

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

UNITED STATES SENTENCING COMMISSION

- - -

Public Hearing

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Pages 1 thru 275

Washington, D.C.
December 2, 1986

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UNITED STATES SENTENCING COMMISSION

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Public Hearing

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Tuesday, December 2, 1986

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10:00 a.m.

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Ceremonial Courtroom

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U.S. Courthouse

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Washington, D. C.

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P R O C E E D I N G S

CHAIRMAN WILKINS: May I ask the Commission to please take their seats?

Let me welcome all of you here this morning to the last in a series of regional hearings the United States Sentencing Commission has been holding throughout the country. As you are certainly well aware, a few months ago, we published a document entitled, "A Preliminary Draft", and it was published for the purpose of providing a vehicle for extensive public comment. And it has certainly done just that, as we have received comment from hundreds of individuals -- judges, lawyers, probation officers, victim-witness advocates, and others who are interested in the administration of justice. I know I speak for the entire Commission that this public input has been absolutely necessary for our continued work in writing the guidelines. And so I am sure these next two days will be very productive as well.

Let me introduce the Commissioners to you. To my extreme right is Ben Baer; then, Michael Block; Helen Corrothers; to my immediate right is Paul Robinson; to my immediate left is Ilene Nagel; Stephen Breyer; George

1 MacKinnon, and Ron Gainer.

2 We will get right into our hearing. We have
3 a number of witnesses, all day today and all day tomorrow,
4 and I would ask that the witnesses please adhere to the
5 schedule as much as possible, and I will caution our
6 Commissioners as well if we will attempt as best we can
7 to comply with the schedule.

8 Our first witness this morning is Stephen S.
9 Trott. I received a call from Mr. Trott earlier, and he
10 told me he is tied up with the Attorney General and others
11 on matters this morning, but he will be here, but perhaps
12 about an hour late.

13 So we'll move on to our next witness, and when
14 Mr. Trott is able to come we will call him to the witness
15 stand.

16 With that said, we are delighted to have with
17 us the Director of the Bureau of Prisons, who is certainly
18 well-known to all of you, Norman A. Carlson. Mr. Carlson
19 and the Bureau of Prisons have been working with us on
20 matters of mutual interest, particularly dealing with prison
21 capacity and impact guidelines will have, and I am confident
22 that with his assistance and the assistance of his most

1 able staff, that we will be able to produce a document
2 that will give us a true picture of the impact of a guideline
3 system, and particularly the one that we will promulgate
4 sometime next spring, will have on prison capacity.

5 Mr. Carlson, we are delighted to have you with
6 us, and we appreciate your attendance.

7 MR. CARLSON: Thank you very much, Mr. Chairman,
8 members of the Commission.

9 First of all, let me introduce the gentleman
10 on my right, your left, Clare Cripe, who is the General
11 Counsel of the Bureau of Prisons, who has of course been
12 intimately involved in the guidelines analysis from the
13 standpoint of the Bureau of Prisons.

14 Let me say, Mr. Chairman, that I appreciate
15 very much the opportunity to be with you today. I do have
16 a prepared statement which I will be glad to leave, which
17 provides our official views. I will try to summarize
18 if I may, rather briefly, and then of course respond to
19 any questions that you or your colleagues on the Commission
20 may have.

21 At the outset, I want to compliment the Commission
22 for the work you have done so far. There is no doubt in

1 my mind or I think in anyone's mind that you have an extremely
2 complex assignment or task. There are many viewpoints
3 both philosophic and pragmatic, and many of those viewpoints
4 are divergent in terms of the impact they will have on
5 the criminal justice system.

6 I think you have made a good start, and I think
7 we are very happy to have the opportunity to work closely
8 with you and your colleagues. I am particularly pleased
9 that a number of you took time very early on in your
10 assignment to visit some of our institutions. Since that
11 time, I know Judge MacKinnon has visited another institution.
12 I think it is very important that the Commission actually
13 see our institutions, the capacity we have, and some of
14 the problems we encounter in the correctional component
15 of the Federal criminal justice system.

16 Obviously, the most critical factor we are concerned
17 about is what the impact will be in terms of future prison
18 population as the guidelines are developed and promulgated.
19 We must develop our long-range plans based on the future
20 population, and of course, the future population of the
21 prisons will be dictated largely by the guidelines that
22 this Commission eventually does circulate and place into

1 effect.

2 By way of background, since 1980 the Federal
3 Bureau of Prisons has encountered a rapid increase in popula-
4 tion of over 75 percent. In 1980, our population stood
5 at 24,000 offenders, which was right at rated capacity.
6 Today it is 41,400, or 50 percent above our combined
7 capacity of existing institutions. That increase is a
8 result of several factors -- first of all, an increase
9 throughout the Federal criminal justice system; more law
10 enforcement agents for the FBI and DEA; additional assistant
11 U.S. attorneys, and of course, more Federal judges. In
12 addition, there has been an attempt to focus attention
13 of the criminal justice system at the Federal level on
14 violent crime, organized criminal activity and particularly
15 on drug trafficking, which now constitute nearly 40 percent
16 of the total inmates confined in Federal prisons.

17 Compounding that rapid increase has been the
18 presence of some 2,000 Cuban Marielinos, which of course
19 are a difficulty for us, as well as some 2,500 District
20 of Columbia offenders who for various reasons have been
21 placed in Federal institutions rather than at Lorton, the
22 D.C. Department of Corrections.

1 One further note. The Anti-Drug Abuse Act which
2 was passed by the Congress just before they adjourned in
3 October will unquestionably add further to the problem
4 we have with overcrowding, both in terms of the number
5 of narcotics offenders committed to custody, as well as
6 the length of sentences that will be imposed as a result
7 of that Act of the Congress.

8 To manage this burgeoning population, we have
9 had support from the Department of Justice, the Office
10 of Management and Budget, and the Congress. We are currently
11 undertaking the largest expansion program in the history
12 of the Bureau of Prisons. We have added new institutions, and
13 we have constructed additional housing units at existing
14 facilities. In total today, we have added some 4,500 beds
15 to our system in the past six years, and we have seven
16 additional institutions which are fully funded by the
17 Congress, five of which are under construction, and the
18 remaining two will shortly be under construction. They
19 will add a total of some 6,800 additional beds to the
20 Federal prison population. So we are trying to address
21 the problem, but I must say, Mr. Chairman, that over-
22 crowding without question is a very critical concern to

1 all of us in the Federal prison system.

2 On a number of occasions I have had an opportunity
3 to testify that in my opinion prison capacity should not
4 dictate sentencing policy, and I want to reiterate that
5 today. I don't think it should be the factor that drives
6 the entire criminal justice system. At the same time,
7 I believe very strongly that you can't ignore the impact
8 of major changes in the sentencing practices on the prison
9 system, because obviously, if you change the sentencing
10 practices at the front end of the system, it will
11 eventually have some substantial impact on the prison
12 component in the system.

13 We have, as you know, Mr. Chairman, been working
14 very closely with your staff in trying to develop models
15 which will help us estimate the impact of the sentencing
16 guidelines. While the first analysis has been very prelim-
17 inary, I think there is no doubt that the current guidelines
18 as promulgated in the first draft, at least, would have
19 a substantial impact in terms of increasing the number
20 of offenders confined in Federal prisons, both because
21 the number of people going to prisons will increase and
22 also the length of time they will serve without, of course,

1 parole being a possibility, being a secondary factor.

2 I don't question any of the sentencing lengths
3 that have been proposed, but I am concerned with our ability
4 to respond to a dramatic increase in prison population,
5 both in the short run and of course more importantly, in
6 the long-term.

7 In my opinion, as I have expressed before, prisons
8 are truly a scarce resource in the criminal justice system.
9 As in the case of all scarce resources, we have to try
10 to maximize the impact prisons can have on the criminal
11 justice process. I think above all we must be concerned
12 that prison space is available to those who present the
13 greatest threat to society: the violent, the predatory,
14 and the repetitive offenders.

15 Let me, if I may, Mr. Chairman, just comment
16 briefly on several specific areas of the guidelines that
17 do impact on the prison system.

18 First of all, we are concerned with the pre-
19 ponderance of evidence standard for all sentencing information.
20 Our concern, however, is focused on the ability of the
21 U.S. Probation Service to develop pre-sentence reports
22 with that process or through that process which will provide

1 us the information we critically need to make classification
2 and designation decisions.

3 As you know, the Pre-Sentence Report is a source
4 document that we in the Bureau of Prisons use daily, and
5 we are dependent very heavily on the ability of the Probation
6 Service to provide us with reliable and valid information
7 on which we can make some very important decisions that
8 impact on our component of the criminal justice process.

9 We also, Mr. Chairman, would urge the Commission
10 to consider establishing a separate section of offenses
11 that would deal with those offenses occurring within the
12 confines of a prison. As you know, prisons are a unique
13 factor in our society, and frequently crimes that may not
14 be too serious in the community at large become very serious
15 within the confines of a prison. I am referring, of course,
16 to escapes, particularly those involving weapons, as well
17 as offenses involving the possession of narcotics or the
18 possession of alcohol in a prison environment. In our
19 opinion, those could be very substantial, substantial diffi-
20 culties within the confines of prison administration, and
21 therefore, we would urge the Commission to establish a
22 separate section for prison offenses that would categorize

1 a number of offenses that do occur unfortunately on a too
2 frequent basis within the confines of prisons.

3 Let me say, Mr. Chairman, that I want to
4 conclude my statement by repeating again that I have long
5 supported sentencing guidelines. I am convinced they have
6 worked. I have seen them work in the State of Minnesota.
7 In my opinion, I think sentencing guidelines will bring
8 greater rationality to the criminal justice system. I look
9 forward to continuing our efforts to work with you and
10 your colleagues and staff on the Commission in developing
11 the subsequent drafts of the guidelines.

12 Thank you.

13 CHAIRMAN WILKINS: Thank you very much, Mr.
14 Carlson. On behalf of the Commission, we again appreciate
15 all the cooperation and assistance that you and your staff
16 have given us, and I know we will continue to work together.

17 I am interested in what you said about a separate
18 section for crimes in prisons. This is something we
19 have not addressed, and I think it is time we do.

20 Do you think you could send us just in writing
21 those areas that you are mostly concerned about? You named
22 four of them, and I have written them down, but there may

1 be a few others. And you might want to even suggest
2 how we would deal with those.

3 MR. CARLSON: Yes, I will. They are in my
4 prepared statement, which I will leave with the Commission
5 for your further review.

6 CHAIRMAN WILKINS: Thank you very much.

7 How much lead time do you need to construct,
8 say, a Level I institution?

9 MR. CARLSON: A Level I institution requires
10 very little lead time. Generally, these are surplus military
11 facilities, such as the one at Duluth, Minnesota and the
12 one at Big Spring, Texas where we acquire surplus military
13 property, convert it over with less than a year lead time.

14 The problem, however, is the Level 4, 5, and
15 6 institutions, the medium- and maximum-security institutions
16 such as Otisville, New York which you have seen, and
17 Lewisburg, Pennsylvania. Here, you are talking four to
18 five years by the time you get the money from the Congress,
19 go through the environmental impact process, and eventually
20 construct the institution.

21 CHAIRMAN WILKINS: I see.

22 Any questions from any Commissioners to my right?

1 COMMISSIONER CORROTHERS: Yes. Director
2 Carlson, would you advocate along with our working on guidelines
3 for offenses which occur within the institution provision
4 for providing credit for cooperation also within the institu-
5 tion? I am aware of cooperation existing on occasion that
6 results in the saving of lives outside the institution,
7 such as when revenge is being planned on a law enforcement
8 person or judge. But then there are also occasions when
9 solutions to investigations inside would greatly benefit
10 through the use of cooperative individuals.

11 MR. CARLSON: Commissioner Corrothers, I certainly
12 would agree that there is a need to provide some mechanism
13 to recognize those offenders who, at sometimes substantial
14 risk to themselves and their families, begin to cooperate
15 with the government in their criminal investigations. It
16 is going to be difficult to do with the sentencing guidelines
17 because many times the cooperation occurs after they are
18 sentenced and confined in an institution.

19 However, as you know the Congress in its wisdom
20 has provided that the Bureau of Prisons can go back to
21 the sentencing judge with substantial new information at
22 any time, and I think we would of course develop our

1 policies and procedures in a manner which would allow at
2 least the Bureau to go back to the sentencing judge and
3 provide him with such information.

4 COMMISSIONER CORROTHERS: Okay, thank you.

5 COMMISSIONER BLOCK: Mr. Carlson, I wanted to
6 follow up on that comment about overcrowding, and I speci-
7 fically wanted to get some information on what drives capacity;
8 what is it that determines what the capacity of an existing
9 prison is?

10 MR. CARLSON: Mr. Block, we use physical capacity
11 as a baseline, if you will. This is the capacity that
12 was designed by the architects at the time the institution
13 was initially constructed. Obviously it is an ideal capacity;
14 it is a capacity which reflects one inmate in one room
15 or in one cell or in one dormitory space. That is, of
16 course, the ideal as I mentioned.

17 We also have another capacity we use, the rated
18 capacity of the institution, which accounts for the degree
19 of overcrowding we have throughout the system. It is a
20 flexible provision. Currently, we are some 50 percent
21 over our physical capacity, the design capacity of institu-
22 tions. I for one think 50 percent is too high. I think

1 it exacerbates the tensions, the frustrations, the problems,
2 that one inevitably finds in a prison environment.

3 On the other hand I would say that one does
4 not have to consider the physical capacity as the ideal,
5 as being the only possibility. I think there is a range
6 between our current situation and no overcrowding which
7 presents a different level of tolerance.

8 We have used, as you know, a 20 percent factor.
9 We feel that we can operate effectively at 20 percent over
10 the design capacity of our institutions. One could argue
11 that maybe it could be 25 or 30 percent, and I can't dispute
12 that. I think 20 percent is close to the point that we
13 ought to strive to achieve. We never will, perhaps, but
14 at least it is a goal that we have established within the
15 Bureau of Prisons.

16 COMMISSIONER BLOCK: So then if I understand,
17 it is not habitability that is driving this, but rather,
18 manageability?

19 MR. CARLSON: Manageability is certainly a factor,
20 but I don't think you can separate the two. I think there
21 is a very close correlation between the constitutionality
22 of a prison or jail environment and level of overcrowding.

1 You can increase to a certain percentage or to a certain
2 extent, but once you reach critical mass, I think at that
3 point you not only have management problems, but I for
4 one think it is the time that the courts will certainly
5 consider whether the institution meets Constitutional standards.

6 COMMISSIONER BLOCK: Thank you.

7 CHAIRMAN WILKINS: Thank you. Any questions
8 to my left?

9 (Pause.)

10 CHAIRMAN WILKINS: Go ahead, George.

11 COMMISSIONER MacKINNON: I was wondering about
12 how much you use State facilities. I notice we've got
13 a lot of Federal statutes now and for a number of years
14 have been moving into the State; they are cases that really
15 should have been prosecuted by the States -- local bribery
16 where they use the mails; and the Travel Act; and things
17 of that character. And I just wondered how much you do
18 use the State facilities?

19 MR. CARLSON: Unfortunately, Judge MacKinnon,
20 we can use them to a very limited extent. Most State systems,
21 as you know, are as overcrowded as the Bureau of Prisons,
22 and in some cases they are even more overcrowded. I believe

1 that some 38 States are now under some type of Federal
2 court order requiring them to limit their capacity. The
3 result, of course, of that is that the State systems are
4 simply unable to take any large number of additional inmates.

5 We do work collaboratively with a number of
6 the State systems. As you know in Minnesota, we have a
7 number of offenders that are housed at Oak Park Heights,
8 their new maximum security prison. We do that because
9 the Minnesota population has not gone up to the extent
10 that various other States have. But our degree of cooperation
11 is mostly limited by State prison capacity problems.

12 COMMISSIONER MacKINNON: Mentioning Minnesota,
13 you might be interested, if you didn't know, that the prison
14 population in Minnesota today is about the same, percentage-
15 wise, in proportion to the population as it was in 1900.

16 MR. CARLSON: I didn't know that.

17 COMMISSIONER MacKINNON: Four point four percent.

18 CHAIRMAN WILKINS: Commissioner Nagel?

19 COMMISSIONER NAGEL: Mr. Carlson, I may have
20 missed the number. How many beds do you currently have
21 available, not including the 6,800 under construction?

22 MR. CARLSON: How many beds? Our current

1 physical capacity, design capacity, if you will, is approxi-
2 mately 27,000, between 27,000 and 28,000. And we now have
3 41,500 inmates in those beds. And as you saw at the
4 institutions that you visited, we are simply double-bunking
5 virtually all housing units at those institutions. That
6 is the only way we can accommodate this rapidly increasing
7 population.

8 COMMISSIONER NAGEL: Has the double-bunking
9 been a problem so far?

10 MR. CARLSON: To date the answer is negative.
11 We have not had significant problems because of double-
12 bunking. However, I want to emphasize again that we can't
13 go on adding to this prison population. We are at what
14 I consider to be a very critical point.

15 Fortunately, we do have the extra 6,800 beds,
16 or additional 6,800 beds which are now fully funded by
17 the Congress and will be coming on-line within the next
18 14 months. Were it not for that fact, it would be a very
19 critical situation. But at least we have some relief to
20 the current level of overcrowding.

21 In addition, of course, we are hoping that the
22 Congress in its wisdom continues to fund additional prison

1 construction, and I think that is one of the factors that
2 both the Commission as well as the Bureau of Prisons have
3 to be concerned with.

4 COMMISSIONER BREYER: The number that I should
5 keep in mind, too, if I am thinking of prison capacity
6 is around 40,000 -- that is, if you have about 27,000 capacity
7 now, and around 6,800 coming on line, that brings you up
8 to around a little under 34,000 --

9 MR. CARLSON: Right.

10 COMMISSIONER BREYER: -- and then you can go
11 20 percent above that without feeling too uncomfortable.

12 MR. CARLSON: That's correct.

13 COMMISSIONER BREYER: So then, as you get above
14 40,000, you begin to feel more and more uncomfortable.

15 MR. CARLSON: That's correct. That's a very
16 good analysis of the situation.

17 CHAIRMAN WILKINS: Mr. Carlson, the Congress
18 recently passed an Anti-Drug Abuse Law that has some signi-
19 ficant mandatory minimum sentences. I wonder what impact
20 that recently-passed piece of legislation will have on
21 prison capacity?

22 MR. CARLSON: As I mentioned previously, it

1 without question is going to exacerbate the overcrowding
2 problem. It is very difficult yet to predict what will
3 happen because the law has been enacted in such a short
4 period of time, and we have not done a careful analysis.
5 But I think there is no doubt in my mind or anyone's mind
6 that it is going to further expand the Federal prison popula-
7 tion, certainly in the short term, and perhaps even more
8 importantly in the longer term.

9 CHAIRMAN WILKINS: Well, thank you very much,
10 Mr. Carlson. We appreciate your attendance and we look
11 forward to working with you in the future.

12 MR. CARLSON: Thank you.

13 CHAIRMAN WILKINS: Our next witness is Mr. Bobby
14 Lee Cook. Mr. Cook is a well-known lawyer specializing
15 in the defense of individuals indicted for various State
16 and Federal offenses. He has tried over 1,000 cases, I
17 was informed yesterday, and successfully defended over
18 300 murder cases. He has been involved in legal proceedings
19 in just about every circuit in this nation, and in Asia,
20 Europe and South America.

21 Mr. Cook, we appreciate very much your attendance,
22 and we look forward to hearing from you.

1 MR. COOK: Thank you very much, Mr. Chairman,
2 Judge Wilkins, and distinguished members of this Commission.

3 In a little bit of mirth, I would first like
4 to say that as my participation in the criminal justice
5 process, the advent of sentencing, I generally try to
6 stay away from as much as I can and to avoid it unless
7 it becomes an absolute necessity.

8 I first, as Mr. Carlson did, congratulate this
9 Commission for its arduous work in a very complex area,
10 operating under the new mandate of Congress with reference
11 to effecting effective guidelines in the criminal area.

12 I have not prepared a written statement as Mr.
13 Carlson had, and I would like to speak generally on some
14 of these areas that concern me.

15 As a criminal practitioner, having tried and
16 dealt with lots of cases in the Federal system, I think
17 it would be fair to say that in dealing with the present
18 parole guidelines as they exist, I find them to be very
19 tedious and very complex, and frankly, I would suggest
20 that 90 percent of the criminal lawyers throughout this
21 country who practice in Federal court simply don't understand
22 them. I am unable in most instances to give adequate and

1 effective assistance of counsel in explaining to clients
2 after they have been sentenced when they will be eligible
3 for parole and under what particular circumstances.

4 So I think maybe the sentencing guidelines,
5 although this is only a beginning, probably will be a good
6 start in an area of clarification.

7 Some of the areas which concern me I would refer
8 to maybe as a rigidity of the guidelines. I think that
9 there should be measures made within the guidelines themselves
10 by this Commission which give an Article 3 judge the right
11 and the opportunity to depart from the guidelines and to
12 exercise judicial discretion in sentencing in certain phases.
13 I don't think the guidelines should be so stringent that
14 a Federal judge would have to say, "Well, under this
15 classification, I must give you three years," five years,
16 or six years. There must be some flexibility. I am
17 convinced, after a long lifetime of practicing in the criminal
18 courts, Federal and State courts, that to some extent every
19 tub must sit on its own bottom, and that ultimately an
20 Article 3 judge must have a wide degree of discretion. And
21 I can see no reason why the guideline cannot do that and

22

1 still appropriately fulfill its mandate and charter under
2 the Congressional intent.

3 Another area that is of concern to me as a prac-
4 ticing criminal lawyer -- I would not like to see plea
5 bargaining inhibited to the extent to where the guidelines
6 in each instance would have to be conformed to. The Supreme
7 Court, I think in all of its wisdom in Santobello versus
8 New York and other decisions, recognized not only the
9 legitimacy of plea bargaining, but I think indeed the neces-
10 sity of plea bargaining in order to keep this system from
11 turning topsy-turvy.

12 There are many cases that individuals will deal
13 with, I think, where it would be difficult for the guidelines
14 to determine what should be done in a plea bargaining aspect.
15 I have just completed a plea bargain agreement in a Federal
16 court where a person was indicted on some 17 felony counts.
17 But the case soured on the government -- to use the colloquial
18 expression -- and we ended up negotiating a plea bargain,
19 a binding agreement under Federal Rule 11, pleading to a
20 misdemeanor and paying a \$500 fine.

21 Now, that might sound rather incredulous on
22 its face, but knowing the facts, as the assistant United

1 States attorney did, and knowing the facts as I did, it
2 was the outcome of the case which would have been anticipated.
3 And it would be hard to deal with that type of situation
4 in the guidelines.

5 There is another area that is of some concern
6 with me. I have no problem with the fact of the acceptance
7 of responsibility and to recognize that something should
8 be given to a person who enters a plea of guilty who is
9 in fact guilty. But I think that concomitant with that,
10 that we have got to understand that there are those individuals
11 who are charged with a crime, who go to trial, who want
12 to put the government to the proof, who do not want to
13 suborn testimony and who will testify truthfully and still
14 can get a fair trial without being punished. I think there
15 are those cases in which a premium should be placed upon
16 a person having a fair trial and exercising their Consti-
17 tutional rights without being penalized at a later date.
18 And I think the guidelines, if possible, should speak to
19 that.

20 Those are the areas that are primarily of concern
21 to me. I might state quite frankly that I stumbled in on
22 your press conference yesterday, Judge Wilkins, without

1 having been invited, and many of the things that I was
2 concerned with adversely, to my satisfaction, you cleared
3 them up admirably at that time.

4 So I am willing to field any friendly questions.

5 CHAIRMAN WILKINS: Thank you very much, Mr.
6 Cook.

7 Let me just ask you this. I guess you have
8 probably handled as many cases as any lawyer in the United
9 States of America on the criminal defense side, I would
10 assume. I just wonder when your clients enter a plea --
11 and I am not talking about pursuant to a plea agreement,
12 but just "belly up" -- is it your experience that the
13 sentence is less than it would have been had that individual
14 exercised his or her Constitutional right to a trial?

15 MR. COOK: I think, to give you a perfectly
16 honest answer, that my experience throughout this country
17 is yes.

18 CHAIRMAN WILKINS: Well, that's what our studies
19 have shown as well. And what we are trying to do is, one,
20 decide should we provide for that custom, if you will,
21 to be continued under a guideline system or not.

22 MR. COOK: I have no problem with that. I

1 have no problem with that.

2 I would say something else that I overlooked.

3 In dealing with the area of cooperation, I notice that
4 you've got a 40 percent adjustment. There are cases -- and
5 I have seen those cases, and I suggest that you and Judge
6 MacKinnon have seen those cases, too -- in which 40 percent
7 simply wouldn't be enough. I think you need an area there
8 to permit an Article 3 judge to say that you are able to
9 go not just 40 percent, but zero in certain cases. I have
10 seen cooperating witnesses perform duties far and over
11 and beyond the call of duty in which their very lives and
12 safety and those of their families were involved. I think
13 you have got to give a judge an "out" there to do whatever
14 he feels is necessary under the circumstances. And I think
15 the judge should make the determination; the Article 3
16 judge should make the determination as to the cooperation,
17 and not the assistant United States attorney or a
18 certification from the United States attorney. I think
19 it ultimately should repose in the court as a judicial
20 process.

21 CHAIRMAN WILKINS: So as I understand, you want
22 us to keep the element of cooperation in the guidelines,

1 that it be recognized as a valid consideration, but take
2 it away from the U.S. attorney and leave it where it is
3 now, leave it with the court?

4 MR. COOK: Yes, sir.

5 CHAIRMAN WILKINS: Let me ask you this, not
6 as a defense attorney but as an American citizen: Should
7 prison capacity play a role in our decisionmaking process
8 as to appropriate sentences?

9 MR. COOK: Well, I think philosophically, not
10 speaking as a defense lawyer, but speaking hopefully with
11 some degree of logic and concern, I think if I were a judge,
12 in imposing a prison sentence or in not imposing one, the
13 capacity of a prison at a given time would not be anything
14 that I would give any momentary consideration to. I think
15 either there is a need for a prison sentence or not. I
16 think that is something which addresses itself more or
17 less to the budgetary concern of Congress or to an agency.

18 CHAIRMAN WILKINS: Thank you.

19 Any questions from any Commissioner to my right?

20 (Pause.)

21 CHAIRMAN WILKINS: To my left?

22 (Pause.)

1 CHAIRMAN WILKINS: Fine. Mr. Cook, I understand
2 you are going to submit more extensive remarks in writing
3 as soon as they are prepared.

4 MR. COOK: Yes.

5 CHAIRMAN WILKINS: We look forward to receiving
6 those, and appreciate your testimony and your assistance
7 with this Commission. And if I might, perhaps we can call
8 upon you during the next few months as we begin to finalize
9 another publication of guidelines sometime in January.

10 MR. COOK: Thank you very much, Judge Wilkins
11 and members of the Commission.

12 CHAIRMAN WILKINS: Thank you.

13 I understand Mr. Henry Hudson will be here at
14 eleven. So we will move on and come back to Mr. Hudson
15 as we will come back to Mr. Trott when their schedules
16 permit them to be here.

17 We are very pleased to have Mr. Richard Arcara
18 with us today. He is a district attorney from Buffalo,
19 New York, and he is representing the National District
20 Attorneys Association. With him is Mr. Kirk Wolfgang
21 of that Association. Both of these gentlemen have been
22 working with the United States Sentencing Commission from

1 its inception as part of working groups of judges, lawyers,
2 defense attorneys, prosecuting attorneys, probation officers,
3 who have been coming in in groups and as individuals to
4 assist us. So we are delighted to have both of you with
5 us this morning.

6 MR. ARCARA: Good morning, Mr. Chairman. My
7 name is Richard J. Arcara. By way of background, I am
8 a former United States Attorney for the Western District
9 of New York. Presently I am the District Attorney of Erie
10 County in Buffalo. And as its President-elect, I speak
11 to you today on behalf of the National District Attorneys
12 Association.

13 Our Association represents the interests of
14 the State and local prosecutors from throughout the United
15 States.

16 As you know, the National D.A.s worked very
17 closely during the last year with the Commission as it
18 proceeded with its monumental task of meeting the Congres-
19 sional mandate to promulgate sentencing guidelines.

20 We wish to commend you on the overall quality
21 of the Preliminary Draft Sentencing Guidelines which were
22 issued in September of this year.

1 The National District Attorneys Association
2 generally supports the approach taken by the Commission
3 in the guidelines, but we have some reservations and would
4 like to make some recommendations for your consideration.

5 The guidelines reflect not only your hard work
6 and dedication to your task, but also your sense of duty.

7 We understand and appreciate the determination
8 it takes to follow the difficult and complex mandate given
9 you by the Congress. There is no question that the Commission
10 could have taken a much simpler and less controversial
11 path. There is also no question that you reflected a
12 sensitivity to the public's concerns regarding the present
13 sentencing system and the abuses which exist in unwarranted
14 sentencing disparities.

15 My remarks will be more of a general nature
16 at first, and then I will go into a couple of specific
17 areas.

18 At the outset, it must be stressed that the
19 Commission was created and is operating under the provisions
20 of Chapter II of the Comprehensive Crime Control Act of
21 1984, which contains the Sentencing Reform Act. The Commis-
22 sion is obligated to follow the mandate of Congress and

1 the guidelines are to be held accountable to that standard
2 and that standard alone.

3 The Commission rightly has sought input from
4 interested parties throughout the country. Academic discourse
5 and philosophical arguments are properly being considered
6 by the Commission, and they serve many useful purposes.
7 However, in the final analysis, the private philosophies
8 of an organization or an individual are not the proper
9 measure of the guidelines.

10 The National District Attorneys Association
11 suggests that the Commission is compelled to reject criticism
12 of the guidelines which are based on philosophical standards
13 inconsistent with the enabling legislation.

14 Congress intended to cure the unwarranted dispari-
15 ties of subjective sentencing and set a goal for the Commission
16 to create guidelines which produce similar treatment of
17 similar defendants who commit similar crimes.

18 In that regard, Congress specifically directed
19 the Commission, in Title 28 USC 994(f), to pay particular
20 attention to the requirements to provide "certainty and
21 fairness in sentencing and reducing unwarranted sentencing
22 disparities." This is the emphasis of the Congress and

1 the mandate to the Commission.

2 The National District Attorneys Association
3 believes that the Commission has been faithful to its enabling
4 legislation and the resulting guidelines, with some modifica-
5 tions, are an appropriate mechanism to achieve the stated
6 purposes required by the Congress.

7 The methodology of the guidelines includes a
8 straightforward, simple-to-apply, narrative approach which
9 seeks to reflect the thought processes a responsible and
10 conscientious judge would employ in making a sentencing
11 decision. It operates on a system of real offense sentencing
12 which requires the judge to identify all relevant offense
13 characteristics and base the sentence on the conduct
14 necessarily involved in the offense of conviction plus
15 the conduct done in furtherance of that offense and any
16 injuries or harm which result from the defendant's conduct.

17 We agree with the choice made by the Commission
18 in selecting this method over one based on "offense of
19 conviction". We believe it essential that there be a complete
20 accounting of the nature of the crime and all its associated
21 elements to allow for the specific differentiation of
22 criminal conduct that the Congress mandated.

1 The Commission has drafted a modification in
2 the use of the real offense system by adopting a substantive
3 compromise between the two systems. The guidelines specify
4 only those factors that the Commission believes should
5 be considered in assessing a sentence.

6 We believe, however, that the Commission may
7 be too restrictive in this area and has excluded judicial
8 discretion to a much greater degree than may be wise. We
9 suggest that in addition to the "road map" approach that
10 the guidelines specifically provide that other offense
11 characteristics may be considered by the judge as he finds
12 them to relate to the conduct of the defendant. The judge
13 may then, using sound discretion, account for these acts
14 and consequences either in aggravation or in mitigation
15 of the offense value, within a range to be determined by
16 the Commission.

17 We also endorse the use of numerical offense
18 values assigned to each relevant aspect of the defendant's
19 conduct. The offense values reflect each identified unlawful
20 act or omission, injury or harm under the modified real
21 offense system.

22 The use of the numerical value system facilitates

1 a determination of the relative ranking of offenses and
2 the relative level of sanction for the particular criminal
3 conduct in question.

4 In assigning the preliminary values contained
5 in the draft, the Commission has correctly considered most
6 prominently the harm resulting from the offense and the
7 need to deter future similar conduct.

8 We believe that the Commission should specifically
9 set base offense values. However, we do not necessarily
10 believe that the Commission should preempt the reasonable
11 judicial discretion that the sentencing judge might have
12 in actually setting the value for each specifically identified
13 offense characteristic. Rather, we would suggest that
14 the Commission use a range for such specific offense character-
15 istics and afford the sentencing judge the opportunity
16 to exercise his discretion in formulating the actual sentence
17 under the guidelines.

18 For example, rather than specific values of
19 120 for severe bodily injury and 60 for serious bodily
20 injury, the Commission should promulgate a maximum and
21 a minimum range for each level of injury from which a judge
22 may exercise his discretion in determining a value to

1 be added to the base value.

2 The National District Attorneys Association
3 does not believe that a numerical system is inherently
4 evil. Objections to the guidelines based on its numerical
5 system, and claiming that it unfairly impinges and impedes
6 the exercise of discretion on the part of the sentencing
7 judge are misplaced.

