# AGENDA

**United States Sentencing Commission**  
**Public Hearing on Offense Seriousness**  
**April 15, 1986**

### 10 a.m.
- **Chairman William W. Wilkins, Jr.** Opening Remarks

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UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON
OFFENSE SERIOUSNESS

APRIL 15, 1986

CHAIRMAN WILLIAM W. WILKINS, JR., Presiding

(THE TRANSCRIPT WAS PREPARED FROM A TAPE RECORDING.)
CHAIRMAN WILKINS: Let me call this public hearing to order.

Good morning to all of you. I am William Wilkins, Chairman of this Sentencing Commission, and you can see the names of the other Commissioners here with me.

I welcome you to this public hearing on the subject of the relative seriousness of criminal offenses.

We have available on the table just outside this hearing room a packet of information about the Sentencing Commission for anyone who may be interested in that.

During our break and at the conclusion of our hearing, I am sure that our Commission members will enjoy the opportunity to visit with you and probably exchange ideas.

This Commission and our public hearing today is in response to the Congressional mandate contained in the Comprehensive Crime Control Act of 1984. The Sentencing Commission is charged with the task of formulating sentencing policies pursuant to that guideline for our federal criminal system.

These policies and guidelines will be designed, as I am sure you know, to create a determinant sentencing system which may be appropriately entitled Truth in Sentencing, with the aims of certainty, fairness, and the
avoidance of unwarranted disparity among similar defendants who commit similar crimes.

Unwarranted disparity I believe is the single major problem in our system, which resulted in the creation of the Sentencing Commission. This disparity is vividly represented when similar defendants commit similar crimes, be it bank robbery or mail fraud or weapons violation or drug violation or whatever, and yet these defendants receive greatly disparate sentences due to one single factor -- which federal judge happened to rap the gavel on that particular case.

Unwarranted sentencing disparity undermines public confidence in our system, and it breeds disrespect for the rule of law.

As the Commission proceeds with its work, we invite public participation in our efforts and seek input from a wide range of individuals and groups with expertise and with concern about our federal criminal justice system. Although not required by law, the Commission recently unanimously adopted a policy of an open door policy as far as all of our Commission meetings are concerned, and we invite anyone who is interested to participate with us in these meetings.

A notice to this effect was recently published in the Federal Register.
Our hearing today focuses on the topic of offense seriousness. In this area the Commission is required by statute to consider public concern and views in formulating sentencing guidelines and policy statements.

In constructing guidelines, the Commission is required to carefully consider factors inherent in each criminal offense and the manner in which the criminal conduct occurred. In other words, what is it about a particular crime, the way in which it is committed, the impact upon others which we should consider as a Commission in drafting our guidelines?

In addition to developing a determinant sentencing system which will reduce unwarranted disparity, this Commission must not only formulate appropriate sentences for criminal conduct involved, but we must also formulate sentences which are rational and explainable. The resulting system will be open and understandable, and it must articulate -- the judges who impose sentences -- to victims who suffer crimes, to defendants who are punished, and to the American public in general why a particular sentence is appropriate. It is not enough for us to come up with just sentencing guidelines that give a sentence; we must also say why this sentence is being given and, most importantly, why is this the appropriate sentence in this particular case.
In conjunction with this hearing, the Commission has received more than 130 responses from individuals and groups on the issue of offense seriousness. I assure all of you here and those who are unable to attend that this Commission appreciates the thoughtful consideration and the hard work which went into these responses.

Our hearing agenda today includes ten presentations with 15 minutes allotted to each participant. In order to allow time for the Commissioners to pose questions, we request that to the extent possible all witnesses summarize your testimony in your presentation.

We have carefully studied those statements that have already been received. They were earlier distributed to all Commissioners. Your full written statements will be included within this record, and indeed the record will remain open for 30 days from today to allow any amendment to your remarks or for the receipt of other testimony from individuals who are unable to attend today.

We have a recording system in operation now. I might add that the microphones that you see are not for amplification but only for recording. So if you would please speak loudly and clearly so that we can all hear.

The first witness today is Peter Walsh, who represents the Association of the Bar of the City of New York.
Mr. Walsh, we are delighted to have you with us.

TESTIMONY OF THE ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK BY MR. PETER WALSH

MR. WALSH: Thank you, Mr. Chairman.

On behalf of the Association, we would like to thank you very much for the opportunity to testify. I would also like to say to all of you thank you very much for being (inaudible) come up to New York and chat with us a couple of weeks ago. It was very helpful, and we admire your courage in undertaking this task on the timetable you have got (inaudible).

I know you have both gone over the letter I submitted earlier which summarizes the results of our group. So I won't repeat that.

I would like to say that this is not an official opinion from the Association of the Bar but rather the efforts of a committee concerned with criminal justice to assist you directly as we can in response to your questionnaire.

We do not attempt in doing this to arrive at any hierarchy by category of crimes, nor did we attempt to work out a philosophy of sentencing on which we could agree. We leave that to you. I hope we can.

But we did talk about the questions that were posed, Mr. Chairman, and very briefly it was our feeling
that clearly the manner of the commission of a crime should affect its punishment, almost to the point where it would seem unnecessary to articulate that. But beyond that very general principle, we found as a result substantial disarray as to how it should be done.

When it came to the question of robbery, which you posed, with or without a gun, it seemed to us that the monetary difference in the example you posed was not so great that it would bring the unarmed robbery up to a level of disparity (inaudible) done with a gun. At the same time, a lot of discussion noting that many robberies (inaudible) victim and that there is always a potential for injury (inaudible) others even if the perpetrator is not directly armed.

As to the questions of theft and forgery versus the counterfeiting, the best I could say is that we were clearly undecided. It seemed to us very difficult to determine (inaudible) separate out the questions of the character of the offender, and we had a group of experienced criminal practitioners sitting around the table, and they immediately assumed that the person who was engaging in counterfeiting was likely to be a worse character than the person who is initially forging checks (inaudible) order.

So that became a very difficult thing, and I know you are going to have the same sort of problem (inaudible).
As to the question of the linkage between type of crime and a particular sanction, that was one area where we did feel very strongly, although it was only just briefly, and the feeling of the group that we had was that there ought not be some (inaudible) linkage between the type of crime and the type of sanction, and the feeling basically was that to make such a linkage would improperly in some cases prevent the judge from taking account of the mitigating factors or other ameliorative aspects of the crime that he normally and properly would, and we didn't think that that was a particularly fine idea (inaudible).

With respect to the ranking of crimes, the examples you gave, basically we sat down and each having individually ranked them compared notes to see where we stood, and we, not surprisingly, came up with a fairly broad range in certain cases. Others produced a consensus almost from the start, and I guess what I would like to do is very briefly discuss those cases that presented difficulties for us on the assumption that (inaudible).

We began by striking off the outliers, top and bottom, among those rankings given and concluded that if we could get to within two placement in this separation top to bottom, we would call that consensus. I don't know if you will be able to settle for that (inaudible), but that is how we went about it. And those ones which, after striking off
the top and bottom, had a spread of more than two places
were (inaudible) toxic substances (inaudible) the murder,
the bank robbery, the assault on a ranger -- which
ultimately we did not rank, concluding we did not have
sufficient information about it in the description to
effectively place it -- the commercial (inaudible) in
obtaining federal funds.

Going specifically to the point you discussed, on
the toxic substances it seemed to us decisive that there was
no indication of human harm and, similarly, there wasn't any
indication in the description that we had a situation in
which there was irreversible damage. Clearly, there was
damage to the environment. Clearly, it was done for
commercial purposes. It was a corporate act, but it did not
seem from the description that there had been (inaudible),
for example, of the species or something like that
(inaudible). It was something that was ultimately curable
by money, and it was the feeling as a consequence that
(inaudible), depending on the circumstances.

The murder example you posed was the subject of
the sharpest discussion among our members. It was pointing
out that this is likely to have been processed as a state
crime in the ordinary course (inaudible), and it was the
belief by many of our group that murder was the highest
crime bar none (inaudible) should not be put first rank.
There was an immediate disagreement on that point, and the counter argument of course was that in the federal system there are more severe crimes than murder; namely, treason, espionage, or assassination of the President, something of that order, and there had to be a placement which would take account of that and allow even more severe treatment by way of example for those crimes.

Having said that, it was still the feeling that an actual murder had to be ranked very highly, and I think our ranking (inaudible).

We did spend some attention on the question of the assault on a ranger. Understanding that we (inaudible) ranking, it was felt that if that represented a true attempted murder, an intentional assault (inaudible), the feeling that that should also have a very high ranking in the scheme of things.

The bank robbery (inaudible). It would perhaps give you a flavor (inaudible) New York when immediate characterization of it was that this was not a good robbery, and by that they meant that there was no gun, that the amount of money was relatively low. Indeed, their feeling was that as bank robberies go it was probably as low as a bank robbery can get.

But nonetheless, more serious (inaudible) crimes (inaudible) placement on that, again noting the fear
instilled in the victim, which may be very considerable
despite (inaudible) gun, and the obvious potential for
injury when a guard (inaudible) said stop (inaudible) run,
somebody gets hit.

The commercial fraud by the auto dealer,
odometers, it was a little bit of a puzzlement (inaudible)
out of New York as to why this might figure so prominently
in your scheme as being not likely in many cases to be
prosecuted as a federal crime at all. It was sensed that it
just wasn't that important in the scheme of things.

(Inaudible) with the New York sentencing group I
handed to counsel, a woman who was prosecuting the crime
(inaudible), and when she discovered that auto thefts were
regularly indicted by the state she was surprised, shocked
(inaudible) people who had stolen Corvettes and were
indicted despite the obvious value of cash to the Corvette.
A difference in geography, and I would suppose it is
possible that something like this (inaudible) different
parts of the country (inaudible).

The fraud by the college president, it would seem
to be for a good purpose in some respects, trying to save
his college, no apparent indication of (inaudible) to the
individual, but then again we had a substantial discussion
of this kind of thing occurring on a regular basis in some
places.
...not too distant past in which a whole series of schools had regularly put in false statements to extract federal money.

But again the conclusion that the individual had not benefitted from that, we put it down in the lower category.

The firearm incident you posed to us was a puzzle in some respects, and in part because of the lack of further information, no evidence as to the nature of the (inaudible), no indication of present intent as to the use of the weapon, recognizing at the same time that in a crime of this nature it may often be the case that all you have is the firearm (inaudible) and no indication or certainly no provable matter of intent. So that seems to figure. People regarded it as relatively serious except again the fact (inaudible) 410 gauge shotgun. There is something about a 410 gauge, and I don't know if you were picking a weapon for criminal purposes (inaudible) typically to the 16 or 12 gauge which does a lot more damage (inaudible).

So that suggests to us that it was intended for sporting and other purposes and that this was relatively (inaudible).

The comment that we had overall looking at this array of crimes that you quoted was one of regret, and
recognizing the extreme limitations of time and the limitation of (inaudible), but a regret nonetheless that the survey did not include some of the more prominent federal crimes which are prosecuted (inaudible) serious fraud, antitrust (inaudible) and what one of our members, a former U.S. Attorney in the Southern District, characterized as the middle America crimes which are prosecuted on a widespread basis -- false statements to banks, for example, dire acts, thefts (inaudible), postal fraud, and then, perhaps most appropriate for today, tax evasion.

Those things seemed to us to be the kinds of crimes that are going to figure on a regular basis in the diet of any federal attorney's office, and it seemed to us that reconsideration should be given to that and that those things were more likely to figure in the great middle range among the crimes that you had given us.

I would conclude with that. That was the central lack we saw in this, but we do recognize obviously the extreme limitations which you were working with.

I am happy to try and answer questions.

CHAIRMAN WILKINS: Thank you very much. Of course, that was the questionnaire. The questions we posed in the letter was merely primarily done to generate comment, (inaudible) to some of those crimes that you mentioned (inaudible) need professional consideration.
You mention the attempt (inaudible) perhaps attempted murder by a forest ranger. I wondered if you would comment just generally about the relationship, in your judgment, between the attempt to commit a crime and the actual commission of the crime and how we should rank the two; for example, attempted armed robbery being stopped by alert police officers prior to the defendant's entering the bank as opposed to the completed crime. In the scheme of things, should we treat attempt just as seriously as the bank robbery itself, or is it less serious, or how would you compare the two?

This is the serious question you must answer, the attempt to commit a crime as compared to (inaudible).

MR. WALSH: I understand the problem, and there are some cases where the attempt (inaudible) completed crime, such as conspiracy (inaudible), and you want to use that opportunity to denounce that crime to the public. Nonetheless, the feeling, I think, (inaudible) that the completed crime is somehow (inaudible) even if (inaudible) intelligence or alerting the officer, something like that.

I would say that the feeling among our group was that it ought to receive some discount but not a very great one, and that the completed crime would be much more severe than the attempt if it is a crude attempt, and that is why with respect to the assault on the ranger I think the
feeling among our group was that if this was truly a shot
aimed at or certainly with real forethought on the part of
the actor, then we put it very close to murder. The murder
itself in the scheme of things (inaudible) the accident that
occurred in a federal building, estranged husband, and
things of that order, and although it would be a federal
crime, it just didn't rank in the (inaudible), and assault
specifically on a federal officer such as (inaudible).

CHAIRMAN WILKINS: Would you rank conspiracy,
treat conspiracy the same way as attempts?

MR. WALSH: We did not discuss that particular
point, although I think the feeling generally was that it
will have to be regarded in much (inaudible). Essentially,
it is equivalent to that because again that may be
(inaudible).

CHAIRMAN WILKINS: (Inaudible) conspiracy or a
completed conspiracy.

MR. WALSH: I mean a completed conspiracy.

CHAIRMAN WILKINS: All right, thank you.

Any questions from other Commissioners on the
left?

VOICE: Well, I know (inaudible), comments that
maybe some people who don't know something you know, which
is that we have listed all these crimes here, 300 of them or
more, in this book, and I know that your organization is
responding to this more detailed list.

MR. WALSH: Yes.

VOICE: Which will include the security events, the antitrust events, all the different ones you named, and of course we all appreciate your putting in here, and I am flagging -- I am glad that you would want to express views on those other things because we have sent this not just to your group but others, and there may be other people here who are willing to do it who don't know about its existence, and so there are other copies of this here, and it is simply a very, very detailed list of -- which is in our computer -- of all the different type of crimes there are which we have classified and we are soliciting views on people's opinions about how they should be ranked.

MR. WALSH: A fairly massive undertaking all by itself (inaudible).

VOICE: Yes.

MR. WALSH: One thing that I might perhaps touch upon. But when (inaudible) talked to us, we were made aware that you were functioning at least for organizational purposes on (inaudible), and our immediate concern went to the question of fact finding.

Whenever (inaudible) response beyond the statutory definition, you are going to be finding yourself in a (inaudible) process, whether it is done in securing
(inaudible) conviction or (inaudible), and this whole area struck us as perhaps one of the most problematic areas that you would encounter.

(Inaudible.)

VOICE: Well, I hope that you will say something about that when you respond because -- I mean, you may have something you want to say right now.

One of the greatest problems is the extent to which the offense for which the person is being punished reflects the person's actual behavior and the extent to which it should reflect the charged behavior, and my impression is that those commissions that have gone into this in the states have ended up always compromising that, and there are some instances where it should reflect charged behavior, and inevitably there are some where it will reflect actual behavior, even if only, for example, this person stole $100,000 rather than $5,000.

And precisely where that should be the one and where the other is something I hope that you would address in your responses to this and, in addition, the problem of, if it reflects the actual rather than the charged behavior, how does one find out what was the actual behavior?

MR. WALSH: That is precisely my point.

VOICE: Exactly. Well, any ideas that you have (inaudible). I mean, there are various states that have
looked into that, where they leave up to the judge to find disputed questions of fact on a more probable than not standard, and then there are questions of the evidentiary rules (inaudible).

So if you would like to say something about that now, that would be excellent, and if not, I hope that you will include comments on that in your comments on this more comprehensive finding.

MR. WALSH: I can tell you what the experience we have had in New York was.

VOICE: What?

MR. WALSH: Working on (inaudible).

But given the enormous number of plea bargains which run through the system, it was felt that it was virtually impossible to suggest that having an actual factual adjudication in most cases and that necessarily meant that (inaudible) conviction, which obviously we have got a great deal of power in prosecuting. I think that that is the balance we are striking.

How much of that (inaudible) applies here in terms of what we give up or what will he not say before the court.

(Inaudible.)

But that is a very delicate balance, and I don't think (inaudible) resolved all (inaudible), and I expect
that we will try and make suggestions, suggest something on
that because it seems to us really the critical point
(inaudible).

VOICE: Have you ever had any experience with
forgers?

MR. WALSH: I have not personally.

VOICE: Of course, you put counterfeiters above
them. Forgery is a disease, uncurable. A counterfeiter
might counterfeit a couple of items and might have a very
skilled talent, but once you catch him, well, he is pretty
well caught. But a forger goes on forever.

MR. WALSH: And the question is why should we
rank them --

VOICE: You said counterfeiter is more injurious
than a forger.

MR. WALSH: I think, sir, that it is the feeling
that the counterfeiting goes -- because he (inaudible)
currency (inaudible) has some affect much broader than
forgery which affects only (inaudible) particular incident.
Counterfeiting can undercut the entire system.

VOICE: Potential (inaudible).

MR. WALSH: (Inaudible.)

VOICE: You said about tax (inaudible).

MR. WALSH: Not that it didn't affect the public
(inaudible), sensitive to the fact that it was
environmental funds and it is much more (inaudible). But
the feeling we had from the description given that there was
not an indication that human health in a direct sense
(inaudible). It was not like release of dioxin in a town
which had contaminated and completely obliterated the town.
It was something that from the description appeared to be
apparently visited upon the wildlife.

VOICE: Now, we are talking about pollution,
toxic substances.

Now on the amount of money. Two men go into a
bank one day to rob it (inaudible) $100,000 there and walk
out with 10. The next town down the road, the robbers went
in and walked out with $100,000.

Should the amount of money that they got relate
to the crime? They are after everything they could get.

MR. WALSH: I think in the circumstances as you
pose it the amount of money (inaudible) than the fact of how
they got it.

VOICE: (inaudible) same way.

MR. WALSH: Exactly, but I think that the
likelihood is that the theft of $200,000 is likely -- will
attract (inaudible) attention and has more --

VOICE: No question about it.

MR. WALSH: -- there is more to be deterred in
the public's eye if people see that somebody has gotten away
with something. I think that that is an important (inaudible).

VOICE: The failure to accomplish the maximum amount justifies a lesser sentence?

MR. WALSH: I think it might be taken into account, but in a minor way under the circumstances.

CHAIRMAN WILKINS: Any other questions?

VOICE: Mr. Walsh, you mentioned that there was -- you would recommend no per se linkage between the crime and the type of sanctions or the decoupling of the crime and the sanctions.

Could you expand on that just for a moment?

MR. WALSH: Our thought was that -- and as I took the question, or we took it -- we do not wish to see a limitation, for example, in which you invariably (inaudible) certain (inaudible) crimes that might be properly addressed with a fine or supervision or something on that order. I would suspect that there are certain crimes we would probably in virtually every case wish to impose a sentence of a particular type.

Fraud (inaudible) is unlikely to result in (inaudible). At any rate, to try and put (inaudible) situation (inaudible) as well as responsibility of imprisonment, but the feeling was that you don't necessarily wish to impose a sanction of imprisonment. There might very
well be some reason why it wouldn't be appropriate, and we thought that your selection of other factors and (inaudible) together might do that rather than (inaudible) that the type of crime (inaudible).

VOICE: Actually, you (inaudible) characteristics or characteristics of the environment would be important?

MR. WALSH: Well, I think that there was quite a bit of concern (inaudible) about the offender characteristics, and they are not all the same and they shouldn't be treated the same. I think that that is part of the task you have got before you.

(Inaudible.)

VOICE: Thank you.

VOICE: Counsel, is securities fraud a crime in New York?

