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UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON
SENTENCING OPTIONS

JULY 15, 1986

(THE TRANSCRIPT WAS PREPARED FROM A TAPE RECORDING.)

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CHAIRMAN WILKINS: We appreciate very much your attendance, and we appreciate the work that obviously the witnesses who will appear this morning have already done in preparation.

I might add that we have received written testimony from a large number of people throughout the country, and all of this is being used and studied by the Commission.

This is the fourth in a series of public hearings that we have been holding. The first hearing dealt with offense seriousness. Prior record was the subject of the next hearing, and then we had a hearing dealing with organizational sanctions, and we have a hearing scheduled in September dealing with the issue of plea negotiations.

We have found so far -- and I am sure this will be no exception today -- that these public hearings have been very beneficial to this Commission, to assist us in this very complex task that we are about.

I might say, too, that it is the Commission's view from the very beginning that these guidelines should not be written in the vacuum of the Commission office but that they should be written after receiving the opinions and the views and input from a wide range of individuals who share our interest in writing guidelines that will not only
meet the Congressional mandate but will truly serve the interest of justice, and this is a part of this public input that we have been receiving.

Throughout October and November of this year, we will be conducting hearings throughout the country, and at that time we will be dealing with some specific guidelines that we will have proposed in a tentative draft fashion so that we can receive comments based on not just issues but also what we have written on paper.

I hope that you all will be able to attend some of these regional hearings. One of them will be here in Washington. The others will be scattered throughout the country in a timetable that we will be publishing in the Federal Register.

Today our topic, as you all know, deals with sentencing options.

Many times when the word "guidelines" or "sentencing guidelines" are mentioned, the first thing that comes to mind is how shall guidelines provide for incarceration, and that is indeed an important part of our work, the type of sentence to prison that would be appropriate in a given situation. It is not all of the work, but an important part of guidelines must address the issue of something that is other than incarceration in a penitentiary.
There are circumstances, there are individuals who commit crimes, we believe, that truly can be punished appropriately as well as taught the error of their ways and learn respect for the law and the rights of other people by something other than incarceration in a prison.

It is important that we know how to identify those types of situations and then provide for the appropriate alternative or sentencing option that we will be addressing today.

We are delighted to have Mr. Douglas Ginsburg with us this morning, an Assistant Attorney General in charge of the Antitrust Division.

Mr. Ginsburg.

TESTIMONY OF MR. DOUGLAS GINSBURG, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

MR. GINSBURG: Thank you very much, Judge Wilkins. It is a pleasure for me to be here and have the opportunity to give the Antitrust Division's views on (inaudible).

These subjects are of great importance to the Antitrust Division, and I will elaborate on certain (inaudible).

The sentences that are currently being imposed for criminal antitrust violations are generally
inadequate to achieve the primary purpose (inaudible). To the extent that these sentences also involve alternatives such as community service, we think that they are probably even further from the essential sanctions (inaudible) need to be given in order to (inaudible).

The kind of sentences also suffer from the kind of unwarranted sentencing disparities which prompted the creation of this Commission.

(Inaudible) the guidelines that will be promulgated by the Commission provide a more powerful and a more consistent deterrence (inaudible) available.

Now, the Sherman Act is the principal antitrust (inaudible). It has since its passage in 1890 (inaudible) criminal statute in recognition of the seriousness of the crimes involved and of the need to deter them strongly. Congress in 1974 amended the Sherman Act to make the violation punishable as a felony with up to three years imprisonment.

Virtually all the criminal antitrust cases that are brought involve intentional agreements among competitors to increase prices by such means as price fixing, (inaudible), or covert market allocation. In exceptional circumstances, monopolization or attempted monopolization cases might also be prosecuted criminally.

While the antitrust laws can also be invoked
By the government and by private (inaudible) in order to challenge (inaudible) open and notorious conduct that may have the effect of restraining competition, it is only intentional conduct that clearly (inaudible) and clearly illegal under established precedence that the government proceeds against criminals.

For the sake of brevity, (inaudible) Commission, I will refer to all such criminal antitrust offenses as price fixing (inaudible).

I don't think there is any doubt that price fixing is a serious offense. It is an offense that cannot be committed inadvertently. It is one that causes substantial social harm (inaudible) no social benefits whatever.

Unfortunately, though, we have (inaudible) punishment to deter price fixing, the current sentencing practices of the courts have made it -- have not made most effective use of those tools, to say the least.

I mentioned that since 1974 the Sherman Act provides for prison sentences of up to three years for individuals and fines, I should add, for corporations ranging up to $1 million.

The Criminal Fine Enforcement Act of 1984 increase that fine for individuals to a maximum of $250,000 and provided for the possibility of an alternative maximum
fine for individuals or corporations calculated at twice the
greater of the gain, pecuniary gain, or loss associated with
the offense. Those new maximums apply only to offenses
committed after 1984, but the felony jail sentence that
(inaudible) in the last decade has been applied to numerous
price fixing cases (inaudible) that we prosecuted criminally
in that period.

These substantial penalties could (inaudible)
imposed with substantial deterrent effects, but instead I
believe the actual sentences that are meted out by the
courts (inaudible).

Now, to give you specific data on that, in fiscal
years 1984 and 1985 there were 126 individuals sentenced in
criminal antitrust cases. These were all felony
convictions. We recommended incarceration in 107 of those
126 incidences. That is about 85 percent.

Pardon me.

And for all of the others -- pardon me -- with
one exception we made no sentencing recommendation in those
cases. Nonetheless, of the 126, only 40 -- and that is
about 32 percent of them -- actually were sentenced to even
a single day in prison, actual asylum, not suspended
sentence.

The average time imposed, looking at the entire
group of 126 defendants, was only about 30 days, and of
course for the smaller group that went to jail at all the average was something like (inaudible).

The fines that were imposed on defendants sentenced during these two fiscal years were also rather modest, to say the least and averaged in fact less than $16,000 over the group of 126 individuals.

The average fine for the 100 corporations that were sentenced was only about $133,000.

Of the 126 individuals, 36 of them -- that is about 28 percent -- received instead or as part of their sentence some form of community service obligations, and of these 36, I should point out that the Division had recommended actual jail for 34 of them and, as part of the plea agreement, made no sentencing recommendation for the other two. The 34 recommendations for jail resulted instead in the imposition of community service instead of jail.

Seven of the 36 felons actually got some jail time in addition to community service. The other 29 got solely community service.

Now, I take it that deterrence is the primary goal of criminal antitrust enforcement, and I am convinced that accomplishing this goal requires the use of very substantial penalties in the form of both fines and of imprisonment for reasons that I will explain.

The penalties currently being imposed by the
courts are simply insufficient to deter price fixing. I think that is evident from even a casual inspection of the states involved with price fixes and the benefits that they derive from (inaudible).

The failure of our system to achieve deterrence is evident from our continuing discovery of significant instances, significant numbers of price fixing conspiracies each year, and the explanation is obvious. Price fixing opportunities present a potential for extracting huge sums from consumers, and there is a very good chance that price fixes will escape detection despite our best efforts.

In order to deter so potentially lucrative an enterprise requires much higher (inaudible) than imprisonment (inaudible).

Now, before addressing fines and imprisonment, I would like to explain why four kinds of alternative sentences or sanctions (inaudible) are not adequate substitutes for imprisonment and heavy fines in the antitrust area, and I refer here specifically to community service, probation, debarment, and restitution.

These alternative sentences or sanctions I think often impose in fact little hardship on offenders, and their availability results too often (inaudible) their substitution for more meaningful sanctions, which I think undermines deterrence (inaudible).
Turning first to community service, it seems apparent to us that many if not most of the sentences imposed (inaudible) under the rubric of community service are not in fact punishments at all.

To take a specific example, one defendant's community service involved coordinating an annual (inaudible) for a charity. A defendant in another antitrust case was required to organize a golf tournament as a fundraiser for the Red Cross (inaudible).

In yet another case the defendant was sentenced (inaudible) speeches (inaudible) economic effect of his criminal activities. This is a punishment that in practice is more likely to frustrate than to advance the purposes of the antitrust laws, I am sure. In fact, such penalties do nothing more than trivialize (inaudible).

Second, turning to probation for individuals or corporations, I think that is inappropriate as an antitrust penalty because it provides little deterrence and serves no real countervailing purpose in the typical antitrust case. Price fixing is an intentional offense committed by individuals whose background or reasons for committing it (inaudible).

(Inaudible) using probations that go (inaudible) on a first offender is equivalent to eliminating entirely any effective penalty (inaudible). Probation is sometimes
used to help ensure future compliance by those (inaudible).

In the case of an antitrust violation, this function can and should adequately be served by a combination of fines and incarceration. Neither individual nor corporate defendants need assistance from the government regarding how to go straight, as it were, or, more specifically, how to avoid future criminal antitrust violations, and further, as corporate defendants, where I think the idea of probation is a (inaudible) probation implies for the antitrust defendant, corporate antitrust defendant, really no more than an unwarranted judicial regulation of the defendant's continuing business activities.

Third, with respect to debarment, this is generally also an inappropriate sanction for price fixing. Indeed, ironically, by eliminating a competitor through debarment is to impose on society the same harm as does the crime it is designed to punish; namely, the elimination of competition.

Indeed, there could be situations in which all of the potential suppliers might be debarred because they are all parties to a price fixing conspiracy, which would only make the product, at least for a while, totally unavailable to the purchasing agencies.

Fourth, restitution, which I think can be a
meaningful sanction in many circumstances but in the
criminal antitrust case (inaudible).

Those who are injured by an antitrust violation
already have the private (inaudible) of action to collect
treble damages (inaudible). Since any restitution would
have to be credited against those subsequent treble damage
awards, restitution would not significantly or perhaps not
at all enhance deterrence (inaudible) a follow-on private
civil case could be (inaudible).

Now, there is not always a follow-on civil case
brought in the wake of every criminal antitrust (inaudible),
but the absence of a follow-on private case probably
indicates that the defendant was financially unreachable or
that there are severe, indeed insurmountable difficulties in
identifying the victims and determining the extent of their
injuries.

Thus, restitution is not a meaningful remedy in
that case either, where there wouldn't be a private
follow-on suit, and in fact it may significantly and
unnecessarily increase the cost of criminal prosecution and
perhaps even unduly complicate or prolong the sentencing
process (inaudible).

Alternative sanctions (inaudible) fines and
imprisonment should be the primary, if not the exclusive
penalties for price fixing.
Organizations, where incarceration is not an option, a fine is clearly (inaudible). Objections to fining organizations that I think the Commission has heard is insubstantial in the case of price fixing. Since the firm's owners are the major beneficiaries of price fixing, there should be no concern about shareholders also bearing the cost of fines when that price fixing is prosecuted.

The shareholders should be no more insulated from the gains and losses from price fixing activities than they are from the gains and losses of any other risky management decisions. Indeed, it is essential that the shareholders have the incentives to institute appropriate safeguards in order to prevent criminal behavior, and I would point out that most major corporations in this country and certainly the great majority of publicly traded companies have formal antitrust compliance programs that are instituted by management in order to limit or minimize the exposure of the corporation from antitrust liability. Without those types of compliance programs, I think it would be impossible to provide the same degree of confidence from individuals to (inaudible).

The optimal crime for any given act (inaudible) equal to the damage caused by the violation divided by the probability of convictions in that particular case. That is a fairly general abstract (inaudible).
Because the harm caused by price fixing to the rest of society is always going to be greater than the benefits that would accrue to the price fixer, such a fine would result in a socially optimal level of price fixing, which is in this case zero. There are no socially beneficial (inaudible).

Unfortunately, however, in the real world we cannot impose the uniquely appropriate fine in each case, since that would require knowledge of the perceived probability of conviction in each case, perceived by the defendant. We can, however, estimate with an appropriate proxy the average probability of detection and conviction. We can get some idea, in other words, of the probability of detection by looking at how long the conspiracy (inaudible) have typically managed to avoid our detection.

For example, there have been substantial highway construction ever since World War I, with many thousands of contracts handed out each year. We did not learn about the (inaudible) and thus did not prosecute a highway (inaudible) case until 1972. Since then we have prosecuted hundreds of such cases, and we have every reason to believe that a significantly larger number escaped (inaudible).

Of the cases that we have prosecuted, we have found that they have often involved continuous conspiracies running for 10 years and more. So it is quite probable that
many conspiracies operated for decades without ever being discovered and never will be discovered.

The general evidence on how long conspiracies have typically been in place leads us to believe that the probability of detection for price fixing generally is less than 1 in 10. Combined with the fact that not all of those who are detected may be indicted and then convicted, this indicates that the appropriate multiple is at least 10. Based on our experience that price fixing typically results in price increases, that has harmed the consumers in a range of 10 percent of the price.

That multiple of 10 would indicate that the appropriate fine must be at least equal the total amount of the sales made by the defendant pursuant to the price fixing (inaudible).

Simply put, a million dollars of sales at competitive prices subject to the price fixing scheme would sell for perhaps $1,100,000. The harm to the consumers is the $100,000. The multiplier being 10 because of the possibility of detection is 1 in 10, the total fine should be $1 million in that instance, and it is easy to see that taking the sales themselves (inaudible).

Well, there are, unfortunately, limits on the utility of setting antitrust fines on the basis of the sales that are made by defendant. In many, if not most cases the
sales that are subject to the conspiracy will exceed the statutory maximum, the $1 million fine.

But twice the gain or loss alternative that is currently in force under the Criminal (inaudible) Enforcement Act could be used to derive larger fines, but in the unique antitrust context that entails enormous potential complexities and should be approached only with the utmost caution.

With the optimal fine we do substantially see $1 million, or where the defendant is otherwise unreachable because they have been (inaudible).

The best probation would appear to be to impose what fine is practically available and emphasize even more the importance of deterring the individual (inaudible) impose on the corporation such a fine as is practically available and emphasize that much more about the necessity of deterring the individuals whose conduct infiltrates their corporate employers.

Now, in the case of individuals, of course, both fines and incarceration are available, and we support (inaudible) of both. Fines alone simply cannot do the job. Even fines that are large enough simply to deter most price fixing would be huge and often far greater than the statutory maximum because the potential gains from the price fixing are so large and the likelihood of detection
is regrettably fairly small. Few individuals or even corporations have the resources needed to pay the fines that would be large enough to deter price fixing.

Typical cases in recent years have involved individuals and corporations that would have found it difficult or impossible even to pay a fine equal to the damage from the violations much less the amount -- perhaps 10 times the damages -- that would have been necessary to deter the violations.

Thus, neither individuals nor corporations can be deterred adequately by reliance on fines alone because they know that their limited resources make the true cost of (inaudible) far less than the nominal amount of the optimal fine.

In fashioning a schedule of specific penalties for price fixing, a number of guiding concepts are available, given that you can't realistically impose optimal (inaudible).

The first is that the punishment should be directly related (inaudible). The punishment should increase as the harm increases so as to provide additional deterrence for more socially undesirable behavior.

Second, when deterrence has demonstrably failed, the penalty scheme should impose more severe penalties; that is, recidivists should be dealt with more harshly than the
first offenders.

I have to emphasize that I am not saying that we should go easy on first time offenders but rather that we should deal even more harshly with subsequent offenders.

Third, the enforcement costs of maintaining a given level of deterrence should be minimal, which implies first that there needs to be some mechanism for rewarding both pleas of guilty and, even more important, cooperation with the government's investigation and prosecution of others.

A second implication of the need to keep down enforcement costs is that all offense and offender characteristics on which the sentences are based should be objective and should be easily ascertained. That is necessary in order to minimize the cost of sentencing, discovery of relevant facts, hearing, and the probable appeal, as well as to minimize the potential for error.

For example, while sentences should vary according to the harm caused, the measure of harm should be a simple one. I would suggest that the amount of sales affected by the conspiracy is the appropriate way to measure harm (inaudible).

Finally, there are strong arguments for reducing judicial variance with respect to both fines and imprisonment. Substantial variance in fines for the same
offense just exacerbates the problem of unreachability simply because the high fine is less likely to be recoverable (inaudible).

There is even a more compelling reason to strive (inaudible) with respect to imprisonment. There is general agreement among antitrust analysts, I think, that the deterrent effect of certain prison sentences is far greater than the effect of less certain but possibly longer sentences. I think that certainty as to the likelihood (inaudible) is the key antitrust deterrent, given the type of individual that is likely to be involved in an antitrust penalty, and we are talking here about an executive in a large firm or an owner or manager of a smaller company. In essence, even a modest jail sentence is likely to have a significantly adverse effect on the person's reputation, social status, and future earning power.

So, Mr. Chairman, I think that a certain jail sentence would be a strong deterrent to antitrust violations, and this argues strongly for a substantial minimum term of imprisonment for all first time price fixes, with the possible exception of those whose cooperation with the government leads to the conviction of others.

In conclusion, Mr. Chairman, we are recommending that corporations and individuals be fined in amounts that
increase in direct relation to the harm caused by the antitrust violations, that all individuals receive in addition a certain term of imprisonment that begins with some fixed minimum and increases to some (inaudible), and finally that the sales affected by the price fixing serve as the measure of harm caused.

Thank you, Mr. Chairman. I would be happy to address any questions.

(Tape reversed.)

CHAIRMAN WILKINS: ...that you would suggest that would serve the purposes of deterrence as well as the other purposes that we are interested in?

MR. GINSBURG: Well, in terms of a specific amount of time, I think we are somewhat diffident about offering a number of months and saying confidently that that is the demonstrably correct number of months. But we have something in the range of six to 12 months in mind.

I think that that is the kind of sentence that would very definitely get the attention of the typical antitrust offender.

CHAIRMAN WILKINS: Fine.

Any questions to my right?

VOICE: My question, Mr. Chairman, was the one that you already asked.

I understood that you were dissatisfied with the
average current sentence to incarceration of 30 days, and I am to understand that repeat offenders would certainly get a more substantial amount of time and the maximum for them then would be 12 months and first offenders the minimum would be six months.

MR. GINSBURG: Well, I think for repeat offenders, Commission Corrothers, that the maximum -- I was suggesting that -- to go back, I was suggesting that six to 12 months, something (inaudible) six and 12 months would be appropriate for first offenders. For repeat offenders I really think that something much more closely approaching the three-year statutory maximum would be appropriate, bearing in mind that this is a crime that constitutes essentially fraud at the wholesale level. It can only be committed by someone for a second time that is simply willing to take (inaudible), and I think that we need to make those odds sufficiently adverse (inaudible).

COMMISSIONER CORROTHERS: The final question is you do not feel that community service is at any time appropriate to be used in connection with or in addition to a period of incarceration?

MR. GINSBURG: Well, I would be reluctant to say --

COMMISSIONER CORROTHERS: And how do you feel about the provision following that period?
MR. GINSBURG: I would be reluctant to say that community service might never be an appropriate supplement to a sentence involving jail and a fine.

For instance, the person who is completely incapable of paying any fine might very well (inaudible). The key thing, it seems to me, is that the system look first to a substantial crime and jail time before looking for any alternatives because our experience has been that those alternatives have driven out the real deterrence. Instead of being (inaudible).

CHAIRMAN WILKINS: Commissioner Block.

COMMISSIONER BLOCK: Is the gain -- the argument that you need a minimum prison term for each price fixer an argument based on the fact that the statutory maximum for the fine is too low?

(Inaudible.)

MR. GINSBURG: Even if there were no statutory maximum fine, we would still have the problem that individuals are unable to respond to fines sufficiently to deter this activity.

An offender who realizes 100- or $200,000 from a (inaudible) for several years can confidently be expected (inaudible) or otherwise be put beyond the reach of the court the proceeds from those activities, and even an unlimited fine would (inaudible) to deter that kind of
activity as a result.

So you need jail sentences, I think, regardless of the fines if one has a realistic assessment of the assets (inaudible).

COMMISSIONER BLOCK: And it would apply to firms, also?

MR. GINSBURG: Well, for firms I think it is equally true that they would be unable to pay optimal fines in many instances, again particularly where (inaudible) smaller firms (inaudible), but since jail is not a realistic alternative our suggestion there is that the fine be imposed as well on the individuals.

COMMISSIONER BLOCK: Thank you.

CHAIRMAN WILKINS: Any questions to my left?

VOICE: We have had antitrust people here before, and they shy away from any disqualification for government contracts, and you didn't say a word about it.

MR. GINSBURG: Well, I, under the heading of debarment, suggested that that can have an anticompetitive effect, and I can only relate some of our recent experience (inaudible).

VOICE: I am aware of what happened in (inaudible).