8 Furthermore, although Title 18 United States
9 Code Section 3553(b) requires sentencing judges to impose
10 a sentence of the kind and within the range created by
11 the guidelines, we believe that there is ample judicial
12 discretion also retained. Even though a guideline range
13 must be strictly limited to a maximum variation of six
14 months or a 25 percent difference between the minimum and
15 maximum sentence of incarceration, the guidelines also
16 allow unfettered discretion within that specific range.
17 And furthermore, you have the safeguard where if a judge
18 wants to deviate, all he has to do is put it in writing
19 and explain his reasons.

20 That is one of the problems that we face today,
21 where judges will go on the bench and just arbitrarily --
22 at least, it appears that way in the minds of the public

1 and the press -- and set forth a sentence which sometimes
2 is very, very difficult to explain.

3 I can recall when I was an assistant United
4 States attorney where a judge would render a sentence that,
5 under what he had to say, seemed to be reasonable, but
6 on the underlying facts did not appear to make much sense
7 when you knew the facts -- but unfortunately, nobody knew
8 the real facts. And at that time, the United States
9 Attorney's Office could not comment at sentencings before
10 1975.

11 The Commission has been criticized because of
12 the degree of detail contained in the guidelines. We believe
13 that such detail facilitates a proper differentiation
14 between criminal conduct for sentencing purposes.

15 By way of example, the property tables in the
16 guidelines could arguably contain fewer than 13 gradations.
17 The fewer categories there are, however, the more often
18 different criminal situations will be lumped together and
19 treated the same. We believe that the amount of detail
20 in the guidelines is necessary to avoid the unwarranted
21 wide variations in sentencing that would continue to exist
22 if only general guidelines and policy statements are

1 proposed.

2 I could sit here for hours and talk about my
3 12 years' experience at the Department of Justice as an
4 Assistant U.S. Attorney and as a United States Attorney
5 and talk to you about the war stories that I experienced
6 based upon the disparities in sentencing, talking about
7 different areas, within very short periods of time, and
8 the confusion that that generated and the criticism within
9 the system as you sat there and you tried to defend the
10 position of the judge, because inherently, we are obviously --
11 personally, I am very interested in a credible system that
12 the public can rely upon. And it was very difficult many
13 times during that 12 years to understand how one judge
14 could be so far different from another judge on basically
15 the same factual pattern.

S2 16 We further note that Congress, by demanding
17 the creation of guidelines with specified narrow sentencing
18 ranges and requiring judges to follow those guidelines,
19 is asking for a radical departure from past practices.
20 Suggestions from opponents of the guidelines that statutory
21 restrictions be amended, that the required timetable for
22 implementation be modified, that the implementation procedures

1 themselves be modified, and that "field tests" be developed
2 should not be made to this Commission but are matters which
3 have already been decided by the Congress.

4 Beyond these general comments, I now would like
5 to talk to you about four specific areas, if I may.

6 The first one -- the issue of prison overcrowding
7 as a factor in determining sentencing guidelines.

8 We believe that the Commission should attempt
9 to promulgate guidelines in an atmosphere free from the
10 external and artificial constraint of linking such guidelines
11 to the present capacity of the Federal prison system. The
12 Commission's first responsibility is to create guidelines
13 which equitably and fairly reflect the purposes of sentencing,
14 just punishment, deterrence, incapacitation and rehabilita-
15 tion. Your responsibility is to formulate a system which
16 determines a just sentence for particular criminal conduct
17 in specific circumstances.

18 It is essential that this Commission make its
19 judgments free from every artificial constraint on justice.
20 If it is a good judgment, this Commission believes that
21 criminal conduct should be punished by incarceration,
22 the guidelines should properly call for it at the level

1 at which justice will be done.

2 Justice is not served by this Commission blinding
3 itself to what justice requires and instead calling for
4 alternatives to incarceration for the sole reason of the
5 potential effect on prison population that such incarceration
6 may cause. It would be illogical and inappropriate to
7 factor in a mitigating circumstance which is based wholly
8 on the fortuitous availability or unavailability of prison
9 space at a particular point in time. To artificially skew
10 the guidelines toward minimal incarceration, as some would
11 propose, is to render such guidelines unjust and void.

12 This Commission would better serve the ends
13 of justice by making honest determinations regarding incar-
14 ceration and closely monitoring the effect such guidelines
15 would have on prison capacity.

16 This Commission fulfills its responsibility
17 by monitoring and reporting the effects of its guidelines.
18 The actual administration of correctional systems is the
19 responsibility of the Executive Branch of government. The
20 cost of paying for justice is properly a cost which the
21 National District Attorneys Association believes the Congress
22 must face. It is a cost properly paid in dollars and not

1 by returning convicted criminals to the streets when they
2 should be serving a just sentence.

3 Number 2, the need for form sentencing and a
4 reduction in the use of felony probation.

5 No greater decision has to be made by the Senten-
6 cing Commission than the bottom-line issue of sentence
7 length for specific crimes and the availability of non-
8 incarcerative sentences, notably probation, for convicted
9 felony offenders.

10 The Congress had delineated certain sentencing
11 parameters which the Commission must follow. Congress has
12 directed that crimes of violence or in violation of the
13 drug laws perpetrated by prior felons shall be severely
14 punished by near maximum terms of imprisonment. Substantial
15 terms of imprisonment are required when an offender has
16 two or more prior felony convictions.

17 Accordingly, Congress itself makes the element
18 of a defendant's prior criminal record an aggravating factor
19 which must be taken into account by the guidelines by increasing
20 the length of incarceration.

21 Study after study shows that prior criminal
22 history is a strong predictor of recidivism. Based on

1 a crime control theory simply put, a convicted criminal's
2 prior criminal history should result in increased sentence
3 length for the purpose of incapacitation and/or deterrence.
4 We commend the Commission for its efforts to formulate
5 a mechanism which adopts this theory of punishment, and
6 we approve of the basic format contained in the guidelines.

7 Furthermore, we believe that the guidelines
8 must reflect the need for tough sentences for all violent
9 and otherwise serious crime and for violations of the drug
10 laws. We believe that the guidelines which provide for
11 firm sentences of incarceration are consistent with the
12 Congressional mandate under which you must operate.

13 The Congress has stated that, "in many cases,
14 current sentences do not accurately reflect the seriousness
15 of the offense;" and that the "Commission shall not be
16 bound by such average sentences and shall independently
17 develop a sentencing range..."

18 We submit that such language is nothing less
19 than a call by the Congress for longer sentences of incarceration
20 than presently are being assessed. We hope that this
21 Commission will not seek to ameliorate the attacks on the
22 guidelines by a wholesale modification of the sentencing

1 ranges which the preliminary guidelines proposed. As proposed,
2 we believe that the range of sentences contained in the
3 guidelines for the most part are appropriate in terms of
4 sentence length.

5 This Commission must address the issue of pro-
6 bationary sentences for convicted felony offenders. We
7 request that you resist all calls for maintaining the avail-
8 ability of non-incarcerative sentences for virtually all
9 crimes.

10 Probation is simply not adequate in most instances
11 to reflect the seriousness of the offense, to promote respect
12 for the law, or provide just punishment for an offense.
13 Probation is not always effective as a deterrent to criminal
14 conduct, and it fails to incapacitate a defendant or to
15 protect the public from further crimes of a convicted
16 defendant.

17 More often than not, probation does little for
18 a convicted defendant's rehabilitation. It does not meet
19 the basic needs of sentencing as defined by Congress
20 in 18 U.S.C. 3553.

21 Furthermore, the imposition of unwarranted
22 probationary terms for convicted felony offenders is at

1 the base of Congress' displeasure with sentence disparities
2 and with the uncertainty found in the present sentencing
3 system.

4 Third, the appropriateness of sentencing
5 convicted defendants for the psychological harm they inflict.

6 People have the right to be free from crime
7 and the effects of crime. One of the basic tenets of our
8 criminal laws is that they serve to protect the physical
9 security of the person. Of utmost importance is the right
10 of a person to be free from adverse psychological damage
11 inflicted as the result of criminal conduct.

12 Clearly, psychological trauma can be every bit
13 as injurious to a person as physical trauma. We commend
14 the Commission for including in the Preliminary Guidelines
15 as an aggravating sentencing factor the actual existence
16 of extreme or significant psychological injury caused by
17 the defendant's criminal conduct.

18 We are not talking here about mere anger or
19 fear or feeling of violation that plagues victims of most
20 criminal conduct. The Commission properly does not factor
21 in such injury, real though it may be. Rather, the Commission
22 seeks to include only significant or extreme psychological

1 injury which causes substantial impairment of the intellec-
2 tual, psychological or emotional capacity of a victim.

3 Certainly such injuries may be hard to quantify
4 and the government properly has to establish the existence
5 of such injury. However, where it does exist, we believe
6 the Commission has correctly noted that it would have a
7 significant impact on the sentencing judge, and it should
8 be a factor in assessing a sentence under the guidelines.
9 In those cases, the time required to develop the existence
10 of this aggravating factor is well-worthwhile.

11 However, we again advise the Commission to allow
12 for a range of values for such identified psychological
13 injury. We believe that a sentencing judge will be in
14 a better position to make a reasoned value judgment of
15 the degree of sentence enhancement merited, within a range
16 selected by the Commission.

17 The National District Attorneys Association
18 believes that a convicted defendant should be made to face
19 all the consequences of his criminal actions. After these
20 consequences can't be completely measured in drops of blood
21 or stitches or broken bones. They may be measured in anguish,
22 emotional scars, and significant impairment of the psychological

1 state of the victim. To ignore these provable injuries
2 is to heap additional insensitivity upon the helpless victim
3 at the very time he or she is at the weakest. A fair and
4 just sentencing system should not revictimize such a victim
5 of a crime.

6 Based on my own personal experience as a local
7 prosecutor now, a day doesn't go by when we don't directly
8 deal with the victim and the psychological trauma. We
9 don't deal with it quite to the degree at the Federal level
10 that we do at the State level. It is something where I
11 think there is room and should be room in the sentencing
12 guidelines for those rare occasions where it does occur
13 at the Federal level.

14 The fourth and the last area is the need to
15 allow prosecutors sufficient latitude in rewarding cooperation
16 from defendants and in obtaining plea disposition.

17 A convicted criminal's willingness to cooperate
18 with authorities is a valid consideration at sentencing.
19 Cooperation is a significant mitigating factor which helps
20 distinguish offenders for purposes of sentencing. In many
21 cases, cooperation by knowledgeable offenders is the only
22 way to create, conduct and complete investigations aimed

1 at fettering out other criminal conduct. This is particularly
2 so in the investigation and prosecution of major narcotics
3 offenses and other organized criminal activity.

4 The guidelines recognize this legitimate need
5 of law enforcement. However, the National District
6 Attorneys Association believes that the 40 percent maximum
7 reduction available under the guidelines may not always
8 be sufficient to reward exceptional assistance which may
9 involve significant risks undertaken by an offender during
10 his cooperation.

11 Rather than set specific categories of reduction
12 as is presently proposed, we suggest that the United States
13 Attorney be able to request up to 100 percent reduction
14 for offenders who perform undercover work or who provide
15 testimony under life-threatening or personally dangerous
16 circumstances where such conduct directly and materially
17 aids a significant criminal prosecution.

18 However, we have no objection in making any
19 sentence reduction in excess of 40 percent contingent
20 upon the sound exercise of judicial discretion rather than
21 solely upon the certification of the United States Attorney.
22 We believe that allowing this greater leeway will serve

1 as an incentive for offenders to cooperate and will serve
2 the ends of justice. We believe that such exceptional
3 service on behalf of law enforcement, coming as it does
4 even after conviction, sufficiently distinguishes one offender
5 from another and justifies any disparity in the final sentence
6 which the cooperating offender receives.

7 We further suggest that any disputes that develop
8 between the United States Attorney and the defense attorney
9 with respect to the certified range between 20 and 40 percent
10 should be allowed under the guidelines to be resolved by
11 the sentencing judge.

12 Finally, on plea dispositions. Plea dispositions
13 account for the overwhelming percentage of all criminal
14 convictions and cooperation by a convicted criminal is
15 usually made part of a plea agreement.

16 The National D.A.s believe that the guidelines
17 must reflect the fact that under the present system, sentence
18 bargaining is in many instances a significant factor in
19 inducing a plea disposition. The Commission is correct
20 in determining that offenders who plead guilty currently
21 receive substantially lower sentences than those who are
22 sentenced after a trial. It is a fact of life.

1 The guidelines properly establish a mitigating
2 factor where the offender demonstrates that he or she recognizes
3 and sincerely accepts responsibility for the offense and
4 has taken steps toward rehabilitation. We agree with the
5 Commission that the reduction should not automatically
6 accompany a plea disposition because of the mere fact that
7 a plea was entered, but rather properly resides instead
8 in the sound exercise of discretion of the sentencing judge.

9 The guidelines propose that this reduction be
10 limited to 20 percent of the total offense value otherwise
11 calculated for the offense. We suggest that the limitation
12 to only 20 percent may be too restrictive and that more
13 leeway may be necessary to effectuate a just sentence,
14 especially when sentencing a first-time offender who may
15 present other offender characteristics which might properly
16 serve as a mitigating factor. These, of course, are the
17 characteristics set forth in Title 28, Section 994(d),
18 which include age, education, vocational skills, employment,
19 family and community ties, et cetera.

20 We suggest that the range should be extended
21 upward, but that any percentages in excess of 20 percent
22 require the specific agreement of the United States

1 Attorney. It should be clear that any reduction is subject
2 to the discretion of the sentencing judge who may reject
3 any agreement made between the prosecution and defense
4 to exceed the 20 percent limit and assess only the amount,
5 if any, which he deems appropriate.

6 We believe that by allowing reductions for cooperatio
7 and for plea dispositions where acceptance of responsibility
8 and relevant offender characteristics exist, this
9 Commission can provide for both just and firm sentences
10 consistent within one single set of guidelines.

11 In conclusion, the National District Attorneys
12 Association believes that the draft promulgated by the
13 United States Sentencing Commission is a commendable initial
14 effort in the development of fair sentencing guidelines.
15 We agree with the basic structure and the format of the
16 Preliminary Draft of the guidelines. We suggest only that
17 more deference be afforded sentencing judges in determining
18 the actual offense values from a range of values established
19 by the Commission.

20 We believe that retaining such discretion will
21 have a positive effect on creating a fair and workable
22 system. It is also our hope that more leeway will be given

1 to accommodate cooperation by defendants and to facilitate
2 plea dispositions.

3 We believe that the Commission is proceeding
4 on the correct road toward the development of sentencing
5 guidelines. After this period of public comment, we hope
6 that the Commission remains faithful to its mandate.

7 CHAIRMAN WILKINS: Thank you very much.

8 MR. ARCARA: Thank you, Judge.

9 CHAIRMAN WILKINS: We just heard an experienced
10 defense attorney tell us the guidelines should be relaxed --
11 Mr. Cook -- to accommodate up to 100 percent consideration
12 or cooperation, and now you, an experienced Federal and
13 State prosecuting attorney, you just told us the same thing.
14 I am confident that in view of that, the Commission will
15 revisit that issue, if both sides of the Bar feel strongly
16 about it. This is why these public hearings are so helpful
17 to us.

18 MR. ARCARA: We believe, Judge, that that is
19 certainly a factor. We deal with these individuals on
20 a daily basis. And they know, particularly in the organized
21 crime, particularly in the narcotics area, that, "Look,
22 if I cooperate and I testify, I'm going to only get a

1 40 percent reduction. It is not worth it to me. I want
2 to go into the Federal Witness Protection Program, and
3 I am willing to make significant cases for you. But I
4 am concerned about my life. If I go to jail, there will
5 be certain risks to my safety. And I am just not going
6 to cooperate, because I really can't afford to go to jail.
7 I want the Federal Witness Protection Program to take me
8 under its wing and provide that protection for me, and
9 unless you give me that assurance, I am not going to
10 cooperate."

11 That is basically how most organized crime cases
12 are made today under that system, and I think that the
13 prosecutor needs that kind of latitude, Obviously, with
14 the full concurrence of the court.

15 I think that is one of the things that I am
16 trying to say here today is that we want the judges to
17 have a certain degree of discretion. I think that there
18 can be guidelines formulated, allowing even more discretion
19 than may be here, particularly on the values. I think
20 judges, by and large -- and I have heard some Federal judges
21 very opposed to these guidelines, because all of a sudden
22 they can no longer go on the bench and just do whatever

1 they want -- and it happens in the real world; it happens.
2 I have seen it where judges will just walk on the bench,
3 and all of a sudden there is a sentence imposed, and everyone
4 is looking at each other to find out what's this all about,
5 what is the reasoning for it, and there is really no sound
6 reason. And that is what has caused the basis for the
7 disparity that we have today, the unwarranted disparity.

8 CHAIRMAN WILKINS: Thank you.

9 Any questions from any Commissioner to my right?
10 Commissioner Block?

11 COMMISSIONER BLOCK: Mr. Arcaro, I wanted to
12 just follow up on the suggestion you made that we use a
13 range rather than a set number for aggravating and mitigating
14 characteristics. How do you see that as consistent with
15 the requirement that in cases where imprisonment is given
16 that the range not exceed 25 percent?

17 MR. ARCARA: Well, I think there should be another
18 factor. I think when you are talking about whether or
19 not an individual had a gun, if you give him 60 or 120
20 points -- I am saying rather than have -- and I say this
21 with all due respect -- an arbitrary number of 60 or 120,
22 say 30 to 90, or say 60 to 120, and let the judge decide

1 whether the gun was in the person's pocket, whether the
2 gun was pointed at somebody, or whether he fired the gun.
3 I mean, these are factors. And just putting a number on
4 it without allowing a judge to use some discretion there,
5 I think is a mistake. I think the judges want that; the
6 judges want that discretion at that point. And I think
7 if you give them a little more discretion, maybe there
8 won't be as strong opposition as there may be today, and
9 I believe that there is some out there.

10 COMMISSSTONER BLOCK: Let me follow up on that
11 point, because it is a technical point that I would like
12 some clarification on. It seems to me that you correctly
13 note that one of the reasons for this legislation is to
14 rein in discretion, and it reins it in in a particular
15 way. It says that in fact when you get a category of
16 offense and offender, the minimum and maximum can't be
17 separated by more than 25 percent. And then you make the
18 suggestion, well, for something like possession of a gun,
19 we would have a variable range that way exceeds the 25
20 percent range.

21 It seems to me that unless you write some
22 commentary, unless we write some commentary about how

1 those numbers are to be determined, we haven't fulfilled
2 the legislative requirement.

3 MR. ARCARA: Well, I am of the belief that a
4 judge just doesn't like to look at a number and just say
5 I am boxed into that number, at any level, whether you
6 are assessing values -- or whatever level you are at --
7 they just are opposed to that. These are judges, now,
8 that have been serving for many years, that are used to
9 broad discretion, and all of a sudden they are looking
10 at maybe a computer, with a number, and they are saying,
11 "I don't like that." And they are going to look for ways
12 to get around it.

13 COMMISSIONER BLOCK: I am well aware of many
14 judges' aversion to numbers. But I still get back to the
15 sort of technical point about how do we get at it -- it
16 is a perfectly credible idea; it is just how do we work
17 it into a system that constrains us to this 25 percent
18 variation. And I think you have given us part of the answer,
19 but I still am somewhat confused about how we reconcile
20 it.

21 Thank you.

22 CHAIRMAN WILKINS: Any questions from Commissioners

1 to my left?

2 COMMISSIONER MacKINNON: Judge, you have been
3 referring to me as on your "left" throughout the country;
4 in Washington, that is sort of out of sync, that sort of
5 thing --

6 CHAIRMAN WILKINS: Some people think everybody
7 is to my left, Judge.

8 COMMISSIONER MacKINNON: -- and I wish you would
9 refer to something like "the portside".

10 (Laughter.)

11 COMMISSIONER MacKINNON: Counsel, my inquiry
12 goes somewhat along the lines of Commissioner Block's.
13 You said that you wanted a maximum and a minimum for each
14 offense, and let the judge exercise his discretion.

15 Now, beyond that, of course, the statute does
16 require -- when we put down a number, it isn't a hard number.
17 It is a number which under the statute has a 25 percent
18 discretion.

19 Now, are you suggesting that we have an additional
20 leeway to the 25 percent, and a leeway to begin with, and
21 then 25 percent on that?

22 MR. ARCARA: Well, certainly, when you are looking

1 at the values, when you are at that point in the "road
2 map", don't just say, "A gun, 60 points," or 60 units.
3 Give the judge a little discretion in there. I think it
4 will address that problem of the automatic factor that
5 is being perceived out there right now. And I think that
6 that will address that problem.

7 I firmly believe that the 25 percent should
8 also -- I fully agree with that -- and also the fact that
9 judges have the prerogative right now to disregard everything
10 and just say, "I am going to disregard all the guidelines,
11 and I am going to impose a sentence for the following reasons."

12 COMMISSIONER MacKINNON: Well, then, what you
13 are going to do is double-up discretion. You are going
14 to have an additional discretion, and then you are going
15 to have 25 percent on top of that. And my question is
16 the difficulty of doing that under the statute under which
17 you are operating.

18 MR. ARCARA: Well, I would make that recommenda-
19 tion, Judge, that there be another level of discretion.

20 COMMISSIONER MacKINNON: Of course, this aversion
21 to numbers -- every prisoner gets down, usually, to a certain
22 number of months, years, or so and so, in prison. And

1 whether you put it down here to begin with, or the judge
2 puts it down, there isn't any difference that I can see.
3 They are all numbers. They are numbers to that prisoner.
4 And as I see it, all we are doing here is following the
5 mandate of Congress to come up with something in which
6 they have decreed there shall be a 25 percent variation.

7 MR. ARCARA: I am not saying that there should
8 not be the 25. That is later down the road, the map.

9 COMMISSIONER MacKINNON: Yes, but you want more
10 discretion to begin with.

11 MR. ARCARA: When you are looking at those values,
12 Judge, when you are looking at the gun example, I have
13 a problem with just the 60 or the 120 or whatever the number
14 is. I would just like to see a little range in that process.

15 COMMISSIONER MacKINNON: Well, how would you
16 have a lower range for the base offense value?

17 MR. ARCARA: No, I wouldn't touch that. I'd
18 leave the base offense value the same.

19 COMMISSIONER MacKINNON: That's the most rigid
20 and the most important thing in the whole sentence.

21 MR. ARCARA: I would leave that the same. I
22 would add more discretion at the value level.

1 COMMISSIONER MacKINNON: With the additives.

2 MR. ARCARA: Yes, sir.

3 COMMISSIONER MacKINNON: Thank you.

4 CHAIRMAN WILKINS: Commissioner Gainer?

5 COMMISSIONER GAINER: Mr. Arcara, would it be
6 useful to characterize that range of values you suggest
7 as an opportunity for a judge to exercise his judgment
8 as to the factual situation before him, rather than an
9 exercise of discretion? Perhaps that change in nomenclature
10 might avoid some of the perceptions that are leading us
11 to the questions we are raising today.

12 MR. ARCARA: I agree with that, yes. I think
13 it is more in line with what I was trying to express, the
14 judgment factor.

15 COMMISSIONER GAINER: It seemed to me your example
16 led in that direction, of whether an individual had a gun
17 in his pocket or whether an individual actually had a gun
18 on display, or whether an individual used a gun. These
19 are factors that would provide keener nuances to be addressed
20 by a judge in making his determination of what actually
21 happened in that particular case, as perhaps if we character-
22 ized it as a greater opportunity to exercise refined judgment

1 rather than discretion, and it might get us over some of
2 our common conceptual hurdles.

3 MR. ARCARA: I agree with that.

4 CHAIRMAN WILKINS: Thank you very much. On
5 behalf of the Commission, let us express our appreciation
6 to you and to Mr. Wolfgang and all the members of your
7 association. You all have given us a great deal of assistance,
8 and we are delighted to have worked with you and will continue
9 to do so.

10 Thank you very much.

11 MR. ARCARA: Thank you for giving us the opportunity
12 to appear here.

13 CHAIRMAN WILKINS: Thank you.

14 Our next witness is a very distinguished lawyer
15 and prosecuting attorney. Now he is an Associate Attorney
16 General of the United States Department of Justice. We
17 welcome Mr. Stephen S. Trott. Mr. Hudson, we will take
18 you as our next witness.

19 MR. TROTT: Mr. Chairman, members of the Commission,
20 thank you very much for this opportunity. I apologize
21 for being late and appreciate your willingness to accommodate
22 my somewhat difficult schedule today. With that in mind,

1 and with your permission, I'll get right into our comments.

2 On behalf of the Department of Justice, we believe
3 that the Commission has made remarkable progress during
4 its existence towards achieving the sophisticated kind
5 of sentencing guidelines system envisioned by the supporters
6 of the legislation that became the Sentencing Reform Act
7 of 1984. Most encouraging is the Commission's clear
8 determination to develop a comprehensive, detailed system
9 that will stand as a tremendous advance over all prior
10 attempts at guideline systems. To devise a system that
11 aims candidly at the achievement of both just punishment
12 and crime control, and to do it in a fashion that assures
13 that similar offenders committing similar offenses will
14 receive similar sentences, no matter where or by whom they
15 are sentenced, is no easy task.

16 I would like to highlight certain aspects of
17 the Draft Report, and we will be providing to you very
18 shortly lengthy comments which will supplement my oral
19 testimony and which will contain some information that
20 I am not going to dwell on today. With your permission,
21 I would like to first address the concept of modified real
22 offense sentencing.

1 In the Department, we believe that it is absolutely
2 critical that the criminal justice system assure and be
3 clearly perceived by the public to assure that every addition-
4 al harm caused by an offender in the course of an offense
5 will result in some degree of increase in the sentence.
6 I guess one way to describe this is to say that "every
7 harm must count."

8 For this reason, we agree with the Commission
9 that some form of modified real offense sentencing is the
10 most appropriate predicate for sentencing guidelines.

11 However, in view of our beliefs that the sentence
12 for any offense should reflect both the harms resulting
13 from the offense conduct and the conduct related to the
14 offense as well as the relative criminality of the offender,
15 the system outlined in the draft, in our view, will need
16 substantial modification before it will result in sentences
17 that accurately reflect how much harm resulted from an
18 offender's conduct and how serious a criminal committed
19 the offense.

20 Our principal concern is that the form of modified
21 real offense sentencing system set forth in the draft may
22 be too narrow. In this regard we have two primary objections.

1 First, we believe that the substantive definition
2 concerning the conduct that a judge may consider in sentencing
3 an offender excludes consideration of some particularly
4 relevant factors; and secondly, we believe that the framework
5 employed by the guidelines does not adequately address
6 the myriad of unique factual situations that may be confronted
7 at the time of sentencing.

8 The draft guidelines provide for sentences based
9 solely upon, "the conduct necessarily involved in the offense
10 of conviction" plus "the conduct done in furtherance of
11 the offense of conviction and any injuries resulting from
12 such conduct." Limiting sentencing solely to the conduct
13 of the offense and that done in furtherance of the offense
14 and the harms resulting therefrom will prohibit, we are
15 afraid, consideration of some particularly important
16 factors.

17 We urge the definition of conduct that is relevant
18 to sentencing under the guidelines be enlarged to include
19 any conduct that is related to the offense of conviction,
20 even if it is not -- even if it is not -- in furtherance
21 of that offense and any harms resulting from that conduct.

22 Consideration of related activity and resulting

1 harm is consistent with the view that the guidelines should
2 provide sentences that reflect not only the proximate harms
3 of the offense, but also -- and I think this is critical --
4 the true criminality of the offender.

5 Our second objection to the definition of relevant
6 conduct employed in the draft is that it allows consideration
7 only of, quote, "the threatened, attempted, or completed
8 injuries that result from the offender's conduct." It
9 does not allow consideration of harms that are not necessarily
10 threatened or accomplished, but which nonetheless are intended
11 by the offender.

12 In certain circumstances, these intended harms
13 may be extremely important in determining the true nature
14 of the offender's conduct. For example, you might have
15 a bank embezzlement in which somebody is simply after money
16 to buy a boat or to live better or to pay off a mortgage.
17 That is one type of bank embezzlement, involving "x" dollars.
18 You could have another bank embezzlement involving "x"
19 dollars, but the purpose of that might be to finance a
20 major drug organization; or to pay somebody to murder somebody.
21 I think that there ought to be a clear way in the guidelines
22 to recognize that the intended harm motivation of the person

1 is something that clearly ought to be identified.

2 Finally, it doesn't appear that the definition
3 of relevant conduct allows consideration of any risk of
4 injury or harm that may flow from the offender's conduct.
5 Consideration of this harm is critically important in certain
6 cases. For example, in toxic pollution cases, you may
7 have a situation where a toxic polluter engages in certain
8 conduct, and really what we are concerned about as much
9 as what was done is the enormous risk created by this conduct
10 to an environment, the people, the communities, or whatever.
11 So in that regard, we believe that figuring out some way
12 to add risk to the things to be considered is very important.

13 As to the framework of the guidelines, we agree
14 with the general concept of the draft guidelines which
15 establishes base values for various categories of offenses
16 and then enhance these values based upon relevant offense
17 characteristics. It is our view that such a framework
18 will work, but only if it assures that any harm caused
19 or risk or intended by a course of criminal conduct is
20 considered in determining appropriate sentences.

21 We recommend that the guidelines provide a sentence
22 enhancement for all conduct, either in furtherance of or

1 otherwise related to the offense of conviction and all
2 resulting harms -- accomplished, risked or intended. In
3 order to assist judges in deciding if certain conduct or
4 harms are in furtherance of or otherwise related to the
5 offense, the guidelines could retain a listing within each
6 offense category of specific offense characteristics which
7 are common to that offense category.

8 However, these listings would not be exclusive.
9 Rather, they would be supplemented by a table of general
10 offense characteristics that could be applicable to all
11 offenses.

12 Many of these general characteristics are already
13 identified in the draft guidelines and could be extracted
14 from the specific offense categories. In our written comments
15 we will provide to you a long laundry list of things that
16 we think you could include in pursuing this approach.

17 We recognize that the recommendations that we
18 are making making the modified real offense system employed
19 by the guidelines somewhat closer to a pure real offense
20 system. At pages 12 to 14 of the draft, four arguments
21 against a real offense sentencing system are set forth.
22 It is our view that none of these arguments would apply

1 with any greater force to the guidelines if our suggestions
2 were implemented with respect to the substantive definition
3 of "relevant conduct" and the framework employed in the
4 guidelines.

5 Let me briefly touch on the generic offense
6 categories. The use of generic offense categories simplifies
7 the use of the guidelines and is especially appropriate
8 with respect to Federal offenses. Other than the suggestion
9 that we previously discussed that there be a greater number
10 of categories or subcategories, we have only one additional
11 suggestion.

12 We believe the guidelines should provide that
13 an offender should be sentenced with reference to the offense
14 category which most accurately reflects the nature of the
15 underlying conduct and not necessarily the offense category
16 applicable to the offense of conviction.

17 The problem we see with a system that requires
18 sentencing pursuant to guidelines formulated for the
19 statutory offense of conviction is that it does not account
20 for the fact that Federal statutes often force a prosecutor
21 to select a charge that provides a basis for Federal
22 jurisdiction, but that does not accurately or adequately

1 reflect the true nature of the misconduct involved. This
2 is a fact of Federal life. Such charging limitations can
3 result in uneven and inappropriate sentences under the
4 system outlined in the draft. For example, if you had
5 a massive embezzlement and the prosecutor found himself
6 or herself limited only to the use of mail fraud, we might
7 artificially put a very large scheme into a smaller pigeon-
8 hole, resulting in the inability of the sentencing judge
9 to fully come to grips with the true criminality of the
10 offender.

11 If the offense categories are not reconstructed
12 based upon principal harms, but are maintained as set forth
13 in the draft, the guidelines should provide that the
14 sentencing judge must make a determination as to the offense
15 category which properly applies to a criminal offense.
16 The Commission may wish to establish as a general rule that
17 the guidelines which apply to the statutory offense
18 of conviction must be applied unless the sentencing judge
19 specifically finds that the statutory offense of conviction
20 does not adequately reflect the underlying criminal conduct.

21 Let me touch briefly on also now the judicial
22 function and the quantification of relevant harms. I think

1 I may be getting into something that was being worked on
2 with some questions that were being asked before I came
3 up here.

4 Our recommendations regarding the decisions
5 as to the conduct and harms that are relevant to sentencing
6 and as to the category of guidelines that are to be allowed
7 in a particular offense recognize the need to allow
8 flexibility in the application of the guidelines.

9 They also recognize that the needed flexibility --
10 and I would underline that word, "flexibility" -- is best
11 provided in our view by allowing sentencing judges latitude
12 to exercise their sound judgment as to the true nature
13 of the offense for which sentence is being imposed.

14 Similarly, we believe that it is absolutely
15 necessary for the guidelines to rely upon the sound exercise
16 of judgment by the sentencing judges in quantifying the
17 sanction units that will be attributed to many of the offense
18 characteristics and in assessing the degree to which these
19 sanction units will be increased or decreased because of
20 other relevant offense or offender characteristics.

21 Now, we are not suggesting that sentencing
22 judges be given unfettered jurisdiction or discretion

1 discretion to decide the values to be placed on relevant
2 characteristics. Rather, we recommend with respect to
3 most offense and offender characteristics the guidelines
4 provide a range of sanction units, or even a range of multi-
5 pliers that will be used by the sentencing judge when a
6 particular characteristic is found to be relevant to the
7 imposition of sentence. To guide judges -- and that is
8 what is important -- in determining how to value the relevant
9 characteristics, the guidelines should identify the relevant
10 criteria which should be examined -- delineate the range
11 of possible effects for each criterion listed and provide
12 some illustrative examples of conduct that fall at various
13 levels within the range.

