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# UNITED STATES SENTENCING COMMISSION

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## TRANSCRIPT

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PUBLIC HEARING ON  
SENTENCING OPTIONS

JULY 15, 1986

ORIGINAL  
TRANSCRIPT  
OF PROCEEDINGS

UNITED STATES SENTENCING COMMISSION

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SENTENCING OPTIONS

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(THIS TRANSCRIPT WAS PREPARED FROM A TAPE RECORDING.)

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UNITED STATES SENTENCING COMMISSION

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## P R O C E E D I N G S

2 CHAIRMAN WILKINS: We appreciate very much your  
3 attendance, and we appreciate the work that obviously the  
4 witnesses who will appear this morning have already done in  
5 preparation.

6 I might add that we have received written  
7 testimony from a large number of people throughout the  
8 country, and all of this is being used and studied by the  
9 Commission.

10 This is the fourth in a series of public hearings  
11 that we have been holding. The first hearing dealt with  
12 offense seriousness. Prior record was the subject of the  
13 next hearing, and then we had a hearing dealing with  
14 organizational sanctions, and we have a hearing scheduled in  
15 September dealing with the issue of plea negotiations.

16 We have found so far -- and I am sure this will  
17 be no exception today -- that these public hearings have  
18 been very beneficial to this Commission, to assist us in  
19 this very complex task that we are about.

20 I might say, too, that it is the Commission's  
21 view from the very beginning that these guidelines should  
22 not be written in the vacuum of the Commission office but  
23 that they should be written after receiving the opinions and  
24 the views and input from a wide range of individuals who  
25 share our interest in writing guidelines that will not only

1 OMTbur

1 meet the Congressional mandate but will truly serve the  
2 interest of justice, and this is a part of this public input  
3 that we have been receiving.

4           Throughout October and November of this year, we  
5 will be conducting hearings throughout the country, and at  
6 that time we will be dealing with some specific guidelines  
7 that we will have proposed in a tentative draft fashion so  
8 that we can receive comments based on not just issues but  
9 also what we have written on paper.

10           I hope that you all will be able to attend some  
11 of these regional hearings. One of them will be here in  
12 Washington. The others will be scattered throughout the  
13 country in a timetable that we will be publishing in the  
14 Federal Register.

15           Today our topic, as you all know, deals with  
16 sentencing options.

17           Many times when the word "guidelines" or  
18 "sentencing guidelines" are mentioned, the first thing that  
19 comes to mind is how shall guidelines provide for  
20 incarceration, and that is indeed an important part of our  
21 work, the type of sentence to prison that would be  
22 appropriate in a given situation. It is not all of the  
23 work, but an important part of guidelines must address the  
24 issue of something that is other than incarceration in a  
25 penitentiary.

1 OMTbur

1                   There are circumstances, there are individuals  
2 who commit crimes, we believe, that truly can be punished  
3 appropriately as well as taught the error of their ways and  
4 learn respect for the law and the rights of other people by  
5 something other than incarceration in a prison.

6                   It is important that we know how to identify  
7 those types of situations and then provide for the  
8 appropriate alternative or sentencing option that we will be  
9 addressing today.

10                   We are delighted to have Mr. Douglas Ginsburg  
11 with us this morning, an Assistant Attorney General in  
12 charge of the Antitrust Division.

13                   Mr. Ginsburg.

14                   TESTIMONY OF MR. DOUGLAS GINSBURG, ASSISTANT  
15 ATTORNEY GENERAL, ANTITRUST DIVISION, U.S.  
16 DEPARTMENT OF JUSTICE

17                   MR. GINSBURG: Thank you very much, Judge  
18 Wilkins. It is a pleasure for me to be here and have the  
19 opportunity to give the Antitrust Division's views on  
20 (inaudible).

21                   These subjects are of great importance to the  
22 Antitrust Division, and I will elaborate on certain  
23 (inaudible).

24                   The sentences that are currently being imposed  
25 for criminal antitrust violations are generally

2 OMTbur

1 inadequate to achieve the primary purpose (inaudible). To  
2 the extent that these sentences also involve alternatives  
3 such as community service, we think that they are probably  
4 even further from the essential sanctions (inaudible) need  
5 to be given in order to (inaudible).

6 The kind of sentences also suffer from the kind  
7 of unwarranted sentencing disparities which prompted the  
8 creation of this Commission.

9 (Inaudible) the guidelines that will be  
10 promulgated by the Commission provide a more powerful and a  
11 more consistent deterrence (inaudible) available.

12 Now, the Sherman Act is the principal antitrust  
13 (inaudible). It has since its passage in 1890 (inaudible)  
14 criminal statute in recognition of the seriousness of the  
15 crimes involved and of the need to deter them strongly.  
16 Congress in 1974 amended the Sherman Act to make the  
17 violation punishable as a felony with up to three years  
18 imprisonment.

19 Virtually all the criminal antitrust cases that  
20 are brought involve intentional agreements among  
21 competitors to increase prices by such means as price  
22 fixing, (inaudible), or covert market allocation. In  
23 exceptional circumstances, monopolization or attempted  
24 monopolization cases might also be prosecuted criminally.

25 While the antitrust laws can also be invoked

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1 civilly by the government and by private (inaudible) in  
2 order to challenge (inaudible) open and notorious conduct  
3 that may have the effect of restraining competition, it is  
4 only intentional conduct that clearly (inaudible) and  
5 clearly illegal under established precedence that the  
6 government proceeds against criminals.

7 For the sake of brevity, (inaudible) Commission,  
8 I will refer to all such criminal antitrust offenses as  
9 price fixing (inaudible).

10 I don't think there is any doubt that price  
11 fixing is a serious offense. It is an offense that cannot  
12 be committed inadvertently. It is one that causes  
13 substantial social harm (inaudible) no social benefits  
14 whatever.

15 Unfortunately, though, we have (inaudible)  
16 punishment to deter price fixing, the current sentencing  
17 practices of the courts have made it -- have not made most  
18 effective use of those tools, to say the least.

19 I mentioned that since 1974 the Sherman Act  
20 provides for prison sentences of up to three years for  
21 individuals and fines, I should add, for corporations  
22 ranging up to \$1 million.

23 The Criminal Fine Enforcement Act of 1984  
24 increase that fine for individuals to a maximum of \$250,000  
25 and provided for the possibility of an alternative maximum



1 OMTbur

1 fine for individuals or corporations calculated at twice the  
2 greater of the gain, pecuniary gain, or loss associated with  
3 the offense. Those new maximums apply only to offenses  
4 committed after 1984, but the felony jail sentence that  
5 (inaudible) in the last decade has been applied to numerous  
6 price fixing cases (inaudible) that we prosecuted criminally  
7 in that period.

8           These substantial penalties could (inaudible)  
9 imposed with substantial deterrent effects, but instead I  
10 believe the actual sentences that are meted out by the  
11 courts (inaudible).

12           Now, to give you specific data on that, in fiscal  
13 years 1984 and 1985 there were 126 individuals sentenced in  
14 criminal antitrust cases. These were all felony  
15 convictions. We recommended incarceration in 107 of those  
16 126 incidences. That is about 85 percent.

17           Pardon me.

18           And for all of the others -- pardon me -- with  
19 one exception we made no sentencing recommendation in those  
20 cases. Nonetheless, of the 126, only 40 -- and that is  
21 about 32 percent of them -- actually were sentenced to even  
22 a single day in prison, actual asylum, not suspended  
23 sentence.

24           The average time imposed, looking at the entire  
25 group of 126 defendants, was only about 30 days, and of

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1 course for the smaller group that went to jail at all the  
2 average was something like (inaudible).

3 The fines that were imposed on defendants  
4 sentenced during these two fiscal years were also rather  
5 modest, to say the least and averaged in fact less than  
6 \$16,000 over the group of 126 individuals.

7 The average fine for the 180 corporations that  
8 were sentenced was only about \$133,000.

9 Of the 126 individuals, 36 of them -- that is  
10 about 28 percent -- received instead or as part of their  
11 sentence some form of community service obligations, and of  
12 these 36, I should point out that the Division had  
13 recommended actual jail for 34 of them and, as part of the  
14 plea agreement, made no sentencing recommendation for the  
15 other two. The 34 recommendations for jail resulted instead  
16 in the imposition of community service instead of jail.

17 Seven of the 36 felons actually got some jail  
18 time in addition to community service. The other 29 got  
19 solely community service.

20 Now, I take it that deterrence is the primary  
21 goal of criminal antitrust enforcement, and I am convinced  
22 that accomplishing this goal requires the use of very  
23 substantial penalties in the form of both fines and of  
24 imprisonment for reasons that I will explain.

25 The penalties currently being imposed by the

2 OMTbur

1 courts are simply insufficient to deter price fixing. I  
2 think that is evident from even a casual inspection of the  
3 states involved with price fixes and the benefits that they  
4 derive from (inaudible).

5 The failure of our system to achieve deterrence  
6 is evident from our continuing discovery of significant  
7 instances, significant numbers of price fixing conspiracies  
8 each year, and the explanation is obvious. Price fixing  
9 opportunities present a potential for extracting huge sums  
10 from consumers, and there is a very good chance that price  
11 fixes will escape detection despite our best efforts.

12 In order to deter so potentially lucrative an  
13 enterprise requires much higher (inaudible) than  
14 imprisonment (inaudible).

15 Now, before addressing fines and imprisonment, I  
16 would like to explain why four kinds of alternative  
17 sentences or sanctions (inaudible) are not adequate  
18 substitutes for imprisonment and heavy fines in the  
19 antitrust area, and I refer here specifically to community  
20 service, probation, debarment, and restitution.

21 These alternative sentences or sanctions I think  
22 often impose in fact little hardship on offenders, and their  
23 availability results too often (inaudible) their  
24 substitution for more meaningful sanctions, which I think  
25 undermines deterrence (inaudible).

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1 Turning first to community service, it seems  
2 apparent to us that many if not most of the sentences  
3 imposed (inaudible) under the rubric of community service  
4 are not in fact punishments at all.

5 To take a specific example, one defendant's  
6 community service involved coordinating an annual  
7 (inaudible) for a charity. A defendant in another antitrust  
8 case was required to organize a golf tournament as a  
9 fundraiser for the Red Cross (inaudible).

10 In yet another case the defendant was sentenced  
11 (inaudible) speeches (inaudible) economic effect of his  
12 criminal activities. This is a punishment that in practice  
13 is more likely to frustrate than to advance the purposes of  
14 the antitrust laws, I am sure. In fact, such penalties do  
15 nothing more than trivialize (inaudible).

16 Second, turning to probation for individuals or  
17 corporations, I think that is inappropriate as an antitrust  
18 penalty because it provides little deterrence and serves no  
19 real countervailing purpose in the typical antitrust case.  
20 Price fixing is an intentional offense committed by  
21 individuals whose background or reasons for committing it  
22 (inaudible).

23 (Inaudible) using probations that go (inaudible)  
24 on a first offender is equivalent to eliminating entirely  
25 any effective penalty (inaudible). Probation is sometimes

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1 used to help ensure future compliance by those (inaudible).

2 In the case of an antitrust violation, this  
3 function can and should adequately be served by a  
4 combination of fines and incarceration. Neither individual  
5 nor corporate defendants need assistance from the government  
6 regarding how to go straight, as it were, or, more  
7 specifically, how to avoid future criminal antitrust  
8 violations, and further, as corporate defendants, where I  
9 think the idea of probation is a (inaudible) probation  
10 implies for the antitrust defendant, corporate antitrust  
11 defendant, really no more than an unwarranted judicial  
12 regulation of the defendant's continuing business  
13 activities.

14 Third, with respect to debarment, this is  
15 generally also an inappropriate sanction for price fixing.  
16 Indeed, ironically, by eliminating a competitor through  
17 debarment is to impose on society the same harm as does the  
18 crime it is designed to punish; namely, the elimination of  
19 competition.

20 Indeed, there could be situations in which all of  
21 the potential suppliers might be debarred because they are  
22 all parties to a price fixing conspiracy, which would only  
23 make the product, at least for a while, totally unavailable  
24 to the purchasing agencies.

25 Fourth, restitution, which I think can be a

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1 meaningful sanction in many circumstances but in the  
2 criminal antitrust case (inaudible).

3           Those who are injured by an antitrust violation  
4 already have the private (inaudible) of action to collect  
5 treble damages (inaudible). Since any restitution would  
6 have to be credited against those subsequent treble damage  
7 awards, restitution would not significantly or perhaps not  
8 at all enhance deterrence (inaudible) a follow-on private  
9 civil case could be (inaudible).

10           Now, there is not always a follow-on civil case  
11 brought in the wake of every criminal antitrust (inaudible),  
12 but the absence of a follow-on private case probably  
13 indicates that the defendant was financially unreachable or  
14 that there are severe, indeed insurmountable difficulties in  
15 identifying the victims and determining the extent of their  
16 injuries.

17           Thus, restitution is not a meaningful remedy in  
18 that case either, where there wouldn't be a private  
19 follow-on suit, and in fact it may significantly and  
20 unnecessarily increase the cost of criminal prosecution and  
21 perhaps even unduly complicate or prolong the sentencing  
22 process (inaudible).

23           Alternative sanctions (inaudible) fines and  
24 imprisonment should be the primary, if not the exclusive  
25 penalties for price fixing.

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1 Organizations, where incarceration is not an  
2 option, a fine is clearly (inaudible). Objections to fining  
3 organizations that I think the Commission has heard is  
4 insubstantial in the case of price fixing. Since the firm's  
5 owners are the major beneficiaries of price fixing, there  
6 should be no concern about shareholders also bearing the  
7 cost of fines when that price fixing is prosecuted.

8 The shareholders should be no more insulated from  
9 the gains and losses from price fixing activities than they  
10 are from the gains and losses of any other risky management  
11 decisions. Indeed, it is essential that the shareholders  
12 have the incentives to institute appropriate safeguards in  
13 order to prevent criminal behavior, and I would point out  
14 that most major corporations in this country and certainly  
15 the great majority of publicly traded companies have formal  
16 antitrust compliance programs that are instituted by  
17 management in order to limit or minimize the exposure of the  
18 corporation from antitrust liability. Without those types  
19 of compliance programs, I think it would be impossible to  
20 provide the same degree of confidence from individuals to  
21 (inaudible).

22 The optimal crime for any given act (inaudible)  
23 equal to the damage caused by the violation divided by the  
24 probability of convictions in that particular case. That is  
25 a fairly general abstract (inaudible).

1 OMTbur

1                   Because the harm caused by price fixing to the  
2 rest of society is always going to be greater than the  
3 benefits that would accrue to the price fixer, such a fine  
4 would result in a socially optimal level of price fixing,  
5 which is in this case zero. There are no socially  
6 beneficial (inaudible).

7                   Unfortunately, however, in the real world we  
8 cannot impose the uniquely appropriate fine in each case,  
9 since that would require knowledge of the perceived  
10 probability of conviction in each case, perceived by the  
11 defendant. We can, however, estimate with an appropriate  
12 proxy the average probability of detection and conviction.  
13 We can get some idea, in other words, of the probability of  
14 detection by looking at how long the conspiracy (inaudible)  
15 have typically managed to avoid our detection.

16                   For example, there have been substantial highway  
17 construction ever since World War I, with many thousands of  
18 contracts handed out each year. We did not learn about the  
19 (inaudible) and thus did not prosecute a highway (inaudible)  
20 case until 1972. Since then we have prosecuted hundreds of  
21 such cases, and we have every reason to believe that a  
22 significantly larger number escaped (inaudible).

23                   Of the cases that we have prosecuted, we have  
24 found that they have often involved continuous conspiracies  
25 running for 10 years and more. So it is quite probable that



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1 many conspiracies operated for decades without ever being  
2 discovered and never will be discovered.

3 The general evidence on how long conspiracies  
4 have typically been in place leads us to believe that the  
5 probability of detection for price fixing generally is less  
6 than 1 in 10. Combined with the fact that not all of those  
7 who are detected may be indicted and then convicted, this  
8 indicates that the appropriate multiple is at least 10.  
9 Based on our experience that price fixing typically results  
10 in price increases, that has harmed the consumers in a range  
11 of 10 percent of the price.

12 That multiple of 10 would indicate that the  
13 appropriate fine must be at least equal the total amount of  
14 the sales made by the defendant pursuant to the price fixing  
15 (inaudible).

16 Simply put, a million dollars of sales at  
17 competitive prices subject to the price fixing scheme would  
18 sell for perhaps \$1,100,000. The harm to the consumers is  
19 the \$100,000. The multiplier being 10 because of the  
20 possibility of detection is 1 in 10, the total fine should  
21 be \$1 million in that instance, and it is easy to see that  
22 taking the sales themselves (inaudible).

23 Well, there are, unfortunately, limits on the  
24 utility of setting antitrust fines on the basis of the sales  
25 that are made by defendant. In many, if not most cases the

1 OMTbur

1 sales that are subject to the conspiracy will exceed the  
2 statutory maximum, the \$1 million fine.

3 But twice the gain or loss alternative that is  
4 currently in force under the Criminal (inaudible)  
5 Enforcement Act could be used to derive larger fines, but in  
6 the unique antitrust context that entails enormous potential  
7 complexities and should be approached only with the utmost  
8 caution.

9 With the optimal fine we do substantially see \$1  
10 million, or where the defendant is otherwise unreachable  
11 because they have been (inaudible).

12 The best probation would appear to be to impose  
13 what fine is practically available and emphasize even more  
14 the importance of deterring the individual (inaudible)  
15 impose on the corporation such a fine as is practically  
16 available and emphasize that much more about the necessity  
17 of deterring the individuals whose conduct infiltrates their  
18 corporate employers.

19 Now, in the case of individuals, of course, both  
20 fines and incarceration are available, and we support  
21 (inaudible) of both. Fines alone simply cannot do the job.  
22 Even fines that are large enough simply to deter most price  
23 fixing would be huge and often far greater than the  
24 statutory maximum because the potential gains from the price  
25 fixing are so large and the likelihood of detection

1 OMTbur

1 is regrettably fairly small. Few individuals or even  
2 corporations have the resources needed to pay the fines that  
3 would be large enough to deter price fixing.

4 Typical cases in recent years have involved  
5 individuals and corporations that would have found it  
6 difficult or impossible even to pay a fine equal to the  
7 damage from the violations much less the amount -- perhaps  
8 10 times the damages -- that would have been necessary to  
9 deter the violations.

10 Thus, neither individuals nor corporations can be  
11 deterred adequately by reliance on fines alone because they  
12 know that their limited resources make the true cost of  
13 (inaudible) far less than the nominal amount of the optimal  
14 fine.

15 In fashioning a schedule of specific penalties  
16 for price fixing, a number of guiding concepts are  
17 available, given that you can't realistically impose optimal  
18 (inaudible).

19 The first is that the punishment should be  
20 directly related (inaudible). The punishment should  
21 increase as the harm increases so as to provide additional  
22 deterrence for more socially undesirable behavior.

23 Second, when deterrence has demonstrably failed,  
24 the penalty scheme should impose more severe penalties; that  
25 is, recidivists should be dealt with more harshly than the

1 OMTbur

1 first offenders.

2 I have to emphasize that I am not saying that we  
3 should go easy on first time offenders but rather that we  
4 should deal even more harshly with subsequent offenders.

5 Third, the enforcement costs of maintaining a  
6 given level of deterrence should be minimal, which implies  
7 first that there needs to be some mechanism for rewarding  
8 both pleas of guilty and, even more important, cooperation  
9 with the government's investigation and prosecution of  
10 others.

11 A second implication of the need to keep down  
12 enforcement costs is that all offense and offender  
13 characteristics on which the sentences are based should be  
14 objective and should be easily ascertained. That is  
15 necessary in order to minimize the cost of sentencing,  
16 discovery of relevant facts, hearing, and the probable  
17 appeal, as well as to minimize the potential for error.

18 For example, while sentences should vary  
19 according to the harm caused, the measure of harm should be  
20 a simple one. I would suggest that the amount of sales  
21 affected by the conspiracy is the appropriate way to measure  
22 harm (inaudible).

23 Finally, there are strong arguments for reducing  
24 judicial variance with respect to both fines and  
25 imprisonment. Substantial variance in fines for the same

1 OMTbur

1 offense just exacerbates the problem of unreachability  
2 simply because the high fine is less likely to be  
3 recoverable (inaudible).

4           There is even a more compelling reason to strive  
5 (inaudible) with respect to imprisonment. There is general  
6 agreement among antitrust analysts, I think, that the  
7 deterrent effect of certain prison sentences is far greater  
8 than the effect of less certain but possibly longer  
9 sentences. I think that certainty as to the likelihood  
10 (inaudible) is the key antitrust deterrent, given the type  
11 of individual that is likely to be involved in an antitrust  
12 penalty, and we are talking here about an executive in a  
13 large firm or an owner or manager of a smaller company. In  
14 essence, even a modest jail sentence is likely to have a  
15 significantly adverse effect on the person's reputation,  
16 social status, and future earning power.

17           So, Mr. Chairman, I think that a certain jail  
18 sentence would be a strong deterrent to antitrust  
19 violations, and this argues strongly for a substantial  
20 minimum term of imprisonment for all first time price  
21 fixes, with the possible exception of those whose  
22 cooperation with the government leads to the conviction of  
23 others.

24           In conclusion, Mr. Chairman, we are recommending  
25 that corporations and individuals be fined in amounts that

1 OMTbur

1 increase in direct relation to the harm caused by the  
2 antitrust violations, that all individuals receive in  
3 addition a certain term of imprisonment that begins with  
4 some fixed minimum and increases to some (inaudible), and  
5 finally that the sales affected by the price fixing serve as  
6 the measure of harm caused.

7 Thank you, Mr. Chairman. I would be happy to  
8 address any questions.

9 (Tape reversed.)

10 CHAIRMAN WILKINS: ....that you would suggest  
11 that would serve the purposes of deterrence as well as the  
12 other purposes that we are interested in?

13 MR. GINSBURG: Well, in terms of a specific  
14 amount of time, I think we are somewhat diffident about  
15 offering a number of months and saying confidently that that  
16 is the demonstrably correct number of months. But we have  
17 something in the range of six to 12 months in mind.

18 I think that that is the kind of sentence that  
19 would very definitely get the attention of the typical  
20 antitrust offender.

21 CHAIRMAN WILKINS: Fine.

22 Any questions to my right?

23 VOICE: My question, Mr. Chairman, was the one  
24 that you already asked.

25 I understood that you were dissatisfied with the

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1 average current sentence to incarceration of 30 days, and I  
2 am to understand that repeat offenders would certainly get a  
3 more substantial amount of time and the maximum for them  
4 then would be 12 months and first offenders the minimum  
5 would be six months.

6 MR. GINSBURG: Well, I think for repeat  
7 offenders, Commission Corrothers, that the maximum -- I was  
8 suggesting that -- to go back, I was suggesting that six to  
9 12 months, something (inaudible) six and 12 months would be  
10 appropriate for first offenders. For repeat offenders I  
11 really think that something much more closely approaching  
12 the three-year statutory maximum would be appropriate,  
13 bearing in mind that this is a crime that constitutes  
14 essentially fraud at the wholesale level. It can only be  
15 committed by someone for a second time that is simply  
16 willing to take (inaudible), and I think that we need to  
17 make those odds sufficiently adverse (inaudible).

18 COMMISSIONER CORROTHERS: The final question is  
19 you do not feel that community service is at any time  
20 appropriate to be used in connection with or in addition to  
21 a period of incarceration?

22 MR. GINSBURG: Well, I would be reluctant to  
23 say --

24 COMMISSIONER CORROTHERS: And how do you feel  
25 about the provision following that period?

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1 MR. GINSBURG: I would be reluctant to say that  
2 community service might never be an appropriate supplement  
3 to a sentence involving jail and a fine.

4 For instance, the person who is completely  
5 incapable of paying any fine might very well (inaudible).  
6 The key thing, it seems to me, is that the system look first  
7 to a substantial crime and jail time before looking for any  
8 alternatives because our experience has been that those  
9 alternatives have driven out the real deterrence. Instead  
10 of being (inaudible).

11 CHAIRMAN WILKINS: Commissioner Block.

12 COMMISSIONER BLOCK: Is the gain -- the argument  
13 that you need a minimum prison term for each price fixer an  
14 argument based on the fact that the statutory maximum for  
15 the fine is too low?

16 (Inaudible.)

17 MR. GINSBURG: Even if there were no statutory  
18 maximum fine, we would still have the problem that  
19 individuals are unable to respond to fines sufficiently to  
20 deter this activity.

21 An offender who realizes 100- or \$200,000 from a  
22 (inaudible) for several years can confidently be expected  
23 (inaudible) or otherwise be put beyond the reach of the  
24 court the proceeds from those activities, and even an  
25 unlimited fine would (inaudible) to deter that kind of



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1 activity as a result.

2 So you need jail sentences, I think, regardless  
3 of the fines if one has a realistic assessment of the assets  
4 (inaudible).

5 COMMISSIONER BLOCK: And it would apply to firms,  
6 also?

7 MR. GINSBURG: Well, for firms I think it is  
8 equally true that they would be unable to pay optimal fines  
9 in many instances, again particularly where (inaudible)  
10 smaller firms (inaudible), but since jail is not a realistic  
11 alternative our suggestion there is that the fine be imposed  
12 as well on the individuals.

