GAS

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON PROPOSED AMENDMENTS

TO THE SENTENCING GUIDELINES

United States Courthouse,

Washington, D.C.

- - -

March 5, 1991

9:30 a.m.

BEFORE:

WILLIAM W. WILKINS, Chairman
JULIE E. CARNES, Commissioner
MICHAEL S. GELACAK, Commissioner
GEORGE E. MacKINNON, Commissioner
PAUL L. MALONEY, Commissioner
A. DAVID MAZZONE, Commissioner
ILENE H. NAGEL, Commissioner

MILLER REPORTING CO., INC.
507 C Street, N.E.
Washington, D.C. 20002
(202) 546-6666

C O N T E N T S

MILLER REPORTING CO., INC.
507 C Street, N.E.
Washington, D.C. 20002
(202) 546-6666

P R O C E E D I N G S

CHAIRMAN WILKINS: Let me call this public hearing to order.

This is another in a series of public hearings and meetings that the United States Sentencing Commission has held over the past 5 years. Today, we will be addressing proposed amendments of the individual guidelines, amendments that have recently been published in the Federal Register, and this is part of our public comment period, which will end in about another week or 10 days.

We are delighted to have a number of very distinguished witnesses on our witness list who are prepared to testify. I will tell all of those in attendance and anyone else who arrives that, at the conclusion of their testimony, anyone and everyone is welcome to come forward and offer such testimony and comments as you may deem appropriate.

Our first witness this morning is Paul Borman. Mr. Borman is Chair of the ABA Criminal Justice Section Committee on Sentencing Guidelines. We know Mr. Borman from past experience, and we know he is a very able public defender in Detroit.

Paul, I understand that you have been tied up in a

trial for some time now, so we are delighted that you are back with us.

MR. BORMAN: Thank you, Judge.

I would like to say hello to the new members of the Commission, I have not had a chance to meet yet, Judge Mazzone, Commissioner Carnes I met previously when she worked there, and Mr. Gelacak I met yesterday, and the rest of you know me probably too well.

At today's hearing, I am going to testify in behalf of the American Bar Criminal Justice Section. As you are well aware, the American Bar Association has over 350,000 members throughout the country, and I am the Chair of the Criminal Justice Section Committee on the United States Sentencing Guidelines.

We established this committee, because we recognize the importance of the Sentencing Guidelines to the Federal Criminal Justice System. Our committee is made up of attorneys from every aspect of the system, including prosecution, defense, judicial and academic. We have had the benefit of two extended discussions on the 1991 proposals, most recently on last Thursday, February 28th.

As many of you may remember, our ABA committee has

testified before you on numerous occasions concerning the process by which the Commission promulgates guidelines, the substance of the guidelines and the overall role. We believe this continuing dialogue that we have entered with you over the years has developed into a mutual respect on both sides, which significantly benefits the criminal justice system.

The story or the saga, as I call it in the testimony, of the sentencing guidelines has been followed with great interest by the ABA, because it impacts every criminal defendant convicted in the Federal courts, and also because the ABA, as you are well aware, has developed standards on sentencing by which we evaluate the guideline proposals.

The Commission's 1991 amendment proposals, 37 numbered amendments, covering 51 pages of single-spaced, double-column print, are the sixth set of amendments to the 1987 Guidelines. We believe the Commission should approach the amendment process with a stop, look and listen attitude, and then, only if necessary, proceed to implement guidelines with great caution.

Our committee, as I mentioned, composed of practitioners everywhere in the Federal criminal justice system involved in the day-to-day use of the guidelines, firmly

believes that today, almost three and a half years after the initial set of guidelines were handed down, after hundreds of amendments and many, many series -- I believe there were three in 1988, one in 1989, and one in 1990 -- of amendments, that most participants in the Federal criminal justice system, including judges, prosecutors, defense attorneys, and defendants, really do not clearly understand the way they should how the guidelines operate, and yet no lawyer can walk into a Federal courtroom to do proper representation of his client, whether it be the United States or as representing a defendant, unless they know the guidelines well, because the impact of the guidelines is from the time of the arrest and you must know them at that time.

So, we believe the value of the Commission's work really must be measured by quality, and not quantity, and to change an old phrase, we believe that "if it ain't broke, don't fix it." We really strongly believe that if you find that there is no urgent necessity, on compelling need to put in another guideline in a particular situation, then don't amend it.

We are thankful to have this process right now. We know that, as you go through the year, there are matters that

come to your attention and these are the proposals that are now before us. But if you don't think there is a necessity, then please don't pass more amendments, because, as you well know, the amendments don't all replace other provisions. Frequently, they add onto provisions. Also, amendments occur at different times, and so crimes occur at different times.

I was just talking with Vicki Portney, from the Justice Department, and we have had comparable cases where amendments have included crimes charged over 2 years, which includes three sets of guidelines that are applicable to that particular defendant. Well, unless you're really schooled and up on everything, you're not even going to know that there are three sets of guidelines applicable. If you know that, then you still have to spend the time to go and read them and understand them and then apply them.

We recognize, as I think everyone does in the criminal justice system, that the Commission really knows more about the guidelines than anyone else, but that does not help the foot soldiers in the criminal justice system who are in the courts.

We applaud the entire Commission, really, for accepting the ABA's invitation to hold a working meeting at

our guidelines seminar in the District of Columbia this May. We think that will facilitate a better understanding by the practitioners of the guidelines. At the same time, if we have one principal message, it is we strongly urge you to spend a major part of your time and budget in setting up multiple guideline training programs all around the country, and we believe it is best with human teachers, and not with video cassettes or things like that.

The interplay is important, because not only will you and your staff teach, but you and your staff will learn what is going on, and we applaud the Sentencing Commission for having Commissioners and staff go out during the last year and a half, I believe, to various parts of the country to find how certain aspects of the guidelines are working there. But at the same time, we think by doing teaching programs and bringing in these individuals, that you will help educate people about the guidelines and also avoid creating more problems and helping solve many problems.

Somewhat humorously, I point out that Gen. Schwarzkopf did not run the war sitting in the Pentagon in Washington, he got out where it was going on, and we think that, too, will be the best way to deal with the guidelines, which

are an important critical part of the justice system. They are here to stay, they are really the essence of criminal practice.

With regard to these amendments, we worry that, as people come close to learning where they are at in the amendments, "shazam," as they use the term for those who are old enough to remember Captain Marvel, you get new amendments, and then you have to learn those, as well, and apply them. So, this is the message.

A week ago, I was preparing this testimony, and the New Yorker came out and there was a cartoon in it which shows someone, and the caption says, "He read for 2 straight hours, without any training," and I said, you know, just put in the guidelines and this is something where they are difficult, but they are critical, and we really hope that you will accept this offer. We will help you, if you wish us to help you, in terms of setting up training programs, but there are many, many people out in the field who must know the guidelines who don't.

With regard to the 1991 amendment process itself, we want to compliment the Commission for making better efforts in providing additional time for comments. We would seek 90

days, but we have got more than we had last year, and we appreciate that fact.

We appreciate the fact that the Commission has provided background reports tied to some of the specific amendments, and we appreciate the fact that you are asking early on for comments on matters that are going to be coming up next year, because we and you well know that if we want to have any impact for next year, we had better get the stuff in by May of this year, because that is when the hard work gets done.

With regard to the prison impact statement, we have looked for it, we cannot find it. We hope that it will be coming soon, because it is a necessary component of the Commission's proposed amendments, as you go through not just the general impact statement, but with regard to each of the amendments.

Further, we urge the Commission to study in depth certain key aspects of the guideline program that our experience has shown requires examination, for example, the importance and impact of offender characteristics, and the issue of mitigating roles, which ties in with Amendment 11, and the study that Commissioner Carnes speaks about under-

taking next year.

With regard to the staff reports, we would like that next year they could be more accessible to interested parties. Perhaps you could publish a reasonable number of copies that could be sent to Federal courthouse libraries and to groups that traditionally follow the Commission's work. This would be similar to the organized crime proposals that were sent out throughout the country.

With regard to some of the most recent amendments that were put forward, some do not have the reports. Now, we recognize that not every amendment requires a report, but, at the same time, providing under reason 4, as this provides "a more appropriate sanction," we believe does not justify a particular amendment.

With regard to some of the underlying amendments, the real offense issue has been sort of out there from the time the guidelines first came out, and we hope that you will have time to address this issue really thoroughly. I know that it is a modified real offense system that we are working in. We feel that some of the guidelines are working toward more of a real offense system than a modified one, and we hope that the Commission would do a study with regard to

where that is going, and to allow a significant discussion on that issue before it continues ahead on these guidelines.

With regard to one of the studies which I read, the bank robbery report, we believe really that it does not support the conclusion that the bank robbery sentences under the guidelines are too low. I believe there is only 4 or 5 percent that were at the top of the guidelines, and 1 or 2 -- I do not have them in front of me -- that went above the guidelines, which indicates that there is no great urgent need to go above.

If you have the statistics, we would like to see them. We understand that there are going to be more statistics forthcoming with regard to bank robbery guidelines. We are not taking a position one way or the other with regard to that, other than the fact that we are seeking a report that would justify the particular amendment.

The Commission, from the outset in its initial 1987 publication, indicated that departures will form the most significant type of supporting data, and we urge that the Commission hold back on a lot of amendments and let the departures happen. For example, last year, you passed amendments in the area of bank robbery, I understand.

Now, by the time these amendments get out and become effective, by the time an indictment happens on a crime, I would say that there are very few crimes where there are convictions at this time from last year's amendments to show a need for another amendment in an area that was amended last year. It just is not time, in terms of the lag time in prosecuting offenses.

The written submission here contains comments about several proposed amendments. For the most part, the comments flow from the broad process arguments that I have advanced.

I want to note our interest and willingness to work with the Commission on Commissioner Corrothers' proposals, as well, on alternatives to incarceration. We have seen that report and we know that it will be dealt with in the next amendment cycle, along with Commissioner Carnes' working group, I believe, on mitigating roles -- and I don't know if Commissioner Nagel's working group on plea bargaining is continuing -- but these are areas that we would be willing to work with you, because I believe that the mutuality of our interest in the Federal criminal justice system with yours will produce greater benefits, as we work together early on concerning the 1992 cycle, and also with regard to this cycle.

I want to highlight just a few of the proposed amendments, because I think that they raise issues that are not prosecutor defense, but are really what I would call general process issues.

If Congress passes a new law which increases the maximum penalty for an offense, that legislation may provide greater scope for the court to depart upward from a guideline range that already provides adequate punishment for the hardline case. The ABA sentencing guidelines note that specifically, that merely because an offense is increased or has a large maximum does not mean that the sentences should be increased to reach that maximum.

We all know of egregious cases where a maximum may be appropriate, but that does not mean that because legislation is passed, that that justifies that. We believe that there must be further underlying data that will support an increase in that situation.

With regard to Item 7, I know you are going to hear about this from the Justice Department, because the primary reason advanced for moving that guideline through is that the U.S. Attorneys are not following the Thornburgh memorandum named after the Attorney General of the United States. We

believe that the Commission should bring this matter to the attention of the Justice Department, rather than to supervise the Justice Department, because the Supreme Court placed the Commission in the Judicial Branch and not the Executive Branch.

Further, and more importantly, the U.S. Attorney in the field, in the pit, must utilize in charging what is readily provable, and it's difficult for someone sitting back looking at it, without being in the middle of the case, to arbitrarily second-guess a U.S. Attorney on their decision-making in what to charge.

With regard to Item 11, as I pointed out, we appreciate the Commission's willingness to publish this request. We hope that it is not limited to drugs, because, for example, if Michael Milken had a secretary who was involved in some of the things, she or he might well be in this similar situation, like a mule in a narcotics case, and a minimal participant really, as we all know, is sometimes unjustly punished, because of guidelines or the one-time in a narcotics case who was a conspirator, whereas, the big person gives cooperation and gets less than the one-time mule gets. These are things that you are aware of, we know that, and we

appreciate you publishing proposal Amendment No. 11, which is dealing with that matter, and we hope you will take it up and deal with it. Item 15, obviously, deals with that, as well.

With regard to misdemeanor offenses, we are not criticizing the ABA writing guidelines for every misdemeanor offense. We are questioning whether this particular one requires a particular guideline. Obviously, from a general point of view, writing additional guidelines is something that we are interested in, but we are not taking a stand against any such thing, but again, is it necessary, is it urgent, is it going to fix it, or is it going to put another glitch in there.

With regard to the in-depth study on guns, again, the question is does the staff report really support the proposal. We see a lot of mention that the ATF requested this, the ATF that, a letter from a Federal district judge. These are components of studies supportive of guidelines, but we question whether they provide the general background to do a comprehensive overhaul of a provision that is going to impact very largely in all of the Federal districts, because there are so many gun offenses going through there.

A major question with regard to Item 31, if you do

create a Category 7, is that going to move up the career offender and the armed criminal automatically into that new category. That isn't specifically stated there, but that is something that we wonder about.

With regard to the guideline that talks about the preponderance of the evidence standard, granted that most of the courts deal with that, but we believe that the Commission, while it is the supreme guideline writing authority, is not the supreme court of sentencing, and that that issue best be left to the Federal court system. It is in the circuits and it will probably get to the Supreme Court.

Other than that, I thank you for the opportunity to testify. I have followed the Commission's work with great interest during my "imprisonment" in Detroit for the last 6 months, and on behalf of the ABA, I say that we are here to work with you, and the mutuality between our organizations is something that I hope will continue in a constructive way, and I know it will. I know it will.

If there are any brief questions, I would be glad to answer them.

CHAIRMAN WILKINS: Thank you, Mr. Borman.

Let me say quickly, over the last 5 years, since

November of 1987, the Commission has had an extensive training program ongoing. Indeed, seldom does a week go by that some member of the staff or this Commission is somewhere in the United States training, and I think because of this, the success of the guidelines has been more than many expected.

Now, the problem we have is that we go where we are asked to go, and if you would like to put together a program of Federal defendants in a regional program or anything you and your colleagues could come up with, let's get together and work out a schedule and we will provide the training resources to go to you, if we can work it out logistically.

MR. BORMAN: I speak on the ABA, so it would really be a program for all practitioners, and we appreciate that, because we know that there was the trainers program about a year and a half ago. When you came early on stream, there was a lot. Recently, I know there has been instances, but I believe, just from hearing what the practitioners say, that there is a real need for it, and I appreciate what you are saying, Mr. Chairman, and we will get back to you on that.

CHAIRMAN WILKINS: Thank you.

Any questions from Commissioners on my right?

COMMISSIONER CORRUTHERS: I have a comment.

CHAIRMAN WILKINS: Commissioner Corruthers.

COMMISSIONER CORRUTHERS: We always appreciate your comments, Paul. I just have a comment that I think we share your opinion, in general, that we ought to go as slowly as possible with the amendments and place our concentration on implementation of the current guidelines and the study of them. I think your comment indicates that the study is interrupted in some cases too quickly.

I think we are moving in the general direction that you mentioned, though. It is important to recognize the benefit to our amendment process that the hotline provides. We received very meaningful comments from the probation officers, whose job it is to implement the system.

If we find that a guideline is not working as intended, then, of course, we need to fix it as quickly as possible prior to getting experience. But I think, overall, your comments are valid and we are moving in that direction.

CHAIRMAN WILKINS: Any questions--

COMMISSIONER MacKINNON: Let me say one thing on minimum sentences, where Congress has provided a mandatory minimum. I thought you made just a slight suggestion that we

shouldn't get too far beyond that. We are stuck with the necessity for proportional sentences, and the minimum must necessarily be the minimum offense and, consequently, we have to make adjustments up above, even though we haven't done it before.

MR. BORMAN: Judge MacKinnon, one thing I forgot to mention is we appreciate the fact that Judge Wilkins did write the Congress, urging them not to enact the additional mandatory minimum. We think that the Sentencing Commission is the appropriate body to enact sentences.

With regard to the point about minimum, we recognize that when there is a mandatory minimum, we must deal with that. What we are talking about is when they create an increased maximum. I believe that in Amendment 1, it went from 4 to 15 years, and that was the basis for the Commission raising the guideline in that area.

CHAIRMAN WILKINS: Not raising, just publishing for comment. Just because we publish it for comment does not mean that we are locked in to passing an amendment.

MR. BORMAN: That is why we are here.

CHAIRMAN WILKINS: Right, which leads me to tell you about prison impact. We are not going to do a prison

impact on these amendments we published, until it looks like we are coming close to promulgating them, because it is a very exhaustive effort to go into this prison impact study and we don't want study proposals that aren't going to see the light of day, but we will do that before it goes to Congress, of course, and it will be available to you.

Any questions from the Commissioners on my left?

COMMISSIONER NAGEL: I just wanted to echo Judge Wilkins' sentiments and thank you once more for your continuing participation and thoughtful comments.

With regard to the plea negotiation study, just so you are apprised of where we are, we are in the second phase, and when that is completed, we will certainly hope to sit down together and sort of see what the data show and then what proposals to make, if any, so that is where we are.

CHAIRMAN WILKINS: Anyone else? Paul?

COMMISSIONER MALONEY: Thank you, Mr. Chairman.

Paul, I appreciate your remarks. I have a question with regard to how you believe the Commission ought to deal with the increases in the statutory maxes, when presumably we have guidelines on the books now which are based on the statutory maxes as it then existed, and we have a clear

intention from the Congress that the seriousness of a particular offense, whether it be the sex offenses that you referred to, which is Amendment 1, or in bank fraud or in alien related offenses, that this Commission should not immediately turn its attention to revising the guideline to reflect congressional intent that these offenses that are viewed more seriously in 1991 than they were perhaps the last time they were amended in years past.

I am a little bit -- what would you proposes for us to do, when we are faced with an increase in an increase in a statutory maximum which clearly, it seems to me, somehow implicates a change in the guidelines?

MR. BORMAN: Well, I believe that the statutory maximum increase is to deal with the egregious case, the S&L owner who bilked billions or the sexual offender who, you know, did really -- you know, the Willy Horton type analogy of the horrible case, an individual that society feels created a situation that must be answered. At the same time, I don't think that is telling the Commission they should raise it for everyone in all those situations.

In other words, if a judge writes a letter saying I wish I had more room to depart up on a particular case, I

believe that is why Congress passed something like that, but I don't think that means you should change the guidelines which apply to every case, because of that. I think if Congress says to the Commission -- although I don't like the idea of Congress telling the Commission what to do, but I think that if you have this increased sentence and let that go for a couple of years that Congress passed, and you see that there are departures and if there are a lot of upward departures showing that the judges, as well as society, feels that they should go up, then at that point you may want to raise the guideline. But ab initio, just to say because Congress increased it for the worst case scenario, that you should raise the guidelines, I don't think necessarily follows.

