UNIVERS STATES SENTENCING COMMISSION

Public Hearing - Washington, D.C.
Ceremonial Courtroom, U.S. Courthouse
December 2-3, 1986

December 2, 1986

10:00 a.m.  William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission

10:15 a.m.  Stephen S. Trott
Associate Attorney General, U.S. Department of Justice

10:30 a.m.  Norman A. Carlson
Director, Bureau of Prisons

10:45 a.m.  Bobby Lee Cook
Cook & Palmour, Summerville, GA

11:00 a.m.  Henry E. Hudson
U.S. Attorney, Eastern District of Virginia

11:15 a.m.  Richard Arcara
National District Attorneys Association

11:30 a.m.  Anthony Travisono
Exec. Director, American Correctional Association

11:45 a.m.  Marlene Young
Exec. Director, NOVA (National Organization for Victim Assistance)

12 noon  Reuben M. Greenberg
Chief of Police, Charleston, South Carolina

12:15 p.m.  Suzan Shown Harjo
Exec. Director, National Congress of American Indians

12:30 a.m.  Lunch

2:00 p.m.  The Honorable R. Lanier Anderson
11th Circuit Court of Appeals

The Honorable William C. O'Kelley
U.S. District Court, District of Northern Georgia

2:15 p.m.  The Honorable Edward R. Becker
3rd Circuit Court of Appeals

The Honorable Maryanne Trump Barry
U.S. District Court, District of New Jersey
2:30 p.m.    Alan Ellis  
              National Association of Criminal Defense Lawyers

2:45 p.m.    Jack Lipson  
              Federal Defenders Advisory Committee

3:00 p.m.    Cheryl M. Long  
              Public Defender, District of Columbia

3:15 p.m.    Dr. Edward J. Burger, Jr.  
              Council for Court Excellence

3:30 p.m.    James W. Ellis  
              Ruth Luckasson  
              American Association on Mental Deficiency

3:45 p.m.    Public Comment
UNITED STATES SENTENCING COMMISSION

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Public Hearing

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Wednesday, December 3, 1986

10:05 a.m.

Ceremonial Courtroom

U.S. Courthouse

Washington, D.C.
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CHAIRMAN WILKINS: Let me ask all of the Commissioners to please take a seat.

Good morning, ladies and gentlemen. We will begin now the second day of a hearing which will end a number of regional hearings that we have held around the country during the last six or eight weeks. I know the hearing yesterday was very productive from our standpoint, and I am sure that today's hearing will be as well.

One of the things we did early on in the work of the Commission was to organize what we call working groups of prosecuting attorneys, defense attorneys, probation officers, judges, and others who are interested in the administration of justice and in our work. And this has been most beneficial to the Commission in discussing and debating various issues and helping us reach at least tentative resolution of a number of problems.

Mr. Roger C. Spaeder, who is an attorney with a law firm here in Washington, D.C., worked with us early on on some very important issues, particularly in the areas of plea bargaining and in organizational sanctions. Mr. Spaeder is here today as our first witness this morning.
We are delighted to see you again.

MR. SPAEDER: Thank you.

Mr. Chairman, may it please the Commission, my name is Roger Spaeder, as you indicated, from the Washington law firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker.

I had the privilege at an early point in my career of serving as an Assistant United States Attorney in this jurisdiction. But I have since made my professional livelihood representing individuals who may well come into contact with the guidelines the Commission is in the process of formulating.

I have had the opportunity to review the proposed guidelines and would like to make some constructive observations concerning how they may impact in two particular areas about which I have some knowledge and concerns.

The first area on which I would like to focus is that of organizational sanctions and the concept of voluntary disclosure of corporate misconduct.

Under the guidelines, as the Commission knows, an offender's total offense value may be reduced by mitigating offender characteristics. Acceptance of responsibility and cooperation are two of the principal ones identified
by the Commission in its draft. In my judgment, neither of these offender characteristics, and indeed none of the others identified by the Commission, covers the situation in which an organizational offender voluntarily discloses its misconduct to the government.

Actively encouraged by a number of Federal agencies, particularly the Department of Defense, other agencies engaged in Federal contracting activities, and soon to be part of a regulatory scheme, I understand, to be promulga-
ted by the Comptroller of the Currency, voluntary disclosure of corporate misconduct is rapidly becoming one of the most important issues in Federal law enforcement policy.

The philosophy of voluntary disclosure is fairly straightforward. It rests on the premise that corporations should voluntarily report criminal conduct of their employees in order to avoid the harsh consequences that can result from the application of the rules imposing vicarious criminal liability on organizations.

In my own experience, voluntary disclosure usually arises in one of two contexts. In the first context, the corporation learns of undisclosed misconduct before it is detected by a government agency. This can be a totally
inadvertent disclosure; it can be the result of an internal
or special counsel investigation; it can be the result of
a report to an internal corporate ombudsman.

The second situation is in which the corporation
uncovers a criminality in the course of an investigation
which is prompted or generated by a governmental probe or
inquiry.

Very often, however, the wrongdoing identified
within the corporation by the corporation far exceeds that
known to the government at the time it begins its investiga-
tion.

The problem is that once the company learns of
that criminality, it forces its inside corporate counsel
and the outside lawyers who advise it to confront some
exceedingly difficult choices. Counsel can voluntarily
disclose the wrongdoing to the government in the hope of
avoiding prosecution or punishment. Counsel also has to
consider simply remaining silent in the hope that the
criminality will escape the government's attention.

Particularly in the areas of government contracting
and banking, where Federal regulation and audit are common-
place, the corporation's choices are exceedingly difficult.
Silence may in the long run achieve absolutely nothing, because the misconduct eventually may be uncovered. On the other hand, the voluntary disclosure which counsel is considering making to the government may not be rewarded at all, or may be so inadequately rewarded that there is really no incentive for the corporation to make a clean breast.

In my judgment and in the judgment of some of my colleagues, the Commission's sentencing guidelines must speak to this issue in a precise and comprehensive way. Reliance on the residual authority granted to the court by Title 18, United States Code Section 3553(b) to justify special treatment for a corporate defendant that voluntarily discloses misconduct is simply not adequate to ensure an organizational offender that its own voluntary self-incrimination will indeed produce significant benefits at sentencing.

As a consequence, I recommend that the Commission create a separate category in its post-offense conduct portion of the guidelines, which is currently Part B of Chapter III, dealing with offender characteristics. I would call this particularly topic "voluntary disclosure". This mitigating circumstance should be available only to organizational
offenders because it is in this unique context that voluntary
disclosure is a realistic possibility. Unlike defendants
who face the risk of incarceration if their crimes are
detected, and therefore are not keen on voluntarily reporting
it to law enforcement agencies, a corporation finds itself
in a very different situation.

Two forms of voluntary disclosure in my judgment
should be recognized. The first is that which emanates
from disclosure before governmental detection. The second
form of voluntary disclosure is that emanating from disclosure
which follows governmental detection.

In the first situation, applicable to corporations
that reveal their own misconduct before the government gets
wind of it, a maximum discretionary sentence reduction of
50 percent should be allowed; or, alternatively, a reduction
in offense value of 50 percent might be provided by allowing
the offense value to be multiplied by .50.

In the case of voluntary disclosure which follows
detection by law enforcement officials, the sentence reduction
obviously, or the offense value multiplier obviously should
be smaller.

Because I am speaking here of organizational
offenders, the sentence reduction would apply primarily to the monetary fines otherwise dictated by application of the guidelines. But because the Commission's own draft contemplates that corporations can receive other punishments like probation and so forth, the voluntary disclosure reduction ought to apply across-the-board to the various sanctions that might be imposed.

I think that voluntary disclosure of corporate misconduct is fundamentally different from cooperation or acceptance of responsibility, and for that reason deserves separate treatment.

Unlike the situation generally applicable to individuals, an organization may indeed be criminally liable for the acts of its agents even if the agent is acting outside the scope of his authority. The decided cases are fairly uniform in holding that where a corporate employee commits a crime which benefits the corporation, the corporation is criminally liable even if the conduct of the agent violated internal policy or was beyond the scope of his employment.

Second, as a matter of sound law enforcement policy, the Commission should encourage organizational offenders to undertake compliance and prevention programs
designed to prevent crimes within the corporation, and a significant reward at sentencing is consistent with that policy.

Third, voluntary disclosure produces enormous savings in investigative costs which would otherwise be entailed if the corporation remained silent. As a practical matter, most government agencies lack the time and resources to fully investigate the industries under their regulation and are therefore forced to rely in significant measure on self-regulation. Significantly rewarding a corporation for voluntary disclosure furthers this goal of self-regulation.

Finally, since corporate self-incrimination often runs counter to human nature and to the incentives that exist in the corporate board room, a corporation should seize significant incentives at the time it makes the decision to voluntarily disclose misconduct in that it will know in advance that it will receive significant consideration at sentencing.

The second area in which I have some interest and about which I would like to share my observations with you relates to plea bargaining. I have noted the Commission's proposed treatment of the plea bargaining concept, and as
I read the Commission's guidelines, the expectation is that a plea of guilty could in the court's discretion be treated as evidence of acceptance of responsibility and to that end could result in a 20 percent reduction in the sentence otherwise required by the guidelines.

In my opinion that does not provide a significant incentive to induce individual or corporate offenders to tender pleas of guilty. I am certain the Commission has heard a great deal about the pleas of guilty provisions of the guidelines, and so I will not go over many of the standardard objections, except to note that with respect to individuals, the irony seems to be that under the current sentencing system, so much discretion is invested in the trial court that almost any offender who is considering a plea of guilty can at least hold out the hope of a very lenient sentence or probation if his unique circumstances strike the heart of the court.

Under the proposed guidelines, the numbers which are generated through the Commission's formula, subject to the ameliorative factors that we have discussed, can reduce an offender's sentence when he pleads guilty, but only by 20 percent. In my humble opinion, that is not
sufficient to induce many offenders to seriously entertain guilty pleas.

Next I would like to discuss -- indeed my final remarks today -- the concept of plea bargaining under Rule 11 and the inquiry the Commission has made in its guidelines about whether or not plea bargains in general or Rule 11(e) pleas in particular might undermine the policy inherent in the guidelines.

As the Commission well knows, there are provisions of Rule 11(e) which authorize a court to accept a plea bargain struck between a prosecutor and defense attorney which calls for a specific sentence to be imposed by the court. If that provision remains in effect, one presumes that even after the guidelines are enacted into law, the court could indeed accept a plea bargain calling for a specific sentence.

Indeed, I believe that the Commission's guidelines should make clear that that practice is not to be forbidden by enactment of the guidelines. And indeed, I would suggest an amendment to Rule 11(e) which would also permit the court to entertain and approve a plea bargain calling for a stipulation of facts which, if accepted by the court as part of the bargain, would effectively bind the court in terms of
the sentence to be imposed because it would stipulate as to some of the elements involved in the computational process for the sentence.

I think the Executive Branch of government ought to be given some flexibility in enforcing these laws and given that Rule 11(e) already provides judicial oversight in accepting or rejecting pleas, based on whether or not the disposition is in the interest of justice, I have little fear that a continuation of this practice will undermine the Congressional policy inherent in the guidelines.

Probably the most significant factor in plea bargaining when one gets to this particular issue is the strength of the government's case. It is unclear to me that the Commission's guidelines really can effectively speak to that issue, because it is unique to the prosecutor and his investigative situation. Prosecutors ought to be allowed, be permitted to negotiate on a specific sentence in unusual circumstances where the strength of the government's case requires treatment of an offender in a fashion that might be infinitely more lenient than would otherwise be required by the guidelines.

The Commission may wish to consider requiring
the prosecutor to submit a written proffer to the court identifying the considerations which warranted his exercise of prosecutorial discretion in the fashion presented in a particular case so that the court can make a determination as to whether or not the disposition is in the interest of justice. But the practice should be committed to continue. And as regards stipulated findings as part of a plea bargain, it should be recognized as part of the Commission's guidelines that that practice as well is not inconsistent with the guidelines as enacted by Congress.

Those are my observations.

CHAIRMAN WILKINS: Thank you very much for those very thoughtful and well-prepared remarks.

What would you suggest be the maximum consideration to be given for acceptance of responsibility? We have selected 20 percent in this preliminary draft; that's just a number. Current practices show it varies between 24 or 25 percent and 70 percent, depending on the crime. What would you suggest?

MR. SPAEDER: Well, with respect to individual offenders -- we are not talking here about the issue of
a corporation that voluntarily discloses -- my intuition --
and I have no better sense than my own intuition -- is that
a sentence reduction of a discretionary nature up to a
maximum of 50 percent would be appropriate.

To the average offender who seeks from his
defense counsel some sense of the sentence he is likely
to receive from a court in consequence of his plea of guilty,
I do not believe that many offenders will be grabbed by
the idea that they may receive as much as only 25 percent.

CHAIRMAN WILKINS: Thank you.
Are there any questions from any Commissioner
to my right?

Commissioner Block?

COMMISSIONER BLOCK: I have a question about
your limitation of the voluntary disclosure discount to
organizations. Would you expand on that somewhat?

MR. SPAEDER: I have suggested application only
to corporations because I see it as a practical problem
only in that area. There are so many other forces which
run counter to a defendant's election to voluntarily confess
his crimes even before they are detected that I have not
seen this in practice as a major problem.
One does read cases, though, where counsel is visited by a client in the privacy of his office, and a serious crime is disclosed, which indeed the client may wish for lots of reasons to reveal to governmental authorities. That disclosure even under my conception of the guidelines would not reduce any additional reward at sentencing apart from whatever the individual would otherwise receive by pleading guilty.

If the Commission were to enlarge the discount to 50 percent, of course, that would be a significant discount.

COMMISSIONER BLOCK: I guess I still don't see the rationale. I think it is a good suggestion for organizations, but I guess I don't see the rationale for restricting it to organizations. If it is rarely used, there doesn't need to be a cost in having it. Are you arguing that it provides the wrong incentive for individuals and the right incentive for organizations?

MR. SPAEDER: No. I am not wedded to the proposition that the suggestion ought to apply only to organizational offenders. And one could logically extend it to individuals. Because of the peculiar problems about
vicarious criminal liability in corporations, very often
the people and corporations who are making the decision
about voluntary disclosure are not the people who commit
the crime, and as a consequence, agents in some division
located in Memphis or DesMoines may have committed a serious
crime which disposes the corporation to liability; the
board of directors may wish to disclose it. They did not
authorize the crime and may wish to entertain entirely
different considerations in deciding whether to incriminate
themselves, meaning the corporation. I believe it is a
lot easier to do that than it is for an individual.

COMMISSIONER BLOCK: That's an interesting point.

Thank you.

CHAIRMAN WILKINS: Yes?

COMMISSIONER ROBINSON: Would another way of
solving the problem you raise be to permit that cooperation
by an official to be counted as under the cooperation
adjustment? There is a plea of guilty adjustment, and there
is the cooperation. The cooperation might be interpreted
as applying only to other cases, and typically that's what
it would be used for. But I think that one way might be
to take that restriction off and just say that as long
as the cooperation adjustment is going to be by certification of the United States Attorney anyway, one way of handling it would be to allow the United States Attorney to certify cooperation that somehow was related to this defendant's own case.

Would that achieve the same result?

MR. SPAEDER: As presently defined, I don't believe corporation embraces this approach, but it conceivably could be so defined to cover it.

There is a tripartite system set up in the current guidelines, three levels of discount. Only one of them strikes me as sufficiently strong to induce voluntary disclosure, and that is the 60 percent reduction provided for exceptional assistance to law enforcement agencies. Obviously, it is exceptional for a corporation to tell the government about a crime that the government doesn't even know about when the crime may expose the corporation to millions of dollars in fines, debarrment from future government contracting, probation, and indeed incarceration of its own employees, which I can assure you creates incredible morale problems within a corporation.

So I view it as somewhat of a difference in kind
rather than in degree, but I accept the Commissioner's observati
ons that you could put it into the cooperation section.

COMMISSIONER ROBINSON: Thank you.

CHAIRMAN WILKINS: Any other questions?

George?

COMMISSIONER MacKINNON: On voluntary disclosure, you appended the statement by Deputy Defense Secretary Taft. I wondered if you had ever gone back to what the experience was in the Internal Revenue Service after the war, when they had a voluntary disclosure practice?

