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UNITED STATES SENTENCING COMMISSION

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Public Hearing

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Wednesday, December 3, 1986

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10:05 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: Let me ask all of the Commissioners to please take a seat.

Good morning, ladies and gentlemen. We will begin now the second day of a hearing which will end a number of regional hearings that we have held around the country during the last six or eight weeks. I know the hearing yesterday was very productive from our standpoint, and I am sure that today's hearing will be as well.

One of the things we did early on in the work of the Commission was to organize what we call working groups of prosecuting attorneys, defense attorneys, probation officers, judges, and others who are interested in the administration of justice and in our work. And this has been most beneficial to the Commission in discussing and debating various issues and helping us reach at least tentative resolution of a number of problems.

Mr. Roger C. Spaeder, who is an attorney with a law firm here in Washington, D.C., worked with us early on on some very important issues, particularly in the areas of plea bargaining and in organizational sanctions. Mr. Spaeder is here today as our first witness this morning.

1 We are delighted to see you again.

2 MR. SPAEDER: Thank you.

3 Mr. Chairman, may it please the Commission, my
4 name is Roger Spaeder, as you indicated, from the Washington
5 law firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker.

6 I had the privilege at an early point in my career
7 of serving as an Assistant United States Attorney in this
8 jurisdiction. But I have since made my professional liveli-
9 hood representing individuals who may well come into contact
10 with the guidelines the Commission is in the process of
11 formulating.

12 I have had the opportunity to review the proposed
13 guidelines and would like to make some constructive observa-
14 tions concerning how they may impact in two particular
15 areas about which I have some knowledge and concerns.

16 The first area on which I would like to focus
17 is that of organizational sanctions and the concept of
18 voluntary disclosure of corporate misconduct.

19 Under the guidelines, as the Commission knows,
20 an offender's total offense value may be reduced by mitigating
21 offender characteristics. Acceptance of responsibility
22 and cooperation are two of the principal ones identified

1 by the Commission in its draft. In my judgment, neither
2 of these offender characteristics, and indeed none of the
3 others identified by the Commission, covers the situation
4 in which an organizational offender voluntarily discloses
5 its misconduct to the government.

6 Actively encouraged by a number of Federal agencies,
7 particularly the Department of Defense, other agencies
8 engaged in Federal contracting activities, and soon to be
9 part of a regulatory scheme, I understand, to be promulga-
10 ted by the Comptroller of the Currency, voluntary disclosure
11 of corporate misconduct is rapidly becoming one of the most
12 important issues in Federal law enforcement policy.

13 The philosophy of voluntary disclosure is fairly
14 straightforward. It rests on the premise that corporations
15 should voluntarily report criminal conduct of their employees
16 in order to avoid the harsh consequences that can result
17 from the application of the rules imposing vicarious criminal
18 liability on organizations.

19 In my own experience, voluntary disclosure usually
20 arises in one of two contexts. In the first context, the
21 corporation learns of undisclosed misconduct before it is
22 detected by a government agency. This can be a totally

1 inadvertent disclosure; it can be the result of an internal
2 or special counsel investigation; it can be the result of
3 a report to an internal corporate ombudsman.

4 The second situation is in which the corporation
5 uncovers a criminality in the course of an investigation
6 which is prompted or generated by a governmental probe or
7 inquiry.

8 Very often, however, the wrongdoing identified
9 within the corporation by the corporation far exceeds that
10 known to the government at the time it begins its investiga-
11 tion.

12 The problem is that once the company learns of
13 that criminality, it forces its inside corporate counsel
14 and the outside lawyers who advise it to confront some
15 exceedingly difficult choices. Counsel can voluntarily
16 disclose the wrongdoing to the government in the hope of
17 avoiding prosecution or punishment. Counsel also has to
18 consider simply remaining silent in the hope that the
19 criminality will escape the government's attention.

20 Particularly in the areas of government contracting
21 and banking, where Federal regulation and audit are common-
22 place, the corporation's choices are exceedingly difficult.

1 Silence may in the long run achieve absolutely
2 nothing, because the misconduct eventually may be uncovered.
3 On the other hand, the voluntary disclosure which counsel
4 is considering making to the government may not be rewarded
5 at all, or may be so inadequately rewarded that there is
6 really no incentive for the corporation to make a clean
7 breast.

8 In my judgment and in the judgment of some of
9 my colleagues, the Commission's sentencing guidelines must
10 speak to this issue in a precise and comprehensive way.
11 Reliance on the residual authority granted to the court
12 by Title 18, United States Code Section 3553(b) to justify
13 special treatment for a corporate defendant that voluntarily
14 discloses misconduct is simply not adequate to ensure an
15 organizational offender that its own voluntary self-incrimina-
16 tion will indeed produce significant benefits at sentencing.

17 As a consequence, I recommend that the Commission
18 create a separate category in its post-offense conduct portion
19 of the guidelines, which is currently Part B of Chapter
20 III, dealing with offender characteristics. I would call
21 this particularly topic "voluntary disclosure". This mitiga-
22 ting circumstance should be available only to organizational

1 offenders because it is in this unique context that voluntary
2 disclosure is a realistic possibility. Unlike defendants
3 who face the risk of incarceration if their crimes are
4 detected, and therefore are not keen on voluntarily reporting
5 it to law enforcement agencies, a corporation finds itself
6 in a very different situation.

7 Two forms of voluntary disclosure in my judgment
8 should be recognized. The first is that which emanates
9 from disclosure before governmental detection. The second
10 form of voluntary disclosure is that emanating from disclosure
11 which follows governmental detection.

12 In the first situation, applicable to corporations
13 that reveal their own misconduct before the government gets
14 wind of it, a maximum discretionary sentence reduction of
15 50 percent should be allowed; or, alternatively, a reduction
16 in offense value of 50 percent might be provided by allowing
17 the offense value to be multiplied by .50.

18 In the case of voluntary disclosure which follows
19 detection by law enforcement officials, the sentence reduction
20 obviously, or the offense value multiplier obviously should
21 be smaller.

22 Because I am speaking here of organizational

1 offenders, the sentence reduction would apply primarily
2 to to the monetary fines otherwise dictated by application
3 of the guidelines. But because the Commission's own draft
4 contemplates that corporations can receive other punishments
5 like probation and so forth, the voluntary disclosure reduction
6 ought to apply across-the-board to the various sanctions
7 that might be imposed.

8 I think that voluntary disclosure of corporate
9 misconduct is fundamentally different from cooperation or
10 acceptance of responsibility, and for that reason deserves
11 separate treatment.

12 Unlike the situation generally applicable to
13 individuals, an organization may indeed be criminally liable
14 for the acts of its agents even if the agent is acting outside
15 the scope of his authority. The decided cases are fairly
16 uniform in holding that where a corporate employee commits
17 a crime which benefits the corporation, the corporation
18 is criminally liable even if the conduct of the agent violated
19 internal policy or was beyond the scope of his employment.

20 Second, as a matter of sound law enforcement
21 policy, the Commission should encourage organizational
22 offenders to undertake compliance and prevention programs

1 designed to prevent crimes within the corporation, and a
2 significant reward at sentencing is consistent with that
3 policy.

4 Third, voluntary disclosure produces enormous
5 savings in investigative costs which would otherwise be
6 entailed if the corporation remained silent. As a practical
7 matter, most government agencies lack the time and resources
8 to fully investigate the industries under their regulation
9 and are therefore forced to rely in significant measure
10 on self-regulation. Significantly rewarding a corporation
11 for voluntary disclosure furthers this goal of self-regulation.

12 Finally, since corporate self-incrimination often
13 runs counter to human nature and to the incentives that
14 exist in the corporate board room, a corporation should
15 seize significant incentives at the time it makes the
16 decision to voluntarily disclose misconduct in that it will
17 know in advance that it will receive significant consideration
18 at sentencing.

19 The second area in which I have some interest
20 and about which I would like to share my observations with
21 you relates to plea bargaining. I have noted the Commission's
22 proposed treatment of the plea bargaining concept, and as

1 I read the Commission's guidelines, the expectation is that
2 a plea of guilty could in the court's discretion be treated
3 as evidence of acceptance of responsibility and to that
4 end could result in a 20 percent reduction in the sentence
5 otherwise required by the guidelines.

6 In my opinion that does not provide a significant
7 incentive to induce individual or corporate offenders to
8 tender pleas of guilty. I am certain the Commission has
9 heard a great deal about the pleas of guilty provisions
10 of the guidelines, and so I will not go over many of the
11 standard objections, except to note that with respect
12 to individuals, the irony seems to be that under the current
13 sentencing system, so much discretion is invested in the
14 trial court that almost any offender who is considering
15 a plea of guilty can at least hold out the hope of a very
16 lenient sentence or probation if his unique circumstances
17 strike the heart of the court.

18 Under the proposed guidelines, the numbers which
19 are generated through the Commission's formula, subject
20 to the ameliorative factors that we have discussed, can
21 reduce an offender's sentence when he pleads guilty, but
22 only by 20 percent. In my humble opinion, that is not

1 sufficient to induce many offenders to seriously entertain
2 guilty pleas.

3 Next I would like to discuss -- indeed my final
4 remarks today -- the concept of plea bargaining under Rule
5 11 and the inquiry the Commission has made in its guidelines
6 about whether or not plea bargains in general or Rule 11(e)
7 pleas in particular might undermine the policy inherent
8 in the guidelines.

9 As the Commission well knows, there are provisions
10 of Rule 11(e) which authorize a court to accept a plea bargain
11 struck between a prosecutor and defense attorney which calls
12 for a specific sentence to be imposed by the court. If
13 that provision remains in effect, one presumes that even
14 after the guidelines are enacted into law, the court could
15 indeed accept a plea bargain calling for a specific sentence.

16 Indeed, I believe that the Commission's guidelines
17 should make clear that that practice is not to be forbidden
18 by enactment of the guidelines. And indeed, I would suggest
19 an amendment to Rule 11(e) which would also permit the court
20 to entertain and approve a plea bargain calling for a stipula-
21 tion of facts which, if accepted by the court as part of
22 the bargain, would effectively bind the court in terms of

1 the sentence to be imposed because it would stipulate as
2 to some of the elements involved in the computational
3 process for the sentence.

4 I think the Executive Branch of government ought
5 to be given some flexibility in enforcing these laws and
6 given that Rule 11(e) already provides judicial oversight
7 in accepting or rejecting pleas, based on whether or not
8 the disposition is in the interest of justice, I have little
9 fear that a continuation of this practice will undermine
10 the Congressional policy inherent in the guidelines.

11 Probably the most significant factor in plea
12 bargaining when one gets to this particular issue is the
13 strength of the government's case. It is unclear to me
14 that the Commission's guidelines really can effectively
15 speak to that issue, because it is unique to the prosecutor
16 and his investigative situation. Prosecutors ought to be
17 allowed, be permitted to negotiate on a specific sentence
18 in unusual circumstances where the strength of the government's
19 case requires treatment of an offender in a fashion that
20 might be infinitely more lenient than would otherwise be
21 required by the guidelines.

22 The Commission may wish to consider requiring

1 the prosecutor to submit a written proffer to the court
2 identifying the considerations which warranted his exercise
3 his exercise of prosecutorial discretion in the fashion
4 presented in a particular case so that the court can make
5 a determination as to whether or not the disposition is
6 in the interest of justice. But the practice should be
7 committed to continue. And as regards stipulated findings
8 as part of a plea bargain, it should be recognized as part
9 of the Commission's guidelines that that practice as well
10 is not inconsistent with the guidelines as enacted by
11 Congress.

12 Those are my observations.

13 CHAIRMAN WILKINS: Thank you very much for those
14 very thoughtful and well-prepared remarks.

15 What would you suggest be the maximum consideration
16 to be given for acceptance of responsibility? We have
17 selected 20 percent in this preliminary draft; that's just
18 a number. Current practices show it varies between 24 or
19 25 percent and 70 percent, depending on the crime. What
20 would you suggest?

21 MR. SPAEDER: Well, with respect to individual
22 offenders -- we are not talking here about the issue of

1 a corporation that voluntarily discloses -- my intuition --
2 and I have no better sense than my own intuition -- is that
3 a sentence reduction of a discretionary nature up to a
4 maximum of 50 percent would be appropriate.

5 To the average offender who seeks from his
6 defense counsel some sense of the sentence he is likely
7 to receive from a court in consequence of his plea of guilty,
8 I do not believe that many offenders will be grabbed by
9 the idea that they may receive as much as only 25 percent.

10 CHAIRMAN WILKINS: Thank you.

11 Are there any questions from any Commissioner
12 to my right?

13 Commissioner Block?

14 COMMISSIONER BLOCK: I have a question about
15 your limitation of the voluntary disclosure discount to
16 organizations. Would you expand on that somewhat?

17 MR. SPAEDER: I have suggested application only
18 to corporations because I see it as a practical problem
19 only in that area. There are so many other forces which
20 run counter to a defendant's election to voluntarily confess
21 his crimes even before they are detected that I have not
22 seen this in practice as a major problem.

1 One does read cases, though, where counsel is
2 visited by a client in the privacy of his office, and a
3 serious crime is disclosed, which indeed the client may
4 wish for lots of reasons to reveal to governmental authorities.
5 That disclosure even under my conception of the guidelines
6 would not reduce any additional reward at sentencing apart
7 from whatever the individual would otherwise receive by
8 pleading guilty.

9 If the Commission were to enlarge the discount
10 to 50 percent, of course, that would be a significant
11 discount.

12 COMMISSIONER BLOCK: I guess I still don't see
13 the rationale. I think it is a good suggestion for
14 organizations, but I guess I don't see the rationale for
15 restricting it to organizations. If it is rarely used,
16 there doesn't need to be a cost in having it. Are you
17 arguing that it provides the wrong incentive for individuals
18 and the right incentive for organizations?

19 MR. SPAEDER: No. I am not wedded to the
20 proposition that the suggestion ought to apply only to
21 organizational offenders. And one could logically extend
22 it to individuals. Because of the peculiar problems about

1 vicarious criminal liability in corporations, very often
2 the people and corporations who are making the decision
3 about voluntary disclosure are not the people who commit
4 the crime, and as a consequence, agents in some division
5 located in Memphis or Des Moines may have committed a serious
6 crime which disposes the corporation to liability; the
7 board of directors may wish to disclose it. They did not
8 authorize the crime and may wish to entertain entirely
9 different considerations in deciding whether to incriminate
10 themselves, meaning the corporation. I believe it is a
11 lot easier to do that than it is for an individual.

12 COMMISSIONER BLOCK: That's an interesting point.
13 Thank you.

14 CHAIRMAN WILKINS: Yes?

15 COMMISSIONER ROBINSON: Would another way of
16 solving the problem you raise be to permit that cooperation
17 by an official to be counted as under the cooperation
18 adjustment? There is a plea of guilty adjustment, and there
19 is the cooperation. The cooperation might be interpreted
20 as applying only to other cases, and typically that's what
21 it would be used for. But I think that one way might be
22 to take that restriction off and just say that as long

1 as the cooperation adjustment is going to be by certification
2 of the United States Attorney anyway, one way of handling
3 it would be to allow the United States Attorney to certify
4 cooperation that somehow was related to this defendant's
5 own case.

6 Would that achieve the same result?

7 MR. SPAEDER: As presently defined, I don't
8 believe corporation embraces this approach, but it conceivably
9 could be so defined to cover it.

10 There is a tripartite system set up in the current
11 guidelines, three levels of discount. Only one of them
12 strikes me as sufficiently strong to induce voluntary
13 disclosure, and that is the 60 percent reduction provided
14 for exceptional assistance to law enforcement agencies.
15 Obviously, it is exceptional for a corporation to tell the
16 government about a crime that the government doesn't even
17 know about when the crime may expose the corporation to
18 millions of dollars in fines, debarment from future government
19 contracting, probation, and indeed incarceration of its
20 own employees, which I can assure you creates incredible
21 morale problems within a corporation.

22 So I view it as somewhat of a difference in kind

1 rather than in degree, but I accept the Commissioner's
2 observations that you could put it into the cooperation
3 section.

4 COMMISSIONER ROBINSON: Thank you.

5 CHAIRMAN WILKINS: Any other questions?

6 George?

7 COMMISSIONER MacKINNON: On voluntary disclosure,
8 you appended the statement by Deputy Defense Secretary Taft.
9 I wondered if you had ever gone back to what the experience
10 was in the Internal Revenue Service after the war, when
11 they had a voluntary disclosure practice?

12 MR. SPAEDER: I don't know, Judge. I don't know
13 what the --

14 COMMISSIONER MacKINNON: There is a case in the
15 Supreme Court and out of the 8th Circuit involving the
16 Shotwell Manufacturing Company that makes Crackerjack, and
17 Sullivan, the brother of the Chief Judge of the Northern
18 District at that time. And your suggestion raises the problem
19 to me as to how far this is going to affect the Income
20 Tax Department. They did away with it eventually. There
21 was some inducement after the war to have these people come
22 back in, and I guess they did collect quite a bit of money.

1 But you would apply this, I suppose, to the Internal
2 Revenue Department, also?

3 MR. SPAEDER: Well, it would apply to criminal
4 offenses committed under the Internal Revenue Code, although
5 it would not necessarily apply to any civil liability that
6 is a collateral consequence of the disposition.

7 Your Honor may be talking about an amnesty program;
8 I don't know. This is certainly not one. It only involves
9 a sentence reduction. And given the Congress' amendments
10 in October of 1984 to the Criminal Code, enhancing felony
11 conviction fines to, I believe, a quarter of a million dollars
12 in many circumstances, even for individuals and more for
13 corporations, significant exposure exists anyway, so that
14 a sentence reduction of 50 percent would still leave a fair
15 bit of judicial discretion to impose hefty fines where they
16 are warranted.

17 COMMISSIONER MacKINNON: I am not sure whether
18 the reduction was mandatory or discretionary. I think it
19 was probably discretionary. Of course, you get into millions
20 of lawsuits over whether this man came in voluntarily or
21 not. Generally, they came in when the Internal Revenue
22 people came around on audit, and of course, before they

1 started the audit they had some pretty good information
2 that they had done something wrong. So it does have its
3 complications.

4 MR. SPAEDER: Although I do recommend that even
5 as to those people who come to the prosecutor's office after
6 they are detected, they should receive in the corporate
7 context a sentence reduction on a discretionary basis,
8 because in my own experience so often the government only
9 knows the tip of the iceberg. And very often, inside
10 counsel are aware of many substantial offenses that have
11 been committed. The corporation suspects the government
12 will not detect all of it, but feels an incentive to go
13 to the prosecutor and make a disclosure, and there ought
14 to be some incentive for doing so; the corporation ought
15 not to be deprived of that opportunity simply because an
16 agent has knocked on the door and made some additional
17 inquiries already.

18 COMMISSIONER MacKINNON: Thank you.

19 CHAIRMAN WILKINS: Thank you very much, Mr. Spaeder.
20 We appreciate your remarks.

21 MR. SPAEDER: Thank you.

22 CHAIRMAN WILKINS: Our next witness is

1 Breckinridge L. Willcox. Mr. Willcox is United States
2 Attorney for the District of Maryland.

3 Mr. Willcox, we are delighted to see you.

4 MR. WILLCOX: Thank you, Judge, and other members
5 of the Sentencing Commission.

6 In my prepared remarks, I address two issues
7 which I think have some application to us as front-line
8 prosecutors, and let me briefly summarize my remarks for
9 you now.

10 The first area I want to address is cooperation
11 and plea agreements. I certainly cannot stress enough the
12 importance of cooperation. Federal narcotics investigations
13 simply cannot progress without defendants' cooperation.
14 I think that the draft guidelines recognize very useful
15 and helpful gradations in Sections (b)331, 332, and 333.
16 But I think there perhaps needs to be some expansion.

17 At the outset I note that often the government
18 is unable to certify as to a defendant's truthfulness, or
19 in the more usual scenario, the defendant simply pleads
20 guilty, but refuses to either cooperate or, more commonly,
21 refuses to testify.

22 Some additional gradations might be useful

1 to further recognize incipient contrition and to place a
2 value on enhancing courage guilty pleas.

3 The treatment accorded offenders who accept responsi-
4 bility as specified in (b)321 and 322 is again useful and
5 helpful, but I do think that a naked guilty plea standing
6 alone should warrant some sort of token automatic reduction.

7 I agree with Mr. Spaeder that if there is little
8 incentive, a 10 or 20 percent incentive, to plead guilty,
9 we are not likely to encourage many guilty pleas. But I
10 do recognize that many defendants choose to plead guilty
11 on the morning of the first day of trial simply to avoid
12 the pain and the agony if not the expense of standing trial.
13 And I do think that there should be some minimal incentive
14 to simply entering a guilty plea.

15 I am not sure the defendants who plea on the
16 eve of trial are terribly motivated by any sentence reduction;
17 rather, they simply wish to avoid the expense and pain of
18 the trial itself.

19 The most important factor, I think, in cooperation
20 is the timing and the degree of it. And as the guidelines
21 recognize, the timing and degree of cooperation should
22 warrant the most significant sentence reduction. Every

1 possible inducement should be held out to those who cooperate,
2 especially early on in the investigation. The road to
3 Damascus can be a long and tortured one, and early conversion
4 should be recognized.

5 Section (b)333, which provides for a 40 percent
6 reduction for exceptional cooperation, appears to recognize
7 the timeliness factor, but I think more specificity in terms
8 of the timing of cooperation might be in order.

9 In general, the (b)321 and 331 series are very
10 helpful and very useful, and in my view are necessary to
11 lend some degree of predictability to the current chaotic
12 sentencing experiences. I firmly believe that the most
13 effective law enforcement is predictable law enforcement.

14 Let me now turn to the monetary loss tables which
15 I spend a fair amount of time on in my prepared remarks.
16 The property loss or gain tables in (b)251, (c)211 and
17 (f)211 seem to make significant distinctions between the
18 same economic forgery, tax evasion, and fraud scheme. I
19 detect that the Commission has made a conscious policy
20 decision which has the effect of treating fraud cases
21 as not as serious as real crimes, and I can tell you as
22 a professional white collar crime prosecutor and defense

1 counsel that white collar crimes are real crimes. And they
2 are often committed by leading members of the community.
3 And those individuals should be branded for exactly what
4 they are -- thieves.

5 I can easily make the argument that the amount
6 of loss in a crime of violence should be less of an aggrava-
7 ting factor than in a fraud case. The bank robber, for
8 example, seldom has any notion as to how lucky he is going
9 to be. His offense should be enhanced more by the amount
10 of the violence he uses rather than his happenstance of
11 the proceeds of his robbery.

12 On the other hand, big-time fraud artists
13 display an enormous amount of planning, cunning and
14 sophistication. And as I pointed out in my prepared
15 remarks, tax cheats as I interpret these tables are treated
16 much more akin to bank robbers. I can see no useful distinc-
17 tion in these disparate monetary loss tables.

18 One final point. At several instances in the
19 draft guidelines it seems to be envisioned that evidentiary
20 hearings be held in connection with several of the issues
21 outlined in Chapter III, specifically the (b)321 and 331
22 series. Elsewhere in the draft guidelines, specifically

1 the commentary following Section 7 of Chapter I, it is
2 specified that at such evidentiary hearings, the judge may
3 admit evidence that is not barred by evidentiary rules.
4 If that means that hearsay is excluded, we are all in deep
5 trouble, because obviously at sentencing hearings the govern-
6 ment's presentation consists almost entirely of hearsay
7 evidence, and if that is excluded, we are going to turn
8 sentencing hearings into replays of the trial itself.

9 Moreover, the U.S. Attorney's certification of
10 the extent of cooperation in sections (b)331 to 333 often
11 will generate disputes. The defendant may wish to claim
12 he has coeprated extensively, exhaustively, and ought to
13 get a 40 percent reduction, while the government's view
14 is that his cooperation was even less than total, or not
15 very useful at all.

16 My sense is that we may well have disputes, and
17 if the guidelines contemplate that we will have evidentiary
18 hearings to resolve those disputes, I find that notion offen-
19 sive. I think the government ought to be able to unilaterally
20 certify in its view the amount and extent of the defendant's
21 cooperation, and the defendant should only get a hearing
22 on that issue if he can colorably show that the government

1 acted in bad faith or was somehow ill-motivated in making
2 that certification.

3 CHAIRMAN WILKINS: Thank you very much, Mr. Willcox.

4 You know, any guideline system, regardless of
5 what it looks like, will change the process somewhat at
6 the sentencing stage. But I assure you that this Commission
7 shares your concern and the concern of many others that
8 we do not want to change the process to the extent that
9 we have a mini-trial every time a sentence is imposed. And
10 so we are searching for ways to avoid that very unfortunate
11 possibility. I do not believe that our guidelines will
12 ultimately provide for mini-trials and so forth. But it
13 still will change somewhat. But I appreciate your remarks
14 very much.

15 Any questions from other Commissioners?

16 Commissioner Block?

17 COMMISSIONER BLOCK: Mr. Willcox, I want to address
18 Your comment about the monetary loss tables. First of all,
19 I agree with the relative emphasis on monetary loss in the
20 robbery as opposed to fraud cases. I think in some sense,
21 the structure suggested in the preliminary draft comes part
22 of the way towards that, in the sense that the base offense

1 value is much higher for robbery than it is for, say, fraud,
2 and hence the dollar values matter more in fraud than they
3 do in the absolute sentence given for robbery. I think
4 your suggestion goes to the fact that additional dollars
5 should count less in robbery than in fraud; is that what
6 you are suggesting?

7 MR. WILLCOX: Yes, sir.

8 COMMISSIONER BLOCK: Thank you.

9 CHAIRMAN WILKINS: Other questions?

10 (Pause.)

11 CHAIRMAN WILKINS: Thank you very much.

12 MR. WILLCOX: Thank you.

T2S1 13 CHAIRMAN WILKINS: Our next witness is Mr. Joseph
14 E. diGenova, the distinguished United States Attorney from
15 the District of Columbia. Mr. diGenova, we are delighted
16 to see you again.

17 MR. diGENOVA: Mr. Chairman, Your Honor, members
18 of the Commission, thank you very much for the opportunity
19 to be here this morning.

20 I had originally intended to offer substantial
21 comments, but I looked over into the jury box and saw the
22 members of the jury panel and was reminded of a story that

1 Senator Russell Long tells about his famous father, Huey
2 Long.

3 Apparently, the Governor had downed a cup of
4 cheer too many one night, and after fumbling with the keys
5 to his front door for a while, he finally got to the door
6 and opened it only to trip over the threshold. He landed
7 flat on his face just inside the door and looked up
8 sheepishly, only to find Mrs. Long looking down at him.

9 However, never one to lose the initiative, the
10 Governor said, "I will dispense with my prepared text and
11 take questions from the floor."

12 I would simply like to dispense with my prepared
13 text, Mr. Chairman and members of the Commission, and under-
14 score several points about the general process of what the
15 Commission has done and why I think it is important that
16 the Commission has taken on honestly the charter which
17 Congress has given it.

18 Let me begin by saying that my work as United
19 States Attorney here and my number of years working in the
20 United States Senate, as well as my service for two years
21 including up until today on the Sentencing Guideline Commission
22 for the Superior Court of the District of Columbia, give

1 me, I think, a keen appreciation of the difficult job that
2 Congress has given you, and also gives me a great deal of
3 admiration for the work that you have accomplished so far.

4 Within that background I'd like to just discuss
5 a few general points about sentencing reform and maybe
6 allude to two issues which have arisen here.

7 Now, as I have listened to the testimony and
8 read about it and read some of it over the last months,
9 it is apparent that many individuals have complained about
10 the guidelines taking away judges' discretion. I think
11 that that obviously is a concern to the judges and to
12 individuals who are not terribly interested in the notion
13 of certainty.

14 It is axiomatic that when Congress instituted
15 the notion of guidelines, it made a policy decision that
16 for whatever, for good or ill, it sought to circumscribe
17 the discretion of judges to a certain extent. That is
18 precisely what Congress intended.

19 Now, we can argue about the wisdom of that
20 decision, but that decision was made. And there are many
21 that would argue that the notion of having guidelines in
22 Federal courts is not an acceptable one given what

1 Federal judges are asked to do every day.

2 We have been asked to address the question, the
3 real question, of the disparities which have existed in
4 sentencing, and no one can deny that they do exist inside
5 individual districts and from district to district. When
6 you have the kinds of disparities that are reflected in
7 the data that has been given to this Commission, in some
8 instances ranging, just as one example, from probation to
9 five years in a typical mail fraud case, in cases of identical
10 quality and caliber, or sentences of three years and then
11 another sentence of twenty-five years in bank robbery cases,
12 those of course are the things that have concerned policy-
13 makers and cry out for some form of accounting.

14 So it is not surprising that Congress took the
15 step that it did. What I am concerned about is that as
16 guidelines become drafted and implemented, we not lose
17 the notion, if we stick by what Congress intended, which
18 is finalty and some certitude and that there not be much
19 deviation from the fundamental notion of what the guidelines
20 are trying to impose for particular offenses.

21 What we have discovered in working on the Superior
22 Court Guideline Commission -- and I know that the Commission

1 has rejected this notion -- is that a grid of some form
2 is extremely helpful in not only making the guidelines
3 understandable but making them acceptable to a wider range
4 of individuals because they were as a result of that under-
5 standable, and people could see what the ultimate consequences
6 were going to be, literally, in front of them as a result
7 of looking at the grid.

8 We found that to be most reliable in terms of
9 trying to communicate the fundamental ideas that the Commission
10 was trying to adopt, and that it would be the least likely
11 option to lead to disparity, litigation and appeals.

12 I understand the Commission has not opted for
13 that, and for very good reason. What I want to underscore
14 is that I think that the effort that this Commission has
15 made is absolutely vital and that in addressing the problems
16 in a draft guideline setting in which the Commission has
17 made it very clear to everybody that this is not the final
18 word, that this is a working document, that this has
19 become in and of itself a major contribution to actually
20 getting to the point of a final set of guidelines -- and
21 I have appreciated the opportunity to review them -- I
22 do share many of the concerns that have been expressed by

1 my colleague, Mr. Willcox from Maryland, particularly about
2 the notion of a sentencing proceeding becoming a mini-trial;
3 the notion that we will expand precious judicial and
4 prosecutorial resources at a part of the judicial proceeding
5 which has historically not required the kinds of evidentiary
6 investments that might appear to be required by a casual
7 reader of these preliminary draft guidelines. And I am,
8 of course, sensitive to the Commission's views that they
9 are indeed just preliminary, and that is why hearings are
10 being held so people will have an opportunity to pinpoint
11 to the Commission their concerns.

12 I also think that, as has been expressed, the
13 notion of cooperation must be given some concrete expression
14 and that the certification of the United States Attorney
15 ought to be sufficient in and of itself to deal with that
16 question with regard to whether or not the cooperation has
17 been satisfactory to the government. As it stands today,
18 the representation of the United States Attorney in
19 regard to that is generally accepted by the court. It may
20 be done in various ways. If the cooperation has been good,
21 the government frequently -- universally -- says that. If
22 the cooperation has not been good, it says that, too. If

1 it has been mediocre, it says that -- trying to assist the
2 judge in some way in making a very difficult decision of
3 what sentence to impose.

4 There are two areas -- and then I will stop and
5 take any questions -- that we have had to address in our
6 role locally which I think you are now beginning to face
7 up to as some of the comments come in, and that is adequate
8 prison capacity and the fundamental establishment of the
9 guidelines.

10 There is a view that -- how do you deal with
11 this question of capacity and how should it fit in. One
12 of those answers is supplied by the Commission's legal charter;
13 the other, by good sense and sound public policy. The answer
14 supplied by the Commission's charter requires it to take
15 Prison capacity "into account" in making its recommendation
16 and authorizes the Commission to recommend expansion of
17 those facilities if the Commission deems it necessary.

18 The answer supplied by good sense and sound
19 public policy is that linking sentencing decisions -- linking
20 sentencing decisions, individual sentencing decisions --
21 to prison capacity improperly, in my view, joins two
22 separate concepts to the detriment of both of them.

1 Providing adequate prison capacity is a duty
2 a civilized society owes to its law-abiding citizens
3 whose safety cannot be jeopardized by a separate and irrelevant
4 factor. Put simply, adequate prison capacity should be
5 a consequence of proper sentencing of criminal offenders
6 and not a factor in establishing sentences.

7 Finally, I just want to say a few words about
8 one of the controversial aspects of any sentencing guidelines.
9 Judges in our district, prosecutors, defense lawyers and
10 others, have been involved for actually almost three years
11 in developing the guidelines locally that I alluded to.
12 Early in our deliberations it was clear that one of the
13 consequences of establishing sentencing guidelines would
14 be to place a limit on the discretion of sentences that
15 judges could establish. Congress recognized that when it
16 established your charter.

17 Our experience indicates, however, that once
18 the guidelines are carefully drawn, as this Commission is
19 attempting to do in its preliminary draft, with the full
20 participation of the judiciary, the conscientious judges,
21 we believe will gratefully embrace them because they will
22 have been through a sound policy of exposition. And I am

1 quite confident that the United States Sentencing Commission
2 will find a similar experience and that these public hearings
3 will perform an important function in involving the judiciary,
4 the legal profession and the public in your vitally important
5 work.

6 I would be happy to respond to any questions
7 you have generally or anything that was addressed by anyone
8 else, including the corporate problems that Mr. Spaeder
9 addressed.

10 CHAIRMAN WILKINS: Thank you very much.

11 Let me ask you about what we call "acceptance
12 of responsibility". Mr. Willcox expressed concern that
13 the maximum of the consideration of 20 percent over the
14 otherwise applicable guideline sentence would not be suffi-
15 cient inducement for encouraging guilty pleas. And of
16 course, we would hope that the percentage of those defendants
17 who plead guilty in our courts, 88 to 90 percent today,
18 would not change significantly under any guideline system.

19 Do you have a view on that acceptance of
20 responsibility and whether or not 20 percent is sufficient?
21 Of course, it is not mandatory and it is not automatic.
22 It is u to 20 percent within the discretion of the judge;

1 that's the way it's written now.

2 MR. diGENOVA: Well, I suppose 20 percent of
3 what is the way I look at it. If you are involved in reaching
4 a disposition with a defendant, the prosecutor is going
5 to retain the discretion in conjunction with the defense
6 attorney through the very professional negotiations that
7 go on between prosecutors and defense counsel, to pick
8 an appropriate crime and to pick a crime which has a sentencing
9 range which will give some real benefit to a defendant who
10 seeks to legitimately cooperate with the government, if
11 not necessarily by giving up others, because there may not
12 be any others to give up, but at least by recognizing that
13 he or she has done something wrong and is willing to at
14 least admit that and pay the price.

15 I assume that there is going to be a range, and
16 I have looked at this -- not in the great depth that the
17 Commission has -- that there is going to be a range of
18 offenses in any given situation that the government is going
19 to have at its disposal.

20 Now, any time you try to pick a number out of
21 the air, it is fundamentally going to have to -- there is
22 no way to rationally pick the number. Twenty percent may

1 seem fine to me in a given case given the particular facts.
2 It may not seem enough to me in another case where that
3 kind of recognition as to the individual involved, I might
4 want to say I'd like to give 40 or 50 percent. It may be
5 that some range may be necessary a little bit higher than
6 the 20 percent, but as long as again, as within the guidelines,
7 there are ranges within which people can rationally choose.
8 I don't think anyone can fault that. There are obviously
9 policy problems along the way that have to be addressed.
10 But I think by picking 20 percent, the Commission has started
11 at a rational level, and I think people can differ about
12 whether or not it should be higher. And I can accept the
13 notion that I might want it higher; I might want it as high
14 as 50 percent in certain circumstances, and in order to
15 continue to induce people who want to preserve the scarce
16 judicial and prosecutorial resources that we now have.

17 I am not offended by 20 percent, but I can
18 certainly envision circumstances in which I'd like to have
19 more than that and think that the guidelines ought to have
20 more than that.

21 CHAIRMAN WILKINS: You bring up a good point
22 in your discussion. We always need to keep in mind, and

1 some overlook this, that we should not look at acceptance
2 of responsibility or that section alone, because as you
3 point out, there is another section dealing with cooperation,
4 another section that we will have dealing with plea negotiations,
5 and all of those things impact one on the other.

6 MR. diGENOVA: That's correct. There is a cumu-
7 lative effect of a number of parts of the guidelines which
8 in many ways do nothing more -- the guidelines do nothing
9 more than put into a package what already goes on in the
10 system, and that is the negotiation which occurs at the
11 beginning of the case, at the front end of the fuel cycle.
12 And then as more facts become apparent, the culpability
13 becomes more clearly defined, other decisions are made
14 along the way, and indeed the defendant has an opportunity
15 to cooperate, perhaps inculcate others, perhaps there
16 are not others to inculcate, and then also involves other
17 actions which the defendant may take between the beginning
18 and the end of the process to help a prosecutor determine
19 the nature of the specific charge which should be brought.
20 And that, under the guidelines, will still be -- the Commission
21 is not going to change the laws of the country; they are
22 going to be there, they are all still on the books; there

1 are a host of laws in most instances which a creative prosecu-
2 tor can make use of in order to find a reasonable disposition
3 with a particular defendant. And obviously, criminal histories
4 and modifying factors are going to have an impact on that
5 as well.

6 So I think that Congress having asked this Commission
7 to take on a basically Herculean task which is to try and
8 articulate in a volume many of the unspoken notions which
9 surround the art and practice of sentencing in the United
10 States, has asked the Commission to take on a task which
11 I think is basically undoable in many ways. It is something
12 that, like Congress frequently asks people to do, they do
13 something which can't be done. Well, that's all right.
14 I think the Commission thus far has done a noble job and
15 a very helpful job in trying to outline and articulate
16 what some of these perhaps somewhat arcane notions of sentencing
17 are, and quite frankly, having read it and gone through
18 it, I find it very helpful in trying to analyze some of
19 my own notions of what is wrong with sentencing practices
20 in general. It is not, in my view, the final product, and
21 obviously the Commission doesn't view it that way, either.
22 So I don't think it is anything for people to get all upset

1 about, and obviously your Commission has been subject to
2 some criticism for this document. I think that is probably
3 healthy in a democracy that we can have that kind of
4 criticism. The Commission obviously does not view this
5 as the final document. And I would hope that it isn't
6 the final document, because I have expressed some of my
7 concerns with it, but I am sure it is going to be changed.

8 CHAIRMAN WILKINS: Well, it is far from the final
9 document, and of course was published only for the reason
10 to generate the extensive public comment because the time-
11 table is so short. And if we wanted until next year to
12 go through this process, we wouldn't have time to absorb
13 and digest and use constructively the comments that we are
14 receiving now.

15 Commissioner Block?

16 COMMISSIONER BLOCK: Mr. diGenova, I have a follow-
17 up question on your preference for a matrix presentation.
18 Is that in part a preference for a simpler form, a simpler
19 set of guidelines?

20 MR. diGENOVA: Well, let me speak as a commissioner
21 on another commission. I'm not a judge, and so I do not
22 have the expertise that many judges have who battle daily

1 with the notion of imposing a sentence -- a very onerous
2 responsibility in a free society.

3 I have found as a commissioner that in dealing
4 with a matrix, it has been easier for me to understand all
5 the notions being brought together in a thoughtful process
6 that has taken almost three years for us to do.

7 Now, that may be a symptom of my own wish to
8 reduce things to understandable form because I find it
9 easier to do things when I understand them.

10 However, I certainly recognize that others may
11 differ on that and that for purposes of assuaging sentencing
12 judges around the country, the Commission does not wish
13 to present them with a numerical matrix to make judges
14 feel like accountants. That's fine. But from my perspective
15 as a commissioner I have found it easier, after a tremendously
16 long deliberative process of three years, to understand
17 what the ultimate result was when I have seen it reduced
18 to matrixes, various ones -- one for drug offenses because
19 they are different and distinct; a separate one for
20 armed offenses, and then one matrix for the other offenses,
21 and then some non-grid offenses which have mandatory minimums
22 and for which no exception can be made. So I have found

1 the matrix or the grid concept to be easier for me to
2 understand, and I would assume, hopefully, for some judges
3 to understand, and perhaps even more acceptable. But it
4 is not, obviously, the end-all and the be-all of guidelines.

5 COMMISSIONER BLOCK: I just want to pursue that
6 a little further on the technical points. How did you handle
7 something like fraud, which has these dollar dimensions
8 and maybe some other dimensions about victims -- how do
9 you handle that in terms of characterizing the offense
10 in a matrix or grid form?

11 MR. diGENOVA: Well, we have offender characteris-
12 tics, criminal histories; we have offenses, and they are
13 ranked based on -- I don't have the grids with me now --
14 but they are on dollar amounts, the amounts involved. And
15 we have some victim impact data which is used to determine
16 whether or not the victim was a corporation or whether or
17 not the victim was someone who could not absorb this particular
18 financial loss. There are various ones.

19 COMMISSIONER BLOCK: So you have these discrete
20 categories.

21 MR. diGENOVA: Yes.

22 COMMISSIONER BLOCK: And then you put an average

1 there for that discrete category.

2 MR. diGENOVA: Yes.

3 COMMISSIONER BLOCK: Based, I suspect in your
4 case, something like the current sentence, but you put an
5 average there.

6 MR. diGENOVA: We have aggravating and mitigating
7 factors which are taken into account in establishing where
8 that fits in on a particular grid.

9 COMMISSIONER BLOCK: One of the complaints that
10 we hear quite a bit is that if we use a simple system, then
11 we will be treating, quote, "unequals equally" or the
12 same. Does the matrix presentation, the matrix form, have
13 that problem?

14 MR. diGENOVA: I don't understand that, "unequals
15 equally"? Well, let me just say this. It is readily
16 apparent in establishing any sentencing guideline that the
17 notion to achieve uniformity will require some sacrifice
18 of individualization along the way in order to achieve
19 the greater goal of uniformity. That is a policy
20 judgment that a sentencing guideline commission makes at
21 the beginning, that it is going to decide that it is better
22 to have proximity to uniformity than it is to have

1 disparity in individuality, for a number of reasons -- for
2 honesty to the public, for the acceptance of sentences once
3 they are imposed because they will be final, they will be
4 understood, there will be truth-in-sentencing, people will
5 know what is coming down the pike before and after they
6 commit an offense. Those are perfectly legitimate factors
7 to be taken into account in balancing against notions of
8 individuality if you accept the notion that disparity is
9 a problem.

10 If you do not accept the notion that disparity
11 is real, then of course you have no use for guidelines at
12 all, and this whole discussion is useless.

13 There seems to have been some consensus that
14 the disparity was sufficiently grave and sufficiently
15 widespread that the notion of guidelines, the time for that
16 had come. Now, we can all argue about the birth of this
17 particular piece of legislation and the manner in which
18 it was enacted into law and all that, but the fact is, the
19 President signed it, and we have it, and there appears to
20 be a sufficient amount of professional opinion, judicial
21 and otherwise, that this is an issue that needs to be
22 addressed.

