
UNITED STATES SENTENCING COMMISSION



TRANSCRIPT

PUBLIC HEARING ON
ORGANIZATIONAL SANCTIONS

JUNE 10, 1986

ORIGINAL
TRANSCRIPT
OF PROCEEDINGS

UNITED STATES SENTENCING COMMISSION

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ORGANIZATIONAL SANCTIONS

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(THIS TRANSCRIPT WAS PREPARED FROM A TAPE RECORDING.)

ACE-FEDERAL REPORTERS, INC.

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United States Sentencing Commission
Hearing on Organizational Sanctions

June 10, 1986

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UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON
ORGANIZATIONAL SANCTIONS

JUNE 10, 1986

CHARIMAN WILLIAM W. WILKINS, JR., Presiding

(THIS TRANSCRIPT WAS PREPARED FROM A TAPE RECORDING.)

1 OMT/bc

P R O C E E D I N G S

(10:00 a.m.)

CHAIRMAN WILKINS: Let me call this public hearing to order. This is the third in a series of public hearings that we will be conducting throughout the summer.

The first hearing dealt with offense characteristics and the seriousness of criminal conduct. We just recently had a hearing on prior record of offenders.

Coming up is a sentencing options hearings and plea negotiations. And as you know, today's public hearing will concentrate on the issue of organizational sanctions.

I might say that the public hearings that we've held to date have been most helpful to the Commission in framing issues dealing with the subjects which were discussed.

And I feel that and I'm sure that this hearing will also be very helpful to us. I might add that the work that the witnesses have done in advance, and the written testimony that we have received exhibits a great deal of thought and effort and hard work.

And the Commission has received the testimony and we very much appreciate all the work that all of you have done in preparation for this hearing.

I might add, too, that we have received written testimony from a large number of other individuals and

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1 organizations addressing this issue. And all of this of
2 course is part of our public record and will be studied by
3 the Commission staff as we address the issue of
4 organizational sanctions.

5 And when you think of guidelines, most of the
6 time, you only think of individual sanctions. What do we do
7 about the drug dealer or the bank robber, or someone like
8 that.

9 But we need to focus a great deal of our energy
10 and work on organizational sanctions, particularly in the
11 federal section. And to this reason, we have scheduled this
12 hearing to address that single issue.

13 We have a number of fine witnesses and experts in
14 the field. What we'll do is we'll play our timetable
15 somewhat by ear, although we do have a schedule. But I do
16 not want to restrict any witness because of time
17 constraints.

18 In addition to that, at the conclusion of our
19 hearing of the witnesses of the schedule, any person in
20 attendance will be given an opportunity to comment or make
21 any statements that he or she feels is appropriate.

22 Our first witness to testify are attorneys
23 representing the American Bar Association, a Mr. William
24 M. Brodsky and George C. Freeman, Jr.

25 Gentlemen, if you would like to come around and

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1 we may sit together.

2 Good morning.

3 STATEMENTS OF MR. WILIAM M. BRODSKY, and

4 GEORGE C. FREEMAN, JR.,

5 AMERICAN BAR ASSOCIATION

6 MR. BRODSKY: Good morning, Mr. Chairman, Members
7 of the Commission. My name is William M. Brodsky. I'm a
8 practicing attorney. All of my professional life, I've been
9 involved in the criminal law, starting out as an officer in
10 the Judge Adjutant General's Corps, United States Army; then
11 as an Assistant U.S. Attorney. And for the last eight
12 years, I've been a defense lawyer, practicing in New York
13 City.

14 I am active member of the American Bar
15 Association. I'm the Vice Chairman of the White Collar
16 Crime Committee of the Criminal Justice Section of the ABA.

17 With me today is George Curman Freeman, Jr.
18 Mr. Freeman is a partner in a Richmond, Virginia firm, with
19 Washington, D. C. offices at Hungtinton and Williams.

20 He is currently the delegate of the section of
21 the Corporation Banking and Business Law, the ABA House of
22 Delegates, and is a former chairman of that section of Ad
23 Hoc Committee of the Federal Criminal Code.

24 In the past, together with Professor William
25 Greenhall of the Criminal Justice Section, Mr. Freeman

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1 testified for the ABA for various House and Senate
2 committees that were considering federal criminal code
3 legislation.

4 Mr. Freeman is very well-versed in this area and
5 especially knowledgeable of special topics relevant to this
6 hearing today. That is, organizational sanctions, the
7 appropriateness or inappropriateness of criminal sanctions
8 for regulatory -- that is, offenses not found in Title 18.

9 We would like to divide our testimony this
10 morning...the Commission. I will briefly highlight,
11 summarize the ABA standard with respect to organizational
12 sanctions.

13 Mr. Freeman would like to comment with respect to
14 appropriate treatment or regulatory Title V's.

15 Mr. Chairman, I understand that our printed
16 remarks will be incorporated for the record and I will not
17 repeat them, but just summarize them for the Commission.

18 CHAIRMAN WILKINS: That's correct. They will be
19 incorporated in total. And it is a good idea to, and not
20 only you, Mr. Brodsky, but other witnesses, if they will
21 summarize the written testimony. And that will give us more
22 time for dialogue between you and the Commission.

23 MR. BRODSKY: Essentially, Mr. Chairman, the ABA
24 standards which are -- this is one of the many volumes of
25 the ABA standards. That regarding the sanctions is one of

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1 the longest.

2 The issue of how does one punish an organization,
3 corporation or an association, who cannot be incarcerated,
4 is one of the most difficult.

5 How does one think in terms of adequate
6 punishment and sufficient, specific in terms, on behalf of a
7 corporation who poses a significant problem?

8 The ABA has recommended in effect five methods by
9 which this can and should be achieved.

10 The first one is restitution. Making whole the
11 victims of any crimes caused by a corporation. In this
12 connection, it's significant to point out that the injury to
13 the victim should be the approximate cause by the
14 corporation's or association's malfeasance.

15 That is, that there must be a causal connection
16 between the corporation -- and the claim for restitution. I
17 must point out that this restitution or sanction should be
18 in conjunction with all the other significant civil remedies
19 that exist.

20 Indeed, in determining what is an appropriate
21 sanction, any amounts paid under restitution put into our
22 policy should be set off from any subsequent civil action,
23 whereby the victim, under more liberal rules, may be able to
24 recover significantly greater amounts.

25 The restitution sanction recommended by our

1 OMT/bc

1 association limits the amount to be paid to the victims to
2 actual out-of-pocket pecuniary loss, not in such things as
3 separate other punitive damages. Those are relative, should
4 be, to the civil side.

5 The fact of restitution, that restitution was
6 ordered by a court, should not be admissible in any way in a
7 civil proceedings that may or may not follow after the
8 criminal process.

9 In any determination of how much restitution
10 should be paid, the court should acquire a government or the
11 claimant to establish by a preponderance of the evidence
12 this particular claimant is one that was wronged by the
13 corporation's wrongdoing, and that the amount of restitution
14 is that which was felt by the out-of-pocket expenses.

15 In this connection, I think it's somewhat out of
16 order, the notice of conviction, which Congress has also
17 written -- is one that the ABA recommends as an appropriate
18 sanction.

19 The goal of acquiring association or an
20 organization convicted of a crime, to publicize that fact,
21 one can envision as the statute and our standards indicate,
22 can add to the Wall Street Journal for any national or local
23 publications, and alert those groups that were harmed by the
24 corporation's wrongdoing, put in claims under the
25 restitution section. And thereby effectively implement the

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1 restitution sanction.

2 And also to the aspect of the publicity that will
3 come from the notice of conviction or sanction is one that
4 is appropriate.

5 It is significant, however, that the notice of
6 conviction sanction should not be used to hold up to public
7 ridicule any individuals or corporations who may have
8 committed a crime.

9 This is not, as far as the ABA standard is
10 concerned, the intent of notice of conviction. It is
11 designed primarily to let the public be aware that this
12 particular entity has violated the law and gained whatever
13 deterrents may occur to regular market forces as a result
14 of.

15 And, secondly, to alert those potential victims
16 that may have a claim they can lodge against the
17 corporation.

18 Secondly, the aspect of a special fine schedule,
19 that is, fines that would be posed on a corporation, a
20 greater punishment, if you will, than the simple monetary
21 amounts that are set forth in the statute.

22 This is important because in many institutions,
23 the cost of compliance by a corporation with certain
24 regulatory requirements may far exceed the potential fine
25 that could be imposed in a criminal context.

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2 The ABA, as many other groups, have wrestled with
3 what amount of special fines would be appropriate for an
4 organization that violates certain kinds of...and the ABA
5 standards, as approved by the House of Delegates, says that
6 it's only the amount of pecuniary gain that the corporation
7 made from its wrongdoing, or conversely, the amount of
8 pecuniary loss that the corporation caused to the victim
9 that should be imposed as a sanction.

10 The belief here is that one wants to make the
11 sanction significant enough so that the corporation will be
12 deterred from violating the law, and not simply coming up
13 with a fine that costs much less than the cost of the crime.

14 At the same time, not to propose a punitive
15 sanction on the corporation that would so distort the
16 process that it would, in effect, be an unconstitutional
17 violation of a principle of -- in the punishment and the
18 offense.

19 Next there is the issue of misqualification from
20 office. This is a sanction which both in the statute as
21 adopted by Congress and in the ABA standards applies really
22 only to individuals who have been convicted of a crime.

23 There is nothing in the statute, and certainly in
24 the ABA standards; we recommend strongly against the
25 imposition of any punitive criminal sanctions against any
individual human being who has not been convicted of a

1 OMT/bc

1 crime.

2 If the corporation needs to be sanctioned, that
3 can be done through the continuing official oversight and
4 will all come to an annulment.

5 But disqualification from office may be an
6 appropriate sanction under the strict, narrow guidelines set
7 forth in the ABA standards, and as set forth in the statute,
8 for a person who himself or herself was convicted of a
9 crime.

10 The continuing judicial oversight. This is
11 perhaps in some respects the most significant aspect of the
12 ABA standards with respect to an organizational sentence in
13 that it gives the court the widest kind of authority to
14 assure that the goals of sentencing are achieved by an
15 organization. There is the deterrence, it won't happen
16 again.

17 Punishment, more significantly that the law will
18 be complied with both specifically by that organization and
19 by others. While the ABA, these standards were adopted in
20 1979, was against the concept of corporate probation, that
21 was resulting from the philosophy of the existing law, which
22 meant that probation was something that could only be
23 imposed in lieu of incarceration.

24 Now, under our new statute, probation may be
25 imposed as a punishment by itself and as a condition of that

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1 probation, an organization may be required to impose on
2 itself certain reporting requirements, certain investigatory
3 requirements, sufficient that the court would have an
4 ability to supervise whether the organization has ceased the
5 illegal activity.

6 It has instituted reforms to assure that it will
7 not return, and will report to the courts. And of course
8 the contempt power of the court exists even though the
9 corporation still can't be incarcerated. The wide variety
10 of coersive sanctions the court can impose on the
11 organization itself. And if that proves insignificant or
12 ineffective in deterring the conduct, they can, in my
13 opinion -- and I speak for myself -- that individuals within
14 the corporation can be assigned the task of carrying out --
15 the corporation the continuing additional oversight
16 functions, and that person could be subject to sanctions of
17 the court.

18 These are then the five general principles that
19 the ABA has established for organizational functions. There
20 are three major -- that the ABA suggests to keep in mind
21 with personal sanctions on any organization.

22 These are that the special fines and even the
23 restitution should not be imposed in cases where -- damages
24 can be obtained by victims or government agencies, such as
25 in anti-trust cases; that any such sanctions or use of those

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1 sanctions should be imposed only after a full adversary
2 hearing where both sides would have an opportunity to
3 protest the factual predicate on which the proposed fine --
4 reasonableness of the penalties, so that the courts can --
5 the --

6 With that, Mr. Chairman, I have finished my --
7 CHAIRMAN WILIKENS: Mr. Freeman.

8 MR. FREEMAN: It's a pleasure to be here today
9 and see several old friends. I'd like to emphasize two
10 points that Mr. Brodsky's just made, and then move on to my
11 assigned topic, which is distinction that should be made
12 between regulatory and common law type crimes.

13 I'd like to talk just a minute to emphasize how
14 important it is in your guidelines to emphasize that in a
15 particular way you are ordering restitution on the part of a
16 corporation that you emphasize the importance of proximal
17 quality improvement, and no relaxation on those standards.

18 Recently, the administration had a task force on
19 the current prices in insurance availability and
20 affordability. And they had a very interesting, informative
21 report on that crisis.

22 And they really attribute that crisis to the
23 perversion of tort law in the state tort system. That is,
24 concept of causation has been eroded. Burdens of proof have
25 been reversed. And, in particular, the concept of joint and

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1 several liability has been extended far beyond its common
2 law origins, were exclusively in conspiracy or concerted
3 action.

4 And it's sort of a tort that causes unprincipaled
5 search for the deep pocket. And the report recommends a
6 number of reforms, eight major reforms in those state
7 systems.

8 Now, whether the states will make those reforms
9 or whether Congress through some sort of preemption will
10 adopt legislation, it does that, is part of -- we don't know
11 how that's going to turn out.

12 But I think you have to be very careful in your
13 guidelines to make it clear that the concept of restitution
14 here is not going to turn into another unprincipaled search
15 for the deep pocket, that causation must be proven in fact.

16 There's no relaxation of the burden, no shifting
17 of the burden. And the concept of joint and several
18 liability has no place absent proof of conspiracy or
19 concerted action.

20 I think that's very important to prevent
21 restitution just recurring in an ad hoc way of substituting
22 for the present tort system.

23 The second thing I'd like to emphasize in what's
24 been said here is the importance of keeping in mind the
25 concept of proportionality. And I would like to emphasize

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1 its constitutional dimension.

2 Recently, relatively recently, the Supreme Court
3 came out with a very interesting decision in Sohm versus
4 Helm, where Mr. Justice Powell, writing for a thin majority
5 of one, found that concept in the 8th Amendment and
6 particularly as it applies to length of sentence.

7 But that decision is very interesting because in
8 both the majority and the minority opinion, the statement is
9 quite clear that the rights that we have under the
10 Constitution and under the notion of due process were at
11 least as broad as it existed in England at the time we
12 gained our independence.

13 And of course one of the principal doctrines that
14 was in force at that time and we still honor is the Magna
15 Carta. And there are three chapters in Magna Carta that
16 deal with an obscure concept called an immersila (ph.) And
17 an immersila was the form from a heavy fine that was levied
18 by either the king or the lord. And it essentially started
19 out by taking all of a man's property.

20 And it was in effect a moderation from the
21 earlier form where if you offended the king, he simply cut
22 off your head and you were tainted. He got all your
23 property and your heirs were disinherited.

24 So rather than cut off your head, he just took
25 all your property. So, at Runnymede, the barons were going

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1 to put an end to that. And so they put in a requirement,
2 one for the lord, one for the bishop and one for the common
3 man, that any taking of property had to be proportional to
4 the event.

5 And, interestingly enough, it also had to leave
6 the person, whether lord, bishop or freeman, with the means
7 of making his livelihood.

8 And that concept has come down to us through the
9 due process clause and it's been reinforced in the 8th
10 Amendment.

11 So I think that it's very important that
12 particularly in the area of fines, that you emphasize the
13 importance of that concept of proportionality.

14 And there are two aspects to it. One is that you
15 make the fine proportionate to the blameworthiness of the
16 conduct and, second, that you bear in mind the second
17 requirement of Magna Carta, which is to leave a person with
18 adequate means in which to continue his livelihood.

19 And in the case of a corporation, particularly a
20 large, publicly-held corporation, where you have a number of
21 innocent people who are at stake, even if the leaders or
22 some official in the corporation takes off and does the
23 wrong thing, you have a number of investors who are totally
24 innocent in the whole process.

25 And that makes this concept of proportionality

I OMT/bc

1 even more important.

2 And that brings me to my third point, which is
3 the importance for you all to do in effect what Congress
4 didn't do at the urging of the earlier Brown Commission, and
5 then at the urging of our ABA back when the Federal Criminal
6 Code was being considered in Congress several years ago.