MR. SPAEDER: I don't know, Judge. I don't know what the --

COMMISSIONER MacKINNON: There is a case in the Supreme Court and out of the 8th Circuit involving the Shotwell Manufacturing Company that makes Crackerjack, and Sullivan, the brother of the Chief Judge of the Northern District at that time. And your suggestion raises the problem to me as to how far this is going to affect the Income Tax Department. They did away with it eventually. There was some inducement after the war to have these people come back in, and I guess they did collect quite a bit of money.
But you would apply this, I suppose, to the Internal Revenue Department, also?

MR. SPAEDER: Well, it would apply to criminal offenses committed under the Internal Revenue Code, although it would not necessarily apply to any civil liability that is a collateral consequence of the disposition.

Your Honor may be talking about an amnesty program; I don't know. This is certainly not one. It only involves a sentence reduction. And given the Congress' amendments in October of 1984 to the Criminal Code, enhancing felony conviction fines to, I believe, a quarter of a million dollars in many circumstances, even for individuals and more for corporations, significant exposure exists anyway, so that a sentence reduction of 50 percent would still leave a fair bit of judicial discretion to impose hefty fines where they are warranted.

COMMISSIONER MacKINNON: I am not sure whether the reduction was mandatory or discretionary. I think it was probably discretionary. Of course, you get into millions of lawsuits over whether this man came in voluntarily or not. Generally, they came in when the Internal Revenue people came around on audit, and of course, before they
started the audit they had some pretty good information that they had done something wrong. So it does have its complications.

MR. SPAEDER: Although I do recommend that even as to those people who come to the prosecutor's office after they are detected, they should receive in the corporate context a sentence reduction on a discretionary basis, because in my own experience so often the government only knows the tip of the iceberg. And very often, inside counsel are aware of many substantial offenses that have been committed. The corporation suspects the government will not detect all of it, but feels an incentive to go to the prosecutor and make a disclosure, and there ought to be some incentive for doing so; the corporation ought not to be deprived of that opportunity simply because an agent has knocked on the door and made some additional inquiries already.

COMMISSIONER MacKINNON: Thank you.

CHAIRMAN WILKINS: Thank you very much, Mr. Spaeder. We appreciate your remarks.

MR. SPAEDER: Thank you.

CHAIRMAN WILKINS: Our next witness is
Breckinridge L. Willcox. Mr. Willcox is United States Attorney for the District of Maryland.

Mr. Willcox, we are delighted to see you.

MR. WILLCOX: Thank you, Judge, and other members of the Sentencing Commission.

In my prepared remarks, I address two issues which I think have some application to us as front-line prosecutors, and let me briefly summarize my remarks for you now.

The first area I want to address is cooperation and plea agreements. I certainly cannot stress enough the importance of cooperation. Federal narcotics investigations simply cannot progress without defendants' cooperation. I think that the draft guidelines recognize very useful and helpful gradations in Sections (b)331, 332, and 333. But I think there perhaps needs to be some expansion.

At the outset I note that often the government is unable to certify as to a defendant's truthfulness, or in the more usual scenario, the defendant simply pleads guilty, but refuses to either cooperate or, more commonly, refuses to testify.

Some additional gradations might be useful
to further recognize incipient contrition and to place a
value on enhancing courage guilty pleas.

The treatment accorded offenders who accept responsi-
bility as specified in (b)321 and 322 is again useful and
helpful, but I do think that a naked guilty plea standing
alone should warrant some sort of token automatic reduction.

I agree with Mr. Spaeder that if there is little
incentive, a 10 or 20 percent incentive, to plead guilty,
we are not likely to encourage many guilty pleas. But I
do recognize that many defendants choose to plead guilty
on the morning of the first day of trial simply to avoid
the pain and the agony if not the expense of standing trial.
And I do think that there should be some minimal incentive
to simply entering a guilty plea.

I am not sure the defendants who plea on the
eve of trial are terribly motivated by any sentence reduction;
rather, they simply wish to avoid the expense and pain of
the trial itself.

The most important factor, I think, in cooperation
is the timing and the degree of it. And as the guidelines
recognize, the timing and degree of cooperation should
warrant the most significant sentence reduction. Every
possible inducement should be held out to those who cooperate, especially early on in the investigation. The road to Damascus can be a long and tortured one, and early conversion should be recognized.

Section (b)333, which provides for a 40 percent reduction for exceptional cooperation, appears to recognize the timeliness factor, but I think more specificity in terms of the timing of cooperation might be in order.

In general, the (b)321 and 331 series are very helpful and very useful, and in my view are necessary to lend some degree of predictability to the current chaotic sentencing experiences. I firmly believe that the most effective law enforcement is predictable law enforcement.

Let me now turn to the monetary loss tables which I spend a fair amount of time on in my prepared remarks. The property loss or gain tables in (b)251, (c)211 and (f)211 seem to make significant distinctions between the same economic forgery, tax evasion, and fraud scheme. I detect that the Commission has made a conscious policy decision which has the effect of treating fraud cases as not as serious as real crimes, and I can tell you as a professional white collar crime prosecutor and defense
counsel that white collar crimes are real crimes. And they are often committed by leading members of the community. And those individuals should be branded for exactly what they are -- thieves.

I can easily make the argument that the amount of loss in a crime of violence should be less of an aggravating factor than in a fraud case. The bank robber, for example, seldom has any notion as to how lucky he is going to be. His offense should be enhanced more by the amount of the violence he uses rather than his happenstance of the proceeds of his robbery.

On the other hand, big-time fraud artists display an enormous amount of planning, cunning and sophistication. And as I pointed out in my prepared remarks, tax cheats as I interpret these tables are treated much more akin to bank robbers. I can see no useful distinction in these disparate monetary loss tables.

One final point. At several instances in the draft guidelines it seems to be envisioned that evidentiary hearings be held in connection with several of the issues outlined in Chapter III, specifically the (b)321 and 331 series. Elsewhere in the draft guidelines, specifically
the commentary following Section 7 of Chapter I, it is
specified that at such evidentiary hearings, the judge may
admit evidence that is not barred by evidentiary rules.
If that means that hearsay is excluded, we are all in deep
trouble, because obviously at sentencing hearings the govern-
ment's presentation consists almost entirely of hearsay
evidence, and if that is excluded, we are going to turn
sentencing hearings into replays of the trial itself.

Moreover, the U.S. Attorney's certification of
the extent of cooperation in sections (b)331 to 333 often
will generate disputes. The defendant may wish to claim
he has cooperated extensively, exhaustively, and ought to
get a 40 percent reduction, while the government's view
is that his cooperation was even less than total, or not
very useful at all.

My sense is that we may well have disputes, and
if the guidelines contemplate that we will have evidentiary
hearings to resolve those disputes, I find that notion offen-
sive. I think the government ought to be able to unilaterally
certify in its view the amount and extent of the defendant's
cooperation, and the defendant should only get a hearing
on that issue if he can colorably show that the government
acted in bad faith or was somehow ill-motivated in making that certification.

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

You know, any guideline system, regardless of what it looks like, will change the process somewhat at the sentencing stage. But I assure you that this Commission shares your concern and the concern of many others that we do not want to change the process to the extent that we have a mini-trial every time a sentence is imposed. And so we are searching for ways to avoid that very unfortunate possibility. I do not believe that our guidelines will ultimately provide for mini-trials and so forth. But it still will change somewhat. But I appreciate your remarks very much.

Any questions from other Commissioners?

Commissioner Block?

COMMISSIONER BLOCK: Mr. Willcox, I want to address your comment about the monetary loss tables. First of all, I agree with the relative emphasis on monetary loss in the robbery as opposed to fraud cases. I think in some sense, the structure suggested in the preliminary draft comes part of the way towards that, in the sense that the base offense
value is much higher for robbery than it is for, say, fraud, and hence the dollar values matter more in fraud than they do in the absolute sentence given for robbery. I think your suggestion goes to the fact that additional dollars should count less in robbery than in fraud; is that what you are suggesting?

MR. WILLCOX: Yes, sir.

COMMISSIONER BLOCK: Thank you.

CHAIRMAN WILKINS: Other questions?

(Pause.)

CHAIRMAN WILKINS: Thank you very much.

MR. WILLCOX: Thank you.

CHAIRMAN WILKINS: Our next witness is Mr. Joseph E. diGenova, the distinguished United States Attorney from the District of Columbia. Mr. diGenova, we are delighted to see you again.

MR. diGENOVA: Mr. Chairman, Your Honor, members of the Commission, thank you very much for the opportunity to be here this morning.

I had originally intended to offer substantial comments, but I looked over into the jury box and saw the members of the jury panel and was reminded of a story that
Senator Russell Long tells about his famous father, Huey Long.

Apparently, the Governor had downed a cup of cheer too many one night, and after fumbling with the keys to his front door for a while, he finally got to the door and opened it only to trip over the threshold. He landed flat on his face just inside the door and looked up sheepishly, only to find Mrs. Long looking down at him.

However, never one to lose the initiative, the Governor said, "I will dispense with my prepared text and take questions from the floor."

I would simply like to dispense with my prepared text, Mr. Chairman and members of the Commission, and underscore several points about the general process of what the Commission has done and why I think it is important that the Commission has taken on honestly the charter which Congress has given it.

Let me begin by saying that my work as United States Attorney here and my number of years working in the United States Senate, as well as my service for two years including up until today on the Sentencing Guideline Commission for the Superior Court of the District of Columbia, give
me, I think, a keen appreciation of the difficult job that Congress has given you, and also gives me a great deal of admiration for the work that you have accomplished so far.

Within that background I'd like to just discuss a few general points about sentencing reform and maybe allude to two issues which have arisen here.

Now, as I have listened to the testimony and read about it and read some of it over the last months, it is apparent that many individuals have complained about the guidelines taking away judges' discretion. I think that that obviously is a concern to the judges and to individuals who are not terribly interested in the notion of certainty.

It is axiomatic that when Congress instituted the notion of guidelines, it made a policy decision that for whatever, for good or ill, it sought to circumscribe the discretion of judges to a certain extent. That is precisely what Congress intended.

Now, we can argue about the wisdom of that decision, but that decision was made. And there are many that would argue that the notion of having guidelines in Federal courts is not an acceptable one given what
Federal judges are asked to do every day.

We have been asked to address the question, the real question, of the disparities which have existed in sentencing, and no one can deny that they do exist inside individual districts and from district to district. When you have the kinds of disparities that are reflected in the data that has been given to this Commission, in some instances ranging, just as one example, from probation to five years in a typical mail fraud case, in cases of identical quality and caliber, or sentences of three years and then another sentence of twenty-five years in bank robbery cases, those of course are the things that have concerned policymakers and cry out for some form of accounting.

So it is not surprising that Congress took the step that it did. What I am concerned about is that as guidelines become drafted and implemented, we not lose the notion, if we stick by what Congress intended, which is finally and some certitude and that there not be much deviation from the fundamental notion of what the guidelines are trying to impose for particular offenses.

What we have discovered in working on the Superior Court Guideline Commission -- and I know that the Commission
has rejected this notion -- is that a grid of some form
is extremely helpful in not only making the guidelines
understandable but making them acceptable to a wider range
of individuals because they were as a result of that under-
standable, and people could see what the ultimate consequences
were going to be, literally, in front of them as a result
of looking at the grid.

We found that to be most reliable in terms of
trying to communicate the fundamental ideas that the Commission
was trying to adopt, and that it would be the least likely
option to lead to disparity, litigation and appeals.

I understand the Commission has not opted for
that, and for very good reason. What I want to underscore
is that I think that the effort that this Commission has
made is absolutely vital and that in addressing the problems
in a draft guideline setting in which the Commission has
made it very clear to everybody that this is not the final
word, that this is a working document, that this has
become in and of itself a major contribution to actually
getting to the point of a final set of guidelines -- and
I have appreciated the opportunity to review them -- I
do share many of the concerns that have been expressed by
my colleague, Mr. Willcox from Maryland, particularly about
the notion of a sentencing proceeding becoming a mini-trial;
the notion that we will expand precious judicial and
prosecutorial resources at a part of the judicial proceeding
which has historically not required the kinds of evidentiary
investments that might appear to be required by a casual
reader of these preliminary draft guidelines. And I am,
of course, sensitive to the Commission's views that they
are indeed just preliminary, and that is why hearings are
being held so people will have an opportunity to pinpoint
to the Commission their concerns.

I also think that, as has been expressed, the
notion of cooperation must be given some concrete expression
and that the certification of the United States Attorney
ought to be sufficient in and of itself to deal with that
question with regard to whether or not the cooperation has
been satisfactory to the government. As it stands today,
the representation of the United States Attorney in
regard to that is generally accepted by the court. It may
be done in various ways. If the cooperation has been good,
the government frequently -- universally -- says that. If
the cooperation has not been good, it says that, too. If
it has been mediocre, it says that -- trying to assist the
judge in some way in making a very difficult decision of
what sentence to impose.

There are two areas -- and then I will stop and
take any questions -- that we have had to address in our
role locally which I think you are now beginning to face
up to as some of the comments come in, and that is adequate
prison capacity and the fundamental establishment of the
guidelines:

There is a view that -- how do you deal with
this question of capacity and how should it fit in. One
of those answers is supplied by the Commission's legal charter;
the other, by good sense and sound public policy. The answer
supplied by the Commission's charter requires it to take
Prison capacity "into account" in making its recommendation
and authorizes the Commission to recommend expansion of
those facilities if the Commission deems it necessary.

The answer supplied by good sense and sound
public policy is that linking sentencing decisions -- linking
sentencing decisions, individual sentencing decisions --
to prison capacity improperly, in my view, joins two
separate concepts to the detriment of both of them.
Providing adequate prison capacity is a duty a civilized society owes to its law-abiding citizens whose safety cannot be jeopardized by a separate and irrelevant factor. Put simply, adequate prison capacity should be a consequence of proper sentencing of criminal offenders and not a factor in establishing sentences.

Finally, I just want to say a few words about one of the controversial aspects of any sentencing guidelines. Judges in our district, prosecutors, defense lawyers and others, have been involved for actually almost three years in developing the guidelines locally that I alluded to. Early in our deliberations it was clear that one of the consequences of establishing sentencing guidelines would be to place a limit on the discretion of sentences that judges could establish. Congress recognized that when it established your charter.

Our experience indicates, however, that once the guidelines are carefully drawn, as this Commission is attempting to do in its preliminary draft, with the full participation of the judiciary, the conscientious judges, we believe will gratefully embrace them because they will have been through a sound policy of exposition. And I am
quite confident that the United States Sentencing Commission will find a similar experience and that these public hearings will perform an important function in involving the judiciary, the legal profession and the public in your vitally important work.

I would be happy to respond to any questions you have generally or anything that was addressed by anyone else, including the corporate problems that Mr. Spaeder addressed.

CHAIRMAN WILKINS: Thank you very much.

Let me ask you about what we call "acceptance of responsibility". Mr. Willcox expressed concern that the maximum of the consideration of 20 percent over the otherwise applicable guideline sentence would not be sufficient inducement for encouraging guilty pleas. And of course, we would hope that the percentage of those defendants who plead guilty in our courts, 88 to 90 percent today, would not change significantly under any guideline system.

Do you have a view on that acceptance of responsibility and whether or not 20 percent is sufficient? Of course, it is not mandatory and it is not automatic.

It is up to 20 percent within the discretion of the judge;
that's the way it's written now.

MR. diGENOVA: Well, I suppose 20 percent of what is the way I look at it. If you are involved in reaching a disposition with a defendant, the prosecutor is going to retain the discretion in conjunction with the defense attorney through the very professional negotiations that go on between prosecutors and defense counsel, to pick an appropriate crime and to pick a crime which has a sentencing range which will give some real benefit to a defendant who seeks to legitimately cooperate with the government, if not necessarily by giving up others, because there may not be any others to give up, but at least by recognizing that he or she has done something wrong and is willing to at least admit that and pay the price.

I assume that there is going to be a range, and I have looked at this -- not in the great depth that the Commission has -- that there is going to be a range of offenses in any given situation that the government is going to have at its disposal.