1 It seems to me fundamental in the notion of
2 accepting a guideline that you are going to have to give
3 us some individuality, and you are going to have to give
4 up the kind of "benign disparity", as some people would
5 call it, in order to achieve the greater good for the greater
6 number.

7 COMMISSIONER BLOCK: Thank you.

8 CHAIRMAN WILKINS: Commissioner Baer?

9 COMMISSIONER BAER: I'd like to ask why has it
10 taken three years in the District of Columbia and it isn't
11 out yet?

12 MR. diGENOVA: Because it isn't easy.

13 COMMISSIONER BAER: Second question. Once
14 the proposed guidelines are developed, is the Parole Board
15 abolished?

16 MR. diGENOVA: No. These guidelines that we
17 are developing were the result of a judicially-created
18 initiative. The late Chief Judge H. Carl Moultrie decided
19 that the court needed guidelines after doing a computer
20 run on the sentencing practices of the court, and complaints
21 from the Bar about disparities. They did the computer run,
22 and they discovered indeed that there was a wide range

1 -- some judges never gave any time; other judges always
2 gave time -- and so there was a concern for this. And
3 three years ago we started on this process, and as we began
4 to unravel the facts and analyze individual statutes, we
5 discovered that this was an extremely difficult thing to
6 do.

7 And I must tell you that the non-judicial members
8 of the Commission at the end of the three-year period came
9 away with a great deal of respect for what judges do every
10 day, which is impose a sentence, because they finally began
11 to realize that the imposition of a sentence is an extremely
12 difficult job. It is not an easy task -- if it is conscientiously
13 taken unto.

14 And so what happened is that as we all began
15 to sort of robe ourselves, if I may put it that way, in
16 trying to fashion appropriate guidelines, we began to become
17 frightened of the responsibilities that were coming upon
18 us, and we began to agonize over how things should be
19 approached and how the guidelines should be shaped and how
20 the format should occur.

21 We are now in the position of issuing our
22 guidelines probably in the next month. They have been

1 been reviewed by the judges, and they will now be issued
2 to the public for public comment, and it is quite clear
3 to all of us -- and that's why I empathize with what
4 this Commission is going through; I sympathize with you;
5 I understand the difficulty of the task -- and I must say
6 that I am not surprised that people have had differing
7 opinions about the preliminary draft. On the other hand,
8 having gone through this now for three years myself, I
9 have to give you a tremendous amount of credit for what
10 you have accomplished in a much shorter period of time than
11 we have. And Commissioner Baer, I can only tell you that
12 the reason it has taken three years is that we never realized
13 how difficult this job of establishing guidelines could
14 be, and it has been an agonizing experience.

15 I am happy to say that the members of the Commission
16 have uniformly approached this task with great seriousness --
17 and when you meet at seven o'clock in the morning so you
18 can get to your job by nine or nine-thirty, let me tell
19 you, that requires a degree of dedication that I never
20 thought I had. But it was scintillating company at seven
21 o'clock in the morning with a good cup of coffee and a
22 fresh doughnut. But I just really think that people don't

1 understand. I certainly never understood. I have been
2 a Federal prosecutor in this courthouse in the early
3 Seventies, had asked for many sentences, had gone through
4 sentencing proceedings. I then worked on the Hill, and
5 then I became United States Attorney. And I have been five
6 years back in the office, and I tell you, I never realized
7 until I got on this Commission what really goes into making
8 a judgment about a sentence. It is very, very complex.
9 And I think the public, and certainly Congress, does not
10 understand what the stakes are and how difficult it is to
11 construct guidelines. It is a very, very, very difficult
12 task.

13 I am surprised by my own reaction to that, because
14 I took a very simplistic view of sentencing when the Commission
15 started. And now that we have gotten through this process,
16 I don't have that view anymore. In fact, I am awestruck
17 by the responsibility that the Federal judges have, and
18 I am not sure that I am capable of figuring out what these
19 guidelines ought to look like -- I don't know that anybody
20 is, quite frankly.

21 COMMISSIONER BAER: What will the role of the
22 D.C. Parole Board be after these guidelines are issued?

1 MR. diGENOVA: Yes, I didn't answer that part
2 of your question. The answer is that these guidelines were
3 then set up as not mandatory -- they were going to be
4 issued -- and only in felony cases, not in misdemeanors,
5 obviously, where there is no range of sentences -- only
6 in felony cases, and that they would be adopted by the
7 court, and they will be recommended to the court to follow
8 once they are in final form.

9 They will be issued, and judges will obviously
10 not be required to follow them, but there will be some
11 community pressure to follow them because, I hasten to add,
12 the Commission will not go out of existence. Our Commission
13 will remain in existence to monitor the guideline implementation
14 process, to see whether or not there is compliance and whether
15 or not, if there is not, there ought to be some form of
16 legislation similar to that which established this Commission,
17 to simply put the grids and the matrixes and the guidelines
18 into law.

19 We have run into problems, for example, in reviewing
20 the statutes, where we have found many of the penalties
21 enacted by Congress when Congress was enacting the local
22 laws for the District, are way out of whack, and that they

1 are too low, and that the Commission has come up with a
2 sentencing grid for a particular offense in which the judge
3 cannot impose that sentence because the law does not permit
4 it.

5 I must say that in most instances, what we have
6 discovered is that the judges -- and the majority of this
7 commission was judges -- that the sentences really weren't
8 tough enough. When people began to go through the entire
9 Criminal Code and began to discuss the philosophy behind
10 an individual statute and offense and try to place it
11 with all the other felonies and how they should rank, it
12 was fascinating. The ranking of offenses became one of
13 the most fascinating aspects of this process because we
14 began to see a discussion not only of the statutes themselves,
15 but of the social policy behind individual offenses and
16 how, 15 or 20 years ago when a statute was passed and
17 a crime, for example, of indecent liberties with a child
18 was not necessarily considered the way it is today, our
19 commission was off the charts on the sentences we wanted
20 to impose in those cases because of our knowledge of the
21 permanent psychological damage done to these victims --
22 if not necessarily physical damage, the psychological

1 damage which in most instances may be irreparable, and may
2 cost society in dollars, in Social Security benefits, for
3 years and years to come, that recommendations would be made
4 in a separate book that the commission will send to
5 Congress and the Council that various penalties be
6 changed, in most instances significantly upward, which
7 then underscores the whole notion of prison capacity and
8 who is going -- and of course in the District, our prison
9 capacity is a serious problem where over 95 percent of our
10 inmates in the D.C. prison system are recidivists with
11 three or more prior felony convictions, so you can see
12 the problem we face.

13 COMMISSIONER BAER: Final question. Can we assume,
14 then, that your commission believes that when prisoners
15 come back to D.C., they should be supervised?

16 MR. diGENOVA: Oh, absolutely. There isn't any
17 doubt about it. We all believe that some semblance of
18 supervision obviously is supposed to be happening now in
19 the system, but we all know, also, that the limited
20 resources don't make that possible.

21 Let me just underscore that I am additionally,
22 besides being somewhat struck by the demanding nature

1 of sentencing, I have also been struck by the demanding
2 nature of the probation officer's work and what a phenomenal
3 job the Probation Department does in analyzing these cases
4 for judges before they get to sentencing. Considering the
5 workload that the Probation Department has, I don't know
6 how they do it. I really don't know how they do it -- and
7 they do extremely professional work, and they serve this
8 court in a truly remarkable way. I am very, very proud
9 to work with them.

10 CHAIRMAN WILKINS: Any other questions?
11 Commissioner Nagel?

12 COMMISSIONER NAGEL: I want to begin by thanking
13 you, Mr. diGenova, for enormously illuminating testimony,
14 but ask if I could just push you a little further because
15 of your varied experience both on the Sentencing Commission
16 as U.S. Attorney and formerly as a Senate staffer.

17 In the course of our hearings over the last few
18 months we have heard in particular from some constituent
19 groups a focus on what I think have been four aspects of
20 the preliminary guidelines.

21 One is the ignoring of prison capacity, and you
22 have spoken to that issue, so I won't ask you to repeat

1 that. But there are three others that I would like to have
2 your views on.

3 One is the perceived excessive emphasis on certainty
4 of imprisonment for all serious offenders. The second is
5 a supposed devaluing of probation as an alternative to all
6 sentences rather than as an alternative to sentences with
7 a very low imprisonment range. And the third is our seeming
8 departure from current practice and the degree to which
9 current practice should dictate any proposed guidelines.

10 If you want, I'll repeat those.

11 MR. diGENOVA: No; I have them, thank you.

12 COMMISSIONER NAGEL: Okay. If you could give
13 us your comments on that.

14 MR. diGENOVA: Well, on the certainty of incarceration
15 tion for all serious offenses, I just think that this again
16 gets back to the fundamental notion of guidelines and the
17 question of uniformity and the acceptance of a notion that
18 a society is going to make a general policy judgment that
19 a particular type of penalty needs to be imposed in a case,
20 in a particular kind of case, for the good of all. Now,
21 that may be for reasons of deterrence, whether or not you
22 believe in deterrence -- and I don't necessarily believe

1 in deterrence in all cases; I do believe in punishment and
2 retribution, which I think are perfectly proper and indeed
3 civilized notions that a society has a right to express.

4 The certainty of punishment is very, very impor-
5 tant; the certainty that for particular types of very serious
6 offenses, individuals are going to pay a price, I think
7 is vital in a society that professes to provide ordered
8 liberty for people who pay taxes and otherwise obey the
9 law.

10 It is not in my view offensive that when people
11 break the Social Contract and decide that they will take
12 unto themselves which laws they will obey and which laws
13 they will not, that when they pick ones that hurt other
14 people, physically or financially, it is not bad that a
15 public policy decision is made that those people should
16 go to prison, generally speaking, for a period of time.

17 So that's a philosophical question more than
18 anything else about the question of certainty, and my
19 answer is I am not offended by that. I think you can accom-
20 modate some of the concerns that people might have
21 about that with aggravating and mitigating factors and other
22 notions of cooepration, and the other things we talked

1 about in that huge world, that global village of ideas,
2 that are included in the guidelines, before you ever get
3 to what the person pleads to. There are lots of ways to
4 deal with what that certain sentence is going to be, in
5 my view, if I understand these guidelines correctly.

6 On the question of devaluing probation, again,
7 probation, I don't believe, is devalued at all by this.
8 In fact, I believe it is enhanced by the notion of establishing
9 some certainty as to the kinds of things that you expect
10 people to be accountable for in one form or another. And
11 again, if you are going to have guidelines and you are going
12 to have uniformity, you cannot have the kind of deviation
13 which is going to include all the situations that some defense
14 attorney or some prosecutor or some theorist might want
15 to have included in the guidelines. Something has to be
16 sacrificed in the process to achieve uniformity if you accept
17 the notion of guidelines.

18 On the question of departure from current
19 practice, well obviously, there is going to be some departure
20 from current practice. The current practice apparently
21 is disparity. So if you are talking about actual problems
22 in the sentencing process, obviously there are many, many

1 current practices which will be changed as a result of this.
2 It will change to a certain extent, I think most dramatically,
3 obviously, it is going to change what a judge can do. That
4 is obviously one of the key complaints about the draft and
5 the notion of guidelines in general. I don't see that being
6 a problem for me as a prosecutor unless efforts are made
7 to put restrictions on the kinds of negotiations that I
8 can enter into as a prosecutor, in which case, then I think
9 you would have an even more serious problem in terms of
10 trying to accomplish what the Commission is trying to do.

11 There has to be flexibility, it seems to me,
12 at that part of the process. If that practice were to change,
13 and if the prosecutorial discretion were to be limited in
14 any meaningful way, then it seems to me you would have a
15 terrible situation in which you wouldn't have any kind of
16 flexibility at the front end of this cycle to determine
17 what is going to happen at the end of the cycle.

18 COMMISSIONER NAGEL: Thank you.

19 CHAIRMAN WILKINS: Commissioner Breyer?

20 COMMISSIONER BREYER: Thank you for your comments
21 about the process. I underline them. I couldn't agree
22 with you more. It is much harder than I ever thought it

1 would be, and people don't understand it until they start
2 to do it.

3 MR. diGENOVA: I don't ever want to do it again,
4 by the way. I am not volunteering for another --

5 COMMISSIONER BREYER: My thought process, you
6 so well-described. All right. I appreciate that. And
7 that is why I am really going to ask a question that is
8 more addressed to other people in the audience who are
9 going to testify later than to you. And the reason that
10 I am saying that now is because as you have pointed out,
11 our choice in September was to put out what I'd call the
12 roughest block of marble, or to put out nothing. I think
13 it was right to put out this very rough block of marble
14 so that people could comment. And from my own point of
15 view, I would not know where to go without those comments.
16 I mean, it has been very, very useful.

17 MR. diGENOVA: Well, I think you know where to
18 go now. I think several people have told you.

19 (Laughter.)

20 COMMISSIONER BREYER: Right. But you see, this
21 is a practical problem, because at the same time I am
22 reasonably optimistic that we can in fact do something

1 to help with the basic underlying problem, which is the
2 Problem of disparity.

3 There is a problem of disparity, and it is possible
4 to do some small amount of good, I think. But what worries
5 me is that because of the inevitable stirring up of
6 degrees of opposition because the block of marble was so
7 rough, that if we start to get postponements and so forth,
8 People will get tired of the whole idea, and that would
9 prevent any good from coming of this.

10 Now, that is preface. That is why I am asking
11 the question, because practically speaking, we will come
12 out, I imagine, with a version in January or February anyway
13 for comment again, and it is really that version that people
14 should be commenting on now, because I already know their
15 comments on the last one. And it seems to me that most
16 of the people -- I don't know all of them -- but I mean,
17 I think there is widespread view that a lot of those comments
18 are very well-taken.

19 So I have been sitting here, thinking, well,
20 how would I describe the next version as I would guess it
21 would be. Well, I would describe it as, number one, starting
22 with the framework that is in the blue book insofar as that

1 framework is roughly descriptive of crimes that are charged
2 in statutes. And you know, there is a chart. You can go
3 right from the statute to the description in the book. It
4 is pretty much, I think, based on what are the actual
5 words and the actual statutes, pretty much, not entirely.

6 All right. Now I would say there are five
7 steps that are going to take place. The first in a way
8 is the easiest. That is called "de-bugging" it. That is,
9 it is filled with technical mistakes. Of course. I could
10 write 192 suggestions, which I did; MacKinnon wrote about
11 100 others; other people had a whole lot of others. So
12 that is step one.

13 I think step two will be simplification. That
14 is, under each of these headings as you picture them in
15 that blue book, instead of there being eight or nine differen-
16 ces, there may be only two or three or none. Now, that
17 is what Block was talking about, because you realize in
18 doing that, one creates a different kind of unfairness.
19 One lumps together people who are really un-alike. All
20 right. So, now that we have done that to simplify, we have
21 to do something about that.

22 The third thing is to have ranges -- that is,

1 overlapping ranges -- where you hurt people; perhaps instead
2 of saying 14 months, you would say 10 months to 40 months.
3 "Judge, you choose," and then overlap the ranges so there
4 is no bright line that people will be attempting to litigate.

5 All right. Now, I want you to take this in,
6 because I want you to be thinking, given your experience
7 at the D.C. Commission, is this going to work. All right?
8 That's really the question now.

9 All right. The fourth thing will be broader
10 discretion to the judges such as, "Judges, you choose among
11 these ranges," and "Judges, you depart where you have a
12 good reason for departing." Indeed, we might suggest a
13 few good reasons; indeed, leave it open to the judges to
14 pick other good reasons, as long as they write them down.

15 And the fifth thing would be plea bargaining.
16 Plea bargaining might, under certain kinds of supervision,
17 both charge and sentence bargaining, give the judge the
18 power to approve it where those reasons are specified
19 and the judge thinks they are good ones.

20 Now, those are five major sorts of modifications
21 around this basic structure. And the problem for us is
22 going to be is a version which incorporates some form of

1 those five major modifications going to be close enough
2 that in fact we can begin to put such a system in place.

3 Now, I don't necessarily expect you to have a
4 reaction to that. If you do have reactions, fine.

5 MR. diGENOVA: Well, I have a lot of reactions,
6 but I don't think I want to express them today, because
7 I'll tell you why. Having been through this process now
8 for a long period of time, I have learned not to go with
9 my initial reaction about a lot of things as I have gone
10 through this sentencing guideline thing. I don't think
11 any of those ideas is offensive, in terms of analyzing the
12 particular problems that this Commission is facing, and
13 they may be very worthwhile things to pursue. And indeed,
14 structurally, they sound like things that obviously the
15 Commission should take a look at and no doubt will. So
16 again, I am not offended by the notions, and if you are
17 looking at these things, I think that's the key thing.

18 But the bottom line is that guidelines by their
19 very nature express the notion of certainty and minimal
20 deviation -- minimal deviation -- because otherwise, if
21 the ranges of selection are too wide, you then return to
22 pretty much where you started before. It won't do any

1 good to fine-tune a set of guidelines so that if you accept
2 the Congress' mandate, if one intellectually accepts that
3 mandate -- and that's all I am talking about; I am not talking
4 about a personal preference here -- if one accepts that
5 mandate, then the range of disparity or the range of deviation
6 in individual sentences has got to be kept to a minimum.
7 Otherwise, you end up right where you were before; the only
8 difference is you are going to have more litigation. And
9 if I am asked what I want, I want it back the old way. If
10 that is where we are going to end up, which is a set of
11 guidelines which are going to provide ranges of selections
12 for judges and give various opportunities for hearings and
13 appeals and additional litigation, it isn't worth the
14 candle at that point, because nothing will have been
15 accomplished. That of course flies right in the face of
16 those who say, "We don't want that kind of certainty. We
17 really want to be able to fine-tune this thing in every
18 particular case down to a 30-day period."

19 Well, that to me is the fundamental notion of
20 having or not having guidelines. So it really revolves
21 around when you say "ranges", in various areas of what you
22 are talking about, what you mean by that; what does it

1 look like when it is finally down on a piece of paper. And
2 when you start having overlapping ranges in between offenses,
3 you start to have some problems, I'll tell you right now.
4 You have different problems in terms of scooting -- I see
5 this in terms of matrixes -- in terms of scooting people
6 in and out of various boxes with very, very tiny, tiny
7 discrepancies. And I am willing to pursue that and see
8 what happens and see what the Commission does.

9 But remember -- my mindset is on the notion of
10 the mandate that I was given on that commission and the
11 mandate to this Commission as I read it, which is certitude.

12 The ranges bother me if they are too big.

13 COMMISSIONER BREYER: Well, this is also at the
14 back of my mind, to tell you the truth. As we have tried
15 to get narrow discussion down to very fine points, we
16 discover that different people disagree about what the
17 various factors should be and how much they should count
18 for. And in addition to that, there are large numbers
19 of people, particularly judges, who are very concerned about
20 all the litigation that will go on, flooding the system
21 over each division. Then it seems to me possibly a way
22 out of that is to at least begin -- you see, you can set

1 a process into place. The process could perhaps be very,
2 very broad discretion -- a bit of an improvement. Then,
3 over time, collect data. And as you collect data over time,
4 narrow the guidelines. So you don't have to do everything
5 in a day, or in year, ten years, twenty years. Then gradually
6 narrow them down to the narrow ranges you are talking about.

7 Do you have a reaction? I am quite interested.

8 MR. diGENOVA: Well, I think that's not what
9 Congress intended. I mean, if you want to know what my
10 reaction is, I don't think that's what Congress intended.
11 At least that's not what they said as I read the statute.
12 It might be a good idea, but it's not what Congress said.

13 CHAIRMAN WILKINS: Any other questions?

14 George?

15 COMMISSIONER MacKINNON: You have a gridiron
16 at the present time, and you allow -- that is, assuming
17 the court adopts it -- and you say they aren't mandatory.
18 Do they have to give any reasons?

19 MR. diGENOVA: If they deviate. They have to
20 give written reasons for a deviation above or below the
21 grid sentence.

22 COMMISSIONER MacKINNON: In open court?

1 MR. diGENOVA: They have to be in writing in
2 the court jacket.

3 COMMISSIONER MacKINNON: I find that you have
4 to give them an open court.

5 MR. diGENOVA: I am not against that.

6 COMMISSIONER MacKINNON: Well, that's the official
7 sentence that any person gets.

8 Did you find that the guidelines that you came
9 to would increase prison sentences generally, you thought?
10 Do You estimate that?

11 MR. diGENOVA: Your Honor, what we discovered
12 was that there was from what we could tell an insufficient
13 database to be able to make the judgment finally. However,
14 what we did discover from a sampling that we did was that
15 there would have been, from what we can tell, given the
16 kinds of defendants coming into the system, a minimal
17 increase in the sentences, a very minimal increase. That
18 is what we discovered -- minimal.

19 COMMISSIONER MacKINNON: Where did you come out
20 at on comparison with time served?

21 MR. diGENOVA: Do you mean the actual time served
22 by individuals as opposed to comparison with parole?

1 COMMISSIONER MacKINNON: Well, when I first came
2 on the court for the last seven or eight years, we had
3 the jurisdiction over all D.C. sentences. And we were
4 flabbergasted at times the way the actual sentences were
5 treated once they got to Lorton.

6 MR. diGENOVA: Oh, yes.

7 COMMISSIONER MacKINNON: I saw in the paper the
8 other day that the City Council is opposing some modification
9 of parole that would throw the thing out the window almost.
10 And I don't know -- I haven't looked at it specifically,
11 and that's just a general observation.

12 So I wonder whether your comparisons are based
13 or will be based on the time served -- well, let me put
14 it this way. To what extent are your actual sentences now
15 sentences to be served as opposed to sentences that can
16 be reduced by some person down the line?

17 MR. diGENOVA: Well, as a result of changes that
18 Congress has required through various appropriations bills
19 and the way that the District of Columbia Parole Board
20 does its business, there is now much more realistic time
21 being served by individuals because the parole system has
22 been revamped as a result of new policies which do not

1 permit people to get parole as early as they used to. As
2 a result, the sentences being imposed now, the indeterminate
3 sentences, the bottom line part of that sentence, the minimum
4 is becoming a realistic time in prison.

5 The average sentence now for felons is four to
6 twelve years. That gives you some range of the seriousness
7 of the offender history that we are dealing with. It is
8 a very, very serious offender history mode. As I indicated,
9 90 percent have more than three prior felony convictions.
10 So you have a very serious problem in terms of the minimums.

11 Now, the matter that you alluded to is something
12 that I think this Commission is going to have to face up
13 to in the larger context of what Congress does. Our
14 sentencing commission is now through and has sent the
15 guidelines to the judges, and then this proposal has been
16 introduced in the Council to essentially allow the Parole
17 Commission to give good time credits of five or six
18 varieties to allow for a crediting of up to 30 days in a
19 given one-month sentence for an incarcerated defendant
20 of time off for good behavior, which essentially means
21 100 percent ability to get a person out early.

22 COMMISSIONER MACKINNON: Well, it's the Christmas

season.

MR. diGENOVA: It has been fixed now, and so now it is only down to 50 percent, or 15 days per month of the minimum sentence that has been imposed which can be credited for, for example, fulfilling a minimum educational course. I don't want to get into a discussion of that, because if I do, I may say some things that shouldn't be in the public record at this point.

But let's just put it this way. This Commission may very well be faced with the same type of reaction from Congress as it gets a look at this thing. Legislatures do have a way of reacting to various stimuli in the public policy debate process.

COMMISSIONER BREYER: They will react how?

MR. diGENOVA: Well, in my view, the wrong way-- but you know, I am only one person with a rather -- I wouldn't say conservative, but a tougher view of what ought to happen to people who violate the criminal laws.

COMMISSIONER MacKINNON: And you are suggesting that Congress might find a way somewhere down the line, if these sentences are more severe than they think they ought to be, that they would find some way to reduce them.

1 MR. diGENOVA: Well, let's put it this way, Your
2 Honor. The sentences that our commission arrived at were
3 arrived at -- we called those realistic sentences. They
4 were sentences that reflected the consensus view of the
5 Commission about what ought to happen with specific types
6 of crimes as in comparison to all the crimes that are in
7 the Criminal Code. There was a series of philosophical
8 Policy, criminal justice-type decisions that were made
9 by the Commission in good faith, and they reflected, I think,
10 a very rational decision about what a crime ought to cost
11 someone in terms of social factors, in terms of the Social
12 Contract.

13 Now, it is very obvious that what we call
14 realistic -- and there were a range of philosophical
15 opinions on that panel -- a legislative body, for reasons
16 unrelated to logic and sound public policy might find them
17 unacceptable. I don't think Congress is any different than
18 the Council in that regard.

19 COMMISSIONER MacKINNON: Of course, every
20 sentence calls for a sentence that goes to the crime and
21 a sentence that goes to the criminal. To what extent do
22 you think your guidelines will get to the criminal as apart

1 from just sentencing for the crime?

2 MR. diGENOVA: Well, there is no doubt in my
3 mind that the manner in which we have used offender history,
4 as we call it, is a very significant factor in adding points
5 to where that person actually ends up on that grid. And
6 that criminal history information of that offender is
7 vital in any type of guideline format, and obviously the
8 Commission has taken that into account, and I am satisfied
9 with the way that our guidelines ended up that a responsible
10 decision is made to credit that kind of information in
11 terms of societal costs -- what does society have a right
12 to ask in return for the privilege to walk around freely
13 and do certain things in a free society. And we have done
14 a very good job -- by "me", I mean the commission -- that
15 sentencing commission has placed great emphasis on offender
16 history, and I don't see any way not to.

17 COMMISSIONER MacKINNON: How did you come out
18 on concurrent and consecutive sentencing?

19 MR. diGENOVA: Presumption for consecutive.

20 COMMISSIONER MacKINNON: Of course, you are not
21 bound by it.

22 MR. diGENOVA: That's correct.

1 COMMISSIONER MacKINNON: Is there any appeal
2 from your sentences; from the sentence of the Superior
3 Court can an appeal be taken?

4 MR. diGENOVA: Well, this is an informal process
5 at this point. These guidelines are not mandatory. They
6 don't even have to be followed. It is presumed that once
7 they are issued by the court, obviously that they will be,
8 and there will be some sort of review mechanism by the
9 judges of various sentences. That is part of the implementation
10 process which is being worked on now.

11 COMMISSIONER MacKINNON: Now, our statute does
12 away with parole and youth correction. Do you still have
13 parole?

14 MR. diGENOVA: Yes.

15 COMMISSIONER MacKINNON: And did the repeal of
16 the Youth Correction Act which formerly applied to the
17 District take away your jurisdiction on youth parole
18 offenses, too?

19 MR. diGENOVA: It did for a while, and then the
20 Council passed something similar to it, called the Youth
21 Rehabilitation Act, which put back in place something similar
22 to that, but not as quixotic and capricious.

1 COMMISSIONER MacKINNON: Thank you.

2 CHAIRMAN WILKINS: Thank you very much.

3 Our next two witnesses are two judges from the
4 5th Circuit, Judge Robert M. Hill, who is a member of the
5 5th Circuit Court of Appeals, and Judge George P. Kazen,
6 who is a United States District Judge for the Southern
7 District of Texas.

8 JUDGE HILL: Good morning. I am Judge Hill.
9 Let me refer to Judge Kazen, but first give you a little
10 historical background on Judge Kazen.

11 He sits in Laredo, Texas, a border city to the
12 Republic of Mexico. Essentially all of his docket is
13 criminal in nature, nearly 100 percent. And he and I were
14 having breakfast this morning, and he has disposed of over
15 400 criminal cases this year and has sentenced, I assume,
16 a defendant in each one of those cases. So I will defer
17 to Judge Kazen at this time.

18 JUDGE KAZEN: Thank you very much for the
19 opportunity to speak here, and I hope our paper has arrived
20 or will arrive in due course, as I know our time is limited.

21 We very much appreciate your willingness to listen
22 to all points of view. I can only say "Amen" to at least

1 part of what the last speaker said. I think anyone who
2 looks at your work, even if he had never been involved in
3 the criminal justice system at all, even if he had never
4 thought about it at all before, could realize what essentially
5 an impossible task you have been given.

6 And I don't know what the answer is. I would
7 simply say that we are deeply troubled by the present product.
8 And I know much of what I will say here, briefly, you have
9 heard before, and I gather from Judge Breyer would be criticisms
10 or observations that many others have made. And I appreciate
11 what he says, that this is just the rough block of granite.

12 But we are deeply troubled by the methodology
13 in the present guidelines. We find that this particular
14 approach attempts to quantify and put numerical values on
15 things that simply cannot be quantified. It tries to take
16 something as infinitely varied as human life itself and
17 reduce it to a simple mathematical formula, the result,
18 we think, is an arbitrary, very rigid, extremely complex,
19 mechanical system.

20 Many of our colleagues, in trying to work these
21 guidelines, have found that in many, many cases the resulting
22 sentence would be quite severe, more severe than now. We

1 simply raise the question of fairness of that.

2 We raise the question of prison space. They
3 are not only severe compared to what is happening today,
4 but if you take away parole, they are then at least doubly
5 severe. And while perhaps in an ideal world, we shouldn't
6 link it, the question is where are we going to put these
7 people. We are led to believe that the Bureau of Prisons
8 say we are at capacity or over capacity now. I think that
9 is a problem.

10 In our State of Texas, all the politicians
11 clamor for everyone to be in jail for long periods of times;
12 juries award sentences of 60, 70 years, 1000 years, 2000
13 years, but nobody will vote the taxes to have the prisons.
14 They go in one door, and the Federal judges essentially
15 put them out the back door because of overcrowding.

16 We are especially concerned with the whole method
17 of reaching the sentence. We have raised technical
18 objections that I won't bother with here today. Frankly,
19 we don't understand the calculation on multiple counts
20 that say you take them and add them up and go back to the
21 starting point. There are areas where the sequences don't
22 seem to work. The judge is at a certain sequence in the

1 process, and then he is referred back to some earlier step
2 in the process.

3 But beyond all of that, it is an approach that
4 we find very unrealistic and unnatural. Yes, when I sentence
5 somebody, sure I consider his criminal record, I consider
6 whether I think he is remorseful or not, whether or not
7 he has cooperated and to what extent; yes, I consider
8 whether he was a large or a small figure in the conspiracy;
9 yes, I consider whether he used any particular skill and
10 that sort of thing. But I don't try to mechanically consider
11 those in a lockstep, sequential method where I am making
12 discrete findings at each step and adding and subtracting
13 and multiplying as I go along. And I think there are two
14 very serious problems with that. One is it simply opens
15 Pandora's box as far as the whole concept of making the
16 sentencing a mini-trial, making it a very cumbersome proceed-
17 ing where every single step is a battleground over the
18 factual findings, and therefore every step is a potential
19 appeal.

20 Beyond that, I think, is the question of what
21 we are trying to do with the criminal justice system, what
22 is the perception. Apparently, what we are trying to

1 remedy is a perception that the system is not consistent,
2 that it is not uniform enough, that it is disparate. But
3 I think we can't substitute by putting in a solution that
4 is worse than the problem.

5 When I sentence somebody, there are often very
6 many defendants there -- six or eight or ten at a time.
7 They are there, their lawyers are there, the law enforcement
8 officers are there, the public is there, the press is there.
9 And what they are interested in is what am I doing with
10 that particular defendant, what is he telling me, what am
11 I telling him, what analysis am I making, what reasons am
12 I giving for what I am doing. Nobody in that room knows
13 or cares how a judge in Connecticut or Utah or Arizona or
14 somewhere else would handle a hypothetical similar person.
15 Even the criminal element, if you want to look at that,
16 in that region where I am from, they want to know what I
17 am doing, how do I apply justice in that court.

18 And I think there is a real danger in substituting
19 that sort of process and that sort of perception with the
20 perception that the judge is sitting there with his scratch
21 pad and his calculator and is simply leafing through one
22 table or another and adding and subtracting and multiplying

1 with his calculator, tallying up much in the sense of a
2 clerk or a quiz show host, he is running up a tote board,
3 and up pops the sentence.

4 I think we cannot allow that to happen. That
5 is unnatural, and it is, as I say, a cure worse than the
6 problem.

7 We are troubled somewhat by the concept of the
8 modified real offense situation. We think that is obviously
9 better than the pure charge of conviction method, for all
10 the reasons you have stated. But we are troubled for reasons
11 that I have stated in the paper.

12 Some of the examples that the Commission gives
13 seem to us not to make a whole lot of sense. The idea
14 that if a man has robbed three banks, and he is indicted
15 for those, but he pleads out to one, that somehow you
16 disregard the other two; the cocaine dealer who has got
17 unlawful weapons in his home is not related -- we find that
18 troublesome.

19 Our point is not necessarily -- we really don't
20 care whether you add those in to the calculation of the
21 base offense value or not, but we think it must be clear
22 somehow that the judge can look at the real facts and the

1 total picture, and we ask you to keep in mind the provisions
2 of Section 3661 that says no limitation shall be placed
3 on the type of information concerning the background, character
4 or conduct which the court may consider in imposing the
5 sentence.

6 We think plea bargaining is essential. We believe
7 that whether one likes it or not, whether one philosophically
8 believes it is a good idea or not, the criminal justice
9 system simply cannot exist without plea bargaining. If
10 plea bargaining were taken away or drastically limited,
11 the system would collapse from its own weight. If a flexible
12 system of plea bargaining is not allowed from the very outset,
13 as sure as dammed up water will seek an outlet somewhere,
14 there will be some kind of disparate, wildly unjust plea
15 bargaining somewhere along the line. We gave you the
16 illustration, I attached a newspaper article to our paper
17 ten years ago, of an incident that happened in our district
18 where the particular court bottled up the cases, refused
19 to plea bargain, announced everybody was getting sentences
20 to serve. He acquired something like 300 jury cases on
21 his docket. An outside judge was sent in to simply
22 wholesale-discharge all of them in two or three days. That

1 is not a good solution, but that's the kind of thing that
2 happens if unnatural restrictions are placed on plea
3 bargaining.

4 We think the present system allows a reasonable
5 system of checks and balances between the court and the prose-
6 cutor and the defense lawyer. We think if this Commission
7 is concerned with plea bargaining somehow overcoming the
8 system that then the court could be and should be directed
9 -- the parties, rather -- should be in the first instance
10 required to state why they are making that particular plea
11 bargain, and give the court the opportunity to accept it
12 or reject it.

13 We mourn the apparent death of probation. We
14 don't think the Congress contemplated that. We think that
15 over the years we have accumulated a very professional,
16 very well-trained group of officers, very dedicated to the
17 system. We have developed very careful techniques, community
18 treatment confinement, community services, restitution,
19 home curfews, all that sort of panoply of devices that
20 essentially would go down the drain under this system. It
21 is very difficult for us to figure out who would ever be
22 eligible for probation under this system.

1 And we do not think -- and I have preached to
2 anyone who would ever listen to me -- I do not think probation
3 is a slap on the wrist, I do not think probation is a cop-
4 out. I think probation is an alternate kind of sentence
5 very well-suitable to many kinds of cases. And I think the
6 Congress has stated that all except class A and B felonies
7 could be eligible for probation; that it is in effect a differen
8 kind of sentencing. The Commission has been told to do some-
9 thing that minimizes overcrowding, and we have been told
10 to give careful evaluation to certain factors that might
11 lead to a sentence of probation. And we think that that
12 whole structure should not be abandoned.

13 We agree to a large extent, I suppose, with Judge
14 Breyer. We think that this is a revolutionary concept. We
15 think that the American tradition has generally been to
16 be moderate even when we are being revolutionary. We think
17 that it is extremely important for the Commission to walk
18 before we run. I don't think it is realistic to try to
19 go from no system at all to a theoretically perfect system
20 overnight. The Commission is going to remain in effect.
21 As Judge Breyer said, the Commission can gather data, can
22 gather information, can continue to shape and mold. We
must come up with a system not only that the Bench and

1 Bar understand, but a system that the Bench and Bar believe
2 in. If we in effect create a judicial form of prohibition,
3 it will be a law on the books, but it will be honored largely
4 in the breach.

5 Our suggestion would be to consider a situation
6 that, at least as the last gentleman said, it is very difficult
7 for us to sit here and throw out ideas without the breadth
8 of study that you ladies and gentlemen have had, but we are
9 not as nearly troubled about the effort to put numbers on
10 the offense characteristics. While I agree with Judge
11 Breyer that that could use some fine-tuning as far as exactly
12 how the categories are structured, and we find some unrealistic
13 aspect of trying to put a precise number on the difference
14 between a serious injury and a severe injury and an
15 extreme injury, and that sort of thing, but with some fine-
16 tuning, we think that the effort to put weights, the effort
17 to structure and define and categorize the offenses is
18 no problem, and the effort to put some kind of weight
19 value on there. Our difficulty is the effort to try to put
20 numerical values on all the things that go into the personal
21 aspects, particularly under Chapter III.

22 We would urge the Commission to consider in that

1 area true guidelines, which we don't see that these are.
2 We don't think these are guidelines at all. We think this
3 is an effort to mechanically and arithmetically reach a system.
4 But we would at least ask you to consider a situation where
5 the court first decides what exactly is the offense that
6 this individual has committed, look up the value number on
7 it, and find at that point that that offense generally
8 carries a certain suggested range of sentencing. Then the
9 court would be told, through guidelines, to consider all
10 of the range of factors mentioned in Chapter III plus the
11 ones that the Commission has so far not passed on -- age,
12 work record and so forth.

13 The court would then be told that it must
14 articulate which of those factors apply and whether they
15 are aggravating or mitigating factors and therefore whether
16 the sentence is within the guidelines or above or below.

17 I think that at least is a start. I think that
18 is a system that will work. I think that is a system that
19 the judges and the Bar and the public will accept. And
20 it would be, I think, no service at all to send back to the
21 Congress a system that we all know is unrealistic, we all
22 know nobody can follow, we all know will not work, but say,

1 "This is what somebody thinks you intended to do, and so
2 this is what we are going to run up the flagpole."

3 We think that the mere fact that there is no
4 mere parole, that therefore there is truth in sentencing;
5 that fact that a judge must and now should state, as he
6 should be doing anyway, with particularity why he is
7 sentencing a particular person the way he is sentencing
8 him; and the fact that appeals are allowed -- those three
9 things themselves are a major step forward. And we think
10 the sort of approach that we are suggesting here would be
11 as good and as realistic a system as the Commission could
12 possibly promulgate the first time up at bat.

13 We thank you again for the opportunity to be here
14 today. We thank you for listening to us, and we look forward
15 to the second draft.

16 Thank you very much.

17 CHAIRMAN WILKINS: Thank you very much.

18 I know the Commission appreciates not only the
19 thoughtful comments today, but as I reported back after
20 visiting Corpus Christi with you and other judges, the
21 great amount of attention and work that you have put
22 into this. It is most helpful to us. In fact, I'd like

1 to be able to call upon you in the next few months as we
2 come out with another draft that I think is moving, as we
3 have been doing over the past few months, moving more in
4 this direction as we realize the need for flexibility, the
5 need to maintain discretion, and yet stay within this somewhat
6 restricted mandate from the Congress. We appreciate it very
7 much.

8 Let me ask any of the Commissioners if you have
9 any questions?

10 Commissioner MacKinnon?

11 COMMISSIONER MacKINNON: Judge, first of all,
12 I think that you described to me the ideal system, and to
13 me, I think if you get through and start working with this,
14 you'd come pretty close to doing what we are trying to do
15 here. But you have come up with some quantification objection.
16 And my question is, don't you quantify in every case? You
17 have got to get down to certain months, in the last
18 analysis. But I suppose you want to reach it as an end result
19 and not figure the ingredients in there. That's the only
20 difference I see.

21 JUDGE KAZEN: Yes, sir, because I don't -- and
22 maybe it's not a realistic distinction, but I think it is --

1 I think that it is not realistic to pretend that I can take
2 every, single one of those factors and make a discrete judgment
3 numerically and weigh precisely how much that factor affects
4 it, standing alone. I don't think that's how the mind works.
5 I don't think that's how the system comes out.

6 And as I said, there are two things wrong with
7 that. One is that if you are out there, there is no way
8 you can figure a sentence in advance. I mean, you can look
9 at the pre-sentence report, you can have some idea of what
10 you think, but you are going to go out there, and then the
11 battle begins. And if the defendant realizes that every,
12 single step along the way is a numerical factor that bumps
13 or lowers the sentence, then every, single step along the
14 way is a point of contention. It is a point of contention
15 a a mini-trial, whether we like it or not. It is probably
16 going to require some sort of evidence some sort of discrete
17 finding on that particular issue, and then that is going
18 to be grounds for appeal.

19 And I also don't think -- no, I don't do it that
20 way. I don't say, "Well, you've got so much up for this
21 factor, so much down for this factor, so much up for this
22 factor, so much down for this factor."

1 COMMISSIONER MacKINNON: No, but you evaluate
2 it all and the sum total.

3 JUDGE KAZEN: Yes, yes.

4 COMMISSIONER MacKINNON: That's all I have.
5 I appreciate your coming down and I appreciate your help.

6 JUDGE KAZEN: Thank you. We'd be happy to keep
7 in touch, and we look forward to your next product.

8 CHAIRMAN WILKINS: Thank you very much.

9 We'll hear from the 8th Circuit at this time,
10 the Honorable Gerald Heaney, who sits on the 8th Circuit
11 Court of Appeals, along with Judge Donald O'Brien, who is
12 the Chief Judge of the Northern District of Iowa.

13 Gentlemen, good morning.

14 JUDGE HEANEY: Good morning. I, too, welcome
15 the opportunity to appear before the Commission and to comment
16 on the preliminary draft that you have prepared.

17 Before making these comments, however, I would
18 like to make our basic point, and that is that the judges
19 of the 8th Circuit--what I have said has been circulated
20 to them -- believe that it would be a grave mistake if you
21 were to adopt the guidelines in their present form.

22 CHAIRMAN WILKINS: We agree with that.

1 JUDGE HEANEY: Well, the system that you propose.
2 And I'll get into that in some more detail.

3 I think there are two alternatives. One is as
4 an initial step, to adopt the Minnesota system, and the second
5 would be to adopt a system similar to what Judge Kazen
6 has outlined to us this morning, that I think has a good
7 deal of merit.

8 We feel that the guidelines as proposed raise
9 serious Constitutional questions, are extremely complex,
10 will add considerably to the work of the already overburdened
11 District Court judges, will multiply the number of appeals,
12 and will not eliminate disparities. In fact, in our judgment,
13 they will create more disparities than they will eliminate.

14 Now, I think it is important at the outset that
15 we also realize that the Comprehensive Crime Control Act
16 of 1984 makes very significant changes to the whole sentencing
17 process, and as the other speakers have pointed out, that
18 the judges are now going to be imposing real sentences.
19 They are no longer going to be able to sentence a person
20 to 15 years with the knowledge that they are only going to
21 service 6. They are going to be imposing a real sentence.
22 They are no longer going to be protected by the Parole

1 Commission. Persons aren't going to be released early, and
2 so the judges know now that what they give is what the person
3 gets.

