UNITED STATES SENTENCING COMMISSION

Public Hearing - New York City
United States Courthouse, Foley Square
October 21, 1986

10:00 a.m.	William W. Wilkins, Jr. Chairman, U.S. Sentencing Commission
10:10 a.m.	Marvin Frankel, Esq. Former U.S. District Court Judge
10:30 a.m.	Jack Weinstein Chief Judge, U.S. District Court for the Eastern District of New York
10:45 a.m.	Phylis S. Bamberger, Esq. Attorney-in-Charge, Federal Defender Services Appeals Unit
	Owen Walker, Esq. Federal Public Defender, District of Massachusetts
11:15 a.m.	Break
11:30 a.m.	Rhea K. Brecker, Esq. Chief, Narcotics Unit, U.S. Attorney's Office, S. District of New York
11:50 a.m.	Kenneth Feinberg, Esq. Chairman, New York State Committee on Sentencing Guidelines
12:10 p.m.	Henry Howard Victim Advocate
12:30 p.m.	Lunch
1:30 p.m.	Michael Smith Executive Director, Vera Institute of Justice
1:50 p.m.	Harold Tyler, Esq. Former U. S. District Court Judge
	Jon Newman U. S. Court of Appeals for the Second Circuit
	William Conner U.S. District Court for the Southern District of New York
2:20 p.m.	Break
2:40 p.m.	Robert Fiske, Esq. Former U. S. Attorney
	John Martin, Esq. Former U. S. Attorney
3:10 p.m.	Robert McKay, Esq. Professor of Law, New York University School of Law
3:30 p.m.	Public Comment

Honorable Marvin Frankel introduced ..... page 3 line 22
Honorable Marvin Frankel speaks ..... page 4 line 5

Summary:

Preliminary draft of the guidelines shows the kind of in depth research necessary for the task. This quality of research has produced something that is extremely complicated and goes against previous models that have worked to keep it simple. Would like to know projected impact of the guidelines. Does not like that the guidelines are also to be attempting to control prosecutorial discretion; the focus should be first on making a solid set of guidelines and then deal with prosecutors. There are inconsistencies in the assigned mitigating value of cooperation with the prosecutor.

Honorable Marvin Frankel questioned ..... page 13 line 19
Honorable Jack B. Weinstein introduced ..... page 17 line 3
Honorable Jack B. Weinstein speaks ..... page 17 line 7

Summary:

Speaks for the judges of the Second District. The preliminary draft drastically increases the length of imprisonment given as a sentence. The guidelines would double the work of the court by not offering enough incentive for a plea and requiring extra time for hearings to determine proof of the facts predicate for a sentence. The guidelines do not take advantage of the probation system. The draft is too complex and limiting of judicial discretion. Commission needs to do more research on what the impact of the guidelines will be. Should not do away with split sentences as the preliminary draft suggests.

Honorable Jack B. Weinstein questioned ..... page 26 line 14
Honorable Mark Wolf introduced ..... page 41 line 23
Honorable Mark Wolf speaks ..... page 42 line 11

Summary:

Wolf represents the First Circuit. Guidelines will create more work through the need for more detailed sentencing hearings. Need to determine a better system than is set forth in the preliminary draft for gauging the value of the cooperation with the prosecutor. Need to do away with unwarranted national disparity, but need to leave room for regional crime priorities to be emphasized in sentencing as a deterrent to others.

Owen Walker and Phyllis Bamberger introduced ..... page 69 line 14
Owen Walker speaks ..... page 70 line 14

Summary: Walker

The preliminary draft is too complicated; this is going to result in specialization of sentencing as a type of law and the overworking of public federal attorneys. The guidelines are needlessly increasing sentences. The Commission should not present guidelines that offer different sentences where judges are behaving similarly without any type of manual. Commission has done well covering aggravating factors but has done nothing with mitigating factors.

Phyllis Bamberger speaks ..... page 80 line 24

Summary: Bamberger

The preliminary report does not have logical structure dealing with cross-references. The value assigned to aggravating factors seems arbitrary. In order to

complete the computation for the offense level it is necessary for the probation officer to have accurate and reliable information; especially for the purpose of determining criminal history. The information that probation officers currently have access to is not reliable. Never explicitly said that people have the right to a hearing to determine the facts for sentencing.

Rhea K. Brecker Introduction ..... Page 107 line 18
Rhea K. Brecker Speaks ..... Page 107 line 23

Summary:

Prosecutors, defense attorneys and judges can all live with the guidelines. Is actually more pressure for the prosecutor because the mystery of how much weight the judge gives to a particular fact is taken away. Having a guarantee of at least some prison time for certain crimes does serve as a deterrent. The guidelines are not specific regarding whether someone may receive benefits for both acceptance of responsibility and cooperation.

Kenneth Feinberg Introduction ..... Page 123 line 6
Kenneth Feinberg Speaks ..... Page 123 line 13

Preliminary draft has too much detail. Need to minimize occasions where certain specific or aggravating factors are prescribed. In being less specific the judges will enjoy more discretion. The Commission's ambition is working against them, go slowly.

Kenneth Feinberg Questioned ..... Page 131 line
Henry Howard Introduction ..... Page 139 line 19
Afternoon Session Begins Again ..... Page 141
Michael Smith Introduction ..... Page 141 line 4
Michael Smith Speaks ..... Page 141 line 9

Summary:

Smith is the Executive Director of the Vera Institute of Justice. The system of pure offense sentencing is an excellent theory. The guidelines do not outline what are appropriate reasons for departure. The add-ons and multiples take a person too far from the pure offense values. The judiciary needs more than one option in sentencing besides imprisonment or nothing.

Judge Jon Newman and Harold Tyler Introduction ..... Page 153 line 7
Judge Jon Newman Speaks ..... Page 154 line 5

Summary: Newman

Newman is a judge in the Circuit Court of Appeals of the Second Circuit. The guidelines deem the elevation of retribution the primary objective of sentencing. Need to incorporate more judicial discretion into the guidelines. Allow the appellate court to have judicial review over sentencing for the next few years. Commission must do a trial run before putting the guidelines to actual use.

Harold Tyler Speaks ..... Page 162 line 4

Summary: Tyler

There is no discussion of how to use fines in the guidelines. The Commission's preliminary draft has increased fines but this will not necessarily lead to greater use of fines as alternative punishment. It is not practical to use multipliers to determine sanction units.

Judge Jon Newman and Harold Tyler Questions ..... Page 168 line 8
Robert Fiske and John Martin Introduction ..... Page 182 line 23
Robert Fiske Speaks ..... Page 183 line 20

Summary: Fiske

Guidelines will increase burden on criminal justice through litigation about them and the fact that under them more defendants will want to go to trial not plea. Personal philosophy is that sentencing is the function of the judge. The guidelines will have the effect of transferring the burden of sentencing to the prosecutor from the judge. Preliminary draft does not specify when consecutive sentences would be imposed for multiple counts. There is not enough reward for cooperation. Corporations should not have to pay fines higher than the damage caused by the illegal action; corporations should not be fined based on their ability to pay. Should not use probation and management restructuring as alternative punishments for corporations. Should identify and imprison those individuals responsible for the crime.

John Martin Speaks: ..... Page 191 line 25

Summary: Martin

Guidelines should not use the amount of gain received from a crime by a criminal to determine the seriousness of the crime. They also give too much power to the prosecutor. As a result of the guidelines the court will be trying only criminal cases because no one has incentive to plea. Need to offer more of a reward for cooperation.

Robert Fiske and John Martin Questioned ..... Page 198 line 8
Robert McKay Introduction ..... Page 207 line 11
Robert McKay Speaks ..... Page 207 line 17

Summary: Mckay

Creating guidelines is an experiment that must be attempted. The federal judiciary should have more discretion than under the current rules. There should not be increases in penalties under the guidelines. Fines above damages caused by corporations are justified in the name of deterrence.

Marie Ragghiante Introduction ..... Page 222 line 25
Marie Ragghiante Speaks ..... Page 223 line 5

Summary: Ragghiante

Ragghiante is concerned about the reduction in use of probation as an alternative sentence under the guidelines. There should be mandatory release supervision for violent offenders and drug offenders.

Marie Ragghiante Questioined ..... Page 226 line 13
Commission opens for comments from the floor ..... Page 227 line 17
Phylis Bamberger asks questions of the Commission ..... Page 227 line 20
Susan Steinman ..... Page 234 line 10

Summary: Steinman

Guidelines should also take into account the purity of the drug sold, not just the weight. Also, by doing away with the 15 percent "good time" there will be anarchy in the prisons. Should be a greater reward for accepting the plea. Should not have a decay factor.

UNITED STATES SENTENCING COMMISSION

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Benjamin F. Baer,
Commissioners

PUBLIC HEARING - NEW YORK CITY

October 21, 1986
9:30 a.m. - 4:30 p.m.

United States Courthouse
Foley Square, New York, N. Y.

THE CHAIRMAN: I would like to call this public hearing to order, please.

I want to welcome all of you to one in a series of public hearings that the United States Sentencing Commission is now holding throughout the country. We are delighted to be here in New York. In behalf of the Commission, let me express our appreciation to Chief Judge Brieant, his staff, and all the members of the court family here in New York who have been so accommodating to us and assisted us in all the logistical and administrative matters that needed to be taken care of in preparation for this meeting. I thank all of you for coming, and I hope and I am convinced that we will have a productive day.

We published a few weeks ago what we titled "Preliminary Draft." It does not represent necessarily the views of each individual Commissioner, but the Commission did elect to publish it as a vehicle for extensive public comment.

As many of you know, we have been holding hearings in Washington on various issues and this has been most productive. But to increase public comment, we thought it would be a good idea to publish a document so that concrete responses could be received

from the justice community and all of those interested in the work that the Sentencing Commission is about. So we have set up a mechanism now, not only these public hearings as one method of comment, but also a method by which we will receive comment from those all over the nation. We will assimilate it, study it, and use it as we draft our final guidelines, which must be submitted to the Congress by April of next year.

Again, I appreciate the interest that you have shown, the work that the witnesses have evidently put into the work of the testimony and the submissions that we have received. Some of you have not submitted written testimony, but we would appreciate that it be submitted as soon as possible. We intend to critically analyze it, as you have critically analyzed the document that we have published.

I would ask too, because we have a number of distinguished witnesses appearing today, that we attempt as best we can to adhere to the schedule that has previously been published.

To begin our testimony, the first witness is the Honorable Marvin Frankel, the former United States District Judge and a practicing attorney, and known as a guru in the area of sentencing and sentencing

guidelines. Judge Frankel, we are delighted that you take the time to appear and assist us in this important task.

MR. MARVIN FRANKEL: It is a pleasure and an honor, your Honor.

I do have a very brief statement which my distinguished classmate and former colleague Weinstein has described as reflecting false modesty. It is the first time I have ever been accused of modesty of any kind. But the fact is that I have been awed by this product, and have just found it impossible to give it the lengthy, intensive study that it obviously requires. So I have limited myself to the brief reactions that I was able to generate in the time available to me and with the knowledge available to me, and I will, for what they are worth, summarize those for the Commission.

I use advisedly the word "awesome" to describe the quality of this document and my reactions to it. It shows the deepest kind of study and most extensive kind of inquiry into the factors that could be viewed as being vital to a thorough examination of problems of sentencing. My doubts and my questions about the product reflect, I think, what seemed to me to be the possible defects of those virtues. To put

that in English, I have an initial reaction that is negative, because I find this draft incredibly complex for an initial cut at a problem of such enormous difficulty as initiating the guidelines on the road to rational sentencing.

I would have thought that you'd have started from the opposite end of the telescope, that you'd have started with a very simple document and a very simple set of guidelines that judges, brand new to this and wholly unaccustomed to it, and their probation officers as well, would not view with a kind of fright that I think this preliminary set will engender.

It is perfectly clear to me -- I don't see any reference to it in the document -- that the Commission and its staff must surely have studied the prior efforts of Minnesota and Washington, about which my friend Leonard Orland and I wrote an article a couple of years ago that I immodestly cite in the statement I am submitting. Your outline doesn't reflect, however, any indications of your relying on that experience and using it, or indications of how and why, having studied it, you appear largely to have discarded it and reinvented this subject.

I must say that my own initial impressions

of what was done in Minnesota and Washington were quite favorable. The product was intelligible to me. It seemed workable. Both of those commissions had serious and distinguished scholarly leadership. They were content to start small and to face the intricacies and complexities as life goes on.

I have always thought that the genius of a Commission like this is the understanding from the outset that it is to have a continuous role in the study and formulation of constantly improved sentencing guidelines and procedures. By that token I would have expected, as I say, that you would start out with a relatively simple approach and move on toward something more complex.

I frankly would have preferred to see, and I guess as a witness before you and a citizen with an interest in this, I might say I think I still will prefer to see, a set of grids that look like the Minnesota and Washington efforts, grids that a judge can take out case by case, crime by crime, and apply with relatively simple arithmetic, free of combinations of additions, subtractions, multipliers and fractions that I don't think are going to work.

The suggestion of a set of grids relates to

another, more uncertain thought that I have had about these guidelines. I am not comfortable with so-called real offense sentencing, even when it has the prefix "modified" in front of it. As I think, and as I say in this, I am really diffident because I am not positive of my ground, but I give you my thoughts. I think that the only warrant that a judge or a Commission has for prescribing sentences for people is that somebody has violated a law or laws written by the Congress. I think the sentencing process ought to begin with the violation, not with some new construct that the Commission has substituted in effect for the statute, which was charged in the indictment and which was the subject of the plea or the verdict, or whatever.

In my statement I have a small paragraph expressing some worry about multipliers particularly. I think a multiplier, especially with some of the large numbers that are generated in these guidelines, has a potential threat of reintroducing the wide disparities that your work is supposed to mitigate. I don't think anybody's work can eliminate the disparities. I don't think anybody hopes for that. I think multipliers are a dangerous mode of calculating sentences. If it is a difference between six months and a year, the

multiplication by 2 is no great concern. But when the offense value runs up to 180, which divided by 12 is a lot of years, if you multiply that by 2 you give to judges a range of discretion that I think is, at least at first blush, for me antithetical to the effort to eliminate guidelines.

My next point is that in my reading, which may not have been adequate, I missed the qualities of projection and anticipation that I found valuable and important in the Minnesota study particularly. I don't see anywhere in here how the Commission proposes to appraise the potential impact of its guidelines. Are our sentences generally going to increase? Are they going to decrease? Are they expected to stay, on average, about the same? I don't hold any strong brief for any one of those outcomes. My own personal view, having sentenced a lot of people long ago, has always been that our sentences are too long. But I don't think, so far as I know, the Commission has a mandate to shorten sentences, on average. By the same token, I am not aware of any mandate to increase them.

You ladies and gentlemen are much more aware than I am of the difficult but important task you have of trying to relate the numbers of people you put in

prison to the numbers of beds you have in prisons, which has always seemed to me to be a very good idea. But your preliminary document, unless I missed something -- which could have happened, I say apologetically -- doesn't say that you have started to do that or how you propose to do that. And I think, even at the early discussion stage, if that has been omitted, it is an important omission. And if it is not omitted, you have my apologies repeated. I just bring the thought to your attention.

My last point is that I am skeptical about the pervasive idea running through your document of your apparent belief that the guidelines as you promulgated them should be so structured that in and of themselves they will have some valuable effects in cabining prosecutorial discretion. I want to say in the same breath that very few kinds of discretion in this world seem to be more in need of limits than prosecutorial discretion in our system of criminal prosecutions.

I have understood that the Commission has, among its many important mandates, the task of studying the exercise of prosecutorial discretion and ways to constrain it and regulate it. I look forward to your

doing that, realizing what a terribly difficult job it is and what difficult jurisprudential problems it presents, among many other things. What I am saying, nevertheless, is that I don't think you ought to formulate your guidelines with a view to making them the instrument of confining prosecutorial discretion. First, I don't think you are going to succeed in that way. I think both prosecutors and defense lawyers will be able to avoid that kind of simple approach to cabining their efforts when they are bargaining. Secondly, you get into things like real offense sentencing, which you are using for that device, which I think are wrong for other reasons, and therefore I think that you have been led astray, with all respect, when you decided that the way you would state your guidelines would control prosecutorial discretion.

I should confess that I have always been a little bit dubious about the view that guidelines sentencing will probably or inevitably give more power to the prosecutor. I don't believe this is a case where what you squeeze out of the judges gets pumped into the prosecutors. That is such an elegant figure of speech that one hates to resist it. But whether that is right or not, what I am saying is that you

ought to leave that aside for the moment and you ought to proceed to make the best guidelines you can, and, as soon as you get around to it, study the way plea bargaining works, the way prosecutors charge, how they use the charging power to enhance their bargaining power, and take hold of that as a project in itself, which I think is liable to be manageable somewhere down the line, although I confess it is a very hard task.

Lastly, I think you may have been a little inconsistent, though I am not absolutely sure of this, when you assign numbers to the mitigating value for defendants of cooperation with the prosecutor. I thought you gave very large numbers to that factor. They are not necessarily binding on the judge, but they, like the rest of the guidelines, have a strong element of control over the sentencing discretion. To give the prosecutor the authority to give up to a 40 percent reduction, as I understand it, for cooperation seems to me to look in exactly the opposite direction from your thought that you ought to be trying to find ways to put limits on the powers of prosecutors.

All the things I have said are in the nature of doubts and criticisms. I don't want to curry favor with the Commission, but I do want to add that I think

this is an admirable effort. I think it has taken hold of intricacies and complexities that certainly never occurred to me many years ago when I was a district judge and when I once wrote a plea for something like guidelines. I think, in exposing the subject and in making public the products of so much scholarship and reflection, the Commission has already done an enormous service, and I want to be clear when I say that it is not just a manner of speaking when I tell you that I admire and respect this product. In the end, however, in the hope that you will succeed and in the belief that you must if we are to get a good sentencing system, my main point is that I think the first product must be simple and readily salable, and I have grave doubts whether this one satisfies those needs.

THE CHAIRMAN: Thank you very much, Judge Frankel. We too are concerned that our final draft not be so complex that it is not workable in the real world. We appreciate your comments along that line. Any solutions that you have to offer to help us reduce the complexity of any document we would most appreciate.

Of course, as you know, we labor under a statute that does a number of things, one of which provides a maximum range of variation between the

minimum and maximum sentence of 25 percent. Because of that restriction, unless we provide sufficient offense and offender characteristics, so the judges can distinguish one defendant from the other, we could have guidelines that would be simple in application but yet would lump the large number of defendants who have dissimilar characteristics into that same category and that might result in unfairness. There is a balance there that we are trying to find. We appreciate so much your thoughts on it and share your concern.

MR. FRANKEL: Thank you, Mr. Chairman. I have here about ten copies of this thing I wrote. May I just leave them with the reporter.

THE CHAIRMAN: Yes, sir. Let me ask to see if any member of the Commission has any questions they would like to put to you. Any to my right? Any to my left?

COMMISSIONER BREYER: I can't resist, since you are the grandfather or the godfather, I don't know, of this effort --

MR. FRANKEL: I prefer grandfather, in this setting. (Laughter)

COMMISSIONER BREYER: Yes. So if some of us, as children or grandchildren, go astray, you have to

get us back onto the reservation. It seems to me that -- and this is a basic problem, just as the chairman said -- you want us both to be more simple and you also are worried about giving the judges or the prosecutors too much discretion. How do we do both?

I guess the thing that has prevented us from being simple is what I call this lovely gray book. This book contains all of 18 U.S.C., and you start looking through those code provisions and, unlike Minnesota, where by and large the criminal code reflects the severity of offenses, these don't.

You have the Travel Act, the Hobbs Act. You look at the Travel Act. Everything under the sun could be a Travel Act offense. Everything under the sun could be a Hobbs Act offense. So you can't simply say that anyone who violates the Hobbs Act goes to jail for two years, because it can cover everything from murder down to some kind of corruption.

At that point we begin to get into real offense elements. How can we avoid it? One way of avoiding it, of course, is, you have a very simple thing, say, a Hobbs Act violation. It is normally two years, if you can say that. But, Judge, you go outside your discretion, depart readily. Prosecutor, you make

a plea bargain with the defendant. You depart with the plea bargain. Lots of discretion built in. If we are not going to have lots of discretion, we are going to think of every way you could violate the Hobbs Act, or any of the other 2,000 provisions.

So my dilemma that I am putting to you throughout is, how do we do both? How do we both have a simple system resting upon charges and not have a system that allows judges easily and readily, as they do in Minnesota, to depart from the guidelines at the drop of a hat and say, "This is a different circumstance. I am leaving, this is my reason, this is why I didn't do what the Commission told us." That's the dilemma.

MR. FRANKEL: Can I make one suggestion? I have always thought that guidelines made by a Commission, which is the first body really to study this subject in the history of the world, ought to have an element that I think you people call prescriptive. And I support that. However, I think one beginning on the task that you just described, your Honor, is to start out being a little more prescriptive than I think you have been.

Take the Hobbs Act. Judges have been

muddling along with the Hobbs Act for many years with that wide range of discretion. But, exercising that discretion, they have been doing some things with it. I don't know what those would add up to. But I think one of the things you should be starting with is the question: What have the judges really done with the Hobbs Act? And if you put a bunch of scholars who are better at arithmetic and statistics than I am to work on that material, you might find yourself with a set of guideline ranges inherent in the experience of the judiciary.

I don't think the experience of the judiciary is entirely to be discarded. They know something. That won't solve your problem. But as you go statute by statute, I am sure you'd find that, though the maximum is ten years under the Federal Code, the averages and means and medians that the judges have sort of clustered around do indeed vary from statute to statute, sometimes arbitrarily and wrongly, but sometimes sensibly. I think studying that would take you a small step on the road toward making your grids, which I still would like to see you evolve if you could.

THE CHAIRMAN: Thank you very much, Judge.

MR. FRANKEL: Thank you.

(The witness was excused.)

THE CHAIRMAN: Our next witness is the Chief Judge of the Eastern District of New York, the Honorable Jack B. Weinstein. Judge, we are glad to have you with us.

JUDGE JACK WEINSTEIN: Thank you, Judge Wilkins and Commissioners, for being so gracious as to allow me to speak early so that I can get back to my criminal calendar.

The Eastern District has 8.5 million people, Mr. Chairman. It's the largest district in terms of population in the Second Circuit. It has Kennedy and a number of other major airports and a huge coastline, a very divergent population, many illegal aliens. We have many drug crimes, organized crime, tax evasion, and a whole variety. We may not be first in terms of the World Series, Judge Breyer, Boston may beat us, but I think in terms of crime we are close to the top. So we know something, I think, as judges, about crime.

I think I speak for our judges generally, and I have circulated a draft of my memorandum.

First, the prison penalties to be imposed under this draft would require many times more prison time than at present. The result would be unnecessary

cruelty, unacceptable costs in prisons and welfare, and far less rehabilitation than we now accomplish. To propose, for example, mandatory sentences of fifteen or more years in prison for peasant women from Africa and South America who are couriers and who smuggle drugs out of economic desperation, is to show no sense of the kind of real people and problems we have to meet in our district. Such cases when not aggravated now command an average effective time in jail of about twenty months.

If these draft proposals were to be adopted you would have to reserve at least three times the prison space we now require for people sentenced in the Eastern District. In failing to analyze the present real terms served as against your proposed requirements for prison, the report is entirely unsatisfactory.

Second, the proposals would increase the work of our court enormously. Any defense counsel worth his or her salt would require a hearing with proof of the facts predicate for a sentence. There would be almost no point in pleading guilty since the prison terms are so long and the discount for a plea so small. For example, counts dismissed under a plea agreement would still be predicates for a higher

sentence. Trials and hearings would be multiplied. We would almost have to double the size of our court in terms of judges.

Now have you computed that price? Will anyone pay the price? And what is the point of getting a series of guidelines that cannot be enforced because the facilities are not available?

Third, you have failed to take advantage of the superb federal probation system that has been developed over many years. Drastically reducing probation as a substitute for prison means that you have ignored our experience that probation can work in many cases to serve the community through rehabilitation of offenders.

Fourth, the draft is much too detailed and rigid. For example, to make such a precise schedule for smuggling aliens, so that the time in prison depends on whether 1 to 4, 5 to 10, or more aliens were smuggled, is almost amusing. Perhaps "low, medium and high" would be justified. But this kind of matter has to be left to the judge. Judges can ask whether the smuggler did it for profit or friendship, whether he acted cruelly, whether he sought to reunite families, and so on; whether he smuggled four aliens or five is

hardly the most pressing or probative consideration.

Because of a relatively few disparate sentences at either end of the spectrum, you propose, as I understand this report, a rigid, inflexible procrustean bed that does not comport with the wisdom and experience that our judges, prosecutors and probation services have acquired. Why don't you start slowly, with only the least possible constraints on the judges, based on our present experience? Then, as experience warrants, you can add to or modify your guidelines. To destroy a whole viable system through some theoretical gain seems unwise, terribly expensive, and cruel.

Fifth, much more research is required on the possible effects of guidelines. I respectfully suggest that the research be done first, that we experiment slowly, that we take advantage of a great deal of the pragmatic experience with a system that at least works, even though it needs improvement. And I urge you not to take too narrow a view of your work. On page after page the emphasis is on prison as the preferred sanction. I believe that is undesirable. Many of the proposed terms are much too long, particularly since a term once imposed will not be reducible by a Rule 35

motion directed to the judge alone, or at least in the near future the prosecutor's consent will be required, nor will the Parole Board be able to ameliorate too harsh a sentence in the future. At least the Parole Board's grids are a helpful starting point for maximum sentences since they are based on some experience.

Imprisonment is not, and cannot be, the primary solution to our serious crime problem. The alternative to the prison must be explored and used. Probation is not a lenient approach to sentencing. It is a practical method of dealing with a myriad of social and sociological problems inundating the courts and the correctional system.

I have in my written statement, Mr. Chairman, a description of job training, our drug treatment, our family and psychiatric services, our community services, our basic home detention, and other methods that we use in our district.

I would like to highlight briefly a few illustrations of why I am concerned.

First, even the low preponderance of the evidence standard recommended for sentencing hearings will not prevent a great many defendants from requesting a hearing on the facts which would, under

your proposals, be absolutely vital predicates for a precise sentence. Presumably the rules of evidence will not be rigidly applied. Yet there cannot be any doubt that there will be a large increase in criminal workload, and our court would require at least one additional judge for these hearings alone.

Second, if pleas of guilty are given little weight in reducing sentences and the number of pleas are substantially reduced, as almost certainly will be the case under these guidelines, the criminal workload in our district would more than double. This would require at least another six more judges in our court.

I suggest that you allow the court to approve a plea agreement with reduced terms unless there was a clear abuse of discretion. There has been no such pattern in our court. Such agreements are essential to obtain the cooperation and information needed by the government.