MR. GINSBURG: Well, we have some recent (inaudible) cases that I think may prove awfully typical of
the kinds of cases that we will be seeing in the next several years where the Army Corps of Engineers is subject to a statutory requirement to set aside certain projects or a certain number of projects for small business enterprises or in other cases perhaps minority business enterprises, but our exposure involved the small business set-aside.

That requirement limits significantly the number of potential bidders for the job. Those bidders then engaged in price fixing (inaudible).

Now, if as a result all of those defendants later convicted (inaudible) of participating in the Army's projects, in fact there will be little or perhaps even no (inaudible), no proviso for their services to the Army Corps for a period of time, which really can't be regarded as beneficial to the taxpayers.

VOICE: Well, because you have got certain circumstances like that wouldn't be any reason why you shouldn't have some consideration given to that kind of a sanction.

MR. GINSBURG: Well, I agree with that, Judge MacKinnon, and the Army has its own procedures, as have all of the states (inaudible) for debarment of contractors (inaudible). They have varying degrees of discretion to do (inaudible) debarment or to forego debarment if it would have adverse consequences for their procurement.
COMMISSIONER MACKINNON: Do you think this Commission can order a maximum or a minimum sentence?

MR. GINSBURG: It is my understanding that the Commission can order a minimum sentence subject to at least such departures as the court may be able to justify in a particular case.

COMMISSIONER MACKINNON: Well, it wouldn't be minimum (inaudible)?

MR. GINSBURG: Well, I guess I would have to look at the statute in question and get back to the Commission with an answer on that.

COMMISSIONER MACKINNON: A lot of your statistics were based on, you say, recommendations to the court that weren't followed.

It has been my experience that 90 percent of the cases, criminal cases, in the country the judge never asked for any recommendations from the prosecutor.

MR. GINSBURG: Well, Judge, it is our practice to submit a recommendation wherever the court will accept our doing so, and there are courts that by rule or by decision of the individual judge will not accept a government recommendation. Of course, in those cases we stand mute.

In addition, there are occasional inferences in which by reason of a plea bargain (inaudible), but it is our practice wherever possible to make recommendations in order
to aid the --

COMMISSIONER MACKINNON: But do you find that the judges take that or want them or ask for them?

MR. GINSBURG: Well, in terms of their taking our suggestions, the record is spotty and disappointing. We had a case in the last two weeks where we recommended $375,000 in fines and, to our surprise, the judge imposed $400,000. The more typical story is one in which the fine is reduced and the jail is completely eliminated from our recommendation.

COMMISSIONER MACKINNON: My last question is: to what extent have you considered this damages paid on several suits? Don't judges generally take those into consideration, too, the potentiality (inaudible) suit probably already filed?

MR. GINSBURG: Well, the number of antitrust cases in which there has been a follow-on civil action for damages has dwindled over the years. I believe it is about 50 percent of the incidences now, and it is possible that courts are erroneously anticipating that such a suit will follow as a matter of (inaudible).

But the anticipation of such a suit in addition to being erroneous does, I think, undermine the scheme of sanctions contemplated in the statute by eliminating from the mix the criminal fine which was to be imposed in
addition to any civil liability.

CHAIRMAN WILKINS: Steve.

COMMISSIONER BREYER: I think that was very interesting.

I have written two things down here that are a little conflicting.

When you said six to 12 months, do you mean that as a typical sentence or do you mean it really as a minimum sentence?

Because you said a minimum sentence which then would rise. I am quite interested in what you think the typical sentence ought to be.

(Inaudible.)

Defendants have no prior record (inaudible), and they have fixed prices on goods maybe worth 20-, 30-, $40 million, and that is it.

What is your idea of a typical time they should go to jail?

MR. GINSBURG: Well, I would take the six to 12-month period and relate it to the volume of commerce --

COMMISSIONER BREYER: Now, the volume of commerce is $30 million.

MR. GINSBURG: So in that instance it would seem to me that the 12-month period --

COMMISSIONER BREYER: You are saying it is a
range, six to 12 months.

Now, to get that range under the current law, I guess the judge would have to sentence them to three years because, roughly speaking, a person really serves a third.

MR. GINSBURG: That is our experience.

COMMISSIONER BREYER: That is your experience.

So what you are really saying is that the typical price fixing case the person should be given what would now be the maximum under the statute?

MR. GINSBURG: Well, the typical price fixing case involving 30- or $40 million in commerce, which is not the typical (inaudible), and I can only guess at that amount.

COMMISSIONER BREYER: What kinds of ranges of jail sentences have you typically asked for during, say, the '84-'85 period?

Now, I realize that you haven't necessarily gotten it, but --

MR. GINSBURG: We have rarely asked -- Judge Breyer, we have rarely asked for -- in fact never asked for more than a year because we do think that our recommendation wouldn't be taken seriously by the court in light of our experience with other courts if we were to ask for two or three years.

COMMISSIONER BREYER: You would have asked in a
large case typically for three years, the maximum, if you
thought you would get it?

MR. GINSBURG: Well, I think we certainly would
have asked for a year in cases that we did not ask for a
year. I don't think I would go beyond a year on a first
offense, although I think it would be perfectly reasonable
to provide (inaudible).

COMMISSIONER BREYER: But it is clear in your
mind --

(Simultaneous voices.)

COMMISSIONER BREYER: But it is clear in your
mind that to ask for a year now, until we report, typically
meant four months in jail. To ask for a year after we
report would mean a year in jail.

MR. GINSBURG: Now, I should point out that an
interesting contrast (inaudible). We have recently had a
number of cases in which the antitrust count was joined with
or followed by in a subsequent case a count for perjury or
tax fraud or (inaudible), and it is remarkable how stringent
the courts are with anyone convicted of perjury, and I think
appropriately so.

So that we had, for instance, a three-year
sentence (inaudible) for someone who was convicted both of
perjury and of price fixing, and the court didn't allocate
the sentences. We have had other instances in which a year
or more have been given (inaudible) or perjury aspects of
the case while at the same time a virtually trivial fine for
or community service have been imposed in connection with
the antitrust crime.

And I think something is seriously amiss when the
courts are perfectly capable of recognizing the necessity of
deterrence in order to preserve the integrity of their
process and yet minimizing the deterrent effect of the
antitrust enforcement effort which is essential to the
integrity of our public procurement process as well as
(inaudible).

CHAIRMAN WILKINS: Thank you very much.

Let me just -- I think a year's sentence today
would result in a service of about 10 months because there
is no parole on a sentence of one year or less. So if a
price fixer was sentenced to a year, they would serve
between that six to 12-month range that you are suggesting
now.

MR. GINSBURG: (Inaudible.)

CHAIRMAN WILKINS: Correct.

Well, thank you very much, Mr. Ginsburg. We
appreciate it.

MR. GINSBURG: Thank you, Mr. Chairman.

CHAIRMAN WILKINS: Thank you.

MR. GINSBURG: If there are any other questions
later, I would be happy to respond in writing.

CHAIRMAN WILKINS: Well, I am sure --

MR. GINSBURG: (Inaudible.)

CHAIRMAN WILKINS: Okay, thank you. I am sure we
will be in touch with you.

Representing the American Bar Association,
Criminal Justice Section is Mr. John Greacen and Ms. Loy
Robinson.

We are delighted to have you both with us. Let
me suggest that if you will somewhat summarize your
testimony, and then we will allow more time for questions,
and we don't have any microphones, John. So you and Loy, if
you are going to be speaking as well, please sound off so we
can all hear you in the back of the room.

Thank you.

TESTIMONY OF THE AMERICAN BAR ASSOCIATION,
CRIMINAL JUSTICE SECTION BY MR. JOHN GREACEN
AND MS. LOY ROBINSON

MR. GREACEN: Thank you, your Honor, members of
the Commission.

I do represent the American Bar Association here
today. I want to make perfectly clear that I do not
represent the views of the United States Court of Appeals
for the Fourth Circuit, where I work. On the other hand, I
hope ultimately that the views I espouse will be the views
of the junior member of that court.

(Inaudible.)

With me today is Loy Robinson, who is the Executive Director of the Criminal Justice Section of the American Bar Association and Director of the Washington, D.C. Professional Services Division of the ABA.

The testimony that I have given you prior to my appearance is based on the American Bar Association standards on sentencing alternatives and practices, which is about half of this book. The standards in this area are the most comprehensive and inclusive of a very fine set of standards on criminal justice, and what I have done is to try to pick out from it the policies that pertain particularly to the topics of this hearing and to the particular questions that you posed in your letter of invitation.

In my summary I am going to comment on those general policies and not on the specific answers to your questions and rely on you to probe me on those if you are moved to do so.

The American Bar Association standards strongly advocate the use of nonincarcerative sanctioning wherever possible. The standards use the notion sanctions involving about nonincarcerative sentences. It is important to recognize that the alternatives that you are discussing are
sanctions. They are restrictions on the liberty, on the
assets of people. They are not mere slaps on the wrist.

The standards do not countenance the kind of
community service alternatives that Mr. Ginsburg noted of
organizing golf tournaments, by the way. Community service
can be onerous and should be onerous regardless of the
standing of the person who is sentenced to it.

The standards advocate nonincarcерative sanctions
because the American Bar Association believes that those
sanctions best meet the needs of most offenders. In most
cases they satisfy the public's need for appropriate
punishment. They are cheaper, and quite frankly, they are
the only way that sentencing guidelines can meet the
requirement of your statute, that the guidelines minimize
the likelihood that the federal prison population will
exceed the capacity of the federal prisons.

The standards articulate the least restrictive
alternative as the basic touchstone for the judge's criminal
sentencing, and that is that the sentence imposed in each
case shall call for the minimum sanction which is consistent
with the protection to the public and the gravity of the
crime.

The standards do not deal with specific crimes.
They deal with overall policies, and therefore my testimony
just deals in the necessarily abstract notion.
The standards call for the application of nonincarcerative alternative sanctions to every crime type. Your legislation, as I read it, doesn't authorize you to do that, but it is our view that the Commission ought to authorize nonincarcerative sanctions in every instance where the legislation gives you the leeway to do so.

The standards call for wide use of probation and for a whole set of other sanctions called intermediate sanctions, which would be short term (inaudible) sorts of incarceration but below the minimum of an ordinary incarceration for that type of crime.

The sanctions call for the use of fines, with fines indexed to the financial gain or loss involved and not to a magic number.

Finally, the guidelines -- the standards call for the full integration of alternative sentences into guidelines, realizing that the only way for the least restrictive alternative to be actually implemented in a guideline system is for those sentences to be integrated fully into the guideline structure.

In my testimony I posed three questions to myself dealing with this general issue:

What alternatives should the Commission recognize?

The answer is as many as possible, and the way in
which the guidelines are set up ought to spur rather than
dampen the individual sentencing judge's creativity in
developing yet additional alternatives as may be appropriate
to a particular case.

For what crimes should alternative sanctions be
allowed?

And the answer is as many as possible.

Finally, how should alternative sanctions be
integrated into a sentencing guideline scheme?

This is a very difficult question, particularly
for witnesses appearing at this stage in your process where
we don't yet know the structure and form that your
guidelines will take because of course this must respond to
a particular form.

As I see it, this Commission is breaking new
ground here in integrating alternatives into sentencing
guidelines. For the most part, the guidelines of which I am
familiar merely say in/out, and they do not say what happens
to those who are out.

We suggest in the testimony three possibilities:
first, that the notion of the least restrictive alternative
be stated specifically in the guidelines as the principal
canon of construction for sentencing judges.

Second, we point out that particular
nonincarcerative sentences can be incorporated into a grid
of a traditional guideline matrix, and if you will look at Appendix A, which appears two pages after page 13 of the testimony, you will see one taken from the standards in which the alternative sentences are set into a guideline matrix along with the incarcerative sentences.

And our third possibility is the notion of the development of some sort of an equivalency table where nonincarcerative sentences could be equated to incarcerative sentences, and I direct your attention to page 7 of the testimony. I would like to modify slightly the testimony in the last sentence on the bottom of page 7.

Page 7 suggests that the Commission might say that a month of total imprisonment was the equivalent of X months of probation or Y months of intensive supervised probation or W hours of community service. The next sentence unfortunately doesn't carry through that notion because it should read as follows:

Then if the guidelines specified a six-month incarceration sentence, the alternative would be 6X months of probation or some combination sentence such as 4Y....
The attempted algebra here is not confusing, but it...

One other comment I would make. In the answer to one of your questions on the structure of a hearing to determine the appropriate amount of restitution, I failed to direct your attention to Standard ET-614, which does spell out the American Bar Association's recommendations on sentencing hearings, calling for an evidentiary hearing where there are disputes as to the presentence report and the decision on the preponderance of the evidence standard.

CHAIRMAN WILKINS: Thank you very much, Mr. Greacen.

Mr. Robinson, do you have any comments you'd like to make?

COMMISSIONER ROBINSON: No. (Inaudible).

CHAIRMAN WILKINS: Good. Thank you.

Any questions to my right?

COMMISSIONER: I just wanted to follow up on this least restrictive alternative motion. What does that mean in practice? How do you decide when prison and fine, least restrictive alternative, recognizing that there are constitutional problems in trying to define...

MR. GREACEN: The way it would work in practice is the sentencing judge would ask, having already decided that probation is out of the question, given the gravity of
this case, would next ask:

Are fines appropriate in this case? In this case, could fines satisfy the damage to the fabric of society?

And, if so, then the fines could substitute for incarceration. Or, it might be that, given the case, fines would need to be added to incarceration.

But, the standards suggest that fines are rarely appropriate in addition to incarceration.

COMMISSIONER: Would you admit to the provision that it would give guidance to the -- the guidelines or policy statements about how the judge is to make that determination? About whether in fact fines could satisfy the principles of punishment in this case?

MR. GREACEN: This is the ultimate and difficult question that the Commission has to grapple with. And I'm afraid my answer will be unsatisfactory and will merely say that you have to walk the thin line between giving the guidance to the sentencing judge that the statute foresees you giving, and leaving the judge the discretion to decide a particular case.

COMMISSIONER: But the alternative -- face the court. I think that's the point.

COMMISSIONER: I'm not clear on one point. Now, do you encourage, or the ABA encourages non-incarceration
whenever it's not found prohibited by statute?

Are we to understand then that, generally speaking, the violent, repeat offender, which is of course mentioned in the statute, would go to prison and the white collar offender would never go to prison?

MR. GREACEN: I'm glad you asked the question.

My testimony is to the effect that the possibility of a nonincarcerative sentence be available for all crime types. Now that does not mean for all criminals, events and incidents and cases.

And the standards are very clear that there are crimes of a white collar variety where the nature of the affront to society is sufficiently great that a sentence of probation would minimize the effects and would be inappropriate.

So I would distinguish between the availability of a nonincarcerative sentence or a type of fine bridge this guidance to judges to whether to impose incarceration in a particular case of that type.

The standard strongly objects to mandatory incarceration based on the type of fine.

COMMISSIONER: You would promote then a wide degree of discretion on the part of the judge being permitted?

MR. GREACEN: Guided by the directions given by
the guidelines set up by the...

COMMISSIONER: You know, listening to you sounds like you're going to give the Judge a great deal of discretion. So what does that do with the disparity? Which is one of the reasons we're having a Sentencing Commission?

MR. GREACEN: The -- of our Association's standards strongly advocates sentencing guidelines as the only way to square the needs for discretion with the need for equality and consistency of sentencing.

We'd be looking to the Commission to calibrate the sentences for particular crime types. But what we're merely saying is that no crime type should, by its nature alone, prohibit a nonincarceration.

COMMISSIONER: You completely disagree with Mr. Ginsburg when he said the type of penance he was talking about was every one of those guys should serve the time in jail. You disagree with that, I guess.

MR. GREACEN: That's right.

COMMISSIONER: But we're not saying that, in some instances, some of those penances are not appropriate.

MR. GREACEN: That leaves it to the discretion to the --

COMMISSIONER: (Inaudible).

MR. GREACEN: That leaves the discretion to the judge the way it is right now, before we have sentencing
guidelines. And then there's disparity.

MR. GREACEN: But the guidelines could set forth the instances in which the gravity of the crime is so great that incarceration is required. But it would not -- we're not saying that the guidelines should not have instances where incarceration is required. But that that should not be across-the-board for particular types of crimes.

CHAIRMAN WILKINS: Any questions to my left?

Mr. Gainer.

COMMISSIONER GAINER: Mr. Greacen, either you or Ms. Robinson, (inaudible).

It seems there's a sort of presumption underlying the choice. And I'm not familiar with --

MS. ROBINSON: Mr. Gainer, while I've been with the ABA, sir, it seems like -- that was not their feeling in fashioning those standards and I don't really know the historical basis for it. But I think it's generally an approach of the careful use of whatever kind of sanctions...and the original draft would be taken in -- with the notions of --

MR. GREACEN: In fact, the portion that I read to you has the flipping of the opposite side of the coin. The least restrictive alternative consistent with the protection of the public and the gravity of the crime.

So it's --
COMMISSIONER GAINER: (Inaudible).

MR. GREACEN: No. I think the --

The principle would say use that alternative, that sentence which least infringes the liberty of the offender, the convicted citizen. But, consistent with effectiveness.

CHAIRMAN WILKINS: Any other questions?

COMMISSIONER: How much content do you give? You have the idea of the least restrictive sentence. Of course, where appropriate. What is the least restrictive sentence? How do you know when the least restrictive might be prison. And you talk a little bit about the content of that.

You say, well, if it's a crime of violence resulting in serious bodily injury by a first offender, then perhaps prison.

What else do you think might warrant prison?

I don't know the extent. I'm not expecting you necessarily to have -- to that. But, if you do...

MR. GREACEN: The standards could be only in the broadest terms standard 18 2.5(C) in talking about the appropriate use of total confinement. That's prison. Suggests these as examples of appropriateness, confinement is necessary in order to protect the public from further serious criminal activity by the defendant or where confinement is necessary so as not to unduly depreciate the
seriousness of the offense and thereby foster disrespect for the law.

Now those are very, very formal standards. And they conclude standards do not become more specific. We will be glad to comment to the Commission on drafts of your--of whether when you come out with them would think that they are appropriate along those lines.

COMMISSIONER: What do you think about intensive probation? Have you any concrete examples of where intensive probation has worked fairly well? Even might be substituted for what would otherwise be a prison sentence?

I mean, if you were to advise me, well, where should I go? What's the top price in your terms that's concrete meaning for that term? I mean, is it St. Louis? Sacramento? Or is there a place where they put this into practice and can say, well, that's worked pretty well. Go look at that one.

CHAIRMAN WILKINS: Thank you very much, Mr. Gracen, and thank you, Ms. Robinson. We appreciate your efforts today, but also the efforts in the past in assisting the Commission. We look forward to continuing with you.

Representing the National Association of Criminal Defense Lawyers, Mr. Herbert Hoelter, Ms. Marcia Ghein. We're delighted to have you both with us.
STATEMENT OF MR. HERBERT J. HOELTER AND MS. MARCIA G. SHEIN, OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

MR. HOELTER: We've both prepared about five minutes for testimony and the rest of the time for questions.

CHAIRMAN WILKINS: Fine. Thank you.

MR. HOELTER: We are talking today on the fields of sentencing in the federal system.

MS. SHEIN: Mr. Chairman, Members, it's nice of you to have us here. We appreciate it very much. As a practitioner in the field, our organization is the National League of -- based in Atlanta. And we promote the use of sentencing on -- alternatives to lengthy incarceration. And in association with the National Association, we are here providing our thoughts and testimony on -- quite a bit.

(Inaudible).

I have submitted my testimony, I believe, previous to this. I don't know -- but I will try to --

The present population in the United States reached an all-time high in 1985 -- half million overcrowded conditions in the federal prison system...need for the Comprehensive -- Control Act of 1984.

Currently, 37 percent, that's more than a third of the federal prison population, is rated at security level
one. This means that at least 37 percent of offenders of nonviolent crimes, most likely first offenders, serving short times of incarceration, could just have easily have been placed in all kinds of sentencing programs without jeopardizing the public.

This is supported by the intent of USC 18 3551. They could in fact be contributing to the very public they have wronged instead of burdening them further with an average of $15,000-20,000 per prisoner per year in tax dollars.

In order to solicit public endorsement of alternatives to incarceration, a vigorous campaign on the realities of crime and punishment must be launched.

TV is not reality-oriented and we tend to believe that it is. The majority of crimes is not rape, murder, robbery. In fact, violent crimes constitute only 17 percent on the average, and that is generally confined to a state average. The average in the federal system is far below that.

No distinction is being made by the public between violent crimes deserving a serious sanction versus all other categories of crime. Without reeducating the public first, we continue to place under pressure our judicial system to respond to only a small segment of crimes and punishment needs.
The United States has the longest sentences in the world and one of the highest crime rates. The United States ranks behind only the Soviet Union and the Union of South Africa, prisoners are kept longer.

