

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES SENTENCING COMMISSION
in conjunction with the
1998 NATIONAL INSTITUTE ON WHITE COLLAR CRIME

PUBLIC HEARING
THURSDAY
MARCH 5, 1998

"KEY ISSUES: REASSESSING SENTENCES FOR
FEDERAL THEFT, FRAUD, AND TAX CRIMES"

Parc 55 Hotel
Sienna Room, Third Floor
San Francisco, California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES SENTENCING COMMISSION
in conjunction with the
1998 NATIONAL INSTITUTE ON WHITE COLLAR CRIME

PUBLIC HEARING
THURSDAY
MARCH 5, 1998

"KEY ISSUES: REASSESSING SENTENCES FOR
FEDERAL THEFT, FRAUD, AND TAX CRIMES"

The United States Sentencing Commission met in
the Sienna Room, Parc 55 Hotel, San Francisco, California,
at 1:15 p.m., The Honorable Richard P. Conaboy, United
States District Court Judge, Chair, presiding.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COMMISSION MEMBERS PRESENT:

MICHAEL S. GELACAK, Vice Chair

MICHAEL GOLDMSITH, Commissioner

The Honorable DEANELL R. TACHA, United States
Circuit Judge, Tenth Circuit, Commissioner

EX-OFFICIO MEMBER PRESENT:

MARY FRANCIS HARKENRIDER

STAFF PRESENT:

JOHN H. KRAMER, PH. D., Staff Director

PAMELA MONTGOMERY

DONALD A. PURDY

JIM GIBSON

KEN COHEN

JOHN STEER

PAULA DESIO

A G E N D A

	<u>PAGE</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	

I.	Welcome and Introduction of Commissioners DR. JOHN H. KRAMER, Staff Director United States Sentencing Commission	7
II.	Opening Statement The Honorable RICHARD P. CONABOY United States District Court Judge	9
III.	Panel 1 Implications of Proposed Changes to Loss Table on Sentences for Federal Tax Crimes	14
	Opening Statement by Defense Attorney	
	JAMES A. BRUTON, III, ESQ. Williams & Connolly Washington, D. C.	15
	Opening Statement by DOJ representatives	
	MARK MATTHEWS, ESQ. Deputy Assistant Attorney General Tax Division Department of Justice	24
	RICHARD SPEIER, JR. Director of Investigations Western Region Internal Revenue Service	29
	Response by Defense Attorneys	
	CHARLES M. MEADOWS, ESQ. Meadows, Owens, Collier, Reed, Cousins & Blau, LLP Dallas, Texas Chair, Criminal Development Subcommittee Civil and Criminal Penalties Committee of the ABA Tax Section	35
	PAULA JUNGHANS, ESQ. Martin, Junghans, Snyder & Bernstein, PA Baltimore, Maryland	38

1	TESTIMONY OF JUSTIN THORNTON, ESQ.	45
	Washington, D. C.	
2	Co-chair, Tax Enforcement Subcommittee,	
	ABA White Collar Crime Committee	
3		
4	IV. PANEL 2	57
5	Proposed Changes to Fraud and Theft Tables and	
	Proposal to Delete "More-than-minimal planning" and	
6	add "Sophisticated Means"	
7	Issue One: Loss Tables	
	Opening statement by defense attorney	
8	GERALD H. GOLDSTEIN, ESQ.	59
	Goldstein, Goldstein and Hilley	
9	San Antonio, Texas	
	Former President of the National Association of	
10	Criminal Defense Lawyers (NACDL)	
11	Issue Two: More-than-minimal planning/ sophisticated means	
	Opening statement by defense attorney	
12		
13	DAVID AXELROD, ESQ.	66
	Vorys, Sater, Seymour and Pease, LLP	
14	Columbus, Ohio	
	Former Assistant U.S. Attorney (S.D. Florida)	
15	Former Trial Attorney, Tax Division, DOJ	
16	Opening Statement by DOJ regarding both issues	
17	MARY SPEARING, ESQ.	72
	Chief, Fraud Section, DOJ	
18	Former Assistant U.S. Attorney (E.D. Pa.)	
19	KATRINA C. PFLAUMER, ESQ.	80
	U.S. Attorney, Western District of Washington	
20	Response by Defense Attorneys	
21	EPHRAIM MARGOLIN, ESQ.	78
	San Francisco, California	
22	Former President of the National Association of	
23	Criminal Defense Lawyers	
24		
25		

1	Issue Three:	89
2	Proposed revisions to definition of Loss	
3	Opening Statement by defense attorney	
4	T. MARK FLANAGAN, ESQ.	90
5	McKenna & Cuneo	
6	Washington, D. C.	
7	Chair, Subcommittee on Procurement Fraud,	
8	ABA White Collar Crime Committee	
9	Former Assistant U.S. Attorney (DC)	
10	Opening Statement by DOJ	
11	KATRINA C. PFLAUMER, ESQ.	93
12	Response by defense attorneys	
13	DAVID AXELROD, ESQ.	102
14	GERALD H. GOLDSTEIN, ESQ.	104
15	V. Public Comments	106
16	Testimony of:	
17	FRANK BOWMAN, Spokane, Washington	106
18	Visiting Professor, Gonzaga University Law School	
19	Former Assistant U.S. Attorney (S.D. Florida)	
20	DAVID COHEN, ESQ.	112
21	EARL J. SILBERT, ESQ	114
22	JAMES E. FELMAN, ESQ.	118
23	BENSEN WEINTRAUB, ESQ.	123
24	VI. Closing Remarks	124
25	The Honorable RICHARD P. CONABOY,	
	United States District Court Judge	

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

P R O C E E D I N G S

1:19 p.m.

DR. KRAMER: Good afternoon!

I would like to convene this public hearing of the United States Sentencing Commission. I'm certainly pleased that we are able to be here in San Francisco at your session so that we can entertain and receive your testimony and input this afternoon.

This has actually been a series of hearings for the Commission: In October, we had a hearing on loss in Washington, D. C. In December, we had a hearing on manslaughter; February, we had a hearing on telemarketing; today, we have a hearing on fraud and loss tables, and the loss definition, of course. Next week, we will have another hearing in Washington, D. C. which will cover some of these topics, as well as additional topics that are on the Commission's agenda plate.

We want to emphasize that we've done this, and we've tried to open up to receive more testimony, to allow for more input in our decision-making process. So we really welcome this chance to listen to you.

My job, right now, is to introduce the commissioners; and, then, we will start at 1:30 with the panel. We have a very busy afternoon, so I've warned a few of the panelists that we will try to watch the time

1 fairly closely so everybody gets a chance. At the end of
2 the day, we have scheduled a time for unscheduled comments
3 to be made, and we have two commissioners who have to
4 leave towards the end of the afternoon. I want to make
5 sure we get to that as we have scheduled it. So,
6 apologies if we push you a little bit.

7 First, let me introduce members of the
8 Commission.

9 First, we have Mary Harkenrider, who is an ex
10 officio member of the Commission. She is counsel to the
11 Assistant Attorney General for the Criminal Division of
12 the Department of Justice.

13 Next to her, we have Commissioner Michael
14 Goldsmith, from Salt Lake City. He is a professor of law
15 at Brigham Young University.

16 Beside Commissioner Goldsmith, we have Judge
17 Deanell Tacha, of Lawrence, Kansas, from the Tenth
18 Circuit, United States Circuit Court Judge, of the Tenth
19 Circuit.

20 And this very dashing figure, beside me here,
21 is Michael Gelacak. Commissioner Gelacak is vice
22 chairman, and he's from Centerville, Virginia.

23 To my left, we have the chair, Judge Richard
24 Conaboy, of Scranton, Pennsylvania. He has been the
25 chair, since 1994. He will now take it over and deal with

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 the rest of it.

2 OPENING STATEMENT

3 THE HONORABLE RICHARD P. CONABOY,
4 UNITED STATES DISTRICT COURT JUDGE
5 CHAIRMAN, U. S. SENTENCING COMMISSION

6 JUDGE CONABOY: Thank you, John, very much,
7 and good afternoon, everybody.

8 As our staff director said, I am Richard P.
9 Conaboy, and I am presently a United States District
10 Judge. I've been a judge since 1962, although I went on
11 the federal bench in 1979.

12 And I mention that not to indicate that the
13 years passing give you any greater grasp of the issues
14 that are involved; but it is amazing, in the last 35
15 years, how many changes have taken place in the system of
16 justice that we have in the United States — the best, I'm
17 convinced, anywhere in the world — in how far we've come
18 and how many changes have been made. And, more
19 importantly, in the sentencing area, it amazes me that,
20 for the last 35 years that I know of, we've been
21 struggling with the same problems over and over again,
22 sometimes running into ourselves as we try to come up with
23 solutions, particularly in this very troublesome area of
24 sentencing.

25 As I indicated to you, when I first went on

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 the bench, there were no Sentencing Guidelines. There was
2 no aspect of being a judge that caused me, and I think
3 almost any other judge, as much consternation as the very
4 difficult job of imposing a sentence on the criminal
5 defendant.

6 In many civil cases, you do your best to
7 study the issues that are involved, and listen carefully
8 to the arguments that are made; and, then, you make a
9 decision and, generally speaking, you feel you've tried
10 your best and you made a judgment that's based on reason
11 and good sense, and followed the law as you saw it.
12 That's never quite so with imposing a sentence. You walk
13 away from most sentencing wondering how much was enough
14 and at what point should punishment go beyond what we
15 reasonably think is appropriate in the given case, and was
16 my sentence too severe, or was it too lenient under the
17 circumstances. And why, what end were we trying to
18 achieve in imposing the sentence?

19 As a result, there was often disparity among
20 courts and judges in imposing sentences, and the
21 implementation of Sentencing Guidelines was the natural
22 outgrowth of a desire to try to put some sense into the
23 sentencing process, and to see that, at least in the
24 federal court system, sentences imposed in California, for
25 similar crimes on similar defendants, were the same as

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 those imposed in New York or Florida, or anywhere else in
2 the country. And it has helped. The concept of
3 Sentencing Guidelines has helped immensely in that area.
4 And it has reduced the disparity that we used to find
5 sometimes in sentences around this country. And it also
6 has helped, I think, to raise the public perception of how
7 hard we try, in the federal system, to impose sentences
8 that are fair and just. So now judges can look to the
9 Sentencing Guidelines and look to a method which helps
10 them arrive at a given sentence in a given case, and all
11 of that is very good.

12 One of the big concerns that I have, and
13 others join me in this, is that, as newer people,
14 particularly, take the bench, they will not take the
15 sentencing process and sentencing obligation as seriously,
16 perhaps, as they should.

17 We had a judge testify before us out in
18 Denver, Colorado about a year ago. He very strongly
19 pointed out to us how sentencing used to bother him. That
20 he would go home the night before a sentence and wouldn't
21 enjoy his supper, and didn't sleep very well, and that he
22 carried it around in his stomach, wondering what was the
23 right thing to do. But he said, "I don't find that
24 anymore, because I come in the morning of a sentence and
25 it's all computed for me, and the sentence is already laid

1 out, and I don't have to worry even whether it's right or
2 wrong; under the circumstances, it's the one commanded by
3 the guideline system."

4 Well, whether you agree or disagree with that
5 kind of statement or testimony, it's a bothersome thing.
6 And we are struggling, as a Commission, as it's presently
7 peopled nowadays, to constantly remind judges of the great
8 responsibility they still have when they're imposing
9 sentences. That there are times when a judge must go
10 beyond in the mathematical computation and look carefully
11 to see is this the right sentence under the circumstances.
12 And, if it's not, there are many ways and many times when
13 the sentences must be adjusted to make sure that the
14 sentence does fit the purposes for which sentencing is to
15 be imposed in this country. And we're — in trying to do
16 that, we're looking at the Sentencing Guidelines
17 constantly and bearing in mind that even those who
18 originally drafted and wrote the initial Sentencing Guidelines poin
19 living body of law, subject to change as we learn more
20 about human behavior and as we learn more about how the
21 sentencing process was being carried on in the federal
22 courts. So, we're engaged in this kind of process
23 constantly.

24 In this fraud and loss and theft area, as you
25 all know, and as John Kramer just pointed out, we have

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 been looking at this now for several years. We've had
2 several other hearings. We've invited people to come in
3 and testify to us and submit to us a variety of
4 suggestions and ideas on what's to be done in this area.
5 Which comprises, by the way, a very, very large portion of
6 the sentences imposed under the Federal Sentencing
7 Guidelines are in the fraud, loss and theft area.

8 So we appreciate your, all of you who are
9 here today to help us, coming once again to give us your
10 opinions on some of these areas.

11 We've broken this focus on this part of the
12 guidelines into approximately four areas: One is the
13 definition of loss; the other is the tables that are
14 involved in this. The third is what we call referring
15 guidelines, other guidelines that refer to the tables, and
16 how they will be handled if there are changes to be made.
17 Finally, one of the most important things that we're
18 trying to do, from the standpoint of simplification, is to
19 combine the guidelines, as they now exist, into one
20 guideline. Make it easier for all involved, we hope.

21 So we've asked, then, and received, and we
22 appreciate recommendations from the Criminal Law
23 Committee, and we received help and advice and guidance
24 from the Practitioners Advisory Group and the Department
25 of Justice, and many other individuals, and we thank you

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 all for your interest in what we're doing. We feel and
2 hope that your suggestions will enable us to make a final
3 determination which will be the most appropriate and the
4 most just under all of the circumstances.

5 We have several panels here today and a
6 number of people who are going to speak to us. Let me get
7 to the first panel, and John Kramer has agreed to take on
8 the job of keeping track of time here for us. We'll try
9 to not interrupt you; but, just in an effort to try to
10 move this along, maybe remind us, ourselves, if we're over
11 time.

12 PANEL ON TAX AMENDMENT ISSUES

13 TAX ISSUES ONE AND TWO:

14 PROPOSED CHANGES TO TAX TABLE AND THE
15 ENHANCEMENT FOR SOPHISTICATED MEANS

16 JUDGE CONABOY: On the first panel here, we
17 have Mark Matthews, who is a Deputy Assistant Attorney
18 General in the Tax Division. Richard Speier, who is
19 Director of Investigation of the Western Region of the
20 Internal Revenue Service.

21 And we have James Bruton, who is with
22 Williams & Connolly in Washington, D. C., and a former
23 deputy attorney general in the Tax Division.

24 Charles Meadows of Texas, who is with the
25 Criminal Development Subcommittee of the Civil and

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 Criminal Penalties Commission of the ABA.

2 Paula Junghans of Baltimore, a great city on
3 the East Coast, of Martin, Junghans, Snyder & Bernstein.

4 We welcome you all here, and if we can start
5 from left to right, if that doesn't interrupt the way the
6 panel wants to go?

7 MR. BRUTON: I think, actually, there was an
8 agenda. Mr. Purdy wanted me to start; and, then, we would
9 go down —

10 JUDGE CONABOY: Very good. All right. Thank
11 you.

12 STATEMENT OF
13 JAMES A. BRUTON, III, ESQ.
14 WILLIAMS & CONNOLLY
15 WASHINGTON, D. C.

16 MR. BRUTON: I've been asked — well, first,
17 it's a pleasure to be here, Mr. Chairman, and members of
18 the Commission.

19 I haven't been before you in a number of
20 years, and it's — I regard it as a great honor to be here
21 today to have my comments heard on the subject of the
22 changes that have been proposed. The way this is set up
23 is: I would go ahead and speak for a few minutes. I
24 think Mr. Matthews will then present his; and, then, the
25 other panelists will present a rejoinder to some of the

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 things that Mr. Matthews says. I think that's way it
2 we'll go.

3 JUDGE CONABOY: That's fine.

4 MR. BRUTON: The remarks that I put in,
5 you're missing the last three pages. They are a little
6 long for me to read in this format. So, I'm going to have
7 to condense down a little bit, but they're available. I
8 understand Mr. Purdy has all the pages now so that it
9 actually is a complete record.

10 The guideline proposals, or the amendments
11 that we're asked to discuss in this panel, relate to,
12 first, possible changes in the sentence — the Tax Loss
13 Table, which is 2T4.1. There are three proposals on the
14 table, two that are in the public statement, and a third
15 which is, I believe, an amalgam of the other two
16 statements. It blends the others.

17 The Option 1 basically makes no changes in
18 the current table until about \$40,000; and, then, breaks
19 with more severe sentences, or larger increments of loss
20 applied in the later periods. Although, all these
21 proposed tables go in two-step, rather than one-step,
22 increments, which is the current circumstance.

23 The Alternative 2 actually decreases the
24 dollar amount at which sentences will produce jail, and, in
25 fact, will actually compel imprisonment by an individual.

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 And the other provision that we're dealing
2 with, or the third provision, is just the amalgam of the
3 two, which is intended to, I assume, cover the best of
4 both of those issues.

5 My view on that, or our view, collectively,
6 from the defense bar side is: We should not make a change
7 in the tax tables. I was in Mark Matthews seat in 1993
8 when we came to the Commission and asked to increase from
9 the levels that existed prior to that time. And, if the
10 Commission recalls, at that time, the broad guidelines,
11 and the tax guidelines, were identical. And the burden
12 that we carried with us was not should we move both of
13 them; but, rather, the only proposal that the Commission
14 would consider at that point was whether to change tax
15 individually. And, so, I carried the burden up with me of
16 having to say: Well, we should make tax independent of
17 fraud.