Third, in one of the examples of how modified real offense sentencing would work, you give no weight to the finding of a shotgun in a convicted cocaine distributor's apartment. I believe all the judges in my district would consider possession of such a weapon aggravating and would impose a far heavier

sentence. There are many indicia of dangerousness not directly connected with the particular crime charged that a sentencing judge can and should consider.

As I read your report, 180 points at least are given for almost all one kilo heroin and cocaine offenses. Presumably that would apply to the mules that come into our courts by the hundreds each year. Our sentences for such carriers with no record and no control over the operation are on the order of three years, which means twenty months' service. Your plan would lead to sentences of 168 to 210 months, as I read it. That is very harsh. Many of these carriers -- most of them -- are ignorant women from underdeveloped countries who cannot resist the lure of a few hundred dollars in view of the extreme poverty of their families. We sentence hundreds of them from Africa and South America each year. I doubt whether heavier sentences are going to deter them, and particularly they will have not the slightest impact on the people who are in those countries in sending these poor unfortunate women over. They don't care how long they spend in jail or if they die over here. And there is an unlimited supply of such people because of the heavy demand for drugs in this country.

Fifth, as I read the report, long prison sentences will be mandatory in many cases since the report says probation will be "in addition to any other sanction" in a serious crime. The examples on page 142 suggest that probation in most cases would not be an alternative. Any such interpretation as a requirement, in my opinion, is intolerable. We find probation quite useful in many cases. Supervised probation should be limited so that satisfactory completion of a limited term -- five years now -- should suffice. We could, if you thought it was essential under the statute, have unsupervised probation after. This much is in the special parole situation in drug cases.

Sixth, one of the great flaws in the 1985 criminal law reforms was the elimination of the split sentence. As you know, Judge, we formerly had a split sentence, which would be a small term in prison followed by a long period of probation with the threat that if the person did anything wrong he would go into prison for the rest of the term. That is abolished now. We could handle it now in a multiple-count case by giving a relatively small sentence on one count followed by probation and the threat of a very long term on subsequent counts. That is no longer open to

us. What are we going to do with these cases? Are we going to take good citizens and destroy their families and make it impossible for them to continue in life when they get out of prison under this theory which will give them these enormous terms?

What is the situation going to be on multiple counts? Your proposed rule would cumulate the defendant's three most serious convictions. Under your guidelines, as I read them, it would result in sentences of 45 or more years in many of our drug cases. A common drug importation case of one kilo is usually charged as conspiracy, importation, and possession with intent. Three crimes. How are we going to handle that? I think that has to be left to the Court's discretion to a large extent.

In turning back to this matter of prison terms -- and I am going to end that way, in case you want to ask me any questions -- I want to reflect on some reading I have been doing. In Volume II of the Gulag Archipelago, Solzhenitsyn relates that during the terrible times of Stalin, when prisoners were being sent to Siberia in droves, the official word came down from Moscow: "Reduce the number of prisoners." The Soviets dealt with the problem by shooting, starving,

beating and working prisoners to death.

Now, we are not going to be able to meet that problem that way in this country, and we shouldn't. But we are not going to be able to add indefinitely to the number of prisoners we send to prison. Nobody is going to pay for it, and there aren't the facilities for it. We must avoid this unworkable solution of simply building more prisons.

I think, Mr. Chairman, you can reduce the burdens you have and make a greater contribution to an effective system of justice by building upon, and not destroying, the present system.

THE CHAIRMAN: Thank you very much, Judge.

Let me ask you this: How would you suggest we distinguish? You used a section dealing with the smuggling of illegal aliens, where an individual smuggles twenty across the border with a truck, and one who brings one across the border in an automobile. Would you treat them both the same?

JUDGE WEINSTEIN: No, we handle that, as you know, Judge, in connection with gun offenses. If it is a business, we handle it one way. If it is not a business, we handle it another way. It is quite disparate, and there is no problem with it. If we have

some of these people who are using forged documents in connection with it, and have a lot of people and running a business, we sentence them to long terms. If we have a person, as I have had, who has a folk in the Philippines, who is a leader in his community and is helpful in bringing in some relative, he shouldn't do it but certainly we are not going to treat him in the same way as a businessman who is deliberately flouting our laws. Nor will we treat the church people who are involved, let's say, in the Arizona case in the same way as we would somebody who smuggles people in, then throws them overboard and kills them when they are about to be met.

You know as well as I do, Judge, that many of us and members of our families at one time came over to this country illegally. There are aspects of compassion here. You cannot, in my opinion, just drive every one of the cases into this rigid mold. It simply won't work, both as a matter of mechanics -- we don't have the manpower and womanpower to do it, we don't have the facilities -- and the cruelty is just enormous. I see no reason for it.

THE CHAIRMAN: Thank you. You did mention the fact that you thought that the drug dealer who had

a shotgun in his house should be sanctioned for the shotgun as well.

JUDGE WEINSTEIN: Well, he should not be sanctioned, but he is a dangerous character.

THE CHAIRMAN: That's correct. Our guidelines tentatively adopt the position of modified real sentencing, which is that if a weapon is used in furtherance of the crime, then it will be a factor. You are suggesting that we go perhaps to a pure real offense in sentencing?

JUDGE WEINSTEIN: Well, that is one approach. None of them will be entirely satisfactory. But we have drug dealers who haven't fired a shot, but if you go in on a search warrant, they have a whole arsenal of bazookas and all kinds of weapons. I don't care whether he has fired a shot at all, if we get him he will go away for a very, very long time.

That seems to me the realistic aspect of this. We have all kinds of people, Judge, as you know, and we have to take care of them on an individual basis if we are going to protect society.

THE CHAIRMAN: Thank you so much. Let me ask the other Commissioners if they have any questions they would like to ask. Judge MacKinnon.

COMMISSIONER MacKINNON: You go ahead.

THE CHAIRMAN: Commissioner Block.

COMMISSIONER BLOCK: Judge Weinstein, you mentioned that this area is one of the crime capitals of the world.

JUDGE WEINSTEIN: I didn't use the term "crime capital." (Laughter) I just said a great many of our people are engaged in crime. Much of the crime is family related. We have families who are quietly cutting dope, and children and grandparents, and so on, and running numbers. I wouldn't call it the crime capital.

COMMISSIONER BLOCK: Changing the terminology to one of the most crime-prone areas in the United States, do you think that has any relationship to the sentences that are meted out?

JUDGE WEINSTEIN: Absolutely not.

COMMISSIONER BLOCK: That has no effect at all.

JUDGE WEINSTEIN: Absolutely not. If you had fifteen years for these mules, you wouldn't affect one ounce of importation into the Eastern District, based on what I have seen. Swift justice, hard justice, discriminating justice, yes. But you have not supplied --

when I say "you," I mean the legislature -- the facilities.

One of the things the Chairman properly pointed out is, we have this criminal code which is utterly absurd. It is full of hypocrisy. All kinds of crimes are punished at enormous rates. Nobody expects them to be sentenced at those rates, because there are no facilities available. As a matter of fact, it might very well be, I say with all due respect, that the first report may well say, "We can't do this, Congress, given your sentence. The first thing we ought to do is rationalize the sentence." And then we won't have the situation you have now where Congress suddenly sees a big drug problem and for political reasons increases all penalties, knowing that they can't be imposed. That is no way to operate when we have a serious problem. We are not operating show business or public relations. But that is much the situation that we have to face.

COMMISSIONER BLOCK: If I can ask a followup specific question on that. If it is not the length of imprisonment --

JUDGE WEINSTEIN: If it is not what?

COMMISSIONER BLOCK: If it is not the length

of imprisonment, are you convinced that the certainty of imprisonment is a useful crime tool?

JUDGE WEINSTEIN: Oh, there is no doubt in my mind, yes, swift and certain justice is much more effective. But in order to do that, Commissioner Block, you have to realistically cut down the number of crimes and the punishments. In our district, as of today, because of the way the federal statutes are structured, while we are sitting here there are at least a thousand crimes being committed. There are millions of crimes being committed each year -- telephone calls, applications to the banks, applications through the mail to colleges. All of those are federal crimes.

One way of approaching this is to say, what can our society do, what is our society concerned about? Let's be realistic, and let's do it and be certain about it. But your problem is that you don't have that kind of statute.

COMMISSIONER BLOCK: Thank you.

COMMISSIONER MacKINNON: Judge, I didn't think that you caught the original import of Commissioner Block's question. As I understood it, it was: Do you think that the sentences imposed in the Eastern District at the present time reflect the

enormity of the crime in that district?

JUDGE WEINSTEIN: You mean do our sentences go up as the crimes --

COMMISSIONER MacKINNON: No. You have a regional difference between the Eastern District and Salt Lake City on the same offense, because of the enormity of crime in Brooklyn. That is what he is asking about.

JUDGE WEINSTEIN: Oh, I didn't understand the question. I can't answer that, Commissioner MacKinnon. I know that in our district we have reduced a great deal the disparities because we have a sentencing panel. Before we sentence anyone, three of the judges and the probation officer meet and go over the sentence. And so we have worked out some degree of uniformity. What the situation is between us and Utah I don't know, but I can tell you that, knowing Utah, the crimes and criminals are quite different.

COMMISSIONER MacKINNON: How about the Eastern District and the Southern District, do you think you are compatible with those?

JUDGE WEINSTEIN: Yes, I think generally there is a compatibility.

COMMISSIONER MacKINNON: You suggested, and

so did Judge Frankel, that we go slow to begin with and then add on as we get along. Of course, the difficulty with that is that this has to go through Congress. And if you are at all familiar with the difficulty of getting anything through Congress, originally, that's quite a stumbling block.

JUDGE WEINSTEIN: I understand that.

COMMISSIONER MacKINNON: I think you will find that we have to write at this time a statute, or rules, which are going to have the effect of a statute, that are going to be in effect for a considerable period of time without substantial change. Now, facing that, that is our problem.

JUDGE WEINSTEIN: Commissioner, I understand the political problem, but I would think that under those circumstances even more humility is required, because any serious errors in changing a system that works, however badly, is going to create problems for a long time. But I must say, Commissioner, I see no objection to telling Congress in a preliminary report: "Ladies and gentlemen, we cannot do this until we have a rational scheme of statutes and until you give us a certain degree of play. Congress may well have made a mistake, and your now approaching it may give us the

wisdom to make a suggestion for the modification of the statute."

You know, I found that in World War II that when a soldier is ordered to shoot somebody that should not be shot, there is the possibility, in extreme circumstances, of turning around and saying, "Don't you think you ought to think about it, Lieutenant, before you order me in there to shoot?" I think maybe you ought to do that to Congress.

COMMISSIONER MacKINNON: That gets to my last question, and that is the 25 percent, what you termed a rigid mold, under which we are operating, which Congress imposed. How would you not increase prison population if crime increases? That is what we are faced with.

JUDGE WEINSTEIN: Well, crime as a matter of fact, Commissioner, according to the FBI statistics, has leveled off and has dropped; it goes up and down. And based upon the teenage population, before we had this current birth rate, it will probably drop off the next few years. Then in about fifteen years it will probably increase again, I suppose. The answer is that as crime goes up, if you want to imprison more people, you need more prisons. But my objection to these

proposals is that the quantum jump in imprisonment as I see it in our district would be enormous and that I don't think is justified, unless somebody is willing to pay the price. But it seems to me that hypocrisy ought to stop at this Commission.

COMMISSIONER MacKINNON: What do you think about an income tax violator, a substantial violator, do you think he ought to get some time?

JUDGE WEINSTEIN: It depends.

COMMISSIONER MacKINNON: I said a substantial violator.

JUDGE WEINSTEIN: There are all kinds of substantial violators, but let me give you a hypothetical situation where I think I gave a substantial violator two years of weekends and then a long probation after that. The reason was that he was running a large industrial establishment, and it was quite clear to me that if he were sent to prison for a long time, which I might have otherwise done, that a couple of hundred people would have lost their jobs. That's one case.

I am suggesting to you that unless you have some judgment, you can't handle these cases. Other cases, yes, I have sent them to prison for a long time.

You have to consider whether their teenage children are going to be destroyed, what is going to happen to the family. Is this a one-time delict, or is it a pattern of conduct? What is the general deterrence problem? Those are all problems that have to be put into this computer that we call our mind. And I don't believe I can answer that question flatly.

COMMISSIONER MacKINNON: What you are really advocating is a different practical structure for the sentencing guidelines than Congress has permitted us at the present time.

JUDGE WEINSTEIN: That may be so. You know your statute better than I, Commissioner. I do think the rigidities here, as I have indicated, are too great, and it may well be that, on analysis, you should go back to Congress and say, "Let's change this. It is not practical."

THE CHAIRMAN: Thank you.

COMMISSIONER BAER: Judge, in the Eastern District of New York I think you occasionally have a bank robbery, is that right?

JUDGE WEINSTEIN: We have hundreds of bank robberies, Commissioner Baer, but we don't deal with them any more, because it's too minor a problem now.

(Laughter) At one time, as you know, the FBI specialized in bank robbers. Now the FBI is taking care of problems of organized crime, spies, people who are destroying our political structure, and so on. So the bank robbers go into the state court. Occasionally I will get a bank robber. And he will have four or five different bank robberies, and the state has given him six months or suspended, and then I will give him twenty-five years. He will look at me with utter disbelief. "Why didn't somebody tell me that I might be in the federal court?"

COMMISSIONER BAER: Judge, the question I wanted to ask is: How do you differentiate between a bank robber, this is his first offense, no prior record, doesn't use drugs, as compared to a guy that is out of Sing Sing three months ago, has been in and out of prisons since he was about eighteen years old, is now 25 and has robbed another bank?

JUDGE WEINSTEIN: Obviously, this second man would be getting a great deal more. And in the first case there are instances, for example, where I have given probation, very strict probation, in the case of highly intelligent young people 17 or 18. Many these bank robberies today are not like the old-style bank

robberies where we had professionals. They are pickup jobs. A couple of black kids in the ghetto will get together, and a kid sometimes who is very straight, comes from a good family and has a good educational background, will be told, "Come on along." And he will go along and drive the car and he is a bank robber. I am not going to treat that kid who has potential for being a leader in the community the same way I would treat one of these professional Sing Sing fellows. I mean, it would be absurd to destroy a family and a person and a possible leader that way. It makes no sense.

THE CHAIRMAN: Any other questions?

COMMISSIONER BREYER: This may be a long question but requires a short answer. Not surprisingly, I think many of your points are excellent points. I think the question for us is the extent to which we can take them into account. That is, to what extent are the problems statutory and to what extent are they problems that can be adequately dealt with in these guidelines?

Let me divide it into two parts. There are the numbers problems. As far as these numbers are concerned, they are not Commission numbers. They have

no official status. The Commission has not voted on them. The document says that they are simply put in because the research is not yet complete. Indeed, we have in our computer 10,000 presentence reports where we are conducting at this moment independent analysis to find out exactly what existing practice is. Indeed, our Chairman has assured me only a few minutes ago that within two days we can produce, not on the basis of the 10,000 but on the basis of other material, rough preliminary ideas of what existing numbers would be. Of course, I want to see that in two days, and then I have an idea.

JUDGE WEINSTEIN: Judge, are those the numbers on the sentences or the time served?

COMMISSIONER BREYER: Time served.

JUDGE WEINSTEIN: Time served.

COMMISSIONER BREYER: Time served. That is what is interesting. Time really served. So in two days from today I can find out, roughly, how this would stack up, roughly, on the basis of estimate with time actually served. Within six weeks or eight weeks I will be able to tell you, because of the 10,000 documents that are in our computer, what the numbers probably are. We still won't be perfectly right, but

we will have done reasonable research on the question.

JUDGE WEINSTEIN: You have to discount those numbers, too, by numbers of the probation terms that never get into those figures, and you also have to discount them by the plea bargains, that is, by the dismissal of higher courts. That is a very complex job.

COMMISSIONER BREYER: Very complex. We will not be perfect, but it will reflect lots of computer time and lots of researchers who have gone over 10,000 independent documents. So it won't be perfect by any means, but at that point we will be able to get an estimate of how we are changing things and why. It is because we don't have that estimate yet that we say, on page 20, that impact analysis would be premature.

So, part of the numbers problem, I think -- we, of course, had to put in numbers or people wouldn't focus just on the words -- but in a sense the numbers aren't realistic, in my opinion. Other people might have a different opinion.

JUDGE WEINSTEIN: If your computer can differentiate between a Nigerian lady who is a courier and a London barrister who is a courier, each of which brings in a thousand grams, I think that would be wonderful.

COMMISSIONER BREYER: That is the second part, and I think that is the more interesting part at this moment to me. The second part which strikes a certain chord in my mind is what I call this problem of discretion and the problem of distinguishing among different situations. There, of course, we run into this tremendous tension that the more we allow it, the greater the extent to which the guideline premise can be eroded. And now the interesting question to me is: To what extent can we, under this statute, allow it, how, and in what ways?

So my question is going to be: Will you help us with that? That is, will you think about it from that point of view, i.e., what can this Commission do within the confines of this statute, that will not erode the basic premise of the guideline idea? That is complex and I know you are interested in it. So am I.

JUDGE WEINSTEIN: Judge Breyer, in the Eastern District of New York we hardly think of anything else. (Laughter) Thank you very much.

(The witness was excused.)

THE CHAIRMAN: Thank you. We already are behind schedule, so we will move quickly.

Our next witness is the distinguished

District Judge of the District of Massachusetts, the Honorable Mark Wolf. Along with him is Judge Hugh Bownes from the State of New Hampshire. Judge Bownes.

JUDGE HUGH BOWNES: I am going to let Judge Wolf operate on his own. He is on the District Court.

THE CHAIRMAN: Thank you, Judge. Judge Bownes is from the First Circuit Court of Appeals.

Judge Wolf, we are delighted to have you with us as well.

JUDGE MARK WOLF: Mr. Chairman, thank you. I am here at the request of Chief Judge Campbell of the Court of Appeals of the First Circuit, and I am indeed a district judge far junior to my very distinguished colleagues who preceded me.

Judge Campbell told me that part of the reason he asked me to appear on behalf of the Circuit relates to my background prior to becoming a judge in May of 1985. In 1974, at the tail end of the Nixon Administration, I was a Special Assistant to the Deputy Attorney General of the United States, Lawrence Silberman. From 1975 to 1977 I was a Special Assistant to Edward Levi, the Attorney General of the United States in the Ford Administration, and in that capacity worked on guidelines for the Drug Enforcement

Administration and the Federal Bureau of Investigation. From 1981 I was the Deputy United States Attorney in Massachusetts and the Chief of the Public Corruption Unit in that office. What I think Judge Campbell had in mind and what I would like to try to do -- that's why I mention that background -- is relate my reactions to these guidelines in light of that experience, as well as to my judicial experience and the comments expressed at the First Circuit Judicial Conference last week as a result of a lengthy discussion among all the judges in the First Circuit.

I would like to briefly make some general statements, and then tie those statements in to one particular aspect, based on my experience.

I picked up these guidelines when I received them about eight days ago with great enthusiasm, because I came to this process strongly favoring presumptive sentencing. What I understood presumptive sentencing to be is a system that would tell district judges what factors they were required to consider, give guidance as to what weight to assign to each of those factors, require explicit reasoning on the record if a judge chose to depart from the sentence suggested by that equation of factors and weights, and permit,

indeed require in many cases, review and revision by a Court of Appeals if there was a sentence outside the guidelines.

I think that such a system would do a great deal to enhance respect for the administration of justice, because there are within our courthouse, I know, dramatically different perceptions, well founded, as to what different judges will give to similar people in similar circumstances. That, in my mind, injures the administration of justice.

I did, however, think that a presumptive sentencing system would leave meaningful discretion, supervised by the Court of Appeals, to do what peculiar circumstances, and many cases have peculiar circumstances, require in particular instances.

I read these guidelines or tried to read them with care, as did my colleagues, and have been disturbed, because it appears to me that a more accurate label for what the guidelines reflect, as a result largely, I think, of the legislation, which appears to me the Commission has been quite faithful to, is not presumptive sentencing with guidelines but establishing mandatory sentencing, that is, requirements as opposed to guidelines, in requiring

mandatory sentences within a 25 percent range.

I would like to say why I interpret it that way, and perhaps will be corrected if it is a misinterpretation, and then describe what I think are some of the unfortunate effects of a mandatory sentencing system, even within this range.

I read 18 United States Code section 3554 to say, yes, a district judge may take into account factors not adequately considered by the Sentencing Commission. But 28 U.S.C. Section 994(c) and (d), of the statute creating the Commission, gave you what appeared to me to be an exhaustive list of things to consider. I couldn't think of anything, myself, that wasn't on that list.

As I read these preliminary guidelines, I see that some things have been listed as aggravating factors that we must take into account, some things have been listed as mitigating factors that we must take into account, some things are left off. I assume that what is left off, if they are left off at the end, are after you have considered the factors established by the statute and determine that they aren't relevant or reliable for sentencing purposes.

So if I were to be faithful to the terms of

the legislation and what I understand it to intend, which I think it is my duty to do, I have difficulty in imagining a case in which I could feel that I could legally go outside the guidelines, although I might feel that justice required it in a particular case.

The effects that I would anticipate from this kind of mandatory sentencing, within a range, are the following:

The first disturbing effect to me is the litigation explosion I think it would result in in Massachusetts, in the First District and elsewhere. In Massachusetts the guidelines, with the numbers they have now, I think would drastically diminish the number of pleas and require many more cases to go to trial. I think that we may be one of the jurisdictions, probably are one of the jurisdictions, that people have in mind when they think there is too much national disparity, and I don't think it is inappropriate for somebody to direct us to raise many of our sentences. But I think, as a practical matter, if the sentences were anything close to the level they are now, and the discount was a maximum of 20 or 25 percent, the number of cases going to trial would increase dramatically.

Second, I think a fair reading of the

statute and the guidelines would require many relatively complicated sentencing proceedings. In my view, if the prosecution and the defense had any dispute, for example, as to whether a teller was assaulted in the course of a bank robbery, we would have to have a proceeding concerning that. I frequently find in suppression hearings sometimes there is evidence that neither side wishes to bring to me, but there is a witness I want to hear from. They might have made some implicit deal not to emphasize the teller. But I think it is my obligation, if there is something in the presentence report that that teller may have been injured, to find out and to require the presentation of that evidence. I think, and my colleagues of more experience have thought, that would require a considerable amount of litigation.

In addition, and this is what I will speak to a bit at the end, cooperation and perhaps other things like cooperation become litigable issues. The guidelines contemplate the United States Attorney certifying whether there has been cooperation and whether that has been truthful and significant. This was a principal area of my activity for four years. There frequently may be disputes regarding whether

there has been truthful and significant cooperation.

If one is legally entitled to a discount for truthful and significant cooperation or for active truthful and significant cooperation, that becomes a litigable issue. I have a case that I will describe later, decided in 1960 when Elliot Richardson was the United States Attorney, that went on for months in Massachusetts. It is a lovely, thirty-page opinion that describes what can happen in the way of difficulties if that becomes a litigable issue.

I think that would not be just a burden on the court process. But if you are going to have that kind of litigation, no matter how many judges you have, it distracts from other things that are vital to the administration of justice generally, like civil cases, but criminal justice particularly.

In my experience as a prosecutor, in long-running investigations, particularly, for example, public corruption investigations or narcotics investigations when you are trying to go up to a higher echelon of responsibility, the defendant's primary strategy will be delay. The individual defendant wants to delay having to go to court and maybe eventually going to prison, and those who are insulated by that

level of defendant want to delay the investigations generally. This ponderous litigation and then the appeals that would derive from it I think would have the effect of injuring the administration of justice.

In addition, I think that while personally I am very sympathetic to the goal of eliminating unwarranted national disparity some national disparity, or some disparity among regions is warranted. General deterrence is recognized in the guidelines, for example, as an important factor in an appropriate sentence. But the need for general deterrence may legitimately differ from place to place. If there is a conspiracy to smuggle illegal aliens along the Southwest border, I would think that sentences there now may be rather severe, and part of the reason they would legitimately be severe is that you want to send a message to others in that area. We don't see many, if any, of those cases in Massachusetts. If we were to be required to impose a sentence that is appropriate to send the message out to calculated criminals in Texas out there in Massachusetts, it might not be a well-founded sentence, the reasoning would not apply.

Similarly, when I was in the United States Attorney's Office, we were the only one, of 94

districts in the United States, to rank public corruption as the first law-enforcement priority in that district. We devoted resources in a certain way and argued that sentences of a certain dimension were required, not just to punish the people who did it but to deter others, because the problem was so serious. That might not be appropriate in other parts of the country.

The final difficulty, I think, with this approach -- I think the guidelines are extremely impressive for the considerations that they explicate, which we consider or ought to consider and for identifying the competing tensions -- but I would guess that there is probably not even anybody on the Commission who is fully comfortable with any one of the numbers or any one of the guidelines. We generally have a system of justice that permits a kind of common-law evolution based on experience and facts in particular cases. This doesn't seem to permit that kind of development. While the Commission could revise the guidelines for classes of people, it does not appear to me that the experience of judges who have to listen to these people and sentence them on a day-to-day basis would be integrated and there would be the

opportunity for this to be perfected but also evolve as community or national attitudes change. That is one of the geniuses of our system of law and justice.

I have a couple of proposed possible remedies to some of these.

First, and this really may be legislatively required rather than something you could do on your own, or it is possible that you interpret the legislation differently than my initial reading suggests it to me, but if the guidelines could truly be turned into presumptive guidelines that would require us to consider and show that we consider particular factors, give them weight, and if we decide to go outside of the sentence dictated by that equation, explain why, and then permit review by the Court of Appeals, it seems to me that would go a very long way to eliminating unjustified disparity between judges in the same courthouse, and unjustified disparity nationally, while perhaps allowing some common-law evolution to accommodate regional differences that are important to a sense of confidence in the administration of justice.

Second, an issue that you didn't fully address yet is the relationship of pleas to the guidelines. I and my colleagues would prefer a system

that allows pleas to result in sentences outside the guidelines. I can understand a concern that that would permit local prosecutors, particularly, to basically eviscerate the effect of the guidelines in their district. It seems to me there is a way to address that. For example, you could address that by requiring that any plea that would result in a sentence outside the guidelines or a certain percentage outside the guidelines be approved not just by the United States Attorney but by an Assistant Attorney General or his designee in Washington. What that would do, in my view, is take somebody in the Executive Branch with a responsibility for national perspective and require him to make a decision as to whether the disparity between Massachusetts and Texas in the case before him is justified or not justified.

In my experience with the FBI and DEA guidelines, when we reach the hardest issues, like when do you allow an informer to engage in unlawful conduct or otherwise unlawful conduct, it is impossible to write a guideline that everybody would be comfortable with for all the imaginable circumstances, and what was built in were basically procedural safeguards that required certain levels of review going up to the

Director of the FBI or the Attorney General himself in those hard cases. It seems to me that some reliance on procedures, as opposed to substance, would give flexibility without letting some maverick United States Attorney basically eviscerate the guidelines for his district.