There is no evidence that longer sentences have provided any greater deterrence than shorter ones.

One Federal Judge that we worked with not too long ago helped in this reeducation process by selecting a productive alternative to incarceration which met precisely the needs of the individual and society.

A young American Indian unable to successfully imitate Western ways and bereft of his own particular ways of life, with a history of community disturbances and parental difficulties was finally arrested for multiple social transgressions.

His own community knowing of his troubled past did not wish to see him locked away in a cage. This community interest was documented in a unique alternative plan presented to a federal court. Thus informed, the Judge banished the Indian to the Alaskan Wilderness. Now it sounds harsh on the surface, but the Indian was able to live his life in the Indian style and his ways in the Alaskan Wilderness, where he, too, was willing to take up sanction.

In this case, society was willing to support such a sanction, knowing he was not harmful to society nor -- to
himself.
The bottom line was the Judge recognized the need for a unique, creative alternative and then logically chose one.

This is the kind of media coverage that would help reeducate the public and make your job somewhat easier. Alternatives cannot work if they are not used, and they will not work if they are not individualized.

We cannot afford to remove the human factor from the law lest we become no better than the -- who recently executed those two Australians for their heroin possession.

We have a need to develop guidelines for using alternatives and not just guidelines for incarceration.

The validity of alternatives can only be established by their use and the use of available alternatives that are not being used is endless, and you have heard many of them today.

In 1985, the Bureau of Prisons implemented another alternative plan to help relieve overcrowdedness, called the Repairative Work Project. I would like to see some statistics about those who benefited from this program. I have none and have seen none of my clients ever receive the benefit of this.

I recommend more community treatment centers. I recommend the use of those types of centers. And to go for
those types of centers as an alternative to prison. It would save tax dollars.

Any incarceration or isolation is indeed sufficient punishment in many cases, including community services tacked on to that.

A man was charged in a $16,000 refusal to file tax charges. He was sentenced to a year in prison and at a cost of $15,000–17,000 per year at that time.

A further plan, rejected by the court, would have placed him in a community hospital as a volunteer in a position that normally cost the hospital $14,000 in salary.

So, instead of being able to work fulltime, being able to pay back his taxes as well as pay the interest and everything else that occurred as a result of his time away from paying those taxes, and save the hospital money, we spent twice as much money incarcerating him.

Wouldn't a year in a community service program have satisfied the needs of the judicial system and society to a greater benefit for all?

The more recent case of $250,000 tax violation, the Judge did indeed see fit to sanction that individual to 30 hours of service -- and encourage the civil litigation aspect of the case to be resolved quickly so the taxpayer and the tax dollars that were required to be paid could be resolved.
To suggest that alternatives are not punishment is absurd. Alternatives on socially constructed sentences. We are so fraught with a lack of funding for meaningful social services that any volunteer pool is a valuable resource.

And we have at least 37 percent of the federal prison population, much less those that are still eligible while under probation, so much to tap.

To think that incarceration is the only deterrent is yet another myth. Studies have shown that all forms of punishment have minimal to moderate deterrence effects. However, probation and community-based alternatives register minimum to maximum effectiveness in rehabilitation.

Longer sentences do not deter crime. They waste lives. Theirs, yours and ours. In the Atlanta Journal Constitution just last evening, just before coming here, there was an interesting article printed on sentencing alternatives. And I thought I would share it with you since it sort of popped up just before I left.

It relates to thousands pay for crime with community work. And even in the contents of this, they discuss a young man in Atlanta who was charged with selling cocaine who is now doing 40 hours of service for the Cerebral Palsy Center of Atlanta.

Another individual, young man, is helping build
homes for Cambodian refugee families, as well as restoring houses for poor families in the Appalachian Region.

These types of offender alternatives have saved the State of Georgia $8 million. Now, that's one State. You can imagine what it is on a national scale.

Certainly, we can put that traffic in the federal system. There is an extravagancy emphasis on the current -- system on the use of alternatives, which we can ill-afford to maintain for human as well as economic reasons.

If we can't be motivated by our hearts and common sense, let's be motivated by our pocketbooks and common sense. I know -- this Commission will take in establishing its sentencing guidelines and policy statements on the use of more alternatives.

Thank you.

CHAIRMAN WILKINS: Thank you.

MR. HOELTER: Good morning, Judge, Members of the Commission. I'm here representing the National Association of Criminal Defense Lawyers also. I'm very proud to have been associated with that group for about eight years.

During that same time period, I've been Director of the National Center on Institutions and Alternatives. Our organization has worked in courts in 67 of the 94 jurisdictions that are out there today, resulting somewhere in the neighborhood of about 5,000 alternative plans...
about half of them in federal court.

Dr. Miller, who will testify next, is President of the organization.

My testimony today is obviously directed at urging the Commission to give serious consideration to alternative sanctions. I find it a little bit disconcerting and difficult to do given the tone that's already been set by having your first witness come up and ask you to do more to -- put people in jail.

I think that we can certainly develop a more positive tone for alternatives. I think the events of the past, the uprising of Lorton, the debacle, having two of our major criminal and justice officials dress up like thugs and go commit a crime in New York City. I think it's outrageous.

I hope that the Commission looks at these and how it's a failure. I hope that the Commission is progressive enough in its thinking and planning so that we can have a federal prison system and a federal criminal justice system of which we can be proud.

I think, years ago, six years ago, seven years ago, I think we could be proud of the federal system. I can no longer say that. I think the federal system has lost its status. It's much more akin to the ever volatile, over-crowded and inhumane conditions that are present in our
state systems.

We have watched the Bureau of Prisons populations grow. Six years ago, the system was relevantly acceptable. Today, it's 50 percent overcrowded. You hear the rote phrase about these alternatives, the scarcity of prison resources and the need to look at individual cases and the like.

Similarly, we've heard the -- very compelling, but they've become almost trite. The fact that it takes $75,000 to build a jail cell and $20,000-25,000 to keep someone in there. It's gotten old.

We seem to be hearing that the public wants justice. What does that mean? The prison system has told you that they're the only ones who provide justice these days. That's simply not true. They're lying to you.

There's many ways to get justice in the country today and you don't have to cage people to get it all the time.

I'm urging you to look at some of the alternatives that we are talking about today in the development of a guideline...

Some of the ways in which we've achieved justice and that federal judges have achieved justice in the past eight years of our...have been using a number of options.

The first one, Marcia has already mentioned.
Expand the use of community service. We've gone well beyond the dates when community service was vagrants picking up beer cans in the park or public --

We have courts ordering it fulltime. I'm sorry that the Assistant Attorney General West, I was very proud of him, could see alternatives for the United Way. That was one of my antitrust cases. We put the community service in a case and he said we must state that. That case involved a tremendous restitution, involved civil litigation -- it involved putting together a tremendous fundraising campaign for United Way, which had traditionally been losing money, in a poor community over the years.

And to simply scoff at the idea of community service because they don't think it's punishment is ridiculous.

The same with a tremendous number of social issues being performed by...and it's done from a five-hour a week tap, fulltime.

You have people putting together homeless shelters in Philadelphia. We have people putting together truck distribution routes for food banks in New Jersey.

Dozens and dozens of social restitutions. We're very proud of what we have done in antitrust cases, tax cases...

Another alternative that was scoffed at years ago
was house arrest, where a person is confined to their house whether the use of electronic monitoring was used or not. Today, it's being used routinely in federal court. When a judge said:

I'm no longer going to pursue the overcrowded conditions in the federal system. We can restrict your residence at home.

Our organization won for the better a monitoring program in the State of Texas right now, helping people use the state population...

The issue of fines and subsequent -- one of the double-edged swords in the federal system, that there's many defendants who have resources; yet, there are no identifiable victims to the crime. Again, in antitrust cases, you pioneered the use of what you call substantive...cases, where the defendant is assessed a penalty to pay money to a community organization, where a joint offender must sponsor a person, a drug addict through a drug treatment for three or four years, at the cost of $20,000 a year. Tremendous amount of resources that one can use if their imagination is there with subsequent victims and fines.

There's a lot of other examples in alternative punishments that are available. I don't think that it's that complicated. I think that, if necessary, they can be
used in conjunction with a short-term imprisonment. Rather than 18 months, six months in prison and 12 months community service work.

With all due respect to all the Commission members, I would assure you that were any of you in trouble, you would be the first one to say that "I need an alternative sentence. I'll hire the NCIA and National Legal Services. Please, help us come up with something."

I would assure you that you would not like to spend six to 12 months in jail. If it weren't for some of the more distinguished public servants in this country who have --

(Laughter.)

To suggest that deterrence is the single reason for imprisonment is also absurd. If deterrence worked after Watergate, there would have been no ABSCAN. After ABSCAN, there would have been no BRILAP.

Tell me deterrence works with some of the smartest criminals and then take it down to the lower level, and that's where most of our criminals are.

I urge the Commission to structure alternative punishments within the guideline format. Judges deserve discretion. They've worked hard to be on a federal bench. They deserve the right to help set penalties. You can have guidelines, but you can also structure alternatives within
those guidelines, alternatives that are decent and that
don't deprive the community of resources that they need and
don't waste resources that...

Thank you very much.

CHAIRMAN WILKINS: Thank you, Mr. Hoelter.

Any questions to my right?

COMMISSIONER: I think, one. I would share the
opinion that both of you expressed in terms of increased
utilization of community service is desirable. I think we
can be a lot more creative than we've been in the past, so
that they can give back to society something.

Our concern though about a couple of things. Of
course, you mentioned that it bothered you somewhat about
the earlier testimony indicating that deterrence is the only
reason for prison.

I'm not sure that I understood you correctly with
regard to white collar offenders. Did I hear your promotion
of the idea that in all cases, an alternative to
incarceration is appropriate?

And I wonder if there would be any concern about
promotion of respect for the law as being a justifiable
reason for incarceration of white collar offenders?

MR. HOELTER: A couple of issues we could raise.

One of the arguments that has developed over the
years with regards to white collar crime, as punishment for
white collar crime, has been we should now do to the white
collar criminal what we've always done to the poor
criminal.

If a guy robs a 7/Eleven, he gets 10 years for
that. And a white collar criminal commits a tax fraud of
$250,000, he gets one year, there's somehow something unjust
about it. And I...

(Conclusion of side 1 of tape 2.)

...somehow think that argument needs to be
reversed. Rather than say we will operate a bail system and
we need to do to white collar people what we've always done
to the poor people, why don't we do to the poor people what
we've done to the rich people?

Why don't we give them one year in community
service? Why don't we give them alternative sanctions
within the community?

True. They don't have the money. And there are
certain constitutional problems with fines and other
sanctions. But we don't have to limit it to financial
sanctions. There's a lot of other things that can be done
that would guarantee public safety that can give justice in
this country.

MS. SHEIN: If I may, briefly, we have to address
ourselves to this issue of deterrence. This is a major word
that just hangs over the Judge's head, hangs out of the
court room just like a shark ready to devour anybody that stands in the front. And prosecutors use that word loosely. There's no proof of any sort any time, anywhere, that indicates that longer sentence for Joe Blow is going to help Joe Shine over here not to do something.

You know, the guy that goes to jail for 20 years, with the exception of a few of your public officials, is never going to be noticed, is never going to be known. And a year in jail, his family...so on down the line.

I don't remember, you know, somebody that I see in the newspaper getting caught for some major offense. That's not what I remember. I remember that it's against the law. And that's what we have.

This issue of deterrence --

MR. HOELTER: And the new act addresses that. The new act specifically says that if deterrence is the only reason for putting somebody in jail, you should not do it.

The new act says that. Judge Mary Johnson -- in the case that we just recently had in the Southern District of New York, quoted it to us.

I said, "Thank you, your Honor, that's what I always thought."

CHAIRMAN WILKINS: Any questions to my left?

COMMISSIONER: Yes. Herb, you gave us an example of an American Indian who was banished. Would you limit
that option to an American Indian?

MS. SHEIN: No.

(Laughter.)

MS. SHEIN: It's a creative... that is such an incredible... in fact, the prosecutor came up to me afterwards and said -- and I laughed because it was a clearly unusual case.

I have never seen one quite as unique as this. Certainly, that's not a sanction I'm sitting here suggesting that the Commissioner apply it for a guidelines.

But it shows the flexibility and creativity of a Judge whose recognized the need for the individual society. Certainly, if you create a criteria for a fine alternative, such as guidelines for guidelines for alternatives, so to speak, so the Judges will at least have a way of designing a fact pattern for using that.

Now, it may, you know, result in a creative thing such as this. But then again, it may not. But the idea is some guidelines.

COMMISSIONER: That was a kind of specific question. You answered the way I thought you would. But I have a more general question to you and maybe to the other people that are going to testify.

We're talking about sanctions and we're looking at, I think, offenders you say don't have to go to prison.
And I think you're usually talking about the first-time offender. Is that right? Primarily?

MS. SHEIN: First, small fry secondary.

COMMISSIONER: What about sanctions for the career criminal, the guy or woman that we've been sending to prison time after time after time. And it's obvious that prison is not a deterrent for that individual, that type of individual.

Now, in your creativeness, have you thought of some, you know, options? We're talking about some options other than prison for that type of offender.

MS. SHEIN: As a former federal probation officer in the Southern District of Florida, I dealt with the psychiatric and alcoholic patients. Every one of my offenders had multiple rapsheets. I had nine and 10-page rapsheets. And I was still wondering why I'm supervising.

That is a problem. I acknowledge that. I also acknowledge that those individuals may not be applicable. But, at least, I mean, by reducing this 37 percent first offender consideration allow space for the multiple offender and especially multiple violent.

COMMISSIONER: My question is, an option other than prison. Prisons, as you point out, are very, very expensive.

MS. SHEIN: Yes.
COMMISSIONER: So, other than prison. An appropriate thing other than prison.

MR. HOELTER: -- I think that's when you have multiple offenses and a long-range record, clearly, there's an underlying problem. Whether it be drugs or alcohol.

Take the District of Columbia. Sixteen thousand drug addicts. There are 60 residential beds. And I think that's what -- what one needs to be able to do within the system, and I don't know, again, the structure of -- I think one needs to be able to approach those cases individually. One need not write off those people because they've committed an offense, and you throw them away. You can supervise them in their home. You can put together resident programs, secure, locked facilities that are decent and humane.

What you need in this system is in order to have the financial resources to do that, we don't need a system that says we're spending $20,000 to put somebody in a camp, in a barricks somewhere, if we give you $1,000 to program for that person. We don't need assistance...

COMMISSIONER: One more. I'm going to ask all the people that are going to testify. Think of an option other than incarceration for this type of offender.

I mean, something that may deter him.

MS. SHEIN: Inhouse psychiatric program? Inhouse
residential treatment programs? There are several of them that run for two, three to four years, depending on the need.

Certainly, this is financially a problem we'd have running community support programs like this, but there are programs inhouse for multiple years, dependent on what you find out.

One of the problems of multiple offenders is determining whether it's a true antisocial personality or if there all this time in their lives has been some underlying problem that has not yet been reached or tapped or uncovered or resolved.

I say this because I worked for the Salvation Army a group therapist for them with alcoholics, 12 and 13 and 14 years of it, with no family, no nothing. And, in that group therapy, despite all that problem and where they were at, they stayed there for several years and, eventually, many of them went on to restructure their families and get back out in the community.

They offered that multiple year type of sanctions off the street. So there are options. There are not that many there, but they are there. And we perhaps need to propose using them if you find out that there's something else, such as the alcoholism, which can create crime in a number of cases, multiple cases. You end up with a real
problem.

CHAIRMAN WILKINS: Any other questions?

(No response.)

CHAIRMAN WILKINS: Well, thank you very much.

COMMISSIONER: One. You said we have the longest sentences in the world. Is that true in the federal or the federal and the state or what?

MS. SHEIN: It's the federal and state system combined.

COMMISSIONER: How did the federal compare?

MS. SHEIN: We were unable to get a distinctive... I would suggest it's similar in average rates.

COMMISSIONER: ... we don't have the power of appropriations. We have to write a sentence. In a word, can you tell me what to do? So as far as think about your typical -- is a typical -- a typical bankrobber, dope seller may be antitrust violations.

Now suppose what -- one thing is we have short-tailed sentences for those followed by blank alternative...

You're saying no jail sentence followed by blank. What words do we put in the blank?

And I don't know if you have a preference between short followed by blank, or not followed by blank.

MR. HOELTER: Or a combination of the two.
COMMISSIONER: Or a combination of the two. And if so, where and when?

MR. HOELTER: But I don't agree with your premise that you have no appropriations.

COMMISSIONER: No, I didn't say issue. I said we do not have the power to appropriate money.

MR. HOELTER: Because what you're going to do in the setting of a political --

COMMISSIONER: I agree with that.

MR. HOELTER: The guideline system said to the Federal Bureau of Prisons: Put a cap on the level of people you can put in prison. Then it's an appropriation issue. I think the Commission should consider a cap.

COMMISSIONER: I specifically didn't say an issue. I just wanted to point out that often Congress --

MS. SHEIN: Terminology. Terminology is your problem. And I recognize that. It's sort of guidelines for guidelines used for alternatives. I think you have to put into words what the judges should look at in determining what offender would apply to that.

And that could mean that it could be any of the offenders. The guidelines, though they say sanctions of incarceration, it does also say in the bill or the Senate Act, is that you can put in writing a reason to go below the guideline, and put in writing a reason to go above the
And I believe that's going to be a consideration of the Commission, that what are those reasons. As soon as you design those reasons, you'll be able to possibly expand that into thoughts for the judges views for them to consider going below the guidelines towards the alternative sentencing and...

So that's where we probably should start opening up your terminology.

COMMISSIONER: ...hours for six months. Structure those directly into the guidelines so that there's an alternative to having these other places.

CHAIRMAN WILKINS: Thank you both very much.

MS. SHEIN: Thank you very much, all of you.

CHAIRMAN WILKINS: We'll hear from Mr. Jerry Miller, representing the National Center on Institutions and Alternatives and, after that, we'll take a short break. Mr. Miller, we're delighted to have you with us today.

MR. MILLER: Thank you, Mr. Chairman.

STATEMENT OF MR. JERRY MILLER,
NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES
MR. MILLER: I've not come before the Commission with a series of how to suggestions as it goes about its task of proposing sentencing recommendations to be attached
to the new crime bill.

Rather, I ask the Commission members and staff to view my testimony as some sort of time out, an interval less to take notes or listen to legal prescriptions and to pause and reflect a moment or two on a few abiding issues, which I think should never leave the room when this deliberative body meets.

This is not to say I couldn't or wouldn't like to make some concrete suggestions, particularly after the recent interchange here and can and I would. After a decade as an officer assigned to work with the U.S. military in stockade and disciplinary barracks both in this country and Europe, and after two decades working in the civilian corrections system, many of those years at cabinet level positions in state government in both Republican and Democratic administrations, and after another eight years heading this present agency I now head, the work of which has been primarily focused on sentencing of felons -- we've done some 5,000 felony sentences actually in federal and state courts -- I would have a number of specific suggestions.

However, I'm sure the Commission will have or has had opportunities to hear these from others. Moreover, I fear that the recommendations I believe would have the most felicitous effect on a sentencing practice and ultimately on
a national correctional system would probably not be well-
received by a Commission assigned a relatively narrow,
technical, dare I say, unfortunately, too technical a
mission.

Clearly, the hope and watchword of those who
designed the Crime Control Act was that it would contribute
to the common wheel and domestic tranquility of the nation.
It was designed and written primarily by lawyers, approved
by a body made up here exclusively of lawyers.

As an imminent Norwegian philosopher and
criminologist, Niles Cristy, has commented:

Training in law is training in simplification.

It is a trained incapacity to look at all values in a
situation and, instead, to select only the legally relevant
ones, that is, those defined by the high priests within the
system to be the relevant ones, so few elements of the
totality are considered that complete equality is
guaranteed.

But it is through its simplification a primitive
system. With this in mind, the Commission should realize as
it goes about its complicated and difficult task and adjusts
guidelines, grids and formulate a -- fences, at another
level, it is still not much beyond the primitive task of
those early 19th Century European Commissions which were
given a mission of converting branding, cutting off of limbs
into terms of imprisonment -- 10 years for a hand. How many
for an eye? Et cetera, et cetera.

As Kristy -- and others have demonstrated:
There are limits to pain as a means of
guaranteeing order. There are even greater problems if we,
and particularly new as commission members, believe that
sentencing stricture and time in prison reflect on even --
or even has much relevance to the myriad of factors and
vagaries which come together to result in a commission of
an individual crime of any kind.