7 And that is we have pointed out and they did
8 earlier that in the area of regulatory offenses there has
9 been an unfortunate tendency over the years to over-
10 criminalize those statutes.

11 And various reasons account for it. I think the
12 principal reason why those statutes are over-criminalized is
13 the way Congress acts through the committee system. And
14 many of you are familiar with the committee system and how
15 it works on the Hill.

16 But, if you will think back about the number of
17 regulatory bills that have gone through the Congress -- the
18 Clean Air Act, the Clean Water Act, The Super Fund, RECLA,
19 Securities and Exchange Act, all these other acts -- then
20 it's very, very, very rare that there is consecutive or
21 joint referral to the Judiciary Committee.

22 So the committees that are most expertise in what
23 should be the most appropriate form of criminal sanction,
24 that expertise is never brought to bear.

25 And you also know, those of you who are familiar

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1 with the way the Senate and the House operate, that when
2 those bills come to the court, there is usually no
3 meaningful debate, particularly on the criminal sanction.
4 It's just too complex to get up to speed with. And so these
5 things go through with huge criminal sanctions in there
6 often for conduct which is not only nonwillful or
7 nonknowing, but it's often unavoidable.

8 And of course the excuse given is, well, EPA and
9 the Justice Department will be denied exercise of their
10 constitutional discretion and they will never go after the
11 truly innocent people.

12 But, sometimes, political pressures build up and
13 things fall through cracks. I would hope that in your
14 guidelines you would particularly, specifically point out
15 the need to distinguish between regulatory offenses that are
16 what we would call (mallum in say), that is, everybody knows
17 who they are. No doubt about it. And the kinds of offenses
18 that are inadvertent, where, really, criminal sanctions are
19 really inappropriate.

20 And certainly even when they're mandatory matters
21 like knowledge, willfulness, inadvertent should clearly be
22 reflected in the level of fines or the level of offenses in
23 the organization.

24 So, there's a final aspect to that, too. And
25 that is that a lot of these environmental statutes in

1 OMT/bc

1 particular are technology forcing statutes. EPA sets
2 standards to get the maximum amount of cleanup based on what
3 it thinks the technology can be extrapolated to.

4 Scrubbers for power plants were a very good
5 example of that. The earlier phases of those scrubbers
6 didn't live up to what the manufacturers said they would.
7 They didn't live up to...

8 (Conclusion of side 1, tape 1.)

9 ...the suggestions, and it just didn't work for
10 them.

11 So I think it's very important to recognize that
12 because in the long run, too, law is the self-enforcer. And
13 to be self-enforcing, you have to know what it is and it has
14 to be -- has to conform with common sense. And you can't be
15 put in the situation where you're told to supply power to
16 the City of Washington using a certain technology, and then
17 you find out the new technology doesn't work. You still
18 have to supply the power.

19 Do you cut off the power? And people are in
20 violation of criminal sanctions. So I think it's very
21 important in your guidelines to distinguish between those
22 types of situations and the type situations where people
23 knowingly, willfully do something out of the way...

24 CHAIRMAN WILKINS: Thank you very much,
25 Mr. Freeman. We'll have a question and answer period at

1 OMT/bc

1 this time.

2 Mr. Brodsky, you testified and I believe in your
3 written testimony indicated that the fine imposed on a
4 corporation should be equal or not greater than the amount
5 of gain or the amount of loss caused.

6 For example, a corporation in a criminal act
7 makes a half million dollars or causes a loss of a half
8 million dollars, the fine should not exceed a half million
9 dollars.

10 Is that...?

11 MR. BRODSKY: That's essentially correct.

12 CHAIRMAN WILKENS: Does that say to a
13 corporation, if you get caught, all you've got to do is give
14 it back?

15 MR. BRODSKY: No. I think that what that says is
16 that there are other courses in addition to the fine. The
17 fine is not the only sanction that would be imposed on the
18 corporation under that scenario.

19 In other words, there are a full panoply of
20 sanctions that are available to the court. And any victim
21 that may have been harmed by the corporation, the fine is in
22 addition to any other sanctions.

23 The cost of compliance itself. In other words,
24 the corporation is in effect being punished twice, if you
25 will. It isn't just that they're paying to the court what

I OMT/bc

1 they should have paid to comply initially. They had to do
2 that anyway, with the oversight, the probation. They've got
3 to comply with the law.

4 And then this fine is a punishment. And I don't
5 think that it's simply one single -- we rolled the dice and
6 we lost, so we'll pay what we would have had to pay had we
7 done it right the first time.

8 MR. FREEMAN: If I could supplement that with a
9 few ideas. First of all, I think it's important to
10 recognize when we're talking about corporations, we're also
11 talking about the public -- situation.

12 Again, we get back to looking at an economic
13 entity where there are a lot of stakeholders who are totally
14 innocent of the behavior. And not only stockholders. It
15 also can be employees.

16 And that's point number one. Point number two is
17 we do have the criminal sanctions in there for the
18 individuals. And the individuals who ordered the conduct,
19 who planned it, where the sanctions apply to them
20 individually, that's where you get the control of...

21 CHAIRMAN WILKINS: Do you think it would be
22 appropriate in a given case for the court to appoint an
23 accountant or lawyer, make the corporation pay for it, and
24 have this person charged with the responsibility of
25 developing a report of who within the corporate structure

OMT/bc

1 made the decisions to violate the law? And would have that
2 disseminated to all stockholders?

3 These innocent people, the stockholders out
4 there, they may not know the corporate officers who were
5 really involved with making the decisions.

6 MR. FREEMAN: I would hope that the U.S. Attorney
7 would do that when he's bringing the action against the
8 corporation, and would name those individuals and charge
9 them individually with violation of the law.

10 CHAIRMAN WILKINS: But I want him to make sure
11 that a copy of that indictment gets out to the stockholder
12 in Omaha, Nebraska...

13 MR. FREEMAN: When they're convicted, I think
14 that's what we're talking about.

15 CHAIRMAN WILKINS: One other question I wanted to
16 ask you about the innocent shareholders. I realize that is
17 a problem. In a civil suit, however, there is no
18 consideration given to the innocent shareholder when a civil
19 judgment is handed down against the corporation for some
20 tort action or whatnot.

21 But you would suggest, in the criminal area, we
22 should somehow take into account the fact that when I bought
23 some stock in the ABC Corporation, I had no idea that it
24 was going to be involved in criminal conduct?

25 MR. FREEMAN: Well, I will say this. When we

I OMT/bc

1 started out and I was one of the authors of our report, ad
2 hoc report on the Federal Criminal by Sections, we really
3 felt that restitution had no part in the civil and criminal
4 law.

5 So the ABA position on it is a compromise
6 position because we felt one of the real problems that you'd
7 get into in this area, and I still think you get into it, is
8 you give -- if it is charged that a large class of people
9 have been injured and we're going to give them restitution,
10 it almost becomes like a mass tort case.

11 And the problems of witnesses testifying when
12 they are in the criminal proceeding, when they have a stake
13 in the civil, you know, they're going to get a nice, you
14 know, they're going to get some money out of it, it's
15 a pretty tricky kind of area.

16 So I think really this is quite different from
17 civil law, and I think that that's one of the main things
18 you've got to keep. You've got to keep it distinct. And it
19 can't be just an easy road to the tort system.

20 I think that's the real danger you have to guard
21 against in this whole area.

22 CHAIRMAN WILKINS: Any questions?

23 COMMISSIONERS: Yes, Mr. Chairman, I have a
24 question for Mr. Brodsky.

25 Among your five recommended sanctions, I'm not

1 OMT/bc

1 clear as to how the sanction of continuing judicial
2 oversight differs from probation. Probation was said to
3 utilize a method whereby conditions would ensure the court
4 that the organization had in fact ceased its criminal
5 activity.

6 Could you clarify that for me?

7 MR. BRODSKY: Certainly. I'm going to try to put
8 out my other remarks. It was that the ABA policy was
9 directed in 1979, at a time when, in effect, a corporation
10 could not be placed on probation. And due to the law,
11 corporations now can be placed on probation.

12 The terminology "continuing judicial oversight"
13 can in fact be implemented as a condition of probation.
14 It's one of the conditions. And, indeed, that would be the
15 way in which...

16 COMMISSIONER: Thank you.

17 COMMISSIONER: Mr. Brodsky, I want to follow up
18 on this special fine schedule, just ask a clarifying
19 question.

20 Where the recommendation is to have a single
21 kinds of gain, monetary gain, by a single times the loss,
22 and the question was asked:

23 Isn't that really a license, for example? It's
24 difficult to reconcile that with deterrents, the use of
25 fines for deterrents.

I OMT/bc

1 And your reply was, well, there are other
2 sanctions. And my question is:

3 Why would they be preferable to a multiple of
4 the gain -- three times, four times gain?

5 In other words, you'd be using the other
6 sanctions to impose costs on a corporation.

7 MR. BRODSKY: The philosophy and this is
8 pertaining to the commentary...is that a punitive fine, if
9 you will, would not have the same kind of deterrence against
10 the organization as it would against an individual that has
11 to pay the fine.

12 Indeed, the malefactor, the corporate officers,
13 if you will, the agents of the organization, will have
14 caused them an expense, will just pass the fine on to its
15 customers by raising the prices, or as Mr. Freeman points
16 out, to the shareholders by depriving them of their
17 dividends. And that the philosophy underlying our position
18 is that in fact it will not have the kind of deterrence that
19 a normal fine would have upon an individual.

20 So that the other sanctions are creatively
21 designed to try to achieve the same goal without punishing
22 those, the customers and the shareholders, who are indeed
23 innocent.

24 COMMISSIONER: But they would raise the cost to
25 the corporation.

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1 MR. BRODSKY: The logic seems to me to follow
2 through. So there's a certain economic model that says that
3 if a corporation pays a large sum of money, it will either
4 have to pass that on to its product, and the public may
5 choose not to buy their product, but that's very, very
6 attenuating.

7 And the studies and the information -- to our
8 standards points out that the persons who sit down, if you
9 will -- if in fact they do -- and decide not to comply with
10 a certain regulatory practice, don't think of those aspects
11 of it, or would not in fact -- that kind of conduct.

12 MR. FREEMAN: Well, if you think about it this
13 way, the D.C. Circuit just handed down a recent decision on
14 a case in which I was interested. I was not the partner who
15 argued the case. But it involved -- penalties under the
16 Clean Air Act.

17 And on behalf of the utility industry, we had
18 appealed the EPA regulation that set forth how those
19 penalties were to be calculated. Said that the economics of
20 a public utility are quite different from the economics of a
21 competitive corporation.

22 And the court was very sympathetic but said that
23 the Congress would never let that -- in order to appeal, we
24 had to appeal to Congress, not to them.

25 But, even in that opinion, they recognized that

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1 if, for some reason, again, go back to the technology -- the
2 scrubber won't work and you are not in technical
3 compliance -- that simply means that the people in
4 Washington are going to pay more for their electricity
5 because of the fine.

6 It doesn't affect the stockholders pretty much.
7 And it's just the incidence is wrong. So I come back again,
8 what we're thinking about, when you think about crime, think
9 about the incidence is largely going to be on the people, on
10 a group of individuals.

11 And, usually, they're the group of individuals
12 who were not responsible in any way for the conduct. And
13 so, again, we come back to the importance, when you are
14 thinking about sanctions against organizations, bear in mind
15 the concept of trying to operate only on individuals and
16 don't operate on corporations.

17 And the place where the prosecutor ought to
18 concentrate is on convicting the individuals, because they
19 are the people who did it. And if you go and get them, then
20 it operates as a deterrent to their fears; whereas, if you
21 just sock the corporation and hit the stockholders, you
22 really, you're just --

23 CHAIRMAN WILKINS: Any question to my left?

24 COMMISSIONER: Mr. Brodsky or Mr. Freeman. With
25 regard to the issue of innocent shareholders, which is a

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1 real issue, would it be unfair to assume that a fine levied
2 against an organization will hurt the same innocent
3 shareholders who, for the most part, are going to be
4 benefitted by the organization's conduct in the criminal
5 action by persons?

6 MR. BRODSKY: Indirectly, yes. In the sense that
7 to the extent that the corporation makes larger profits
8 because it did not comply with the law. We're talking about
9 a situation where they would save money by not complying
10 with certain requirements.

11 That is correct.

12 COMMISSIONER: I have a question for
13 Mr. Freeman. He very eloquently cited us to Magna Carta
14 earlier, talking about its request, demand that punishment
15 be proportional, which would seem appropriate.

16 And the requirement that the person be left with
17 enough to continue to live.

18 That makes sense, I guess, doesn't it, in the
19 case of persons. But, clearly, does that make sense in the
20 case of organizations?

21 I mean, it's not as if organizations,
22 corporations, associations are citizens. They exist unlike
23 human beings. They exist for the benefit of the rest of
24 society. We recognize them as legal entities. We use them
25 for our benefit.

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1 Is it as clear that, for example, a liquidation
2 sanction wouldn't be appropriate?

3 MR. FREEMAN: Well, I would say you raise a very
4 interesting question. I had the privilege a few years ago
5 when I got out of law school to be Clerk to Justice Black.
6 And Justice Black was very open and encouraged us to ask him
7 all kinds of questions.

8 One of the things I asked him one time was:

9 Why are corporations treated as persons under the
10 14th Amendment?

11 And he said:

12 That's a good question, George. And he said:
13 Not even I am willing to go back and reopen that one.

14 You've raised a very important and fundamental
15 issue. But I think that's the cornerstone on which the
16 economy of this country is built, the idea that a
17 corporation does have the right of an individual under our
18 Constitution.

19 I mean, it's been there since they passed the
20 14th Amendment.

21 COMMISSIONER: I think the crude response was
22 simply for every situation, they insisted organizations are
23 like persons. And to the extent that organizations serve
24 certain purposes, we might want to recognize them and treat
25 them as persons for some cases, but not for others.

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1 Even that aside, to the extent that we have
2 something called the death penalty, and to the extent that
3 organizations have the ability because of their structures
4 to cause more societal harm and disruption than a single
5 individual, just gauging the extent of the harmed society
6 might appropriately lead to liquidation as a proportional
7 punishment.

8 MR. FREEMAN: Well, I come back though to the
9 fact that the corporation itself never does anything. It is
10 merely the instrument by which other people have. And if
11 we're talking about deterrence, retribution -- retribution
12 and deterrence -- all the sanctions would fall on
13 individuals who use that organization for its resources for
14 that purpose.

15 COMMISSIONER: I guess my problem is, with those
16 two arguments together, you can justify just about
17 anything. Organizations are not people. No one is
18 responsible. But, organizations are persons entitled to
19 every rights of citizens of the United States.

20 MR. FREEMAN: It's because we decided, and I
21 think it was -- I don't know. It was a long time deciding--
22 to extend that extra form of protection to that particular
23 way of holding property.

24 COMMISSIONER: Thank you.

25 COMMISSIONER: Two questions. Mr. Brodsky, what

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1 do you think should happen in the anti-trust case, the
2 criminal case brought against a corporation?

3 If you don't think the corporation should be
4 fined, what should happen?

5 MR. BRODSKY: I'm not saying, your Honor, that a
6 corporation should not be fined.

7 COMMISSIONER: There will be federal damages.

8 MR. BRODSKY: Federal damages would be there.

9 COMMISSIONER: But saying what should happen in
10 the criminal case, where the corporation is convicted.
11 Undoubtedly, there are trouble damages involved. Now, this
12 is a different case.

13 What do you think the Judge should assess as
14 punishment against a convicted corporation in a criminal
15 anti-trust case?

16 MR. BRODSKY: The Judge could choose from a
17 panoply of sanctions.

18 COMMISSIONER: What?

19 MR. BRODSKY: And require the corporation to
20 institute indepth compliance, on the part of the board to
21 form a committee that would oversee anti-trust compliance
22 for education of his employees; hire outside counsel to
23 educate.

24 COMMISSIONER: That sounds like no punishment.
25 And if you say no punishment, is that seriously what you

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1 mean?

2 MR. BRODSKY: Well, I'm not arguing for no
3 punishment. But punishment is only one of the three basic
4 goals of sentencing. Punishing deters and will be
5 retribution, or in this case, restitution. If there are
6 individuals who have been convicted, they certainly will be
7 punished.