The second check that I would favor, and I think is in here implicitly already, is a requirement that the judge accept the departure the way we now accept agreed-upon pleas. If the judge were not satisfied that the disparity was justified, then the government, even including the government in Washington, and the defendant could not do it.

To me, if you had presumptions and checks and balances as opposed to mandatory requirements this would be vastly improved.

The last thing -- and I don't know quite how much time I should take -- I would like to address, at least briefly, is the issue of public corruption, which you have not valued in here, in dealing with cooperation. I think it will illustrate some of the intangible costs of looking just at sentencing alone rather than just a part of the system of criminal justice.

I would, based on my experience, urge you to treat public corruption as a very serious crime. There are things in the statute that echo attitudes in many communities that might suggest the opposite. Public corruption rarely involves violence. Usually you are dealing with a first offender. The amount of a bribe sometimes is small. As a practical matter, politicians usually don't want public corruption regarded as a serious crime. I don't know that Congress will be criticizing you if you fail to impose serious penalties for public corruption. The public, I think, would, but politicians usually won't. It is a serious crime, though.

In Massachusetts, in the late 1970s, there was a two-year public Commission headed by the former president of Amherst that looked at corruption in state and county buildings. And sometimes a couple of thousand dollar bribe would be paid to get a contract, and it would literally result in millions of dollars of shoddy construction. So if you were just looking at the amount the official received, the economic cost would not be descriptive at all.

Second, I find, in my experience, that it is usually people who are poor and powerless who are

victimized by public corruption. In Boston, the mayor in 1980 went out to a black neighborhood and gave his inaugural address and then he put a former butcher, one of his work coordinators, in as the local official there. They were going to redevelop this area that terribly needed human and economic renewal. He tried to sell the first contract. It delayed the renewal for years. We caught him. But everything stopped there. And these poor people got a tremendous justified sense of the unfairness of the system.

This may sound a little trite, but basically we are a nation that aspires to have government of the people, by the people and for the people, and we are a model for the world based on that. Corruption is essentially a corruption of that ideal.

But prosecuting or investigating corruption is very, very difficult. Corruption transactions are structured to be hard to detect and demonstrate. There are no angry victims. What you have to do is try to catch one person, get him to tell you something, get corroboration of it, try to get him to actively cooperate, tape-record the conversation. In Massachusetts, people who know about corruption have powerful influences opposing doing that. The corrupt

politicians work with people they think they can trust. These people fear ostracism and they fear physical harm.

In my view -- and this is why I think you might want a court of appeals to reconcile my view with what might be Judge Frankel's, because district judges are disparate -- in some cases 40 percent might not be enough of a reduction. Indeed, you can't tell at the beginning what will be appropriate. What prosecutors, good prosecutors, now do is tell somebody, "You cooperate, you have to be truthful, we will bring it to the Judge's attention, and we will see what happens." That gives defendants some hope. While it doesn't give them any assurances, I would also say with regard to cooperation it is important to emphasize truthfulness. It is a little dangerous to emphasize significance. Significance may be hard to measure quickly. If two people tell you they paid a public official, you have a case. When one tells you, while it is important to get the first one, one on one is not enough. Also, it may encourage some people to fabricate testimony to try to get a bigger reduction. It certainly is what they are always accused of when they are cross-examined. If somebody can hold up a statute and say, "See, you get six years less because you implicated my client," you

have actually diminished the significance even of truthful testimony.

The last point I would make -- and I will leave you with Judge Wyzanski's rather brilliant decision in Worcester -- is that when we require the U.S. Attorney to certify with regard to cooperation, you have again created, I think, a litigable issue that characterizes the difficulties with requirements as opposed to presumptive guidelines, because I think a defendant could quite reasonably come in to me and say, "I truthfully and significantly cooperated, but the U.S. Attorney hasn't certified it or hasn't certified it at the right level." As in the Worcester case, that could lead to a proceeding where the defendant will describe all the public officials that he has given information on, and they in effect are on trial, although they are not parties to the proceeding. Indeed, an unscrupulous prosecutor wishing to advance his career when he can't get an indictment and a conviction for some reason, publicizes all of these things.

To me it illustrates -- and, as I say, I will leave a copy of the decision -- some of the enormous but also collateral effects on the

administration of justice that can arise if these become litigable requirements as opposed to guidelines. Thank you.

THE CHAIRMAN: Thank you very much, Judge Wolf.

Our time is short, but I just want to say a couple of things. One, I know we share much of your concern. We have been through this time and time again, as we have labored under the statute that the Congress has given us. And it is not a presumptive sentencing statute. Consequently, we have no option but to go a different route than that. But on a couple of things I wish you would review your comments if you get time and send me a letter --

JUDGE WOLF: I will do that, Mr. Chairman (Your comments)

THE CHAIRMAN: Particularly let's talk about the 25 percent variance between the minimum and maximum. Up to 20 percent for acceptance of responsibility. Up to 40 percent for cooperation. Those things should not be viewed as independent of the other, for it may be that the total of those combined may be sufficient to take care of the types of cases that you have suggested. It may not be. But I wish you would give some thought

to that and let us know, because again this is very tentative; we are searching for the right answer. Also, the factors that you pointed out on public corruption and any others that you can think of. We are drafting public corruption right now. It is a very important area, not only as to, from what you said, pretty tough sentences in this area, but we are also concerned with what are the important factors that a judge considers in a public corruption case. You are right, it is not just the amount of the bribe that is important, there are many other factors, but we have to capture those factors somehow and write them down.

JUDGE WOLF: It goes, I think, in part to something that was implicit in Judge MacKinnon's question, in my mind, and I will write this, but corruption is a particularly calculating crime. General deterrence is very important. I happen to value general deterrence highly in tax cases. If Judge Weinstein and I were sharing a wall and had a different view, I would think that if Judge Breyer and Judge Bownes could in one of their opinions tell us which was right and which was wrong, we would come into greater harmony and that that would be a very desirable system.

THE CHAIRMAN: Thank you very much, Judge.

Any other questions or comments? Paul?

COMMISSIONER ROBINSON: I guess you struck several themes that the other witnesses have, and I guess the current theme is concern about not enough discretion, concern about increased fact-finding burdens and litigation, but I think, as Judge Breyer and Judge Wilkins have pointed out, we are, I admit, stuck with the statute we have. There is a range the statute permits. Any guideline system that is an explicit system requires fact-finding. Some guidelines may require more fact-finding than others. But once you get into that business, you have hearings you didn't have before.

There are a series of other issues. I know Judge Weinstein mentioned about split sentences, and of course we have lost the ability to have this big sentence hanging over someone's head. Judge Weinstein was also concerned about more discretion on concurrent consecutive.

But the legislation tells us that we must provide guidelines on this. I guess the general point is, which you made and others have made, that we ought not be satisfied with the statute as it exists; we ought to recognize the flaws in the legislation, and

rather than simply carrying it out, if we are pointed to, we ought to get up our nerve and go back to Congress and say it is not workable, we are in the best position to know that it is not workable, change it.

Of course, that is hard. That is hard to do when you have been hired to do a job and you took on the job. It is hard to turn around and say, well, I have changed my mind. It is a problem, aside from the psychological difficulties of actually thinking that seven Commissioners are all going to agree to not do the job but are going to go back to Congress and, in a sense, opening the same can of worms that this legislation embodied when it was debated. There are a lot of different points of view and a lot of people said the same sorts of things you are saying now. Certainly one outcome of our going back would be for Congress, in a sense, to throw up their hands and say, let's forget the whole thing.

I guess my question to you is: In your judgment would we be better off having nothing, that is, back where we were before the Comprehensive Crime Control Act of 1984, or having guidelines implemented under the existing statute as best as we can do under the existing statute to account for many of the

legitimate problems you have mentioned? Would that flawed system be better perhaps? Five or ten years from now might it be even better? Or, on balance, should we take the risk of dumping the whole thing?

JUDGE WOLF: Based on my time in Washington, I think Congress had goals and they thought that this would be a means to achieve those goals. But if the intense scrutiny, and really in many respects, I think, brilliant analysis, indicates that in effect mandatory sentencing is not the right way, the best way, to approach those goals, but an effective presumptive sentencing would be, I myself would think that the sponsors of the original legislation would be quite responsive to you and that their colleagues, too, would be responsive. Is the old system better than this system? I think so.

COMMISSIONER ROBINSON: You think so?

JUDGE WOLF: I think so. Although I think a presumptive sentencing system would be far superior to both. But we have a government generally that deals with processes in checks and balances. We divide power. We have a legal system that is always a bit based on the statutes, but then the law evolves from particular cases. This statute in its mandatory respects, if I

read it right -- and perhaps I misread it, but if I read it right -- is quite foreign to the emphasis on process and the recognition that the law ought to evolve.

I will tell you what brought this home to me quite graphically. When we were at the Judicial Conference, we had an afternoon that we spent discussing these guidelines. We met the next afternoon with some college professors, with some group therapy for judges by reading Billy Budd. Billy Budd is the story of a sailor unjustly accused of discussing mutiny, who stutters, he can't speak, and he answers by hitting the fellow who has accused him. The fellow has an eggshell skull and dies. The captain thinks that the law requires that he be put to death immediately on the high seas. The story is written in a way that makes it clear that this is the law but it is not just.

I can think of circumstances under these guidelines that would prompt a comparable result conceivably. If there is such a result or something that is perceived to be that sort of result, it is very injurious to the public's confidence in the administration of justice. If you start bending the words to avoid the result, I think that is injurious to

the candor that ought to be expected from judges. Judges are not to be even implicitly encouraged to try to evade these things. But in some respects, in my view, it is unfortunate if we mistake oversimplification for clarity.

It is very hard to prescribe for the vast universe of things that can come up. As a district judge, it has been one of the most revealing things to me how various the people and the circumstances can be in cases that on paper look comparable. I don't think we should have unlimited discretion by any means to do what we think feels good. And I have a tremendous amount of sympathy with what I think motivated this legislation. But it seems to me that the legitimate goals of the authors are not going to be achieved, and what might happen if there is too rigid a system put into effect is if there is sufficient number of horrible cases early on, somebody might just wipe the whole thing off the board.

I think relatively easily you can find places where one says "must" and change them in legislation to "may," and give us these same considerations, give us your best judgment as to what appropriate sentences are. I, like Judge Weinstein,

would like to see what the current sentences, time served, are, and then if these are different, much more or much less, understand why they are different. But give us that, and allow appellate review so we can't evade it, and so, particularly within our own court houses, justice or sentences will be substantially harmonized. I think the really debilitating thing is when somebody draws Judge Wolf or Judge X and feels that they are going to get treated dramatically differently by the luck of that draw because our sentencing philosophies are different. I think you could get to that if you can somehow get this legislation to "may."

COMMISSIONER BREYER: Since I was at the same meeting, I think the answer to Commissioner Robinson, only my personal judgment, is that if the guideline would be very rigid and not to allow discretion and not to allow departures, my belief in my personal opinion is that the judges in the First Circuit would prefer no guidelines. That is what I think. If the guidelines are adequately flexible so you can take all circumstances into account and depart, then I think the answer is that they probably might feel they are OK. That is our basic problem. Can we

get adequately flexible guidelines that don't depart from the basic purpose?

JUDGE WOLF: Thank you. That is certainly a fair summary of what I heard from the dozens of district and appellate judges last week.

THE CHAIRMAN: Judge MacKinnon?

COMMISSIONER MacKINNON: What you want is a presumptive sentence. As you stated early on, that would put the actual writing of the law into the hands of the courts of appeals. That's right, isn't it?

JUDGE WOLF: I think it would put the interpretation of the law in the Court of Appeals. It would be a standard for appellate review, and the standard would be the same among the Circuits, I don't know that they would apply it the same way in every case.

COMMISSIONER MacKINNON: You would have twelve Circuits writing the law with the same variation that you get at the present time. Of course, that is what happened in Minnesota. And they had, within about four years, 350 cases. Minnesota is 2 percent of the population. On the basis of that, you would have in the Federal Circuits about 8,750 cases within the next four years on this particular subject.

JUDGE WOLF: I don't deny that is a significant issue. Two things. First of all, some regional disparities might be appropriate, and that kind of regionalized review by the Court of Appeals would be used for a very big country. That would be one way of putting some flexibility in. To the extent there are going to be appeals anyway, I don't know if there are going to be many appeals from me, as I read the statute, because I don't know that I can go out of it, but that is a place where my colleagues may differ.

Second, I would tend to think that there might be a lot of appeals initially, but eventually, once the attitudes of the circuit courts were known, there would be fewer issues and fewer questions for district judges. They would be answered. We do, as we do with other appellate decisions, try to be faithful to the guidance of the Court of Appeals. So eventually that would diminish. But I do think that in a presumptive sentencing system there is some added litigation and there is an added burden on the Court of Appeals. That, I think, is worth the cost.

COMMISSIONER MacKINNON: My final question is this, and this seems to be permeating a lot of discussion: Have you ever found an unscrupulous

federal prosecutor prosecuting cases for his own personal advancement?

JUDGE WOLF: I was regularly accused of that myself while I was the Deputy United States Attorney. We got a conviction in every public corruption case, although one was ultimately -- all but one. But have I ever? I happen to think that that is a greatly exaggerated concern, and one that can be addressed not through the guidelines but through going to superiors in Washington. You can always think of the most extreme case. If you try to create a system that is going to automatically take care of the most extreme case, I think it will create other problems. In my view, there is the possibility of having an unscrupulous prosecutor. But to do something that is going to rigidify the sentencing system and generate litigation across the country, to try to protect against that is really the wrong remedy for that potential problem.

COMMISSIONER MacKINNON: Actually, it's an extreme rarity if it exists at all, isn't it?

JUDGE WOLF: In my experience, it is extremely rare.

COMMISSIONER MacKINNON: But it is raised by

defendants in a great many cases.

JUDGE WOLF: In a prominent case, it is inherent. In every administration any prosecutor's office has to be vigilant to make sure it is not well founded. It could occur, but you cannot judge the frequency of the occurrence by the frequency of the complaint.

COMMISSIONER MacKINNON: Thank you.

THE CHAIRMAN: Thank you very much, Judge Wolf.

JUDGE WOLF: Thank you.

(The witness was excused.)

THE CHAIRMAN: Our next witness is Owen Walker, the Federal Public Defender for the District of Massachusetts, as well as Phyllis S. Bamberger, who is the attorney in charge for the Federal Defender Services Appeal Unit in the Southern District of New York. Both of these individuals have been working with the Commission from time to time on various issues and have testified in Washington. We are delighted to see you here for this hearing.

MR. OWEN WALKER: Thank you.

THE CHAIRMAN: Mr. Walker, will you lead off the testimony?

MR. OWEN WALKER: Yes, thank you, Judge Wilkins.

I am going to do three things, actually: talk about complexity, just like the other witnesses have; illustrate my remarks with the role in the offense section; and finally -- and this wasn't in my script -- I am going to suggest a solution to the problem that every witness has raised this morning, namely, how do you get the necessary discretion to handle cases compatible with the statute?

THE CHAIRMAN: Hurry through the first two. I want to get to that.

MR. OWEN WALKER: All right. The first problem is the problem of complexity. When you take something like this and throw this many words at a problem in the court system, you are bound to get chaos, confusion, misunderstanding, and turmoil. Take the bail statute, for example, which is quite a clear statute, the new statute, Section 3142. There are, I think, close to 200, if not more, reported cases on that one section of the law. If the Commissioners think people care about bail, they certainly care about sentencing and a great deal more. Every word, every phrase, every comma, in this thing is going to be the

subject of endless litigation. That is somewhat of an exaggeration but not too much of an exaggeration. That has certainly been true of the bail law.

This effort raises every fundamental, theoretical, philosophical question about the criminal justice system that has been debated for years and years in courses on criminal justice, first year of criminal law. It requires answers, and it requires numerical answers. This isn't some obscure provision of a long new act of Congress. But when you get that close to the fundamental questions of criminal law and try to solve them with words, you are going to get endless litigation that is going to go on for years and years.

Think of the effect on criminal lawyers. As it is, many fine criminal lawyers don't want to come near the federal courts. Cases are too complicated. They will come in reluctantly, they will handle cases. Now when they know that to come in and handle an average sentencing in a federal criminal case they will be responsible for knowing a 50-page statute, or a large part of it, and 170-page book, they are not going to do it.

One reason they are not going to do is, if

they miss something -- and it is very easy to miss things -- or haven't thought of an idea, they are going to get sued afterwards by their clients. What does that mean? That means the criminal sentencing is going to become a specialty, it is going to become like tax law, and there will be much more work for our offices, Federal Defender offices, because ordinary lawyers won't touch the stuff. It will be too expensive. Sentencing will become a legalistic phenomenon. People will write memos of law, they will nitpick over phrases. "What did the Commission mean?" The whole point of sentencing is going to be forgotten in this endless stream of litigation. The point of the process will be lost.

It is ironic that nowadays when people are recognizing that government regulation is too complicated and should be simplified, a problem which is a real problem, namely, sentencing disparity, is solved by throwing 250 pages together of words on the thing. It is inevitable, members of the Commission, that in a few years the pendulum is going to swing. As it swung before, from fixed sentences to flexible sentences, now it is going back again, it will swing back, and we will have a sentence simplification act,

just as we have a tax simplification act, which will enable people to get on with the business of sentencing in a proper manner.

This Commission, I think, is in a position where it can monopolize the time of federal judges with sentencing in federal criminal cases. I think that is a very dangerous thing. Federal judges, as I don't need to remind the Commissioners, do a lot of other things besides criminal law, and in fact more important things. It used to be until about ten years ago that federal criminal cases were a minor part of the federal courts' business, and what the federal courts did was important things, the constitutional questions. The federal courts are the final arbiter of our system of government. They deal now with environmental cases, consumer protection, the great legal economic questions of this country, control of administrative agencies, labor questions, reapportionment. The Commission has the power of putting all those important things in second place to a matter which is important but is not so important that we should forget the other primary business of the federal courts.

To say that thoughtful people who are concerned about the federal courts and who care about

the federal courts despite their many faults are worried about what is going to happen is an understatement. The previous remarks of the previous witnesses make that clear. There is a serious possibility that these guidelines are going to do much more harm than good. A Pandora's box is going to open, and, to be blunt about it, on November 1, 1987, all hell is going to break loose in the court system.

Secondly, the sentences are far too great, and the examples of the so-called "mules" from Africa is an excellent one. We deal with a great many at Logan Airport ourselves. But there are hundreds and hundreds of cases where people who are now getting probation or low sentences, in cases in which all judges would give probation or low sentences -- and I want to get into this -- would be doing substantial amounts of time. If there is anything you don't want to alter, you don't want to interfere with the way federal judges are now behaving in the same way. And what we do is change the behavior that is good behavior of federal judges, namely, where they do treat the same cases in the same way.

Let me go briefly into the role in the offense section. It is Part A of Chapter 3. It is

very confusing. The concept of role in the offense -- in other words, the part you took in a multidefendant case -- is confused with the manner in which the offense occurred. One section says you don't make any adjustment if the person was the sole offender, and then another section, the section right before it, says if the person was the sole offender and he did it with a certain amount of skill, you up the adjustment. The two concepts of role and purpose are confused, and on the role question, the reduction is .5 to .8.

This reflects a very narrow view of cases that actually occur in the courts. Take the average multidefendant fraud case that now occurs, commonly in the federal courts five, ten, fifteen defendants. In a ten-defendant case you will get levels of involvement in the case that range from the very minimal to the very great. And when I say very minimal, I mean very minimal.

I just handled a case where it was a multidefendant fraud; it occurred over a several-month period. My client was involved, assuming guilt, for a week. He delivered a couple of securities, say $6 million; he was an errand boy. No judge in our district, I submit, would have given the defendant more

than probation. The prosecutor recommended probation. Indeed, it is possible that the prosecutor only indicted the person because he was hoping to get him to testify against the other defendants. But the guidelines -- and I calculated them on the plane this morning -- would have required at least five or six years for that defendant. If the guidelines are taking situations where no judge would give a defendant more than six months and are requiring all judges to give the person five or six years, they are creating serious injustice and not correcting the problem that they were set up to correct.

Boilerroom operations. You have the same thing. Some defendants are involved for months and months; some defendants are involved for a week. But the defendants who are involved for a week are going to get five or six years also when no judge would think of giving them more than probation in situations like that.

Indeed, I have forgotten my statistics, but the fact is that just as with any human phenomenon, such as role in the offense, the results are going to range over a range from very minimal to very great. And whatever it is, two- or one-third of the behavior is going to be outside the standard deviation from the

norm. The guidelines don't reflect the fact that this is the real situation.

This even occurs in heroin cases, heroin distribution. I represented wives of heroin dealers who on one occasion have handed, against their will perhaps, or reluctantly, bags of heroin to a customer who came in. They want to get divorced, they told their husband, to get out of the situation. Yet, they are as guilty of heroin distribution as their husband. No judge would give an offender like that anywhere near the sentence the guidelines would call for. In the role in the offense situation, the Commission recognizes by the fact that there is a range from .5 to .8 that one number can't capture human behavior of this sort. And I would suggest that no number can. The range should go from 0 up to 1.0.

The Commission has done an excellent job on aggravating characteristics, but not any job at all, I would submit, on the mitigating characteristics, the manner and the purpose. The kid that saws off a shotgun on a dare from another kid, he knows it is illegal to do so, puts the gun up in the attic and forgets about it. I have had cases like that. Every prosecutor, every judge, every defense lawyer, every

probation officer, knows that crimes that sound very serious can often be very minimal. The guidelines do not recognize that fact.

There are other problems. For example, old cases. There are many cases that sit in the federal agencies and on prosecutor's desks until close to the statutory limitations period. Then an indictment comes out. Five years after the conduct has occurred, the defendant has either cleaned up his act completely has a job and is married, or else he has been in jail for six other things. The Commission is assigning full weight to offenses like that, which no judge would.

My final point, and here is a possible solution to the problem -- and please don't hold this against any of my colleagues, because I have just really thought of this idea as I have listened to some of the other speakers. By the way, I certainly agree, and I think every practitioner would agree, with what Judge Weinstein and Judge Wolf have said or the bulk of what they said. There is a way within the statute to maintain flexibility and yet comply with the statute. Let me suggest this: an active role guidelines, hook, line and sinker, period, and then an act or provision which says: we recognize that no system of numerical

guidelines can possibly do justice and be efficient as well. Therefore, the guidelines are the parole guidelines, but the judges are encouraged to aggravate and especially to mitigate from the parole guidelines in appropriate circumstances. And not only are they encouraged, but they should mitigate and aggravate in appropriate circumstances and leave it at that.

Then you have essentially yardstick guidelines of the sort that every speaker up till now has proposed, and you have a flexible system. If there are abuses, the Court of Appeals can come along and resolve most of the problems. The fact is that disparity, because of the public concern about the matter, is being reduced, as Judge Weinstein just said. It is being reduced in our district as well. There is concern about this.

One reason there is concern is that a lot of judges pay attention to the parole guidelines. Believe me, I don't think the parole guidelines are perfect or even that good, but they are a yardstick, and that is their function. The Commission could enact essentially yardstick guidelines and preserve the court system. As I say, don't hold that idea against anybody else, I would ask the Commission.

I would also say that I have submitted a memo with twelve hypothetical examples, and almost all of them are based on actual cases that our office has handled, showing that the role in the offense sections are inadequate, I believe, or I would contend they show that, and I would ask the Commission to have a look at that. Thank you very much.

THE CHAIRMAN: Mr. Walker, I appreciate that very much. I wish you would also send a list of those elements that you think would be appropriate for mitigation. What are the circumstances? Don't just tell us you need to build in mitigation. Tell us what are the words to build it in, what are the circumstances to build it in. The same with aggravation as well. I agree with you that we need to address that. This is preliminary, we are still in this process, but we would be most interested in seeing how you would put the mitigating circumstances that would cover all of the circumstances in your experience that might occur. That is what we are trying to do.

THE CHAIRMAN: Ms. Bamberger, we will hear from you.

MS. PHYLIS S. BAMBERGER: My concern is with both the detail and certain aspects of the basic

structure. I will first focus on some of the details which came up; then I would like to discuss the modified real time sentencing; and then the impact on the Probation Department and defense counsel as I perceive it from my experience.

Some of the details which I think that need to be considered are things like unconstitutional presumptions which are built into the guideline range. For instance, a nonpayment of taxes raises the presumption that the income on which the taxes have not been paid is illegal. This presumption would not meet the Supreme Court's test of rationality under a whole long series of cases, and since the guideline also shifts the burden to the defendant to prove that his income was legally obtained, it is probably a violation of the Fifth Amendment. That is just one example of what I perceive to be an unconstitutional aspect of the rules.

Secondly, the relationship between various offense characteristics and cross-references between the different type seem to be irrational and arbitrary. For instance, a sale of drugs to a person under 18, even if the defendant does not know that the person is under 18, adds 18 points to the sentence, but

distribution of drugs while in possession of a weapon -- and presumably that is knowing possession because you really know what you possess -- adds only 6 points. Interference by two people with the civil rights of another by going in disguise on a highway or into the home adds only 12 points. I suggest to you, what has happened to our 1960s civil rights movement? Is the Ku Klux Klan less serious than a defendant who sells one grain of a mixture of drugs to a person under 18 who knows exactly what he is doing?

Another aspect or detail which I am terribly concerned with is the provision on adding 3 points for being a drug abuser. First of all, what is a drug abuser? Is it an addict? Is it a person who has an occasional use? The period of time for this abuse is ten years. Well, what about hundreds of our college students who at the age of 17, 18 and 19 occasionally use drugs, and ten years later somehow are involved in the law? Are we to punish them more severely because ten years ago they made a mistake or had an indiscretion or followed the pack? It is also in violation, I believe, of this mandatory addition of section 994(d) of the statute, which says that drug addiction or drug -- it says drug addiction so we are

all talking about abuse, I assume there is a difference -- shall not be used if it is unrelated or irrelevant to the sentencing. The required use of it is in violation of the statute.

Finally, in its commentary, the Commission cites to us data in support of the connection between crime and narcotics use. Data is not dated, we do not know where it came from, we do not know the base for that data. The research is unknown to us. I suggest to you that adding 3 points based on an announcement of data of that type is really very unsatisfactory.

In certain aspects of the guidelines they are terribly vindictive, and I can only mention to you the computation of sentence points for Section 848. 848 points are doubled no fewer than four times. A person who is convicted of a violation of 848, for which Congress has prescribed a minimum sentence of ten years, can serve life imprisonment for no additional aggravating factors because it is constantly doubled. It is doubled automatically. It is doubled because the substantial income comes from the 848 counts, although that is an element of the crime.

