

DDH

UNITED STATES SENTENCING COMMISSION

Public Hearing

Sentencing Guidelines for Organizational Defendants

February 14, 1990

United States Courthouse  
3rd and Constitution Avenue, N.W.  
Washington, D.C.

BEFORE:

William W. Wilkins, Jr., Chairman

Helen Corrothers, Commissioner

Irene H. Nagel, Commissioner

George E. MacKinnon, Commissioner

Stephen A. Saltzburg, Commissioner

## C O N T E N T S

STATEMENT OF:	<u>PAGE</u>
Professor Carl J. Mayer, Hofstra Law School, Public Citizen	5
Morris B. Silverstein, Assistant I.G., Criminal Investigations Policy and Oversight, Department of Defense	16
Earlyn Church, Superior Technical Ceramics, Corp., St. Albans, Vermont, National Association of Manufacturers, accompanied by James P. Carty, Vice president, National Association of Manufacturers	33
James Strock, Assistant Administrator for Enforcement, Environmental Protection Agency, accompanied by Bruce Bellan	53
Joseph E. diGenova, Defense Attorney's Advisory Group on Organizational Sanctions	69
Sheldon H. Elsen, Orans, Elsen & Lupert, New York, New York	94
Frank H. Menaker, Jr., Vice President, General Counsel - Martin Marietta Corporation	113
Professor Christopher Stone, University of Southern California Law Center	128
Professor Amitai Etzioni, George Washington University, accompanied by Ms. Sally Simpson, Criminologist, University of Maryland	150
Frank McFadden, Senior Vice President, General Counsel, Blount, Inc., Montgomery, Alabama, American Corporate Council Association	163

## C O N T E N T S [continued]

STATEMENT OF:	<u>PAGE</u>
Roger W. Langsdorf, Senior Counsel, Director of Antitrust Compliance, ITT Corporation, U.S. Chamber of Commerce	174
Samuel J. Buffone, American Bar Association	187
Professor Richard Gruner, Whittier College School of Law	209
Fred Garrick, Associated Builders and Contractors	224
Nell Minow, General Counsel, Institutional Shareholders Services	235
John P. Borgwardt, Associate General Counsel, Boise Cascade Corporation, Boise, Idaho	248

\* P R O C E E D I N G S \*

1  
2 CHAIRMAN WILKINS: Good morning. Let me call this  
3 public hearing to order.

4 This is third in the series of public hearings the  
5 Sentencing Commission has held on the issue of Organizational  
6 Sanctions and we appreciate all of you who are in attendance  
7 today, as well as many individuals and organizations who  
8 submitted written testimony to us before today.

9 From the testimony that we have received and have  
10 reviewed, it appears that this will be a very informative and  
11 interesting session. We have a number of outstanding  
12 witnesses who will be appearing today.

13 Your testimony given today will be recorded and  
14 transcribed for the benefit of the Commission and I suggest  
15 to all of the witnesses that you consider limiting your  
16 opening remarks to the Commission to somewhere between 5 and  
17 6 minutes perhaps, so that we will have ample opportunity to  
18 ask you questions and sort and identify issues that are on  
19 our minds and receive the benefit of your thoughts.

20 We have a number of witnesses who will be testify-  
21 ing and we have a very long day and, consequently, in order  
22 to give everyone an opportunity to participate and be heard,



1 we must ask you to assist us in keeping on schedule.

2 Our first witness today is Professor Carl Mayer  
3 from Hofstra Law School.

4 Professor, come around, please, sir.

5 Professor Mayer is appearing on behalf of Public  
6 Citizen, our first witness today.

7 We're delighted to have you with us, Professor.

8 I am informed that all of the furniture in this  
9 ceremonial courtroom has been removed to the other courtrooms  
10 because of various multi-defendant trials that are going on  
11 today and this table was brought in as a makeshift.

12 Professor and other witnesses, it's not real  
13 stable. So be careful not to lean on it too hard.

14 Go ahead.

15 **STATEMENT OF PROFESSOR CARL J. MAYER, HOFSTRA LAW SCHOOL,**  
16 **PUBLIC CITIZEN**

17 PROFESSOR MAYER: Thank you, Mr. Chairman, members  
18 of the Commission. My name is Carl Mayer. I'm an assistant  
19 professor at Hofstra Law School. I would like to thank you  
20 for the opportunity to comment on the proposed guidelines.

21 Ralph Nader had been invited today and had intended  
22 to testify jointly with me. Unfortunately, Mr. Nader had an

1 engagement in another city and therefore could not attend  
2 today. He requested that I convey his apologies and also  
3 that I commend the Commission on his behalf for considering  
4 new forms of sanctions on corporations beyond simply monetary  
5 fines.

6 In his absence, I will try to outline the impres-  
7 sions of public interest groups on the proposed sanctions as  
8 well as add my own more academic observations. Although, I  
9 should note that these comments should not be construed as  
10 representing that of any organization. They are my own.

11 If I could summarize my testimony briefly, I would  
12 say that on Valentine's Day if I were to send something to  
13 these proposed guidelines it would be a nice card, but it  
14 would not be chocolate or flowers. It would be a nice card  
15 because these guidelines go a long way towards recognizing  
16 that monetary fines are not sufficient sanctions and that  
17 probation and community service are very important as  
18 deterrents to corporate crime.

19 Chocolate and flowers would not be forthcoming  
20 because the terms of probation could be much stiffer. In  
21 particular, as my testimony suggests, I think that three  
22 terms of probation would be quite important for the Commis-

1 sion to consider.

2 First, a debarment condition or suspension of  
3 Federal subsidies;

4 Second, a publicity sanction; and,

5 Thirdly, a consideration given to charter suspen-  
6 sion or revocation in certain instances.

7 Now, I begin with the presumption that corporate  
8 crime is a serious problem that has not been adequately  
9 deterred.

10 In 1985, the New York Times survey of the American  
11 public found that Americans believe that corporations engage  
12 in white collar crime very often. They also believe that  
13 some white collar and corporate criminal activity is more  
14 serious, for example, hazardous dumping, than some forms of  
15 homicide by individuals.

16 Public Citizen and other public interest organiza-  
17 tions spend a good deal of their time acting as shadow  
18 prosecutors. By that I mean they spend a good deal of their  
19 time prodding Federal regulators, Federal prosecutors,  
20 counseling whistleblowers, and other people interested in  
21 deterring corporate crime.

22 The cost to society of having public interest

1 groups spend their time on this time of shadow prosecutorial  
2 activity should be considered in the mix.

3           Perhaps the best example of this was Public  
4 Citizen's 2 year effort to have the Federal Government  
5 prosecute the Eli Lilly [ph.] Corporation for manufacturing  
6 Ora Flex [ph.], a drug that resulted ultimately in the deaths  
7 of 96 people.

8           Ultimately, there was a settlement in the case and  
9 the corporation was fined a mere \$25,000, but this is  
10 precisely the type of activity that public interest organiza-  
11 tions spend excessive time doing.

12           As a reflection of that public interest organiza-  
13 tions around the country in a broad coalition with environ-  
14 mental and consumer groups have recently introduced into  
15 several State legislature the Corporate Decency Act.

16           The Corporate Decency Act, which is appended to my  
17 testimony, is an act which provides for much tougher sanc-  
18 tions, specifically the three that I will discuss today.

19           The first is contract debarment. Now a suspension  
20 of Federal subsidies can be very effective for large or-  
21 ganizations, for example, the General Electric Corporation,  
22 which has been three times in the last decade convicted for

1 defrauding the Department of Defense on military contracts.

2           Now for large organizations that often are not  
3 deterred by fines a suspension of Federal subsidies is a  
4 uniquely important remedy.

5           In particular, if you analogize to the individual  
6 situation, if Ivan Bolsky [ph.] can be placed on probation  
7 and one of his probation conditions can be that he no longer  
8 participate in the securities industry while he is on  
9 probation, for a corporation it is very important that  
10 Federal subsidies, which would be a much less harsh probation  
11 condition than that imposed on Bolksky [ph.], that Federal  
12 subsidies be removed for the duration of probation.

13           The second important point is publicity sanctions.  
14 The literature on that is well known I believe to the  
15 Commission. I would only add as far as publicity sanction  
16 goes that business schools and business literature take very  
17 seriously the concept of corporate cultures and to the extent  
18 that publicity sanctions go a long way towards eliminating  
19 criminality from a corporate culture, they serve an important  
20 function.

21           I should also note that the Commission's guidelines  
22 specifically indicate that as a term of probation that the

1 court may direct a convicted organization to notify its  
2 employees about the conviction and conditions imposed upon  
3 the corporation under probation.

4 If employees can be notified, I see no reason why  
5 other constituents of the corporation, namely communities,  
6 workers, and shareholders, and consumers, should not be  
7 notified by requiring a publicity sanction.

8 Finally, charter suspension is a extreme remedy,  
9 but on that, as my testimony indicates, could be very  
10 important in fighting criminal activity by organizations that  
11 are legitimate organizations, legitimate business organiza-  
12 tions, but that are controlled by organized crime.

13 I point out in my testimony an example of this  
14 which is the recent prosecution in New York City by the  
15 Manhattan District Attorney's Office of a trucking and  
16 garment industry corporations that are believed to be mob  
17 controlled, but that are still legitimate businesses.

18 In some instances, charter suspension would be an  
19 appropriate remedy.

20 Finally, I end with a note on theory. The corpora-  
21 tions and their representatives have done much to tell the  
22 Commission that a corporation should only be considered an

1 economic entity and therefore cannot be subject to additional  
2 sanctions such as probation, jail terms, charter revocation.

3 I will only point to the Commission that in many  
4 other areas of the law, particularly constitutional law and  
5 corporate law, the same advocates for corporations go before  
6 the courts and ask that corporations be treated precisely  
7 like persons.

8 For example, in the constitutional area, corporate  
9 advocates often suggest that they can be treated like persons  
10 for First Amendment purposes, for Fourth Amendment purposes,  
11 for Fifth Amendment purposes, that corporations can speak  
12 with a unified voice, have associational interest in speech,  
13 have double jeopardy Fifth Amendment protections just like  
14 persons.

15 If they can be treated like persons in other areas  
16 of the law and if corporations and their advocates suggest  
17 they can be treated as such, I see no reason for not extend-  
18 ing that treatment to corporations in the criminal area and  
19 considering the important sanctions as terms of probation  
20 under the Commission's jurisdictional directive. I see no  
21 reason that these conditions cannot be imposed.

22 CHAIRMAN WILKINS: Thank you very much, Professor.

1           Let me ask, to my right, any Commissioner have  
2 questions?

3           COMMISSIONER MacKINNON: Yes, I have a couple of  
4 questions.

5           You talked about General Electric being convicted  
6 of three crimes defrauding the Federal Government?

7           PROFESSOR MAYER: Yes, I'm basing that on my  
8 reading of the papers.

9           COMMISSIONER MacKINNON: What were the nature of  
10 those crimes so far as the higher management in the firm was  
11 concerned? How did they get up? Have you made any study of  
12 those offenses?

13           PROFESSOR MAYER: I haven't made any study. To my  
14 knowledge, they were convicted recently in U.S. District  
15 Court in Philadelphia. It does not appear in that instance  
16 that high management was involved, but I am not certain. In  
17 the other two--

18           COMMISSIONER MacKINNON: That's the extent of my  
19 question.

20           PROFESSOR MAYER: Yes.

21           COMMISSIONER MacKINNON: You also said that  
22 corporations ought to be subjected to jail terms.



1 PROFESSOR MAYER: I said charter suspension or  
2 revocation.

3 COMMISSIONER MacKINNON: You mentioned jail term  
4 like an individual. Did you mean that?

5 PROFESSOR MAYER: Well, only to the extent that you  
6 can analogize to charter suspension.

7 COMMISSIONER MacKINNON: Thank you.

8 PROFESSOR MAYER: Certainly.

9 CHAIRMAN WILKINS: To my left?

10 COMMISSIONER NAGEL: How you envision the debarment  
11 provision working? The Commission obviously cannot make a  
12 debarment decision. So how would you envision that working?

13 PROFESSOR MAYER: It would be a term of probation,  
14 a condition of probation, that during the course of proba-  
15 tion, the corporation, for example, General Electric, would  
16 be barred from receiving, for example, Defense Department  
17 contracts.

18 This provision already works in many Federal  
19 statutes, statutes relating to nuclear power contracting, a  
20 licensing of broadcasting, and the terms of probation could  
21 be simply based on the mechanisms imposed in those statutes.

22 I believe it is fully within the authority of the

1 Commission to impose that as terms of probation.

2 CHAIRMAN WILKINS: Commissioner Saltzburg?

3 COMMISSIONER SALTZBURG: I just did not understand  
4 that last answer. You think that all of the statutes that  
5 govern Federal agencies are statutes that the Commission can  
6 use and draft regulations that would allow Federal judges to  
7 make decisions as to whether the FCC to grant licenses, as to  
8 whether the military would grant contracts?

9 PROFESSOR MAYER: No, no, not at all. The point is  
10 that as a term of probation, debarment provisions could be  
11 inserted by Federal judges under the terms of probation.

12 These terms of probation would simply be modeled on  
13 those provisions contained in statute or directed by statute.  
14 So it would be fully within the Commission's authority.

15 CHAIRMAN WILKINS: I assume that the publicity  
16 sanction would be a condition of probation under your  
17 proposal?

18 PROFESSOR MAYER: Absolutely. All of these  
19 proposals would be conditions of probation.

20 CHAIRMAN WILKINS: When would the court order this  
21 sanction? Would it be a discretionary call by the court?  
22 Assuming that there's been widespread publicity already about

1 the indictment and conviction, would it really be necessary  
2 that a publicity sanction be imposed?

3 PROFESSOR MAYER: Well, sometimes there is not  
4 widespread publicity. For example, the General Electric  
5 conviction just 2 weeks ago in District Court in Philadelphia  
6 received only a column like this [gesturing] in the Wall  
7 Street Journal.

8 CHAIRMAN WILKINS: You would suggest it would be a  
9 discretionary call, but be an option available?

10 PROFESSOR MAYER: That is right, the same way that  
11 the guidelines already direct that the judge require the  
12 corporation to inform employees about the conviction and the  
13 terms of probation.

14 CHAIRMAN WILKINS: Well, thank you very much,  
15 Professor. We appreciate the thought and effort into your  
16 testimony and your appearing today.

17 PROFESSOR MAYER: Thank you. Appreciate your time.

18 CHAIRMAN WILKINS: Our next witness is Morris  
19 Silverstein, Assistant Inspector General, Criminal Investiga-  
20 tions Policy and Oversight, Department of Defense.

21 General Silverstein is no stranger to the our  
22 Commission. He has testified before the Commission before

1 and indeed I believe it was last April when we last you and  
2 we were dealing with individual guidelines.

3 MR. SILVERSTEIN: That is correct, sir.

4 CHAIRMAN WILKINS: Delighted to see you again.

5 STATEMENT OF MR. MORRIS B. SILVERSTEIN, ASSISTANT INSPECTOR  
6 GENERAL, CRIMINAL INVESTIGATIONS POLICY AND OVERSIGHT,  
7 DEPARTMENT OF DEFENSE

8 MR. SILVERSTEIN: I am pleased to be here to  
9 testify on the subject of organizational sanctions. We have  
10 submitted our written testimony and based on my experience,  
11 when a judge says 5 or 6 minutes, I will stick to 5 or 6  
12 minutes.

13 The Department of Defense investigative organiza-  
14 tions over the past several years have had much experience in  
15 investigation and prosecution of corporations, prosecution  
16 with the Department of Justice.

17 Since 1982, there have been 25 convictions of top  
18 100 Department of Defense contractors and numerous convic-  
19 tions of smaller or medium size contractors.

20 There has been two responses--or among the respon-  
21 ses have been two to these efforts. One has been the  
22 congressional enactment of statutes which increases the

1 criminal fines on Department of Defense violations.  
2 In the Department of Defense Authorization Act of 1986, the  
3 maximum fine was increased to 1 million dollars on false  
4 claim cases. In the Major Fraud Act of 1988, the maximum  
5 fine was increased to 5 million dollars.

6 In reviewing the option--

7 CHAIRMAN WILKINS: To 5 million you said?

8 MR. SILVERSTEIN: Up to 5 million dollars.

9 There have also been other congressional statutes  
10 which I have referred to in my written submission.

11 In looking at the two options provided by the  
12 Commission, we believe Option 1, called the economic ap-  
13 proach, is more appropriate in Department of Defense matters.  
14 There are three reasons why we say this.

15 First, it seems consistent with congressional  
16 enactment in the area of crimes involving the Department of  
17 Defense;

18 Secondly, in a relationship with the Department of  
19 Defense the crimes that occur are really crimes defrauding  
20 the Department of Defense of dollars and the Option 1, the  
21 economic approach, more appropriately makes the punishment  
22 fit the crime;

1           Thirdly, in doing various hypothetical calculations  
2 involving particular losses and particular types of situa-  
3 tions involving crimes against the Department of Defense, we  
4 find that Option 1 offers a greater fine than Option 2 and  
5 seems more consistent with congressional intent and with what  
6 some of the courts have been doing in situations where they  
7 have been imposing a criminal fine, restitution, and settle-  
8 ments involving civil fraud also against the Department of  
9 Defense.

10           We do, however, find that one area, the Option 1 as  
11 presently constructed, does not really address the needs in  
12 terms of product substitution cases.

13           Product substitution cases losses are often  
14 difficult to determine. The loss is not just the value of  
15 the contract, but it may be the particular product that is  
16 being produced is caused by a latent defect or a latent  
17 defect causes it, it is part of a larger component, and then  
18 part of an even larger component.

19           In terms of losses, we believe that any computation  
20 of loss in product substitution cases should include the loss  
21 of identifying, retrieving, testing, replacing the parts. We  
22 mention on page 6 an example of our testimony involving

1 springs.

2           In perpetrating the fraud, the contractor realized  
3 the relatively insignificant economic advantage, difference  
4 between qualities of the steel. The cost of qualities of  
5 steel was fairly low and the cost of performing a particular  
6 test was less than \$50.

7           However, there was dramatic effect on the contrac-  
8 tor's customers and the defense industries. Customers  
9 incurred enormous costs in attempting to identify, rectify,  
10 and determine the extent of the fraud.

11           One customer involved in the Space Shuttle incurred  
12 a cost of roughly 1 and a half million dollars to basically  
13 trace, examine, replace, and retest the particular springs in  
14 question.

15           We also think that the product substitution area  
16 can be affected in two other ways.

17           One, the aggravating factor for it is right now  
18 different, it appears, from that of an aggravating factor for  
19 a national security matter.

20           In the prior amendments in individual sanctions,  
21 the Commission asked us to address whether or not the Major  
22 Fraud Act 2 year enhancement should be applied to all

1 individuals and not just to contracts under 1 million  
2 dollars.

3 We believe that the enhancement or the aggravating  
4 factor for product substitution cases where there is a risk  
5 of serious personal injury should be increased from 20  
6 percent to 50 percent to reflect the real nature of those  
7 particular matters.

8 And thirdly, even though the prior to recommenda-  
9 tions may involve an enhanced economic penalty, they are both  
10 imposed based on a determination that there is economic loss  
11 that can be determined. In some situations that is not going  
12 to occur and for that we would suggest that the Commission  
13 continue as it has suggested a departure in those particular  
14 situations.

15 The other type of response that has occurred during  
16 the last few years to the activities of the Department of  
17 Defense investigative organizations and the Department of  
18 Justice and Defense Procurement Fraud has been corporate  
19 self-governance programs.

20 The Department of Defense has continually en-  
21 couraged and supported it. Recommendations from the Packard  
22 Commission, Secretary Cheney's new defense management review,



1 again talk about corporate self-governance.

2           If one starts from the proposition that one of the  
3 objectives of sentencing corporations is to cause them to  
4 modify their behavior to act in a way that we would like to  
5 them act and to have that permeate through the corporate  
6 culture, then self-governance is one effective way of  
7 accomplishing that.

8           In looking at the aggravating and mitigating  
9 factors the Commission proposes, the Commission recommends  
10 that a higher weight of a mitigating factor 30 percent being  
11 given to voluntary disclosure of a particular incident than  
12 it does to the corporate efforts to prevent this activity  
13 from occurring in the first place, whether it be an isolated  
14 act which was done in violation of the corporate programs  
15 that were in effect.

16           The question, of course, is how does the judge  
17 evaluate what the corporation has done? I mean a voluntary  
18 disclosure has been made, that's fairly clear, but how does a  
19 court evaluate what actions the corporation has taken?

20           In the Department of Defense there is a mechanism  
21 called suspension and debarment. Over the last year, there  
22 were over a thousand suspensions and debarments. I do not

1 recall the number involving corporations. But suspension and  
2 debarment in the Department of Defense and throughout the  
3 Federal Government is really--is not a punitive sanction.

4 It is basically a business decision as to whether a  
5 corporation is presently responsible, that is, whether the  
6 Department of Defense should continue to do business with  
7 this contractor.

8 And in looking at the suspension and debarment, the  
9 appropriate officials will look at the corporation's efforts  
10 to prevent what occurred from occurring in the first place;  
11 what level of management was involved; what training have  
12 they provided the employees; is there a Code of Ethics in the  
13 corporation; are employees trained on it; what happens when  
14 people violate the standard of conduct; is the corporation  
15 willing to make restitution? These are some of the factors  
16 that are taken into consideration.

17 In looking at the Commission's proposal for  
18 probation, again, it looks like these are the same factors  
19 that are being taken into consideration. And one suggestion  
20 would be where a court is looking at these particular matters  
21 if somebody in the Government had, for example, a suspension  
22 debarring official has already evaluated these efforts, that

1 there might be some mechanism whereby the facts of what they  
2 have uncovered can be provided to the court so the court can  
3 take that into consideration.

4           From our experience in terms of evaluating what  
5 internal efforts a corporation has done, it is a very large  
6 effort and in those situations where corporations have been  
7 indicted and as a result of that conduct we are looking at  
8 situations of a suspension and debarment, it takes quite a  
9 bit of review by individuals spending--going out looking at  
10 the facility of the corporation that is involved. Suspension  
11 and debarment, for example, we try and focus on the facility  
12 that is involved, not the--to see if what occurred at the  
13 facility is representative of the entire corporation. If  
14 not, suspension and debarment will be focused on a particular  
15 facility.

16           Those are the major remarks I have had regarding  
17 the Sentencing Commission's preliminary draft and I would be  
18 happy to answer any questions that you may have.

19           CHAIRMAN WILKINS: Thank you very much.

20           Judge MacKinnon, any questions?

21           COMMISSIONER MacKINNON: Yes.

22           You talked about debarment. I recall that one of

1 the largest massive frauds that you had involved the sub-  
2 marine program and they were the only manufacturer of  
3 submarines and you tried to debar them and you had to pull  
4 out.

5 What other sanctions were imposed, do you know?

6 MR. SILVERSTEIN: In that situation--I am not  
7 familiar with the particular case.

8 COMMISSIONER MacKINNON: Well, you are familiar  
9 with the New London situation. They had a massive fraud on  
10 over billing and the conversation around and the publicity  
11 was that they were going to be debarred. Instead, they could  
12 not debar them because they were the only one making these  
13 nuclear submarines and so they did not.

14 MR. SILVERSTEIN: In that situation, there was no  
15 indictment or conviction coming out it.

16 COMMISSIONER MacKINNON: Oh, I know.

17 MR. SILVERSTEIN: What the suspension debarring  
18 officials will do is, from an administrative standpoint,  
19 there will be a lot tighter controls being imposed and  
20 there are a variety of administrative contractual sanctions  
21 that can be taken. For example, progress payments can be  
22 withheld until the Government--

1 COMMISSIONER MacKINNON: Well, do you know what  
2 they did?

3 MR. SILVERSTEIN: In this particular case?

4 COMMISSIONER MacKINNON: Yes.

5 MR. SILVERSTEIN: No, sir, I do not know the  
6 details of all the--or what actions were taken.

7 COMMISSIONER MacKINNON: I was looking for some  
8 alternative to that situation.

9 MR. SILVERSTEIN: Where you only have a limited  
10 number of suppliers there basically is a--in terms of the  
11 Department of Defense dealing with it, there is a an override  
12 to the suspension and debarring official. If there are only  
13 two manufacturers of submarines, we are not going to stop  
14 doing business with one or both of them and the only way to  
15 deal with it in that situation is through contractual  
16 oversight type of activities.

17 COMMISSIONER MacKINNON: Thank you.

18 COMMISSIONER CORROTHERS: One question.

19 In your written response to our question, I believe  
20 it was number 14 of the published specific issues for  
21 comment, you addressed the issue of whether directors should  
22 be removed by calling attention to the appropriate section of

1 Option 1, which provides for a fine reduction where the  
2 organization takes prompt disciplinary action against those  
3 involved in the offense conduct, which includes directors.

4 My question is just for clarification of your  
5 meaning. Are you saying that some type of discipline short  
6 of removal is sufficient, or to repeat the published ques-  
7 tion, do you feel that removal of directors is ever an  
8 appropriate sanction?

9 MR. SILVERSTEIN: Not in taking away the suspension  
10 debarment issue where the Department of Defense--if you have  
11 people involved who are in appropriate positions, we do not  
12 want them involved in doing business with us.

13 From a punitive sentencing situation, I think there  
14 are going to be situations where directors might be removed.  
15 If the situation is such that the corporate culture that  
16 caused a particular fraud is such that there are no internal  
17 controls that the top corporate management were aware of it,  
18 more or less acquiesced in it, and although did not par-  
19 ticipate directly in the criminal conduct, and you cannot  
20 prove criminal intent on their part, their recklessness and  
21 carelessness gave rise to the underlying environment, which  
22 gave rise to this criminal intent.

1 COMMISSIONER CORROTHERS: Thank you.

2 COMMISSIONER NAGEL: Mr. Silverstein, in an  
3 instance where you have a corporation that is the only  
4 corporation that makes a particular part of value for the  
5 Department and for those reasons either a fine or debarment  
6 are not viable options or a fine sufficient to the harm, what  
7 is the Department's view as to the viability of corporate  
8 probation where the corporation would come forward with a  
9 compliance plan of sort?

10 Is that something the Department would endorse? Is  
11 that something the Department finds problematic?

12 MR. SILVERSTEIN: That occurs in suspension  
13 debarment situations where a corporation will say, "We're  
14 presently responsible", or in terms where there has been a  
15 conviction and will agree with the debarment of authorities  
16 that it will undergo the following types of activities for a  
17 period of years.

18 So to that extent, we already have in some instan-  
19 ces that sort of corporate probation, although, I hesitate in  
20 calling it probation in suspension debarment, but the same  
21 sort of review a corporate remedial action is reviewed after  
22 the particular event has occurred.

1           COMMISSIONER NAGEL: And what is your experience  
2 with that effort? Or perhaps you could provide us with some  
3 written documents detailing your experience with those  
4 programs because there is some concern that this would  
5 involve the courts in sort of over reaching into running the  
6 corporation.

7           If it is worked in the Department of Defense  
8 context, perhaps you could share with us at later time some  
9 of your experiences. Is that possible?

10          MR. SILVERSTEIN: Yes, I can do that.

11          COMMISSIONER NAGEL: Thank you.

12          CHAIRMAN WILKINS: Commissioner Saltzburg?

13          COMMISSIONER SALTZBURG: I have three fast ques-  
14 tions. First, on debarment, the previous witness suggested  
15 debarment might be a condition of probation. Your written  
16 testimony on page 10 suggests that you would like to call the  
17 debarment investigation to the court's attention for use in  
18 sentencing.

19          Am I right in assuming that DOD would prefer for  
20 reasons, as Judge MacKinnon suggested, having to make  
21 decisions about whether you need a particular contractor to  
22 have the final say whether than the courts about whether



1 there should be debarment?

2 MR. SILVERSTEIN: Well, we have the decision as to  
3 whether or not we want to do business with this person in the  
4 future, which is a separate decision from a court, I believe,  
5 in setting forth conditions of probation although the same  
6 factors are taken into consideration.

7 COMMISSIONER SALTZBURG: Second, you mentioned in  
8 your written testimony that you preferred Option 1 rather  
9 than Option 2 and you indicated on a hypothetical as you have  
10 run that Option 1 produces higher fines.

11 MR. SILVERSTEIN: That is right.

12 COMMISSIONER SALTZBURG: Are those fines in your  
13 judgment too high? Is there any threat that they would  
14 drive businesses out of the bidding process? Are you worried  
15 about that at all?

16 MR. SILVERSTEIN: Well, we are always worried why  
17 firms leave the Defense industrial base. However, on the  
18 other hand, if somebody is not going to follow the law, we do  
19 not want them as a contractor.

20 In looking at the fines, and I tried to do some  
21 comparison between what has occurred in some convictions of  
22 major contractors, I cannot draw a good enough parallel

1 between--for the following reasons: In settlements that  
2 occur the total amount is sometimes called criminal fine,  
3 sometimes it is cost of investigations, sometimes it is civil  
4 fraud under False Claim Act, it is sometimes administrative  
5 recovery, it is sometimes restitution. So we have been  
6 getting back a significant amount of money. Two to three  
7 times the fine range, which is what Option 1 is, is a  
8 parallel like the False Claims Act for civil fraud in that it  
9 is two to three times depending on whether a company  
10 cooperates and brings a matter to the Government's attention.

11 So I do not think the two to three times is going  
12 to drive those contractors out who should not be out in the  
13 first place.

14 COMMISSIONER MacKINNON: Billy?

15 CHAIRMAN WILKINS: Judge MacKinnon?

16 COMMISSIONER MacKINNON: Could you give me a letter  
17 on that electric boat fraud, what happened and whether or not  
18 they were indicted and so on? I would appreciate it.

19 MR. SILVERSTEIN: Yes, sir, I can.

20 CHAIRMAN WILKINS: Could I follow up on the  
21 debarment issue? Are you suggesting that from DOD standpoint  
22 you would want the Commission to write a guideline that gives

1 the judge debarment authority, of course, you retaining that  
2 authority to do business or not?

3           What I am concerned about, you may make the  
4 decision that because of the particular nature of the work,  
5 even though the criminal activity occurred, that you would  
6 not think debarment would be in the best interest of national  
7 security, and yet, the judge having the authority to order  
8 debarment might do that contrary even to the wishes of the  
9 Department.

10           I am trying to figure out do you want us to give  
11 the authority to the judge or do you want to leave it with  
12 you? Of course, you will always have it, but--

13           MR. SILVERSTEIN: In terms of a--if this were only  
14 Department of Defense contractors, what I am suggesting is  
15 that the information be provided to the judge so he can--you  
16 know, if we are going to have corporate probation, he can  
17 make that evaluation because often there will be matters  
18 outside the Department of Defense's jurisdiction which  
19 involve the crime.

20           We would hope that there would be sensitivity to  
21 the contractual needs of the Government. I really have not  
22 thought out the answer to the question. There could be

1 serious problem if a judge decided to take actions and say  
2 that the Government shall no longer deal with a particular  
3 contractor. I do not think that is an appropriate role.

4 But for corporate probation in terms of imposing  
5 certain sanctions that the corporation should follow and  
6 certain remedial actions, I think something could be done in  
7 that regard.

8 CHAIRMAN WILKINS: Thank you. If you have any more  
9 thoughts on this debarment issue, I would appreciate you  
10 dropping us a line. Thank you, again.

11 Our next witness is Earlyn Church.

12 Ms. Church, please come around.

13 Also--well, first of all, Ms. Church is with  
14 Superior Technical Ceramics Corporation of St. Albans,  
15 Vermont, here representing the National Association of  
16 Manufacturers. With her is James P. Carty. Jim Carty is  
17 Vice President of the National Association of Manufacturers.

18 Jim, I think, knows all of us and we know Jim. He  
19 is no stranger to the Commission. Indeed, we share office  
20 space with NAM at the building down the street and we  
21 appreciate Jim's assistance in notifying people around the  
22 country about this issue and the hearing and we received a

1 lot of response from your colleagues.

2 We appreciate both of you being here today. We are  
3 glad to hear from you.

4 STATEMENT OF MS. EARLYN CHURCH, SUPERIOR TECHNICAL CERAMICS,  
5 CORPORATION, ST ALBANS, VERMONT, NATIONAL ASSOCIATION OF  
6 MANUFACTURERS, ACCOMPANIED BY MR. JAMES CARTY, VICE PRESI-  
7 DENT, NATIONAL ASSOCIATION OF MANUFACTURERS

8 MS. CHURCH: Mr. Chairman and fellow Commission  
9 members, I am secretary and treasurer of Superior Technical  
10 Ceramics, Corporation of St. Albans, Vermont. We manufacture  
11 industrial ceramic components for high technology.

12 STC employs 95 people, but I am also on the board  
13 of the National Association of Manufacturers. My testimony  
14 is given on behalf of NAM, in which I will stress four  
15 fundamental points.

16 One, we strongly urge postponement of the issuance  
17 guidelines;

18 Two, we feel that the fines under both Options 1  
19 and 2 are flawed;

20 Three, probation of a organization is a potential  
21 death sentence for small to medium size companies;

22 Four, restitution first should offset other

1 penalties.

2           Turning to our first point, our members vigorously  
3 support enforcement of our criminal and civil laws at all  
4 levels of society. We all endeavor to be good neighbors and  
5 citizens.

6           It is a fact of our complex society, however, that  
7 laws are broken by well meaning, but sometimes careless and  
8 negligent persons who work for businesses.

9           If one of our employees breaks a law, even if it is  
10 against all our policies and training, our companies can be  
11 indicted. The business community accepts responsibility for  
12 its employees' actions even when committed in violation of a  
13 company policy.

14           The proposed guidelines, however, are extremely  
15 harsh, punitive, unwarranted and will place many businesses  
16 on the threshold of insolvency, an unintended result, I am  
17 sure.

18           To quote Chairman Wilkins in a recent Law Review  
19 article, The Commission was required by the congressional  
20 mandate to determine past sentencing practicing by adopting  
21 an empirical starting point for its decisions which would  
22 allow for the exercise of informed and independent judgment,

1 end of quote.

2           Unfortunately, the data to date reveals Commission  
3 findings are based on a very narrow statistic analysis of  
4 less than 1400 cases coming under old sentencing laws. Also,  
5 only 340 cases have been reviewed to date by the Commission  
6 using the new sentencing laws. This is in stark contrast to  
7 the 110,000 cases reviewed for the individual guidelines.

8           Eighty-five to ninety percent of this limited  
9 sample involves small, privately held businesses, not a  
10 representative cost section of American business.

11           The data to date has not turned up any significant  
12 variations in the sentences being given, nor patterns of  
13 violation that will support the proposed guidelines. These  
14 are compelling reasons not to issue a proposal at this time.

15           My second point deals with the penalty fines. My  
16 company's personal experience may give you some insight into  
17 how a business could effect by the ever changing legal  
18 landscape and our attempt to comply.

19           We currently have seven professional engineers who  
20 work on filling out forms and tracking regulatory develop-  
21 ments. We estimate that in 1989, 900 hours were spent  
22 filling out Government forms. This represents lost profes-

1 sional time that affects our business operation. A company  
2 with 100 employees can little afford this. Yet, if a mistake  
3 is made in this paperwork process or if an employee does not  
4 follow regulations, we would be subject to fines.