13 COMMISSIONER BLOCK: Thank you.

14 CHAIRMAN WILKINS: Any questions to my left?

15 VOICE: We have had antitrust people here before,  
16 and they shy away from any disqualification for government  
17 contracts, and you didn't say a word about it.

18 MR. GINSBURG: Well, I, under the heading of  
19 debarment, suggested that that can have an anticompetitive  
20 effect, and I can only relate some of our recent experience  
21 (inaudible).

22 VOICE: I am aware of what happened in  
23 (inaudible).

24 MR. GINSBURG: Well, we have some recent  
25 (inaudible) cases that I think may prove awfully typical of

1 OMTbur

1 the kinds of cases that we will be seeing in the next  
2 several years where the Army Corps of Engineers is subject  
3 to a statutory requirement to set aside certain projects or  
4 a certain number of projects for small business enterprises  
5 or in other cases perhaps minority business enterprises, but  
6 our exposure involved the small business set-aside.

7 That requirement limits significantly the number  
8 of potential bidders for the job. Those bidders then  
9 engaged in price fixing (inaudible).

10 Now, if as a result all of those defendants later  
11 convicted (inaudible) of participating in the Army's  
12 projects, in fact there will be little or perhaps even no  
13 (inaudible), no proviso for their services to the Army Corps  
14 for a period of time, which really can't be regarded as  
15 beneficial to the taxpayers.

16 VOICE: Well, because you have got certain  
17 circumstances like that wouldn't be any reason why you  
18 shouldn't have some consideration given to that kind of a  
19 sanction.

20 MR. GINSBURG: Well, I agree with that, Judge  
21 MacKinnon, and the Army has its own procedures, as have all  
22 of the states (inaudible) for debarment of contractors  
23 (inaudible). They have varying degrees of discretion to do  
24 (inaudible) debarment or to forego debarment if it would  
25 have adverse consequences for their procurement.

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COMMISSIONER MACKINNON: Do you think this Commission can order a maximum or a minimum sentence?

MR. GINSBURG: It is my understanding that the Commission can order a minimum sentence subject to at least such departures as the court may be able to justify in a particular case.

COMMISSIONER MACKINNON: Well, it wouldn't be minimum (inaudible)?

MR. GINSBURG: Well, I guess I would have to look at the statute in question and get back to the Commission with an answer on that.

COMMISSIONER MACKINNON: A lot of your statistics were based on, you say, recommendations to the court that weren't followed.

It has been my experience that 90 percent of the cases, criminal cases, in the country the judge never asked for any recommendations from the prosecutor.

MR. GINSBURG: Well, Judge, it is our practice to submit a recommendation wherever the court will accept our doing so, and there are courts that by rule or by decision of the individual judge will not accept a government recommendation. Of course, in those cases we stand mute.

In addition, there are occasional inferences in which by reason of a plea bargain (inaudible), but it is our practice wherever possible to make recommendations in order

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1 to aid the --

2 COMMISSIONER MACKINNON: But do you find that the  
3 judges take that or want them or ask for them?

4 MR. GINSBURG: Well, in terms of their taking our  
5 suggestions, the record is spotty and disappointing. We had  
6 a case in the last two weeks where we recommended \$375,000  
7 in fines and, to our surprise, the judge imposed \$400,000.  
8 The more typical story is one in which the fine is reduced  
9 and the jail is completely eliminated from our  
10 recommendation.

11 COMMISSIONER MACKINNON: My last question is: to  
12 what extent have you considered this damages paid on several  
13 suits? Don't judges generally take those into  
14 consideration, too, the potentiality (inaudible) suit  
15 probably already filed?

16 MR. GINSBURG: Well, the number of antitrust  
17 cases in which there has been a follow-on civil action for  
18 damages has dwindled over the years. I believe it is about  
19 50 percent of the incidences now, and it is possible that  
20 courts are erroneously anticipating that such a suit will  
21 follow as a matter of (inaudible).

22 But the anticipation of such a suit in addition  
23 to being erroneous does, I think, undermine the scheme of  
24 sanctions contemplated in the statute by eliminating from  
25 the mix the criminal fine which was to be imposed in

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1 addition to any civil liability.

2 CHAIRMAN WILKINS: Steve.

3 COMMISSIONER BREYER: I think that was very  
4 interesting.

5 I have written two things down here that are a  
6 little conflicting.

7 When you said six to 12 months, do you mean that  
8 as a typical sentence or do you mean it really as a minimum  
9 sentence?

10 Because you said a minimum sentence which then  
11 would rise. I am quite interested in what you think the  
12 typical sentence ought to be.

13 (Inaudible.)

14 Defendants have no prior record (inaudible), and  
15 they have fixed prices on goods maybe worth 20-, 30-, \$40  
16 million, and that is it.

17 What is your idea of a typical time they should  
18 go to jail?

19 MR. GINSBURG: Well, I would take the six to  
20 12-month period and relate it to the volume of commerce --

21 COMMISSIONER BREYER: Now, the volume of commerce  
22 is \$30 million.

23 MR. GINSBURG: So in that instance it would seem  
24 to me that the 12-month period --

25 COMMISSIONER BREYER: You are saying it is a

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1 range, six to 12 months.

2 Now, to get that range under the current law, I  
3 guess the judge would have to sentence them to three years  
4 because, roughly speaking, a person really serves a third.

5 MR. GINSBURG: That is our experience.

6 COMMISSIONER BREYER: That is your experience.

7 So what you are really saying is that the typical price  
8 fixing case the person should be given what would now be the  
9 maximum under the statute?

10 MR. GINSBURG: Well, the typical price fixing  
11 case involving 30- or \$40 million in commerce, which is not  
12 the typical (inaudible), and I can only guess at that  
13 amount.

14 COMMISSIONER BREYER: What kinds of ranges of  
15 jail sentences have you typically asked for during, say, the  
16 '84-'85 period?

17 Now, I realize that you haven't necessarily  
18 gotten it, but --

19 MR. GINSBURG: We have rarely asked -- Judge  
20 Breyer, we have rarely asked for -- in fact never asked for  
21 more than a year because we do think that our  
22 recommendation wouldn't be taken seriously by the court in  
23 light of our experience with other courts if we were to ask  
24 for two or three years.

25 COMMISSIONER BREYER: You would have asked in a

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1 large case typically for three years, the maximum, if you  
2 thought you would get it?

3 MR. GINSBURG: Well, I think we certainly would  
4 have asked for a year in cases that we did not ask for a  
5 year. I don't think I would go beyond a year on a first  
6 offense, although I think it would be perfectly reasonable  
7 to provide (inaudible).

8 COMMISSIONER BREYER: But it is clear in your  
9 mind --

10 (Simultaneous voices.)

11 COMMISSIONER BREYER: But it is clear in your  
12 mind that to ask for a year now, until we report, typically  
13 meant four months in jail. To ask for a year after we  
14 report would mean a year in jail.

15 MR. GINSBURG: Now, I should point out that an  
16 interesting contrast (inaudible). We have recently had a  
17 number of cases in which the antitrust count was joined with  
18 or followed by in a subsequent case a count for perjury or  
19 tax fraud or (inaudible), and it is remarkable how stringent  
20 the courts are with anyone convicted of perjury, and I think  
21 appropriately so.

22 So that we had, for instance, a three-year  
23 sentence (inaudible) for someone who was convicted both of  
24 perjury and of price fixing, and the court didn't allocate  
25 the sentences. We have had other instances in which a year

1 OMTbur

1 or more have been given (inaudible) or perjury aspects of  
2 the case while at the same time a virtually trivial fine for  
3 or community service have been imposed in connection with  
4 the antitrust crime.

5 And I think something is seriously amiss when the  
6 courts are perfectly capable of recognizing the necessity of  
7 deterrence in order to preserve the integrity of their  
8 process and yet minimizing the deterrent effect of the  
9 antitrust enforcement effort which is essential to the  
10 integrity of our public procurement process as well as  
11 (inaudible).

12 CHAIRMAN WILKINS: Thank you very much.

13 Let me just -- I think a year's sentence today  
14 would result in a service of about 10 months because there  
15 is no parole on a sentence of one year or less. So if a  
16 price fixer was sentenced to a year, they would serve  
17 between that six to 12-month range that you are suggesting  
18 now.

19 MR. GINSBURG: (Inaudible.)

20 CHAIRMAN WILKINS: Correct.

21 Well, thank you very much, Mr. Ginsburg. We  
22 appreciate it.

23 MR. GINSBURG: Thank you, Mr. Chairman.

24 CHAIRMAN WILKINS: Thank you.

25 MR. GINSBURG: If there are any other questions



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1 later, I would be happy to respond in writing.

2 CHAIRMAN WILKINS: Well, I am sure --

3 MR. GINSBURG: (Inaudible.)

4 CHAIRMAN WILKINS: Okay, thank you. I am sure we  
5 will be in touch with you.

6 Representing the American Bar Association,  
7 Criminal Justice Section is Mr. John Greacen and Ms. Loy  
8 Robinson.

9 We are delighted to have you both with us. Let  
10 me suggest that if you will somewhat summarize your  
11 testimony, and then we will allow more time for questions,  
12 and we don't have any microphones, John. So you and Loy, if  
13 you are going to be speaking as well, please sound off so we  
14 can all hear you in the back of the room.

15 Thank you.

16 TESTIMONY OF THE AMERICAN BAR ASSOCIATION,  
17 CRIMINAL JUSTICE SECTION BY MR. JOHN GREACEN  
18 AND MS. LOY ROBINSON

19 MR. GREACEN: Thank you, your Honor, members of  
20 the Commission.

21 I do represent the American Bar Association here  
22 today. I want to make perfectly clear that I do not  
23 represent the views of the United States Court of Appeals  
24 for the Fourth Circuit, where I work. On the other hand, I  
25 hope ultimately that the views I espouse will be the views

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1 of the junior member of that court.

2 (Inaudible.)

3 With me today is Loy Robinson, who is the  
4 Executive Director of the Criminal Justice Section of the  
5 American Bar Association and Director of the Washington,  
6 D.C. Professional Services Division of the ABA.

7 The testimony that I have given you prior to my  
8 appearance is based on the American Bar Association  
9 standards on sentencing alternatives and practices, which is  
10 about half of this book. The standards in this area are the  
11 most comprehensive and inclusive of a very fine set of  
12 standards on criminal justice, and what I have done is to  
13 try to pick out from it the policies that pertain  
14 particularly to the topics of this hearing and to the  
15 particular questions that you posed in your letter of  
16 invitation.

17 In my summary I am going to comment on those  
18 general policies and not on the specific answers to your  
19 questions and rely on you to probe me on those if you are  
20 moved to do so.

21 The American Bar Association standards strongly  
22 advocate the use of nonincarcerative sanctioning wherever  
23 possible. The standards use the notion sanctions involving  
24 about nonincarcerative sentences. It is important to  
25 recognize that the alternatives that you are discussing are

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1 sanctions. They are restrictions on the liberty, on the  
2 assets of people. They are not mere slaps on the wrist.

3 The standards do not countenance the kind of  
4 community service alternatives that Mr. Ginsburg noted of  
5 organizing golf tournaments, by the way. Community service  
6 can be onerous and should be onerous regardless of the  
7 standing of the person who is sentenced to it.

8 The standards advocate nonincarcerative sanctions  
9 because the American Bar Association believes that those  
10 sanctions best meet the needs of most offenders. In most  
11 cases they satisfy the public's need for appropriate  
12 punishment. They are cheaper, and quite frankly, they are  
13 the only way that sentencing guidelines can meet the  
14 requirement of your statute, that the guidelines minimize  
15 the likelihood that the federal prison population will  
16 exceed the capacity of the federal prisons.

17 The standards articulate the least restrictive  
18 alternative as the basic touchstone for the judge's criminal  
19 sentencing, and that is that the sentence imposed in each  
20 case shall call for the minimum sanction which is consistent  
21 with the protection to the public and the gravity of the  
22 crime.

23 The standards do not deal with specific crimes.  
24 They deal with overall policies, and therefore my testimony  
25 just deals in the necessarily abstract notion.

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1 The standards call for the application of  
2 nonincarcerative alternative sanctions to every crime type.  
3 Your legislation, as I read it, doesn't authorize you to do  
4 that, but it is our view that the Commission ought to  
5 authorize nonincarcerative sanctions in every instance where  
6 the legislation gives you the leeway to do so.

7 The standards call for wide use of probation and  
8 for a whole set of other sanctions called intermediate  
9 sanctions, which would be short term (inaudible) sorts of  
10 incarceration but below the minimum of an ordinary  
11 incarceration for that type of crime.

12 The sanctions call for the use of fines, with  
13 fines indexed to the financial gain or loss involved and not  
14 to a magic number.

15 Finally, the guidelines -- the standards call for  
16 the full integration of alternative sentences into  
17 guidelines, realizing that the only way for the least  
18 restrictive alternative to be actually implemented in a  
19 guideline system is for those sentences to be integrated  
20 fully into the guideline structure.

21 In my testimony I posed three questions to myself  
22 dealing with this general issue:

23 What alternatives should the Commission  
24 recognize?

25 The answer is as many as possible, and the way in

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1 which the guidelines are set up ought to spur rather than  
2 dampen the individual sentencing judge's creativity in  
3 developing yet additional alternatives as may be appropriate  
4 to a particular case.

5 For what crimes should alternative sanctions be  
6 allowed?

7 And the answer is as many as possible.

8 Finally, how should alternative sanctions be  
9 integrated into a sentencing guideline scheme?

10 This is a very difficult question, particularly  
11 for witnesses appearing at this stage in your process where  
12 we don't yet know the structure and form that your  
13 guidelines will take because of course this must respond to  
14 a particular form.

15 As I see it, this Commission is breaking new  
16 ground here in integrating alternatives into sentencing  
17 guidelines. For the most part, the guidelines of which I am  
18 familiar merely say in/out, and they do not say what happens  
19 to those who are out.

20 We suggest in the testimony three possibilities:  
21 first, that the notion of the least restrictive alternative  
22 be stated specifically in the guidelines as the principal  
23 canon of construction for sentencing judges.

24 Second, we point out that particular  
25 nonincarcerative sentences can be incorporated into a grid

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1 of a traditional guideline matrix, and if you will look at  
2 Appendix A, which appears two pages after page 13 of the  
3 testimony, you will see one taken from the standards in  
4 which the alternative sentences are set into a guideline  
5 matrix along with the incarcerative sentences.

6 And our third possibility is the notion of the  
7 development of some sort of an equivalency table where  
8 nonincarcerative sentences could be equated to incarcerative  
9 sentences, and I direct your attention to page 7 of the  
10 testimony. I would like to modify slightly the testimony in  
11 the last sentence on the bottom of page 7.

12 Page 7 suggests that the Commission might say  
13 that a month of total imprisonment was the equivalent of X  
14 months of probation or Y months of intensive supervised  
15 probation or W hours of community service. The next  
16 sentence unfortunately doesn't carry through that notion  
17 because it should read as follows:

18 Then if the guidelines specified a six-month  
19 incarceration sentence, the alternative would be 6X months  
20 of probation or some combination sentence such as 4Y....

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1 The attempted algebra here is not confusing, but  
2 it...

3 One other comment I would make. In the answer to  
4 one of your questions on the structure of a hearing to  
5 determine the appropriate amount of restitution, I failed to  
6 direct your attention to Standard ET-614, which does spell  
7 out the American Bar Association's recommendations on  
8 sentencing hearings, calling for an evidentiary hearing  
9 where there are disputes as to the presentence report and  
10 the decision on the preponderance of the evidence standard.

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

13 Mr. Robinson, do you have any comments you'd like  
14 to make?

15 COMMISSINER ROBINSON: No. (Inaudible).

16 CHAIRMAN WILKINS: Good. Thank you.

17 Any questions to my right?

18 COMMISSIONER: I just wanted to follow up on this  
19 least restrictive alternative motion. What does that mean  
20 in practice? How do you decide when prison and fine, least  
21 restrictive alternative, recognizing that there are  
22 constitutional problems in trying to define...

23 MR. GREACEN: The way it would work in practice  
24 is the sentencing judge would ask, having already decided  
25 that probation is out of the question, given the gravity of

1 OMT/bc

1 this case, would next ask:

2 Are fines appropriate in this case? In this  
3 case, could fines satisfy the damage to the fabric of  
4 society?

5 And, if so, then the fines could substitute for  
6 incarceration. Or, it might be that, given the case, fines  
7 would need to be added to incarceration.

8 But, the standards suggest that fines are rarely  
9 appropriate in addition to incarceration.

10 COMMISSIONER: Would you admit to the provision  
11 that it would give guidance to the -- the guidelines or  
12 policy statements about how the judge is to make that  
13 determination? About whether in fact fines could satisfy  
14 the principles of punishment in this case?

15 MR. GREACEN: This is the ultimate and difficult  
16 question that the Commission has to grapple with. And I'm  
17 afraid my answer will be unsatisfactory and will merely say  
18 that you have to walk the thin line between giving the  
19 guidance to the sentencing judge that the statute foresees  
20 you giving, and leaving the judge the discretion to decide a  
21 particular case.

22 COMMISSIONER: But the alternative -- face the  
23 court. I think that's the point.

24 COMMISSIONER: I'm not clear on one point. Now,  
25 do you encourage, or the ABA encourages non-incarceration



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1 whenever it's not found prohibited by statute?

2 Are we to understand then that, generally  
3 speaking, the violent, repeat offender, which is of course  
4 mentioned in the statute, would go to prison and the white  
5 collar offender would never go to prison?

6 MR. GREACEN: I'm glad you asked the question.

7 My testimony is to the effect that the  
8 possibility of a nonincarcerative sentence be available for  
9 all crime types. Now that does not mean for all criminals,  
10 events and incidents and cases.

11 And the standards are very clear that there are  
12 crimes of a white collar variety where the nature of the  
13 affront to society is sufficiently great that a sentence of  
14 probation would minimize the effects and would be  
15 inappropriate.

16 So I would distinguish between the availability  
17 of a nonincarcerative sentence or a type of fine bridge this  
18 guidance to judges to whether to impose incarceration in a  
19 particular case of that type.

20 The standard strongly objects to mandatory  
21 incarceration based on the type of fine.

22 COMMISSIONER: You would promote then a wide  
23 degree of discretion on the part of the judge being  
24 permitted?

25 MR. GREACEN: Guided by the directions given by

1 OMT/bc

1 the guidelines set up by the...

2 COMMISSIONER: You know, listening to you sounds  
3 like you're going to give the Judge a great deal of  
4 discretion. So what does that do with the disparity? Which  
5 is one of the reasons we're having a Sentencing Commission?

6 MR. GREACEN: The -- of our Association's  
7 standards strongly advocates sentencing guidelines as the  
8 only way to square the needs for discretion with the need  
9 for equality and consistency of sentencing.

10 We'd be looking to the Commission to calibrate  
11 the sentences for particular crime types. But what we're  
12 merely saying is that no crime type should, by its nature  
13 alone, prohibit a nonincarceration.

14 COMMISSIONER: You completely disagree with  
15 Mr. Ginsburg when he said the type of penance he was talking  
16 about was every one of those guys should serve the time in  
17 jail. You disagree with that, I guess.

18 MR. GREACEN: That's right.

19 COMMISSIONER: But we're not saying that, in some  
20 instances, some of those penances are not appropriate.

21 MR. GREACEN: That leaves it to the discretion to  
22 the --

23 COMMISSIONER: (Inaudible).

24 MR. GREACEN: That leaves the discretion to the  
25 judge the way it is right now, before we have sentencing

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1 guidelines. And then there's disparity.

2 MR. GREACEN: But the guidelines could set forth  
3 the instances in which the gravity of the crime is so great  
4 that incarceration is required. But it would not -- we're  
5 not saying that the guidelines should not have instances  
6 where incarceration is required. But that that should not  
7 be across-the-board for particular types of crimes.

8 CHAIRMAN WILKINS: Any questions to my left?  
9 Mr. Gainer.

10 COMMISSIONER GAINER: Mr. Greacen, either you or  
11 Ms. Robinson, (inaudible).

12 It seems there's a sort of presumption underlying  
13 the choice. And I'm not familiar with --

14 MS. ROBINSON: Mr. Gainer, while I've been with  
15 the ABA, sir, it seems like -- that was not their feeling in  
16 fashioning those standards and I don't really know the  
17 historical basis for it. But I think it's generally an  
18 approach of the careful use of whatever kind of  
19 sanctions...and the original draft would be taken in -- with  
20 the notions of --

21 MR. GREACEN: In fact, the portion that I read to  
22 you has the flipping of the opposite side of the coin. The  
23 least restrictive alternative consistent with the protection  
24 of the public and the gravity of the crime.

25 So it's --

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1 COMMISSIONER GAINER: (Inaudible).

2 MR. GREACEN: No. I think the --

3 The principle would say use that alternative,  
4 that sentence which least infringes the liberty of the  
5 offender, the convicted citizen. But, consistent with  
6 effectiveness.

7 CHAIRMAN WILKINS: Any other questions?

8 COMMISSIONER: How much content do you give? You  
9 have the idea of the least restrictive sentence. Of course,  
10 where appropriate. What is the least restrictive sentence?  
11 How do you know when the least restrictive might be prison.  
12 And you talk a little bit about the content of that.

13 You say, well, if it's a crime of violence  
14 resulting in serious bodily injury by a first offender, then  
15 perhaps prison.

16 What else do you think might warrant prison?

17 I don't know the extent. I'm not expecting you  
18 necessarily to have -- to that. But, if you do...

19 MR. GREACEN: The standards could be only in the  
20 broadest terms standard 18 2.5(C) in talking about the  
21 appropriate use of total confinement. That's prison.  
22 Suggests these as examples of appropriateness, confinement  
23 is necessary in order to protect the public from further  
24 serious criminal activity by the defendant or where  
25 confinement is necessary so as not to unduly depreciate the

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1 seriousness of the offense and thereby foster disrespect for  
2 the law.

3 Now those are very, very formal standards. And  
4 they conclude standards do not become more specific. We  
5 will be glad to comment to the Commission on drafts of  
6 your--of whether when you come out with them would think  
7 that they are appropriate along those lines.

8 COMMISSIONER: What do you think about intensive  
9 probation? Have you any concrete examples of where  
10 intensive probation has worked fairly well? Even might be  
11 substituted for what would otherwise be a prison sentence?

12 I mean, if you were to advise me, well, where  
13 should I go? What's the top price in your terms that's  
14 concrete meaning for that term? I mean, is it St. Louis?  
15 Sacramento? Or is there a place where they put this into  
16 practice and can say, well, that's worked pretty well. Go  
17 look at that one.

18 CHAIRMAN WILKINS: Thank you very much,  
19 Mr. Gracen, and thank you, Ms. Robinson. We appreciate  
20 your efforts today, but also the efforts in the past in  
21 assisting the Commission. We look forward to continuing  
22 with you.

23 Representing the National Association of Criminal  
24 Defense Lawyers, Mr. Herbert Hoelter, Ms. Marcia Ghein.  
25 We're delighted to have you both with us.

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STATEMENT OF MR. HERBERT J. HOELTER AND  
MS. MARCIA G. SHEIN, OF THE  
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

MR. HOELTER: We've both prepared about five  
minutes for testimony and the rest of the time for  
questions.

CHAIRMAN WILKINS: Fine. Thank you.

MR. HOELTER: We are talking today on the fields  
of sentencing in the federal system.

MS. SHEIN: Mr. Chairman, Members, it's nice of  
you to have us here. We appreciate it very much. As a  
practitioner in the field, our organization is the National  
League of -- based in Atlanta. And we promote the use of  
sentencing on -- alternatives to lengthy incarceration. And  
in association with the National Association, we are here  
providing our thoughts and testimony on -- quite a bit.

(Inaudible).

I have submitted my testimony, I believe,  
previous to this. I don't know -- but I will try to --

The present population in the United States  
reached an all-time high in 1985 -- half million overcrowded  
conditions in the federal prison system...need for the  
Comprehensive -- Control Act of 1984.

Currently, 37 percent, that's more than a third  
of the federal prison population, is rated at security level

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1 one. This means that at least 37 percent of offenders of  
2 nonviolent crimes, most likely first offenders, serving  
3 short times of incarceration, could just have easily have  
4 been placed in all kinds of sentencing programs without  
5 jeopardizing the public.

6 This is supported by the intent of USC 18 3551.  
7 They could in fact be contributing to the very public they  
8 have wronged instead of burdening them further with an  
9 average of \$15,000-20,000 per prisoner per year in tax  
10 dollars.

11 In order to solicit public endorsement of  
12 alternatives to incarceration, a vigorous campaign on the  
13 realities of crime and punishment must be launched.

14 TV is not reality-oriented and we tend to believe  
15 that it is. The majority of crimes is not rape, murder,  
16 robbery. In fact, violent crimes constitute only 17 percent  
17 on the average, and that is generally confined to a state  
18 average. The average in the federal system is far below  
19 that.

20 No distinction is being made by the public  
21 between violent crimes deserving a serious sanction versus  
22 all other categories of crime. Without reeducating the  
23 public first, we continue to place under pressure our  
24 judicial system to respond to only a small segment of crimes  
25 and punishment needs.

