economic case, the sentencing hearing could expand -- it
5 could lead up to trial, it seems to me.

6 The biggest problem we have in our district
7 certainly is getting cases to trial. The more time that
8 is taken up in these hearings and proceedings, the less
9 likely we would be able to get cases to trial quickly
10 both on the civil and criminal side.

11 There was a sentence in your report which said,
12 of course, this will be a living document and as judge-
13 made law comes down we will revise it and fine tune it and
14 we will modify it. And it seems to me ten years from now,
15 we will have a wealth of judge-made law. There will be
16 CCH books on sentencing hearings and on all of the factors
17 that are being considered, we will -- those of us who
18 represent clients that have resources, we will write
19 briefs, we will bring in expert witnesses, we will bring
20 in economists, we will have the same kinds of battles over
21 who was hurt by what that we now have in antitrust cases
22 which are unbelievably hard to prove, which involve
23 speculation and linear discretions and all of that sort of
24 thing.

25 And the first thing I had written in my notes was

1 "If it ain't broken, don't fix it." It was interesting
2 that one of the other witnesses said that.

3 And, you know, as I read through this document
4 and I tried to imagine the realities of it as a trial
5 lawyer and how I would function with that document, I
6 began to wonder if the disparities that exist are
7 sufficient to justify changing a system which is working
8 reasonably well. I know everybody can anecdotally come
9 up with stories of the -- Tony Valukas said today that
10 he had an instance where one defendant in a similar case
11 -- similar defendants, one got three years and one got 25
12 years. That is awful.

13 The problem with putting in a system based on
14 disparate anecdotes like that is a serious one. And you
15 know, nobody can say the present system is perfect. But
16 if you stand back and take a look at it from a distance
17 and then envision the -- I think in your report,
18 somebody talked about, or in another report I read Kaufka
19 S series of hearings and appeals and revisions and
20 retrials and rehearings that smart lawyers can cause to
21 happen given mistakes in these cases, it bothers me.
22 It bothers me that a very honest, direct, pure, totally
23 logical system will end up either worse than what we have
24 now or probably no better.

25 What I wonder is if a judge, given the ability

1 to make a decision as to whether these complex economic
2 crimes fit in two or three different categories, knowing
3 knowing that the defendants will give him charts of what
4 results flow from what categories and knowing he
5 has latitude on cooperation and things like that, whether
6 when the whole system concludes, 90 percent of the judges
7 won't end up very close to where they are now. And if 90
8 percent of the judges are going to end up very close to
9 where they are now, then a complicated, very expensive
10 system is being put in sort of discipline ten percent
11 -- I would say that ten percent is is high -- but
12 discipline less than ten percent of the judges, it doesn't
13 seem like the game is worth the candle.

14 CHAIRMAN WILKINS: Thank you very much, Mr.
15 Bartlit.

16 I gather from your testimony that if a white
17 collar defendant hires you and pays you a fee that he has
18 probably been punished enough. I was trying to figure out
19 how we could write that into our guideline.

20 I really appreciate the comments that you have
21 made and I know the Commission does, too.

22 One of the problems that we have is that we
23 labor under a piece of legislation that created us and the
24 legislation that asked us should we have guidelines and
25 told us to draft guidelines. And then Congress has

1 answered that issue and we are now trying to find the
2 guidelines to best serve the administration of justice.

3 And you are exactly correct. The more complex
4 they become, the more issues that we will find that we
5 have to litigate. So we are trying to find that balance
6 as I know you are. And I would be interested in any of
7 your comments in writing as time goes and as you take a
8 look at some of these things.

9 As far as fines on corporations are concerned,
10 you are very likely correct; that is, that civil penalties
11 that can be imposed has been the greatest deterrent.

12 But we have to talk about fines. What is the
13 best approach to take, a policy statement to give to the
14 judge -- which we have to do then under the law -- to tell
15 that judge, "This is the principle that you should follow
16 in assessing the appropriate fine on a corporate
17 defendant"?

18 Is it the gain or loss caused by the improper
19 corporate activity? Is it the corporate assets and
20 ability to pay? How would you say is the way to go?

21 MR. BARLIT: Well, the problem is that the gain
22 or loss is -- it isn't impossible to compute ,but it is
23 really tough to figure out what would have happened.
24 A typical situation, you have prices going up, and the one
25 side says, "Well, they went up because you met at the La

1 Mirage Country Club and talked about it." At the same
2 time, we see inflation going up by the same percentage the
3 prices went up; you see competitive plants perhaps going out
4 of business and they there are overriding economic factors
5 why they would have gone up anyway. And anybody who knows
6 economics knows that probably most cartels in the long
7 haul don't work anyway.

8 So it is hard to -- if you really want to do a
9 decent job, it is hard to use a ten percent assumption.
10 That is totally an arbitrary assumption and it is hard to
11 pick a number that the defendant benefitted by. It is
12 also probably very unfair to penalize a corporation based
13 on its total assets because many times these corporate
14 crimes most of the time they are not committed by people
15 in the board room, they are not committed by division
16 heads. They are committed by the 37-year old sales
17 manager who wants to get to the top and wants to
18 accomplish something good, and he is out there probably
19 contradicting the boardroom philosophy.

20 And to take a company like -- I will take one
21 that I don't represent, like IBM. But to penalize a
22 company like that for the overzealousness of a young
23 marketing person who got together with a competitor to
24 say, "You know, we will bid on this government contract and
25 you bid on this," just doesn't make any sense. It is too

1 Draconian.

2 I guess that my druthers would be to draft a
3 series of four or five three-line principles for trial
4 judges to consider yhat is the collective wisdom of all
5 the people that have considered this, that you ought to
6 consider without a lot of control of the Court's
7 discretion the following things:

8 I think that the federal district, federal
9 judiciary is the strongest institution in America today
10 and I have -- I hate to say this, but I have never lost a
11 case where I felt I was right and shouldn't have lost. I
12 lost lots of cases. I feel like you can give federal
13 judges lots of discretion. If you have a mandate to
14 control the discretion by policies, I think that is
15 easier to write four or five or six broad principles that
16 apply to white colar criminals than it is to cabin in
17 their discretion so much.

18 If I were a Prentice Marshall, for example -- I
19 don't know what his view of this is, but I would be irked
20 by being so tightly controlled because I think the
21 essence of being a judge is when you say you are a
22 chancellor of equity, I think a sentencing judge does sit
23 as a chancellor of equity and each case is different and
24 judges have no reason other than to sentence in a fair,
25 honest way and if some -- I would give the minimum

1 guidance that would be consistent with the Congressional
2 mandate. That is a shorter way of saying it.

3 CHAIRMAN WILKINS: Any questions to my left?

4 COMMISSIONER BREYER: I would like to follow that
5 up because I think that your comments were very thoughtful
6 and I agree with quite a few of them. The particular risk
7 -- I mean, I would like to see -- to ask to you be more
8 specific not now, but -- and I will focus the problem
9 specifically.

10 The problem as I see it, which I am very
11 sympathetic to, is the more of the pigeon holes, the more
12 that we create a field day for the lawyers, the more we
13 drag out the trials, the greater the risk of the
14 injustice, and the more difficult it is to put criminals
15 in jails. The fewer the number of pigeon holes, the
16 greater the risk of unfairness because you put unlike
17 defendants in the same category.

18 So the solution is three compared to the
19 present. And this is what you might - what I would like
20 is: 1) What in this document that we have written is an
21 unnecessary pigeon hole? If, in other words, you operate
22 with the principle, "No more pigeon holes than absolutely
23 necessary," what could we eliminate?

24 If you can go through and put checkmarks by the
25 ones that we could eliminate because they are not

1 absolutely necessary, that would be helpful.

2 MR. BARTLIT: Certainly.

3 COMMISSIONER BREYER: The second is if you are
4 going to eliminate the pigeon holes, then there must be
5 within the context and confines of the statute, correlative
6 ease for the judge to depart from the guideline. Whether
7 the words we use to allow the judge to go outside the
8 guideline in the unusual case where our broader category
9 now has somebody stuck in there like he had the dope
10 conviction, but he was 15 years old.

11 And in your area, what are the words that we use
12 to compensate for the fact that now what we have are the
13 six principles or whatever you have.

14 And then the third is again the question that I
15 asked before: How do we simplify the procedure? What
16 kind of procedure can you have at a sentencing hearing
17 that won't get the lawyers caught up in an endless
18 administrative procedure, but at the same time has the
19 elements of basic procedural fairness?

20 So to the extent that I can get you think about
21 those specific problems within the context of this
22 statute, I would appreciate anything that you --

23 MR. BARLIT: I will do that.

24 COMMISSIONER MAC KINNON: Counsel, my thought
25 and my inquiry is somewhat along Judge Breyer's line.

1 I had previously expressed in earlier hearings
2 the thought that you expressed that in many of these
3 corporate crimes they aren't conducted by resolutions of
4 the board of directors, but are due to overzealous
5 employees. And you indicated a few things that you
6 thought might be standards or policies to be followed in
7 differentiating those particular crimes.

8 And to carry out Judge Breyer's suggestion, I
9 would think if you would submit a draft of something along
10 that line that you had in mind more specifically, that it
11 would be quite helpful.

12 The second thing is, did I understand you to
13 say that treble damages were available in SEC cases?

14 MR. BARLIT: No, I didn't. I --

15 COMMISSIONER MAC KINNON: Well, you sort of
16 inferred it and I --

17 MR. BARLIT: Well, what I was inferring, sir, is
18 that -- and I am sort of not real popular among defense
19 counsel voicing these views. But if you really want to be
20 straightforward and look at history, you see that the
21 private attorney general enticed by a large enough carrot
22 is a pretty effective way of cutting out a lot of economic
23 crime.

24 COMMISSIONER MAC KINNON: You are talking about
25 the attorney's fee --

1 MR. BARLIT: Yes.

2 COMMISSIONER MAC KINNON: -- in the SEC type of
3 case?

4 MR. BARLIT: I am talking about the attorney's
5 fees and treble damages. Now, there aren't treble damages
6 in SEC cases now.

7 COMMISSIONER MAC KINNON: That's right.

8 MR. BARLIT: I am just saying if I was sitting
9 back behind the grand table trying to figure out how to
10 end these crimes, that is probably how I would go about
11 it.

12 COMMISSIONER MAC KINNON: My third question is
13 what did you think in the economic area, which I imagine
14 you focused on, upon the judgment indicated in the
15 preliminary draft as to the severity of the offenses that
16 you noticed?

17 In other words, each one of those offenses
18 has a severity --

19 MR. BARTLIT: Yes, sir.

20 COMMISSIONER MAC KINNON: -- a beginning severity
21 for the normal, ordinary, everyday, garden-variety type of
22 offense.

23 MR. BARLIT: As I read through that, I didn't
24 see anything that made me say, "That is crazy." That is
25 normally a pretty good reaction.

1 I thought it was a little bit of a over-
2 simplification to say at that all price fixing is just
3 automatically per se clearly the sort of thing that
4 requires somebody to go to jail.

5 Suzanne and I worked on a case where we finally
6 went to the Supreme Court on and it was clear that the
7 most distinguished appellate court judges of the United
8 States differed as to whether this conduct, which was in
9 a price fixing case, was a crime or not.

10 But as I read through it, I couldn't think of
11 an automatic way of distinguishing, you know, hard-core
12 price fixing from price fixing that is more sophisticated
13 that you could blunder into without knowing you were doing
14 it.

15 I don't believe somebody should go to jail
16 unless they had a pretty good reason to believe they were
17 doing something wrong. So I think there is more
18 sophistication perhaps required in that level.

19 COMMISSIONER MAC KINNON: Do you think it is a
20 good idea to start with the severity evaluation as this
21 particular draft does?

22 MR. BARTLIT: Yes.

23 COMMISSIONER MAC KINNON: Thank you.

24 CHAIRMAN WILKINS: Any questions to my right?

25 COMMISSIONER BLOCK: Yes. Mr. Bartlit, I would

1 like to follow up on that comment about price fixing.
2 What is the question that is most -- where is the area
3 that you see the trouble in?

4 MR. BARTLIT: Well, there are cases that have
5 been found to be price fixing like some of the movie cases
6 that prominent judges in different courts at different
7 times took totally disparate views on. And it has always
8 bothered me to say that a 37 year-old marketing manager
9 who is negotiating a license as to who is going to sell a
10 particular product where or something like that, is
11 presumed by our law to understand what he is doing when
12 appellate judges differ. It is just common sense. And
13 sure, you know when you get in a hotel room and you pass
14 around a slip of paper and everybody writes down the jobs
15 that they and they leave the room and bid on them, you
16 don't have to be a rocket scientist to know that is wrong.

17 But price fixing is not just one thing. There
18 are three or four levels of it. And we all know at the
19 most sophisticated end, there are a lot of smart people at
20 Harvard Law School writing a lot of articles over whether
21 different things are price fixing or not.

22 And there ought to be some fine tuning. And
23 this is really sophisticated. And there ought to be some
24 fine tuning for the kinds of economic crimes like that
25 that are not -- in other words, all price fixing doesn't

1 fit into one basket; and all other kinds of vertical and
2 other restraints in another. It is more complex than
3 that.

4 I can talk about this all day. I don't think
5 you want to hear it, but I could do that.

6 COMMISSIONER BLOCK: If you have a specific
7 suggestion, we would appreciate it.

8 MR. BARTLIT: That I can do. I could name the
9 kinds of cases that illustrate different categories.

10 CHAIRMAN WILKINS: Thank you very much.

11 MR. BARTLIT: Thank you.

12 CHAIRMAN WILKINS: We are to going to hear from
13 one more witness before we take a break. Mr. Samuel K.
14 Skinner, a partner of Sidley & Austin, a former United
15 States attorney.

16 Mr. Skinner, we are very pleased to have you
17 with us today and we appreciate your taking your time out
18 not only to prepare for testimony, but to be here with us.

19 MR. SKINNER: Thank you, Judge Wilkins. May it
20 please the Commission, I think that having experienced for
21 nine years as a prosecutor and United States attorney and
22 having practiced the nine years as defense counsel not
23 only in the type of cases that Mr. Bartlit discusses, but
24 I also on occasion have taken a drug case, and on several
25 occasions have had either indigent or non-paying clients

1 -- and I probably knew that going in and take them anyway,
2 with my partners' blessing, at least quiet blessing -- and
3 as a former member of the President's Commission on
4 Organized Crime and vice- chairman of that Commission, I
5 do, I think, appreciate what this Commission's task has
6 been and what you have attempted to do.

7 Ours on the President's Commission on Organized
8 Crime was a little bit easier because we had a great deal
9 of flexibility to write what we wanted to write and say
10 what we wanted to say and do what we wanted to do and
11 attack the areas within the President's broad guidelines
12 that we wished to address. Yours is addressing a specific
13 statute and a specific perceived need by the House and
14 Senate of the United States.

15 I would only comment that like all actions of
16 Congress they usually take a long time to reach a final
17 point, and I think paralleling the efforts of Congress, a
18 number of significant steps had been taken by the
19 Department of Justice, the Bureau of Prisons and the Board
20 of Parole in trying to deal with what was then and to a
21 lesser degree is still a problem and that is the
22 disparity of sentencing.

23 I don't know whether the number -- in this
24 district, this district has a pretty good record. And
25 while I think as I look across the room at the judges

1 whose pictures are on the wall behind you, I know that
2 they would vary greatly on the way they address a case.

3 I don't think it is as severe as it is in other
4 parts of the county. So I think the perceived need by the
5 legislature was correct. I think, however, that it may be
6 that the system that we are now looking at and some of the
7 steps that have been taken, it is not quite as bad a
8 problem or severe a problem as it has been before.

9 I must confess that having read the preliminary
10 draft not in its entirety, I must confess I find it a very
11 complex document. I think that I understand the basic
12 concepts. But I think if we played "20 Questions" with the
13 Commission, its staff, or anybody else, we could probably
14 stump each other quite a bit.

15 That just demonstrates what you are dealing
16 with is a complex problem. And what concerns me is that as
17 you adopt sentencing guidelines, which you must under the
18 legislation, you must strive to make it as simple as
19 possible for all that are involved. It is a complex
20 problem. Sentencing is the most important part of the
21 criminal justice system. And at the risk of offending
22 practitioners, defense counsel, prosecutors, and judges, I
23 think this document and the concepts behind it, we have to
24 find and you have to find a mechanism to make it as simple,
25 as clear as possible for implementation. Because if you

1 don't, you are going to find litigation and disparities in
2 the implementation of the guidelines that may be as severe
3 as you are addressing.

4 And I am not sure, having watched Judge Breyer
5 -- and I know that the question will be, "Well, what can
6 we do to simplify it, and would you submit your written
7 submissions?" I have watched him long enough to know that
8 is going to be one of his questions. I will reflect on
9 that and volunteer as a part of my written to do it.

10 But I do think you have to have -- and
11 sentencing is such a personal thing now and each judge has
12 its own discretion -- that you are also going to have to
13 wean judges away from a total discretionary system to a
14 mandated system.

15 And I would only observe there that having been
16 around the system for almost 20 years, I notice that
17 whatever system there is, people -- if they want to --
18 look for ways, whether they be judges or prosecutors or
19 defense attorneys, to get around it. If they want to
20 accomplish something, especially Article III judges who
21 have been sitting a while, they seem to find ways within
22 certain limits -- and prosecutors do, too.

23 I think that this still gives -- this system
24 still gives a great system of flexibility to the
25 prosecutors to charge what offenses they want to charge.

1 It appears to me from a preliminary viewpoint that it
2 allows him to do some piling on of charges a little bit
3 greater than they might otherwise if that serves their
4 particular purpose. It still, of course, gives them the
5 flexibility not to return charges at all.

6 It gives the courts and the United States
7 attorneys very little discretion, in my opinion, in certain
8 areas as cooperation. I think that -- it may be the
9 modified Rule 35 that was passed, maybe there is something
10 that could be done, but I think that is a area.

11 I think the modified real offense system as I
12 understand it, while it is complex, I don't find any major
13 disparities. I think that you are going to get a argument
14 here or there. But given the concepts that you are
15 adopting and given the priorities that you, as a matter of
16 principal, that you have placed on the various
17 subcategories of defenses, I don't think there is any
18 that really jump out and grab you.

19 I do agree with Mr. MacCarthy that in the area
20 of probation where someone exceeds the number of points
21 necessary or that eliminates probation as a option to the
22 judge, as I understand it there are still mitigating
23 factors which will get out of the range which the judge
24 can take into consideration. I think that those have to
25 be defined clearly. And a judge can understand that area

1 and maybe it is the way to do it: that if you find a
2 mitigating factor as defined would be that he has the
3 custody, he is the only parent and he or she has custody
4 of three children at home, that is a mitigating factor
5 that would take it down and that may eliminate those kinds
6 of situations.

7 I don't think in those kind of cases you are
8 going to find many appeals anyway. I don't think the
9 government is going to be appealing a judge of a judicial
10 finding of mitigating factors taking it below and allowing
11 them to put someone on probation, if in fact, it is those
12 kinds of cases.

13 I do, however, see a very real problem in the
14 modified real offense system as it is currently placed in
15 how the evidence is going to be introduced and how the
16 court is going to find the evidence. You have set a
17 standard, but you basically expanded possibly the rights
18 of the defendant which I think to some degree is very good
19 because frankly the way the system works now, every party
20 -- each party puts a version of their own facts in, the
21 probation officer goes out and talks to the agent, talks
22 to the defendant, talks to various other people; he or she
23 comes up with what they think is kind of a summary of what
24 happened.

25 But in many cases there are honest disagreements

1 that are not litigated. The judge just looks at the
2 sentence report and kind of makes an instinct decision.
3 And I think to the degree that will be systemized is very
4 helpful because it is an important part -- especially
5 under these guidelines where the judge's flexibility is
6 diminished substantially if those findings are present.

7 I do think that the defendants are entitled to
8 know in advance of pleas how the United States attorney is
9 going to treat these cases on some of those factors. I
10 think it is going to be very difficult, for instance, for a
11 judge to take a plea in a case when he talks about "the
12 maximum sentence that I can impose" without knowing the
13 factors that the government says must be taken into
14 consideration by the judge at sentencing.

15 Now, maybe that is accommodated for and not,
16 but I think that a judge is going to say, "Well, we know
17 what the real offense is. Now, talk to me about the
18 aggravation and mitigating circumstances and the value
19 that you place on, and then I will give the defendant the
20 maximum sentences that I can impose under the guidelines,"
21 so that he fully understands it is a informed plea. So I
22 think that something has to be done prior to showing up in
23 court for sentencing, seeing the pre-sentence report a day
24 before and being expected to act or react. If you don't
25 do that, I think that you are going to have a lot of

1 evidentiary disputes, you are going to have a lot of
2 appeals and you are going to have a very complicated
3 system.

4 I am a little concerned unless we are we have a
5 very simple system, the effect the new system is going to
6 have on quick justice. In the draft report, you talked
7 about the importance of certainty versus length. I happen
8 to be an advocate of the certainty and speed system rather
9 than the length of the system. I think that one of the
10 most significant things that has happened on the criminal
11 justice system as it relates to me and the defendants that
12 I represent is the Bail Reform Act. And the certainty if
13 they are convicted, assuming the decision of the 2nd
14 Circuit is not law, the certainty that they have, that they
15 are -- you know, you tell defendants when you are
16 counseling them, "If you go to trial and you are convicted,
17 you are going not going to have 12, 16 or 18 months. In
18 all likelihood, you will be incarcerated at the day of
19 sentencing."

20 I think that that has provided some enhancement
21 for the justice system and it has also eliminated,
22 possibly eliminates some of the need for lengthy sentences
23 because of the certainty. But that is just one man's
24 opinion.

25 As I had mentioned cooperation, there are two,

1 I guess there are two categories of defense counsel: some
2 that don't provide -- if their client wants to cooperate,
3 they refer them to someone else. They will not discuss
4 cooperation with the government as part of their
5 representation. Without getting into whether I think that
6 is the correct or whether I think that they have a ethical
7 obligation to do so, I am in the second school that says
8 you have an obligation to your client to discuss all
9 options that are available to that individual, including
10 cooperation.

11 There are cases, I might add, where a
12 reduction of .6 aren't going to accomplish what the
13 government wants to accomplish, and frankly probably
14 aren't going to help my clients if, in fact, they make
15 that ultimate decision and put themselves at risk and go
16 through all they go through. I think a reduction from
17 1.0 to .6 may not accomplish what -- and there are a lot
18 of cases they want them on the street. I am surprised
19 that Mr. Valukas didn't mention, that and I am sure you
20 will be hearing from others. And maybe as I said under
21 the Rule 35 modification they still can get them out,
22 rather than going to Board of Parole or waiting in the
23 case as they do now. Because once charges have been
24 preferred, the flexibility is gone. I think it has
25 probably gone, and they have lost a lot of the flexibility.

1 I think that you have to assess as you go
2 through the burden that you are placing, the guidelines
3 will place on the system, assessing it and trying to assess
4 the real rather than to perceive administrative and
5 economic costs so that when these guidelines go into
6 effect that the system is ready to handle them.