5 We do have training programs dealing with hazardous  
6 waste, safety, and OSHA regulations. Unfortunately, human  
7 error is often with us. We find that Government inspectors  
8 come in varying degrees expertise, but almost universally  
9 with an adversarial attitude.

10 Let me tell you a war story. Our company uses a  
11 very pure form of talc as a rough material in highly techni-  
12 cal ceramics. We had an OSHA inspector who fined the company  
13 \$5,000 because talc was present in the air in the mixing  
14 room. He claimed that the talc contained asbestos. We  
15 pointed out that respirators were required and were worn in  
16 that room and that there had been no instances of asbestosis  
17 in our industry.

18 On the day he issued the fine, I asked if he had  
19 children. He replied that he did. I asked if he had  
20 diapered those children and if so, with what powder. He  
21 replied talcum powder. I pointed out that the only dif-  
22 ference between Johnson and Johnson's and the talc in our



1 rooms was that Johnson and Johnson's contains perfume. He  
2 replied that the powder was applied to the other end of the  
3 baby. We won the appeal.

4 Another example for you to savor, we accumulate  
5 three 55 gallon drums of dirty oil each year from machinery,  
6 the same type of oil used in your cars. Our barrels of dirty  
7 oil must be handled and disposed of at great cost as a  
8 hazardous waste, yet hundreds of local garages in the State  
9 of Vermont recycle their spent oil as heating fuel. Ap-  
10 parently, the size of the company affects whether or not a  
11 material is hazardous or not.

12 The point of this litany is to demonstrate that  
13 compliance with our laws is not always a simple and precise  
14 task and violations may take place that are not deserving of  
15 the measures proposed in these guidelines.

16 The huge variation in possible fines, \$500 to 25  
17 million in Option 1, and \$250 to 374 million in Option 2, is  
18 difficult to comprehend and very disturbing to small busi-  
19 nesses whose total sales are often substantially less than  
20 the fines contemplated in either proposal at even their mid-  
21 level ranges.

22 For example, a recordkeeping or reporting violation

1 concerning pesticides could incur fines of \$3,000 to \$4,000  
2 per violation. Failure to navigate the complexity of our Tax  
3 Code could expose businesses to fines ranging from \$3,000 to  
4 68 million. The environmental crime of knowing endangerment  
5 by mishandling hazardous substances could result in a fine  
6 starting at \$700,000 even if no bodily injury occurs.

7 We urge that mandatory fines should not be imposed  
8 on an organization that has done everything reasonably  
9 possible to prevent a crime.

10 We are concerned, not because organizations that  
11 float the law would be punished under the guidelines, but  
12 because prudent organizations that have taken every  
13 reasonable step to assure compliance with the law could also  
14 be severely punished.

15 A substantial compliance program should receive a  
16 substantial reduction in fines. The present proposal is  
17 inadequate.

18 Thirdly, we have distinct problems with prospective  
19 probation requirements. We question the ability, training,  
20 and time available for the courts to run a commercial  
21 enterprise as proposed.

22 The Commission has not documented any past cases

1 that would have called for this type of over reaching and  
2 strict supervision.

3           Such restrictions will lead to loss of jobs and the  
4 eventual demise of manufacturing companies. We can only  
5 observe that the present system is operating effectively and  
6 is extremely dangerous to suggest to the courts a radical  
7 solution to a non-problem. As we say in Vermont, if it ain't  
8 broke, don't fix it.

9           We are also concerned about other problems arising  
10 from probation. We do not take issue per se with the concept  
11 that courts should retain jurisdiction over an organization  
12 that has not made full restitution or payment of the fine at  
13 the time of sentencing. However, if a company has not paid  
14 its fine by the day of sentencing, it is mandatory that it be  
15 placed on probation. The phenomena will occur with some  
16 regularity since many times through no fault of the organiza-  
17 tion all victims will not have been found or all of the clean  
18 up can not have been completed by the sentencing date.

19           Additionally, the organization will have to  
20 authorize funds for payment after learning at sentencing the  
21 exact amount to be paid.

22           What happens to the organization that appeals its

1 conviction? Because of the potentially huge fines and the  
2 non-deductibility of restitution paid, NAM foresees many  
3 companies, both small and large, being placed in a probation-  
4 ary status for failing to pay such fines and restitution  
5 before the day of sentencing. This status could last from 1  
6 to 5 years and would have an absolutely devastating impact on  
7 the continued viability of a company. Credit would dry up.  
8 Suppliers would cease deliveries and employees would feel  
9 insecure in their jobs.

10 My fourth point deals with the mandatory restitu-  
11 tion and the ability to offset it. The Commission's  
12 proposals go too far in adding situations not specifically  
13 authorized by law.

14 In the case of an accidental spill, restoring water  
15 quality by requiring restitution will probably cost hundreds  
16 of thousands of dollars. We feel there is a difference  
17 between restitution for an environmental accident and the  
18 ability to offset this amount against the eventual penalty as  
19 opposed to a situation where a defendant is unjustly enriched  
20 by its criminal activity, such as acquiring a contract by  
21 bribery where an offset is not called for.

22 The doubling or trebling of the restitution loss at

1 the final fines will surely tax the financial stability of  
2 any company. To compound the problem a defendant who has  
3 made restitution will not be allowed to offset the amounts  
4 spent in restitution against the final fine.

5 In conclusion, we strongly urge the Commission not  
6 to forward its present recommendations to Congress, but to  
7 reconsider its proposal in its entirety due to the ques-  
8 tionable factual basis for its action.

9 Changes in Federal criminal law during the past 5  
10 years have presented a completely different factual basis for  
11 comparison purposes. The historical basis for establishing  
12 guidelines for individual sentencing is sorely lacking for  
13 the sentencing of organizations.

14 The Commission acknowledges a dearth of data  
15 regarding organizational sentencing, but makes it, in quote,  
16 far more difficult to view past practices as representing any  
17 kind of norm, end of quote.

18 No statistics exist showing the similarity in  
19 sentencing organizations for the same conduct, nor are there  
20 any statistics demonstrating that the penalties for organiza-  
21 tions are lower than they should be under the new increased  
22 penalties enacted in and since 1984. In fact, data under

1 these new statutes is just beginning to be collected. The  
2 figures that have been compiled show an increase in fines for  
3 organizations, but do not reflect any judicial consensus  
4 approaching the punitive levels that the Commission's  
5 guidelines would impose.

6           However, if even a face of these serious defects,  
7 the Commission persists in taking some action. We urge that  
8 it issue non-binding, general policy statements, but only  
9 after a complete rewriting of the proposal, taking into  
10 consideration these criticisms.

11           This procedure will be most prudent in the light of  
12 the meager, non-representative record and the effects that  
13 statutory changes will have on future sentencing practices.

14           We appreciate this opportunity to address NAM's  
15 concerns to this Commission and I will be pleased to answer  
16 any questions at this time.

17           CHAIRMAN WILKINS: Thank you, Ms. Church.

18           Jim, are you going to offer testimony?

19           MR. CARTY: No.

20           CHAIRMAN WILKINS: All right. Thank you.

21           Judge MacKinnon.

22           COMMISSIONER MacKINNON: Ms. Church, you said that

1 the small businesses were not representative?

2 MS. CHURCH: Well, the cases that I have been made  
3 aware of were primarily cases that dealt with mail fraud, fly  
4 by night corporations, pornographic literature, similar  
5 cases. They were what you might call extremely closely held  
6 corporations that didn't live very long.

7 COMMISSIONER MacKINNON: Well, our statistics show  
8 that most of the cases involving corporations do involve  
9 small businesses.

10 MS. CHURCH: That's what I agree with, but when you  
11 break it down it shows that it's--I said it does involve  
12 small business and I'm saying it involves a very small  
13 segment of small business.

14 COMMISSIONER MacKINNON: But we're writing  
15 guidelines for the people that commit the violations and  
16 those are mainly small businesses. Now we are not exclusive  
17 in that respect, but they are the ones that are the largest  
18 offenders, according to our statistics.

19 How do you cut that?

20 Do you think we ought to write them for small corporations  
21 and then a separate one for large corporations?

22 MS. CHURCH: No, I think that all the penalties

1 should be reviewed in the light that mitigating circumstances  
2 have not been applied to a sufficient degree.

3 COMMISSIONER MacKINNON: Of course, we're never  
4 going to get any better mix of data than we have now because  
5 there aren't just too many Federal crimes that involve  
6 corporations in a year. They run about 3 or 4 hundred. That  
7 isn't going to increase, I don't think.

8 So your argument could be made at any time with  
9 respect to corporate sentences or corporate involvement.

10 MS. CHURCH: It is a difficult set of guidelines to  
11 be operating a business under, however, if you're looking  
12 that what the penalties are if some how or other your company  
13 in all well meaningfulness slips up.

14 MR. CARTY: Judge, can I make a point, please?

15 COMMISSIONER MacKINNON: Yes.

16 MR. CARTY: I think that what we are trying to get  
17 on our statement is the fact that you're absolutely right  
18 there are fewer cases versus the individuals I mean by a  
19 magnitude of hundreds and you're not going to get a lot more  
20 cases, but you have differences in that since 1984, there  
21 have been many statutes passed by the Congress which in-  
22 creases the fines that businesses will face. Those cases are



1 just coming to the courts because, as you realize, there are  
2 all perspective. So it takes a time to investigate them.

3 COMMISSIONER MACKINNON: We're aware of that.

4 MR. CARTY: Okay. You also have to realize if you  
5 have such a few limited number of cases, obviously the system  
6 that was in place in the past was doing its job. The  
7 American business community realized if they violated the law  
8 they would be charged as criminals, they would fined, and  
9 they would be put in a situation that would threaten their  
10 business. I think that accounts for why you have such few  
11 cases.

12 I think that the Commission--I personally think  
13 that the Commission has gone much too far. When I read that  
14 statute, the statute talks about 99 percent of the time  
15 individuals. I see very few references to corporations.

16 CHAIRMAN WILKINS: Helen?

17 COMMISSIONER CORROTHERS: Ms. Church, you've stated  
18 and indicated on page 9 of your written testimony that we  
19 should simply reconsider the whole idea of the issuance of  
20 guidelines primarily due to limited past practice data.  
21 You've maintained in fact that it's not broken and we need  
22 not fix it.

1 I'd like to note that we've also been presented  
2 with information that evidence shows, and I'm quoting a  
3 respondent, beyond a reasonable doubt, quote, that the level  
4 of illegal conduct by major American corporations is high.  
5 For example, in 1985, a study of 500 leading U.S. industrial  
6 corporations revealed that nearly two-thirds were involved in  
7 illegal conduct. The opinion is presented that the high  
8 level of illegal conduct indicates that the wagon is broken,  
9 that it's a clear indication of under prosecution and under  
10 deterrence.

11 Now this morning, Professor Mayer cited studies  
12 from I guess 1949, 1979, 1982, 1975, and 1985, all of these  
13 studies indicating a high level of criminal conduct.

14 I guess my question is, does this information have  
15 any impact on your opinion concerning whether the wagon is  
16 broken or whether there is a need for guidelines?

17 MS. CHURCH: I think I should refer back to what  
18 Mr. Carty has just said that there are new statutes and new  
19 penalties that post date any of the studies that you are  
20 referring to.

21 CHAIRMAN WILKINS: Questions?

22 [Negative responses.]

1           CHAIRMAN WILKINS: Well, let me say, we've always  
2 had an excellent relationship with NAM and I'm sure we will  
3 continue to have one. NAM writes that these proposed  
4 guidelines are extremely harsh, punitive, unwarranted, place  
5 many businesses on the threshold of insolvency.

6           Ms. Church and Jim, the next time y'all come, I  
7 wish you'd be a little more direct and not hold back on your  
8 opinions about what you think about what we're doing.

9           [Laughter.]

10          MR. CARTY: We'll try, Mr. Chairman.

11          CHAIRMAN WILKINS: Thank you very much.

12          Let me ask you this now, can Federal judges put  
13 corporations on probation today?

14          MR. CARTY: Yes, they can.

15          CHAIRMAN WILKINS: And if we wrote guidelines that  
16 were non-binding that addressed this issue of corporate  
17 probation, would that be acceptable to NAM?

18          MR. CARTY: Under the present circumstances, we'd  
19 think that would be the last thing that you should do. You  
20 should start from scratch.

21          We think that it's very important that the senten-  
22 ces being handed out by judges under the new statutes and I

1 think that you'll have a much better factual basis to  
2 determine whether or not there is any inconsistency, that  
3 there is any pattern.

4 I think, you know, when you look at your statute  
5 the obvious reason why the Congress created the Commission  
6 was that they felt that there was inconsistency, that there  
7 was no norm for the type of sentences that were being handed  
8 out. Basically, they were talking about individuals. They  
9 weren't talking about corporations.

10 So I think in this case you must really take a lot  
11 more time than you have taken and gather a lot more facts  
12 before you go forward.

13 CHAIRMAN WILKINS: What if we wrote non-binding  
14 policy statements, the judge can take or leave it and there  
15 would be no appeal, no one can tell him to do it?

16 MR. CARTY: I understand that. Again--

17 CHAIRMAN WILKINS: You would not favor that?

18 MR. CARTY: That is a last resort. If you feel--

19 CHAIRMAN WILKINS: What's the first resort then, do  
20 nothing?

21 MR. CARTY: Do nothing, restudy, wait for an  
22 appropriate period of time to discover the errors or the

1 problems in the sentencing of corporations. I don't think  
2 you have done that.

3 Now, however, if you feel that it is necessary that  
4 you have done it, then I'd say do it with general principles  
5 and not with the mandatory guidelines.

6 CHAIRMAN WILKINS: That's what I said, non-binding.

7 MR. CARTY: Yes.

8 CHAIRMAN WILKINS: Okay. Of course, I don't know  
9 how long--you are right, we don't have much data on these  
10 cases since the major fraud, but it's not because we didn't  
11 look for them.

12 MR. CARTY: I understand.

13 CHAIRMAN WILKINS: It's because they are just not  
14 there and the question is do we wait several years or 4 or 5  
15 years out before we do anything or not.

16 MR. CARTY: Doesn't that indicate to you that there  
17 may not be a problem?

18 CHAIRMAN WILKINS: No, it just means there hasn't  
19 been many prosecuted.

20 MR. CARTY: But getting back to Ms. Corrothers'  
21 comment, it seems to me that all of these studies should have  
22 been based upon indictments. If you don't have an indict-

1 ment, anyone can charge--anyone can make up allegations. It  
2 seems to me that if you have an indictment and you have  
3 prosecution, then you've got actual cases on which to base  
4 those studies. I don't think they were based on indictments  
5 and prosecutions.

6 COMMISSIONER MacKINNON: Well, we've got 300 that  
7 we're basing it on.

8 COMMISSIONER CORROTHERS: And do you think that the  
9 fine levels back in those days were sufficient to make it  
10 worthwhile for the prosecutor to in fact prosecute? I mean,  
11 do you think that had any impact, the low level of fines  
12 authorized?

13 MR. CARTY: The prosecutor has immense discretion  
14 and I assume that the prosecutor looks at all the facts and  
15 they come to the conclusion that a case is worthwhile or a  
16 case is not worthwhile, obviously. They have to make a  
17 judgement. You can't prosecute every crime that comes down  
18 the street. If you did, you couldn't be using this courtroom  
19 this morning.

20 CHAIRMAN WILKINS: Let me ask either one, Ms.  
21 Church, assume there's a corporation, not yours, but one like  
22 yours, that the four top vice presidents get together and

1 through a decision making process they commit a fraud in the  
2 name of the corporation that amounts to a gain of \$500,000 to  
3 the corporation. What should the fine level be you think?

4 MS. CHURCH: I don't believe that I'm qualified to  
5 answer that; (a) you haven't give the parameters or the size  
6 of the corporation, but if they have attempted to give--to  
7 make a fraudulent act, then they are violating our basic  
8 legal system and, of course, they should be dealt with in the  
9 courts.

10 CHAIRMAN WILKINS: We don't even play--our  
11 guidelines don't come into play until they go into court and  
12 are convicted. In one case that you suggested that there was  
13 an appeal and you won the appeal, I mean the guidelines would  
14 never apply. It's only after convictions. I'm just trying  
15 to get an idea of what--this is what we are wrestling with.  
16 What should that fine level be? You've got a half a million  
17 dollar fraud committed by a corporation that's about the size  
18 of yours. What do we do?

19 MS. CHURCH: Well, a half million dollar fraud  
20 commitment to our corporation, we'd have to go out and borrow  
21 the money and if we were not able to borrow the money because  
22 we were on probation, I don't see how we'd ever get off

1 probation.

2 CHAIRMAN WILKINS: Okay. You just need more  
3 information before you could suggest what the level of fine  
4 should be, and you're probably right.

5 Well, again, thank you very much. We'll see you in  
6 the hallway, Jim, and I'm sure we'll be talking about this.  
7 We really appreciate the hard hitting testimony that you've  
8 given us and I hope you understand the difficult respon-  
9 sibilities that we're about. Thank you very much.

10 COMMISSIONER MacKINNON: Let me add something.

11 CHAIRMAN WILKINS: Yes.

12 COMMISSIONER MacKINNON: I'm not just exactly a  
13 newcomer in this field. I've been--it's 60 years since I  
14 started working for what today is one the largest mutual  
15 funds in the world and eventually was general counsel for it.

16 I've been a United States Attorney, been on the  
17 court for 20 years, and we know a lot about corporate crime.  
18 We're not--I'm not legislating in the dark and we might know  
19 even more than the National Manufacturers know about it.

20 I remember when the National Manufacturers was  
21 first elaborated and built up in 1932 and 1933--1933 actual-  
22 ly. I know all about them.



1 CHAIRMAN WILKINS: Thank you very much. We will  
2 see you all.

3 Assistant Administrator for Enforcement of the  
4 Environmental Protection Agency, James Strock is here to  
5 testify. The Commission has worked closely with EPA in the  
6 past, especially Mr. Paul Thompson and Bruce Bellon and we  
7 look forward to continued cooperation.

8 Thank you very much. We'd be glad to hear a  
9 summary of your testimony and any other comments you wish to  
10 make.

11 STATEMENT OF MR. JAMES STROCK, ASSISTANT ADMINISTRATOR FOR  
12 ENFORCEMENT, ENVIRONMENT PROTECTION AGENCY; ACCOMPANIED BY  
13 MR. BRUCE BELLAN

14 MR. STROCK: Thank you very much, Mr. Chairman. I  
15 am James Strock, Assistant Administrator Enforcement at the  
16 U.S. EPA and with me is Mr. Bruce Bellan, who is a continuing  
17 expert in this field.

18 As you referred to, among the various Federal  
19 regulatory agencies, few, if any, have worked more closely  
20 than EPA in the development of sentencing guidelines, first,  
21 for individual defendants, and then with regard to organiza-  
22 tion defendants.

1           We are particularly pleased to be following up. I  
2 know that our Deputy Assistant Administrator for Criminal  
3 Enforcement, Paul Thompson, testified before you on December  
4 2nd in California.

5           And we are also pleased that environmental offenses  
6 are one of the key types of crimes that the Commission will  
7 use to monitor application of the guidelines.

8           In furtherance of our cooperation in this area, we  
9 have asked a staff representative of the Commission to attend  
10 our agency's National Criminal Enforcement Conference in  
11 California next month. And in particular, we hope to  
12 exchange further information on this question.

13           Finally, I would add in a prefatory comment that  
14 the agency has submitted extensive written comments to the  
15 Commission on February 9th.

16           I would like to say up front that the agency does  
17 endorse the overall approach of the draft sentencing  
18 guidelines and we recognize the tremendous complexity you  
19 have in developing these corporate sanctions.

20           We are particularly pleased again that environmen-  
21 tal enforcement offenses represent one of the key indicators  
22 you use in monitoring the progress in this area.

1           We are very hopeful that the Commission will  
2 continue to support the view that Federal courts should be  
3 encouraged to use their probationary powers to carefully  
4 structure conditions in this area to guarantee future  
5 compliance both by the offender in question and with a strong  
6 deterrent message to other members of the regulatory com-  
7 munity.

8           And, also, we are hopeful that through appropriate  
9 forms of restitution, community service, and other remedial  
10 measures, probation will also serve to rectify the harm  
11 caused by criminal wrongdoing.

12           At the same time, there are several aspects of the  
13 proposed guidelines that we would ask consideration for  
14 modification prior to submittal to the Congress.

15           I would like to focus at this time on several  
16 specific areas. Two areas which require--well, the first  
17 would be reference to restitution and remedial orders in the  
18 forms of community service.

19           The present proposal for Federal judges under the  
20 guidelines to issue restitution and remedial orders raises  
21 the concern that it does not appear that judges would be  
22 bound by EPA procedures and policies governing response to

1 remedial need.

2           Nationwide we have seen sentencing judges getting  
3 directly involved, rolling up their sleeves to fix environ-  
4 mental problems. Our concern would be that remedial orders  
5 might inadvertently impose limits on civil and administrative  
6 remedies that EPA could be able to obtain.

7           Likewise, the guideline section dealing with  
8 restitution only indirectly requires that the court disclose  
9 to both the attorney for the Government and defendant matters  
10 pertaining to restitution.

11           Similarly, the sections concerning remedial orders  
12 and community service, both of which could as a practical  
13 matter be far more comprehensive than a restitution order,  
14 include no requirement either directly or indirectly of  
15 review and input from the Government concerning the scope of  
16 potential remedial orders.

17           The agency recommends that the procedures for  
18 ordering restitution and/or remedial measures be amended  
19 pursuant to Chapter 6 of the Sentencing Guidelines now in  
20 effect which sets out a process for the Government and  
21 defense to make known to the court their positions with  
22 respect to sentencing factors.

1 Restitution matters and remedial measures aimed at  
2 rectifying environmental harm and protecting public safety  
3 and compliance plans intended to prevent organizational  
4 recidivism are of a nature, especially in the environmental  
5 arena, to warrant adoption of such procedures in the sentenc-  
6 ing of organization defendants.

7 The second area where Government input is necessary  
8 relates to the structure and adherence to court ordered  
9 compliance plans and audits.

10 The agency endorses the concept set up in the  
11 probation section of requiring compliance plans as a condi-  
12 tion of probation to increase the likelihood of future  
13 compliance with the law.

14 However, the agency would again urge the Commission  
15 to adopt procedures perhaps similar to those in Chapter 6 of  
16 the existing guidelines which allow the agency, through  
17 Government counsel, to apply its expertise to both evaluating  
18 the plans and audits and assessing adherence to them in the  
19 future.

20 This will assure that plans that do not receive  
21 judicial certification when the plan or audit recommendations  
22 might otherwise be inconsistent with applicable statutory or

1 regulatory requirements. We would also urge that the  
2 State environmental authorities be involved in this process  
3 as well.

4 Finally, there are three areas which in the  
5 agency's judgment should be expanded because of their effect  
6 on the scope of remedial order and community service.

7 First, the commentary to the section dealing with  
8 remedial orders limits the purpose of such orders to prevent-  
9 ing future harm to victims. This could well be too narrow a  
10 focus.

11 A remedial order should be able to require that the  
12 harm already caused by a violation be corrected in addition  
13 to eliminating or reducing possible future harm.

14 Thus, for example, in the hazardous waste context,  
15 the court should be able to order that all waste already  
16 improperly disposed of be cleaned up without making a  
17 determination that such a waste necessary creates the  
18 potential for a future harm.

19 Second, the commentary to the community service  
20 section states that such service as a means of preventative  
21 or corrective action must be, quote, directly related to the  
22 offense, end quote, and offers the example of research to

1 develop new anti-pollution or clean up techniques related to  
2 the underlying emphasis instant offense.

3           The agency understands that the Commission's  
4 concern that community service not be a vehicle for compul-  
5 sory, unstructured, or standardless do good deeds conceived  
6 by a court, defendant, or Government is a real concern.

7           However, we urge some additional consideration  
8 because in the environmental realm one type of environmental  
9 violation can have multi-various consequences.

10           For example, a pesticide violation in the food  
11 chain could well have an affect all the way up to infants who  
12 are breast fed by mothers who consumed contaminated foods.

13           Accordingly, we recommend that the present more  
14 narrow concept of relatedness language be expanded and  
15 perhaps reworded to state that community service be related  
16 to, quote, the nature and circumstances of the offense.

17           Third, there is a need to recognize in guidelines  
18 or in commentary that trust funds constitute an appropriate  
19 form of remedial relief.

20           The agency believes it is important that a sentenc-  
21 ing court be made aware that the harm inflicted with  
22 reference to an environmental offense may well extend beyond

1 that which is presently understood or correctable.

2 In these situations, the guidelines should specifi-  
3 cally advise a sentencing court to consider the formation of  
4 a trust fund or a similar future reaching device to allow  
5 potential correction of future ills not immediately ascer-  
6 tainable.

7 And I might add, this is a very common part of  
8 various environmental statutes already in the sense that, for  
9 example, super fund has very clear language that limits the  
10 potential of releases on coverage not to sue to make sure  
11 that future releases or consequences not now understood can  
12 be taken into effect.

13 Lastly, two final recommendations concerning fine  
14 calculations; the agency, as we indicated in our written  
15 comments, does not strongly prefer one fine option over the  
16 other.

17 Other either option fines will be greatly in-  
18 creased. The agency in addition attaches greater importance  
19 to probation and restitution and remedial orders in the  
20 sentencing process.

21 At the same time, we would offer two comments. We  
22 believe that the final fine calculation formula should



1 provide for the doubling of fine amounts for second of-  
2 fenders. This would be consistent with criminal penalty  
3 provisions in existing environmental statutes administered by  
4 the agency.

5           Secondly, we urge that the concept of pecuniary  
6 gain also be expanded. Under both fine options presently  
7 offered by the Commission the pecuniary gain is to be  
8 factored into the fine formula. What this appears to  
9 envision is the prototype of illegal sales where one fines  
10 illegal profits or explicit gross gain even if no profits can  
11 be demonstrated.

12           The difficulty for us is that in the environmental  
13 field there is the concept of economic benefits throughout  
14 our statutes for non-compliers, which gives them a harder to  
15 quantify but very clear competitive advantage from delayed or  
16 avoided compliance. This concept is also familiar in the  
17 health and safety statutes, consumer product safety statutes  
18 as well.

19           So those are my prepared comments and I would be  
20 pleased to answer with Mr. Bellan any questions you might  
21 have at this time.

22           CHAIRMAN WILKINS: Thank you very much.

1 Judge MacKinnon?

2 COMMISSIONER MacKINNON: You said that community  
3 service should be restricted to more or less the nature of  
4 the offense and the circumstances involved.

5 Don't you think it ought to also be used as a  
6 punishment in some cases?

7 I mean we can't write it for you alone.

8 MR. STROCK: Well, Judge, unlike others, I will  
9 certainly defer to your wisdom and experience without  
10 question.

11 Our concern is, and we find this in other areas,  
12 for example, penalty mitigation policy both administrative  
13 and judicial, that we in those cases for statutory reasons  
14 and here for prudential reasons believe there should be a  
15 nexus between the violation and the service that follows  
16 partly because in the environmental area, being a newer area  
17 than most, and one that by necessity expands over a series of  
18 existing areas of endeavor, there is frankly a need for an  
19 educational function as well and we would hope that that  
20 would be served at the same time as the other functions are  
21 being served.

22 COMMISSIONER MacKINNON: Well, offenses vary so

1 much. It seems to me that that is going to be a hard  
2 objective to accomplish. If you're going to restrict it to  
3 the nature and circumstances of the offense, community  
4 service, that's an awfully close restriction.

5 MR. STROCK: Judge, I'd appreciate the opportunity  
6 to work further with you on that because I believe it could  
7 be somewhat of a question of a matter of definition. I would  
8 think there well could be a number of forms of community  
9 service that we could envision and provide examples of that  
10 would be meeting both our needs, particularly again in the  
11 education type realm where we have done some work already.

12 COMMISSIONER MACKINNON: You've also said about  
13 creating a trust fund for future offenses. Isn't that more  
14 or less a civil function? Isn't that a little hard to work  
15 into a criminal case?

16 MR. STROCK: It's one we've had to do by necessity  
17 and there is precedent for it given the nature of the harms  
18 that take place because the fact is it is simply too dif-  
19 ficult at times otherwise to fight between two competing  
20 interest; one is the interest of the criminal system in  
21 having a clearly defined hopefully somewhat rapid adjudica-  
22 tion of responsibility combined with the fact that in many of

1 these violations it can take quite a long time to get the  
2 full scope of damage properly assessed. And this strikes us  
3 as a good way to balance those competing considerations.

4 MR. BELLAN: If I may, in our written comments I  
5 actually provided two or three examples of environmental  
6 trusts and I wanted to set those out because that only  
7 required two paragraphs in the orders of probation to  
8 establish these trust funds. They are not cumbersome to  
9 establish. Basically, setting aside a certain amount for the  
10 purpose of the trust fund, appointing a trustee, and setting  
11 forth the purpose of the trust. And as you will see in our  
12 written comments, that there was not a complex procedure.

13 COMMISSIONER MacKINNON: I have another question  
14 which doesn't cover your testimony, but gets to some of my  
15 background and experience.

16 I was wondering what you're doing with these mine  
17 dumps that are a hundred years old that have a lot of cyanide  
18 in them and things of that character? They are all strung  
19 out through the mountains in my home--former home State of  
20 Colorado.

21 MR. STROCK: Mine too.

22 COMMISSIONER MacKINNON: And I wonder what you do

1 with them?

2 MR. STROCK: Well, a couple of things. As you  
3 would know--

4 COMMISSIONER MacKINNON: They don't involve any  
5 present crime, do they, or don't they?

6 MR. STROCK: No, not usually.

7 The mining sites present some very difficult  
8 jurisdictional questions for the Government as well as actual  
9 clean up questions.

10 At the present time, EPA is involved in a number of  
11 sites in your home State of Colorado. Generally, once the  
12 risk is assessed, because sometimes these sites are located  
13 far away from existing communities, then work does begin as  
14 with any other site.

15 The potential though for criminal liability is  
16 usually very limited because the activities which led to the  
17 contamination are in many cases at best were not illegal in  
18 any way at the time they occurred. So those present a  
19 different but very hard set of questions for us.

20 COMMISSIONER MacKINNON: Are you doing anything on  
21 them?

22 MR. STROCK: Yes.

1 COMMISSIONER MacKINNON: Thanks.

2 MR. STROCK: I have worked on both sides of those.

3 COMMISSIONER MacKINNON: Thank you.

4 MR. STROCK: Thank you.

5 CHAIRMAN WILKINS: Commissioner Corrothers?

6 COMMISSIONER CORROTHERS: I just have a comment,  
7 not really a question. The comment is included in the  
8 written response that savings are a major motivation for  
9 environmental offenses.

10 MR. STROCK: Yes.

11 COMMISSIONER CORROTHERS: And I would simply like  
12 to thank you for calling our attention to the fact that our  
13 draft guidelines do not reflect the cost savings as a  
14 economic gain. I think we will be looking at that.

15 MR. STROCK: Thank you for emphasizing that,  
16 Commissioner, and I would particularly draw your attention to  
17 Section 120 of the Clean Air Act that lays out in a very  
18 succinct form one approach the agency has taken.

19 Also, I would suggest that in the various penalty  
20 policies, some based on statutory language, others not, that  
21 that factor is explicitly taken into account across the  
22 board. It is absolutely essential in the environmental area.

1 COMMISSIONER CORROTHERS: Thank you.

2 CHAIRMAN WILKINS: Commissioner Nagel?

3 COMMISSIONER NAGEL: Yes, you made reference in  
4 both your written and your oral statement to a concern for  
5 our proposed tying of community service to a direct relation-  
6 ship with the instant offense.

7 And the concern that prompted us to do that was  
8 voiced earlier, I think probably 2 or 3 years ago, at public  
9 hearings by the both the Anti-Trust Division and I think EPA  
10 where in previous cases the sentences was either a rodeo or  
11 setting of an endowed charity university in an environmental  
12 case, et cetera.

13 As I recall, the problem expressed was that such a  
14 sentence resulted in almost honor being bestowed upon the  
15 defendant rather than a punitive sanction. And so we were  
16 encouraged to try to formulate a community service provision  
17 that would not permit that to occur. And yet, I am sym-  
18 pathetic to your point.

19 Is there some way you see that we could do both, or  
20 is that really not a major concern anymore? Is that someth-  
21 ing that was so unusual, the rodeo, the endowed charity, that  
22 we really need not to response to that, or perhaps we

1 overreacted? Could you comment on that?

2 MR. STROCK: No, I think the answer is clearly it  
3 is a very important concern and particularly in a program  
4 that is so decentralized as much of environmental enforcement  
5 is, it is very important that strong and clear signals be  
6 sent.

7 Clearly, again, if the nexus becomes too at-  
8 tenuated, you could have the perverse effects you mentioned  
9 and I would again suggest we work rapidly with the same  
10 problem in penalty mitigation situations.

11 What I would propose to do, if it's agreeable to  
12 the Commissioners, is to work with you and provide specific  
13 examples for your consideration you might include in your  
14 next draft.

15 COMMISSIONER NAGEL: In addition, it would be  
16 helpful if you would actually propose some alternative to  
17 language to that which we used to wrestle with the same  
18 problem because I think we share the concern, it's just we  
19 need to find an appropriate solution.

20 MR. STROCK: Thank you. We will do so.

21 COMMISSIONER NAGEL: Thank you.

22 CHAIRMAN WILKINS: Thank you both.



1 MR. STROCK: Thank you and I appreciate your  
2 patience with my cold as well.

3 CHAIRMAN WILKINS: You wrote me a letter a couple  
4 of weeks ago and I am replying today. I just want to let you  
5 know, it's been several weeks, but I have been doing some  
6 other things.

7 Thank you very much.

8 Our next witness is Joe E. diGenova, practicing  
9 attorney with Bishop, Cook, Purcell, and Reynolds here in the  
10 District. Joe is the chairman of Defense Attorney's Advisory  
11 Group on Organizational Sanctions, which the Commission put  
12 together a few months ago, and I would might add that this  
13 group, under Mr. diGenova's leadership, worked tirelessly and  
14 provided a great deal of assistance to the Commission without  
15 any compensation.

16 And we are indebted to you and your group, Mr.  
17 diGenova, and we look forward to your testimony today.

18 **STATEMENT OF MR. JOSEPH E. diGENOVA, DEFENSE ATTORNEY'S**  
19 **ADVISORY GROUP ON ORGANIZATIONAL SANCTIONS**

20 MR. diGENOVA: Thank you, Mr. Chairman, members of  
21 the Commission. I am pleased to be here this morning.

22 As I indicated in my written statement, I obviously

1 do so in a representative capacity on behalf of the other  
2 members of the Attorney Working Group who labored for 9  
3 months to try and make written recommendations to the  
4 Commission in an area which when we began our process we  
5 thought would be relatively simple and when we ended our  
6 process we realized it was anything but.

7 We are, therefore, sympathetic to what the Commis-  
8 sion has gone through and is sympathetic with the product it  
9 has produced as a result of its own labors in this sometimes  
10 rather drought ridden vineyard.