The great American philosopher and social
psychologist, writing in 1917 on the psychology of punitive
justice, George Herbert Mede, commented that:

In the legal arena, the social worker is
inevitably the sentimentalist. And I come here as a social
worker today. However, in the social settlement, the
legalist is an ignoramous. And whether he wished to admit
the reality or not, sentencing is in large part a social
settlement between offender in society, victim and offender,
victim in society, et cetera.

We would deceive ourselves if we really believed
that the attaching of set periods of incarceration, even
minimally, met the needs of such a situation.

The lawyers with the lost criminal case, much
like doctors with the terminal patient, could plead from
contact and involvement in a task which so clearly reflects the limitations of the professional armentaria at a most crucial juncture.

Retreat to formulating, numbers and mandatory sentences gives the gloss of rationality and science to a lost cause and makes one's efforts seem more meaningful than facts might otherwise dictate.

There are, therefore, very real limits to pain in healing or to deterrence in sentencing.

Eldois Hopsley in his classic 1937 book on Ends and Means, noted at that difficult time that progress in civilization has not been progress in technology or even in justice, but it has been progress in charity.

Look to those countries with harsh criminal codes now or any time in history. When held next to their contemporaries, there is little to imitate.

We look more to Athens and Sparta, more to Christian Rome than pagan Rome, more to Thomas Moore than Oliver Cromwell.

The question with the technology of designing a sentencing schema therefore is not simply what works. Rather, it is what can we do which advances a democratic, just and compassionate society.

Obviously, executing first-time offenders would probably cover residivism and serve well the limited needs
of specific and general deterrants. But it would be beside
the point in our society.

Rather, the question is how, as you go about your
tasks, can compassion be protected in a bill which emanated
from a great deal of extreme law and order rhetoric
influenced by the kinds of passion you would hold as model
of stability and temperance.

It seems to me that you must continually allow
that to the degree the individual defendant is sentenced by
formulating alone, and to the degree judicial -- that is,
human discretion -- is removed from the individual case, to
that degree, we are teaching other less felicitous lessons
than the simple message of justice.

We are also teaching that the individual matters
little, that we prefer not to hear, much less consider a
unique, eccentric and otherwise troublesome, cantankerous
mitigative information in our deliberations.

I realize there are limits on these
considerations. Such limits were in fact all-encompassing
even in the hayday of judicial discretion. So I don't think
we need be overly fearful of individual consideration
routinely undermining the imposition of sentences under our
criminal law.

But it seems to me the Commission must attempt to
maintain as much discretion in sentencing as politically
possible, precisely because it keeps the human and the fallible involved on both sides of the legal and social settlement.

We will be in a great crisis as a society when we reach that point where we are able to make infallible decisions based on computer models of sentencing. For with such decision-making, we use the interchange, the argument, the roughhousing, the doubts, the mistakes which are so crucial to the evolution and development of a democratic society.

In this sense, one can in part see the mandatory and determinate sentencing itself as a flight from certain realities.

In the words of British anthropologist, Edmund Leach, it is an example of the imposition of discipline by force. It is the maintenance of the values of the existing order against threats which arise from its own internal contradiction.

In a sense, that is one of the unfortunate tasks of this Sentencing Commission.

I realize of course that this Commission has a limited role, to recommend the parameters of pain, possible time to be served for given criminal offenses.

May I presume to make a couple of brief recommendations?
As you set the parameters, let your thinking and world judgment wander a bit afield from exacting justice, retribution, pain and deterrence, to include at least the possibility of feeling, reconciliation and forgiveness.

For those who see the criminal justice sentence as absorbed primarily in only meting out punishment, at least give equal consideration to pain that is less likely to debilitate, isolate and harden. Reliance on time alone, even for deterrence purposes as the best or even primary means of righting wrongs or guaranteeing justice or giving redress, if nothing else, betray a curious lack of imagination.

May I propose that Commission members take time for reflection, look at themselves and ask a simple question:

What would I recommend were I or a guilty son or daughter, brother, sister, friend or relative were before the bench for sentencing?

We have a minimum of insight in humility. Surely, most in this room could conceive of the possibility of such an eventuality. Those who can't can of course be harsh.

In such a situation, what would we want as a just sentence and what should it reflect?

We would not want an errant friend or relative to
break the law again. We'd want to cut down on recidivism. We would want to be very cautious. But we would maintain an involved and personal concern.

We'd want individual consideration of and attention to the specifics of the offense as well as the vissitudes and individual characteristics of the offender, and how the sentence might affect them.

We would allow the possibility of leavening justice with mercy on the basis of those unique human qualities in a uniquely human event, the crime.

We've had, as Mr. Hoelter mentioned earlier, occasion to prepare alternative sentences for a large number of people in public office, including judges, prosecutors, policemen, sheriffs, legislators at both the federal and state level.

We've had letters of support for all kinds of sentencing, and some of those plans from people like Gerald Ford and Barry Goldwater and White House staff members, so that there certainly is not a total disregard of alternative sentencing.

I realize it's not the role of a sentencing court to be a loving parent or a concerned sibling, but neither is its role alone to be a detached computer, grinding out sentences to fit plans based in selected inattention and studied ignorance of cantankerous human realities.
The ultimate irony of the Crime Control Act and, really, of this Commission, is that both were created just as the nation is entering an era where we have the possibility and the technology to know and store millions of bits of information about an individual, with the potential of finally fitting the sentence and the rehabilitation to the offender and the crime.

That, at this crucial time in our history, we retreat to the meat axe of the set formula mandatory, determinative sentence, which ultimately disregards, denigrates and degrades the individual under a banner of upholding the majesty of the law.

I would, therefore, hope that the Commission would keep as much flexibility in the sentencing system as the current climate will allow. You are inventing the tradition which will set the national courts for many decades.

More importantly, your decisions will affect thousands of individuals whose own identities will be much determined by the outcome of your deliberation.

So I ask as you reflect on the numbers, a year here, 20 years there, life there, remember the contingent state we all share in the too short life we live on this earth, and then make your firm decision.

That's my presentation.
CHAIRMAN WILKINS: Thank you very much, Mr. Miller. I'll note that you might take some small comfort from the fact we have four nonlawyers on this Commission, so...

(Laughter.)

CHAIRMAN WILKINS: Any questions to my right?

(No response.)

CHAIRMAN WILKINS: To my left?

COMMISSIONER: I think that you're just more or less opposed to the task that Congress has given us.

MR. MILLER: I would hope that you would have some administrative flexibility within that task. I've been working in government for a long time, and I know there is that potential in any task given by any legislative body.

And I hope that you would make use of that flexibility because there are in fact many alternatives that can be proposed within this. And there are many directions it could take.

We need to fill in that middle ground. We're in a position in corrections that would be akin to medicine if medicine were in the position of having only two treatments—the maximum and the minimum.

Probation, usually inadequate, understaffed, underfunded; and maximum security...and there's nothing in the middle.
It's like going to the doctor and saying I have a headache and the doctor says I've got two treatments -- an aspirin and a lobotomy. So which do you prefer?

(Laughter.)

MR. MILLER: Or going with a broken leg and he says I have two treatments -- an aspirin and a lobotomy.

We're stuck.

(Laughter.)

MR. MILLER: And we've got to fill in that middle ground and it would seem to me there might be some flexibility for this Commission to at least stimulate some thinking about that middle ground, and getting some of the funding to that middle ground.

To suggest, for example, that parole, supervised probation parole, hasn't worked; therefore, we're going to have the institution, one cannot say that unless one is willing to attach to parole and probation something akin to the amount of fiscal resources where one can attach to the prison.

To suggest that we've had someone in probation at $50 a month and it hasn't worked, therefore, we're going to put them in prison at $75 or $50 a day, is apples and oranges. If in fact we applied $50 a day in the community and it hasn't worked, fine. Lock them up. In fact, in most cases, we wouldn't have to.
COMMISSIONER: I take it, your answer is to put
them into real life (ph.)

(Laughter.)

CHAIRMAN WILKINS: Mr. Miller, would you give us
a copy of your prepared remarks?

MR. MILLER: Yes. I brought seven of these, and
some material on our organization.

CHAIRMAN WILKINS: Thank you. I'll just receive
them here.

We're going to take a break at this time. We're
going to come back at 12 noon sharp. Then we will hear from
one who is no stranger to this Commission, Mr. Al
Bronstein. The restrooms are located to your rear out...

(Recess.)

(Conclusion of tape 2, side 2.)
TESTIMONY OF MR. ALVIN J. BRONSTEIN, AMERICAN CIVIL LIBERTIES UNION NATIONAL PRISON PROJECT

MR. BRONSTEIN: Thank you, Judge Wilkins, (inaudible) Commissioners.

It is always interesting to follow Jerry Miller after he beat up on the lawyers. Jerry is on my board. Fortunately, he doesn't come to most meetings.

(Laughter.)

But when he does, he does make us think.

I listened to John Greacen, the ABA, and I was trying to think of a single word that he said that I would disagree with, and I can't think of one. So I considered just coming up here and saying "Ditto" and leaving.

But then Judge MacKinnon wouldn't be able to pursue my ignorance (inaudible).

(Laughter.)

But really not (inaudible) statement except to expand upon a few things that I think have been talked about here and address some of the questions posed earlier by members of the Commission that either were not answered or I think could be answered a little more expansively.

The main message that John Greacen (inaudible) ABA (inaudible) was that the Commission as a matter of principle ought to look at the least restrictive alternative; that is, to use not the presumption of
incarceration to begin with but rather to start at the bottom, the least punitive sanction, and then only get to incarceration as a last resort, a concept that I would endorse.

Judge Breyer then asked what kinds of crimes require imprisonment (inaudible). But I think there was a very good answer there, and I like to think of it this way. What kinds of criminality really threaten society, the fabric of society?

That is not to say that individual criminals committing serious injury on one person is not a serious criminal (inaudible). I think that is not the case where I would say automatic imprisonment. If that is the case, we will look at all the factors.

But there are other categories that I think are the more serious (inaudible) threatening impact on all of our lives that they have. Political terrorist is one. (Inaudible) or public officials have to hide, if they have to -- judges are worried about security in their courtroom. That kind of criminality threatens the fabric of our society.

Corrupt public officials, the other side of that coin, if you will, I find very scary, very threatening to our society. Again, the government official who takes bribes, a judge who commits certain criminal acts, those are
very threatening.

The major corporate crime where the impact of their criminality touches thousands or tens of thousands of people I think is a serious event. I think a bank vice president who embezzles a thousand -- a hundred thousand dollars is a far more serious criminal than a man who walks into the bank and steals a hundred thousand dollars or robs the bank. Just because of the violation of public trust, the perception that the public has of that kind of criminality (inaudible).

And obviously organized crime, where the efforts involve the lives, the health of so many thousands and thousands of people, where the money involved is so vast, that is very threatening (inaudible).

That is the kind of criminality that I would start with, Judge Breyer, (inaudible). That deserves incarceration.

Other kinds of crimes (inaudible).

Mr. Gainer asked what the origin was of that. I was involved in the ABA at the time when they were developing sentencing standards, and the feeling was that you balance it with the most effective sanction -- was that incarceration was not an effective sanction, was not a cost effective sanction. It costs a great deal. It was criminogenic; that is, it created probably more criminality
than it cured and that people who spent (inaudible) in prison came out and escalated their criminal activity, that (inaudible).

There were many studies on that point, a whole (inaudible) of them coming out of the National Science Foundation, the National Academy of Science of all places, indicating that we had no evidence that general deterrence would be achieved.

So that was the background, that incarceration was not an effective sanction except to punish. You can punish people effectively with incarceration, and that is a legitimate societal need, to punish certain kinds of behavior, but that we were punishing too much at too great a cost, and therefore the origin of least restrictive (inaudible) which actually began in juvenile (inaudible) ABA (inaudible) and then the adult (inaudible).

To summarize, incarceration is felt to not be a cost effective sanction (inaudible).

Another way of looking at that was (inaudible) what I characterize as (inaudible) when you begin to consider using that large power, the largest power that the state exercises (inaudible) on a regular basis is the power to (inaudible).

(Inaudible) while I am answering questions, Judge MacKinnon asked about the (inaudible) between federal
sentences and state sentences, talking about time served, which I think the question was.

The average federal sentences are shorter, about 20 percent, I believe, the last figure that I saw. But that is a very skewed figure, and it might (inaudible) federal sentences by state, state by state. For example, Texas sentences are very, very long because they have a very harsh recidivist statute (inaudible).

(Inaudible) Texas Supreme Court involved a man who committed three felonies, a total of which were three forged checks amounting to $240, and he had a life sentence without parole. You can get life without parole in Texas for the third felony no matter what it is, and other states have similar kinds of sanctions. So their sentences are going to be longer than the federal system.

To compare incarceration rates and sentencing time served (inaudible) already mentioned, the witness was not entirely accurate (inaudible).

(Inaudible.)

There is no question that we are not soft on crime in this country. We are very tough on crime. Yet you can talk about incarceration as a response to crime (inaudible) in the hope that it will solve crime rates. It won't.

(Inaudible.)
I have some very recent figures that might be of interest in terms of (inaudible) incarceration. I tried to project from the current figures in California what it might cost the country to have a major impact on crime.

California's prison population went up from 1973, 20,000, to June of this year, 51,000. That is a direct result of (inaudible) in the middle '70s, the first state (inaudible).

Their corrections budget; that is, their operating costs, have gone up 350 percent from 1976 to 1986. They are now spending $1.8 billion in capital construction, to be completed in 1990. At that point they will have a prison population (inaudible) 145 percent of (inaudible) spend almost $2 billion, and in spite of the fact that they now have almost three times as many people locked up in prison as they had in '73. They will have 65,000 in 1989 (inaudible) but no impact on crime rates at all.

(Inaudible.)

To project that up to the national level, I think we could probably have an impact on crime with that incarceration policy, spend about $450 billion (inaudible), about 50 billion for law enforcement or police, increase our apprehension rates, about 100 billion for prosecution in the courts (inaudible), and about 300 billion in capital
expenditures to build enough prisons to house them.

I don't think this country is prepared to do that. I don't (inaudible), but just to give you an idea of the scale of numbers that would have to be involved to make an impact on crime.

A couple of states that moved early on to determinative sentencing (inaudible), Indiana, Maine, and California (inaudible), and that is why the work of this Commission becomes so important.

As a number of witnesses have said already today, what this Commission does is looked at very carefully by the states and will be emulated by the states. Anything that the federal system does is always looked at and is something that is followed by the states.

So you are in a unique position to guide the states (inaudible).

Let me give you my formula for what (inaudible) laid out in my statement (inaudible).

I think there ought to be preconditions met before a prison sentence is imposed.

First, it is the least restrictive sanction appropriate (inaudible).

(Inaudible.)

When I use the term "socially justifying (inaudible)," I am not talking about achieving general
deterrence. I am talking about the case (inaudible).

I believe it was a man who came in a federal building and shot his wife. We talked about that not being a serious crime in the big picture. It is serious (inaudible) way because it is not a crime that (inaudible) repeated. But there we have to -- society has to say you can't go in a federal building or otherwise and shoot your wife (inaudible) involving a domestic dispute.

So there should be some punishment, a short punishment because it is not a crime for which society generally needs protection.

(Inaudible.)

And other less restrictive sanctions that have applied to (inaudible) frequently or recently. To go back to Mr. Baer's example, I think there are categories (inaudible) of offenders who ought not to be imprisoned the first time or even a second time, but who --

(Hammering and construction noises in the background.)

-- and then we must say, well, we tried, and now you get the heaviest thing we can do. We are going to lock you up for a period of time.

I think there are other offenders, repeat offenders, who need to be looked at on a case-by-case basis to see why perhaps it is directly the result of alcohol or
drug abuse. With those, it seems to me (inaudible) to try
to treat the problem rather than lock up the problem, only
to have it come out the next time.

I believe there is something on (inaudible), and
I hope (inaudible) talk about the various studies
(inaudible), a very hard core group of offenders, 16 to 21
year olds, who were committing just enormous numbers of
crimes, and then many of them, as they reached 21, stopped.
They had never been caught. They admitted that they had
committed a hundred burglaries, a hundred street crimes, but
they never got caught, and then they stopped.

And the reason why (inaudible), they were finally
able to get into the job market. These were people who
(inaudible).

They needed some money to be able to date, to be
able to buy a car, to be able to do things that young people
want to do, and they couldn't get jobs when they were 16 or
17 or 18. No job offers. When they were able to break into
the job market, at whatever level they could, halfway decent
wages, they stopped engaging in criminality.

If we can identify that as the cause, maybe we
can do something different (inaudible).

Finally, I just want to make mention of something
in the news recently, last week, (inaudible), and so on.
The first (inaudible).
In fact, today they blame the press for reporting on it (inaudible), and we were talking to prisoners and allowing prisoners to call us on the phone.

(Inaudible.)

But in the discussion of the transfers of people around, something that has been totally missed by the press, they announced Friday, late Friday, that they were transferring 300 sentenced for misdemeanors out to Occoquan. The feeling was they, because they were sort of not very dangerous people, could be there without the (inaudible).

I want to know what 300 sentenced misdemeanors was doing taking up, you know, jail and prison space when they (inaudible), and that is the kind of thinking that I think that (inaudible) guidelines, that if we look carefully at groups of people, individuals who will not wind up filling our places up (inaudible).

(Hammering and construction noises in the background.)

Not getting anecdotal, but we have a population cap in the Rhode Island prison system (inaudible) overcrowding, and (inaudible) report every two weeks (inaudible) facility, and I noticed in the last report that one of the people was in there for an attempt to steal fish. An attempt, not even a successful fish thief.
Again, I wonder why the person who attempts to steal fish is using up space that ought to be saved for a rapist or a murderer.

So (inaudible) kinds of principles that I think the ABA guidelines, standards (inaudible). That is what I hope will guide this Commission.

I will stop there.

CHAIRMAN WILKINS: Thank you.

I take it that you agree with Mr. Ginsburg that those, generally speaking, who violate the Sherman Act should be sentenced to some term of incarceration?

MR. BRONSTEIN: Yes. I think that is a category of offenders that ought to get a short sentence because I think you can -- as I think I mentioned in some other testimony. There is a lot of good evidence (inaudible) that you can achieve general deterrence by a certain short term of imprisonment for white collar crimes and for drunk driving.

(Inaudible.)

CHAIRMAN WILKINS: Right.

Any questions to my right?

VOICE: I have one question, Mr. Bronstein.

You make the point that there is too much imprisonment.

One of the -- Hawaii is one of the exhibits in
your written testimony -- show that the sentence per 100,000 population with the United States (inaudible) large number (inaudible).

I am wondering if that is the right comparison, or isn't it really a comparison of the number sentenced relative to the crime rate?

In some sense I think what you have done (inaudible) saying we have too many hospitals in areas where we have too many sick people.

MR. BRONSTEIN: No, I don't have those figures in here, but if you compare the crime rates in those Western European countries, or most of them, they are not very different except in one respect. That is crime committed with a handgun (inaudible).

(Inaudible.)

Well, our rate here, we commit over 20,000 homicides (inaudible) year. There is no country in Western Europe that has as many as 100.

But burglary, bank robbery, quite similar.

VOICE: Isn't it true, though, that if you --

MR. BRONSTEIN: 10 percent variations (inaudible).

VOICE: (Inaudible) after receiving the testimony, and I don't have anything that I have a lot of confidence in, but it seems to me that a lot of European
like Norway and France have higher rates of imprisonment when measured by their crime rate than we do. I mean, it seems to me that the information presented distorts your figures somewhat.

Have you ever done that?

MR. BRONSTEIN: Well, (inaudible) interested in seeing that done, but I haven't looked at -- well, I have looked specifically at the UK, at Sweden, at the Netherlands, and our rates are 10, 15 percent higher, our crime rates in particular, in measured categories (inaudible), and the difference between incarceration rates is (inaudible) at all.

VOICE: But you would agree that that would be a better way of --

MR. BRONSTEIN: That would be a better way.

CHAIRMAN WILKINS: Any questions, Mr. Gainer?

COMMISSIONER GAINER: (Inaudible.)

Neil Christin, who was quoted by the previous witness, (inaudible) United States (inaudible) Europe (inaudible) made the Europeans look very bad at that time, which was about eight years ago. His view was that crime rates in the United States were distinctly higher in almost all categories (inaudible) crime rates in Europe.

You have on page 3 not just (inaudible) among the persons who have made that statement (inaudible).
But I, too, am troubled by what Dr. (inaudible) has pointed out, and that is the (inaudible) additional factors.

Could we not as well say that in the United States we have the most reckless driving (inaudible) in the free world?