7 If would be -- it would be strange and
8 certainly counterproductive to have guidelines
9 established, have them implemented and find out because we
10 hadn't properly assessed the economics and the fiscal
11 and the administrative requirements that we had, in fact,
12 slowed down the system of justice, lengthened the time
13 between the charge and the trial and not accomplished
14 what you wanted to accomplish.

15 You would set back not only the concept of
16 equality in sentencing, but the entire concept. And I am
17 not sure that that is your responsibility, but it
18 certainly is the Department of Justice's or someone's, or
19 Congress' or someone's responsibility to look at that
20 parallel with what you are doing here.

21 And finally there can be no question that
22 whatever guidelines you come up with, you are going to
23 have to be reviewing them on a regular basis. This is not
24 something you can just say, "Here it is, Judge. Good
25 luck." It is not like passing a statute and saying, "It

1 is now one to five with a \$10,000 fine." It is much more
2 complex than that. And I think it is going to take the
3 cooperation of the judiciary, the probation office, the
4 Bureau of Prisons, and of course, the Sentencing
5 Commission and the organized bar to make sure that once
6 you have implemented these guidelines, you will redo them
7 and make them even better.

8 With those observations and knowing that I have
9 got Professor -- I mean Judge Breyer's -- first question
10 under advisement, I will be glad to answer any questions.

11 CHAIRMAN WILKINS: Thank you very much, Mr.
12 Skinner.

13 Am I correct that your suggestion is that in the
14 area of cooperation that the guidelines should provide the
15 potential for more of a reduction for cooperation
16 depending on the circumstances of the case; is that right?

17 MR. SKINNER: Judge, I have, as a prosecutor and
18 when I was a defense counsel, I have counseled and clients
19 have accepted it, my suggestion that -- and sometimes they
20 don't and we go to trial -- but on those that we do, I
21 find it very -- in some cases as a prosecutor, I found it
22 very difficult when I couldn't do what I wanted to do. I
23 couldn't give the individual what I wanted to give him
24 because of some of the guidelines.

25 I grew up -- as I look around at some of these

1 judges, there are a few judges that are no longer with us,
2 that they understood the importance of cooperation. And
3 together, if it was the right case and the right situation
4 and we made the right motion, and defense counsel was
5 obviously fully advised, they would take that into
6 consideration; and on cases we have let very serious
7 offenders on the street in some kind of probation or some
8 kind of supervision or something like that either because
9 of the tremendous cooperation that they have given or the
10 fact that we coulnd't really take them and had to put them
11 in new custody.

12 We have made tremendous cases in this district
13 as United States Attorney, and we have -- and the
14 defendants have received substantial consideration
15 adequately represented by counsel in the areas of
16 cooperation. And I don't think that reducing that to .6
17 is enough.

18 Now, I think that works in favor of the
19 government because the government just says, "Well, all I
20 can do under the guidelines is reduce it to .6. So
21 therefore if you have got a eight-year sentence, I can
22 take you down to 4.8. And take it or leave it. There is
23 nothing that I can do."

24 Well, my client who might be testifying or
25 cooperating, if that is his choice, is going to want more

1 than a reduction from 8 to 4.6.

2 CHAIRMAN WILKINS: Let me ask you to reflect on
3 this -- and I know that Judge Breyer will have you
4 writing to us, so you --

5 MR. SKINNER: You can have me write, too.

6 CHAIRMAN WILKINS: You understand too if you
7 accept responsibility for your criminal act, that there is
8 an additional reduction of a maximum of 20 percent?

9 MR. SKINNER: Right, a 20 percent reduction.

10 CHAIRMAN WILKINS: And under the law there is a
11 minimum maximum variation of 25 percent within which the
12 judge can sentence -- that we could assume that perhaps in
13 each case, you can sentence on the low side of 25 percent
14 plus the 20 percent, take the six percent --we might have
15 no end to time, so --

16 MR. SKINNER: And if all judges understood the
17 guidelines like you do and were you on the district court,
18 I am sure that the defense counsel, the prosecutor, and
19 you could all come to some solution to that. I am not so
20 sure that would always be the case. And if they sentenced
21 them on the high side and the question is when does the
22 contrition take place? I am not quite sure. Is it at
23 sentencing?

24 What happens if they go into custody and they
25 decide cooperation is worked out at a later date. And I

1 don't want to dwell on cooperation because I don't want
2 the impression left that all I do is bring in clients and
3 cooperate because I certainly don't. But I recognize that
4 and I am not so sure it is adequately dealt with. And I
5 think the defendant who cooperates is penalized in that
6 situation.

7 CHAIRMAN WILKINS: Well, you have not dwelled on
8 it, but you have addressed it in a most responsible manner
9 and I appreciate your views on it. Maybe we need some
10 policy statements to go along to guide us or the district
11 judge when these things occur that we should look to the
12 low side of 25 percent --

13 MR. SKINNER: I also think on the probation,
14 you need those in on the probation area as well so that
15 they know that the judge before he goes below the
16 guidelines because of mitigation, that it is the policy
17 that if all of these factors are present; for instance,
18 it is anticipated that they might, you know, the judge
19 might -- while they might be out of the guidelines, you
20 know, it would not be a unreasonable departure if all of
21 those factors were present. I don't know quite how you
22 address that.

23 CHAIRMAN WILKINS: Any questions to my right?

24 COMMISSIONER CORROTHERS: Mr. Skinner --

25 MR. SKINNER: Yes, ma'am.

1 COMMISSIONER CORROTHERS: Because of your
2 background both as a U.S. attorney and as defense attorney,
3 I wonder what your opinion is concerning the white collar
4 offender. We heard testimony earlier that indicated
5 that white collar offender is not being appropriately
6 sanctioned, and then very recently we heard testimony that
7 indicated that this is not a wagon that needs to be
8 fixed, that the current system is just fine.

9 MR. SKINNER: Well, I -- eight years ago, I
10 think my statement would have been a different, because I
11 remember arguing in this very courtroom in the biggest
12 antitrust case in history before Judge Parsons, where
13 literally there was a room full of defense counsel -- they
14 were really being fined then, Judge Wilkins -- that we
15 argued with the Assistant Attorney General for the
16 criminal, for the antitrust division on deterrences and
17 incarceration, and that, of course, has been their
18 position.

19 Mr. Bartlit is absolutely correct. The level of
20 knowledge in the commercial area as to antitrust offenses
21 and the consequences has increased substantially.
22 It is just, you know, we have gone in light years. And
23 every major responsible corporation today has an antitrust
24 counselling program.

25 As I think Judge MacKinnon mentioned, however,

1 an individual anxious for no personal gain, but to get
2 recognition for quota, for success, will still depart in
3 spite of these guidelines.

4 And it appears to me that individual -- and I
5 have represented a number -- we really have kind of two
6 situations. Number one, we have that kind of individual
7 who maybe wasn't paying attention at the counseling
8 program or maybe was being directed by someone else or
9 those kind of pressures. That price fixing case, in my
10 opinion, is substantially different than the price fixing
11 case where knowing full well it was against the law and in
12 complete defiance of the counseling program they go ahead
13 and do that.

14 I am not so sure that the guidelines adequately
15 -- and maybe they do under the departure of up and down 25
16 percent in mitigation factors and if Judge Wilkins is
17 there sentencing him, I think the judge probably can take
18 that into consideration. But we have got to educate all
19 of the Judge Wilkins in this country as to what they can
20 and can't do under this, and how they do it, and what they
21 could take into consideration.

22 I noticed a couple of district judges were here.
23 I think they're probably getting an advance course on it.
24 But I think that's important. So I think you can
25 differentiate between the two.

1 I do believe that the fines -- I believe the
2 fines are very important. But I still -- in all of the
3 defendants that I counsel, the one question that
4 continually comes up is, "Am I going to go to jail?" I
5 don't have one -- they all ask it, whether it is the first
6 day, or the day before plea or every day inbetween. "What
7 is going to happen to me?" And that is why I think
8 understanding the guidelines and advising them correctly,
9 we are also going to eliminate some incompetency of
10 counsel arguments that are going to appear because counsel
11 aren't going to understand what these mean as well.

12 So I think, you know, there is room inbetween. I
13 think that you can go a little overboard. And as I read
14 them right now, I think we don't take into consideration
15 directly the individual who is not quite as sophisticated
16 and as intentional, so to speak, as the -- because today
17 you really have to be -- in a public corporation anyway
18 -- you have to be pretty stupid or pretty direct to go
19 ahead with a price fixing. And I think that is the reason
20 we don't see as many of these cases.

21 CHAIRMAN WILKINS: Any questions on my left?

22 COMMISSIONER BREYER: Mr. Skinner already asked
23 my question.

24 MR. SKINNER: I bet you have two or three more,
25 though.

1 COMMISSIONER BREYER: I could answer that, but
2 I --

3 MR. SKINNER: Why don't you answer it?

4 COMMISSIONER BREYER: Well, I mean there are a
5 number of different things one might do. One thing, you
6 could say -- I don't know how exactly how to say this and
7 I don't want to preempt on the reason you have. I already
8 know what I think I would do.

9 You suppose we start off -- make it quite clear
10 these are very preliminary. This is the first time
11 anybody has tried guidelines. This is a 20-year or a
12 50-year project. It is not a one-year project. And we
13 will continuously collect information about how the
14 guidelines are being administered.

15 Therefore, if in the first one, two, three,
16 four or five years of the life of the sentencing
17 guidelines, district judges error on the side of going
18 outside and write their reasons down, that is probably a
19 good thing, and we can collect the reasons. And having
20 collected the reasons, we can analyze them and improve the
21 guidelines later on thereby making them more rational and
22 also making it tougher to go outside. If you viewed it as
23 a first cut and said -- looked at it as a first cut --
24 "Judge, if you think there is a reason to go outside of
25 the guideline, do it." And then later on --

1 But now, how we phrase that, the extent to which
2 we write that in? I think those are questions of policy
3 that we will have to debate and figure out.

4 MR. SKINNER: We will have time to reflect on it.
5 Thank you very much

6 CHAIRMAN WILKINS: Thank you very much, Mr.
7 Skinner. We appreciate your remarks.

8 We are going to stand in recess now until 15
9 minues after the hour. Thank you.

10 (Brief recess.)

11 CHAIRMAN WILKINS: This hearing will now come to
12 order. Our next witness is Ms. Merri Dee, a well-known TV
13 personality here in the Chicago area and one who has been
14 a strong and effective advocate for victims rights for a
15 number of years. Ms. Dee, we appreciate so much your
16 being with us and spending time, and we welcome your
17 comments.

18 MS. DEE: Thank you very much. I must at the
19 onset say that I am honored to be here before you, Judge
20 Wilkins, and thank for you the invitation being before the
21 commissioners. I know how important this day is. And I
22 want you to know in the very beginning that I am having
23 my day in court today.

24 For those who do not know, I am a victim. I
25 prefer to be looked at as a survivor. The incident that

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22 want you to know in the very beginning that I am having
23 my day in court today.

24 For those who do not know, I am a victim. I
25 prefer to be looked at as a survivor. The incident that

1 happened to me happened 15 years ago July 17th, 1971.
2 I will bring those of you up to date who do not know what
3 happened.

4 I was getting off of work, was kidnapped with a
5 television guest from the television station where I
6 worked, made to drive to a forest preserve. And at the
7 end of that evening, I sat -- I laid, I should say in the
8 mud in the forest preserve with that television guest,
9 with two .38's in the head. One entered center-side of
10 of the head, grazing brain, and the other entered at the
11 base of the skull, right at the spine.

12 Today I have residual effects. I am now in my
13 third day of pain that feels as though when I put my top
14 teeth to the bottom, electricity is happening in my body.
15 It is perfectly all right because I consider myself a
16 survivor. And in that survivorship, I have to tell myself
17 that I cannot lay down, that I have a obligation to
18 survive. Therefore, I must go to work every day and
19 support myself, that I have a obligation to America as a
20 victim and as a person who is a public personality. I
21 think that I am going to take this obligation probably on
22 to my grave when the time comes.

23 At the end of that evening with two .38's in
24 the head, I was taken to a hospital. Brutalized mentally
25 after the physical brutalization by a Chicago policeman,

1 I was miraculously found by an ambulance. And please
2 bear with me, this is a little bit difficult.

3 The ambulance driver could not take me, he said,
4 because it was against the rules. So therefore, he was to
5 leave me. Miraculously once again, a police car came
6 along. And after asking me every question there was in
7 the United States and probably in America -- the only
8 thing I think he left out was where my mother was buried
9 and what her maiden name would be -- the police instructed
10 the ambulance driver to go across and pick up the
11 television guest because I had said that he was laying
12 there and where he was. They were instructed to go get
13 him, they found him. The policeman instructed them to
14 take him to the hospital.

15 I was left there with the policeman, again
16 answering all of the questions that he could possibly
17 muster, with two .38's in the head, completely covered in a
18 white suit with blood and mud. So I consider that
19 physical brutalization and mental brutalization very
20 difficult to go through for anybody -- even as strong a
21 kid like me.

22 In the hospital I lost the use of my legs,
23 both legs; I lost eyesight. And only after a good while
24 did I gain that eyesight back and the use of my legs. I
25 have in these 15 years suffered a awful lot. The physical

1 harm, the psychological harm isn't anything that I can
2 even sit at this table today and tell you in detail
3 because you don't have time for all that I could tell you.

4 The guidelines that I read that refer to people
5 like me are on target, and I hope that God gives each one
6 of you who have decision-making power, the wherewithal and
7 the strength and the good health to go on and deliver
8 what victims across this country need in these guidelines.

9 This man who kidnapped me was out of jail seven
10 days. He had been convicted six times prior to me on
11 numerous convictions. He had grown to the age of 28 years
12 old. And from the age of 15, he had only been outside
13 about -- jfrom my research, six and-a-half months.

14 Seven days, he was out. He was given a
15 conviction after being found up in Michigan in my
16 automobile going 100 miles an hour, found by an off-duty
17 policeman at 6:00 in the morning, with a hitchhiker.

18 He was given 120 years, they told me. Twelve
19 years later, he was released. He was released without my
20 knowledge. And I say without my knowledge because someone
21 called my sister and said, "I think I saw a guy that looks
22 like the guy that shot your sister. I think I saw him
23 walking around."

24 Well, one sister called another one, to another
25 brother to another one, and finally to my daughter who

1 works in the city government here, who called around to
2 find out, only to find out that it was true. He had been
3 released.

4 After this release, he began to call me with
5 death threats at both the television station and in the
6 building where I lived. This went on for a while until my
7 daughter and I both were basket cases. My son, who is in
8 this courtroom this morning, was so irate and so angered
9 and disgusted that it affected his work as an attorney in
10 this city.

11 In 1985, November, I was interviewed on 60
12 Minutes in which I got a chance to see this man for the
13 very first time in 13, 14 years, who stood up there and
14 said, "If I committed the crime, then I have served my
15 time. Leave me alone so that I can go and do what I need
16 to do to live. Leave me in my chosen obscurity."

17 Interesting that I can remember that almost
18 word for word. I saw a man on camera who said, "Of
19 course, I did not make any phone calls to her. I don't
20 know her. I would never do anything like that. I have
21 already served my time. I am not going back in. I don't
22 know where to call her. I would never do anything like
23 that."

24 Those phone calls finally stopped after I kept
25 having to insist to the police and to the Superintendent

1 of Police that I was not lying, that I was not crazy, I
2 was not imagining. These phone calls were coming.

3 I had to have witnesses to make sure that they
4 did not think that I was lying or crazy -- which was a
5 large insult to me.

6 Finally, they slapped his hands and told him,
7 "Don't you go near her. You promise.?"

8 "I promise."

9 -- come back to me to tell me, "He is not
10 doing anything like that. He said he wasn't. He would
11 never do that."

12 In January of 1986, this same man was picked up
13 in a stolen automobile, given a lie detector test and
14 failed it. And then when he was again asked, "Did you
15 make those phone calls then, and did you make phone calls
16 starting five minutes after the 60 Minutes broadcast from
17 November until now in January?"

18 And he said, "Yeah, I made a few phone calls.
19 I made a few. She was in my way. She is popular and
20 everybody likes her. And nobody was thinking anything
21 about me and I was angry. She -- because of her
22 popularity, has people on her side and nobody was on my
23 side."

24 For the eighth time he has been convicted. And
25 fortunately, the judge took into consideration the

1 psychological harm that had been done. And he is now in
2 again as of July 23rd serving a 12-year sentence.

3 That is basically the update on what happened.
4 I have made an awful lot of speeches across this
5 speaking to school kids, to womens' groups, to mens'
6 groups, to distinguished panels of people like yourselves.
7 And everybody says basically the same thing also to
8 victims, "Why? Why do they get out so easily? Why, if
9 he is given 120 years, why did he get out in 12 years?"

10 I have tried to explain the number system to
11 the best of my ability. And I call it that number system
12 to the best of my ability because it boggles my mind. As
13 intelligent as I call myself, it boggles my mind. So I had
14 to think about these guidelines and some of the things
15 that I want.

16 When speaking up in Wisconsin recently, I
17 spoke about rehabilitation and about a program of which
18 there is only one of its kind whose recidivism rate is not
19 even enough to talk about -- it is less than one percent
20 -- that has been in effect for, I guess, since 1979. It
21 is a program that deals with first offenders. People want
22 to know why am I involved in that. "How in the world can
23 you, a victim, having been brutalized the way that you
24 were, can be involved in something like this?"

25 And my only answer is I have a responsibility

1 because I lived, because it is important for somebody to
2 be able to stand up and tell these people from the
3 beginning, "This is your first offense," and let them know
4 exactly the trauma that has happened to me, to my
5 children, to the rest of my family, to my co-workers, to
6 my doorman, to the cab drivers, to the people who want to
7 look out for me everywhere. There is no privacy. And I
8 don't think there is going to be any in the future for me.

9 So that if I am going to be this public person
10 who gets stopped in the grocery store when she is in
11 tennis shoes, blue jeans and a t-shirt, and a pony tail, to
12 say, "How do you feel?" If I am this person who is going
13 to continuously have to be reminded of it by everybody,
14 then I think that my responsibility is to live a good life
15 to the best of my ability; is to live a life that makes a
16 difference. And that's why I am involved in the program
17 for first offenders.

18 The recidivism rate in the state of Illinois is
19 approximately 65 to 67 percent. People look at this
20 program called Probation Challenge and they say, "What do
21 you have that for? You don't need anything like that.
22 That is a waste of time. Nobody is going to support
23 that."

24 Well, basically they have been right
25 because the people have been working free of charge just

1 about. The governor, fortunately has finally given a
2 small grant. This is a program that should be -- should
3 be copied across this country. It is an educational
4 program for young people, people who are first offenders.
5 They need this kind of help, so I am going to stay
6 involved in this program.

7 I would like to urge a couple of things.
8 Uniformity of sentencing is so important to me. If you
9 shoot me in Chicago, Illinois, and you shoot me into Santa
10 Monica, California, you ought to be able to give the same
11 sentence. I support that wholeheartedly. And I know it
12 is complex, but it can and should be done.

13 I am all for quick sentencing. These long,
14 drawn-out sentences -- or I shouldn't say sentences,
15 the long, drawn-out court hearings do psychological harm
16 beyond belief to the victim and family and people who are
17 involved, and taxpayers who have to pay for all of this.

18 So the quicker the sentence comes, I think from
19 all of the interviews and the casual conversations I have
20 had from people who are victims, the quicker that sentence
21 comes, the better you feel, the more relief that actually
22 comes.

23 Parole? I was devastated to find out that
24 after this man served his 12 and-a-half years of a
25 120 year sentence, that he was let out the way he was let

1 out. And that in that in January when he he was picked up
2 again, he was not on parole. He has been given six months
3 parole. He had been released to a parole officer with the
4 same last name as his. I thought that was unusual. I
5 decided not to check into that any more because I don't
6 want to be angry. I want to not work hard and I want to
7 work smart.

8 Rehabilitation? When I was up in Wisconsin
9 making this speech, a judge approached me afterward and he
10 said, "What do you want? Don't you understand that jail
11 is for punishing and not for rehabilitation?"

12 And I said, "Yes, I understand that
13 wholeheartedly." And I don't know that I am smart
14 enough to have the total answer to you, but I do know that
15 when you put man or a woman, Jane or John Doe, inside for a
16 12 or a 15-year period, that he or she is going to sit
17 there seething. I do know that is a pressure cooker that
18 is brewing inside there. I do know it because I have
19 talked to them and they are bold enough to say, "Yes, I am
20 out and I am mad and I might do it again." Bold enough.

21 I don't know what that answer is as far as
22 rehabilitation is concerned. But I do know that something
23 should and has to be done.

24 A long sentence cannot any longer be given in
25 my mind sincerely if a judge is going to sit on that bench

1 and take that bench as his responsibility and say, "I give
2 you a 120-year sentence.

3 I do not want a judge to play with my mind and
4 say, "but I mean 12 and-a-half."

5 If it is going to be a 100-year sentence, I
6 want to know it. And if he really and truly, after some
7 insightful and thorough research into this case, finds
8 that that sentence that he wants to give out for murder,
9 attempted murder, two counts of aggravated battery, two
10 counts of kidnapping, interstate transport of an
11 automobile, carrying a concealed weapon, if he wants to
12 give a sentence of four years or ten years, then I want
13 him as a victim to tell me that is a 10-year sentence, no
14 cut, 10 years. I don't want to hear 120 years. It means
15 nothing. It is a lie to a victim. It is angering to a
16 victim. It makes you feel low-class and highly insulted.

17 I want to thank Judge Wilkins for an
18 invitation to be here today. I am, as I mentioned, honored
19 and extremely privileged. I wish that every victim could
20 have this day, this opportunity in court. This has helped
21 me so much to be able to sit here in front of you, to
22 your distinguished colleagues, Judge Wilkins and Chairman
23 Wilkins, for the incisive research that you have done on
24 these guidelines. Continue, please continue. And
25 please continue to call on people like me year after year

1 after year when these laws need to be updated.

2 I hope that we don't have to have a law from
3 1929 make a decision on my life or what happens to me any
4 more. Tremendous hurt and harm comes from it.

5 Some people say, "Would you feel better
6 if you had some money?"

7 I would like to have some money, yes. I would
8 like to have money and take it and donate it to programs
9 like the one that I am involved in that would help across
10 this United States because it is necessary. That money is
11 not going to stop my head from hurting today. The money
12 that has been spent by me personally is atrociously large.
13 Insurance doesn't cover all of these things.

14 The money doesn't stop my heart from breaking
15 when my kid cries when he or she sees me not be able to
16 lift my head off of that bed sometimes. So money, it has
17 its place.

18 To me it is so much more important for
19 uniformity of sentencing to be a real viable piece of
20 property that I could take home and look at when I am at
21 home. It would make this pain feel a lot better.

22 Thank you so much for this day.

23 CHAIRMAN WILKINS: Thank you, Ms. Dee. We are
24 indeed honored by your presence today. And as you so
25 vividly remind us in our search for justice, we should keep

1 in mind that it is justice not just for the defendant, but
2 for the victim as well.