11 As noted, the Attorney's Working Group's recommen-  
12 dations to you say far better than I could in any form of  
13 reconstituted testimony what we believed and what we believe  
14 now to be a proper and recognizable theoretical basis for  
15 proceeding in the area of organizational sanctions, par-  
16 ticularly in the absence of sufficient, empirical data on the  
17 subject, a matter which has been discussed somewhat this  
18 morning both pro and con.

19 Rather than discuss in greater detail the specific  
20 findings and recommendations, which I am delighted to respond  
21 to questions about, however, I think it more appropriate that  
22 focus be placed on what we believe to be the most important

1 part of this process and that is the question of whether or  
2 not there exists a sufficient historical and factual basis  
3 upon which to base organizational sanctions at this time.  
4 And I am well aware of the exchange which has already  
5 occurred this morning between Judge MacKinnon and others of  
6 the panel with other witnesses.

7           We have recommended in our letter of May 19th,  
8 quote, that the Commission for the time being promulgate  
9 flexible policy statements rather than rigid and binding  
10 guidelines.

11           We do not recommend that the Commission do nothing.  
12 Let me make that clear at this point. Let me digress by just  
13 saying that we believe that there ought to be--ultimately  
14 there ought to be guidelines. We do not have any doubt about  
15 that. The question of how you get to that point is another  
16 matter and we are extremely sympathetic to the plight in  
17 which the Commission finds itself with an apparent mandate to  
18 do something in this area, but with, also, I think, good  
19 faith concerns expressed by reasonable people to it about  
20 whether or not there is a base to do that and whether or not  
21 by waiting a reasonable period of time some additional data  
22 can be accumulated which would be helpful, not necessarily

1 dispositive, but nonetheless helpful through the passage of  
2 time.

3 We particularly want to emphasize--and I am going  
4 to be very brief so that we can have an exchange on this--  
5 that we take great comfort in the fact that the Commission  
6 did an extensive amount of research in dealing with in-  
7 dividual guidelines obviously because there were more cases  
8 available to deal with and much more to study.

9 We also are confronted with the new historical  
10 reality which is that only recently has Congress enacted new  
11 legislation upping fine levels which answer Commissioner  
12 Corrothers' question earlier of why prosecutors didn't  
13 approach these cases in the first place historically, because  
14 it wasn't worth the candle.

15 I, like Judge MacKinnon, have been a prosecutor, a  
16 United States Attorney, an Assistant United States Attorney.  
17 I have worked for an Attorney General. I have investigated  
18 corporations. I have investigated them as a Chief Counsel of  
19 the Committee in the United States Senate and I have  
20 represented them in private practice.

21 I tend to take the view that as a group in our  
22 society, corporations are an extraordinarily law abiding

1 group of citizens. I tend to disagree rather markedly with  
2 the description of them presented by Professor Mayer earlier  
3 here today which seems to draw out a litany of studies, none  
4 of which, I might add, for my knowledge, are based on the  
5 notion of convictions, but rather the analysis of corporate  
6 data and then a judgment and an opinion being rendered as to  
7 whether or not that data describes these individuals as  
8 engaged in illegal conduct.

9 I think to promulgate guidelines on the basis of  
10 that kind of, for want of a better word, misinformation,  
11 disinformation, I think would be extremely unwise and I  
12 applaud the Commission for not having done so. And I assume  
13 obviously that it will not do so in the future because to do  
14 so, I think, would be a mistake.

15 I think that any responsible person from the  
16 outside looking at the extremely difficult job that the  
17 Commission has would say that it has obviously made a noble  
18 effort in this preliminary draft of organizational sanctions.

19 But I continue to return to the notion that I  
20 think--and the other members of the Working Group agree with  
21 me and they are both former prosecutors and long time defense  
22 attorneys, corporate representatives, we have some people who

1 actually teach in law schools in that group and who take a  
2 different view of it philosophically--nonetheless, we all  
3 came to a consensus position that we felt we needed more  
4 information and we felt that the Commission could benefit  
5 from even a window of opportunity of a couple of years  
6 dealing with these massive new fine levels that are now  
7 available to Federal prosecutors.

8           We only have to look at Drexel Burnham Lambeer's  
9 predicament as of today to see exactly what the ultimate  
10 consequences of massive fines can be to any organization good  
11 or bad. Drexel Burnham obviously deserved what it got.

12           The number of companies that find themselves in  
13 that position, however, I think are few in number. And I  
14 think what we need to do and what we are recommending  
15 respectfully to the Commission today is that the Commission  
16 do take--walk that extra mile for that camel at the end, that  
17 it take some additional time to look at some new data being  
18 generated with these massive new fines that are now available  
19 to Federal prosecutors so that it can have something more  
20 akin to a reasonable empirical basis upon which to base  
21 fines.

22           I will tell you that I blanched when I read that

1 374 million dollar figure in Option 2. It really is a  
2 corker. I have to admit. I had notions of--from old tax  
3 studies of things being confiscatory and perhaps excessive  
4 under the Eight Amendment, cruel and unusual punishment  
5 clause and the excessive fines clause. But notwithstanding  
6 that, I understand and we do as a group understand the  
7 necessity for the Commission to address this area and to  
8 eventually promulgate very serious fine levels beyond  
9 restitution.

10 We would only hope, however, that the Commission,  
11 although we know it wants to move and it has obviously  
12 demonstrated a willingness to move as quickly as it can and  
13 indeed responsibly, as it has, wait a little bit longer, take  
14 a little bit more time, allow these new fine statutes since  
15 '84 and thereafter to be used by prosecutors. Let's see the  
16 kinds of corporations that are convicted. Let's see how many  
17 corporate officials along with those corporations are  
18 convicted in those cases and do some comparisons. And then  
19 let's try to get a better view of what reasonable fines might  
20 look like for both the Scavlow [ph.] corporation, the  
21 criminal enterprise, which exists for no other reason other  
22 than to commit crime and make illegal profits, or the good

1 law abiding corporation which does voluntary disclosure, has  
2 compliance programs, educates its employees, punishes those  
3 who break the law, and decides that it wants to do what it  
4 should do is good for society.

5 I think a little bit more time isn't going to hurt  
6 and I'm delighted to answer any questions, Mr. Chairman.

7 CHAIRMAN WILKINS: Thank you very much.

8 Judge MacKinnon?

9 COMMISSIONER MacKINNON: What were the details of  
10 any fine leveled against Drexel Burnham; do you know that?

11 MR. diGENOVA: That was an agreed upon disposition,  
12 Your Honor. There were multiple counts under the new Federal  
13 statutes. I think ultimate fine, I think, is 625 million. I  
14 could be wrong. It could be 650.

15 They agreed to multiple mail fraud counts in  
16 exchange for the Government dropping RICO , which would have  
17 led ultimately probably to the forfeiture of the enterprise,  
18 which was Drexel Burnham Lambeer, the enterprise as defined  
19 in the information to which they pled.

20 But the Government agreed not to use RICO . Of  
21 course, the senior corporate entity has filed for bankruptcy.  
22 So I think ultimately the RICO occurred without RICO .



1           COMMISSIONER MacKINNON: That's a big fine, of  
2 course, it's a mirror pittance so far as the magnitude of the  
3 operations that they were engaged in.

4           MR. diGENOVA: I think you will find no friends in  
5 our group with regards to the methodology employed by some of  
6 the people at Drexel Burnham Lambeer, Your Honor.

7           COMMISSIONER MacKINNON: In getting to an in-  
8 dividual comparison, wasn't Bolsky's [ph.] fine around 300  
9 million dollars, or the restitution that he gave?

10          MR. diGENOVA: It was substantial, Your Honor. I  
11 don't remember the specifics of Mr. Bolsky [ph.], but, as you  
12 know, he entered into a plea agreement the Government, did a  
13 pretty good job in terms allegedly of cooperating and has,  
14 from which some cases have come. But his fine was substan-  
15 tial in restitution, yes, Your Honor.

16          COMMISSIONER MacKINNON: Three hundred million  
17 stuck in my mind.

18          MR. diGENOVA: I think you may be right, sir.

19          COMMISSIONER MacKINNON: Or more.

20          MR. diGENOVA: Yes. But he had a lot left over, I  
21 understand, as well--

22          COMMISSIONER MacKINNON: Yes, I think so.

1 CHAIRMAN WILKINS: Commission Corrothers?

2 COMMISSIONER CORROTHERS: I would just like to  
3 thank you for your work that you've done on behalf of the  
4 Commission as Chair of the Attorney Working Group to bring us  
5 recommendations in this area.

6 It requires a great commitment of both time and  
7 effort and we appreciate it.

8 MR. diGENOVA: I thank my partners for allowing me  
9 to do it, Commissioner Corrothers.

10 CHAIRMAN WILKINS: Commissioner Nagel?

11 COMMISSIONER NAGEL: I want to start by echoing the  
12 same sentiment, Mr. diGenova. You have not only been an  
13 enormous help to the Commission in the context of organiza-  
14 tional sanctions, but you have been with us from the beginn-  
15 ing and that came after your own experience on the D.C.  
16 Sentencing Commission and you were kind enough to share with  
17 us your experience there. And I would like to take this  
18 opportunity to thank you again.

19 Let me ask you a question that comes out of your  
20 testimony and somewhat out of your written statement and in  
21 part it follows up on some testimony by the people from NAM  
22 this morning.

1           It turns out that I think there is a slight  
2 mischaracterization about the use of past sentencing practice  
3 data. In the individual context, as you recall, we examined  
4 a sample of data on 10,000 cases for which we actually  
5 augmented data initially collected on 40,000, but that,  
6 nonetheless, was a sample.

7           In the context of the organizational sentencing  
8 practices of the past, we actually did better than that  
9 because we took the full population of cases. Because there  
10 were a smaller number by definition, we didn't take a sample.  
11 We actually studied all of the decisions.

12           And so statistically, those data are actually more  
13 reliable than the sampling. That aside, those data are based  
14 on pre-guideline periods as were the individual data and on  
15 pre-Congressional changes in the fine levels.

16           And from that perspective they are just as useful  
17 to the Commission as were the individual data.

18           The question then is, what kinds of new data would  
19 you think would be informative to the Commission in that you  
20 urge us to sort of, as you say, go the extra mile? What kind  
21 of data would we collect to help us determine what normative-  
22 ly should be sentences for corporations?

1 I think NAM may be correct in pointing to the fact  
2 that disparity may not be the key issue when you are looking  
3 at organizational sanctions. And I think the public percep-  
4 tion, if you look at public opinion data, which Professor  
5 Mayer made reference to, is not really that disparity is the  
6 key issue, but rather some perception about leniency,  
7 insufficient fines, et cetera.

8 So if we're not looking to disparity, but rather  
9 we're looking to inadequacy, what kind of data are we going  
10 to get now that will somehow tell us ultimately what those  
11 fine levels should be?

12 And that's the problem I have with the call for  
13 more time based on more data. I don't know what the data are  
14 going to tell us.

15 MR. diGENOVA: Commissioner Nagel, I think the  
16 answer to that is something which I have said about  
17 guidelines in general. And it is this, when I was the United  
18 States Attorney over a 5 year period, I was perfectly  
19 satisfied with the sentencing that was going on in this  
20 courthouse, whether it was fines or prison terms. And the  
21 reason was very simple. Congress had enacted new laws, all  
22 kinds of new statutes that Federal prosecutors didn't have 25

1 years ago.

2           You could go in any prosecutor's office a number of  
3 years ago and the number of statutes he or she had available  
4 were literally miniscule. Today they are legend.

5           During that period of time before individual  
6 guidelines, sentencing in white collar criminal cases, which  
7 is what the guidelines were all about, everybody screaming  
8 and yelling that white collar criminals weren't getting  
9 enough time, the sentences in this courthouse and around the  
10 country were, as far as I was concerned, were terrific.  
11 People who should be getting slam dunked were getting slam  
12 dunked. People who weren't, weren't. Corporations, you  
13 couldn't get them because you didn't have enough money to  
14 fine them. The fine structure simply wasn't worth the candle  
15 to go prosecute the corporation unless you could throw it  
16 into a package and do it.

17           We learned a lot during that period of time about  
18 what judges were willing to do when they had--when  
19 prosecutors had legal tools and sentencing awareness, for  
20 want of a better word, was being imposed upon Federal judges  
21 around the country.

22           I was very happy with white collar crime sentences.

1 Drug sentences could have been a little better, but that's--  
2 Congress has seen fit that now is improved even better than  
3 what it ought to be.

4           With regard to corporate sentencing or organiza-  
5 tional sentencing, I find myself in a position of saying I am  
6 quite sure that if given a year or 2 with new fine struc-  
7 tures, the Commission will find that Federal judges will  
8 impose severe sentences where required, given some guidance  
9 from the Commission in policy statement about what it wants  
10 to look for and what it expects, that where law permits it,  
11 restitution for organizations will be what it should, given  
12 the public awareness of this issue, given the sensitivity of  
13 the Federal bench to the way people look at the way they do  
14 their jobs.

15           I think that just as we learned that individual  
16 sentencing can improve, pre-guideline, and it certainly did.  
17 There is no question about that--that the same thing will  
18 happen and that you will in fact get a base of information.  
19 What kind of information? The level of fines, the kinds of  
20 restitution creative or otherwise that judges deem ap-  
21 propriate.

22           And, if the Commission were to go so far as to

1 require a supervisory probation, which I think respectfully  
2 is extremely unwise, given the incredible workload that  
3 Federal judges have and the aversion of the Department of  
4 Justice, I might add, to using masters in view of its own  
5 policy statements against the use of masters and their  
6 refusal indeed to agree that masters are even legal people in  
7 the court system, I think that would be thrusting upon the  
8 Federal judiciary at this time too much.

9 I would like to give Federal judges a chance over  
10 the next year or two to sentence some corporations under  
11 guidance from the Commission by way of policy statements.  
12 Again, I am not saying that the Commission should do nothing.

13 I do not agree with that. I think the Commission should do  
14 something.

15 I think it should say what it thinks judges ought  
16 to do in this area, but I really believe that the empirical  
17 base needs to be built a little bit and I think the Commis-  
18 sion can learn from that. Now it may not be the kind of data  
19 that the Commission will say, "Well, that's dispositive and  
20 it tells us what we ought to do." I don't see how, however,  
21 it can be anything less than informative.

22 Now that may be overly simplistic and it may not

1 even answer as well as you would like the question you have  
2 asked, which is a good one a fair one. Maybe much of what I  
3 feel about this is visceral because I learned how Federal  
4 judges learned pre-guideline about sentencing white collar  
5 criminals. They learned from United States Attorneys telling  
6 them that they wanted sentences. They learned from  
7 newspapers telling them they wanted sentences in these cases.  
8 And they learned that economic crime had consequences beyond  
9 that of what might have been immediately discernable to the  
10 average Federal judge.

11 I think in the case of sentencing organizations you  
12 will the same thing. And the Commission might very well  
13 learn something from the behavior of Federal judges during  
14 this training period, to call it a training period, when the  
15 Commission gives them policy guidance.

16 You know and I know that some judges will fight  
17 that guidance because they do not like guidelines at all and  
18 they will not follow it. Others will follow it, they will  
19 use it, they will try to be creative with it within the  
20 bounds of the law, given their limited power, and they will  
21 try to use them and to assist the Commission in its work.

22 I just, I guess viscerally looking at the record,



1 feel I would like to have more than 300 and some cases to  
2 look at before I write fines going up to 374 million dollars  
3 a count.

4 COMMISSIONER NAGEL: Thank you.

5 CHAIRMAN WILKINS: Commissioner Saltzburg?

6 COMMISSIONER SALTZBURG: I have got two questions.  
7 One of them, Joe, is just to clarify your testimony versus  
8 National Association of Manufacturers.

9 Not everybody has had a chance, sitting out there,  
10 to read your testimony. We all did. But it's fair, isn't  
11 it, to say that your recommendation, that your group to the  
12 Commission is not to do nothing? It's to issue non-binding  
13 policy statements that would urge courts, as I understand it,  
14 is this a fair statement, to impose upon corporations--all  
15 corporations and organizations convicted of criminal ac-  
16 tivity, one, the full cost of the--in terms of gain or loss  
17 of the illegal behavior, plus restitution, plus an enhance-  
18 ment if it's an environmental or other case in which non-  
19 pecuniary losses or gains are not adequately reflected in the  
20 pecuniary numbers?

21 MR. diGENOVA: Yes.

22 COMMISSIONER SALTZBURG: And to leave to U.S.

1 Attorneys, as you put it--this is a follow-up--the argument  
2 that in some instances that even ought to be increased. The  
3 judges ought to go higher because of problems of detecting  
4 and punishing certain kinds of behavior.

5 MR. diGENOVA: Yes.

6 COMMISSIONER SALTZBURG: Let me ask you one other  
7 question, if I can, and this is based on your experience when  
8 you were U.S. Attorney because it's one that has bothered a  
9 lot of people who have put forward proposals for the Depart-  
10 ment, and that is, right now, as a number of people probably  
11 point out in their written statements, any corporation can be  
12 held responsible virtually for any act of its agents even  
13 where it has policies in place that prohibit the very act  
14 that the agents have committed, and even where they have made  
15 efforts to police.

16 A number of proposals, including the one by you  
17 group, suggested that there ought to be understandably some  
18 reduction in punishment where corporations have policies and  
19 do police.

20 The question I have is, did you give any thought  
21 when you were U.S. Attorney or have you given any sense to  
22 whether the Department of Justice or the Department of

1 Defense, or both, and EPA ought to have some policies in  
2 place as to whom they ought to prosecute, I mean, when they  
3 ought to go after a corporation as opposed to individuals?

4 MR. diGENOVA: Yes, I do. I did then and I have  
5 since for different reasons.

6 I do think there ought to be guidelines for that.  
7 I think the Department of Justice and all Federal agencies  
8 should not be frightened. I'm not talking about sentencing  
9 guidelines. I'm talking about prosecution and enforcement  
10 guidelines.

11 I don't think the Department of Justice ought to be  
12 frightened about prosecutive guidelines. We had them. We  
13 had them internally, when I was United States Attorney.  
14 Before I was United States Attorney, there were guidelines.

15 Guidelines internally for prosecution and in  
16 determining when an organization should be held accountable,  
17 I think are very important.

18 I think that the Department, for example, ought to  
19 have internal guidelines for judging the culpability of an  
20 organization pre-indictment in making that decision.

21 If an organization, for example--and I want to talk  
22 about debarment for a minute. If I forget, I respectfully

1 request that somebody remind me. If an organization spends a  
2 lot of time and money on prevention, on education, on good  
3 faith policy, they have programs to advise their employees  
4 about what new regulations are, as was testified earlier to  
5 by Earlyn Church about the seven engineers who spend their  
6 time filling out forms and dealing with compliance, if  
7 companies do that and they are not criminal enterprises, in  
8 other words, they are not set up merely to commit crimes, and  
9 they have shareholders either closely held or publicly held,  
10 and they do business, whether they are on a stock exchange or  
11 not, some consideration must, and I underscore "must" as a  
12 matter of fundamental fairness, given imputed liability,  
13 given the fact that corporate criminal liability is almost  
14 automatic regardless of the level of the employee, regardless  
15 legally whether or not the corporation has in fact done all  
16 these good things, as a matter of prosecutorial discretion,  
17 the Department, particularly now, given what I believe to be  
18 not the Commission's level of fines, but the potentially  
19 confiscatory and excessive levels of fines that are poten-  
20 tially legally available to a court now, regardless of  
21 guidelines, the Department of Justice owes it to the American  
22 business community to establish internal guidelines which say

1 if you do these things, and I'll say within the complete  
2 discretion of the Department of Justice to determine whether  
3 or not it is good faith, you do X, Y, and Z, you have done X,  
4 Y, and Z, we're going to give you a pass under certain  
5 circumstances and we can define those and talk about those  
6 and they will become as difficult as writing the guidelines  
7 themselves.

8 I think if you do not do that you are going to run  
9 into such issues as fundamental unfairness, given the levels  
10 of fines that are now available that I think you run the risk  
11 of having Congress take a second look at the whole process,  
12 not the guidelines, but fines, everything.

13 The Department owes it to itself to do that. It's  
14 a fair thing to do. Not all the corporations who run  
15 businesses in this country are criminals, contrary to what  
16 you may have heard earlier today.

17 I think it is just the opposite. I think the  
18 corporations in this country do a tremendous job. I think  
19 they try to be law abiding. They try to educate their  
20 employees. They are obviously bad actors. We see them  
21 everyday, particularly in the environmental area.

22 But the Department needs to pay attention to that

1 difference between good actors and bad actors and people who  
2 are in the business and running corporations with thousands  
3 of employees need to be treated fairly because chances are we  
4 are all going to decide eventually that they do make some  
5 sort of contribution to the society by employing people,  
6 paying taxes, and producing a good product perhaps once in a  
7 while that some of us buy, use, or hope that our armed forces  
8 buy and use.

9 I am not suggesting that scaglows get away with  
10 anything. We all realize that people ought to be prosecuted  
11 for product substitution and defective products and all of  
12 that, if they sell a weapon that blows up in a soldier's  
13 hand, you know, they ought to be sent to jail for the rest of  
14 their natural lives. But beyond that and getting into the  
15 area of whether the Department ought to have guidelines, that  
16 is such an easy one to call, the answer is clearly yes. I  
17 think the Department owes it not only to the business  
18 community and the Congress, the Department owes it to itself  
19 so it knows what it is doing because many times it does not.

20 COMMISSIONER SALTZBURG: I am supposed to remind  
21 you about debarment.

22 MR. diGENOVA: Oh, debarment. I think if you get a

1 Federal judge involved in debarment that is the worst  
2 possible thing. I think judges should stay out of debarment.  
3 I think that's a job for the executive branch.

4 I can see it now, the Department of Defense has a  
5 sole source on an intelligence related piece of technological  
6 data, information gathering mechanism, NSA, the Department  
7 says, "We're not going to debar you." The Federal judge  
8 says, "Oh, yeah. I've got news for you. I'm going to debar  
9 them." And then you get into an incredible inter-branch  
10 conflict over who decides what is in the interest of United  
11 States intelligence.

12 I think debarment ought to be kept out of this  
13 process of sentencing completely.

14 CHAIRMAN WILKINS: Thank you.

15 Ilene?

16 COMMISSIONER NAGEL: Yes. Just one quick follow-up  
17 question. I want to use your experience, having been in our  
18 position once before.

19 Suppose we're persuaded by your argument and the  
20 argument of others that we should proceed more slowly with  
21 corporate defendants, organizational defendants than with  
22 individual defendants, suppose we were to say that we will

1 promulgate for some initial period of time policy statements  
2 rather than binding guidelines, suppose at that point the  
3 Federal defenders come forward and say, "Ha, for corporations  
4 you decide to use great caution and you promulgate voluntary  
5 policy statements, but for the indigents of America you are  
6 busy sending them off to prison in truckloads. How come we  
7 didn't get voluntary guidelines and they get voluntary  
8 guidelines?" And they make an equity argument. I am making  
9 it more crass, but suppose that point is made, what is your  
10 answer?

11 MR. diGENOVA: Well, the answer is it is apples and  
12 oranges. Corporate officials are going to prison everyday in  
13 Federal courts in this country. And if it were a question of  
14 people versus people, they would have a good argument.

15 If you were saying that under a certain type of  
16 theft a person who steals out of a mail box in an apartment  
17 building a Social Security check and gets a minimum of s^Ay 6  
18 months under the guidelines and a corporate official who  
19 steals \$175,000 from a company or bilks in a penny stock  
20 fraud case, gets no time under the guidelines are they are  
21 announced, I would say they have a great argument, but that  
22 is not the law.



1           The law as the Commission has enunciated is, is  
2 that human beings sentenced under the guidelines are treated  
3 equally. A corporation is not a human being. It is an  
4 entity. It employs people. The consequences of its disil-  
5 lusion or its confiscation or its evisceration by a sentence  
6 are completely different to questions like that.

7           Those same people who might be sentenced under the  
8 guidelines might very well work for that corporation, some of  
9 those same four people. It is apples and oranges. It is a  
10 very emotional argument. They may very well make it. I  
11 think legally and constitutionally it makes no sense what-  
12 soever. This Commission has been very brave and courageous  
13 in the past and I am sure will ignore it.

14           CHAIRMAN WILKINS: Thank you very much, Mr.  
15 diGenova. We appreciate your testimony and your assistance  
16 in the past.

17           Our next witness is Sheldon H. Elsen. Mr. Elsen is  
18 an attorney with Orans, Elsen & Lupert, New York. He is no  
19 stranger to the Commission. In fact, Mr. Elsen testified at  
20 our hearing last year in California.

21           I understand you are also a former Assistant United  
22 States Attorney and an adjunct Professor of Law. We are

1 delighted to have you with us.

2 STATEMENT OF MR. SHELDON H. ELSEN, ORANS, ELSEN & LUPERT, NEW  
3 YORK, NEW YORK

4 MR. ELSEN: Thank you, Judge Wilkins and members of  
5 the Commission. Professor Saltzburg, good to see you here.

6 As Judge Wilkins said, I have had legs in all  
7 camps. I have been an Assistant United States Attorney in  
8 the Southern District of New York. I have served as a  
9 defense lawyer and I have taught criminal law, as well as  
10 other things, at Columbia Law School. So I have sufficient  
11 biases that I trust that they will all cancel out, I hope.

12 What I am going to do, I think--and I wanted to  
13 thank you for inviting me again to participate with you in  
14 what appears to be, I think, a very constructive continuing  
15 dialogue--is to start within the framework of the assumptions  
16 upon which the Commission is proceeding and to comment upon  
17 technical questions, and to save the broader policy questions  
18 for just a brief note at the end.

19 And in so doing, I am going somewhat beyond this  
20 memorandum that I submitted to you because I reviewed your  
21 draft again and I have a few more remarks to make.

22 I think that there is a considerable improvement in

1 this draft from the one that I saw in October of 1988 at the  
2 previous hearings, and I think that the--much of the practi-  
3 cal improvement comes from reducing the emphasis upon precise  
4 calculations of economic quantities which are not in practice  
5 readily computable except at a cost which itself interferes  
6 with the process.

7 I refer particularly to the question of calculating  
8 pecuniary loss or pecuniary gain. And you may recall, in our  
9 last discussion the concern that I and others expressed that  
10 the United States Attorney's office, during a grand jury  
11 investigation of complex crimes, normally does not have such  
12 a figure and the requirement of producing such a figure can  
13 add so much time to the investigative process that it creates  
14 a disincentive to allocate scarce resources to the prosecu-  
15 tion of corporations because you are going to have to come up  
16 with a figure of that sort. Whereas, in your other  
17 guidelines you have much more general numbers.

18 Now you have indeed responded to them by giving  
19 them under Option 1 an alternative method of calculating and  
20 under Option 2, basically as I understand what were you  
21 saying, you are moving to offense levels and guidelines on  
22 that basis so that the requirement of these calculations is

1 much less rigid and I think that is a step forward, a big  
2 step forward.

3 I would like to point out that I do think there is  
4 one technical problem that I would like to call to your  
5 attention and I trust I read it correctly. Where you point  
6 out--where you talk about restitution you expressly deal with  
7 the problem of extensive hearings, which may be burdensome.  
8 And you point out that if restitution is going to take too  
9 long or going to be too cumbersome that you perhaps will defer  
10 to the civil remedies and pass on beyond that.

11 But as I understand it, in both Options 1 and 2,  
12 you have a requirement that the judge must take into account  
13 pecuniary loss or gain not subject to restitution or discour-  
14 gement. That has to be automatically tacked on to the number  
15 obtained from the tables with the multiple.

16 The problem with that is that it requires the  
17 United States Attorney's office to make these precise  
18 calculations. Otherwise, the United States Attorney's office  
19 cannot do its job of serving the courts. And I would not  
20 think that the United States Attorney's office can be  
21 expected to come in at the end of a case without all the  
22 material that a court needs to apply the guidelines.

1           Therefore, you leave, I think, in the calculations  
2 the disincentive I had been concerned about, that is, that  
3 the Government still must go through perhaps an extensive  
4 preparation of the damages portion of a case which normally  
5 they would not have to do in preparing a criminal case for  
6 prosecution. And I would urge you to give consideration  
7 again to that point.

8           Now you have, I believe, dealt with another  
9 calculation problem quite well. In the earlier discussions  
10 we were concerned about the difficulty in calculating the  
11 cost of prosecution, that is, the Justice Department does not  
12 know with any precision what its costs are. There are no  
13 time records kept. It is very hard to calculate what the  
14 cost of the investigating agency are, how do you allocate  
15 overhead and the like, calculations which are not normally  
16 thrown up in the normal course of prosecutorial business.  
17 And, therefore, it would create great difficulty.

18           Now you have made that a rough figure for a judge  
19 to take into account and I believe you have in a way dealt  
20 with that problem. You ask, I believe, whether these costs  
21 should be made more precise and added in and for the very  
22 reason that we have talked about, I would urge you to stay

1 where you are now and not to jump back into the precise  
2 calculations because you have a tremendous burden which you  
3 are creating for the prosecution, which is a disincentive, to  
4 use this remedy and at the same time at additional costs to  
5 the public, to the tax payer, as well as the fact that it is  
6 unsatisfactory. You cannot do it very well.

7           As a predicate for all these discussions, I do  
8 think that organizational prosecution in many cases is an  
9 appropriate method of approaching. Sometimes it is very  
10 valuable to corporate executives who are thereby kept out of  
11 the path of something that they might not normally be  
12 considered to be wholly responsible for, and at the same  
13 time, it permits the use of the criminal process.

14           So I would hope that the practical solutions in the  
15 direction of greater flexibility remain and that the problem  
16 that I had suggested can be dealt with.

17           Now in your eleventh question you asked whether  
18 cooperation should be considered as a departure downward as  
19 it appears in the present draft, or should be changed into a  
20 guideline factor.

21           I would think that you should keep it as a depar-  
22 ture downward for a very important reason. The corporation

1 which has problems of this sort almost invariably tends to  
2 cooperate either through new management, new directors who  
3 come in, or through the fact that senior management may not  
4 be involved. That is a great incentive. And the decision  
5 not to cooperate, as the guidelines now read, would be a very  
6 unwise decision because it throws the corporation in to these  
7 ranges of fines which are quite extraordinary in some  
8 regards.

9           But if you just make it a guideline factor, you  
10 have a mixed bag where the corporation is still subject to  
11 very heavy fines and the incentive is not as great and there  
12 is more of an incentive to fight the prosecution rather than  
13 to clean up the act.

14           I would say--I also note that you have taken a  
15 count of a number of other factors, particularly bribes to  
16 Federal officials, which is corrupting and cannot be measured  
17 economically. And I applaud that. I think that that is a  
18 return to the more traditional measures of criminal cul-  
19 pability, which does indeed belong in this code.

20           Having said all that, I will return to a position  
21 which I had earlier expressed and which is widely shared by  
22 my colleagues at the Bar in New York and that is that these

1 penalties are very heavy. I mean Option 2 penalties are--  
2 they knock your eye out. They are very heavy penalties.

3 Now I confess--I think that Commissioner Nagel's  
4 question is a very good one. How do you justify tough  
5 approaches to individuals and flexible guidelines for  
6 corporations? Maybe we are too late for that question that I  
7 would be concerned about.

8 Many of the Bar in New York and I think practically  
9 all of the judges are very uncomfortable with the constraints  
10 of the guidelines. I do not think that this comes as a great  
11 piece of information to the Commission. I think you have  
12 heard this. And though it is true, as former a United States  
13 Attorney just said, that he likes to see white collar  
14 criminals slam dunked, we have a lot of problems in our  
15 jails, I mean starting with the Crime Commission in the 60's.  
16 We have these terrible problems in our correctional systems  
17 and individuals are--can have personality discenegration with  
18 very long sentences. And so there is a very big problem with  
19 the way it applies to individuals in that I think you may  
20 have excessive deterrence and you may have the opposite of  
21 rehabilitation and that is personality discenegration.

22 I appreciate that this is not what I was asked to



1 speak about today, nor is it on your agenda for today, but I  
2 think that the correct answer to Commissioner Nagel's  
3 otherwise unanswerable question is that the individual  
4 guidelines are in some respects and in many respects too  
5 tough and that is what I think is probably the answer.

6 I would favor a reduction of the scale of fines,  
7 particularly in Option 2. And I would favor greater  
8 flexibility. But it may be that it is late in the day to  
9 make that type of answer to what I think is a very good  
10 question, but it is my honest answer to that question.

11 So I would be very happy to take any questions.

12 CHAIRMAN WILKINS: Thank you very much.

13 Judge MacKinnon?

14 COMMISSIONER MacKINNON: I was wondering about your  
15 last statement as to whether you thought the individual  
16 guidelines were too tough in respect to those guidelines that  
17 relate to the mandatory minimum sentences, or whether you  
18 were concerned about sentences that the Commission had the  
19 free hand to implement?

20 MR. ELSEN: As a matter of fact, some of the judges  
21 have said in the mandatory minimum sentences I think that  
22 they are helped in this area.

1           COMMISSIONER MacKINNON: So you do not think they  
2 are too tough in that respect?

3           MR. ELSEN: Well, I must tell you, Judge MacKinnon,  
4 I do not get into those types of crimes and, therefore, I do  
5 not have much personal experience, but I have heard that from  
6 some of the Federal judges.

7           The problem I have is in the area that former U.S.  
8 Attorney diGenova just said, the white collar area. I do  
9 think that corporate executives, of course, should not be  
10 permitted to engage in environmental pollution or insider  
11 trading, but there is a problem of excessive deterrence. We  
12 do want to permit people to do their job.

13           We have had some areas of the law, like foreign  
14 corrupt payments, in which corporate officials are caught  
15 between the criminal law and the problems of doing business  
16 in other parts of the world and the use of very stiff  
17 criminal sentences which can really destroy individuals  
18 creates an excessive deterrence and inability to deal with  
19 foreign competition and the like. And I think that there are  
20 a lot of--

21           COMMISSIONER MacKINNON: Even if do not pay bribes,  
22 we don't recognize that paying a foreign bribe is okay.

1 MR. ELSEN: Well, I--

2 COMMISSIONER MacKINNON: That is what is really  
3 involved.

4 MR. ELSEN: You know, Judge, I was involved in a  
5 lot of those cases and I think that paying foreign bribes is  
6 a terrible thing and it is very, very hard on Americans. It  
7 is something that somehow does not crease the conscience of  
8 French, Germans, Japanese, or others of our civilized allies.

9 COMMISSIONER MacKINNON: South Americans.

10 MR. ELSEN: I'm talking about people who do not  
11 take bribes in their home countries. I am not talking--South  
12 Americans are the people who take home bribes in their home  
13 territory. I am talking about people who share the value  
14 systems of our country.

15 Our senior management had great problems with  
16 enterprises that have been created in these areas and very,  
17 very harsh criminal penalties drive people away. Now that  
18 may be a good thing. It may be a good thing that we want to  
19 create greater timidity in business. But I am not sure that  
20 it is.

