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UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

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UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

Tuesday, March 25, 2003

Thurgood Marshall Federal
Judiciary Building
Judicial Conference Center
One Columbus Circle, N.E.
Washington, D.C. 20002

The public hearing convened, pursuant to notice, at 3:21 p.m.

BEFORE:

JUDGE DIANA E. MURPHY, Chair
United States Sentencing Commission

JUDGE RUBEN CASTILLO, Vice Chair
JUDGE WILLIAM K. SESSIONS, III, Vice Chair
PROFESSOR MICHAEL E. O'NEILL, Commissioner

ERIC JASO, Ex-Officio Member

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Chief Judge, United States District Court for the District of South Dakota
Chair, Native Americans Advisory Group

Paul K. Charlton 19
United States Attorney for the District of Arizona

Jon M. Sands 29
Assistant Public Defender for the District of Arizona

PANEL TWO - SARBANES-OXLEY ACT OF 2002

William Mercer 39
United States Attorney for the District of Montana
Chair, Subcommittee on Sentencing Guidelines, Attorney General's Advisory Committee

Lawrence S. Goldman 64
President, National Association of Criminal Defense Lawyers

Frank Bowman 72
Associate Professor of Law
Indiana University School of Law

James Felman and Barry Boss 121
Co-Chairs, United States Sentencing Commission Practitioners Advisory Group

1 P R O C E E D I N G S

2 JUDGE MURPHY: I would like to call the
3 hearing to order. The Sentencing Reform Act, as
4 all of you know in the room probably--or maybe a
5 few don't--gave the Commission the responsibility
6 of reaching out to the public and letting public
7 have input into the work of federal sentencing.
8 And every year, we publish notice about what we're
9 up to; what we're thinking about; we ask for ideas
10 about what we should be putting on our agenda; we
11 develop some tentative proposals; we ask from your
12 reaction to it; and the proposals get refined
13 during the annual cycle.

14 And one important phase of this public
15 interaction, is when we have a public hearing and
16 we set this up--when we were thinking about it a
17 couple of months ago, we thought that we might have
18 some other issues on the agenda today, Oxycodone,
19 and some others. But it appeared that what would
20 be most useful for us in our process of coming up
21 with the guidelines that we'll be sending to
22 Congress on May 1, would be to get some further

1 help with the Manslaughter guideline or guidelines.
2 And, also, of course, with our response to
3 the congressional statute corresponding to some of
4 the criminal/corporate cases that people are
5 familiar with, the Sarbanes-Oxley Act.
6 And so we have two panels and if the first
7 panel would come up to the table. This will be on
8 Manslaughter and we're very happy to have two
9 people from our Native American Advisory Group,
10 Chief Judge Larry Piersol, from the District of
11 South Dakota, who chairs it; Jon Sands, who is a
12 member of it, who also is a public defender in
13 Arizona, or the assistant public defender in the
14 District of Arizona; and then the United States
15 Attorney for the District of Arizona, Paul
16 Charlton.
17 So every year when we have public
18 hearings, during my tenure, we've used a little
19 clock, a timer, that would ding when five minutes
20 happen and then it would really go off with a
21 terrible noise at seven minutes. But I know two of
22 the three of you, just met you, Mr. Charlton. I

1 have confidence that you're going to stick to the
2 time. So we just have the threat of the timer. I
3 hope we won't use it. Because we would like to
4 have some time to be able to ask some questions.
5 Judge Piersol?
6 JUDGE PIERSOL: Thank you, Judge Murphy.
7 This'll, I hadn't understood this ahead of time, so
8 it's five minutes and then at seven, we get the
9 hook, is that it?
10 JUDGE MURPHY: Well, we don't--we've read
11 your written statements. I think sometimes the
12 most--the interaction is the most productive,
13 because we have fewer commissioners now and our
14 ex-officio, Ed Reilly, had other business, but
15 typically, commissioners have a lot of questions
16 and so if you certainly want to have those and be
17 able to.
18 JUDGE PIERSOL: Well, I know little, so it
19 won't take long. So, Thank you very much Judge
20 Murphy and members of the Commission for inviting
21 me to come here.
22 And I'm here, as Judge Murphy's indicated

1 in my capacity as the chair of the Sentencing
2 Commission's Native American Sentencing Issues Ad
3 Hoc Advisory Group, and so I'll be speaking when
4 I'm speaking from the Interim Report that you
5 received last week. I'll be speaking for the group
6 and I'll try to stay close to the report.
7 And if I say something, that is a personal
8 opinion on response to a question or something,
9 I'll try and indicate that it is.
10 Because the only thing that we have that
11 we have reached consensus on is the Interim Report
12 that we have. I mean it isn't like we're having
13 big disagreements on other things, but we are
14 continuing to study, you know, other issues that
15 we'll report to you later on in our final report.
16 As you know, because of the manslaughter
17 issues, we went ahead and moved more quickly on
18 that than any other issue. So for whatever the
19 issue can make of it, we can report our views to
20 you.
21 And to give you a little bit of what we
22 did, I divided our group into different areas of

1 subcommittees, you know, sex offenses, and
2 assaultive behavior, and then the
3 murder/manslaughter. And Jon Sands, to my right,
4 is one of the members of that committee. Milos
5 Pecora [ph], who is a victim's witness specialist,
6 from the Central Division of South Dakota, which is
7 Pier [ph], she's a member of the Crow Creek tribe,
8 and she testified before you in Rapid City, if you
9 remember. Strong testimony, I suspect that's why
10 she was chosen to be on--she's also on that
11 committee. Interesting, by the way, her husband's
12 an FBI agent Pier, also, in the same division.
13 Diane Hamitua [ph], who Paul Charlton has been kind
14 enough to lend to us is Assistant United States
15 Attorney in Arizona and a Hopi tribal member.
16 She's also on the group that was specifically the
17 subcommittee on this. As was Thomas LeClair [ph],
18 who is a lawyer now, but was the Director of Tribal
19 Justice in the Department of Justice and a member
20 of the Mohawk Nation.
21 The subcommittee reported to us, so you
22 can know something about our procedure--the

1 subcommittee reported to the full committee in a
2 written report, which we then had for consideration
3 at our February meeting, where Paul Charlton,
4 again, was kind enough to host us, including Krispy
5 Kreams that we'll recover from soon. But it was a
6 meeting where we devoted almost the entire day to
7 murder/manslaughter because of the fact that that
8 was the one that we were going to be reporting
9 really, in a final way to you. And so we have
10 about 12 pages single-spaced, just summarized
11 minutes that discuss--that lay out the discussion,
12 which is available, too, of course.
13 But then from that came our Interim
14 Report, which we then had a subsequent telephone
15 conference--which is how we've been doing a lot of
16 our meetings, is by telephone conference, for
17 economy, but it's worked well. Although that
18 meeting in Arizona, of course, was with everybody
19 there.
20 Now, just--before I get to the
21 manslaughter and the breakdown between involuntary
22 and voluntary. We left open the second-degree

1 murder discussion because from our point of view,
2 Native Americans did not constitute an overwhelming
3 proportion of those convicted in federal court of
4 second-degree murder. But it may be for reasons of
5 proportionality and so on that we'll have to come
6 back and consider that and so that is open. But we
7 weren't reporting on that to you, because we went
8 specifically then to manslaughter. And first of
9 all, then, on the involuntary manslaughter--oh, by
10 the way, I'm sorry, I didn't mention--although
11 maybe you know--that we, of course, have had good
12 staff assistance from Grace Chungbecker [ph] and
13 Teresa Cuning [ph], of our direct staff and Kevin
14 Blackwell [ph] has furnished us with lots of good
15 statistical information that we requested.
16 And a little bit of background on that,
17 you know, Arizona and South Dakota are the two big
18 states with regard to the most, and then New Mexico
19 is regarded to these sorts of offenses,
20 particularly, with Native Americans. And so we
21 wanted to gather information from those states.
22 Well, it isn't available in Arizona so we went

1 to--and it isn't available in Montana, either--we
2 went, then to South Dakota, which was next after
3 Arizona, South Dakota, New Mexico, and Minnesota,
4 because they had good databases.
5 And then when you go back to the 1997
6 study group which you had, which of course your
7 manslaughter working group in 1997, they had
8 essentially the same experience, you know, that the
9 data wasn't available there. But we did get good
10 data from those states which Kevin Blackwell then
11 presented to us at various times.
12 Then, going to our considerations, you
13 know that there's a sentencing base of 10 for
14 criminal negligence; 14 for recklessness; and we
15 had varying recommendations from defender groups
16 and prosecutor groups. And we noted in our report
17 that the involuntary manslaughter is overwhelmingly
18 a Native American offense, about 75 percent of
19 those. And the--of the cases are, a lot of them
20 are alcohol-related vehicle offenses. But that
21 isn't all of the cases, though. And I'll get back
22 to that in a minute.

1 By comparison, we only had, of the
2 criminal negligence, only had, I think, four or
3 maybe five cases in the one-year database we had on
4 those. So there really wasn't--weren't very many
5 criminal negligence cases, but had a bigger
6 database of the involuntary manslaughter.
7 But even then, you know, the numbers,
8 compared--for instance when you look, compared to
9 drug cases, you know, 40 percent of the 60,000
10 cases or whatever we have a year, you know, I mean
11 we're talking very small numbers, here. But
12 impacting one particular population a lot, Native
13 Americans. But nonetheless, statistically,
14 sometimes we were, at best, on the cusp, with
15 regard to the statistics. And so, that's why I'd
16 like to stress that without going through the
17 entire make up of the board where we have, you
18 know, prosecutors, defenders, hopefully, like Judge
19 Malloy [ph] and myself, who are in the middle, have
20 victims' assistance people; people, Maggie Jensen
21 [ph], who's the Chief Probation Officer in Arizona,
22 and others, you know from various perspectives.

1 And I think that that is important, that's really
2 why we're there, we make what we can of the
3 statistics, but particularly when the statistics
4 are sometimes not as big a base as we would like, I
5 think it's even more important that we have the
6 experience factor that we do.
7 And it has been a group, that I think has
8 worked well and hard together, both the staff, as
9 well as the group.
10 Now, there was--there have been
11 suggestions that the base defense level go from 14
12 to 16 or 18 or 20, depending upon who you're
13 listening to and, likewise, there had been
14 suggestions before that criminal negligence go from
15 10 to 12 or 16. Our proposal, after a lot of
16 discussion, as I say, 11 pages of it--that was just
17 the summary--was that the base offense level for
18 involuntary manslaughter be raised to a level 18.
19 And, also, we advised that specific offense
20 characteristics also be used: A four-level
21 increase if death occurred while driving
22 intoxicated or under the influence of alcohol or

1 drugs. A two-level offense increase would occur if
2 the actions of the defendant resulted in multiple
3 homicides; about 9 percent, I think, were that. A
4 two-level increase if the offense involved the use
5 of a weapon in the offense.
6 And with regard to the use of a weapon in
7 the offense, some were concerned that well, you'd
8 say that every time that there was a car involved
9 that would treated as a weapon and you'd get two
10 points. And so we were suggesting a commentary
11 that would add--would show that a vehicle would
12 only be considered a weapon if it was so
13 specifically used; for instance, driving a car into
14 a crowd or, one that I had where you drive a car
15 over somebody and drive it back over to them to
16 make sure you got them, you know, that sort of a
17 situation as opposed to the normal just driving and
18 having an accident.
19 Then, with regard to the base defense
20 level for criminal negligence, we recommended that
21 it stay a that a level 10. And my reading of the
22 1997 group also was that they didn't make any

1 recommendation on that. And there--we gave some
2 examples in our report of how this would work.
3 And, basically, on a category-one
4 person--category-one criminal offense--that has a
5 defense level 22, if they plead they would be a 19
6 and now you'd have a fence range of 10 to 16
7 months. And, by the way, one of the thing that you
8 know and that you're well aware of, there have been
9 a lot of upward departures on this. You know, way
10 above the normal average of one percent, I think
11 the average was around 11 percent, which is an
12 indication that, obviously, the range is too low, I
13 think.
14 Anyway, under our proposal, a category-one
15 that plead would then have a range of 37 months and
16 the high end of 37 months would be mid range of the
17 statutory maximum.
18 Then, on voluntary manslaughter, it's a
19 base defense now of 25 and there are no specific
20 offense characteristics. And we looked back at the
21 working group in 1997 and we adopted a
22 recommendation of the statutory maximum be

1 increased from 10 years to 20 years to reflect the
2 severity of the conduct. And this allows some more
3 sentencing flexibility at the upper end of the
4 range. And, once again, voluntary manslaughter
5 generally involves North American--Native American
6 defendants.
7 We have another recommendation with regard
8 to voluntary manslaughter, and that be that the
9 base defense level stay the same, but that there be
10 a two-level increase for the use of a weapon and a
11 four-level increase for use of a firearm.
12 So, in a nutshell, without a lot of the
13 discussion that went back and forth. Those are our
14 recommendations on those points. And I don't want
15 you to think that coming to the 18 was, we said,
16 well, the defenders are at 16 and the prosecutors
17 are at 20, so we'll be at 18. That wasn't the
18 reason. It happened that way, but that wasn't the
19 reason. The reason was, we had a lengthy
20 discussion, we looked at the statistics, people
21 relying upon their experience and their backgrounds
22 and that's where we reached a complete consensus

1 with regard to that, not just, well, we'll strike
2 the middle, that wasn't it at all.
3 JUDGE MURPHY: I would think it would be a
4 challenge to reach a complete consensus with your
5 group.
6 JUDGE PIERSOL: Well--
7 JUDGE MURPHY: Having been there for a
8 while at the first meeting.
9 JUDGE PIERSOL: --probably, there might
10 have been some people that had their fingers
11 crossed, but they expressed consensus. I imagine
12 that there are those that would have preferred it
13 be one place and some that would prefer it be
14 another, but we had no dissents. So, if I could
15 answer any questions, I'd be happy to.
16 JUDGE MURPHY: Maybe on the case of this
17 panel, it would be best to get the input from each
18 person and then ask or does somebody have a
19 question that they want to ask right now? Okay,
20 should we hear from the other member of the
21 Advisory Group and then let you respond after that,
22 perhaps.