I have that all outlined in a written paper which I will submit. I just think that it demonstrates

very crucial vindictiveness along the lines that Judge Weinstein mentioned before.

Finally, I think that there are presumptions, not evidentiary presumptions but presumptions of social engineering, which this Commission has incorporated into the guidelines which are policy decisions which should not be made by a sentencing guideline commission: that probation is unwarranted, that courts of appeals are inadequate to handle conflicts among district judges in following the law; that civil rights violations are less bad than drug violations. It seems that the Commission has adopted 100 percent the false and overly exaggerated and hot political issue with respect to drugs while forgetting about the very serious other problems that our society faces in the criminal law area.

I would like to focus for a minute on the modified real offense sentencing, which seems to be the crux of the way the points are added under the draft.

First I would like to say that I do believe that it is correct to use the roadmap concept of cross-reference. It provides some limitation on what can be used to enhance sentences. Modified real offense sentencing is overinclusive. The definitions

provided by the draft include five. They appear in some varying form on pages 5, 10, 15, 16 and 17 of the draft. No two definitions are the same. They include things like necessary conduct, related conduct, conduct in furtherance, and -- an extraordinary leap for the criminal law -- any harm, actual or threatened and, I assume from the way it is written, intended or unintended, anticipated or unanticipated, recklessly engaged in or not. I think that this last problem presents a very substantial constitutional question. It adopts strict liability for sentencing in the criminal law. Strict liability, except for certain very limited regulatory crimes, is a standard foreign to criminal cases and, I think, raises very substantial questions of substantive due process.

Let me give you some of your examples or pull out some of the examples which appear in the discussion of modified real offense sentencing. An 18-year-old person is given drugs to distribute by a defendant. That is one of the examples. But what if the defendant did not know that the person was 18 years old? What if the defendant was told by the other person that he or she was more than 18 years old? Then you impose an additional penalty, quite substantial,

because the person who was given the drugs was under 18 years old.

The other example, which we have gotten unsolicited comments on from defendants all over the country, is the defendant who sells drugs to another person, who dies as a result of taking the drugs. You are including a murder conviction or points for a murder in a charge of perhaps selling one grain or one gram or two grams.

I had a case this year involving a defendant who sold one grain of a mixed substance. The amount of actual narcotic drug in that package was so small that the government chemist testified it was not measurable. What happens if an individual dies as a result of that package? The individual may have been very ill, knowing he was very ill, taking the drugs purposefully. The defendant may have said to his purchaser, "This is high quality stuff; be sure you dilute it." And the victim or the person who purchased drugs deliberately does not do so. It is not fair, it is not substantively in accord with due process, to punish a person in those circumstances as if that person committed a murder. But under your example there is no option but to impose that kind of punishment.

Another one of the examples given in the list is a defendant convicted for conspiracy to forge and cash one check. The judge then makes a finding that this defendant forged and cashed twenty other checks. In that example there is no finding by the judge that those twenty other checks were part of the conspiracy. So that the defendant may have actually forged and cashed those checks quite apart from the conspiracy, having nothing to do with it, not in furtherance of it, but the sentencing judge is required to consider those twenty other checks in imposing the sentence based on the conspiracy.

The one that offends me the most -- and I admit that there is a difference of opinion on this -- is the bank robber who drives away at 120 miles an hour and hits a child who is then paralyzed for life, or whatever that example is. There are variations in that hypothetical which make the imposition of the sentence based on the paralyzed child to be totally unfair. What if the defendants decided to rob the bank in the middle of the night when they knew that nobody would be around, and there is a young child who is out against the wishes of the family? What if the defendants decide they will drive only 10 miles an hour away from

the crime so as to minimize the possibility of a chase, and the child playing ball runs out between two cars and is hit? Will we punish for all of those things?

Once again, the examples that require the kind of harm, the "in furtherance," the "necessarily related," of the modified real offense sentencing provisions are overly broad and overly inclusive.

I suggest an alternative using modified real offense sentencing, which is that you limit your definition to include only acts in furtherance of the crime and that are intended or recklessly provided as a result of the crime, and require that the judge make a finding of the two things before the cross-references apply. So that you use the cross-references that are already built in, but in between it and its automatic application the judge is required to make those two findings based on that very strict standard.

While the draft does not deal with it, I am very concerned about the ability of the defendant to present defenses to the cross-references. It seems to me that that leads to the whole question of the accuracy of the fact-finding necessary to impose sentences under this draft and what we are doing to accomplish reliability. And that is the key:

reliability. If the reliability is askew, this system is not only no better than the last system was, but it is worse, because it is a mandatory system. Under the old system, if a judge did not want to hear evidence, thought a factual issue was too complex or would take too much time to introduce evidence, he could disregard it, and in fact had to so indicate in an attachment to the presentence report so that the Parole Commission and the Bureau of Prisons would understand it. But in this context the judge is required to consider any factor which is raised by the facts of the case.

It appears to me that the Commission has not given adequate attention to the procedures which must be followed to assure accuracy in fact finding.

Let me first start from the beginning. The judge is not going to do all these computations all by himself. He or she doesn't have time. In fact, I tried to compute a burglary sentence, and it took two pages in the outline, moving back and forth between the charts. So, according to the statute, the initial information must come from the presentencing investigation and report. But the Probation Department is not presently equipped to handle the kinds of investigations that are required on a factual basis to

satisfy the requirements of this draft. Factual data in presentence reports presently come largely from government agency reports like the FBI, the DEA, and the prosecutor. These reports are filled with hearsay and innuendo and comments and unreliable information and sources undisclosed or unknown. When the defense gets to see them, they always have little holes cut in them so that you never know where the material came from. You can't do that in this system. You have to have the Probation Department have available reliable information from known sources who then become available to the defense for challenge. You can't rely on NYSIS reports from the New York State Department of Correction as to prior criminal history. In a recent study just done, there was shown in the NYSIS reports that inaccuracy or incompleteness was at a very high level. I haven't got the statistic but I will get it for you. It is virtually certain that few other states have reliability in their criminal history reports that is any higher than New York has. The Probation Department cannot rely on those reports any more. There must be an authoritative, up-to-date, current accurate system for determining criminal history.

Then the other problem that comes up is:

Will the probation officers have access to experts that they will need to make approximations of point scores for physical harm, severe physical harm, a little bit of physical harm? Will they have access to experts to examine victims for psychological harm or damage to property, or will they just go out willy-nilly and decide after talking to a victim for fifteen minutes that this victim is suffering severe psychological harm?

In addition to that, the probation officer is now required, if he has to add up all the points which the Judge will consider, to make judicial decisions. Under the modified real offense sentencing scheme, will the probation officer decide what conduct was in furtherance of the crime or how much harm was caused as a result of the crime? Or the defendants role in the offense? All of these are judicial decisions which the probation officer is now being asked to make in his report to the judge.

And now let's get to the defense counsel. The defense lawyer has to have access to the information. He must have discovery in the same sense that he does for trial. He must have time to examine the report and prepare his alternate information.

He must have additional funding for the

Criminal Justice Act. One of the things that this Commission, I believe, is compelled to do in their report is to go to Congress and say that Criminal Justice Act funding must be increased. Every one of our cases will now require extensive investigation. We have to talk to a victim -- well, that is another problem, which I will get to in a minute. We have to talk to a victim. We have to get an expert to examine that victim and make sure that that victim's psychological harm does or does not exist or that that victim's physical injury does or does not exist, or the harm to property is X amount of dollars or minus X amount of dollars, or that the defendant's conduct was in some respect unknowing. We have to prepare a full case for our client so that those points do not add up.

There are additional problems, because the defense lawyer must be in a position to controvert evidence presented at the trial which during the trial counsel could not controvert because to do so would interfere or prejudice the defense. Very often it comes up that the amount of money stolen or the amount of drugs involved or the number of people involved is totally irrelevant to the defense which the defendant is presenting. Therefore, prosecution evidence as to

that remains in the record on the rebuttal, but each of those things now becomes terribly relevant for sentencing because each one of those items adds points to the score.

On page 5 of the guideline draft it says that the trial record shall be used by the judge, but we have to have an opportunity to rebut for sentencing those portions of the trial record which need not have been rebutted for the determination of guilt or innocence. We also, of course, have to be able to rebut allegations in the presentence report by having access to victims and experts.

There is another aspect here. What is the relationship of defense counsel and the defendant to the probation officer? You can rest assured that I am not going to have my client tell any probation officer that when he was a freshman in college he smoked pot, because that is going to add three points to his score. I don't know what I am going to tell him to do when that question is asked, but you can be sure I am going to think long and hard about it when I come up with an answer.

Now we get to the question: How do we resolve all these disputed facts? The trial record

doesn't do it because the jury's verdict only decided on the elements of the crime. The presentence report doesn't do it because it is disputed. We have to have a hearing. But nowhere in the draft is there a word about the right to a hearing. I am not talking about Rule 32's granting discretionary power to the judge to grant a hearing if he or she wants to. I am talking about the right to a hearing so that any contested facts can be fully litigated. The Commission was very skillful in talking about the right to witnesses and the right to cross-examine, but we don't hear a word about the right to compulsory process.

What happens if the judge decides to base the decision on hearsay information in the presentence report? We can't do a thing about it, because we don't ever get to the question of cross-examination because that witness is not even in the courtroom. And we can't make him appear in the courtroom because we don't have any right to compulsory process.

It seems to me that if we are going to deal with the issues of accuracy in fact-finding, there has to be a serious rethinking about what kind of procedures we are going to use at the hearing, and with a full expectation that these hearings are going to

take a good long time.

I am not disputing, for purposes of this presentation, what other people have done with respect to their views of complexity. I will tell you, make it as complex as you want, put in everything, leave out nothing, but if that is the position that the Commission is going to take, then you have got to give us in the process, something on the other side, which is to make sure that all the things that you want in the sentencing decision process are accurate, complete, and full, so that my client doesn't go to jail for an extra ten years because somebody made a mistake.

THE CHAIRMAN: Thank you very much. We appreciate receiving your comments. You overstate the comment with respect to selling drugs to the 18-year-olds. The reason that increases the penalty is that the law requires us to do that. The Congress has spoken. We must obey the Congressional mandate when it has been directed to us by the Congress. So some of the things that you talk about are things that we think perhaps are right but perhaps Congress has already made that decision for us.

Whether or not the defendant has to know that the defendant is eighteen years old or younger

when he sells the dope is a legal decision. I would not be so presumptuous now to answer that, but what we have tried to do in the guidelines is not rewrite the law, because that would create so many more problems for you and your clients, and we have the Commission trying to say you did know it, knowledge is required, and the law says knowledge is not a requirement. We have been very careful to omit any legal requirements. If knowledge is a requirement and it is not met, of course you would not be sanctioned for that. But those are matters that come up.

I do say, too, that of course you have a right to a hearing. It is implicit throughout our guidelines.

MS. BAMBERGER: That is the problem with the implicit. It is nowhere explicit and it is not in accord with Rule 32.

THE CHAIRMAN: You are right about that. We didn't say you had a right to a hearing and cross-examination and all that. We should have said you have a right to a hearing. Really it was so understood that everyone had a right to a hearing any time a factual matter is in dispute. We probably should have used those words. We will correct that so

it will be absolutely understood that when there is a fact in dispute -- and I don't think there will be as many circumstances as you might imagine -- and there is a fact-finding process to be had, of course there is a right to a hearing and examination.

But you have some good comments. Some of those the law requires us to do, some of the things we should reexamine. I appreciate very much the thought and obvious work that you put into this presentation, and I would hope that you will send us your comments and others that you may have as you continue to review this document.

Any other questions from the Commission? Commissioner Corrothers.

COMMISSIONER CORROTHERS: Yes, as to the numbers, I would like to repeat what Judge Breyer said earlier: Our numbers are not finalized -- and that is emphatically true, and this is what I would like to add: with relation to the civil rights actions, which you mentioned.

My question is: Do you feel that a death connected with drugs received from a defendant should not be considered at all in the sentencing process?

MS. BAMBERGER: It depends. But to make it

mandatory, I think, is to demonstrate the criticism that has been uniformly expressed this morning.

THE CHAIRMAN: What would it depend on? What would you consider?

COMMISSIONER CORROTHERS: Because you mentioned that the child who was injured or killed, I guess, by the car should not be considered, and the victim who died of an overdose or died because of something in relationship to the drug ingested should not.

MS. BAMBERGER: It depends. If a bank robber is driving away from a bank in a suburban mall where it is known that there are families and children, that would seem to be a fair consideration. If, however, the bank robber intentionally drove at 10 miles an hour so as to avoid a problem, or whatever the motive was -- maybe he didn't want the police to know he was driving away from a bank robbery -- and there are circumstances which result in the injury to a child through the car, perhaps it should not be considered. What I am complaining about is the mandatory nature of each of these factors as provided by your examples.

I am also a little concerned about the very broad use of what relates to the underlying crime, and

that is why I propose that it be conduct only in furtherance, with a limitation on harm to that knowingly inflicted, for instance, a bank robber who hits a teller. Obviously it is knowingly done. But -- I am just trying to think of an unintended harm -- the unintended harm may in fact be the death due to the drug overdose. It may have simply nothing to do with that defendant, and the defendant should not be charged with it. If there is a sense that there is a homicide involved, that may be grounds for an independent prosecution. But on that record it seems to me to be unfair and inappropriate to enhance the drug sentence.

THE CHAIRMAN: Any other questions? Judge MacKinnon.

COMMISSIONER MacKINNON: You dealt with the civil rights, the same as Ms. Corrothers has commented on. I think, however, you dealt only with the original evaluation of it, the original figure, and failed to take into consideration the fact that was to be augmented by the other offenses that involved it.

MS. BAMBERGER: What I was talking about was in terms of comparison add-on's.

COMMISSIONER MacKINNON: I know it, but whatever the other offense was, whether it was a voting

right violation, an assault, a discharge or something like that, would add on to the figure that I think that you were talking about.

MS. BAMBERGER: I am not sure that I am understanding you.

COMMISSIONER MacKINNON: I think you under-evaluated what the guidelines do for civil rights violations.

MS. BAMBERGER: What I was saying is that if you have -- let me find that civil rights section.

I don't want to take up the Commission's time, but what I was talking about is, when an individual sells a drug --

COMMISSIONER MacKINNON: I am talking about civil rights.

MS. BAMBERGER: I am making a comparison. Well, I can't answer the question without looking at it. I don't know if the Commission wants to take the time.

COMMISSIONER MacKINNON: You said they were less violent than drug offenses. But I say that the booklet, I think, evaluates a civil rights offense and then provides for the add-on of the particular crime out of which it arose, which might get it up to what you are driving at.

MS. BAMBERGER: Here it is. H211 has "interfering with civil rights. The base offense value is 6." Then "Specific Offense Characteristics. If the offender conspired to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any civil right, add 12 to the base offense value."

COMMISSIONER BREYER: But that is Judge MacKinnon's point. He says, in addition to that, he threatens to cause physical harm or he harms his property or he causes psychological harm -- in other words, any other kind of harm that is caused. And there is likely to be some. In the Ku Klux Klan they threaten to hurt people; at that point you refer to Section A and then you add on the physical harm, you add on the psychological harm, you add on all the proper harms.

MS. BAMBERGER: You do the same thing with the drug violation. What I am trying to point out is that there are inconsistencies in the add-on's. It is not totally imperfect, it is just partially imperfect.

COMMISSIONER MacKINNON: The other comment I wanted to make was that you complained about the fact that they were required to consider all the facts, and

harm occurs and imposing it the same in all cases means that when in fact it is caused intentionally, that person is not getting more punishment than the person who does it negligently or with more culpability -- in other words, the idea of taking into account whatever whatever level the person has in causing the harm. I think you are right. It is appropriate to take into account all the bases.

But the one point I suppose I have trouble with, and I am sure you have an explanation for this, is that, on the one hand, you seem to be saying we might be better off without this kind of system, or what we have now has certain virtues to it; on the other hand, when it comes to talk about evidentiary reliability, you are obviously very concerned that you have a hearing, you have an opportunity to dispute the facts, that the guidelines should not be applied using facts that we are not sure about, and you ought to be able to litigate all of those. But, of course, my problem is: you don't have any of that now at all. A judge has taken into account all the things that you see in that book right now. You don't have the opportunity of that process to bring in witnesses, to debate issues that you want to dispute. You have a

certain ability to be heard on these matters, but the factors can have just as much an effect on the sentence. Your client could well be getting ten years more under the current system based on a fact which might well be erroneous.

Is it the fact that the system is more explicit so it is more obvious that we are relying on these facts? Is that what it is that means that we have to have all this evidentiary support that we didn't have before? (a) What is it that creates the increased burden for having evidentiary reliability, and (b) how is it that you appear so concerned about evidentiary reliability? Why are you so satisfied with the current system? Why is the current system attractive to you at all?

MS. BAMBERGER: I would like to answer the first question first, and that is: Each of these elements can be considered by the judge in his or her discretion. First of all, on the record, on a disputed fact, the judge will say either "I am not considering it" or "I will have a hearing to resolve the fact and then decide whether or not I will consider it."

It seems to me that if the judge is going to say on the record, "I have not considered that fact,"

in many situations we have to take the judge at his or her word, and we have a fairly good gauge for knowing whether the judge has done that, because of our understanding of what we think the sentence could fairly be or not fairly be under the circumstances.

If the judge has been dishonest in saying that he is not considering the disputed fact when in fact he is, it seems to me that there are two legal remedies that we might have. We might have the right to an appeal. Admittedly that would be a very difficult appeal to argue. But there would be a theory to argue, which would be that this sentence is way out of line unless the judge in fact did consider the sentence. Secondly, you now have available, which we won't have later, a Rule 35 motion in which we will attempt to re-present to the judge the argument that he must have considered that fact or that fact might have been considered because under the circumstances the sentence appears to be too high. That is also difficult, because it is once again an appeal to the judge's discretion, but nevertheless those two avenues do exist.

The other factor in answer to your question is that you make a presumption that the judges will

consider this when they say they don't, and that is something that I don't know. There has been no research done on whether judges consider facts which they say they are not considering. It would seem to me that one of the things the Commission might want to do is to inquire of judges for anonymous answers as to whether or not they really consider facts which they should not be considering. I don't know what will happen as a result of that, but it seems to me that that is the best answer that I can provide you with.

There is one other answer, and that is the answer which I believe is the appropriate alternative to sentencing guidelines, which is appellate review of sentence. The federal courts in this country, for some reason absolutely unbeknownst to me, many years ago said that they had no right to review the length of sentence and would review a sentence only if it was illegal or based on illegal factors. Why they did that I don't understand. If in true common-law tradition they would review judges discretion as they impose sentence and require a statement by sentencing judges as to why they were imposing a sentence, it would seem to me that the abuse of discretion and disparity which now everybody is complaining about wouldn't have

existed in the first place and we wouldn't need the guideline. So the other alternative is to require judges to make a statement as to what his findings are and ask the appeals court to review it.

Why am I happy about this? I am not happy about this. But what I am saying to you is that because the draft imposes mandatory factors on each of the judges to impose in a particular sentence, due process requires that there be accuracy in fact-finding. What happened before is irrelevant, because now we know what is going on if we didn't know what was going on before, and because we know what is going on, we have to have it accurate.

THE CHAIRMAN: Any other questions? Thank you very much. We appreciate both of you appearing today.

(The witnesses were excused.)

THE CHAIRMAN: Our next witness is Rhea K. Brecker. She is Chief of the Narcotics Unit, United States Attorney's Office for the Southern District of New York. Ms. Brecker, delighted to have you with us today.

MS. RHEA K. BRECKER: Thank you, Judge Wilkins. Let me begin with a brief caveat on why it is me who is here. You, of course, invited Rudolph

Giuliani, the U.S. Attorney in this district. He is, however, engaged in trying a lengthy and complex case in New Haven, so he has not had a chance to read the guidelines or, indeed, to discuss them with me in anything but the briefest detail. So my views are my own rather than his. Probably just as importantly, I haven't had the benefit of the views of the Department of Justice. The Department of Justice is still continuing its review and, as I understand it, they will be submitting a written comment to you in the future.

As I anticipate, our office will prepare a written comment, Mr. Giuliani will be the person who decides on its content. It will be sent to the Department of Justice and will eventually through that vehicle be filtered to you.

So, with all of those caveats, I am speaking as an individual prosecutor. I do bring to you ten years of experience as a prosecutor, presently as Chief of the Narcotics Unit, but before that as a member of the organized crime, the business frauds unit, and the general crimes unit of my office. So my perspective is not limited to narcotics.

I have also condensed my remarks in view of

the time.

Let me begin by saying my analysis did not challenge the legislative assumptions. So, unlike Judge Frankel or Judge Weinstein, I do not suggest to you a different kind of system which might evolve. Rather, I have tried to look at your document and see if it is workable. And I may be one of the few people who you have heard from this morning who thinks that whether it is the system that you might have chosen or not or whether Congress set the right parameters, that we can live, all of us -- defense lawyers, prosecutors, and judges -- with this system.

I think that the complaints that Ms. Bamberger just made about the factual determinations and Commissioner Robinson's questions were well put. In the system today, the judge makes a number of factual determinations. The prosecutor brings facts to the judge's attention. The defense lawyer does. Only there is a mystery over what evaluative weight is given to the different factors. I think, if anything, this system is harder on the prosecutor than on the defense lawyer. The mystery is lifted, the Judge must specify the particular factors. The government bears the burden of proving them by a heavy standard,

preponderance of the evidence, and there is a review if the judge has misapplied the guidelines as well as if the judge has gone outside the guidelines.

Like all the speakers, I think that at least at the beginning it is going to be a difficult and onerous process. I think we would be kidding ourselves if we thought that during the break-in period of any significant change like this we would not see changes in plea negotiations -- they will become more defensive; they will take more defense time and more prosecutorial time; that we will not see changes in the amount of time it takes to calculate the sentence; that there will not be more sentencing hearings and that there will not be more appeals from the sentences. I don't know how long that break-in or shake-down time will be, but I think it is a finite time and I think that, as we all come to have more experience with the system, the challenges will be fewer. When you report to Congress, you might point out that there will be a break-in period. Maybe you can get some help from the bench in the interim with some more judicial appointments, some help for the public defenders and some help for the prosecutors while you are at it, because it is going to be a brave new world.

The numbers I understand are not final, but I am particularly pleased with two different concepts which I see incorporated in the guidelines. On the one hand, there seem to be for many crimes, for instance, most tax crimes, most securities frauds, most white collar crimes, indeed most small drug sales, the certainty of some period of imprisonment. Granted it is generally a small period of imprisonment. But I do believe that the certainty of some period of imprisonment serves a deterrent function.

We may be wrong, but we have never tried that standard in the recent past in this country. We had mandatory minimum sentences in the federal system until 1972, I guess, under the old drug law. We haven't had them since. The practice in many districts is, at least in drug areas, to give probation, often; the same is true in many white collar areas. It is at least worth an experiment, I submit, and yours is, I think, a cautious experiment, because at the bottom end of the scale the period of imprisonment is quite brief. The burden on the prison resources for that reason hopefully will be not extreme but manageable. On the other end of the scale, obviously are the numbers for serious drug crimes.

For serious racketeering charges, are very heavy. I do not know the statistics in this district, but it is my instinct that the numbers are probably statistically significantly heavier than in this district, the same as Judge Weinstein said for the Eastern District. I do not think that is a shame. I believe that for serious drug criminals and serious racketeers, heavy sentences do serve a significant public purpose. If that means that we will have to have some additional prison space, I hope that is cost which the Congress is willing to bear. Certainly if the degree and severity of serious crime has increased, we cannot live with a prison system structured to a happier period that existed before.

With all of those pluses aside, let me bring to your attention a few questions or criticisms that I may have. One has to do with the level of cooperation, the credit given for cooperation. I think I side with Judge Wolf on this one. As I read it, there is still some ambiguity over whether the cooperator who also accepts responsibility for his crime gets the benefit of both the 20 percent acceptance of responsibility, plus the potential for up to 40 percent for cooperation. If you mean both, I hope you will clarify that.

Assuming you do mean both, that comes to an aggregate of 60 percent. I looked at it from the point of view of a drug prosecutor. I took as an example a kilogram-level dealer of heroin who decides to cooperate at the first moment of apprehension, wears a wire, goes undercover with very dangerous people, cooperates up the scale to his suppliers, cooperates down the scale, cooperates against the money launderers, testifies often in court, and there is a determination that his testimony was truthful each time. That person who started with 180 offense units, if he pled to one substantive count of unspecified amount of narcotics transactions but with the factual basis being a kilogram of heroin or more, would have a 60 percent discount, which would bring him down to 70 offense units. While I am not sure how that works on the table I think that means about a five-year sentence. I submit that that may be not enough of a reduction. The so-called Rockefeller drug laws in the State of New York, which give 15-year mandatory minimums to a heavy heroin dealer, give the option of literally life parole for the exceptional cooperator.

You as a public policy matter may not want to give the sentencing judge the option to take away

imprisonment totally, but I would urge that you provide a situation where perhaps it would be lower than five years for the person who has the best of all opportunities. Obviously, the drug dealer who was previously convicted doesn't even get as low as five years, because his starting offense units will be higher than 180 units. I projected the most favorable.

I wonder if someone who is endangering their life and knows to a certainty that they will be serving five years in prison will opt to cooperate. I asked myself, if I were in that position would I, even though obviously it is a tremendous advantage in terms of the actual period of imprisonment. I am concerned my answer would be no. Certainly it is different than the practice in the past, the benefits that at least some major cooperators have gotten.

The second thing that bothers me about cooperation is the certification by the U.S. Attorney, particularly as to the truthfulness of testimony, where the certification is that the cooperation is exceptional. As it stands now, the major defense argument made in trial testimony by an accomplice witness is that the accomplice has an incentive to fabricate in order to please the prosecutor. The

prosecutor's best answer is to say that the accomplice is testifying in front of the judge who will sentence him or her, and that the accomplice would not wish to lie in front of that judge because that will only wreak havoc when it does sentencing. I think not only does that have rhetorical appeal, and I do think it has that; I believe it's true. I should hope that it is an incentive to the cooperator that they will have to bear a responsibility on the sentencing day if they have testified untruthfully in the face of the very judge who is imposing sentence. I feel more comfortable leaving that determination to the judge. If there is a dispute about truthfulness, the defense lawyer can argue his or her version, we can argue our version, and the judge can ultimately make the decision.