3 We note in our guidelines that we spent a
4 significant amount of attention to the psychological harm
5 that you have talked about so that the judge would be
6 required to look at the psychological harm of the victim
7 and calculate the degree and aggregate the sentence, if it
8 is present.

9 Are we on the right track, do you think, in doing
10 that?

11 MS. DEE: Yes, very definitely. I got a chance
12 to see what that can do by this last sentence that was
13 meted out to this man.

14 The judge took it himself to do that, to take a
15 look at the psychological harm that had been done to me and
16 to everybody else involved. And I think, yes, you are on
17 the right track. Please stay there.

18 CHAIRMAN WILKINS: Thank you.

19 Any questions to my right?

20 MS. CORROTHERS: Yes. I would simply like to
21 express to Ms. Dee our appreciation for having been here
22 and to commend you for your courage and strength. And I
23 believe I heard you on 60 Minutes. And the offender at
24 the time when he denied the threats and talked about his
25 having received a education and was concerned only with

1 his life was very convincing, and only recently did I hear
2 that that, too, was a lie and that he had now admitted to
3 making the threats. I did not know until I just heard
4 from you that he now had been convicted, I guess, of the
5 threats and was given a sentence. I am glad to hear that.

6 The only other point I would make is that
7 to reassure you that on the Commission, we are very, very
8 concerned about the victim.

9 I just regret that the earlier person who
10 testified was not here to hear your testimony because we
11 were slightly criticized for having concerned ourselves
12 with the psychological harm. And I just regret that your
13 testimony was not heard by that person. But I would just
14 like to thank you and commend you again.

15 MS. DEE: Thank you.

16 COMMISSIONER BLOCK: I would like to join in
17 thanking you.

18 COMMISSIONER ROBINSON: Actually when you
19 were telling about your horrible history, the
20 psychological injury aspect and a number of other things
21 occurred to me as you were talking about it -- factors
22 like you were abducted and this event took some time and
23 there was obviously a lot that went on in this whole
24 incident beyond just the shooting in the head and
25 attempted murder.

1 One of the principles that the Commission has
2 talked about is a system that would in a sense take
3 account of everything: everything would count for
4 something. Every time that offender decided to do one
5 more thing to the victim, whether it was imposing more
6 psychological injury or more physical harm or further
7 abduction or something like that, a principle that says
8 everything counts.

9 The problem, of course, with that kind of a
10 system as you may have heard from quite a few of the other
11 witnesses -- and Ms. Corrothers is right in saying, " I
12 wish those people were still here " -- the problems that
13 this system takes into account, a whole variety of harms
14 including psychological injury, is that it tends to be
15 more complex. And we are told by some of those witnesses,
16 "Well, that is just not workable and it takes too much
17 time or energy." And then we have to appreciate there is
18 a certain appeal to those sort of arguments.

19 On the other hand, having a system that doesn't
20 take those into account, in other words the kind of system
21 that says, "Well, your case is an attempted murder case
22 like all other attempted murder cases," that seems
23 obviously unacceptable.

24 I take it -- and I am not sure, I am just
25 guessing about this -- maybe part of what you are saying

1 to us is: Better to error on the side trying to take into
2 account all of the things that make your attempted murder
3 so horrendous, including the psychological injury, better
4 to try to take those into account than have a system that
5 may well be simpler and easier to apply, but
6 doesn't do justice.

7 Is that part of what you are saying?

8 MS. DEE: Absolutely.

9 CHAIRMAN WILKINS: Any questions from my left?

10 COMMISSIONER BREYER: I, of course, am very
11 pleased that you are here and I am sure that the other
12 Commissioner think what you are doing is important and
13 helps other people, and it makes a difference. And so I
14 think that -- I want to point one thing out to you: One
15 of the virtues that you see in what we are doing is one of
16 our most important purposes -- making sentencing honest.
17 The time given will be the time served.

18 But we are a Commission that has to do the
19 federal law. We can't control and we don't control
20 state law.

21 So I would be very interested, since I have had
22 asked everyone that they report back to us in detail, what
23 I hope very much you will do is that you keep track of what
24 we are doing and how it works for three or four or five
25 years. And then if you think it is working in a way that

1 meets your expectations, that you would encourage the
2 states to follow the same system or at least take the best
3 parts of whatever it is that we do. the same kind of
4 principles insofar as they work to apply to the State of
5 Illinois or other states as well as the federal system.

6 So I hope you stay in touch.

7 MS. DEE: I will. I intend to be watching
8 closely.

9 COMMISSIONER MAC KINNON: I take it from the
10 nature of the sentence, Ms. Dee, that you suffered -- or
11 that the defendant got, that it was not a federal
12 sentence; it was a state sentence?

13 MS. DEE: Right

14 COMMISSIONER MAC KINNON: I am concerned about
15 the nature of the individual that prompted the -- and
16 the circumstances that prompted the original kidnapping.
17 Was he a sexual offender or not, or for some other
18 purpose?

19 MS. DEE: I wish I could sit here and tell you
20 in detail that I know. I don't know.

21 What I did find out was that he had been
22 incarcerated for auto theft and armed robbery and no murder
23 charges. All sorts of different things. And that he had
24 become a decent artist and had been allowed -- and that it
25 was knowledgeable by the warden -- that he had painted a

1 picture of Merri Dee and was allowed to keep it in his
2 cell.

3 COMMISSIONER MAC KINNON: And that is grounds
4 for release?

5 MS. DEE: Whatever is fair, I guess.

6 COMMISSIONER MAC KINNON: But the original
7 crime, did it indicate that he had any sexual desires in
8 anticipation or not?

9 MS. DEE: No, not at all.

10 COMMISSIONER MAC KINNON: Did you know what the
11 purpose of the original abduction was?

12 MS. DEE: No.

13 COMMISSIONER MAC KINNON: And how about the
14 other personality? You said you had a guest?

15 MS. DEE: Yes, he was a television guest.

16 COMMISSIONER MAC KINNON: Was that a woman,
17 too?

18 MS. DEE: No, it was a man.

19 COMMISSIONER MAC KINNON: A man?

20 Thank you ever so much.

21 MS. DEE: My pleasure.

22 CHAIRMAN WILKINS: Thank you, Ms. Dee. We
23 applaud your courage and dedication. We look forward to a
24 continuing working relationship with you.

25 MS. DEE: Thank you.

1 CHAIRMAN WILKINS: Our next witness is
2 Executive Director of the Chicago Crime Commission,
3 Mr. Patrick Healy.

4 Mr. Healy, we are delighted to have you with us
5 today.

6 MR. HEALY: Good morning, sir.

7 Mr. Chairman, my name is Patrick Healy. I am
8 the Executive Director of the Chicago Crime Commission.
9 It is an honor to appear before this Commission and to
10 offer on behalf of the Chicago Crime Commission any
11 assistance and support that will enable your Commission to
12 accomplish its objectives.

13 My remarks will be extremely brief in that you
14 have heard and will continue to hear from practioners and
15 legal technicians who are better qualified to comment on
16 the provisions of the suggested guidelines than I. I
17 have read the guidelines and they are right on point in
18 addressing the current problems.

19 We are in the process of addressing specific
20 provisions of the guidelines and those remarks will be
21 spent to you shortly.

22 The public perception of the administration of
23 justice in this community as well as in most large
24 metropolitan areas is that it is a two-tier system based
25 on the type of crime committed and the punishment

1 received. This perception is not without foundation when
2 the public witnesses the disparity of sentencing for a
3 wide variety of anti-social and criminal conduct. The
4 ultimate effect is one of cynicism, mistrust and a
5 nagging doubt that justice is fairly and evenly
6 administered.

7 From the thousands of calls that the Commission
8 receives in the course of the year from citizens, the
9 courts and how they operate is one of the major
10 complaints. If we expect the citizenry not only to
11 cooperate with enforcement of our laws, but to have
12 respect for them, we must be able to show that there is a
13 even-handed, fair system of punishment when punishment is
14 required. The citizen presently does not have that feeling
15 when he observes a person sentenced to 14 months in jail
16 for cheating on a \$35 sales tax bill and on the same news
17 program learns that two policeman have been placed on
18 probation after viciously beating a hand-cuffed prisoner
19 in the police station, while on TV, for no apparent reason.

20 Although these guidelines pertain to federal
21 violations, we know and we can assume that they will serve
22 as models and have a strong influence on the state court
23 system. It is for this reason that the Crime Commission
24 wishes to re-emphasize the importance of your goals, the
25 fairness of sentencing and the protection of society.

1 We do find the guidelines lacking in victim
2 impact statement. The people I talk to in the federal
3 system tell me that is because there are so few victims,
4 unlike the state system. I can't accept that; there is
5 always a victim for every crime. That victim should have
6 his say in the sentencing process. The void created by
7 the lack of input only fuels people's dissatisfaction with
8 the court system. The public finds it very confusing and
9 hypocritical to read about lengthy prison sentences to
10 individuals other than organized crime figures, who have
11 committed some crime and then hear about major drug
12 dealers, handling astronomical amounts of money, or white
13 collar crime defendants, bilking thousands of investors.
14 Receiving light sentences, or in some cases, no sentence.

15 We offer these remarks to assure you that
16 communities across the country will watch with keen
17 interest the implementation of your final
18 recommendations. The open debate that you have
19 encouraged is commendable and we are aware that you will
20 be hearing a wide divergence of opinions representing
21 various interests. We are quite satisfied that if the
22 guidelines produce a truly fair sentence, all other
23 problems are unimportant that is they will automatically
24 work for the protection of society, which in turn, will
25 reestablish proper respect for the law.

1 Thank for the opportunity to address the
2 Commission. My specific comments will be forthcoming.

3 CHAIRMAN WILKINS: Thank you very much, Mr.
4 Healy.

5 I might say that these guidelines do
6 contemplate that victim impact statement would be a real
7 part of the sentencing process. So I did not want you to
8 think that we were dismissing the importance of victim
9 impact statement. That will still be within the
10 presentence report that we will be submitting.

11 MR. HEALY: But there's an attitude that there
12 are certain federal crimes that have no victims; therefore,
13 it is pretty well left out of the thought process.

14 CHAIRMAN WILKINS: I see what you mean. That is
15 an attitude, I think, that some hold. But as you point
16 out, there is always a victim. Our guidelines do not
17 necessarily address that specifically, but perhaps in
18 a policy statement we should make that very clear.

19 MR. HEALY: I mean, who represents the person
20 whose investment has been taken away, but she's only one
21 of a thousand investors who have been bilked, but yet
22 that is her life savings?

23 CHAIRMAN WILKINS: I know that you will be
24 following our work closely towards the format because as
25 you pointed out, it may have a impact on the states if we

1 do the job we hope we can do.

2 MR. HEALY: We consider that the value of the
3 this meeting.

4 CHAIRMAN WILKINS: Yes.

5 Any questions to my right? Any questions to my
6 left?

7 That is one of the virtues -- excuse me, Judge
8 MacKinnon.

9 COMMISSIONER MAC KINNON: The Chicago Crime
10 Commission has been in effect for quite a while?

11 MR. HEALY: Sixty-seven years, Judge.

12 COMMISSIONER MAC KINNON: It was the body, as I
13 remember, that did the original -- one of the original
14 investigations on Al Capone and the operations and the
15 syndicate back in the '20s?

16 MR. HEALY: We did. We still have a fondness
17 for it.

18 COMMISSIONER MAC KINNON: I remember a friend of
19 mine -- Dixon, a great athlete at the University of
20 Chicago, was working on that at the time.

21 What is your estimate of the amount -- you are
22 going to submit some detailed comments, I take it?

23 MR. HEALY: We have a team of lawyers looking
24 at it now.

25 COMMISSIONER MAC KINNON: What is your estimate

1 CHAIRMAN WILKINS: We will now continue to
2 receive testimony in this regional public hearing. The
3 first two witnesses this afternoon are distinguished judges
4 from this circuit: the Honorable Michael Mihm, a United
5 States District Judge from the Central District of
6 Illinois, and the Honorable Joel M. Flaum from the United
7 States Court of Appeals for the 7th Circuit.

8 I understand you gentlemen will witness together
9 in a compatible session. Please come around. Thank you
10 very much.

11 JUDGE MIHM: Judge Wilkins and members of the
12 Commission, good afternoon. On behalf of Judge Flaum and
13 myself, I bring you greetings from my brother and sister
14 judges from the 7th Circuit. We welcome you to the 7th
15 Circuit and we commend you for your important work.

16 We recognize that you come to the Commission with
17 a variety of backgrounds and points of view. And those of
18 us who have taken the time to find out who you are are
19 extremely impressed with the quality of the appointments
20 represented on your Commission and the balance that exists
21 on the Commission.

22 We recognize that you have made a monumental
23 effort to carry out the mandate of Congress in the best and
24 fairest way. I think that it would be fair to say without
25 exaggeration that your work has important historical

1 significance. The results will have a revolutionary effect
2 on the criminal justice system.

3 Within the framework of your task, we believe that
4 you and your staff have done an excellent job of coming up
5 with guidelines. And the judges of this circuit
6 appreciate the sincere hope in this and willingness that
7 you have exhibited to consider alternatives, rethink
8 positions. You have, we believe, really brought a
9 judicial temperament to the process.

10 I have had a somewhat limited opportunity to
11 confer with the other judges of the circuit as to their
12 reaction to the guidelines because of the time constraints,
13 and also, quite frankly, the length of the guidelines
14 themselves.

15 I would like to begin my comments this afternoon
16 with some general reactions to the guidelines, so you
17 probably, I am sure, have heard these before. They are
18 nothing new, but they are reactions that have been made to
19 me by my fellow judges and I feel compelled to report them
20 to you.

21 The general reaction to these guidelines by the
22 judges of this circuit, the reaction of isolated positive
23 reactions and overwhelmingly strong negative reactions to
24 the guidelines -- and again, this is not a negative
25 reaction to the work that you have done, but rather a

1 negative reaction to the scope of the mandate that was
2 given to you by Congress.

3 The majority of judges in this circuit believe
4 that the mandate itself, at least the scope of it, was open
5 sea. And quite frankly if Congress were a court of law,
6 I'm sure that we would be filing a motion to reconsider.

7 We realize that Congress had the power to do
8 this. We recognize that some action in this area was
9 appropriate. But with all due respect to Congress as to
10 the degree of change that is resulting from the mandate, we
11 believe it is an unwarranted and unwise intrusion into the
12 exercise of judicial discretion. One judge has
13 characterized it as an effort to put thought in the bottle.
14 Some of the other reactions I received from judges in
15 this circuit are that it is too complicated to work,
16 that error is almost inevitable, that it is too
17 formalistic, that it will be like jumping from one section
18 of the Uniform Commercial Code to another, that it won't
19 have the effect that it is intended to have. That is, it
20 won't have the effect of eliminating disparity, but will
21 merely disguise it with code words and categories.

22 That disparity is a fact of life in every branch
23 of the government -- and certainly the executive branch in
24 the criminal area is a good example of that. Prosecutors
25 today make the initial decision as to who is to be

1 prosecuted; as to those prosecuted, what charge will be
2 made; as to the charge made, what agreements will be
3 entered into concerning plea bargaining.

4 One of the judges has written to me: "If the
5 guidelines were simply that and if the judge could impose
6 the sentence he or she believed appropriate in the case
7 without the elaborate findings that would be required by
8 these guidelines and if no expanded appellate review was
9 provided, I would welcome them. As they were worked,
10 however, I think they are unwise. And as for appellate
11 review, I think it will be about as helpful as instant
12 replays of the referee's calls have been for the NFL this
13 fall. It will not make the games better; it will only
14 make them longer."

15 The Court of Appeals, the judges that I have
16 spoken with from the Court of Appeals, share that opinion.
17 I think that all of us recognize that sentencing is
18 probably one of the most difficult functions that is
19 performed by a district judge. The appellate judges
20 recognize the difficulty of that task, and frankly, they
21 don't look forward to what from their point of view, I
22 believe, is second guessing the district judge in terms of
23 the detailed findings of fact that will be required under
24 these guidelines, not only in terms of sentences which
25 occur outside of the range created, but also the findings

1 of fact that will be necessary in order to realize the
2 range.

3 The bottom line is we know the guidelines will be
4 adopted in some form. We intend to pursue whatever
5 avenues are available to us to recommend to Congress that
6 Congress consider the possibility of drawing back somewhat
7 from the mandate as it presently exists.

8 We believe that a more proper approach to the
9 problem would be to have legislatively developed factors to
10 be considered in aggravation and mitigation; that the trial
11 court be required to discuss those factors, the existence
12 or non-existence of them on the record; to state the
13 reasons for sentence.

14 But we strongly believe that it goes too far to
15 have the sentencing judge be required under normal
16 circumstances to sentence within a particular range based
17 on the assignment of point values.

18 It may be that an alternative, at least in some
19 of these areas, if Congress feels it appropriate, would be
20 to expand the number of situations in which mandatory
21 minimum sentences for certain offenses could exist.

22 As for the impact of these guidelines on the
23 system, as I said, I think it is clear that they will be
24 historically significant. We believe that the guidelines
25 will drastically increase the number of prolonged

1 evidentiary hearings as part of the sentencing or
2 post-sentencing process.

3 This must be understood. I know it was referred
4 to this morning and I know the Commission has expressed an
5 interest in examples. I hope to give you a few briefly in
6 a few moments.

7 As I said earlier, it is not simply a matter of
8 being concerned about making an appropriate record if there
9 is a sentence imposed outside of the range. The mandate
10 and the guidelines require detailed findings of fact even
11 to create the range.

12 We believe that there will be a significant
13 increase in the number of offenders actually sentenced to
14 prison. We would suggest that the prisons that we have
15 now are either overcrowded or approaching that. Again,
16 that may not be a reason not to do this, but we think it is
17 extremely important that Congress understand the practical
18 result of what they are doing and be willing to pay the
19 price of dealing with it.

20 We also believe that at least initially that
21 these guidelines will increase the number of trials.
22 There was some reference to that this morning and I think
23 that these comments were probably well taken. I think it
24 will also increase the number of situations where there is
25 either a withdrawal of the guilty plea or an attempt to

1 withdraw a guilty plea.

2 We believe that if the guidelines go through
3 Congress in substantially the form that they now appear,
4 that Congress should consider having a one-year advisory
5 opinion or advisory period at the beginning of their
6 operation. And by that, I mean that instead of simply not
7 having the guidelines one day and having them the next,
8 that we have a period of time during which the mechanics of
9 the procedures would be followed and that the courts be
10 required to report to whatever authority is established for
11 that purpose, probably the Sentencing Commission, the
12 effects of going through the mechanics. But that at
13 least for a period of one year, that the court not be
14 required to actually impose the sentence within the range
15 established.

16 We also believe that if the guidelines are passed
17 in substantially their present form that there will
18 unequivocally have to be what we would call a "hot line"
19 established because we are convinced that in addition to
20 substantial training which will have to take place for all
21 components of the system, that we will need a quick, quick
22 "fix," if you would, for the questions that we know will
23 develop under these guidelines.

24 We believe that the guidelines wil significantly
25 expand the obligations of probation and what is

1 traditionally contained in the pre-sentence report. That
2 is something else that is going to have to be considered in
3 terms of its impact on the use of present resources.
4 Either more resources are going to have to be provided for
5 that purpose or other things will suffer.

6 I think it is obvious from the testimony this
7 morning that another effect of the guidelines will be to
8 substantially expand, at least in certain cases, the duties
9 and time of defense attorneys and prosecutors. Because if
10 our prediction is correct that the number of evidentiary
11 hearings will significantly increase and that the scope of
12 those hearings will increase, that is obviously going to
13 take the time of everyone involved in that process.

14 Many federal judges now have case loads that are
15 extremely heavy. The added strain of the time that we
16 believe will be involved in the operation of these
17 guidelines will generate the need for additional judges.

18 If Congress does not recognize that and provide
19 for that, if indeed it does occur, then the quality of
20 justice will suffer in other areas, if not this.

21 Going to the guidelines themselves, the first
22 major topic of discussion in the guidelines is the question
23 of modified real offense sentencing. And I think there is
24 an excellent discussion of that in the guidelines. I
25 certainly wouldn't attempt to improve upon it. We do have

1 some problems with the modified real offense sentencing,
2 although in a substantial way we do agree with it.

3 My understanding of the way that that will
4 operate is that the court will be limited to considering
5 the ingredients of conduct that is related to and in
6 furtherance of the crime of conviction.

7 One of the hypotheticals that was discussed at a
8 meeting in Washington was the bank robber situation where
9 some offenders go into a bank to rob a bank and they take
10 the customers and employees hostage, put them in a vault;
11 during the course of the robbery, one of the women
12 hostages is raped. And it is our understanding under
13 those circumstances that rape would not be a factor to be
14 considered by the court because it would not meet the
15 definition of being in furtherance of the crime of
16 conviction. It is not related to the bank robbery. We
17 find that reality unacceptable.

18 There are also other problems that flow from
19 that, practical problems because of other components of
20 the guidelines. Let me expand on the hypothetical.

21 Let's say that the hostage who was raped was the
22 vice-president of the bank, and prior to the time that they
23 entered the vault, she was beaten because she was in the
24 vault or who had the information as to the combination to
25 the vault. She was beaten prior to the time that the

1 vault was opened and then she was beaten in relation to the
2 rape. And the pre-sentence report indicates that as a
3 result of what happened, she suffered bodily injury and
4 severe psychological injury.

5 At that sentencing hearing, to the extent to
6 which that type of thing would be contested, how would the
7 court be expected to distinguish between the physical harm,
8 or more importantly, the psychological harm that occurred
9 as a result of the bank robbery and the harm that resulted
10 from the rape. Obviously if I got a black eye in the
11 first part and something else during the rape, that is one
12 thing. But when we are talking about components like
13 psychological harm, I would suggest it is very difficult to
14 make those distinctions.

15 And needless to say, we believe that those type
16 of factors, although they are certainly appropriate
17 considerations in sentencing, are the type of factors which
18 because of the harm value -- the potential harm value that
19 is assigned to them -- are areas where we can expect a
20 significant amount of disagreement and challenge.

21 As you know from the guidelines in reference to
22 bodily injury, the sanction unit range is anywhere from
23 zero to 120. And in the psychological injury situation,
24 the range is anywhere from zero to 48 sanction units.

25 Also, as to the question of physical harm and

1 psychological harm, how will that be established? To the
2 extent to which it is disputed, I agree with the testimony
3 this morning that it will be very common for the victim to
4 have to testify at the sentencing hearing.

5 Those of you who have been involved in the
6 criminal process, as I know you have, recognize that
7 sometimes that can create its own trauma, an additional
8 trauma arising out of a crime.

9 Will we need medical testimony and to what
10 extent? Will we need psychological and psychiatric
11 testimony? Will the victim have to submit to appropriate
12 discovery by the defendant in terms of framing the issues
13 or framing the evidence for this consideration?

14 Was the reaction that occurred; say, for example,
15 a psychological reaction of the victim, was it reasonable?
16 Will it be a completely subjective test which will depend
17 only upon what the actual response was, or will the court
18 have to factor in some way some element of objective
19 analysis as to -- if there is such a thing -- how a
20 reasonable person would have reacted under similar
21 circumstances?