8 The corporation, if it has to pay trouble damages
9 and has to prevent itself from doing it again, the
10 sanction...

11 COMMISSIONER: All right. That leads to my
12 second question. It's a problem that I certainly don't have
13 the answer to.

14 In regulatory offenses, quite often there are
15 strict liability perhaps or negligence phase. The notion of
16 putting a human being in jail when he doesn't have a guilty
17 state of mind is one I think rightly criminal law finds
18 difficult to grapple with. It's a bad idea.

19 An individual going to jail who is out of the
20 guilty state of mind is very unusual. But a corporation
21 being punished criminally without a guilty state of mind
22 isn't quite as objectionable perhaps as punishing a human
23 being without a guilty state of mind.

24 Is that so?

25 I mean, if that is so, maybe the application of

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1 strict criminal liability in certain instances in
2 corporations but not individuals is quite a good idea.

3 I'm interested in your views on that.

4 MR. FREEMAN: Well, I share your initial
5 premise, that certainly law, it's a terrible thing to send
6 somebody to jail without them having intended either
7 knowingly or willfully done something wrong. Strict
8 criminality applied to individuals to me is just --

9 When it comes to corporations, it depends, it
10 seems to me, on what the purpose of the law ought to be. If
11 you are going to -- in other words, why even have criminal
12 sanctions when you can have civil sanctions?

13 That's the whole --

14 COMMISSIONER: You brand the behavior as very
15 objectionable behavior. And in a sense, you get the virtue
16 of telling the world: This is a terrible thing that has
17 happened. Without the vise of putting a human being in jail
18 without a guilty --

19 MR. FREEMAN: Well, I would say that the terrible
20 thing in the regulatory hearings in the way it happens is
21 that the conduct is normally punished with even just strict
22 liability on the civil side is conduct which is totally
23 inadvertent, even on the part of the corporation.

24 And in its hindsight in most instances. What we
25 start off with in these regulatory areas are statutes that

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1 are very vague, almost total power given to the regulatory
2 agency.

3 A lot of the agencies cut corners. As you know,
4 Judge, and they don't comply with the Administrative
5 Procedures Act, and they don't vote for rulemakings and the
6 rules aren't very clear. And they try to get by with case
7 by case communication, often.

8 So people don't know until after they've done it
9 that they've done something that's --

10 So that gets us back again to what is the purpose
11 of sanctions in the whole regulatory area. And I think that
12 the criminal sanctions should be applied only when you have
13 a clear rule. Everyone knows the rule or should know the
14 rule. The conduct is deliberate.

15 And under those circumstances, criminal sanctions
16 are entirely appropriate. But, again, I think they should
17 apply -- should fall the heaviest on the individuals
18 involved. And not through some multiple or some notion of
19 punitive damages against the corporation.

20 CHAIRMAN WILKINS: All right. Any other
21 questions?

22 COMMISSIONER: How would probation violations be
23 treated? You know, that's not in our guidelines
24 specifically, but speaking for myself, I can envision a
25 circumstance in which the court in effect appoints a special

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1 master.

2 MR. FREEMAN: Under criminal law?

3 COMMISSIONER: Yes, sir. Go ahead. Whose job
4 and by what authority? Just simply as a condition of the
5 probation, I think it's -- finds their own authority.

6 MR. BRODSKY: No, sir, I think it's not contained
7 within the statute. Under the new law, any condition of
8 probation is what the statute says, the court can implement
9 this continuing judicial oversight through that vehicle.

10 And this special master could advise the court of
11 progress.

12 COMMISSIONER: What do you mean by a special
13 master? That's one way of doing it.

14 MR. BRODSKY: The tools...the court could do away
15 with the special master and simply set down, do two things.
16 One, cause a study to be done by the board of directors.
17 They would have to hire an outside --

18 COMMISSIONER: What would he do then?

19 MR. BRODSKY: Well, then the court would impose
20 certain conditions of probation.

21 COMMISSIONER: Well, I know he's got the
22 probation, but they violated it now.

23 MR. BRODSKY: Then the court could fine the
24 corporation.

25 COMMISSIONER: Well, wait a minute. You've

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1 already fined them. You're going to do it again?

2 MR. BRODSKY: Yes, sir.

3 COMMISSIONER: Suppose they have imposed the
4 maximum fine? That's my problem.

5 MR. BRODSKY: Well, now we're dealing with
6 violation of a court order. That is, an order by the
7 court. And these are the conditions --

8 COMMISSIONER: So you say that you can get
9 contempt?

10 MR. BRODSKY: Yes, sir.

11 COMMISSIONER: And of course you can accomplish a
12 lot of that by just a straight out injunction to begin with.

13 MR. BRODSKY: Well, certainly you could.
14 Certainly, in those parallel proceedings where there are
15 civil cases that follow on, as our standards point out,
16 we're not suggesting that continuing judicial oversight
17 necessarily is appropriate.

18 That is, that that could be achieved through...

19 (Conclusion of side 2, tape 1.)
20
21
22
23
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1 VOICE:disagree with your statement.

2 Deterrence does not work on corporations. I think -- you
3 say it does work or doesn't work?

4 VOICE: I say it doesn't work.

5 VOICE: Yes. I disagree with that. I have any
6 number of instances where it works, and it can work by an
7 injunction.8 The other thing, on how the "persons" got into
9 the 14th Amendment, if you will read "The Gentleman from New
10 York, published by Yale University Press some 30 or 40 years
11 ago, which (inaudible), it describes in detail how
12 (inaudible) in the case of the Supreme Court (inaudible) in
13 the United States Senate, how he put "persons" into the 14th
14 Amendment by virtue of testimony that when he was on the
15 Senate committee writing the 14th Amendment that they
16 considered "persons" to include corporations.17 CHAIRMAN WILKINS: Commissioner Nagel has a
18 question, I believe.19 COMMISSIONER NAGEL: In setting the appropriate
20 level of criminal fines, what is your position on whether
21 the size of the corporation or corporate assets should be
22 taken into account?23 VOICE: There is in effect nothing in the ABA
24 standards that talks about that as an appropriate criteria
25 for imposing a fine.

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1 CHAIRMAN WILKINS: You would limit it to the gain
2 or the loss?

3 VOICE: To the gain or loss.

4 CHAIRMAN WILKINS: We appreciate very much,
5 Mr. Brodsky, Mr. Freeman, you coming and sharing with us
6 your work and your thoughts. We look forward to a
7 continuing working relationship with you.

8 Thank you very much.

9 VOICE: Thank you.

10 CHAIRMAN WILKINS: Our next witness is Mr. Harvey
11 M. Silets, a distinguished member of the Bar from Chicago.
12 He got up at 4:00 o'clock in the morning so he could be with
13 us today, and we appreciate that extra effort.

14 Thank you.

15 TESTIMONY OF HARVEY M. SILETS, CORPORATE
16 DEFENSE ATTORNEY, TAX

17 MR. SILETS: Good morning.

18 CHAIRMAN WILKINS: Good morning.

19 MR. SILETS: Good morning, Mr. Chairman.

20 It was 4:30, but it was just as hard.

21 (Laughter.)

22 MR. SILETS: I guess I should begin by telling a
23 little bit about myself, although in my tome that I
24 submitted to the Commission I have recited some of the
25 things that I have done.

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1 I have been Chief Tax Attorney for the
2 U.S. Attorney's Office in the Northern District of
3 Illinois. I am currently the Chairman of the Federal Rules
4 of Criminal Procedures Committee at the American College for
5 Trial Lawyers.

6 I want to state a caveat, however, that what I
7 say here today is not anyone's opinion other than my own,
8 and indeed perhaps some of my opinions, in light of my
9 colleagues Mr. Brodsky and Mr. Freeman's testimony, may seem
10 somewhat heretical.

11 In my submission to the Commission, I spent a bit
12 of time discussing the philosophy of the imposition of
13 criminal sanctions on the corporate enterprise as a
14 corporate enterprise, distinguishing it from individuals.

15 We recognize now that the status of the law is
16 that corporations can be punished, and therefore the
17 philosophy, which I term the reductionist theory, that if
18 you punish the individuals who operate the corporation that
19 the sanctions to be imposed upon the corporation need not be
20 available or should be minimized, is something that I don't
21 agree with.

22 As long as we have included in the law that
23 corporations should be punished, then we should punish them
24 if they commit an offense.

25 So the question then becomes not imposing

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1 sanctions upon the individuals because if they are convicted
2 they will be punished separately, but what should happen to
3 the corporation itself?

4 The sanctions that have been established by
5 Congress -- the factors in determining sanctions that have
6 been established by Congress in Section 3553(a)(2) are four
7 in number.

8 Two of them really are not applicable to
9 corporations in my judgment, one of course being rendering
10 educational, vocational guidance to the offender. I don't
11 think that is necessary in the case of the institutional
12 offender.

13 And the other is the need to protect the public
14 from further crimes of the defendant. That is a matter
15 which was raised by one of the members of the Commission
16 (inaudible) considered or called incapacitation. You lock
17 somebody up. That is one way to keep them from committing
18 the crime again. Another way is to disenfranchise them, is
19 to take away their charter to operate. I think Mr. Robinson
20 raised that question.

21 I am opposed to that. I am opposed to that
22 because it is contrary to society's best interest to destroy
23 the corporation.

24 One does not always impose capital punishment for
25 every offense, and I submit that there is probably no

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1 offense that a corporate enterprise would reach the
2 magnitude of capital punishment.

3 In my view, what happens if you impose capital
4 punishment on a corporation is that you disenfranchise the
5 public, and particularly the employees of the corporation
6 who may be totally innocent. They will lose their job or
7 jobs if the corporation is incapacitated.

8 But the Congress has really said that there are
9 two basic factors that are applicable to the corporate
10 circumstance. Well, one is the theory of retribution, and
11 the other is the theory of deterrence.

12 Now, interestingly enough, in my view, Congress
13 has by this act for the first time said that retribution
14 really is something to be considered, an eye for an eye, a
15 tooth for a tooth, and so on.

16 In my judgment, the imposition of a sanction on
17 an enterprise -- perhaps I am apart from my colleagues on
18 this issue -- is that there should be a sanction which
19 results in a disutility to the corporate enterprise; that
20 is, that it should be disabused of any benefit which it has
21 obtained and be punished. So in my judgment it may be a
22 cumulative circumstance; that is, you can have restitution
23 so that they disgorge the benefits and, in addition to that,
24 they should be punished.

25 My belief is that by doing that to the corporate

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1 enterprise that you in effect implement both of the two
2 applicable provisions of the factors that Congress has said
3 it should be considered -- retribution and deterrence.

4 Now, how can this happen, and should it happen?

5 My answer to that is, yes, it should happen, and
6 it can happen because the theory of restitution is not
7 something that is done in the blind.

8 Two -- at least two of the members of this panel
9 have bar or have been district court judges. We know -- and
10 I, as a trial lawyer, know -- that if restitution is being
11 ordered it is not being ordered in the dark. I mean, there
12 is an informed judgment, there is a hearing, an adversarial
13 hearing that will take place as to what constitutes the
14 appropriate restitution. It is not a number which will be
15 pulled out of the air.

16 So the concern that my colleagues express about
17 restitution is not my concern because, as the advocate, will
18 be able to speak on behalf of my client to determine what
19 the correct restitution should be.

20 I know that I am operating under a limited time,
21 and I don't want to go over the 46 pages of my brief. I
22 have always been amazed why briefs are never brief.

23 But Judge MacKinnon raised the problem that is
24 paramount in my mind in terms of sanctions. It is true that
25 we now have the ability to impose probation on a corporate

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1 enterprise, and probation typically, as it applies to an
2 individual, says to the individual you have been sentenced
3 to a period of incarceration, suspended, or at least in part
4 suspended. If you violate your probation, you will go to
5 jail.

6 Corporations don't go to jail. So what happens
7 if the corporation does violate its probation?

8 I disagree with my colleagues when they say the
9 contempt citation. I don't believe it is possible. I don't
10 believe that the court can order an individual within a
11 corporation to maintain the probationary period. After all,
12 that individual is not the person who has been prosecuted.

13 So what we have, in my own personal judgment, is
14 the anomalous situation that a very good sanction, the very
15 kind of sanction that should be used to see to it that
16 the future does not repeat the past, may result in
17 a nonentity. Nothing happened.

18 Violation of the probation, and the corporation
19 reappears before the court, and the court says I have now --
20 I have already imposed the maximum punishment by way of
21 fine. The violation of probation, as I read the statute,
22 says you can come back and be resentenced to the maximum, or
23 that has been provided in the first (inaudible).

24 But the corporation has already been fined to the
25 maximum. Typically, that is what a court would do.

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1 What happens?

2 I don't know what happens, but I would think that
3 this Commission might have some authority or power in its
4 report to suggest to Congress that perhaps a new offense is
5 created or should be created by the violation of the
6 probationary period.

7 In summary, then, my position is that the
8 interaction between deterrence and retribution can be
9 achieved through fines, through restitution, through a
10 probationary period, through publicity, publicity which will
11 indicate to the community that this corporation is one which
12 is not as its advertising otherwise would depict, publicity
13 which would tell the people who have been hurt by its action
14 that they may have a cause of action which they might not
15 otherwise be aware of without that publicity, and, most
16 importantly, a totality of sanctions which will result in
17 what I call disutility of the commission of the crimes to
18 the corporate enterprise, make it so that it is not
19 profitable as a corporation.

20 CHAIRMAN WILKINS: Thank you very much. Let me
21 ask you about publicity.

22 How extensive should the publicity be after
23 conviction of a corporation, and who should frame the
24 language? Should it be the Department of Justice, or should
25 the court place that burden on the defendant, then they come

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1 back and report and show what has been done? Should the
2 court do it?

3 Just what is the procedure that you would suggest
4 that we might suggest in our guidelines be followed?

5 MR. SILETS: My belief is that (inaudible)
6 prosecution bears the burden of proof, that they should go
7 first, just like in any sentences. They should go first and
8 propose what they feel is the best.

9 The defense, the corporate enterprise, should
10 have an opportunity to comment or make its own proposal as
11 to the contents of the publicity.

12 And the final arbiter of course would be the
13 judge.

14 In terms of the scope of the publicity, I think
15 that depends on the scope of the offense. If it is
16 localized, I think then the publicity should be localized.
17 If it is a national -- if it has a national impact, it
18 should be publicized nationally.

19 But at a minimum, it seems to me that it should
20 be in all of its filings with the SEC and all other
21 regulatory agencies and to all of its stockholders.

22 CHAIRMAN WILKINS: All right, sir.

23 Any questions to my left?

24 VOICE: (Inaudible.)

25 Why couldn't the judge say to the officers, I am

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1 going to put you under an order to fulfill the conditions of
2 the probation?

3 (Inaudible.)

4 It is an obligation that the court raise its
5 hands. Couldn't the judge in carrying out that obligation,
6 carrying out his initial order, tell the president, you do
7 this in the future. Then if the president doesn't do it in
8 the future, the president is violating the court order that
9 the judge imposed.

10 Why not?

11 MR. SILETS: Judge Breyer, I don't think that
12 that can be done because (inaudible) corporate officers are
13 not the persons who commit the offense.

14 COMMISSIONER BREYER: I know, but suppose that
15 you were a president of a corporation and the corporation
16 has a legal obligation to pay me some money. I can go in
17 and enforce, I take it, the corporation to pay me the money,
18 and you, as the officer of the corporation, again as a legal
19 obligation, I guess, would be forced to write the check.

20 MR. SILETS: Yes, on the other hand --

21 COMMISSIONER BREYER: So why can't you as
22 attorney do the same thing vis-a-vis that obligation
23 (inaudible)?

24 MR. SILETS: What would you say then -- if I
25 might counter with a question -- if the corporate officer

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1 resigned, said I am not going to undertake that burden; I
2 didn't commit the crime and I shouldn't make these -- take
3 the steps which the court orders me to do?