There is another benefit on cooperation of perhaps letting the range be down to a very small period of imprisonment. Judge Weinstein made a very appealing argument about the courier who comes from an economically disadvantaged country, comes without the benefit of much education, and is caught at Kennedy Airport. One response is that if the courier can provide the name of who it was in that African or South American country who sent them and who it was they were

to call when they got here, that person may be able, depending upon the range of credit you give for cooperation, to be sentenced precisely as Judge Weinstein has asked. I would suggest that providing cooperation is an appropriate benefit to give to society in return for the lower period of imprisonment. So you can serve some of the humanitarian arguments made by Judge Weinstein as well.

You have asked for comments regarding the supervision of pleas. In this district we do not, quote-unquote, sentence bargain. We do charge bargain. As I understand sentence bargaining in other districts, it is subject to judicial supervision, and obviously I hope under the guidelines it would continue. But I would hope that if the prosecutor and the defense lawyer have pegged a number within the guideline range, that that number would be entitled to substantial deference if not be controlling; on the other hand, if they have pegged a number outside of the guideline range, that the sentencing judge would review it the same as if he or she were independently going to sentence outside the guideline, namely that there would have to be factors which the Commission had not adequately taken into account that justify that

sentence. I think that operates as some control on the prosecutor but leaves some discretion to the parties together.

I would encourage stipulations of facts. I think one way ultimately to minimize the number of appeals and the number of sentencing hearings is if we can between us find a way to resolve our factual disputes prior to the guilty plea or at the guilty plea. Certainly, districts that sentence bargain today should be willing to try to get an allocution from the defendant at the time of the guilty plea which reflects what are the common areas of factual understanding. Our district may reach the same conclusion, although we don't, quote-unquote, sentence bargain. It is too soon to tell precisely what our position will be about allocution. But I would ask that you encourage district judges to allow there to be a relatively lengthy allocution if that is what both parties have requested. In this district some judges do not permit them. Other judges say to the prosecutor that the prosecutor has the opportunity to summarize the facts that he or she believes he or she could have proven at trial, and at the conclusion of that summary turns to the defendant and says, "Are those facts true?" If the

defendant at that point says yes, you've at least eliminated a dispute later on, and that might be a system that we would all want to go to.

But a caveat on stipulated facts is that your guidelines should make clear -- and I hope prosecutors will follow them -- that you can't stipulate to something which is factually untrue. The hypothetical of the bank robber who in fact robbed the bank with the gun. You may take a plea under charge bargaining to simple bank robbery without the gun, but you cannot conceal from the Court the fact of the gun. So what you do is, you put a cap on the maximum amount, and then you allow the guideline within that cap according to the real facts. Your guidelines should make it clear that the prosecutor can't stipulate away what really occurred.

Another way of encouraging plea negotiations is perhaps clarifying some of the modified real offense concepts. They are difficult ones for us. I might have preferred full real offense if I were starting all over, but I think I could live with modified real offense. But your illustrations are not perhaps completely clear. You have an illustration of a serial bank robber. You plead to one bank robbery, you don't

take the other bank robbery into account. Then you have the illustration that I believe Ms. Bamberger referred to of a conspiracy to distribute, or to forge one check, but there are multiple checks, and you take them into account. I think perhaps you might just change the language on that as a conspiracy to distribute checks -- I have a little problem with a conspiracy to distribute one check -- then you take multiple checks into account, and then you say explicitly that the other checks were overt acts in furtherance of that conspiracy. I think that is probably what you mean, and if you make it explicit, it is easier for us.

I have talked to some of the other people in my office and they got some bright ideas, and I don't really know, we couldn't decide where they fit, so I offer this example to you. If you have someone who has been negotiating with an undercover officer for a series of drug purchases, an initial sample of a few grams, perhaps a quarter kilogram followed by a kilogram, with the smaller ones laying the foundation of trust for the final, if we manage to get a plea to the maximum sale are we allowed to argue the earlier ones as related to the maximum as laying the factual

foundation? There was a disagreement among the people I talked to. It will help in terms of plea negotiations if both sides know what the answer to that question is. We can live with whatever the answer is, but let us know in advance to the extent possible what the answer is.

Similarly, for that same situation, if the person pleads to all three counts, the sample, the quarter kilogram and the kilogram, is the maximum offense limit 180 or is the maximum offense level 180 for the kilogram, plus an amount for the quarter kilogram, an amount for the smaller? The reason I ask is that if the total one and one-quarter kilograms plus sample had been distributed at one time, the max would have been 180 offense units. Should you get more for it happening three times? I believe the answer is yes. That is what I would urge you to find. But I am not sure it is clear from the present guide with respect to some of the factual problems that will arise ultimately in the presentence report.

I would suggest that your direction to the Congress for either changes in the rules or suggestions to the judges of what they might set as the rules in their own courtrooms is that the presentence report be

available considerably earlier than it presently is. That may mean a change in the Speedy Trial Act of the length of time between the guilty plea or the conviction by jury and sentencing, because the Probation Department is going to have one whopping big job ahead of it under the guidelines. But if the presentence report is available earlier, both parties can read it earlier, and then both parties, if they object to any facts, should be required to submit written objections and exchange them in advance of the sentencing date so that they can respond in writing to each other, and that rather than come into court on the sentencing day with a great deal of oral differences, there be a precisely drawn basis in advance.

I actually think that if you quantify the factors, some of what the government now puts into the so-called government's version in the presentence report, where we may not have a great chance of proving it by a preponderance of the evidence, will no longer be in the government's version, and that will eliminate a lot of the problems. Because I hope we are not foolish enough to urge before the Court something which we cannot factually sustain.

I believe my final comment is that with

respect to the so-called "other offender characteristics" that you enumerate at pages 136 to 137, you have a very major choice ahead of you. If you wish to accord much greater discretion to the sentencing judges, as many of your speakers this morning said, you could ask that those be factors that justify going outside the guidelines. They are so inclusive that they would give nearly every sentencing judge in nearly every case a reason to go outside the guidelines. If, however, you believe that the Congressional intent was to keep the sentencing in general within the guidelines, then I suggest that those would be factors that can be weighed by the sentencing judge in choosing where within that 25 percent variable the sentence should fall. That is a big policy decision, and how you call that one may well decide how the guidelines work.

Do you have any questions for me?

THE CHAIRMAN: Thank you very much. We appreciate your coming, for the work that you have done, and hope we will receive your comments and those of your department, the United States Attorney's Office, very soon.

Any comments, questions, to my right? To my left?

I appreciate your testimony today and the work you have given this Commission in the past. Thank you very much. We look forward to working with you in working on the guidelines.

Our next witness is Mr. Kenneth Feinberg, attorney in New York and Washington. He is the chairman of the New York State Committee on Sentencing Guidelines. Mr. Feinberg is also working as a consultant with the United States Sentencing Commission.

Mr. Feinberg, we are delighted to see you here today.

MR. KENNETH FEINBERG: Thank you, Mr. Chairman, and I am very pleased to be here. I assume there are some hungry Commissioners, so I will prove the truth of historian Macauley's definition of a good lawyer: somebody who in ten minutes can delve into the very depths of the superficial. (Laughter)

Let me commend this Commission for this product that it has been distributing throughout the country. I am not sure that the product as it has been distributed will eliminate disparity, but it most certainly brings some sunlight and candor to the sentencing process. And insofar as even this draft tries to open up the mysteries of the sentencing

process and layout and articulate some binding principles to govern the imposition of sentence, I think it is a major improvement.

At the same time I welcome the fact that the Commission acknowledges on practically every page that this is a preliminary draft, educational and informational in nature, in which you seek desperately reaching out and seeking assistance from experts and the public in an effort to finalize a workable product. And I think that is relevant.

With those hosannas, let me urge you to avoid what happened in New York and avoid developing a product which will collect dust on every library bookshelf in the country. I think that you have a momentous task, but it is one concerning which you should be aware of the political obstacles as well as the substantive dilemmas that you will confront.

I think that the problems with this draft are unfortunately problems of overambition. What's gone wrong with this draft, I think, the reason that it needs a working-over and subsequent change, is that this Commission has been too ambitious in trying to articulate a sentencing guidelines under the law.

As I say, my hats that I wear range from

the guideline deflate the legitimate arguments raised by Phyllis Bamberger and Judge Weinstein and others about the impact of these guidelines on our criminal justice system.

The second concern I have is that I think that the draft is ambitiously overly detailed. I do not think that the guidelines, as we begin the effort with the Congress and as we try to implement these guidelines initially, require us to deal with the disparity to the extent of evaluation of property in the property offenses with such detail; by talking about variations in sentencing guidelines on the basis of the specific number of aliens smuggled into the country; on the basis of guidelines which would with such refinement talk about the amount of tax evaded. I do believe that all of those are relevant considerations in those offenses -- amount evaded, number of aliens smuggled, value of property -- but such refining discrimination in these guidelines is unnecessary, at least until you show me statistics that show me it is necessary, and I tend to doubt that those statistics will demonstrate that.

I am in favor of a sliding scale that will use judicial discretion in deciding whether or not the

evasion is, say, low pecuniary gain, moderate pecuniary gain, high pecuniary gain, and leave, at least initially, to the federal judges who sentence the authority to decide where within that sliding scale an offender fits.

The third and final area where I think ambition has caused problems is in the speed at which this Commission is working in an effort to get these guidelines out. I understand the schedule. I understand the Congressional mandate. Nevertheless, without the numbers, without a more, I think, careful review of how much detail we want to have in these guidelines, there is a danger that in an effort to disseminate to the public and get everything out, we will make some errors in this draft that can be avoided.

Let me make one or two other quick specific points about the guidelines. Just as I believe there is too much detail in these guidelines when it comes to offense variables or base offense harms, I also urge the Commission, to the extent possible, to avoid developing guidelines that deal with factors that are not found in existing federal codification. I think that the Commission in its ambition is courting trouble when it starts to prescribe in regulations presumptions

dealing with income tax evasion, presumptions that say that an offender who is only a few years older than a minor should be dealt with differently in sentence in sex offenses than someone who is an adult; and in various other places. I think the Commission would do well to minimize the number of occasions that it prescribes certain specific or aggravating factors.

This means, it seems to me, that the Commission has three methodological areas to consider in developing a new draft. You can have too much detail. As you attempt to eliminate that detail, that automatically, it seems to me, means more discretion for the sentencing judge. The third area in the triad here -- the first two being detail and discretion -- is what to do about the particular problem of the plea. It may be that you want to take another look at plea bargaining and spin off from the general rules that govern guidelines some sort of plea negotiation or plea bargain in an effort to, at least initially, go slow in dealing with these guidelines.

The modified real offense sentencing proposal I think is a welcome and an acceptable compromise. It is rather brilliant, it seems to me, in walking the line between the real offense advocates and

those who want to look simply to the plea itself. However, I think Phyllis Bamberger was correct that if you are going to have modified real offense sentencing, make sure it is that: sentencing based on the plea and harms in furtherance of that plea or conviction, and nothing else. I think there is some language in which the Commission wants to go beyond the furtherance language that I think may impose some problems.

Finally, I offer two conclusion points: Go slow. I think that we are going down an avenue here unprecedented in its importance, and I suggest that the Commission might want to cut back a little bit on its ambition and its speed in an effort to test how these guidelines are going to work in practice. You have the monitoring function. You can alter and modify these guidelines as events dictate.

Secondly, remember the point that the perfect is the enemy of the good. I think if we try and develop a perfect system -- and I address these comments especially to the critics as well as to the Commissioners -- it seems to me we will end up with nothing. We must work toward developing the best we can get, based on political and substantive realities. Let us avoid, it seems to me, an effort at developing

the perfect. The test for me, at least, is deciding whether these guidelines and this draft is doable or workable or a plus. It seems to me the test basically is what Commissioner Robinson was just talking about with Phyllis Bamberger: Take the guidelines and compare the guidelines to existing law.

Critics of these guidelines should focus not only on what is wrong with these guidelines but what is wrong with the way we go about sentencing criminals today in the federal system. Much of the criticism that I see directed at this effort and these guidelines could be compounded and multiplied and directed at the existing criminal justice system with its mysteries and its darkness. I think that insofar as this Commission is working towards bringing some candor and sunlight to the criminal justice sentencing process, subject to the caveats I have expressed of my concerns, and we can get into this another time at greater detail because of the time, I think the Commission is to be commended and I urge it to go forward in dealing with some of the problems that have been addressed, so we can meet the Congressional deadline with a product that is better, on balance, than what we have today.

THE CHAIRMAN: Thank you very much, Mr.

they want in that haven't been put in. That is, all these details are important to somebody.

More than that, I see the details as helping judges in the sense of saying that here are the things to think about, if you haven't always thought about these. Even experienced judges may get something out of that book. Of course, if you are talking about having a better sentencing system five or ten years down the road, you have the details out there so people can argue about it. Is this a good factor to have or not? Is that a good value? I guess what I was thinking about and what you were talking about is, is there some way to compromise, to get more of the advantages without the disadvantages?

One of the things that strikes me might be useful is your suggestion for a sliding scale. Let's assume that, for example, on the continuum of personal injury, where you might have, say, eight categories or more, and each one has some particular criteria and each one has a point value assigned, I suppose one approach might be to say, keep the detail, keep as much articulation of each one of those categories as possible; in other words, give the judge as much guidance as possible about what the continuum looks

like and where the point score falls, but make it all discretionary. That is, say, "Judge, if you have personal injury involved, you pick from 10 to 400 harm value. You pick. Here is a nonbinding spectrum with a lot of detail in it." I think you can use that for all sources, whether you are talking about the culpability level, whether you are talking about loss of free will because of insanity, or cooperation, or something else. You can have scales for literally everything. It seems to me that solves a lot of the problems of the judges we had in here this morning, you need discretion, you can't quantify, and so on.

Here is my problem. Congress has given us this mandate of having a 25 percent range. I think it is correct, it is not a technical violation of the statute, if we put in all these sliding scales. But, of course, it makes something of a joke of their request for having a narrow range, because what they wanted was for particular class of offenders to have a specific or very narrow range. Of course, by giving the judge the sliding scale, in a sense he can slide; now he has five sliding scales, he can come out really wherever he wants to; and at the end we say, "Oh, but at the end you have to stay within 25 percent." He

says, "Oh, sure, I will stay within the 25 percent because I have already made all my adjustments earlier on." He doesn't need that 25 percent any more. On the one hand, that sort of compromise seems terribly attractive to me and would answer a lot of what we have heard today; but, on the other hand, is that consistent with what Congress wanted out of us?

MR. FEINBERG: No, Congress certainly, I don't think, cares one way or the other in its legislation as to the efficacy of a sliding scale. I think that you, Paul Robinson, raise some very good points when you talk about the downside to eliminating harm values and detail. I have two responses, I guess, to that. I believe that over a relatively short period of time -- three, four, five years -- you will be vindicated in terms of your view that there has to be more detail and less discretion. I think that that view probably over a relatively short period of time will be demonstrated.

I guess what I say to you is twofold. I say first, statistically today on the basis of nonexistent data, which we don't even have yet in the Commission, I think that too much detail is probably overkill. I mean, how serious is the disparity that Congress sought

to address that it would call for the type of detail that you favor and that I think I will probably favor once we see how the system is going to work over a relatively short period of time?

The second is a political point. I don't think it helps the Commission all that much to send up a detailed harm value document to the Congress if it isn't going to fly. My view is that, contrary to the discussions of ideological position in the Congress as to whether the guidelines are tougher or softer on crimes, I don't think that is the danger that the Commission faces in its guidelines. The real danger the Commission confronts is that we send up something that is methodologically viewed as unsound and not credible. If the federal judiciary and the prosecutors and Phyllis Bamberger and everyone else comes in and to a man or a woman or a person says, "We're better off with the existing system because this is too complicated and it is going too far too fast," I think that will be a terrible mistake and a lost opportunity.

I guess what I am saying is, let's go slow, let's not try and do everything at once, let's see if we can sell an initial set of guidelines that will

retain judicial discretion, let us monitor those guidelines, and let us see if over a short period of time it may or may not be necessary, with the data, to provide more and more restriction in the way of detail. My suggestion is, I think I am with you, but not at this time.

THE CHAIRMAN: Judge MacKinnon?

COMMISSIONER MacKINNON: What was the reason for the New York failure?

MR. FEINBERG: Oh, welcome to the club. I mean, I can give you --

COMMISSIONER MacKINNON: I think we ought to have it on the record.

MR. FEINBERG: I believe the main problem with the failure is a problem that this Commission never is going to have to deal with. I think that what happened in New York is commissioners were appointed with an understanding that each commissioner would represent a particular component of the criminal justice system and that each commissioner would have as a function making sure that whatever comes out of that Commission protects the turf of individual components of that system, whether it be district attorneys or wardens or judges or police or what have you. I think

that the Commission was not a collegial working Commission. I think everyone got on very well, but the problem was one of other agendas. I don't think that this Commission, as far as I can tell, has other agendas. I think this Commission is determined to try and put out the very best product it can.

The second problem, Judge, that I think was a terrible substantive dilemma is one that is a substantive dilemma for this Commission: The research and the statistical data necessary to promulgate credible guidelines were never available. And I don't think it is available yet to this Commission. In two days it will be, I guess, and then all the problems will be solved.

COMMISSIONER MacKINNON: My second question was one I had written down originally about the concern of Congress for disparity, and you, just in answering Professor Robinson, articulated it also, when you said: How serious is the disparity that Congress sought to address? Now, tell us just exactly, from your position in that particular situation in Congress, how wide was the disparity that you think that they sought to address, recognizing that there are 435 members that had to be considered.

MR. FEINBERG: Congress had, as part of its hearing record, evidence in the hearings --

COMMISSIONER MacKINNON: We got all that.

MR. FEINBERG: That's right. -- that sentencing disparity was a problem. I think what Congress felt the problem was was not that everyday day-in-and-day-out sentence. I think Congress saw aberrations at the high end and at the low end. That was the first problem that it sought to address: the occasional, but well publicized albeit, sentence that was out of the ordinary, high or low.

The second problem that Congress sought to address -- and this was addressed in the legislation creating the Commission -- was the division of sentencing authority between courts and parole boards. It was of paramount importance to the Congress, it seems to me, to consolidate the sentencing authority in the person who has the role, the federal sentencing judge, and that the legislation did I think in one swoop.

COMMISSIONER MacKINNON: Then would you say that they were aiming primarily at wide disparity?

MR. FEINBERG: That's correct.

COMMISSIONER MacKINNON: Is that a correct

characterization?

MR. FEINBERG: I think that's fair. What is wide disparity is open to debate.

COMMISSIONER MacKINNON: Yes.

MR. FEINBERG: But I do not believe that the Congress was concerned about every single bank robbery or every single kidnapping or every single income tax evasion. It was the sense that something ought to be done to minimize the likelihood of aberration.

COMMISSIONER MacKINNON: Of great disparity.

MR. FEINBERG: Of great disparity or aberration. That is why it is presumptive rather than mandatory.

THE CHAIRMAN: Thank you very much, Mr. Feinberg.

MR. FEINBERG: Thank you.

(The witness was excused.)

THE CHAIRMAN: The next witness, and our last witness before we break for lunch, is Mr. Henry Howard. Mr. Howard, we are delighted to have you with us.

Mr. Henry Howard. Apparently he is not here.

We will adjourn this until the afternoon.

We will take a recess at this time and we will start promptly at 2 o'clock sharp.

(At 1:30 p.m., a luncheon recess was taken.)

AFTERNOON SESSION

2:10 p.m.

THE CHAIRMAN: Our next witness this afternoon session is Mr. Michael Smith. He is Executive Director of the Vera Institute of Justice.

Mr. Smith, we are delighted to have you with us.

MR. MICHAEL SMITH: Thank you very much. I am delighted to be here, delighted to see this at last and have an opportunity to read it. I hope I am going to have an opportunity to comment on it, although I wish I had been a fly on the wall during some of your deliberations, because the document itself seems to me to be frustrating to a reader, as I am not able to discern from it some of the thinking that interests me the most. So I have made a few notes that I will run through rather quickly. If there is anything that is on my mind that is on your minds, then perhaps we could talk further about it. Otherwise, my job, it seems to me, is to send you guys back to work. I gather you have had a lot of testimony already that suggest lines of inquiry for you.

The particular lack I felt at this stage, though I am sure we will have it soon, is that without

any of the products of your in-house research described at the very beginning, it is very difficult, for me anyway, coming from the experience of the New York Sentencing Guidelines Commission, to test against the data the most interesting of your hypotheses. The idea, which is very attractive to me, of the modified pure offense sentencing and the subsequent multipliers and additives, and so forth, is exciting. It is a way of conceptualizing the sentencing process that then makes it amenable to the form of guidelines you provided.

But to me the real question becomes whether or not and to what extent that fits with the reality of the sentencing decision-making. Obviously, only one way to attack that question is to look at the empirical data and find out what kind of fit there is. But, without it, I should think you would have some anxiety about the extent to which, when you finish with your in-house research, you have got a fit. Without that fit, it seems to me you are, by the powerful logic of the guideline development you have shown, in a bind, because you have explained why it is that sentences ought to be done this way, and you have lost your anchor with past practice and the regulation of it.

I don't know myself. I have no idea whether

you will find the fit. But it seems terribly important to look for it and, if you find partial fits, to figure out how to adjust necessary guidelines to fit where they do, and so forth.

Similarly, I just wasn't able to discern what your thoughts are on questions of departure. Those questions, in my mind, range all the way from questions like whether or not one can, given the statements made here about the purposes of sentence, depart for purposes of rehabilitation, for example. Although we don't have a formal distinction between the various purposes of sentencing, the commentary makes it fairly clear that the preferred purpose of sentencing is public protection. I don't know what that means when translated into guidance for departure or for appellate review of decisions -- interesting questions in my mind, very difficult ones in a guidelines context.

In the same vein, the precision that one gets from the rather nice roadmapping of the modified real offense sentencing seems to me, although it is hard to know without applying them to specific cases, to be abandoned to some extent when you get to the multiple parts of your guideline system. That may just be because it looks that way and that when you actually

apply those multiples to the numbers that you get in real cases from the offense scores that it won't be so, but it looks to me a bit as if that is going to be much less precise, if you like, than the offense values that are associated with the modified real offense sentencing. If so --

COMMISSIONER BREYER: You mean in Chapter 3, multiples?

MR. SMITH: Yes. If so, it strikes me that that is worth tightening up an awful lot, because you have gone quite some distance on the modified real offense scoring device.

Also in that area, I assume from the comments in the document that the difficulties of determining real offense will be the subject of stipulation between the parties; that in a sense we need that in order to limit the number of factual disputes that arise when we go to modified real offense sentencing. But when I look at that without guidance there, it seems to me you run into some problems. The analysis of why conviction offense sentencing presents a shift of power to prosecutors is persuasive, in my view, but the modified real offense sentencing strikes me as a distinction without a difference, because I

assume that the stipulation of facts will substantially limit any third-party intervention, from the bench for example, to determine what in the majority of cases were the facts and therefore what the offense value is. I don't know the way around that. It seems to me you are probably stuck with that. And I haven't myself developed any notions about how to guide that process.

COMMISSIONER BREYER: Look at the differences. The problem with charge offense bargaining is, imagine that the defense attorney and the prosecutor don't agree, the prosecutor still can control --

MR. SMITH: I am sorry, I can't quite hear you.

COMMISSIONER BREYER: If the prosecutor and the defense attorney don't agree and you have a charge offense system, the prosecutor can control the sentence by himself, unilaterally determine what to charge. The difference is that once you have a modified real offense you have two checks. One is even on your assumption that you are going to allow bargaining over the elements of it, you still have two people, the defense attorney and the prosecutor, who happen to agree on those elements. The second thing is, it is

subject to the control of the judge. That is a question of how you write in the rule of --

MR. SMITH: I know you called for comment on that. I am not proficient in that area, but when I look at it, that seems to me to be an absolutely crucial piece.

COMMISSIONER BREYER: But you see that difference?

MR. SMITH: I do see the difference. It should go to eliminating disparities rather than protecting us against prosecutors.

The thoughts I have that to some extent I have already shared in a different form to a number of staff are, on this subject of the noncustodial penalties, that again without the in-house research I have no idea what kinds of cases or how many fall into the categories 0 to 14 on the offense spectrum. I don't know what the play is in the system then. But as a matter of principle it seems to me that at that point this document has put us all into a bind. I don't think, myself, that a society is wise that leaves the judiciary only one choice at the time of sentence, I mean, either imprison or not. In short, either punish or not, incapacitate or not.

I know that is not what is in the minds of the Commissioners who are responsible for the document. But it seems to me that it is very powerfully suggested by the way the text develops and the way the thing is laid out.

It looks to me as if the provisions for other than imprisonment sentences, to the extent that I could pick up the meaning, are principally, in operational terms, add-on sentences of imprisonment in cases that matter.

I think that's too bad. I think that's too bad because I think that the state of development of alternative sanctions generally is impoverished in this country and that we need to create a market for the development of better, more effective alternatives. More effective toward what purpose? Toward the purpose of sentencing.

There is another kind of problem here. The sentencing units, to the extent we get to them, are to an extent divorced from the purposes of sentencing. They invite a kind of translation table as provided in terms of imprisonment. And imprisonment has a kind of handy apparent uniformity to it, fungible kinds of things, units of imprisonment. Not so easy to do this

with the alternatives. It is challenging intellectually and very challenging operationally. But that is the challenge, it seems to me, that we want to face in this society. That is the challenge which, if met, then provides a number of responses, whether the purpose be punitive or incapacitative or retributive. I guess when I put it that way I felt very disappointed on that score.

One of the things I would have done, it seems to me, is suggested by your questions. For myself, I think it would be a mistake because I think it would reduce the importance of it to suggest that after having picked the proper term of imprisonment, that is, the proper punishment to be associated with the sanction unit, then you can use the rest of the scale for an alternative properly weighted. That, I think, reduces the importance of the alternative to much too low a priority. I much prefer the approach suggested, on the other hand, of permitting the total sanction unit values to be made up of some combination of sanctions. That, I think, does require to some extent -- but I don't think it needs to be done with the precision or the apparent precision of the imprisonment scale -- the scaling of the alternatives

to the sanction units. I find that difficult without being able to attach purposes to the sanction units, because I think the variations possible within probationary sentences generally to be very much greater than we know them to be now, and that in order to develop them properly they have to be associated with purposes rather than sanction units. Thus, at that point in the development of the scheme, I am disappointed because it seems to me not to lend itself very well to what I think to be necessary in the forward development of our sentencing alternatives.

COMMISSIONER BREYER: Can I interject this. I want to focus your attention on this. To a degree we can do that, and it takes place within the 0 to 14 range which blurs the in-out decision. The in-out decision is nicely blurred because on anything under six months it is going to be up to the judge. So the alternative is all right there. We are pretty certain we can do that because of our statute which says you can have a six-month gap or 25 percent. But what we can't figure out quite is whether we have the statutory authority to give these alternatives between prison and the other things.

MR. SMITH: Statutory authority.