22 Who, if anyone, has the duty to pursue this?
23 We may have a situation where the U.S. Attorney doesn't
24 chose to pursue. They may appear in the pre-sentence
25 report, but he or she may not want that aggravated

1 component to be considered in the sentencing.

2 Should the U.S. Attorney have a duty to pursue it
3 whether they want to or not? Does the court have a duty to
4 pursue it? The court is not an advocate. To what extent
5 would the court be required to become an advocate under
6 these guidelines?

7 What about probation? To what extent would the
8 investigative process which normally occurs which leads to
9 the pre-sentence investigation be expanded by the probation
10 office? Does this create the possibility of a hostile
11 relationship between probation and the U.S. Attorney's
12 office in a particular case or generally?

13 The U.S. Attorney may have a weak case. That
14 may have been why a plea was agreed to. They may not want
15 to go into these aggravating areas.

16 The defendant obviously has no incentive to
17 pursue it because ordinarily it would be an aggravating
18 factor.

19 As to the actual sanction units assigned in the
20 various parts of the report, I am not prepared today to
21 report to you any specific or general reaction to those.
22 I am -- Judge Flaum and I are going to be soliciting views
23 from the judges in this circuit on the point and
24 recommending that by a certain deadline that each of the
25 judges go back over some sentencings that they have engaged

1 in in the past and resentence those people in their mind
2 based on the guidelines and give us their feedback as to
3 that.

4 I have received some limited response to this
5 question from two judges. One judge's example in the case
6 where he did it, it ended up exactly the same sentence that
7 he imposed and that made him feel very good.

8 The other response was from a judge who told me
9 that she was extremely distressed when she reached the
10 bottom line because she found that the sentence that she
11 would have been required to impose without going far beyond
12 the guidelines would have been radically different from the
13 sentence that she did actually impose.

14 I note that the guidelines contain on page 27 a
15 statement that no decision has been made as to how -- in a
16 general sense -- of how to deal with inchoate offenses.
17 We believe that although that has not yet been answered, it
18 is an extremely serious question and one that bears a great
19 deal of reflection.

20 There are specific sections of the guidelines in
21 some of the sexual crimes that indicate that an attempt,
22 for example, would be treated in the same way as if the
23 offense had actually been completed. We have some concern
24 about that. Obviously, there are attempts and then there
25 are attempts, and there are solicitations and then there

1 are solicitations.

2 The degree of involvement, the extent to which
3 the criminal activity had been pursued and the manner in
4 which it had been pursued fell short of the actual
5 completion, we believe should not be dealt with on an all
6 or nothing basis as it is apparently is, at least in
7 reference to some offenses now.

8 We would suggest at the very least that some
9 range of discretion should be created in reference to
10 inchoate offenses.

11 As to the areas dealing with abduction and
12 unlawful restraint, if duration of the unlawful restraint
13 is a legitimate factor, we question why there is only one
14 category. The only category in existence is that if the
15 restraint lasted more than 24 hours, 24 sanction units
16 would apply. We would suggest that if it is a legitimate
17 factor, that perhaps more than one category should exist.

18 Under the theft section -- specific offense
19 characteristics, we believe that you should specifically
20 include a factor of the vulnerability of the victim. I
21 know that that exists in other areas. I don't believe
22 that it exists in the area of theft. And obviously there
23 is as much a chance of vulnerability of the victim in the
24 area of theft as there is in other areas.

25 Under the property table, the guidelines create

1 sanction units based on the value of the property taken,
2 among other things. This does not seem to adequately
3 address the situation where the amount involved may be
4 small, but the effect of the theft on the victim may be
5 astronomical.

6 You may have an individual victim for whom the
7 theft of a rather small amount of money can be disastrous.
8 And that is even true at the corporate level comparatively
9 speaking where a small bank, for example, which is
10 victimized by theft, the consequences may be dramatic.

11 On page 60 of the guidelines in the section
12 dealing with drug offenses, we believe exists another
13 example of the type of thing that will generate very
14 extensive hearings, evidentiary hearings, determining
15 amount when no seizure occurs.

16 And it says if there is no drug seizure or the
17 amount seized does not reflect the actual scale of the
18 offense, the sentencing judge shall determine the quantity
19 of the controlled substance by a preponderance of the
20 evidence.

21 I have written next to that "Good luck."
22 Because I think that although there certainly may be
23 situations where the type of factors that are enumerated in
24 that section may exist, because of the effect that these
25 findings will have on the range that is created, they are

1 going to be substantially challenged and the government is
2 going to be held to their burden of proof without doubt.

3 As to the fraud property table which appears on
4 page 78, there are 12 categories in that table ranging from
5 amounts of money less than -- 5,000 or less to over 25
6 million. We think that that certainly is a realistic range
7 for most offenses.

8 The last range is a range that goes from
9 \$5,000,001 to \$25 million. And we think that if
10 these type of distinctions are meaningful, it occurs to us
11 that one range including \$20 million in it may be an
12 unrealistic amount.

13 Going to page 123, the acceptance of
14 responsibility, how it is established, we note it also
15 applies to the finding of guilt. And the way this is
16 structured is that, as you know, the judge has the
17 discretion to reduce the sentence by up to 20 percent. I
18 am assuming that it includes situations where there was a
19 finding of guilt just to try to head off any Constitutional
20 concern.

21 It is very hard for me to imagine a situation
22 where a person who pleaded not guilty and persisted in that
23 plea of not guilty and is found guilty, for it to be
24 typically established in any meaningful way that they
25 accept responsibility because typically they don't. They

1 deny responsibility.

2 We clearly believe that an automatic sentence
3 reduction of 20 percent or some other arbitrary figure for
4 a guilty plea would be unconstitutional. And we also
5 believe that even if it were not, it would not be in the
6 interests of justice to have that type of automatic
7 reduction.

8 As to cooperation, we have some serious problems
9 with this section. It places tremendous power in the
10 hands of the U.S. Attorney. Much of it is there, of
11 course, because it is the only place it could be. But we
12 believe that the ultimate power should exist in the hands
13 of the judge.

14 As it is framed now, the U.S. Attorney alone
15 makes the decision as to which category of multiplier will
16 be used. And then the judge, unless the court finds that
17 this is made in bad faith, is bound to accept it. We
18 believe the court should have more discretion than that.

19 I also agree with some of the comments this
20 morning -- I don't recall who made them -- that there well
21 may be circumstances where this multiplier is not adequate,
22 depending on the level of cooperation involved.

23 Another interesting comment, the guidelines adopt
24 the modified real offense approach to sentencing
25 apparently except in the area of cooperation. Because in

1 this area, on page 125, I believe it is, it says that this
2 multiplier in effect would apply whether the cooperation is
3 in the same case or wholly unrelated to the offense
4 committed by the offender.

5 Now, it may be simply that there is good
6 justification for creating that distinction, but I think it
7 should be recognized that is a significant distinction.

8 As to criminal history, I don't think that
9 anything you do in that area can avoid injecting a certain
10 amount of disparate sentencing into these guidelines.

11 On page 132, you suggest that although it may
12 be disparate, it is not random, the length of sentence
13 reflects judicial assessment, et cetera.

14 That may or may not be true. Some states have
15 mandatory minimums for certain types of offenses; for
16 example, Illinois has a mandatory minimum of four years for
17 residential burglary. If the same offender was sentenced
18 in Indiana or Iowa, it may be that they would receive
19 probation. So you have to remember that.

20 Secondly, in terms of factoring in the amount of
21 time spent in prison, that will vary greatly depending on
22 whether the jurisdiction at the time of sentence is flat
23 time jurisdiction or an indeterminate jurisdiction.

24 I also note in paragraph C-322, it looks like --
25 well, in the early part of the guidelines, you suggested if

1 someone committed two armed robberies and pled guilty to
2 one and one was dismissed, that the one would not be
3 considered. It looks to me like this paragraph brings it
4 back in through the back door because this paragraph says
5 that other conduct not resulting in conviction, similar
6 conduct, where the court would apparently make a finding by
7 preponderance of the evidence, I assume, that he committed
8 another armed robbery and include that as an aggravating
9 factor under the criminal history section.

10 I am way out of time. I apologize for that. I
11 do have significant comments concerning certain other
12 specific provisions which I am sure can be dealt with
13 adequately in written form and I assure you that you will
14 receive those.

15 We have some extremely serious concerns about how
16 probation will operate. We are extremely interested in
17 maintaining the integrity of what we believe is a very fine
18 probation system that is in existence now. We have some
19 concerns about supervised release and plea agreements.

20 But I am way out of time, so I think that I will
21 stop there. Thank you very much.

22 CHAIRMAN WILKINS: Thank you very much, Judge
23 Mihm. We certainly share your concern on the issues that
24 you have raised and the issues that we have discussed with
25 our working groups and certainly in-house with the

1 Commission.

2 You put your finger right on the real major
3 decision that we have to decide, and we would ask you to --
4 with your other comments -- address this issue of modified
5 real offense sentencing. We can go from one extreme of
6 pure real effect sentencing to sentence by statute for
7 conviction.

8 With regard to the case where the bank teller is
9 raped, that can be handled in one of two ways. One, the
10 charge of rape can be brought and prosecuted; and another
11 would be to change the definition of modified real offense
12 sentencing to say "during and in furtherance of."

13 JUDGE MIHM: I had intended to give you -- maybe
14 I did or didn't.

15 Did I give you some suggested wording on that?

16 CHAIRMAN WILKINS: I --

17 JUDGE MIHM: I had intended to and basically that
18 is what I was going to say: that that wording should be
19 changed to read "in furtherance of the crime of conviction
20 or during the course of the commission of the crime of
21 conviction."

22 And I realize that there are problems with that
23 wording, too. But that is in a general sense what we want
24 to convey.

25 CHAIRMAN WILKINS: I might want to say, too, the

1 guidelines do not provide for an automatic reduction for a
2 plea of guilty. You were merely underlining that.

3 JUDGE MIHM: Zero to 20.

4 CHAIRMAN WILKINS: In the discretion, yes.

5 You raised so many questions, I am not going to
6 ask any myself, but I know that somebody will ask you to in
7 addition to these questions that you have raised and when
8 you send in the questions, we would appreciate it if you
9 would put those to a solution as well for --

10 JUDGE MIHM: I would be more than happy if I
11 could do that in 30 words or less.

12 CHAIRMAN WILKINS: Any questions to my right?

13 COMMISSIONER ROBINSON: If I might. I
14 appreciate your presentation, Judge. You have probably
15 given us some specific suggestions --

16 I particularly like your idea about one-year
17 advisory testing period. The legislature doesn't
18 currently provide that. But to the extent that you can
19 keep that idea alive, we suggest that that be --

20 Let me ask you one question, a general question.
21 You expressed a concern, I think appropriately so, about an
22 increased evidentiary burden to come from a system like
23 this that tries to be comprehensive or more comprehensive
24 than in some states that has all of these factors, and you
25 are right to the extent that there is a factor there that

1 is an issue. It means that the judge has to look at it.
2 And whether you have an evidentiary hearing or not, the
3 more factors, the more characteristics, the greater the
4 burden to some extent.

5 On the other hand, you, I think, have suggested a
6 number of factors that we ought to take into account that
7 even with the document we have already, which may be too
8 long, are in there. I think that you mentioned that you
9 thought we ought to distinguish substantive offense from
10 attempts or at least kind of attempts, more categories of
11 abduction, including vulnerability as an issue to, in
12 theft, consider the effect on the victim in the cases of
13 small amounts of theft, just to name some of them that you
14 mentioned.

15 You may agree there may be a natural tension here
16 between on the one hand having a system more comprehensive
17 which might suggest even fewer characteristics; on the
18 other hand, having a system that has all of the
19 characteristics that you, at least, think would be
20 relevant.

21 What can we do to try to find some sort of
22 accommodation between those two? Are we stuck? Do we
23 have to bite the bullet and say, "Oh, no, we have a
24 comprehensive system that is very burdensome;" or a
25 system that is much easier to apply or doesn't take into

1 account a lot of the things that you want and more, or is
2 there some other strategy that we can apply?

3 JUDGE MIHM: I think the most that you can do
4 based on your mandate is what you have done and try to fine
5 tune it as much as you can.

6 One of your comments this morning that this is
7 not the end; this is the beginning. And assuming that
8 these guidelines pass in some form similar to what they are
9 now, I would suggest that the first five years, there is
10 going to be a tremendous amount of fine tuning involved
11 both by Congress and by the District Courts and the
12 Appellate Courts, certainly.

13 I don't think it is possible -- you're telling me
14 about the passage of legislation and the passage of
15 guidelines -- to conceive of every possible thing that can
16 happen before they go into effect.

17 I would suggest that some of the richest change
18 that I am sure will occur in these guidelines will result
19 from things that happen after they go into effect. And
20 you and we will learn from our mistakes.

21 We do have a serious concern that I may not have
22 mentioned previously, however, and that is that we do
23 believe that on the lower end of the sentencing that
24 probation is -- I said the "other side" of it, I said we
25 are going to be having more people going to prison. The

1 opposite side of that, obviously is that probation, we
2 believe, is not going to be utilized in certain cases where
3 it is the appropriate result. We recognize that what these
4 guidelines do is create a range and that we have the
5 authority to go outside the range.

6 And any judge that I have talked to about this
7 have made it very clear to me that we won't hesitate to do
8 that, and I am sure that you will see a lot of that.

9 But to the extent to which the guidelines exist
10 in such a form that a judge doesn't have to go outside of
11 the range, I think the better off we will all be.

12 COMMISSIONER ROBINSON: So you would have us
13 error in favor of putting the factor in to the extent that
14 we can, even though it may create some additional
15 evidentiary burden, at least given our current legislative
16 mandate?

17 JUDGE MIHM: Well, I am concerned about the
18 disproportionate lack of emphasis on mitigating factors in
19 terms of these guidelines as they presently exist. I know
20 that is one of the unresolved areas and you have not fully
21 addressed that. But several judges that I have spoken
22 with who have read the guidelines are extremely concerned
23 over the extent to which we believe that we may end up, may
24 have to end up, giving legitimate recognition to mitigating
25 factors only by going below the guidelines. And I think

1 that would be an unfortunate result, and I know it is one
2 that you don't intend.

3 CHAIRMAN WILKINS: Any questions to my left?

4 COMMISSIONER BREYER: Thank you. I think that
5 you have made a number of very important criticisms. I
6 have two comments. One is that this is not the first time
7 I have worked at gunpoint as chief counsel of the Senate
8 Judiciary Committee. This is not the first time that
9 judges have waited until after the horse is out of the barn
10 to try lock the door.

11 JUDGE MIHM: No, I am very --

12 COMMISSIONER BREYER: -- hear many of these
13 criticisms voiced by judges to the contrary. Judge
14 Franklin, Judge Tyler, Judge Newman, many of the judges
15 were extreme advocates of a sentencing guideline system
16 with the characteristics that you have. And quite often
17 we were presented in my old capacity, as counsel, with
18 studies of the 2nd Circuit, which were not antedoctal, but
19 studies in which sentencing reports were presented to --
20 the same reports to many different judges -- with the
21 result of wildly different sentences for the identical
22 person. So there were many people, including many members
23 of the federal judiciary that thought it was a very serious
24 problem. It called for this approach.

25 Very little opposition that, you know, the 2nd

1 Circuit is now feeling is important.

2 The other comment is that I wonder if the judges
3 wouldn't look at the experience in Minnesota, the state of
4 Washington, Pennsylvania, which has had guideline systems
5 of a mandatory sort where the serious administrative
6 problems that you discussed have not emerged -- at least to
7 my knowledge. They seem to have been administering the
8 system in Minnesota without enormously lengthy hearings and
9 the system hasn't fallen apart. So I suppose --

10 JUDGE MIHM: I am not suggesting that the system
11 will fall apart. I am suggesting if in those other areas
12 they have not developed, it would have to be in my
13 opinion because there's enough different from these
14 guidelines that those things are handled in some other
15 fashion or somebody is not doing their job.

16 COMMISSIONER BREYER: The real reason that I
17 saying this, of course, is I want to spur you on to
18 something. Because I think that the appellate section of
19 the law came out quite differently than what was my
20 understanding of its intent, which was to allow appeals
21 readily from sentences that are outside of the guidelines,
22 but not to allow appeals readily from sentences within the
23 guidelines. And if that has come out backwards, and if
24 that is radically going to effect the work of the appellate
25 courts -- and I think it will -- I hope that maybe the

1 horse is not totally out of the barn.

2 So I think --

3 JUDGE MIHM: I would suggest that perhaps after a
4 passage of three or four or five years that that will
5 settle down. But initially, as you know, because of the
6 various component parts that will go into the creation of a
7 range, any defense attorney worth his salt is going to have
8 to seriously consider appealing on the basis that certain
9 aggravating factors that were found that the judge was
10 clearly erroneous in the findings that were made.

11 I assume that will be the same.

12 COMMISSIONER BREYER: See, in looking -- I mean
13 if -- what I wonder is if we can get the appellate thing of
14 the statute right. And then if, in fact, the procedure at
15 the sentencing hearing is not enormously complex, it
16 wouldn't take much to get more procedural protection than
17 there is today, which is zero; and then if there is a
18 certain amount of flexibility and discretion built into the
19 way in which the district court judge applies these, then
20 I wonder it then isn't considerably more workable than you
21 are thinking?

22 I mean the --

23 JUDGE MIHM: I think that --

24 COMMISSIONER BREYER: -- to say that, "Oh, no.
25 We will appeal this." And then saying, "Well, maybe there

1 is a chance it might work."

2 JUDGE MIHM: I think you are right. But I have
3 serious doubts as to whether it would be possible to frame
4 it so that was the result.

5 COMMISSIONER BREYER: What do you think -- first
6 of all, modified real offense sentencing. It is obvious
7 that even within the Commission, you have put your finger
8 on a point on which there has been disagreement and which,
9 I suppose, hasn't been written as well as I thought it had
10 been written because I thought that what we said was that
11 there is no rule. I thought it spelled that out very
12 specifically. There is no rule which says "take into
13 account the harms that are committed in furtherance of."

14 Rather, it says: "That is a principle that has
15 led us to instruct what is the rule." The rule, I thought
16 we said -- you see, is a road map; that is to say, when the
17 judge applies the guidelines, he turns to "Bank Robbery,"
18 and in bank robbery, he finds cross-references. And
19 those harms that he is to count are those harms that are
20 the subject of the cross-reference.

21 He is not to apply some general statement of
22 principle, count every harm in furtherance of the
23 guideline.

24 Now this, as I think we said -- I don't hold you
25 responsible for not having memorized every word in 187

1 pages. Frankly I am spelling this out because I think it
2 is such an important point and it does represent
3 compromise.

4 But if you say to the district judge, "Judge, you
5 take into account every harm that has been committed in
6 furtherance of this crime," we will be here until next
7 Christmas while people try to figure out every possible
8 harm in furtherance of what ever charged.

9 To avoid that, while still providing the element
10 of real offense sentencing, what the guidelines said is,
11 "Judge, as to robbery, you turn to page" -- I guess it is
12 30 -- 40. And before he says it is B231(b)(2) --

13 See, I have memorized this Code --

14 -- it says taken -- "If any victim suffered
15 physical injury or psychology injury resulted, add the
16 appropriate value from Part A," which is personal harms.
17 That is the rule. And therefore, the rape would be added
18 because that is a personal harm, and the --

19 JUDGE MIHM: Well, if I remember correctly, at
20 our meeting in Washington, this very hypothetical was
21 discussed --

22 COMMISSIONER BREYER: And it came out the other
23 way. And that's because -- I mean, we listened to what
24 you were saying.

25 JUDGE MIHM: Okay.

1 COMMISSIONER BREYER: But this is a matter of
2 significance.

3 JUDGE MIHM: Well, my question then becomes: If
4 the principles would appear as stated, the policy
5 guidelines as stated, and they say that the court should
6 consider only the conduct which occurs in furtherance of --

7 COMMISSIONER BREYER: No, it doesn't say that.
8 What it says is the road map. And the reason that I am
9 saying this -- and maybe it may be --

10 JUDGE MIHM: I don't think that we are looking at
11 the same page.

12 COMMISSIONER BREYER: Well, then we have to
13 change it to do that.

14 But, I mean, the thing that I am thinking of is
15 -- look on page 15. See, it says on page 15 in the middle
16 of the second full paragraph, we talk about two
17 compromises. It says: "The substantive compromise
18 consists of what is referred to as a road map. Its
19 objective is to include, for sentencing purposes, only
20 those real elements that are importantly bound up with the
21 conduct that constitutes the crime charged." And then it
22 gives an example.

23 And then what it says is: "The guidelines take
24 account of those harms and conduct that it lists or
25 cross-references. They do not take account of any other

1 conduct."

2 Then on the next page, it talks about an
3 alternative possibility which is what we were talking about
4 in Washington. And there it says on the middle of the next
5 page: "A different possibility is the use of a rule that
6 allows the sentencing judge to consider all conduct or
7 harms," you see. However, this rule would prove to be
8 unusually difficult because of the problems in determining
9 what conduct to consider.

10 In order to simplify this conduct, the Commission
11 has developed preliminary guidelines that rely on explicit
12 cross-references.

13 Now, I flag that for the reason that -- and then
14 it says here we would like your views on that. And I flag
15 that deliberately because I would call it one of the two
16 most important compromises in this approach. That is
17 called the "explicit road map approach." And we could go
18 through a rule or we could go to some other thing.

19 The second basic compromise is the procedural
20 approach, and that consists of -- which isn't here. I
21 mean, the question is what are the rules of evidence at
22 that sentencing hearing.

23 But you see, the substantive approach means that
24 then the critics and commentators have to go through this
25 section by section, look at what is explicitly

1 cross-referenced, and then tell us whether we have
2 cross-referenced the right thing.

3 Now, that is something that will be hard to do
4 and hard to comment on. But once it is done, it won't be
5 hard to apply. Because all you have to do is look up the
6 section "Bank Robbery" and then follow the road map that is
7 right there.

8 Now, that isn't a great approach. It is just
9 that we found it difficult or I found it difficult to think
10 of a preferable alternative.

11 CHAIRMAN WILKINS: Well, Judge, you did point out
12 one thing. When you use this approach, one of the
13 problems that we had is that we missed something. We
14 missed one that you pointed out to us, and that is the
15 vulnerability of victims --

16 And so by using it as a road map, we have got to
17 make sure that we have all of the points covered. And I
18 think that in this analysis, hopefully we will by you and
19 other judges analyzing this document.

20 Any other questions to my left? Yes.

21 COMMISSIONER NAGEL: Judge, I want to thank you
22 very much for your thoughtful comments and I look forward
23 to receiving in more detail the written document that you
24 have.

25 You mentioned in your discussion of criminal

1 history some concern for the use of the length of the
2 sentence of a prior conviction as -- the severity of the
3 past offense. And that has been an issue with which we
4 have wrestled over time. And we ultimately proposed that
5 one. But I think that we are open to any others.