Now, any time you try to pick a number out of the air, it is fundamentally going to have to -- there is no way to rationally pick the number. Twenty percent may
seem fine to me in a given case given the particular facts.  
It may not seem enough to me in another case where that  
kind of recognition as to the individual involved, I might  
want to say I'd like to give 40 or 50 percent. It may be  
that some range may be necessary a little bit higher than  
the 20 percent, but as long as again, as within the guidelines,  
there are ranges within which people can rationally choose.  
I don't think anyone can fault that. There are obviously  
policy problems along the way that have to be addressed.  
But I think by picking 20 percent, the Commission has started  

at a rational level, and I think people can differ about  
whether or not it should be higher. And I can accept the  

notion that I might want it higher; I might want it as high  
as 50 percent in certain circumstances, and in order to  
continue to induce people who want to preserve the scarce  
judicial and prosecutorial resources that we now have.  

I am not offended by 20 percent, but I can  
certainly envision circumstances in which I'd like to have  
more than that and think that the guidelines ought to have  
more than that.  

CHAIRMAN WILKINS: You bring up a good point  
in your discussion. We always need to keep in mind, and
some overlook this, that we should not look at acceptance
of responsibility or that section alone, because as you
point out, there is another section dealing with cooperation,
another section that we will have dealing with plea negotiations,
and all of those things impact one on the other.

MR. diGENOVA: That's correct. There is a cumu-
lative effect of a number of parts of the guidelines which
in many ways do nothing more -- the guidelines do nothing
more than put into a package what already goes on in the
system, and that is the negotiation which occurs at the
beginning of the case, at the front end of the fuel cycle.
And then as more facts become apparent, the culpability
becomes more clearly defined, other decisions are made
along the way, and indeed the defendant has an opportunity
to cooperate, perhaps inculpate others, perhaps there
are not others to inculpate, and then also involves other
actions which the defendant may take between the beginning
and the end of the process to help a prosecutor determine
the nature of the specific charge which should be brought.
And that, under the guidelines, will still be -- the Commission
is not going to change the laws of the country; they are
going to be there, they are all still on the books; there
are a host of laws in most instances which a creative prosecutor can make use of in order to find a reasonable disposition with a particular defendant. And obviously, criminal histories and modifying factors are going to have an impact on that as well.

So I think that Congress having asked this Commission to take on a basically Herculean task which is to try and articulate in a volume many of the unspoken notions which surround the art and practice of sentencing in the United States, has asked the Commission to take on a task which I think is basically undoable in many ways. It is something that, like Congress frequently asks people to do, they do something which can't be done. Well, that's all right. I think the Commission thus far has done a noble job and a very helpful job in trying to outline and articulate what some of these perhaps somewhat arcane notions of sentencing are, and quite frankly, having read it and gone through it, I find it very helpful in trying to analyze some of my own notions of what is wrong with sentencing practices in general. It is not, in my view, the final product, and obviously the Commission doesn't view it that way, either. So I don't think it is anything for people to get all upset.
about, and obviously your Commission has been subject to
some criticism for this document. I think that is probably
healthy in a democracy that we can have that kind of
criticism. The Commission obviously does not view this
as the final document. And I would hope that it isn't
the final document, because I have expressed some of my
concerns with it, but I am sure it is going to be changed.

CHAIRMAN WILKINS: Well, it is far from the final
document, and of course was published only for the reason
to generate the extensive public comment because the time-
table is so short. And if we wanted until next year to
go through this process, we wouldn't have time to absorb
and digest and use constructively the comments that we are
receiving now.

Commissioner Block?

COMMISSIONER BLOCK: Mr. diGenova, I have a follow-
up question on your preference for a matrix presentation.
Is that in part a preference for a simpler form, a simpler
set of guidelines?

MR. diGENOVA: Well, let me speak as a commissioner
on another commission. I'm not a judge, and so I do not
have the expertise that many judges have who battle daily
with the notion of imposing a sentence -- a very onerous responsibility in a free society.

I have found as a commissioner that in dealing with a matrix, it has been easier for me to understand all the notions being brought together in a thoughtful process that has taken almost three years for us to do.

Now, that may be a symptom of my own wish to reduce things to understandable form because I find it easier to do things when I understand them.

However, I certainly recognize that others may differ on that and that for purposes of assuaging sentencing judges around the country, the Commission does not wish to present them with a numerical matrix to make judges feel like accountants. That's fine. But from my perspective as a commissioner I have found it easier, after a tremendously long deliberative process of three years, to understand what the ultimate result was when I have seen it reduced to matrixes, various ones -- one for drug offenses because they are different and distinct; a separate one for armed offenses, and then one matrix for the other offenses, and then some non-grid offenses which have mandatory minimums and for which no exception can be made. So I have found
the matrix or the grid concept to be easier for me to understand, and I would assume, hopefully, for some judges to understand, and perhaps even more acceptable. But it is not, obviously, the end-all and the be-all of guidelines.

COMMISSIONER BLOCK: I just want to pursue that a little further on the technical points. How did you handle something like fraud, which has these dollar dimensions and maybe some other dimensions about victims -- how do you handle that in terms of characterizing the offense in a matrix or grid form?

MR. diGENOVA: Well, we have offender characteristics, criminal histories; we have offenses, and they are ranked based on -- I don't have the grids with me now -- but they are on dollar amounts, the amounts involved. And we have some victim impact data which is used to determine whether or not the victim was a corporation or whether or not the victim was someone who could not absorb this particular financial loss. There are various ones.

COMMISSIONER BLOCK: So you have these discrete categories.

MR. diGENOVA: Yes.

COMMISSIONER BLOCK: And then you put an average
there for that discrete category.

MR. diGENOVA: Yes.

COMMISSIONER BLOCK: Based, I suspect in your case, something like the current sentence, but you put an average there.

MR. diGENOVA: We have aggravating and mitigating factors which are taken into account in establishing where that fits in on a particular grid.

COMMISSIONER BLOCK: One of the complaints that we hear quite a bit is that if we use a simple system, then we will be treating, quote, "unequals equally" or the same. Does the matrix presentation, the matrix form, have that problem?

MR. diGENOVA: I don't understand that, "unequals equally"? Well, let me just say this. It is readily apparent in establishing any sentencing guideline that the notion to achieve uniformity will require some sacrifice of individualization along the way in order to achieve the greater goal of uniformity. That is a policy judgment that a sentencing guideline commission makes at the beginning, that it is going to decide that it is better to have proximity to uniformity than it is to have
disparity in individuality, for a number of reasons -- for
honesty to the public, for the acceptance of sentences once
they are imposed because they will be final, they will be
understood, there will be truth-in-sentencing, people will
know what is coming down the pike before and after they
commit an offense. Those are perfectly legitimate factors
to be taken into account in balancing against notions of
individuality if you accept the notion that disparity is
a problem.

If you do not accept the notion that disparity
is real, then of course you have no use for guidelines at
all, and this whole discussion is useless.

There seems to have been some consensus that
the disparity was sufficiently grave and sufficiently
widespread that the notion of guidelines, the time for that
had come. Now, we can all argue about the birth of this
particular piece of legislation and the manner in which
it was enacted into law and all that, but the fact is, the
President signed it, and we have it, and there appears to
be a sufficient amount of professional opinion, judicial
and otherwise, that this is an issue that needs to be
addressed.
It seems to me fundamental in the notion of accepting a guideline that you are going to have to give us some individuality, and you are going to have to give up the kind of "benign disparity", as some people would call it, in order to achieve the greater good for the greater number.

COMMISSIONER BLOCK: Thank you.

CHAIRMAN WILKINS: Commissioner Baer?

COMMISSIONER BAER: I'd like to ask why has it taken three years in the District of Columbia and it isn't out yet?

MR. diGENOVA: Because it isn't easy.

COMMISSIONER BAER: Second question. Once the proposed guidelines are developed, is the Parole Board abolished?

MR. diGENOVA: No. These guidelines that we are developing were the result of a judicially-created initiative. The late Chief Judge H. Carl Moultrie decided that the court needed guidelines after doing a computer run on the sentencing practices of the court, and complaints from the Bar about disparities. They did the computer run, and they discovered indeed that there was a wide range
-- some judges never gave any time; other judges always
gave time -- and so there was a concern for this. And
three years ago we started on this process, and as we began
to unravel the facts and analyze individual statutes, we
discovered that this was an extremely difficult thing to
do.

And I must tell you that the non-judicial members
of the Commission at the end of the three-year period came
away with a great deal of respect for what judges do every
day, which is impose a sentence, because they finally began
to realize that the imposition of a sentence is an extremely
difficult job. It is not an easy task -- if it is conscien-
tiously taken unto.

And so what happened is that as we all began
to sort of robe ourselves, if I may put it that way, in
trying to fashion appropriate guidelines, we began to become
frightened of the responsibilities that were coming upon
us, and we began to agonize over how things should be.
approached and how the guidelines should be shaped and how
the format should occur.

We are now in the position of issuing our
guidelines probably in the next month. They have been
been reviewed by the judges, and they will now be issued
to the public for public comment, and it is quite clear
to all of us -- and that's why I empathize with what
this Commission is going through; I sympathize with you;
I understand the difficulty of the task -- and I must say
that I am not surprised that people have had differing
opinions about the preliminary draft. On the other hand,
having gone through this now for three years myself, I
have to give you a tremendous amount of credit for what
you have accomplished in a much shorter period of time than
we have. And Commissioner Baer, I can only tell you that
the reason it has taken three years is that we never realized
how difficult this job of establishing guidelines could
be, and it has been an agonizing experience.

I am happy to say that the members of the Commission
have uniformly approached this task with great seriousness --
and when you meet at seven o'clock in the morning so you
can get to your job by nine or nine-thirty, let me tell
you, that requires a degree of dedication that I never
thought I had. But it was scintillating company at seven
o'clock in the morning with a good cup of coffee and a
fresh doughnut. But I just really think that people don't
understand. I certainly never understood. I have been
a Federal prosecutor in this courthouse in the early
Seventies, had asked for many sentences, had gone through
sentencing proceedings. I then worked on the Hill, and
then I became United States Attorney. And I have been five
years back in the office, and I tell you, I never realized
until I got on this Commission what really goes into making
a judgment about a sentence. It is very, very complex.
And I think the public, and certainly Congress, does not
understand what the stakes are and how difficult it is to
construct guidelines. It is a very, very, very difficult
task.

I am surprised by my own reaction to that, because
I took a very simplistic view of sentencing when the Commission
started. And now that we have gotten through this process,
I don't have that view anymore. In fact, I am awestruck
by the responsibility that the Federal judges have, and
I am not sure that I am capable of figuring out what these
guidelines ought to look like -- I don't know that anybody
is, quite frankly.

COMMISSIONER BAER: What will the role of the
D.C. Parole Board be after these guidelines are issued?
MR. diGENOVA: Yes, I didn't answer that part of your question. The answer is that these guidelines were then set up as not mandatory -- they were going to be issued -- and only in felony cases, not in misdemeanors, obviously, where there is no range of sentences -- only in felony cases, and that they would be adopted by the court, and they will be recommended to the court to follow once they are in final form.

They will be issued, and judges will obviously not be required to follow them, but there will be some community pressure to follow them because, I hasten to add, the Commission will not go out of existence. Our Commission will remain in existence to monitor the guideline implementation process, to see whether or not there is compliance and whether or not, if there is not, there ought to be some form of legislation similar to that which established this Commission, to simply put the grids and the matrixes and the guidelines into law.

We have run into problems, for example, in reviewing the statutes, where we have found many of the penalties enacted by Congress when Congress was enacting the local laws for the District, are way out of whack, and that they
are too low, and that the Commission has come up with a
sentencing grid for a particular offense in which the judge
cannot impose that sentence because the law does not permit
it.

I must say that in most instances, what we have
discovered is that the judges -- and the majority of this
commission was judges -- that the sentences really weren't
tough enough. When people began to go through the entire
Criminal Code and began to discuss the philosophy behind
an individual statute and offense and try to place it
with all the other felonies and how they should rank, it
was fascinating. The ranking of offenses became one of
the most fascinating aspects of this process because we
began to see a discussion not only of the statutes themselves,
but of the social policy behind individual offenses and
how, 15 or 20 years ago when a statute was passed and
a crime, for example, of indecent liberties with a child
was not necessarily considered the way it is today, our
commission was off the charts on the sentences we wanted
to impose in those cases because of our knowledge of the
permanent psychological damage done to these victims --
if not necessarily physical damage, the psychological
damage which in most instances may be irreparable, and may
cost society in dollars, in Social Security benefits, for
years and years to come, that recommendations would be made
in a separate book that the commission will send to
Congress and the Council that various penalties be
changed, in most instances significantly upward, which
then underscores the whole notion of prison capacity and
who is going -- and of course in the District, our prison
capacity is a serious problem where over 95 percent of our
inmates in the D.C. prison system are recidivists with
three or more prior felony convictions, so you can see
the problem we face.

COMMISSIONER BAER: Final question. Can we assume,
then, that your commission believes that when prisoners
come back to D.C., they should be supervised?

MR. diGENOVA: Oh, absolutely. There isn't any
doubt about it. We all believe that some semblance of
supervision obviously is supposed to be happening now in
the system, but we all know, also, that the limited
resources don't make that possible.

Let me just underscore that I am additionally,
besides being somewhat struck by the demanding nature
of sentencing, I have also been struck by the demanding nature of the probation officer's work and what a phenomenal job the Probation Department does in analyzing these cases for judges before they get to sentencing. Considering the workload that the Probation Department has, I don't know how they do it. I really don't know how they do it -- and they do extremely professional work, and they serve this court in a truly remarkable way. I am very, very proud to work with them.

CHAIRMAN WILKINS: Any other questions?

Commissioner Nagel?

COMMISSIONER NAGEL: I want to begin by thanking you, Mr. diGenova, for enormously illuminating testimony, but ask if I could just push you a little further because of your varied experience both on the Sentencing Commission as U.S. Attorney and formerly as a Senate staffer.

In the course of our hearings over the last few months we have heard in particular from some constituent groups a focus on what I think have been four aspects of the preliminary guidelines.

One is the ignoring of prison capacity, and you have spoken to that issue, so I won't ask you to repeat
that. But there are three others that I would like to have
your views on.

One is the perceived excessive emphasis on certainty
of imprisonment for all serious offenders. The second is
a supposed devaluing of probation as an alternative to all
sentences rather than as an alternative to sentences with
a very low imprisonment range. And the third is our seeming
departure from current practice and the degree to which
current practice should dictate any proposed guidelines.

If you want, I'll repeat those.

MR. diGENOVA: No; I have them, thank you.

COMMISSIONER NAGEL: Okay. If you could give
us your comments on that.

MR. diGENOVA: Well, on the certainty of incarcer-
ation for all serious offenses, I just think that this again
gets back to the fundamental notion of guidelines and the
question of uniformity and the acceptance of a notion that
a society is going to make a general policy judgment that
a particular type of penalty needs to be imposed in a case,
in a particular kind of case, for the good of all. Now,
that may be for reasons of deterrence, whether or not you
believe in deterrence -- and I don't necessarily believe
in deterrence in all cases; I do believe in punishment and retribution, which I think are perfectly proper and indeed civilized notions that a society has a right to express.

The certainty of punishment is very, very important; the certainty that for particular types of very serious offenses, individuals are going to pay a price, I think is vital in a society that professes to provide ordered liberty for people who pay taxes and otherwise obey the law.

It is not in my view offensive that when people break the Social Contract and decide that they will take unto themselves which laws they will obey and which laws they will not, that when they pick ones that hurt other people, physically or financially, it is not bad that a public policy decision is made that those people should go to prison, generally speaking, for a period of time.

So that's a philosophical question more than anything else about the question of certainty, and my answer is I am not offended by that. I think you can accommodate some of the concerns that people might have about that with aggravating and mitigating factors and other notions of cooperation, and the other things we talked
about in that huge world, that global village of ideas, that are included in the guidelines, before you ever get to what the person pleads to. There are lots of ways to deal with what that certain sentence is going to be, in my view, if I understand these guidelines correctly.

On the question of devaluing probation, again, probation, I don't believe, is devalued at all by this. In fact, I believe it is enhanced by the notion of establishing some certainty as to the kinds of things that you expect people to be accountable for in one form or another. And again, if you are going to have guidelines and you are going to have uniformity, you cannot have the kind of deviation which is going to include all the situations that some defense attorney or some prosecutor or some theorist might want to have included in the guidelines. Something has to be sacrificed in the process to achieve uniformity if you accept the notion of guidelines.