1 JUDGE CHARLTON: Yes, Judge, that would be
2 fine, thank you.
3 JUDGE MURPHY: Okay.
4 MR. SANDS: I want to thank the
5 Commission, again, for having me here. I come with
6 reservations. And I say that all because
7 involuntary manslaughter as the judge pointed out
8 is an overwhelmingly Indian or Native American
9 offense. But involuntary manslaughter cuts across
10 various types of action. One of the questions that
11 the Commission would have to wrestle with is:
12 Should you have just a base offense level that is
13 the heartland of the case? Or should you have a
14 base offense level that has specific
15 characteristics that raise it for most of the
16 offenses?
17 The committee believed strongly that the
18 specific offense characteristics was the way go.
19 The reason was that it continues the Commission's
20 journey over the past several years of refining the
21 guidelines to focus on specific conduct; in this
22 case, the danger of drinking and driving. This was

1 a danger that was expressed by the senators that
2 wrote the letter; this was a danger that was
3 present in the committee; and it will be a danger,
4 I am sure, that Mr. Charlton will address in his
5 comments.
6 Clearly, if you have a specific offense
7 characteristic, it will--for drinking--it will
8 affect most of the cases. But it leaves, as a
9 lower base offense levels, those cases that don't
10 involve drinking; it could be speeding; it could be
11 a discharge of a weapon; it could be the myriad
12 conduct that we all know and we know that it
13 shouldn't be with the plus-four with the drinking.
14 So we would urge the Commission to look at this
15 carefully and seriously.
16 And there is precedent for it. For
17 example, in the assault guidelines, virtually every
18 assault has some sort of physical injury. That's
19 not built into the base offense level, so that
20 could be here. To do another one, immigration:
21 Virtually all the immigration cases probably have
22 aggravated felonies. Those are SOCs and the

1 Commission should follow that here, as well.
2 We would also urge the Commission not to
3 raise criminal negligence. There are very, very
4 few cases. They are really the aberration and
5 there is no call for raising that. And the Judge
6 was right in that the Committee came with a
7 consensus. The federal defenders have presented
8 their proposals. I'm wearing both hats and I would
9 take off my hat in recognition of the fine work
10 that Judge Piersol has done and staff in getting
11 the committee to come up with these
12 recommendations. Thank you.
13 JUDGE MURPHY: Mr. Charlton.
14 MR. CHARLTON: Thank you, Judge. And
15 thank you, members of the Commission, for inviting
16 me here today, it's my privilege to be here and I
17 very much appreciate the opportunity to visit with
18 you about some of the unique issues that we deal
19 with in the District of Arizona.
20 I want to thank Judge Piersol, as well,
21 for his leadership on the ad hoc committee, and we
22 very much appreciate the input that he's provided

1 us and the information that he's given us to think
2 about, as it relates to his committee
3 recommendations.
4 I don't have to wear two hats today,
5 though, so I'll be wearing the had of the chief
6 federal prosecutor in the District of Arizona.
7 The topic is, as I said, particularly
8 important to the District of Arizona because we
9 routinely handle the highest numbers of prosecution
10 under the Major Crimes Act, arising out of
11 violations in Indian country, including federal
12 manslaughter cases in the United States.
13 The low statutory and guideline sentences
14 for these offenses are a topic of frustration
15 routinely discussed among my counterparts with
16 similar criminal jurisdiction responsibilities and
17 who serve on the United States Attorney General's
18 Native American Issues Advisory Subcommittee.
19 We have, as most of you know, exclusive
20 authority to prosecute Major Crimes Act violations
21 occurring within the Arizona--Arizona's 21 Indian
22 reservations. Two of the largest Indian

1 reservations in the United States are located
2 within our state's boundaries: the Navajo Indian
3 Reservation and the Tohono O'odham Indian
4 Reservation. So we are fluent in the issues that
5 affect victims and defendants as well as in our
6 office, when it comes to manslaughter cases.
7 Today, the average range of sentence for a
8 defendant for involuntary manslaughter is 16 to 24
9 months imprisonment; followed by three years of
10 supervised release. We have shared with the
11 Commission, through our prepared testimony, a
12 number of examples of some of those cases that we
13 think are compelling enough to move us in our
14 desire to see some of these sentencing guidelines
15 changed.
16 I'd like to share, though, if I may, just
17 one case with you, in particular, that involves a
18 gentleman by the name of Kyle Peterson [ph], who
19 was charged with one count of involuntary
20 manslaughter for the death of a 60-year-old man who
21 was driving to work, south-bound on loop 101
22 Freeway in Phoenix. In order to understand this,

1 you need to know just a little bit about our
2 geography. There is an Indian reservation which
3 lies right on the boundary of the City of Phoenix;
4 the Salt River Indian Reservation.
5 Two vehicles collided head-on as they were
6 entering a portion of the freeway located on this
7 Indian reservation, the Salt River Indian
8 Reservation. The victim was killed instantly.
9 Peterson suffered serious head injuries and his
10 recovery has been positive. At the time of impact,
11 Peterson's blood alcohol level was .158. He plead
12 guilty to the charge of involuntary manslaughter
13 and no agreements and was sentenced to 14 months in
14 custody; followed by three years of supervised
15 release.
16 In her victim impact statement, the
17 decedent's widow stated, "Finally, there is my rage
18 at a system that allows a criminal to face almost
19 no punishment because of Federal Sentencing
20 Commission laws. DUI is a criminal offense, why
21 does the federal system not treat it as such?"
22 Victim families routinely hear or read

1 about state drunk-driving homicide cases where long
2 sentences are imposed by state court judges.
3 Without exception, every assistant U.S. attorney
4 and victim advocate assigned to federal
5 drunk-driving homicides must go through the painful
6 process of explaining to victim families that the
7 long sentences meted out in the state system do not
8 apply because the defendant will be sentenced under
9 the Federal Sentencing Guidelines.
10 To illustrate this, in Arizona State
11 Court, the crime of manslaughter is
12 designed--excuse me, designated either dangerous or
13 non-dangerous. In Maricopa County, the largest
14 county in our state, DUI homicides are almost
15 exclusively charged as dangerous felonies. The
16 sentence for manslaughter, dangerous, ranges from 7
17 to 21 years in custody and yields a presumptive ten
18 and a half year sentence. And therein lies much of
19 the difficulty that we face as we try to talk to
20 the victims of these families, many of whom--in
21 fact, the great majority of whom--are Native
22 Americans, themselves, and try to explain the

1 inequities in the sentences that these defendants
2 will receive.
3 Some of the victims in these cases were
4 injured, rather than killed. And, as you know, had
5 they been injured, under the guidelines, as they
6 relate to assault resulting in seriously bodily
7 injury, would have been harsher. Federal
8 prosecutors routinely seek upward departures to
9 increase a drunk-driving defendant's final adjusted
10 sentence. However, courts are reluctant to impose
11 upward departures in manslaughter cases.
12 Additionally, if a defendant's tribal criminal
13 history reflects repeated criminal conduct, while
14 they are under the influence of alcohol, a
15 prosecutor may seek an enhanced sentence, however,
16 federal court judges are reluctant to apply an
17 upward departure, even where a defendant has prior
18 multiple tribal court DUI convictions.
19 In another case example that occurred in
20 our District. A defendant by the name of Dale
21 Hasken, received a 14 month sentence for a DUI
22 homicide of a 15-year-old. Hasken had multiple

1 prior DUIs in tribal court dating back 20 years.
2 The District Court ruled that only one of Mr.
3 Hasken's prior convictions was admissible because
4 of inadequate documentation and his concern--that
5 the District Court judge's concern--as to whether
6 or not Hasken was represented in tribal court on
7 those multiple convictions.
8 Depending on the extent and substance of a
9 defendant's tribal criminal history, the facts and
10 the character of the victim, the Court may make
11 legal and factual findings that a defendant is
12 entitled to enhancement. In drunk-driving
13 homicides, however, it is hard for a prosecutor to
14 argue that the Sentencing Commission did not take
15 into account the loss of life or the degree of a
16 defendant's intoxication, therefore, sentencing
17 enhancement in those cases, although routinely
18 sought, are difficult to substantiate and are,
19 thus, rarely imposed.
20 It is my hope that these examples that we
21 have previously submitted will serve to illustrate
22 the need for immediate improvements to the

1 manslaughter statutory penalty and sentencing
2 guidelines.
3 I would, if I may, Judge, being very much
4 of the time constraints, just briefly address the
5 issue of second-degree murder, although I know that
6 goes a little far afield of what we wanted to talk
7 about today.
8 As you consider addressing manslaughter, I
9 urge the Commission to re-examine the murder
10 sentencing guidelines in relationship to the
11 statutory maximum penalty, life imprisonment. The
12 Commission must evaluate whether the 33 base
13 offense level is appropriate, given that
14 second-degree murder involves a high-level of
15 culpability on the part of the defendant.
16 The frustration felt by the victims'
17 families, prosecutors and often expressed by
18 District Court judges themselves in imposing
19 sentences us an all too common experience in the
20 District of Arizona. So I am, as I said before,
21 thankful and encouraged that this Commission
22 continues to have an interest in this area. I want

1 to thank, again, Judge Piersol for his work on the
2 ad hoc advisory committee. My colleagues and I at
3 the Attorney General's Native American Issues
4 Advisory Committee, look forward to the Committee's
5 findings. Thank you, again, for this invitation to
6 speak here today.
7 JUDGE MURPHY: Judge Sessions.
8 JUDGE SESSIONS: Obviously, the offense is
9 reckless involuntary manslaughter, you have a base
10 defense level of 14 that you're recommending and
11 then you say, four-level enhancement for
12 intoxication for alcohol abuse or drugs. I guess
13 my question is: Is a person who commits this
14 offense under the influence of alcohol anymore
15 culpable than a person who is not under the
16 influence of alcohol? In other words, is there any
17 rational basis for including the alcohol use as an
18 enhancement as opposed to incorporated within the
19 basic defense level?
20 JUDGE PIERSOL: Well, I think that Jon
21 Sands addressed that partially. We had quite a
22 little discussion about that. But the people that

1 aren't the drinkers, which is going to be the
2 minority but, nonetheless, there are other types of
3 offenses and they shouldn't get branded with a
4 higher built-in offense level. That's why we
5 thought add it the other way around so it's a
6 specific offense characteristic.
7 JUDGE SESSIONS: Yeah, but then,
8 philosophically, why is it more serious to actually
9 commit this offense while you're under the
10 influence of alcohol as opposed to committing this
11 offense while you're not under the influence of
12 alcohol.
13 JUDGE PIERSOL: Well, Kevin Washburn [ph]
14 made a good point on that, I thought. He's one of
15 the members of our group. And he said, normally,
16 with alcohol, people have had interdiction with the
17 courts before, you know, because they've been
18 picked up for--maybe they got a drunk driving
19 reduced down to reckless or something, but people
20 that drink a lot, usually have had interdiction
21 with the courts and so they have been on notice, so
22 to speak, that this is prohibited conduct and that

1 adds a level of opprobrium, I think, to a drunk
2 driving as opposed to somebody else that was
3 reckless, maybe, but didn't do that because they've
4 had an involvement with the courts. And I thought
5 that was an interesting point.
6 MR. SANDS: Judge, one of the issues, too,
7 is that it's just not the alcohol, it's driving.
8 You are getting into a vehicle on a public road and
9 getting into a vehicle, you are assuming that
10 public risk. It's different from private conduct
11 that may result in a reckless death. And so that
12 is why we drew that distinction. It just not
13 drinking, it's drinking while driving. And that
14 goes to the concerns that were expressed from the
15 Senate and from the U.S. attorneys that it's the
16 drunk-driving that is the problem.
17 That also goes to an issue that came up in
18 the past, which is road rage. That usually
19 involves drinking or drugs, too. And so that plays
20 into it.
21 JUDGE SESSIONS: But the recklessness is
22 getting into a vehicle and then operating that

1 vehicle under the influence, that is the
2 recklessness, which essentially translates to the
3 element of the offense. I'm just trying to figure
4 out logically, why this wouldn't be in a base
5 offense level. I hear Larry's point that, well,
6 probably, they've had some sort of contact with the
7 system before. It may be very well be that they
8 have tribal convictions, I don't know about that.
9 But theoretically, if they have criminal
10 convictions in a state system, then those are all
11 factored in the criminal history category. They're
12 already taken care of. Anyway, that's the
13 philosophical question that I have.
14 JUDGE PIERSOL: There's another way to
15 address it, and I think your 1997 study dealt with
16 this a little bit, in Appendix 4 to that study.
17 you know in Europe, they look at drinking and
18 driving differently. There's an opprobrium against
19 even getting in a car there. In the United States,
20 it seems that the social opprobrium only attaches,
21 either getting caught or maiming or killing
22 somebody. They have a different attitude than we

1 do and our social attitudes haven't changed.

2 And the rest of it is that in the United

3 States, we use enforcement to try and reduce our

4 incidents, as opposed to addressing the causes of

5 alcoholism, for example. And so, that would be

6 another reason since we do use that method. It's a

7 cheaper method, not as effective, but it's cheaper.

8 That would be another reason to put four points on

9 it for drinking to try and prevent it.

10 MR. CHARLTON: Judge, can I? Thank you,

11 Judge. I would encourage the Commission to think

12 about this guideline as one in which the mens rea

13 element is one in which it encompasses the idea of

14 whether or not you're drinking and driving or not,

15 just as you asked that question, Judge Sessions.

