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UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON PROPOSED AMENDMENTS

TO THE SENTENCING GUIDELINES

- - -

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

MEMBERS PRESENT:

WILLIAM W. WILKINS, JR., Chairman

HELEN CORRUTHERS

MICHAEL K. BLOCK

ILENE H. NAGEL

STEPHEN G. BREYER

C O N T E N T S

C O N T E N T S (continued)

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P R O C E E D I N G S

CHAIRMAN WILKINS: The Commission will come to order.

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

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

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

Let me caution everyone, usually it is our fault

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

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

Ms. Seymour, please come around.

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

Thank you very much, Ms. Seymour. We are delighted that you are here and we are delighted to have a representative for the Victims Rights Movement with us.

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

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

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

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

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

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

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

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

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

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

just racked up the 130th murder yesterday.

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

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

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

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

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

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

up to 12 years. If he uses a gun, his discount could be increased as much as 15 years below present guidelines. If the armed robber seriously injured someone during the course of the offense, he could receive up to 140 months discount below present guidelines.

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

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

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

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

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

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

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

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

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

Provisions like the career offender statute are

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

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

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

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

statutory minimum becomes a flat sentence imposed without regard to aggravating factors.

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

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

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

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

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

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

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

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

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

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

than 50 plants, too severely.

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

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

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

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

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

The Commission should not hesitate in pushing forward in the white collar crime area. With respect to fraud, the $5 million ceiling in the table contained in Section

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

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

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

involving serious bodily injury used in the guidelines.

The Commission has also requested our comments concerning a proposed new abuse of sexual contact guideline. While the proposed guideline represents a great improvement, we believe it should provide higher penalties. Moreover, with respect to the proposed penalties where the offense involves a minor, we believe that the effective two-level discount where the victim is between the ages of 12 and 15 years is highly inappropriate.

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

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

where I can be reached, if any of you require additional information or clarification of my testimony, which you will all receive written copies of.

Thank you.

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

MS. SEYMOUR: Could I respond later?

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

MS. SEYMOUR: Thank you.

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

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

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

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

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

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

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

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

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

Now, I put that argument to you and I am sorry for using the time, but I think it is important that your organization address that argument, because I would be quite interested in your views on that.

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

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

[Laughter.]

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

MR. SEYMOUR: Thank you for the opportunity.

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

Thank you.

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

Both of you gentlemen are no strangers to this

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

Mr. Dennis?

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

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

I feel that the sentencing portion of the prosecution is probably one of the most critical for the prosecutor and certainly for the defendant, and I have consistently placed a high emphasis on making sure that probation officers are fully informed of the facts that form the basis of prosecution, and this is particularly important where a conviction is based upon a plea, rather than a trial. It can be even very important where there is a trial taking place, because the probation officer is often not there and not necesarily familiar with the record, familiar with the exhibits, familiar with the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

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

MR. DENNIS: Yes, and then take questions.

CHAIRMAN WILKINS: Fine.

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

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

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

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

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

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

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

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

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

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

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

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

[Pause.]

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

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

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

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

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

MR. BROWN: Surely.

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

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

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

[Pause.]

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

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

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

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

In the career offender category, which the Department feels that, because of the congressional language, we

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

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

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

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

Public officials that abuse their trust need to be punished more severely. It erodes our faith in government. Once we erode our faith in government, we have serious problems, and the Hobbs Act is our best attack on that, so we feel very strongly that the Hobbs Act particularly needs substantial revision.

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

individuals serving those types of sentences.

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

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

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

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

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

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

MR. BROWN: Yes.

CHAIRMAN WILKINS: Okay.

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

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

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

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

MR. DENNIS: Would move it, yes.

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

MR. DENNIS: Yes, that's right.

CHAIRMAN WILKINS: -- allowed by statute.

MR. DENNIS: Yes.

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

CHAIRMAN WILKINS: I see.

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

COMMISSIONER CARUTHERS: Yes, I do.

CHAIRMAN WILKINS: Commissioners Block?

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

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

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

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

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

MR. DENNIS: Now, wait a minute.

[Laughter.]

COMMISSIONER BLOCK: But you don't think it is related to the size of the --

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

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

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

COMMISSIONER BLOCK: Thank you.

CHAIRMAN WILKINS: Mr. Dennis?

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

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

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

CHAIRMAN WILKINS: Thank you.

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

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

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

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

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

CHAIRMAN WILKINS: Thank you.

Commissioner Caruthers?

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

MR. BROWN: I was recommending an increase of approximately two levels for a safe or a simulated weapon or explosive.

COMMISSIONER CARUTHERS: Okay. So, we would basically have the three --

MR. BROWN: Correct.

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

MR. BROWN: In some earlier submissions to the Commission, I recommended that we need to get it up closer to 5 years real time.

COMMISSIONER CARUTHERS: For unarmed?

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

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

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

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

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

MR. BROWN: I think it should be very close to that, maybe not quite that much, but that was our general recommendation. I think the minimum would be at least a couple of levels.

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

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

COMMISSIONER CARUTHERS: Right.

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

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

MR. BROWN: That's correct.

COMMISSIONER CARUTHERS: Okay.

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

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

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

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

COMMISSIONER CARUTHERS: Thank you very much.

CHAIRMAN WILKINS: Commissioner Nagel?

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

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

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

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

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

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

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

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

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

COMMISSIONER NAGEL: Thank you.

CHAIRMAN WILKINS: Judge Breyer?

COMMISSIONER BREYER: I have three questions. My

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

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

MR. DENNIS: Exactly.

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

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

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

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

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

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

don't know at this juncture what that situation will look like. In any case, it would seem to me that if in the scheme of things it appears that we need to begin building now in order to meet that demand in 15 years, that the energy should be directed towards lobbying the Congress with regard to the effect of laws that have been passed that the Sentencing Commission feels that it is duty-bound to acknolwedge through raising the penalties and thereby perhaps precipitating a crowded condition at some time in the future in the correctional institution. But we will certainly respond in writing on that.

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

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

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

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

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

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

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

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

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

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

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

COMMISSIONER BREYER: I would agree with you.

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

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

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

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

[2] CHAIRMAN WILKINS: Gentlemen, thank you very much.

MR. DENNIS: Thank you.

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

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

Mr. Buffone.

MR. BUFFONE: Chairman Wilkins, Members of the Commission, we are honored to be here today. We have submitted extensive written comments.

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

constrained to not speak on behalf of the ABA, but we have attempted to address the range of issues that we were authorized to speak on.

I would like to deviate both from my written comments and what I had prepared to say this morning, based upon some of what I have heard from the prior witnesses. We are concerned that the Commission continually exercise its responsibilities pursuant to 28 U.S.C., section 994(g) to assess the impact of its guidelines and amendments that it proposes to the guidelines on prison populations.

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

We have testified at earlier times before the Commission that we disagree with the impact statements that were made in your initial report. It was the view of our committee

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

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

Our reading of the vast majority of what is proposed in this package of amendments is that they are a discharge of that responsibility. The responsibility is to continually refine the guidelines and make them more comprehensible. We view the overwhelming majority of what you have done as technical in nature and, based upon that, non-controversial. We commend you for even putting those types of non-controversial amendments before the public for comment and consideration.

But we would like to address the far narrower range of comments of proposed amendments, those that are controversial potentially. We see what the Commission has done is respond in large part to new legislation passed by Congress, and we would like to isolate what we view are three ways in which Congress has chosen to express its will to the Commission.

The first is those amendments that respond to newly created criminal offenses for which there is no currently applicable guideline. We recommend that the Commission adopt a flexible approach and promulgate guidelines where there is a historic basis for formulating an appropriate offense range. Where, however, you have a totally new offense prescribed by legislation, where you have no convenient analogue, we recommend that the Commission not hesitate to refrain from promulgating specific guidelines and, rather, await initial prosecutions to see how prosecutorial patterns evolve and to give flexibility to sentencing judges initially, so that you can see how they react to specific fact situation before you promulgate rigid guidelines for those new offenses.

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

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

In some instances, Congress has fixed a mandatory minimum penalty or amended existing mandatory minimum penalties. In other cases, Congress has specified a particular offense level and asked the Commission to promulgate that offense level. In still other instances, such as that contained in Proposed Amendment 119, Congress has listed factors and directed the Commission to consider the appropriateness of providing an enhancement of a specified number of levels for particular conduct.

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

The delegation authority to the Sentencing Commission

to utilize its expertise in formulating a comprehensive set of sentencing guidelines is inconsistent, in our view, with congressional imposition of mandatory minimum sentences. Additionally, fixing of mandatory minimum sentences will upset the carefully structured balance of the guidelines' consideration of multiple sentencing factors.

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

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

envisioned in the Sentencing Commission.

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

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

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

Our standards recommend use of a least restrictive

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

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

There has been a lot of discussion this morning about the proposed amendment to the robbery guideline. We were provided earlier this week with some of the Commission's supplemental materials and, quite frankly, we have not had the opportunity to go through them with the precision that I would like in order to comment on them. We will do that in the coming weeks and, if we have any additional comments, we will bring them to the Commission's attention.