MR. WALSH: Yes, it is, sir. It violates the Martin Act.

VOICE: I know it is the Martin Act, but also there is a federal statute. But do you ever see it prosecuted?

MR. WALSH: Yes, we do.

VOICE: Is it (inaudible) --

MR. WALSH: Believe it or not.

VOICE: -- to the extent that it exists?

MR. WALSH: I am not certain I would say how
extensive its existence could go, but as to whether it is
prosecuted, yes, it certainly is. It may not --

VOICE: (Inaudible.)

MR. WALSH: Yes. I would not say that prominence
(inaudible) federal securities prosecution is, but we would
not normally get into that level of activity prosecuting at
the state level. I don't think there is any question about
that.

But the Attorney General is active in prosecuting
securities fraud, even in my small upstate town.

VOICE: I am talking about the Southern
District.

MR. WALSH: I think that most of the securities
fraud of any consequence is probably prosecuted (inaudible).

VOICE: I think there must be any number of
security frauds every day (inaudible). Now, how can you
rectify that?

MR. WALSH: I am not certain I can tell you how
to rectify that, sir.

(Inaudible) prosecute those cases you can find,
and in fact you may find that you can't prosecute more than
a handful of them, you can't make a case on more than a
handful of them. Under the circumstances I would guess that
one, in fact, that you would be after is the deterrent
(inaudible) of the sentence imposed. So a prison term.
A white collar crime like that may have, even if it is of a relatively brief nature, a far broader deterrent factor than some other sanction and be consequently more useful.

CHAIRMAN WILKINS: Commissioner Baer?

COMMISSIONER BAER: Mr. Walsh, I would like to refer back to your comments about the car thefts.

MR. WALSH: Certainly.

COMMISSIONER BAER: If I understood you correctly, upstate New York considers car theft very seriously, the New York City area not so serious.

Now, the question is: what are the implications of that, assuming it is true, for this Commission, which has to adopt guidelines across the nation?

MR. WALSH: When New York was working on a sentencing body, its proposal (inaudible) said, well, there isn't any proof of the disparity or whatever there exists, it is probably a good thing. And I guess the fact that some crimes are more seriously regarded in one place than another, if you are going to promulgate a uniform set of guidelines such that anything is going to be prosecuted in the name of the United States of America and you are not going to be prosecuting in the name of the United States of America as modified by Southern Oregon or as people see (inaudible). I think you are going to have to have
something that is seen to be fairly uniform across the country.

That means that the standards which may be modified by geography are going to have to give somewhere, at least in my view.

COMMISSIONER BAER: So let me follow up.

Being a victim. Now, you live upstate New York and I gather the citizens there consider it pretty serious to have his car stolen.

MR. WALSH: Yes.

VOICE: In Manhattan it is not considered to serious to have my car stolen?

MR. WALSH: I wouldn't suggest that it is not considered serious, but my remark was only intended to indicate that the likelihood of their being indicted in New York City was substantially less than would be the case if you were in upstate New York.

COMMISSIONER BAER: Yes, but putting yourself in the shoes of the victim, the person who owns the car and has it stolen, that victim is -- you know, no punishment.

I don't quite understand why --

MR. WALSH: I am certain that the victim regards it as equally serious, and perhaps the point is that we ought to arrive at a reasonable estimate of what the seriousness of it is so the person who steals a car in
Southern Oregon or in Tijuana is treated approximately the same. I think that is the omission and that the fact that somebody steals a car in Syracuse as opposed to Manhattan does not mean that one person gets a misdemeanor and walks and the other one spends a year and a half in the state prison, which is the situation as it exists presently.

CHAIRMAN WILKINS: What you are saying, Mr. Walsh, is that regional perceptions of crime may somehow explain disparity but it doesn't make it right?

MR. WALSH: I am not even certain I would go so far as to say that explains it. I think there is an awful lot more disparity in the results other than regional differences, but I don't think that (inaudible) there is any question that there are regional differences enter into it.

In our work we found that certain counties in the state were far, far out of line with the rest of the state because of a very few individuals sitting on the bench. You could predict, and it was so strenuous that the strongest efforts by the parole board to shorten the time served by individuals serving in those counties did not bring them into line with the state average. I suspect that in certain (inaudible) areas you may find the same on a national basis.

I wouldn't say it justifies it at all, in my personal view, but this is not something our committee
discussed as to whether there might ever be justification
for regional differences or sufficient breadth of sentence
possible to allow for that, but I don't think (inaudible).

CHAIRMAN WILKINS: Thank you very much,

Mr. Walsh.

VOICE: Well, I have one statement about your car
theft.

If the FBI went through the same situation and
they found a lot of cases that should have been prosecuted
on some other basis for being (inaudible) and they weren't
car thefts at all -- they were what we would call joy
riding, just temporary. A fellow would pick up a car and
take it to a temporary space, and so on. Now, you could
say that is stealing it, but he didn't intend to permanently
appropriate it.

And I presume -- is that somewhat the basis of
your distinction, the distinction that is being made between
your community and some of those communities and some of the
others?

MR. WALSH: No, sir. I was thinking of Park
Avenue. I am sorry perhaps if I (inaudible). In the cases
I am talking about, you are talking about true theft, and
true thefts on the streets of New York City are likely not
to be regarded as seriously the first time in terms of what
the results by way of sanctions to the defendant as it would
be if it was upstate.

I am not speaking about a distinction between theft and joy riding.

VOICE: You are talking about true theft, right.

MR. WALSH: Yes, sir.

CHAIRMAN WILKINS: Mr. Walsh, we appreciate not only your testimony today, which was very informative, but the responses that you and your association have previously made, and we look forward to a continuing working relationship with your association.

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

We are pleased to help.

CHAIRMAN WILKINS: Thank you.

Our next speaker is a probation officer representing the Federal Probation Officers Association, Susan Smith.

Ms. Smith, we are delighted to have you with us this morning.

I might add that Don Damley is here, the Chief of the Probation Division of the Administrative Office of the Courts, and, Don, I just want to say to you publicly how much we appreciate the work that you and all of your probation officers, including Ms. Smith, throughout the nation indeed, have done already, and we are going to continue to call upon you for information and opinions and
views and work product during our tenure here.

MR. DAMLEY: Thank you, sir.

CHAIRMAN WILKINS: Thank you.

TESTIMONY OF THE FEDERAL PROBATION OFFICERS
ASSOCIATION BY MS. SUSAN SMITH

MS. SMITH: You have the statement that I have
this morning (inaudible) here by the President of the
Federal Probation Officers Association. Because it is
brief, I would like to ask your indulgence to allow me to
read this.

CHAIRMAN WILKINS: Certainly.

MS. SMITH: Thank you.

I am Robert L. Simon, President, Federal
Probation Officers Association and Chief Probation Officer
of the District of Arizona.

I wish to thank Chairman Wilkins and all members
of the United States Sentencing Commission for this
opportunity to address the Commission on the question of
offense disparity.

The Commission's instant task is indeed
formidable, the genesis of which will (inaudible) the
federal probation officers to (inaudible) investigate,
evaluate, and recommend for a given individual or
organization charged with a criminal violation sanctions.

Even those probation officers (inaudible).
(Inaudible) severity on a daily basis, they too experience sanctions by (inaudible) when it comes to ranking specific crimes and categories of crimes.

It has been said a serious crime is one that affects me, my family, or loved ones directly (inaudible) seriousness of crime (inaudible).

(Inaudible) criminal, including the severity of their crimes, are embedded in our (inaudible) institutions. These judgments are further colored by consideration of race, ethnic origin, socioeconomic status, geographic (inaudible), occupational (inaudible) host of other variables (inaudible).

Too often when we speak of crime we speak of legal categories and definitions (inaudible). Judicial sanctions (inaudible) resolution about what was done but rather how, when, where, and (inaudible). These variations have found their way into the penal code in a wide range of possibilities (inaudible) further compounds (inaudible).

For most Americans who only wish to be safe on the street and secure in their homes, violence and threat of violence is considered (inaudible) serious crime. (Inaudible) degree of murder, voluntary or involuntary manslaughter, et cetera.

(Inaudible.)

The question of crime (inaudible) deal with its
outcome has driven so much (inaudible) after Adam and Eve
purloined the forbidden fruit. We are no closer to a
conclusive answer and our attempts at after-the-fact
resolution continue full circle.

Society dictates how its institutions will
address any given problem. We (inaudible) treatment
modality and are entering the realm of the just deserts
(inaudible), but these artificial and short-lived responses
to crime and the criminal fail for the most part to grasp
the reality that people want to be safe.

People rank severity of crime primarily on the
basis of injury and suffering (inaudible) conclusion
tendered by the U.S. Department of Justice (inaudible) 1985
national survey of crime (inaudible).

(Inaudible.)

Violation of public trust occurs after
(inaudible) organized crime involved. These crimes mandate
confinement with little or no regard for how the illegal act
is perpetrated.

The question of sanctions goes to the heart of
the security question, but when does legitimate judicial
discretion become disparity?

(Inaudible) both prosecutor and judge, which in
turn (inaudible) and accountability legitimately, reasonably.

(Inaudible.)
The window of opportunity is open. That is reexamination of sanctions and the (inaudible).

(Inaudible) establishing the priorities and reaffirming the basic values (inaudible).

The Federal Probation Officers Association and the 1,942 officers it represents appreciates this opportunity to work for and with the Commission (inaudible) in an endeavor to keep our feet on the ground.

Thank you again for allowing (inaudible). I will be glad to respond to any questions that the Commission members may have (inaudible).

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

I wondered if your Association has done any thinking about probation revocation. One of the requirements we have under the law is to draft policy and guidelines for probation revocation, and it strikes me that this may be as difficult an area as the sentencing guidelines themselves.

You go from one extreme where a probationer commits a crime while on probation, and that may be an easier decision to make as far as revocation is concerned, but how about the probationer that moves from one residence to another without notifying you or travels outside the district without notifying the probation officer or fails
to make a monthly report -- those types of things? I won't call them administrative, but at least they are noncriminal in the traditional sense.

Has there been any thought about how we should handle this problem?

MS. SMITH: I think probation officers traditionally and daily give thought to that very question. We have what we call general terms and conditions of probation and have what we call special conditions of probation which are imposed by the court for specific offenses and specific offenders.

I think perhaps that what we are calling now as the general conditions of probation (inaudible), and we need to determine how applicable they are in this day and time to the offenders that we are dealing with.

When we are talking about obeying all laws, federal, state, and local, do we mean traffic violations? Do we mean traffic violations? Do we mean running a stop sign, do we mean having a bad exhaust on our car? What exactly is meant by law violations?

(Inaudible.)

Oftentimes we see that there is a -- if not disregard but an overlooking of the juvenile court process and the orders that come out of the juvenile court oftentimes (inaudible) orders that are in place, which are
legal orders, a violation of the state law (inaudible), and
we are overlooking that (inaudible).

I think perhaps that instead of having the
general conditions of probation that we have today that the
conditions of probation need to be revamped and in effect
tailormade to this offender.

At least one district that I am aware of is
looking very seriously at compiling (inaudible) conditions
of probation which they (inaudible) are starting to use in
that (inaudible).

(Inaudible) what is termed technical violation,
but in fact when you write them down and have them defined
and tell offenders that they are conditions of probation, if
they are terms and conditions of probation they should be
dealt with (inaudible) and not be given (inaudible).

CHAIRMAN WILKINS: It is a difficult problem
probation officers have, and you have a term of probation
and it is not complied with. What should our guidelines say
the court should do about it?

That is the issue. Of course, you recognize the
issue. But we hope that your association will give us
(inaudible). We are very interested in having your views.

Any questions of my right?

VOICE: Ms. Smith, as a probation officer you
have prepared some presentence reports? You have prepared
presentence --

MS. SMITH: Yes, sir.

VOICE: Yes, okay.

In doing that, have you had any difficulties or any problems ranking the offense severity according to the United States Parole Commission guidelines, and, if so -- while you think about that -- and, if so, what suggestions do you have to the Sentencing Commission so we can make the probation officer's job -- I don't want to say a little bit easier, but I mean more practical?

MS. SMITH: I don't believe your question -- if I can answer your question (inaudible) -- I don't believe that we have full information about the offense and that that full information has been reported in the presentencing report, that we would have difficulty in rating the offense severity. If we had more information where we have a problem (inaudible).

And if I could just deviate for just a moment, I think I can speak for probation officers across the nation, that we are certainly hoping that the presentence report will be able to address the total offense severity regardless of the conviction (inaudible).

VOICE: Will that prove very difficult for you in your separation of the report, the determination of the actual offense behavior?
MS. SMITH: With my limited experience, I initially began working in a large metropolitan area, Los Angeles, and (inaudible), although it is designated a large area (inaudible), and my experience (inaudible). I think the more valuable the information we get, the more accurate (inaudible).

We have to let the prosecutors and the agents know why we need the information, what (inaudible), and they can help us put together the (inaudible).

CHAIRMAN WILKINS: Any questions from my left?

VOICE: You have very interesting ideas and testimony, and I wondered to what extent you are in the process of making it practical.

As I look at the statute, it seems to me that the intent of Congress vis-a-vis probation in the new law is to make probation a kind of punishment, not simply a rehabilitation but also aiming at certain conditions, such as you have to impose a condition in the new law (inaudible) restitution, community service, or day and evening stay in jail, for example, confinement.

Well, has the Probation Association gone through or is it able to go through the -- let's say -- 300 crimes and tried to figure where and when in respect to each of these alternatives, these alternative punishments if you would like, might be practical or preferable?
What I am thinking of specifically is we are going to end up with a large number of crimes where the appropriate punishment is prison, and there will be a large number of other crimes and offenders where the appropriate punishment is not prison. So that isn't the end of this. That is the beginning.

And in trying to organize that beginning in respect to the crimes where the person will not go to prison, the probation officers who have this experience could be -- will be, I would hope -- amazingly useful simply going through each of them and saying, all right, very few postal fraud defendants who are convicted in fact go to prison.

Can you go through in an organized way and figure out what should happen to them in terms of punishment imposed by probation?

That is a question of your resources. It is a question of your views of seriousness. It is a question of your views of what is practical, and you have the information.

I wonder if you have begun to address that problem or if you can.

MS. SMITH: We have not as an organization (inaudible), but I think (inaudible) even to a limited degree (inaudible).
VOICE: Commissioner Baer I think addressed it.
MS. SMITH: (Inaudible.)
CHAIRMAN WILKINS: You had a question (inaudible)?
Thank you very much, Ms. Smith. We appreciate you and what your organization has been doing. There is no question that probation officers under the guideline system that we implemented (inaudible) will play a major role in making our system work.
Thank you very much.
MS. SMITH: Thank you.
I might say that this association, too, has been most responsive to our requests for their opinions, input and assistance, and we look forward to a continuing relationship with you, Mr. Walker.
TESTIMONY OF THE FEDERAL PUBLIC DEFENDERS ASSOCIATION BY MR. OWEN WALKER
MR. WALKER: Thank you, Judge Wilkins.
We, the Federal Public Defenders, on whose behalf I am speaking today, appreciate this opportunity to address the Commission (inaudible).
When we got your letter, Judge Wilkins,
requesting (inaudible) after all the various Federal Public Defender offices around the country, we received responses from most of them and we tabulated them and submitted to the Commission -- and it probably just arrived yesterday here -- the results of all of our various views about the various offices and our attempt to rank the crimes.

We found that overall there was a great deal of consistency in the rankings of the various offices arrived at of which crimes were the most serious, which were middle level, and which were the least serious, with a few exceptions, and those few exceptions were mostly cases in which we did not really present what we (inaudible) group that went through the same process.

For example, (inaudible) we varied all over the lot because we didn't really know exactly what was going on there, and so as a result we couldn't rank it.

The main considerations in the rankings of course were things like violent (inaudible), the extent of the planning, the level of the offenders involved in the (inaudible), although that wasn't so much (inaudible), the amount of money which was likely to be gained by the crime, and things of that sort, (inaudible) trust, and other factors which are pretty much taken into account on a day-to-day basis by most judges and other individuals involved in the sentencing process.
I think if there is any overall conclusion from this exercise it is that the ranking of crimes is something which can be done, even by people that have very different philosophies about the criminal justice system, and even though we are all public defenders we certainly don't share the same views about the philosophy, the philosophy of punishment or indeed the length of punishment (inaudible) cases.

I think, however, another main point that we want to make is that even though it is possible to rank offenses in a way that a lot of people would pretty much agree with, we are strongly of the view that that should not be the end of the offense characteristics task, particularly in any given case. Ranking we see as only a starting point, and we feel that the guidelines should, after a rank is determined for a particular case, then go into the more difficult questions which the statute and certainly the legislative history requires the guidelines to consider -- such things as whether an offense was on the spur of the moment or after extensive planning, the level of involvement of an offender in the offense. If you have five people all convicted of the same crime, same series of acts, you run the scale from the person that organized the whole thing down to the person that committed one minor act to further the whole enterprise, and you simply cannot fairly sentence the two
people or the five people in the same manner, and the
guidelines cannot in ranking crimes take into account the
level of involvement in an offense, for example, or the
amount of planning.

These have to be the subject, we feel, of
separate guidelines that really allow one to move around the
grid or whatever preliminary target the offense calls for,
and this is a matter which I am not sure that we believe
that even probation officers can do.

Once -- the question of judging the offender's
level of involvement in and/or amount of planning is a
matter of judgment, and that is something judges will be, we
feel, required to do, and we are not sure that -- we have
suggested in one of our papers allowing -- having a system
of more flexible guidelines which allow a case to be moved
around from the original target within a certain range
according to some of these more difficult to pin down
factors, and it is hard to do this in a manner which is fair
and which under the present system judges of various sorts
would all agree should be done.

In other words, I guess what we are saying is it
is very hard to put into writing results which a lot of
people would agree should take place in a given case.

Just for an example, to take the example of the
person purchasing firearms, that sounds -- we might have an
initial picture of what that offense calls for when we first read it, but that example, given other facts, could call for very different sentences.

If the person was a member of some kind of paramilitary, terrorist organization that was building up an arsenal and was trying to buy any weapons he could get, that act would call for a very severe sentence.

If it was -- and we have cases where people do not even know that they have been convicted of a felony. They know they have been convicted of a crime and gotten probation, and then they still have the -- they possess the firearm with a felony record not knowing that actually they have committed a crime, and even though it sounds like a serious crime to purchase it for it to be a felony, possession of a firearm, or to lie on the statement, sometimes these cases are not in fact as serious as they might otherwise seem.

So this is just an example of how a particular case runs -- could run the gamut from a very serious one to one that is not serious at all, and it is difficult to prepare guidelines that properly and fairly take that into account.

Mail fraud is another example. Mail fraud is -- as everyone here knows, wire fraud is very commonly used in the federal court, and basically it is a catchall charge
which does not really describe the activity. Mail fraud can
be very, very serious, and even if with small amounts of
money involved, and other mail frauds, depending on the kind
of level of involvement, for example, or the amount of
planning, even with a great deal of money involved, it is
not a very serious offense.

I think the $64 question that has been posed at
this point is how should the Commission compare the relative
seriousness of different kinds of crimes, and I think we
have -- I don't think that in the abstract that is as
difficult a task as it might otherwise seem, that it is
(inaudible) I think in the particular cases in the crime
guidelines is where the gravest difficulty lies
(inaudible).

VOICE: Do you want to submit a list?

MR. WALKER: I beg your pardon, sir?

VOICE: Do you want to submit a list?

MR. WALKER: Well, for example, the Parole
Commission guidelines, the present Parole Commission
guidelines -- now, this may be my own view, and I
shouldn't --

VOICE: We could go there, too.

MR. WALKER: I shouldn't speak for all of us, but
I don't have a great many problems with the actual ranking
of offenses in the parole guidelines. But the place where
the parole guidelines are devastating in particular cases where they are not sensitive enough to take into account what actually occurred, and I think that really is our theme at this point.