4 I guess the point that I am making is that while
5 it is common for the corporate enterprise to commit a crime
6 through its agents and it is also common that the agents or
7 officers are prosecuted as well, it is uncommon that
8 corporations are prosecuted only, and I think it would be
9 unfair to take in that circumstance and order an individual
10 officer to comply with criminal probation.

11 COMMISSIONER BREYER: You have written this
12 (inaudible)?

13 MR. SILETS: Yes, in one of my footnotes.

14 VOICE: How about (inaudible) contracts in
15 government cases?

16 MR. SILETS: I think that that is a decision that
17 can -- that is an opportunity for the district court, but I
18 think the district judge has to weigh that very carefully.
19 There may be national interests that would exceed the
20 punishment that may be thought necessary in an individual
21 situation.

22 I don't suggest that it should not be a sanction,
23 but I don't think it should be one which should be lightly
24 undertaken.

25 VOICE: I have a good deal with this notion of

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1 disutility and punishment, but would you -- the questions
2 that were raised this morning about innocent shareholders --
3 how do you reconcile the disutility and punishment with the
4 possible effects on innocent shareholders?

5 MR. SILETS: Well, in my piece that I have given
6 you I have cited a couple of situations where corporate
7 fines have resulted in an impact on large public
8 corporations of 33 cents a share.

9 I am not quite certain that with a large company
10 that fines of the magnitude that the Criminal Code permit
11 will have any significant effect at all.

12 In terms of restitution, we start on the premise
13 that there has been an unlawful benefit for the corporation
14 to begin with. So removing that benefit from the
15 corporation should not injure the stockholder.

16 It seems to me the extreme circumstance is when
17 you impose capital punishment.

18 VOICE: Let me go back to this 33 cents a share
19 because while it sounds like a little, some of the
20 shareholders are kind of concentrated, but if you are right
21 that there is very little effect on shareholders, then where
22 would you get the tax from at the organizational level?

23 You have got sanctions on the individuals, and
24 that should (inaudible) their behavior. Where would you get
25 the --

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1 MR. SILETS: Well, you are going to get it
2 through the combination of sanctions, not by fines alone,
3 and that is my point. A fine alone is not sufficient to
4 accomplish the task of deterrence. It is the combination of
5 all of those things that I have described (inaudible) used
6 in concert that will deter the corporation from future
7 criminal conduct.

8 VOICE: I certainly agree with you when you say
9 that liquidation is not always appropriate. Of course, the
10 claim that Mr. Freeman was making that I thought you were
11 agreeing with was that it is never appropriate for
12 corporations.

13 It would seem to me you -- essentially two
14 arguments that you made about why it was inappropriate, one
15 that there is this disruption to employees and another
16 (inaudible) not corporate conduct that would ever justify
17 the death penalty analogy.

18 But I take it the first one is easy enough to
19 resolve by -- before distribution of assets to stockholders
20 after liquidation the corporation is required to provide --
21 find alternative employment, provide moving expenses or
22 retraining or whatever. I mean, there is a good deal the
23 corporation could do to solve the problem of disruption to
24 employees.

25 So really what it comes down to is, is there

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1 corporate conduct that is ever bad enough to justify that
2 sort of sanction with liquidation?

3 Now, I suppose even if you took a standard that
4 was tied to the death penalty for human beings you could
5 certainly have cases where board of directors sanctioned
6 conduct that causes death, that impairs the national
7 security of the country, things like that. But -- so I
8 suppose there is no reason to think that the standard for
9 the death penalty of human beings is what is used for
10 corporations.

11 If they exist for our benefit, isn't it just for
12 us to make a judgment whether society would be better off
13 with them or without them and that that ought to be a
14 liquidation standard?

15 MR. SILETS: Let me start first by suggesting it
16 is my belief that Congress rejected the liquidation of
17 corporations and sanctions somewhere in the process of
18 coming up with penalties that had been considered by
19 committed but rejected.

20 But assuming that it was -- for purposes of this
21 discussion -- (inaudible), I think that if the corporate
22 structure was very small, with few employees, the problem of
23 giving employment to the otherwise displaced employees would
24 not be difficult. But just imagine the Du Pont Corporation
25 being liquidated. The problems would be so massive they

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1 couldn't be accomplished.

2 Is there an incident where corporate crime
3 results in individual death and therefore should not capital
4 punishment be imposed?

5 Perhaps, but it seems to me that the sentencing
6 court, when it imposes judgment, has to take into
7 consideration not only the offense but what the judgment and
8 sentence would have -- what impact it would have on society
9 as a whole.

10 And if you impose the liquidation sanction on
11 corporations, it would seem to me that you could not make a
12 hard and fast rule because it is so extreme, particularly in
13 the case of a public corporation, that if it were ever to be
14 used at all it would have to be used with the greatest
15 discretion and on the (inaudible).

16 CHAIRMAN WILKINS: All right, fine. Any other
17 questions from the Commission?

18 (No response.)

19 CHAIRMAN WILKINS: Well, Mr. Silets, we greatly
20 appreciate you coming. We will study your written testimony
21 in more detail.

22 Thank you very much, sir.

23 Do you want to take a five-minute break?

24 We are going to take a 10-minute break. At 25
25 minutes after 11:00 we will promptly reconvene.

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Thank you.

2

(Recess.)

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CHAIRMAN WILKINS: We are very pleased to have with us as our next witness Mr. Stephen S. Trott, who is the Assistant Attorney General in charge of the Criminal Division at the Department of Justice.

7

Mr. Trott, we appreciate your appearance today and the work that you and your division have put into this appearance, and I might add, too, all of the assistance that the Department of Justice has given us when we began our work several months ago.

12

TESTIMONY OF STEPHEN S. TROTT, ASSISTANT

13

ATTORNEY GENERAL, CRIMINAL DIVISION, U.S.

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DEPARTMENT OF JUSTICE

15

MR. TROTT: Mr. Chairman, thank you very much.

16

It is my pleasure, and we are delighted to be of help. I am glad we have been able to be of some service to you, and we are looking forward to continuing to work together in the future.

19

20

I have filed a somewhat lengthy document outlining the various positions that we have on some of the issues before you. With your permission, I would forego reading that document and simply make a couple of observations and then, on the basis of some of the very interesting and I think informative discussion that has been

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1 held here so far today, answer some of your questions.

2 First off, there seems to be a divergence of
3 opinion on an issue that I think is very, very important,
4 and that is whether or not -- just exactly what you ought to
5 do to an organization.

6 It seems to me, to paraphrase, that there has
7 been expressed the idea that somehow it is the individuals
8 who you really should be concerned with and by going after
9 the individuals you handle the problem. After all, it is
10 the individuals who did it, so why get so upset with the
11 organization?

12 In my experience, which extends back over 20
13 years as a prosecutor, I believe on the basis of that
14 experience that organizations, as organizations, do react to
15 criminal prosecution and they are subject to the enforcement
16 purposes that are contained within the idea of general
17 deterrence.

18 I have seen this on many, many occasions, not the
19 least of which involves the now interesting and
20 well-discussed E. F. Hutton case, a case in which no
21 individuals were prosecuted, for reasons that have been
22 explained in public many times. Nonetheless, the effect
23 that that case had, not only on E. F. Hutton itself in terms
24 of changing practices, policies, procedures and the lack of
25 control on low level individuals who were responsible for

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1 that, but the impact of that on other corporations and other
2 organizations similarly situated who are involved in very
3 large cash management programs has I think been rather
4 dramatic.

5 I have talked to many people who work for other
6 companies who manage cash, and everyone has told me that
7 after the E. F. Hutton case they immediately pulled in all
8 of their people and examined what they were doing and in
9 most instances changed what they were doing. They cut out
10 the problem of the float price that we identified in the
11 E. F. Hutton case.

12 Probably in excess of 25 people have told me that
13 the E. F. Hutton case had an impact on their organization
14 simply because they did not want to get charged with
15 criminal conduct, and again there is a situation where no
16 individuals were ever prosecuted.

17 I think if you were to talk to Hutton itself and
18 ask them what the impact and effect the prosecution had on
19 Hutton, they would tell you that it was enormous. People
20 were fired right and left. They changed internal
21 procedures. The publicity of the criminal prosecution
22 itself had an impact on Hutton.

23 Then in essence it ends up in the final analysis
24 protecting the people that were supposed to be protected,
25 and those are the potential future victims of these kinds

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1 of schemes.

2 In other cases in which I was personally
3 involved, such as one involving Rockwell out on the West
4 Coast, we instituted a number of sanctions and we watched
5 the turnaround inside the company, even though no individual
6 in that case again was prosecuted. But we put into place
7 through something that was akin to probation a whole series
8 of things that Rockwell had to do, and they did them, and I
9 think it protected the government in that case, doing
10 business with Rockwell, from any future criminal conduct.

11 To give you an idea of the kinds of things we did
12 in the Rockwell case, we said to Rockwell -- we forced
13 Rockwell essentially into accepting an injunction, and in
14 the injunction Rockwell agreed to the labor mischarge
15 (inaudible). They had a couple of contracts. Instead of
16 charging it to Contract A, they were charging it to
17 Contract B as a result of management.

18 And we told Rockwell, look, you are going to have
19 to produce a movie. In that movie you are going to have to
20 explain to your employees what their responsibilities are
21 when it comes to labor charges, and you are going to have to
22 show that movie to every employee involved in these
23 divisions once a year. And they agreed.

24 You are going to have to put on the wall a sign
25 that says, remember your responsibilities in terms of labor

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1 mischarging, and if anybody suggests that you do anything
2 else, call these numbers.

3 We forced them to put in place a whole new
4 computer program for timekeeping. We forced them to serve
5 copies of the injunction on each new employee and all the
6 employees that were around so that everybody was fully aware
7 of what was going on.

8 So through a whole range of options we were able
9 to engage in specific and general deterrence.

10 I think that is really what the message is. As
11 was so ably said by the witness before me, judges aren't
12 going to just pick things out of the air when it comes to
13 restitution and judges and courts aren't going to treat
14 people arbitrarily and capriciously. Every situation is
15 going to be somewhat different.

16 So what I think is necessary is a full range of
17 options available to sentencing judges, from thermonuclear
18 to almost an encouraging pat on the back, which a sentencing
19 judge can choose from in order to address the kind of
20 conduct with which that sentencing judge is confronted, and
21 in some situations that is going to have to be very, very
22 strong medicine.

23 When you have a large corporation which engages
24 in wholesale criminal conduct which results in the loss of a
25 lot of money in any kind of a context and it appears to be

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1 the organizational policy to do this, you are going to want
2 to have a sentencing judge in a position where fines can be
3 enormous and where all kinds of measures can be taken to
4 make sure that that kind of conduct goes punished and that
5 people who are similarly situated watching that kind of
6 conduct recognizes there are costs of cheating the
7 government, of cheating elderly people, of cheating
8 whomever, that are far greater than any benefit that can
9 possibly be gained by this activity.

10 But then you are going to have to have also the
11 option to ratchet this down. If you have a corporate
12 situation where it is not the corporate policy, where it was
13 low level people who were engaged in this activity, such as
14 in the E. F. Hutton case, then a judge will want to tailor
15 the sanctions accordingly.

16 I think definitely that there should be the
17 availability of fines that far exceed the amount of the
18 loss, far exceed the amount of the loss. You are going to
19 find a situation where you have a huge corporation. The
20 provable loss is going to be a figure that in connection
21 with the total assets of that corporation is almost
22 nothing. If you impose that type of a fine, it becomes just
23 a joke.

24 So I think again you have to have a full range of
25 options. That has always been something that struck me as

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1 very important for a sentencing judge. We have a tendency
2 to have all kinds of options for the people who need a
3 break, for the organizations who need a break, for the
4 organizations with a lot of innocent shareholders and a lot
5 of innocent employees, but we have to make sure that we also
6 have the kinds of options that are necessary when you get a
7 real rogue outfit that just sits down and decides it is time
8 to please everybody under the sun. And we are confronted
9 daily with those kinds of corporate or organizational
10 enterprises in the United States.

11 Then the other idea that has been talked about
12 briefly is -- again, it is a variant of this -- is all you
13 have to do is get the individual. If you have a system that
14 focuses just on the individuals, what you do is you create a
15 new position in organizations. It is called Vice President
16 in charge of Going to Jail.

17 (Laughter.)

18 And all they do is jettison a scapegoat here, a
19 scapegoat there, and there is no incentive for them to clean
20 up the act.

21 So unless you have something that can impact on
22 the organization, you don't have the CEO or whoever it is
23 running that operation or the shareholders or anybody else
24 with an incentive to make sure this never happens again.

25 General Dynamics is a good example. It was

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1 featured recently on McNeil-Lehrer. It has been the subject
2 of a lot of discussion in Congress and a number of
3 lawsuits.

4 Without getting into any of the merits of these
5 lawsuits, when we were discussing General Dynamics we kept
6 saying to ourselves there has got to be a change of attitude
7 in this organization and the attitude right now is not a
8 good one. What changes the attitude? And the only thing
9 that changes attitude is availability of strong medicine.

10 We began to see changes in attitudes in General
11 Dynamics. All of a sudden, there was a new person in charge
12 of the operations, and one of the first thing that the new
13 person did was install an ethics course for the executives
14 in General Dynamics, and they even had television cameras in
15 the ethics course, discussing these issues of labor
16 mischarging and all the rest, and it appeared to me that it
17 was coming -- that the message was finally coming down from
18 the top:

19 Let's clean up the act. A government contract is
20 not just an opportunity to get rich quick. It is also an
21 obligation to play by the law.

22 So again -- I don't want to get into too great a
23 detail here. I had rather answer some of your questions --
24 you have to change that attitude in the organization. If
25 all you are going to do is get the Vice President in charge

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1 of Going to Jail, you are never going to change the attitude
2 of the corporation. The corporation can always say we were
3 clean, John Jones did it. Get rid of John Jones, and it is
4 business as usual.

5 Now, on fines we have advanced an idea in our
6 papers -- and I am sure that it is not a new idea -- that a
7 judge imposing a fine should really examine very carefully
8 what the impact of that fine is going to be and to ask the
9 organization or whomever -- probation person or a special
10 master, whatever -- to come up with a fine that will have
11 the intended impact on the company.

12 In other words, where is this money going to come
13 from? Is it going to impact a lot of innocent employees?
14 Is it going to adversely impact a lot of innocent
15 shareholders, or does the company have a bunch of money
16 sitting around that it was going to use to acquire some
17 other company that is available for this fine, and is it
18 going to have the real -- the hammer effect on the company,
19 where it belongs, and not on the people who can get swept up
20 in these kinds of things?

21 So I think that the approach is to -- when you
22 begin to talk about a fine -- to begin to ask, well, how is
23 that company going to pay the fine, where is it going to
24 come from? Then the fine can be tailored to have the best
25 possible impact; in other words, sort of a surgical impact,

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1 corporations are concerned.

2 MR. TROTT: I agree with you, and all of the
3 things that you have identified are aspects that could be
4 looked into.

5 It might be more valuable for us to answer that
6 for the record and to put together our thoughts on the
7 subject in a concise written form and get that to you just
8 as soon as we can.

9 CHAIRMAN WILKINS: All right, sir.

10 MR. TROTT: But I firmly believe that it has to
11 exceed the amount of the loss or else it is not going to
12 have the impact that you want it to have on the organization
13 in question.

14 CHAIRMAN WILKINS: All right, sir.

15 Any questions?

16 VOICE: Mr. Chairman, this is just a comment,
17 that on the E. F. Hutton situation, the fact that the
18 medicine must have indeed been strong was indicated by the
19 fact that they expended, and I guess will be expending,
20 large sums of money to hire people who are squeaky clean and
21 who have credibility with the American people to in fact
22 assist them in improving their image.

23 MR. TROTT: That is right.

24 VOICE: So I see that as a strong indicator, and
25 it is sort of a punishment in that it does involve the

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1 expenditure of funds.

2 MR. TROTT: They were socked by that case, even
3 though no individual was touched, to the extent -- as you
4 point out -- they went out and hired one of the most popular
5 human beings in the United States, Bill Cosby, to try to
6 rehabilitate their image, and, you know, good luck.

7 VOICE: Yes.

8 (Laughter.)