6 And I would only ask that in the course of your
7 polling your colleagues, perhaps you could suggest to us
8 some more promising alternatives. As I say --

9 JUDGE MIHM: Well, we recognize that in
10 area like that, you ultimately have to end up with some
11 -- I don't know that "arbitrary" is the right word, but I
12 guess it is.

13 COMMISSIONER BREYER: You are putting your
14 finger on one of the most important points -- that is why I
15 am really anxious to go back. And we need comment on these
16 things.

17 JUDGE MIHM: We will.

18 COMMISSIONER NAGLE: I think we are quite open to
19 alternative ways of doing it. It is just that we have
20 tried several at this point. We tried that approach.
21 But if you have a better approach, we would certainly like
22 to hear about it and take it into consideration.

23 JUDGE MIHM: Well, after discussing this on a
24 limited fashion and on a limited basis with my colleagues,
25 I don't think there is any danger of your not hearing

1 from us.

2 CHAIRMAN WILKINS: Thank you very much, Judge
3 Mihm. We appreciate it.

4 JUDGE MIHM: Thank you very much.

5 CHAIRMAN WILKINS: The Chicago Bar Association
6 has asked Melvin B. Lewis to be here and testify as their
7 representative.

8 Mr. Lewis, we are delighted to have you with us.
9 We appreciate your taking your time to assist us in this.

10 MR. LEWIS: I am grateful for your willingness to
11 hear me, sir.

12 CHAIRMAN WILKINS: Thank you.

13 MR. LEWIS: First let me note that the period of
14 time which elapsed between the receipt of the preliminary
15 draft and the hearing today simply did not permit reference
16 of our position to the board of managers of the Bar
17 Association for thorough action.

18 In that circumstance, the criminal law committee
19 of the Chicago Bar Association is empowered to make a
20 position statement on behalf of that body and it is in that
21 capacity that I appear here today.

22 The committee itself is composed of several dozen,
23 at least, practitioners within the field of criminal
24 justice, and virtually equally divided among prosecution,
25 defense, and judiciary. As an academician, I hold the

1 balance of power, therefore, because I fall outside any of
2 those categories. And I guess it is for that reason that
3 I have been entrusted with the communication of their
4 position today.

5 Obviously within so heterogenous a group, it
6 would be quite unlikely if we were to have a coherent
7 statement with respect to every aspect of the draft. And
8 I should like to emphasize today those areas within which
9 we have achieved a relatively substantial unanimity in
10 respect to the guidelines.

11 Now, in the first instance, let me say to you
12 that we are very favorably impressed by the manner in which
13 the formulation of these guidelines has really chosen to
14 emphasize the essential nature of the offense rather
15 than the nomenclature which attaches to it. And the
16 categorization in that aspect with regard is an extremely
17 salutary action.

18 We aren't, however, quite concerned about the
19 matter of increments to and deduction from those base
20 value. And what I propose to suggest to you here now is
21 really not a matter which was referred to earlier as
22 "glitches." Rather we think of them as emblematic of a
23 very serious problem presented by this draft overall and
24 one to which we aren't prepared here this afternoon,
25 very respectfully, to suggest a solution.

1 Now, if we consider, for example, the question of
2 theft to start with -- not because that has any special --
3 poses any special problems to the exclusion of other areas
4 considered within the draft, but only as an illustration of
5 the problem to which we would direct the Commission's
6 attention.

7 But we do question seriously whether the
8 criminality of say a purse snatching offense really can
9 be said to depend upon the contents of the purse, which
10 is a concept of which the offender can't even to guess
11 until he will have snatched the purse.

12 I am mindful of the Shakespearan observation:
13 "He who steals my purse steals trash," which in my case is
14 really quite accurate. I would go further perhaps and
15 say "He who steals my purse renders himself vulnerable to
16 very serious disappointment. And yet at the same time is
17 likely to cause me to walk home this evening rather than
18 take the bus, which would stir up substantial resentment on
19 my part."

20 That, I suppose, is undue levity applied to a
21 very serious concept, that being really: Do these
22 guidelines -- pardon me -- do the incremental aspects of
23 these guidelines really bear a totally rational
24 relationship to the requisite sanction?

25 Now, even if we turn to fraud -- and, of course,

1 what springs to mind in that context is the mail fraud
2 scheme that we have, broadly based, with a large number of
3 victims and so forth.

4 But even in that context, we would earnestly
5 suggest to this body that the number of transactions is
6 very -- is a very much more reliable indicator of the
7 degree of criminality and the necessity for sanction than
8 is the total amount involved in the defalcation.

9 We would consider in a somewhat related context,
10 as we start to talk about the additives to the base value
11 of the offense -- I would ask that the body perhaps
12 consider the offense, the relatively minor offense of
13 trespass for which there is very ample theological
14 precedent for a request for forgiveness.

15 The basic value there is 6. But if -- if the
16 premises of the dwelling, not the dwelling now, but the
17 premises of the dwelling, a very different thing, are the
18 subject of that trespass, then there is an increment of 12.
19 We now have a total of 18 which results in mandatory
20 incarceration regardless of criminal history.

21 Now, this to our minds really calls into
22 question whether the guidelines are, in fact, sufficiently
23 sensitive to the Congressional mandate as expressed in
24 section 994(j), I believe -- yes -- which suggested a
25 general inappropriateness of imprisonment as a punishment

1 for a first offender who has not been convicted of a crime
2 of violence or otherwise serious crime.

3 Of course seriousness, like other attributes, is
4 very much in the eye of the beholder. But we really think
5 that these guidelines in that aspect fall substantially
6 short of the statutory mark in that respect, at least.

7 Perhaps a better illustration of the problem that
8 I have been attempting to bring to your attention here
9 might be pointed out in respect to questions of drug
10 possession. At page 16 of your guideline within paragraph
11 6, you very properly point out that in the event of a
12 charge of say distribution of cocaine, if after the
13 distribution offense has been completed, a search warrant
14 shows an illegal weapon within the home of the offender,
15 that that would not be considered as a factor to add to the
16 offense value because that possession of the illegal
17 firearm was simply unrelated to the cocaine offense.

18 Yet, as was remarked quite memorably in a radio
19 program of my youth -- and I was a youth once, whether or
20 not the Commission is prepared to accept that assertion --
21 there was -- the line, I think, was the "big print giveth
22 and the small print taketh away. "

23 And in that rather -- quasitheology, I
24 direct your attention again, if I might, to the question of
25 marijuana possession as outlined on page 61 of your

1 guidelines.

2 Now, you properly point out there yes, it is
3 indeed a crime. But it might also be fairly viewed, I
4 think as -- the kind of thing as to which a
5 first offender ought not mindlessly to be incarcerated.

6 Yet at the same time, yes, we have here indeed a
7 base value of 12, which would not require incarceration.
8 But if within the home of that offender while he possesses
9 the marijuana there should be a sporting rifle legally
10 owned, a .22 to -- cans with, we are now in a situation
11 where there is a firearm under his control at the time of
12 his commission of events, which adds 24 to the base value,
13 which puts him into the penitentiary for a minimum of two
14 years.

15 And I might say in that circumstance, I would
16 regard a meaningful showing of remorse as really somewhat
17 unlikely. Remorse perhaps, an apprehension; remorse
18 perhaps at the Draconian character of the ensuing penalty.
19 But I should be really quite surprised to find an offender
20 in that posture really believing that he had somehow
21 betrayed his heritage. And I would doubt that he would on
22 the face of things qualify for the 20 percent reduction
23 which accompanies such a showing of remorse where deemed
24 genuine.

25 Now, there, I suggest, to you that we have a very

1 serious problem that is susceptible of amelioration, I
2 think, quite readily, with a rather minor modification of
3 the preliminary draft.

4 As we read section 994(b) -- it is our view that
5 the 25 percent spread factor is applicable only to terms of
6 imprisonment; that it has nothing to do with the question
7 of whether the offender will be probation eligible.

8 Given that situation, we urge to you more use of
9 probation because we really believe here that functionally
10 we have a situation in which there really will be no longer
11 functioning such a thing as probation in the case of
12 anything that reasonably would be regarded as a felony.
13 I think that it just effectively really is ruled out here
14 on a searching examination on this draft.

15 And we also again advert to the statutory mandate
16 of 994(J). So respectfully we suggest that with regard to
17 selected sections here, such sections of this draft as
18 commend themselves to the Commission as worthy of that type
19 of consideration, we suggest that a safety valve is
20 really quite appropriate. The Commission, of course, is
21 statutorially required to constrict within relatively narrow
22 limits the volatile concept of sentencing. But as with
23 any similar pressure situation, the presence of a safety
24 valve is quite literally essential.

25 So with regard to those sections that commend

1 themselves to the Commission as worthy of such -- and with
2 the different number -- a different number assigned to the
3 blank for each section -- we would commend to you the
4 desirability of the following language: "In any sentencing
5 proceeding conducted pursuant to this section, if the
6 defendant's total number of sanction units is less than
7 blank, and if the defendant has never before been convicted
8 of a crime of violence, and if the court finds that the
9 presence of the defendant within the community is not
10 likely to pose a threat to persons or property, then the
11 court may impose a sentence of probation in lieu of
12 incarceration."

13 We urge that safety valve to this Commission.
14 We think in doing so we also address another concern that
15 was voiced at an earlier stage of these proceedings where a
16 member of the Commission stated that he really rather hoped
17 that at the inception, at the implementation of this plan,
18 the judges would fairly frequently go outside of the
19 guidelines, state their reasons for so doing, and thus
20 create precedent for possible modification of those
21 guidelines.

22 We urge to you, however, that the insertion of
23 that safety valve at the inception is a much better
24 solution. And that if we are to implement this on an
25 experimental basis, the availability of that relief to the

1 judge who would consider the guidelines facially Draconian,
2 as for example in the case of the hunter's son who has a
3 small amount of marijuana in his home and is condemned to
4 the penitentiary for a minimum of a two-year period, that
5 this judge really should have available to him this
6 alternative method of procedure, bearing in mind that
7 federal probation has, in fact, proven itself to be one of
8 the most valuable elements of the criminal justice plan
9 both in saving money for the taxpayer and as well in
10 reclaiming the offender into useful citizenship which is,
11 of course, simply another way of saving money for the
12 taxpayer when you get down to it if one is to take a purely
13 economical approach here.

14 I would suggest one other proposition to this
15 Commission. And again, this relates to the question of
16 automatic increments and deductions from the base value of
17 the offense.

18 It has been mentioned earlier in these
19 proceedings that to turn over to the prosecutor rather than
20 to the judge the determination as to whether the offender
21 has given serious cooperation is really to turn the
22 judicial process pretty much on its head.

23 The defendant, as is written, is deprived of the
24 opportunity to attempt to show to the judge the fact that
25 he did, in fact, provide such cooperation to law

1 enforcement. And the prosecutor's word, quite literally,
2 is law which controls judicial action. We find that
3 philosophically questionable.

4 Now, it is too late in the day, of course, to
5 challenge the value of cooperation as a tool in law
6 enforcement. But I would ask that this Commission bear in
7 mind that in leaving that particular safety valve, and in
8 closing the safety valve of probation, the guidelines may
9 very well be just intensely counterproductive, because with
10 respect to cooperation, it is just one of the fundamentals
11 of this life that the only likely beneficiaries are the
12 least-deserving offenders, those with the greatest
13 sophistication and involvement in crime.

14 The true first offender who finds himself within
15 the throes of the criminal justice system really has no
16 information of value to offer to a prosecutor. There is
17 usually very little he can do to show any type of
18 assistance because he knows nothing.

19 It is only the confirmed offender -- and to use a
20 word which is very, very meaningful, I think, to my fellow
21 Chicagoans, the Panskos of this world, who are in a
22 position to qualify for a .6 factor.

23 Now, in that context, and as we talk about the
24 essentially opportunistic nature of that deduction factor,
25 I remind you of Mr. Skinner's comment earlier where he

1 expressed concern for the situation in which the offender,
2 in a position to cooperate, might say "I want more than .6.

3 You are talking here really about an intensely
4 opportunistic approach to the sentencing concept. I don't
5 -- I am not in the position of saying that it should not be
6 a factor to be taken into consideration. But I do urge to
7 you that first the determination should invariably be that
8 of the judge and not of the prosecutor.

9 Certainly there are situations in which
10 considerable sensitivity attaches to the status of the
11 defendant as a cooperating witness, but that is a situation
12 which readily can be solved by hearings in chambers, off
13 the record. It is certainly not necessary that his
14 cooperation be spread before the public. But it seems to
15 me is irreducibly necessary that it be the judge rather
16 than the prosecutor who makes the determination.

17 And that, as well, reverting again to my plea to
18 this body for the perpetuation of the probation system --
19 it seems to me that it is as well very necessary that that
20 not be the only avenue to leniency.

21 Thank you for having heard me, sir. I am
22 available to any questions that the Commission may have.

23 CHAIRMAN WILKINS: Thank you very much, Mr.
24 Lewis. You do point out one good point we always need to
25 keep in mind: that we read these guidelines and we're

1 convinced that they are absolutely clear in certain
2 respects, and then someone takes an objective look as you
3 have done and you point out areas where we need to have
4 some clarifying language.

5 It was never contemplated, of course, that the
6 young man possessing marijuana would be sentenced
7 additionally for the fact that his father had a hunting
8 rifle in his house. But you certainly could read what we
9 have written to encompass that situation. We envisioned
10 the illegal possession of weapons and so forth due to the
11 commission of drug offenses. But we need to be a little
12 more explicit.

13 One thing you did point out -- and I will not ask
14 you respond now, but merely to give it some serious thought
15 -- and that is the safety valve language that you posed has
16 a great deal of merit for consideration.

17 My concern is though, does the statute under
18 which we operate allow us to do it?

19 MR. LEWIS: We believe, sir, very strongly that
20 it does. The only restriction against it that I can see
21 -- of course there would be certain situations in which --
22 in which the statute says that anything other than
23 imprisonment is quite inappropriate. But nothing about the
24 language which I have suggested would remotely encompass
25 the situations thus denounced by the statute.

1 The only impediment that is involved there is
2 994(B). And 994(B) addresses only the term of
3 imprisonment, as I read it, sir -- and I certainly can't
4 claim any expertise in a body that -- before a body as
5 sophisticated as this one that would command your respect
6 -- but as I read it, it relates only to the situation in
7 which, by the facial language of the provision: "If a
8 sentence specified by the guidelines includes a term of
9 imprisonment, the maximum the range established for such a
10 term shall not exceed the minimum of that range by more
11 than 25 percent."

12 It relates only to the length of time that a
13 defendant shall spend in incarceration if, in fact, he is
14 to be incarcerated. It has, as I read it, sir, absolutely
15 nothing to do with eligibility of probation.

16 Yet the guidelines seem to take the tact that in
17 accommodating this 25 percent spread that we go -- rather
18 arbitrarily say that zero is 25 percent less than one or
19 something to that effect.

20 Zero, as translated to the question of probation,
21 as an alternative to incarceration really is in quite a
22 different category, as I see it. And I think that -- I
23 think the statute commands that interpretation because I
24 would be very reluctant to ascribe to Congress the virtual
25 guide of the probation system which would be what

1 otherwise would result.

2 I really think that there was a -- there is an
3 approach which is taken within the guidelines at page 141,
4 conversion of sanctions, which would be another way of
5 approaching the thing. But I do commend to this body a
6 use of probation, a resort to probation, vastly expanded
7 beyond anything contemplated here at present.

8 CHAIRMAN WILKINS: Thank you very much.

9 Any questions to my right?

10 COMMISSIONER ROBINSON: Yes, if I could ask -- a
11 number of -- but let me briefly --

12 MR. LEWIS: Sir, could you -- it is very hard to
13 hear you, sir. I really --

14 COMMISSIONER ROBINSON: Let me just ask briefly
15 what I think is an important structural issue that we have
16 wrestled with. It seems to me that there is two
17 approaches to actually defining the units in which these
18 guidelines themselves would deal. One approach is to use
19 the actual co-offense section as opposed to an approach
20 that looks instead not at the co-offense section at all,
21 but at what you might call the "elements of harm. "

22 So it wouldn't be the robbery section or sections
23 -- robbery might not even be mentioned. Instead, the
24 elements approach might have an element of -- concerning
25 theft and another concerning injury and another

1 psychological injury and another taking for pecuniary gain
2 or something like that; and those elements taken together
3 would then be what a robbery suspect would be judged on.
4 And, of course, each one of those elements might be used --
5 the taking element might be used not only in robbery but
6 other cases as well.

7 Those represent two very different kinds of
8 drafting techniques, in a sense. And many state systems
9 have used the co-section defense approach.

10 And I suppose the attractiveness of that
11 co-section defense approach is that those are the terms, at
12 least, with which lawyers and judges are familiar with in
13 the co-section.

14 Do you have a view as to -- as to which we should
15 pursue? The preliminary draft is, I think, probably mixed
16 in a sense. It tends towards one approach in some places,
17 it tends toward another in other places.

18 Do you have some views on which approach --

19 MR. LEWIS: Yes, sir. I really believe that the
20 draft properly is to be viewed as valuing the substance of
21 the events far above the nomenclature which normally would
22 have been said to attach to that offense. And personally
23 I very much approve of that approach. I think it makes a
24 good deal of sense.

25 CHAIRMAN WILKINS: Any questions to my left?

1 COMMISSIONER BREYER: Yes. I don't really see
2 how your proposal differs. It has been very interesting
3 and I think your testimony has been very interesting and I
4 appreciate it. But how does the proposal differ from what
5 we have?

6 MR. LEWIS: Well --

7 COMMISSIONER BREYER: I don't see where we have
8 -- maybe the number isn't high enough. Maybe we should
9 have higher numbers or lower sentencing numbers in many
10 respects or many places.

11 But leaving the levels out, look, if a person
12 has 13 units or less, it is then up to the district court
13 whether the district court sends him to jail for up to
14 six months or puts him on probation.

15 Now, from what I have heard you say, that is what
16 we should do --

17 MR. LEWIS: No --

18 COMMISSIONER BREYER: And then you wanted to --

19 MR. LEWIS: No, sir.

20 COMMISSIONER BREYER: What did you say?

21 MR. LEWIS: My proposal to this Commission, sir,
22 very respectfully is this --

23 COMMISSIONER BREYER: Yes?

24 MR. LEWIS: That even though the total score
25 may be substantially in excess of 13, with respect to

1 certain selected offenses --

2 COMMISSIONER BREYER: Well, you mean the numbers
3 taken -- the number for certain offenses should not be 13,
4 it should be 26?

5 MR. LEWIS: Exactly, sir.

6 COMMISSIONER BREYER: Then you are --

7 MR. LEWIS: Or more.

8 COMMISSIONER BREYER: Then our approach is --

9 MR. LEWIS: Pardon?

10 COMMISSIONER BREYER: I mean, our approach is if
11 the number comes up less than 14, it is up to the judge
12 whether to put the person on probation or to send him to
13 jail for up to six months.

14 MR. LEWIS: Yes, sir.

15 COMMISSIONER BREYER: Now, that is what you have
16 recommended -- don't -- don't -- I mean, tell me I am wrong
17 if I am wrong. But it sounded to me that that is just
18 what you recommended --

19 MR. LEWIS: No, sir. I am -- I am recommending
20 situations in which if the judge were to sentence the
21 offender to the penitentiary under your guidelines, he
22 might very well be sent for three or five years. But the
23 option of probation would still be available. That's what
24 I am saying --

25 COMMISSIONER BREYER: I don't know how we do

1 that. In other words, we say -- in other words, the
2 offense score comes up not 14, but the offense score comes
3 up 120 and we say, "Judge, this is your choice under this
4 statute. The score is 120. You send him to jail for 25
5 percent range, which is 110 months to 130 months. But we
6 give you another alternative, zero."

7 Boy, I think that would be tough to square with
8 this language. In other words, do you think Congress is
9 telling us that we can say 100 and --

10 MR. LEWIS: Well, I suppose, sir, at the range of
11 120 or 130 months, that may be beyond where you would want
12 to go in any situation. It may be.

13 But I say this to you, as well, that it is not
14 at all unusual now for a judge to be able to sentence to
15 probation an offender whose offense readily can carry a
16 five-year sentence. And I should hate to -- I should hate
17 to see that safety factor removed from the sentencing
18 equation.

19 I -- yes, sir, I am quite literally advocating to
20 you a situation in which with regard to selected sections
21 -- and obviously now I am not talking about kidnapping.
22 Obviously, I am talking about trespassing, I am talking
23 about marijuana.

24 With regard to selected sections, even though the
25 total score may be 20 or 30, that the judge still should

1 have the option of probation available to him.

2 COMMISSIONER BREYER: Thank you.

3 MR. LEWIS: Have I answered your question, sir?

4 COMMISSIONER BREYER: Yes.

5 COMMISSIONER MAC KINNON: Professor, you made the
6 point that the sanctions should not necessarily depend on
7 the results of the crime, like in purse snatching.

8 MR. LEWIS: Yes, sir. Well, certainly in terms
9 of the money.

10 COMMISSIONER MAC KINNON: That's right. In
11 other words, he might have gotten a dime that was worth
12 \$25,000 in the purse.

13 But, of course, we have crimes like that, also,
14 in counterfeiting and bankrobbery. Five men go in and go
15 to rob a bank, and they find the vault just closed and they
16 don't get anything. And so you have created a -- you
17 pointed to a situation which we're conscious of and we
18 think that we have taken care of it in some respects.

19 MR. LEWIS: Well --

20 COMMISSIONER MAC KINNON: If you will look at the
21 sanction, for instance, for counterfeiting. You know, if
22 you catch a man in the ordinary counterfeiting, you catch
23 him with a couple of bills, but they have been floating all
24 around the community for a long time.

25 So we're dealing with that point.

1 MR. LEWIS: I wonder really, though, if I might,
2 your Honor -- I wonder really whether we're talking now
3 about truly analogous situations.

4 A person who has dealt with \$5,000 in counterfeit
5 currency obviously has dealt with counterfeit currency on a
6 broader scale and more frequently than a person who has a
7 counterfeit \$5 bill in their possession.

8 A person, on the other hand, who snatches a purse
9 which happens to contain a valuable item is not any more
10 deeply involved in crime than the person who snatches an
11 empty purse. And there are situations in which, I
12 suppose, the value involved in the offense is really quite
13 a rational bench mark as to the extent of criminal
14 involvement.

15 There are other situations in which it is utterly
16 irrelevant as I see it.

17 COMMISSIONER MAC KINNON: I appreciate your
18 point.

19 MR. LEWIS: Thank you.

20 COMMISSIONER ROBINSON: How can we tell these
21 situations in which --

22 MR. LEWIS: Sir?

23 COMMISSIONER ROBINSON: How can we -- what
24 general principle will tell us which situations are which?

25 MR. LEWIS: The general principle, it would seem

1 to me, which would tell you which situation is which is
2 this: Does the amount realized rationally reflect
3 the degree of criminality, the degree of criminal
4 involvement on the part of the participant.