But we hope that the Commission's consideration of

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

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

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

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

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

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

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

We continue to commend you for this process and will at the first available opportunity make known our views to Congress that the funding for the Commission should be increased, so that you can continue to perform this kind of public outreach, as well as discharge the many other important responsibilities that you have, such as assessing prison overcrowding, and we believe that the Commission does not now have adequate resources to discharge all of its responsibilities.

In the coming weeks, we will also formalize a recommendation that we have made informally to the Commission, and that is that you establish a practitioners working group or advisory committee to, on an on-going basis, advise the Commission of the kinds of anomalies and difficulties that practitioners are experiencing in guideline application fields.

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

Thank you.

CHAIRMAN WILKEY: Thank you.

Mr. Salky?

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

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

The American Bar Association's position, as you know, has been to encourage the Commission to increase the alternatives to incarceration, and we are very supportive of the home detention amendment, the ability to sentence for home detention. On that particular amendment, the Commission has asked for comments as to whether or not home detention should be available on a day to day basis, such as the other forms of community confinement. We believe that there is no significant difference from home detention, from the other types of community confinement that are already available on a day to day basis, and we think that that is an appropriate way to treat home detention.

On specific guidelines, we have not taken a position

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

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

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

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

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

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

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

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

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

The Commission has placed certain baseline requirements for the application of criminal livelihood that we believe minimizes the economic discrimination that that guideline possessed, and we commend the Commission in that regard.

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

Thank you.

CHAIRMAN WILKINS: Thank you very much.

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

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

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

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

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

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

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

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

I think the courts need not only departure authority,

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

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

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

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

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

CHAIRMAN WILKINS: Thank you very much.

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

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

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

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

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

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

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

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

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

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

MR. BUFFONE: -- at or near the maximum authorization, in my view contemplated Criminal Code reform, which didn't happen.

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

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

Thank you.

CHAIRMAN WILKINS: Commissioner Nagel?

COMMISSIONER NAGEL: No questions.

CHAIRMAN WILKINS: Commissioner Caruthers?

COMMISSIONER CARUTHERS: I notice that you did express great concerns, both of you, that we evaluate the potential impact on prison population of amendment to the guidelines. I would certainly want to assure you on that matter and perhaps at the same time disappoint you, but we have directed our staff to provide us with an impact statement pertaining to guideline amendments, so that is done.

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

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

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

MR. SALKY: Could I just comment briefly?

COMMISSIONER CARUTHERS: Surely.

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

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

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

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

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

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

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

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

Thank you.

CHAIRMAN WILKINS: Thank you very much.

Our next witness is Jonathan Macey, Professor of Law

at Cornell Law School. Professor Macey, we are delgithed to have you with us.

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

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

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

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

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

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

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

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

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

The final reason that people talk about as a justification for punishing insider trading quite severely is because the activity affects a large number of disaggregated shareholders and these large number of disaggregated shareholders are particularly vulnerable as victims and, as a consequence, a serious penalty is warranted.

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

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

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

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

The suggestion, for example, that offenses that involve more than minimal planning should be punished more

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

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

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

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

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

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

Finally, as far as the specific offense characteristics, is the relevancy of the chart that draws a correlation between loss by the public, presumably by some party on the

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

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

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

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

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

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

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

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

Thank you.

CHAIRMAN WILKINS: Thank you very much.

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMISSIONER BLOCK: Thank you.

CHAIRMAN WILKINS: Commissioner Caruthers?

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

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

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

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

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

the levels, I think is a bad thing.

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

COMMISSIONER CARUTHERS: Thank you very much.

CHAIRMAN WILKINS: Thank you.

Commissioner Nagel?

COMMISSIONER NAGEL: Professor Macey, given your expertise, I would like to ask you, if you had your druthers of sitting at a blank piece of paper and someone asked you to specify the appropriate sanction, ranging anywhere from probation or fine or imprisonment for an individual convicted of insider trading, what would that sentence be, and then would you make a distinction between the sentence for one person convicted of insider trading versus another and, if so, on what basis, and essentially by how much would you like to see

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

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

COMMISSIONER NAGEL: You can put this in your homework assignment.

MR. MACEY: I will have to dig up some research assistants.

[Laughter.]

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

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

COMMISSIONER NAGEL: Would you start at a base of 9 imprisonment and then use that as a specific offense characteristic, is that what you are suggesting?

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

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

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

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

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

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

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

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

COMMISSIONER NAGEL: Thank you.

CHAIRMAN WILKINS: Judge Breyer?

COMMISSIONER BREYER: No questions.

CHAIRMAN WILKINS: Professor, thank you very much.

MR. MACEY: Thank you.

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

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

MR. RENDINO: Thank you, Your Honor.

I want to thank the Commission for once again allowing

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

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

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

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

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

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

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

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

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

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

MR. RENDINO: Thank you very much.

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

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

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

Now, the robbery itself is probably the most important factor, but I believe that the monetary enhancement or the adjustment should not be thrown out without due consideration of professionals.

I will conclude my remarks there, Mr. Chairman.

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

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

CHAIRMAN WILKINS: Well, is 50 a reasonable load?

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

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

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

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

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

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

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

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

CHAIRMAN WILKINS: Thank you.

Commissioner Block?

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

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

COMMISSIONER BLOCK: I know Arizona has had some.

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

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

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

COMMISSIONER BLOCK: Would you provide that?

MR. RENDINO: Very definitely.

COMMISSIONER BLOCK: Thank you.

CHAIRMAN WILKINS: Thank you.

Judge Breyer?

COMMISSIONER BRYER: Thank you. I thought the submissions were very interesting and helpful. Thank you.

CHAIRMAN WILKINS: Commissioner Nagel?

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

MR. RENDINO: Thank you very much.

CHAIRMAN WILKINS: Thank you very much, Tom.

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

MR. WEINTRAUB: Thank you, Your Honor.

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

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

NACDL was the only membership bar organization that involved itself in nationwide challenges to the constitutionality of the guideline system and its derivative legislation up to and including the Mistratta case. With the resolution

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

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

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

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

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

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

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

and on the basis of empirical data.

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

It appears, for example, that the Commission is responding to a variety of comments, complaints, observations which trickled in to the Commission from a self-selected group of perhaps District Judges, United States Attorneys, and perhaps defense attorneys and probation officers.

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

At the time the proposed amendments were published,

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

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

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

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

In short, it is our position that this proposed amendment was instituted in large measure simply in response to one isolated court decision. And while it is my understanding that in the past several days the Third Circuit reached a similar holding, that was subsequent to the publication in the Federal Register of the notice of proposed rulemaking.

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

I am not suggesting that the maintenance of the present system for telephone count dispositions would be inconsistent with the Commission's own standards on plea agreements, so long as the offense adequate reflects the overall seriousness of the relevant conduct. And in many situations,

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

CHAIRMAN WILKINS: Thank you very much.

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

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

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

thinking about.

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

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

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

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

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

Thank you.

CHAIRMAN WILKINS: Thank you very much.

Questions from my left, Judge Breyer?

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

group or any other group.

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

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

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

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

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

MR. RENDINO: Well, we clearly applaud the Commission for undertaking an empirical study based on past numerical

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

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

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

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

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

Was there a question that I left unanswered there?

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

Any other questions? Commissioner Nagel?

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

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

CHAIRMAN WILKINS: Commissioner Block?

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

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

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

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

Thank you.

CHAIRMAN WILKINS: Commissioner Caruthers?

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

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

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

Thank you.

MR. WALLACE: Thank you.

CHAIRMAN WILKINS: Again, thank you both.

MR. WALLACE: Thank you, Judge.

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

Oversight.

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

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

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

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

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

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

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

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

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

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

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

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

and substitution of products.

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

Defective products are products which do not meet the standards required by the contract and therefore are probably non-conforming or otherwise will fail, either catastrophic failure or more likely result in premature failure and expenses to the Department from that aspect. This is a critical problem and one that is very difficult to separate criminal activity from just the problems of manufacturing items to specifications.

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

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

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

Now, in 1988 alone, the four Defense criminal investigative organizations, with Department of Justice assistance, of course, obtained 679 convictions in these areas that I just spoke to, and we recovered some $445 million in fines, restitutions, penalties, civil recoveries, settlements and so forth, and those amounts and those convictions apply to large contractors and small contractors.

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

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

the dollar level of the contract involved.

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

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

component which it is a part of.

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

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

Those receiving a minimum of 18 months or more were 3; 4 were 12 to 18 months; 1 was 6 to 12 months; 6 were in the category of 1 day to 6 months; and there was no incarceration in 9 of these cases.

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

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

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

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

Overall, through the entire period, September '82 to February of '89, about 53 percent of those convicted of product substitution have been incarcerated.

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

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

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

CHAIRMAN WILKINS: Thank you very much.

Mr. Silverstein, do you intend to make remarks?

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

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

Are there any questions from my right? Commissioner Block?

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

MR. VANDERSCHAAF: That is correct, sir.

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

deal with that in a sensible way.

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

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

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

was presented, the individual received a substantial jail sentence.

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

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

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

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

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

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

COMMISSIONER BLOCK: Would a rectification cost inclusion in the loss be helpful? I mean one way to judge the

seriousness is how much is spent on --

MR. VANDERSCHAAF: Sometimes the losses are so tremendous that I don't think you -- first of all, I don't know how we would add those up, and you would never be able to recover. Many of the companies are far, far too small to even begin to --

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

MR. VANDERSCHAAF: It might.