(Inaudible.)

We have the highest incidence rate per 100,000 general population in the free world and the world as a whole, and it would seem that this wouldn't necessarily indicate that our driving practices are the most reckless. It would seem that the total number of drivers (inaudible) number of miles driven would have some appropriate place in the equation.

(Inaudible) going to suggest that the ACLU (inaudible) serious consideration to the question raised by Dr. (inaudible).

Would you be able to spend a little time attempting to (inaudible) crime rate per 100,000 population in the nations that you (inaudible)?

(Inaudible.)

I think that would be very helpful.

MR. BRONSTEIN: We will try, and we have been trying to do that. It becomes difficult (inaudible). I talk frequently with the Director of Research (inaudible)
Swedish (inaudible), Norman Bishop. I talk with him (inaudible).

(Inaudible.)

And he (inaudible) that difference in reporting crime, different definitions of crime (inaudible).

It would be a much fairer presentation. My impression from talking to Mr. Bishop (inaudible) not long ago was (inaudible). That was a time when (inaudible) by holding us up as a good example, that it was as much political as it was statistical (inaudible).

VOICE: (Inaudible.)

MR. BRONSTEIN: Well, Neils is more a politician than a criminologist.

(Inaudible.)

That is obviously a political (inaudible). But it is a fair criticism, and we are working on it, and as soon as (inaudible) or any part of it (inaudible).

VOICE: Mr. Chairman (inaudible).

CHAIRMAN WILKINS: Sure.

VOICE: You have indicated at the end of your testimony that (inaudible) individual who obtains $100,000 by fraud is a more serious criminal than one who obtains $100,000 by robbing a bank.

(Inaudible.)

MR. BRONSTEIN: Not just fraud, but the bank
vice president, someone in the bank.

VOICE: (Inaudible.)

MR. BRONSTEIN: It is a violation of trust as well as the crime.

VOICE: I was wondering how far you would carry that (inaudible).

If the bank president (inaudible) $2, would you consider that a more serious crime than an individual coming in and robbing the bank of $2?

MR. BRONSTEIN: Yes. If the amounts were equivalent (inaudible) steal $2, I mean, yes.

VOICE: Did the robber have a gun?

MR. BRONSTEIN: That would change the equation.

If the robber had a gun (inaudible).

CHAIRMAN WILKINS: Any other questions?

VOICE: You didn't refer to drug offenses as those that affected society.

MR. BRONSTEIN: Well, I include those in the organized crime area, that if you are talking about drug offenses as --

VOICE: Distribution.

MR. BRONSTEIN: All right. Again, we are talking about the hundreds of people that the District of Columbia police sweep up on 14th Street.

VOICE: I am talking about major distribution.
MR. BRONSTEIN: Major distribution, I consider that part of organized crime. That is a very, very serious and threatening crime.

VOICE: What is your position on the life sentence imposed yesterday by California for spying (inaudible)?

MR. BRONSTEIN: That would be the FBI agent?

VOICE: Yes, sir.

MR. BRONSTEIN: That I consider a very serious offense, and without -- just based only on the newspaper facts (inaudible).

VOICE: Yes.

MR. BRONSTEIN: I guess you have a couple of factors. You have a person with a lot of public trust. After all, if you can't trust the FBI, and so on, and so there is a violation of public trust there.

A law enforcement official, the threat to security which was involved in the substantive elements of the crime. I consider that a very serious offense.

VOICE: Would you justify that sentence?

MR. BRONSTEIN: I am not sure the life sentence that I gather -- well, it was a life sentence, but he will be eligible for parole in 16 years is what I read in this morning's paper. It is not a flat life (inaudible).

VOICE: Now, your statistics also (inaudible) --
you give old parole statistics. A lot of people do.

We are concerned with the federal system, and
they are 10 percent below.

MR. BRONSTEIN: That is my --

VOICE: (Inaudible) these other statistics so far
as we are concerned.

I mean, we say we are the harshest at the federal
government (inaudible) parole.

MR. BRONSTEIN: I said that in the context of
urging the Commission not to accept what is sort of the
common political and even media rhetoric that this country
is soft on crime. I don't think we are soft on crime. I
think we are tough on crime, and that is why I (inaudible)
standpoint.

VOICE: One point of information. You talked
about the sentence in Texas. You said for three offenses,
the third offense --

MR. BRONSTEIN: All three total, there were three
forged checks.

VOICE: Yes.

MR. BRONSTEIN: The total --

VOICE: I know, but the sentence -- the life
imprisonment went for three offenses?

MR. BRONSTEIN: For the third offense.

VOICE: For the third offense.
MR. BRONSTEIN: Because of the third offense.

VOICE: Well, now when those statutes -- those (inaudible), that is where they originated -- when they first came in, they were for four offenses. When did they get down to three?

(Tape reversed.)

MR. BRONSTEIN: ...mandatory, whatever it happens to be.

VOICE: You have answered my question. Thank you.

CHAIRMAN WILKINS: Mr. Breyer.

COMMISSIONER BREYER: I thought your statistics -- I am not a statistician, but I thought you were just thinking of a point that deals with simple-minded persons like me because if there is some obvious way to (inaudible) lot of people stops crime (inaudible) stops crime, it couldn't be that obvious because we do put a lot of people in jail. In fact, we put more than three times as many in jail with our population as Europe does, yet we seem to have at least as much crime.

I mean, that --

MR. BRONSTEIN: That report.

COMMISSIONER BREYER: Yes. I thought that was -- and the other (inaudible).

So my question really is -- in your experience,
because you have had a lot of experience with the federal system as well as the state system, my impression from what you say, from what I read, is that comparing federal and state, the federal prison population comes close -- let me (inaudible) -- becomes closer to the model you have in mind than the state prison population, that by and large first offenders don't go to jail (inaudible) and usually jail cells are reserved for those who commit more serious crimes.

MR. BRONSTEIN: Right.

VOICE: One, is that so?

Two, let's think of the people who are now not getting sentenced to prison or they are there for a short time and then released.

Given your experience, what would you do with those people, if anything, that would either, A, punish them or, B, tend to make them not commit more crimes or, C, stop other people from committing more crimes?

In other words, I am trying to focus you directly, say, on the subject matter of this.

What in your experience works in terms of these other people who have just left jail or haven't gone there that might work in terms of actually leading to less crime or possibly improving the person.

MR. BRONSTEIN: The first question -- and I don't
agree -- the federal system used to (inaudible), and that is where their population, contrary to the rest of the country going up, the federal prison population is going down.

There was a stated national prosecutorial policy in the middle to late '70s that they were going for what they called quality criminality and not quantity. They were trying to prosecuting large white collar crimes, large drug cases, and were not prosecuting lots of numbers of smaller offenders, minor drug cases, bank robberies (inaudible). They were turning those over to the states.

I have been told by the Director of the Federal Bureau of Prisons that early in the current Administration, whatever year that would, '81, that he was advised that there would be a change in prosecution policy, that they were now going to go after quantity as well. Now, you see the prison population going up.

It is my impression that today there are lots of people in federal prisons who would not have been given jail sentences 10 years ago or who would have been treated in the state system (inaudible). There are lots of first offenders and lots of people who likely could be dealt with in some other way, but they are not.

I saw the U.S. Attorney for this district on "Face the Nation" on Sunday morning, and he said quite explicitly if a person breaks the law they go to jail. That
is what he responded.

(Inaudible.) similar to some of the states (inaudible).

In terms of what you do, what I have seen to be the most successful sanction, which does involve some (inaudible) in the broad sense, is what is called community intensive supervision (inaudible) parole (inaudible) 75 years ago (inaudible) down in Georgia and they have got now in Kentucky, where parole probation officers had very small caseloads, who really did not only supervise but placed under surveillance their probationers. They had contact three to five times a week, sometimes on a daily basis. They not only watch, but they also provide some assistance, some social assistance, which is what Jerry Miller was talking about. They help them with housing, with jobs, with all the kinds of things that would make a person fall back into crime.

That, it seems to me, is the most appropriate sanction, and it can be combined with fines as restitution for a large number of offenders who ought to go institutions.

CHAIRMAN WILKINS: Thank you very much, Mr. Bronstein. We appreciate you being with us today. We will be in touch.

MR. BRONSTEIN: Thank you.
CHAIRMAN WILKINS: Mr. Harvey Goldstein is with us. He is Chief of Probation for the State of New Jersey. Mr. Goldstein, we are delighted to have you with us.

TESTIMONY OF MR. HARVEY GOLDSTEIN, CHIEF OF PROBATION, STATE OF NEW JERSEY

MR. GOLDSTEIN: Thank you, Mr. Chairman.

I guess part of the reason I was invited to come here today to share my views on the New Jersey experience (inaudible) this morning (inaudible).

And that is indeed a very apt description, and I would like to share with you briefly a bit of an overview of the statement that I submitted and talk about some issues that I think are most cogent and urgent to deal with.

In 1979, the State of New Jersey adopted a new criminal code, and that code very specifically laid out determinate sentences, some reductions of incarceration, and capability for mandatory minimums and eligible periods of parole, and the general presumption that the State of New Jersey was going to incarcerate more people and incarcerate them for a longer period of time.

What happened in 1979, we saw the beginning of the creeping up of the prison statistics in terms of (inaudible), where by 1982 (inaudible) correctly, we are at approximately 140 percent in the state facilities and about
135 percent (inaudible).

As this was going on, we also had a change in
Chief Justice in the State of New Jersey, and he began the
process of taking a look at our systems, and in 1981 decided
that his year-long effort in studying probation (inaudible)
would be undertaken by business people, by lay citizens
(inaudible) 350 groups from each of the judicial districts
in the State of New Jersey.

The design was simple. It was an effort to take
a look at what we were doing and really chart out plans for
the future.

One of the groups was given a fairly unique
task. They were told -- provided with all the information
about prison crowding in the state, provided with all the
best estimates we could give them, and they were asked:
could you define an intermediate sanction that was
punishment-oriented but had the kinds of advantages that
would perhaps lead to lower criminality on the part of
people who went through it?

But there was little question that the intent
initially was to assure that there was some type of
punishment, and indeed they played with a variety of
(inaudible).

You will hear probably in some of the articles
that are written about New Jersey's model the (inaudible)
are over their heads in cases of any violations of New
Jersey sentencing provision models, and indeed over the
course of the years they did design such a program that
ultimately became known as New Jersey's ISP.

It was for nonviolent criminals. It was clearly
an experiment. It was under the direct control of the Chief
Justice and the administrative office (inaudible). It was
an effort to identify some selected inmates who, based upon
a process I will describe in a moment, could be expected to
come out into the community without a significant increase
in risk to the community members and be subject to an
intensively (inaudible) program, one that was also
sufficiently funded that there resources in there to provide
a lot else as well.

It is a program that involves the application
(inaudible) original sentence must be for our state prison
system (inaudible) just cause based on our sentencing
statutes, and then the person applies to come out into the
program. They can apply at any time, but they must serve a
minimum of 60 days, and they average serving about 90 days
(inaudible) before they come out.

They have to develop a plan, a plan which tells
us and the sentencing court what they will be doing, how
they will be spending their time, how they will be
supporting their families, how they will be dealing with
some of the problems that crop up in the past that led them into the institution that is (inaudible).

That has been screened by what we call an ISP screening board, which is interestingly composed. It is composed of members of the program. The director or his designee sits on the panel. It is also composed of a member from the State Department of Corrections.

The third, probably the critical element of the program, is the citizen (inaudible). Citizen members receive no reimbursement or other pecuniary gains (inaudible) will literally go over each of the cases that comes through the system, and no case will we process into our system until after they have given their okay to it.

If they succeed through what is involved in the screening board process, they go before a three-judge sentencing panel who actually determine if he fits into the program.

Once admitted into the program, there are some individualities in the plans that they develop, but there are some critical components (inaudible). Probably the most significant one is it is based on the control of the community. We require a minimum of 20 contacts between the ISP staff and the client, him or herself.

The 16 hours of community service that has been talked about already this morning is another component of
it, some paying back. Restitution is in many instances where a victim can be identified incorporated into the entire plan that is involved.

As a matter of fact, the witness -- the victim will be contacted by the program at every stage during screening and ultimately given the opportunity to either present in writing his views or present his views to the court or they actually do make personal appearances to testify.

The other components of the program, also designed around some control elements, is a heavy reliance on monitoring. There is a requirement of employment or steps that will lead to employment. There is the curfew that is imposed that is dealt with and enforced the entire term (inaudible).

(Inaudible) that are imposed, based upon the needs of an individual program, and most recently -- I guess you will be hearing about this later on this afternoon -- we have begun experiments in electronic surveillance (inaudible).

The program has been operational since September of 1983, and I would like to share with you what the results have been at least to date.

I should point out that the National Institute of Justice is funding an independent evaluation which should be
available at the end of this year or the beginning of next year.

In the two and a half years we have been operating, approximately 4300 inmates have applied to ISP. Only 691 have been accepted, roughly an acceptance rate of 16 percent, a very selective program.

In addition, we find that a number of people who have applied to the program have found out about the program and then have decided to withdraw because they felt (inaudible) and they would rather spend their time in the state prison system.

374 (inaudible) is our generally current (inaudible) population (inaudible) program, which is roughly equivalent to a medium sized institution in the State of New Jersey. 150 has successfully graduated from the program as of this point in time.

I said before that employment was the cornerstone for the program, and we have been very pleased. We have been running since the inception a 94 percent employment rate. That has some distinct benefits. And these are not all minimum wage type jobs. As a matter of fact, the annualized average salary exceeds $10,000.

As a result of those jobs, $600,000 in federal taxes has been paid by people who would have otherwise been in our state prison system. $125,000 has been paid
in New Jersey state taxes, and 275,000 has been paid in
restitution and child support (inaudible).

We have also collected on an incremental basis
(inaudible) supervision fees, something that we have just
begun with. It is only eligible for that (inaudible)
population and it is based on (inaudible).

We indeed have had those that we have had to
return to prison for failure to (inaudible) the program, and
as of this date 161 offenders have been returned, roughly 23
percent of the total (inaudible). However, only 3 percent
of those, 3 of the 23, have been returned for an indictable
offense. The remaining 20 percent have (inaudible) various
and sundry reasons, lack of program compliance or disorderly
personal violations combined with (inaudible).

In my role as Chairman of the Board of Directors
of the American Probation Parole Association, I have seen
widespread popularity (inaudible) proliferation of intensive
supervision programs. Generally as a result of (inaudible)
overcrowding and budget limitations in state departments of
corrections, these programs have really begun to rereflect
the original principles of probation -- small caseload,
frequent meaningful contact, community involvement, and an
emphasis on appropriate kinds of behavior.

Equally important, intensively supervised
probation as a concept is extremely flexible. That is one
of the reasons across the country we really haven't come up with an acceptable definition of that. It has really been molded on the basis of each jurisdiction's need.

I say that, but let me just point out a couple of examples first in New Jersey. The ISP program I have been talking about is a state-run program in the Administrative Office of the Courts dealing with state prisons.

An experimental program called ECLIPSE has been done on a county level, county jail inmates. It has been equally successful.

The State Bureau of Parole has just started an ISSP, an Intensive Supervision and Surveillance Program, which will be run by the Parole Bureau in our state.

In contrast to New Jersey's resentencing procedures, (inaudible) original sentencing states that involve ISP.

Each of the states that have begun to experiment with this have really reflected their own individual needs and problems and concerns, such as geography and availability of funds. Where it is run out of, who runs it, what are the circumstances of it, what are the contact rates, whether it is an alternative or an add-on are all things for an individual state (inaudible).

Because my experience with the federal system is limited, there are contextual complexities that I cannot
address in contemplating the application of ISP to the federal system.

Concerns of regional and geographic differences and problems, resources, and the like require that that flexibility which we see inherent in the programs of the (inaudible) within the federal system.

I urge the Commission to (inaudible) carefully establishing the federal level ISP for nonviolent offenders as part of the overall sentencing strategy which results from these deliberations.

I think there are different levels of involvement of various actors within the system. This Commission should probably focus on major level policies, defining who goes in and under what circumstances. What are the general goals and objectives designed to be met, and what are the target populations do you want to use it for?

Major program elements should generally be defined, but with flexibility maintained to allow some local creativity.

At the district court level, I think the key of the judiciary there is critical. We believe that our program in New Jersey works mostly because it has the direct support of the resentencing (inaudible) of the Supreme Court.

We have had the opportunity to have a lot of
input in the design of the program as well as the
administration, and I think the technical aspects of how to
run the program need to be dealt with at their level.

For your consideration, I think there are a
couple of key sentencing options that you may want to
consider. ISP, it seems to me, can fit into three different
places.

The first one is an original sentencing option
that is available for (inaudible) equally as well as a
determination (inaudible) on probation or placement to
incarceration.

The second is the program where ISP can be used
as part of the total decision -- total sentencing the judge
hands down. So, for example, if it were to be two years in
followed up by a period of two years of supervised release,
perhaps ISP could be considered in lieu of one of those
years in.

And finally, an area that is rarely talked about
but we have been doing a fair amount of research on in New
Jersey (inaudible) regular traditional probation violators.
Originally, the thought was that they would be given their
chance on probation, and they should not be (inaudible). We
have considered them, and after some initial shock on their
part when (inaudible) midnight on Friday night or 2:00
a.m. Saturday morning, we have found that they have about
the same survival rate within ISP as do the other
(inaudible).

I appreciate the privilege of speaking before you
today. I will try and answer any of your questions.

CHAIRMAN WILKINS: Thank you very much.

Any questions to my right?

VOICE: Mr. Chairman, I have a question.

Mr. Goldstein, you commented that intensive
supervision, the program is recommended for a select group
of inmates, prison inmates, and I think on page 2 of your
testimony your statement reflects that the program is open
to nonviolent offenders.

I wonder if you would recommend a period of
intensive supervision for violent offenders subsequent to
their completion of the period of incarceration.

Now, you just mentioned that, except that you
stated your recommendation of the program being in lieu of a
part of the sentence. So I am not referring to that, just
not in lieu of a part of the sentence.

Would you recommend that a period of intensive
supervision follow a completion of a term of incarceration,
completed term of incarceration?

MR. GOLDSTEIN: Yes, I would. Perhaps that is a
fourth alternative.

We were not at liberty when the New Jersey model
was being developed to consider that. This became an issue of the judiciary becoming involved in the parole process. A different system than the federal system.

We have had some unique experiences, mostly with those people who have withdrawn after applying to the program. And two may help give you a flavor for -- response to your question.

The first one was the person was involved in distribution of drugs. The level was immediate level. There are people with this particular individual's background and general circumstances that have made it into the program. He had gotten all the way up to the point of the resentencing panel and withdrew, and we sent staff out to query him as to why he withdrew, and his answer was instructive but not particularly comforting to us.

He said, fairly frankly, that he had spent the last five years making his living out of selling dope and that he had averaged about $65,000 a year tax-free. He was sure that when he was released on parole perhaps in another six or seven or eight months that he could get over on his parole officer, but he was equally sure he couldn't do it when it came to the ISP officer.

In the area of even violent crime --

VOICE: I agree with that, which is the reason for my question.
MR. GOLDSTEIN: The same thing is true in the area of violent crimes. We find that a lot of the reasons for the acting out of a particular program participation has to do with frustrations and the inability to get a job, the inability to communicate with family members, the (inaudible), particularly peer relationships, and these are all things that ISP can be designed to deal with.

So the answer to your question is (inaudible).

VOICE: You gave a good example.

Now, what about an example of the guy who prefers to stay in prison? I mean, what does that tell us? What does that tell you?

MR. GOLDSTEIN: We have a couple of different things that it tells us, depending upon who makes -- you know, provides that kind of information to us.

The first thing is that indeed New Jersey's ISP is punishment. If it weren't punishment, we would have more people coming in and a higher rate (inaudible).

In addition, it tells us that, you know, we needed to go further than just the model that we have. We still consider ISP in our state as an experiment, at least until the federal evaluation (inaudible) evaluation is done.

We have every confidence that will be a very positive evaluation. In the meantime, pending that, we have
seen two expansions already -- the first one is the county
jail sentences, which perhaps it should have been that all
along, and the second one to the parole area.

I don't think there is any question that our
judges on the resentencing panel take into consideration the
fact that when some of the offenders would be released they
would be released without the kind of intensive supervision
that we can give, and therefore choose to put them in the
program perhaps a little bit earlier coming out of the
institutions just to make sure that there are the kind of
controls in the community (inaudible).

CHAIRMAN WILKINS: Any questions to my left?

VOICE: How much did it increase your staff?

MR. GOLDSTEIN: Well, we had to struggle with
that a little bit initially. The question was who -- which
staff should do it.