4 We also have to keep in mind that the Congress
5 itself has moved towards establishing mandatory minimum
6 sentences for a number of crimes, and elsewhere in the
7 statute has indicated certain other crimes where the
8 sentence imposed should be at or near the statutory
9 maximum.

10 Now, these changes in and of themselves will
11 require a lot of time and labor to understand and to
12 implement. We are going to have problems with the public
13 who are used to seeing particular types of offenders sentenced
14 to 15 years who are now obviously going to have to be given
15 much shorter sentences, and we are going to have a problem
16 explaining that to the public and even to the lawyers
17 who are involved in the process.

18 As has been pointed out, we can move slowly on
19 this. The first guidelines need not be the most complex
20 ones, because we have the years ahead of us to make those
21 changes.

22 Now, we recognize that the Minnesota model gives

1 very great discretion to the prosecutors. The Minnesota
2 Commission recognizes that. And while we have some reserva-
3 tions with respect to that, we feel it probably would be
4 better as a first step than to go into the guidelines as
5 you now have them drawn.

6 Now, I realize that they are preliminary. But
7 what we have done is to ask the probation officers of our
8 four busiest courts to prepare an analysis for us as to what
9 would happen if persons were sentenced pursuant to these
10 guidelines. And we did so knowing that your numbers aren't
11 final, but just as you had to have a point to start, we had
12 to have a point to start. And I am going to file these with
13 the Commission so that you and your staff will have an
14 opportunity to analyze them, and I would greatly appreciate
15 it if your version of the sentences that would be called
16 for under the guidelines are consistent with those that
17 our probation officers have, because I am fully convinced
18 that when you come out with your next draft of the guidelines,
19 that if you circulate that draft to the most experienced
20 district court judges in the country and to the most
21 experienced probation officers, and ask them to analyze them,
22 that you will find that you have as much disparity as you

1 have at the present time, simply because there is so much
2 room for individual judgment -- did the person have a gun
3 or didn't he; did he have it in his pocket or was he holding
4 it in his hand; was the gun loaded or wasn't it loaded. You
5 can go down through every one of these factors -- psychological
6 harm, whatever -- and the judge, if he is going to do his
7 job, is going to have to examine them very carefully, and
8 what his ultimate finding is may or may not be consistent
9 with what another judge would do under the same circumstances.

10 Number two, we are convinced that very few
11 persons will be eligible for probation. I am going to speak
12 to that a little later on.

13 Now, the fact-finding responsibilities of the
14 probation officers will be dramatically increased because
15 if the district court judges are going to rely on the pre-
16 sentence reports, and if the probation officers know that
17 their report is going to be the final basis for a determinate
18 time in prison, all of them have told me that we are just
19 going to have to do an even better job than we have been
20 doing up to this point. It is going to take us more time,
21 and we aren't going to have the personnel to do the supervision
22 job that we are called upon to do.

1 It is our view also that the judges will have
2 to devote substantially more time to the sentencing process,
3 notwithstanding the fact that their judgmental role in that
4 process will be diminished, and the number of guilty pleas
5 will decline significantly unless we are going to permit
6 the plea bargaining process to override the guidelines. And
7 I want to talk about that a little bit more. And of course,
8 there are going to be numerous appeals.

9 On the basis of the Minnesota experience, we estimate
10 that in our Circuit, we'll get somewhere about 250 additional
11 appeals per year from persons who are dissatisfied with the
12 sentence or from the government that had been dissatisfied
13 with it.

14 Now, first of all with respect to the length
15 of the sentence. As I say, we asked the chief probation
16 officers to review the guidelines and to take actual cases
17 where people had actually been sentenced and to go through
18 that and work with their chief judge and attempt to come
19 up with the sentence that they felt would be proper.

20 Now, the study that we made in four States reviewed
21 100 cases including 76 in which a term of imprisonment was
22 imposed. The total number of months to be served in those

1 cases was 1,734 months. Now, using exactly the same cases,
2 our probation officers come up with those persons would be
3 required to serve 5,640 months under the guidelines. This
4 represents an increase of 225 percent, or an average increase
5 of about 40 months for each person sentenced.

6 Now, it may well be that you believe that you
7 are reflecting Congress' intent that persons convicted of
8 crimes, particularly those that are drug-related and that
9 involve violence, be sent to prison for longer periods
10 of time. Perhaps you are correct on that. But even if you
11 exclude those crimes, we found that the average sentence
12 was substantially increased.

13 We are submitting the separate appendixes that
14 your staff and you can review carefully.

15 Now, in that line, I'd like to make another point.
16 If you could just turn to page 8 of my remarks you will see
17 in there the last page of a pre-sentence report, the full
18 report of which is set forth in the material that I am
19 furnishing to you. And you will notice on that report
20 that this person was convicted of bank robbery; he was
21 sentenced to 15 years on Count 1, to 5 years on Count 2,
22 which was a conspiracy count which was to run consecutively,

1 and Count 2 was to be without parole. And so he probably
2 would have served about 36 months under the present guidelines
3 if it had not been for the longer sentence. But because
4 the judge's sentence was longer, he probably would wind
5 up serving about seven years, about that length of time.

6 Now, as our chief probation officer for this
7 District has computed it, he would wind up serving 258 to
8 322 months.

9 The significant thing about this, and what bothers
10 us a great deal and bothers me particularly, is that the
11 base offense value is 36. Yet, because he had a gun, you
12 add 60 points. Now, the anomaly of that is that you have
13 to prove the base offense, which only has sanction units
14 of 36, beyond a reasonable doubt, and you only have to prove
15 that he carried a gun by a preponderance of the evidence,
16 and yet the penalty for carrying the gun is almost twice
17 that for the base offense. And that is true as you go down
18 the line. The computed the psychological harm to the
19 victim at 24 here, which is almost equal to the value of
20 the base offense, but yet it only needs to be proved by a
21 preponderance of the evidence. And then the sanction
22 units are so great for the conduct that was involved in

1 the offense; obviously, the big fight in every sentencing
2 Procedure is not going to be whether he committed the
3 base offense -- he probably has plead guilty to that -- the
4 main fight is going to be on the points that really make
5 a difference. And I think that you are either going to have
6 to do one of two things. You are either going to have to
7 have many hearings and a large number of cases, or we are
8 going to have to do as several of the district attorneys
9 that I have heard testify here over the last few days have
10 said, and that is that you permit the plea bargain to override
11 the guidelines.

12 Now, I don't know which of those two alternatives
13 would be the worst. I think that our judges, with a few
14 exceptions, will resist mightily any effort which will
15 take them out of the plea bargaining process. Judges
16 like Judge Eisele from the Eastern District of Arkansas,
17 one of our most distinguished District Court judges, I think
18 it would have to be a direct Act of Congress before he
19 would agree to participate in any process in which the
20 prosecutor and the defense counsel would prepare a statement
21 of facts that the prosecutor said that he could prove
22 by a preponderance of the evidence, listing the factors

1 that would be important in the ultimate decisionmaking
2 process and then give him no opportunity to either accept
3 or reject that or examine into the truthfulness of the
4 factual statement that had been developed by the prosecutor
5 and the defendant.

6 CHAIRMAN WILKINS: Let me just say, Judge, I
7 don't mean to interrupt you, but there is no thought doing
8 that by anyone.

9 JUDGE HEANEY: Well, if that is true, then that
10 will be wonderful. But I sat here, and I heard the last
11 witness, the United States District Attorney, the witness
12 before-last, testify at great length that we've got to take
13 away the discretion of the District Court judges, but don't
14 limit my discretion to enter into a plea bargain. And I
15 heard two or three other United States District Attorneys
16 say substantially the same thing, that the system isn't
17 going to work.

18 And I think it would be a grave mistake if we
19 permitted prosecutors and defense attorneys to "cook the
20 books" -- the term that we use in Minnesota is "swallow
21 the gun". And in case after case after case, that's precisely
22 what you do, because if you have a notation in there that

1 there was a gun used, then the plea can't be accepted. So,
2 they "cook the books" and "swallow the gun", and they bring
3 it into the judge, and the busy judges more often than not
4 will accept the plea. Now, some of our judges may be willing
5 to do that, but a majority of them at least have indicated
6 to me that under no circumstances are they prepared to accept
7 that as an alternative.

8 CHAIRMAN WILKINS: And we do not advocate that.

9 JUDGE HEANEY: Well, that's good.

10 COMMISSIONER BREYER: I don't think the U.S. Attorneys
11 have. I think everyone has always spoken on the assumption
12 that the judge would control the decision about whether or
13 not to accept the plea.

14 JUDGE HEANEY: Well, I think I must have been
15 listening wrong over the last --

16 COMMISSIONER MacKINNON: And the other thing is,
17 Judge, that we are going to deal with that, too, period.

18 JUDGE HEANEY: Well, that would be helpful. But
19 if you deal with it, then we are faced with the other problem,
20 and that is --

21 COMMISSIONER MacKINNON: You won't have any problem
22 with it when we deal with it.

1 JUDGE HEANEY: Then we are going to have the other
2 problem of the evidentiary hearings, or they have been referred
3 to as the "mini-trials".

4 COMMISSIONER MACKINNON: And that may be eliminated,
5 too.

6 JUDGE HEANEY: Well, I hope so.

7 I'd like to talk now a little bit about probation.
8 And I want to call to your attention particularly the most
9 comprehensive study on the results of probation that has
10 been made in the United States. This is a 16-year study
11 made by the Eastern District of Arkansas by Judge Eisele.
12 He has kept a record over the entire period of time of every
13 person in that court who has been placed on probation and
14 what that individual's record has been after he has been
15 released.

16 And I quote from you, just from page 57, that
17 "Over the 16-year period the average violation rate was
18 2.7 for probationers, 9.8 for parolees, and 36.3 for
19 mandatory releasees.

20 So if there is anything that all of our judges
21 agree with whole-heartedly, it is that we should not destroy
22 the system of probation, because not only do these statistics

1 indicate that probation has worked, but the testimony of
2 the chief probation officer presented to this committee of
3 the United States, which I have read, also indicates that
4 while their experience hasn't been as good as it is in
5 Arkansas, that generally the experience has been helpful.

6 Now, I listened to Judge Breyer's question the
7 other day, as to just exactly how we are going to do this.
8 And I think the first step in this process would be to
9 compile your own complete statistics with respect to
10 probationers, where it has been successful, where it hasn't
11 been successful, and then write your guidelines
12 consistent with that experience. And you may even say
13 that persons who are accused of this and this kind of
14 crime should not be placed on probation, or should ordinarily
15 not be placed on probation, or define your characteristics.
16 But for goodness sake, don't disregard the years of favorable
17 experience that we have had with respect to probation.

18 Now, we can argue, and we heard the Chief of
19 Police testify yesterday, as to whether the granting of
20 probation encourages other persons to engage in crime,
21 and I suppose that we could have reams and reams and reams
22 of statistics one way and another on that, and I don't know

1 as we are ever going to agree on an answer to it. And I
2 would only say that Congress has not indicated that it feels
3 that probation has failed, that it should be ended, and I
4 think that we should do our very best to retain the alternative
5 of probation in those types of situations where all of the
6 evidence indicates that it has worked well.

7 Now, I think that I have covered almost everything
8 that I intended to cover and would simply close by stating
9 that our recommendations are that you take your time adopting
10 the guidelines, that when you do adopt them, keep them as
11 simple as possible. We would prefer an offense of conviction
12 model; if not, a model similar to that suggested by Judge
13 Kazen, I am sure would be our next alternative.

14 I think that you should consider that the guidelines
15 should be as broad and general as possible, and that we should
16 recognize that probation has worked well and that you give
17 very careful consideration to the whole guilty plea process,
18 and I have happy to have your assurances on that.

19 Now, there are a number of questions that you
20 have asked. We have answered those, and they are in the
21 data that we have provided. I guess there is one other point
22 that I wanted to talk about, and that is this business of

1 the overcrowding of prisons.

2 All of us who are on the Bench have sat on cases
3 in which prison conditions have been the issue, and our
4 Circuit as well as many others have held that prison
5 conditions are unconstitutional in a number of municipal
6 and State prisons. And I think that an individual judge
7 when he is sentencing the person before him will ordinarily
8 not consider what the populations of the prisons of the United
9 States are. And the only exception to that would be if we
10 knew that this person were going to be sent to an unconstitu-
11 tional prison setting. That certainly would influence our
12 thinking.

13 But your role is a different role. You have been
14 asked by the Congress really, in effect, to fix the length
15 of sentences. You are not sentencing an individual defendant
16 to a particular prison. You are asked to fix the sentences,
17 and the level at which you fix those sentences is going to
18 determine the prison population. And I don't believe that
19 you can anticipate that Congress is going to necessarily
20 meet the needs for prisons in advance of legislation on
21 their part.

22 CHAIRMAN WILKINS: Thank you very much,

1 Judge.

2 Yes, sir?

3 JUDGE O'BRIEN: Mr. Chairman, I know you are running
4 behind, but first of all, I did give you a prepared
5 statement, and I'd appreciate it if you'd read that. I put
6 a lot of thought into it.

7 But I have been listening for the last couple
8 days, and there are a couple things I'd like to address
9 quickly, if I could.

10 CHAIRMAN WILKINS: Yes, sir.

11 JUDGE O'BRIEN: Judge MacKinnon said yesterday
12 that this is a pretty tight statute that we've been handed.
13 And I'd admit that it's pretty tight. Section 994 entitled
14 "Duties" is certainly fairly tight.

15 Judge, 994 is so tight that it may be impossible.
16 I took the liberty -- and I hope you won't mind -- of
17 checking all you folks out, because I don't go anyplace
18 unless I know where I'm going, and I've read your stuff,
19 and I've talked --

20 COMMISSIONER MacKINNON: You noticed that I came
21 from Sioux City, didn't you?

22 JUDGE O'BRIEN: Yes, sir.

1 COMMISSIONER BREYER: I hope you've read a lot
2 about airline deregulation.

3 JUDGE O'BRIEN: I have. And I found out on
4 Judge MacKinnon, they say to me that, "He's a very resolute
5 fellow, a tough S.O.B.," and so forth.

6 COMMISSIONER MacKINNON: That was just when
7 we were playing Iowa.

8 JUDGE O'BRIEN: What I want to say is this. My
9 perception of you is, after listening for two days here,
10 that you are not so tough that you'd march into the
11 Valley of Death with the 600. And they also said that
12 you wouldn't be gungho to limit judges' prerogatives. And
13 I don't think you are, either.

14 But now, 994 in this tough code section that
15 you are talking about --

16 COMMISSIONER MacKINNON: Judge, let me interrupt
17 you just a minute.

18 JUDGE O'BRIEN: Yes.

19 COMMISSIONER MacKINNON: You are absolutely right.
20 And I often cite the circumstance when I was U.S. Attorney,
21 and we had a bank robbery case. Judge Nordby gave him
22 25 years. Within three weeks, we had another case

1 of bank robbery that was handled, and the judge gave
2 straight probation. And I thought both sentences were
3 perfect.

4 JUDGE O'BRIEN: All right. Listen to this for
5 just a minute, will you, Judge?

6 COMMISSIONER MacKINNON: Yes.

7 JUDGE O'BRIEN: Nine ninety-four, "Duties of the
8 Commissioner" -- the only way that comes ahead of 995,
9 which is the powers, is because it's got a lower number.
10 No one will say that it's soft if this Commission follows
11 995(a)(20) before you completely carry out your duties
12 under 994.

13 Now, 995(a)(20) says "make recommendations to
14 Congress concerning modification or enactment of statutes".
15 They are even asking you to give them some new statutes.

16 So I don't think that you've got to worry about
17 how tough it is. You said yesterday --

18 COMMISSIONER MacKINNON: Judge, it's a fine
19 point of legislative interpretation that the statement
20 that is later in the statute sometimes overrides the former
21 statement.

22 JUDGE O'BRIEN: Well, I'll bet you've ruled

1 differently, or you should have if you haven't.

2 COMMISSIONER MacKINNON: Well, that's what you
3 were arguing.

4 JUDGE O'BRIEN: No. I understand. But let me
5 just say to you, you said yesterday we've got a problem,
6 and we can't duck it. Nobody wants you to duck it. But
7 you don't have to perfect Chapter 994 before you ever taste
8 995.

9 COMMISSIONER MacKINNON: We've got to take them
10 all together.

11 JUDGE O'BRIEN: And one other thing. Politics
12 is the art of the possible. The Senators and the Representa-
13 tives, they couldn't get a perfect bill. Two titans from
14 the Senate met late in the legislative hours and compromised.
15 Neither one of them liked what they were doing. Maybe they
16 both went outside and held their noses; I don't know for
17 sure. But they both knew it wasn't perfect. It's not
18 part of the Constitution.

19 This Commission is not going to be shirking your
20 mandate if you tell them so, or at least invoke 995(a) (20)
21 and make recommendations with some modifications.

22 Thank you, and I'm sorry I held you up.

1 COMMISSIONER MacKINNON: Judge, the final vote
2 in the Senate was 99-to-1.

3 JUDGE O'BRIEN: I understand. It was late at
4 night. One guy said, "I'm not going for this at all unless
5 You go for this." It was a big trade.

6 COMMISSIONER MacKINNON: I served on the Hill,
7 and I know what you are talking about.

8 JUDGE O'BRIEN: That's right.

9 Mr. Chairman, can I say one other thing?

10 CHAIRMAN WILKINS: Yes. Take your time.

11 JUDGE O'BRIEN: All right. I am an old U.S.
12 Attorney; 25 years ago, I was a U.S. Attorney, one of the
13 youngest in the United States. And I was rough and tumble,
14 and I had good luck, and I won a lot of cases for the
15 government. And I am not bragging about that, but I have
16 to say that so you'll know where I'm coming from.

17 I've been sitting here for two days, and all the
18 prosecutors have been in here, and man, they are tough
19 prosecutors. I have a problem with it, and I'll tell you
20 what it is. I used to try anybody that came, all comers,
21 and when it was all over, I didn't really give a damn what
22 the sentence was. That wasn't my problem. I had convicted

1 somebody, I had done a good job. If the judge -- and they
2 weren't -- but if they got loony and let them go, that
3 wasn't my problem. I notice all these prosecutors coming
4 in here, and they are saying, "Boy, it's bad news."

5 Now, let me tell you, in the House of Representa-
6 tives report -- and the citation is in my prepared remarks --
7 Congressman Conyers says this -- and I think this is important
8 -- "Since discretion and the cause of any resultant disparity
9 is currently divided among the court, the prosecutors, the
10 police and the Parole Commission, any curtailment of the
11 discretion of one sector through guidelines will merely
12 increase the power of the others without really addressing
13 disparity."

14 Now, what is happening is that the Parole
15 Commission is gone. The courts are cut back. The police
16 situation is a constant. So who is filling all this hole
17 that used to be part of the parole and part of the judges?
18 It's going to be the U.S. Attorneys have stepped in and all
19 this discretion.

20 I want to tell you that as a U.S. Attorney it
21 was a fiefdom. Nobody ever called me up from Washington
22 and said, hey, you've got to do this or you've got to

1 do that, and if they did, I wouldn't have done it anyway.
2 Every U.S. Attorney is just all by himself, and there may
3 be as much disparity in U.S. Attorneys as there are
4 judges.

5 But if you think about it, the people who come
6 in and who are going to be handling these pleas in lots of
7 lots of instances, young lawyers less than five years out
8 of law school, they are going to be coming in there, and
9 they are going to be talking about this discretion that the
10 judge used to have; they now have it. And I know I'm talking
11 too long, but I'm going to tell you one quick story, and
12 then I'll quit.

13 Judge last week, Mr. Baer, I got from your place
14 a letter, and it said, "Would you kindly comment on this?
15 In 1962, a bank robber was convicted and given 50 years.
16 He is still in jail. You recommended at that time as the
17 prosecutor that he should not get parole. What do you
18 think about it now?"

19 I wrote back and said, "What did the judge say?"

20 They wrote back and said, "The judge said he had
21 no comment."

22 Now, the judge was older than I was and wiser

1 than I was, but I said, "No comment."

2 Twenty-five years later, this fellow is still
3 in because I said don't let him be out on parole. Now,
4 was I smarter then than I am now? Are these young U.S.
5 Attorneys, who are going to be doing the same thing, are
6 they smarter now than they will be 25 years from now?
7 I'm not so sure. I don't know that for sure.

8 I have been a visiting judge. You go down to
9 the Department of Justice, and you sit there for a week,
10 and they bring in all their new prosecutors, and you help
11 them, and you test them, and you try to get them to be better
12 prosecutors. They are good kids -- but they are kids.
13 And those are the people that we are supposed to be giving
14 our discretion away to.

15 One of the men came in this morning and he said
16 the U.S. Attorney's certification ought to be enough. Now,
17 does he mean it ought to be enough that the judge has got
18 to buy it, or does he mean it ought to be enough so they
19 don't have a hearing? I hope it's not that the judge would
20 have to buy it.

21 I would ask the Chairman, and maybe you are the
22 only one on this Commission who has ever sentenced anybody,

1 have you ever turned down a prosecutor who said to you, "This
2 guy has really helped us. We made four other cases." I
3 don't think you've ever turned anybody down on a deal like
4 that; I'd swear you haven't.

5 Now, just one last thing, if I could. This is
6 from one of our more distinguished judges in the 8th
7 Circuit, and here is what he says. "The judge has always
8 exercised considerable discretionary power. Sentencing
9 power in a judge is most appropriate because the judge is
10 an impartial tribunal, not the advocate for one side as is
11 the prosecutor. The sentencing guidelines legislation
12 in the proposed guidelines reduce the sentencing judge's
13 discretionary power to a token. The converse side of this
14 is that the prosecutor's power is expanded, because there
15 is little, if any, check on the prosecutor's traditional
16 powers arising from his choice of charges and plea
17 bargaining and his power is further expanded by his right
18 to certify one of three degrees of cooperation. Under
19 that power, he can grant or deny defense reduction and
20 offense value up to 40 percent. It looks to me like the
21 new law and the guidelines increase the prosecutor's
22 sentencing power to about 90 percent and reduce the

1 judge's power to about 10 percent. I think that is funda-
2 mentally wrong." Judge Vieter, Chief Judge, DesMoines.

3 Now I am going to quit, but I'd like to ask you
4 if it would be all right -- I've got some thoughts on
5 Mr. Block's tough problem, and what do you do with probation,
6 and I've got some thoughts on Judge Breyer's problem of
7 what do you do, should we really wait, or are we missing
8 an opportunity. But if it is okay, I am going to write them
9 letters about that, and thank you.

10 CHAIRMAN WILKINS: Thank you. We appreciate it
11 very much, and I appreciate your comments.

12 You know, it was pointed out and suggested
13 -- (inaudible) -- upon a charge of sentencing, as I
14 understand it.

15 JUDGE HEANEY: Yes. In other words, our Minnesota
16 system is a simpler system from which you could move to a
17 more complex one.

18 CHAIRMAN WILKINS: But if we did that, that would
19 just about give it all to the prosecuting attorney, and
20 that's why we primarily have adjusted that concept.

21 JUDGE HEANEY: It does give more discretion to
22 the prosecutor than will be given under your system. But

1 I think you have to weigh the two of them. And your system
2 really makes a "bean-counter" out of the judge, with the
3 conduct and the conduct values precisely allocated. And
4 as I say, he has either got one or two alternatives. He
5 is either going to have to accept the version offered by
6 the prosecutor, or he and his probation officer are going
7 to have to figure it out, present it to the defendant, and
8 if the defendant is willing to accept it, fine, if he isn't,
9 then they are going to have an evidentiary hearing. And
10 I think it is going to be terribly complicated, terribly
11 time-consuming, and I don't think it is going to work.

12 CHAIRMAN WILKINS: Do you have a question? Go
13 ahead, Judge Breyer.

14 COMMISSIONER BREYER: Well, that's the real
15 trade-off. The trade-off is, on the one hand, as you move
16 toward the charge offense, you give more and more power to
17 the prosecutor under a determinative sentencing system
18 to actually fix the sentence. But what you are gaining
19 from that is fewer evidentiary hearings.

20 But if there is a way to simplify the hearing
21 process so that in fact there turn out not to be an enormous
22 number of evidentiary hearings -- and the price of that is

1 giving more discretion to the judge. You see, every silver
2 lining in this business comes along with its own cloud. But
3 look -- a system that is modified real offense, let's
4 say, which gives more discretionary power to the judge will
5 avoid both the many evidentiary hearings that you fear and
6 will also avoid giving the prosecutor the greater discretion
7 to fix the sentence, which you also fear. And the only price
8 of that one is to give more discretionary power to the judge,
9 which you like.

10 And so it seems to me that's where you should
11 end up.

12 JUDGE HEANEY: But there is another factor in
13 there that I think that we have to also put in the scales,
14 and that is the importance that we are giving to the non-
15 charged conduct which, in most of the examples that we have
16 developed, turns out to be more important in the ultimate
17 sentence than does the charged conduct.

18 And what we do in the Minnesota system is that
19 if the prosecutor wants a long sentence, he is going to have
20 to charge it and prove it, or get a plea of guilty. And
21 in your system, what he can do is he can under-charge and
22 achieve the same result by a preponderance of the evidence

1 on those factors --

2 COMMISSIONER BREYER: That's why you limit them
3 to a very few. If you limit them to a very few and those
4 that are specified, you minimize that problem.

5 JUDGE HEANEY: Well, it may be that you can do
6 it. I don't think the first draft does it, because in all
7 of the examples that we had from the first draft, the
8 associated conduct turned out to be more important,
9 significantly more important, than did the charged conduct.
10 And that, it seems to me, is putting the cart before the
11 horse.

12 COMMISSIONER BREYER: That is correct.

13 CHAIRMAN WILKINS: Well, the numbers were very
14 tentative, as you point out. We did pick 60 months for a
15 gun, because there is a Federal statute that it is a mandatory
16 five-year sentence if you use a gun.

17 JUDGE HEANEY: Yes, I understand that.

18 CHAIRMAN WILKINS: So that was just something
19 basic, because we don't have the research that we need yet.
20 But it is on the way, I hope.

21 But we don't believe -- and this is a struggle --
22 that the fellow who comes in the bank on videotape with a

1 sawed-off shotgun ought not be sanctioned for carrying that
2 shotgun in that violent act. And we know it happens today,
3 because you plea down to unarmed bank robbery, or something
4 like that.

5 JUDGE HEANEY: Well, I think that I would agree
6 with you, but then the question is should the prosecutor --
7 if he charges that he had a gun, then it goes up to 25
8 years.

9 CHAIRMAN WILKINS: Right.

10 JUDGE HEANEY: Under your guidelines here, he
11 gets an additional 60 months for that, along with the
12 other sanctions for the other conduct. And it adds up to
13 be, as I say, about nine or ten times what the base value
14 of the offense is.

15 And that really bothers me. In other words,
16 for the proven offense, you get 36 sanction units; for the
17 unproven conduct, you get 235.

18 CHAIRMAN WILKINS: Well, again, if the numbers
19 were changed to what you would consider to be more realistic,
20 which I assure you is going to happen, would you have the
21 same concern? We are concerned about the process right now.

22 JUDGE HEANEY: Okay. If the numbers were more

1 realistic, if there were sufficient discretion to place worthy
2 people on probation, if we take care of the guilty plea
3 process and then move towards a system, as Judge Kazen
4 has suggested, in terms of a value system, I would think
5 that you would get a good deal more support from the District
6 judges than you are getting at the present time.

7 CHAIRMAN WILKINS: Thank you. Let me ask Judge
8 Breyer to ask his stock question on probation, or should
9 I ask it? I'd like for you all to hear it and think about
10 this issue, because it is very troublesome to us.

11 COMMISSIONER BREYER: Well, I finally got the
12 memo I liked from Mr. Greacen, actually, at the ABA, in the
13 testimony here. So I'll put this in the form of a legal
14 Question.

15 Imagine you were me, as we fear we might be
16 testifying in the Senate, let's say, and this would be the
17 question I think we might get asked. What you are suggesting
18 is that as to every sentence, there be an alternative of
19 probation. Now, our basic job in writing guidelines, I take
20 it, is to take certain categories, like a bank robber who
21 has one conviction, and he has a gun, and tell the judges,
22 "Judge, this is the typical sentence for that -- typical.

1 This is what we think you should give." Now, that's what
2 we're supposed to tell them, right? They can depart if
3 it is atypical, but, "Judge, this is the typical sentence."

4 So now, Senator Biden, let's say, reads what
5 we've done, he turns to the statute, and he says, "Hey,
6 look at a person who has a gun, and he has taken \$50,000
7 from a bank, and he has one past conviction. I have before
8 me what the Commission is recommending. You are recommending
9 to the judge, 'Judge, put him in jail for ten years, or
10 don't put him in jail at all.'"

11 He says, "How can both be typical? I mean,
12 you are not saying to put him in jail for one year, two
13 years, three years. I could understand how you'd give
14 a broad range, but what I can't understand is how you give
15 a range which says either a long prison sentence or no
16 prison sentence, but not a short prison sentence."

17 And then I would go and read the statute, which
18 says, "If a sentence specified by the guidelines includes
19 a term of imprisonment, the maximum of the range established
20 for such a term shall not exceed the minimum of that range
21 by more than 25 percent."

22 And I'd say, "Commissioner, you have recommended

1 to the judges that for a bank robber with a gun who has a
2 record of one prior conviction, the judge shall either give
3 ten years or no years. It sounds to me as if that is greater
4 than 25 percent. Anyway, it sounds to me as if it is a
5 little screwy, since I don't see how it could be typical
6 both to give him nothing and to give him ten, but not to
7 give him three, four, five, six, or seven."

8 I mean, that's the kind of question I fear, and
9 I'd like to know the answer.

10 JUDGE HEANEY: Of course, you are absolutely
11 right. And your answer yesterday was depart.

12 COMMISSIONER BREYER: Yes, that's right.

13 JUDGE HEANEY: And I agree with you, depart.
14 But when we have a system in which 40 percent of the persons
15 who are now tried or plead guilty are given probation, you
16 don't have a system that requires you to depart in 40
17 percent of the instances.

18 And so my answer to it was, as I gave you when
19 I started out, was first of all to make a comprehensive
20 study as to the persons who are currently being placed on
21 probation, the success ratio that you are having with the
22 various crimes, and then write your guidelines for probation

1 that will take care of most of the cases and then require
2 a departure in the kind of case that you have, just the
3 way you are handling the rest of it. I think that will
4 answer your question. In other words, your threshold at
5 the present time is much too low.

6 COMMISSIONER BREYER: Well, I mean, what that
7 suggests -- and maybe it is possible; I mean, enough people
8 seem to think it is, and they are all very good judges --
9 I mean, I am talking about legally now -- maybe you could
10 say, "All right, Judge, you could look to probation as an
11 alternative to prison where the prison sentence is up to
12 let's say two or three years. But if it is nine or ten
13 years, you can't look to probation."

14 JUDGE HEANEY: Precisely -- or whatever standard
15 you come up with. Or you might say, well, if a gun was used,
16 or if a person was hurt, you can't give probation. I am
17 just using that as an example.

18 It seems to me it is relatively easy to do that,
19 and it is highly desirable, because you don't want to throw
20 out 40 percent or nearly 40 percent of the situations that
21 we have at the present time.

22 JUDGE O'BRIEN: There might be another way to

1 go at it. I don't know what your data shows, but I'd be
2 awfully surprised if you got very many statistics which
3 show that people who have already been convicted of bank
4 robbery are getting probation the second time around.

5 COMMISSIONER BREYER: Well, there are some, there
6 are some.

7 COMMISSIONER BLOCK: Three percent of all
8 bank robberies.

9 JUDGE O'BRIEN: Well, that's astounding to me.
10 But I would say this to you, that instead of talking about
11 maybe three years instead of eight or something, you'd
12 be better off to be talking about no probation for a repeat
13 offender of a serious crime unless the Circuit Court of
14 Appeals would approve a very detailed, written situation
15 that the dumb judge sent. Now, if the judge is dumb,
16 hopefully everybody on the Circuit isn't dumb, so you'd
17 have a safeguard there.

18 COMMISSIONER BREYER: Yes. You see, that suggests
19 another approach to the problem which is to just say, all
20 right, for the ten-year sentence, we don't say anything
21 about probation except to tell the judge, "If you think
22 this case warrants probation, the bank robber, of one year,

1 then depart from the guidelines." Depart.

2 JUDGE HEANEY: Depart, right.

3 COMMISSIONER BREYER: Depart. That's the way
4 to handle it.

5 JUDGE O'BRIEN: Yes, but that isn't going to be
6 an answer, either.

7 COMMISSIONER BREYER: They have to give their
8 reasons.

9 JUDGE O'BRIEN: I've talked to several judges
10 in Florida who are working on this and several in Minnesota,
11 and they say that finally it has gotten down to where they've
12 pretty near sawed off their legs on every reason that they
13 thought was good for departing, and it's down now to where
14 in Minnesota, two judges told me departing is awful tough.

15 COMMISSIONER BREYER: Well, we saw some statistics
16 that in Minnesota they depart in half the cases. It was
17 something like 49 percent.

18 JUDGE O'BRIEN: But are they being adopted? You
19 can depart all you want; it can get reversed.

20 JUDGE HEANEY: I think the most recent statistics
21 are about 33 percent where they depart from the guidelines,
22 but the departures are mainly minimal, and the number of

1 appeals from the departures are about equally divided between
2 the State and the defendants. And I think that last year,
3 we had something like 36 appeals for departures.

4 And I think what Judge O'Brien is saying is that
5 the supreme Court is gradually whittling away at the
6 circumstances under which they can depart.

7 All I ask on probation is don't throw out the
8 baby with the bath water.

9 CHAIRMAN WILKINS: We are very sensitive to that.

10 If you are going to be with us a while, we'll
11 continue this conversation. I'd like to talk to you later
12 on today, if you can.

13 JUDGE HEANEY: Yes. We are going to be here.
14 I have got to catch a plane at four o'clock.

15 CHAIRMAN WILKINS: I'll see you over lunch, then.

16 Thank you.

17 JUDGE HEANEY: Thank you.

18 JUDGE O'BRIEN: Thank you.

19 CHAIRMAN WILKINS: Our next witnesses are honorable
20 Albert Quie and honorable Robert F. Utter, representing
21 the Justice Fellowship. We are well-covered with Minnesota
22 today with Governor Quie of Minnesota and a former

1 Congressman from that State as well. Glad to see you.

2 GOVERNOR QUIE: Thank you very much. I appreciate
3 it.

4 CHAIRMAN WILKINS: Mr. Utter is a Supreme
5 Court Justice from Washington State, and we are honored
6 by your presence. Thank you.

7 JUDGE UTTER: Thank you.

8 GOVERNOR QUIE: That's right. Justice Robbert Utter
9 is here, on my left. On my right is Daniel Van Ness, who
10 is President of Justice Fellowship, and he has written up
11 the written testimony which we are pleased to submit to you.

12 We will just make some oral comments and then
13 respond to any questions that you might have.

14 CHAIRMAN WILKINS: Thank you.

15 GOVERNOR QUIE: I am Chairman of the Board of
16 Justice Fellowship. This is a national public education
17 and lobbying organization that works for criminal justice
18 reforms which are consistent with biblical teaching on
19 justice and righteousness. And one of the efforts is
20 towards the end of holding offenders culpable for the harm
21 that they cause their victims, rather than solely the harm
22 that they cause the state.

1 I am interested in the work of this Commission
2 because I was in the State Legislature, was in the Congress
3 for 21 years, and then Governor of the State; I was Governor
4 when the sentencing guidelines were established in Minnesota.
5 The Commission had done its work before I was Governor, but
6 my first year, this was adopted. So I look at it as from
7 the political point of view and faced with that.

8 I now am also the Director of Prison Fellowship,
9 and because of that, deal with volunteers who are dealing
10 with inmates, and I go into the prisons myself and deal
11 with the inmates, so I get a different vantage point than
12 I used to do when I was holding public office myself.

13 And I want to commend you on this task. I know
14 it is a difficult task. But I would say that it is well-
15 accepted in Minnesota what we have done. I don't believe
16 that that would be repealed in Minnesota -- not that it is
17 agreed by everyone -- but there are two things that I think
18 make it stand out. One is that we did deal with the impact
19 it has on the prison population, and I think our Commission
20 did well that there was not an immediate increase in prison
21 population because of sentencing guidelines, but there was
22 an increase soon thereafter. The Commission met again,

1 adjusted the guidelines, in order that we would keep our
2 prison population at a reasonable level. And we have it
3 at a reasonable level because we rent out beds to other
4 States and to the Federal government. Since we started doing
5 that, while I ws Governor in '81, we have made \$22 million
6 out there. So it is all right to do that.

7 The other part besides impact is that prior to
8 the guidelines, we had started on a track where those who
9 had committed violent crimes and serious crimes would go
10 to prison, and those who did not commit violent and serious
11 crimes would be handled through probation, community
12 corrections. I believe the sentencing guidelines have
13 enhanced that. So when one looks at the fact that our
14 prison population has not increased, there has been an
15 increase in the number of violent crimes and a reduction
16 of non-violent crimes, and we have made adjustment within
17 the State.

18 So those are the comments I would make, and I'd
19 like to turn it over to Justice Utter now.

20 CHAIRMAN WILKINS: Justice Utter?

21 JUSTICE UTTER: We, I think, are the second
22 State to adopt essentially the Minnesota plan. It is a

1 pleasure for me to appear with my friend, Governor Quie,
2 to comment on that.

3 Our success has not been as great as theirs has
4 been. Our initial legislation called for doing away with
5 the Board of Prison Terms and Paroles, doing away with
6 probation following the prison term that had been imposed.
7 That's not working, and it probably will be repealed and
8 modified in the coming session. We find there are some
9 offenders for whom probation must be given after release.
10 We find that to have uniformity throughout the State in
11 probation violation hearings, that it is necessary to work
12 on a broad basis rather than an individual jurisdiction
13 basis. I notice you deal in part with that in your report,
14 and I would just simply share that with you.

15 It has been "back to school" for me. I was a
16 trial judge for a number of years, and I sat on at least
17 16,000 individual sentencings. I have been a Supreme
18 Court Judge for 15 years now, and thank goodness I don't
19 have to do that anymore. But I understand the problems
20 you are dealing with.

21 There are two different perspectives I'd like
22 to bring shortly before you. One is the perspective of

1 victims. In the early 1970s, I helped draft a victims
2 rights bill for Washington State. I think it was the third
3 or fourth victim compensation bill in the United States.
4 And it started a history, at least in our State, and followed
5 subsequently by many other States, of a focus of concerns
6 on victims as clients, actually, of the criminal justice
7 system, not as an unwanted appendage, but really as the focus
8 of what we do.

9 I am concerned in going over these guidelines
10 and noting, I think, a diminution, not intentionally but
11 just because so much has been said in the other areas about
12 how victims are affected by this.

13 I think we are troubled that the guideline tables
14 translate offense values only into prison terms. In our
15 written testimony that we have submitted, we have demonstra-
16 ted an emphasis on reparation, characterizes both the enabling
17 legislation that you are working under and significant parts
18 of the draft guidelines. The other major emphasis is, of
19 course, incapacitation for serious offenders.

20 We believe that a return to a reparation model
21 in criminal justice is essential. We applaud the initial
22 efforts in this direction, and we urge as you go on to

1 subsequent drafts that you return to that and explore the
2 very many areas where a reparation model can be effective.

3 We are concerned about the failure of the guideline
4 table to provide for punishments consistent with the reparation
5 model such as restitution or community service for those
6 offenders who do not require incapacitation, and a large
7 number do not. You are dealing with the most difficult
8 problems, those offenders who do require incapacitation,
9 and those are hard cases. But for those who do not, there
10 are a wide variety of services in the community that both
11 can be available to them and that they can offer to victims
12 whose lives they have affected.

13 The guidelines do not even in the words of the
14 enabling legislation reflect the general appropriateness
15 of imposing a sentence other than imprisonment in cases
16 in which a defendant is a first offender who has not been
17 convicted of a crime of violence or otherwise serious
18 offense.

19 We have suggested an alternative approach to the
20 guideline table on pages 10 through 12 of our written
21 testimony, which I will not go over in detail. We are
22 suggesting basically that three scores be calculated --

1 first, an offense score, secondly a reparation score, and
2 third, a risk score. The offense score would determine
3 the length of the sentence; the reparation score, the amount
4 of restitution and community service; and the risk score,
5 the amount of control over the offender's freedom which
6 must be imposed.

7 The modified real offense approach is promising,
8 but contains several features that cause us some concern.
9 The first is that it may actually create unwarranted
10 disparity if it becomes any more complex, simply because
11 judges, defense attorneys, prosecutors and probation officers
12 may be confused about how that road map is to be followed.

13 We recommend that judges be given explicit
14 authority to sentence outside of the guidelines in the
15 event that imposition of the sentence indicated by the
16 guidelines would result in unwarranted disparity.

17 Second, the Commission may want to clarify what
18 special offense characteristics can be raised for the
19 first time in sentencing. Could prosecutors, concerned
20 that they may not be able to prove the weapon beyond a
21 reasonable doubt, charge the offender with simple robbery
22 and then attempt to prove possession of the weapon at

1 sentencing with a lower burden of proof? That has been
2 addressed by many previous speakers today, and I won't
3 elaborate on that.

4 We recommend on pages 18 through 20 of our
5 Written testimony that supervised release be used to both
6 assist the prisoner and protect the community. However,
7 the revocation hearings will be burdensome to courts once
8 the Parole Commission is phased out. First, it will create
9 a tremendous caseload problem, and secondly, there is likely
10 to be disparate treatment for similar offenders in revocation
11 hearings as each judge conducts them. I think that is a
12 great practical concern of mine when I see the problems that
13 have arisen within our State in attempting to implement that.

14 Therefore, we recommend that Congress either
15 create a new national body, which it probably won't do, or
16 that it modify the current Parole Commission to handle
17 revocation procedures, which I think is more practical and
18 gives more uniformity and addresses some of the problems
19 that States who are now experimenting with it are currently
20 facing.

21 Finally, we have not done a comprehensive
22 analysis of the relative values of some of the offense

1 scores in the draft. As other speakers have pointed out,
2 there are a number of anomalies. A first-time burglar who
3 does not enter a dwelling and who does not damage and takes
4 no property receives a base score of 24 and serves 12 to
5 18 months. A person who operates a house of prostitution
6 receives a base score of 12 and serves no time. A person
7 who interferes with another's civil rights receives a base
8 score of 6 and serves no time. A person convicted of importing
9 pure heroin would receive the same sentence as the street
10 dealer who peddles a substance of the same weight, but which
11 contained only a detectable amount of heroin.