21 You know, as these cases come up for sentencing and  
22 it looks all cut and dried and you have a presentence report,

1 and you have an investigation and it all looks what a  
2 terrible scoundrel this was, but that is not the way it  
3 approaches. It comes to an executive on the executive's  
4 desk. The executive is dealing with a booming, buzzing  
5 confusion and has to make a lot of policy choices.

6 And if you are going to be talking about 5 years in  
7 a Federal penitentiary for making the wrong policy choice,  
8 you are going to excessively deter. I think that that is one  
9 of the problems with the way the individual guidelines are  
10 working out in the white collar area right now.

11 COMMISSIONER MACKINNON: I don't know what you mean  
12 by policy choices?

13 MR. ELSEN: I'm talking about an executive who may  
14 choose to play it safe, not to take a risk, that what they  
15 think--I mean, for example, in the--

16 COMMISSIONER MACKINNON: But you have to violate  
17 the law.

18 MR. ELSEN: Well, Judge, suppose you are told in a  
19 foreign country that X is the sales agent whom you have to  
20 deal with. You suspect that X is involved with some people  
21 in the foreign government. You suspect that X's success may  
22 not be due simply to his skills as a sales representative,

1 but maybe due to the fact that monies are passing back and  
2 forth. You decide not to touch X. You decide not to. Now  
3 that may be a wrong decision. X may be the right person to  
4 deal with in that country, but the fact that it might turn  
5 out that you are dealing with a person like X who could land  
6 you into criminal trouble causes you to forego the decision  
7 to take a risk. Now I choose that--

8 COMMISSIONER MacKINNON: Wait a minute. Your  
9 definition--you are talking about dealing. What is your  
10 defi--what do you mean "dealing?"

11 MR. ELSESEN: I'm talking about to retain X as your  
12 representative.

13 COMMISSIONER MacKINNON: At an elaborate sum.

14 MR. ELSESEN: No, not necessarily.

15 COMMISSIONER MacKINNON: Well, like the husband of  
16 the Queen, for instance.

17 MR. ELSESEN: Well, it is absolutely true. There are  
18 a lot of governments where you--now I am choosing a statute  
19 that is not enforced today I recognize and I am sure you  
20 recognize it too, Judge MacKinnon.

21 COMMISSIONER MacKINNON: No, I don't.

22 MR. ELSESEN: And I am drawing examples because I

1 have had extensive experience with this statute and I have  
2 seen--with the investigations that preceded these statutes  
3 and I have seen what works.

4           Now it is absolutely true if you want to deal--as I  
5 can think of an example of an experience, if you want to deal  
6 with--do business in Pakistan years ago and your sales agent  
7 is a member of the Buto clan, you may very well conclude that  
8 that is too risky because it could eventually turn out that  
9 there is a corrupt allegiance there. On the other hand, it  
10 may be the only way to do business in that country and you do  
11 not know of any surface illegality.

12           The French will go in. The Japanese will go in.  
13 The Germans will go in. And if we are going to put people in  
14 jail for long periods of time, our people are not going to go  
15 in and will stay out of that country.

16           Now that may be okay, but I think that there are a  
17 lot of policy decisions that cross the desks of corporate  
18 executives which are--which should not be deterred quite that  
19 heavily. I am not saying that there should not be fines. I  
20 am not saying that there should not be punishment. I am just  
21 saying very heavy punishment is killing. I mean it destroys  
22 an individual. A manager simply will stay farther away than

1 perhaps our national interest dictates, that is what I am  
2 saying.

3 COMMISSIONER MacKINNON: I think I understand you.

4 MR. ELSEN: Yes. I do not know if we agree or not,  
5 but that is an honest appraisal of the situation. I per-  
6 sonally as an individual am delighted I never have to deal  
7 with those decisions. I have the same moral code you do, but  
8 it is a luxury. I am not sure that we should impose that on  
9 all of our citizens.

10 CHAIRMAN WILKINS: Questions?

11 COMMISSIONER NAGEL: Yes. Mr. Elsen, you raised an  
12 interesting point which is the relationship between the  
13 severity of the sentence and the voluntary versus binding  
14 issue, that is, whether guidelines are mandatory or volun-  
15 tary.

16 Let me just see if I can get clear your position on  
17 this because I think we did not articulate it before. Assume  
18 of the moment that ultimately the guidelines promulgated--as  
19 you know the guidelines are iterative and we start at  
20 position A, but there is no reason we will not go to B, or C,  
21 or D--assume that ultimately the guidelines promulgated both  
22 for individuals and for organizational defendants are set at

1 levels with which you agree in terms of the severity, that  
2 is, your normative judgement and the Commission's normative  
3 judgment end up in the same place so that you would not  
4 testify that these are too high or too low or whatever, then  
5 what is your position on whether one can justify mandatory  
6 guidelines for individuals, which is in fact the mandate we  
7 received from Congress? It was clear they rejected this  
8 notion of voluntary and a temporary step to try out non-  
9 binding guidelines for organizational defendants assuming  
10 they are all set at the right level. That is the question I  
11 should have asked Mr. diGenova, but since you have--

12 MR. ELSEEN: But I mean that is thrown up by his  
13 question. You have to construe your mandate and I happen to  
14 believe that that is a matter of public policy, the more  
15 flexible guidelines in which the judge can take account of  
16 individual factors. The old system, the much berated old  
17 system is a better system.

18 COMMISSIONER NAGEL: But Congress answered this.

19 MR. ELSEEN: But Congress answered that. You do not  
20 have that option and I recognize that. So I suppose you have  
21 to interpret your legislative mandate and if you find that  
22 moving in and out between the mandatory and then giving the



1 judges a time to exercise discretion so you can gather  
2 further data and experience, if you believe that that is  
3 consistent with your mandate, I think it is constructive. I  
4 think Mr. diGenova makes a good suggestion to you.

5 COMMISSIONER NAGEL: Thank you.

6 CHAIRMAN WILKINS: Seldom does a week go by when a  
7 district judge does not tell me that these guidelines are too  
8 tough. Seldom does a week go by that a district judge does  
9 not call me up and say, "What in the world are y'all doing up  
10 there, Wilkins? These guidelines aren't tough enough." So,  
11 you know, you get both ways. Maybe that means that we are  
12 pleasing neither and that is maybe a good sign.

13 MR. ELSEN: Judge Wilkins, I suspect that--you  
14 know, we are not necessarily in the criminal sentencing area  
15 a unified culture. Different parts of the country have  
16 different views. I come from a section of the country which  
17 is out of favor right now. There are some views which people  
18 will call liberal and I realize that's a terrible word to  
19 use. But I mean there is that attitude and some parts of the  
20 country have much tougher--just a couple of things from my  
21 experience.

22 I remember when I was a brand new Assistant U.S.

1 Attorney. I was prosecuting a stolen car case and I was up  
2 against a very experienced legal aid lawyer. He really knew  
3 the system inside and out. And he was defending a young man  
4 who had stolen a car in Alabama and had driven it to the  
5 Southern District of New York, where he was caught. And  
6 under the law at that time, if he pleaded guilty he could be  
7 sentenced in either district. He could be sentenced in the  
8 district where he was apprehended.

9 And I remember this legal aid lawyer saying to this  
10 young man, "You are the smartest young man I have ever met  
11 because if you had been caught in Alabama you would have  
12 gotten 10 years and in New York you are going to get proba-  
13 tion", and that is what happened.

14 And it use to be--I remember--you know, Judge  
15 Skelly Wright in terms of many of his views is considered a  
16 social liberal in some ways. But Skelly Wright use to come  
17 to New York for 3 weeks every summer when the Yankees were in  
18 town and he use to sit there and he came from Louisiana. It  
19 was a grim day for the defendants in the Southern District of  
20 New York. I was a prosecutor. They all got--they were, to  
21 use Mr. diGenova's words, they were slam dunked in ways that  
22 they were not accustom to in New York. Why? This a great

1 judge, a man of complete integrity. He came from a different  
2 culture. And that is one of our big problems. I sympathize  
3 with you.

4 But I think if you put color coding for your calls  
5 on your walls, you may find that they come from different  
6 parts of the country.

7 CHAIRMAN WILKINS: Well, we may, but reasonable  
8 differences I think is something Congress perhaps has already  
9 answered for us and it depends on the crime as well as the  
10 region. I know in New York if you get caught for a pistol  
11 because of the high density of population, you are in a lot  
12 of trouble. Where I come from, if you get caught without one  
13 you are in a lot of trouble.

14 [Laughter.]

15 MR. ELSEN: What?

16 CHAIRMAN WILKINS: Where I come from, if you get  
17 caught without a pistol you are in a lot of trouble, you see.  
18 So it just depends on where you are from and who the judge  
19 is.

20 We are trying to rationalize all of that and that  
21 is what this thing is all about. We appreciate your ap-  
22 preciation of our job, but we also appreciate the assistance

1 that you have rendered us and it has been substantial.

2 MR. ELSEEN: Well, that is a hard job you have in  
3 reconciling regional differences. That is a perfect example,  
4 the gun laws. There is no question, New York is much tougher  
5 than Nebraska or your part of the country.

6 CHAIRMAN WILKINS: Thank you very much.

7 MR. ELSEEN: Thank you very much.

8 CHAIRMAN WILKINS: Our next witness is Frank H.  
9 Menaker, Jr., Vice President, General Counsel, Martin  
10 Marietta Corporation. Mr. Menaker is accompanied by Victoria  
11 Toensing.

12 Ms. Toensing, will you offer testimony as well?

13 MS. TOENSING: No.

14 CHAIRMAN WILKINS: Okay. Fine.

15 MR. MENAKER: I asked her to join me principally  
16 because she has worked a lot on this paper that I have given  
17 to you and then I thought if you had any questions that she  
18 could answer, it would be much quicker to get them answered  
19 right away.

20 CHAIRMAN WILKINS: Well, we are delighted to have  
21 both of you with us. Ms. Toensing has worked very closely  
22 with the Commission on a number of projects over the past few

1 years.

2 MR. MENAKER: I understand. Thank you.

3 STATEMENT OF MR. FRANK H. MENAKER, JR., VICE PRESIDENT,  
4 GENERAL COUNSEL, MARTIN MARIETTA CORPORATION

5 MR. MENAKER: Let me first introduce myself. As  
6 the General Counsel of Martin Marietta Corporation, I also  
7 have had the opportunity to serve on a number of different  
8 projects throughout the community in which we deal. I am the  
9 Chairman of the Working Group of the Defense Industry  
10 Initiative, for example, which is something I hope to explain  
11 to you in a minute.

12 I have chaired the Voluntary Disclosure Committee  
13 of the American Bar Association's Public Contracts Loss  
14 Section and I am also a member of the Public Contracts Loss  
15 Section, a council member.

16 Also, I am a Director of the ACCA and I see that  
17 Mr. McFadden and Nancy Nort [ph.] and they are going to, I  
18 think, speak to you this afternoon. So I have a fair amount  
19 of experience in corporate matters and I am certainly not a  
20 criminal lawyer and I do not appear before you today with  
21 that level of expertise at all.

22 One of the things I did want to talk about, if I

1 could, was to try and describe to you what we think is  
2 important in terms of Martin Marietta and perhaps other  
3 corporations' concerns with regard to these guidelines.

4           And I guess the biggest concern that I have is in  
5 trying to help you find a balance between imposing sentences  
6 on corporations for their wrongdoing and at the same time  
7 trying to incentivise corporations to develop meaningful  
8 compliance programs because I think that corporations  
9 themselves are probably best equipped to deal with wrongdoing  
10 if in fact they have the proper incentives to do it.

11           One of the things that--and I use the term meaning-  
12 ful compliance programs because it is a term that was used by  
13 Deputy Attorney General Arnold Burns in a letter he wrote in  
14 1987 to then the Deputy Secretary of Defense Will Taft when  
15 he said that the decision that the Department of Justice  
16 would make with regard to indicting corporations would be  
17 based upon those that do business in the procurement area--  
18 Government procurement area. It would be based upon whether  
19 or not in part corporations had meaningful compliance  
20 programs. But nobody really understood what that meant at  
21 the time. That was February 5, 1987, when he wrote that  
22 letter.

1           Since that time, we have worked a lot with people  
2 like Morris Silverstein, who is also here today, and I  
3 believe addressed you earlier, in trying to understand that  
4 term and in trying to develop programs that would meet both  
5 the needs of the corporation and preventing wrongdoing and  
6 also would develop for the corporation a character of  
7 responsibility that would enable them to continue to do  
8 business with whatever customers they have.

9           There is no question in my mind that law enforce-  
10 ment has expanded dramatically against corporations in a  
11 variety of areas. It is not just corporations like Martin  
12 Marietta that do primarily defense contracting or contracting  
13 with NASA and other Government agencies, but corporations in  
14 the energy business like Exxon. Today I am told there was an  
15 article in the paper that they are negotiating a plea right  
16 now with regard to the Prince William Sound oil spill from  
17 the Exxon Valdez.

18           Energy corporations are facing increased law  
19 enforcement. Pharmaceutical corporations are facing it.  
20 Everybody really that does business in the country, I think,  
21 has to understand that law enforcement is increasing and  
22 criminal law enforcement is really what I am talking about.

1           The environmental laws are being enforced criminal-  
2 ly from a Federal standpoint much more aggressively than they  
3 were 5 years ago. Health and safety laws have been enforced  
4 to some extent by the States against corporations from a  
5 criminal standpoint, but now I think the Federal Government  
6 will also enter that arena. And certainly from our  
7 standpoint, the Government procurement statutes have been  
8 enforced criminally much more aggressive in the past 5 years  
9 than they ever were before.

10           So it is important that corporations develop an  
11 ability to react to this type of law enforcement, to develop  
12 what we call these meaningful compliance programs, and to  
13 create the cultural changes that they have to create within  
14 their organizations to meet what I think is a very sig-  
15 nificant challenge.

16           From the standpoint of meaningful compliance  
17 programs, a corporation like Martin Marietta will have a very  
18 aggressive internal audit function. It will have environmen-  
19 tal audit functions. It will have technical audit functions.  
20 It will have health and safety capability in terms of audit  
21 functions so that when we go out with various different teams  
22 of people throughout our organization we are looking for



1 compliance in a variety of areas.

2 Internal audit, I think, the financial internal  
3 audit is the lynch pin of all of these compliance programs.  
4 In addition to that, we will have whistleblower protection,  
5 or in effect we will have programs that provide that  
6 employees will not be treated unfairly if they make allega-  
7 tions against the corporation. We have ombudsmen that are  
8 set up within the corporation to hear allegations and talk  
9 about cultural change. That is a significant cultural change  
10 for a corporation. To provide an ombudsman or an ethics  
11 officer that anyone can go to and make an allegation is very  
12 unique in corporate America, but I think we are going to see  
13 more of it.

14 The traditional approach to bring an allegation  
15 through a corporation is to go to your supervisor. Obviously  
16 an employee who sees wrongdoing is not going to do that.  
17 They are not going to make the allegation at all, or they  
18 will just sit on it and let a matter fester. But an employee  
19 who can go to an ombudsman or an ethics officer clearly has  
20 that opportunity to bring a matter to the attention of higher  
21 level people in a corporation, put it out for investigation  
22 and analysis and probably disclosure.

1           An internal audit function has to be capable of  
2 auditing for contract compliance. It has to audit marketing  
3 people. It has to audit the marketing functions. It has to  
4 audit consultants. It has to do compliance auditing that is  
5 really different than the kinds of auditing that they have  
6 done in the past, which is basically procedural audits or  
7 financial audits to determine that the books and records of  
8 the corporation are in compliance with the policies and  
9 procedures of the corporation.

10           One other element to self-governance which I think  
11 is important is the element of voluntary disclosure. It is  
12 something which I think was addressed in the guidelines and  
13 it is part of the recommendations that we have made that it  
14 be given further consideration.

15           But with regard to voluntary disclosure, a cor-  
16 poration like Martin Marietta will have a policy that says  
17 that it will disclose all wrongdoing that it discovers in,  
18 for example, with regard to the Morris Silverstein program of  
19 the DOD, we make disclosures to the Department of Defense of  
20 any matters which we find might violate the Federal procure-  
21 ment laws.

22           That is a unique situation because once we make

1 that disclosure we subject ourselves both to Government  
2 investigation through the DOD, as well as potential prosecu-  
3 tion by the Justice Department.

4 We get certain advantages by making that dis-  
5 closure. One is that I think we get extra consideration from  
6 the Department of Justice as to whether or not they should  
7 indict a corporation who has tried to find a problem and  
8 disclose it. Secondly, the DOD guarantees that they will not  
9 debar a corporation that has made a voluntary disclosure.  
10 And to date they have kept that commitment with regard to all  
11 of the disclosures that they have received.

12 The quid pro quo is a very important element to  
13 motivating corporations to participate in these kinds of  
14 programs. Our voluntary disclosure procedure is so detailed-  
15 -and we send this to all of our employees--that if in fact a  
16 decision is made at a lower level of management not to make a  
17 disclosure, there is an automatic appeal to a higher level of  
18 management. And even if the chief executive officer of the  
19 corporation should decide that it is a matter that he does  
20 not want to disclose, then the General Counsel has the  
21 authority to take that matter to the Board of Directors.

22 So a disclosure in a company with a policy or

1 procedure like that is more than likely. In fact, I have a  
2 copy of our policy and operating instructions, which I would  
3 be glad to leave with you if you would like to see it.

4 I think that it is important that we understand  
5 that meaningful compliance programs and whether or not they  
6 really get implemented will depend upon whether or not the  
7 chief executive officer and the senior management of the  
8 corporation and the board of directors really support those  
9 programs.

10 We often use the example when it comes to wrongdo-  
11 ing whether or not a manager winks when someone says what  
12 should I do about a given problem. Should I put a cost in  
13 pool A or should I put it in pool B? And if clearly the  
14 answer is to put it in pool A and the manager says, "Well, do  
15 what's right", and winks at the individual, he is probably  
16 sending a message that he really wants it in pool B.

17 And so when you have a program, you not only have  
18 to say the right things, you have to go out and train your  
19 people in what to do. Joe diGenova talked about that this  
20 morning. Training programs are extremely important and I  
21 think you have to enforce your policies and procedures as  
22 strictly as you possibly can. That gets back to the over-

1 sight and governance processes of a corporation.

2           The reason why I bring all of this to your atten-  
3 tion is because I feel that you need to find ways to not only  
4 handle the wrongdoing of a corporation through the sentencing  
5 guidelines which you are proposing, but also that you find  
6 mechanisms to further incentivise corporations to develop  
7 these kinds of programs because I believe that there is a lot  
8 of room for movement in this area, a lot of industries are  
9 interested in it, it is not just the defense industry. And  
10 certainly if the Commission were to react more positively in  
11 this area, I think we would see a movement in that direction.

12           I had only a few other comments that I would make.  
13 We made some recommendations. We made, I think, 14 recommen-  
14 dations in the paper that was submitted. One of those  
15 recommendations asked you to consider increasing the credit  
16 given to a corporation for its efforts to prevent recurrence  
17 of an offense under Option 1 as well as under Option 2. We  
18 would ask you to consider that further.

19           Also, we would like you to reconsider the defini-  
20 tion of high level management. I think that if you are going  
21 to have a broad, wide area of trying to describe who is high  
22 level management, you really do not get any benefit at all

1 from the way you are approaching the subject. That has got  
2 to be a narrowly defined area. We would suggest a model  
3 penal code would be the appropriate definition.

4 Make high level management those individuals who in  
5 fact have an influence over the policy of the corporation and  
6 do not broaden that area too far because if you do, it will  
7 become meaningless.

8 I had no other direct comments, but I would be glad  
9 to answer your questions.

10 CHAIRMAN WILKINS: Thank you.

11 Judge MacKinnon, any questions?

12 COMMISSIONER MacKINNON: You know I was really set  
13 back when you said that you are only recently developing  
14 meaningful compliance programs for complying with the law. I  
15 just cannot understand that.

16 MR. MENAKER: I didn't mean it to sound the way you  
17 understood it. What I meant was--

18 COMMISSIONER MacKINNON: Well, you indicated that  
19 enforcement was increasing and they are really working on  
20 this now.

21 On high level management you want it restricted?

22 MR. MENAKER: Yes, sir.

1           COMMISSIONER MacKINNON: With a corporation of  
2 135,000 employees, you want just restricted to a few assis-  
3 tant vice presidents and presidents? Most of those crimes  
4 are committed by managers and supervisors.

5           MR. MENAKER: Well, in terms of increasing the  
6 fines against a corporation where you believe that high level  
7 management is involved, if you are going to get any bang for  
8 that you should in fact limit it to senior level officials of  
9 the corporation who in fact make policy for the corporation.

10           COMMISSIONER MacKINNON: But don't you think that  
11 the people in the supervisory level and the management level  
12 in a corporation with 135,000 employees make a lot of policy?

13           MR. MENAKER: Actually, they don't make as much  
14 policy as you probably think. What do very often--

15           COMMISSIONER MacKINNON: Maybe they make more than  
16 you think.

17           MR. MENAKER: Well, I don't know, but what they do  
18 is they interpret policy. There is no question about that  
19 and a corporation has an obligation to communicate effective-  
20 ly to all levels of management what its policies and  
21 procedures really are.

22           And if in fact there is a misinterpretation, then

1 there may be a failure on the part of high level management.  
2 But if someone deliberately goes around policies and  
3 procedures, which is more likely to happen with the larger  
4 organization that you are talking about, then in fact I am  
5 not sure the increased fine should be appropriate.

6 COMMISSIONER MacKINNON: Deal with a concrete  
7 problem. Do you have an assistant for Martin Marietta? Do  
8 you have a vice president or an assistant vice president  
9 actually conducting negotiations with the Defense Department?

10 MR. MENAKER: You mean to negotiate a contract?

11 COMMISSIONER MacKINNON: Yes.

12 MR. MENAKER: Very often you do have a senior level  
13 person negotiating a contract.

14 COMMISSIONER MacKINNON: Well, I am saying, do  
15 others do it?

16 MR. MENAKER: Oh, yes, sir.

17 COMMISSIONER MacKINNON: Well, why shouldn't they  
18 be considered as high level managers?

19 MR. MENAKER: In terms of if they defrauded the  
20 Department of Defense, if they failed to provide them with  
21 information they should provide or misstated something?

22 COMMISSIONER MacKINNON: If they arranged for a



1 bribe.

2 MR. MENAKER: If they arranged for a bribe,  
3 depending upon the level and depending upon the circumstan-  
4 ces, you would have to, I think, treat the corporation  
5 accordingly. But I don't think you can say flat out that the  
6 chairman of the board, or the directors of the corporation or  
7 the senior officers of the corporation condone that activity  
8 just because it occurred.

9 COMMISSIONER MACKINNON: No, but he was a man  
10 himself in high level management. If he's able to that--

11 MR. MENAKER: No question. The higher level the  
12 person involved in it clearly indicates the policy of the  
13 corporation with regard to it. I agree with that.

14 COMMISSIONER MACKINNON: Thank you.

15 CHAIRMAN WILKINS: Commissioner Corrothers?

16 COMMISSIONER CORROTHERS: Thank you for the degree  
17 of specificity that you provided in terms of the types of  
18 preventive incentives that we should promote or advocate.

19 Will you be forwarding us a copy of your testimony?  
20 I don't think that I have received a copy? Did you provide  
21 that already?

22 MR. MENAKER: Well, I'll be glad to reduce that to

1 a more specific statement, yes, ma'am. I will do that.

2 CHAIRMAN WILKINS: That will be helpful, as well as  
3 your compliance document.

4 COMMISSIONER CORROTHERS: Yes, that will be useful  
5 too, the example, you have.

6 CHAIRMAN WILKINS: Questions?

7 In your compliance program, when you report  
8 criminal violations to the DOD for example, what do you about  
9 the individual?

10 MR. MENAKER: Well, it depends. Very often we  
11 follow the guidance of the DOD and the Justice Department at  
12 that point. On occasion, they have asked us to keep the  
13 individual in place, although removed from actual respon-  
14 sibility and on occasion we have disciplined them immediately  
15 and terminated their employment.

16 We have had a number of employment terminations  
17 over the past 5 years. And very recently, based upon four  
18 disclosures that we made, I think, in 1987 and 1988, we had  
19 four individuals indicted and convicted for their offenses.

20 CHAIRMAN WILKINS: So your compliance and dis-  
21 closure indicates not only infraction, but those individuals  
22 responsible for the conduct.

1 MR. MENAKER: It does.

2 CHAIRMAN WILKINS: And then you leave it up to the  
3 prosecuting authorities and what to do about that.

4 MR. MENAKER: We identify that. We enter into a  
5 specific agreement with the Department of Justice, which has  
6 been worked out in advance by Justice and the DOD, and that  
7 agreement describes exactly what we are committing to and  
8 what we must tell them.

9 The individuals are quite often disciplined and the  
10 corporation, of course, has to make restitution and has to  
11 negotiate even a civil settlement with the Justice Department  
12 with regard to that.

13 CHAIRMAN WILKINS: Very good. Well, thanks a lot.

14 MR. MENAKER: Yes, sir.

15 CHAIRMAN WILKINS: Our next witness is Professor  
16 Christopher Stone, University of Southern California Law  
17 Center. Professor Stone has appeared before this Commission  
18 before.

19 We are delighted to see you back again today,  
20 Professor Stone.

1 STATEMENT OF PROFESSOR CHRISTOPHER STONE, UNIVERSITY OF  
2 SOUTHER CALIFORNIA LAW CENTER

3 PROFESSOR STONE: Thank you. Because I have had  
4 prior opportunities, I am not here armed with any theme. I  
5 would like to just pick up a few points, some of which are in  
6 response to exchanges I heard earlier.

7 The first, Mr. Saltzburg has raised what I think is  
8 an extremely important issue that was going to be the first  
9 one that I would have chosen to address, but I was not sure  
10 how it fell within the purview of this Commission, and that  
11 is the relationship between the fine to the corporation or  
12 the organization and that to its agents.

13 I think as long as that is unsettled there is bound  
14 to be ramifications in the attitude towards these guidelines.  
15 Many people who feel that the organizational fines are not  
16 high enough would feel otherwise if they were satisfied that  
17 the prosecutors were selecting for indictment and pursuing  
18 indictment of the individuals.

19 I think the pattern that evolves, as I understand  
20 it, is a co-indictment, that U.S. Attorneys favor some co-  
21 indictment of agents in the organization and then during the  
22 course of negotiations there tends to--there has tended to be

1 some null crossing of the individuals in exchange for a  
2 guilty plea by the organization.

3           Of course, this is what makes a number of us feel  
4 that the fines against organizations under those circumstan-  
5 ces is not high enough. Now if there were opportunity for  
6 firming up guidelines and discussing them, one might feel a  
7 little otherwise.

8           In regard to a few other points that Mr. diGenova  
9 raised in his testimony and some of these things have  
10 occurred, I have heard that we ought to spend a little more  
11 time and make the guidelines mere policy statements and not  
12 mandatory.

13           As I read the provisions for the probation, the  
14 language indeed for the most controversial of the provisions  
15 is already cast in discretionary tone. If probation is  
16 ordered, this in respect to the compliance, it is recommended  
17 that the following steps take place. If probation is imposed  
18 under 8(d)(1)(1)(b) where the firm is unable to pay the fine  
19 at the time of the sentencing, is it recommended that the  
20 court may impose other conditions.

21           It seems to me at least in regard to the probation-  
22 ary provisions, it already is some mixture of mandate and

1 policy. I have heard several times discussion about the  
2 massive fine level; that's the term Joe used, the massive  
3 fine level.

4 Let me comment that I think in our society today  
5 corporations are capable of doing massively damaging things,  
6 massive spills we're getting, massive stock frauds, a 3  
7 hundred million dollar settlement in the Bolsky [ph.], I  
8 think the figure was in that range, is not massive relative  
9 to massive salaries and compensation to people in that field.

10 What would be the appropriate level? You asked Ms.  
11 Church I thought the right question. You said, well, let's  
12 take a 500 million dollar fraud. What should the fine be?  
13 And I sympathize with her having a hard time to answer. It's  
14 a hard question. Sentencing is hard.

15 Well, under the present guidelines, as I read them,  
16 the fine level would top out at 1.5 million, two times the  
17 higher of pecuniary gain or pecuniary loss plus the non--the  
18 equal amount up to the point that hasn't been restituted.

19 So let's say 1.5 million on 500 million, I guess  
20 you said--

21 CHAIRMAN WILKINS: I said 500 thousand.

22 PROFESSOR STONE: Okay. Whatever it is, it's

1 triple the amount. If you do triple it, say 1.5, is that  
2 massive. What that means is that if the chances of your  
3 being caught are one and three or less, it's a good bargain,  
4 that is, if I face making \$500,000 and possibly getting  
5 caught and possibly being pressed to conviction, and possibly  
6 writing a check, and indeed when I write that check it would  
7 be some time in the future, given the possibilities of appeal  
8 and the time for indictment and discovery and we applied a  
9 discount rate of 10 percent or 8 percent, whatever the firm  
10 is using and penciling out its other adventures, my sense is  
11 it is a very non-massive fine, that is, the chances are 50/50  
12 of getting caught. I would be surprised that the chances of  
13 being detected in a fraud are that large.

14           When someone robs a bank, you know a bank has been  
15 robbed. You know there has been a crime. You may not know  
16 who did it, but you know there has been a crime. These  
17 massive stock frauds people just don't know. So the chances  
18 of being caught are very slight.

19           So if you are looking at the deterrent effect, I  
20 would say, no, these guidelines don't have massive penalties.  
21 They are rather slender. Are the penalties massive? Look  
22 what the guidelines do for environmental spills. If you have

1 a series of environmental spills, that is to say if you have  
2 unlawful discharges under the Federal Water Pollution Control  
3 Act, they are treated by the guidelines if it is a pattern of  
4 behavior as increasing six levels, which means that the total  
5 fine might be something like, as I calculate it, \$40,000.

6           The Congressional fine is 5 to 50 thousand dollars  
7 a day for these violations. That is, Congress' fine level  
8 could be for a 5 day spill, your 50,000 times 5. It tops out  
9 under these guidelines at something like \$40,000, the way I  
10 calculate in my testimony a level six increase. Are those  
11 massive? They don't seem as large as what Congress intended.  
12 So I don't really think that they are massive at all.

13           One area that I have singled out for attention that  
14 is particularly important has to do with regulatory offenses.  
15 Now they are important because the way the guidelines are  
16 shaped the critical terms are net pecuniary gain and net  
17 pecuniary loss and those work for your classic offenses like  
18 anti-trust violations where there is going to be a clear gain  
19 to the price fixture, let's say, and clear losses out there  
20 to those who have experienced losses through high consumer  
21 prices.

22           The many offenses such as failure to report under



1 the Nuclear Regulatory Act, the regulations, I regard as very  
2 serious. They pose hazards to the whole society. There is  
3 really no pecuniary gain of any measure by the company that  
4 falsifies records, by the licensing of a nuclear plant that  
5 does not report that corrosion is appearing in some pipe.  
6 There is no gain to it. It hasn't caused a loss to the  
7 public yet. It has caused an enormous loss to the society.  
8 The information value is a value to the society. If in one  
9 nuclear plant something is going wrong, not only to know that  
10 is of value to the regulators so that they can come in on  
11 that plant, but it may give evidence of what is happening in  
12 every comparable plant in the United States.

13           Now the fine under the structure that you have now  
14 makes that a mere regulatory non-reporting. Four thousand  
15 dollars doubled is eight thousand dollars. Congress has  
16 measured such violations--has put a price tag of \$100,000 on  
17 them, much higher, and it seems to me rightly so. That is,  
18 the real problem, it seems to me, in the basic structure is  
19 that the regulatory offenses which don't cause a net  
20 pecuniary gain particularly don't cause a pecuniary loss, but  
21 impair the integrity of the systems on which the public rely  
22 for nuclear safety, for toxic safety, to get at problems

1 before they cause a public peril, before you've got a spill,  
2 before you've got your waste dump out there. That paper  
3 trail I regard as very significant and I think that these  
4 fines, massive, massive fines, no, these aren't massive  
5 fines. It is very light, light relative to deterrence it  
6 seems to me, quite light relative to what Congress has  
7 provided for in the relevant statutes.

8 I just had a few others points. I can touch on  
9 them very briefly. One, I think there has to be a provision  
10 that whenever an individual agent of a corporation is fined  
11 that the fine not be subject to indemnification under State  
12 law.

13 See the way the State corporations codes are framed  
14 typically, and certainly that of Delaware and now California  
15 and a number of States following suit, if an agent of an  
16 organization suffers some third party loss, including fines  
17 in the wake of episodes for which the officer did not have  
18 reason to know that he was violating the law or that was  
19 operated in the best interest of the corporation et cetera,  
20 the fined executive could just turn around to the corporation  
21 and get the corporation to indemnify the amount of the fine.

22 That is, after the work that has gone in to the

1 prosecutor taking the case, going before the jury, getting a  
2 conviction, getting a fine, vindicating supposedly the  
3 interest of the Government, quietly that executive can go  
4 back to the organization and request and indeed, depending  
5 upon the articles of the corporation, perhaps demand that he  
6 or she be indemnified, thereby deflecting the amount of the  
7 fine. That is intolerable. It is intolerable that corpora-  
8 tions acting under the powers of State law should be able to  
9 subvert the operation of the Federal criminal law and that  
10 could be easily amended simply by providing that in instances  
11 where an agent of a corporation has been fined that as part  
12 of the sentence that has got to be picked up. Otherwise,  
13 there is no reporting mechanisms. These are very low  
14 visibility decisions to be picked up in the Federal reporting  
15 under the securities laws only perhaps in the instances of  
16 the top level executives.

17 Why don't I just take questions beyond that.

18 CHAIRMAN WILKINS: Thank you for your informative  
19 testimony.

20 Go ahead, Commissioner.

21 COMMISSIONER CORROTHERS: Professor Stone, in the  
22 area of I guess we could call it criminal or violation

1 history, I think it's on the last page of your written  
2 testimony, you indicate that by the time a violator is  
3 referred to the U.S. Attorney for criminal prosecution that  
4 there is often already a history of failed attempts to, I  
5 guess we'll call it, deter, through administrative remedies,  
6 and that as a consequence you favor prior civil enforcement  
7 sanctions by public authority to be treated on an equal  
8 footing with prior criminal convictions.

9 Another respondent has suggested to us almost the  
10 same thing, that we recognize and sanction both types of  
11 history, but that administrative and civil adjudication  
12 involve among other things a different standard of proof than  
13 conviction. So that for this reason and the other reasons we  
14 should separate the two as aggravating factors and sanction  
15 less harshly for the civil and administrative adjudications.

16 Do you see any merit to this suggestion?

17 PROFESSOR STONE: Well, thank you. It seems to me  
18 that what we are talking about--what I was focusing on was  
19 the conditions for the imposition of probation and it is true  
20 that in the civil--classic civil administrative penalty that  
21 comes up under some of regulatory agencies that the standard--  
22 --the burden of proof is less onerous to the prosecution. But

1 I don't think that that means that a court in deciding  
2 whether to issue probation ought not to be able to have that  
3 record before it as one of the considerations.