14 Finally, we believe that the system we propose
15 will be readily accepted and implemented by the judiciary
16 more easily under this approach. It will continue the
17 better part of current sentencing practices -- namely,
18 the ability to construct sentences that reflect the particular
19 facts and circumstances of any one case. At the same time,
20 by limiting the effect of particular factors to narrow
21 areas within certain defined ranges eliminates the worst
22 of current practice -- namely, arbitrary, wholly inconsistent

1 treatment of the same factors by different judges.

2 Let me also touch briefly on the sentencing
3 procedures, which are of some concern to us. The preliminary
4 draft proposes a procedure for resolving disputed sentencing
5 facts in which the judge is to determine such facts by
6 using a preponderance of evidence standard. Commentary
7 in the preliminary draft further indicates that a hearing
8 is contemplated at which all parties will have the right
9 to present and to cross-examine witnesses, and that the
10 judge may admit all evidence that is relevant and reliable
11 except for that evidence that is barred by evidentiary
12 rules.

13 We are gravely concerned -- and this may be
14 an understatement -- about the proposed procedures. They,
15 in our view, would impose a new and quite possibly intolerable
16 burden on Federal prosecutors and the courts at the time
17 of sentencing proceedings. Furthermore, the procedures
18 might turn the sentencing proceeding into a mini-trial,
19 a result that is both unnecessary and in our view unwise.
20 Indeed, the burden of proof in evidentiary proposals
21 are so onerous as to render the draft guidelines possibly
22 unworkable from a law enforcement perspective.

1 Somebody remarked to me the other day that we
2 are going to turn sentencing over to magistrates, who
3 will be detailed by sentencing judges to conduct hearings
4 and report back facts, findings, recommendations, and all
5 the rest. We may be adding a layer of sentencing structures
6 and procedures that could very heavily encumber the system.

2S1 7 Additionally, we believe that the Sentencing
8 Reform Act itself adopted the procedural changes in
9 the sentencing hearing that Congress believed were needed.
10 Under the revised provisions of Rule 32 of the Federal
11 Rules of Criminal Procedure, the pre-sentence report is
12 required to include information regarding the offense and
13 offender characteristics and the guidelines that the
14 probation service believes apply. It can simply be taken
15 from there in terms of the sentencing process.

16 Other facets of the draft proposed procedure,
17 such as the adoption of a preponderance standard in
18 disputed fact situations, and the necessity for cross-
19 examination, are equally unwise. Present law, which operates
20 on a broader modified real offense basis than the more
21 formal one proposed by the draft, includes no such require-
22 ments. The draft explains this proposal by citing McMillan

1 versus Pennsylvania, which we respectfully believe is
2 inapposite. It is my view that McMillan was talking
3 about a situation where sentencing is going outside of
4 guidelines, not working within guidelines, and we would
5 respectfully request re-examination of McMillan as it
6 purports to be a basis for this requirement.

7 The recently reaffirmed "some evidence" standard,
8 which is what we are working off now, not the preponderance
9 of evidence standard, in our view is the appropriate standard
10 for sentencing hearings, and has been for years, and we
11 see no reason to change that now.

12 In sum, the entire procedural scheme, including
13 its stated burdens and the allocation of those burdens,
14 is contrary to applicable statutes, the case law, and in
15 our view, sound practical considerations. And I would
16 ask any other judges who are addressing this to be questioned
17 as to what their view is as to what procedural problems
18 this would cause.

19 We urge the Commission on our part to abandon
20 these proposed procedures and develop a new commentary
21 in which it notes that the questions of procedure and
22 evidence for resolving disputed sentencing facts are

1 left, as they always have been, to the discretion of the
2 court in light of 18 U.S.C. 3577 experience, and the body
3 of case law, which we discuss more fully in the written
4 submission that we present to you.

5 Mr.Chairman, I know you have many witnesses
6 today, and we all have busy schedules. With that, I would
7 like to finish my formal comments, and again we will be
8 submitting much more to you.

9 We again compliment you on the work that you
10 have done. We think it is workable; we think it is
11 definitely moving in the right direction, and with some
12 fine-tuning, we will be able to come forth with a product
13 that will serve the system of justice well.

14 Thank you.

15 CHAIRMAN WILKINS: Thank you very much, Mr.
16 Trott. We appreciate not only your assistance in the past,
17 but that of your staff and other members of the Department
18 of Justice. And we will study the submission that is
19 going to be submitted.

20 I just wondered in another area, if I could
21 just ask you, if you are speaking for the Department or
22 individually, what role should prison capacity play in

1 decisions that this Commission must make in drafting
2 guidelines?

3 MR. TROTT: Well, when you start talking about
4 the role that prison capacity should play, I think you
5 begin to put the cart before the horse. It is our view
6 that it is the job of the criminal justice system to identify
7 criminal offenders. It is the job of sentencing judges
8 to sentence those offenders in accord with the most appropri-
9 ate sentence to protect society, to pursue punishment
10 and all the other rehabilitative ideals, whatever you want
11 to express. And then it becomes the job of the Congress
12 and the Executive to find prisons to put people. And I
13 think that prison capacity ought to be driven by those
14 people who ought to be there, not by the artificial limitations
15 that we have to cope with today.

16 CHAIRMAN WILKINS: Thank you very much.

17 Any questions to the portside?

18 COMMISSIONER BREYER: I have several. On your
19 last point, what do we do about the statute which says,
20 "The sentencing guidelines prescribed under this chapter
21 shall be formulated to minimize the likelihood that the
22 Federal prison population will exceed the capacity of the

1 Federal prisons"? I mean, are we not supposed to take
2 prison capacity into account at all? I had thought that
3 Mr. Carlson put the matter very well when he said that
4 prison capacity should not drive the criminal justice system
5 or sentencing practices, but at the same time, prison capacity
6 cannot be ignored.

7 Do you agree with that formulation, or do you
8 agree with the statement in the statute?

9 MR. TROTT: I agree with everything Mr. Carlson
10 says. But let me tell you that there is no such thing
11 as prison capacity, Mr. Commissioner, because prison capacity
12 is changing, as Mr. Carlson continues to build that capacity
13 and add new prisons.

14 It is our view that with the additional moneys
15 that have come to us from Congress, that we will build
16 additional prisons, and it is our view as part of the Executive
17 Branch that we intend to pursue additional prison capacity.
18 But if you were to artificially decide that prison capacity
19 seems to be "x", we can guarantee you that it is going
20 to be "x"-plus in very short order, and we are going to
21 be doing everything we can to increase that capacity to
22 accommodate what this Commission believes ought to happen

1 to criminal offenders in the United States.

2 COMMISSIONER BREYER: I think that is good.

3 But I take it you think we should follow the statutory
4 sentence, the words that I read, which says we have to
5 take it into account -- unless you don't think it does
6 say that.

7 MR. TROTT: I always, Counsel, follow the law.

8 COMMISSIONER BREYER: All right. The other
9 thing which is much more significant to me -- and maybe
10 I'll find this out; I look with great anticipation to the
11 written comments, because from the oral comments, it sounded
12 as if you were going to urge us to go back to an approach
13 that I thought was very attractive conceptually, but that
14 we couldn't figure out how to work out, which was this
15 July 10th version of the guidelines, which hasn't appeared
16 because we couldn't figure out how to do it. And basically,
17 it sounded to me as if you were suggesting we go back to
18 that.

19 Now let me put to you what I think is the major
20 dilemma. You say, "Every additional harm should result
21 in some increase in punishment." And I thought about that;
22 that sounds attractive as a slogan. But the more I thought

1 about it, the more I thought that it probably isn't true,
2 either as a description of what practice is or what ought
3 to be. And moreover, I thought that it would produce an
4 impossible procedural dilemma.

5 If you are really serious, and the first part
6 of your remarks suggests you are serious, that judges are
7 to be instructed they must take into account every
8 additional harm that is caused by the defendant, then I
9 get into exactly the dilemma you were talking about in
10 the last part of your remarks, that of course, every
11 defendant will suddenly contest every fact in the pre-
12 sentence report that will result in an added time in
13 prison, and that I think is what has led judges, prosecutors,
14 defenders throughout the country to say the issue is not
15 whether you have a little more procedural protection or
16 a little less procedural protection; the issue is if the
17 defendant has an incentive to contest every minor aspect
18 of the case which will lead to some few more days, months
19 or weeks in prison, under any procedural system, you will
20 produce an unworkable set of hearings.

21 That, I think, is the practical administrative
22 dilemma that at least led me to think that a system which

1 is going to try to take into account in every individual
2 case every additional harm, no matter -- all the small
3 ones, big ones, et cetera -- will prove unworkable. You
4 suggest, well, don't have as much procedural protection.
5 But surely, you don't mean have none? Surely, you don't
6 mean the simple fact that a pre-sentence report says that
7 the person did thus and so is to be taken automatically
8 as showing it, without the judge giving him a chance to
9 show the contrary? He must have a chance. And as soon
10 as you admit that, I don't understand how it becomes
11 workable to tell the judges that they must take into account
12 every harm that is caused.

13 MR. TROTT: As usual, you have raised some good
14 points. I don't think we want to be automatic about this,
15 but we believe that at least every harm as I have outlined
16 it ought to be taken into consideration -- maybe not an
17 automatic attachment of additional sanctions, but ought
18 to be taken into consideration. The potential should be
19 there.

20 But let me tell you just from my own experience,
21 having gone through a change in California from an indeter-
22 minate sentence to a determinate sentence, we were

1 concerned that the determinate sentence hearing would turn
2 into some sort of a big flap over the probation reports.
3 And I can tell you that never materialized.

4 COMMISSIONER BREYER: But in California, first
5 of all, you have three definite numbers for each crime,
6 and it is a charge offense system, with aggravators or
7 mitigators, which by and large are left up to the judge;
8 he may or may not. Then, you have a special commission,
9 and the special commission looks and sees what he does
10 and decides whether or not it is disparate, and if they
11 think it is, they send it back to the judge. That is quite
12 different.

13 MR. TROTT: Well, I'm talking about whether
14 or not there is a lot of fighting over what is in the probation
15 report, because I can tell you that the probation report
16 establishes the predicate on the basis of which the judge
17 sentences. The probation report sets out all kinds of
18 facts and circumstances, and the amount of fighting that
19 goes on over the accuracy of those facts is minimal.

20 COMMISSIONER BREYER: But is the judge required
21 as to any specific fact to translate that specific fact.--
22 such as, for example, the bank robber elbowed somebody

1 on his way up to the bank line. Is he required by statute
2 or rule to increase the sentence in light of that specific
3 additional harm? I think the answer in California is no,
4 he is not required to do so. Am I right?

5 MR. TROTT: Well, you are probably right in
6 your use of the word "required". We will continue to work
7 with you to examine the questions that you raise.

8 CHAIRMAN WILKINS: Commissioner Nagel?

9 COMMISSIONER NAGEL: Prior to your arrival today,
10 Mr. Trott, we heard testimony from one of our distinguished
11 defense attorneys and from a former United States Attorney,
12 both advocating the same position. The argument made was
13 that in certain instances where there is substantial
14 cooperation, we should essentially allow the guidelines
15 to be trumped by plea agreement -- that is, 100 percent
16 reduction from whatever was the guideline sentence.

17 Given your extensive experience as a prosecutor,
18 do you have any comment on that and any advice for us?

19 MR. TROTT: We will be submitting that in writing.
20 It is lengthy, and I am afraid I would slow up your morning
21 by getting into that. It is a complex subject, but we
22 will be addressing that in writing very shortly.

1 CHAIRMAN WILKINS: Thank you.

2 Any other questions?

3 George?

4 COMMISSIONER MacKINNON: You pointed out that
5 intended harms may be important and ought to be separately
6 evaluated and added as a part of the basic character of
7 the individual that the judge would sentence for.

8 I think to a certain extent in our base offense
9 value that we have set for each of the crimes, we have
10 intended to incorporate that particular facet of a particular
11 crime, in other words, what it was aimed at, and if we
12 were to add something additional for it, that we would
13 be counting it twice.

14 Now, I am talking first of all about cases
15 like bribery or attempted bribery. It is just as bad for
16 a man to offer a Congressman \$100,000 to do something as
17 to actually pay him. And yet, he is being sentenced for
18 what he intended. And there are a number of crimes like
19 that elicited through Title XVIII. I just withdraw somewhat
20 from the fact that we can get every intended harm as a
21 separate additive to each of these offenses.

22 Do you still go along with the guidelines if

1 we thought that the base offense value at times included
2 that intended harm?

3 MR. TROTT: Well, our observation would remain
4 the same. We would hope that the opportunity would be
5 available under the sentencing guidelines to capture the
6 true criminality and the gravamen of the conduct that is
7 involved, and that in certain circumstances there would
8 not be an artificial limitation against considering
9 something like -- you might have a situation where you
10 found somebody committing an arms offense, and during the
11 probation report it surfaced that the reason why these
12 arms were being purchased was to start a race war to attack
13 a foreign country or something like that. As a sentencing
14 judge, I would be very concerned about that kind of stuff
15 and would hope that in sentencing, that I could take that
16 into consideration.

17 That's what I think we are getting at when we
18 make the suggestion. How you work it into the guidelines
19 may be a second question. We certainly don't want redundancy
20 or double-counting.

21 COMMISSIONER MacKINNON: Take the shipment of
22 arms to a certain, particular person. Wouldn't that be

1 generally covered by our base offense value?

2 MR. TROTT: What if it were an embezzlement,
3 and you found out the purpose of the embezzlement was to
4 get the money to buy the arms to start some sort of a war.
5 Do you reach that far?

6 We find frequently that when you probe deeply
7 into the activities of criminal groups especially, that
8 their long-range, their outer limit goals and motivations
9 frequently are not tied into what you catch them doing;
10 but if they were to follow along down those lines, there
11 are other things that are involved, and we simply hope
12 that artificially a judge is not sealed off from again
13 being able to appreciate the true criminality of a person.

14 Now, again, the objection immediately arises
15 as well that this is real offense sentencing, isn't it
16 and --

17 COMMISSIONER MACKINNON: Of course, Section
18 3577 which you refer to, we had some discussion about out
19 in San Francisco, and it certainly permits a sentencing
20 judge to take a lot of factors like that into consideration.
21 And I suppose that that's about what you are requesting.

22 MR. TROTT: That's probably a fair way to

1 characterize it.

2 CHAIRMAN WILKINS: What we need to do is include
3 motive -- isn't that what we are saying, Mr. Trott -- motive,
4 and allow for motive to be reflected in the sentence. The
5 embezzler who embezzles to fund a drug deal perhaps is
6 different than the embezzler who embezzles to buy a color
7 television set.

8 MR. TROTT: That may be another way to describe
9 it, yes.

10 CHAIRMAN WILKINS: Any questions from other
11 Commissioners?

12 Commissioner Corrothers?

13 COMMISSIONER CORROTHERS: Mr. Trott, I believe
14 you indicated an objection to the preponderance standard.
15 Could you summarize your ideas as to the appropriate standard
16 to be utilized?

17 MR. TROTT: The current standard as I understand
18 it is that there must be "some evidence". That's the standard
19 we have been using for years. It appears to have worked
20 fairly well, and we would suggest that that be considered.
21 In our written comments, we have three or four paragraphs
22 on that that you might like to read.

1 COMMISSIONER CORROTHERS: Okay, thank you.

2 CHAIRMAN WILKINS: Commissioner Block?

3 COMMISSIONER BLOCK: Mr. Trott, I want to go
4 back again over this question about "every harm must count"
5 and ask something which bothers me about it, and that is
6 sort of its practical consequences.

7 Where is the cutoff point in terms of practicality
8 from your point of view? Where do you see it -- it sounds nice
9 and may have some theoretical justification -- although
10 I think that its theoretical underpinnings are somewhat
11 weakened by a comment made by Judge MacKinnon that essentially
12 the base value of an offense should include the anticipated
13 harms, and that punishing for outcomes in addition to that
14 punishes events which I think have some element of seren-
15 dipity. That seems to me a problem with it. But getting
16 away from its theoretical concerns and more to the practical
17 concerns, what are the practical aspects of having these
18 customized sentences where every criminal essentially gets
19 a different sentence depending on what their scores are,
20 and they will differ by a couple months here and a couple
21 months there -- what is the real practical aspect of that
22 in terms of use of scarce resources? I agree that prison

1 capacity should not drive sentences, but I also don't want
2 to sentence taxpayers. And in that sense, I think we have
3 to answer what are the practical consequences of making
4 every harm count.

5 MR. TROTT: You don't want to sentence taxpayers?

6 COMMISSIONER BLOCK: I don't want to sentence
7 taxpayers. I think we have to justify what are the practical
8 consequences of making every harm count.

9 MR. TROTT: If I can start with your last point
10 first, I think we sentence taxpayers by releasing dangerous
11 people back out to the streets where the taxpayers can
12 be preyed upon by them, number one. Number two --

13 COMMISSIONER BLOCK: I wasn't suggesting that.

14 MR. TROTT: I know you weren't, but in terms
15 of prison capacity.

16 But in addressing the practical consequences
17 of this, I have tried to take this document and maybe do
18 the impossible -- pretend that I was a sentencing judge
19 and ask myself could I do this; is this workable, is this
20 practical. And I am the first one to admit I have never
21 been a judge, and so I have trouble doing it that way.
22 I might suggest that other judges sit down and attack

1 this from the standpoint of having received this in the
2 mail or something like this in the mail and being told,
3 "Okay, do this," so it is not a question anymore of whether
4 I like it, whether I want to do it, whether this was a
5 gigantic mistake, whether the legislation had never been
6 passed -- but okay, now it is my job, and can I work with
7 this and can I do it.

8 My answer is yes, and I don't think it is imprac-
9 tical, and I think this is what judges do now when they
10 sentence. They take a look at the offense, they take a
11 look at the offender and the offender's characteristics,
12 and they go through, sometimes very, very quickly, the
13 kinds of things that you are talking about. I mean, we
14 know in a minute what somebody is up to when we look at
15 the charge, when we look at the plea, when we look at the
16 conviction, listen to the evidence or read the pre-sentence
17 report. Then it is simply a question of plugging that
18 into appropriate categories that enable us to capture the
19 true criminality and give us the ability to sentence in
20 connection therewith.

21 I'll tell you one approach that I take to this.
22 I think the American criminal justice system -- and I am

1 not complaining -- has contained for years every option,
2 every available option, for the people who need a break.
3 And there are people who need a break. But it has failed
4 to contain sufficient options for the rest of us, who need
5 a break from some offenders. And what I am saying here
6 is that what we are trying to do is make sure that we can
7 capture the outer limits on a sentencing and not necessarily
8 say that a sentence must be at the outer limits, but that
9 somehow the capacity is there to capture what this person
10 is, what this person has done, and what this all means.
11 And the practical part of that becomes extremely complex
12 and maybe burdensome to the point that it is not worth
13 it if you start having sentencing hearings, cross-examination,
14 introduction of facts, mini-trials. Then you are in trouble.
15 But if you use, if you continue to use the current
16 process with some evidence, and the discretion of the judge,
17 the pre-sentence report with what is required to be in
18 there, the option of defense lawyers to tackle some fact
19 in the pre-sentence report and say, "Wait, whoa, time out;
20 that's not right," and then the willingness, the ability
21 of a judge to tackle it on what the disagreements are,
22 rather than constructing the whole thing, I don't think

1 you have practical problems.

2 COMMISSIONER BLOCK: I'm the last one to complain
3 about crime control. But what bothers me is the use of
4 the slogan of "every harm counts" and to use up prison
5 capacity for that slogan. I mean, that's what bothers
6 me, not crime control. I am the last one to complain about
7 crime control. You want high sentences, that's fine.

8 MR. TROTT: Well, we're flexible. Maybe not
9 every harm "must" count, but maybe every harm, however
10 you describe that, ought to be available to count under
11 the guidelines if a judge believes they ought to count.

12 COMMISSIONER BREYER: Well, that's quite a
13 different story. That is quite a different and importantly
14 different story. As soon as you start talking about
15 every harm "may" count, and you start throwing in a lot
16 of other things, et cetera, then of course what you are
17 doing is you are handing to the judge a list of things
18 which the judge in his discretion may decide to use to
19 aggravate or mitigate the sentence; a system much closer
20 to the present.

21 Now, if you add to that the notion that the
22 process that is due is a function of the importance of

1 the issue and the nature of the dispute, et cetera -- something
2 which is captured, I think, in a case called "Fatica"
3 (phonetic) -- if in fact you add that to it, you have of
4 course a system that is more workable. But the price that
5 you are paying for that word, "may", and for the flexible
6 due process is that you have limited drastically the extent
7 to which your change through the guidelines cabins the
8 discretion of the judge and departs from the present system.

9 That doesn't bother me, that last fact, but
10 I am just telling you the importance that one might attach
11 to a difference between "may" take the harms into account
12 and "must" take the harms into account.

13 MR. TROTT: I guess what I am demonstrating
14 is our ability to work with you and recognize your
15 concerns. I'm trying to just think off the top of my head
16 and go along these lines. But I think our position still
17 remains fairly clear on this.

18 CHAIFMAN WILKINS: Thank you very much.

19 MR. TROTT: Thank you very much, Mr. Chairman.
20 I appreciate this opportunity.

21 CHAIFMAN WILKINS: Our next witness is the
22 United States Attorney for the Eastern District of

1 Virginia, formerly the Chairman of the President's
2 Commission on Pornography, Mr. Henry E. Hudson. Mr. Hudson,
3 thank you very much for attending today, and we look forward
4 to hearing from you.

5 MR. HUDSON: Thank you, Mr. Chairman and members
6 of the Commission. I appreciate the opportunity to address
7 you.

8 Initially I want to tell you that although I
9 have rather thoroughly surveyed the guidelines, I do not
10 purport to be an expert on their application. And also
11 I am not here testifying on behalf of the Department of
12 Justice, but only as one individual prosecutor.

13 By way of general comments, one of the initial
14 impressions I had from reading over the guidelines and
15 discussing them with other members of my staff, and judges
16 and lawyers in the Eastern District of Virginia is that
17 perhaps the guidelines may promote uniformity of disposition
18 at the expense of removing the human element from the
19 sentencing process. I think everyone here who has been
20 involved in criminal litigation has had just a visceral
21 reaction to a defendant that you received either from his
22 demeanor in the courtroom, the contrition that he or she

1 expresses, or perhaps the reaction that you get to the
2 victim's own personal rendition of what happened.

3 I can think of numerous times, particularly
4 when I was a State prosecutor, where I would write down
5 on my yellow pad before I went to court what I thought
6 may be an appropriate sentence to recommend to the judge,
7 and when I arrived in court, heard the defendant's elocution,
8 or heard further testimony from the victim, I changed my
9 mind completely about the approach to the case; sometimes
10 thought a greater sentence, and at times a lesser sentence
11 was appropriate.

12 So I think that these kinds of judgmental
13 impressions, even though they are at times deceiving,
14 are an integral part of the sentencing process.

15 In reading over the guidelines, I hope that
16 there is adequate provision for just these types of impres-
17 sions on the part of the court. I think that the disposition-
18 al formula that you have devised under the acceptance of
19 responsibility, psychological injury to the victim, and
20 the latitude you give to the court in converting the
21 sanction units into a sentence provide a certain amount
22 of discretion. But I share the comments of Mr. Arcara

1 that there needs to be a little bit wider discretion on
2 the part of the court for imposing the mitigating, aggravating
3 factors as well as the conversion process, because there
4 is this human element that sometimes defies numerical
5 capture.

6 My general reaction to the guidelines is a very
7 favorable one. I am a very strong proponent that certainty
8 of incarceration is probably the strongest deterrent to
9 criminal activity that we can possibly develop. I think
10 that even the probability of a very short-term incarceration
11 has a far more deterrent effect than the possibility of
12 long-term incarceration.

13 I have never in my 13 years as a prosecutor --
14 and I have tried hundreds and hundreds of cases -- ever
15 heard a defendant express any type of remorse or displeasure
16 over the possibility of community service or home detention.
17 Now, they play an important part in the sentencing process;
18 I don't quarrel with that. But I think where you target
19 certain types of offenses that you truly feel strongly
20 about deterring, I think the probability of some type of
21 sanction is crucial.

22 Some people don't believe that people actually

1 take into consider the potential risk of incarceration
2 in devising a scheme of criminal activity. Well, in the
3 10 years I was a prosecutor in Arlington County, Virginia,
4 the adjacent jurisdiction, I could see crime patterns
5 changing constantly based upon the viewpoints of the courts
6 or the aggressiveness of prosecutors. We had a problem
7 with residential burglary, problems with drug trafficking
8 in the Northern Virginia area in the early 1980s, and as
9 courts began uniformly and without exception giving
10 residential burglars and drug traffickers penitentiary
11 sentences, we found a drastic reduction in this type of
12 criminal activity.

13 So I think there is an element of risk calculation
14 that is an important part of the mindset of people that
15 want to engage in criminal activity.

16 And as I look at the sentencing patterns, both
17 Federally and in the State system today, I believe the
18 very wide disparity you see with respect to fraud types
19 of offenses, even people with large amounts of theft in
20 the white collar area, really demands that there be some
21 type of mandatory sanction for people who steal large
22 sums of money.

1 In addition to the type of deterrent effect
2 that mandatory sentencing can have with respect to a system
3 generally, it has a tremendous amount of effect with respect
4 to specific offenses. Probably the most popularly cited
5 example of that is the public reaction to the mandatory
6 sentences in most jurisdictions to driving under the influence
7 of alcohol. I think almost every jurisdiction now has
8 some type of mandatory period of incarceration for driving
9 under the influence of alcohol, and it has drastically
10 reduced -- I certainly can speak personally for Virginia --
11 the incidence of drunk driving.

12 I hope that the types of mandatory sentencing
13 provided by these guidelines will have the same effect
14 on fraud, racketeering and drug trafficking.

15 Another commendable aspect of the sentencing
16 guidelines is the fact that it seems to offset what everyone
17 knows to be the personal prejudice of courts, the backgrounds
18 and experience that go into the sentencing process. I
19 believe that everyone, no matter how much you try to set
20 it aside, has some predispositions, predilections, and
21 prejudices that go into the sentencing process. I have
22 seen it over the course of the years in numerous courts;

1 you all have, too. And these guidelines, I think, set those
2 aside very well.

3 The area which I believe is best affected by
4 the guidelines, as I mentioned to you, is in the white
5 collar crime area. Unfortunately, those people that are
6 involved in white collar crime more frequently than not
7 are people that have an otherwise good background. They
8 are people who otherwise meet the profile for probation.
9 They are well-educated; they have status in their community;
10 they have had occupational success. The guidelines sheer
11 away that mantle that sometimes immunizes these people
12 from incarceration and treats them like any other type
13 of criminal offenders.

14 A couple of specific sections I wanted to comment
15 on. First of all, section (b) (211) dealing with theft.
16 In my opinion, there should be an aggravating factor
17 included for what in Virginia we would call a "larceny
18 from the person"; in other words, purse-snatching or
19 pickpocketing. As you all know, these offenses fall short
20 of robbery because they are not a forcible dispossession
21 based upon threats or intimidation. But yet I think they
22 are a much greater trespass on the victim than the average

1 type of theft, and I would like to see some type of provision
2 for additional aggravating units of punishment added when
3 that is found in a criminal offense.

4 Secondly, in section (b) (221) under burglary,
5 it has been my experience that a burglar who carries a
6 firearm, whether or not he presents it, poses a tremendous
7 threat to the occupant, particularly when the building
8 being burglarized is a dwelling. And I would think that
9 the Commission should seriously consider adding some type
10 of specific characteristic unit for the carrying of a
11 firearm in the commission of a burglary.

12 I want to touch also a little bit on plea agreements.
13 I certainly an indelibly on record against the injudicious
14 use of plea bargaining, both politically and professionally
15 on record against it.

16 However, I also recognize that negotiated pleas
17 are a very important part of the criminal justice system.
18 The sentencing guidelines in my view are going to fundamentally
19 change our entire approach to plea negotiations.

20 Utilizing the modified real conduct approach
21 which I think is certainly appropriate, I think prosecutors
22 have very limited latitude in negotiating on the basis

of a

1 of the base offense value and the aggravating offense
2 characteristics and still remain within the guidelines.

3 I believe that if a prosecutor attempted, by
4 agreement, to bargain away the application of the
5 aggravating factors, a court on that basis alone could
6 reject the plea agreement.

7 One of the main avenues open for plea negotiations
8 under the guidelines is the units for cooperation. And
9 I concur with Mr. Arcara that I believe that 100 percent
10 latitude should be afforded for negotiations for cooperation.
11 Undoubtedly, in organized crime and more clandestine types
12 of criminal activity, the only way a prosecutor can possibly
13 get convictions is to give substantial consideration for
14 cooperation. And certainly, the risks inherent in cooperation
15 very frequently warrant that type of consideration. So
16 I join Mr. Arcara in that recommendation.

17 But aside from specific units for cooperation,
18 there is not a great deal the government under these
19 guidelines can offer a defendant as an incentive to enter
20 a plea of guilty that he or she cannot obtain based upon
21 the merits of the case, in other words, proof of mitigating
22 factors. The prosecutor could dismiss charges and thereby

1 reduce the number of base value points, or I suppose where
2 there are multiple counts of an indictment, a prosecutor
3 could dismiss one or more of the counts, reduce the base
4 value and aggravating factors attendant to that particular
5 count. But that practice seems to be somewhat at variance
6 with the idea of a real conduct analysis, because again
7 the prosecutor is attempting to shield from the court's
8 consideration aggravating parts of the offense.

9 I think there is even greater limitation placed
10 on the prosecutor as far as sentencing bargaining. Unless
11 the Commission is willing to recognize plea negotiations
12 as being a permissible reason to deviate from the sentencing
13 guidelines, there is very little liberty a prosecutor can
14 take in that area. If the Sentencing Commission wishes
15 to allow plea negotiations to be an area that would take
16 the case outside of the sentencing guidelines, if it were
17 done without just cause, I believe it could very well undermine
18 the entire Sentencing Act.

19 There are problems with that as well. If the
20 Commission requires a plea agreement to be outside of the
21 plea guidelines be judicially found to be an appropriate
22 exercise, the prosecutor would be put in the unfortunate

1 position of having to represent to the court at the time
2 of the plea his or her rationale for the plea agreement.
3 If the plea agreement is rejected or withdrawn, then the
4 defendant would have the advantage of knowing the prosecutor's
5 self-perceived deficiencies in their case.

6 Another approach, I suppose, would be to allow
7 the prosecutor to submit in camera to the court the rationale
8 for the plea agreement, and if the court accepted that
9 rationale as being appropriate, the court could put on
10 the record that it finds that justice warrants that disposition.

11 I think a lot of judges would feel like that
12 may be an unprecedented participation on their part in
13 the plea bargaining process and would feel very uncomfortable
14 with it.

15 I think a compromise approach might be to allow
16 prosecutors to have a certain number of units which they
17 could use in plea negotiations. I think that if the Commission
18 accepts the notion that negotiated pleas are an integral
19 part of the criminal justice system and that it not only
20 at times furthers judicial and prosecutorial economy, but
21 many times prevents a case with some type of evidentiary
22 defects to result in a conviction that might otherwise

1 result in the case being totally lost -- I don't think
2 that plea negotiations strictly represent an attitude
3 on the part of the prosecutors to dispose of cases injudicious-
4 ly. There are many times where evidentiary defects in
5 a case would otherwise allow a defendant to totally go
6 free. Therefore, I think the entire system, the victim
7 and everyone involved is well-served at times by negotiated
8 dispositions. And I believe that the guidelines could
9 best accommodate this by allowing a prosecutor to have
10 a certain number of points toward the overall sanction
11 that that prosecutor could negotiate as a part of a plea
12 agreement.

13 Finally, the staff of our Commission has asked
14 me in my former capacity as Chairman of the Attorney General's
15 Commission on Pornography, to comment on the sentencing
16 guidelines on obscenity.

17 The Commission on Pornography heard a lot of
18 testimony concerning the disparity in sentencing practices
19 in obscenity cases. In fact, one of the reasons that was
20 often cited to us why there are so few obscenity prosecutions
21 in the United States is the belief on the part of many
22 prosecutors that the infrequency of incarceration does

1 not warrant the expenditure of the judicial resources.

2 It was the recommendation of the Commission,
3 and I believe it was forwarded to your Chairman, that the
4 Commission consider a provision that a person convicted
5 a second or subsequent time of a Federal violation of
6 obscenity laws with respect to adult materials receive
7 a minimum mandatory one year of imprisonment; and secondly,
8 that individuals convicted of trafficking in child pornography
9 also receive a mandatory period of confinement.

10 From my reading of the guidelines, it would
11 appear that the Commission has definitely adopted the latter
12 recommendation, and your guidelines would appear uniformly
13 to provide for incarceration for purveyors of child
14 pornography.

15 However, with respect to those people trafficking
16 in adult pornography, as I interpret your guidelines, it
17 would only mandate one year of confinement for a recidivist
18 pornographer -- or rather, obscenity trafficker -- whose
19 materials exceeded \$50,000 in value.

20 In fact, as I read your guidelines, if the retail
21 value of the material were under \$10,000, a distributor
22 with a prior conviction could avoid any type of confinement

1 for his or her second conviction. In order to prevent
2 this occurrence with respect to obscenity offenses as well
3 as other similar types of crimes, I would suggest that
4 the criminal history score for a prior felony conviction
5 which may have resulted in probation or something short
6 of incarceration be increased. That would in my view
7 achieve the goal of the Attorney General's Commission on
8 Pornography.

9 On balance, again as an individual prosecutor,
10 I very favorably receive the sentencing guidelines. I
11 think that I mentioned certainty of punishment is important.
12 I think it provides for uniformity of disposition, and
13 I think that prosecutors everywhere, with some refinements,
14 welcome the work of this Commission.