12 Finally, we note that in determining the criminal
13 justice score, the guidelines use prior imprisonment rather
14 than prior conviction. This could present problems, given
15 the well-known differences in length of sentences and in
16 use of imprisonment from State to State within the Federal
17 system.

18 Thank you for the opportunity to offer our comments
19 this morning. As my voice is coming to an end, so will
20 my comments.

21 Thank you.

22 CHAIRMAN WILKINS: Thank you very much. Your

1 written comments, as all of them, will be distributed not
2 only to this Commission, but all of our staff, and we will
3 have a process set up to digest all of this, and so we will
4 study in detail what you have submitted to us.

5 I think Commissioner Corrothers has a question.

6 COMMISSIONER CORROTHERS: Yes. This could be
7 directed to any or one person, or maybe all of you. We heard
8 from you and the testimony just prior to your testimony
9 praise concerning several features of the Minnesota guidelines
10 system. So I guess I wouldn't ask what you consider the
11 best features, because obviously, they are numerous. But
12 are there any features or parts of the Minnesota guidelines
13 system that you would advise us not to emulate? Are you
14 aware of any problem areas, pitfalls, that we should avoid?

15 GOVERNOR QUIE: I wouldn't say pitfalls. I think
16 maybe we have adjusted them. But listening to the concerns
17 that people have who are in the corrections system itself,
18 when a person serves a sentence and a prison term, how they
19 move out into the community. We have halfway houses and
20 so forth. But there is a feeling that they would like to
21 be more involved and to some extent, even wonder if they
22 are skirting on the edge of the way the interpretation of

1 the law is in order that they can follow the individual
2 more closely than they have and provide services for them.

3 I think it follows on testimony before that was
4 talking about either the ten years or probation; what about
5 the person that ought to serve the prison sentence but needs
6 that time on parole and more supervised, in other words.

7 COMMISSIONER CORROTHERS: Would that area come
8 within what you just mentioned, the suggestion about another
9 organization that would deal with the revocation; that could
10 be included as an overall solution to that whole area?

11 GOVERNOR QUIE: Yes, yes.

12 JUSTICE UDDER: Minnesota courts have had an
13 interesting problem on what do you do with the judge who
14 exceeds the guidelines, either in imposing a sentence higher
15 than the guidelines or in imposing a sentence lower than
16 the guidelines.

17 They have adopted a rule that says they will use
18 essentially a doubling process, and if the sentences were
19 then doubled, what the recommended guidelines are; the
20 presumption is that it will not be reviewable. If it is
21 more than doubled, it is reviewable, but not necessarily
22 reversable. But it is just a way for the courts to

1 categorize those cases that are appealed.

2 Our a State in a 5-to-4 vote in which I dis-
3 sented, did not adopt that rule. I wish they would have,
4 but that is another aspect of the rule that I think makes
5 some sense.

6 COMMISSIONER BLOCK: Judge Utter, I just
7 wanted to have a brief inquiry about the suggested
8 trifurcation of the sentencing process that you suggested.
9 You had three scores that you suggested, and that last
10 was a risk score that would in a sense determine whether
11 an individual would be imprisoned or not.

12 I assume that that score would try to get at the
13 question of incapacitation. How would you then handle the
14 first-time, quote "white-collar offender" in a securities
15 violation, an antitrust violation, in a fraud scheme,
16 bank embezzlement scheme, where the likelihood of risk
17 to the community by that risk score is likely by any
18 measurable standard to be logged? Would you then say to
19 that offender, "Okay, you don't go to prison"?

20 JUSTICE UTTER: On the contrary. I guess
21 everyone second-guesses my sentences, so it is fair for me
22 to do the other as well. I saw just two days ago one of

1 the defendants in the securities fraud case in New York
2 that was a participant, apparently a person who was coopera-
3 ting with the government, but received no jail time at all
4 but rather, a substantial community service sentence. My
5 sense of justice was offended with that, and it fits exactly,
6 I think, the supposition you raise. While I think the risk
7 factor is low, the offense factor is great, and that is a
8 breach of trust. I think in looking at something of this
9 nature you can say while one is low, another factor may be
10 higher.

11 COMMISSIONER BLOCK: So in terms of the statutory
12 language, if it was an otherwise serious crime, even though
13 it was a first offender, then you would use that offense
14 score to get at the --

15 JUSTICE UTTER: Precisely.

16 COMMISSIONER BLOCK: Thank you.

17 CHAIRMAN WILKINS: Justice Utter and Governor
18 Quie, thank you very much.

19 GOVERNOR QUIE: Thank you.

20 CHAIRMAN WILKINS: Our next witness is from the
21 Criminal Justice Section of the ABA, Mr. John Greacen.
22 With Mr. Greacen is Laurie Robinson of the ABA. We are

1 glad to see both of you. Neither are strangers to our
2 Commission; both have testified in previous hearings on other
3 issues.

4 MR. GREACEN: Your Honor, thank you very much
5 for the opportunity to appear.

6 I have been designated by President Eugene Thomas
7 of the American Bar Association to appear today on behalf
8 of the 320,000 members of the American Bar Association,
9 not just its 8,000 criminal practitioners who are part
10 of the Criminal Justice Section.

11 I want to tell the Commission that I come here
12 with a great deal of personal awkwardness in that I know
13 a number of you personally, and I admire all of you greatly,
14 and I have a great deal of admiration for the work that the
15 staff and the Commission has put into the first draft. So
16 I come with great trepidation to fundamentally oppose the
17 direction in which the first draft went.

18 I was greatly relieved to hear Judge Breyer
19 describe the second draft, because I think I actually
20 appear here in favor of the second draft. So, my personal
21 awkwardness is greatly relieved.

22 COMMISSIONER BREYER: Is that a blank check?

1 (Laughter.)

2 MR. GREACEN: No. The check was not filled out
3 specifically, so my signature is no more specific than the
4 check.

5 The American Bar Association is fundamentally
6 opposed to the direction and structure set forth in the
7 preliminary draft guidelines. My purpose today is to
8 explain why we are opposed and to suggest the directions
9 in which we would urge the Commission to move in that
10 second draft.

11 I did submit a 50-page document to you earlier
12 this week, and I hope you all have it with you, because
13 I would like to refer specifically to the appendices in
14 the course of my remarks, because we want to some length
15 to try to actually draft an alternative that in our view
16 is more consistent with the notion of guidelines than the
17 preliminary draft.

18 As you know, the American Bar Association does
19 not oppose sentencing guidelines. To the contrary, we
20 strongly recommend them for all jurisdictions, Federal
21 and State. It is just that we don't like the way in which
22 the first draft was structured. We have read very carefully

1 the Commission's statutory mandate and the legislative
2 history behind it, and we do not believe that the aspects
3 of your approach that we oppose are required by that legisla-
4 tion, nor do we believe that the direction in which we urge
5 you to proceed is in any way inconsistent with the legislation.

6 There are five principal reasons for our opposition
7 to the current draft. The first is our sense that the
8 discretion of the judges and the lawyers in the system is
9 radically reduced, and in fact, sentencing is turned into
10 a mechanical, numerical ritual. Now, you have heard those
11 words before.

12 What I can tell you is that the Council of the
13 Criminal Justice Section, which met within the last two
14 weeks and spent a good deal of time talking about this
15 draft, which consists of defense attorneys and prosecutors
16 and judges, uniformly expressed alarm at the sense to which
17 these guidelines would reduce the sentencing process, that
18 has always been an individualized process, to a mechanical,
19 addition/division ritual. And they themselves felt that
20 their roles would be reduced to those of robots.

21 That is the impression that these guidelines
22 produce.

1 The American Bar Association's notion of guidelines
2 is guidance, not substitution for the discretion of decision-
3 makers in the process. The ABA standards speak of guidelines
4 as benchmarks, as starting places from which a judge would
5 move in arriving at a sentence.

6 Our second major objection is the limitation
7 on the factors that a judge can consider and the weight
8 that can be given to different factors.

9 Our third objection, which is to the modified
10 real offense sentencing, arises out of that former objection,
11 that the modified real offense sentencing proposal limits
12 the vision of the judge to those factors which are specified
13 in the road map.

14 The American Bar Association believes that a
15 fair sentence has got to take into account all of the
16 behavior of the offender and the offender's characteristics,
17 and all aspects of the offense.

18 The modified real offense sentencing says look
19 at this amount -- it's not just the charge, that's right --
20 but you are then drawing other limits. And we would rather
21 have no limits. The judge needs to be able to look at the
22 entire event, the course of conduct out of which it arose,

1 the history of conduct out of which it arose. Our overall
2 recommendation is that the Commission return to an offense
3 of conviction basis for pegging the initial guideline
4 with an instruction to the judge to take into account all
5 other aspects of the offender's behavior and prior conduct.

6 Our fourth major objection is what we consider
7 the unprecedented limitation on the availability of probation.
8 The statement goes into considerable length to point out
9 that we think that the Commission has in fact departed
10 from Congress' intention in limiting probation to those
11 offenses that would be sentenced for six months or less.

12 We point out that in fact, there is very good
13 reason from the research on sentencing for the in/out decision
14 to be based on different considerations from those that would
15 determine the length of the sentence for those who are sent
16 to prison. And therefore, the Commission's approach, which
17 links those two together and which says that the probation
18 is available only for a certain length of sentence, is doing
19 violence to our understanding of the sentencing process,
20 and in fact the Commission should produce different guidelines
21 for the determination of the in/out decision than those that
22 apply to the length of sentence for those who go to prison.

1 Our fourth major objection is to the length of
2 sentences that are set forth in the document. We know that
3 those are prented numbers. Nonetheless they are much, much
4 longer than the sentences that are currently meted out.
5 Our overall recommendation is that whatever mix of sentences
6 go into the guidelines, ultimately, the overall effect be
7 a level of sentencing comparable to time served under current
8 sentencing practices.

9 Of course, the Commission should not stick to
10 rigidly the average sentence or the average time served for
11 specific crimes. Your job is to monkey with those and tinker
12 with them so you come out with a more rational process than
13 in the past, but nonetheless the overall severity should
14 be within the range of the severity of time served under
15 the current process.

16 I have spent a good deal of time in Arizona, and
17 in Arizona there is a saying that a man should not criticize
18 another man until he has walked a mile in his moccasins.

19 As a result, we tried to actually construct
20 an alternative approach, a draft guideline, that would be
21 consistent with our notion of the direction in which we would
22 urge the Commission to travel. What we found in putting

1 on your moccasins is that we got very sore feet. It is
2 rocky road, it is tough work. We agree completely with Mr.
3 diGenova's comments that this is a very, very hard business.

4 Let me mention three parts of the statement
5 that suggest general guidance for the Commission for the
6 future before turning to that specific example.

7 First, we agree strongly with the approach that
8 Judge Breyer mentioned earlier, that this Commission will
9 be in existence for a long time. Its initial set of guidelines
10 will not be the ultimate set of guidelines. And just as
11 you deal with assessing the risk of offenders, you need
12 also to assess the risk of unintended negative consequences
13 from your own actions. And therefore we recommend the most
14 conservative approach possible in the initial guidelines.
15 Take a step in the right direction, but don't try to come
16 out with the ultimate answer to all the questions.

17 We strongly recommend a flexible guidelines
18 process which will, in our view, retain the confidence
19 of the judges and the lawyers practicing in the Federal
20 criminal courts. When the guidelines get rigid and the
21 result preordained, then the judge drops out of the
22 discretion-making process, and the lawyers are going to

1 pick up the slack, and we do not feel that that is necessarily
2 productive. If you leave more flexibility with the judge,
3 then the process will maintain its current balance of power
4 with the prosecutor, the defense attorney and the judge.

5 We recommend that the focus of analysis be
6 the offense, and that the Commission in looking at a second
7 draft look first to the crime categories, much as you have
8 laid them out now, but attempt to assign the weight of other
9 factors -- prior history, contrition, cooperation, the very
10 tough problem of multiple counts and multiple offenses and
11 overlapping statutes and multiple victimizations as a result
12 of one act. Analyze those within the context of each
13 substantive area of the Code. That is, we think, the principal
14 vice of the first draft, is that it attempts to answer those
15 questions on a universal basis, that there is a universal
16 answer to probation, a universal answer to contrition, to
17 the consecutive versus concurrent sentencing dilemma.

18 We think the Commission can make much more progress
19 if you focus on those problems within the context of a
20 particular area of criminality, to try to come up with a
21 rule that will be as valid for the securities fraud and the
22 drug dealer and the violent assaulter, we think, is preordained

1 to failure or to the kind of mechanical consequence that
2 we perceive in the first draft.

3 Second, we recommend that the Commission authorize
4 judges to consider those other offense characteristics that are
5 set forth -- I forget now the specific section of your
6 statute; the 11 or 12 other factors including age, family
7 ties, community ties, employment, education and the like.
8 These are very difficult topics to deal with. It is
9 important that they not be specified in the guidelines as
10 the factors that determine the guideline sentence. But we
11 think it would be unfair to eliminate them entirely from
12 the sentencing judge's discretion. It is exactly these
13 qualities that are now used by judges in determining the
14 in/out decision, and the judge needs to be allowed to take
15 them into account.

16 Finally, we believe the Commission has not paid
17 enough attention to the fact-finding process yet in the
18 guidelines, and we lay out in the statement the considerable
19 discussion of this topic in the ABA standards.

20 The ABA standards recognize that the sentencing
21 determination cannot be a trial-type determination; the
22 Rules of evidence cannot apply, and a standard beyond

1 preponderance is unacceptable. What the standards try to
2 do is to carve out a middle ground, though, one that
3 preserves the rights of the offender and the rights of
4 society from incorrect factual determinations by imposing
5 a verification requirement on information used in sentencing.
6 For a judge to act on a fact, that fact would need to be
7 established from two independent sources. I can discuss
8 that later if you have questions on it, but at this point
9 I would like to turn to Appendices A and B and in fact
10 describe for the Commission the alternative approach that
11 we have come up with.

12 You will see as you look at it that many of the
13 terms, many of the principles here, are very familiar
14 to you, because I have stolen them from your document.
15 The Appendix A suggests that the Commission can divide up
16 all of the available Federal sentences into 21 categories,
17 A through U, that cover the full range of sentences available
18 under Federal law, a much easier way than the great, long
19 table now included in the guidelines. Appendix B assumes
20 that sort of a categorization of the crimes, but Appendix
21 B's validity does not stand or fall on the Commission's
22 acceptance of that greatly simplified list of 21 categories

1 of length of sentence.

2 Appendix B begins by setting out the range of
3 sentences that are available to a judge for the Federal
4 crimes involved in assault and battery. Then, it chooses
5 a number of categories for which it establishes benchmark
6 sentences. Those benchmarks are little factual vignettes
7 that say, in the usual case, this kind of conduct deserves
8 this kind of sentence.

9 COMMISSIONER BREYER: Let me stop you there.
10 When you say "deserves", do you mean the judge must provide
11 that sentence or not?

12 MR. GREACEN: No.

13 COMMISSIONER BREYER: He doesn't have to?

14 MR. GREACEN: No, he does not have to. This
15 is a benchmark.

16 COMMISSIONER BREYER: Usual case. I hvae a usual
17 case.

18 MR. GREACEN: If he has a usual case --

19 COMMISSIONER BREYER: Yes; does he have to?

20 MR. GREACEN: I think in the structure of the
21 guidelines as Congress intended them, the judge always has --

22 COMMISSIONER BREYER: I know, but you have a

1 number of things here in Appendix B -- and maybe you want
2 to go into this later; I won't go into it now -- but I
3 didn't understand in reading it whether you meant that it
4 is mandatory or discretionary. Sometimes you talk about
5 the sentencing judge should sentence the offender to
6 Category A, B, or sentence if rehabilitation, et cetera.
7 That suggested to me that it was up to the judge whether
8 or not to choose A, B, C, D, E, F, G, H, I, J, K, L, M,
9 or et cetera -- up to the judge.

10 Then I thought, you don't mean it's up to the judge.
11 If the judge decides that the person has characteristics
12 1, 2, and 3, he must impose a D. So, which do you mean?
13 If he has characteristics 1, 2, and 3, he must impose a
14 D, or if he has characteristics 1, 2, and 3, he may impose
15 a D?

16 MR. GREACEN: A fair question. If he had
17 characteristics A, B, and C, and the appropriate
18 adjustments were made --

19 COMMISSIONER BREYER: There are no appropriate --
20 the judge says, "Here, I have a banker robber. He robbed
21 a bank, and he took \$50,000, and he has one past conviction.
22 That's the guy. See him -- he is in front of me. He has

1 brown hair, blue eyes" -- whatever. That's it.

2 MR. GREACEN: All right. Then the judge would
3 be required to sentence at that level unless he deviated
4 from the guideline, giving written reasons why --

5 COMMISSIONER BREYER: So you mean these are mandatory,
6 A, B, C, D, E, J, L, et cetera?

7 MR. GREACEN: Yes, these are the guidelines.
8 Otherwise, the whole document turns into mush, doesn't it?

9 COMMISSIONER BREYER: Right. That's what I
10 thought.

11 MR. GREACEN: And the guideline scheme turns into
12 mush.

13 COMMISSIONER BREYER: Right.

14 MR. GREACEN: There has to be something from which
15 to deviate. So that is my answer.

16 Then, the guideline sets forth adjustments for
17 prior offenses, prior record, for other characteristics
18 that would be particularly important to this type of crime,
19 in effect, instructing the judge to move up or down the
20 scale from the benchmark to take into account these factors.
21 We would anticipate that these would change category to
22 category of crimes.

1 Then the guideline sets forth a number of potential
2 aggravating or mitigating factors for the purpose of drawing
3 to the judge's attention that these factors often occur in
4 this particular area of crime and that they should be
5 considered if they are there. They do not limit the judge's
6 ability to consider other aggravators or mitigators.

7 And then finally, there would be a more philosophi-
8 cal statement of the Commission's thinking, the considerations
9 that should guide the judge in applying this guideline in
10 this category of crimes. And you will see, Judge Breyer,
11 that in drafting this one, just as an example, we have
12 stuck in a limit to the extent to which probation might
13 be available for this type of crime.

14 COMMISSIONER BREYER: Well, the thing that threw
15 me the other way was you have two paragraphs that say,
16 "The sentencing judge should give primary weight to the
17 purpose of deterrence of other potential offenders where
18 he assaults a high government official." They you say
19 he should give primary weight to the purpose of incapacitation
20 in imposing sentence on an offender convicted on two previous
21 occasions of crimes involving physical violence. I didn't
22 know what you meant by saying he should give primary weight

1 to one purpose or another, because he has no choice; there
2 is no room for him to give weight to the one thing or
3 the other. If the person is in the category, that's the
4 sentence.

5 The only time, under the way you've just
6 explained it, one would give weight to the one or the other
7 is if one were operating outside your categories of the
8 Guidelines.

9 MR. GREACEN: That's right. So this would
10 then be the guidance as to how to operate outside, and
11 whether to operate outside.

12 COMMISSIONER BREYER: Oh. So in other words,
13 what you are saying is you are trying to give instructions
14 for what deviate from the guidelines, and then, when you
15 do deviate from the guideline, take all your things into
16 account you've written on pages 53 and 54, as helps to the
17 judge who wants to deviate.

18 MR. GREACEN: That's right.

19 COMMISSIONER BREYER: Well, then, I don't really
20 think it's very different from what we've proposed except
21 that you are providing a very sort of interesting set of
22 suggestions as to when and how deviations might occur.

1 Am I right or not? I want to be corrected if

2 I am wrong.

3 MR. GREACEN: Well, we perceive it as fundamentally
4 different.

5 COMMISSIONER BREYER: Well, what's the difference?
6 What's the difference? I mean, what you've done in A through
7 L, it's a very intelligent, perfectly sensible list of
8 things that put people in boxes A through O, and if I looked
9 at page whatever it was, 34 of the blue book, I discover
10 another set of factors for putting people in boxes. Actually,
11 they weren't A through O boxes, there were a few fewer
12 boxes -- or maybe there were a few more.

13 Now, I like a lot of the things on your list,
14 and I didn't like all the ones in your initial list. Some
15 of yours, I don't think are perfect, nor were some of the
16 initial ones, but it seems to me that the approach is
17 identical.

18 You take assault and battery, you look at a lot
19 of things that put people in boxes, and you put them in some
20 boxes. And if I actually looked at your list, it is pretty
21 similar to the list that was in the first version. I'll
22 bet you took some of the things from there -- or, we both

1 ended up at the same point, and you have a few things I don't
2 like, to tell you the truth. But that's all all right, that's
3 all right.

4 I'm trying to get at what is the difference in
5 principle. What is the difference in principle between
6 what you have done in this appendix and what was in the
7 blue book? I don't see it.

8 MR. GREACEN: We tried to do a whole lot less
9 than the Commission tried to do.

10 COMMISSIONER BREYER: You have fewer distinctions.

11 MR. GREACEN: Many fewer distinctions.

12 COMMISSIONER BREYER: All right. I'll look at
13 the penalties. You have a weapon; you have serious bodily
14 injury; you have whether it is a high government official --
15 that's one I think I would leave out -- I don't know if
16 it maybe deviates from the guidelines; people can argue
17 about that -- whether he had a weapon, intended to cause
18 serious injury. Did he cause serious permanent bodily
19 injury? Did he cause serious bodily injury? Did he
20 just cause bodily injury? Did he intend to cause injury?
21 Was the victim the President of the United States?

22 I think those are most of the things that

1 were in the initial draft. There may have been some others
2 there, and you may have simplified. What else is there?

3 MR. GREACEN: Many of the things that are in
4 the aggravators are taken out.

5 COMMISSIONER BREYER: Okay, I see, and you put
6 it over in the discretionary part.

7 MR. GREACEN: Yes.

8 COMMISSIONER BREYER: I think that makes sense.
9 All right. So you have done two things. One is you have
10 taken the initial set of aggravators that were in the
11 assault and battery section and moved them over -- I am
12 sorry to do this, but I am trying to get it clear in my
13 mind. You have taken some of those things and you have
14 simplified it by moving some of those things into the
15 discretionary section.

16 And the second thing you have done is that you
17 have expanded the discretionary section -- i.e., discretionary
18 meaning, "Judge, depart"; that's what we mean by that, and
19 you have given him broader latitude to do that.

20 MR. GREACEN: Yes.

21 COMMISSIONER BREYER: And those are the two
22 differences that you see.

1 COMMISSIONER BREYER: And there are some other
2 differences, there are some other difficult problems that
3 we could talk about, but those are the two differences.

4 Now, you call yours "charge offense", and we've
5 called ours "modified real offense", but I don't see that
6 there is a difference there. I mean, our assault and
7 battery section refers to 18 U.S.C. 111, but it doesn't mean
8 it is limited to 18 U.S.C. 111. Do you mean yours to be
9 limited to 18 U.S.C. 111, that is that the prosecutor has
10 to charge 18 U.S.C. 111 to plug your guideline in -- or are
11 you willing, for example, to plug in your guideline if the
12 offense charge was bank robbery, and during the course of
13 the bank robbery, the person went off and hit a guard over
14 the head? Do you mean to do that, or not?

15 If you don't mean to do it, of course, if you
16 don't mean to do it, then you've got a real difference; then
17 you have pure charge offense sentencing -- and of course,
18 by doing that, you'll hand right to the prosecutor the decision
19 about whether the person goes to jail for three more years
20 or not. Do you want a ten-year sentence for bank robbery
21 or a seven-year sentence when he hit the guard? Whose
22 decision? The prosecutor's. Is that what you want? That's

1 pure charge offense. Do you want that?

2 MR. GREACEN: Our view is that those considerations
3 for the bank robbery and how the use of violence in the course
4 of the bank robbery is sentence ought to be dealt with
5 under the category of bank robbery.

6 COMMISSIONER BREYER: And so therefore you want
7 to say that the decision as to whether or not the bank robber
8 who hits the guard over his head, whether or not that person
9 goes to jail for three extra years is the prosecutor's.
10 Today, of course, the decision is the judge's. Today, of
11 course, the judge does take into account the fact that he
12 hit the guy over the head when he imposes that bank robbery
13 sentence. So the ABA is really saying, "We don't like the
14 fact that it's up to the judge today; we want the prosecutor
15 to decide it."

16 I would be surprised if you're saying that, but
17 I'd certainly be open to listening.

18 MR. GREACEN: To the extent that the prosecutor
19 by not charging the weapon can limit the maximum sentence
20 to the unarmed robbery, yes, that discretion is unalterably
21 transferred to the prosecutor.

22 COMMISSIONER BREYER: Oh, no, no, no. It's

1 much more than that, it's much more than that. Today you
2 can sort of limit what happens by choosing the statutes.
3 As soon as we move to a system where those numbers in the
4 statutes are for real, they don't operate as much of a
5 constraint. I mean, you see a bank robbery statute, and
6 the statute in there will be like up one to twenty years.
7 Now, there is not going to be a constraint in terms of what
8 you charge. The person who charges bank robbery gives the
9 judge enormous discretion to the charge.

10 Today what happens is that the judge sits there
11 and he reads the pre-sentence report, and he says, "Okay,
12 if this fellow hit the guy over the head in the course of
13 it, I'll up the sentence."

14 Tomorrow, under our system, in the modified
15 real offense, the same would happen, but only if the
16 judge, after an evidentiary hearing of some kind decides
17 that he really did hit the guard over the head.

18 Your system will say the judge won't give him
19 the extra three years; it will be up to the prosecutor to
20 decide whether to come in and charge that extra offense,
21 in which case he'll get the extra three years, or not to,
22 in which case, he won't. So what you've done is removed

1 the discretion from the judge and given it to the prosecutor.

2 MR. GREACEN: Only to the extent that the maximum
3 sentence allowable under law is so low that the judge cannot
4 apply the guideline. Now, let me explain what I'm trying
5 to say.

6 The guideline for armed robbery, or for robbery,
7 would set out vignettes.

8 COMMISSIONER BREYER: Oh. In other words, you're
9 saying when he charges robbery --

10 MR. GREACEN: He charges robbery.

11 COMMISSIONER BREYER: -- and now what you are
12 doing is you are telling the judge, "Judge, he's charged
13 robbery, bank robbery. Now up the sentence if he hit
14 somebody over the head."

15 MR. GREACEN: That's right. That vignette --

16 COMMISSIONER BREYER: Well, that's what we've
17 written in the blue book. Then we agree. I mean, the blue
18 book says you look to robbery, you look at bank robbery;
19 if in the course of the bank robbery the person committed
20 an assault, then you look and see under the assault section
21 what the punishment for that was, and you add it on.

22 MR. GREACEN: All right, and that's the part of

1 it that turns mechanical for us.

2 COMMISSIONER BREYER: Yes, correct, and I agree
3 with that. But we are going to change that. What we are
4 going to do, instead of just saying add on automatically
5 the penalty for assault, there will be a range of things,
6 and it will come to some kind of discretion, looking at
7 how seriously the guy is hurt, et cetera. All right, good.
8 I am sorry. I don't mean to -- I am not actually wasting
9 time from my point of view. That is, I am trying to focus --
10 then, I think what you call "charge offense" really comes
11 down, I think -- and correct me if I'm wrong -- to what
12 we've been calling "modified real offense." That is, you
13 look to the thing charged, and then you add on certain
14 specified things that are written there. Like, a physical
15 injury, hit over the head during the course of the robbery.
16 That's the road map. That's what we're trying to do.

17 And then the difference between your version and
18 what we have here are things that I think we are moving toward.
19 One is greater discretion to depart; more ranges, less
20 mechanical -- for example, bank robbery, hits the guy over
21 the head. All right. Don't just say, "Judge, add on
22 22 months." Say, "Judge, look at the situation and add on

1 between 5 and 15 months, depending on how serious the
2 injury was," for example, or depart if it isn't covered
3 here..

4 MR. GREACEN: That comes out about the same way
5 as the adjustments notion, yes.

6 COMMISSIONER BREYER: Yes. So, are we now talking
7 the same language?

8 MR. GREACEN: I think we are, although --

9 COMMISSIONER BREYER: See if you can think of
10 a difference, because I want to flush out the difference.
11 Now I think we are on the same track. If we're not, I want
12 to try to get at it.

13 MR. GREACEN: In both of our systems we are
14 constrained by the maximum sentence under the crime of
15 conviction.

16 COMMISSIONER BREYER: Oh, yes, but that isn't
17 much of a constraint.

18 CHAIRMAN WILKINS: We are constrained today by
19 that.

20 MR. GREACEN: That's right.

21 COMMISSIONER BREYER: That's not much of a
22 constraint in the new --

1 CHAIRMAN WILKINS: Let's take out time to study
2 this report that has just been submitted, and we'd like to
3 get back with you, Mr. Greacen, of course, and perhaps use
4 some of this as we move forward in the next few weeks.

5 MR. GREACEN: It's not copyrighted.

6 CHAIRMAN WILKINS: Good, good. And we won't
7 criticize the ABA on its guidelines, either, until
8 we have walked in your moccasins a while. But we do
9 appreciate it. That's what's so helpful. People criticize,
10 and we welcome that. That's why we're doing this. But it
11 is far more helpful to us to receive a suggestion or an
12 alternative in the concrete, as you have presented here,
13 so that we can analyze it and study it, rather than talk
14 in general terms about solutions that can be offered and
15 so forth. So we appreciate it very much.

16 MR. GREACEN: If the Commission had not come out
17 with the preliminary draft guidelines, it would not be getting
18 this kind of response.

19 CHAIRMAN WILKINS: That's right. We recognize
20 that.

21 MR. GREACEN: So we are deeply indebted to you
22 for doing that. You weren't ready to put it out, and it

1 took a good deal of courage to do it, and we admire you
2 for doing it.

3 CHAIRMAN WILKINS: Well, we have thickened our
4 skin and are certainly sensitive to it.

5 Commissioner Gainer?

6 COMMISSIONER GAINER: I was just curious, Mr.
7 Greacen, since you have now attempted walking in the
8 Commission's moccasins to the extent that you have prepared
9 Appendices A and B, would you care to hazard a guess as to
10 what proportion of the ABA's dissatisfaction is prompted
11 by the preliminary draft, and what proportion of the
12 ABA's dissatisfaction would be prompted by the Sentencing
13 Reform Act itself?

14 MR. GREACEN: It is my view that, with only
15 minor exceptions, the ABA supports the statute, and we do
16 not feel that we have significant quarrels with the statute.

17 The one major quarrel that we had during the
18 enactment of the statute was on the appeal, that the ABA
19 standards would allow appeal from any sentence, not just
20 those that deviated from the guidelines. And there may be
21 some other specifics. But in the main, we believe that
22 the statute that you were handed and asked to deal with

allows you to do what you want to do.

COMMISSIONER GAINER: One other matter. You have noted this morning, and you stated in your prepared testimony that you were concerned about a bureaucratic mechanical application of mathematical formulas or modeals, and contrasted that with what you appeared to find more to the ABA's liking on page 5, where you note "preserving an appropriate degree of discretion for lawyers and judges in the sentencing process."

I see that the Section on Taxation has some independent submission, which I have not yet had an opportunity to go through, but simply in seeing it there, it struck me that there may be an analogy between attempting to extract an appropriate penalty from a criminal defendant and attempting to extract a fair tax from a private citizen.

I was curious as to whether your Section on Taxation might be willing to abandon the "bureaucratic mechanical application of formulas" models in assessing individual tax and go instead to a system that would give an appropriate degree of discretion to lawyers and judges in determining what every individual citizen might

1 pay as their income tax for the year?

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2 If your section hasn't addressed this matter,
3 I am sure that with some clear thought, they might be able
4 to come up with a clear distinction. That escapes me
5 right now, but should you come across that, I would appreciate
6 hearing it.

7 MR. GREACEN: I see a profound difference,
8 Mr. Gainer, between the application of the tax laws and
9 the application of the criminal laws.

10 COMMISSIONER GAINER: Oh, but in the grand
11 tradition, which the ABA is happy to point out on many
12 occasions, I would be interested in hearing what that
13 distinction is.

14 If it is tradition, I don't think this morning
15 I will prolong the matter further by inquiring.

16 MR. GREACEN: I think it is a matter of principle
17 that the criminal laws have to do with the deprivation
18 of the liberty of citizens.

19 COMMISSIONER GAINER: And property.

20 MR. GREACEN: And property.

21 COMMISSIONER GAINER: And what else is taxation?

22 MR. GREACEN: One is not taxed to so many years

1 in prison.

2 COMMISSIONER GAINER: One is taxed to penury
3 on occasion.

4 MR. GREACEN: To what? To penury. That is so.

5 COMMISSIONER GAINER: I am simply calling into
6 question, as you may see, Mr. Greacen, whether the distinction
7 that you made with such verve is quite as well-founded as
8 the ABA might on occasion like to think and whether a little
9 too much obeisance is not occasionally paid to traditions
10 in the Anglo-American system of justice.

11 MR. GREACEN: It is a valid question. We would
12 strongly believe that these principles are ones that are
13 importantly rooted in our Anglo-American traditions, and
14 need to stay there, and they are not just old, encrusted,
15 ancient anachronisms; they are what give life to the
16 freedoms of Americans as opposed to others.

17 COMMISSIONER GAINER: Those are grand words, but
18 when you come across the specifics, let me know.

19 Thank you.

20 MR. GREACEN: Thank you.

21 CHAIRMAN WILKINS: Anyone else?

22 COMMISSIONER NAGEL: Yes. I have a series of

1 questions, and due to the lateness of the hour and, I am
2 sure, everyone's increasing appetite, what I'll do is just
3 briefly read them, as you to think about them, and I will
4 furnish you a copy if you would like.

5 I want to thank you again also for your very
6 thoughtful and constructive suggestions.

7 In your written testimony, you state that the
8 Commission has focused exclusively on the object of certainty
9 of Federal criminal sentences, apparently overlooking the
10 fairness to which the Congress it give equal weight. And
11 my question is, can you define for us "fairness" and tell
12 us the basis upon which you made the judgment that fairness
13 was not a concern in the preliminary draft.

14 Second, you indicated that justice requires
15 individualization. I would ask how you recommend that we
16 reconcile that emphasis with the legislative history of
17 the Sentencing Reform Act, one purpose of which was to move
18 away from a system characterized by individualization towards
19 a system characterized by greater uniformity and less
20 disparity.

21 On page 7, you state that, "Research has shown
22 that judges rarely consider more than half a dozen factors

1 in determining a sentence in a particular case. I would
2 ask if you would provide us for the citations for that
3 research since it is at odds with my own reading of the
4 research literature, and I think it underlies your emphasis
5 on fewer factors.

6 In addressing the question of current practice,
7 you state on page 19, "We do not recommend that current
8 sentencing practices be enshrined," but later in that
9 same paragraph, you recommend that proposed sentences be --
10 using your language -- "roughly consistent with current
11 practice."

12 My question is how shall we define "roughly
13 consistent", and which purposes or principles of sentencing
14 would dictate the decision to propose guidelines that are
15 "roughly consistent with current practices"?

16 You indicate that the ABA standards reflect the
17 opinion that existing sentence lengths should be decreased.
18 And I ask two questions here: First, is there anything
19 in our statute or its legislative history from which you
20 can infer strong Congressional support for this Commission's
21 embracing that same position; and second, do you have any
22 data from surveys of the public which would suggest that

1 the public embraces that same value and would have us do
2 the same?

3 And my final question is that there is a comment
4 On page 4 that you believe that the ABA's reaction is "an
5 accurate indicator of the Bar's reaction." And just as a
6 point of information, it would be helpful to us to know
7 whether the ABA membership actually voted on your statement
8 after careful consideration of the draft and whether you
9 have taken a systematic survey of the Bar or in some other
10 method to determine the consistency of their reaction with
11 Your own.

12 As I said, I'll be happy to furnish you with my
13 list. If you want to comment on any of these now, I'd
14 be happy, but in view of the time, I'll also defer.

15 COMMISSIONER CORROTHERS: Mr. Chairman, I think
16 most of us had some of the same questions, so if we could
17 receive a response in writing, with copies to all of us,
18 I think that would be preferable.

19 CHAIRMAN WILKINS: Is that satisfactory to you,
20 Mr. Greacen?

21 MR. GREACEN: I'd be glad to answer those
22 questions.

1 CHAIRMAN WILKINS: Fine. All right, we'll leave
2 it at that, then.

3 We'll be back in touch with you and Ms. Robinson
4 as we work through the next couple months, and hopefully,
5 we'll begin to mesh our thinking.

6 Thank you very much.

7 MR. GREACEN: Thanks very much.

8 CHAIRMAN WILKINS: We have two more witnesses
9 before we break for lunch, also representing the American
10 Bar Association; in this case, the Section on Taxation,
11 Mr. John B. Jones and Ian M. Comisky.

12 Gentlemen, we are glad to see you. We don't
13 intend to rush you now at all. We are very interested in
14 this field, and have done a great deal of work ourselves
15 in looking at this area, and of course, your written
16 submission is probably the most helpful thing that we
17 will have received, because we need to analyze it and try
18 to implement the ideas that you give us.

19 MR. JONES: Thank you, Mr. Chairman.

20 Our statement identifies me as Chair of the
21 Section; Ian Comisky is Chair of our Task Force which
22 prepared the written statement. And I really am pleased

1 to tell you that our oral comments will be brief, because
2 since I didn't prepare the written statement, I can say I
3 think it sets forth our position very well.

4 We are speaking for the Section because we thought
5 it would be helpful to this group to get down into a large
6 area of law with rather specific context and be sure that
7 the Commission understands some of the particular considera-
8 tions.

9 I think we also worry that when somebody sits
10 down to think of a problem about sentencing, they say, well,
11 let's start with tax because that's easy -- we've got the
12 dollars, and everything is dollars up and down -- and as
13 you might imagine, we don't really think that that's a fair
14 characterization.

15 My own experience in criminal tax law goes
16 back to 25 years or so ago when I was working as deputy
17 to Judge Oberdorfer, from whom you will be hearing later,
18 and I did have the feeling then, and I am sure it is still
19 true, that there are two large categories of tax evaders,
20 and I'd just like to plan them in people's minds so that
21 they will realize the disparity of situations with which
22 one may be dealing.

1 One category of evaders might be a husband and
2 wife who work very hard to run a retail operation, and they
3 work so hard they don't think Uncle Sam is entitled to
4 a large share of it, and they systematically arrange to keep
5 10 percent of their business off their books year-in, year-
6 out. And let's just for argument say they evade \$10,000
7 of taxes over three years. I think those are hardcore
8 criminals, if you will.

9 But another case -- and it comes up all too
10 frequently -- it is part of the problem that everybody is
11 exposed and has duties under the tax system -- people get
12 into situations of stress -- it might be health, marital
13 difficulties, business reverses, what-have-you -- and they
14 get a little bit behind. They miss a year. And there are
15 so many people who do that who just simply can't catch up;
16 they don't know, they can't get their act together in those
17 pressure circumstances enough to write their situation to
18 Uncle Sam, and three years go by, and they are out a lot
19 of money.

20 But the situation is really quite different from
21 the first case I gave, and of course, there are many variations
22 on that theme, but the dollars involved are not the sole

1 measure of variety there, and they are very difficult
2 to quantify.

3 Our second point has to do with severity of sentence,
4 and that's a point that has been made by others. We submitted
5 a rather complex table based on Internal Revenue Service
6 figures. I think perhaps it needs some explanation and
7 detail, which we would be happy to provide to staff. It
8 is long and lengthy. It is clear that the guidelines proposed
9 to apply to the sentences would be a very dramatic, lengthening
10 of sentences in the tax field as well.

11 It is also true that you talk as if amounts of
12 dollars in tax cases were constant. There are civil dollars
13 and criminal dollars. People put in the indictment what
14 they can prove to criminal standards; there may or may not
15 be other dollars. These guidelines will put a tremendous
16 premium on resolving that, perhaps requiring detailed trials.
17 Tax trials are long, they take a lot of detail and a lot
18 of time on the stand, and it is not very easy to shortcut
19 it.

20 One thing that seemed to us that was not
21 appreciated by the drafters is the little catch-all of let's
22 add the unlawfully obtained income to the tax deficiency

1 in order to obtain length of sentence. Just to take one
2 obvious case, what if you paid tax on the illegally gained
3 income. You might have \$500,000 of illegally gained income.
4 The charge was that he forgot \$20,000. You have a \$10,000
5 deficiency, or something like that. And then you would add
6 the \$500,000 of illegally gained income, just because it
7 was illegally gained. And we also think that the presumption
8 that income is illegally gained has Constitutional dimensions,
9 particularly in the context of a criminal trial. We say
10 that you can double or triple the penalties under that
11 clause. And I guess if you want to take that route,
12 I'd suggest that we find some tax experts to help you make
13 it more rational.

14 We understand what the Commission is driving
15 at, but it just ain't that easy to do.

16 We have at the end put five suggestions peculiar
17 to tax which we are sure that conscientious judges and even
18 prosecutors would have in mind in determining what was
19 appropriate sentence. One of the ones -- this draft goes
20 entirely on the nature of amount of dollars. Obviously,
21 the percentage of understatement makes a difference. If
22 somebody has \$10,000 of income, it is hard to just find

1 an innocent explanation forgetting about \$5,000. But if,
2 on the other hand, that person has \$200,000 of income, it
3 is conceivable that the \$500,000 was overlooked.

4 We agree with the character of the source of income.
5 We think that is somewhat consistent with your own. We do
6 want to see to what extent a particular tax charge relates
7 to tax charges on other people, whether it is isolated,
8 whether it is conspiracy. In tax practice, is is very
9 serious when somebody "cooks the books" in order to hide
10 a tax deficiency. That would be very strong evidence of
11 bad intent and entitled to, under your system, a number of
12 penalty points.

13 Instructive activities can also take place
14 while the investigation is going on. There can be
15 remedial measures which are taken; if the man, when
16 confronted with the problem, cooperates in the
17 investigation and paying his tax, surely, that is relevant.

18 So I think we have made these points in our
19 statement, and we are glad to answer questions now or later.
20 We are in Washington and available to meet with you and
21 perhaps perfect this statement a little. I will be glad
22 to answer any questions.

1 CHAIRMAN WILKINS: Thank you very much.

2 Perhaps it would be good for us to take a look
3 at your statement in detail and go back to the drawing board
4 a little bit and get back in touch with you. Perhaps you
5 could visit with us, spend a couple of hours. This is
6 where we find a great deal of help from the practitioners
7 in the field, and this is to whom we look for this type of
8 help.

9 MR. COMISKY: We are available, and we would be
10 delighted to meet with the Commission at its convenience.
11 This obviously is generated by individuals who practice a
12 lot of the time in the criminal tax area in particular, and
13 the comments summarize our major concerns.