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1 The United States has the longest sentences in  
2 the world and one of the highest crime rates. The United  
3 States ranks behind only the Soviet Union and the Union of  
4 South Africa, prisoners are kept longer.

5 There is no evidence that longer sentences have  
6 provided any greater deterrence than shorter ones.

7 One Federal Judge that we worked with not too  
8 long ago helped in this reeducation process by selecting a  
9 productive alternative to incarceration which met precisely  
10 the needs of the individual and society.

11 A young American Indian unable to successfully  
12 imitate Western ways and bereft of his own particular ways  
13 of life, with a history of community disturbances and  
14 parental difficulties was finally arrested for multiple  
15 social transgressions.

16 His own community knowing of his troubled past  
17 did not wish to see him locked away in a cage. This  
18 community interest was documented in a unique alternative  
19 plan presented to a federal court. Thus informed, the Judge  
20 banished the Indian to the Alaskan Wilderness. Now it  
21 sounds harsh on the surface, but the Indian was able to live  
22 his life in the Indian style and his ways in the Alaskan  
23 Wilderness, where he, too, was willing to take up sanction.

24 In this case, society was willing to support such  
25 a sanction, knowing he was not harmful to society nor -- to



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1 himself.

2 The bottom line was the Judge recognized the need  
3 for a unique, creative alternative and then logically chose  
4 one.

5 This is the kind of media coverage that would  
6 help reeducate the public and make your job somewhat  
7 easier. Alternatives cannot work if they are not used, and  
8 they will not work if they are not individualized.

9 We cannot afford to remove the human factor from  
10 the law lest we become no better than the -- who recently  
11 executed those two Australians for their heroin possession.

12 We have a need to develop guidelines for using  
13 alternatives and not just guidelines for incarceration.

14 The validity of alternatives can only be  
15 established by their use and the use of available  
16 alternatives that are not being used is endless, and you  
17 have heard many of them today.

18 In 1985, the Bureau of Prisons implemented  
19 another alternative plan to help relieve overcrowdedness,  
20 called the Repairative Work Project. I would like to see  
21 some statistics about those who benefited from this  
22 program. I have none and have seen none of my clients ever  
23 receive the benefit of this.

24 I recommend more community treatment centers. I  
25 recommend the use of those types of centers. And to go for

OMT/bc

1 those types of centers as an alternative to prison. It  
2 would save tax dollars.

3 Any incarceration or isolation is indeed  
4 sufficient punishment in many cases, including community  
5 services tacked on to that.

6 A man was charged in a \$16,000 refusal to file  
7 tax charges. He was sentenced to a year in prison and at a  
8 cost of \$15,000-17,000 per year at that time.

9 A further plan, rejected by the court, would have  
10 placed him in a community hospital as a volunteer in a  
11 position that normally cost the hospital \$14,000 in salary.

12 So, instead of being able to work fulltime, being  
13 able to pay back his taxes as well as pay the interest and  
14 everything else that occurred as a result of his time away  
15 from paying those taxes, and save the hospital money, we  
16 spent twice as much money incarcerating him.

17 Wouldn't a year in a community service program  
18 have satisfied the needs of the judicial system and society  
19 to a greater benefit for all?

20 The more recent case of \$250,000 tax violation,  
21 the Judge did indeed see fit to sanction that individual to  
22 30 hours of service -- and encourage the civil litigation  
23 aspect of the case to be resolved quickly so the taxpayer  
24 and the tax dollars that were required to be paid could be  
25 resolved.

1 OMT/bc

1 To suggest that alternatives are not punishment  
2 is absurd. Alternatives on -- socially constructed  
3 sentences. We are so fraught with a lack of funding for  
4 meaningful social services that any volunteer pool is a  
5 valuable resource.

6 And we have at least 37 percent of the federal  
7 prison population, much less those that are still eligible  
8 while under probation, so much to tap.

9 To think that incarceration is the only deterrent  
10 is yet another myth. Studies have shown that all forms of  
11 punishment have minimal to moderate deterrence effects.  
12 However, probation and community-based alternatives register  
13 minimum to maximum effectiveness in rehabilitation.

14 Longer sentences do not deter crime. They waste  
15 lives. Theirs, yours and ours. In the Atlanta Journal  
16 Constitution just last evening, just before coming here,  
17 there was an interesting article printed on sentencing  
18 alternatives. And I thought I would share it with you since  
19 it sort of popped up just before I left.

20 It relates to thousands pay for crime with  
21 community work. And even in the contents of this, they  
22 discuss a young man in Atlanta who was charged with selling  
23 cocaine who is now doing 40 hours of service for the  
24 Cerebral Palsy Center of Atlanta.

25 Another individual, young man, is helping build

OMT/bc

1 homes for Cambodian refugee families, as well as restoring  
2 houses for poor families in the Appalachian Region.

3           These types of offender alternatives have saved  
4 the State of Georgia \$8 million. Now, that's one State.  
5 You can imagine what it is on a national scale.

6           Certainly, we can put that traffic in the federal  
7 system. There is an extravagancy emphasis on the current --  
8 system on the use of alternatives, which we can ill-afford  
9 to maintain for human as well as economic reasons.

10           If we can't be motivated by our hearts and common  
11 sense, let's be motivated by our pocketbooks and common  
12 sense. I know -- this Commission will take in establishing  
13 its sentencing guidelines and policy statements on the use  
14 of more alternatives.

15           Thank you.

16           CHAIRMAN WILKINS: Thank you.

17           MR. HOELTER: Good morning, Judge, Members of the  
18 Commission. I'm here representing the National Association  
19 of Criminal Defense Lawyers also. I'm very proud to have  
20 been associated with that group for about eight years.

21           During that same time period, I've been Director  
22 of the National Center on Institutions and Alternatives.  
23 Our organization has worked in courts in 67 of the 94  
24 jurisdictions that are out there today, resulting somewhere  
25 in the neighborhood of about 5,000 alternative plans...

1 OMT/bc

1 about half of them in federal court.

2 Dr. Miller, who will testify next, is President  
3 of the organization.

4 My testimony today is obviously directed at  
5 urging the Commission to give serious consideration to  
6 alternative sanctions. I find it a little bit disconcerting  
7 and difficult to do given the tone that's already been set  
8 by having your first witness come up and ask you to do more  
9 to -- put people in jail.

10 I think that we can certainly develop a more  
11 positive tone for alternatives. I think the events of the  
12 past, the uprising of Lorton, the debacle, having two  
13 of our major criminal and justice officials dress up like  
14 thugs and go commit a crime in New York City. I think it's  
15 outrageous.

16 I hope that the Commission looks at these and how  
17 it's a failure. I hope that the Commission is progressive  
18 enough in its thinking and planning so that we can have a  
19 federal prison system and a federal criminal justice system  
20 of which we can be proud.

21 I think, years ago, six years ago, seven years  
22 ago, I think we could be proud of the federal system. I can  
23 no longer say that. I think the federal system has lost its  
24 status. It's much more akin to the ever volatile, over-  
25 crowded and inhumane conditions that are present in our

1 OMT/bc

1 state systems.

2 We have watched the Bureau of Prisons populations  
3 grow. Six years ago, the system was relevantly acceptable.  
4 Today, it's 50 percent overcrowded. You hear the rote  
5 phrase about these alternatives, the scarcity of prison  
6 resources and the need to look at individual cases and the  
7 like.

8 Similarly, we've heard the -- very compelling,  
9 but they've become almost trite. The fact that it takes  
10 \$75,000 to build a jail cell and \$20,000-25,000 to keep  
11 someone in there. It's gotten old.

12 We seem to be hearing that the public wants  
13 justice. What does that mean? The prison system has told  
14 you that they're the only ones who provide justice these  
15 days. That's simply not true. They're lying to you.

16 There's many ways to get justice in the country  
17 today and you don't have to cage people to get it all the  
18 time.

19 I'm urging you to look at some of the  
20 alternatives that we are talking about today in the  
21 development of a guideline...

22 Some of the ways in which we've achieved justice  
23 and that federal judges have achieved justice in the past  
24 eight years of our...have been using a number of options.

25 The first one, Marcia has already mentioned.

OMT/bc

1 Expand the use of community service. We've gone  
2 well beyond the dates when community service was vagrants  
3 picking up beer cans in the park or public --

4 We have courts ordering it fulltime. I'm sorry  
5 that the Assistant Attorney General West, I was very proud  
6 of him, could see alternatives for the United Way. That was  
7 one of my antitrust cases. We put the community service in  
8 a case and he said we must state that. That case involved a  
9 tremendous restitution, involved civil litigation -- it  
10 involved putting together a tremendous fundraising campaign  
11 for United Way, which had traditionally been losing money,  
12 in a poor community over the years.

13 And to simply scoff at the idea of community  
14 service because they don't think it's punishment is  
15 ridiculous.

16 The same with a tremendous number of social  
17 issues being performed by...and it's done from a five-hour a  
18 week tap, fulltime.

19 You have people putting together homeless  
20 shelters in Philadelphia. We have people putting together  
21 truck distribution routes for food banks in New Jersey.

22 Dozens and dozens of social restitutions. We're  
23 very proud of what we have done in antitrust cases, tax  
24 cases...

25 Another alternative that was scoffed at years ago

OMT/bc

1 was house arrest, where a person is confined to their house  
2 whether the use of electronic monitoring was used or not.  
3 Today, it's being used routinely in federal court. When a  
4 judge said:

5 I'm no longer going to pursue the overcrowded  
6 conditions in the federal system. We can restrict your  
7 residence at home.

8 Our organization won for the better a monitoring  
9 program in the State of Texas right now, helping people use  
10 the state population...

11 The issue of fines and subsequent -- one of the  
12 double-edged swords in the federal system, that there's many  
13 defendants who have resources; yet, there are no  
14 identifiable victims to the crime. Again, in antitrust  
15 cases, you pioneered the use of what you call  
16 substantive...cases, where the defendant is assessed a  
17 penalty to pay money to a community organization, where a  
18 joint offender must sponsor a person, a drug addict through  
19 a drug treatment for three or four years, at the cost of  
20 \$20,000 a year. Tremendous amount of resources that one can  
21 use if their imagination is there with subsequent victims  
22 and fines.

23 There's a lot of other examples in alternative  
24 punishments that are available. I don't think that it's  
25 that complicated. I think that, if necessary, they can be



1 OMT/bc

1 used in conjunction with a short-term imprisonment. Rather  
2 than 18 months, six months in prison and 12 months community  
3 service work.

4 With all due respect to all the Commission  
5 members, I would assure you that were any of you in trouble,  
6 you would be the first one to say that "I need an  
7 alternative sentence. I'll hire the NCIA and National Legal  
8 Services. Please, help us come up with something."

9 I would assure you that you would not like to  
10 spend six to 12 months in jail. If it weren't for some of  
11 the more distinguished public servants in this country who  
12 have --

13 (Laughter.)

14 To suggest that deterrence is the single reason  
15 for imprisonment is also absurd. If deterrence worked after  
16 Watergate, there would have been no ABSCAN. After ABSCAN,  
17 there would have been no BRILAP.

18 Tell me deterrence works with some of the  
19 smartest criminals and then take it down to the lower level,  
20 and that's where most of our criminals are.

21 I urge the Commission to structure alternative  
22 punishments within the guideline format. Judges deserve  
23 discretion. They've worked hard to be on a federal bench.  
24 They deserve the right to help set penalties. You can have  
25 guidelines, but you can also structure alternatives within

OMT/bc

1 those guidelines, alternatives that are decent and that  
2 don't deprive the community of resources that they need and  
3 don't waste resources that...

4 Thank you very much.

5 CHAIRMAN WILKINS: Thank you, Mr. Hoelter.

6 Any questions to my right?

7 COMMISSIONER: I think, one. I would share the  
8 opinion that both of you expressed in terms of increased  
9 utilization of community service is desirable. I think we  
10 can be a lot more creative than we've been in the past, so  
11 that they can give back to society something.

12 Our concern though about a couple of things. Of  
13 course, you mentioned that it bothered you somewhat about  
14 the earlier testimony indicating that deterrence is the only  
15 reason for prison.

16 I'm not sure that I understood you correctly with  
17 regard to white collar offenders. Did I hear your promotion  
18 of the idea that in all cases, an alternative to  
19 incarceration is appropriate?

20 And I wonder if there would be any concern about  
21 promotion of respect for the law as being a justifiable  
22 reason for incarceration of white collar offenders?

23 MR. HOELTER: A couple of issues we could raise.

24 One of the arguments that has developed over the  
25 years with regards to white collar crime, as punishment for

OMT/bc

1 white collar crime, has been we should now do to the white  
2 collar criminal what we've always done to the poor  
3 criminal.

4 If a guy robs a 7/Eleven, he gets 10 years for  
5 that. And a white collar criminal commits a tax fraud of  
6 \$250,000, he gets one year, there's somehow something unjust  
7 about it. And I...

8 (Conclusion of side 1 of tape 2.)

9 ...somehow think that argument needs to be  
10 reversed. Rather than say we will operate a bail system and  
11 we need to do to white collar people what we've always done  
12 to the poor people, why don't we do to the poor people what  
13 we've done to the rich people?

14 Why don't we give them one year in community  
15 service? Why don't we give them alternative sanctions  
16 within the community?

17 True. They don't have the money. And there are  
18 certain constitutional problems with fines and other  
19 sanctions. But we don't have to limit it to financial  
20 sanctions. There's a lot of other things that can be done  
21 that would guarantee public safety that can give justice in  
22 this country.

23 MS. SHEIN: If I may, briefly, we have to address  
24 ourselves to this issue of deterrence. This is a major word  
25 that just hangs over the Judge's head, hangs out of the

OMT/bc

1 court room just like a shark ready to devour anybody that  
2 stands in the front. And prosecutors use that word  
3 loosely. There's no proof of any sort any time, anywhere,  
4 that indicates that longer sentence for Joe Blow is going to  
5 help Joe Shine over here not to do something.

6 You know, the guy that goes to jail for 20 years,  
7 with the exception of a few of your public officials, is  
8 never going to be noticed, is never going to be known. And  
9 a year in jail, his family...so on down the line.

10 I don't remember, you know, somebody that I see  
11 in the newspaper getting caught for some major offense.  
12 That's not what I remember. I remember that it's against  
13 the law. And that's what we have.

14 This issue of deterrence --

15 MR. HOELTER: And the new act addresses that.  
16 The new act specifically says that if deterrence is the only  
17 reason for putting somebody in jail, you should not do it.

18 The new act says that. Judge Mary Johnson -- in  
19 the case that we just recently had in the Southern District  
20 of New York, quoted it to us.

21 I said, "Thank you, your Honor, that's what I  
22 always thought."

23 CHAIRMAN WILKINS: Any questions to my left?

24 COMMISSIONER: Yes. Herb, you gave us an example  
25 of an American Indian who was banished. Would you limit

OMT/bc

1 that option to an American Indian?

2 MS. SHEIN: No.

3 (Laughter.)

4 MS. SHEIN: It's a creative...that is such an  
5 incredible...in fact, the prosecutor came up to me  
6 afterwards and said -- and I laughed because it was a  
7 clearly unusual case.

8 I have never seen one quite as unique as this.  
9 Certainly, that's not a sanction I'm sitting here suggesting  
10 that the Commissioner apply it for a guidelines.

11 But it shows the flexibility and creativity of a  
12 Judge whose recognized the need for the individual society.  
13 Certainly, if you create a criteria for a fine alternative,  
14 such as guidelines for guidelines for alternatives, so to  
15 speak, so the Judges will at least have a way of designing a  
16 fact pattern for using that.

17 Now, it may, you know, result in a creative thing  
18 such as this. But then again, it may not. But the idea is  
19 some guidelines.

20 COMMISSIONER: That was a kind of specific  
21 question. You answered the way I thought you would. But I  
22 have a more general question to you and maybe to the other  
23 people that are going to testify.

24 We're talking about sanctions and we're looking  
25 at, I think, offenders you say don't have to go to prison.

1 OMT/bc

1 And I think you're usually talking about the first-time  
2 offender. Is that right? Primarily?

3 MS. SHEIN: First, small fry secondary.

4 COMMISSIONER: What about sanctions for the  
5 career criminal, the guy or woman that we've been sending to  
6 prison time after time after time. And it's obvious that  
7 prison is not a deterrent for that individual, that type of  
8 individual.

9 Now, in your creativeness, have you thought of  
10 some, you know, options? We're talking about some options  
11 other than prison for that type of offender.

12 MS. SHEIN: As a former federal probation officer  
13 in the Southern District of Florida, I dealt with the  
14 psychiatric and alcoholic patients. Every one of my  
15 offenders had multiple rapsheets. I had nine and 10-page  
16 rapsheets. And I was still wondering why I'm supervising.

17 That is a problem. I acknowledge that. I also  
18 acknowledge that those individuals may not be applicable.  
19 But, at least, I mean, by reducing this 37 percent first  
20 offender consideration allow space for the multiple offender  
21 and especially multiple violent.

22 COMMISSIONER: My question is, an option other  
23 than prison. Prisons, as you point out, are very, very  
24 expensive.

25 MS. SHEIN: Yes.

OMT/bc

1 COMMISSIONER: So, other than prison. An  
2 appropriate thing other than prison.

3 MR. HOELTER: -- I think that's when you have  
4 multiple offenses and a long-range record, clearly, there's  
5 an underlying problem. Whether it be drugs or alcohol.

6 Take the District of Columbia. Sixteen thousand  
7 drug addicts. There are 60 residential beds. And I think  
8 that's what -- what one needs to be able to do within the  
9 system, and I don't know, again, the structure of -- I think  
10 one needs to be able to approach those cases individually.  
11 One need not write off those people because they've  
12 committed an offense, and you throw them away.

13 You can supervise them in their home. You can  
14 put together resident programs, secure, locked facilities  
15 that are decent and humane.

16 What you need in this system is in order to have  
17 the financial resources to do that, we don't need a system  
18 that says we're spending \$20,000 to put somebody in a camp,  
19 in a barracks somewhere, if we give you \$1,000 to program  
20 for that person. We don't need assistance...

21 COMMISSIONER: One more. I'm going to ask all  
22 the people that are going to testify. Think of an option  
23 other than incarceration for this type of offender.

24 I mean, something that may deter him.

25 MS. SHEIN: Inhouse psychiatric program? Inhouse

OMT/bc

1 residential treatment programs? There are several of them  
2 that run for two, three to four years, depending on the  
3 need.

4 Certainly, this is financially a problem we'd  
5 have running community support programs like this, but there  
6 are programs inhouse for multiple years, dependent on what  
7 you find out.

8 One of the problems of multiple offenders is  
9 determining whether it's a true antisocial personality or if  
10 there all this time in their lives has been some underlying  
11 problem that has not yet been reached or tapped or uncovered  
12 or resolved.

13 I say this because I worked for the Salvation  
14 Army a a group therapist for them with alcoholics, 12 and 13  
15 and 14 years of it, with no family, no nothing. And, in  
16 that group therapy, despite all that problem and where they  
17 were at, they stayed there for several years and,  
18 eventually, many of them went on to restructure their  
19 families and get back out in the community.

20 They offered that multiple year type of sanctions  
21 off the street. So there are options. There are not that  
22 many there, but they are there. And we perhaps need to  
23 propose using them if you find out that there's something  
24 else, such as the alcoholism, which can create crime in a  
25 number of cases, multiple cases. You end up with a real



OMT/bc

1 problem.

2 CHAIRMAN WILKINS: Any other questions?

3 (No response.)

4 CHAIRMAN WILKINS: Well, thank you very much.

5 COMMISSIONER: One. You said we have the longest  
6 sentences in the world. Is that true in the federal or the  
7 federal and the state or what?8 MS. SHEIN: It's the federal and state system  
9 combined.

10 COMMISIONER: How did the federal compare?

11 MS. SHEIN: We were unable to get a  
12 distinctive...I would suggest it's similar in average  
13 rates.14 COMMISSIONER: ...we don't have the power of  
15 appropriations. We have to write a sentence. In a word,  
16 can you tell me what to do? So as far as think about your  
17 typical -- is a typical -- a typical bankrobber, dope seller  
18 may be antitrust violations.19 Now suppose what -- one thing is we have short-  
20 tailed sentences for those followed by blank alternative...21 You're saying no jail sentence followed by  
22 blank. What words do we put in the blank?23 And I don't know if you have a preference between  
24 short followed by blank, or not followed by blank.

25 MR. HOELTER: Or a combination of the two.

OMT/bc

1 COMMISSIONER: Or a combination of the two. And  
2 if so, where and when?

3 MR. HOELTER: But I don't agree with your  
4 premise that you have no appropriations.

5 COMMISSIONER: No, I didn't say issue. I said we  
6 do not have the power to appropriate money.

7 MR. HOELTER: Because what you're going to do in  
8 the setting of a political --

9 COMMISSIONER: I agree with that.

10 MR. HOELTER: The guideline system said to the  
11 Federal Bureau of Prisons: Put a cap on the level of people  
12 you can put in prison. Then it's an appropriation issue. I  
13 think the Commission should consider a cap.

14 COMMISSIONER: I specifically didn't say an  
15 issue. I just wanted to point out that often Congress --

16 MS. SHEIN: Terminology. Terminology is your  
17 problem. And I recognize that. It's sort of guidelines for  
18 guidelines used for alternatives. I think you have to put  
19 into words what the judges should look at in determining  
20 what offender would apply to that.

21 And that could mean that it could be any of the  
22 offenders. The guidelines, though they say sanctions of  
23 incarceration, it does also say in the bill or the Senate  
24 Act, is that you can put in writing a reason to go below the  
25 guideline, and put in writing a reason to go above the

OMT/bc

1 guideline.

2 And I believe that's going to be a consideration  
3 of the Commission, that what are those reasons.

4 As soon as you design those reasons, you'll be  
5 able to possibly expand that into thoughts for the judges  
6 views for them to consider going below the guidelines  
7 towards the alternative sentencing and...

8 So that's where we probably should start opening  
9 up your terminology.

10 COMMISSIONER: ...hours for six months.  
11 Structure those directly into the guidelines so that there's  
12 an alternative to having these other places.

13 CHAIRMAN WILKINS: Thank you both very much.

14 MS. SHEIN: Thank you very much, all of you.

15 CHAIRMAN WILKINS: We'll hear from Mr. Jerry  
16 Miller, representing the National Cnter on Institutions and  
17 Alternatives and, after that, we'll take a short break.

18 Mr. Miller, we're delighted to have you with us  
19 today.

20 MR. MILLER: Thank you, Mr. Chairman.

21 STATEMENT OF MR. JERRY MILER,

22 NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES

23 MR. MILLER: I've not come before the Commission  
24 with a series of how to suggestions as it goes about its  
25 task of proposing sentencing recommendations to be attached

OMT/bc

1 to the new crime bill.

2 Rather, I ask the Commission members and staff to  
3 view my testimony as some sort of time out, an interval less  
4 to take notes or listen to legal prescriptions and to pause  
5 and reflect a moment or two on a few abiding issues, which I  
6 think should never leave the room when this deliberative  
7 body meets.

8 This is not to say I couldn't or wouldn't like to  
9 make some concrete suggestions, particularly after the  
10 recent interchange here and can and I would. After a decade  
11 as an officer assigned to work with the U.S. military in  
12 stockade and disciplinary barracks both in this country and  
13 Europe, and after two decades working in the civilian  
14 corrections system, many of those years at cabinet level  
15 positions in state government in both Republican and  
16 Democratic administrations, and after another eight years  
17 heading this present agency I now head, the work of which  
18 has been primarily focused on sentencing of felons -- we've  
19 done some 5,000 felony sentences actually in federal and  
20 state courts -- I would have a number of specific  
21 suggestions.

22 However, I'm sure the Commission will have or has  
23 had opportunities to hear these from others. Moreover, I  
24 fear that the recommendations I believe would have the most  
25 felicitous effect on a sentencing practice and ultimately on

OMT/bc

1 a national correctional system would probably not be well-  
2 received by a Commission assigned a relatively narrow,  
3 technical, dare I say, unfortunately, too technical a  
4 mission.

5 Clearly, the hope and watchword of those who  
6 devised the Crime Control Act was that it would contribute  
7 to the common wheel and domestic tranquility of the nation.  
8 It was designed and written primarily by lawyers, approved  
9 by a body made up here exclusively of lawyers.

10 As an imminent Norwegian philosopher and  
11 criminologist, Niles Cristy, has commented:

12 Training in law is training in simplification.  
13 It is a trained incapacity to look at all values in a  
14 situation and, instead, to select only the legally relevant  
15 ones, that is, those defined by the high priests within the  
16 system to be the relevant ones, so few elements of the  
17 totality are considered that complete equality is  
18 guaranteed.

19 But it is through its simplification a primitive  
20 system. With this in mind, the Commission should realize as  
21 it goes about its complicated and difficult task and adjusts  
22 guidelines, grids and formulate a -- fences, at another  
23 level, it is still not much beyond the primitive task of  
24 those early 19th Century European Commissions which were  
25 given a mission of converting branding, cutting off of limbs

OMT/bc

1 into terms of imprisonment -- 10 years for a hand. How many  
2 for an eye? Et cetera, et cetera.