18 Our position was — and I think, today, I'm
19 in the unique position of being back before you again
20 defending the guidelines that I defended as a proposal
21 five years ago. They were a major increase over what had
22 previously existed. Our concern was that not enough
23 taxpayers who had been engaged in fraud would be seeing
24 sentences that produced prison, and that there were too
25 many opportunities for probation, and too many

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 opportunities for alternative sentences. So, we asked the
2 Commission to move that up; and, in fact, that took place.

3 What I didn't realize at the time, and I was
4 here, and I've mentioned in my remarks that I think I was,
5 at least, involved in sending something up to the
6 Commission virtually every year I was there. So we always
7 had something on the agenda that we wanted you to do, and
8 we were always running up with a new opportunity for
9 change in the guidelines.

10 I have seen — and I have seen it the hard
11 way over the last five years — that change in the tax
12 area should be approached very cautiously. I say that
13 because of the way tax cases are generated. Tax cases
14 generally take several years, and usually they're closer
15 to the end of the statute of limitations, which is six
16 years, than the earlier part of the statute of
17 limitations. So, if we change the guidelines this year,
18 for all practical purposes, we won't see cases being
19 sentenced, a meaningful number of cases being sentenced,
20 under that for maybe three years, four years, or more
21 years out. In fact, there's still cases involving the
22 1992 book that are existing now that Mark's office is
23 recommending prosecution in, as we speak. And that will
24 happen for the next couple of years, in any event.

25 That's sort of the natural consequence of the

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 nonretroactivity rule that we abide by. But what it puts
2 the position — it creates the position in the tax arena
3 where there is multiple books, and the plea bargaining and
4 the resolution of cases is dependent largely on which book
5 you land in. So that you can have two people sentenced
6 the same year, for the same offense, for roughly the same
7 tax amount, and, yet, you'll have disparate sentences
8 right within maybe a month. So that's a very difficult
9 thing to deal with. I think it creates a perception that
10 just the bad luck of being investigated for this, or
11 another crime, is the issue. Whether one year the offense
12 level should be higher than another year, I think is
13 something of major gravity. And I think it's an issue
14 that lingers with us as time goes on. And I didn't
15 perceive that at the time. I certainly see it now.

16 Are criminal sentences in tax cases too low?

17 I came up here in 1993 and argued that we
18 needed deterrence. I was with Mike Dolan, who is the
19 Deputy Commissioner of Internal Revenue Service. I helped
20 him prepare his remarks. And the one thing that I was
21 deathly afraid of is that one of the Commissioners would
22 ask me: How do you know? Because there were studies
23 being undertaken in the Service to try see if one criminal
24 prosecution would increase collections anywhere else. And
25 there were studies, but they haven't really gotten very

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 far.

2 The question here is even more precise. Not
3 just whether there is a criminal prosecution, but whether
4 a certain level of jail, for certain offense level, will
5 the desired effect: Deterring. The reason why this is
6 important is: Unlike most crimes, I think the federal
7 prosecutors try to prosecute almost every other offense
8 that they can find because the offense needs a response.
9 In the tax arena, the government knows, going in, that it
10 can't even come close to scratching the surface of the
11 number of people who are involved in tax evasion crimes of
12 various kinds.

13 There's a tax gap, which I'm not even sure
14 how large it is now. It was \$120 billion when I was in
15 the government; and I don't know if it's the same, or
16 roughly the same, each year, a shortfall in collections
17 over what ought to be gotten. And the question is: If
18 you prosecute 1,500 cases a year, what's the effect of
19 that? And, in turn, what's the effect of sending a
20 certain number of people to jail? That is not an
21 answerable question. There are no statistical bases to be
22 able to make that determination.

23 When you see the dislocations that are
24 caused, and the relative disparities that are caused, by

25

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 making a change like this, I think it's one of the things
2 where the government has a very, very heavy burden to come
3 forward and say: This is really what we need, and these
4 are the areas. Not just to put numbers down there,
5 because they essentially become arbitrary. I could have
6 come in, five years ago, and maybe I should have, by the
7 government's presentation, and argued for more; but how
8 could we know? We wouldn't have known at that time.
9 Should it have been higher? Should we have it 70 percent
10 of all taxpayers, tax evaders, in jail? Should we have 30
11 percent? What's the right number? That's not an
12 answerable question.

13 The other thing is that I think we have to be
14 careful when we use the statistics in the tax area to make
15 determinations about these issues of how many people
16 should go to jail. The tax area is unique, in that:
17 There are very many people who are prosecuted for other
18 crimes that end up in the tax arena. Plea bargains go
19 there. There are a lot of resolutions in the government
20 is general enforcement program, which is really relatively
21 small. And the question is: Do these plea bargains, do
22 agreements as to tax loss, do other agreements that go
23 into these things skew the numbers in such a way that,
24 when the Commission attempts to determine whether those
25 numbers have meaning, I don't think they are very useful

1 in that respect. And I think seeing, trying to target a
2 certain percentage of people to be incarcerated is
3 probably — No. 1, it may not work. Because the plea
4 bargaining still has to be put into the equation to
5 determine what the likely outcome would be.

6 Finally, let me just mention, in passing, or
7 quickly, so I can finish up the issue with the proposed
8 change in sophisticated means.

9 The experience of our panel, the defense
10 lawyers, is that we see it raised in almost every case.
11 The statistics show that it is only in 16 percent of the
12 cases that it's actually imposed. I think that tells you,
13 right away, that the plea bargaining issue there may be
14 significant. It also, I think, suggests that the
15 probation offices are becoming more and more accustomed to
16 applying it, and you'll see a natural increase as time
17 goes on.

18 The real problem that concerns us, or concerns
19 me, particularly, is the initial jump to the level 12 in
20 low-end cases, where there's is sophisticated means or
21 sophisticated concealment. I'm not sure I can tell from
22 the definitions the difference between the two, but the
23 question is: Taking, say, a \$1,000 tax-evasion case, and
24 finding that the individual had altered documents, or
25 created a phony document, or attempted to present some

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 false material to somebody to conceal the crime, that that
2 could be construed as sophisticated means or sophisticated
3 concealment and push that person to a level 12, for that
4 small a tax, it seems to me is close to unconscionable.

5 I'd say that the courts are well equipped with
6 the existing guidelines to impose the sentences that are
7 needed when there is a showing that there is something
8 egregious that's going on. And I think the problem of
9 compartmentalizing this, both from the tax table and this,
10 is: A thorough investigation, showing multiple years,
11 will tend to increase in these tax years in a way that
12 other crimes don't. A tax evader who is shown to have
13 engaged in this conduct for eight years, rather than one
14 year, will certainly have more tax loss and spend more
15 time in jail, and the sophisticated-concealment issues
16 will come out more likely.

17 I'll just conclude with that. I think the
18 others will pick up for me where I have failed to cover
19 things.

20 Thank you.

21 JUDGE CONABOY: Pam Montgomery is very kindly
22 holding up signs for us over there, so we won't have to
23 interrupt you if you keep your eye on the signs.

24 Mark, do you want to proceed, please.

25 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATEMENT OF
MARK MATTHEWS,
DEPUTY ASSISTANT ATTORNEY GENERAL, TAX DIVISION
DEPARTMENT OF JUSTICE

MR. MATTHEWS: I want to thank you, again, for the opportunity to appear here. This is my second appearance before the Commission. We had an opportunity to speak almost a year ago.

I am not going to read my testimony, but will submit it for the record; but I will mention a couple of the high points in it, or, at least, high points from the government's perspective. They may be low points from the defense bar's perspective.

The thrust of the testimony is to focus on the need in the tax world for us to increase the severity in the Tax Tables, especially at the low levels. We talked about that last year, talked about some statistical evidence last year, and I think we had some substantial support for the notion of evaluating those Tax Tables at the lower end last year. I just hope that we can act this year and not let another year pass, frankly, for one of the reasons that Mr. Bruton, and that's the delayed effect, particularly in the tax area, for when these go into effect.

We have a huge general deterrence requirement in

1 the tax program. We are trying to deter more Americans on
2 fewer prosecutions than in almost any other area of law
3 enforcement. There are approximately 200 million
4 Americans who are touched by the income tax laws and have
5 an affirmative obligation to citizenship to complete and
6 file those returns, as well as make a payment. We
7 prosecute about 1,500 of those cases a year. And,
8 frankly, when we look at the real legal source income
9 cases that we think have the greatest deterrent effect on
10 the Americans who are not otherwise committing crimes,
11 other than tax crimes, we only have about 700 or 800
12 prosecutions a year.

13 To address that, we came up with this tax-gap
14 project. The tax gap is the difference between those sums
15 that should have been reported and paid each year, and the
16 sums that are actually reported and paid each year. As
17 Jim stated, that is a very large number. It is still over
18 \$100 billion. We haven't gotten it down, since Jim left,
19 despite all of our best efforts. The compliance rate is
20 about 83 percent.

21 One of the things that —

22 JUDGE TACHA: But if I understand his point
23 correctly, it is that it got raised in '93, and most of
24 those are not through the pipeline yet. So, how do we
25 know, how do we know, whether, as a matter of fact, it is

1 — I mean, even given your purpose, you can accomplish
2 that?

3 MR. MATTHEWS: Exactly. I think my point is
4 less made, is honestly less made on an analysis, even
5 though I'm going to talk about where we are in terms of
6 the incarceration right now. It's more of an analysis of
7 the strict application of the dollars to what we know
8 about taxpayers out there in the world. We are very
9 interested in uniformity and fairness in the tax system.
10 We're trying to reach these 200 million Americans. The
11 reason why the Tax Division exists is to see that we try
12 to act in an uniform and fair way.

13 What I can tell about the Tax Tables, even
14 without having seen the sentencing results, is that it
15 takes something like a \$40,000 tax loss, assuming
16 acceptance of some responsibility, to put a defendant, a
17 putative defendant, into a range in which there is not a
18 certainty, but a virtual certainty, of some sort of
19 incarceration.

20 When I look at that \$40,000, and look at the
21 very good statistical evidence about what taxpayers owe
22 what amount of money, that's where I come up with some of
23 the numbers we have in our testimony where we have 95
24 percent, or more, of the American public literally does
25 not pay enough in taxes, that if they cheated to the full

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 extent of their tax liability for three years, which is
2 the average case, that they could possibly get themselves
3 into an incarceration zone.

4 I don't even like saying this publicly. This is
5 the only place I do because you are the ones who can
6 effect that. That, I don't -- you know, that stands
7 alone, regardless of the incarceration rate. One of the
8 things that Mr. Speiers is going to talk about is the way
9 they look at their program when they go out and make
10 cases. One of the things they look to in their cases is
11 the possibility of the deterrence message, and possibility
12 that someone might go to jail. Now that's not to say that
13 everybody has to go to jail in the tax world, by no means;
14 but we do look -- he looks primarily, as he spends his
15 resources, to send that general deterrence message, he
16 looks to that. So, even with the tables, as they are now,
17 we have somewhat, just under 40 percent, of our cases with
18 the defendants receiving some sort of incarceration time,
19 as opposed to the guidelines, as a whole, where it's
20 something like over 80 percent of the cases.

21 So the break mark for us, you know, 97 percent
22 of the reason why I'm here today is, is not the upper end
23 of the table, although that's important to us and we
24 support that, but the really important break mark for us
25 is that level 12.

1 Right now, as I understand, Option 2 is the one
2 that would essentially put the Option 12 at the \$30,000.
3 I don't purport to say that \$30,000, I don't — you know,
4 Jim is correct. You know, in a lot of law enforcement,
5 the statistical evidence is hard to gather. The
6 deterrence is something you understand in your gut. And
7 the Commission, in its experience and statistics, I'm not
8 saying that I — that there's some magic about \$30,000.
9 What I do know, from what all we know about all the
10 taxpayers at large, is it will open the range of taxpayers
11 and take the CID's focus, it will give them the
12 opportunity to look not just at the upper end of the
13 taxpayers, a very small percentage of the taxpayers, but
14 expand it further.

15 That's one of the things we have to do as
16 mission. We have to show that, no matter what your income
17 level is, if you go about a sustained pattern of cheating
18 on your taxes, you will, that will be addressed. Now, you
19 might not have to go to jail, but we will try, will try to
20 address that conduct. So we need to bring that benchmark
21 down.

22 JUDGE TACHA: You agree with his statement that
23 most of the District Courts are showing a lot of
24 reluctance to send low-end tax violators to prison?

25 MR. MATTHEWS: Well, when you say "low-end," do

1 you mean low end in —

2 JUDGE TACHA: Well, what do you — I don't know
3 what anybody means by low end. I guess that's the debate
4 here: Who is low end?

5 MR. MATTHEWS: Right. I think, you know, it's
6 certainly true that, when we have a defendant who is in a
7 10, 12, who is in the low-end range, there is some sort of
8 span, or when there is some sort of incarceration, there's
9 no doubt that we have a lot of judges who will, who will
10 give, who will give some sort of probation or split
11 sentence, or some sort of that.

12 One of the things — and I think that relates to
13 some of the difficult individual judging points, with a
14 judge with an individual defendant. Sometimes, our own
15 statistics hurt us when a judge in a community sees as
16 much tax fraud out there as we do, and you realize that
17 there are millions of other similarly situated people who
18 the system has not addressed. I guess I can understand,
19 in individual case, why that, you know, why that happens,
20 why that judge does that. The beauty of the guidelines
21 are that we don't have to stand with an individual. We
22 take a more systemic view. And I would think that, when
23 we get above that level, when we get above the level 12,
24 we're not going to, we're not going to see all those cases
25 at the low end of the range. Although, as the Commission

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 even recognizes in its manual, some even small portion of
2 the imprisonment, a very small portion of imprisonment in
3 the tax world, carries a particularly large deterrent
4 effect, given the community we're looking at. These are
5 not people, in the heartland that we're looking at, who
6 are committing other bad crimes out there. I'm not saying
7 tax isn't bad, but their tax is the only violation they're
8 committing here. So, I don't, I hope we wouldn't,
9 wouldn't see that.

10 I want to be very careful with my time and give
11 Mr. Speier a few moments, despite questions, if I can.

12 JUDGE CONABOY: Mr. Speier, do you want to
13 proceed.

14 MR. SPEIER: Thank you very much.

15 This is my first opportunity to address the
16 Commission; and, on behalf of IRS Criminal Investigation
17 Division, I want to thank you for the opportunity.

18 Like Mr. Matthews, I'm going to focus my
19 comments primarily on the need to reform the Tax Tables,
20 specifically at the lower end. I'd like to, hopefully,
21 give you some insight as to the way the Criminal
22 Investigation Division does business and the types of
23 cases that we do work.

24 Criminal Investigations Division's workload has
25 changed dramatically through the years, from the times

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 where Mr. Bruton was in the Tax Division. I think he saw
2 us go away from the period where we were working almost 50
3 percent, or more, of our cases in the narcotics and money
4 laundering area. We're no longer there. Sixty percent of
5 the CID resources are addressing what Mr. Matthews
6 referred to as tax-gap type crime, white collar income tax
7 crime, related to legal source income. This represents a
8 tremendous departure from where we were ten years ago, and
9 it's a strategy that is trying to address what — we'll
10 pick a number — \$120-some million tax gap.

11 MR. MATTHEWS: Billion.

12 MR. SPEIER: Billion, excuse me. Thank you.
13 We're definitely not that efficient.

14 Our role in criminal investigation is to provide
15 a deterrent, and we try and commit our investigations to
16 those cases that, if successful, will yield us deterrent
17 publicity. And, in the Western Region, of which I'm in
18 charge, that's basically the western quarter of the United
19 States. IRS Special Agents in those states, and in those
20 IRS districts, are instructed to work those income tax
21 investigations that are likely to yield deterrent
22 publicity and have a very good likelihood of generating
23 prison time. That's pretty much our yardstick and our
24 guideline.

25 JUDGE CONABOY: Can I interrupt you there?

1 MR. SPEIER: Please, sir.

2 JUDGE CONABOY: I don't know, maybe we shouldn't
3 be interrupting; but I think it's along the same lines
4 that you're talking, Richard.

5 Several of you now have mentioned the increases
6 that went into effect three or four years ago. Is there
7 any indication that that has had anymore of a deterrent
8 effect, or can you judge that? Somebody has said it's
9 hard to judge.

10 MR. SPEIER: That's a correct statement: It's
11 very, very hard to judge. I see certain types of tax
12 crime that are increasing, and I can address trends in
13 certain types of tax crime. It's pretty difficult to be
14 directly responsive. I don't have the evidence,
15 statistical type of evidence, to address that.

16 MR. MATTHEWS: Can I make one minor point?

17 I have actually spent some recent time speaking
18 to some Europeans, as well, with their tax systems. One
19 of the things I fear, when I'm in bed at night thinking
20 about my job, is: I'm afraid that we are living on some
21 past gas in this country. That we fortunately had a
22 culture, we've had a country where, for a long time, we
23 have a rock solid 80-plus percent compliance in this
24 country because there was a time, and because it's good
25 publicity, good work, early on in our, in our culture. I

1 worry about the slippery slope when, if and when, the
2 public understood some of the numbers that we actually
3 talk here about here: 10 million nonfilers, less than
4 200. Not 200,000 — 10 million, now 200 prosecuted a
5 year. I worry about losing the edge. And, rather than
6 the idea that those cases are increasing — I wish I could
7 prove that. I can 't. I think our fear is that, if we
8 don't do what we do and, given the number of our
9 prosecutions, we have only a handful per state each year
10 that get statewide publicity, I guess it's a more
11 guttural, you know, reaction. What happens if we don't
12 get those 2 or 3 cases that get publicity?

