

TRANSCRIPT OF PROCEEDINGS

UNITED STATES SENTENCING COMMISSION

- - -

PUBLIC HEARING ON PROPOSED AMENDMENTS

TO THE SENTENCING GUIDELINES

- - -

Washington, D.C.
April 7, 1989

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UNITED STATES SENTENCING COMMISSION

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TO THE SENTENCING GUIDELINES

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Friday, April 7, 1989
9:00 a.m.
Ceremonial Courtroom
United States Courthouse
Washington, D.C.

MEMBERS PRESENT:

WILLIAM W. WILKINS, JR., Chairman
HELEN CORRUTHERS
MICHAEL K. BLOCK
ILENE H. NAGEL
STEPHEN G. BREYER

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P R O C E E D I N G S

CHAIRMAN WILKINS: The Commission will come to order.

This is another in a series of public hearings we have been holding over the last three years. The Commission began its work and adopt the policies, but before any decisions were made, that all of the issues would be put out for public comment and we would have public commentary, written as well as oral, before we made any decisions.

As you know, pursuant to statutory direction and authority, the Commission is considering a series of amendments to the guidelines which were promulgated on May 1, 1987, and the purpose of our hearing today is to receive comment about these various proposed amendments as well as other related issues.

We appreciate very much the very obvious effort, time and energy and thought that has gone into the prepared written statements which we have received from the witnesses who will be testifying, as well as many others who are interested in the work of the Sentencing Commission and the improvement of the administration of justice.

Let me caution everyone, usually it is our fault

1 when we run over, but we want to give everyone the same oppor-
2 tunity to be heard, so I would appreciate and the Commission
3 would all appreciate it if those witnesses would summarize
4 their testimony and provide some ample time in the space
5 allotted for questions from the Commission.

6 Our first witness is Ms. Anne Seymour. Ms. Seymour
7 is a representative of the National Victims Center, Fort
8 Worth, Texas.

9 Ms. Seymour, please come around.

10 Ms. Seymour informed us this morning that she is on
11 other business and has a very tight schedule and must be out
12 of here shortly after 9:00 o'clock, consequently we will not
13 have time for oral questions and answers from Ms. Seymour, but
14 she has committed to address any questions we have in writing.

15 Thank you very much, Ms. Seymour. We are delighted
16 that you are here and we are delighted to have a representa-
17 tive for the Victims Rights Movement with us.

18 MS. SEYMOUR: Thank you. I am delighted to be here,
19 Mr. Chairman and Commissioners.

20 My name is Anne Seymour, as you know, and I am
21 representing the National Victims Center. We have offices in
22 Fort Worth and in New York City, and our organization serves

1 over 6,400 victims service and criminal justice programs around
2 the country.

3 I just want to explain first that I have had a long-
4 time interest in sentencing, ever since I was a probation
5 officer, about 10 years ago. From there, I went to the
6 California Legislature, where I worked for both the Speaker of
7 the House, Willie Brown, and President pro tem, Dave Verberti,
8 at a time when we were really doing some serious changes in
9 the Criminal Justice Code in California, including the move to
10 determinat sentencing.

11 From there, I moved to Texas and, in working as a
12 Director for the National Office of Mothers Against Drunk
13 Driving, I was really surprised to find that you didn't really
14 hear DUI offenses and sentencing in the same sentence, which
15 I thought was remiss.

16 Finally, when we started the National Victims Center
17 over three years, I began to realize that it was very important
18 to victims that the severity of crime be matched by severity
19 in sentence. I have also had the opportunity to work for
20 several years for the American Correctional Association's
21 Task Force on Victims of Crime, where I have learned again and
22 again that the level of sentencing is terribly important to

1 a victim's short-term and long-term emotional and psychological
2 recovery.

3 While the injuries suffered by the victims of crime
4 vary, their desire to see justice done remains constant. In
5 our view, one of the most important remedies the criminal
6 justice system can offer to victims is the promise that
7 similar offenders who commit similar crimes will receive swift,
8 proportionate and uniform punishment.

9 Indeed, Congress enacted the Sentencing Reform Act
10 of 1984, in an effort to fulfill that promise. It was due to
11 the creation of this Commission and its guideline sentencing
12 system that Congress intended not only to eliminate unwarranted
13 sentencing disparity, but also to change historical patterns
14 of punishment in areas such as serious violent crimes or white
15 collar offenses, for which plainly inadequate sentences have
16 been imposed in the past.

17 Those goals remain as urgent today, if not more so,
18 than they were in 1984. In our cities, whole neighborhoods
19 have become the alien preserve of drug dealers and the open
20 battleground for increasingly bloody gang conflicts. Indeed,
21 this Commission sits in a city which has the dubious distinc-
22 tion of being the "drug murder capital of the Nation." They

1 just racked up the 130th murder yesterday.

2 Sadly, illegal use and trafficking in drugs has
3 permeated virtually all levels of society, from the back
4 streets to main street. Nor is it only in the area of drugs
5 that a new wave of lawlessness is felt. In recent years, the
6 Nation has witnessed an explosion in white collar and economic
7 offenses. Insider trading and stock fraud provide a prime
8 example.

9 As the House Commerce Committee conclude in their
10 report issued last year, the insider trading scandal on Wall
11 Street represents far more than the transgressions of a few
12 individuals. Instead, the Committee found criminal conduct
13 to be at the heart of a substantial amount of market activity
14 by established securities industry professionals.

15 In his annual report for 1986, the Attorney General
16 placed losses due to economic crime generally at over \$200
17 million. That annual report, the most recent available, cannot
18 take into account more recent developments, such as the massive
19 defense procurement fraud investigation currently being spear-
20 headed by the U.S. Attorney in Alexandria, or the savings and
21 loan crisis which continues to unfold, and we are certainly
22 feeling the impact of that down in Texas.

1 Against this backdrop, we find a number of the pro-
2 posals being considered by the Commission to be somewhat
3 difficult to support. For example, we are perplexed by the
4 two proposals currently before you which would substantially
5 reduce sentences for career offenders. Under section 994(h)
6 of Title 28, U.S. Code, the Commission is required to "assure
7 that the guidelines specify a sentence to a term of imprison-
8 ment at or near the maximum term" for a defendant over the age
9 of 18 is convicted for the third time of a crime of violence
10 or a drug felony.

11 Given the current high and increasing levels of drug
12 related violent crimes, levels of crimes which are nowhere
13 more evident than here in the District of Columbia, it seems
14 at best perverse for the Commission to consider at this time a
15 change that would seriously undermine that very specific
16 congressional directive, yet that is exactly what the proposals,
17 if promulgated, would do.

18 The sentence discounts that would be effected by the
19 career offender proposals are far from minimal. According to
20 the Commission's own calculations, under the proposals, a
21 career bank robber convicted this particular time of unarmed
22 robbery could look for a reduction in existing guidelines of

1 up to 12 years. If he uses a gun, his discount could be in-
2 creased as much as 15 years below present guidelines. If the
3 armed robber seriously injured someone during the course of
4 the offense, he could receive up to 140 months discount below
5 present guidelines.

6 Similarly, if the offender is a career drug pusher
7 and is convicted this time for selling 10 grams of heroin,
8 he could look forward to a reduction in his sentence as much
9 as 255 months, which is more than 21 years, as compared to the
10 extant guidelines.

11 According to the proposal, if the offender would
12 happen to turn 50 before the end of his potential term of
13 imprisonment, he could be eligible for even great discounts.
14 If we correctly understand this aspect of the proposals, those
15 over 50 would be entitled to a sort of "senior citizen"
16 discount, in part because, in the words of the Commission,
17 criminal careers generally do not extend beyond age 50 and
18 criminality is not a good predictor of future criminality
19 beyond 10 to 15 years.

20 That argument proves a little too much for many
21 victims I know and for a lot of others concerns with criminal
22 justice.

1 If the primary concern of this or any other criminal
2 statute is criminality as a predictor of criminality, then
3 under the Commission's reasoning there would never be a reason
4 for imposing a sentence of imprisonment for a term of more
5 than 15 years. Nor is it clear that the purpose of this or
6 any other criminal statute is primarily to incapacitate an
7 offender until the age of voluntary retirement. If that were
8 so, then the Commission would need to adopt a system of penal-
9 ties which diminish with the age of the offender, taking care,
10 however, to account for individual differences.

11 In its explanation of the proposals, the Commission
12 also notes criticism that the career offender guideline does
13 not adequately reflect the instructions which the Congress has
14 given to the Commission, not only in 28 U.S.C., section 994(h),
15 but in the Sentence Reform Act as a whole and in other enact-
16 ments as well.

17 Notably, although the Commission's explanation claims
18 a congressional source for that criticism, it fails to cite
19 any House or Senate report, any bill or resolution or any
20 statement in the Congressional Record. Indeed, when one in-
21 spects Congress' recent actions, its will with respect to
22 crimes of violence and drug felonies is unmistakable.

1 For example, just last year, Congress raised the
2 minimum mandatory penalty for carrying a firearm during a
3 crime from 10 to 20 years, raised the mandatory penalty for
4 committing a crime which involved carrying a machinegun or
5 silencer from 10 to 30 years, and made a second conviction for
6 such an offense subject to a mandatory term of life imprisonment,
7 and also created a mandatory life term of imprisonment
8 for offenders convicted for the third time of a drug felony.
9 Last year, also, Congress raised the cap on the Victims of
10 Crime Act to \$150 million, which is certainly showing their
11 commitment to the victims of violence.

12 Of course, one should not forget that, as a result
13 of the '86 and '88 Anti-Drug Abuse Acts, Title 21 is replete
14 with mandatory minimums.

15 In our view, that recent records stands in stark
16 contrast to an argument that Congress would be sympathetic to
17 newly promulgated sentencing discounts for career drug and
18 violent offenders. On the contrary, it seems that Congress
19 intends the opposite, namely, that upon conviction the
20 penalties would hit career offenders like a brick wall,
21 certain, severe and high.

22 Provisions like the career offender statute are

1 intended to recognize those who repeatedly commit drug felonies
2 and violent crimes, as posing a threat to society and as
3 possessing a level of culpability far above other offenders.
4 Accordingly, the career offender statute singles out such
5 criminals for harsher treatment. Remarkably, the Commission
6 seems to be flinching at the prospects of certain severe
7 punishment for serious offenses.

8 Significant in that regard is the apparent policy of
9 the guidelines which is continued and intensified under the
10 proposed amendments to convert statutory mandatory minimum
11 sentences into guideline maximum sentences.

12 In commenting on the Anti-Drug Abuse Act of 1988,
13 Senator Strom Thurmond warned that the potential problem with
14 mandatory minimum sentences was that they may have the prac-
15 tical effect of becoming a flat sentence which judges tend to
16 impose, regardless of aggravating factors which should warrant
17 a more severe penalty.

18 The Senator further recognized that sentencing guide-
19 lines could overcome that problem by taking into account such
20 aggravating circumstances. Unfortunately, the proposed new
21 guidelines generally fail to meet Senator Thurmond's concerns.
22 Indeed, they often aggravate the problem by insuring that the

1 statutory minimum becomes a flat sentence imposed without re-
2 gard to aggravating factors.

3 To illustrate, the proposed guidelines for drug
4 importation by aircraft, for drug offenses involving children,
5 for drug offenses in prisons, and for using certain weapons in
6 connection with the drug felony or crime of violence, merely
7 repeat the statutory language creating the minimum or simply
8 incorporates the statute by reference.

9 Yet, under each of those provisions of the Anti-Drug
10 Abuse Act of 1988, when read in the context of the powers and
11 authorities which the Commission received in the Sentencing
12 Reform Act of '84, the Commission has the authority and
13 responsibility to include aggravating factors in its guide-
14 lines. We are at a loss to understand why the proposals fail
15 to do so.

16 The guidelines seem strangely blind with respect to
17 drugs and other ways as well. For example, Congress has
18 required that the Commission increase the penalty for operating
19 a common carrier under the influence of a controlled substance
20 or alcohol or death or seriously bodily injury as a result.

21 Somewhat strikingly, however, the Commission seems
22 to interpret that mandate as not even suggesting reconsideration

1 of whether the current flat offense of (8) in Chapter 2 is
2 appropriate for all other circumstances. We believe that it
3 is not. When the pilot of an airliner or the engineer of a
4 drain operates their vehicles under the influence of drugs or
5 alcohol, at the very least they place their passengers in
6 grave danger. That no mishap occurs is purely fortuitous.
7 Under the current guidelines, such offenders would receive a
8 Level 8 which, with the Level 2 reduction for acceptance of
9 responsibility, could result in a sentence of 0 to 6 months
10 probation, with no jail time at all. Clearly, that sentence
11 is disproportionately low to the risk created by the offense.

12 Must the victims die or be seriously injured before
13 we are prepared to punish those who put all our lives at risk
14 with such careless behavior? Can we not recognize the in-
15 herent criminality of a pilot of a major commercial airline
16 who takes drugs before or while flying, and set the sentence
17 so as to deter and punish?

18 The proposed guideline is also disproportionately
19 low, compared to the way the guidelines to meet far less
20 serious offenses. For example, a con man who fraudulently
21 takes \$10 under the pretext of collecting donations for
22 charity receives an offense level of 10 under Chapter 2, as

1 does the thief who steals one undelivered letter from the Post
2 Office. Even allowing for the two-level reduction for
3 acceptance of responsibility, the offenders in those cases
4 would be required under the guidelines to serve some time in
5 confinement. Surely, placing the entire crew and passengers
6 of an airline in jeopardy by piloting under the influence of
7 drugs or alcohol is a more serious offense, but deserve
8 greater, not less punishment.

9 We believe -- and I personally, as a frequent flier,
10 believe -- the guidelines should treat it as such. Again, as
11 with the drug provisions mentioned earlier, the Commission's
12 treatment of congressionally mandated increase for death or
13 serious injury virtually converts the statutory minimum into
14 a guideline maximum. Why is there no increase for the number
15 of victims of the nature of drugs?

16 Similarly perplexing is the Commission's agonizing
17 over the treatment of marijuana plants. In the Anti-Drug
18 Abuse Act of 1988, Congress created an equivalency between 100
19 marijuana plants and 100 kilograms of marijuana. The Commis-
20 sion seems concerned that extending that equivalency beyond
21 what is absolutely required by statute will be to treat small
22 marijuana growers, in the Commission's view those with fewer

1 than 50 plants, too severely.

2 Yet, even assuming that Congress was primarily con-
3 cerned with targeting large-scale marijuana growers, that is
4 no reason to give a discount to other offenders.

5 The Commission also seems concerned that weighing
6 both the LSD and the medium within which it is disbursed,
7 which is usually blotter paper or sugar cube, would be unfair
8 to the pusher. Yet, for many offenses, including those
9 involving LSD, the prohibitions contained in Title 21 are
10 tied to the weights of a mixture or substance containing a
11 detectable amount of a controlled substance. Why the sugar
12 cube should be treated as something other than the substance
13 containing a detectable amount of LSD, because it weighs more
14 than blotter paper, is unclear. The law addresses the entire
15 substance or mixture and does not attempt to separate out the
16 drug in its pure form.

17 The Commission's concern here runs contrary to the
18 policy which Congress has set in these matters. Indeed, in
19 United States v. Bishop, the Court addressed the question of
20 whether the penalty imposed under the guidelines should be
21 determined according to the weight of the LSD alone or as
22 disbursed in a medium, and there it was blotter paper. In

1 his opinion, Judge Hanson found that the plain language in-
2 dicates that Congress intended for the penalties imposed to
3 be driven by the quantity of a mixture or substance containing
4 a detectable amount of LSD and, hence, relevant weight for
5 purposes of determining sentence is the weight of the blotter
6 paper in which the LSD is disbursed.

7 Given the current national commitment to stemming
8 drug abuse, we see no justifiable reason for the Commission to
9 resist the congressional resolve by, in effect, mandating
10 lower sentences under the guidelines for certain drug offenses
11 involving LSD than would otherwise be provided under statute.
12 The Commission should, however, give consideration to
13 increasing the drug quantity table to provide scale penalties
14 for quantities which exceed current ceilings. As drug inter-
15 diction efforts increase, the number of cases involving
16 massive amounts of controlled substances are on the rise.
17 Already we have seen such cases brought, such as the Lahrer
18 case. The guidelines should provide certain penalties for
19 such, undoubtedly the most serious drug offenders.

20 The Commission should not hesitate in pushing for-
21 ward in the white collar crime area. With respect to fraud,
22 the \$5 million ceiling in the table contained in Section

1 2(f)(1.1) simply is too low. Insider trading cases, not
2 parenthatically, in our judgment, a victimless crime at all,
3 alone involve amounts substantially in excess of that amount.
4 For example, the Dennis Levine case involves an alleged \$12.6
5 million in unlawful gain. Ivan Boesky allegedly made \$50
6 million in unlawful profit, and the case against the firm of
7 Kidder, Peabody & Company involved profits over \$13.6 million.

8 In the area of procurement fraud, the picture is
9 similarly devastating. The General Accounting Office reports
10 that 148 procurement fraud cases involving the Defense Depart-
11 ment involves an estimated loss of \$387,396,999. Moreover,
12 cases against single defendants have involved losses as high
13 as \$90 million. Of course, defense procurement fraud can
14 involve more than mere economic loss. It can also jeopardize
15 the lives of our men and women in uniform and place the
16 national security at risk.

17 We would therefore urge the Commission to comply
18 with the mandate of the Major Fraud Act and increase the
19 penalties for major fraud which involve a conscious or
20 reckless risk of death or serious bodily injury. We would
21 recommend an increase in such offenses at least four levels,
22 thus corresponding to the standard enhancement for offenses

1 involving serious bodily injury used in the guidelines.

2 The Commission has also requested our comments con-
3 cerning a proposed new abuse of sexual contact guideline.

4 While the proposed guideline represents a great improvement,
5 we believe it should provide higher penalties. Moreover, with
6 respect to the proposed penalties where the offense involves
7 a minor, we believe that the effective two-level discount
8 where the victim is between the ages of 12 and 15 years is
9 highly inappropriate.

10 Finally, we would recommend that the Commission
11 further amend its guidelines for escape from a correctional
12 institution. Under the current guidelines, a seven-level
13 reduction is available for less serious cases. As currently
14 written, however, that reduction is available even for those
15 who are in prison as a result of committing a crime of
16 violence or a drug felony. Such leniency is wholly inappro-
17 priate and unacceptable, and we would urge the Commission to
18 close this unnecessary and dangerous loophole in the guide-
19 lines.

20 I appreciate the opportunity to appear before you
21 and express the views of the National Victims Center and many
22 victims whom I work with. I have Paul contact information,

1 where I can be reached, if any of you require additional in-
2 formation or clarification of my testimony, which you will all
3 receive written copies of.

4 Thank you.

5 COMMISSIONER BREYER: Would it be all right to ask
6 you a question now, not for you to respond now, but I do have
7 a question I would like a brief response to.

8 MS. SEYMOUR: Could I respond later?

9 COMMISSIONER BREYER: Yes, I don't want you to re-
10 spond today, not this minute, because I know you have to go and
11 I very much appreciate your being here.

12 MS. SEYMOUR: Thank you.

13 COMMISSIONER BREYER: I wouldn't ask it, except I
14 think it is an important question in my mind. In my mind, I
15 don't think your group has taken a position on what I consider
16 to be the most important argument for changing the career
17 criminal provisions. The reason in my mind why the change has
18 been put forward has not to do with being more lenient at all.
19 It has to do with being tougher on crime and trying to increase
20 the deterrent effect.

21 The argument, as I understand it, has to do with how
22 can we actually use the prison system cost effectively to put

1 more people likely to commit crimes in prison and thereby de-
2 terring, incapacitate people who might commit crime. The
3 argument, as I understand it, is the following: That the
4 proposed career offender change focuses upon not the most
5 serious criminals, not the major murderers or people who
6 commit very serious rapes or major drug dealers, but those whom
7 I would call moderately serious criminals, the crimes are
8 serious but not the most serious. And what it says is those
9 people, like bank robbers, medium-level drug dealers, by the
10 time they are eligible for this treatment, the career offender,
11 they are likely to be in their mid-thirties.

12 If we put them away for 30 years, which is equivalent
13 to a 90-year sentence, we are keeping them until they are in
14 their mid-60's and 70's. Let's let them out when they are
15 only 50. Let's keep them there for 20 years, like a 60-year
16 sentence, instead of a 90-year sentence. I mean let's keep
17 them for 20 real years or 15, not 30.

18 Now, if we do that, we will have, without building a
19 lot more prisons, space available to increase the sentence
20 for the first-time bank robbers, for armed first-time bank
21 robbers who perhaps should stay in prison maybe for 5 years or
22 7 years, instead of 2 or 3. If in fact you use the space to

1 put people in prison who are younger, leaving out of prison
2 the people who are older, you will stop people from com
3 crimes during those years they are likely to commit the cr
4 so the argument for this career change is it is a way of
5 using that space in order to incapacitate people who are like
6 to be committing crimes, instead of incapacitating people who,
7 if we let them, wouldn't commit crimes.

8 Now, I am not assessing the merits of that argument,
9 but I have heard that argument made at length and I think it
10 is that argument that led to this proposal, and that is what
11 I w-uld appreciate you addressing. If you say, well, let's
12 build lots more prisons, you may be right, but they may not
13 be built.

14 MS. SEYMOUR: I live in Texas and I can certainly
15 appreciate the concern of prisons.

16 COMMISSIONER BREYER: Well, they may not be built,
17 and so in the real world, where they may not be built, should
18 not this Commission be concerned with how to use those prisons
19 to put in prison the people who are likely to commit crimes if
20 they are not there, rather than using it to warehouse people
21 who are 70 years old, who are not likely to be committing
22 crimes at that point in their life?

1 Now, I put that argument to you and I am sorry for
2 using the time, but I think it is important that your organi-
3 zation address that argument, because I would be quite
4 interested in your views on that.

5 MS. SEYMOUR: I would be pleased to, and I will send
6 you our argument.

7 CHAIRMAN WILKINS: Thank you, Judge Breyer, and I
8 won't ask you to repeat the question.

9 [Laughter.]

10 Ms. Seymour, I want to thank you very much.

11 MR. SEYMOUR: Thank you for the opportunity.

12 CHAIRMAN WILKINS: You bring a perspective to this
13 Commission that always must be present when the criminal
14 justice decisions are made.

15 Thank you.

16 Our next witness, two witnesses, as a matter of fact,
17 Edward Gennis, Jr., Assistant Attorney General, Criminal
18 Division, Department of Justice, and Mr. Joe B. Brown. Mr.
19 Brown is a U.S. Attorney from Nashville, Tennessee and, as you
20 know, is the Chair of the U.S. Attorneys Subcommittee on
21 Sentencing Guidelines.

22 Both of you gentlemen are no strangers to this

1 Commission and to the work, and we appreciate you taking the
2 time of assisting us with this important task.

3 Mr. Dennis?

4 MR. DENNIS: It is certainly our pleasure, Mr.
5 Chairman, and I thank you for this opportunity to address the
6 Commission.

7 Let me preface my prepared remarks by saying that, as
8 a former Assistant United States Attorney and United States
9 Attorney who has sort of drifted into the career of criminal
10 prosecution, I have consistently placed a high priority on
11 sentencing advocacy, and this was well before the sentencing
12 guidelines legislation became a reality.

13 I feel that the sentencing portion of the prosecu-
14 tion is probably one of the most critical for the prosecutor
15 and certainly for the defendant, and I have consistently placed
16 a high emphasis on making sure that probation officers are
17 fully informed of the facts that form the basis of prosecution,
18 and this is particularly important where a conviction is based
19 upon a plea, rather than a trial. It can be even very im-
20 portant where there is a trial taking place, because the
21 probation officer is often not there and not necessarily familiar
22 with the record, familiar with the exhibits, familiar with the

1 harm that may have been caused as a result of this particular
2 crime.

3 I also feel that -- and this isn't just in terms of
4 my experience over the years -- that the most important
5 element for any judge to take into account in sentencing is
6 that the sentence is appropriate to the conduct, that although
7 certainly factors of one's personal background and history
8 should be taken into account, that the primary and the core
9 concern should be with the sentence really fitting the crime.

10 So, when the sentencing guideline legislation was
11 passed and this distinguished Commission was formed, I felt
12 that this was certainly a recognition that the sentencing
13 procedures should be given greater attention, and I think that
14 the work of this Commission has been outstanding. It has
15 certainly been a very difficult and arduous task, I know, and
16 a very complicated one, but I think that the guideline scheme
17 that has emerged in theory, in terms of the way that the
18 guidelines are structured and the appropriate balances that
19 have been made insofar as the matrix system is concerned, is
20 about as good as you could possibly make it, and we can argue
21 over the specific decisions that may be made in terms of
22 particular guideline ranges and levels, but in terms of the

1 structure of those guidelines, I feel that this is a very work-
2 able system, it is one that has appropriate flexibility, it
3 is understandable. It certainly will take work on our part
4 to make sure that the training is there for Assistant U.S.
5 Attorneys, and I would just digress a moment by saying that,
6 as U.S. Attorney in Philadelphia, we did manage to conduct at
7 least one seminar with the bench, with the defense bar and
8 with the Federal prosecutors, to familiarize ourselves with
9 the guidelines, and of course this was well before the
10 Mastrata case had reached the Supreme Court.

11 Of course, with that decision by the Supreme Court,
12 we are prepared to go forward with great speed to make sure
13 that our assistants are thoroughly versed in the guidelines
14 and the guideline system. As I stated, I believe, Judge
15 Wilkins, you and I were on a panel out in San Francisco when
16 the guidelines had just been announced and promulgated, and
17 at that time I was asked by someone in the audience whether
18 the Department of Justice would promulgate its own regulations
19 with regard to how we would approach the guidelines, and I
20 said at that time, and it is still my view, that the guide-
21 lines themselves are the regulations for the Department, in
22 the sense that each U.S. Attorneys Office and each prosecutor

1 should really take his lead from the guidelines in terms of
2 what is an appropriate disposition in any case that he or
3 she is handling. And so we are working with the Commission
4 insofar as making sure that the word gets out, that we do
5 have in place the appropriate guidance to prosecutors in terms
6 of plea-bargaining and positions taken, so that the guidelines
7 system is supported and that the will of the Congress and the
8 will of the people of the United States, through the
9 representatives, is being followed insofar as achieving the
10 goals that the guideline system is designed to achieve, con-
11 sistent sentencing, a rational system of sentencing, and
12 predictability insofar as sentencing is concerned.

13 This morning, of course, I believe that many of the
14 issues that will confront this Commission insofar as the
15 amendments are concerned really relate to the question of how
16 much is enough, what is an appropriate sentence in any par-
17 ticular crime.

18 Of course, this is an issue that I think will be of
19 increasing importance for the Commission and for the Congress
20 of the United States and for the Department of Justice,
21 because it is very clear to me that, although the decisions
22 made in terms of the appropriate levels of penalty to be

1 imposed under the guideline system originally were based upon
2 historical data related to the old parole guidelines, with
3 some real common sense about how certain disparities and
4 ambiguities and contradictions should be rationalized, and I
5 think that is certainly a reasonable approach, a very sensible
6 approach in terms of taking that first cut on what levels of
7 sentence should be imposed.

8 But it is also equally to me that, as time goes on,
9 the Congress of the United States will, I am sure, under the
10 advice of its constituencies, be making decisions about what
11 are the appropriate maximums insofar as particular offenses
12 are concerned, and what this Commission faces is the question
13 of how it should react when Congress raises maximum penalties
14 in its criminal statutes, and that is the basis of my concern
15 here this morning.

16 My prepared remarks I would ask be made a part of
17 the record, and certainly we discuss particular areas, areas
18 of career offenders, areas of fraud insofar as the judgments
19 that have been tentatively made on what levels of penalties
20 should be imposed for very serious cases of fraud, robbery,
21 sexual abuse, and other areas as well.

22 But as a broad policy matter, I would ask that the

1 Commission seriously consider the weight that it must give to
2 congressional judgments that particular crimes should receive
3 enhanced penalties, because if that is ignored or if it is not
4 adequately taken into account, in my view the Commission will
5 be on a collision course with the Congress, and I don't think
6 that the Commission will win. In a way, I think that is a
7 bad thing, because I view the Commission's role as really
8 making the critical judgments and rationalizing this system,
9 and to some extent making sensible judgments about what
10 Congress may really mean insofar as some legislation, which
11 may be contradictory. And I am not suggesting that it is just
12 a rubber stamp or that it should blindly increase penalties,
13 regardless of other factors.

14 But I feel that unless the Commission gives consider-
15 able weight to legislation increasing the maximum penalties
16 for criminal misconduct, that it will bring about less
17 flexible legislation in the future. The increased use of
18 mandatory minimums, which could really undo the feature of
19 the Commission that I think makes this whole system work,
20 and that is the fact that when you go from making general
21 pronouncements to having to apply these rules in the particular,
22 oftentimes there are injustices that are done. And when I say

1 injustices, I am not one who believes that a greater penalty
2 is necessarily a more just penalty. I know that this Commis-
3 sion is looking at the issue with regard to perhaps some
4 sentences that might be higher than they should be, and that
5 is the Commission certainly should operate, but it has to
6 have that flexibility. In order to maintain that flexibility,
7 particularly in its early stages of grappling with these
8 issues, that the Commission would be well-advised to take
9 seriously into account this particular issue.

10 I will not attempt to address specifics insofar as
11 my statement is concerned. I will readily admit that, al-
12 though I went through that training course a few months ago, I
13 do not pretend to be an expert insofar as the real details of
14 the sentencing guideline system. I will say that the Criminal
15 Division has a training course that is going to be held this
16 month, and I will be attending that in order to brush up in
17 terms of the specific guidelines, and I will also readily admit
18 that Joe Brown is a heck of a lot more conversant in terms of
19 the in's and out's of the amendments and the guidelines than
20 I am, but this area that I have spoken to you about is one
21 that I feel very strongly about. It is my desire and the
22 desire of the Department to insure that the Sentencing

1 Commission continues to operate in the fashion that it has,
2 and we feel that our positions and recommendations in this
3 regard is in the spirit of certainly supporting that system.

4 Thank you.

5 CHAIRMAN WILKINS: Thank you, Mr. Dennis. Is it
6 your desire to hear from Mr. Brown and then take questions?

7 MR. DENNIS: Yes, and then take questions.

8 CHAIRMAN WILKINS: Fine.

9 Mr. Brown, we would be glad to hear from you at this
10 time.

11 MR. BROWN: Judge Wilkins, Members of the Commission,
12 I also appreciate the opportunity of being here today. I know
13 many of you have had the opportunity to sit in on some of the
14 subcommittee meetings, and we have tried I think to always
15 invite the Commissioners and some of you have been able to
16 attend and we have generally had some of the staff there,
17 because we believe that an open discussion of the problems is
18 beneficial for both the Department of Justice and for the
19 Commission.

20 We will be submitted in our Phoenix meeting, which
21 Commissioner Block attended, at least a portion of it, we went
22 there and discussed all of the amendments, and we should have

1 I think an ample time last week, our comments in some detail
2 on that through Steve Saltzburg, our ex-officio representative.

3 We have several that we are concerned about. Mr.
4 Dennis I think in his prepared remarks covered many of them,
5 involving sexual abuse of children, particularly on the Indian
6 reservations, is a serious problem for many of the U.S.
7 Attorneys; the insider trading, which in his prepared remarks
8 are fairly specific; the problem there with the savings and
9 loans and such that we feel there does need to be substantial
10 increases.

11 I think, generally speaking, on the issues where
12 Congress has increased the minimum mandatory, and obviously
13 Congress now is aware of the Sentencing Commission and aware
14 of what they are doing, it seems to me that you do have to
15 give great weight when Congress substantially increases the
16 maximum punishment, that they do believe that an increase in
17 the guidelines is necessary. It doesn't do much good for
18 Congress to increase the punishment substantially, if the
19 guidelines do not take that into account, at least propor-
20 tionately, and I think that was a question asked by the
21 Commission, and our response is we think that must be given
22 great weight. If Congress goes from 1 year to 15 years, they

1 are really expecting I think a substantial increase in the
2 punishment for that area, and that comes up in the firearms.

3 On the other hand, I think, as Mr. Dennis pointed
4 out, minimum mandatory sometimes distort the system, that sort
5 of trumps the guidelines in many respects and I think we have
6 to be sometimes careful in asking too much for minimum manda-
7 tories. Those are sometimes a band-aid, at least in my view,
8 and we need to have increased punishment. Congress is
9 obviously very concerned about that, but I think sometimes
10 they cause problems in application of the system.

11 And to the extent the Commission has also asked the
12 question, what do you do when there is a minimum mandatory,
13 how do you set your sentencing guideline levels, from the U.S.
14 Attorney perspective, we would like to see them set at least
15 a little above the minimum mandatory, so that if you have an
16 acceptance of responsibility, you can come down a little bit.
17 Otherwise, we have no give to the system and we have really
18 no inducement for a plea. And while some of the cases involv-
19 ing, for instance, firearms are relatively simple cases,
20 they either have the gun, they either have the prior convic-
21 tions or they don't, but nevertheless, you are still talking
22 about -- you can't try anything in Federal court in less than

1 a day now, and 2 days is considered a fairly short trial, if
2 you throw in a motion to suppress, which there generally is.

3 So, we would like to see at least some flexibility
4 so that we have an opportunity for please. Bank robbery is
5 one that many U.S. Attorneys have commented on. The Parole
6 Commission did a recent study of some 21 cases --

7 CHAIRMAN WILKINS: Mr. Brown, let's suspend just a
8 second. Everyone is signaling they can't hear, and we are
9 having some difficulty hearing, at least I am. I can hear
10 you, but it is not amplifying as it should. What's the
11 problem?

12 [Pause.]

13 MR. BROWN: Usually I am accused of being too loud,
14 but I apologize. I will try to speak up a little.

15 On the bank robbery issue, the Parole Commission did
16 a study, a study of some 21 cases, 57 percent of them under
17 the guidelines were less than they currently were. In fact,
18 one of them received a more severe sentence, 7 were the same,
19 and 13 were less.