14 Just to go over one point in a tad more detail,
15 we were very concerned in the tax area with differentiating
16 between evasion and tax perjury, number one. We don't
17 believe the guidelines differentiate sufficiently on an
18 adequate basis between a full statement tax offense and
19 evasion offenses. The evasion offenses are treated very
20 severely and very strictly, and the tax perjury charges
21 under 7206(1) and (2) are treated, it appears, with great
22 leniency. In this area, perhaps, going into a lot of the

1 comments, we believe that tax perjury is often a more
2 serious offense than a tax evasion case, because often
3 tax perjury or false statement is charged where you cannot
4 prove a specific amount of tax due, but the circumstances
5 arise such as in a payoff type situation where improper
6 deductions are being made to generate, for instance, our
7 example was a payoff to an IRS agent, and a small amount
8 of a bribe to an IRS agent could be considered much more
9 serious than an evasion of a significantly greater amount
10 of tax. That is one area we believe the Commission should
11 look at in much more detail, that analogy and that relationship
12 between those offenses.

13 Again, we would be delighted to meet again and
14 delighted to help in any way we can in the Commission's
15 efforts.

16 CHAIRMAN WILKINS: We will be back in touch with
17 you.

18 Do any Commissioners have questions?

19 COMMISSIONER BLOCK: Yes. I think this is a point
20 of clarification in terms of the background of the drafting
21 of the section. I think two factors should be kept in mind.
22 Part of the drafting was driven by the fact that there are

1 very few criminal tax cases every year, so every one counts
2 in the demonstration sense. I think general deterrence is
3 a very important, very important, concern, so that customizing
4 sentences to fit into "softcore" and "hardcore", I think
5 the burden is high here about whether we want to customize
6 sentences for "hardcore" and "softcore" tax evasion.

7 The second is that it is written against an over
8 \$90 billion shortfall in taxes, and that's a conservative
9 estimate. That's the IRS estimate, that the shortfall in
10 taxes may be some \$90 billion. So, one, tax evasion is a
11 serious problem, and there are very few criminal cases.
12 So I would just like you to consider that when we get
13 together again --

14 MR. JONES: The Tax Section yields to no one
15 in appreciating the terrific compliance problem. I don't
16 think that the criminal laws are going to solve it. But if
17 the sentence is going the right place-- it seems to us
18 that if the sentences bear some relation so the offense
19 and the contribution to the compliance problem, you are
20 going to get better results.

21 CHAIRMAN WILKINS: Thank you very much.

22 Well, we're running a little late, and that's

1 not unusual for these types of hearings, because we get
2 involved with the witnesses, as has been very evident.

3 We're going to take a short break so that we
4 can stretch our legs -- and the court reporter, perhaps,
5 needs a little break as well -- and we're going to grab
6 a quick bite to eat... We'll come back in 20 minutes. I
7 know we've got other witnesses here who are scheduled
8 to go, and others who we've had to put after lunch, and
9 I appreciate that very much. But we want to get back
10 on schedule as best we can.

11 So let's take a short break for about 20 minutes.

12 (Short recess.)
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AFTERNOON SESSION

(2:25 p.m.)

CHAIRMAN WILKINS: Our next two witnesses are two judges here from the District of Columbia, the honorable Abner J. Mikva, Court of Appeals, District of Columbia Circuit, and the honorable Louis F. Oberdorfer, United States District Court, here in the District of Columbia.

Judges, we are delighted to have you with us.

JUDGE MIKVA: Thank you very much, Mr. Chairman.

I will keep my statement brief. I have circulated copies of it to all of you, and I will just give you a few paragraphs from it.

I think perhaps some of my previous nonjudicial experience may be more relevant to some of the comments I want to make. I was in the Congress for five terms and in the State legislature for five terms. I shepherded a new criminal code through the State legislature in Illinois. I was a member of the original Brown Commission, which proposed many of the concepts that are now, I am delighted to see, in your draft. It is nice to know that seeds, even if they are planted a long time ago, sometimes come to fruition. That is encouraging.

1 But my comments are going to be very general,
2 because first of all you have to understand our Circuit
3 probably has less criminal cases than any other Circuit
4 in the country; because of the unique sovereignty of the
5 District of Columbia, we see less criminal appeals, I would
6 guess, than any other Circuit except perhaps the Federal
7 Circuit. So we are hardly the experts that can complain
8 that we are going to be undone by the mass of appeals that
9 we are going to see.

10 I will let my distinguished colleague, Judge
11 Oberdorfer, talk about some of the concerns that the
12 District judges have in our Circuit where again, even
13 with a lesser number of criminal cases they are concerned.

14 But I'd like to talk about the legislative
15 handles that you are dealing with. Perhaps because of our
16 close proximity to the Hill, and because our docket
17 deals so largely with the legislative process, we may
18 be more sympathetic to the Herculean task that you have
19 been given by the Congress.

20 We are aware of the time constraints that you
21 operate under, and we are aware that you were not authorized
22 to be a study commission or deal philosophically and

1 thoughtfully about some vague concepts and report back to
2 the Congress sometime in the future. You were given a specific
3 mandate to do something real and practical, and I recognize
4 that 991(b) is a very specific set of marching orders
5 indeed.

6 But taking all of those obvious observations
7 into account, I join in the concern that has been expressed
8 by others that maybe the Commission may have bitten off more
9 than the courts are able to chew.

10 If I can cite on example from my history, the
11 late Senator Ervin and I collaborated on the Speedy Trial
12 Act -- I don't mention that around too many trial judges;
13 they still don't think it is a very good idea, and it certainly
14 is not a perfect piece of legislation -- but it has worked
15 reasonably well in achieving the goals that its sponsors
16 sought to achieve. And that is that, in a much smaller,
17 obviously, but not too dissimilar way, the Speedy Trial Act
18 also sought to change some deeply ingrained patterns and
19 procedures in the Federal courts.

20 I think that the reason it succeeded was that
21 it contained some safety valves, some escape hatches, some
22 pressure-relieving devices that allowed the courts and

1 the lawyers some leeway in the behavior-changing commands
2 that the statute put on the courts.

3 And while it is probably true of all law reform,
4 I think it is especially true when you are dealing with
5 Article III judges that judicial reform must be incremental
6 or it won't be at all.

7 And I am not unmindful of the mood in Congress
8 or the mood in the country that led to the statute under
9 which you labor. I have seen the legislative history, and
10 I was in Congress for much of the early debate on this whole
11 concept of sentencing reform. But I don't think that incre-
12 mentalizing your reform in any way violates your mandate
13 or Congressional intent.

14 The statute creates this Commission as an ongoing
15 body. Since it took us 200 years to get into the mess that
16 we are in as far as sentencing is concerned, I don't think
17 it is fair to assume that Congress expected you to solve
18 the whole thing this year. Congress wanted truth-in-
19 sentencing -- that was a popular, catchy, political phrase
20 that I heard over and over again which clearly is in the
21 statute. They wanted to address the problems of disparity
22 in sentencing. They wanted to emphasize the protection

1 of society over the previously unsuccessful hopes and
2 aspirations for rehabilitation.

3 I think those legislative aims and aspirations
4 would not be violated if the guidelines contained some of
5 the relief valves that I've talked about above.

6 For example, the sentencing guidelines now
7 make probation a very "sometimes" thing. Yet you have
8 heard over and over again that the Federal Probation
9 Service is a well-working, well-functioning institution.
10 I don't think we ought to throw it out. I think the
11 guidelines could authorize some variation of what is now
12 called the split sentence, where the trial judge could
13 calculate the prison sentence under the guidelines but
14 would still be authorized -- and again, I'm putting aside
15 the A and B violations, which clearly probation is not
16 allowed for -- would still be authorized to grant probation.
17 If probation was violated, the defendant would be obligated
18 to serve the guideline sentence. Such a device might
19 alleviate some of the current concerns that the proposed
20 guidelines will simply overwhelm our prisons.

21 It might also alleviate some of the concerns
22 that plea bargaining either will become a facade or

1 nonexistent altogether, depending on whether the guidelines
2 leave any running room or not.

3 And I don't think that it is likely that such
4 a proposal would swallow up the rest of the guidelines. I
5 think the Federal judges understand the awesome responsibility
6 they have for opting for probation as opposed to incarceration.
7 But disallowing it altogether, all at once, it seems to me
8 creates more consequences than our justice system can
9 digest.

10 I was nodding vigorously -- I apologize for trying
11 to influence the jury -- while one of my predecessors was
12 talking about the need to try to retain the use of restitution
13 as one of the weapons in the arsenal of criminal justice
14 that came into the Federal laws, painfully and with diffi-
15 culty, and it is there. But there is nothing in the mandate
16 that you were given that says you were supposed to take
17 restitution into account. I think you have to look at the
18 fact that the legislative process itself is incremental,
19 and that all of the previous statutes that were passed
20 didn't get wiped out when Congress set up the sentencing
21 commission.

22 Let me just say a word about the numbers. If

1 as it appears, the specific numbers that are on the
2 preliminary draft will mean substantially longer incarceration
3 for more Federal offenders, I earnestly hope you will change
4 those numbers. I say this not because of some compassion
5 for the people who are convicted of violating our Federal
6 laws -- I have been a judge long enough and have visited
7 enough prisons in my life to know that most of the people
8 whom I sent to our prisons deserve to be there -- but my
9 concern is for the institutions and for these precious
10 Concepts that I think we are trying to get established in
11 our Federal justice system.

12 Congress has nowhere indicated its readiness to
13 spend the billions of dollars that would be necessary to
14 house an increased number of Federal prisoners for substan-
15 tially longer periods than now. If the Federal system
16 of penal institutions becomes overloaded in the same manner
17 that many of our local and State institutions, the fruits
18 of this reform will be very bitter indeed.

19 We have here in Washington situations where the
20 local law enforcement officials literally have to drive
21 prisoners around in a van, waiting for spaces to open up
22 in the local jail so that they don't violate a

1 Constitutionally-mandated Federal court order not to put
2 anymore prisoners in that jail. If something like that
3 were to happen to our Federal institutions, I think it would
4 be a disaster.

5 And I want to say that I read that legislative
6 history as carefully as I know how, and I have read the
7 statute as carefully as I know how -- I was even there for
8 some of the earlier debates -- and I don't think that the
9 language of the statute itself indicates a consensus in the
10 Congress that the present sitting time is inadequate overall.
11 If the consequences of the numbers proposed by the Commission
12 are anywhere near as dire as predicted, the overcrowding
13 problem would overwhelm any good that otherwise might be
14 achieved.

15 As I indicated to you, my comments were general.
16 We can afford to be dispassionate and objective on our
17 Court of Appeals because, as I say, even with the guidelines
18 as they stand, we would not anticipate seeing too many
19 appeals. But as Federal judges concerned about the entire
20 system of justice, we want to see the Commission's product
21 work. We want to see our colleagues accept it not only as
22 the law of the land, but as something that can alleviate

1 a problem that we all concede has existed. And as someone
2 personally who has worked in the vineyards for a long, long
3 time, I have a special interest in seeing that the Commission's
4 efforts succeed.

5 I share the believe of my former colleagues in
6 Congress that the parole system simply was not working as
7 it was being implemented in this country. Whether it could
8 or not under a different set of rules, I don't know, but
9 it wasn't working. And I think that this concept of
10 truth-in-sentencing, of something resembling flat time, was
11 important to come into being, and I applaud the Commission
12 for carrying out that piece of its mandate faithfully.

13 And as one of your strongest rooters, I hope you
14 can pare back sufficiently elsewhere to allow our courts
15 and our penal system to digest your product. It would be
16 a tragedy if the unintended but predicted chaos of 1987 would
17 force the Congress to revisit the subject in a way that
18 would close up what I consider a very a important window
19 to address the problem of sentencing reform.

20 I would like to ask if you would hear from my
21 distinguished colleague, Judge Oberdorfer, who can be much
22 more specific than I can.

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MEMORANDUM

TO: Central Files
FROM: Cary Walters *CW*
DATE: January 9, 1987
RE: Judge Oberdorfer's Revised Testimony

Please note that the following testimony made by Judge Oberdorfer contains revisions. Original testimony, in addition to Judge Oberdorfer's memorandum documenting these revisions, are attached to the end of this document.

CHAIRMAN WILKINS: Thank you very much. Judge Oberdorfer?

JUDGE OBERDORFER: Mr. Chairman, before I get specific, I,m going to speak even more generally than Judge Mikva did about two matters.

I have been sitting here, as you know, today and yesterday, and I was reminded by the testimony of John Jones of the ABA, who was my colleague in the Tax Division, that I spent more years than I like to remember working with the Internal Revenue Code. I bring to you the thought that when the Internal Revenue Code of 1913 was adopted by the Congress, first of all, it was a very simple, relatively simple, document then; but the Treasury Department did not try to undertake to anticipate all of the transactions that would be governed by, or affected by, the Internal Revenue Code.

I think that that is germane to the recommendation that you heard, at least from many judges; and that is, as Judge Mikva just said: Take it easy. Se how this thing works.

Going back to the Internal Revenue Code for a moment, it was originally sort of a common law, and the

interstices were worked out by an interrelated process of regulation and decision. Supreme Court decisions were very important in the development of tax law.

Then, it got out of hand, and, as you know, one of the most popular things in recent years has been simplification. You've got an opportunity to do simplification before you have a field full of kudzu.

The other general statement that I'd like to make relates to my observation that every judge -- certainly every District judge whom you've heard and, I know, every one of my colleagues, at least those who were at lunch the other day when we had a conversation about this -- is concerned, and I mean very concerned, they are not lightly concerned, or politically concerned, but concerned as judges, as trustees for the power committed to us by the Constitution and by the President after confirmation based on a screening process.

That led me to where I was yesterday, which was with a jury. Every time we charge a jury, we say in the first paragraph what the function of the court is; and then we say, "The function of the jury is to sit as judges

of the facts." And we reiterate, "Remember that you are not partisans or advocates in this matter; you are judges." We don't expect uniformity from juries. The public doesn't expect uniformity from juries.

I suggest to you that one reason we have been allowed by the Supreme Court and by the Constitution to have an expeditious disposition of sentencing proceedings is because, traditionally, a sentence has been treated and acted upon as a matter of judgment more than a matter of fact. The complications that so concern my colleagues, and I think concern all the District judges, about the procedure that would be involved if we go too far into having to find facts, make findings of fact the way we would after a bench trial, supported only by evidence -- and the law is full of debates about what is evidence -- is that you may have and Congress may have pulled up anchor from the basis on which we have been allowed to proceed officially on a Constitutional basis, you may be a matter of judgment into a matter of fact-finding and a matter of evidence and a matter of adversary process.

That is why I think you've gotten, as you would have certainly at our lunch table the other day if you had been there, a

firestorm of concern, not reaction, not rebellion, but concern by people who have been, over a lifetime, use to large responsibility based on an exercise of their informed and independent judgment. And it may be that this is Congress' problem, not yours. It may be that you are just being good soldiers and doing what you're told, and that's fine.

But one of these judges pointed out to you this morning, that subparagraph 20 of some section invited you to go back to the Congress with changes in your mandate. And I suggest to you that you may find your work in the docket in the Supreme Court where there will be at issue scores and hundreds of sentences that have been imposed by a process that was not constitutional due process.

You all have read the McMillan versus Pennsylvania decision more carefully and prayerfully than I have, but I did read it. It was a five-to-four decision. There is a heavy emphasis, in Justice Rehnquist's opinion, on the fact that they were dealing with a State process. He talks about this Frankfurtian concept of the States as a laboratory of experiment. I certainly wouldn't think that a lawyer would violate Rule 11 if he attempted to

raise the question of whether or not, for example, your preponderance-of-the-evidence suggestion, valid though it may be with respect to State sentences, has any validity in a federal environment.

That is the generality.

My specifics are really an echo, a pale echo, of what the other judges have said this morning. We are concerned about the threatened waste of the strength of our probation service. We think we have an outstanding probation office here. I had the privilege this Spring of chairing a search committed for a new director of our probation office. I had a chance to interview those people and look into their work. I hadn't been familiar with really before, except for the one man who comes in and advises me on sentences. I can testify to something that at least would be the basis for a finding that these people do remarkably fine work. They prepare, as you know, our presentence reports. In my case, they confer about sentences, and they have a hands-on relationship with probationers that is remarkable.

Indigenous to our particular docket is the fact that a large plurality of our criminal cases--and we don't have the volume of criminal cases that most of you all .

have -- a large plurality of our criminal cases are drug-related: people committing crimes, not just drug crimes, but stealing checks and forging checks and bank embezzlement and those kinds of things that they wouldn't do except that they are feeding their habits. And we use probation and the drug aftercare facilities of our probation office, we think, very successfully. Of course, in the few criminal cases we have, we get pleas in most of them. We would be drowned by an aggressive defense of our drug cases and -- I don't need to go into it again -- by all of the complications that we see in the procedural hazards, the unexplored procedural world that we will emerge into, if we have evidentiary hearings on sentences. Preponderance of the evidence beyond a reasonable doubt isn't really the concern.

Those are my thoughts. The other things that I have here, gentlemen and ladies, are reprises of what other judges have said better and more carefully than I could, and I would yield to questions.

CHAIRMAN WILKINS: Thank you very much. We appreciate your thoughtful comments.

Questions from Commissioners to my right?

1 (Pause.)

2 CHAIRMAN WILKINS: To my left?

3 COMMISSIONER BREYER: I have one, because I
4 know that both of you very distinguished judges have lots
5 of experience in the area that you are talking about, and
6 I just want to have, perhaps, Judge Mikva reiterate. Listening
7 to Judge Oberdorfer's suggestions -- and I think I would
8 characterize the suggestions, in my mind, under the category
9 of increase the range across which the judge can exercise
10 judgment. That's basically what he is suggesting.

11 And there are, of course, many, many ways of doing
12 that, through the use of ranges in the guidelines, through
13 the encouragement to go outside, et cetera. But do you think
14 -- because we did hear this morning testimony to the effect
15 that if we did that, Congress, that entity, would disapprove
16 of what we were doing, because to the extent that we increase
17 the range over which judges exercise judgment, we increase
18 the possibility of disparity. Now, that's of course true.
19 But do you, then -- because you particularly, Judge Mikva,
20 I know of few people, if any, more knowledgeable than you
21 in this area, since you worked in Congress on this particular
22 legislation in particular -- do you think that would be

1 a serious problem were we to adopt this suggestion?

2 JUDGE MIKVA: First of all, whatever all of you
3 agree on, even if it is unanimous and even if it is attested
4 to by all of the judges and 30 angels standing, swearing
5 on a bible, is going to come in for some criticism in the
6 Congress. I'm not telling you anything you didn't know.
7 There is no conceivable proposal that all 535 prima donnas
8 could agree on. Even when my colleague George MacKinnon
9 was there, it wasn't that collegial a body, and it
10 isn't any more collegial since he left.

11 I think that the Congress is looking to you to
12 come up with a workable system, and I think that they will
13 respect not only your labors and not only the variety of
14 views that are expressed both on the Commission and that
15 You have taken the trouble to hear, but I think they will
16 respect the notion that you are putting your imprimatur
17 on a set of recommendations that are not the last word in
18 sentencing reform, but the first word in sentencing reform.

19 If you say, "This is how far we think we can
20 go now, and we're going to look at this and continue to
21 work on some of these areas," Judge Breyer -- I am like
22 Drew Pearson; I guess right on what Congress is going to

1 do, I am 97 percent right 12 percent of the time -- but it
2 is inconceivable to me that they would veto that effort.

3 COMMISSIONER BREYER: Thank you.

4 CHAIRMAN WILKINS: Thank you.

5 George?

6 COMMISSIONER MacKINNON: The invitation to go
7 back to Congress is a good suggestion, but we've tried it.
8 We have already been back. And we got our answer, and it
9 was pretty much, "No", absolutely and unqualifiedly "No".

10 So I just put that in the record so you won't
11 think that we hadn't thought about it.

12 JUDGE MIKVA: I am aware.

13 COMMISSIONER MacKINNON: I think, Judge Mikva,
14 your comment about the split sentence, I would suggest that
15 you submit a proposal where we could, within the statutory
16 framework that we are operating here, authorize a split
17 sentence. We have been around now, five or six hearings
18 all around the country, and nobody has ever come up with
19 anything like that, and no person on the Commission has
20 really been able to come up with it, although we have been
21 focusing on a lot of things, and maybe we could if we
22 really got down to some more experimentation. But I'm

sure we would most welcome any suggestion that would achieve that result.

Judge Oberdorfer, having read McMillan versus Pennsylvania, how did you read that case? Didn't you read that they could go outside and take in -- well, it said that they could take in a factor as a sentencing consideration and weave it into the sentence that was not charged in the indictment.

JUDGE OBERDORFER: I understand they said that, but I also had a big paragraph in there about federalism.

COMMISSIONER MacKINNON: Well, do you think that the States have any more federalism --

JUDGE OBERDORFER: Do I think that the due process clause has a different meaning applied to the States than it does to federal law? The Supreme Court has a supervisory responsibility over the federal courts that it doesn't have over the State courts, and there is certainly a body of doctrine and there was once a body of doctrine, and I think there are probably embers of it still in the fire, and I see them in that case, that say that the Supreme Court should be more deferential to matters of this kind where there are, in effect, experiments by States.

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The Supreme Court might well reach a different result.

Just reading the Supreme Court tea leaves, they didn't put the emphasis in federalism in there for nothing. Somebody asked for it, and that may be the fifth vote. It is a five-to-four case.

COMMISSIONER MacKINNON: Well, do you mean that they would let the States go further --

JUDGE OBERDORFER: Yes.

COMMISSIONER MacKINNON: -- than they think that the Federal government ought to go?

JUDGE OBERDORFER: Yes.

COMMISSIONER MacKINNON: It would just seem to me it would be the other way around.

JUDGE OBERDORFER: Well, if the Supreme Court agrees with you, then this will be all right; if they don't --

COMMISSIONER MacKINNON: The clause is the same, "due process".

JUDGE OBERDORFER: Well, there is due process and there is due process, just like there is arbitrary and capricious and arbitrary and capricious.

COMMISSIONER MacKINNON: Well, my experience on this is not like Judge Mikva's, who says that criminal

1 cases are a minor part. When I came on this court for the
2 first ten years, it was our major part, and we had more
3 criminal cases than any Federal court in America. And we
4 dealt with them in all phases.

5 My question is, you talk about increasing the
6 range -- how do you get around the 25 percent that the
7 statute prescribes?

8 JUDGE MIKVA: I think that that is one of the
9 limitations that, obviously, you live with, and the range
10 of -- that would be something you would have to go back
11 to Congress for. And let me indicate to you that I didn't
12 suggest that.

13 Now, when you are actually talking about the numbers,
14 the actual numbers, I think that the statute does say that
15 it shall vary 25 percent. But there are other kinds of
16 judgment factors that can be increased, and indeed you have
17 provided for many of them in your sentencing guidelines.
18 I realize you have been charged with trying to turn the role
19 of a sentencing judge into that of an automobile mechanic,
20 but you haven't done it, and if you tried to do it, you
21 didn't succeed. There obviously is a lot of judgment that
22 a sentencing judge is still going to exercise.

1 The concern that Judge Oberdorfer and I have is
2 that you have hamstrung the judges in so many areas where
3 again, it isn't that I am making a plea for the dignity
4 or feelings of the district judges -- I don't think the system
5 can work if you overload the evidentiary hearings the way
6 Judge Oberdorfer suggested or if you overload the prisons.

7 COMMISSIONER MacKINNON: Of course, people that
8 have tried a lot of cases generally, when they get to that
9 problem now, they pretty well handle it at the time of
10 sentencing, whether there is any dispute in the probation
11 report. They don't get into a lot of hearings.

12 JUDGE MIKVA: But your guidelines suggest that
13 some of these must be done by way of evidentiary hearings.
14 That's part of the problem.

15 COMMISSIONER MacKINNON: Well, I know what the
16 original draft says.

17 JUDGE MIKVA: Okay. I have not seen the subsequent
18 draft, and I am delighted to hear that that particular
19 concern has been obviated.

20 COMMISSIONER MacKINNON: There are a great many
21 things in here, and I cannot overlook at this present time
22 and evade commenting on the fact that Section 991 and

1 subsequent of Title 28 is by far not our only limitation.
2 It is all the sentencing provisions that are incorporated
3 in the criminal code around 3553 and Title 18. And if you
4 can ever show me a Federal statute that has ever been
5 written that has more things that says you can do and you
6 have to do and other things that you can't do, I have never
7 seen a group of statutes, and they both must be read together,
8 because they refer to each other. I have never seen a statute
9 with greater restrictions.

10 JUDGE MIKVA: And some of them, Judge MacKinnon,
11 as you know, tell you to march in opposite directions at
12 the same time, and --

13 COMMISSIONER MacKINNON: They tell you to be
14 "certain" and "flexible".

15 JUDGE MIKVA: That's right. And one of the ones,
16 it seems to me, that you have to take into account, because
17 this is one that, whether you go back to Congress or not,
18 you are going to end up dumping that in their lap, is where
19 they tell you, "Don't overload the prisons." And that's
20 a specific direction in the statute, and that the guidelines
21 should not be such that they are going to overload the prisons.

22 Well, you have heard witness after witness suggest

1 that if the numbers are anywhere near the way they are being
2 crunched out in the preliminary report, that's exactly what
3 is going to happen.

4 COMMISSIONER MacKINNON: Well, this represents
5 somewhat of a conflict among people in America on a lot
6 of subjects who think that this particular aspect of the
7 Criminal law can be made into a science. And you know and
8 I know that it has a lot of the qualities of an art. And
9 we are trying to blend the two together to conform to the
10 statute as best we can.

11 JUDGE MIKVA: That's why it is so reassuring,
12 Judge MacKinnon, to know that there are so many Rembrandts
13 on this Commission.

14 COMMISSIONER BREYER: With your Congressional
15 instinct, you say it is easy to say increase the range of
16 discretion over which the judges will exercise judgment.
17 Immediately, you pointed out that the statute says 25
18 percent. Now, the way that I think we can increase the
19 range of judgment is, let's suppose a bank robber with
20 one prior conviction -- or what it will say is it will
21 say, let's say, Level M. Level M is eight to ten years.
22 That satisfies the statutory requirement of the 25 percent

1 rule. But in getting to Level M, Judge, if this offender
2 has whacked three people over the head, you can add between
3 one and four levels, depending on how seriously you think
4 that person has been hurt. Now, you see, that's one way
5 of getting discretion in there.

6 Now, at that point, when we build that kind of
7 judgmental discretion in, we risk the Congressmen saying to
8 us, "Well, wait a minute, I said 25 percent." And of course,
9 at the end of the road, you only have the 25 percent discre-
10 tion, but in getting to the end of the road, you have enormous
11 discretion. You have violated the theory of the statute.

12 JUDGE MIKVA: Not if the -- in other words, even
13 the Congress recognized, as Judge MacKinnon just said, that
14 you could not turn this into a perfect science -- indeed,
15 if it were perfectly symmetrical, you wouldn't need the
16 25 percent leeway. They know that this is --

17 COMMISSIONER BREYER: So what I just said, you
18 think would be okay?

19 JUDGE MIKVA: Of course you could, and I think
20 that the answer to the Congress is, "You did not charge us
21 with removing all disparity. We have removed a substantial
22 degree of disparity, and we are going to continue to look

1 at it."

2 COMMISSIONER BREYER: All right.

3 COMMISSIONER MacKINNON: Judge, I want to hold
4 out to you the hope that you will come in contact with,
5 that the results of the cases that are appealed in the
6 Courts of Appeals, will fill in a lot of the blanks in these
7 particular cases.

8 Now, it is the history in Minnesota that the
9 guidelines have been written not in the guidelines, but by
10 the decisions, totalling over 350, in the Supreme Court
11 of Minnesota. And you are going to be in the same position.
12 You are going to have to pass along the reasons that are
13 given, and that provides a very substantial ground
14 for ameliorating over-strictness, over-liberality, and
15 everything else. And it does get back to the courts, and
16 it is not written in concrete -- but nothing is written
17 in concrete that is subsequently going to go before a
18 court. You know that. And I think our court is as
19 imaginative in that area as any court.

20 The final thing I want to say is that on
21 disparity, I don't think any person thinks that disparity
22 is going to be disposed of. Of course they are going to

1 be different, and they are going to look different to a lot
2 of people who don't know a lot about what is happening,
3 what kind of a man they had, what kind of an offense they
4 had. They are going to say, well, that's a disparate
5 sentence, as they do today.

6 But I think you will find that I think the
7 statute is aimed at wide disparity, great disparity. And
8 what we are going to have here is, well, the 25 percent,
9 that's a disparate basis right there. And we are going to
10 have disparity, but it is going to be a more reasonable
11 disparity, recognizing that that's about all you can
12 achieve in this particular area.

13 I wouldn't worry about the eventual outcome in
14 that respect.

15 CHAIRMAN WILKINS: Thank you very much, Judges.

16 Our next witness is Mr. Charles Sullivan. Mr.
17 Sullivan represents Citizens United for Reform of Errants.

18 Mr. Sullivan, we are delighted to have you with
19 us.

20 MR. SULLIVAN: Judge Wilkins and Commission
21 members, I think the best way for me to proceed would be
22 to plow through this statement, because I have tried to

1 state some specific suggestions that I want to be on
2 the record as correctly stating.

3 CURE, Citizens United for Rehabilitation of
4 Errants, is a national prison reform organization whose
5 membership is comprised of prisoners, ex-prisoners, families
6 of prisoners, and concerned citizens.

7 CURE started in Texas in 1972. My wife Pauline
8 and I are the founders of CURE and presently function as
9 the national staff here in Washington. Before coming to
10 D.C. in August of 1985 and expanding CURE to a national
11 organization, we spent 12 years in Texas as staffpersons
12 of Texas CURE.

13 In effect, we try to organize the consumers of
14 the sentencing guidelines, those persons whose lives are
15 directly affected. My comments are from that perspective.

16 Also, I have attended all the hearings of the
17 Commission here in Washington, and CURE has filed position
18 papers on all the issues considered at the public hearings.
19 In this latter regard, I have coordinated prisoner input.

20 Thus, when I say that my general reaction to the
21 Preliminary draft is extreme disappointment, I feel that
22 I have a record of involvement to state this position. In

1 fact, I am amazed that such progressive testimony and
2 discussion could produce a document that does not consider
3 alternatives to incarceration as true punishment.

4 In reading the draft, I thought for a minute that
5 I was back in the "lock 'em up" State of Texas.

6 I was hoping that the Sentencing Commission,
7 free from political pressure, would set an example for the
8 States by recommending modifications in the severity of
9 Present sentencing laws, breaking out of the "Can you top
10 this?" demagoguery in regard to sentencing is long overdue.

11 I would like now to make some specific comments
12 and then return and conclude with the biggest reason for
13 my overall disappointment. This final comment will be from
14 the rehabilitative perspective.

15 First of all, the specific comments. One, the
16 ability of the government to function effectively and without
17 disruption, on page 21 of the preliminary draft, is a reason
18 to enhance punishment in offenses involving the person.
19 For example, if the victim in a homicide is a government
20 official, then 36 points are added to the base offense
21 value. I would suggest that this principle be applied
22 to the mitigating factors as well as to the aggravating.

1 Why not a lessening of culpability for those Vietnam
2 veterans if their criminal behavior can be tracted to the
3 defense of their country?

4 Two, I would disagree on the classification of
5 the consumption of alcohol and drugs. At times I would
6 consider them mitigating rather than aggravating circum-
7 stances.

8 Three, there is also token treatment of non-
9 custodial sanctions in the draft. For example, there is
10 not any reference to victim-offender reconciliation or to
11 any other form of mediation. Obviously, victim-offender
12 mediation is impossible for some types of crimes. But the
13 guidelines should make reconciliation and reparation the
14 highest priority of the criminal sanctions, in the same
15 way the present provision of the guidelines permitting
16 restitution and community service, merely in combination
17 with imprisonment, can only compound punishment that is
18 already excessive.

19 Four, giving priority to restitution over a fine
20 is highly desirable. Certainly, a major component of
21 victim-offender reconciliation is restitution.

22 Five, there has undoubtedly been a laudable

1 attempt by the Commission to eliminate economic discrimination
2 in the guidelines, and I congratulate you on this. However,
3 there are still, I feel, some items. Sanction units assigned
4 to economic crimes in the white-collar category are far
5 more lenient than those assigned to street crimes. A compari-
6 son of the sanction units for fraud and for burglary reveals
7 how wide this disparity is.

8 Also, why does the unlawful possession of the
9 ghetto drug, heroin, have a base offense value of 18, while
10 the more middle-class drug of cocaine is considered less
11 serious, at 16?

12 Of course, I am not suggesting that cocaine
13 be increased to 18, but rather that heroin be reduced to
14 16.

15 Six, another suggestion of remedying economic
16 discrimination in the guidelines is the proportionate
17 ability to pay approach. For example, on page 124 of the
18 preliminary draft, acceptance of responsibility for the
19 offense should have, quote, "proportionate to his or her
20 economic status" added to restitution of a substantial
21 nature.

22 Noncustodial options should be available, too,

1 for enforcing payment of restitution and fines. These options
2 include extending the period over which the money is to be
3 paid, permitting payment by installment, substituting
4 community service, or omitting the fine in whole or in part
5 when default results from changed circumstances, such as
6 the offender's loss of employment or serious accident
7 or serious illness.

8 Seven, here, we would like to make a suggestion
9 on further refinement of the guidelines. If the current
10 offense involved is less serious and not related to the previous
11 offense, then a less multiplier should be used than a multiplier
12 for the same type of offense. An example of this would be
13 if someone has in his past a conviction for armed robbery
14 and then is picked up for, say, shoplifting, certainly they
15 should not be given the same weight as if the present current
16 offense is armed robbery.

17 Of course, CURE supports only an enhancement of
18 the offense if the criminal record indicates the offender
19 is presently serving a felony sentence. This was basically
20 Dr. Burton Scalloway's position, who testified this summer
21 before the Commission. As CURE sees it, juvenile convictions,
22 unajudicated offenses, and completed sentences should be

1 irrelevant in sentencing.

2 Eight, there is potential for abuse and psychologi-
3 cal injury factored into the base values as an aggravating
4 element. This is particularly disturbing when such a finding
5 can be based only on the preponderance of the evidence.

6 Nine, the provision for capital punishment was
7 eliminated from the new drug law. The Commission could
8 provide an example to the States, a way out of the legislators'
9 dilemma, if they would also recommend abolishing the Federal
10 death penalty.

11 Most of these comments have been gleaned from
12 the more extensive comments and analysis in CURE's written
13 submission. This submission consists of two papers -- one
14 from a prisoner, and the other from an individual who has
15 just returned from a northern European, people-to-people
16 study of alternatives to prison crowding. I think you will
17 find both of these perspectives very informative.

18 I would like to conclude with sharing my experience
19 on rehabilitation in Texas and its application to the
20 guidelines. Almost ten years ago in Texas, the Governor
21 and the legislature decided to get tough with criminals
22 by substantially increasing the severity of sentences. This

1 get-tough policy, however, was not matched with the doubling
2 and tripling of prison capacity as the policy required. The
3 impact was, obviously, overcrowding. The Federal courts
4 intervened, and the term "rehabilitation" was not only
5 secondary, but was given practically no emphasis as the
6 State confronted its daily overcrowding crisis. This crisis,
7 by the way, included 52 inmate-on-inmate killings over a
8 21-month period.

9 Today in Texas, the prison population has somewhat
10 stabilized, due chiefly to a substantial increase in good
11 time, up to three days for one, and a substantial increase
12 in paroles.

13 However, rumors about mass releases or kickouts,
14 as the prisoners call them in Texas, have replaced any
15 concern for rehabilitation in the mind of the prisoner and
16 in the mind of the administration. As I read the guidelines,
17 I felt like I was back in the Seventies in Texas. It seems
18 to me that you are setting the stage for a tremendous increase
19 in Prisoner population. Since you have no direct authority
20 over Federal prison capacity, and we are living in a Gramm-
21 Rudman era, the result will be massive overcrowding of the
22 already-crowded Federal facilities. This in turn will

1 provoke Federal litigation and daily crisis management.

2 In my 15 years of experience of working with
3 prisoners and their rehabilitation, I have concluded that
4 there are three elements that must be present in order that
5 a prisoner might begin to habilitate him or herself.

6 The first is that of uniform sentencing, for which
7 you are striving. Second is due process in sentencing and
8 also in disciplinary infractions in prisons. The third is
9 that a prisoner has to know where he or she stands in
10 relation to release. If this draft of the guidelines is
11 implemented, this third element will be lost, and in my opinion,
12 rehabilitation will be vitiated. Instead of prisoners possibly
13 asking themselves "how best to do my time", they will be
14 laying in, because they will think that the next kickout
15 is right around the corner.

16 What I'm saying is that if you have guidelines
17 that require, as I think you do, a doubling or tripling
18 of prison capacity, and can't fund this increase, the tail
19 of capacity begins to wag the dog of the guidelines instead
20 of vice versa.

21 Thus, I ask for the sake of rehabilitation that
22 you make certain, as your Congressional mandate states, that

1 you take into account the nature and capacity of the penal,
2 correctional and other facilities and services available.

3 Realistically, however, I think these guidelines
4 as they are presently drafted are the first step toward
5 more prison overcrowding, prison management by crisis, and
6 kickout.

7 And in this, I would like to recommend that the
8 Commission recommend to Congress that they institute what
9 they call the Michigan Plan or the Prison Overcrowding
10 Act where, basically, if there have to be people released
11 that they are not released en masse, but that nonviolent
12 prisoners, say 30 days are taken off each sentence, so that
13 it is not one of these things where you open the gates of
14 the prison and let out so many, which causes such problems
15 politically, et cetera.

16 But I think it would be a good time to recommend
17 to Congress, even before the guidelines become implemented,
18 that they pass the Michigan Plan or the Prison Management
19 Act -- it is called different things in different States.

20 I would like to thank the Commission. I feel
21 that -- and I have said this to many people -- that it is
22 a very open process that you have, and I certainly compliment

1 you on this. I don't know if, as I've said, the progressive
2 things that you are hearing are registering, but I certainly
3 feel that you have been very open, and I certainly appreciate
4 being asked to testify.

5 CHAIRMAN WILKINS: Well, you have reminded us
6 of these things on several occasions, Mr. Sullivan, so we
7 are not missing them. But this rough draft, we didn't mean
8 to write probation out of the law at all. We have no inten-
9 tion to do that. We merely had to draw the line somewhere
10 to move on to some other, what we considered at the time
11 more pressing issues -- that is, a format of the approach
12 we were going to take, and so forth.

13 MR. SULLIVAN: And in the same way, Judge,
14 the innovative programs that are going, maybe not necessarily
15 -- and I come from Texas, and we don't have a lot of these
16 programs of innovative alternatives to incarceration that
17 are maybe happening in other States -- and I notice that
18 you have visited some of the intensive probation programs,
19 et cetera, victim-offender reconciliation -- these things
20 are happening, not across the country, but in certain
21 States, and hopefully the guidelines will incorporate
22 these types of programs.

1 CHAIRMAN WILKINS: Well, I am sure they will address
2 many of them. In fact, the statute itself requires us to
3 pay heavy attention to such alternatives to incarceration,
4 the primary being probation and the terms and conditions
5 attendant to it.

6 Any questions to my right?

7 COMMISSIONER CORROTHERS: Just a statement to
8 Mr. Sullivan, that we certain won't forget the concept of
9 rehabilitation in our efforts.

10 CHAIRMAN WILKINS: Commissioner Block?

11 COMMISSIONER BLOCK: Mr. Sullivan, I just want
12 some sort of a general reaction from you on this notion
13 of the importance of the victim-offender reconciliation.
14 Where does that fit in in the purposes of punishment,
15 and for the purposes of sentencing?

16 MR. SULLIVAN: Well, I think it is certainly
17 Punitive for the offender to have to face the victim, as
18 well as, certainly, providing satisfaction to the victim.
19 But I certainly think that -- in my experience in dealing
20 with prisoners -- most prisoners feel that they are serving
21 their time -- and I'll go back to my experience in Texas,
22 where they pick cotton for the State, and they do all kinds

1 of things -- and what comes through in my experience in
2 Texas is they don't see why this has any relation to their
3 crime. And I think if you could begin to focus in on the
4 victim, and it does have something to do with the crime,
5 I think it can be punitive, certainly -- I don't think they
6 would like to face the victim -- but it forces, in some
7 of these programs where the victim voluntarily is able if
8 he or she wants to, to sit down with the offender, and the
9 offender is forced to face the consequences of what he
10 or she did, I think that can be very punitive and of course,
11 very effective in turning that person around and making
12 a law-abiding citizen of him -- I would think.

13 COMMISSIONER BLOCK: So you would see it as
14 rehabilitation.

15 MR. SULLIVAN: Rehabilitation, and also there
16 is a punitive side to it, as well.

17 COMMISSIONER BLOCK: Thank you.

18 CHAIRMAN WILKINS: Any other questions?

19 (Pause.)

20 CHAIRMAN WILKINS: Thank you very much.

21 Our next witness is Mr. Cornelius Behan,
22 Chief of Police, Baltimore County Police Department.

1 Chief Behan, we are pleased that you are here.

2 CHIEF BEHAN: Thank you, Mr. Chairman, members
3 of the Committee. I thank you very much for inviting me
4 to speak today.

5 To identify myself just a little bit further,
6 I am currently the President of the Police Executive Research
7 Forum and the past President of the National Executive
8 Institute and currently the Chairman of the National Law
9 Enforcement Steering Committee that was formed a year ago
10 to oppose the passage of the McClure-Voelker bill.

11 My comments will come from a perspective of local
12 law enforcement as opposed to the State or Federal level.

13 We read the guidelines, and we had some difficulty
14 with them. It may be because of their complexity, or it
15 may be because we are not that familiar with Federal laws.
16 And our attorneys struggled with them. So, realizing that
17 we may not be as knowledgeable as others, we'll make some
18 comments that perhaps will be helpful to the Commission.

19 The role of local law enforcement in this country
20 is unique. Local police have most of the contacts with the
21 public than any other part of the criminal justice system.
22 The public does not understand the criminal justice system..

1 They are confused by it; they don't think it works for them.

2 As a result they have become more fearful in
3 many cases, and they have politicized their fear into
4 action. And we see now many States with victims' rights
5 legislation. We see committees formed to change and
6 mandate sentencing, and we now know they are engaged in
7 court-watching.

8 Therefore, our criminal justice system must include
9 as one of its prime concerns public safety. You have
10 mentioned it on page 7 of your report. We would suggest
11 that you might consider putting it right on page 1, with
12 deterrence, rehabilitation, just punishment, and the other
13 considerations, incapacitation, that You have. The public
14 must know that we care.

15 The Commission should be commended for its real
16 offense sentencing guidelines; they are tremendous. The
17 public doesn't understand plea bargaining. They understand
18 the crime that happened to them. And as you add mitigating
19 factors and sanctions on various aspects of the crime as
20 it happened to them, I know they'll understand it and will
21 appreciate much more what we are doing. I think they
22 are just great.