4           You see, it's typical. It's not just occasional,  
5 but it is typical that before a case is referred to the U.S.  
6 Attorney for prosecution on the criminal side by one of the  
7 regulatory agencies that there is already a history of  
8 several attempts by the EPA or by NOA, or by one of the  
9 regulatory agencies to bring the company to heel with the  
10 civil fines.

11           So that if we are thinking about a one bite rule,  
12 by the time we get that one bite into Federal court there may  
13 well be in the record of this company's behavior two or three  
14 episodes of essentially the same conduct.

15           Now I think it is quite fair to point out, as has  
16 been pointed out, that the standard before the agencies is a  
17 lower standard. But I think in deciding whether or not to  
18 have a probation, that it is wise to take into account.

19           I should underscore the fact, I also believe that  
20 most companies in America are honest. I think that most  
21 people in America are honest. The criminal law is being  
22 drafted for those company and those people in companies that

1 are abhorrent and by adopting these provisions and by  
2 recognizing that probation is one of several possible  
3 alternatives for judges to have to deal with these compli-  
4 cated and rare cases we are in any way, those of us who  
5 advocate it, trying to besmirch the reputation of corporate  
6 America. Indeed, on the contrary, my sense from dealing with  
7 corporations, and I have practiced on Wall Street and  
8 represented no one by all law violators, that the big--many  
9 companies, including, I think, the largest companies are very  
10 law abiding and actually standards of this sort would not  
11 affect their behavior as much as standards of companies that  
12 are more marginal and do a lot of the dirty work. And fine  
13 companies like some of those you have heard from--representa-  
14 tives speak from today already are talking about compliance  
15 programs.

16 All this does is make available to the court a  
17 remedy if there is not in place a compliance program. It  
18 gives a nudge to the firm to institute programs that I think  
19 many good chemical companies already have. There is nothing  
20 that goes beyond what really good chemical companies already  
21 have in these recommendations.

22 CHAIRMAN WILKINS: Thank you.

1 Questions?

2 COMMISSIONER NAGEL: Yes. Following up on that  
3 comment you just made in response to Commissioner Corrothers'  
4 question, you have testified before this Commission previous-  
5 ly, as well as submitted documents, essentially arguing for  
6 the viability of probation as an appropriate sanction under  
7 certain contexts for organizational probation. In fact, I  
8 believe at the last hearing you testified about the program  
9 at Occidental, et cetera.

10 In view of the criticism that we have been hearing  
11 in response to our now proposed two versions of guidelines,  
12 as well as some of the recent criticism that has appeared in  
13 the press, is there something you would say in response as  
14 someone who earlier argued for the viability of this  
15 proposal? Having now heard some of the criticism, if you  
16 were responding, what would your response be? Are you  
17 persuaded by their arguments? Sort of where are you on this?

18 PROFESSOR STONE: I haven't been persuaded that  
19 anything in here is unwise. I think that the standard for--  
20 under the policy recommendations that a court would--it is  
21 recommended that a court impose all of these limitations on a  
22 firm that hasn't anted up. When I first read it I must say I

1 blached because I thought, what judge is going to want to  
2 constitute himself to the SCC.

3 I really think that those provisions which would  
4 invite a court to monitor dividends and mergers do all those  
5 things that it takes an enormous staff to do are terribly  
6 unwise.

7 I take it that what is contemplated there is simply  
8 a firm that is a very small firm on the rocks. No one is  
9 thinking about a major company that the fear is that you may  
10 have some companies subject to a fine and it can't pay the  
11 fine for a while. It is trying to get backing up to pay the  
12 fine and somebody then drafted what looks to me like a part  
13 of a condensed indenture agreement from a major lending  
14 institution.

15 That part troubles me, I'd have to say, but I take  
16 it--and I'm not sure it's required. I know of no case in  
17 which a company or a firm that was subject to a fine has  
18 tried to merge out of the fine. Of course, it couldn't  
19 legally merge out of a fine, go bankrupt. If it disim-  
20 balanced itself of assets and then declares bankruptcy, of  
21 course that would be a fraud of creditors of whom the United  
22 States ranks quite high and it is treated rather generously



1 by the courts, I don't think that that's really required, but  
2 I wasn't part of the discussion. I take it that it was  
3 contemplated that that provision restricting dividend  
4 payments, et cetera, et cetera was something that I never had  
5 seen and I am enthusiast for it. I don't know that it's  
6 needed. It's probably going to make a lot of people think  
7 that these provisions are more onerous, more cumbersome than  
8 they really are. I don't think that they go beyond what the  
9 SCC has been doing in anxialary relief for years in Federal  
10 courts.

11 In settling cases under the securities laws Federal  
12 courts have handed down--there have been judgments that have  
13 imposed certain internal changes within companies, mandated  
14 they hire a compliance officer, made it clear that the board  
15 of directors has to review for a period of a year or 2 years  
16 the securities prospectuses that are going out. They have to  
17 anyway, but making clear about press releases, things of that  
18 style, and they seem to work. They restore investor con-  
19 fidence. People adjust to them. I think it's a lot of--I  
20 don't want to say hysteria--I think it's really--I sympathize  
21 with the people who are concerned in reading these things.

22 But, no, the answer to your question, would I

1 withdraw any of these probation provisions, I would install  
2 that little clause that I recommend in the submitted tes-  
3 timony that Commissioner Corrothers stressed.

4 COMMISSIONER NAGEL: Thank you.

5 CHAIRMAN WILKINS: Commissioner Corrothers?

6 COMMISSIONER CORROTHERS: Very quickly, concerning  
7 the relationship of the fine to the size of the organization,  
8 you suggest that we have not yet sufficiently allowed for the  
9 differences in the punitive aspect caused by differences in  
10 wealth of the various organizations.

11 You pose the possibility of solving this problem by  
12 some index of likely insensitivity to fines that we might  
13 call organizational denseness.

14 PROFESSOR STONE: Yes.

15 COMMISSIONER CORROTHERS: Though there is some  
16 question as to what characteristics would correspond with  
17 denseness sought.

18 You indicate that an appropriate reaction to  
19 denseness might be achieved by or through the use of proba-  
20 tionary regulations.

21 Are you able to expand on this idea, i.e., how this  
22 could be achieved?

1           PROFESSOR STONE: Yes, the one I was addressing  
2 there for the others was the fact that there is a lot  
3 concern. There always has been a lot of concern about  
4 levying fines of the same level irrespective of some measure  
5 of wealth of the corporation.

6           I have some--I share the uneasiness about a single  
7 level of fine across organizations of considerably different  
8 wealth characteristics, but the sort of wealth characteris-  
9 tics that we talk about ordinarily in connection with sorting  
10 out corporations into types, large and small, what do they  
11 mean in corporate--when we talk about corporations that have  
12 to do with the gross sales or profits or number of employees,  
13 things of that style, and I think it is very hard to set  
14 guidelines that will say charge a company that is big in some  
15 sense undefined and difficult to define sense of big, higher  
16 punch than a small company.

17           I am not sure that it is wise either because it may  
18 be distorting of appropriate market mechanisms. It seems to  
19 me that the solution is if a judge is worried about the fact  
20 that here is this huge company and this is the third or  
21 fourth time it is has been convicted of a pollution, similar  
22 pollution episode across the country, instead of just

1 thinking, well, I need a higher level of fine, which tends to  
2 discriminate in very difficult ways between large and small  
3 companies, that that would be an added reason for the  
4 imposition of some compliance order on the firm.

5           So the fears that one has about the fine being  
6 inadequately differentiated for firm type can be cashed out,  
7 if you will, not by changing the fine level or playing around  
8 with what is a dense company, an insensitive defined company,  
9 and a non-insensitive defined company can be cashed out by  
10 changing the attitude towards probation.

11           COMMISSIONER CORROTHERS: Thank you very much.

12           CHAIRMAN WILKINS: We have only a minute left. Let  
13 me ask you, one of our proposals deals with the corporation  
14 primarily organized and existing and used for criminal  
15 purposes, and we would suggest, or these proposals do, that  
16 in effect, the fine strip the corporation of all of their  
17 assets.

18           PROFESSOR STONE: Yes.

19           CHAIRMAN WILKINS: You raised concern about the  
20 creditors of this organization and how we would deal with the  
21 quote, innocent creditor. And I would suggest that the same  
22 area deals with the innocent shareholder in any situation,

1 perhaps.

2 PROFESSOR STONE: Yes, but this wasn't just the  
3 shareholder. I am concerned about that whole provision. It  
4 seems to me that if a company is convicted it will be  
5 convicted of a particular crime and then this question, was  
6 it organized for a criminal purpose, it is a terribly hard  
7 thing to deal--to put in some judge's lap because the judge  
8 has heard testimony about a crime, something defined as a  
9 crime and now it seems to me that all of the problems of RICO  
10 start to come up and there are massive problems in RICO and  
11 you start to have to have now another hearing without a lot  
12 of guideline. What does it mean that a company was, you  
13 know, organized for a criminal purpose? Suppose it is a  
14 company that just simply could not from day one meet the  
15 affluent standards of that air basin that it operates in?  
16 Was it organized for a criminal purpose? I don't know.

17 What worried me was in the wake of the uncertainty  
18 of substantively what's meant and procedurally how do you  
19 decide what is a criminal organization. What compounds it is  
20 that the penalty seemed to be obliterate it. The fine should  
21 be high enough to deprive it of its assets.

22 What I was pointing out there was that the company,

1 albeit in some way organized for a criminal purpose, might  
2 have innocent bona fide lending institutions, that is, banks  
3 might have extended credit to this organization not knowing,  
4 and after all, it took the prosecutor some difficulty finding  
5 out, that you had here a, quote, criminal organization.

6           If you really set the fines so heavy as to  
7 obliterate it of its assets, depending on what one means by  
8 assets, but I take it if you take out the assets you also are  
9 going to wipe out not only the shareholders' equity, but the  
10 liabilities--the credit accounted for liabilities in the  
11 classic sense that offset those assets.

12           So you may have an innocent bank--and there still  
13 are, I would like to believe, some innocent banks in America--  
14 -you have an innocent bank that is wiped out. It seems to me  
15 that if you are going to retain that provision, which I am  
16 not enthused about, then in lieu of the word "asset" it ought  
17 to say net assets, which would be--define net assets as net  
18 of the bona fide loans. Now that also causes problems  
19 because many small organizations, some of the stockholders  
20 also leverage by extending loans to the organization. They  
21 put in some of their money in stock and they try to enjoy a  
22 creditor position. So that would take some careful--if you

1 want to retain that section, it would be wise to talk to  
2 someone about just some accounting--standard accounting  
3 terminology. There are some comparable situations. All I am  
4 pointing at--and it could be taken care of--is there is a  
5 problem of confiscation of funds that are funds of innocent  
6 people, essentially, of innocent lenders.

7 CHAIRMAN WILKINS: That is a problem, I understand  
8 it, but is the same problem there with innocent shareholders  
9 in any situation?

10 PROFESSOR STONE: Well, not quite. Yes and no  
11 because shareholders have the claim to the residual. So if  
12 the company is making a lot of money off illegal behavior,  
13 they are the beneficiaries. If a company has got a bond--has  
14 got let's say an 8 percent note, they are going to be paid 8  
15 percent on the note.

16 CHAIRMAN WILKINS: There may be a joint venture  
17 worked in there too with some lending institution.

18 PROFESSOR STONE: Yes, that is right, and then they  
19 would have--I think in the case of a joint venture the  
20 culpability of the joint venture would have to be examined.

21 But in regard to the difference between  
22 shareholders and bond holders, I appreciate on the first

1 level what you are saying. It is an appropriate question to  
2 put to me.

3 I am saying that the position of the stockholders  
4 and the bond holders isn't exactly parallel because the bond  
5 holders are entitled to their play as presumably some  
6 percentage of their loan unless they can exchange and swap  
7 for some--the ventures are convertible or something like  
8 that.

9 The stockholders are often though quote, innocent,  
10 in that they don't have any managerial hand in the wrongdo-  
11 ing. They, nonetheless, may be tainted in that over a period  
12 of years during which the offenses have been accruing they  
13 have been the beneficiaries of the bloated stock value in a  
14 way in which isn't quite as direct as the way of bond  
15 holders.

16 I think that needs a look at. I think that  
17 provision really needs a look at and I think that someone  
18 should hold it up against RICO and see what sort of inter-  
19 ference there is.

20 The image that I get in my mind is like two songs,  
21 possibly both a little off key, being played in the same room  
22 and there is some dissidence there between RICO and what you



1 have in that little section.

2 CHAIRMAN WILKINS: It would only apply to a very  
3 small minimum of corporations, although they are a few that--

4 PROFESSOR STONE: That's right. I so understood  
5 it.

6 CHAIRMAN WILKINS: Well, thank you very much.  
7 Again, we appreciate your assistance to this Commission. We  
8 look forward to a working relationship with you in the future  
9 as well.

10 We will take a break now and stand in recess until  
11 1:30. We will start back sharply at 1:30.

12 [Whereupon, at luncheon recess was taken.]

1

## AFTERNOON SESSION

2

3

4

CHAIRMAN WILKINS: We will begin the afternoon session of this public hearing on Organizational Sanctions and Related Matters.

5

6

7

Our first witness this afternoon is Professor Amitai Etzioni, who is a distinguished Professor of Law at George Washington University.

8

9

10

Professor Etzioni will be accompanied by Sally Simpson. Ms. Simpson is a criminologist at the University of Maryland.

11

12

Professor and Ms. Simpson, we are delighted to have you both.

13

14

15

PROFESSOR AMITAI ETZIONI, GEORGE WASHINGTON UNIVERSITY;  
ACCOMPANIED BY MS. SALLY SIMPSON, CRIMINOLOGIST, UNIVERSITY  
OF MARYLAND

16

17

PROFESSOR ETZIONI: Thank you, Mr. Chairman, Members of the Commission.

18

19

20

I will just briefly summarize my statement. I served for 20 years at Columbia University. I would like to elaborate first of all on your work.

21

22

The American society tends about once every 10 years to sort of turn its mind on one major issue. In the

1 60's you kind of pay attention to civil rights, in the 70's  
2 to the environment and at current to the kind of issues that  
3 we focused on in the turn of the century during the progres-  
4 sive era seem now to be on the agenda, the question of ethics  
5 of public institutions.

6 I most sincerely see the work of the Commission as  
7 lending a major hand to a need to show up American institu-  
8 tions. Now the world I live in and studies is slightly  
9 different from what you heard of some of the witnesses today,  
10 but indeed there are many corporations of integrity. There  
11 is also another small number which are engaging in various  
12 kinds of criminality including in recent years after the  
13 changes in sentencing.

14 So, for instance, we have regular report of  
15 something called sink tests where laboratories take specimens  
16 from patients and collect \$150 for the test and then throw  
17 them down the sink to save them the cost of doing the test  
18 and report to the patients that the tests were negative.  
19 There were fatalities as a result.

20 We have banks. We estimate the amount of money  
21 laundered from drug dealers in American banks is 200 billion  
22 a year. Very few of those have been sentenced yet.

1 I, myself, served as a staff director of a State  
2 commission appointed by the State of New York investigating  
3 nursing homes and there you see the problem which I will turn  
4 to in detail in a moment where they assume they are not going  
5 to be caught and they engage in every human and economic  
6 abuse in the book including putting patients whose insurance  
7 run out on the porch so they catch pneumonia and shorten  
8 their life. And when they are caught they would either go  
9 out of business in New York and reopen in New Jersey, or if  
10 they would be fined, there was a great debate if there should  
11 be 6 percent interest levied on top of the restitution and  
12 that was in the period in which interest rates in the bank  
13 were very higher than 6 percent and the fact that it had no  
14 deterrence consequence, you can see, that many of the nursing  
15 homes, specific ones which are called by Judge Coplan [ph.]  
16 in his investigation in 1965 were brought up before our  
17 commission in 1975 and are still in business in 1985 doing  
18 some of the same kind of violations that they were caught  
19 before.

20 So there are significant segments of American  
21 enterprise which do need a showing up and I think the work of  
22 the Commission has basically implemented, as suggested, would

1 go a good part of the way necessary to achieve that affect.

2           What is necessary according to the most conserva-  
3 tive economists, economists who have never been charged by  
4 being in any way politically or otherwise on the liberal side  
5 of the continuum is to not to make it attractive to corpora-  
6 tions to engage in violations and the only way that can  
7 happen is if the fines will exceed at least by some margin  
8 the benefit they expect to gain from violating the law.

9           Therefore, the fines have to be calculated by a  
10 multiplier which reflects the conviction rate. Now I would  
11 be the first to admit that since we are talking here about  
12 measuring the frequency of illegal activity that we have a  
13 problem here. You cannot get, obviously, a precise reliable  
14 definition of how infrequent an illegal activity is by  
15 nature. Nevertheless, when you study this matter you do get  
16 a good estimate, just a very good estimate for the flow of  
17 cocaine in this country.

18           And I would say that the best judgment can come at  
19 when you see for instance how common insider trading is and  
20 such that if you convict one out of a hundred, not only by  
21 indictment, conviction, and collect the fines because there  
22 are various obviously maneuvers taking place after convic-

1 tions such as the few we heard about today, that this is  
2 probably an airing on the higher side.

3           So let me use the one out of hundred as my conser-  
4 vative estimate. That would suggest that if a corporation  
5 caused the damage of the kind which you asked about earlier  
6 of 500,000 and if it is not seem to them something they  
7 should charge the cost of doing business the multiplier to be  
8 used would have to be a hundred and a margin to provide some  
9 kind of deterrence. It is very far away from where we are  
10 and as a result it is very difficult for a corporation of  
11 integrity to stay in business because they have to compete  
12 with corporations who are not of integrity who, for instance,  
13 will report to the FDA as we had last year that their drugs  
14 are safe and effective when they are not. Now imagine this  
15 competition between a pharmaceutical firm who maintains the  
16 law and one which violates it or the defense where they  
17 underbid their products, how can a corporation of integrity  
18 stay in business?

19           I would hope, and I am sad to say it is not  
20 happening it seems, that the business community would be the  
21 first to come forward and demand severe penalties on those  
22 who compete unfairly by violating the law.

1 I would be further encouraged if they would do what  
2 to some extent the Bar does to some extent, the medical  
3 societies, where they disbar members who grossly violate the  
4 codes.

5 So if the National Manufacturer Association and  
6 other such groups, the Chamber and Commerce we hear from  
7 later, would come forward and say, "Fine, we will take care  
8 of our members who engage in improper, illegal, and unethical  
9 conduct", well, then maybe you could rest assured. That is  
10 not what we are hearing. We are hearing from them to say,  
11 study more.

12 Well, I make my livelihood out of studying things.  
13 We can always study more, but there is time for action and it  
14 is overdue.

15 Let me say about the notion that there are innocent  
16 shareholders, the shareholders are the ultimate seat of  
17 sovereignty and they delegate their power to the management.  
18 The management in the end, by condition, by ethical theory,  
19 by legal theory, is responsible to the shareholders.

20 So if management misbehaves and as a result there  
21 are losses to the shareholders, the shareholders would become  
22 more alert and be more synthesized to the need to see to it

1 that they will invest only in corporations of integrity.  
2 Maybe they will pay more to rating services who really rate  
3 not only bonds by A, B, C, and triple A, but will rate them  
4 by their moral and legal integrity and that way the market  
5 forces will come to work on the side of integrity.

6 So I see no problem at all if a corporation is  
7 engaged in illegal behavior and if they are publicly fined  
8 and that in somehow affecting the shareholders. They will  
9 learn from the experience and in turn see to it that a  
10 cleaner management will replace those of less integrity.

11 Maybe I will stop here and answer whatever ques-  
12 tions.

13 CHAIRMAN WILKINS: Thank you very much.

14 Do you have any comments, Ms. Simpson, you would  
15 like to make?

16 MS. SIMPSON: No.

17 CHAIRMAN WILKINS: Any questions to my right?

18 COMMISSIONER MacKINNON: Professor, what is the  
19 foundation for your testimony about the large corporate  
20 crimes, I mean so many more than are ever discovered?

21 PROFESSOR ETZIONI: You figure if we have a part of  
22 those which were discovered by the Department of Justice when



1 they did a study in 1979, we came almost to exactly the same  
2 figure. They are based strictly on convictions. They do not  
3 include indictments or any other kind of earlier allegations.

4 COMMISSIONER MacKINNON: What were their findings?

5 PROFESSOR ETZIONI: There findings were that 62  
6 percent of the sample they studied they found--of the large  
7 corporations they studied were involved in one or more  
8 illegal activity.

9 COMMISSIONER MacKINNON: Of consequence or--

10 PROFESSOR ETZIONI: Well, yes, indeed. The issues  
11 involved are fraudulent products, major tax violations,  
12 environmental violations, price fixing.

13 COMMISSIONER MacKINNON: Can you give me a concrete  
14 example?

15 PROFESSOR ETZIONI: Well, earlier in the day  
16 reference was made to an unnamed corporation in Connecticut.

17 COMMISSIONER MacKINNON: In what?

18 PROFESSOR ETZIONI: In Connecticut, which was  
19 building nuclear submarines. That would be a case in point.

20 I see no--

21 COMMISSIONER MacKINNON: That was public.

22 PROFESSOR ETZIONI: Sir?

1 COMMISSIONER MacKINNON: That was public.

2 PROFESSOR ETZIONI: We are not referring--many of  
3 the things--

4 COMMISSIONER MacKINNON: I am talking about one of  
5 these that haven't surfaced.

6 PROFESSOR ETZIONI: No--

7 COMMISSIONER MacKINNON: You were talking about a  
8 lot of undiscovered crimes.

9 PROFESSOR ETZIONI: No. All of the cases we  
10 studied and they studied in one way or another are on the  
11 record only often they lack--

12 COMMISSIONER MacKINNON: What record, criminal  
13 record or prosecutions?

14 PROFESSOR ETZIONI: Yes, sir, or--

15 COMMISSIONER MacKINNON: You mean you come up with  
16 the 62 percent corporations actually prosecuted?

17 PROFESSOR ETZIONI: In many cases the corporations  
18 agreed not to repeat the crime in the future and that was all  
19 that happened. They admitted to their--I am not a lawyer by  
20 training. Actually, I am professor of sociology. I may not  
21 say it technically accurate.

22 But what happened is the corporations did not deny

1 that what happened was not in line with the law, but they  
2 agreed not to repeat this activity in the future in exchange  
3 for not being punished.

4 COMMISSIONER MacKINNON: Well, I don't know what--I  
5 think you are getting off the beat there. We have the  
6 figures on Federal corporate crime in America and they don't  
7 run over 400 a year. Now you say--and, of course, there are  
8 thousands of corporations and you say that 60 percent are  
9 engaged in law violations.

10 I just wonder--and you just said that they were all  
11 charged. Well, they aren't in Federal courts.

12 PROFESSOR ETZIONI: Let me talk to what I am most  
13 familiar with. Is the corporate 500--the Fortune 500  
14 industrial corporation. So 60 percent of 500 would amount to  
15 300--

16 COMMISSIONER MacKINNON: Two fifty.

17 PROFESSOR ETZIONI: To 300, if I am not mistaken.

18 COMMISSIONER MacKINNON: Of what?

19 PROFESSOR ETZIONI: Three hundred of the Fortune  
20 500 and I am happy to provide you the list of the cases.  
21 They are charged of one or more--convicted not charged--  
22 convicted or made a deal in one or more criminal activity.

1           COMMISSIONER MacKINNON: What kind of cases? Not  
2 Federal cases because we only get 400 a year and we find that  
3 they are all mostly small corporations.

4           PROFESSOR ETZIONI: Well, I don't know. Is  
5 Beechnut a small corporation?

6           COMMISSIONER MacKINNON: Small corporations mostly  
7 that commit the Federal violations.

8           COMMISSIONER NAGEL: May I perhaps ask a question  
9 that might help clarify?

10           What kind of time sample, that is, when we look at  
11 the number of corporations convicted by year. Were you  
12 looking at all corporations in the corporate 500 and looking  
13 to see over the period of let's say some larger number of  
14 years there was a criminal investigation or conviction, if  
15 not a conviction, there was some other settlement of criminal  
16 investigation. Is that--what was the timeframe--

17           PROFESSOR ETZIONI: That is exactly correct. We  
18 are talking about a 10 year period from 1975--

19           COMMISSIONER CORROTHERS: To '84.

20           PROFESSOR ETZIONI: That's exactly correct.

21           COMMISSIONER NAGEL: So for a period of 9 years  
22 when you investigated the 500 corporations in the Fortune 500

1 you found roughly 60 percent had some criminal either  
2 conviction or settlement of a criminal investigation where  
3 they did not dispute the criminal activity?

4 PROFESSOR ETZIONI: That's correct.

5 COMMISSIONER NAGEL: Am I saying that correctly?

6 PROFESSOR ETZIONI: Exactly right, only it's 10  
7 years. Its from January of '75 to December '84.

8 COMMISSIONER NAGEL: And we're talking about 400  
9 per year. So it's two different data bases.

10 PROFESSOR ETZIONI: Right.

11 COMMISSIONER NAGEL: Could I ask one follow-up  
12 question? And that could include a State conviction?

13 PROFESSOR ETZIONI: I'm sure that's true.

14 COMMISSIONER MacKINNON: But you don't find many  
15 State convictions.

16 PROFESSOR ETZIONI: I did not code them according  
17 to State and Federal.

18 COMMISSIONER MacKINNON: Thank you.

19 COMMISSIONER CORROTHERS: Professor, just a  
20 comment, as you know, I have been quoting from your testimony  
21 all day. I would just say that your work or achievements are  
22 remarkable. Because of the paucity of data in this area you

1 are extremely beneficial to our efforts and I would just like  
2 to thank you for your assistance to us.

3 PROFESSOR ETZIONI: Thank you very much.

4 CHAIRMAN WILKINS: Any questions to my left?

5 [No response.]

6 CHAIRMAN WILKINS: Just one quick question, your  
7 views on the innocent shareholder issue, how should we deal  
8 with that, if at all?

9 PROFESSOR ETZIONI: Well, I don't think this should  
10 be a concern to the Commission. I think when the corporation  
11 is publicly convicted and is publicly fined the question  
12 that is publicly held should not matter precisely because you  
13 want to send a signal to the shareholders to shift their  
14 investments to corporations of integrity.

15 CHAIRMAN WILKINS: Well, thank you very much,  
16 Professor. And Ms. Simpson, we appreciate your attendance as  
17 well. Thank you.

18 Our next witness is Mr. Frank McFadden, Senior Vice  
19 President and General Counsel, Blount, Incorporated of  
20 Montgomery, Alabama. Mr. McFadden is representing the  
21 American Corporate Council Association.

22 Nice to have you with us, sir.

1 STATEMENT OF MR. FRANK McFADDEN, SENIOR VICE PRESIDENT,  
2 GENERAL COUNSEL, BLOUNT, INC., MONTGOMERY, ALABAMA, AMERICAN  
3 CORPORATE COUNCIL ASSOCIATION

4 MR. McFADDEN: Mr. Chairman, Judge MacKinnon,  
5 Commissioners, I am delighted to be here. And as the  
6 Chairman has correctly pointed out, I appear on behalf of the  
7 American Corporate Council Association, which is an organiza-  
8 tion of corporate counsel, an organization I have served as a  
9 director for 6 years and was its Chairman in 1989.

10 Solely so the Commission will understand where I  
11 come from and for that reason only, I report to the Commis-  
12 sion that it was my high privilege to serve as a United  
13 States District Judge for 12 years in the Northern District  
14 of Alabama.

15 I, therefore, come to this problem with some  
16 appreciation for the problems, although it was never my  
17 privilege or duty to impose sentences with the help of  
18 guidelines formulated by this distinguished Commission.

19 CHAIRMAN WILKINS: I'm not sure you missed a whole  
20 lot, Judge.

21 [Laughter.]

22 MR. McFADDEN: Some of my colleagues would think I

1 was blessed; others would perhaps think I was cursed. We do  
2 come here with different cultures, as has been said earlier,  
3 and when the Chairman referred to his section of the country  
4 and the guns, I was reminded of certain areas in our section  
5 establishments which check you for knives when you enter and  
6 if you don't have one, they give you one.

7 [Laughter.]

8 MR. McFADDEN: I will keep my remarks very simple  
9 and they will track in large measure what has been said in  
10 the written submission on behalf of the American Corporate  
11 Council.

12 The first point is that we think the guidelines are  
13 not needed. There is not enough data, in our judgment, to  
14 form a meaningful set of guidelines. Nor does the data  
15 establish a demonstrated need for the guidelines.

16 I do not believe that American business is as  
17 corrupt as Professor Mayer and others have suggested. I have  
18 seen American business from the point of view of a practicing  
19 lawyer in two States, New York and Alabama, from a point of  
20 view of a trial judge in which I had many corporations before  
21 me in many contexts. I am not an expert on sentencing  
22 corporations, however. And I have been in the business world



1 for a good many years in a company with international  
2 operations and thousands of employees and I do not believe we  
3 have the critical criminal problem which has been suggested  
4 here.

5 Nor do I believe that the prosecutors and law  
6 enforcement agencies at all levels of Government, both local,  
7 State, and Federal, are as incompetent as it has been  
8 suggested. Particularly, Professor Mayer suggests that there  
9 are thousands of undiscovered and unprosecuted crimes. I  
10 just believe that our regulatory agencies and our law  
11 enforcement agencies at all levels of Government have been  
12 more efficient than it has been suggested.

13 I would have less problem with these guidelines if  
14 the standard of criminal conduct was the same for corpora-  
15 tions as it is for individuals. I & we are talking about  
16 conduct with criminal intent on behalf of the senior manage-  
17 ment of a corporation, I would be the last to defend any  
18 leniency in that aspect of the enforcement of the criminal  
19 laws and the imposition of the fines that the Congress has  
20 seen fit to impose.

21 However, as we all know, under the doctrine of  
22 imputed liability, senior management of a corporation and the

1 corporation must face the liability of conduct of very low  
2 level employees, some cases have suggested menial employees,  
3 notwithstanding a very detailed compliance program, such as  
4 has been outlined to you, and an aggressive execution of that  
5 compliance program.

6           At times the corporation may be held criminally  
7 liable when the individual who was committing the act did not  
8 know it was illegal. He was stupid, but it was illegal. And  
9 I suggest that when we are dealing with that kind of cir-  
10 cumstances the application of mechanical guidelines with  
11 little or no discretion on the part of the judge is perhaps  
12 misplaced.

13           I have a lot of faith in the judges that the  
14 Congress and the President have sent to the Federal bench  
15 over the years. And I believe by and large they are capable  
16 of fitting in this context the crime to the punishment,  
17 particularly where there is no body of empirical data to  
18 establish the disparities and the other deficiencies which  
19 the Congress and the Commission have found in the sentencing  
20 process.

21           Another theory I have with respect to this, that if  
22 you take the discretion away from the judge you give it to

1 the prosecutor and I am told, although I have made no  
2 independent study of it, that with respect to the individual  
3 guidelines some of the sitting judges are complaining that  
4 that's what's happening, that the discretion is being removed  
5 from the courtroom to the prosecution's drafting table.

6 I suggest to you that the judge is the one, the  
7 Article 3 judge appointed by the President and approved by  
8 the Senate, is the one who should exercise that discretion  
9 and not the prosecutor.

10 Now I am acutely aware that the probation  
11 guidelines are policy statements and that if passed would not  
12 be binding on the courts. But with the congressional mandate  
13 that this Sentencing Commission possesses it would be very,  
14 very difficult for the courts to ignore them and I also  
15 suggest to you that policy guidelines and recommendations are  
16 one step away from final and binding guidelines. That would  
17 be the normal progression.

18 I suggest to you, as other speakers have, that  
19 judges by inclination, training, experience, and time are not  
20 capable of running corporations; not capable of running them  
21 even if they did have the education, experience, and inclina-  
22 tion because of the other duties.

1           The Fifth Circuit Court of Appeals of the United  
2 States took judicial notice once that Federal judges were not  
3 particularly competent in accounting matters. I being the  
4 judge of whom they were speaking, I became acutely aware of  
5 that judicial notice.

6           I would suspect that the courts would take judicial  
7 notice that trial judges are not particularly expert at  
8 running corporations. More importantly, however, I think  
9 that the courts, if they undertake to run the corporations,  
10 will run afoul of other courts and other governmental  
11 agencies.

12           If the court has to put its stamp of approval on  
13 the issuances of new securities, the acquiring of debt, it  
14 would be in conflict with both State and Federal agencies  
15 with respect to those matters.

16           If the court has to give its approval before a  
17 bankruptcy proceeding may proceed, I suggest that we will  
18 have conflicting courts both with jurisdiction over that  
19 matter if the sentencing court chooses to exercise it.

20           Mr. Chairman, those are all of the remarks that I  
21 propose to make at this time, and I, of course, invite  
22 questions from the Commission.

1 CHAIRMAN WILKINS: Thank you, Judge McFadden.  
2 Judge MacKinnon?

3 COMMISSIONER MacKINNON: You spoke about your  
4 experience and I think your current experience. Has that  
5 been international?

6 MR. McFADDEN: Yes, sir.

7 COMMISSIONER MacKINNON: Is your client in the  
8 waste management field internationally?

9 MR. McFADDEN: We are in the business of designing  
10 and building plants, among other things, to burn waste in the  
11 United States. We were in that business in the United States  
12 and in Europe. We have sold the company in Europe which was  
13 involved in it.

14 But we do not deal with the waste until it is  
15 delivered to the plant where it is then burned and converted  
16 into energy.

17 COMMISSIONER MacKINNON: Really my question was  
18 whether Blount was in the waste management field or operation  
19 in Australia.

20 MR. McFADDEN: No, sir.

21 COMMISSIONER MacKINNON: I know you are in Min-  
22 neapolis, but I--

1 MR. McFADDEN: Yes, sir. We do have a plant in  
2 Minneapolis and one in New Jersey.

3 COMMISSIONER MacKINNON: I just wondered how  
4 extensive that was. That was a new venture for a Postmaster  
5 General.

6 MR. McFADDEN: Yes, sir. It was a new venture for  
7 the Postmaster General and it is not--we have two plants in  
8 operation and some that may or may not go forward and, as we  
9 have announced publicly, that unit of our business is for  
10 sale.

11 COMMISSIONER MacKINNON: I can understand why. I  
12 get the Minneapolis paper everyday.

13 MR. McFADDEN: Well, you understand some of the  
14 political problems and the staying power that is necessary.  
15 We think it is a good business, but--

16 COMMISSIONER MacKINNON: That's all I have. Thanks  
17 a lot, Judge.

18 MR. McFADDEN: Yes, sir.

19 COMMISSIONER CORROTHERS: Judge McFadden, you have  
20 indicated in your testimony that an aggressive compliance  
21 program should merit more than a 20 percent reduction in the  
22 fine.

1 MR. McFADDEN: Yes, ma'am.

2 COMMISSIONER CORROTHERS: Could you share with me  
3 what you feel would be an adequate reduction? Do you have in  
4 mind a certain percentage?

5 MR. McFADDEN: I do not have in mind a certain  
6 percentage and I would not. I philosophically have problems  
7 with percentages because there is so many factors involved in  
8 it. And I know from experience that you can have a very  
9 aggressive, hard compliance program and in organization with  
10 10 or 15 or 20 thousand people someone violates the law. And  
11 I think there are so many factors in that that the trial  
12 judge would have to put all of those together and I hesitate  
13 to put a percentage on it.