20 We feel in general that the bank robbery guidelines
21 overall are too low, even for unarmed bank robbery or the so-
22 called note job. We feel like there should be a substantial

1 raise in that area, which we have addressed earlier. And we
2 also feel that, particularly where there are firearms used,
3 there should be a very substantial --

4 CHAIRMAN WILKINS: Stop a minute. There is no use
5 for us to spend a lot of time and effort and money and all
6 you folks come and nobody can hear. Excuse me, Mr. Brown.

7 MR. BROWN: Surely.

8 CHAIRMAN WILKINS: I don't know whether the other
9 Commissioners can hear. You can hear with some difficulty,
10 but I know folks in the back can't hear. We didn't have any
11 trouble hearing Mr. Dennis, but maybe it is just the movement
12 of the microphones that created some distortion.

13 MR. BROWN: Maybe I am a little taller than Ed and
14 I am further away from them.

15 CHAIRMAN WILKINS: Is that a problem? Now it is not
16 working.

17 [Pause.]

18 CHAIRMAN WILKINS: Joe, you are just going to have
19 to give us --

20 MR. BROWN: We are concerned on the bank robbery
21 issues, that they are in general too low across the board,
22 particularly those where firearms are involved. We recommend

1 a level of approximately 8 where there is a firearm involved,
2 which would basically bring it to the 5-year, it would be
3 imposed by 924(c). In many cases, you could charge a 924(c)
4 and arrive at the same result, but there are other cases in
5 which, for proof problems, a firearm undoubtedly was used, but
6 you don't catch the person with the firearm, and you may have
7 a beyond-a-reasonable-doubt problem in proving a 924(c). How-
8 ever, it is clear from photographs, it is clear from the
9 description that it was in fact a gun and, by preponderance
10 of the evidence, which we believe is the appropriate test for
11 enhancement, you could use the bank robbery enhancement, so
12 that is why we are recommending a very substantial increase
13 there.

14 We also think there should be a specific offense
15 characteristic for a simulated or a fake weapon. The threat
16 to a victim or the fear generated in a victim by someone
17 putting -- even though it turns out later to be a phony gun
18 -- in their face is certainly the same, whether it is real
19 or not, and we believe there should be a modest increase in
20 bank robbery specific characteristics for that.

21 In the career offender category, which the Depart-
22 ment feels that, because of the congressional language, we

1 need basically to stay what we have, but with an acception
2 of responsibility reduction, to give us some flexibility there.

3 The Commission did propose an option one of that
4 amendment, a Category 7 defense level. The U.S. Attorneys, in
5 discussing this, thought that it was an excellent idea, but
6 it should be applied across the board. We are beginning to
7 see many cases where the offense history point, the criminal
8 history points are up in the 20's. Right now, Category 6 cuts
9 off at 13, and we believe there are many habitual, but not
10 necessarily violent, criminals who need to be covered, and
11 when that reach that level above 13 history points, we believe
12 that that option one would be -- the Commission should perhaps
13 consider adding that across the board to catch the habitual,
14 but not necessarily violent. We see people, as soon as they
15 get out, they write more bad checks, as soon as they get out
16 they go and steal something off a truck. They are habitual
17 criminals, their case history. I had one the other day who
18 was 23, and we see a lot of those.

19 The Hobbs Act amendment is one that we are also con-
20 cerned about, many of the U.S. Attorneys are seeing Hobbs Act
21 violations, particularly under color of official right, where
22 the proper application of the guideline will often result in

1 a sentence well under 2 years, perhaps for obstruction of
2 justice, which often occurs in Hobbs Act, you do get up to 2
3 years. We feel that the Hobbs Act needs to be -- the base
4 level needs to be increased, and also there are two specific
5 characteristics there. One is the amount of bribes taken or
6 sought, and the other is the fact that they are a public of-
7 ficial. Right now, you are the higher of the two. We believe
8 you should add those two together to get the Hobbs Act up.

9 Public officials that abuse their trust need to be
10 punished more severely. It erodes our faith in government.
11 Once we erode our faith in government, we have serious prob-
12 lems, and the Hobbs Act is our best attack on that, so we feel
13 very strongly that the Hobbs Act particularly needs substan-
14 tial revision.

15 On the escape provisions, Amendment 160, generally
16 speaking, we think that there perhaps should be an adjustment
17 there for those offenders who are violent criminals and the
18 drug offenders. We are going to be seeing those in jail now
19 for longer periods of time. I don't think it is unreasonable
20 to think that those people are going to be more likely to try
21 to escape perhaps than others, so perhaps on the escape there
22 should be an enhancement of a couple of levels for those

1 individuals serving those types of sentences.

2 One other general matter and then I will leave some
3 time obviously for questions. The Commission, in -- I have
4 trouble numbers -- 6(b)(1.1c) had recommended the courts
5 defer acceptance of plea pending the PSI, presentence report.
6 That takes a considerable amount of time to do. Sixty days
7 is going to be fairly quick in most situations.

8 We have a concern that during that period of time,
9 the defendant basically can almost change his mind at will.
10 Perhaps he begins to feel that the presentence report is not
11 going to be quite as favorable as he originally thought and
12 he changes his mind. The standard for withdrawal at this
13 point, as I understand it and we understand it, is basically
14 he can do it.

15 We recommend that either the Commission perhaps de-
16 lete that language or that the court, where possible -- and
17 generally, we think the court can accept the plea of guilty
18 itself, but reserve acceptance of the plea agreement, so we
19 get locked in where we go to a higher standard, that if the
20 defendant then wants to withdraw, he has got to show fair
21 and just or just cause. But right now it is an open-ended
22 problem. We release our witnesses when we get that, and if

1 something happens to a witness, the defendants can try to
2 withdraw. If the plea has been accepted, perhaps the plea
3 agreement itself reserved, and we do understand the Commis-
4 sion's saying that the courts should not buy a pig in a poke
5 and approve a plea agreement at the time it is given, but we
6 think there is a possibility -- and many courts apparently are
7 doing this -- of going ahead and accepting a plea of guilty
8 and telling the defendant that the actual terms of the agree-
9 ment will be reserved until such time as the presentence
10 report is completed and the court has had a time to study it.
11 We think the Commission should either consider adopting some
12 change in language, or at least pull out the directive or
13 suggestion to the court that it reserve the plea in all cases.
14 We think that does cause some practical problems.

15 That basically concludes my oral remarks and I will
16 be glad to try to take questions along with Mr. Dennis that
17 the Commission has.

18 CHAIRMAN WILKINS: Thank you very much, Mr. Brown.
19 What number was that you said, was that 6(b)(1.1) you were
20 referring to?

21 MR. BROWN: Yes.

22 CHAIRMAN WILKINS: Okay.

1 MR. BROWN: Yes, 6(b)(1.1)(c).

2 CHAIRMAN WILKINS: Let me ask you this, with regard
3 to carrier or special offenders, as a threshold question or
4 issue that must be resolved, and I didn't know whether the
5 Department has taken a position, and, if so, what is the po-
6 sition. The statute reads in part "shall specify sentence to
7 determine imprisonment," and the language I want to talk about
8 is "at or near the maximum term authorized for categories of
9 defendants." The question is what is the Department's posi-
10 tion regarding that language?

11 MR. DENNIS: Well, our position is that the language
12 means what it says and that the Commission should design a
13 formula that would insure that the sentence to be imposed is
14 at or near the maximum. As we understand it now, the sentence
15 imposed would not be at or near the maximum.

16 CHAIRMAN WILKINS: The way the guidelines stand now,
17 it would, some proposals would move from --

18 MR. DENNIS: Would move it, yes.

19 CHAIRMAN WILKINS: So you say that the maximum term
20 authorized is the maximum statutory punishment --

21 MR. DENNIS: Yes, that's right.

22 CHAIRMAN WILKINS: -- allowed by statute.

1 MR. DENNIS: Yes.

2 MR. BROWN: I think, Judge, with the provision we do
3 think that -- right now there is no provision for an acceptance
4 of responsibility and we do feel that "at or near" would allow
5 the current guidelines to be amended to at least allow for
6 acceptance of responsibility. We think the other amendments
7 that the Commission has proposed to the first two options are
8 too low. They do not get to the "at or near." The one third
9 option, I believe, just basically said it was set absolutely
10 at that and we think that is a little too Draconian. We think
11 basically the current guideline is appropriate, but that there
12 should be the possibility at least of allowing the two points
13 for acceptance of responsibility.

14 CHAIRMAN WILKINS: I see.

15 Let me ask Commissioners first to my right and then
16 to my left, if you have questions.

17 COMMISSIONER CARUTHERS: Yes, I do.

18 CHAIRMAN WILKINS: Commissioners Block?

19 COMMISSIONER BLOCK: I had a question and a request.
20 Let me address the question first to Joe Brown. In terms of
21 bank robbery, I share your concern that the existing guidelines
22 don't adequately distinguish particularly dangerous offenders,

1 and I am wondering, in addition to the categorization in terms
2 of armed robbery, is it possible to get at the extent of risk
3 by looking at the dollar value aggravators that we have in the
4 robbery guideline?

5 What I am thinking of here is we don't have a very
6 fine distinction about how many people are at risk and just how
7 dangerous the instant offense is. Wouldn't relooking at the
8 dollar values help with that?

9 MR. BROWN: In my view, no. A bank robbery goes into
10 a bank and has got a gun in his pocket, he is going to rob
11 whoever is in the bank. How much he gets out is really more
12 of a function of how much money is in the teller's cage than
13 it is any preplanning on his part. Some robbers go in and
14 stick up a savings and loan and don't get any money out of the
15 savings and loan, because they think it is a bank, it looks
16 like a bank. So, I think money level for robbery is a very
17 crude distinction.

18 The basic gravamen to me of robbery is the threat
19 and the force of violence. How much you get is much less
20 important. It is like a pickpocket, he may get in my pocket
21 and it has got \$20 in it, he gets in Ed's and has got \$150.

22 MR. DENNIS: Now, wait a minute.

1 [Laughter.]

2 COMMISSIONER BLOCK: But you don't think it is re-
3 lated to the size of the --

4 MR. BROWN: The pickpocket has got the same intent.
5 It is more of a functional luck as to how much money he gets.
6 I think it needs to be distinguished more on the threat of harm
7 to the victims, rather than money. I think money is secondary.

8 COMMISSIONER BLOCK: I was using it as a way to cate-
9 gorize how large the institution is, how many people were there.
10 It is very hard to have a table about how many people were
11 threatened and how large the institution was, and money might
12 be one way of --

13 MR. BROWN: If I were a bank robber, I wouldn't pick
14 a big city bank because you would get very little money. But
15 you go to a rural bank on Friday afternoon and everybody is
16 coming in to cash their check, you are going to get \$60,000 or
17 \$70,000, yet it will be a much smaller bank and the risk will
18 be less people involved. It is really more of a function --
19 to me, the money is not just an appropriate weight point.

20 COMMISSIONER BLOCK: Thank you.

21 CHAIRMAN WILKINS: Mr. Dennis?

22 MR. DENNIS: I agree with that, and this is just by

1 virtue of experience. Someone who is shrewd enough to go rob
2 a supermarket at the right time is going to get a lot more
3 money than they are if they just go in willy-nilly to a bank
4 and start pulling through tellers' cages, because the banks
5 have procedures where they limit the amount of money that is
6 in that to begin with. And I have seen many bank robberies
7 where the amount that was stolen was \$3,000, \$4,000 at the
8 most, and you get a good grocery store or a supermarket robbery
9 and you are up \$30,000 or \$40,000 quite easily.

10 So, the money is not really the key, I agree with
11 Joe, it is the threat that really presents the problem. When
12 you come into a bank, you have to use some kind of force or
13 threat of force. The danger that the security there may over-
14 react or may react in a way that could not only cause harm to
15 themselves but to customers in the bank, passersby, the risk
16 that you create in terms of a potentially fatal situation is
17 quite extraordinary, and I think that is the way I would, of
18 course, view it. Then if you have actual aggravating circum-
19 stances that take place during the course of a particular bank
20 robbery or robbery of any kind, then that could be an adjust-
21 ment.

22 CHAIRMAN WILKINS: Thank you.

1 COMMISSIONER BLOCK: Let me follow that up with a
2 request now. I had two points, one question and one request.
3 In terms of Judge Breyer's hypothetical that one way to look
4 at the suggestions made that there was a career offender in
5 robbery is that you take the limited amount of prison re-
6 sources and try and really get more crime control out of those.

7 I think it would be extremely helpful, if it was
8 possible to do it in a timely manner, that we get information
9 from the Bureau of Prisons in terms of the funded expansion in
10 prison capacity and proposed expansion of prison capacity, so
11 we know something about what constraints we are facing in the
12 immediate future.

13 MR. DENNIS: Well, we would certainly be happy to
14 cooperate with you in that regard. In point of fact, we would
15 expect that the Commission might be a bit of an ally with us
16 insofar as lobbying with the Congress to make sure that there
17 is adequate prison space.

18 There may be philosophical differences insofar as,
19 you know, on what occasion a person should be sent to prison,
20 but if he or she is going to be sent there, I think they ought
21 to be sent to an institution where there is adequate space and
22 where, you know, they are not penalized by having to be in

1 overcrowded institutions and that sort of thing, I think we
2 can agree on that. To that extent, I know just as a practical
3 political matter that those who are incarcerated or likely to
4 be incarcerated are not usually the ones most persuasive inso-
5 far as being able to convince the Congress or bring the
6 appropriate arguments in support of that, and to that extent
7 I think that this Commission certainly should take an active
8 role in that, and the Department certainly is doing that. So,
9 we would be happy to share that information with you.

10 CHAIRMAN WILKINS: Thank you.

11 Commissioner Caruthers?

12 COMMISSIONER CARUTHERS: Mr. Brown, concerning bank
13 robbery -- I haven't read your testimony, and I am sure the
14 answer is there -- what area you mentioned was enhancement for
15 weapons, you felt we should enhance the sanction for a safe
16 weapon, for example? Should we have, in your opinion, three
17 different, shall we say, categories, one for unarmed, two for
18 the safe weapon, and should the sanction be increased beyond
19 that for non-armed but not as much as for the actual weapon?

20 MR. BROWN: I was recommending an increase of ap-
21 proximately two levels for a safe or a simulated weapon or
22 explosive.

1 COMMISSIONER CARUTHERS: Okay. So, we would basic-
2 ally have the three --

3 MR. BROWN: Correct.

4 COMMISSIONER CARUTHERS: I know, when you expressed
5 concern that you thought bank robbery, that these penalties
6 should be raised, you led in with a comment about the U.S.
7 Parole Commission study. I don't have the expertise to attach
8 to the validity of that. I don't think a lot of cases were
9 utilized, et cetera, but beyond that, I don't know if you
10 stated what you thought an appropriate level should be. I
11 think you said that we should increase the sanction from where
12 we are now. Do you have a level that you would recommend?

13 MR. BROWN: In some earlier submissions to the Com-
14 mission, I recommended that we need to get it up closer to 5
15 years real time.

16 COMMISSIONER CARUTHERS: For unarmed?

17 MR. BROWN: For unarmed, and that would be I think
18 about a four-level increase, roughly a four-level increase over
19 what is currently there. Again, I realize, you know, we can't
20 put everyone in prison. I give speeches and I ask how many
21 people want more people in jail and everybody puts their hands
22 up. I ask how many of you are willing to raise taxes and

1 build a jail in the backyard and, you know, most of the hands
2 come down. So, I realize there is a dichotomy there.

3 COMMISSIONER CARUTHERS: Well, obviously we are go-
4 ing to have to make some tough decisions about who should go
5 and who should not go, since everybody can't go, that's for
6 sure.

7 MR. BROWN: I realize that, and that is why we are
8 trying to say in this particular area, as U.S. Attorneys, this
9 is one we feel very strongly needs to come up.

10 COMMISSIONER CARUTHERS: But you think the unarmed
11 bank robbery should be at a 5-year real time?

12 MR. BROWN: I think it should be very close to that,
13 maybe not quite that much, but that was our general recom-
14 mendation. I think the minimum would be at least a couple of
15 levels.

16 COMMISSIONER CARUTHERS: Okay. On escape, a quick
17 question. I think you indicated that you felt that the sanc-
18 tion should not be different based on the type of facility,
19 non-secure versus secure, but that you -- I believe you said
20 that you feel that the sanction should be different based on
21 the seriousness of the offense. Is that correct? I just want
22 to make sure of that.

1 MR. BROWN: We will have a little more detail on
2 that. Basically, the current guideline provides a distinction
3 between, in effect, a secure and non-secure facility.

4 COMMISSIONER CARUTHERS: Right.

5 MR. BROWN: I see a difference, that there should be
6 a difference between someone that cuts his way out of prison
7 and someone that walks off on furlough. Now, if that furlough
8 is from a secured facility or an unsecured facility, I don't
9 see a lot of difference, he is still unsecure. So, I do say
10 that there should be a distinction and the subcommittee has
11 certainly --

12 COMMISSIONER CARUTHERS: In terms of how they left
13 and from where they left?

14 MR. BROWN: That's correct.

15 COMMISSIONER CARUTHERS: Okay.

16 MR. BROWN: So, we do say that there should be a
17 distinction there.

18 COMMISSIONER CARUTHERS: I agree with that, as a
19 former prison warden. I agree with that.

20 MR. BROWN: Someone that escapes from a secure
21 facility should be treated much more severely than someone
22 who goes from an unsecured, and the furlough from an unsecured

1 facility, if the facility is unsecure. But the one that
2 escapes from a yard or saws his way out -- and the Commission
3 already makes that distinction. If someone voluntarily re-
4 turns within a short period of time, yes, perhaps we should
5 have a distinction there. But once you go beyond a certain
6 period of time, and that's sort of the guy that goes out and
7 ties one on and comes back a couple days later when he sobers
8 up, does not need to be punished as severely as someone who
9 leaves and is caught or stays for a prolonged period. We
10 agree with the Commission's current plan there, current think-
11 ing there, but we do think that perhaps for those violent
12 offenders or they are in for violent drug offenses, perhaps
13 there should be a couple of levels enhancement for that limited
14 area. We generally like what the Commission has currently.

15 COMMISSIONER CARUTHERS: Thank you very much.

16 CHAIRMAN WILKINS: Commissioner Nagel?

17 COMMISSIONER NAGEL: First, I want to thank you very
18 much for being so helpful in making suggestions, both in your
19 working group and your continuing efforts. I know the group
20 has taken seriously every question we have addressed and has
21 tried to provide us with some data and we appreciate that.

22 I just have one question and it hasn't been posed

1 before, so if you don't want to answer it now, you want to
2 think about it -- in view of your experience with guideline
3 application, if we were to make an amendment to the bank
4 robbery guidelines, is there a preferred reason to put more in
5 the base and less in the enhancements, or more in the enhance-
6 ments and less in the base with regard to the weapon enhance-
7 ments, which currently go between three and five levels, and
8 you are suggesting that we add a Level 2, as Commissioner
9 Caruthers suggested, for a toy weapon or something of that
10 kind? So, do you have a preference, given the guideline ap-
11 plication, given how you have seen the cases play out, even
12 understanding that if previous strata things were a little
13 different, then there will be hopefully imposed for strata,
14 does it make sense to put more in the base and keep the levels
15 as they are, or put more in the base and raise the enhance-
16 ments or lower the enhancements?

17 MR. BROWN: Our recommendation on that was sort of
18 a combination, minus a raise in the base --

19 COMMISSIONER NAGEL: Are you talking about a 5-year
20 real time base?

21 MR. BROWN: Yes. Even if you didn't go quite that
22 far, but that was our optimum increase, but an increase in the

1 base, a minimum of two levels, and a very substantial increase
2 in the characteristic offenses where there is a real firearm,
3 we are recommending about eight levels there, eight levels
4 roughly corresponds to 5 years.

5 COMMISSIONER NAGEL: So, you prefer to have more in
6 the enhancement?

7 MR. BROWN: Yes. Once the weapon goes in, and I
8 think Congress has certainly expressed its concern by passing
9 many statutes dealing with the use of a weapon. We felt that
10 a further increase there in the 5-year range was appropriate,
11 with a smaller increase in the base itself. And I am not
12 limiting it necessarily to robbery. That 2(b) statute actually
13 covers robbery, extortion, et cetera. For the base, we really
14 think it should go up altogether. We used the force and the
15 threat, and there should be some increase. It is easier to
16 talk about bank robbery, and I suspect bank robberies are
17 probably 90 percent of the violations, or perhaps higher, that
18 come under that 2(b) category, but really we were talking about
19 it in the base overall for robbery, period.

20 COMMISSIONER NAGEL: Thank you.

21 CHAIRMAN WILKINS: Judge Breyer?

22 COMMISSIONER BREYER: I have three questions. My

1 first is based on Mr. Brown's -- and I agree with you as well,
2 Mr. Dennis -- your point, I am very sensitive to the following
3 point. Legislators worried about the crime problem say let's
4 have longer and longer sentences, executive officials and
5 prosecutors say let's sentence these people to long sentences,
6 and then there is no place to put them. And then there are
7 forces outside that continue to commit crimes and everyone
8 blames someone else, and it is in light of that I would like
9 to go with you to help get the extra prison space. I agree
10 with you.

11 I wonder if we can get, unless we can show that we
12 are using existing space in a cost-effective way, it is with
13 that in mind that I think isn't there something to taking 70-
14 year-old moderately serious people and putting them out on the
15 street, there is a lot of space in the year 2010 that will be
16 freed up that way, and put in the bank robbers that Mr. Brown
17 is talking about.

18 MR. DENNIS: Exactly.

19 COMMISSIONER BREYER: Now, in light of that, my
20 understanding is that the Department of Justice is not opposed
21 to that as a matter of policy, but you are worried about the
22 statute. I worked on this statute a little bit and I think

1 that the purpose of this provision in the statute was to key
2 the career offender to the entire criminal code revision --
3 you remember the entire revision -- and that entire revision
4 changed all the maximums and it noted that they were real
5 time, and therefore the maximum for bank robbery went down
6 from 25 to 10. So, when they said the maximum authorized,
7 they were thinking of the 10-year real sentence, not the 25-
8 year sentence.

9 Now, the language in this statute now I think still
10 admits to that interpretation, because it doesn't say author-
11 ized by statute, it just says authorized, and therefore I tend
12 to think that you could produce a reasonable legal interpre-
13 tation that would achieve Congress' purpose in putting this
14 provision in the statute. I am not positive, and so really I
15 am not going to ask you to answer this now, but it seems to me
16 eventually we are going to have to make up our mind on this
17 legal point. I take it it is a closed question, and so I
18 would appreciate the Department submitted their legal memo-
19 randum on this and allowing us to consider that legal memor-
20 randum along with the memoranda of our staff or any other legal
21 sources, because it seems to me, as a matter of policy, it
22 will allow Mr. Brown and you, Mr. Dennis, to get your

1 objective, which is to use this space in a cost-effective way
2 and put some of the bank robbers in prison for a longer time.

3 MR. DENNIS: Judge Breyer, we would be happy to sub-
4 mit a memorandum addressing the legal and policy issues raised
5 by your question. Just in general terms, it is my view that
6 in the circumstance that you posited where, as you say, a
7 maximum sentence for bank robbery would be 20 or 25 years and
8 then the real time -- but that would be in a situation where a
9 parole was available, and now under the sentencing guidelines
10 it would be 10 years real time, and I guess the question comes
11 that if Congress subsequently then increases the maximum to 50
12 years, whether or not that 10-year real time is still an
13 appropriate sentence, and we feel that the Sentencing Commis-
14 sion presumptively should adjust the real time sentence under
15 the guidelines upward. So, on that point, that would be my
16 general comment on it, but certainly we will research the
17 issue and present a more supported analysis of that.

18 The other issue, though, I think in terms of the
19 prison space and the efficient use of prison space, is one
20 that I would hesitate to recommend that the guidelines be
21 adjusted according to your evaluation of what prison space
22 might or might not be available in 15 years. One is that we

1 don't know at this juncture what that situation will look like.
2 In any case, it would seem to me that if in the scheme of
3 things it appears that we need to begin building now in order
4 to meet that demand in 15 years, that the energy should be
5 directed towards lobbying the Congress with regard to the ef-
6 fect of laws that have been passed that the Sentencing Commis-
7 sion feels that it is duty-bound to acknowledge through rais-
8 ing the penalties and thereby perhaps precipitating a crowded
9 condition at some time in the future in the correctional in-
10 stitution. But we will certainly respond in writing on that.

11 COMMISSIONER BREYER: And can you think of -- this is
12 just a suggestion, and I don't necessarily expect it to be
13 followed or not, but I can't resist the following. I couldn't
14 agree with you more, that gradually what we are all doing is
15 learning how to work within this structure. And one of the
16 things I have noticed over time is the Department has become
17 more and more familiar -- of course, we are familiar with it
18 because we work in it, but it has been more and more helpful
19 that the more familiar the Department becomes with the overall
20 structure, the more the individual representatives of the
21 Department begin to see how one sentence is related to another
22 sentence. And without an understanding of that relationship,

1 the temptation is for each individual within the Department or
2 the U.S. Attorneys Office simply to see the types of cases
3 they work on, and when they see the types of cases they work
4 on, they tend to remember most vividly the instances where the
5 sentences were too low, because that is their job. Their job
6 is to prosecute and they are very sensitive to places where it
7 seems to eschew a result, particularly when they don't neces-
8 sarily see the entire relationship. Insofar as they feed
9 through recommending to us directly, they can do that, but
10 insofar as you have people in your office, as you develop
11 through screening and see the overall picture and explain to
12 the individuals the relationship, the better we can use the
13 information that comes to us.

14 I simply want to encourage you to do what you are
15 already doing, which is to develop that expertise in your
16 office, to look at the entire thing.

17 MR. DENNIS: Judge Breyer, I think that is correct.
18 In fact, because of the fact that we will be handling appeals
19 of sentences and reviewing them and issues come up, we will be
20 more conscious of the relationship among sentences and differ-
21 ent disparities or contradictions or ambiguities or inequities
22 that may arise, and I feel it is our duty to try to rationalize

1 those and be helpful to the Sentencing Commission with regard
2 to that.

3 I agree that, certainly as prosecutors, we do tend
4 to by nature, perhaps, be more aggressive insofar as promoting
5 or arguing for stiffer sentences, but, on the other hand, I
6 think if a good case is made that a particular guidelines is
7 too harsh, I would hope that we would be equally ready to
8 recommend to you that it be modified downward.

9 COMMISSIONER BREYER: Could I as well ask Mr. Brown
10 a quick question. This is a detailed trivial -- I mean it is
11 not trivial in its importance, but at the particular level of
12 specificity. Do you have any reaction to this LSD problem
13 that we face? We discussed that a lot. You know, in general,
14 in the drug area, the purity doesn't count and the reason that
15 purity doesn't count is that you can use amounts without look-
16 ing at purity as a surrogate for whether or not a guy is up
17 high in the hierarchy or whether he is down low. But as soon
18 as you start talking about LSD, it doesn't seem to apply any
19 more.

20 Imagine a person who has 100 doses of LSD and he
21 sells them for \$2.50 each, and if they are on a sugar cube,
22 if you weigh the sugar cube, they will go to prison -- I don't

1 know, I looked it up -- I guess for about 10 years. And if
2 there are the same number of doses on a piece of blotter paper,
3 he would go to prison for a little over 5 years, and if he
4 sells them without being on a blotter paper or a sugar cube,
5 he goes to prison for 8 months. Now, he has done exactly the
6 same thing in each instance, and at the moment I am thinking
7 there is no reason for that, but maybe there is.

8 MR. BROWN: We have discussed that with our subcom-
9 mittee. The Narcotics Section has taken the position that
10 they think that the results of the guideline currently in use
11 is one that is required by the statute. The subcommittee,
12 when looking at it, our view was if it is statutorily re-
13 quired, we think they ought to change the statute.

14 We are concerned that it really does almost reach an
15 arbitrary and capricious --

16 COMMISSIONER BREYER: I would agree with you.

17 MR. BROWN: If you put the LSD on an anvil, you are
18 in deep trouble.

19 COMMISSIONER BREYER: If you put it on a tank --

20 MR. BROWN: Yes, we think the dosage unit makes more
21 sense. The Narcotics Section has done a legal study and they
22 believe that Congress needs to change the statute before you

1 can change the guideline. I think from the U.S. Attorneys
2 standpoint, we would support a position to go more with dosage,
3 but it may take a statutory change to do it. We are concerned
4 that it almost reaches, could reach I think in some cases a
5 question of constitutionality as to arbitrary.

[2]

6 CHAIRMAN WILKINS: Gentlemen, thank you very much.

7 MR. DENNIS: Thank you.

8 CHAIRMAN WILKINS: We look forward to continue a
9 working relationship with the Department and with the U.S.
10 Attorneys. Thank you.

11 Our next two witnesses will be our representatives
12 from the American Bar Association, the ABA Committee on
13 Sentencing Guidelines, Mr. Sam Buffone and Mr. Steve Salky.
14 Again, the ABA is no stranger to our deliberations. We appre-
15 ciate the efforts that your written testimony shows, as well
16 as your taking the time to be with us today.

17 Mr. Buffone.

18 MR. BUFFONE: Chairman Wilkins, Members of the Com-
19 mission, we are honored to be here today. We have submitted
20 extensive written comments.

21 As I noted in those comments, due to the absence of
22 ABA policy on many of the specific offense guidelines, we were

1 constrained to not speak on behalf of the ABA, but we have at-
2 tempted to address the range of issues that we were authorized
3 to speak on.

4 I would like to deviate both from my written comments
5 and what I had prepared to say this morning, based upon some
6 of what I have heard from the prior witnesses. We are con-
7 cerned that the Commission continually exercise its responsi-
8 bilities pursuant to 28 U.S.C., section 994(g) to assess the
9 impact of its guidelines and amendments that it proposes to
10 the guidelines on prison populations.

11 Section 994(g), in our reading, contemplates that the
12 Commission will first of all be aware of the existing capacity
13 of penal institutions and, based upon that awareness, make
14 assessments of the impact of its guidelines on future prison
15 populations. We think that it is imperative that the Commis-
16 sion have the data that you have requested from the Justice
17 Department and, in formulating any guidelines, assess what the
18 potential impact of that guideline will be on overcrowding of
19 the prisons.

20 We have testified at earlier times before the Com-
21 mission that we disagree with the impact statements that were
22 made in your initial report. It was the view of our committee

1 that the impact of the guidelines is going to be more signifi-
2 cant than the impact that was projected by the Commission in
3 its supplemental report. It is for that reason we have an
4 even deeper concern about the apparent absence of any data
5 upon which you can formulate a determination that the impact
6 of your proposed guidelines in areas like bank robbery and
7 career offenders.

8 The other principal area that I would like to address
9 this morning before turning our comments over to Mr. Salky for
10 some specific comments on individual guidelines, is the entire
11 process by which the Commission amends guidelines. We read the
12 statute as contemplating that the Commission will do precisely
13 what it is doing now, and that is engage in an on-going process
14 of continually refining and amending the guidelines.

15 Our reading of the vast majority of what is proposed
16 in this package of amendments is that they are a discharge of
17 that responsibility. The responsibility is to continually re-
18 fine the guidelines and make them more comprehensible. We
19 view the overwhelming majority of what you have done as tech-
20 nical in nature and, based upon that, non-controversial. We
21 commend you for even putting those types of non-controversial
22 amendments before the public for comment and consideration.

1 But we would like to address the far narrower range
2 of comments of proposed amendments, those that are controver-
3 sial potentially. We see what the Commission has done is
4 respond in large part to new legislation passed by Congress,
5 and we would like to isolate what we view are three ways in
6 which Congress has chosen to express its will to the Commis-
7 sion.

8 The first is those amendments that respond to newly
9 created criminal offenses for which there is no currently ap-
10 plicable guideline. We recommend that the Commission adopt a
11 flexible approach and promulgate guidelines where there is a
12 historic basis for formulating an appropriate offense range.
13 Where, however, you have a totally new offense prescribed by
14 legislation, where you have no convenient analogue, we recom-
15 mend that the Commission not hesitate to refrain from promul-
16 gating specific guidelines and, rather, await initial prosecu-
17 tions to see how prosecutorial patterns evolve and to give
18 flexibility to sentencing judges initially, so that you can
19 see how they react to specific fact situation before you
20 promulgate rigid guidelines for those new offenses.

21 The provisions of the Anti-Drug Abuse Act of 1988
22 and the Major Fraud Act of 1988 have presented the Commission

1 with other instances, other than new offenses, that you are
2 going to have to grapple with, and you have asked for comment
3 on many of these.

4 In some instances, Congress has fixed a mandatory
5 minimum penalty or amended existing mandatory minimum penal-
6 ties. In other cases, Congress has specified a particular
7 offense level and asked the Commission to promulgate that
8 offense level. In still other instances, such as that con-
9 tained in Proposed Amendment 119, Congress has listed factors
10 and directed the Commission to consider the appropriateness of
11 providing an enhancement of a specified number of levels for
12 particular conduct.

13 During the legislative process that led to the enact-
14 ment of the recent drug legislation, Senator Nunn wrote to the
15 Commission, and Chairman Wilkins responded in a letter of
16 August 22, 1988, asking that you address the issue of mandatory
17 minimum sentencing. While Chairman Wilkins recognized that
18 the Commission did not oppose the mandatory minimum sentencing,
19 he stated that mandatory minimum sentencing may not be the
20 best way for Congress to set sentencing policy. We strongly
21 agree with that statement.

22 The delegation authority to the Sentencing Commission

1 to utilize its expertise in formulating a comprehensive set of
2 sentencing guidelines is inconsistent, in our view, with
3 congressional imposition of mandatory minimum sentences.
4 Additionally, fixing of mandatory minimum sentences will upset
5 the carefully structured balance of the guidelines' consider-
6 ation of multiple sentencing factors.

7 We recommend that the Commission formulate offense
8 levels, irrespective of congressional enactment of mandatory
9 minimum sentencing, realizing that the judge is going to be
10 constrained by the mandatory minimum. The Commission should
11 formulate such guidelines just as it would for any other
12 offense where there is no mandatory minimum sentence.