9 MR. TROTT: But that again shows that an
10 organization will respond even if -- they did not have the
11 opportunity to jettison in a criminal case any of the
12 scapegoat Vice Presidents in charge of Going to Jail. They
13 had a case -- the whole thing -- as an organization right in
14 the nose, and the important thing as far as we were
15 concerned is that that was appropriate in that case.

16 The entire management structure at the upper
17 levels of E. F. Hutton was not directly involved in the
18 criminal conduct that was carried out by some lower level
19 people, but they created an atmosphere in which they
20 encouraged this type of behavior, and they absolutely looked
21 the other way when it was going on.

22 So we felt that it was very appropriate to hit
23 the organization as an organization rather than go down to a
24 couple of lower level green eyeshade people and blast them
25 in a small court somewhere up in Scranton, Pennsylvania.

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VOICE: Management with a corporation is about the same as a military organization in that the military commander is responsible for all that the company does or fails to do. In this case it works through from management, and so that is really essentially the same.

MR. TROTT: Yes, and we did use an injunction in the E. F. Hutton case also that was able to encompass conduct that we could not have ever prosecuted criminally, but we were able to convince E. F. Hutton to submit themselves with respect to their cash management schemes to this very, very broad (inaudible).

CHAIRMAN WILKINS: Questions?

VOICE: If you are going to submit (inaudible) difficult question, but I think it would be quite interesting, the question the Chairman asked, because after all the money -- you know, the money to be used to acquire another corporation belongs to the shareholders. The money that just sits there has an owner, and the shareholder might be innocent.

So I am quite interested in how we determine the appropriateness of the fine, what level.

The other two things that I would be very interested in are how do you decide to prosecute the corporation as well as the individuals -- for example, you just said, well, look, the people up at the top of the

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1 company -- well, they -- you are going to say you couldn't
2 prosecute them as individuals because they didn't have the
3 requisite state of mind.

4 MR. TROTT: That is right.

5 VOICE: And then you thought, well, the question
6 is if there is a totally innocent state of mind what are we
7 doing involving them at all?

8 And you felt, well, they are somewhere in
9 between. They don't have a totally innocent state of mind,
10 but they don't have a totally guilty state of mind, and
11 maybe there is nothing more to say about that issue than
12 that.

13 But you probably have some way, perhaps more
14 complicated than that, of figuring out when it is
15 appropriate to make a corporation the defendant, and I would
16 find that awfully interesting if you have.

17 MR. TROTT: Every case obviously differs, to
18 state the obvious, but our general policy, our normal
19 policy, is to prosecute both the organization and the
20 individual if we have of course proof with respect to each
21 side of that equation that there was culpability for the
22 crime.

23 But when we address an -- when we start an
24 investigation, we are investigating both the corporate or
25 the organizational responsibility and looking for the

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1 individuals that did it.

2 The best possible outcome, we get both the
3 company and the individual.

4 VOICE: If in fact over in the division -- I
5 mean, again of the department -- you might have something on
6 also the questions that are being raised, which I think is
7 pretty interesting. It involves both individuals and
8 corporations, and that is the question of when you prosecute
9 people where they have less than an intentional state of
10 mind, and particularly regulatory offenses.

11 That is -- because there is a temptation, which
12 he points to, I guess sometimes. When something terrible
13 happens in the world, people want to blame somebody, and
14 what he is worried about is sometimes it is a somewhat
15 innocent person who gets blamed and gets hit with the whole
16 reaction that people have.

17 And so I think he in a way was looking for lines
18 that will distinguish as to what the state of mind has to be
19 in a regulatory offense, the individual and the corporation,
20 and that might be something again that the people in the
21 department have thought about.

22 MR. TROTT: Yes, we have, and that is a situation
23 where prosecuting the organization, based on the facts,
24 could be the appropriate thing to do rather than the
25 individuals.

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1 But again it depends on exactly what the
2 individuals did.

3 Of course, as you recognize, it is not our job to
4 rewrite the laws that Congress gives us. If Congress says
5 this is a crime, you know, and these are the elements of it,
6 you know, we sort of salute. And we have wide discretion
7 within the parameters, but we just can't go outside and say,
8 well, Congress really didn't mean to do this, so we are
9 going to red-line it from our code.

10 VOICE: You have several aspects of your case
11 when it involves a corporation, and I presume that what you
12 are saying is that it depends on the case. And if you have
13 a man in a corporation that has general corporate,
14 managerial authority and he commits a crime or directs a
15 crime you are going to prosecute him as well as the
16 corporation whose agent he is. But if it is some person
17 down here selling something on the street for a particular
18 corporation and he is out on his own and misrepresents or
19 something like that, you are not going to attack the
20 corporation. And it just is a question which is determined
21 in each case by the nature of the offense.

22 The one point I want to make is it was always my
23 understanding that if a corporation is acting illegally --
24 and I am talking about (inaudible) corporation such as you
25 were talking about -- that it is within the power of the

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1 Attorney General of the state to go in and cancel that
2 corporation's charter and that they have done it and can do
3 it in certain cases.

4 Now, we tend to, I think, focus too much on a lot
5 of the large corporations. There are a lot of smaller
6 corporations where the criminal intent can be more directly
7 focused on the corporate officers, and throughout the
8 country, why, those people are subject to some of the local
9 action by the Attorney General. At least that is what I
10 always thought (inaudible) the Attorney General to go after
11 corporations like that.

12 And I don't suppose you have seen any cases of
13 that. I have seen one or two. But that is a possibility
14 and shouldn't be overlooked. If you have got a real bad
15 corporation, you might try to prevail upon your local
16 Attorney General.

17 MR. TROTT: That is true. Savings and loans have
18 charters, and there are all kinds of activities. We have
19 seen many failures around the country.

20 VOICE: Yes.

21 MR. TROTT: Maryland and Ohio. And you are
22 accurate when you point out that there are the remedies to
23 be brought there against these organizations.

24 Another point that was made earlier about
25 debarment with respect to companies that do business with

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1 the government. I frankly would rather see that left to the
2 government.

3 On many occasions we find that the government
4 would rather continue doing business with a company under
5 changed circumstances than find themselves unable to do
6 business with that company at all. Sometimes in the
7 interest of national security it is necessary for a company
8 to clean up its act rather than go out of business.

9 CHAIRMAN WILKINS: Mr. Trout, do you think that
10 the guidelines which we will ultimately promulgate take into
11 account the civil liability a corporation may suffer as a
12 result of what has been prosecuted by a criminal indictment,
13 albeit the fact usually the civil case comes perhaps years
14 after the criminal action has been concluded? Is there any
15 way that we could do that, and should we do that?

16 MR. TROTT: Well, that is hard to tell because
17 you have a lot of different situations, such as false
18 claims. You frequently will bring a charge, a criminal
19 charge, against a company and that is followed by a false
20 claim suit by the Civil Division.

21 Ordinarily, when I am confronted with this
22 problem, I have a tendency to say let the civil case take
23 care of itself, let the private case take care of itself,
24 let the charter problem take care of itself, let the
25 licensing problem take care of itself.

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1 We used to become involved in what we called
2 global settlements. I got to the point where I decided that
3 global settlements are more trouble than they are worth.
4 The more people you get involved -- the state attorney
5 general, the licensing people, all these kinds of things --
6 the less possible it is to resolve the case.

7 On occasion we do settle cases with a local
8 settlement, both the civil side and the criminal side, but I
9 think on balance I would have a tendency to allow the other
10 areas to take care of themselves.

11 But that doesn't mean for a second that I don't
12 think restitution has a valid part in the sentencing
13 process. I think that has got to be kept in the forefront.
14 For too long we have ignored the victims of these kinds of
15 crimes in the criminal justice system. Restitution I think
16 is appropriate.

17 In the Hutton case, one of the keys to the
18 settlement, for example, was the willingness of Hutton to
19 pay back every penny from all the banks that had been
20 fleeced plus interest and to sit still for the establishment
21 of a special master program that would sit down with the
22 banks and all the 7000 -- 7 million documents that we had
23 and figure out what the loss was.

24 VOICE: (Inaudible) criminal also involve a civil
25 case, and you prosecute your civil -- your criminal case

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1 first --

2 MR. TROTT: Yes.

3 VOICE: -- and then your civil case (inaudible).

4 MR. TROTT: Yes. Again, sometimes when you are
5 prosecuting that type of a case and there is a plea, an
6 arrangement will be made to forego the civil consequences or
7 to include them in the settlement of the case.

8 CHAIRMAN WILKINS: Commissioner Nagel.

9 COMMISSIONER NAGEL: You mentioned giving
10 consideration to the negative impact on potentially innocent
11 shareholders or innocent employees at the same time you
12 yourself know that sometimes the impact of the sentence will
13 create a positive influence because an incentive for
14 shareholders exercising control.

15 Do you have any suggestions for rules that you
16 would use to establish how we determine or how one resolves
17 the tension between those two positions and ultimately
18 (inaudible)?

19 MR. TROTT: I think again it depends on the case,
20 and you would have to analyze the case and determine whether
21 this was corporate policy emanating from the highest levels
22 of the organization or whether this was some operation that
23 got going down below that people at the top weren't aware
24 of, and again you are sort of looking for an overall sense
25 of the responsibility of the organization for the conduct

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1 itself, whether it was deliberate, whether it was negligent,
2 whether it was innocent at the levels that drive the
3 corporation, and I think then you tailor the response around
4 the level of criminality that you find at the various strata
5 in the organization.

6 It is not all that easy, but just like I point
7 out some of the factors in the document that I have
8 submitted to you, if there was a distinct corporate purpose
9 involved then it is one thing. If this was something that
10 just kind of happened because somebody at a particular level
11 was doing it more for personal reasons than for corporate
12 reasons, then it is something else.

13 CHAIRMAN WILKINS: Mr. Trott, we appreciate very
14 much your sharing with us....

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1 CHAIRMAN WILKINS: Thank you.

2 Our next witness is also from Chicago, a
3 distinguished member of that Bar, Mr. Mark Crane.

4 Mr. Crane, we're delighted to have you with us.

5 MR. CRANE: Thank you.

6 STATEMENT OF MR. MARK CRANE,
7 CORPORATE DEFENSE ATTORNEY, ANTITRUST

8 MR. CRANE: Chairman Wilkins, Members of the
9 Commission, I'm here individually and on behalf of a small
10 group of antitrust lawyers who are experienced in the
11 handling of criminal antitrust cases.

12 I gave to the staff this morning a surprise copy
13 of the testimony, adding the name of John Shennifield.
14 Mr. Shennifield and Mr. McGraph, who already signed the
15 statement, are both former Assistant Attorneys General in
16 charge of the Antitrust Division.

17 We are all active in the Antitrust Section of the
18 American Bar Association. I will be its chairman starting
19 in August, but we are here individually and our views
20 represent our own. They represent no views of the Antitrust
21 Section or of the American Bar Association.

22 So I'm happy to say that in no major respect do I
23 think they differ from what Mr. Freeman and Mr. Brodsky have
24 said here today in general terms.

25 What I would like to do would be to orient you

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1 for a moment to the antitrust case and summarize briefly the
2 positions set forth in our paper, and then submit to
3 questions.

4 We are typically talking about a price-fixing
5 case. We are typically talking, though not always, about a
6 larger corporation.

7 I think you should have those limits in mind in
8 analyzing what we are talking about.

9 Antitrust is unique perhaps in having nearly a
10 100-year history in criminal enforcement, enforcement that
11 involves both organizations and individuals.

12 And the central point of our message is that we
13 think that the balance that has been worked out of sanctions
14 in the past has been successful, and it is one that should
15 not be seriously tampered with for reasons relating to the
16 kind of offense we're talking about.

17 The past sanctions have consisted of sentences
18 for individuals, which can include jail, fine, and several
19 damage sanctions in subsequent cases.

20 We would like to talk briefly about each of these
21 in turn. It is our view that perhaps the most important
22 thing that can be done to deter organizational antitrust
23 offenses is to deal severely with the individuals who are
24 convicted of acting on behalf of the corporation.

25 We believe that a jail sentence for those people

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1 should be the norm. It does not have to be long -- a few
2 weeks to a few months is sufficient.

3 But the concept of going to jail we think is
4 central to organizational deterrence. There are at least
5 two reasons for that.

6 Most businessmen feel that pricing policy is a
7 legitimate arm of sales and corporate policy. And even if
8 they think that what they are doing when they talk to
9 competitors about price, or about divisions of markets, is
10 illegal. They don't consider it to be criminal.

11 And we believe there is no way to convince
12 corporate executives, both in the same corporations and
13 other corporations, of the fact that price-fixing is a
14 criminal act, indeed, a felony, than to impose on a regular
15 basis jail sentences on those convicted.

16 Secondly, we believe that the imposition of jail
17 sentences as a regular matter changes the dynamics within
18 the organization. Typically, the people who are involved in
19 the front line are lower level managers, sometimes reacting,
20 dutifully reacting, to some kind of pressure from above,
21 maybe implicit, maybe explicit.

22 By raising the ante of the offense, by imposing
23 the jail sentence on them, it will make the junior level
24 manager who would be in the front line of the offense more
25 resistant to it. He would be more likely to say no.

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1 And when he says no, his superior would be likely
2 to do it. But we believe that when we talk about
3 organizational offenses, at least in the antitrust area, you
4 cannot do so without considering the very important impact
5 of fines on the people convicted -- I'm sorry. Jail
6 sentences on the people who are convicted.

7 Turning briefly to fines, they are not an
8 important sanction on organizational antitrust cases in most
9 offenses, because the corporations are simply too large and
10 the maximum fine is a million dollars.

11 In a smaller corporation, it may be very
12 important. But in the large corporations, it simply doesn't
13 matter.

14 We are not concerned about the possibility of
15 larger fines. We think that fines that were larger might be
16 helpful, but they are not presently authorized by law.

17 We do feel strongly, however, that the fines
18 cannot be tapered to the damage caused in an antitrust, or
19 to a multiple of the damage caused, because of the
20 complexity of the proof.

21 We have had a lot of experiencing in proving
22 damage in antitrust cases. And it's done in the civil cases
23 by a comparison of a hypothetical price, competitive price,
24 with the actual price. And this requires expert economic
25 testimony, statistical testimony, accounting testimony.

OMT/bc

1 This is the result of perhaps a year or more of
2 discovery and several weeks of trial. To import this
3 complicated process into the sentencing process would unduly
4 complicate and delay it. We think the present system works
5 well without it.

6 We have similar reservations about the use of the
7 criminal process for restitution. There, in addition to
8 computing the amount in gross, you have to find out who all
9 of the purchasers were and how much their purchases were.
10 And then you multiply it, and overcharge time for the valid
11 purchases and that's the damage.

12 And that simply is a major piece of litigation
13 under class action law and not one, once again, that lends
14 itself to the sentencing process.

15 Fortunately, we believe that the treble damage
16 action is a useful device in that regard. It does provide
17 restitution. It does provide a real deterrent. And in
18 severe treble damage cases, they are expensive and
19 disruptive to them and the damage can run into tens of
20 millions of dollars.

21 So the bulk of our view, the crux of our view, is
22 that the present system has worked well and that there is
23 little that should be done to change the sentencing process
24 in this particular area.

25 You will notice, however, that I have not

OMT/bc

1 mentioned anything about probation or corporations. We have
2 had relatively little experience with that, and we are
3 trying to speak based upon our collective experience as
4 practicing lawyers on the defense and prosecution side.

5 We don't believe it inappropriate to put a
6 corporation on probation. I think we agree with most of
7 what has been said here. This is covered in my paper, the
8 thrust of our position.

9 We have some of the same reservations
10 that Mr. Freeman expressed about probation which tries to
11 run the business of a defendant. We think that particularly
12 in the antitrust area, where it goes to the whole sales side
13 of the business, where the business sells its product, this
14 is not something that the court or a master can really run.

15 But we do feel that probation with certain
16 specific, carefully crafted conditions, might be
17 appropriate. You could debar certain of the employees from
18 participating in the price-setting or even the sales side of
19 the company, for example.

20 You could provide that there be an antitrust
21 compliance program if it was specifically stated exactly
22 what the organization had to do -- what subjects they had
23 to cover, when, with what kinds of people, something like
24 the film that Mr. Trott mentioned.