13 JUDGE CONABOY: What I was wondering — and I
14 think probably everyone would agree with that, that that
15 is a major concern. But my question, I guess, goes more
16 to what can you do about that? Is putting people in jail,
17 more people in jail, the only thing, or the right thing,
18 for us to be doing? I don't know whether you can address
19 that in context or not.

20 MR. SPEIER: Certainly, addressing tax issues,
21 criminal enforcement is only one aspect of this. And,
22 with the criminal enforcement, given that there is only
23 3,200 Special Agents nationwide addressing all the
24 millions of tax returns that are filed, and those that
25 need to be filed and are not filed, we have to be real

1 choosy about the ones we get. And the ones that we choose
2 to investigation, we need to insure that we get the type
3 of deterrent publicity that we're looking for; and that
4 is: A message that there is a down consequence to evading
5 your taxes, defrauding the government, or willfully not
6 filing your tax return. We also have to be very cognizant
7 that we don't get into a posture where we media stating
8 that an individual has been indicted and convicted for tax
9 crime and there was no deterrent, there was no prison
10 time. That's obviously something that, in our case
11 selection, we have to be very careful of.

12 MR. MATTHEWS: She's calling time. We'll have to
13 go on to the next point.

14 STATEMENT OF
15 CHARLES M. MEADOWS, JR.
16 MEADOWS, OWENS, COLLIER, REED, COUSINS & BLAU,
17 DALLAS, TEXAS
18 CHAIR, CRIMINAL DEVELOPMENT SUBCOMMITTEE
19 of the
20 CIVIL AND CRIMINAL PENALTIES COMMITTEE
21 of the
22 ABA TAX SECTION

23 MR. MEADOWS: My name is Chuck Meadows. This is
24 my first time to be able to address the Commission. I
25 thank you for that opportunity.

1 I would like to talk about two particular areas:
2 No. 1, and that's, first of all, the lower income. I'm
3 not sure that that's a good allocation of resources of the
4 Service to prosecute those people. We have civil
5 penalties, 75 percent fraud penalties, that can take care
6 and serve as a deterrent in that area. But the bigger
7 crime, the larger crime, how can we look at that area?

8 I see, in the guidelines, two proposals. One is
9 to combine the fraud counts with the tax loss issues,
10 which would significantly increase tax penalties, criminal
11 penalties.

12 The First Circuit, just in January, released an
13 opinion, United States v. Brennick, B-r-e-n-n-i-c-k. I do
14 not have a citation for that. But, in that case, it
15 recognized the difficulty in computing tax loss versus
16 fraud loss. Someone steals \$200,000 from the bank and
17 doesn't pay it back, we know pretty much what the loss is.
18 But in the tax loss area, we apply an arbitrary
19 percentage, 29 percent or 34 percent, or 20 percent in the
20 case of nonfilers. We have even different calculations of
21 tax loss among the tax loss guidelines. We don't have one
22 consistent guideline. And I know, from the judges, at
23 least my experience is, you don't want to conduct an audit
24 in your courtroom to determine actually what the tax loss
25 is. You don't have the time to do that. We need to have

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 at least some — and that's one reason, I think, that
2 justifies the lower penalties in this area, because we
3 know we're dealing with an arbitrary figure.

4 The second area I would deal with is just simply
5 the two-level increase that has been proposed for higher
6 crimes, instead of going up one level each time. Would
7 the Commission consider the possibility of having the
8 judges, the District Judges, have the opportunity to make
9 a sentence within that two-level increase so that they can
10 have the discretion to view the loss? Instead of having
11 automatically go up two levels, maybe they should be able
12 to say it goes up one or two levels depending upon the
13 judges determination of loss. I know we've gone away from
14 getting judge's discretion in that area in order to try to
15 make more uniform sentencing, but there are differences in
16 the crimes that are committed.

17 Those are the two points I'd like to emphasize
18 in addition to my written remarks.

19 MR. GOLDSMITH: The problem with that latter
20 point, at least in theory, though, is that it violates the
21 25 percent rule. That the sentencing needs to be within
22 25 percent of the upper range, needs to be within 25
23 percent of the lower range. If you allow the judge
24 discretion to go up and down two levels, that goes well
25 beyond the parameters of 25 percent. So that alone,

1 without any accompanying criteria, would not be possible
2 under the statute.

3 MR. MEADOWS: That issue, though, if you go into
4 that level by jumping two levels, you're going to set up a
5 situation where there will be more appeals, in my opinion
6 as a practitioner. Because you are no longer going to
7 have an overlap at the District Judge level where the
8 appellate court can say there is harmless error here
9 because a 33-month sentence falls within both guidelines.
10 When you go up two levels, the lowest guideline sentence
11 will be higher than the highest guideline sentence for the
12 previous offense, and you're going to have a gap in there.
13 That loss area is going to mean more litigation over what
14 that loss number was. It's going to have a real
15 meaningful impact.

16 Now, appellate courts say harmless error, don't
17 worry about it, you could sentence from that guideline
18 range. But, if you go to two levels, and maybe you should
19 just go to one level, if, in fact, that's the statute; but
20 I would oppose the two-level increase because of that
21 reason.

22 JUDGE CONABOY: Paula.

23 //

24 //

25 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATEMENT OF

PAULA JUNGHANS, ESQ.

MARTIN, JUNGHANS, SNYDER & BERNSTEIN

BALTIMORE, MARYLAND

MS. JUNGHANS: Good afternoon.

My name is Paula Junghans. I appreciate your inviting me to speak today. Since I'm last, I'll try to be quick. I would like to talk for a few minutes about the deterrence issue, which seems to be the focus of Mr. Matthews' and Mr. Speier's proposals.

I've been doing criminal tax cases for 21 years. I've represented dozens of people who have been prosecuted and hundreds more who are committing tax evasion, who have either not been caught at all, or who have not been recommended for prosecution.

I haven't yet met a single person who told me that, when he was committing his crime, he sat down and calculated what his potential sentence was going to be. I don't think that's what deterrence comes out of. I think what deterrence comes out of is what Mister, is what the government representatives recognize, and that is the possibility of being caught. The way to achieve that, in my view, is for — and I realize you can't control this entirely — is for Congress to allocate to the Internal Revenue Service more money for more enforcement. It is

1 not to impose harsher enforcement on smaller existing
2 cases.

3 It seems to me the proposals that we're talking
4 about here will involve spending a lot of money on
5 additional beds in jails, and nobody is talking about
6 where that money is going to come from.

7 I also do not understand what appears to be the
8 perception that anything other than jail does not serve as
9 a deterrent. Community confinement is a punishment. Home
10 detention is a punishment. Being a felon is an enormous
11 punishment, particularly if you prosecute people who are
12 professionals and who have collateral consequences coming
13 out of their convictions. Those range of punishments are
14 in place now, and will be in place, as well, with these
15 harsher penalties. But to focus the effort, it seems to
16 me, on harsher penalties, on smaller cases, is the wrong
17 cure.

18 I think we all agree what the problem is, but I
19 think that's the wrong cure. And I don't think that what
20 we have now under the '93 guidelines is broken; and,
21 therefore, I don't we should fix it.

22 JUDGE CONABOY: Does anyone want to respond to
23 that? Mark, Richard?

24 MR. MATTHEWS: Without taking too much time,
25 there have been a couple of references, I think, by all

1 the defense attorneys to the notion of the government
2 aiming at the small guy, or the low-end taxpayer. The
3 numbers that we're trying to talk about I don't think, by
4 any means, reach into low-end taxpayers. We're saying
5 that there's 95 percent of the taxpayers are essentially
6 beyond the reach of the imprisonment possibility.

7 Again, I agree, there are cases where
8 imprisonment is not appropriate. That is a sanction, a
9 felony punishment is. But we are trying to broaden the
10 range, and it's not to reach down to the little guy. It's
11 to reach into the upper middle class, with the possibility
12 of imprisonment in some of these cases. So, I — you
13 know, there was reference to a thousand dollar tax case.
14 Those don't exist. I mean, we are talking about much
15 bigger cases than that.

16 One last point is: We talked about
17 \$40,000/\$30,000. Remember, those are — there was the
18 notion of the difficulty of computing that. And nobody
19 wants to do all this. I don't think that's happening in
20 the courtrooms in tax cases. We're so careful about that.
21 That \$40,000 represents what we call the "criminal
22 numbers" in the tax world, as opposed to the civil
23 numbers.

24 In most of our tax-gap cases, the agents are
25 trained to avoid the gray areas. Don't — you know, we

1 focus on where — you know, tax cases are difficult enough
2 to convict as it is. You're trying to show real, show the
3 jury real, willfulness, to show what they're doing. You
4 focus on the black and white tax crimes. And our average
5 cases, there may be as many as two times, three times the
6 civil numbers. Those aren't included in the calculations
7 most of the time. Not to say we ignore relevant conduct.
8 Those have not been investigated. So it's not as — I
9 don't think the defendants are suffering, for any of this
10 gray area, the notion of tax cases.

11 MR. BRUTON: If I may just add one point,
12 though, that Mr. Matthews has referred to, to the
13 possibility of incarceration. The fact is that, under the
14 current guidelines the possibility of incarceration exists
15 at every single level from zero right on up the scale.
16 It's the certainty of incarceration that the government is
17 trying to deal with, and the question is: Are the courts
18 capable of responding to this in situations where they
19 feel that there's an appropriate case before them that
20 requires the right kind of sentence? It seems to me
21 they've got the tools and I don't think we can assume that
22 they're not willing to exercise that authority.

23 MR. GOLDSMITH: May I question, Mr. Chairman?

24 JUDGE CONABOY: Yes.

25 MR. GOLDSMITH: Focusing on this \$40,000 amount,

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 I see that the thoughts being expressed here is that the
2 provision will hit the little guys too hard. But to
3 produce a tax loss for \$40,000, we're talking about, for
4 example, deductions that have been overstated to the tune
5 of \$150,000.

6 MS. JUNGHANS: Only in a one-year case.

7 MR. BRUTON: Only in a one-year case.

8 MR. GOLDSMITH: In a one-year case, okay. So,
9 you know, over a three-year span of time, so it's \$50,000
10 per year, which is a fair amount of money. I mean, I'm
11 kind of wondering what kind of little people we're talking
12 who are overstating deductions like \$50,000 a year.

13 MR. BRUTON: I gave an example in my paper, that
14 \$5,500 a year. The single year case, makes \$40,000 a
15 year, and \$5,500 evaded during that year, which wasn't an
16 outlandish number. If that same evader is found by the
17 IRS to have done that in eight years, you've broken your
18 \$40,000 mark immediately.

19 The IRS -- one of the questions here is how
20 thoroughly do you investigate the cases? And the question
21 is: Do you make tax cases, such that very little
22 investigation can go in, with the certainty of a one-year
23 case, where you can't differentiate taxpayers? One person
24 who does it one year is different than another person who
25 does it eight or nine years, and the government can reach

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 back beyond the statute of limitations and produce that,
2 and they do in most cases.

3 MR. GOLDSMITH: Well, would you concede that, if
4 it were done in the situation of a one-year violator, that
5 this is a tax loss of \$40,000, in those circumstances,
6 wouldn't this appropriate all other things being equal?

7 MR. BRUTON: Conceivably, but I can say this:
8 It is rare. Historically, the IRS has prosecuted
9 multi-year cases for a reason. The reason is that a
10 single year is not an attractive case to prosecute so they
11 bring multiple cases. I think the judges on the
12 Commission probably have, if they've seen a single-year
13 case, it would be a rarity. It's just — I've seen them
14 maybe a couple of times in my whole career.

15 MR. MATTHEWS: We don't do eight-year cases,
16 which is what it took in the example. We don't have
17 judges finding relevant conduct over eight years. It's
18 the difference between the one year, \$150,000 a year, and
19 the eight years. We're not touching much of that
20 difference, I think, by option 2.

21 MR. GOLDSMITH: Do you know what the increase
22 would be in terms of the incarceration? Excuse me, I'm
23 sorry.

24 JUDGE CONABOY: That's all right, but we'll have
25 to end with this question.

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 MR. GOLDSMITH: Do we know what the increase
2 would be in incarceration by changing the figure \$40,000
3 to \$30,000? Are we talking about, all of a sudden,
4 dramatically increasing the number of prison beds and the
5 number of people that would be close to this?

6 MR. MATTHEWS: You know, I saw something the
7 staff had put together in trying to determine impact. I
8 guess — I don't think it's that much, honestly, in the
9 case of agreement. I think maybe we can provide something

10 —

11 MR. GOLDSMITH: I'd like to see if you can get
12 that.

13 MR. MATTHEWS: I will do that.

14 MR. SPEIER: I would further, just quickly,
15 argue that there is no way that, given that, that we would
16 lower our standards of what we're going to be
17 investigating. We're still going to be looking at the
18 most, best deterrent taxpayers, most egregious taxpayers,
19 in any given district, in any given area.

20 DR. KRAMER: Before we — I would ask the panel
21 to remain; but we want to move to Justin Thornton now, who
22 is — we're a little behind schedule, but we'll try to get
23 to you. And, then, what we'll allow is some questioning
24 for everyone when Justin finishes.

25 So, if you're ready, Justin, you may begin.

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATEMENT OF

JUSTIN THORNTON, ESQ.

CO-CHAIR, TAX ENFORCEMENT SUBCOMMITTEE,

ABA WHITE COLLAR CRIME COMMITTEE

MR. THORNTON: Thank you, Your Honor.

Judge, I'll be as brief as I can here with my remarks in order to keep the dialogue going.

I've been practicing in the criminal sector for 20 years now; the first 10 years as a prosecutor, and the the past 10 years in private practice. Also, I might offer the disclaimer that, while I am holding an ABA leadership role in the criminal tax area, I'm also a member of the Practitioners Advisory Group. I'm appearing here and expressing my own personal view, not those of any professional organization with which I'm affiliated.

With that, I understand and I appreciate the Commission's desire to simplify the Sentencing Guidelines. The point that I would like to make here today, though, is that criminal tax cases really are different than other kinds of fraud cases and should be treated accordingly. And I join my other panel members, for the defense bar, in our opposition to the adoption of the proposed changes to the guidelines for the tax, for tax expenses.

The '93 amendments still aren't in effect now. It's as if we have a cake baking in the oven, which isn't

1 out yet, and we're asked to change the recipe. And, so, I
2 would urge the Commission to consider just not adopting
3 any of these options at this point. Criminal tax cases,
4 as it's been mentioned, have a six-year statute of
5 limitations. They span multiple years. They have all the
6 pattern of filing. Defendants are subject to subsequent
7 and severe civil tax adjustments, with interest and
8 penalties, in the tax area, unlike in your usual fraud
9 case.

10 Proof of a tax loss, as Mr. Meadows pointed out,
11 it really is subject to complex, technical tax laws. And
12 I think it's fair to say the recidivism is much lower in
13 the tax area than it is in other fraud areas. And,
14 importantly, most judges in tax cases, I believe it is
15 fair to say, are sentencing at the low end of a particular
16 guideline level. Accordingly, they already have the
17 discretion, under the current guidelines, to impose
18 lengthier sentences should they wish to do so.

19 I also concur with my fellow panelists that the
20 empirical data is just simply not existent at this time to
21 establish, I think, a good reason that the guidelines
22 should simply be increased, for the jail time to be
23 imposed on tax criminals, for purposes of deterrence. I
24 don't think the data is there to show that, if one goes to
25 jail longer and reads about it in the paper, there is

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 going to more deterrence.

2 I will tell you that I think there is deterrence
3 about the publicity which the IRS will seek to achieve
4 whenever there is a tax indictment. As night follows day,
5 there will be a press release when there is an indictment
6 charging someone with tax offenses. The public can read
7 about it in the paper, that the maximum penalties are 5
8 years per count, and they go to jail for 15 or 20 years.
9 There's some deterrence right there.

10 Now what happens to alternatives to
11 incarceration, I don't know that those are inappropriate
12 to be imposed in tax cases. Nor am I convinced that, in a
13 normal tax case, that home detention, for instance, is not
14 an appropriate sentence. I was surprised -- I had a
15 client, one time, who told me he'd much rather do his time
16 in the federal penitentiary than to spend an equal amount
17 of time with his spouse in home detention.

18 I would urge the Commission not to adopt any of
19 those.

20 JUDGE CONABOY: Let me just ask, before I ask
21 some of the other Commissioners, allow them some
22 questions, on the statute of limitations and the fact that
23 some of the, as you said, the 1993 amendments haven't
24 kicked in, would that create a dilemma if we were to
25 follow that reasoning, that we would never change them

1 because we'd always have that problem?