MR. SILVERSTEIN: In regard to that, in the prior comments regarding the organizational sentencing sanctions, we recommended in estimating the loss would not only include the actual dollar loss on the contract, but the loss of seeking out discovering, removing the parts, the loss due to the testing of the parts, loss due to in fact putting the new parts back in.

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

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

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

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

MR. VANDERSCHAAF: Okay.

COMMISSIONER BLOCK: In part, that is not enough, but one of the ways to get at this is to include the rectification costs in setting the base offense level.

MR. VANDERSCHAAF: If in fact --

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

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

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

CHAIRMAN WILKINS: Commissioner Caruthers?

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

MR. VANDERSCHAAF: Thank you.

CHAIRMAN WILKINS: Commissioner Nagel, any questions?

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

CHAIRMAN WILKINS: Thank you very much.

MR. VANDERSCHAAF: Thank you.

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

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

Good afternoon.

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

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

CHAIRMAN WILKINS: Thank you.

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

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

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

is that, to the extent that reviewing the penalties for fraud at federally insured savings and loans and other federally insured institutions, is an attempt to address the savings and loan problem, it probably will not lead to the desired results. The $100 billion deficit we face today, in my view, was not a failure of the legal system, it was a failure of the regulatory system, and I think that there is some confusion about that.

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

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

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

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

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

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

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

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

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

As I noted in my written statement, a well-functioning market based economy, of course, must punish fraud, but poor financial performance, incompetence or a lack of financial sophistication generally are not the elements of criminally fraudulent behavior. Managers placed in an untenable situation by a flawed regulatory system should not then have to face ex post judgments by parties attempting to deflect criticisms from themselves.

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

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

CHAIRMAN WILKINS: Thank you very much.

Judge Breyer?

COMMISSIONER BREYER: Thank you. I see your point.

CHAIRMAN WILKINS: Commissioner Nagel?

COMMISSIONER NAGEL: Thank you. I read your testimony and it was quite interesting.

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

COMMISSIONER BLOCK: I just have a short clarifying

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

MS. ENGLAND: With my position?

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

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

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

particular problem there.

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

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

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

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

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

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

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

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

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

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

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

investment decision as a manager.

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

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

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

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

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

COMMISSIONER BLOCK: Thank you.

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

MS. ENGLISH: Thank you.

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

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

Thank you very much. We stand in recess.

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

AFTERNOON SESSION

CHAIRMAN WILKINS: The Commission will be in order.

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

JUDGE URBOM: Yes, sir.

CHAIRMAN WILKINS: And you communicated with the Commission in a very extensive letter outlining your experience and we appreciate your appearance and testimony today.

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

JUDGE BRODERICK: Thank you.

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

JUDGE URBOM: Judge Wilkins and Members of the Commission, I am glad to be here so you could hear me.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If they don't have a job, we help them get a job, that is, the defendant. Thus far, that has worked all right. We have an understanding that if the person cannot afford this monitor, then the monitoring will be done by a probation officer without any charge to the defendant. That is why we have been able to find opportunity for the person to make enough money where he can be self-supporting, plus supporting the monitor for that period of time he is on house arrest.

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

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

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

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

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

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

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

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

CHAIRMAN WILKINS: Thank you very much.

Judge Broderick, would it be your preference to deliver your remarks now and take questions jointly, or not?

JUDGE BRODERICK: That is fine.

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

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

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

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

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

There has been -- and I know everyone on this Commission is familiar with it -- an experiment, a joint experiment between the Bureau of Prisons and the Probation Department and the Parole Commission on early release and on the use of home confinement, with monitoring, with electronic monitoring with respect to that early release. This is an experiment that has been going on for some time and it will continue for some time.

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

District of California.

We, the members of the Judicial Conference Committee, are very much of the opinion that home confinement is punitive. I think what we have just heard about Nebraska reinforces that. We don't have statistics, of course. We are dealing mostly with anecdotal information, but that information is quite persuasive, that there are many, many people who would prefer to serve time in a community confinement, rather than under strictly supervised home confinement.

We believe that permitting home confinement as an alternative to a limited segment of possible prison sentences will be an extremely useful alternative sanction to be available, and it will certainly be an alternative that in the long run is going to be an economic one. It is much less expensive to supervise someone on home confinement than to have that same person either in a full prison or in a camp prison or in a community facility. So expense is one consideration.

Another consideration, of course, is that Congress has spoken to this area and Congress has said that home confinement should be a sanction, with or without elctronic monitoring, but only as an alternative to prison. Now, that provision of the 1988 Act, I think it is section 7305, does

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

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

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

end.

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

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

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

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

Thank you.

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

Did I get the sense, either Judge, that wealthy individuals are hard to quality for home detention?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMISSIONER BREYER: Thank you.

CHAIRMAN WILKINS: Commissioner Nagel?

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

doing the same.

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

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

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

COMMISSIONER NAGEL: Back in.

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

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

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

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

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

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

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

COMMISSIONER NAGEL: Thank you.

CHAIRMAN WILKINS: Commissioner Caruthers?

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

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

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

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

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

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

call them technical violations. To what extent did you experience problems with the offenders committing new offenses, as compared to the technical violations?

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

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

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

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

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

COMMISSIONER CARUTHERS: Thank you very much.

JUDGE URBOM: We have not seen any substantial

incidence of crime, but there have been other violations.

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

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

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

CHAIRMAN WILKINS: Commissioner Block?

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

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

COMMISSIONER BLOCK: All right.

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

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

COMMISSIONER CARUTHERS: Thank you.

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

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

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

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

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

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

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

I don't think that rich people ought to be disqualified from any kind of sentence, but I think that in particular circumstances, the defendant involved, the circumstances of the crime, and the economic situation in which they find themselves may speak to what kind of sentence they need.

COMMISSIONER BLOCK: Thank you.

CHAIRMAN WILKINS: Thank you very much.

JUDGE BRODERICK: May I just add something to that?

CHAIRMAN WILKINS: Yes, sir, Judge Broderick.

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

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

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

CHAIRMAN WILKINS: Thank you very much.

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

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

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

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

[Laughter.]

Professor Freed?

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

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

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

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

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

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

But there are other sources of public information that make this sanction important to consider today. There are the two pilot projects run by the Parole Commission that have already been referred to. There is this wonderful monograph put out by the Federal Judicial Center, entitled "Home Confinement: An Evolving Sanction in the Federal Criminal Justice System," which details in extensive and illuminating details the problems and the accomplishments of home confinement and the issues that remain to be resolved.

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

a back-end form of release.

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

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

justice case, and spelling out the details on which the sanction would be administered. It is a wonderful set of guidelines for anyone wanting to see the application of this sanction in a single case.

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

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

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

Finally, we recommend that in each place in your guidelines where the term "home detention" appears, you change it to "home confinement," for the reasons spelled out in detail in the Federal Judicial Center monograph and summarized in our testimony.

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

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

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

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

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

I hope that the process by which you proceed to

embrace this sanction on a limited basis will set a precednet for the way in which other alternative sentences might be brought to the attention of the Commission, so that it can try to ex pand the range of intermediate punishment that can substitute for imprisonment, which may not be necessary and is so costly today.

Thank you.

CHAIRMAN WILKINS: Thank you very much.

Commissioner Block?

COMMISSIONER BLOCK: I just have a question for Professor Freed, following up on a quick perusal of the written testimony. I notice that your reply to our inquiry of whether electronic monitoring ought to be required, your reply is that there ought to be encouragement, not required. I guess I would like to have you expand on that, in terms of what requirements you would put in this initial stage on the compliance monitoring at least in this system.

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

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

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

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

COMMISSIONER BLOCK: Thank you.

CHAIRMAN WILKINS: Commissioner Caruthers?

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

MS. CASPAR: Well, the States have used this technique with all kinds of serious offenders. Florida, for example, which has used it on the gamit of crimes almost, has a fairly low revocation rate, of about 20 percent, and this includes technical violations.

The Federal courts have been much more cautious in

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

COMMISSIONER CARUTHERS: Thank you.

CHAIRMAN WILKINS: Steve?

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

MR. FREED: I agree with what the Judges said earlier, that the sanction is too new and the imagination and resourcefulness of different judges and different districts is too wide for the Commission to restrain any of the variables at this time.

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

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

COMMISSIONER BREYER: Thank you.

CHAIRMAN WILKINS: Thank you.

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

their own details of supervision and monitoring and other aspects, some of which is spelled out in Judge Weinstein's opinion.

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

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

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

CHAIRMAN WILKINS: Thank you very much.

Our next witness is the Acting Assistant Attorney General, Tax Division, someone who is no stranger to the Commission as well, Mr. James I.K. Knapp.

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

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

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

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

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

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

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

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

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

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

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

income.

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

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

Consequently, we believe that certain changes need

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

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

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

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

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

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

cases will be realized.

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

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

I would like to spend just a couple of minutes finally on the third matter, which is the clarification of the scope of relevant conduct. The Commission has proposed to, in effect, set out a presumption that all tax violations are related and put the burden on the defendant to prove otherwise.

The problem with that is it doesn't provide any guidance for determining what constitutes related conduct between one tax violation and another. Does that mean related in a functional sense, in a motivational sense, in a transactional sense, to juse time or type of techniques that were used in a particular violation? There is just a whole myriad of situations one could hypothesize where you could have a violation separated by 5 years, one could be a deduction violation and one could be a non-reporting of income violation -- all kinds of questions would arise as to whether or not this was related or non-related conduct.