13 In several provisions of the Omnibus Anti-Drug Abuse
14 Act of 1988, Congress did something that we consider very
15 significant and that we intend to bring to the attention of
16 Congress as soon as there is a committee hearing at which we
17 can testify, and that is that Congress mandated that the
18 Commission set specific offense levels. We believe that is
19 inconsistent with the overall tenor of the Sentencing Reform
20 Act and the clear legislative history. It is inconsistent
21 with our view of what this Commission should be and what the
22 criminal justice standards of the American Bar Association

1 envisioned in the Sentencing Commission.

2 We believe that the far better approach is that taken
3 by Congress in at least that one provision that I referred to
4 earlier of the Major Fraud Act, and that is to tell the Com-
5 mission we believe that a two-level enhancement, for example,
6 may be appropriate under certain circumstances and we urge you,
7 the Commission, to give serious consideration to that.

8 We will recommend to Congress that where it wishes
9 to express its will to the Commission, that is the appropriate
10 way to do it, so that you can exercise your expertise, take
11 into consideration the clear expression of congressional will,
12 but not have your hands bound by specific determination.

13 The Commission sought comment on one additional
14 aspect of legislation, and that is where the Congress specific-
15 ally increases a maximum sentence covered by an existing
16 guideline, how should you react to that. We believe that
17 where Congress increases a statutory maximum, it may well be
18 difficult to determine whether it viewed the crime generally
19 as one that required an increased sentence, or whether it
20 responded to particular heinous violations of the statute
21 which should be punished by a more severe sentence.

22 Our standards recommend use of a least restrictive

1 alternative necessary to effectuate sentencing policy. Simi-
2 larly, 18 U.S.C. section 3553(a) requires that a court impose
3 a sentence "sufficient but not greater than necessary" to
4 comply with the overall purposes of the Sentencing Reform Act.

5 Consistent with these policies, it is the associa-
6 tion's belief that, in the absence of a clear congressional
7 intent to increase sentences generally or in the absence of
8 the Commission's own conclusion, supported by adequate data
9 that sentences for a particular offense should be increased
10 generally, the Commission should apply a rule of lenity. Such
11 a rule of lenity would be consistent with the general prin-
12 ciples of criminal law, implement section 3553(a) and help deal
13 with the ever-increasing over-crowding of Federal prisons.

14 There has been a lot of discussion this morning about
15 the proposed amendment to the robbery guideline. We were pro-
16 vided earlier this week with some of the Commission's supple-
17 mental materials and, quite frankly, we have not had the
18 opportunity to go through them with the precision that I would
19 like in order to comment on them. We will do that in the
20 coming weeks and, if we have any additional comments, we will
21 bring them to the Commission's attention.

22 But we hope that the Commission's consideration of

1 robbery does not indicate that the Commission will be reacting
2 to anecdotal data or impressionistic views that come from the
3 field about the particular lenity or severity of particular
4 offenses.

5 Our own experience indicates that there is almost an
6 exponential increase in the number of sentencings occurring,
7 that the data base potentially is increasing, and that as the
8 number of sentences increase, you are going to have more in-
9 formation available to you.

10 We urge that with any specific offense level like
11 robbery, that you rely on the data that is generated from the
12 field, as well as the experiences of prosecutors, probation
13 offices, sentencing judges and defense attorneys.

14 Along these lines, we think that there may be a
15 legislative problem that needs cured on the Commission's
16 authority to amend guidelines, and in our written comments we
17 have addressed the recent amendment to your authority to amend
18 guidelines, the expiration of your emergency authority, and
19 that suggested that there be additional congressional action
20 to permit the Commission to amend guidelines whenever you seek
21 that. Our view of Mastrata is that that would not offend
22 your delegated authority and that Congress would have the

1 authority to veto any amendment to the guidelines at any time
2 that it sees fit, and that if you submit it in an annual
3 report to Congress, they could act on that report under any
4 timeframe that they viewed appropriate.

5 We think part of the maturation of the Commission
6 and its responsibilities is that there should be a recognition
7 of your unique expertise and authority to amend the guidelines
8 whenever you deem appropriate.

9 I would be remiss if I didn't comment that we are
10 once again encouraged and applaud the Commission for the open-
11 ness of its process, the holding of these hearings, your
12 effort to solicit as much and as detailed comment from as many
13 different aspects of the criminal justice system and the public
14 as you could.

15 We continue to commend you for this process and will
16 at the first available opportunity make known our views to
17 Congress that the funding for the Commission should be in-
18 creased, so that you can continue to perform this kind of
19 public outreach, as well as discharge the many other important
20 responsibilities that you have, such as assessing prison over-
21 crowding, and we believe that the Commission does not now have
22 adequate resources to discharge all of its responsibilities.

1 In the coming weeks, we will also formalize a recom-
2 mendation that we have made informally to the Commission, and
3 that is that you establish a practitioners working group or
4 advisory committee to, on an on-going basis, advise the Com-
5 mission of the kinds of anomalies and difficulties that prac-
6 titioners are experiencing in guideline application fields.

7 With those general comments in mind, I would like to
8 turn this over to Mr. Salky, and I would like, if I could,
9 reserve any questions you have until Mr. Salky concludes.

10 Thank you.

11 CHAIRMAN WILKEY: Thank you.

12 Mr. Salky?

13 MR. SALKY: I will be brief. I would like to amplify
14 one position that Mr. Buffone has already comment on, and that
15 is the assessment of impact on prison overcrowding. It has
16 come up in the comments on both the robbery guideline as well
17 as the career offender. I think it comes up as well in the
18 amendments to home detention and other areas, and that is that
19 the Commission I think is not only obligated by the statute to
20 assess generally the impact that the changes amendments will
21 have on the prison population, but my suggestion would be that
22 the Commission, on each of these areas, whether it be an area

1 that is going to potentially decrease the number of people
2 that have to serve time or an area that increases, what I would
3 term a prison impact statement, just somewhat like an environ-
4 mental impact statement, that an attempt be made, in other
5 words, to judge the robbery guideline, how many additional
6 numbers of bed space, man-years, et cetera, how that will be
7 counterbalanced possibly by other amendments that the Commis-
8 sion has taken into consideration for home detention and other
9 alternatives to incarceration.

10 The American Bar Association's position, as you
11 know, has been to encourage the Commission to increase the al-
12 ternatives to incarceration, and we are very supportive of the
13 home detention amendment, the ability to sentence for home
14 detention. On that particular amendment, the Commission has
15 asked for comments as to whether or not home detention should
16 be available on a day to day basis, such as the other forms
17 of community confinement. We believe that there is no sig-
18 nificant difference from home detention, from the other types
19 of community confinement that are already available on a day
20 to day basis, and we think that that is an appropriate way to
21 treat home detention.

22 On specific guidelines, we have not taken a position

1 on the appropriate offense levels for many of the amendments.
2 We don't believe that we should, but we want to take a few
3 moments to comment on procedures, and Sam has already mentioned
4 the necessary imperical data that we believe ought to be the
5 basis for any of the Commission's amendments, as opposed to
6 comments simply from the field, though we think those are im-
7 portant. The Commission ought to await the generation of data.

8 In that regard, there is an amendment which the
9 Commission seeks to change the policy regarding resolution of
10 disputed facts, and it seems to reduce that from a guideline
11 to a policy statement. I don't know that the Commission in-
12 tends in any way to denegrate in that fashion the resolution
13 of disputed facts. We think it is very important that courts
14 be encouraged to do so, that there be a record for appellate
15 review of sentences, so that we can develop a common law, a
16 procedure, a body of interpretation, if you will, of the
17 Commission's formulations, so that we can begin to properly
18 assess, and the Commission itself can begin to properly assess
19 its amendment process.

20 I know that there is existing in Rule 32 and the
21 Federal statute requirements for Federal judges to resolve
22 disputed facts, but I would think that if there is a signal

1 from the Commission that the Commission is moving away from
2 requiring judges to resolve disputed facts, that that not be
3 the direction the Commission move in. It is a significant task
4 for judges to apply these guidelines, but we believe that the
5 only way to develop this common law sentencing is that you
6 have effective appellate review of sentencing which the guide-
7 line system allows and mandates, is to require judges to re-
8 solve disputed facts on the record, in many cases with written
9 opinions, and we would prefer that they be done in writing.
10 The Commission's original mandate I think had a provision for
11 all of the decisions to be returned to the Commission in
12 writing for purposes of study, and we believe that that is an
13 appropriate mechanism.

14 On a few minor points, but on areas that the Commis-
15 sion has addressed earlier, the career offender provision, we
16 think the current guideline is flawed for reasons that are
17 stated in the proposed amendments. The literal interpretation
18 of the statutory directive we believe is inconsistent with the
19 legislative history of the Sentencing Reform Act, and we
20 believe that the Commission ought to look for ways to increase
21 the flexibility in sentencing career offenders, particularly
22 because the "career offender," there are many, many differences,

1 given that the career offender is treated primarily on the
2 basis of numerous types of past offenses.

3 We think Option 1 of the Commission's proposal is a
4 start in that direction in considering how to revise the
5 guideline, and we suggest that the Commission may want to con-
6 sider making the career offender designation a grounds for
7 departure above Option 1, since Option 1 increases the guide-
8 line structure not as much as Option 2. The Commission may
9 want to consider adding a departure grounds, either upward or
10 downward, depending on the nature of the underlying conduct,
11 grade the person as a career offender and giving the courts
12 therefore an option even within category of offense Level 7,
13 to deviate, to explain some reasons in a departure guideline
14 about the reasons that the court could deviate.

15 The final comment I will make -- and most of the
16 other areas are covered in our written comments -- is the
17 guideline on criminal livelihood. We believe that the present
18 amendment cures an economic discrimination that was in the
19 earlier guideline. There was told to me, not based on my ex-
20 perience, one of the horror stories where an offender who had
21 committed a Federal offense, who otherwise had been amenable
22 to probation, reports to the probation officer and the

1 presentence investigation report that he or she has been
2 eating by virtue of shoplifting and has been feeding him or
3 herself in that manner. That case, I was told, resulted in a
4 grade for criminal livelihood and therefore an increase that
5 required that person to go to prison.

6 The Commission has placed certain baseline require-
7 ments for the application of criminal livelihood that we be-
8 lieve minimizes the economic discrimination that that guide-
9 line possessed, and we commend the Commission in that regard.

10 I will not make any more comments. We have a written
11 proposal. I will seek questions for the two of us from the
12 Commissioners.

13 Thank you.

14 CHAIRMAN WILKINS: Thank you very much.

15 With criminal livehood, we were struggling with the
16 statute, as you recall, and we appreciate the help from the
17 ABA in this resolve, at least on first glance at the directive
18 that you gave us a little discretion. Perhaps this amendment
19 does meet the concerns that you all have expressed and I hope
20 it does, and we need to follow up on this working group of
21 practicing attorneys. The working groups have worked wonderful
22 in the past, the attorneys, probation officers and judges, and

1 it has been extremely beneficial to the Commission. I think
2 is an excellent idea, so let's don't lose that idea. We will
3 communicate and work out the details.

4 Let me put this in the perspective a little bit. We
5 have been talking about some pretty big numbers, 20 years and
6 30 years and so forth. We do have another statutory problem
7 with special offenders. There may be different ways to inter-
8 pret the language, but is someone who is a special offender
9 commits unarmed bank robbery, they would fall in the category
10 of 32 and the judge could sentence him to 17.5 years.

11 If we inject acceptance of responsibility as a pos-
12 sibility, which it is not now under special offenders, the
13 judge then could reduce that sentence to 14 years for this
14 special offender who has a maximum statutory offense potential
15 of 20 years. I just wonder, would that move toward the posi-
16 tion that the ABA would think would be reasonable? We could
17 give them 30 years and let's reduce it to 20 years, that is
18 not really what we are talking about. We are talking about a
19 17-year sentence as opposed to maybe reducing it to 14 years.

20 MR. BUFFONE: If I understand your question,
21 Chairman Wilkins, I think they are among the most difficult
22 problems the Commission faces in dealing with career offenders

1 and special offenders. One of the questions that was asked
2 earlier today was should we increase the base offense level
3 or should we have enhancements in order to deal with them. I
4 think that is the root of your question and I would like to
5 address it on that level.

6 We think what the courts need are some flexibility,
7 especially in dealing with a potential range of special of-
8 fenders, and it would be better to perhaps mediate somewhat
9 the base offense level but provide a wide range of enhance-
10 ments, so that judges can look at the specific nature of the
11 special offender who stands before them and, where appropriate,
12 have incapacitating sentences that are going to put those
13 people away for long periods of time.

14 As an example, I can't help but thinking of in my
15 practice I, on a pro bono basis, represent a number of demon-
16 strators here in Washington, and we have a lot of them, and I
17 on more than one occasion have walked into the courthouse with
18 a minister or rabbi who has a very long arrest record, based
19 upon participation in civil disobedience activities. I can
20 see in appropriate circumstances that person starting to look
21 like a career offender.

22 I think the courts need not only departure authority,

1 but the ability to separate out the truly dangerous special
2 offender. I don't mean to place the demonstrating priest or
3 rabbi there, but I think extremes are in order. There are
4 going to be special offenders who don't require that degree of
5 incapacitation.

6 MR. SALKY: There is another reason I think to
7 mediate or moderate the increase in the base offense level and
8 allow for flexibility in either a specific offense character-
9 istic or a departure, because I think that will give the
10 Commission more feedback from actual sentencing practices and
11 give it, therefore, data in the future to base a change in the
12 base offender level.

13 In other words, if the Commission, each time it
14 promulgates a change such as a robbery, where it may not have
15 -- and I haven't had a chance to review the package of data
16 that the Commission handed out -- may not have a great deal of
17 data, and then legislates a base offense level change of a
18 significance increase.

19 It seems to me that it prohibits the judiciary from
20 providing the Commission with some feedback through its own
21 actual in-practice sentencing procedures, and then the Com-
22 mission six months or a year later can come back and look at

1 that data, reassess that data and determine if 80 percent of
2 the judges are going above, because of specific offense
3 characteristics or departures, the Commission may then have a
4 baseline data to justify an increase in the base offense level.
5 But I think experience will be that the judge, and I think the
6 Commission ought not to legislate without sufficient informa-
7 tion.

8 CHAIRMAN WILKINS: Thank you very much.

9 Let me start the questioning with other Commissioners
10 to my left. Judge Breyer?

11 COMMISSIONER BREYER: Just quickly, if we could get
12 a legal memo on career offender. I don't know if you notice
13 that, as you pointed out, we have some suggested changes that
14 will significantly change the career offender provision. Now,
15 there is a legal question as to whether we can do that, because
16 the statute says that for three-time violent and drug
17 offenders, we should have a sentence at or near the maximum
18 authorized, and the Justice Department says that that means
19 the maximum authorized by statute, and therefore when we went
20 to the bank robbery statute, it says 25 years and it says we
21 have to put them in prison for 25 years.

22 Now, I know that wasn't the intent of Congress, but

1 I am saying do you think perhaps you could confer with the
2 Justice Department attorneys? It would be wonderful if the
3 different lawyers involved in this could reach the same pro-
4 vision, but after talking to them or not talking to them, you
5 give us your advice on the legal question involved.

6 MR. BUFFONE: Judge Breyer, we have representation
7 from the U.S. Attorneys Office and the Justice Department on
8 our committee and we would be happy to take that up and share
9 the --

10 COMMISSIONER BREYER: I think it would be important
11 to have that before a week from Tuesday.

12 MR. BUFFONE: I think an important point that you
13 made is that this may well be a legislative anomaly.

14 COMMISSIONER BREYER: Well, it is and Congress has
15 a --

16 MR. BUFFONE: I share your view of the legislative
17 history that the "at or near the statutory maximum" is --

18 COMMISSIONER BREYER: It says at or near the maximum
19 authorized.

20 MR. BUFFONE: -- at or near the maximum authoriza-
21 tion, in my view contemplated Criminal Code reform, which
22 didn't happen.

1 COMMISSIONER BREYER: Yes, right, so that is not the
2 first time in history Congress would have passed some language
3 on something that didn't come about, so now one is forced to
4 interpret that language in light of what we have, in light of
5 what didn't happen. Therefore, the question is do we try to
6 carry out what they wanted or does the language prevent that?
7 Maybe it does and maybe it doesn't. I am simply saying there
8 is a legal question and I think the Department will give us
9 their legal views and I think it would be useful to know if
10 the American Bar Association, which is an association of
11 lawyers, if they too have those legal views which are similar
12 to the Department or other legal views and what they are based
13 on.

14 As far as the other things, if you look at your data
15 you go through totally different subjects. I think you may
16 find, going through this data, that a lot of detailed work,
17 the numerical data, rather tends to validate the data that we
18 put out initially. It also tends to show that our prison
19 impact statement might not be so wrong, the prison impact
20 model that we are going to use in order to get just what you
21 want, namely, what are the impacts of these proposed changes.

22 Thank you.

1 CHAIRMAN WILKINS: Commissioner Nagel?

2 COMMISSIONER NAGEL: No questions.

3 CHAIRMAN WILKINS: Commissioner Caruthers?

4 COMMISSIONER CARUTHERS: I notice that you did ex-
5 press great concerns, both of you, that we evaluate the po-
6 tential impact on prison population of amendment to the guide-
7 lines. I would certainly want to assure you on that matter
8 and perhaps at the same time disappoint you, but we have di-
9 rected our staff to provide us with an impact statement per-
10 taining to guideline amendments, so that is done.

11 However, if I understand it from this perspective
12 that we establish penalties based on whether there is "space
13 in the inn," because this would be contrary to establishing
14 penalties based on the purposes of sentencing as established
15 by Congress.

16 It is essential that we know what the impact is and
17 I recall personally putting a request in writing. It is
18 essential, because Congress should not be caught unaware of
19 the impact. They did not mean to be caught unaware. I think
20 that is the reason for their concern expressed in the legis-
21 lative history, that we assess this, so they should be advised
22 of the impact so that they can assure that the Bureau's

1 resources are adequate, and it is my personal position that
2 the Commission should take care that we are supportive of the
3 Bureau's request for adequate resources.

4 MR. SALKY: Could I just comment briefly?

5 COMMISSIONER CARUTHERS: Surely.

6 MR. SALKY: I don't understand that position to be
7 inconsistent with the Commission's obligations to make assess-
8 ments of its own guidelines and its own deliberations based
9 at least in part on that factor. Thus, Judge Breyer, talking
10 about the sort of cost-benefit in the career offender area, is
11 in part a consideration of the available space and how to best
12 maximize the utilization of that space seems to me to be part
13 of the Commission's obligation as well as Congress' obligation.

14 COMMISSIONER CARUTHERS: Certainly, we will assess
15 the impact. We have asked the staff to advise us of the im-
16 pact. Once we receive that, we do have a mandate to recommend
17 to Congress any changes we determine advisable for the Bureau,
18 whether it be in terms of utilization of facilities or in
19 changes pertaining to classification or any correctional change
20 that we deem worthwhile in terms of alleviating their con-
21 gested situation certainly is within our authority and our
22 mandate to go beyond looking at the impact and saying, okay,

1 Congress, this is what the impact is, and I didn't mean to
2 imply that. I really meant to assure you how we would not be
3 looking at that with the intent that we would establish penal-
4 ties based on space in the end.

5 MR. BUFFONE: Commissioner Caruthers, we go with you
6 right up to the end and when we come to that we read the
7 Commission's statutory mandate differently. The last sentence
8 of 994(g) says that the sentencing guidelines prescribed under
9 this chapter shall be formulated to minimize the likelihood
10 that the Federal prison population will exceed the capacity of
11 the Federal prisons as determined by the Commission. What that
12 tells us is that you have to, on an on-going basis, know what
13 the capacity is, and if you ever project that you are going
14 over it, you cannot do it.

15 COMMISSIONER CARUTHERS: Well, what that says to me
16 -- and that is personally -- is that we should always use the
17 least restrictive method necessary to adequately punish an
18 offender for an offense, so that is my personal interpretation
19 of what that means.

20 COMMISSIONER BLOCK: Mr. Chairman, may I make just
21 one comment? I wanted you to hold onto that thought about the
22 cost effectiveness of the career offender provision and

1 perhaps help us over time to develop some balance in this area,
2 in the sense that I wanted to reinforce all the other Com-
3 missioners' assurances that a prison impact statement is being
4 done for each of the significant changes. I think we ought to
5 work together, though, over time to make sure that we do a
6 crime impact statement also. I think you will agree that, as
7 a body that is supposed to rationalize sentencing, we should
8 not only be concerned with the costs of the capacity but also
9 the benefits, and in that sense you could work with us to get
10 both prison impact, which is the cost side, and the crime
11 impact.

12 Now, I am perfectly aware that the crime impact is
13 a larger and more difficult problem, but in some sense you can
14 see the Commission as an institution which in fact can take
15 systemic views of sentencing, and in that sense we ought to
16 develop our expertise and come to the amendment process as we
17 mature with both an impact statement, which you were arguing
18 before, but I wish you would give some consideration to
19 helping us think out the crime impact statement also.

20 Thank you.

21 CHAIRMAN WILKINS: Thank you very much.

22 Our next witness is Jonathan Macey, Professor of Law

1 at Cornell Law School. Professor Macey, we are delighted to
2 have you with us.

3 MR. MACEY: My remarks and reported expertise is
4 really confined to insider trading and my remarks will fall
5 into two categories. The first concerns the questions of the
6 extent to which insider trading involved fraud. Of course,
7 the sentencing guidelines for insider trading fall into the
8 category of offenses involving fraud or deceit, and while it
9 is true that insider trading does involve fraud in certain
10 circumstances, in other circumstances, which are clear cases
11 of insider trading, they will, as I will describe a little bit
12 later, involve breaches of fiduciary duty, they are bad things,
13 arguably, but they don't involve fraud, and to that extent may
14 genuinely involve quite a different thing from the standpoint
15 of someone trying to impose a sentence on such people.

16 I tried in my written comments, and I want to touch
17 upon those briefly, to identify what the best arguments might
18 be for increasing the sentences on people who have been in-
19 volved in insider trading as that has been defined by the
20 Supreme Court in *Chirrell v. Dirksen* and its progeny.

21 The first, and the one that Congress really talks
22 about when they passed the Insider Trading Securities Fraud

1 Enhancement Act of 1988, in which they suggested toughening up
2 the sentencing guidelines, is that it is hard to detect insider
3 trading. That is certainly true, particularly the ability of
4 people to consummate illegal transactions through conduits,
5 through accounts located offshore, but it is also important to
6 keep in mind that the reason it is so hard to detect insider
7 trading is because the kinds of activities that the insider
8 trading laws are addressing themselves to go well beyond the
9 notion of affirmative misstatements, that is, fiduciary duties,
10 violations of fiduciary duties, and even outright fraud as
11 that term is used in the context of insider trading don't
12 involve actual misstatements of the kind that we learned in
13 law school comprises common law fraud.

14 Nonetheless, I think that is really the best reason,
15 the most sensible reason for increasing penalties for people
16 who have been convicted of violating rules against insider
17 trading.

18 The second reason, the one that really the Securities
19 and Exchange Commission most often addresses itself to is the
20 idea that insider trading penalties ought to be particularly
21 stiff, because such activity undermines the confidence that
22 small investors have in the capital markets and therefore

1 impairs the capital formation process, and there are two
2 problems, it seems to me, with that argument.

3 First, purely as a legal matter, the Supreme Court
4 has made it clear time and time again that violations of Rule
5 10(b)(5) and other rules constraining insider trading do not
6 exist to police a generalized fiduciary duty owed by traders
7 to the marketplace, rather, in all of the cases that we read
8 about involving insider trading, in order to obtain a con-
9 viction under the law, there must be a violation of a specific
10 preexisting fiduciary duty, and it is that fiduciary duty that
11 is being policed by these rules, and it really isn't clear,
12 therefore, where the connection is between this idea of trying
13 to police the capital markets, which is obviously something
14 that is within the SEC's charge, and the specific crime of
15 insider trading. But more to the point is simply the imperical
16 evidence that, for a variety of reasons having to do with the
17 investor's ability to have buy and hold strategies and diver-
18 sified portfolios assets, the evidence from markets, particu-
19 larly Japan, where insider trade is not only decriminalized
20 but rampant, suggests that simply as an imperical matter
21 there doesn't seem to be a correlation between the tinegrity
22 of the capital markets and the robustness of the capital

1 markets and the incidence of insider trading. We observe a
2 very robust capital market in Tokyo and other places,
3 Singapore, Osaka, Hong Kong, with no penalties, criminal
4 penalties for insider trading, and no civil penalties that
5 are enforced.

6 The final reason that people talk about as a justi-
7 fication for punishing insider trading quite severely is be-
8 cause the activity affects a large number of disaggregated
9 shareholders and these large number of disaggregated share-
10 holders are particularly vulnerable as victims and, as a
11 consequence, a serious penalty is warranted.

12 But if you look at the Supreme Court's opinions in
13 Chirrell v. Dirksen, which for reasons I can discuss I think
14 are correctly decided as providing a theoretical basis for
15 imposing penalties on insider traders, the fact of the matter
16 is that, generally speaking, the rights that we are seeking
17 to vindicate in these prosecutions are not the rights of large
18 numbers of disaggregated shareholders. The fact of the matter
19 is that in most of these cases it is the right of a specific
20 entity or firm to whom a fiduciary duty was owed and has been
21 breached.

22 At times, for example, the case of Basic v. Levinson,

1 a recent Supreme Court case, there will be a confluence, there
2 will be a large number of people harmed, but in other cases
3 that involve equally serious misconduct, the number of people
4 actually harmed may be far lower.

5 Clearly, it is not a popular thing to say that we
6 should go slow in increasing penalties for insider trading. I
7 know few crimes that have come to the center stage of popular
8 consciousness with more abruptness and force than insider
9 trading, and leaving that rather thorny issue to the side, I
10 would like to address the more specific question of what about
11 the specific criteria that are involved as far as how they
12 ought to impact upon somebody's actual sentence, and I am
13 concerned that there is very little correlation between what
14 I believe to be instances of serious insider trading and
15 criteria to lead to serious penalties, similarly, I think that
16 criteria that would cut the other way. In other words, some
17 of these criteria would lead to serious penalties for benign,
18 relatively benign instances of insider trading, and some of
19 these would lead to minimal sentences for what I regard as
20 egregious examples of insider trading.

21 The suggestion, for example, that offenses that in-
22 volve more than minimal planning should be punished more

1 strictly I think is a particularly bad idea. For example, I
2 was thinking of a very egregious case of insider trading that
3 might involve an on-going takeover attempt, the incumbent
4 management has filed a motion for injunctive relief in a trial
5 court, and a law clerk of the judge engages in insider trading
6 on the basis of his or her prior knowledge of the judge's
7 decision regarding the grant of injunctive relief. There is
8 very little planning involved in that, but I think it involves
9 a pretty serious case of insider trading.

10 By contrast, there are very Byzantine schemes that
11 involve insider trading violation, where a firm that is trying
12 to take over another firm will contact an investment banker or
13 an arbitrageur and say we have some problems with the Williams
14 Act here, because of the requirement in the Williams Act that
15 say we have to disclose a lot of information we don't want to
16 disclose within 10 days of acquiring 5 percent of the stock,
17 we can get more of the stock and avoid the disclosure penalties
18 by teaming up with you in a kind of secret coalition and
19 purchasing shares of the target.

20 There, too, we have a violation of rules of insider
21 trading, but our assessment of how bad or how strict the
22 sentence ought to be applied in this particular example is

1 purely a function of our assessment of the Williams Act, very
2 technical disclosure provisions, and don't involve in an over-
3 wide range of issues the kind of clearly egregious over-
4 reaching and a breach of trust that the former example did.

5 Similarly, this idea about we ought to have stricter
6 penalties for schemes to defraud more than one victim, I think
7 there can be very serious schemes that only defraud a single
8 victim, particularly because of the idea that the party whose
9 rights are being vindicated in these actions is the party to
10 whom a fiduciary duty was owed.

11 For example, in cases involving -- these cases that
12 seem to come up quite often involving journalists who work for
13 organs of the financial press who trade in anticipation of
14 publication of certain financial data, there the courts have
15 decided liability is predicated on the fiduciary duty of the
16 trader in these situations to his or her employer, i.e., a
17 single victim, and it is not obvious to me why the penalties
18 should be lower or different than when you have lots of
19 victims.

20 Finally, as far as the specific offense characteris-
21 tics, is the relevancy of the chart that draws a correlation
22 between loss by the public, presumably by some party on the

1 one hand as a factor, and the problem here is that the Supreme
2 Court has made it quite clear that the damages, the losses, if
3 you will, in an insider trading case should not be calculated
4 on the basis of counting up the losses of the people who were
5 buying stock while the insider was selling or selling stock,
6 but while the insider was buying; rather, the losses revolve
7 around the damages borne by the party to whom a fiduciary duty
8 was owed.

9 To cite a very simple example, drawn on the facts in
10 the Chirrell case, Vincent Chirrell was a printer for a
11 printing company and he decoded information that allowed him
12 to learn in the context of his employment as a printer the
13 targets of takeover attempts, where the bidding firm had
14 purchased the services of his printing company to publish the
15 necessary documentations surrounding the offer, and he goes
16 out and buys shares of the target.

17 The Supreme Court made it clear that if criminal
18 liability is to come out of the actions of a defendant in a
19 case such as this, it is going to be predicated upon the breach
20 of the duty that the printer owed in the context of his employ-
21 ment to the bidding firm, not on the basis of a fiduciary duty
22 that is owed by this purchaser, the printer who knows about

1 the tender offer in advance, to the disaggregated sellers of
2 the stock, to whom no preexisting fiduciary duty was owed.
3 Therefore, it is inappropriate to look at their losses, since
4 the Supreme Court has said that his culpability isn't predi-
5 cated upon any duty owed to them, because in fact no such
6 duty is owed.

7 Then you have got the very difficult problem under
8 these circumstances that exist at every case of figuring out
9 what the losses are. That is, the losses are going to be the
10 diminution in the probability that this takeover will actually
11 occur, the lost profits to the bidder, and if the takeover is
12 actually successful, the higher price the bidder actually has
13 to pay as a consequence of the insider's purchases.

14 Similarly, in these financial press cases that I
15 mentioned a moment ago, the losses for a breach of fiduciary
16 duty to the printing firm -- Business Week, Wall Street
17 Journal, et cetera -- is the loss in circulation as a conse-
18 quence of advertising revenues as a result of the diminution
19 in reputation to the firm.

20 So, the point simply is that these loss calculations
21 may not have a very close correlation and may in fact be im-
22 possible to really determine. In our example of the law clerk,

1 what are the losses to the party to whom the fiduciary duty
2 was owed, how do you put a number on sort of the reputation of
3 the judicial process or the reputation of the judge that hired
4 this clerk or what have you -- very complicated ephemeral
5 and, it seems to me, perhaps misguided.

6 Thank you.

7 CHAIRMAN WILKINS: Thank you very much.

8 Let me start to my right this time. Commissioner
9 Block, do you have any questions?

10 COMMISSIONER BLOCK: I just wanted to get some
11 specifics. If you take for a moment Guideline 2(f)(1.2) on
12 270, I just want to get your suggestions on a specific offense
13 characteristic.

14 You will notice that the insider trading starts at
15 page 2.70.

16 MR. MACEY: Okay. I'm with you.

17 COMMISSIONER BLOCK: You will notice that the base
18 offense level starts with an 8, which is, for various reasons,
19 two levels above fraud, but then in the existing guidelines
20 the only specific offense characteristic is the gain from the
21 offense. Now, faced with that guideline, how would you change
22 it, or would you leave it alone?

1 MR. MACEY: Do you mean would I suggest -- to make
2 sure I understand, moving from the gain to moving from the
3 losses --

4 COMMISSIONER BLOCK: Yes, faced with this guideline
5 which is now the guideline on insider trading, the reference
6 in the fraud guideline in order to scale doesn't use loss, it
7 uses gain, there are no other aggravators. What would you do
8 with it, or would you leave it alone?

9 MR. MACEY: Well, if my choice is to leave it alone
10 versus move to the loss calculation, I would definitely leave
11 it alone. The loss calculation may involve in certain cases a
12 far lower determination than the gains are far higher. The
13 other problem is calculating gain is a much simpler matter,
14 but the cost involved, in terms of expert witness testimony,
15 having financial -- just to give you some example of why I
16 think you would be much better to leave it alone, it is clear
17 from the law that -- let's imagine an insider is selling short,
18 betting that the stock price is going to go down, there has
19 got to be testimony from financial economists in a case like
20 that when we compute losses of what the -- very complicated
21 calculations regarding the beta coefficient of the stock in-
22 volved, i.e., the economic prediction of how that stock is

1 going to trade in relation to the market as a whole, because
2 you have to segregate in these calculations the change in
3 stock price of the firm who is based on the insider trading,
4 insider trader's knowledge advantage on the one hand versus
5 the aspect of the penalty that is based on general market
6 movements, which involves a pretty sophisticated calculation
7 that financial economists will for a fee perform, but again
8 even once that calculation is performed, for the reason I
9 described, it is not absolutely clear, it is not really clear
10 to me at all, really, how that links up to how egregious we
11 view the offense to be.

12 So, if you have to pick some criteria, it seems to
13 me the gain is at least a roughly useful guideline. The prob-
14 lem again, you know, in the case of our law clerk which I
15 would use as an egregious example, the gains may be very
16 minimal. The gains in a more benign case, such as our front-
17 running, the Williams Act related insider trading, the gains
18 can be astronomical. So, given a choice, I would pick gains,
19 I am not sure what I would do if I had the world to pick from.

20 COMMISSIONER BLOCK: Well, the next several weeks
21 might be too short a period to do that, but you might think
22 -- I was impressed with your written testimony in terms of

1 differentiating the cases of insider trading, and I think this
2 guideline probably doesn't do a very good job of that. It is
3 better than some of the amendments, possibly, but maybe you
4 would give some thought as a homework assignment to help us
5 better differentiate the pernicious versus the non-pernicious
6 insider trading scheme.

7 MR. MACEY: Okay. If I think of anything, I will
8 write, if that is appropriate.

9 COMMISSIONER BLOCK: Thank you.

10 CHAIRMAN WILKINS: Commissioner Caruthers?

11 COMMISSIONER CARUTHERS: I think if you address
12 Commissioner Block's question in your homework assignment, it
13 would satisfy my curiosity. What I had listened to you dis-
14 cuss, the extent to which insider trading involves fraud and
15 your belief that it involves bad things but not fraud, I
16 guess I was not sure how bad this bad thing is. I know that
17 you are opposed to increasing the penalty, but I wasn't sure
18 whether you got the current offense level is about right, or
19 whether you feel that the current guideline is too high.