2 MR. THORNTON: I think we at least wait to see
3 what the effect is.

4 JUDGE CONABOY: How long do we wait? I mean —

5 MR. THORNTON: Until we have the necessary
6 empirical data, I don't know the answer to that. But that
7 data simply does not exist at this point. And I agree
8 with Mr. Bruton, the point that he makes, where you can
9 have two tax defendants, down the hall from one another in
10 the same federal courthouse, receiving disparate
11 sentences, depending upon which guidelines are in effect.
12 And, here, we're being asked to look at even, yet, another
13 set of guidelines.

14 JUDGE TACHA: But that's happening in a lot of
15 areas.

16 JUDGE CONABOY: Do you have any information on
17 recidivism?

18 MR. THORNTON: I don't have any information. It
19 is, it is very low. I mean, and I — I mean, I think it's
20 sort of understandable from the nature of the crime and
21 the subjects.

22 JUDGE CONABOY: So you don't contest that?

23 MR. THORNTON: I don't contest it. It's not,
24 it's not a business where we have repeat people. We're
25 trying to deter the repeat offender. We're trying to

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 deter the first-time offender, really.

2 JUDGE CONABOY: Commissioner Gelacak, you have
3 some questions?

4 MR. GELACAK: Yeah, I guess.

5 Mr. Matthews, I take it, from your comments,
6 your concern over this \$120 billion tax gap, or whatever
7 it is, that you would, by the nature of that number, you'd
8 support a change from the current IRS system to a
9 value-added tax that we could —

10 (Laughter.)

11 MR. MATTHEWS: One of the blessings of my job is
12 that they tell me not to address tax policy. I enforce
13 the laws that are there. I don't — if they change to
14 that, we'll try to bring those cases.

15 MR. GELACAK: Well, if you enforce tax policies,
16 then I'm also kind of dazzled by your statement you don't
17 comment on tax policy. I'm kind of dazzled by the
18 statement that you presented us. On page 5 —

19 MR. MATTHEWS: Page 5?

20 MR. GELACAK: This is your statement.

21 MR. MATTHEWS: Sure.

22 MR. GELACAK: I assume it's yours. It was
23 handed to me. I assumed it was handed to me by you. On
24 page 5, the first full paragraph, you say: "We
25 believe ...," and I assume you're speaking for the Tax

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 Division:

2 "We believe that, unfortunately, the current
3 Tax Table does not do a good enough job of
4 making the possibility of imprisonment upon
5 conviction for a tax violation enough of a
6 realistic threat for many taxpayers."

7 Do you really mean to say that?

8 MR. MATTHEWS: Yes.

9 MR. GELACAK: So you're —

10 MR. MATTHEWS: I don't know what portion of it
11 you're going to quibble with. I'm happy to hear —

12 MR. GELACAK: Well, I'd like to quibble with the
13 language "of a realistic threat," if you will. I've been
14 around, maybe I've been around too long, but I've never
15 seen anybody come in and say that the purpose of their
16 mission was to create a threat to the American public.

17 MR. MATTHEWS: Well, I — I see your point. I
18 don't think the — I'm using a term of art, "realistic
19 threat." I don't mean to say that the IRS has threatened
20 people. I think —

21 MR. GELACAK: Well, what do you mean, sir?

22 MR. MATTHEWS: Well, I do think that you do want
23 a perception on the part of the American public that, if
24 they engage in tax crimes of the kind of magnitude,
25 complexity, where the willfulness is so evident — the

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 very few cases that we pull out of the tens of millions of
2 Americans who probably could potentially be charged, we're
3 down to about 700 of those. Yes, I do want the people to
4 believe that, if they put themselves, committed those
5 sorts of acts against the tax system, which funds all of
6 our government, our national defense, our roads, our
7 highways, that, yes, there is a realistic threat,
8 realistic possibility — I could use the words, "realistic
9 possibility," if that would be — that's what I mean.

10 MR. GELACAK: But isn't what you're saying now
11 the point — we've had this debate before, and I doubt
12 that either one of us is going to change the other's mind.
13 But Ms. Junghans was correct, I think, in saying that what
14 you're talking about is the need for more enforcement
15 dollars.

16 You started to draw some analogy, which I had a
17 little trouble following, about how IRS enforcement was
18 better years ago because of some initial success. I take
19 it, by that, you meant some initial success in
20 prosecutions. But I have to be honest with you. I
21 honestly believe that, if I were to walk outside this
22 building right now, and I asked a thousand people, the
23 first thousand people that I came in contact with on the
24 street, if they could tell me of all of the terrible tax
25 prosecutions that have caused them some concern, I don't

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 believe I'd come with one case.

2 I don't think anybody cares about the
3 prosecutions. I think you care about the prosecutions. I
4 think the prosecutions are important. I think people who
5 evade the law ought to be in some way dealt with, but I
6 don't think 1,500 cases a year deters anybody from doing
7 anything. And I don't think dollar figures deter people
8 doing those things. I think we're talking about the need
9 for more law enforcement, perhaps. I personally think, I
10 think the value-added tax is a better solution to getting
11 at that number than you do, and I'm a Democrat.

12 (Laughter.)

13 I just don't buy your arguments for deterrence.
14 I know you have to come up here and make them. And I
15 remember, I remember, because I was here. I was here and
16 I remember the Tax Division and the IRS coming up and
17 saying: These changes are enough. These changes will do
18 it. Now, we're not sure that they did anything. We don't
19 know what they did; but whatever it is they did, we need
20 more of it. It's kind of a strange way to go about making
21 policy, I guess.

22 I'm not sure I've asked you a question.

23 MR. MATTHEWS: No. I think you stated — I
24 think there probably is a difference in our view of
25 deterrence. And given the — I think, probably, the

1 difficulty for each of us to prove it statistically in
2 some way, you're sort of there. And, you know, my view,
3 my conversations with people, the number of audiences I
4 speak to, you get humorous, yet nervous, laughter about
5 the possibility of a criminal case, and that leads me to
6 believe that there are a lot of people at some level who
7 do fear that possibility when they're filling out those
8 returns, and they're thinking about, well, are the recipes
9 there, or should I exaggerate this, or what about that
10 deduction, or what about my — but I don't think we can
11 convince each other. But I will take you up on the more
12 resources. I'd love to double my 1,500, if we could do
13 so.

14 MR. GELACAK: I wish you the best of luck. I'd
15 be happy to support your request for — if you think it
16 will help you in any way — your request for more
17 resources. I don't know if my support is going to help
18 you.

19 MR. MATTHEWS: I might take you up on that.

20 JUDGE CONABOY: Judge Tacha, do you have any
21 other questions? I'm going to down the table, Mike.

22 MR. MATTHEWS: Sure.

23 JUDGE TACHA: No, no.

24 JUDGE CONABOY: Mike, do you have any questions.

25 MR. GOLDSMITH: I want to stress that,

1 notwithstanding the apparent orientation of my questions,
2 I have not made up my mind about this issue at all.
3 Having said that, though, Mr. Thornton, I'm unsure of
4 your example about how the IRS certainly achieved
5 significant deterrence by issuing a press release, saying
6 that someone is subject potentially to 10 to 15 years
7 imprisonment for a tax violation. That would be very hard
8 to do under the present tables. For example: Right now,
9 they would have to take more than \$80 million to be at
10 offense level 26, than if you had two sophisticated means
11 and two of something else. I mean, we're going to be at
12 level 30, which produces, at that point, a maximum of 10
13 years.

14 MR. THORNTON: I'm sorry. I'm addressing only
15 the issue of deterrence as it relates to maximum penalty.
16 I'm not suggesting that one could reasonably get there
17 under the guidelines. It's just a matter of statutory
18 maximum penalties as it relates to deterrence.

19 MS. JUNGHANS: Might I say something? I mean, I
20 think Justin's point, which all of us have experienced,
21 is: It's very interesting that, when the IRS issues these
22 press releases, it always reports what the potential
23 statutory maximum is. It never reports what the guideline
24 application would be, because it doesn't — and, frankly,
25 whether the guideline application came out at 14 months or

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 18 months, I seriously doubt would make any difference.
2 They want the statutory maximum. They don't want people
3 to know what the guidelines are.

4 MR. MATTHEWS: I mean, the reasons why we don't
5 try to put guideline calculations into the announcement of
6 an indictment, and we're —

7 JUDGE CONABOY: You can't figure out the
8 guidelines.

9 MR. MATTHEWS: You can't figure that out.

10 (Laughter.)

11 I mean, I think we'd be in real trouble if we
12 were trying to do that math, and we try to, try to get
13 away from, you know, it's 10 counts, so it's 50 years.
14 That happens in districts. I'm not going to deny that.
15 They add it up that way. To the extent that we see them
16 in the Tax Division, we try to bring that back and talk
17 about a realistic — you know, there are 10 counts, each
18 of which are 5 years. So, we're not intentionally making
19 the point we're being accused of making.

20 JUDGE CONABOY: That's a good point, though, in
21 many ways. Because, traditionally, not only in tax
22 prosecutions, not only in federal prosecutions, when there
23 is an indictment, there is an arrest, the maximums are
24 always mentioned. We use an example of a sign that's up
25 on of the ski lodges, up where I live, that has a huge

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 sign, right at the bottom of the ski lift, there's a huge
2 sign that says: "Every person, including children, must
3 have a ski lift ticket. Violators will be punished to the
4 full extent of the law. \$500 penalty, or 10 years in
5 prison." You got to figure, for a ski lift ticket, that's
6 pretty severe.

7 MR. MATTHEWS: Especially for children.

8 MR. GOLDSMITH: I'd rather spend 10 years in
9 prison than ski Pennsylvania.

10 (Laughter.)

11 JUDGE CONABOY: Mary Harkenrider, do you have
12 questions?

13 MS. HARKENRIDER: No.

14 JUDGE CONABOY: Okay. Well, we thank this
15 panel. We want to move to the next panel because we are
16 very close to time, and we appreciate your comments very,
17 very much.

18 ISSUES ONE AND TWO:

19 PROPOSED CHANGES TO FRAUD AND THEFT TABLES AND PROPOSALS
20 TO DELETE "MORE-THAN-MINIMAL PLANNING" AND ADD

21 "SOPHISTICATED MEANS"

22 JUDGE CONABOY: All right. This panel is
23 proposed to talk about changes to the tables and the
24 proposal to delete "more-than-minimal planning" and add
25 "sophisticated means," and other matters, if you wish to

1 do so.

2 Let me just introduce, first, Gerald Goldstein,
3 who is a another Texas here today, former president of the
4 National Association of Criminal Defense Lawyers.

5 And, by the way, I probably should have stated,
6 at the beginning, and I think it's probably true, Gerald,
7 with your situation, that none of our speakers here today,
8 or panelists, are here representing or speaking on behalf
9 of their associations; but they are appearing here,
10 rather, as individuals. We want to make that clear, that
11 we're not trying to associate any of the various groups
12 that these people belong to with the comments that are
13 made here today.

14 MR. GOLDSTEIN: That's correct, Mr. Chairman.

15 JUDGE CONABOY: If I didn't make that
16 disclaimer, I'm sure the group would.

17 And David Axelrod is from Columbus, Ohio and a
18 former assistant U.S. Attorney in Florida, and a former
19 trial lawyer with the Tax Division of the Department of
20 Justice.

21 Mary Spearing is the Chief of the Fraud Section
22 of the Department of Justice, and a former U.S. Attorney
23 in the Third Circuit, or in the Eastern District, and
24 appeared, occasionally, in the Middle District.

25 MS. SPEARING: Yes, before Your Honor.

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 JUDGE CONABOY: With great distinction.
2 Katrina Pflaumer is the U.S. Attorney for the
3 Western District of Washington.

4 Finally, Ephraim Margolin — is it Margolin?

5 MR. MARGOLIN: Yes.

6 JUDGE CONABOY: Very good. Mr. Margolin is a
7 former president of the National Association of Criminal
8 Defense Lawyers and from San Francisco.

9 We've had sunny weather for a few days.

10 MR. MARGOLIN: You are welcome to my city.

11 JUDGE CONABOY: Well, we thank you all for being
12 here. I guess, Gerald, you're going to lead off the
13 commentary.

14 STATEMENT OF
15 GERALD H. GOLDSTEIN, ESQ.
16 GOLDSTEIN, GOLDSTEIN, AND HILLEY
17 SAN ANTONIO, TEXAS

18 MR. GOLDSTEIN: Mr. Chairman, Commissioners,
19 fellow gentle persons, I'd like to address the overriding
20 concern that I have about the general policy consideration
21 — reflected, by the way, in both of the new options
22 regarding the loss tables — that there is a perceived
23 need to raise penalties for economic offenses to achieve
24 what I think we all can agree is a laudatory objective of
25 better proportionality of guideline penalties between

1 economic crimes and other offenses of comparable
2 seriousness.

3 I think the defense bar generally — I think I
4 can speak for the defense bar, generally, that we don't
5 quarrel with a need for a punishment rationale that
6 reflects proportionality between economic crimes often
7 committed by white collar corporate types in boardrooms,
8 that they ought to be similarly situated in terms of
9 punishment to similarly situated serious crimes committed
10 by minority members or disadvantaged use on the street.
11 In fact, I find myself representing more and more, as they
12 are described, three-piece, flannel-mouth types, as
13 opposed to gang colors. And the idea that we should treat
14 the poor and the disadvantaged that find their way into
15 the criminal justice system more severely than the
16 well-heeled is something that I think is offensive to the
17 defense bar, as it probably is to you.

18 However, I would suggest to you that the
19 empirical data that the Commission has generated does not
20 support the commonly held notion that these, that the
21 typical offender of an economic crime is a well-heeled fat
22 cat, with a high-priced, high-powered defense lawyer.
23 Your own figures indicate that, for the most part, they
24 are minor-league small-timers, who are represented,
25 generally speaking, by public defenders or appointed

1 counsel under the CJA.

2 There is no question that disproportionality
3 between the high sentences meted out against drug
4 offenders, compared to those in fraud and theft cases, is
5 offensive. It's offensive to all of us. But I would
6 suggest to you that that is as much a result of
7 congressionally mandated minimum mandatory sentences and
8 political reality as it is to any rationally based
9 sentencing policy. And even if we could get parity
10 between the two, I'd suggest that you can achieve that in
11 ways without yet again raising the penalty scheme for
12 economic crimes.

13 That's not the only means of reaching parity.
14 You had this fight once before in the powder versus crack
15 cocaine situation; but we find ourselves, like a gutter
16 ball, going in the same direction each time. And as
17 desirable as some sort of proportionality may be, raising
18 sentences for economic crimes to the draconian level of
19 drug offenses may create more problems than we will be
20 solving.

21 I'd like to suggest to you that whether we're
22 talking about the definition of loss, or whether we're
23 talking about loss tables, and granted the goal of reduced
24 litigation is a laudatory one, I'd suggest to you that 90
25 percent of these criminal cases are resolved by plea.

1 That the sentencing hearing is, in reality, the only real
2 criminal hearing most citizens, accused of crime in
3 America today in federal court, receive. And, as far as
4 hearing go, with all due candor, it's a sham. You get
5 more due process when they take away your food stamps,
6 under Goldberg v. Kelly than when they take away your
7 liberty at a federal sentencing hearing. You have no
8 confrontation rights. There's no rules of evidence, and
9 hearsay is the rule, rather than the exception. I mean,
10 any defense lawyer will tell you what it's like to — what
11 are you going to do, cross-examine the probation officer
12 about what an agent told him about what some undisclosed
13 confidential informant told him?

14 And, so, whatever we say about these loss
15 tables, the actual determination is made that a citizen
16 watches being made is a fairly hopeless, hopeless process
17 in terms of what we normally consider to be process that's
18 due. And these are factual findings. We've gone from a
19 purely discretionary system to a factual finding.

20 The American College of Trial Lawyers, not your
21 liberal bastion of defense lawyers, criminal defense
22 lawyers, has even issued a pamphlet, "The Law of Evidence
23 in Federal Sentencing Proceedings." I image you're
24 familiar with it. But it suggests the danger of having a
25 system that's going to be the only hearing somebody is

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 going to have on a sentencing process without any rules.

2 MR. GOLDSMITH: I'm surprised it's that thick.

3 MR. GOLDSTEIN: Actually, it's fairly
4 interesting reading. And what these, primarily civil
5 lawyers — some of you might be familiar with the American
6 College. I was not a member of this committee, but I am a
7 fellow. I did go to some of these meetings and it was
8 interesting to watch these —

9 One of the problems is that, what's driving this
10 constant upward spiral of the need to constantly move up
11 the Sentencing Guidelines, I would suggest, is our
12 perception of the public's perception. Quite frankly, if
13 we went over to the real lawyers, the civil lawyers, that
14 try cases in civil courts everyday, they wouldn't know
15 what we were talking about.

16 The general public, I would suggest to you,
17 still has the perception that the federal sentencing
18 scheme is this revolving door that paroles people long
19 before their sentences are up. And perhaps if we spent
20 some of the money that we're going to spend on all these
21 beds we're going to have to build and staffing these new
22 prisons on educating the general public, maybe we'd find
23 out what deterrence might mean.

24 We don't know, and I was interested, and I won't
25 reiterate it because I think you all — I'm appreciative

1 of the — everybody is concerned about the fact that we
2 don't know what the deterrent effect is of the last upward
3 movement of these guidelines. This will be the third time
4 we've raised the economic guidelines. And, while that
5 natural tendency is understandable, it is, I would
6 suggest, not based on any empirical data, but, rather, on
7 anecdotal concerns that many of us have.