COMMISSIONER BREYER: Yes, statutory authority for what we are talking about, something other than within that six-month period. As I read the statute, it is pretty hard to see it in the statute.

MR. SMITH: That is a terrible dilemma. Not having the problems you guys had, I didn't study the statute that carefully.

COMMISSIONER BREYER: Maybe if I focus your attention on it you can figure it out.

MR. SMITH: It is a terrible dilemma, it seems to me, and it leads me, I am afraid, then, if I understand it -- and I may not -- to the need, if you wish to be part of the proper development of a set of sanctions that can be used for the various purposes of sentencing across the band of cases, to set your mandatory imprisonment term higher, thereby incurring the political wrath of those who feel that anything that is worth punishing has to be in prison. I mean, the equivalent between imprisonment as punishment and imprisonment as incapacitation, which I take it is buried in the statute as well as the guidelines, is a terrible stop to any creative thinking to how otherwise to accomplish the purpose of sentencing.

COMMISSIONER BREYER: It is that 25 percent

range. It says the maximum can't be more than 25 percent greater than the minimum. You can look at the statute.

MR. SMITH: For example, the question that came up in New York, and we wouldn't have a statute that resolved it, was whether you can have a departure not for reasons related to the offender or the offense, if you like, but for reasons related to the availability of an appropriate means of accomplishing the sentencing purpose. Absent such a provision for departure, judges can't be involved, as they must be, in my view, in the creation of appropriate enforced punitive, incapacitative and retributive sanctions. With such a departure, judges can work with the better of our probation departments to create them where they do not now exist, which is pretty much everywhere. Not that there weren't pieces to be put together but a great deal more work has to be done there.

If the guidelines themselves don't do it, if the statute seems to assume it can't be done, which is a terrible shame, then it seems to me it is your job to find a creative way to create that force within the guidelines. One way would be, when you get to your departure criteria, say, look, if you can find a

probation officer who is prepared to do the kinds of things that one could talk about in individual cases, then fine, satisfy the sanction units that way. Indeed, I suppose if it is a departure matter it is going to save you some of the difficulties -- and I think they are very great -- of scaling the alternative punishments in the kind of way you can scale the imprisonment ones. But to take away altogether the force for creative development of alternative punishments, I think to be a mistake, not only to the federal sentencing system but to the development of appropriate ways of incapacitating, punishing, and exercising retributive justice that we need.

Those were, I suppose, my thoughts.

THE CHAIRMAN: Thank you very much, Mr. Smith. Your thoughts are well taken. As Judge Breyer suggested, perhaps you could study the statute under which we work.

MR. SMITH: That probably would be a good idea.

THE CHAIRMAN: Not that you haven't read it, but with a view toward figuring out how we can accomplish what you have suggested within the statutory constraints.

MR. SMITH: Fine.

THE CHAIRMAN: Thank you. Any questions or comments from the Commission?

Thank you very much, Mr. Smith.

(The witness was excused.)

THE CHAIRMAN: We are pleased to have with us Jon Newman, Judge of the Circuit Court of Appeals of the Second Circuit, and Harold Tyler, an attorney practicing here in New York, formerly United States District Judge and Deputy Attorney General. Judge Newman, Judge Tyler, if you will come around.

COMMISSIONER BREYER: While you are sitting down, I would just like to say I am glad to be down here from the First Circuit, and I would like to point out to you judges in the Second Circuit that this morning in Boston -- and this is a particular hardship that all of us who are from Boston have this morning -- the sun is shining more brightly and the sky is bluer and the birds are singing and the Red Sox are winning the World Series. (Laughter)

JUDGE JON NEWMAN: It is certainly a result appreciated by those of us from Hartford, Judge.

I take it you want to hear briefly from each of us.

THE CHAIRMAN: I think it would be good if we could hear both opening statements and then let us question both of you together.

JUDGE NEWMAN: Mr. Chairman, I have prepared a statement, which I have submitted to the Commission, I have a copy here for you, so I don't intend to read that. I do want to make two or three points highlighting that statement.

Preliminarily I want to make it clear that in conforming with the Judicial Conference suggestion that a judge be designated from each circuit and each district court to be in touch with the Commission -- and I have been so designated by Chief Judge Feinberg -- I am not today endeavoring to report to you in any sense the views of our court. They have not had at all an adequate opportunity to react to the document you have submitted. So that this statement of mine is entirely an expression of my own views and not in any sense representative of the court. It may be that between now and your December 3 deadline we will be able to furnish you, if a consensus emerges, with the nature of that consensus on some or perhaps several issues, but at the moment my views are only for myself.

I want to put before you essentially three

suggestions in addition to the several comments that are in the statement itself. They all arise from my fundamental criticism of the degree to which the Commission has followed its philosophy. It seems to me the underlying philosophy you have acted upon is a principle of sentencing that elevates retribution to the primary objective. You have said that for every single aspect of harm a person does, he shall pay a price. I have some trouble with that as a moral principle, but I don't propose to debate that with you. But, having adopted that policy to the extent you have, you have created for yourselves -- and I am afraid if you don't adjust it you have created for the federal judiciary -- a system that is, if not unworkable, at least so cumbersome that it will precipitate hundreds, indeed thousands, of hearings in the district courts in the course of the sentencing process, many of which will not significantly contribute to a better or even a sterner system of justice. And there will arise from those countless hearings hundreds and perhaps thousands of appeals which will clog the appellate courts, which also will not contribute to a better or more just or even necessarily more rigorous system of sentencing.

I think the complexity of your system is a

product of the philosophy you have adopted. If everything counts, then there must be a determination of whether each of those things happen. And the sentencing process, I think, is already complicated enough and subtle enough without imposing upon 800 federal district judges the need to determine, up or down, whether every aspect of quantifiable harm occurred.

So the three basic suggestions I would make to you are these:

First, I think you should review many of the specific items that now need to be quantified under your proposal and inject into the system considerable leeway for the sentencing judge either to disregard the factor entirely or at least to apply a variable scale in pricing the add-on of that factor, thereby eliminating many of the rare for identification distinctions you now have.

Just to illustrate the point, you price psychological injury, but you price it in degrees. If there is extreme psychological injury, I think it is 48 points. If there is only moderate or significant, it gets 24 points. I can imagine a very elaborate hearing to determine whether or not the psychological injury

was significant or extreme, but if the person is going to get eight or nine years for armed robbery, I don't think it is worth the time of the District Court, the time of the whole system, in order to add one more year because of that fine gradation between significant psychological injury and extreme psychological injury. And there are many examples throughout that I could give you.

So my first suggestion is, you review these quantifications and see if you could either give the district judge a range to quantify them, which would eliminate the precise gradations, or give him or her, perhaps under some outer-limit guidelines, discretion to disregard the factor entirely. And I say that not holding any brief that the district judges must have their existing discretion preserved. I happen to think they ought not to have their existing discretion preserved, and I thought so when I was a sentencing judge. So this is not recent religion with me. But even with limits on their discretion, I would hate to see a system so rigid that they are propelled into one of two evil alternatives: the one being countless hearings in order to determine what happened; the other extreme being capitulating to a fact stipulation

submitted by the U.S. Attorney and the defense lawyer, which I am afraid will in many cases be dictated by the U.S. Attorney, who can say, "I'm going to demand these facts unless you plead guilty to the certain charge. If you go to trial, then I am going to demand all these at the end. If you plead, I will let you plead to a lesser fact stipulation." That is enormous power to put in the hands of a prosecutor. It recalls the days when we had, just in the narcotics area, a mandatory five-year sentence and a zero to five-year sentence and the prosecutor could charge either one and his power was enormous. Congress itself got away from that. You have, I am afraid, reintroduced that power by saying to the Court either get a fact stipulation from the prosecutor or hold a hearing to see if everything can be priced. So I would first inject the leeway at the District Court level.

The second thing I would do, at least for the first year in which this system is in operation, is inject leeway at the appellate level. I think no matter how you ease the present rigidity of these, you can surely predict that there will be indeed hundreds of errors made in the computation of the scores. Just as the Speedy Trial Act had a transition year in which

its deadlines were in place but the sanctions for violation could be disregarded for the first year or so of that statute, I think you ought to recommend to Congress -- it would probably take a statute -- to allow sentences to be in place notwithstanding some minor discrepancy in the calculation.

To some people that is going to be very unpalatable, because everything is now so visible that one is going to say, "But look, if you had only calculated this right, the sentence would have been three months less. How can you overlook a three-month add-on that should not be there?" It seems to me you can do that for this reason: Every day today people are sentenced and they get three months more than than in the next courtroom, indeed sometimes three years and sometimes six years, and every appellate court says, "We're sorry, we can't do anything about it." So the fact that a minor discrepancy in calculation could be overlooked is not at all injecting unfairness into the system as we now know it. Indeed, you will have constricted the outrageous cases. And you could easily put limits on the appellate court power, or you could suggest to the Congress to do that, that a discrepancy is only tolerable up to a certain point, or it could be

in terms of the relationship of the sentence given to the maximum allowable. There are lots of formulas you could use, and there will be plenty of time to try to work those out, but I just want to inject the proposal that appellate courts be given leeway, just as district courts would be given leeway, to tolerate discrepancy at least during the first year of this system. Otherwise I foresee hundreds, if not thousands, of remands for hearings over admitted misapplications but misapplications that really ought not to matter very much.

The third thing I suggest to you is that before these go into effect and however you refine them in the period between now and April, you work out an elaborate field-testing system. I understand your own staff proposes to try to do that by looking at presentence reports and calculating the scores. But I suggest to you that while it is a useful step, it is an inadequate step to flush out all the problems that these guidelines are going to present. You have to see the system in the adversary process, not as a staff person simply looking to see, can he make the quantification. Yes, he'll make it, he'll come out with 132 points and he'll do it. The question is,

given a presentence report, what will a prosecuting attorney demand, what will a defense attorney resist, and which problems will be submitted to the trial judge for resolution and which ones won't?

You can't have game playing in the real world with real lives, but you can set up an extensive field test, assigning people the role of prosecutor, the role of defense counsel, the role of judge. I would think many attorneys in the Justice Department and the Public Defenders Office in D.C. would be quite willing to subject this to a rigorous sort of dry-run field test, so that you will see how the adversary process will react to this, not how your staff will react to it simply making their isolated decision.

I don't want to preempt my colleague. I think I will let it go at that. There are many other comments I put in the statement and I hope to be in touch with you further on many others. Of course, I haven't said a word about the fundamental other issue of severity or leniency, because I think, for me at least, the first issue is your methodology. It is a wholly other question whether, whatever your methodology is, you are too severe or too lenient or a little of each. That is a wholly separate problem.

THE CHAIRMAN: Thank you very much, Judge.

Judge Tyler.

MR. HAROLD TYLER: Mr. Chairman and members: As you are aware, I have written some of my broad concerns to the Commission through the Chairman in September. Since they are thus, I assume, known to you and they do indeed echo views expressed by Judge Newman, also in early September in his letter of September 3, I will not repeat that.

Let me take up, if I may, three issues which I think can be addressed very briefly and indeed I am sure that already this morning they may have been talked to.

First of all, one of the items which is very obvious from the current draft, and indeed is specifically a subject in which the Commission asked for comment, is the matter of fines. At the beginning of Chapter 6 there is a discussion of fines, although of course there is no attempt to lay down any guidelines for usage thereof. As a former sentencing judge under preexisting, that is, pre-1984, law, I am a little troubled by what is said at one point in that discussion.

As you recall, the Commission notes in this

draft that by its actions in 1984 the Congress quite evidently hoped by increasing the maximum of fines that there would be more usage by the sentencing judges of fines as one of the alternative forms of punishment. The Commission then goes on to say in this draft something, however, that I do not think, at least from my experience, and I am bold enough to suggest that most of my colleagues, so far as I know, of those days didn't have the view expressed here at all, and that is that the Commission expects that because the fines have been increased there will be increasing usage by United States sentencing judges of fines. I find that very troublesome because even in this court and in this room, where parenthetically I imposed most of my sentences over my thirteen years as a sentencing judge, I found that use of fines was very, very limited, not because the fines were low but because most federal offenders, in my opinion, except in very, very specific and exceptional categories of federal criminal conduct, do not have the wherewithal to pay the fines. Not only that, the offenders are usually not the type who will be deterred in any sensible fashion by having a fine imposed upon him or her. Finally, of course, as the Commission is well aware and so is Congress, there are

many instances where to impose the fine upon a federal offender really ends up penalizing dependents, for whom there is no showing that they participated in any direct sense in the criminal conduct of that person who had been in one way or another responsible for at least some of their support.

I would urge, therefore, that the Commission, as I am sure it will do in rethinking fines, inquire further as to whether or not it really is true that fines were not used so much prior to 1984 on some ground that the maximum fines were lower then. I don't believe so.

Furthermore, and more positively, I argue that there are very, very few, comparatively, federal criminal offenders for whom a serious fine makes any real sense. Fortunately I believe that they do exist. People who commit financial crimes, such as tax evasion, securities law violations, are very frequently greedy and this is one of the motivations for their criminal conduct. Those people, it seems to me, quite clearly are deterred by the imposition of fines.

Finally, on the subject of fines, I see no particularly clear basis on which any person reading the present guidelines can understand where and how

fines will be used in any event after you get beyond the 0 to 14 classification in that section of page 140 that lists the way in which you total up sanction points.

I recognize that that is something the Commission has frankly said they aren't ready to get into, but I would hope that two things happen: one, that it will not be assumed that fines are going to be easily and better imposed now because the fines are higher since 1984; two, that it is going to be at all helpful under the present draft for any judge to understand how he can use fines in any way, either as a supplement to a prison term, a supplement to a probation term, a supplement to a community-service-type disposition, and that in some way the Commission has to make an adjustment of points and give the judges alternative flexibility to, in appropriate cases, determine where they can use fines, either solely or in keeping with other sentence disposition.

Let me turn to the second point, and I am sure this one has been raised before -- indeed, my colleague, Judge Newman, has raised it at least in the month of September and presumably maybe now in his proposed written statement -- and that is the use of

multipliers in terms of totaling up sanction units. As Judge Newman has put it even today and, as I recall, in an earlier letter dated September 3, there is not only some question about the moral underpinning and support for this approach, but I would even argue whether or not there is any practical underpinning for using a multiplier as opposed to a device whereby the Commission simply gives a range within which judges can consider certain factors and apply them either in mitigation or enhancement of a sentence. But the idea of a multiplier with these precise and multitudinous sanction approaches for basic offenses seems to me to create the possibility of manifest unfairness where the Commission and the Congress would not intend it and certainly, from the point of view of the sentencing judges, it is very likely -- not in every case, to be sure -- that manifest unfairness which is not contemplated by anybody would be mandated by the use of multipliers.

Finally, I want to raise the third point, which really, as I understood it, came up in the dialogue between particularly Judge Breyer and Mr. Smith of Vera a few moments ago, and indeed has been addressed to some extent by Judge Newman, and that is

this: It has been said by Judge Newman and, as I understood it, Mr. Smith that under the current draft there is going to be power conferred, wittingly or unwittingly, upon counsel to control sentences. Judge Breyer, I have no desire to suggest to you that the Red Sox are going to win four straight. Similarly, I have no desire to say to you that your point is irrelevant when you argue that here we are dealing with a modified real offense approach as compared to a charge approach. But I believe that even with that distinction, which I accept as far as it goes, it is still true that prosecutors are going to have a good deal of control over what happens in sentencing.

You, I believe, point out, and I assume fairly and correctly, that there should be some discretion to judges to review what comes up. I am frank to say I don't read anything here -- I may be remiss -- now to see how that should be controlled. I assume and I hope that the Commission will approach that with some latitude and discretion to sentencing judges to say, "Listen, I'm not going to accept that even though you have stipulated to this state of facts," having obviously in mind these guidelines and how that will come out. So I would underscore and echo the

dialogue which you had with Mr. Smith.

Now, with the connivance of one of your counsel, David Tevelin, I have promised to send in my written comments. I thank you for your leeway in that sense, and I will do this within a week. Thank you very much.

THE CHAIRMAN: Thank you very much, Judge. We appreciate your comments.

The concept of Judge Newman of a range, which you have talked with the Commission about before, has great appeal, and I would encourage you to continue thinking along those lines, because it may be one practical way that we can build in discretion, which I think all of us agree is much needed. A range, however -- take psychological harm -- of 6 to 18, for example, depending on the degree of harm, of course would necessitate a hearing, would it not?

JUDGE NEWMAN: Well, you have come to my fallback position. My first position is that the sentencing judge should have discretion to disregard certain factors entirely. If you don't want to give him that authority in general, then there could be some sort of formula that says when the point value is at least X, or when the sentence without regard to a

factor is at least Y percent of the maximum, or there are other ways of determining the point at which a judge ought to be allowed to disregard a factor, so that he couldn't just disregard everything, but under some constraint you could develop a formula that said that once that point has been reached, the psychological harm factor, just to use it as an example, can be disregarded entirely. If you don't want to go that far, then at least have the range of point values -- and I agree with Judge Tyler that I would rather see point values than multipliers -- that at least avoids the fine gradations between extreme and significant harm or, in your bodily injury, between impairment of two bodily functions versus impairment of one bodily function. I can't imagine a poorer use of the time of district judges than to hold a hearing on how many bodily functions have been incapacitated. The person is going to go to jail a long time for the shooting. He doesn't need to get an extra X months because it is more than one bodily function.

So I think you could do it either by giving leeway, not unlimited, but leeway for those sentences that fell within whatever limits you want to disregard the factor entirely or, if you won't go that far, at

least to avoid the fine gradations within the calculation of the significance of the factors.

THE CHAIRMAN: And just provide a range, for bodily injury, for example.

JUDGE NEWMAN: Right. Or for example on the other side -- and this to echo Judge Tyler's point about the prosecutor's power because it covers both -- your guideline proposal now says that when the U.S. Attorney says that there has been a requisite degree of assistance to the government, you have three classifications of cooperation and there shall be a discount in multipliers by, I think, 6, 7 and 8. What you have said, by doing that, is that the prosecutor -- not the judge -- the prosecutor can by his own decision decree that whatever sentence the judge would otherwise give shall be reduced 40 percent. That is an enormous club to put in the hand of a prosecutor. I would much rather you, first, take the club out of the prosecutor's hand, and, secondly, have a sliding scale which simply says: The sentencing judge may give a discount, as you do in some factors where you have an up to 20 percent discount for some other factor. I would have thought it is more vital to do that with respect to the U.S. Attorney's judgment about

cooperation, which as I say can be a club, and simply say the sentencing judge may discount up to either X percent or up to Y points, depending upon the degree of cooperation as reported by the U.S. Attorney. That lets the factor be counted but it doesn't let the prosecutor dictate the degree of reduction.

THE CHAIRMAN: Any other questions from the Commission?

COMMISSIONER MacKINNON: If the result of these guidelines, or the guidelines that are eventually adopted, does not result in all the court trials that you have anticipated, would you still oppose the underlying basis?

JUDGE NEWMAN: If I was assured there wouldn't be all the hearings, nor in order to accomplish the hearings the delegation of sentencing power to prosecutors, if I was assured neither one would happen, then I would have far less hesitancy about your methodology. Then I would focus solely on your numerical values, whether in some cases it is too high, in some it is too low, and I think in some it is a little of both. But as far as methodology --

COMMISSIONER MacKINNON: Those aren't final.

JUDGE NEWMAN: I understand that. But I say,

I would then turn to the issue of severity. But, sure, my concern with your methodology is because I fear either many hearings or delegation to prosecutors or a lot of both.

COMMISSIONER MacKINNON: We can work both of those out, Judge.

JUDGE NEWMAN: I hope you can. I think you can go a long way toward working those out. But the reason I suggest your sort of mock field testing is that I think neither you nor I will think it is as good as you think or as bad as I fear until we see some people at least playing the adversary role trying to see what would happen. That is the only way we will know. My fears may be groundless. I hope a demonstration would prove they are. But I fear that they are not groundless, and you ought to find out before you tell 800 district judges, go do it tomorrow.

COMMISSIONER MacKINNON: Obviously, there are going to be a number of trials to begin with, but the question is whether they would persist.

JUDGE NEWMAN: Oh, I don't think these are problems that would work themselves out. There may be a few issues of interpretation that would work themselves out at the appellate level. But if you took

this document and put it into practice tomorrow, you would still have to determine the degree of psychological injury, the degree of physical injury, the precise dollar amounts. You have taken your scale down from about 80 steps to 12, but it still requires an awful lot of determination of precise dollar amounts; it requires determination in every tax case, how much income came from illegal sources. That could be a four-week trial in itself. The fact that one appellate court makes a ruling in one case doesn't mean they have done anything to obviate the trial in the next forty cases. So I would not have much confidence that these problems will work themselves out in the course of appellate rulings. It has been my experience that the more appellate rulings you get, the more hearings you get in trial courts.

THE CHAIRMAN: Any other questions?

COMMISSIONER BLOCK: Judge Tyler, I want to ask a question on fines. You mentioned you didn't think that a limit on the size of the fines was a very important reason for their not being used in the past?

JUDGE TYLER: Yes.

COMMISSIONER BLOCK: I wanted to follow with a specific inquiry: In the area where you think fines

are useful, as in the area of financial crimes, tax evasion, antitrust, securities, does that same reasoning hold?

MR. TYLER: Yes. I think there, Mr. Block, that those are areas where I believe that most offenders were men and women who really did not like to have their money taken away from them, and that therefore I always assumed in most of those cases that a good heavy fine was really quite successful, both as a deterrent, general and special, and a retributive-type sentence.

Where I have trouble with what appears in the language in the first part of Article 6 of the present draft is the suggestion that because Congress raised the fines, it follows from that that there will be more use of fines from now on. I can't believe that because most federal offenders don't commit massive security frauds or are not guilty of massive tax evasion or things of that kind.

All I am suggesting, gently but firmly, is that the Commission might consider recognizing this in laying down standards or guidelines for use of fines at all, and if so, to what extent in exchange for certain sanction points, and recognize that for most federal

offenders they are not really successful criminals, they just really aren't, and that I hate to think of anything being prepared that would suggest that judges are going to have a great deal more usage of fines now because Congress has increased the maximum. That's all.

COMMISSIONER BLOCK: Thank you.

THE CHAIRMAN: Any other questions?

COMMISSIONER BREYER: I am sure some of this you won't have reaction to now and others you might, but first you realize that this draft which you have seen is, from my point of view, a big improvement over the draft that you saw in August.

MR. TYLER: Right.

COMMISSIONER BREYER: And the problem throughout has been dealing with what I call the problems of administrability and necessary flexibility. That is really what you are addressing yourselves to right now. As I tend to categorize it, I think I see three general approaches which are exemplified. You can introduce administrative and necessary flexibility by encouraging plea bargaining; you can do it by building scales, etc., into the guidelines; and you can do it by encouraging departures from the guidelines. That seems to me to cover the waterfront.

On the plea bargaining Judge Newman is concerned because of the prosecutorial power that it implies. Therefore, there are ways people have suggested -- this is what I want you to think about -- to cabin that power. As I group that, I can group that into three categories. There are those who use procedural approaches such as allowing the judge or the victim or some other interested person to ask the head of the Criminal Division to certify that this particular plea bargain is within national guidelines, that is, to prevent the maverick prosecutor from going off on his own. There is that kind of solution. There is a solution where we would say there are certain things you can't take into account in your plea bargaining, and we would list them. Then there are certain things that have been suggested today, for example: prosecutor, or judge, you must write why you have a case calling for a sentence where the plea bargain is different from the guideline. Those are three. I mention those because there may be four, five and six that you can think of. I say that just to stimulate your thinking while we are on the problem of cabining the discretion of the prosecutor.

The other thing you might have a reaction to

is, let's go back to your preferred approach, the preferred approach being to build discretion into the guideline. And there one thing worries me and I wonder what your answer is. One that worries me is this: A person has committed a drug crime. There is physical injury caused. What do we say in the guideline? If we say, add on for physical injury -- Judge, it is up to you as to how much you add on, depending on how serious the physical injury -- I then remember that physical injuries can range from a flick of something on your finger to death. From that point I have built an awful lot of discretion into that drug guideline if at the same time I give the judge the power to go from 0 to 400. So if I figure out a way to make that a little bit more specific, I know and you know that there are other people, not necessarily in this room today, who will say that what you have done is undermined the whole notion of guidelines because you have given the judge the power, either inside or outside, to depart.

Now, I have asked those to stimulate some reactions.

JUDGE NEWMAN: I can comment this way: I think the suggestions you have made of other ways to do it themselves breed a host of problems, and it would be

an illusion to think that if you just adopt some of those, the problem has gone away.

For example, if you talk about putting limits on the plea-bargaining process, the first thing you have done -- and I haven't even seen your draft of limits, but whatever it says -- is that you have created another ground of litigation. There will then be hearings whether this is a case that exceeds the limits on plea bargaining. We will have hearings on that and we will have appeals on that. Never underestimate the capacity of lawyers to litigate over things. We saw this in the parole guidelines, where we said it's all discretionary anyway, and we have had hundreds of cases. Now we are talking about real sentences.

So even all of your areas of suggestion are breeding grounds of litigation, number one.

To come to the more philosophical point, if you press me as to whether I would rather see the discretion so channeled that we are either going to have a lot of hearings and/or a lot of prosecutor heavy-handedness or some broadened discretion, I have no hesitancy in saying to you that I'd rather see the broadened discretion.

Now, don't think that means letting the judge go from 0 to 40 years. At the moment I am fighting to let him dispense with some six-month rule, some three month add-on, some fine dollar gradations, things like that. You can give discretion and still have some limits. I am not suggesting you should go all the way back to limitless discretion. You are going to have your base value for harms. But at some point, particularly in a world without parole, once you have gotten to a fairly healthy sentence, which you are going to have under these guidelines, at that point to be able to say, the judge doesn't have to give another year or two years for nothing, he ought to be freed of that constraint.

I agree with you that it is worth looking at lots of different ways to channel this discretion without having no limits whatsoever, but I would be very skeptical of devices that purport to say that he can only do it in certain circumstances, because those themselves will be grounds of litigation.

THE CHAIRMAN: Thank you very much. Paul?

COMMISSIONER ROBINSON: Very briefly, your judgment is, then, that if we allow him the ability to ignore certain harms, that that won't be make for

litigation, United States attorneys won't come in and say, "Oh, the guidelines provide this" or "it is a matter of discretion in the guidelines as to whether he takes account of harm or not," that he can with impunity not take that into account and therefore we won't have litigation, but if there is a sliding scale there will be litigation?

JUDGE NEWMAN: If the ultimate guideline says, with respect to a particular factor, that if the sentence otherwise achievable is within a mathematical relationship to whatever you think is important, the maximum or your guideline or whatever, and he can then disregard it, no, you won't have litigation over that. If you say that he can pick a point value between X and Y, you won't eliminate litigation over whether the factor occurred at all, but you will at least eliminate litigation over the degree to which the factor occurred.