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

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

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

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

Thank you.

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

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

COMMISSIONER BREYER: I congratulate you on your new position.

MR. KNAPP: Thank you.

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

MR. KNAPP: Thank you.

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

If you take all the people who in 1987 were not confined, in each of these areas there were quite a few poeple who got pure probation --

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

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

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

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

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

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

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

MR. KNAPP: Well, I think what we are proposing, if the Commission is going to take interest out of the calculation, that they should substitute a one-level increase, instead of --

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

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

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

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

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

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

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

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

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

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

CHAIRMAN WILKINS: Thank you.

Commissioner Nagel?

COMMISSIONER NAGEL: Nothing.

CHAIRMAN WILKINS: Commissioner Caruthers?

COMMISSIONER CARUTHERS: No.

CHAIRMAN WILKINS: Commissioner Block?

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

MR. KNAPP: It is nice to be here.

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

MR. KNAPP: Yes.

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

MR. KNAPP: Yes.

COMMISSIONER BLOCK: Now, in the tax area it is slightly more complicated. I remember simulating that. I want

to go over this so that I understand your concerns. As I understand the first concern is that if you look at the way the system will work, it works pretty much the way we thought it would, and that is that there will be a lot of 7 to 10's, Levels 7 to 10's, and those are the area where you get into community confinement and you are worried about departures there, down to no meaningful confinement.

MR. KNAPP: No meaningful community confinement or community confinement in name only.

COMMISSIONER BLOCK: Okay. I have two observations on that. One, it appears from very preliminary evidence in the fraud area, where we have a few hundred cases, that we are not having a huge problem in those lower offense levels. That is very preliminary.

I guess what I would like is that you help us monitor that by giving us information on where, when these come up, where these incidents are, where the system is breaking down. It is fairly serious. When we designed the system to get to certain -- and if your assertion comes true, then we haven't accomplished what we set out to accomplish, but I think there may be a little more time for that, maybe a little preliminary guess what will happen without the evidence.

MR. KNAPP: It is going to be difficult to do that in tax cases, because the guidelines only apply to tax of fenses that were committed after I guess November of 1987, which --

COMMISSIONER BLOCK: Well, we might be getting some evidence from --

MR. KNAPP: We have isolated cases, conspiracy cases, but it is going to be some time before we can do it. Under our calculations, if the two-level reduction applied in the vast majority of cases, 93 percent of those cases would be Level 10 or below. Now, if the two-level didn't apply, it jumps down to 77 percent, but that is still a very substantial percentage, so the vast majority of cases are subject to this concern, namely that there will be no meaningful sort of confinement and that does not send a very good deterrent message, regardless of what really happens in individual cases.

COMMISSIONER BLOCK: Two points again. One, let me get some evidence at least from other areas closely related. I mean I realize that tax is particularly difficult, but there are frauds with somewhat shorter fuses and we get evidence next year that this is happening, we will have a firmer basis to react. I think we all share a concern that if this

occurs, it is not what we intended to occur.

The second is I am concerned about the calculations and, as I remember it, the prediction was that on average sentences would be 9 months. I don't have a supplementary report in front of me, so I am going to do this from memory. I think that prediction was for an average sentence of 9 months and a reduction and probation from some 50 percent down to 25 percent. I think that is what it is.

The probation numbers look about right when you calculate your calculations with the 900. I wonder why we got a higher average sentence figure than I guess you would come out with. Did you calculate what the average sentence would be in these '87 cases, if they say we are in the middle of the guideline rates?

MR. KNAPP: It may very well be when you did your calculations, you took into consideration tax cases involving illegal income where there are no charges involved, the so-called special enforcement cases which are not in this calculation. That may explain it. But according to the study which was done just of general enforcement cases, which is the typical taxpayer, legal income, general deterrence type of case, if you applied the guidelines to the '87 cases, 10

percent would fall Level 6 or below, and that is straight probation. But an additional 66, for a total of 77 percent, would fall Level 10 or below. And if you apply the two-point adjustment to acceptance of responsibility, which I suspect will be applied in the vast majority of those cases, almost whenever there is a plea, that number jumps up to 93 percent, so, only 7.5 or 8 percent are facing the clear heavy Level 11 or more type imprisonment.

COMMISSIONER BLOCK: I want to follow up on that. It seems to me that it really turns on what happens in those cases. I mean we have to wait a while to see whether in fact we get imprisonment in those cases, because that is what we are predicting, that we get meaningful confinement. If we get meaningful confinement, we have done what we set out to do, we shorten the sentences. We have reduced the straight probation inside the guidelines, we have reduced the straight probation much below the level that you have in 1987. You have 45 percent of your cases where there is a straight walk, and that has been reduced to about 25 percent. Your argument is hypothetically, though, judges aren't going to use that discretion in the 7 to 10 range to give real sentences. We need some evidence that that is not occurring before we act.

MR. KNAPP: Well, I think when you made your original calculations, you probably also factored interest into consideration. I don't know --

COMMISSIONER BLOCK: But you made the point about --

MR. KNAPP: If you make this one-level adjustment and with the two-level, then the corresponding two-level reduction for acceptance of responsibility, my projection would be that you would have 15 percent fall in the straight probation category, 71.5 percent fall in this wobbily area, that is 7 through 10, and 13.5, which is not a humongous number, in the upper category. So, what I am suggesting is that perhaps this one-level increase is a reasonable alternative to the interest, and in addition will still enable you to test this because you will still have a very significant number of cases falling in this wobbily area.

COMMISSIONER BLOCK: Thank you.

CHAIRMAN WILKINS: Judge Breyer?

COMMISSIONER BREYER: There is a mix-up here, I think I may be the one mixed up. Now, I don't see how the guidelines weaken the penalty at all, in any sense. I think maybe I am misreading it or maybe there is -- look at Levels 7, 8, 9 and 10, look at what happens now. What happens now

is, well, a little less than half the people get fewer probation, that means they are out on the street, and the other have get some term of prison, right?

MR. KNAPP: Well, I don't know that they are on probation, it is just simply --

COMMISSIONER BREWER: Half of them get prison and something happens to the other ones?

MR. KNAPP: Something, yes.

COMMISSIONER BREYER: I mean probably they are out on the street, but I don't know what else --

MR. KNAPP: Not necessarily.

COMMISSIONER BREYER: My point is that now go over to the guidelines. In Levels 7, 8, 9 and 10, the sentence is the judge may satisfy that sentence by a sentence of imprisonment. I mean I don't see any reason why -- you are lawyers and I am impressed by lawyers, and I assume they will still be in court arguing today just as they did in 1987, Judge, this man belongs in prison, he is a Level 7, he's a Level 8, he's a Level 9, he's a Level 10, send him to prison, just as you did in 1987. And I don't know why the judge wouldn't do it. If he did it before, why wouldn't he do it now?

The only bite that the guidelines have on Levels 7,

8, 9 and 10 is those people who were being sent to prison in '87. They can't just go walk on the street. Those people who were being sent to prison in '87 have to be given a term of confinement, so the guidelines are only tougher, they are not lenient, more lenient in any sense. The people who were sent to prison still go to prison, and the people who are walking around, they go to confinement, too.

Now, the other sense in which the guidelines are tougher is that the number of people overall who can't walk around, overall, on your own calculations, are either 9 percent or 14 percent are the maximum number that can be walking around in the street. Right? And currently, there could be up to 46 percent walking around in the street.

So, we have done two things. First of all, there can't be more than, let's say, maximum 20 percent walking around on the street, whereas today there could be 46 percent walking around in the street; and the second thing is that anyone who is going to prison in the past still could be sent and should be sent to prison in the future. So, I don't see any way in the tax area, for better or for worse, I don't see any way in which these guidelines are more lenient in any respect, and I do see, I think from what I have said, they

have accomplished this objective of taking the people, many of them who are walking around the streets, saying they are going to get at least a short term of confinement, so that is how I am reading this.

MR. KNAPP: I think what happened, I can see why you reached that conclusion. One thing you will note of interest, that the percentage of those going to prison at the different levels is roughly the same, from bottom up to top, and I think what that reflects is the fact that in the past the judges only weighed the amount of the tax loss, it was a relevantly minor factor in fixing the sentence. Now that the Commission has made it the driving force, said this is really the predominant thing, I think the tendency of the courts is going to be, well, all right, this is a case which now the Commission has put down in the lower part, has put in the Level 7 to 10 category, and it is a Category 1 situation, which almost all these situations are, I think the tendency of these judges is going to pick the least onerous alternative available, because these are all individuals, these general enforcement people are all individuals who are not involved in other kinds of criminal activity.

You have got a lot of drug traffickers out there

ready to go to prison, and the tendency in all these cases is going to be to say no, we are going to give these people the least onerous form of confinement we can get away with.

COMMISSIONER BREYER: So you will have to try to keep track of what is going on and why and let us know this. It is --

MR. KNAPP: Well, we will get into that situation to begin with, because once this arises and the word gets out, if the word gets out that the vast majority of people are, in effect, if they are suffering any sort of confinement, it is an easy sort of confinement and that is going to seriously going to diminish the deterrent effect of criminal tax enforcement.