3 As Kristy -- and others have demonstrated:

4 There are limits to pain as a means of  
5 guaranteeing order. There are even greater problems if we,  
6 and particularly new as commission members, believe that  
7 sentencing stricture and time in prison reflect on even --  
8 or even has much relevance to the myriad of factors and  
9 vaguaries which come together to result in a commission of  
10 an individual crime of any kind.

11 The great American philosopher and social  
12 psychologist, writing in 1917 on the psychology of punitive  
13 justice, George Herbert Mede, commented that:

14 In the legal arena, the social worker is  
15 inevitably the sentimentalist. And I come here as a social  
16 worker today. However, in the social settlement, the  
17 legalist is an ignoramous. And whether he wished to admit  
18 the reality or not, sentencing is in large part a social  
19 settlement between offender in society, victim and offender,  
20 victim in society, et cetera.

21 We would deceive ourselves if we really believed  
22 that the attaching of set periods of incarceration, even  
23 minimally, met the needs of such a situation.

24 The lawyers with the lost criminal case, much  
25 like doctors with the terminal patient, could plead from

OMT/bc

1 contact and involvement in a task which so clearly reflects  
2 the limitations of the professional armentaria at a most  
3 crucial juncture.

4 Retreat to formulating, numbers and mandatory  
5 sentences gives the gloss of rationality and science to a  
6 lost cause and makes one's efforts seem more meaningful than  
7 facts might otherwise dictate.

8 There are, therefore, very real limits to pain in  
9 healing or to deterrence in sentencing.

10 Eldois Hopsley in his classic 1937 book on Ends  
11 and Means, noted at that difficult time that progress in  
12 civilization has not been progress in technology or even in  
13 justice, but it has been progress in charity.

14 Look to those countries with harsh criminal codes  
15 now or any time in history. When held next to their  
16 contemporaries, there is little to imitate.

17 We look more to Athens and Sparta, more to  
18 Christian Rome than pagan Rome, more to Thomas Moore than  
19 Oliver Cromwell.

20 The question with the technology of designing a  
21 sentencing schema therefore is not simply what works.  
22 Rather, it is what can we do which advances a democratic,  
23 just and compassionate society.

24 Obviously, executing first-time offenders would  
25 probably cover residivism and serve well the limited needs

OMT/bc

1 of specific and general deterrents. But it would be beside  
2 the point in our society.

3 Rather, the question is how, as you go about your  
4 tasks, can compassion be protected in a bill which emanated  
5 from a great deal of extreme law and order rhetoric  
6 influenced by the kinds of passion you would hold as model  
7 of stability and temperance.

8 It seems to me that you must continually allow  
9 that to the degree the individual defendant is sentenced by  
10 formulating alone, and to the degree judicial -- that is,  
11 human discretion -- is removed from the individual case, to  
12 that degree, we are teaching other less felicitous lessons  
13 than the simple message of justice.

14 We are also teaching that the individual matters  
15 little, that we prefer not to hear, much less consider a  
16 unique, eccentric and otherwise troublesome, cantankerous  
17 mitigative information in our deliberations.

18 I realize there are limits on these  
19 considerations. Such limits were in fact all-encompassing  
20 even in the hayday of judicial discretion. So I don't think  
21 we need be overly fearful of individual consideration  
22 routinely undermining the imposition of sentences under our  
23 criminal law.

24 But it seems to me the Commission must attempt to  
25 maintain as much discretion in sentencing as politically



OMT/bc

1 possible, precisely because it keeps the human and the  
2 fallible involved on both sides of the legal and social  
3 settlement.

4 We will be in a great crisis as a society when we  
5 reach that point where we are able to make infallible  
6 decisions based on computer models of sentencing. For with  
7 such decision-making, we use the interchange, the argument,  
8 the roughhousing, the doubts, the mistakes which are so  
9 crucial to the evolution and development of a democratic  
10 society.

11 In this sense, one can in part see the mandatory  
12 and determinate sentencing itself as a flight from certain  
13 realities.

14 In the words of British anthropologist, Edmund  
15 Leach, it is an example of the imposition of discipline by  
16 force. It is the maintenance of the values of the existing  
17 order against threats which arise from its own internal  
18 contradiction.

19 In a sense, that is one of the unfortunate tasks  
20 of this Sentencing Commission.

21 I realize of course that this Commission has a  
22 limited role, to recommend the parameters of pain, possible  
23 time to be served for given criminal offenses.

24 May I presume to make a couple of brief  
25 recommendations?

OMT/bc

1 As you set the parameters, let your thinking and  
2 world judgment wander a bit afield from exacting justice,  
3 retribution, pain and deterrence, to include at least the  
4 possibility of feeling, reconciliation and forgiveness.

5 For those who see the criminal justice sentence  
6 as absorbed primarily in only meting out punishment, at  
7 least give equal consideration to pain that is less likely  
8 to debilitate, isolate and harden. Reliance on time alone,  
9 even for deterrence purposes as the best or even primary  
10 means of righting wrongs or guaranteeing justice or giving  
11 redress, if nothing else, betray a curious lack of  
12 imagination.

13 May I propose that Commission members take time  
14 for reflection, look at themselves and ask a simple  
15 question:

16 What would I recommend were I or a guilty son or  
17 daughter, brother, sister, friend or relative were before  
18 the bench for sentencing?

19 We have a minimum of insight in humility.  
20 Surely, most in this room could conceive of the possibility  
21 of such an eventuality. Those who can't can of course be  
22 harsh.

23 In such a situation, what would we want as a just  
24 sentence and what should it reflect?

25 We would not want an errant friend or relative to

OMT/bc

1 break the law again. We'd want to cut down on residivism.  
2 We would want to be very cautious. But we would maintain an  
3 involved and personal concern.

4 We'd want individual consideration of and  
5 attention to the specifics of the offense as well as the  
6 vicissitudes and individual characteristics of the offender,  
7 and how the sentence might affect them.

8 We would allow the possibility of leavening  
9 justice with mercy on the basis of those unique human  
10 qualities in a uniquely human event, the crime.

11 We've had, as Mr. Hoelter mentioned earlier,  
12 occasion to prepare alternative sentences for a large number  
13 of people in public office, including judges, prosecutors,  
14 policemen, sheriffs, legislators at both the federal and  
15 state level.

16 We've had letters of support for all kinds of  
17 sentencing, and some of those plans from people like Gerald  
18 Ford and Barry Goldwater and White House staff members, so  
19 that there certainly is not a total disregard of alternative  
20 sentencing.

21 I realize it's not the role of a sentencing court  
22 to be a loving parent or a concerned sibling, but neither is  
23 its role alone to be a detached computer, grinding out  
24 sentences to fit plans based in selected inattention and  
25 studied ignorance of cantankerous human realities.

OMT/bc

1                   The ultimate irony of the Crime Control Act and,  
2 really, of this Commission, is that both were created just  
3 as the nation is entering an era where we have the  
4 possibility and the technology to know and store millions of  
5 bits of information about an individual, with the potential  
6 of finally fitting the sentence and the rehabilitation to  
7 the offender and the crime.

8                   That, at this crucial time in our history, we  
9 retreat to the meat axe of the set formula mandatory,  
10 determinative sentence, which ultimately disregards,  
11 denigrates and degrades the individual under a banner of  
12 upholding the majesty of the law.

13                   I would, therefore, hope that the Commission  
14 would keep as much flexibility in the sentencing system as  
15 the current climate will allow. You are inventing the  
16 tradition which will set the national courts for many  
17 decades.

18                   More importantly, your decisions will affect  
19 thousands of individuals whose own identities will be much  
20 determined by the outcome of your deliberation.

21                   So I ask as you reflect on the numbers, a year  
22 here, 20 years there, life there, remember the contingent  
23 state we all share in the too short life we live on this  
24 earth, and then make your firm decision.

25                   That's my presentation.

OMT/bc

1 CHAIRMAN WILKINS: Thank you very much,  
2 Mr. Miller. I'll note that you might take some small  
3 comfort from the fact we have four nonlawyers on this  
4 Commission, so...

5 (Laughter.)

6 CHAIRMAN WILKINS: Any questions to my right?

7 (No response.)

8 CHAIRMAN WILKINS: To my left?

9 COMMISSIONER: I think that you're just more or  
10 less opposed to the task that Congress has given us.

11 MR. MILLER: I would hope that you would have  
12 some administrative flexibility within that task. I've been  
13 working in government for a long time, and I know there is  
14 that potential in any task given by any legislative body.

15 And I hope that you would make use of that  
16 flexibility because there are in fact many alternatives that  
17 can be proposed within this. And there are many directions  
18 it could take.

19 We need to fill in that middle ground. We're in  
20 a position in corrections that would be akin to medicine if  
21 medicine were in the position of having only two  
22 treatments--the maximum and the minimum.

23 Probation, usually inadequate, understaffed,  
24 underfunded; and maximum security...and there's nothing in  
25 the middle.

OMT/bc

1                   It's like going to the doctor and saying I have a  
2 headache and the doctor says I've got two treatments -- an  
3 aspirin and a lobotomy. So which do you prefer?

4                   (Laughter.)

5                   MR. MILLER: Or going with a broken leg and he  
6 says I have two treatments -- an aspirin and a lobotomy.

7                   We're stuck.

8                   (Laughter.)

9                   MR. MILLER: And we've got to fill in that  
10 middle ground and it would seem to me there might be some  
11 flexibility for this Commission to at least stimulate some  
12 thinking about that middle ground, and getting some of the  
13 funding to that middle ground.

14                   To suggest, for example, that parole, supervised  
15 probation parole, hasn't worked; therefore, we're going to  
16 have the institution, one cannot say that unless one is  
17 willing to attach to parole and probation something akin to  
18 the amount of fiscal resources where one can attach to the  
19 prison.

20                   To suggest that we've had someone in probation at  
21 \$50 a month and it hasn't worked, therefore, we're going to  
22 put them in prison at \$75 or \$50 a day, is apples and  
23 oranges. If in fact we applied \$50 a day in the community  
24 and it hasn't worked, fine. Lock them up. In fact, in most  
25 cases, we wouldn't have to.

OMT/bc

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COMMISSIONER: I take it, your answer is to put them into real life (ph.)

(Laughter.)

CHAIRMAN WILKINS: Mr. Miller, would you give us a copy of your prepared remarks?

MR. MILLER: Yes. I brought seven of these, and some material on our organization.

CHAIRMAN WILKINS: Thank you. I'll just receive them here.

We're going to take a break at this time. We're going to come back at 12 noon sharp. Then we will hear from one who is no stranger to this Commission, Mr. Al Bronstein. The restrooms are located to your rear out...

(Recess.)

(Conclusion of tape 2, side 2.)

OMTbur

1

TESTIMONY OF MR. ALVIN J. BRONSTEIN, AMERICAN

2

CIVIL LIBERTIES UNION NATIONAL PRISON PROJECT

3

MR. BRONSTEIN: Thank you, Judge Wilkins,

4

(inaudible) Commissioners.

5

It is always interesting to follow Jerry Miller

6

after he beats up on the lawyers. Jerry is on my board.

7

Fortunately, he doesn't come to most meetings.

8

(Laughter.)

9

But when he does, he does make us think.

10

I listened to John Greacen, the ABA, and I was

11

trying to think of a single word that he said that I would

12

disagree with, and I can't think of one. So I considered

13

just coming up here and saying "Ditto" and leaving.

14

But then Judge MacKinnon wouldn't be able to

15

pursue my ignorance (inaudible).

16

(Laughter.)

17

But really not (inaudible) statement except to

18

expand upon a few things that I think have been talked about

19

here and address some of the questions posed earlier by

20

members of the Commission that either were not answered or I

21

think could be answered a little more expansively.

22

The main message that John Greacen (inaudible)

23

ABA (inaudible) was that the Commission as a matter of

24

principle ought to look at the least restrictive

25

alternative; that is, to use not the presumption of



OMTbur

1 incarceration to begin with but rather to start at the  
2 bottom, the least punitive sanction, and then only get to  
3 incarceration as a last resort, a concept that I would  
4 endorse.

5 Judge Breyer then asked what kinds of crimes  
6 require imprisonment (inaudible). But I think there was a  
7 very good answer there, and I like to think of it this way.  
8 What kinds of criminality really threaten society, the  
9 fabric of society?

10 That is not to say that individual criminals  
11 committing serious injury on one person is not a serious  
12 criminal (inaudible). I think that is not the case where I  
13 would say automatic imprisonment. If that is the case, we  
14 will look at all the factors.

15 But there are other categories that I think are  
16 the more serious (inaudible) threatening impact on all of  
17 our lives that they have. Political terrorist is one.

18 (Inaudible) or public officials have to hide, if  
19 they have to -- judges are worried about security in their  
20 courtroom. That kind of criminality threatens the fabric of  
21 our society.

22 Corrupt public officials, the other side of that  
23 coin, if you will, I find very scary, very threatening to  
24 our society. Again, the government official who takes  
25 bribes, a judge who commits certain criminal acts, those are

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1 very threatening.

2 The major corporate crime where the impact of  
3 their criminality touches thousands or tens of thousands of  
4 people I think is a serious event. I think a bank vice  
5 president who embezzles a thousand -- a hundred thousand  
6 dollars is a far more serious criminal than a man who walks  
7 into the bank and steals a hundred thousand dollars or robs  
8 the bank. Just because of the violation of public trust,  
9 the perception that the public has of that kind of  
10 criminality (inaudible).

11 And obviously organized crime, where the efforts  
12 involve the lives, the health of so many thousands and  
13 thousands of people, where the money involved is so vast,  
14 that is very threatening (inaudible).

15 That is the kind of criminality that I would  
16 start with, Judge Breyer, (inaudible). That deserves  
17 incarceration.

18 Other kinds of crimes (inaudible).

19 Mr. Gainer asked what the origin was of that. I  
20 was involved in the ABA at the time when they were  
21 developing sentencing standards, and the feeling was that  
22 you balance it with the most effective sanction -- was that  
23 incarceration was not an effective sanction, was not a cost  
24 effective sanction. It costs a great deal. It was  
25 criminogenic; that is, it created probably more criminality

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1 than it cured and that people who spent (inaudible) in  
2 prison came out and escalated their criminal activity, that  
3 (inaudible).

4 There were many studies on that point, a whole  
5 (inaudible) of them coming out of the National Science  
6 Foundation, the National Academy of Science of all places,  
7 indicating that we had no evidence that general deterrence  
8 would be achieved.

9 So that was the background, that incarceration  
10 was not an effective sanction except to punish. You can  
11 punish people effectively with incarceration, and that is a  
12 legitimate societal need, to punish certain kinds of  
13 behavior, but that we were punishing too much at too great a  
14 cost, and therefore the origin of least restrictive  
15 (inaudible) which actually began in juvenile (inaudible) ABA  
16 (inaudible) and then the adult (inaudible).

17 To summarize, incarceration is felt to not be a  
18 cost effective sanction (inaudible).

19 Another way of looking at that was (inaudible)  
20 what I characterize as (inaudible) when you begin to  
21 consider using that large power, the largest power that the  
22 state exercises (inaudible) on a regular basis is the power  
23 to (inaudible).

24 (Inaudible) while I am answering questions, Judge  
25 MacKinnon asked about the (inaudible) between federal

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1 sentences and state sentences, talking about time served,  
2 which I think the question was.

3 The average federal sentences are shorter, about  
4 20 percent, I believe, the last figure that I saw. But that  
5 is a very skewed figure, and it might (inaudible) federal  
6 sentences by state, state by state. For example, Texas  
7 sentences are very, very long because they have a very harsh  
8 recidivist statute (inaudible).

9 (Inaudible) Texas Supreme Court involved a man  
10 who committed three felonies, a total of which were three  
11 forged checks amounting to \$240, and he had a life sentence  
12 without parole. You can get life without parole in Texas  
13 for the third felony no matter what it is, and other states  
14 have similar kinds of sanctions. So their sentences are  
15 going to be longer than the federal system.

16 To compare incarceration rates and sentencing  
17 time served (inaudible) already mentioned, the witness was  
18 not entirely accurate (inaudible).

19 (Inaudible.)

20 There is no question that we are not soft on  
21 crime in this country. We are very tough on crime. Yet you  
22 can talk about incarceration as a response to crime  
23 (inaudible) in the hope that it will solve crime rates. It  
24 won't.

25 (Inaudible.)

OMTbur

1 I have some very recent figures that might be of  
2 interest in terms of (inaudible) incarceration. I tried to  
3 project from the current figures in California what it might  
4 cost the country to have a major impact on crime.

5 California's prison population went up from 1973,  
6 20,000, to June of this year, 51,000. That is a direct  
7 result of (inaudible) in the middle '70s, the first state  
8 (inaudible).

9 Their corrections budget; that is, their  
10 operating costs, have gone up 350 percent from 1976 to  
11 1986. They are now spending \$1.8 billion in capital  
12 construction, to be completed in 1990. At that point they  
13 will have a prison population (inaudible) 145 percent of  
14 (inaudible) spend almost \$2 billion, and in spite of the  
15 fact that they now have almost three times as many people  
16 locked up in prison as they had in '73. They will have  
17 65,000 in 1989 (inaudible) but no impact on crime rates at  
18 all.

19 (Inaudible.)

20 To project that up to the national level, I think  
21 we could probably have an impact on crime with that  
22 incarceration policy, spend about \$450 billion (inaudible),  
23 about 50 billion for law enforcement or police, increase our  
24 apprehension rates, about 100 billion for prosecution in the  
25 courts (inaudible), and about 300 billion in capital

OMTbur

1 expenditures to build enough prisons to house them.

2 I don't think this country is prepared to do  
3 that. I don't (inaudible), but just to give you an idea of  
4 the scale of numbers that would have to be involved to make  
5 an impact on crime.

6 A couple of states that moved early on to  
7 determinative sentencing (inaudible), Indiana, Maine, and  
8 California (inaudible), and that is why the work of this  
9 Commission becomes so important.

10 As a number of witnesses have said already today,  
11 what this Commission does is looked at very carefully by the  
12 states and will be emulated by the states. Anything that  
13 the federal system does is always looked at and is something  
14 that is followed by the states.

15 So you are in a unique position to guide the  
16 states (inaudible).

17 Let me give you my formula for what (inaudible)  
18 laid out in my statement (inaudible).

19 I think there ought to be preconditions met  
20 before a prison sentence is imposed.

21 First, it is the least restrictive sanction  
22 appropriate (inaudible).

23 (Inaudible.)

24 When I use the term "socially justifying  
25 (inaudible)," I am not talking about achieving general

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1 deterrence. I am talking about the case (inaudible).

2 I believe it was a man who came in a federal  
3 building and shot his wife. We talked about that not being  
4 a serious crime in the big picture. It is serious  
5 (inaudible) way because it is not a crime that (inaudible)  
6 repeated. But there we have to -- society has to say you  
7 can't go in a federal building or otherwise and shoot your  
8 wife (inaudible) involving a domestic dispute.

9 So there should be some punishment, a short  
10 punishment because it is not a crime for which society  
11 generally needs protection.

12 (Inaudible.)

13 And other less restrictive sanctions that have  
14 applied to (inaudible) frequently or recently. To go back  
15 to Mr. Baer's example, I think there are categories  
16 (inaudible) of offenders who ought not to be imprisoned the  
17 first time or even a second time, but who --

18 (Hammering and construction noises in the  
19 background.)

20 -- and then we must say, well, we tried, and now  
21 you get the heaviest thing we can do. We are going to lock  
22 you up for a period of time.

23 I think there are other offenders, repeat  
24 offenders, who need to be looked at on a case-by-case basis  
25 to see why perhaps it is directly the result of alcohol or

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1 drug abuse. With those, it seems to me (inaudible) to try  
2 to treat the problem rather than lock up the problem, only  
3 to have it come out the next time.

4 I believe there is something on (inaudible), and  
5 I hope (inaudible) talk about the various studies  
6 (inaudible), a very hard core group of offenders, 16 to 21  
7 year olds, who were committing just enormous numbers of  
8 crimes, and then many of them, as they reached 21, stopped.  
9 They had never been caught. They admitted that they had  
10 committed a hundred burglaries, a hundred street crimes, but  
11 they never got caught, and then they stopped.

12 And the reason why (inaudible), they were finally  
13 able to get into the job market. These were people who  
14 (inaudible).

15 They needed some money to be able to date, to be  
16 able to buy a car, to be able to do things that young people  
17 want to do, and they couldn't get jobs when they were 16 or  
18 17 or 18. No job offers. When they were able to break into  
19 the job market, at whatever level they could, halfway decent  
20 wages, they stopped engaging in criminality.

21 If we can identify that as the cause, maybe we  
22 can do something different (inaudible).

23 Finally, I just want to make mention of something  
24 in the news recently, last week, (inaudible), and so on.  
25 The first (inaudible).



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1 In fact, today they blame the press for reporting  
2 on it (inaudible), and we were talking to prisoners and  
3 allowing prisoners to call us on the phone.

4 (Inaudible.)

5 But in the discussion of the transfers of people  
6 around, something that has been totally missed by the press,  
7 they announced Friday, late Friday, that they were  
8 transferring 300 sentenced for misdemeanors out to  
9 Occoquan. The feeling was they, because they were sort of  
10 not very dangerous people, could be there without the  
11 (inaudible).

12 I want to know what 300 sentenced misdemeanors  
13 was doing taking up, you know, jail and prison space when  
14 they (inaudible), and that is the kind of thinking that I  
15 think that (inaudible) guidelines, that if we look carefully  
16 at groups of people, individuals who will not wind up  
17 filling our places up (inaudible).

18 (Hammering and construction noises in the  
19 background.)

20 Not getting anecdotal, but we have a population  
21 cap in the Rhode Island prison system (inaudible)  
22 overcrowding, and (inaudible) report every two weeks  
23 (inaudible) facility, and I noticed in the last report that  
24 one of the people was in there for an attempt to steal  
25 fish. An attempt, not even a successful fish thief.

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1                   Again, I wonder why the person who attempts to  
2 steal fish is using up space that ought to be saved for a  
3 rapist or a murderer.

4                   So (inaudible) kinds of principles that I think  
5 the ABA guidelines, standards (inaudible). That is what I  
6 hope will guide this Commission.

7                   I will stop there.

8                   CHAIRMAN WILKINS: Thank you.

9                   I take it that you agree with Mr. Ginsburg that  
10 those, generally speaking, who violate the Sherman Act  
11 should be sentenced to some term of incarceration?

12                   MR. BRONSTEIN: Yes. I think that is a category  
13 of offenders that ought to get a short sentence because I  
14 think you can -- as I think I mentioned in some other  
15 testimony. There is a lot of good evidence (inaudible) that  
16 you can achieve general deterrence by a certain short term  
17 of imprisonment for white collar crimes and for drunk  
18 driving.

19                   (Inaudible.)

20                   CHAIRMAN WILKINS: Right.

21                   Any questions to my right?

22                   VOICE: I have one question, Mr. Bronstein.

23                   You make the point that there is too much  
24 imprisonment.

25                   One of the -- Hawaii is one of the exhibits in

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1 your written testimony -- show that the sentence per 100,000  
2 population with the United States (inaudible) large number  
3 (inaudible).

4 I am wondering if that is the right comparison,  
5 or isn't it really a comparison of the number sentenced  
6 relative to the crime rate?

7 In some sense I think what you have done  
8 (inaudible) saying we have too many hospitals in areas where  
9 we have too many sick people.

10 MR. BRONSTEIN: No, I don't have those figures in  
11 here, but if you compare the crime rates in those Western  
12 European countries, or most of them, they are not very  
13 different except in one respect. That is crime committed  
14 with a handgun (inaudible).

15 (Inaudible.)

16 Well, our rate here, we commit over 20,000  
17 homicides (inaudible) year. There is no country in Western  
18 Europe that has as many as 100.

19 But burglary, bank robbery, quite similar.

20 VOICE: Isn't it true, though, that if you --

21 MR. BRONSTEIN: 10 percent variations  
22 (inaudible).

23 VOICE: (Inaudible) after receiving the  
24 testimony, and I don't have anything that I have a lot of  
25 confidence in, but it seems to me that a lot of European

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1 like Norway and France have higher rates of imprisonment  
2 when measured by their crime rate than we do. I mean, it  
3 seems to me that the information presented distorts your  
4 figures somewhat.

5 Have you ever done that?

6 MR. BRONSTEIN: Well, (inaudible) interested in  
7 seeing that done, but I haven't looked at -- well, I have  
8 looked specifically at the UK, at Sweden, at the  
9 Netherlands, and our rates are 10, 15 percent higher, our  
10 crime rates in particular, in measured categories  
11 (inaudible), and the difference between incarceration rates  
12 is (inaudible) at all.

13 VOICE: But you would agree that that would be a  
14 better way of --

15 MR. BRONSTEIN: That would be a better way.

16 CHAIRMAN WILKINS: Any questions, Mr. Gainer?

17 COMMISSIONER GAINER: (Inaudible.)

18 Neils Christin, who was quoted by the previous  
19 witness, (inaudible) United States (inaudible) Europe  
20 (inaudible) made the Europeans look very bad at that time,  
21 which was about eight years ago. His view was that crime  
22 rates in the United States were distinctly higher in almost  
23 all categories (inaudible) crime rates in Europe.