1 The police have to also handle the fear of crime
2 as well as investigate and solve it. The public's fear is
3 more vicarious than factual. They read, they talk, they
4 listen, and they become fearful not from the experience
5 as much as from hearing about the experience or the after-
6 effects of the experience.

7 I would draw your attention to residential
8 burglaries. You might consider weighting that just a
9 little bit differently. The burglar is potentially a killer.
10 He also, when he violates a home, sometimes changes the
11 life of that family for the rest of their lives. Three-
12 quarters of residential rapes and robberies start with a
13 burglary.

14 So the fear of burglary in the home is tremendous,
15 and often people don't get over it when it occurs. And we
16 would suggest that you might want to add a psychological
17 factor to the sentence caused by the violation as well as
18 the other factors caused by the crime itself.

19 You may want to add more weight to auto theft
20 when the person is deprived of his auto for work, or for
21 some other need. Many people don't have the insurance or
22 the ability to get another car, and they are truly

1 victimized by losing an auto. You just may want to
2 consider it.

3 By looking at these kinds of things, I think we
4 send a message to the public that we care, that we are
5 truly interested in them, and not just the fairness of
6 our treatment of the defendant.

7 The police must respond to violence. We must
8 respond in any way we can to any acts of violence,
9 particularly that violence that occurs in conjunction with
10 another crime. The imposed sanctions are a measure of how
11 seriously we look at that. We tend to be soft on violence,
12 and let me just explain that, if I may, for a minute.

13 The criminal justice system becomes hardened,
14 if you will, to violence, and we see it as another crime.
15 We see so much of it, so much robbery and rape and mayhem,
16 that we don't have all the sensitivity all the time that
17 we should. The subtle forms of violence, terrorist acts,
18 frightening people, racial incidents, domestic violence,
19 are usually not dealt with in the same degree as we do
20 other kinds of crime, yet their impact is tremendous.
21 The courts as a result are seen as soft on violence when
22 they make decisions, and that is why we have these activist

1 groups. In Maryland, we have the Anti-Crime Coalition;
2 we have the Roper Committee, and their only reason for being
3 is to get legislation and mandating sentencing where they
4 perceive the court were kind of weak.

5 So I would suggest that we look at that very
6 carefully.

7 The proliferation of handguns and its obvious
8 impact on violence potential must be given high priority.
9 As you know, we lose 20,000 people a year being killed by
10 handguns. Sixty of them are cops, 200,000 more are
11 are victims of robbery or assault with handguns.

12 Therefore the Commission should review its
13 sanctions on handguns, and merely the carrying of it should
14 have a heavy sanction. The use of it should have a heavier
15 sanction. And if they use a machine gun or a silencer, the
16 world should fall on top of their heads.

17 The National Rifle Association has as one of
18 its prime initiatives in the coming legislature to try
19 to revoke the banning of machine guns as it was passed
20 by Congress last year. If they succeed in their initiative,
21 we'll have machine guns coming out of our ears. And we
22 know that the machine gun is the gun of choice for terrorists,

1 for drug dealers, and for organized crime, for those who
2 want to attack police and the public. So we should take
3 note of that.

4 The injuries associated with the crime have
5 been mentioned in the guidelines, but more weight should
6 be considered as to the extent of the injury sustained --
7 how it affects people in the long term. For example,
8 if an elderly person is knocked down on the street by
9 a robber, or in the home, by a burglar that they walked in
10 on, they may break a hip. For the elderly person, that may
11 be the last injury of their life, and it may be the most
12 sustaining one. The guidelines should reflect that.

13 As we looked through this, we didn't see
14 terrorism jump out at us in the guidelines. It was mentioned,
15 but we think serious consideration should be given to
16 abductions, bombings, and racial intimidation where terrorism
17 is used.

18 The Commission might give serious consideration
19 to the insidiousness of family violence. The way we see
20 it, the child that is abused, the spouse that is abused,
21 can't get away; there is no place they can run to. They
22 are the perfect victim. And I think that those who commit

1 those kinds of crimes should get a message from us that that
2 is not acceptable. They are particularly vulnerable victims,
3 although sometimes the injuries are not always that severe.

4 We must resopnd to the repeat offender, and you
5 mentioned that. We know a small number of criminals commit
6 a tremendous amount of our crime. Police and prosecutors
7 are initiating career criminal programs. We have a ROPE
8 Program in Maryland, Repeat Offender Program Experiment.
9 I am fortunate enough to chair that group.

10 Most definitions take into consideration the
11 criminal history of juveniles and adults. The Commission
12 should be commended for doing that in its guidelines,
13 taking criminal history into consideration. However, I
14 might suggest that when it comes to juveniles, that you
15 review it -- any imprisonment for serious crime by a juvenile
16 might be considered. Right now, you have some crimes in
17 there, but not all of them. But when a juvenile goes to
18 jail, it is usually for a very, very bad reason -- or,
19 for very, very good reasons, or because of bad acts -- and
20 you might want to consider that important.

21 Consideration of drug usage is a step in the
22 proper direction. But more weight might be given to the

1 length of time the person is on the drugs and the number
2 of drugs they are using at a particular time. I think that
3 might be worthy of extra mitigation circumstances.

4 Violation of probation ought to be considered.
5 As you know, when a person gets arrested certainly in
6 Maryland and other places for a new offense, the violation
7 process doesn't begin until the new offense is adjudicated.
8 That means they are on the street. Yet, the obvious
9 violations of being out when they shouldn't be, or in wrong
10 company, or with a gun, are there.

11 We would suggest you might mention that once a
12 person has been arrested for a second offense when they
13 are out on violation of probation, that the process begin
14 immediately.

15 You may want to reassess the guilty plea as the
16 first step toward rehabilitation. The reason I say that
17 is that repeat offenders use the guilty plea as a way to
18 step down the charge so they can get away from getting a
19 record that will make them a repeat offender. They manipulate
20 the system for their own gain. So guilty pleas are not
21 necessarily rehabilitative; in some cases, they are just
22 the opposite. They are a way they abuse the system.

1 Similarly with drug offenders who enroll in the
2 drug rehab programs, very often they do that just to show
3 that they have gained responsibility since they have been
4 arrested, and it is again, their view how to beat the
5 system, and you might look at that.

6 The Commission should review its credit for
7 cooperation, In other words, you rightfully notice that
8 when a defendant works and turns over for a police official,
9 that that is a good thing to do, and you have given them
10 weight right through all the mitigating factors. Well, I
11 think that you might consider just giving the weight toward
12 the crime itself that they have caused and not give them
13 any time, any sentencing, forgiveness, for any of the mitigating
14 factors -- the violence they use, the gun they use, and
15 things of that nature. Even though they help us, and even
16 though we are glad to have them turned around, I think they
17 should get the mesage that if they are going to play that
18 game, they have to pay for it, while it is accepted that
19 the original offense is honored.

20 A word of causion as I close, that you are going
21 to re-evaluate them as you go along, and that, of course,
22 is a very, very fine thing to do, look at these things and

1 see how we can do them better. But I caution you about
2 don't do it on the basis alone of a lack of facilities, or
3 a lack of judges or a lack of court space. I think we let
4 our public down when we do that. I would try to avoid,
5 for example, what I read in the Washington Post where they
6 are recommending that the good time scores be manipulated
7 in Washington, D.C. in order to get prisoners out. Well,
8 We know the dilemma. Gosh, we know what capital budgets
9 are in our business. But we also know what it means to have
10 people walk who shouldn't walk. So I would ask you to consider
11 that.

12 Mr. Chairman, ladies and gentlemen, those are
13 my brief remarks. Thank you very much.

14 CHAIRMAN WILKINS: Thank you, Chief.

15 Are there questions from Commissioners to my
16 left?

17 Commissioner Block?

18 COMMISSOINER BLOCK: Chief Behan, I'd just like
19 to acknowledge my thanks to you for bringing to our attention
20 protection of the public as a central concern of this
21 Commission. We often lose track of that, I think.

22 CHIEF BEHAN: Thank you very much.

CHAIRMAN WILKINS: Any other comments or questions?
George?

COMMISSIONER MacKINNON: Chief, to what extent
do your policemen participate with Federal authorities in
arrests and matters of that character, or in solving crimes?

CHIEF BEHAN: We have never had -- and I have
been in the business 40 years, Commissioner MacKinnon --
a better association with the Feds than we have at the present
time. We have regular meetings. We exchange officers
with the FBI, DEA, Secret Service. My VIP Squad, you can't
tell as being any different from the VIP Squad of the Secret
Service, because they are trained by them and operate with
them when occasion calls for it.

We use the Federal statutes very frequently, because
You get better chance of conviction through the Federal
statutes, and the resources of the Federal government are
given to us constantly, including airplanes and personnel
as well as other kinds of help. And it is very good, and
improving.

COMMISSIONER MacKINNON: And you turn evidence
over to the Federal authorities and vice versa?

CHIEF BEHAN: Yes, when it is required. Sometimes,

1 they persecute in our courts; other times, in Federal courts.
2 And our district attorneys, State's attorneys, sometimes
3 actually do the prosecuting.

4 COMMISSIONER MacKINNON: And on arrests, of
5 serious offenders, violent offenders, do your policemen
6 Sometimes participate with the Federal authorities in
7 joint arrests?

8 CHIEF BEHAN: Yes, sir, particularly in the drug
9 area. We even have our people sworn in as Federal Marshals
10 so they can operate throughout the State, beyond the juris-
11 diction of Baltimore County, so that they are covered as
12 they engage in these kinds of activities.

13 We have people permanently assigned to task
14 forces on the drug level.

15 COMMISSIONER MacKINNON: That was the point I
16 was coming to, as to whether they shouldn't enjoy the
17 same protection of Federal statutes where Federal officers
18 are shot at or killed or disabled or something, that the
19 actual Federal officer does.

20 CHIEF BEHAN: Yes, they should. And that's why,
21 when we get into these crimes that go beyond our borders,
22 we have them sworn in by the Federal people, to protect them.

1 Otherwise, we do have to back away on occasion,
2 because we don't have the protections. But the Feds try
3 very hard to see that we are protected.

4 COMMISSIONER MacKINNON: So what you would say
5 is that in that situation of joint activity and in dangerous
6 areas, it is being taken care of?

7 CHIEF BEHAN: Yes, sir, it is.

8 COMMISSIONER MacKINNON: Thank you.

9 CHIEF BEHAN: Thank you.

10 CHAIRMAN WILKINS: Thank you again, Chief.

11 Our next witnesses are Mr. Jeffery D. Troutt,
12 Research Director of the Institute for Government
13 and Politics, and appearing with him is Mr. Robert B. Kiles-
14 met, who is President of the International Union of Police
15 Associations.

16 Gentlemen, we are glad to have you.

17 MR. TROUTT: Thank you very much.

18 Mr. Chairman, Commissioners, I appreciate the
19 opportunity to appear before you today. I know that you
20 have a difficult job, and I support you, and I believe the
21 American people appreciate the job you are doing.

22 I would like to express my support for the draft

1 approach of the preliminary sentencing guidelines. On the
2 whole, I think you have done an excellent job, and I agree
3 with most of your recommendations.

4 I support you in that you are giving tough
5 determinate sentences for offenders. In this area, I
6 believe the sentencing judges have done a great disservice
7 by imposing sentences that are too lenient. Granted, they
8 do so with the noblest of intentions, but I believe the
9 consequences of the leniency is intolerable.

10 There is an understandable desire on the part
11 of many judges to give convicted criminals the benefit of
12 the doubt, to give them two, three, four bites of the apple,
13 and impose a sentence which they hope will reform them.
14 However, the fact is that many, if not most, convicted
15 criminals are recidivists who are going to be back before
16 the courts at some future date. That means that somebody
17 somewhere has been and will be again victimized by that
18 criminal. This is a dreadful cost, and the dreadful cost
19 of this leniency is apparent when we consider that crime
20 is the number one killer of young black men.

21 Strong sentences reflect society's abhorrence
22 of crime and support for the victims of crime. This is

1 important, but I believe there is an even more compelling
2 reason for imposing strong sentences: protecting potential
3 victims. Each time a criminal faces a sentence in a courtroom,
4 the future of many people hang in the balance. The judge
5 never sees these people. He may never consider them, but
6 their lives will be affected by the judge's decision. When
7 we consider that the number of people who have been victim-
8 ized by criminals who should have been behind bars, we
9 see that sentencing has an impact in human terms that
10 extends beyond just the individual criminal and his or her
11 family.

12 In the written statement I gave you, I concentrated
13 on three areas -- drug-related crimes, sexual crimes, and
14 organized crime. In the interest of brevity, I'd like to
15 just talk a bit about drug-related crime, since many of the
16 same factors are present in the other two.

17 The sentencing guidelines suggest a likely increase
18 for sentences for drug-related offenses. I think that is
19 commendable. Recent polls have shown that the American
20 people believe that drugs are the number one problem today.
21 Lengthy sentences for drug-related offenses properly reflect
22 the American people's revulsion against drugs, and I believe

1 it has the support of the American people and the Congress
2 and the current Administration.

3 Drug offenses deserve stiff sentences for many
4 reasons. Chief among them is the fact that drugs are the
5 catalyst for a whole host of other crimes. Drug addicts
6 commit burglaries and armed robberies in order to obtain
7 money to buy drugs, and drug pushers contribute to this by
8 supplying the illegal substances.

9 At the top of the pyramid, drug dealers often
10 murder the competitors, sometimes in public places, without
11 regard for the lives of innocent persons, including children
12 who can be injured or killed in the crossfire.

13 Drug abuse isn't a victimless crime. When 50
14 to 70 percent of those arrested are abusing drugs and the
15 connection between drugs and crime is so overwhelming,
16 it cannot be called victimless. A large portion of crime
17 is drug-related. If we correctly have compassion for drug
18 addicts, we can correctly reach out to help them. But they
19 are not the only victims of the drugs. The victims of drugs
20 are also the victims of drug-related crime and even the
21 economics -- all of us on the whole pay an economic cost
22 for drug-related crime.

1 I believe imprisonment will benefit both the society
2 and the drug user. Society will benefit because it will
3 be subjected to fewer of the collateral crimes that are
4 associated with drug use, and the drug abuser will benefit
5 in that he or she will be cut off from the source of drugs
6 and have an opportunity to dry out and also, perhaps,
7 there will be some in-prison drug rehabilitation services
8 available to them, and perhaps after some time, the drug
9 abuser will realize that the cost of drugs to that person
10 Personally is just too high.

11 And quite properly, of course, you give stronger
12 sentences to drug smugglers and drug pushers. If for no
13 other reason, we should give them such lengthy sentences
14 to reflect our revulsion towards drug pushing. But it won't
15 just reflect our indignation. It will assure that these
16 abominable people will not be able to continue to peddle
17 their poisons, especially toward children. And I think that
18 is the most compelling reason to impose stiff sentences on
19 drug pushers.

20 I would like to mention Judge Jack Weinstein of
21 the U.S. District Court expressed concern to you, I believe
22 it was in New York, about the fact that the sentencing

1 guidelines imposed 180 points for some drug-related offenses
2 and then went on to bemoan the fact that many of the people
3 who are convicted of drug smuggling are what he called "mules",
4 or peasant women from South American or Africa who smuggle
5 drugs into the country in order to provide economic relief
6 for their families. With all respect to Judge Weinstein,
7 I think his concern is seriously misplaced. I would ask
8 where is his concern for the protection of innocent people
9 who are injured by drug use, but never appear by his court.
10 What about the thousands of young Americans who are subjected
11 to peer pressure to use drugs? And why does Judge Weinstein
12 seem to be more concerned about the well-being of the criminal
13 than the well-being of his victim?

14 This is not to say that we don't have compassion
15 on the very wretched economic state that a lot of Third
16 World women endure and their families endure, but it just
17 doesn't excuse smuggling these kinds of poisons in; this
18 poison kills people. And I don't think we can afford such
19 a policy.

20 In summary, I'd say in general the sentencing
21 guidelines are a step in the right direction in that they
22 reflect an abhorrence of crime and a firm resolve to

1 prevent criminals from preying upon innocent citizens.

2 So on the whole, I reiterate my support for the
3 sentencing guidelines. And I would also note that I would
4 urge you not to take prison capacity into account. I believe
5 that is a function of the legislature and that if prisons
6 indeed do become more overcrowded as a result of these
7 guidelines, it will force the Congress to choose between
8 shorter sentences or building more prisons, and I think
9 that is very appropriately a legislative determination.

10 I appreciate the opportunity to testify before
11 You, and I would welcome any chance to be of further
12 assistance. The American people have suffered for years
13 at the hands of unrepentant criminals. The Congress has
14 given you, the Commission, the power to reform one part of
15 the system by reducing disparity and setting sentences
16 so as to promote respect for law and crime. We look to you
17 with hope and optimism.

18 Thank you.

19 CHAIRMAN WILKINS: Thank you, Mr. Troutt.

20 Mr. Kliesmet?

21 MR. KLIESMET: My name is Robert Kliesmet, and
22 I am the President of the International Union of Police

1 Associations, AFL-CIO.

2 I come here today to talk to you, to thank you
3 for the opportunity to be here and express my views.

4 This Commission has been charged with a responsi-
5 bility that is both complex and solemn. I hope that my
6 comments will be of some value to you. I come to you with
7 the perspective of the average street cop. Quite purposefully,
8 I am avoiding the "ivory tower"-type testimony which often
9 dominates discussions of these issues. If we can analogize
10 the problem of crime to a flood, I think we can see the value
11 of such a perspective.

12 From the mountaintop, you can see where the flood
13 is coming and where it is going, but you can't really see
14 the extent of damage caused by the flood unless you come
15 down from the mountain and spend a little time where the
16 flood is raging.

17 The "ivory tower" judges and scholars attempt
18 to isolate causes and effects of crime, but they don't see
19 the human cost. The average police officer does. They
20 deal with both the criminal offender and his victim. It
21 is the police officer, more than anyone, who sees the true
22 cost of crime in human terms. It is the police officer,

1 not the judge, who has the sad duty of informing a wife that
2 she is now a widow. It is the police officer, not the scholar
3 who daily sees promising young lives destroyed by drugs.

4 One of the greatest frustrations in a police
5 officer's career occurs when the violent criminal is given
6 what essentially is a slap on the wrist by a lenient
7 judge. Police officers know the cost of crime. They see
8 it every day. They know well that most criminals are not
9 deterred by our criminal justice system because it is simply
10 too lenient. They also know that more often than not, criminals
11 who kill police officers are repeat offenders.

12 Lenient sentences do more than just frustrate
13 police officers. When courts release dangerous criminals,
14 they undermine public confidence in the criminal justice
15 system and increase the public's fear of crime. At best,
16 the public feels cynical; at worst, it feels helpless.

17 As a police officer, I have spent many years dealing
18 with criminals and their victims. I know from this experience
19 that some people rape, kill and steal without remorse. People
20 who commit premeditated murder, people who commit rape,
21 people who push drugs on young people, are not simply
22 misguided -- they are evil. They need to be put somewhere

1 where they cannot harm innocent people. In my prepared
2 written statement, which I'll submit, I cite four examples
3 of abuse of parole and probation. However, in an attempt
4 to be brief, I would ask that you'd read those.

5 Some have testified that probation is an effective
6 alternative to prison. My belief is this. If a person
7 shows by a criminal act that he poses a threat to society,
8 he should be in prison. Placing dangerous persons on probation
9 in hope that they may be reformed through community service
10 is an unreal expectation. It is playing Russian roulette
11 with the lives of innocent people. Any form of punishment
12 which releases a violent criminal is insufficient, inapprop-
13 riate and dangerous.

14 Whatever attempts we make to reform criminals --
15 and I believe that we should attempt to reform first and
16 sometimes second offenders -- should be made inside
17 prisons, where they cannot harm innocent people in the
18 event reformation proves to be ineffective. A person
19 who has committed a serious crime, for example, murder,
20 armed robbery or rape, has already shown himself to be
21 dangerous. I see no need in giving a sentence of
22 probation in such a case. In fact I believe that it is

1 counter-productive. A prison sentence is fully justified,
2 and the chances that the criminal will commit another serious
3 crime are too high to risk probation.

4 Some witnesses have criticized the Commission
5 for the alleged harshness of some of the proposed sentences.
6 They seem to go out of their way to explain what they would
7 call the "root causes" of crime. Chief among these causes
8 is poverty. Where poverty does not cause crime, the apologists
9 for criminal behavior claim that it is a mitigating factor.
10 In other words, the person born into poverty is somehow
11 trapped by sociological forces he cannot control and
12 is drawn into committing criminal acts.

13 All this ignores the fact that the vast majority
14 of poor people are decent, law-abiding citizens. It also
15 ignores the role of individual choice. The nature of poverty
16 may tend towards increased temptation to commit criminal
17 acts, but that is not relevant in the sentencing process,
18 nor does it mitigate or excuse the criminal act. High-
19 level executives in businesses are undoubtedly faced
20 with many temptations to commit criminal acts ranging
21 from fraud to insider trading; yet, the fact that he or she
22 is faced with this temptation is not a mitigating

1 circumstance, nor should it be. We demand ethical behavior
2 from such people.

3 For year, defendants' attorneys in rape cases
4 inferred that the appearance and demeanor of the rape
5 victim enticed the defendant and somehow made this
6 abhorrant act the victim's fault, or mitigated the
7 defendant's guilt. Courts rightly rejected this tactic.
8 The notion that a rapist is not responsible for his act
9 is no longer accepted and fortunately is for the most part
10 behind us. Even so, the notion that poverty somehow
11 mitigates a defendant's guilt or excuses criminal conduct
12 is still popular in some circles. This notion should
13 become equally unacceptable. It simply should not be a
14 factor in sentencing. Courts should assume that sane
15 criminals act out of free will and should sentence accordingly.

16 One of the witnesses before this Commission
17 took great care to point out that a large number of
18 convicts come from the ranks of the hardcore unemployed.
19 Again, this infers that somehow, unemployment causes
20 crime. Perhaps programs to treat criminals employable
21 skills have their place -- inside prison walls. I, for
22 one, am not prepared to risk the safety of society at

1 large on the off-chance that the violent criminal will be
2 reformed when he can get a job. The lives of our citizens
3 are too precious to risk in such a cavalier manner.

4 I would point out that the same witness argued
5 that prison sentences should not be used because it would
6 deprive the families of the convicted offender's potential
7 earnings. This is not merely inconsistent; it is illogical.
8 It ignores the economic consequences of criminal activity.
9 The professional criminal, and even the casual criminal,
10 inflict an economic cost on society far in excess of
11 their contribution through legitimate earnings. Besides,
12 one might ask, from where do the earnings come to support
13 the criminal's family. Are they derived from lawful
14 employment, or are they actually the fruits of criminal
15 activity?

16 Additionally, much of the harm caused by crime
17 cannot be quantified in economic terms. You can measure
18 and approximate loss of income to a family when the head
19 of the household is murdered; but how do you measure the
20 grief suffered by the survivors? How do you put a dollar
21 value on the humiliation and fear inflicted on the victim
22 of a rape, or the loss of the quality of life when the

1 elderly are too frightened of crime to venture out of their
2 homes or apartments?

3 Criminals inflict a huge cost upon society in
4 ways that are quantifiable and unquantifiable. This loss
5 far exceeds the economic loss to the criminal's family.

6 Some witnesses have bemoaned the unwholesome
7 effect of separating families by imprisoning a criminal
8 parent. This same witness asserts that imprisoning the
9 criminal will somehow cause the children of the criminal
10 to become criminals themselves. If this were said by
11 an ordinary person, we might pass it off as
12 laughably naive. But it was stated by a Federal judge
13 who presumably takes this into account in sentencing.

14 I assert that the opposite is true. Parents,
15 if not overtly, teach values to their children by example.
16 If the criminal parent remains with his or her children,
17 what values will they impart to their children? Even
18 if they make some conscious effort to teach them honesty
19 or any other virtue, is the child likely to learn the lesson,
20 or will the children instead follow the parents' example?
21 The latter is more likely. If they remain with the
22 family, the children probably run a greater risk of

1 becoming criminals themselves than they would if the
2 offending parent was incarcerated.

3 In summation, I would like to reiterate that
4 I reject the notion that sane individuals are not
5 responsible for their own behavior. Courts must recognize
6 that criminals intentionally commit criminal acts and should
7 take this into account in the sentencing process. Among
8 these people are murderers, rapists and drug dealers. These
9 people should be given lengthy prison sentences so that they
10 will not pose a further threat to the innocent public.

11 I thank you.

12 CHAIRMAN WILKINS: Thank you very much.

13 Questions?

14 Commissioner Baer?

15 COMMISSIONER BAER: I would like to compliment
16 both of you, particularly Mr. Troutt, for your very good
17 testimony about the relationship between drug use and crime.
18 It is a well-known fact that a large number of the bank
19 robbers in this country say they robbed these banks in order
20 to support their drug habit. In that type of case, do you
21 consider that drug addiction as an aggravating factor or
22 a mitigating factor?

1 MR. TROUTT: I would consider it definitely
2 an aggravating factor. While certainly, it is unconstitu-
3 tional to incarcerate someone for the status of being a drug
4 addict, the fact is, I believe it is aggravating because
5 if the person is that desperate for drugs that they are going
6 to commit a bank robbery, then I think the chances are
7 excellent that they are going to commit another crime if
8 we don't impose some sort of sentence on them that gets them
9 away from people that can be harmed by those crimes.

10 COMMISSIONER BAER: So if, in looking at
11 offender characteristics, we give some sanction units
12 for this, you would support that?

13 MR. TROUTT: Yes.

14 COMMISSIONER BAER: The second question is to
15 both of you. You both did a good job of describing some
16 criminal behavior. What percent of these people are going
17 to be back on the streets within two, three, five, ten,
18 fifteen years, or whatever?

19 MR. KLIESMET: Are you talking about persons
20 who were incarcerated?

21 COMMISSIONER BAER: I'm talking about everybody
22 who goes to prison; what proportion are going to come back

1 out?

2 MR. KLIESMET: Well, eventually all of them.

3 COMMISSIONER BAER: Unless they die in prison.

4 MR. KLIESMET: Yes.

5 COMMISSIONER BAER: Okay. Now, should those people
6 be supervised? Should that be part of the system?

7 MR. KLIESMET: Do you mean probation kind of
8 supervision?

9 COMMISSIONER BAER: No. They are not on probation,
10 obviously; they have already been in prison. Should they
11 be supervised after their release from prison. That is
12 the question.

13 MR. KLIESMET: Well, certainly I believe in
14 supervision. However, I am not a believer in parole. I
15 am a believer in determinate sentencing. If you do the
16 crime, you do the time.

17 COMMISSIONER BAER: Well, I didn't ask that.
18 You are answering the wrong question. I said after they
19 serve a determinate sentence -- we agree there is going to
20 be a determinate sentence -- after they serve that
21 determinate sentence, should they be supervised? Should
22 that be public policy?

1 MR. KLIESMET: I don't think that they should
2 be supervised in the sense that they have an agent who
3 watches their behavior. However, I think that the local
4 police should be notified that this person has been released
5 from prison, and they should be aware that one of the problems
6 of American policing is we don't know who is out on parole
7 because the Parole Department doesn't have liaison with the
8 police department to let us know who is out of prison and
9 where they are. That is one way of keeping some kind of
10 supervision over persons who have been released from
11 prison.

12 COMMISSIONER BAER: So the police department
13 ought to give the supervision?

14 MR. KLIESMET: Well, it would give general
15 supervision. I don't mean they would make any stops;
16 however, they would be aware that this person is in the
17 neighborhood or in the environment.

18 COMMISSIONER BAER: Mr. Troutt?

19 MR. TROUT: I think I differ slightly from Mr.
20 Kliesmet on that. I would think that perhaps some minimal
21 amount of supervision would be in order, just to see if they
22 immediately lapse into that type of a lifestyle again.

1 However, if we are going to incarcerate someone and give
2 them the kind of sentence that they should get, I think
3 that perhaps, once they have paid their debt to society,
4 we should minimize our supervision.

5 COMMISSIONER BAER: Do you have any research about
6 these drug users that go to prison, how many of them never
7 use drugs again after they come out of prison?

8 MR. TROUTT: No, I don't. I'd be happy to look
9 that up for you.

10 COMMISSIONER BAER: I would suggest that you do
11 that.

12 MR. TROUTT: Okay.

13 COMMISSIONER CORROTHERS: Would you be in favor
14 of every person who has a period of incarceration to undergo
15 a period of supervision upon release after serving the
16 determinate sentence, or just certain offenders for certain
17 specific offenses?

18 MR. TROUTT: To be honest with you, I don't
19 know.

20 MR. KLIESMET: I would venture to say that I think
21 that it may be appropriate.

22 CHAIRMAN MacKINNON: George?

1 COMMISSIONER MacKINNON: Mr. Kliesmet, where do
2 you come from?

3 MR. KLIESMET: I was a police officer for 28
4 years in the city of Milwaukee, Wisconsin.

5 COMMISSIONER MacKINNON: Your name would
6 suggest that.

7 MR. KLIESMET: However, I am Polish.

8 COMMISSIONER MacKINNON: I wonder if you could
9 give us some examples from your experience of what you
10 consider to be a "slap on the wrist"?

11 MR. KLIESMET: Well, a police officer arrests --

12 COMMISSIONER MacKINNON: I mean, get down to
13 some specific cases.

14 MR. KLIESMET: Well, I can give you one right
15 here, which I didn't read to you, but I'll take the time
16 to read it to you.

17 It is in regard to a bank robber in Northern
18 Virginia who was tried and convicted in the court of the
19 eastern section of Virginia. In 1974 he went to prison --
20 and he had a criminal record that dated back to the Forties;
21 he had been in and out of the system -- but in 1974, he
22 robbed the Stafford County Bank. He was apprehended, taken

1 to trial, convicted, and sent to prison for 15 years. He
2 was paroled after five years. The Parole Board went so far
3 as to terminate his parole after two years. In 1983,
4 he again robbed the same bank. Apparently, he didn't learn
5 anything in prison, but he went out to see if he could do
6 the job right this time. He was apprehended and convicted
7 and sent back to prison a second time.

8 In 1985, he was placed on parole again --

9 COMMISSIONER MacKINNON: Is this Federal or
10 State?

11 MR. KLIESMET: -- these are all Federal violations
12 under the Federal court system --

13 COMMISSIONER MacKINNON: Where was he sentenced
14 in the first instance -- in Virginia?

15 MR. KLIESMET: In Virginia. Both times in
16 Virginia.

17 The third time, while on parole for the second
18 armed robbery, he held up the same bank a third time. That
19 was in May of this year. Fortunately, or unfortunately,
20 in the shoot-out that resulted during the apprehension, he
21 was shot and killed. However, the seriousness of it comes
22 in in that a police officer was shot and wounded.

1 Those are the concerns that the police have about
2 people who are let in and out of prisons and just do not
3 learn anything through rehabilitation and do these serious
4 kinds of crimes.

5 COMMISSIONER MacKINNON: How long did he serve
6 on his second sentence?

7 MR. KLIESMET: On his second sentence, he served
8 two years.

9 COMMISSIONER MacKINNON: Did you have any experi-
10 ences in Milwaukee?

11 MR. KLIESMET: Oh, I had a lot of experiences
12 in Milwaukee.

13 I can tell you a story about a State that had
14 one party in power that built the prison; the subsequent
15 election had the other party in power, and they sold the
16 State prison to the Federal government, and the subsequent
17 party got enough money to build another prison,
18 but didn't get re-elected, and the next party spent two years
19 arguing about where the prison is going to be. Now they
20 have another administration in there, and he finally said,
21 "The prison is going to be here, and we are going to build
22 it and put people in jail."

1 I can talk about experiences in Wisconsin on
2 the issue of overcrowding and sending people to jail, and
3 it depends on who is in power; it is a political issue
4 rather than an issue that the criminal justice system
5 wants to deal with directly.

6 COMMISSIONER MacKINNON: Minnesota sold
7 Sandstone to the Federal government to build Oak Park,
8 and now they are taking Wisconsin prisoners.

9 MR. KLIESMET: Yes, I know, because one of our
10 Governors sold the prison.

11 COMMISSIONER MacKINNON: Thanks a lot.

12 CHAIRMAN WILKINS: Thank you both very much.

13 MR. TROUTT: Thank you.

14 CHAIRMAN WILKINS: Mr. Rory McMahon is the
15 Secretary of the Federal Probation Officers Association.
16 This association has provided a great deal of assistance
17 to the Commission over the past 12 months, as have individual
18 members of this Association and other probation officers.

19 So, Mr. McMahon, we are delighted to see you,
20 and we will be glad to hear from you at this time.

21 MR. McMAHON: Mr. Chairman, I am Rory J. McMahon,
22 Secretary of the Federal Probation Officers Association and

1 a senior U.S. probation officer working in the Southern
2 District of Florida, assigned to the Fort Lauderdale office.

3 I wish to thank you, Chairman Wilkins, and all
4 of the distinguished members of the U.S. Sentencing Commission,
5 for allowing us the opportunity to address you today
6 regarding the recently promulgated sentencing guidelines
7 draft.

8 I would like to begin my remarks today by thanking
9 all of the judges and several other distinguished speakers
10 that have testified during the past two days, expressing
11 their unqualified support and appreciation for the U.S.
12 Probation Service.

13 I would also like to comment on two sections,
14 General Comments, and Specific Recommendations.

15 First, we would like to make some general comments
16 about the overall guidelines and their implementation. Then
17 I will make specific comments and recommendations regarding
18 issues of specific concern.

19 The efforts and progress of the Sentencing
20 Commission in addressing the basic injustices and uncertainty
21 of present sentencing practices and the development of a
22 truth-in-sentencing system are laudatory. Based upon a

1 review of the draft and prior discussions with members of
2 the Commission, it is apparent that the U.S. probation system
3 will maintain an integral role in the new sentencing guidelines
4 system.

5 We strongly recommend that the Commission give
6 concrete support by whatever means are available and
7 appropriate to ensure that U.S. probation offices are ade-
8 quately trained and staffed to facilitate Congressional
9 intent and implement Commission guidelines into reality.

10 As a member of the Panel of Working Probation
11 Officers that convened in Washington, D.C. in July to work
12 with the proposed set of guidelines, I experienced first-
13 hand the complexity and additional responsibility that will
14 be thrust upon the U.S. Probation Service upon adoption of
15 the guidelines. I realize that the U.S. District Court
16 judges will rely heavily, if not solely, upon the calculations
17 and interpretations of these guidelines formulated by the
18 U.S. probation officer.

19 As a result of these additional responsibilities
20 and duties assigned to the probation system, there needs
21 to be a concomitant increase in the resources available
22 to the probation division as well as a review of the workload

1 formula and staffing patterns to assess the impact of these
2 guidelines on personnel staffing.

3 We urge that the Commission use its considerable
4 power and influence with the Congress to ensure that funds
5 are available to the probation division, the administrative
6 office, and the Federal Judicial Center to enable probation
7 officers to perform their vital role in this process.

8 Additionally, we urge the Commission to consider
9 and if deemed appropriate, recommend to the Congress that
10 the U.S. probation system be allowed to retain a certain
11 percentage of the fines collected by our agency and specifi-
12 cally earmark those funds for the training and resources
13 needed for implementation of the sentencing guidelines.
14 Certain proposals of the Commission, such as the home
15 detention concept, can most appropriately be performed
16 through the use of electronic monitoring equipment, which
17 will require the purchase or lease of expensive hardware
18 and software. In view of the fact that probation officers
19 are responsible in most cases for the collection of fines,
20 we see that it is appropriate for a percent of those funds
21 to be allocated for the use of the probation system.

22 With respect to our specific comments and

1 recommendations, these are primarily concerning the proba-
2 tion and post-release supervision sections of your draft.
3 While realizing that the Commission has primarily addressed
4 the categorizing of crime and assigning numerical sanction
5 units to them in this draft, the comments regarding probation
6 and supervised release leave the reader uncertain as to
7 the Commission's expectations as to what are the purposes
8 and philosophy of both probation and post-release supervision.
9 This uncertainty lends itself to certain perceived problems
10 in the implementation of the proposed concepts regarding
11 supervision conditions, methods and manners of formulating
12 and filing violations, sanctions for violation of probation
13 and post-release supervision, and other concepts proposed
14 in the draft, such as home detention.

15 As an example, nowhere in Chapter III is the need
16 for the cooperation with the U.S. Probation Office by the
17 defendant ever mentioned. There needs to be built into the
18 process a mechanism for mitigating or aggravating
19 adjustments provided for the cooperation, attitude, and
20 responsiveness of the defendant with the probation officer.
21 Otherwise it is not in the defendant's best interest to
22 cooperate with the officer assigned to conduct the

1 pre-sentence investigation. The defendant's cooperation
2 can only hurt him or her by disclosure of such things as
3 prior record, financial and employment irregularities, and
4 other damaging information that may result in the aggrava-
5 tion of his scoring. Conversely, without his cooperation,
6 the job of the U.S. probation officer becomes much more
7 difficult.

8 We recommend that cooperation with the U.S.
9 probation officer be included in Section Part (b), Post-
10 Offense Conduct. Furthermore, we recommend that perjured
11 statements to a U.S.P.O. and attempts to destroy or
12 conceal information or material evidence should be considered
13 an aggravating factor and scored appropriately.

14 With respect to the conversion of sanction units
15 into sentences, we favor a combination of Options 1 and 3.
16 In order for the guideline system to work efficiently, in
17 our view, there needs to be a requirement that the judge
18 use all the sanction units accumulated by the defendant,
19 including a minimal range required as a term of imprisonment
20 when needed. The balance of the sanction units should then
21 be satisfied with nonimprisonment sanctions such as probation,
22 post-release supervision terms, and other appropriate

1 considerations.

2 With respect to the conditions of supervision,
3 we recommend that certain vague, unenforceable terms and
4 descriptions be either clarified or avoided. The word
5 "promptly" in Condition G should be changed to a more specific
6 time frame, such as "two days" or "within 72 hours", which
7 we believe is clear and less likely to lead to misunderstanding
8 or inability to be clearly enforced by the court.

9 Additionally, in Condition H, we submit that
10 "maintain reasonable hours and associate with law-abiding
11 persons" is vague and unenforceable. We recommend that the
12 Condition read, "The offender shall not associate with
13 individuals with criminal convictions unless granted permission
14 to do so by the probation officer."

15 Furthermore, we recommend that the Commission
16 propose the adoption of wording for the imposition of certain
17 special conditions of supervision -- special conditions
18 such as financial disclosure for white-collar criminals,
19 employment and travel restrictions for the third party
20 risk offender, and conspiratorial offender, and search
21 conditions for the narcotics trafficker and violent
22 offenders should all be worded similarly to avoid

1 misunderstanding and unenforceability. We have submitted
2 written suggestions as to the recommended wording for the
3 Commission's consideration.

4 The violation of probation and post-release
5 supervision section of the draft is of concern to us. It
6 is speculated that the proposed revocation terms for
7 violators are unacceptably low. Our reading of Chapter V
8 suggests that if an offender is convicted of an A or B
9 felony, subsequently released to post-release supervision,
10 and commits a lesser technical violation, revocation will
11 result in service of a six-month period of additional
12 incarceration following which there will be no resumption
13 of the up to three years of supervision.

14 In essence, the post-release offender can
15 dispense with his three-year supervision term by committing
16 a lesser technical violation which will result in service
17 of a six-month term and no further supervision. We believe
18 that a number of offenders, in particular the career criminal
19 and organized crime offender, would prefer to serve the
20 six months than be responsible to a probation officer
21 for three years. We believe that this highlights a flaw
22 in the revocation process that needs to be addressed by

1 the Commission. We further suggest that this process needs
2 to be more clearly defined and refined to ensure that
3 supervision terms are meaningful and provide more control
4 than the historical "paper tiger" image of community
5 supervision.

6 In conclusion, we thank the Commission for allowing
7 this Association and U.S. probation officers individually
8 to have input into the formulation of these sentencing
9 guidelines. We offer to the Commission our continued
10 interest and availability to continue to work closely with
11 you in your task of clarifying, completing, enlarging and
12 defining the remaining section of the guideline and
13 sentencing structure.

14 We remain at your disposal for whatever task
15 you deem appropriate and in the interest of the Federal
16 probation system.

17 We thank you for this opportunity to provide
18 comment, and we congratulate you on the outstanding job
19 that you have done under the most trying of circumstances.

20 Mr. Chairman, this completes my prepared remarks.
21 I will be happy to respond to any questions the Commission
22 may have.

1 CHAIRMAN WILKINS: Thank you, Mr. McMahon, not
2 only for those remarks but for what you have given us in
3 the past.

4 I might say that in my judgment no group has
5 given us any more assistance than Probation Officers throughout
6 the last 12 months of the life of this Commission, and we
7 are going to continue to call upon you individually and
8 your Association and other probation officers to assist us.

9 Of course, we recognize that you recognize you
10 have a vested interest in this, because you certainly
11 will play a pivotal role in the implementation of the
12 guidelines.

13 Questions or comments from my right?

14 COMMISSIONER BAER: I'd like to commend you on
15 what I thought was a pretty good idea about possibly using
16 some of the sanction units or then the term after the
17 person leaves prison. My question is, do you see us
18 being able to do this under the present law, or will we
19 need to ask Congress for a law change? I think the idea
20 is good in terms of public protection.

21 MR. McMAHON: I think that it can be done within
22 the existing structure of the law. I think that the judge

1 should be required to use all the sanction units that are
2 calculated at the time of the sentencing, and if part of
3 those units are used for a term of imprisonment, the balance
4 could be used for imposing terms of either probation or
5 post-release supervision and/or conditions such as home
6 detention and things of that nature.

7 COMMISSIONER BAER: You're saying the judge could
8 do that under current law?

9 MR. McMAHON: That would be our reading of it.

10 COMMISSIONER BAER: It is an area you might want
11 to look into further.

12 CHAIRMAN WILKINS: Any other comments or
13 questions?

14 (Pause.)

15 CHAIRMAN WILKINS: Hearing none, thank you again.

T5S2 16 Our next witness, Mr. Wayne Lapierre, is Executive
17 Director of the Institute for Legislative Action, representing
18 the National Rifle Association. We are delighted to have
19 you, Mr. Lapierre.

20 Who is this with you?

21 MR. LAPIERRE: Richard Gardner, with the Deputy
22 General Counsel, National Rifle Association.

1 CHAIRMAN WILKINS: Good. Mr. Gardner, we are
2 delighted to have you as well.

3 MR. GARDNER: Thank you.

4 MR. LAPIERRE: Thank you, Mr. Chairman and Members
5 of the Commission.

6 We appreciate on behalf of the NRA members being
7 given the opportunity to testify. More than six months ago,
8 the NRA gave testimony in front of this Commission on the
9 general topic of truth in sentencing as it relates to fire-
10 arms-related criminal violations. That testimony continues
11 today to represent NRA's policy in this regard.