8 What we're going to do under either of these new
9 proposals is create a whole new universe of first-time
10 fraud offenders, with judicially mandated prison
11 sentences. We're going to limit Title III District Judges
12 discretion to impose home detention, and alternative means
13 of confinement, all without any congressional
14 intervention, and without any empirical data to back it
15 up.

16 A good example would be, for example, the safety
17 valve for first-time offenders, despite the congressional,
18 at least mandate, that first-time offenders be treated in
19 some fashion other than by imprisonment. We've got a
20 safety valve for drug offenders, but we don't have a
21 safety valve for first-time economic offenders. Why not?
22 What is the difference? Why shouldn't they be given the
23 same opportunity as their brethren and sisteren [sic] of
24 the criminal law, defendant class?

25 The Criminal Law Committee of the Judicial

1 Conference, for example, appears to be a proponent of
2 increasing the guidelines for economic crimes; and, yet,
3 the empirical data that the Commission has generated
4 indicates that the District Judges obviously are
5 sentencing at the low end of the current guidelines.
6 Don't do what they say, do what they do. They appear to
7 be satisfied with the punishment scheme, if they are not
8 even sentencing at the high-end of the guidelines.

9 In conclusion, because I know we've got a lot to
10 do here, may I just suggest that, rather than raise the
11 economic crime sentences to the level — and I would
12 suggest irrationally high level — of drug offenses and
13 enable proportionality, I would suggest we're trading one
14 problem for a bigger one. It's unsound policy, and I'd
15 suggest it's unsound economics. Perhaps we could spend
16 that money informing the public that building, staffing
17 and maintaining prisons at a cost that they could be
18 sending most of these folks to Harvard, quite frankly, for
19 a good year, is irrational criminal justice policy. More
20 importantly, to them, in their pocketbooks, it's
21 irrational economic policy.

22 JUDGE CONABOY: Thanks, Gerald.

23 David, are you going to proceed next?

24 MR. AXELROD: Yes, sir.

25 //

1 //

2 STATEMENT OF

3 DAVID AXELROD, ESQ.

4 VORYS, SATER, SEYMOUR & PEASE

5 COLUMBUS, OHIO

6 MR. AXELROD: Thank you, Mr. Chairman,
7 Commissioners. I haven't had an opportunity to address
8 the Commission, for some years now. I appreciate the
9 opportunity to do so now.

10 I did discuss, in some detail, in my written
11 statement the proposed adjustments for more-than-minimal
12 planning, or in the change in the way that would be
13 handled, and proposed specific offense characteristics for
14 sophisticated concealment. Rather than repeat that, I'm
15 going to direct myself to some what I think are bigger
16 picture issues which relate to those two specific offense
17 characteristics.

18 The major points that I want to make to the
19 Commission today are: These sorts of changes should only
20 be considered as part of an overall plan for rationalizing
21 how we view and how we sentence economic crimes, and they
22 should only be viewed in context of one another. I don't
23 think that it's proper or particularly useful to look at
24 them one at a time because none of them operate in a
25 vacuum. They all operate together and they combine to

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 achieve, sometimes, results that are beyond that which
2 might be expected when you consider them only one at a
3 time.

4 My two major criticisms of the proposed
5 amendments are that they are overly complex and they will
6 result in what I view as unwarranted increases in
7 sentences imposed on defendants even at the middle levels
8 of the loss table. I'm not going to address myself to the
9 upper levels of the loss tables. I think that that's
10 already been discussed and will be discussed further.
11 But, even at the middle level, sentences would rise in
12 what I view as a fairly dramatic way.

13 Furthermore, I don't believe that these sorts of
14 specific offense characteristics are required to deal with
15 the concern that courts need a bit more flexibility in
16 reflecting the planning and the evils that come with
17 sophisticated concealment in imposing sentences. I think
18 that can be appropriately dealt with simply by recognizing
19 the court's authority to depart upward in cases involving
20 unusual sophistication and unusual efforts at concealment.

21 I want to comment a bit about the complexity.

22 The adoption of these sorts of specific offense
23 characteristics that we're talking about. These, the two
24 that I've discussed in my written testimony, and all of
25 the ones that are under discussion in connection with the

1 economic crimes amendments, introduce or increase specific
2 problems in the sentencing process.

3 I may be too late, in fact, I think I am about
4 10 years too late, with the comment that trying to go
5 over, with your client, how he or she is going to be
6 sentenced shouldn't resemble preparing an income tax
7 return, but it does. And it probably has about the same
8 rate of accuracy and error, and we're now proposing, I
9 suppose, to add additional kinds of schedules. We're
10 going to have a Schedule C now, and, someday, we may be
11 talking about net operating loss carryovers in connection
12 with sentencing. And I don't think that's particularly
13 desirable.

14 You don't need a specific offense characteristic
15 for every feature that may be present in a crime. Some
16 features of the acts which comprise criminal activity are
17 not appropriate measures of culpability and others punish
18 the same harms so that you have redundancy. What specific
19 offense characteristics do do, in my 10 years of
20 experience, that dealing with the guidelines, is they
21 invite litigation in every case. If you adopted a
22 specific offense characteristic that says that there's a
23 2-level bump and a 12-level floor for crimes of unusual
24 sophistication, then, my experience teaches that
25 aggressive assistant U.S. Attorneys will be advocating

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 that in almost every fraud case. And I don't think that's
2 particularly desirable, either.

3 Another problem with them is that they're too
4 inflexible. The original Sentencing Commission recognized
5 the need for flexibility in dealing with various features
6 of criminal activity when it prepared the first set of
7 guidelines and adopted commentary that is still in Chapter
8 1, Part A. When the Commission said that the appropriate
9 relationships among different factors are exceedingly
10 difficult to establish, or they are often
11 context-specific, we deprive the courts of the ability to
12 deal with the context in which violations occur, and in
13 which these features occur, when we adopt the mechanical
14 specific offense characteristics.

15 Another problem that specific offense
16 characteristics create is: They introduce, they have the
17 potential to introduce, the very sort of disparity that
18 the guidelines were intended to eliminate. The original
19 Commission, in the commentary in Chapter 1, gave a
20 hypothetical that I think tells something about these
21 proposed amendments, and I'm going to read it. This is
22 offered as an illustration of how a sentencing system,
23 tailored to fit every conceivable wrinkle of each case,
24 would become unworkable. What the Commission wrote was:

25 "For example: A bank robber with or without a

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 gun, which the robber kept hidden, or
2 brandished, might have frightened, or merely
3 warned, injured, more seriously or less
4 seriously, tied up or simply pushed, a guard,
5 teller or customer, at night or at noon, in an
6 effort to obtain money for other crimes, or
7 for other purposes, in the company of a few,
8 or many, other robbers for the first or fourth
9 time."

10 That was given as an example of bad practice in
11 sentencing. And I think that, when we consider adopting
12 too many new specific offense characteristics, we're
13 working our way towards.

14 The other problem is that I think we're going —
15 MR. GOLDSMITH: Mr. Axelrod, let me just
16 interrupt for a moment, if I can. How many new
17 sophisticated offense characteristics are you talking
18 about that makes this too many?

19 MR. AXELROD: Well, it's not, it's not strictly
20 a numerical function, but I've reviewed all the proposals
21 for redefinition of loss, and the one that would have been
22 — I don't think it's in the February working draft; but
23 was 2F1.1B7. It had a number of different features that
24 could have generated a two-level bump, or four levels, if
25 there were more than — if more than one was present, and

1 there's sophisticated means. There will be
2 more-than-minimal planning that will disappear. Then,
3 there's the issue of whether or not there should be a
4 sophisticated offense characteristic for only minimal
5 planning. We're talking about making this significantly
6 more complex than it needs to be. Those sorts of things
7 can be dealt with through departure authority where
8 unusual planning, unusual concealment, or less than
9 typical planning or concealment are present.

10 MR. GOLDSMITH: Isn't the ballpark issue here,
11 the ball game issue, and the one you're really focusing on
12 now, sophisticated means? If that's the case, we're
13 really only talking about one characteristic here.

14 MR. AXELROD: Well —

15 MR. GOLDSMITH: The definition of loss involves
16 a variety of other issues, but your principal concern
17 seems to be sophisticated means. That may pass and fail
18 on it's merit, having to do with whether it's appropriate
19 to have that can of enhancement, as such. But I don't see
20 that adding that specific — that single specific offense
21 characteristic adds much by way of complexity. It may be
22 that it's too broadly framed, or too narrowly framed, or
23 that there may be other problems with it. But just adding
24 that sophisticated offense characteristic, specifically an
25 addition of one characteristic, as such —

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 MR. AXELROD: Well, my problem with these —
2 yes, sir?

3 JUDGE CONABOY: Commissioner Goldsmith has run
4 you out of time.

5 MR. GOLDSMITH: I'm sorry. My apologies.

6 JUDGE CONABOY: He even says nasty things about
7 Pennsylvania skiing. He spares no one.

8 MR. GOLDSMITH: I would rather listen to your
9 answer, though, than ski Pennsylvania.

10 JUDGE CONABOY: We'll get back to that, but
11 let's move this along.

12 Mary, you're going to go next.

13 MS. SPEARING: Yes.

14 STATEMENT OF

15 MARY SPEARING, ESQ.

16 CHIEF, FRAUD SECTION

17 UNITES STATES DEPARTMENT OF JUSTICE

18 MS. SPEARING: Mr. Chairman, members of the
19 Commission, this is my first time appearing before the
20 Commission, and I'm pleased to be here.

21 Ms. Pflaumer and I are going to address all of
22 the remaining issues. I'm going to first deal with the
23 loss tables more than minimal planning and sophisticated
24 means as sentencing factors; and, then, she's going to
25 deal with the definition of loss.

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 JUDGE CONABOY: Would you move the mic over,
2 please. I don't know whether this room is ---

3 MS. SPEARING: As an initial matter, we urge the
4 Commission to move ahead to revise the loss tables; and,
5 at the same time, enact the changes closely related to
6 that revision. These issues are ripe for decision. The
7 Commission has received extensive public input on these
8 issues over multiple guideline cycles.

9 Turning to the proposed revision of the fraud
10 and theft loss tables, we applaud the Commission for
11 recognizing the importance of improving the tables that,
12 to a significant extent, control the sentences applicable
13 to myriad of white-collar offenses. The Commission has
14 proposed two options to amend the loss tables in the fraud
15 and theft guidelines, and is also considering a third
16 option developed in April 1997.

17 Recognizing that all of the options improve the
18 current sentencing structure, the Department prefers
19 option No. 2, especially in the mid- to high-dollar range,
20 where it increased sentences more quickly for offenses of
21 dollar amounts between \$70,000 and \$1.2 million. Offenses
22 at these levels are serious and common. The loss amount
23 for approximately 25 percent of the defendants sentenced
24 in fiscal year 1996 under guideline 2F1.1 fell within this
25 range. Option 2 would place an offender, who commits a

1 fraud of just over \$70,000 at offense level 16; and one
2 who commits a \$1.2 million fraud at level 22.

3 By contrast, options 1 and 3 rise more slowly
4 for offenders in the \$70,000 to \$1.2 million range. For
5 example: Both of these options would place a defendant,
6 whose offense involves just over \$70,000, a offense level
7 14, 15 to 21 months, or even a split sentence, with as
8 little as 5 months of imprisonment after acceptance of
9 responsibility, exactly where such an offender is under
10 the current guidelines if the offense involved
11 more-than-minimal planning, as the vast majority do.

12 Similarly, a \$1 million option 2 would result in
13 an offense level of 22, while options 1 and 3 would
14 produce offense level 20, just one level above the current
15 level, with more-than-minimal planning.

16 To deter serious offenses in the range of
17 \$70,000 to \$1.2 million, improvement in the fraud and
18 theft loss tables is vitally needed. All three options
19 recognize this need where larger dollar amounts are
20 involved. At amounts of \$1.2 million and greater, all
21 three options are the same and reflect significant
22 increased over current sentences.

23 We applaud the Commission in recognizing the
24 seriousness of these expense offenses and urge the
25 Commission to acknowledge the need for increases in the

1 mid- to high-dollar range.

2 I want to turn my attention to more-than-minimal
3 planning and sophisticated means.

4 We support the deletion of the enhancement for
5 more-than-minimal planning or scheme to defraud more than
6 one victim. We view the deletion of these factors and
7 their incorporation into the loss tables as a positive
8 step in reducing litigation. However, the goal of reduced
9 litigation will not be realized if courts are permitted to
10 reduce sentences based on minimal planning.

11 We strongly oppose the addition of language
12 providing a reduction in the offense level because of
13 limited, or insignificant planning, or simple efforts at
14 concealment, as proposed. The table does not incorporate
15 more-than-minimal planning at all offense levels;
16 therefore, no basis at all exists for a reduction at the
17 lower dollar amount.

18 More importantly, however, if minimal planning
19 is allowed or not prohibited as a basis for departure,
20 defendants will likely argue it in most cases. The result
21 will be that minimal planning will become a frequent
22 litigation issue, just as more-than-minimal planning has
23 been a litigation issue under the current guidelines, and
24 uneven results will be likely. The net effect will simply
25 be to shift the burden from the prosecution to the defense

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 without eliminating the factor from consideration.

2 A balance approach would be for the Commission
3 to adopt language prohibiting a downward departure on the
4 basis of minimal planning and upward departure on the
5 basis of more than minimal planning, as presented by the
6 Commission in an issue for comment. The promulgation of
7 such language would signal to all parties that the
8 Commission had adequately taken into account the issue of
9 minimal planning and more-than-minimal planning, as
10 reflected in the loss tables.

11 If, on the other hand, the Commission remains
12 silent on the departure issue, that silence will likely
13 result in litigation as defendants and prosecutors seek to
14 test the views of the Courts of Appeals on minimal
15 planning as a basis for downward departure and
16 more-than-minimal planning as a basis for upward
17 departure. This is an issue the Commission should decide
18 before a circuit complaint develops.

19 The Commission has also proposed a specific
20 event characteristic providing a two-level increase for
21 sophisticated concealment, or for either sophisticated
22 concealment or commission of the offense from outside the
23 United States. An enhancement for sophisticated means
24 used to impede the discovery of the existence or the
25 extent of the offense currently is found in the Tax

1 Evasion Guidelines.

2 The proposed new factor for fraud and theft
3 guidelines would expand an existing sophisticated offense
4 characteristic in the fraud guideline, which provides the
5 floor of offense level 12 if an offense involved the use
6 of foreign bank accounts or transactions to conceal the
7 true nature or extent of the fraudulent conduct. The
8 proposed enhancement would broaden this concept to apply
9 to other means besides the use of foreign bank accounts.
10 Few options are presented. We prefer the one that
11 specifically provides for the commission of the offense
12 from outside the United States.

13 Thank you.

14 JUDGE CONABOY: Thank you, Mary.

15 Katrina, do you want to proceed?

16 MS. PFLAUMER: Do you want me to proceed to loss
17 definition, Mr. Chairman? I'm prepared to speak on that.
18 Or, should we proceed to Mr. Margolin?

19 JUDGE CONABOY: We were going to move to that
20 next, but —

21 MS. PFLAUMER: That's what I'm going to speak
22 on. We tried to save more time for that because we think
23 it's maybe a little more complex.

24 JUDGE CONABOY: All right. While, why don't we
25 just hold that, for a minute, and let me see. Is there —

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 we were going to give some time for responses. Ephraim,
2 you were going to lead the, according to my notes here, a
3 response to some of these comments.

4 MR. MARGOLIN: I'll be glad to try.

5 JUDGE CONABOY: All right. You can proceed, if
6 you will.

7 STATEMENT OF
8 EPHRAIM MARGOLIN, ESQ.
9 SAN FRANCISCO, CALIFORNIA

10 MR. MARGOLIN: I would like to suggest three
11 major areas of my concern. The first area has to do with
12 the whole notion that, every time a body politic gets
13 together, the result is increased penalties, the notion of
14 increasing penalties under whatever banner. Because
15 narcotics get very heavy sentences, or whatever, we do not
16 think of reducing narcotics. We think of increasing
17 everybody else. And, before you know it, the result of
18 that is that, in my mind, we're getting a society which is
19 bound to penal solution to the point where other solutions
20 become impossible to accomplish.

21 My second point has to do with the number of
22 increases. It is true that the present law does have
23 something like 20 or 25 different hundred dollars or less
24 silly situations. And, yes, it is necessary to do
25 something about that. I think that it is totally out of

1 whack with what people make and how people live.

2 However, when you look at the three options,
3 which I have -- which were given to me, I see three
4 different areas of concern.

5 The first one has to do with the small cases.
6 And, in the small cases area, it would seem to me that, if
7 you went, say, to under \$50,000, if you stated that in
8 that area, as an experiment, judges will be given greater
9 authority for downward departure. If you simplify the
10 whole thing into four or five different data, you would be
11 doing us a lot of favor.

12 I do not know the empirical basis for what you
13 have here, but the very closeness of some of the
14 arguments, here are one or two things: \$30,000, one
15 thing; \$40,000, one thing; \$50,000. They are equally kind
16 of your thoughts. I mean, where do they come from? The
17 suggestion I am making is sufficiently broad at least to
18 start a discussion over the introduction of simplification
19 and downward departure.