25 And, very important, it could include publicity

OMT/bc

1 sanctions. We believe strongly that since the treble damage
2 remedy is a cornerstone of enforcement, the victims need to
3 know about it.

4 The newspaper is pretty good about that already,
5 but the sentences make sure that the victims learn, probably
6 by newspaper or media because of the difficulty in mail
7 advertising to a lot of groups of purchasers; and also the
8 purchaser's identity is long-gone, if it's kind of a small
9 transaction that records aren't kept after the bills are
10 paid by the purchasing organization.

11 So we do feel that that is significantly
12 important. That is the thrust of what we had to say to you
13 in writing. I think perhaps I'll stop there, if I may, and
14 take whatever questions you might wish to ask.

15 COMMISSIONER: We appreciate your position
16 regarding the complexity of measuring the appropriate fine
17 to be imposed. Fortunately or unfortunately, that's a task
18 that we must address.

19 And so I wondered if you were given the
20 responsibility of devising a system that would appropriately
21 calculate a fine in an antitrust case, what would be the
22 principles that you would employ?

23 Bearing in mind we've got harm to the
24 competitors, we've got harm to the public in general, that
25 perhaps should be taken into account.

OMT/bc

1 MR. CRANE: Well, first of all, I would urge you
2 not to try to do it, but to recognize that antitrust is a
3 special animal with respect to system in place and that the
4 complexity makes it impossible to do it fairly.

5 If you have to do it, I would tie it to sales
6 advertising. But I would use a very small percentage
7 multiple of that sales, maybe on the order of a percentage
8 point, or 1 percent or 2 percent, a very small amount.

9 I think even that would require additional
10 legislation. And that legislation should make it clear that
11 that fine has to then be taken into account in treble damage
12 computation in some way, at least against the treble damages
13 to individuals.

14 COMMISSIONER: Do we need legislation to
15 accomplish that?

16 MR. CRANE: I believe you would.

17 COMMISSIONER: Thank you, sir.

18 CHAIRMAN WILKINS: Questions to my right?

19 COMMISSIONER: One followup question on this
20 setting fines. One is if you aren't going to use the
21 percentage of sales, what would you use?

22 I mean, would you have flat rate fines?

23 MR. CRANE: No. Then, I think you'd have to
24 simply have flat rate fines. You could do considerable, I
25 suppose, in terms of the size of the client by raising the

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1 fine, actually to \$10 million. And let the Judge worry
2 about it.

3 It wouldn't be good under the biggest cases, but
4 it would cover a very large number of regional prices.

5 COMMISSIONER: One more followup question on the
6 smaller firms. You addressed your comments to the larger
7 firms and the larger price-fixing conspiracies.

8 But, recently, if my memory serves me correctly,
9 many of the Justice Department cases have been -- cases,
10 where the firms are in fact small.

11 MR. CRANE: Yes.

12 COMMISSIONER: Does that change the nature of
13 your recommendation?

14 MR. CRANE: Well, we note in our paper at the
15 beginning that different considerations might apply to
16 smaller firms. We do not specify what those might be.

17 I don't think anything I said would be
18 inappropriate for a smaller firm. But it might be
19 appropriate to...

20 If you have a smaller firm which is essentially
21 the alter ego of the wrongdoers, then a harsher sentence on
22 the firm itself might be appropriate. You don't have as
23 much of a problem in fact on innocent employees. There are
24 few of them finding jobs in other businesses.

25 You don't have much impact on shareholders

OMT/bc

1 because, presumably, they are connected with or are the
2 wrongdoers. In an extreme case, I would refer you to
3 corporate capital punishment, that might be appropriate.

4 In giving those remarks, I speak only for
5 myself...

6 COMMISSIONER: One last question. Why would you
7 subtract the fines if they were based on percentage of sales
8 from treble damage?

9 MR. CRANE: Because the treble damage itself is a
10 very large -- largely punitive. And it seems to me that if
11 you are talking overall penalty for the corporation, it
12 shouldn't have a very substantial fine -- I'd say 2 percent
13 of sales -- and then find that the overcharge was another 2
14 percent of sales, which is then trebled to 6 percent of
15 sales to become 12 percent of sales.

16 And if you're talking about a group of defendants
17 with \$2 billion worth of sales, you are piling, I think,
18 penalty on penalty.

19 I'm not necessarily suggesting that you should
20 automatically deduct it, but surely that you be in the
21 discretion of the Judge in the civil case, which is the
22 second case.

23 And maybe you should have the discretion of
24 deducting it before treble...

25 COMMISSIONER: The general notion being then that

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1 three times damages is an appropriate multiple?

2 MR. CRANE: I would say it's an appropriate
3 multiple because it's an historical one. We talked at some
4 length in the Antitrust Section about whether a double or
5 quadruple would be better. And that's a highly subjective
6 decision.

7 CHAIRMAN WILKINS: Commissioner Robinson.

8 COMMISSIONER ROBINSON: If a multiple of loss --
9 aren't workable, a percentage of sales is not workable, and
10 if the Commissions were willing to simply set some maximum
11 of judgment and do whatever you want within that on the
12 theory that part of our obligation is to provide some more
13 uniformity, we would like to look to something.

14 Would percentage of assets be an appropriate
15 means? Is it appropriate to have a higher fine? In a
16 sense, a percentage of that in an antitrust action, the
17 fight would be the same in relation to your total assets.

18 So there'd be the same price between large and
19 small companies. So, in that sense, it would be a flat
20 rate. When we talk about flat rate, as I pointed out, \$10
21 million for one company and \$10 million for another may be a
22 flat rate in a sense, but very different effects.

23 MR. CRANE: I think that it would be appropriate
24 to take that into account as a kind of surrogate for ability
25 to pay. And that's always a factor that is important to set

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1 the fine.

2 Let me be very clear. I do not favor using the
3 multiple of sales. I was asked by -- I think I would rather
4 see a higher absolute fine and then a series of criteria the
5 Judge raised to consider in deciding whether to go from zero
6 to, say, 10 million, whatever the number is.

7 And there is in our report a list of factors that
8 we think go to the question of how serious the antitrust
9 offense was, one of which was the amount of sales. There
10 are about six of them.

11 And I think that if you want to change the fines
12 for antitrust offenses, that's the way I would attempt to do
13 it. A higher absolute dollar, then a list of criteria the
14 Judge was requiring. But not tie it to any formula, so much
15 percentage of sales and so much percentage of assets.

16 CHAIRMAN WILKINS: Question?

17 COMMISSIONER: I'm not sure you didn't cover
18 this. You used the maximum of a million dollars.

19 (Inaudible.) I thought it was a statutory maximum of
20 \$500,000, or twice the harm or twice the gain, whichever is
21 the higher.

22 MR. CRANE: That is correct.

23 COMMISSIONER: So the million won't --

24 MR. CRANE: Well, yes and no. First of all, the
25 language of what I call the double damage fine is in the

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1 Criminal Fines Enforcement Act and has not yet been made
2 law...

3 And I've been talking to the Congress formerly
4 about the unwisdom of doing that, at least in antitrust
5 cases, for the reasons I've articulated to you.

6 Secondly, the language in the Crimes Control Act,
7 I mean, Fines Enforcement Act, specifically says that you
8 use the double damage fine only when doing so will not
9 unduly complicate or prolong the sentencing process.

10 That language comes from the victim's Witness
11 Protection Act, where there was a discussion of a
12 legislative history which indicated that their restitution
13 was not to be made in antitrust cases, it was under the
14 Title 18 cases, because of the complication of computing the
15 damage.

16 And we feel that no Judge who understands what
17 would be involved would apply a double damage fine.

18 COMMISSIONER: Do you think there should be a
19 distinction between, say, vertical and horizontal pricing?
20 Horizontal pricings have got universal condemnation. And
21 vertical pricings have (inaudible). I think are just as
22 bad, although there are some that are not so bad.

23 (Laughter.)

24 MR. CRANE: Judge Breyer, that's a very, very
25 difficult question. The Justice Department has guidelines

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1 for prosecution. What they say there is that they will only
2 prosecute in those areas where the intent was very clear.
3 That is, there was no gray area as to whether or not it
4 violated the law.

5 And this is sometimes interpreted as being the
6 rule of reason case -- criminally. If it isn't, the per se
7 case...

8 I think my feeling is, and again I'm speaking for
9 myself, is that if the Justice Department has decided to
10 prosecute criminally, then what I said should apply with
11 ranges. There will be ranges in the jail sentence, there'll
12 be ranges in the fine, and let the Judge take into account
13 the various factors that you cite where in the range.

14 But that we shouldn't try to distinguish between
15 a criminal conviction or one antitrust offense...criminal
16 issue...if the Justice Department decided to start bringing
17 a lot of innovative criminal cases, which has not been true
18 in the 30 years that I've been practicing law, then we might
19 have a little problem. But I don't think it's a real
20 problem today.

21 COMMISSIONER: ...a short jail sentence. How
22 about prison?

23 MR. CRANE: Well, I didn't mean to distinguish
24 between prison or jail. I was talking about a term of
25 incarceration. In Chicago, where I practice, short terms of

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1 incarceration are served in the Metropolitan...but I didn't
2 mean to suggest a location other than I would want to be
3 reasonably certain that it was a state place for a white
4 collar criminal to go.

5 I don't think I would want to see a price fixer
6 sent for even a short time to...that's because of the
7 tradition in our jails.

8 COMMISSIONER: Or to...

9 MR. CRANE: That's quite possible.

10 COMMISSIONER: What percentage of antitrust cases
11 do you find are criminal...

12 MR. CRANE: Uh...that's a hard question. I think
13 I would say in the area of 10 percent, but there are more
14 reliable statistics than the ones I'm giving you. But
15 you've got to remember, Judge, that there are many cases
16 which do not lend themselves to criminal prosecutions
17 because they are...or...merger cases, which is not a
18 criminal statute.

19 Most of the price fixing cases have been genesis
20 in a criminally...at least investigations.

21 COMMISSIONER: A conviction would be a felony?

22 MR. CRANE: Yes, sir. Yes, it would. If I may
23 just make one brief observation on probation in response to
24 the one question that you asked before:

25 In the antitrust cases directly, what can the

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1 Judge do if the corporation doesn't go along? In the
2 antitrust case, I don't think that's a serious problem
3 because, generally, I think the corporations will obey.

4 It isn't the kind of a crime that seems to lend
5 itself to top management saying I'm glad we did it and we'll
6 do it again. It's the kind of crime that once the
7 seriousness of it is brought to their attention, and the
8 fact that people are very anxious...

9 That doesn't really answer your question.

10 COMMISSIONER: Well, some of them continue for a
11 long time.

12 MR. CRANE: They do, but not usually after
13 something like that. All I'm saying is I think, in the
14 antitrust case, there is a good chance that the corporation
15 will obey a probationary order that is clear.

16 CHAIRMAN WILKINS: Commissioner Block.

17 COMMISSIONER BLOCK: I have a followup on that
18 kind of discussion on horizontal and vertical price-fixing.

19 MR. CRANE: Yes.

20 COMMISSIONER BLOCK: If I understood you, the
21 last comment you made about the fine is that you would
22 allow, in your own opinion, that whether it was horizontal
23 or vertical would be a factor in determining the size of the
24 fine?

25 MR. CRANE: No. I meant to say that the factors

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1 that you would use on a horizontal case to decide whether to
2 give a maximum or a minimum fine would also apply in the
3 vertical case.

4 And that in a situation where the vertical case
5 was maybe a marginal case of price-fixing, you have plenty
6 of reason to bring the fine down using the same standards or
7 the separate standards to distinguish horizontal fine.

8 Have I stated it clearly enough, or...?

9 COMMISSIONER BLOCK: Yes. No, I'm just puzzled by
10 your principle that harm is distinguished in criminal
11 punishments. That there is broad agreement I think about
12 horizontal price-fixing causing substantial harm and not
13 very broad agreement about the degree of harm vertical
14 price-fixing causes.

15 MR. CRANE: But, certainly, the degree of harm,
16 even in a horizontal case, would be a factor. There, it
17 would probably be determined by the amount of sales. I
18 think the time that same principle seems to be used to
19 analyze the effect of the vertical pricings.

20 If your view was correct, the Justice Department
21 would agree that they would not bring the case as a criminal
22 case.

23 CHAIRMAN WILKINS: Thank you very much,
24 Mr. Crane.

25 MR. CRANE: Thank you.

OMT/bc

1 CHAIRMAN WILKINS: I'm confident your remarks and
2 your submission will be very helpful to us. We appreciate
3 you taking the time and the effort to participate in this
4 hearing.

5 MR. CRANE: Thank you, Mr. Chairman. We
6 appreciate the opportunity to do so.

7 CHAIRMAN WILKINS: The final witness on our
8 agenda today is John C. Coffee, Jr. He is Professor of Law
9 at Columbia University.

10 Jack, we're glad to have you with us.

11 STATEMENT OF MR. JOHN C. COFFEE, JR.,
12 PROFESSOR OF LAW, COLUMBIA UNIVERSITY

13 MR. COFFEE: I think I should begin with one of
14 those usual prophylactic statements that says who I am not
15 representing.

16 (Laughter.)

17 Although I have heard that the reporters and the
18 American Bar Association were -- I am definitely not here to
19 represent them. They've been well-represented by George
20 Freeman and others.

21 I also am not representing the American law
22 students that I served as reporter for the Corporate
23 Government's Project. But I am interested on just where
24 corporate law and criminal law meet. Today, they're meeting
25 on the Sentencing Commission.

OMT/bc

1 I want to start by briefly saying a few orthodox
2 words that I'll say quickly...

3 One, I think there is an obvious case for court
4 penalties. I think there's probably a consensus among
5 scholars who work in this area that if you can deter the
6 principle, the principle will take care of the agent.

7 That is, penalties focused on a corporation will
8 produce -- for the agent. The corporation can monitor
9 agents much more cheaply than can society. It can find out
10 what its managers are doing, whereas, the states cannot.
11 It proposes constitutional obstacles and very high costs are
12 involved.

13 When the corporation is interested in monitoring
14 its agents, it seems to be very effective. Tremendous
15 respect on antitrust compliance programs...and I think it
16 has some impact. That's because that corporation is
17 concerned about at least that class of liabilities.

18 But I think, as a practical matter, corporations
19 are largely concerned only about antitrust liabilities,
20 perhaps securities liabilities.

21 Finally, there are problems that are focused
22 strictly on the agent. In many, many kinds of misconduct,
23 it is terribly difficult to identify the agent.

24 If you look at the Ford Pinto case, it's very
25 hard to decide there who was wrong, if you think something

OMT/bc

1 wrong occurred, because decision-making is collegial,
2 bureaucratic, it extends over a long period of time. There
3 is no one decision-maker.

4 You can identify with the kind of competence that
5 our Constitution requires before you apply sanctions.
6 Therefore, focusing on the group, certain levels do it.
7 Indeed, if you can find the agent, it might be just to apply
8 a sanction to him. You might fine a person who had designed
9 a gas tank in a Ford Pinto case with a \$30,000 a year
10 trainee who was just brought in and told to design a gas
11 tank with the following cost parameters.

12 That person really shouldn't have the whole
13 stigma applied to him. Nor is the financial executive who
14 said to cut the costs 50 percent because, universally, he
15 didn't know the first thing about engineering.

16 Thus, a corporate or entity focus is justified
17 on justice grounds.

18 (Conclusion of side 1, tape 3.)

19 ...corporation which the economists say might
20 call the William Sony model of corporation. Caught between
21 the rock and the hard place. He may well know that there's
22 a criminal penalty, but he also knows there's a fairly low
23 probability of apprehension -- expectancy rate on
24 indictments.

25 On the other hand, although getting dismissed or

OMT/bc

1 demoted is a much smaller sanction in its overall severity,
2 the probability of that is quite high because of the
3 need to keep cost production --

4 So he is caught between internal sanctions and
5 social sanctions and has to determine which he will see in a
6 given case, that's pressuring him more.

7 Thus, as long as he can be pressured from above
8 implicitly, in the absence of adequate corporate
9 penalties...he will say the higher probability of an
10 internal sanction for not cutting costs or not complying is
11 more severe, facing as I am mortgage payments and children
12 going to college next semester. So I will take that chance
13 because I'm certain that I'll be dismissed if I don't reach
14 the quota.