Basically, our feeling is we are anxious to see how the Commission ranks crimes, and we will certainly have comments, as we do with particular offenses in the ranking.

VOICE: I mean, you have this list.

MR. WALKER: Well, I am not sure that -- yes, we are going to work on that, although I am not quite sure what the questions are that would be asked and whether (inaudible).

But we will do that. But that basically is (inaudible) our views at the moment on this particular question.

CHAIRMAN WILKINS: Mr. Walker, in your past statement you listed draft dodgers as the least serious offender or offense of those that we had presented to you, and I think primarily you said because the crime was motivated perhaps by a political or moral or ethical reasons.

Do you recall?

MR. WALKER: I am not -- I don't think we took that view. At least, I wouldn't have taken that view. I think that in the rankings we regarded it as in the lower
CHAIRMAN WILKINS: Well, let me ask you, what about tax -- the tax protester? Today is a good day, I guess.

(Laughter.)

A fellow that says I am not going to file my taxes because the government is using my money in an unconstitutional manner, so I am not going to pay. Now, he is doing that for what he perceives to be some political or moral reason.

Do you think if we put significant sanctions on that conduct that we would motivate the majority of people who might otherwise pursue that course of conduct to comply with the law and pay their taxes?

MR. WALKER: Well, I tend to doubt it. The few tax protester cases that I have been involved in (inaudible) I am not sure we are dealing with rational people who would be deterred if the punishment were that much greater. On the other hand, I don't for one minute suggest that tax protesters shouldn't get a (inaudible). We can't have (inaudible) society just marching to the tune of their own drummer on April 15th.

So I think the matter has to be treated seriously even though (inaudible).

CHAIRMAN WILKINS: Any questions on my left?
VOICE: You have two very interesting points that you raised, important ones. But one problem is the problem of we will have a crime, let's say mail fraud, and that label isn't sufficiently definitive to pick up the important variations that might affect punishment. There are a number of ways in which they might be picked up.

I gather that the State of Washington has guidelines that specifically state a judge can take them into account when he looks for aggravating or mitigating features.

Another way to do it was what you were flirting with. You know, you have several (inaudible). Another way to do it might be to break down the offense into different categories. Another way to do it might be to qualify, you know, sets of sentences with qualifiers such as he is the big cheese or a small.

Now, when you go through this, will you do that? That is, will you give us your ideas as to which way -- and you may not have specific ideas. You might say either -- when you think about the ways in which in particular instances one might make these more sensitive and suggest some.

MR. WALKER: Yes.

VOICE: I am not saying -- I mean, you may not have the right suggestions. Neither may I and neither may
anyone, but I think it would be helpful to have the concrete suggestions.

MR. WALKER: I think one problem is who is going to use the rankings, and the problem is if you give to a probation officer the task of deciding whether somebody was the big cheese or not, it is going to make things very difficult and there could be all kinds of arguments, and it might be -- I think the way we see it as being done -- is having the (inaudible) a definite system of easily determinable effects done by the probation officer is to get a target sentence or target spot in the guidelines and then say that is where the target is, but, Judge, it is up to you to decide on the more intangible factors.

VOICE: You can, or you can say, all right, it is 18 to 20 months for the typical person with this offense, typical involvement, right, and, Judge, if you think involvement is significantly greater than typical; i.e., master mind, then take that into account as an aggravating feature.

Or you could say, and/or raise the offense, raise the level, go into a different box.

Or if he was just somebody spur of the moment, move it down, mitigating, or you might say go to a different box.

And so I am just interested in getting you to
think in part which offenses one should do that for and specifically how should we do it.

I don't know, you may be indifferent. I mean, you may end up thinking, well, there is no obviously better way to do it or worse way to do it, but I think it is worth trying to looking at things --

MR. WALKER: Yes.

VOICE: And somebody out in the State of Washington may know how that system is working there.

VOICE: Everybody is going to use this -- the lawyer that defends the man in the initial incidence; the prosecutor, trial judge, probation officer, right straight down the line. Everybody is going to use this to enter their calculations somewhere along the line.

MR. WALKER: I agree with you completely. It is just now, as you know, the probation officer attaches to the presentence report a parole guideline range, and it is a fairly easy job to do comparatively and there usually isn't too much argument about it, and it is a useful thing for the judge to have.

But it won't be useful if the probation officer has to take into account things which the probation officer is not in a position to finally decide.

But I agree with you, the guidelines -- I think we would like a system where we can in some way quantify
these intangible factors, such as level of involvement, but leaving a certain amount of flexibility so that if the numbers really don't fit the case that the judge can go even further.

VOICE: But it isn't the probation officer that can impose the sentence. It is the judge. He will look over that probation report. If he doesn't agree with it, he won't follow it.

MR. WALKER: I think that is right. It is maybe what the probation officer should do is come to a final evaluation and say I have determined that he was the big cheese, but there is going to be a lot -- so much controversy about that among the lawyers and the prosecutor.

VOICE: All probation officers have slants, judges have slants, and they generally adjust to those things when they come up.

MR. WALKER: But it is, I think -- I guess the point of this exercise (inaudible) is to eliminate or reduce these slants to the extent possible.

VOICE: No, it is to make it available to reflect them to a reasonable extent, the extent that they are reasonable.

CHAIRMAN WILKINS: Any questions to my right?

VOICE: Yes. Mr. Walker, I think all of us
agree that generally offenders should be held accountable for their illegal behavior.

Could we sort of agree on that?

Then in your statement in a footnote you said, sentencing judges should look only at the offense of conviction, and then you went on and made a -- sort of modifier -- and such other facts that are established in accordance with the procedures proposed in the federal defender position paper.

Now, I haven't read that, so I am not sure what that is, but it sort of follows up the earlier discussion, and you know.

MR. WALKER: Yes.

VOICE: I think it is -- I mean, you know, do we want to look at what the person actually did?

MR. WALKER: I think that we --

VOICE: And should we hold him accountable for what he really did. The truth.

MR. WALKER: By and large, we do want to do that. However, there are problems if you just say that in the abstract, I believe.

For example, let's say a person is charged with a crime which has a higher punishment if it is done with a weapon than if it isn't done with a weapon, which is generally the case. Well, let's say armed bank robbery has
a different punishment from unarmed bank robbery. If the
prosecutor charges the defendant with unarmed bank robbery,
and then in the sentencing phase of the case says, well,
really, your Honor, he was using a gun and we just charged
him with unarmed bank robbery, it is actually armed bank
robbery, we don't think the guidelines should be allowed to
take into account the fact that actually a gun was used or
if the prosecutor so alleges.

And in this respect we adopt what we understand
to be the position or we urge the position that both
Minnesota by case law and Washington by statute seem to have
obtained.

On the other hand, for factors which the presence
or absence of which do not create a different crime, another
statutory crime, we think those factors have to be decided
in some cases by the judge; for example, the amount of money
involved. If the guidelines but not the statute creates a
difference between greater than $50,000 or less than
$50,000, we think that the judge will have to determine that
fact if there is a dispute, and we urge the use of the rules
of evidence and other fair procedures.

So to that extent and these other factors like --
that were involved -- if we are acting under duress or
something of that sort, we also believe that a judge after a
hearing from both sides should apply the rules of evidence
and should make a decision, and in this respect we think
that the statute offers a -- has to reform the present
procedures where the prosecutor will get up and say
something, the defendant will get up and say that the facts
are completely different, and the judge basically doesn't
have to make a decision. He can just decide what he wants,
which way his feeling is.

And so it offers an opportunity for a certain
amount of fairness in sentencing which didn't use to exist.
On the other hand, I believe none of us can deny the fact
that it is going to make sentencing in a great many cases a
very, very complicated process with all kinds of
opportunities for appeal, and many of us are rather worried
about the effect of this whole enterprise on the tort system
and even in its ability to process civil cases and other
court cases.

VOICE: Back to the bank robber for just a
second.

Can you imagine a prosecutor, when he has a case
where it is clear that the bank robber had a gun --
oftentimes it is not clear, but in cases where it is clear
-- I mean he pulled out the revolver and maybe there is a
photograph -- now can you imagine in a case like that where
a prosecutor for -- can you think of any reason why he
wouldn't charge robbery with a weapon?
MR. WALKER: I can actually.

VOICE: You can?

MR. WALKER: I can think of reasons where, if there was some doubt --

VOICE: Well, there is no doubt.

MR. WALKER: Right.

VOICE: But can you still think of a reason where he may not?

MR. WALKER: No, I can't.

VOICE: Cannot think of any.

MR. WALKER: Well, perhaps, but in the normal case, if it is a clear case with a gun, he will charge a gun. But if it is not a clear case and he has some doubts about whether he can prove it, we certainly don't want to be a -- and the present system offers a way of -- sort of a back door.

VOICE: What about the same bank robber and instead of one bank robbery there were 10 bank robberies, everyone documented, he can be indicted on them, there were surveillance photographs, you have the witnesses? There were 10 bank robberies.

MR. WALKER: Well, that, as you know, Commissioner, is one of the most difficult problems in sentencing and even with the parole guidelines. The parole guidelines have a rather artificial system of adding up
multiple offenses, so called, and that -- all I can say to that is that is a very, very difficult problem. I think the parole guidelines attempt is a pretty good one, but it is (inaudible).

VOICE: I am not interested in the parole guidelines. I am interested in what we are going to do in the future when a guy robs 10 banks and most of them, 95 percent of the cases are plea bargained. I mean, if you believe that offenders should be held accountable, are we going to hold them accountable? You know, if you really did it, do we hold him accountable?

That is the question.

CHAIRMAN WILKINS: Mr. Walker, if you can solve the issue of consecutive concurrent sentencing today, there will be no Commission --

(Laughter.)

VOICE: Counsel, you may be the closest person we are going to get to be able to answer the question as to how you are going to get around the United States Attorney charging the sentence and taking this -- imposing a charge and thereby more or less sabotaging or not reflecting a proper sentence that might be -- that a person might consider proper.

Have you any ideas about that?

MR. WALKER: Well, one hears a lot about the
power of the prosecutor and oppression by the prosecutor.

But I am not perhaps as troubled by some of that as perhaps
I should be, but if the prosecutor can prove that somebody
committed 50 crimes, even though they are just 50 separate
telephone calls as part of one overall scheme, he has every
right to bring an indictment.

I do think, though, that the guidelines should be
able to reflect the fact that the actual behavior in a case
like that is similar to a case where a prosecutor charged
maybe five incidences of -- five separate acts of fraud but
that the scheme had been going on for the same length of
time, so that the sentence will end up to be the same.

In other words, I don't think you can just
multiply. If there are 50 fraudulent telephone calls, one
sentence by 50. Obviously, you can't, and the -- but some
of the factors like length of planning or the amount of time
devoted to the activity are the things that really should
resolve that or help resolve the disparity that might come
from different prosecutorial factors.

But it is similar to the question about multiple
offenses and how you treat those. If you can solve the
multiple offenses problem, you may go a good part of the way
toward solving whatever problem might exist from different
prosecutorial factors.

VOICE: Wouldn't you solve it by letting him
charge a representative group of offenses, say whatever was involved -- car theft, bank robbery, mail fraud -- and us give the judge enough latitude to impose a reasonable sentence for what he had done, even though they had engaged in some other criminal activity?

MR. WALKER: I think --

VOICE: Judges and juries sort of resent and you don't get too good a results sometimes when you are bringing 54 indictment -- count indictments.

MR. WALKER: I agree with you completely, Judge. I just think with the present Parole Commission guidelines there really is not that much -- if one prosecutor charges 50 and another 10 counts for the same case, the parole guidelines usually come out with largely the same result, I would think.

VOICE: Well, I am talking about sentencing.

MR. WALKER: Well, and we would hope that the guidelines would --

VOICE: Men on the Hill don't want us to let the U.S. Attorney bypass these sentencing guidelines.

MR. WALKER: And I guess what I am saying is that I think the parole guidelines don't let them do that, and I would hope of course that your guidelines would not.

VOICE: That is too far down the line for the fellows on the Hill. They want to avoid it at the outset.
MR. WALKER: Well, I am not sure that this Commission has the power to tell prosecutors what they can and can't charge. I suppose the prosecutors can charge every offense that he can prove, even if there are a thousand of them.

VOICE: Or not prove or not charge any offense that he doesn't want to charge, decides not to charge?

MR. WALKER: Right. I agree with that.

VOICE: That is the fly in the ointment.

MR. WALKER: Well, given the maximum sentences which exist, I suppose there are instances where a prosecutor could charge a misdemeanor with a low max for a very serious crime, but then he is presumably doing it for some rational reason, and if he isn't, I mean, there are those procedures other than sentencing guidelines (inaudible).

CHAIRMAN WILKINS: Thank you, Mr. Walker. We are going to move on. I will tell you we do appreciate, again, the work that you and your association have done, and we look forward to working with you.

MR. WALKER: Thank you.

CHAIRMAN WILKINS: Thank you.

Our next participant is David Conover, who represents the National Rifle Association. We are glad to have you with us.
MR. CONOVER: Thank you very much, sir.

I would like to just run over some highlights of our written testimony and not give the entire thing. I will be glad to answer any questions you may have later on, especially about the three firearms incidents in your (inaudible) questionnaire.

On behalf of the more than 3 million members of the National Rifle Association, I thank you for giving me this opportunity to contribute to your valuable efforts (inaudible) purposes and objectives of our association, and second among those purposes is to promote public safety, law and order, and the national defense.

I wish to address sentencing and sentencing procedures in three perspectives -- first, the armed criminal and weapons of choice; second, the armed career criminal and drug trafficking; and, finally, violators of regulatory firearm laws.

Since 1958, the NRA has advocated mandatory terms of imprisonment for persons who use firearms and other weapons to commit violent crimes. The hard evidence from states that support this public policy proves conclusively the merit of imposing strict jail time on violent criminals.
Throughout the nation, mandatory penalties show particular effectiveness in reducing predatory crimes like murder and robbery that crimes research shows are most feared by citizens.

While these strides in crime control are significant, I submit that they are limited by targeting firearms as the only crucial weapon carried by dangerous criminals.

We would encourage this Commission to adopt policy guidelines for judges and parole boards that take into account the importance of minimizing the disparity in sentencing between violent criminals who use firearms and those who use other weapons.

Violence is a common denominator, but the tool used to commit that violence should not be treated selectively or focused solely on firearms, as federal law currently mandates.

Second, the effectiveness of mandatory penalties on armed career criminals and drug traffickers must be weighted. The mass of evidence indicates that if armed career criminals who commit vastly more than their share of serious crimes are subjected to mandatory penalties, dozens of crimes per year will be prevented.

The importance of adding armed drug traffickers to those subject to mandatory terms of imprisonment in the
new federal law is clear. Drug trafficking is a crime which disproportionately involves the federal government.

Most violent crimes are state offenses and such criminals comprise the bulk of state prisons. That is not the case with drug traffickers, who represent a relatively small percentage of state felons but a relatively large proportion of federal prisoners.

The increasing federal role in trying to curtail the problem of drug trafficking and the crimes associated with the business justifies stringent penalties for armed drug traffickers.

In any consideration of mandatory penalty legislation it must be noted that these provisions can only be effective to the extent that they are requested by prosecutors and imposed by judges. It is incumbent on this Commission in our estimation that you encourage a sentencing policy and guidelines which call on judges to be faithful to the law regarding mandatory penalties.

Finally, the NRA derives a sharp distinction between mandated jail terms of those violent criminals that pose a threat to society and those individuals who commit technical violations of regulatory firearm laws. Judicial discretion and leniency may be called for when dealing with persons who have committed minor, victimless, technical, and paperwork violations of federal gun laws. In general, we
oppose stringent or mandatory sentencing of persons whose only transgression was to carry or transport firearms in violation of federal, state, or local law.

For an example of this, Massachusetts adopted a mandatory prison term for carrying a firearm without a license. The result, the Bay State has seen its violent crime rate skyrocket and its homicide rate near a national trend, but its prisons incarcerate persons who had never before committed crime and who were not arrested attempting to commit a violent crime.

Indeed, the most recent egregious case involved a citizen who used an unlicensed firearm in self-defense and now faces a one-year mandatory jail sentence. Authorities had previously refused to act against the man's antagonist despite threats the citizen had received from his assailant, a man with a police record.
-- had received from his assailant, a man with a police record.

The State Supreme Court recently upheld that sentence for carrying, under the Bartley-Fox Mandatory Sentencing Law, although the use of the ground was found by the jury to be justifiable self-defense, saying that before the days of the mandatory one-year sentence, the special circumstances involving the accused could be reflected reasonably in the sentencing. That option is no longer available.

The mandatory penalty provision was imitated in New York, and now a subway employee working in a system where courts have ruled the police have no obligation to protect citizens from violent crime, faces a potential mandatory penalty for carrying a handgun with which he saved his life from violent assault inflicted by two robbers.

Although carrying a firearm without a permit was not on the Offense Seriousness questionnaire sent out by this Commission, when it appears in Justice Department surveys of perceived offense seriousness, the public at large tends to rank it as relatively inconsequential.

We urge this Commission to establish a policy and guidelines with regard to technical violations of the federal gun laws.

Congress is currently considering the Firearms
Owner Protection Act which, if passed, would make it necessary to prove that violations of the federal gun law were willful for many of the technical, paperwork violations of the law, which would reduce some of the offenses to misdemeanor level.

I hope that reform legislation passes. It would not, however, entirely solve the problems faced by gun owners.

Beside the mandatory penalties for committing violent or drug-trafficking crimes with guns, most of the offenses possible under the Gun Control Act, whether felony or misdemeanor, would remain malum prohibitum rather than malum in se offenses.

We believe that sentencing guidelines should be aimed at swift and certain punishment for serious, violent and dangerous armed criminals, but at a policy of leniency for technical, paperwork and malum prohitium violations of law regarding firearms acquisition, transfer, transportation and disposition among the generally honest gun owners of this country.

Thank you very much.

And I would like to add that I was pleased to hear Mr. Walker and Mr. Walsh express reservations about the question regarding the individual with a prior felony record attempting to buy the shotgun. That tends to be the main
fellow bought d with regulatory firearms laws, is that they
catch those individuals, as Mr. Walker indicated, who are
not aware that they have a prior felony conviction, who have
a relative old felony conviction and have since lived
basically law-abiding lives. They catch those individuals,
but they do not affect the hard-core, violent criminals that
should be the target of such laws.

CHAIRMAN WILKINS: Well, that is a common federal
offense, a felon in possession of a firearm, as you know.

MR. CONOVER: It is, unfortunately, an offense
that is rarely prosecuted on top of other crimes, however.
You rarely see an armed robber with a prior conviction also
tried for possession of the firearms.

CHAIRMAN WILKINS: That's correct. Because most
of the prosecutors feel with the armed robbery charge, the
possession of the firearm, paling in significance to that
major charge.

But what about the fellow who has a state felony
conviction, housebreaking, and he goes into the pawn shop or
he goes to the local K-Mart, and he buys a pistol? And he
fills out the forms, and of course, he must falsify by
saying he does not have a record. And of course, the
computer spits him back out, and they go pick him up.

99 times out of 100, you'll never be able to
prove -- at least, the FBI could not prove AGF, that this
fellow bought it for the purpose of committing a crime.

And usually, the defendant can explain a reason why, self-defense or 410 shotgun, rabbit hunting. How do we view this? Or shouldn't we make a difference between a pistol and a shotgun versus an automatic weapon, or is there some distinction to be made there?

MR. CONOVER: Well, that was one of the problems I had with one of the earlier comments that -- Mr. Walsh saying that the nature of the firearm was such that he did not believe that it was a crime gun or something along those lines.

We would prefer not to draw distinctions between firearms, and we would prefer that the convictions or charges result from actual criminal activity and that leniency, or at least a high level or discretion on the part of individual judges rule, when the offense is only the regulatory firearms violation.

CHAIRMAN WILKINS: Any questions to my right?

VOICE: I had a question about the NRA's position on the seriousness of, say, a robbery with or without a weapons. I mean, would you summarize evaluation of the differential seriousness, when a weapon is used in a crime and when a weapon is not used?