COMMISSIONER MALONEY: I take it from your remarks that you don't see a relationship between raising the statutory maximum and the Commission's responsibility to raise the hardline as a result of that?

MR. BORMAN: No, I don't. I think if you get departures after that goes through, then I think it shows that there is a need to raise the Commission's guidelines.

COMMISSIONER MALONEY: Thank you.

Thank you, Mr. Chairman.

CHAIRMAN WILKINS: Thank you, Mr. Borman.

Our next witness is a most experienced and highly regarded United States Attorney from the Middle District of Tennessee. Mr. Joe Brown is also the Chairman of the Attorney General's Subcommittee on Sentencing Guidelines.

MR. BROWN: Judge Wilkins and members of the Commission, with me is Bob Edmunds, a U.S. Attorney from Greensboro, North Carolina, who is also a charter member of the Guidelines Subcommittee.

CHAIRMAN WILKINS: Mr. Edmunds, we are glad to have you with us, as well.

MR. BROWN: If there are any hard questions, he will answer them.

[Laughter.]

I really appreciate the opportunity to appear before you all today on behalf of the Department of Justice. These amendments cover a number of important things, and we commend the Commission for getting them out early, so that we have had adequate time to look at them.

I would hope that, as Mr. Borman pointed out,in the 37 single-spaced pages, if there could have been some bold

headings for those with tired eyes, it is sometimes kind of hard to pick out the amendments from the printing, I know that is a detail, but it would help.

CHAIRMAN WILKINS: We will make a note of that. We are limited to some degree by what the Federal Register will do in printing, but you are right, we need to do all we can to ease the chore.

MR. BROWN: Even an index would help.

I would like to highlight a few of the more important proposals in my statement today. In the area of criminal history, firearms, reentry of aliens, these proposed amendments will significantly improve the guidelines from a law enforcement standpoint, and we urge the Commission to promulgate final guidelines along the lines you have proposed.

The department believes that the amendments affecting financial institutions, institutional fraud and substantial assistance either do not go far enough or may crate some new problems, and I will cover those in a little more detail.

On criminal history, Category 7, Amendment 31, you have proposed a new criminal history Category 7, to provide increased sentences for offenders with extensive criminal

history. We strongly believe that this new criminal history category should be adopted and is needed to deal with serious recidivism.

Under the current guidelines, we are capped out at a criminal history score of 13, and anything more than that is all lumped together in Category 6. I think we have seen a number of cases where defendants have criminal histories well in excess of 13. We believe that this new level will assist the District Courts in handling these more serious offenders.

Of course, the judge is not bound by them, and they may depart now. However, the judge is not bound to depart, departure or the failure to depart is not appealable. I think even the defense bar may in some cases feel that Category 7 may be appropriate, because in some cases when judges have tended to depart, they have tended to depart very substantially, and we believe a new Category 7 will help.

There are three alternatives proposed in scoring the new criminal Category 7. We generally favor the third, which would provide for a criminal Category 6, with 13 to 15, and then the 7 with a 16 to 18, with the possibility of departure thereafter. We believe this is consistent with what was done in the earlier guidelines and would be appropriate

and easy to follow.

One of the questions asked was what would you do with the career offenders, whether you would treat that as being moved up to a Category 7, or left at Category 6. I think we generally favor leaving those at Category 6, those are substantial sentences already, unless the defendant has earned a Category 7 in his own right. So, the artificial move we would say leave at 6, but if he has earned it in his own right, fine, he is entitled to a 7.

On related cases, this is an area that obviously the Commission has spent a good deal of time with, and we believe that any of the three proposals would work. We favor, I believe in this case, the second proposal, Option 2, which -- all of them provide, of course, that offenses are separated by arrest, someone is arrested -- commits an offense, is arrested and goes out and commits another one, that those would not be treated as related.

Option 2 would also then say, as I understand it, that you would not treat as grouped, you would treat as related those that would not group. You wouldn't group for guideline purposes, then, they would not be considered related. We believe that this is consistent with what

practitioners are used to. We are beginning, I think, to get used to the grouping rules, and hopefully we do understand the grouping rules now, and this would be consistent with that approach.

We do believe that there is a need for change in this area, because the prison system now lumps together too many related offenses that are related simply because of accidents of geography or timing, in that they happen to be sentenced before the same judge at the same time, and we believe that should not be necessarily related. If they would not group or would be treated as separate offenses for guideline purposes now, then we think they should be treated separately for the recidivism statute.

The firearms statute, which is Amendment 22 and several related amendments, we believe that the Commission's proposal in this area is a significant improvement. This would consolidate numerous firearms guidelines and some which have missing gaps in them into a consolidated set of guidelines for firearms. Several stand out, I think, as being very effective from a law enforcement perspective.

It would improve proportionality in sentencing, by creating several new categories of sentences for those

offenders convicted of violent felonies or drug offenses, but who have not yet earned the armed career criminal status of 924(e).

Judge Wilkins, you and Commissioner Nagel know that there was some discussion yesterday at the Violent Crime Summit about cliffs. This is one of those cliffs, and I believe that the Commission's proposal on this, to even out or increase some of those serious violent offenders who have not yet reached the full-blown 3 offenses would be helpful and would increase proportionality, so you don't have that sudden cliff when you reach the 3.

The Commission can fill in and has filled in the gaps, and by doing this, we believe that you should continue to do so, by providing for these intermediate armed career criminals. I shudder to say "junior armed career criminals," but somewhat in that area.

The proposed firearms amendment would also increase the base offense level, of course, for the receipt, possession and transportation by convicted felons to either 14, 15 or 16 level. For the defendant who has used or possessed the firearm solely for sporting purposes, there is the decrease down to the 6, 7 or 8. We welcome this proposed increase for

convicted felons, because we do believe they pose a serious threat to the safety of the public.

The current level for convicted felons is not sufficient, from a law enforcement standpoint, for punishment and deterrence, particularly in light of the sporting purpose reduction. Congress has set the statutory maximum penalty for this offense at 10 years, and convicted felons, as I pointed out before, is one of the more dangerous groups that we have.

Also, there are lawful means for convicted felons to possess firearms, through the expungement of state statutes, through the provisions of the ATF, those convicted felons who have shown that they are worthy of that can have their rights restored. If they choose not to have those rights restored, but to possess firearms in violation of the law, then we believe that they need to be punished appropriately.

We also believe that providing tables for increased number of guns is appropriate, too. At the present time, the number of guns really only affects in trafficking, but a convicted felon who possessed a stash or a number of firearms is certainly more dangerous than a convicted felon who possesses a single firearm, we believe.

So, we urge the Commission to adopt these changes. This is a comprehensive set of guidelines involving firearms. There may be some additional refinement. These concern relatively minor points, and we will be submitting additional written comments to the Commission on those, but we are very pleased with the proposals in that area right now, particularly in the violent crime that we are all particularly concerned with now.

One of the topics that has received among the most comment from U.S. Attorneys to our subcommittee has been the reentry of deported aliens, particularly those who reenter after being convicted of serious or aggravated offenses. We believe that the Commission's proposed guideline on this, which would provide a specific offense characteristic enhancement of 20 levels, while steep, is appropriate. These are individuals who have entered the country, been convicted of an aggravated felony, deported and then have reentered. These are among our more serious offenders, and there needs to be a very strong message that these individuals should not come back into the country.

Very often, the experience of the U.S. Attorneys has been that these were drug dealers, they have been

convicted and caught once of drug dealing, they are back in the country, and the only reason they are back is that they are going to be dealing drugs again, it is just that we didn't catch them with drugs, but we caught them back in the country, and having once committed an aggravated felony, they should understand that if they come back, they are going to face very, very stringent punishment. I think Congress, in providing for the 15-year maximum punishment, has indicated that, and the message of the Commission I think is very carefully followed. We recommend, in particular, the 20-level specific increase under 2L1.2(b)(2).

The fraud involving financial institutions, that is Amendments 4, 5 and 6, obviously, this is an area which has received a considerable amount of congressional attention over the past years, with the savings and loan an bank fraud, and the size of frauds have increased. What used to be considered a major fraud is now, I think in many cases, simply a routine fraud. I can remember when I thought a $100,000 bank fraud was an astronomical figure, and now it is almost de minimis, which is, I fear, a sad commentary on our financial institutions.

Congress has very definitely addressed this area.

They have increased maximum punishment by as much as 15 times. Since 1988, there have been substantial increase, the drug kingpin statute, with all of these Congress I think is sending a message that it wants these financial institution crimes treated more severely.

I know the Commission addressed this initially and did, in fact, in white collar crimes, initially provide for imprisonment, where imprisonment had not been used before. I believe, with the message Congress is sending, though, that we even need to look at that further. In section 2504 of the Crime Act, Congress increased the maximum imprisonments from 20 to 30 years for 10 major Title 18 violations, and directed the Commission to set guidelines at certain levels.

Our complaint, I suppose, in many respects is that the Commission has perhaps not gone far enough, and also that the Commission may need to round out some of these cliffs. We have the direction to set the offense level at not less than 24, where the defendant personally benefits more than $1 million. It seems, again, that we have a cliff there and there should be some consideration as to those that personally benefit somewhat less than $1 million, and also for those that benefit for more than $1 million.

The financial kingpin statute has a minimum mandatory of 10 years. The Commission basically, by its guideline, has set out that the 10-year minimum mandatory, in fact, would be the maximum sentence. We believe that, in this area, the Commission needs to study this and consider having guidelines that would provide for sentences above the 10-year minimum mandatory, rather than simply making the minimum mandatory also the maximum sentence.

We believe that, generally, there is an inadequate treatment in this area. The base offense penalties have stayed the same. The Commission has addressed, in part, Congress' increased penalty by providing additional levels over 4160 million. Those are very rare cases. I think that the Commission needs to take another look at the hardline cases or what is becoming, I suppose, escalated hardline cases, and that perhaps study the base offense levels, in general, and the enhancement, in general.

There is a feeling among many U.S. Attorneys that when you get into those higher levels, you can steal an awful lot of money for one level and that there needs to be something done, either to increase by two levels in some of these higher levels, or take a look at the whole structure.

But it does seem that when you can sort of jump from $160 million to -- I have forgotten what the next level is -- $500 million, it is a lot of zeros for a country boy. But that is a concern. It is amazing what people can steal these days.

Congress, in directing the setting of levels at no less than Offense Level 24, the Commission has basically just done that, and I think the direction of Congress, though, was to set it at no less than 24. Again, we think there is a cliff there at the 24 level which the Commission needs to take a look at, rounding the corners off on both sides of the edge, providing additional above 24, and perhaps providing some levels at less than 24, so we don't have that major jump there.

On the financial crime kingpin statute, again, we feel that the drug kingpin statute was a good model which should be used there, and we should not, in effect, have a minimum/maximum, as well as a minimum mandatory 10 years, that there needs to be a gradient there, and we commend the reasoning of the drug kingpin statute as to be applied there, also.

In summary, we strongly urge the Commission to revise the guidelines relevant to the statutes amended by the

Crime Control Act, in order to respond to the congressional determination that a defendant convicted of fraud offenses affecting financial institutions be subjected to substantially greater punishments.

One last amendment, Amendment 35, is the substantial assistant to authority. The subcommittee that I chair discussed this at some length, and we have mixed feelings on this amendment. We like the clarification. It makes it very clear that this departure under 5K1.1 must be made on government motion. However, we are concerned that by interjecting into the commentary that it can be done in the absence of government motion, in bad faith, is getting the Commission somewhat from guideline-writing over into opinion-writing, that this is a matter, if it comes up, of bad faith, that should be addressed by the court and is not really an appropriate area to be addressed in the guidelines themselves.

If the Commission wishes to address -- and we do like the language clarifying that -- we believe that it would be better to leave out the comments about bad faith, for that is a matter that would be reserved to the courts. If the Commission wants to leave the bad faith language in, generally we would prefer just to leave the guideline as is. We are

not doing that badly under it, and it may be one of those areas where, if it is not broken, don't fix it too much.

In conclusion, the department does plan to provide the Commission with its views on all the proposed guideline amendments in the coming weeks. There are a number of additional areas which we will urge the Commission to take final action in accordance with its proposals. The areas of money laundering and restitution represent a substantial improvement in the guidelines, and we will be pleased to assist the Commission in finalizing as many of these areas as is possible.

I believe I have got a little time for questions.

CHAIRMAN WILKINS: Thank you, Mr. Brown.

Let me just comment that, while the Commission does not always agree, the work that you and Mr. Edmunds and the members of your subcommittee have done have been of great assistance to the Commission and I, on behalf of all of us, appreciate the hard work and the many hours that I know you and your colleagues have put into this work, in addition to the other responsibilities that you hold.

Questions from my right?

COMMISSIONER MacKINNON: Did I understand you to

say that you thought that 5K1.1 ought to be on motion of the government?

MR. BROWN: It is on motion of the government.

COMMISSIONER MacKINNON: That is what I thought. What do you want?

MR. BROWN: What I am saying, Judge, is that we like generally the -- the guideline would clarify that. I don't think it changes the law at all. I think it is designed to perhaps clarify it and make it stronger. We generally favor the language in the first part. It was the note in the commentary that we didn't like, talking about that the judge may do so upon showing of bad faith by the government, we thought that was just a bad thing to start writing into the guidelines, that the matter should be left to the court and not written into the guidelines.

COMMISSIONER MacKINNON: You against the commentary on the bad faith?

MR. BROWN: Yes.

COMMISSIONER MacKINNON: What do you think of that?

MR. BROWN: I think, generally speaking, if the court finds the bad faith, they are probably going to go along with that. I think that is probably the developing law,

that if the government does act in bad faith, that the court may depart. You know, I sincerely hope that the court would never find a valid faith of bad faith, but it is a large government and it is always possible. I think that is the developing law, but I think to write it into the guideline just simply encourages more litigation on it. I thin bad faith can be extremely rare cases.

COMMISSIONER MacKINNON: Bad faith brings on a hearing between what the defendant says he was told and what the U.S. Attorney said he told him.

MR. BROWN: I think that is why it is critical that plea agreements be in writing and why the court have a full rule of having colloquy to put it on the record, so that you avoid the problems.

CHAIRMAN WILKINS: Any questions from Commissioners on my left?

COMMISSIONER MAZZONE: Just following up, Mr. Brown, on Judge MacKinnon's statement, 5K does sometimes cause a problem. In my experience, suppose a problem when there is sort of an unseemly scramble to get there first, in which case a person who might be considered to be a major participant gets there first, and by that time the refrain can

be from the prosecutor, "Well, I've got everything I need, I don't need you, a minor participant," and that sometimes results in the -- well, it might not be bad faith, it sometimes results in unfair treatment of that lesser participant, simply because he didn't get thee first.

What is the department's policy, if there is a written policy or guide, to providing some kind of recognition that, although that person did not win the race to your office, was willing to cooperate, was not able, unfortunately, to render substantial assistance? Shouldn't there be some recognition of that?

MR. BROWN: Judge, you pose a very difficult question. To my knowledge, there is no written policy on that, and it is a very difficult question, because the defendant who comes in the door first, quite frankly, generally does have more to offer. He may break the logjam, and so there is I think a natural incentive to give the person who gets there first -- I have often given the defense attorneys a speech that the train is about to leave and do they want to be on it or not, and to insure that the next time I tell them that, if they don't make the train, I have left some of them crying at the station, to put it bluntly.

I think we do have to be careful, though, that we do not, by using 5K, reduce a major defendant below that of other defendants. There has still got to be proportionality. I think it is something my subcommittee has looked at and we are discussing. I don't have a pat answer, because it is an extremely difficult question.

I think this is one of the situations where the District Court has some responsibility in looking at an overall case and the judge has the right in rejecting pleas and in making those substantial assistance departures. The judge has some responsibility in this, too, because he can also see the overall picture.

I think we are torn between the rock of the first defendant having the most information and being the most valuable and, therefore, wanting to induce that, against the hard place of not treating someone who just happens to be a little slower or his lawyer happens to be a little bit slower in getting to our door, not treating them more harshly.

It is a difficult question and I think, as prosecutors, we have to look at it, to insure that we try to be as fair as possible. I have never turned a defendant down who was willing to come in an testify, simply because I might not

need him. I may not give him as much benefit as the first one in, but my practice has been to still make the motion, but I don't believe -- I am not sure the department can write guidelines or write a policy on it, except the only thing we can do is try to be fair about it.

COMMISSIONER MAZZONE: It is worth following up with other participants in this hearing, because I think you will hear from the defense bar, that that is what happens in substantial cases, and I think the guidelines say specifically -- it is nice of you to say that judges can see the whole picture, but I don't think that is always the case, you see. We rely on a presentence report and we also rely, and I think the guidelines direct us to rely on the valuation by the prosecution of the value of the assistance.

So, when someone comes in and says, "Judge, I did everything I could, I tried," think that is what is the foundation of that bad faith language, the bad faith language to which you object in there, is that there is no recognition of what that person was willing to contribute, but I think there is discussion that has to be pursued there.

Thank you.

CHAIRMAN WILKINS: Questions?

COMMISSIONER CARNES: Mr. Brown, we hear sometimes from the field that the 5K1 provision has reintroduced some disparity into the system, that is, that there is non overall standard from the department as to when the motion should be made, so assistants from one district may make them on one set of facts, whereas, assistants in another for the same level of cooperation would not make them.

We also hear that there is disparity about the levels that are recommended, which I think where the standard met would occur, and even within a single office, you may have one assistant that would recommend a large departure and another who wouldn't recommend a departure at all under the same circumstances.

Given those concerns, I know when I participated on your committee, we talked about it at that time, are you all still exploring ways for the department to monitor what is going on there and try to get some controls, so that we can avoid what is alleged to be some pretty big disparity in this area?

MR. BROWN: We did a study approximately a year ago on that. We are still looking at that, because it is an area of concern. We hear this also, and the committee is coming

out or I believe will come out with some recommendations to the U.S. Attorneys as to how to handle this particular area.

I think, from our study, it showed that approximately 80 percent of the U.S. Attorneys were within a general view of 2- to 4-level reduction, depending on the quality of the cooperation or 50 percent, and in that general framework that there was fairly good agreement as to what was going on.