We have the State Administrative Office of
Courts, and I head the Probation Division, but we did not
have at that time any field staff. The field staff
(inaudible) Supreme Court judges at the county court level.

We decided to....

(End tape.)
total program from the 42 and includes -- staff --

Twenty-five officers. Each officer carries a caseload between 15 to 20, a total of anywhere at any time--75 to 500. At a cost of a little under -- thousand a year.

Probably 61,000.

COMMISSIONER: Was the number of people that you accepted determined or affected by the staff?

MR. GOLDSTEIN: Not yet, but we're getting there. It's our understanding that we can certainly go back to legislation and ask for additional funds for more staff.

We had taken as a matter of policy a position that said if we're not -- with staff, in fact, we won't run the program.

We don't want to have a gradual erosion -- we'd rather not run the program if that were the case.

COMMISSIONER: Thank you.

CHAIRMAN WILKINS: Well, thank you very much, Mr. Goldstein. We appreciate your sharing your experience in New Jersey with us.

MR. GOLDSTEIN: Thank you.

CHAIRMAN WILKINS: Anne Schmidt represents the National Institute of Justice; and Mr. Samuel Saxton is the Director of Prince George's County Department of Corrections.
STATEMENT OF MS. ANNESLEY K. SCHMIDT,
NATIONAL INSTITUTE OF JUSTICE; and
MR. SAMUEL F. SAXTON, DIRECTOR,
DEPARTMENT OF CORRECTIONS, PRINCE GEORGE'S
COUNTY, MARYLAND

MS. SCHMIDT: This is a chart on the kinds of
model -- a smaller version of it is included in my
testimony. And, basically, we thought you'd like to see
some of --

This is the first column, the continuously
signaling device.

VOICE: Excuse me, Mr. Chairman. There are
people in the back who cannot hear.

CHAIRMAN WILKINS: All right, Ms. Schmidt, just
shout it out.

MS. SCHMIDT: All right.

(Laughter.)

MS. SCHMIDT: First of all, does anybody else
want a copy of the chart? You're welcome to call me once we
get back to my office.

This is a continuously cycling electronic
monitoring. This device fits on the offender's leg. It
sends out a continuous signal. When the offender comes
within range, which is about 150 feet of this device, it
sends out the signal.
This device is plugged into a telephone jack and to a telephone. Every time it either loses the signal or gets the signal, it calls the central office to tell the computer.

Now let's say you work 9 to 5 and it takes you 15 minutes to get to work. The program is set so that you can leave at 8:30 in the morning; you must be back by 5:30.

At 8:35, the computer gets a signal that says the signal has been lost. It checks its program. It knows that that's within the time that you're allowed. And it says, fine, you've gone to work.

But it gets to be 5:30 and it hasn't gotten another message. It prints out a note that you're not home like you're supposed to be. Violation.

So, at 5:35, it then gets the thing from the computer, gets the message that says he's home now. And it prints he got home, but he's late.

And that's basically how this device is. Now, Stan has a different kind of equipment. Have you got your equipment, too?

MR. SAXTON: Yes, I have.

Thank you very much for inviting me to testify here. I'd like to have Al kind of -- I want you to demonstrate this.

This device, we call this one inactive, it calls
the station and tells the station what's going on. Between
the person who is wearing it, or whatever happens to be the
device, and the computer terminal and the terminal back at
the base.

This one is what we call acid, for a word.

MS. SCHMIDT: That's the device in the second
column on the chart.

MR. SAXTON: And we program a computer to call
the individual who is wearing this wrist kit at various
times. It can be one to 100 times a day. We can call him
at his home. This box is attached to his telephone. It's
very easy to just plug it into his phone...

This wrist lid is placed on the individual. This
wrist lid is attached to his -- and then when the individual
is at home, he will get a phonecall like this.

(Demonstration).

MR. SAXTON: And that makes it plain that that is
in fact the wrist that belongs to that person.

COMMISSIONER: If he takes it off his arm and
places it in --

MR. SAXTON: No...

(Laughter.)

MR. SAXTON: It's attached permanently to his
wrist...

COMMISSIONER: I see. Worn like a watch.
MR. SAXTON: Yes. In this, you have two forms of identification. First, you have them identify what the individual is wearing. And you have the voice from the individual saying his name and the time, which is played back...in addition to that, we go out on a daily basis and visit the individual at his home to make sure that this has not been tampered with.

Any of the instruments can be tampered with one way or the other. But, once this one is tampered with, it can't be put back together.

COMMISSIONER: I mean, you keep it on all the time? It's waterproof.

MR. SAXTON: It's on 24 hours a day.

COMMISSIONER: Is the question always the same? What is your name and the time? Or do you vary the question to make sure the person knows the answer only if he's that person?

MR. SAXTON: Well, no, it will stay the name and the time. But, remember, the time has to compare with the time that comes out on the computer program.

In other words, when it prints out that it is a verified call, it prints out the name at the top, the number, the time the call was made, and that it was a good phonecall.

Compare that with the time he says it was when he
answered the phone. Yes, it's very easy to cut it. I mean, you can cut it and leave it any way you wanted to leave it. But, she couldn't answer the phone and say the time. We'd know it.

COMMISSIONER: There is a different technology on the market which says use less verification in technology to compare --

COMMISSIONER: Thank you because I'm so accustomed to dealing with criminals that I can figure out ways around that.

MR. SAXTON: There's a way around the voice that does that?

COMMISSIONER: Right, right. That's what I was wondering. Right. Okay.

CHAIRMAN WILKINS: How much does this cost per unit?

MS. SCHMIDT: They vary all over the place. They're probably on the high side around 100 (inaudible).

MR. SAXTON: For this system for one day, the one that we have -- this is the cheaper model -- it costs us $1.72 a day. For your most serious, more expensive models, we're talking $7 a day.

If I may very quickly go over just a couple of things that are not in my testimony. I want to compliment the gentleman just before me. It was almost like he was
testifying for me.

I'm a president-elect of the American Jail Association. And what we're doing is looking for ways to bring America's jails out of the 15th century. And one of the things that we certainly have looked at -- and I would agree with Mr. Bronstein in a couple of ways, too -- that I don't know why we really have never took a hard look at who is in prison. Who is in these jails?

I've been in this business now for about 35 to 40 years. And I am amazed at how naive we tend to be sometimes in looking at who is there.

It's been my experience that you can divide prison populations and jail populations. I can speak to the jails much more than the prison because that's what I am. I'm a jail administrator. I'm a professional jail administrator.

And looking at the numbers, and I do this every day, there is about 20 percent that walk in the door and walk back out again -- I'm not talking about the crime necessarily. I'm talking about the numbers.

They walk in, walk back out, and we've done everything that we're going to do with them. There's about 60 percent in the middle. You can divide that into two 30's if you would -- 30 percent toward the higher side, and 30 down towards the lower side.
And there's about 20 percent that I call them the bad news bears. They wear trouble like a halo. Everywhere you go, they've got more and more. When you've seen where there are lots of problems in a jail, look toward that bottom 5 percent for causing 95 percent, supported by the 15 percent just above them.

What I've just described to you is the bell curve. And in each case, you've got to have programs and things to deal with each one of these entities.

Too often, we have looked at what goes on in jails. They're saying "all of them guys". They're not all the same. And it gets awful personal sometimes when you begin to see whose there.

Your son and mine. I don't want to be facetious or a wise guy. I don't intend to come here to do that. I would ask this obvious question:

Who in this room that hasn't got a son, a daughter, close friend, somebody you know or somebody your son knows that hasn't smoked a little grass? And played with a little pill?

It is getting personal, folks, that we've now got to do something different in terms of how we take care of business inside of the jail.

That is my answer. I'm going to open in a very short time a new, generation jail. That may be a strange
term to some folks. But a new generation jail is designed to deal with the kinds of issues that we're now discussing.

There'll be 596 beds over there. I guarantee you, if I don't do something and quick, I'm going to have every one of those beds filled up 20 minutes after I open the door.

Anybody that wants to dispute that?

So what do I do? I've got to find a way to do it. And that's what brought me to using and looking at homee detention. I don't see it as a panacea. I think that it needs men and women to make it work properly, like any other system.

In addition to that, I would suggest that it will give me a tremendous leg up on several problems that I need to have control of. Let me share some of them.

If you would accept that that top 20 percent really should be oriented towards work release, now there is a problem there.

Last Friday, the Washington Post took me to task about my home detention program. I'll tell you publicly, that's good because I think that pig iron is nothing but pig iron until it's tempered by fire.

So let folks look at me and let them aspirate what problems are with that. What I would have a problem with is if they are reporting it wrong, if they kill a good
program simply because they are inured as to what's really going on and what is needed.

This is a United States problem, in my judgment. I would have to tell you, please forgive me for being a little bit enthusiastic. I'm a former Marine. And I've spent a tremendous part of my life fighting for this country.

You know what I'm going to tell you? That if you don't do something about this problem, it's going to overrun us because it could very well be that we'll have 50 percent of the people in jail and the other 50 percent of them watching them.

Now we've got to stop that nonsense. And I'm telling you that home detention is one approach to a very serious problem.

Here is what I plan to do with it in Prince George's County. I'm going to be putting some people out to learn some trades. Who was that that said that part of them is not having the ability to work.

So I intend to put some folks over to the vocational high school and put some bracelets on them because the public is going to say to me:

You can't let these hardened crooks fool around without supervision. Now I've got some control. I will be looking at people at the front end who have cases that are
not -- they are misdemeanors, or low grade felonies, not violent crimes. But the other stuff that we send people into the jails far too much.

And we're not being nice guys when we put somebody in home detention. If you've ever taken your son and told him to go stand in the corner and don't move, or go to your room and don't come out. Or if you've ever had that experience yourself, you know that it can be quite disheartening to have to sit there for hours on end.

Things that we normally take for granted you no longer can do.

So it is not being nice to send someone into home detention. Another area that I intend to use this particular program for is for temporary releases. It's awful hard to see someone that has a mother that has died and then you're going to send that person out, and then you're going to send two armed guards right next to him on each --

I don't have to. I can send him into the funeral home or parlor or whatever, put a monitor on him and monitor him from the car outside. That makes a lot of sense.

To my way of thinking, home detention is an idea whose time has come. I agree with the gentleman who says it must be laid on, applied to a specific locality. That's got to be.
But, aside from that, home detention, I believe, is one of the best things that is happening to the criminal justice system in a long time. It will allow me to be a much better administrator over the long run. I certainly...

CHAIRMAN WILKINS: Thank you. Any questions?

COMMISSIONER: Yes, Mr. Chairman.

First of all, I would say congratulations to you on your being elected president-elect of the Jail Association.

MR. SAXTON: Thank you.

COMMISSIONER: You are respected widely in the field of Corrections for your enthusiasm which we've enjoyed today, as well as your competence and commitment.

I'm not aware of the criticism in the magazine that criticized home detention program. Would you state the nature of the criticism?

MR. SAXTON: Certainly. I certainly will. Home detention is a very young baby right now. It's going to take a long time to get it so that it can stand on its feet and where it will in fact have the support and understanding of the wide range of the public.

It isn't something that's just going to happen; it's got to be marketed. What had happened is that we had a person that I would agree that was inappropriate that was there. But the problem here is one of all of us learning
how to sentence, you know, much smarter.

And we had made a wrong move there. So, you know. We could be wrong and, hopefully, nobody will shoot me for it.

COMMISSIONER: They had discovered a person that should have been in prison? Was that they discovered a person that should have been in prison?

MR. SAXTON: Sure. Not in prison. Should have remained in jail and not out there. Now, one thing that we've got to understand though is that the system works. It was Al Hall's people that went out and caught him doing wrong and brought him back.

COMMISSIONER: So it did do its job.

MR. SAXTON: But, it potentially could have...and I think that we have to admit when we are not right.

We had some other folks on and we haven't had any of them that have violated that trust.

COMMISSIONER: Of course, that was pertaining to the screening for the program and not the program itself, in terms of its effectiveness.

That's all I have.

MR. SAXTON: I expect to have around 200 people in this program, somewhere in the next two years.

Yes, sir?

COMMISSIONER: Do you have any idea how long you
keep company in this home detention?

MR. SAXTON: I would have to guess at that. An effective period would be about, I would say, six months and under. I think if we do it more than that, you're going to...it's like putting somebody on eternal parole and probation.

I cringe every time I look at the staff and see someone on parole or probation for five years. That's asking for trouble nine out of 10 times.

MS. SCHMIDT: The most experience in monitoring programs has been in Palm Beach, Florida. And the feeling of the people administering that program is that 90-120 days is about the maximum tolerance before people really begin to chafe under the restriction of home incarceration.

MR. SAXTON: The reason I asked the question, we've got a lot of experience with people in halfway houses. That's about the maximum, 120 days.

COMMISSIONER: What are the restrictions that are placed on a person in home confinement? Is it just being at home, at your house?

MR. SAXTON: No, not at all. This is why I suggest to you it is a pretty rough type of punishment. For example, you cannot go outside of your home without permission from my department. You're in our home detention.
If you went out on something as innocuous as just to get a loaf of bread without provision, you have just crossed the line. And nine out of 10 times, we will be there knocking.

So you have got to ask permission. One of our experiences has been a young man wanted to go out and play basketball and the answer is no because you are in home detention to stay there. You are approved to go where you can go. And those places you ought not go, take it literal because that's exactly how we mean it.

COMMISSIONER: So, no recreational opportunities are built in? It's not fun and games.

MR. SAXTON: It's not fun and games, and we will give you time, if you want to go play basketball, ask permission, we'll let you do it.

COMMISSIONER: Are you allowed visitors?

MR. SAXTON: No visitors in the home without permission.

MS. SCHMIDT: Many of the programs allow time out for...

COMMISSIONER: How do you monitor this?

MR. SAXTON: We simply tell you that's the requirement and we will be around seeing you very frequently. If you are doing something you've got no business, we will show up like the bad penny, believe me.
And that's how we monitor. We'll manage by sections. We're not going to sit there and watch you all day.

But that's what puts you in home detention anyway. We screened you and felt that you were an appropriate candidate. If you made us out a lie because you did not do what you were told to do, then we'll deal with you in another way. That's what happens.

COMMISSIONER: How would you react to if this became a federal program the possible disparity that's introduced, because of the vast differences in living styles.

MR. SAXTON: Local...

COMMISSIONER: Well, federal in particular I'm talking to because there's so much white collar crime. If we start using that for white collar crimes, you're getting people that live in Carmody Hills in Los Angeles as opposed to other sections of Los Angeles.

MR. SAXTON: Frankly, I heard that question asked earlier and I would have to tell you that I would tend to look at the need to individualize what you are going to give each individual.

There are some white collar criminals that, yes, you go into home detention. There are others I think that are just plain criminals who you do just like you do everybody else.
I don't see where -- you've got to look at who and what they've done.

COMMISSIONER: Then you wouldn't be bothered by the fact that home detention involved for one person sitting by a swimming pool and the other person sitting by a radio?

MR. SAXTON: Please understand me, Doctor, that when I say home detention, I'm not talking about a swimming pool. I'm talking about inside of the house. And if he's out in the --

(Laughter.)

--swimming pool, he will be a customer at Upper Marlboro, I guarantee you, within a very short time.

COMMISSIONER: Not on the golf course.

CHAIRMAN WILKINS: Any other questions?

COMMISSIONER: You mentioned in your testimony that over 85 percent of those placed on the home detention program have not reentered the prison system.

What are the statistics for residivism overall without regard to whether they were sentenced subsequently in...

MR. SAXTON: ...solved residivism in the country was around 64 percent, which is extremely high.

COMMISSIONER: For those who participate in the home detention?

MR. SAXTON: I'm talking about just regular folks
or people that are in this program, it's around 8-10 percent. That's what I've always seen.

MS. SCHMIDT: What is the oldest of these programs, starting in December of '84. So we haven't really had the time to accumulate the...

COMMISSIONER: Thank you.

COMMISSIONER: You said that some people were sent into jail too much. For what crimes?

MR. SAXTON: I'm suggesting to you -- did I say too much? I am saying that there is a breakdown of people that are there. And that if we're looking in terms of what we're going to do with them in the jail, there's about 20 percent that fall into that category that you do little or nothing for.

And that work release is --

COMMISSIONER: But what are the characteristics of the offender that you say go in there too much?

MR. SAXTON: The kinds that I would suggest is the nonsupport case. I see a lot of those. I saw in one state prison there was about 300 people that fell into that category, and they were grossly overcrowded.

Let me give you some more, a contained look at some of those this morning.

COMMISSIONER: But what are the offenses?

MR. SAXTON: That's what I'm going to try to give
Disorderly conduct. I see a lot of long-term folks in for just disorderly conduct. Thirty, forty, fifty days. You see some of that.

Gambling. Certainly there should be something done about gambling. But it's not unheard of to see folks in jail for long periods of time on a gambling violation.

Receiving stolen property. Now I'm not talking about the guy that got the Cadillac or something and that's what he received. I'm talking about some minor kinds of things, that we begin to see some of those. The Hershey bar. And I've seen a lot of those folks. They tend to stay there for a long period before they ever come to trial.

And then, once they come to trial -- and that's the kinds of cases that you see coming through that the Judge finally, and I understand you are Judges, that they're given credit for time served. A lot of those cases, I see happening a lot.

The other kinds that I would suggest to you would be failure to pay some fines. We have a guy that owed the traffic ticket for 30 bucks. He stays in jail for 45 days and then he gets credit for time served.

In the meantime, we've got a person that doesn't have a job. I'm not saying he ought to not have gotten something. I think that is true. But how much something
and how much is overkill? Is it then analogous to killing a
fly with a hammer when you keep somebody like that forever?

Those are the kinds of offenses. Some commercial
B&E's. I'm not talking about serious B&E's. I think
someone broke into a body's home, I'd be awful nervous about
that.

Some drug offenders. If in fact you're going to
demand...

(Conclusion of side 1 of tape 4.)

CHAIRMAN WILKINS: Ms. Schmidt, Mr. Saxton, we
appreciate your coming today. And we, as Mr. Corrothers
pointed out, appreciate your enthusiasm.

Thank you very much.

Burt Galaway is Director of Graduate Studies,
University of Minnesota School of Social Work.

STATEMENT OF MR. BURTON GALAWAY, DIRECTOR,
GRADUATE STUDIES, UNIVER OF MINNESOTA,
SCHOOL OF SOCIAL WORK

MR. GALAWAY: Chairman Wilkins and Members of the
Commission, I am correctly identified as a Professor of
Social Work from the University of Minnesota. I must
declare, however, that I am not speaking for the University
of Minnesota or for the School of Social Work.

The positions I've taken are my own positions.

They are positions that have developed over about 15 years
of work in the area of restitution. But it is primarily in the nature of hope and development implementation, beginning with the Minnesota Center in 1972, and currently I am serving as Director of Minnesota Citizens Council on Crime and Justice, which brings burglars and crime victims together for purposes of facing these associations regarding...restitution.

Before going to the questions I was asked to address, I want to make two very, very brief comments on the issue of crime rates and incarceration rates.

I certainly agree that looking at incarceration rates, one must control for crime rates...

Studies done early in the 1970 citation, which I did not bring, unfortunately, but we will try to provide you with, looking at the 50 States, there was absolutely no correlation between crime rates and incarceration rates.

States with the low crime rates, many states with low crime rates have high incarceration rates. Many states with high crime rates have low incarceration rates. There was absolutely no correlation at all.

And in terms of international comparisons, let me also caution that you may be comparing apples and oranges because most of the incarceration rates reported in this country are prison rates; whereas, at least in European countries, most of the incarceration rates include short-
term prison with short-term incarceration, less than a year...serving longer.

So to compare those rates, we really have to take the short-term people out of the European base or add the short-term persons in the American base.

It's very much an apples and oranges situation. Indeed, the American situation would be less desirable in it because we may actually be minimizing...

All right, back to my central questions, which had to do with restitution. I will very briefly make three points and then respond to the questions.

The first point is, in my view, restitution ought to be considered a sentence. That is, made available to the Census Report either as the sole penalty for the offense, or as the penalty when the seriousness of the offense dictates. It may be combined with other nonincarceration penalties.

Therefore, I would argue that for property offenders, at least, and you've pushed me a bit into crimes of violence, but for property offenders, at least, their restitution should be something preferred, gentlemen. And it should be used in all cases for property offenders.

The question then becomes one of under what circumstances or conditions are other penalties required for a property offender?
My view is that other penalties may be required when the seriousness of the act, the seriousness of the thought, indicates that restitutional law will not be a sufficiently severe punishment. And then look at combining restitution with other nonincarceration penalties.