20 The final thing is: You know, I go to court, I
21 reach the time of sentencing, I have an inconsequential
22 guy whose life now is going to be impacted forever; and,
23 in the final account, the importance of your guidelines to
24 me is whether I reached level 12. Because, until that
25 point, most people will not get the benefit of the doubt.

1 Those who deserve it might, because the judge has the
2 power at that point to impose probation or house
3 detention, or whatever, rather than prison. And by
4 playing the game of numbers, as we do in our different
5 plans, this gets lost. And it is very important for me
6 that you realize this is 30 or 40 percent of all the
7 cases. And those cases need to be looked at with some, I
8 wouldn't say compassion; I will say with some logic.

9 JUDGE CONABOY: Thank you. Anyone else have any
10 comment on any of the matters we've covered? We're going
11 to move to the revisions to the loss —

12 MS. PFLAUMER: Could I respond to that?

13 JUDGE CONABOY: Sure, sure.

14 STATEMENT OF
15 KATRINA C. PFLAUMER, ESQ.
16 UNITED STATES ATTORNEY
17 WESTERN DISTRICT OF WASHINGTON

18 MS. PFLAUMER: I'm surprised to hear how many
19 inconsequential guys Mr. Goldstein and Mr. Margolin
20 represent.

21 MR. GOLDSTEIN: I cop to it.

22 MS. PFLAUMER: The tables proposals, as I
23 understand them, have very little effect at that range.
24 In fact, in some cases, the proposal would lower the
25 guidelines at that range.

1 I think the area that is of critical importance
2 to the justice department — and I think I am supposed to
3 be speaking for them, actually, my organization — is the
4 area of cases above \$70,000, particularly between \$70,000
5 and \$1.3 million, which is an area where we think that the
6 penalties are improperly low and should be raised. That
7 is an area, as Mary Spearing said, of importance to us and
8 represents about 25 percent of the cases which have a huge
9 impact on the public.

10 MR. MARGOLIN: Would you agree with me, then, on
11 everything under \$70,000?

12 MS. PFLAUMER: I think the tables, as proposed,
13 agree with you. I would not, from the standpoint of the
14 Justice Department, agree with you that a \$50,000 theft
15 might not and should not be assumed to include
16 more-than-minimal planning, if that's where you're going.

17 MR. GOLDSTEIN: I think one of the places we're
18 going is the hopes that we might, if we're going to
19 ratchet up at the higher end, we might think about
20 providing more secure due process rights in the process of
21 determining those by whatever definition we establish, and
22 providing greater discretion to District Judges in the
23 areas where we're at a point where there still is some
24 discretion to exercise. That would be by, perhaps, moving
25 in two directions. If we're going to move up after

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 \$70,000, move down below it.

2 JUDGE CONABOY: All right. Well, I thank all of
3 you, again. I'm going to -- do you want to ask some
4 questions?

5 MR. GOLDSMITH: I do.

6 JUDGE CONABOY: Let me ask each of you, then --
7 what I'm afraid of is that some of you want to leave
8 early, and I'd like to get everybody in before people have
9 to leave. So, let me ask each of you to keep your
10 questions brief.

11 Mike Gelacak, Commissioner Gelacak, do you have
12 any questions, brief questions?

13 MR. GELACAK: Brief questions. Well, just one,
14 I guess.

15 I'm fascinated by the Department's argument, if
16 you will, that what is the best way to go about this is to
17 eliminate the requirement for them to prove up any
18 more-than-minimal planning. Because, it seems to me, that
19 the only logical conclusion of making that go away is that
20 the people who are going to suffer are the people who
21 don't have more-than-minimal planning. They are going to
22 get whacked. What's wrong -- what offends me, not today,
23 but what offends me all the time with this argument is:
24 What is wrong with the prosecutor having to prove
25 more-than-minimal planning? It seems to me that's the

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 job.

2 MS. SPEARING: Well, if one of the goals is to
3 reduce litigation, and —

4 MR. GELACAK: Well, I don't think the goal, for
5 me, is to reduce litigation. Either you can prove that or
6 you can't. We shouldn't give that to you on a platter.

7 MS. SPEARING: Well, if — but, if one of the
8 goals is to reduce litigation, and you look at one of the
9 factors in sentencing where prosecutors have sought and
10 succeeded in a high percentage of cases in proving
11 more-than-minimal planning, it would seem that you ought
12 to build it into the tables, rather than have that
13 litigation ensue in every case. The —

14 MR. GELACAK: Why? So that those people, who do
15 not engage in more-than-minimal planning, should suffer a
16 higher penalty? That's the logical consequence, isn't it?

17 MS. SPEARING: No. The logical, the logical
18 point is to avoid what is already existing in every — why
19 make the prosecutor in every case prove what is in every,
20 in almost every case, in terms of the higher guideline? I
21 mean, the elimination of more-than-minimal planning is not
22 built into the lower end of the guidelines —

23 MR. GELACAK: Because I always understood our
24 system of justice to be designed to protect the least
25 amongst us. And that would be the individual, or two, or

1 three, or ten, or fifty, who do not engage in
2 more-than-minimal planning. Why should they go to jail
3 automatically? Why should their time be increased
4 automatically because everybody else does, we don't want
5 to have to take our time proving that?

6 MS. SPEARING: I think, in the end, the usual
7 situation where we have a uniform rule that builds it into
8 the table, where there is a presumption that, at a certain
9 point, you probably had to plan, more than minimally, to
10 steal \$50,000. If you're the extraordinary teller, who
11 had \$50,000 at hand in his or her drawer, and took it out
12 and took off out of the bank that afternoon, I am sure
13 that you would get a downward departure motion —

14 MR. GELACAK: Well, but we just heard —

15 MS. SPEARING: I know.

16 MR. GELACAK: We just heard the argument that we
17 should not have that downward departure. We should do it
18 both ways. We should eliminate — we should include it in
19 the bump, and we should also not allow the departure for
20 minimal planning.

21 MS. SPEARING: Well, there will be other —
22 there will be other downward departure bases if you put it
23 in as more-than — as less-than-minimal planning itself.
24 What I'm saying is, is that you're opening up yourself to
25 the same problem that we have now, which is: Different

1 standards and different courts, endless fact hearings,
2 different ideas about what more or less minimal planning
3 is. But there are other bases for downward departure,
4 which are usually that the less culpable person, who is
5 not seriously involved with the scheme. When you're up at
6 that size of a scheme, it's almost never a single person.
7 That's just a reality of it.

8 JUDGE CONABOY: Can I move to Commissioner
9 Tacha? Do you have any questions?

10 JUDGE TACHA: No.

11 JUDGE CONABOY: Commissioner Gelacak, or
12 Goldsmith? Go on, say it.

13 MR. GOLDSMITH: No, go on. I'll hold back.

14 This issue is one that point in conflicting
15 directions. For example: The need for reform in this
16 area, I think, is illustrated by a statement in the
17 *Federal Sentencing Reporter*, recently, by a leading
18 scholar in this country, in which he said:

19 "Under the current guidelines, a defendant can
20 steal a very substantial sum without being
21 required to serve any prison time. For
22 example: A first-time offender must steal
23 more than \$70,000 before his sentence to
24 imprisonment is mandated. And the amount
25 rises to \$200,000 for a one-time occurrence

1 involving only minimal planning."

2 So, on the one hand, I see that as problematic
3 with the current guidelines and something the needs to be
4 addressed. On the other hand, I am -- I'm have been
5 troubled, for quite some time, about the fact that the
6 judges, as represented by the Judicial Conference Criminal
7 Law Committee, have apparently been pushing for, or have
8 endorsed the need for an increase in the area; but the
9 numbers suggest that the judges have not been sentencing
10 at the high end of the range. And so, I'd like to ask our
11 Justice Department representatives if they could possibly
12 explain that apparent anomaly?

13 JUDGE CONABOY: Mary, can you explain why judges
14 are not?

15 MR. GOLDSMITH: -- being too low, why are they
16 all of sudden saying --

17 MS. SPEARING: I can explain --

18 JUDGE CONABOY: Without naming any judges.

19 MS. SPEARING: I can describe our frustration
20 with judges not sentencing at the high end of the range.
21 But I can't, I can't explain why, on the one hand, they
22 see that the tables are not adequate in terms of loss, the
23 guidelines are not; and, yet, they don't take advantage of
24 the situations where they can sentence higher.

25 MS. PFLAUMER: In my experience, it's the

1 presentation with an individual before you in your
2 courtroom, and the sympathetic factors of that individual,
3 which presents you with a choice. You have a range that's
4 available to you, and you may stay proportionally in that
5 range, given that this is what is deemed to be the
6 appropriate sentence for this offense, for this law, I
7 find this person to this degree of sympathetic. Whereas,
8 if you ask me where this range should be, I will tell you,
9 as the overwhelming majority of judges did in response to
10 surveys, the appropriate range for this should be higher.

11 MR. GOLDSMITH: I've read the survey and I'm
12 concerned, I'm most concerned, that next time they're
13 going to come back and say: These penalties, for
14 white-collar crime, are too draconian and need to be
15 lowered.

16 JUDGE CONABOY: David, we need to —

17 MR. GOLDSMITH: That's the —

18 JUDGE CONABOY: Let me hear David.

19 MR. AXELROD: I think the answer is something
20 entirely different; and that is: As we sit here today,
21 and we look at the loss tables, it's an abstraction, and
22 we're not dealing with concrete cases. When judges are
23 faced with human beings and real facts, real cases, they
24 find that the loss tables and phases give them the
25 opportunity to impose sentences that are as severe as they

1 feel they need to. As a result, you find that the
2 overwhelming majority are sentenced, as Commissioner
3 Goldsmith pointed out, at the middle and bottom of the
4 guidelines.

5 JUDGE CONABOY: Gerald, were you going to say
6 something?

7 MR. GOLDSTEIN: I can only say that it's the
8 difference of perception and reality. I understand all
9 these anecdotal speculation about what might be if it
10 weren't like it is. What we need to look at is the
11 empirical data. The judges, obviously, have plenty of
12 room to exercise that limited amount of discretion we give
13 them, and they seem to be exercising it at the low end.
14 And, by and large, whether it's because they are
15 confronted with real situations, in real life, effecting
16 real people, rather than sitting around here picking, with
17 a pointy pencil, and just saying: Well, we're going to
18 change the difference between \$30,000 and \$40,000.

19 That's not a criticism of you. It's what I was
20 trying to do, and I was sitting there trying to do it.
21 It's an impossible task in the abstract. It's why,
22 perhaps, we're going in the wrong direction. But
23 whichever direction we go, what we might want to look at
24 is: What is reality? What are they doing? When they've
25 got that kind of discretion, they use it at the low end.

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 Maybe that ought to tell us something about whether we
2 need to right —

3 MR. MARGOLIN: It is a difference between the
4 rhetoric and practice, yes.

5 JUDGE CONABOY: Let me be arbitrary here. Mary,
6 do you have questions?

7 MS. HARKENRIDER: No.

8 JUDGE CONABOY: If not, we want to move on.

9 Well, let me thank you. Some of you are going
10 to remain on this last one. I want to get to this
11 definition of loss issue. So, can we thank this panel.
12 Those of you, who are not on it, we'll excuse you, and
13 Mark Flanagan is going to be added.

14 NON-TAX ISSUE THREE

15 PROPOSED REVISIONS TO DEFINITION OF LOSS

16 JUDGE CONABOY: Mark Flanagan is from
17 Washington, D. C., and is chairman of the Subcommittee on
18 Procurement Fraud, of the ABA White Collar Crime
19 Committee, and a former Assistant U.S. Attorney. A lot of
20 U.S. Attorneys interested in this now. Let's see, the
21 rest remain the same here.

22 Mark, if you're ready, which you like to proceed
23 and make your comments. We're into, now, the proposed
24 revision to the definition of loss, which is, as we all
25 know, is an extremely important area that we're struggling

1 with. We would appreciate, again, the input that all of
2 you give you to us on this.

3 STATEMENT OF
4 T. MARK FLANAGAN, ESQ.
5 MC KENNA & CUNEO
6 WASHINGTON, D. C.

7 MR. FLANAGAN: Thank you, Judge Conaboy.

8 Good afternoon. I'm glad to be here. I've been
9 following closely, over the last year, some of the work of
10 the Commission, having to do with the proposed amendments
11 for the theft and fraud guidelines.

12 I think it's a critical concept, one of the most
13 critical concepts you've been discussing here this
14 afternoon. And I encounter it, really, in two ways in the
15 work I do. First of all, in sentencing, it obviously
16 comes up. But it also comes up, very importantly, in
17 negotiations, in resolving things that are short of going
18 to trial and having indictments, where you need really
19 firm guidelines to predict what would be happening. And
20 there's a lot of disparity in the various jurisdictions
21 around the country as to what the definition of loss is
22 and how it works.

23 If I had any theme here today, I think the
24 Commission has the opportunity to move forward to clarify
25 and improve upon the definition now, while still having

1 uniformity and proportionality. I think Judge Rosen, in
2 the hearing in October that you had held, had noted that
3 about 20 percent of all cases involved the loss
4 provisions. And some of the work I did, in looking at
5 some of the data, showed that 35 percent of organizational
6 sentencing involved the theft, fraud, mostly the fraud,
7 guidelines.

8 In coming here today, I'm going to keep these
9 remarks very brief. I had prepared some other remarks;
10 but, after reading the written statement of the Justice
11 Department, I really decided to make some more global
12 remarks in light of that written statement. And I'd like
13 to make three comments.

14 The first comment is: I believe the bedrock of
15 the theft and fraud guidelines — and let's concentrate
16 more on the fraud — is the definition of loss. You form,
17 first, the definition. You take all the harm that would
18 to into the definition; and, then, you go to the loss
19 tables. The Justice Department is inviting the Commission
20 to only go forward with the loss tables at this time, and
21 to table, if you will, the definition of loss, claiming
22 that it would be too impractical to go forward at this
23 time, too tough to go forward at this time.

24 I really disagree with that format, for several
25 reasons. First of all, I think the Commission, in it's

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 February Working Draft, has already gone a very long way
2 in tackling some of the tough problems; and, I think, in
3 short order, they could resolve any remaining issues.
4 Also, I think it just is not the right way to go. It is
5 putting the cart before the horse. I think, first, you
6 need to address the definition, and then move to the loss
7 tables. Otherwise, it is very difficult to assign and
8 give real meaning to your loss tables if you don't have a
9 definition that the courts are uniformly dealing with
10 across the country, and that the prosecutors and defense
11 counsel are also uniformly dealing with.

12 The second comment really deals with the
13 treatment of gain. In the written statement I prepared,
14 and elsewhere, I have argued that I believe gain is really
15 something that should be a grounds for departure. That
16 the ordinary focus should be on the loss to the victim.
17 The Commission, in its current February Working Draft, has
18 elevated gain into one of several factors. I still
19 believe it would be better grounds for departure.

20 The Justice Department, however, is arguing and
21 urging that gain should be part of the core definition of
22 loss. I think that's a fundamental change to do so. Right
23 now, in your February Working Draft, that would mean that
24 you would be taking your concepts of actual loss and
25 intended loss and, now, adding gain into the mix. I think

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 that is just going to unnecessarily make something that
2 needs to have clarity more complex and you will muddy the
3 waters. I don't think it's the way to go.

4 A third comment has to do with the overall
5 theme. I think, if you had to isolate one issue that the
6 definition of loss should have, that issue is to have a
7 causation standard in your guidelines. In the work that
8 I've read about, in the October hearing, in the
9 commentators, there is almost uniform acclaim that you
10 need to do that, and your February Working Draft does just
11 that.

12 The Justice Department seems to walk around that
13 issue. And I don't think it is really the time or the
14 place, when you are so close, to take the loss tables and
15 go forward with them and not to simultaneously be
16 addressing the definition.

17 Thank you very much.

18 JUDGE CONABOY: Thank you, Mark.

19 Katrina, were you going to come in at this
20 point?

21 MS. PFLAUMER: Yes, if I may. Thank you.

22 JUDGE CONABOY: I didn't mean to skip over Mary.

23 If you want to comment on this one, too.

24 //

25 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATEMENT OF
KATRINA C. PFLAUMER, ESQ.
UNITES STATES ATTORNEY
WESTERN DISTRICT OF WASHINGTON

MS. PFLAUMER: We tried to save our ten-minute segment for the loss definition because we think that that is an area that has received less comment that is less fully developed and, frankly, is really not quite ready for enactment. We do think that the fraud tables are sufficiently distinct and serve a different purpose, and that the public comment has been slowly received and they're fairly well refined, and would hope that you go forward with the fraud tables.

I think that there is an obvious relationship between the two; but what we don't have, and I don't think we will have in the foreseeable future, is a way of measuring what exactly the change in the loss definition is going to do to the various levels of the fraud table. Therefore, waiting and saying that they're linked is fine; but, unless we can measure the impact and the linkage, there is no real reason to separate the two. From our point of view, we should go forward with the changes in the loss table that have been fully — excuse me, in the punishment tables that have been fully discussed, and continue to work with you on trying to revise the loss

1 definition.

2 Our understanding of the purposes of revising
3 the loss definition is to simplify the fraud and theft
4 guidelines, to reduce litigation, and to better reflect
5 the seriousness and culpability of the offender. We
6 appreciate the proposed loss definition expands the
7 coverage in a significant way, and we think that that is a
8 positive step.