We have recommended that this be done at the supervisory level, so that you don't have one assistant doing A and another assistant doing B, and by publishing this study to all of the U.S. Attorneys, I think we have pointed out where they may be somewhere on the extreme. I have talked to a number of them myself about the area of the problem, as much as the Commission did.

The Commission, you may recall, in one of its early drafts, tried to actually quantify substantial assistance, and the Commission basically backed off and left it to the U.S. Attorney. We have the same problem in trying to tell a U.S. Attorney what substantial assistance is worth. Substantial assistance can vary.

The greatest substantial assistance is where we, in fact, give a defendant immunity, so we range all the way from

a defendant who, because we need his testimony, we give immunity, which is the ultimate departure downward, albeit not under the guidelines, with the departure downward to those where they come in, they are very cooperative, they are willing to do something, but they really don't offer much, and so we may give them a modest one- or two-level reduction.

So, it is a very difficult problem and we are aware of the criticism and the comment there and we are still continuing to look at it. We appreciate the comments that the Commission made. I believe you just sent me from Flint, Michigan, and I have already talked with the U.S. Attorney about it this morning. He says it is a statistical aberration.

COMMISSIONER CARNES: I would like to echo what the Chairman said to you, and commend you and Mr. Edmunds on the fine job you have done over the years. I think in a system that has resulted in a lot of change, you kind of kept some contact between the Commission and the department in the field, and I commend you for the fine work that both of you have done.

MR. EDMUNDS: Thank you.

CHAIRMAN WILKINS: Just quickly, because of the

position that you hold, another problem that we need to address in this area is a difficult area, but I am afraid that sometimes substantial assistance motions are made, and you know the defendant does not qualify by statute or by guidelines for that motion, but it is made as a part of the plea bargaining process, in order to entice a plea, and this is something we will be looking at, as well, and you just have to be aware of it.

Any time authorities extend it to any group, in this case the government, and if it is not exercised properly, then there is an overreaction to cure the problem. I know that you are aware of this problem and the whole gamut of substantial assistance needs to be constantly addressed, as I know you are doing.

Thank you again.

Our next witness is Mr. Mark Pomerantz. Mr. Pomerantz is an attorney in New York City. He is appearing today on behalf of the New York Council of Criminal Defense Lawyers.

This is this group's first appearance before the Commission. We thank you very much for your prior written submissions, and we look forward to your testimony here today.

MR. POMERANTZ: I appreciate, on behalf of the organization, the opportunity to be here. While it is our first appearance, I have listened carefully to what has gone on before me and I would hope that it won't be our last appearance. I do think we have some very practical input to make to the Commission from people who practice on a daily basis as defense attorneys in the Federal courts.

I would like to address the proposed amendments as they relate to defendants who are cooperating or who are considering whether to cooperate, and follow up on the discussion that was had with Mr. Brown, because it is our judgment that, indeed, the substantial assistance provision 5K1 is broken and does need to be fixed.

I would just note at the start a thought that occurred to me as I listened to the colloquy, one problem that the guidelines as they now exist don't address, is the fact that assistance and the impact of assistance, what it meas is a continuum, and by creating a breaking point when the government decides to make a motion for a departure and when the government decides not to make a motion as being the single determinant of the judge's authority, it does not do enough to recognize the myriad situations in which assistance

perhaps does not rise to the level where the government decides it is in the government's interest, from an institutional perspective, to make the motion, but yet is assistance that is important in making respects.

I would note, although it did not come down in time to be included in our written submission, that the Second Circuit just came down with a very important decision in this area on February 8th, United States v. Garcia, is a case in which the district judge decided to depart on the basis of a defendant's decision to be debriefed by the government to testify at the trial, if it became necessary, after which the logjam was indeed broken and the remaining defendants pleaded guilty.

The government, for whatever reason -- it is not disclosed in the opinion, perhaps because the witness actually did not have to take the witness stand -- declined to make the 5K1 motion for a departure. There was no holding or challenge to the government's good faith or bad faith in making that decision. The district judge decided, however, that a departure was warranted, based not on assistance to the government, but the defendant's assistance, in effect, to the court, finding that the guidelines don't speak to the

kind of cooperation which relate to the defendant who breaks the logjam in a multi-defendant case that is pending in the seriously over-clogged dockets of the district courts of the United States.

The Second Circuit affirmed that decision. One might well suspect that this is allowing the horse to come in through the backdoor here, because of judicial dissatisfaction with the government's decisions, at least in some cases, on whether to make a motion.

I would just give you another example drawn from my own experience right across the river in Alexandria. I had a defendant in the Operation Ill-Wind case who cooperated, was debriefed by the U.S. Attorneys office and the Naval Department of Intelligence, testified at the trial of the defendants who went to trial, sentencing was scheduled immediately following his trial testimony. I asked the government whether indeed the 5K1 motion would be made, and I was told, well, the committee that in our district decides whether to make those motions meets on Thursday, and we won't have an answer.

I reminded the prosecutor with whom I was dealing that my sentence was scheduled for Tuesday, and I would like

to know whether the motion will be made before the sentence, rather than after the sentence. I was told they were aware of that problem, but they had gone to the judge, in fact, to ask the judge to adjourn the sentencing, but the judge was bound and determined to proceed.

What happened was we had the sentence, where there was simply no decision made yet about whether a departure motion would be made, and the judge I guess preempted the issue by deciding that, although I had asked for a determination that my client was a minor participant and the government had challenged that position, the judge found that he was a minimal participant, and with the benefit, then, of the increased reduction in the offense levels, in effect, solved what was the sentencing problem, without having to consider whether the government would or would not make a departure motion based on cooperation.

It is our perspective that the guideline provision, which, of course, is not required by statute, as it is in the case of departures from mandatory minimums, where Congress has articulated in the statute, in 3553(e), that a government motion is a requirement, which I would suggest makes some sense, since it is the government that has the initial

charging responsibility to determine whether to bring a charge that carries the mandatory minimum, and one I think can see the logic in giving the government the unilateral authority to make the motion to allow the defendant to be taken out of the mandatory minimum, where the government has the authority to make the charging decision in the first instance.

Our problem is allowing the government to have the authority in all cases to decide whether the cooperation is sufficiently substantial to warrant making the departure motion, and I would just suggest that for those of us who have to deal with our clients and explain not only the guidelines, but this particular aspect of the guidelines, the dialogue that takes place between attorney and client is one which is not, I think, a very positive one, particularly in districts like the Southern District of New York, where I do most of my practicing, in which the government has decided, as an institutional matter, that it will never ever commit to making a departure motion until immediately in advance of sentence.

There are no plea agreements under which the government decides, even though it knows the general parameters of the defendant's cooperation, the government at least

in that district has decided, as an institutional and policy matter, that it will not enter into a plea agreement obligating the United States Attorneys office to make a 5K1 departure motion.

So, the dialogue with one's client, after explaining that the cooperation comes in advance of the client, will ask when he will know if the judge will have the freedom to depart, and the response of the attorney is, well, you will know when you're sentenced. And when the client asks, well, who makes the decision of whether I'm eligible for a departure, the client is told the government makes the decision. The client asks, well, have they told you that they will make the motion, since they know what I have to say and I'm obligated under my agreement to testify and cooperation, and so forth, and the client will be told by the attorney, well, no, they haven't made a commitment yet whether they are going to make a motion or not make a motion.

The client asks what happens if they don't make the motion, and the response from the attorney is, well, you're stuck if they don't make the motion. And the client asks, even if I've cooperated completely and in good faith and the government has arrested 10 people, all of whom have plead

guilty, well, that's right, it's the government's decision to make.

And when the client asks whether we can file a motion to compel the government to make the departure motion, the answer is no, and then the client asks, well, if the government doesn't make the motion, we can appeal that decision, right, and the client is told, well, no, you can't appeal in those circumstances. And the last question, which may be the hardest one to answer, is what do I need you for, Mr. Defense Attorney?

We believe strongly that it is a mistake to give the government unilateral authority to allow the judge to depart. If the Commission decides to adhere to the existing guideline, we would hope that the Commission will amend the application note to allow the court to depart, when the government unreasonably fails to make a motion for a departure.

In our judgment, the new application note, which speaks of the bad-faith breach of an agreement to file a departure motion, is simply too narrow. It is too narrow, for several reasons. First, there are, as I have noted, many districts in which the government will not and does not ever

make a commitment to make the motion for departure, so to speak in terms of the government's breach of that commitment does not begin to address the situation.

Second, we think that there are many instances, one of which may have been in this Garcia case that I just cited, where the government's decision is not a bad-faith decision, but it is simply an unreasonable decision. Where the particular assistant, for instance, may decide that having now obtained the defendant's cooperation, he wants to have his cake and eat it, too.

We are not, I think the Commission would not, to intrude on the government's prerogatives to make the standard one of objective reasonableness, rather than subjective good faith, if the Commission is, and I think it is properly moving in the direction of at least realizing that there are instances in which the government's unilateral authority is open to question.

To move on, if I can, to a clarifying amendment also dealing with the topic of cooperating defendants, there is a clarifying amendment that has been proposed to 1B1.8, and that, of course, is the provision that allows the government and the defense to agree in a case involving a cooperating

defendant that the defendant's self-incriminating information that was previously unknown to the government will not be used to increase his guideline range.

The current cycle of proposals include a proposed amendment that would add an application note about this guideline applying only in situations where the cooperation agreement relates to unlawful activities of others. We think that there is no reason to include that limitation, and indeed strong reasons not to include it.

The government often has a strong interest in obtaining information from defendants and cooperation from defendants that does not relate exclusively to the involvement of other people. One example that is a case involving an allegation of espionage, where the government has a very strong interest in knowing how much damage was done, and the interest certainly stands equally to finding out who else was involved.

In the case of a sole spy, for instance, the government's interest in finding out from the defendant himself how much damage was done to national security would certainly support an agreement under which the defendant's incriminating information about the number of years in which

he has been involved in that kind of activity is one that, following the general philosophy of this guideline, the defendant should be allowed to give without fearing that the information coming from his own lips will be used to increase his sentence.

Likewise, if I might draw from personal experience again, I represented an Assistant United States Attorney in the Southern District of New York who was arrested and prosecuted for stealing drugs and money from the office evidence locker, and there was a strong interest on the part of the government to know from this defendant, first of all, whether anybody else was involved, but, second, the entire story, so that the government's strong interest in perfecting its security procedures could be recognized and steps could be taken. The government was very, very interested in knowing what damage had been done there, too, and, likewise, that is a situation in which an agreement that the defendant's information will not be used to enhance his sentence is a logical one, not simply from the defense side, but from the government side, as well.

I would point out that the provision allows that kind of protection to a defendant only with the government's

agreement, so I don't see any real risk that there is any prosecutive interest that will be served by limiting the limited form of immunity, if you will, for a defendant's own statement to situations in which the cooperation agreement focuses on incriminating other people.

I would note, on a related point, that, again, the Southern District of New York has an institutional policy of refusing to make 1B1.8 agreements, but that may be something of -- I know one of the Commissioners mentioned that there is a great deal of variety in how districts approach cooperating defendants. This is one example, and I would suggest that it is important to find out the enormous amount of inter-district disparities in practice, as they relate to cooperating defendants.

Thank you.

CHAIRMAN WILKINS: Thank you very much.

Let me extend the offer to you that if the New York Council would like to set aside a day for training, we will provide all the necessary materials and personnel to conduct that training session with you, so you just let us know and we will be there.

MR. POMERANTZ: We are very grateful for that.

CHAIRMAN WILKINS: We would need you to handle some of the logistics, finding a place and also issue invitations to anyone you wish to. The more, the better.

Any questions from Commissioners on my right?

COMMISSIONER MacKINNON: Yes. Are you related to Abe Pomerantz?

MR. POMERANTZ: I was told that he was once the richest lawyer in New York, and I regret to say that there is no relation.

[Laughter.]

COMMISSIONER MacKINNON: He was also one of the best.

CHAIRMAN WILKINS: Any questions from the Commissioners on my left?

[No response.]

We appreciate again the very thoughtful written submissions that we earlier received, and we look forward to a continued working relationship with you and your council. Thank you.

Mr. Barry Portman is our next witness. Mr. Portman is a Federal defender in San Francisco, appearing on behalf of the Federal and Community Defenders. Accompanying Mr.

Portman is Mr. Tom Hutchinson.

Mr. Portman, you may proceed.

MR. PORTMAN: Thank you very much, Mr. Chairman.

Tom Hutchinson, who is seated at my right, is the sentencing consultant for the Federal and Community Defenders and bore the laboring oar on the written response that we filed this morning. We also would like, if we may, to file a supplemental written response before the comment period closes.

Before addressing some of the more significant proposed amendments, I would like to just make several observations concerning themes in our response to many of the amendments. Some of these I think you may have heard from Paul Borman earlier, but I think they perhaps bear repeating and maybe in a different context.

The first is that the amendment process we feel is proceeding without sufficient time to gather sentencing data and to reflect on its meaning. To give two examples, the bank robbery guideline proposed amendment before us here has had two predecessors, or three, I think, actually, but two significant prior amendments. The firearms and explosives guideline had a prior amendment. Both resulted in increased

defense levels.

There really has been insufficient time to reflect on how courts have viewed the appropriateness of those increases. Because the new guideline is applied only to offenses that occur subsequent to its enactment, and because there is a time lag, at least in our district, of at least 7 months, on the average, between the time of arrest and the time of sentencing, you don't have the first case, you don't have data no the first case applying the November 1990 guidelines before the Commission yet, and won't have it until the beginning of July.

So, there is really no data before you on the last amendments when you go into the next amendment cycle. Even next year, there will only be approximately 6 months worth of data, so we think that the amendment process is proceeding without sufficient time to gather data and reflect on its meaning.

Secondly, we feel that is contrary to the methodology that the Sentencing Commission adopted originally, which was to look primarily to the sentences that had been imposed and the value judgments of judges across the country. By rejecting that, it calls into question the nature of the

decisions that the Sentencing Commission is making, whether they are based on anecdotal evidence, whether it is squeaky wheels that are promoting change, that it is who talks to the Commission that inspires a change, rather than a nationwide consensus drawn upon departures and the area in the sentencing range that judges across the country are arriving at to impose the sentence.

The second problem is the bench and bar's capacity to absorb these changes. I have participated in a number of training sessions, not only in our own district and state, but in other states, and I don't think the question of the frequency of training sessions alone can satisfy the problem that the bench and bar have with the constant amendment process.

I think what you may be creating here, to draw an analogy, is a wonderfully fuel-efficient, aerodynamic car that only factory mechanics can drive. You have probation officers who devote themselves to studying the intricacies of the guidelines and try to keep up on the amendment process, and they alone, it seems within the criminal defense community -- and here I am including defense lawyers, prosecutors, and judges -- seem to be able, because of the time they can devote

almost exclusively to this, to keep up with those changes.

I don't think it is a question of training so much, as it is a question of slowing down and permitting people to at least deal with one or two or, at the most, three sets of guidelines that will apply to a particular offense -- I am now thinking of the bank robbery guideline that has been amended three times -- rather than a change every year or so, that your bookshelf has every set of amendments and you constantly have to go back and look at time periods.

The second general observation is that, with respect to a number of these amendments, there is either insufficient data indicating there is a problem, or the data doesn't support the proposed solution. The bank robbery amendment would be an example.

The purpose for the amendment, the notes indicate, is to more adequately reflect the seriousness of the offense. One would expect to find that dissatisfaction with the present guideline level would be reflected in judicial sentences, and that they would frequently be at the top of the range or that there would be upward departures, but the contrary is true.

Between January 19, 1988, and June 30, 1990, 42

percent of the cases were at the bottom of the guideline or below. Only 27 percent were at the top or above. And after November 1, 1989, it changed even more significantly: 51 percent were at the bottom of the range or below, and 24 percent were above.

The same is true of the firearm offenses. When we look at the 2K2.1 single guideline offenses, there are 59 of them, in the time frame after November 1, 1989, 49 percent were below or at the bottom, and only 29 percent were at the top. For the trafficking offenses, 2K2.2, it was even more significant: Below or at the bottom were 70 percent, above or at the top was 6 percent.

One last example is with respect to the creation of Category 7. In the same time frame I have indicated, there were upward departures in only 2.4 percent of the reported cases, well below the national upward departure level of 3.5

What does that indicate? It indicates, I believe, that there is not a need to increase the seriousness of these offenses, that the perception of judges indicates the contrary, that the offense levels are too severe and should be lowered.

A third point or observation that I would like to

make is that, at least with respect to the firearms proposed amendment and the bank robbery proposed amendment, we are witnessing an ad hoc conversion to a real offense guideline system.

The Sentencing Commission made a conscious choice at the outset to reject a real offense system. There was a well publicized dissent to that, but the Commission took a principle stand, after considerable thought, to reject it, a real offense in favor of a modified real offense system.

Now, through the use of the bank robbery guideline of uncharged conduct or charged but dismissed conduct and in the firearm and explosive guideline reference to offense conduct, rather than the offense of conviction, the real offense system is being brought though the backdoor, without I think a thorough study and a principle basis for applying it.

Bank robberies and firearms offenses constitute a great deal of the Federal criminal docket, and when you introduce the real offense system there, you are making a significant change, I feel, in the way the Sentencing Commission's basic philosophy or jurisprudence is changing, and that is important, because I think the credibility of the

Commission in enunciating guidelines depends on faithfulness to the principles that it says it is following.

Secondly, I don't think there is a demonstrated need for this change. The comment is that the current guidelines may result -- and I am referring to the bank robbery -- in lower sentences in certain multiple robbery cases than in pre-guideline cases. There is no data supporting, and the upward and downward departure rates for charged and dismissed robberies are about the same.

I don't think whatever value there might be in adopting a real offense system in these two areas is outweighed not only by the question of principle, but by practical problems. The comment that was made at the time that the real offense system was rejected was that it was unworkable and it introduced disparities. It certainly does encourage more trials, and where the real offense system is used in drug offenses, there certainly have been more trials.

It overlooks proof problems and encourages defendants who know that they are going to be held accountable for additional bank robberies, even if they plead to only one, to ask for trials, so at least the witnesses will be there, they will have cross-examination, and the judge will be more

reluctant to count those additional bank robberies that could have been dismissed in the sentencing calculation, when the jury has refused to find the defendant accountable for them.

Finally, one brief comment on the prison or lack of a prison impact statement. I appreciate, Judge Wilkins, that the Commission does do a prison impact statement, once it has arrived at a guideline or believes it will adopt one, but I think in certain areas that comes too late. I am thinking now of the proposal about Category 7, and particularly if career criminal offenders are going to be put into that category, and the impact of the related case amendment.