24 You have on page 3 not just (inaudible) among the  
25 persons who have made that statement (inaudible).

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1 But I, too, am troubled by what Dr. (inaudible)  
2 has pointed out, and that is the (inaudible) additional  
3 factors.

4 Could we not as well say that in the United  
5 States we have the most reckless driving (inaudible) in the  
6 free world?

7 (Inaudible.)

8 We have the highest incidence rate per 100,000  
9 general population in the free world and the world as a  
10 whole, and it would seem that this wouldn't necessarily  
11 indicate that our driving practices are the most reckless.  
12 It would seem that the total number of drivers (inaudible)  
13 number of miles driven would have some appropriate place in  
14 the equation.

15 (Inaudible) going to suggest that the ACLU  
16 (inaudible) serious consideration to the question raised by  
17 Dr. (inaudible).

18 Would you be able to spend a little time  
19 attempting to (inaudible) crime rate per 100,000 population  
20 in the nations that you (inaudible)?

21 (Inaudible.)

22 I think that would be very helpful.

23 MR. BRONSTEIN: We will try, and we have been  
24 trying to do that. It becomes difficult (inaudible). I  
25 talk frequently with the Director of Research (inaudible)

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1 Swedish (inaudible), Norman Bishop. I talk with him  
2 (inaudible).

3 (Inaudible.)

4 And he (inaudible) that difference in reporting  
5 crime, different definitions of crime (inaudible).

6 It would be a much fairer presentation. My  
7 impression from talking to Mr. Bishop (inaudible) not long  
8 ago was (inaudible). That was a time when (inaudible) by  
9 holding us up as a good example, that it was as much  
10 political as it was statistical (inaudible).

11 VOICE: (Inaudible.)

12 MR. BRONSTEIN: Well, Neils is more a politician  
13 than a criminologist.

14 (Inaudible.)

15 That is obviously a political (inaudible). But  
16 it is a fair criticism, and we are working on it, and as  
17 soon as (inaudible) or any part of it (inaudible).

18 VOICE: Mr. Chairman (inaudible).

19 CHAIRMAN WILKINS: Sure.

20 VOICE: You have indicated at the end of your  
21 testimony that (inaudible) individual who obtains \$100,000  
22 by fraud is a more serious criminal than one who obtains  
23 \$100,000 by robbing a bank.

24 (Inaudible.)

25 MR. BRONSTEIN: Not just fraud, but the bank

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1 vice president, someone in the bank.

2 VOICE: (Inaudible.)

3 MR. BRONSTEIN: It is a violation of trust as  
4 well as the crime.

5 VOICE: I was wondering how far you would carry  
6 that (inaudible).

7 If the bank president (inaudible) \$2, would you  
8 consider that a more serious crime than an individual coming  
9 in and robbing the bank of \$2?

10 MR. BRONSTEIN: Yes. If the amounts were  
11 equivalent (inaudible) steal \$2, I mean, yes.

12 VOICE: Did the robber have a gun?

13 MR. BRONSTEIN: That would change the equation.  
14 If the robber had a gun (inaudible).

15 CHAIRMAN WILKINS: Any other questions?

16 VOICE: You didn't refer to drug offenses as  
17 those that affected society.

18 MR. BRONSTEIN: Well, I include those in the  
19 organized crime area, that if you are talking about drug  
20 offenses as --

21 VOICE: Distribution.

22 MR. BRONSTEIN: All right. Again, we are talking  
23 about the hundreds of people that the District of Columbia  
24 police sweep up on 14th Street.

25 VOICE: I am talking about major distribution.

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1 MR. BRONSTEIN: Major distribution, I consider  
2 that part of organized crime. That is a very, very serious  
3 and threatening crime.

4 VOICE: What is your position on the life  
5 sentence imposed yesterday by California for spying  
6 (inaudible)?

7 MR. BRONSTEIN: That would be the FBI agent?

8 VOICE: Yes, sir.

9 MR. BRONSTEIN: That I consider a very serious  
10 offense, and without -- just based only on the newspaper  
11 facts (inaudible).

12 VOICE: Yes.

13 MR. BRONSTEIN: I guess you have a couple of  
14 factors. You have a person with a lot of public trust.  
15 After all, if you can't trust the FBI, and so on, and so  
16 there is a violation of public trust there.

17 A law enforcement official, the threat to  
18 security which was involved in the substantive elements of  
19 the crime. I consider that a very serious offense.

20 VOICE: Would you justify that sentence?

21 MR. BRONSTEIN: I am not sure the life sentence  
22 that I gather -- well, it was a life sentence, but he will  
23 be eligible for parole in 16 years is what I read in this  
24 morning's paper. It is not a flat life (inaudible).

25 VOICE: Now, your statistics also (inaudible) --



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1 you give old parole statistics. A lot of people do.

2 We are concerned with the federal system, and  
3 they are 10 percent below.

4 MR. BRONSTEIN: That is my --

5 VOICE: (Inaudible) these other statistics so far  
6 as we are concerned.

7 I mean, we say we are the harshest at the federal  
8 government (inaudible) parole.

9 MR. BRONSTEIN: I said that in the context of  
10 urging the Commission not to accept what is sort of the  
11 common political and even media rhetoric that this country  
12 is soft on crime. I don't think we are soft on crime. I  
13 think we are tough on crime, and that is why I (inaudible)  
14 standpoint.

15 VOICE: One point of information. You talked  
16 about the sentence in Texas. You said for three offenses,  
17 the third offense --

18 MR. BRONSTEIN: All three total, there were three  
19 forged checks.

20 VOICE: Yes.

21 MR. BRONSTEIN: The total --

22 VOICE: I know, but the sentence -- the life  
23 imprisonment went for three offenses?

24 MR. BRONSTEIN: For the third offense.

25 VOICE: For the third offense.

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MR. BRONSTEIN: Because of the third offense.

VOICE: Well, now when those statutes -- those (inaudible), that is where they originated -- when they first came in, they were for four offenses. When did they get down to three?

(Tape reversed.)

MR. BRONSTEIN: ....mandatory, whatever it happens to be.

VOICE: You have answered my question. Thank you.

CHAIRMAN WILKINS: Mr. Breyer.

COMMISSIONER BREYER: I thought your statistics -- I am not a statistician, but I thought you were just thinking of a point that deals with simple-minded persons like me because if there is some obvious way to (inaudible) lot of people stops crime (inaudible) stops crime, it couldn't be that obvious because we do put a lot of people in jail. In fact, we put more than three times as many in jail with our population as Europe does, yet we seem to have at least as much crime.

I mean, that --

MR. BRONSTEIN: That report.

COMMISSIONER BREYER: Yes. I thought that was -- and the other (inaudible).

So my question really is -- in your experience,

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1 because you have had a lot of experience with the federal  
2 system as well as the state system, my impression from what  
3 you say, from what I read, is that comparing federal and  
4 state, the federal prison population comes close -- let me  
5 (inaudible) -- becomes closer to the model you have in mind  
6 than the state prison population, that by and large first  
7 offenders don't go to jail (inaudible) and usually jail  
8 cells are reserved for those who commit more serious  
9 crimes.

10 MR. BRONSTEIN: Right.

11 VOICE: One, is that so?

12 Two, let's think of the people who are now not  
13 getting sentenced to prison or they are there for a short  
14 time and then released.

15 Given your experience, what would you do with  
16 those people, if anything, that would either, A, punish them  
17 or, B, tend to make them not commit more crimes or, C, stop  
18 other people from committing more crimes?

19 In other words, I am trying to focus you  
20 directly, say, on the subject matter of this.

21 What in your experience works in terms of these  
22 other people who have just left jail or haven't gone there  
23 that might work in terms of actually leading to less crime  
24 or possibly improving the person.

25 MR. BRONSTEIN: The first question -- and I don't

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1 agree -- the federal system used to (inaudible), and that is  
2 where their population, contrary to the rest of the country  
3 going up, the federal prison population is going down.

4 There was a stated national prosecutorial policy  
5 in the middle to late '70s that they were going for what  
6 they called quality criminality and not quantity. They were  
7 trying to prosecuting large white collar crimes, large drug  
8 cases, and were not prosecuting lots of numbers of smaller  
9 offenders, minor drug cases, bank robberies (inaudible).  
10 They were turning those over to the states.

11 I have been told by the Director of the Federal  
12 Bureau of Prisons that early in the current Administration,  
13 whatever year that would, '81, that he was advised that  
14 there would be a change in prosecution policy, that they  
15 were now going to go after quantity as well. Now, you see  
16 the prison population going up.

17 It is my impression that today there are lots of  
18 people in federal prisons who would not have been given jail  
19 sentences 10 years ago or who would have been treated in the  
20 state system (inaudible). There are lots of first offenders  
21 and lots of people who likely could be dealt with in some  
22 other way, but they are not.

23 I saw the U.S. Attorney for this district on  
24 "Face the Nation" on Sunday morning, and he said quite  
25 explicitly if a person breaks the law they go to jail. That

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1 is what he responded.

2 (Inaudible.) similar to some of the states  
3 (inaudible).

4 In terms of what you do, what I have seen to be  
5 the most successful sanction, which does involve some  
6 (inaudible) in the broad sense, is what is called community  
7 intensive supervision (inaudible) parole (inaudible) 75  
8 years ago (inaudible) down in Georgia and they have got now  
9 in Kentucky, where parole probation officers had very small  
10 caseloads, who really did not only supervise but placed  
11 under surveillance their probationers. They had contact  
12 three to five times a week, sometimes on a daily basis.  
13 They not only watch, but they also provide some assistance,  
14 some social assistance, which is what Jerry Miller was  
15 talking about. They help them with housing, with jobs, with  
16 all the kinds of things that would make a person fall back  
17 into crime.

18 That, it seems to me, is the most appropriate  
19 sanction, and it can be combined with fines as restitution  
20 for a large number of offenders who ought to go  
21 institutions.

22 CHAIRMAN WILKINS: Thank you very much,  
23 Mr. Bronstein. We appreciate you being with us today. We  
24 will be in touch.

25 MR. BRONSTEIN: Thank you.

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CHAIRMAN WILKINS: Mr. Harvey Goldstein is with us. He is Chief of Probation for the State of New Jersey. Mr. Goldstein, we are delighted to have you with us.

TESTIMONY OF MR. HARVEY GOLDSTEIN, CHIEF OF PROBATION, STATE OF NEW JERSEY

MR. GOLDSTEIN: Thank you, Mr. Chairman.

I guess part of the reason I was invited to come here today to share my views on the New Jersey experience (inaudible) this morning (inaudible).

And that is indeed a very apt description, and I would like to share with you briefly a bit of an overview of the statement that I submitted and talk about some issues that I think are most cogent and urgent to deal with.

In 1979, the State of New Jersey adopted a new criminal code, and that code very specifically laid out determinate sentences, some reductions of incarceration, and capability for mandatory minimums and eligible periods of parole, and the general presumption that the State of New Jersey was going to incarcerate more people and incarcerate them for a longer period of time.

What happened in 1979, we saw the beginning of the creeping up of the prison statistics in terms of (inaudible), where by 1982 (inaudible) correctly, we are at approximately 140 percent in the state facilities and about

OMTbur 1 135 percent (inaudible).

2 As this was going on, we also had a change in  
3 Chief Justice in the State of New Jersey, and he began the  
4 process of taking a look at our systems, and in 1981 decided  
5 that his year-long effort in studying probation (inaudible)  
6 would be undertaken by business people, by lay citizens  
7 (inaudible) 350 groups from each of the judicial districts  
8 in the State of New Jersey.

9 The design was simple. It was an effort to take  
10 a look at what we were doing and really chart out plans for  
11 the future.

12 One of the groups was given a fairly unique  
13 task. They were told -- provided with all the information  
14 about prison crowding in the state, provided with all the  
15 best estimates we could give them, and they were asked:  
16 could you define an intermediate sanction that was  
17 punishment-oriented but had the kinds of advantages that  
18 would perhaps lead to lower criminality on the part of  
19 people who went through it?

20 But there was little question that the intent  
21 initially was to assure that there was some type of  
22 punishment, and indeed they played with a variety of  
23 (inaudible).

24 You will hear probably in some of the articles  
25 that are written about New Jersey's model the (inaudible)

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1 are over their heads in cases of any violations of New  
2 Jersey sentencing provision models, and indeed over the  
3 course of the years they did design such a program that  
4 ultimately became known as New Jersey's ISP.

5 It was for nonviolent criminals. It was clearly  
6 an experiment. It was under the direct control of the Chief  
7 Justice and the administrative office (inaudible). It was  
8 an effort to identify some selected inmates who, based upon  
9 a process I will describe in a moment, could be expected to  
10 come out into the community without a significant increase  
11 in risk to the community members and be subject to an  
12 intensively (inaudible) program, one that was also  
13 sufficiently funded that there resources in there to provide  
14 a lot else as well.

15 It is a program that involves the application  
16 (inaudible) original sentence must be for our state prison  
17 system (inaudible) just cause based on our sentencing  
18 statutes, and then the person applies to come out into the  
19 program. They can apply at any time, but they must serve a  
20 minimum of 60 days, and they average serving about 90 days  
21 (inaudible) before they come out.

22 They have to develop a plan, a plan which tells  
23 us and the sentencing court what they will be doing, how  
24 they will be spending their time, how they will be  
25 supporting their families, how they will be dealing with



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1 some of the problems that crop up in the past that led them  
2 into the institution that is (inaudible).

3 That has been screened by what we call an ISP  
4 screening board, which is interestly composed. It is  
5 composed of members of the program. The director or his  
6 designee sits on the panel. It is also composed of a member  
7 from the State Department of Corrections.

8 The third, probably the critical element of the  
9 program, is the citizen (inaudible). Citizen members  
10 receive no reimbursement or other pecuniary gains  
11 (inaudible) will literally go over each of the cases that  
12 comes through the system, and no case will we process into  
13 our system until after they have given their okay to it.

14 If they succeed through what is involved in the  
15 screening board process, they go before a three-judge  
16 sentencing panel who actually determine if he fits into the  
17 program.

18 Once admitted into the program, there are some  
19 individualities in the plans that they develop, but there  
20 are some critical components (inaudible). Probably the most  
21 significant one is it is based on the control of the  
22 community. We require a minimum of 20 contacts between the  
23 ISP staff and the client, him or herself.

24 The 16 hours of community service that has been  
25 talked about already this morning is another component of

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1 it, some paying back. Restitution is in many instances  
2 where a victim can be identified incorporated into the  
3 entire plan that is involved.

4 As a matter of fact, the witness -- the victim  
5 will be contacted by the program at every stage during  
6 screening and ultimately given the opportunity to either  
7 present in writing his views or present his views to the  
8 court or they actually do make personal appearances to  
9 testify.

10 The other components of the program, also  
11 designed around some control elements, is a heavy reliance  
12 on monitoring. There is a requirement of employment or  
13 steps that will lead to employment. There is the curfew  
14 that is imposed that is dealt with and enforced the entire  
15 term (inaudible).

16 (Inaudible) that are imposed, based upon the  
17 needs of an individual program, and most recently -- I guess  
18 you will be hearing about this later on this afternoon -- we  
19 have begun experiments in electronic surveillance  
20 (inaudible).

21 The program has been operational since September  
22 of 1983, and I would like to share with you what the results  
23 have been at least to date.

24 I should point out that the National Institute of  
25 Justice is funding an independent evaluation which should be

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1 available at the end of this year or the beginning of next  
2 year.

3 In the two and a half years we have been  
4 operating, approximately 4300 inmates have applied to ISP.  
5 Only 691 have been accepted, roughly an acceptance rate of  
6 16 percent, a very selective program.

7 In addition, we find that a number of people  
8 who have applied to the program have found out about the  
9 program and then have decided to withdraw because they felt  
10 (inaudible) and they would rather spend their time in the  
11 state prison system.

12 374 (inaudible) is our generally current  
13 (inaudible) population (inaudible) program, which is roughly  
14 equivalent to a medium sized institution in the State of New  
15 Jersey. 150 has successfully graduated from the program as  
16 of this point in time.

17 I said before that employment was the cornerstone  
18 for the program, and we have been very pleased. We have  
19 been running since the inception a 94 percent employment  
20 rate. That has some distinct benefits. And these are not  
21 all minimum wage type jobs. As a matter of fact, the  
22 annualized average salary exceeds \$10,000.

23 As a result of those jobs, \$600,000 in federal  
24 taxes has been paid by people who would have otherwise been  
25 in our state prison system. \$125,000 has been paid

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1 in New Jersey state taxes, and 275,000 has been paid in  
2 restitution and child support (inaudible).

3 We have also collected on an incremental basis  
4 (inaudible) supervision fees, something that we have just  
5 begun with. It is only eligible for that (inaudible)  
6 population and it is based on (inaudible).

7 We indeed have had those that we have had to  
8 return to prison for failure to (inaudible) the program, and  
9 as of this date 161 offenders have been returned, roughly 23  
10 percent of the total (inaudible). However, only 3 percent  
11 of those, 3 of the 23, have been returned for an indictable  
12 offense. The remaining 20 percent have (inaudible) various  
13 and sundry reasons, lack of program compliance or disorderly  
14 personal violations combined with (inaudible).

15 In my role as Chairman of the Board of Directors  
16 of the American Probation Parole Association, I have seen  
17 widespread popularity (inaudible) proliferation of intensive  
18 supervision programs. Generally as a result of (inaudible)  
19 overcrowding and budget limitations in state departments of  
20 corrections, these programs have really begun to rereflect  
21 the original principles of probation -- small caseload,  
22 frequent meaningful contact, community involvement, and an  
23 emphasis on appropriate kinds of behavior.

24 Equally important, intensively supervised  
25 probation as a concept is extremely flexible. That is one

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1 of the reasons across the country we really haven't come up  
2 with an acceptable definition of that. It has really been  
3 molded on the basis of each jurisdiction's need.

4 I say that, but let me just point out a couple of  
5 examples first in New Jersey. The ISP program I have been  
6 talking about is a state-run program in the Administrative  
7 Office of the Courts dealing with state prisons.

8 An experimental program called ECLIPSE has been  
9 done on a county level, county jail inmates. It has been  
10 equally successful.

11 The State Bureau of Parole has just started an  
12 ISSP, an Intensive Supervision and Surveillance Program,  
13 which will be run by the Parole Bureau in our state.

14 In contrast to New Jersey's resentencing  
15 procedures, (inaudible) original sentencing states that  
16 involve ISP.

17 Each of the states that have begun to experiment  
18 with this have really reflected their own individual needs  
19 and problems and concerns, such as geography and  
20 availability of funds. Where it is run out of, who runs it,  
21 what are the circumstances of it, what are the contact  
22 rates, whether it is an alternative or an add-on are all  
23 things for an individual state (inaudible).

24 Because my experience with the federal system is  
25 limited, there are contextual complexities that I cannot

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1 address in contemplating the application of ISP to the  
2 federal system.

3 Concerns of regional and geographic differences  
4 and problems, resources, and the like require that that  
5 flexibility which we see inherent in the programs of the  
6 (inaudible) within the federal system.

7 I urge the Commission to (inaudible) carefully  
8 establishing the federal level ISP for nonviolent offenders  
9 as part of the overall sentencing strategy which results  
10 from these deliberations.

11 I think there are different levels of involvement  
12 of various actors within the system. This Commission should  
13 probably focus on major level policies, defining who goes in  
14 and under what circumstances. What are the general goals  
15 and objectives designed to be met, and what are the target  
16 populations do you want to use it for?

17 Major program elements should generally be  
18 defined, but with flexibility maintained to allow some local  
19 creativity.

20 At the district court level, I think the key of  
21 the judiciary there is critical. We believe that our  
22 program in New Jersey works mostly because it has the direct  
23 support of the resentencing (inaudible) of the Supreme  
24 Court.

25 We have had the opportunity to have a lot of

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1 input in the design of the program as well as the  
2 administration, and I think the technical aspects of how to  
3 run the program need to be dealt with at their level.

4 For your consideration, I think there are a  
5 couple of key sentencing options that you may want to  
6 consider. ISP, it seems to me, can fit into three different  
7 places.

8 The first one is an original sentencing option  
9 that is available for (inaudible) equally as well as a  
10 determination (inaudible) on probation or placement to  
11 incarceration.

12 The second is the program where ISP can be used  
13 as part of the total decision -- total sentencing the judge  
14 hands down. So, for example, if it were to be two years in  
15 followed up by a period of two years of supervised release,  
16 perhaps ISP could be considered in lieu of one of those  
17 years in.

18 And finally, an area that is rarely talked about  
19 but we have been doing a fair amount of research on in New  
20 Jersey (inaudible) regular traditional probation violators.  
21 Originally, the thought was that they would be given their  
22 chance on probation, and they should not be (inaudible). We  
23 have considered them, and after some initial shock on their  
24 part when (inaudible) midnight on Friday night or 2:00  
25 a.m. Saturday morning, we have found that they have about

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1 the same survival rate within ISP as do the other  
2 (inaudible).

3 I appreciate the privilege of speaking before you  
4 today. I will try and answer any of your questions.

5 CHAIRMAN WILKINS: Thank you very much.

6 Any questions to my right?

7 VOICE: Mr. Chairman, I have a question.

8 Mr. Goldstein, you commented that intensive  
9 supervision, the program is recommended for a select group  
10 of inmates, prison inmates, and I think on page 2 of your  
11 testimony your statement reflects that the program is open  
12 to nonviolent offenders.

13 I wonder if you would recommend a period of  
14 intensive supervision for violent offenders subsequent to  
15 their completion of the period of incarceration.

16 Now, you just mentioned that, except that you  
17 stated your recommendation of the program being in lieu of a  
18 part of the sentence. So I am not referring to that, just  
19 not in lieu of a part of the sentence.

20 Would you recommend that a period of intensive  
21 supervision follow a completion of a term of incarceration,  
22 completed term of incarceration?

23 MR. GOLDSTEIN: Yes, I would. Perhaps that is a  
24 fourth alternative.

25 We were not at liberty when the New Jersey model



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1 was being developed to consider that. This became an issue  
2 of the judiciary becoming involved in the parole process. A  
3 different system than the federal system.

4 We have had some unique experiences, mostly with  
5 those people who have withdrawn after applying to the  
6 program. And two may help give you a flavor for -- response  
7 to your question.

8 The first one was the person was involved in  
9 distribution of drugs. The level was immediate level.  
10 There are people with this particular individual's  
11 background and general circumstances that have made it into  
12 the program. He had gotten all the way up to the point of  
13 the resentencing panel and withdrew, and we sent staff out  
14 to query him as to why he withdrew, and his answer was  
15 instructive but not particularly comforting to us.

16 He said, fairly frankly, that he had spent the  
17 last five years making his living out of selling dope and  
18 that he had averaged about \$65,000 a year tax-free. He was  
19 sure that when he was released on parole perhaps in another  
20 six or seven or eight months that he could get over on his  
21 parole officer, but he was equally sure he couldn't do it  
22 when it came to the ISP officer.

23 In the area of even violent crime --

24 VOICE: I agree with that, which is the reason  
25 for my question.

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1 MR. GOLDSTEIN: The same thing is true in the  
2 area of violent crimes. We find that a lot of the reasons  
3 for the acting out of a particular program participance has  
4 to do with frustrations and the inability to get a job, the  
5 inability to communicate with family members, the  
6 (inaudible), particularly peer relationships, and these are  
7 all things that ISP can be designed to deal with.

8 So the answer to your question is (inaudible).

9 VOICE: You gave a good example.

10 Now, what about an example of the guy who prefers  
11 to stay in prison? I mean, what does that tell us? What  
12 does that tell you?

13 MR. GOLDSTEIN: We have a couple of different  
14 things that it tells us, depending upon who makes -- you  
15 know, provides that kind of information to us.

16 The first thing is that indeed New Jersey's ISP  
17 is punishment. If it weren't punishment, we would have more  
18 people coming in and a higher rate (inaudible).

19 In addition, it tells us that, you know, we  
20 needed to go further than just the model that we have. We  
21 still consider ISP in our state as an experiment, at least  
22 until the federal evaluation (inaudible) evaluation is  
23 done.

24 We have every confidence that will be a very  
25 positive evaluation. In the meantime, pending that, we have

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1 seen two expansions already -- the first one is the county  
2 jail sentences, which perhaps it should have been that all  
3 along, and the second one to the parole area.

4 I don't think there is any question that our  
5 judges on the resentencing panel take into consideration the  
6 fact that when some of the offenders would be released they  
7 would be released without the kind of intensive supervision  
8 that we can give, and therefore choose to put them in the  
9 program perhaps a little bit earlier coming out of the  
10 institutions just to make sure that there are the kind of  
11 controls in the community (inaudible).

12 CHAIRMAN WILKINS: Any questions to my left?

13 VOICE: How much did it increase your staff?

14 MR. GOLDSTEIN: Well, we had to struggle with  
15 that a little bit initially. The question was who -- which  
16 staff should do it.

17 We have the State Administrative Office of  
18 Courts, and I head the Probation Division, but we did not  
19 have at that time any field staff. The field staff  
20 (inaudible) Supreme Court judges at the county court level.  
21 We decided to....