MR. CONOVER: In general, any dangerous weapon or weapon with which the offender could inflict serious bodily
harm, we would view as much more serious an offense than an unarmed robbery.

Now in the written testimony, we refer to the Georgia statute, which covers all deadly weapons. And we look at that as a very good example of a mandatory sentencing law which applies to a wide range of of weapons which may be used to inflict harm.

VOICE: So I were to summarize, my understanding of your position is that, while you would deemphasize the seriousness of these, what you call "technical violations," you would focus on violations using weapons --

MR. CONOVER: Oh, yes, the misuse of weapons.

CHAIRMAN WILKINS: Any questions from over there?

VOICE: Since I am from Massachusetts, I tend to react a little -- I don't agree that our gun control law has led to an increase in the murder range, but --

MR. CONOVER: I didn't mean to imply that.

VOICE: But the -- I'll leave that aside.

Also, you realize, for our purposes, all -- everything we do is mandatory, in a sense. And in another sense, it's not mandatory. We have fixed sentences, but the judge will be able to go outside the fixed sentence for aggravating or mitigating circumstances. And that is going to be true for all the offenses.

So with that in mind, it seems to me, you've put
your finger on a rather good point.

With the gun control -- not the -- with the registration offense here. You lie about a prior felony. In some of the cases -- the cases which I've seen on appeal, if you look at the presentence reports, the ones that were brought, these people were probably people involved in a serious gang. They might have had a long history of very undesirable unactivity, and they were caught for this.

On the other hand, sometimes, as you point out, it could be some poor guy who just made a mistake once.

MR. CONOVER: Exactly.

VOICE: All right. Now, since both are possible, how do we, in the guideline, reflect that difference? What's your idea? I don't expect you to be answer that. I think it's a difficult question, but I would be interested in having your thoughts about it.

MR. CONOVER: Well, I'm not sure we can give you an answer, but I can say that the mandatory, such as the Bartley-Fox or the Dodge-Carey --

VOICE: Well, that isn't up to us, you see.

MR. CONOVER: I understand that, but you can set a precedent, and that is the wrong way to go about it, because you do not allow the judge to make those kind of determining factors on whether there's some previous history of violence or that the individual is essentially a
law-abiding citizen, who is caught up in this net.

In terms of that, I think that -- in terms of the regulatory, which do not involve an actual criminal offense or during the commission of some crime, that there should be a wide range of discretion on the part of the judge.

Now in terms of carrying, using, transporting during the commission of the crime or in a conspiracy to commit a crime, in those cases, we believe a mandatory should kick up, because those are clear-cut cases.

CHAIRMAN WILKINS: Thank you very much.

We appreciate your appearing today, and we look forward to working with you in the future.

Mr. Alvin Bronstein. Mr. Bronstein represents the American Civil Liberties Union.

We are delighted to have you with us. We appreciate the work that has gone into the responses that we have already received from your organization.

TESTIMONY OF ALVIN BRONSTEIN, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION - NATIONAL PRISON PROJECT.

MR. BRONSTEIN: Thank you, Judge. Members of the Commission.

Unlike the previous speaker, I represent slightly in excess of a quarter of a million members, only three of whom own firearms.
(Laughter.)

All of three being early 17th century muskets.

(Laughter.)

Let me briefly summarize my written testimony, the focus of which was that we, I think, have to look at the elements or issues that go into the particular offense in establishing offense severity rather than the cold facts. The best illustration of that is in my own office, where I circulated the Commission's questionnaire. We got great disparity on a couple of the offenses, because people were outraged by a particular offense, the estrange husband going into a federal building and shooting his wife, without thinking it through and looking at the elements.

Those elements, as we see them are the number of persons that are actually injured or potentially injured. Therefore, the organized crime head, the heroin importer, have the potential for great injury to a great many people. Rank them high.

The estranged spouse, the Social Security forgery, don't cause injury to a lot of people. Great injury to one person but not to a lot of people. On that element, you rank low.

The degree of personal gain involved.

Again, in organized crime, you have corrupt officials. Great personal gain.
Rank high.
The person who gives a false alibi, illegal camper, apparently -- apparently on the facts, no personal gain involved.

For that element, you rank low.
Are there multiple elements?
For example, most of the people in my office ranked the bank robber without the weapon, who was a $10,000 robber, higher than the bank embezzler, who was also a $10,000 robber.

I see another element in the latter. It's not only a violation of the law, in terms of robbing a bank of $10,000, but a violation of personal trust. Second element.

I would rank that (inaudible) high.

CHAIRMAN WILKINS: You would put the embezzler higher?

MR. BRONSTEIN: Yes, sir.

Are there -- what is the possibility of achieving general deterrence?

And that was a very trick thing, because, generally, I don't believe in general deterrence, except the data that I've seen, mostly in Europe, which suggest that in two areas, we can achieve general deterrence.

One, which has no application to this, is drunk
driving, can work.

The other, which does, and that is economic or
white collar crime. There is data that you can achieve
general deterrence with the degree of thought that goes
into the economic crime. That is possible, when you write
that more severely.

The bank robber who goes -- the street criminal,
the estranged spouse. There is really no possibility of
general deterrence. That doesn't involve the same kind of
thought process.

So that -- so that particular element, you rank
low.

The likelihood of repeated criminality without a
severe sanction, individual deterrence, if you will.

Again, the economic criminal, the organized
crime, and if they get away with it, they go on and on and
on.

The estranged spouse, the draft evader. There is
no likelihood of repeating that without or with a severe
sanction.

So for that purpose, you rank it low.

The element that is most difficult to define and
which I consider the most important, and that is, does the
offense constitute a threat to the fabric of our society,
generally or sort of a general lawlessness?
I disagree with a lot of people that street crime is the most serious thing facing our society. I just don't believe it threatens the fabric of our society. It changes some behavior. It is serious in this country, and we need to do a lot about it, but I don't see that as threatening as the corrupt official.

VOICE: What about around here, where you can't go in certain areas?

MR. BRONSTEIN: Well, that changes habits and behavior. It doesn't create, in my mind, a fear that our society is collapsing. If I hear about a -- excuse me, judges(?) -- judge who takes a bribe or a high government official or a corporate official that commits an act of lawlessness, that I find very serious, because it creates an atmosphere, a feeling that it's okay to break the law, because, after all, look, those people do it, why not everyone else?

That's not what happens when somebody breaks into 20 liquor stores in Southeast Washington. People don't think, well, anyone can do it, because they won't get away with it. They think those people will be punished.

They don't think the high corrupt official will be punished.

VOICE: You can go in areas in this town, and they will be selling dope like playing cards.
MR. BRONSTEIN: Yeah, but I don't think the person who is selling the dope on the street --

VOICE: Any person that goes in there is susceptible to some involvement.

MR. BRONSTEIN: That's right.

VOICE: Those are serious people. Serious criminals, congregating in certain areas.

MR. BRONSTEIN: That's true, but I don't think that the person on the street engaged in selling heroin threatens the fabric of our society. The person who's bringing it in, the perhaps corrupt officials who are allowing it to come in, they are threatening.

VOICE: Under our law, the principal is liable the same as the other guy.

MR. BRONSTEIN: Well, we're not disputing what our law is. I am telling you what the elements ought to be, in my opinin.

I think that those acts which generate in the public mind a feeling that anyone can get away with crime because high officials do it, those, I think, are very threatening.

If I may be presumptive for a moment, let me share some admonitions with you. I think one of the things you have to keep in mind is that deprivation of liberty is an enormous exercise of state power. Prison is harsh. It
is often counterproductive, and we know it is costly.

There are other democracies in the Western world
who recognize that as a matter of policy. The Scandinavian
countries in their statutes say, we recognize that a prison
is a harmful sanction. Therefore, we will use it
parsimoniously.

I think the Commission ought to keep that in
mind.

Imprisonment -- and scarce prison beds is a
scarce resource -- ought to be utilized for the people who
really deserve it. People who injure large numbers of
people.

VOICE: Don't you recognize a difference between
comparing us to the Scandinavian countries? I come from
Minnesota, where we also compare everything to
Scandinavian.

(Laughter.)

VOICE: And --

MR. BRONSTEIN: (Inaudible) with Scandinavian --
Minnesota has a greater predominance of German ethnics than
they do Scandinavian.

VOICE: (Inaudible) more Germans than Swedes.

More Germans than Norwegians, but not more Germans than
Swedes and Norwegians.

(Laughter.)
MR. BRONSTEIN: Of course, you cannot make all comparisons. They are a smaller country. They're not as homogeneous as they used to be. But there are things they can learn from us. Their pretrial detention is outrageous compared to ours. They have no presumption of innocence.

And there are things we can learn from them. And that's all I'm suggesting.

It seems to me that, except for those people who we can clearly identify as meeting the serious criteria, we ought to reserve imprisonment and try other sanctions.

The last thing I want to say is that don't expect to come up with a perfect system. If you set that as your goal, it will be very frustrating.

We don't live in a perfect society. If we did -- or a perfect world. If we did, we wouldn't need prisons in the first place.

I don't know what the answer is for many people, other than prisons. I can't come up a better answer for you.

Don't expect perfection. I think if you are guided by a sense of justice, a sense of equity, a sense of fairness, a sense of reality, you'll do a good job, which hopefully, will be a mode for the rest of the country.

If you have any questions, I'll be --

CHAIRMAN WILKINS: Thank you very much.
COMMISSIONER CORROHERS: Mr. Chairman?

CHAIRMAN WILKINS: Go ahead.

COMMISSIONER CORROHERS: A couple of questions back to the case involving the husband who shoots the wife.

I was concerned that there was no mention of the fact that it was a public building as compared to the privacy of their own home, so to speak.

Would you have differentiated with your ranking, had the shooting occurred in the home or was that considered?

MR. BRONSTEIN: I would have, and I have to admit that I didn't consider that factor.

COMMISSIONER CORROHERS: I thought you didn't.

MR. BRONSTEIN: It came out in my staff's post-ranking conversations. Someone pointed out, did you forget that this person going into the public building could have injured other people?

COMMISSIONER CORROHERS: Right.

MR. BRONSTEIN: I forgot that element.

COMMISSIONER CORROHERS: I could see that that was totally not there.

MR. BRONSTEIN: The other thing that was interesting was that people immediately assumed -- the women in my office immediately assumed that because it was a husband killing a wife, that there was an element of the
abuse of women involved --

COMMISSIONER CORROTHERS: I could see that that would --

MR. BRONSTEIN: -- and admitted that they would have felt differently in ranking it, if it had been -- the estranged spouse had been a woman that shot the husband. And I think that's something that will have to be considered.

But you are right. I neglected to look at the public feature of it.

COMMISSIONER CORROTHERS: One other comment, is that having been a prison warden, I agree with you that the deprivation of liberty is, in fact, the most serious sanction. And you already said that you didn't have the answers, in terms of what the other sanctions ought to be or the options.

I would just stated from a personal perspective that I certainly would be interested in your organization giving some thought, in fact, to those options and that at such time in the future when we have a hearing addressing that, that we could deal with that.

MR. BRONSTEIN: I think you may have slightly misunderstood me, or I didn't make it clear, Commissioner Corrothers, that I can -- certainly will provide a range of other sanctions. What I was trying to say is that a substitute for prison, I don't know what the answer is.
For those people that we want to sort of really protect society from, I don't know what the answer is, other than prison, but for those that don't need imprisonment, there are a range of sanctions, some of which the Federal Government is already using -- fines, restitution, halfway houses, probation.

COMMISSIONER CORROTHERS: I am not sure that we are, in fact, using all of the options that are available, and I am not sure that there can't be suitable -- well, options from the point of a better protection of society than what we have.

MR. BRONSTEIN: That's true.

COMMISSIONER CORROTHERS: And so I would certainly be interested in your organization looking at options in terms of, from a protection of the public standpoint and options that would, in fact, reflect punishment rather than what we have currently.

MR. BRONSTEIN: We certainly will be doing that, and I have indicated to Commissioner Baer, who heads the Subcommittee on Alternatives, that we will be compiling advice to put to Commissioner Baer's subcommittee.

CHAIRMAN WILKINS: Commissioner Block.

COMMISSIONER BLOCK: Yes. I want to return to this question of seriousness, because maybe I don't understand what you mean by "society," when you claim that
violent crime is not a threat to the fabric of society.

I'd like you to expand on that a little bit further. I guess -- it's hard for me to understand how --

MR. BRONSTEIN: What I was talking about is the individual criminal act. The person who shoots somebody on the street. That is a serious offense, but I don't think it is threatening to the general fabric of our society, the same way that the Under Secretary of Defense accepts a bribe or a high law enforcement official accepts a bribe to cover something up. I find that much more threatening in a general sense, because it creates the feeling that we really have no laws in this society, because, look, here are respected people who are violating the public trust, who are undermining our system of law. The people who are supposed to uphold the law.

The street criminal, I just don't see in the same light. I don't think when people stop and think about it, seriously, carefully, feel the same way. We react immediately and emotionally to the street criminal. That's a horrible crime. It is a crime that usually is on the front page of the tabloids or even, you know, The Washington Post. Carried on the third page is another kind of story, but that is the one that I think people really worry about.

COMMISSIONER BLOCK: Let me return to that. It seems to me that -- and I am only doing this intuitively,
that if you have criminals loose, and you have no security
of life and property, the government officials seem to me to
be superfluous at that point.

MR. BRONSTEIN: I don't think our society is like
that. I mean, we have a lot of predators out there. I
believe that you can walk in most parts of this city and
every other city in this country without a great deal of
fear, as long as you exercise a reasonable amount of
caution.

COMMISSIONER MC KINNON: Not at nighttime.
(Laughter.)

MR. BRONSTEIN: I do it, Judge McKinnon, and I
think it is more in the --

COMMISSIONER MC KINNON: There are places here at
nighttime, you'd want protection.

MR. BRONSTEIN: I've lived in the city for 14
years now. I have not changed my behavior just from fear of
being mugged or assaulted.

COMMISSIONER MC KINNON: Well, I'll tell you the
general impression is that you should be feared -- that you
should be afraid. That's what people generally say in this
town.(?)

MR. BRONSTEIN: Well, I think that is part of the
mythology that we have perpetrated on the public, that is,
that those are the things we really have to worry about and
not worry about the problems in the very highest places.

COMMISSIONER MC KINNON: With the killing rates on the streets here every day?

MR. BRONSTEIN: Which are going down all the time.

COMMISSIONER MC KINNON: Well, they were high enough to begin with.

(Laughter.)

MR. BRONSTEIN: And they are still too high. One killing, a killing a year is too high.

COMMISSIONER MC KINNON: Yes.

MR. BRONSTEIN: And you know, I'm not trying to say that the crime problem is not serious. It's very, very serious.

VOICE: Do you think these headlines that you mentioned contributed to this misguided perception?

MR. BRONSTEIN: I think so. I mean, it is like the media reporting a person who is out on parole committing -- or on a work release program -- committing an offense. And that is all the story talks about. They don't tell you in the story, the way most other Western European publications will, that -- in the second paragraph -- that 983 other people went through this program without committing and offense.

COMMISSIONER BLOCK: Isn't it true, though, that
the single largest cause of death among young blacks is homicide?

MR. BRONSTEIN: That's right. And if --

COMMISSIONER BLOCK: And that's not a problem?

MR. BRONSTEIN: -- the previous speaker's

organization would ease up a little, we could something

about that.

(Laughter.)

Canada. Canada abolished the death penalty and

simultaneously established very rigid gun control 14 years

ago. The rate of homicides has gone down every year since.

CHAIRMAN WILKINS: Commissioner Nagel.

COMMISSIONER NAGEL: Is it your position that if

we fix the sentence for a spouse murder at probation or

suspended sentence, that would have no impact on the

behavior of others? Is that it?

MR. BRONSTEIN: That proposition, although I
don't think that would be the appropriate sanction, I think

a person who takes another person's life ought to be given

some -- some part of the harshest sanction we have. I think

that person ought to be imprisoned for a relatively short

period of time, to make the statement that he cannot, in our

society, solve your emotional problems by killing someone.

COMMISSIONER NAGEL: But if you set it a

suspended sentence --
MR. BRONSTEIN: But I don't think -- whatever you did -- whatever you did, I don't think would have any effect on others, because I don't think people think about sanctions when they are going through that kind of emotional crime of passion we've just contemplated.

VOICE: Would you say a short term for murder?

MR. BRONSTEIN: For that kind of murder.

VOICE: For what we might typically call manslaughter. Is that what you're referring to?

MR. BRONSTEIN: All right(?)

VOICE: This was first degree murder.

COMMISSIONER BREYER: Mr. Bronstein, I know you have considerable experience with -- in working with people in prison -- in prisons, in general. And I am really addressing this question to you, but also other people who have testified and who are likely to testify.

I'd like you to think about it -- you may have no answer now -- to about what sources of information we turn to when we eventually rank these 300 or so crimes in this book in order of seriousness.

Now I can think -- I want to be certain we don't leave something out. And I can think of seven different sources we are turning to. I mean, we will turn to public opinion as expressed in yours and other people's answers to this type of questionnaire and the Justice survey and
newspaper surveys that Wolfgang -- Professor Wolfgang surveyed several.

That is just one category.

We will have the rankings of specific crimes by groups who have worked and have considerable experience, as you do, in different areas of law enforcement.

That's two.

We looked at model penal code rankings.

That's three.

We will look to maximum and minimum in the individual statures set by Congress.

That's four.

We looked at the parole guidelines.

That's five.

We will look to actual time served now in prison, as determined by surveys, with the help of the probation people who will get us some of this information.

That's six.

And we will look to relevant state experience.

That's seven.

All right, somehow having looked to that, we will then eventually have to make our rankings.

So while I don't expect an answer now, I want you and other people to realize that we have those seven areas in mind, and you may be able to think of an eighth specific
source of information, or a ninth or a tenth, in which case, you may produce it for us.

You may have an answer to that right now or you may not.

MR. BRONSTEIN: I'd rather reserve on that, Mr. Breyer and get back to you.

COMMISSIONER Breyer: Right.

COMMISSIONER Mc KINNON: I want to say this, just generally. It is generally considered that the loss of baseball in the nation's capital is due to the fact of its location.

MR. BRONSTEIN: Well, I don't know. I haven't followed that controversy, Judge. I stopped being a baseball fan many years ago. I prefer basketball now.

COMMISSIONER Mc KINNON: To follow our prior discussion.

MR. BRONSTEIN: But I don't see -- why do we still have a hockey team that has risen to great heights. We have a football team, and we have a basketball team.

COMMISSIONER Mc KINNON: One's in the daytime and the other one isn't in the same place.

(Laughter.)

MR. BRONSTEIN: I'm not an expert on that. I'll take your word for that.

CHAIRMAN WILKINS: Thank you very much for
assisting us today. We look forward to working with you.

We're going to take just a ten-minute break at
this time. At 10 minutes after the hour, we'll start back.

(Recess.)

CHAIRMAN WILKINS: Our next participant in this
hearing is the Rev. L. William Yolton, representing the
National Interreligious Service Board for Conscientious
Objectors.

Rev. Yolton, we appreciate your appearance here
today. I note that you notified us that you have a chart
that you wish to be included with your written testimony.

REV. YOLTON: Yes.

CHAIRMAN WILKINS: Let the record show that chart
was just delivered to me, and I have distributed it to all
the other Commissioners, as well as a copy has been
delivered to the reporter, and it will be made a part of
your testimony in this record.

REV. YOLTON: Thank you, sir.

CHAIRMAN WILKINS: Thank you.

TESTIMONY OF REV. L. WILLIAM YOLTON ON BEHALF
OF THE NATIONAL INTERRELIGIOUS SERVICE
BOARD FOR CONSCIENTIOUS OBJECTORS.

REV. YOLTON: I am a Presbyterian minister and
trained in the field of traffics(?) And I am now the
Executive Director of the National Interreligious Service
for Conscientious Objectors.