In the price-fixing illustrations which were the subject of the first testimony this morning, I would argue that if restitution is not a sufficient penalty for those cases, we might look at a year or two or three years of fulltime community service as necessary to increase the severity.

In regards to the question of alternatives, I prefer not to think about charges. I think one of the serious problems in our culture is that we have to forge this link between punishment and prison, thinking only of prison as the form of punishment.

And you I think start talking about replacing the imprisonment with other forms of punishment. And I would suggest for property offenders replacing imprisonment as the punishment with, first, restitution in condition with other nonincarceration penalties when restitution is not sufficient to meet the standards of proportionality between the seriousness of the offense and the severity of the penalty.

Our second point has to do with the logistics,
the issue of how can you determine a restitution allowance without delaying the sentencing process?

I have difficulty understanding why that is any more difficult than determining the quantum of any other criminal. How does one come into the fair quantum of community service or fair quantum of imprisonment or fair quantum of probation supervision controlled by the intensity of the probation supervision.

It seems to me that that is an issue which must be resolved with any penalty. However, with restitution, I suspect what is being asked is:

How does one decide how much damages were actually done, and what should the offender be held accountable for restoring to the victim?

The experience of all the restitution problems that I've been involved with and familiar with through -- and through research suggests that it's really not a very serious problem. But it needs to be done prior to the disposition hearing.

There needs to be a process as a part of that pre-sentence investigation by which offenders -- and a reasonable amount of restitution determined, a plan to the court for consideration in sentencing.

I mentioned earlier that we are doing this with juvenile burglars and their victims and, in -- County,
Minnesota, we have negotiated -- we had 47 meetings last year, and 25 percent -- staffers.

We had 47 victim offender meetings in 1985 and arrived at agreements with 45 of the 47. We've had about an equal number of meetings so far in the first half of 1986 and have yet to have a meeting where we have not negotiated an agreement that is acceptable -- for consideration of kind of sentence.

We have yet to have a Judge change any -- some points, but we have agreements that have been negotiated that are largely acceptable to the court.

The third question I was asked to deal with had to do with the effectiveness of combining restitution with community sense and community service sentencing or with incarceration.

I've also -- my position on that. I think that restitution can and should be combined with other sentences of nonincarceration, again, when the seriousness of the offense dictates that that's essential to give proportionalities to the sentences.

And I think it's particularly desirable to combine restitution with community service sentencing because I see both as restorative in nature. They require the defendant to engage in activities which restore the losses of society and form a net contribution to the society.
and to the victim.

I don't think it's useful to try to combine restitution with sentences of incarceration, largely because there's simply delay in the ability to carry out the sentence. It seems to me it creates -- our studies of offenders indicates that they tend to perceive restitution when combined with incarceration as very unfair because they have, quote, "paid their debt to society" by serving time; where they don't hold that sense of unfairness when that restitution is combined with other nonincarceration sentences.

It would be my view that the state should limit incarceration to those offenses which are really a very serious threat to the nation, where all other interests -- offender interests and victim interests -- must be relegated to the law that they should accomplish -- the state's need to incarcerate very serious offenders.

And a serious offender in my mind is an offender who has committed a serious act.

-- for my position on that.

CHAIRMAN WILKINS: Thank you very much,

Professor. If this Commission were to adopt a policy that in all cases, regardless of any other punishment imposed, that restitution would be required, regardless of the crime, in every case, the victim would be made whole, would you
have any quarrel with that general policy?

PROFESSOR GALAWAY: I would have no quarrel with that general policy, with the exception of if it was limited to a sentence other than incarceration. If you're going to adopt restitution with incarceration, I would have a problem.

CHAIRMAN WILKINS: So you would say that restitution should not be required if incarceration is going to be required?

PROFESSOR GALAWAY: That's correct.

CHAIRMAN WILKINS: Why is that?

PROFESSOR GALAWAY: Because I think it delays effective in terms of accomplishing the restitution obligation. It detracts from the offender's ability to do that. And it delays for long periods of time any hope that the victim may have of...

CHAIRMAN WILKINS: Whereas, if a victim fund was set up so the victim was paid out of the fund, and then the defendant required to reimburse the fund either tomorrow or next year, or three years from now, would that solve that problem?

PROFESSOR GALAWAY: No, it wouldn't because I think that in terms of poverty offenders, at least, that's a very impractical approach because of setting up such a fund. It's just astronomical.
I think that, theoretically, it's an interesting idea. I think, in practice, it's just not.

CHAIRMAN WILKINS: But you stated there are states that have tried it?

PROFESSOR GALAWAY: There are no states that have victim compensation. They are providing compensation of property of offenders. My last study of victim compensation schemes, that was in the mid-seventies, there were a couple of -- internationally -- a couple of nations that under very limited circumstances permitted restitution for property loss.

North Ireland, for example, permitted restitution for property loss when the loss was the result of their activities -- legal society.

And New Zealand at that time permitted restitution, state compensation, when there was property loss, the property damage was caused by a person on...

But, typically, those...

(Inaudible).

CHAIRMAN WILKINS: I'd like to pursue this with you further. Perhaps we could talk individually. Our time is limited today.

Any other questions from my right?

COMMISSIONER: Mr. Chairman.

You said, Professor, that with property offenses,
the appropriate penalty is always restitution? Or if we wanted to make the -- more severe, we would ask community service.

Would you then not think that repeat offenders, property offenders, should be incarcerated? That's one question.

And the other question is that you would object to restitution being combined with a prison sentence because the offender has, quote, "paid his debt".

Would you not feel that possibly he has paid his debt to the victim, the individual victim, but what about the harm to the society, harm to the tranquility of society, or the damage to the respect for the law?

Your comment?

PROFESSOR GALAWAY: Well, in my statement, very briefly made the argument that restitution as a penalty is appropriate because of the symbollic position of the victim. The victim has served as every person bearing the brunt of the crime, whether the victim is an individual or an organization.

Therefore, my argument runs it's proper to let the victim receive special penalties, as every person. It's symbollic to all of us, in the penalty.

And I think it is a matter of policy to determine which offenses that penalty alone will be, for which -- that
penalty alone will be sufficient and for which offenses are
other penalties necessary in order to symbolize...

Now, I think very clearly, however, that there
are many other penalties other than incarceration that will
accomplish that retribution function. And that we ought to
use those other penalties for property offenders, reserving
imprisonment for the more serious offender, which I see
as...

COMMISSIONER: So even if the property offender
is a repeat offender, you would not feel that incarceration
is appropriate?

PROFESSOR GALAWAY: That's correct.

COMMISSIONER: Thank you.

PROFESSOR GALAWAY: I believe it should be --

COMMISSIONER: Eight-time burglar?

PROFESSOR GALAWAY: That's right.

COMMISSIONER: Twelve time burglar? A hundred
time burglar?

PROFESSOR GALAWAY: Yes.

COMMISSIONER: That's it then.

(Laughter.)

PROFESSOR GALAWAY: Our view is that the penalty
should be based on the offense, not on the past record...

COMMISSIONER: What of the assault?

PROFESSOR GALAWAY: Or if it's an assault, that
becomes a more serious action. Imprisonment is probably necessary.

COMMISSIONER: I'm somewhat puzzled by this. Are you suggesting that the only punishment for some types of property offenses would be restitution?

PROFESSOR GALAWAY: Yes.

COMMISSIONER: But it seems to me though again strange, I mean, that someone's considering stealing $50 and the punishment for that is giving back the $50. As long as you don't get caught all the time, it seems like a good business.

PROFESSOR GALAWAY: I am prepared to accept the view that there will be property offenders for which you need to add additional nonincarceration penalties.

COMMISSIONER: Well, how will we know those? I mean, how will we separate the angels from the devils?

I just heard you say that, you know, they will be depending only on the offense. Now you have this problem.

Some people -- none of us in this room included, I hope -- would be tempted to in fact steal $50 if all they had to do was give it back. And I think the obligations are identical...

PROFESSOR GALAWAY: My experience in the restitution program has indicated that, first of all, the defendant seldom secures full value of the property stolen.
They are more likely to steal a television set and fence that for a hundred dollars and wind up paying the hundred dollars back to that victim.

I could also agree that one may be able to find more intangible losses for which the Judge will address special -- more tangible one could be in terms of --

(Inaudible).

CHAIRMAN WILKINS: Any other questions?

Mr. Gainer.

COMMISSIONER GAINER: Are we to understand then that Mr. Bronstein's claim -- $40,000, in your view, it would be appropriate to sentence to restitution --

(Inaudible).

PROFESSOR GALAWAY: No. It would be in my view that that vice president could well be sentenced to a restitution plus -- community service. I have no objection to sentencing a person to three, four or five years to full-time community service.

There are a number of public service organizations that would be delighted to have the administrative and managerial skills that that vice president would have.

COMMISSIONER GAINER: (Inaudible).

PROFESSOR GALAWAY: I can say that given the option, -- might prefer that, although I think that,
(inaudible). But I think if you accept the terms to it, that might have an equally deterrent value as a prison term.

CHAIRMAN WILKINS: Thank you very much, Professor. We appreciate it.

Do you have a question, Judge?

COMMISSIONER: Yes. Does it include burglary?

PROFESSOR GALAWAY: Yes.

COMMISSIONER: The offense of burglary is not taking something. It's breaking and entering. That's the thing that is law. That's the element of the offense. Not taking.

PROFESSOR GALAWAY: Well, the element of the offense may well vary from jurisdiction to jurisdiction.

COMMISSIONER: No, it's all the same all over the country. Breaking and entering. That's burglary. Common law burglary.

PROFESSOR GALAWAY: In Minnesota, where the charges of burglary did not involve unlawful entry --

COMMISSIONER: Well, what's the difference?

PROFESSOR GALAWAY: Well, the difference in terms of restitution?

COMMISSIONER: No. In the element of the offense. That's what burglary is. You have to realize that a man that burglarizes a home has committed something that
is going to scare the people in there. Now, whether he gets
$100 or $10 or a radio or what, is sort of beside the
point. The main thing is the breaking and entering.

PROFESSOR GALAWAY: That might well be a type of
offense for which guidelines would specify restitution plus
service, or restitution plus some amount of time of
nonincarcerative penalty, because one believes that it is a
more serious offense than theft.

Then that...

CHAIRMAN WILKINS: I have to ask you, why are you
so against incarceration?

PROFESSOR GALAWAY: Oh, I think that it
accomplishes absolutely nothing. I think it's a waste of
taxpayers' money. I think it mars and dehumanizes,
brutalizes both staff and inmates. I see absolutely no
evidence that it can --

CHAIRMAN WILKINS: If it brutalizes inmates, why
does he go out and then repeat and repeat and go back when
he needn't go back?

That's the guy I'm talking about. What about
him? What alternative is there for him?

PROFESSOR GALAWAY: There's the alternative for
him then of continuing to require him to be in some
nonincarcerative function penalty, each time that he is
found guilty.
CHAIRMAN WILKINS: You would agree we ought to find some kind of a penalty for that offender to be deterred.

PROFESSOR GALAWAY: No. You see, that's one of the things that's philosophic. My view is that the central value to be accomplished in sentencing is fairness. And imposing a sentence is fair given the series of events.

And that utilitarian goal, such as deterrence and rehabilitation, in short, is not to be dropped should...

CHAIRMAN WILKINS: Judge MacKinnon.

COMMISSIONER MACKINNON: The Minnesota guidelines don't follow that, do they?

PROFESSOR GALAWAY: The Minnesota guidelines do clearly enunciate that philosophical position, although they do not operationalize it, it's on the -- because they do prevent incarceration for some kinds of crimes.

But they do enunciate the -- that's clearly the basis for --

COMMISSIONER MACKINNON: And they've gone through a little development on that?

PROFESSOR GALAWAY: They have gone through some development. And at this time, pressure is being brought to bear to put this into effect.

CHAIRMAN WILKINS: Thank you again, Professor.

Our next witness is Ms. Sally Hillsman, from the
Vera Institute of Justice. Ms. Hillsman, glad to see you.

MS. HILLSMAN: Thank you.

STATEMENT OF MS. SALLY HILLSMAN,
VERA INSTITUTE OF JUSTICE

MS. HILLSMAN: Mr. Chairman and Members of the Commission, thank you very much for the opportunity to be here today to share with you some of my thoughts and observations on the use of -- sentences --

It has evolved out of about five years of research -- others on this topic, much of which has been funded by the U.S. Department of Justice, the National Institute of...

As sentencing philosophy in the United States has shifted toward greater emphasis on retributive models of justice, policymakers have been hampered by the prevailing view that imprisonment is -- but virtually the only means they are able to punish.

Within the realm of alternatives, as I think is evidenced by today's testimony, policy attention has been focused on relatively new sanctions. Not surprisingly, however, there has also been renewed interest in what is one of the oldest and certainly one of the most widely used ways of punishing people without imprisonment; namely, the criminal fine.

The obvious advantages of the fine has made an
important sentencing tool in American courts at all levels. In U.S. District Courts, almost a third of all of the sentences include a fine.

    In trial courts of limited jurisdiction around the country, they are clearly the predominant form of punishment. And at state general jurisdiction trial courts, fines are used far more frequently than is generally recognized, both alone and in combination with other noncustodial sentences.

    It's the perception of the disadvantages of the fine that gives policymakers for it -- the increased availability in the last few years of research on fining...

    (Conclusion of side 2 of tape 4.)
...sentencing judge, that fines are already perceived as sufficiently punitive. Judges use them widely, not only for minor offenses but (inaudible) over a wide range of (inaudible), including, fraud, embezzlement, drug sale, (inaudible), burglary, and assault.

Furthermore, research suggests that these fines are a (inaudible), that they are corrective far more often and expeditiously than is generally recognized.

While statutory fine maximums do tend to be low (inaudible), at least at the nontrivial level, these amounts are arrived at particularly in the federal system.

The judges nonetheless continue to impose relatively low fine amounts. It appears to reflect the lack of guidance on how to use already tested sentencing methods, such as European (inaudible), for example, that (inaudible) fine amount simultaneously, the severity of the offense, and the means of the offender, rather than to reflect judges' unwillingness to consider fines punitive.

A recent survey of American judges who handle criminal cases at the state trial court level indicates that they view fines favorably as punishment, and many expressed considerable interest in exploring innovative ways to impose them, particular the European (inaudible).

And indeed, research in Europe suggests that when (inaudible) fine systems are implemented, fine amounts rise
significantly, especially for more affluent offenders.

Are fines a deterrent?

Well, the evidence about the deterrent effects of fines is as limited as the evidence about the deterrent effects of other sanctions, including (inaudible). The available evidence (inaudible).

Research in West Germany, for example, suggests that controlling for offense and for the characteristics of offenders with prior records fines that meet (inaudible) fines are no less effective than imprisonment for some offenders and considerably more effective than either imprisonment or probation for other offenders.

(Inaudible.)

Such evidence has encouraged West Germany, England, and Sweden to make fines and sentences short for most offenses as a matter of national policy.

Well, there is much evidence to suggest that -- support the idea that American judges (inaudible) use fines. It is also apparent that they have not, as have the European counter-fines, formulated strong professional views about the proper place for fines/sentences within the repertoire of options.

This suggests the time is ripe for greater federal attention, reappraising the role of the fine and to experimenting with new approaches to imposing them.
And that is particularly appropriate because very recent changes to federal statutes now direct federal judges to take both the severity of the offense and the means of the offender into account when imposing a fine and set the terms of payment, including installments, at the time of sentencing.

This situation seems to me to present an opportunity for the federal system through the work of the Sentencing Commission to assume leadership in this area. It is fortunate, therefore, that other important changes in federal statutes have been made during the last several years, changes that create the necessary preconditions for such a reappraisal to be successful.

When I first testified about federal fine practices in 1983, there were a whole series of statutory and administrative problems that impeded the use of fines in the federal court system. Most of these issues have now been addressed by statutory reforms, and as a result, there is a much greater potential, I think, for the remaining administrative difficulties to be resolved.

I would like to (inaudible).

First, you have already indicated the statutory fine ceiling could be raised by Congress, and federal judges are now directed to consider both offense severity and
These new provisions should create a stronger statute for the probation divisions (inaudible) heretofore inadequate procedures for collecting and assessing the national (inaudible).

Second, federal judges are now permitted to modify original fine statutes. They were not before. This should encourage feedback of information to courts on the defendant's payments (inaudible) and help judges more systematically and rationally -- be more systematic and rational in their original decisionmaking. It will also ease some of the problems associated with (inaudible) ability to pay.

Third, the efficacy of (inaudible) addresses capacity (inaudible). Research indicates that successful enforcement depends upon centralizing responsibilities (inaudible) function. New federal statutes placing full responsibility for correction in the U.S. Attorney's Office have finally accomplished this, at least in principle, thereby replacing acute fragmentation of federal enforcement procedures with at least the beginning system of rational administration.

Finally, research on enforcement (inaudible) credible threat (inaudible). Statutory provisions now provide the federal courts for the first time with a
credible threat to encourage payment, and when there is
(inaudible) with the initial decision to fine.

This has been accomplished by creating a
(inaudible) sentencing and making that rule enforcible with
the same efficient procedures that it (inaudible)
taxpayers. This makes it possible to (inaudible) rather
than imprisonment as the appropriate coercive device
(inaudible).

Therefore, research on fining practices that
properly set (inaudible) amount of penalties (inaudible)
successful sentencing. Although the (inaudible). Whether
it can be enforced (inaudible) uncomfortably high levels of
coercion appears to depend on the size of the original fine
in relationship (inaudible).

Providing guidance on alternatives. Most courts
in the United States rely on (inaudible), thereby limiting
their use (inaudible). Of course, such methods make it very
difficult to adjust (inaudible).

While the English have resisted the development
of the (inaudible) fine system, their broad problem was
incarceration (inaudible) arising from inconsistent fine
setting practices, pushing them (inaudible).

Because U.S. sentencing statutes now direct that
both severity and means be taken into account, it appears
desirable to consider a (inaudible) fine system seriously
in any reappraisal of federal sentencing policies.

(Inaudible) fine systems were initially developed in Sweden in 19-(inaudible) and introduced in Denmark (inaudible) generally in 1975. The basic notion is that the punishment represented by a fine should be proportionate to the (inaudible), consistent or uniform within severity classifications and equal towards individuals of different financial resources.

To reconcile the potentially conflicting principles of consistency and equity, (inaudible) fine systems create a two-stage decision process.

First, the number of (inaudible) fine units to which an offender will be set determines (inaudible), but not with regards to the means of the offender. Thus, (inaudible) are sentenced to the same number of units. The monetary value of each unit, however, is determined separately in the second stage of sentencing, and it it explicitly set in relationship to what the offender can afford to pay (inaudible).

Thus, the total (inaudible) system, the degree of punishment should be in proportion to the gravity of the crime across different offenses and consistent within severity categories but within a given offense (inaudible) economic burden on defendants of different means.

The general (inaudible) fine system is
the most used for comparison with the U.S. federal system. It is organized around a benchmark. The minimum fine sentence is five (inaudible) fine units, and the maximum is 360 for a single offense.

Although there is no direct correspondence between the number of (inaudible) fine units and terms of imprisonment established by law for the same offense, the 360 unit maximum logically links the idea of a one-year prison sentence.

However, since Germany has set the maximum monetary value of any (inaudible) fine unit at a fairly high level, about $4000, fines for wealthier offenders convicted of serious (inaudible) are quite substantial even if theoretically they are (inaudible) for a year imprisonment. They can be as high as a million and a half dollars for a single offense and multiples of that for subsequent offenses.

Calculation of the number of (inaudible) fine units correspond (inaudible) is not now being prescribed under the German law. Courts therefore themselves have developed guidelines (inaudible), and they vary from region to region.

Judges in the area most thoroughly studied in Germany have produced guidelines for ranges of (inaudible) fine units corresponding to broad offense groups. However,
the ranges are so great -- for example, from 10 to 50 units (inaudible) -- that they render the idea of guidelines (inaudible) meaningless.

For this reason, there has been some discussion in Germany of (inaudible) the system in an attempt to narrow those ranges. This suggests that in a fine -- a (inaudible) fine model (inaudible) United States federal system a fairly strict -- that is, a narrow range -- sentencing guidelines. (Inaudible.)

The rules are in keeping with much of the current sets of guideline thinking in this country.

In assessing an individual's means and ability to pay under (inaudible) fine or any other fine system, federal statutes leave American courts to rely largely on information obtained from defendants. While defendants are asked by the probation division to cooperate voluntarily, most information cannot now be compelled.

If (inaudible) fines are introduced into the federal system, fine amounts will undoubtedly rise and statutory changes may be needed to provide the courts at least in some instances with greater legal access to substantial information.