20 Then, the more I listened to you, I thought maybe
21 you are saying -- and I guess this is a general question over-
22 all -- whether you are advocating that we go back to square

1 one for insider trading, in terms of establishing the base
2 level, establishing losses, or how we look at that, determin-
3 ing what will be the specific offense characteristics. The
4 more you talked, the more I thought that this is what you are
5 advocating. Am I reading you correctly?

6 MR. MACEY: Right. I think that is a very fair,
7 very excellent question. I guess my point really is this: As
8 the 1988 law defines what we are about today, that is, if we
9 look at all of the things that that Act envisions as insider
10 trading, and then think about what are the appropriate sentenc-
11 ing guidelines for those things, I guess in a nutshell my
12 answer is some of the things that the Act envisions as being
13 insider trading honestly involve very egregious breaches of
14 fiduciary, breaches of trust and things that are not common
15 law fraud but a lot like it, and therefore, you know, sentenc-
16 ing guidelines, the old ones, the new ones, strict ones are
17 sort of appropriate.

18 On the other hand, some of the other things that are
19 called insider trading I would think are much more benign,
20 don't involve fraud -- some do, but some don't -- all involve
21 breach of fiduciary duty of varying degrees, but maybe some
22 aren't as serious as others, and therefore to jump up all of

1 the levels, I think is a bad thing.

2 So, I guess my point is that there are two things
3 going on. We are increasing the penalty level and we are
4 broadening at the bottom end of the spectrum the kind of range
5 of activities that we are talking about the penalties applying
6 to, and so my answer is -- I guess you are quite right to call
7 me on it, to be more precise, I guess I would say it is not
8 so much that the penalties are too strict for everything, it
9 is just that there are certain activities that they capture
10 that are inappropriate, in my view.

11 COMMISSIONER CARUTHERS: Thank you very much.

12 CHAIRMAN WILKINS: Thank you.

13 Commissioner Nagel?

14 COMMISSIONER NAGEL: Professor Macey, given your ex-
15 pertise, I would like to ask you, if you had your druthers
16 of sitting at a blank piece of paper and someone asked you to
17 specify the appropriate sanction, ranging anywhere from pro-
18 bation or fine or imprisonment for an individual convicted of
19 insider trading, what would that sentence be, and then would
20 you make a distinction between the sentence for one person
21 convicted of insider trading versus another and, if so, on
22 what basis, and essentially by how much would you like to see

1 it increase? Assume you were in our place, what would you do?

2 MR. MACEY: I guess this sort of anticipates what
3 I was thinking about in response to Commissioner Block's
4 point --

5 COMMISSIONER NAGEL: You can put this in your home-
6 work assignment.

7 MR. MACEY: I will have to dig up some research as-
8 sistants.

9 [Laughter.]

10 I will try -- this is very vague, and hopefully I
11 will be more precise at some point -- to draw a correlation be-
12 tween the gravity of the breach of fiduciary duty, which as a
13 matter of law is what we are called upon to think about when
14 we are thinking of inside trader's culpability, we look at the
15 gravity of the breach of the fiduciary duty and some are going
16 to be worse than others.

17 Certainly, in my view, some of them would rise to
18 the level of things we put people in jail for in this society
19 without --

20 COMMISSIONER NAGEL: Would you start at a base of 9
21 imprisonment and then use that as a specific offense character-
22 istic, is that what you are suggesting?

1 MR. MACEY: No, because that is a prerequisite.
2 Now, all of these cases will involve a breach of a fiduciary
3 duty, and the question is -- to talk about fiduciary duty, it
4 is really a term of art in insider trading cases, that is to
5 say obviously we think of fiduciary duty -- it comes into
6 our lexicon of corporations and it comes in our lexicon in
7 the law, and in securities laws it relates to insider trading
8 -- and the range of fiduciary duties, the range of relation-
9 ships that comprise fiduciary duties in the realm of insider
10 trading is far broader than it is in trust, and far broader
11 even than in corporations.

12 For example, if you have two corporations and they
13 enter into negotiations with one another, in a lot of cases
14 on just this sort of facts, negotiations with one another where
15 these two companies are thinking about a joint venture. It
16 might be that they are thinking of a partnership, in other
17 words, and during the context of their negotiations the first
18 firm learns stuff about the second firm and the second firm
19 learns stuff about the first firm, and the negotiations break
20 off, they never enter into the joint venture, but one of the
21 firms, on the basis of what it learned during these confidential
22 joint venture negotiations, decides to buy or sell stock in

1 the other firm that has learned confidential matters about
2 that firm.

3 Now, some courts have felt that set of facts doesn't
4 involve a violation, because there was an implied consent or
5 a variety of rationales. Other courts have held, by contrast,
6 that there was an implied fiduciary duty in the context of
7 this relationship of a limited nature that would include
8 reading into this contract, if you will, an obligation to
9 forebear from engaging in insider trading.

10 Now, clearly, this is not a fiduciary duty as we
11 think about it from the law of corporate law, but it is a
12 fiduciary duty, some courts have held, and I think there is
13 some justification for it under a variety of fact patterns.
14 But in this area, should somebody go to jail for that? It is
15 pretty vague. Courts are split. As I say, under certain fact
16 patterns this would involve a breach of fiduciary duty as the
17 term is thought about insider trading, but sending somebody to
18 jail on that really would plague me.

19 On the other hand, you know, there are other examples
20 of cases where the fiduciary duties have been breached merely
21 where a lawyer is in a position of trust with a client who is
22 talking about a financial matter of great sensitivity, and the

1 lawyer goes out and trades. I am pretty sympathetic to sending
2 that person to jail.

3 Again, they are all going to involve the court making
4 a decision that there is a fiduciary duty being breached, but
5 to say to a court, on the basis of which of these schemes is
6 more complex or on the basis of other kinds of criteria that
7 we talked about, that you maybe send somebody to jail for the
8 first one, merger and joint venture negotiations, but not the
9 second one, that gives me pause.

10 COMMISSIONER NAGEL: Thank you.

11 CHAIRMAN WILKINS: Judge Breyer?

12 COMMISSIONER BREYER: No questions.

13 CHAIRMAN WILKINS: Professor, thank you very much.

14 MR. MACEY: Thank you.

15 CHAIRMAN WILKINS: Our next witness is Mr. Tom
16 Rendino. Tom has testified on several occasions before the
17 Commission and has worked with the Commission on the Probation
18 Officers Working Group. He is the President of the Federal
19 Probation Officers Association.

20 Mr. Rendino, it is a pleasure to see you once again.

21 MR. RENDINO: Thank you, Your Honor.

22 I want to thank the Commission for once again allowing

1 the field probation officers to be represented with some of
2 our thoughts and feelings and comments on the guidelines, and
3 specifically the proposed amendments.

4 I think I will rely in large part on my prepared
5 statement and I would be happy to answer any questions related
6 to that, but I do have three or four other comments that I
7 would like to bring to the Commission's attention.

8 First of all, I just came from the trainers session
9 in Nashville and I want to advise the Commissioners that, if
10 you haven't done so already, you really must salute Phyllis
11 Newton and her staff. It was an excellent session and the
12 reports, because the FPOA does monitor all the sessions and
13 the previous session was exactly the same, so you have a
14 winner there and I hope you can keep her for a good long time,
15 as well as her staff.

16 The second thank you I want to bring to you, because
17 it is bearing increasing fruit for the field, is the network
18 of computers that the Commission put out in the field in two
19 subsequent years. First off, there was some paranoia on the
20 part of some field officers who got a little bit shakey when
21 they walked in front of the keyboard and the screen, however,
22 in large part it has been a blessing and it has increased the

1 efficiency of the field, particularly in the preparation of
2 the somewhat complicated presentence reports which are now not
3 so complicated, with the advent of the computers and the word
4 processors. As an adjunct, it has helped us in many other
5 areas. It has brought line staff more up to snuff as far as
6 being computer literate, and it has helped in other duties
7 also when we are not having staff do those presentence reports.

8 The third point I would like to emphasize, and it
9 goes to page 4 of my prepared statement, is basically that as
10 we in general endorse the home detention proposal, I must
11 emphasize and reiterate once again that we just do not have
12 the staff currently nor the resources, such as the electronic
13 gear, to really implement that. It is almost as if we are
14 trying to shoot ourselves in the foot here in endorsing the
15 proposal that would probably send us under for the third time
16 and drown us out there in the field.

17 I guess what I am saying is we vote "yes," but we
18 plead that if it is endorsed, that you go to Congress or who-
19 ever else you may need to go to see what impact that will have
20 on us and what additional staff and resources we will need to
21 implement that. I know it is not a resolved issue, but if it
22 becomes a resolved issue in the affirmative, we will do it, we

1 want to do it credibly but we need extra help to do it credibly.

2 I would like to ask the permission of the Chair, I
3 queried the President of the new Federal Probation Clerks
4 Council, our clerical component is organized into a profes-
5 sional association, and due to my travels and a mix-up in
6 getting papers to me, her statement as to the impact of guide-
7 line sentencing on the clerical staff in the various probation
8 offices didn't reach me until just yesterday and, if I might,
9 I would like to offer up her written statement as an extension
10 of my own remarks, if that is possible.

11 CHAIRMAN WILKINS: Certainly, it will be included.
12 In fact, the public comment period will remain open next week
13 as well, so we are going to have plenty of opportunity for
14 that. That is an important thing for us to know, but it is
15 also something that probably is appropriately submitted to
16 Congress as well, since the final decision will rest there,
17 but we will always support the probation officers as far as
18 personnel and resources, and you know the past few years have
19 proven that to be true.

20 MR. RENDINO: Thank you very much.

21 My final comment, I think I heard the Department of
22 Justice, Joe Brown, I believe it was he who mentioned that

1 money may not be as important as the robbery itself in a bank
2 robbery case. If I heard that correctly, I would like to just
3 give the flip side of that, based on 20 years of experience
4 out on the line.

5 There have been and there are and there probably will
6 be in the future the professional bank robbers that spend a
7 great deal of time plotting and planning, and they invariably,
8 with little misses, obtain large sums of money, as opposed to
9 the amateurs, if we may use that term, who go in and get \$1,800.

10 Now, the robbery itself is probably the most impor-
11 tant factor, but I believe that the monetary enhancement or
12 the adjustment should not be thrown out without due consider-
13 ation of professionals.

14 I will conclude my remarks there, Mr. Chairman.

15 CHAIRMAN WILKINS: Thank you. Let me ask you briefly
16 with regard to electronic monitoring, a probation officer can
17 supervise, is it correct to say, between 50 to 80 defendants
18 in a normal situation, depending on the intensity of the
19 supervision of some of them, is that about the rule of thumb,
20 is that correct?

21 MR. RENDINO: That is carrying a heavy load, Your
22 Honor.

1 CHAIRMAN WILKINS: Well, is 50 a reasonable load?

2 MR. RENDINO: Fifty is a good operative number, yes.

3 CHAIRMAN WILKINS: Assuming that electronic monitor-
4 ing is introduced and a probation officer is assigned to
5 monitor electronic-monitored defendants, how many could that
6 probation officer reasonably supervise?

7 MR. RENDINO: The current state of the information,
8 and we have relatively little of this activity in the Federal
9 system presently, but the current state of the information,
10 particularly that coming out of South Florida, is that an
11 experienced, very mature probation officer, absent any other
12 duties, could probably supervise between 20 and 25 at the
13 maximum.

14 CHAIRMAN WILKINS: And can you briefly state why that
15 is?

16 MR. RENDINO: The supervision is much more intensive
17 than our so-called high-activity supervision. As Your Honor
18 is aware, we have low-activity supervision and high-activity
19 supervision. The home detention, with electronic monitoring,
20 requires a great deal of extras. For instance, the officers,
21 the team must be on duty seven days per week, including
22 holidays. We have a number of incidents we could bring to

1 your attention, what happens on Saturday evening, when the
2 computer advises the officer on duty at 2 a.m. that the client
3 is no longer where he or she is supposed to be, and then what
4 that entails, and it sometimes goes into some very risky
5 neighborhoods. When the sun falls, some of these neighborhoods
6 become even more risky, and it goes on and on and on. So it
7 requires a much closer attention, much higher intensity.

8 CHAIRMAN WILKINS: It requires immediate response, a
9 call from the monitoring system, if the thing is going to work?

10 MR. RENDINO: You don't wait until Monday morning,
11 Your Honor, you must get in the car and on your way immediately.

12 CHAIRMAN WILKINS: Thank you.

13 Commissioner Block?

14 COMMISSIONER BLOCK: I have a short question to
15 follow up on the electronic monitoring experiments. I know
16 that the State I am from, Arizona, there is an experiment with
17 electronic monitoring that went on for some time. What are
18 the other districts that have front-end electronic monitoring
19 home arrest options or have had it in the past? I am sure
20 right now they don't have much of it.

21 MR. RENDINO: I missed the beginning, you said what
22 other districts?

1 COMMISSIONER BLOCK: I know Arizona has had some.

2 MR. RENDINO: Los Angeles and the Southern District
3 of Florida.

4 COMMISSIONER BLOCK: Do you have some written
5 material on those experiences that we could get hold of pretty
6 rapidly?

7 MR. RENDINO: I don't have it here, but I am sure I
8 can get some funneled to you.

9 COMMISSIONER BLOCK: Would you provide that?

10 MR. RENDINO: Very definitely.

11 COMMISSIONER BLOCK: Thank you.

12 CHAIRMAN WILKINS: Thank you.

13 Judge Breyer?

14 COMMISSIONER BRYER: Thank you. I thought the sub-
15 missions were very interesting and helpful. Thank you.

16 CHAIRMAN WILKINS: Commissioner Nagel?

17 COMMISSIONER NAGEL: Thank you very much. In par-
18 ticular, I want to thank the entire Probation Service for being
19 extraordinarily helpful and supportive throughout all of our
20 efforts. You have done a wonderful job and I just want to
21 express my appreciation.

22 MR. RENDINO: Thank you very much.

1 CHAIRMAN WILKINS: Thank you very much, Tom.

2 The National Association of Criminal Defense Lawyers
3 is an association which has been actively involved with the
4 Commission from the very beginning. Its representatives are
5 here today. You testified before and we are delighted to see
6 you once again, Mr. Benson Weintraub and Mr. Scott Wallace.

7 MR. WEINTRAUB: Thank you, Your Honor.

8 Judges and members of the Commission, may it please
9 the Commission: NACDL has a deep commitment to assisting the
10 Sentencing Commission in the public hearing process to hope-
11 fully impact in a material way upon all aspects of guideline
12 sentencing, including the on-going amendment process.

13 I am a partner in the Miami law firm of Sonnett,
14 Sal & Tunney, and my practice is limited to representing
15 offenders in sentencing, post-conviction and habeas corpus
16 proceedings. I am accompanied today by Scott Wallace, who is
17 the Acting Executive Director and Legislative Director of our
18 association.

19 NACDL was the only membership bar organization that
20 involved itself in nationwide challenges to the constitution-
21 ality of the guideline system and its derivative legislation
22 up to and including the Mistratta case. With the resolution

1 of Mistratta by the Supreme Court, we of course have an abiding
2 commitment to continue monitoring the sentencing guideline
3 promulgation process, and that will be the principal focus of
4 our testimony today.

5 What concerns us, Judges and Members, is the process
6 by which amendments are enacted. We note, of course, that
7 when the Commission originally developed its initial guideline
8 package, it was the result of an exceptionally thorough and
9 exhaustive empirical based analysis of past sentencing prac-
10 tices.

11 While we, of course, accept that representation,
12 NACDL has for the past several years sought access to the raw
13 data that the Commission has used in determining its initial
14 set of guidelines and it would be of tremendous assistance to
15 us in providing future public testimony and comment if we were
16 able to access that material, not necessarily limited to the
17 raw data as well as perhaps redemptive versions of the 10,000
18 presentence reports.

19 But we were particularly impressed with this exhaus-
20 tive empirical based analysis by the Commission in its initial
21 stages. We are, however, very deeply concerned that this set
22 of approximately 290 amendments may not reflect the same type

1 of deliberative empirical based research and study necessary
2 to enable the Commission to sufficiently analyze existing
3 data, particularly new data obtained from the District Courts
4 with respect to past sentencing practices, in order to use
5 such data as a benchmark for determining whether the Commis-
6 sion's initial guidelines should be validated or changed.

7 In that regard, we urge the Commission to proceed
8 quite cautiously to deliberate and ultimately to postpone
9 action on the proposed amendments until the May 1990 submis-
10 sion, which is required. We feel that if that action was
11 taken, it would afford the Commission the opportunity to engage
12 in the exhaustive empirical based analysis that is necessary.

13 Since many districts, including my home district,
14 have not applied sentencing guidelines until sometime after
15 the Supreme Court's decision in Mistretta, guideline sentenc-
16 ing in many districts is still in its infancy. I recognize,
17 of course, that in many other districts there is available
18 data to be analyzed by the Commission in order to review sen-
19 tencing practices under the guidelines and to perhaps afford
20 the Commission an opportunity to review its past guideline
21 provisions, with an eye towards making amendments, if indicated,
22

1 and on the basis of empirical data.

2 As my colleagues from the ABA pointed out earlier,
3 it appears to the Defense Bar that the deliberative process
4 leading to the proposal of these amendments are largely the
5 result of anecdotal experiences, and we feel that amendment
6 by anecdote is inconsistent with the spirit and intention of
7 the enabling legislation, as well as the Commission's self-
8 imposed limitations to base its proposed amendments and guide-
9 line changes on empirically based data, and we would urge you,
10 therefore, to engage in the same type of exhaustive analysis
11 that you did initially with respect to these particular amend-
12 ments.

13 It appears, for example, that the Commission is re-
14 sponding to a variety of comments, complaints, observations
15 which trickled in to the Commission from a self-selected group
16 of perhaps District Judges, United States Attorneys, and per-
17 haps defense attorneys and probation officers.

18 What is more disturbing to us, however, is what the
19 Defense Bar, specifically through NACDL, perceives to be a
20 knee-jerk reaction, for example, with respect to the proposed
21 modification of the telephone count.

22 At the time the proposed amendments were published,

1 I believe that there was only one Court of Appeals decision,
2 Caraha Vargis in the Second Circuit, holding that because of
3 the weight and purity of the cocaine involved in that specific
4 case, the Second Circuit upheld the sentencing judge's im-
5 position of an upward departure, because it did not adequately
6 reflect the overall seriousness of the offense and perhaps was
7 not the type of offense conduct taken into consideration of a
8 kind and to a degree contemplated by the telephone count
9 guideline.

10 This particular guideline has very, very far-reaching
11 implications. The representatives from the Department of
12 Justice commented this morning in the context of mandatory
13 minimum sentences, for example, that such sentences do impact
14 in a very substantial way upon the plea process.

15 The telephone count is the only narcotics offense
16 not presently geared to the drug quantity table and, as such,
17 serves, in our view, as a safety valve for application to
18 relatively low culpability offenders or offenders peripherally
19 involved in narcotics transactions, whose level of account-
20 ability should not be measured by the amount of drugs involved,
21 because even given the adjustments contemplated by the role
22 and acceptance sections, such persons would not, consistent

1 with the sentencing principles enunciated in Mistretta and the
2 Sentencing Reform Act, be adequately held accountable, they
3 will be held too accountable.

4 In short, it is our position that this proposed
5 amendment was instituted in large measure simply in response
6 to one isolated court decision. And while it is my under-
7 standing that in the past several days the Third Circuit
8 reached a similar holding, that was subsequent to the publica-
9 tion in the Federal Register of the notice of proposed rule-
10 making.

11 The telephone count must be preserved in its current
12 form as front-line practitioners, as representatives of an
13 association comprised of approximately 15,000 criminal defense
14 lawyers practicing criminal law in Federal courts in every
15 State in the United States, we must be able to have some
16 flexibility in order to avoid a complete breakdown in the plea
17 bargaining process.

18 I am not suggesting that the maintenance of the
19 present system for telephone count dispositions would be in-
20 consistent with the Commission's own standards on plea agree-
21 ments, so long as the offense adequately reflects the overall
22 seriousness of the relevant conduct. And in many situations,

1 particularly with respect to low culpability offenders, the
2 telephone count would do that.

3 Because of the inability to respond in a substantive
4 way on the merits to each of the proposed guideline amendments,
5 we have simply submitted preliminary written statements to the
6 Commission today. We do, however, contemplate filing early
7 next week a comprehensive statement in writing analyzing each
8 particular proposed amendment.

9 I would also like to echo at this time some of the
10 concerns expressed earlier with respect to the prison impact
11 statements. I believe that there was a comment from the bench
12 before indicating that the Commission may not have up-to-date
13 information with respect to current prison population and
14 capacity.

15 As a defense attorney, I routinely receive this in-
16 formation on a weekly basis, breaking down the population not
17 only system-wide, but by institution, and this is available
18 from the Bureau of Prisons on a weekly basis.

19 I also feel that Mr. Block's comments with respect
20 to a crime impact statement is also particularly important. On
21 the general subject of impact statements, we feel, in addition,
22 that a judicial impact statement may be indicated to assess

1 the effect of the guidelines on the case management of each
2 District Court, as well as each United States Court of Appeals.

3 In short, there are a number of amendments which we
4 feel the Commission lacks sufficient data at this time to pass
5 judgment on.

6 One thing that I would like to mention before clos-
7 ing, though, is Amendment No. 268, dealing with substantial
8 assistance. We feel that the guideline section 5(k)(1.1)
9 should be preserved. Ultimately, through legislative changes,
10 we feel that sentencing judges should have the ability sua
11 sponte to reward cooperation, because too much discretion in
12 this regard is now vested in the Department of Justice under
13 3553(e) and Rule 35(b). And while mandamus proceedings might
14 be initiated to compel a United States Attorney to perform a
15 duty owed when the offender otherwise qualifies in all material
16 respects for a cooperation departure, there is no real remedy
17 authorized under law, under the legislation and under the
18 guidelines, and we feel that the Commission should be sensitive
19 to that.

20 In conclusion, the current issue of the Federal
21 Sentencing Reporter contains written comments by Members of
22 the Commission, including Ms. Caruthers, Judge McKinnon and

1 others, manifesting a consensus that before changes in the
2 guidelines are made, there must be a thorough deliberative
3 process.

4 We are also aware of the August 22, 1988 letter from
5 Judge Wilkins to Senator Nunn, referenced by Mr. Buffone
6 earlier today, and we support the Commission's position for
7 Congress to scrutinize the appropriateness of utilizing manda-
8 tory minimum sentences, particularly in view of the expressed
9 congressional preference for a body of experts, the Sentencing
10 Commission, to develop sentencing policy. And I feel in this
11 regard that the mandatory minimum legislation undermines the
12 function of the Commission and the Commission's ability to
13 exercise discretion over actual sentences to be imposed would
14 be furthered through more stronger efforts on the Hill to
15 sensitize Congress, particularly through the sunset provision
16 proposed by the Chairman, to review their policies on mandatory
17 minimums, so that any mandatory minimum sentence is consistent
18 with the overall sentencing scheme contemplated by this body
19 of experts.

20 We deeply appreciate the opportunity to appear and
21 your invitation for such, and we would be pleased to entertain
22 any questions that the Commission may have at this time.

1 Thank you.

2 CHAIRMAN WILKINS: Thank you very much.

3 Mr. Wallace, do you have any comments to make at
4 this time?

5 MR. WALLACE: I would like to add one additional
6 issue that sweeps through several of the guideline amendments.
7 It is the question of punishing people for a crime other than
8 the one of which they were convicted. It gets to the question
9 of real offense sentencing versus charge of conviction sen-
10 tencing. It crops up in Amendment No. 118, regarding mail
11 fraud, Amendment No. 110, multi-count conspiracies, Amendment
12 No. 112, conspiracies where reasonably foreseeable acts of
13 others are to be imputed to the offender, Amendment No. 140,
14 regarding impersonating a Federal officer for the purpose of
15 facilitating some other offense, and the telephone count that
16 Benson was referring to earlier.

17 This notion of punishing people for offenses that
18 they intended to facilitate or contemplated as the results of
19 a conspiracy, a multi-count conspiracy, is appealing, perhaps,
20 in order to cut off the avenue of plea bargaining as an escape
21 valve or as a way of circumventing the guideline process,
22 rather, charge bargaining is more what the Commission is

1 thinking about.

2 But it does not take into consideration the necessity
3 of that safety valve and the appropriateness of it. There is
4 a reason that Congress created a telephone count, as distinct
5 from the underlying distribution counts, and there is a reason
6 that conspiracies and attempts and other offenses are treated
7 separately in the statute than the underlying offenses, and
8 the congressional intent appears to be that they should be
9 treated less severely, because the underlying offense was not
10 directly accomplished and the U.S. Attorney, if they can estab-
11 lish that the underlying offense was accomplished, is free to
12 charge and prove that.

13 To give proper reflection, proper recognition to the
14 difference in these offenses and not to punish them as if they
15 were the same as the underlying offense is necessary to facili-
16 tate the plea bargaining, upon which the entire criminal
17 justice system relied, and without which it would break down
18 and strangle on the extra cases going to trial.

19 It is also essential, in order to put the government
20 to its proper criminal burden of proof and not to have people
21 suffering additional punishments of evidence proved only by a
22 preponderance of the vidence.

1 So, we would urge you to take this into considera-
2 tion throughout the guideline amendment process, whether the
3 telephone drug count or any other time this crops up. We
4 notice the Congress is similarly susceptible to this attitude.
5 They passed the BiFulco amendment in the Drug Abuse Act,
6 saying that conspiracies and attempts shall be punished as if
7 the underlying offense had been committed, and that includes
8 mandatory minimums.

9 But we think that both Congress and the Commission
10 needs to pay particular attention to this problem and the
11 severe ramifications that it would have, particularly in the
12 area of plea bargaining.

13 Thank you.

14 CHAIRMAN WILKINS: Thank you very much.

15 Questions from my left, Judge Breyer?

16 COMMISSIONER BREYER: I am curious about -- I could
17 not agree with you more about the need for detailed numerical
18 study before making significant changes in any of these numbers
19 and indeed the Commission has to last for 20 or 30 years, 50
20 years, not for 1 or 2, and we can't make changes on the basis
21 of anecdotes, and particular groups being overly sensitive or
22 very sensitive to one point of view or another, indeed your

1 group or any other group.

2 I would be interested in what you think of what I
3 think here are two exceptions, where the data was fairly well
4 looked into. One is the bank robbery and the other is the
5 career offender. I felt the staff in this instance looked into
6 the matter very thoroughly and really quite well. The data has
7 only been recently put out, but that is because they spent a
8 lot of time doing it. They used not only the prison impact
9 statement, and my impression is still that our prison impact
10 model, which was developed with the Bureau of Prisons with
11 people at MIT, is as good a model as anyone is likely to find.
12 So, I would be surprised and I would like to know if any of
13 the other Commissioners or the staff or anyone says it isn't
14 up to date. I would think it was up to date, and that we
15 realize that.

16 Then you state in your written testimony, you stated
17 in respect to the career offender or the changes that appear
18 to result in longer guideline sentences, and that isn't true.
19 The changes that were put out for career offenders are de-
20 signed to do the opposite. Maybe in some instances they are
21 longer, in others they are shorter, but whether they are
22 longer or shorter is beside the point.

1 What the data shows is that in bank robbery, which
2 is a fairly good segment of the Federal prison population,
3 people in column 6 are getting sentences for unarmed robbery
4 that averaged around 5 years real time, 5 to 6 years real time.
5 The career offender provisions raise that to between 17 and 22
6 years. That was an increase of, say, a factor of 4. Armed
7 robbery in column 6 still had an average -- maybe it is too
8 low, but the average past experience was 5 or 6 years, and the
9 career offender raised it maybe 22 to 27 years real time.

10 Well, those were enormous changes and we had receiv-
11 ed complaint, not just from offenders but from prosecutors as
12 well and judges, that some of that was not rational, and it
13 was in light of that that the staff really looked into the
14 numbers and came up with rather detailed numbers about what
15 was going on in bank robbery and they primarily confirmed that
16 our bank robbery guidelines were on average, based on past
17 practice, but that past practice was rationalized in a variety
18 of ways, and these changes reflect that data.

19 So, I would be quite interested in what you think
20 about that.

21 MR. RENDINO: Well, we clearly applaud the Commis-
22 sion for undertaking an empirical study based on past numerical

1 references in these two categories, and no one questions, even
2 members of the bench bar, the need to adequately hold serious
3 and violent offenders adequately accountable to society for
4 commission of their offenses.

5 However, at least as of this date and I believe that
6 the data only became available relatively recently, we have
7 not had the opportunity to assess that data ourselves but, of
8 course, relying on your representation that it was thorough
9 and exhaustive, we hope that the data will validate the pro-
10 posal.

11 COMMISSIONER BREYER: I don't know, it is what it is
12 and it is put so that other people can look at it and make
13 any comments.

14 MR. RENDINO: On the other hand, with respect to
15 both categories, for example, we are not insensitive to the
16 concern that you expressed earlier, Your Honor, with respect
17 to a 70-year-old offender who is largely incapacitated by
18 definition, perhaps even medically incapacitated, which might
19 render that person legally or functionally incapacitated, a
20 legitimate sentencing objective, according to Mistretta, why
21 shouldn't we make bed space available for the other offenders
22 coming in, rather than warehousing?

1 We would also appreciate having access to the prison
2 impact data so that we would be in a position to assure our
3 constituency as to the validity or, if we perceive by consulta-
4 tion with our experts, invalidity of the assumptions by which
5 the guidelines are being amended.

6 Was there a question that I left unanswered there?

7 CHAIRMAN WILKINS: I think you covered pretty well
8 most if it.

9 Any other questions? Commissioner Nagel?

10 COMMISSIONER NAGEL: No, I just wanted to thank you
11 again, especially Scott -- I know that you come a long way --
12 for always being responsive to our requests for being here with
13 comments and suggestions. It is very helpful.

14 MR. WALLACE: It is our pleasure and we appreciate
15 it.

16 CHAIRMAN WILKINS: Commissioner Block?

17 COMMISSIONER BLOCK: I just wanted to clear up any
18 misinterpretation that might flow from my request to Mr.
19 Dennis for additional information. You can rest assured that
20 the Commission has the prison capacity information. The
21 request was simply to get the out-year funding for the building
22 program and the projected building program. The question was

1 really to anticipate what the capacity might look like a number
2 of years from now. It is not a question about the incident
3 capacity.

4 MR. WALLACE: In clarification of our position, as
5 well, we have supported the Bureau of Prisons in their re-
6 quests for additional construction funds, because, in addition
7 to serving as Vice Chair of the Sentencing Committee, I am also
8 co-chair of the Prisoners' Rights Committee. We feel that
9 through construction, the conditions of confinement for our
10 clients will be largely ameliorated with the construction of
11 additional facilities, and we feel that systemically there is
12 an acute need for more institutions. We are not part of the
13 prison moratorium movement, although we, of course, promote
14 the preference of alternatives, including home detention,
15 discretionary electronic monitoring, et cetera. We want
16 prisoners to be housed in adequate and decent facilities,
17 which can only be accomplished through additional construction,
18 and we have consistently supported the Bureau in that regard.

19 COMMISSIONER BLOCK: I just wanted to clear up any
20 misinterpretation of whether we did have accurate capacity
21 information.

22 Thank you.

1 CHAIRMAN WILKINS: Commissioner Caruthers?

2 COMMISSIONER CARUTHERS: I would just say that you
3 are on target in your perception that the process is extremely
4 important as we go about our work. I think there can't be
5 emphasized too much.

6 I agree further with your rationale that it was the
7 congressional intent that process be important and, of course,
8 they established that intent through their deliberation and
9 determining that the Commission would be full-time, so I think
10 that is an accurate perception.

11 Beyond that, I simply would say that we appreciate
12 your group's continuous input in our work, and I think that you
13 said that there would be some specific recommendations coming
14 in and I look forward to that.

15 Thank you.

16 MR. WALLACE: Thank you.

17 CHAIRMAN WILKINS: Again, thank you both.

18 MR. WALLACE: Thank you, Judge.

19 CHAIRMAN WILKINS: Our next two witnesses, Mr. Derek
20 J. VanderSchaaf, Deputy Inspector General, Department of
21 Defense, and accompanying him is Mr. Morris Silverstein, who
22 is the Assistant IG for Criminal Investigation, Policy &

1 Oversight.

2 We are delighted to see you both and we welcome your
3 oral comments and, of course, your written comments will be
4 made a part of this permanent record.

5 MR. VANDERSCHAAF: Thank you, Judge Wilkins. I am
6 happy to be here and I will try as best I can to express the
7 Department of Defense Inspector General's viewpoint on the
8 matters that you have before you, and particularly address
9 some aspects of these proposed amendments that are under con-
10 sideration.

11 Let me state right up front that I don't purport to
12 have any special or specific expertise in this business of
13 determining appropriate punishments, but we have from time to
14 time commented to officials in the Department and to United
15 States Attorneys with respect to certain categories of frauds
16 where we have had difficulties in achieving what we consider
17 to be appropriate punishments.

18 The Office of Inspector General in the Department of
19 Defense was established in late 1982, and Congress vested us
20 with overall responsibility for creating and implementing
21 policy and guidance for conducting oversight over matters of
22 fraud, waste, and abuse within the Department of Defense.

1 The conduct of criminal investigations by our office
2 is a relatively small portion of our work, but it is a very
3 important portion. By far, the largest amount of our effort
4 goes into audit and inspection functions of the programs,
5 functions, activities and the management responses and manage-
6 ment actions of officials in the Department of Defense.

7 But we have a special situation in DOD where we have
8 four major criminal investigative organizations, and I have
9 with me today Mr. Morris Silverstein, who serves as an
10 Assistant Inspector General to develop policy and provide
11 oversight to those various four criminal investigative organ-
12 izations.

13 Now, from the very start of our organization, we have
14 focused on procurement fraud, because that is where we felt the
15 problems were, where the big money was, and so forth. I can
16 go back in my memory of history and some research that goes
17 back to the end of World War II, and between World War II and
18 mid-1980, there was not a single conviction of a major defense
19 contractor for fraud.