15 Thank you very much.

16 CHAIRMAN WILKINS: Thank you, Mr. Hudson.

17 I appreciate the work you have obviously done
18 in preparation for the testimony you have given us today,
19 and the other assistance that you have given us.

20 As I take it some guidelines have an in/out
21 line, where there is a presumption of probation or a presump-
22 tion of going to jail. Ours do not do that. Even in

1 areas where probation is available, there is also equally
2 the option for the judge to sentence to imprisonment. And
3 I take it you like this approach that doesn't provide for
4 a hard in/out line?

5 MR. HUDSON: Yes, I do. But I think in your
6 comments also, the commentary that accompanies the guidelines,
7 you mention that with respect to certain types of offenses --
8 I believe tax evasion was one of them -- that it is your
9 intention to provide for certain minimum mandatory incarceration
10 tion in every case, and that I believe has the type of
11 deterrent effect that one needs to achieve in that area.

12 But I believe the human element, just the
13 expressed contrition, or the horror that a victim recites
14 to the court, is something that has got to be factored
15 in; and I would hope in that latitude that the judge
16 has in converting to the sanction units provides adequate
17 latitude.

18 CHAIRMAN WILKINS: Thank you very much.

19 Any questions from Commissioners to my right?

20 (Pause.)

21 CHAIRMAN WILKINS: Portside?

22 Commissioner MacKinnon?

1 COMMISSIONER MacKINNON: Counsel, do you believe
2 that the guidelines as you have read them comport with the
3 statute?

4 MR. HUDSON: In what respect, Judge?

5 COMMISSIONER MacKINNON: Well, generally. We
6 all recognize in this country that a lot of people, and
7 I'd say the majority of them, believe that you can accomplish
8 anything by a lawsuit or a new law. And they have drafted
9 a pretty tight statute here, haven't they?

10 MR. HUDSON: Yes, sir.

11 COMMISSIONER MacKINNON: And I just wondered
12 what your observation was, if you thought that we had
13 complied with the statute.

14 MR. HUDSON: There is no question that the guidelines
15 as presently drafted in my mind, as I interpret them Judge
16 MacKinnon, comport with the statute, yes, sir.

17 COMMISSIONER MacKINNON: The next question I
18 had was about your comment on white collar crime and coopera-
19 tion of up to 100 percent, especially where there was some risk
20 in the cooperation of some person after he had come
21 into the criminal justice system. What would you think
22 would be an appropriate sentence for Mr. Boesky, recognizing

1 that he is cooperating and did cooperate, apparently? What
2 guideline do you think we ought to have for that offense?

3 MR. HUDSON: Judge, I don't know what I have
4 done to warrant this type of question, sir.

5 (Laughter.)

6 MR. HUDSON: But I believe if I were the sentencing
7 judge in that case, irrespective of the extent of his
8 cooperation, he would have to serve a substantial period
9 of incarceration.

10 COMMISSIONER MacKINNON: It's a species of fraud,
11 isn't it?

12 MR. HUDSON: There is no question that that
13 is the quintessence of fraud. I suppose -- and I guess
14 there are exceptions to every observation, Judge -- but
15 the example that I am sure Mr. Arcara and myself are thinking
16 of is the individual who may be a street-level distributor
17 for a major drug trafficker. And we all know that no matter
18 how careful one may be in their placement of an individual
19 in a penal institution, it is awfully hard to safeguard
20 them against retribution. And sometimes the only way that
21 you can convince that person to testify is by ensuring
22 them that they are not going to be incarcerated.

1 I'm not saying that it is totally right, but
2 I am saying it is the only mechanism by which we can uproot
3 organized crime and clandestine organizations.

4 But the type of surface tension in my observations
5 between the necessity for mandatory sanctions for white
6 collar crime and the cooperation that that particular
7 individual had for the government is difficult to resolve.
8 It is a tough dilemma, Judge. I don't know, sir, what
9 the answer is.

10 COMMISSIONER MacKINNON: Of course, the risk
11 that he has been involved in is rather minimal --

12 MR. HUDSON: I would think so, by comparison.

13 COMMISSIONER MacKINNON: -- in wiretapping
14 and bugging certain conversations.

15 My last question relates to the Commission on
16 Pornography, which you chaired. I wonder -- and I haven't
17 read it, but of course I will, and hope to in due time --
18 I wonder if you got into the participation of organized
19 crime in obscenity and pornography?

20 MR. HUDSON: Yes, sir, we did.

21 COMMISSIONER MacKINNON: Thank you.

22 CHAIRMAN WILKINS: Thank you very much, Mr.

1 Hudson.

2 MR. HUDSON: Thank you, Judge.

3 CHAIRMAN WILKINS: Our next witness is Mr.
4 Anthony Travisono. Mr. Travisono is Executive Director
5 of the American Correctional Association. We are delighted
6 to have you with us.

7 MR. TRAVISONO: Good afternoon.

8 Thank you, Mr. Chairman, for the opportunity
9 to allow the American Correctional Association to offer
10 testimony regarding the recently published preliminary draft
11 of the United States Sentencing Commission's guidelines.

12 The work involved in the first draft is enormous,
13 and we congratulate the Commission and staff for a remarkable
14 effort.

15 My testimony today is based upon a correctional
16 point of view. And if you watched the football game last
17 night, Joe Montana during those last waning minutes was
18 trying to get a pass received by one of his best. He
19 kept throwing the ball over, and the receivers just could
20 not run fast enough to get that ball. Well, they lost.
21 The Giants won, and Joe Montana lost.

22 Well, from our point of view, corrections has

W. S. . . .

1 always lost. We have never been able to "catch that pass",
2 because the family of court, the family of judges, the family
3 of prosecutors and all throw that ball just a little beyond
4 our reach, and we have always been behind.

5 And to answer part of your question on capacity
6 driven, should you be responsible, we would like very much
7 to conceive of you as being a partner so that we couldn't
8 be always behind. Now, I'm asking you to overturn 200 years
9 of history, which is almost impossible to do. But the correc-
10 tional family has always been several years behind the flow
11 of justice. And as Norm Carlson mentioned this morning,
12 he is 50 percent over capacity. He thought maybe 20 percent
13 would be okay.

14 Well, in many States, 50 percent would be okay,
15 because as you are well aware, we are in many instances
16 70 and 80 and maybe 100 percent.

17 So my testimony is given from that point of view,
18 that we would like to become a part of the family and a
19 part of the family that is thought of up front rather than
20 behind as in the case where, in the case of California,
21 for eight or nine years, they have built no institutions,
22 and the California system is 100, 200 percent overcrowded.

1 And now they are building them like mad, because they are
2 trying to catch up. Many States are in that ballgame, so
3 that capacity problem is certainly a problem to us.

4 So with all of that, I'd like to begin some thoughts
5 -- and I have it all in writing, and I will submit it to
6 you, and I won't take your time to read all of it. But
7 we have been concerned with this Act since 1978 when it
8 was first being discussed as Senate 1437, particularly on
9 the guidelines, and we have kept abreast of this all the
10 while it was developing. And we are acutely aware that
11 with the fate of the United States Sentencing Commission,
12 Judge, and its work goes the fate of Federal corrections
13 and as well the State and local corrections in due time.

14 When Congress established the Sentencing Commission
15 and gave it unusual and significant power, it also placed
16 all States on notice that sentencing guidelines will or
17 may be the way of the future.

18 The concept of the Act and the only known reasons
19 for its existence were basically twofold, as we all understand
20 equity in sentencing by reducing disparity and certainty.

21 From our point of view, there is no science,
22 nor is there an art or any legal documents developed by

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END

1 anyone that can justify a sentence length and its performance
2 to a specific goal, with the exception of life without
3 parole and the death penalty.

4 Sentence lengths are still mired in folklore,
5 a folklore that often took into account the heinousness
6 of the offense, emotion of the offense, and the emotion
7 of the time. We as a society will perhaps never be in a
8 position to have a system that satisfies everyone. At best,
9 the systems we develop will only alienate a few.

10 Our crowded prisons will be expected to do a
11 job of deterrence through longer sentences, but that job
12 really belongs to public policy if the quality of life in
13 the community is to be assured.

14 So while the restricting of sentencing discretion
15 and the elimination of community control supervision are
16 intended to ensure greater fairness in sentencing, they
17 could mean that all offenders would spend more time in our
18 overcrowded prisons, thus diminishing their chances of develop-
19 ing self-responsibility.

20 As correctional professionals, we have always
21 had difficulty accepting the negative criticism that so
22 often calls disparity a problem of judges and

1 paroling authorities. The great majority of disparate
2 decisionmaking has come from prosecutors and defense counsels
3 who participate in plea and charge bargaining prior to court
4 trials.

5 We in corrections have always been told -- and
6 forced to accept the idea -- that prosecutors need the widest
7 berth possible to get the offender to trial. We have been
8 told that it is not the length of the sentence that is the
9 most important aspect of a case, but rather the certainty
10 of punishment. If this is indeed true, the sentence lengths
11 outlined in the preliminary draft of the guidelines are
12 not as important to this great debate as what happens before
13 the trial even begins. If science can't give us answers,
14 and if the practices that drives the entire sytem is plea
15 or charge bargaining, then the U.S. Sentencing Commission
16 need not burden corrections with these enormous increases
17 in sentence lengths. Correctional professions agree that
18 certainty of punishment is more significant than length
19 of sentence.

20 Further, it appears that the preliminary draft
21 has set up an extremely complicated process with several
22 quality checkpoints along the way. The reason for these

1 checkpoints appears to be heading off the inevitable --
2 that is, the concept of reducing disparate sentencing will
3 inevitably be compromised because thousands of persons,
4 at least in the total family, who will be interpreting the
5 guidelines once they are in place. If the guidelines have
6 several required steps but still allow flexible interpreta-
7 tion, it is conceivable that disparate sentencing will be
8 worse under the guidelines than under the present system.

9 Over the past 12 years, the American Correctional
10 Association has developed standards for the operation of
11 correctional facilities and agencies. One of our goals
12 during this developmental process was to make the standards
13 uncomplicated, one-sentence thoughts so that the confusion
14 of interpretation would be held to a minimum. Yet it is
15 still necessary to send out our one-sentence standards with
16 a one-paragraph discussion and generally a two- to three-
17 paragraph interpretation of the standard's intent in order
18 to avoid confusion.

19 With as many principals on the scene -- judges,
20 prosecuting officers, probation officers, defense counsel
21 and others -- the flexible interpretation of the guidelines
22 could turn out to be a nightmare that the Commission

1 and corrections will have to live with on a daily basis.

2 There are other concerns. For example, community
3 control supervision is a correctional program with an honorable
4 history of about 110 years, and its proposed elimination
5 has caused alarm in the criminal justice community. Correc-
6 tions professionals believe in community control supervision
7 as a positive reinforcement to good behavior in prison and
8 as an aid to regaining personal responsibility.

9 No matter how diligent and careful we are in
10 fixing and enforcing guidelines, the elimination of community
11 control for some offenders seems bound to result in longer
12 prison terms.

13 Fairness -- the elimination of sentence disparity --
14 may be attained at the cost of ratcheting all sentences
15 upward. The current guidelines appear to begin this process.

16 Although numbers can be changed, and I hope that
17 they will be changed, those suggested will add a great
18 burden to correctional facilities. I say this because today
19 in this country there is a great outrage over offenders
20 such as drug offenders, career criminals, white-collar
21 criminals, and on the local level, drunk drivers. When
22 the public is in a punishing mood, the net result inevitably

1 will be longer sentences, and this mood will be reflected
2 in sentencing guidelines over the years, not subject to
3 mitigation by community control. Longer sentences are not
4 nearly as great a deterrent as swift and certain punishment.

5 Community control supervision is needed by all
6 releasees because it is unwise to simply free a prisoner
7 who has served a long term of two years or more. Such an
8 offender inevitably becomes institutionalized in outlook
9 and cannot function properly if all structure is suddenly
10 removed. Think of the individual who has served, say, eight
11 years and during that time has become alienated from family
12 and the community. He or she is released with a bus ticket,
13 a suit of clothes, and a few dollars. He or she will need
14 help in making the kind of positive connections to go on
15 living. Without the guidance of an experienced community
16 control officer, that individual has little chance for
17 success.

18 So we believe in a system of gradual decompression.
19 But we believe that all offenders who are released should
20 be under community control and not just a few, as the Act
21 indicates.

22 Part of your responsibility is to suggest to

1 Congress some sections of the law that may be seen in the
2 best interest at this time. One of these areas is, as I
3 mentioned earlier, on community control, we recommend that
4 community control for all persons serving one year in prison
5 be given at least a period of time on community supervision --
6 not only for violent offenders and drug dealers.

7 I think the public expects the criminal justice
8 system to protect it. The elimination of community control
9 supervision does not ensure much safety to the general public.
10 Recent studies such as the Figgie Report, "A Search for
11 Justice and Safety", indicates that the public wants a community
12 supervision and control, and that they feel it does aid
13 in deterring crime and in helping the offender accept self-
14 responsibility and self-discipline.

15 We are hoping that through corrections that our
16 recently-adopted policy statements will make a difference
17 in the community. These policy statements speak to the
18 issue of community control.

19 Considering the language of the Act, the sense
20 of the Senate resolution and the draft guidelines, those
21 offenders sentenced to a term of imprisonment for more than
22 one year will be either among the more violent or those

1 who are more likely to recidivate. Whether one views
2 post-release supervision as a means to protect the public
3 or as a vehicle to aid in the transition back to society,
4 it is clear that both of these sets of offenders require
5 this supervision.

6 Finally, I note that the Commission has wisely
7 concluded in Chapter V that a revocation mechanism -- as
8 opposed to the Act's contempt procedure -- is the more
9 appropriate way to sanction violations. The Commission
10 has correctly anticipated the amendment to 18 U.S.C. section
11 3583(e) contained in the Anti-Drug Abuse Act. But they
12 should go a step further and urge Congress to amend the
13 Act to have an administrative agency, rather than the
14 courts, as the appropriate entity for handling such revocations.

15 I think the courts are sufficiently burdened,
16 as they are now, and need not carry this extra responsibility.

17 The American Correctional Association is aware
18 that your statute does not bind you to past practices or
19 the present development of guidelines by others. We are
20 aware that you do not have to be concerned with prison
21 space, but only need to advise Congress of the resources
22 necessary to place the guidelines in effect. Ladies and

1 gentlemen, we wish you well in your present guidelines,
2 with your preliminary draft, but it does appear to raise
3 the ante for the use of some disparity, more admissions
4 and longer stays within correctional institutions, and a
5 significant workload for hte U.S. Sentencing Commission
6 in the days ahead. You have an obligation to advise Congress
7 and to suggest some changes in the law that may further
8 refine the answer to, "Is the statute correct, is it balanced,
9 is it practical, is it really workable, does it fix something
10 that was broken, and lastly, will it stand the test of time?"

11 Thank you for allowing me these few moments.

12 CHAIRMAN WILKINS: Thank you very much.

13 Any questions from Commissioners to my right?

14 COMMISSIONER CORROTHERS: I take it, Mr. Travisono,
15 that you were encouraging the Sentencing Commission to encourage
16 Congress to not allow prison facilities to keep up with
17 what we recommend; is that correct?

18 MR. TRAVISONO: As a partner in the business
19 of criminal justice, I would ask that you strengthen our
20 hand by letting us be aware and abreast, rather than always
21 behind.

22 COMMISSIONER CORROTHERS: Thank you.

1 CHAIRMAN WILKINS: Other questions?

2 George?

3 COMMISSIONER MacKINNON: What do you mean by
4 "community supervision and control"?

5 MR. TRAVISONO: Part of a sentence, Judge, should
6 be in the community, and one of the reasons why parole super-
7 vision has been given a bad name over the last five to eight
8 years, maybe even longer, is because we have never been
9 able to get the resources to properly control. So we are
10 talking about having intensive supervision in the community
11 where one person may supervise no more than 10 to 15 persons
12 in the community. That's what I mean by community control.

13 COMMISSIONER MacKINNON: That would be a local
14 unit of government or so?

15 MR. TRAVISONO: Well, in the case of the Federal
16 government, it is your probation/parole officer.

17 COMMISSIONER MacKINNON: I was inquiring whether
18 you meant something outside of that.

19 MR. TRAVISONO: Oh, no. It would be a part of
20 the system, yes.

21 COMMISSIONER MacKINNON: I enjoyed your remarks
22 on Montana. He overthrew his receivers, and you likened

1 it to our situation and your situation where you don't have
2 enough facilities. And of course, what both of them need
3 is more backbone. He lost some there the other day. And
4 if some people would have the backbone to erect the prisons
5 that they need, your complaint would be satisfied, wouldn't
6 it?

7 MR. TRAVISONO: Yes, sir.

8 COMMISSIONER MACKINNON: Thank you.

9 CHAIRMAN WILKINS: Thank you very much.

10 Our next witness is Marlene Young. As you know,
11 Ms. Young is the Executive Director of the National Organiza-
12 tion for Victim Assistance.

13 Ms. Young, we are delighted to see you again.

14 MS. YOUNG: Thank you, and good afternoon, Chairman
15 Wilkins, members of the Sentencing Commission.

16 I am Marlene Young, Executive Director of the
17 National Organization for Victim Assistance, and I appreciate
18 the opportunity to speak to you today on behalf of our member-
19 ship across the nation, as well as thousands, literally
20 hundreds of thousands, of victims of crime that exist every
21 year.

22 We are the oldest national victim advocacy

1 organization in the nation, and we are founded to provide
2 direct services to those victims of crime as well as to
3 speak out on their behalf in public forums like this to
4 effect public policy and legislation.

5 What I would like to present to you is a summary
6 of the testimony that I have submitted in writing and then
7 allow you to ask me some questions about the victims' perspec-
8 tive. I have submitted as well in writing some detailed
9 comments on the Commission's Draft Sentencing Guidelines
10 to the staff for their consideration, and so I will just
11 present to you some of the main issues that we feel
12 very strongly about with regard to victims of crime.

13 We are sifting today only two blocks from the
14 place in 1981 where Virginia Montgomery, a woman over the
15 age of 65, was assaulted by a purse-snatcher here in the
16 District of Columbia. As a result of that purse-snatch,
17 she fell, her hips were broken, and she was hospitalized
18 for nearly a year. She went from the scene of the crime
19 and the hospitalization here in the District of Columbia
20 to recover down in the State of Texas. During that time,
21 her assailant had been arrested and was brought to trial
22 here in the Superior Court of the District of Columbia.

1 At the trial, he was convicted, and he was given a probationary
2 sentence and was ordered to pay restitution of \$382.

3 What the judge did not know in that sentencing
4 situation was the fact that Virginia Montgomery had suffered
5 over \$11,000 worth of medical bills that went uncovered,
6 in addition to transportation expenses and a permanent physical
7 injury.

8 It is because of that kind of situation that
9 victims face in our courtrooms across this nation that I
10 am here today to talk to you of the injustices that they
11 often perceive and the fact that they are often treated
12 as little more than pieces of evidence in the courtrooms
13 either during the trial and certainly at sentencing.

14 It is circumstances like those that afflict Virginia
15 Montgomery that have brought the issues that victims want
16 to state clearly in front of public forums. The justice
17 of the victims' cause has won them powerful allies in many
18 areas. I could among those allies the Congress of the United
19 States, which has passed both the Victim-Witness Protection
20 Act and the Sentencing Reform Act.

21 And another salient ally, I think, is this
22 Commission, whose draft guidelines as I read them display

1 a desire to advance the victim's interest in the sentencing
2 process.

3 And I must say that I take heart from the Commis-
4 sion's determination to establish a system of modified real
5 offense sentencing, one that takes into account any injuries --
6 medical, economic, and emotional -- resulting from the
7 offender's conduct.

8 Thus, assuming that the Commission holds to this
9 general approach, the degree of victim's harm will become
10 a key determinant of the severity of the sanction to be
11 imposed, and so the Federal sentencing system will enshrine
12 the principles underlying the invention of the Victim Impact
13 Statement and what we consider the victims' movement's
14 most noteworthy contribution to the theory and practice
15 of sentencing.

16 By seeking to put before the court an objective
17 assessment of the harm done to the victim, the Victim
18 Impact Statement invites the judge to borrow from tort
19 law precepts in weighing the degree of culpability and
20 the wrongdoer, and the Commission is elevating that invitation
21 into an explicit principle of criminal sentencing.

22 That, in our view, represents a major

1 jurisprudential breakthrough, and for that I thank you.

2 And hence, I would suggest that your work to
3 date suggests to me that you are indeed a friend of victims
4 as well as concerned with the treatment of offenders. Thus,
5 when I offer you a number of suggestions today for expanding
6 your draft guidelines, I hope they will be taken not as
7 criticism but as ways to better achieve the number of goals
8 which I believe you favor.

9 However, before I discuss those specific issues
10 with you, I must suggest and emphasize that it is not just
11 the products of justice with which we are concerned, but
12 the process.

13 We in the victims movement have learned that
14 the old truth that it is not enough that justice be done,
15 but that justice be seen to be done, is very important to
16 the victims and the public at large. The victims, their
17 therapists, and others in the behavioral sciences have supported
18 the idea that it is important to have specific devices included
19 in sentencing guidelines that provide for the victim's
20 involvement at a number of stages in the sentencing process,
21 before, during, and after the sentencing proceedings.

22 The most salient such devices for our purposes

1 are the following three: plea bargain consultation, the
2 use of a Victim Impact Statement, and mandatory restitution.

3 Let me start with the plea bargain process on
4 which the Commission has invited comment. The draft guidelines
5 ask to what extent can prosecutors and defense attorneys
6 stipulate to the underlying facts of an offense and the
7 offender's characteristics when such factors determine the
8 sentencing results.

9 That question shows sensitivity to the need of
10 reality checks on proffered pleas. But to me, the more
11 basic problem is how to ensure that plea bargaining is done
12 responsibly. One kind of irresponsibility occurs when
13 attorneys, in justifying a substantial reduction in charges,
14 stipulate to a set of facts which are so selective as to
15 be a distortion of the truth. Another and more common
16 problem occurs when busy attorneys strike hasty bargains
17 based on skimpy analysis of police reports -- a practice
18 that works injustice for the victim and offenders alike.

19 I should say that I did one time a cursory study
20 of over 3,626 police reports and discovered that in two-
21 thirds of them the facts that were related on those police
22 reports were not sufficient to state the kind of crime that

1 had taken place and which the report was reporting on.

2 So I think it is very important to recognize that we need
3 a fuller view before we enter the plea bargaining process.

4 What the Commission seems to want and what we
5 heartily endorse are some kinds of reality checks whereby
6 the sentencing court can meet its responsibility to set
7 a sanction commensurate to the crime. Fortunately, we feel
8 that two such tests to the appropriateness of a given plea
9 are already mandated in the Federal Victim-Witness Protection
10 Act, and we feel should be underscored in these sentencing
11 guidelines.

12 The first is mandating victim consultation
13 over proposed plea agreements, and the second is the use
14 of a Victim Impact Statement in looking at those plea
15 agreements.

16 Of all the points of possible consultation with
17 a victim in the criminal justice process, there is none
18 more important than one that is required over plea
19 agreements, for in the nine convictions out of ten that
20 are achieved by way of a plea, that agreement becomes for
21 all intents and purposes, the victim's day in court. It
22 is only one of two opportunities that the victim's experiences

1 and feelings will have a bearing on the outcome.

2 And we would urge in addition to the consultation
3 and the introduction of a Victim Impact Statement during
4 those kinds of discussions to make sure that the victim
5 has an opportunity to allocute as well as write a statement
6 to be considered at that time.

7 On this point, I think it is important to take
8 issue with one comment made in the draft guidelines.
9 Explaining why offenders who plead guilty now get substan-
10 tially lower sentences, the Commission offered this as one
11 of three rationales. It means that, quote, "witnesses,
12 especially victims, are spared the stress of a trial."

13 While that reasoning does reflect common beliefs,
14 those beliefs, I would say, are misleading and incomplete.
15 The research of Deborah Kelly and others seems to conclude
16 that when victims are given a plea as a fait accompli, they
17 are typically left embittered and not grateful. Only when
18 they are consulted on the proposed plea does it typically
19 produce stress-bearing benefits for the victim.

20 Further, research findings that consultation
21 and no-consultation pleas yields in the aggregate about
22 the same levels of punishment suggest that the Commission

1 can reinforce the value of requiring consultation over pleas
2 without seeing a significant effect on incarceration rates.

3 The second reality check on proffered plea
4 agreements and their stipulations of fact is the Victim
5 Impact Statement. Plainly, if the victim of a purported
6 burglary is shown to have troublesome injuries as a result
7 of the crime, everyone is on-notice that this is no mere
8 burglary. And in practice, the use of Victim Impact
9 Statements does have that effect of keeping latent errors
10 out of the court process.

11 In short, the conscientious judge who wants to
12 sentence an offender fairly has an important ally in warding
13 off misleading stipulations of fact about the crime, and
14 that ally is the victim of crime.

15 It seems to me that the Sentencing Commission
16 by instructing Federal judges to ensure that prosecutors
17 and probation officers meet their statutory duty, the
18 Sentencing Commission can thereby see its concerns answered
19 in day-to-day practice.

20 The Victim Impact Statement has two other benefits
21 for the court: It helps to quantify the restitution needs
22 for the victim, and it helps to uncover a degree of malice

1 or wrecklessness in the offender's conduct.

2 That brings me to the second stage -- the sentencing
3 hearing itself. Here, we would urge that the commission
4 require that three forms of victim harm -- those identified
5 in the Commission's Report, economic, medical and emotional --
6 be given careful scrutiny through the Victim Impact Statement.
7 The guidelines could amplify how each of these enumerated
8 harms are to be considered. Thus, for example, the Commission
9 could mandate that full restitution should be ordered in
10 every case involving an identifiable victim. This would
11 produce three worthy benefits.

12 First, it would resolve the uncertain legislative
13 guidance regarding restitution as a mandatory sentence and
14 as a mandatory condition of probation or supervised release.
15 These ambiguities are found within the Sentencing Reform
16 Act itself and between it and the Victim-Witness Protection
17 Act. A clear statement that restitution is to be ordered
18 whatever the balance of the sentence is to be will do violence
19 to none of the statutory language and will honor the intent
20 of the most deliberate of those statutes -- the Victim-
21 Witness Protection Act.

22 Second, by mandating that full restitution is

1 to be paid and then by having the sentencing court modify
2 that restitution order to fit the offender's present economic
3 circumstances would enable the Commission to allow the victims
4 to recover as much as possible of the losses that they suffer
5 as a result of the crime. Since victims are now permitted
6 to enforce restitution through civil judgments or like civil
7 judgments, it means that should the offender come into some
8 assets in future years, his victims can seek full satisfaction
9 of his debt to them without having to institute a civil
10 action. This use of a modified restitution order, incidentally,
11 has been sanctioned by one of the United States Court of
12 Appeals.

13 The third benefit of mandatory restitution is
14 that the Commission can help to resolve through its guidelines
15 an uncertainty found in a key passage of the Victim-Witness
16 Protection Act. That passage reads: "The court shall impose
17 an order or restitution to the extent that such order is
18 as fair as possible to the victim and the imposition of
19 such an order will not unduly complicate or prolong the
20 sentencing process."

21 NOVA and others historically have always opposed
22 the original "unduly complicate or prolong" language considered

1 by the legislative sponsors, since we feared it would be
2 a loophole through which every Federal offender would seek
3 to escape paying his debts. The Commission could do a good
4 service to victims by underscoring the intent that restitution
5 shall be ordered and by reminding judges that restitution
6 is after all a form of punishment, and no miscarriage of
7 justice is done if a restitution order is made closer to
8 the victim's claim than the offender's, so long as it
9 approximates the economic harm done.

10 As to the next type of harm documented in the
11 Victim Impact Statement, the Commission could encourage
12 sentencing courts to carefully weigh the long-term medical
13 and physical effects of the crime, both to gauge the true
14 nature of the assault or to gain insight as to the motive
15 or recklessness of the offender.

16 For instance, in a study I did with juvenile
17 offenders some years ago, I discovered that they consciously
18 chose to pick on elderly victims to become victims of their
19 purse-snatch because they felt they were much easier targets,
20 and hence you could add a hint of predatory malice to that
21 decisionmaking on their part.

22 As to the weighing of the psychological impact

1 of the crime, the Commission is to be commended for translating
2 this into a scheme of fixing aggravated sentences, for we
3 have long known that some offenders do more than rob and
4 steal and burglarize; they commit their crimes in ways to
5 terrorize their victims and leave them emotionally harmed.

6 We are drawn to the ideas of classifying psychological
7 injuries in two categories, extreme and significant, as
8 the Commission has done. But we would suggest that the
9 Commission has available to it a diagnostic tool well-recognized
10 in law that can aid the sentencing court in determining
11 extreme injury. That tool is the definition of post-traumatic
12 stress disorder as spelled out in the Diagnostic and
13 Statistical Manual, Third Edition, of the American Psychiatric
14 Association.

15 We would suggest that you could supplement your
16 black letter rule in this regard with an appendix citing
17 that most common and accepted tool of assessing, PTSD, that
18 may aid courts and experts in the sentencing phase. And
19 we are asking Dr. Dean Kilpatrick of the University of South
20 Carolina Medical College, as well as some of our other colleagues,
21 to work together to submit some suggestions on how to use
22 that PTSD formulation in guidelines for judges at sentencing.

1 As to the issues of significant psychological
2 injury, we believe that presenting evidence of such enhanced
3 harm is also feasible and is therefore desirable through
4 a Victim Impact Statement and has been used in local juris-
5 diction now for a number of years.

6 We would like to add one embellishment, however,
7 to the idea of psychological injury, and that is where
8 present it be seen as intentionally or wrecklessly caused
9 by the offender. Since we know that some victims experience
10 lingering terror and fear as a result of crime, we know
11 that others suffer second injuries through the assault
12 of family, friends, the criminal justice system, et cetera,
13 and we know that they are predictable, we feel that certainly
14 an offender at least wrecklessly contributes to those injuries.

15 While we would question the advisability of using
16 this evidence in enhancing the offender's punishment, we
17 think it is very important to look at that evidence when
18 you suggest or look at ordering any type of restitution.

19 As to weighing the offender's responsibility
20 for causing such psychological injury, judges make those
21 judgments at all times in their civil cases, and so we perceive
22 they would have no trouble doing it in a sentencing hearing.

1 My final comments go to the victims' interests
2 in seeing certain aspects of the sentencing power used routinely
3 and enforced vigorously.

4 Certainly, I would repeat my original suggestion
5 that restitution be mandatory. Similarly, I would urge
6 the Commission to cite authority in the Victim-Witness
7 Protection Act for fashioning stay-away orders whenever
8 appropriate in their sentences. And finally, I would urge
9 that orders to pay fines be similarly enforced in the Federal
10 court system, explicitly noting their social benefits in
11 that they are the main source of revenue for the Federal
12 Crime Victims Fund, which supports victim assistance efforts
13 nationwide. But we suggest that these be paid in the
14 three-tier level of priority that has been instituted at
15 some State levels at this time. That is that the mandatory
16 penalty assessment be paid first, restitution second, and
17 fines third.

18 Mr. Chairman, the crux of my testimony is to
19 encourage the Commission to engraft the purposes of the
20 Victim-Witness Protection Act into the language of your
21 sentencing guidelines, for those guidelines will become
22 more than a statement of philosophy and guidance to the

1 Federal court; they will also become, I think, a desk book
2 for the judiciary.

3 Thus, if you fail to incorporate the victim-
4 oriented procedures that Congress has established in your
5 guidelines, I feel that they will be neglected by the Federal
6 judiciary or worse, I would say, continue to be so neglected,
7 because indeed they are today. Should that happen, the
8 opportunity to give victims a legitimate voice in the
9 sanctioning of their offenders will have been missed, and
10 that would be an injustice that I believe neither you nor
11 I would like to see happen.

12 Thank you.

13 CHAIRMAN WILKINS: Thank you very much.

14 It is obvious that a great deal of work and effort
15 has gone into your presentation. I have already distributed
16 your written comments, and I am confident that the Commission
17 will study those comments in detail; I am also confident
18 that I think your concerns will be reflected in any submission
19 that we send to the Congress next spring. We look forward
20 to a continued working relationship with you and your
21 organization.

22 MS. YOUNG: Thank you very much.

1 CHAIRMAN WILKINS: Any questions of Commissioners
2 to my right?

3 (Pause.)

4 CHAIRMAN WILKINS: Commissioner Nagel?

5 COMMISSIONER NAGEL: Thank you very much for
6 your comments. I have one question which is that at one
7 point earlier this year, we received some communication
8 from the Inspectors General, and the head of the Inspectors
9 General Council was considering developing an extensive
10 proposal for restitution.

11 Has your organization been in contact with them,
12 or have you worked jointly on those proposals?

13 MS. YOUNG: No, we have not. I'm glad you brought
14 it to my attention, though.

15 COMMISSIONER NAGEL: I believe the appropriate
16 person to contact is Inspector General Kuserow, of the
17 Department of Health and Human Services. And you may want
18 to join him in a proposal to the Commission.

19 MS. YOUNG: Thank you.

20 CHAIRMAN WILKINS: Any other questions?

21 (Pause.)

22 CHAIRMAN WILKINS: We thank you very much.

1 Our next witness is Reuben M. Greenberg. He
2 is the Chief of Police of the City of Charleston, South
3 Carolina. Chief Greenberg is known not just throughout
4 the State of South Carolina, but indeed throughout the
5 nation.