I will summarize the written testimony.

Our organization represents the principal religious bodies in the United States on the narrow issues of conscientious objection and selective service practice.

Basically, the position of the National Interreligious Service Board has been opposition, in general, to the conscription law, but I think probably we are capable of responding to what we think, from a secular point of view might be feasible in terms of administrating the law as it now stands.

As we see it, little is accomplished by incarceration of those who object by reasons of conscience to participation in wars.

Would rehabilitation amount to changing your beliefs because of prison violence, but then you would do violence?

On the contrary, the experience of conscientious objectors of one sort or another over the years has been, in World War I, 17 dies in prison. At other times, there has been very repressive treatment of such prisoners. They're not the popular ones in jail.

And at other points, however, they have been the source often of change within the prison system, sometimes to the difficulties of the prison system, in terms of
leading work stoppages or efforts to change the rules inside
the prison, because, for the most part, the conscientious
objector does not see that they will do their own time,
which is the standard rule inside the prison system that
each person does his own time, but in fact, they are
concerned about the situation of others.

So that very often, the leaders, a person of the
movement for prison reform, leaders, a person of the
movement for prison reform after they get out of jail are
the persons who have been conscientious objectors, as is the
case now in several major prison reform movements(?).

It is our opinion that the finding of the
sentencing judge as to sincerity ought to be a significant
factor in the sentencing procedure.

In general, the person who is since in objection,
whether it be on the qualifying grounds in the present
statute or on other grounds, probably will not benefit at
all from incarceration. That person might more usefully be
engaged in service that they've pledged themselves to in the
society. So that, for instance, Allan Thomas, the brother
of Norman Thomas, who was one of those convicted draft
violaters in the First World War, ended up being one of the
leading specialists on the cure of venereal disease. So
that there is this pattern of persons who have been involved
in these issues, who, in a sense, dedicated themselves in
one way or other to service in society. They don't see
service simply in terms of two years in the military
service, but, in fact, of a religious devotion to a lifetime
of service.

So that we see that these persons probably would
be assigned, perhaps within the range of the sentencing
severity to probation during that time in some meaningful
service in the society.

On the other hand, we do recognize that there are
those who commit violations of the Selective Service Act
purely on selfish reasons. And that determination is not
often easy to find on the basis of the trial record, because
the lay character of selective service procedure and the
failure to provide due process or counsel along the way
means that you have a very mixed up product by the time you
get to the end. And there is no opportunity for the courts
to review, on the basis of fact, whether or not this person
is a conscientious objector, whether they are, in fact,
properly treated.

Britain, for instance, found in the Second World
War that they could accept, through a tribunal proceeding,
which had counsel present, the adjudication of all
conscientious objector cases, assigning some to no duties at
all in the society -- they were the absolutists -- and
assigning others to some form of public service during that
They accepted all categories of conscientious objectors, not only just as our statute provides, those who opposed to participation in war in any form, but also what we now call "selective objectors," that is, those who have a just war principle and did object to particular wars.

So that Britain was able to accommodate that within their society, and I think, probably our society could too, on the basis of a sentencing judge's determination of severity.

As we see it, the incarceration of conscientious nonresistant persons like the conscientious Mennonite, serves no particular purpose. Their function would be to return to society and continue in their peaceful agrarian pursuits.

And for this reason, we think that, as we approach a new draft law process, that we expect that we are going to have more persons opposed to this draft law itself. The modifications have been made administratively by this Administration will probably mean that upon the institution of a draft law in the future, we will once again have a flood of persons who are unable to cooperate even with the registration process.

So already in the chart, I've shown the 19 of the 20 prosecutions. We just had a new prosecution this year.
for nonregistration.

And these include now, traditional peace church people. They used to not do this. This is a new phenomenon in their perception of the use of the Selective Service System itself as a part of the war apparatus. And this perception will probably increase the numbers of person who are objectors to the Selective Service's process.

Changes in the administration of Selective Service eliminating many of the due process rules that had been built in will also mean there will be many more persons objecting to the system itself. Increasing contact with the military, which is part of the new system, will also mean the traditional objector will find it difficult to cooperate.

So I suspect that with the institution of an active draft, we will again have arise a number of persons who are conscientious objectors or objectors in some way to the operation of the Selective Service. 1971, it was the largest single category of prosecutions by the Justice Department. So that we think that this, once again, will be a problem, should it be necessary to return to an active draft.

I have no problems with the grading of the offenses that have been discussed by the successive revisions of the proposed Federal Penal Code, and this
is Felony B and Felony E and Misdemeanor A.

Obviously, there is a different circumstance in wartime, a different circumstance when there is a peacetime draft operating, and still a different circumstance now when there is only a registration required.

At this moment, the sentences, as they are administered by the Parole Board, are running about four months maximum. They are treating it as a period of six months penalty, and with good time, people are getting out at four months.

I think that probably for much of the time that we will need the Selective Service System, for many infractions, this would be the maximum.

There is one particular problem, which I mention in my written testimony, is the problem of they are infractions by Selective Service personnel themselves. They are infractions by Selective Service personnel themselves. The penalty has been so draconian, that the Selective Service System and prosecutors have dropped charges against Selective Service personnel.

Were the grading to be adjusted and specification adjusted to such a low level that it would not be a significant penalty for such persons, you might have a deterrent to their continuing in the abuse of the process.

Now we know of one case where Selective Service
went in an dissolved an entire local board. That was their remedy for dealing with what otherwise would have been demoralizing to the whole system.

So that I think that there could be some distinction between the types of offenses within the system, some distinction between whether a person has refused induction or simply has failed to report and address. Same penalty.

There ought to be some kind of distinction between the types of offense under the Military Selective Service Acts.

And finally, of course, I think that probably the extreme ones, even in wartime than are necessary.

The Soviet Union, which is now engaged in war in Afghanistan, has a statute which allows for two years incarceration for offenses against their constriction.

South Africa, which, in 1983, for the first time instituted conscientious objection as a right, has an offense -- has a punishment of up to six years, but they've only had sentences so far, one month and one year.

So that it seems to me that our sentence level is much higher for selective service violations than anywhere in the rest of the world. Certainly, much higher than Western Europe.

So I would hope that there would be a general
reduction in the length of sentence, and taking account of
the practices as it has actually existed within the
sentencing process and trying to level out what has
probably, for Selective Service, been the greatest disparity
of sentencing of any of the crimes in the middle(?) of the
Code.

CHAIRMAN WILKINS: Well, thank you very much.
Any questions to my right?
(No response.)
Any questions to my left?

VOICE: How do you think it should work -- what
do you think we -- how do you think we should categorize
these, for purposes of sentencing the conscientious
objector?

REV. YOLTON: I would assume that if you once
decide that this person has a serious --

VOICE: He has a conscientious --

(Simultaneous voices.)

REV. YOLTON: -- then I would say, keeping the
grading in mind for equity with other persons --

VOICE: Right.

REV. YOLTON: -- they should be put on a
probationary sentence, and that is the question of diversion
from the criminal justice, from out of the prison system.

VOICE: To include community service, you --
REV. YOLTON: That's right.
Now my assumption is that they are willing, for the most part to do community service.

VOICE: And they are willing to engage in community service.

REV. YOLTON: Yes. Several of those who have now been sentenced, have been engaged in community service.

VOICE: Now what are these offenses? Just signing?

REV. YOLTON: At this stage, the offense -- some of them have not been willing to supply -- willingly supply the information; however, that is obtainable.

In the case of Charles F., he was unwilling to sign the card. He was willing to supply all other information which was available. Most of them -- of 18 of the 20 that have been indicted, they have been public about their refusal to register for the draft. They've been public about who they are; their Social Security numbers are known; they have not concealed their addresses; they've written letters to the President and to their congressman and to general attorney(?).

VOICE: They've been somewhat advocates of others not doing the same, haven't they?

REV. YOLTON: It depends. Some have; some have not.
VOICE: Yeah.

REV. YOLTON: Schlossberg, a religious objector, has been very quiet about his. So it varies a great deal as to whether or not they've been advocates of others doing it.

VOICE: That ought to call for some additional penalty, don't you think?

REV. YOLTON: Well, I have a question as to whether they advocate others breaking the law. That's one question. The Act itself provides for punishment of those who aid and abet. There is a provision for that, but if it is simply free speech, as in the case of Spock and Coffin, who opposed the war and opposed the draft system that supported it, it seems to me that to use the Selective Service law to infringe upon free speech and suppress dissent in the society, is a gross misuse of Selective Service.

VOICE: Even during a war?

REV. YOLTON: Even during a war.

As a matter of fact, Professor Johnson at Rutgers has written a whole book on just war, and it just come out from Yale University Press. And he argues that there ought to be provision, even in our society for selective objective, because this is a test of sensitive consciences within the society of the acceptability of that particular
wa and its prosecution.

VOICE: Of course, I'm not talking about the conscientious objector per se but his going on the stump during a war. He is promoting, in fact, other people to join him.

You do not see that as an aggravating factor to the Act?

REV. YOLTON: I would say that you have to separate that completely. You have to ask whether or not you wish to infringe upon free speech.

Thoreau, obviously, would be jailed much longer than he was for not paying his taxes, because he was advocating that the Mexican War was an unconstitutional war and his taxes used for that war were improperly being administered.

So, yes, I would argue that there should be complete separation in the use of the Selective Service Act as free speech(?).

VOICE: So you would not utilize it as an aggravating factor, is what you're saying?

REV. YOLTON: No, I would not. My feeling is, if you feel deep enough about your convictions being about the wrongness of participation in war, certainly, it ought to be a part of what you are publicly willing to express.

VOICE: Uh-hum.
VOICE: And if that were the case, the problem would be, what -- how -- are you going to put all the Mennonite preachers in jail?

VOICE: A part of our system, the criminal justice system that we must create is to utilize aggravating and mitigating factors with all offenses.

My question to you was, in regard to this offense, would you see that as an aggravating factor? Would you see any factor be aggravating and/or mitigating?

REV. YOLTON: Oh, I would say, certainly, and aggravating factor is always the encouragement of people to use deceitful means to obtain exemption. This abuse is much greater, in terms of persons who deceived the government about their exemption and deferment possibilities than those who opening said "I am opposed to participation in the war."

CHAIRMAN WILKINS: Thank you very much.

VOICE: Just a minute.

CHAIRMAN WILKINS: Yes.

VOICE: Lincoln also said that "Do you mean to tell me that some person that advocates desertion, I can't touch the air on his head, but the man that deserts, I have to shoot him?"

REV. YOLTON: It seems to me, this is one of the problems of civil liberties in a wartime situation.
VOICE: Now we're talking about -- we're not --
we're talking about your problem, your conscientious
objector. He doesn't only work on -- the militant one not
only works on some people who haven't signed up yet or who
were going to sign up, maybe, but don't, but he also works
on people who are in the service.

Now we had them here, I sat on the case, where
they were running what they called "coffee houses." You get
the personnel in and induce them to desert.

Now is that to be winked at?

REV. YOLTON: The question as to whether people
are directly aiding and abetting or whether, in fact, they
are, themselves expressing free speech about the situation.

VOICE: Well, they're aiding and abetting and
they're --

REV. YOLTON: There was widespread dissent within
the society about the Vietnam War.

VOICE: It's all -- it's all --

REV. YOLTON: (?) We never would have gotten out.

VOICE: It's all speech, and all speech is free.

But the consequences are pretty severe sometimes.

REV. YOLTON: Let me -- James Luther Adams has
done a study of dissent in Nazi Germany.

Nazi Germany had free speech. The only
difficulty is, you could not associate to exercise your
free speech. You could stand on a street corner and say whatever you wanted, but you could not organize with others to advocate that position.

VOICE: That's like Hyde Park.

REV. YOLTON: But it seems that this stage, I think one of the things about America is that you can, in fact, organized with others to express dissent in the society, and that we have to look at the question as to how great the danger is in time of war, in order to decide how much limitation freedom of speech there will be.

VOICE: Did you give the statistics during the war on conscientious objectors? How many there were?

REV. YOLTON: 3000 that were imprisoned.

VOICE: How many?

REV. YOLTON: 3000. The statistics are in there. Not the number of total conscientious objectors. In fact, that's not possible for us to get that number completely.

VOICE: How many?

REV. YOLTON: 3000 were imprisoned.

VOICE: Imprisoned.

REV. YOLTON: For draft law violations. Most of them conscientious objectors.

VOICE: Did any of them go back into the service after they got out?
REV. YOLTON: There were a few instances of such cases. I'll give you a prime example of someone just going back --

VOICE: If you need one, I can give you one myself.

REV. YOLTON: Max Kampelman is an example of a conscientious objector who's gone back and leading the negotiations in disarmament. A Mormon(?) conscientious objector.

VOICE: I gave a blue jacket three months in the brig, and when he came out, he walked over and he says, "I made a mistake," and he shipped out.

REV. YOLTON: No, there's no question but what there are persons who are in the military who make a decision.

David Fletcher, who is a Quaker physician, who was serving in the armed forces at the time of the invasion of Grenada. And what he saw there made him a conscientious objector, and he became a Quaker out of that. At the moment, we're still trying to get him out of the military.

CHAIRMAN WILKINS: Thank you very much, Rev. Yolton. We appreciate your comments and all the solid work that went into the submissions that you made.

REV. YOLTON: Thank you.

CHAIRMAN WILKINS: Paul Kamenar represents the
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Washington Legal Foundation.

We are delighted to have you with us.

TESTIMONY OF PAUL KAMENAR, WASHINGTON LEGAL FOUNDATION.

MR. KAMENAR: Thank you, Mr. Chairman, members of the Commission.

My name is Paul Kamenar, and I am Executive Legal Director of the Washington Legal Foundation.

I will just briefly summarize my testimony. I submitted along with it certain other exhibits.

The Foundation is a public interest law firm that has about 200,000 members nationwide. We devote a substantial amount of our resources to promoting the rights of crime victims rather than the rights of the criminals. We think that they certainly have enough rights in society as it is, and there's been certainly not much attention paid to the rights of the crime victim.

While we believe that government has a fundamental duty to protect society's citizens from violence from others -- I think that Commissioner Block had it exactly right a few witnesses ago, when he said, in essence, that if society can't do that, everything else is superfluous.

We also believe very strongly in the fundamental principles of punishment as regards to deterrent and
retribution.

We have a court watch program, where we monitor lenient sentences by judges around the country, and it is really a said commentary that we even have to be here today. In essence, if the judges were doing their jobs properly, we wouldn't have to be sitting around deciding what crime is more serious than other crimes.

Congress has made that decision in terms of what the sentencing decision should be. Unfortunately, the judges across this country have not been sensitive to victims' rights, and you have now mandatory sentencing in many cases by state legislatures, recognizing this fact.

A couple of examples real quick, we have in our testimony.

Right here in the District of Columbia, a man broke into a house, shot a woman in the head three times with a gun, blew her brains out, and the Chief Judge of the District of Columbia sentenced the man to weekends only in a halfway house for a year.

Now that was sort of comparable to the suggestion on the hypothetical about somebody shooting his estranged wife in a federal building. In this case, the woman turned out to be his estranged girl friend.

But that is irrelevant from our point of view. A human life was viciously taken. The man pleaded guilty.
VOICE: Did he qualify for welfare?

MR. KAMENAR: No, he did not. As a matter of fact, he had a government job and was making about $30,000 a year, and it was through our Foundation's efforts that got the man fired from the Defense Department, because he was still back in his job during the week drawing federal tax dollars for his salary with a murder conviction on his record. And there is some regulations that no one knew about until I dug them out that allows a convicted felon to be fired from a government job.

And in essence, I would think that's probably more aggravating than the one of coming into a public building, in a sense, because a public building is open to the public. A private home has an other societal interested state. In fact, when you go into that home, you are violating two laws. One, breaking and entering. When you enter a dwelling for a felonious purpose, that in itself is burglary in many states, and to the actual murder, there is a more societal interest in protecting the privacy of one's home, and -- although I would say both of them deserve the most serious punishment, both the federal building and the private home.

The other example was a child molestation that occurred at a federal facility at West Point. The man molested at least five kids, pled guilty. It was his
second convicted offense, and a federal judge sentenced the
man to probation, and as part of his so-called "therapy" or
whatever, he was ordered to live in the area, where he could
be integrated into society again.

Meanwhile, the major whose son was molested,
contacted me -- what can we do about this, because he's
threatening other people in the neighborhood.

It shows that our whole system is breaking down,
and I think for us to sit around here and decide whether or
not a first degree murder is more serious than rolling back
odometers on a car, really, I think that the system is so
bad that that's not going to cure it. It's already beyond
repair in many cases. I think, again, what we need to do is
to focus again on the deterrent aspect.

We believe, unlike the ACLU, that deterrence
strongly is effective for street crime, and if you don't
believe that, I suggest you have a fine for burglary rate
in line with a $10 parking ticket, and what the incidence of
that crime go up.

Obviously, as the cost of crime goes up, you're
going to have the incidence of crime going down.

The ACLU talked about the fabric of society. I
don't think people lock their doors at night fearing that
someone is going to take a $10,000 bribe the next day at the
(Laughter.)

That's absolute nonsense.

They're worried about the street crime out, about going out in the street and having the children being able to go to school and not be mugged and molested. That's the real fabric of society that we're worried about. And we think, again, the focus of this Commission should be not, towards what's called in some your literature, the "just desert model," but rather the deterrent model. The "just desert model" has a nice ring to it. I thought it meant retribution, retribution being that society expresses more (inaudible) to the crime, but it's defined as a actual harm by the crime and, two, the moral culpability of the criminal.

Now the actual harm, I'm not sure whether you really intended that. Obviously, if a terrorist plants a bomb in an airport and the police catch it in time, no one was injured.

Does that mean that, since no harm's done, so to speak, we're not going to punish that person or punish that person as much?

Moral culpability is the other criteria of the just desert model. It seems to me, once someone is found guilty by a judge and a jury, that ends it. He's is morally culpable. To then go back after that and say, well, let's
see, did his dad take him to a baseball game when he was three years old, and he lost his dog, and he's been injured by society. In effect, putting the victim -- I mean, society as the perpetrator and the criminal as the victim is twisting the whole telescope around here. I think that's the wrong way to go, and we, again, to summarize, believe that this Commission should focus on the deterrent aspect of crime as well as punishment for punishment's sake, and our definition should be really the just deserts of what this Commission should be doing.

Thank you very much. I'll take some questions, if you all have any.

CHAIRMAN WILKINS: Is there much — you know, as a federal judge, I deal with a lot of defendants, and I deal with a lot of violent people who committed nonviolent crimes, because our federal system is more geared toward what we might call the nonviolent crime as opposed to street crime, although we do have some street crime in the federal system.

So we need to focus on the street crime, but I think one reason so much emphasis has been given to the bribing of public officials and fraud and white collar crime, is because that is what makes up the great majority of the criminal acts that are prosecuted in our federal courts, as opposed to our state courts, where the great
majority of that is the more violent acts.

In turn, I think we agree with you that we've got
to put the violent acts in focus. But we're going to be
dealing with a lot more nonviolent acts, as far as on a
case-by-case basis.

MR. KAMENAR: I appreciate that comment, Judge,
but I think part of the problem is defining what is
violent. There are some judges who think that the boy or
girl that was molested was not a violent crime, because
there were no physical injuries. And some judges have
justified that to me by saying that, ignoring the fact, the
traumatic, psychological damage done to that person.

Too, the area of drug dealing and heroin, the
violence that comes from the drug problem in this country is
enormous. The President's Commission on Organized Crime
recognized that very well in their recent report. I think,
when I read the statistics in the brochure to the amount of
sentences given to drug dealers was -- it just boggled my
mind. I could not believe that they're treated, almost as
if they're committing some parking violation was the essence
of the kind of treatment and the jail terms that are being
passed out.

So I think that the judges have to realize that
violence is not just where someone comes and shoots
somebody, but potential violence and the violence that is
wreaked by the drugs that are introduced into this country.