20 Since the mid-1980's, we have 17 of the top 100
21 defense contractors convicted, several on more than one occa-
22 sion, and I want to tell the Commission that the dollar amounts

1 involved in these convictions has increased substantially.
2 Some of the dollar amounts have grown rather large. A recent
3 conviction involving the Sunstrand Corporation involved some
4 \$115 million, so those kinds of frauds have greatly exceeded
5 the current limitation, the current total \$5 million limita-
6 tion in the guidelines.

7 Now, in matters involving defense procurement fraud,
8 we focus in three areas primarily and place a priority on
9 them. The number one priority is on what we call product sub-
10 stitution. We also place priority on mischarging, which is
11 the charging of labor or materials or other aspects from one
12 contract and moving the cost to another contract, or charging
13 the Department of Defense for commercial work on one of its
14 contracts.

15 We also focus on defective pricing, which is in fact
16 providing the Department of Defense with cost or pricing data
17 that is inaccurate in order to improve one's profit position
18 on a fixed-price contract.

19 But number one and first and most important to us
20 is product substitution, and let me divide that into three or
21 four categories where we look there. We are talking about
22 false testing, failure to test products, defective products,

1 and substitution of products.

2 Now, false testing is obviously self-explanatory,
3 somebody tests the product, it doesn't meet and certifies that
4 it does meet the specifications and ships the product anyway.
5 Failure to test, again, is simply the tests are not conducted
6 even though the Department has paid to have the tests completed.

7 Defective products are products which do not meet
8 the standards required by the contract and therefore are prob-
9 ably non-conforming or otherwise will fail, either catastrophic
10 failure or more likely result in premature failure and expenses
11 to the Department from that aspect. This is a critical problem
12 and one that is very difficult to separate criminal activity
13 from just the problems of manufacturing items to specifica-
14 tions.

15 Finally, we have substitution of products, which
16 includes simply providing us with a product other than the one
17 that was specified in the contract, substituting metals or
18 substituting any kind of item for the one in the contract.

19 Now, these product substitution categories over
20 interrelate. When someone cheats the Department of Defense in
21 one of these areas, they have a tendency to do it in a number
22 of areas. For example, the government may request original

1 equipment from the original equipment manufacturer and a
2 foreign manufacturer counterfeit will show up on our shelves
3 that didn't have any testing at all, either. As I say, they
4 get mixed together.

5 Now, in 1988 alone, the four Defense criminal in-
6 vestigative organizations, with Department of Justice assis-
7 tance, of course, obtained 679 convictions in these areas that
8 I just spoke to, and we recovered some \$445 million in fines,
9 restitutions, penalties, civil recoveries, settlements and so
10 forth, and those amounts and those convictions apply to large
11 contractors and small contractors.

12 Principally, what I am here to try to discuss with
13 you this morning is our interest in Amendment No. 119 of the
14 amendments that you have proposed. This is direct fallout
15 from the Major Fraud Act which was enacted by Congress last
16 year.

17 The proposed legislation provided for an additional
18 2 years incarceration for matters covered by the Major Fraud
19 Act, "where conscious or reckless risk of serious personal
20 injury results from the fraud." The applicability, however,
21 is limited to contracts of over a million dollars, and we
22 believe that that applicability should apply, irregardless of

1 the dollar level of the contract involved.

2 Establishing a dollar damage or a dollar threshold
3 in defective pricing and cost mischarging, that makes a lot
4 of sense. But when you try to put a dollar figure on product
5 substitution cases, you have a lot of difficulty in doing it.
6 We simply are unable to do so, and we will get into the
7 problems where those difficulties come. They are largely
8 built around latent defects and inability to determine when a
9 part will fail, cost to identify the parts, cost to remove the
10 parts from a weapons system, and so forth and, of course, such
11 parts, if they are in fact defective, can cause catastrophic
12 malfunctions and have in some occasions apparently done so now.

13 We believe it is imperative that all sentencing in
14 product substitution cases, where there is a risk of serious
15 injury was created, that the guidelines provide for incarceration,
16 even if monetary loss to the government has not been
17 proven. It is generally difficult, as I just said, to prove
18 such losses. For example, in some cases the replacement
19 failure of the individual part may be a measure of the loss.
20 Well, in others it may be the larger component made ineffective
21 by the defective part. In other cases, the loss may be
22 the cost identified to get the component out of the major

1 component which it is a part of.

2 Now, we do the product substitution review of cases
3 that have been around between 1985 and 1987. This review en-
4 compassed cases that involved high dollar losses. There were
5 15 cases involved, and we felt these cases had a serious impact
6 on readiness or mission requirements within the Department of
7 Defense.

8 We conclude that few of the sample cases involve
9 sentences of significant deterrent value. We further concluded
10 that the montary penalties were also generally not significant
11 in these cases, and the sentencing pattern that resulted from
12 these 15 cases was as follows:

13 Those receiving a minimum of 18 months or more were
14 3; 4 were 12 to 18 months; 1 was 6 to 12 months; 6 were in
15 the category of 1 day to 6 months; and there was no incarcer-
16 ation in 9 of these cases.

17 Now, the courts have taken I think -- relatively
18 lenient sentences were handed down in many of these cases,
19 because I guess of the white collar nature of the crime. The
20 defendants were shown to be pillars of their community, the
21 courts were told that the contractor found it necessary to
22 commit the improper conduct to stay in business, the jobs in

1 the community would be hurt if the contractor had tested the
2 equipment properly and found that it didn't work and there-
3 fore had to lose it or lost money and had gone out of business
4 for failure to produce.

5 Other times, the courts were told that the product
6 substitution was of no great consequence, in other words, the
7 Department couldn't prove that the part was not working, even
8 though it had not been tested, as required. So, under those
9 circumstances, we did not do that well, in my opinion, in ob-
10 taining appropriate sentences.

11 Now, since this time, we have worked with the United
12 States Attorneys around the country, we have tried to develop
13 better sentencing memoranda, and the Department has attempted
14 to provide the United States Attorneys with information on the
15 damages resulting from these cases, and I think the situation
16 has improved considerably.

17 Overall, through the entire period, September '82 to
18 February of '89, about 53 percent of those convicted of pro-
19 duct substitution have been incarcerated.

20 In conclusion, we would urge that you adopt the
21 amendment to the guidelines as you have printed it here, and
22 send a clear message of zero tolerance on product substitution.

1 We think that will work to improve the quality of the materials
2 which the government relies on in the defense of our country.

3 I will try to answer your questions and take up any
4 other matters you desire to pursue along this line. Thank you.

5 CHAIRMAN WILKINS: Thank you very much.

6 Mr. Silverstein, do you intend to make remarks?

7 MR. SILVERSTEIN: I would just reiterate what Mr.
8 VanderSchaaf has said.

9 CHAIRMAN WILKINS: Good. We are glad to have you
10 both.

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

13 COMMISSIONER BLOCK: Just a question about these 15
14 cases. As I understand it, you looked at 15 cases from '85 to
15 '87, and the screen for that was either a large dollar loss or
16 when the product substitution had a serious impact on readi-
17 ness.

18 MR. VANDERSCHAAF: That is correct, sir.

19 COMMISSIONER BLOCK: Now, it is a very small number
20 of cases. Usually, we have tried to have more numerous cases
21 to write special provisions for, but here we have a special
22 case, we have a congressional directive and we are trying to

1 deal with that in a sensible way.

2 So, let's take the small number of cases. If you
3 look at one side of the screen, that is just serious impact on
4 readiness, are those the cases that most of the time get in-
5 carceration? Is it the dollar value that is being devalued in
6 these '85-87 cases, or is it a mix?

7 MR. VANDERSCHAAF: I think it is a mix and I think
8 principally it is when we can show that there is potential
9 harm, physical harm to individuals if the part had in fact
10 failed before or was likely to fail and cause harm. I think
11 that is what gets incarceration in these cases, more than the
12 dollar loss or the impact on readiness. I think people tend
13 to relate this to a product that is liable to hurt someone.

14 I will give you an example. We had a fire hose that
15 was used aboard-ship, the nozzle part. You know what a fire
16 hose is, it takes two or three good strong men to hold one of
17 these fire hoses in place and put it on a fire. As soon as
18 you turned this particular one on, the manufacturer had sub-
19 stituted a product in it, the ball inside of the nozzle came
20 loose and you were unable to turn it off. Well, if you drop
21 a fire hose and it starts swinging all over the deck and it
22 is loose, it is liable to cause personal injury. When that

1 was presented, the individual received a substantial jail
2 sentence.

3 In other cases, where you have an electronic part
4 that is not tested, it is placed in hundreds of items, you are
5 not even sure where it is placed in total, and yet you can't
6 point to any specific danger or harm to anyone, you are less
7 likely to have a jail sentence handed down.

8 MR. SILVERSTEIN: In regard to the number of cases
9 in connection with this hearing, we basically looked at all
10 the product substitution convictions by the Defense Criminal
11 Investigative Service since they were formed in 1983, and
12 there were about 136. Now, this covered both significant
13 product substitution cases that were referred to in our prior
14 testimony and some that were of a lessor nature. Of the 136,
15 we found that there was no incarceration in 56 cases, that
16 only approximately 48 of those individuals incarcerated got
17 more than 2 years in terms of real time, not suspended sen-
18 tences or incarceration.

19 One of the things that concerns us is that dealing
20 with courts in trying to establish victim impact to the
21 Department of Defense is very difficult in some instances to
22 show that actual harm occurred, because we caught it ahead of

1 time and in fact we are glad we caught it ahead of time and in
2 some ways that lessens the sentences that are going to be given
3 out because the harm didn't occur, so therefore our problem is
4 in the deterrent aspect of the sentence to other people in
5 similar situations. It is much more so in this type of case,
6 where the dollar amounts are difficult to prove and the crim-
7 inal fines may or may not make a difference than in the ac-
8 counting contract fraud case.

9 COMMISSIONER BLOCK: Your judgment, though, is that
10 the adjustment suggested suggested is helpful in that regard?
11 Will the adjustment that was suggested be helpful in that re-
12 gard, or are you going to have the same problems again when
13 you don't have a high demonstrated risk or an actual occurrence
14 of harm?

15 MR. VANDERSCHAAF: Well, we in the Department had to
16 do a better job of demonstrating the risk and I think we have
17 done that. We have alerted the entire system that we have got
18 to support the United States Attorneys when they press these
19 cases, plus this addition that you are proposing here will be
20 helpful.

21 COMMISSIONER BLOCK: Would a rectification cost in-
22 clusion in the loss be helpful? I mean one way to judge the

1 seriousness is how much is spent on --

2 MR. VANDERSCHAAF: Sometimes the losses are so tre-
3 mendous that I don't think you -- first of all, I don't know
4 how we would add those up, and you would never be able to re-
5 cover. Many of the companies are far, far too small to even
6 begin to --

7 COMMISSIONER BLOCK: In the scale of penalties, we
8 can't handle this in enough time, but one way to handle the
9 loss may be to try to scale the penalties to include not only
10 the most obvious loss, some accounting profit loss, but what
11 it costs you to remedy the product substitution, it might
12 help with this problem of --

13 MR. VANDERSCHAAF: It might.

14 MR. SILVERSTEIN: In regard to that, in the prior
15 comments regarding the organizational sentencing sanctions, we
16 recommended in estimating the loss would not only include the
17 actual dollar loss on the contract, but the loss of seeking
18 out discovering, removing the parts, the loss due to the test-
19 ing of the parts, loss due to in fact putting the new parts
20 back in.

21 COMMISSIONER BLOCK: You see, it might be helpful
22 here in setting a metric or setting the offense level on it,

1 since the defense levels are driven in large part by dollar
2 loss and that might be a way in this context of also dealing
3 with the dangerousness of product substitution.

4 MR. VANDERSCHAAF: I would agree with you completely
5 on some of our others, as Morris calls them, accounting-type
6 fraud, that there is a great tie-in between the dollars and
7 the kinds of sentences one ought to hand out. You know, you
8 don't lose a war or a battle or something because somebody
9 overcharges you for a product, but if you have got a product
10 out there that doesn't work, that can have a real impact and
11 effect, and I don't know how you put that --

12 COMMISSIONER BLOCK: No, I am not suggesting that.
13 I am suggesting in fact that you use the dollars to get a
14 better manager of the risk of harm, where it is difficult --
15 I mean a two-level adjustment.

16 MR. VANDERSCHAAF: Okay.

17 COMMISSIONER BLOCK: In part, that is not enough,
18 but one of the ways to get at this is to include the rectifi-
19 cation costs in setting the base offense level.

20 MR. VANDERSCHAAF: If in fact --

21 COMMISSIONER BLOCK: I am not saying that the dollar
22 of the accounting loss is the important part.

1 MR. VANDERSCHAAF: If in fact we can establish the
2 rectification costs.

3 COMMISSIONER BLOCK: I am not saying that is major,
4 but it is something maybe we should think about.

5 CHAIRMAN WILKINS: Commissioner Caruthers?

6 COMMISSIONER CARUTHERS: Just a comment that I am
7 very concerned about this area and therefore appreciate your
8 testimony. After studying your testimony, perhaps I would like
9 to contact you and have you respond to some concerns, but I
10 won't bother to do that now, because it would be a matter of
11 great detail. But thank you for your testimony in this area.

12 MR. VANDERSCHAAF: Thank you.

13 CHAIRMAN WILKINS: Commissioner Nagel, any questions?

14 COMMISSIONER NAGEL: No. Thank you. I appreciate
15 your testimony.

16 CHAIRMAN WILKINS: Thank you very much.

17 MR. VANDERSCHAAF: Thank you.

18 CHAIRMAN WILKINS: We appreciate the obvious effort
19 that went into your written testimony as well. Thank you.

20 Catherine England is our next witness. Ms. England
21 is a representative of Cato Institute.

22 Good afternoon.

1 MS. ENGLAND: Good afternoon. I would like to again
2 thank you for giving me the opportunity to comment today on
3 the question you raised, should there be a higher offense
4 level for fraud involving a federally chartered or insured
5 financial institution.

6 First, I need to apologize, however. I discovered
7 yesterday that there was a typographical error in my written
8 statement and it made a couple of the paragraphs almost un-
9 readable, so I have a corrected version for the record and for
10 anyone interested.

11 CHAIRMAN WILKINS: Thank you.

12 MS. ENGLAND: In think about this question, you know,
13 it occurred to me that if you had asked the question in any
14 kind of normal period of time, if we know what a normal period
15 of time is, it probably wouldn't have even been brought to my
16 attention.

17 But with a \$100 billion deficit facing the savings
18 and loan industry and coupled with President Bush's request
19 for more Justice Department money to pursue fraud within the
20 industry, this seems to become part of the "never again"
21 promise for the financial institutions industry.

22 My bottom line, the point I would like to make today

1 is that, to the extent that reviewing the penalties for fraud
2 at federally insured savings and loans and other federally in-
3 sured institutions, is an attempt to address the savings and
4 loan problem, it probably will not lead to the desired results.
5 The \$100 billion deficit we face today, in my view, was not a
6 failure of the legal system, it was a failure of the regula-
7 tory system, and I think that there is some confusion about
8 that.

9 So, one of my purposes is to urge you or to urge you
10 to urge Congress to first clearly define what we mean by fraud
11 at federally insured financial institutions. There is certain-
12 ly some confusion among financial institution managers now and
13 perhaps even among regulators in the way that the use of the
14 word "fraud" is being used, the charges of fraud are being
15 levied in the press and by regulators.

16 Certainly, there is a feeling that, you know, with
17 \$100 billion in losses in this industry, we couldn't have lost
18 it all legally, and that is the frustration I think that is
19 out there among taxpayers as well as regulators and Congress.
20 There must be some way to recoup these huge deficits through
21 the legal system and thereby relieve taxpayers of the burden
22 that is facing them.

1 But as I explained in my written statement, the vast
2 majority of the losses among the hundreds of insolvent insti-
3 tutions were generally incurred through investment decisions
4 that were acceptable from a regulatory point of view. Many
5 thrift managers are certainly guilty of incompetence and a lack
6 of financial sophistication, but whether their actions should
7 be viewed as criminal from a legal point of view is another
8 question and one that I think deserves some attention.

9 I generally spend my time studying the incentive
10 structures created by different regulatory environments, as
11 opposed to concentrating on the legal environment, but regula-
12 tion is only a small part of the larger rules of the game that
13 we talk about under which our economic system works. Another
14 vital element is clearly the legal structure, the definitions
15 of criminal activities, the likelihood of being caught, and
16 the penalties for those criminal activities. Thus, I view
17 criminal definitions and penalties as having two purposes. One
18 is retribution and punishment, but the other is deterrence.

19 The way in which we define the rules of the game de-
20 termine who will participate and how they will behave and what
21 decisions they will make. This is true in everything from
22 more simple criminal activities we think about, about whether

1 to break into a house or not, to insider trading and financial
2 institution management issues.

3 My concern with financial institution managers con-
4 cerned is not only with the individuals whose institutions are
5 already decapitalized and who are awaiting buyers or liquida-
6 tion, though sense of equity would lead me to argue that we
7 should counteract the current witch hunt among the journalism,
8 the press in some cases, by recognizing that most of these
9 managers did play by the rules as they perceived them.

10 My concern is also for the message we are sending
11 existing and potential depository managers by basing loosely-
12 worded charges of fraud on an ex post evaluation performance,
13 and that seems to be what is going on in a lot of cases, that
14 if the investment decisions didn't work out, then we start
15 asking questions about whether fraud was involved.

16 If managers are constrained on the one hand by
17 Federal regulatory authorities and what they can do and even
18 when they can close their institutions, and then face charges
19 of fraud if their efforts prove unsuccessful, we will find it
20 difficult to attract the kind of managerial talent needed to
21 steer our financial institutions through increasingly compe-
22 titive and potentiall volatile conditions in the future.

1 As I noted in my written statement, a well-function-
2 ing market based economy, of course, must punish fraud, but
3 poor financial performance, incompetence or a lack of finan-
4 cial sophistication generally are not the elements of crimin-
5 ally fraudulent behavior. Managers placed in an untenable
6 situation by a flawed regulatory system should not then have
7 to face ex post judgments by parties attempting to deflect
8 criticisms from themselves.

9 In the effort to identify the villain, I think we
10 have to look at certainly there were probably causes of fraud
11 that did occur, but we also need to look at the broad regula-
12 tory system and not just to the private sector.

13 I would be glad to answer any questions. Thank you.

14 CHAIRMAN WILKINS: Thank you very much.

15 Judge Breyer?

16 COMMISSIONER BREYER: Thank you. I see your point.

17 CHAIRMAN WILKINS: Commissioner Nagel?

18 COMMISSIONER NAGEL: Thank you. I read your testi-
19 mony and it was quite interesting.

20 CHAIRMAN WILKINS: Any questions to my right?
21 Commissioner Caruthers or Commissioner Block?

22 COMMISSIONER BLOCK: I just have a short clarifying

1 question. I noticed several weeks ago a report by the General
2 Accounting Office that fraud was predominant or at least it
3 was common in a number of cases that they had looked at, it
4 was a relatively large number of cases. How do you reconcile
5 that with you --

6 MS. ENGLAND: With my position?

7 COMMISSIONER BLOCK: Yes, the point that there isn't
8 a lot of fraud out there?

9 MS. ENGLAND: Well, I think it goes back to how we
10 define fraud. I wasn't involved in the GAO study, of course,
11 but my understanding from talking to people within the industry
12 and from the regulatory agencies is that there is not a clear
13 legal definition of fraud for financial managers in these
14 cases, that we usually look to intent in their making invest-
15 ment decisions, and there is a great deal of misunderstanding
16 in the way that some of the new products are being offered.

17 For example, one specific example is direct invest-
18 ments, and there is a lot of gray areas and the tendency now
19 is to look at those as -- to raise questions about fraud in
20 those. One specific example, for example, is direct invest-
21 ments in real estate and providing the lending to build new
22 office buildings, particularly in Texas, there has been a

1 particular problem there.

2 Lending to build new buildings and taking an equity
3 position to protect the institution, which was a new power
4 granted in the 1980's to some of these institutions that were
5 finding themselves under water, construction loans generally
6 the lending takes place 3 to 5 years before the institution
7 begins to get any money back on it. In fact, there is an
8 initial loan to start the construction and then an reevaluation
9 a couple of years into it for improvements and things.

10 Now, there can be an argument made -- sometimes, you
11 know, part of the depository institutions is very close ties
12 to the business community, that is why we have decentralized
13 depository institutions. What happened in Texas, of course,
14 is that a lot of office buildings were put into construction
15 and in 2 or 3 years later, when the decisions were made whether
16 we lent to finish up this building to provide the improvements,
17 real estate values had fallen substantially. Now, the deposi-
18 tory institution manager faces a decision, does he go ahead
19 and make those loans to finish the building or does he take
20 his losses now.

21 Many of them went ahead and made the loans and hoped
22 that the real estate markets would bounce back and they didn't.

1 You know, if he has a close business tie with the guy who is
2 doing the construction work, was his decision to go ahead and
3 make the loans, some of those are decisions are being looked
4 at bordering on fraud. It seems to me what I am suggesting is
5 that business decisions should be -- and if that had worked
6 out, there is an admission that if that had worked out, if
7 real estate values had rebounded and those loans had been re-
8 paid, rather than being losses and the Federal Government
9 taking over millions of square feet of office space in Texas,
10 it wouldn't have been looked at as fraud, it would have been
11 looked at as a shrewd business decision.

12 And that is part of the problem here, is there is a
13 lot of unquestionable decision, there is real concern about
14 the fiduciary responsibilities certainly of those investment
15 decisions, but the ex post factor is playing, apparently from
16 what I have been able to gather, is playing into the decisions
17 to call it fraud or not. If it succeeded, it would have been
18 a good business decision, going ahead to support those build-
19 ings. Since it didn't succeed, now we start looking at the
20 business ties between the builder and the --

21 COMMISSIONER BLOCK: Let me just follow that up for
22 a minute here, and that is, as I interpret your comments, if

1 we are looking at rising the fraud levels especially for
2 financial institutions as reaction to the predominance of that
3 activity in the financial world, that might be misplaced,
4 point one.

5 MS. ENGLAND: Well, I don't have any problem with
6 charging managers who abscond with funds or if they use the
7 funds from federally insured deposits to line their own pockets
8 or build their own houses or those kinds of things, placing
9 severe penalties on them.

10 I think that the gray area we are in now is that a
11 lot of new activities were allowed to these institutions, when
12 it didn't work out then questions were raised, and we just
13 need a clearer definition to make it work.

14 COMMISSIONER BLOCK: Help me with what is the down-
15 side of raising the penalties for that sub-class economic act
16 of someone.

17 MS. ENGLAND: Well, as long as there is a clear
18 definition going in, I don't see a lot of down-side and I
19 wouldn't suggest that we should raise the penalties. As long
20 as it is clear that you make a decision, whether it works out
21 or it doesn't work out, when you make a decision you know what
22 kind of legal ground you are on, are you making a legal

1 investment decision as a manager.

2 If we leave some of the ambiguity that is currently
3 being used, we don't know how it is going to play out in the
4 courts, obviously, because a lot of these cases are just now
5 being brought to trial, so they have been charged by the
6 regulators but it has not been determined yet in court. But
7 if we do leave the ambiguity in the law and raise the penalty,
8 it seems to me that the down-side is then it will then affect
9 the way financial institutions are managed, in the sense of
10 to provide for a dynamic economic, financial institutions have
11 to be able to make certain decisions about when to invest and
12 when not to invest. That is important in providing investment
13 capital to new firms.

14 If we leave managers with uncertainty about whether
15 they are going to be charged with fraud later, then I think
16 that we will see a lot less of the kinds of funding that banks
17 and savings and loans are particularly in a place to do, and
18 that is to lesser known risks. It is easy to get someone to
19 fund IBM or GM, but Joe's Pizza Parlor down the street or
20 somebody's business they are trying to start, use a business
21 relationship they have had before to start a new business in
22 their garage, there needs to be clear guidelines I think if

1 we are going to allow direct investments for savings and loans
2 in business in building office buildings, then we should have
3 some guidelines about it, otherwise we just won't see the
4 kinds of lending that we want depository institutions to make.

5 COMMISSIONER BLOCK: I just wanted to crystallize
6 the point that since we have only control over the guidelines
7 for sentencing and nothing to do really with assessment of
8 liability, so if I interpret your comments, given the fuzziness
9 in this area, raising the penalties is likely to have
10 a disincentive effect throughout the economy?

11 MS. ENGLISH: Right, is likely to have disincentives
12 effects, rather than move the system. As I stated, I don't
13 think -- you know, if the penalties were much higher 10 years
14 ago, I don't think we would have seen a lot of difference in
15 the losses that we are suffering today, so I am trying to
16 suggest that it is not -- again, it is not a legal system
17 failure that we are seeing, it is more a regulatory failure.

18 COMMISSIONER BLOCK: Thank you.

19 CHAIRMAN WILKINS: Thank you very much, Ms. England.

20 MS. ENGLISH: Thank you.

21 CHAIRMAN WILKINS: As amazing as it may seem, this
22 hearing is running on time, so we will recess now and reconvene

1 promptly at 1:30. At 1:30, our lead-off witnesses will be
2 Judges Warren Urbom and Vincent Broderick, Dan Freed and
3 Marie Caspar on deck, so we will see all of you at 1:30.

4 Thank you very much. We stand in recess.

5 [Whereupon, at 12:30 p.m., a recess was taken, to
6 reconvene at 1:30 p.m., the same day.]

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1 AFTERNOON SESSION

2 CHAIRMAN WILKINS: The Commission will be in order.

3 Distinguished Judges, Judges Warren Urbom and
4 Vincent Broderick, come around. We are glad to see you at the
5 witness table. We all know, and I am sure many of you, that
6 Judge Urbom has been using home detention very successfully
7 and I guess began one of the first real experimental programs
8 with this some three or four years ago, I guess, wasn't it,
9 Judge?

10 JUDGE URBOM: Yes, sir.

11 CHAIRMAN WILKINS: And you communicated with the
12 Commission in a very extensive letter outlining your experi-
13 ence and we appreciate your appearance and testimony today.

14 Also, Judge Broderick is a member of the Probation
15 and Criminal Law Committee, and is representing that committee
16 today. Judge Broderick, we are delighted to have you as well,
17 sir.

18 JUDGE BRODERICK: Thank you.

19 CHAIRMAN WILKINS: We will be glad to hear from you.

20 JUDGE URBOM: Judge Wilkins and Members of the Com-
21 mission, I am glad to be here so you could hear me.

22 I began with the view a few years ago that there was

1 some kind of place for something other than ordinary probation
2 or ordinary imprisonment. My first opportunity to impose home
3 confinement or, as it was then called, house arrest came in
4 1982 when a series of contracting bid riggers, highway con-
5 tractor bid riggers came before me, a little struggling group
6 that was trying to get going in Lincoln, Nebraska, called the
7 Nebraska Commission for Sentencing Alternatives proposed home
8 confinement. I rejected it out of hand then, because these
9 people were fairly prominent persons in their home community,
10 in Lincoln, where I was, and it seemed to me that the last
11 thing they needed was to stay at home. Their homes were nice
12 and I don't have any opposition to nice homes, but it seemed
13 to me that home confinement for them did not offer anything
14 that the sentencing goals -- and I believe in all the goals
15 that are set out in the statute -- was reaching for.

16 So, I thought what they needed was some brashness.
17 I caused all them to go to jail, I caused them to do substan-
18 tial community service, confined community service, so that
19 they were confined some place other than jail for a substan-
20 tial period of time, followed by a lot of community service,
21 plus a large financial obligation toward community service.

22 Then, a few years later, in 1986, I was confronted

1 with a young man who was a petty thief, he had stolen a
2 bicycle and word got around that he wanted to sell it for food
3 stamps, so a Service Serviceman got some food stamps and
4 bought his bicycle from him for \$250 worth of food stamps.

5 When it came before me, the proposal was that house
6 arrest or community confinement or home confinement might be
7 a reasonable alternative. After investigating the situation,
8 including what his home situation was, all his attitudes, it
9 seemed to me to fit, so I experimented with it on him.

10 He was a young man who had a job. It was a job that
11 lasted from about 4:00 o'clock on Saturday night until 1:00
12 o'clock Sunday morning, and that is the only job he had and
13 he said he was quite content with it and that was good enough
14 for him.

15 It seemed to me what he needed, he had not only his
16 own livelihood to try to take care of, but he had child sup-
17 port which was due, and it seemed to me what he needed was an
18 organized life, some way to put his life together so that he
19 had some self-discipline and some responsibility for his
20 obligations, and I thought home confinement had an opportunity
21 to do that, so I required him to live at home with his father,
22 which for him was a pretty traumatic kind of experience. In

1 my own judgment, he would have felt very much at home in jail.
2 I think he would have fit nicely, he would have taken to it
3 like fish to water, and it is doubtful that it would have done
4 anything for him except perhaps give him some new ways to get
5 into mischief.

6 We put him on home confinement, and then I offered
7 him the option that he would have to be at home for 30 days,
8 be inside the house all the time night and day, except when
9 he was out learning how to find a job. I required him to
10 attend a training program for learning how to work and find a
11 job, and he could go help get his GED. At those periods of
12 time, he didn't have to be in his house, but all the rest of
13 the time he did.

14 Then I said, in addition to that, when you are
15 through your 30 days, you will have to spend another 100 days
16 inside your house, unless you get a full-time job, if you
17 work 40 hours a week, you don't have to be in the house any
18 time at all.

19 He did get a job, he did get a full-time job. He
20 finished his probation time satisfactorily, and the last I
21 heard about him he still was working and was doing reasonably
22 well.

1 That experience gave me enough courage to try it some
2 more when a group of drug persons came before me for sentencing.
3 They were user-dealers. None of them had made any money to
4 speak of from their operations, they sold drugs for the pur-
5 pose of getting the drugs for themselves, as far as I could
6 tell they earned no money. They were cooperative people,
7 eager and willing to cooperate with the authorities with re-
8 gard to what they knew about the drug business in Nebraska,
9 and were people who had made a commitment of their own to have
10 drug treatment.

11 That proved successful, too, and I was pleased with
12 the result of that. A few months later in 1986, I was con-
13 fronted with a proposition that the facilities in Lincoln,
14 Nebraska for putting people in jail were very limited, because
15 the local -- we have no Federal community center in Lincoln
16 or close-by, it is only a jail contract situation, and they
17 were getting full of their own people and so were declining
18 in some instances to take Federal people.

19 It seems to me that an alternative that I had to try
20 there among these people who were of the highest risk level
21 than the ones I had before, would be home confinement, so I
22 took the chance of putting them in home confinement for a very

1 substantial periods of time and since that time have used home
2 confinement on a selected basis. I think when I wrote to you
3 a year ago, I said had put 50 on home confinement, and that
4 number is up now, but not radically. I suppose it may have
5 reached the 60 level by now.

6 They have been instances where they have always been
7 people who are willing to cooperate with the authorities. I
8 have had one or two people who were reluctant to do that and
9 so I was reluctant to use home confinement, but offered them
10 -- I delayed in an instance or two sentencing so that they
11 could think about it some more and ultimately they decided
12 they would rather cooperate than go to prison. They did and
13 home confinement was the result.

14 We have not used electronic monitoring, not because
15 of a matter of commitment, but as a matter of what we thought
16 necessity. We did not have enough people on home confinement
17 at any given time to make electronic monitoring economically
18 feasible.

19 Our program has been one where we have sought to
20 make it self-sustaining, that is, we want the defendant to pay
21 the costs of home confinement. What we have done is have a
22 retired Deputy United States Marshal be the monitor. He then

1 calls on these people by telephone at all irregular times, he
2 visits them in their home, he visits them in their place of
3 work or wherever they are supposed to be, because I require
4 each person to become involved in making up his or her program
5 for home confinement, what are you going to do with this home
6 confinement other than stay at home.

7 So, I set out the times when they don't have to be
8 in their house, when they are working, when they are taking
9 drug treatment, when they are taking counseling for some other
10 reason, going to the doctor, and that is about all. All the
11 rest of the time they have to be at home.

12 They also have to make out a schedule a week in ad-
13 vance of exactly where they are going to be, whom they are
14 going to see and why they are going to be there, then at the
15 end of the week they have to make out another sheet that tells
16 exactly where they have been, when they were there, whom they
17 saw while they were there. The monitor, of course, then cross-
18 checks that with the monitor's own information as to where the
19 person has been and why and whom they have seen.

20 We have not found so far anyone who has not been
21 able to afford the monitor. He charges very little, \$100 to
22 \$150 a month for what he does. We insist that they have a job.

1 If they don't have a job, we help them get a job, that is,
2 the defendant. Thus far, that has worked all right. We have
3 an understanding that if the person cannot afford this monitor,
4 then the monitoring will be done by a probation officer with-
5 out any charge to the defendant. That is why we have been
6 able to find opportunity for the person to make enough money
7 where he can be self-supporting, plus supporting the monitor
8 for that period of time he is on house arrest.

9 We have followed the house arrest program with a
10 period of usually intensive community service, and one of the
11 values we have had in all of this is the enlistment of other
12 people's help. It is not just a matter of the probation of-
13 ficer trying to keep track of or even the monitor trying to
14 keep track of the person, but engagement of the other people
15 who live in the house. A spouse may be wonderfully helpful
16 in the monitoring of the person, a child may be, a father in
17 one instance. Whoever lives in the house, if that person is
18 enthusiastic, we can gain considerable help.

19 We also get help from the police department and the
20 sheriff's office. They are persons who have bought into the
21 program and are eager to help. We let them know who is on
22 home confinement, where they are supposed to be when, and they

1 assist in the monitoring. So, we have been able, without
2 electronic monitoring, to do what I think is an adequate job
3 of supervision.

4 The experience has been that -- my insistence is
5 that they follow closely and tightly the restrictions I put
6 on them, on the home confinement, and lecture them clearly
7 that if they do not, they are telling me they don't buy that,
8 that they would rather be in prison and I am quite willing to
9 accommodate them. I pull no punches about that when they
10 violate, the result almost always is imprisonment, although I
11 have backed away on an occasion or two, depending upon the
12 circumstances. But I want the word to be out that I am very
13 serious about their following exactly the conditions that I
14 put upon them, and the times that they can and cannot be away
15 from home.