12 The sentencing guidelines published in the
13 Federal Register of October 1st represent a common sense
14 approach to an issue of very real concern to millions of
15 Americans.

16 The National Rifle Association heartily supports
17 the principles outlined in the sentencing guidelines which
18 could serve the legislatures and courts of the 50 States
19 as a model for constructing their own sentencing policy
20 with relation to firearms misuse and violent crime.

21 There are several facets of the Commission's
22 proposed guidelines I would like to single out as being

specifically supported by the National Rifle Association.

We applaud the recognition that protecting the public from criminal misuses of firearms and other dangerous felons is a primary goal of sentencing policy. The NRA also supports your treatment of all deadly devices as a factor in sentence enhancement. Too many such policies focus solely on firearms, to the exclusion of all other dangerous or deadly devices.

The NRA's nearly 3 million members, as well as 60 million other firearms owners, are also happy to learn of the enhancement penalties for theft where the object stolen is a firearm.

Likewise, we support the sentence enhancement proposed by the Commission for receipt of stolen property where that property is a firearm.

These two provisions when combined with the recently-enacted reforms of our Federal firearms laws, P.L. 99-308, which makes it a Federal felony for any individual, not just a licensed dealer, to transfer firearms to a member of the prohibited categories, we believe should aid law enforcement in addressing the black market of firearms. This activity, study after study by the Justice Department has proven, is a major source of criminally-acquired

1 firearms.

2 The NRA, however, also believes that some
3 clarification regarding sentencing policy for conduct
4 relating to the Gun Control of 1968 is necessary. Under
5 Section (k) (221), and wherever the word "rifle" appears,
6 we would suggest adding the words, "or shotgun", for reasons
7 of precision.

8 Also under section (k) (221) (a) (1), we oppose
9 the Commission assigning fully three times the offense
10 value unit to a handgun as opposed to a long gun.

11 Likewise under (k) (221) (a) (6), we oppose the addition
12 of an extra three points to the base offense value where
13 a violation involved a handgun distinguished from a long
14 gun.

15 Essentially, we believe these provisions represent
16 -- and our members believe -- a mistaken conception of the
17 handgun as a crime gun. In fact, the only difference
18 between a handgun and a long gun is about ten minutes and
19 a hacksaw.

20 Criminologist James Wright of the University
21 of Massachusetts at Amherst, Gary Klack of Florida State
22 University, and other authors of most comprehensive studies

1 of firearms laws and criminal acquisition of firearms have
2 deplored policies which might encourage the substitution
3 of long guns for handguns. These arbitrary and artificial
4 distinctions between types of firearms could lead to the
5 following type of scenario: An offender willfully sells
6 four handguns to a prohibited person. The total sanction
7 units for that offense would be 27, resulting in a prison
8 term of between 16 and 22 months. Yet if that same offender
9 willfully sells four rifles to a prohibited person, the total
10 sanction units would be 15, for a sentence of four to ten
11 months in prison. Again, the NRA urges that distinction
12 be eliminated.

13 Finally, the major concern of the NRA relates
14 to the nature of enhanced penalties for carrying firearms
15 during and in relation to the commission of a crime of
16 violence for drug trafficking offenses. It was the intent
17 of Congress when it passed Public Law 99-308 that these
18 sentence enhancements be mandatory minimum sentence, not
19 subject to probation or parole. If the reported method
20 for computing time off in the guidelines would in any way
21 have the effect of reducing this sentence enhancement for
22 criminal misuse of firearms, the NRA would oppose these

1 provisions in their present forms.

2 Notwithstanding the concerns just stated, we would
3 like to commend the Commission for its fine work, and we
4 appreciate being given the opportunity today to comment.

5 CHAIRMAN WILKINS: Thank you very much.

6 Mr. Gardner?

7 MR. GARDNER: I have no additional comments.

8 CHAIRMAN WILKINS: Fine. Well, we appreciate
9 not only the -- do we have a written submission from you?

10 MR. LAPIERRE: Yes, you will.

11 CHAIRMAN WILKINS: Good, good. We appreciate
12 not only your submission today, but the support and
13 assistance your Association has given us in the past..

14 Are there any comments or questions from any
15 Commissioner?

16 Commissioner Block?

17 COMMISSIONER BLOCK: I just had a short question
18 of clarification on the distinction between long guns
19 and handguns. It was my impression that handguns are somewhat
20 more concealable, and in that sense an enhanced penalty
21 for their use in the commission of a crime would make
22 some sense.

1 MR. LAPIERRE: Well, we believe any criminal with
2 five minutes can sit down and make a long gun concealable
3 also; therefore, there really is no distinction.

4 COMMISSIONER BLOCK: Thank you.

5 CHAIRMAN WILKINS: George?

6 COMMISSIONER MacKINNON: My question goes to the
7 same point. What you are talking about is a sawed-off
8 shotgun. Well, we can say it's a sawed-off shotgun.
9 As I recall the Federal statute, that's what it talks
10 about.

11 MR. LAPIERRE: Well, we believe the main problem
12 is a person misusing any firearm in a crime, so whether
13 it be a rifle, a shotgun or a handgun, the problem is
14 the person misusing that, and that's what the sentencing
15 guidelines should focus in on.

16 COMMISSIONER MacKINNON: Well, how many firearms
17 offenses or how many crimes committed in part by firearms
18 offenses are committed by rifles as opposed to handguns?

19 MR. LAPIERRE: There are crimes committed with
20 rifles. The greater percentage would be with handguns.

21 COMMISSIONER MacKINNON: By far, by far. And
22 the reason for that is because they are more adaptable

1 to that particular crime, and a rifle is not, because a man
2 has to conceal his gun. Ordinarily, when he is going to commit
3 a bank robbery or a lot of others, and run around the country
4 before he gets to a certain place, he can't be carrying
5 a rifle around on Main Street downtown without attracting
6 a lot of attention. ...

7 MR. LAPIERRE: Again we would come back to the
8 point that it only takes five minutes to turn a rifle --

9 COMMISSIONER MacKINNON: Yes, but we are talking
10 about the commission of crimes. We are not talking about
11 what you can do with a rifle or what you can do with a
12 shotgun.

13 Now, the English go so far as to say anything
14 simulating a handgun. Would you go for that? Certainly,
15 a lot of crimes are committed by simulated firearms --
16 that is, toy guns that look like firearms or concealed
17 weapons or the appearance of concealed weapons.

18 MR. LAPIERRE: Our position is we believe
19 the distinction should be any firearm used in a violent
20 crime, and that's what the sentencing guidelines should
21 focus in on.

22 COMMISSIONER MacKINNON: I know, but I was asking

1 you about whether it ought to go further and deal with
2 simulated firearms, or imitation firearms.

3 MR. GARDNER: Judge, if I might, I think we would
4 not support that kind of distinction, because of course,
5 simulated firearms, or the hand in the pocket, are things
6 where the potential for danger obviously doesn't exist
7 as it does with a real firearm. And I think that the key
8 is the potential for danger.

9 COMMISSIONER MacKINNON: But you can't tell when
10 you are looking at a Colt 45 whether it is loaded or not.
11 It might be unloaded. And of course, the ability to put
12 some force on is not there. And certainly, it creates the
13 appearance, and that is what is the real, vital factor
14 in the offense.

15 MR. GARDNER: That would create the offense, but
16 if we are talking about what kind of penalty is appropriate,
17 whether an enhanced penalty is appropriate, the deadliness
18 or actual ability of the instrumentality to cause injury
19 should be a significant factor.

20 COMMISSIONER MacKINNON: Well, what's the
21 difference whether you actually create the fear by something
22 that is capable of doing it, or whether you do it by

1 something that isn't capable of doing it, but has exactly
2 the same reaction on the victim? What's the difference?

3 MR. GARDNER: The difference is if it is an
4 imitation firearm or the hand in the pocket, you in fact
5 can't do the damage. And in fact I would suggest that if
6 you put the same kind of penalty on both, you may tend to
7 encourage the use of actual functioning firearms and not
8 the other kind of thing, so that the potential for hazard
9 is going to be increased.

10 COMMISSIONER MacKINNON: Well, I just tell you
11 that that's the way they do it in England.

12 MR. GARDNER: Well, they also don't have a Bill
13 of Rights in England.

14 CHAIRMAN WILKINS: Thank you again very much.

15 Did you have a comment, Mr. Lapierre?

16 MR. LAPIERRE: Judge, the only comment is a follow-
17 up. In terms of firearms in crime, the real problem from
18 NRA's point of view are the repeat offenders who continually
19 skirt the criminal justice system time and time again, and
20 in terms of guns showing up in crime, the people that are
21 using them are that class. They are not the normal American
22 citizens out there. And we believe that is why these

1 sentencing guidelines that really toughen the penalty for
2 violent use of a firearm in a crime would really help cut
3 crime out there involving firearms.

4 COMMISSIONER MacKINNON: Yes, but when you get
5 down to the mere possession of a firearm, not particularly
6 in a crime (inaudible), when that extends to a rifle or
7 to a shotgun, a full-length rifle or a full-length shotgun,
8 it isn't practical in a lot of communities. People have
9 them all around their houses all the time, and yet some
10 of these laws make that seem to be illegal.

11 CHAIRMAN WILKINS: Thank you.

12 MR. LAPIERRE: Thank you, Mr. Chairman.

13 CHAIRMAN WILKINS: Our next witness is the Executive
14 Legal Director for the Washington Legal Foundation, Mr. Paul
15 D. Kamenar. Mr. Kamenar, we appreciate you letting us call
16 you out of order, and we are delighted to hear from you.

17 MR. KAMENAR: Thank you very much, Mr. Chairman.
18 I was scheduled to testify this morning, and because I
19 was running late, I was bumped, and I understand I missed
20 an invitation to lunch. I appreciate that, and if this
21 hearing goes on much longer, I would accept one for dinner.
22 But I had better get my two cents in now while I have a

1 chance.

2 Our foundation is a national, nonprofit,
3 public interest law and police center with approximately
4 200,000 members nationwide. We devote a substantial part
5 of our resources to areas of criminal justice reform,
6 judicial accountability and crime victims' rights.

7 As part of our Court Watch Project, we all too
8 often see cases where judges both at the State and Federal
9 level impose undue lenient sentences for violent crimes
10 such as murder, rape, child molestation, and so forth, giving
11 probation or minimal prison terms. In that regard we applaud
12 the general approach taken by this Commission in these
13 proposed guidelines which would increase the length of
14 incarceration periods for most Federal offenses. And we
15 agree heartily with the reasons for this as stated on
16 page 7 of the draft, namely, that the purpose of this is
17 to provide just punishment, i.e. retribution, and deterrence
18 and protecting the public from future criminality.

19 Accordingly, probation should be used only for
20 the most minor nonviolent offenses. In reviewing these
21 draft guidelines and hearing some of the testimony this
22 morning regarding what this would do in terms of restricting

1 judges' flexibility, et cetera, I am reminded of a letter
2 that was written by Thomas Jefferson to Enman Pendleton on
3 August 26 of 1776. Jefferson, as you know, as a member of
4 the House of Delegates in Virginia, sought far-reaching
5 legislative reforms. He was successful in getting passed
6 his bill for religious freedom, but he was unsuccessful in
7 replacing Virginia's harsh criminal code with one that he
8 considered more in line and humane.

9 Jefferson describes his penalogical views to
10 Pendleton as follows: "The fantastical idea of virtue
11 and the public good being a sufficient security to the
12 state against the commission of crimes, which you say
13 you have heard insisted upon me by some, I assure you was
14 never mine. It was only the sanguinary hue of our penal
15 laws which I meant to object to.

16 "Punishments, I know are necessary, and I would
17 provide for them, strict and inflexible, but proportion to
18 the crime. Death might be inflicted for murder and perhaps
19 for treason, if you would take out of the description of
20 treason all crimes which are not such in nature; rape and
21 so forth, punished by castration; all other crimes, by
22 working on high roads, river galleys, and a certain time

1 proportioned to the offense. Laws thus proportionate and
2 mild should never be dispensed with. Let mercy be the
3 character of the lawgiver, but let the judge be a mere
4 machine. The mercies of the law will be dispensed equally
5 and impartially to every description of men. Those of the
6 judge or of the executive power will be the eccentric
7 impulses of whimsical, capricious, designing man." And
8 the letter goes on.

9 I guess there is something for everybody in
10 Jefferson's letter here. Capitol punishment, we believe,
11 is a Constitutional and appropriate punishment for certain
12 heinous crimes. On the other hand, castration would certainly
13 be not tolerated in today's society.

14 To the extent that the guidelines would transform
15 judges into "mere machines" or, as Judge Hill this morning
16 said, "a bean-counter", I guess is necessary to some
17 extent to reduce what we see as the capriciousness of the
18 sentencing authorities that led Congress to pass this law
19 in the first place.

20 As a footnote, I would note that Jefferson did
21 not include incarceration as one of his suggested forms
22 of punishment. "Working on river galleys", as set forth,

1 can be referred to today, I guess, as community service.

2 At this point I would like to address those
3 areas of the draft which are of particular concern to our
4 Foundation. First of all, with respect to capitol punishment,
5 as you know, certain Federal crimes do provide for that --
6 espionage, homicide, aircraft hijacking and so forth. On
7 Page 21 of your report, section (a)(211), expressly and
8 properly refers to the availability of the death penalty
9 for homicide level one. However, the Commission has not
10 developed any guidelines on this sentence and when it
11 should be imposed. We think that the Commission has the
12 authority to do so and urge the Commission to do so under
13 section 944(a)(1), (a)(2), and (b). In (a)(1), Congress
14 mandated that the Commission's duty is to promulgate
15 guidelines in determining the sentence to be imposed in
16 a criminal case, including probation, fine and incarceration,
17 including but not limited to. I would submit that
18 the death penalty can also have your guidelines formed
19 as well. There are those who think that the Federal death
20 penalty is unconstitutional under Furman versus Georgia.
21 However, in that case, the Supreme Court has never touched
22 or said one word about the Federal death penalty sentencing

1 laws, and indeed the first Federal judge to address this
2 issue in 1984 issued an opinion saying that the Federal
3 death penalty law for espionage can be applied, and we
4 filed a brief in all the Walker spy cases which I will submit
5 as an exhibit, arguing why the death penalty is Constitutional.

6 However, this Commission is not in a role to
7 determine the Constitutionality of the law, but I would
8 suggest that if you do not include capitol punishment in
9 your guidelines, that you make some kind of a preface indicating
10 that the Commission's failure to do so does not in any way
11 indicate that capitol punishment is inappropriate for any
12 crime that does allow for capitol punishment or otherwise
13 take a view one way or the other on that.

14 Turning to the standard of proof on pages 8 and
15 9, this was of some subject to the hearings this morning
16 about McMillan versus Pennsylvania, whether you should have
17 the preponderance of the evidence standard.

18 We don't think that you should have that standard.
19 I don't think it is required. I read briefly the McMillan
20 versus Pennsylvania case. I agree with Judge Oberdorfer
21 that that dealt with State law and is not applicable at
22 the Federal level. The difference there, and I think Judge

1 MacKinnon brought this out as well, or at least raised
2 this issue, and I'd like to perhaps clarify it if I can,
3 the difference is McMillan dealt with the statute, saying
4 there was a preponderance of evidence needed for this crime
5 of whether you carried a weapon as an incident that could
6 be used by the sentencing authority as opposed to an el-
7 ement of the crime. And all the court said in McMillan
8 was that Pennsylvania can do that. If they want to have
9 a preponderance of the evidence standard, fine. They
10 didn't say you even had to have that. But the petitioner
11 in McMillan was saying, "No; we need a higher level, clear
12 and convincing."

13 The court said, "No, you don't need that." That
14 was the holding. It didn't say that everything else
15 needed a preponderance of the evidence. In fact, it focused
16 on due process applying to the fact of conviction, not on
17 the sentencing authority. And it was careful to point out
18 in the Speck case, and I'll read from McMillan, where the
19 court said in Speck, "The conviction of a sexual offense
20 otherwise carrying a maximum penalty of ten years exposed
21 the defendant to an indefinite term to and including life
22 imprisonment for post-trial findings of other offense

1 characteristics," et cetera. And there the Supreme
2 Court said, "Wait a minute. We need some due process
3 there, confrontation and cross-examination."

4 But in all these cases you are all dealing with,
5 you are never going above the maximum level provided by
6 Congress, and that is all you are doing is as an agency of
7 the judicial government is to give guidelines to the
8 judges as to what range, in this already permissible
9 level of sentencing, you can impose.

10 Therefore, I think the due process does not
11 require the preponderance of the evidence standard. I
12 think it would just cause needless litigation that would
13 get this Commission bogged down in getting these guidelines
14 enacted, and I would heartily recommend that they be
15 eliminated.

16 The modified rule of sentencing, we generally
17 support. We have some problem with some of those examples
18 that were given. For example, you gave the hypothetical
19 on page 16 that a cocaine distributor who had a shotgun
20 in his apartment, that you can't use that shotgun. We think
21 that a sentencing judge could consider the shotgun as
22 related to the offense. Most drug dealers possess illegal

1 weapons to protect their illegal business from other
2 drug dealers or dissatisfied customers. It would be
3 different if the offense was, say, check forgery, but we
4 do not think it is a big difference whether the cocaine
5 distributor was busted in his apartment where the gun
6 was located, or on the front sidewalk in front of his
7 apartment. So I think the sentencing authority of the judge
8 should be kept broad in terms of what can be considered.

9 A few other minor points real quickly. The multiple
10 crimes, in terms of multiple rapes, multiple bank robberies,
11 we think that the sentencing authority can consider all
12 of those even though they were not all charged and convicted.
13 We think that just because there was no necessarily legal
14 connection between each one, the criminal should not benefit
15 from the fact that he is engaged in a crime spree by
16 himself. I mean, you stated that if he was conspiring with
17 another then, yes, it is okay to add them up and we can
18 consider it, but if he conspired with himself, so to speak,
19 then he gets a break, and we don't think he should.

20 With respect to the issue of drugs, we think that
21 the Commission cannot go far enough in this area in terms
22 of assigning high offense values. I am not sure whether

1 the Commission addressed, besides cocaine, the issue of
2 crack. I think the Parole Commission has rule-making
3 proceedings on this, and I think it might be helpful to look
4 at what they are doing in terms of what offense values to
5 assign to the distribution of crack.

6 Finally, in terms of child offenses, we were very
7 surprised to see that on page 30, criminal sexual conduct
8 with a minor, the base offense is only 12 offense units --
9 I thought that was a typographical error -- which means a
10 child rapist may be given probation or up to zero to
11 six months for --

12 CHAIRMAN WILKINS: What page is that?

13 MR. KAMENAR: On page 30. "Criminal sexual
14 conduct with a minor. If the offender committed criminal
15 sexual conduct with a minor absent circumstances of any
16 forced or coercion, the base offense value is 12."

17 Most child rapists don't really use kinds of
18 force or coercion; they lure their innocent victims to
19 that crime.

20 CHAIRMAN WILKINS: No, no, wait a minute. This
21 is dealing with a specific Federal statute that is usually
22 referred to as "statutory rape". This is where you've

1 got consenting individuals. It only has a maximum, I
2 think, of one year, statutory maximum penalty.

3 MR. KAMENAR: Okay. I still think that that
4 level is still too low. Statutory rape, 12 years old,
5 I don't know whether you could consent --

6 COMMISSIONER MacKINNON: You can't go any higher.
7 The statute limits it to a year.

8 CHAIRMAN WILKINS: You see, if the victim is
9 under age 12 --

10 MR. KAMENAR: Then, under your guidelines,
11 you could take six off of that and therefore -- can they
12 be put on probation?

13 CHAIRMAN WILKINS: Yes.

14 MR. KAMENAR: Okay. Our position is there
15 should be minimum jail time for raping a child. I am
16 sorry.

17 CHAIRMAN WILKINS: Yes, but this is not raping
18 a child. This is statutory rape -- a 17 year-old boy
19 and a 15 year-old girl --

20 MR. KAMENAR: No, no. You've got "12 years
21 old".

22 CHAIRMAN WILKINS: No, no. If the child is

1 under 12 --

2 MR. KAMENAR: Under 12, but if they are 12
3 and one day. We are not talking about 17 and 18 year-
4 olds fooling around in the backseat of a car.

5 CHAIRMAN WILKINS: All the State statutes do
6 this. This is not rape in the traditional sense.

7 MR. KAMENAR: Fine. We disagree. Let's move
8 on.

9 I think that it is also outrageous that in
10 terms of force and violence being used that you just refer
11 simply back to (a)(222) and (a)(225), under their cross-
12 references, where you say, "If the victim has suffered
13 Physical injury, add the appropriate offense value." We
14 think that with respect to raping children -- and this
15 includes people under 12, because that's where that kicks
16 in -- if a man rapes a three or four year-old baby,
17 and there is physical violence, obviously, that it should
18 not just simply go back to what the adult things are,
19 but I think you should double the amount that is used
20 for when children are involved.

21 My goodness, we treat juveniles differently
22 when they are criminals in our juvenile justice system;

1 shouldn't we treat them differently when they are victims
2 of these heinous crimes?

3 CHAIRMAN WILKINS: We should; we should do
4 that. The guidelines do that. But you have got to factor
5 in some other things, like the vulnerable victim statute --

6 MR. KAMENAR: No. It says here, under (b)(1),
7 "If the victim suffered physical injury, add the appropriate
8 offense value from (a)(222)-(a)(225)," which is assault
9 and battery.

10 COMMISSIONER BREYER: What section are you
11 looking at?

12 MR. KAMENAR: I'm looking on page 30, section
13 (a)(233) --

14 COMMISSIONER BREYER: I think that you understand
15 that the offense that (a)(233) is talking about is where,
16 without any force, deception or violence, a man and a
17 woman make love, both wanting to do it. Now, that's an
18 offense under a statute if in fact one of the parties
19 is young enough for it to qualify as statutory rape.

20 Now, there aren't many people, I think, where
21 the two parties involved are reasonably old, i.e., more
22 than adolescents, there aren't many people who would say

1 that those people should go to jail for long periods of
2 time. Now, maybe your Foundation thinks that. If they
3 do think that, I think it's novel. I mean, there may
4 be people who think that. I am not saying -- it is not
5 idiotic to think that. I just haven't come across it.

6 MR. KAMENAR: Okay, but look at (a)(1), Judge.
7 It says if the victim was under age 12.

8 COMMISSIONER BREYER: Now you have serious
9 problems when they get quite young, because they may
10 be pre-adolescent --

11 MR. KAMENAR: And they may be babies, and there
12 is a lot of that going on.

13 COMMISSIONER BREYER: Right, right, right.
14 But remember, still, that we are basically focusing on
15 a case in which there is no force, violence or deception.
16 Now, as soon as you get to a young person even in that
17 situation, these guidelines are pretty tough, because
18 even in that situation they say five years in jail,
19 you see, where you get to the child who is pre-adolescent.

20 But I want to be sure that you are focusing
21 on what we are talking about. Now, if you think that
22 that five years in jail is too little -- I don't think

1 you could actually impose it if the prosecutor prosecutes
2 under the statute that we are talking about because of
3 the one-year maximum. But I mean, we are now talking
4 in sort of an ideal world. I just want to be certain
5 that we are talking about the same thing. Now, what
6 precisely do you think is wrong here?

7 MR. KAMENAR: I think if the maximum is one
8 Year, obviously you can't give more than one year.

9 COMMISSIONER BREYER: Right.

10 MR. KAMENAR: I agree with you there. I was
11 under the assumption that there was another law other
12 than statutory rape whereby if a young child of four,
13 five or six years old is forcibly raped by an adult.--

14 COMMISSIONER BREYER: Okay. That's a different
15 section. My goodness, you are absolutely right.

16 MR. KAMENAR: That's a different section.

17 CHAIRMAN WILKINS: Oh, yes.

18 COMMISSIONER BREYER: Yes, that's a different
19 section.

20 MR. KAMENAR: Okay. Nevertheless, I would
21 still say that whatever cross-references you do have --
22 do you have it enhanced for if the victim is a minor?

1 COMMISSIONER BREYER: We sure do. Look at
2 (4) (232) and (231), and even in the one you were talking
3 about --

4 MR. KAMENAR: Well, okay, then I misspoke.
5 I want to make clear that if the victim is a minor, that
6 it is doubled or whatever.

7 COMMISSIONER BREYER:: Oh, it's a lot.

8 CHAIRMAN WILKINS: And I might add the Congress
9 has recently passed a statute dealing with this area,
10 and of course, we are using that as a model for the new
11 draft. It changes some of this, but it still makes a
12 distinction.

13 MR. KAMENAR: Okay. In my prior testimony
14 before the Commission, I think I gave an example of a
15 Federal judge where children were molested on a military
16 base, and the judge gave the man probation and he was
17 allowed to be back in the community. The parents were
18 very upset about that, and I was just afraid that under
19 these guidelines, he wouldn't see any jail time.

20 Finally, I would just like to say with respect
21 to the issue of fines, we recommend that in each and every
22 case, whether there is probation or not, that the judge

1 impose a fine to constitute either restitution and/or
2 court costs, Even if the criminal does not have much money,
3 a fixed amount should ge set, and a percentage should
4 be ordered to be paid to the victim and/or the court.

5 The statute, I realize, says that imprisonment
6 cannot be used as a form of rehabilitation. However,
7 it is our view that the payment of a fine of restitution
8 is a form of rehabilitation and serves that salutary
9 purpose because, even by paying a fine, the criminal has
10 a sense or acknowledgment that he is responsible for the
11 damage caused to his victim. And even if it is only ten
12 dollars a month, the fact that out of his money he is
13 being paid in the jail prison system for prison industries,
14 et cetera, that he is using to buy his cigarettes, records,
15 and what-have-you, that he knows a certain percentage
16 of that has to go to the victim or the court.

17 I think it is just a matter of principle that
18 in each and every case, a fine must be imposed in some
19 form or another.

20 Thank you very much.

21 CHAIRMAN WILKINS: Good. Thank you very much.

22 Any questions or comments?

1 (Pause.)

2 CHAIRMAN WILKINS: Thank you again.

3 Pete Shields is Chairman of Handgun Control,
4 Incorporated. Mr. Shields, we are delighted to have you
5 with us today.

6 MR. SHIELDS: Thank you, Mr. Chairman, members
7 of the Commission.

8 I am pleased to testify before you on behalf
9 of Handgun Control, a public citizen organization with
10 One million members and supporters, working to promote
11 legislation to curtail gun violence.

12 Besides speaking for Handgun Control, I also
13 speak to you today as a victim of violent crime, as a
14 father of a young man who senselessly lost his life to
15 a handgun violence. Thus I am particularly and personally
16 concerned with the proposals of the Sentencing Commission
17 as they relate to firearms.

18 I would first like to commend you for the out-
19 standing job you are doing in reaching out to the public
20 for comments. I especially appreciate the effort you
21 have made to keep Handgun Control informed of your
22 progress, and I am delighted to have the opportunity to

1 testify today.

2 Federal criminal law intersects with firearm
3 laws in two respects -- first and most importantly, the
4 Federal government through the Gun Control Act of 1968
5 and the Federal Firearms Act of 1934, regulates commerce
6 in firearms and other destructive devices. The important
7 interrelation of this regulatory function and violent
8 Crime in America is apparent from statistics provided
9 by the Treasury Department's Bureau of Alcohol, Tobacco
10 and Firearms.

11 in 1985, of the 3,137 defendants arrested by
12 ATF for violating Federal firearms laws, 65.2 percent
13 were narcotics dealers or users, 54 percent had prior
14 felony records, 29 percent had a history of violence,
15 18 percent were domestic or international gun traffickers,
16 11 percent were illegal manufacturers or converters of
17 machine guns, and over 10 percent were organized crime
18 members.

19 In short, defendants charged with violating
20 Federal firearms laws are not, quote, "law-abiding citizens
21 snagged in the net of red tape." Violators of these laws
22 are dangerous criminals whose firearms violations expose

1 thousands of Americans to further violence.

2 The preliminary guidelines procedure for calculating
3 sentences for violations of these crucial Federal laws
4 wisely distinguishes among firearms, recognizing that
5 handguns because of their concealability pose a greater
6 threat to life than do long guns and that automatic weapons
7 are more dangerous than conventional firearms. And of
8 course, this section also recognizes the danger of those
9 sawed-off guns that were referred to shortly before.

10 However, Handgun Control respectfully urges
11 that the Commission reconsider the offense values it has
12 preliminary assigned for violation of the Gun Control
13 Act and the National Firearms Act.

14 Based on our understanding of the preliminary
15 draft, we believe that the offense values assigned for
16 violations of Federal firearms laws would result in
17 sentences that were too lenient if the violators' violations
18 were viewed in terms of their potential for further injury.
19 Or, stated somewhat differently, Federal firearms violations
20 often constitute the first crucial link in a chain of
21 violent criminal activity, and thus, penalties of those
22 violations should be substantial.

1 Consider, for example, the sentences that would
2 be imposed under the guidelines for the following hypotheti-
3 cal crimes. First, an individual illegal manufacturers
4 two machine guns and delivers those machine guns to an
5 individual whom he knows has previously served time for
6 drug trafficking. If convicted, the machine gun manu-
7 facturer would be sentenced to two or two and a half years.

8 A second example. An individual who purchases
9 a dozen Saturday night specials, the gun most frequently
10 used in violent crime, in a State where purchase laws
11 are lax, and who then sold those handguns, no questions
12 asked, on the streets of New York City, would face a
13 sentence of 10 to 16 months.

14 Considering the high potential for further
15 violence, injury or death set in motion by these crimes,
16 we think the draft guidelines are far too lenient.

17 Handgun Control's specific legislative agenda
18 has always included the passage of mandatory sentences
19 for those who use handguns or other firearms to commit
20 a crime. We were pleased that Congress chose to establish
21 mandatory sentences for armed, violent Federal felons
22 in 1984 and for armed drug offenders in 1986.

1 It is not clear, however, from our review of
2 the guidelines, which offenses the Commission considers
3 crimes of violence for enhancing sentencing. For example,
4 Homicide I and II would obviously qualify. Does this
5 list of crimes of violence, though, include other levels
6 of homicide -- burglary, abduction, or unlawful restraint?

7 To the extent that these crimes are not crimes
8 of violence, we strongly urge that the sentences for
9 those and other crimes against persons and property be
10 enhanced if the offender is armed with a gun.

11 Specifically, rather than focusing primarily
12 on the outcome, we believe that your inquiry should also
13 focus on the potential risk of injury. In other words
14 an armed burglar who steals \$100 is more dangerous than
15 an unarmed burglar who steals \$10,000 and should be
16 sentenced accordingly.

17 Similarly, an individual who uses a gun in
18 an unsuccessful abduction may be more dangerous than an
19 unarmed criminal who commits a successful abduction.

20 In addition to these general comments, we
21 specifically want to draw your attention to the following
22 provisions. First, reckless and negligent homicide.

1 Here, our first concern involves relative weight given
2 to the use of a firearm. The guidelines assign a base
3 value of 30 for homicide caused by the defendant's reckless
4 conduct and a base value of 12 for homicide caused by
5 defendant's negligent conduct. In the case of reckless
6 conduct, the base value increases by 12 if the defendant
7 uses a weapon and by 6 in the case of negligent behavior.

8 Ironically, however, the reckless or negligent
9 use of a firearm in connection with homicide is only half
10 as costly in sentencing terms as is being under the influence
11 of any intoxicating substance. Being intoxicated adds
12 24 to 12 offense units for reckless and negligent homicide.

13 I respectfully urge the Commission to reconsider
14 this ratio.

15 I also note that the guidelines do not distinguish
16 between the use of firearms versus other weapons. Because
17 a gun has such a high propensity for inflicting serious
18 injury or death when used negligently or recklessly,
19 we recommend that the Commission consider an additional
20 offense value for use of a firearm.

21 Second, assault. We are assuming that an assault
22 constitutes a crime of violence and so falls under the

1 mandatory penalty provision where the offender is armed.
2 Accordingly, we were puzzled by the distinction drawn
3 between threatening with a firearm, discharging the firearm,
4 and causing injury with the firearm. If assault falls
5 under the mandatory provisions, these distinctions seem
6 irrelevant. If assault is not considered a crime of violence,
7 then we are indeed puzzled as to what is a crime of violence.

8 Third, stolen property. The 1981 Final Report
9 of the Attorney General's Task Force on Violent Crime
10 estimated that between 65,000 and 225,000 handguns are
11 stolen each year in the United States and that a significant
12 portion of guns used in crimes had been stolen. We respect-
13 fully suggest that the Commission reconsider the offense
14 totals it gives to those who steal and receive stolen
15 firearms.

16 For theft of a firearm, the guidelines would
17 take the basic theft offense value of 2, add 12 because
18 a firearm is involved, and then add enhanced values depending
19 on the value of the property stolen. If the total value
20 of property stolen is less than \$1,000, the increased
21 offense value is 4. This means that an individual stealing
22 30 Saturday night specials would be looking at a total

1 offense value of 18. This translates into 6 to 12 months
2 of imprisonment.

3 If these 30 guns were received by another for
4 resale, the recipient offense total would also be 18.

5 Thus, under the preliminary guidelines, the
6 individual who arms 30 people who presumably cannot qualify
7 for lawful purchase of guns may spend only 6 months in
8 prison. On the other hand, he has exposed dozens and
9 dozens of individuals to serious risk of death or injury.
10 The lives of tens of thousands of people in this country
11 are shattered every year by handgun violence. I know
12 first-hand the agony and the anguish felt by the victims
13 of senseless violence, as my son was murdered with a
14 handgun in 1974.

15 Enhanced sentences for those who use guns in
16 crimes is one of the most important positive steps that
17 can be taken, and Handgun Control and I personally strongly
18 support them.

19 I do hope that the members of the Commission
20 carefully review my comments and suggestions and reconsider
21 the offense values it has preliminarily designed for
22 violations of the Gun Control Act and the National Firearms

1 Act. If done, I believe these already impressive guidelines
2 would be improved.

3 Thank you.

4 CHAIRMAN WILKINS: Thank you very much.

5 The first example you spoke of where you said
6 the sentence would be two to two and a half years, if
7 the sentence were going to be six to seven years, does
8 that sound more in line with what you think would be
9 appropriate?

10 MR. SHIELDS: Yes -- I am not a lawyer, and
11 I am not an expert in the criminal justice field. I
12 just think you have to weigh the balance here. But the
13 two to two and a half years, in my book, is just far too
14 low.

15 CHAIRMAN WILKINS: I have the same problem
16 that perhaps you are having with this, and I have to
17 stop to remind myself that two years is really six
18 years, three years is really nine years. You see, if
19 we keep thinking about it in today's world and then
20 compare it to the guideline world, because this two to
21 two and a half years would have to be all served. There
22 won't be any parole. So that has to be kept in mind.

1 MR. SHIELDS: Okay. I think about it all the
2 time, because the killer of my son is in prison for life,
3 and I am waiting for that call one of these days where
4 he has only served eight to ten years, and somebody is
5 saying he is coming up for parole. And I want to go up
6 there and testify and say keep him there.

7 CHAIRMAN WILKINS: I appreciate your feelings
8 on that. I meant to say that we all need to keep thinking
9 in those terms -- perhaps two and a half years is not
10 sufficient sentencing; I am not arguing that -- but when
11 we look at these sentences, we need to consider the fact
12 that we are probably viewing them from today's world,
13 and so we have to multiple by three, you see, in order
14 to get a real comparison.

15 But I appreciate very much your views.

16 MR. SHIELDS: I guess my fundamental point
17 here is that we give heavy weight to the potential for
18 injury when somebody is carrying, using, trafficking in
19 these deadly handguns, which are the primary weapon of
20 crimes of violence in this country.

21 CHAIRMAN WILKINS: Yes, thank you.

22 Comments or questions?

Commissioner Breyer?

1
2 COMMISSIONER BREYER: Yes. I appreciate your
3 keeping track of this, and in a way, you have put your
4 finger on a problem that is a little bit more difficult
5 technically than you may realize. I think some of the
6 odd results that you get come from the fact that when
7 we look to the statute, it governs an enormously broad
8 range of different kinds of activities, and it is hard
9 for us in the guideline to break down a statute like
10 section 922 into all its constituent parts, of which
11 there may be thousands in there -- you know how long a
12 statute that is; it is a very long statute -- and then
13 sort of put separate penalties for each. That is a
14 problem we are going to have to grapple with, because
15 if we try to break it down too finely -- in which case,
16 if we break it down, we can take your guy who sells the
17 five guns and treat him more harshly than somebody else
18 who has just made a technical mistake. If we do that,
19 we are going to run into some of the problems that the
20 judges have this morning. If we don't do that, we are
21 going to have to leave it up to the judges to use their
22 discretion in aggravating, and we are going to have to

1 compromise those two things.

2 So I think that your -- looking at the next
3 version and keeping the cases you have in mind and then
4 seeing specifically how they would be treated, I think
5 would be helpful. So I urge you to continue to do that.

6 MR. SHIELDS: Thank you.

7 COMMISSIONER MacKINNON: You talked about selling
8 12 Saturday night specials on the street as being an
9 offense. What was that offense?

10 MR. SHIELDS: Well, it is an offense of the
11 Federal firearms laws.

12 COMMISSIONER MacKINNON: What -- registration
13 or lack of registration, or what -- just the mere sale?

14 MR. SHIELDS: Well, no. Across State lines.

15 COMMISSIONER MacKINNON: He needs to bring
16 them across State lines and sell them.

17 MR. SHIELDS: That's right, that's right.

18 COMMISSIONER MacKINNON: Now, you talked about
19 assault. Well, there are two things; there are assault
20 and batter. Assault is not battery. And you said assault
21 is a crime of violence. Well, many times, in many
22 definitions, it falls short of being a crime of violence.

1 MR. SHIELDS: Even if the person is carrying
2 a firearm?

3 COMMISSIONER MacKINNON: I say many times under
4 certain definitions, it falls short of being an actual
5 crime of violence, just assault.

6 Now, assault is putting some person in threat.
7 And many times, some courts consider it to be short of
8 the accomplishment, which would be a battery. But generally,
9 many statutes talk about assault with a firearm, and more
10 or less give it the same kind of a sentence as they would
11 a crime of violence, although it might not technically
12 meet the same definition as a crime of violence.

13 Now, you talked about the "odd results" that
14 you get in some of these cases. Actually, what you mentioned
15 was that some cases do bring about odd results. Well,
16 a judge can say under these guidelines and under the law --
17 and we anticipate they will come to the same conclusion
18 that you do -- that this is an "odd result", and therefore,
19 it justifies an increased penalty, and I am giving it,
20 and that's my reason for imposing this sentence. And
21 the defendant can appeal, and the Court of Appeals would
22 say, "We'll throw your case out", and that's the way

1 the statute contemplates taking care of "odd results";
2 they let the judge deal with it. So they are not uncorrect-
3 able.

4 MR. SHIELDS: Well, I am glad, because some
5 of them, you know, the negligence --

6 COMMISSIONER MacKINNON: Well, a lot of people
7 here have been dealing with these things as though they
8 were absolutes. Well, in many respects they are absolutes.
9 But they can be appealed, and they can be increased or
10 decreased. And if the experience in the Federal system
11 is anything like it was in Minnesota, you're going to
12 have a number of appeals when you start out, and you are
13 going to settle some of these questions. And the judges
14 are going to write some of these guidelines. And consequent-
15 ly, we hope more justice will result.

16 Thank you.

17 MR. SHIELDS: Thank you.

18 COMMISSIONER ROBINSON (presiding): Any other
19 questions?

20 (Pause.)

21 COMMISSIONER ROBINSON: Thank you very much,
22 Mr. Shields. We appreciate your coming.

1 Is Scott Wallace here? If you would come up.
2 Mr. Wallace is from the NACDL, National Association of
3 Criminal Defense Lawyers. Alan Ellis, I understand, is
4 still sick.

5 MR. WALLACE: That's right. We appreciate
6 your willingness to reschedule to suit him, but he is
7 still indisposed with a bad case of the flu.

8 My name is Scott Wallace, and I am Legislative
9 Director of the National Association of Criminal Defense
10 Lawyers. In view of the lateness of the hour, I will
11 not try to go over the entire statement of Mr. Ellis,
12 but let me just highlight a few important points.

13 I would call your attention particularly to
14 our expressions of concern about the modified real offense
15 sentencing system and the preponderance of the evidence
16 test that is applied to sentencing determinations.

17 The main issue that I would like to highlight
18 is something that has been discussed a lot in the last
19 couple of days here, and that's the question of prison
20 overcrowding and how it should be considered in the
21 formulation of these guidelines.

22 We recognize that some members of this Commission

1 have expressed reservations about giving prison capacity
2 any voice in the formulation of the guidelines. As Mr.
3 Trott said yesterday, to do so would be to put the cart
4 before the horse. We sincerely understand this reluctance.
5 In an academic sense, doing justice -- that is, the rightness
6 an appropriateness of a particular punishment for a
7 particular crime -- must be absolute and should be. Whatever
8 our own view of what the just punishment ought to be,
9 we all would like to see it applied fairly and consistently
10 without regard to what Mr. Trott referred to as artificial
11 limitations on money and prison space.

12 But we are not now in an academic forum. These
13 guidelines are going to be administered in the real world,
14 in a criminal justice system dominated by artificial
15 limitations, a stingy Congress, and the perpetual
16 tradition of making do with inadequate resources.

17 Indeed, in the forum we are in today, there
18 is really no point in discussing at all the issue of
19 whether prison overcrowding must be considered by the
20 Commission in formulating the guidelines. Congress has
21 already resolved the issue: It must be considered. And
22 if the Commission disagrees, its sole recourse is to go

1 back to Congress with one of two recommendations: One,
2 that Section 994(g), the one mandating that the guidelines
3 be designed to minimize overcrowding, be repealed; or
4 two, that \$10 billion or whatever it takes be appropriated
5 to build new Federal prisons.

6 But unless, and until either of these happens,
7 the Congress' mandate stands and must be followed. We
8 would simply like to emphasize that it need not be
9 followed in an arbitrary, inconsistent or artificial way.

10 We would encourage the Commission to borrow
11 a concept from the recently-enacted Tax Reform Act, the
12 concept of revenue neutrality -- that is, that you can
13 dramatically change the law, rewrite national priorities,
14 get tougher with some people and lighten the burden on
15 others, all without changing the bottom line -- the amount
16 of revenue taken in.

17 There may be disagreement now about the need
18 to have a neutral bottom line. But it was a "given" in
19 the tax debate handed down from the President and accommodated
20 by the entire Congress, and in the sentencing area as
21 well, it is a "given", handed down by Congress to this
22 Commission, and it does not belong in this debate to

1 question the need for it.