On the question of departure from current practice, well obviously, there is going to be some departure from current practice. The current practice apparently is disparity. So if you are talking about actual problems in the sentencing process, obviously there are many, many
current practices which will be changed as a result of this. It will change to a certain extent, I think most dramatically, obviously, it is going to change what a judge can do. That is obviously one of the key complaints about the draft and the notion of guidelines in general. I don't see that being a problem for me as a prosecutor unless efforts are made to put restrictions on the kinds of negotiations that I can enter into as a prosecutor, in which case, then I think you would have an even more serious problem in terms of trying to accomplish what the Commission is trying to do.

There has to be flexibility, it seems to me, at that part of the process. If that practice were to change, and if the prosecutorial discretion were to be limited in any meaningful way, then it seems to me you would have a terrible situation in which you wouldn't have any kind of flexibility at the front end of this cycle to determine what is going to happen at the end of the cycle.

COMMISSIONER NAGEL: Thank you.

CHAIRMAN WILKINS: Commissioner Breyer?

COMMISSIONER BREYER: Thank you for your comments about the process. I underline them. I couldn't agree with you more. It is much harder than I ever thought it
would be, and people don't understand it until they start
to do it.

MR. diGENOVA: I don't ever want to do it again, 
by the way. I am not volunteering for another --

COMMISSIONER BREYER: My thought process, you
so well-described. All right. I appreciate that. And 
that is why I am really going to ask a question that is 
more addressed to other people in the audience who are 
going to testify later than to you. And the reason that 
I am saying that now is because as you have pointed out, 
our choice in September was to put out what I'd call the 
roughest block of marble, or to put out nothing. I think 
it was right to put out this very rough block of marble 
so that people could comment. And from my own point of 
view, I would not know where to go without those comments. 
I mean, it has been very, very useful.

MR. diGENOVA: Well, I think you know where to 
go now. I think several people have told you.

(Laughter.)

COMMISSIONER BREYER: Right. But you see, this 
is a practical problem, because at the same time I am 
reasonably optimistic that we can in fact do something
to help with the basic underlying problem, which is the Problem of disparity.

There is a problem of disparity, and it is possible to do some small amount of good, I think. But what worries me is that because of the inevitable stirring up of degrees of opposition because the block of marble was so rough, that if we start to get postponements and so forth, People will get tired of the whole idea, and that would prevent any good from coming of this.

Now, that is preface. That is why I am asking the question, because practically speaking, we will come out, I imagine, with a version in January or February anyway for comment again, and it is really that version that people should be commenting on now, because I already know their comments on the last one. And it seems to me that most of the people -- I don't know all of them -- but I mean, I think there is widespread view that a lot of those comments are very well-taken.

So I have been sitting here, thinking, well, how would I describe the next version as I would guess it would be. Well, I would describe it as, number one, starting with the framework that is in the blue book insofar as that
framework is roughly descriptive of crimes that are charged in statutes. And you know, there is a chart. You can go right from the statute to the description in the book. It is pretty much, I think, based on what are the actual words and the actual statutes, pretty much, not entirely.

All right. Now I would say there are five steps that are going to take place. The first in a way is the easiest. That is called "de-bugging" it. That is, it is filled with technical mistakes. Of course. I could write 192 suggestions, which I did; MacKinnon wrote about 100 others; other people had a whole lot of others. So that is step one.

I think step two will be simplification. That is, under each of these headings as you picture them in that blue book, instead of there being eight or nine differences, there may be only two or three or none. Now, that is what Block was talking about, because you realize in doing that, one creates a different kind of unfairness. One lumps together people who are really un-alike. All right. So, now that we have done that to simplify, we have to do something about that.

The third thing is to have ranges -- that is,
overlapping ranges -- where you hurt people; perhaps instead of saying 14 months, you would say 10 months to 40 months. "Judge, you choose," and then overlap the ranges so there is no bright line that people will be attempting to litigate.

All right. Now, I want you to take this in, because I want you to be thinking, given your experience at the D.C. Commission, is this going to work. All right? That's really the question now.

All right. The fourth thing will be broader discretion to the judges such as, "Judges, you choose among these ranges," and "Judges, you depart where you have a good reason for departing." Indeed, we might suggest a few good reasons; indeed, leave it open to the judges to pick other good reasons, as long as they write them down.

And the fifth thing would be plea bargaining. Plea bargaining might, under certain kinds of supervision, both charge and sentence bargaining, give the judge the power to approve it where those reasons are specified and the judge thinks they are good ones.

Now, those are five major sorts of modifications around this basic structure. And the problem for us is going to be is a version which incorporates some form of
those five major modifications going to be close enough
that in fact we can begin to put such a system in place.

Now, I don't necessarily expect you to have a
reaction to that. If you do have reactions, fine.

MR. diGENOVA: Well, I have a lot of reactions,
but I don't think I want to express them today, because
I'll tell you why. Having been through this process now
for a long period of time, I have learned not to go with
my initial reaction about a lot of things as I have gone
through this sentencing guideline thing. I don't think
any of those ideas is offensive, in terms of analyzing the
particular problems that this Commission is facing, and
they may be very worthwhile things to pursue. And indeed,
structurally, they sound like things that obviously the
Commission should take a look at and no doubt will. So
again, I am not offended by the notions, and if you are
looking at these things, I think that's the key thing.

But the bottom line is that guidelines by their
very nature express the notion of certainty and minimal
deviation -- minimal deviation -- because otherwise, if
the ranges of selection are too wide, you then return to
pretty much where you started before. It won't do any
good to fine-tune a set of guidelines so that if you accept
the Congress' mandate, if one intellectually accepts that
mandate -- and that's all I am talking about; I am not talking
about a personal preference here -- if one accepts that
mandate, then the range of disparity or the range of deviation
in individual sentences has got to be kept to a minimum.
Otherwise, you end up right where you were before; the only
difference is you are going to have more litigation. And
if I am asked what I want, I want it back the old way. If
that is where we are going to end up, which is a set of
guidelines which are going to provide ranges of selections
for judges and give various opportunities for hearings and
appeals and additional litigation, it isn't worth the
candle at that point, because nothing will have been
accomplished. That of course flies right in the face of
those who say, "We don't want that kind of certainty. We
really want to be able to fine-tune this thing in every
particular case down to a 30-day period."

Well, that to me is the fundamental notion of
having or not having guidelines. So it really revolves
around when you say "ranges", in various areas of what you
are talking about, what you mean by that; what does it
look like when it is finally down on a piece of paper. And when you start having overlapping ranges in between offenses, you start to have some problems, I'll tell you right now. You have different problems in terms of scooting -- I see this in terms of matrixes -- in terms of scooting people in and out of various boxes with very, very tiny, tiny discrepancies. And I am willing to pursue that and see what happens and see what the Commission does.

But remember -- my mindset is on the notion of the mandate that I was given on that commission and the mandate to this Commission as I read it, which is certitude.

The ranges bother me if they are too big.

COMMISSIONER BREYER: Well, this is also at the back of my mind, to tell you the truth. As we have tried to get narrow discussion down to very fine points, we discover that different people disagree about what the various factors should be and how much they should count for. And in addition to that, there are large numbers of people, particularly judges, who are very concerned about all the litigation that will go on, flooding the system over each division. Then it seems to me possibly a way out of that is to at least begin -- you see, you can set
a process into place. The process could perhaps be very, very broad discretion -- a bit of an improvement. Then, over time, collect data. And as you collect data over time, narrow the guidelines. So you don't have to do everything in a day, or in a year, ten years, twenty years. Then gradually narrow them down to the narrow ranges you are talking about.

Do you have a reaction? I am quite interested.

MR. diGENOVA: Well, I think that's not what Congress intended. I mean, if you want to know what my reaction is, I don't think that's what Congress intended. At least that's not what they said as I read the statute. It might be a good idea, but it's not what Congress said.

CHAIRMAN WILKINS: Any other questions? George?

COMMISSIONER MacKINNON: You have a gridiron at the present time, and you allow -- that is, assuming the court adopts it -- and you say they aren't mandatory. Do they have to give any reasons?

MR. diGENOVA: If they deviate. They have to give written reasons for a deviation above or below the grid sentence.

COMMISSIONER MacKINNON: In open court?
MR. diGENOVA: They have to be in writing in the court jacket.

COMMISSIONER MacKINNON: I find that you have to give them an open court.

MR. diGENOVA: I am not against that.

COMMISSIONER MacKINNON: Well, that's the official sentence that any person gets.

Did you find that the guidelines that you came to would increase prison sentences generally, you thought? Do you estimate that?

MR. diGENOVA: Your Honor, what we discovered was that there was from what we could tell an insufficient database to be able to make the judgment finally. However, what we did discover from a sampling that we did was that there would have been, from what we can tell, given the kinds of defendants coming into the system, a minimal increase in the sentences, a very minimal increase. That is what we discovered -- minimal.

COMMISSIONER MacKINNON: Where did you come out at on comparison with time served?

MR. diGENOVA: Do you mean the actual time served by individuals as opposed to comparison with parole?
COMMISSIONER MacKINNON: Well, when I first came on the court for the last seven or eight years, we had the jurisdiction over all D.C. sentences. And we were flabbergasted at times the way the actual sentences were treated once they got to Lorton.

MR. diGENOVA: Oh, yes.

COMMISSIONER MacKINNON: I saw in the paper the other day that the City Council is opposing some modification of parole that would throw the thing out the window almost. And I don't know — I haven't looked at it specifically, and that's just a general observation.

So I wonder whether your comparisons are based or will be based on the time served -- well, let me put it this way. To what extent are your actual sentences now sentences to be served as opposed to sentences that can be reduced by some person down the line?

MR. diGENOVA: Well, as a result of changes that Congress has required through various appropriations bills and the way that the District of Columbia Parole Board does its business, there is now much more realistic time being served by individuals because the parole system has been revamped as a result of new policies which do not
permit people to get parole as early as they used to. As a result, the sentences being imposed now, the indeterminate sentences, the bottom line part of that sentence, the minimum is becoming a realistic time in prison.

The average sentence now for felons is four to twelve years. That gives you some range of the seriousness of the offender history that we are dealing with. It is a very, very serious offender history mode. As I indicated, 90 percent have more than three prior felony convictions. So you have a very serious problem in terms of the minimums.

Now, the matter that you alluded to is something that I think this Commission is going to have to face up to in the larger context of what Congress does. Our sentencing commission is now through and has sent the guidelines to the judges, and then this proposal has been introduced in the Council to essentially allow the Parole Commission to give good time credits of five or six varieties to allow for a crediting of up to 30 days in a given one-month sentence for an incarcerated defendant of time off for good behavior, which essentially means 100 percent ability to get a person out early.

COMMISSIONER MacKINNON: Well, it's the Christmas
season.

MR. diGENOVA: It has been fixed now, and so
now it is only down to 50 percent, or 15 days per month
of the minimum sentence that has been imposed which can
be credited for, for example, fulfilling a minimum educational
course. I don't want to get into a discussion of that,
because if I do, I may say some things that shouldn't be
in the public record at this point.

But let's just put it this way. This Commission
may very well be faced with the same type of reaction from
Congress as it gets a look at this thing. Legislatures
do have a way of reacting to various stimuli in the public
policy debate process.

COMMISSIONER BREYER: They will react how?

MR. diGENOVA: Well, in my view, the wrong way--
but you know, I am only one person with a rather -- I wouldn't
say conservative, but a tougher view of what ought to happen
to people who violate the criminal laws.

COMMISSIONER MacKINNON: And you are suggesting
that Congress might find a way somewhere down the line,
if these sentences are more severe than they think they
ought to be, that they would find some way to reduce them.
MR. diGENOVA: Well, let's put it this way, Your Honor. The sentences that our commission arrived at were arrived at -- we called those realistic sentences. They were sentences that reflected the consensus view of the Commission about what ought to happen with specific types of crimes as in comparison to all the crimes that are in the Criminal Code. There was a series of philosophical policy, criminal justice-type decisions that were made by the Commission in good faith, and they reflected, I think, a very rational decision about what a crime ought to cost someone in terms of social factors, in terms of the Social Contract.

Now, it is very obvious that what we call realistic -- and there were a range of philosophical opinions on that panel -- a legislative body, for reasons unrelated to logic and sound public policy might find them unacceptable. I don't think Congress is any different than the Council in that regard.

COMMISSIONER MacKINNON: Of course, every sentence calls for a sentence that goes to the crime and a sentence that goes to the criminal. To what extent do you think your guidelines will get to the criminal as apart
from just sentencing for the crime?

MR. diGENOVA: Well, there is no doubt in my mind that the manner in which we have used offender history, as we call it, is a very significant factor in adding points to where that person actually ends up on that grid. And that criminal history information of that offender is vital in any type of guideline format, and obviously the Commission has taken that into account, and I am satisfied with the way that our guidelines ended up that a responsible decision is made to credit that kind of information in terms of societal costs -- what does society have a right to ask in return for the privilege to walk around freely and do certain things in a free society. And we have done a very good job -- by "me", I mean the commission -- that sentencing commission has placed great emphasis on offender history, and I don't see any way not to.

COMMISSIONER MacKINNON: How did you come out on concurrent and consecutive sentencing?

MR. diGENOVA: Presumption for consecutive.

COMMISSIONER MacKINNON: Of course, you are not bound by it.

MR. diGENOVA: That's correct.
COMMISSIONER MacKINNON: Is there any appeal from your sentences; from the sentence of the Superior Court can an appeal be taken?

MR. diGENOVA: Well, this is an informal process at this point. These guidelines are not mandatory. They don't even have to be followed. It is presumed that once they are issued by the court, obviously that they will be, and there will be some sort of review mechanism by the judges of various sentences. That is part of the implementation process which is being worked on now.

COMMISSIONER MacKINNON: Now, our statute does away with parole and youth correction. Do you still have parole?

MR. diGENOVA: Yes.

COMMISSIONER MacKINNON: And did the repeal of the Youth Correction Act which formerly applied to the District take away your jurisdiction on youth parole offenses, too?

MR. diGENOVA: It did for a while, and then the Council passed something similar to it, called the Youth Rehabilitation Act, which put back in place something similar to that, but not as quixotic and capricious.
COMMISSIONER MacKINNON: Thank you.

CHAIRMAN WILKINS: Thank you very much.

Our next two witnesses are two judges from the 5th Circuit, Judge Robert M. Hill, who is a member of the 5th Circuit Court of Appeals, and Judge George P. Kazen, who is a United States District Judge for the Southern District of Texas.

JUDGE HILL: Good morning. I am Judge Hill.

Let me refer to Judge Kazen, but first give you a little historical background on Judge Kazen.

He sits in Laredo, Texas, a border city to the Republic of Mexico. Essentially all of his docket is criminal in nature, nearly 100 percent. And he and I were having breakfast this morning, and he has disposed of over 400 criminal cases this year and has sentenced, I assume, a defendant in each one of those cases. So I will defer to Judge Kazen at this time.

JUDGE KAZEN: Thank you very much for the opportunity to speak here, and I hope our paper has arrived or will arrive in due course, as I know our time is limited.

We very much appreciate your willingness to listen to all points of view. I can only say "Amen" to at least
part of what the last speaker said. I think anyone who looks at your work, even if he had never been involved in the criminal justice system at all, even if he had never thought about it at all before, could realize what essentially an impossible task you have been given.

And I don't know what the answer is. I would simply say that we are deeply troubled by the present product. And I know much of what I will say here, briefly, you have heard before, and I gather from Judge Breyer would be criticisms or observations that many others have made. And I appreciate what he says, that this is just the rough block of granite.

But we are deeply troubled by the methodology in the present guidelines. We find that this particular approach attempts to quantify and put numerical values on things that simply cannot be quantified. It tries to take something as infinitely varied as human life itself and reduce it to a simple mathematical formula, the result, we think, is an arbitrary, very rigid, extremely complex, mechanical system.

Many of our colleagues, in trying to work these guidelines, have found that in many, many cases the resulting sentence would be quite severe, more severe than now. We
simply raise the question of fairness of that.

We raise the question of prison space. They are not only severe compared to what is happening today, but if you take away parole, they are then at least doubly severe. And while perhaps in an ideal world, we shouldn't link it, the question is where are we going to put these people. We are led to believe that the Bureau of Prisons say we are at capacity or over capacity now. I think that is a problem.

In our State of Texas, all the politicians clamor for everyone to be in jail for long periods of times; juries award sentences of 60, 70 years, 1000 years, 2000 years, but nobody will vote the taxes to have the prisons. They go in one door, and the Federal judges essentially put them out the back door because of overcrowding.