I think the number of people affected is a very serious matter that should be addressed at this point, where interested parties such as the defenders can have some opportunity with data before them to speak to that particular issue. I think waiting until, in a sense, the Commission has already decided on the issue is too late.

With respect to particular guidelines, we oppose the robbery guidelines, for the reasons that I suggested generally. We believe that, essentially, the data suggests that the offense levels are too high, if anything, rather than meriting any increase.

With respect to the question of why prosecutors do not prosecute 924's, in addition to 18 United States Code 2113(d), armed robbery violations, I think one factor that has certainly occurred in many cases I have seen is because there is a definitional difference between a firearm in 924 and a dangerous weapon in 2113(d). You can, under a Supreme Court case, and certainly under Ninth Circuit law, commit a violation of the armed robbery statute by using a wooden gun, but you can't commit a violation of 924 without an operable firearm, and I think that and many other reasons are why prosecutors don't always charge 924's, and I think, without some further study, that it would be unwise to change the guideline at this point.

Similarly, for firearms and explosives, I feel that the reasons advanced for the change are really not justified. The first reason offered is concerns expressed by judges, probation officers and practitioners, but they are really unnamed.

The second one, eliminating duplication and confusion, I don't think that there is enough evidence that that is really true and that it would compensate for the confusion of yet another amendment change. Why can't we see

what the last amendments wrought, before embarking on yet another amendment process there?

I think the same thing is true about the purpose enunciated of avoiding a need to revisit the guidelines. That assumes that there is a need now to do so, and I don't think that has been established, because we don't have the data. Finally, of course, this goes to the real offense guideline system.

With respect to the related cases, we feel that there is an underlying question or assumption that has been passed over by the Commission. in considering whether to amend the related case application note. The underlying consideration is one I think that was adopted from the Parole Commission, which was that it is not the number of convictions, but it is the recency and severity of the sentences that is the most predictive of factors in determining whether there is going to be recidivism, and I think that has been rejected in this proposed amendment by focusing only on the number of convictions.

Secondly, we feel there is inadequate statistical evidence of the problem. It is true that the 17 percent of the upward departures were based, in whole or in part, on

this, but that does not tell the whole story. The whole story would be what was the percentage of upward departures possible, and here we believe that another study from the Commission indicates that it is only about .4 percent.

Finally, without a cap on the number of points that could be awarded and a use of 3D1.2, we feel that, as to some of the options expressed here, the exception will be likely to swallow the rule, that the convictions themselves will become more important than the sentences imposed under 4A1(a), (b) and (c), and that arose out of the same offense or the same course of conduct might be doubly counted.

With respect to the new criminal history category, we again feel that the data does not justify an increase. I was very happy to hear that the United States Attorney from Tennessee felt that career offenders should remain in Category 6, if, in fact, you did adopt that, rather than going into Category 7.

Finally, with respect to substantial assistance, which has been given considerable attention here in comments today, in some respects I do agree with Mr. Brown. If it is a question of a contract, an agreement between the prosecutor and the defense counsel, there is no need of a guideline or a

comment to remedy that situation. That is constitutional contact law going back to Santo Bella. I think if that is the problem, already there is in place a body of law that addresses it.

I think what this proposed amendment does is, while the reason offered is to suggest that this Commission stands behind the Choatis opinion, rather than deters, I think it is more limited than Choatis. The Choatis majority opinion didn't limit to agreement situations, it talked about situations where there was bad faith by the prosecutor, and I think this is more limited than Choatis.

Finally, I think requiring a showing of bad faith by a prosecutor focuses on the wrong end of the sentencing process. Instead of focusing on the defense behavior, it focuses on the prosecutor's behavior, and ofttimes it is not bad faith. It may be a prosecutor who, for tactical reasons, decides that he doesn't want the witness, the defendant who is cooperating to be subject to a cross-examination about the deal he got, or it may be because he is proceeding out of ignorance.

So, I agree with Mr. Pomerantz that the substantial assistance area should be revisited as a whole, but this

particular revision we feel is very limited.

Thank you.

CHAIRMAN WILKINS: Thank you, Mr. Portman.

Any comments from this side?

[No response.]

Let me extend to you the same invitation as to others: If you and your colleagues in your area would like to set up a training program, if you would just give us a call, we would be glad to coordinate with you and provide the materials and personnel to conduct it for you.

MR. PORTMAN: I appreciate that, Mr. Chairman.

CHAIRMAN WILKINS: We are sometimes criticized by defenders, because it is claimed that we have turned over too much sentencing authority to prosecutors. I think this criticism is somewhat overstated, and perhaps arises in part from the prosecutors' authority to charge or not charge a statute carrying a mandatory minimum sentence, over which we have no control.

In effect, to limit or to reduce, but certainly not to overextend the sentencing authority to the prosecutors, we have tried to move toward a real offense sentence system. As you know, a charge-based system gives tremendous authority to

the prosecutors in setting the sentence. They are either charged with three armed robberies or they are charged with one. If you charge only one, you're only sentenced for one and not the other two.

But I hear you saying that you like that system and would like us to continue or perhaps even move more toward a charge-based system, giving the prosecutors more authority than perhaps they even now have.

MR. PORTMAN: I'm not sure if it gives the prosecutors more authority. What I am saying, Mr. Chairman, is that before undertaking a major change, I think that there should be some considerable study and request for public comment, because an ad hoc change in certain areas, important areas such as bank robbery, I think in this case works but to the detriment of defendants. It was one of the few areas where, let's say in bank robberies, which are one of the most frequent offenses and what Mr. Hoover made his reputation on years ago, and the FBI still does vigorously prosecute.

What this does is introduce a whole new area of uncharged robberies, and I think it brings up more confusion and raises more possibilities for extended trials than does even the drug defense area, because you have discreet

offenses occurring, as opposed to perhaps a question of quantity.

CHAIRMAN WILKINS: Let me just say, too, that I know coming into this is so hard to realize it, necessarily, but, for example, armed robbery is not a new issue. The Sentencing Commission has been debating that for 5 years and, indeed, it was out for even comment last year, as I recall, so it is not something we just all of a sudden come up with and put it out and let's make an ad hoc change. All or many of these are issues that we have been addressing for some time, and we are now coming to grips with another opportunity to make a change or not, but it is not something we just thought about in the last 30 days, as I am sure you are well aware.

Let me ask the Commissioners to my right if you have any comments or questions.

[No response.]

To my left?

[No response.]

Thank you very much. I do hope we hear from you for setting up a training program. Mr. Hutchinson, you may get involved in this somehow and maybe we can coordinate some

regional training programs for community and public defenders.

MR. PORTMAN: We would be happy to. Judy Clarke, who is our training coordinator, I am sure, will be in touch with you.

CHAIRMAN WILKINS: Thank you very much.

MR. PORTMAN: Thank you.

CHAIRMAN WILKINS: Our next witness is Alan Ellis. Mr. Ellis, we are glad to see you again. He is President of the National Association of Criminal Defense Lawyers, and has been working with the Commission since its beginning, I think.

We are delighted to receive your written, as well as your oral testimony today, Mr. Ellis.

MR. ELLIS: Thank you, Judge Wilkins. It is a pleasure to see you again. It has been a while.

As you mentioned, I am the President of the National Association of Criminal Defense Lawyers. Additionally, I am also the senior partner of a six-attorney criminal defense law firm, specializing in Federal sentencing. Our firm specializes in Federal sentencing at three places, Your Honor. We have an office in Philadelphia, one across the river here in Alexandria, and also in the San Francisco Bay area, in a little town called Mill Valley, which is currently

undergoing 50 percent water rationing, which is one of the reasons I am here today, to take a shower.

[Laughter.]

I believe you have received copies of the very thorough written comments submitted on NACDL's behalf by my law partner, Alan Chaset, the distinguished chairman of our post-conviction committee. Alan could not be her this morning. He is attending a parole hearing on New York. If memory serves, that is something that we also do in fewer, fewer cases these days.

What I would like to do this morning is to highlight five key issues raised in Mr. Chaset's comments. First of all, prison impact assessments: We appreciate the fact that the Commission will be preparing prison impact assessments on these new package of guideline amendments prior to their submission to Congress. We applaud this. Such assessments are indispensible, not only to the Commission in weighing each amendment, but also to bar groups and other participants in the comment process, and, perhaps most importantly, to Congress, the old custodian of the Federal prison system's purse strings, in deciding whether to let the amendments become law and, if so, how to pay for them.

Indeed, it is our concern that Congress, even more than the Commission, is in desperate need of this type of impact assessment information. Members of Congress are never more than one political breeze away from shouting through a new batch of mandatory minimums, to address the crime de jura, the crime of the day, and, obviously, at such times nettlesome budget limitations are the furthest thing from their minds. Massive increases in mandatory minimums are easily passed, without the least idea of what they will cost.

Mr. Chairman, you may recall that we wrote to you on this subject in December. We urged the Commission at that time, in conducting its statutorily mandated study of the effect of mandatory minimums, which is due to be completed, I understand, by May 29th, to recommend that Congress adopt some sort of procedure requiring consideration of prison impact assessments before new statutory mandatory minimums could be enacted and take effect.

Not having yet heard back from the Commission on this matter and knowing of your deep concerns about congressional use of mandatory minimums, we re-raise the issue today, and I have here a copy of our December letter for the Commission's convenience that I would hand out.

Indeed, we are aware of no opposition anywhere to such a requirement. DOJ officials, of prosecutors elsewhere, and especially criminal justice planning experts have uniformly agreed with us that it is irresponsible to continue to jack up sentences in this way, without some mechanism for determining the value, the cost benefit of each new law, and for planning ahead to pay for the necessary prison space, before overcrowding reaches crisis proportions.

Second, Amendment 11, on drug quantity: Yes, we believe that the guidelines place excessive reliance on quantity, with inadequate room to consider role in the offense. The result is that low-level drug offenders receive proportionately far more severe punishment than mid- and high-level drug offenders, and the problem is compounded by the reality that the street-level guy or the mule or the lookout usually knows little about the larger operation, and, thus, has no one to roll over on, while the kingpin has all kinds of useful information with which to buy a 5K1.1 departure.

Examples of proportionate injustice, I am sure, are well known to you all, and the Commission's sensitivity on this issue is evident in the way you have framed this issue in soliciting comments today.

To this end, we believe that the Commission should seriously consider the development of guidelines and policy statements to broaden the discretion of sentencing judges in weighing the relative severity of drug offenses according to individualized offense and offender characteristics, without being dominated by issues of drug quantity. We hope that the Commission will observe the principle of parsimony codified in 18 U.S.C., section 3553(a), to develop a broad-based approach that will allow the courts to impose sentences which are "sufficient, but not greater than necessary" to achieve the purposes of sentencing.

Offense level capping mechanisms, such as those proposed for drug establishment offenses under Amendment 15 should be considered for expansion to a wider range of offense and offender characteristics. Additionally, large adjustment levels in Chapter 3 should be considered and some specific departure language capturing mitigating fact pattern scenarios should be prepared.

Third, speaking again of 5K1.1, we support the proposed amendment to 5K1.1, as far as it goes, addressing situations where the government, in bad faith, abridges an agreement to file a motion to depart below the guideline

range. We believe, however, that the amendment should go further, to permit departure for substantial assistance, regardless of bad faith or good faith, and regardless of whether the government has bothered to request it. The plain fundamental goal is to encourage cooperation, and judges can surely be trusted to find it where it exists, no matter who brings it to the court's attention.

Fourth, Amendment No. 34, dealing with defender characteristics: While the statement of reasons here speaks of the need to correct numerous inconsistencies and ambiguities, we're concerned that the goal is simply to further restrict the already overly limited exercise of judicial discretion and to effectively overturn isolated, but well-considered court decisions with which the Commission obviously disagrees.

We object to this ad hoc process of making significant changes, including this here, preventing such considerations as age, mental, emotional and physical conditions, charitable and prior good works, and, in particular, military history, from being factored into the decision, even in unusual situations when those factors should rationally be considered.

We are deeply concerned that the sentencing process is desperately in need of more humanizing, not less. We firmly believe that the congressional mission of eliminating unwarranted sentencing disparity does not necessitate the elimination of all sentencing disparities. These which are rationally related to the individual's offense and the level of personal culpability must not only be tolerated, but encouraged. By shutting off such options and mandating cookie-cutter justice for dissimilarly situated individuals convicted of committing the same offense, the Commission we fear is only substituting one form of disparity for another.

This proposed amendment also raises one other broader issue, the question of amendments based on sketchy information, a single judicial decision, like the case in Maryland, the military history case, or isolated complaints from judges or prosecutors. We are concerned that the Commission is, on occasion, intervening too early in problems that may very well sort themselves out through the courts and through the gradual learning curve by which judges, probation officers, prosecutors, and defense lawyers are managing to deal responsibly with what little wiggle room is left in the process.

The Commission was set up as a quasi-legislative body. We do not believe that it should become just another court, indeed, as my colleague Judy Clarke often says, the supreme sentencing guideline court for routine questions of guideline interpretation.

We are concerned about the problems created by such early intervention, in terms of the endless process of guideline amendment. Although there are fewer amendments this year than last, for which we are thankful, there are still too many. Even for lawyers immersed in Federal criminal law, such as us, it is difficult to keep up. For the far greater proportion of practitioners who handle Federal criminal cases only occasionally, the state of the law is so elusive and bewildering as to raise serious doubts of one's competency to render effective legal assistance.

Let me tell you something: I am sending my kids through college on raising challenges to guideline sentences through 2255 habeas corpus motions based on ineffective assistance of counsel. Nobody comes into my office and says, "I'd like to retain you to review my case, I got an acquittal, take a look at this fantastic closing argument my attorney did for me." That doesn't happen in my practice. People

come to me and they say, "Look at my case, is there anything you can do for me?" I will tell you something, I'm seeing massive malpractice on a wide scale by many, many defense lawyers in sentencing guideline cases.

Fifth and finally, we wish to raise the issue of defense representation on the Commission itself. We continue to note with concern the apparent impact of the Department of Justice on this Judicial Branch agency. While we applaud the fact that a Federal defender has been serving on loan as part of the staff, and while we are most pleased with the development in growth of the practitioner advisory group, more balance is still needed to assist and inform the deliberative process.

We believe that the Commission should support such a goal by seeking the establishment of an ex officio position for a defense practitioner, or by even working to have the next Commissioner vacancy filled by one of us.

Finally, Judge Wilkins, before concluding, in Mr. Portman's testimony, I got the impression that you think that the defense bar likes the real offense system. Quite frankly, we don't. We really have a lot of problems with the fact that our clients are being sentenced based on unadjudi-

cated behavior.

I think that we might well be willing to give the prosecutors as little more charging power, in return for not having our clients sentenced based on hearsay, prosecutor allegations which find themselves into the PSI and often constitute the official version of the PSI, despite the fact that it is supposed to be a neutral document.

On behalf of the 20,000 members of NACDL and our 52 State and local affiliates, I appreciate the opportunity to testify before the Commission once again, and I would be pleased to respond to any questions any of you might have.

CHAIRMAN WILKINS: I will disabuse my mind of the belief that you favor a more real offense sentencing system, if you and your colleagues will not criticize us for extending too much authority to the prosecutors.

Would you like us to go to Congress and ask them to repeal the Sentencing Reform Act and do away with these guidelines?

MR. ELLIS: I would prefer to see the guidelines as suggested by the Federal Court Study Committee be -- what are the words -- instructive, for guidance only, as opposed to mandatory, yes.

CHAIRMAN WILKINS: I might just tell you that Judge Mazzone is heading up this working group addressing the mandatory minimum sentencing issue, and any comments and assistance you can render to the Commission in that regard, you may wish to contact Judge Mazzone directly.

MR. ELLIS: If I may say one more think, Judge Wilkins, in response to your last question, I want to say something. At the beginning or the process, and as you pointed out earlier, I was involved pretty much from day one. I was supportive of the guidelines early on, and I want to confess to you that I took a lot of heat from some of my colleagues on that, and I am a little embarrassed to say that I may have been wrong and they may have been right.

CHAIRMAN WILKINS: Well, I think, as a distinguished jurist yesterday commented, the guidelines are here, Congress has made the decision and I am convinced that we are going to have a guidelines sentencing system for many, many years to come in the future. To preface it, we should address ourselves to improving the system that we have, and I for one have no hesitancy in saying that the guideline system is a great improvement over the system of the past. It may not be a perfect system, but we are striving for that. Compared to

the past, it is an improvement.

I will not say any more, but I know you know this, because you are an expert in this area, but just so those in the audience and others that read this testimony, military service, charitable civic good works, we are suggesting a proposal and we said this ordinarily would not be a basis for departure, but I think you may have misspoke just a bit there. In the unusual case, of course, this would be something that could be considered, so we are not trying to block it out altogether, we are just saying ordinarily military service is not something that you use as a departure from the appropriate guideline sentence.

Are there questions from those to my right?

COMMISSIONER GELACAK: Mr. Ellis, I take it from your comments that you believe that a prison impact study would impact upon mandatory minimum sentences in a congressional sense?

MR. ELLIS: I certainly agree that they would, sir, yes.

COMMISSIONER GELACAK: Why do you believe that?

MR. ELLIS: I think that minimum mandatory sentences are passed, without any concern as to what is going it is

going to cost in terms of prison construction, staffing for the Bureau of Prisons, additional prosecutors, additional U.S. Marshals, additional public defenders, and so forth. Many States are now embarking on a pay-as-you-go prison impact assessment process.

Tennessee, for example, has a statute in effect that requires that before any new criminal justice legislation is enacted, it be accompanied by an appropriate appropriation to pay for the increased costs of the new proposed legislation, and any crime bill that goes not have that appropriation provision is automatically declared null and void. I think the experience in Tennessee is that when the legislators from that State see the cost of what they are proposing, they think twice about going ahead with some of this needless legislation.

COMMISSIONER GELACAK: Let me suggest to you that it has been my experience that taking a look at cost or potential cost doesn't necessarily slow our Congress down one bit, in any instance. It has also been my experience that when Congress talks about mandatory sentences, the term implies that they intend to put people in prison, so that it doesn't make any difference to them at the time that they

enact that legislation what the cost would be, what the effect would be, or how to go about implementing it, that they intend those costs, in effect, that is specifically why that pass that legislation.