2 What we are advocating, then, is a notion of
3 incarceration neutrality, that is, that whatever you decide
4 to do to restructure sentencing priorities, the bottom
5 line, the Federal prison population relative to prison
6 capacity, must not increase. In fact, since we are
7 already dealing with a Federal prison overcrowding rate
8 of some 50 percent, as Mr. Carlson testified yesterday,
9 the goal should be to decrease it, not just a little but
10 to zero percent, the point where population would not
11 exceed capacity at all. At that point, the Congress'
12 mandate would clearly be met. Obviously built into this
13 concept would be foreseeable annual increases in prison
14 capacity so that the bottom line could inflate over the
15 Years in line with reasonable expectations of new Congres-
16 sional appropriations for Federal prison construction,
17 based on historical appropriations patterns for the
18 buildings and facilities account of the Federal prison
19 system.

20 In this regard, though, we note that although
21 Federal prison construction has been on a four-year spending
22 spree, adding between 1,000 and 2,000 new beds each

1 fiscal year from 1984 to 1988, the Department of Justice,
2 according to its budget submission to the Congress for
3 fiscal year 1987, plans to build not a single new space
4 in the years 1989 through 1991. The plan is to level
5 off for those three years at a rated capacity of \$31,866.
6 And yet, those same budget materials state that the over-
7 crowding rate at that time, at the time they were prepared,
8 which was 42 percent, was unacceptably high and that the
9 1984 Crime Control Act will further increase the inmate
10 Population.

11 And yesterday Mr. Carlson testified that the
12 draft guidelines would lead to "a potential dramatic
13 further increase in the Federal prison population". We
14 would urge the Commission to set priorities. We can't
15 send everybody to prison. And we can't increase current
16 sentence lengths by 225 percent, as Judge Heaney's study
17 in the 8th Circuit that he explained this morning indicates
18 would happen under the proposed guidelines. Choices
19 have to be made, priorities assigned; whom do we most
20 want to send to prison? Obviously, hardcore, repeat,
21 violent offenders. Whom might equally well be punished
22 by a combination of imprisonment plus some appropriately

1 tailored, nonincarcerative alternative? For which offenders
2 is there the least compelling need for incarceration?
3 Which could be diverted?

4 There is a broad, imaginative and ever-expanding
5 array of promising alternatives to incarceration out there.
6 For offenders on the lower rung of the culpability ladder,
7 whoever you decide they may be, such alternatives must
8 be provided.

9 That concludes my statement.

10 Thank you.

11 CHAIRMAN WILKINS: Thank you very much.

12 Any questions?

13 Commissioner Block?

14 COMMISSIONER BLOCK: I just want to follow
15 up on these "promising alternatives". Can you enlighten
16 me about the "promising alternative punishments" that
17 we might use or might suggest for offenders?

18 MR. WALLACE: Well, they depend on the specific
19 offense involved, but many of them are out there already:
20 Fines, restitution, community service.

21 COMMISSIONER BLOCK: Would you say for securities
22 violations, antitrust violations, and certain frauds that

1 we use only fines and save the prison capacity?

2 MR. WALLACE: No. The determinations are yours,
3 of course, to make as to what particular offenses should
4 merit solely an alternative or a combination of prison
5 sentence plus some alternative. In a case like Mr. Boesky,
6 for example, which was discussed yesterday, a combination
7 might be appropriate, where he might actually be more
8 hurt by having to cough up a tremendous amount of money,
9 or as much hurt as going to prison for an appropriate
10 length of time.

11 COMMISSIONER BLOCK: So you might save the
12 prison capacity by not incarcerating white-collar criminals
13 and in fact using the prison capacity for just street
14 crimes?

15 MR. WALLACE: No, I am not recommending a
16 distinction between white-collar crime and street crime.

17 COMMISSIONER BLOCK: I am just trying to find
18 out where you use these promising alternatives. People
19 who commit street crimes don't have a lot of resources
20 to pay fines, nor can they pay restitution.

21 MR. WALLACE: Well, money is only one alternative.

22 COMMISSIONER BLOCK: Well, what do you do?

1 MR. WALLACE: Well, say you have a first offender,
2 violent offender, someone who has committed a street
3 burglary, who has no money of his own, a street robbery,
4 you could structure -- and this has been done in an
5 infinite number of very imaginative ways -- require him
6 to perform community service for a victims' organization,
7 to become aware of the humanity of the people who he has
8 violated.

9 COMMISSIONER BLOCK: Do you think that is an
10 adequate punishment both to show the seriousness of the
11 offense and to deter?

12 Do you think putting that in the guidelines
13 is a wise public policy?

14 MR. WALLACE: I think if you are talking about
15 first offenders, of course --

16 COMMISSIONER BLOCK: Well, you want them to
17 be last offenders. It seems to me you are breeding career
18 criminals.

19 MR. WALLACE: Our bottom line also is deterrence,
20 and I think that is a most important --

21 COMMISSIONER BLOCK: If you treat first offenders
22 that way, you are creating career offenders.

1 MR. WALLACE: Well, we disagree.

2 COMMISSIONER BAER: What about the drug users?

3 In the Federal system, about a third of the new commitments
4 are for drug users, and many of those are first offenders;
5 in fact, the biggest ones are sure to be first offenders.
6 What are you advocating for those?

7 MR. WALLACE: Well, I guess I would like to
8 respond further in writing. We have several experts on
9 drug offenses who might be able to help answer that more
10 specifically than I can. But I will be pleased to respond
11 with a more detailed answer.

12 CHAIRMAN WILKINS: Thank you.

13 Commissioner Nagel?

14 COMMISSIONER NAGEL: Yes. The legislation
15 under which we operate begins with a statement of four
16 purposes of sentencing, and dramatically absent from those
17 purposes is to determine sentences so as to manage prison
18 capacity.

19 One question I have is why you think that was
20 not included if it was the Congress' intent that we use
21 sentences as a way to manage capacity.

22 Furthermore, the legislative history reveals

1 that there was an amendment proposed which would have
2 had existing capacity dictate the sentences, and in fact,
3 that amendment was to the best of my recollection overwhelmingly
4 rejected -- I think the vote was 93-to-1. So it was not
5 that Congress did not consider the policy you are advocating,
6 but I believe that it considered it and rejected it.

7 My question to you is on what basis do you
8 advise us to act in what would appear to be direct contra-
9 diction to the legislation under which we operate?

10 MR. WALLACE: Well, the four purposes to which
11 you refer, as I understand, are the purposes of punishment.

12 COMMISSIONER NAGEL: No; they are the purposes
13 of sentencing.

14 MR. WALLACE: The purposes of sentencing.

15 COMMISSIONER NAGEL: Right. But what might have
16 been included is that one purpose of sentencing is to
17 manage prison capacity, is to be assured that no more
18 than the existing number of persons are sentenced to
19 imprisonment such that there is no additional overcrowding,
20 et cetera. In fact, in some States, that has been a purpose.
21 I think it is quite well-known that that was an overall
22 purpose or an overriding concern in the Minnesota

1 determination of their sentences. And the amendment was
2 Proposed to Congress that we follow the Minnesota pattern,
3 and as I say, to the best of my recollection, Congress
4 specifically rejected that by a 93-to-1 vote.

5 MR. WALLACE: Well, I would suggest a distinction
6 between the purposes of sentencing and the purposes of
7 the sentencing guidelines.

8 COMMISSIONER NAGEL: Well, this was specific
9 to the sentencing guidelines. And how do you reconcile
10 your advice to us in view of the legislative history and
11 that specific amendment?

12 MR. WALLACE: Let me address that amendment,
13 then, first. The amendment was targeted at zeroing in
14 on existing capacity. We are not suggesting that the
15 Federal prisons should not be permitted to expand. That
16 was basically a moratorium on prison construction amendment.

17 What we are suggesting is not that Congress
18 should be precluded from appropriating money for new prison
19 spaces. Obviously, that is necessary. We are trying
20 to foster a recognition that Congress is institutionally
21 reluctant -- perhaps incapable -- of providing adequate --

22 COMMISSIONER NAGEL: How do we know that, by

1 the way, in the absence of proposing sentences to them
2 that conform to the purposes and then letting them make
3 that decision independent of our second-guessing that
4 ahead of time? That's really the question?

5 MR. WALLACE: Well, the basis for my own personal
6 thoughts on that is from having worked for four years
7 in the Senate, in part on the Senate Judiciary Committee,
8 working on prison overcrowding issues and handling repeated
9 efforts by Republican Senators for whom I worked, to
10 provide additional funding for prison construction -- one
11 year, an amendment for \$600 million; the next year, in
12 the face of a 60-to-33 defeat on that amendment, an amendment
13 for \$200 million; the next year, an amendment for \$25
14 million. We got the \$25 million one, but it was like
15 pulling teeth, and that was in the context of the 1984
16 Crime Control Act.

17 COMMISSIONER GAINER: Mr. Wallace, do you think
18 it might have helped you in that situation if you had
19 had in being at that time a sentencing commission saying
20 that, as a result of the logical application of our guidelines
21 that we have developed, developed in order to meet the
22 four Congressionally-specified purposes of sentencing,

1 we find that an additional 8,500 beds are going to be
2 necessary in the next three years, and if they are not
3 provided, unfortunately, we are going to have to dump
4 on the streets a variety of individuals who we think full
5 well justify incarceration. Would that not have helped
6 you? Would it not be somewhat a different situation next
7 year or the year after that, when there is in being a
8 commission designed to look at these things and to make
9 recommendations to the Congress?

10 MR. WALLACE: Certainly, the fact that such
11 a recommendation comes from an independent bipartisan
12 commission has historically enhanced almost any proposal
13 that has been put to Congress. They love independent
14 commissions, and they generally treat them with great
15 deference, especially when they establish them themselves.

16 The issues, though, remain the same, and just
17 recently in the last couple of months, and mentioned in
18 our statement, in the 1986 Drug Act, there was a lot
19 of discussion about the increased prison population that
20 would result from the stiffer sentences in the drug area.
21 Republicans and Democrats alike agreed on that fact, and
22 the House had lengthy discussion of how much money they

1 should add for prison construction. They concluded they
2 should add \$1 billion over the course of three years to
3 fund the construction of 17 new Federal prisons. The
4 Senate, faced with Gramm-Rudman and budget realities,
5 came back and said, "Well, our proposal is one new prison,
6 about \$90 million." They compromised -- two new prisons,
7 \$98.7 million. That's the reality.

8 Now, you might be able to get a little bit
9 more by virtue of the Commission requesting it, but that's
10 historically the way it has gone, and I think that is
11 what you have to start from.

12 COMMISSIONER NAGEL: Doesn't that undermine
13 your earlier point, which is that we should have prison
14 capacity drive the determination of sentence proposals;
15 and if in fact Congress has demonstrated that it is willing
16 under certain circumstances, why shouldn't be separate
17 those decisions, that is, do what I think the legislation
18 expected us to do, which is to determine the sentences
19 according to the four mandated purposes, and then if
20 there is an increased need as a result of an impact study,
21 then you go to Congress and you make your arguments, and
22 then they can act as an independent legislature, which

1 was the position being advocated earlier by one of the
2 witnesses.

3 What would be the basis for arguing that we
4 should second-guess now, a priori, ahead of time, and
5 then let that determine the sentences?

6 MR. WALLACE: Well, I don't think anybody can
7 argue that you have to have a crystal ball to see what
8 kind of money is going to be appropriated. And in fact,
9 the statute doesn't require you to do that. It simply
10 says that you should formulate the guidelines so as to
11 minimize the risk that population shall exceed capacity.
12 And they don't even say by how much. Perhaps it could
13 be argued that that provision contemplates a permissible,
14 30, 40 percent overcrowding rate. At the time that the
15 provision was enacted, Federal prison overcrowding stood
16 at 42 percent. Perhaps it could be argued that that is
17 acceptable under the language of the provision, and you
18 have at least that much fudge room from 42 percent down
19 to zero for you to have a guess about what will be
20 constructed next year.

21 But I think one thing is sure, and that is
22 that you cannot go above that, significantly above that,

1 certainly, because that doesn't fall under the heading
2 of minimizing overcrowding. And if you take current
3 overcrowding rates, and you have a 225 percent increase
4 in sentence length, I don't see how you re going to get
5 below the 42 percent overcrowding rate.

6 COMMISSIONER BREYER: Well, you don't know
7 what it is going to be, as I don't know what it is going
8 to be. I mean, I don't know what the numbers are going
9 to be, so I doubt that you know what the numbers are going
10 to be.

11 MR. WALLACE: Well, I am just speaking from
12 reasonable certainty. It is sort of like everyone's gut
13 feeling about the President's economic program: increase
14 defense spending, cut taxes, and logic will tell you
15 although he assures you otherwise that it probably is
16 not going to produce a reduced deficit. I'm just
17 trying to go on common sense.

18 COMMISSIONER BREYER: I'm saying that you don't
19 know what the recommendation of the Commission is going
20 to be in terms of length, I suppose, because I don't know
21 what they are going to be. Since I don't know what they
22 are going to be, I doubt that you know it.

1 MR. WALLACE: Oh, certainly.

2 COMMISSIONER BREYER: And so there is a lot
3 of "what if-fing", I think, going on in respect to the
4 impact on the prisons. That is, Congress has just passed
5 a set of laws that create some new crimes and have mandatory
6 sentences for a whole lot of drug crimes, and they have
7 changed the immigration law to impose criminal penalties
8 on employers who hire aliens, I take it, so if this Commission
9 disappears from the face of the earth tomorrow, I suspect
10 that there will nonetheless be additional criminal defendants
11 who are convicted of new and different crimes.

12 So the extent to which whatever we recommend
13 in a whole variety of areas creates a significant increase
14 in prison population over and above what will happen in
15 the future anyway, I think at this point is pretty
16 speculative.

17 I agree with you 100 percent, and I think
18 everybody does, that this Commission will follow the
19 statutory instruction that the sentencing guidelines
20 prescribed under this chapter shall be formulated to
21 minimize the likelihood that the Federal prison population
22 will exceed the capacity of the Federal prisons as

1 determined by the Commission. I mean, that's the statement
2 in the law, and I don't know anyone on the Commission
3 who does not intend to follow the law.

4 MR. WALLACE: Well, obviously, I am not
5 anticipating what your next version of the guidelines
6 will look like, but my comment is directed solely at the
7 preliminary draft that we have before us.

8 COMMISSIONER NAGEL: I would add just one further
9 thing, and that is when you reconsider this issue, you
10 may want to separate out the potential impact over the
11 short-run versus the long run, and that it may be that
12 you may have a short-run increase, but it may also be
13 that you may have a short-run increase, but it may also
14 be that you will have a long-run decrease as a function
15 of the deterrent effect of the short-run increase. That
16 is at least possible, and I think should be entertained.

17 MR. WALLACE: If in the short run, there is
18 100 percent prison overcrowding rate, then in the short
19 run, the courts are going to mandate early releases, and
20 everything that you are trying to do here will be
21 frustrated by that.

22 CHAIRMAN WILKINS: Judge MacKinnon?

1 COMMISSIONER MacKINNON: There are just a couple
2 of points I wanted to clear up. First of all, I probably
3 ought to comment that roughly, my understanding is we
4 have about 44,500 prisoners in the Federal institutions
5 at the present time, and the expectation is that without
6 any change whatsoever, that by 1990, 1991, that is going
7 to amount to 51,000 prisoners -- apart from what we do,
8 completely.

9 The other matter that I wish to address my
10 thoughts to is the Minnesota situation. Now, you heard
11 a lot of misstatements about what happened in Minnesota
12 or what the Minnesota situation is. And I will tell you
13 what it is.

14 The prison population in Minnesota today
15 is substantially what it was years and years and years
16 ago. It is slightly higher, about 4.47 percent as
17 opposed to 4.4 four years ago, all through the years.
18 It has remained fairly constant.

19 Now, all of this talk about the Act being
20 limited to prison population, and it has some language
21 in there, they have one of the most modern and one of
22 the best prisons in America, and the capacity is way

1 underutilized.

2 As a matter of fact, as you noted when I talked
3 to the gentleman from Milwaukee, he reflected the fact,
4 which I knew, that Minnesota is presently taking Wisconsin
5 prisoners in order to fill up the prison. They have got
6 to go outside to get prisoners to fill up the prison.
7 So it has not had any impact on prison capacity to that
8 extent.

9 Now, I know you didn't make any statement about
10 that, but I just wanted to get that on the record at the
11 close at this particular time.

12 CHAIRMAN WILKINS: We appreciate your attendance,
13 and we also appreciate the work of your organization which
14 has been working with us over the past year, and we are
15 sure we will continue to have a working relationship with
16 Defense Attorneys.

17 MR. WALLACE: Thank you very much. We certainly
18 appreciate your receptivity and your interest in hearing
19 us. It is very much appreciated.

20 CHAIRMAN WILKINS: Thank you.

21 In keeping with the policy of the Commission
22 during these regional hearings, we invite anyone who

1 has comments to come forward and address the Commission
2 on any related subjects dealing with the guidelines or
3 policies of the Commission.

4 Mr. Santorelli?

5 I was going to recognize you. Mr. Santorelli
6 is in private practice now, as I understand it, and was
7 formerly the Administrator of LEAA.

8 MR. SANTORELLI: Yes, and I as too young when
9 I held the job. As I think back now, I would have done
10 some things differently.

11 Thank you, Mr. Chairman, for permitting me
12 to share a few moments of your time, especially at this
13 late hour. I am particularly pleased to renew some
14 relationships with some members of this Commission who
15 are old colleagues, and I am particularly delighted to
16 see that you have Ron Gainer on this Commission, whose
17 life I shared and whose job I shared at a previous time
18 in my life when we were shoulder-to-shoulder on these
19 same issues, and I have a tremendous impression of deja
20 vu, and I hope that you will represent some of those same
21 views in-house as I will try in the next few minutes.

22 I am also pleased to see Judge MacKinnon here,

1 whose views I have long admired when I was a lowly
2 assistant U.S. attorney, 212 years ago, I think, Judge.
3 Again, thank you.

4 I represent no one in an organizational sense,
5 although I am a council member of the ABA's Section on
6 Criminal Justice and have had a hand in writing the views
7 that you heard earlier I think, today, from John Greacen.
8 So I will make no attempt to engage in what I will call
9 "technical analysis" of this proposal.

10 I have to commend this Commission for its
11 labors and its patience on hearing many witnesses, some
12 of whom I did not have the pleasure of hearing and will
13 probably repeat, and if I am redundant, excuse me.

14 I am here out of a personal passion to share
15 with this Commission some views that might go unnoticed
16 because I and Ron Gainer tread some of these same paths
17 before.

18 Commissions are sort of a way out of a thorny
19 problem for government when it doesn't have a clear idea
20 of what it wants to do, and also when it wants to delegate
21 some of its difficult responsibilities. In a sense, you
22 are an arm of the Congress, to find facts for it and

1 to report back to it.

2 I would urge you from the outset, as a veteran
3 of the old Brown Commisison, reform of the Federal criminal
4 law, and S.1 that followed it, and the efforts to reform
5 the criminal law in an unpopular time when many vested
6 interests were involved, particularly lawyers who had
7 well-developed notions of what jurisprudence should mean
8 and what the terms of the criminal statutes should mean,
9 and judges who had vested interests in their interpretations,
10 and it all failed, even though it was a good idea.

11 This also sounds like a good idea, but it is
12 truly a thorny thicket, because from my own personal
13 perspective, I think you have been given a job to do
14 which does not address the problem that gave rise to the
15 frustrations that created this effort at dealing with
16 a thing called "certainty of sentencing" or "certainty
17 of punishment".

18 I think from my own view that this Commission
19 and the rather complex, narrow, and perhaps too directive
20 statute that you have gotten, is a result of what the
21 Congress too often does. It is reactionary to a problem
22 that is intractable.

1 I have spent 22 years of my life -- far shorter
2 than some of you on this Commission -- in the criminal
3 justice field, half of it from the prosecution and reform
4 side -- I was once a prosecutor before I got to LEAA,
5 and I was once Ron Gainer before I got to LEAA -- and
6 for the last 11 years, I have been in private practice,
7 seeing the other side of this process and seeing how
8 it actually works.

9 The theory of equality or nondisparity in
10 sentencing is a dangerous theory, in my opinion, in a
11 criminal justice system whose fundamental values are
12 individual justice, the application of individual and
13 tailored responses. Once we allow ourselves to think of
14 the criminal justice system as a monolithic, inexorable,
15 mechanistic, functioning, computer-model-based methodology
16 of handling wrongdoers, we are in great danger.

17 The Congress is careless, in my judgment, after
18 these 22 years of responding to the problem of crime,
19 because it doesn't know what to do. It passes statutes
20 in the face of fundamental underlying problems. It
21 makes more criminal laws, it creates more prosecutors, --
22 more criminal laws than the country needs, in my opinion,

1 giving rise to more lawyers than are needed in my opinion,
2 and not enough places to put persons convicted of crime.

3 In a sense, it is not quite a copout, but it
4 is close to that. And I don't want you to feel so squeezed
5 and restrained by the statute to relieve a pressure that
6 is not being relieved. In a sense, I see this Commission's
7 function as an expression of the frustration that there
8 is not enough certainty in apprehension and conviction.
9 It is not enough certainty in sentencing, and in a sense,
10 that is sort of a misleading function to have to perform,
11 because it takes people off the hook of where the uncertainty
12 comes about in crime, recidivism, and the likelihood of
13 the creation of crime.

14 You are dealing only with that minimal fraction,
15 that tiny fraction at the end of the pipeline that the
16 system has caught. Yes, it is true -- recidivism at that
17 point can be prevented by longer sentences, but such
18 a fractional kind of dealing with the problem. And I
19 don't want us to take ourselves off the hook as a system,
20 saying this is some kind of a solution of panacea.

21 I know this is a big mouthful, and perhaps
22 it is something that the Commission doesn't need to hear

1 in public, but I am constrained to say it, because I sit
2 here and I watch the reinvention of the wheel. I watch
3 the Congress -- for whom I worked once as counsel to the
4 Judiciary Committees of both the House and Senate -- struggle
5 with a problem and try to find mechanisms that are not
6 really fundamentally responsive to the problem.

7 If you feel the courage, after having heard
8 much testimony, perhaps not to take on the burden yourselves,
9 of your own opinion, but to say that reflected in the
10 testimony you have heard over and over again, as that
11 this concept of uniformity in sentencing and trying to
12 follow the excessive guidelines, in my opinion, that the
13 statute puts out to you, many witnesses felt that this
14 was not a significant answer. And if you feel courageous
15 enough to ask for further guidance in a revision of the
16 statute, or to make recommendations beyond or in a direction
17 other than the statute, I would encourage you to do so.

18 I find that there are not enough voices in
19 our country willing to deal honestly and fundamentally
20 with some of the issues that we see. Instead we tinker
21 with the system.

22 I am not here to give you a personal analysis

1 of your statutory proposal. It is in my judgment something
2 You feel constrained to develop within the statute. I
3 am troubled by it because it seems to be heading towards
4 a mechanism, semi-computer profile way of dealing with
5 human conduct, and I am disturbed by that. I don't want
6 us to go in that direction.

7 Why am I disturbed by that? I have been
8 participating in a previous system, and let me tell you
9 how it turned out. And this comes as no surprise to Com-
10 missioner Baer, with whom I have shared my views personally,
11 and I hold him in no respect responsible for this, except
12 it is an inexorable natural result of bureaucracies. I
13 worked on, and Ron Gainer with me, a long time ago in
14 1970 and 1971, al think called guidelines for the Parole
15 Board, next Parole Commission. And they were meant by
16 us to be guidelines. And we were, in good-hearted, normal,
17 human, cornfed boys' view, that this would be interpreted
18 by the Parole Board and Commission and Commissioners in
19 the light in which it was written, and we put in the language
20 that these were merely guidelines, that they were not
21 presumptions, and they were not to be inexorably followed,
22 and that they were in fact just guidelines, and that we

1 expected plenty of times in which they would not be
2 applicable, because there is an individual, humanistic
3 function to be performed by the Parole Commission -- judgments
4 made, intelligently as men can, on the conduct of men,
5 based on efforts to evaluate them, yes, the most imperfect
6 of sciences, but the most perfect of our human endeavor
7 in this country, and that is not to have machines run
8 the criminal justice system.

9 But what has happened? I have seen the
10 results of our well-intentioned efforts. I have practiced
11 before, in effect, the Parole Commission -- not the Commission
12 itself, but its hearing examiners -- in representing
13 individual defendants who are entitled to some human
14 consideration after having been convicted and evaluated
15 and incarcerated and spent time. And what do I find?
16 I hate to tell you. The guidelines have become either
17 a machine, relied upon by the lazy -- I do not wish to
18 impute that to any one person on the Parole Commission
19 staff, now -- or the fearful, or the unwilling to take
20 risks or make judgments.

21 Hearing officers say to me, "You may have
22 made a persuasive case, Mr. Santorelli," or, "Yes, these

1 may be proper considerations -- but I don't think my regional
2 commissioner or director is going to approve them, because
3 there is no willingness to, or there is a presumption
4 against" -- or a bunch of weasel words which all come
5 out to the same thing: they hide behind the guidelines
6 as the easy way out.

7 We all know from our government service there
8 is damned little reward for sticking your neck out. There
9 is very little reward in the system for being courageous
10 or deviant or making judgments; there is a great reward
11 for making no waves and following the rules. And we are
12 rule-oriented as a society -- regulation, rule, guideline,
13 et cetera.

14 I have seen the mountain. Our efforts to do
15 guidelines have produced a fractional result in the Parole
16 Commission. Only a few cases are decided outside of the
17 guidelines -- certainly, not what we intended when we
18 began this process.

19 Now, I take these moments of your time from
20 my own personal passion to share with you what happens
21 to guidelines. And the more precise and the more complex
22 and the more categorical guidelines are, the more they

1 are relied upon.

2 I long for a system in which judges are given
3 the function that I think we hope judges were created
4 to give, and that is to make judgments and not be restricted
5 by, hemmed in by, too much pontification from on-high --
6 and that is not this Commission, but it is the Congress
7 which likes to make rules and laws, and you are merely
8 their instrument.

9 If you can look into the future as to how these
10 guideliens might be applied, I would ask you as part of
11 your function to do that. I am troubled by what guidelines
12 become.

13 I have one more thought, and in my moment of
14 emotion -- you will have to forgive an Italian-American
15 for having emotions -- I would like to consult my notes
16 for a second.

17 (Pause.)

18 I recognize that there is a desire in our system
19 to be certain that some crimes or all crimes are punished
20 by something predictable called incarceration. But we
21 all know in our hearts that very little rehabilitation
22 or non-recidivism is inculcated by a period of time in

1 jail. So we look at the prison as a place to hold people,
2 perhaps to prevent for sure their recidivism. Fair enough.
3 But is that something that should be the subject of a
4 mechanical formula, or is that something that we should
5 continue to rely on the best of human instincts to make
6 judgments about? I for one think so. I do not believe
7 that in many cases, many criminal cases -- first of all,
8 I believe our system to over-criminalize human conduct --
9 but in many criminal cases, that an extended period of
10 time in jail serves any useful purpose.

11 And I have always preferred, from my own experience
12 in this system, a rational parole system. I recognize
13 that the Congress has some doubts about that, considering
14 its statutory enactment of terminating the existence of
15 a Parole Commission, and I think that is wrong. I think
16 that is a wrong direction for our criminal justice system.

17 I don't know whether you share that view. I
18 don't know what other witnesses have had to say about
19 it. But I believe that a combination of tailored sentences,
20 with some incarceration and extensive periods of supervised
21 release, is a more not only humane, but likely to be
22 realistic. It is unrealistic to think that we can put

1 all of the criminals that are convicted in jail for long
2 enough to prevent their recidivism. It is just theory
3 in the face of experience.

4 Now, I know those are a lot of words. They
5 are not all as organized as a written presentation might
6 have been, but frankly, a written presentation would bore
7 me if I were sitting on the other side of that bench.

8 I just wanted you to have those few views.
9 I certainly come to you from no high chair of government
10 officialdom or a small chair of representation of an
11 organization. They are strictly 22 years of experience
12 in this town, in this system, in this Federal government.

13 And thank you very much for letting me be
14 this expostulative.

15 CHAIRMAN WILKINS: Thank you. Thank you for
16 sharing your thoughts and opinions with us.

17 Do any Commissioners have questions, comments,
18 for Mr. Santorelli?

19 George?

20 COMMISSIONER MACKINNON: I am reminded by Mr.
21 Santorelli's comments, whom I greatly respect, of the
22 hearings that were run on the Public Housing Act back

1 in 1933. They went on for a long time. And they had
2 a bunch of people, contractors primarily and purveyors
3 of synthetic equipment and materials and everything else,
4 and they put their testimony in, and there were a couple
5 of people who had been actually building homes all over
6 America and knew something about it, knew something about
7 the quality of the material that they were talking about,
8 and they couldn't get a word in. And finally, if you
9 will look at those very extensive hearings, on the last
10 day, for about the last half-hour, they finally listened
11 to these three or four people that really knew something
12 about it. And they told them that what they were doing
13 was buying a bunch of synthetic junk, and that they
14 were going to be putting it into public housing, and they
15 were going to be creating new slums. Now, that is 53
16 years ago, and of course, it has all come to pass. But
17 there were only a couple people who made that remark,
18 and they made it at the very end of these hearings, and
19 the people in Congress were holding them off, trying to
20 stop them from testifying.

21 We have not tried to stop Mr. Santorelli, and
22 I respect his views very much. I merely want to tell

AH, ah

1 you that Mr. Santorelli is the principal author of the
2 present judicial system in the District of Columbia, and
3 very active and very successful and very competent in
4 everything he ever did, and I appreciate your views.

5 Thank you very much.

6 MR. SANTORELLI: With that, I should be thought
7 to be wise than to speak and be thought to be otherwise.

8 Thank you.

9 CHAIRMAN WILKINS: Does anyone else have any
10 Questions or comments?

11 (Pause.)

12 CHAIRMAN WILKINS: Thank you very much.

13 MR. SANTORELLI: Thank you, Mr. Chairman.

14 CHAIRMAN WILKINS: Would anyone else like to
15 address the Commission? If so, please come forward.

16 (Pause.)

17 CHAIRMAN WILKINS: Seeing no more takers, we
18 stand adjourned.

19 (Whereupon, at 5:40 p.m., the Commission
20 was adjourned.)

21

22

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF COLUMBIA

WASHINGTON 20001

CHAMBERS OF

LOUIS F. OBERDORFER

UNITED STATES DISTRICT JUDGE

December 23, 1986

Ms. Mary Ellen Abrecht
Special Counsel to the Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Ms. Abrecht:

Thank you for letting me see the transcript of my testimony before the Commission on December 3, 1986. Enclosed is a mark-up that would smooth out some of the rough spots.

Incidentally, Judge Mikva asked me to ask you if you would let him see the transcript of his remarks before it is printed.

Sincerely yours,

Louis F. Oberdorfer

Enclosure

cc: The Honorable Abner J. Mikva
U.S. Court of Appeals for the District of Columbia

CHAIRMAN WILKINS: Thank you very much.

Judge Oberdorfer?

JUDGE OBERDORFER: Mr. Chairman, before I get specific, I'm going to speak even more generally than Judge Mikva did about two matters.

I have been sitting here, as you know, today and yesterday, and I was reminded by the testimony of John Jones of the ABA, who was my colleague in the Tax Division, that I spent more years than I like to remember working with the Internal Revenue ~~Service~~ ^{Code}. ~~And~~ I bring to you the thought that when the ~~Internal~~ Internal Revenue Code of 1913 was adopted by the Congress, first of all, it was a very simple, relatively simple, document then; but the Treasury Department did not ~~then~~ try to undertake to anticipate all ^{of} the transactions that would be governed by, or affected by, the Internal Revenue Code.

~~And~~ I think that that is germane to the recommendation that you heard, at least from many judges, and that is, as Judge Mikva just said: Take it easy. See how this thing works.

Going back to the Internal Revenue Code for a moment, it was originally sort of a common law, and the

INTERSTICES

1 inter~~stices~~ were worked out by an interrelated process of
2 regulation and decision. Supreme Court decisions were
3 very important in the development of tax law.

4 Then, it got out of hand, and, as you know, one
5 of the most popular things in recent years has been simplifi-
6 cation. You've got an opportunity to do simplification
7 before you have a field full of kudzu.

8 The other general statement that I'd like to make
9 relates to my observation that every judge -- certainly
10 every District judge whom I've heard here, and, I would
11 suspect, every District judge you've heard, and, I know, every
12 One of my colleagues, at least, those who were at lunch the
13 other day when we had a conversation about this -- ^{IS} ~~are~~ concerned,
14 and I mean very concerned, ^{they are} not lightly concerned, ~~are~~ ^{or}
15 politically concerned, but concerned as judges, as trustees
16 for the power committed to us by the Constitution and by
17 the President, ^{after} ~~via~~ confirmation, ^{BASED ON A REVIEW} ~~by rigorous and rigorous~~
18 screening process.

19 That led me to where I was yesterday, which was
20 with a jury. ~~At~~ Every time we charge a jury, we say in
21 the first paragraph what the function of the court is; and
22 then we say, "The function of the jury is to sit as judges

1 of the facts." And we reiterate, "Remember that you are not
2 partisans or advocates in this matter; you are judges."

3 And we don't expect uniformity from juries. The public
4 doesn't expect uniformity from juries.

5 ~~And~~ I suggest to you that one reason we have
6 been allowed by the Supreme Court and by the Constitution
7 to have ^{an} expeditious disposition of sentencing proceedings
8 is because, traditionally, a sentence has been treated and
9 acted upon as a matter of judgment more than a matter of
10 fact ~~and that~~ the complications that so concern my colleagues,
11 and I think concern all the District judges, about the procedure
12 that would be involved if we go too far into having to find
13 facts, make findings of fact the way we would after a bench
14 trial, supported only by evidence -- and the law is full
15 of debates about what is evidence -- ^{is} that you may ~~and~~ ^{have and}
16 Congress may ^{have} ~~I am not blaming it on you~~ -- ~~may have~~
17 pulled up anchor from the basis on which we have been allowed
18 to proceed officially ^{on a} the Constitutional basis, ^(you may be) turning
19 a matter of judgment into a matter of fact-finding and a
20 matter of evidence and a matter of adversary process ^(you will have)
21 That is why I think you've gotten ~~at~~ ^{at} certainly at
22 our lunch table the other day if you had been there, a

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As you would have

1 firestorm of concern, not reaction, not rebellion, but
 2 concern by people who have been ~~used~~, over a lifetime,
 3 *used* to large responsibility based on an exercise of their
 4 informed and independent judgment. And it may be that this
 5 is Congress' problem, not yours. It may be ^{that} you are just
 6 being good soldiers and doing what you're told, and that's
 7 fine.

8 But one of these judges pointed out to you this
 9 morning that subparagraph 20 of some section invites you
 10 to go back to the Congress with changes in your mandate.

11 And I suggest to you that you may find your work in the
 12 ~~dock~~ ^{where there ~~is~~ will be} in the Supreme Court with at issue scores and hundreds
 13 of sentences that have been imposed by a process that
 14 was not ~~6~~ constitutional due process.

15 You all have read the McMillan versus Pennsylvania
 16 decision more carefully and prayerfully than I have, but
 17 I did read it. It was a five-to-four decision. There is
 18 a heavy emphasis, in Justice Rehnquist's opinion, on the
 19 fact that they were dealing with a ~~state~~ ^{state} process. ~~He~~ ^{He}
 20 talks about this Frankfurtian concept of the ~~states~~ ^{States} as a
 21 laboratory of experiment. ~~I~~ I certainly wouldn't think
 22 that a lawyer would violate Rule 11 if he attempted to

1 raise the question of whether or not, for example, your
2 preponderance of the evidence suggestion, valid though it
3 may be with respect to state sentences, has any validity
4 in a Federal environment.

5 That is the generality. *4* My specifics are really
6 an echo, ~~or~~ a pale echo, *4* of what the other judges have said
7 this morning. We are concerned about the threatened waste
8 of the strength of our probation service. We think we have
9 an outstanding probation office here. I had the privilege
10 this spring of chairing a search committee for a new
11 director of our probation office, ~~and~~ I had a chance to interview
12 those people and look into their work. ~~I~~ I hadn't been familiar
13 with it, ~~really~~ before, except for the one man who comes
14 in and advises me on sentences. ~~and~~ I can testify to something
15 that at least would be the basis for a finding that these
16 people do remarkably fine work. ~~They~~ They prepare, as you know,
17 our pre-sentence reports. In my case, they confer about
18 sentences, ~~and~~ and they have a hands-on relationship with
19 probationers that is remarkable.

20 Indigenous to our particular ~~document~~ *docket* is the fact
21 that a large plurality of our criminal cases -- and we don't
22 have the volume of criminal cases that most of you all

1 have -- a large plurality of our criminal cases are drug-
2 related; ~~some~~ people committing crimes, not just drug
3 crimes, but stealing checks and forging checks and bank
4 embezzlement and those kinds of things that they wouldn't
5 do except that they are feeding their habits. And we
6 use probation and the drug aftercare facilities of our
7 probation office, we think, very successfully. ~~And~~ Of
8 course, ⁱⁿ ~~even~~ the few criminal cases we have, we get pleas
9 in most of them. We ^w could be drowned by ^{an} aggressive defense
10 of our drug cases and ~~AM~~ -- I don't need to go into it
11 again -- by all of the complications that we see in the
12 procedural hazards, the unexplored procedural world that
13 we will emerge into, if we have to have evidentiary
14 hearings on sentences. ^P Preponderance of the evidence beyond ^A
15 reasonable doubt isn't really the concern.

16 Those are my thoughts. ^{the} Other things that I have
17 here, gentlemen and ladies, are reprimands ^{SES} of what other
18 judges have said better and more carefully than I could,
19 and I would yield to questions.

20 CHAIRMAN WILKINS: Thank you very much. We
21 appreciate your thoughtful comments.

22 Questions from Commissioners to my right?

1 sure we would most welcome any suggestion that would achieve
2 that result.

3 Judge Oberdorfer, having read McMillan versus
4 Pennsylvania, how did you read that case? Didn't you
5 read that that they could go outside and take in -- well,
6 it said that they could take in a factor as a sentencing
7 consideration and weave it into the sentence that was not
8 charged in the indictment.

9 JUDGE OBERDORFER: I understand they said that,
10 but they also had a big paragraph in there about federalism.

11 COMMISSIONER MACKINNON: Well, do you think that
12 the States have any more federalism --

13 JUDGE OBERDORFER: Do I think that the due process
14 clause has a different meaning applied to the States than
15 it does to federal law? The Supreme Court has a supervisory
16 responsibility over the federal courts that it doesn't have
17 over the state courts, and there is certainly a body of
18 doctrine. ~~Things change, I suppose, but~~ there was once a
19 body of doctrine, and I think there are probably embers of
20 it still in the fire, and I see them in that case, that say
21 that the Supreme Court should be more deferential to matters
22 of this kind where there are, in effect, experiments by States,

*

1 ~~and that~~ ^{The Supreme Court} they might well reach a different result.

2 Just reading the Supreme Court tea leaves, they
3 didn't put ~~that~~ ^{the emphasis on federalism} in there for nothing. Somebody asked for
4 it, and that may be the fifth vote. It is a five-to-four
5 case.

6 COMMISSIONER MacKINNON: Well, do you mean that
7 they would let the States go further --

8 JUDGE OBERDORFER: Yes.

9 COMMISSIONER MacKINNON: -- than they think that
10 the Federal government ought to go?

11 JUDGE OBERDORFER: Yes.

12 COMMISSIONER MacKINNON: It would just seem to
13 me it would be the other way around.

14 JUDGE OBERDORFER: Well, if the Supreme Court
15 agrees with you, then this will be all right; if they don't --

16 COMMISSIONER MacKINNON: The clause is the
17 same, "due process".

18 JUDGE OBERDORFER: Well, there is due process
19 and there is due process, just like there is arbitrary and
20 capricious and arbitrary and capricious.

21 COMMISSIONER MacKINNON: Well, my experience on
22 this is not like Judge Mikva's, who says that criminal

1 CHAIRMAN WILKINS: Thank you very much.

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4 specific, I'm going to speak even more generally than
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8 course, even the few criminal cases we have, we get pleas
9 in most of them. We could be drowned by aggressive defense
10 of our drug cases and by -- I don't need to go into it
11 again -- by all of the complications that we see in the
12 procedural hazards, the unexplored procedural world that
13 we will emerge into if we have to have evidentiary
14 hearings on sentences; preponderance of the evidence beyond
15 reasonable doubt isn't really the concern.

16 Those are my thoughts. Other things that I have
17 here, gentlemen and ladies, are reprieves of what other
18 judges have said better and more carefully than I could,
19 and I would yield to questions.

20 CHAIRMAN WILKINS: Thank you very much. We
21 appreciate your thoughtful comments.

22 Questions from Commissioners to my right?

1 sure we would most welcome any suggestion that would achieve
2 that result.

3 Judge Oberdorfer, having read McMillan versus
4 Pennsylvania, how did you read that case? Didn't you
5 read that that they could go outside and take in -- well,
6 it said that they could take in a factor as a sentencing
7 consideration and weave it into the sentence that was not
8 charged in the indictment.

9 JUDGE OBERDORFER: I understand they said that,
10 but they also had a big paragraph in there about federalism.

11 COMMISSIONER MacKINNON: Well, do you think that
12 the States have any more federalism --

13 JUDGE OBERDORFER: Do I think that the Due Process
14 Clause has a different meaning applied to the States than
15 it does to Federal law? The Supreme Court has a supervisory
16 responsibility over the Federal courts that it doesn't have
17 over the State courts, and there is certainly a body of
18 doctrine. Things change, I suppose, but there was once a
19 body of doctrine, and I think there are probably embers of
20 it still in the fire, and I see them in that case, that say
21 that the Supreme Court should be more deferential to matters
22 of this kind where there are in effect experiments by States,

1 and that they might well reach a different result.

2 Just reading the Supreme Court tea leaves, they
3 didn't put that in there for nothing; somebody asked for
4 it. And that may be the fifth vote. It is a five-to-four
5 case.

6 COMMISSIONER MacKINNON: Well, do you mean that
7 they would let the States go further --

8 JUDGE OBERDORFER: Yes.

9 COMMISSIONER MacKINNON: -- than they think that
10 the Federal government ought to go?

11 JUDGE OBERDORFER: Yes.

12 COMMISSIONER MacKINNON: It would just seem to
13 me it would be the other way around.

14 JUDGE OBERDORFER: Well, if the Supreme Court
15 agrees with you, then this will be all right; if they don't --

16 COMMISSIONER MacKINNON: The clause is the
17 same, "due process".

18 JUDGE OBERDORFER: Well, there is due process
19 and there is due process, just like there is arbitrary and
20 capricious and arbitrary and capricious.

21 COMMISSIONER MacKINNON: Well, my experience on
22 this is not like Judge Mikva's, who says that criminal