We are especially concerned with the whole method of reaching the sentence. We have raised technical objections that I won't bother with here today. Frankly, we don't understand the calculation on multiple counts that say you take them and add them up and go back to the starting point. There are areas where the sequences don't seem to work. The judge is at a certain sequence in the
process, and then he is referred back to some earlier step in the process.

But beyond all of that, it is an approach that we find very unrealistic and unnatural. Yes, when I sentence somebody, sure I consider his criminal record, I consider whether I think he is remorseful or not, whether or not he has cooperated and to what extent; yes, I consider whether he was a large or a small figure in the conspiracy; yes, I consider whether he used any particular skill and that sort of thing. But I don't try to mechanically consider those in a lockstep, sequential method where I am making discrete findings at each step and adding and subtracting and multiplying as I go along. And I think there are two very serious problems with that. One is it simply opens Pandora's box as far as the whole concept of making the sentencing a mini-trial, making it a very cumbersome proceeding where every single step is a battleground over the factual findings, and therefore every step is a potential appeal.

Beyond that, I think, is the question of what we are trying to do with the criminal justice system, what is the perception. Apparently, what we are trying to
remedy is a perception that the system is not consistent, that it is not uniform enough, that it is disparate. But I think we can't substitute by putting in a solution that is worse than the problem.

When I sentence somebody, there are often very many defendants there -- six or eight or ten at a time. They are there, their lawyers are there, the law enforcement officers are there, the public is there, the press is there. And what they are interested in is what am I doing with that particular defendant, what is he telling me, what am I telling him, what analysis am I making, what reasons am I giving for what I am doing. Nobody in that room knows or cares how a judge in Connecticut or Utah or Arizona or somewhere else would handle a hypothetical similar person. Even the criminal element, if you want to look at that, in that region where I am from, they want to know what I am doing, how do I apply justice in that court.

And I think there is a real danger in substituting that sort of process and that sort of perception with the perception that the judge is sitting there with his scratch pad and his calculator and is simply leafing through one table or another and adding and subtracting and multiplying
with his calculator, tallying up much in the sense of a clerk or a quiz show host, he is running up a tote board, and up pops the sentence.

I think we cannot allow that to happen. That is unnatural, and it is, as I say, a cure worse than the problem.

We are troubled somewhat by the concept of the modified real offense situation. We think that is obviously better than the pure charge of conviction method, for all the reasons you have stated. But we are troubled for reasons that I have stated in the paper.

Some of the examples that the Commission gives seem to us not to make a whole lot of sense. The idea that if a man has robbed three banks, and he is indicted for those, but he pleads out to one, that somehow you disregard the other two; the cocaine dealer who has got unlawful weapons in his home is not related -- we find that troublesome.

Our point is not necessarily -- we really don't care whether you add those in to the calculation of the base offense value or not, but we think it must be clear somehow that the judge can look at the real facts and the
total picture, and we ask you to keep in mind the provisions of Section 3661 that says no limitation shall be placed on the type of information concerning the background, character or conduct which the court may consider in imposing the sentence.

We think plea bargaining is essential. We believe that whether one likes it or not, whether one philosophically believes it is a good idea or not, the criminal justice system simply cannot exist without plea bargaining. If plea bargaining were taken away or drastically limited, the system would collapse from its own weight. If a flexible system of plea bargaining is not allowed from the very outset, as sure as dammed up water will seek an outlet somewhere, there will be some kind of disparate, wildly unjust plea bargaining somewhere along the line. We gave you the illustration, I attached a newspaper article to our paper ten years ago, of an incident that happened in our district where the particular court bottled up the cases, refused to plea bargain, announced everybody was getting sentences to serve. He acquired something like 300 jury cases on his docket. An outside judge was sent in to simply wholesale-discharge all of them in two or three days. That
is not a good solution, but that's the kind of thing that happens if unnatural restrictions are placed on plea bargaining.

We think the present system allows a reasonable system of checks and balances between the court and the prosecutor and the defense lawyer. We think if this Commission is concerned with plea bargaining somehow overcoming the system that then the court could be and should be directed -- the parties, rather -- should be in the first instance required to state why they are making that particular plea bargain, and give the court the opportunity to accept it or reject it.

We mourn the apparent death of probation. We don't think the Congress contemplated that. We think that over the years we have accumulated a very professional, very well-trained group of officers, very dedicated to the system. We have developed very careful techniques, community treatment confinement, community services, restitution, home curfews, all that sort of panoply of devices that essentially would go down the drain under this system. It is very difficult for us to figure out who would ever be eligible for probation under this system.
And we do not think -- and I have preached to anyone who would ever listen to me -- I do not think probation is a slap on the wrist, I do not think probation is a cop-out. I think probation is an alternate kind of sentence very well-suited to many kinds of cases. And I think the Congress has stated that all except class A and B felonies could be eligible for probation; that it is in effect a different kind of sentencing. The Commission has been told to do something that minimizes overcrowding, and we have been told to give careful evaluation to certain factors that might lead to a sentence of probation. And we think that that whole structure should not be abandoned.

We agree to a large extent, I suppose, with Judge Breyer. We think that this is a revolutionary concept. We think that the American tradition has generally been to be moderate even when we are being revolutionary. We think that it is extremely important for the Commission to walk before we run. I don't think it is realistic to try to go from no system at all to a theoretically perfect system overnight. The Commission is going to remain in effect. As Judge Breyer said, the Commission can gather data, can gather information, can continue to shape and mold. We must come up with a system not only that the Bench and
Bar understand, but a system that the Bench and Bar believe in. If we in effect create a judicial form of prohibition, it will be a law on the books, but it will be honored largely in the breach.

Our suggestion would be to consider a situation that, at least as the last gentleman said, it is very difficult for us to sit here and throw out ideas without the breadth of study that you ladies and gentlemen have had, but we are not as nearly troubled about the effort to put numbers on the offense characteristics. While I agree with Judge Breyer that that could use some fine-tuning as far as exactly how the categories are structured, and we find some unrealistic aspect of trying to put a precise number on the difference between a serious injury and a severe injury and an extreme injury, and that sort of thing, but with some fine-tuning, we think that the effort to put weights, the effort to structure and define and categorize the offenses is no problem, and the effort to put some kind of weight value on there. Our difficulty is the effort to try to put numerical values on all the things that go into the personal aspects, particularly under Chapter III.

We would urge the Commission to consider in that
area true guidelines, which we don't see that these are.
We don't think these are guidelines at all. We think this
is an effort to mechanically and arithmetically reach a system.
But we would at least ask you to consider a situation where
the court first decides what exactly is the offense that
this individual has committed, look up the value number on
it, and find at that point that that offense generally
carries a certain suggested range of sentencing. Then the
court would be told, through guidelines, to consider all
of the range of factors mentioned in Chapter III plus the
ones that the Commission has so far not passed on -- age,
work record and so forth.

The court would then be told that it must
articulate which of those factors apply and whether they
are aggravating or mitigating factors and therefore whether
the sentence is within the guidelines or above or below.

I think that at least is a start. I think that
is a system that will work. I think that is a system that
the judges and the Bar and the public will accept. And
it would be, I think, no service at all to send back to the
Congress a system that we all know is unrealistic, we all
know nobody can follow, we all know will not work, but say,
"This is what somebody thinks you intended to do, and so this is what we are going to run up the flagpole."

We think that the mere fact that there is no more parole, that therefore there is truth in sentencing; that fact that a judge must and now should state, as he should be doing anyway, with particularity why he is sentencing a particular person the way he is sentencing him; and the fact that appeals are allowed -- those three things themselves are a major step forward. And we think the sort of approach that we are suggesting here would be as good and as realistic a system as the Commission could possibly promulgate the first time up at bat.

We thank you again for the opportunity to be here today. We thank you for listening to us, and we look forward to the second draft.

Thank you very much.

CHAIRMAN WILKINS: Thank you very much.

I know the Commission appreciates not only the thoughtful comments today, but as I reported back after visiting Corpus Christi with you and other judges, the great amount of attention and work that you have put into this. It is most helpful to us. In fact, I'd like
to be able to call upon you in the next few months as we come out with another draft that I think is moving, as we have been doing over the past few months, moving more in this direction as we realize the need for flexibility, the need to maintain discretion, and yet stay within this somewhat restricted mandate from the Congress. We appreciate it very much.

Let me ask any of the Commissioners if you have any questions?

Commissioner MacKinnon?

COMMISSIONER MacKINNON: Judge, first of all, I think that you described to me the ideal system, and to me, I think if you get through and start working with this, you'd come pretty close to doing what we are trying to do here. But you have come up with some quantification objection. And my question is, don't you quantify in every case? You have got to get down to certain months, in the last analysis. But I suppose you want to reach it as an end result and not figure the ingredients in there. That's the only difference I see.

JUDGE KAZEN: Yes, sir, because I don't -- and maybe it's not a realistic distinction, but I think it is --
I think that it is not realistic to pretend that I can take
every, single one of those factors and make a discrete judgment
numerically and weigh precisely how much that factor affects
it, standing alone. I don't think that's how the mind works.
I don't think that's how the system comes out.

And as I said, there are two things wrong with
that. One is that if you are out there, there is no way
you can figure a sentence in advance. I mean, you can look
at the pre-sentence report, you can have some idea of what
you think, but you are going to go out there, and then the
battle begins. And if the defendant realizes that every,
single step along the way is a numerical factor that bumps
or lowers the sentence, then every, single step along the-
way is a point of contention. It is a point of contention
a a mini-trial, whether we like it or not. It is probably
Going to require some sort of evidence some sort of discrete
finding on that particular issue, and then that is going
to be grounds for appeal.

And I also don't think -- no, I don't do it that
way. I don't say, "Well, you've got so much up for this
factor, so much down for this factor, so much up for this
factor, so much down for this factor."
COMMISSIONER MacKINNON: No, but you evaluate it all and the sum total.

JUDGE KAZEN: Yes, yes.

COMMISSIONER MacKINNON: That's all I have. I appreciate your coming down and I appreciate your help.

JUDGE KAZEN: Thank you. We'd be happy to keep in touch, and we look forward to your next product.

CHAIRMAN WILKINS: Thank you very much.

We'll hear from the 8th Circuit at this time, the Honorable Gerald Heaney, who sits on the 8th Circuit Court of Appeals, along with Judge Donald O'Brien, who is the Chief Judge of the Northern District of Iowa.

Gentlemen, good morning.

JUDGE HEANEY: Good morning. I, too, welcome the opportunity to appear before the Commission and to comment on the preliminary draft that you have prepared.

Before making these comments, however, I would like to make our basic point, and that is that the judges of the 8th Circuit--what I have said has been circulated to them -- believe that it would be a grave mistake if you were to adopt the guidelines in their present form.

CHAIRMAN WILKINS: We agree with that.
JUDGE HEANEY: Well, the system that you propose. And I'll get into that in some more detail.

I think there are two alternatives. One is as an initial step, to adopt the Minnesota system, and the second would be to adopt a system similar to what Judge Kazen has outlined to us this morning, that I think has a good deal of merit.

We feel that the guidelines as proposed raise serious Constitutional questions, are extremely complex, will add considerably to the work of the already overburdened District Court judges, will multiply the number of appeals, and will not eliminate disparities. In fact, in our judgment, they will create more disparities than they will eliminate.

Now, I think it is important at the outset that we also realize that the Comprehensive Crime Control Act of 1984 makes very significant changes to the whole sentencing process, and as the other speakers have pointed out, that the judges are now going to be imposing real sentences. They are no longer going to be able to sentence a person to 15 years with the knowledge that they are only going to service 6. They are going to be imposing a real sentence. They are no longer going to be protected by the Parole
Commission. Persons aren't going to be released early, and so the judges know now that what they give is what the person gets.

We also have to keep in mind that the Congress itself has moved towards establishing mandatory minimum sentences for a number of crimes, and elsewhere in the statute has indicated certain other crimes where the sentence imposed should be at or near the statutory maximum.

Now, these changes in and of themselves will require a lot of time and labor to understand and to implement. We are going to have problems with the public who are used to seeing particular types of offenders sentenced to 15 years who are now obviously going to have to be given much shorter sentences, and we are going to have a problem explaining that to the public and even to the lawyers who are involved in the process.

As has been pointed out, we can move slowly on this. The first guidelines need not be the most complex ones, because we have the years ahead of us to make those changes.

Now, we recognize that the Minnesota model gives
very great discretion to the prosecutors. The Minnesota Commission recognizes that. And while we have some reservations with respect to that, we feel it probably would be better as a first step than to go into the guidelines as you now have them drawn.

Now, I realize that they are preliminary. But what we have done is to ask the probation officers of our four busiest courts to prepare an analysis for us as to what would happen if persons were sentenced pursuant to these guidelines. And we did so knowing that your numbers aren't final, but just as you had to have a point to start, we had to have a point to start. And I am going to file these with the Commission so that you and your staff will have an opportunity to analyze them, and I would greatly appreciate it if your version of the sentences that would be called for under the guidelines are consistent with those that our probation officers have, because I am fully convinced that when you come out with your next draft of the guidelines, that if you circulate that draft to the most experienced district court judges in the country and to the most experienced probation officers, and ask them to analyze them, that you will find that you have as much disparity as you
have at the present time, simply because there is so much room for individual judgment -- did the person have a gun or didn't he; did he have it in his pocket or was he holding it in his hand; was the gun loaded or wasn't it loaded. You can go down through every one of these factors -- psychological harm, whatever -- and the judge, if he is going to do his job, is going to have to examine them very carefully, and what his ultimate finding is may or may not be consistent with what another judge would do under the same circumstances.

Number two, we are convinced that very few persons will be eligible for probation. I am going to speak to that a little later on.

Now, the fact-finding responsibilities of the probation officers will be dramatically increased because if the district court judges are going to rely on the pre-sentence reports, and if the probation officers know that their report is going to be the final basis for a determinate time in prison, all of them have told me that we are just going to have to do an even better job than we have been doing up to this point. It is going to take us more time, and we aren't going to have the personnel to do the supervision job that we are called upon to do.
It is our view also that the judges will have to devote substantially more time to the sentencing process, notwithstanding the fact that their judgmental role in that process will be diminished, and the number of guilty pleas will decline significantly unless we are going to permit the plea bargaining process to override the guidelines. And I want to talk about that a little bit more. And of course, there are going to be numerous appeals.

On the basis of the Minnesota experience, we estimate that in our Circuit, we'll get somewhere about 250 additional appeals per year from persons who are dissatisfied with the sentence or from the government that had been dissatisfied with it.

Now, first of all with respect to the length of the sentence. As I say, we asked the chief probation officers to review the guidelines and to take actual cases where people had actually been sentenced and to go through that and work with their chief judge and attempt to come up with the sentence that they felt would be proper.

Now, the study that we made in four States reviewed 100 cases including 76 in which a term of imprisonment was imposed. The total number of months to be served in those
cases was 1,734 months. Now, using exactly the same cases, our probation officers come up with those persons would be required to serve 5,640 months under the guidelines. This represents an increase of 225 percent, or an average increase of about 40 months for each person sentenced.

Now, it may well be that you believe that you are reflecting Congress' intent that persons convicted of crimes, particularly those that are drug-related and that involve violence, be sent to prison for longer periods of time. Perhaps you are correct on that. But even if you exclude those crimes, we found that the average sentence was substantially increased.

We are submitting the separate appendixes that your staff and you can review carefully.

Now, in that line, I'd like to make another point. If you could just turn to page 8 of my remarks you will see in there the last page of a pre-sentence report, the full report of which is set forth in the material that I am furnishing to you. And you will notice on that report that this person was convicted of bank robbery; he was sentenced to 15 years on Count 1, to 5 years on Count 2, which was a conspiracy count which was to run consecutively,
and Count 2 was to be without parole. And so he probably would have served about 36 months under the present guidelines if it had not been for the longer sentence. But because the judge's sentence was longer, he probably would wind up serving about seven years, about that length of time.

Now, as our chief probation officer for this District has computed it, he would wind up serving 258 to 322 months.