15 That's the case, I think, in a nutshell, smaller
16 nutshell, for looking at the corporation -- not exclusively
17 but a dual strategy.

18 Now, given this, given I favor a dual strategy,
19 that you have to look both to the corporation and the
20 individual, and if both can be prosecuted simultaneously
21 very economically because it doesn't cost much to add an
22 additional name to the indictment, and it gives you very
23 unique plea bargaining dynamics, too. Trade off one against
24 the other. A true prisoner's dilemma between the individual
25 and the corporation as to who will plea bargain first.

OMT/bc

1 What should we do to make corporate penalties
2 work under this dual strategy approach?

3 I want to recommend two, very simple policy
4 objectives for the Commission to adopt, that I believe would
5 be endorsed by a board of concensus of informed people.

6 Then I wish to suggest means by which to reach
7 these ends for which I claim no particular success.

8 Finally, I want to turn to a few special problems
9 in interpretation under your statute, where I believe
10 legislative history provides you with very little guidance
11 and where discretion is considerable.

12 I will ask for a chance to finish here fully,
13 just go on for a bit. But I will basically, politely
14 counsel you to do the right thing, to do the right thing
15 because there's a very vague statute in a number of areas.

16 It's hence that you could either take a stonewall
17 or merely, as suggested, that you are free to look at
18 carefully and reach a contrary result where you're sure
19 policy goals are caught in the opposite direction. In
20 particular, I'm referring to problems really to
21 identification and to the ceiling on multiple penalties,
22 which I'll come to in a moment.

23 Now, my two basic intentions. First, the
24 individual one. Based on past experience of other
25 jurisdictions...I would say that the most important

OMT/bc

1 architectural issue in the construction of sentencing
2 guidelines is the drawing of the inhouse lie. That is, the
3 lie between presumptive incarceration and presumptive
4 probation or not incarcerated...

5 Whether or not you deviate from the traditional
6 sentencing the other states have used in the past, whatever
7 format you use, the Bar will quickly discover where this
8 in/out line is, probably plea bargain around it, or it will
9 take that into its negotiating strategy.

10 This in/out line, however it's presented or
11 disguised, is the Continental Divide in the San Andreas
12 fault of your particular structure. Everything is going to
13 evolve around where that is.

14 Therefore, I think the policy goal that you
15 should be looking to is to try to mitigate the importance of
16 that line. And I think the best way to mitigate the
17 importance of that line is to bridge it by making extensive
18 use of a disqualification probation sanction.

19 It should be at the center qualification that
20 you're thinking of, not at the periphery. Now I'm saying
21 this. I do believe there has to be appropriate limitations
22 on the use of this sanction, and I believe appropriate
23 limitations are set forth in ABA Standards 18-2.8, Brief.

24 Now since this is counsel's second counsel, I
25 won't go further in pushing the ABA standards. I'll just

OMT/bc

1 get you to look at the particular limitations there.

2 I'd point out also that there's been a lot of
3 case law just the last year. For example, this Circuit has
4 disqualified a Congressman from -- probation where he was
5 convicted of a federal elections violation, from
6 participating in any form of political activity in the
7 period of probation.

8 The claim was made there that the 10th Amendment
9 guaranteed the citizens of his jurisdiction the right to
10 send him back to Congress. The court dismissed that and
11 voted that the individual couldn't represent 10th
12 Amendment...and that this was traditionally reasonably
13 related to the rules of probation.

14 Well, that case gives you a certain -- logic.
15 You can tell citizens that they can't have their congressmen
16 reelected. I'm sure you can tell shareholders they don't
17 have the right to reelect particular officers, in the
18 corporate office.

19 I think it's a much more constructive fiction
20 there that shareholders wanted to do so.

21 There have been a bunch of other cases involving
22 a police officer in the last year who was denied the right
23 to serve in a law enforcement capacity during probation
24 because they were involved in crimes which breached their
25 trust.

OMT/bc

1 Well, I think, if a corporate official is engaged
2 in a knowing and serious violation of law -- and I'm not
3 talking about negligence offenses or minor regulatory
4 offenses, again, confined to the ABA standard -- I think
5 that that is the best way to hold to a basic presumption
6 against incarceration.

7 I'm not arguing against the short, sharp shock of
8 sentence of two or three months, within their confines for
9 split seconds. I think the disqualification sanction is the
10 best way both on the particular kind of function, for
11 example, that he has filed fraudulent tax returns,
12 disqualify him from preparation of tax returns or
13 ...reports, in that capacity. And from the particular
14 employer during the period of that probation.

15 That I think does allow you to avoid sending
16 people in their sixties and seventies to prison for a first
17 offense. It only crowds our jails and exposes people to the
18 terror and danger of prison; while still giving adequate
19 deference to the notion of equality.

20 That's a very real penalty imposed here to
21 disqualification...skeptical from whether there was any real
22 penalty associated with these various community service
23 actions that have come into increased and somewhat
24 disreputable use.

25 Okay. That was the first point in terms of

OMT/bc

1 organizational sanctions. When you look at the individual,
2 think of what is to mitigate the in/out line of
3 disqualification sanction is probably the most sensible
4 thing.

5 Now we turn to the organization. I think just
6 about everyone who has made the point that penalties both as
7 they are authorized and as they are imposed are too low to
8 be adequate to deter organizations that are looking at the
9 profit and gain from any form of misbehavior.

10 Thus, a major aim ought to be how do you escalate
11 the penalty structure? I'm speaking here basically about
12 financial penalties.

13 You're aware of your own empirical data that
14 shows that something like the majority of all sentences
15 between '81-'84 were between \$1,000 and \$25,000. Only
16 something like 18 percent were over \$100,000, and only
17 something like under 1 percent were over \$1 million.

18 That's the kind, despite statutory maximum, that
19 is considerably higher. It's not simply a problem of
20 inability to impose. It's a problem of judicial reluctance
21 to impose. The criminal justice system has a long tendency
22 to be somewhat static -- returning to the same equilibrium
23 no matter how you disturb it from the outside.

24 I think you've got to face the problem that there
25 are reasons why Judges are reluctant to impose high fines.

OMT/bc

1 I suspect that you know these reasons from the judicial ones
2 to mind, but they're partly the courts see very little to
3 gain from imposing a very high fine. They may fear that
4 they're going to produce bankruptcy, layoffs or other kinds
5 of crimes, either real or imagined.

6 They may be used to norms that were set in terms
7 of individual or prosecution's. And also prosecutors have
8 very little reason to indict corporations when they see only
9 (inaudible) that are impossible.

10 I'm going to suggest three things here in
11 escalating your structure. One is heavier reliance on
12 restitution. Seeing restitution not simply as a matter of
13 compensatory justice, as a means of restoring the victim,
14 but seeing it as a mechanism for escalating the penalty
15 structure because it gives Judges a reason to impose
16 sanctions, rather than the sense that they're just pouring
17 money into the federal treasury without any kind of a --

18 Also, restitution motivates Judges to get
19 involved in sentencing, to see sentencing as an important
20 process for something useful being done; rather it's one
21 more burden that's already being posed by an overworked
22 district court that has many, many things to do already.

23 If something looks meaningful, the courts will
24 give it some time. If it does not look meaningful, it is
25 going to get shortshrift.

OMT/bc

1 So, restitution from that view. Immediately,
2 let's talk about the guidelines issue. This is probably, I
3 suppose, the \$64 question.

4 How should you set your guidelines for
5 organizations?

6 I would think at the lowest level you offer here
7 that it would be possible and justifiable to set a guideline
8 saying that in the case of organizations, you may want to
9 define this really in terms of large organizations, the fine
10 should be set at a level not below the expected gain or loss
11 up to the statutory maximum.

12 That is, statutory maximum cuts you off and you
13 can't impose the full gain or loss.

14 I am saying that in terms of a floor rather than
15 in terms of a point. Of course, there's a very good
16 argument for saying it should be a multiple of the gain or
17 loss. But at that point, we get into rather complicated due
18 process issues about whether or not the gain here was X or
19 was Y.

20 If, however, we find that the statutory maximum
21 is already going to cut us off, we don't have to go through
22 that prolonged inquiry with due process obstacles that we
23 are going to encounter there. We're going to instead just
24 see that at a minimum, the court should be instructed -- you
25 don't have to exercise all due discretion. You don't need

OMT/bc

1 a right answer, you need to get a range.

2 The most sensible way of doing that is to say
3 that the floor should be not less than the expected gain or
4 loss where that can be calculated.

5 I understand that there is a statutory reference
6 to unduly prolong -- and that word "unduly" can carry
7 considerable weight. I think "unduly" has to be looked at
8 in terms of the end purpose of the sentencing that you're
9 heavily involved in.

10 Now what would this mean? I think you need to
11 give examples, not just a simple statement but an
12 illustration.

13 In a pollution case, it might mean that you would
14 look at the cost of having to install adequate pollution
15 controls rather than making the illegal...

16 In the case that's recently been prosecuted by
17 the Department of Justice, such as -- failed to report to
18 the government, the undisclosed side effects of certain
19 drugs that are pretty well known in the last year, you might
20 look at the profit from that particular which has
21 jeopardized.

22 And the product's been recalled for further
23 testimony and disclosure is made. And other cases involving
24 (inaudible) statements, where there might have been a
25 product recall, you might look at the profit from that

OMT/bc

1 particular product. This doesn't exhaust the field. You
2 need to give illustrations here if you're going to
3 communicate to the -- that federal judges would need to
4 read.

5 Now there are other things that you can think
6 of. And here I'm going to mention some ideas that I don't
7 endorse. When I look at the long history of sentencing and
8 all the literature on fines -- the vast European literature
9 dealing with the Scandanavian system of -- you could make
10 this kind of analogy.

11 You could say, well, this corporation had profits
12 on a daily basis of a million dollars a day. We fine the
13 individual defendant in this jurisdiction something like 30
14 days or one month of his salary. So we'll take one month of
15 the corporation's profits.

16 I have a lot of trouble with that because the
17 corporation is not an individual. It's a conglomerate with
18 many different product lines. Many different profit lines.
19 It produces some really odd disparities and artifacts.

20 If you look at two companies, one of which is a
21 conglomerate like IT&T and one of which is closely-held,
22 both making the same profit from the same product, one of
23 which you look instead at the parent company's total
24 revenues, and in the other case, you look at the rather
25 miniscule revenues of this particular company.

OMT/bc

1 I think really the focus should be on the profits
2 from this activity rather than the overall revenues and
3 profits of the company.

4 I also share -- with Judge Breyer about any
5 attempt to look at particular pockets or sources of funds.
6 Money is money. I don't think it makes sense whether it's
7 on borrowing power, unused capital, cash flow, or something
8 else that you would have earmarked for a specific purpose.

9 I really do think you've got to see what -- what
10 we're looking at, but the cost of -- not where the source of
11 funds come from. Otherwise, you put a tremendous premium on
12 a company that's facing prosecution to get rid of these
13 little pockets of money in terms of its general borrowing
14 power, because it doesn't seem to have an easy target for a
15 particular fine.

16 Okay. Now in this area of how do you escalate
17 financial penalties, I think it's particularly important
18 that you clarify with ambiguity Section 35, 72(b). We've
19 talked briefly before I came up here about the maximum fine,
20 which is \$500,000 for an organization, except that it could
21 be raised to one million where there are multiple caps.
22 That is, the premise in 35.72(b) is that the court can
23 increase the fine and impose an aggregate of fines where up
24 to one million dollars, where they arrive from a common
25 theme or plan and that, quote, "do not cause separable or

OMT/bc

1 distinguishable harm or damage."

2 That's the important escape clause. Does the
3 misconduct cause separable kinds or distinguishable kinds of
4 harm or damage?

5 The Senate report suggests that is in there in
6 order that, for example, a company that files 15 letters to
7 a federal agency, all of which are false, might get 15
8 different prosecutions or 15 maximum fines of a half million
9 dollars -- even out of these different letters, each of
10 which violates false claims statutes and mail and wire fraud
11 statutes. Same thing.

12 On the other hand, take the case where we do have
13 a distinct kind of harm or damage. Each of those
14 institutions, even though they're banks, suffers a distinct
15 loss. It's a loss for them.

16 Is two or three thousand dollars a day for each
17 of 50 or 60 banks? Now that's the kind of conduct where it
18 seems to me that it's a loss to you and a loss to you.
19 Obviously, distinguishable in terms of what you feel.

20 You need to clarify that. Otherwise, there is
21 going to be the impression, which I've already heard both
22 here and elsewhere, that the maximum is one million
23 dollars. Not one million. It's one million only if the
24 kinds of harm are not distinguishable. And when we have,
25 for example, a toxic pollution case, we have to ask

OMT/bc

1 ourselves:

2 Are these kinds of harm sustainable as suffered
3 by victim A, victim B, victim C?

4 I think they are. But I think the first reading
5 of the statute, because it looks like -- is very scanty on
6 this topic, might convince a court looking at it quickly or
7 a district court to write on these issues, doesn't have the
8 centralized perspective you have...

9 They think this is all the same kind of harm.
10 This is a pollution harm. So, therefore, even though there
11 are 80 individuals, they aren't distinguishable.

12 All right. What's wrong there is you say that
13 those kinds of harms, where they are distinct to different
14 individuals or distinct kinds of harm, should create an
15 ability to go above a million dollars because in the case of
16 the corporate offender, the count deliberation is the norm.
17 That is, credibility to 1,000 counts of mail and wire
18 fraud. That's the regular and off the charts...again. But
19 it is normal that you'll have a number of counts.

20 And prosecutors will quickly learn that they can
21 impose very high penalties if they wish to take the effort
22 to impose additional counts.

23 In the case of the individual defendant, the only
24 reason for having 35 counts is to have something to plea
25 bargain with. Drop it down to 22 counts. Down to 114 years

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1 from 136, whatever. Plea bargaining heart attack.

2 In the case of the corporation, it's not. One's
3 adequate to deter if 35.72(b) doesn't impose an absolute
4 barrier. That I think depends on what you say about it and
5 how much weight you put on this language of distinguishable
6 kinds of harm...

7 Okay. Let me turn now to restitution. Again,
8 restitution is commonly thought of simply as a matter of
9 justice, restoring the victim. But it is a totally
10 separable kind of sanction than one that clearly can go well
11 above any maximum one million dollar fine.

12 Also it is not dischargeable in bankruptcy, as
13 our fines also are not under the particular forces there.

14 The statute has broadly expanded its class of
15 eligible victims. Prior to this statute, the loss had to be
16 actually part of the indictment and proven as part of the
17 prosecutor's case.

18 The statute clearly has phrased it differently,
19 and the case law has rushed in the last year to embrace that
20 statute. I think you have memos of your own which indicate
21 what Durham, Richard, Allison, Keytext all say, and they are
22 also all covered in my own memorandum to this body. And I
23 have submitted a copy of it to the record, which shows that
24 the case law now is really permitting the court -- the
25 courts are embracing this opportunity. They are not always

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1 loathe to expanding sentencing options -- is embracing the
2 opportunity in a number of interesting cases:

3 To give restitution where it's caused even though
4 it has no connection with the actual offense charged in the
5 indictment or proven at trial.

6 There are cases such as Durham, which involve an
7 individual who is a bankrobber, but in the course of
8 escaping, commits arson and he winds up with a restitution
9 for that uncharged, unproven arson to the insurance company
10 that owns the car.

11 There is the case of a woman who was subject to a
12 sexual attack, who later needs to apply this to your
13 penance, as a kind of personal therapy. That cost of the
14 air and travel expense is picked up on your restitution
15 statute on the grounds that, although it was not proven at
16 trial anyway, it was approximately proven...

17 Those are ways of escalating your penalty
18 structure to recognize that the penalty structure needs to
19 be escalated in this area.

20 And the case law goes to really all kinds of
21 variations. My suggestion here is really that you should
22 examine that case law closely, take it up and clarify it,
23 and I think you will embrace this new standard, because it
24 does focus around statutory options.