14 COMMISSIONER CORROTHERS: I guess even as I'm  
15 listening you I guess even with the compliance programs they  
16 could vary in terms of how effective they are or how well  
17 thought out they are, or how many factor--how strong they  
18 are.

19 So I guess that would be one of the things too the  
20 judge would have to look at.

21 MR. McFADDEN: Yes, ma'am. There are two factors  
22 to it. I can write a very detailed compliance program and

1 distribute it to all of the managers, but unless the managers  
2 aggressively monitor it and execute it, it's not worth the  
3 paper it's written on.

4           COMMISSIONER CORROTHERS: And have training or some  
5 type of quality control, or some type of internal auditing  
6 system to verify that the employees are indeed following  
7 those procedures.

8           MR. McFADDEN: And while we are on the subject of  
9 mitigating matters, it seems to me that one of these is a  
10 catch 22 as a reduction of 20 percent if the corporation  
11 discovers it and reports it to the authorities.

12           And if the corporation discovers it and reports it  
13 to the authorities, it has made the case for the prosecutor  
14 and it would be an unusual prosecutor that wouldn't take  
15 advantage of that.

16           So you encourage them to comply, but then--and you  
17 reduce the fine, but when he goes into court still on a  
18 guilty plea, as I would understand it, he would be subject to  
19 a minimum penalty of 200 percent of the gain or loss with the  
20 mitigating and aggravating factors applied, and that's  
21 troublesome to me.

22           Excuse me. You asked a question and didn't ask for



1 another speech. I'm sorry about that.

2 COMMISSIONER CORROTHERS: Oh, that's fine. I found  
3 useful all of your comments. Thank you very much.

4 MR. McFADDEN: Thank you, ma'am.

5 CHAIRMAN WILKINS: Questions, Commissioner Nagel?

6 COMMISSIONER NAGEL: No.

7 COMMISSIONER MacKINNON: Judge, on the discount for  
8 cooperation and things like that, in England I think they  
9 suggest 30 to 40 percent. Would you think that would be  
10 about adequate?

11 MR. McFADDEN: Well, I think that would certainly  
12 be a good place to start and we are talking about cooperation  
13 with the prosecuting people, but it is difficult for me to  
14 assign percentages to it because these matters are so  
15 complex--often are so complex.

16 Cooperation after the involvement of high level  
17 management, knowing better and with intent to violate the law  
18 is one thing. Cooperation when some low level employee has  
19 been stupid is quite another.

20 COMMISSIONER MacKINNON: Thank you.

21 CHAIRMAN WILKINS: Thank you very much, Judge. We  
22 appreciate you sharing your views with us.

1 MR. McFADDEN: Thank you.

2 CHAIRMAN WILKINS: Our next witness is Roger W.  
3 Langsdorf, Senior Counsel and Director of Antitrust Com-  
4 pliance of ITT.

5 You are representing the United States Chamber of  
6 Commerce today, is that correct, Mr. Langsdorf?

7 MR. LANGSDORF: That is correct.

8 CHAIRMAN WILKINS: We are glad to have you with us.

9 MR. LANGSDORF: I am very glad to be here.

10 STATEMENT OF MR. ROGER W. LANGSDORF, SENIOR COUNSEL, DIRECTOR  
11 OF ANTITRUST COMPLIANCE, ITT CORPORATION, U.S. CHAMBER OF  
12 COMMERCE

13 MR. LANGSDORF: I am appearing on behalf of the  
14 nearly 180,000 organizations which are members of the Chamber  
15 of Commerce. More than 92 percent of the Chamber's members  
16 are small business firms with fewer than 100 employees.  
17 Fifty nine percent have fewer than 10 employees.

18 In formulating the sentencing guidelines for  
19 individuals, the Commission was guided by the principle that  
20 all defendants should be treated in an equal manner since all  
21 men and women are created equal at least in the eyes of the  
22 law.

1           The problem in extending this proposition to  
2 organizations is that unlike people, organizations are not  
3 created equal. They range in size and degree of complexity  
4 from a one man corporation to a multi-national giant.

5           As the Commission has noted, between 85 and 90  
6 percent of organizations sentenced in the last 5 years were  
7 small and closely held.

8           Fines which may well be within the means of a  
9 multi-billion dollar corporation may virtually destroy a  
10 smaller organization. However, except where there is a total  
11 inability to pay, the court is forbidden under the guidelines  
12 to lower the fines below the guideline minimum.

13           The guidelines are based on the assumption that  
14 organizations should be treated much more harshly than  
15 individuals regardless of the size of the organization. The  
16 fine scales under both options are greatly in excess of the  
17 fine schedules for individuals, particularly in the case of  
18 the smaller organization and is unfair and irrational to  
19 impose a substantially greater minimum fine on a defendant  
20 simply because it is an organization. As a result, innocent  
21 stockholders may be punished much more severely than in-  
22 dividuals perpetrating the crime.

1           Because of the vast differences between organiza-  
2 tions, the minimum fine should be set at a level low enough  
3 to give the court flexibility to ensure that the punishment  
4 fits the organization as well as the crime.

5           In Section 3572 of Title 18 of the United States  
6 Code, the court in determining whether to impose a fine and  
7 the amount of fine is required to consider among other  
8 factors the defendant's income, the burden that the fine will  
9 impose, whether restitution is ordered, and the amount and  
10 the size of the organization.

11           The guidelines list these factors, but state that  
12 they may be considered by the court only in determining the  
13 amount of the fine within the guideline range. This is a  
14 clear violation of the statute which specifies that the  
15 factors must be considered by the court in determining  
16 whether to impose any fine at all or a fortiori, whether to  
17 go below the minimum levels.

18           We have serious problems with both of the options  
19 which the Commission has imposed. In both cases the fines  
20 would be greatly in excess of the fines which have been  
21 imposed on organizations in past cases.

22           On Monday night, I received a telephone call from

1 John Lott, who was formerly the chief economist at the  
2 Commission and is now a professor at UCLA Business School.  
3 He said that he conservatively estimated that the fines under  
4 Option--

5 COMMISSIONER MacKINNON: Of what Commission?

6 MR. LANGSDORF: Pardon me. The United States  
7 Sentencing Commission.

8 --that the fines under Option 1 would constitute a  
9 15 to 20 fold increase in the fines on organizations and that  
10 Option 2 would constitute a 40 fold increase in such fines.

11 What possible justification can there be for these  
12 truly massive increases? What research has the Commission  
13 conducted to determine whether these increases are necessary?  
14 What studies has the Commission made to determine what cost  
15 this increase would impose on business? How many businesses  
16 would be driven to the brink of bankruptcy? What determina-  
17 tion has the Commission made of the effect which these  
18 increases would have on decreasing crime?

19 The only studies we have seen by the Commission's  
20 staff are two papers setting forth a compilation of the means  
21 and medians of fines which were imposed in 1984 to 1988. As  
22 far as we can tell, there is no correlation between the

1 results of these studies and the fines which have been  
2 imposed in the guidelines.

3           We are disturbed that no matter which option is  
4 selected the minimum fines which will be imposed would often  
5 been greater than the maximum fines permitted by statute.  
6 The effect would be to deny the courts the discretion which  
7 Congress intended them to have to lower fines below the  
8 statutory maximum.

9           Under Option 2, the fines at the upper end of the  
10 scale would wipe out many small businesses, which constitute  
11 a vast majority of the defendants. However, we feel that  
12 Option 2 may be even worse. Thus, if there is a substantial  
13 loss say in an environmental spill of say 100 million  
14 dollars, the fine would be a minimum of 200 million dollars  
15 and if restitution is not practicable at the time of sentenc-  
16 ing, the fine would be 300 million dollars. This is certain-  
17 ly massive by any standard and this could be for a low level  
18 offense. So that it would be entirely disproportionate to  
19 the degree of culpability.

20           In some cases such a fine may be justified, but in  
21 many cases it would not and under the guidelines the courts  
22 would be stripped of the discretion to lower the fines.

1           With respect to restitution, Judge Wilkins is  
2 quoted as saying in a Wall Street Journal, January 19th, that  
3 the thrust of the guidelines is to provide a system which  
4 will promote and motivate and provide real strong incentives  
5 for companies to police themselves, for corporations that  
6 don't cooperate, that don't clean up the environment when on  
7 order to, that don't make restitution, some penalties, heavy  
8 penalties may be imposed.

9           When in fact under the guidelines heavy penalties  
10 or fines are imposed whether or not restitution is made.  
11 Indeed, as I read the guidelines, particularly Option 1, the  
12 greater the amount paid thereby establishing the amount of  
13 the loss, the greater the fines would be. Thus, rather than  
14 provide an incentive to make restitution, it does the  
15 opposite.

16           In conclusion, we would like to endorse the  
17 recommendation made by some of the previous speakers to issue  
18 the guidelines if at all in a non-binding form at this time.  
19 You might even consider issuing them with both options so  
20 that the courts could select between the options or within  
21 Option 1, of if they deem it appropriate, to go below the  
22 options.

1           The courts will then have an opportunity to see how  
2 they work in actual practice for perhaps a period of 3 years,  
3 given the higher level of fines which the Congress has  
4 authorized courts to impose.

5           At the end of this period the Commission then can  
6 determine on the basis of this actual experience whether a  
7 separate set of mandatory guidelines for organizations should  
8 be issued at all and, if so, what the form of these  
9 guidelines should be.

10           CHAIRMAN WILKINS: Thank you very much.

11           Questions?

12           COMMISSIONER MacKINNON: Counsel, you said that  
13 these fines bore no relation to your prior fines. Of course,  
14 you recognize that the Congress has increased very substan-  
15 tially--

16           MR. LANGSDORF: I understand that.

17           COMMISSIONER MacKINNON: --the amount of fines.  
18 And, of course, the--

19           MR. LANGSDORF: The maximum fines which may be  
20 imposed.

21           COMMISSIONER MacKINNON: Well, and, of course, the  
22 necessarily the fines before that couldn't be anywhere near



1 what they can be now or should be now according to what  
2 Congress has opened up.

3 MR. LANGSDORF: That's true.

4 COMMISSIONER MacKINNON: You recognize also that  
5 these fines can't exceed what Congress has authorized.

6 MR. LANGSDORF: I understand that, but they--as I  
7 pointed out, what the effect of these guidelines is in many  
8 cases to push the fines up to the statutory maximum so that  
9 there is no real minimum/maximum, it's right at that level.

10 COMMISSIONER MacKINNON: I'm very appreciative of  
11 having your figures on the amount of members and the amount  
12 of your members that involves small corporations.

13 Thank you.

14 COMMISSIONER NAGEL: I wanted to just follow up on  
15 something I very quickly read in your testimony, which we  
16 just got and so that is--

17 MR. LANGSDORF: I apologize for that.

18 COMMISSIONER NAGEL: No, that's fine. I tried to  
19 glance through it quickly. And that is that it appears to me  
20 that you might be arguing that the Commission should take  
21 into account the size of the corporation in order to dif-  
22 ferentiate the appropriate fine and that's a position that we

1 have previously heard a great deal of testimony about, but on  
2 the other side, that is, most everyone else who has testified  
3 before us has argued not to take size into account. I think  
4 there was an exception this morning in Professor Stone's  
5 testimony.

6 Can you elaborate for a minute on that because it's  
7 an area we've debated at great length?

8 MR. LANGSDORF: I realize it's a very difficult  
9 proposition and in my capacity as lawyer for ITT Corporation,  
10 I hesitate to urge that higher fines be imposed on larger  
11 corporations.

12 The point that we are trying to make is that there  
13 has to be a wide range so that the courts can take the size  
14 of the corporation, particularly at the lower end, into  
15 consideration. I think that's--I suppose the balance has to  
16 be struck, but when the minimums are so high and they are  
17 beyond--I think that in many cases people think of a major  
18 corporation in setting them.

19 When the minimums are so high they are above the  
20 level of the smaller corporation. And, therefore, I think  
21 that the range has to be low enough so that it is within the  
22 reach of smaller corporations.

1 COMMISSIONER NAGEL: Let me put the question more  
2 specifically as it has emerged in prior debates. Suppose you  
3 have two organizations, both convicted of polluting. You  
4 estimate that the harm is equal in both instances, suppose  
5 it's equal to \$100,000, just say it's small. One is a very  
6 small mom and pop operation and one is a major corporation.

7 Do you set a fine in accordance with the harm, that  
8 is the \$100,000, however you do that, or do you set it with  
9 the harm modified by some consideration of one is a small mom  
10 and pop and one is a major corporation, or do you look  
11 primarily to the size? What would your view on that be?

12 MR. LANGSDORF: I guess my view is that in every  
13 one of these situations it depends on a number of factors. I  
14 think--

15 COMMISSIONER NAGEL: Assume all other factors are  
16 equal.

17 MR. LANGSDORF: For a small corporation a fine, I  
18 suppose, even of that size could be prohibitive for--frankly  
19 for a company the size of ITT that would be a slap on the  
20 risk. And I think it does--and I think the courts just have  
21 to have this flexibility. It may depend on a number of  
22 factors, what kind of a compliance program the court--

1 COMMISSIONER NAGEL: But you would take size into  
2 account, assuming everything else is equal, because this has  
3 been, as I say, an area of great debate and--

4 MR. LANGSDORF: Yes, I would, but I think that to  
5 formulate guidelines that rejudify that would be almost  
6 impossible. That's why I urge flexibility.

7 COMMISSIONER NAGEL: Thank you.

8 CHAIRMAN WILKINS: Let me ask you very quickly,  
9 assuming that the corporation is indicted and convicted, high  
10 level management was involved in the decision making process  
11 of the misconduct, they did not cooperate, didn't voluntarily  
12 make restitution, the illegal gain was a half a million  
13 dollars, what should the fine be?

14 MR. LANGSDORF: I think that the--I would like to  
15 make a point that I think one of the other speakers made that  
16 a distinction can be drawn between gain and loss. I'm  
17 particularly troubled by the loss situation, as I said, in an  
18 environmental case where something which can be even a low  
19 level crime can cause a massive amount of loss. I think the  
20 unfairness is much greater.

21 I think that where the top level management is  
22 involved and there is a large gain, and particularly if the

1 corporation is in a position to afford it, I think the fine  
2 should be severe and I don't know exactly what multiple, but--  
3 -

4 CHAIRMAN WILKINS: What is it, 2, or 3, or 4--

5 MR. LANGSDORF: I would be not shocked by two times  
6 of the amount. If there is an actual gain and the corpora-  
7 tion can afford it, yes, that would not shock me.

8 CHAIRMAN WILKINS: Two wouldn't. Would four shock  
9 you? I'm just asking you. See we've got to make these hard  
10 calls. I'm asking--

11 MR. LANGSDORF: I mean it's really difficult for  
12 you to play God on some of these things and that's one of my  
13 problems. These figures just come out of nowhere with  
14 effects on every corporation and every type of situation,  
15 every type of crime. That's why I'm really troubled by the  
16 whole proposition.

17 CHAIRMAN WILKINS: Commission Corrothers has a  
18 question.

19 COMMISSIONER CORROTHERS: Since we just received  
20 your testimony, I hope I'm not misrepresenting your views. I  
21 am trying to quickly look at it. But I believe that you feel  
22 that unless the--this is in the area of probation--that

1 unless the company is without resources for policing itself  
2 that the notion of probation is offensive.

3 I'm wondering what the alternative is when, as we  
4 indicated among the circumstances in our published draft,  
5 that there is a criminal conviction within a previous say 5  
6 years of conduct similar to that's involved in the instance  
7 offense or high level management involvement, as sustained or  
8 pervasive pattern of criminal behavior, et cetera, there is  
9 clear assurance that what--I guess I'm wondering what  
10 alternatives do you have to assure that there is some type of  
11 assurance that the problem will be remedied?

12 MR. LANGSDORF: In such a case appropriation is  
13 clearly, clearly appropriate.

14 COMMISSIONER CORROTHERS: So then you don't find in  
15 every instance the notion of probation to be offensive?

16 MR. LANGSDORF: No, certainly not. I think this--  
17 As I understand, the guidelines will greatly expand the  
18 circumstances under which probation would have to be ordered  
19 and that we would find offensive.

20 COMMISSIONER CORROTHERS: It seemed that--your view  
21 appeared quite restricted in your statement that except for  
22 when the company has no resources you found it offensive. So

1 that was a pretty strong statement.

2 MR. LANGSDORF: Yes, I think certainly subject to  
3 the amendment that you have suggested.

4 COMMISSIONER CORROTHERS: Okay. Thank you.

5 COMMISSIONER MACKINNON: Counsel, if a judge  
6 finished with a case and he didn't do a lot else, but he had  
7 someone that has paid the normal one, and he had some  
8 reluctance to be assured that the corporation was going to  
9 operate properly thereafter, wouldn't you think that that  
10 would be a good case to put the corporation say on a year or  
11 two probation to see, nothing else?

12 MR. LANGSDORF: I think within the discretion of  
13 the judge, yes, Your Honor, yes.

14 CHAIRMAN WILKINS: Thank you very much, sir.

15 Our next witness is Samuel J. Buffone. Mr. Buffone  
16 is a practicing attorney here in Washington. He's here  
17 representing the American Bar Association. He is also the  
18 Chairman of an practitioners advisory working group that  
19 works very closely with the Commission.

20 Mr. Buffone, we are delighted to have you with us.

21 STATEMENT OF MR. SAMUEL J. BUFFONE, AMERICAN BAR ASSOCIATION

22 MR. BUFFONE: Thank you, Chairman Wilkins and

1 Members of the Commission. I am pleased to be here. As the  
2 Chairman noted, I appear today to speak on behalf of the  
3 American Bar Association.

4 I would like to recognize at the outset that in the  
5 preparation of our testimony the committee that I Chair on  
6 the Sentencing Commission was aided and worked quite closely  
7 with other arms of the American Bar Association, specifical-  
8 ly, the White Collar Crime Committee, a subcommittee Chaired  
9 by Victoria Toensing, that contributed substantially to our  
10 positions as reflected in our written testimony.

11 I would also like to echo a comment that I made  
12 during the last set of hearings on organization sanctions,  
13 but I think is even more evident, and that is that the  
14 Commission deserves to be praised for the process by which  
15 you have considered the complex issues posed by organization-  
16 al sanctions.

17 We at the American Bar Association believe that the  
18 openness and depth of the consideration that you have given  
19 to this issue should not only be a model for further  
20 deliberative processes of the Commission, but for other  
21 agencies as well. And we commend you for the effort you have  
22 put into this and the openness by which you have received



1 comments not only from our organization, but from the public  
2 at large.

3 CHAIRMAN WILKINS: Thank you.

4 MR. BUFFONE: In our prior testimony on these  
5 issues given in October of 1988, we suggested that the  
6 Commission adopt a flexible approach to organizational  
7 sanctions and suggested at that time that you use broadly  
8 formulated guidelines with expansive commentary so as to  
9 permit a period of experimentation and application.

10 Our views at that point were that that period of  
11 experimentation would permit the generation of a data base  
12 that would permit the Commission to go forward towards the  
13 promulgation of more concrete guidelines.

14 I have read and heard some of the testimony that  
15 has been given this morning and I understand that there have  
16 been some comments that have been supportive of that type of  
17 approach.

18 I would like to try to bring some specificity to  
19 just what our position is because I think it diverges  
20 somewhat from what some of the other witnesses testified to.

21 First, we support organizational guidelines. We  
22 believe that there should be guidelines consistent with the

1 statute and the Commission's purpose to aid judges in the  
2 sentencing of organizations.

3 We believe that now is an appropriate time to  
4 promulgate such guidelines. However, we recognize, as we  
5 have in the past, that the small amount of data available to  
6 the Commission does not provide an adequate basis to have a  
7 firm and concrete set of guidelines that will cover all  
8 application situations.

9 We think that absence of data is further compounded  
10 by the fact that as the Commission itself has recognized this  
11 is a new day for organizational sentencing. Enhanced fines,  
12 availability of alternative sentencing options such as  
13 corporate probation, that while available in the past, have  
14 not been utilized on a regular basis by sentencing courts,  
15 creates even some suspicion for the data that does exist.

16 In addition, we have seen an increase in enforce-  
17 ment activities by the Department of Justice in the areas of  
18 economic and white collar crime that of necessity involve  
19 organizations. And we believe that as that stepped up  
20 campaign of enforcement continues into the future that you  
21 are going to see more instances of organizational sentencing  
22 rather than less.

1           That all comes together, we believe, to create a  
2 situation where the Commission should look for procedures and  
3 guidelines that permit applications that will permit sentenc-  
4 ing judges to experiment, to have some breath to the options  
5 that are available to them and then as a Commission to  
6 closely monitor that data and move towards concrete guideli-  
7 nes that would cover more of the application situations like  
8 the individual guidelines.

9           In the interim period, what we recommend is that  
10 you have broadly formulated guidelines; that those guidelines  
11 be accompanied by expansive commentary. By expansive  
12 commentary I mean commentary that will in detail address many  
13 of the issues that have been considered through your long  
14 deliberative process, reflect some of the debate that you  
15 have heard on those issues, and give some guidance.

16           We believe that one of the most complicating issues  
17 in the area of organizational sentencing is the range of  
18 issues created by vicarious liability. And I know you have  
19 heard from others speak about the issues of vicarious  
20 liability as they apply to corporate criminality.

21           We think that the breath and range of the vicarious  
22 liability doctrine creates the potential for unforeseen

1 applications and the Commission should recognize that and in  
2 its commentary direct district courts to view the applica-  
3 tions of vicarious liability and suggest that the departures  
4 may be appropriate where there are unforeseen applications of  
5 vicarious liability.

6           That brings us to our next point, which is depart-  
7 ture authority generally. The Commission has taken a  
8 position on departures in the proposed guidelines that while  
9 addressing several specific issues does not vary much from  
10 the generalized standard of departures as contained in the  
11 individual guidelines.

12           We suggest that consistent with the statute that,  
13 as you know, limits departures to matters that were not  
14 adequately considered of a kind or to a degree by the  
15 Commission that you draft commentary to make it clear that  
16 there are many factors that you have not adequately con-  
17 sidered; that you expect that those factors will indeed be  
18 presented to sentencing court judges and that consistent with  
19 the Commission's heart land concept of departures as ex-  
20 pressed in the initial individual guidelines, that you make  
21 clear that the heart land for organizational sentencing may  
22 indeed be a very narrow heart land, but given the limited

1 experience in the past, that the typical normative case that  
2 the guidelines are based on is a very narrow range of cases  
3 and that the availability of departure on either side of that  
4 heart land indeed may be far more expansive than in the area  
5 of individual guidelines.

6 As a second basic recommendation, we recommend that  
7 the organizational guidelines provide for flexibility in the  
8 application of monetary penalties and increased coordination  
9 with civil and administrative remedies.

10 It is the ABA's position, as reflected in its  
11 Standards on Criminal Justice, that monetary penalties,  
12 including fines and restitution, should be the principle  
13 weapon in the arsenal of a sentencing judge when looking at  
14 the issues of corporate criminality.

15 We do not believe, however, that they are always  
16 necessary or that monetary sanctions should in all instances  
17 be the predominant sanction.

18 We read the guidelines as making mandatory sanc-  
19 tions perhaps more mandatory than the statute contemplated.  
20 In our written testimony, we have addressed the issues of the  
21 statutory mandate for imposing fines and restitution and have  
22 suggested that the guidelines be moderated to make it clear

1 that fines are not necessary in all cases.

2           Regarding coordination with civil and administra-  
3 tive remedies, we suggest that any final guidelines clarify  
4 the degree of coordination with civil and administrative  
5 remedies, both those that have gone to judgment, those that  
6 are filed and proceeding, and those that are contemplated.

7           We would foresee a system in which sentencing  
8 judges would have authority to judge the likelihood that  
9 administrative or civil remedies will in fact be instituted  
10 and provide an adequate remedy for restitution, and satisfy  
11 part of the need that would be served by a punitive fine.

12           That position is in large part driven by our fear  
13 that the complexity of factual determinations required for  
14 findings of gain and loss in order to determine the ap-  
15 propriate level of fines or the appropriate level of restitu-  
16 tion may unduly complicate the sentencing process.

17           We believe that the undue complication is not  
18 always an excuse for not imposing fines or restitution, as  
19 the statute may reflect at least as to restitution, and that  
20 often civil remedies and administrative remedies provide an  
21 efficient and satisfactory basis for determining the levels  
22 of restitution and provide some disgorgement of ill gotten

1 gains from corporate wrongdoers.

2 Our third general recommendation is that the  
3 guidelines should limit the circumstances under which  
4 intervention as corporate probation is appropriate. And I  
5 use the word "intervention" as advisably.

6 While our criminal justice standards take almost a  
7 semantic approach to this that corporate probation is a  
8 misnomer, I don't mean to make much of the semantics, but  
9 rather, I would like to focus on the application.

10 Where corporate probation is truly interventionist  
11 in the sense that the nature of the probation requires  
12 intervention into the ongoing affairs of the corporation at  
13 the management level, controlling such things as the payment  
14 of dividends, the establishment of business plans, and the  
15 formulation of the corporation's business practices in the  
16 future, we believe that those kinds of interventionist  
17 probation should be limited for a narrow range of cases where  
18 they are indeed necessary.

19 The guidelines mandate that probation and a series  
20 of probationary conditions will be imposed in all cases where  
21 there has not been payment of a monetary fine or sanction at  
22 the time of sentencing.

1           We have tried to set out in our testimony a wide  
2 range of circumstances in which we believe it will not be  
3 possible or appropriate for monetary sanctions to be paid at  
4 the time of sentencing.

5           Either the exact amount of restitution or fines  
6 cannot be appropriately determined at the point of sentenc-  
7 ing, the restitutionary victims cannot be appropriately  
8 isolated, the corporation may determine that it wishes to  
9 lodge an appeal and challenge the finding, there will be  
10 situations in which there will be much more complicated  
11 remedial orders that may require additional fact finding and  
12 some level of implementation before an adequate restitution-  
13 ary or monetary penalty can be arrived at.

14           In those situations, we believe it is not ap-  
15 propriate to impose probation as a matter of course with  
16 probationary conditions which may be interventionist in  
17 nature.

18           In addition, there will be a wide range of cir-  
19 cumstances, we believe, in which the ability and willingness  
20 of a corporation to pay a fine or restitution will indeed not  
21 be at issue.

22           In those circumstances, unless a court makes a



1 specific finding that there is either a likelihood of an  
2 inability to pay, or a likelihood of an unwillingness on  
3 behalf of the corporate defendant to make payment, in those  
4 situations probation would clearly be necessary in order to  
5 ensure that the monetary sanctions are carried out.

6           If those two findings are not made, then we do not  
7 believe that corporate probation would be appropriate in  
8 those circumstances.

9           Again, to summarize, we believe that the remedy of  
10 probation should be applied in a narrow range of cases,  
11 first, to those cases where other sanctions cannot be  
12 adequately carried out without probation, the example of  
13 corporation that does not have the financial ability or the  
14 willingness to pay a fine. It should be reserved for the  
15 narrow range of cases where supervision of the corporation's  
16 activities will promote law abiding conduct and serve other  
17 criminal law purposes.

18           There has been many references to environmental  
19 crimes. We envision circumstances in which environmental  
20 compliance might well be furthered by a probationary sen-  
21 tence.

22           We envision circumstances in which the level of

1 criminality in a corporation and the absence of any effect of  
2 compliance or self-policing policies or programs within the  
3 corporation would be furthered by some degree of intervention  
4 that would ensure that such policies and programs were put  
5 into place.

6           Our fear is that reading the guidelines, as they  
7 are now suggested, if we have that wide range of corporations  
8 that are the smaller corporations that have been referred to,  
9 then in all likelihood will not have formalized compliance  
10 programs. If a judge is to make a finding, as suggested by  
11 the guidelines, would such programs in the future in all  
12 likelihood decrease the potential for further criminality?

13           I believe the exact language as contained at  
14 Section 8d 1.1(c)(3), the court finds that probation will  
15 significantly increase the likelihood of future compliance  
16 with the law. Our fear is that where there has been past  
17 criminality, no corporate compliance program, that a judge  
18 would be hard pressed to not make that finding that a  
19 compliance program would significantly further future  
20 compliance with the law and that corporate probation will  
21 become the normative, perhaps mandated sanction rather than  
22 the limited sanction envisioned by our criminal justice

1 standards.

2 Our third general recommendation--excuse me--those  
3 three general recommendations are what we believe should  
4 govern the formulation of guidelines for corporations.

5 If the Commission is looking for refinements of its  
6 existing proposal, we have made a number of specific recom-  
7 mendations for refinements in that proposal.

8 I would like to address a few of those. One is  
9 proposed guideline 8(c)1.1, suggests what we have labeled as  
10 a disabling fine provision and it provides that where a  
11 corporation is operated for a primarily criminal purpose the  
12 fine levels should be set at a sufficient level to take all  
13 of the assets of the corporation.

14 We fear that there are potential dangers in the  
15 application of that guideline. It would effectively require  
16 the equivalent of a RICO or CCE enterprise forfeiture without  
17 any of the many protections mandated by Congress before such  
18 forfeiture can be imposed, including a finding of guilt  
19 beyond a reasonable doubt as to the forfeiture issues.

20 It additionally carries with it the potential for  
21 vague application. Courts will be asked to determine what is  
22 a corporation operated primarily for a criminal purpose

1 without any clear definition of what "primarily operated for  
2 a criminal purpose" means.

3 We can envision a situation in which a corporation  
4 will be indicted for very limited conduct, convicted of that  
5 offense, come to sentencing and find that a whole series of  
6 uncharged criminal episodes will be brought to the attention  
7 of the sentencing court in order for the court to determine  
8 whether or not the corporation has operated primarily for a  
9 criminal purpose.

10 Additionally, the words, "primarily for a criminal  
11 purpose", we believe are subject to the same sort of vague-  
12 ness attack which is recently troubled at least four members  
13 of the Supreme Court in H.J., Inc., as applied to the pattern  
14 definition in the RICO statute.

15 Among the other specific suggestions that we have  
16 made is that the Commission permit discretion to a sentencing  
17 court to waive the comparative culpability of multiple  
18 defendants.

19 We believe the existing case law permits a district  
20 court judge to do that for individuals and he should be  
21 permitted to do that under the restitutionary guidelines as  
22 to corporate and individual defendants or multiple corporate

1 defendants.

2 We suggest that Commission permit specifically  
3 consideration of acceptance of responsibility. Now we read  
4 the guidelines to encompass some consideration of that issue  
5 by the Commission and we read your mitigating factors as  
6 potentially applicable to the issue of acceptance of respon-  
7 sibility.

8 We think there should be clarification of the  
9 ability of a sentencing court judge to consider true accep-  
10 tance of responsibility by a corporation, perhaps even pre-  
11 conviction and pre-investigation as a factor that would  
12 provide for an equivalent two level adjustment as that  
13 currently provided for individuals.

14 We believe that there should be an increase in the  
15 fine ranges so as to permit more flexible application of the  
16 guidelines so that sentencing judges would have broader  
17 discretion to make finding within the range; fewer guideline  
18 ranges of more breath.

19 And I have already addressed the issues regarding  
20 monetary penalties, but we have suggested that the proposed  
21 guidelines be amended to clarify that monetary penalties  
22 should not be necessary in all cases and that where--excuse

1 me--monetary penalties should not require probationary  
2 conditions in all cases and specifically, the guidelines  
3 should recognize that where an appeal is taken, probationary  
4 conditions should ordinary be stayed if they are for the sole  
5 purposes of enforcing payment of the fine or restitution.

6 Thank you for your consideration of our comments.

7 CHAIRMAN WILKINS: Thank you for your testimony.

8 Judge MacKinnon?

9 COMMISSIONER MacKINNON: Why do you say that  
10 corporate probation is a misnomer?

11 MR. BUFFONE: Judge, I tried to say that was a  
12 semantic distinction and that's the position taken in the  
13 Criminal Justice Standards. The drafters of those standards  
14 took that position because they believed that what they  
15 thought was appropriate for what we're now calling corporate  
16 probation was so divergent from the what we know as in-  
17 dividual probation that it should be called something else.

18 I think whatever we call it we all understand what  
19 it is and I don't think it makes much difference what we call  
20 it as long as we draw that distinction that corporate  
21 probation is going to serve a different purpose, have  
22 different types of conditions attached to it than it would

1 for individual probation.

2 COMMISSIONER MacKINNON: You recognize that it  
3 would be an appropriate remedy in some instances?

4 MR. BUFFONE: Correct, Your Honor. We support  
5 corporate probation and believe that it should be one of the  
6 sentencing options available to a sentencing judge.

7 COMMISSIONER MacKINNON: How about apportionment?  
8 You said that you wanted them to weigh the liability among  
9 several corporations that are guilty.

10 MR. BUFFONE: We want the authority to do that,  
11 Your Honor. We cited law from two circuits that permit in  
12 the application of restitution to individuals a consideration  
13 of relative culpability.

14 We believe that that should be extended to corpora-  
15 tions that where you have a situation with individual and  
16 corporate defendants or multiple corporate defendants that a  
17 court be permitted to apportion restitution based upon  
18 culpability.

19 COMMISSIONER MacKINNON: But not required to do so?

20 MR. BUFFONE: Not required.

21 COMMISSIONER MacKINNON: Thank you.

22 CHAIRMAN WILKINS: Commissioner Saltzburg?

1           COMMISSIONER SALTZBURG: Sam, I have question. Has  
2 the ABA taken a formal position or the criminal justice  
3 section? Is this a formal position of theirs or the subcom-  
4 mittee position? What is the status of the testimony?

5           MR. BUFFONE: You understand our hierarchy some-  
6 what, but it does get complex. This is a position of the  
7 Criminal Justice Section. It has not been adopted by the  
8 House of Delegates or the Criminal Justice Council.

9           Our subcommittee has generalized authority to take  
10 positions before the Sentencing Commission. Those positions  
11 are subject to change when voted upon by the House of  
12 Delegates.

13           In addition, the ABA as a whole certainly has the  
14 authority to take positions contrary to those taken by our  
15 subcommittee and has not voted on the positions taken in our  
16 testimony.

17           To the extent that they reflect the Criminal  
18 Justice Standards and are consistent with them, the standards  
19 do reflect overall ABA policy.

20           COMMISSIONER SALTZBURG: I have just have two other  
21 questions about portions of your testimony that are in  
22 writing. I don't think you addressed them here, but maybe



1 you did.

2 First, there is an argument made in the written  
3 portion regarding the use of the word "may" when it comes to  
4 restitution and when it comes to fines. And I understand the  
5 argument to be that Congress put in the statute that fines  
6 "may" be imposed, restitution "may" be imposed and that the  
7 proposed guidelines in effect require corporations in many--  
8 in fact, all instances where they are convicted to pay fines  
9 and to pay restitution if indeed there are victims as to whom  
10 restitution can be paid and that somehow the argument is  
11 that's a violation of a statute.