The significant thing about this, and what bothers us a great deal and bothers me particularly, is that the base offense value is 36. Yet, because he had a gun, you add 60 points. Now, the anomaly of that is that you have to prove the base offense, which only has sanction units of 36, beyond a reasonable doubt, and you only have to prove that he carried a gun by a preponderance of the evidence, and yet the penalty for carrying the gun is almost twice that for the base offense. And that is true as you go down the line. The computed the psychological harm to the victim at 24 here, which is almost equal to the value of the base offense, but yet it only needs to be proved by a preponderance of the evidence. And then the sanction units are so great for the conduct that was involved in
the offense; obviously, the big fight in every sentencing
Procedure is not going to be whether he committed the
base offense -- he probably has plead guilty to that -- the
main fight is going to be on the points that really make
a difference. And I think that you are either going to have
to do one of two things. You are either going to have to
have many hearings and a large number of cases, or we are
going to have to do as several of the district attorneys
that I have heard testify here over the last few days have
said, and that is that you permit the plea bargain to override
the guidelines.

Now, I don't know which of those two alternatives
would be the worst. I think that our judges, with a few
exceptions, will resist mightily any effort which will
take them out of the plea bargaining process. Judges
like Judge Eisele from the Eastern District of Arkansas,
one of our most distinguished District Court judges, I think
it would have to be a direct Act of Congress before he
would agree to participate in any process in which the
prosecutor and the defense counsel would prepare a statement
of facts that the prosecutor said that he could prove
by a preponderance of the evidence, listing the factors
that would be important in the ultimate decisionmaking process and then give him no opportunity to either accept or reject that or examine into the truthfulness of the factual statement that had been developed by the prosecutor and the defendant.

CHAIRMAN WILKINS: Let me just say, Judge, I don't mean to interrupt you, but there is no thought doing that by anyone.

JUDGE HEANEY: Well, if that is true, then that will be wonderful. But I sat here, and I heard the last witness, the United States District Attorney, the witness before-last, testify at great length that we've got to take away the discretion of the District Court judges, but don't limit my discretion to enter into a plea bargain. And I heard two or three other United States District Attorneys say substantially the same thing, that the system isn't going to work.

And I think it would be a grave mistake if we permitted prosecutors and defense attorneys to "cook the books" -- the term that we use in Minnesota is "swallow the gun". And in case after case after case, that's precisely what you do, because if you have a notation in there that
there was a gun used, then the plea can't be accepted. So, they "cook the books" and "swallow the gun", and they bring it into the judge, and the busy judges more often than not will accept the plea. Now, some of our judges may be willing to do that, but a majority of them at least have indicated to me that under no circumstances are they prepared to accept that as an alternative.

CHAIRMAN WILKINS: And we do not advocate that.

JUDGE HEANEY: Well, that's good.

COMMISSIONER BREYER: I don't think the U.S. Attorneys have. I think everyone has always spoken on the assumption that the judge would control the decision about whether or not to accept the plea.

JUDGE HEANEY: Well, I think I must have been listening wrong over the last --

COMMISSIONER MacKINNON: And the other thing is, Judge, that we are going to deal with that, too, period.

JUDGE HEANEY: Well, that would be helpful. But if you deal with it, then we are faced with the other problem, and that is --

COMMISSIONER MacKINNON: You won't have any problem with it when we deal with it.
JUDGE HEANEY: Then we are going to have the other problem of the evidentiary hearings, or they have been referred to as the "mini-trials".

COMMISSIONER MacKINNON: And that may be eliminated, too.

JUDGE HEANEY: Well, I hope so.

I'd like to talk now a little bit about probation. And I want to call to your attention particularly the most comprehensive study on the results of probation that has been made in the United States. This is a 16-year study made by the Eastern District of Arkansas by Judge Eisele. He has kept a record over the entire period of time of every person in that court who has been placed on probation and what that individual's record has been after he has been released.

And I quote from you, just from page 57, that "Over the 16-year period the average violation rate was 2.7 for probationers, 9.8 for parolees, and 36.3 for mandatory releasees.

So if there is anything that all of our judges agree with whole-heartedly, it is that we should not destroy the system of probation, because not only do these statistics..."
indicate that probation has worked, but the testimony of
the chief probation officer presented to this committee of
the United States, which I have read, also indicates that
while their experience hasn't been as good as it is in
Arkansas, that generally the experience has been helpful.

Now, I listened to Judge Breyer's question the
other day, as to just exactly how we are going to do this.
And I think the first step in this process would be to
compile your own complete statistics with respect to
probationers, where it has been successful, where it hasn't
been successful, and then write your guidelines
consistent with that experience. And you may even say
that persons who are accused of this and this kind of
crime should not be placed on probation, or should ordinarily
not be placed on probation, or define your characteristics.
But for goodness sake, don't disregard the years of favorable
experience that we have had with respect to probation.

Now, we can argue, and we heard the Chief of
Police testify yesterday, as to whether the granting of
probation encourages other persons to engage in crime,
and I suppose that we could have reams and reams and reams
of statistics one way and another on that, and I don't know
as we are ever going to agree on an answer to it. And I
would only say that Congress has not indicated that it feels
that probation has failed, that it should be ended, and I
think that we should do our very best to retain the alternative
of probation in those types of situations where all of the
evidence indicates that it has worked well.

Now, I think that I have covered almost everything
that I intended to cover and would simply close by stating
that our recommendations are that you take your time adopting
the guidelines, that when you do adopt them, keep them as
simple as possible. We would prefer an offense of conviction
model; if not, a model similar to that suggested by Judge
Kazen, I am sure would be our next alternative.

I think that you should consider that the guidelines
should be as broad and general as possible, and that we should
recognize that probation has worked well and that you give
very careful consideration to the whole guilty plea process,
and I have happy to have your assurances on that.

Now, there are a number of questions that you
have asked. We have answered those, and they are in the
data that we have provided. I guess there is one other point
that I wanted to talk about, and that is this business of
the overcrowding of prisons.

All of us who are on the Bench have sat on cases in which prison conditions have been the issue, and our Circuit as well as many others have held that prison conditions are unconstitutional in a number of municipal and State prisons. And I think that an individual judge, when he is sentencing the person before him will ordinarily not consider what the populations of the prisons of the United States are. And the only exception to that would be if we knew that this person were going to be sent to an unconstitutional prison setting. That certainly would influence our thinking.

But your role is a different role. You have been asked by the Congress really, in effect, to fix the length of sentences. You are not sentencing an individual defendant to a particular prison. You are asked to fix the sentences, and the level at which you fix those sentences is going to determine the prison population. And I don't believe that you can anticipate that Congress is going to necessarily meet the needs for prisons in advance of legislation on their part.

CHAIRMAN WILKINS: Thank you very much,
Judge.

Yes, sir?

JUDGE O'BRIEN: Mr. Chairman, I know you are running behind, but first of all, I did give you a prepared statement, and I'd appreciate it if you'd read that. I put a lot of thought into it.

But I have been listening for the last couple days, and there are a couple things I'd like to address quickly, if I could.

CHAIRMAN WILKINS: Yes, sir.

JUDGE O'BRIEN: Judge MacKinnon said yesterday that this is a pretty tight statute that we've been handed. And I'd admit that it's pretty tight. Section 994 entitled "Duties" is certainly fairly tight.

Judge, 994 is so tight that it may be impossible. I took the liberty -- and I hope you won't mind -- of checking all you folks out, because I don't go anyplace unless I know where I'm going, and I've read your stuff, and I've talked --

COMMISSIONER MacKINNON: You noticed that I came from Sioux City, didn't you?

JUDGE O'BRIEN: Yes, sir.
COMMISSIONER BREYER: I hope you've read a lot about airline deregulation.

JUDGE O'BRIEN: I have. And I found out on Judge MacKinnon, they say to me that, "He's a very resolute fellow, a tough S.O.B.," and so forth.

COMMISSIONER MacKINNON: That was just when we were playing Iowa.

JUDGE O'BRIEN: What I want to say is this. My perception of you is, after listening for two days here, that you are not so tough that you'd march into the Valley of Death with the 600. And they also said that you wouldn't be gungho to limit judges' prerogatives. And I don't think you are, either.

But now, 994 in this tough code section that you are talking about --

COMMISSIONER MacKINNON: Judge, let me interrupt you just a minute.

JUDGE O'BRIEN: Yes.

COMMISSIONER MacKINNON: You are absolutely right. And I often cite the circumstance when I was U.S. Attorney, and we had a bank robbery case. Judge Nordby gave him 25 years. Within three weeks, we had another case
of bank robbery that was handled, and the judge gave straight probation. And I thought both sentences were perfect.

JUDGE O'BRIEN: All right. Listen to this for just a minute, will you, Judge?

COMMISSIONER MacKINNON: Yes.

JUDGE O'BRIEN: Nine ninety-four, "Duties of the Commissioner" -- the only way that comes ahead of 995, which is the powers, is because it's got a lower number. No one will say that it's soft if this Commission follows 995(a)(20) before you completely carry out your duties under 994.

Now, 995(a)(20) says "make recommendations to Congress concerning modification or enactment of statutes". They are even asking you to give them some new statutes.

So I don't think that you've got to worry about how tough it is. You said yesterday --

COMMISSIONER MacKINNON: Judge, it's a fine point of legislative interpretation that the statement that is later in the statute sometimes overrides the former statement.

JUDGE O'BRIEN: Well, I'll bet you've ruled
differently, or you should have if you haven't.

COMMISSIONER MacKINNON: Well, that's what you
were arguing.

JUDGE O'BRIEN: No. I understand. But let me
just say to you, you said yesterday we've got a problem,
and we can't duck it. Nobody wants you to duck it. But
you don't have to perfect Chapter 994 before you ever taste
995.

COMMISSIONER MacKINNON: We've got to take them
all together.

JUDGE O'BRIEN: And one other thing. Politics
is the art of the possible. The Senators and the Representa-
tives, they couldn't get a perfect bill. Two titans from
the Senate met late in the legislative hours and compromised.
Neither one of them liked what they were doing. Maybe they
both went outside and held their noses; I don't know for
sure. But they both knew it wasn't perfect. It's not
part of the Constitution.

This Commission is not going to be shirking your
mandate if you tell them so, or at least invoke 995(a)(20)
and make recommendations with some modifications.

Thank you, and I'm sorry I held you up.
COMMISSIONER MacKINNON: Judge, the final vote in the Senate was 99-to-1.

JUDGE O'BRIEN: I understand. It was late at night. One guy said, "I'm not going for this at all unless you go for this." It was a big trade.

COMMISSIONER MacKINNON: I served on the Hill, and I know what you are talking about.

JUDGE O'BRIEN: That's right.

Mr. Chairman, can I say one other thing?

CHAIRMAN WILKINS: Yes. Take your time.

JUDGE O'BRIEN: All right. I am an old U.S. Attorney; 25 years ago, I was a U.S. Attorney, one of the youngest in the United States. And I was rough and tumble, and I had good luck, and I won a lot of cases for the government. And I am not bragging about that, but I have to say that so you'll know where I'm coming from.

I've been sitting here for two days, and all the prosecutors have been in here, and man, they are tough prosecutors. I have a problem with it, and I'll tell you what it is. I used to try anybody that came, all comers, and when it was all over, I didn't really give a damn what the sentence was. That wasn't my problem. I had convicted
somebody, I had done a good job. If the judge -- and they
weren't -- but if they got loony and let them go, that
wasn't my problem. I notice all these prosecutors coming
in here, and they are saying, "Boy, it's bad news."

Now, let me tell you, in the House of Representa-
tives report -- and the citation is in my prepared remarks --
Congressman Conyers says this -- and I think this is important
-- "Since discretion and the cause of any resultant disparity
is currently divided among the court, the prosecutors, the
police and the Parole Commission, any curtailment of the
discretion of one sector through guidelines will merely
increase the power of the others without really addressing
disparity."

Now, what is happening is that the Parole
Commission is gone. The courts are cut back. The police
situation is a constant. So who is filling all this hole
that used to be part of the parole and part of the judges?
It's going to be the U.S. Attorneys have stepped in and all
this discretion.

I want to tell you that as a U.S. Attorney it
was a fiefdom. Nobody ever called me up from Washington
and said, hey, you've got to do this or you've got to
do that, and if they did, I wouldn't have done it anyway.
Every U.S. Attorney is just all by himself, and there may
be as much disparity in U.S. Attorneys as there are
judges.

But if you think about it, the people who come
in and who are going to be handling these pleas in lots of
lots of instances, young lawyers less than five years out
of law school, they are going to be coming in there, and
they are going to be talking about this discretion that the
judge used to have; they now have it. And I know I'm talking
too long, but I'm going to tell you one quick story, and
then I'll quit.

Judge last week, Mr. Baer, I got from your place
a letter, and it said, "Would you kindly comment on this?
In 1962, a bank robber was convicted and given 50 years.
He is still in jail. You recommended at that time as the
prosecutor that he should not get parole. What do you
think about it now?"

I wrote back and said, "What did the judge say?"
They wrote back and said, "The judge said he had
no comment."

Now, the judge was older than I was and wiser
than I was, but I said, "No comment."

Twenty-five years later, this fellow is still in because I said don't let him be out on parole. Now, was I smarter then than I am now? Are these young U.S. Attorneys, who are going to be doing the same thing, are they smarter now than they will be 25 years from now? I'm not so sure. I don't know that for sure.

I have been a visiting judge. You go down to the Department of Justice, and you sit there for a week, and they bring in all their new prosecutors, and you help them, and you test them, and you try to get them to be better prosecutors. They are good kids -- but they are kids. And those are the people that we are supposed to be giving our discretion away to.

One of the men came in this morning and he said the U.S. Attorney's certification ought to be enough. Now, does he mean it ought to be enough that the judge has got to buy it, or does he mean it ought to be enough so they don't have a hearing? I hope it's not that the judge would have to buy it.

I would ask the Chairman, and maybe you are the only one on this Commission who has ever sentenced anybody,
have you ever turned down a prosecutor who said to you, "This guy has really helped us. We made four other cases." I don't think you've ever turned anybody down on a deal like that; I'd swear you haven't.

Now, just one last thing, if I could. This is from one of our more distinguished judges in the 8th Circuit, and here is what he says. "The judge has always exercised considerable discretionary power. Sentencing power in a judge is most appropriate because the judge is an impartial tribunal, not the advocate for one side as is the prosecutor. The sentencing guidelines legislation in the proposed guidelines reduce the sentencing judge's discretionary power to a token. The converse side of this is that the prosecutor's power is expanded, because there is little, if any, check on the prosecutor's traditional powers arising from his choice of charges and plea bargaining and his power is further expanded by his right to certify one of three degrees of cooperation. Under that power, he can grant or deny defense reduction and offense value up to 40 percent. It looks to me like the new law and the guidelines increase the prosecutor's sentencing power to about 90 percent and reduce the
judge's power to about 10 percent. I think that is fundamentally wrong." Judge Vieter, Chief Judge, DesMoines.

Now I am going to quit, but I'd like to ask you if it would be all right -- I've got some thoughts on Mr. Block's tough problem, and what do you do with probation, and I've got some thoughts on Judge Breyer's problem of what do you do, should we really wait, or are we missing an opportunity. But if it is okay, I am going to write them letters about that, and thank you.

CHAIRMAN WILKINS: Thank you. We appreciate it very much, and I appreciate your comments.

You know, it was pointed out and suggested -- (inaudible) -- upon a charge of sentencing, as I understand it.

JUDGE HEANEY: Yes. In other words, our Minnesota system is a simpler system from which you could move to a more complex one.

CHAIRMAN WILKINS: But if we did that, that would just about give it all to the prosecuting attorney, and that's why we primarily have adjusted that concept.

JUDGE HEANEY: It does give more discretion to the prosecutor than will be given under your system. But
I think you have to weigh the two of them. And your system really makes a "bean-counter" out of the judge, with the conduct and the conduct values precisely allocated. And as I say, he has either got one or two alternatives. He is either going to have to accept the version offered by the prosecutor, or he and his probation officer are going to have to figure it out, present it to the defendant, and if the defendant is willing to accept it, fine, if he isn't, then they are going to have an evidentiary hearing. And I think it is going to be terribly complicated, terribly time-consuming, and I don't think it is going to work.

CHAIRMAN WILKINS: Do you have a question? Go ahead, Judge Breyer.

COMMISSIONER BREYER: Well, that's the real trade-off. The trade-off is, on the one hand, as you move toward the charge offense, you give more and more power to the prosecutor under a determinative sentencing system to actually fix the sentence. But what you are gaining from that is fewer evidentiary hearings.