Right now you have these stages, and depending on which side of the three- or four-part division within the factor scale he is, the point value varies. So the more you have flexibility at that level, the more you eliminate the need to find. To take the example -- I don't mean to beat it to death but it is your example -- between psychological injury and only

moderate psychological injury. If you can simply add some points for psychological injury, you don't have to have a hearing to determine precisely into which cubbyhole the psychological injury belongs.

COMMISSIONER ROBINSON: I guess I didn't understand. I thought Judge Breyer was suggesting that as one of the alternatives to have the sliding scale where he wasn't stuck with the category, he could basically come up in his own discretion with a number and be guided by the categories, and I thought that that too would generate litigation. I guess you are saying as to that that would not.

JUDGE NEWMAN: If he can dispense with the factor altogether, I don't see any litigation. Maybe on the defense side you would have an abuse-of-discretion argument, the judge abused his discretion in failing to consider cooperation. There might be some litigation there. But I don't think the government would be in a very favorable position to come in and say that the judge abused his discretion, having given nine years, in failing to consider this aggravating factor which would have resulted in a ten-year sentence. I don't think there will be much litigation over that.

THE CHAIRMAN: I will ask you, Judge, will

you be here this afternoon or leave after the testimony?

JUDGE NEWMAN: I am here all week.

THE CHAIRMAN: We can talk to you about it?

JUDGE NEWMAN: When you are finished today, you mean?

THE CHAIRMAN: We take a break of about twenty or thirty minutes.

JUDGE NEWMAN: All right.

THE CHAIRMAN: Will you or not? Do you plan to stay or not?

JUDGE NEWMAN: I am going to be in the building. If I could do it at the end of your day rather than in twenty minutes, it would help me a great deal.

THE CHAIRMAN: That would be fine.

JUDGE NEWMAN: Can I come back at the end of the day, 4 or 4:30?

THE CHAIRMAN: We will notify you. Thank you very much.

JUDGE NEWMAN: Thank you.

(The witnesses were excused.)

THE CHAIRMAN: Our next two witnesses are former United States Attorneys, now attorneys in private practice, Mr. Robert Fiske and Mr. John Martin.

We are pleased to have you.

MR. ROBERT FISKE: Thank you very much. Would you like me to start?

THE CHAIRMAN: Yes.

MR. ROBERT FISKE: I am Robert Fiske. I would just say to Judge Breyer that in 1978, when I was United States Attorney, I watched the playoff game in a room with forty Assistant United States Attorneys. I was the only Red Sox fan in the room as Bucky Dent's home run sailed into the screen. I had forty Assistant United States Attorneys who were Yankee fans. So I am here with the same feeling that the sun is shining in Boston.

COMMISSIONER BREYER: You better take advantage. Red Sox fans never know what will happen tomorrow or tonight.

MR. FISKE: That's right. At least we are in the Series.

I would make a couple of general observations which may have been made previously. But to the extent that your Commission is supposed to consider the impact of these guidelines on the criminal justice system, as it says on page 1 of your report, it does seem clear to me that one inevitable result of

these guidelines is that there is going to be a tremendous increased burden on all aspects of the criminal justice system. I would concur with the remarks that have been made before about the extent to which there will be litigation over these guidelines. I think those points were all well taken. My own sense of the guidelines is that if they are enacted the way they are now, there will be many more defendants who would like to go to trial rather than plead guilty, and that that itself may increase of course the burden on the judicial system in terms of more judges, more prosecutors, and more defense attorneys.

In terms of the philosophy of these guidelines, when John Martin and I were United States Attorneys here in the Southern District, our office always followed the philosophy that sentencing was the function of the judge, not the function of the prosecutor. We would decline, we did not make sentence recommendations at the time of sentence, and indeed resisted doing it on occasion, but we would only do it when we were asked and we didn't particularly relish doing it at the time.

I think it is clear from these guidelines that one major effect of these guidelines is to

transfer a great deal of the sentencing result from the judge to the prosecutor. That point has been made, I am sure, by judges who were not happy about that. I am not sure, if I were still a prosecutor, I would be happy about that either.

One of the clear impacts of this to me is that it puts a tremendous amount of power in the prosecutor to negotiate plea agreements with the defendant. The threat of going to trial in a case where there are multiple charges available, as opposed to offering a plea to something less, places a tremendous premium, it seems to me, on a plea in these circumstances. And, of course, the greater the potential sentence is for the multiple crimes that have been committed without regard to the multipliers that were referred to earlier, the greater premium there is on the defendant to try to negotiate some kind of a plea. The way these guidelines are structured, the defense attorney is going to want to have as many of the factors as possible, hopefully all of them, agreed to, so that he knows ahead of time going in, what his maximum risk is under the guidelines and not leave to some litigation or some hearing any of the factors that may be in dispute. Of course, to the extent that there

cannot be an agreement on those factors and there is a plea with some of those factors unresolved, then you are losing many of the benefits of the plea in the first place, because then you have to have a hearing to resolve those factors.

One of the things that isn't totally clear to me in the guidelines is the circumstances under which the court is required to impose consecutive sentences. I know you attempt to deal with that, page, I think it is, 166 --

THE CHAIRMAN: You are correct, that has not been answered. If you can find the answer, I wish you would send it on in, because it is the most difficult issue of any that I can think of that we have to some extent come to grips with.

MR. FISKE: This is one of the places where the effect of, the prosecutor's plea negotiations are in terrorem to the extent that the guidelines require consecutive sentences if a defendant is convicted on multiple counts. Obviously, the prosecutor has tremendous leverage over the defendant to get him to plead to one count and try to avoid those consecutive sentences. The sense I have from the guidelines right now is that a defendant faces a far greater risk of

consecutive sentences under these guidelines than he does today where in my experience consecutive sentences are quite rare.

One point I would like to make with respect to something that Judge Newman said about cooperation. I can understand how from a judge's point of view he is reluctant to see it as an automatic discount factor for cooperation where simply by certifying cooperation the United States Attorney can mandate a certain percentage reduction in an otherwise stipulated sentence. I can understand that concern. As a prosecutor, I think I would have a concern, on the other side of the coin, that I am not sure that in some cases the 40 percent reduction is enough when you truly have a defendant who has cooperated under exceptional circumstances, risking his life, let's say, in an organized crime situation to produce a conviction of a very important criminal or a very important group of criminals.

One of the cases that I prosecuted when I was United States Attorney was a drug dealer named Nicky Barnes, who received a life, 848 sentence without parole. There is no way we would ever have been able to bring that case without the cooperation of two witnesses. I suspect that if they knew that all they

were going to get for their cooperation, no matter how valuable it was, was a 40 percent reduction off a sentence for dealing in narcotics under these guidelines, the chances are pretty good we never would have gotten that cooperation and we never would have been able to bring that case. So I think that is one illustration from the law enforcement side where greater discretion is needed in the sentencing judge.

THE CHAIRMAN: What if we just provided that cooperation is a basis recognized by the Commission to deviate entirely from the guidelines in sentencing?

MR. FISKE: That would be acceptable.

THE CHAIRMAN: But you would leave that decision to the judge and not upon certification of the U.S. Attorney?

MR. FISKE: Yes.

THE CHAIRMAN: The recommendation, not certification.

MR. FISKE: That would solve my problem and, I suspect, Judge Newman's also.

The one other area that I would like to comment on, because I know we are all here for a limited time and I am not sure anyone else has made this comment -- I don't want to just repeat what others

have said -- is to deal with the part of your recommendations that deal with sentencing organizations. There is, of course, a tremendous interrelationship between the criminal process as it is applied to the individuals in the organization and as it is applied to the organization itself. And, again speaking as a former prosecutor, I always felt, and I think prosecutors feel today, that by far the most effective deterrent to corporate crime is not some kind of fine against the corporation but rather the prosecution of the individuals in the corporation who are responsible for that crime. To me that is where the emphasis should be both in the bringing of the case and in the sentences that are imposed.

If you are dealing with corporate crime where the corporation has been convicted, obviously the only sanction available -- you can't send the corporation to jail -- is imposing a fine. You have proposed two alternatives, the so-called just punishment approach and the harm-based deterrent compensation approach.

I have a concern, not only because my firm now represents corporations but just as a matter of basic fairness, that I don't see a justification for

imposing a fine on a corporation under any circumstances greater than the harm that was caused. I would reject this ability-to-pay concept to the extent that that exceeds the harm that was actually done.

Just to give a simple example, several years ago the United States Attorney's Office here brought a case against General Motors because its Tarrytown plant was discharging paint into the Hudson River in violation of the Navigable Rivers Act. It was indeed a crime to do that. And General Motors eventually pled guilty to that crime. But the thought of imposing a fine that would have a meaningful impact on General Motors in the light of its financial condition for the harm that was done by discharging the paint in the Hudson River seemed to me would just totally distort the whole criminal process.

The other point that I would deal with, because I noticed it in the report here -- I don't know how serious this is -- is a suggestion that conditions of probation could be imposed on a corporation under which, among other things, the corporation could be required to restructure its management to the extent that the management had been felt to be responsible for the criminal wrongdoing. My feeling would be that, to

the extent that a major factor in sanctioning the corporation would be the extent to which the criminal conduct was participated in or allowed to happen by the top management, I think that is quite correctly identified as one of the crucial factors in the whole approach. Obviously, if top management has been involved, that would call for a more significant penalty on a corporation, but, more important, the top management itself ought to be prosecuted and sent to jail.

To the extent that there isn't enough evidence to justify a criminal conviction of the top management, then I question whether the criminal process should be used through conditions of probation to force the corporation to change the management, which hasn't been convicted of a crime. I think that can more properly be done through the corporate process itself.

Those are just some general comments. Maybe I will turn the mike over to John Martin and maybe together we can answer some of your questions.

THE CHAIRMAN: Very good. Thank you.

Mr. Martin.

MR. MARTIN: Thank you, Mr. Chairman. I

have some prepared remarks which I will be happy to leave with the Commission and not burden you with. But I would like to start by disclosing my own bias against the sentencing guidelines. I think that the effort that you have made reflects a lot of careful thought and hard work, and underscores for me the difficulty of coming up with guidelines that can make, through objective criteria, very subjective judgment on the seriousness of the offender's conduct.

I think in that regard I would ask the Commission to look at the guidelines insofar as they look to, as a predominant factor in many of the cases, the value, the amount of gain by the activity. I think it is particularly clear if you look at the guidelines with respect to insider trading, where there is a range of point spread from 12 to 52 value points, depending upon the amount of the gain. However, with insider trading, the amount of the gain is often a fortuity as a result of events that occur after the illegal conduct, and therefore it is no measure of the culpability of the defendant or the seriousness of his crime. Indeed, when you look at that 12 to 52 range and then find that being aware or being an insider or an investment banker only has a 3-point factor, it seems to me the gain is

very much out of proportion in the weight given to the crime.

Also, look at the fact that the amount of gain realized is often the result of either the defendant's own personal wealth or his or her willingness to take risks. The amount of gain will vary tremendously depending upon whether or not the defendant decides to buy the underlying stock, thereby protecting a substantial portion of the investment, or rather goes in and buys an option on the stock where he can win or lose it all but there will be tremendous variation in the amount of the gain with the same illegal conduct. Therefore, I think that is an area where the value assigned to the amount of gain of the defendant is out of proportion.

I think that often comes up in many of the other statutes where there is a lot of fortuity involved. Indeed, for the person who decides to rob an armored truck, it may be good or bad luck for that person whether the truck had been emptied at the bank or filled at the bank before the robbery took place.

The other concern I had is one that others have expressed and I won't belabor it, and that is the fact that this system gives too much power to the

prosecutor here. I think the Commission attempted to deal with that by saying you look at the charge, and the court would then have the ability to look at the real facts. The fact is, the charging decision becomes very important. I can charge somebody who is engaged in a narcotics transaction with tax evasion. I can make that agreement. As has been stated throughout and I won't belabor it, there is tremendous power given to the prosecutor in that system and it seems to me that system sweeps the guideline concept under the rug.

Another concern that I share with Bob Fiske and others that have testified is that the guidelines as they exist do not give sufficient consideration or sufficient range for both cooperation and for pleas of guilty. Frankly, as I read the guidelines, in light of my experience and the kind of cases that we prosecuted, I think that almost every case you had in this district would go to trial; there would be no pleas of guilty. I don't have the exact statistics, but I am willing to hazard a guess that when I was U.S. Attorney and today close to 50 percent of the cases ultimately get disposed of with nonjail sentences in this district. The decision to plead guilty is often made because the defendant believes that the difference between a plea

of guilty and going to trial on a record that will prove to the judge that there was no doubt about the crime and the defendant is in fact guilty can often be the difference between a period of incarceration and a sentence of probation. That consideration disappears under the guidelines which give only an 80 percent credit in situations where, as I see the cases that we prosecute here or have been prosecuted in this district, you are talking about months in jail. The option with rolling the dice and walking away because of the vagaries of some luck at trial, in my mind are going to convince most defendants to insist upon their right to trial, and this court will be trying nothing but criminal cases.

I agree with Bob that the question of cooperation, a 40 percent reduction for someone who has risked his life, is simply not going to provide the type of cooperation you need. You have to look at this in terms of what it does to the person's life in general. You are talking, when one is testifying in life-threatening situations, about someone who is going to have to spend their life in the Witness Protection Program. They are going to have to say to their wife or husband and children, "I am going to testify in this

case. That means we are going to have to move out of here, never see any of the people we know again, and hide out in some city that is totally foreign to us under a different identification. And what am I going to get for this? I will get a 40 percent reduction in the sentence that would be imposed." It is not going to happen.

Every cooperation is very difficult for an individual. When you testify against friends, you are testifying against one's basic code of honor. And yet in every major case that is prosecuted in the federal courts, I think cooperation of insiders is a crucial factor. That has to be rewarded in ways that are more significant, I think, than the guidelines provide.

The other problem I see is that the alternative is immunity. That has two problems, in my view. One, it takes totally out of the judicial system the appropriate sentence; two, it creates severe credibility problems. From the government's standpoint the witness is more credible and honest if he can testify that "I do not know the sentence that can be imposed in my case. I know that the government will bring to the sentencing judge's attention the cooperation I have rendered, but this sentence will be

determined by the judge, not the prosecutor." I think that witness becomes more credible than somebody who walks into court and says, "Yes, for my testimony I have gotten a complete pass on my criminal activity."

Just to reiterate something I said earlier, I do think that the guidelines are quite severe. To take an example, when I was U.S. Attorney, because of the serious nature of criminal activity here in New York and limited resources of the federal government, we had guidelines with the Federal Bureau of Investigation as to when they would begin an investigation of a possible federal violation. Those guidelines provided -- I do not have copies with me, I did not take them with me -- but I believe they provided that we did not even investigate bank embezzlements of less than $10,000. A bank embezzlement of $10,000 has a point range under the guidelines of 20 points, making for a mandatory jail sentence. I think what that underscores is the fact that even though you are setting up guidelines that are supposed to have uniformity throughout the country, you are pressing another area where because of prosecutorial discretion or lack of available resources, you are going to have incredibly disparate results for

the same conduct.

Thank you very much.

THE CHAIRMAN: Thank you very much. And I appreciate the testimony and your submissions.

Any questions from the Commission? Mr. Block.

COMMISSIONER BLOCK: Mr. Martin, I would like to follow up on your point about insider trading, as it goes to a larger issue in the guidelines, the point specifically being the dependence of the point values on the size of the insider trading, the fact that we use these many categories to go between 0 and above 25 million. Your point is that there is a lot of serendipity about the dollar value. Given that is likely the case, in both insider trading and in other financial crimes, how would you in effect solve that problem? Would you, as to all insider trading, take the midpoint of the range -- we use 12 to 52 -- of 26, say, and then aggravate or mitigate with some general factors? How would you deal with the fact that there are differences that are systematic? There are two types of factors in all of these crimes. There are systematic factors. Some insider trader situations are different than others; some burglaries are different

than others; some robberies are different than others. We use an extreme version of that. We track the precise outcome and say the difference is difference up to a dollar or up to $10,000, but the point is there. How would you track the underlying differences while getting away from the serendipitous elements?

MR. MARTIN: I really can use that in part as an example of my whole concept. I think every situation is fact intensive. Whether a lawyer for a prominent takeover firm who sends out that information and uses it should be sentenced to a substantial period of incarceration doesn't, in my view, depend upon how much money he makes. Yet the mere fact that somebody is a lawyer in a different set of circumstances may make his conduct less culpable than the lawyer who specializes in takeover work or a lawyer who is involved for some other reason. In trying to, in my view, assign really binding point values, I think my own approach to this whole area would be one that has very broad guidelines with very broad appellate review of sentencing, hopefully in that area.

But I think, as to the guidelines, yes, you can say that insider trading in and of itself is a crime that involves a certain seriousness and, as you

say, in all cases maybe there should be a sentence of incarceration of no less than six months. That will put the judgment back to the prosecutor whether or not six months is appropriate in that set of circumstances, and that would affect the decision whether or not you are going to prosecute.

I will draw an example for you. When I was U.S. Attorney we prosecuted an individual named Carlo Florentino, a partner in a prominent New York law firm specializing in acquisitions. Prior to the lawsuit his lawyer came to me and made a very effective presentation that this man had severe psychological problems, that he really wasn't in this for any traditional culpable reason, it was as a result of psychological problems, and it was documented. My reaction was: I hear you, what you say is very persuasive and I believe it, but that is a sentencing decision, it is not a prosecutorial decision. I as a prosecutor have a responsibility to the community at large. That is a much more difficult decision for me as a prosecutor to make if I know that I have to take those factors into consideration and this man is probably going to have to go to jail for 18 to 24 months. So you end up pushing back on the prosecutor,

I think, the decision jail or no, and if he makes that decision he doesn't prosecute.

COMMISSIONER BLOCK: Let me just push that one bit further. In a crime like insider trading, which most of us will admit is a rational, calculating crime, you would then not have the costs track the gains at all? In other words, insider trading would be the violation and whether it was $500,000 or $25 million wouldn't affect the sentence outcome if you were convicted.

MR. MARTIN: I guess it is how do you approach this thing. It seems to me that if you are giving the judge a fairly good range, you can say that, at a minimum, simply the crime itself, insider trading should be six months in jail at least, and it may be, depending upon a variety of factors, up to ten years in jail.

COMMISSIONER BLOCK: We have this problem of having to enumerate the variety of factors. That is what the book is: enumerating the variety of factors. I am looking for some help on that. It is one thing to say, "You should enumerate the factors," but then we have to walk down the street with that.

MR. MARTIN: I think one of the factors you

identify is the nature of the individual's responsibility. That to me is a more significant factor than the amount of money.

COMMISSIONER BLOCK: Thank you.

THE CHAIRMAN: Judge MacKinnon.

COMMISSIONER MacKINNON: Mr. Fiske, I am interested in when and how you made your understanding with your witness in that case to testify.

MR. FISKE: Well, I think --

COMMISSIONER MacKINNON: If that is a fair question.

MR. FISKE: Sure. I think the way it is traditionally done now --

COMMISSIONER MacKINNON: I want to know how you did it.

MR. FISKE: I did it the way it was traditionally done. (Laughter)

COMMISSIONER MacKINNON: All right.

MR. FISKE: Which is, we had a written plea agreement with the witness, which was turned over to the defense attorneys at the time of trial, under which it was stipulated that the witness would plead guilty to certain offenses and that he would cooperate with the government, that he would give truthful testimony,

and that at the time of his sentence the government would call the full extent of his cooperation to the attention of the sentencing judge for whatever benefit the judge decided that was worth at the time he imposed the sentence. The way we did it in that case wasn't any different than it is done in a great number of cases, but I would emphasize the point that John made that cooperation itself is a major step for many witnesses, just the act of cooperating is very difficult. Where you also have the problem of someone risking his life or having to spend the rest of his life in the Witness Protection Program, it just isn't going to work if a witness has to plead guilty to something that under the guidelines is going to call for ten years and then he knows he gets a 40 percent reduction, so he is facing a sure six years. It just won't happen. But I think the suggestion that Judge Wilkins made at the beginning, that this be something in which the sentencing judge is given discretion specifically to deviate from the guidelines or go outside the guidelines would certainly solve the problem.

COMMISSIONER MacKINNON: Well, your witness testified without any assurance. It was still up to

the judge.

MR. FISKE: That is correct. He could have gotten fifteen years. He ended up getting a suspended sentence.

COMMISSIONER MacKINNON: And now under this you anticipate that because of some certainty in receiving a sentence, that bargaining chip would be taken away.

MR. FISKE: Absolutely. In other words, if the sentence that was called for was fifteen years and he knew he could get a 40 percent reduction by testifying, that is still roughly eight years in jail with no parole. That is a long time to spend.

COMMISSIONER MacKINNON: The other question I have is about your General Motors case where you thought the fine ought to be equal to the harm. How did you determine the harm in that dumping case?

MR. FISKE: In that case it was just a statutory fine that was imposed. There was a negotiated agreement to plead to a certain number of counts, and there was a fine. I forget the exact amount, but I believe it was in the hundreds of thousands of dollars.

COMMISSIONER MacKINNON: But did it reach

the extent of harm?

MR. FISKE: It was very difficult to measure the extent of harm when paint chips go into the Hudson River.

COMMISSIONER MacKINNON: It reached the maximum extent of the harms available for the individual offenses?

MR. FISKE: Yes, except that under that statute it was one of these multiple crimes where every time they dump the paint into the river it was another crime. So if you wanted to prosecute them for 200,000 violations, they could have done it, but it was again a negotiated agreement.

My only point was that I thought that to approach the sentencing of the corporation in the context of let's impose a fine on General Motors that means something and has an impact on them financially would have been, for a company that size, totally out of proportion to the harm that was done by the criminal conduct. That is why I was advocating the other approach.

COMMISSIONER MacKINNON: And you would think that it would be out of order for that offense to be treated as a continuing single offense?

MR. FISKE: Well, it is a continuing single offense.

COMMISSIONER MacKINNON: That's right. And if it was only subject to one punishment, that wouldn't be enough, would it?

MR. FISKE: No, I wouldn't oppose. I mean, if the government wanted to bring the case as a multiple-count indictment, I think that would be appropriate under the statute. If the corporation were convicted, the Court could take the number of counts into consideration. I am just saying the amount of fines that eventually should be imposed in that or any other corporate case is one that is commensurate with the harm.

The other point I meant to make before, which is a fairly obvious one with respect to fines of corporations, is that the person that ultimately pays the fine is the stockholder of the corporation who had in the ordinary case absolutely nothing to do with it.

COMMISSIONER MacKINNON: And the consumers originally.

MR. FISKE: Correct. That's why, to the extent you can measure the harm to the public and build that into a fine and there is some method of

restitution to the individuals, that is the best system.

COMMISSIONER MacKINNON: Thank you.

THE CHAIRMAN: Thank you very much, gentlemen. We appreciate it very much.

(The witnesses were excused.)

THE CHAIRMAN: We are going to take a short recess at this time. We will start back in fifteen minutes, which will be ten minutes to 4.

(Recess)

THE CHAIRMAN: We will resume receiving testimony now. We are pleased to have with us the former president of the City Bar Association, Professor of Law at New York University, Professor Robert McKay.

Professor, thank you for coming.

MR. ROBERT McKAY: Thank you.

Mr. Chairman, members of the Commission:

I liked the depth and breadth of experience of those who have preceded me here, so I shall not impose on your time very long, but I come to you with two strong convictions based upon the more limited experience that I have had outside the field of sentencing directly. I would like to tell you something about how I come to my two conclusions.

The first is a firm conviction that

sentencing guidelines is an experiment that must be attempted and it is important to perfect it as far as possible. The second is that I have great faith in the federal judiciary and so I have considerably more interest in wider discretion than the present rules suggest.

Nevertheless, unlike, I believe, all the other witnesses that have come before you, I come with a shaky conviction that even if you were not to amend your present proposal at all, I think probably I would want to put it to Congress. I believe, however, you can do much better and I know you are interested in trying to produce the best possible product.

I endorse many of the things that have been said. I have had access to the statements made earlier -- the witness statements by Judge Newman, Judge Tyler, Judge Frankel, Kenneth Feinberg -- and I have talked to others about this. I basically share their views, so I won't elaborate on those very much.

My own convictions come from experience beginning fifteen years ago, in September of 1971, when the Attica uprising occurred. It still holds the unhappy record of being the bloodiest uprising in all of American correctional history. Fifteen years ago

this month I was designated as chair of the New York State Special Commission to investigate Attica. I came to it with very little information other than a kind of loose academic background of not much specific knowledge about the prisons. But I came away with some very deep convictions.

One of the most striking things to all of us was that although the inmates in Attica at that time had a great many things to complain about, the things that really disturbed them most were things that we can all do something about. They were questions of equity, of fairness, of justice. They were concerned about disparity of sentencing. As one inmate conferred with a cellmate next door or down the corridor, to their judgment at least they had been convicted for similar offenses and yet their disparities were widely divergent. Sometimes there was an upstate-downstate difference in sentencing philosophy. Sometimes it came as a result of plea bargaining that one indulged in and another did not indulge in. And sometimes, really perhaps more often than anything, it was simply the fact that judges had very different notions of what was appropriate, and their judgment was unconfined. Discretion was almost unlimited in the wide range of

sentencing that was available to them.

The other thing that the inmates complained about very deeply was the inequity of the parole system as it operated at that time. One of the things I like about your proposal is that there is a gradual phasing out of parole. Because it was not really the sentencing judge that made the determination as to the length of the sentence, but it was the Parole Commission. They operated under what seemed to us very loose standards and without much information. Some of that has been corrected in New York and some of that has been corrected in other states, and perhaps the federal system works still better.

But the combination of disparity in sentencing, aggravated by the inequities as we saw it of the parole system, made for very serious and, we thought, largely justifiable complaints on the part of inmates.

If that can be corrected -- and I do not put aside other changes that need to be made in the prison system -- but if that can be corrected, it seems to me we will have taken a very real step forward in correcting the problems of the criminal justice system.

My other particular experience has been in

the last two years as the Association of the Bar of the City of New York and other organizations grapple with the attempts in New York State to draw sentencing guidelines. From that I learned what I had not known before. I came to the earlier conclusion that sentencing guidelines and some kind of determinate sentences was a goal to be striven for, but I have learned in the last two years what a complicated process it is, which all of you understand fully at the present time.

The New York State body -- and I believe you have had testimony from Mr. Feinberg and Mr. Smith on that today, so I won't elaborate -- used a somewhat different approach, but that too was unsuccessful. The legislature was not ready to buy it and, indeed, many of us who supported the principle were not ready, at least at that time, to support the way it was done. We thought the sentences were not clearly enough defined in terms of the light of experience already demonstrated. We thought they tended to be more severe and that seemed to us to be retrogressive. In the particular case -- a problem you do not have -- the state legislature stood over the body to enlarge the sentences any time they wanted. And, of course, this

society is generally punitive now, and that seemed to us a very serious difficulty.