12 Isn't that exactly what the Commission has done  
13 with respect to individuals and imprisonments and the same  
14 word "may" used and isn't the whole idea of guidelines to  
15 have something to guide courts and they can depart when they  
16 find something the Commission hasn't considered?

17 MR. BUFFONE: I said the basic position did not  
18 mean to imply that the guidelines would be legal. We  
19 believe, however, that the statutory language that we  
20 referred to indicated that Congress contemplated that there  
21 might be situations in which fines or restitutions would not  
22 be necessary and we think that the guidelines should clarify

1 that fines and restitutions are not mandatory in all situa-  
2 tions.

3 But I think the broader issue is that the Commis-  
4 sion has made a determination in its draft guidelines that it  
5 will be a primarily fine driven sanction system. While with  
6 emphasis on primary, we don't dispute that basic decision, we  
7 think the Commission may have gone too far in being--n having  
8 the entire sanction model be driven by the fine determination  
9 and we think that the commentary should suggest that there  
10 may well be instances of corporate criminality where other  
11 types of remedies, including corporate probation compliance  
12 programs, remedial orders, notice to victims, may be more  
13 important the monetary sanctions.

14 COMMISSIONER SALTZBURG: Let me ask one other  
15 question. I don't understand at all, I confess, the portion  
16 of the testimony in writing that has to deal with appeals.

17 The argument as I understand it is somehow the  
18 imposition of probation when a corporation is unable to  
19 immediately pay a fine interferes or impairs the right to  
20 appeal. And the subpoint is that if a corporation is simply  
21 fined and can pay it, it can seek a stay of the fine by  
22 posting a bond and then can appeal.

1           Maybe you could explain this to me. It seems to me  
2 a corporation has the right to appeal upon the imposition of  
3 any sentence and it is true, I guess, it's true that if  
4 probation has taken effect, probation conditions may be  
5 imposed while an appeal is pending, but it is also true,  
6 isn't it, the same is true with respect to a bond, there's a  
7 cost of posting it the whole time the appeal is pending. So  
8 I don't understand the argument.

9           MR. BUFFONE: Let me give an example of how I think  
10 that would affect. Let's assume that we have a Fortune 500  
11 corporation that for the past hundred years has paid a  
12 quarterly dividend and its stock in large part may trade at a  
13 higher value because of the anticipation of investors that  
14 they are going to be paid that quarterly dividend. Let's  
15 further assume that that same corporation is convicted of a  
16 crime and that there is a significant fine attached in the  
17 millions of dollars.

18           At the time of sentencing, the corporation may  
19 believe that it has a very solid grounds for appeal, but  
20 under--as we read the guidelines, the fine would be imposed  
21 at the time of sentencing, probation would attach because the  
22 fine was not paid, and one of the conditions of probation

1 would be that any dividends could not be paid without the  
2 approval of the court.

3 Now that might send shock waves out to the inves-  
4 tors who hold the stock because of the security of the  
5 dividend payment. We think that corporation should be placed  
6 in a situation where there can be a stay of that condition of  
7 probation until a determination is made that the fine is in  
8 fact final following appeal and the corporation would then  
9 pay it.

10 COMMISSIONER MacKINNON: How does that interfere  
11 with appeal?

12 MR. BUFFONE: Well, not having the right to stay  
13 those conditions of probation would interfere with the  
14 appellate right, Your Honor, because the corporation would be  
15 forced to choose between having someone interfere with their  
16 dividend determination or go forward with this appeal.

17 I understand Commissioner Saltzburg to say that the  
18 solution there is to merely bond the fine. It's not clear  
19 from the guidelines that that's an option.

20 COMMISSIONER SALTZBURG: What I guess I'm saying so  
21 I understand the point, that you are right, as long as the  
22 probation conditions attach, and if the corporation appeals

1 it may be subject to all the conditions while the appeal is  
2 pending, right?

3 MR. BUFFONE: That is correct.

4 COMMISSIONER SALTZBURG: But he can always ask the  
5 judge, "Judge, don't interfere with our paying the dividend",  
6 right?

7 MR. BUFFONE: I think it's a very easy problem to  
8 deal with and that would be dealt with quite simply by a  
9 statement to that effect in the commentary.

10 CHAIRMAN WILKINS: Thank you very much. We  
11 appreciate your testimony.

12 Our next witness is Professor Richard Gruner.  
13 Professor Gruner is from Whittier College School of Law and  
14 he has been in communication with our Commission and indeed  
15 has testified on at least one other occasion that I recall.

16 Professor, delighted to see you again.

17 **STATEMENT OF PROFESSOR RICHARD GRUNER, WHITTIER COLLEGE**  
18 **SCHOOL OF LAW**

19 PROFESSOR GRUNER: It's good to be back and it's  
20 nice to be able to testify in support of what I find to be a  
21 substantial addition to this area of the law, an area which  
22 has been overly neglected and, as one of the earlier tes-

1 tifiers indicated, I think you've addressed one of the  
2 problems that society is currently focusing on, that being  
3 corporate misconduct and the scope of corporate impacts that  
4 that misconduct can impose.

5 I would like to speak today about a few specific  
6 topics that are addressed in more detail in my written  
7 submission; first of all, some of the choices that the  
8 Commission has left open in the draft, and also, some  
9 additions to the draft that I think would improve it.

10 Overall, I want to emphasize though that I think  
11 both in the area of corporate and organizational fines and in  
12 the probationary standards that the draft is an excellent set  
13 of standards and requires no dramatic fundamental change.

14 The few areas that I would like to indicate that  
15 there might be adjustments concerning, first of all, the  
16 major choice of Option 1 versus Option 2 in the fine setting  
17 standards.

18 I think it's clear to persons that think about how  
19 corporations make decisions that a standard that inadequately  
20 deters corporations from pursuing illegal gains is an  
21 inadequate fine setting standard and I think as currently  
22 drafted, Option 2 would create inadequate deterrence to

1 crimes that are aimed at illegal gains.

2 For that reason, particularly with respect to  
3 pecuniary offenses, those meaning where gain is the object,  
4 that those I think are the substantial bulk of the offenses  
5 that are going to be involved here, that the fines that would  
6 be produced by Option 2 are just way too low.

7 The need is for a fine setting mechanism that more  
8 than extracts illegal gains, a fine setting mechanism that  
9 extracts multiple times illegal gains such that an organiza-  
10 tion or a person within an organization who knows that not  
11 every offense is going to be penalized will nonetheless see  
12 organizational fines because of their multiple of illegal  
13 gain amount will nonetheless be deterred by the scope of the  
14 potential fine.

15 That is why the mechanism in Option 1 where gain--  
16 as to pecuniary offenses--gain or loss is the primary scaling  
17 mechanism seems much more sensible.

18 I have one reservation about Option 1 which is in  
19 the other type of offense, which is in the what I label non-  
20 pecuniary offense where the losses and gains are either  
21 unmeasurable or small and in that context I am concerned that  
22 the Option 1 minimums are too small, particularly in cir-

1 cumstances where the crime prevention expenses may be large  
2 with respect to a type of non-pecuniary offense.

3           As I read the drafts, and I think it was confirmed  
4 in some of the discussion earlier this morning, the ad-  
5 vantages to an organization of not implementing crime  
6 prevention techniques are not included in the concept of gain  
7 under the current draft.

8           So that if a couple saves a million dollars by not  
9 implementing certain crime prevention techniques, it still  
10 might come out ahead so long as the offenses that it are  
11 involved do not incur losses or gains, meaning that the  
12 offenses that might be committed would be punished only by  
13 the minimum fines.

14           There are two approaches to counteract this. One  
15 was suggested in discussion this morning, which is to try to  
16 incorporate the notion of prevention costs that were not  
17 incurred by the organization as a notion of gain and once  
18 that's included in gain, then if you pick up in Option 2,  
19 those hypothetical gains will raise the appropriate organiza-  
20 tional fines.

21           That's a good approach in concept. I'm concerned  
22 though that the notion now of gain is a hypothetical gain.



1 In other words, the gain to the organization is what they  
2 should have done, but didn't, a very difficult determination  
3 it seems to me, particularly since it will be hard to  
4 determine, given that we're talking about actions that were  
5 not taken, what should have been done that would have been  
6 sufficient to prevent the offense and, therefore, the costs  
7 that should be included in that hypothetical gain or the  
8 prevention costs gain figure.

9 It seems to me that a preferable approach might  
10 simply be to rely on stiffer minimum penalties, recognizing  
11 that those stiffer minimums are to deal with the non-  
12 pecuniary offenses and that that forgoes what I see as a very  
13 difficult fact finding exercise concerning prevention costs.

14 I would suggest that as an appropriate measure of  
15 minimum fines that indeed the fines that would have been  
16 determined under Option 2 might be appropriate minimums under  
17 Option 1.

18 A few other detail issues concerning the fine  
19 setting mechanisms; I notice that there is a substantial  
20 increase in fines related to the involvement of high level  
21 management. And while I would not contest that the involve-  
22 ment of truly high level management is a source of concern

1 and should be a basis for fine increase, the definition of  
2 who is a high level manager is a very problematic one.

3           The comments to the current draft indicate that  
4 anyone with substantial management authority will be con-  
5 sidered high level management, while that's helpful because I  
6 think it suggests that some mid-level managers in large  
7 organizations will be within the concept of high level  
8 management.

9           Defining who has substantial management authority  
10 is of itself an ambiguous or difficult task involving an  
11 ambiguous standard.

12           It seems to me that a preferable approach would be  
13 rather than relying on a finding that high level management  
14 was involved that instead a sentence increase be premised on  
15 the involvement of any superior with a primary actor in a  
16 crime.

17           In other words, where an organizational offense is  
18 committed by a primary actor the support in the offense by a  
19 superior at any level or the concealment of that offense by a  
20 superior at any level should be the basis for a fine in-  
21 crease. That would include, of course, the high level  
22 manager who is concealing or supporting, but it would also

1 include say a branch officer manager who concealed offenses  
2 by a subordinate.

3           As to the provision on fine setting--the provisions  
4 that relate to prior offenses and increases based on prior  
5 offenses, I have two different types of difficulties. In one  
6 dimension I think the provisions are too broad and that's  
7 with respect to large organizations who would find themselves  
8 in a position almost always of having some track record of an  
9 offense somewhere in that organization within the prior 15  
10 years. And I am troubled by the notion that perhaps in being  
11 sentenced for an environmental offense, for example, the  
12 concern would have a prior tax reporting offense 14 years  
13 previously, obviously in a different functional component of  
14 the company.

15           I don't see that prior offense as having much basis  
16 or much reason to be included as a basis for a fine increase.  
17 So I would recommend that the provisions on considering prior  
18 offenses as a basis for fine increase relate only to offenses  
19 involving similar conduct or similar personnel within the  
20 prior 15 years. With that limitation it would apply ap-  
21 propriately to large concerns as well as small ones.

22           In another respect, however, I think that the prior

1 offense provisions are too weak. Specifically, it doesn't  
2 seem, according to my reading, that any further increment for  
3 the third, fourth, and subsequent offenses; that once you  
4 find one prior offense there is an increment, but not so for  
5 multiples beyond that.

6 So I would suggest that in fact the increase be for  
7 each prior offense or that there be some arrangement for  
8 prior offenses beyond one prior during the period under  
9 scrutiny.

10 Turning to organizational probation, which has been  
11 my ongoing interest in the organizational sentencing area, I  
12 again applaud the current draft for supporting the notion of  
13 probation as an organizational reform tool. I believe this  
14 going to be a very commonly used sentence that will achieve  
15 significant public benefits.

16 It is a necessary sentence in that in many respects  
17 organizational fines, even at some of these levels may still  
18 be inadequate to achieve all of the goals of sentencing under  
19 current law.

20 Particularly when used as a supplement to organiza-  
21 tional fines, probation can ensure that actual changes in  
22 corporate or organizational behavior to avoid future criminal

1 misconduct are made.

2           In addition, probation sentences can help ensure  
3 that organizational offenders carry out the corrective  
4 measures they have agreed to take by providing for external  
5 monitoring of subsequent organizational activities by  
6 probation officers or expert consultants.

7           I do believe that current draft could be  
8 strengthened by addition either in policy statements or  
9 commentary of more particulars as to the nature of the  
10 compliance plans that are envisioned under the draft and I  
11 would suggest that the following sorts of measures would be  
12 ones that could be specified as illustrative, although not  
13 exclusive examples of the types of measures that would be  
14 included in a compliance plan.

15           Specifically, requirements of changes in operating  
16 practices where the changes would lessen the chance of  
17 subsequent offenses;

18           Requirements of changes in information handling and  
19 monitoring practices that would tend to reveal subsequent  
20 offenses;

21           Requirements of increased monitoring of organiza-  
22 tional operations by top managers to expand the awareness of

1 those top managers of potential illegal conduct at lower  
2 levels;

3           The specification of individual responsibilities  
4 for organization reform tasks that are required under the  
5 compliance plan; and,

6           Finally, requirement of studies either at the  
7 outset of probation or over the course of the probation term  
8 of the sufficiency of organizational practices to prevent and  
9 detect illegal actions by organization employees and agents  
10 with such studies either to be performed by the organization  
11 or by outside experts, as the court deems necessary.

12           I would go on to point out that in connection with  
13 probation used as a reform tool, I believe that the current  
14 draft could be strengthened by further provisions concerning  
15 the monitoring of probation compliance.

16           Specifically, the draft currently refers to the  
17 creation of reports by the organizational probationer on  
18 probation compliance, those reports to be reviewed by the  
19 sentencing court or probation officer.

20           While such reports may be a valuable part of a  
21 broader monitoring program, they will not necessarily be  
22 sufficient of themselves.

1            Sentencing courts should be able to authorize  
2 probation officers to make inquiries of organizational  
3 probationers perhaps on an unscheduled basis to determine  
4 their performance under probation terms.

5            In addition, probation officers should have the  
6 ability to make unscheduled reviews of corporate records and  
7 facilities perhaps, however, subject to the requirement of  
8 advance authorization by a sentencing court.

9            These are simply good audit techniques. Probation  
10 compliance measurement should not be limited to use of less  
11 effective techniques.

12           As a related matter, I think there should be  
13 provision in the draft for the appointment of special  
14 probation officers. It has been recognized in prior tes-  
15 timony that courts are not effective in running corporations  
16 or even perhaps monitoring how closely corporations or other  
17 organizations have complied with probation terms.

18           The solution to that problem is to get the exper-  
19 tise that is necessary. And the way to get that expertise is  
20 through the appointment of special probation officers. Such  
21 probation officers could either be management experts,  
22 attorneys, executives in the same field as the organizational

1 probationer, persons with enough knowledge of the relevant  
2 areas to determine when specific probation terms have or have  
3 not been complied with.

4           And I think the draft would be more effective in  
5 providing for probation compliance monitoring if it included  
6 reference to these kinds of special probation officers.

7           As a related matter, the draft does not at current  
8 time cover the consequences of revocation of probation and  
9 I'm thinking particularly of probation as used as a reform  
10 measure.

11           It would be useful to include further provisions  
12 that specify that upon resentencing after a revocation of a  
13 probation compliance plan the further compliance plan would  
14 include more substantial constraints on conduct and more  
15 substantial monitoring provisions to reflect the failure of  
16 the earlier plan.

17           Those are the extent of my prepared comments. I  
18 would be happy to answer any questions.

19           CHAIRMAN WILKINS: Thank you very much.

20           Judge MacKinnon?

21           COMMISSIONER MacKINNON: I want to agree with you.

22 You were talking about the appointment of monitors and so on



1 to superintend probation. I had already written down on my  
2 notes here before you said that was the way to do that was to  
3 appoint a monitor to ride herd. And I want to tell you  
4 that's the way to do it.

5 PROFESSOR GRUNER: I think that that's both a--

6 COMMISSIONER MacKINNON: That could be in the  
7 corporation.

8 PROFESSOR GRUNER: That could be part of the  
9 compliance plan to designate a compliance officer in the  
10 corporation who is responsible for gathering the information  
11 on compliance status and providing it to the court.

12 It could be an independent expert that is acting as  
13 a sort of intermediary to interpret the corporation's data to  
14 present a summary to the court.

15 I think there is a concern that the reports that  
16 may be created will be either so burdensome for the court to  
17 review or so technical for the courts to review that there is  
18 going to need to be some help available and that is the way  
19 to do it.

20 COMMISSIONER MacKINNON: Well, on the long range,  
21 it's best to have it in house.

22 PROFESSOR GRUNER: It certainly is. The only

1 concern with that would be to ensure that the in house person  
2 is himself acting with the independence that such a position  
3 applies.

4 COMMISSIONER MacKINNON: That's all. Thank you.

5 COMMISSIONER CORROTHERS: Of course, we are doing  
6 that in the field of corrections, the monitors both in house  
7 and appointed who work with the courts.

8 My only comment was to say, Professor Gruner, that  
9 I found your testimony quite useful for our purpose and I  
10 thank you.

11 CHAIRMAN WILKINS: Commissioner Nagel?

12 COMMISSIONER NAGEL: Yes, sir.

13 I want to thank you again for your continued help  
14 to the Commission. I have one quick question and that is  
15 that you mention in your written statement the use of what  
16 you call punitive community service. Could you just either  
17 very briefly comment on that for us or perhaps you want to  
18 send something in?

19 PROFESSOR GRUNER: That would be something to think  
20 about either in amending the community service provisions or  
21 the probation portions. But the idea is that there is prior  
22 case law concerning the use of probation as a means to

1 implement community service that was clearly punitive to the  
2 defendant organization and usually in circumstances where  
3 fines would not have been an adequate punitive substitute.

4 I'm thinking particularly of the Daniel [ph.] O.  
5 Pastries case, which was a case involving price fixing by  
6 several New York City bakeries in which had fines been  
7 imposed in a substantial amount the bakeries would have gone  
8 out of business and there were obviously a lot of employees  
9 who were not participants in the price fixing that would have  
10 been put out of work.

11 And there the sentencing court decided that it was  
12 more appropriate to require that the bakeries provide  
13 essentially loaves of bread, loaves of their product to  
14 charitable organizations in the community, but not really for  
15 a, what I would consider a normal restitution purpose, it was  
16 more to impose a burden of service on the firm to punish them  
17 because fines were not adequate.

18 Now it seems to me if that type of punishment were  
19 reserved for circumstances where the organization could not  
20 pay its full fine you would limit the risk of cases like the  
21 ones appointing professors to endowed chairs, et cetera. You  
22 simply would not have those cases because where the corpora-

1 tion or organization could pay a fine, you would never  
2 trigger the punitive probation arrangement.

3 On the other hand, once a finding of inadequate  
4 resources was available and even perhaps in circumstances  
5 where a plan of periodic fine payment would be problematical  
6 because it too would risk putting the firm out of business,  
7 that a substitute arrangement of community service designed  
8 to be punitive is a good alternative that should be avail-  
9 able.

10 COMMISSIONER NAGEL: If there are other examples  
11 which you can cite to us, they would be very helpful to have.

12 PROFESSOR GRUNER: I'd be glad to.

13 COMMISSIONER NAGEL: Thank you.

14 CHAIRMAN WILKINS: Thank you very much.

15 PROFESSOR GRUNER: Thank you.

16 CHAIRMAN WILKINS: Our next witness is Fred  
17 Garrick, Associated Builders and Contractors.

18 Good afternoon, Mr. Garrick. We are glad to have  
19 you with us.

20 **STATEMENT OF MR. FRED GARRICK, ASSOCIATED BUILDERS AND**  
21 **CONTRACTORS**

22 MR. GARRICK: Thank you very much.

1 Judge Wilkins, Members of the Commission, good  
2 afternoon. My name is Fred Garrick. I am General Counsel  
3 for BENK, a construction general contractor operating  
4 throughout the United States.

5 BENK is a member of Associated Builders and  
6 Contractors and I am here today on behalf of ABC to express  
7 our concerns with regard to certain aspects of the guidelines  
8 this Commission has proposed regarding the sentencing of  
9 organizations in criminal cases.

10 ABC is a national construction trade association  
11 representing over 18,000 members who believe in the American  
12 shop philosophy which states that jobs should be awarded to  
13 the lowest responsible bidder regardless of labor affilia-  
14 tion.

15 BENK is a national corporation with operations in  
16 engineering, construction, and plant maintenance industries.  
17 We are headquartered in Birmingham, Alabama.

18 BENK has experienced phenomenal growth since our  
19 founding in 1972. Our contract volume last year was ap-  
20 proximately 1.3 billion dollars, just as an indication of the  
21 size of our operations.

22 BENK fully subscribes to the merit shop philosophy.

1 Although BENK is not signatory to any collective bargaining  
2 agreements with any unions, we hire employees regardless of  
3 their labor affiliation whether they are union members or  
4 independent craft people.

5 We subcontract work to others based on the lowest  
6 responsible bid regardless of whether a subcontractor may be  
7 open shop or union affiliated.

8 CHAIRMAN WILKINS: Mr. Garrick, may I interrupt you  
9 a minute, sir?

10 MR. GARRICK: Yes, sir.

11 THE WITNESS: We have copies of your testimony. It  
12 would really be more beneficial to us if you would summarize  
13 the points that you want to make and let us ask you some  
14 questions.

15 I don't know whether you were reading the introduc-  
16 tory part or not, but I will let you use your time any way  
17 you want to. I just suggest we can benefit more from the  
18 other approach.

19 MR. GARRICK: A revised summary is available for  
20 you, sir. But to summarize with regard to the two issues,  
21 first, with regard to the probation issue, certain aspects of  
22 the probation does give us concern in the control aspect that

1 a court may have over the corporation, those aspects being  
2 principally the restrictions that may be put on a company and  
3 with regard to the raising of operating capital that may be  
4 necessary because the increase of--any increase in debt in  
5 the corporation or requires approval by the probation officer  
6 who may be in charge.

7           Construction companies generally live and die by  
8 operating capital and that is a factor that would be of  
9 concern. So, therefore, we would encourage the Commission  
10 through footnotes to address the flexibility that they may  
11 have in the operation of the probation provisions.

12           Additional concerns would be those relative to  
13 compensation to individual officers or managers who may be  
14 non-related to the incident that was in question.

15           The other aspect that I would like to address is  
16 with regard to violence within the labor movement. The three  
17 factors that I feel may be warranted as additional considera-  
18 tion with regard to aggravating factors would be an or-  
19 ganization's lack of taking disciplinary action towards  
20 particular members who may be responsible for the actions  
21 involved, in particular, those individuals who may par-  
22 ticipate in or direct violence within--under the offending

1 actions that the lack of taking such discipline is considered  
2 an aggravating factor on behalf of the sentencing guidelines.

3 An additional consideration with regard to the  
4 aggravation factor would be that the activity--the criminal  
5 activity is one which acts to deprive citizens of a fundamen-  
6 tal right. Going into the classification of the activity,  
7 the criminal activity involved, if it has the result of  
8 infringing upon fundamental rights of individuals, that also  
9 should be considered as an aggravating factor.

10 And the third item with regard to the aggravation  
11 factor--the aggravating factor in determining the fine levels  
12 would be the level of violence that may have occurred in such  
13 activity.

14 A lot of the discussions concern the white collar  
15 crime of embezzlement or fraud or what have you, but the fact  
16 that violence does come into play whether it be for bodily  
17 injury or property damage, then that also should be a factor  
18 of consideration.

19 I will pleased to answer any questions you may  
20 have.

21 CHAIRMAN WILKINS: Thank you very much.

22 Judge MacKinnon?



1 COMMISSIONER MacKINNON: What are the most frequent  
2 offenses that your members are charged with?

3 MR. GARRICK: That our members are charged with?

4 COMMISSIONER MacKINNON: Yes.

5 MR. GARRICK: The contractors whom I represent  
6 through the ABC I really can't say that there is a frequency  
7 of items that those members are charged with.

8 COMMISSIONER MacKINNON: Bid rigging?

9 MR. GARRICK: Pardon?

10 COMMISSIONER MacKINNON: Bid rigging?

11 MR. GARRICK: That is certainly an item that has--  
12 that contractors have been charged with.

13 COMMISSIONER MacKINNON: Antitrust at all?

14 MR. GARRICK: That would fall under the bid  
15 rigging provisions, correct.

16 COMMISSIONER MacKINNON: Well, that's under the--  
17 but I'm talking about normal antitrust.

18 MR. GARRICK: Probably not a whole lot in the  
19 antitrust area. Bid rigging would probably be the most--have  
20 the most notoriety about it. You may have some environmen-  
21 tal--criminal environmental problems that may occasionally  
22 crop up. I can't speak on specific instances on that.

1 COMMISSIONER MacKINNON: And are you speaking about  
2 violence in labor matters?

3 MR. GARRICK: That is correct.

4 COMMISSIONER MacKINNON: Do you have many offenses  
5 in that area?

6 MR. GARRICK: Yes.

7 COMMISSIONER MacKINNON: You do?

8 MR. GARRICK: Yes.

9 COMMISSIONER MacKINNON: And are they handled  
10 through the National Labor Relations Board, or on a criminal  
11 basis?

12 MR. GARRICK: Both. The National Labor Relations  
13 Board, you can obtain injunctive remedies to try and cease  
14 conduct there, but on the criminal side those are generally  
15 pursued by the State agencies through the State criminal laws  
16 and occasionally by Federal agencies through any potential  
17 violations of Federal laws in that regard.

18 COMMISSIONER MacKINNON: Thanks a lot.

19 COMMISSIONER CORROTHERS: Mr. Garrick, you're in  
20 the Birmingham, Alabama office, is that right?

21 MR. GARRICK: That's correct.

22 COMMISSIONER CORROTHERS: I believe that's near a

1 little town that's called Anniston.

2 MR. GARRICK: Yes.

3 COMMISSIONER CORROTHERS: I had basic training more  
4 years ago than I'd like to remember in Anniston. I can never  
5 forget it even though I try.

6 MR. GARRICK: I've been there about a year.  
7 Previously, I spent about 12 years in Greenville, South  
8 Carolina where I was general counsel for Daniel at that time.

9 COMMISSIONER CORROTHERS: I must say that I just  
10 received this written testimony and was trying to look  
11 quickly through it, concerning the application of guidelines  
12 to the labor related violence, which I guess was your second  
13 issue, was quite interesting as well as startling. I had no  
14 idea the degree of problems in this area.

15 MR. GARRICK: I was in International Falls when a  
16 riot occurred against our company and it was very startling.

17 COMMISSIONER MacKINNON: Are you talking about  
18 Boise Cascade?

19 MR. GARRICK: That is correct.

20 COMMISSIONER CORROTHERS: I certainly agree with  
21 your statement, I think it's on page 9, that the right to  
22 pursue one's livelihood without fear or intimidation would

1 appear to me to be, as you say, as much a civil right as the  
2 right to vote or use public accommodations.

3 This is quite startling. Obviously, we should be  
4 concerned about these issues and should consider them in some  
5 way. I will have to have some time to read your testimony  
6 more thoroughly, but I would hope that we are able to do  
7 something in this area.

8 MR. GARRICK: Thank you.

9 COMMISSIONER CORROTHERS: Thank you.

10 CHAIRMAN WILKINS: Commissioner Nagel?

11 COMMISSIONER NAGEL: Yes. I just wanted to clarify  
12 something. I also just read your statement very quickly.  
13 But is your concern that there is currently inadequate  
14 punishment in terms of the sentences meted out to organiza-  
15 tions convicted of an offense related to the violence? Or is  
16 it the offense of conviction is something other than the  
17 violence, but the violence is part and parcel of the sort of  
18 organizational behavior and, therefore, there should be some  
19 specific offense adjustment?

20 MR. GARRICK: I think it's twofold; first, that I  
21 don't believe that there is adequate punishment in that area  
22 for violence.

1 COMMISSIONER NAGEL: Are they even convicted? I  
2 mean it looks from what I have read that there aren't even  
3 prosecutions or convictions for these offenses.

4 MR. GARRICK: I'm sorry, I missed that.

5 COMMISSIONER NAGEL: Are these offenses being  
6 prosecuted?

7 MR. GARRICK: The prosecutions, the ones that are  
8 outlined in the statement, there are certain State prosecu-  
9 tions ongoing at this time. There are Federal investigations  
10 ongoing. I do not know the results of though because the FBI  
11 has not come out with that yet.

12 The other aspect is sending a message to State  
13 agencies that reinforces the Federal Government's position  
14 against violence of any form.

15 COMMISSIONER NAGEL: Thank you.

16 CHAIRMAN WILKINS: Commissioner Saltzburg?

17 COMMISSIONER SALTZBURG: No questions.

18 CHAIRMAN WILKINS: Judge MacKinnon do you have any  
19 further questions?

20 COMMISSIONER MacKINNON: Was Boise Cascade charged  
21 with any violation of a State law in connection with the  
22 strike in International Falls?

1 My recollection of reading that was that the union  
2 members attacked the corporation for use of non-union labor  
3 in a construction project.

4 MR. GARRICK: Right.

5 COMMISSIONER MacKINNON: Now as Boise Cascade  
6 charged with any offense?

7 MR. GARRICK: No, they were not.

8 COMMISSIONER MacKINNON: I'm aware of the attitude  
9 of the Governor on that matter.

10 MR. GARRICK: I did not know before I received  
11 notice of the statements today that Boise Cascade was even  
12 attending and I haven't spoken with them. I do not know the  
13 subject of their talk--

14 COMMISSIONER MacKINNON: When you mentioned  
15 International Falls, that's the one you were talking about,  
16 wasn't it?

17 MR. GARRICK: That is correct.

18 COMMISSIONER MacKINNON: Thank you.

19 CHAIRMAN WILKINS: Well, Mr. Garrick, you bring to  
20 the table a dimension involving organizational sanctions,  
21 that is violence by number of organizations that certainly  
22 this Commission needs to give serious consideration to as we

1 draft guidelines in this area and we thank you very much.

2 MR. GARRICK: Thank you very much.

3 CHAIRMAN WILKINS: Nell Minow is General Counsel  
4 and is representing the Institutional Shareholders Services.

5 Ms. Minow, we welcome you to this hearing.

6 STATEMENT OF MS. NELL MINOW, GENERAL COUNSEL, INSTITUTIONAL  
7 SHAREHOLDERS SERVICES

8 MS. MINOW: Thank you very much.

9 You have my testimony already. So what I would  
10 like to do is just talk very briefly and then perhaps we can  
11 discuss some of the points in it.

12 I hope you will indulge me and let me just make one  
13 personal note here. I want you to know that even though I am  
14 talking about maybe one speck on one leaf, I'm aware of the  
15 forest that you all are dealing with and I am really pleased  
16 with what you have done.

17 When I was in law school, I worked for both the  
18 State and the Federal prosecutor's office. I have been very,  
19 very interested in sentencing issues ever since then. And  
20 just one small note of irony, when you were first getting  
21 started, I helped prepare some materials for you. I was at  
22 that time in the Justice Department. So I am particularly

1 pleased to be here in a somewhat different capacity today.

2 I am here today to talk about the interest that  
3 shareholders have in companies that obey the law. I've  
4 outlined already in my testimony and I am following in the  
5 footsteps of the President of my company, Bob Monks, the way  
6 that shareholders are twice charged with the cost of criminal  
7 behavior by the corporations. They pay both the prosecution  
8 and the defense as well as the decrease in value of their  
9 share ownership.

10 And we as advisors to institutional investors with  
11 over a trillion dollars of assets, most in equity securities,  
12 are very, very much concerned about this.

13 When you look at an individual who has violated the  
14 law, you look at somebody who faces real personal consequen-  
15 ces and you just don't see that in the corporate context the  
16 same way.

17 Of course, the primary sentencing on all of our  
18 minds today I am sure is Rayful Edmond who was given quite a  
19 severe sentence. And that is something that the prosecutor  
20 in that case announced was intended to be a message to the  
21 community that this kind of behavior was going to have these  
22 kinds of consequences.



1 I recall from the materials that I prepared for  
2 this Commission when I was at the Justice Department the case  
3 of a man convicted of an antitrust violation who was sen-  
4 tenced to public service, which turned out to be the or-  
5 ganization of a golfing tournament and I think that that is  
6 much too often the case.

7 I think that people who testify before commissions  
8 like this often commit the sin of not saying what they want.  
9 So I am going to tell you what I want. When you talk about  
10 mitigating factors in sentencing corporations, I would like  
11 some mention of a corporate structure indicating that there  
12 is some accountability of shareholders in the case of a  
13 criminal violation.

14 I think that is a specific example of the kinds of  
15 evidence of taking responsibility for a crime and preventing  
16 its occurrence in the future that we look for in an in-  
17 dividual or a corporation that has violated the law.

18 And, other than that, I would be happy to talk some  
19 more about some of the items in my written testimony, if that  
20 would be useful.

21 CHAIRMAN WILKINS: I am sure we will have some  
22 questions.

1 Judge MacKinnon, do you have any at this point?

2 COMMISSIONER MacKINNON: No, I don't. Thank you.

3 COMMISSIONER CORROTHERS: I think I have one, Ms.  
4 Minow. You suggest the provision mandating that no director  
5 who has served during the commission of certain identified  
6 crimes would be eligible for continued service on the board.

7 It's been presented to us by others that removal of  
8 directors is appropriate in cases wherein they are engaged in  
9 racketeering or essentially the directors are responsible for  
10 the criminal activity or acted in a criminal manner.

11 Do you think this particular criteria is ap-  
12 propriate or sufficient?

13 MS. MINOW: I would go a little further than that  
14 and I believe we submitted some materials earlier that were  
15 some sample provisions that we would like to see.

16 There are certain kinds of violations of the law,  
17 particularly with regard to pollution occupational safety  
18 that I would include there because I think those are the ones  
19 where the director should take responsibility for making sure  
20 that the company complies.

21 Now I am not talking about petty violations of  
22 their regulations or anything like that. I am talking about

1 criminal activity and for that reason I think the directors  
2 should be held liable.

3 COMMISSIONER CORROTHERS: There was a problem, as  
4 far as I was concerned, in terms of the specifics and you did  
5 respond that this particular criteria is not broad enough. I  
6 didn't see any specifics in your testimony. You say that we  
7 got this earlier?

8 MS. MINOW: Yes.

9 COMMISSIONER CORROTHERS: Was this--

10 MS. MINOW: In a supplemental--

11 COMMISSIONER CORROTHERS: Was it pertaining to this  
12 round of--

13 MS. MINOW: No, but I would be happy to resubmit  
14 it.

15 COMMISSIONER CORROTHERS: Was it the previous  
16 hearing on organizational sanctions?

17 MS. MINOW: It was a follow up to Mr. Monk's  
18 previous testimony, yes, and I would be happy to resubmit it.

19 COMMISSIONER CORROTHERS: 1988?

20 MS. MINOW: Yes.

21 COMMISSIONER CORROTHERS: Thank you.

22 COMMISSIONER NAGEL: I have one irrelevant question

1 and one relevant question. My irrelevant question is are you  
2 related to the distinguished legal family of Newton Martha?

3 MS. MINOW: You bet. I am. As a matter of fact, I  
4 will tell you that Martha and I have a new Law Review article  
5 which just came out 2 weeks ago on the--the subject of the  
6 article is "Shareholder rights and women suffrage", which  
7 shows you how desperately we wanted to write something  
8 together.