16 Also, it's my understanding, Judge Murphy,

17 and please correct me if I'm wrong--that in order

18 for the Sentencing Commission to move on this issue

19 now, they cannot, at this point in time, consider

20 specific offense characteristics, and so what I

21 would ask the Commission to do is to consider

22 moving on this issue now, changing the base offense

1 level to what the Department of Justice has asked
2 for anyway, which is a 20, and then use the mens
3 rea element as one in which we would try to fit
4 this issue of drunk driving into.
5 MR. SANDS: The trouble with the mens rea
6 is that there is no intent to kill. That's why
7 this makes this involuntary as opposed to murder.
8 MR. CHARLTON: But recklessness, I think
9 is, in part, defined by whether or not an
10 individual gets into a vehicle and is drinking or
11 not.
12 MR. SANDS: Which goes back to your point
13 that, if a person has priors, then the government
14 could seek a charge of second-degree murder in
15 those cases, rather than trying to use the
16 involuntary here.
17 MR. CHARLTON: Except that it's--my
18 understanding is that the, I'm sorry--are we taking
19 up time on an internal debate here, a little too
20 much time?
21 JUDGE MURPHY: I know that some of the
22 Commissioners have questions and, perhaps--

1 MR. CHARLTON: Pardon me, Judge Castillo,
2 I did not--
3 JUDGE MURPHY: Well, he's conceded to
4 Professor O'Neill.
5 JUDGE CASTILLO: That's okay, I'm going to
6 defer to my fellow Commissioner.
7 PROFESSOR O'NEILL: I actually like
8 listening to the give-and-take, it's interesting to
9 have sort of both sides on the same panel or people
10 representing slightly different views.
11 What I was going to say is it's
12 interesting that you bring that up, as well,
13 because ordinarily--just going back to the
14 philosophy that Judge Sessions brought
15 up--ordinarily, while it's Hornbook law that
16 intoxication is not an defense to a general-intent
17 crime, ordinarily intoxication is a defense to a
18 specific-intent crime. And, therefore, perhaps,
19 the Department of Justice's recommendation makes
20 some theoretical sense to the way that we normally
21 treat intoxication-type offenses; not to say
22 whether the base defense level of 20 is too high or

1 too low or what have you, but just in terms of how
2 we traditionally treat those sorts of offenses.
3 JUDGE CASTILLO: I wanted to thank all
4 three panels of Panel One, especially, our two
5 Advisory Committee Members. And Mr. Charlton, you
6 anticipated my question, because I was going to ask
7 you what the Department of Justice's reaction or
8 what your own personal reaction was to this
9 consensus recommendation that our Advisory Group
10 had made. Do you want to expand any further? I'm
11 hearing loud and clear that you want us to adapt a
12 base defense level of 20. Anything else you want
13 to say?
14 MR. CHARLTON: I think there's an urgency
15 to this issue, as well. I think part of our case
16 examples are trying to underscore the fact that we
17 are, on a daily basis, explaining to victims of
18 crime that the sentence that their family member
19 are going to receive or that their loved one would
20 be vindicated on is going to be much less than what
21 they might see in the state court system. You have
22 an opportunity now to fix that problem. I'd

1 encourage you to go forward with it if you take the
2 tact of adjusting this guideline with specific
3 offense characteristics. Again, not being
4 completely up to speed on what the procedures are,
5 I understand that you will have to publicize those
6 changes and wait, again, for a period of time.
7 JUDGE CASTILLO: All of these cases that
8 you presented to us are pretty horrendous. In this
9 Peterson case, what was the sentencing range? If
10 he received a 14-month sentence, what was the
11 range, do you know?
12 MR. CHARLTON: I'm sorry, I don't have
13 that information with me, but I'd be delighted to
14 get it for you.
15 JUDGE CASTILLO: Do you know if your
16 assistant advocated some type of upward departure
17 and it was rejected?
18 MR. CHARLTON: I don't know that answer,
19 either, Judge, I'm sorry.
20 JUDGE CASTILLO: That's okay, thank you.
21 JUDGE MURPHY: Judge Piersol, you had your
22 hand up.

1 JUDGE PIERSOL: I'd just like to make the
2 point that this is a personal one and not from the
3 group. But from the point of view of a sentencing
4 judge, and I sentenced five people yesterday and I
5 sentence five people tomorrow, so you're affecting
6 my work, believe me. But from the point of view of
7 a sentencing judge, it's desirable to have specific
8 offense characteristics. Sure, it does generate
9 some more work, some more contention, maybe
10 appellate decisions, but it's desirable from the
11 point of view I think, of the sentencing judge
12 because you can tailor the sentence. And I think
13 you get away from some of the objections, at least,
14 the judges have to the sentencing guidelines with
15 specific offense characteristics because it gives
16 you more to work with. One way or the other, you
17 don't have to worry about the different attitudes
18 that different circuits take with regard to
19 departures, whether it's up or down.
20 JUDGE SESSIONS: Because you have more
21 flexibility, you can essentially accept or reject
22 the specific offense characteristics, without

1 concern for being reversed.
2 JUDGE PIERSOL: Not that I worry about
3 that.
4 JUDGE CASTILLO: That's because Judge
5 Piersol's in a very good Circuit.
6 JUDGE MURPHY: Are there any other
7 questions for the panel? I think Mr. Sands, you
8 wanted to say something.
9 MR. SANDS: Excuse me?
10 JUDGE MURPHY: Didn't I see your hand up a
11 minute ago, do you want to add.
12 MR. SANDS: Oh, I always take the
13 opportunity for the last word. The recommendation
14 of the Committee essentially doubles what the
15 sentence would be. And that is an important
16 consideration. Congress, a few years ago,
17 increased the statutory maximum for six years. By
18 following the Committee's recommendation, with the
19 adjustment, you're looking at a sentencing range of
20 30 to 37 months after acceptance. If you go with
21 an offense level of 20, assuming 50 or 51, with
22 acceptance is 24 to 30. That sends a message on

1 how serious the government is treating these
2 offenses. But it also recognizes that no one gets
3 into that car intending to kill someone, that
4 involuntary is without the intent to kill.
5 JUDGE CASTILLO: Mr. Sands, I can't let
6 you leave now, without telling you I enjoyed
7 reading your bio and finding out that you have
8 found true happiness in your job, very few people
9 do. So I commend you for finding it.
10 MR. SANDS: Thank you.
11 MR. CHARLTON: Thank you very much.
12 JUDGE MURPHY: Thank you very much.
13 Mr. Goldman, since I know what the others
14 look like. We'll follow the same general format
15 for the Sarbanes-Oxley Act comments. Still
16 standing is William Mercer, who is United States
17 Attorney of the District of Montana and chairs the
18 Sentencing Guidelines Subcommittee of the Attorney
19 General's Advisory Committee. And then we have
20 twins as the next speaker. Barry Boss and Jim
21 Felman who are the Co-Chairs or our Practitioners
22 Advisory Group. And we have the pleasure of

1 receiving their regular advice and counsel from.
2 And then it's Lawrence Goldman, I think, who is now
3 President of the National Association of Criminal
4 Defense Lawyers. And, finally, Professor Bowman,
5 Frank Bowman from the University of Indiana who
6 once wooed at the Sentencing Commission and has
7 worked on our Economic Crime Package in 2001.
8 Some of you have heard me say that we
9 originally intended to have this part of the
10 program more evenly divided between points of view.
11 But some of the invitees were unable to come
12 because of, in on case illness and in another case
13 death. So, at any rate, we're very happy to have
14 all of you here and shall we start with you, Bill,
15 and then have everybody else go at you or--
16 MR. MERCER: That's fine.
17 JUDGE MURPHY: --we'll give you a chance
18 for rebuttal, then.
19 MR. MERCER: Thank you very much, Judge
20 Murphy and fellow Commissioners. Thank you for the
21 opportunity to discuss sentencing policy for fraud
22 offenses on behalf of the Department of Justice.

1 Before doing that, I want to thank the Commission
2 for taking up the important question of the
3 adequacy of the involuntary manslaughter guideline.
4 For those of us in Indian country, it is a crucial
5 issue.
6 On the Department's behalf, I'd first like
7 to thank the Commission and its staff for being
8 responsive to many of the Justice Department's
9 concerns during this amendment cycle on various
10 aspects of the Guidelines. The Department has had,
11 and continues to have, differences with the
12 Commission on certain important issues, such as
13 Sarbanes-Oxley, just as Commissioners sometimes
14 differ amongst themselves, our agencies may differ
15 with Congress and so on. To us, those differences
16 of opinion on matters of pubic policy, and the
17 robust debate that accompanies these process of
18 making law, evidences a healthy system, no one
19 which is broken. We should not overlook the many
20 areas, including important ones, where the
21 Commission and the Administration agree, and we are
22 grateful for all the hard work the Commission and

1 its staff does in response many competing demands.
2 We especially appreciate your efforts to implement
3 recent legislation relating to bioterrorism and
4 cybercrime, work that is critical to our country's
5 ongoing fight against terrorism.
6 Let me turn to the topic at hand; the
7 Commission's implementation of the Sarbanes-Oxley
8 Act of 2002.
9 Combating corporate crime and fraud
10 continues to be a top priority of this
11 Administration and the Justice Department., and we
12 continue to work to fulfill the President's goal,
13 shared by the Congress, and embodied in the
14 Sarbanes-Oxley Act, to renew public confidence in
15 corporate America and revive trust in its markets.
16 A key means that the Sarbanes-Oxley employed toward
17 that end was to ensure consistently tough sentences
18 for corporate criminals and for those who enrich
19 themselves and harm innocent victims through fraud.
20 The Act dramatically raised statutory penalties for
21 fraud and obstruction, and Congress directed the
22 Commission to re-evaluate and amend existing

1 Guidelines penalties.
2 The need for swift and substantive
3 Guideline amendments reflected the expectation of
4 the President and the Congress that law enforcement
5 would not wait to put the Sarbanes-Oxley to good
6 use. Indeed, we have not. Just last week, the
7 former chief financial officer of HealthSouth
8 Corp., the nation's largest provider of outpatient
9 surgery, diagnostic imaging and rehabilitative
10 services, agreed to plead guilty to securities
11 fraud, conspiracy to commit securities and wire
12 fraud, as well as false certification of financial
13 records which were designed to inflate the
14 company's revenues and earnings by hundreds of
15 millions of dollars. This is the first false
16 certification case brought pursuant to
17 Sarbanes-Oxley and is just one example of the more
18 than 160 individuals charged by the Justice
19 Department and its Corporate Fraud Task Force.
20 Although the Commission voted in January
21 to increase penalties for those I would call
22 exceptionally culpable criminals--senior corporate

1 officers like the former HealthSouth CFO would be
2 one example--it did nothing to raise the stakes for
3 the vast majority of criminals federally prosecuted
4 for fraud each year. Despite the Commission's
5 subsequent efforts to convince the public and
6 Congress that it's January amendments were actually
7 tough on crime, its a--or more accurately its
8 inaction--sent exactly the wrong message to those
9 who would commit such offenses. We are here today
10 in part to discussion what additional amendments,
11 if any, would be appropriate and responsive to the
12 Sarbanes-Oxley Act's directives. We will again
13 hear a chorus of voices urging the Commission to do
14 nothing further or, perhaps, even to repeal the
15 narrow enhancements it passed in January. We hope
16 that the Commission will, instead, heed the voices
17 of the President and the Congress, and that it will
18 take this final opportunity to finish the job the
19 Act intended it to do and, thus, avoid the prospect
20 that the President and Congress will feel compelled
21 to do themselves.
22 Our position regarding the fraud

1 guidelines and the need for significant penalty
2 increases beyond what the Commission has already
3 promulgated in its emergency guideline amendment
4 has been set out in detail and continues to be
5 quite clear. Since last August, we have set forth
6 both in writing and orally before the Commission
7 our strong view on the need for across-the-board
8 changes to the fraud loss table on a number of
9 occasions. Our October 2002 letter laid out in
10 detail our proposal for implementing the
11 Sarbanes-Oxley by amending Section 2B1.1 to
12 increase fraud sentences to respond appropriately
13 to Congress clear direction and to correspond to
14 the significant increases in the fraud statutory
15 maxima that were key elements of this legislation.
16 We need not repeat these details here.
17 However, I would like to restate some of
18 the basic principles underlying our position,
19 principles which also undergird the Sentencing
20 Reform Act and the Sarbanes-Oxley.
21 First, we believe that the certainty of
22 real and significant punishment--that is, the

1 certainty of prison time for all but the most minor
2 cases--best serves the purposes of deterring fraud
3 offenders and particularly white collar criminals.
4 As we have said before, and as the research shows,
5 offenders usually decide to commit fraud and other
6 forms of white collar crime not out of passion, but
7 only after evaluating the costs and benefits of
8 their actions. Certainly, criminal defense
9 attorneys will tel you the overwhelming motivation
10 of their clients is to stay out of prison. If the
11 criminally inclined think the risk of prison is
12 minimal, they will view fines, probation, home
13 arrest and community confinement mere as a cost of
14 doing business. We aim to remove the price tag
15 from a prison term. We believe that if it is
16 unmistakable that the automatic consequence for one
17 who commits a fraud offense is prison, many will be
18 deterred, and at the least those who do the crime
19 will, indeed, do the time.
20 Second, we believe the certainty of
21 significant penalties--meaning real jail time--in
22 white collar cases fosters trust and confidence in

1 the criminal justice system. If drug and violent
2 offenders get long prison terms while many white
3 collar offenders get probation, home arrest,
4 community confinement, people will draw the
5 conclusion that felons with wealth and influence
6 are not held to the same standards as those
7 without. Such cases feed the public perception
8 that there is a double standard for haves and
9 have-nots, and that certain people are above the
10 law. We think this is unacceptable and corrosive
11 to societal order.
12 Third, we believe that so-called "lower
13 loss" frauds--those involving less than $100,000 or
14 even less than $50,000, which for most people is a
15 lot of money to have stolen--are serious crimes
16 that should trigger at least some significant
17 prison time for those who commit them. As the
18 Attorney General said at a corporate fraud
19 conference last fall, the Department is committed
20 to pursuing "allegations of corporate fraud
21 regardless of the size of the prominence of the
22 company under scrutiny." to victims of such

1 frauds--a small business targeted for embezzlement
2 or creditors cheated by bankruptcy fraud (where
3 only the federal government has jurisdiction to
4 prosecute)--these losses can, indeed, be
5 significant even devastating. Such cases
6 constitute a significant percentage of federal
7 fraud prosecutions, particularly outside the major
8 cities. Also, the specter of prison time should
9 also appear at these so-called "lower levels," to
10 deter and punish smaller players who participate
11 in, but may not be at the heart of a major
12 corporate fraud. Because investigators must often
13 work their way up the corporate ladder to uncover
14 the extent of the scheme and bring the perpetrators
15 to justice, we have found that the threat of prison
16 time makes lower-level employees more willing to
17 cooperate and provide information to obtain
18 leniency.
19 Let me say a few words about downward
20 departures. We remain very concerned about the
21 growing number of non-substantial assistance
22 downward departures and its impact on federal

1 sentencing policy generally. Because Congress
2 contemplated that the sentencing guidelines would
3 cover most cases, the Sentencing Reform Act and,
4 indeed, the original Guidelines, as evidenced by
5 Justice Briar's "Law Review" article in the--"Law
6 Review" in 1988," expressly anticipated that it
7 would rarely be appropriate, much less necessary,
8 for judges to depart from the prescribed sentence
9 range. In the first few years the guidelines were
10 in effect, that was, in fact, the case. Today,
11 judges depart far more frequently and almost always
12 downward. The trend is unmistakable, and it
13 threatens to undermine the very goals of
14 consistency and predictability that Congress meant
15 to achieve in moving to determinate sentencing and
16 that it expected the Commission to promote.
17 Thank you, again, for inviting me on
18 behalf of the Department of Justice and for taking
19 up these important issues of federal sentencing
20 policy. And I will be happy, at the appropriate
21 time to answer any questions that the Commission
22 may have. Thank you.