6 Chief, we appreciate you coming to Washington
7 and participating with us today.

8 CHIEF GREENBERG: Ladies and gentlemen of the
9 Commission, I am very happy to have this opportunity to
10 present my views regarding the sentencing of criminal
11 offenders.

12 While I will be primarily speaking for myself,
13 I nonetheless am confident that many professionals in the
14 criminal justice field would endorse the views that I will
15 express to the Commission today.

16 Of course, as you know, the criminal justice
17 system has been characterized, really, as a non-system --
18 disjointed, convoluted, and non-functioning. The reason
19 for the system being described in this way is simple: The
20 system doesn't work.

21 The system is not only ineffective, but indeed
22 is, I believe in many aspects, counterproductive. We operate

1 the system -- or non-system, if you prefer -- in a way that
2 ensures that our criminal justice problems become worse
3 for our efforts rather than our creating a measure of improve-
4 ment.

5 Nowhere is this more true than in sentencing
6 decisions. We have, I believe, deluded ourselves into
7 believing that we should not punish criminals if we can
8 convince ourselves that an offender will not repeat its
9 Criminal actions in violation of the law in the future.
10 We say that it makes no sense to punish someone for his
11 past behavior if we can conclude that he or she will not
12 violate the law in the future.

13 In other words, almost every criminal can escape
14 being held accountable for his past misdeeds on the promise
15 or hope that those deeds will not be repeated.

16 It seems to me that we are sending the wrong
17 message out to criminal offenders. We are telling them --
18 indeed, demonstrating to them -- in ways much more effective
19 than words that even if caught, even if convicted, they
20 will not be held accountable for their crimes in any meaningful
21 way without having first been granted third, fourth, and
22 even fifth chances before being punished.

1 A recent case in the Charleston Municipal Court
2 is illustrative of this expectation on the part of criminal
3 offenders. Police officers had arrested several adult members
4 of a theft ring for shoplifting at a local shopping mall.
5 A number of those arrested had numerous previous arrests
6 and convictions, dating back several years. Their apparent
7 defense strategy was to prevent a young woman who had been
8 lucky enough to have no previous arrests or convictions
9 to plead guilty to the entire shoplifting charge and thereby
10 protect the others, who had both previous arrests and convic-
11 tions.

12 The judge accepted the young woman's plea and
13 promptly sentenced her to a \$200 fine and 30 days in jail --
14 the absolute maximum penalty available for first-offense
15 shoplifting.

16 Later, outside the courtroom, the shoplifters
17 howled and protested that a great injustice had been done.
18 It seemed to them that the judge had played a dirty trick.

19 "She was supposed to get probation," they cried.
20 "Everyone gets probation the first time."

21 Experience had shown them that almost no first-
22 time encounter with the justice system would result in

1 even a minimal jail term; that only after many subsequent
2 arrests and convictions was there much fear of their serving
3 any time in jail.

4 A major reason for our sending out such signals
5 to the criminal element in this country is that we presume
6 that these offenders have somehow inadvertently committed
7 a crime and had gotten caught at it the very first time
8 that they had committed an offense. In most instances
9 nothing could be further from the truth. Their crimes had
10 been committed many times but finally, their luck having
11 run out, they were apprehended.

12 We forget or we refuse to see that criminals
13 "decide" to commit crimes, especially crimes of economic
14 gain, in much the same way that they make any other
15 decision. They assess the benefits to be gained and contrast
16 those benefits to the risk involved. And if that risk-
17 benefit calculus is perceived on their part to be a positive
18 one, then they "decide" to commit the criminal act. This
19 is why they laugh at us when they are placed on parole
20 or on probation; they have guessed the outcome and, unlike
21 that one case in Charleston, they most often guess correctly.

22 Perhaps the worst mistake in appropriate sentencing

1 that we can make is when judges fail to impose needed jail
2 terms in order to ease the problem of jail and prison
3 overcrowding. The capacity of the jail or prison is not,
4 in my opinion, a proper concern for a sentencing judge.
5 The sentencing judge should confine his sentencing determina-
6 tion to the specific facts of the crime and matters regarding
7 the defendant alone and should not mar his decision with
8 any consideration of the criminal's probable place of confine-
9 ment, nor the conditions therein.

10 Judges should no more make such a determination
11 than police officers should fail to arrest armed robbers
12 on the basis that the prosecutor is too burdened with work
13 to properly prosecute them.

14 And of course, we do need more jails and more
15 prison space. But that is a problem for the corrections
16 department, the sheriffs, and the State legislators, not
17 a problem for judges. And in any case, failing to incarcerate
18 criminal offenders in the belief that it is somehow "cheaper"
19 to place them on probation, or otherwise minimize their
20 jail terms, is, I believe, largely erroneous. While it
21 may be cheaper insofar as the jail and prison budgets are
22 concerned, it is certainly not cheaper either in dollars

1 nor in injuries to the new victims or victims-to-be of
2 probated criminal offenders.

3 We simply manage to pass the costs of servicing
4 these criminals from the taxpaying public as a whole to
5 the individual persons whom the criminal decides to victimize.

6 We have boxed ourselves into the ridiculous position
7 of determining the number of prisoners we have by counting
8 the number of jail cells there are rather than, more logically,
9 determining the number of jail cells that we need by counting
10 the number of prisoners that we ought to incarcerate.

11 I am sure that criminal offenders must look upon
12 the efforts of judges, probatio officers, parole boards
13 and legislators with both wonderment and glee, realizing
14 that here are all of these people sitting down and attending
15 meetings, trying to figure out ways of getting them out
16 of jail sooner or in many cases, preventing them from going
17 to jail at all.

18 Again, this is not a message that I believe we
19 ought to be sending out to criminal offenders. It is expensive
20 to put criminals in jail; it costs money. But ours is not
21 a society that is without resources. We can protect ourselves
22 from convicted criminals if we wish to do so. But if it

1 is, as many criminals apparently believe, that we will not
2 protect ourselves, then we will have to do as people have
3 always done when they are either too cheap, too lazy, or
4 too apathetic to defend themselves; we will have to run
5 when we can run and get caught, shot, beaten, robbed and
6 raped and when we can, because that's the law of the jungle,
7 and a jungle is what is developing out there unless we decide
8 to curtail it.

9 Thank you for your patience in hearing my remarks.

10 CHAIRMAN WILKINS: Thank you very much, Chief.

11 I guess you've probably dealt with as many victims
12 as any witness who will testify before tis Commission. I
13 wonder what you think about inclusion in the guidelines
14 of this harm we have identified as psychological harm. You
15 know, there is nothing in the law that says that is a recognized
16 harm, but it seems like judges seem to recognize it, and
17 we are trying to put our finger on exactly how to identify
18 it and how to use it to enhance a sentence where the victim
19 suffers not only loss of property or physical injury, but
20 many times psychological injury.

21 CHIEF GREENBERG: The issue of psychological
22 harm gives me a certain amount of difficulty, simply because

1 it is very difficult to measure. But nonetheless, let's
2 take it away from the individual who might develop a psychologi-
3 cal harm, and let's use that same concept and refer to a
4 community.

5 In our community or in any community that I can
6 imagine, it will do us absolutely no good whatsoever relative
7 to the sense of well-being in our community for us to have
8 15 or 20 elderly women knocked to the street and have their
9 purses snatched by purse-snatchers, if we arrest every
10 single one of those 15 or 20 purse-snatchers within five
11 minutes of the crime. So far as the well-being of the community,
12 there is still a sense, even knowing that within five minutes
13 each person was apprehended, people will still be afraid
14 to go to the grocery store, and they will still be afraid
15 to walk down the street, and they will still be afraid to
16 go to church and to interact in business and various kinds
17 of social concerns. That is even if the person is apprehended.
18 And of course, we are not even nearly that effective within
19 the law enforcement community.

20 So consequently, I can certainly appreciate the
21 impact, as you can, I believe, of looking at how a community
22 would look at it -- and these community people would not

1 even be direct victims themselves; they would simply read
2 or hear about these incidents, and it changes the entire
3 life of the community.

4 I have seen entire communities change on the
5 basis of the activities of one man who is going around
6 sexually assaulting single women in their homes -- the
7 entire activities. Playgrounds are empty. People are escorted
8 home by their employers, sent home in cabs, police officers
9 called to check the house before they go in -- on the basis
10 of the activities of one individual. And even when that
11 individual is finally apprehended, nonetheless, there remains
12 a pall on that neighborhood, that somehow things were not
13 as well.

14 If that is what you mean by the psychological
15 damage, not only could that damage obviously be inflicted
16 on the particular individual, but also that damage is inflicted
17 on society as a whole.

18 CHAIRMAN WILKINS: Thank you.

19 Any questions of other Commissioners?

20 Commissioner Corrothers?

21 COMMISSIONER CORROTHERS: Yes, I have a comment,
22 Chief Greenberg. Recently, I had the privilege of seeing

1 your career highlighted on "60 Minutes" and I would simply
2 commend you on an excellent interview.

3 CHIEF GREENBERG: Well, thank you very much.

4 CHAIRMAN WILKINS: Commissioner Block?

5 COMMISSIONER BLOCK: Chief Greenberg, I want
6 to follow up on your comment about the bad messages being
7 sent out by letting first offenders out or, as I have come
8 to realize the expression, "first bit of the apple".

9 We have been implored by many in these hearings
10 that we have conducted across the country to leave as a
11 viable option in almost all cases where we are permitted
12 by statute to leave it, to leave as an option in the guidelines
13 the possibility of probation. We haven't figured out how
14 to do that yet, but we have been implored to leave as an
15 option for serious crimes probation, so that an individual
16 might get probation, or that individual might get eight
17 to ten years, but probation always being an option.

18 How would you answer those who implore us to
19 leave that option?

20 CHIEF GREENBERG: Well, I am not suggesting that
21 probation is an absolutely ineffective option. What I am
22 suggesting is that it is used much too frequently, particularly

1 in situations similar to those that Ms. Young just spoke
2 about; I think that certainly most of us could agree that
3 in a situation of that kind, probation, even if it was the
4 first conviction -- and I point out, first conviction is
5 not necessarily the first opportunity an individual had
6 to commit the crime -- then I think in a situation like
7 that, probation should be out of the question.

8 Having worked in probation myself in the past
9 for certain types of offenses, it can be an appropriate
10 penalty. But any kind of penalty in which there is a possibility
11 or probability that an individual could become injured,
12 then I think that that is a different situation.

13 Particularly I don't think that criminals should
14 benefit from the good luck and the good fortune of their
15 victims. The woman that Ms. Young spoke about a few moments
16 ago had bad luck in the sense that her hips were broken.
17 But there are also purse-snatch victims, many of them, and
18 even the majority, that have good luck -- they are knocked
19 to the street but they don't break anything, just have a
20 few scrapes and bruises. And therefore the victim suffers
21 very little, and so consequently the criminal, who had no
22 idea that that would be the outcome, we've got to assume

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1 that if he's willing to take that type of action, that
2 he has already contemplated the worst possible outcome in
3 his mind, and said, "Despite that, I will commit the act."
4 And he should not benefit because the victim had somebody
5 above looking out for him.

6 COMMISSIONER BLOCK: I certainly agree with that.

7 Thank you.

8 CHAIRMAN WILKINS: Any other questions?

9 (Pause.)

10 CHAIRMAN WILKINS: Thank you very much, Chief.

11 This hearing will stand in recess until two o'clock
12 this afternoon.

13 (Whereupon, at 1:00 o'clock p.m., the proceedings
14 were recessed, to reconvene at 2:00 o'clock p.m. this same
15 day.)

1 CHAIRMAN WILKINS: The next witnesses are two
2 distinguished judges from the 11th Circuit. First of all,
3 Judge Lanier Anderson is a member of the 11th Circuit Court
4 of Appeals, and William O'Kelley, a United States District
5 Judge from the District of Northern Georgia.

6 We appreciate you gentlemen appearing today and
7 I know that you have perhaps some individual comments and
8 perhaps you will also represent the views of other judges
9 with whom you have spoken about this preliminary draft and
10 the approach we are taking and how we shall improve it before
11 we send it to the Congress.

12 JUDGE O'KELLEY: Thank you, Mr. Chairman, and ladies
13 and gentlemen of the commission.

14 We wish to thank you for the opportunity to appear
15 before the commission and express the views of the judges of
16 the 11th Circuit which, as you know, is the newest and
17 youngest within the United States.

18 We have talked with and have a cross-section of
19 replies from our inquiries as well as our discussions with
20 judges and particularly following the appearance of you,
21 Judge Wilkins, at our judges workshop in October.

22 With your permission, of course, I will make a few

1 comments and then hopefully reserve a couple of minutes for
2 Judge Anderson.

3 In the time allotted, I, of course, cannot deal with
4 all the offense values established by the commission in
5 evaluating various sentences and/or aggravating or mitigating
6 factors. I don't believe that's what you asked us here for
7 anyway. I will address a few of these matters that are of
8 greatest concern to the judges of our area.

9 First, I believe there is a great deal of concern
10 among the trial judges, certainly in our area, about the
11 graduations relating to values as to property offenses, that
12 they are too detailed. In particular, I am referring to
13 the tables on pages 43, 44, 78, 113, 155 and possibly pages
14 68 and 110 of the proposed guidelines.

15 These tables have as many as--particularly, the
16 one on page 43, as many as 13 different levels for increasing
17 the offense level or offense value.

18 We are of the opinion that some consideration should
19 be given and enhancement should be considered as to increased
20 dollar values of loss to a victim. However, the guidelines, in
21 our opinion, include too great an absolute differential.

22 In the Table at page 43 there's a difference of

1 1,500 percent in values between the low end of the scale as
2 compared to the high end of the scale. As an example, one
3 who steals \$1,000 in a bank robbery or, conversely, one who
4 steals \$25,000 in an identical bank robbery should not be
5 treated, in my judgment, substantially different--maybe to
6 some extent different. They both intended to get all of the
7 money that was there. One was luckier than the other.

8 While we recognize that the value of the loss to
9 the victim or the profit to the criminal is a factor that
10 should be considered, the scale of graduation is too great
11 and too detailed in our opinion.

12 We recommend a scale of larger graduation with
13 fewer brackets. Even so, the brackets should have some over-
14 lapping. In other words, should one or two cents difference
15 or even a few dollars difference cause an increase of six
16 points in the factor scope. The difference between \$1,000
17 and \$25,000 could possibly be a breaking point and another
18 at \$100,000 or above.

19 The point I am making is not the exact point at
20 which an increase in the points by aggravation should occur
21 but there should be fewer of them and over a wider range.

22 Now, the judges of the 11th Circuit also have grave

1 concern as to the recommendations made in the proposed
2 guidelines at page 125 relating to cooperation and, particularly,
3 in regard to the control that may be exercised in that area
4 by the prosecuting attorney. And I am aware that several on
5 both sides of the prosecutorial scene have expressed similar
6 views this morning to what I say.

7 This concern is particularly as to the control, as
8 I said, that is exercised by the prosecuting attorney. The
9 judges of our circuit seem to be very concerned that the
10 U. S. Attorney should not have control over an absolute
11 factor of credit points for cooperation. This should be a
12 matter left, to some extent, within the discretion of the
13 sentencing judge within the range whatever it might be set
14 by the guidelines.

15 The fact that the prosecuting attorney makes a
16 certification from which there is an automatic .8, .6 or .4
17 factor involved we think is too constricting.

18 The severest of these criticisms come from the
19 judges who were formerly prosecutors. They are of the opinion
20 that the prosecuting attorney has enough control over the
21 manner in which a charge or indictment is brought--that is,
22 nature of the offense or the counts to which pleas are accepted

1 without further binding the sentencing judge in this area.

2 I do not suggest what the percentage range of
3 reduction should be but it should be broad and not arbitrary
4 but discretionary.

5 Now, there is some concern--and this is addressed
6 I think to some comments you raised, Judge Wilkins, at our
7 workshop, and I'll address it very briefly. There is some
8 concern as to how pleas of guilty should be treated or whether
9 or not one is penalized for pleading not guilty and going to
10 trial.

11 Most judges with whom we have talked believe that
12 normal guidelines without any deviation would apply to a con-
13 viction after a plea of not guilty. Most do not have any
14 problem, however, with giving mitigating considerations to
15 a defendant who has entered a plea of guilty; thus, by that
16 plea, saving the government the cost of a trial and the
17 defendant, by the plea, accepting responsibility for his
18 criminal actions.

19 We are of the opinion that giving mitigating con-
20 sideration to such factors is not penalizing the one who goes
21 to trial. Obviously, a sentence should not be enhanced
22 because one stands trial unless in doing so one of the other

1 aggravating factors occurs, such as perjury, destruction of
2 evidence, or other obstructions of justice which you have
3 expressed in your proposed guidelines.

4 In general, we support your view and approach to
5 the modified, real offense to sentencing as opposed to
6 statutory sentencing. The "floating window," as I believe
7 you referred to it at the workshop, which is established
8 after taking into consideration these facts relating to the
9 offense itself and then those other aggravating and mitigating
10 factors that will raise or lower the guidelines is a fair
11 approach to sentencing.

12 In my judgment, there will still be disparity in
13 sentencing; however, it would have been legitimized by
14 consideration on the record of the factors that were considered
15 in raising or lowering the sentence.

16 That then leads me to the point that has uniformly
17 caused judges throughout the circuit the greatest concern.
18 The concern expressed by all is that there will be extensive
19 hearings involved in the sentencing process in order to develop
20 the facts and make the findings upon which the sentence is
21 predicated. Those have been referred to by some this morning
22 as "mini-trials."

1 Some believe that this might even lead to fewer
2 pleas of guilty and more trials. I am not certain as to that,
3 but everyone is certain that it will lead to more extensive
4 hearings as to sentencing and will have a tremendous adverse
5 impact upon the trial courts as well as the appellate courts.
6 I will not address the latter but save that for Judge Anderson.

7 In this regard, it is our opinion that as many of
8 the aggravating and/or mitigating factors as possible could
9 and should be left with some limitations and the discretion
10 of the sentencing judge, as was done at page 124 of the
11 proposed guidelines.

12 As set forth there, the court may make a 20-percent
13 adjustment as to post-offense conduct that is in effect in
14 the total discretion of the sentencing judge. The subject
15 of cooperation, among others, should be treated in a similar
16 manner.

17 Many of the districts in our circuit are already
18 under seige with large numbers of protracted trials in drug
19 smuggling and other areas. It is believed that these trials
20 will merely be extended into the sentencing stages. I, for
21 one, have already experienced attempts at this without the
22 guidelines.

1 Surely, some procedures can be considered to avoid
2 any further raid on our most precious commodity--that is,
3 judicial time and resources.

4 And in this regard our recommendation is that the
5 commission either adopt or recommend a procedure for the
6 narrowing of issues and thus minimizing the matters in dispute.
7 In this regard, the probation committee of the judicial
8 conference has already submitted to the Advisory Committee on
9 Criminal Rules a proposed amendment to Rule 32 of the Federal
10 Rules of Criminal Procedure. And I hope that you will be
11 able in some way to address this subject matter in any further
12 releases that you may have.

13 Now, likewise, you had addressed and requested
14 comment on plea bargaining, and I will have a brief comment
15 on that. I am of the opinion that a plea bargain should not
16 limit the sentence that may be imposed by the court except
17 as provided by statute and the guidelines. The only exception
18 to this, of course, would be as to count bargaining and
19 charge bargaining. I believe that would be consistent with
20 the present view of Rule 11 of the Federal Rules of Criminal
21 Procedure.

22 By way of conclusion and summary, I believe that the

1 judges of the 11th Circuit support, in principle, an approach
2 to endeavor to eliminate disparity in sentencing; however,
3 they are opposed to factors that are mandatory upon certifi-
4 cation of the prosecuting attorney and generally would favor
5 guidelines and a system that are as simple as possible and
6 that would have the least impact upon the trial in appellate
7 courts in regard to hearings and appeals therefrom. I believe
8 that I state these are the overwhelming concerns of our circuit.

9 And I will ask Judge Anderson to conclude with his
10 comments.

11 JUDGE ANDERSON: My brief comments will serve only
12 to emphasize the pervasive concern that the judges who
13 communicated to us--and, incidentally, we tried to get and
14 did get remarks from, I think, every district court in the
15 circuit. Their pervasive concern was the fear that this new
16 system would entail significant additional work load because
17 of the evidentiary hearings that would be required in order
18 to make the findings within the guidelines. They are more
19 concerned about the findings that are required within the
20 guidelines than those outside the guidelines because the
21 latter will be more rare.

22 In an effort to try to be helpful in this regard

10 1 and not just complain, we hope that perhaps a study of this
2 impact could be made, perhaps, even a pilot project with
3 designated district judges to actually apply the guidelines,
4 as Judge O'Kelley has done, in a few cases.

5 We also think that a procedure similar to the one
6 Judge O'Kelley mentioned with the proposed amendments to
7 Rule 32 of the Criminal Rules would be helpful. That proposal
8 provides that the probation report would be presumptively
9 correct and then, in order to preserve error, in effect, you
10 would have to make a timely challenge.

11 One thing that is not in those proposed amendments
12 as yet, although they may be, is a requirement that any
13 challenge would have to be made perhaps even by sworn
14 affidavit; if not that, a detailed proffer of evidence perhaps
15 with a good-faith test similar to Rule 11 of the Civil Rules.

16 A second concrete suggestion that might help reduce
17 the potential for mini-trials at sentencing or for too complex
18 mini-trials is, if it is possible for you within the statute,
19 to suggest an abuse of discretion standard of review on appeal
20 rather than a clearly erroneous standard. I realize you may
21 have trouble with the statute, and I don't know how precisely
22 you might--I don't want to say "get around the statute," but

11
1 you might work within the statute.

2 One possible way is that some things aren't facts.
3 Like the acceptance of responsibility that you referred to
4 is not really a fact and you indicate it's within the total
5 discretion.

6 Other matters of judgment in reaching those guide-
7 line factors might also be expressly labeled as matters within
8 the discretion of the district judge and, therefore, very
9 limited scope of review.

10 In conclusion, our judges, while they are fearful
11 of the additional work load, we realize that if necessary,
12 just as with the prisons, Congress can appoint more judges
13 to handle the work load, but we do think that within the
14 general framework that you have already developed there can
15 be improvements which would minimize the chance of mini-trials
16 and we would urge you to take that into consideration.

17 CHAIRMAN WILKINS: Thank you very much, Judge
18 Anderson. I think we all share your concern, first of all,
19 with the appellate issue. That's something that we are working
20 with. Of course, it may require Congressional action or at
21 least some rulemaking, but, in the interim, as we discussed
22 over lunch, perhaps there may be some stop-gap measures that

2 1 we can attempt to make that may provide us some solution.

2 Let me ask any commissioner to my right if you have
3 any questions of either of the two judges who have just
4 testified.

5 Commissioner Block?

6 COMMISSIONER BLOCK: Judge O'Kelley, you made a
7 suggestion that the dollar amounts in those offenses that
8 involve property have two properties; one, that they have
9 overlapping ranges, which I think they do now have overlapping
10 ranges, but since they are a six-month range and the numbers
11 are only two apart most of them do have overlapping ranges.
12 And the second was a more substantial, I think, suggestion
13 which was that there would be fewer of those.

14 Now, if they had significantly more overlap and
15 less gradation, would that take care of your objection to the
16 number of ranges?

17 It seems to me there is some advantage to the number
18 of ranges, and that is, if there is some significant overlap
19 and if any one range doesn't count very much, we encourage
20 less argument over exactly what range you're in. If you have
21 only three ranges, it's quite important.

22 JUDGE O'KELLEY: I wouldn't suggest there be only

3
1 three. I think I--but I think 13--and all of the tables are not
2 that many ranges. I think some of them are shorter. Some of
3 them are 11, for some reason. But it seems to me there is
4 too much emphasis put on the dollar amount as opposed to other
5 factors.

6 COMMISSIONER BLOCK: If we reallocated that, there
7 was more on the defense value and less on the dollar amount
8 but we kept the number of ranges, I mean, you have no problem
9 with just the number of ranges.

10 JUDGE O'KELLEY: To some extent if it's all--but
11 if it is arbitrated the overlapping solves more of the problem
12 than the numbers, yes.

13 CHAIRMAN WILKINS: Any questions to the other side?

14 JUDGE MAC KINNON: What you're talking about is
15 you don't want the fortuitous outcome of a crime to determine
16 the punishment. However, where obviously a man robs a bank
17 he expects to get a lot of money and, if he runs into a 7-11,
18 he isn't going to get as much money. I mean those are facts
19 that would justify, to a certain extent, the amount, but you
20 don't want it to depend on the fact that, if you went into
21 the bank and only got \$5,000, and you got run out quickly,
22 you want the potentiality of what he might have gotten and

14 1 what he was aiming after control his sentence rather than--

2 JUDGE O'KELLEY: I think that's unfair. The
3 seriousness of the crime is the same, in my judgment. If he
4 goes in and the teller has just checked out and has only
5 change left in the drawer or if the teller is bold enough to
6 only hand one pack of bills as opposed to everything in the
7 drawer, is no different than the one who should come in and
8 there happens to be \$50,000 in cash in the drawer and the
9 teller gives all of it to the bank robber.

10 The point is, the person who came in to rob the
11 bank intended to get everything that was in that cash drawer
12 regardless of the amount, and the seriousness of the event,
13 in my judgment, is there is very little difference. It is
14 just the fortuity of other events that controlled how much
15 they got.

16 COMMISSIONER MAC KINNON: On the discretion of the
17 United States Attorney today, he can decide not to charge a
18 crime at all and not even present it to the grand jury, or
19 he can go through procedures and get absolute immunity, and
20 that's a great power. And if he wants to dismiss a case in
21 midstream, I think the law probably is that the court can't
22 do anything about it.

15

1 JUDGE O'KELLEY: Judge, that's correct, and my
2 comments did not take issue with that. I agree with that.
3 That's the U. S. Attorney's discretion and he may exercise
4 it, and I have questioned that a judicial officer should
5 interfere with that discretion, but, once there's a plea
6 of guilty or a conviction as to a particular crime, the
7 responsibility then falls upon a judge to impose the sentence.
8 And if the sentence is wrong and an incorrect sentence, the
9 judge--I'm going to take the blame for it to the public if
10 it's an excessive sentence or it's an inadequate sentence.
11 And my view is I should bear the responsibility for it,
12 not the mere fact that a prosecuting attorney has certified
13 to something that demands and requires that I do something
14 that in my judgment is not appropriate. That's the complaint
15 that the trial judge has.

16 COMMISSIONER MAC KINNON: Well, all the inquiries
17 that we have made for all the hearings we've had for pretty
18 much a year now have indicated to us from the United States
19 Attorneys that most of them do not participate in the sentencing
20 process. They do not argue for particular sentences--that's
21 most of them.

22 Now, in some of these metropolitan communities they

6
1 get egged on and do different things, but generally that's
2 the position of the United States Attorneys throughout
3 America.

4 JUDGE O'KELLEY: I can't speak for others. In our
5 district they make recommendations but they cannot control
6 the sentences. The judges there--I will not and the other
7 judges in our district will not accept a plea under Rule 11
8 that is the third category of a plea agreement that binds the
9 court to impose a particular sentence. We will accept and
10 give consideration to recommendations but will not accept
11 a negotiated plea. And that's, in effect, what the recommenda-
12 tion is here that you not allow that to be bound and it then
13 appears to be the judgment of a court when, in fact, it's the
14 judgment of a prosecuting attorney.

15 COMMISSIONER MAC KINNON: Do you traditionally ask
16 the United States Attorney for a recommendation?

17 JUDGE O'KELLEY: I ask them if they have anything
18 to say and, if they wish to make a recommendation, they are
19 free to do so. Sometimes they do and sometimes they do not.

20 Many of the plea agreements that are struck in our
21 district are that the United States Attorney will not make
22 a recommendation. That's part of the agreement that they will

1 not make a recommendation.

2 COMMISSIONER MAC KINNON: Unless in allocution they
3 state some erroneous fact.

4 JUDGE O'KELLEY: They usually reserve in their
5 plea agreements that they may respond to any statement of
6 fact that the government considers to be incorrect.

7 CHAIRMAN WILKINS: Thank you, Judge O'Kelley and
8 Judge Anderson. Your comments are well-taken not only on
9 the issue of cooperation but the other issues that you raise,
10 as well, and we appreciate so much the time and effort that
11 it has taken for you to participate with us. And we look
12 forward to a continued working relationship with your circuit
13 over the next few months.

14 JUDGE ANDERSON: Thank you for inviting us.

15 JUDGE O'KELLEY: Thank you.

16 CHAIRMAN WILKINS: We just heard from the 11th
17 Circuit. The 3rd Circuit with us today is the Honorable Ed
18 Becker, 3rd Circuit Court of Appeals, and the Honorable
19 Maryanne Barry, United States District Judge for the District
20 of New Jersey.

21 Judges, we are delighted that you are here and we
22 look forward to hearing from you.

1 JUDGE BECKER: Thank you, Mr. Chairman.

2 I have been a judge of the 3rd Circuit Court of
3 Appeals for almost five years. Prior to that, I was a judge
4 of the United States District Court for the Eastern District
5 of Pennsylvania for over 11 years.

6 Judge Barry, a very distinguished trial judge has
7 been a District Judge for over three years. Prior to that
8 she was the First Assistant United States Attorney for the
9 District of New Jersey. So, we have a prosecutor's view.

10 The statement which I submit is a joint statement.
11 Judge Barry joins in it. We have received comments from
12 many 3rd Circuit judges and, with respect to the matters set
13 forth in Part Two of my statement to which I will presently
14 refer, we are confident that we speak for the judges of the
15 3rd Circuit.

16 Now, I have submitted, and the commissioners I
17 believe have before them a statement of some 57 pages of which
18 10 pages are charts. We have tried to cover a lot of ground.
19 For instance, with respect to the matters on which the
20 commission specifically requested comment, we have covered
21 some 20 items.

22 We have covered at great length, for instance, the

1 conditions of probation and supervised release. We have a
2 six-page presentation in detail responding to questions that
3 the commission posed.

4 But I said that I had 10 pages of charts and what
5 I would like to do is start my presentation by referring to those
6 charts and explaining them before I get into the text, as
7 it were, of our paper.

8 Now, these charts represent three exercises that
9 I asked the probation office in the Eastern District of
10 Pennsylvania to carry out. It is a very fine probation office
11 and I said, "First, what I would like you to do is to take
12 six cases that have recently been sentenced, so we know what
13 the actual sentences are and we know, in cases of incarceration,
14 what the parole commission guideline is."

15 Then I said, "Take these six cases. Send them to
16 the commission. Ask Rusty Burress to score them." And Rusty
17 Burress scored all six cases; that is, he scored five of
18 the six. One of them he simply couldn't compute the score
19 on the basis of the presentence investigation report.

20 Then I said, "Give them to eight or 10 officers and
21 let them score them, and let's see how easy they are to apply.
22 I mean, give them some training first and let's see what the

1 scores come up as. Let's see how close we all get."

2 Then I said, "Secondly, let's see what the actual
3 sentence was that the judge imposed and then let's see what
4 the guideline"--the tentative--we understand that they are
5 tentative and you are going to change the translation numbers,
6 but they, at least, give us some indication as to what the
7 sentence would be under the tentative guidelines.

8 And the third exercise was to take six cases that
9 are more than five years' old, where the in-out decision was
10 a close decision but where the judge opted for probation and
11 where probation was successfully completed and let's see
12 what happened to those people--what would have happened to
13 those people under the guidelines.

14 Now, at page 10A through F are the results of the
15 socring. And the first thing this demonstrates is that we
16 are going to have to do an awful lot of training of probation
17 officers and judges. In the first case, the commission score
18 was 28; the probation officers scored anyway from 17 to 70.

19 And, by the way, I also ask you if you will look
20 at the chart, we have not only what the case is about--the
21 first is tax evasion; the commission's guidelines' score and
22 what the eastern district officers scored. But we have a

1 brief summary of the case facts and an identification of the
2 major problems.

3 I said, "What was the problem in calculating the
4 score? Why were the scores skewed? And as you will see,
5 they are terribly skewed. Let's see if we can identify it."
6 And the fact of the matter is that for the most part it is
7 in calculating the harm values--all these things that so many
8 of the witnesses have talked about is where we get into trouble.

9 The second case, which was a transportation securities
10 case, the commission's score was 79; the probation officers'
11 went from 79 to 143, and one was at 450.

12 The fourth case, the commission's score was 13;
13 the probations' went from 72 to 250, and one probation officer
14 scored 2060. I don't know whether that's more than a life
15 sentence but, in all events--

16 CHAIRMAN WILKINS: It would be close to it.

17 JUDGE BECKER: --a bank robbery case which the
18 commission scored at 100, the officers went from 91 to 216.

19 Well, obviously, these are tentative guidelines.
20 Obviously, the officers had not been fully trained, but if
21 you consider the GAO study of U. S. Parole Commission scoring,
22 which found U. S.--well, people, who are supposed to do nothing--

2 1 that is, the U. S. Parole Commission Officers' score and they
2 were all over the lot.

3 The kind of complexity that we talk about, in my
4 view, creates a very serious problem. Have in mind one of
5 the suggestions that we made is that maybe there ought to be
6 some kind of commission certified scorers in each probation
7 department. But if you have small districts, the judge is
8 going to have to end up doing it. You may not have that kind
9 of cadre of probation officers. And the short of it is that
10 we think that it can be quite troublesome.

11 Secondly, with respect to what the sentences were,
12 those are on page 11A. The sentences--and I won't go into
13 detail, but the sentences in almost every case were much more
14 severe under the tentative guidelines.