But if there is a way to simplify the hearing process so that in fact there turn out not to be an enormous number of evidentiary hearings -- and the price of that is
giving more discretion to the judge. You see, every silver
lining in this business comes along with its own cloud. But
look -- a system that is modified real offense, let's
say, which gives more discretionary power to the judge will
avoid both the many evidentiary hearings that you fear and
will also avoid giving the prosecutor the greater discretion
to fix the sentence, which you also fear. And the only price
of that one is to give more discretionary power to the judge,
which you like.

And so it seems to me that's where you should
end up.

JUDGE HEANEY: But there is another factor in
there that I think that we have to also put in the scales,
and that is the importance that we are giving to the non-
charged conduct which, in most of the examples that we have
developed, turns out to be more important in the ultimate
sentence than does the charged conduct.

And what we do in the Minnesota system is that
if the prosecutor wants a long sentence, he is going to have
to charge it and prove it, or get a plea of guilty. And
in your system, what he can do is he can under-charge and
achieve the same result by a preponderance of the evidence
on those factors --

COMMISSIONER BREYER: That's why you limit them
to a very few. If you limit them to a very few and those
that are specified, you minimize that problem.

JUDGE HEANEY: Well, it may be that you can do
it. I don't think the first draft does it, because in all
of the examples that we had from the first draft, the
associated conduct turned out to be more important,
significantly more important, than did the charged conduct.
And that, it seems to me, is putting the cart before the
horse.

COMMISSIONER BREYER: That is correct.

CHAIRMAN WILKINS: Well, the numbers were very
tentative, as you point out. We did pick 60 months for a
Gun, because there is a Federal statute that it is a mandatory
five-year sentence if you use a gun.

JUDGE HEANEY: Yes, I understand that.

CHAIRMAN WILKINS: So that was just something
basic, because we don't have the research that we need yet.
But it is on the way, I hope.

But we don't believe -- and this is a struggle --
that the fellow who comes in the bank on videotape with a
sawed-off shotgun ought not be sanctioned for carrying that shotgun in that violent act. And we know it happens today, because you plea down to unarmed bank robbery, or something like that.

JUDGE HEANEY: Well, I think that I would agree with you, but then the question is should the prosecutor -- if he charges that he had a gun, then it goes up to 25 years.

CHAIRMAN WILKINS: Right.

JUDGE HEANEY: Under your guidelines here, he gets an additional 60 months for that, along with the other sanctions for the other conduct. And it adds up to be, as I say, about nine or ten times what the base value of the offense is.

And that really bothers me. In other words, for the proven offense, you get 36 sanction units; for the unproven conduct, you get 235.

CHAIRMAN WILKINS: Well, again, if the numbers were changed to what you would consider to be more realistic, which I assure you is going to happen, would you have the same concern? We are concerned about the process right now.

JUDGE HEANEY: Okay. If the numbers were more
Realistic, if there were sufficient discretion to place worthy
people on probation, if we take care of the guilty plea
process and then move towards a system, as Judge Kazen
has suggested, in terms of a value system, I would think
that you would get a good deal more support from the District
judges than you are getting at the present time.

CHAIRMAN WILKINS: Thank you. Let me ask Judge
Breyer to ask his stock question on probation, or should
I ask it? I'd like for you all to hear it and think about
this issue, because it is very troublesome to us.

COMMISSIONER BREYER: Well, I finally got the
memo I liked from Mr. Greacen, actually, at the ABA, in the
testimony here. So I'll put this in the form of a legal
Question.

Imagine you were me, as we fear we might be
testifying in the Senate, let's say, and this would be the
question I think we might get asked. What you are suggesting
is that as to every sentence, there be an alternative of
probation. Now, our basic job in writing guidelines, I take
it, is to take certain categories, like a bank robber who
has one conviction, and he has a gun, and tell the judges,
"Judge, this is the typical sentence for that -- typical.
This is what we think you should give." Now, that's what we're supposed to tell them, right? They can depart if it is atypical, but, "Judge, this is the typical sentence."

So now, Senator Biden, let's say, reads what we've done, he turns to the statute, and he says, "Hey, look at a person who has a gun, and he has taken $50,000 from a bank, and he has one past conviction. I have before me what the Commission is recommending. You are recommending to the judge, 'Judge, put him in jail for ten years, or don't put him in jail at all.'"

He says, "How can both be typical? I mean, you are not saying to put him in jail for one year, two years, three years. I could understand how you'd give a broad range, but what I can't understand is how you give a range which says either a long prison sentence or no prison sentence, but not a short prison sentence."

And then I would go and read the statute, which says, "If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than 25 percent."

And I'd say, "Commissioner, you have recommended
to the judges that for a bank robber with a gun who has a
testimony of one prior conviction, the judge shall either give
ten years or no years. It sounds to me as if that is greater
than 25 percent. Anyway, it sounds to me as if it is a
little screwy, since I don't see how it could be typical
both to give him nothing and to give him ten, but not to
give him three, four, five, six, or seven."

I mean, that's the kind of question I fear, and
I'd like to know the answer.

JUDGE HEANEY: Of course, you are absolutely
right. And your answer yesterday was depart.

COMMISSIONER BREYER: Yes, that's right.

JUDGE HEANEY: And I agree with you, depart.

But when we have a system in which 40 percent of the persons
who are now tried or plead guilty are given probation, you
don't have a system that requires you to depart in 40
percent of the instances.

And so my answer to it was, as I gave you when
I started out, was first of all to make a comprehensive
study as to the persons who are currently being placed on
probation, the success ratio that you are having with the
various crimes, and then write your guidelines for probation
that will take care of most of the cases and then require a departure in the kind of case that you have, just the way you are handling the rest of it. I think that will answer your question. In other words, your threshold at the present time is much too low.

COMMISSIONER BREYER: Well, I mean, what that suggests -- and maybe it is possible; I mean, enough people seem to think it is, and they are all very good judges -- I mean, I am talking about legally now -- maybe you could say, "All right, Judge, you could look to probation as an alternative to prison where the prison sentence is up to let's say two or three years. But if it is nine or ten years, you can't look to probation."

JUDGE HEANEY: Precisely -- or whatever standard you come up with. Or you might say, well, if a gun was used, or if a person was hurt, you can't give probation. I am just using that as an example.

It seems to me it is relatively easy to do that, and it is highly desirable, because you don't want to throw out 40 percent or nearly 40 percent of the situations that we have at the present time.

JUDGE O'BRIEN: There might be another way to
go at it. I don't know what your data shows, but I'd be
awfully surprised if you got very many statistics which
show that people who have already been convicted of bank
robbery are getting probation the second time around.

COMMISSIONER BREYER: Well, there are some, there
are some.

COMMISSIONER BLOCK: Three percent of all
bank robberies.

JUDGE O'BRIEN: Well, that's astounding to me.
But I would say this to you, that instead of talking about
maybe three years instead of eight or something, you'd
be better off to be talking about no probation for a repeat
offender of a serious crime unless the Circuit Court of
Appeals would approve a very detailed, written situation
that the dumb judge sent. Now, if the judge is dumb,
hopefully everybody on the Circuit isn't dumb, so you'd
have a safeguard there.

COMMISSIONER BREYER: Yes. You see, that suggests
another approach to the problem which is to just say, all
right, for the ten-year sentence, we don't say anything
about probation except to tell the judge, "If you think
this case warrants probation, the bank robber of one year,
then depart from the guidelines." Depart.

JUDGE HEANEY: Depart, right.

COMMISSIONER BREYER: Depart. That's the way to handle it.

JUDGE O'BRIEN: Yes, but that isn't going to be an answer, either.

COMMISSIONER BREYER: They have to give their reasons.

JUDGE O'BRIEN: I've talked to several judges in Florida who are working on this and several in Minnesota, and they say that finally it has gotten down to where they've pretty near sawed off their legs on every reason that they thought was good for departing, and it's down now to where in Minnesota, two judges told me departing is awful tough.

COMMISSIONER BREYER: Well, we saw some statistics that in Minnesota they depart in half the cases. It was something like 49 percent.

JUDGE O'BRIEN: But are they being adopted? You can depart all you want; it can get reversed.

JUDGE HEANEY: I think the most recent statistics are about 33 percent where they depart from the guidelines, but the departures are mainly minimal, and the number of
appeals from the departures are about equally divided between
the State and the defendants. And I think that last year,
we had something like 36 appeals for departures.

And I think what Judge O'Brien is saying is that
the supreme Court is gradually whittling away at the
circumstances under which they can depart.

All I ask on probation is don't throw out the
baby with the bath water.

CHAIRMAN WILKINS: We are very sensitive to that.

If you are going to be with us a while, we'll
continue this conversation. I'd like to talk to you later
on today, if you can.

JUDGE HEANEY: Yes. We are going to be here.

I have got to catch a plane at four o'clock.

CHAIRMAN WILKINS: I'll see you over lunch, then.

Thank you.

JUDGE HEANEY: Thank you.

JUDGE O'BRIEN: Thank you.

CHAIRMAN WILKINS: Our next witnesses are honorable
Albert Quie and honorable Robert F. Utter, representing
the Justice Fellowship. We are well-covered with Minnesota
today with Governor Quie of Minnesota and a former
Congressman from that State as well. Glad to see you.

GOVERNOR QUIE: Thank you very much. I appreciate it.

CHAIRMAN WILKINS: Mr. Utter is a Supreme Court Justice from Washington State, and we are honored by your presence. Thank you.

JUDGE UTTER: Thank you.

GOVERNOR QUIE: That's right. Justice Robbert Utter is here, on my left. On my right is Daniel Van Ness, who is President of Justice Fellowship, and he has written up the written testimony which we are pleased to submit to you.

We will just make some oral comments and then respond to any questions that you might have.

CHAIRMAN WILKINS: Thank you.

GOVERNOR QUIE: I am Chairman of the Board of Justice Fellowship. This is a national public education and lobbying organization that works for criminal justice reforms which are consistent with biblical teaching on justice and righteousness. And one of the efforts is towards the end of holding offenders culpable for the harm that they cause their victims, rather than solely the harm that they cause the state.
I am interested in the work of this Commission because I was in the State Legislature, was in the Congress for 21 years, and then Governor of the State; I was Governor when the sentencing guidelines were established in Minnesota. The Commission had done its work before I was Governor, but my first year, this was adopted. So I look at it as from the political point of view and faced with that.

I now am also the Director of Prison Fellowship, and because of that, deal with volunteers who are dealing with inmates, and I go into the prisons myself and deal with the inmates, so I get a different vantage point than I used to do when I was holding public office myself.

And I want to commend you on this task. I know it is a difficult task. But I would say that it is well-accepted in Minnesota what we have done. I don't believe that that would be repealed in Minnesota -- not that it is agreed by everyone -- but there are two things that I think make it stand out. One is that we did deal with the impact it has on the prison population, and I think our Commission did well that there was not an immediate increase in prison population because of sentencing guidelines, but there was an increase soon thereafter. The Commission met again,
adjusted the guidelines, in order that we would keep our prison population at a reasonable level. And we have it at a reasonable level because we rent out beds to other States and to the Federal government. Since we started doing that, while I was Governor in '81, we have made $22 million out there. So it is all right to do that.

The other part besides impact is that prior to the guidelines, we had started on a track where those who had committed violent crimes and serious crimes would go to prison, and those who did not commit violent and serious crimes would be handled through probation, community corrections. I believe the sentencing guidelines have enhanced that. So when one looks at the fact that our prison population has not increased, there has been an increase in the number of violent crimes and a reduction of non-violent crimes, and we have made adjustment within the State.

So those are the comments I would make, and I'd like to turn it over to Justice Utter now.

CHAIRMAN WILKINS: Justice Utter?

JUSTICE UTTER: We, I think, are the second State to adopt essentially the Minnesota plan. It is a
pleasure for me to appear with my friend, Governor Quie, to comment on that.

Our success has not been as great as theirs has been. Our initial legislation called for doing away with the Board of Prison Terms and Paroles, doing away with probation following the prison term that had been imposed. That's not working, and it probably will be repealed and modified in the coming session. We find there are some offenders for whom probation must be given after release. We find that to have uniformity throughout the State in probation violation hearings, that it is necessary to work on a broad basis rather than an individual jurisdiction basis. I notice you deal in part with that in your report, and I would just simply share that with you.

It has been "back to school" for me. I was a trial judge for a number of years, and I sat on at least 16,000 individual sentencings. I have been a Supreme Court Judge for 15 years now, and thank goodness I don't have to do that anymore. But I understand the problems you are dealing with.

There are two different perspectives I'd like to bring shortly before you. One is the perspective of
victims. In the early 1970s, I helped draft a victims rights bill for Washington State. I think it was the third or fourth victim compensation bill in the United States. And it started a history, at least in our State, and followed subsequently by many other States, of a focus of concerns on victims as clients, actually, of the criminal justice system, not as an unwanted appendage, but really as the focus of what we do.

I am concerned in going over these guidelines and noting, I think, a diminution, not intentionally but just because so much has been said in the other areas about how victims are affected by this.

I think we are troubled that the guideline tables translate offense values only into prison terms. In our written testimony that we have submitted, we have demonstrated an emphasis on reparation, characterizes both the enabling legislation that you are working under and significant parts of the draft guidelines. The other major emphasis is, of course, incapacitation for serious offenders.

We believe that a return to a reparation model in criminal justice is essential. We applaud the initial efforts in this direction, and we urge as you go on to
subsequent drafts that you return to that and explore the
very many areas where a reparation model can be effective.

We are concerned about the failure of the guideline
table to provide for punishments consistent with the reparation
model such as restitution or community service for those
offenders who do not require incapacitation, and a large
number do not. You are dealing with the most difficult
problems, those offenders who do require incapacitation,
and those are hard cases. But for those who do not, there
are a wide variety of services in the community that both
can be available to them and that they can offer to victims
whose lives they have affected.

The guidelines do not even in the words of the
enabling legislation reflect the general appropriateness
of imposing a sentence other than imprisonment in cases
in which a defendant is a first offender who has not been
convicted of a crime of violence or otherwise serious
offense.

We have suggested an alternative approach to the
guideline table on pages 10 through 12 of our written
testimony, which I will not go over in detail. We are
suggesting basically that three scores be calculated --
first, an offense score, secondly a reparation score, and
third, a risk score. The offense score would determine
the length of the sentence; the reparation score, the amount
of restitution and community service; and the risk score,
the amount of control over the offender's freedom which
must be imposed.

The modified real offense approach is promising,
but contains several features that cause us some concern.
The first is that it may actually create unwarranted
disparity if it becomes any more complex, simply because
judges, defense attorneys, prosecutors and probation officers
may be confused about how that road map is to be followed.

We recommend that judges be given explicit
authority to sentence outside of the guidelines in the
event that imposition of the sentence indicated by the
guidelines would result in unwarranted disparity.

Second, the Commission may want to clarify what
special offense characteristics can be raised for the
first time in sentencing. Could prosecutors, concerned
that they may not be able to prove the weapon beyond a
reasonable doubt, charge the offender with simple robbery
and then attempt to prove possession of the weapon at
sentencing with a lower burden of proof? That has been addressed by many previous speakers today, and I won't elaborate on that.

We recommend on pages 18 through 20 of our written testimony that supervised release be used to both assist the prisoner and protect the community. However, the revocation hearings will be burdensome to courts once the Parole Commission is phased out. First, it will create a tremendous caseload problem, and secondly, there is likely to be disparate treatment for similar offenders in revocation hearings as each judge conducts them. I think that is a great practical concern of mine when I see the problems that have arisen within our State in attempting to implement that.

Therefore, we recommend that Congress either create a new national body, which it probably won't do, or that it modify the current Parole Commission to handle revocation procedures, which I think is more practical and gives more uniformity and addresses some of the problems that States who are now experimenting with it are currently facing.

Finally, we have not done a comprehensive analysis of the relative values of some of the offense
scores in the draft. As other speakers have pointed out, there are a number of anomalies. A first-time burglar who does not enter a dwelling and who does not damage and takes no property receives a base score of 24 and serves 12 to 18 months. A person who operates a house of prostitution receives a base score of 12 and serves no time. A person who interferes with another's civil rights receives a base score of 6 and serves no time. A person convicted of importing pure heroin would receive the same sentence as the street dealer who peddles a substance of the same weight, but which contained only a detectable amount of heroin.

Finally, we note that in determining the criminal justice score, the guidelines use prior imprisonment rather than prior conviction. This could present problems, given the well-known differences in length of sentences and in use of imprisonment from State to State within the Federal system.