1 JUDGE MURPHY: Mr. Boss and Mr. Felman.
2 MR. FELMAN: I think we decided that I'm
3 going to go first and then Barry's going to go.
4 I'm going to talk about whether there's a need to
5 increase sentences, generally; and, then,
6 specifically talk about whether there's a need to
7 change the table; and then I'm going to talk about
8 the proposal to change the base defense level. And
9 then Mr. Boss is going to discuss some general
10 comments about the role of the Commission,
11 vis-a-vis Congress and the political process.
12 Much of what--and, obviously, it goes
13 without saying as we always begging, that we
14 really, truly appreciate the opportunity to appear
15 before the Commission and share with the
16 Commissioners what we hope to be the view of
17 practitioners. We had a conference call earlier
18 with 25 or so practitioners from across the country
19 on the phone who weighed in on our presentation
20 and, hopefully, added a few pearls of wisdom to
21 what we have to say.
22 I think a lot of what we just--what I

1 think I just heard from my colleague, Mr. Mercer,
2 it sounds like something I might have heard five
3 years ago. I think that we talked about all this
4 for at least five years--it seemed longer than that
5 at the time--leading up to the global economic
6 crime package of 2001. And I think that, as a
7 practitioner's advisory group, we look at the
8 process that went into that as how this Commission
9 really best functions. It is an illustration of
10 what the Commission can achieve when it utilizes
11 the resources that are available to it. There was
12 effort by the staff to research and gather the
13 data. There were hearings like this. There was a
14 forum that George Mason University assisted with,
15 where we heard from a broad spectrum of
16 policymakers and academics. And it lead to certain
17 decision that I think were very hardly thought
18 about and looked at, that addressed all of these
19 issue.
20 And there doesn't seem to be any reason to
21 believe or, based on any data, that the decisions
22 made were wrong, because we simply don't even know

1 what the impact of them is yet. I haven't had a
2 case yet that has applied those guidelines,
3 although I suspect they are just now starting to be
4 in the pipeline. I think it really undermines the
5 process of the Commission to go and revisit the
6 exact same thing that it just spent five years on
7 before we have any data to assess what the impact
8 of that work was. And that's been said before and
9 I was going to start with some Elizabeth Taylor
10 husband joke or something as the way this feels.
11 It just--it's the same thing that we've said over
12 and over.
13 There does seem to be a misperception that
14 somehow what happened in 2001 was a lowering of the
15 sentences at the low end, just across the board.
16 And it gets confusing and that's why, one time I
17 think I gave you a piece of paper that is a
18 loss-table comparison. You really have to look at
19 whether or not the prior guideline used more than
20 minimal planning or not. And at the lower level,
21 cases with lower-level loss amounts, the more than
22 minimal planning did not apply in about 60 percent

1 of those cases. And if you forget about the more
2 than minimal planning and assume that it did not
3 apply, the '01 amendments lowered the penalties by
4 one level only for losses of between $2,000 and
5 $5,000. That is the only place in which they
6 lowered the penalties. Otherwise, they were either
7 the same or greater. And then, if there was more
8 than minimal planning under the old guidelines,
9 generally, they are the same--well, they're lower
10 up until--and I put all this in a table that I gave
11 you--they're lower until $30,000 and then they
12 become the same for $30,000 to $40,000, and then
13 they're one level lower from $40,000 to $70,000.
14 But it's not a dramatic change.
15 But there was a reason why that change was
16 made. As I recall, hearing articulated, there was
17 a thought that the lower-level offenders do not
18 always need to go to prison. In fact, I think what
19 we heard from most of the social scientists and the
20 data is that the real deterrent for many of those
21 people is the stigmatization. Most of my clients,
22 the jail time is the icing on the cake. These are

1 people who generally have no prior record and they
2 have business licenses; they're lawyers, doctors,
3 accountants, they're in positions of authority and
4 trust. And the impact for them is that their lives
5 as they've previously known it, are over.
6 Everything they went to school for and graduate
7 school for, it's over. That is a permanent
8 life-altering event from these people. The idea
9 that somehow, you know, whether they go to jail for
10 six months or eight months or twelve months after
11 that, is somehow the big make-or-break, that's
12 really not it for many of these people.
13 The severity of what just happened, in
14 terms of the emergency amendments, to consider them
15 to be soft on crime is stunning to me. I think
16 they are of historic proportions. I think they
17 usher in a new age of the incarceration of
18 non-violent first-time offenders, for periods of
19 time previously reserved only for those who have
20 killed someone. And I will remind you and what I
21 assume is going to happen again, although I don't
22 agree with it, obviously, is essentially a plus-18

1 for anybody in one of these offenses. You've got a
2 plus-6 for more than 250 victims; a cumulative
3 plus-4 if there's a hundred of them that were
4 substantially jeopardized; it's double counting of
5 the same loss or the same harm, to me. You've then
6 go sophisticated means--offense, abuse of trust.
7 So, if there's no loss at all, you can get five
8 years. If there's a $30,000 loss, you can get 10
9 years; if there's a $400,000 loss, you can get 20
10 years. And once the loss hits $2.5 million, it's
11 life. So, virtually, if anyone--any of these cases
12 that Sarbanes-Oxley was directed about is starting
13 at life. And I just--I've been telling my
14 colleagues in the criminal defense bar, and when I
15 do, I usually have to wear body armor, which I know
16 is a different subject, but I mean, it's, I've been
17 telling them right now this is the heyday of
18 criminal defense practice. Because once this stuff
19 come down the pike, if you get a case where these
20 adjustments apply, you're not even going to
21 recognize the landscape, it's a sea change in what
22 happened.

1 I think it, frankly, was done very rapidly
2 without enough forethought and I would urge the
3 Commission not to--and once you--and that's before
4 you even get to the loss-table, that plus-18, to me
5 it's triple counting. It's the dollar loss, plus
6 the hundred people who lost it, plus the 250 who
7 lost some, it's the same utter harm. And when I
8 think about the objective of the guidelines to be
9 rational and to sit there and weigh all the
10 different things, I mean, who would come to this
11 first--at first blush and say, let's do it this
12 way. It's certainly not soft on crime.
13 But if fulfilled the purpose of the
14 Sarbanes-Oxley Act, if anything did it. There
15 isn't any need to further change the table. And I
16 can't tell you how complex this is going to get.
17 It already tough enough having to go to the book
18 and figure out which table and what was the date
19 and the date bargaining and what are the facts and
20 which table applies when and now, if you change it
21 again, it's just that all over again. There are
22 cross-references, 20 or so to that table,

1 throughout the book. Has anybody gone through and
2 looked at them and said do we need to do that? Do
3 we need to increase the punishments for all of
4 those offenses by changing this table?
5 The changes to the base offense level is,
6 also, again, complexity. And I, it was a
7 simplification project that I guess couldn't be
8 simplified or it just died on the vine, but I would
9 hate to think with the people who wanted that to go
10 through would think about this. Because, now, in
11 order to figure out the base offense level, you
12 have to pull out your statute book off the shelf,
13 you have to look at the statute. And most of the
14 statutes don't always have the punishments in them,
15 they'll say, as punished by this other code
16 provision. And I'm sorry, but there's a lot of
17 defense lawyers out there, who just aren't as
18 bright as we'd like them to be. And they don't
19 follow all this stuff and they're going to miss it.
20 And you're going to see people get it wrong. And
21 you're also going to see incredible charge
22 manipulation, where a prosecutor--and there's no

1 way to measure this in advance--I understand the
2 staff can tell you how many cases now are charges
3 of mail fraud, but what they can't tell you is how
4 many will be charges of mail fraud once it has a
5 statutory lead--once there's a
6 guideline--significance to it.
7 And I just find it so ironic, as somewhat
8 a geek or a student of mail fraud, because if the
9 statute taught a history of it. I mean, to think
10 that that one, should be singled out for greater
11 punishment? I mean it just barely has
12 constitutional muster. I mean, it's about
13 protecting the mails. And then they hook it in
14 with the Commerce Clause so they can reach all of
15 this. And if you go back and look at the history
16 of the development of the mail fraud statute, it's
17 like this broad, stop-gap, covering everything
18 fraud, if you can't find anything more specific
19 that's on point.
20 And to say that that one's worse, is, you
21 know, it's just, when you match up the guideline
22 with the code, you're not making sense. I

1 understand the objective is to try to sort out that
2 that's from the frauds and to try to get there, but
3 I think that we're going to have a lot of
4 manipulation there, where prosecutor will say, if
5 you plead guilty, I'll charge this statute. If you
6 don't, I'll charge this one and it's just
7 inherently antithetical to what the guidelines are
8 about.
9 You know, when we tried to get you all to
10 expand pursuant to 994J, to expand zones B and C,
11 all I heard about was, well, you know, a lot of
12 thought went into exactly where those lines are
13 drawn and we don't want to mess with moving those
14 tables down because we know exactly what loss
15 numbers trigger in where and whatnot. And all that
16 seems to just kind of go out the window now, where
17 it's okay, we'll just bump it down a level. And it
18 seems to me, at the very least, my compromise
19 proposal back is, if you're going to drop it down a
20 level, drop zones B and C down a level, while
21 you're at it. And I think that everybody has
22 looked for that as least as an increase in

1 flexibility. And Congress didn't repeal 9N84J in
2 Sarbanes-Oxley. And what it says is that every
3 offense, except for--unless it's otherwise serious,
4 should not get incarceration. And that wasn't
5 repealed and there isn't in Sarbanes-Oxley that's
6 inconsistent with that. And so I would urge you to
7 consider that and I probably used too much of my
8 time and so, I'll defer to my twin here, who will
9 talk about other matters.
10 JUDGE MURPHY: You'll have to talk fast
11 now.
12 MR. BOSS: I anticipated that he would use
13 almost all the time.
14 MR. FELMAN: I ought to have let him go
15 first.
16 MR. BOSS: I'll be fairly brief. There
17 really are only two points that I want to make.
18 The first is that the key--first of all, I want to
19 echo Jim's comments. We really do appreciate the
20 opportunity, always, to come and give our
21 perspective to the Commission. We do feel pretty
22 strongly about this round of amendments and so

1 we're glad to have the opportunity to tell you
2 about our thoughts.
3 There are two issues I just want to
4 address and I'll try to be brief. The first is,
5 we've asked the Commission to be mindful of its
6 role and its purpose in considering these
7 amendments. As a matter of policy, the
8 Practitioners Advisory Group is very concerned that
9 the Commission be sheltered from the political
10 winds. The whole purpose of the Commission, of
11 course, is to be an independent, judicial agency
12 with special expertise in sentencing. And the
13 minute that the Commission becomes subject to
14 political pressures and the emotional climate, the
15 media climate about what's the crime du jour, we
16 wind up with very bad policy. In fact, it was
17 really critical to the court's analysis and it's
18 threat of the constitutionality of the Sentencing
19 Commission is that it's an independent judicial
20 agency with special expertise. And probably the
21 best example of the Commission exercising that
22 expertise was the Economic Crime Package, which it

1 took five years to study and assemble all the data.
2 And I won't repeat what Jim said, but we all know
3 the effort that went into that and at the end of
4 the day we had a, you know, a debate about what
5 level should be. And the Commission, in its
6 infinite wisdom decided this is where it should be.
7 And the guidelines were enacted as of November 1,
8 2001.
9 And the notion now of changing the
10 Economic Crime Package based on the political
11 climate, without any empirical data. And, of
12 course, absolutely none has been provided flies
13 completely in the face of the Commission's purpose
14 of being an expert sentencing body. The Commission
15 should act on data not on other extrinsic factors
16 which tend to influence policy, perhaps, in
17 Congress.
18 And we hope, the PAG, we feel it--we
19 learned our less from the War on Drugs, where that
20 was the crime du jour, everybody felt we needed to
21 be really tough on drugs. And I think there's a
22 widespread recognition that Congress, and even the

1 Commission, went overboard in how it reacted to
2 that War on Drugs. And, as we know, from the last
3 amendment cycle, it is very hard--if not
4 impossible--once we step into that abyss to ever
5 come out. And to bring things back to a rational
6 basis. And so, we ask the Commission to be very
7 careful and to be true to its purpose in
8 considering whether or not to go further than it
9 has in the emergency amendments.
10 The second point that I want to make that
11 is very, very troubling to the PAG is a new
12 rationale that's been given for increasing loss
13 levels for the low-end offenders. And that is,
14 that it will increase the incentive for
15 cooperation. We have never heard this rationale
16 proffered before by the Department. Of course, it
17 was always implicit and those of us on the defense
18 side always knew that there was charge manipulation
19 to try to get people to cooperate, but I thought
20 that there was always a widespread recognition that
21 that was improper. It's a violation of cue
22 process, it's a violation of the purposes behind

1 the Sentencing Reform Act, but now we're at the
2 point where that's, we're saying okay, let's go
3 ahead and just hold higher sentences over people's
4 heads.
5 We believe sentences should be based on
6 severity of the offense level--severity of the
7 offense, excuse me. And the other consideration
8 set forth in the enabling statute in the
9 guidelines. Putting aside whether it's a
10 legitimate way to create an offense level, that is
11 holding a hammer over somebody's head to get them
12 to cooperate. Even if you decide, well, that's
13 okay for us to consider, it's horrible sentencing
14 policy. Because what we learned in the drug area
15 is the people at the bottom are the people who are
16 least able to cooperate. And there's no reason to
17 believe it would be any different in the economic
18 crimes context. And so what we'll have happen is,
19 these small potatoes, the people at the bottom, the
20 minnows, as the Department refers to them in some
21 of its press releases, they get eaten up. They
22 just get a higher sentence and there's an incentive

1 to cooperate, but they've got nothing to cooperate
2 with and so what we're left with is they just get a
3 higher sentence, without any rational basis for
4 imposing that kind of sentence.
5 We just think it's bad for the Commission
6 to be stepping into these areas. The Commission
7 should exercise its expertise, its independence and
8 wait to see what happens with the Economic Crime
9 Package before going any further in this area.
10 Again, thank you for hearing from us.
11 JUDGE MURPHY: Mr. Goldman.
12 MR. GOLDMAN: Thank you. Thank you, Judge
13 Murphy. Commissioners, thank you for the
14 opportunity to on behalf of the National
15 Association of Criminal Defense Lawyers and
16 personally to speak with you.
17 I'm going to speak for a couple minutes,
18 if I may, about some global effects of the
19 sentencing guidelines, how they affect practice;
20 some of the, I think, quite unintentional
21 byproducts. And then try to tie it in to the issue
22 of a desire of the Department of Justice for