16 We have -- I don't know exactly how many, I think
17 in the communication I made with you a year ago I said we had
18 50 persons on it at one time or another. There had been 6 at
19 that time who had been revoked on probation because of viola-
20 tions during the home confinement, and 6 that have committed
21 violations after release from home confinement but still on
22 intensive supervision, and that made about 24 percent of the

1 people whom I had put on home confinement who at one time or
2 another had been revoked. I am sure that the statistics are
3 approximately the same now. We continue to get some viola-
4 tions and I expect that and want it to be that if the person
5 violates, he or she understand that I am serious in saying
6 that I consider you, I have always considered you a risky
7 product and if you cannot perform on house arrest and home
8 confinement, then I am quite willing to see that you are put
9 someplace else.

10 I think that is a brief description of our program.
11 I am hopeful that home confinement can continue to be seen as
12 a viable option to imprisonment. I think it can be used in
13 that context, I think it can be used in pre-release, pretrial
14 situations. I think that is simply a weapon or an option that
15 the Federal Judge needs in order to fulfill all of the require-
16 ments and the rules of sentencing. It needs to be simply an
17 opportunity for judges to function.

18 In my judgment, the window through which we operate
19 ought to be expanded somewhat so that our opportunity for
20 using it as an option will be increased beyond where it is
21 now. It should not be opened wide, but it should be increased
22 some beyond where it is now.

1 CHAIRMAN WILKINS: Thank you very much.

2 Judge Broderick, would it be your preference to de-
3 liver your remarks now and take questions jointly, or not?

4 JUDGE BRODERICK: That is fine.

5 CHAIRMAN WILKINS: All right, so why don't we hear
6 from you.

7 JUDGE BRODERICK: Thank you very much, ladies and
8 gentlemen of the Commission for this opportunity to appear
9 here. I am, as the Chairman said, speaking on behalf of Judge
10 Becker, who is head of the Judicial Conference Committee on
11 Criminal Law and the Administration of Probation. He regrets
12 that he is not here. He will be submitting a statement with
13 respect to all of the various matters, except home confinement,
14 so I will confine what I have to say to the subject of home
15 confinement.

16 It is my opinion and Judge Becker's opinion and the
17 opinion I believe of most of the members of the Criminal Law
18 and Probation Administration Committee that home confinement
19 is a sentencing option which should be available, and there
20 are various reasons for this.

21 One reason -- and I think this is perhaps the reason
22 that our Committee got interested in the subject in the first

1 place -- is the matter of available prison space. We had a
2 meeting some time ago with at least two of the Members of the
3 Commission and prison authorities and probation people in
4 which there was a discussion of projections of what impact the
5 Sentencing Commission's guidelines will have, and I believe
6 that Commission Block suggested that the impact was not going
7 to really be felt until 1991 or 1992. Well, that means it is
8 here today, because if we are planning for the future and in
9 way contracting on behalf of the United States Government,
10 that contracting for 1991 and 1992 should be going on now.

11 There has been -- and I know everyone on this Com-
12 mission is familiar with it -- an experiment, a joint experi-
13 ment between the Bureau of Prisons and the Probation Depart-
14 ment and the Parole Commission on early release and on the use
15 of home confinement, with monitoring, with electronic monitor-
16 ing with respect to that early release. This is an experiment
17 that has been going on for some time and it will continue for
18 some time.

19 But if anyone on this Commission has any question
20 about the punitive aspects of home confinement, I would sug-
21 gest very strongly that they should inspect and look into this
22 experiment in Florida and the experiment in the Central

1 District of California.

2 We, the members of the Judicial Conference Committee,
3 are very much of the opinion that home confinement is puni-
4 tive. I think what we have just heard about Nebraska rein-
5 forces that. We don't have statistics, of course. We are
6 dealing mostly with anecdotal information, but that information
7 is quite persuasive, that there are many, many people who
8 would prefer to serve time in a community confinement, rather
9 than under strictly supervised home confinement.

10 We believe that permitting home confinement as an
11 alternative to a limited segment of possible prison sentences
12 will be an extremely useful alternative sanction to be avail-
13 able, and it will certainly be an alternative that in the
14 long run is going to be an economic one. It is much less ex-
15 pensive to supervise someone on home confinement than to have
16 that same person either in a full prison or in a camp prison
17 or in a community facility. So expense is one consideration.

18 Another consideration, of course, is that Congress
19 has spoken to this area and Congress has said that home con-
20 finement should be a sanction, with or without electronic
21 monitoring, but only as an alternative to prison. Now, that
22 provision of the 1988 Act, I think it is section 7305, does

1 seem to me directly conflicts with the present requirements of
2 the guidelines which do not permit home confinement to be an
3 alternative to prison. I say alternative to prison. I do
4 want to stress that we are not talking about an alternative
5 to Lewisburg or an alternative to Atlanta. We are talking
6 about an alternative to community centers and we are talking
7 about an alternative on the low-end of the sentencing guide-
8 line range.

9 Professor Daniel Freed is going to be testifying
10 before you this afternoon, and he has I believe -- unless he
11 has changed it since yesterday -- some very specific language
12 to suggest in ways of amendments to the present provisions of
13 the guidelines on home confinement, and the language that he
14 suggests seems to me is very adequate to handle the situation
15 as it should be handled.

16 What he is suggesting, what he will be suggesting
17 is going to make it possible for the Sentencing Commission to
18 oversee this area while the judges are operating in this area.
19 Now, Nebraska has gone all out. The experiments in Florida
20 and in California have certainly indicated the utility of home
21 confinement at the least end of the process, and I see no
22 reason why it should not be equally applicable at the front

1 end.

2 So far as what crimes it will be applicable to, I
3 would suggest that the very process of confining it to the
4 lower end of the sentencing range is going to be an effective
5 control, and that three or four years from now, when there has
6 been sufficient data with respect to the use and the effec-
7 tiveness or the lack of effectiveness of home confinement,
8 then perhaps the Commission will want to be more specific in
9 those areas.

10 At the present time, I do not believe that there
11 should be a specific with respect to crimes that it will or
12 will not be applicable to. I think that Federal Judges do
13 have a certain amount of balanced judgment with respect to the
14 types of crimes and criminals that home confinement will not
15 be helpful with respect to, and that that matter could be left
16 at large.

17 I think I should also say that a week ago, at a
18 meeting at our board of judges in the Southern District of New
19 York, I told the judges that I was coming down here to speak
20 and that the thrust of my talk was to urge that home confine-
21 ment under the guidelines be permitted as an alternative to
22 imprisonment. It was also agreed, unless I heard to the

1 contrary, that could be expressed as the sense of the judges
2 of the Southern District. One judge does not agree. He does
3 not believe in home confinement, otherwise I believe what I
4 have said does express the sense of the judges in the Southern
5 District of New York, and I think the Members of the Commission
6 know that the Eastern District of New York, to whom we in the
7 Southern District do not talk, have gone pretty far down this
8 road and the judges there are quite enthusiastic about it.

9 Thank you.

10 CHAIRMAN WILKINS: Thank you very much, Judges. I
11 am sure all of us agree with you that we should, and I know
12 we will, respond to the new and recent changes in the statute
13 regarding home confinement.

14 Did I get the sense, either Judge, that wealthy in-
15 dividuals are hard to qualify for home detention?

16 JUDGE URBOM: I have not found any so far, but that
17 doesn't mean there won't be.

18 CHAIRMAN WILKINS: Well, I just wondered if that is
19 something we ought to write into the guidelines. That is so
20 hard to do, you know. Maybe we need to rely upon the good
21 judgment of the sentencing judge in selecting the appropriate
22 home confinement or intermittent confinement or community

1 confinement alternatives that would be available, if we change
2 it.

3 JUDGE URBOM: I think we would have to leave that to
4 the discretion of the judges.

5 CHAIRMAN WILKINS: What is the longest time you can
6 reasonably put someone on home detention?

7 JUDGE URBOM: The longest I have put anybody on is
8 a year, I believe, but I am not stuck with the idea that that
9 is the maximum, but that is the highest I remember.

10 CHAIRMAN WILKINS: Would you both suggest a one-for-
11 one tradeoff confinement to home detention, one day for one
12 day, or some other ratio?

13 JUDGE URBOM: My own judgment is it varies with the
14 situation. You can't say it is a one to one or three to one
15 or something else. I suppose my own view of it is there not
16 be a less than one to one and not be more than three to one,
17 say.

18 CHAIRMAN WILKINS: Well, I guess under the guideline
19 arrangement a judge could fashion some type of ratio, but --

20 JUDGE BRODERICK: I would urge very strongly that, at
21 least initially, and until you have had a chance to study the
22 data that comes in in the next two or three years, that it

1 should be on a one to one ratio. Now, that is the ratio that
2 presently is in terms of community confinement.

3 CHAIRMAN WILKINS: Well, the guidelines would give
4 some flexibility, a judge could give 3 months intermittent
5 confinement, but in the same guideline range he could very
6 likely give 4 or 5 months home detention, so you could work
7 that out.

8 Let me ask for questions on my left. Judge Breyer?

9 COMMISSIONER BREYER: There was a Rand study, I
10 don't know if you have seen it, there was a Rand study a
11 couple of years ago on alternatives, and one of the things
12 that they mentioned with respect to community confinement and
13 home confinement was a concern -- I don't know if it was
14 demonstrated or simply impressionistic, but after a certain
15 number of months, people on home confinement just got fed up
16 and walked out, even if they knew they were going to get
17 caught, they would go do it. They just said I have had enough
18 of this, and that was a concern that was flagged as a reason
19 for not having home confinement beyond a certain period of
20 months. I think it might have said -- this is my memory and
21 I may be wrong -- maybe 6 months or 7 months or 8 months or
22 somewhere in there. I wonder if you have any view about that?

1 The door is there and you might just get fed up and say I am
2 going to walk out, I know I will get caught but I don't care.

3 JUDGE BRODERICK: I think, Judge Breyer, that is one
4 of the reasons why home confinement is punitive, because there
5 are no jail doors. The man or the woman who under home con-
6 finement has to discipline himself and it is very tough to do
7 this.

8 COMMISSIONER BREYER: Do you think there is a period
9 of months from your experience, after which it becomes riskier
10 to impose?

11 JUDGE BRODERICK: Well, I can't speak from my ex-
12 perience, because I have not had that experience, but I do
13 think that the maximum that you would be dealing with under
14 the guidelines as we are suggesting they be amended would be
15 no more than a year.

16 JUDGE URBOM: I think home confinement is very puni-
17 tive. I have had people reject it because it was too hard.
18 I think that how long a person can reasonably be there depends
19 upon the circumstances, because if the person has to be there
20 24 hours a day and never leaves, it doesn't take very long
21 before he might reach the point that you mention. If the
22 person is going to work on a full-time job, then it can be

1 substantially longer, because the person doesn't spend all
2 that much time huddled in his or her house, so the time that
3 a person is given some relief from that, just as a jail, I
4 am sure a prison which gives no work-release, for instance,
5 is quite a different experience from the person in a jail or
6 prison where he can get work-release. So, I think the relief
7 from it depends and makes a difference on how long the person
8 can be there without going out of his mind. So, that has to
9 be fashioned -- I don't think there you can say it can't be
10 more than this or this, because I think the circumstances de-
11 termine it.

12 I think I have used two, maybe three where a year
13 was involved and they finished their year and I didn't hear
14 from either the monitor or the probation officer that these
15 people were about to walk out. They finished their time. It
16 wasn't easy, but they finished it.

17 COMMISSIONER BREYER: Thank you.

18 CHAIRMAN WILKINS: Commissioner Nagel?

19 COMMISSIONER NAGEL: Judge Broderick, you know, at
20 your urging I did go and look at the Florida program and was
21 persuaded to have a view other than which I started, because
22 it was so impressive, so I support your urging of everyone

1 doing the same.

2 I guess one question I have for both of you is that
3 my perception of the Florida program and its success was in
4 part based on the electronic monitoring, the job requirement
5 and the random drug testing, as well as the intensive super-
6 vision of the officer, and the question is -- and maybe
7 Professor Freed will address this when he gives his testimony
8 -- how do we write that into the statute and how many of those
9 or is it a period -- do we know anything about how it works
10 when we don't have that kind of either electronic monitoring
11 or physical, intensive supervision, and the job requirement --
12 and the Florida program is much like the one you described,
13 you either work or there isn't an opportunity to do many other
14 things unless he earned it over a period of time, and that is
15 what the detainees articulated as their reason for thinking
16 it was constraining and punitive, especially in comparison to
17 the community confinement. So, would you suggest we write
18 that in? Would you suggest -- is it feasible to make elec-
19 tronic monitoring or intensive probation a condition, can the
20 system absorb that right now? What is your view?

21 JUDGE BRODERICK: Commissioner Nagel, I think that
22 it should not be mandatory that there be electronic monitoring.

1 I think the test of experience speaks very loudly to the con-
2 trary. There are various areas of consideration with respect
3 to possible differences between the Florida and California
4 experience, on the one hand, and the experiences that we will
5 have with home confinement at the threshold, rather than --

6 COMMISSIONER NAGEL: Back in.

7 JUDGE BRODERICK: -- the exit. One consideration is
8 the very punitive nature of the handling of any violations.
9 Anyone who violated in Florida is out of the program, and that
10 was absolute.

11 Now, you are going to have 600 judges making the de-
12 cision, rather than having the prison authorities in Florida
13 making the decision, you are always going to have the judges
14 making the decision and that is going to be I think a problem.
15 The 600 judges not always think alike, and certainly one
16 aspect of the Florida-California programs that has been very
17 important -- and I think this was also an aspect of the
18 Nebraska program -- and that is that the rules are very strict
19 for them or you're out.

20 What Professor Freed is also suggesting that will
21 address this, he -- I am paraphrasing what I think he will
22 say, what he is saying in effect is we don't have data and we

1 need data and the source of the data should be the judges who
2 do the sentencing. You should know why they use home confine-
3 ment, what their experience has been with the home confine-
4 ment, what reasons they said they had for putting particular
5 people into it and for not putting people into it, and then
6 eventually when it gets on track will be coming to the Com-
7 mission and in two or three hences you can see if you need
8 something more definitive than the way of providing this.

9 JUDGE URBOM: It is my judgment that the principal
10 value of home confinement is in causing there to be put to-
11 gether an organized -- most of these people have not had
12 organized lives, they are loose ends, and they need some kind
13 of structure, but it needs to be self-imposed structure in
14 order for them to turn themselves around. I think they ought
15 to take on the job of self-discipline and self-responsibility,
16 be responsible for themselves and learn how to discipline
17 themselves, which is very unproductive in the prison setting,
18 I think. It is hard enough to learn at home, but it seems to
19 be easier there or more likely to be accomplished there than
20 some place else.

21 I think they need the watchfulness of somebody.
22 There is drug testing always available. I think there needs to

1 be a reasonable search and seizure for drugs or alcohol, so
2 that any given time a probation officer can require that and
3 violations result if they are found with it. Electronic
4 monitoring is not necessary and I think is certainly not a
5 difficulty either.

6 COMMISSIONER NAGEL: Thank you.

7 CHAIRMAN WILKINS: Commissioner Caruthers?

8 COMMISSIONER CARUTHERS: Concerning the Nebraska
9 experience, could you elaborate a little bit on the type of
10 offenses and offenders that you saw in the program?

11 JUDGE URBOM: Yes. I sentenced the people who come
12 before me, obviously, and so I don't much pick and choose what
13 kind of people they are going to be. When they come before
14 me, then I decide this is a person who is a good choice for
15 that or not. Most of the people who come before me since
16 1986, when I first began using that, have been drug offenders,
17 that is because those are most of the people who come.

18 The other kind of people we got a fair sprinkling of
19 are people who are guilty of embezzlement, farmers who make
20 false statements to banks in order to get loans or get an ex-
21 tension of a loan, which I have not found to be susceptible
22 to this type of sentencing. Most of the ones I have put on

1 home confinement have been drug offenders. They have been of
2 the same category I mentioned earlier, that is, user-dealers,
3 not high-level dealers who have made their living on this, but
4 the people who sell drugs in order to get drugs and use them-
5 selves. They have to be people in my judgment who are willing
6 to lay their souls bare, by that I mean willing to say I
7 commit myself to a drug-free society. It may not mean I am
8 going to tell everyone I know about it to the authorities to
9 help rid society of this plague; secondly, they have to be
10 willing to lay themselves on the line for getting rid of the
11 drugs in their own lives. They have to be willing to go into
12 treatment, whatever kind of treatment it takes, long-term,
13 short-term, whatever it is, they have to be ready to do that.

14 I also require that they be an intimate part of the
15 pulling together of their program, their plan. That is a part
16 of this self-discipline and responsibility that I think is
17 necessary. I can't just impose it on them and expect them to
18 lap it up. They have to be a part of the planning effort, to
19 be personally involved, not just their attorney, personally
20 involved to pull the program together and carry it out.

21 COMMISSIONER CARUTHERS: I think since the program
22 is strict, you would of course have the violations, I would

1 call them technical violations. To what extent did you ex-
2 perience problems with the offenders committing new offenses,
3 as compared to the technical violations?

4 JUDGE URBOM: Excuse me, I am not sure I heard you.

5 COMMISSIONER CARUTHERS: To what extent did you
6 experience the participants committing new offenses, as com-
7 pared to the technical violations? And I would expect that
8 to be high, because of the strictness of the program.

9 JUDGE URBOM: Very rarely do they commit other
10 crimes. I don't know that I have had more than maybe two or
11 three -- I doubt that many -- violations because of the crime,
12 another violation like they use drugs. That is a typical one.
13 They come up with a dirty urine or they have used --

14 COMMISSIONER CARUTHERS: I consider that success
15 when the violations are due to technical problems, that shows
16 the program is successful.

17 JUDGE URBOM: It has been my judgment, that is true.
18 I have been strict even about that, though. One of the things
19 is that they not use drugs or that is a violation of their
20 probation, whether it is a crime or not.

21 COMMISSIONER CARUTHERS: Thank you very much.

22 JUDGE URBOM: We have not seen any substantial

1 incidence of crime, but there have been other violations.

2 COMMISSIONER CARUTHERS: So, even though you are
3 handling, as you say, people who come before you, you have had
4 a pretty good group if you have had a low number of people who
5 commit new offenses, so you haven't been doing too badly in
6 terms of your selections.

7 JUDGE URBOM: I have been very pleased with that
8 fact. That remains true to today, but of course things may be
9 different tomorrow. But as of now, we have success and the
10 success is measured by new crimes.

11 COMMISSIONER CARUTHERS: I wouldn't measure it in
12 that manner. Thank you.

13 CHAIRMAN WILKINS: Commissioner Block?

14 COMMISSIONER BLOCK: I just want to follow up on
15 Judge Wilkins' comment.

16 JUDGE BRODERICK: Commissioner Block, may I just add
17 something to that answer?

18 COMMISSIONER BLOCK: All right.

19 JUDGE BRODERICK: We do have some statistics from
20 the pilot programs at the half-way mark that may not directly
21 be responsive but may be helpful. There were 152 people who
22 had been in the programs as of the half-way mark, and 72 were

1 actively being monitored at the half-way mark, 80 had been
2 discharged. Now, of those 80, 57 had completed the program
3 and had gone on out into the world, and 23 had been revoked
4 and had been revoked for violations of some sort. One was a
5 domestic disturbance, there were 3 curfew restrictions that
6 were violated, and 2 failed to show up for work they were
7 scheduled to show up on, and 17 committed drug violations.

8 COMMISSIONER CARUTHERS: Thank you.

9 COMMISSIONER BLOCK: I just had a short question
10 about restricting the applicability of home confinement. You
11 mentioned something, Judge Urbom, that bothered me somewhat
12 and that was that if the offender had a nice residence you
13 were reluctant to use it. As you know, we are bound in our
14 guidelines and policy statements not to let socioeconomic
15 status influence the outcomes, and I take that in both di-
16 rections, you know, it operates both up and back.

17 I am wondering what the argument really is against
18 using home confinement for "white collar" offenders.

19 JUDGE URBOM: There is no argument against using the
20 white collar people. It depends upon the particular defendant,
21 in my judgment, as to what his or her crime is, therefore what
22 the appropriate sentence is to address all of the people who

1 need to be addressed as well as the factors that need to be
2 addressed, factors that we know of that are set out under the
3 guidelines in the statute. People also are a consideration,
4 and we have to address the defendant and we address the
5 defendant's family, and we have to address the victim and the
6 victim's family, people who read the headlines in the news-
7 papers, all of that. We have to address the other people who
8 may even attempt to do this same kind of thing, who may or may
9 not get the word by word of mouth or whatever.

10 What I am saying is we have got to address those
11 people if we want to think of society accepting our judgments
12 about what kind of sentences we are giving, and we have to
13 address all of those people, in my judgment, in the data. I
14 think that, given the particular person who is -- I had the
15 opportunity to sentence people who have nice houses and were
16 not disqualified just because they had nice houses, because I
17 can see no relationship between what they need and what other
18 people perceive they need and being confined to the home.
19 What was needed, in my judgment, was a short-term of imprison-
20 ment for shock value from the people going to jail, that
21 scared them, that affected them. I had a conference with each
22 one of them after it was over, I sentenced each one and after

1 it was over, the probation finished or whatever, they came in
2 and we had a conference.

3 What they needed -- and I affirmed this by my con-
4 versation with them -- was the shock value of being in jail.
5 Secondly, they needed to have a sense of giving back to their
6 community. They had to get rid of this guilt, express their
7 guilt, express their regret at having been involved in this
8 kind of thing by giving to the community, and that is what
9 they did. I couldn't see that being at home added anything
10 to that and that the idea of other people thinking, well, all
11 they are doing is sitting in this nice plush home, it would
12 reduce the opportunity for the public to accept it as the
13 sentencing alternative.

14 I don't think that rich people ought to be disquali-
15 fied from any kind of sentence, but I think that in particular
16 circumstances, the defendant involved, the circumstances of
17 the crime, and the economic situation in which they find them-
18 selves may speak to what kind of sentence they need.

19 COMMISSIONER BLOCK: Thank you.

20 CHAIRMAN WILKINS: Thank you very much.

21 JUDGE BRODERICK: May I just add something to that?

22 CHAIRMAN WILKINS: Yes, sir, Judge Broderick.

1 JUDGE BRODERICK: I think the public perception is
2 important, for two reasons. One is that public acceptance of
3 the fairness of sentencing is important; and the second is the
4 deterrent effect. I think a bad name was given to home deten-
5 tion by the young fellow who was confined to a \$1,000 a month
6 chalet in Hawaii. This is something that can be easily
7 handled. Home detention can be in a community facility. If
8 the home is too palatial to warrant punishment by confinement
9 to the home, they can be confined elsewhere.

10 CHAIRMAN WILKINS: Thank you very much, Judges. I
11 am confident that your testimony --

12 JUDGE URBOM: May I add one other features. I think
13 the people in the home also make a difference in that sense,
14 what their attitude about all of it is.

15 CHAIRMAN WILKINS: Thank you very much.

16 JUDGE URBOM: Judge Wilkins, I mentioned to you
17 earlier, but I want to say to all of you, I have here a video-
18 tape that I am going to let you have, if you want it. It was
19 made by a television station in Omaha with respect to its news
20 program that it ran three nights in segments on its news
21 program of Nebraska's home confinement program, and our pro-
22 bation officers are going to Phoenix for a recent Conference

1 of the Chief Probation Officers and added to that by each of
2 the probation officers telling their evaluation of the program
3 and they also asked the monitor to do the same thing and the
4 Chief of Police of Lincoln. They all have their little say
5 on the tape and I am glad to leave it with you if you would
6 like to have it.

7 CHAIRMAN WILKINS: Judge, thank you. I know we will
8 all be interested in seeing that. If you would take it with
9 you -- I see our General Counsel, John Steers there, and he
10 will take charge of it, so we won't misplace it. Thank you
11 very much.

12 Our next witnesses are Professor Dan Freed and Marie
13 Caspar. We have long been the beneficiary of Professor Dan
14 Freed's expertise and his counsel. Since we know what
15 Professor Freed's testimony will include, we will only hear
16 from Ms. Caspar.

17 [Laughter.]

18 Professor Freed?

19 MR. FREED: Mr. Chairman and Members of the Commis-
20 sion, we very much appreciate the opportunity to be here today.
21 I have delivered to each of you -- too late for you to have
22 read it in advance, nevertheless you have it before you -- the

1 statement that we prepared, and what I plan to do now is go
2 through very briefly a summary of the amendments that we
3 propose and some observations about the policy process that
4 has brought home confinement before the Commission today.

5 Before I begin, though, I would like to introduce
6 Marie Caspar, a second-year student in the law school and
7 working this year on home confinement and has done some fas-
8 cinating field research in interviews with judges, probation
9 officers, and offenders who have been subject to this, and I
10 am delighted to have her answer the hard questions that you
11 have, and I will take the easy ones.

12 When the Commission issued its guidelines originally,
13 it authorized home confinement, home detention, as a condition
14 of probation, but it forbade the use of home confinement as a
15 substitute for imprisonment. The act of Congress in the fall
16 of 1988 requires you now to reconsider that decision.

17 The two years that have intervened since your first
18 guideline have been years in which a tremendous amount of
19 very valuable information about this sanction has come into
20 the public domain. You have heard some very significant testi-
21 mony today, not only about the shared consensus in the Southern
22 District of New York that judges would like to try this, but

1 you have heard from the chief architect of home confinement
2 in the Federal system, Judge Urbom, talking about how it works.
3 And I must say from reading a number of the transcripts of
4 sentencing hearings before Judge Urbom and a lot of the orders
5 and procedures that are used in that district, that nobody
6 could doubt the punitiveness and severity, as well as con-
7 structive nature of this sanction as administered in the
8 United States District Court for the District of Nebraska.

9 But there are other sources of public information
10 that make this sanction important to consider today. There
11 are the two pilot projects run by the Parole Commission that
12 have already been referred to. There is this wonderful mono-
13 graph put out by the Federal Judicial Center, entitled "Home
14 Confinement: An Evolving Sanction in the Federal Criminal
15 Justice System," which details in extensive and illuminating
16 details the problems and the accomplishments of home confine-
17 ment and the issues that remain to be resolved.

18 In addition to that, the Federal Courts in the
19 Eastern District of New York, the District of Connecticut, the
20 District of Columbia, the Eastern District of Wisconsin, and
21 the District of Arizona are among Federal Courts which have
22 imposed home confinement as a direct sentence, rather than as

1 a back-end form of release.

2 There is an important Rand study mentioned by Judge
3 Breyer which talks about home confinement on a national basis.
4 There have been a number of articles in Federal Probation
5 that give interesting details about the use of home confine-
6 ment in the States, and it is significant to see the number of
7 States which have been using this sanction over a period of
8 years and the large volume of cases that have already been
9 subject to home confinement. Florida is probably the leader.
10 Florida's statute allows home confinement to be imposed as a
11 direct sentence, not even a condition of probation, on any
12 felony offender other than one charged with a capital crime.
13 So, in terms of seriousness, Florida, a State with serious
14 crime problems, serious prison problems, has seen this as a
15 very large volume credible sanction to use.

16 The most dramatic revelation of the use of home con-
17 finement by a Federal District Judge prior to today's appear-
18 ance by Judge Urbom is found in the decision of Chief Judge
19 Jack Weinstein in the Eastern District of New York, in 1985,
20 in the case of United States v. Murphy, reported at 108 FRD
21 437, spelling out why the Judge imposed a 2-year sentence on a
22 woman charged in a serious financial fraud and obstruction of

1 justice case, and spelling out the details on which the sanc-
2 tion would be administered. It is a wonderful set of guide-
3 lines for anyone wanting to see the application of this sanc-
4 tion in a single case.

5 From all of this information that has come out,
6 mostly in the time since your initial guidelines, it is hard
7 to avoid the conclusion that the time has come to authorize
8 home confinement as a prison substitute on a limited basis,
9 and in our statement we spell out the manner in which we think
10 the Commission can limit the use of home confinement in a way
11 that is fair and usable to the judiciary.

12 There are three components of that amendment. The
13 first is to amend Guideline 5(f)(5.2) which now permits home
14 detention to be used only as a condition of probation, and
15 add the words "but only as an alternative to incarceration in
16 accord with a schedule of substitute punishments" in Guideline
17 5(c)(2.1).

18 The second amendment is to change 5(c)(2.1) so as to
19 add home confinement as a sanction every place where community
20 confinement appears, and this includes adding it to the
21 schedule of substitute punishments, so that home confinement
22 counts day for day with prison confinement.

1 Finally, we recommend that in each place in your
2 guidelines where the term "home detention" appears, you change
3 it to "home confinement," for the reasons spelled out in de-
4 tail in the Federal Judicial Center monograph and summarized
5 in our testimony.

6 In addition to these amendments -- and this has al-
7 ready been referred to by Judge Broderick -- we list a number
8 of questions that we think the Commission should put in com-
9 mentary to the new guidelines, that ask judges to respond in
10 detail to information about the crime, the offender, and the
11 appropriateness of this sanction being used in the particular
12 case. We have a lot of detailed questions, and undoubtedly
13 others can add more to them, but we think that reports by
14 judges on their individual home confinement cases that respond
15 to these questions will mean that you may have dozens, perhaps
16 hundreds of cases that are described in the kind of detail
17 that Judge Weinstein went into in the Marie Murphy case, and
18 would give a rich data base to the Commission when it considers
19 a year or two down the line whether there is a need for further
20 guidance.

21 Before I close, I would like to just take a moment
22 to contrast the manner in which this issue comes before the

1 Commission today. With the concern expressed by some witnesses
2 this morning about the adequacy of what they saw as sufficient
3 information, systematic information as opposed to anecdotal
4 information, as the basis for changing guidelines, it seems to
5 me that what you have here is a rich base of information in
6 State and Federal experience by judges, by parole commissions,
7 by researchers that allows you to take a modest step in ac-
8 cording flexibility to judges at the low-end of the guidelines
9 to use this sanction.

10 The guideline that you adopt can also help judges
11 spell out in greater detail than they have in the past how
12 they arrive at a sentence so that other judges can learn and,
13 in the process, diminish the disparity that has existed in the
14 past from sentences without reason, decisions without publi-
15 cations.

16 We think that the kind of information requirement
17 that you can put here will enable not only judges, but lawyers,
18 prosecutors, defense lawyers, and probation officers, tell
19 them how to plan for a sentencing year, what kind of informa-
20 tion to offer to judges for use in a sentencing opinion, and
21 in turn those decisions will help educate the public.

22 I hope that the process by which you proceed to

1 embrace this sanction on a limited basis will set a precedent
2 for the way in which other alternative sentences might be
3 brought to the attention of the Commission, so that it can
4 try to expand the range of intermediate punishment that can
5 substitute for imprisonment, which may not be necessary and
6 is so costly today.

7 Thank you.

8 CHAIRMAN WILKINS: Thank you very much.

9 Commissioner Block?

10 COMMISSIONER BLOCK: I just have a question for
11 Professor Freed, following up on a quick perusal of the written
12 testimony. I notice that your reply to our inquiry of whether
13 electronic monitoring ought to be required, your reply is that
14 there ought to be encouragement, not required. I guess I
15 would like to have you expand on that, in terms of what re-
16 quirements you would put in this initial stage on the compli-
17 ance monitoring at least in this system.

18 MR. FREED: Why don't I let Marie answer that.

19 MS. CARPAR: Well, it appears from the work that we
20 have done that the effectiveness of a home confinement sentence
21 depends a lot more on the way it is monitored and the certain-
22 ty with which it is monitored than the means used to monitor.

1 As long as the offender knows from the beginning
2 that his movements are going to be verified and that any vio-
3 lation is going to result in swift reaction, the sentences
4 seem to work very well and it doesn't matter much how you do
5 it.

6 I have also noticed in my comparisons with differ-
7 ent Federal Judicial Districts that the districts that are
8 geographically large and not dense, that the electronic
9 monitoring may not be very economically feasible; whereas, in
10 the Eastern District of New York, which is very dense, is
11 small, they use it very well there.

12 COMMISSIONER BLOCK: Thank you.

13 CHAIRMAN WILKINS: Commissioner Caruthers?

14 COMMISSIONER CARUTHERS: Ms. Caspar, would you
15 elaborate a little bit on what you found concerning offenders,
16 the types of offenses, or various backgrounds of offenders?

17 MS. CASPAR: Well, the States have used this tech-
18 nique with all kinds of serious offenders. Florida, for ex-
19 ample, which has used it on the gamit of crimes almost, has
20 a fairly low revocation rate, of about 20 percent, and this
21 includes technical violations.

22 The Federal courts have been much more cautious in

1 their use to date and have used it much less, and generally on
2 pretty low-level crimes. But the Eastern District of New York
3 has used it on an assault case, a minor drug case, plus fraud,
4 embezzlement-types of cases. In Connecticut, they have used
5 it only on lower-level white-collar crimes.

6 COMMISSIONER CARUTHERS: Thank you.

7 CHAIRMAN WILKINS: Steve?

8 COMMISSIONER BREYER: I think it is a very useful
9 statement. The questions particularly I think we could ask
10 the judges, and I hope we find out the answers to them. Do
11 you have any feeling about the length of time after which this
12 may or may not become problematic?

13 MR. FREED: I agree with what the Judges said earlier,
14 that the sanction is too new and the imagination and resource-
15 fulness of different judges and different districts is too
16 wide for the Commission to restrain any of the variables at
17 this time.

18 However, if you accept the recommendation that we
19 made to amend 5(c)(2.1), you will effectively be confining
20 home confinement as the guideline sentence for no less than 1
21 month and no more than 16 months, because that is the range
22 that is covered by 5(c)(2.1)(c) and (c).

1 It is perfectly true that judges will be able to de-
2 part down to zero and as high as they wish if they can satisfy
3 the statutory test for departure, but it strikes me that the
4 Commission did exactly the right balance as a first go-round
5 on alternative sanctions when it limited community confinement
6 and intermittent confinement in 5(c)(2.1), and I think that is
7 the way you want to begin here. Then when you see the way in
8 which judges use this sanction, you can make adjustments in
9 the length.