25 At the same time that we do that, however, there

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1 are also problems here. I think this is a very two-sided
2 statement I make here.

3 The due process accorded by the statute for
4 restitution hearing is, in my judgment, not adequate and, in
5 time, particularly in a large case, could result in
6 constitutional obstacles and in cases which effectively take
7 away this power unless it's handled separately in advance.

8 Here I think you need to enhance due profits
9 beyond that accorded by Section 36.64. In particular, some
10 kind of prior notes by the government to indicate exactly
11 the kinds of losses.

12 We don't mean full-scale discovery. In a week or
13 two. But, notes of losses properly specified in a
14 particular fashion before the restitution hearing is
15 convened.

16 I would also think that the use of -- should be
17 -- as well, the individual probation officer...as possible.

18 There are again a number of offenses notes in the
19 ABA standards that I would draw your attention to;
20 particularly the notion of any civil defense would be
21 available, including the causation. Offsets should be
22 allowed in the restitution hearing.

23 Otherwise, we create a strange situation in which
24 the restitution hearings are given a much larger award than
25 it could in an available civil action.

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1 Finally, I do think it's important that you try
2 to adopt guidelines and carve out those areas in which civil
3 litigation is already adequate to handle the problem, such
4 as anti-trust, securities type liabilities, and not get
5 involved in giving restitution for those kinds of impossibly
6 broad classes.

7 The restitution hearing is not going to serve as
8 a substitute for the class action. And I think that the
9 best way to focus on this is not simply the number of
10 complainants who were injured, but whether there is a viable
11 other alternative litigation remedy, such as -- antitrust
12 and securities liabilities.

13 Okay. I want to turn to identification very
14 briefly. There's a curious statement in Section 35.72(F) of
15 your statute which submits the corporation to pay the
16 individual fine if state law permits. I'm not quoting
17 exactly, but that's the substance of what it says.

18 From my ARR, where I serve as the reporter for
19 the identification area, I can tell you that, essentially,
20 state law does permit such a crime under the -- Act, does
21 permit the Board or direct committee directors to identify,
22 as long as the Board makes the finding that this was not a
23 knowing illegal conduct.

24 Dealing with criminal law, it means knowledge of
25 illegality rather than knowledge of the conduct. As a

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1 result, identification is likely to be ignored.

2 Now, The sentence board again has a rather
3 confused sentence that says:

4 We don't mean to disrupt the internal corporate
5 government, but leave it to the state whether or not to
6 permit identification.

7 All right, really you shouldn't disrupt
8 traditional governments, but I think that that statement
9 seems to ignore a very well-developed body of law on the
10 limits of identification.

11 There are case laws in really all the principal
12 circumstances. For example, with respect to securities --
13 liabilities, there cannot be identification even of civil
14 liabilities. It's against public policy in virtually every
15 circuit today to identify even civil liabilities where there
16 is -- indicates the Securities Act liabilities -- more in
17 criminal liabilities that should be identified.

18 What is involved here is not a question of
19 overriding state law, recognizing your federal public
20 policies in federal criminal statutes that cannot be
21 identified.

22 I do think that you have a rule here to say a
23 number of things in your standards that limit identification
24 from at least some kind of liabilities.

25 Finally, even if you are -- I think you need to

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1 look for procedures surrounding identification. One thing I
2 think you clearly can do is to require notice at the
3 sentencing hearing whether or not the corporation intends to
4 identify, that notice would be such that it would be a false
5 statement to make false notices.

6 I don't think corporations would dare do that.

7 (Conclusion of side 2 of tape 3.)
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1 considerable discretion, given the number of
2 counts that could possibly have been prosecuted, to escalate
3 the penalty to the crime (inaudible) to deter the
4 corporation.

5 The minimum (inaudible) to find out who is
6 (inaudible) and if this is a case in which the corporation
7 has been identified, the penalty should be set with that
8 fact in mind, at least within the limits of the maximum
9 number of counts that they have been convicted of.

10 Okay, I have a few very brief concluding comments
11 about probation.

12 I think that you should recognize that the ABA
13 standards (inaudible). They didn't reject probation. They
14 rejected some of the broader notions of probation under
15 which the probation officer effectively had (inaudible).

16 They endorsed the notion of oversight, and what
17 should oversight mean?

18 Well, here I think you have well-developed
19 experienced from the SEC (inaudible). The SEC has time and
20 again appointed special counsel for the corporation, and
21 indeed this has now become a voluntary process.

22 E. F. Hutton did it in a special study and
23 eventually changed the composition of their board of
24 directors (inaudible) to an outside board.

25 To my mind, it is illusory to think that we are

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1 going to have many cases of individuals violating a judicial
2 order with respect to probation.

3 The case was presented this morning of the
4 treasurer who simply resigns from office. Well, let him
5 resign. Then look at the assistant treasurer and see if he
6 wishes to resign. If he wishes to resign, move on to the
7 assistant cashier. If all the corporate officers resign,
8 you can now impose trusteeship, and an equity receivership
9 is well-known in the SEC context.

10 The capacity of course to design remedies is
11 well-known in many other areas of civil litigation. School
12 boards, for example, without being convicted have been
13 subjected to all kinds of novel decrees, and there has not
14 been much problem.

15 Also, the collateral consequences of criminal
16 convictions are so high (inaudible). Hutton shows this, as
17 they were subject to blue sky commissioners in every state,
18 and they were losing their right to manage mutual funds
19 under different statutes. There was so much pressure on
20 them (inaudible) strikes me as a very, very unlikely
21 scenario.

22 But if it were to happen (inaudible) possibility
23 of contempt and ultimately it is a criminal charge,
24 obstruction of justice, which could apply to these kinds of
25 proceedings. There was deliberate attempt to resist. I see

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1 nothing here beyond the case law to deal with 50 years ago
2 when they tried to figure out how to fine a corporation,
3 again (inaudible).

4 I do think that there is much that can be done in
5 the properly limited, properly constrained probation
6 sanction, but essentially I am not proposing anything now or
7 I am not proposing that you look to the SEC experience, how
8 to generalize that. The publicity, the need to rehabilitate
9 yourself is properly recognized by many within the company,
10 and at a minimum, rather than simply looking to existing
11 officers, the power to appoint special counsel to conduct
12 an intensive self-study as the corporation's own counsel, so
13 that he is able to pierce the attorney/client privilege and
14 prepare a study of what went on among the directors. That
15 to me is really the baseline (inaudible).

16 I don't mean this in a run of a mill sense, but
17 in an important (inaudible) where the corporation's own
18 internal processes appear to have been somewhat
19 (inaudible). I think that is an important sanction.

20 Okay, I have spoken long enough. If you have got
21 any questions I can answer, I would be happy to.

22 CHAIRMAN WILKINS: What about using net assets as
23 a basis on which to calculate fines?

24 VOICE: Well, why should we distinguish between
25 two companies, one of which has only one division and one of

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1 which is ITT?

2 They both are expecting to make a \$50,000 profit,
3 and we are going to have one of these companies now pay a 5
4 percent of net assets penalty, a \$10 billion penalty, and
5 the other one million. We wind up using a very different
6 level of deterrence. We over-deter large corporations and
7 may under-deter small corporations. I had rather look at
8 the profit.

9 And when we start using any kind of set
10 percentage, we wind up having overkill, (inaudible) effects
11 (inaudible) very large corporations. I just think it is
12 (inaudible) of net assets.

13 CHAIRMAN WILKINS: Questions to my right?

14 VOICE: Looking at this question of escalating
15 fines and penalties, is that because the (inaudible), I mean
16 using different forms to escalate rather than using simply a
17 fine --

18 MR. TROTT: I was suggesting that within the
19 (inaudible). All I was looking at was the ceiling on the
20 fine, which (inaudible), about whether there was a ceiling
21 on the aggregate number of fines for each count, and I was
22 (inaudible).

23 (Inaudible.)

24 Why am I doing this? I am really essentially at
25 the lowest level of (inaudible).

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1 VOICE: I was really talking about the question
2 of these other types of --

3 MR. TROTT: Restitution or probation?

4 VOICE: Probation.

5 MR. TROTT: I think probation can be an
6 incapacitative remedy. Others have dismissed that this
7 morning, but I think you do have to look at corporations not
8 only through an economic lense but as a culture. There are
9 different kinds of cultures out there.

10 When you change the composition of the board of
11 directors, you suddenly tell people that the ground rules
12 have changed, that there is a new board (inaudible). The
13 new one coming in (inaudible) to be very careful monitors,
14 and it has a real impact on the corporate culture.

15 VOICE: Let me follow up on that.

16 We heard some testimony this morning that nothing
17 changes the culture like sanctions in terms of threatened
18 fines.

19 The question is do you need any direct control
20 over the corporation; do you need to sort of be a consultant
21 to the corporation; or can you just establish large monetary
22 fine and then let the corporation find its own way in terms
23 of --

24 MR. TROTT: We may have an extended discussion
25 here because I do have a concern about who bears the cost

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1 of very, very large monetary fines.

2 I tend to think that small fines are meaningless,
3 as the information cost of monitoring your agents can be
4 greater than the cost of most fines. The corporation isn't
5 going to bother to find out what is really going on at that
6 (inaudible) level until the costs of finding out are less
7 than the costs of incurring business as usual. That might
8 be a large level to begin with.

9 But once we get up to very large fines, at that
10 point the cost of those fines may well be imposed on
11 creditors as well (inaudible).

12 The logic of deterrence here is (inaudible). You
13 want to focus on the shareholder, even though he is
14 innocent, because he is the one party who can change the
15 behavior of managers, and eventually when the penalties are
16 high enough the monitoring will begin to price corporate
17 securities in terms of the (inaudible) probabilities of
18 future recidivism.

19 That kind of market-based remedy seems to me
20 to -- one should focus on the shareholder (inaudible) no
21 particular point, with very large fines upon creditors.

22 When you look at the financial structure of a
23 large part of corporate America today, it is highly
24 leveraged, and well before you could impose the kind of fine
25 that reaches 25 percent of revenues you are going to thrust

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1 that company into Chapter 11 because (inaudible) volatile,
2 interest rates change (inaudible).

3 VOICE: We should follow this up.

4 VOICE: Yes, I was just thinking on that point,
5 the very fact that you say that (inaudible) for bankruptcy
6 (inaudible) less likely that you could collect it. If it is
7 not dischargeable, the company has to dissolve, and you
8 can't resurrect the company.

9 (Simultaneous voices.)

10 VOICE: This is no different than (inaudible).

11 VOICE: (Inaudible.)

12 VOICE: Things do get worked out.

13 My point was that creditors -- when you change
14 the debt/equity ratio of the company, you are imposing a
15 cost on creditors that to my mind accomplishes very little
16 because they are not in a position (inaudible).

17 If you instead -- I don't want to go into full
18 equity (inaudible) notion here, but when you break up
19 (inaudible), that kind of notion simply imposes a cost on
20 shareholders without any impact on the (inaudible).

21 VOICE: My actual question was -- at one point
22 you seemed to suggest that there might be like a rule, and
23 the rule would be when you fine a corporation the fine must
24 be at least equal to the expected gain.

25 VOICE: Or loss.

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VOICE: Or loss.

2

VOICE: That would be a guideline. You can

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deviate from all kinds of guidelines, but I would suggest

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rather than focusing on multiple (inaudible).

5

VOICE: I guess so, but I understand that once

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you say that then the judge looks at it, and I guess he has

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to do it, and what worries me a little, or at least

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(inaudible) and various others, is, my god, sometimes that

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will be possible.

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But think of an antitrust case -- I mean think of

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your pollution case. I mean, let's imagine that. In some

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instances, you say, oh, that is what we will do, is we will

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just assess a fine equal to the cost of the pollution in

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question.

15

Well, the company will say, what do you mean the

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cost of the pollution in question? That wasn't an

17

alternative. The reason we did this is the pollution

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equipment, if we purchase it, will put us out of business,

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and therefore we -- the gain. It was a saving on the

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pollution equipment. The expected gain was staying in

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business.

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What is that worth? An imaginative lawyers like

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you or maybe me or some others here can think of 50

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arguments that it would be totally crazy, right, and then

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they will have enormous hearing.

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VOICE: We can have this tremendous game of (inaudible).

My answer to that would be even under the current statute, even under 3611, (inaudible) how you can make the payment, the court can modify the method of payment by installment schedules. He can do it through all kinds of mechanisms.

(Inaudible.)

You can pay not simply in cash (inaudible).

VOICE: That is not my point. My point is the absolute rule as this Commission sets it will cover both cases --

VOICE: I said a guideline. A guideline is not the same thing as an absolute rule.

VOICE: Could we say suggest that you leave it up to the district courts as to when (inaudible).

VOICE: Well, again, when the district court goes below that guideline, I think the appellate review of what is the reasons for going below that guideline then is justified.

(Inaudible.)

VOICE: They can go outside the guideline only for aggravating (inaudible).

VOICE: No, I think they can go outside the guideline for factors that are not set forth in the

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1 guideline table, and you can indicate that deviation from
2 the guideline will be justifiable (inaudible).

3 But I think that that will be asserted far more
4 often than it would occur.

5 CHAIRMAN WILKINS: Ron.

6 COMMISSIONER GAINER: (Inaudible.)

7 VOICE: Yes, that is a very big problem. That is
8 the reason for not looking at a point (inaudible); that is,
9 you can say a court could reach a decision much more easily
10 (inaudible).

11 COMMISSIONER GAINER: (Inaudible.)

12 VOICE: The guidelines are, after all, ranges,
13 and I think that you may find it easier to set a range
14 (inaudible) fixation of the exact point (inaudible).

15 Am I answering you or (inaudible)?

16 COMMISSIONER GAINER: (Inaudible.)

17 CHAIRMAN WILKINS: Any other questions?

18 VOICE: Follow-up on Commissioner Gainer's point
19 about expected gain.

20 You don't mean that in a mathematical sense of
21 (inaudible) times the gain; you mean that in --

22 VOICE: When I look at the expected gain, I do
23 not mean really that the court should be in the business of
24 trying to figure out (inaudible) because that would be the
25 pure (inaudible) formula, and I don't think that a court of

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1 law should really get involved in making computations
2 (inaudible).

3 VOICE: So you essentially would -- the
4 requirement could be translated as the necessity for the
5 crime to be punitive in the sense that a necessary
6 (inaudible).

7 VOICE: (Inaudible) more than simply (inaudible)
8 with respect to a gain that was never really received
9 (inaudible).

10 VOICE: What about -- did I understand you to say
11 that (inaudible)?

12 VOICE: No, I think it is difficult to convince
13 courts to impose fines. I don't think once it is imposed
14 (inaudible) that they are paid immediately. They may be
15 paid under installments, but they are paid.

16 VOICE: What about the corporation paying fines
17 (inaudible)? Do you say there is some difficulty in that?

18 VOICE: Well, I think -- my premise initially was
19 that you can't safely rely on a system of justice that
20 focuses exclusively on either the individual or the
21 corporation to the extent that identification is the norm --
22 now I am not saying it is the norm, but I am saying
23 (inaudible).

24 VOICE: Well, is it possible? I mean under state
25 law.

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1 VOICE: Under the model (inaudible) Corporation
2 Act, Section 5 of the (inaudible) Corporation Act, directors
3 can identify an agent with respect to criminal fines
4 provided they find that the conduct was not knowingly
5 engaged in -- (inaudible).

6 VOICE: Is this a Delaware law?

7 VOICE: The Delaware law uses the phrase "good
8 faith," also. This is a decision made not by the courts,
9 but by directors. The board may well find that the
10 (inaudible).

11 CHAIRMAN WILKINS: Thank you very much,
12 Professor.

13 Would anyone else like to make any comments?
14 (No response.)

15 CHAIRMAN WILKINS: The record of this hearing
16 will remain open for the next 30 days so that additional
17 submissions can be received.

18 I want to thank our witnesses who have testified
19 today and again to express to all of you our appreciation
20 not only for you coming but all the hard work that you did
21 prior to to your arrival here in Washington, and I am
22 confident that the comments and submissions will be very
23 helpful to this Commission.

24 There being nothing further, we stand adjourned
25 until our next hearing.

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(Whereupon, the hearing was adjourned.)