1 across-the-board increases in the levels of prison
2 sentences for low-level economic crimes.
3 First, I think we should all remember that
4 the issue is not who can go to jail, but the issue
5 is, essentially, here who controls the jail
6 decision. Every federal crime allows the
7 possibility of incarceration. If somebody steals a
8 candy bar from the stand, I think it's
9 upstairs--downstairs, that person, potentially, is
10 subject to a six-month jail sentence. It's up to
11 the judge to decide whether he or she deserves it.
12 What the proposal is to eliminate that
13 discretion. Not to make sentences possibly
14 harsher, but to give the decision of whether there
15 is mandatory jail to the administrative branch of
16 government, the Department of Justice.
17 In a certain sense, it is, to be blunt, a
18 turf battle. It's who makes the call, the
19 prosecutors or the judges. Jail is always a
20 possibility in the lower levels of economic crimes,
21 like any other crimes.
22 Second, and I will not repeat much of what

1 my colleagues on my right said. My immediate
2 right, I should say, said and I agree with
3 everything they say. Eighteen--less than 18 months
4 ago after a very serious, painstaking review, this
5 Commission enacted or put in effect, the Economic
6 Crime Package, which will, undoubtedly, have severe
7 increases in white collar penalties. We don't yet
8 know how much but, certainly, we should await that
9 before we go further.
10 Statistics show, contrary to what has been
11 brooded about, that white collar defendants,
12 indeed, receive substantial sentences. It has
13 been--unlike other sentences, been creeping up--not
14 creeping, but moving not quite at a gallop, but
15 moving up constantly over the years so that they
16 are roughly on a par with narcotics crimes and
17 crimes of violence. And they are, clearly, going
18 to get to be higher. So the old saw that white
19 collar defendants are treated better is just out of
20 date.
21 The real disparity in the system, or the
22 real choice--the only real safety valve for the

1 high-ends, or many of them, is the 5k1 letter.
2 It's a question of prosecutorial control over who
3 cooperates. These disparities in the system,
4 frankly, are not from District to District or judge
5 to judge, but who gets the benefit of that 5K1
6 recommendation, which judges in my experience have
7 invariably followed to some extent, and who gets
8 out of the harsher part of the guidelines.
9 The real people who suffer, as one of my
10 colleagues said, are the poor schnook who has no
11 one to give up. The people at the high-end can
12 cooperate; the people at the middle-end can, but
13 the poor person who committed a crime by himself or
14 who comes into late or is irrelevant to the
15 prosecutor's case, because the other have pleaded
16 already, this is the person who suffers by the
17 guidelines. The person who cannot get that 5k1
18 letter.
19 And what this also has happened, and I
20 cannot document this, but I will tell you from my
21 personal experience, I've see it and every white
22 collar defense lawyer, as I am, will tell you, too:

1 People who are actually innocent are pleading
2 guilty. This is what has happened. And they do
3 this because they go to the lawyer and the question
4 is often one of intent. It's usually, or very
5 often, the white collar question, not who did it,
6 that's always given, not whether the acts were
7 done; that's usually given, not always, but usually
8 given. The question is the mens rea or lack of it,
9 the criminal intent.
10 And over and over we deal--we, white
11 collar defense lawyers--deal with people who have
12 what I call criminally bad judgment. People who
13 probably, technically have mens rea, but no one in
14 his or her right mind a jury is going to credit it
15 because their judgment is so bad.
16 But what happens very often is, the lawyer
17 says to them, look, you are facing a very severe
18 sentence, you can cooperate with the prosecutor,
19 but you have to realize, you have to say as the
20 prosecutors have told me point blank, that you
21 intended to commit a crime. And I don't mean
22 there's a subordination of perjury, it doesn't get

1 that far. And part of this is educational, lawyer
2 to client, prosecutor to lawyer. But what happens
3 is people who actually did not believe they
4 committed crimes end up cooperating.
5 And then they testify and when they
6 testify they say, I intended to commit a crime and,
7 in a way the jury, by nature, transfers that
8 intent, as they see it to the defendant. So what
9 this whole 5k1 syndrome--and mandatory sentences
10 increase that effect anymore--it has brought the
11 situation where, literally innocent people, in the
12 white collar area are pleading guilty and, as
13 sometimes happens, been convicted.
14 It's changed to a large extent how
15 criminal defense lawyers act. We're no longer,
16 many of us, criminal defense lawyers. We have six
17 or sever cooperating clients for every one we go to
18 trial with, only 3 percent go trial.
19 But let me speak, briefly, about the
20 specific proposal to put across the board--increase
21 across-the board sentences. The government has
22 pushed, startling--that it's perhaps startling,

1 perhaps not, that it's come out and said directly,
2 we want--we need the minnows to get the big fish.
3 Well, the bottom line is we they get the minnows
4 anyhow.
5 Twenty percent of the people in white
6 collar cases, 17 percent across the board get 5Ks,
7 many, many more try for them, but they're too late
8 or have too little. The first motion, most white
9 collar defense lawyers make in a case as soon as
10 the client comes in is to hail a taxi, raise their
11 right hand, hail a taxi, go down to the
12 prosecutor's office. That's what happens here.
13 This is a system where, again, six to seven
14 cooperators for every one who goes to trial.
15 There's no shortage. And it isn't mandatory jail
16 so much does it, but that puts a greater
17 pressure--it's the possibility of jail.
18 Second, deterrents--most white collar
19 people do, to be sure, deterrence is an element,
20 but the bottom line, is most of them act out of
21 desperation--some greed, to be sure--some greed,
22 but desperation, misguided loyalty, to keep their

1 jobs, to keep their companies going. And many of
2 them, as I said, just because they have just
3 dreadful judgment. So you cannot really deter
4 someone who has dreadful judgment, because he or
5 she doesn't really believe and--give sometimes the
6 corporate client--a corporate climate,
7 understandably, he or she doesn't believe that what
8 he's doing is wrong.
9 I say we have gone very, very far in 2001.
10 I would ask that we leave what little is left of
11 judicial independence. I haven't talked about the
12 judge's role, you know it much better than I. It's
13 very different than it was years ago. But let's
14 leave the judges what judicial independence they
15 have left. Let's keep the playing field--what's
16 level in it, let's keep that left.
17 There are better ways to fight white
18 collar crime than the need of upping up sentences
19 every time. We have weak regulatory agencies.
20 We've abdicated--they've abdicated their
21 responsibility to industrywide agencies. Many in
22 terms of fairness many, many, many white collar

1 defendants don't know what they were doing wrong
2 because they were no guidelines, there are no
3 rules. We're dealing with a most amorphous word:
4 fraud. We're dealing with tax evasion, as opposed
5 to tax avoidance. The difference is, how do you
6 determine fraud? I've always said, it's what a
7 prosecutor decides he or she in the stomach doesn't
8 like and how far a judge is willing to tolerate
9 that. It is such a amorphous concept to give
10 incredibly harsh sentences for a bad judgment call,
11 just seems wrong.
12 I'd ask this Commission--I understand--we
13 all understand the tremendous pressures. The
14 Department of Justice said it point blank, we can
15 always go to the legislature, they say. No
16 gentility about that. But increasing sentences is
17 costly, it's harsh, and it's ineffective. Thank
18 you.
19 JUDGE MURPHY: Thank you. Professor
20 Bowman.
21 PROFESSOR BOWMAN: Judge Murphy, members
22 of the Sentencing Commission, I want to thank you,

1 first, for inviting me to appear before you this
2 afternoon. It's always a pleasure to be here.
3 Over the last four months, you've received
4 from me a number of responses to your requests for
5 comments regarding proposed post-Sarbanes-Oxley
6 amendments and I've also provided a written
7 statement for this hearing and I'm not going to
8 repeat here what I said in the letters or in my
9 written statement.
10 Instead, I want to say a few words about
11 the struggle for institutional control of federal
12 sentencing, of which the debate of economic crime
13 sentencing is only an incident.
14 I want to preface my remarks with a brief
15 autobiographical aside, because, unlike the rest of
16 my colleagues on this panel, I do not represent any
17 institution or group, I speak only for myself.
18 Before I grew this beard and became a pointy-headed
19 academic, I was a prosecutor--federal and state,
20 on three different occasions, totalling some 14
21 years. If serving as a prosecutor were a criminal
22 offense, I've already had my third strike. I

1 served in the Justice Department, as a trial
2 attorney or an Assistant U.S. Attorney in the
3 Administrations of Jimmy Carter, Ronald Reagan, the
4 elder Bush and Bill Clinton.
5 At some deep level, I am a prosecutor and
6 I always will be. Moreover, though I have
7 prosecuted my share of robbers and rapists and
8 murderers, I am not a member of what we used to
9 call at the Denver D.A.'s office the knife and gun
10 club, folks who believe that the only real crimes
11 are violent crimes. Rather, in the criminal
12 division, at the Denver D.A.'s office and at the
13 Miami U.S. Attorney's office, I specialized in
14 prosecuting white collar offenses. I have no
15 sympathy for thieves and swindlers, they should be
16 investigated vigorously by federal prosecutors;
17 prosecuted aggressively, and sent to prison more
18 often and for longer terms than had until recently
19 been the case.
20 Now, that said, I find myself in the
21 unaccustomed position of opposing the Justice
22 Department on almost all points of their current

1 proposal. I do so, not because becoming a teacher
2 has made me into a big sissy, but because, as a
3 supporter of both the sentencing guideline system,
4 and the federal prosecutors, I am convinced that
5 the Justice Department is pressing positions which
6 are unwise. Positions so inflexible, so
7 inconsiderate of the judgment and institutional
8 prerogatives of the other actors in the federal
9 sentencing system, that, if adopted, they push us
10 several giant steps down the path towards the
11 collapse of the guidelines experiment.
12 And we're here today, because the
13 Department of Justice wants higher sentences for
14 federal economic crimes. They insist that you, the
15 Sentencing Commission pass a complete revision of
16 the loss table 2B1.1. A revision that would
17 increase sentences for all defendants, all
18 defendants who cause losses greater than $10,000.
19 Now, in form, their proposal is an
20 across-the-board sentence increase. Examined
21 conceptually and carefully, it contains two
22 different components.

1 First, they want to change the low end of
2 the table to increase the number of defendants
3 required to serve prison time. This would be
4 accomplished by lowering the loss amounts that
5 trigger eligibility for zone A, B, and C sentences.
6 The objective is to restrict the discretion of
7 judges to impose non-prison sentences, split
8 sentences and other alternative punishments.
9 In shorthand, this component of the DOJ
10 proposal is directed at the in/out decision.
11 The second component of the DOJ proposal
12 is a modification of the loss table to increase the
13 length of prison sentences for all economic crime
14 defendants who would already be serving prison
15 sentences under current guidelines.
16 The Department demands--and I think
17 demands is not too strong a work--that the
18 Commission pass both halves of its proposal. If
19 its wishes are not met, says the Department, you
20 will go to Congress. Let's consider the two parts
21 of the Department of Justice proposal.
22 First, the low-end sentences or the in/out

1 choice. The low-end portion of the DOJ position
2 has two things going for it. The first is
3 consistency and that is throughout the long
4 economic crime package debate, the Department under
5 both Presidents Clinton and Bush urged lower
6 trigger points for incarceration. And in Senate
7 testimony last summer, the Department expressed its
8 concern about sentences for losses for less than
9 $70,000.

10 Second, this component of the Department
11 of Justice's position is supported by a logical
12 argument. The argument is set out in Bill Mercer's
13 written statement. In essence, the Department
14 argues that serious offenses should result in some
15 period of incarceration. And, in their view, the
16 current loss table lets serious offenders--those
17 who steal sums in the range of, say, $30,000 to
18 $100,000 escape incarceration.

19 Now this is an argument with which I have
20 consider personal sympathy. Seventy thousand
21 dollars, for example, is a lot of money, stealing
22 $70,000 is a serious matter. And one can argue

1 perfectly reasonably that one who does so should be
2 required to go to prison.
3 The weakness in the Department of Justice
4 position is that it made exactly this same argument
5 for five year, during the long process of
6 developing the Economic Crime Package. And this
7 Commission, after careful study, consultation with
8 all the other interested institutions, judges,
9 probation officers, the defense bar, arrived at a
10 loss table with different trigger points than the
11 Department of Justice would have preferred.
12 In the 15 months since November 2001, the
13 Department's arguments have neither changed nor
14 improved. The positions of the other interested
15 parties have not altered. No new facts have come
16 to light. Indeed, there has been no time to
17 determine the effects of the November 2001
18 amendments. Only two things have changed: the
19 control of the United States Senate and passage of
20 a bill aimed at serious, large-scale corporate
21 fraud.
22 By linking its recycled arguments for

1 lower in/out trigger points to an across-the-board
2 sentence increase, the Department of Justice hopes
3 to harness congressional concern about serious
4 corporate crime to compel the passage of provisions
5 that have absolutely nothing to do with the
6 language or purpose of the Sarbanes-Oxley Act.
7 Now what about sentence increases for
8 crimes involving losses above $70,000? The
9 Department's argument for raising sentences on all
10 those already receiving prison terms is weak
11 precisely where it's low-loss in/out argument was
12 strong. First with respect to inconsistency.
13 Before the passage of Sarbanes-Oxley, the
14 Department did not argue that economic crime
15 sentences, in general, were too low. Indeed, in
16 June 2002, on June 19, 2002, in a hearing--in which
17 I, myself, testified before the Senate Judiciary
18 Committee--the United States Attorney for the
19 Southern District of New York, New York, Mr. Komi
20 [ph], specifically endorsed the Economic Crime
21 Package as a substantial achievement. Since
22 Sarbanes-Oxley, the Department's position on the

1 adequacy mid-to-high loss economic crime sentences
2 has reversed 180 degrees.
3 Second, even after the passage of the
4 Sarbanes-Oxley Act, the Department has never
5 attempted to explain why higher sentences for those
6 already receiving prison sentences are necessary or
7 even desirable. There has never been an effort to
8 show that current sentencing levels provide
9 inadequate deterrents or are disproportionate to
10 the seriousness of the offense.
11 For example, if you read Bill Mercer's
12 written testimony, it does contain a cogent
13 argument for requiring more medium- to low-loss
14 defendants to serve some prison time. However, it
15 is utterly silent--utterly silent on the question
16 of why, as a matter of sound sentencing policy
17 every sentence of every defendant with a loss
18 amount greater than $70,000 should increase. This
19 silence speaks volumes.
20 Given the sentences now called for by the
21 post November 2001 economic crime guidelines, it
22 simply cannot be seriously argued that sentences

1 for serious federal economic crime offenses are too
2 low. That argument is simply not temple [ph].
3 The Department's sole argument is that
4 Sarbanes-Oxley requires sentencing increases for
5 everybody, regardless of whether or not their
6 offenses bear any relation to the high-level
7 corporate fraud at which Sarbanes-Oxley was
8 transparently directed.
9 The Department's argument stated pointedly
10 is that Sarbanes-Oxley leaves this Commission no
11 discretion, no room for judgment about optimum
12 sentencing policy. Indeed, no room for determining
13 or attempting to determine the intent of Congress.
14 The only permissible response to Sarbanes-Oxley,
15 according to the Department of Justice is more
16 prison for every federal defendant convicted of
17 stealing.
18 At bottom, the arguments we've heard this
19 afternoon from the Department of Justice, indeed,
20 all the arguments that we're engaged in here are
21 not about sentence length at all. This is an
22 argument about power: institutional power over the

1 sentencing process.