CHAIRMAN WILKINS: Absolutely. Q

VOICE: I have a quick question.

CHAIRMAN WILKINS: Go ahead.

VOICE: Do you think that plea negotiations is
the culprit here, as in the example of the case where a man
entered the house and shot the woman? Was it the plea
bargaining process that caused him to get the slap on the
wrist for killing another human being?

MR. KAMENAR: Well, plea bargaining generally
does, of course, reduce the nature of the offense to a lower
or lesser included offense.

In this case, he was indicted on first degree
murder. He was there; the police picked him up. He had the
gun in his hand. A first year law student can get a
conviction. Nevertheless, the man pled guilty to second
degree murder, and the prosecutor asked for "substantial
time," without explaining what they meant by that. And the
judge imposed just the weekends only in jail.

Now --

VOICE: What did the judge say as the rationale?

MR. KAMENAR: Believe it or not, the judge said,
"Hey, the victim's did. We can't bring the victim back,
which, if anything, that should be the more aggravating
circumstance.
Two, it was the man's first offense.

(Laughter.)

Okay. The first offense, in terms of --

VOICE: He only had one wife.

(Laughter.)

MR. KAMENAR: And it wasn't even a wife(?). It was an estranged girl friend.

And I had women call in my office afterwards, because -- complaining about this, as well, because there is a lot of violence out there that we tend to cover underneath the rug and say, well, it's domestic violence. It's a jealous boyfriend killing a woman, et cetera. Precisely the kind of violence that affects the society every day. And if we don't start addressing it in real terms, you're going to get an increase of that, and yet women call us up saying, you know, I'm worried about this, because my boyfriend, who's estranged, has been calling me and borrowing me, might think, well, gee, weekends only in jail for -- halfway house for a year. I can take that and maybe induced to go ahead and commit the crime where he otherwise would not, if he had stricter sentences.

VOICE: Do the judge did use: the victim is dead, first offense? These were the mitigating factors actually used?

MR. KAMENAR: That's right. That's right.
VOICE: Okay.

CHAIRMAN WILKINS: Commissioner Baer.

COMMISSIONER BAER: Do you have any opinion about, to what extent this Commission should consider prison overcrowding, in reference to the guidelines it establishes?

MR. KAMENAR: I think it should not consider that at all, because what you're doing when you consider prison overcrowding is, again, focusing on the criminal and not the offense or the crime. You're focusing on the welfare of the criminal. Will this prison overcrowding -- which, by the way, is judicially defined -- I've been to prisons and so-called "double bunking," where the court has ruled that it's overcrowded, not because, in fact, it is. I mean, some of our -- if you go on a naval submarine, our men are certainly (inaudible) more cramped quarters than those in many of these prisons.

So I think, first of all, that it is a myth here that the prisons are overcrowded. Certainly, some of them may be -- you know, physically may very well be in certain cases.

But secondly, I don't think this Commission should consider that at all. I think that is a red herring. I think what you are doing then is looking at the propitious or fortuitous time that somebody's convicted, that, oops, well, today, the prisons are overcrowded,
therefore, even though, if they weren't overcrowded, you'd get a more serious sentence, because -- you lucked out today, because there was a high crime rate this month, and you get to go at a lesser sentence.

I don't think that should impact at all. And if it does, I think what this Commission should do is make a recommendation to Congress that we need more prisons, if that is the case, if you think they are overcrowded, rather than work from a -- stated prison reform work backwards. And I think that that's going in the wrong direction.

VOICE: I think the law permits us to, in effect, do that.

MR. KAMENAR: Well, not really.

CHAIRMAN WILKINS: I think it requires us to consider it, but how much weight we give to it is another matter.

VOICE: Yes.

VOICE: Yes.

CHAIRMAN WILKINS: Any other questions?

VOICE: Yes. Now I have three.

(Laughter.)

My first is a comment, that you might want to comment on.

The comment is that, I have heard a lot about these deterrents and just deserts theory since I got on
this Commission, and every so often I can sort them out in my mind, but not too often. I'm just not certain which way they cut. I mean, it sounds to me like this estranged husband who kills his wife. The reason you might want to send that person to jail is because they've done something very wrong. They've taken a human life.

MR. KAMENAR: Precisely.

VOICE: And I wouldn't be terribly interested whether other estranged husbands would or would not be deterred under the circumstances.

And so it seems to me, given your examples, that on the other hand, you'd think of a white collar criminal and maybe the fact they only catch one tax evader out of a thousand means that if you hike the penalty a little bit, there would be less tax evasion.

So I'm just not certain that one of the other of those theories matches up with the basic thrust of your testimony.

MR. KAMENAR: No, I -- (inaudible) my testimony that we believed in both principles of justice -- retribution and deterrence.

VOICE: So you have to figure out where they belonged, and so forth.

MR. KAMENAR: Right.

VOICE: It isn't all one or all the other.
MR. KAMENAR: It's not one or the other. And the two may balance. I think that with the estranged husband, estranged wife situation, the underlying principle there is retribution, the seriousness of the crime, (inaudible) human life is taken. But I don't discount that there may not be any deterrent effect from that, as well. I think that there's always a general deterrent effect when society imposes punishment in a swift and severe way. It just permeates a notion out there that if you do something wrong, you're going to get caught.

VOICE: Well, that may not be deterrence; that may be just deserts or retri -- or whatever. But the other thing, in light of prison capacity, it sounds quite nice to say, well, it doesn't matter how many prisons are necessary, but what worries me a little is, if you say, we come up with sentences that treble the prison population, you're putting 60,000 or 70,000 more people in prison. If you were to do that, and prison cells causes $33,000 a prisoner, and if you go to Congress and say, we'd like $400 billion extra next year to build new prisons, one might face the practical question of what happens if they say no.

So I'm just not certain that one can proceed, as a practical matter on the theory that prison space will, in fact, be built at the cost of $33,000 per additional prisoner. And while, of course, it isn't an absolute
constraint, et cetera, I'll --

VOICE: $33,000 per prisoner.

VOICE: Yeah. Per prisoner. That's what I'm saying, per prisoners of 33 times 66,000 extra prisoners seems to me like a big number, since I'm not a mathematician, but it's many, many, many billions. And I've heard there's this thing called "Gramm-Rudman," which -- I don't know if that's real, but --

(Laughter.)

VOICE: I'll assure you.

(Laughter.)

(Simultaneous voices.)

VOICE: Is it?

VOICE: Right.

VOICE: Right. But I mean, I don't know. It's no absolute constraint absolutely, but I mean, I wonder if you really mean we shouldn't take into account the likelihood of whether or not there will be billions and billions of dollars additionally appropriated.

MR. KAMENAR: Well, I'm not sure whether the federal system current overcrowding is comparable to what it is in some states, but --

VOICE: But we've seen -- we went to several prisons, and we saw in several -- in fact, quite a lot of what I would call overcrowding. I mean, people were in
dormitories, and they didn't have a separate space, and they were pushed quite close together, and they had two bunks one on top of another with a space about like that. And -- I mean, it looked pretty crowded to me.

MR. KAMENAR: Well, sure, you're used to living in a home and not being --

VOICE: Well, we saw several different --

MR. KAMENAR: The point being that, I think you should not be basically intimidated by the situation, in terms of deciding how to treat criminals in terms of the just punishment that is due them. Again, if there is a problem of certain overcrowding, I would think that the ones that would be more apt to be sent to prison would be the ones that are not involved in violent crime or crimes that involve potential violence. Someone rolling back an odometer on a car, certainly, I would not sentence him to ten years of hard labor. They are the ones that are likely(?) to engage in things like restitution and other things like that, where they have the means, and the crime is more of an economic type crime. And I think maybe we can solve some of the overcrowding problems about which --

VOICE: I also have a practical thought for you. I don't know if you've thought of it, but since you are interested in a very important problem, the problem of the victims of the crime, you might not have noticed, or you
might have, that in the new statute, fines that are going to be collected, are going to be sent to a fund which will be used to help victims of crime. And this is, in a way, a new area, because at the same time, the level of fine that can be imposed has been raised dramatically.

MR. KAMENAR: Sure.

VOICE: And so it might be -- if your organization -- you and your organization wanted to focus on that, make some suggestions about where fines might usefully be imposed that could then, in turn, flow back to the victims of crime, I think that might be helpful.

CHAIRMAN WILKINS: Any other questions?

VOICE: Billy.

CHAIRMAN WILKINS: Yes, sir.

VOICE: You talk about violence.

Does that really cover it? Isn't the threat of violence and fear, the equivalent of it?

MR. KAMENAR: Absolutely, Judge. I define violence in a very broad way. In other way, if a burglar breaks into your house, and you're upstairs sleeping, there are a lot of people that say, well, that's not a violent crime, but all too often -- and I can give you examples -- where that leads to violence, potential violence, very easily.

VOICE: Well, the circumstances lead to fear.
MR. KAMENAR: Fear is psychological violence, which is just as reprehensible.

VOICE: Continual fear, of when you're going to come home the next time, there's going to be somebody in the house.

MR. KAMENAR: Exactly. Exactly. And I think, again, that's all too often ignored by the sentencing authorities around the country, where they do not consider the victims, the impact of the crime on the victim. And as you know, some states have what are called "victim impact statements," where they require the victim -- to allow that person to address the judge in sentencing, to let them know what kind of physical, psychological trauma, et cetera, was imposed on them by the criminal before the judge sentences that that person

CHAIRMAN WILKINS: Thank you very much, Mr. Kamenar. We appreciate your comments.

MR. KAMENAR: Thank you.

CHAIRMAN WILKINS: Our next witness is Mr Patrick McGuigan. He represents the Institute for Government and Politics.

We're glad to have you.

MR. MC GUIGAN: Thank you.
TESTIMONY OF PATRICK MC GUIGAN, ON BEHALF
OF THE INSTITUTE FOR GOVERNMENT AND
POLITICS.

MR. MC GUIGAN: Judge Wilkins and members of the
Sentencing Commission.
I appreciate the opportunity to present my views
on some of the important issues, you face as you try to
develop firm and effective sentencing guidelines for the
federal system.
I'll summarize my testimony which I've submitted,
and I will add some revisions to the thing I gave you last
week(?).

The primary goal of the Commission, I believe,
should be to establish sentencing guidelines which are
designed first and foremost to promote truth in sentencing,
policy goals.
The American people deserve to have a sentencing
policy which is open and known and understood and not a
sentencing policy masked by sociological goobledegook.

It sound to me, from communications with these
folks earlier, that you are looking at masses of
complicated, sometimes irrelevant criteria

As Jack Kress put it in his (inaudible) book on
determinate sentencing, "Prescription for Justice, the
central purpose of sentencing guidelines is "to open a
system too long shielded from public scrutiny."

It does not appear to me that your functional committee structure facilitates that central purpose. Rather, it allows and even encourages a mindset that gives great weight to issues of relative insignificance. Indeed, I note that not one of your several committees even mentions the primary issue of underlying and consistent policy setting.

There is no need for you to waste money in a period of already excessive federal spending.

VOICE: Doesn't do what?

MR. MCGUIGAN: Pardon?

VOICE: Our subcommittee doesn't do what?

MR. MCGUIGAN: Mentions the primary issue of underlying consistent policy setting.

VOICE: That's all we talked about.

VOICE: We're all policy.

VOICE: That's all we talk about.

MR. MCGUIGAN: Why don't we talk about it after I get done?

CHAIRMAN WILKINS: Let's let Mr. McGuigan finish his comments.

VOICE: Yeah.

CHAIRMAN WILKINS: Go ahead.

MR. MCGUIGAN: Thank you, sir.
There is no need for you to waste money in a period of already excessive federal spending.

The Commission should learn from the already-existing state and local sentencing guidelines that the Commissioner can build on the models of intelligent and successful programs and learn from errors already made.

There is one important exact of the latter. The Commission must avoid the error made in Minnesota. That Commission implicitly decided that providing larger living quarters for serious felony offenders was more important than protecting decent citizens from criminal predators.

For all intents and purposes, Minnesota adopted a purely "just deserts model," which was discussed earlier with no concern for deterrence, crime controls or public safety in the formation of sentencing guidelines.

This approach is absolutely antithetical to everything the U.S. Congress believes, members of the Congress believed when they passed this legislation.

As an aside, I might also stress that the existing Parole Commission is invalid as a model for the Sentencing Commission's work.

Leave the determination of moral blameworthiness, justice for the offender and other aspects of just deserts theory to the Almighty.

Your job is to develop sentencing guidelines
designed to promote deterrence of crime through the punishment of criminals.

Frankly, this kind of thing, the use of sociological data and other things to obscure sentencing issues is starting to get obscene.

Americans communicated very effectively in 1984 their determination that criminals be incarcerated. It will be a tragedy, if those who described the Comprehensive Crime Control Act of 1984 as "dead on arrival" in the House of Representatives, wind up being the ones who manage and implement its provisions.

The mentality that ferrets out rehabilitationist minutia instead of concentrating on simple policy goals, may lead the Commission to repeat just such errors in its work, should the Commissioners proceed on the path that I, from my impressions, believe they're already following.

Placed in this context, I can deal with some of the specific issues you asked people that were testifying to address.

The topic of this hearing is the ranking of offenses by seriousness.

While your area is crucial, I also believe it is more limited. Congress placed the Commission within the Judicial Branch for a reason. You are not to legislate. As I see it, this is not a matter of choice. It is a
constitutional imperative.

The Federal Criminal Code, for that matter, the Constitution, states the policy of the Judicial and Legislative Branches of Government on these issues. Your limited and proper function is not to redefine those roles, even by your most brilliant insights or even by a consensus of the many experts whom you asked to rank order offense scenarios.

These law school hypotheticals may be fun to play with and will doubtless provide days of entertaining and intellectually engaging activity for the staff, but they are not what the task of sentencing guidelines is all about.

Your first task in ranking offense seriousness is to go to the Criminal Code and ascertain how Congress has preliminarily rank ordered the offense in question, then, to try to flush out the differences of gradation.

VOICE: Have you heard the description that I've been giving of what we've been doing?

MR. MC GUIGAN: I wasn't here.

VOICE: Oh, you weren't here. You don't know about --

MR. MC GUIGAN: I've been reading all the stuff you guys put out.

VOICE: Oh, you say you've read this book then?

You've read this book? I mean, you're coming up here and
saying a whole lot of things, you know, that just aren't so. And so it is -- when I've gone through all this, and we've done precisely what you just now described and have given and made public, and you're welcome to comment on just that kind of listing.

MR. Mc GUIGAN: (Inaudible.)

VOICE: Right. Well -- but it would be helpful, if you -- you know, if you wanted to find out, and you didn't know, because you didn't get the information, just call me. I'll be happy to tell you that.

MR. Mc GUIGAN: Well, as long as this issue has been raised, Mr. Chairman, do you want me to stop with my testimony and address this?

CHAIRMAN WILKINS: Go ahead with your testimony.

MR. Mc GUIGAN: All right.

The first task in ranking offense seriousness is to go to the Criminal Code and ascertain how Congress has rank-ordered the offense in question, then try to to flesh out the interstices between the Code provisions.

Now I would probably, for a generic ranking of crimes, putting crimes against the individual first, followed by crimes against the state, among which I would include drug offenses, and then crimes against property.

But I wonder if my ranking, even if my views are accompanied by those of numerous experts really matter
anywhere near as much as those of a congressional enactment.

Of course not.

It is my belief that your methodology is leading you down a slippery slope of you defining the gradations of crime rather than following the intent of Congress.

The questions presented to me concerning the matching of sanctions against crime is incomprehensible in isolation. Until you set policy, you cannot answer it. Assuming the primacy of protecting the public, I can answer the question, but otherwise, none of your respondents, here or later, will be talking the same language.

A Marxist concerned with state monopoly of property, would give an altogether different response, as would anyone more concerned with redistribution of wealth, than the reduction of violent crimes.

As to the questionnaire, I attached my rank ordering response, but I emphasized the reluctance with which I do that, because, again, I'm struck that the methodology could only result in spurious interpretations. it begs the most important question and contains numerous and dubious assumptions.

Perhaps the most glaring methodological flaws in the assignment we had is the hidden assumption of equal spacing between the ranks. The most immense gap will be
viewed as equal in this analysis, unless your research staff decides to insert their own biases into the results.

A second flaw is how the example were chosen. You can see they are not representative, and yet they will clearly be treated as such in your discussions.

Among the most important questions begged by the choices is whether or not the Commission's task is to create working guidelines for the federal system or instead, if your task is to put forward a model ignoring the fact of the uniqueness of the federal caseload.

Now while the Commission's work will undoubtedly be closely monitored by people in the states, I opt for the former approach, because of my federalist leanings, which tell me that the models already exist in the states.

I urge the Commission to restructure and organize its approach to these questions, so that you can meet your time schedule, reduce your expenditures, and most importantly, meet the goals assigned by the both the Congress, who created you, and the President who appointed you.

Thank you for the opportunity to address, and I assume Judge Breyer might have some questions.

CHAIRMAN WILKINS: Well, we'll see.

Thank you very much. Appreciate your comments.

Let me address one thing. The committees that
we have formed are working committees, and they were formed for management purposes, and indeed, the Crime Control Act that creates the Sentencing Commission authorizes this approach to our responsibilities, but one thing that the law does say is that the committees may not establish policies. So our working committees are prohibited by the law from getting into the policy making(?), and that is something on which the entire Commission is working.

What would be the policy that you would suggest to us to be our guiding goal while we're were at work?

MR. MC GUIGAN: Well, I think that what I described in my testimony from, you know, researching in victims(?) for four years, it seems to me that more or less -- that's my personal opinion, but I also think it more or less coincides with what the Congress has already done, which is, crimes against individuals, violent crimes, what we categorize as violent crimes, are at the upper end of the sanctions, and the middle echelon are crimes against the state, including drugs offenses, although there, you again drift into the violent crime area. And then finally, at the bottom, white collar crime or economic crime.

That's, I think, is a central policy choice, and my impression is, from everything I've read, and I have read that binder, that essential first step hasn't been made.

COMMISSIONER BREYER: What will you divide it(?)?
Offenses against property, offenses against the person, 
offenses against government processes, offenses against 
public order, safety and health?

I mean, now, I don't know -- if you've read the 
binder, then I am puzzled, 'cause I first was seeing red 
(laughing), because I thought that -- look, a lot of people 
listen to your organization. I mean, you represent 
Congressman Gingrich, and there are a lot of people out 
there who listen to what you say, so criticism, based on 
what is actually going on, is very well-taken, but then why 
I was worried, because it seemed to me that you had made a 
very sound suggestion, and I thought that what's we're 
trying to do. You go to the Code, and you try to list all 
the crimes, and you try to list all the crimes, and you 
try to get the names that will describe them, and then -- 
that's what this binder is, isn't it?

MR. MC GUIGAN: Have you made the policy choice?

COMMISSIONER BREYER: No, the next step, the next 
step before deciding how to order those crimes is to get the 
views of people who are far more knowledgeable than I, 
people who have spent their lives working in various areas 
of the criminal law, and that's why we asked you and lots of 
other people to take this binder and to go through it, 
applying your policies and experience and tell us how those 
things should be labeled, how they should be ordered, how
they should be qualified, but without that, without that serious work, I can't --

MR. MC GUIGAN: Now we're getting in kind of a discussion of, you know, what does the Judicial Branch do? What do judges do? I think, to sum it, you all are in the judicial branch. You have a certain limited policy-setting role, but it is limited, and it strikes me that talking about, you know, sociological data and looking at reams of information, that can be useful, but it is only useful at the margin. The essential thing is, most policy choices have already been made for you-all.

It is not clear to me, and I understand everything I've read(?) --

VOICE: What is the "sociological goobledegook" that you referred to in your testimony? Tell me what that is, will you? I'd be very interested to find out what that is.

MR. MC GUIGAN: Well, I'm referring to a lot of material I've had to read over the several years which talk about the reasons people commit crimes, and whether or not --

VOICE: We've only been in existence a little while(?)