22 (End tape.)

23

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1 total program from the 42 and includes -- staff --

2 Twenty-five officers. Each officer carries a  
3 caseload between 15 to 20, a total of anywhere at any  
4 time--75 to 500. At a cost of a little under -- thousand a  
5 year.

6 Probably 61,000.

7 COMMISSIONER: Was the number of people that you  
8 accepted determined or affected by the staff?

9 MR. GOLDSTEIN: Not yet, but we're getting  
10 there. It's our understanding that we can certainly go back  
11 to legislation and ask for additional funds for more staff.

12 We had taken as a matter of policy a position  
13 that said if we're not -- with staff, in fact, we won't run  
14 the program.

15 We don't want to have a gradual erosion -- we'd  
16 rather not run the program if that were the case.

17 COMMISSIONER: Thank you.

18 CHAIRMAN WILKINS: Well, thank you very much,  
19 Mr. Goldstein. We appreciate your sharing your experience  
20 in New Jersey with us.

21 MR. GOLDSTEIN: Thank you.

22 CHAIRMAN WILKINS: Anne Schmidt represents the  
23 National Institute of Justice; and Mr. Samuel Saxton is the  
24 Director of Price George's County Department of  
25 Corrections.

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1 STATEMENT OF MS. ANNESLEY K. SCHMIDT,  
2 NATIONAL INSTITUTE OF JUSTICE; and  
3 MR. SAMUEL F. SAXTON, DIRECTOR,  
4 DEPARTMENT OF CORRECTIONS, PRINCE GEORGE'S  
5 COUNTY, MARYLAND

6 MS. SCHMIDT: This is a chart on the kinds of  
7 model -- a smaller version of it is included in my  
8 testimony. And, basically, we thought you'd like to see  
9 some of --

10 This is the first column, the continuously  
11 signaling device.

12 VOICE: Excuse me, Mr. Chairman. There are  
13 people in the back who cannot hear.

14 CHAIRMAN WILKINS: All right, Ms. Schmidt, just  
15 shout it out.

16 MS. SCHMIDT: All right.

17 (Laughter.)

18 MS. SCHMIDT: First of all, does anybody else  
19 want a copy of the chart? You're welcome to call me once we  
20 get back to my office.

21 This is a continuously cycling electronic  
22 monitoring. This device fits on the offender's leg. It  
23 sends out a continuous signal. When the offender comes  
24 within range, which is about 150 feet of this device, it  
25 sends out the signal.

OMT/bc

1 This device is plugged into a telephone jack and  
2 to a telephone. Every time it either loses the signal or  
3 gets the signal, it calls the central office to tell the  
4 computer.

5 Now let's say you work 9 to 5 and it takes you 15  
6 minutes to get to work. The program is set so that you can  
7 leave at 8:30 in the morning; you must be back by 5:30.

8 At 8:35, the computer gets a signal that says the  
9 signal has been lost. It checks its program. It knows that  
10 that's within the time that you're allowed. And it says,  
11 fine, you've gone to work.

12 But it gets to be 5:30 and it hasn't gotten  
13 another message. It prints out a note that you're not home  
14 like you're supposed to be. Violation.

15 So, at 5:35, it then gets the thing from the  
16 computer, gets the message that says he's home now. And it  
17 prints he got home, but he's late.

18 And that's basically how this device is. Now,  
19 Stan has a different kind of equipment. Have you got your  
20 equipment, too?

21 MR. SAXTON: Yes, I have.

22 Thank you very much for inviting me to testify  
23 here. I'd like to have Al kind of -- I want you to  
24 demonstrate this.

25 This device, we call this one inactive, it calls

OMT/bc

1 the station and tells the station what's going on. Between  
2 the person who is wearing it, or whatever happens to be the  
3 device, and the computer terminal and the terminal back at  
4 the base.

5 This one is what we call acid, for a word.

6 MS. SCHMIDT: That's the device in the second  
7 column on the chart.

8 MR. SAXTON: And we program a computer to call  
9 the individual who is wearing this wrist kit at various  
10 times. It can be one to 100 times a day. We can call him  
11 at his home. This box is attached to his telephone. It's  
12 very easy to just plug it into his phone...

13 This wrist lid is placed on the individual. This  
14 wrist lid is attached to his -- and then when the individual  
15 is at home, he will get a phonecall like this.

16 (Demonstration).

17 MR. SAXTON: And that makes it plain that that is  
18 in fact the wrist that belongs to that person.

19 COMMISSIONER: If he takes it off his arm and  
20 places it in --

21 MR. SAXTON: No...

22 (Laughter.)

23 MR. SAXTON: It's attached permanently to his  
24 wrist...

25 COMMISSIONER: I see. Worn like a watch.

OMT/bc

1 MR. SAXTON: Yes. In this, you have two forms of  
2 identification. First, you have them identify what the  
3 individual is wearing. And you have the voice from the  
4 individual saying his name and the time, which is played  
5 back...in addition to that, we go out on a daily basis and  
6 visit the individual at his home to make sure that this has  
7 not been tampered with.

8 Any of the instruments can be tampered with one  
9 way or the other. But, once this one is tampered with, it  
10 can't be put back together.

11 COMMISSIONER: I mean, you keep it on all the  
12 time? It's waterproof.

13 MR. SAXTON: It's on 24 hours a day.

14 COMMISSIONER: Is the question always the same?  
15 What is your name and the time? Or do you vary the question  
16 to make sure the person knows the answer only if he's that  
17 person?

18 MR. SAXTON: Well, no, it will stay the name and  
19 the time. But, remember, the time has to compare with the  
20 time that comes out on the computer program.

21 In other words, when it prints out that it is a  
22 verified call, it prints out the name at the top, the  
23 number, the time the call was made, and that it was a good  
24 phonecall.

25 Compare that with the time he says it was when he



OMT/bc

1 answered the phone. Yes, it's very easy to cut it. I mean,  
2 you can cut it and leave it any way you wanted to leave it.  
3 But, she couldn't answer the phone and say the time. We'd  
4 know it.

5 COMMISSIONER: There is a different technology on  
6 the market which says use less verification in technology to  
7 compare --

8 COMMISSIONER: Thank you because I'm so  
9 accustomed to dealing with criminals that I can figure out  
10 ways around that.

11 MR. SAXTON: There's a way around the voice that  
12 does that?

13 COMMISSIONER: Right, right. That's what I was  
14 wondering. Right. Okay.

15 CHAIRMAN WILKINS: How much does this cost per  
16 unit?

17 MS. SCHMIDT: They vary all over the place.  
18 They're probably on the high side around 100 (inaudible).

19 MR. SAXTON: For this system for one day, the one  
20 that we have -- this is the cheaper model -- it costs us  
21 \$1.72 a day. For your most serious, more expensive models,  
22 we're talking \$7 a day.

23 If I may very quickly go over just a couple of  
24 things that are not in my testimony. I want to compliment  
25 the gentleman just before me. It was almost like he was

OMT/bc

1     testifying for me.

2             I'm a president-elect of the American Jail  
3 Association. And what we're doing is looking for ways to  
4 bring America's jails out of the 15th century. And one of  
5 the things that we certainly have looked at -- and I would  
6 agree with Mr. Bronstein in a couple of ways, too -- that I  
7 don't know why we really have never took a hard look at who  
8 is in prison. Who is in these jails?

9             I've been in this business now for about 35 to 40  
10 years. And I am amazed at how naive we tend to be sometimes  
11 in looking at who is there.

12             It's been my experience that you can divide  
13 prison populations and jail populations. I can speak to the  
14 jails much more than the prison because that's what I am.  
15 I'm a jail administrator. I'm a professional jail  
16 administrator.

17             And looking at the numbers, and I do this every  
18 day, there is about 20 percent that walk in the door and  
19 walk back out again -- I'm not talking about the crime  
20 necessarily. I'm talking about the numbers.

21             They walk in, walk back out, and we've done  
22 everything that we're going to do with them. There's about  
23 60 percent in the middle. You can divide that into two 30's  
24 if you would -- 30 percent toward the higher side, and 30  
25 down towards the lower side.

OMT/bc

1                   And there's about 20 percent that I call them the  
2 bad news bears. They wear trouble like a halo. Everywhere  
3 you go, they've got more and more. When you've seen where  
4 there are lots of problems in a jail, look toward that  
5 bottom 5 percent for causing 95 percent, supported by the 15  
6 percent just above them.

7                   What I've just described to you is the bell  
8 curve. And in each case, you've got to have programs and  
9 things to deal with each one of these entities.

10                  Too often, we have looked at what goes on in  
11 jails. They're saying "all of them guys". They're not all  
12 the same. And it gets awful personal sometimes when you  
13 begin to see whose there.

14                  Your son and mine. I don't want to be facetious  
15 or a wise guy. I don't intend to come here to do that. I  
16 would ask this obvious question:

17                  Who in this room that hasn't got a son, a  
18 daughter, close friend, somebody you know or somebody your  
19 son knows that hasn't smoked a little grass? And played  
20 with a little pill?

21                  It is getting personal, folks, that we've now got  
22 to do something different in terms of how we take care of  
23 business inside of the jail.

24                  That is my answer. I'm going to open in a very  
25 short time a new, generation jail. That may be a strange

OMT/bc

1 term to some folks. But a new generation jail is designed  
2 to deal with the kinds of issues that we're now discussing.

3 There'll be 596 beds over there. I guarantee  
4 you, if I don't do something and quick, I'm going to have  
5 every one of those beds filled up 20 minutes after I open  
6 the door.

7 Anybody that wants to dispute that?

8 So what do I do? I've got to find a way to do  
9 it. And that's what brought me to using and looking at  
10 homee detention. I don't see it as a panacea. I think that  
11 it needs men and women to make it work properly, like any  
12 other system.

13 In addition to that, I would suggest that it will  
14 give me a tremendous leg up on several problems that I need  
15 to have control of. Let me share some of them.

16 If you would accept that that top 20 percent  
17 really should be oriented towards work release, now there  
18 is a problem there.

19 Last Friday, the Washington Post took me to task  
20 about my home detention program. I'll tell you publicly,  
21 that's good because I think that pig iron is nothing but pig  
22 iron until it's tempered by fire.

23 So let folks look at me and let them aspirate  
24 what problems are with that. What I would have a problem  
25 with is if they are reporting it wrong, if they kill a good

OMT/bc

1 program simply because they are inured as to what's really  
2 going on and what is needed.

3 This is a United States problem, in my judgment.  
4 I would have to tell you, please forgive me for being a  
5 little bit enthusiastic. I'm a former Marine. And I've  
6 spent a tremendous part of my life fighting for this  
7 country.

8 You know what I'm going to tell you? That if you  
9 don't do something about this problem, it's going to overrun  
10 us because it could very well be that we'll have 50 percent  
11 of the people in jail and the other 50 percent of them  
12 watching them.

13 Now we've got to stop that nonsense. And I'm  
14 telling you that home detention is one approach to a very  
15 serious problem.

16 Here is what I plan to do with it in Prince  
17 George's County. I'm going to be putting some people out to  
18 learn some trades. Who was that that said that part of them  
19 is not having the ability to work.

20 So I intend to put some folks over to the  
21 vocational high school and put some bracelets on them  
22 because the public is going to say to me:

23 You can't let these hardened crooks fool around  
24 without supervision. Now I've got some control. I will be  
25 looking at people at the front end who have cases that are

OMT/bc

1 not -- they are misdemeanors, or low grade felonies, not  
2 violent crimes. But the other stuff that we send people  
3 into the jails far too much.

4 And we're not being nice guys when we put  
5 somebody in home detention. If you've ever taken your son  
6 and told him to go stand in the corner and don't move, or go  
7 to your room and don't come out. Or if you've ever had that  
8 experience yourself, you know that it can be quite  
9 disheartening to have to sit there for hours on end.

10 Things that we normally take for granted you  
11 no longer can do.

12 So it is not being nice to send someone into home  
13 detention. Another area that I intend to use this  
14 particular program for is for temporary releases. It's  
15 awful hard to see someone that has a mother that has died  
16 and then you're going to send that person out, and then  
17 you're going to send two armed guards right next to him on  
18 each --

19 I don't have to. I can send him into the funeral  
20 home or parlor or whatever, put a monitor on him and monitor  
21 him from the car outside. That makes a lot of sense.

22 To my way of thinking, home detention is an idea  
23 whose time has come. I agree with the gentleman who says it  
24 must be laid on, applied to a specific locality. That's got  
25 to be.

OMT/bc

1 But, aside from that, home detention, I believe,  
2 is one of the best things that is happening to the criminal  
3 justice system in a long time. It will allow me to be a  
4 much better administrator over the long run. I certainly...

5 CHAIRMAN WILKINS: Thank you. Any questions?

6 COMMISSIONER: Yes, Mr. Chairman.

7 First of all, I would say congratulations to you  
8 on your being elected president-elect of the Jail  
9 Association.

10 MR. SAXTON: Thank you.

11 COMMISSIONER: You are respected widely in the  
12 field of Corrections for your enthusiasm which we've enjoyed  
13 today, as well as your competence and commitment.

14 I'm not aware of the criticism in the magazine  
15 that criticized home detention program. Would you state the  
16 nature of the criticism?

17 MR. SAXTON: Certainly. I certainly will. Home  
18 detention is a very young baby right now. It's going to  
19 take a long time to get it so that it can stand on its feet  
20 and where it will in fact have the support and understanding  
21 of the wide range of the public.

22 It isn't something that's just going to happen;  
23 it's got to be marketed. What had happened is that we had a  
24 person that I would agree that was inappropriate that was  
25 there. But the problem here is one of all of us learning

OMT/bc

1 how to sentence, you know, much smarter.

2 And we had made a wrong move there. So, you  
3 know. We could be wrong and, hopefully, nobody will shoot  
4 me for it.

5 COMMISSIONER: They had discovered a person that  
6 should have been in prison? Was that they discovered a  
7 person that should have been in prison?

8 MR. SAXTON: Sure. Not in prison. Should have  
9 remained in jail and not out there. Now, one thing that  
10 we've got to understand though is that the system works. It  
11 was Al Hall's people that went out and caught him doing  
12 wrong and brought him back.

13 COMMISSIONER: So it did do its job.

14 MR. SAXTON: But, it potentially could have...and  
15 I think that we have to admit when we are not right.

16 We had some other folks on and we haven't had any  
17 of them that have violated that trust.

18 COMMISSIONER: Of course, that was pertaining to  
19 the screening for the program and not the program itself, in  
20 terms of its effectiveness.

21 That's all I have.

22 MR. SAXTON: I expect to have around 200 people  
23 in this program, somewhere in the next two years.

24 Yes, sir?

25 COMMISSIONER: Do you have any idea how long you



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1 keep company in this home detention?

2 MR. SAXTON: I would have to guess at that. An  
3 effective period would be about, I would say, six months and  
4 under. I think if we do it more than that, you're going  
5 to...it's like putting somebody on eternal parole and  
6 probation.

7 I cringe every time I look at the staff and see  
8 someone on parole or probation for five years. That's  
9 asking for trouble nine out of 10 times.

10 MS. SCHMIDT: The most experience in monitoring  
11 programs has been in Palm Beach, Florida. And the feeling  
12 of the people administering that program is that 90-120 days  
13 is about the maximum tolerance before people really begin to  
14 chafe under the restriction of home incarceration.

15 MR. SAXTON: The reason I asked the question,  
16 we've got a lot of experience with people in halfway  
17 houses. That's about the maximum, 120 days.

18 COMMISSIONER: What are the restrictions that are  
19 placed on a person in home confinement? Is it just being at  
20 home, at your house?

21 MR. SAXTON: No, not at all. This is why I  
22 suggest to you it is a pretty rough type of punishment. For  
23 example, you cannot go outside of your home without  
24 permission from my department. You're in our home  
25 detention.

OMT/bc

1                   If you went out on something as innocuous as just  
2 to get a loaf of bread without provision, you have just  
3 crossed the line. And nine out of 10 times, we will be  
4 there knocking.

5                   So you have got to ask permission. One of our  
6 experiences has been a young man wanted to go out and play  
7 basketball and the answer is no because you are in home  
8 detention to stay there. You are approved to go where you  
9 can go. And those places you ought not go, take it literal  
10 because that's exactly how we mean it.

11                   COMMISSIONER: So, no recreational opportunities  
12 are built in? It's not fun and games.

13                   MR. SAXTON: It's not fun and games, and we will  
14 give you time, if you want to go play basketball, ask  
15 permission, we'll let you do it.

16                   COMMISSIONER: Are you allowed visitors?

17                   MR. SAXTON: No visitors in the home without  
18 permission.

19                   MS. SCHMIDT: Many of the programs allow time out  
20 for...

21                   COMMISSIONER: How do you monitor this?

22                   MR. SAXTON: We simply tell you that's the  
23 requirement and we will be around seeing you very  
24 frequently. If you are doing something you've got no  
25 business, we will show up like the bad penny, believe me.

OMT/bc

1 And that's how we monitor. We'll manage by sections. We're  
2 not going to sit there and watch you all day.

3 But that's what puts you in home detention  
4 anyway. We screened you and felt that you were an  
5 appropriate candidate. If you made us out a lie because you  
6 did not do what you were told to do, then we'll deal with  
7 you in another way. That's what happens.

8 COMMISSIONER: How would you react to if this  
9 became a federal program the possible disparity that's  
10 introduced, because of the vast differences in living  
11 styles.

12 MR. SAXTON: Local...

13 COMMISSIONER: Well, federal in particular I'm  
14 talking to because there's so much white collar crime. If  
15 we start using that for white collar crimes, you're getting  
16 people that live in Carmody Hills in Los Angeles as opposed  
17 to other sections of Los Angeles.

18 MR. SAXTON: Frankly, I heard that question asked  
19 earlier and I would have to tell you that I would tend to  
20 look at the need to individualize what you are going to give  
21 each individual.

22 There are some white collar criminals that, yes,  
23 you go into home detention. There are others I think that  
24 are just plain criminals who you do just like you do  
25 everybody else.

1 OMT/bc

1 I don't see where -- you've got to look at who  
2 and what they've done.

3 COMMISSIONER: Then you wouldn't be bothered by  
4 the fact that home detention involved for one person sitting  
5 by a swimming pool and the other person sitting by a radio?

6 MR. SAXTON: Please understand me, Doctor, that  
7 when I say home detention, I'm not talking about a swimming  
8 pool. I'm talking about inside of the house. And if he's  
9 out in the --

10 (Laughter.)

11 --swimming pool, he will be a customer at Upper  
12 Marlboro, I guarantee you, within a very short time.

13 COMMISSIONER: Not on the golf course.

14 CHAIRMAN WILKINS: Any other questions?

15 COMMISSIONER: You mentioned in your testimony  
16 that over 85 percent of those placed on the home detention  
17 program have not reentered the prison system.

18 What are the statistics for residivism overall  
19 without regard to whether they were sentenced subsequently  
20 in...

21 MR. SAXTON: ...solved residivism in the country  
22 was around 64 percent, which is extremely high.

23 COMMISSIONER: For those who participate in the  
24 home detention?

25 MR. SAXTON: I'm talking about just regular folks

OMT/bc

1 or people that are in this program, it's around 8-10  
2 percent. That's what I've always seen.

3 MS. SCHMIDT: What is the oldest of these  
4 programs, starting in December of '84. So we haven't really  
5 had the time to accumulate the...

6 COMMISSIONER: Thank you.

7 COMMISSIONER: You said that some people were  
8 sent into jail too much. For what crimes?

9 MR. SAXTON: I'm suggesting to you -- did I say  
10 too much? I am saying that there is a breakdown of people  
11 that are there. And that if we're looking in terms of what  
12 we're going to do with them in the jail, there's about 20  
13 percent that fall into that category that you do little or  
14 nothing for.

15 And that work release is --

16 COMMISSIONER: But what are the characteristics  
17 of the offender that you say go in there too much?

18 MR. SAXTON: The kinds that I would suggest is  
19 the nonsupport case. I see a lot of those. I saw in one  
20 state prison there was about 300 people that fell into that  
21 category, and they were grossly overcrowded.

22 Let me give you some more, a contained look at  
23 some of those this morning.

24 COMMISSIONER: But what are the offenses?

25 MR. SAXTON: That's what I'm going to try to give

OMT/bc

1 you, sir.

2 Disorderly conduct. I see a lot of long-term  
3 folks in for just disorderly conduct. Thirty, forty, fifty  
4 days. You see some of that.

5 Gambling. Certainly there should be something  
6 done about gambling. But it's not unheard of to see folks  
7 in jail for long periods of time on a gambling violation.

8 Receiving stolen property. Now I'm not talking  
9 about the guy that got the Cadillac or something and that's  
10 what he received. I'm talking about some minor kinds of  
11 things, that we begin to see some of those. The Hershey  
12 bar. And I've seen a lot of those folks. They tend to stay  
13 there for a long period before they ever come to trial.

14 And then, once they come to trial -- and that's  
15 a--the kinds of cases that you see coming through that the  
16 Judge finally, and I understand you are Judges, that they're  
17 given credit for time served. A lot of those cases, I see  
18 happening a lot.

19 The other kinds that I would suggest to you would  
20 be failure to pay some fines. We have a guy that owed the  
21 traffic ticket for 30 bucks. He stays in jail for 45 days  
22 and then he gets credit for time served.

23 In the meantime, we've got a person that doesn't  
24 have a job. I'm not saying he ought to not have gotten  
25 something. I think that is true. But how much something

OMT/bc

1 and how much is overkill? Is it then analogous to killing a  
2 fly with a hammer when you keep somebody like that forever?

3 Those are the kinds of offenses. Some commercial  
4 B&E's. I'm not talking about serious B&E's. I think  
5 someone broke into a body's home, I'd be awful nervous about  
6 that.

7 Some drug offenders. If in fact you're going to  
8 demand...

9 (Conclusion of side 1 of tape 4.)

10 CHAIRMAN WILKINS: Ms. Schmidt, Mr. Saxton, we  
11 appreciate your coming today. And we, as Mr. Corrothers  
12 pointed out, appreciate your enthusiasm.

13 Thank you very much.

14 Burt Galaway is Director of Graduate Studies,  
15 University of Minnesota School of Social Work.

16 STATEMENT OF MR. BURTON GALAWAY, DIRECTOR,  
17 GRADUATE STUDIES, UNIVER OF MINNESOTA,  
18 SCHOOL OF SOCIAL WORK

19 MR. GALAWAY: Chairman Wilkins and Members of the  
20 Commission, I am correctly identified as a Professor of  
21 Social Work from the University of Minnesota. I must  
22 declare, however, that I am not speaking for the University  
23 of Minnesota or for the School of Social Work.

24 The positions I've taken are my own positions.  
25 They are positions that have developed over about 15 years

1 OMT/bc

1 of work in the area of restitution. But it is primarily in  
2 the nature of hope and development implementation, beginning  
3 with the Minnesota Center in 1972, and currently I am  
4 serving as Director of Minnesota Citizens Council on Crime  
5 and Justice, which brings burglars and crime victims  
6 together for purposes of facing these associations  
7 regarding...restitution.

8 Before going to the questions I was asked to  
9 address, I want to make two very, very brief comments on the  
10 issue of crime rates and incarceration rates.

11 I certainly agree that looking at incarceration  
12 rates, one must control for crime rates...

13 Studies done early in the 1970 citation, which I  
14 did not bring, unfortunately, but we will try to provide you  
15 with, looking at the 50 States, there was absolutely no  
16 correlation between crime rates and incarceration rates.

17 States with the low crime rates, many states with  
18 low crime rates have high incarceration rates. Many states  
19 with high crime rates have low incarceration rates. There  
20 was absolutely no correlation at all.

21 And in terms of international comparisons, let me  
22 also caution that you may be comparing apples and oranges  
23 because most of the incarceration rates reported in this  
24 country are prison rates; whereas, at least in European  
25 countries, most of the incarceration rates include short-



OMT/bc

1 term prison with short-term incarceration, less than a  
2 year...serving longer.

3 So to compare those rates, we really have to take  
4 the short-term people out of the European base or add the  
5 short-term persons in the American base.

6 It's very much an apples and oranges situation.  
7 Indeed, the American situation would be less desirable in  
8 it because we may actually be minimizing...

9 All right, back to my central questions, which  
10 had to do with restitution. I will very briefly make three  
11 points and then respond to the questions.

12 The first point is, in my view, restitution ought  
13 to be considered a sentence. That is, made available to the  
14 Census Report either as the sole penalty for the offense, or  
15 as the penalty when the seriousness of the offense  
16 dictates. It may be combined with other nonincarceration  
17 penalties.

18 Therefore, I would argue that for property  
19 offenders, at least, and you've pushed me a bit into crimes  
20 of violence, but for property offenders, at least, their  
21 restitution should be something preferred, gentlemen. And  
22 it should be used in all cases for property offenders.

23 The question then becomes one of under what  
24 circumstances or conditions are other penalties required for  
25 a property offender?

OMT/bc

1 My view is that other penalties may be required  
2 when the seriousness of the act, the seriousness of the  
3 thought, indicates that restitutional law will not be a  
4 sufficiently severe punishment. And then look at combining  
5 restitution with other nonincarceration penalties.