2 I've been a supporter of the federal

3 sentencing guideline system, because at least as

4 originally conceived, it markedly reduced judicial

5 sentencing discretion, while leaving judges

6 considerable de facto room for maneuver. I've

7 supported the system because it gave prosecutors

8 meaningful, if not absolute power to influence

9 sentences. As a prosecutor, thought that was good,

10 and I still do. And I've supported this system

11 because it created a body of politically neutral

12 specialists, this Commission, to provide a forum

13 for rational argument about sentencing policy. As

14 conceived, this system created a reasonable balance

15 between the institutions most concerned with

16 sentencing. The Commission, the courts, the

17 Justice Department. And it, at least, provided a

18 forum, in which the defense bar could be heard,

19 even their views have, perhaps, carried less weight

20 than some others.

21 What we see today, loathe though I am to

22 say it, is the Department of Justice bent on

1 gathering virtually all sentencing authority to
2 itself. Consider the argument about the low end of
3 the loss table. The Justice Department argues that
4 the current guidelines do not provide prison
5 sentences for defendants at certain loss levels.
6 Not true. The current guidelines do not require
7 prison sentences for someone who steals, for
8 example, $50,000, but judges certainly have the
9 power to impose prison sentences for such cases.
10 And they often do.
11 If you look at your own statistics for
12 fiscal year 2001, 30 percent of economic crime
13 defendants who are eligible for straight probation
14 are given prison by judges in this country. What
15 the Department wants is to take away the judge's
16 power of choice.
17 The same tenancy is at work in the area of
18 departures. The Department insists, and always
19 has, on unfettered power to charge bargain and to
20 award 5K1 departures. A power that is, to be
21 frank, often employed on behalf of defendants who
22 have done little or nothing. But the exercise of

1 judicial departure is to the complete and anathema.
2 The drive for institutional control over
3 sentences is not limited to competition with the
4 Judiciary. The 2001 Economic Crime Package was the
5 result of years of careful study, consultation and
6 negotiation among all the interested parties and
7 institutions. It showed, if I may say so, what the
8 sentencing Commission could do; how well the
9 process could work; how valuable this institution
10 is. Your work and your considered judgment are
11 entitled to respect and to reasonable deference
12 from all the parties to the sentencing process.
13 The present Department of Justice
14 initiatives suggest that this Department of Justice
15 views this Commission not as an authority, not as
16 an institution worthy of deference and respect, but
17 as an obstacle to centralizing sentencing authority
18 in the Executive Branch.
19 I think this is profoundly unfortunate.
20 The sentencing guidelines are a good thing.
21 They're a very good thing for prosecutors.
22 However, in order to survive, the system must have

1 a reasonable distribution of rulemaking power; it
2 must permit exercise of discretion by prosecutors,
3 and judges and defendants, alike.
4 And these guidelines must not become a
5 one-way ratchet creating ever higher sentences for
6 everything. We are moving quickly in that
7 direction. If the movement does not stop, this
8 system will collapse in a burst of revulsion.
9 The institution, I must say, that would
10 mourn the guidelines passing the most would be
11 federal prosecutors. But the institution now doing
12 the most to cause this downfall is the Department
13 of Justice. I hope the Department of Justice will
14 moderate it's positions and I hope this Commission
15 will act in a way that's consistent with its
16 important mandate. Thank you.
17 JUDGE MURPHY: Thank you. I said, at the
18 beginning that you'd have a little opportunity for
19 rebuttal.
20 MR. MERCER: Well, I think if you're open
21 to it, I'll just answer questions from the
22 Commission and hopefully have a chance to

1 editorialize along the way to be responsive to my
2 panel colleagues.
3 JUDGE MURPHY: Okay, this fine. Judge
4 Castillo.
5 JUDGE CASTILLO: I'll take up your
6 invitation raised by Mr. Felman to quote from that
7 actress that you referred to and tell you what she
8 told all of her various spouses. I'll try not to
9 keep you very long.
10 I find myself, consistent, with my prior
11 remarks in agreement with Mr. Goldman, Mr. Felman,
12 Mr. Boss and, in particular what Professor Bowman.
13 And I want to thank you, professor, for all your
14 submissions. I've read them all very carefully, as
15 I read all the submissions. And we share the same
16 prosecutorial background, and I feel probably, the
17 same sentiments about what is going on now.
18 Now, Mr. Mercer, you and I have interacted
19 before and I apologize if that seemed like a
20 deposition, it wasn't meant to. I will tell you
21 that I think the Department of Justice should be
22 happy. First of all, the Economic Crime Package in

1 '01, is a piece of amendment legislation that I'm
2 very proud of as a Commissioner. I think, in many
3 ways, we were ahead of the curve in reacting to
4 things that were just in the process of developing,
5 but one of my missions since I came to the
6 Commission was to increase the penalties for white
7 collar crime. And I don't hesitate to say that in
8 front of our Practitioners Advisory Group or the
9 President of the National Association of Criminal
10 Defense Lawyers because I thought, at the high end,
11 especially, they were inadequate.
12 And so I think that that '01 legislation,
13 which is probably the amendments that will apply to
14 all these recent indictments, if you obtain
15 convictions, was one that was considerable and
16 studied process.
17 Now, I'm not--I don't have the same proud
18 feelings about what we did in January. One, we
19 were rushed, it was an emergency-type of situation.
20 But I think that, again, on behalf of the U.S.
21 Attorneys Committee, you should be very proud of
22 all of the enactments that we undertook in January

1 that became effective immediately and what remains
2 is this one dangling issue as to the loss tables
3 and what's to be done.
4 I've studied it very closely. I will tell
5 you--I was especially taken and maybe Professor
6 Bowman--and there is a question coming--Professor
7 Bowman is familiar with a law review article that
8 one of his colleagues from Washburn University
9 School of Law Professor Mary Criner Ramirez [ph],
10 has just put out an article in the "Loyola
11 University Law Journal." It's called "Just in
12 Crime: Guiding Economic Crime Reform after the
13 Sarbanes-Oxley Act of 2002," where she makes a very
14 good point that: one, our economic crime package in
15 '01, was a well-considered change, but that there
16 is a problem and the problem is with downward
17 departures.
18 And so, I will tell you, when you go back
19 to Montana, go back happy, because we will be
20 making it clear, if we haven't, it's because we
21 haven't been clear enough. As of tomorrow, I
22 predict, if my predictions are good, we'll be

1 announcing that we're going to be looking closely
2 at downward departures. Because, in particular, I
3 am concerned about how downward departures interact
4 with white collar crime.
5 But other than that, my question is this:
6 You make the point about this cooperation at
7 low-level broad movers and in connection with white
8 collar crime. Well, my question would be, the way
9 relevant conduct principles apply, even if you were
10 a lower-level person in a white collar criminal
11 event, if you would call it that, my sense would
12 be, as a judge, that the loss calculations and all
13 of the enhancements would apply to somebody lower
14 level and you would still get all the incentive if
15 not more for cooperation. Am I somehow wrong in
16 that analysis?
17 MR. MERCER: Well, certainly, relevant
18 conduct is going to come into play interest he
19 event the relevant conduct runs to everything that
20 this particular defendant might know. I think that
21 the testimony goes to the question of a defendant
22 with a narrower set of understanding that probably

1 few district judges would say, I'm going to start
2 from point A and I'm going to find that this
3 defendant somehow had knowledge that reaches to all
4 these other parts of criminal conduct. Once again,
5 I don't think there's much certainty in that and,
6 in terms of trying to have the right set of
7 guidelines in this area, I don't know if I think
8 that relevant conduct would drive the sentence in a
9 case like that. This is one of those areas, where
10 I don't know if the Commission studied it, I don't
11 know if academics have studied it. I don't have
12 much of a sense of how relevant conduct has been
13 applied by district courts in the white collar
14 context, particularly those higher corporate fraud
15 levels, so it's a little bit hard for me to know
16 how that's run historically. But based upon the
17 question, I'm not quite sure that that's a very--
18 relevant conduct alone is a very powerful signal to
19 the white collar--the potential white collar target
20 who might be involved in an investigation.
21 JUDGE CASTILLO: One of the debates that
22 we've been having just internally, since you last

1 informally testified before us, is what's the
2 definition of white collar crime? I know you--I
3 asked you that, so I'm going to give you a complete
4 nuclear energy opportunity to define that for me,
5 if you will.
6 MR. MERCER: Well, I think the way you
7 posed it during the last opportunity, for me to
8 address the question. You asked whether a bank
9 teller who was guilty of an embezzlement charge,
10 should be considered as a white collar criminal?
11 JUDGE CASTILLO: Yes.
12 MR. MERCER: And I said, no. And, in a
13 sense, I think I was looking to the way courts have
14 construed abuse of trust and, frankly, the way the
15 Commission has looked at abuse of trust. And I
16 believe that unless we're talking about a lead
17 teller, or the head teller, we're not going to see
18 an abuse of trust enhancement. And I think we can
19 argue that that's not a white collar crime.
20 I'm much more comfortable defining it the
21 way the Commission's defined it, which saying,
22 we're not going to try to decide something--whether

1 something's a white collar crime or whether it is
2 something else. We can describe all of these
3 things as fraud crimes.
4 A bankruptcy fraud in a certain context,
5 you know, it's always a fraud crime, whether it's
6 always a white collar crime, it's not, but I think
7 the guidelines--what the Commission did as part of
8 the 2001 package was to collapse these things,
9 theft, embezzlement fraud, into that one guideline.
10 I think different people have questions about
11 whether that makes sense or not, but the bottom
12 line is, that's the way the Commission has
13 construed it and I think it's going to be very
14 difficult for us to always define what's a white
15 collar crime. We certainly can't do it by statute,
16 we can't say, this 1341 charge or that 1344 charge
17 is a white collar crime always. Because sometimes
18 it's going to be and sometimes it isn't going to
19 be.
20 JUDGE CASTILLO: Your written
21 testimony--this is the last question I'm sorry.
22 Your written testimony emphasizes lower-level fraud

1 offenders, so I take it that you draw a distinction
2 between a lower-level fraud offender and
3 lower-level theft offender or am I wrong about
4 that?
5 MR. MERCER: I wouldn't want it to be
6 construed that narrowly. I think we're trying to
7 ask the Commission to look at the way it is
8 structured to be 1.1 and we're not asking for you
9 to bifurcate 2B1.1 into 2F1.1 again. What we've
10 tried to say is that we think the Congress, based
11 upon Section 905 of Sarbanes-Oxley and based upon
12 the kind of comments that Professor Bowman and I
13 heard from Senator Biden and others during
14 hearings, indicates that members of Congress and,
15 certainly, the Executive Branch is very concerned
16 about the $65,000 fraud case. And very concerned
17 that there isn't really any, yeah, it's true, it's
18 a 6 to 12 guideline range. But I think we know
19 from the Commission data, that there aren't very
20 many people that are going to see 6 months or 12
21 months in a BOP facility, with that guideline
22 calculation. They're going to get home arrest,

1 they're going to get community confinement and
2 that's not the appropriate message in terms of
3 promoting respect for the law, all that.
4 And I, quite frankly, I have to say, this
5 begins my editorializing, I do not--the argument
6 that this is somehow an attempt for the Department
7 of Justice to power grab the institutional
8 questions on sentencing, this is a legislative
9 rulemaking question, which is: What does the
10 Commission think that a person who has committed a
11 $65,000 fraud crime or a $100,000 fraud crime,
12 what's the just punishment there? Is it home
13 arrest? Is it community confinement? Is that
14 going to achieve any purposes of sentencing, those
15 statutory purposes? The Department's argument, and
16 we believe the Congress's argument has been we need
17 to worry more about the $50,000, $60,000 and it is
18 inappropriate that those people are going to be in
19 zone B.
20 JUDGE MURPHY: Professor O'Neill.
21 PROFESSOR O'NEILL: I'm definitely glad
22 you added that editorializing at the end because I

1 think that's one of the arguments that I've been
2 frankly looking for the Department of Justice to
3 make.
4 I need some help, basically. And here's
5 sort of the help I need and some of the concerns, I
6 guess that I have. I look at the decision to
7 punish someone, to place them in prison is
8 obviously one of the most awesome decisions that
9 probably anybody can make in the criminal justice
10 system. I'm lucky, when I leave my Commission job,
11 I can just go and lecture to students and do things
12 that have absolutely no impact on the world
13 whatsoever. Unfortunately, many of my colleagues
14 here on the Commission have to make those same sort
15 of difficult decisions that, frankly, at this point
16 in time, I'm glad I'm not necessarily having to
17 make them, the fact that I'm also on the
18 Commission.
19 Similarly, the decision to release
20 somebody, or the decision to cut somebody's
21 sentence is obviously a momentous decision; both in
22 terms of someone who may have been victimized and

1 also for the potential for other people to be
2 victimized, as well. So, obviously that's one of
3 the concerns that we have on the Sentencing
4 Commission.
5 Ordinarily, we have sort of two
6 theoretical bases for punishment: There's the idea
7 of deterrence. General deterrence, holding you up
8 as an example so other people won't do bad things.
9 Specific to deterrence, let's make sure the bad
10 person is not doing bad things again. Then there's
11 the notion of retribution.
12 Well, as I go back even before the 2001
13 changes that the Sentencing Commission made to the
14 fraud loss tables and to the guidelines and to the
15 whole Economic Crimes Package, I notice a couple of
16 kind of interesting things. General deterrence is
17 always difficult to demonstrate. I think we all
18 recognize it exists. It's very difficult to
19 actually prove--a lot of people have done academic
20 work on it, it's very difficult to demonstrate.
21 One of the things that I do notice and
22 maybe this is something sort of useful for the