CHAIRMAN WILKINS: Thank you very much, Mr. Knapp. You did make one compelling point, that some of the guidelines, because of the interest, the longer the government waits to indict, potentially the higher the sentence becomes.

MR. KNAPP: That is correct.

CHAIRMAN WILKINS: That is not a good consequence.

MR. KNAPP: Right.

CHAIRMAN WILKINS: Well, thank you very much. We appreciate not only your comments, but your written testimony

as well, and we look forward to continue to work with you and your division.

Thank you.

MR. KNAPP: Thank you very much.

CHAIRMAN WILKINS: Our next witness is Mr. Lucien Campbell. Mr. Campbell is a Federal Public Defender from San Antonio, Texas, one of the Federal Public Defenders who has worked with us since the beginning of this Commission's work.

Mr. Campbell, I too want to note that we appreciate not only your attendance but your very comprehensive written submission. I know it took many hours to complete it and we appreciate that very much.

MR. CAMPBELL: Thank you, Judge Wilkins.

CHAIRMAN WILKINS: I must say one other thing. I apologize to you and to the other witnesses. I have a long-standing commitment to represent the Sentencing Commission at a Brookings Institution activity and I must leave now in order to meet that commitment at 3:30. But I have your written testimony and I read it and I will continue to refer back to it, as well as the others. That is why the written testimony is so important. We have a lot of give and take here, but we can go back and study the the other.

In any event, I must leave you and I am going to ask Commissioner Nagel if she would chair the remainder of the afternoon of the Commission's activities. I enjoyed having lunch with you.

MR. CAMPBELL: Thank you, Judge.

Mr. Chairman and Members of the Commission, I am pleased to submit my testimony on behalf of the Federal Offenders. We operate under the Criminal Justice Act in 47 out of the 94 judicial districts, and we undertake representation in over half of the appointed cases in the Federal Courts.

What I would like to do is summarize our response to some of the Commission's key proposals and, if time permits, to mention some of the points that are important to me.

First, it is proposed to amend the bank robbery guideline. I would point out that the guidelines are going to have a leveling influence on sentences across the country. They are going to take them up in some areas and take them down in others, and I think the question is not whether someone is offended or someone complains here or there. Even if the data that the Commission has gathered showed that the average may be lower, I think that is the beginning of the inquiry and not the end of the inquiry.

I think the question is does the present guideline serve the statutory purposes of sentencing. As we speak, the guidelines have been in effect nationwide something less than three months, and I think it is well to recall that that particular guideline is a rather complex one. It has a number of specific offense characteristics capturing a number of different things, it is going to cover a lot of different cases and produce a lot of different results, and I think it simply needs some time to see exactly how it is going to work.

I am particularly concerned with the first offender note robbers who I think are fully punished by the present guideline and I would be concerned about seeing them swept upward in a general revision of that guideline.

The career offender guideline I think stands on a different footing and perhaps I should say why I think it is different and why I am not saying go slow in a revision of that guideline.

First, there is a difference in the way it operates. Whereas the robbery guideline is complex and works many different ways, one can look at the career offender guideline and see the result in any given case. I think also the magnitude of the error is important. If the robbery guideline

is wrong, it is a much smaller error than the error produced by the career offender guideline if that one is wrong. And I believe the sentences produced are excessive.

Where the Commission is able to identify a guideline that produces an excessive sentence, then I think there is an imperative to amend it. Apart from the question of deprivation of personal libery, which I am sure is measured carefully, an excessive sentence is a form of governmental extravagance. Of course, the Commission is charged with the responsibility of managing valuable government resources and they are resources that are in very short supply.

I am not going to repeat the arguments against it. I think they are collected rather completely in the proposal, but I am especially impressed by the way that the maximum turns on this patchwork criminal code that we have that has not been rationalized. It is a terribly rude way to fix the maximum punishment, when it is going to depend on what happens to be the maximum of the last offense of conviction.

On the question of whether the Commission has authority to make a change, I think the Commissiondoes. I think it is very significant that 994(h) does not speak to the statutory maximum. I think there is room to interpret it to

mean a functional maximum as determined by the Commission, which the Commission seems to be in the process of doing.

The Commission has already interpreted and implemented, as I think 994(h) intended, the congressional mandate did not say cut off remote convictions, which the Commission did, or foreign convictions, which the Commission did, and the Congress let that guideline pass into law. So, I certainly think there is room to interpret it.

Option H that is presented in the proposal, I am not sure exactly why it is there, but I certainly think that is not what Congress intended, that is, to automatically give everyone the statutory maximum. If the Congress intended that, it is a simple matter for the Congress to do that by statute, as they did in a similar statute in the last drug act. There would certainly be no need to tell the Commission to address by guideline.

Criminal livelihood, I would subit, is still in need of some attention from the Commission, because it reaches persons on the basis of socioeconomic condition. If two people steel $10,000, it carries a likelihood that one who has a job will not go to jail and the one who does not have a job will go to jail. I would suggest that the Commission look to

the time period involved. I have seen instances of trying to interpret "substantial period of time" to mean a period as short as simply a few weeks, and the one-year period in the proposed amendment does not reach that at all, because it merely establishes a maximum period of time that the government can look to to try to identify the $6,700 in the proposal.

I would also suggest that the Commission not delete the exclusion from minor offenses, because I have seen many instances where in minor offenses, by that I mean misdemeanors or petty offenses, that could arguably apply to take someone up to Level 13 and I don't think those are the kinds of cases that the Congress intended to reach by 994(i).

We do favor home detention on a one for one basis, I would submit. I think to do it on any other basis on a lessor equivalency would be rather arbitrary, because I think there is a considerable overlap in the restrictiveness between some community confinements and some home detentions. Also, making it something less than one for one would have the effect of restricting the availability of it.

I don't think it is necessary to restrict it to particular kinds of offenses or offenders, because if the Commission retains some limitation on the maximum length in the

commentary as there is now, that will have a natural effect of limiting the kinds of offenses for which it would be available.

We are pleased to see the Commission is considering an amendment to walk a ways from the half-way house, 2(p)(1.1). We would suggest, rather than Level 10, that Level 8 would be the proper level for a walk-away from a non-secure facility. I see that the Bureau of Prisons recommended a 10. I am not privy to what is behind that recommendation, but it simply seems to me that a non-secure walk-away is less serious and certainly not any more serious than a walk-away from a secure facility, even if the underlying offense is a misdemeanor.

I think the voluntary return is valuable and should be retained. I am sure that among the target audience in the half-way houses, the 96-hour figure is well known, because this is frequently an impulse offense. I think it is going to induce a number of people to return, thus affecting the offense conduct and saving the time of marshals from having to go out and hunt people down.

I don't see a need to differentiate between offenders, types of offenses for which someone is incarcerated, because I think that that process has already happened. I think by the

time someone arrives at a community treatment center, they have been equalized. In other words, some people may have served more time inside in hard confinement before they arrived there, but once they arrived there they have been equalized and the offense conduct is basically the same.

On acceptance of responsibility, we oppose the change from "made a good-faith effort" to "provided substantial assistance," because it would seem to require concrete results in order to entitle someone to relief for acceptance of responsibility.

I think it could cut out consideration from the person who provides valuable assistance but, through some happenstance or law enforcement error, there are no results; someone who proffers or tenders very valuable assistance, but the government elects, for whatever reason, timing or lack of resources, not to act on it, and there are no results. I think both people in those categories are deserving of some consideration. I think results are evidence of entitlement to consideration, but lack of results should not cut someone out of it.

[5] If I may mention one other item, I am concerned with the interplay between 1(b)(1.2), applicable guideline and

acceptance of responsibility. They were both amended back in January 1988. To "relevant conduct" there was added the language that when a person stipulates during a guilty plea to elements of a more serious offense, use that guideline and treat it as if the person had been convicted. At the same time, "acceptance of responsibility" was changed from acceptance of responsibility for the offense of conviction to acceptance for his criminal conduct, and the net results is that a defendant can be whip-sawed between these two provisions.

Someone who, for example, during the course of a guilty plea acquiesces in or agrees in a full statement of the factual basis I believe is at risk of having 1(b)(1.2) apply. Someone who does not is at risk of having talked himself out of acceptance of responsibility.

Now, there is evidence here and there in the guidelines that it is not intended to work that way, but I have seen efforts in the courts to apply it that way and I think it is a significant pitfall for the unwary. I think it should be clear that what is referred to is an express stipulation, an agreement entered into with the full knowledge and understanding of the defendant and counsel before 1(b)(1.2) should

come into play.

The defenders appreciate this opportunity to present testimony and participate in this process. I would like to mention that we wish to be available to the Commission and staff not only at this public comment time, but at any time that it appears that it would be productive to confer on matters of mutual interest.

Thank you.

COMMISSIONER NAGEL [presiding]: Thank you very much, Mr. Campbell. We appreciate your testimony and your very comprehensive commentary on the proposed amendments.

Any questions to my left?

COMMISSIONER BREYER: You review legal work rather quickly, very well. Do you think that you will have some sort of memo on whether we have the legal power to adopt the career offender modifications that are proposed? Maybe you can discuss it with the department.