9 COMMISSIONER NAGEL: My more relevant question is,  
10 there has been a great deal of talk about the innocent  
11 shareholder and it's always raised in the context of if you  
12 fine corporation proportionate to the loss, that sort of  
13 punishment will basically be borne by the innocent  
14 shareholder rather than by corporate management.

15 And in fact, Bob Monks, I thought, made a very  
16 interesting point when he first testified about his idea  
17 about holding the board of directors responsible.

18 Now the Commission gave great consideration to that  
19 idea, ultimately did not follow it because there were too  
20 many problems and we had a great deal of concern about the  
21 innocent director and basically identifying which was the  
22 responsible director.

1           But, nonetheless, I guess I'd be interested to hear  
2 what is your view on this concern for the innocent  
3 shareholder and how then do we set an appropriate fine given  
4 the corporate structure, which is based on shareholders?  
5 What do we do with that?

6           MS. MINOW: Well, that is a real problem and the  
7 answer to that I'm afraid--there is an answer that goes  
8 beyond your area of jurisdiction. Right now because of State  
9 laws limiting director liability and indemnification there is  
10 really no way to get to the directors and get them to pay  
11 personally.

12           So I think that is a very difficult question and  
13 you're going to have a problem with the fine. Nevertheless,  
14 it is important to keep it as a matter of deterrence. Our  
15 shareholders--I know this isn't a complete answer to the  
16 question, but our institutional shareholders are holders of  
17 every company and even though they may take something of a  
18 bath with a big fine out of one of them, they will be  
19 profiting in the other ones which will see this fine and  
20 refrain from doing likewise, sort of the Rayful Edmond  
21 situation.

22           I don't know what three life sentences does to him

1 that the first one didn't do, but it send that kind of a  
2 signal.

3 Also, of course, to the extent that the company  
4 profited improperly from the criminal activity, they should  
5 have to pay up and that's something that no matter how greedy  
6 the shareholders are for returns I don't think that they want  
7 those kinds of returns.

8 COMMISSIONER NAGEL: Thank you.

9 COMMISSIONER MACKINNON: Billy?

10 CHAIRMAN WILKINS: Go ahead, George.

11 COMMISSIONER MACKINNON: You were talking about  
12 pollution and occupational safety and holding directors  
13 liable. I hear a lot of talk around here about holding  
14 directors liable but in my experience, and it's vast, I think  
15 there are very few cases where directors are liable. The  
16 people that are liable are the officers. Those are the  
17 people that are running the corporation. The directors meet  
18 once a month or so. They don't get down to the hands on  
19 operation of the day to day which are causing these offenses  
20 ordinarily.

21 MS. MINOW: Yes, that's true, but the directors, of  
22 course, are responsible for selecting management and for

1 setting up a compensation structure for management.

2 COMMISSIONER MacKINNON: Yes, but it's just hard to  
3 find criminal liability in that.

4 MS. MINOW: Well, also, I think that the primary  
5 reason for holding directors liable is that if you do so it  
6 will encourage them to do what some companies have already  
7 done in response to criminal liability and that is to set up  
8 a compliance structure which encourages employees to report  
9 any kind of a problem rather than discouraging it.

10 And I think directors are responsible for es-  
11 tablishing that kind of a structure.

12 COMMISSIONER MacKINNON: Well, that's minimal.  
13 When you get down to an actual offense I think you're going  
14 to find that you might not even reach the officer. You're  
15 going to get some low level manager or supervisor that's  
16 doing it.

17 MS. MINOW: Yeah, but how often in that case is the  
18 company itself convicted of the crime?

19 COMMISSIONER MacKINNON: Very seldom.

20 MS. MINOW: Yes, that's why I'm not afraid of  
21 being--

22 COMMISSIONER MacKINNON: The company will be

1 convicted, but not the director. I mean they are so remote  
2 from the day to day operation of those companies that it just  
3 isn't practical to be always talking about directors and  
4 ignoring officers and managers and supervisors and people  
5 that really cause the offenses.

6 MS. MINOW: Well, I think you're right and I was  
7 including, of course, the corporate officers who also serve  
8 as directors in my discussion.

9 But I do think you're right in making a distinction  
10 between inside and outside directors. On the other hand,  
11 ultimately in the case of certain enumerated crimes, and  
12 we've submitted some material on that in the past, I think it  
13 may be appropriate to hold the directors liable, if they were  
14 negligent, if they were complicitus--

15 COMMISSIONER MacKINNON: Let me ask you this, I  
16 have followed this for a long time, can you cite me any cases  
17 where directors have been--where any substantial number of  
18 directors have been held responsible?

19 MS. MINOW: No, and I think that's part of the  
20 problem. I think they should be in some cases. That's what  
21 I'm saying here.

22 COMMISSIONER MacKINNON: Well, if they could have



1 been I think the United States Attorney would have charged  
2 them.

3 MS. MINOW: Well, I'm not saying that they should  
4 be put in jail for these kinds of crimes. I'm saying they  
5 should be ineligible for further service on the corporation.  
6 That was one of my possible examples.

7 COMMISSIONER MacKINNON: That's a theoretical  
8 application, really in my judgment.

9 MS. MINOW: No, I think it's a mitigating factor in  
10 determining the corporate sentence. If they have  
11 demonstrated that they take criminal activity that seriously,  
12 then I think that should be taken into account in determining  
13 the sentence.

14 I mean, you know, you've got the example of Japan  
15 where there is an airplane crash and the president of the  
16 company personally visits each and every survivor and then  
17 resigns. And you just don't see that kind of accountability  
18 in American directors.

19 COMMISSIONER MacKINNON: Well, I don't--I'm not  
20 concerned about the crash in Japan. I am concerned about the  
21 payment of the bribe by Boeing to the Prime Minister of the  
22 country.

1 MS. MINOW: Well, if--Okay. I am too. And don't  
2 you think that the directors play some role in that?

3 COMMISSIONER MacKINNON: I don't know whether they  
4 did or not.

5 MS. MINOW: I think the directors should send a  
6 very strong signal to management and say that we will not  
7 tolerate any violation of the law. And if they are not  
8 capable of sending that signal, then I think they should be  
9 removed.

10 The example that I come back to over and over  
11 again, of course, is Beechnut where they knowingly--the top  
12 management of that company knowingly permitted sugar water to  
13 be sold as apple juice for infants who, of course, don't know  
14 what apple juice is supposed to taste like and couldn't tell  
15 you even if they did, which was bad enough.

16 What really bothered me though was that the  
17 directors of the parent company, Nestle, not only did not  
18 fire these men, but they continued to pay their salary  
19 through the course of the appeals.

20 Now to me that does not send the appropriate signal  
21 to the Beechnut employees that they take compliance with the  
22 law seriously. To me if I were a Beechnut employee, I would

1 say, "Well, sure. Why not?"

2 Now this was a particular frustration to me because  
3 Nestle is a Swiss company and as shareholders there was  
4 nothing we could do, but that's a problem for the laws of  
5 Switzerland and not the laws of the United States.

6 But that's the kind of unaccountability that I  
7 really, really object to and that's something where in my  
8 mind the directors who permitted this behavior to go and  
9 apparently encouraged it should be--

10 COMMISSIONER MacKINNON: But did they permit it to  
11 go on?

12 MS. MINOW: The top management of Beechnut--

13 COMMISSIONER MacKINNON: I'm talking about the  
14 directors.

15 MS. MINOW: The directors?

16 COMMISSIONER MacKINNON: I'm not talking about the  
17 officers.

18 MS. MINOW: No, but by continuing to pay their  
19 salaries through the course of the appeal even though they  
20 admitted that they had done this, I think that was inap-  
21 propriate behavior and they should have been removed if it  
22 had been an American company.

1 CHAIRMAN WILKINS: Well, your testimony has been  
2 very informative this afternoon and we appreciate your  
3 assistance to us.

4 We also appreciate the assistance you rendered  
5 several years ago when you helped us get started.

6 MS. MINOW: Thank you very, very much. If I could  
7 be of any other help, just give me a call.

8 CHAIRMAN WILKINS: Well, you've been a great help.  
9 Thank you very much.

10 Our last but certainly not least witness today is  
11 Mr. John P. Borgwardt.

12 Mr. Borgwardt, we are delighted to have you with  
13 us.

14 He is Associate General Counsel of Boise Cascade  
15 Corporation of Boise, Idaho.

16 Thank you very much for coming today and assisting  
17 us in this difficult matter.

18 STATEMENT OF MR. JOHN P. BORWARDT, ASSOCIATE GENERAL  
19 COUNSEL, BOISE CASCADE CORPORATION, BOISE, IDAHO

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

21 I am John Borgwardt. I am a lawyer with Boise  
22 Cascade Corporation, Associate General Counsel.

1 COMMISSIONER MacKINNON: From where?

2 MR. BORGWARDT: Excuse me?

3 COMMISSIONER MacKINNON: From where?

4 MR. BORGWARDT: From Boise, Idaho, Judge.

5 John Ferry, our Chairman and Chief Executive  
6 Officer has filed written comments with the Commission given  
7 his views and he has asked that I appear before you this  
8 afternoon to comment further on our concerns about these  
9 guidelines that have been proposed.

10 If you don't know about Boise Cascade, and Judge  
11 MacKinnon apparently knows a little bit about us anyway, it's  
12 a forest products company with annual sales exceeding 4  
13 billion dollars. It's one of the Fortune 500 manufacturing  
14 companies. It's the eighth largest producer of paper and  
15 paperboard in North America. It employs over 20,000 people.

16 We have eight paper and paperboard mills in the  
17 U.S. and two more in Canada. We have 40 other manufacturing  
18 facilities located around the country at which we manufacture  
19 lumber, plywood, particle board, and corrugated cartons. We  
20 also have a very extensive network of office supply distribu-  
21 tion throughout the country.

22 We have a number of reservations about the proposed

1 guidelines, but they can be grouped really into three  
2 categories.

3           They fail adequately to distinguish between the  
4 truly culpable organizations and those organizations that  
5 have honestly tried and industrially tried to comply with the  
6 law, but nonetheless, find themselves charged and even  
7 convicted of violations.

8           The guidelines shift the responsibility and the  
9 discretion for selection of penalty from the judiciary, which  
10 is dedicated to an impartial administration of justice, to  
11 the prosecutorial branch, which is an advocate and should be  
12 an advocate, is not dedicated to impartiality and I don't  
13 think ever really should be.

14           Finally, they achieve the effect of punishing the  
15 innocent in the guise of being tough on crime.

16           Let me comment briefly on each of these. First,  
17 the degree of culpability; I don't think I would want to  
18 quarrel with Ms. Minow when she says that there have been  
19 occasions when organizations, and as Mr. Garrick said, not  
20 just business organizations, but labor unions, they have been  
21 culpable of acts that should be punished and should be  
22 punished severely. But not every organization that stands

1 convicted of a violation of Federal law bears the same kind  
2 of culpability that Ms. Minow was referring to.

3           There are a myriad of Government regulations. I  
4 cannot begin to count the ones that apply to our organiza-  
5 tion. I try very hard. I spend my entire professional life  
6 trying to guide my corporate clients into the compliance with  
7 Federal, State, and local regulations. We are actively  
8 pursuing that goal. I think we do a reasonably good job of  
9 it.

10           And yet, on any given day an organization of our  
11 size is probably able to be charged with and prosecuted for  
12 some violation.

13           We are engaged in activities that we have been  
14 doing for years. At the outset of those activities they were  
15 considered not only legal, but they were moral and ethical.  
16 Times change, ideas change, laws change, our behavior changes  
17 as well, sometimes it does not change as rapidly as the  
18 prosecutors or the interpreters would like it to.

19           Regulations are not always written as clearly and  
20 as understandably as they might be. And the prosecutors who  
21 first promulgate those regulations, then interpret them, and  
22 then enforce them are in the first instance interpreting

1 those as they thought they intended to write them, but not  
2 always as those of us who must comply with those regulations  
3 understand them.

4 At best, the compliance with these regulations is a  
5 difficult and a troublesome task that is not always achieved  
6 with perfection in the first instance.

7 Not only are we subject to regulations that are  
8 inadvertently susceptible of violation, in an organization of  
9 any size there are quite often people who are off doing  
10 whatever they are doing despite the best efforts of manage-  
11 ment, directors, and their supervisors and they commit acts  
12 that are not only against company policy, but against  
13 specific instruction.

14 I am not trying to suggest that an organization  
15 should be relieved of its responsibility. I am not trying to  
16 repeal the doctrine of respondent superior. On the other  
17 hand, I am suggesting to you that there may be great degrees  
18 of culpability or a lack thereof in an organization that goes  
19 all the way from clear participation by top management down  
20 to the point where management has done everything it possible  
21 can to avoid those violations and yet still the organization  
22 commits a violation, is responsible for it, and suffers the



1 punishment.

2           The guidelines, as I understand them, do not make  
3 sufficient distinctions between those degrees of culpability  
4 and I am not entirely sure, in response to Ms. Nagel's  
5 comment how do you avoid punishing the truly innocent, I'm  
6 sure that I know how to avoid that in guidelines that will be  
7 applied in a mandatory manner.

8           The way it's done today is that the judge, viewing  
9 all of the facts, all of the circumstances, is able to choose  
10 and to fit the penalty to fit the degree of culpability.

11           Judge Harold Green of this district has commented  
12 better than I possibly can on the inherent shift of discre-  
13 tion from the judiciary to the prosecutor. That shift that  
14 he discussed was in discretion for selection of the punish-  
15 ment for an individual. That discretion is even more  
16 pronounced in dealing with an organization.

17           An organization by its very nature is engaged in  
18 activity that's repetitive in nature. If we do it today, we  
19 probably did it yesterday, and in all likelihood, we will do  
20 again tomorrow. We will do it until something in the  
21 organization changes and that can come about by a change in  
22 our understanding of the law, a change in our understanding

1 of the interpretation of the law, a realization that the law  
2 has changed, or for whatever it may be, but a violation by an  
3 organization is seldom a single violation.

4           If the violation is prosecuted as a violation of a  
5 single act and a single punishment is selected, the punish-  
6 ment is at one level. If it is chosen--if the prosecutor  
7 chooses to take advantage of the wording of the statute or  
8 the regulation and chooses to prosecute for each separate  
9 violation that occurs on each occasion, the multiplicity or  
10 the multiple that applies to the punishment can be substan-  
11 tially increased and, again, that is at the discretion now,  
12 or it will be under the guidelines, that will be at the  
13 discretion of the prosecutor and not of the judge.

14           Again, we are concerned that the application of  
15 that discretion can be done by a prosecutor who is not going  
16 to draw the distinction between the degrees of a culpability  
17 that we think the judiciary does and does very well.

18           In our experience, it is not at all unusual for an  
19 organization to be held accountable for a violation of some  
20 rule or regulation, not because the prosecutor seeks to  
21 punish for that activity, but rather because that is the  
22 activity that can be punished. The motivation is too often

1 the decision by the prosecutor that the organization has  
2 engaged in some conduct that the prosecutor finds offensive  
3 or that the prosecutor's constituency finds offensive.

4           If punishment is sought, there are almost always  
5 violations that can be discerned that the organization can be  
6 charged with and the punishment can be imposed even though  
7 that is not the motive for the activity.

8           The Federal judiciary has been our protection  
9 against that kind of arbitrary application of the criminal  
10 law. We would not like to see that protection diminished.

11           Finally, I would like to observe that if the  
12 guidelines are rigidly adhered to in accordance with their  
13 designed purpose, they do have the effect inevitably of  
14 punishing the innocent more often than is acceptable in our  
15 system.

16           No system can ever guarantee that the innocent will  
17 not be punished, but I suggest to you that we should not  
18 intentionally adopt a system that punishes the innocent with  
19 the thought that by doing so we will encourage those in-  
20 nocence to exercise tighter control over the truly culpable.

21           We are suggesting that, I think, when we suggest  
22 that directors who are not aware or who are not participants

1 in a scheme to violate the law or managers who are not par-  
2 ticipants, or in the case of the imposition of fines, if we  
3 are to impose liability on the organization, and I'm talking  
4 about business corporations primarily because that's what I  
5 represent, the shareholders are going to be penalized for  
6 activity, or they can be, if these guidelines are rigidly  
7 enforced, the shareholders can be penalized for activity in  
8 which the organization is not culpable, management is not  
9 culpable, and yet there will be enormous fines levied upon  
10 those people simply because they have invested in that  
11 company.

12           It's interesting to compare, for example, the  
13 present savings and loan situation. I don't think there are  
14 very many people that would like to step forward in public  
15 who are not representing savings and loan management and say  
16 that what they did was all acceptable and those people should  
17 not be held accountable.

18           And yet, we recognize that if the depositors who  
19 had entrusted their savings to the savings and loans were  
20 forced to forfeit any substantial part of that it would be an  
21 unfair punishment of those people for acts that they had not  
22 committed.

1           There are, of course, differences between  
2 shareholders in public corporations and depositors who have  
3 put their money into insured savings accounts, but the  
4 concept, I suggest to you, is basically the same. These are  
5 people who have invested their own funds, their own savings  
6 in companies that they believe to be honestly run and for the  
7 most part that I believe are honestly run.

8           If they have not been, if there has been true  
9 culpability on the part of the organization, I will not be  
10 among those who will step forth and defend them. On the  
11 other hand, I suggest to you that there are many, many  
12 business organizations that are caught up in the violation of  
13 statutes and regulations, despite their honest and vigorous  
14 attempts to comply.

15           I am not suggesting they should be free from  
16 punishment, but I am suggesting that there should be some--  
17 there should be a great deal of consideration given to the  
18 innocent investor and free him from the kind of punishment  
19 that I think these guidelines will mandate.

20           I understand that you have had a long day. I  
21 suspect that you have heard many of these thoughts expressed  
22 before. There probably has been a great deal of repetition.

1 I am sorry to repeat those, if I have, except I  
2 think it is well that you understand that there are a lot of  
3 us who share some of these concerns and it bears hearing from  
4 a lot of us who do have them.

5 I thank you.

6 CHAIRMAN WILKINS: Thank you.

7 Judge MacKinnon?

8 COMMISSIONER MacKINNON: I assure you that you  
9 haven't repeated generally. There are a couple of items, but  
10 outside of that it's been brand new.

11 Has there been any change in your mind in the power  
12 of the prosecutor?

13 MR. BORGWARDT: I believe these guidelines will  
14 give to the prosecutor a great deal more power.

15 COMMISSIONER MacKINNON: Like what that he didn't  
16 have before?

17 MR. BORGWARDT: He can and always has been able to  
18 select the choice of a single charge of violating a statute  
19 with multiple counts or charging multiple violations, each  
20 one separate counts.

21 The sentencing judge has always had the power then  
22 to either impose a single sentence and have it run concur-

1 rently, or he can do a lot of things that judges can do and  
2 you are certainly aware of that.

3 By these guidelines I think what we're doing is  
4 saying to the prosecutor, you can make those choices. You  
5 can select the crime that you choose to charge or the number  
6 of crimes that you choose to charge and the penalty then will  
7 not be subject to the discretion of the sentencing judge. He  
8 will have no option but to impose--

9 COMMISSIONER MacKINNON: Well, he has though in an  
10 appropriate case. The difficulty is the words "appropriate  
11 case". If it isn't an appropriate case he doesn't. He can  
12 depart in an appropriate case.

13 MR. BORGWARDT: There is--what little I have read  
14 so far indicates that, (a) the judges are reluctant to depart  
15 from the guidelines--

16 COMMISSIONER MacKINNON: Well, they're going to  
17 have to get--they're going to have to learn to do it because  
18 our guidelines are only written for the average offense.  
19 They aren't written for aggravated offenses.

20 MR. BORGWARDT: I'm concerned that the judiciary  
21 sees them as being a lot more restrictive on their discretion  
22 than your remarks say and the few comments that I have seen

1 attributed to the reviewing courts have supported the  
2 restrictions that the district judges now feel that they are  
3 under.

4 This will, of course, take time to work out, but  
5 the guidelines as written and as I think most people are  
6 interpreting them give the sentencing judge precious little--

7 COMMISSIONER MacKINNON: The sentencing--you mean  
8 the prosecutor?

9 MR. BORGWARDT: No, the sentencing judge.

10 COMMISSIONER MacKINNON: Give the sentencing judge  
11 what?

12 MR. BORGWARDT: Very little discretion.

13 COMMISSIONER MacKINNON: He has a lot more sentenc-  
14 ing authority than he ever had before. He could give two  
15 sentences before and both of them--one of them was terminated  
16 within one-third of the sentence by the parole board and the  
17 other one could be terminated immediately by the parole  
18 board.

19 Now the sentence that he chooses is the sentence  
20 that's going to be enforced. So he's got more authority than  
21 he ever had before. Before the Parole Commission set the  
22 limit on every sentence, plus a 10 years limitation in the



1 statute in 4205.

2           You were talking about these, as I take it, the  
3 victims. If you're going to choose between whether the  
4 victim is going to pay the cost or the corporation is going  
5 to pay the cost, in other words, is the victim going to be  
6 the only person, or should the corporation be the victim? It  
7 seems to me that when those situations arise that you have to  
8 go to the entity that made the offense possible.

9           MR. BORGWARDT: Judge, I have not commented on the  
10 part of the sentencing guidelines that assume that the  
11 organization will be required to make full restitution for  
12 any gains that it has gained recovered. I don't quarrel with  
13 that concept at all.

14           I do not quarrel with the concept that the or-  
15 ganization should be responsible for actual harm caused to  
16 the victim. That's a restatement of what I understand to be  
17 the tort law and if there is to be a reinforcement of that  
18 through the criminal process, again, I have no quarrel with  
19 that. It is the penalty on top of that that I am concerned  
20 with.

21           COMMISSIONER MacKINNON: I don't understand your  
22 S&L comparison. Generally there aren't any savings and loans

1 being prosecuted in these times, are there? They are  
2 prosecuting the officers.

3 MR. BORGWARDT: They are prosecuting the officers.

4 COMMISSIONER MacKINNON: Yes.

5 MR. BORGWARDT: I suspect that the reason that  
6 there is no prosecution of the organization is that there  
7 probably under present rules and regulations and laws even  
8 there is no advantage to the prosecution of the organization.

9 COMMISSIONER MacKINNON: I don't think so. I don't  
10 think they've committed offenses. It seems to me that  
11 everything I read about is an offense by an officer of a  
12 corporation or it reflects a diminution in the real estate  
13 investment in the general real estate market.

14 MR. BORGWARDT: Judge, I'm not sure that I'm  
15 qualified to debate that issue with you as to the degree of  
16 culpability of the organization.

17 If the management of those savings and loans are  
18 guilty of violations, my guess is that the organization is  
19 also guilty, again, as being responsible for the officers.

20 COMMISSIONER MacKINNON: I think it's personal  
21 aggrandizement by the individuals--individual officers. The  
22 most that I hear of, they embezzled and defrauded and picking

1 up money on the side for commissions on loans and things of  
2 that character. It doesn't involve the corporate activity  
3 itself. They are entrenching on the corporation.

4 MR. BORGWARDT: Again, I can't debate it. I get my  
5 information from the newspapers and I'm not always sure of  
6 the accuracy of that.

7 COMMISSIONER MacKINNON: Well, so do I.

8 Thank you.

9 COMMISSIONER CORROTHERS: I have one question. You  
10 verbally expressed concern about the punitive impact of the  
11 fine on the shareholders. The written comments reflect that  
12 tying funds to a multiple of profit or harm is sensible only  
13 when the economic interest of the organization are held by  
14 the same persons who have engaged in the illegal conduct and  
15 that to do otherwise punishes innocent shareholders.

16 It has been suggested to us by others that adequate  
17 deterrence requires that the fine be sufficiently high to  
18 prevent the organization from absorbing it as a part of the  
19 cost of doing business.

20 The idea has also been promoted that an appropriate  
21 fine will provide incentive to shareholders to take steps to  
22 obtain in the words of one respondent, "cleaner management"

1 end of quote.

2 Do you feel that this idea has any merit, the idea  
3 that fines could provide an incentive?

4 MR. BORGWARDT: In theory, the American business  
5 corporation is owned by its stockholders and is responsible  
6 to its stockholders and, therefore, the stockholders, through  
7 their vote at the annual meeting, have the power to change  
8 management and the board. In practice, that is rarely the  
9 case.

10 I have seen it once or twice in my career, but it  
11 is--

12 COMMISSIONER CORROTHERS: Why is that so?

13 MR. BORGWARDT: The nature of the organization  
14 being what it is, the stock is generally either very widely  
15 held making it difficult for the shareholders to act in a  
16 manner that truly influences the corporation, or it is held  
17 by a--even with institutional shareholders there are a fairly  
18 large number, there is beginning to be a movement on the part  
19 of some of the institutional shareholders to try to exercise  
20 some voice over the management of the corporations in which  
21 they invest. That is happening particularly in some of the  
22 areas of take over defenses, shareholder democracy, one share

1 one vote. So far, I don't know of any movement that is being  
2 organized that really will transfer control of the corpora-  
3 tion and its activities to the shareholders. It's probably  
4 too expensive a proposition to be able to manage--to be  
5 managed.

6 The simplest and easiest way for a shareholder to  
7 register his or its displeasure with the management of a  
8 company is simply to share those shares and reinvest in  
9 another company. That's what usually happens.

10 COMMISSIONER CORROTHERS: Of course, in the past,  
11 the fines in many cases have been a lot lower than what they  
12 probably be in the future.

13 MR. BORGWARDT: That is correct.

14 COMMISSIONER CORROTHERS: And I guess we will see  
15 in the future whether shareholders look a little harder for  
16 ways of getting the type of control they need.

17 MR. BORGWARDT: The concern that I have again is  
18 not for the corporation or the organization that is truly  
19 culpable. I am suggesting, however, that the guidelines as  
20 drafted do not adequately distinguish between those and the  
21 result is going to be to punish many of the innocent  
22 shareholders and do so under the principle that if we punish

1 the innocent enough they will take control and somehow stop  
2 those who are guilty from committing those crimes. Govern-  
3 ment can't do it. Organizations can't do it. I can't do it.  
4 You can punish me all you want to, I can't stop a lot of  
5 things that are going on and I would hate to see us adopt the  
6 attitude that by punishing enough innocent people we can  
7 force them to go and do something to stop those who are  
8 guilty and I think that's what we're trying to do.

9           COMMISSIONER CORROTHERS: I don't really think the  
10 motive is to punish innocent people. I think what is  
11 happening is they are somehow caught up in the system and I  
12 don't know if we know a way to totally separate them from  
13 either benefitting from the profits or from the results of  
14 what could be profitable of illegal conduct, nor the punish-  
15 ment associated with that illegal conduct.

16           MR. BORGWARDT: You have proposed disgorgement of  
17 ill gotten gains. I don't quarrel with that. You have  
18 proposed compensation for actual harm caused and I don't  
19 quarrel with that.

20           But when you go on and say and let's not worry  
21 about the fact--

22           COMMISSIONER CORROTHERS: When we go on it's then

1 to effect punishment because when you return what you have  
2 taken you have not yet instituted punishment.

3 So your problem is, it's only when we get into  
4 punishment.

5 MR. BORGWARDT: That's right and when we get into  
6 punishment--

7 COMMISSIONER CORROTHERS: I am wondering what do  
8 you do about illegal conduct?

9 MR. BORGWARDT: I don't know. I don't have an  
10 answer, but what we are doing with these guidelines is to say  
11 if we punish the innocent enough, maybe we can force the  
12 innocent to take the proper steps. I don't think we're ready  
13 for that in this country. I'm not ready for it.

14 COMMISSIONER CORROTHERS: Thank you.

15 CHAIRMAN WILKINS: Commissioner Saltzburg?

16 COMMISSIONER SALTZBURG: I just have a statement, a  
17 short one. It is a long day. I've got to say I thought, as  
18 Judge MacKinnon did, I didn't think you repeated anything  
19 we've heard, but I do think that--I am the Department of  
20 Justice's representative on the Commission and a couple of  
21 things you said I thought were--made a more powerful case for  
22 these guidelines than anything I've heard all day.

1 I mean a number of us had been real concerned about  
2 where to draw the line and what kinds of rewards to give  
3 corporations and we've had witnesses prior to you today who  
4 have said that--some who have said there is an extraordinary  
5 amount of corporate crime going on in America and we've  
6 questioned that. Some have said there is very little, that  
7 most corporations are law abiding, and we questioned that.  
8 And your chairman of the board chief executive officer has  
9 written a letter telling us there is really not a problem and  
10 the guidelines aren't needed. And you sat here and I wrote  
11 down, I was just staggered by this, I wrote down what you  
12 said. You said many, many business organizations are caught  
13 up in criminal activity and you said that our prosecutors--  
14 now I admit they are not all perfect, but you said our  
15 prosecutors sometimes prosecute criminal activities and they  
16 get convictions not for those crimes, but because of some  
17 other crime maybe they wanted to prosecute, but they didn't.

18 You know, one of the things in your statement I  
19 found missing was, we may bring charges sometimes. You know,  
20 we may have motives sometimes that aren't always the best,  
21 but we don't convict anybody unless we can prove beyond a  
22 reasonable doubt they are guilty or they confess that they



1 are guilty.

2           And one of the things about these guidelines that I  
3 think you ought to take back to the chairman of the board is  
4 that these guidelines are probably more protection than  
5 anything you have had before because contrary to the tes-  
6 timony that you gave where you talked about the fact that the  
7 prosecutor can add these charges on, the prosecutor can  
8 decide under the guidelines whether or not to add these  
9 penalties and cumulate them and punish you, the fact is,  
10 that's up to the Commission because the Commission to adopt  
11 the guidelines for individuals that group things and that  
12 prevent prosecutors from doing that and tie their hands. And  
13 if the Commission decides to do that for organizational  
14 sanctions, they can do the same thing and they could provide  
15 protections.

16           And the last thing that I wanted to say is that I  
17 think it really for me--you know, it doesn't advance the ball  
18 at all to talk about the innocent shareholders and the  
19 innocent managers and the few guilty people who work for the  
20 corporation. The whole point, you know, from the very  
21 beginning you're trying to figure out how you impose sanc-  
22 tions on corporations is to figure out how to get attention

1 of all the people in the corporate enterprise to make them  
2 give a different answer from the one you gave.

3           As long as the answer continues to be, you know, I  
4 don't know what to do about it, but all I know is that  
5 directors can't do anything because they don't know what's  
6 going on and I can't do anything, I'm just counsel. Nobody  
7 can do anything, but you're not going to get anywhere unless  
8 you just make us disgorge the ill gotten gains, I believe is  
9 the term you used, you're going to get the same reaction  
10 which is we better increase the sanctions because eventually  
11 theory is, and I believe it, the theory is we're going to get  
12 somebody's attention.

13           MR. BORGWARDT: I'm sorry that you--that either I  
14 misspoke or you misinterpreted my words. I did not say that  
15 many corporations are engaged in illegal activity. I think  
16 many corporations are engaged in activity that can inadver-  
17 tently, despite their best efforts and despite their best  
18 intentions, they can be charged with, prosecuted for, and  
19 ultimately convicted of some violations of some rules.

20           COMMISSIONER MACKINNON: Did you say they got  
21 caught up in--

22           MR. BORGWARDT: No, I have in mind, Judge--I have

1 in mind--I've recently been spending a good deal of my time  
2 with OSHA regulations and environmental regulations. I defy  
3 anybody to look at the activities of his or her organization  
4 and say we have absolutely no chance of being in violation of  
5 any of those regulations today.

6 I won't even talk about what might happen tomorrow,  
7 but the possibility of inadvertent violation of just those  
8 two areas, despite the best efforts of everybody in the  
9 company, is very high indeed.

10 COMMISSIONER MacKINNON: I've had some OSHA cases  
11 and I agree with you.

12 CHAIRMAN WILKINS: One comment, let me make, you  
13 paraphrased Judge Green and I think one other witness  
14 commented about the perception of the shift of power from the  
15 prosecutor--from the court to the prosecutor. And I take  
16 exception with that. I think those who make that assertion  
17 do so from either a lack of understanding of the operation of  
18 the guidelines, or in attempt to distort how they really work  
19 and I do not accuse you of doing that at all, sir. I don't  
20 mean that.

21 But let me just tell you just so the record is  
22 clear, we struggled with this mightily because a guideline

1 system can do just that and we don't want that to happen.  
2 Prosecutors have a lot of authority. Someone embezzles a  
3 corporation or an individual \$10,000 every 30 days for 12  
4 months, the U.S. Attorney in the past would indict one count,  
5 \$120,000, maximum sentence 5 years, or 12 counts, \$10,000 per  
6 count every 30 days, the maximum sentence 60 years. Now  
7 that's a lot of discretion.

8 Under the guidelines it doesn't matter how the  
9 indictment is phrased, if you steal \$120,000 you are punished  
10 for \$120,000.

11 So in many respects this discretion we keep hearing  
12 about of the prosecutor has been significantly reduced in  
13 many areas.

14 But in any event, let me say too that we are not  
15 wed to these guidelines that we put out. Many areas--there  
16 can be legitimate concern about them. Had we written  
17 something in a mamby pamby fashion or just some general  
18 statements, I doubt if you would have made the trip from  
19 Idaho to Washington to help us with this matter.

20 But because we have written several options and in  
21 concrete form, we got the attention of a lot of people and  
22 that's what we needed because we need a lot of people's help

1 because this is a very, very difficult area.

2           You have brought home to us the struggle that we  
3 are involved in and that is how do we distinguish between the  
4 corporation that is heavily involved in criminal activity  
5 from the top management to the bottom and the corporation  
6 that does everything it can to prevent crime, to be a model  
7 citizen, and yet, there is a rogue employee out there for one  
8 reason or another commits a crime in the name of the corpora-  
9 tion.

10           Now those are the two extremes and that is what we  
11 are struggling with and we are appreciative of your assis-  
12 tance to us to help us find the right answer.

13           COMMISSIONER MacKINNON: Billy?

14           CHAIRMAN WILKINS: Yes, sir.

15           COMMISSIONER MacKINNON: You were talking about  
16 before under the old system there could be 30 counts and the  
17 judge doesn't have to give them any sentence, or could give  
18 any sentence he wanted to. Well, of course, these guidelines  
19 and the action of Congress are an indictment of district  
20 court judges. That had to be corrected.

21           So to that extent, the rule now is that he has to  
22 give an appropriate sentence to get away from this wide

1 disparity and there isn't anything we can do about that. But  
2 that's the result and that's the cause and these people that  
3 you hear talking about the guidelines interfering with their  
4 judgment, sure they do. That's what Congress provided and we  
5 can't do anything about it.

6 The other thing I was going to ask you was, how  
7 does your corporation in size compare with Warehouse [ph.]?

8 MR. BORGWARDT: We're a bit smaller.

9 COMMISSIONER MacKINNON: I appreciate your problems  
10 in Minnesota too.

11 CHAIRMAN WILKINS: Thank you very much, sir.

12 In keeping with our policy, we invite anyone now  
13 who has not testified and who wishes to testify to come  
14 forward.

15 [No response.]

16 CHAIRMAN WILKINS: Having no takers, I declare this  
17 hearing adjourned. Thank you all very much.

18 [Whereupon, at 4:15 p.m., the hearing adjourned.]