However, the experience of other court systems suggest that (inaudible) voluntary cooperation should not be considered a priori barriers (inaudible) fines or to these
For example, Germany relies largely on easily available information which can generally be verified (inaudible), as do in fact American courts most often in setting bail amounts. Data on employment and other types of income are the major source of information used by German courts to establish an ability to pay, and this does not seem to trouble German judges who report satisfaction with the system.

It would appear, therefore, that the federal courts can substantially improve their efforts to obtain financial information voluntarily, and our own (inaudible) federal information division and data collected by the (inaudible) suggests that this activity has not been given very high priority in preparing presentence reports. Data are often incomplete and sometimes nonexistent.

While statutes directing federal judges to consider ability to pay when setting fines would increase the pressure on probation officers to provide better information, this should be accompanied by procedures to ensure that (inaudible) financial investigation and also that a (inaudible) information is available (inaudible). If this is done, federal judges can be provided with standardized assessments of offenders' ability to pay.

American financial institutions and other
lenders make such determination routinely, using relatively few pieces of data, much of which is also provided by (inaudible) or available credit union.

Furthermore, the recent shift in the statutory responsibility for setting the terms of payment of federal sentencing judges can encourage making large fines when other financial obligations (inaudible). Proper installments can mitigate at least some (inaudible) problems encountered (inaudible) to pay.

Before closing, I would like to offer a brief comment on post-sentencing enforcement issues. That is a question (inaudible).

The research evidence is unambiguous that even large fines (inaudible). Conditions that must be met are largely administrative ones, and if they are met, there is little reason to believe significant numbers of defendants will (inaudible).

Research evidence suggests that nonpayment typically results from improperly set fines, administrative ineptitude, and failure of enforcement agencies to credibly threaten (inaudible) offenders in a timely fashion.

Recent legislative actions provided the federal (inaudible) potential for fine enforcement to operate far more smoothly and effectively than it has in the past. This represents (inaudible).
It also presents an unparalleled opportunity (inaudible).

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

Has there been any criticism that you have collected of the day fine system?

MS. HILLSMAN: Any criticism?

CHAIRMAN WILKINS: Those who criticize, what do they say that is bad about it?

MS. HILLSMAN: I think that the major issue that comes up with the day fine system is the question of whether or not you can credibly (inaudible) of the offender. That seems to be the major issue.

That is certainly the major issue with the British, who have, as I said before, made these fines in essence their sentencing choice, and they have not (inaudible).

I might point out, however, that they are moving very rapidly in the direction of any pilot projects (inaudible). We do find that they have determined that they are setting fines improperly, and that is causing a problem of (inaudible), which is the last thing you want if you are going (inaudible).

I think that issue is the one. The other issue that comes up, which is an issue related to it, is
what to do about very poor offenders; that is, where you
have somebody (inaudible) in a poverty situation. That is
another issue that comes up.

(Inaudible.)

CHAIRMAN WILKINS: Thank you.

Any questions to my right?

VOICE: I couldn't agree with you more. I mean,
use of fines and moving towards more use of the monetary
sanctions.

A few things puzzle me though about day fines,
and I wanted to cover those, and you just alluded to it in
sort of the question about the poor.

It seems to me that is a general question about
low income individuals, low wage individuals. It sounds
nice to set the cost by ability to pay, but you are setting
the cost by ability to pay and the gains by the ability to
break the law. There is no necessary correspondence between
ability to pay and ability to steal, and it seems to me that
there are difficulties here.

How do you prevent this day fine system from
becoming a license for low wage individuals to steal?

MS. HILLSMAN: I think that the first thing that
one has to do is separate out the number of -- the notion of
the number of units from the amounts, and what you are going
right to the heart of is the question that if you have
somebody who is rich (inaudible) they may accumulate substantial amounts of monetary resources, then of course their apparent income is low so they will be paying out a relatively small amount.

I think the only real answer to that question is to -- if you have a repeat offender, a repeat theft offender, the only thing that one could do is to have repeat offenses be a part of the establishment of the number of day fine units (inaudible). So that number would rise as the frequency of past arrests rise. And then set the amount that is relative to what it appears that they can afford to pay and extend that payment period over a fairly long period of time. The total amount would not be insubstantial, even if it is not related to the total amount that they might (inaudible).

VOICE: Well, I guess that goes to -- I have a more fundamental problem than the problem of just the career offender, such as the career thief.

It seems to me to strike right at the heart of property crimes, which many (inaudible), that the gains are not proportional, necessarily very closely tied to the individual's legal wage, so that since you are trying the cost continually to that wage --

MS. HILLSMAN: No, but if you set the number of units in relationship to the severity of the offense --
VOICE: But the --

MS. HILLSMAN: -- will equally be determined by in fact the --

VOICE: But no one cares about -- I mean, if you are rational and calculating, the units all have to be converted into what it costs you. The fact that something costs 500 units means something different when it is essentially a dollar a unit than when it is $20 a unit.

MS. HILLSMAN: But if you have --

VOICE: I think.

MS. HILLSMAN: If your offense is -- his means is as a series level of steps, the number of units are great, each individual unit may be relatively small in size, but then what the judges say (inaudible) setting that installment, so that the total amount over a period of time is relatively low.

VOICE: But it still will be the case that high wage people will pay a higher (inaudible) price, the same theft.

Two people considering stealing Mercedes-Benz, for example. One has a low income, one has a high income. The way day fines work, I think, is the low income individual will have a lower absolute dollar fine than the high income individual?

MS. HILLSMAN: Correct. That is correct.
VOICE: And I am just wondering how you avoid licensing theft on the (inaudible).

VOICE: Diminishing marginal utility of money.

(Laughter.)

VOICE: I think it is more radical than that. It seems to be (inaudible).

CHAIRMAN WILKINS: Any questions to my left?

VOICE: Yes.

(Inaudible.)

As a practical matter, how does -- I would like you to elaborate a little bit. I mean, I have looked at the Swedish thing (inaudible). It seems to me that you do run into the problem of a lot of poor people who often do commit crimes, or they may not be poor if they have been successful at their crime.

(Laughter.)

(Inaudible.)

...dope. You take the dope away from me, I would be broke.

(Laughter.)

And there may be lots of people like that who have no other source of income. That is the way it is. You say, oh, we are going to take all your money. Well, the (inaudible) on welfare. Well, we have set the welfare level at a very low level to support your family, not you anyway,
and now you are going to take his welfare away, or what does happen? I mean, there might be lots of people like that.

MS. HILLSMAN: I think are two responses to that. One of them is that we tend to (inaudible). As a matter of fact, the federal courts and most state courts that I have (inaudible) never really ever just give (inaudible) make much sense, the reason being because poverty (inaudible).

Day fines take that into account by suggesting that losing a small amount of money for somebody who has a small amount of money is punitive, as punitive as (inaudible) larger amount of money from somebody who has a great deal.

However, it is also certainly the case (inaudible) where you cannot withdraw monetary resources from somebody without in fact (inaudible).

I think in those cases that one does have to get away from the monetary sanction and do something, for example, such as community service.

(Inaudible.)

...very poor offenders who are repeat multiple property (inaudible), and the kind of work they do is, I assure you, punitive. They clean rats, dead rats out of the basements (inaudible), and the sanction is also enforced. When they don't appear, they go to jail.
So there are ways of (inaudible) community services when you are talking about poor offenders (inaudible) amounts of money (inaudible).

I think that is (inaudible).

VOICE: In these other places, (inaudible) trial takes time. There is a long time between the indictment to trial in the first place, and if you are cynical a little, you can expect there are going to be an awful lot of people who by the time the sentence comes around to be pronounced they say I have no money.

(Laughter.)

And regardless of how they started out, right at that moment they do have no money. Maybe their wife, their cousin, other people may have the money, but they do not at the moment.

Now, that is a question of enforcing (inaudible) transfers to people. How does that work?

MS. HILLSMAN: That is (inaudible). I think that that is a question which has not been entirely resolved (inaudible), that when you have a financially astute offender (inaudible) a very serious offense, then the issue of their dissipating their assets in one or another (inaudible) is a very important one.

VOICE: You don't need to be too sophisticated. Take the car, take the house, get it out of your --
What do they do in Germany about this? What have they done?

MS. HILLSMAN: That issue rarely comes up in Germany, as far as I can understand. There is only one other solution that I can see for that particular problem, which is that it assumes at least (inaudible) have some form of income, and if one then thinks not so much about the assets in the past but (inaudible) assets in the future, and I would suggest that in my judgment that is an approach to the problem that wasn't being explored.

Since federal judges are now being required by statute to (inaudible) rather than the way it used to be in the federal system, which was that it was done by the enforcement agents rather than by the sentencing agents, it gives the sentencing judge, I think, the opportunity to explore that whole issue when setting the original sentence.

CHAIRMAN WILKINS: Thank you very much, Ms. Hillsman. We appreciate your testimony.

Will our panel come around?

TESTIMONY OF THE U.S. PROBATION OFFICE PANEL
BY MR. DONALD CHAMLEE, DIRECTOR, PROBATION DIVISION, ADMINISTRATIVE OFFICE OF THE U.S. COURTS; MR. NEWT SCOTT, CHIEF U.S. PROBATION OFFICER, TULSA, OKLAHOMA; AND MR. WILLIAM D. GRAVES, CHIEF U.S. PROBATION OFFICER, DENVER,

COLORADO

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MR. CHAMLEE: Thank you, Mr. Chairman. It is our pleasure to be here.

I want to congratulate the Commission for its endurance. I am sure you must be sitting here to hear these other two gentlemen and not me because you have heard from me before.

I would like to say with respect to the last witness, who was talking about the way we do our presentence investigations and develop the financial background, the criticism which she made about the probation system is at least in the past fundamentally correct. We were not doing a very good job.

We are engaged in some activities to improve the standards.

(Inaudible.)

And I hope in the future to have a much more sophisticated approach to developing the financial backgrounds of defendants.

I think what I have done in my written statement I will summarize very briefly. I know the hour is late. The Commission seemed to be interested in intensive supervision issues, so what I have tried to do is (inaudible) where we are right now in the federal system and what kind of intensive supervision we do now provide.

We are funded, for example, for a caseload with
our high risk offenders 41 (inaudible), and that is not
getting to where Mr. Goldstein is, but it is moving in that
direction.

We do have a number of things that go into most
intensive supervision programs. He can get the taste of
jail or he can be placed in a community treatment center for
a period of time. We do have minimum monthly contacts, and
I emphasize the word "minimum." The standards call for no
maximum with our high risk offenders.

We do have some after care services available
(inaudible) people. We have a legislative proposal pending,
by the way, to expand that through the contracting
(inaudible) alcoholism treatment (inaudible). We also have
programs in the large cities where we have concentrations of
mentally ill offenders, where we have organized crime
defendants. We have nationwide a community service program,
and as my testimony indicates, one in six of our probation
(inaudible) do now contain some community service.

I will just comment on that since that issue also
came up last time. Both the rich and poor alike have one
asset that they cannot conceal, and that is their Saturdays
and Sundays.

(Laughter.)

They can give those up equally.

We do also have a very small program (inaudible),
called (inaudible) parole, which (inaudible) has been involved in, can probably tell you more about it than I can.

So we do a little of that kind of high activity...

(Tape reversed.)

I would summarize by saying our recommendations to the Commission would be (inaudible) offenders to incarceration, the maximum possible flexibility be left for the local situation (inaudible) probation officers to frame the conditions as they change because they do in fact change constantly in the (inaudible).

We are interested in more (inaudible) sentencing alternatives like have been discussed here today. We would be glad to enter into a dialogue with the Commission on what needs to be done in that area.

And I would just say in concluding my comments, we look for a new day in the criminal justice system with you folks taking the lead in setting new standards, setting new challenges for us in the probation system.

CHAIRMAN WILKINS: Well, we are going to do that.

(Laughter.)

MR. CHAMLEE: I am sure of that.

I will defer to my colleagues.
CHAIRMAN WILKINS: Mr. Graves or Mr. Scott, we would be happy to hear from either one of you.

MR. GRAVES: All right. Judge Wilkins, Commissioners, I want to also take this opportunity to thank the Commission for this opportunity, for the openness that the Commission has exhibited in having federal probation officers involved in this process.

I don't believe that we have the opportunity in many cases to participate on working committees and have an opportunity to tell you how we feel about the sentencing process.

I want to emphasize first that the sentencing judge is in a unique position to weigh all the factors relevant to sentencing decisions.

Our recommendation to you as you develop the national strategy is to leave sufficient latitude in the guidelines to allow sentencing judges to function in their traditional role, balancing the collective interest of the public against the private interest of the defendant.

I want to now go into some of the more specific questions that you have asked us to comment on.

In reference to intensive probation supervision, intensive probation supervision was created at the state level to respond to prison overcrowding and/or the needs to toughen the image of probation or parole in the community.
The federal courts generally deal with a different type of climate than do the state courts. The majority of our clients are convicted of nonviolent, white collar types of offenses.

The Federal Probation Service does have a very adequate risk prediction scale, the RPS-80, that provides for high activity supervision of specific clients. Through this classification system we have been able to develop specialized caseloads for drug treatment, mental health, organized crime cases, et cetera.

It can be modified. I believe at this time it should be modified and studied somewhat, but I suggest that we generally not leave this system, this system of predicting arrests.

On additional probation conditions, I believe that there are a number of conditions that need to be standardized in order to provide the probation officer with the tools he needs to meet his statutory responsibilities. Those conditions are outlined in my detailed statement.

I would suggest two additional alternative conditions -- a financial disclosure condition and a condition for third party risk disclosure.

On fines, I believe that should be considered in every case but be a preferred sanction in addition to other sanctions. I believe, though, it should be used in
traffic, driving offenses, restraint of trade cases, organized crime cases, drug cases, crimes where there is a financial loss to the government -- for example, income tax violations, false statements, and claims, et cetera.

In determining the amount of fine, I do think it is important to consider the criminal offense, defendant's participation and his ability to pay. Ability to pay can be based on the financial section of the presentence report, but sworn testimony by the defendant at the time of sentencing is another means of determining assets that may have been unreported to the investigating probation officer.

Whatever method is used to determine the appropriate fine, the important principle is that the fine be collected.

I believe that restitution must be considered in all cases where there is identifiable victims, where there is an identifiable victim who has suffered a loss. I do think that restitution must be a higher priority than either a fine or community service.

On community service, the Administrative Office's soon to be published monograph entitled "Community Service: A Guide for Sentencing and Implementation" is a well thought out document that provides adequate direction for the court and its probation department in imposing and supervising
I do feel that community service is a criminal sanction for the defendant's wrongdoing and is one of a number of alternatives that the court can use to aid reparation to the community or the individual defendant's rehabilitation.

I don't, however, perceive it as being a primary determinant in whether or not confinement sentence is imposed.

I don't believe that we have many of the types of cases that lend themselves to the use of house arrests or electronic surveillance. State courts have generally imposed this condition with select groups and nonviolent offenders, such as DUI cases or, as was mentioned earlier, nonsupport cases.

I do believe that we can provide adequate supervision for that class of offender through use of community treatment centers, alcohol treatment programs, and the National Crime Information Center Computer Practice System.

There may very well be exceptions to this in districts that handle large numbers of arrests, such as mine. I would use that as an example. However, it would be important to establish a uniform national policy that identifies target groups and specific goals.
Electronic surveillance has also been used by the state to monitor pretrial detainees who would not normally be eligible for release on a personal recognizance bond because of their prior record.

The Crime Control Act addresses those issues by requiring judicial findings for detention in cases where there is a black list or a threat to the community. It requires a postable bond for all offenders.

And I believe that concludes my remarks.

CHAIRMAN WILKINS: Thank you very much, Mr. Graves.

Mr. Scott, do you have any remarks you would like to make?

MR. SCOTT: Judge Wilkins, Commissioners, I can adopt with no serious differences the lengthy written statements of both my colleagues. I responded in writing by reciting your question to the answering in a brief fashion my feelings about those things.

I would share with you only this thought and these brief comments.

I am the Chief Probation Officer in Tulsa, Oklahoma. I have served in that capacity for 18 years. I have a total of 26 years of service with the courts.

My father served as a Chief United States Probation Officer from 1943 to 1968. I am familiar with the
practices, experiences of the federal criminal justice system during the last 43 years.

I would say to you that it is my impression that federal judges have with rare exceptions sentenced offenders in fair and meaningful ways.

The Bureau of Prisons generally have done a commendable job of housing inmates humanely and safely. Paroling authorities have over the years been reasonably objective in granting early releases from confinement.

Probation officers have done an excellent job (inaudible). The probation system has been an agent for change in people's lives.

What I am trying to describe is probably the best criminal correction system in the world. It didn't just get dropped here all at once out of a cloud. It grew out of a body of statutes that increased over the years out of case law and the practices that people (inaudible).

You have been mandated now to draw up a new picture of what it is we do, and I would say to you that if you want your work to live long make it a four-lane highway, not a one-lane horse path.

I guess what I am getting down to is if the thing is not broken don't fix it. Adopt all the practices of the system that now exist that have worked so well and add to
them your description of what is appropriate for the future, and what you do here will live longer than if it is a narrow picture.

Thank you very much.

CHAIRMAN WILKINS: Thank you, sir.

I wonder -- Don, you said we haven't used these electronic monitoring devices very much in the system. That is true. But do you think they have a future for us in the federal system?

MR. CHAMLEE: Probably mostly in the pretrial area, where it makes a lot of sense as an alternative to spending your detention time awaiting trial in jail.

We haven't had much exposure to it (inaudible) as enlightening as any of the other presentations I have heard of before. I am sure there are places where it could be used.

In Virginia Western right now there have been some people under house arrest (inaudible). They have the electronic monitoring devices to assist them with what they do. It is something judges generally are starting to catch onto. It is on the agenda with the probation committee (inaudible).

CHAIRMAN WILKINS: Have you, Mr. Graves or Mr. Scott, had any experience with house arrest in your state districts?
MR. GRAVES: It is something that hasn't been used a lot by federal judges, in my experience. I didn't know, maybe from Colorado to Oklahoma, maybe it is.

MR. SCOTT: It would be my feeling that in concentrated population areas where it could be monitored and policed well that it probably will have a growing use. There will be some problem within federal judicial districts that cover large geographic areas.

For instance, in the Northern District of Oklahoma, I don't have the resources to monitor something 80 miles away or 150 miles away, where there is one case there. You know, there would be a practical problem.

But in those areas I could see its use.

CHAIRMAN WILKINS: Thank you.

Any questions to my right?

VOICE: Just one, I guess.

First of all, it is very good to see you again, Chief Graves and Chief Scott, Chief Graves from a very good region, the West, and Newt from God's country.

I have not heard the expression "If it is not broken, don't fix it" since I left home, and believe me, we will remember that.

(Laughter.)

With regard to Don, I think a little question. I imagine you would need a substantial increase in probation
officers if we took a very serious look at intensive supervision.

If we did take such a look, what would you think would be an appropriate or an effective caseload -- number for caseloads per officers?

MR. CHAMLEE: Well, if we went down (inaudible) to a caseload of, say, 25 and back that up with electronics monitoring. I suppose that would be a reasonable shot.

That would require additional resources.

VOICE: Right.

And, also, Don, would you be in favor of a system that would utilize two officers, one being directed toward the area of counseling in terms of employment, family ties, all those kinds of things, and the other being essentially a police officer?

MR. CHAMLEE: Commissioner, I think what we would probably do in our system would be to pick up some of the surveillance requirements through the use of paraprofessionals. We have 40 paraprofessionals in the system right now, and I would expect we would expand that and then be doing the 2:00 a.m. contacts and maintain probation officers with the principal supervision (inaudible).

VOICE: Thank you.

CHAIRMAN WILKINS: Any other questions?
(No response.)

CHAIRMAN WILKINS: The few number of questions to our friends from the probation offices is probably motivated by the hour, but, Don and Mr. Scott and Mr. Graves, we appreciate what you are doing.

We realize probation officers are going to play an important role -- indeed, perhaps a pivotal role -- in the implementation of these guidelines, and so we have asked for your input and your participation in the drafting of these guidelines as well, and we have received nothing but full cooperation, not only from you gentlemen but all probation officers with whom we have had any contact, and we are most appreciative.

We will see you in Denver at a public hearing sometime this fall.

Is there any new business or anyone wants to make any comments who is in attendance at this time?

(No response.)

CHAIRMAN WILKINS: Hearing none, we will stand adjourned.

This Commission will reconvene at 3:15.

(Whereupon, the Commission was adjourned, to reconvene at 3:15 p.m., this same day.)