1 Department as well, I'm sorry I don't have a
2 PowerPoint or something to present this on. But if
3 I look at prosecutions for the sort of traditional
4 fraud-type crimes, embezzlement, larceny, whatever.
5 I look at from fiscal year 1997 roughly 10,589
6 prosecutions being brought, which represents about
7 21.7 percent of all the federal criminal
8 prosecutions being brought. I fast forward from
9 1997 to 2001 and I see a drop in the total number
10 of frauds being prosecuted. So I see prior to the
11 time that we actually made a change in the
12 guidelines in 2001, I see a drop from 21.7 percent
13 of the cases to 16.3 percent of the cases and a
14 drop from 10,589 cases prosecuted to only, 9,708
15 cases being prosecuted. And I'd just like to note,
16 because I was actually served as general counsel to
17 the Senate Judicial Committee, at least during some
18 of that time, but that was also during a period of
19 time where we had an enormous expansion in terms of
20 the number of investigators and also the number of
21 AUSAs out there, especially following 1996 and the
22 whole Oklahoma City tragedy where we increased the

1 number of prosecutors and investigators generally.
2 So, looking back on it, just in terms and
3 this is a very rough and a very crude sort of
4 measure of general deterrents. And, perhaps, this
5 is something that would be a nice collaborative
6 effort between the Department of Justice and
7 Sentencing Commission to look at. But from a
8 general deterrent sort of perspective, I don't see
9 the justification, frankly, we made, even for
10 changing the 2001 guidelines, necessarily, at least
11 at the high end.
12 The second thing, I'd say and that goes to
13 the other type of deterrents, and that's the idea
14 of specific deterrents. A guy named Daniel
15 Reesberg [ph], I think I've got the name right, did
16 a study a couple of years ago, looking at specific
17 deterrents for individuals, for white collar
18 criminals who received straight probation and the
19 same sort of similarly situated defendants who went
20 to prison Boom, do not pass GO, do not collect
21 your $200, go directly to prison.
22 One of the interesting things that he

1 found was that, with respect to both the people who
2 received straight probation and the folks who
3 actually went to prison, no difference in terms of
4 subsequent recidivism rates.
5 Now, interestingly enough, the Sentencing
6 Commission, in a project that I've been sort of
7 working a lot on, I guess, and it has to do with
8 the criminal history project that we're looking at
9 in terms of doing our 15-year review of the
10 guidelines, one of the other interesting things
11 that we've found in cranking the data and cranking
12 the numbers ourselves, is looking folks who
13 actually went to prison, vis-a-vis, people who got
14 probation, in terms of the recidivism project that
15 we're doing, which is--I'll just have a little plug
16 for the Sentencing Commission, here--it's the
17 largest recidivism project of its type that's ever
18 been done anywhere, at least as far as we know.
19 We got the same sort of a message and
20 that's that people, whether they're at the low end
21 or at the high end of the guidelines, don't seem to
22 recidivate anymore whether they've gone to prison

1 or whether they just get convicted and wind up
2 going onto probation.
3 Now, the second issue, and that was the
4 issue I think that you so eloquently addressed with
5 respect to the retributivist [ph] element, is that
6 if the Department feels like the penalties are
7 simply in terms of just punishment, just not high
8 enough, that's sort of the justification that I
9 guess I would rather here. Because I'm just having
10 sort of a difficult time deciding how we change
11 these penalties when I have a tough time, when I
12 crank the numbers, of looking at either the element
13 of either specific deterrence or general
14 deterrence.
15 Now, I will say that one big thing
16 happened last year. And that's Sarbanes-Oxley.
17 And I believe, and I think the Department is quite
18 right, that the Department, rather that the
19 Congress of the United States instructed us to
20 change the penalties. There's obviously a question
21 as to whether or not we have to change all the
22 penalties from the lower-level offender to the

1 highest level offender or whether it's just some
2 subset of those folks. But I, at least, believe
3 that Congress intended us to change these
4 penalties. Obviously, they increased them
5 four-fold with respect to mail and wire fraud; ten
6 fold with respect to ERISA violations. So,
7 clearly, Congress recognizes that there's a problem
8 going on there.
9 Now, to that then, I would add, I would
10 look at what we did in 2001 and I would say that
11 for all crimes, for all fraud offenses above
12 $120,000 in cost, we increased penalties pretty
13 substantially across the board. And, in fact for
14 crimes sort of below $70,000--the real change was
15 below $70,000 to about $5,000 the change that we
16 wrought in the fraud-loss tables wound up being
17 about a month less time, obviously there are other
18 concerns that are going to be involved there, that
19 may, in fact, you know, change penalties even more.
20 But then, for people who are under $2000K in terms
21 of a loss, there was virtually no change in what we
22 did in the $2,000 table as compared to what had

1 been done before.

2 Now, so we've at least above $70,000

3 changed the penalties fairly substantially--for

4 some things not for all things. Then in January,

5 we did another change, which again, may not have

6 addressed entirely what Congress wanted in

7 Sarbanes-Oxley, but at least was probably a step in

8 the right direction, perhaps, given the

9 legislation.

10 So the question that I have is ought we to

11 really be giving a little bit more time to see

12 whether or not the changes that we did in 2001 and

13 the changes that we effected in January, whether or

14 not those satisfy what the congressional mandate

15 was.

16 And if the answer to that is, well,

17 there's a problem with respect to, you know, the

18 retributive element of punishment, then that's

19 obviously a different story.

20 The second thing that I would ask is

21 perhaps we could work with the Department of

22 Justice to see exactly what's going on in terms of

1 deterrents. I hope, just as an academic, that in
2 2001 when we made the changes, that this was going
3 to be a perfect example to be able to look at
4 general deterrents, to give us the best shot,
5 perhaps, we had at seeing whether or not there was
6 any sort of deterrent effect. Now, obviously,
7 we're not going to be able to do that because we
8 are going to have to change the tables.
9 So, perhaps that's something we can, you
10 know, work with the Department on in looking at. I
11 guess there's not really a question here--it's more
12 of an indication, I don't know.
13 MR. MERCER: You promised--you promised
14 there was going to be a question. Yeah there are a
15 couple questions.
16 PROFESSOR O'NEILL: Any response or any
17 comments.
18 MR. JASO: I think the question is, isn't
19 that so?
20 PROFESSOR O'NEILL: And so, since you were
21 trained at George Mason, you recognize the
22 importance that we place on empirical research.

1 MR. MERCER: I do, indeed, and I was
2 thinking as you were defining the difference
3 between general and specific deterrents, I was
4 pleased to have Professor Parker talk to me about
5 that at length, because I think I have a grasp of
6 the difference of the two.
7 I agree that 2001, the 2001 package is not
8 going to give the Commission the basis to make a
9 determination about general deterrence. I can see
10 how a significant study on those convicted of
11 crimes, whether they were in the state system or
12 the federal system, would give the Commission a
13 basis to reach conclusions about specific
14 deterrents. Because you've got a sample of
15 offenders, you can track them, you can find out if
16 they've recidivated and that's great.
17 There is not--I cannot conceive of a model
18 where the clients of these gentlemen before they
19 became clients that they could be evaluated by, you
20 know, all of the great researchers that you have on
21 the Commission and say to them, all right, now if
22 we increase the base offense level in a way that if

1 you commit $100,000-worth of fraud, in stead of the
2 maximum, you're probably going to face is five
3 months in a split-sentence. Let's say that we jump
4 that up so that you were going to get something
5 more like 12 to 18 months in a federal prison, do
6 you think you'd commit that crime? The
7 hypothetical is just--I don't know how the
8 Commission would ever reach any conclusions there.
9 But what we believe is that general
10 deterrence is a primary basis for this amendment
11 because the public has the perception and they're
12 correct, that if they steal $50,000, in all
13 likelihood, it could be through a bankruptcy fraud,
14 it could be through a scam, it could be through a
15 number of different vehicles, as a first-time
16 offender, they aren't going to go prison. And that
17 gives them what they perceive to be an automatic
18 get-out-of-jail-free card. And that is not helpful
19 in terms of general deterrence.
20 The way the Commission can send a very
21 different signal is that if they, if you take a
22 serious look at this whole base offense level and

1 say to yourselves, do we really think that we are
2 deterring anyone from committing the $60,000, the
3 $50,000 crime. And I don't believe it's there.
4 And on the second question, the one that
5 you framed on just desserts, you know, I hope, I
6 guess when I think about the Sentencing Reform Act
7 and the reason why we've continued, and I'm
8 delighted that Judge Castillo's announced the
9 departure study, because one of the reasons why
10 that's been a consistent message in this
11 Administration is, we really do believe that the
12 principle Sentencing Reform Act are very clear,
13 that we want to treat similarly situated offenders
14 in an equitable and fair manner. And it is really
15 not occurring to the extent that $100,000 offender
16 in one jurisdiction is going to get a split
17 sentence and someone who has committed that same
18 $100,000 mail fraud crime elsewhere, is going to
19 get a straight probation sentence.
20 PROFESSOR O'NEILL: Let me interrupt for a
21 second. Do you think that Sarbanes-Oxley, which is
22 really why we're here today--because we probably

1 wouldn't be changing this but for Sarbanes-Oxley,
2 and probably, maybe the Department wouldn't even be
3 asking for changes but for Sarbanes-Oxley--do you
4 think that Sarbanes-Oxley was also intended to
5 change the punishments for property destruction and
6 for garden-variety theft offenses?
7 MR. MERCER: I think Section 905 said to
8 the Commission and I think the testimony and the
9 comments made by Senator Biden and others are very
10 clear that this was a directive to the Commission
11 to reconsider everything that--all the
12 underpinnings of sentencing with respect to fraud
13 crimes. It wasn't limited to the massive corporate
14 criminal, exclusively.
15 PROFESSOR O'NEILL: Theft and destruction
16 of property, included?
17 MR. MERCER: To the extent that it's
18 covered by 2B1.1, 905, it gives the Commission--it
19 directs the Commission to reconsider all these
20 penalties. And that takes us into this mid-level,
21 to the extent that we define a low-level crime, and
22 I'm really hesitant to define $100,000 as a low-

1 level crime, I'm really hesitant to do that. But I
2 think that's the way that this has been framed is
3 that those losses are somehow low-level. I think
4 they're very significant and I think we send a bad
5 signal when people don't--aren't in a zone B
6 sentence for those crimes.
7 But, back to the just desserts question.
8 We're at a point now where you can steel $900,000,
9 in a country with a median income of--obviously,
10 it's variable from state to state. In mine, it's
11 about $20,000. So, if we have a bank fraud crime
12 where the person has stolen $900,000. There aren't
13 many members of the public that believe just
14 desserts for that crime is a 24-month sentence.
15 Which, based upon your 2001 amendments, is exactly
16 what it is. It's a 14, plus an--it's a 14 over the
17 base of 6, less 3 for acceptance at a 17, that's a
18 24 to 30 range. One bank is a victim, right?
19 Now, back to this question of just
20 desserts, retribution, however, you want to frame
21 it and promoting respect for the law, statutory
22 principles of sentencing, there is a crisis of

1 confidence in the public mind, I think when it
2 comes to this sort of thing. And you would find, I
3 think, both at the congressional level and,
4 certainly among members of the public that it's
5 wrong that somebody can steal $950,000 and be
6 looking at a 24- to 30-month range if they plead.
7 So, I hope that's responsive. I think
8 just desserts is a big component of this. You
9 know, there certainly, I think, are just desserts
10 aspects in other parts of the criminal law. But
11 this is the area--this is the area where the
12 defendants are educated, they are competent, they
13 are savvy, they are represented by tremendous
14 counsel and they are going to be responsive to
15 incentives. And if this Commission sends a message
16 that people in all likelihood are going to be in
17 zone D and they're going to be in federal prisons,
18 we believe that you will not only have a
19 significant--made a significant contribution in
20 terms of retribution, the just desserts aspect, but
21 you will also send a very strong deterrence
22 message.

1 JUDGE MURPHY: I'd like to interject a
2 thought here. We are sincerely, still in progress
3 working on what to do in this situation, so it's
4 been very valuable for us for you all to be here.
5 I'm mindful that we've already gone half an hour
6 over the time and that we're keeping all the
7 panelists here by that factor.
8 With that introduction, if anybody had a
9 short question and there could be a short answer.
10 It's just that, you know, the time runs away and
11 we've gotten very valuable statements here that
12 we're going to be thinking about. Eric, you had
13 your hand up?
14 MR. JASO: Let me give it a shot. The
15 comment was made before by essentially, everyone,
16 the four non-Mercer people here, that--and there
17 was a certain theme here I think it's fair to say.
18 I mean, we heard several points being made every
19 thing without recounting it from, you know what did
20 mail fraud originally intend to cover to, you know,
21 the idea that there's--the real problem here is
22 some sort of regulatory weakness and that, you

1 know, disenchanged [ph] people can't understand the
2 law and, therefore, go astray.
3 The thing that strikes me and the question
4 is directed, initially, to Professor Bowman, but
5 the others can answer. And I invite them to, which
6 is: You know, I did, I think Jim Felman said, he
7 had sense of deja vue here. I do, too, because I
8 was at the Biden hearing and Professor Bowman and
9 others testified arguing strenuously that statutory
10 penalties should not be increased because that was
11 on the agenda at that point because that was the
12 United States Congress for the reasons that
13 essentially are being espoused here, which is we
14 already did the job in 2001, let's have time for
15 those things to work, there's no need to increase
16 statutory penalties. At that time, I think the
17 only thing people were really advocating,
18 certainly, the Administration was advocating 10
19 years. Let me get to the question.
20 If Professor Bowman and others--you
21 testified against increasing statutory penalties
22 before the Senate and are now essentially arguing

1 that, notwithstanding the increase the increase
2 from 5 to 20 years for key white collar and fraud
3 crimes, there is no need for the Sentencing
4 Commission to increase penalties, then why were you
5 making that argument before the Senate if that,
6 ultimately, was not going to be the necessary
7 result of what the Senate did in increasing--the
8 Congress did in increasing penalties. I hope that
9 was clear.
10 PROFESSOR BOWMAN: Well, I know the reason
11 I made the argument is because I believed it to be
12 true. I still believe it to be true. But I think
13 what you're really asking is whether or not, since
14 the argument was made by me and others, and since
15 the Congress passed increases to statutory maximum
16 sentences, doesn't that mean that somehow or other
17 their action represents a general directive to the
18 Sentencing Commission to increase all economic
19 crime sentences? I think the answer is, no.
20 First of all I think senators and
21 congressmen are really quite--those involved in
22 drafting this legislation are really quite