15 Now, how much conclusion can we draw from that? I
16 don't know, but it seems to me that you get all your evidence
17 together and take a look at it and, to repeat, then you can
18 look at these at your leisure but the sentences were much
19 harsher, significantly harsher under the guidelines.

20 Now, I do want to say that these were picked at
21 random. These were not picked with a design to show disparity.
22 Insofar as the successful probation cases are concerned, those

13 1 are at 12B. The one that retrospectively interested me most--
2 excuse me, at 12A--is Case Number Two. The defendant was
3 a 31-year-old black female who plead guilty to distributing
4 a large amount of methane amphetamine on two occasions and
5 carrying a fire arm during the offense subsequently provided
6 extensive assistance to the government; no prior convictions;
7 this woman successfully completed five years of uneventful
8 probation supervision; remained crime free and drug free;
9 steadily maintained full employment and supported her children
10 and, as I said, she provided cooperation. Under the mandatory
11 minimum sentence under the guidelines, it would be six-and-a-
12 half years' real time, and the actual sentence was five years'
13 probation.

14 And I said to the probation officer, I said, "Who
15 was the judge that imposed this sentence?" And he said,
16 "Judge Becker." I didn't remember the case. Then when he
17 filled me in on the case, I realized, yes, I did remember the
18 case. And this was a sort of a sad-sack type who provided--
19 and the main reason that animated my sentence was cooperation.

20 Well, again, how much can we understand that the
21 statute is different and retribution or just deserts play a
22 greater role? We understand that the commission is constrained

24

1 by statute, and that most of the criticisms that have been
2 levied against the draft guidelines by the judges, including
3 Judge Barry and me, are directed against the statute or
4 the statute in the guise of the commission, and we understand
5 that different factors are now involved, but it seems to me
6 that there is some lesson to be learned from this exercise.

7 Now, we have surveyed the prior testimony and, as
8 I read it, the judges who preceded us have said that the guide-
9 lines are unduly mechanical and rigid, complex, difficult to
10 apply, too often inappropriately harsh, burdensome on
11 prison facilities, productive of vastly increased work loads
12 for both trial and appellate courts, likely to discourage
13 guilty pleas, likely to elevate the role of the prosecutor
14 over the judge, and likely to create their own brand of
15 disparity, and the biggest problem, of course, is stripping
16 the judges of discretion.

17 You've heard that from everybody before. We, Judge
18 Barry and I, understanding that most of what the commission
19 has done has been constrained by the statute, nonetheless
20 feel at liberty to express our view, and we agree--and this
21 is set forth in our statement--with those comments which
22 we have thus summarized. But we thought that we could be of

1 more help to you in addressing areas that others had not
2 addressed.

3 Incidentally, with respect to these exercises, if
4 you are interested in the actual cases, Thomas Moher, M-o-h-e-r,
5 of the Probation Department of the Eastern District of
6 Pennsylvania, can make the actual reports available to you
7 so you can take a look at them and see whether the problem
8 was with the Eastern District Probation Officers.

9 But the short of it is that we endorse the comments
10 of most of the other judges. We have, in Part II, a general
11 comment on the draft guidelines which are consonant with
12 what you have heard pretty much before.

13 There are two points that we do wish to stress.
14 First of all, we think that the 20-percent discount, in
15 essence, for guilty pleas is grossly inadequate. We feel--
16 we don't know what the statistics are precisely. We think that
17 probably 90 percent of the cases terminate in guilty pleas.
18 With a 20-percent discount, nobody is going to plead, or very
19 few are going to plead and the system may choke to death.

20 With respect to the 40-percent discount for coopera-
21 tion, we also think that that is inadequate.

22 Insofar as the quantification for harm values is

1 concerned, on page 8 we complain that because of the detailed
2 ratcheting of the guidelines the judge is given inadequate
3 leeway in making extremely subtle and difficult distinctions
4 relative to sentence enhancement which have enormous conse-
5 quences. The difference between extreme psychological
6 injury and significant psychological injury or between--among
7 severe, permanent and serious bodily injury is elusive at
8 best. The property table is much too stratified. We, by
9 and large, believe that there should be wider ranges, reduce
10 the number of categories, permit the sentencing judge to
11 select within a range specified by the commission the number
12 of points to be added or subtracted instead of using a
13 precise point value designated by the commission.

14 Indeed, consonant with that, our general conclusion
15 is that we believe that the premise and a flawed premise of
16 the commission's system is that there is a correct sentence
17 in every case. Rather, we believe that there is a range of
18 correct sentences in every case and that what the guidelines
19 should do is to give the judge wide discretion within that
20 range without being obliged to quantify the significance to
21 be ascribed to each factor.

22 Now, what I would like to do is devote the rest of

1 my time to tell you what we really came here about. Our first
2 point is that we strongly urge the commission to seek legisla-
3 tion from the Congress. We view the Congress as your partner
4 in this exercise.

5 What is this exercise? This exercise is the most
6 revolutionary change in sentencing since the Founding of the
7 Republic. The stakes here are enormous. They cannot be
8 underestimated. The stakes are enormous for the Federal
9 Judiciary--for everybody who is involved or who may become
10 involved in the system.

11 Now, we respect very much what the commission has
12 done. We, in fact, are awed by the product you have turned
13 out under the pressure and time and circumstances. It is
14 prodigious; it is formidable; it is thoughtful; it is
15 intelligent. But given all that is at stake, we think you
16 need help from the Congress. We think you need to go to the
17 Congress and ask for more time.

18 Given the criticisms that have been leveled at
19 the guidelines in these hearings, we do not believe that by
20 April of 1987 you can give the very best product to the
21 Congress. We think that what Congress is entitled to is
22 the very best possible product, and we believe that the

1 commission should seek from the Congress another six months
2 or another year, if necessary, to put all of this together.
3 We don't think that you have enough time up to now and, even
4 more important, what the testimony has revealed is that there
5 are problems with the joints. There are structural problems
6 with the guidelines that are hamstringing. Judge O'Kelley and
7 Judge Anderson referred to a few of them.

8 We believe that you should seek correction from the
9 Congress. We think that you ought to go to the Congress
10 after the first of the year and say additionally, "These are
11 the problems that we are having." Whether it be in the
12 area of guideline ranges or a number of other areas that
13 we will identify, above all, the 25 percent could be increased
14 to as much as 50 percent, which would solve an awful lot of
15 problems. But even leaving that aside, there are areas which
16 you can identify which you could go to the Congress and say,
17 "We need help in this area. We need help in that area. We
18 need help in some other area." And we urge you to do so.

19 I mentioned the 20-percent guilty plea limit, the
20 40-percent cooperation limit--the welfare of the whole federal
21 criminal justice system turns on your decision and there's
22 an awful lot at stake that we urge you to think about.

29 1 Now, I want to be very specific at this point in
2 terms of things that you might seek legislation on. Now,
3 Judge O'Kelley and Judge Anderson are not going to be very
4 happy with what I am about to say, and I say it notwithstanding
5 my agreement with them that the biggest problem--that one of
6 the big problems is the proliferation of findings that have
7 to be made and the burden on judges of these additional
8 sentencing hearings, but it is plain that the critical facet
9 of the sentencing process under the guidelines is the determina-
10 tion of modified real offense behavior beyond the offense
11 of conviction.

12 Facts found by a mere preponderance of the evidence
13 may convert what would otherwise be a probationary term into
14 a sentence of incarceration ranging anywhere from a modest
15 term to decades in jail. The mere preponderance standard is
16 the lowest standard by which facts may be found in federal
17 court. We state in our presentation that we think that is
18 unfair and that maybe it ought to be modified, although we are
19 not all that happy with clear and convincing, but a preponderance
20 finding is, of course, jura, the least reliable finding.

21 Now, you've got somebody who is going to get an
22 extra, two, five, 10 years in jail because of a bare

30 1 preponderance finding--the least reliable finding with respect
2 to something that wasn't the offensive conviction but is
3 offense-related conduct.

4 Under Federal Rule of Evidence, Section 1101(d)(3),
5 the Rules of Evidence--the Federal Rules of Evidence do not
6 apply in the sentencing context.

7 The inapplicability of the evidentiary rules under
8 the present system has not been a cause of concern because
9 of the virtually unlimited discretion vested in the sentencing
10 judge to balance things out, but under the new system each
11 and every fact may result in many years of real sentence time.
12 For every judicial finding and the evidence upon which it is
13 based implicates so serious a liberty interest, and where the
14 finding may be predicated on the lowest standard of any
15 cognizable judicial finding, we do not believe that our system
16 can countenance the making of those findings without application
17 of the more rigorous rules embodied in the Federal Rules of
18 Evidence.

19 On a misdemeanor for conviction the Federal Rules of
20 Evidence apply. Well, I could go on with a minimal or no jail
21 term. I think it is a very serious problem. The solution,
22 it seems to me, is to simplify the system so not so many

1 findings and not so many hearings are indicated.

2 Additionally, we suggest in our paper, in terms of
3 fact-finding, that consideration be given by the commission
4 to recommending the use of the jury during the trial process
5 by a special interrogatory to find some of these facts. There
6 has been an abhorrence in the federal system of special verdicts
7 in criminal trials. At this point, facts that the jury may
8 find may be infinitely more important than the finding of
9 guilt or innocence and, therefore, some consideration, we
10 think, should be given in that area.

11 On the subject of appellate review, we address this
12 commencing on page 16 of our paper. We think that there are
13 two serious flaws; that the appellate courts are really going
14 to be jammed because, in the event of a short sentence, if
15 the appellate courts don't hear it right away, the sentence
16 is going to be over. This is going to have an effect on the
17 appellate courts like the Speedy Trial Act on the trial courts;
18 you don't try civil cases; you just try criminal cases.

19 We are going to have to shunt aside the rest of our
20 docket and set up emergency panels so we can hear sentence
21 review before the sentence runs out.

22 Two problems--first of all, the courts of appeal are

1 given the power to review--the duty to review sentences
2 imposed as a result of an incorrect application of sentencing
3 guidelines issued by the commission. The term "incorrect"
4 seems awfully heavy-handed in terms of tremendous appellate
5 oversight of the district courts. I think the Congress ought
6 to be asked to reconsider.

7 Secondly, with respect to Section 3742(e), the
8 courts of appeal--this is in sentences outside guideline
9 range. If the court of appeals determines that the sentence
10 is outside of the range of the applicable sentencing guidelines
11 and is unreasonable, then you do something about it.

12 Well, I don't know what "unreasonable" means as
13 an appellate judge. And, secondly, I don't think the shoe
14 fits because an outside guideline sentence depends on whether
15 the sentencing court erred in finding the presence of an
16 aggravating or mitigating circumstance that was not adequately
17 taken into consideration by the commission in formulating the
18 guidelines and that the circumstance should result in a
19 different sentence.

20 That seems to me determining whether or not the
21 commission gave adequate considerations they did it or they
22 didn't do it, and it doesn't seem to involve the matter of

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1 unreasonable which is the touchstone for review under
2 3542(e). So, as I view it, the section doesn't make any
3 sense and it ought to be reconsidered--another thing that you
4 can refer to Congress.

5 Now, let me get to something that is troubling to
6 me. It's troubling to a lot of people. I spoke to Ms.
7 Corrothers earlier and apparently I am the first judge to
8 raise it before the commission, but the fact of the matter
9 is that in very respectable circles serious objections have
10 been raised as to the constitutionality of the composition
11 of this commission.

12 In the Legal Press of December 8th of the National
13 Law Journal in which the chairman is quoted, there is an
14 extensive discussion of it. It's been in law journals. I
15 can tell you through what the judges on the panel know is
16 the very best grapevine of all--the "law clerk grapevine,"
17 that one of the very major law journals is about to come out
18 with a very major comment asserting the unconstitutionality
19 on a number of grounds that the commission--now, the fact of
20 the matter is that there is no way on God's green earth that
21 the first guy, or the fifth guy, or the 10th guy that gets
22 sentenced to jail under the guidelines isn't going to challenge

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1 constitutionality of the commission.

2 And it seems to me that if there is a problem that
3 it ought to be solved now and not when 3,000 people are in
4 jails and then some court or other says, "Yes, the commission
5 was unconstitutionally composed and everybody has got to be
6 let out, or resentenced, or what-have-you."

7 Now, Judge Barry and I--and we devote 13 pages,
8 from pages 19 to 31 of our presentation. We array in very
9 great detail the constitutional arguments.

10 The delegation argument, which is seriously pressed
11 in some quarter, we have relegated to a footnote, but the
12 argument about executive power and about the presence of
13 judicial members on the commission we discuss in great detail.

14 It is inappropriate for us to express a view with
15 respect to the correctness of those arguments, but we strongly
16 urge the commission seriously to consider this matter and,
17 if the commission determines that there is a problem, it is
18 not too late for the Congress to correct it. There is just
19 too much at stake. It ought to be done now.

20 At page 23, et seq, we discuss the argument from
21 executive power; the effect of the President's power to
22 remove the commission; the argument is that functionally and

15 1 legally the executive controls the commission and, thereby,
2 the sentences to be imposed in criminal case--because the
3 fact of the matter--the inescapable fact of the matter is that
4 sentences under the guidelines are not discretionary with the
5 judges; the judges must sentence under the guidelines. This
6 isn't advisory. You people, the argument goes, in essence,
7 are making laws, and that the executive has this control.

8 Now, we discuss in great detail the authority of
9 Bowsheer and Synar, of the Gramm-Rudman Case, the Humphrey's
10 Executor Case and the Weiner Case, and we array it all. You
11 can consider the arguments. There are better sources than
12 the Becker and Barry paper.

13 We do note, however--and this has not been much
14 noted--that the presence of the Attorney General, ex officio,
15 on the commission is another factor which may be strongly
16 urged by people who assert the unconstitutionality of the
17 commission.

18 With respect to the presence of judicial members, the
19 attack is based on the fact that judicial presence on the
20 commission upsets the delicate balance of powers under our
21 tripartite system, which is supposed to be a system under
22 which judges are not beholden to the President.

36 1 There are some very technical arguments and
2 obviously my infinite respect for the judicial members of
3 the commission which is known to them is irrelevant to these
4 technical, legal arguments, but that's how courts decide
5 cases, on the Separation of Power Cases, on the basis of
6 technical, legal arguments not on the basis of personalities.
7 The power of the President to appoint, the power of the
8 President to remove, this is an ongoing commission. The
9 President can appoint a district judge and give him a circuit
10 judge salary by putting him on the commission. The President
11 can cut his salary by removing him from the commission;
12 whereupon, he goes back to district judge--technical arguments,
13 but this is the stuff of which lawsuits are made.

14 Challenges to the commission in terms of discovery
15 of the judges who sat on the commission as to what the
16 commission meant and the judicial involvement in legislation,
17 this is not, it seems to me, like Civic and Wilson, which
18 discussed the S-i-b-b-a-c-h, the Federal Rules of Federal
19 Procedure because this seems to be more substantive not
20 procedural.

21 The argument further goes that this is not a one-shot
22 deal because this commission is going to be ongoing for quite

1 a number of years. The argument further goes that the 180-
2 day layover in Congress will not solve it because Congress
3 does not affirmatively legislate; rather the guidelines become
4 law if the Congress does nothing.

5 The short of it is that these arguments have been
6 raised, and we strongly urge the commission to take a look at
7 them. If the commission decides that there's a serious problem,
8 it is not too late to ask Congress to do something whether
9 it's with the removal power or some reconstitution of the
10 commission to solve the problem.

11 Well, I have overstepped my time. We have responded
12 at some length to 20 points. I have called special attention
13 to pages 39 to 46 to our comments on conditions of probation
14 and supervised release. I also call special attention to
15 Judge Barry's discussion. She wrote on pages 35 to 38
16 determining offense values for multiple crimes.

17 One of the commissioners has described the commission
18 system as one of guided flexibility. We hope that that is
19 what you end up with. All of us are counting on it.

20 That completes my oral presentation.

21 CHAIRMAN WILKINS: Thank you very much, Judge Becker.

22 Ms. Barry?

38 1 JUDGE BARRY: I come here out of respect for the
2 commission and the work that you are doing, but I adopt and
3 endorse Judge Becker's remarks. He speaks very well for
4 our circuit.

5 CHAIRMAN WILKINS: Yes, he does. Thank you very much.
6 We appreciate not only the attendance today of Judge Becker
7 and Judge Barry but, of course, this document which reflects
8 a great deal of thought and effort.

9 JUDGE BARRY: Much thanks to Judge Becker on that,
10 as well.

11 CHAIRMAN WILKINS: I know it is going to be very
12 helpful to us. Some of the issues that you raised, we need
13 to go back and revisit them, I'm sure. As you know, that
14 preliminary draft was just a rough cut to get comments
15 started, but it is not quite as easy to run to the Congress
16 and get an amendment.

17 We have run to the Congress and I have run several
18 times and have been met with a great deal of resistance by
19 the House to the subcommittee who has oversight responsibilities
20 to this commission to do anything. Indeed, we tried to
21 address the Appellate Review that Judge Breyer has been very
22 concerned about, and Judge MacKinnon, and, of course, I and

1 all the appellate judges, and we tried to get that changed.
2 And the Senate passed something that we thought would correct
3 the problem, or least give some relief, and the House refused
4 to even act at all. It never got out of committee.

5 So, that's where we are with some of these problems.
6 Now, I imagine we may run into the same problem with trying
7 to find legislation that may relieve some of the constitutional
8 potential problems that exist.

9 So, I'm not sure what we should do. I mean, do we
10 wait to see if the Congress gives us some relief, or do we
11 push forward under the existing mandate and hope to get relief
12 but if we don't go forward with the statute as it is written?

13 JUDGE BECKER: Well, it seems to me that you ought
14 to try to get relief. If you don't get relief, then you've
15 got to do the best you can. You can't abdicate your
16 responsibility.

17 CHAIRMAN WILKINS: I don't think there's any question
18 that we will try to get some legislation to help us in many
19 of these areas. I just don't know whether we will be
20 successful or not and particularly by the deadline.

21 JUDGE BECKER: I think that the easiest thing would
22 be to get an extension of the deadline. And I think that the

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1 Congress cannot help but be pleased with what you have done
2 up to now. It is not like going at the beginning--I mean,
3 there was one extension of the deadline. That's before
4 anything had happened, but that was also because no one had
5 been appointed or confirmed.

6 But it seems to me--I didn't bring the Blue Book
7 up here with me--you go and you give them that Blue Book,
8 and then you give them a summary of the testimony. It seems
9 to me they have to say, "Hey, you people have really done
10 yeoman service. You've done a terrific job. You have really
11 made tremendous progress." I think they will be pleased and
12 seeing that you have gone that far, I am inclined to think
13 they would be disposed at least to give you six months. Maybe
14 they won't give you a year, but I think it now being December
15 and you've got to get it in in April, if they at least give
16 you from April or May to the following December, I think that
17 would be a big help.

18 We all remember Walter Houston saying, "It's a long,
19 long time from May to December." You can do a lot in that
20 period of time. I didn't sing.

21 CHAIRMAN WILKINS: Are there any questions from
22 other commissioners on my right?

1 Mr. Breyer?

2 COMMISSIONER BREYER: You mention a 20-percent discount
3 as really too small, and you are the first person to testify
4 to say that. Almost every judge, defense attorney and
5 prosecutors all want a wider range. A 25-percent limitation
6 in the range of the law is in the law. If that range were
7 expanded would that help solve the problem?

8 JUDGE BECKER: I think it would. I would like Judge
9 Barry to respond to that. She is now an active trial judge
10 and a former prosecutor.

11 JUDGE BARRY: There are cases where 100 percent
12 would be appropriate. Just as in the cooperation area, there
13 are cases where 100 percent is appropriate.

14 I think my difficulty as a judge and as a former
15 prosecutor is that this is a particularly difficult area to
16 quantify. It is a particularly difficult area to say, "Well,
17 pick a number out of the air. Should it be 20 percent? Should
18 it be 40 percent? Should it be 60 percent?"

19 A guilty plea with cooperation, what result? This
20 is the perfect area for the judge's discretion within perhaps
21 certain bounds, but how can you restrict to 40 percent the
22 value of cooperation rendered under life-threatening conditions,

1 wearing a wire in danger of one's life, and bringing in the
2 Number Two cocaine conspiracy in the country? 40 percent? No.
3 100 percent perhaps yes.

4 And the same in the guilty plea area, there are
5 cases where one pleads guilty, evidencing the first step on
6 the road to rehabilitation, and you look at this individual
7 and you say, "There is a man or a woman who can make it;" that
8 leads right into one of the most frequently articulated
9 difficulties with the guidelines, which is the lack of
10 discretion on the in-out decision, probation versus incarceration.
11 tion.

12 COMMISSIONER BAER: Let me follow up. You know,
13 you make a good argument, it seems to me, for the present
14 system. But let me go back to this wide disparity. There's
15 been a lot of testimony about the wide disparity of sentencing
16 now in this country. So, how do you do something about that
17 and still be at the discretion of the judge?

18 JUDGE BARRY: I have a lot of regard for the way the
19 system is working now. With certain exceptions, you have,
20 at both sides of the spectrum what I think all reasonable
21 persons could agree, are abuses.

22 I also, though, have respect and understanding for

43 1 what the commission is mandated to do. I suppose the question
2 really becomes, how does one inject some more discretion into
3 what you are trying to do without creating the very disparity
4 you are mandated to prevent? It is very difficult. I don't
5 know that it's possible without being so rigid that we end
6 up not doing justice, and that is the greater flaw.

7 There are ways, though, even with the most rigid
8 system that there will be disparity because even the most
9 rigid system can be manipulated, although perhaps not by
10 judges.

11 CHAIRMAN WILKINS: Thank you.

12 Any other questions?

13 COMMISSIONER MAC KINNON: Judge Becker, do you think
14 this particular format is more complex than the parole
15 commission guidelines?

16 JUDGE BECKER: Yes.

17 COMMISSIONER MAC KINNON: Did the advent of state
18 guidelines in Pennsylvania increase trials?

19 JUDGE BECKER: I don't think so. The state guidelines
20 in Pennsylvania are purely advisory. They have very little
21 impact on the sentencing system, Judge MacKinnon, because they
22 are so simple. They are about 1/1000th as complex as this

14 1 and they are purely advisory.

2 COMMISSIONER MAC KINNON: You say that this increases
3 sentences. What do you think is the Congressional intent
4 discerned from their statute as to whether sentences should be
5 increased?

6 JUDGE BECKER: I don't think Congress intended to
7 take a position with respect to that, although I think, given
8 Congress' emphasis on the goals of sentencing, which are
9 somewhat elevating retribution or just deserts over its
10 previous status and downplaying rehabilitation, I think that
11 it is a fair statement that Congress expected some modest
12 increase in a number of sentences. But I think Congress'
13 greatest concern was disparity and developing a system under
14 which you serve the time that you were sentenced to, rather than,
15 you know, the judge imposed 20 years and you know the guy
16 wasn't going to serve 20 years, and the public is fooled.

17 COMMISSIONER MAC KINNON: You mean, honesty in
18 sentencing?

19 JUDGE BECKER: Honesty in sentencing. I think they
20 were concerned more with honesty in sentencing and in
21 eliminating disparity than in filling the jails because they
22 have certainly not shown a willingness to spend the money to

15 1 build more jails. But I must concede that there are a certain
2 number of cases where, on the basis of a pure rehabilitation
3 philosophy, under the previous system, a probation sentence
4 was indicated whereas now that would be more difficult to
5 justify.

6 COMMISSIONER MAC KINNON: Well, Congress inferen-
7 tially spoke against rehabilitation, didn't they?

8 JUDGE BECKER: I think it inferentially spoke against
9 rehabilitation as a--

10 COMMISSIONER MAC KINNON: Except that it might be
11 formulated within an adequate sentence.

12 JUDGE BECKER: I think that's right.

13 COMMISSIONER MAC KINNON: Judge Trump said you had
14 respect for the way it is working now, but I think if you
15 will read the legislative history and the details of this
16 Act--and I'm sure you have--Congress didn't seem to come down
17 to that same conclusion. And when you look at the increase
18 in crime and the increase in severe crime, you can't come
19 to any other conclusion but what we've got a problem, and
20 they've thrown it in our laps pretty much and that's what we're
21 trying to deal with.

22 JUDGE BARRY: I think that there must be a way to

16
1 deal with the severe crime problem. And as a judge in a
2 metropolitan area, who spends 90 percent of her criminal time
3 taking pleas or trying drug cases, I am very sympathetic to
4 that. But to say that there's a high crime problem and that
5 there must be resolution doesn't mean that in the past and
6 now we are not imposing heavy sentences for criminal activities.

7 I imposed two 30-year sentences last week without--

8 COMMISSIONER MAC KINNON: Do you think that what you
9 are sentencing for drug offenders is the same sentence that
10 they are giving in Miami, Florida?

11 JUDGE BARRY: I think each area is somewhat
12 different. I think it would be probably fairly similar given
13 the size of the amount--the amounts involved.

14 You can't compare a drug offense in Montana, however,
15 to a drug offense in Miami, and these guidelines will be
16 applied nationwide.

17 I can't answer your question any more intelligently
18 than that, but I don't for a moment want to be thought to
19 agree that I don't believe that heavy sentences and appropriate
20 sentences are not now being imposed, because I think they are
21 in most cases.

22 COMMISSIONER MAC KINNON: Of course, the judge in

7
1 Montana could give an appropriate sentence that he thought
2 was adequate and state his reasons, and he could say that,
3 in his opinion, the guideline was more addressed to a crime in
4 your area than it is in his. And it would be up to the
5 9th Circuit to decide whether that was an adequate reason or
6 not.

7 JUDGE BARRY: Was he incorrect or was it unreasonable?

8 COMMISSIONER MAC KINNON: Yes. Thank you.

9 COMMISSIONER BREYER: Well, obviously, you've both
10 spent an enormous amount of time on this. It is very much
11 appreciated. I appreciate it enormously because you have
12 really gotten to the bottom of a lot of difficult problems,
13 and you've put your finger on a large number of things.

14 I think the most important practical thing, of
15 course, is going to be do we ask for an extension? There's
16 a very practical problem with asking for one, even if we need
17 one, which we may not.

18 We put out this initial draft knowing it would be
19 incomplete, controversial, filled with errors, hopelessly
20 off on the numbers--you know, big mistakes, but, of course,
21 the reason for putting it out was to provide a focus for
22 discussion, because at least speaking only for myself, but I

48 1 suspect I have agreement, that seeing different groups react
2 to this initial draft has been crucial for me to begin to
3 grapple with the problem. And if we hadn't put the draft
4 out, I think we would be nowhere, and by putting the draft
5 out I think we've managed to focus debate, at least in my
6 mind, so I can see alternatives fairly clearly, and I could
7 not see them before. Maybe others didn't need that but I think
8 some of them did. So, that's the up side.

9 The down side is the very process of putting out
10 this draft has gotten lots of people very worried because they
11 have seen mistakes, and how do they know if we will really
12 correct them. And because they are so worried, it could be
13 that, if you have a postponement, the time will never come
14 back, and the only down side of that would be that there is
15 a problem with disparity, and it would be a pity to lose the
16 chance to do something about it.

17 So, that's sort of the parameters of what will turn
18 out to be a decision as to whether we can get something good
19 enough to put in place that doesn't have enough problems--it
20 will have some--that it isn't at least worth a start. That's,
21 I think, the parameters of the debate about whether to go
22 back to Congress.

9 1 Now, on the cures, I don't know that the big problems
2 that you raise are that difficult to solve, at least, if you
3 are prepared for tentative guidelines that only perhaps make
4 a dent in the disparity problem; that is, you have heard
5 suggestions before. I mean, you can have wide ranges of
6 numbers and you can overlap the ranges, and you give judges
7 the choice of picking between six months and 16 months, if
8 you want, for stealing a small amount of money and, for stealing
9 a middle amount of money, you can start down to four months
10 and go to 20. You see, you can overlap the ranges and by
11 having broad discretion you can get rid of a lot of the details.
12 You can have fewer distinctions. You can encourage judges to
13 depart. Say, "Depart whenever you have a good reason to
14 depart." And then you can leave it up to the collection of
15 information and refinement over time to get the more detailed
16 distinctions that will help more with disparity.

17 Now, I put that out because I want you to have that--

18 JUDGE BECKER: It sounds good.

19 COMMISSIONER BREYER: Yes, but I think it can be
20 done practically, but one problem with that is, of course,
21 look, as soon as you get a great, big category and you say,
22 "Oh, judge"--look, you get a great, big category and you put

1 a bank robber who has one past offense, if all bank robbers
2 with one past offense are in the same category, you are going
3 to lump a lot of people who are really different. And one
4 approach to treating them differently is to say, "Judge, you
5 decide."

6 A second approach to treating differently is to,
7 say, have a lot of rules. You heard this morning the Justice
8 Department urge us in the direction of having a lot of rules.
9 I am not certain how strongly they felt about that, but that's
10 what is making me think that this simple approach may not
11 be so simple. It may be that not everybody agrees that we
12 ought to go with broad distinctions at least tentatively.
13 Maybe there are people who think we should make even more
14 distinctions and have even more since I see that's a possible
15 direction, but I'm not certain everybody agrees to it.

16 Now, I put those things out for you to think about
17 because, obviously, you are thinking about them. You are
18 thinking about them.

19 One practical thing, also, where you have judges
20 with discretion--you know, operating in our bank robber with
21 one--what California does with that is it says--and I wonder
22 if we could get that in. What they say is, "Judge, after you

1 sentence this offender, send all the information over to a
2 Commission."

3 Now, they have a special commission, and what
4 that commission has is a computer with 1,000 factors in it,
5 and that computer will tell, on the basis of 1,000 factors,
6 whether there is disparateness in the sentence.

7 If there is, it will send it back to the Judge.

8 If they sent it back to the judge, the judge is
9 likely to look at it and resentence.

10 You see, now, there that kind of a possibility
11 floating out there and possibly we could do that through
12 the rules, if that's a good idea.

13 You see, it might require moddification of Rule 35--
14 well, anyway, I'm not really asking a question.

15 JUDGE BECKER: It wwas a very interesting and
16 provocative thought.

17 We have a wise commission.

18 CHAIRMAN WILKINS: Thank you, Judge Becker and
19 Judge Barry.

20 We appreciate it very much.

21 JUDGE BECKER: Thank you.

22

T261 1 CHAIRMAN WILKINS: Our next witness scheduled is
2 Mr. Alan Ellis. He is ill today, confined to his home, and
3 we hope he will be here tomorrow.

4 I will now ask Mr. Jack Lipson to come forward.
5 He is representing the Federal Defenders Advisory Committee.
6 Mr. Lipson, we appreciate your attendance today.

7 MR. LIPSON: Thank you, Judge Wilkins.

8 Just by way of background, I'm the attorney in
9 charge of the Federal Defender Offices in the Southern and
10 Eastern Districts of New York, and I've worked as an attorney
11 representing indigent defendants in the federal courts for
12 most of the past 16 years, during which time I would guess I
13 have represented close to 2,000 defendants.

14 I am appearing here today on behalf of the federal
15 defenders who represent a substantial percentage of the
16 criminal defendants in 40 of the most active federal districts
17 throughout the nation. During the past 11 months, the
18 defenders have submitted a number of position papers setting
19 forth our views on a variety of specific issues relevant to
20 the development of a system of sentencing guidelines. We've
21 also had representatives testifying at some of the other
22 hearings that the Commission has held. We are also submitting

1 today a general overview of our comments on the Commission's
2 first draft.

3 I hope that these papers which we've submitted, as
4 well as the informal communications that we've had with the
5 members of the Commission and the Commission staff, have
6 been of assistance to you in your efforts.

7 During the limited time available today, I'd like
8 to make some general observations regarding the Commission's
9 first draft and to focus on some features of that draft
10 which the defenders as a group find particularly troubling.

11 Let me preface my remarks by emphasizing that the
12 defenders recognize that unwarranted disparity in sentencing
13 is a problem which must be addressed if our courts are to
14 fulfill the promise of equal justice under law. It's a
15 problem of particular concern to those of us who represent
16 indigent clients who often perceive that they are unjustifi-
17 ably treated differently than persons of wealth and privilege.

18 It is, therefore, with much regret that I must
19 report that the defenders believe that the draft guidelines,
20 the first draft of the guidelines, are seriously flawed and
21 fail to fulfill the promise of the Sentencing Reform Act.

22 Basically, we believe that the draft guidelines

1 seek to do too much too fast on the basis of too little
2 knowledge, and that consequently they do not serve the
3 congressional purpose of both reducing unwarranted disparity
4 in sentencing, while at the same time promoting fairness in
5 sentencing.

6 I would note, first of all, that the draft guidelines,
7 if they were implemented as they are presently drawn, would
8 result in sentences which are extremely harsh and far in
9 excess of those that are imposed today. We have heard from
10 Judge Becker about his experience in attempting to apply
11 these guidelines to cases that have been before him or
12 members of his court. I, too, have attempted to apply the
13 guidelines to cases that I have handled over the past year
14 -- cases, I should note, which were before a spectrum of
15 judges, not just judges considered particularly liberal
16 sentencers.

17 In all cases, in every single case, the sentence
18 that would be called for under the guidelines was far in
19 excess of the sentence that was actually imposed. And when
20 one considers that the sentence called for under the guidelines
21 is a real time sentence, the difference is absolutely shocking.

22 I should report to you that this experience is not

1 one that I alone have found in the Southern District of New
2 York. Other defenders from throughout the country, including
3 defenders from districts in which the general reputation of
4 judges is that they're much tougher sentencers than the
5 judges, perhaps, in the Southern and Eastern Districts of
6 New York, they've all reported that an application of the
7 guidelines results in substantially heavier sentences than
8 are presently imposed today.