I don't agree with mandatory minimums, but I don't believe that prison impact has any effect on that adjudication one way or another. I don't think it impacts their decision process. In fact, I think when they say mandatory minimums, they are telling you and us and everyone else we don't care about the fallout from these provisions, it is more important to us that these people be incarcerated and that the message go to the community that they will be incarcerated, and if it causes problems, we will find a way to solve them. That is our problem.

MR. ELLIS: The voters of my State in California revolted in November, and for the first time in history soundly rejected a proposed prison construction bond. The public is simply not willing to spend money on locking people up any more.

COMMISSIONER GELACAK: I agree with that also, and I think it depends on how you ask those questions. The public doesn't want people to be incarcerated if it is going

to cost money, but they don't want them out in public, either, so it depends on how you address that question. I just suggest to you that, while I think I agree with a lot of what you say, I don't think prison impact is going to cause the fellows up on the Hill, in determining whether to institute mandatory minimums, a whole lot of concern.

We tried a lot of ways to get them to slow down and to back off and allow the Sentencing Commission to take a look at these issues, rather than have them mandated and have every session send down another bunch of criminal statutes, but you know what the politics of that are.

MR. ELLIS: Well, I hope that the Commission, when it does make its recommendations to Congress on April 29th does take a pay-as-you-go approach similar to that which Tennessee has on its books.

CHAIRMAN WILKINS: The Commission has made its stand very clear, that we believe that mandatory minimums are consistent with the working guideline system. We met with some success last year with a series of mandatory minimum proposals in various pieces of legislation, almost all of which were tabled and not enacted last year, so we are hoping that Congress is finally coming around to an understanding of

what we do and give the guidelines a chance to work.

Are there questions from those on my left?

COMMISSIONER MAZZONE: Not a question, Mr. Ellis, but the working group on mandatory minimum penalties, the study of which Congress is requiring, would welcome and indeed invite you, on behalf of the 20,000 criminal defense lawyers in your organization, to submit a more formal resolution to me, either at my chambers in Boston or here at the Commission, in time for us to use it and to incorporate into our final report. That would be valuable to us.

MR. ELLIS: You will have it shortly, Your Honor.

CHAIRMAN WILKINS: All right. Thank you very much.

MR. ELLIS: Thank you. I will get that to you.

CHAIRMAN WILKINS: If you will give it to our assistant over there, we will make copies of it. Thank you very much.

Our next witness and individual we welcome to the Commission once again is Mr. Paul Kamenar, the Executive Legal Director of the Washington Legal Foundation, with whom the Commission has worked over the past few years.

We are delighted to have you, Mr. Kamenar.

MR. KAMENAR: Thank you very much, Mr. Chairman. I

apologize that my testimony was not delivered until this morning. I hoe you all have copies. I have given Mr. Martin additional copies.

My name is Paul Kamenar, and I am the Executive Legal Director of the Washington Legal Foundation. We are a nonprofit public interest law policy center. I have testified before the Commission on several occasions and appreciate the opportunity again today.

We have been supportive in the past of the Commission imposing substantial guidelines and punishment on those who commit serious offenses, drug offenses, but we are also concerned that the Commission's guidelines are non-violent, they are non-drug regulatory offenses, particularly in the environmental area.

Part 2Q have resulted in substantial periods of incarceration that are wholly unjustified and contrary to congressional intent that the guidelines reflect the general inappropriateness of any incarceration for first offenders who have committed such regulatory or minor offenses, and that is in 28 U.S.C. 994(j).

As you know, we represent John Posji, who was given a Level 16 and is serving 27 months in Allenwood Federal

Penitentiary for an environmental offense, the longest ever imposed in the history of the United States, and his crime was simply putting topsoil and clean fill on his own property, and not a single, fish, bird or sea lion was harmed by this so-called environmental offense. His problem was that he didn't have a permit from the EPA and Corps of Engineers officials.

As I note in my testimony, some of the proposed guidelines for this cycle graphically illustrate the gross disparity between offense levels for certain serious offenses, such as drug offenses and the current guidelines for minor regulatory offenses. Therefore, I wish to take up the Commission's invitation in the Federal Register notice, where it said, it emphasizes that it welcomes comment on any aspect of the sentencing guidelines, policy statements and commentary, whether or not the subject of a proposed amendment.

First, just in general observations, I believe some of the witnesses before me stressed this as well, we believe that the Commission should have found empirical data before it undertakes revisions on its guidelines and, indeed, should have done so in many areas before the initial guidelines were promulgated, and this is required by Congress under 994(m),

where it requires the Commission to ascertain the average sentences imposed on the pre-guideline cases.

Secondly, and perhaps more importantly, we think that the Commission in many respects have been remiss in not providing a statement of clear and articulate reasons as to why it is departing from past practice or, as some of the witnesses before me, why it is revising certain guidelines. In some cases, you do have some data and some cases you do not, and in some cases, if you do have data, it may suggest you should go the other way than the way you are proposing to go.

Another final observation on the general promulgation of the guidelines is the short and compressed time schedule we are operating under here. I believe there is insufficient opportunity for comment and deliberations, especially when numerous changes are being offered. In effect, what you are having here is oral argument before the briefs are being submitted, and most agencies require comments first to be submitted to the agencies, and then the parties and the regular community have an opportunity to pick them apart, and then have focused administrative hearings, so that the analysis can be more refined.

To be sure, the Commission's organic statute may be to blame to a certain extent, but we believe the Commission can alleviate this problem by parsing out over the course of the calendar year various proposals it has in mind. Theoretically, the Commission can submit any of its proposals to the Congress by January 3rd of the year that Congress is in session, although the past practice has seemed to wait until May 1st. Thus, the Commission can now promulgate proposals for changes, you can do it in May, you can do it in June, get comments over the summer, have hearings in October and November, and have your proposal ready to go, and when January 3rd comes up, you can have those various proposals being sent to Congress.

I also recommend that the Commission suggest to Congress that that 180-day period be revised. I think it is inordinately long, that there is really no necessity for that 180 days, 90 may be more reasonable, and, therefore, you can shift the May 1st deadline up to June, July, August 1st.

I know, for example, that the Federal Election Commission statute has to send its regulations to Congress, as well, and in that law Congress only required 30 legislative days for those regulations to percolate on the Hill, and,

indeed, that is in an area where Congress is acutely concerned about changes in the way they operate their campaigns.

Turning to several proposed revisions that you do offer, I would like to focus on a couple, for example, Amendment 15, 2D1.8, running or managing a drug establishment. The Commission proposes two options. The first option is geared toward the underlying controlled substance levels found in 2D1.1, and significantly, for my testimony, caps the offense level to 16, if "the defendant had no role in the underlying controlled substance offense other than renting or allowing the use of his premises" for drug use or trafficking.

The Level 16, the same level my client received for putting topsoil on his property, 21 or 27 months, is easily reached in the environmental area under 2Q1.2 and 3. Is it fair that hard-working citizens who place clean building sand or topsoil on their own property be given a Level 16 under 2Q1.3, because they failed to get a permit under the Clean Water Act, and incarcerated the same length of time, if not more, than those who rent their property to drug manufacturers or dealers to ply their deadly trade on the rest of society? This is a particularly egregious disparity, when one considers both the underlying offenses and the statutory

penalty for each of these two offenses.

Congress, under running of a drug establishment in 21 U.S.C. 856, made the penalty 20 years, up to 20 years and a fine of $500,000. This is a Class B felony, the most serious category of crime next to a Class 8 felony, which allows for life in prison, and yet the Commission, concerned about the fairness of sentencing such despicable criminals, is seriously considering limiting an entire category of such offenders to a Level 16, just because "they had no role in the underlying controlled substance offense other than renting their property to the drug dealers or manufacturers."

Quite frankly, I don't understand why the Commission is so overly concerned about carving out a relative safe harbor for this offense, when the core offense conduct or the heartland case, as envisaged by the Congress, is the renting of the property or allowing it to be used, regardless of the property owner's role in the underlying offense. This proposal would essentially cap the punishment for a core offense to approximately 10 percent of the maximum punishment Congress authorized for this crime.

Again, it is in sharp contrast to the Level 16 that is easily reached in the environmental area, and that is more

egregious, where the statutory maximum under the Clean Water Act case is 3 years, rather than 20 years. Thus, a first-time environmental offender is given 75 percent of the statutory maximum for non-heartland cases.

There is no question in my case that the government ever said that this was a serious water polluter, and yet the Justice Department asked for that, as well as in other environmental cases they are seeking 100 percent of the statutory maximum, because some environmental crimes are misdemeanors and only allow for 1 years, so you have the anomaly of first-time offenders getting and being recommended to receive the statutory maximum for minor regulatory offenses.

I think Congress rightly dealt harshly with the managing drug establishment. They serve a vital link in the distribution of drugs throughout this country. As an example, if all the vending machines in 7-11's and other stores around this country were prohibited from stocking and selling Coca-Cola, it would be difficult for that company to get that product to its customers, and the same works with respect to illegal drugs.

Consequently, I cannot understand how the Commission

can possibly characterize core violators as "peripherally involved defendants," and why it is so concerned about "anomalous results." I do not understand what is so anomalous about a manager of a crack house or one where drugs are being manufactured in someone's basement or warehouse getting a longer jail sentence than the amount of drugs that happen to be picked up in that particular raid, when, in fact, there is evidence that person has been allowing that to happen over a long period of time.

Finally, in this area, we think that there are numerous examples where offense characteristics are disproportionate, again looking at the environmental section. One is giving the full 4 points for not having a permit, and yet you only have 2 points or less for other offensive conduct. For example, in your Amendment 17, possession of material depicting a minor engaged in sexually explicit conduct, where the minor is under the age of 12, you're only going to add 2 points for that. Is the depiction of a 5-year-old engaging in explicit sex acts with an adult worth only 2 additional points, but not having a permit for putting topsoil on your own property worth 4?

Indeed, even applying the most stringent punishment

this Commission has in mind for 2G2.4, namely, a base offense level of 10, rather than its option of 6, and 2 points for depicting a minor under the age of 12, ,that would total, the grand total would be 12 offense levels for the worst person convicted of this crime. Yet, Congress made the maximum punishment here again 5 years, again compared to 3 years for environmental or 1 year for most of the misdemeanors under that section. Again, we think that there is this gross disparity with the current revisions.

Finally, with respect to other offense characteristics, you have 2 points for trafficking up to 75 pounds of explosives, 2 points for illegally trafficking and selling firearms under the firearms provision, but you only add 1 point to rape of a minor, if the abuser was a custodian or guardian, such as a parent or teacher, 2 points for bodily injury under another guideline, 2 points if the kidnap victim is held for 30 days, 2 points if a drug trafficker possesses a firearm.

Yet, when you compare that with the aggravating circumstances in the environmental guidelines, the Commission is quick to add 4 points, with the potential, under your own application note, up to 6. This is totally out of line with

the Commission's other designations. It is not really necessary, because you didn't have a permit, all criminal conduct is unpermitted and you don't add points onto a drug trafficker or bank robber, because what he does was not permitted by the government.

Finally, and most importantly, I am going to give you the need to have this Commission revise its environmental guidelines. We are particularly concerned with this. I told you about the client we have. There are other people like that out there. O.C. Mills, in Florida, a first-time offender, was given a Level 16 and served in Federal prison 21 months for putting 19 loads of clean building sand on a quarter-acre lot, on which he planned to build his retirement home.

Again, the double-counting problem is inherent. You have given 6 points for the base offense level, and the base offense is discharging a pollutant without a permit. Then you are giving 6 more points for discharging a pollutant, and you are giving 4 more points for not having a permit.

These flaws are widely recognized and documented in the letter I sent to the Commission in January, in a very thorough article written by lawyers Benjamin Sharps and Mr.

Chen of Perkins Cohe, that reprinted the DNA Toxic Law Report, and I have attached it to my testimony.

We are disappointed, Mr. Chairman, of your letter of February 7th to us, rejected our request for the Commission to consider this area, for several reasons. The primary reason was the fact that the Commission apparently decided at its January 3rd meeting not to take up the environmental section. However, the whole purpose of my January 15th letter was that the Commission's action on January 3rd was not an informed decision, because of the misleading information provided to this Commission by the Department of Justice and EPA representatives about the operation of the environmental guidelines.

Furthermore, your letter speculates that since the reason the judge, in fact, the only reason the judge offered imposing the high end of the Level 16 on my client was the view that Mr. Poska was "a stubborn violator." I should note that the judge referred to no damage caused to the environment. You suggested that, if it were not for the guidelines, my client would have received a harsher sentence. This speculation is unwarranted, for several reasons.

In the first place, the maximum penalty for the

worst water polluter in the country is 3 years. If this were strictly a pre-guideline case, and I wish it would have been, and he had gotten the 3 years, he would have been out on parole after serving 12 months. As it is, he has got a 27-month sentence.

Furthermore, the issue of stubbornness certainly does not seem to be a relevant offender or offense characteristic by the Commission for other crimes. I can't see where someone who is charged with several counts of fraud or several counts of drug possession, that there are added more points or harsher sentence because they are stubborn. Thus, it appears that the judge is able to exploit the flawed guideline in our case and others for using the high offense course to validate impermissible reasons for imposing these harsh sentences.

Finally, your letter conveniently ignores altogether the unjust sentences in the Mills case and other cases, and the critique of Messrs. Sharpe and Chin. You also said the Commission is too busy revising other guidelines, and this reason is disappointing, for a number of reasons.

First, the Commission had under full consideration a full revision of the environmental guidelines at least on

January 3, 1989. That is over two years ago. Now, the attached letter from the EPA to you, Mr. Chairman, is an exhibit to my testimony, and yet we are asking and you are suggesting a third year of delay, which I think is simply intolerable, especially for the 50 or so other individuals to be sentenced this year under the environmental guidelines.

Secondly, I suggest that a revision is relatively simple: Reduce or eliminate the no permit offense characteristic, one of the two sources of the double counting problem. That is relatively easy. In fact, the Commission can still meet this amendment cycle, by publishing that short notice in the Federal Register in the next couple of weeks, receive the comments by April and have the revision up to the Hill. Further refinements could be addressed afterward, if deemed necessary, but surely this revision is worth the time of the Commission, as it is worth the time of the Commission in considering how it is going to impose sentences on managers of crack houses and whether they should get a break.

Your letter is also remarkable for what it does not say. First of all, you don't dispute our contention that the guidelines are inherently flawed, because the Commission failed to compute average sentences imposed for environmental

offenses before the guidelines were enacted, as expressly required by the Congress, in order to determine whether stiffer sentences were warranted.

Second, there is no attempt to point to any reasons why Congress' preferences, that it is generally inappropriate to impose incarceration for first-offenders for minor violations. Some jail time may be warranted in environmental cases for first offenders, maybe 2 or 3 months. But Levels 12, 14, 16 and higher is simply overkill. The 27-month sentence that has been imposed on Mills and Poska and others translates to an outrageous pre-guideline sentence of 63 to 81 months. Does the Commission really believe that these sentences are what it intended or believe it is just?

Finally, your letter does not dispute our contention that the guidelines provide for impermissible double-counting. Indeed, Mr. Chairman, at the January 3rd meeting, you acknowledged the potential for impermissible double-counting, but suggested that the courts can take care of this problem. Several courts, however, including courts of appeals, have not taken care of the double-counting problem, to the detriment of my client and others, and it behooves the Commission to revise or clarify the guidelines immediately.

At a minimum, a simple policy statement can be and should be swiftly issued to the courts and probation officers to address the double-counting flaw that allows judges to impose sentences on first offenders at the urging of the DOJ, that according to the Commission's data released last year, exceeds the average sentence imposed under the guidelines for a host of serious crimes such as auto theft, larceny, fraud, prison escape, counterfeiting and many drug offenses, even counting all levels of criminal history, and not just first offenders.

Thank you for the opportunity to present these views. I will be happy to answer any questions that you may have.

CHAIRMAN WILKINS: Thank you very much.

Some of the points are well taken, particularly those dealing with drug establishments. The Commission set a very ambitious agenda for itself this year, and before the communication from you, we decided to defer until the next amendment cycle such areas as acceptance of responsibility, role in the offense, environmental offenses, and these selected areas we intend to give a very, very thorough review and make informed decisions as we can for amendments next

year.

I must say to you, to set the record straight, we talked about this case that you represent the defendant from Pennsylvania, I think orally, and certainly in writing. I did not call your client "a stubborn defendant."

MR. KAMENAR: No, the judge in the case did.

CHAIRMAN WILKINS: The District Judge said he was the most stubborn defendant he had ever seen.

MR. KAMENAR: And that's the only reason he gave for imposing the sentence. He referred to nothing in terms of any environmental harm.

CHAIRMAN WILKINS: I didn't want you to think I called him that.

MR. KAMENAR: No, I understood.

CHAIRMAN WILKINS: The fact of the matter is, he was sentenced to the maximum sentence allowed by the guidelines of 27 months. The judge could have sentenced him to 21 months or 22.

MR. KAMENAR: As thy did in O.C. Mills. But don't you think that even in O.C. Mills, that is unduly harsh?

CHAIRMAN WILKINS: I am saying to you, Mr. Kamenar, that it may be somewhat speculative, but it is certainly

informed speculation, reasonable speculation to think that had it not been for the guidelines, your client would have been sentenced to more than the sentence imposed, because the judge gave him all he could give him within the limits of the guidelines, and I think that speaks to something to say that the judge was concerned about something, the offense and the surrounding circumstances and the failure of your client, I am informed, on many occasions to comply with court orders and what not.

Let me just say that we are going to take a look at this with you and with others very carefully, and we want to do it in a very thorough process. We have to set our own agenda and our own timetable, and you must understand that this is a very pressing matter as far as you are concerned. It is to some of the Commissioners, too, but it is only one of several that we are going to address beginning this year, beginning as soon as this amendment cycle is complete.

So, we can follow some of your suggestions and perhaps have some of this out of the way before January of next year. We have a very ambitious schedule for a lot of areas and we work diligently to discharge our responsibilities, and we are going to do it in environment and other

area. But I must say to you, as far as I am concerned, I believe in very severe sentences for those who pollute and otherwise damage our environment, and that is something that is not going to charge, as far as I am concerned.

MR. KAMENAR: I understand that, Mr. Chairman. I appreciate those views and I would like to say, first of all, that while you set the agenda, I hope that this Commission setting an agenda, having it being pushed by the EPA and the DOJ, but, more importantly, the double-counting problem which you recognized at the January 3rd meeting can be easily solved with the stroke of a pen, through a policy statement to the court, saying that the Commission did not intend this.