6 In the price-fixing illustrations which were the  
7 subject of the first testimony this morning, I would argue  
8 that if restitution is not a sufficient penalty for those  
9 cases, we might look at a year or two or three years of  
10 fulltime community service as necessary to increase the  
11 severity.

12 In regards to the question of alternatives, I  
13 prefer not to think about charges. I think one of the  
14 serious problems in our culture is that we have to forge  
15 this link between punishment and prison, thinking only of  
16 prison as the form of punishment.

17 And you I think start talking about replacing the  
18 imprisonment with other forms of punishment. And I would  
19 suggest for property offenders replacing imprisonment as the  
20 punishment with, first, restitution in condition with other  
21 nonincarceration penalties when restitution is not  
22 sufficient to meet the standards of proportionality between  
23 the seriousness of the offense and the severity of the  
24 penalty.

25 Our second point has to do with the logistics,

OMT/bc

1 the issue of how can you determine a restitution allowance  
2 without delaying the sentencing process?

3 I have difficulty understanding why that is any  
4 more difficult than determining the quantum of any other  
5 criminal. How does one come into the fair quantum of  
6 community service or fair quantum of imprisonment or fair  
7 quantum of probation supervision controlled by the intensity  
8 of the probation supervision.

9 It seems to me that that is an issue which must  
10 be resolved with any penalty. However, with restitution, I  
11 suspect what is being asked is:

12 How does one decide how much damages were  
13 actually done, and what should the offender be held  
14 accountable for restoring to the victim?

15 The experience of all the restitution problems  
16 that I've been involved with and familiar with through --  
17 and through research suggests that it's really not a very  
18 serious problem. But it needs to be done prior to the  
19 disposition hearing.

20 There needs to be a process as a part of that  
21 pre-sentence investigation by which offenders -- and a  
22 reasonable amount of restitution determined, a plan to the  
23 court for consideration in sentencing.

24 I mentioned earlier that we are doing this with  
25 juvenile burglars and their victims and, in -- County,

OMT/bc

1 Minnesota, we have negotiated -- we had 47 meetings last  
2 year, and 25 percent -- staffers.

3 We had 47 victim offender meetings in 1985 and  
4 arrived at agreements with 45 of the 47. We've had about an  
5 equal number of meetings so far in the first half of 1986  
6 and have yet to have a meeting where we have not negotiated  
7 an agreement that is acceptable -- for consideration of kind  
8 of sentence.

9 We have yet to have a Judge change any -- some  
10 points, but we have agreements that have been negotiated  
11 that are largely acceptable to the court.

12 The third question I was asked to deal with had  
13 to do with the effectiveness of combining restitution with  
14 community sense and community service sentencing or with  
15 incarceration.

16 I've also -- my position on that. I think that  
17 restitution can and should be combined with other sentences  
18 of nonincarceration, again, when the seriousness of the  
19 offense dictates that that's essential to give  
20 proportionalities to the sentences.

21 And I think it's particularly desirable to  
22 combine restitution with community service sentencing  
23 because I see both as restorative in nature. They require  
24 the defendant to engage in activities which restore the  
25 losses of society and form a net contribution to the society

OMT/bc

1 and to the victim.

2 I don't think it's useful to try to combine  
3 restitution with sentences of incarceration, largely because  
4 there's simply delay in the ability to carry out the  
5 sentence. It seems to me it creates -- our studies of  
6 offenders indicates that they tend to perceive restitution  
7 when combined with incarceration as very unfair because they  
8 have, quote, "paid their debt to society" by serving time;  
9 where they don't hold that sense of unfairness when that  
10 restitution is combined with other nonincarceration  
11 sentences.

12 It would be my view that the state should limit  
13 incarceration to those offenses which are really a very  
14 serious threat to the nation, where all other interests --  
15 offender interests and victim interests -- must be relegated  
16 to the law that they should accomplish -- the state's need  
17 to incarcerate very serious offenders.

18 And a serious offender in my mind is an offender  
19 who has committed a serious act.

20 -- for my position on that.

21 CHAIRMAN WILKINS: Thank you very much,  
22 Professor. If this Commission were to adopt a policy that  
23 in all cases, regardless of any other punishment imposed,  
24 that restitution would be required, regardless of the crime,  
25 in every case, the victim would be made whole, would you

OMT/bc

1 have any quarrel with that general policy?

2 PROFESSOR GALAWAY: I would have no quarrel with  
3 that general policy, with the exception of if it was limited  
4 to a sentence other than incarceration. If you're going to  
5 adopt restitution with incarceration, I would have a  
6 problem.

7 CHAIRMAN WILKINS: So you would say that  
8 restitution should not be required if incarceration is going  
9 to be required?

10 PROFESSOR GALAWAY: That's correct.

11 CHAIRMAN WILKINS: Why is that?

12 PROFESSOR GALAWAY: Because I think it delays --  
13 effective in terms of accomplishing the restitution  
14 obligation. It detracts from the offender's ability to do  
15 that. And it delays for long periods of time any hope that  
16 the victim may have of...

17 CHAIRMAN WILKINS: Whereas, if a victim fund was  
18 set up so the victim was paid out of the fund, and then the  
19 defendant required to reimburse the fund either tomorrow or  
20 next year, or three years from now, would that solve that  
21 problem?

22 PROFESSOR GALAWAY: No, it wouldn't because I  
23 think that in terms of poverty offenders, at least, that's a  
24 very impractical approach because of setting up such a  
25 fund. It's just astronomical.

OMT/bc

1 I think that, theoretically, it's an interesting  
2 idea. I think, in practice, it's just not.

3 CHAIRMAN WILKINS: But you stated there are  
4 states that have tried it?

5 PROFESSOR GALAWAY: There are no states that have  
6 victim compensation. They are providing compensation of  
7 property of offenders. My last study of victim compensation  
8 schemes, that was in the mid-seventies, there were a couple  
9 of -- internationally -- a couple of nations that under very  
10 limited circumstances permitted restitution for property  
11 loss.

12 North Ireland, for example, permitted restitution  
13 for property loss when the loss was the result of their  
14 activities -- legal society.

15 And New Zealand at that time permitted  
16 restitution, state compensation, when there was property  
17 loss, the property damage was caused by a person on...

18 But, typically, those...

19 (Inaudible).

20 CHAIRMAN WILKINS: I'd like to pursue this with  
21 you further. Perhaps we could talk individually. Our time  
22 is limited today.

23 Any other questions from my right?

24 COMMISSIONER: Mr. Chairman.

25 You said, Professor, that with property offenses,

OMT/bc

1 the appropriate penalty is always restitution? Or if we  
2 wanted to make the -- more severe, we would ask community  
3 service.

4           Would you then not think that repeat offenders,  
5 property offenders, should be incarcerated? That's one  
6 question.

7           And the other question is that you would object  
8 to restitution being combined with a prison sentence because  
9 the offender has, quote, "paid his debt".

10           Would you not feel that possibly he has paid his  
11 debt to the victim, the individual victim, but what about  
12 the harm to the society, harm to the tranquility of society,  
13 or the damage to the respect for the law?

14           Your comment?

15           PROFESSOR GALAWAY: Well, in my statement, very  
16 briefly made the argument that restitution as a penalty is  
17 appropriate because of the symbollic position of the  
18 victim. The victim has served as every person bearing the  
19 brunt of the crime, whether the victim is an individual or  
20 an organization.

21           Therefore, my argument runs it's proper to let  
22 the victim receive special penalties, as every person. It's  
23 symbollic to all of us, in the penalty.

24           And I think it is a matter of policy to determine  
25 which offenses that penalty alone will be, for which -- that



OMT/bc

1 penalty alone will be sufficient and for which offenses are  
2 other penalties necessary in order to symbolize...

3 Now, I think very clearly, however, that there  
4 are many other penalties other than incarceration that will  
5 accomplish that retribution function. And that we ought to  
6 use those other penalties for property offenders, reserving  
7 imprisonment for the more serious offender, which I see  
8 as...

9 COMMISSIONER: So even if the property offender  
10 is a repeat offender, you would not feel that incarceration  
11 is appropriate?

12 PROFESSOR GALAWAY: That's correct.

13 COMMISSIONER: Thank you.

14 PROFESSOR GALAWAY: I believe it should be --

15 COMMISSIONER: Eight-time burglar?

16 PROFESSOR GALAWAY: That's right.

17 COMMISSIONER: Twelve time burglar? A hundred  
18 time burglar?

19 PROFESSOR GALAWAY: Yes.

20 COMMISSIONER: That's it then.

21 (Laughter.)

22 PROFESSOR GALAWAY: Our view is that the penalty  
23 should be based on the offense, not on the past record...

24 COMMISSIONER: What of the assault?

25 PROFESSOR GALAWAY: Or if it's an assault, that

1 OMT/bc

1 becomes a more serious action. Imprisonment is probably  
2 necessary.

3 COMMISSIONER: I'm somewhat puzzled by this. Are  
4 you suggesting that the only punishment for some types of  
5 property offenses would be restitution?

6 PROFESSOR GALAWAY: Yes.

7 COMMISSIONER: But it seems to me though again  
8 strange, I mean, that someone's considering stealing \$50 and  
9 the punishment for that is giving back the \$50. As long as  
10 you don't get caught all the time, it seems like a good  
11 business.

12 PROFESSOR GALAWAY: I am prepared to accept the  
13 view that there will be property offenders for which you  
14 need to add additional nonincarceration penalties.

15 COMMISSIONER: Well, how will we know those? I  
16 mean, how will we separate the angels from the devils?

17 I just heard you say that, you know, they will be  
18 depending only on the offense. Now you have this problem.

19 Some people -- none of us in this room included,  
20 I hope -- would be tempted to in fact steal \$50 if all they  
21 had to do was give it back. And I think the obligations are  
22 identical...

23 PROFESSOR GALAWAY: My experience in the  
24 restitution program has indicated that, first of all, the  
25 defendant seldom secures full value of the property stolen.

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1 They are more likely to steal a television set  
2 and fence that for a hundred dollars and wind up paying the  
3 hundred dollars back to that victim.

4 I could also agree that one may be able to find  
5 more intangible losses for which the Judge will address  
6 special -- more tangible one could be in terms of --

7 (Inaudible).

8 CHAIRMAN WILKINS: Any other questions?

9 Mr. Gainer.

10 COMMISSIONER GAINER: Are we to understand then  
11 that Mr. Bronstein's claim -- \$40,000, in your view, it  
12 would be appropriate to sentence to restitution --

13 (Inaudible).

14 PROFESSOR GALAWAY: No. It would be in my view  
15 that that vice president could well be sentenced to a  
16 restitution plus -- community service. I have no objection  
17 to sentencing a person to three, four or five years to  
18 full-time community service.

19 There are a number of public service  
20 organizations that would be delighted to have the  
21 administrative and managerial skills that that vice  
22 president would have.

23 COMMISSIONER GAINER: (Inaudible).

24 PROFESSOR GALAWAY: I can say that given the  
25 option, -- might prefer that, although I think that,

1 OMT/bc

1 (inaudible). But I think if you accept the terms to it,  
2 that might have an equally deterrent value as a prison  
3 term.

4 CHAIRMAN WILKINS: Thank you very much,  
5 Professor. We appreciate it.

6 Do you have a question, Judge?

7 COMMISSIONER: Yes. Does it include burglary?

8 PROFESSOR GALAWAY: Yes.

9 COMMISSIONER: The offense of burglary is not  
10 taking something. It's breaking and entering. That's the  
11 thing that is law. That's the element of the offense. Not  
12 taking.

13 PROFESSOR GALAWAY: Well, the element of the  
14 offense may well vary from jurisdiction to jurisdiction.

15 COMMISSIONER: No, it's all the same all over the  
16 country. Breaking and entering. That's burglary. Common  
17 law burglary.

18 PROFESSOR GALAWAY: In Minnesota, where the  
19 charges of burglary did not involve unlawful entry --

20 COMMISSIONER: Well, what's the difference?

21 PROFESSOR GALAWAY: Well, the difference in terms  
22 of restitution?

23 COMMISSIONER: No. In the element of the  
24 offense. That's what burglary is. You have to realize that  
25 a man that burglarizes a home has committed something that

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1 is going to scare the people in there. Now, whether he gets  
2 \$100 or \$10 or a radio or what, is sort of beside the  
3 point. The main thing is the breaking and entering.

4 PROFESSOR GALAWAY: That might well be a type of  
5 offense for which guidelines would specify restitution plus  
6 service, or restitution plus some amount of time of  
7 nonincarcerative penalty, because one believes that it is a  
8 more serious offense than theft.

9 Then that...

10 CHAIRMAN WILKINS: I have to ask you, why are you  
11 so against incarceration?

12 PROFESSOR GALAWAY: Oh, I think that it  
13 accomplishes absolutely nothing. I think it's a waste of  
14 taxpayers' money. I think it mars and dehumanizes,  
15 brutalizes both staff and inmates. I see absolutely no  
16 evidence that it can --

17 CHAIRMAN WILKINS: If it brutalizes inmates, why  
18 does he go out and then repeat and repeat and go back when  
19 he needn't go back?

20 That's the guy I'm talking about. What about  
21 him? What alternative is there for him?

22 PROFESSOR GALAWAY: There's the alternative for  
23 him then of continuing to require him to be in some  
24 nonincarcerative function penalty, each time that he is  
25 found guilty.

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1 CHAIRMAN WILKINS: You would agree we ought to  
2 find some kind of a penalty for that offender to be  
3 deterred.

4 PROFESSOR GALAWAY: No. You see, that's one of  
5 the things that's philosophic. My view is that the central  
6 value to be accomplished in sentencing is fairness. And  
7 imposing a sentence is fair given the series of events.

8 And that utilitarian goal, such as deterrence and  
9 rehabilitation, in short, is not to be dropped should...

10 CHAIRMAN WILKINS: Judge MacKinnon.

11 COMMISSIONER MACKINNON: The Minnesota guidelines  
12 don't follow that, do they?

13 PROFESSOR GALAWAY: The Minnesota guidelines do  
14 clearly enunciate that philosophical position, although they  
15 do not operationalize it, it's on the -- because they do  
16 prevent incarceration for some kinds of crimes.

17 But they do enunciate the -- that's clearly the  
18 basis for --

19 COMMISSIONER MACKINNON: And they've gone through  
20 a little development on that?

21 PROFESSOR GALAWAY: They have gone through some  
22 development. And at this time, pressure is being brought to  
23 bear to put this into effect.

24 CHAIRMAN WILKINS: Thank you again, Professor.

25 Our next witness is Ms. Sally Hillsman, from the

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1 Vera Institute of Justice. Ms. Hillsman, glad to see you.

2 MS. HILLSMAN: Thank you.

3 STATEMENT OF MS. SALLY HILLSMAN,

4 VERA INSTITUTE OF JUSTICE

5 MS. HILLSMAN: Mr. Chairman and Members of the  
6 Commission, thank you very much for the opportunity to be  
7 here today to share with you some of my thoughts and  
8 observations on the use of -- sentences --

9 It has evolved out of about five years of  
10 research -- others on this topic, much of which has been  
11 funded by the U.S. Department of Justice, the National  
12 Institute of...

13 As sentencing philosophy in the United States has  
14 shifted toward greater emphasis on retributive models of  
15 justice, policymakers have been hampered by the prevailing  
16 view that imprisonment is -- but virtually the only means  
17 they are able to punish.

18 Within the realm of alternatives, as I think is  
19 evidenced by today's testimony, policy attention has been  
20 focused on relatively new sanctions. Not surprisingly,  
21 however, there has also been renewed interest in what is one  
22 of the oldest and certainly one of the most widely used ways  
23 of punishing people without imprisonment; namely, the  
24 criminal fine.

25 The obvious advantages of the fine has made an

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1 important sentencing tool in American courts at all levels.  
2 In U.S. District Courts, almost a third of all of the  
3 sentences include a fine.

4 In trial courts of limited jurisdiction around  
5 the country, they are clearly the predominant form of  
6 punishment. And at state general jurisdiction trial courts,  
7 fines are used far more frequently than is generally  
8 recognized, both alone and in combination with other  
9 noncustodial sentences.

10 It's the perception of the disadvantages of the  
11 fine that gives policymakers for it -- the increased  
12 availability in the last few years of research on fining...

13 (Conclusion of side 2 of tape 4.)  
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1                   ....sentencing judge, that fines are already  
2 perceived as sufficiently punitive. Judges use them widely,  
3 not only for minor offenses but (inaudible) over a wide  
4 range of (inaudible), including, fraud, embezzlement, drug  
5 sale, (inaudible), burglary, and assault.

6                   Furthermore, research suggests that these fines  
7 are a (inaudible), that they are corrective far more often  
8 and expeditiously than is generally recognized.

9                   While statutory fine maximums do tend to be low  
10 (inaudible), at least at the nontrivial level, these amounts  
11 are arrived at particularly in the federal system.

12                   The judges nonetheless continue to impose  
13 relatively low fine amounts. It appears to reflect the lack  
14 of guidance on how to use already tested sentencing methods,  
15 such as European (inaudible), for example, that (inaudible)  
16 fine amount simultaneously, the severity of the offense, and  
17 the means of the offender, rather than to reflect judges'  
18 unwillingness to consider fines punitive.

19                   A recent survey of American judges who handle  
20 criminal cases at the state trial court level indicates that  
21 they view fines favorably as punishment, and many expressed  
22 considerable interest in exploring innovative ways to impose  
23 them, particular the European (inaudible).

24                   And indeed, research in Europe suggests that when  
25 (inaudible) fine systems are implemented, fine amounts rise

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1 significantly, especially for more affluent offenders.

2 Are fines a deterrent?

3 Well, the evidence about the deterrent effects of  
4 fines is as limited as the evidence about the deterrent  
5 effects of other sanctions, including (inaudible). The  
6 available evidence (inaudible).

7 Research in West Germany, for example, suggests  
8 that controlling for offense and for the characteristics of  
9 offenders with prior records fines that meet (inaudible)  
10 fines are no less effective than imprisonment for some  
11 offenders and considerably more effective than either  
12 imprisonment or probation for other offenders.

13 (Inaudible.)

14 Such evidence has encouraged West Germany,  
15 England, and Sweden to make fines and sentences short for  
16 most offenses as a matter of national policy.

17 Well, there is much evidence to suggest that --  
18 support the idea that American judges (inaudible) use  
19 fines. It is also apparent that they have not, as have the  
20 European counter-fines, formulated strong professional views  
21 about the proper place for fines/sentences within the  
22 repertoire of options.

23 This suggests the time is ripe for greater  
24 federal attention, reappraising the role of the fine and to  
25 experimenting with new approaches to imposing them.

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1 And that is particularly appropriate because very  
2 recent changes to federal statutes now direct federal judges  
3 to take both the severity of the offense and the means of  
4 the offender into account when imposing a fine and set the  
5 terms of payment, including installments, at the time of  
6 sentencing.

7 This situation seems to me to present an  
8 opportunity for the federal system through the work of the  
9 Sentencing Commission to assume leadership in this area.

10 It is fortunate, therefore, that other important  
11 changes in federal changes in federal statutes have been  
12 made during the last several years, changes that create the  
13 necessary preconditions for such a reappraisal to be  
14 successful.

15 When I first testified about federal fine  
16 practices in 1983, there were a whole series of statutory  
17 and administrative problems that impeded the use of fines in  
18 the federal court system. Most of these issues have now  
19 been addressed by statutory reforms, and as a result, there  
20 is a much greater potential, I think, for the remaining  
21 administrative difficulties to be resolved.

22 I would like to (inaudible).

23 First, you have already indicated the statutory  
24 fine ceiling could be raised by Congress, and federal judges  
25 are now directed to consider both offense severity and

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1 means.

2           These new provisions should create a stronger  
3 statute for the probation divisions (inaudible) heretofore  
4 inadequate procedures for collecting and assessing the  
5 national (inaudible).

6           Second, federal judges are now permitted to  
7 modify original fine statutes. They were not before. This  
8 should encourage feedback of information to courts on the  
9 defendant's payments (inaudible) and help judges more  
10 systematically and rationally -- be more systematic and  
11 rational in their original decisionmaking. It will also  
12 ease some of the problems associated with (inaudible)  
13 ability to pay.

14           Third, the efficacy of (inaudible) addresses  
15 capacity (inaudible). Research indicates that successful  
16 enforcement depends upon centralizing responsibilities  
17 (inaudible) function. New federal statutes placing full  
18 responsibility for correction in the U.S. Attorney's Office  
19 have finally accomplished this, at least in principle,  
20 thereby replacing acute fragmentation of federal enforcement  
21 procedures with at least the beginning system of rational  
22 administration.

23           Finally, research on enforcement (inaudible)  
24 credible threat (inaudible). Statutory provisions now  
25 provide the federal courts for the first time with a

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1 credible threat to encourage payment, and when there is  
2 (inaudible) with the initial decision to fine.

3 This has been accomplished by creating a  
4 (inaudible) sentencing and making that rule enforceable with  
5 the same efficient procedures that it (inaudible)  
6 taxpayers. This makes it possible to (inaudible) rather  
7 than imprisonment as the appropriate coercive device  
8 (inaudible).

9 Therefore, research on fining practices that  
10 properly set (inaudible) amount of penalties (inaudible)  
11 successful sentencing. Although the (inaudible). Whether  
12 it can be enforced (inaudible) uncomfortably high levels of  
13 coercion appears to depend on the size of the original fine  
14 in relationship (inaudible).

15 Providing guidance on alternatives. Most courts  
16 in the United States rely on (inaudible), thereby limiting  
17 their use (inaudible). Of course, such methods make it very  
18 difficult to adjust (inaudible).

19 While the English have resisted the development  
20 of the (inaudible) fine system, their broad problem was  
21 incarceration (inaudible) arising from inconsistent fine  
22 setting practices, pushing them (inaudible).

23 Because U.S. sentencing statutes now direct that  
24 both severity and means be taken into account, it appears  
25 desirable to consider a (inaudible) fine system seriously

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1 in any reappraisal of federal sentencing policies.

2 (Inaudible) fine systems were initially developed  
3 in Sweden in 19-(inaudible) and introduced in Denmark  
4 (inaudible) generally in 1975. The basic notion is that the  
5 punishment represented by a fine should be proportionate to  
6 the (inaudible), consistent or uniform within severity  
7 classifications and equal towards individuals of different  
8 financial resources.

9 To reconcile the potentially conflicting  
10 principles of consistency and equity, (inaudible) fine  
11 systems create a two-stage decision process.

12 First, the number of (inaudible) fine units to  
13 which an offender will be set determines (inaudible), but  
14 not with regards to the means of the offender. Thus,  
15 (inaudible) are sentenced to the same number of units. The  
16 monetary value of each unit, however, is determined  
17 separately in the second stage of sentencing, and it it  
18 explicitly set in relationship to what the offender can  
19 afford to pay (inaudible).

20 Thus, the total (inaudible) system, the degree of  
21 punishment should be in proportion to the gravity of the  
22 crime across different offenses and consistent within  
23 severity categories but within a given offense (inaudible)  
24 economic burden on defendants of different means.

25 The general (inaudible) fine system is

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1 the most used for comparison with the U.S. federal system.  
2 It is organized around a benchmark. The minimum fine  
3 sentence is five (inaudible) fine units, and the maximum is  
4 360 for a single offense.

5 Although there is no direct correspondence  
6 between the number of (inaudible) fine units and terms of  
7 imprisonment established by law for the same offense, the  
8 360 unit maximum logically links the idea of a one-year  
9 prison sentence.

10 However, since Germany has set the maximum  
11 monetary value of any (inaudible) fine unit at a fairly high  
12 level, about \$4000, fines for wealthier offenders convicted  
13 of serious (inaudible) are quite substantial even if  
14 theoretically they are (inaudible) for a year imprisonment.  
15 They can be as high as a million and a half dollars for a  
16 single offense and multiples of that for subsequent  
17 offenses.

18 Calculation of the number of (inaudible) fine  
19 units correspond (inaudible) is not now being prescribed  
20 under the German law. Courts therefore themselves have  
21 developed guidelines (inaudible), and they vary from region  
22 to region.

23 Judges in the area most thoroughly studied in  
24 Germany have produced guidelines for ranges of (inaudible)  
25 fine units corresponding to broad offense groups. However,

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1 the ranges are so great -- for example, from 10 to 50 units  
2 (inaudible) -- that they render the idea of guidelines  
3 (inaudible) meaningless.

4 For this reason, there has been some discussion  
5 in Germany of (inaudible) the system in an attempt to narrow  
6 those ranges. This suggests that in a fine -- a (inaudible)  
7 fine model (inaudible) United States federal system a fairly  
8 strict -- that is, a narrow range -- sentencing guidelines.

9 (Inaudible.)

10 The rules are in keeping with much of the current  
11 sets of guideline thinking in this country.

12 In assessing an individual's means and ability to  
13 pay under (inaudible) fine or any other fine system, federal  
14 statutes leave American courts to rely largely on  
15 information obtained from defendants. While defendants are  
16 asked by the probation division to cooperate voluntarily,  
17 most information cannot now be compelled.

18 If (inaudible) fines are introduced into the  
19 federal system, fine amounts will undoubtedly rise and  
20 statutory changes may be needed to provide the courts at  
21 least in some instances with greater legal access to  
22 substantial information.