MR. CAMPBELL: We would be happy to --

COMMISSIONER BREYER: It is a difficult question and I think a week from Tuesday, when we are going to be discussing these things, I think it would be helpful to have the best legal advice we can have and you might see what the department

thinking is.

MR. CAMPBELL: I agree that it is an interesting question and we would like to turn our attention to that. I might mention also that a good attorney, of course, submits a proposed order setting out exactly what he wants. We did not have the time to do that and submit a draft guideline every time we made a suggestion. But if the Commission finds that it would be helpful to come up with a draft, we would like to have the opportunity to do that.

COMMISSIONER BREYER: Well, the career criminal is the policy question and the -- one question is the policy we have got to follow. We could come to one answer. I mean I favor these changes first of all, and the other is the question is whether we have the legal authority to change and I hope that the statute is flexible enough to give us that authority. It is that second question that I think we might need legal help on.

The other thing, it seems to me, is your last point, because you are quite right that the purpose of that stipulation has nothing to do with acceptance of responsibility. It was a way in an appropriate case, as the statute provides, to escape the literal language of the career offender provisions

of the statute. You are aware of that?

MR. CAMPBELL: Yes.

COMMISSIONER BREYER: I don't think it was meant to have any consequence to the acceptance of responsibility or vice versa. I am not sure what language we should put in, whether it is commentary or whatever to make that clear. This is the first time I have ever heard that unintended consequence of that.

MR. CAMPBELL: Well, in a setting where there is an attempt on the part of any participants in the process to increase the result --

COMMISSIONER BREYER: I see it.

MR. CAMPBELL: -- it certainly provides a way to attempt to do that.

COMMISSIONER NAGEL: Commissioner Block?

COMMISSIONER BLOCK: I just have an observation on that last point, and I want to get it clear before I attempt my comment. Your point in terms of relevant conduct and the acceptance of responsibility is that with stipulation the conduct is really -- say bank robbery, let's take that, and in arranging a plea, one possibility according to the guidelines is to take a plea to the lesser including bank larceny,

let's say, but to stipulate the elements of the robbery and then to be sentenced under the robbery guideline.

Was your concern that the defendant faced with that option or not accepting the traditional stipulation, would not get the acceptance of responsibility unless he or she stipulated to the robbery elements?

MR. CAMPBELL: Because of the broadening of the acceptance of responsibility, and having just made that change a year ago, I am certain the Commission does not wish to retreat from it, so I think if the Commission sees the need to address it, it would be on the other end of making it clear that what is contemplated is an express stipulation in reliance on 1(b)(1.2).

COMMISSIONER BLOCK: There is a little evidence on a related but not identical point, and you will pardon me for the relatedness and not the identical, because we have nothing on that point. But in looking at the first several hundred bank robbery cases, we noticed that there are both a dropping of counts and acceptance of responsibility, but that is only a related question, but it doesn't appear as if the courts are requiring one to accept pleas for all of the counts before giving acceptance of responsibility. Now, that is not

identical, but it is a related issue, and the other guidelines seem to be working out okay in the sense that there is no whip-sawing between dropping counts and the acceptance provision. The information is available and we are distributing that now and you might be interested in that.

COMMISSIONER NAGEL: Thank you very much, Mr. Campbell.

MR. CAMPBELL: Thank you.

COMMISSIONER NAGEL: Our next witness is Professor Larry Ribstein, Professor of Law, George Mason University.

Professor Ribstein, we are very happy to have you with us today.

MR. RIBSTEIN: I appreciate the opportunity to be here. I admire your stimini at this point in the afternoon, and I will try not to presume on it more than I need to.

I am here to talk about insider trading penalties and specifically the suggestion in proposed Amendment 119 that possible insider trading penalties should be increased beyond those for other forms of fraud and also the adjustments in the basic fraud penalties that will be applied to insider trading under 2(f)(1.2).

Very briefly, I have three kinds of problems with

insider trading penalties and with not only the amendments but also the present system.

One, the problem of the penalties being based on loss, there are two sort of sub-problems with that. One is we don't really have a theory or a good explanation for the kinds of losses insider trading causes. There is a considerable amount of debate on that.

The second sub-problem is that the way loss I think is computed now under 2(f)(1.1) is that you look at the way that the market has been affected by the information that the insider was trading on, and that I think is not only totally inappropriate from a policy standpoint, but also inconsistent with case law, statutory law, and so forth.

The problem is that insider trading is not the same thing as deception. What the insider is doing wrong is trading and nothing more than that. If anything, he is helping the market more than he is hurting it, to the extent that other people trade on the basis of the information about what the insider is doing. We are not talking about a lie or a misrepresentation to the market. So, again, I think it is in appropriate to base insider trading penalties on the same theory that is being used for deception under 2(f)(1.1), and to the

extent that you even increase insider trading penalties beyond what is now being imposed for deception and to the extent that you increase the penalties for deception, I think you are just making those problems worse.

Our second problem is that, whatever penalties you have for insider trading, I think ought to take into account the fact that the crime is extremely ill-defined at this point. Congress refrained from defining it when it last had the opportunity in the 1988 Act, and the courts still haven't made up their minds, for instance, the Supreme Court very recently in the Carpenter case declining to decide whether the misappropriation theory was a valid theory for insider trading losses.

I think one illustration of that is the problem you get under the Dirks case, a tippee is liable if the tipper reaps some personal benefit from the tip, so what is the personal benefit? It might be, as the Supreme Court itself indicated, a gift by the tipper to the tippee, what has been known as the "big chill" situation, where you have a tipper who wants to confer a present in the form of information on the tippee. The Supreme Court said that that might be a personal benefit, but that is very hazy when you get that kind

of benefit.

I mentioned in my written statement the case of Barry Switzer who was sunbathing at a track meet one day, overheard a friend of his who was a corporate executive talking about a business trip he was about to take to sell a subsidiary. Switzer then traded on that information, tipped to remote and third-level tippees, and they all reaped some money, but the Court said that was not a violation of 10(b)(5), because the executive friend of Switzer's didn't know that Switzer was there.

Well, under Dirks it is quite possible that if this executive had glanced around, had turned around and seen Switzer sunbathing there, Switzer saw the glance and interpreted it or should have interpreted it -- there is a sienter problem here -- should have interpreted it as an attempt to make a gift to Switzer. That is a violation of personal benefit under Dirks. That is some very hazy facts to rest a potentially criminal violation on.

The third problem I have with criminal penalties for insider trading, the way they are presently constituted, is that you have got I think a significant danger of deterring legitimate activities. One kind of activity that I mentioned

in my statement is the activity of analysts which the Supreme Court was specifically concerned about in the Dirks case. Analysts work on all kinds of non-public information and they have got to be able to know when that hazy test under Dirks has been breached and they, of course, are going to have in mind the potentially serious criminal penalties that can follow from playing too close to the line.

I think that is unfortunate, because analysts do quite a bit in terms of conveying information to the market. Another example that I didn't mention in my testimony is the effect on incentive compensation. It is quite a legitimate form of compensation to award executives stock in their company. But if you have extremely serious prison sentences associated with playing too close to the line, that form of compensation becomes less valuable.

I want to close by an illustration of the kinds of problems you get into by loss-related penalties for insider trading. In the Switzer case, according to a table in the Court's opinion in Switzer, a very rough computation of the market loss that would be applied under 2(f)(1.1), if you look at Note 8 under that, let's look at the aggregate market loss resulting from the disclosure, it is about $2.5 million. This

is comparing the sale prices of investors who sold before the disclosure with the post-disclosure price.

Under the proposed amendments to 2(f)(1.1), that would make it a Level 21 offense, which is about the same thing as selling 60 kilos of marijuana under 2(d)(1.1). Now, I think in addition to the practical problems I have mentioned of over-deterring legitimate activity and so forth, I think you have a problem here of penalties that are't properly related to the seriousness of the offense. So, I think, despite the attention has been given to some highly publicized recent insider trading cases, I think the Commission ought to stop and think about it, think about what I think are some very serious issues about what the appropriate penalties are for insider trading.

Thank you.

COMMISSIONER NAGEL: Thank you. I take it that one of your real concerns is at the point of adjudication and conviction, rather than the point of sentencing and that in effect your argument is that when we come to sentencing, because of the concerns you raise about who should and should not be convicted, we should proceed cautiously. If I read you correctly, let me ask you the same question I asked Professor

Macey, and that is if you were in our place, what would you recommend the normative sentence for someone who is convicted, since we don't deal with that stage, someone who comes to us convicted of insider trading?

MR. RIBSTEIN: Well, it seems to me I thought about that question in terms of what approach you would take and it seems to me that maybe the best -- I have trouble dealing with this, as I am sure Professor Macey did, too, because neither of us think there ought to be any criminal penalties for insider trading, but --

COMMISSIONER NAGEL: That may be the answer.

MR. RIBSTEIN: Right, but I am not here to propose that, because that is not your job, obviously. I want to say that in view of the uncertainty --

COMMISSIONER NAGEL: You could argue that it should be probation for 2 months or something, that is what I am asking you.

MR. RIBSTEIN: But Congress has very specifically said that there shall be criminal penalties for insider trading, and I am not going to argue with Congress today. What I am going to say is that in fixing those penalties, we ought to have some of these considerations in mind, and perhaps a

benefit related test, rather than a loss related test, given two points: One, the problem you have in determining what the losses are, and, two, the over-deterrence problem. I think somebody who is reaping a very substantial benefit from insider trading knows what he or she is getting into and --

COMMISSIONER NAGEL: When you say "a benefit," do you mean -- is there a distinction?