Now, if you are saying that you intend that people should be punished this severely, that may be your view. I think that is not what Congress intended, in terms of when they stated that the government should reflect a general inappropriateness for first offenders being given any incarceration for minor offenses.

Now, there are environmental violations and there are environmental violations, just as there are drug offenses of one joint of marijuana and one drug offenses with 1,000 kilos. So, this blanket environmental violation, that people

pollute, is something that cannot be used to cover up, as the Commission has done in its regulations, all of these kinds of environmental areas.

Forget the Poska case. Look at the dozens of other cases I have cited in our prior submission, and look at the thoughtful and critique article written by Mr. Chen and Mr. Benjamin Sharpe, that shows how the Commission's guidelines allow and demand a mandatory statutory maximum for first offenders for certain kinds of offenses.

While you have other things on your table here, I just cannot imagine why you are spending all your time or lots of your time worrying about how to treat fairly certain kinds of drug dealers and bank robbers and so forth, and when you are talking about first offenders who are using their property, who are upstanding citizens in the community having to go to jail for such a long time. Sure, maybe some jail time is appropriate. This has been said by the Commission on many occasions, that we might want to have some jail time to send a message. Two or 3 months may be more than sufficient under the general statute of 18 U.S.C., about the purposes of sentencing, to make that point.

But for somebody to get the longest sentence in the

history of the Untied States under the guidelines, and I am looking at every case that has been prosecuted, I am looking at toxic waste, PCB's, heavy metals thrown in drinking water supplies, people being killed and injured, and this person gets the largest -- you are supposed to reduce the disparities out of these guidelines, not create them. If you look at the chart after the guidelines, it is wholly out of whack.

I appreciate the Commission's intent to look at it at the next cycle, but I cannot understand why you can't get something out for the people to comment on and still keep the option open as to whether you want to do it. Because what is going to happen is you are going to get into another cycle like the organizational sanctions, where one set goes out to the public, and, lo and behold, now two or three more years pass there. You have had since January 1989 a proposed revision in-house that could easily have been sent out.

Again, I see that we can't agree on this. I am very disappointed by the Commission's performance in this area.

CHAIRMAN WILKINS: Any questions from Commissioners to my right?

COMMISSIONER: MacKINNON: Yes. I listened very attentively to your description of this particular offense up in Pennsylvania. What kind of an offense was it, basically, in one word?

MR. KAMENAR: In one word, it was a pollution offense.

COMMISSIONER MacKINNON: Water pollution?

MR. KAMENAR: Water pollution.

COMMISSIONER MacKINNON: Yes, we understood that and you talked about birds and things like that. I read the case and I was very interested in reading this. My only comment is I want to tell you, from reading the case and reading about all that was ever written, I want to stress the fact that repeated defiance of court orders is not a minor violation.

MR. KAMENAR: Your Honor, you have your facts wrong, and I will be glad to straighten that record out for you. You said, first of all, water pollution was the category. The Commission --

COMMISSIONER MacKINNON: Yes, but you didn't mention that.

MR. KAMENAR: The court and the government did not

dispute that there was no pollutants put in the stream next to his property. Indeed, they conceded that the stream runs clearer today, because he cleaned the junk out of there. What they went was a technical violation, that part of the property comes through the wetlands --

COMMISSIONER MacKINNON: I know a little about water. There was some subsurface water involved, period. Now, all water pollution doesn't occur on the surface.

MR. KAMENAR: Your Honor, there was no evidence of any water pollution. I will be glad to give you the whole record of the case. It was as technical violation, and there were not repeated court orders.

COMMISSIONER MacKINNON: I have read the case.

MR. KAMENAR: There was no case to read. There was a criminal trial, the Third Circuit gave no opinion --

COMMISSIONER MacKINNON: The Third Circuit, and it was all reported.

MR. KAMENAR: There was nothing reported. The Third Circuit had no opinion. I didn't even get a chance to argue the case.

COMMISSIONER MacKINNON: I'm telling you that the newspapers well reported the whole thing.

MR. KAMENAR: Well --

CHAIRMAN WILKINS: If you have a transcript of the trial, I would be happy to see it.

MR. KAMENAR: Fine, but I don't want to get the Commission bogged down in one case. This is systemic across the board with all these environmental cases. In fact, as far as violating the court orders and stubbornness, if that is the criteria to getting that kind of a high level, then why not give high levels to bank robbers or people for multiple counts or fraud, because they are stubborn? The fact that you don't have a permit --

CHAIRMAN WILKINS: I think that happens, Mr. Kamenar. If you violate a court order, you probably are going to be sanctioned, one way or the other. That is the long and short of it.

MR. KAMENAR: Well, he was sanctioned both. He was found in contempt of the civil court, and yet that was, in effect, quasi double jeopardy.

COMMISSIONER MacKINNON: Don't come before any board or court that I serve on and tell me that defiance, repeated defiance of court orders is a minor violation.

MR. KAMENAR: There was one court order, Your

Honor, and that was in the civil case. In fact, let me tell you that the judge in the civil case, the Chief Judge of the Eastern District of Pennsylvania, Judge Fullam, was hearing a civil contempt hearing of Mr. Poska. Lo and behold, he said to the U.S. Attorney, "Gee, I read in the paper where you arrested this guy. Wouldn't it have been reasonable or make more sense to let the civil court handle this person first?" In fact, they did solve the problem. There was no further violation after that.

The government in this case wanted to set an example, indeed, at the sentencing hearing, the U.S. Attorney said we want to set an example to all property owners, all corporations, all developers that you have to get a permit or you're going to pay the piper. But the question is should that sentence fit the crime, no matter how stubborn this man was.

COMMISSIONER MacKINNON: I repeat again, that it is not a minor violation, as far as I am concerned, that when you state that it is, you make no brownie points with me.

CHAIRMAN WILKINS: Let me say this, Mr. Kamenar, let me exercise my prerogative, if I have one, as Chairman. Let's get off this case, and we can --

MR. KAMENAR: I would love to. Just look at the Mills case and look at dozens of other cases. Forget the Poska case.

CHAIRMAN WILKINS: I would be happy to do that.

COMMISSIONER GELACAK: Before you do that, I wouldn't be happy to do that. If there is a record that exists that we can look at, I would like to look at it.

MR. KAMENAR: In fact, I will send the sentencing hearing over, because, incredibly, it is the double counting that you recognize where the court says, okay, the underlying offense is discharging a pollutant without a permit, that is 6 points. You don't have a permit, there is 4 more, and you are discharging a pollutant, there is 6 more. Regardless of what the record is going to say, that is what the judge and the probation officer --

COMMISSIONER GELACAK: You seem to prolong the discussion. I would just like to take a look at the record, in light of what has been said here today, that's all.

MR. KAMENAR: Fine.

CHAIRMAN WILKINS: Do any Commissioners to my left have any comments or questions they would like to ask?

[No response.]

Thank you very much.

Our next witness is Judge Mark Wolf.

Judge Vincent Broderick, I understand, is working on Capitol Hill, and you are going to represent the Judicial Conference of the United States Committee on Criminal Law and Probation Administration.

We are delighted to have you with us, Judge Wolf.

JUDGE WOLF: Thank you very much.

Judge Broderick got an invitation to meet with Senator Thurmond at 11:00, and he hoped that he would be back, but he asked me to begin in his absence, if he was delayed.

The statement that was furnished to you this morning, the written statement is the statement for which Judge Broderick is the judge primarily responsible, and I think, to the extent that his views would in any way differ in emphasis from those that I would express, they are reflected there. But I do hope that he will be here to supplement what I have to say.

At the outset, I would like to say not only am I happy to be here, but I am here on behalf, as you said, Mr. Chairman, of the Judicial Conference Committee on Criminal

Law and Probation Administration.

As you know, recently that committee was expressly designated by the Judicial Conference to respond to matters like your present amendments and to initiate recommendations in the area of sentencing guidelines, and that was an alternative, as we perceive it, to the recommendation of the Federal --

CHAIRMAN WILKINS: Excuse me, Judge Wolf.

Judge Broderick, if you would like to come around, sir.

JUDGE WOLF: Judge Broderick would like me to continue.

In essence, we view that as accepting our committee's recommendation last year in opposition to the Federal Court Study Commission recommendation that a separate Judicial Conference committee, with a large and independent research staff, be established to address guidelines issues. Also, contrary at least to the original view of the Federal Court Study Commission, our committee did not advocate that the guidelines ought to be made advisory. To the contrary, we urged the Judicial Conference not to take that approach.

So, we come here very much committed to the

continuation of the guidelines and to work as effectively as possible with you, to help them achieve the ambitious, but important goals that they have.

I might also say that when I say it's a pleasure to be here to have this opportunity, it's not the sort of ordinary salutation that one makes on an occasion like this, because we could have much less to talk about, if you Commissioners had not been so effective in expressing and representing, as we tried to do, the Judicial Conference concerns about minimum mandatory sentences as they were about to proliferate in the 1990 Omnibus Crime bill.

As you well know, but I would like to state it as publicly and formally as I can, the judges in the Judicial Conference share your conviction that minimum mandatory sentences are highly undesirable in almost all instances, and utterly inconsistent with the whole theory of the guidelines. We recognize that the Commission and, frankly, particularly your Chairman were especially effective in communicating the concerns that we share to Congress in a way that caused them to at least pause, which we appreciate, and we are very anxious to work with you in an entirely complimentary way on the current study on minimum mandatory sentences and to find

a niche where we can be helpful and not distracting.

Judge Mazzone's recent response to the inquiry we made was far more than fully satisfactory, and I think the next item on our agenda, when we finish testifying today, is to try to identify how we can both strengthen what our staff is doing with the Commission and, in an examined way, contribute to that effort, because our goals are quite the same.

Having said that, in the time that remains I would like to make some observations on (a) the guideline process, some of which I have heard discussed earlier morning, and (b) some of the specific recommendations, and these matters are addressed in considerable more detail in the written statement furnished today.

It seems to me that, just as the guidelines have some disparate and somewhat challenging goals, so does the amendment process. Personally, I really applaud the effort generally to take the amendment process very seriously, because, as I have expressed on other occasions, I have had a concern that either the guidelines, which I thought were very impressive, but necessarily, as any human endeavor is probably imperfect at the outset, need review and revision to be more

just.

In addition, things that might have been most appropriate 5 years ago could become out of date, as law enforcement and other considerations change. So, I do think that careful attention to proper revisions is important, and I hope we never get to the day when we don't have these hearings or nobody comes, because then we are going to have a very mechanical, I think oppressive and unjust system.

I do think there is another difficulty with the amendment process, and that is the amendment process has the potential to frustrate evolution through judicial decisions of the guidelines and to frustrate a whole bunch of people, namely, district judges and Court of Appeals judges who have experience and are getting insights, from really fully employing them to develop a common law of judging in some of these subtle, but significant areas. And there is a concern that may be reflected in some of the particular amendments that you all may be kind of micro-managing this process.

Some of the provisions that raise those questions in our mind are, for example, the provision that suggests, again, the preponderance of the evidence, rather than clearly convincing as the right standard. Many judges feel that is a

matte of law, a procedural matter left to us and that is where it should stay, or addressing issues like whether physique ought to be a basis for a departure.

There is one Second Circuit case, as far as I know, that says it is. I know I have rejected that myself, and I didn't write an opinion on it, but you have got my statement of reasons, if somebody reads them. You now, judges are debating these things and we wonder whether it is really necessary or, indeed, appropriate in the still early stage to be getting such explicit directions.

Similarly, you suggest a new Category 7 of criminal history, but our staff says there are only 13 out of 35,000 people who would fall in that category. The Judicial Conference recommendations last year would actually perhaps encourage more upward departures and, in that sense, not be more lenient, but more flexible, looking at the degree of dangerousness, as well as the future dangerousness, as well as the likelihood of recidivism.

Basically, I think, looking ahead, if it were possible, what we would like to see -- and I think this has been echoed by some of the earlier witnesses -- is a guideline amendment system, sort of an each generation of proposed

amendments, that there was a theme or a principle addressed, perhaps flexibility at the lower end, which was one of the primary themes of the Judicial Conference recommendations, perhaps departures, but a unifying theme, so we would be discussing at this point a principle, a unifying principle, and then how the particulars fit that principle.

A corollary of that, I think, would be the desirability, regardless of whether there is as theme, and there probably will always be some technical amendments that are urgently needed, some fuller explanation or a report describing the amendments and their purposes, because some of the initial commentary here is probably not as illuminating to the uninitiated, as it is to you who are so deeply familiar with this.

Although this isn't in the written statement, I would also encourage you to write a report and tell us what you thought about, but didn't decide to suggest. The judges now are sending in statements of reasons, and some are writing longer letters and reports, asking the Commission to seriously consider revisions in particular areas that are disturbing.

We have a particular case in the First Circuit that

I have in mind, where the Court of Appeals declined, reversed the departure and said, while the District Judge is uncomfortable with this, and we on the Court of Appeals personally are uncomfortable with this, we can't say the Sentencing Commission didn't consider it, so it is good that the District Judge wrote the Sentencing Commission, because we can't get relief from the Court of Appeals.

You may have carefully considered those comments, but they don't show up in the amendments. If we knew what you were considering, frankly, I think it would have the general effect of encouraging judges to go along with the guideline process, even if our recommendations or a particular judge's recommendations are rejected, rather than trying to manipulate to get a result, because there is a perception that the Sentencing Commission won't seriously consider what is sent.

CHAIRMAN WILKINS: Won't consider what, a letter sent, you said? I didn't hear you.

JUDGE WOLF: Pardon me?

CHAIRMAN WILKINS: I didn't hear what you said. What was the last thing you said, we will or will not consider? The perception is we will not consider, you said?

JUDGE WOLF: Well, I think there is a concern and I appreciate the question. This is not a very politically popular area, I will confess, but I have in mind the Dean case in Massachusetts, and I use this only as an illustration. Dean was a passive recipient of child pornography, and I know the District Judge wrote a long letter and report to the Sentencing Commission. When the case went to the First Circuit, Judge Campbell reversed the departure. It was the second --

CHAIRMAN WILKINS: Was it an upward or downward departure?

JUDGE WOLF: It was a downward departure, and he basically said the Sentencing Commission has considered this, so we can't affirm the departure, but we hope the Sentencing Commission will look into it. I know that other judges in our district have written you on this subject.

What is not clear is whether you have considered those comments and decided they are not meritorious, which is perfectly appropriate, if they are not persuasive, or whether they have been overlooked. But part of the reason I throw it out, and it is something I would like to come back to at the end, if there is a feeling that the Commission is not

responsive in the sense of carefully considering, even if not going along with the thoughtful comments of busy District judges I have particularly in mind, then I think it increases the incentives, the kind of not-be-candid or try to evade the formal mechanisms that the guidelines are intended to encourage, and I think that would be kind of regrettable. So, some kind of report that both explains what you have done, that tells what you considered and decided not to do, might be very valuable.

On some of your specifics -- and I don't want to go too long -- you ask for advice on whether there is too much emphasis on drug quantities, and the answer to that from the judges' perspective is absolutely yes. You have recognized one of the things that is more than troublesome to judges, the kind of case where you get multiple defendants, where somebody is truly a mule or a person with extraordinarily little knowledge, who is used because of their ignorance and is required to get a large sentence.

Now, I don't know how much discretion we have in this area, because this is where the minimum mandataries tend to kick in. But to the extent that it is within the guidelines, we would very much like to work with you in this area,

and there are three approaches that seem to us fruitful to study.

The first approach you will find in the Judicial Conference Recommendation No. 7 from last year. It addresses this and it emphasizes looking at foreseeability, in other word, was the amount of drugs ultimately involved foreseeable, or was it somehow beyond the scope of the agreement or the insight.

Judge Kazen from Texas was telling me about a case where some woman was paid to ride in the car, so it would look like a conventional family going to church or something on Sunday and, you know, she knew that something was up or she had to know there were drugs involved, to be convicted, but she had no idea that it was as big trunkful, and she was sent away for a long time. To her, it wasn't foreseeable. There may be some problems with that approach, but that is one.

Second, the approach you use for people who rent drug property, property used in drug dealing, where you say, well, there is a certain reduction if your only role was renting -- and there is a cap, I think, a Level 16 -- may be fruitful in this area. In other words, if somebody is truly

a mule, and it may be hard to define who is really a mule, but we know it when we see it, this same approach may have promise.

The other thing you could carefully consider, because this is just extraordinarily troublesome to judges, and I have in mind myself. The newspaper article I read about two years ago, Judge Schwarzer literally weeping as he sent somebody away for 10 years who was a driver in a drug deal, but he felt fidelity to the law was essential. Maybe it is --

CHAIRMAN WILKINS: He felt the mandatory minimum at the --

JUDGE WOLF: Yes, I think that is right, which illustrates the problem again, but maybe this is an area, if somehow pursuing those first two approaches or any others that good minds can think of isn't quite right, that this is an area that, perhaps you could recognize, may be particular appropriate for consideration for departures. If you have somebody who is the real minimal, minimal ignorant mule and the government won't let them substantially cooperate, because they literally can't do anything, maybe this is where you give judges back, to the extent you have the power to do

it, because there are no mandatory minimums in some of this authority.

Generally speaking, we would like to see the guidelines encourage candor, discourage hidden departures through improper plea bargains. As I have had a chance over the years to talk with Commissioner Navel, among others, I don't think prosecutorial discretion is anything new whatsoever, but the importance of it is magnified, our ability as judges to sort of compensate for what may be errors in judgment are limited by the guidelines in the minimum mandataries, and that is appropriate.

I think it is very important in this area that you send aa balanced message concerning departures, because, as judges, we have been getting mixed signals. Judge Breyer and some of the current members have gone out and said, you know, these are intended for the heartland depart, but the real message of each of the individual revisions you put out now are to circumscribe discretion. You say age is not ordinarily a factor, but the Judicial Conference recommendations urge that age plus something, naivete, be recognized as factors.

You want to reduce the possibility of considering or clarify the inappropriateness of considering military and

civic activity, and I happen to -- I just can't weld the motive for that -- it seems to us that perhaps the best way to deal with this would be to take something like the application note that the Judicial Conference suggested to Chapter 5, part (h) and what it suggested last year, so when you say X is not ordinarily a basis for departure, go on and add the next sentence that gives some explanation generically of what is unusual or potentially extraordinary, that sort of gives both sides of the equations, so judges who have to work fast, you know, will look at it and remember to consider the second part, is this truly unusual or extraordinary.