5 COMMISSIONER ROBINSON: I understand.

6 CHAIRMAN WILKINS: Thank you very much,
7 Mr. Lewis. We appreciate so much your testimony --

8 MR. LEWIS: I'm grateful, sir, for the
9 opportunity to appear here today.

10 CHAIRMAN WILKINS: -- and also the cooperation
11 that the Chicago Bar Association has given to this
12 Commission. Thank you.

13 MR. LEWIS: Yes, sir. Sure.

14 CHAIRMAN WILKINS: Our next two witnesses are
15 Professor Albert Alschuler and Professor Stephen J.
16 Schulhofer. We are delighted to have these two very
17 distinguished professors of law from the University of
18 Chicago School of Law.

19 Gentlemen.

20 MR. SCHULHOFER: Thank you, Judge. Let me say
21 first, Judge, that I want to stress how much I found on
22 reading the document published by the Commission that you
23 have produced a tremendously impressive achievement. I
24 think it is clear that the Commission has approached its
25 task with great care, and the thoroughness and openness of

1 of the product, I think, reflect the highest standards.

2 My comments this afternoon will have to be limited
3 to just one question, and that is whether the Commission's
4 modified real offense system will work.

5 I think the answer to that question lies in the
6 details, and I can't work through very many of them here.
7 But what I would like to do is try to give you a few
8 examples to illustrate some of the problems that I think are
9 going to arise.

10 There are three major areas that I think we have
11 to be concerned about: charge bargaining, fact bargaining,
12 and the details of the real offense road map.

13 First, with respect to charge bargaining. As I
14 understand it, one of the principal goals of a real offense
15 sentencing system is to prevent charge bargaining from
16 controlling the sentencing.

17 The modified real offense approach faces two
18 important obstacles in its efforts to pursue that goal.
19 First of all, modified real offense approach cannot
20 override the statutory maximum sentence for the offense of
21 conviction.

22 Secondly, the modified real offense approach is
23 modified, and that means that it considers only some of
24 the real offense conduct.

25 Now, I think to assess the significance of those

1 two limitations requires you to work through a large number
2 of examples. I can only mention a couple.

3 Let me address first the problem of applicable
4 statutory maximums. If you have a tax evasion case, the
5 defendant can plead guilty to a misdemeanor under section
6 7203 of the Internal Revenue Code. The elements of that
7 misdemeanor offense are virtually identical to the elements
8 of the felony, but the maximum term drops to one year in
9 prison.

10 A drug case is another example. If the
11 defendant is permitted to plead guilty to possession, then
12 under section 844 of Title 21, the maximum penalty drops to
13 one year in prison. And that is true under section 844
14 regardless of whether it is a case of hard drugs and
15 regardless of the total quantities that are involved.
16 For a repeat offender, the maximum sentence under
17 section 844 is two years.

18 The third example, to mention one more: If you
19 have a very serious assault case, the defendant might plead
20 guilty to attempted murder. The maximum penalty for
21 attempted murder under the Federal Code is three years in
22 prison.

23 Now, all of the examples that I have given you
24 are not cases where you have a plea to some artificially
25 concocted offense. These are perfectly reasonable lesser-

1 included offenses, but they have very low statutory
2 maximums.

3 The effect is that the guidelines and the point
4 system that you have established will become essentially
5 irrelevant; sentencing will be determined by the parties in
6 their plea agreement.

7 The second area that is relevant with respect to
8 charge bargaining is that with respect to offenses that are
9 excluded because of the modifications of the real offense
10 concept. One example is a situation where a defendant is
11 charged with several unrelated counts. If he pleads
12 guilty to one of those counts, then the judge can consider
13 only the count on which he pleaded guilty -- and this is
14 quite clear and obvious in the nature of the system. That
15 is the only offense that the judge can consider, no matter
16 how much more serious the other offenses may have been.

17 So again, the sentencing decision is really made
18 for all practical purposes by the parties in their plea
19 agreement.

20 Let me give you another example. Suppose that
21 the defendant enters a federally insured bank, he robs
22 \$10,000 at gunpoint. According to my calculations, the
23 total offense value there is 134 if he is convicted of
24 robbery.

25 However, if he pleads guilty to burglary, the

1 total offense value under the modified real offense
2 approach, the offense value that you can count under your
3 road map, drops from 134 to 38.

4 And if he pleads guilty to theft, the offense
5 value drops to 14.

6 Since your burglary and theft provisions do not
7 cross-reference to robbery, the trial judge cannot consider
8 the fact that the burglary involved also the robbery of a
9 federally insured bank, and the point totals are only
10 those that I have given you.

11 I will give you just one more example. Suppose
12 a defendant is dealing in large quantities of drugs. As
13 in the case of many federal crimes, the offense produces
14 illegal income. Usually in my experience the income is
15 not reported, and therefore, it is perfectly plausible
16 to charge the defendant with tax evasion.

17 Now, if the defendant is convicted only on the
18 income tax count, even if it is a felony count of income
19 tax evasion, you have a small add-on because the income was
20 of illegal origin. But the judge cannot consider the
21 seriousness of the underlying behavior that produced the
22 illegal income.

23 So again in all of those situations, even apart
24 from the statutory maximums, the real sentencing decision
25 would be made by the parties in their plea agreement.

1 Overall, my impression is not that the guidelines
2 would become totally irrelevant to sentencing. I don't
3 think that the situation is that bad. But in my judgment,
4 there are far, far too many situations in which the
5 sentence will be controlled and dictated by charge
6 bargaining rather than by the guidelines.

7 Now, let me turn to a second area which is fact
8 bargaining. As I read the commentary, fact bargaining is
9 explicitedly authorized and even encouraged under this
10 system.

11 If that is really what you intended, then it
12 seems to me that it simply nullifies the modified real
13 offense system because the facts are going to be those that
14 the parties present in their plea agreement.

15 In addition, it will also nullify most of the
16 rest of the guidelines in the majority of guilty plea
17 cases.

18 Now, some people argue that the guideline would
19 at least provide a norm against which the propriety of the
20 guilty plea agreement could be tested.

21 In my judgement, that won't happen in practice
22 because the norm that is generated by the guidelines is
23 dependent on what the charge is and the norm is determined
24 on the other background facts.

25 If the charge and the other background facts are

1 generated by the bargaining process, then the generation of
2 that norm becomes entirely discretionary and entirely
3 divisible.

4 I think that I understand that part of what
5 motivated that passage referring to fact bargaining was
6 concerned about what would happen to the fact finding
7 process. But I think this is a tension that has to be
8 sorted out in another way. To give the parties complete
9 control through charge bargaining is in my judgment giving
10 up the entire ball game.

11 The third area I want to address is that that
12 concerns the specific details of the road map. I think
13 the road map concept is very useful. I find that working
14 through the details of it, they are just riddled with
15 problems and inconsistencies.

16 I start just briefly with homicide. It is not
17 the most important federal offense, but I think that some
18 of the difficulties are symptomatic. At the third level
19 of homicide, the third level applies to reckless conduct
20 not amounting to malice.

21 Now, under case law definitions of malice, that
22 is simply a contradiction in terms. The concept of malice
23 adds nothing to what you have when you have recklessness.
24 So here you have a situation where the notion of malice,
25 which is an element of the guideline computation, adds

1 nothing of substance. But if the judge finds it, the
2 points jump from 30 at level 3 to 140 at level 2.

3 I mention a second example, which is assault.
4 And I think that this is one that affects a major segment
5 of the cases which you are interested in. Suppose you
6 have a situation where an offender uses a firearm to damage
7 federal property, and in the process of using that weapon
8 he negligently injures a bystander.

9 Now, the question is: Is that personal injury
10 counted, does it add points?

11 I think he wanted it to be counted. The
12 commentary says that it is counted. But all of the
13 personal injury cross-references are linked to the assault
14 and battery sections.

15 Now, if you are working through what the
16 guidelines say rather than what the commentary says, an
17 injury for assault and battery has to be intentional under
18 federal case law. So as I read the assault and battery
19 guidelines, related personal injuries that occur in the
20 course of an offense cannot be counted unless you can prove
21 that they are intentional.

22 Now, maybe I am wrong about that and maybe I am
23 wrong about what you intended and it might be easy to fix.
24 But what happens if you try to fix it?

25 If the physical injury add-on does not require

1 proof of intentionality, then what happens? Work through
2 my same example again: the offender uses a weapon, he
3 negligently inflicts -- I called it for the sake of
4 illustration -- "severe bodily injury." The total add-on
5 according to my figures is 186.

6 Now, what happens if the victim dies? If the
7 victim is killed, the add-on drops from 186 to 18. It
8 doesn't seem to me that that makes sense.

9 I could go on with other examples. I am afraid
10 that my colleague who is sharing the time might inflict
11 severe injury on me if I do. But I think the bottom line
12 here is that the road map in its present state just won't
13 work. It needs lots and lots of fixing in a lot of
14 different ways. I go into some of the details in a
15 written statement that I have submitted.

16 Before I close, I just want to mention a couple
17 of problems of concept that maybe transcend these little
18 glitches.

19 First of all, the first one has to do with the
20 question of conviction offense sentencing. I don't want to
21 beat a dead horse on this subject and the Commission may
22 have already made up its mind, but my impression reading
23 the commentaries is that the Commission was really
24 struggling with a false dilemma in its effort to come to
25 grips with conviction offense sentencing.

1 There is nothing about conviction offense
2 sentencing that requires the judge to ignore aggravating
3 facts. In existing systems that consist of conviction
4 offense approach -- and there are a number of them both in
5 England and in the United States -- in these jurisdictions,
6 aggravating facts are always considered. The only
7 exception is the situation where the aggravating facts
8 constitute a formal element of some more serious charge.
9 That is the situation where conviction offense sentencing
10 says that you shouldn't consider it.

11 So I think that the problem with respect to
12 conviction offense sentencing is much narrower than the
13 Commission may have thought. And I try to identify in my
14 written statement what some of the options are here as well
15 as some of the ways for dealing with what may be the
16 exceptional difficulties that arise because of the
17 jurisdictional definitions that are peculiar to federal
18 law.

19 A last point of a general nature has to do with
20 the -- what I think is the, in a sense, the simplicity of
21 the road map concept or at least its "relative simplicity"
22 might be a better term.

23 It seems to me that the relative simplicity of
24 the road map approach is achieved at the cost of a great
25 deal of double counting. You have many, many add-ons for

1 behavior that involve substantial danger to the public or
2 to individual victims, and that is perfectly appropriate.

3 You also have a considerable number of add-ons
4 for causing harm to individuals and that is also
5 appropriate.

6 But when you combine the two; that is, when you
7 combine the risk-based add-ons and the harm-based add-ons,
8 what happens is that the numbers very, very quickly go
9 right through the roof. And that -- whether or not you
10 are in favor of more severe sentencing, that is going to
11 create tremendous problems for the practical functioning of
12 the sentencing system both in terms of the pressure that it
13 is going to put on the fact finding process and in terms of
14 the way that you very quickly loose any room to distinguish
15 between serious cases and very serious cases and so on.

16 What is happening here is that not only are the
17 numbers going very high very quickly, but in effect you are
18 counting the same thing twice because you are counting the
19 risk of causing harm together with the harm when it occurs.

20 The effect is exactly like that that would be
21 involved if you accumulated punishments for inchoate
22 crimes and completed offenses, something that federal law
23 has never done.

24 So I think that the overlap that occurs and many
25 of the tensions that are inherent in the system flow in

1 part from this perhaps inadvertent mixture of harm-based
2 add-ons and risk-based add-ons. And in that respect, I
3 think there is a great deal of reworking to be done.

4 I don't really have time to go into detail about
5 solutions, but I think that there are a number of possible
6 solutions.

7 One, I think, of a more general nature and is
8 perhaps a caveat that applies to all of the guidelines: It
9 is still my view that it is possible to bring prosecutorial
10 sentencing power under control and to avoid a situation
11 where a prosecutor can subvert the guidelines or in effect
12 become the sentencer. I think it is still possible to
13 do that.

14 But if the Commission doesn't see its way clear
15 to taking the steps that are necessary to achieve that
16 result, then I would really urge you to reconsider the
17 tightness of this system.

18 I think that most of you know I was one of those
19 who pushed very hard for a very tightened structured
20 sentencing system with highly structured discretion. But
21 reading the product, I really wonder whether given the
22 dangers that this will leave the prosecutor in the driver's
23 seat, that at least as a second-best solution, it may be
24 better to loosen up a bit. Don't constrain the judges
25 quite so tightly, but leave them with some of the

1 discretion rather than putting it in the hands of the
2 prosecutor.

3 Finally, I would just repeat that I have great
4 admiration for what you have done. But it is really my
5 judgement that a great deal more needs to be done in order
6 to make this a workable system.

7 Thank you.

8 CHAIRMAN WILKINS: Thank you very much, Mr.
9 Schulhofer.

10 Any questions to my right? To my left?

11 I think that we all are anticipating what I know
12 will be a very detailed written submission to the
13 Commission. And with your permission, after we have
14 studied it, we would perhaps like to get back with you and
15 consult with you further.

16 Does anyone have any questions?

17 Thank you very much.

18 COMMISSIONER MAC KINNON: You said that you
19 thought it was possible to correct the defects that might
20 result from plea bargaining.

21 How would you suggest that be done?

22 MR. SCHULHOFER: Well, I think part of the answer
23 to that question, Judge, may lie in some of the suggestions
24 I made in testimony last month.

25 But to summarize that, what I think you are very

1 rightly hitting on in a very complicated problem, I think
2 that the essential elements of it in my judgment are:
3 first of all, a restriction on fact bargaining; secondly,
4 guidelines to control charge reduction decisions or charge-
5 withholding decisions by the prosecutor.

6 This is the approach that is taken, for example,
7 in the State of Washington. I have problems with
8 some of the details under which that was implemented in
9 Washington -- in the State of Washington. But I think
10 that is the core of it.

11 Without charge reduction guidelines, there is no
12 way to address the problem of statutory maximums. And
13 without --

14 COMMISSIONER MAC KINNON: You say restrict the
15 charging, the bringing of charges by the U.S. Attorney.
16 You don't mean that as an absolute?

17 MR. SCHULHOFER: No, absolutely not.

18 COMMISSIONER MAC KINNON: You can't put an
19 absolute restriction on them, can you?

20 MR. SCHULHOFER: No, absolutely not.

21 I think the effort here has to be for the judge
22 to review any plea agreement that is contingent on the
23 dismissal or withholding of charges. There is no
24 intrusion on the executive branch. The executive branch
25 is free to decide not to press a charge.

1 But what it can't do without judicial approval --
2 and this is only a restatement of Rule 11, it can't
3 withhold or dismiss a charge contingent on a plea of guilty
4 unless the judge approves. And I think the Commission
5 should structure that judicial sentencing discretion
6 because that is the sentencing decision under this document
7 that you have just promulgated.

8 COMMISSIONER MAC KINNON: Well, I agree with you
9 about the restraints that can be put on it, but they are
10 not direct restraints.

11 MR. SCHULHOFER: I think that is right. It may
12 be doing something by the back door, but Congress
13 authorized it. The discretion has been there all along
14 under Rule 11 and I think it is in -- functionally
15 speaking, a sentencing discretion. And for that reason, I
16 think it needs to be structured.

17 But I don't deny what I think is behind your
18 question which is that this is very difficult to do. The
19 mandate that the Commission received under, I think it is
20 section 994(a)(2)(d) to promulgate guidelines of this kind,
21 is very difficult to implement.

22 I think it can be done. But if it cannot be
23 done, I would want to urge you as strongly as I can not to
24 stick to an approach which is as tightly restricted as this
25 one is. I understand the concept of tight restrictions

1 and I at one time was an enthusiastic supporter of them.
2 But if we can't deal with the prosecutor, then this
3 approach, I am afraid, is going to prove very, very
4 counterproductive.

5 COMMISSIONER MAC KINNON: Those are occupying our
6 thinking at various times.

7 CHAIRMAN WILKINS: Thank you very much.
8 Professor Alschuler.

9 MR. ALSCHULER: My remarks will be devoted
10 entirely to answering Judge MacKinnon's question: What
11 should you do about plea bargaining and the exercise of this
12 statutory duty to promulgate policy statements regarding the
13 acceptance of the prosecutorial plea agreements.

14 I want to talk about three varieties of
15 prosecutorial bargaining and how federal sentencing
16 guidelines should respond to them. I am going to call
17 them "informational" bargaining, "costs" bargaining and
18 "odds" bargaining.

19 First, "information" bargaining. A prosecutor
20 sometimes offers leniency in exchange for an offender's
21 assistance in identifying, apprehending, or prosecuting
22 other offenders. The prosecutor doesn't usually offer this
23 leniency as an award for the offender's good character --
24 as Mr. Lewis points out, some of the worst characters in
25 the criminal justice system -- but the prosecutor

1 sacrifices just punishment in one case in order to pursue
2 more important penological objectives in other cases.

3 Now, for more than 800 years, our legal system
4 has recognized the legitimacy and necessity of this kind of
5 bargaining. During most of this period, the power to
6 trade leniency for information was a judicial power. It
7 was circumscribed by formal rules.

8 But the substitution of public for private
9 prosecution changed all that. More than 100 years ago, the
10 United States Supreme Court noted that prosecutors had
11 displaced trial judges in deciding whether to allow
12 accomplices to testify and thereby gain leniency. The
13 Supreme Court said that was a good thing because
14 prosecutors could assess the need for an accomplice's
15 testimony in light of the other evidence available to the
16 state.

17 Now, that argument that has been incorporated 100
18 years ago, seems to me persuasive. And for that reason,
19 the effort of the Commission's preliminary draft
20 guidelines to circumscribe this prosecutorial power seem to
21 me unfortunate.

22 The guidelines provide a uniform 20 percent
23 reduction when the U.S. Attorney certifies that the
24 offender has provided significant information regarding the
25 criminal activities of others. The reduction goes up to

1 30 percent when there is testimony before a grand jury
2 or a trial. You go up to 40 percent in cases of
3 "exceptional assistance."

4 Now, the guidelines don't restrict the
5 prosecutor's power to offer immunity in exchange for
6 cooperation. Indeed, the Commission would not have
7 statutory authority to restrict that broader trade for
8 information. And it seems a little bit odd to me to
9 require a prosecutor to chose between a 20 percent or 30
10 percent reduction and a grant of immunity which is a 100
11 percent reduction.

12 I don't see what is wrong with some intermediate
13 judgment, say a 50 percent reduction in certain cases. In
14 information bargaining, a prosecutor has to assess the
15 strength of the case against the potential informant, he
16 has to assess the need to prosecute that informant, he has
17 to assess how much evidence he currently has available
18 against other offenders, he has to assess how important it
19 is to prosecute those offenders, and he has to assess the
20 value of the information that the informant can provide
21 against those other offenders. It seems to me only the
22 prosecutor is in a position to make that five-part tactical
23 calculation. If a member of a criminal organization is
24 willing to provide information about the kingpin of the
25 organization only if he can get an 80 percent reduction in

1 sentence, I don't think that the prosecutor should be
2 precluded from considering that possibly beneficial trade.
3 To force the prosecutor to grant immunity when he can
4 persuade an informant to accept some punishment does not
5 seem to me to serve the goal of effective law enforcement.

6 And I have some other remarks in my written
7 comments about "information" bargaining. They echo
8 remarks that Mr. Lewis and Judge Mihm made about the
9 inappropriateness of relying on a U.S. Attorney's
10 certification except in cases in which it is made in bad
11 faith, and I won't go into those.

12 I will turn instead to "costs" bargaining.
13 Maybe a prosecutor doesn't seek any assistance or
14 cooperation from the offender in other cases. Maybe he is
15 not worried at all about getting the offender's conviction
16 at trial, but he or she may offer leniency in exchange for
17 a guilty plea to save the government the expenses and
18 burdens of a trial. That is what I am calling "costs"
19 bargaining.

20 I have argued that prosecutors are foolish to
21 trade leniency for that reason. On an open market the
22 benefits that they provide could be worth far more. You
23 know, all of the arguments that are offered to justify
24 "costs" bargaining would also justify prosecutors in
25 trading leniency for cash. Selling leniency could benefit

1 the taxpayers a whole lot more than current forms of plea
2 bargaining.

3 And as you can guess from those remarks, I am no
4 fan of "costs" bargaining. But I am not going to press
5 that position this afternoon. I will instead limit my
6 remarks to three narrower observations. First,
7 discussions of "costs" bargaining, including some of this
8 Commission's comments, may exaggerate the need for this
9 practice. Second, to the extent that "costs" bargaining
10 is necessary or desirable, it should be accomplished
11 through uniform sentencing discounts rather than through
12 case-by-case prosecutorial bargaining. And third, these
13 sentencing discounts should extend to all defendants who
14 waive the right to jury trial, not just to defendants who
15 plead guilty.

16 Comments to the current draft guidelines refer to
17 "society's need to rely heavily on plea agreements for the
18 disposition of criminal cases." But, you know, a number
19 of American jurisdictions have greatly restricted plea
20 bargaining without any ill effect. I am not going to
21 argue that any of these jurisdictions has created a
22 perfect, loophole-free, no-plea-bargaining system, but some
23 of them have come close. In all of these jurisdictions,
24 the overwhelming majority of convictions have still been by
25 guilty plea. One federal district judge who will not

1 permit any plea agreements in his court reports that he
2 cannot notice any disparity in guilty plea rates in his
3 court from anybody else's. This "the sky if falling"
4 theory of plea bargaining has found no support in the
5 experience of the jurisdictions that have limited plea
6 bargaining.

7 Well, why do defendants plead guilty if they
8 don't get any sentencing discount for doing that? Well, in
9 practice, many simply have nowhere else to go. That
10 phenomenon seems particularly common in the federal courts.
11 In the main, federal law enforcement agencies do a pretty
12 good job. But even so, federal prosecutors accept for
13 prosecution only one out of every four cases that law
14 enforcement officers bring to them. The cases that
15 survive this screening are likely to be strong, and a
16 defendant who recognizes that he or she will be convicted
17 at trial has nothing to gain by insisting on trial. And
18 even in the absence of plea bargaining, this defendant has
19 something to lose. Trials involve delay, psychological
20 anguish, and attorney's fees. Defendants and their
21 lawyers are unlikely to spend time and financial and
22 emotional resources on hopeless ventures simply to be
23 perverse. Indeed, as the guidelines suggest, some
24 defendants plead guilty because they are willing to accept
25 responsibility for their conduct. If any sentencing

1 discount at all is necessary to induce the great majority
2 of defendants to plead guilty, this discount is likely to
3 be small, especially in the federal courts.

4 To the extent that "costs" bargaining appears
5 necessary, it should be accomplished through uniform
6 sentencing discounts. A defendant whose trial is likely
7 to be lengthy can save the government more resources by
8 pleading guilty than a defendant whose trial is likely to
9 be short, but to afford this defendant greater leniency
10 because he or she has committed a more involved or
11 complicated crime or because he or she has hired a lawyer
12 more adept at dilatory tactics would plainly be
13 unconscionable. A defendant has no moral claim to the
14 special "endowment" that arises from the fact that his or
15 her trial is likely to be a long one. In a system of
16 case-by-case bargaining, however, defendants who are going
17 to have long trials or who have lawyers who engage in
18 dilatory tactics will gain a special bargaining power.