MR. RIBSTEIN: I am talking about the benefit to the trader.

COMMISSIONER NAGEL: Right.

MR. RIBSTEIN: For instance, in the Wayne case, you are talking about something like $19 million in profits there, I think that should be, assuming we are going to have criminal penalties for insider trading, I think that should be treated far more seriously than somebody who has reaped significantly less benefit, even though that person may have caused an equal or greater loss to the market, given the problems of determining loss.

COMMISSIONER NAGEL: I just want to be sure that you are arguing that it would be more appropriate to use the gain to the offender, rather than the loss as the basis?

MR. RIBSTEIN: Exactly. Right.

COMMISSIONER NAGEL: And you said you had a second distinction?

MR. RIBSTEIN: No, that is my primary -- that is really where I come down. If you are going to use the loss test, then I agree with those aspects of Professor Macey's testimony which I have just had a chance to glance at but I haven't read his other writings, I think you want to look at, for instance, the misappropriation theory as a possible guide, so that somebody who has taken information from his own employer would be punished on the basis of what it cost his employer, rather than what it cost some other party that he had no relationship with.

COMMISSIONER NAGEL: Questions on my left?

COMMISSIONER BREYER: Isn't that what we do?

MR. RIBSTEIN: Excuse me?

COMMISSIONER BREYER: I thought that is what we did. It says that insider trading, we use the fraud table corresponding to the gain resulting from the offense.

MR. RIBSTEIN: If that is true, then that is fine, but that is not the way I am reading it.

COMMISSIONER BREYER: Well, I will read it. It says increased by the number of levels from the table corresponding

to the gain resulting from the offense, and then in the background it says because the victims and losses are difficult, if not impossible, to identify, the gain, i.e., the total increase in value realized through trading in securities by the defendant versus acting in concert with him or when he provided inside information and it is employed, instead of --

MR. RIBSTEIN: Judge, I think at least there is an ambiguity there. If you look at Note 8, it does talk about estimate based on aggregate market loss.

COMMISSIONER BREYER: Note what?

MR. RIBSTEIN: This is Note 8 on page 2.68.

COMMISSIONER BREYER: But that is not insider trading. That is --

MR. RIBSTEIN: That's right, but as I read it, those tables are applied to 2(f)(1.2).

COMMISSIONER BREYER: To find out how to do it, you have to turn to 2(f)(1.2). Anyway, I thought that is what that the --

COMMISSIONER BLOCK: If I can interject, I think the confusion comes from the proposed amendments on page 70, Amendment 119, when it refers to the Major Fraud Act and the Insider Trading Act of '88, it talks about the Commission

seeks comment on whether there should be a higher offense level for insider trading of procurement fraud than for other frauds. It is not clear what guideline we are referring to in that sentence.

COMMISSIONER BREYER: Well, your view is that we are doing it basically right, I mean the part that I read you is basically right?

MR. RIBSTEIN: That's right, but if that is going to be controlling, rather than incorporating the loss tables, then I think --

COMMISSIONER BREYER: Well, you are looking at the table, but if you use it, when you look at the table, but what you are measuring is the amount of money that the people who got the information and played the market, the amount they made.

MR. RIBSTEIN: That's right. I understand. I see what you are referring to on the bottom of 2.70, but in any event, I think that ought to be clarified, because --

COMMISSIONER BREYER: It certainly should, you're right, if there is confusion.

MR. RIBSTEIN: -- because I think there is a confusion created by incorporating the loss table from --

COMMISSIONER BREYER: I mean I thought the theory -- we are prescribing for the typical case, I mean we are not writing -- I realize that in insider trading there are all kinds of unusual cases, there are borderline cases and there are hard cases and so forth, but we are writing really for the easier cases, the typical cases, and I assume those are the cases where somebody gets some inside information and they use it and make money out of it, in which case it seems to me if I were a lawyer, you give me zero money and I take your money and I try to make money out of that and I owe it to you. It is not mine. I took your money and took the opportunity and I owe you that, and it would be true if I took your car and I guess it is true if I took your information, if I take your information and I use it to my advantage. It is your information.

MR. RIBSTEIN: That's right.

COMMISSIONER BREYER: And what I have deprived you of is the use of it. You are entitled to the money I got for it, not me, and that is why I thought we were measuring the harm done in terms of the money I made by wrongly using your information. Should I be thinking of it that way?

MR. RIBSTEIN: I think so, yes, I think that should

be the test. I am not sure that it is clear under the current guidelines.

I also want to respond to another point you made, and that is in distinguishing between the ordinary case and the cases that have actually led to criminal penalties. I think we do need to worry about the deterrent effect on legitimate activity from these criminal cases that actually get to criminal sentencing, because the people will determine their own conduct based on a fear that they are going to be in that dark and they may say, well, you know, it is only Boesky, but there is the kinds of conduct that is included that is a lot more vague than what Boesky did.

COMMISSIONER NAGEL: Questions on my right?

COMMISSIONER BLOCK: Let me follow up on that, because I was somewhat confused with your comments also, and I guess, in reading the proposed amendments, it is not clear in the proposed amendments that we are talking about the 2(f)(1.2) in which we used the word "gain" although the application notes and then the background statement is -- insider trading is viewed essentially as sophisticated fraud, because the victim's loss is difficult, if not impossible, to identify, and the gain is used instead of the loss.

Now, help me with this. To the extent that insider trading is a taking, that is, there are defined property rights, and all insider trading is is a taking. This seems like a reasonable approach, I think you will agree.

MR. RIBSTEIN: That's right. If --

COMMISSIONER BLOCK: What we could use help with, and I think which would address your problem, is how do you get out of this category those types of insider trading which are not takings, where the property rights are not well defined. I don't know what the punishment for those should be, but I know that for a simple taking, I think Judge Breyer was getting to that in terms of when it is a violation of property rights, but this analogy to a sophisticated fraud or any fraud seems okay, at least it is tolerable, and I think you would agree.

The problem you have is when there isn't a taking and there aren't well-defined property rights. How would we rewrite this, if we are going to rewrite it, so as to get out those cases? I think that is the basic fuzziness question that you raise. I think that the essence of your point is that if you crank up the penalties and you have a fuzzy standard, there are real effects in the economy. The standard

is clear if it is just a taking and not so many real effects in the economy.

MR. RIBSTEIN: That's right. Now that I see that the Commission agrees that the test should be related to the insider's gain, we do come down to the problems you have been mentioning. In the Dirks case, the Dirks example is a good example of the situation where the property rights aren't clear and where the taking situation isn't clear and --

COMMISSIONER BLOCK: What would we do in terms of this guideline to deal with that?

MR. RIBSTEIN: I think, instead of adjusting the insider trading or instead of having insider trading penalties moving in lock step with the basic fraud penalties, also, instead of making insider trading penalties worse than the basic fraud penalties, make them less or find some adjustment factors in notes to 2(f)(1.2) that take into a-count that difference between insider trading and other forms of fraud.

COMMISSIONER BLOCK: If I could give you a homework assignment, it would be to help us on that distinction, because I think that would go a long way towards alleviating your fear about whatever we are doing with this penalty structure, it would help us.

MR. RIBSTEIN: Well, I will do that.

COMMISSIONER BLOCK: If I could ask you for a homework assignment, that would be it.

COMMISSIONER NAGEL: I believe we asked Professor Macey to do some homework. He shares I think many of your same concerns, so it would be well if we could receive some specifics on your suggestions on how we should give a new look or look at new criteria for insider trading. I know he seemed to have advocated practically that we should go back to square one and look at the establishment of the base level, look at how we determine loss, look at how we determine the specific offense characteristics, et cetera. He didn't feel that insider trading is fraud, and I think you indicated that you feel that the penalty should be something less than fraud.

MR. RIBSTEIN: That's right.

COMMISSIONER NAGEL: So you tend to agree somewhat with his assessment --

MR. RIBSTEIN: That's right.

COMMISSIONER NAGEL: -- and our taking a new look as well as insider trading not being clearly fraud?

MR. RIBSTEIN: That's right. I think fraud is an extremely broad word and I think that is part of the problem

here. Sure, it might be fraud under some people's definition, but I think the kinds of things that are covered under 2(f)(1.1) are fraud in the sense of deception, and my point is that is not what insider trading is, and therefore you have to go to a completely penalty structure to take that into account.

COMMISSIONER NAGEL: Thank you very much.

MR. RIBSTEIN: Thank you.

COMMISSIONER NAGEL: I have that they have turned up the air-conditioning so high we may have chilled the enthusiasm of anyone else to testify. But let me ask if Mr. Bartholomew is here? Yes, thank you. We were worried that you may have frozen.

Mr. Bartholomew is the Senior Economist with the Federal Home Loan Bank Board. We appreciate your coming and staying through the frost. We are preparing you for going outside.

MR. BARTHOLOMEW: Actually, I should correct that just a little bit. I am not the Senior Economist, I am a Senior Economist.

COMMISSIONER NAGEL: We have the same problem.

[Laughter.]