9 This radical departure from the sentencing practices
10 of judges throughout the country reflects what to me is a
11 puzzling and distressing disregard for present practice.

12 The impact that the implementation of these guidelines would
13 have on the prison system I think just would be devastating.

14 Let me just diverge for a moment from my notes and
15 address a question that was asked previously, and that was
16 whether Congress intended that there should be a toughening
17 in sentences. I think it's clear from the legislation that,
18 with respect to particular types of cases, the legislation
19 indicates that Congress intended that tougher sentences be
20 imposed, the references to violent offenses, the references
21 to particular types of offenses by a recidivist.

22 On the other hand, Congress has indicated that in

1 connection with cases that don't fall in those categories,
2 that there shouldn't necessarily be a toughening. In fact,
3 within the legislation there's an indication that for first
4 offenders who commit non-violent offenses, there should be
5 presumption of probation, or that generally probation should
6 be imposed.

7 The distressing things about these guidelines are
8 that even with respect to those types of cases, virtually in
9 every instance the result under the guidelines is the imposi-
10 tion of a jail sentence.

11 Now, I recognize that the scale of sanction points
12 to sentence length is tentative and can be adjusted and
13 lessen some of the problems that I have noted. The problem
14 with the first draft, however, is more than a matter of the
15 severity of the sentences which it mandates. I think the
16 heart of the problem lies in the approach, in the notion
17 that a simple numerical score of sanction points can be used
18 to measure all relevant factors -- including such things as
19 aggravating circumstances, offense severity, offender char-
20 acteristics -- on a single scale which can then be applied
21 universally to all defendants in all types of cases to
22 determine not only the appropriate length of sentence, but

1 even the question of what type of sentence should be imposed.
2 The fact of the matter is that different factors must and
3 should be weighed differently in different situations, and
4 no single unit of measurement can be utilized in determining
5 the sentence in all cases.

6 The relative importance of the different purposes
7 of sentencing, as set forth in the sentencing statute, is
8 not a constant. It varies from crime to crime and depends
9 also on the type of defendant involved.

10 Experience teaches us -- and I think Judge Becker
11 made reference to this -- that in some situations considera-
12 tions of deterrence are paramount. In others, because of an
13 awareness of the defendant or particular circumstances of
14 the crime, considerations of rehabilitation have to be
15 considered more important. In still others, retribution may
16 be the most important factor.

17 The notion of using a universally applied numerical
18 system just does not take into account these variations in
19 the extent to which sentencing purposes, different sentencing
20 purposes are important in different cases.

21 Moreover, the precise numerical classification
22 which the draft employs and which compel increases in sentences,

1 often by many multiples of that which applies to the core
2 offense, on the basis of exact dollar values, exact quantities
3 of drugs, or on the occurrence of incidental harms, renders
4 this system unduly rigid and closer to one of prescribed
5 rather than guideline sentencing.

6 It's particularly distressing because, as I read
7 the Commission's draft and the commentaries, there is no
8 indication of the basis upon which these numbers are chosen.
9 They appear to be totally arbitrary. There must be more
10 flexibility so as to allow judges in individual cases to
11 exercise judgment as to what the impact of particular factors
12 should be in particular cases.

13 The guidelines should bring to the process a set
14 of principles to guide the exercise of that judgment. They
15 should not rigidly prescribe a fixed result which may be
16 unfair when all of the circumstances are considered together.

17 We are particularly disturbed by the draft's focus
18 on aggravating factors such as psychological injury and
19 other unintended harm, or sometimes unintended harm, which
20 do not reflect any mens rea, but which in many cases sub-
21 stantially enhance the prescribed penalty. The radical
22 enhancement of sentence which is mandated by the existence

1 of these factors under the guidelines may be appropriate in
2 some cases, but the general enhancement that the guidelines
3 provide for seems contrary to the general requirement of
4 mens rea which is traditional in American criminal jurispru-
5 dence.

6 Another problem with the guidelines is the attempt
7 in the guidelines to deal comprehensively and to assign
8 strict numerical values to so many different factors. Now,
9 I think basically -- and I'll save some time now -- the
10 point that I want to make here is the point that Judge
11 Becker so graphically made when he described the attempt by
12 probation officers in the Eastern District of Pennsylvania
13 to apply this guideline system. The results were all over
14 the place; this raises the danger that rather than promoting
15 the end of disparity, you, in fact, will be promoting dispar-
16 ity. Moreover, you will make it even more difficult for
17 defendants and attorneys to have some sense of certainty as
18 to what the sentence is going to be.

19 Moreover, I think that another danger here is that
20 this process will consume an extraordinary amount of time --
21 time of probation officers, of prosecutors, of defense
22 lawyers and judges. And I submit to you this makes the

1 system unworkable.

2 Of special concern to the defenders is the manner
3 in which the guidelines deal with, or perhaps it would be
4 more accurate to say fail to deal with the basis question of
5 whether or not to impose a non-custodial sentence such as
6 probation; the in-out decision. These guidelines, as I read
7 them, are oriented solely to the determination of the length
8 of prison terms to be imposed. They provide no meaningful
9 guidance or thoughtful analysis of when probation is appro-
10 priate.

11 These guidelines essentially have reduced probation
12 to an appendage, an option for judges to consider in those
13 few cases in which total sanction score is less than 14 and,
14 therefore, the case would fall in the zero to six-month
15 range. There's no statement of principles to inform the
16 decision to be made by the judge as to when probation should
17 be imposed.

18 Now, this is disturbing for a number of reasons.
19 It ignores the fact, first of all, that under present practice
20 as I understand it -- and this is based on statistics from
21 1983-84 -- incarceration is imposed in I think approximately
22 40 to 45 percent of the cases, and non-custodial sentences

1 are imposed in 55 to 60 percent of the cases.

2 Now, if, in fact, you're having probation and
3 other non-custodial alternatives imposed in such a large
4 number of cases, it makes no sense to provide no guidance as
5 to when that's appropriate. So it's particularly dangerous
6 to leave this uncovered by the guidelines and merely an
7 appendage to the guidelines on length of custodial sentence.

8 Another problem here is that it fails to give
9 effect to the congressional intent as expressed in Section
10 994(j) that manifests the presumption in favor of probation
11 for non-violent first offenders. That factor seems to have
12 been completely ignored in this guideline system.

13 Moreover, the failure to develop a second set of
14 guidelines, or a set of guidelines that deals with the threshold
15 in-out question, I think is in violation of the mandate of
16 Section 994(a)(1)(A). That section specifically requires
17 that there be guidelines on the question of whether to
18 incarcerate or to give probation. This is a separate mandate
19 from the mandate in Section 994(a)(1)(B) which speaks of the
20 requirement that there be guidelines on the length of prison
21 sentences.

22 The factors relevant to the determination of the

1 length of a prison sentence, moreover, are not necessarily
2 the same as those which must be considered in evaluating
3 whether probation is appropriate. In the former -- that is,
4 the determination of a length of a prison sentence -- con-
5 siderations of rehabilitation are barred under the new
6 statute. In the case of determinations of whether probation
7 is appropriate, considerations of rehabilitation are important.

8 It doesn't make sense or comport with the authorizing
9 legislation to establish a guideline structure in which
10 probation is to be given only to those whose prison term
11 guidelines are in the zero to six-month range.

12 Let me give you an example of where it is so
13 unjust. In the Southern District of New York, we have many
14 cases involving the low level street dealers in drugs,
15 selling very small amounts of drugs. Many of these defendants
16 are themselves drug addicts. I would say based on my experience
17 in these types of cases over the past several years that the
18 range of sentence in these cases -- depending on prior
19 record and things of that sort -- is essentially between two
20 and six years. And again, I am not talking about judges at
21 the extremes. It's pretty much mid-range judges.

22 On the other hand, in the case of defendants such

1 as these who have demonstrated by entering into a residential
2 drug treatment program that they are prepared to try and
3 address the drug problem which led to their involvement in
4 criminal activity, again, most of the judges in the middle
5 range are prepared to give the sentence of probation conditioned
6 on participation in the drug program.

7 Now, under the approach adopted by the Commission,
8 where only persons who fall within the zero to six-month
9 range should be considered for probation, this would not be
10 possible.

11 In still other cases, where the nature of the
12 offender and the offense indicate that there is no need for
13 institutional incapacitation, strict probation with special
14 conditions can serve the ends of specific deterrence and
15 retribution without resort to what would otherwise be an
16 appropriately long jail sentence.

17 Unfortunately, the first draft's approach to the
18 in-out decision fails to address these issues. We, therefore,
19 urge the Commission to develop independent guidelines to
20 this threshold decision as to whether to incarcerate or not,
21 guidelines which give recognition to the fact that the
22 legislative history of this statute indicates that probation

1 is a sentencing option to be considered in cases of appropriate
2 offenders in all categories of offenses, except, of course,
3 A and B felonies and such other statutes where Congress has
4 explicitly provided mandatory sentences.

5 Now, if I just may have a few more moments to
6 address a problem or a question that came up during the
7 testimony of Mr. Trott this morning. One of our areas of
8 concern is the problem of due process in the fact-finding
9 process. I was disturbed to hear this morning that Mr.
10 Trott not only is advocating an increase in the number of
11 factors to be considered in aggravating sentences, but that
12 he advocated that a sum-evidence test might be sufficient
13 for judges to make findings under such a system.

14 I think that the remarks of Judge Becker which put
15 forth the basic concerns of fairness are right on point.
16 Basically, I think it would be a terrible thing if sentences
17 could be increased, in some cases by four or five times, on
18 the basis of a finding of sum-evidence. Certainly, a higher
19 standard should be employed. The standard adhered to in
20 some courts is preponderance. I submit that the proper
21 standard should be clear and convincing evidence.

22 Let me just sum up and make a proposal for how the

1 defenders believe the problem of guidelines should be approached.
2 We believe, of course -- as I said before -- that there
3 needs to be due process guarantees in the fact-finding
4 process. We set this forth more clearly in our paper. We
5 believe, as I said before, that the probation question, the
6 in-out decision must be dealt separately.

7 But more basically, I think that the approach that
8 the Commission should take -- and I think this is pretty
9 close to what Judge Breyer put out as food for thought just
10 a few moments ago -- is an approach that is a much less
11 ambitious effort. I don't think that the Commission should
12 be trying to reinvent the wheel. I think that it should
13 leave much more discretion and flexibility with sentencing
14 judges, and that the Commission should adopt guidelines for
15 typical cases of particular types of crimes. And in doing
16 that, the Commission should look to what present practice is
17 and should depart from present practice only to the extent
18 that the legislation suggests that Congress believes there
19 is a need for tougher sentences.

20 I think that what should happen is that we should
21 allow judges to apply this more general standard; the Commis-
22 sion should set forth principles for judges who deviate from

1 that guidelines, and should monitor what's going on. I
2 submit that the Commission is an ongoing enterprise. By
3 gathering this information, the Commission can then determine
4 the extent to which more restrictive guidelines are necessary.

5 This approach will utilize the experience of
6 judges throughout the country, judges who have been imposing
7 sentences for many, many years, and judges most of whose
8 sentences fall within a broad middle range that prosecutors
9 and defense lawyers generally agree make sense in particular
10 cases.

11 This approach will avoid the pitfall of promoting
12 an illusory mathematical certainty which, if it accomplishes
13 a certainty at all, does so at the expense of fairness.

14 I hope that despite the critical remarks that I
15 have made here today that the Commission will continue to
16 maintain -- share ideas with the defenders. We are looking
17 forward to assisting you in this very, very important enter-
18 prise, and we believe that we can continue to make a contri-
19 bution.

20 I thank you for hearing me today.

21 CHAIRMAN WILKINS: Thank you very much. Any
22 questions from any Commissioners? To my right, Mr. Block?

1 COMMISSIONER BLOCK: Mr. Lipson, I have two ques-
2 tions. Really, two things perplex me. First let me make a
3 statement about our treatment of probation.

4 It seems to me that the statute directs us to
5 consider incarceration in those cases also where the crime
6 is otherwise considered serious. I think your own rendering
7 of our system where we have this lower range where probation
8 is an option is one way of expressing crimes which are not
9 quite as serious as those with higher sanction unit values.
10 So I think it is in that sense consistent with the statute.

11 Let me go on, though, about the issues that really
12 perplex me. One is you, I think, agreed that one of the
13 reasons for this activity is to reduce disparity. Yet you
14 suggest that what we should have is the following type of
15 option: We should have no punishment -- that is, probation
16 -- as an option, even if, say, the punishment range was
17 eight to ten years if imprisonment was granted.

18 Wouldn't, in fact, the judge be faced with the
19 following choice: either give probation or give eight to
20 ten years? And if judges did that, I would submit that that
21 would look like, to some outsiders -- and not even Martians
22 -- that that would, in fact, be disparity?

1 MR. LIPSON: Well, first of all, I think the
2 likelihood of having a case in which the guideline for
3 sentence length was eight to ten years, and yet considerations
4 of factors relevant to the granting of probation would
5 militate in favor of probation are very, very few. I don't
6 think there would be many cases like that.

7 COMMISSIONER BLOCK: Well, then you start back at
8 the sort of the system that we've suggested.

9 MR. LIPSON: No, no. Well, the problem here is
10 that you have a continuum where the only defendants who
11 judges can consider giving probation to and remain within
12 the guidelines are those who are in the zero to six-month
13 range. I think that the illustration I gave -- and there
14 are many other similar illustrations which don't come right
15 to mind -- of defendants who, using an analysis based on
16 offense, on the need for deterrence, and whatever, would get
17 sentences beyond zero to six-month; but whom, when you
18 consider particular factors present in their case, the fact
19 that they're amenable to rehabilitation or the fact that
20 there are conditions of probation that are sufficiently
21 onerous in their case that they can carry out that will
22 serve the purpose of specific deterrence and retribution --

1 there are cases like that. Those defendants should not be
2 left in a situation where the only way they can get probation
3 is if a judge says, "I am going to depart from the guidelines."

4 The considerations that go into the probation
5 decision are different than the considerations that go into
6 length of time in custody. And perhaps the public may not
7 understand that, but I think part of the job of this Commission
8 is in setting forth the guidelines to articulate the reasons
9 why that result can be.

10 COMMISSIONER BLOCK: Again, that's perplexing
11 because if we set forward a set of guidelines that say,
12 here, these are the conditions under which you can be set
13 free, this is the conditions under which the crime doesn't
14 count, it seems to me that that gets at the purposes of
15 punishment --

16 MR. LIPSON: But, you see --

17 COMMISSIONER BLOCK: -- and contradicts completely.

18 MR. LIPSON: Implicit in what you are saying is
19 the view that probation is a sentence that tells the defendant
20 that the crime doesn't count. That's not the case at all.
21 It may be in some instances, if you have probation which
22 doesn't involve close supervision. I'm talking about fashioning

1 forms of probation that involve restrictions on defendants.

2 COMMISSIONER BLOCK: You give it as an example of
3 less punishment in cases where the description of the case
4 is one to evoke an emotion of not punishing the individual.
5 I mean, you gave those examples of the drug dealers that
6 were suitable for rehabilitation or whatever. That calls
7 forth the notion that they shouldn't really be punished.

8 I'm just drawing on your own logic.

9 MR. LIPSON: No. The example I gave of the drug
10 dealer was an example of a defendant where considerations of
11 rehabilitation are sufficiently important that judges in my
12 district, at least, think we should opt for probation.

13 There are other examples of defendants where even
14 considerations of specific deterrence and retribution can be
15 utilized to impose strict probation with demanding conditions.
16 And I would suggest this is appropriate where the nature of
17 the offense or the nature of the defendant or the combination
18 of both are such that we don't have to have a concern that
19 we need to incapacitate this man in order to protect the
20 public. We can have him specifically deterred; because if
21 he violates the probation, he's going to jail.

22 We can exact retribution by requiring that he

1 meets certain conditions. So it's not only the rehabilitation
2 situation where probation is appropriate, but also situations
3 where the other purposes of sentencing can be served by
4 probation.

5 COMMISSIONER BLOCK: It seems to me that probation
6 is a disaster for general deterrence. I mean, Chief Greenberg
7 was here this morning, and he said in very plain English the
8 message that you send when someone commits a serious crime
9 and you don't punish him is that it's okay to commit the crime.

10 MR. LIPSON: I would agree that general deterrence
11 is almost always served better by a custodial sentence, but
12 general deterrence is just one of the purposes for which
13 sentencing is imposed. And in some instances, general
14 deterrence should take a back seat to rehabilitation, specific
15 deterrence, the fact that retribution and specific deterrence
16 can be carried out without the necessity of incarcerating
17 the defendant.

18 COMMISSIONER BLOCK: Thank you.

19 CHAIRMAN WILKINS: Mr. Baer.

20 COMMISSIONER BAER: Just one short question. Most
21 of those little street drug dealers up there in the Southern
22 District of New York, are they first offenders?

1 MR. LIPSON: Some are first offenders; some are
2 persons who had minor arrests for drug use. The general
3 practice is that when the defendant has taken steps -- prior
4 to sentencing -- to enroll in a residential program, and
5 there isn't a terrible prior record, that judges will extend
6 to them the opportunity to be on probation, even though the
7 identical defendant who hasn't indicated that he's prepared
8 to pursue rehabilitative programs will get two, three, four,
9 sometimes as much as six years in jail.

10 COMMISSIONER BLOCK: Can you imagine what that
11 would look like in the guidelines, though? I mean, the
12 instruction would be "if you enroll in a drug treatment
13 program between the time you are caught and the time you are
14 convicted, we'll give you probation"?

15 MR. LIPSON: I would suggest --

16 COMMISSIONER BLOCK: I mean, that would cause a
17 tremendous increase in the enrollment of those programs.

18 MR. LIPSON: Well, it might have a beneficial
19 effect, then, because if defendants in those situations
20 enrolled in such programs -- you know, if they walk away two
21 weeks later, they've violated probation and they're back in
22 custody. But if it had a beneficial effect, what would be

1 the harm in it?

2 Moreover, I think that the principle to be enunciate
3 as a general principle, that the judge, looking at all of
4 the considerations -- the background of the defendant, an
5 evaluation of his motivation -- would decide whether the
6 potential for rehabilitation from the problem that had led
7 to the involvement in the offense is such that probation
8 should be granted.

9 COMMISSIONER BLOCK: I guess I just want you to
10 consider that writing any of those, that even if you agreed
11 with those purposes -- and I don't -- but even if you agreed
12 with those purposes, writing those, writing indicators of
13 motive, such as, again, back to this joining the drug program,
14 I think encourages disingenuous behavior.

15 MR. LIPSON: Well, disingenuous behavior by whom?
16 By defendants or by judges?

17 COMMISSIONER BLOCK: By the defendants.

18 MR. LIPSON: Well, there is the risk of that, but
19 there's the risk of that when we give credit to defendants
20 who enter guilty pleas, yet nobody seems to have a problem
21 with that. In fact, most of the people who have appeared
22 here want to increase the discount that people get when they

1 manifest that they're being rehabilitated by entering guilty
2 pleas.

3 Of course, there are risks. The point is you set
4 out principles and you leave it to the judge before whom the
5 defendant is appearing, the one who is in the best position,
6 along with the probation officer who has spoken to the
7 defendant in preparing the pre-sentence report to evaluate
8 whether this is an appropriate case to go that route, or
9 whether, in fact, the judge should impose a custodial sentence.

10 CHAIRMAN WILKINS: Judge Breyer.

11 COMMISSIONER BREYER: That's the same as I was
12 going to say. I think the defenders have done enormously
13 helpful work throughout the hearings that we have been
14 having. I know your memorandum. Perhaps I can impose on
15 you, and the imposition is could you write something short,
16 if you'd be willing to do it, that replied to what I call my
17 stock objection, which is similar but not identical to what
18 Commissioner Block has said.

19 The defenders consistently and their committees
20 have been very helpful, and they take the view -- as do many
21 of the judges -- that what we should be telling the judges
22 in sentencing is: first, decide whether to give probation

1 thought of a grid.

2 An example of a box would be a person with one
3 prior conviction who has robbed a bank with a gun. That
4 would be Box, let's call it, 12(b)(7). Now, think of that
5 box. I happen to know the mean sentence for that one at the
6 present time. It's roughly between seven and eight years in
7 prison.

8 Now, can Congress have really wanted us to say to
9 the judge the following: Judge, let's take a person who
10 belongs in Box 12(b)(7); that's a person who has robbed a
11 bank with a gun and stolen some money and has a prior conviction.
12 Judge, there are two sensible things to do with this
13 person: One is to send him to jail for seven to nine years;
14 two, don't send him to jail at all, give him probation.

15 Do you not see something odd in telling a judge
16 that there are only two sensible things to do with such a
17 person: One, send him to prison for nine years; or, two,
18 don't send him to prison at all? Because I would have
19 thought that the first thing that Senator Biden would ask me
20 if I were in your position testifying is: Why did you do
21 that? How can it be sensible to send him to jail for nine
22 years, sensible to send him to jail not at all, but not

1 sensible to send him to jail for one year, two years, three
2 years, four years, five years or six years?

3 And it's because of the oddness of that result
4 that I can't believe the statute could be interpreted to
5 tell the Commission that's what you do. See, the words of
6 the statute are, "If there is a term of imprisonment, the
7 top part can't exceed the bottom by more than 25 percent."

8 That means with our Box 12(b)(7) we don't have the
9 right to say: Judge, send him to prison for one year, two
10 years, three years, four years. We have to say: Judge; you
11 send him to prison for seven to nine years.

12 And so you're saying that this statute which tells
13 us we don't have the right to tell the judge, send him to
14 jail for two years, three years, four years; Judge, you have
15 to send him to jail for seven to nine. The same statute
16 that in clear language tells us that also tells us we can
17 say to the judge: Judge, a perfectly sensible thing you can
18 do is send him not to prison at all.

19 I mean, that's the problem. It's one of pure
20 statutory interpretation, and my alternative method of
21 dealing with that same problem is say: Judge, if it's Box
22 12(b)(7), and he really shouldn't go to prison at all,

1 depart from the guideline.

2 MR. LIPSON: See, the faulty premise, I think, in
3 your approach -- with all due respect -- is that you treat
4 the defendant who falls in that Box 12(b)(7), or whatever we
5 call it, as the same defendant or as the same class of
6 defendant who we would consider for probation.

7 COMMISSIONER BREYER: No, no. Suppose he is
8 mentally retarded. I mean, suppose he's a person who was
9 provoked -- not quite to the point of a defense, but to the
10 point where it's very understandable. We can think of a lot
11 of cases in principle where somebody who is in Box 12(b)(7),
12 a guy with a past record who robs a bank with a gun, you
13 know, maybe he should get probation. And I could think of a
14 case where maybe he should get one year or he should get
15 two. But I'm trying to work with this statute, and this
16 statute tells me that the person in that box, if I say he
17 goes to jail for seven years, I can't go down to five, I
18 can't go down to four --

19 MR. LIPSON: The point is that the defendant who's
20 in 12(b)(7) is the bank robber with one prior record who
21 went into the bank with a gun.

22 COMMISSIONER BREYER: Right.

1 MR. LIPSON: If you add the element that he was
2 retarded, or if you add the element that he suffers from
3 some affliction that you think is subject to correction
4 through a rehabilitation program in the community, he's a
5 different class of defendant.

6 COMMISSIONER BREYER: Well, fine.

7 MR. LIPSON: You're not moving him from that box
8 to probation. You're saying this is a different classification
9 of defendant; therefore, we should treat him differently.

10 Now, the problem as I see it with the system
11 that's used here is that it doesn't address that type of
12 defendant.

13 COMMISSIONER BREYER: Depart. Depart from the
14 guideline.

15 MR. LIPSON: Well, why should the determination to
16 give someone like that probation be left to a departure from
17 the guideline?

18 COMMISSIONER BREYER: We're not talking any question
19 of what ought to be. I'm talking a question of reconciling
20 the statute. But I think I'll stop because I'm not getting
21 at it.

22 COMMISSIONER MACKINNON: Counsel, when you talk

1 about disparity, what kind of variations are you thinking
2 about?

3 MR. LIPSON: I'm not sure that I understand the
4 question.

5 COMMISSIONER MacKINNON: You said that you saw too
6 much disparity. Now, what do you call disparity? How much?

7 MR. LIPSON: Well, how much is unfair disparity
8 varies from case to case. I have represented defendants who
9 I thought, based on my prior experience, should have gotten
10 probation and got six months; and I considered that that was
11 a disparate sentence because everybody else who I thought
12 was in the same category got six months.

13 The longer the sentence, obviously, or the longer
14 the sentences that you're talking about, the more time
15 difference it takes to result in a disparate sentence.

16 I should note, of course, that under the present
17 system, some of that disparity ends up being cured by the
18 application of parole guidelines -- at least to the extent
19 that you get to the one-third point, you may be eligible for
20 parole.

21 There's no one answer to what is unwarranted
22 disparity. I guess it's --

1 COMMISSIONER MacKINNON: I want to know how much
2 you're talking about, because there's going to be disparity
3 in any event. I mean, every judge isn't going to -- he's
4 got a 25 percent range.

5 MR. LIPSON: I understand.

6 COMMISSIONER MacKINNON: So there's a permissible
7 disparity right there. Now, how much do you today call
8 disparity, unwarranted, that justifies this particular
9 statute, for instance?

10 MR. LIPSON: Are you asking me to respond in terms
11 of what difference in length of prison sentence I would
12 consider unwarranted disparity?

13 COMMISSIONER MacKINNON: Yes. Or difference in
14 prison sentence or in probation and prison sentence.

15 MR. LIPSON: Quite frankly, it's a difficult
16 question to answer because I think the answer depends on the
17 length of the sentence and the nature of the offense.

18 COMMISSIONER MacKINNON: No question about it.

19 Well, the general answer we've gotten heretofore
20 is that generally they say that some person got probation
21 for what another person got nine years.

22 MR. LIPSON: That's clearly disparity, to my mind.

1 COMMISSIONER MacKINNON: And they say that is what
2 they thought that Congress was trying to deal with.

3 MR. LIPSON: I agree.

4 COMMISSIONER MacKINNON: With wide disparity and
5 not the normal disparity that comes between judges with
6 different ideas and circumstances of an offense or an offender
7 that aren't readily discernible to the ordinary public.

8 MR. LIPSON: I understand that. The question,
9 however, of whether someone getting nine years and someone
10 getting probation is disparity depends on whether they are
11 truly similar offenders who have committed similar offenses.

12 COMMISSIONER MacKINNON: No question about it.

13 Now, you say there's no basis for the numbers
14 here. Isn't the maximum sentence that Congress has imposed
15 for the particular offense a basis for judging the severity?

16 MR. LIPSON: Your Honor, when I said there was no
17 basis for the numbers, I was referring particularly to a
18 number of the --

19 COMMISSIONER MacKINNON: The base offense value.

20 MR. LIPSON: No, no. The add-ons that result in
21 substantial enhancements. I'm not suggesting that there
22 aren't the bases. The problem I have is, as I read this

1 draft, I don't see articulated anywhere a basis from which I
2 can make a judgment as to whether it makes sense or not.
3 They seem to be rather arbitrary in some cases and in some
4 cases inconsistent,

5 I'm not suggesting that there is no basis. I just
6 don't see it articulated here, and perhaps --

7 COMMISSIONER MACKINNON: Do you think it should be
8 -- do you think that Pennsylvania, Washington, Minnesota,
9 New York or any of those provide the basis for their severity
10 rating?

11 MR. LIPSON: I'm not familiar with all of those
12 guideline systems. I looked at the Minnesota statute, and I
13 believe that the Minnesota statute more clearly than this
14 draft articulates the reasons behind the classifications
15 that are employed in that statute.

16 I think it is important to set forth the reasons
17 because it then gives judges a basis for deciding whether in
18 a particular case the prescribed or suggested enhancement
19 makes sense. There may be a factor in a particular case
20 that leads a judge to conclude when he looks at the justifica-
21 tion for the enhancement that application of that enhancement
22 doesn't make any sense.

1 I think statements of principles and reasons are
2 essential to the application of this guideline system.

3 COMMISSIONER MacKINNON: The proportionality of
4 the sentence is graded against the sentence for other closely
5 related or similar crimes and the values that are associated
6 with that.

7 Let me ask you this. You suggested that we should
8 adopt guidelines for typical offenses. Don't you think that
9 our base offense values do exactly that?

10 MR. LIPSON: Well, I think the base offense values
11 may, in fact, be too simple. I think that there should be
12 an evaluation.

13 I understand that the Commission is looking at
14 present sentencing practices and looking at what goes into
15 present sentences, and I think through that process there
16 will emerge sort of placid kinds of cases within generic
17 categories, and also there will emerge from that information
18 as to what the sentences that are generally imposed to those
19 situations are.

20 I don't see in the poor offense values that appear
21 in the present guideline that that's occurred. If it has,
22 it hasn't been set forth in the guidelines.

1 I think it would be productive to look at present
2 practice, see what is being imposed, see what the typical
3 offense is, set a guideline that reflects that, set forth
4 principles for departure, let judges use their wisdom and --

5 COMMISSIONER MacKINNON: You want to perpetuate
6 the errors of the past.

7 MR. LIPSON: No, I don't want to perpetuate them.

8 COMMISSIONER MacKINNON: Well, that's what you're
9 doing.

10 MR. LIPSON: No. We're looking at sort of a
11 sentence that reflects what has been done in the past.

12 COMMISSIONER MacKINNON: I know, but that's what
13 Congress criticized.

14 MR. LIPSON: Congress indicated that with respect
15 to particular types of offenses or particular types of
16 offenders it thought that there should be a toughening of
17 sentences. Clearly, the Commission should follow that
18 mandate.

19 There's a wide range of offenses that don't fall
20 into that category, where I don't see a congressional mandate
21 to toughen sentences. I think we should start with what has
22 been done in the past -- or at least what reflects the

1 mid-range of what has been done in the past -- see how
2 judges apply the standards for deviation or departure; and
3 if they're applying them in an inconsistent manner, then the
4 Commission should fashion tighter guidelines so as to keep
5 the range from getting out of hand.

6 COMMISSIONER MacKINNON: Don't you think that what
7 Congress did to rehabilitation indicates that they thought
8 the sentences ought to be for imprisonment?

9 MR. LIPSON: Well, I think Congress indicated that
10 they thought that sentencing someone to prison should not be
11 based on considerations of rehabilitation. Secondly, Congress
12 did indicate that considerations of rehabilitation should be
13 weighed to the extent that they don't pose -- I don't have
14 the exact language in front of me -- but don't pose a danger
15 to the public or interfere with general deterrence.

16 I don't think that the Commission should conclude
17 from that that Congress has directed that concerns of reha-
18 bilitation be thrown in the ash can because Congress clearly
19 has not done that.

20 COMMISSIONER MacKINNON: Not completely. Not
21 completely, but they put it at the bottom.

22 MR. LIPSON: There are, however, cases where when

1 a consideration of rehabilitation leads or the defendant
2 leads you to believe that rehabilitation can result in the
3 defendant avoiding future criminality and straightening out
4 his or her life, that rehabilitation should be paramount
5 provided that there's no danger to the public in pursuing
6 that, and the defendant placed on probation.

7 COMMISSIONER MacKINNON: Thank you, counselor.

8 CHAIRMAN WILKINS: Thank you. Are there any other
9 comments or questions?

10 (No response.)

11 CHAIRMAN WILKINS: Thank you again. We appreciate
12 your work.

13 MR. LIPSON: Thank you very much.

T3S1 14 CHAIRMAN WILKINS: Cheryl M. Long is a public
15 defender for the District of Columbia. I am informed that
16 Ms. Long will approach the witness table on crutches. She
17 has been the recent victim of a robbery, as I understand it,
18 with the result of that having to get around on crutches.

19 We appreciate, Ms. Long, your attendance today and
20 the testimony that we'll receive. As Judge Breyer pointed
21 out, we have received a great deal of input from the federal
22 public defenders and other defense attorneys, and we find it

1 necessary that we hear from those who are working in the
2 trenches, so to speak, so that hopefully our guidelines will
3 be produced in a manner that are workable and practicable in
4 the real world.

5 MS. LONG: Good afternoon to the Chairperson and
6 the other members of the Commission. I am very pleased to
7 have this opportunity to come before you to give you some
8 comments.

9 I should say that my views of the Commission's
10 draft really come from two different perspectives: one as
11 being public defender for the District of Columbia, but the
12 other perspective is one of serving as a member of the
13 Superior Court Sentencing Guidelines Commission here in
14 Washington.

15 By way of introduction, for those members of the
16 Commission who are not Washingtonians, you may be interested
17 to know that the Public Defender Service was created by
18 Congress in 1970 as an independent agency to provide defense
19 services for indigent persons prosecuted in this jurisdiction.
20 At the time of the creation of this agency, there was no
21 court of general jurisdiction locally, and nearly all defendants,
22 except juveniles, were tried in the United States District

1 Court. In this regard, the Public Defender Service was the
2 forerunner of the Federal Public Defender Offices that are
3 now in place. Although our client base has shifted substan-
4 tially to the Superior Court of the District of Columbia, we
5 continue to operate under the aegis of the Administrative
6 Office of U.S.Courts, and we continue to represent indigent
7 persons in this District Court as well as in the United
8 States Court of Appeals for the D.C. Circuit.