10 COMMISSIONER BREYER: Thank you.

11 CHAIRMAN WILKINS: Thank you.

12 MR. FREED: If I may answer one question that was
13 asked of the Judges before about the details of guidance that
14 the Commission might want to impose over and above what is now
15 in the guidelines for community confinement, it strikes me,
16 from examining the manuals and the instructions put together
17 by United States Probation Offices in the few districts where
18 home confinement has been used to some extent -- Wisconsin,
19 New York, Nebraska, places like that -- that these probation
20 officers have been very conscientious and very detailed, and
21 it seems to me that guidance ought to begin with the United
22 States Probation Service, that local units ought to develop

1 their own details of supervision and monitoring and other as-
2 pects, some of which is spelled out in Judge Weinstein's
3 opinion.

4 Eventually, I think the Probation Division of the
5 Administrative Office of the U.S. Courts will pull together
6 the best of the guidance that comes from local offices, and
7 then you will have available to the Commission something put
8 together by a skilled Probation Service with a national over-
9 view, and you and they can discuss what is necessary to put
10 in the Commission guidelines. But right now I would say trust
11 the Probation Service.

12 CHAIRMAN WILKINS: Thank you. I am confident that
13 we will respond to the statute, Professor Freed and Ms. Caspar,
14 then we will monitor what we do, but we will also be seeking
15 ways to improve whatever we do, to seek better solutions. In
16 that regard, Commissioner Caruthers is chairing a working
17 group in this area, and she will be working for some time, I
18 am sure, seeking better solutions on home detention and home
19 confinement surveys, one of the areas under her umbrella of
20 research, and I am sure she will be calling upon you, with
21 your permission, to continue this dialogue.

22 MR. FREED: We would be pleased to work with her.

1 CHAIRMAN WILKINS: Thank you very much.

2 Our next witness is the Acting Assistant Attorney
3 General, Tax Division, someone who is no stranger to the Com-
4 mission as well, Mr. James I.K. Knapp.

5 Mr. Knapp, you and your colleagues are welcome at
6 the witness chair.

7 MR. KNAPP: Thank you, Mr. Chairman. It is a
8 pleasure to be back here before you and other Members of the
9 Commission again, albeit this time we are wearing a slightly
10 different hat.

11 With me today on my left is Bob Lindsey, who is
12 Chief of the Criminal Appeals Section in the Tax Division;
13 also with me in the audience is Mike Karlan, with the Tax
14 Division; Glenn McAdams, with the Criminal Investigations
15 Division, Internal Revenue Services; and Martin Clark, Chief
16 Counsel's Office, Internal Revenue Service.

17 I appreciate the opportunity to address you this
18 afternoon regarding proposed changes in Part T of the sentenc-
19 ing guidelines pertaining to tax violations. My appearance
20 today is intended to underscore the critical importance we
21 attach to effective sentencing deterrence in the overall
22 Federal tax law enforcement program which the Tax Division and

1 the IRS administer. I propose to read selected portions of
2 my prepared testimony. We have fairly lengthy prepared
3 testimony which we have submitted with some attached exhibits,
4 as well as our comments, and I hope you will consider those
5 in full, but I will proceed now to highlight some key points.

6 Our tax system principally relies on taxpayers to
7 voluntarily determine their own tax liability and pay their
8 taxes on time. The IRS simply would not be able to adequately
9 administer the tax laws without voluntary compliance by tax-
10 payers. Unfortunately, there is a substantial disregard for
11 the principle of voluntary compliance.

12 It has been estimated that the amount of unpaid taxes
13 is now more than \$84 million a year. The IRS uses a variety
14 of methods to encourage voluntary compliance, but criminal
15 prosecution is perhaps one of the most critical ones. It is
16 the ultimate fallback position. It is not enough for those
17 contemplating cheating on their taxes, however, to believe
18 that there is a good chance that they will get caught. They
19 must also believe that if they get caught and successfully
20 prosecuted, they will pay a stiff price in terms of their
21 ultimate penalty for non-compliance with our Nation's tax
22 laws. Our taxes as a whole are, what the Supreme Court has

1 said is the life blood of our whole system of government, and
2 voluntary compliance is absolutely essential.

3 While paying a fine will be economically burdensome
4 to some or even perhaps financially ruinous in a few extreme
5 situations in terms of overall deterrent effect, we believe
6 prison time is the most effective deterrent sanction.

7 Commendably, in drafting the original guidelines
8 of 4 Part T, the Commission sought to increase the average
9 length of sentences imposed upon those convicted of tax crimes,
10 and reduced the number of purely probationary sentences. Un-
11 fortunately, however, we do not believe that this objective
12 may be achieved with a great majority of tax cases.

13 If implemented as presently proposed, particularly
14 with the amendment now deleting interest from the calculation
15 of the Part T taxation sentencing guidelines, that only would
16 not increase average sentencing length for many tax cases, but
17 could actually reduce the percentage of cases in which a term
18 of imprisonment is imposed. As shown by the chart attached to
19 my testimony, roughly 55 percent of convicted taxpayers in
20 1987 were sent to prison -- and I am just talking about 55
21 percent of those convicted under the general enforcement pro-
22 gram, which typically involves evasion of taxation on legal

1 income.

2 But if you applied the guidelines to those offenses,
3 more than three-quarters of those convicted would have fallen
4 in the Level 10 or below category, that is, under a \$40,000
5 tax loss. And if you applied the two-level adjustment for
6 acceptance of responsibility, that figure would go to over
7 90 percent.

8 So, while it is possible that those persons falling
9 in the Level 7 to 10 category could receive a prison sentence
10 under the guidelines, our concern and the concern of the
11 Internal Revenue Service is that it is far more likely that
12 courts would be prone to impose community confinement when
13 permissible. This would be a particular danger if the home
14 confinement option was adopted in this situation. Perception
15 is very important as an aspect of deterrence, and I think a
16 large portion of the general public would perceive that if
17 the vast majority of convicted taxpayers are given community
18 confinement or home confinement or anything like that, that
19 this in effect is favoritism to the rich and this would not
20 serve as a strong deterrent towards compliance with the tax
21 laws.

22 Consequently, we believe that certain changes need

1 to be made in order to ensure that imposition of the sentence
2 of imprisonment is more of a certainty, at least if interest
3 is to be withdrawn from the calculations. In addition, we
4 believe that some of the Commission's proposals fail to clarify
5 certain key aspects of the sentencing calculus to avoid need-
6 less sentencing related litigation.

7 Now, we basically propose three major and a few
8 minor changes in our testimony, but the three major changes
9 are as follows: Number one, we believe that if the Commission
10 is determined to give up interest as part of the tax loss
11 calculation, that it should compensate for that with a one-
12 level increase across the board in terms of the guidelines,
13 and we are prepared to discuss the calculations in that in
14 more detail.

15 Secondly, we believe that there is a need to clarify
16 the term "tax loss" by consolidating the definition that we
17 believe it is possible to consolidate the definition for all
18 the various Title 26 offenses in one section, relabeling it
19 as a criminal tax deficiency and thereby excluding so-called
20 civil or non-goalful, non-criminal tax deficiencies from that
21 calculation. This would resolve some of the questions which
22 I have seen come up in conferences with the defense part.

1 Finally, we think it is necessary to clearly specify
2 that all provable criminal tax deficiencies, including those
3 from non-indictment years, including those from barred years,
4 may be used in determining the relevant conduct.

5 Let me just briefly touch on the interest issue for
6 a second. The elimination of interest would produce a sub-
7 stantial change in the percentage of likely incarcerable cases
8 by decreasing defense levels by one on average. Higher risk
9 calculations shown by Attachment B to my testimony indicate
10 that for a three-year evasion case involving a \$30,000
11 evasion, indicted two years after the filing of the last
12 fraudulent return, the amount of tax loss is increased by 26
13 percent, at an 8 percent interest rate, 33 percent at a 10
14 percent interest rate, and 41 percent at a 12 percent interest
15 rate. In reality, I think it is probably more typical that
16 cases are indicted usually in three or four years sometimes,
17 after the last return is issued.

18 This erosion can be offset by increasing the offense
19 levels in the tax table by one level at all levels of tax
20 loss. More importantly, for all tax offenses, this one level
21 across the board increase will insure that the guidelines'
22 stated goal of increasing the average sentence length in tax

1 cases will be realized.

2 I did some calculations on my own to see how this
3 would work out if this proposal was adopted and, assuming
4 that the two-level adjustment for acceptance of responsibility
5 applied in most situations, what you would have, the net ef-
6 fect would be an increase from roughly 7.5 percent to 13.5
7 percent of typical cases falling into level of 11 and above
8 mandatory prison category, while, correspondingly, where that
9 adjustment applied, would only be a decrease from 28 to 15
10 percent of those entitled to straight probation, that is
11 levels 6 or below, so the effects are not quite as drastic as
12 one might think from a first-blush analysis.

13 I would like to briefly touch on the other aspects
14 of my testimony. In terms of the need to redefine and clarify
15 the term "tax loss" by substituted, as we suggest, the term
16 "criminal tax deficiency," we believe that any confusion in
17 this regard can be eliminated and we have suggested some
18 language not just for the guideline but for the application
19 notes to answer some of the many specific interpretive ques-
20 tions that have come up regarding the types of things that
21 should or should not be taken into consideration, and I commend
22 that to your attention.

1 I would like to spend just a couple of minutes fin-
2 ally on the third matter, which is the clarification of the
3 scope of relevant conduct. The Commission has proposed to, in
4 effect, set out a presumption that all tax violations are re-
5 lated and put the burden on the defendant to prove otherwise.

6 The problem with that is it doesn't provide any
7 guidance for determining what constitutes related conduct be-
8 tween one tax violation and another. Does that mean related
9 in a functional sense, in a motivational sense, in a transac-
10 tional sense, to juse time or type of techniques that were
11 used in a particular violation? There is just a whole myriad
12 of situations one could hypothesize where you could have a
13 violation separated by 5 years, one could be a deduction
14 violation and one could be a non-reporting of income viola-
15 tion -- all kinds of questions would arise as to whether or
16 not this was related or non-rêlated conduct.

17 Unless the government is prepared to litigate this
18 issue in every case right up to the appellate court, I could
19 conceive of a situation where the government basically or
20 at least advising prosecutors in the field to say stick with
21 a plea of conviction, stick with the tax loss for that year,
22 forget about everything else.

1 The need to consider prior years I think is demon-
2 strated, for example, by the recent case involving Lyndon
3 LaRouche, who failed to file any tax return at all for in ex-
4 cess of 10 years, 12 years. Well, he could only be charged
5 with a conspiracy based on the last 2 or 3 years, but you can
6 be certain when the court imposed a 15-year sentence on him,
7 it took into consideration the fact that this man had never
8 filed tax returns for at least the last 10 or 11 or 12 years.

9 All we are asking the Commission to do is to basic-
10 ally allow courts to do what they presently do and provide
11 some sort of clear and specific guidance which would avoid a
12 lot of unnecessary litigation at both the trial and appellate
13 level in that respect.

14 I will be pleased at this time to answer any specific
15 questions that you have. I would just direct your attention
16 to the fact that we have made some comments on the money
17 laundering guidelines and some other lesser issues regarding
18 the tax guidelines which we hope that you will give some at-
19 tention to as well.

20 Thank you.

21 CHAIRMAN WILKINS: We will, and of course your
22 wirtten comments will be included in the record.

1 Judge Breyer, do you have any comments or questions
2 for Mr. Knapp?

3 COMMISSIONER BREYER: I congratulate you on your
4 new position.

5 MR. KNAPP: Thank you.

6 COMMISSIONER BREYER: Judging from the briefs that
7 we get in our court, it is one of the finest organizations in
8 the United States Government. They have a very, very difficult
9 -- to me, I am continuously amazed at the job that the Tax
10 Division does in this very complex area. They educate us.

11 MR. KNAPP: Thank you.

12 COMMISSIONER BREYER: So I think it is a very, very
13 fine job. I notice in the numbers here, it is a little bit
14 difficult -- you see, what we have been saying, we have been
15 going through your numbers and they seem to work out fairly
16 well.

17 If you take all the people who in 1987 were not con-
18 fined, in each of these areas there were quite a few people
19 who got pure probation --

20 MR. KNAPP: That's correct, even at the high levels.

21 COMMISSIONER BREYER: -- even at the high levels, so
22 I don't have it exactly, but it looks to me like about 300,

1 maybe 400 people out of the 924, and so nearly 50 percent got
2 some form of probation. Now, once the guidelines go into ef-
3 fect, instead of 54 percent, even if all were to plead guilty,
4 there only would be 20 percent who would escape some form of
5 confinement.

6 MR. KNAPP: I guess that is where the difficult
7 question comes in. If in fact everyone at Levels 7 through 10
8 is given some sort of meaningful, substantial confinement,
9 that would be correct. Our concern is that the vast majority
10 of the cases fall in that category, Levels 7 through 10, that
11 the courts -- whether it is because of the concern about prison
12 capacity or whatever or crowded docket or whatever -- decide
13 that they are going to put these people on the most lenient
14 form of community confinement, you are going to find that, in-
15 stead, we could turn the statistics right around and find the
16 reverse occurring, with only --

17 COMMISSIONER BREYER: What we were trying to do --
18 and what you were trying to do, because you were very much
19 involved -- is to take a lot of the people who previously got
20 probation to a probation and impose some confinement condition,
21 on the theory that some confinement was a shock, even a short
22 period compared with no confinement, and I take in your point

1 that of course it depends on what confinement and how long
2 and so forth, but it seems to me that is the variation.

3 If we lower it to deal with interest, do you think
4 the way to do it would be to say, instead of monkey with the
5 table -- you see, the table has other things turning, it is
6 convenient to have one table for tax fraud and theft. If we
7 do that, maybe you just simply have to say one additional level
8 because that reflects the interest which would otherwise be
9 too complex to calculate.

10 MR. KNAPP: Well, I think what we are proposing, if
11 the Commission is going to take interest out of the calcula-
12 tion, that they should substitute a one-level increase, in-
13 stead of --

14 COMMISSIONER BREYER: But you didn't mean necessarily
15 monkey with the table?

16 MR. KNAPP: No, but what is Level 7 now in terms of
17 dollar loss would become Level 6.

18 COMMISSIONER BREYER: Level 6 would become 7, is
19 that correct?

20 MR. KNAPP: Level 6 would become 7, yes.

21 CHAIRMAN WILKINS: You're right. Judge Breyer, we
22 could add that one any other way, any way we could figure that.

1 Now, do you advocate that we do away with interest?

2 MR. KNAPP: If you do that, I think --

3 CHAIRMAN WILKINS: We should leave it alone if that
4 works all right. I thought we were having trouble calculating
5 interest in the field.

6 MR. KNAPP: The problem I see with it, you could
7 calculate it all right with a computer or whatever, the service
8 or something, once you get to a certain amount. The problem,
9 I see two basic problems with the interest calculation. Number
10 one, it does put a premium on coming up with a specific tax
11 loss, because that in turn means you are going to need a
12 specific amount over which to calculate the interest and it
13 could very well be at the cutoff point, so it does put a very
14 strong premium at coming out with a very precise amount.

15 Second of all, it is very much a function of the
16 length of time it took the government to indict the case. The
17 person, for whatever reason, was indicted, later is in a more
18 vulnerable position in terms of potential sentence, perhaps
19 through no fault of his own, and that has always bothered me
20 as a conceptual matter, so I think those are the two problems
21 and I would probably prefer that you just substituted a one-
22 level increase and took the extra step.

1 CHAIRMAN WILKINS: Thank you.

2 Commissioner Nagel?

3 COMMISSIONER NAGEL: Nothing.

4 CHAIRMAN WILKINS: Commissioner Caruthers?

5 COMMISSIONER CARUTHERS: No.

6 CHAIRMAN WILKINS: Commissioner Block?

7 COMMISSIONER BLOCK: Mr. Knapp, it is good to see
8 you again.

9 MR. KNAPP: It is nice to be here.

10 COMMISSIONER BLOCK: A couple of questions, because
11 as with Judge Breyer's questions, I think that your particular
12 concerns go to the core of what we tried to do in the property
13 area, which was essentially to reduce substantially the number
14 of -- the proportion of straight probation.

15 MR. KNAPP: Yes.

16 COMMISSIONER BLOCK: In the property area generally,
17 what we tried to do is have somewhat shorter sentences for
18 those that went to some form of incarceration, but more people
19 would be incarcerated.

20 MR. KNAPP: Yes.

21 COMMISSIONER BLOCK: Now, in the tax area it is
22 slightly more complicated. I remember simulating that. I want

1 to go over this so that I understand your concerns. As I
2 understand the first concern is that if you look at the way
3 the system will work, it works pretty much the way we thought
4 it would, and that is that there will be a lot of 7 to 10's,
5 Levels 7 to 10's, and those are the area where you get into
6 community confinement and you are worried about departures
7 there, down to no meaningful confinement.

8 MR. KNAPP: No meaningful community confinement or
9 community confinement in name only.

10 COMMISSIONER BLOCK: Okay. I have two observations on
11 that. One, it appears from very preliminary evidence in the
12 fraud area, where we have a few hundred cases, that we are not
13 having a huge problem in those lower offense levels. That is
14 very preliminary.

15 I guess what I would like is that you help us monitor
16 that by giving us information on where, when these come up,
17 where these incidents are, where the system is breaking down.
18 It is fairly serious. When we designed the system to get to
19 certain -- and if your assertion comes true, then we haven't
20 accomplished what we set out to accomplish, but I think there
21 may be a little more time for that, maybe a little preliminary
22 guess what will happen without the evidence.

1 MR. KNAPP: It is going to be difficult to do that
2 in tax cases, because the guidelines only apply to tax of
3 fenses that were committed after I guess November of 1987,
4 which --

5 COMMISSIONER BLOCK: Well, we might be getting some
6 evidence from --

7 MR. KNAPP: We have isolated cases, conspiracy cases,
8 but it is going to be some time before we can do it. Under
9 our calculations, if the two-level reduction applied in the
10 vast majority of cases, 93 percent of those cases would be
11 Level 10 or below. Now, if the two-level didn't apply, it
12 jumps down to 77 percent, but that is still a very substantial
13 percentage, so the vast majority of cases are subject to this
14 concern, namely that there will be no meaningful sort of
15 confinement and that does not send a very good deterrent
16 message, regardless of what really happens in individual cases.

17 COMMISSIONER BLOCK: Two points again. One, let me
18 get some evidence at least from other areas closely related.
19 I mean I realize that tax is particularly difficult, but
20 there are frauds with somewhat shorter fuses and we get evi-
21 dence next year that this is happening, we will have a firmer
22 basis to react. I think we all share a concern that if this

1 occurs, it is not what we intended to occur.

2 The second is I am concerned about the calculations
3 and, as I remember it, the prediction was that on average
4 sentences would be 9 months. I don't have a supplementary
5 report in front of me, so I am going to do this from memory.
6 I think that prediction was for an average sentence of 9 months
7 and a reduction and probation from some 50 percent down to 25
8 percent. I think that is what it is.

9 The probation numbers look about right when you cal-
10 culate your calculations with the 900. I wonder why we got a
11 higher average sentence figure than I guess you would come out
12 with. Did you calculate what the average sentence would be
13 in these '87 cases, if they say we are in the middle of the
14 guideline rates?

15 MR. KNAPP: It may very well be when you did your
16 calculations, you took into consideration tax cases involving
17 illegal income where there are no charges involved, the so-
18 called special enforcement cases which are not in this cal-
19 culation. That may explain it. But according to the study
20 which was done just of general enforcement cases, which is
21 the typical taxpayer, legal income, general deterrence type
22 of case, if you applied the guidelines to the '87 cases, 10

1 percent would fall Level 6 or below, and that is straight pro-
2 bation. But an additional 66, for a total of 77 percent,
3 would fall Level 10 or below. And if you apply the two-point
4 adjustment to acceptance of responsibility, which I suspect
5 will be applied in the vast majority of those cases, almost
6 whenever there is a plea, that number jumps up to 93 percent,
7 so, only 7.5 or 8 percent are facing the clear heavy Level 11
8 or more type imprisonment.

9 COMMISSIONER BLOCK: I want to follow up on that.
10 It seems to me that it really turns on what happens in those
11 cases. I mean we have to wait a while to see whether in fact
12 we get imprisonment in those cases, because that is what we
13 are predicting, that we get meaningful confinement. If we get
14 meaningful confinement, we have done what we set out to do,
15 we shorten the sentences. We have reduced the straight pro-
16 bation inside the guidelines, we have reduced the straight
17 probation much below the level that you have in 1987. You
18 have 45 percent of your cases where there is a straight walk,
19 and that has been reduced to about 25 percent. Your argument
20 is hypothetically, though, judges aren't going to use that
21 discretion in the 7 to 10 range to give real sentences. We
22 need some evidence that that is not occurring before we act.

1 MR. KNAPP: Well, I think when you made your original
2 calculations, you probably also factored interest into con-
3 sideration. I don't know --

4 COMMISSIONER BLOCK: But you made the point about --

5 MR. KNAPP: If you make this one-level adjustment
6 and with the two-level, then the corresponding two-level
7 reduction for acceptance of responsibility, my projection
8 would be that you would have 15 percent fall in the straight
9 probation category, 71.5 percent fall in this wobbily area,
10 that is 7 through 10, and 13.5, which is not a humongous
11 number, in the upper category. So, what I am suggesting is
12 that perhaps this one-level increase is a reasonable alter-
13 native to the interest, and in addition will still enable you
14 to test this because you will still have a very significant
15 number of cases falling in this wobbily area.

16 COMMISSIONER BLOCK: Thank you.

17 CHAIRMAN WILKINS: Judge Breyer?

18 COMMISSIONER BREYER: There is a mix-up here, I
19 think I may be the one mixed up. Now, I don't see how the
20 guidelines weaken the penalty at all, in any sense. I think
21 maybe I am misreading it or maybe there is -- look at Levels
22 7, 8, 9 and 10, look at what happens now. What happens now

1 is, well, a little less than half the people get fewer proba-
2 tion, that means they are out on the street, and the other
3 have get some term of prison, right?

4 MR. KNAPP: Well, I don't know that they are on
5 probation, it is just simply --

6 COMMISSIONER BREWER: Half of them get prison and
7 something happens to the other ones?

8 MR. KNAPP: Something, yes.

9 COMMISSIONER BREYER: I mean probably they are out
10 on the street, but I don't know what else --

11 MR. KNAPP: Not necessarily.

12 COMMISSIONER BREYER: My point is that now go over
13 to the guidelines. In Levels 7, 8, 9 and 10, the sentence is
14 the judge may satisfy that sentence by a sentence of imprison-
15 ment. I mean I don't see any reason why -- you are lawyers
16 and I am impressed by lawyers, and I assume they will still
17 be in court arguing today just as they did in 1987, Judge,
18 this man belongs in prison, he is a Level 7, he's a Level 8,
19 he's a Level 9, he's a Level 10, send him to prison, just as
20 you did in 1987. And I don't know why the judge wouldn't do
21 it. If he did it before, why wouldn't he do it now?

22 The only bite that the guidelines have on Levels 7,

1 8, 9 and 10 is those people who were being sent to prison in
2 '87. They can't just go walk on the street. Those people
3 who were being sent to prison in '87 have to be given a
4 term of confinement, so the guidelines are only tougher, they
5 are not lenient, more lenient in any sense. The people who
6 were sent to prison still go to prison, and the people who
7 are walking around, they go to confinement, too.

8 Now, the other sense in which the guidelines are
9 tougher is that the number of people overall who can't walk
10 around, overall, on your own calculations, are either 9 per-
11 cent or 14 percent are the maximum number that can be walking
12 around in the street. Right? And currently, there could be
13 up to 46 percent walking around in the street.

14 So, we have done two things. First of all, there
15 can't be more than, let's say, maximum 20 percent walking
16 around on the street, whereas today there could be 46 percent
17 walking around in the street; and the second thing is that
18 anyone who is going to prison in the past still could be sent
19 and should be sent to prison in the future. So, I don't see
20 any way in the tax area, for better or for worse, I don't see
21 any way in which these guidelines are more lenient in any
22 respect, and I do see, I think from what I have said, they

1 have accomplished this objective of taking the people, many of
2 them who are walking around the streets, saying they are going
3 to get at least a short term of confinement, so that is how I
4 am reading this.

5 MR. KNAPP: I think what happened, I can see why you
6 reached that conclusion. One thing you will note of interest,
7 that the percentage of those going to prison at the different
8 levels is roughly the same, from bottom up to top, and I think
9 what that reflects is the fact that in the past the judges
10 only weighed the amount of the tax loss, it was a relevantly
11 minor factor in fixing the sentence. Now that the Commission
12 has made it the driving force, said this is really the pre-
13 dominant thing, I think the tendency of the courts is going
14 to be, well, all right, this is a case which now the Commission
15 has put down in the lower part, has put in the Level 7 to 10
16 category, and it is a Category 1 situation, which almost all
17 these situations are, I think the tendency of these judges is
18 going to pick the least onerous alternative available, because
19 these are all individuals, these general enforcement people
20 are all individuals who are not involved in other kinds of
21 criminal activity.

22 You have got a lot of drug traffickers out there

1 ready to go to prison, and the tendency in all these cases is
2 going to be to say no, we are going to give these people the
3 least onerous form of confinement we can get away with.

4 COMMISSIONER BREYER: So you will have to try to
5 keep track of what is going on and why and let us know this.
6 It is --

7 MR. KNAPP: Well, we will get into that situation
8 to begin with, because once this arises and the word gets out,
9 if the word gets out that the vast majority of people are, in
10 effect, if they are suffering any sort of confinement, it is
11 an easy sort of confinement and that is going to seriously
12 going to diminish the deterrent effect of criminal tax enforce-
13 ment.

14 CHAIRMAN WILKINS: Thank you very much, Mr. Knapp.
15 You did make one compelling point, that some of the guidelines,
16 because of the interest, the longer the government waits to
17 indict, potentially the higher the sentence becomes.

18 MR. KNAPP: That is correct.

19 CHAIRMAN WILKINS: That is not a good consequence.

20 MR. KNAPP: Right.

21 CHAIRMAN WILKINS: Well, thank you very much. We
22 appreciate not only your comments, but your written testimony

1 as well, and we look forward to continue to work with you and
2 your division.

3 Thank you.

4 MR. KNAPP: Thank you very much.

5 CHAIRMAN WILKINS: Our next witness is Mr. Lucien
6 Campbell. Mr. Campbell is a Federal Public Defender from San
7 Antonio, Texas, one of the Federal Public Defenders who has
8 worked with us since the beginning of this Commission's work.

9 Mr. Campbell, I too want to note that we appreciate
10 not only your attendance but your very comprehensive written
11 submission. I know it took many hours to complete it and we
12 appreciate that very much.

13 MR. CAMPBELL: Thank you, Judge Wilkins.

14 CHAIRMAN WILKINS: I must say one other thing. I
15 apologize to you and to the other witnesses. I have a long-
16 standing commitment to represent the Sentencing Commission at
17 a Brookings Institution activity and I must leave now in order
18 to meet that commitment at 3:30. But I have your written
19 testimony and I read it and I will continue to refer back to
20 it, as well as the others. That is why the written testimony
21 is so important. We have a lot of give and take here, but we
22 can go back and study the the other.

1 In any event, I must leave you and I am going to ask
2 Commissioner Nagel if she would chair the remainder of the
3 afternoon of the Commission's activities. I enjoyed having
4 lunch with you.

5 MR. CAMPBELL: Thank you, Judge.

6 Mr. Chairman and Members of the Commission, I am
7 pleased to submit my testimony on behalf of the Federal
8 Offenders. We operate under the Criminal Justice Act in 47
9 out of the 94 judicial districts, and we undertake representa-
10 tion in over half of the appointed cases in the Federal Courts.

11 What I would like to do is summarize our response
12 to some of the Commission's key proposals and, if time permits,
13 to mention some of the points that are important to me.

14 First, it is proposed to amend the bank robbery
15 guideline. I would point out that the guidelines are going to
16 have a leveling influence on sentences across the country.
17 They are going to take them up in some areas and take them
18 down in others, and I think the question is not whether some-
19 one is offended or someone complains here or there. Even if
20 the data that the Commission has gathered showed that the
21 average may be lower, I think that is the beginning of the
22 inquiry and not the end of the inquiry.

1 I think the question is does the present guideline
2 serve the statutory purposes of sentencing. As we speak, the
3 guidelines have been in effect nationwide something less than
4 three months, and I think it is well to recall that that par-
5 ticular guideline is a rather complex one. It has a number of
6 specific offense characteristics capturing a number of differ-
7 ent things, it is going to cover a lot of different cases and
8 produce a lot of different results, and I think it simply
9 needs some time to see exactly how it is going to work.

10 I am particularly concerned with the first offender
11 note robbers who I think are fully punished by the present
12 guideline and I would be concerned about seeing them swept
13 upward in a general revision of that guideline.

14 The career offender guideline I think stands on a
15 different footing and perhaps I should say why I think it is
16 different and why I am not saying go slow in a revision of
17 that guideline.

18 First, there is a difference in the way it operates.
19 Whereas the robbery guideline is complex and works many dif-
20 ferent ways, one can look at the career offender guideline
21 and see the result in any given case. I think also the mag-
22 nitude of the error is important. If the robbery guideline

1 is wrong, it is a much smaller error than the error produced
2 by the career offender guideline if that one is wrong. And I
3 believe the sentences produced are excessive.

4 Where the Commission is able to identify a guide-
5 line that produces an excessive sentence, then I think there
6 is an imperative to amend it. Apart from the question of
7 deprivation of personal liberty, which I am sure is measured
8 carefully, an excessive sentence is a form of governmental
9 extravagance. Of course, the Commission is charged with the
10 responsibility of managing valuable government resources and
11 they are resources that are in very short supply.

12 I am not going to repeat the arguments against it.
13 I think they are collected rather completely in the proposal,
14 but I am especially impressed by the way that the maximum turns
15 on this patchwork criminal code that we have that has not been
16 rationalized. It is a terribly rude way to fix the maximum
17 punishment, when it is going to depend on what happens to be
18 the maximum of the last offense of conviction.

19 On the question of whether the Commission has
20 authority to make a change, I think the Commission does. I
21 think it is very significant that 994(h) does not speak to the
22 statutory maximum. I think there is room to interpret it to

1 mean a functional maximum as determined by the Commission,
2 which the Commission seems to be in the process of doing.

3 The Commission has already interpreted and imple-
4 mented, as I think 994(h) intended, the congressional mandate
5 did not say cut off remote convictions, which the Commission
6 did, or foreign convictions, which the Commission did, and the
7 Congress let that guideline pass into law. So, I certainly
8 think there is room to interpret it.

9 Option H that is presented in the proposal, I am not
10 sure exactly why it is there, but I certainly think that is
11 not what Congress intended, that is, to automatically give
12 everyone the statutory maximum. If the Congress intended
13 that, it is a simple matter for the Congress to do that by
14 statute, as they did in a similar statute in the last drug act.
15 There would certainly be no need to tell the Commission to
16 address by guideline.

17 Criminal livelihood, I would submit, is still in need
18 of some attention from the Commission, because it reaches
19 persons on the basis of socioeconomic condition. If two
20 people steal \$10,000, it carries a likelihood that one who has
21 a job will not go to jail and the one who does not have a job
22 will go to jail. I would suggest that the Commission look to

1 the time period involved. I have seen instances of trying to
2 interpret "substantial period of time" to mean a period as
3 short as simply a few weeks, and the one-year period in the
4 proposed amendment does not reach that at all, because it
5 merely establishes a maximum period of time that the govern-
6 ment can look to to try to identify the \$6,700 in the proposal.

7 I would also suggest that the Commission not delete
8 the exclusion from minor offenses, because I have seen many
9 instances where in minor offenses, by that I mean misdemeanors
10 or petty offenses, that could arguably apply to take someone
11 up to Level 13 and I don't think those are the kinds of cases
12 that the Congress intended to reach by 994(i).

13 We do favor home detention on a one for one basis,
14 I would submit. I think to do it on any other basis on a
15 lessor equivalency would be rather arbitrary, because I think
16 there is a considerable overlap in the restrictiveness between
17 some community confinements and some home detentions. Also,
18 making it something less than one for one would have the ef-
19 fect of restricting the availability of it.

20 I don't think it is necessary to restrict it to par-
21 ticular kinds of offenses or offenders, because if the Com-
22 mission retains some limitation on the maximum length in the

1 commentary as there is now, that will have a natural effect
2 of limiting the kinds of offenses for which it would be avail-
3 able.

4 We are pleased to see the Commission is considering
5 an amendment to walk a ways from the half-way house, 2(p)(1.1).
6 We would suggest, rather than Level 10, that Level 8 would be
7 the proper level for a walk-away from a non-secure facility.
8 I see that the Bureau of Prisons recommended a 10. I am not
9 privy to what is behind that recommendation, but it simply
10 seems to me that a non-secure walk-away is less serious and
11 certainly not any more serious than a walk-away from a secure
12 facility, even if the underlying offense is a misdemeanor.

13 I think the voluntary return is valuable and should
14 be retained. I am sure that among the target audience in the
15 half-way houses, the 96-hour figure is well known, because
16 this is frequently an impulse offense. I think it is going
17 to induce a number of people to return, thus affecting the
18 offense conduct and saving the time of marshals from having to
19 go out and hunt people down.

20 I don't see a need to differentiate between offenders,
21 types of offenses for which someone is incarcerated, because I
22 think that that process has already happened. I think by the

1 time someone arrives at a community treatment center, they
2 have been equalized. In other words, some people may have
3 served more time inside in hard confinement before they ar-
4 rived there, but once they arrived there they have been equal-
5 ized and the offense conduct is basically the same.

6 On acceptance of responsibility, we oppose the change
7 from "made a good-faith effort" to "provided substantial assis-
8 tance," because it would seem to require concrete results in
9 order to entitle someone to relief for acceptance of respon-
10 sibility.

11 I think it could cut out consideration from the per-
12 son who provides valuable assistance but, through some happen-
13 stance or law enforcement error, there are no results; someone
14 who proffers or tenders very valuable assistance, but the
15 government elects, for whatever reason, timing or lack of
16 resources, not to act on it, and there are no results. I
17 think both people in those categories are deserving of some
18 consideration. I think results are evidence of entitlement
19 to consideration, but lack of results should not cut someone
20 out of it.