(Laughter.)

Now you say that --
(Simultaneous voices.)

VOICE: Now you see, Mr. McGuigan, let's assume we have some chromosome disorder, a factor, and you can find that in the material, you may be referring to that (?). I don't pay much attention to the chromosome disorders, but it is a factor that some people would consider.

Now if we did not consider that as a factor and then dismiss it as being irrelevant to our mission, some judge somewhere along the line could deviate from my guidelines, based upon a chromosome disorder.

So we must consider every possible factor, aggravating and mitigating, that could possibly apply, and then find those that are relevant, in our judgment, and say, this is the basis of our guidelines. And we've considered these others, and they're not relevant, so you may not use that as a basis to deviate to what we say.

That's why we have to go through what happens, even to me, as an exercise that I know the answer in advance, but I still must give it consideration, because that's what the statute says, and we're trying to build guidelines that are tight enough, so that some judges who may wish to, in the future, may not be deviating under the law.

MR. MC GUIGAN: What you just described sounds very reasonable.
COMMISSIONER BREYER: See, that's -- you sounded from your tone that you are annoyed at something we're doing, and I want to pin that down, because I want to know what it is, because when I heard the details it sounded to me like our procedure was what you were advocating.

MR. MC GUIGAN: Oh, I'm very fearful that you're heading -- in particular, I think that you're heading towards the Minnesota model.

(Simultaneous voices.)

VOICE: Let me ask you this.

VOICE: Tell us what you know that makes you think that? I'd really like to know?

MR. MC GUIGAN: (Inaudible) that you brought up, who was invited to some of the earliest discussions, earliest meetings of the Commission and who was not informed about those early meetings --

VOICE: We've had a lot of people invited. What difference does that make?

VOICE: You're invited. You want to come?

VOICE: What are the problems with the Minnesota guidelines that you would want us to avoid, the major points?

MR. MC GUIGAN: Thanks. The essential one is taking -- to the extent they do in Minnesota, taking prison overcrowding into account, as a factor in (inaudible) in
determining the seriousness or the length of sentence. I think it is a fatal flaw.

Now the legislation does explicitly require a factor that you take into account, and that's a factor, it doesn't say how strong a factor or anything else. Frankly, I hope you put it at the bottom of the factors you take into account.

Maybe when you get -- if all your numbers are triggered, I don't think it would be as dramatic even as you indicate, but even if it was, maybe you could establish a guideline that once prison overcrowding was at 350 percent, rather than the -- I think the present levels, what is it --

VOICE: They stack people vertically.

MR. MCGUIGAN: 140 percent of capacity.

Well, I am a lot more worried about the impact of those people, whether they're being stacked into cells or not, if they're back out on the streets than if they're in that prison. That's a --

VOICE: So the first thing, then, that we should avoid is the utilizing -- utilization of the prison capacity as a cap?

MR. MCGUIGAN: Oh, absolutely.

VOICE: Okay. And what were the other problems that you would want us to avoid?
MR. MC GUIGAN: That's the essential one.

VOICE: Okay.

VOICE: Could I ask a question about your position when you mentioned policy.

Would you advocate, for example, imprisonment for all prisoners or would you advocate prison for some, restitution for others, alternative sentences for others?

You mentioned separating the crime categories -- the crime against the individual, against the state, property.

Do you see a range of sentences being appropriated?

MR. MC GUIGAN: Yeah. I am a member of a board of advisers to the Restitution Project out of the Office of Juvenile Justice in the Department of Justice, and I see a lot of -- I've seen a lot of very positive --

VOICE: Give me that again? You're a what?

MR. MC GUIGAN: I'm a member of the Board of Advisers for the Restitution Project. It's called the RESTTA Project -- R-E-S-T-T-A -- out of the Department of Justice, and we recently just had a --

VOICE: Are you on salary on that or --

MR. MC GUIGAN: Oh, no. No. It's on my own, as a lecturer(?). Went down there about two weekends ago, to advise the people that have been working in the field in
developing restitutionary models for certain categories of juvenile crime.

In the adult criminal system, federal system, I would say there is a lot of possibilities, positive use of restitution and alternatives to incarceration. You've got to have sufficient sanctions for it to mean something, but clearly for a person who's committed an economic crime, it may be best both for that person and for the victim and for the societal interests, because of things like overcrowding, to have some sort of a diversion, but with meaningful sanctions that involve, you know, dollars and cents.

MR. MC GUIGAN: Counsel(?), I have a number of questions.

First of all, you said -- you referred to some people who said this program was dead on arrival. Who are they; do you know?

MR. MC GUIGAN: I believe that one was Bill Hughes.

VOICE: Bill Hughes.


VOICE: Where is he from?

MR. MC GUIGAN: He represented the sentiment of a number of folks over on the Hill.

VOICE: Where's he from?

MR. MC GUIGAN: New Jersey.
VOICE: You're talking about when this bill, the Conference Crime Program(?) came to the House. That's what you're talking about, isn't it?

MR. MCGUIGAN: (Inaudible.)

VOICE: Okay.

VOICE: The one that passed?

MR. MCGUIGAN: Ultimately, it did pass.

(Simultaneous voices.)

VOICE: (Inaudible.)

VOICE: Yes.

MR. MCGUIGAN: Probably went around Congressman Hughes. That's the reason.

VOICE: You sort of intimated, it seemed to me, that Congress had arranged these dissents -- these sentences for the crimes, and that we shouldn't be required to define them.

MR. MCGUIGAN: Well, no. No. The statute -- don't misunderstand. I think -- I hope I made that clear in the more lengthy version of my testimony.

There is a very clearly defined and explicit role that you-all have to play. My assumption for how you should look at this is to look at how Congress, under the existing structure had rank-ordered offenses, categories of offenses and use that as a guiding light, because they're legislators. You are quasi-judges -- and some of you are
actual judges.

VOICE: That's in the book.

MR. MC GUIGAN: You're fulfilling a judicial function.

VOICE: And you don't think that -- but you do think that we should go back and look at what Congress has done?

MR. MC GUIGAN: I think you should; yes.

VOICE: You think we should.

MR. MC GUIGAN: Absolutely. You have to.

VOICE: It seemed to me, you were objecting to the fact that we were ranking them in a certain way.

MR. MC GUIGAN: I'm not quite --

VOICE: Well, you said our committees were set up wrong and --

MR. MC GUIGAN: I think there's a degree of -- you're doing more work than you have to in the way you've created the structure of the Commission. You're talking about lack of time and other things, and it's all true, and I'm sure you're all trying to do a good job. I'm just offering the input of a guy that watches these things form the outside.

VOICE: That's just what I was talking about.

And we were doing too much work, and one of the things we were doing was going back too much in what had happened in
the past. Right?

MR. MC GUIGAN: As far as data.

VOICE: Yeah.

MR. MC GUIGAN: The first essential step, what legislators have said.

VOICE: Now let me ask you this.

VOICE: That's what we've done.

VOICE: It's right here.

VOICE: Let me ask you this.

What do you think is the first question that Congress and the United States is going to ask when this project becomes effective?

MR. MC GUIGAN: They're going to ask, they'll probably be asking all across the level(?) spectrum, are you tough enough?

VOICE: No, they aren't. They're going to ask, how does it affect what's happened before?

MR. MC GUIGAN: Uh-hum.

VOICE: How does it change it?

MR. MC GUIGAN: Okay.

VOICE: That's what they're going to ask.

MR. MC GUIGAN: I'm not a member of Congress, but that seems reasonable.

VOICE: If we don't collect that data, we can't have an answer. And they say, you're just legislated in or
wrote your rules in the dark.

MR. MC GUIGAN: I think most members of Congress will look, they'll compare sentences recommended by the Commission --

VOICE: Yeah, but they would -- if we don't --

MR. MC GUIGAN: -- to the existing actual sentences served under the --

VOICE: Well, they can't do that, unless we collect it.

MR. MC GUIGAN: Right.

VOICE: That takes us months to collect it. That isn't out there just for the having.

VOICE: It's hard to know what to do(?)

VOICE: You can get at what it was two, three, four, five years ago. We're dealing with now.

So let me ask another thing.

You said something about the Minnesota system.

You're aware that the Congress said, in their report, that the Minnesota system was to be highly commended.

Are you aware of that?

MR. MC GUIGAN: I think they said that about several (inaudible).

VOICE: They did.

MR. MC GUIGAN: About 11.
VOICE: They did.

And it's also a fact that this is the first one ever written by a Commission in the world. And it has attracted world attention from Canada -- I can show you the white paper in Great Britain -- Australia, New Zealand. They're all examining it and trying to do something like it.

Now you say in your letter, or you say in your testimony:

"As one important example of the latter, the Commission must avoid the gross error made in Minnesota, where the commission implicitly decided that providing larger living quarters for serious felony offenders was more important than protecting decent citizens from criminal predators."

What was the basis for that statement?

MR. MC GUIGAN: The (inaudible) says that prison overcrowding is explicitly a part of the determination of sentencing at the front end in the guidelines developed by the Minnesota commission.

VOICE: You mean you ought to throw them in like sardines?

MR. MC GUIGAN: Well, I would do that before I would turn them loose, and I think that that is the same
policy prescription you will encounter, if you talk to
members of Congress involved in this legislation, and
certainly, if you talk to -- if you polled the American
people on whether they would choose prison overcrowding or
choose turning them out, they would choose the
overcrowding.

VOICE: Who are the people in Minnesota who you
talked to who gave you this view of what the commission has
done?

MR. MC GUIGAN: It's my view, based on --

VOICE: Did you talk to people in Minnesota?

MR. MC GUIGAN: No.

VOICE: No. So you don't know how the people in
Minnesota, in fact, feel about their guidelines. This is
your view on the outside.

You haven't talked to anybody in Minnesota about
how the guidelines were set up or what they --

MR. MC GUIGAN: I've read the material(?)

VOICE: Oh. All right.

VOICE: (Inaudible) I talked, the latest, an hour
ago, to the Chief Justice --

VOICE: Of Minnesota.

VOICE: Who served on the commission from the
time it started, and he said it was completely in error.

MR. MC GUIGAN: (Inaudible) to a buzz saw.
(Laughter.)

The other thing is this, (inaudible), you are imputing to the Commission something that might have been imputed to the legislation. And there's a big difference. A Commission is appointed to carry out a legislative act, just as we are. There are some things where our hands are going to be tied. We can't do everything. We've got to read and reread the legislative history of the Act and everything else, in order to pull out from it, a congressional intent. And that isn't easy. And it's going to control our actions.

CHAIRMAN WILKINS: Thank you. Thank you very much.

VOICE: That's all I have.

CHAIRMAN WILKINS: Just one more question.

VOICE: 'Cause this is conceptual thing, and I want you to think if you really mean this.

Look. Remember our case of the man who shoots his estranged wife?

Wouldn't you want that person to be sent to jail, even if sending him to jail does not deter other people? I mean, don't you think a person who shoots somebody deserves to be in jail, even if, in fact, they do it because it's for an emotional reason, and it wouldn't be deterrence?

VOICE: Yeah. Sure.
VOICE: Yeah. Well, that's -- you see, that's what -- of course, you see what I'm thinking of. It isn't -- no theory, the deterrence theory, the just deserts theory doesn't give all the answers to these things.

Don't you agree with that?

VOICE: That's essentially true.

VOICE: Well, that's my impression.

CHAIRMAN WILKINS: We appreciate your testimony, and if there has been some misunderstanding about the openness with which this Commission is going to do this work, I hope we would have corrected it today.

MR. MC GUIGAN: I certainly (inaudible) --

CHAIRMAN WILKINS: And we welcome you --

(Simultaneous voices.)

(Laughter.)

MR. MC GUIGAN: -- reactions here.

CHAIRMAN WILKINS: We welcome you and members of your organization and everyone else to come participate with us, because only through the wide participation by those who share our concerns, will we have guidelines that will truly serve the interests of justice, once we submit them to the (inaudible).

Thank you very much.

We have two -- two other witnesses.

Next is David Jones. Mr. Jones, we will be to
have you. We appreciate you bearing with us through this morning.

TESTIMONY OF DAVID JONES AND STEPHEN JENNINGS, CRIME MAGAZINE.

MR. JONES: Thank you, Mr. Chairman, members of the Commission.

CHAIRMAN WILKINS: Is this Mr. Jennings?

MR. JONES: Mr. Jennings.

CHAIRMAN WILKINS: Very good.

MR. JENNINGS: (Inaudible.)

CHAIRMAN WILKINS: All right. Very good.

MR. JONES: (Inaudible) to that, Judge.

Judge, we did submit two different written testimony, one that addressed some of the issues that were of primary concern to us, which were largely procedural as to how the Commission might commence its task, based somewhat, in my experience in five years as a member of the Pennsylvania Sentencing Commission, but then when we heard that the Commission preferred to concentrate only on the seriousness of the offense issue today, we modified those, and I think that is what is being handed out to you now.

If you would quickly permit me to summarize this seriousness issue.

I think that what we are urging the Commission to do by "seriousness," is to take into account more than
simply some type of a hierarchy, simply an order of crime, but to give some weighting to different crimes within that order. In other words, we could have an ordinal scale, we could have an integral scale, or we could have something more, and it's largely--especially with the more serious offenses, there's something more that I would like to urge upon the Commission.

For instance, if we were to follow what many states--those states that have embarked upon guideline sentencing, if we were to follow what many have done, we would be putting offenses into certain categories for purposes of convenience, if for no other purpose. Pennsylvania, for instance, had ten categories, based upon seriousness of the offense, although the lower two categories were rather amorphous.

But regardless of whether it had 10 or 20 or 30 or five, or whatever categories, one question that would arise is the difference between any one category and the one below it or above it.

The same is the difference between the other group of categories, and we've argued that--that perhaps not, that unlike the keys for the piano, for instance, it's not necessarily possible that we can arrange the seriousness of crime into neat categories. We have to be prepared for large jumps, especially, as we start off at the bottom and
rise to the more serious crimes, maybe there's a jump of
more than double the punishment, especially, if we're
equating seriousness with some type of monthly increase in
punishment.

For instance, if we were to go from, say, a
number of 5 on a 10 point scale and maybe number 5 had 60
months, would number 6 have simply 72 months or something
like this, or would we maybe double between 5 and 6 and
double again between 6 and 7, so that we're reaching the
very highest parameters of permissible sentencing by the
time we get to the top.

Other questions that have arisen in our minds
would be, under what circumstances this Commission should
concoct specific examples of aggravation and mitigation, and
if at all, what those examples should be. And I would turn
you, for example, to Gregg v. Georgia, similar types of
court litigation, where various legislative specifications,
at least for aggravation, in that case, in capital
punishment, have been seemingly approved, and invite you to
to consider specific examples of what aggravation and
mitigation might be and have provided some in the
testimony.

I think that to overlap some of what we've
written with what we've heard today, I would like to urge
the Commission to do several additional things. One is to
pay particular attention to violence. Violence in the street, violence in the home, violence in general, because we certainly feel this is actually the type of conduct that does hit hard at the roots of American society.

I disagree with the representative of the American Civil Liberty Union. I can't imagine how corruption in government, unless it were all-pervasive, which I shudder to think is not the case here, in this country, how it could possible be equated, in terms of seriousness, with the kinds of street crimes that we find in the streets of most large cities, nowadays, largely drug-related.

So I would ask the Commission to think very carefully about not only those people who do the crimes in the streets and who use drugs, but those who deal in them and those bankers who launder the money. These are all violent criminals, and they should be severely punished under these kinds of guideliness.

Judge MacKinnon? I thought you (inaudible). I'm sorry.

And then finally I think that it's important for this Commission to recognize a rule -- and I'm not sure, any more than Mr. McGuigan, if I have entirely understood how the Commission chose to recognize its role -- I certainly will offer my thoughts.
I really think that obviously Congress, being the organ that supposedly expresses the will of the people, should, in the initial analysis, establish sentencing criteria and seriousness of sentencing.

I think it's probably done this, at least to a quotation standard.

I would think the role of this Commission would be, then, to take into account the will of Congress and implement this congressional intent into tangible form.

I think that to clear up a few misunderstandings, what my correspondence with the Commission earlier, what my concerns have been, some of which have been alleviated, is that I'm not sure that the role of the Commission needs to be to ask questions of every segment of American society, and you must forgive me, but I didn't submit the answer to your (inaudible) --

VOICE: It wouldn't hurt, though, would it?

MR. JONES: Well, it wouldn't hurt if we could do it, Judge.

VOICE: Go ahead.

MR. JONES: The problem is, it's difficult to do. If we could call in people to tell us what they think, but I'm not sure that these chunk samples of people will reflect any more of what the average person in society thinks that probably the product of your own individual
experiences.

And I would think that a Commission of this sort, by -- obviously, it's comprised of people from very different backgrounds, by pulling its resources, would be able to come up with probably a pretty viable sentencing plan, largely by itself.

Now Judge Wilkins' comment this morning, I do agree with. I think certainly the Commission has to be -- Judge McKinnon's also -- has to be prepared to report to the Congress and to the American people the differences between traditional sentencing and what it proposes, and to accomplish that goal should take certain testimonies.

I'm not sure, though, that we should delude ourselves into believing that these chunk testimonies, including, of course, my own, especially my own (laughing) -- I don't know if these are indicative of any wider audience, simply indicative of interest on my part and the part of the other people who presented the evidence.

I will be more than happy to answer any questions that the Commission may have of either or both of us.

CHAIRMAN WILKINS: Thank you very much.

Mr. McGuigan believes that, initially, anyway, that we were not receiving enough public input, and you think we're receiving too much. So --

(Laughter.)
VOICE: (Inaudible.)

CHAIRMAN WILKINS: -- then we're doing something that neither side agrees with, which usually means, like in a settlement, it's probably a just thing.

(Laughter.)

MR. JONES: Judge Wilkins, I'm not -- I think that probably the Commission's role is going to be very similar to an arbitrator kind of fashion and settlement. I am not sure that I disagree with Mr. McGuigan. The difference between our perception, his and mine, is that perhaps the Commission was inviting selective testimonies, secret testimonies on the one hand and perhaps what I understand today, accurately or not, to be the Commission's desire to kind of get -- feel out a cross section of the American people, I personally don't think that's necessary, but if the Commission were to try to feel out a cross section of the American people, I doubt if it would succeed by sending out questionnaires to selected groups. And I think it is the selectivity that bothers me. And I suspect it's bothered others too, though I can't speak for them, forthwith.

CHAIRMAN WILKINS: We kind of hated to use the New York phone book, and so we used a list of people, and we've sent out about 200. And we received over 130 responses. Now these went to judges, they went to
organizations, people like yourself. There were probation
officers, defense attorneys. A broad spectrum of the
American public, as the law requires us to obtain public
perception.

But I agree with you, this is not subject where
we need to spend all of our time doing. And indeed, we're
spending, perhaps not enough doing that, because we're
involved in some other areas.

We need to have this balance. We do want you
your input, though. We really do, because you have ideas
that we can take and use and perhaps implement into our
guidelines. And I am not sure that if we met in a dark room
somewhere that we could come up with something that was
rally the right thing to do.

MR. JONES: And we certainly appreciate the
opportunity to make this testimony, and I think the other
witnesses do too, as long as the Commission understands that
the feedback that it gets from selected witnesses, probably
any major witness with expertise should be heard, but that
this input may not be representative. Somehow I get the
feeling, and I think that -- although I'm not perhaps as
cconcerned about the economics as Mr. McGuigan was, I am
cconcerned, nevertheless, that there can be a tendency on the
part of a public commission to go to far and to try to speak
-- pry out input from every last source, which would be a
phenomenally difficult and expense and probably ultimatelyruitless task.

CHAIRMAN WILKINS: Well, I appreciate that.

The expense of doing this. It cost us 22 cents,
and it took some time to put the mailing together. But we
had used the resources existing in our Judicial Center and a
great deal of data from existing resources using the prison
information, probation information, Justice Department
information, put it together. So we're not trying to
(inaudible). We don't have time to do that. But I
appreciate your concerns. And we don't need to spend any
more money than necessary to give us the data that can give
us the information to make, hopefully, the right decision.