9 In May of 1985, I became a member of the already
10 existing Sentencing Guidelines Commission in the District of
11 Columbia. That Commission is composed of Superior Court
12 judges, the United States Attorney, the Corporation Counsel,
13 the Public Defender, and individual members of the bar. The
14 Commission also includes local legislators and non-lawyers
15 among its members. At this juncture, the Commission has not
16 yet released its proposed guidelines for public comment.
17 Nevertheless, I can relate to you certain aspects of our
18 Commission's philosophy and approach that may be helpful to
19 the United States Sentencing Commission. In my testimony
20 today, I would like to highlight several key areas in which
21 I believe the Commission should rethink or restructure the
22 present draft.

1 First, I'd like to address the issue of the factual
2 basis for the guidelines. Although at this point the substan-
3 tive work of the D.C. Sentencing Guidelines Commission is
4 confidential, everyone is aware of the basic premise on
5 which the local Commission began to consider guidelines.
6 The problem that fostered the creation of our local Commission
7 was a strong perception in many parts of the community that
8 there is wide and irrational disparity in sentencings for
9 the same offenses. To begin the process of creating guidelines,
10 our Commission did not even attempt to draft guidelines
11 until it had secured concrete, factual data on actual sentencings
12 in felony cases over a period of time. This provided our
13 Commission with historical information reflecting statistically
14 what kinds of sentences were typical in various categories
15 of cases.

16 A serious flaw in the published draft of the U.S.
17 Sentencing Commission is the lack of a factual data base
18 from which anyone can derive what sentencing practices are
19 reasonable and expectable and which are aberrant, outmoded
20 or discriminatory.

21 My recommendation to this Commission is to obtain
22 as quickly as possible actual statistical data on how persons

1 have been sentenced so that useful conclusions can be drawn
2 about the reasonableness of sentences that will result from
3 application of the proposed guidelines. An additional
4 reason for using a data base early in the creation of the
5 guidelines is that the Congress and the public will want to
6 know the relative basis on which the guidelines purport to
7 rectify past unfairness and the basis on which past sentencing
8 practices and guidelines applications can be compared.

9 There appears to be no concrete basis for such
10 comparisons at the present time. If the gathering of this
11 information cannot be completed to allow the Commission to
12 use such information before submitting these guidelines to
13 Congress, I urge the Commission to seek additional time for
14 completing the final version of the guidelines.

15 Where departure principles are concerned, I note
16 that in Part F of Chapter Six of the draft, the Commission
17 specifically asked for comments on how to treat unusual
18 aggravating and mitigating factors. In my view, the Commis-
19 sion should adopt a general departure guideline that would
20 enumerate both aggravating and mitigating factors that may
21 be applied to any offense, and a basic set of departure
22 principles should replace altogether the aggravating and

1 mitigating multipliers that already exist in disparate
2 places in the guidelines, such as the mitigating multipliers
3 for cooperation with law enforcement.

4 The sentencing judge should have the discretion to
5 fashion an appropriate sentence outside the guidelines based
6 upon the particular facts that bring the case within the
7 ambit of one of the enumerated departure principles. Because
8 so-called "unusual" mitigating or aggravating variables will
9 be fact-bound as to each case, I do not believe that mitigat-
10 ing or aggravating factors should be applied with a system
11 of percentage multipliers.

12 As a threshold matter, the guidelines would be far
13 simpler and easier for everyone to understand and apply if
14 the Commission were to establish a set of specific departure
15 principles instead of relying upon undue detail about some
16 crimes but not others. And I'd cite as an example the
17 amount of taxes evaded in tax evasion cases.

18 Mitigating departure principles might include the
19 following: substantial provocation by the victim; good
20 faith effort to compensate victims for damage suffered prior
21 to detection; participation in a crime under duress or
22 threats that are not sufficient to constitute a complete

1 defense; a defendant's mental capacity or retardation that
2 is not sufficient to constitute a complete defense; and
3 provision of major assistance to law enforcement in the
4 detection or prosecution of other offenders. Such a list
5 can be expanded to include other factors, but the point is
6 that the insufficient recognition of mitigating circumstances
7 reinforces the image of the guidelines as being pro-government
8 and creates substantial unfairness to defendants.

9 Here I pause to point out, for example, that
10 peppered throughout the guidelines are certain assumptions
11 that are made. And as you go about doing what you can to
12 gather facts on which you have established the guidelines, I
13 think it's very important to be very careful about assumptions
14 that you drop along the way.

15 For example, in asking for comments on how to
16 handle unusual mitigating factors, one of the items mentioned
17 was mental illness or retardation that didn't amount to a
18 complete defense. You should not assume that that's unusual.
19 I don't consider it unusual at all. In our particular
20 jurisdiction, our particular client base, we see a tremendous
21 amount of untreated mental illness that is detected only
22 because of good work by a defense attorney in proffering to

1 the court what should be done at the time of sentencing.
2 And you don't see a lot said about this from one jurisdiction
3 to another because lots of times, depending on the approach
4 of different defense attorneys, they don't even bother to
5 mount such a defense knowing that the evidence is just not
6 there that's really going to amount to a complete insanity
7 defense. But that's one thing I would point out as an
8 example. Don't assume that things like that are really so
9 unusual because they're not.

10 It seems to me also that the mitigating factors
11 can be simplified to a great degree if these factors can be
12 applied by a judge to any offense without reliance upon
13 minute distinctions and fine calculations that are envisioned
14 in certain existing parts of the draft. And I note, for
15 example, where the draft mentions that a prosecutor can
16 formally certify to the sentencing judge that someone has
17 been helpful and cooperative with law enforcement. There
18 are certain multipliers set forth there. And in my opinion,
19 there's no particular reason for prescribing so narrowly how
20 much weight a judge should give to a defendant's assistance
21 to law enforcement. Each case will be fact-bound and should
22 be scrutinized in an individual way. The sentencing judge

1 is in the best position to determine, in context, the sig-
2 nificance of a defendant's contribution of assistance to the
3 government. But more importantly, it's essential that the
4 court not be limited to considering this factor to cases
5 where a formal certification has been made by a prosecutor,
6 because as it is set forth now in the guidelines, the prose-
7 cutor retains the control over whether a defendant can
8 benefit in any way by cooperating with the government. He
9 either certifies or doesn't certify it, for whatever reasons.

10 I want to mention finally a very important area,
11 and that is the impact of the guidelines on prison population.
12 The Commission should develop for the benefit of Congress
13 and the public specific information on the impact of the
14 guidelines on the population of the federal prison system.
15 This is essential for two reasons. First, a comparison can
16 be made between the current population and the facility's
17 capacity of the federal prison system and the capacity needs
18 for the future.

19 Prison overcrowding is a problem that plagues both
20 the federal system and local correctional systems. The
21 Congress and the public should be fully informed on the
22 impact of the guidelines system because full disclosure of

1 the attendant costs of the guidelines is important. The
2 Commission should not assume that the public is willing to
3 spend unknown sums of money to account for any secondary
4 costs of the application of the guidelines. This is an area
5 in which the Commission, by now, could have utilized statisti-
6 cal data about the historical impact of federal court sentenc-
7 ings in comparison with projections on the amount of prison
8 bed space that will be required because of the guidelines.

9 The importance of having such comparison data is
10 even more important in light of the fact that the implementa-
11 tion of the guidelines also contemplates an end to parole in
12 the federal system.

13 A second reason for scrutinizing and making findings
14 on the impact of the guidelines is the District of Columbia's
15 unique dependence on the federal prison system. All persons
16 who are convicted and sentenced to incarceration as a result
17 of prosecutions in our local courts are persons who are
18 automatically committed to the custody of the Attorney
19 General of the United States. Many of our local prisoners
20 are given designations to facilities in the federal system,
21 although the majority are designated to serve their sentences
22 at the Lorton Reformatory in Northern Virginia. Lorton at

1 the present time is under the control of the District of
2 Columbia Department of Corrections.

3 The District of Columbia Government is currently
4 under multiple orders from this District Court imposing
5 population limits on several of our correctional institutions.
6 Because of the statutory mandate that the Attorney General
7 accept custody of D.C. inmates, the federal prison system
8 has served as a back-up source of prison bed space. The
9 Attorney General periodically threatens to refuse to accept
10 local prisoners claiming, among other things, that the
11 federal prison system is already operating at 40 percent
12 above design capacity.

13 All of these facts serve to illustrate the importance
14 of determining the impact of the proposed guidelines on the
15 capacity of the federal prison system. If the federal
16 prison system is further overloaded because of the guidelines,
17 there will be a genuine detrimental effect on the District
18 of Columbia itself.

19 I think the proposed guidelines raise many issues,
20 some of which have been covered or will be covered by other
21 members of the defense bar and other individuals who will
22 testify, but I hope that the matters that I have highlighted

1 for the Commission today will be helpful.

2 Thank you.

3 CHAIRMAN WILKINS: Thank you very much.

4 Any questions from the Commissioners?

5 COMMISSIONER BREYER: When do you think you will
6 have the D.C. guidelines?

7 MS. LONG: I had really hoped they would be out by
8 now so that I could talk about them in comparison. The best
9 guess I have is that they may be out as soon as the next 60
10 days or so, but it is difficult to tell.

11 COMMISSIONER BREYER: Now, in your testimony --
12 and we are drawing on your experience -- you've really
13 flagged what you see as the main issues where you feel the
14 D.C. Commission has probably approached it better?

15 MS. LONG: Well, clearly, it has approached it
16 better because it got the facts about what, in fact, judges
17 have been doing with sentencings prior to the time that --

18 COMMISSIONER BREYER: That has been a time problem
19 for us.

20 MS. LONG: Sure.

21 COMMISSIONER BREYER: Because we've had to get the
22 ten thousand FPSIS reports. We wanted to have this out

1 before we had that, so there is a chicken and egg problem.
2 But we will have that. I mean, we will be able to resolve
3 that one. We will have the data to tie it back.

4 MS. LONG: Well, I don't know what the data is
5 going to show. As we all know, it could result in some
6 major changes in what you've already written, but I certainly
7 hope that you have it and consider it before the final

8 package. COMMISSIONER ROBINSON: Are the D.C. go. go. go.

9 COMMISSIONER BREYER: You have dealt with this
10 problem of concurrent-consecutive sentence?

11 MS. LONG: We have.

12 COMMISSIONER BREYER: Without asking you what you
13 are going to do, what do you think is a good approach to it?
14 I'm asking really not to find out what you did but because it's
15 such a difficult problem. COMMISSIONER ROBINSON: And how long has it been a D.C.

16 MS. LONG: It's hard to say off the top of my head
17 what you should do with it when you've got a system that is
18 going to be radically different from our local system. We
19 are not contemplating an end to parole and other such variables.
20 That creates a very, very different situation.

21 Any time you've got a system where there are very,
22 very fine calculations being made, it gets very complex when

1 MS. LONG: Pardon me?

2 COMMISSIONER ROBINSON: The committee that you
3 describe in your testimony started meeting two years ago?

4 MS. LONG: Approximately.

5 CHAIRMAN WILKINS: Yes, Mr. Breyer?

6 COMMISSIONER BREYER: To follow up on Mr. Robinson's
7 question, he asked the first part. The second part was you
8 are not having public hearings?

9 MS. LONG: Oh, we are. We definitely are. We are
10 at the point where there has not been a draft that has been
11 published for public comment, but we are certainly going to
12 have public hearings and ask for public comment. No question
13 about it.

14 COMMISSIONER BREYER: Let me follow that up. Why
15 haven't you put out what you have tentatively developed over
16 the past year so people can react to it?

17 MS. LONG: Well, the short answer to your question
18 is it just isn't ready yet, and the Commission, of course,
19 has to have permission of the court to put it out. And
20 until the court is satisfied that it doesn't have any further
21 questions about it, pending public comment and other comment,
22 we're not really at liberty to simply float it in public.

1 So the short answer is it just isn't ready to go out yet.

2 COMMISSIONER ROBINSON: If you were speculating,
3 how long do you think it would be before those guidelines
4 went into effect; in other words, promulgating them, public
5 comment and so on and so forth?

6 MS. LONG: I'll tell you, it's difficult to predict
7 and I would not want to speculate on it. There has not been
8 any decision as to whether the court would want to experiment
9 with them voluntarily for a period of time; for example,
10 prior to asking that the City Council basically formulate
11 them into legislation.

12 There is no clear picture as to whether it's going
13 to wind up being legislation as opposed to something the
14 judges do collectively as a board of judges. So those
15 issues are still up in the air. That being the case, there
16 is no way to tell when they'd really get started.

17 Needless to say, once they are out, I will certainly
18 communicate them to your Commission and work with your staff
19 as best I can to point out whatever I think may be helpful.

20 COMMISSIONER MacKINNON: Is the Commission a
21 continuing body to continue after the sentencing guidelines
22 come out and are adopted?

1 MS. LONG: The Commission itself has not decided
2 the manner in which there will be any follow-up. As you
3 say, it may be the Commission; it may be in some other form.
4 I really can't say.

5 COMMISSIONER MacKINNON: Of course, they don't
6 determine whether they're going to be continuous or not, I
7 take it.

8 MS. LONG: That's true.

9 COMMISSIONER MacKINNON: But they're not continuous
10 at the present time?

11 MS. LONG: Well, the Commission has not really
12 finished its work.

13 COMMISSIONER MacKINNON: I know that, but I mean
14 they don't contemplate continuation at the present time
15 under the structure that they're operating beyond the time
16 that the Commission guidelines are promulgated and adopted.
17 Is that right?

18 MS. LONG: The best way to answer your question is
19 that there has not been any decision about precisely how
20 long the Commission will continue to operate once the court
21 has made a decision as to what to do with the final product.

22 It is possible that the court will authorize the

1 Commission to continue to work. It's also possible that the
2 court or perhaps the City Council will authorize some other
3 body identified by some other name or composition to do
4 follow-up work, but we just don't know.

5 COMMISSIONER MacKINNON: Did the Commission come
6 into existence by virtue of a decree from the court, or was
7 there any legislative action on the Council?

8 MS. LONG: There was not legislative action by the
9 Council. The court did it on its own.

10 COMMISSIONER MacKINNON: Thank you.

11 CHAIRMAN WILKINS: Thank you again, Ms. Long.

12 MS. LONG: Thank you.

13 CHAIRMAN WILKINS: Our next witness is Dr. Edward
14 J. Burger, Jr., representing the Council for Court Excellence.
15 Accompanying Dr. Burger is Samuel Harahan, the Executive
16 Director. Gentlemen?

17 DR. BURGER: Mr. Chairman and members of the
18 United States Sentencing Commission, I appreciate the oppor-
19 tunity to consider with you the preliminary draft sentencing
20 guidelines prepared by the Commission. I am Dr. Edward J.
21 Burger, and I appear before you as a member of the Board of
22 Directors of the Council for Court Excellence of Washington,

1 D.C.

2 The Council for Court Excellence was founded in
3 1982 to encourage a fuller public understanding of the
4 workings of the local and federal courts in the District of
5 Columbia to provide assistance to the court, and from time
6 to time to advocate changes in the functioning of those
7 courts on behalf of improving the administration of justice.
8 The Council comprises members of the judiciary, representatives
9 from the legal and business communities and civic members,
10 and I am one of the civic members.

11 Sentencing, including sentencing disparity and
12 sentencing reform, was chosen early in the Council's history
13 as an issue for special attention. The Council for Court
14 Excellence was instrumental in bringing to the attention of
15 the local courts, the prosecutors and the defense lawyers,
16 and the District's legislative council in a systematic
17 fashion the fund of experience across the nation concerning
18 sentencing reform efforts and the relationship of sentencing
19 practices to broader matters, including parole and prison
20 capacity.

21 I served as a chairman of the Sentencing Committee
22 of the Council for Court Excellence, and following closely

1 upon the Council's educational efforts, the Superior Court
2 for the District of Columbia established its own Sentencing
3 Guidelines Commission whose recommendations are anticipated
4 shortly and about which you have just heard from Ms. Cheryl
5 Long.

6 At the outset, let me say that the United States
7 Sentencing Commission is, I think, to be congratulated for
8 having developed a very useful and a constructive first
9 draft. It goes appropriately far in the direction of providing
10 guidance to replace formerly unfettered judicial discretion,
11 and this in itself should reduce sentencing disparity and
12 make sentencing more predictable.

13 In addition, and importantly, it will consolidate
14 sentencing authority where it belongs: in the court. This
15 should serve the vitally important role of making the sentencer
16 correspond to the sentence imposed, an absolutely essential
17 ingredient in establishing public confidence in the criminal
18 justice system.

19 Let me just enumerate for you a very short list of
20 items where the Council for Court Excellence believes additional
21 work is needed in order to ensure both a true reform and
22 public's confidence in that reform. The Commission's draft

1 report is in many places very detailed. Several of the
2 sentencing proposals are highly specific. The value of
3 those proposals would be enormously enhanced by referring
4 the reader to the body of research or past experience with
5 sentencing reform efforts to document the reasoning and
6 expected implications of those recommendations.

7 The decade of the 1970s saw a wide variety of
8 efforts to modify sentencing practices and establish new
9 sentencing procedures in institutions. Unfortunately, much
10 of that experience has been systematically and critically
11 reviewed so that at this writing one can have a measure of
12 confidence as to what works well and what does not. Although
13 I am certain that the Commission was fully aware of this
14 work, it is not clear how its own recommendations build on
15 this past experience.

16 Similarly, there is not a clear linkage between
17 the Commission's sentencing guidelines and the existing
18 pattern of sentencing practice. Accordingly, one cannot
19 refer the Commission's particular policy choices and sanction
20 numbers to the present setting.

21 I fully appreciate the importance of evolving
22 prescriptive guidelines rather than merely descriptive ones

1 built simply on the basis of past practice. Yet in order
2 both to justify the proposals and ensure public confidence
3 in them, this linkage should be made more explicit.

4 The present draft appears excessively specific and
5 detailed in some of its recommendations. For example,
6 sanctions proposed for securities offenses, offenses involving
7 drugs, and those concerned with tax evasion are in the form
8 of details numerical schedules whose justification on the
9 basis of empirical or other data is not clear.

10 Public understanding and confidence in this process
11 require that the specificity have some basis in a body of
12 experience and systematically collected empirical data.
13 This aspect of the guideline seems to be somewhat overly
14 ambitious for the first draft of the guidelines and perhaps
15 should await further well-monitored experience for their use.
16 As a recommendation, these detailed schedules might be
17 replaced in the first version by a shorter series of categories
18 representing qualitative degrees of infraction.

19 The concept adopted by the Commission of modified
20 real offense sentencing appears appropriate. This does have
21 the advantage of making more explicit the sentencing practice
22 used and the body of information relied upon. It preserves

1 the role of the judge in sentencing in relation to that of
2 others who may influence the disposition process. However,
3 as discussed in the Commission's own overview, it does
4 represent something of a pragmatic compromise.

5 Further refinement may ultimately be desirable.
6 However, the concept should be tested in practice. Most
7 important, in order to determine how well and equitably it
8 provides for sentencing, careful and full monitoring of
9 sentencing experience must be undertaken, and the results of
10 that monitoring must be used to guide further changes.

11 The Commission has specifically invited comment on
12 how or whether a series of other offender characteristics --
13 such as age, education, family or community ties -- should
14 be considered as mitigating or aggravating factors in reaching
15 sentencing judgments. Perhaps the most prominent argument
16 against their use concerns the issue of sentencing disparity.
17 That argument observes that sentencing disparity has been
18 prominent and that it relates to factors of race, education
19 or economic status. That is, so goes the argument, considera-
20 tion of many of the other offender characteristics in practice
21 has generally had the effect of aggravation and has led to
22 unfair sentencing bias.

1 Further, as has been pointed out by others, very
2 limited confidence can be placed in those variables as
3 predictors of future criminal behavior. Yet to circumscribe
4 the information to be considered by the court would appear
5 to fetter its proper functioning. Furthermore, to limit the
6 information to which a judge may refer in sentencing may
7 threaten a rearrangement of other aspects of the disposition
8 process which, in turn, might further compromise the admin-
9 istration of justice. .

10 Accordingly, there may be virtue in electing the
11 Commission's own second option of citing these factors
12 explicitly as aggravating or mitigating factors where appro-
13 priate. An alternative would be to limit consideration to
14 only prior convictions in reaching sentencing decisions but
15 make available all factors for consideration of the conditions
16 of probation. We firmly believe that this important issue
17 deserves additional study and further public discussion.

18 Fines occupy a more prominent role in sentencing
19 in federal courts than in other jurisdictions. This perhaps
20 is not reflected in the present guidelines which speak
21 essentially only to incarceration. A related point concerns
22 restitution as a part of the criminal court sentence. The

1 draft federal guidelines appear to give little focus to this
2 alternative to incarceration, either from the crime victim's
3 standpoint or from the position that it is the offender's
4 responsibility to make amends for his wrongful action. We
5 would favor the Commission's addressing the restitution
6 issue at least by way of an advisory footnote.

7 Prison capacity and prison overcrowding have
8 become prominent national problems. It is essential to
9 consider what any changes in sentencing practices and proce-
10 dures may imply for prison use. This, indeed, is one of the
11 charges to the U.S. Sentencing Commission. This question is
12 of great importance to the District of Columbia which, as in
13 the case of several other jurisdictions, faces a crisis of
14 prison capacity versus pressures for incarceration.

15 Present guidelines offer no indication that an
16 analysis has been performed estimating what, if any, the
17 effect of these proposed guidelines may have on prison
18 overcrowding. These analyses should be done. I say this
19 mindful of the National Academy of Sentencing Research that
20 the substantial increases in prison populations in jurisdic-
21 tions that have adopted sentencing reforms have not been
22 attributable to the reforms but simply continued long-term

1 trends in rates of incarceration.

2 There is a related pragmatic concern of ours as
3 citizens of the District of Columbia. Each year an average
4 of 1,500 local offenders, convicted and sentenced in the
5 D.C. Superior Court, serve their time in the U.S. Bureau of
6 Prisons facilities. The reason for this is penal space
7 limitation in the D.C. Department of Corrections facilities.
8 This jurisdiction is particularly sensitive to any short-term
9 or transient relationship which might exist between changes
10 in sentencing practices and demand for prison use.

11 Were the U.S. Sentencing Commission to promulgate
12 sentencing guidelines which affected federal prison usage,
13 it is likely the prison capacity available to the District
14 of Columbia would also be affected. Accordingly, it is
15 particularly important to devise a system at the outset to
16 monitor the function and effect of these guidelines in
17 practice.

18 Finally, the guidelines appear to be silent on the
19 matter of departures from guideline prescriptions. Systematic
20 procedures for occasional departures are essential in the
21 functioning of other guidelines such as those in Minnesota.
22 While these departures are unusual, they require on occasion

1 some accommodation, coupled with a recognized avenue of
2 explanation and accountability.

3 Mr. Chairman, that ends my formal statement. Let
4 me introduce Mr. Sam Harahan who is the Executive Director
5 of the Council for Court Excellence, whom I'd be delighted
6 to have join me in any discussion that you might like to
7 have with us.

8 CHAIRMAN WILKINS: Thank you for those very thought-
9 ful comments, Dr. Burger. We are delighted to have you
10 with us, Mr. Harahan, too, and we appreciate the work of
11 your organization.

12 Any questions or comments from any Commissioners?
13 Judge MacKinnon?

14 COMMISSIONER MacKINNON: How did the Committee
15 come into being?

16 DR. BURGER: The Council for Court Excellence had
17 as part of its origin the precedent of the Fund for Modern
18 Courts in New York, started in years earlier by John McCloy,
19 and it has similar aims: to provide public education,
20 better public understanding of how the courts work or don't
21 work; to provide public support for the courts from time to
22 time in the District of Columbia; and, indeed, on occasion

1 to provide some construction tension to urge the courts in
2 one direction or another where it was felt important for the
3 public will.

4 COMMISSIONER MacKINNON: What affiliation does it
5 have, if any?

6 DR. BURGER: It is a free-standing entity entirely.
7 Its composition includes judges, members of the bar, members
8 of the business community, and a group of civic members.

9 COMMISSIONER MacKINNON: And originally organized
10 how?

11 DR. BURGER: Well, I believe one other root of its
12 origin was an earlier commission on the D.C. courts called
13 the Horsky Commission, which produced a series of recommenda-
14 tions for the D.C. courts. That completed its work. It was
15 felt that there should be a follow-on institution to continue
16 to consider those recommendations, and indeed, Mr. Charles
17 Horsky is the President of the Council for Court Excellence.

18 CHAIRMAN WILKINS: Thank you again.

19 DR. BURGER: Thank you.
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1 CHAIRMAN WILKINS: Good afternoon.

2 We are delighted to have with us two distinguished
3 professors from the University of New Mexico.

4 One is James W. Ellis, a professor of law.

5 The other is Ruth Luckasson, a professor in the
6 Department of Special Education.

7 These two witnesses will be representing the
8 American Association on Mental Deficiency.

9 (The remainder of this page is intended to be
10 blank.)

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We appreciate your coming this long distance to share your comments and testimony with us.

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MR. ELLIS: Thank you very much.

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We are here to represent two organizations, the American Association on Mental Deficiency, which is a professional group--it is the largest interdisciplinary professional organization in the field of mental retardation, some 110 years old, I guess--and the Association for Retarded Citizens in the United States, which is a volunteer group, largely composed of parents of people with mental retardation and a much larger group that has been in existence since 1950.

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You have had before you today two kinds of commentators on your preliminary draft and some who have had comments and, to some extent, quarrels with the architecture in the overall structure of what you all have chosen to propose as a tentative draft and others who have looked at particular parts of fine detail, and we fall within the second category.

Our concern is the impact of the sentencing guidelines on people with mental retardation both as they may be victims of crime--and there's reason to think they are probably disproportionately victims of crime, and that they may be

1 offenders.

2 With regard to each of those issues, there are
3 characteristics of mental retardation that should hopefully
4 guide your decision. With regard to victims of crime who
5 may have mental retardation, you all have already recognized
6 in a couple of different ways that the disability of a victim
7 of crime may be relevant. One of them is that at several
8 points you have listed as an aggravating factor the fact
9 that an offender has committed an offense against a person
10 who is particularly vulnerable, and you have described that
11 in various ways which surely would incorporate various forms
12 of mental and physical disability. And those seem to be
13 well-reasoned.

14 I simply would suggest, and have suggested in the
15 written testimony that we have submitted to you all, that
16 there may be other offenses in which you may want to consider
17 the same sort of approach. There may be other crimes in
18 which that may be true.

19 Even more worthy of consideration and possible
20 expansion is the other way in which you have looked at
21 disabled people as victims, and that is where you have provided,
22 as an aggravating factor the fact that the offender had

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1 some sort of custodial responsibility over the victim. And
2 that implicitly recognizes and, correctly it seems to us, that
3 there is--in the trust relationship between someone who has
4 custodial responsibility and his charge, that there is something
5 in the nature of that trust relationship that makes especially
6 culpable the violation of that trust in a way that victimizes
7 the more vulnerable person.

8 And, again, we would suggest and have suggested in
9 our written testimony that there are other offenses in which
10 you might want to use the exact same approach that you have
11 otherwise applied.

12 With regard to offenders who may have mental
13 retardation, the issues are a little more difficult but I
14 think not the most difficult you have before you. It has been
15 generally recognized and Congress has implicitly recognized
16 in its charge to the commission that mental retardation may,
17 in appropriate circumstances, constitute a mitigating factor
18 to be considered in the determination of penalty for an
19 offense.

20 You all, at a couple of points in the tentative
21 draft, invited public comment as to how best that could be
22 accomplished. And you suggested several possible approaches,

5 1 including the multiplier effect and various others.

2 Several of those approaches might well be appropriate.

3 We don't see much promise at least with regard to mental
4 retardation in the multiplier effect--the multiplier factor.

5 That doesn't seem to work real well when you sit down and
6 try to line it out.

7 By contrast, a general statement--not offense by
8 offense but as you all suggested in the commentary, a
9 general statement, the mental retardation may appropriately
10 be--where it has been shown to be relevant to the offense and
11 relevant to culpability, may be considered as a mitigating
12 factor does seem appropriate. And we have suggested some
13 language that you might want to consider in carrying that
14 out.

15 The language we have chosen suggests that for people
16 with mental retardation, which is a very substantial form of
17 mental disability, that departure from the 25-percent range
18 is appropriate and for mental disability less severe than
19 mental retardation is an appropriate consideration within
20 the guidelines. That is an attempt to reflect what we took
21 to be, at least for this draft, your attempt at some parsimony
22 in the discretion given to judges in departure from the

6 1 guidelines.

2 If the commission chose in a subsequent draft to
3 give somewhat greater latitude to judges in the extent to
4 which they depart from the guidelines that adaptation obviously
5 would not create any substantial difficulty.

6 The final point that we would bring to your attention
7 and then make ourselves available for any questions you might
8 have about mental retardation or about the suggestions that
9 we have presented, has to do with the--I suppose with the
10 rehabilitative aspects of non-custodial sentences, or, at
11 least, non-prison sentences.

12 There is, in the tentative draft, a limitation placed
13 on the duration of some forms of community correctional services
14 and while that limitation may have a sufficient and substantial
15 basis for other sorts of offenders, we think it will be counter-
16 productive if applied to offenders with mental retardation
17 because the habilitation, which is the term that is used
18 in the mental retardation field, the habilitative efforts
19 especially for mentally retarded offenders but for mentally
20 retarded people more generally will often take longer than
21 your draft suggests. And so we would ask you to consider
22 either giving judges generally more latitude with regard to

1 the duration of non-custodial confinement or suggesting in
2 commentary that an exception might be made where it can be
3 shown that the rehabilitative efforts will require longer
4 than the prescribed guidelines.

5 With that, I would make both of us available to
6 you all for any questions that you all might have.

7 CHAIRMAN WILKINS: Thank you very much.

8 Any questions to my right?

9 (No response.)

10 CHAIRMAN WILKINS: Do any commissioners have any
11 questions to my left?

12 COMMISSIONER BREYER: Thank you for coming because
13 I think your point is very well taken. And actually I think
14 there's difficulty but I don't think there's an answer to it
15 except through discretion which is the way in which mental
16 retardation or mental illness may interact with other things,
17 for example, A is provoked. Perhaps the person who was
18 ordinary mentally would not be provoked, and provocation is
19 sometimes the defense but not here, but maybe it should be
20 because of the mental problem. And that could combine. Provo-
21 cation, duress could interact with mental problems, and how
22 to take those into account other than through writing them down

1 and suggesting departures. That's the only thing that occurred
2 to me. Maybe you have a different--

3 MR. ELLIS: No, I think that's right, and language
4 of admonition and suggestions is going to be more useful than
5 hard-and-fast guidelines with regard to that overlap, which
6 can also rise with regard to other factors that you all have
7 already considered.

8 For example, I'm not sure what you are calling it,
9 but the "big fish-small fish" problem where you suggested
10 a departure may also be relevant where a person with mental
11 retardation has been drawn into criminal activity and his
12 role is sufficiently culpable that he doesn't have a complete
13 defense but that any objective person looking at it would
14 identify that his mental retardation is relevant to culpability
15 and some of that may be already taken into account in the
16 identification of his role in the offense as compared with other
17 perpetrators of the same offense.

18 COMMISSIONER BREYER: Yes.

19 MR. ELLIS: So, I think you're right that there is
20 some meshing there and that, as was true in the aggravation
21 area, there are some ways in which you have already considered
22 things in generic terms that impact on offenders with mental

1 retardation.

2 COMMISSIONER BREYER: I mean, there is some concern
3 that if you made it too open-ended than people--judges might
4 say, "Oh, this particular defendant must have a mental problem
5 because otherwise he wouldn't have done this terrible crime."
6 And, therefore, you know--I mean, that type of problem. After
7 all, mental illness is something with shades not just black
8 and white. And I see no alternative to the simple discretion
9 allowed the courts of appeals, but have you thought about--

10 MR. ELLIS: That may be true. That may also be a
11 point at which mental illness and mental retardation are
12 distinguishable. And I think it is a point on which they
13 are distinguishable.

14 COMMISSIONER BREYER: Yes.

15 MR. ELLIS: Whether you wish to treat them differently
16 is a different policy question. But should you wish to do so,
17 it is much more manageable as a drafting matter and also in
18 implementation to say, "We have chosen a cut-off, and where
19 your disability is at a certain level of severity we are
20 going to treat it differently than we are going to treat it
21 where it is of a less severe degree." That is more--there is
22 available a clearer and more workable bright line in the area

1 of mental retardation than there is in mental illness.

2 Now, you can fashion one for mental illness and
3 ask the district courts to do the best they can in assigning
4 offenders to one or the other side of the watershed. That's
5 a policy judgment that you all can make, but you will find it
6 easier to do that, I think, with mental retardation than you
7 will with mental illness.

8 COMMISSIONER BREYER: Thank you for coming all the way
9 out here, too.

10 CHAIRMAN WILKINS: Are there any other questions or
11 comments?

12 (No response.)

13 CHAIRMAN WILKINS: We have your written submission.

14 MR. ELLIS: Thank you very much.

15 CHAIRMAN WILKINS: We may call on you again. This
16 issue we've discussed today has troubled the commission from
17 our beginning, and we still have not resolved it, and we need
18 to do it pretty soon. So, we may be back in touch with you.

19 MR. ELLIS: We will be happy to be of any assistance
20 we can.

21 MR. LUCKASSON: Thank you very much.

22 CHAIRMAN WILKINS: Thank you.

1 In keeping with the policy of the commission, the
2 floor is now open to anyone who wishes to come forward and
3 address the commission on any related issue.

4 (No response.)

5 CHAIRMAN WILKINS: Seeing no takers, I will announce
6 that we will stand now in recess until in the morning at
7 10:00 o'clock sharp. Thank you very much.

8 (Whereupon, the hearing was adjourned at 4:30 p.m.
9 to reconvene at 10:00 a.m. Wednesday, December 3, 1986.)