5] 21 If I may mention one other item, I am concerned with
22 the interplay between 1(b)(1.2), applicable guideline and

1 acceptance of responsibility. They were both amended back in
2 January 1988. To "relevant conduct" there was added the
3 language that when a person stipulates during a guilty plea
4 to elements of a more serious offense, use that guideline and
5 treat it as if the person had been convicted. At the same
6 time, "acceptance of responsibility" was changed from accep-
7 tance of responsibility for the offense of conviction to
8 acceptance for his criminal conduct, and the net results is
9 that a defendant can be whip-sawed between these two pro-
10 visions.

11 Someone who, for example, during the course of a
12 guilty plea acquiesces in or agrees in a full statement of the
13 factual basis I believe is at risk of having 1(b)(1.2) apply.
14 Someone who does not is at risk of having talked himself out
15 of acceptance of responsibility.

16 Now, there is evidence here and there in the guide-
17 lines that it is not intended to work that way, but I have
18 seen efforts in the courts to apply it that way and I think it
19 is a significant pitfall for the unwary. I think it should
20 be clear that what is referred to is an express stipulation,
21 an agreement entered into with the full knowledge and under-
22 standing of the defendant and counsel before 1(b)(1.2) should

1 come into play.

2 The defenders appreciate this opportunity to present
3 testimony and participate in this process. I would like to
4 mention that we wish to be available to the Commission and
5 staff not only at this public comment time, but at any time
6 that it appears that it would be productive to confer on
7 matters of mutual interest.

8 Thank you.

9 COMMISSIONER NAGEL [presiding]: Thank you very much,
10 Mr. Campbell. We appreciate your testimony and your very
11 comprehensive commentary on the proposed amendments.

12 Any questions to my left?

13 COMMISSIONER BREYER: You review legal work rather
14 quickly, very well. Do you think that you will have some sort
15 of memo on whether we have the legal power to adopt the career
16 offender modifications that are proposed? Maybe you can dis-
17 cuss it with the department.

18 MR. CAMPBELL: We would be happy to --

19 COMMISSIONER BREYER: It is a difficult question and
20 I think a week from Tuesday, when we are going to be discuss-
21 ing these things, I think it would be helpful to have the best
22 legal advice we can have and you might see what the department

1 thinking is.

2 MR. CAMPBELL: I agree that it is an interesting
3 question and we would like to turn our attention to that. I
4 might mention also that a good attorney, of course, submits a
5 proposed order setting out exactly what he wants. We did not
6 have the time to do that and submit a draft guideline every
7 time we made a suggestion. But if the Commission finds that
8 it would be helpful to come up with a draft, we would like to
9 have the opportunity to do that.

10 COMMISSIONER BREYER: Well, the career criminal is
11 the policy question and the -- one question is the policy
12 we have got to follow. We could come to one answer. I mean
13 I favor these changes first of all, and the other is the
14 question is whether we have the legal authority to change and
15 I hope that the statute is flexible enough to give us that
16 authority. It is that second question that I think we might
17 need legal help on.

18 The other thing, it seems to me, is your last point,
19 because you are quite right that the purpose of that stipula-
20 tion has nothing to do with acceptance of responsibility. It
21 was a way in an appropriate case, as the statute provides, to
22 escape the literal language of the career offender provisions

1 of the statute. You are aware of that?

2 MR. CAMPBELL: Yes.

3 COMMISSIONER BREYER: I don't think it was meant to
4 have any consequence to the acceptance of responsibility or
5 vice versa. I am not sure what language we should put in,
6 whether it is commentary or whatever to make that clear. This
7 is the first time I have ever heard that unintended consequence
8 of that.

9 MR. CAMPBELL: Well, in a setting where there is an
10 attempt on the part of any participants in the process to in-
11 crease the result --

12 COMMISSIONER BREYER: I see it.

13 MR. CAMPBELL: -- it certainly provides a way to at-
14 tempt to do that.

15 COMMISSIONER NAGEL: Commissioner Block?

16 COMMISSIONER BLOCK: I just have an observation on
17 that last point, and I want to get it clear before I attempt
18 my comment. Your point in terms of relevant conduct and the
19 acceptance of responsibility is that with stipulation the
20 conduct is really -- say bank robbery, let's take that, and
21 in arranging a plea, one possibility according to the guide-
22 lines is to take a plea to the lesser including bank larceny,

1 let's say, but to stipulate the elements of the robbery and
2 then to be sentenced under the robbery guideline.

3 Was your concern that the defendant faced with that
4 option or not accepting the traditional stipulation, would not
5 get the acceptance of responsibility unless he or she stipu-
6 lated to the robbery elements?

7 MR. CAMPBELL: Because of the broadening of the ac-
8 ceptance of responsibility, and having just made that change a
9 year ago, I am certain the Commission does not wish to retreat
10 from it, so I think if the Commission sees the need to address
11 it, it would be on the other end of making it clear that what
12 is contemplated is an express stipulation in reliance on
13 1(b)(1.2).

14 COMMISSIONER BLOCK: There is a little evidence on a
15 related but not identical point, and you will pardon me for
16 the relatedness and not the identical, because we have nothing
17 on that point. But in looking at the first several hundred
18 bank robbery cases, we noticed that there are both a dropping
19 of counts and acceptance of responsibility, but that is only
20 a related question, but it doesn't appear as if the courts
21 are requiring one to accept pleas for all of the counts before
22 giving acceptance of responsibility. Now, that is not

1 identical, but it is a related issue, and the other guidelines
2 seem to be working out okay in the sense that there is no
3 whip-sawing between dropping counts and the acceptance pro-
4 vision. The information is available and we are distributing
5 that now and you might be interested in that.

6 COMMISSIONER NAGEL: Thank you very much, Mr.
7 Campbell.

8 MR. CAMPBELL: Thank you.

9 COMMISSIONER NAGEL: Our next witness is Professor
10 Larry Ribstein, Professor of Law, George Mason University.

11 Professor Ribstein, we are very happy to have you
12 with us today.

13 MR. RIBSTEIN: I appreciate the opportunity to be
14 here. I admire your stimini at this point in the afternoon,
15 and I will try not to presume on it more than I need to.

16 I am here to talk about insider trading penalties
17 and specifically the suggestion in proposed Amendment 119 that
18 possible insider trading penalties should be increased beyond
19 those for other forms of fraud and also the adjustments in the
20 basic fraud penalties that will be applied to insider trading
21 under 2(f)(1.2).

22 Very briefly, I have three kinds of problems with

1 insider trading penalties and with not only the amendments but
2 also the present system.

3 One, the problem of the penalties being based on
4 loss, there are two sort of sub-problems with that. One is we
5 don't really have a theory or a good explanation for the kinds
6 of losses insider trading causes. There is a considerable
7 amount of debate on that.

8 The second sub-problem is that the way loss I think
9 is computed now under 2(f)(1.1) is that you look at the way
10 that the market has been affected by the information that the
11 insider was trading on, and that I think is not only totally
12 inappropriate from a policy standpoint, but also inconsistent
13 with case law, statutory law, and so forth.

14 The problem is that insider trading is not the same
15 thing as deception. What the insider is doing wrong is trad-
16 ing and nothing more than that. If anything, he is helping
17 the market more than he is hurting it, to the extent that other
18 people trade on the basis of the information about what the
19 insider is doing. We are not talking about a lie or a misrep-
20 resentation to the market. So, again, I think it is in appro-
21 priate to base insider trading penalties on the same theory
22 that is being used for deception under 2(f)(1.1), and to the

1 extent that you even increase insider trading penalties beyond
2 what is now being imposed for deception and to the extent that
3 you increase the penalties for deception, I think you are just
4 making those problems worse.

5 Our second problem is that, whatever penalties you
6 have for insider trading, I think ought to take into account
7 the fact that the crime is extremely ill-defined at this point.
8 Congress refrained from defining it when it last had the op-
9 portunity in the 1988 Act, and the courts still haven't made
10 up their minds, for instance, the Supreme Court very recently
11 in the Carpenter case declining to decide whether the misap-
12 propriation theory was a valid theory for insider trading
13 losses.

14 I think one illustration of that is the problem you
15 get under the Dirks case, a tippee is liable if the tipper
16 reaps some personal benefit from the tip, so what is the per-
17 sonal benefit? It might be, as the Supreme Court itself in-
18 dicated, a gift by the tipper to the tippee, what has been
19 known as the "big chill" situation, where you have a tipper
20 who wants to confer a present in the form of information on
21 the tippee. The Supreme Court said that that might be a
22 personal benefit, but that is very hazy when you get that kind

1 of benefit.

2 I mentioned in my written statement the case of Barry
3 Switzer who was sunbathing at a track meet one day, overheard
4 a friend of his who was a corporate executive talking about a
5 business trip he was about to take to sell a subsidiary.
6 Switzer then traded on that information, tipped to remote and
7 third-level tippees, and they all reaped some money, but the
8 Court said that was not a violation of 10(b)(5), because the
9 executive friend of Switzer's didn't know that Switzer was
10 there.

11 Well, under Dirks it is quite possible that if this
12 executive had glanced around, had turned around and seen
13 Switzer sunbathing there, Switzer saw the glance and inter-
14 preted it or should have interpreted it -- there is a sienter
15 problem here -- should have interpreted it as an attempt to
16 make a gift to Switzer. That is a violation of personal bene-
17 fit under Dirks. That is some very hazy facts to rest a po-
18 tentially criminal violation on.

19 The third problem I have with criminal penalties for
20 insider trading, the way they are presently constituted, is
21 that you have got I think a significant danger of deterring
22 legitimate activities. One kind of activity that I mentioned

1 in my statement is the activity of analysts which the Supreme
2 Court was specifically concerned about in the Dirks case.
3 Analysts work on all kinds of non-public information and they
4 have got to be able to know when that hazy test under Dirks
5 has been breached and they, of course, are going to have in
6 mind the potentially serious criminal penalties that can follow
7 from playing too close to the line.

8 I think that is unfortunate, because analysts do
9 quite a bit in terms of conveying information to the market.
10 Another example that I didn't mention in my testimony is the
11 effect on incentive compensation. It is quite a legitimate
12 form of compensation to award executives stock in their com-
13 pany. But if you have extremely serious prison sentences as-
14 sociated with playing too close to the line, that form of
15 compensation becomes less valuable.

16 I want to close by an illustration of the kinds of
17 problems you get into by loss-related penalties for insider
18 trading. In the Switzer case, according to a table in the
19 Court's opinion in Switzer, a very rough computation of the
20 market loss that would be applied under 2(f)(1.1), if you look
21 at Note 8 under that, let's look at the aggregate market loss
22 resulting from the disclosure, it is about \$2.5 million. This

1 is comparing the sale prices of investors who sold before the
2 disclosure with the post-disclosure price.

3 Under the proposed amendments to 2(f)(1.1), that
4 would make it a Level 21 offense, which is about the same thing
5 as selling 60 kilos of marijuana under 2(d)(1.1). Now, I
6 think in addition to the practical problems I have mentioned
7 of over-detering legitimate activity and so forth, I think
8 you have a problem here of penalties that aren't properly
9 related to the seriousness of the offense. So, I think,
10 despite the attention has been given to some highly publicized
11 recent insider trading cases, I think the Commission ought to
12 stop and think about it, think about what I think are some
13 very serious issues about what the appropriate penalties are
14 for insider trading.

15 Thank you.

16 COMMISSIONER NAGEL: Thank you. I take it that one
17 of your real concerns is at the point of adjudication and con-
18 viction, rather than the point of sentencing and that in effect
19 your argument is that when we come to sentencing, because of
20 the concerns you raise about who should and should not be
21 convicted, we should proceed cautiously. If I read you cor-
22 rectly, let me ask you the same question I asked Professor

1 Macey, and that is if you were in our place, what would you
2 recommend the normative sentence for someone who is convicted,
3 since we don't deal with that stage, someone who comes to us
4 convicted of insider trading?

5 MR. RIBSTEIN: Well, it seems to me I thought about
6 that question in terms of what approach you would take and it
7 seems to me that maybe the best -- I have trouble dealing with
8 this, as I am sure Professor Macey did, too, because neither
9 of us think there ought to be any criminal penalties for in-
10 sider trading, but --

11 COMMISSIONER NAGEL: That may be the answer.

12 MR. RIBSTEIN: Right, but I am not here to propose
13 that, because that is not your job, obviously. I want to say
14 that in view of the uncertainty --

15 COMMISSIONER NAGEL: You could argue that it should
16 be probation for 2 months or something, that is what I am
17 asking you.

18 MR. RIBSTEIN: But Congress has very specifically
19 said that there shall be criminal penalties for insider trad-
20 ing, and I am not going to argue with Congress today. What I
21 am going to say is that in fixing those penalties, we ought
22 to have some of these considerations in mind, and perhaps a

1 benefit related test, rather than a loss related test, given
2 two points: One, the problem you have in determining what the
3 losses are, and, two, the over-deterrence problem. I think
4 somebody who is reaping a very substantial benefit from insider
5 trading knows what he or she is getting into and --

6 COMMISSIONER NAGEL: When you say "a benefit," do
7 you mean -- is there a distinction?

8 MR. RIBSTEIN: I am talking about the benefit to the
9 trader.

10 COMMISSIONER NAGEL: Right.

11 MR. RIBSTEIN: For instance, in the Wayne case, you
12 are talking about something like \$19 million in profits there,
13 I think that should be, assuming we are going to have criminal
14 penalties for insider trading, I think that should be treated
15 far more seriously than somebody who has reaped significantly
16 less benefit, even though that person may have caused an equal
17 or greater loss to the market, given the problems of determini-
18 ing loss.

19 COMMISSIONER NAGEL: I just want to be sure that you
20 are arguing that it would be more appropriate to use the gain
21 to the offender, rather than the loss as the basis?

22 MR. RIBSTEIN: Exactly. Right.

1 COMMISSIONER NAGEL: And you said you had a second
2 distinction?

3 MR. RIBSTEIN: No, that is my primary -- that is
4 really where I come down. If you are going to use the loss
5 test, then I agree with those aspects of Professor Macey's
6 testimony which I have just had a chance to glance at but I
7 haven't read his other writings, I think you want to look at,
8 for instance, the misappropriation theory as a possible guide,
9 so that somebody who has taken information from his own em-
10 ployer would be punished on the basis of what it cost his em-
11 ployer, rather than what it cost some other party that he had
12 no relationship with.

13 COMMISSIONER NAGEL: Questions on my left?

14 COMMISSIONER BREYER: Isn't that what we do?

15 MR. RIBSTEIN: Excuse me?

16 COMMISSIONER BREYER: I thought that is what we did.
17 It says that insider trading, we use the fraud table corres-
18 ponding to the gain resulting from the offense.

19 MR. RIBSTEIN: If that is true, then that is fine,
20 but that is not the way I am reading it.

21 COMMISSIONER BREYER: Well, I will read it. It says
22 increased by the number of levels from the table corresponding

1 to the gain resulting from the offense, and then in the back-
2 ground it says because the victims and losses are difficult,
3 if not impossible, to identify, the gain, i.e., the total
4 increase in value realized through trading in securities by
5 the defendant versus acting in concert with him or when he
6 provided inside information and it is employed, instead of --

7 MR. RIBSTEIN: Judge, I think at least there is an
8 ambiguity there. If you look at Note 8, it does talk about
9 estimate based on aggregate market loss.

10 COMMISSIONER BREYER: Note what?

11 MR. RIBSTEIN: This is Note 8 on page 2.68.

12 COMMISSIONER BREYER: But that is not insider trad-
13 ing. That is --

14 MR. RIBSTEIN: That's right, but as I read it, those
15 tables are applied to 2(f)(1.2).

16 COMMISSIONER BREYER: To find out how to do it, you
17 have to turn to 2(f)(1.2). Anyway, I thought that is what that
18 the --

19 COMMISSIONER BLOCK: If I can interject, I think the
20 confusion comes from the proposed amendments on page 70,
21 Amendment 119, when it refers to the Major Fraud Act and the
22 Insider Trading Act of '88, it talks about the Commission

1 seeks comment on whether there should be a higher offense
2 level for insider trading of procurement fraud than for other
3 frauds. It is not clear what guideline we are referring to
4 in that sentence.

5 COMMISSIONER BREYER: Well, your view is that we are
6 doing it basically right, I mean the part that I read you is
7 basically right?

8 MR. RIBSTEIN: That's right, but if that is going to
9 be controlling, rather than incorporating the loss tables,
10 then I think --

11 COMMISSIONER BREYER: Well, you are looking at the
12 table, but if you use it, when you look at the table, but what
13 you are measuring is the amount of money that the people who
14 got the information and played the market, the amount they
15 made.

16 MR. RIBSTEIN: That's right. I understand. I see
17 what you are referring to on the bottom of 2.70, but in any
18 event, I think that ought to be clarified, because --

19 COMMISSIONER BREYER: It certainly should, you're
20 right, if there is confusion.

21 MR. RIBSTEIN: -- because I think there is a con-
22 fusion created by incorporating the loss table from --

1 COMMISSIONER BREYER: I mean I thought the theory
2 -- we are prescribing for the typical case, I mean we are not
3 writing -- I realize that in insider trading there are all
4 kinds of unusual cases, there are borderline cases and there
5 are hard cases and so forth, but we are writing really for the
6 easier cases, the typical cases, and I assume those are the
7 cases where somebody gets some inside information and they use
8 it and make money out of it, in which case it seems to me if
9 I were a lawyer, you give me zero money and I take your money
10 and I try to make money out of that and I owe it to you. It
11 is not mine. I took your money and took the opportunity and
12 I owe you that, and it would be true if I took your car and I
13 guess it is true if I took your information, if I take your
14 information and I use it to my advantage. It is your informa-
15 tion.

16 MR. RIBSTEIN: That's right.

17 COMMISSIONER BREYER: And what I have deprived you
18 of is the use of it. You are entitled to the money I got for
19 it, not me, and that is why I thought we were measuring the
20 harm done in terms of the money I made by wrongly using your
21 information. Should I be thinking of it that way?

22 MR. RIBSTEIN: I think so, yes, I think that should

1 be the test. I am not sure that it is clear under the current
2 guidelines.

3 I also want to respond to another point you made,
4 and that is in distinguishing between the ordinary case and
5 the cases that have actually led to criminal penalties. I
6 think we do need to worry about the deterrent effect on legi-
7 timate activity from these criminal cases that actually get to
8 criminal sentencing, because the people will determine their
9 own conduct based on a fear that they are going to be in that
10 dark and they may say, well, you know, it is only Boesky, but
11 there is the kinds of conduct that is included that is a lot
12 more vague than what Boesky did.

13 COMMISSIONER NAGEL: Questions on my right?

14 COMMISSIONER BLOCK: Let me follow up on that, be-
15 cause I was somewhat confused with your comments also, and I
16 guess, in reading the proposed amendments, it is not clear in
17 the proposed amendments that we are talking about the 2(f)(1.2)
18 in which we used the word "gain" although the application
19 notes and then the background statement is -- insider trading
20 is viewed essentially as sophisticated fraud, because the
21 victim's loss is difficult, if not impossible, to identify,
22 and the gain is used instead of the loss.

1 Now, help me with this. To the extent that insider
2 trading is a taking, that is, there are defined property
3 rights, and all insider trading is is a taking. This seems
4 like a reasonable approach, I think you will agree.

5 MR. RIBSTEIN: That's right. If --

6 COMMISSIONER BLOCK: What we could use help with,
7 and I think which would address your problem, is how do you
8 get out of this category those types of insider trading which
9 are not takings, where the property rights are not well de-
10 fined. I don't know what the punishment for those should be,
11 but I know that for a simple taking, I think Judge Breyer
12 was getting to that in terms of when it is a violation of
13 property rights, but this analogy to a sophisticated fraud or
14 any fraud seems okay, at least it is tolerable, and I think
15 you would agree.

16 The problem you have is when there isn't a taking
17 and there aren't well-defined property rights. How would we
18 rewrite this, if we are going to rewrite it, so as to get out
19 those cases? I think that is the basic fuzziness question
20 that you raise. I think that the essence of your point is
21 that if you crank up the penalties and you have a fuzzy
22 standard, there are real effects in the economy. The standard

1 is clear if it is just a taking and not so many real effects
2 in the economy.

3 MR. RIBSTEIN: That's right. Now that I see that the
4 Commission agrees that the test should be related to the in-
5 sider's gain, we do come down to the problems you have been
6 mentioning. In the Dirks case, the Dirks example is a good
7 example of the situation where the property rights aren't clear
8 and where the taking situation isn't clear and --

9 COMMISSIONER BLOCK: What would we do in terms of
10 this guideline to deal with that?

11 MR. RIBSTEIN: I think, instead of adjusting the
12 insider trading or instead of having insider trading penalties
13 moving in lock step with the basic fraud penalties, also,
14 instead of making insider trading penalties worse than the
15 basic fraud penalties, make them less or find some adjustment
16 factors in notes to 2(f)(1.2) that take into account that dif-
17 ference between insider trading and other forms of fraud.

18 COMMISSIONER BLOCK: If I could give you a homework
19 assignment, it would be to help us on that distinction, be-
20 cause I think that would go a long way towards alleviating
21 your fear about whatever we are doing with this penalty struc-
22 ture, it would help us.

1 MR. RIBSTEIN: Well, I will do that.

2 COMMISSIONER BLOCK: If I could ask you for a home-
3 work assignment, that would be it.

4 COMMISSIONER NAGEL: I believe we asked Professor
5 Macey to do some homework. He shares I think many of your same
6 concerns, so it would be well if we could receive some specifics
7 on your suggestions on how we should give a new look or look at
8 new criteria for insider trading. I know he seemed to have
9 advocated practically that we should go back to square one and
10 look at the establishment of the base level, look at how we
11 determine loss, look at how we determine the specific offense
12 characteristics, et cetera. He didn't feel that insider trad-
13 ing is fraud, and I think you indicated that you feel that the
14 penalty should be something less than fraud.

15 MR. RIBSTEIN: That's right.

16 COMMISSIONER NAGEL: So you tend to agree somewhat
17 with his assessment --

18 MR. RIBSTEIN: That's right.

19 COMMISSIONER NAGEL: -- and our taking a new look as
20 well as insider trading not being clearly fraud?

21 MR. RIBSTEIN: That's right. I think fraud is an
22 extremely broad word and I think that is part of the problem

1 here. Sure, it might be fraud under some people's definition,
2 but I think the kinds of things that are covered under 2(f)(1.1)
3 are fraud in the sense of deception, and my point is that is
4 not what insider trading is, and therefore you have to go to
5 a completely penalty structure to take that into account.

6 COMMISSIONER NAGEL: Thank you very much.

7 MR. RIBSTEIN: Thank you.

8 COMMISSIONER NAGEL: I have that they have turned up
9 the air-conditioning so high we may have chilled the enthusiasm
10 of anyone else to testify. But let me ask if Mr. Bartholomew
11 is here? Yes, thank you. We were worried that you may have
12 frozen.

13 Mr. Bartholomew is the Senior Economist with the
14 Federal Home Loan Bank Board. We appreciate your coming and
15 staying through the frost. We are preparing you for going
16 outside.

17 MR. BARTHOLOMEW: Actually, I should correct that
18 just a little bit. I am not the Senior Economist, I am a
19 Senior Economist.

20 COMMISSIONER NAGEL: We have the same problem.

21 [Laughter.]

22 MR. BARTHOLOMEW: Madam Chair and Members of the

1 Commission, I am pleased to appear before you today. I apolo-
2 gize for not getting my written remarks to the Commission
3 prior to my testimony. Unfortunately, this was not possible.
4 However, I did bring them with me and I will be as brief as
5 possible from them.

6 I would like to comment on the presence of negligence
7 and fraud in thrift institutions on which Federal regulators
8 have taken action in recent years. I would also like to com-
9 ment on some issues pertaining to appropriate sentences for
10 those individuals found guilty of criminally fraudulent actions
11 directly related to federally regulated thrift institutions.

12 I should point out, I am a financial economist with
13 the Office of Policy and Economic Research at the Federal Home
14 Loan Bank Board. I am not a lawyer and do not consider myself
15 an expert on the legal issues surrounding criminal fraud.
16 However, I am able to provide some information on the recent
17 problems experienced in the thrift industry, since coming to
18 the Bank Board I have been involved in an economic analysis of
19 the causes of the recent thrift failures.

20 As I am not a legal expert, I apologize if I make
21 any mistakes in the correct use of the legal terms. The Federal
22 Home Loan Bank Board is the Federal regulator of U.S. thrift

1 institutions that are either federally chartered or insured by
2 the Federal Savings & Loan Insurance Corporation.

3 As has been well publicized, the U.S. thrift industry
4 has suffered a number of problems during the 1980's. During
5 the period 1980 through 1988, the Bank Board and the FSLIC
6 have resolved some 488 failed thrift institutions. We consider
7 a resolved thrift institution to be one that was closed by
8 Federal regulators and either liquidated or merged with a
9 healthy institution with assistance from the FSLIC.

10 The causes of the problems experienced by the thrift
11 industry are very complicated and not simply generalized. In
12 terms of the economics of the issue, we often refer to high
13 interest rates in the early 1980's, we refer to problems with
14 particular regional economic conditions in parts of the United
15 States, as well as a few other factors relating more to the
16 economics.

17 Unfortunately, the thrift industry appears to have
18 experienced a significant amount of fraudulent activity that
19 was perpetrated by both thrift institution insiders and out-
20 siders. This has recently been documented in a study by the
21 General Accounting Office, as well as the study that we are
22 doing which is in its preliminary stages.

1 Presently, it is too early to say to what extent
2 this factor, fraud, negligent activity, contributed to the
3 failure of thrifts or to the cost of resolving failed thrifts.
4 As I mentioned, we are doing a study in my office, a detailed
5 study of all of the characteristics of resolved institutions
6 and the costs of their resolution.

7 All 205 institutions that were resolved in 1988 were
8 analyzed. These resolutions are estimated to cost the FSLIC
9 on a present value basis \$31 billion. A summation of the pre-
10 liminary findings of this study are shown in a chart in the
11 written document which I submitted to the Commission.

12 The 50 most costly resolutions in 1988 that were re-
13 solved at an estimated cost of \$24 billion were analyzed
14 separately. In my written remarks, I talk about some of the
15 things that we generally attribute to more the economic side,
16 and those characteristics are illustrated in that particular
17 set of information.

18 The study that we did also examined the 1988 resolu-
19 tions for the presence of negligence and fraud, and it is im-
20 portant to emphasize the fact that we only could look for the
21 presence, not necessarily to the magnitude nor to the degree,
22 nor were we able to ascertain as to whether the presence of

1 fraudulent activity caused the failure of the institution. At
2 this stage, it is not possible.

3 The information collected on the presence of negli-
4 gence and fraud in the 1988 resolutions was based upon the de-
5 termination of the Bank Board's Litigation Division of the
6 Office of the General Counsel. The attorneys working on these
7 cases were surveyed as to their opinion of the presence of
8 several categories of negligence and fraud in a particular
9 case. Their findings may be considered to be those that they
10 feel are actionable and on-actionable on the part of Federal
11 regulators. No attempts were made to distinguish the degree
12 to which an activity had been present.

13 In virtually all cases, the board of directors of
14 resolved institutions were found to not have acted prudently.
15 Fraudulent activities and regulatory violations were found in
16 a number of the resolved thrifts. Our preliminary study shows
17 a higher incidence of self-dealing, other fraud and regulatory
18 violations in the most costly of institutions that we resolved.

19 At this time, it is too early to tell for some of
20 the 1988 resolutions whether categories of negligence or fraud
21 were present. However, based on the count to date, self-
22 dealing was present in at least 34 percent of the 205 cases,

1 and for the 50 costliest resolutions, such activity was found
2 in 50 percent of the cases. In 27 percent of all of the 1988
3 resolutions and 42 percent of the costliest cases, other forms
4 of fraud were present. We define for this study "other fraud"
5 to be that fraud which was perpetrated by outsiders.

6 Loans and borrower violations were also found. We
7 found that they occurred in at least 34 percent of the 1988
8 resolutions, and for the 50 costliest resolutions such viola-
9 tions were found at 50 percent of the institutions. It is
10 coincidental that those ratios for loans to one borrower vio-
11 lations are the same for the ratios for self-dealing. We
12 analyzed that as well, and there were institutions that had
13 self-dealing but not loans to one borrower violations.

14 Whereas this analysis is preliminary and does repre-
15 sent merely the presence of categories of negligence and fraud,
16 it does appear that there was a significant amount of negli-
17 gence and fraud present in those institutions that we studied
18 and were resolved in 1988.

19 It also appears that the costliest resolutions had a
20 higher incidence of the presence of fraud and negligence than
21 the resolutions in general. However, although there was a
22 presence of negligence and fraud in these resolutions, it is

1 not currently possible to determine the magnitude of damages
2 associated, nor to what degree the negligence or fraud con-
3 tributed to the thrift failures.

4 As a civil agency, the Bank Board is not empowered
5 to do criminal investigations or to handle criminal prosecu-
6 tions. However, the Bank Board assembles information and
7 refers it to criminal authorities. The number of criminal re-
8 ferrals involving crimes against savings and loans increased
9 from 434 in 1985 to over 6,100 in 1987.

10 In 1983, there were two significant criminal convic-
11 tions obtained against individuals associated with FSLIC in-
12 sured institutions. In 1987, there were 66 convictions ob-
13 tained, and for the first 11 months of 1988 there were 58 con-
14 victions. During January through November of 1988, civil
15 judgments were rendered in favor of the U.S. Government in 56
16 cases, with some \$97 million awarded.

17 Certainly, this information does reflect the fact
18 that the thrift industry has experienced a significant amount
19 of what is called white-collar crime. In addition to encourag-
20 ing the prosecution of individuals suspected of committing
21 fraud against insured institutions, the Bank Board has aggres-
22 sively supported the imposition of orders requiring restitution

1 to the FSLIC by convicted criminals, along with prison sen-
2 tences and fines.

3 Federal law affords the victim of crime an oppor-
4 tunity of obtaining recovery of funds lost as part of the
5 criminal sentence. Restitution orders issued pursuant to the
6 Victim and Witness Protection Act are routinely sought by the
7 FSLIC from the court at the time of sentencing. Whereas,
8 Federal efforts have been increased, problems currently exist
9 in preventing this type of crime, prosecuting the perpetrators
10 and recovering from the perpetrators the damages that they
11 have caused.

12 As an economist, it is difficult to determine the
13 appropriate sentence for the variety of white-collar crime
14 that exists. Criminal penalties do offer a disincentive to
15 the potential criminal. It is not clear that a fine is a suf-
16 ficient penalty for criminal fraud, especially in thrift in-
17 stitutions. Whereas a financial penalty may cause hardship to
18 those convicted of white-collar crime, a prison sentence cer-
19 tainly may be a greater disincentive.

20 Certainly, the financial losses associated with most
21 white-collar crime of thrift institutions are greater than
22 most of what we would call traditional bank robberies. In

1 this regard, an argument for sentences associated with the
2 the magnitude of the financial losses incurred by the crime
3 might be warranted. It seems that this is not currently the
4 case. I understand from discussions with people in my office,
5 the attorneys who know, unfortunately the typical prison sen-
6 tence for a thrift officer convicted of defrauding that thrift
7 of millions of dollars has been just a few years at most.

8 It is certainly clear that damages incurred through
9 criminally fraudulent activity should be recovered. This is
10 not always possible, as the convicted perpetrator may already
11 have spent or hidden the proceeds of their fraudulent activity.

12 From the point of view of a disincentive, if an in-
13 dividual convicted of fraud cannot pay restitution, then an
14 additional penalty that reflects unrecovered damages seems to
15 make sense. In this way, the potential perpetrator would
16 understand that the consequences of his or her criminal
17 activity would be fully subject to some form of effective pun-
18 ishment.

19 In closing, it is necessary to point out that the
20 thrift industry has experienced a significant amount of white-
21 collar crime perpetrated both by insiders and outsiders. Sen-
22 tences that include both fines and prison terms seem to be

1 warranted as an appropriate punishment and disincentive. Sen-
2 tences that reflect unrecoverable damages definitely seem to
3 be appropriate.

4 Thank you very much for this opportunity and if I
5 can't answer the questions, I certainly can have them referred
6 to the correct people.

7 COMMISSIONER NAGEL: Thank you.

8 Are there any questions.

9 COMMISSIONER BLOCK: I have a quick follow-up ques-
10 tion. The guidelines, as you may know, punish fraud on basic-
11 ally the size of the taking, and the question was whether there
12 should be a special enhancement for financial institutions.
13 If I was to summarize the thrust of your testimony, I think
14 that one part that comes out of is the fact there should be
15 these financial and imprisonment penalties for large-scale
16 fraud. I think you will find that in the guidelines.

17 The second point I am less clear, and that is what
18 is it that makes savings and loan fraud special and why should
19 there be a special level for savings and loan fraud, other
20 than the scale. In the guideline, they scale frauds up to \$5
21 million now and there is a proposal to go above that in terms
22 of gradations. Is there anything special about savings and

1 loan fraud that we should take into account?

2 MR. BARTHOLOMEW: I did see that in the questions
3 that were discussed about revising the guidelines, and as an
4 economist and also having looked at these cases, much as I
5 might want to give specific penalties myself, I don't think
6 that is possible. And as an economist looking at this, to me
7 fraud is fraud. If it is at a thrift institution, I thought
8 about this in preparing the testimony, if somebody rips off a
9 citizen for doing some kind of contract work which they didn't
10 do and didn't fulfill and were fraudulent in the activity and
11 caused damage, those damages to me are the same as damages
12 caused by fraud committed at a thrift institution, other than
13 if we want to refer to the size.

14 COMMISSIONER BLOCK: Thank you.

15 COMMISSIONER NAGEL: Thank you very much.

16 MR. BARTHOLOMEW: Thank you.

17 COMMISSIONER BLOCK: Is there anyone else who would
18 like to testify?

19 [No response.]

20 If not, we will consider this hearing closed. Thank
21 you very much.

22 [Whereupon, at 4:00 p.m., the Commission adjourned.]

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