MR. JONES: That is certainly one of our
concerns.

CHAIRMAN WILKINS: Thank you.

Any questions on my right?

COMMISSIONER BLOCK: Is there anything we can
learn from the Pennsylvania experience on grading offenses
that would be useful?

MR. JONES: Well, Commissioner Block, there's a
couple of points that I did mention in the written
testimony, and that is that I think that concerns with
seriousness now, one of the major points is, I don't think
you can properly codify the seriousness on a 10 point
scale, where you're dealing with some several hundred
crimes, and you're dealing with more crimes than
Pennsylvania, since you're dealing not only with common law
crimes but with a variety of specialized federal statutes,
but you need more room than that. That's one point.

There are several other points. For instance, on
offender background, but they are probably better saved for
a subsequent hearing, largely, that those should be fewer
rather than more categories.

COMMISSIONER BLOCK: So your advice is, the scale
needs to be larger than the (inaudible) --

MR. JONES: If you're going to use a scale, and I
would think that you're going to, unless you're going to try
to codify every crime individually, but if you're going to
utilize a scale, I think one of the pitfalls of the
Pennsylvania system has been that it's really an eight-point
scale. Call it 1 to 10, but the first two don't really
count. And on that scale, there's just not enough room for
leeway. You're spending -- a judge is spending a lot of
time distinguishing between -- assume he wants to stay
within the guidelines, he's spending a lot of time
distinguishing between a matter of two or three weeks.

What the devil does two or three weeks matter?

Maybe to the individual who is in prison, granted, but in
the overall balance of interests that have to be served,
I am not sure that the paperwork is well-spent for a judge to be debating on this type of a level. You need a larger scale going towards a larger number of years in sentencing. Pennsylvania only took into account a minimum, not maximum sentencing. And that's a short one.

CHAIRMAN WILKINS: Any questions on my left?

(No response.)

Mr. Jennings, do you have any statement you'd like to make?

MR. JENNINGS: No, I don't. He is talking for me today. I have some throat problems. But one of the things that has occurred to me as I came in here this morning is that crime is a problem. Violence is a problem. There are two sides to it. One is the criminal, one is the victim.

One of the things that makes me very, very happy is that there are people here and -- out here that are making an effort to do something about it. And as long as we have the dialogue and the input of all sides, you know, sooner or later, all of these brains are going to come up with some way to deal with this matter effectively, equally, in the matter of violent crime.

I have heard a whole lot of talk today about what is violent, and, you know, what is not. What affects society; what doesn't.

I was born and raised on the Hill in
Washington. In 1970, we had three doors in our home, two of which were barred. We had a home in Virginia, which we stayed at most of the time, and only kept beds in the home on the Hill.

Things got better, thank God.

I went out to watch the Senators play one night. At that particular time I was assigned to 8th and I. So I was armed. I carried a gun that night, but I had a box of shells in the car. The car was broken into that night. The shells taken, and when I drove home, the house had been broken into the same night.

Things like that went on for a long, long time during the, I guess, early '70s, and things like that, when we had the riots in '68.

CHAIRMAN WILKINS: Sure. Sure.

MR. JENNINGS: So, you know, I don't care, you know, who thinks that it's worth, you know, for George Shultz to take 10,000 bucks under the table than to have me mugged on the street. I think it is worse to have me mugged on the street. And I think it affects society more. Just like the man said, no one locks their doors, you know, because George Shultz or somebody else -- and I don't mean to pick on George Shultz -- I just saw him a lot, and he sticks in my mind.

But anyway, those are the kinds of things that
I've heard all day today, and I'm glad you're hearing them.
I am glad you're hearing their input(?). The input means
that we can come out, hopefully, with a means to an end.

We are trying to set some guidelines, and that is
what you are doing.

I am glad to see these folks here today, and I
thank you for having us.

VOICE: This is very helpful, thoughtful. Thank
you.

CHAIRMAN WILKINS: Thank you.

Benson Weintraub represents the National
Association of Criminal Defense Lawyers.

TESTIMONY OF BENSON WEINTRAUB, ON BEHALF
OF THE NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS.

CHAIRMAN WILKINS: It's kind of like waiting all
morning for your case to be called, I guess.

MR. WEINTRAUB: This is the first time that the
organized defense bar has the last word.

CHAIRMAN WILKINS: Have you worked out a plea?

(Laughter.)

MR. WEINTRAUB: I am accompanied today by Bruce
Lyons, who is the President-Elect of our Association, and
Scott Wallens, our Legislative Director, is also in the
audience.
I will summarize the salient points of our testimony.

The principal issue that we wish to focus your attention on, really, is to holding the individual accountable for his or her actions only and not for the actions of other codefendants or coconspirators, over whom that person has no ability to control.

We've had this experience come up with the Parole Commission, and the Commission has attempted to address that in several ways, but I believe in focusing our attention on the issue of offense severity today, it would be helpful, from our perspective, to establish a broad range of subcategories within each offense severity level, in order to distinguish the offense characteristics of one type of offender from another.

For example, in drug cases, we frequently find offenders performing different functions.

Under our experience with the Parole Commission, it's apparent that there should be some delineation between the offense characteristics exhibited by an offender who, for example, is the primary organizer or someone who owns the shipment of drugs, as opposed to a person who is perhaps the least culpable in the form of a worker or a courier.

And the Parole Commission has acted through its definition of these peripheral, nonperipheral roles, to
distinguish between the relative culpability among
offenders; however, we would suggest to the Commission that
in formulating sentencing guidelines, that the Commission
take into account offense characteristics through the use of
grading factors or features within each level of offense
severity to properly reflect the role of other types of
offenders within the broad range of a drug offense itself.

For example, we feel that there should be at
least four subcategories of culpability with respect to
drug offenses, specifically.

For example, there should be the highest level of
culpability of that person occupying the position of primary
organizer, with the next most culpable level being a
position played by a person exercising high managerial
functions. The third most culpable classification would
include persons who we call "facilitators." And then the
least culpable category of offender being the courier or
worker.

We feel that the present --

VOICE: You mean the seller?

MR. WEINTRAUB: Not necessarily the seller. I am
speaking more in terms of an importation type case, where
the least culpable person is a courier.

VOICE: You don't bring the thing up to the
sale(?)?
VOICE: Well, we mean a conspiracy.

MR. WEINTRAUB: Yes.

VOICE: Yeah. Mule.

MR. WEINTRAUB: Exactly.

Under our experience with the Parole Commission, we found it inherently unfair to hold offenders accountable only through the peripheral/nonperipheral distinction. And we feel that the Sentencing Commission can benefit from our experience before the Parole Commission in expanding upon their recognized distinction between various levels of offender culpability. And we believe that this can also properly apply to other forms of offenses or offense behavior, as well.

For example, in fraud cases, we believe that there should be a number of factors going into the offense severity table, incorporated as rating factors or features to distinguish among levels of relative culpability between offenders in the case.

We can measure the degree of offense severity, for example, in terms of the dollar amount, as the Parole Commission presently does.

I think this Commission should focus more specifically on the offense characteristics of the individual. That is, how much could the individual realize as a result of the fraud offense rather than how much did
the overall conspirators realize in connection with the
offense behavior itself.

And we feel that these types of factors should be
incorporated into the offense severity level itself rather
than being used as an aggravating or mitigating factor. We
feel that sentencing judges should be given a great deal of
flexibility in the exercise of the guidelines, not only
within the guidelines but, of course, reserving the
discretion to go above or below, when there are particularly
aggravating or mitigating circumstances or offense
characteristics.

One reason which we feel the Parole Commission's
guideline system has not been a total success is because the
guidelines tend to be applied rather mechanically, and by
building into the system of offense severity levels, more
features or subcategories, we feel that the Sentencing
Commission, and in turn, sentencing judges, can exercise
much greater flexibility, according to the offense behavior
exhibited by the individual offender, him or herself.

In terms of rating the relative seriousness of
other offenses, NACDL has established a Sentencing
Commission Liaison Committee, and we have met, and we have
reviewed the black book prepared by the Commission
containing its tentative classification of offenses, and we
have not been able to reach, thus far, any unanimous
consensus with respect to the relative severity of offenses, which is a point which we found rather significant of itself.

We did, in a general way, agree that violent offenses and offenses involving matters pertaining to national defense should be rated the most serious on a relative scale.

The middle range of offenses, which might include property offenses, would occupy, for example, a middle level, with weapons offenses and drug offenses in that general range, as well.

And in weapons offenses, as in any other type of offense behavior, we feel that the scale of the offense itself is most important in determining the individual's specific role in the offense, because we don't want to lose sight of the traditional judicial caveat that sentences are to be individualized. The person is to be judged on the basis of his conduct and not necessarily the conduct of others over whom he may not have had any ability to control.

On the lower severity range, we would include those offenses which are generally referred to as white collar offenses.

In addition to the white collar offenses, which might include tax offenses, regulatory agency violations
or acts of form omission, we would include offenses
generally against government process, including perjury,
obstruction of justice, and the like.

Our decision to recommend to the Commission that
white collar offenses have a lower degree of offense
severity than other forms of offenses which we are
discussing today, is predicated in large measure upon the
assumption that the traditional white collar or business
type offender does not require long periods of supervision
to carry out the Sentencing Commission's mandate, including
an assurance that the guidelines reflect a general
appropriateness of imposing a sentence other than
imprisonment, in cases in which the defendant is a first
offender or who has not been convicted of a crime of
violence.

There are, of course, other types of white collar
offenses, which may be more severe than others, and we've
been asked to rate the relative seriousness of such
offenses, and we join the other witnesses today, who have
determined that offenses involving a breach of the public
trust, for example, an act of official or public corruption,
might be considering an aggravating offense characteristic,
to warrant a decision above the guideline range, which would
otherwise be indicated for this type of white collar
offense.
One area of concern that our subcommittee has focused on, is the designation of the racketeering type offenses, in RICO offenses, specifically, in an offense severity level table. In many cases, prosecutorial charging decisions alone have determined, under our present patrol system, what the minimum offense severity rating will be.

For example, in RICO offenses, the Parole Commission uses Category 5 as a minimum offense severity level, indicating a range of 24 to 36 months.

And the societal evil that the RICO statute was designed to eliminate, really refers to organized crime and to differentiate between the organized crime offender and the business offender, who happens to commit two predicate acts of racketeering, like mail fraud or wire fraud, we feel that type of business offender more accountable to society than might otherwise be necessary.

In following up on the issue of organized crime, we feel that that presents a very difficult problem to society today, which must be addressed. It is often addressed today in presentencing reports, and some courts have developed sentencing procedures designed to ensure that a defendant receives certain due process safeguards and the presentence report for the government identifies that person, for example, as being a "made member of organized crime."
We would urge the Sentencing Commission to develop a policy statement which specifically addresses the use of this type of information, membership in a large scale criminal organization, to require, at a minimum, that the government demonstrate at the sentencing hearing, by clear and convincing evidence, that the fact in the presentencing report is factually correct.

We would urge you to consider the teaching of the United States v. Vatico, which does not stand for that standard of evidence, but it does indicate a procedure to be followed.

Finally, as representatives of the organized defense bar, we would encourage the Commission --

VOICE: What is the citation for that case?

MR. WEINTRAUB: 579 2nd 707 2nd Circuit 78.

VOICE: Page 10.

MR. WEINTRAUB: We would urge the Commission, in developing the guidelines, to be ever mindful of the sense of the Senate Resolution, section 239, urging that prisons be used only in cases calling for incapacitation and not where the primary purpose of sentencing would be retribution or deterrence. We feel that there are a number of alternative type sentences available, both under our present Criminal Code and the new Criminal Code, which would be taken advantage of, and I believe this was addressed this
morning in the questions directed to the representative from the Federal Probation Officers Association.

In my own contact with the Chief Probation Officer in Miami, we are working together to make increased use of probation, of community service and restitution, to make it a meaningful element of sentencing which can present the court with a meaningful alternative to incarceration.

We feel that we have to be cost effective in proceeding today with the future of sentencing, and the primary purpose should be accountability, holding that offender accountable to society for the nature and type of offense which was committed, but only using incarceration as a matter of last resort, and we should consider, first, as sentencing judges, whether incarceration is indicated at all, because we believe that through the use of creative or imaginative sentencing schemes, the sentencing goals selected to be (inaudible) in any particular case, can be furthered through the use of these types of sentences, which would not be devoid of any real meaning and would, in fact, have some symbolic deterrence, which taken in conjunction with finds and restitution, could be meaningful in carrying out the purposes of the Commission.

My own practice is limited to representing offenders in post-conviction proceedings, including sentencing and parole, and drawing from that experience,
in conjunction with the other members of the NACDL
subcommittee, we hope to participate in the future with this
Commission in determining a future course of sentencing
reforms in this nation.

And if Mr. Lyons or I could answer questions, we
would be pleased to.

CHAIRMAN WILKINS: Thank you very much.
Any questions on my left?

VOICE: It think it is very good (inaudible). (An
aside.)

CHAIRMAN WILKINS: Any questions?
Yes, sir.

VOICE: Do I hear you saying that if the purpose
of sentencing is deterrence, that you shouldn't go to
prison, if a certain type of offense is such that going to
prison is a (inaudible) from deterrence, knowing that?

MR. WEINTRAUB: I'm sorry. I didn't get the last
part.

(Laughter.)

VOICE: Well, I mean, let's take --

(Simultaneous voices.)

VOICE: This is April 15th. There are a certain
amount of citizens in this country who are prosecuted for
fraud in reference to their income, Internal Revenue
Court(?) okay?
Now if it is shown that giving some jail time to
that type of person -- because, first of all, that type of
person is not a person who is underprivileged; right,
generally?

So if it is shown that that -- that going to
prison would be a deterrent, a general deterrent, you say,
you wouldn't advocate going to prison for that -- that we
shouldn't --

MR. WEINTRAUB: No, I wouldn't. I am suggesting
that incarceration be used only in cases requiring specific
incapacitation of the offender and shifting the correctional
priorities from deterrence and retribution to other
correctional purposes which can be achieved in other forms
of sentencing. I don't believe that prison, of itself is
the only form of a deterrent sanction in a criminal justice
system.

I think for an offender involved in a tax evasion
case, assuming that this is the first offense, and that the
person leads an otherwise law-abiding life, that there are
other forms of sanctions that can be imposed by a federal
court to insure that that person is held accountable to
society for his failure to pay taxes.

Moreover, through the use of creative sentences,
including community service, we believe that in appropriate
cases, tax evasion offenders should be held accountable by
performing a certain measured amount of hours of community service, working for a charitable agency, for example, putting something back into the community, something which he deliberately withheld through his failure to pay taxes.

VOICE: Well, maybe that ought to be added, but, you know, it is hard to understand that if you say that it's agreed that that would be a deterrent, that you think that there shouldn't be a just punishment for that type of offense, if it is a deterrent.

There are a lot of people in prison that we sentence three, four or five times, when going to prison is not a deterrent, and we have to figure out some other kind of deterrent for that type of person, but if the offense -- if going to prison is a deterrent for a particular type of offense and offender, and not using it -- I mean, I don't understand that.

MR. WEINTRAUB: You're assuming, Mr. Baer, that it is a deterrent, that prison is a deterrent for a tax evasion case, and I'm not quite certain that I agree with that.

VOICE: Antitrust -- we used to say in the Antitrust Division, in sometimes blatant cases of price fixing, where people, say, bilk the public of billions of dollars on drugs or concrete, or something like that, you take one of those business executives who have done this,
knowing that it was completely wrong and illegal and had profited enormously, and just put them in jail for one day, for one day, that would have -- that would lead people to take the price fixing laws more seriously than if they get enormous fines.

So the Division used to say, just give us one day in prison for any of these defendants, and that will have a very salutary lesson on others.

MR. WEINTRAUB: That is a very valid point, Judge Breyer, because under the Probation statute, the grant of probation can be conditioned upon some partial period of confinement and perhaps in appropriate cases, that would be the best sanction under the circumstances, depending upon the aggravating or mitigating factors of that particular case.

(Simultaneous voices.)

VOICE: In these days, would be even more(?).

(Laughter.)

VOICE: Would you use imprisonment for retribution? I notice that you exclude retribution, and I am wondering what you would use in place of imprisonment for retribution.

MR. WEINTRAUB: I don't think that sentencing should be purely retributive in any respect, and that the other traditional purposes of sentencing could be served
by realigning retribitional(?) priorities.

VOICE: Counsel, no sentence, as I view it, is ever on one theory, and I think what every judge tries to do is to mold all sentencing objectives into one, dependent upon the effect it is going to have on the individual, his offense, whether it is going to deter others, the effect on the community and whether it is going to be received.

So you can't say, well, you got to -- (inaudible) tax cases, for instance. You don't want that first offender to go to prison for a substantial tax offense?

MR. WEINTRAUB: It is difficult to generalize, Judge.

VOICE: Extending over, say, three years?

MR. WEINTRAUB: Depending upon the fact of any particular case.

VOICE: $50,000, three years.

MR. WEINTRAUB: Personally, I would not recommend a sentence of imprisonment in that type of situation. And I feel that there are other sanctions available, considering the combination of sentencing goals which you alluded to before, which would be accomplished through a less restrictive form of a sentence.

VOICE: I'm awful glad you're not on the Commission.

(Laughter.)
CHAIRMAN WILKINS: We're going to address this interesting alternative in a later hearing, and perhaps we could call upon you at that time to give us your views.

Mr. Lyons, is there anything you'd like to offer?

MR. LYONS: The only thing I would offer, Steve referred to the Minnesota role model. You should -- I think it is important that you be guided by not only by the Minnesota state sentencing guidelines but the other states that have gone into their own processes, like my own state of Florida.

And we've had debates. We've had prosecutors in our state, when they first were passed, were chagrined, were screaming and yelling. It appears that over the years, emphirically, the researchers told us that they are not as upset, because sometimes when the government or the state moves to aggravate, they seem to get what they want, and unless you are reasonable and you weigh both sides of the picture, you're going to have the government moving to aggravate, or you are going to have -- and defense attorneys saying to clients, you've got nothing to lose to go to trial, or you're going to have a public clamor, and you've got a very difficult task. And I pray that you do look at both sides of the picture.

We appreciate the opportunity not only to be here but to be last.
VOICE: -- We've looked at them all. Washington and Pennsylvania (inaudible.)

MR. LYONS: I might address you, sir, with regard to -- see, we differ too. $50,000 is substantial to me. And I am not saying that jail is not necessarily the answer in that case, but what Benson is indicating is, is we can do it in the form of probation by having that person being incarcerated, because I'll be honest with you, I represent people that would just as soon go to jail than be restricted in community-controlled environments. Believe me when I tell you that.

VOICE: Well, the ordinary criminal much prefers going to jail than being on paper.

MR. WEINTRAUB: Absolutely. I agree with you.

But I appreciate this opportunity. I am not on the agenda, and the fact that you gave me an opportunity to speak, I do appreciate.

VOICE: Well, we (inaudible) coming back.

Thank you very much.

Anyone in the audience wish to testify?

(Laughter.)

VOICE: Sir, I should say -- my name is Kurt Wolfcam(phonetic) here representing the National District Attorneys Association. We had planned to bring a speaker down from New York. Today he is not able to attend.
Hopefully, we can have them input at some of the later hearings (inaudible).

(Simultaneous voices.)

CHAIRMAN WILKINS: Of course, we've asked your organization, and if you would go ahead and send us your comments -- do you intend to do that?

MR. WOLFCAM: I will.

VOICE: -- we will distribute them to the Commission to make them part of this record. And of course, we are in communication with your organization on everything we do, and I am sure you will have another opportunity to participate in another hearing. And I think I am going to speak to your organization in about two weeks, and I'll look forward to seeing you there.

Anyone else?

(No response.)

We stand adjourned.

(Whereupon, the Public Hearing was adjourned.)