9 In the present guidelines, consequential damages
10 are limited to two small classes of cases: defense
11 procurement fraud and product substitution. The proposed
12 definition would expand that concept through the use of a
13 well, we believe, well-understood term, "reasonably
14 foreseeable harm," that criminal lawyers deal with on both
15 sides of the bar at the present time.

16 Despite this improvement, this improvement is
17 accomplished with reasonably foreseeable harm that enfolds
18 consequential damages. We fear that the proposed
19 definition, in its present state, really will complicate
20 and confuse and spawn litigation, rather than reduce
21 litigation. We'd like the loss definition to be the
22 subject of more time and study.

23 The three issues I want to touch on briefly here
24 are: The treatment of gain, the credit against loss, and
25 the departures that are listed in the proposal.

1 It is the position of the Department that gain
2 can be a useful tool in a small minority of cases. That
3 minority of cases is where there is no loss, or whether
4 the loss is very difficult to calculate, not across the
5 board.

6 Those kinds of cases that we see in our office
7 are where someone pretends to be doctor, pretends to be a
8 lawyer, serves the clients. It is very difficult to say,
9 to measure the service that the client got, versus what
10 they would have gotten with a real lawyer or a real
11 doctor; but it's certainly not what they bargained for.

12 Another example would be where a drug company
13 fails to perform tests and falsely certifies that it has,
14 puts a product on the market that we can't say has really
15 hurt anyone yet; but they're certainly not buying what
16 they think they're buying.

17 Those are the kinds of cases where the loss is
18 zero or it's very difficult to calculate, but the gain to
19 the drug company may be immense. The gain to the fake
20 doctor or lawyer may be immense.

21 So, we would propose that gain be used, and that
22 it should be used, as a third type of measurement of loss;
23 that is: in 2A, as opposed to 2B, because it's really not
24 — it's a proxy for loss; it's not a measurement of loss.
25 And again, I think that we would avoid the issues that Mr.

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 Flanagan worries about if we recognize that it's in that
2 small minority of cases where there is no appreciable
3 loss, or where it's impossible to calculate.

4 We certainly don't want to be in an inadvertent
5 situation that could result from the way it's phrased now,
6 where gain is proposed as an alternative in every case,
7 where people look at it as an alternative when it is less
8 than the loss.

9 The second issue I wanted to raise briefly is
10 credits against loss. Again, we have problems with the
11 proposed definition here in this area. Primarily, that
12 the treatment of credit will result in greatly enlarged
13 litigation over whether the defendant provided an economic
14 benefit, the value of the benefit, the timing of the
15 benefit. The problem is that this credit, which now, in
16 the present guideline, is only in a very small group of
17 cases in 7(b) would be extended across the board, and the
18 problem areas would be expanded.

19 The proposed credit rules also fail to reflect
20 some of the items or services that may carry no economic
21 benefit, such as I just talked about, or, for instance, a
22 case where you sugar water being sold as orange juice.
23 There may be a fair-market value to the sugar water; but,
24 again, it is not the value of what they're selling, which
25 is, supposedly, orange juice. So the credit with

1 fair-market value should be considered in light of what
2 the victim thinks the victim is getting, in other words,
3 the intended transaction.

4 The proposed credit rule also presents a problem
5 with regard to property pledged, or otherwise provided as
6 collateral. Where the value of the collateral stays the
7 same or increases, the credit will eliminate loss in a
8 rising market. And this is a substantial problem in the
9 cases we have of HUD fraud, where it is a rising real
10 estate market in many of our cities. You then fail to
11 distinguish between the defendant who walks into the bank
12 meaning to commit a \$50,000 fraud, and a defendant who
13 walks in intending to commit a \$5 million fraud, and who
14 reaps the windfall of the rising real estate values.

15 So, again, we feel we need to work through a
16 variety of these scenarios and apply them in the area of
17 credit.

18 Thirdly, the area of departures. We feel that
19 the departures that are proposed are, in some cases,
20 overly broad and not limited to factors that signify an
21 unusual case. And I see Mr. Goldstein's earlier argument
22 about the numbers of sentences and what we can take from
23 that empirical data. Since the empirical data is that the
24 overwhelming number of departures are to go downward, I
25 think we can clearly say that we don't need anymore bases

1 for downward departures.

2 MR. GOLDSTEIN: So the suggestion is 11 up and 4
3 down.

4 MS. PFLAUMER: In any case, the first is the one
5 that says if a primary objective of the offense was a
6 mitigating or nonmonetary objective. This promises a
7 great deal of expanded litigation. I've never met a
8 corporate executive who didn't tell you that what he was
9 doing was for the good of the company and to keep the
10 employees in the company.

11 Three additional downward departure
12 considerations also reflect troubling inconsistency with
13 the general rules that are proposed on loss and the
14 definition. The first is that the offense was committed
15 in an inept manner. The inept downward departure is one
16 that troubles a lot of us in a lot of different districts.

17 To give you an example: In my district, we have
18 a lot of militiamen who are passing false paper because
19 they have decided that the governor was not properly sworn
20 in, and, so, the state owes them \$4,000, and they are
21 entitled to write their own cashier's checks on the
22 \$4,000. Now, if you look carefully at these cashier's
23 checks, you will understand that these are inept and
24 probably shouldn't be cashed. But should the state or
25 should the Federal Government be — or should the persons

1 be not held responsible if the person representing the
2 government didn't get that message?

3 JUDGE TACHA: Mr. Chairman, can I just
4 interrupt. I am apologizing to you and to all the people
5 who are after you. I have a pre-existing commitment. I
6 have to go. But I will, I assure you, listen very
7 carefully to the tapes, and I have a law clerk listen very
8 carefully.

9 MS. PFLAUMER: All of ours in in writing.

10 JUDGE CONABOY: I was trying to squeeze in as
11 much as I could. I knew that some of our — that's why
12 I've been pushing everybody a little bit. I appreciate
13 your all rushing as much as you can.

14 MS. PFLAUMER: I have very little more, a couple
15 more notes on the difficulty, the tension between some of
16 the principles that are stated in this definition and the
17 proposed downward departures.

18 One is for a credit, so to speak, where a
19 defendant has made complete, or substantially complete,
20 restitution prior to the detection of the offense. That
21 is a principle that obviously ought to be taken into
22 account, but it runs counter to the definition of credit
23 that has been the proposal that we have now, or at least
24 was its intention. Where is this going to be handled?

25 The last downward departure where I think

1 there's a potential tension with the general rule is in
2 the area of the loss which has been substantially
3 increased by an improbable or intervening cause. Again,
4 this runs at some odds or tension with things that are now
5 included in the core definition.

6 Other members of the Justice Department have
7 asked to be sure mention a couple of other very serious
8 concerns here. One of those is the elimination of the
9 protected computer section. That's an area where we're
10 seeing very scary and enlarging crimes happening everyday.

11 The interest area, where we have in our written
12 testimony opted for option B, and the attempted and
13 partially completed defenses section which we think should
14 be there.

15 JUDGE CONABOY: Give me that last one again?

16 MS. PFLAUMER: The attempted and partially
17 completed offenses.

18 JUDGE CONABOY: Oh, yes.

19 MS. PFLAUMER: We've tried, in our written
20 testimony, to outline the chief concerns that we have, and
21 we want to continue to work with the Commission on this
22 definition of loss. We think things are going in the
23 right direction, but we really question whether we are at
24 the point now where using this definition would really
25 simplify or make more fair the guidelines.

1 DR. KRAMER: Thank you very much, Katrina.
2 Jerry or David, did you want to get some
3 response in here to these assertions?

4 MR. AXELROD: Yes, please.

5 STATEMENT OF
6 DAVID AXELROD, ESQ.
7 VORYS, SATER, SEYMOUR & PEASE
8 COLUMBUS, OHIO

9 MR. AXELROD: I think the three defense lawyers,
10 the four defense lawyers at the table, are all in
11 agreement with the government, that the definition of loss
12 is not yet well enough developed for the Commission to
13 proceed with it. Where we disagree is with the idea that
14 the Commission should proceed with changing the loss
15 tables, simply because the proposed changes in the loss
16 tables have received public comment.

17 The problem is: The comments that have been
18 received may be invalidated by what happens to the
19 definition of loss. The loss tables are predicated on a
20 determination that certain conduct should be punished at a
21 certain level. And, if the loss table, if the loss tables
22 are changed to accomplish that and the definition of loss
23 is expanded, it can completely skew the work that the
24 Commission does on the loss tables and completely destroy
25 the assumptions on which the loss tables are established.

1 A perfect example is consequential damages. If
2 particular conduct under the present loss definition is
3 determined to be punishable at a level 15 — just to pick
4 one out of the air — and then the definition of loss is
5 expanded to include consequential damages, the numbers
6 could skyrocket, and the same conduct that the Commission
7 has previously decided should be punished at level 15
8 suddenly might be at level 25.

9 So you need to have the definition of loss in
10 place before you decide how to amend the table. The
11 solution, of course, is to wait and not to do either one
12 of them until the Commission is prepared to do both of
13 them, and that is the course that I advocate.

14 One other word about consequential damages,
15 which is something that concerns me. We need to keep in
16 mind why we talk about loss; and that is because it's a
17 measure of culpability. And consequential damages, I do
18 not believe are a valid measure of culpability.

19 I mean, I deal with people who are facing
20 sentencing and who commit crimes all the time. Normally,
21 I say all of my clients are innocent; but, occasionally,
22 one of them may have done something. And I know that
23 criminal defendants think about gain and they think about
24 loss when they decide what crimes to commit. One thing
25 they don't think about is consequential damages. Because

1 that is not something that enters into their thought
2 processes when deciding what they're going to do, it
3 doesn't really measure how culpable they are. It doesn't
4 measure their personal blame-worthiness. We use it in
5 contract cases and in other contexts because we are more
6 concerned with establishing dollars for the sake of
7 establishing dollars. Here, we try to establish dollars
8 only for the sake of establishing culpability, and I don't
9 think consequential damages does that.

10 JUDGE CONABOY: Gerald, do you want —

11 STATEMENT OF

12 GERALD H. GOLDSTEIN, ESQ.

13 GOLDSTEIN, GOLDSTEIN & HILLEY

14 SAN ANTONIO, TEXAS

15 MR. GOLDSTEIN: I don't think it will come as a
16 shock to anyone that some of my clients have an
17 unfortunate familiarity with the facts of the offense, as
18 well. I also don't think it will come as a shock to
19 anyone that all the prosecutors think we ought to up the
20 guidelines and have more upward departures, and all the
21 defense lawyers think we ought to lower guidelines and
22 have more downward departures.

23 JUDGE CONABOY: We hear that occasionally.

24 MR. GOLDSTEIN: And I think Commissioner
25 Goldsmith's suggestion about the reality check when the

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 District Judges are sentencing at the low end of the
2 guideline range, and the fact that — I think Katrina
3 pointed it out very correctly — there are a lot more
4 downward departures than there are upward departures it is
5 an indication that, with respect to real people, in real
6 life situations — if we're going to have a reality check
7 here — both the level of sentences and the numbers and
8 direction of departures is an indication that the District
9 Judges in this country, when it comes down to the hard
10 decision in reality, find that the current guidelines are
11 severe enough.

12 Lastly, I want to readdress the continuing
13 return to the theme of reducing litigation. I understand
14 that's necessary. I watch what happens in courtrooms, and
15 I realize that the real litigators, the lawyers that
16 practice in the civil bar, never get there cases in most
17 of your courts. At the same time, it seems to me that,
18 while that may be a legitimate goal, litigation was a
19 natural and built-in consequence of the Federal Sentencing
20 Guidelines.

21 When we had absolute discretion in sentencing,
22 nobody appealed the sentence because you weren't going to
23 get anywhere, and you were told that in advance. When we
24 built the guidelines, we built in a specific,
25 fact-specific, fact-finding process in which we have no

1 rules, no one knows where we're going, and we built in an
2 appeal process. We told everyone: This is where we're
3 going to be in litigation. So, the fact that altered the
4 goal of reducing litigation shouldn't blind us to the fact
5 that it ought to be a fair process. Fair, with respect
6 to, I think, what many of you have described as the
7 disparity with the have-nots, not having the same
8 consideration for the lack of planning that the haves
9 might have, and consideration for the due process rights
10 of everyone, from the top of the ladder to the bottom,
11 when they get into this process. I don't think that we
12 should throw out the baby with the bath water.

13 JUDGE CONABOY: We have some members of the
14 audience. I would like the panel members, if you could,
15 even if you have to move from here, to kind of remain,
16 because we may have some more questions for you. But I'd
17 like to get in -- hear from others, as well as the
18 questioning. I know Professor Bowman was ready to give us
19 some comments, and there may be others. So, if you don't
20 mind, I'm going to move to that area at this point.

21 Just give us another chair.

22 MR. BOWMAN: I can do it from here, Judge.

23 JUDGE CONABOY: Can you do it from there.

24 MR. BOWMAN: I assume that's what Andy had in
25 mind.

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 TESTIMONY FROM MEMBERS OF THE AUDIENCE

2 STATEMENT OF

3 FRANK BOWMAN

4 VISITING PROFESSOR

5 GONZAGA UNIVERSITY SCHOOL OF LAW

6 MR. BOWMAN: I want to keep this, keep my
7 comments brief. I want to thank the Commission, once
8 again, for having the forbearance to listen to me once
9 again on this subject. The details of my comments are
10 contained in the written statement that you have from me,
11 so I'm going to try not to repeat myself. That said, I'm
12 going to disagree with everybody on the panel, in one way
13 or another.

14 First of all, I think that this — I'm confining
15 my comments now to the redefinition of loss. I believe
16 this is a desirable reform. I think you are very, very
17 close to bringing it to fruition.

18 Unlike virtually everybody up there, I think it
19 is doable in the time frame that you have remaining in
20 this year. I'm not saying it necessarily will be done, but
21 I think it can be done. And an awful lot of the
22 objections that are — you hear to this particular
23 proposal that you have are fixable. I think they're
24 fixable in reasonably short order. If you have the will
25 to fix them, and if you put some pressure on the

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 interested groups not merely to say what's wrong with this
2 proposal; but, more particularly, if they have a
3 particular complaint about a portion of the proposal, to
4 come forward with specific language that would fix the
5 complaint that they have.

6 I think that the Justice Department, in a number
7 of places, has provided some commendable first steps in
8 that direction, because of the document that's been
9 provided you by Ms. Pflaumer and Ms. Spearing contains a
10 number of places in which they've actually suggested some
11 alternative language. Regardless of the merits or
12 demerits of that particular language, I think that, in
13 each case, that's a step forward and one that I think the
14 Commission should encourage within the limits of its
15 power.

16 With respect to specifics -- again, I'm not
17 going to get into details, because I've written you a long
18 and tedious paper on that subject -- a couple of things I
19 want to say.

20 First, I think that the draft that you currently
21 have, the one that's dated February 20, 1998, should not
22 be adopted as it currently stands. I agree with the
23 Department to this extent: I think, if it were adopted as
24 it currently stands, it would be cause far more problems
25 than it would be worth. But I think the problems with it

1 are discrete. I think they can be fixed. And, in
2 particular, I will try to prioritize the ones that I think
3 need fixing the most.

4 I think that the section, with respect to
5 credits against loss and time of measurement, needs
6 significant rethinking. Simply because, in its current
7 form, in ways I outline in my written remarks, I think
8 it's almost entirely unusable and so complicated,
9 requiring, as it would, the measurement of things on many
10 different dates and in rather confusing ways. I think it
11 has to be fixed. That's the primary one.

12 To my mind, if I were emperor of the universe,
13 that the would be the deal breaker. That would be the
14 thing that, if it were not fixed, I could, I could never
15 support this proposal. But I think it can be fixed, and I
16 think it's the one thing that you need to -- that you
17 should focus your attention on the most.

18 Second on that list of things that really ought
19 to be, perhaps absolutely must be, addressed would be
20 departures, particularly the one for inept manner, which I
21 think is just an invitation to chaos. And in that regard,
22 I agree with the Department.

23 Extremely desirable things I think you should
24 address, but which are not absolutely necessary, are:
25 There are some small fixes I think you should make in the

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 core definitions, some changes in wording to eliminate
2 some complexity.

3 I think it would be desirable — as had been
4 suggested from the panel already, and as I think the
5 judges, the Judicial Conference is likely to suggest — I
6 think the addition of some definitions of some core
7 concepts, particularly definition of how you would like to
8 see foreseeability treated by the courts, would be
9 extremely useful. I think I simply can't agree with the
10 notion that foreseeability, reasonable foreseeability, is
11 so well-understood a concept that we all know what it
12 means. In fact, if you think about it for only a moment,
13 you recognize that reasonable foreseeability is a term
14 which is used in very, very different ways, in different
15 areas of the law, and I think it would be very appropriate
16 for the Commission to consider how you want it used, at
17 least in general terms, in the criminal law context, and
18 to define reasonable foreseeability in a way that gives
19 the judges some guidance as to whether you want this to be
20 an extraordinarily torts-like foreseeability inquiry, or a
21 more limited one. I myself, as I think the Commission
22 knows, favor a much more limited one.