1 sophisticated and that they understand perfectly
2 well that the increase in statutory maximum
3 penalties does nothing necessarily at all with
4 increasing sentencing guidelines.
5 I think they also understood that in
6 placing directives in the legislation, it said to
7 this Commission that it should consider fraud and
8 theft and other white collar sentences and think
9 about them carefully--it understood that this
10 Commission is and is designed to be a repository of
11 expertise and a place which is designed to be, by
12 Congress itself, as a buffer against the temporary
13 enthusiasms of the political moment.
14 And I think that those sophisticated
15 legislators, at least some of them, understood that
16 they could accomplish certain political objectives
17 by raising, essentially, symbolic statutory maximum
18 sentences, secure in the knowledge that this body
19 would do what it is supposed to do, which is to
20 look at sentences as they should be. And also to
21 winnow out from the, frankly, rather confusing
22 provisions of Sarbanes-Oxley that are directed at

1 the Commission, those particular concerns that
2 really motivated Congress in passing this
3 legislation. And those particular concerns were
4 concerns having to do expressly with the type of
5 cases that led to the frenzy to pass Sarbanes-
6 Oxley. And that is to say, the cases involving
7 high-level corporate misconduct and extraordinarily
8 high loss levels.
9 I think this Commission in January,
10 hurried though its actions necessarily were,
11 because of the deadline placed on it by Congress
12 did precisely what it was supposed to do; precisely
13 what you were set up to; precisely what you're
14 sworn to do, which is to do the best thing for he
15 entire system, irrespective of the political
16 enthusiasms of the moment.
17 And I think to misconstrue what Congress
18 did would be a dereliction of the duty that you
19 were sworn to uphold.
20 MR. GOLDMAN: Let me just add one thing.
21 I think it is always difficult to read
22 congressional tea leaves and we're all having

1 problems with it. Secondly--and I don't think it's
2 the Commission's role, respectfully. Secondly,
3 you're dealing with a particular case. There's a
4 very good argument that the fraud statutes by
5 themselves appeared to be too little, a five-year
6 sentence. Indeed, in serious frauds that we all
7 know that usually in mail fraud or wire fraud
8 cases, there's a series of counts. What courts are
9 often forced to do to meet the guidelines is give
10 consecutive sentences. So, you're dealing with
11 what was kind of an aberrational old statute, so I
12 don't think it proves very much at all.
13 JUDGE MURPHY: Judge Sessions.
14 JUDGE SESSIONS: I want to say, I want to
15 maybe address this to the four of you.
16 On the one hand you bring up the Justice
17 Department's accusation, essentially that you are
18 to do this and if you don't do this we're going to
19 take this to Congress and then this will be stuffed
20 down your throat and you see that as a sign of
21 disrespect.
22 And then I also, I'm thinking about the

1 arguments that you've made here and there are two
2 things in particular that struck me most
3 extraordinary. First there was some representation
4 that historically this Commission just continues to
5 increase the penalties and this is how we're
6 responding to the process. That's absolutely
7 simplistic and wrong. Absolutely wrong. So, I
8 guess I need to vent that because that's the
9 representation that's being made here that we're
10 always increasing penalties and that is absolutely
11 incorrect.
12 And the second thing is, I hear you say we
13 should be insensitive to the political process.
14 And I appreciate that this is supposed to be an
15 independent body. We're here in a position of
16 trying to interpret what Congress has said. And
17 one of the things that you learn, I think, in a
18 public policy position is that those people who
19 forget about history, suffer its consequences.
20 This Commission in the past and going back
21 for years has done things which, perhaps,
22 politically fell upon deaf ears and, in fact,

1 responded--resulted in responses which are not
2 counterproductive to what we're doing, but have
3 ramifications for you years. And I'm thinking
4 about, just as one example, crack cocaine. To say
5 that this Commission should not be actively
6 involved in the political process and to understand
7 what's happening on Capitol Hill, invites that kind
8 of history to be repeated again and again and
9 again. You know, and I-- So I listen to what you
10 say and I'm thinking, well, that's absolutely
11 right, you know, the Sentencing Commission should
12 be absolutely free of all kinds of political
13 processes and input.
14 On the other hand, I look at history and
15 see where that's gotten us in the past. And my
16 question to you, really, when you think about it,
17 is that what we're supposed to do at this point?
18 Are we supposed to be absolutely free of political
19 influence? Are we not supposed to compromise among
20 ourselves, knowing full well, that we are part of a
21 larger network and, by the way, include such things
22 as the view of PAG and the view of judges

1 throughout the country. Aren't we supposed to be
2 thinking about all of that? And in the sense
3 arriving at some sort of conclusion which is the
4 product of that kind of consolidation of thinking
5 as opposed to just sitting back here in our naive
6 world in Washington, D.C., trying to decide what's
7 the best public policy?
8 MR. MERCER: May I respond to that, Judge?
9 JUDGE SESSIONS: Sure. I was actually
10 going to only say two sentences, but it just got
11 out of control.
12 MR. JASO: It was a question, though?
13 JUDGE SESSIONS: It was a question, right.
14 MR. MERCER: I hope that neither you nor
15 anyone else construe what I've had to say today as
16 the suggestion that the Commission is or should be
17 outside of the political process. If you go back
18 and look at the things that I've written over the
19 years, I have specifically suggested in writing
20 that this Commission, be more attuned to politics,
21 be more attuned to what was going on the Hill, to
22 consult. I think that that's one of the delightful

1 things about the Economic Crime Package process, is
2 that you did just that. I think under the
3 leadership of Judge Murphy, you have changed
4 the--your relationship to many people and many
5 institutions revolving around the sentencing
6 process.

7 But I guess what I want to say beyond that
8 is this: I think the mantra of this particular
9 group, or one of them, has been that we need to be
10 politically responsive, you need to talk to people,
11 you need to understand what's going on in order to
12 restore the credibility of the Commission, from,
13 perhaps, a somewhat lower level in the past. And I
14 agreed with that and I still do, I think you have
15 to be politically sensitive and I think making sure
16 that you have credibility with other political
17 actors is critical.

18 But my question then, is having done that,
19 what do you use it for? What is it worth? I think
20 you've done everything you could have possibly have
21 done to restore any lost credibility with the
22 political actors in this town. But if that gets

1 you nothing, if it buys you no respect; if it buys
2 you no deference from the Department of Justice or
3 from relevant people on the Hill, what has it done
4 for you? And so, no, I don't suggest you retreat
5 from the political process, I suggest that you
6 engage in it in the most active way.
7 And in this particular case, if your
8 institutional reading is that, you know,
9 overwhelming forces on Capitol Hill would simply
10 roll over you, if you did nothing, then by golly I
11 think you probably have to do something. But I'm
12 not--it's not clear to me that that's true. Though
13 you're going to be closer in touch with that than I
14 am. It is not clear to me that if you proceed that
15 you think best while also being sensitive to
16 congressional desires and attentions in the
17 Sarbanes-Oxley Act, that you can't go to the Hill
18 and explain what you have done and ask them to
19 respect your expertise the credibility that you've
20 built up. And so long as you proceed in a
21 reasonable way, have them honor you in the role
22 that you fulfill. And if you can't do that, if you

1 really think that all you have done is worth
2 nothing, then why are we all here?
3 JUDGE MURPHY: Jim.
4 MR. FELMAN: I will also--I'm somewhat
5 uncomfortable here, because I feel like I need to
6 reconsider everything that I've ever thought,
7 because I find myself in agreement almost entirely
8 with Frank Bowman, which is certainly a first for
9 me, but-- Let me offer my best defense for being
10 naive that I can muster. The judge that I clerked
11 for, Judge McMillian [ph], had a perversion of the
12 Janet Jackson song that I always appreciated. It
13 was, instead of what have you done for me lately,
14 people like Congress only know what you're going to
15 do for them right now. They have no memory, I
16 believe. When I first got here and saw this
17 Commission come in, it was we must restore the
18 credibility with Congress that was lost when the
19 crack amendment was sent. I believe for restoring
20 the credibility with the Congress so that we could
21 do something about crack because everyone
22 recognized that it was wrong. And the thought was

1 once we restore the Commission's credibility with
2 Congress, we will then be able to do something
3 about crack.
4 And what have you done about crack? They
5 told you, after you restored all that credibility
6 with them, don't send us an amendment, we don't
7 want it. But we promise you, that if you send us a
8 report, we'll hold hearings and we'll move on it.
9 And they haven't and they won't. And you got
10 nothing done on that. I mean, so the question now,
11 I suppose is, you're not really talking about
12 interpreting Sarbanes-Oxley, although some of it is
13 about interpreting Sarbanes-Oxley, I think
14 everybody knows that Sarbanes-Oxley was about the
15 high-level, big-time cases and you addressed
16 that--albeit in my opinion, overly severely, in
17 January.
18 What we're really talking about is the
19 threat that if you don't do something else here to
20 blunt the feeling that somehow you haven't done
21 everything the Department wants they're going to go
22 back to Congress and Congress will act again. And

1 the concern that I think I would have in your
2 shoes, which I certainly don't envy, is if your
3 task is on longer to interpret what Congress has
4 told you, but to predict what they will do in the
5 future, then by what guiding principle do you act?
6 Are you now doing what you really think is
7 right or are you somehow doing what you think you
8 have to do even though it isn't right because you
9 think politically it's more expedient? And I think
10 there are reasons that the Commission is not in the
11 Legislative Branch, it's in the Judicial Branch and
12 the statutes provide that a certain number of the
13 commissioners must be judges. And there is a
14 reason, I think, that there are judges on the
15 Sentencing Commission because what judges do is
16 study things impartially, apart from the fray, and
17 I believe that Commissioners Steer and O'Neill
18 engage in that same type activity here and should,
19 and then do what they think is right and make a
20 ruling.
21 And if they're wrong they get reversed,
22 and it's way wrong the Congress can act and enact

1 legislation that reverses that ruling. But I think
2 that the Commission's role is to do what it thinks
3 is right using its expertise and establish the
4 credibility with the Congress by bolstering what
5 it's done with the facts, by saying we studied this
6 for five years, here is the data, here is our
7 expert opinion on the matter. If you disagree with
8 us, it isn't because we don't have credibility,
9 it's because you legitimately believe that the
10 political process must take you elsewhere and it
11 doesn't it's not a bad reflection on the
12 Commission, you've done your job and then they've
13 done their job. And when they tell you
14 specifically, as they know well how to do, we want
15 you to raise the guideline in 2B1.1 and amend the
16 loss tables, they can easily tell you that. Then
17 you do it. But I fear that if the role of the
18 Commission is to predict what might happen
19 politically in the future, if you don't do
20 something now, I don't know what guiding principle
21 you're acting under. And so I would exhort you to
22 exercise your best independent judgment about what

1 fair sentences you believe are and do it. And hope
2 for the best.
3 JUDGE SESSIONS: But you see, one of the
4 factors--
5 JUDGE MURPHY: Judge Sessions, you know
6 Judge Castillo's been waiting to ask a question. I
7 mean -- Judge Castillo.
8 JUDGE SESSIONS: No, I was going to debate
9 him in this particular issue, but I'll remain
10 quiet.
11 MR. FELMAN: Inasmuch as you vote and I
12 don't, I think you win.
13 JUDGE SESSIONS: I have life tenure and--
14 JUDGE MURPHY: Judge Castillo.
15 JUDGE CASTILLO: I didn't mean to generate
16 all this broad philosophical debate, so I'm sorry
17 if I did. And Jim, I just have to say I don't
18 consider the crack issue dead by any means. But
19 here's my question. And it's directed at anyone.
20 Hasn't any of the Department's concerns about
21 low-end fraud offenders already been taken care of
22 with the new restrictions on the use of

1 correctional--community correctional centers?
2 Hasn't that already accomplished, sort of through
3 the back door what was not accomplished through the
4 front door of a guideline amendment?
5 MR. MERCER: Do you want me to address
6 that or is--
7 JUDGE CASTILLO: Anyone can address that.
8 MR. MERCER: You know, the directive to
9 Ms. Sawyer [ph] deals with zone C and zone D
10 offenders. So we start, I think by looking at
11 those offenses that don't, under the current
12 system, end up in either C or D, and there are
13 plenty of them. And they sort of are the start of
14 our concerns about the current system. As all of
15 our statements over time have indicated, we're at a
16 point now where a $30,000 fraud loss, something up
17 to $29,999 is in the zero to six range. And that
18 range we know, I was fascinated by Mr. Felman's
19 comment that a significant number of folks are
20 incarcerated, maybe it was Professor Bowman's
21 argument that a significant number of people are
22 incarcerated even though they're eligible for

1 straight probationary sentences. And I'd be
2 fascinated to know how many zone A offenders have
3 been incarcerated over the last year or so. I
4 don't think it's very many. And the Directive to
5 Ms. Hawk [ph] isn't going to have any effect on
6 zone A.
7 This brings back the point that I think
8 the Sentencing Reform Act got at and that Justice
9 Briar got at in that law review article, the whole
10 notion of what the Commission did in that initial
11 set of guidelines was to say we want to make sure
12 that fraud defendants are subjected to some form of
13 incapacitation and we've created now there this
14 system of up to $30,000 loss, assuming the people
15 are pleading guilty and getting acceptance
16 responsibility, those folks are all zone A, all
17 zero 6.
18 Then we turn to zone B, the loss amount of
19 $30,000 to $70,000 under 2B1.1. It puts people
20 into zone B, assuming they're pleading guilty. So
21 the directive from the Deputy Attorney General has
22 no force and effect on any guideline case where the

1 loss is up to $70,000 and the defendant has plead
2 guilty.
3 That then takes us to the $70,000 and
4 above category and it is certainly the Department's
5 view that while that directive will apply to the
6 Bureau of Prisons, there are plenty of significant
7 public reasons, given my discussion with Professor
8 O'Neill, Commissioner O'Neill in terms of general
9 deterrents and just desserts that suggests to the
10 Department that the directive to Ms. Sawyer isn't
11 going to have any substantial effect on achieving
12 what the Department's proposal seeks.
13 JUDGE MURPHY: I'm going to take the
14 prerogative of the chair now to thank all of you.
15 You obviously have all put a lot of thought into
16 what you said here. Very eloquent statements, and
17 very much to the point, you're all very familiar
18 with the nature of our work and what we're faced
19 with here and hopefully you understand that we're
20 trying to do the best we can. And we aren't sure
21 how we're going to resolve our task next month.
22 But you've given us a lot to think about here and

1 we thank you very much.

2 (Whereupon, at 5:34 p.m., the public

3 hearing concluded.)

C E R T I F I C A T E

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

SHARON SHAPIRO