MR. BARTHOLOMEW: Madam Chair and Members of the

Commission, I am pleased to appear before you today. I apologize for not getting my written remarks to the Commission prior to my testimony. Unfortunately, this was not possible. However, I did bring them with me and I will be as brief as possible from them.

I would like to comment on the presence of negligence and fraud in thrift institutions on which Federal regulators have taken action in recent years. I would also like to comment on some issues pertaining to appropriate sentences for those individuals found guilty of criminally fraudulent actions directly related to federally regulated thrift institutions.

I should point out, I am a financial economist with the Office of Policy and Economic Research at the Federal Home Loan Bank Board. I am not a lawyer and do not consider myself an expert on the legal issues surrounding criminal fraud. However, I am able to provide some information on the recent problems experienced in the thrift industry, since coming to the Bank Board I have been involved in an economic analysis of the causes of the recent thrift failures.

As I am not a legal expert, I apologize if I make any mistakes in the correct use of the legal terms. The Federal Home Loan Bank Board is the Federal regulator of U.S. thrift

institutions that are either federally chartered or insured by the Federal Savings & Loan Insurance Corporation.

As has been well publicized, the U.S. thrift industry has suffered a number of problems during the 1980's. During the period 1980 through 1988, the Bank Board and the FSLIC have resolved some 488 failed thrift institutions. We consider a resolved thrift institution to be one that was closed by Federal regulators and either liquidated or merged with a healthy institution with assistance from the FSLIC.

The causes of the problems experienced by the thrift industry are very complicated and not simply generalized. In terms of the economics of the issue, we often refer to high interest rates in the early 1980's, we refer to problems with particular regional economic conditions in parts of the United States, as well as a few other factors relating more to the economics.

Unfortunately, the thrift industry appears to have experienced a significant amount of fraudulent activity that was perpetrated by both thrift institution insiders and outsiders. This has recently been documented in a study by the General Accounting Office, as well as the study that we are doing which is in its preliminary stages.

Presently, it is too early to say to what extent this factor, fraud, negligent activity, contributed to the failure of thrifts or to the cost of resolving failed thrifts. As I mentioned, we are doing a study in my office, a detailed study of all of the characteristics of resolved institutions and the costs of their resolution.

All 205 institutions that were resolved in 1988 were analyzed. These resolutions are estimated to cost the FSLIC on a present value basis $31 billion. A summation of the preliminary findings of this study are shown in a chart in the written document which I submitted to the Commission.

The 50 most costly resolutions in 1988 that were resolved at an estimated cost of $24 billion were analyzed separately. In my written remarks, I talk about some of the things that we generally attribute to more the economic side, and those characteristics are illustrated in that particular set of information.

The study that we did also examined the 1988 resolutions for the presence of negligence and fraud, and it is important to emphasize the fact that we only could look for the presence, not necessarily to the magnitude nor to the degree, nor were we able to ascertain as to whether the presence of

fraudulent activity caused the failure of the institution. At this stage, it is not possible.

The information collected on the presence of negligence and fraud in the 1988 resolutions was based upon the determination of the Bank Board's Litigation Division of the Office of the General Counsel. The attorneys working on these cases were surveyed as to their opinion of the presence of several categories of negligence and fraud in a particular case. Their findings may be considered to be those that they feel are actionable and on-actionable on the part of Federal regulators. No attempts were made to distinguish the degree to which an activity had been present.

In virtually all cases, the board of directors of resolved institutions were found to not have acted prudently. Fraudulent activities and regulatory violations were found in a number of the resolved thrifts. Our preliminary study shows a higher incidence of self-dealing, other fraud and regulatory violations in the most costly of institutions that we resolved.

At this time, it is too early to tell for some of the 1988 resolutions whether categories of negligence or fraud were present. However, based on the count to date, self-dealing was present in at least 34 percent of the 205 cases,

and for the 50 costliest resolutions, such activity was found in 50 percent of the cases. In 27 percent of all of the 1988 resolutions and 42 percent of the costliest cases, other forms of fraud were present. We define for this study "other fraud" to be that fraud which was perpetrated by outsiders.

Loans and borrower violations were also found. We found that they occurred in at least 34 percent of the 1988 resolutions, and for the 50 costliest resolutions such violations were found at 50 percent of the institutions. It is coincidental that those ratios for loans to one borrower violations are the same for the ratios for self-dealing. We analyzed that as well, and there were institutions that had self-dealing but not loans to one borrower violations.

Whereas this analysis is preliminary and does represent merely the presence of categories of negligence and fraud, it does appear that there was a significant amount of negligence and fraud present in those institutions that we studied and were resolved in 1988.

It also appears that the costliest resolutions had a higher incidence of the presence of fraud and negligence than the resolutions in general. However, although there was a presence of negligence and fraud in these resolutions, it is

not currently possible to determine the magnitude of damages associated, nor to what degree the negligence or fraud contributed to the thrift failures.

As a civil agency, the Bank Board is not empowered to do criminal investigations or to handle criminal prosecutions. However, the Bank Board assembles information and refers it to criminal authorities. The number of criminal referrals involving crimes against savings and loans increased from 434 in 1985 to over 6,100 in 1987.

In 1983, there were two signifiant criminal convictions obtained against individuals associated with FSLIC insured institutions. In 1987, there were 66 convictions obtained, and for the first 11 months of 1988 there were 58 convictions. During January through November of 1988, civil judgments were rendered in favor of the U.S. Government in 56 cases, with some $97 million awarded.

Certainly, this information does reflect the fact that the thrift industry has experienced a significant amount of what is called white-collar crime. In addition to encouraging the prosecution of individuals suspected of committing fraud against insured institutions, the Bank Board has aggressively supported the imposition of orders requiring restitution

to the FSLIC by convicted criminals, along with prison sentences and fines.

Federal law affords the victim of crime an opportunity of obtaining recovery of funds lost as part of the criminal sentence. Restitution orders issued pursuant to the Victim and Witness Protection Act are routinely sought by the FSLIC from the court at the time of sentencing. Whereas, Federal efforts have been increased, problems currently exist in preventing this type of crime, prosecuting the perpetrators and recovering from the perpetrators the damages that they have caused.

As an economist, it is difficult to determine the appropriate sentence for the variety of white-collar crime that exists. Criminal penalties do offer a disincentive to the potential criminal. It is not clear that a fine is a sufficient penalty for criminal fraud, especially in thrift institutions. Whereas a financial penalty may cause hardship to those convicted of white-collar crime, a prison sentence certainly may be a greater disincentive.

Certainly, the financial losses associated with most white-collar crime of thrift institutions are greater than most of what we would call traditional bank robberies. In

this regard, an argument for sentences associated with the the magnitude of the financial losses incurred by the crime might be warranted. It seems that this is not currently the case. I understand from discussions with people in my office, the attorneys who know, unfortunately the typical prison sentence for a thrift officer convicted of defrauding that thrift of millions of dollars has been just a few years at most.

It is certainly clear that damages incurred throgh criminally fraudulent activity should be recovered. This is not always possible, as the convicted perpetrator may already have spent or hidden the proceeds of their fraudulent activity.

From the point of view of a disincentive, if an individual convicted of fraud cannot pay restitution, then an additional penalty that reflects unrecovered damages seems to make sense. In this way, the potential perpetrator would understand that the consequences of his or her criminal activity would be fully subject to some form of effective punishment.

In closing, it is necessary to point out that the thrift industry has experienced a significant amount of white-collar crime perpetrated both by insiders and outsiders. Sentences that include both fines and prison terms seem to be

warranted as an appropriate punishment and disincentive. Sentences that reflect unrecoverable damages definitely seem to be appropriate.

Thank you very much for this opportunity and if I can't answer the questions, I certainly can have them referred to the correct people.

COMMISSIONER NAGEL: Thank you.

Are there any questions.

COMMISSIONER BLOCK: I have a quick follow-up question. The guidelines, as you may know, punish fraud on basically the size of the taking, and the question was whether there should be a special enhancement for financial institutions. If I was to summarize the thrust of your testimony, I think that one part that comes out of is the fact there should be these financial and imprisonment penalties for large-scale fraud. I think you will find that in the guidelines.

The second point I am less clear, and that is what is it that makes savings and loan fraud special and why should there be a special level for savings and loan fraud, other than the scale. In the guideline, they scale frauds up to $5 million now and there is a proposal to go above that in terms of gradations. Is there anything special about savings and

loan fraud that we should take into account?

MR. BARTHOLOMEW: I did see that in the questions that were discussed about revising the guidelines, and as an economist and also having looked at these cases, much as I might want to give specific penalties myself, I don't think that is possible. And as an economist looking at this, to me fraud is fraud. If it is at a thrift institution, I thought about this in preparing the testimony, if somebody rips off a citizen for doing some kind of contract work which they didn't do and didn't fulfill and were fraudulent in the activity and caused damage, those damages to me are the same as damages caused by fraud committed at a thrift institution, other than if we want to refer to the size.

COMMISSIONER BLOCK: Thank you.

COMMISSIONER NAGEL: Thank you very much.

MR. BARTHOLOMEW: Thank you.

COMMISSIONER BLOCK: Is there anyone else who would like to testify?

[No response.]

If not, we will consider this hearing closed. Thank you very much.

[Whereupon, at 4:00 p.m., the Commission adjourned.]

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