19 I have suggested that "information" bargaining
20 depends on an assessment that only a prosecutor can make.
21 "Costs" bargaining is very different. If our legal system
22 has made the judgment that it is appropriate to reward
23 defendants who save the government the expenses of a trial,
24 that judgment of sentencing policy should be implemented by
25 this Commission and by judges rather than by prosecutor.

1 Now, the Commission's plea bargaining directives should
2 advise judges not to accept charge-reduction or
3 sentence-recommendation agreements unless the parties
4 demonstrate a justification for these agreements other than
5 the desire to conserve resources. I repeat that this
6 directive does not forbid "costs" bargaining. It merely
7 declares that the task is not the prosecutor's. If
8 sentencing discounts appear justified by "administrative
9 necessity," the guidelines should provide them.

10 Now, a comment to the guidelines says, "Offenders
11 who plead guilty currently receive substantially lower
12 sentences than those who are sentenced after a trial." I
13 have made statements like that myself, but I have come to
14 realize that they are misleading. In the federal courts,
15 offenders who plead guilty may not receive significantly
16 lower sentences than defendants convicted at nonjury
17 trials.

18 For a number of years, the Administrative Office
19 of the federal courts reported variations in sentences by
20 mode of disposition (jury trial, bench trial or guilty
21 plea). The Administrative Office ended this practice in
22 1971, maybe because its figures revealed a criminal justice
23 system that some people would rather not know. Figures
24 for fiscal '71 were about the same as for prior years.
25 The average sentence weight for defendants who pleaded

1 guilty was 5.3. For defendants convicted at nonjury
2 trials, it was 6.3; for defendants convicted at jury
3 trials, it was 13.5. If those figures are taken at face
4 value, they suggest that about 88 percent of the "discount"
5 from the "jury trial sentence" that a guilty plea defendant
6 received is also received by the defendant who accepts a
7 nonjury trial. You see the same pattern in the
8 Administrative Office figures for particular offense
9 categories. At the time that Tiffany, Avichai, and Peters
10 ran a more sophisticated study on some federal sentencing
11 data and controlling for a lot of variables like
12 seriousness of the offense, type of counsel, prior record
13 and so forth, they found no sentence differential between
14 guilty plea cases and bench trial cases. There was an
15 enormous sentence differential when you went up to a jury
16 trial.

17 Now, all of these figures are out of date. But
18 those are the figures that you would expect in a rational
19 system of "costs" bargaining. Jury trials are expensive,
20 but bench trials may, in fact, cost the criminal justice
21 system no more than plea bargaining. If the
22 administrative benefits of plea bargaining and bench-trial
23 bargaining are the same, bench-trial bargaining seems the
24 better practice. The bench trial is an open rather than a
25 closed-door proceeding; it affords the defendant an

1 opportunity to present his side of the case to an impartial
2 third party; and it doesn't require the defendant to
3 sacrifice his or her chances of acquittal.

4 And this Commission can find out whether guilty
5 pleas currently lead to more lenient sentences in the
6 federal courts than bench trials. If they do not, the
7 Commission should not introduce a guilty-plea discount into
8 a criminal justice system does that not currently have one.
9 It should not a create new and apparently unnecessary form
10 of plea bargaining. Instead, the Commission could make
11 current sentencing practices explicit, providing discounts
12 to defendants who waive the right to jury trial whether
13 they plead guilty or insist on nonjury trials. Some
14 federal practitioners may be as slow as I have been to
15 recognize that bench trials may lead to the same rewards as
16 guilty pleas. And making the actual explicit would
17 encourage these practitioners to consider the bench-trial
18 option both in cases that they currently resolve by pleas
19 and in those that they currently take to jury.

20 Finally, the subject of "odds" bargaining. A
21 prosecutor sometimes offers leniency in exchange for a plea
22 of guilty because he or she fears defeat at trial. Half a
23 loaf seems better than none.

24 Now, "costs" bargaining -- especially when it
25 takes the form of a small, uniform discount for every

1 defendant who saves the state the expenses of a trial --
2 removes from the trial process cases in which defendants
3 have little or no chance of acquittal. Even a small
4 reward can induce a guilty plea when a defendant is certain
5 that he is going to be convicted, but a small reward is
6 unlikely to induce a guilty plea when a defendant senses
7 that his chances of acquittal are great. "Odds"
8 bargaining is different. In "odds" bargaining, a
9 prosecutor can expand the sentence differential
10 indefinitely for the purpose of overbalancing the
11 defendant's chances of acquittal. This practice removes
12 from the trial process those cases that ought to be tried,
13 the ones in which substantial factual issues are in
14 dispute. This is the practice that brings the greatest
15 pressure to plead guilty to bear on defendants who may be
16 innocent.

17 Now, the goal of criminal proceedings is not to
18 make defendants and prosecutors happy by minimizing the
19 risks that they face. It is to determine what defendants
20 deserve punishment and what punishment they deserve.
21 "Odds" bargaining treats defendants as half-guilty and
22 suggests that they should receive half the penalty that
23 they would really deserve if they guilty. I think that most
24 folks-in-the-street take a simpler view: if the
25 defendant's guilt can be shown beyond a reasonable doubt,

1 he ought to get the punishment that an honest-to-God
2 criminal should receive. And if it cannot be shown beyond
3 a reasonable doubt, he or she should not be punished at
4 all. And that is so even if the defendant is factually
5 guilty. "Odds" bargaining is inconsistent with the
6 requirement of proof beyond a reasonable doubt and it is
7 plea bargaining in its worst form.

8 Now, whether or not you accept those views,
9 "odds" bargaining is incompatible with the position that
10 this Commission has taken on "real offense sentencing."
11 When a prosecutor doubts his or her ability to prove the
12 most serious charge in an indictment, he or she may agree
13 to a guilty plea to a less serious charge. Under the
14 Commission's guidelines, however, a judge who reads a
15 presentence report and concludes that that top charge can
16 be established by a preponderance of the evidence will
17 sentence the defendant as though that charge had been
18 established beyond a reasonable doubt. The judge will, in
19 effect, sentence the defendant for an offense that the
20 prosecutor recognized his or her inability to prove.

21 Now, "costs" bargaining frequently rests on a
22 fiction: "We are going to treat the defendant as guilty of
23 an offense less serious than the one that we know he
24 committed in order to save the state the expenses of a
25 trial." An "odds" bargain doesn't represent the same

1 fiction. It involves an express concession by the
2 prosecutor of his or her inability to establish guilt of
3 one charge (just as it involves an express concession by
4 the defendant of the prosecutor's ability to establish the
5 guilt of another charge).

6 You might reconcile "costs" bargaining with "real
7 offense sentencing." You might interpret a "costs"
8 bargain as simply a device for limiting the maximum
9 sentence that the judge may impose. So long as the judge
10 doesn't impose a sentence greater than the statutory
11 maximum, the "costs" bargain has been honored. It doesn't
12 matter what factual assumptions the judge has made in the
13 sentencing within the offense of conviction range so long
14 as these assumptions are supported by a preponderance of
15 the evidence.

16 "Odds" bargaining seems to me to be different.
17 An "odds" bargain reflects the consensual resolution of a
18 genuine dispute. Then "real offense sentencing" comes
19 along and treats this consensual resolution of the dispute
20 as a nullity. "Odds" bargaining says that disputes about
21 guilt or innocence are properly resolved by consent;
22 "real offense sentencing" says that they aren't.

23 Indeed, the combination of these two things is
24 worse than that. You know, I just lied to you. I told
25 you that "real offense sentencing" treats the consensual

1 resolution of a dispute by the prosecutor and the defendant
2 as a nullity. That isn't quite right. With "real
3 offense sentencing," the defendant's factual concession
4 does count; only the prosecutor's factual concession does
5 not count. To combine "real offense sentencing" with
6 "odds" bargaining is to give with one hand and take with
7 the other. The unfairness of this combination seems to me
8 apparent. And in light of the position that it has
9 adopted on "real offense sentencing," the Commission should
10 direct judges to reject plea agreements justified only by
11 the difficulty of establishing guilt at trial.

12 Now, the positions that I have advocated lead to
13 a rather startling conclusion. The Commission should
14 direct judges to reject all prosecutorial plea agreements
15 except those designed to secure an offender's assistance in
16 convicting other offenders. But in cases in which a
17 guilty plea evidences remorse, the proposal doesn't limit
18 the ability of judges to consider that remorse in
19 accordance with the guidelines. The proposal doesn't
20 limit the prosecutor's ability to engage in "information"
21 bargaining. The proposal would not swamp the courts.
22 Sentencing discounts for bench trials and guilty pleas
23 would simply provide a fairer and more uniform form of
24 "costs" bargaining than current practices. Indeed, the
25 Commission could adjust its guidelines in light of

1 administrative necessity more easily than prosecutors can
2 respond to administrative concerns in case-by-case
3 bargaining. The proposal would eliminate only one form of
4 plea bargaining -- a form incompatible with the purposes of
5 the criminal sanction and with this Commission's policy of
6 "real offense sentencing." What legitimate functions of
7 plea bargaining, then, would this proposal fail to serve?

8 I would expect the real objection to the proposal
9 is that it seems very unfamiliar. It is going to -- it
10 would work a substantial change in a bargaining system to
11 which prosecutors, defense attorneys and judges have become
12 accustomed. But this Commission should insist on a better
13 reason than that; and in the absence of a better reason,
14 it should avoid the contradictions, incongruities, and
15 inconsistencies that would arise from allowing
16 prosecutorial discretion to remain unfettered while closely
17 confining judicial discretion.

18 There are lots of other things that I would like
19 to talk about in connection with these guidelines: real
20 offense sentencing and multiple crimes and so forth, but I
21 suppose that is enough.

22 CHAIRMAN WILKINS: Thank you very much,
23 Professor.

24 You intend to submit written comments?

25 MR. ALSCHULER: Yes.

1 CHAIRMAN WILKINS: Good. We look forward to
2 reviewing that. And with your permission, we will be back
3 in touch with you on this very issue. This idea of what
4 to do about plea agreements is one we are discovering and
5 has consumed a great deal of time of this Commission's
6 activity. And we are perhaps not much closer to reaching
7 a resolution than we were when we first began this
8 committee, but sooner or later we have got to bite the
9 bullet and perhaps you can help us bite it.

10 Any questions to my right?

11 COMMISSIONER ROBINSON: Yes. Let me just ask --
12 your distinctions were very, very helpful for me. I think
13 that I agree with everything you have said, but I am just
14 not sure about one thing.

15 Your conclusion about "odds" bargaining is:
16 Better to trust what we have now, which is what you called
17 a consensual resolution of these ambiguous facts, than a
18 real offense sentencing system which after this consensual
19 agreement goes in and really comes up with real offense
20 which is --

21 MR. ALSCHULER: Quite the contrary. I think you
22 ought to stick with your real offense sentencing approach
23 and forbid fact bargaining.

24 You know, one of the things that is most
25 confusing about this modified real offense sentencing

1 proposal is the suggestion in the commentary that finding
2 of facts isn't going to be a problem because the parties
3 may settle them by agreement.

4 If that is so, I don't understand why the charge
5 reduction of plea agreement doesn't settle the facts by an
6 agreement. But one of the illustrations is a case in
7 which, I think it is armed robbery bargained down to
8 unarmed robbery and you still count the gun. Maybe that
9 is not the illustration --

10 CHAIRMAN WILKINS: I think it is.

11 COMMISSIONER ROBINSON: But isn't that, in fact,
12 fact bargaining will get to the problem of the "odds"
13 bargaining case? Where the parties really aren't sure
14 about the fact, one way of coming to a legitimate
15 resolution of the case is to resolve the ambiguous facts to
16 the benefit of the defendant in return for a plea and a
17 sentence based on the facts that everyone agrees to? Isn't
18 that probably the best in a real world, the best
19 approximation of --

20 MR. ALSCHULER: Well, if you allow that, as my
21 brother Schulhofer said, "the ball game is over." If you
22 allow the parties to settle the fact, you haven't done a
23 thing towards promoting the certainty of sentencing.

24 You have, instead, given the power to the
25 prosecutor and the defense attorney to do whatever they

1 want.

2 COMMISSIONER ROBINSON: No. I am suggesting --

3 MR. ALSCHULER: Let's make it spitting on the
4 sidewalk with psychological injury. That will give us 44
5 points. Then you will have to do so and so. Is that
6 fair?

7 COMMISSIONER ROBINSON: Well, my suggestion is
8 how about the parties doing it. I don't think -- the
9 Commission, I'm not sure, has ever -- no one has ever
10 seriously considered that possibility. The possibility is
11 that the parties submit stipulations to have the court, on
12 advice of the probation officer who has independent
13 investigatory resources, let the judge approve or
14 disapprove of the stipulation. But that all three of
15 those parties in a sense come to an agreement on the facts.

16 Isn't that resolution a sentencing system where
17 the sentence will depend on a particular set of facts the
18 judge approves. Isn't that as close to a perfect
19 resolution of the "odds" bargaining case as we can expect?

20 MR. ALSCHULER: If -- if you have a genuine
21 finding of fact by the judge based, of course, on
22 submissions by the parties, then we are back in the land of
23 real offense sentencing again and that is how it ought to
24 work.

25 COMMISSIONER ROBINSON: Then I do agree with

1 everything you have been saying.

2 MR. SCHULHOFER: If I might add one point, I
3 think if what the Commission intended is what Commissioner
4 Robinson just articulated, then I think that the
5 commentaries really need to be clarified, because the
6 passage in the commentaries that were -- I think captured
7 everybody's attention -- is the reference to the procedural
8 compromise.

9 COMMISSIONER ROBINSON: No, no, no. It is not
10 the case. I am speaking only for myself. I didn't mean
11 to imply that that was the Commission's view.

12 MR. SCHULHOFER: The commentary states on page
13 17: Disputes are unlikely in the vast majority of
14 cases where the jury will have resolved some disputes."
15 And then continuing to the next sentence: "Agreement among
16 the parties, particularly when a guilty plea is entered, is
17 likely to resolve most others. When a sentencing fact is
18 disputed, the Commission proposes that the judge determine
19 the fact using the preponderance of the evidence standard."

20 But I think that reading this, I don't see in here
21 room for the kind of procedure which you just implied
22 that would permit a judge to consult a probation report and
23 find facts different from those to which the parties
24 agreed.

25 CHAIRMAN WILKINS: Good point.

1 Any other questions to my left?

2 COMMISSIONER BREYER: Yes. I don't think that
3 you do agree because, I mean, if you are foreseeing a
4 judge approve under Rule 11, he -- I think he may
5 approve; he may disapprove. If you mean he has to open a
6 big hearing before he approves, I don't agree. But that
7 is beside the point.

8 The thing that I wondered about which really --
9 if I heard you correctly, is that your proposal, you think,
10 would not swamp the system because you think we ought to
11 offer a big discount or a significant discount to a
12 defendant in return for that defendant agreeing not to be
13 dropped by a jury. Did I hear you correctly?

14 MR. ALSCHULER: You did not hear me correctly.
15 I said I think that a small discount would be quite
16 sufficient to --

17 COMMISSIONER BREYER: No, or a small --

18 MR. ALSCHULER: -- the vast majority of people --

19 COMMISSIONER BREYER: -- figures, forgetting
20 whether it is small or big. But I thought the figures you
21 gave said -- those juries you used as examples, that those
22 defendants who go to the jury get 13 years; those
23 defendants who agreed to be tried by a judge get 7 years
24 or 6.

25 MR. ALSCHULER: That, Judge Breyer, is so far as

1 we know the current federal practice.

2 COMMISSIONER BREYER: So I think what you
3 suggested then is what we should do is offer a discount of
4 some kind or the other in order to save resources, et
5 cetera, by getting defendants to waive their right to a
6 jury trial.

7 MR. ALSCHULER: That is correct.

8 COMMISSIONER BREYER: All right. Now, do you
9 think that is constitutional -- do you think it
10 is desirable?

11 MR. ALSCHULER: I think it is less
12 unconstitutional than the current practice.

13 COMMISSIONER BREYER: Well, do you think that
14 this Commission should say that a defendant who insists
15 upon his right to a trial by jury should receive a
16 significantly increased punishment?

17 MR. ALSCHULER: Yes.

18 COMMISSIONER BREYER: Well, I don't agree with
19 you about that, but --

20 MR. ALSCHULER: I think that that -- I think that
21 system rather than a de facto -- rather than a de facto
22 system that does exactly the same thing in a haphazard and
23 irrational way would be a big step forward.

24 COMMISSIONER MAC KINNON: Professor, I was
25 likewise intrigued by your figures and I think that I

1 can explain through my experience. The thing that is out
2 of sync is the 6.3 years that the bench trial results;
3 whereas a plea is 5.3 and a jury trial is 13.5.

4 I think you will find if that you have been
5 enmeshed in federal court trials, in bench trials, that you
6 will find that federal court judges give the benefit of the
7 doubt on reasonable doubt to defendants far more than
8 juries, and consequently, you are getting acquittals in
9 those cases which reduce those offenses. And it isn't
10 just a question of everybody -- the same people being found
11 guilty. It is being those defendants get the benefit of a
12 reasonable doubt standard that is more strict and more in
13 favor of the defendant than results in a jury trial or in a
14 guilty plea where reasonable doubt is admitted.

15 MR. ALSCHULER: Well, the -- I didn't make myself
16 clear. Those are not figures for all defendants who go to
17 bench trials. Those are figures for defendants who are
18 convicted at bench trials. So they don't include these
19 cases in which the federal judges have, in fact, found a
20 reasonable doubt and acquitted.

21 COMMISSIONER MAC KINNON: Well, I would say they
22 still give them effect there in their sentence. Like they
23 do in Scotland where they have a majority verdicts out of
24 15-men juries, if it was 8 to 7, why, they get a lesser
25 sentence than if it was 14 to 1.

1 MR. ALSCHULER: Well, that may be. The
2 important point is that the bench trial leads to about the
3 same sentence as the -- as the guilty.

4 CHAIRMAN WILKINS: Well, thank you very much.
5 We again appreciate the testimony that you have offered.
6 You know, this is going to be the truth in a sense to the
7 world. And what you are suggesting is that we come right
8 out and say it, whatever we -- if you get a discount for
9 pleading guilty, you ought to say it. And that has been
10 advocated by others.

11 Thank you very much. We will get in touch with
12 you.

13 Now, this hearing is still continuing. If there
14 is anyone here who would like to address this Commission,
15 please come forward.

16 REVEREND CHEVRIER: My name is Reverend David
17 Chevrier and I am pastor of Wellington Avenue Church, and I
18 would like to make comment on Article L 213 regarding
19 harboring aliens unlawfully in the United States.

20 COMMISSIONER MAC KINNON: What is your name?

21 REVEREND CHEVRIER: Reverend David Chevrier,
22 C-h-e-v-r-i-e-r.

23 COMMISSIONER MAC KINNON: Almost like Chevroree
24 (phonetic)?

25 REVEREND CHEVRIER: Almost like Chevrolet, but

1 very far from it.

2 As pastor of a congregation which has declared
3 itself a public sanctuary for undocumented refugees from El
4 Salvador and Guatemala, I appreciate this opportunity to
5 offer testimony to this Commission on Sentencing.

6 Declaration of Public Sanctuary is a thoughtful,
7 careful, prayerful, and faithful response by the church to
8 the forced deportation of bona fide refugees; it is a
9 conscientious effort to uphold the fundamental principle of
10 nonrefoulement in international law; that is, to affirm the
11 right of refugees not to be forcibly returned to their
12 country of origin when such a return puts their lives and
13 their well-being in serious jeopardy.

14 In a letter to members of Congress in September
15 of 1985, John Healey, the Executive Director of Amnesty
16 International, stated that after many years of, quote,
17 "monitoring human rights in El Salvador...(Amnesty
18 International) has consistently concluded that all branches
19 of the Salvadoran security forces have been regularly
20 involved in a systematic and widespread program of
21 individual and mass killings of civilian non-combatants,
22 torture and disappearances."

23 Quote and continuing: "We have continued to
24 receive reports of human rights abuses with alarming
25 regularlity. Past abuses have not been investigated; and

1 those responsible for human rights violations have not been
2 brought to justice."

3 On June 16th of 1968, a letter to Judge Earl
4 Carroll, the presiding judge at the trial in Tucson of
5 sanctuary workers Amnesty International stated that,
6 quote, it "is concerned that the United States government's
7 inconsistent compliance with certain international legal
8 standards which provide that governments may not return
9 refugees to countries where they risk disappearance,
10 torture or imprisonment on account of race, nationality,
11 religion or political affiliation."

12 "(Our) research on El Salvador and Guatemala
13 indicates clearly that, owing to the state of civil and
14 political unrest in these countries, refugees indeed are
15 returned to them and are put in grave danger of being
16 subjected to just such human rights violations."

17 Last November, Archbishop Rivera y Damas of El
18 Salvador wrote the following in an open letter to members
19 of Congress: "There are more than a million Salvadoran
20 refugees looking for the shelter under international laws
21 protecting refugees that is mandated by the United
22 Nations...the authorities and members of the government of
23 the United States have closed their doors and their hearts
24 against the suffering of my people to go unprotected in a
25 foreign land. To return the persecuted to the source, the

1 origin, the cause of their suffering is an act of injustice
2 in the eyes of Christian love," unquote.

3 Finally, in testimony in a class action suit
4 against the Immigration and Naturalization Service in Los
5 Angeles recently, Quirrio Navarro told the court how he had
6 been deported back to El Savador in 1985. Upon his return
7 there he was shot in the head and the stomach and left for
8 dead by men in a vehicle identified as one in use by
9 security forces.

10 Members of the Commission, when 98 out of 100
11 Salvadorans and Guatemalans are denied political asylum or
12 Extended Voluntary Departure Status by this government,
13 where do such innocent victims go for help?

14 As long as innocent, non-combatant civilians
15 continue to have their villages bombed, their human rights
16 abused, and are driven from their homes by "low intensity
17 warfare," and as long as this present government refuses
18 to acknowledge the base of International Law and simple
19 human compassion, hundreds of churches will continue to
20 respond with compassion to the cries of help from refugees
21 to find some relief from human suffering.

22 I would encourage that you indeed make a
23 distinction on motives under that section and that it not
24 only be political or humanitarian, but that you include
25 International Law in it and that you also consider and

1 include religious or theological basis into consideration.

2 Thank you very much.

3 CHAIRMAN WILKINS: Thank you very much, Reverend.
4 We appreciate your comments. We will be happy to receive
5 any written submission --

6 REVEREND CHEVRIER: I will.

7 CHAIRMAN WILKINS: Any questions to my right? To
8 my left?

9 COMMISSIONER BREYER: Are you going to be here
10 after the hearing? I have a question, but it is not
11 directly relevant --

12 REVEREND CHEVRIER: Sure, I will stay.

13 CHAIRMAN WILKINS: Yes?

14 REVEREND LARSON: My name is Carol Ann Larson,
15 and I am also a pastor of the Wheaton United Methodist
16 Church, which is a sanctuary church, too.