In that application note, we said those offender characteristics that are not ordinarily relevant, when determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall or the type of sentence to be imposed when the guidelines provide sentencing options may be considered, if the factors alone or in combination are present to an unusual degree and are important to sentencing purposes in the individual case. What that do, I think, suggests that you could look at factors individually and in combination. We don't have to go like the blind person and the elephant, because you would get

a whole integrated human being in front of you, and then consider whether there is really something unusual, and if it is that unusual, whether the purposes of sentencing would be satisfied if you depart.

But putting aside how you could define that usual--and this is ours and the Judicial Conference's recommendation, putting in that sort of balancing language I think would kind of reconcile the signals that tend to come out.

Finally or semi-finally, I would say very quickly, you in these amendments seek to clarify that a motion is required for a downward departure for substantial assistance. I suspect you heard and will hear from many judges who disagree. But as several of your Commissioners know, that subject was debated over two days last June at our committee's meeting, an nothing has received more careful, deliberate, I think intelligent discussion, and we decided not to recommend abandoning the requirement of a motion.

In this sense, we are perhaps guilty of what I raised with you. You don't know what we didn't recommend to you, but we had two days of debate or debate over two days as to whether we should say that cooperation could be recognized in the absence of a motion. We decided not to tell you that,

for what I consider good reasons, although I may be a little biased, since I was advocating. We can get into this more at some point, but we have considered what you have recommended, in effect, or reaffirmed.

The last thing I would throw out, just thinking to the future, since Judge Broderick and I now have some enhanced responsibilities in this area, it seems to me that one of the things that we want to participate in studying better, and I think we have a common interest in this, is the effect that each and every one of these amendments is having on the plea process and other dimensions of the administration of justice.

If the guidelines, as the Commission has studied and said, did not diminish the plea rate initially, you know, is that still true, or is there more data now to raise other questions. I think somebody has got to go back and deal with what used to be Judge Mazzone's major Mafia case tomorrow morning. We have in the District Courts and the Courts of Appeals just staggering responsibilities that seem to be escalating, and sentencing is very important. Unlike some of my colleagues, perhaps, I think it is proper if I have to spend more time than I should, when somebody's liberty is at

stake.

But cumulatively, it is just very difficult to do everything we need to do, and it seems to me that the attention you have paid previously to the effect that this has been having on the administration of justice, through trials and through other impacts, is something that should be carefully reassessed. We should discriminate, if we can, we will have to discriminate between the effect of the minimum mandataries, which personally I tend to think is severe, and the effect of the guidelines, which I tend to think is less severe. We would look forward to working with you on many things, but including that in the coming year or so.

Thank you.

CHAIRMAN WILKINS: Thank you.

Judge Broderick?

JUDGE BRODERICK: Thank you. I apologize for being late. I think I was laboring in the proper vineyard. I spent the last 15 minutes or so over in the Russell Senate Office Building talking about mandatory minimums.

I do want to thank the Chairman and Commissioner Nagel for carrying the ball in what was properly not a hostile atmosphere, but at least in one where the impetus

towards mandatory minimum was less than overwhelming. I thought you did a great job.

I am not going to add very much to what my colleague has had to say. I do want to just stress a couple of things. One is pretty obvious. You know that the sentencing guidelines are here to stay and that perhaps the only threat to them is debilitation through excess mandatory minimums.

I want to assure you that, so far as the judiciary is concerned -- and, of course, three of you are members of the judiciary -- the guidelines are here to stay. The period of open combat is long over. I think that the last two years have been marked by cooperation between this Commission and the judiciary, and I hope that this continues, and the comments that Judge Wolf and I are making are in the interests of that cooperative venture.

I want to stress a couple of things that Judge Wolf referred to. One is the problems that I see with the amendment procedure. We have a large constituency out there of many, many hundreds of sentencing judges and, frankly, it is just impossible for our committee to come in here and comment on proposed amendments on the short ticket that we have had with respect to these amendments. There is no way

that we can garner sufficient comment from sufficient people out there on everything that you present and make a truly constructive recommendation.

Now, I recognize that you are constrained by statute, the statute sets forth a schedule for making recommendations for amendments to Congress. The recommendations I believe have to be made before May 1st, you have got to have an 180-day cooling off period, and then I think that has to be completed by November 1st. I haven't really figured out the arithmetic of that, it is so tight, but I think that a more deliberate period for soliciting comments on your proposals can be developed, even within that restrictive statutory framework.

I also believe that the fact that there is a statutory framework for amendments does not men that amendments have to be made. I think whenever you contemplate amendments, you should -- I am sure you do, but I am just reminding you of this problem -- remember that there are people out there, probation officers, prosecutors, defense counsel, and judges, that have to bring themselves up to speed.

Now, this is not too much of a problem, I don't

think, for the prosecutors, because they have information services of their own. It is a problem for judges, because judges are terribly busy. It is a problem for probation officers, because probation officers are very busy. The Federal defenders certainly make a real effort to keep their own people informed, but defense counsel who are not Federal defenders are really an unknown quantity. I think this is something you have to consider and I recommend that you consider, in attempting to work out a more deliberate and orderly and longer period for comment on your recommendations.

I want to stress also another thing that Judge Wolf emphasized. There are concerns on our committee that the lack of flexibility at the low end of the guidelines, is a very troublesome thing for sentencing judges. It is very troublesome to have to sentence a person to a sentence which you do not believe that person should receive.

Now, I agree with the Chairman, that one of the real vices here is the mandatory minimums, and as we were discussing yesterday, one of the real problems with mandatory minimums is not only that they are inconsistent with an orderly guideline system, but they also skew that system and they require in certain cases that the Sentencing Commission

fix a range that it would not otherwise fix.

But on the low range, Congress has told us that it wants the Commission to consider the appropriateness of a sentence other than imprisonment for a first offender on a crime which is not an otherwise serious crime. Now, Congress obviously was talking about felonies, so we do not characterize serious crimes as felonies, and there is a real tension here.

The Commission has made a value judgment, which I think was an entirely proper value judgment, that pre-guidelines we the judges were not sentencing various white collar criminals appropriately, so in that one area the Commission has not relied on past average, but has augmented past averages. I understand it, in setting guidelines. I do not quarrel with that.

But what I do quarrel with is the fact that Congress itself has told us that, generally, it is appropriate not to sentence to prison the first time, if the crime is not otherwise serious, and I think this is something that is very troublesome to judges.

The last thing I want to stress that Judge Wolf, who was very comprehensive here, also covered is the danger

that we slip back into an area where, one way or another, truth starts sliding out of the sentencing process.

Now, maybe all of us are not old enough to remember it, but certainly some of us are old enough to remember the time when the sentence was really a charade. The judge asked if any promises were made. The standard answer was no. We have moved away from that. I mean now, when the judge asks that question, he expects to receive and he does receive chapter and verse as to all promises that have been made.

But in this area of sentences which are either mandated by mandatory minimums, which you can't do very much about, or by your guidelines, which you can do something about, there is a real danger that defense counsel and prosecutors are going to reach an agreement or an accord which involves, in fact, lying to the judge or lying by omission to the judge, and in which the judge is going to be a participant, because he knows they are lying, and this is going to be caused because the guidelines otherwise are going to require a sentence which is too high for this particular offender. This is a very serious problem, and all of us who are interested in the guidelines as serving as the way of the future, as I am sure they will, are going to have to address

ourselves to this problem.

I think that Judge Wolf has covered everything else I have to say, and I want to thank the Commission for listening.

CHAIRMAN WILKINS: Thank you very much. We all appreciate very much the manner in which you, Judge Wolf and Judge Broderick, have represented and presented the views of your committee, and we appreciate very much the support that you have given us. We also appreciate the constructive and meaningful criticism that you offered, as well, and we will continue to work together, I am sure, from now on to achieve mutual goals that we all have in mind.

Let me ask any Commissioner on my right if you have any questions?

COMMISSIONER MacKINNON: I was only going to make just one statement about your comment on white-collar crime. The Act which we were operating under pointed out that we were to insure that the guidelines did reflect the fact in many cases that current sentences do not accurately reflect the seriousness of the offense, so we weren't really out in the wild blue yonder on that.

JUDGE BRODERICK: Please don't misunderstand me,

Judge MacKinnon. I a not criticizing you, I was perhaps giving you more credit than I should have given to you, but you have followed your statutory mandate.

[Laughter.]

COMMISSIONER MacKINNON: We applied it to white-collar crime, as to others.

JUDGE WOLF: Well, if I could speak to that just a bit, perhaps this is something of a preview of coming attractions, because I understand the Judicial Conference's recommendations are to be taken up by you most seriously in the next amendment cycle.

The first four of them are together aimed at creating the possibility for more flexibility at the lower end of the range. The critical decision in many close cases, jail or no jail, would not mandate no jail, and as far as I am concerned, it wouldn't necessarily at all operate to prefer the white-collar criminal. What it could operate to give a break to is sort of the young first offender who has the misfortune, realistically, at least in Massachusetts, to come to court the first time in the Federal system, where we have these guidelines that may command jail, as opposed to the State system -- and many of these are current State and

Federal offenses -- where you really have to get convicted a number of times before you face a serious prospect of jail.

So, the question raised by those four is not, as far as I am concerned, whether there should be more lenient treatment for white-collar criminals, nor whether fewer people necessarily should go to jail, but whether judges ought to have a little more flexibility, when you are down in those recognized marginal cases.

COMMISSIONER MacKINNON: Thank you.

CHAIRMAN WILKINS: Any questions? Commissioner Nagel?

COMMISSIONER NAGEL: I have three points I want to make. One is publicly I want to thank Judge Broderick, as the Chairman of the Judicial Conference Committee on Criminal Law and Probation. I think you have been extremely responsive and gracious to the Commission in including us in your deliberations, and I think that, from my perception, has enabled us to work more cooperatively, and we look forward to continuing that. I think you should be congratulated for your special efforts to include us in those discussions.

Second, I wanted to ask Judge Wolf or Judge Broderick about a point that is made in your written state-

ment, on page 12, and I raise it in part because I have been thinking about it all morning, and I think it was raised in the statement prepared by Mr. Hutchinson and Mr. Portman, s well as others, and that is about this perception that the Commission is moving away from a policy decision about a real offense system.

This may be my own characterization, but as I recall, what we rejected was not a real offense system, but a pure real offense system, but that rejection was simultaneously coupled with the rejection, I think with equal force, of a pure conviction charge system, and what we tried to do was walk a fine line down the middle.

I don't see in these amendments any shifting of that ground, that is, in fact, I think the bank robbery example was the one to which those earlier speaking this morning referred, and that is a case where what happened in the guidelines in the first iteration was that we proceeded with a pure conviction charge system.

So, the proposed amendment, which I may or may not support for other reasons, is not I think a shift away from the real offense policy, but it is an attempt to remove that guideline, in line with the general modified real offense

system. I just sort of throw that out, because I don't see us as making any shift or any policy change. We always try to walk the middle. What we rejected were the pure systems, and coupled with that I guess is a question I have, something I'm just not sure I understand what is being said.

On the one hand, as you know, as part of our research on the plea process, what we hear repeatedly from both judges and defense counsel is the decrying of the shifting of the discretion to set the sentence from the judge to the prosecutor. That is a very commonly heard complaint.

Now, it would seem to me that one of the best ways to accomplish that, that is to shift that discretion, would be to move, in fact, to a pure conviction charge system, which is precisely why we didn't do that. Therefore, I don't understand why the shifting of those offenses that are more like that back to the middle is then criticized by the same group that says, on the other side, you're giving more discretion to the prosecutor. When you move to the middle of a non-real offense, a non-pure conviction system, it seems to me you undercut the charge that you are giving the power to the prosecutor, but then the defense counsel and the defense bar and the judges who make that same complaint tell us not

to do that. So, I am sort of thinking are these two things consistent, or am I missing something, and maybe either of you could help me on that.

Let me just throw out my last question, which is unrelated to the minimum mandatory you want. Judge Broderick, you mentioned that you were concerned that there should be increased flexibility at the bottom for the statutory prescription that we give non-incarcerative sentences to first offenders for otherwise non-serious offenses. I think that is the way the statute reads. I think that is what we should do, personally.

But if you take out drugs and you take out white collar, then where are we going to find -- and we have talked about your question about age, we have talked about age at length, and we haven't responded to that, how we have gone it. But where are you suggesting we go to find these offenses, if you take out drugs and you take out white collar? Maybe an answer is not to take out blanket white collar, but the less serious, sort of economic bank teller theft and --

JUDGE BRODERICK: I think that is the answer.

COMMISSIONER NAGEL: But I would be interested in

hearing from you where you think we should go on that.

JUDGE BRODERICK: I think that may be the answer. I think, of course, even in the drug area you have got some statutory mandates and you have got a statutory mandate in the white collar area, too. You have got a tough job. I don't want to suggest that you don't, Commissioner, and it is probably a lot easier to make suggestions than it is to deliver on them, and maybe what you're saying to me is put up or shut up, and maybe we will have to give some thought to that.

COMMISSIONER NAGEL: Well, I will give you an example. I have proposed, in accordance with the Judicial Conference suggestion on age, that we look at persons over a certain age being given more flexibility, and immediately the comment was, well, those are the white collar people, so that suggestion sort of died on the vine.

JUDGE WOLF: On that point, though, I think that is why some combination of qualities may put into clearer focus where the flexibility is appropriate, because it shouldn't perhaps just be age, but age plus the nature of the offense.

I know that I sentenced a case a young man who was about 19 years old and he worked in a big Boston department

store, and he engaged in the most foolish scheme of generating money for himself by pretending that there were return sales and returns of merchandise, and he used his own name and got caught in about 3 weeks, but he had X amount of dollars. I don't remember how many, but by the time it came to sentencing, the public defender was advocating a downward departure to no jail, and the prosecutor had agreed not to speak.

I said I thought that was terrible. First, in my experience, the Department of Justice has always battled the judges for the right to allocute, and to give it up because of sentencing, the Justice Department didn't feel comfortable with the sentence that the guidelines would prescribe, so I was hoping that the defense lawyer could persuade the judge to depart and nobody would appeal. It was inappropriate and, really, they should have thought about this in advance. The case shouldn't have been prosecuted.

On the other hand, if I had the flexibility, I think, by the first four recommendations, I would have had the discretion of not saying give -- I don't remember what it was, you know, 2 to 10 months or something, it would have been zero to 10 months, I could have done what everybody in

the room, all the actors at that point thought was appropriate, but it was in part --

CHAIRMAN WILKINS: What did you do?

JUDGE WOLF: I sent him to jail. You know, it is not utterly -- when we come to the minimum mandatory sentences, I think sometimes judges are called upon to do things that they really feel are unreasonable, just not right, beyond the range of reason, not contemplated by Congress, because they would agree that it is not reasonable. It is a very painful thing to do. We have a fidelity to the law that we swear an oath to.

When we are talking about the guidelines, a good deal of what we are talking about here is not whether what you are suggesting is unreasonable, that is, you know, no sensible person could think this is just, but we are striving to do something that is better. You are striving to do more perfect, still imperfect, but better justice in the one case that that defendant has and the one life that that person has. You know, whether he has ever gone to jail or never goes to jail makes a big difference to that person.

Now, I didn't feel that I could say -- I knew I could have departed and nobody was going to appeal and I

wasn't going to get reversed, but I don't think that is my job. There are things that I do to try to avert being in that dilemma, but ultimately I tend to understand what my overall obligation is, and also I tend to have found that I can sometimes put the onus back on the Justice Department to consider whether they really want to go through with it, and they have been responsive on occasions and decided, you know, on reflection, we shouldn't go through with it, we will do pretrial diversion or something else. Sometimes, if you look at something carefully enough, almost surprisingly, there is a legitimate ground to depart.But I sent that person away and that is why the guidelines are so much better than the minimum mandataries.

Perhaps Judge Broderick would like to respond to this, but I would respond to Judge Nagel's second question, if I have them in mind in the right order.

JUDGE BRODERICK: I do think that there are other crimes than drug and white collar, if you don't define white collar too broadly. I mean you have got all sorts of post office theft, mail theft and things like that, that in normal course I think you have sort of catastrophic results for the defendant who commits the crime without going to jail. He or

she has a tenured job, in effect, for life, up to pension, and that goes down the boards.

If you figure out the dollars and cents of what that person lost, it is much bigger than anything involved in the case. It is sort of a case of first offense, probably the last offense, the kind of a crime that teaches a lesson that will mean that a crime will never be committed by that person again. It is the sort of a case, it seems to me, under the general appropriateness statute, that should call for probation the first time.

I would also emphasize that, even with respect to the imperatives in the statute, the imperatives with respect to white collar crime, the language generally used, general appropriateness or general inappropriateness, which leaves a leeway there, not only for the judge or should be for the judge, but also for the Commission.

COMMISSIONER NAGEL: I would just add that perhaps, at last from my perspective, that it would be helpful to me if you could put on your agenda for the June meeting maybe an attempt by the committee you chair to make some suggestions about offenses where there is some consensus among your committee members that can fit that characterization of what

Congress intended when they said "otherwise non-serious first offense," et cetera. That would be helpful, so that we don't end up with the problem to which Judge MacKinnon referred, when you weren't here, so you would know, which is if you have somebody who repeatedly is in violation, and he made the comment that an environmental offense, repeated violations are not an example of non-serious. That would be helpful for us.

JUDGE WOLF: If I could briefly address your second question, I think it is more than a fair question, and I hope I am not disclosing a confidence, because Judge Broderick and I had a discussion when we met this morning that illustrated the same point, and I would say two things to you.

First, as Oliver Wendell Holmes said, "The life of the law is not logic, it's experience," and I don't think you should permit us judges or the prosecutors or the defense lawyers to push you one way, that is to a pure offense, or another way, a simple kind of conviction, if your experienced judgment doesn't give you a sense that that is just, and I think that to go to either of those poles really would fail to recognize the complexity.

It is not surprising to me that you would get some

inconsistent signals from defense lawyers, because this takes away discretion from the prosecutors, so they would like that. But the bottom line is, if they are good lawyers, they would like to see their clients do less time, and this is likely to cause them to do more time. The same thing, I don't expect you have heard much in the last 5 years from the Department of Justice coming to you and saying that the sentences should be less severe.

You know, for whatever the reasons, the bottom lines are that the government is usually looking for more onerous sanctions than the defense attorneys, and it is part of our adversary system. We are judges and we should give you a more balanced view, and perhaps we have expressed some ambivalence here, but I don't think wise people should mistake oversimplification for clarity. This is as tough area. It should be surfaced, it should be discussed, you have to calibrate your response, but ultimately you make a judgment as to whether there are being abuses of prosecutorial discretion in this area.