From those two experiences, then, I come with great sympathy to the task that is before you, but great faith in the importance of the undertaking which you have assumed. My two general propositions may seem in conflict with each other. One is that guidelines are appropriate and, indeed, I think necessary. The other is that judges should continue to have a very substantial amount of discretion. I believe, I convinced myself at least, that those two ideas can be reconciled.

My judgment is that you have gone rather too far in the direction of taking away an appropriate range of discretion for the judiciary, in whom, as I have said, I have great confidence. I do not need to belabor that point. It has been said, I think, eloquently, pragmatically, and soundly by Judge Newman and Judge Tyler, whom I heard, and the others whose testimony I have read or a least letters I have seen of theirs in the past.

The second problem I see is what I am told is the likely result of the proposal you have now -- these are people who have better judgment of

Congressional reaction than I: that Congress is very likely to reject the proposal in its present form. Maybe Congress is likely to reject anything. I think at some point it should be put to Congress, and should be put to them in the best possible case, and that is, of course, your objective.

I do not object, as some, to the notion that you are legislating standards. I think that is really part of your objective, because the statutory standards are insufficient, indefinite, give too much range, too much discretion. So if you can give definition to them that is acceptable to Congress, I have no quarrel with that, indeed, I think that is a very desirable way to go.

I am concerned, however, with what I am told would be the impact of the point system that you have devised so far, and that it would in general increase the severity of sanctions that are imposed for criminal offenses. If that is true, I call to your attention what is perfectly obvious but what seems to me a very serious problem.

In the first place, the prisons are already overcrowded, seriously overcrowded, which means that the mission that they have performed of trying to

return inmates to civilization in some reasonable way to perform in our society is going to be further hampered.

Second, the services in prisons that are necessary for that job are very expensive, and the public is not terribly tolerant of expenses in the way of correctional systems.

Finally in this connection there is no particular indication that prisons work very well in doing any of the jobs that they are supposed to do.

Obviously, the isolation factor is there, but the reality is, as we all know, that there are very few that are going to be there more than a few years, sometimes more than a few months, and they are going to be back out on the street. So the incapacitation function is not really, in the long run very important.

There is the rather general concession now, general feeling, consensus, that the rehabilitation factor, which we used to believe in, doesn't work very well, works occasionally to be sure, but that is not really a justification for putting away a person for a longer time than is justifiable for the pure punishment and deterrence aspects. But punishment can be achieved in a fairly short time. Those who have experienced the

sharp shock of prison are pretty well convinced, in most cases, most of us, most of us who are sentenced in the federal prisons, that it is not a very good place to go to be. So the additional length of time probably does not make very much difference on that perception or on the deterrence perception.

For all those reasons I would be reluctant to see any very substantial increase in prison time.

I emphasize just very briefly, seconding what has been said several times, and I think Judge Newman was particularly eloquent on the point, the difficulty that is likely to come in terms of increased litigation on all the elements that go into a determination. Whether it means that the prosecutors get control or whether it means that there will be a large amount of litigation over the so-called facts that go into determining the sentence, either direction seems to me undesirable to open the door to that kind of experimentation.

I am fascinated, I must confess, with your modified real offense sentencing and the way that the text puts in pretty clear English what many, I think, have not fully understood, although the reality is that these factors have been taken into account in the

discretionary structure and that the charging system also does not work very well. But the whole concept, in my judgment, needs to be reexamined in light of the considerations that have been advanced by others.

So, in conclusion, I simply recommend that you give the closest possible attention -- and I know that you are going to see Judge Newman again this afternoon, which I fully applaud -- to try to work out what are really some of the pragmatic problems and how best to deal with them.

Let me express in final conclusion just one brief disagreement with Bob Fiske, whose judgment I admire enormously. He suggested that corporations should not be sanctioned beyond the damages caused, and then, in response to questioning, it seemed to me he didn't quite demonstrate that it was a measure of damages that was at issue but a compilation of statutory penalties and then some kind of a compromise. Since we do have punitive damages, perhaps excessive in my judgment, in civil cases, and the notion there is deterrence, I see no particular reason why there should not be similar kinds of deterrence imposed against corporations or individuals in criminal cases that go beyond the mere award of damages.

My advice, for what it is worth, is to use caution and take the good words you have had from others today. I wish you all success because it is a very important venture. Thank you.

THE CHAIRMAN: Thank you very much, Professor.

Any questions from the Commission? Mr. MacKinnon.

COMMISSIONER MacKINNON: Professor, you said that you would reexamine the guidelines. Would you go so far as to suggest the grid approach?

MR. McKAY: My understanding is that the grid approach worked well in Minnesota. I am sure you have studied that.

COMMISSIONER MacKINNON: We have studied it, and it wasn't the grid approach, it was what the courts did to it.

MR. McKAY: All right.

COMMISSIONER MacKINNON: Go ahead.

MR. McKAY: But it was based upon a grid structure, and there was room in that grid, as there would have been in the New York system, whatever other faults it may have had, for some discretion within each of the boxes, and then opportunities to go outside the

boxes.

COMMISSIONER MacKINNON: Very limited discretion, but there were many departures where they doubled the sentence, the presumptive sentence, and tripled the sentence. The courts eventually held that they couldn't go beyond doubling it. Most of the cases, the 350 some odd cases that have resulted have been in cases where they have almost tried to double the offense, double the sentence.

MR. McKAY: I would not quarrel with that kind of deviation in what I assume are the fairly rare cases where it happens. If 70, 80, 90 percent stay within the boxes and some justification is given, as some justification is required to be given, for deviations either up or down, then that seems to me a system that is likely to work.

COMMISSIONER MacKINNON: It might work, but the present system works to a certain extent, but you get the odd case, which gets a lot of publicity, where some person gets probation where another person got ten years, and you have an uproar in Congress and the public and the news media and every place else.

MR. McKAY: At least an important difficulty with the present system with, as you call it, the odd

case -- and I know it better in the state system than in the federal system -- is that in the celebrated case there is much temptation on the part of the judge, for his or her constituency, to impose the heaviest possible sentence. If there are guidelines, whether yours or the grid system, that restricts the judge, and the judge can say, "I wanted to do X, but I wasn't able to because I was restricted." That seems to me to be a protection to the judge as well as to the system.

COMMISSIONER MacKINNON: Thank you.

THE CHAIRMAN: Thank you. Mr. Block?

COMMISSIONER BLOCK: Professor McKay, you mentioned that you were concerned about the increase in length that might be generated by these guidelines. Let me voice the caution that again these are not numbers that have been voted on by the Commission. But, that said, there are two aspects of the Preliminary Draft and the tentative numbers that are there that increase the length. One is the increased certainty of imprisonment and the reduction in number of individuals likely to be on probation, and then there are some increases in some places of the length of given imprisonment. Do I understand you correctly as not being bothered by the increase of certainty of

imprisonment: your basic concern is the increased length and not the increased number of individuals that would not be on probation?

MR. McKAY: I would have to know more specifically the individual cases, but I would be inclined, I think, to be troubled by both. Whether it is increased number or an increased length of average sentence, it certainly places an additional burden upon the system, which so far there isn't much indication that the system is prepared to handle. My judgment is that in most cases it is not helpful in dealing with the criminal problem, for the reasons that I sought to outline before.

COMMISSIONER BLOCK: Given the reasons that you outlined in terms of the inefficacy of punishment, I guess I am somewhat perplexed at what the role of probation would be as a sanction.

MR. McKAY: I think probation as it operates at the present time is probably not very successful. There has never been enough invested in probation to make it really an effective supervisory device and a post-conviction device for rehabilitation. I have always favored putting a lot more dollars into probation if we are going to have that system at all.

COMMISSIONER BLOCK: So you would look at probation not as a punishment, but rather as a technique for rehabilitation?

MR. McKAY: Of course it is a sanction, because it is a restriction on freedom and a limitation upon mobility, but it is not by any means the same as being in prison, and there is an opportunity for counseling when the system is working properly and for some limited attempt at rehabilitation.

Mr. Chairman, I failed in my remarks to call attention that I do have these two issues of the Record of the Association of the Bar, which includes the report of a criminal justice retreat we had in the fall of 1984 on proposed sentencing guidelines, in which I think there is some very useful experience if you do not have that at hand; and second, the testimony of John Doyle on behalf of the Association of the Bar in connection with the final draft of the sentencing guidelines. I would like to leave those with you for any use you might wish to make of them.

THE CHAIRMAN: Thank you very much. I think Commissioner Baer has a question.

COMMISSIONER BAER: Professor McKay, you made some reference to the United States Control

Commission guidelines. Do you feel that they are too severe at the present time?

MR. McKAY: Well, whether they are too severe or not I don't know that I have a judgment. What I do believe is that they are a great improvement over what was done before and over what is done in most states, because they do define somewhat the circumstances in which parole will be granted and give some prediction as to when it is likely to happen. In New York at least fifteen years ago the problem was that there was no predictability as to when the inmate might get out. We found that the average parole interview, as they came up for eligibility to be considered for parole, was about three minutes, and that inmates had no feeling, and I think probably with justification, that there was any serious consideration of the facts of their case and the reasons for which they should or should not be eligible. It was made elsewhere.

THE CHAIRMAN: Thank you very much, Professor McKay.

(The witness was excused.)

THE CHAIRMAN: Our next witness is Marie Ragghiante. She is a former chairman of the Tennessee

Ragghiante. She is a former chairman of the Tennessee Parole Board and a writer and lecturer on issues of criminal justice. We are delighted to have you with us.

MS. MARIE RAGGHIANTE: Thank you. I am delighted to be here.

First of all, I want to applaud this Commission's efforts to invite pub'ic participation in the development of your guidelines. Secondly, I can't resist mentioning the fact that my experience at the federal level in the past was as a witness before quite a few federal grand juries and as a witness in a couple of federal criminal trials, due to the fact that I initiated a federal investigation of the sale of early prison releases in the State of Tennessee. I heard Professor McKay earlier refer to the issue or the subject of public correction, which was something that I certainly saw first hand in Tennessee.

Also, I want to mention -- and again this may be injected in another way -- that I had the dubious distinction of being fired by the governor of Tennessee and the miraculous experience of winning the lawsuit for reinstatement. Perhaps some of you know that the governor's office aides therein were convicted of having operated the governor's office as a criminal

enterprise.

With regard to this preliminary draft of the sentencing guidelines, I, like a number of others preceding me today, am concerned about the apparently mandatory aspects of these guidelines at the front end, which may in fact reduce the use of probation, something that concerns me. I don't deny that probation may be more effectively used than it has been in some areas, but I don't believe in throwing out the baby with the bath water.

What concerns me as a former official in the area of corrections is the lack of emphasis of these guidelines in the area of release supervision. I am convinced that mandatory release supervision will benefit all of us. I believe it is desirable for all releasees, but that it is essential for violent offenders, drug dealers, and drug users.

It seems to me that no thinking person could seriously assert that the offender, having served a number of years in prison, or even just a number of months, away from the society which has ejected him, can be expected to reenter the community smoothly if we feel no apprehension in this regard. There is a parallel need of the community which can be expected to

benefit from supervised release.

Critics of the parole system in the past most often attacked its decision-making powers with regard to disparity, capriciousness, subjectivity, and so forth, and we know that particularly the U.S. Parole Commission developed guidelines and greatly reduced some of those problems. But rarely have we heard, especially coming from the citizenry, attacks on the concept of providing assistance to releasees. And I wonder whether in fact it was ever the intent of Congress to do away with the supervised release of prisoners.

That is my specific concern today. I have been interested in all that has gone on here today, but I missed hearing any reference made to the concept of parole supervision. I think that in some cases that we may need longer supervision than the one, two or three years mentioned in these guidelines. And again I want to emphasize that I think there should be mandatory release supervision for offenders who have a violent background or drug dealing or drug-abusing history.

THE CHAIRMAN: Thank you very much. I agree with you that we may need some legislation to increase the maximum amount of time that an individual may be

placed on supervised release following release from incarceration, and that is something the Commission will have to take up with the Congress. We have not come to grips with this issue of supervised release, but we must do so within the next few months. I appreciate, as does the Commission, your comments. I would daresay that the Commission shares your views certainly in those two areas. We need some specific guidance to our trial judges that these types of individuals should be placed on, in effect, what would be court-imposed parole, known as supervised release.

Any questions from any of the Commissioners? Judge MacKinnon.

COMMISSIONER MacKINNON: What was your position in Tennessee from which you were fired?

MS. RAGGHIANTE: Pardon me?

COMMISSIONER MacKINNON: What was your position in the government of Tennessee?

MS. RAGGHIANTE: I was the chairman of Tennessee's Board of Pardons and Paroles, and I was fired because of the federal investigation of the governor's office that I had initiated.

COMMISSIONER MacKINNON: Was the governor indicted too?

MS. RAGGHIANTE: The governor was ousted from office for his pardoning abuses, and he went to prison for related offenses.

COMMISSIONER MacKINNON: That was my understanding. Was that a federal or a state violation?

MS. RAGGHIANTE: It was federal.

COMMISSIONER MacKINNON: Thank you.

THE CHAIRMAN: Anyone else have any questions?

Thank you very much. We will be happy to hear from you in writing if you would like to expand your thoughts on supervised release. Thank you very much.

MS. RAGGHIANTE: Thank you.

(The witness was excused.)

THE CHAIRMAN: If anyone in the audience would like to address the Commission, we would be glad to hear from you.

MS. PHYLIS S. BAMBERGER: Yes. I have two questions which deal with matters which the Commissioners have raised in questions and comments during the course of the testimony. It would help us to respond to you if we understood where your thinking came from.

The first question is, what section of the statute which created the Commission and the theory of guidelines requires that the guidelines be mandatory rather than presumptive? The second is, what section of the statute requires that the 25 percent range between minimum and maximum defined the type rather than merely the length of the sentence? I realize that this is an imposition on our part, since we are used to giving you information rather than the reverse, but if we could have some idea where this thinking on the part of the Commission comes from in the statute and the legislative history, it would be helpful, because we read it differently than you do.

COMMISSIONER BREYER: Well, 18 U.S.C. 3553(b). The court shall impose a sentence of the kind and within the range referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Now, (a)(4) says "shall," and (a)(4) says the kinds of sentence. The kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the

guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1). That says whatever we come up with shall be imposed by the judge. Then the question is what shall we come up with. Then you have to turn to the section that deals with us. Do we have it in here?

THE CHAIRMAN: What was the second issue?

MS. BAMBERGER: The second question is, what in the statute requires that the 25 percent difference between the minimum and the maximum sentence defined the type of sentence rather than the length of the sentence? One of the comments made before related to the limited use of probation, and the question raised was -- unless I misunderstood the answer -- that the kind of probation or the number of offenses in which probation could be imposed was somehow restricted by the 25 percent requirement between minimum and maximum. It seemed to me that the response was that the type of sentence was also affected by the 25 percent limitation.

THE CHAIRMAN: Professor Robinson.

COMMISSIONER ROBINSON: I don't think there is a limit. At least, this is one person's interpretation of the guidelines. Where we choose to have a guideline sentence of imprisonment, the range

must be limited to the 25 percent. But it is a policy decision for us to make about when imprisonment will be the guideline recommendation or whether probation could be. There are some specific caveats where Congress says you shall have a significant term of imprisonment if this person is XYZG. But I don't think there is a general policy that insists on a few instances of probation.

MS. BAMBERGER: So did I misunderstand you when I thought you said that the first range of six to fourteen months can't go higher as a probation potential with respect to sanction points? Is that right?

COMMISSIONER ROBINSON: You may be referring to the fact that recent legislation enlarged our ability to provide a range at the low end. That is, we now have the ability to provide a range of from zero to six months at the low end, and one way the Commission could treat that is to say, if your normal sentence under the guidelines would be six months or less, then probation is an option for the Judge. That may be what you have heard. Maybe you are confusing it with the discussion about split sentences?

MS. BAMBERGER: No, no.

THE CHAIRMAN: That is what this proposed draft does provide: that if it is six months or less, then the judge may impose a sentence up to six months or impose probation entirely without any incarceration or probation with limited periods, which is kind of like the old split sentence.

MS. BAMBERGER: What I couldn't understand is why it had to be limited to six months.

COMMISSIONER BREYER: The way the statute is worded, I think that is not a subject of debate. That is, the statute says that the judge shall impose the sentence set out by the Commission, unless there is an aggravating or mitigating factor that the Commission did not adequately consider. That is the sentence I just read to you. Then when it talks about the Commission's duties -- I don't have the statute in front of me, unfortunately -- but, of course, the Commission under that can set out any kinds of categories it wants. But there is a constraint, and the constraint is that it says that if you say person X for offense Y will go to prison, if you say that, having said that, the Commission is to propose a range, and the maximum of that range cannot be more than 25 percent greater than the minimum of that range, with a

recently enacted exception. The recently enacted exception is that the maximum of that range can be six months greater than the minimum of that range. Do you get it? That means that if the maximum of that range were six months, the minimum would be zero, and therefore anything that we tell the Judge, "Judge, it can be up to six months," means the Judge can decide six, five, four, three, two, one, or zero, and that is where there would be some discretion in the judge on the in-out decision and he could have probation instead of the six months.

Now, however, suppose we were to say a person robs a bank with a gun and hits somebody over the head, the proper sentence for that is prison, and moreover it is twenty-two months, we then have to say twenty-two, let's say, to twenty-seven months. We can't give more than a range of that.

What I don't see is under the statute that if we do say prison is proper, and it is more than six months that is proper, how then under this statute can we give the judge the alternative of probation? The only way we could do it is to say -- and that is the sentence I read you from the U.S. Code -- depart from the guidelines. Then you would have to find a way of

complying with those words I just read you. Therefore, the judge would have to say that there must be an aggravating or mitigating factor which the Commission did not adequately put into account.

MS. BAMBERGER: So you read that as not being able to propose to the judge alternative possible sentences which, if he imposes alternative A, it has to comply with 25 percent, or --

COMMISSIONER BREYER: You tell me how we do it. Maybe you can figure out a way of dealing with those words, but the words say, to my reading of them, that "Oh, Commission, if you decide that prison is appropriate for offender type Y for crime type X, you have the 25 percent range between maximum and minimum." You take those words -- they are in the section that deals with the duties of the Commission -- you look at them, and then tell us whether or not there is a way that we can say, "Judge, you have the following choice: prison for five years, or no prison at all and."

MS. BAMBERGER: All right.

COMMISSIONER BREYER: That is a serious question. I am not asking that rhetorically; I am asking that seriously.

MS. BAMBERGER: Fine. That is what we want

to answer.

THE CHAIRMAN: I believe you might look at 28 U.S.C. 991(b). I am told perhaps that is the section. We don't have the Code right in front of us here.

Any other members of the audience who would like to address the Commission or have any comments?

Yes. Come forward, please.

MS. SUSAN STEINMAN: Good afternoon. Can you hear me? My name is Susan Steinman. I have been involved in, I guess you could call it, sentencing and post-conviction work for about nine years now. I had a practice in Atlanta for several years starting about 1977 where I just did parole work and habeases and transfers. Now I work as a freelance consultant with people that do what I call primary federal criminal defense in this area.

I have small practical concerns, and I have heard, you know, a lot of issues discussed here today that I, of course, endorse: some I do; some I don't. The thing I am concerned with primarily, on page 55 you talk about evaluating drug offenses in terms of a total weight --

THE CHAIRMAN: Without regard to purity; is

that the issue?

MS. STEINMAN: Exactly. And these days with the Parole Commission, now they have gone back to the purity, and there are very involved negotiations how to convert it and there are lab reports these days. And I think you are going to get a tremendous disparity built in right there. You are talking about somebody with a huge amount with a little -- here it says any detectable amount. So then what will people do? They will go to maybe smaller transactions of purer drugs. And I realize that they are not final, that the base values are not set yet. I mean in my opinion they are too severe by about half, I would say, and out of line with the practice today. But you are talking about the rest of somebody's life.

The only other thing I can bring to the Commission is that I speak to prisoners day in and day out, and they are very concerned -- I don't know if this is the appropriate body -- but they are very concerned about the 15 percent, we will call it, good time, or possible reduction. They feel that this will be the end of any kind of discipline in the prison. I mean, in a way it is humorous. The old-law prisoner saying, "Oh, those new law prisoners, there will be

nothing to keep them in line. What kind of place is this going to be? They are very concerned about that, especially with a thing like this on page 55, when you are talking about almost any kind of drug offense. It is true that I deal with people that maybe the society considers the worst. You are talking about a 40- and 50-year sentence being handed out fairly regularly. To a person that is 47 years old, you know, or 40 years old, that is the rest of their life. It looks to me, when you are talking about the way the base offense values are evaluated for the 848's, that even for somebody such as we had recently who was a first offender, you know, children, wife, all this business, if he had been convicted under the 848 the base value would have been twenty years off the bat, 40 years old. You go in, you have little children, you come out you are a grandfather.

So I would really like to suggest two things: One thing would be that there really should be some substantial reduction for people to take a plea, something in terms of, you know, a multiplier of .6, something significant, if people are going to take a plea. The other thing would be that I would like to see the factor of someone being a first offender taken

out of the -- you have it in with the prior offense characteristics. I have done some of the calculations for some of the cases I know, and it looks to me like it starts off bad and only gets worse from the defendant's point of view. I would like to see something significant, like someone is a first offender, also turned into a multiplier of the base offense value, like .6, .8, whatever, something like that, instead of getting a minuscule type of reduction of maybe, in a severe offense, fourteen months out of a twenty-year sentence because you are a first offender.

If you are concerned about disparities, if I could convey what I have learned from the way people look at it that are incarcerated, they can understand easily why somebody who puts in a plea gets half of their sentence. They can understand why somebody who puts in a plea and was first offender gets half of that sentence. That is not disparate to them. They have a little more sophistication than just a similar kind of offense. They are more concerned about a circumstance of -- you know, it is strange, but the wisdom is, if you are actually caught, so to speak, either in the transaction, or with the product, you get a lesser sentence than if you were merely involved with a

conspiracy where there was no evidence against you, believe it or not. That is the kind of thing that concerns them.

The only other thing was about the decay factor. You go along and you say, well, someone hasn't been convicted in the last ten years or whatever it is, there is the decay factor, except for people with a prior drug offense and prior violent felony. Now, we recently had a case of a man who was about 65 years old and he had had a prior drug felony, federal felony too, from about, I think it was, 36 years ago, and he was now 65 years old and had become very peripherally involved in a fairly wide-ranging conspiracy, something along the lines of a couple of phone calls or sat in a car, something like this. I would just say that in a circumstance like that, all right, so here he is, 65 years old, you would be looking at doubling or adding on some tremendous amount due to this conviction that was maybe thirty-six years old. I would say that had it been, although I am not that often involved with people with a prior violent crime, let's say he had committed a burglary also forty years ago, and now he is 65 years old, I don't know whether that would be such an appropriate factor to augment the sentence

terribly at that point. Thanks very much.

THE CHAIRMAN: Thank you very much. The point that you talk about is a Congressional decision that we have nothing to do with, and we have not decided purity yet. We had decided at first cut, and we decided to go without it, and we have not come down with that decision one way or the other yet. It is certainly something that we have to consider.

COMMISSIONER BREYER: I would be curious to know what you think about it, because I think you put your finger on a number of good points. What the Drug Administration said about purity, something like heroin, for example, was, well, it is true that a person who is peddling heroin on the street might have a fix that is less pure than a person who is a big-time dope dealer, but similarly the supplier or the importer will have a greater amount. Therefore you don't have to worry about purity if in fact you grade the offense so that it goes up quickly with amount, because the person who has the more pure drug also has the larger amount of the drug.

That is the argument that they they have made. I am not an expert in that and I am rather curious as to what you think about that. Of course, I

suspect that the other thing we have to do is, where you have no detectable amount, you have to say, well, not quite no detectable amount, if there is an unusual case where it's 99 percent chewing gum or 99.999, etc., that you go outside the guideline. But I am rather interested -- you have experience in this area -- in what your reaction is to that argument that has been made on the purity issue.

MS. STEINMAN: Well, I would just like to say from the indictments that I have read that it's not uncommon at all to have a series of transactions, a quarter kilo, an eighth kilo, a kilo, of quite good purity. Of course, the ultimate importer, I guess, if you would get it right off the boat, I suppose, or wherever, it would be very, very pure and there would be a lot of it. But that exceptional case you are not worried about. That guy is already going away forever. So that is not really the concern. You are more concerned with people who maybe are street dealers or are younger and happen to have a kilo that has more than a detectable amount in it or some guy that thinks he is enterprising, he gets an ounce and he throws in 30 ounces of some kind of sugar. You know, you are talking about twenty years with very little reduction

from this kind of person's life, even leaving aside, for the moment, questions of his own drug use and involvement in that kind of offense. For instance, in this district I think 848's commonly have three, four, five transactions in the kilo amounts, so how are you going to figure this? Even if the person is a first offender, was a drug addict, many other things involved, the acts were over a period of one week, so you are talking about, that's it, right, this person should just be locked up and that is the end. So I think that there has to be some kind of significant flexibility for that sort of situation.

COMMISSIONER BREYER: Thank you.

COMMISSIONER MacKINNON: As to your doubt about being able to have discipline within the organization, within prisons, I think without naming names it was the general attitude or idea that the assignments within the institution and the possible transfers to other institutions would be sufficient, in their judgment, to come out with the necessary discipline, if you want to know the answer.

MS. STEINMAN: Well, we'll see about that.

COMMISSIONER MacKINNON: Yes.

MS. STEINMAN: My only other brief question

is that I am asked frequently: Everyone wants to know, when this law comes into effect, will it apply to persons indicted before then, indicted after, and sentenced after? Is there an answer to this? At what point will this apply?

THE CHAIRMAN: It will be my hope and the Commission's hope that it will apply to crimes committed only after the effective date of the guidelines.

MS. STEINMAN: That is what I thought. Thank you very much.

COMMISSIONER BAER: The prisoners you talked to, do they understand under the new system, even though it is only 15 percent off for good behavior, that good time is vested? Do they realize that?

MS. STEINMAN: They realize that, but I think their feeling is that, you know, somebody with, let's say, a twenty-year sentence can get, what is that, a year and a half off? That doesn't really mean much.

COMMISSIONER BAER: 15 percent is a lot less than 33 percent.

MS. STEINMAN: More or less, a year and a half off the back of twenty years, when you are 46, doesn't really mean much, I guess.

THE CHAIRMAN: Does anybody else want to address the Commission?

Hearing none, this Commission hearing may stand adjourned. Thank you all very much.

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