23 Finally, the final thing I want to see is
24 simply, I guess, a reiteration of the point with which I
25 began. I think this can be done. I think what the

1 Commission needs to do is to invite and, frankly, place
2 some pressure on the participants, the institutional
3 participants, and the interest group participants, to come
4 forward not only with complaints, but with specific
5 proposals, specific language that would fix the problems
6 that they have. I think time remains enough to do that.
7 I think you should force them to do that. And, if you do,
8 I think you can do this job within the time remaining. And
9 I think what you will have when you're done is a reform of
10 the guidelines that will be simplifying and that will,
11 indeed, be an appropriate, lasting and desirable legacy of
12 your tenure and at this particular period of the
13 Commission's existence.

14 JUDGE CONABOY: Thank you very much.

15 MR. GOLDSMITH: Before you leave, let me turn to
16 my — well, I certainly concur that we ought to encourage
17 the various participants to come up with language that
18 might somehow help us forge a compromise. Along those
19 lines, I'd like to ask you if you, time permitting in your
20 busy schedule, if you could try to provide language you
21 think might help.

22 MR. BOWMAN: Commissioner Goldsmith, I think
23 I've actually done that.

24 JUDGE CONABOY: He's already done that.

25 MR. GOLDSMITH: Well, I've never seen your

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 statement.

2 MR. BOWMAN: I have, in fact, attached — what
3 I've done in the statement that you have is: I've gone
4 through the February 20, 1998 proposal pretty much line by
5 line, and I've suggested, working off that draft, specific
6 changes that I think would meet a number of the concerns,
7 among them many of the concerns raised by the Justice
8 Department. I don't suggest that those, that that's the
9 last word; but, in effect, I think what I was trying to do
10 is to say this is doable and here's at least one way that
11 you might do it.

12 MR. GOLDSMITH: Good. I'll take a closer look
13 at your statement. Thank you.

14 MR. BOWMAN: Thank you.

15 JUDGE CONABOY: I think I saw some other hands
16 of people who — yes, would you use the microphone for us,
17 please, and would you, each of you who comment, if you
18 would, identify yourselves and who you represent, if
19 anyone.

20 STATEMENT OF

21 DAVID COHEN, ESQ.

22 SAN FRANCISCO, CALIFORNIA

23 MR. COHEN: Hi! My name is David Cohen. I'm a
24 federal criminal practitioner here in San Francisco.

25 I've been practicing federal criminal defense

1 for approximately 10 years. I got my first federal
2 criminal case in 1988, not long after November 1, 1987, so
3 I consider myself to be a person who has practiced during
4 the course of the guideline era.

5 What I've noticed, other than the change in the
6 color of the books during the time — and, by the way,
7 I've never had the opportunity to look the Commission in
8 the eye before, which I'm relishing.

9 (Laughter.)

10 MR. GOLDSMITH: Do you think the book should
11 have pictures?

12 MR. COHEN: Pictures, changing the colors.
13 Changing the colors have been, have been good.

14 The one thing that I've noticed is a trend
15 toward more complicated guidelines and fatter books. And
16 almost universally, the amendments have resulted in
17 increased sentences.

18 I know the safety valve has been instituted and
19 there have been other minor exceptions. But, for the most
20 part, the guidelines have gotten higher and higher. And
21 it's very, very difficult, and I haven't seen any ability
22 for them to be reduced. The only time that there was a
23 significant proposal to reduce the guidelines in 1996, in
24 connection with fraud, in connection with money laundering
25 and crack, the only amendment that was rejected by

1 Congress.

2 My concern is that, when you talk about raising
3 the guidelines, whatever the merits, there's a significant
4 risk because you're not going to be able to lower them
5 politically. I mean, politically, it's very, very
6 difficult. I'm very, very concerned, and I just wanted to
7 raise this with the Commission because you guys and women
8 are trying to do a good job. But the problem is, is that
9 this is an election year. You raise them, it's
10 instituted, it's very difficult to lower them. I noticed,
11 in 1997, there weren't significant amendments of this
12 type, such as the ones in '96 or '98 that were proposed.

13 So, I just urge the Commission to be very, very
14 careful because the defendants aren't here. And it's very
15 rare for people to be able to speak directly to the
16 Commission. I'd urge the Commission — it would be nice
17 if politics were not involved, but politics is involved —
18 and I'd urge the Commission to very, very careful in
19 raising guidelines in general, and these guidelines in
20 particular. And I'd just like to say that, I think, on
21 behalf of many, many people who are appearing for
22 sentencing in courts everyday.

23 Thank you.

24 JUDGE CONABOY: Thank you, Mr. Cohen.

25 Now, there are some others, I think. Yes, sir.

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATEMENT OF

EARL J. SILBERT, ESQ.

MEMBER, PRACTITIONERS ADVISORY GROUP

MR. SILBERT: Mr. Chairman, members of the Commission, my name is Earl Silbert. I'm a member of the Practitioners Advisory Group.

From the time of the promulgation of the regulations, of the Sentencing Guidelines, in the area of theft and fraud, I've been concerned about the primary emphasis, almost dispositive emphasis, they have placed on the concept of loss.

As a prosecutor, for 15 years, and 10 as Assistant U.S. Attorney, and 5 as the United States Attorney, I always thought and practiced the principle, as did our office in the District of Columbia, that, in investigating and prosecuting fraud cases, you follow the money. That is: You look to see who gained the money. It was not our experience that I had, both as a prosecutor and confirmed as a defense attorney, that defendants thought in terms of loss of their victims. They thought in terms of gain. And to me, and our staff, that was the proper measure to assess their culpability and the nature of both the prosecution and the punishment that they should receive.

For example: If you had a fraud procurement

1 case, in which a middle manager participated in a
2 widespread conspiracy to commit fraud in the government
3 contract, for which the loss might have been, say,
4 \$300,000 or \$400,000, and that middle manager received no
5 gain. In our view, the person who stole \$100,000 from his
6 employer, or her employer, and put that money in their
7 pocket, was more culpable and deserving of greater
8 punishment. Yet, under the guidelines, as they are now,
9 as they were promulgated, and as they are under
10 consideration, under your consideration, the reverse would
11 be true: The person, who participated in that fraud for
12 \$300,000 or \$400,000, would receive a significantly
13 greater punishment than the person who put \$100,000 in his
14 or her own pocket.

15 It is for that reason that I would suggest, or
16 just express my concern, that there is an inhumane quality
17 about measuring the time that a person will serve in
18 prison based primarily on the amount of loss, the
19 numerical amount of loss, that he or she caused, without
20 further consideration of the other factors that, in our —
21 in my experience primarily as a prosecutor, with the
22 appropriate measure of their culpability.

23 The second ground, the second point, I would
24 welcome the opportunity simply to make is — and it's been
25 articulated here earlier — is: In trying to assess and

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 look at the role of sentencing in white-collar crime, and
2 considering the purposes of the criminal law, our
3 experience — and, again, I'm drawing primarily on my
4 experience as a prosecutor — was that there were a number
5 of cases in the area of theft and fraud that did not
6 require imprisonment. There were a number that did. And
7 I certainly, as a prosecutor — if you check the record —
8 was active in seeking confinement in appropriate cases
9 involving theft and fraud. In order to accomplish the
10 purposes of the criminal law, whether you're looking at
11 the punishment, or retributive factor, the deterrent
12 factor — which, to us, was always the primary factor in
13 the area of theft and white-collar crime — the sentence
14 of imprisonment of 6 months, a year, year-and-a-half, and
15 two, accomplished all the purposes that the criminal law
16 could fairly and appropriately serve. And sentences above
17 and beyond that, in terms of the necessary or appropriate
18 punishment, but particularly in terms of the necessary
19 deterrence, both deterrence of the individual and
20 deterrence of others, was simply not necessary.

21 Now, it's easy. There was always the temptation
22 in our office to seek increased enhancements of penalties
23 and punishment. I'm somewhat disappointed with my friends
24 in the Department that they seek that today. Because, as
25 I look at the guidelines that you have in the theft and

MILLER REPORTING COMPANY

507 C STREET, N.E.

Washington, D. C. 20002

(202) 546-6666

1 sentencing factors, I respectfully submit to you that, by
2 and large, they do provide for adequate punishment if you
3 look at the overall purposes and evaluate the overall
4 purposes of the criminal law.

5 I would urge and suggest to the Commission that,
6 in assessing whether or not to increase the tables, the
7 loss tables, that they consider not only the measure, the
8 amount of incarceration, but whether or not the
9 appropriate factors are being considered in evaluating
10 what I think is the bedrock of our criminal justice
11 process, which is moral culpability in the commission of
12 crimes and the appropriate steps that we, as a society,
13 should take to respond to it.

14 Thank you.

15 JUDGE CONABOY: Thank you very much.

16 STATEMENT OF

17 JAMES E. FELMAN, ESQ.

18 SAN FRANCISCO, CALIFORNIA

19 MR. FELMAN: Thank you members of the
20 Commission. I simply cannot resist a microphone in front
21 of you all. It's Jim Felman. I'm also with the
22 Practitioners Advisory Group. You've heard some of what I
23 have to say in October.

24 I want to emphasize one point that Mr. Silbert
25 has just made about gain. I don't think any fair-minded

1 person can differ with the proposition that someone who
2 gains zero is fundamentally different from the person who
3 gains 100 percent of the loss. I don't think any
4 fair-minded person can differ with that. Knowing that
5 doesn't answer the problem.

6 I noted in what you published for comments had a
7 proposed downward departure where gain was significantly
8 different from loss. That has been deleted from the
9 February draft. I imagine because there was probably a
10 concern that, with that as departure ground, it would
11 apply to too many cases. Everybody would be arguing in
12 many, many white-collar cases that gain is significantly
13 less so there should be a departure, and the purposes of
14 guideline sentencing would be undermined.

15 First, I have to say that you have to worry when
16 an obviously agreed-upon mitigating factor would apply in
17 too many cases. That ought to bother you a little bit.
18 Now, what to do about it? I, of course, would be in favor
19 of having the downward departure suggested.

20 I agree with the proposition of using loss as a
21 first point. If I could think of some mathematical way to
22 average gain and loss, or take both of them into account
23 somehow in setting the offense level, I'd do it. It's too
24 complicated. I can't do it. You have to start somewhere.
25 I'm okay with starting with loss. But, if you've got an

1 obviously undisputable serious mitigating factor that
2 applies in many, many cases, you've got to do something
3 with it, if you're going to do your best. Uniformity is
4 easy. But if you're going to do your best at
5 distinguishing among different levels of culpability, it's
6 an issue that ought to be addressed. I would only suggest
7 that, if you're not comfortable with it as a departure
8 ground, you consider it as a sophisticated offense
9 characteristic.

10 I never thought I'd be here in front of this
11 Commission asking for a sophisticated offense
12 characteristic because it invites litigation. If we can't
13 have the departure ground, I'm here to ask for it. Give
14 me one point. I don't want to argue about how much it is.
15 Those are political issues. I'm talking about making it
16 rational in trying to differentiate different degrees of
17 culpability. I don't think it would require that much
18 litigation if you're going to have to consider gain,
19 anyway, to figure out whether it's more or less loss —
20 although, I can't agree with that.

21 I would urge you to consider Mr. Silbert's
22 point. As a suggestion for how to enact it if you're not
23 comfortable with the downward departure, use it as a
24 sophisticated offense characteristic.

25 I'll mention the consequential damages. If you

1 include them in all cases, as the February draft does,
2 they will probably engender more litigation, in the real
3 world, than any amendment consideration that you've got.

4 I practice criminal defense law. I go to
5 sentencing from time to time. And I can tell you, as a
6 defense lawyer, that, if consequential damages are
7 included, it will be very much more complicated. I don't
8 know how you could — how to describe that adequately,
9 except to say that, if in a typical case, where
10 consequential damages were excluded, the loss is generally
11 about what we just tried this case about, where it's what
12 we negotiated the plea agreement about. Consequential
13 damages have nothing about either. They are generally
14 about information that is not going to be in the
15 possession of the prosecutor's office, that's not going to
16 be in the possession of the defense attorney, it's not
17 what the case was about. It's about consequential things
18 that happen to the victim later on. We're going to show
19 up at a sentencing hearing and I'm going to get a bill for
20 the victim's lawyer's fees. I'm going to get a bill for
21 the time that the victim took to detect the offense. The
22 complexity of these issues is going to be enormous.

23 If you look at the factors that are considered
24 consequential damages when they're counted, you're talking
25 about very fact-intensive litigation. And, if you get

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 back to the point that the whole point of it is to just
2 make it a rough surrogate for culpability, it's litigation
3 that is completely not worth the trouble to measure
4 culpability. I would urge you not to include
5 consequential damages in all cases.

6 I'll finish by just pointing out that I would
7 note that, before we had guidelines, a lot of people got
8 probation. And I didn't think there was any hue and cry
9 that that was such a horrible thing. The Commission made
10 a political judgment that, for white-collar offenses, the
11 penalty should be higher than pre-guidelines experience.
12 So there was a decision made to increase penalties for
13 white-collar cases when, for pre-sentencing practices,
14 unlike everything else, when the guidelines were first
15 enacted. Two years later, you did it again, in 1989, when
16 you raised the tables. I don't know why. And, now, we're
17 talking about doing it again. In my judgment, without any
18 empirical basis to suggest why this is necessary, I would
19 at least urge that you do it in connection with the
20 definitional issues. If we don't know what the impact of
21 the definitional issues are going to be on how much loss
22 gets included, how can we make a decision to increase the
23 tables now and worry about an unknown additional increase
24 later?

25 Finally, the sophisticated concealment, as it's

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 currently drafted, I think is far too broad. It applies
2 to anyone who makes deliberate steps to make their offense
3 difficult to detect. I would suggest anyone who fails to
4 do that ought to get a downward adjustment for diminished
5 mental capacity. That needs to be rethought, if it's
6 going to be there at all.

7 Thank you.

8 JUDGE CONABOY: Is there anyone else? We can
9 take one more; and, then, I think we'll have to conclude.

10 STATEMENT OF

11 BENSEN WEINTRAUB, ESQ.

12 MIAMI, FLORIDA

13 MR. WEINTRAUB: Thank you. My name is Bensen
14 Weintraub. I'm an attorney in Miami.

15 I have one comment, which is common to each
16 issue that we discussed today, starting with the proposed
17 increases in the tax tables, to the 2F guidelines, as
18 well; and that is: It appears to me that the guideline
19 amendments under consideration appear to be inconsistent
20 with the enabling legislation which created the
21 Commission.

22 The principle of parsimony is specifically
23 incorporated into the Sentencing Reform Act, and I fail to
24 see how the discussion of this type, which necessarily
25 increases the guideline range, provides for the type of

1 sentences within the purpose of — within the meaning of
2 3553(a) that mandates that a court impose a sentence that
3 is sufficient, but not greater than necessary. I think,
4 at this juncture, the amendments are clearly greater than
5 necessary, particularly in the absence of empirical
6 evidence to substantiate the lack of deterrent value as to
7 the existing guidelines.

8 Thank you.

9 JUDGE CONABOY: Thank you very much.

10 Well, I thank all of you for coming, and we're
11 almost on time. We had hoped to finish at 3:40. I think
12 it's a little bit beyond that, but I'd rather conclude on
13 that note.

14 We do appreciate — as we demonstrate here again
15 today, some of these issues are very ticklish, very hard
16 to resolve, particularly in a way to resolve them that
17 everyone would agree is the best way. I guess that's the
18 essence of our system. If we ever get to that point, God
19 help our clients; they'll all be in trouble.

20 I think we reiterated here in many ways how
21 difficult the whole process of sentencing is; and, that,
22 perhaps, some thought has to be continually given to the
23 idea that, when we're depriving people of their freedom,
24 we have to give them at least as much due process as when
25 we deprive them of their property. That's an age-old

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

1 concept in this country, and we're sliding away from it a
2 little bit. It was mentioned here today, in passing, by a
3 number of people, the old concept of plea bargaining has
4 replaced, in large measure, the concept of taking each
5 other on in a competitive way in the courtroom, for better
6 or worse.

7 We need committed people. We need concerned
8 people. And I can just tell you, from all of the
9 discussions we've had at the Sentencing Commission,
10 everyone is struggling with this in trying to arrive at
11 the best conclusions we can.

12 So, we thank you all again, and we'll consider
13 the meeting adjourned at this point.

14 (Whereupon, at 3:50 p.m., the hearing was
15 concluded.)

16

17

18

19

20

21

22

23

24

25

MILLER REPORTING COMPANY

507 C STREET, N.E.
Washington, D. C. 20002
(202) 546-6666

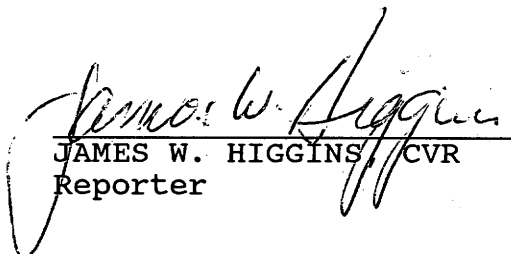
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I hereby certify that this is the transcript of the proceedings held before the

UNITED STATES SENTENCING COMMISSION

on Thursday, March 5, 1998 at San Francisco, California, in the "Key Issues: Reassessing sentences for federal theft, fraud and tax crimes," and that this is a full and correct transcription of the proceedings.



JAMES W. HIGGINS, CVR
Reporter