Even among the judges sitting in front of you, and there are only two of us, you might get a difference of opinion s to whether this is a major problem or sort of a

tolerable way of building something into the system. But it is not the best way to build some flexibility into the system, because it is at the expense of candor, which is just what Judge Broderick said. We are 100 percent on this, it is just devastating to have a system of justice that is based on lack of candor or evident truth, and one of the reasons we would like to see more flexibility at the bottom end and a more balanced statement about when departures are permissible, so that will be a candid way of dealing with these difficulties.

When it is candid, when it is public, it is accountable. You will see it, the public will see it, and the Congress will see it. And if we are abusing our discretion in letting people out of jail on the margins or in departing when we shouldn't, then you can respond to it. But one of the really pernicious things about having to deal with these sort of invisible areas is that there is no public scrutiny, really, and diminished accountability.

COMMISSIONER NAGEL: Let me make one last point. You raised one issue earlier and I would think that you made a very good point about how what we didn't do was disclosed to you or provide you with some mechanism by which you could

discern what we hadn't done. In the area of departures, I would be sad to think that you thought we took every departure and used it as a basis for an amendment to restrain discretion.

In fact, there are probably 100 bases for departures, 99 of which we decided were perfectly consistent with our basic philosophy that departure is a perfectly appropriate response. I think there are only 2 instances, physical -- I can't remember the exact words -- physical physique and for military record, out of probably 100 possibilities, so maybe we could emphasize the 98 where we said --

JUDGE WOLF: That really illustrates more vividly than I could have anticipated my point, because what we and our fellow judges say, you know, what you acted on looks a little idiosyncratic. If it was seen, perhaps, in its fuller context, you would show that you are recognizing that judges, you know, properly exercising discretion, want to leave it in there.

COMMISSIONER NAGEL: So, there is 9 percent departures and there were maybe 3 cases, or 4 total, using military and physique, so we are probably at 99 percent not responsive to that, so we should then --

JUDGE WOLF: At some point, you have probably got more disagreements with many of my colleagues, but what you would like to avert are misunderstandings --

COMMISSIONER NAGEL: Yes, that is why I point that out.

JUDGE WOLF: -- and I think if you both explain more fully the purpose of the amendment, and indeed if there is as coherent theory being set for substantial, but also explain what you could have done and didn't do, what you consider really the acceptability and the understanding would be enhanced and the quality of this dialogue will be enhanced.

COMMISSIONER NAGEL: Yes, I think that is a very good point, and maybe sometime afterwards you could meet with Judge Wilkins to figure out an informal way by which we could share with you what we did on age and why --

JUDGE WOLF: Frankly, neither Judge Broderick nor I participated in transmitting the Judicial Conference's recommendations to you and our very illustrious predecessor, and I don't say that at all jokingly, Judge Becker did it. But I think our recommendations to you are subject to the same criticism I just made. We sent over 8 recommendations and your Commissioners, Commission Nagel was there when we

debated them, so at least orally she understand what we left out and what our theory was, if she remembers.

But we should have said something that says these are the concerns that we have, this is the range of things we considered, you know, recognizing the competing considerations, these are the 8 relatively modest, but we think vitally important suggestions we have made to you, and then they just wouldn't look like perhaps isolated reactions, and they come from a universe of much, much larger things that started with staff papers last March and were discussed by judges of the First and Third Circuits in White Plains and in many meetings here and exhaustively up in Maine, and they got pared down.

COMMISSIONER NAGEL: I will re-communicate to the Commission what you didn't do, if you promise to tell the judges that we didn't respond to 99 percent of the departure reasons --

JUDGE WOLF: Well, I will have to see some evidence of that.

COMMISSIONER NAGEL: If you can remember --

JUDGE WOLF: I would rely on your representation, no matter how formidable, but they will say how do you know?

COMMISSIONER NAGEL: We will give you the numbers.

JUDGE WOLF: Really, I think we should. In fact, if you wrote something and it wasn't going to be read by all judges, we could distill it in one of Judge Broderick's periodic communications, that in some respect would give you credit for what we appreciate, as well as we hope constructive and well received advice in areas that we would like to see improvement.

CHAIRMAN WILKINS: We will be happy to take the credit.

JUDGE BRODERICK: May I just mention one thing, which I have discussed with members of the Commission before, which I think is very important? I think one of the big problems today in the area of departures is that Courts of Appeals believe that the guidelines are written in stone and that an act of departure is something which has to be curbed.

Commissioner Nagel and Judge Mazzone, you may remember, at the meeting we had in December, Judge Pam Rhymer said that when she tries to discuss this with fellow members of her circuit, they say the guidelines say you are not supposed to depart. Now, the guidelines don't precisely say you're not supposed to depart, but they have language in it

that is rather gratuitous and suggests that departures are outside the pale or outside the norm.

There are a number of examples of it on page 1.6 of the November 1, 1990 -- let me just read the last line of one of these paragraphs, talking about unguided departures; "The Commission recognizes that there may be other grounds for departure that are not mentioned. It also believes that there may be cases in which a departure outside suggestive levels is warranted. In its view, however, such cases will be highly infrequent."

Now, that is probably an accurate statement, but it is also a gratuitous statement and it suggests apparently to some Courts of Appeals judges that when a District judge departs, he pretty well does it at his peril. I know from many, many discussions I have had with many, many of you that that just is not your attitude, that you share our view that the health of this system in the future is in constructive articulated departure.

CHAIRMAN WILKINS: Are there any comments from other Commissioners?

COMMISSIONER MacKINNON: Judge Wolf, did I interpret you correctly when you say you want more discretion at lower

levels, that you want probation? Is that basically the request?

JUDGE WOLF: The basic request would be -- yes, permit a probationary sentence as one of the options to a larger range, a lower end of the guideline range.

COMMISSIONER MacKINNON: Would you want probation at higher levels?

JUDGE WOLF: That is not one of the recommendations of the Judicial Conference committee at all. Indeed, one of our recommendations that you clarify the proprietary of upwards departure, when criminal history under-represents both the risk of recidivism or the danger that that recidivism would involve.

No, the proposals I was talking about were really focused on the cases that I know, Judge MacKinnon, you were more familiar with than me, where you are right on the margin between jail or no jail, as a human being, and to permit a little more discretion there.

The corollary of that is just a refinement, and it echoes something that was said earlier, how much jail, whether one should have to do half of the guideline sentence in jail or something less than half, say a month, instead of

3 months.

JUDGE BRODERICK: That isn't important. The point I think, which is also a part of our recommendation at the lower end, that there should be a recognition of the shock treatment of any jail, and that a provision for half the term in prison is not necessary, when one month will do the same thing.

Now, Commissioner Corrothers' Subcommittee on Alternatives to Prison has done aa great deal of work in this area, and I know that the Commission is going to give very careful consideration to those recommendations.

COMMISSIONER MacKINNON: Thank you.

CHAIRMAN WILKINS: Thank you very much.

JUDGE BRODERICK: Thank you.

JUDGE WOLF: Thank you.

CHAIRMAN WILKINS: Our last scheduled witness today is David Yellen. As all Commissioners know, from his prior work here in Washington, David Yellen is now Professor of Law at Hofstra University Law School, in New York.

Professor, we are delighted to have you with us.

MR. YELLEN: Thank you, Judge.

I promise that I will be brief, both because of the

lateness of the hour and also because several other witnesses have talked, in one way or another, about what I wanted to talk about. Let me also say I apologize for not having a written statement for you. My participation in this hearing came up sort of at the last moment. I am writing an article relating to what I am going to talk about, and I will certainly share that with you as soon as it is presentable.

I, too, want to talk about real offense sentencing and the movement in several of these guidelines, as well as amendments in prior cycles toward a more real offense approach. The amendments in this cycle that raise these concerns are those having to do with robbery and firearms, for the most part.

In past amendment cycles, bribery, for instance, I think in the 1989 amendments, you included bribery in the group of offenses that are grouped under 3D1.2(d) and are, therefore, subject to the relevant conduct principle, meaning it is treated in a more real offense way.

Also, telephone counts and conspiracies and attempts in drug cases, the amendments there, although there are some ambiguities in those amendments, they also moved into more real offense direction.

Also, the amendment you made to the introductory commentary to the role in the offense section, where you essentially disagreed with some Circuit Court decisions limiting the role in the offense adjustment to the offense of conviction, you disagreed with that and I agree that those courts, whether it is good or bad policy, they were misinterpreting the guidelines.

With that clarified, a more real offense oriented approach to certain groups of offenses, and my purposes, as at least one other witness, Mr. Portman did, was to just urge caution in continuing this movement towards real offense sentencing, without at least stepping back and thinking about the implications each of these incremental steps has on the entire system, and particularly as it relates to plea bargaining.

These two issues, the line between real offense sentencing and charge offense sentencing and what to do about plea bargaining, I think are the two most critical issues that will affect the ultimate success or failure of the guidelines, and we really are at sort of an infancy in understanding both of those things.

Commissioner Nagel and Professor Schulhofer

recently wrote really a fascinating article that I urge everyone who is interested in plea bargaining, especially, to look at. As they indicate in the article, there isn't a lot of data yet available as to just how much manipulative plea bargaining is taking place at the moment, and it is this sort of manipulative plea bargaining that is the reason that charge offense sentencing is particularly problematic.

So, just to step back for a second, what the Commission originally did, as we all know, is drew a line by way of 1B1.3 and 3D1.2(d), and said on this side of the line we're dealing with basically a charge offense approach, although there are real offense elements, and on this side of the line, although it is not a pure real offense approach, it is much more of a real offense approach. And what we have seeing now with the bribery and proposal with the robbery amendment here is shifting that line over.

What that doesn't address, though, is the fact that, as long as there is as sharp line like that, every type of offense on the other side of the line that is not treated in a real offense way will still be subject to manipulation through plea bargaining, because the offense at conviction will continue to really have a dramatic effect on the

sentence, and I really sympathize with the problem you face here, and this is why you adopted what Judge Breyer eloquently called one of the key compromises in the first place in drawing this line.

Pure real offense sentencing doesn't work and is unfair and is overly burdensome on the courts, and a pure charge offense system of guidelines would be essentially meaningless and would, as you point out, Commissioner Nagel, operate to dramatically shift sentencing discretion to the prosecutor. I think you are right, that there are some inconsistent criticisms leveled at the Commission sometimes that the guidelines shift discretion to the prosecutor, and at the same time real offense sentencing is unfair. It is kind of hard to have it both ways, although it obviously is a little more complex than that.

So, we have seen this initial compromise, and now we have seen, I think predictively, a shift towards more real offense system, as you have seen the anomalies where the second robbery disappears if it doesn't lead to a conviction, but the second fraud or the second drug distribution is still taken into account, and it doesn't make sense. Why should the second robbery disappear or the second bribery previously

or the second civil rights offense, to name one type of offense, that are still not subject to this more real offense approach, and as we have become concerned about the way plea bargaining interacts with this real offense/charge offense line?

But I think you have to be very careful about shifting this line in a sort of ad hoc way, without stepping back and reconsidering the original line that was drawn, why was the critical thing in the original line whether fungible amounts were involved, amounts of money, amounts of drugs.

The Commission didn't really, I think, do an adequate job in the initial set of guidelines in explaining why the line was drawn where it was, and I think that accounts for why you have begun to move away from that line, again without really fully exploring all of the implications of that change.

I am not here to tell you which way you ought to go, because even though I have been thinking about this long and hard, I don't have an answer to it, either. But there are a number of other approaches, in addition to the ones you have been taking, that are worth considering, maybe reducing some of the factors in the guidelines like the amount of drugs

that now dramatically affects sentence and are quite susceptible to manipulative plea bargaining, if the prosecutor is willing to go along with it, and as we have seen in Commissioner Nagel's study and elsewhere, at least a fair number of prosecutors are willing to do that kind of thing.

I am suggesting that there are other ways to get at the same problems that you are addressing in these amendments. maybe we need to more directly confront the problems of charge bargaining to more directly regulate what prosecutors can and can't do. As has been talked about in the past, of course, we may need a more developed system of prosecutors' guidelines.

We are significantly reducing the discretion judges have, and even if we aren't shifting discretion to the prosecutor, we are at least to a large extent leaving the prosecutor's discretion unchecked, so, in a proportional sense, the prosecutor's discretion is being increased relative to the judge's discretion.

The DOJ can do that to some extent, although we see how, despite the Thornburgh memorandum and other statements they have made, they don't reach all of the practices down at the individual Assistant U.S. Attorney level.

There is also a role that the courts can play in regulating charge bargaining, in particular. I wrote a very brief little article in the Federal Sentencing Reporter that is about to come out, about why it is that judges seem to routinely ignore the policy statements in 6B1.2. Those are policy statements, not guidelines, but I think if judges took a little more seriously your recommendation that they state on the record why it is that the charge bargain adequately reflects offense seriousness, you would then get more feedback as to the nature of charge bargaining and to what extent it may be undercutting your overall purposes.

I think, as a corollary to that, the appellate courts ought to say to District Court judges, if you accept a charge bargain, you are, in effect, saying that the remaining counts that are being plead to adequately reflect offense seriousness, so then you shouldn't routinely be able to turn around and depart. You shouldn't be able to say I'm accepting this charge bargain, which suggests to the defendant that they are going to get a reduction in their offense score, and then turn around and depart upwards, because of the very facts that are present in the dismissed counts.

I am not sure exactly what you can do about that,

because your authority to address plea bargaining is limited in the statute. But I think you may need to invite other participants, the defense bar and prosecutors, to get together in some forum to talk more broadly about these dual issues of the real offense/charge offense line and plea bargaining, rather than dealing with perceived problems in an incremental way, which is what I see, for the most part, taking place with these amendments nd prior amendments.

I think I will stop there and just say I will have more to say about this in my writing. I would be happy to answer any questions, if there are any.

CHAIRMAN WILKINS: We look forward to reading that article, Professor Yellen.

Are there any questions nor comments from Commissioners to my right?

[No response.]

Hearing none, to my left?

[No response.]

Well, I don't think the lack of questions probably represents the lateness of the hour and does not represent our interest in your testimony and your work and, indeed, the assistance that you can give to us. As you recognize, these

are tough, tough policy issues, and they have dramatic effect down the road.

Thank you very much, Professor Yellen. It is nice to see you again.

In keeping with our policy, is there anyone here in the Chamber who would like to address the Commission? We would be glad for you to come forward now and take the witness chair and talk to us.

MS. RODRIGUEZ: I beg the indulgence of the Commission, as I speak. I am not a public speaker. I am not an attorney or a judge, and I don't represent any large legal organization.

I am a common citizen, but I think that the Commission --

CHAIRMAN WILKINS: Would you state your name, please?

MS. RODRIGUEZ: My name is Leah Rodriguez, and I come from Miami. I am a common citizen and I speak for the people. I speak for the afflicted, for the concerned, for the caring, and I think the Commission wants to hear what the people have to say.

Several of the speakers here this morning have

addressed very important issues of the mandatory sentencing guidelines and other legal issues that I cannot speak about, because I don't know the fullness of these laws.

As I hear the speakers here this morning, I hear a lot of incarceration, jail sentence, long prison sentences, mostly incarcerations. I fail to hear from anyone here what are we going to do about the detrimental effects of these new sentencing guidelines upon society as a whole.

For every prisoner -- and there are 50,000 to 60,000 Federal prisoners -- there is at last one concerned person. There is at least one family who faces destruction. There is at least one child who is angry, who may turn that anger later upon society.

I think that there should be a commission appointed to study what this is doing to our future, because maybe some of us won't be there, but some of us will be there and we will have to deal with what these laws have done to this country.

I know that the Commission has as very important mission to accomplish, and we the people are not saying let the guilty go. We say if we have sinned, punish us, but be fair in your punishment.

There are thousands of first-offenders, young men who otherwise would be supporting their families and rearing their children, that are there wasting away. They are non-violent, first-offenders, they don't deserve to be put away for 20, 30, 40 years and life. Someone needs to stand up and save us, save the future, because the future lies on the children of today and those are the innocent victims.

We could also speak for the women, the mothers who suddenly become the breadwinner, also the caretaker of these children. They cannot adequately raise their children, and this breeds crime.

My words come from the heart, not from any law book, and I want to congratulate the Commission for allowing me to say what thousands upon thousands of mothers, grandmothers, sisters, daughters and sons would tell you, if they had an opportunity.

Thank you.

CHAIRMAN WILKINS: Thank you very much for your remarks. We appreciate hearing from you and we enjoyed having you at the Commission a few weeks ago, and we welcome you back at any time. Thank you very much.

Does anyone else wish to address this Commission?

MS. TEAL: My name is Erika Teal.

CHAIRMAN WILKINS: Could you speak up, please?

MS. TEAL: My name is Erika Teal, and I come --

CHAIRMAN WILKINS: How do you spell it?

MS. TEAL: E-r-i-k-a T-e-a-l.

CHAIRMAN WILKINS: Thank you.

MS. TEAL: I come before the Commission to make two points that I feel have not been stressed enough by the previous speakers. One is that I think prison sentencing should not be the only answer to punishment when somebody has committed a crime, and this leads me to the second point, which is very simple, that rehabilitation needs to be stressed more in sentencing than punishment.

Taking the two points together, I think many of the criminals would be far better off by receiving sentences like community work, community service, so that they realize the damage that they have done by their crimes, rather than being put into prison with other criminals, where they learn other methods of doing crimes.

I hope that the Commission will consider these two points in their future meetings.

CHAIRMAN WILKINS: Ms. Teal, thank you very much.

Commissioner Corrothers, here to my right, recently chaired an extensive effort in this area of alternative punishments, and the Commission is going to thoroughly review these recommendations during the next 6 months, with a view towards perhaps some amendments next year, and we appreciate your thoughts along this line very much. Thank you.

Does anyone else wish to address the Commission?

[No response.]

That being the case, this meeting is now adjourned. Thank you very much.

[Whereupon, at 1:20 p.m., the Commission was adjourned.]

- - -

C-E-R-T-I-F-I-C-A-T-E

I, Gwen A. Schlemmer , the Official Court Reporter for Miller Reporting Company, Inc., hereby certify that I recorded the foregoing proceedings; that the proceedings have been reduced to typewriting by me, or under my direction and that the foregoing transcript is a correct and accurate record of the proceedings to the best of my knowledge, ability and belief.