23 However, the experience of other court systems  
24 suggest that (inaudible) voluntary cooperation should not be  
25 considered a priori barriers (inaudible) fines or to these



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1 (inaudible).

2 For example, Germany relies largely on easily  
3 available information which can generally be verified  
4 (inaudible), as do in fact American courts most often in  
5 setting bail amounts. Data on employment and other types of  
6 income are the major source of information used by German  
7 courts to establish an ability to pay, and this does not  
8 seem to trouble German judges who report satisfaction with  
9 the system.

10 It would appear, therefore, that the federal  
11 courts can substantially improve their efforts to obtain  
12 financial information voluntarily, and our own (inaudible)  
13 federal information division and data collected by the  
14 (inaudible) suggests that this activity has not been given  
15 very high priority in preparing presentence reports. Data  
16 are often incomplete and sometimes nonexistent.

17 While statutes directing federal judges to  
18 consider ability to pay when setting fines would increase  
19 the pressure on probation officers to provide better  
20 information, this should be accompanied by procedures to  
21 ensure that (inaudible) financial investigation and also  
22 that a (inaudible) information is available (inaudible). If  
23 this is done, federal judges can be provided with  
24 standardized assessments of offenders' ability to pay.

25 American financial institutions and other

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1 lenders make such determination routinely, using relatively  
2 few pieces of data, much of which is also provided by  
3 (inaudible) or available credit union.

4 Furthermore, the recent shift in the statutory  
5 responsibility for setting the terms of payment of federal  
6 sentencing judges can encourage making large fines when  
7 other financial obligations (inaudible). Proper  
8 installments can mitigate at least some (inaudible) problems  
9 encountered (inaudible) to pay.

10 Before closing, I would like to offer a brief  
11 comment on post-sentencing enforcement issues. That is a  
12 question (inaudible).

13 The research evidence is unambiguous that even  
14 large fines (inaudible). Conditions that must be met are  
15 largely administrative ones, and if they are met, there is  
16 little reason to believe significant numbers of defendants  
17 will (inaudible).

18 Research evidence suggests that nonpayment  
19 typically results from improperly set fines, administrative  
20 ineptitude, and failure of enforcement agencies to credibly  
21 threaten (inaudible) offenders in a timely fashion.

22 Recent legislative actions provided the federal  
23 (inaudible) potential for fine enforcement to operate far  
24 more smoothly and effectively than it has in the past. This  
25 represents (inaudible).

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1 It also presents an unparalleled opportunity  
2 (inaudible).

3 CHAIRMAN WILKINS: Thank you very much,  
4 Ms. Hillsman.

5 Has there been any criticism that you have  
6 collected of the day fine system?

7 MS. HILLSMAN: Any criticism?

8 CHAIRMAN WILKINS: Those who criticize, what do  
9 they say that is bad about it?

10 MS. HILLSMAN: I think that the major issue that  
11 comes up with the day fine system is the question of whether  
12 or not you can credibly (inaudible) of the offender. That  
13 seems to be the major issue.

14 That is certainly the major issue with the  
15 British, who have, as I said before, made these fines in  
16 essence their sentencing choice, and they have not  
17 (inaudible).

18 I might point out, however, that they are moving  
19 very rapidly in the direction of any pilot projects  
20 (inaudible). We do find that they have determined that they  
21 are setting fines improperly, and that is causing a problem  
22 of (inaudible), which is the last thing you want if you are  
23 going (inaudible).

24 I think that issue is the one. The other issue  
25 that comes up, which is an issue related to it, is

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1 what to do about very poor offenders; that is, where you  
2 have somebody (inaudible) in a poverty situation. That is  
3 another issue that comes up.

4 (Inaudible.)

5 CHAIRMAN WILKINS: Thank you.

6 Any questions to my right?

7 VOICE: I couldn't agree with you more. I mean,  
8 use of fines and moving towards more use of the monetary  
9 sanctions.

10 A few things puzzle me though about day fines,  
11 and I wanted to cover those, and you just alluded to it in  
12 sort of the question about the poor.

13 It seems to me that is a general question about  
14 low income individuals, low wage individuals. It sounds  
15 nice to set the cost by ability to pay, but you are setting  
16 the cost by ability to pay and the gains by the ability to  
17 break the law. There is no necessary correspondence between  
18 ability to pay and ability to steal, and it seems to me that  
19 there are difficulties here.

20 How do you prevent this day fine system from  
21 becoming a license for low wage individuals to steal?

22 MS. HILLSMAN: I think that the first thing that  
23 one has to do is separate out the number of -- the notion of  
24 the number of units from the amounts, and what you are going  
25 right to the heart of is the question that if you have

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1 somebody who is rich (inaudible) they may accumulate  
2 substantial amounts of monetary resources, then of course  
3 their apparent income is low so they will be paying out a  
4 relatively small amount.

5 I think the only real answer to that question is  
6 to -- if you have a repeat offender, a repeat theft  
7 offender, the only thing that one could do is to have repeat  
8 offenses be a part of the establishment of the number of day  
9 fine units (inaudible). So that number would rise as the  
10 frequency of past arrests rise. And then set the amount  
11 that is relative to what it appears that they can afford to  
12 pay and extend that payment period over a fairly long period  
13 of time. The total amount would not be insubstantial, even  
14 if it is not related to the total amount that they might  
15 (inaudible).

16 VOICE: Well, I guess that goes to -- I have a  
17 more fundamental problem than the problem of just the career  
18 offender, such as the career thief.

19 It seems to me to strike right at the heart of  
20 property crimes, which many (inaudible), that the gains are  
21 not proportional, necessarily very closely tied to the  
22 individual's legal wage, so that since you are trying the  
23 cost continually to that wage --

24 MS. HILLSMAN: No, but if you set the number of  
25 units in relationship to the severity of the offense --

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1 VOICE: But the --

2 MS. HILLSMAN: -- will equally be determined by  
3 in fact the --

4 VOICE: But no one cares about -- I mean, if you  
5 are rational and calculating, the units all have to be  
6 converted into what it costs you. The fact that something  
7 costs 500 units means something different when it is  
8 essentially a dollar a unit than when it is \$20 a unit.

9 MS. HILLSMAN: But if you have --

10 VOICE: I think.

11 MS. HILLSMAN: If your offense is -- his means is  
12 as a series level of steps, the number of units are great,  
13 each individual unit may be relatively small in size, but  
14 then what the judges say (inaudible) setting that  
15 installment, so that the total amount over a period of time  
16 is relatively low.

17 VOICE: But it still will be the case that high  
18 wage people will pay a higher (inaudible) price, the same  
19 theft.

20 Two people considering stealing Mercedes-Benz,  
21 for example. One has a low income, one has a high income.  
22 The way day fines work, I think, is the low income  
23 individual will have a lower absolute dollar fine than the  
24 high income individual?

25 MS. HILLSMAN: Correct. That is correct.

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1 VOICE: And I am just wondering how you avoid  
2 licensing theft on the (inaudible).

3 VOICE: Dinishing marginal utility of money.

4 (Laughter.)

5 VOICE: I think it is more radical than that. It  
6 seems to be (inaudible).

7 CHAIRMAN WILKINS: Any questions to my left?

8 VOICE: Yes.

9 (Inaudible.)

10 As a practical matter, how does -- I would like  
11 you to elaborate a little bit. I mean, I have looked at the  
12 Swedish thing (inaudible). It seems to me that you do run  
13 into the problem of a lot of poor people who often do commit  
14 crimes, or they may not be poor if they have been successful  
15 at their crime.

16 (Laughter.)

17 (Inaudible.)

18 ...dope. You take the dope away from me, I would  
19 be broke.

20 (Laughter.)

21 And there may be lots of people like that who  
22 have no other source of income. That is the way it is. You  
23 say, oh, we are going to take all your money. Well, the  
24 (inaudible) on welfare. Well, we have set the welfare level  
25 at a very low level to support your family, not you anyway,

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1 and now you are going to take his welfare away, or what does  
2 happen? I mean, there might be lots of people like that.

3 MS. HILLSMAN: I think are two responses to  
4 that. One of them is that we tend to (inaudible). As a  
5 matter of fact, the federal courts and most state courts  
6 that I have (inaudible) never really ever just give  
7 (inaudible) make much sense, the reason being because  
8 poverty (inaudible).

9 Day fines take that into account by suggesting  
10 that losing a small amount of money for somebody who has a  
11 small amount of money is punitive, as punitive as  
12 (inaudible) larger amount of money from somebody who has a  
13 great deal.

14 However, it is also certainly the case  
15 (inaudible) where you cannot withdraw monetary resources  
16 from somebody without in fact (inaudible).

17 I think in those cases that one does have to get  
18 away from the monetary sanction and do something, for  
19 example, such as community service.

20 (Inaudible.)

21 ...very poor offenders who are repeat multiple  
22 property (inaudible), and the kind of work they do is, I  
23 assure you, punitive. They clean rats, dead rats out of the  
24 basements (inaudible), and the sanction is also enforced.  
25 When they don't appear, they go to jail.



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1 So there are ways of (inaudible) community  
2 services when you are talking about poor offenders  
3 (inaudible) amounts of money (inaudible).

4 I think that is (inaudible).

5 VOICE: In these other places, (inaudible) trial  
6 takes time. There is a long time between the indictment to  
7 trial in the first place, and if you are cynical a little,  
8 you can expect there are going to be an awful lot of people  
9 who by the time the sentence comes around to be pronounced  
10 they say I have no money.

11 (Laughter.)

12 And regardless of how they started out, right at  
13 that moment they do have no money. Maybe their wife, their  
14 cousin, other people may have the money, but they do not at  
15 the moment.

16 Now, that is a question of enforcing (inaudible)  
17 transfers to people. How does that work?

18 MS. HILLSMAN: That is (inaudible). I think that  
19 that is a question which has not been entirely resolved  
20 (inaudible), that when you have a financially astute  
21 offender (inaudible) a very serious offense, then the issue  
22 of their dissipating their assets in one or another  
23 (inaudible) is a very important one.

24 VOICE: You don't need to be too sophisticated.  
25 Take the car, take the house, get it out of your --

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1                   What do they do in Germany about this? What have  
2 they done?

3                   MS. HILLSMAN: That issue rarely comes up in  
4 Germany, as far as I can understand. There is only one  
5 other solution that I can see for that particular problem,  
6 which is that it assumes at least (inaudible) have some form  
7 of income, and if one then thinks not so much about the  
8 assets in the past but (inaudible) assets in the future, and  
9 I would suggest that in my judgment that is an approach to  
10 the problem that wasn't being explored.

11                   Since federal judges are now being required by  
12 statute to (inaudible) rather than the way it used to be in  
13 the federal system, which was that it was done by the  
14 enforcement agents rather than by the sentencing agents, it  
15 gives the sentencing judge, I think, the opportunity to  
16 explore that whole issue when setting the original  
17 sentence.

18                   CHAIRMAN WILKINS: Thank you very much,  
19 Ms. Hillsman. We appreciate your testimony.

20                   Will our panel come around?

21                   TESTIMONY OF THE U.S. PROBATION OFFICE PANEL  
22 BY MR. DONALD CHAMLEE, DIRECTOR, PROBATION  
23 DIVISION, ADMINISTRATIVE OFFICE OF THE U.S.  
24 COURTS; MR. NEWT SCOTT, CHIEF U.S. PROBATION  
25 OFFICER, TULSA, OKLAHOMA; AND MR. WILLIAM D.  
26 GRAVES, CHIEF U.S. PROBATION OFFICER, DENVER,

27                   COLORADO

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1 MR. CHAMLEE: Thank you, Mr. Chairman. It is our  
2 pleasure to be here.

3 I want to congratulate the Commission for its  
4 endurance. I am sure you must be sitting here to hear these  
5 other two gentlemen and not me because you have heard from  
6 me before.

7 I would like to say with respect to the last  
8 witness, who was talking about the way we do our presentence  
9 investigations and develop the financial background, the  
10 criticism which she made about the probation system is at  
11 least in the past fundamentally correct. We were not doing  
12 a very good job.

13 We are engaged in some activities to improve the  
14 standards.

15 (Inaudible.)

16 And I hope in the future to have a much more  
17 sophisticated approach to developing the financial  
18 backgrounds of defendants.

19 I think what I have done in my written statement  
20 I will summarize very briefly. I know the hour is late.  
21 The Commission seemed to be interested in intensive  
22 supervision issues, so what I have tried to do is  
23 (inaudible) where we are right now in the federal system and  
24 what kind of intensive supervision we do now provide.

25 We are funded, for example, for a caseload with

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1 our high risk offenders 41 (inaudible), and that is not  
2 getting to where Mr. Goldstein is, but it is moving in that  
3 direction.

4 We do have a number of things that go into most  
5 intensive supervision programs. He can get the taste of  
6 jail or he can be placed in a community treatment center for  
7 a period of time. We do have minimum monthly contacts, and  
8 I emphasize the word "minimum." The standards call for no  
9 maximum with our high risk offenders.

10 We do have some after care services available  
11 (inaudible) people. We have a legislative proposal pending,  
12 by the way, to expand that through the contracting  
13 (inaudible) alcoholism treatment (inaudible). We also have  
14 programs in the large cities where we have concentrations of  
15 mentally ill offenders, where we have organized crime  
16 defendants. We have nationwide a community service program,  
17 and as my testimony indicates, one in six of our probation  
18 (inaudible) do now contain some community service.

19 I will just comment on that since that issue also  
20 came up last time. Both the rich and poor alike have one  
21 asset that they cannot conceal, and that is their Saturdays  
22 and Sundays.

23 (Laughter.)

24 They can give those up equally.

25 We do also have a very small program (inaudible),

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1 called (inaudible) parole, which (inaudible) has been  
2 involved in, can probably tell you more about it than I  
3 can.

4 So we do a little of that kind of high  
5 activity...

6 (Tape reversed.)

7 I would summarize by saying our recommendations  
8 to the Commission would be (inaudible) offenders to  
9 incarceration, the maximum possible flexibility be left for  
10 the local situation (inaudible) probation officers to frame  
11 the conditions as they change because they do in fact change  
12 constantly in the (inaudible).

13 We are interested in more (inaudible) sentencing  
14 alternatives like have been discussed here today. We would  
15 be glad to enter into a dialogue with the Commission on what  
16 needs to be done in that area.

17 And I would just say in concluding my comments,  
18 we look for a new day in the criminal justice system with  
19 you folks taking the lead in setting new standards, setting  
20 new challenges for us in the probation system.

21 CHAIRMAN WILKINS: Well, we are going to do  
22 that.

23 (Laughter.)

24 MR. CHAMLEE: I am sure of that.

25 I will defer to my colleagues.

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1 CHAIRMAN WILKINS: Mr. Graves or Mr. Scott, we  
2 would be happy to hear from either one of you.

3 MR. GRAVES: All right. Judge Wilkins,  
4 Commissioners, I want to also take this opportunity to thank  
5 the Commission for this opportunity, for the openness that  
6 the Commission has exhibited in having federal probation  
7 officers involved in this process.

8 I don't believe that we have the opportunity in  
9 many cases to participate on working committees and have an  
10 opportunity to tell you how we feel about the sentencing  
11 process.

12 I want to emphasize first that the sentencing  
13 judge is in a unique position to weigh all the factors  
14 relevant to sentencing decisions.

15 Our recommendation to you as you develop the  
16 national strategy is to leave sufficient latitude in the  
17 guidelines to allow sentencing judges to function in their  
18 traditional role, balancing the collective interest of the  
19 public against the private interest of the defendant.

20 I want to now go into some of the more specific  
21 questions that you have asked us to comment on.

22 In reference to intensive probation supervision,  
23 intensive probation supervision was created at the state  
24 level to respond to prison overcrowding and/or the needs to  
25 toughen the image of probation or parole in the community.

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1           The federal courts generally deal with a  
2 different type of climate than do the state courts. The  
3 majority of our clients are convicted of nonviolent, white  
4 collar types of offenses.

5           The Federal Probation Service does have a very  
6 adequate risk prediction scale, the RPS-80, that provides  
7 for high activity supervision of specific clients. Through  
8 this classification system we have been able to develop  
9 specialized caseloads for drug treatment, mental health,  
10 organized crime cases, et cetera.

11           It can be modified. I believe at this time it  
12 should be modified and studied somewhat, but I suggest that  
13 we generally not leave this system, this system of  
14 predicting arrests.

15           On additional probation conditions, I believe  
16 that there are a number of conditions that need to be  
17 standardized in order to provide the probation officer with  
18 the tools he needs to meet his statutory responsibilities.  
19 Those conditions are outlined in my detailed statement.

20           I would suggest two additional alternative  
21 conditions -- a financial disclosure condition and a  
22 condition for third party risk disclosure.

23           On fines, I believe that should be considered in  
24 every case but be a preferred sanction in addition to other  
25 sanctions. I believe, though, it should be used in

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1 traffic, driving offenses, restraint of trade cases,  
2 organized crime cases, drug cases, crimes where there is a  
3 financial loss to the government -- for example, income tax  
4 violations, false statements, and claims, et cetera.

5 In determining the amount of fine, I do think it  
6 is important to consider the criminal offense, defendant's  
7 participation and his ability to pay. Ability to pay can be  
8 based on the financial section of the presentence report,  
9 but sworn testimony by the defendant at the time of  
10 sentencing is another means of determining assets that may  
11 have been unreported to the investigating probation  
12 officer.

13 Whatever method is used to determine the  
14 appropriate fine, the important principle is that the fine  
15 be collected.

16 I believe that restitution must be considered in  
17 all cases where there is identifiable victims, where there  
18 is an identifiable victim who has suffered a loss. I do  
19 think that restitution must be a higher priority than either  
20 a fine or community service.

21 On community service, the Administrative Office's  
22 soon to be published monograph entitled "Community Service:  
23 A Guide for Sentencing and Implementation" is a well thought  
24 out document that provides adequate direction for the court  
25 and its probation department in imposing and supervising



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1 community service.

2 I do feel that community service is a criminal  
3 sanction for the defendant's wrongdoing and is one of a  
4 number of alternatives that the court can use to aid  
5 reparation to the community or the individual defendant's  
6 rehabilitation.

7 I don't, however, perceive it as being a primary  
8 determinant in whether or not confinement sentence is  
9 imposed.

10 I don't believe that we have many of the types of  
11 cases that lend themselves to the use of house arrests or  
12 electronic surveillance. State courts have generally  
13 imposed this condition with select groups and nonviolent  
14 offenders, such as DUI cases or, as was mentioned earlier,  
15 nonsupport cases.

16 I do believe that we can provide adequate  
17 supervision for that class of offender through use of  
18 community treatment centers, alcohol treatment programs, and  
19 the National Crime Information Center Computer Practice  
20 System.

21 There may very well be exceptions to this in  
22 districts that handle large numbers of arrests, such as  
23 mine. I would use that as an example. However, it would be  
24 important to establish a uniform national policy that  
25 identifies target groups and specific goals.

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1                   Electronic surveillance has also been used by the  
2 state to monitor pretrial detainees who would not normally  
3 be eligible for release on a personal recognizance bond  
4 because of their prior record.

5                   The Crime Control Act addresses those issues by  
6 requiring judicial findings for detention in cases where  
7 there is a black list or a threat to the community. It  
8 requires a postable bond for all offenders.

9                   And I believe that concludes my remarks.

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

12                  Mr. Scott, do you have any remarks you would like  
13 to make?

14                  MR. SCOTT: Judge Wilkins, Commissioners, I can  
15 adopt with no serious differences the lengthy written  
16 statements of both my colleagues. I responded in writing by  
17 reciting your question to the answering in a brief fashion  
18 my feelings about those things.

19                  I would share with you only this thought and  
20 these brief comments.

21                  I am the Chief Probation Officer in Tulsa,  
22 Oklahoma. I have served in that capacity for 18 years. I  
23 have a total of 26 years of service with the courts.

24                  My father served as a Chief United States  
25 Probation Officer from 1943 to 1968. I am familiar with the

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1 practices, experiences of the federal criminal justice  
2 system during the last 43 years.

3 I would say to you that it is my impression that  
4 federal judges have with rare exceptions sentenced offenders  
5 in fair and meaningful ways.

6 The Bureau of Prisons generally have done a  
7 commendable job of housing inmates humanely and safely.

8 Paroling authorities have over the years been  
9 reasonably objective in granting early releases from  
10 confinement.

11 Probation officers have done an excellent job  
12 (inaudible). The probation system has been an agent for  
13 change in people's lives.

14 What I am trying to describe is probably the best  
15 criminal correction system in the world. It didn't just get  
16 dropped here all at once out of a cloud. It grew out of a  
17 body of statutes that increased over the years out of case  
18 law and the practices that people (inaudible).

19 You have been mandated now to draw up a new  
20 picture of what it is we do, and I would say to you that if  
21 you want your work to live long make it a four-lane highway,  
22 not a one-lane horse path.

23 I guess what I am getting down to is if the thing  
24 is not broken don't fix it. Adopt all the practices of the  
25 system that now exist that have worked so well and add to

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1 them your description of what is appropriate for the  
2 future, and what you do here will live longer than if it is  
3 a narrow picture.

4 Thank you very much.

5 CHAIRMAN WILKINS: Thank you, sir.

6 I wonder -- Don, you said we haven't used these  
7 electronic monitoring devices very much in the system. That  
8 is true. But do you think they have a future for us in the  
9 federal system?

10 MR. CHAMLEE: Probably mostly in the pretrial  
11 area, where it makes a lot of sense as an alternative to  
12 spending your detention time awaiting trial in jail.

13 We haven't had much exposure to it (inaudible) as  
14 enlightening as any of the other presentations I have heard  
15 of before. I am sure there are places where it could be  
16 used.

17 In Virginia Western right now there have been  
18 some people under house arrest (inaudible). They have the  
19 electronic monitoring devices to assist them with what they  
20 do. It is something judges generally are starting to catch  
21 onto. It is on the agenda with the probation committee  
22 (inaudible).

23 CHAIRMAN WILKINS: Have you, Mr. Graves or  
24 Mr. Scott, had any experience with house arrest in your  
25 state districts?

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1 MR. GRAVES: It is something that hasn't been  
2 used a lot by federal judges, in my experience. I didn't  
3 know, maybe from Colorado to Oklahoma, maybe it is.

4 MR. SCOTT: It would be my feeling that in  
5 concentrated population areas where it could be monitored  
6 and policed well that it probably will have a growing use.  
7 There will be some problem within federal judicial districts  
8 that cover large geographic areas.

9 For instance, in the Northern District of  
10 Oklahoma, I don't have the resources to monitor something 80  
11 miles away or 150 miles away, where there is one case  
12 there. You know, there would be a practical problem.

13 But in those areas I could see its use.

14 CHAIRMAN WILKINS: Thank you.

15 Any questions to my right?

16 VOICE: Just one, I guess.

17 First of all, it is very good to see you again,  
18 Chief Graves and Chief Scott, Chief Graves from a very good  
19 region, the West, and Newt from God's country.

20 I have not heard the expression "If it is not  
21 broken, don't fix it" since I left home, and believe me, we  
22 will remember that.

23 (Laughter.)

24 With regard to Don, I think a little question. I  
25 imagine you would need a substantial increase in probation

OMTbur 1 officers if we took a very serious look at intensive  
2 supervision.

3 If we did take such a look, what would you think  
4 would be an appropriate or an effective caseload -- number  
5 for caseloads per officers?

6 MR. CHAMLEE: Well, if we went down (inaudible)  
7 to a caseload of, say, 25 and back that up with electronics  
8 monitoring. I suppose that would be a reasonable shot.  
9 That would require additional resources.

10 VOICE: Right.

11 And, also, Don, would you be in favor of a system  
12 that would utilize two officers, one being directed toward  
13 the area of counseling in terms of employment, family ties,  
14 all those kinds of things, and the other being essentially a  
15 police officer?

16 MR. CHAMLEE: Commissioner, I think what we would  
17 probably do in our system would be to pick up some of the  
18 surveillance requirements through the use of  
19 paraprofessionals. We have 40 paraprofessionals in the  
20 system right now, and I would expect we would expand that  
21 and then be doing the 2:00 a.m. contacts and maintain  
22 probation officers with the principal supervision  
23 (inaudible).

24 VOICE: Thank you.

25 CHAIRMAN WILKINS: Any other questions?

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(No response.)

CHAIRMAN WILKINS: The few number of questions to our friends from the probation offices is probably motivated by the hour, but, Don and Mr. Scott and Mr. Graves, we appreciate what you are doing.

We realize probation officers are going to play an important role -- indeed, perhaps a pivotal role -- in the implementation of these guidelines, and so we have asked for your input and your participation in the drafting of these guidelines as well, and we have received nothing but full cooperation, not only from you gentlemen but all probation officers with whom we have had any contact, and we are most appreciative.

We will see you in Denver at a public hearing sometime this fall.

Is there any new business or anyone wants to make any comments who is in attendance at this time?

(No response.)

CHAIRMAN WILKINS: Hearing none, we will stand adjourned.

This Commission will reconvene at 3:15.

(Whereupon, the Commission was adjourned, to reconvene at 3:15 p.m., this same day.)