17 I have with me two documents: One that is from
18 the book of Resolutions of the United Methodist Church,
19 that is the larger body; and another from the book of
20 Resolutions of the Northern Illinois Conference, which is
21 this geographical area. I did not bring copies, but I am
22 sure that you can get copies so each of you can have them.

23 I, too, appreciate the chance to speak with you.
24 I was not aware of the fact that you existed, that there
25 was such a Commission, and I think that is very

1 encouraging.

2 The resolution from -- the title of the
3 resolution from the General Conference of the United
4 Methodist Church is "Assistance and Sanctuary for Central
5 American Refugees." The General Conference of the United
6 Methodist Church, which sets policy and discipline for the
7 entire denomination, meets every four years. Thus, this is
8 from the 1984 conference.

9 As you will see by the resolution, as United
10 Methodists, we are expected to aid refugees from Central
11 America, and this resolution directs us to encourage those
12 congregations who take seriously the mandate to do justice
13 by declaring their churches Public Sanctuaries.

14 The United Methodist Church urges the President
15 of the United States, the Department of State, the
16 Department of Justice and the Congress to grant "extended
17 voluntary departure" legal status to refugees from El
18 Salvador, Guatemala and other areas of the Caribbean and
19 Latin America.

20 In addition, in late September, just a couple of
21 weeks ago, the Methodist Building, which is in Washington,
22 D.C. right next to the Supreme Court building, declared
23 itself a Public Sanctuary site.

24 This resolution from the Northern Illinois
25 Conference has several things in it. But one of them is

1 the calling for two more local congregations in this area
2 to declare themselves Public Sanctuaries in 1987.

3 I share this information with you to make you
4 aware that the United Methodist Church, along with most, if
5 not all, major denominations as well as the governing and
6 policy bodies of the Jewish faith, do not consider refugees
7 from El Salvador and Guatemala to be "illegal aliens," nor
8 to help to aid those refugees, we do not consider that
9 "smuggling." They are our brothers and sisters who have
10 come here because their lives are in danger in their
11 homeland, and upon arrival in this country are treated
12 unjustly and illegally by the United States Immigration and
13 Naturalization Service.

14 People of God are called to choose life and
15 enable others to live. To harass and arrest citizens of
16 the United States because they choose to act according to
17 their faith and provide a means of survival for persons
18 from Central America is to act precisely as the government
19 in Germany acted under Hitler. And I would hope that you
20 would find any sentence or punishment for such actions to
21 be offensive and inappropriate.

22 I guess my kind of wrap-up statement would be I
23 don't believe this is a crime; and so, therefore, would not
24 be subject to criminal prosecution as it has been in the
25 past.

1 CHAIRMAN WILKINS: Thank you very much, Pastor
2 Larson. We appreciate your remarks and would be glad to
3 receive any written submission that you would like to
4 submit to supplement your remarks.

5 REVEREND LARSON: Yes.

6 COMMISSIONER BREYER: I will tell you my
7 puzzlement is we have been given cases on this and I looked
8 up the law at that point, and my reaction -- and we wrote
9 it into the law -- was that the present statute does
10 incorporate International Law. It does incorporate.

11 That is why I am puzzled at this. I mean, the
12 International Law that you are referring to is the one that
13 protects refugees.

14 REVEREND LARSON: Yes.

15 COMMISSIONER BREYER: And so I mean -- I don't
16 know, maybe -- are there people being prosecuted for --

17 REVEREND LARSON: Oh, yes.

18 COMMISSIONER BREYER: The 1st Circuit is viewed
19 as rather --

20 REVEREND LARSON: There have been -- there has
21 been a trial in Arizona where, yes, eight people were found
22 guilty of doing precisely -- of harboring and smuggling
23 illegal aliens -- eight church workers, including priests,
24 nuns, and reverends. So yes, they are being very
25 definitely.

1 COMMISSIONER MAC KINNON: Your solution is to go
2 to Boston?

3 REVEREND LARSON: I missed that. Is that an
4 in-house joke?

5 COMMISSIONER BREYER: -- by a judge in the 1st
6 Circuit, which is in Boston.

7 REVEREND LARSON: Okay.

8 CHAIRMAN WILKINS: Thank you again, Pastor
9 Larson.

10 Anyone else like to address the Commission?

11 MS. KRAMER: Good afternoon. My name is Sharon
12 Kramer. I am an attorney here in Chicago who practices
13 mainly in federal post-conviction remedies. And I would
14 like to bring up a very quick point that is not on target
15 with the guidelines, but auxilliary and pertinent to, and
16 that is the matter of the presentence investigation report.

17 I would say that 95 percent of the problems that
18 my clients have stem from that report. Now, since the
19 addition to Rule 32 of the Federal Rule of Criminal
20 Procedure, 32 CD 3, there is some relief possible.
21 However, the directives do not go far enough. And there is
22 one very simple thing that can be done to alleviate that
23 situation; and that is since they are now disclosable
24 throughout the federal system, to allow a copy of the
25 presentence investigation report to come into the hands of

1 the defendant and his attorney in enough time for them to
2 sit down together, go over it carefully so if there are
3 disputed fact,s they have an opportunity logically to bring
4 them up where they do have the opportunity for an
5 evidentiary hearing which is the law in the 7th Circuit.

6 And that is another point. I believe that an
7 evidentiary hearing should become a part of the rule and
8 not just case law in some of the circuits. And in that
9 way, there will be some fairness in the sentencing process.

10 I have at least two clients who are -- were
11 prosecuted: One was a trial where he pled not guilty --
12 within the last few months; the other pled guilty to a
13 failure to file where the figure of tax owed in the
14 presentence report has given them -- to the Parole
15 Commission now -- the category for massive tax evaders.

16 In one case -- and I have many clients who ask
17 me: Why are the guidelines longer than the sentence?

18 Now, when the sentencing judge places someone on
19 the guidelines, the guidelines and the sentence will be one
20 and the same and not left up to the Parole Commission. But
21 it still remains that a crime -- a lesser crime can be on
22 the indictment, and the figures or statements in a
23 pre-sentence report can color it to the disadvantage of the
24 defendant. By allowing him to have ample time, not just a
25 few minutes before trial or close to the date of sentencing

1 when he isn't thinking clearly, to sit down in his
2 attorney's office and go over it step by step, I think we
3 can eliminate a lot of the unfairness.

4 CHAIRMAN WILKINS: Thank you very much, Ms.
5 Kramer. Those are two real problems that I know exist, and
6 I think that once these guidelines are implemented, a
7 solution will be provided, certainly to the second problem.
8 And perhaps through rule making we need to make presentence
9 investigation reports available well in advance --

10 MS. KRAMER: Right. And the copy. And they are
11 nondisclosable.

12 As you know right now the Rule forbids you to
13 take notes, forbids you to copy them. In a civil case that
14 I have, a civil RICO stemming out of the government's
15 amount in the presentence investigation report, in order
16 for me to get that up to the Appellate Court, I had to have
17 a court order from the court, the judge in the civil case,
18 and then a court order from the judge in the criminal case
19 because the presentence investigation report really
20 belongs to the criminal sentencing judge.

21 And it just makes things very clear that there is
22 no reason if he can see it in the first place why he
23 shouldn't have a copy.

24 CHAIRMAN WILKINS: Thank you.

25 MS. KRAMER: Thank you very much for giving me

1 time.

2 CHAIRMAN WILKINS: Thank you.

3 Yes, sir?

4 MR. DARST: Chairman Wilkins, ladies and
5 gentlemen of the Commission, my name is Richard Darst. I
6 am a practicing attorney in Indianapolis, Indiana. I have
7 been a trial attorney with the Criminal Division of the
8 Department of Justice, an Assistant United States Attorney
9 for seven years; and a practicing attorney defending
10 criminal cases for four years; First Assistant United
11 States Attorney for three years; and I am now a private
12 attorney.

13 I am chairman of the 7th Circuit of our
14 association, Committee on Criminal Law and Procedure, and
15 we do want to submit some comments to you. But I do not
16 speak to you in an official capacity today because of the
17 lack of time to have a meeting.

18 I would like to make a few observations today
19 though from an overview, and that is that we have seen here
20 from going through the different cases, the different
21 possibilities, how complex it can be. Judge Mihm has
22 described the various back doors that can be used, for
23 instance.

24 Believe me -- and I know you know from your own
25 experience -- lawyers will do this. I will do this. It

1 will be good money for the lawyers. It has been described,
2 for instance, as sort of a tax code. It may be a new area
3 of law. It will certainly be a new body of law, except for
4 the few decisions that we have now under Rule 32.

5 The more complex it is, I would submit the more,
6 in your terms, "dishonest" it could be or the more games
7 playing it could create and it will create. So with that
8 in mind, I urge the Commission to make whatever guidelines
9 it has simple, as simple as possible.

10 These guidelines appear to be a little complex.
11 They are a great exercise intellectually. And you, ladies
12 and gentlemen, are experts in the area, not only because of
13 your background, but also because of your experience in
14 working on the guidelines. But I think you can see here
15 here today from all of the wrestling of the guidelines, how
16 different individuals will interpret the different
17 guidelines.

18 Now, I just went through a very simple hearing, a
19 resentencing proceeding in a criminal case involving Rule
20 32 where, as the lady before me spoke, the amount in
21 controversy or the amount involved in the crime was in
22 controversy. And that seemed to be -- that one factor,
23 which is a very simple factor compared to all of your
24 factors which you have, took a very inordinate amount of
25 concern and time of the district court. And it may be

1 difficult to see from your perspective how this could be
2 difficult. But just to run through the figures -- and I am
3 sure that you remember your own cases, the car. The case
4 involved the retagging of two cars in an auto theft ring by
5 one defendant. That amount -- those two cars were one
6 amount. Then there wre other cars charged in the
7 indictment. That amount was another amount, the aggregate
8 amount.

9 Then in the presentence investigation, the
10 prosecution version submitted another amount which was
11 \$300,000. Lastly, there was an addendum to the
12 presentence -- to the prosecution version of the offense
13 attached to the presentence investigation, which gave an
14 amount of \$800,000 based upon not recovered cars, but upon
15 what the state police had told the government, who told the
16 probation officer, who put it in the report. And we had a
17 terrible time, all of us, the defense attorneys, the
18 prosecutors and judges, trying to determine what the
19 appropriate amount was to -- for the offense involved.

20 The judge finally took the position that he was
21 not going to overrule or to rule upon the offense severity
22 rate given to the crime by the probation officer for the
23 reason that he did not have the authority to. Of course,
24 that creates problems down the line with the Parole
25 Commission and with everybody else. He suggested a

1 petition for habeus corpus which involves additional
2 litigation which should probably not be in the court
3 clogging up the court's system.

4 So we had a terrible time just recently with this
5 one factor.

6 I have had other cases, of course, that involved
7 other disputes with amounts, but I won't go into them. So
8 just from this experience wrestling with this one
9 factor and trying to make a factual determination and
10 having the judge at the end say that he would refuse to
11 make a factual determination because it was basically so
12 difficult, he was going to leave it up to the Parole
13 Commission, that I envision the problems that were spoken
14 to by the other speakers.

15 And yes, Commissioner Robinson said we do go
16 through hearings today on Rule 32. That is correct. But
17 those hearings are much more modified and much less
18 complicated than what would be required through these
19 guidelines.

20 I believe that the speakers, the majority of the
21 speakers have been urging that the guidelines not be
22 mandatory. And I would join in that request for the reason
23 that we cannot computerize really sentences. We are trying
24 to give guidance or you are trying to give guidance to the
25 judges as to what sentence should be given, and yet we

1 cannot put into the equation every possible factor.

2 As a matter of fact, you know that on each factor
3 there will be differences from case to case. There are
4 differences between defendants who say "I'm sorry." Some
5 mean it, some do not. So even on a specific factor, there
6 are great differences, and there are probably greater
7 differences than 20 percent in those cases.

8 So I believe that most of the speakers have asked
9 that the guidelines not be as rigid as they are. I would
10 join in and I believe the majority of the speakers who
11 would request that the guidelines not even be mandatory.

12 Connected with this problem is the sort of
13 problem of probation. And it appears that there is a
14 movement, an emphasis away from probation. And I believe
15 that that is an incorrect emphasis. I believe that if a
16 pendulum swings one way, it will swing back the other way,
17 and we will end up back where we started anyway.

18 But perhaps the guidelines were unintentionally
19 foreclosing probation in certain cases. If the guidelines
20 were doing so, then they probably need to be changed.

21 The federal parole and probation officers, or at
22 least the federal probation office, has done an excellent
23 job in the past and is doing an excellent job now. Part
24 of the problem of the federal system is that it sort of
25 picks up a bum rap from the state criminal justice systems

1 -- because the federal system has done an excellent job --
2 and perhaps the perception in Congress from the media and
3 from the talk about crime on the streets has spilled over
4 to create an image of the federal system not doing a good
5 job.

6 The federal system does an especially good job in
7 the area of white collar crime, for instance. White collar
8 crimes have been prosecuted more and more over the years to
9 the point where we are now -- the federal government is now
10 prosecuting top level organized crime figures, which has
11 not been done in the past; prosecuting public officials,
12 which has not been done a decade or two ago, at least to
13 the extent that it is happening now; gone to the extent of
14 prosecuting corrupt judges which did not happen years ago.
15 So we need to take the comments of the speakers today in
16 the perspective that just because there is more prosecution
17 of white collar crime does not mean that the system is
18 horrible or that the federal criminal justice system is
19 failing, but rather that it is succeeding for the reason that
20 it is prosecuting crimes that were not being prosecuted in
21 the past and also for the reason that society has changed
22 to a more and more paper society which would mean more and
23 more white collar crime.

24 I would -- in view of the lateness of the hour, I
25 would just state that I would request, as a practitioner

1 who has practiced on both sides of the fence, that -- and
2 seeing judges trying to wrestle with the guidelines that
3 come out of Washington, to (1) keep it as simple
4 as possible. And I believe that will help achieve your
5 purpose of honesty because the more complicated it is, the
6 more -- that you have described "dishonest" it will be.

7 For instance, the problem of parole was not that
8 parole was such a bad system, but that the public felt
9 misled and felt that they were lied to, as you have sort of
10 implied.

11 The parole system that we have now has basically
12 a parole eligibility of one-third point in a sentence. And
13 if the public does not understand this, they believe they
14 were lied to.

15 If we have something as complex as the proposed
16 guidelines which we try to explain to the public and try to
17 explain to practitioners and judges, I believe that it will
18 be more of a problem in trying to explain to the public
19 what happened in a sentence than it will be trying to
20 explain a simple one-third compilation under the old parole
21 system.

22 Another illustration of how the complexity may be
23 a problem is that I view -- I view sort of from a
24 simplistic standpoint-- the sentencing guideline as sort
25 of a son of the parole guidelines, and this may be an

1 incorrect characterization. But the Parole Commission
2 attempted to have fairly simple guidelines. And although
3 they were simple, the judges struggled with them and tried
4 to figure out how it would back out a sentence from them.

5 The judges commented against the Parole
6 Commission stating that they didn't understand how they
7 operated and criticized the Parole Commission. The Parole
8 Commission was actually attempting to do a very good job by
9 having simple guidelines for a uniform sentences across the
10 country and trying to eliminate disparity.

11 But these guidelines, the Sentencing Guidelines,
12 are much more complicated than the parole guidelines which
13 the judges had difficulty understanding and the practioners
14 had difficulty understanding. So first of all, I would ask
15 that to keep it simple.

16 Secondly, I would ask to give the judges
17 discretion because they have done a very excellent job in
18 the past. The Southern District of New York was mentioned
19 and the study there. That may be an unusual district in
20 that I know our judges attempt to share information as to
21 sentences and try to keep sentences within similar ranges.

22 I know that the Northern District of Illinois --
23 the judges in the Northern District of Illinois -- go to
24 great lengths to attempt to do this. They even have --
25 sentencing concepts which first started in Brooklyn, and

1 the judges in the Northern District of Illinois use those.

2 Thirdly, I would request that the Commission --
3 and this -- some of these comments relate as much to the
4 law as they do to the guidelines. But I know that the
5 Commission will be referring back to Congress and perhaps
6 making recommendations to Congress at some point. I ask
7 that the Commission not forget rehabilitation in probation
8 and in prisons and in release. If we do -- if we do not,
9 we forget rehabilitation, then we end up perhaps with
10 overcrowded prisons and convicts, angry convicts, released
11 upon the street which I do not want for either the
12 convicted citizens or for the rest of society.

13 Thank you.

14 CHAIRMAN WILKINS: Thank you very much, Mr.
15 Darst. I would encourage your organization of the 7th
16 Circuit Bar to do a critical analysis of this document and
17 let us have your submissions in writing. We would
18 appreciate that.

19 MR. DARST: Thank you.

20 CHAIRMAN WILKINS: Thank you very much.

21 Anyone else who wants to testify?

22 Yes, sir, come right up.

23 MR. KULIS: Good afternoon, Chairman. My name is
24 Chester Kulis, K-u-l-i-s. I am a member of the Board of
25 Directors of the Illinois Counsel against Handgun Violence

1 in Chicago. I would like to offer the Commission some
2 critique of its guidelines relating to firearms.

3 My experience reflects not only my involvement
4 with the Illinois Counsel, but also 15 years of work in law
5 enforcement; and also most importantly the fact that I am
6 a relative of a victim of handgun violence. My brother,
7 Michael, was killed with a handgun in the course of a
8 robbery in 1972.

9 What I am concerned about, I think that the
10 Illinois Counsel are concerned about, are the relative
11 laxity of the guidelines pertaining to handguns. When I
12 address the issue as a member of the Illinois Counsel, I
13 make comparison of the use of handguns to illegal
14 drug use.

15 You know, I personally as a citizen and as a law
16 enforcement officer, think that someone who has an illegal
17 firearm is certainly comparable in danger to the community
18 to someone who has possession of narcotics or perhaps even
19 traffics in narcotics. And yet your guidelines are
20 dramatically different. When you look at the base value
21 for firearms violations, it is only a 6. By comparison,
22 when you compare it to unlawful possession of narcotics,
23 you are basically dealing in the range of 12 -- I believe
24 12 to 18. Now, that says to me that possession of an
25 illegal firearm is far less serious in the Commission's

1 view than is mere possession of a drug.

2 If you look at the base guidelines for the
3 manufacture and sale of drugs, you go way up the scheme
4 obviously. And I think there has to be some comparable
5 value addressed to the issue of firearms.

6 If you look at the other side of the coin where
7 an individual, you know, transports a firearm knowing it is
8 going to be used in a felony, it does go up. But I think
9 at that point, it is too late. I think that the issue of
10 handgun availability and just generally illegal firearm
11 availability is one that the Commission has to address.

12 You know, when it comes to narcotics,
13 unfortunately it is a major problem in the United States.
14 But by and large the people who are most directly affected
15 are the narcotics users and abusers. Citizens are
16 secondarily affected through crimes that are committed.

17 When it comes to firearms, the people who are
18 most directly affected are the victims. And I think the
19 Commission ought to take cognizance of the fact that we
20 have so many handgun deaths in the United States,
21 particularly handguns. Handguns represent about 12,000
22 homicides every year -- I am sorry, 9,000 homicides. We
23 have 12,000 handgun suicides, and an additional 1,000
24 handgun accidental deaths.

25 Let me give you a case in point from my

1 experience as a law enforcement officer. About a year ago,
2 we dealt with a fellow in Chicago who was arrested by the
3 Chicago Police for dealing in marijuana, and subsequently
4 in the course of the undercover investigation, they found a
5 cache of firearms. And he -- and it turned out that he was
6 bringing these firearms from Mississippi to Chicago and
7 basically dealing in firearms and marijuana, whatever he
8 could deal with.

9 The irony was when he was turned over to the
10 federal court, he was only subject to a very light
11 sentence, much lighter than had he been prosecuted in
12 federal court for dealing in marijuana.

13 Now again, I would much rather be confronted on
14 the street by a guy who is a marijuana dealer than a guy
15 with a handgun. And I think we have got to just tighten up
16 those guidelines a little bit to reflect that illegal gun
17 sales are a major problem in the United States.

18 Illinois, for example, has no gun manufacturers
19 in Illinois. All of our guns, legal and illegal, come from
20 out of state. And the federal government, I think, has to
21 recognize that.

22 One other point -- and I realize that the hour is
23 late and I will keep my comments brief for the second
24 point. On point three, if the offender possessed,
25 received, or transported a firearm while -- I am sorry. I

1 have the wrong category. Here you go. Excuse me.

2 "Received or transport a firearm while in the
3 employ of any person prohibited by the federal, state or
4 local law from possessing a firearm with knowledge of such
5 prohibition, add 6."

6 I would urge the Commission to strike "with
7 knowledge of such prohibition." It seems to me that that
8 provision makes guns kind of a sui generis category.

9 If someone has possession of drugs, we don't
10 require the government to show that they had to know that
11 there was a law prohibiting the possession of narcotics.
12 We simply have to show that they knowingly possessed
13 narcotics and that is it.

14 If someone doesn't file an income tax return, we
15 don't have to show that they knew that there was a law on
16 the books. We merely say, "You didn't file a return. It
17 was knowingly done. It is a violation."

18 I think what we are doing here basically is
19 putting an insurmountable burden on law enforcement to show
20 that the person knew that there was a local or state or
21 federal law prohibiting such possession. Obviously that is
22 going to be an almost impossible burden and I think that it
23 lets too many offenders off the hook.

24 Thank you.

25 CHAIRMAN WILKINS: Good point that you make and I

1 made note of it to check that out.

2 Thank you.

3 MR. KULIS: I will submit a written statement,
4 too. Thank you very much.

5 COMMISSIONER BREYER: You realize that the
6 penalty is five years, equivalent to a 15-year term given
7 under the guidelines -- equivalent to a 15-year term
8 if anyone uses a firearm while he is committing a crime.

9 I guess I would like to get your written comments
10 on what --

11 MR. KULIS: Well, again, I think my own
12 perception is, you know, we have to deal with a number of
13 illegal handguns out there before they get used.

14 COMMISSIONER BREYER: Maybe we should distinguish
15 between a handgun and a rifle.

16 MR. KULIS: Oh, definitely, yes. I mean I think
17 as an officer, I think that is the issue. The handgun, you
18 know, those -- that is a threat to the people on the
19 streets and whatever.

20 CHAIRMAN WILKINS: You are talking about the
21 possession -- illegal possession of these weapons.

22 MR. KULIS: And you will note that the guidelines
23 do increase the penalty for a handgun as opposed to a
24 rifle.

25 MR. KULIS: I do, but I don't think significantly

1 enough. You know, just the possession of hand guns, I
2 think, has not only the potential effect in terms of
3 physical danger, but just intimidating the community.
4 Those guns out there are a problem as much, I think, as
5 narcotics.

6 Thank you.

7 CHAIRMAN WILKINS: Thank you so much. We
8 appreciate your comments.

9 Anyone else wish to testify? If no one else
10 wishes to testify, this hearing is now concluded. Thank
11 you very much.

12 (Hearing concluded.)

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