Thank you for the opportunity to offer our comments this morning. As my voice is coming to an end, so will my comments.

Thank you.

CHAIRMAN WILKINS: Thank you very much. Your
written comments, as all of them, will be distributed not
only to this Commission, but all of our staff, and we will
have a process set up to digest all of this, and so we will
study in detail what you have submitted to us.

I think Commissioner Corrothers has a question.

COMMISSIONER CORROTHERS: Yes. This could be
directed to any or one person, or maybe all of you. We heard
from you and the testimony just prior to your testimony
praise concerning several features of the Minnesota guidelines
system. So I guess I wouldn't ask what you consider the
best features, because obviously, they are numerous. But
are there any features or parts of the Minnesota guidelines
system that you would advise us not to emulate? Are you
aware of any problem areas, pitfalls, that we should avoid?

GOVERNOR QUIE: I wouldn't say pitfalls. I think
maybe we have adjusted them. But listening to the concerns
that people have who are in the corrections system itself,
when a person serves a sentence and a prison term, how they
move out into the community. We have halfway houses and
so forth. But there is a feeling that they would like to
be more involved and to some extent, even wonder if they
are skirting on the edge of the way the interpretation of
the law is in order that they can follow the individual
more closely than they have and provide services for them.

I think it follows on testimony before that was
talking about either the ten years or probation; what about
the person that ought to serve the prison sentence but needs
that time on parole and more supervised, in other words.

COMMISSIONER CORROTHERS: Would that area come
within what you just mentioned, the suggestion about another
organization that would deal with the revocation; that could
be included as an overall solution to that whole area?

GOVERNOR QUIE: Yes, yes.

JUSTICE UDDER: Minnesota courts have had an
interesting problem on what do you do with the judge who
exceeds the guidelines, either in imposing a sentence higher
than the guidelines or in imposing a sentence lower than
the guidelines.

They have adopted a rule that says they will use
essentially a doubling process, and if the sentences were
then doubled, what the recommended guidelines are; the
presumption is that it will not be reviewable. If it is
more than doubled, it is reviewable, but not necessarily
reversible. But it is just a way for the courts to
categorize those cases that are appealed.

Our a State in a 5-to-4 vote in which I dis-
sented, did not adopt that rule. I wish they would have, but that is another aspect of the rule that I think makes some sense.

COMMISSIONER BLOCK: Judge Utter, I just wanted to have a brief inquiry about the suggested trifurcation of the sentencing process that you suggested. You had three scores that you suggested, and that last was a risk score that would in a sense determine whether an individual would be imprisoned or not.

I assume that that score would try to get at the question of incapacitation. How would you then handle the first-time, quote "white-collar offender" in a securities violation, an antitrust violation, in a fraud scheme, bank embezzlement scheme, where the likelihood of risk to the community by that risk score is likely by any measurable standard to be logged? Would you then say to that offender, "Okay, you don't go to prison"?

JUSTICE UTTER: On the contrary. I guess everyone second-guesses my sentences, so it is fair for me to do the other as well. I saw just two days ago one of
the defendants in the securities fraud case in New York that was a participant, apparently a person who was cooperating with the government, but received no jail time at all but rather, a substantial community service sentence. My sense of justice was offended with that, and it fits exactly, I think, the supposition you raise. While I think the risk factor is low, the offense factor is great, and that is a breach of trust. I think in looking at something of this nature you can say while one is low, another factor may be higher.

COMMISSIONER BLOCK: So in terms of the statutory language, if it was an otherwise serious crime, even though it was a first offender, then you would use that offense score to get at the --

JUSTICE UTTER: Precisely.

COMMISSIONER BLOCK: Thank you.

CHAIRMAN WILKINS: Justice Utter and Governor Quie, thank you very much.

GOVERNOR QUIE: Thank you.

CHAIRMAN WILKINS: Our next witness is from the Criminal Justice Section of the ABA, Mr. John Greacen. With Mr. Greacen is Laurie Robinson of the ABA. We are
glad to see both of you. Neither are strangers to our Commission; both have testified in previous hearings on other issues.

MR. GREACEN: Your Honor, thank you very much for the opportunity to appear.

I have been designated by President Eugene Thomas of the American Bar Association to appear today on behalf of the 320,000 members of the American Bar Association, not just its 8,000 criminal practitioners who are part of the Criminal Justice Section.

I want to tell the Commission that I come here with a great deal of personal awkwardness in that I know a number of you personally, and I admire all of you greatly, and I have a great deal of admiration for the work that the staff and the Commission has put into the first draft. So I come with great trepidation to fundamentally oppose the direction in which the first draft went.

I was greatly relieved to hear Judge Breyer describe the second draft, because I think I actually appear here in favor of the second draft. So, my personal awkwardness is greatly relieved.

COMMISSIONER BREYER: Is that a blank check?
(Laughter.)

MR. GREACEN: No. The check was not filled out specifically, so my signature is no more specific than the check.

The American Bar Association is fundamentally opposed to the direction and structure set forth in the preliminary draft guidelines. My purpose today is to explain why we are opposed and to suggest the directions in which we would urge the Commission to move in that second draft.

I did submit a 50-page document to you earlier this week, and I hope you all have it with you, because I would like to refer specifically to the appendices in the course of my remarks, because we want to some length to try to actually draft an alternative that in our view is more consistent with the notion of guidelines than the preliminary draft.

As you know, the American Bar Association does not oppose sentencing guidelines. To the contrary, we strongly recommend them for all jurisdictions, Federal and State. It is just that we don't like the way in which the first draft was structured. We have read very carefully
the Commission's statutory mandate and the legislative history behind it, and we do not believe that the aspects of your approach that we oppose are required by that legislation, nor do we believe that the direction in which we urge you to proceed is in any way inconsistent with the legislation.

There are five principal reasons for our opposition to the current draft. The first is our sense that the discretion of the judges and the lawyers in the system is radically reduced, and in fact, sentencing is turned into a mechanical, numerical ritual. Now, you have heard those words before.

What I can tell you is that the Council of the Criminal Justice Section, which met within the last two weeks and spent a good deal of time talking about this draft, which consists of defense attorneys and prosecutors and judges, uniformly expressed alarm at the sense to which these guidelines would reduce the sentencing process, that has always been an individualized process, to a mechanical, addition/division ritual. And they themselves felt that their roles would be reduced to those of robots.

That is the impression that these guidelines produce.
The American Bar Association's notion of guidelines is guidance, not substitution for the discretion of decision-makers in the process. The ABA standards speak of guidelines as benchmarks, as starting places from which a judge would move in arriving at a sentence.

Our second major objection is the limitation on the factors that a judge can consider and the weight that can be given to different factors.

Our third objection, which is to the modified real offense sentencing, arises out of that former objection, that the modified real offense sentencing proposal limits the vision of the judge to those factors which are specified in the road map.

The American Bar Association believes that a fair sentence has got to take into account all of the behavior of the offender and the offender's characteristics, and all aspects of the offense.

The modified real offense sentencing says look at this amount -- it's not just the charge, that's right -- but you are then drawing other limits. And we would rather have no limits. The judge needs to be able to look at the entire event, the course of conduct out of which it arose,
the history of conduct out of which it arose. Our overall recommendation is that the Commission return to an offense of conviction basis for pegging the initial guideline with an instruction to the judge to take into account all other aspects of the offender's behavior and prior conduct.

Our fourth major objection is what we consider the unprecedented limitation on the availability of probation. The statement goes into considerable length to point out that we think that the Commission has in fact departed from Congress' intention in limiting probation to those offenses that would be sentenced for six months or less.

We point out that in fact, there is very good reason from the research on sentencing for the in/out decision to be based on different considerations from those that would determine the length of the sentence for those who are sent to prison. And therefore, the Commission's approach, which links those two together and which says that the probation is available only for a certain length of sentence, is doing violence to our understanding of the sentencing process, and in fact the Commission should produce different guidelines for the determination of the in/out decision than those that apply to the length of sentence for those who go to prison.
Our fourth major objection is to the length of sentences that are set forth in the document. We know that those are printed numbers. Nonetheless they are much, much longer than the sentences that are currently meted out. Our overall recommendation is that whatever mix of sentences go into the guidelines, ultimately, the overall effect be a level of sentencing comparable to time served under current sentencing practices.

Of course, the Commission should not stick to rigidly the average sentence or the average time served for specific crimes. Your job is to monkey with those and tinker with them so you come out with a more rational process than in the past, but nonetheless the overall severity should be within the range of the severity of time served under the current process.

I have spent a good deal of time in Arizona, and in Arizona there is a saying that a man should not criticize another man until he has walked a mile in his moccasins.

As a result, we tried to actually construct an alternative approach, a draft guideline, that would be consistent with our notion of the direction in which we would urge the Commission to travel. What we found in putting
on your moccasins is that we got very sore feet. It is rocky road, it is tough work. We agree completely with Mr. diGenova's comments that this is a very, very hard business.

Let me mention three parts of the statement that suggest general guidance for the Commission for the future before turning to that specific example.

First, we agree strongly with the approach that Judge Breyer mentioned earlier, that this Commission will be in existence for a long time. Its initial set of guidelines will not be the ultimate set of guidelines. And just as you deal with assessing the risk of offenders, you need also to assess the risk of unintended negative consequences from your own actions. And therefore we recommend the most conservative approach possible in the initial guidelines. Take a step in the right direction, but don't try to come out with the ultimate answer to all the questions.

We strongly recommend a flexible guidelines process which will, in our view, retain the confidence of the judges and the lawyers practicing in the Federal criminal courts. When the guidelines get rigid and the result preordained, then the judge drops out of the discretion-making process, and the lawyers are going to
pick up the slack, and we do not feel that that is necessarily productive. If you leave more flexibility with the judge, then the process will maintain its current balance of power with the prosecutor, the defense attorney and the judge.

We recommend that the focus of analysis be the offense, and that the Commission in looking at a second draft look first to the crime categories, much as you have laid them out now, but attempt to assign the weight of other factors -- prior history, contrition, cooperation, the very tough problem of multiple counts and multiple offenses and overlapping statutes and multiple victimizations as a result of one act. Analyze those within the context of each substantive area of the Code. That is, we think, the principal vice of the first draft, is that it attempts to answer those questions on a universal basis, that there is a universal answer to probation, a universal answer to contrition, to the consecutive versus concurrent sentencing dilemma.

We think the Commission can make much more progress if you focus on those problems within the context of a particular area of criminality, to try to come up with a rule that will be as valid for the securities fraud and the drug dealer and the violent assaulter, we think, is preordained.
to failure or to the kind of mechanical consequence that we perceive in the first draft.

Second, we recommend that the Commission authorize judges to consider those other offense characteristics that are set forth -- I forget now the specific section of your statute; the 11 or 12 other factors including age, family ties, community ties, employment, education and the like. These are very difficult topics to deal with. It is important that they not be specified in the guidelines as the factors that determine the guideline sentence. But we think it would be unfair to eliminate them entirely from the sentencing judge's discretion. It is exactly these qualities that are now used by judges in determining the in/out decision, and the judge needs to be allowed to take them into account.

Finally, we believe the Commission has not paid enough attention to the fact-finding process yet in the guidelines, and we lay out in the statement the considerable discussion of this topic in the ABA standards.

The ABA standards recognize that the sentencing determination cannot be a trial-type determination; the Rules of evidence cannot apply, and a standard beyond
preponderance is unacceptable. What the standards try to do is to carve out a middle ground, though, one that preserves the rights of the offender and the rights of society from incorrect factual determinations by imposing a verification requirement on information used in sentencing. For a judge to act on a fact, that fact would need to be established from two independent sources. I can discuss that later if you have questions on it, but at this point I would like to turn to Appendices A and B and in fact describe for the Commission the alternative approach that we have come up with.

You will see as you look at it that many of the terms, many of the principles here, are very familiar to you, because I have stolen them from your document. The Appendix A suggests that the Commission can divide up all of the available Federal sentences into 21 categories, A through U, that cover the full range of sentences available under Federal law, a much easier way than the great, long table now included in the guidelines. Appendix B assumes that sort of a categorization of the crimes, but Appendix B's validity does not stand or fall on the Commission's acceptance of that greatly simplified list of 21 categories
of length of sentence.

Appendix B begins by setting out the range of sentences that are available to a judge for the Federal crimes involved in assault and battery. Then, it chooses a number of categories for which it establishes benchmark sentences. Those benchmarks are little factual vignettes that say, in the usual case, this kind of conduct deserves this kind of sentence.

COMMISSIONER Breyer: Let me stop you there. When you say "deserves", do you mean the judge must provide that sentence or not?

Mr. Greacen: No.

COMMISSIONER Breyer: He doesn't have to?

Mr. Greacen: No, he does not have to. This is a benchmark.

COMMISSIONER Breyer: Usual case. I have a usual case.

Mr. Greacen: If he has a usual case --

COMMISSIONER Breyer: Yes; does he have to?

Mr. Greacen: I think in the structure of the guidelines as Congress intended them, the judge always has --

COMMISSIONER Breyer: I know, but you have a
number of things here in Appendix B -- and maybe you want
to go into this later; I won't go into it now -- but I
didn't understand in reading it whether you meant that it
is mandatory or discretionary. Sometimes you talk about
the sentencing judge should sentence the offender to
Category A, B, or sentence if rehabilitation, et cetera.
That suggested to me that it was up to the judge whether
or not to choose A, B, C, D, E, F, G, H, I, J, K, L, M,
or et cetera -- up to the judge.

Then I thought, you don't mean it's up to the judge.

If the judge decides that the person has characteristics
1, 2, and 3, he must impose a D. So, which do you mean?
If he has characteristics 1, 2, and 3, he must impose a
D, or if he has characteristics 1, 2, and 3, he may impose
a D?

MR. GREACEN: A fair question. If he had
characteristics A, B, and C, and the appropriate
adjustments were made --

COMMISSIONER BREYER: There are no appropriate --
the judge says, "Here, I have a banker robber. He robbed
a bank, and he took $50,000, and he has one past conviction.
That's the guy. See him -- he is in front of me. He has
brown hair, blue eyes" -- whatever. That's it.

MR. GREACEN: All right. Then the judge would
be required to sentence at that level unless he deviated
from the guideline, giving written reasons why --

COMMISSIONER BREYER: So you mean these are mandatory,
A, B, C, D, E, J, L, et cetera?

MR. GREACEN: Yes, these are the guidelines.
Otherwise, the whole document turns into mush, doesn't it?

COMMISSIONER BREYER: Right. That's what I
thought.

MR. GREACEN: And the guideline scheme turns into
mush.

COMMISSIONER BREYER: Right.

MR. GREACEN: There has to be something from which
to deviate. So that is my answer.

Then, the guideline sets forth adjustments for
prior offenses, prior record, for other characteristics
that would be particularly important to this type of crime,
in effect, instructing the judge to move up or down the
Scale from the benchmark to take into account these factors.
We would anticipate that these would change category to
category of crimes.
Then the guideline sets forth a number of potential aggravating or mitigating factors for the purpose of drawing to the judge's attention that these factors often occur in this particular area of crime and that they should be considered if they are there. They do not limit the judge's ability to consider other aggravators or mitigators.

And then finally, there would be a more philosophical statement of the Commission's thinking, the considerations that should guide the judge in applying this guideline in this category of crimes. And you will see, Judge Breyer, that in drafting this one, just as an example, we have stuck in a limit to the extent to which probation might be available for this type of crime.

COMMISSIONER BREYER: Well, the thing that threw me the other way was you have two paragraphs that say, "The sentencing judge should give primary weight to the purpose of deterrence of other potential offenders where he assaults a high government official." They you say he should give primary weight to the purpose of incapacitation in imposing sentence on an offender convicted on two previous occasions of crimes involving physical violence. I didn't know what you meant by saying he should give primary weight
to one purpose or another, because he has no choice; there is no room for him to give weight to the one thing or the other. If the person is in the category, that's the sentence.

The only time, under the way you've just explained it, one would give weight to the one or the other is if one were operating outside your categories of the Guidelines.

MR. GREACEN: That's right. So this would then be the guidance as to how to operate outside, and whether to operate outside.

COMMISSIONER BREYER: Oh. So in other words, what you are saying is you are trying to give instructions for what deviate from the guidelines, and then, when you do deviate from the guideline, take all your things into account you've written on pages 53 and 54, as helps to the judge who wants to deviate.

MR. GREACEN: That's right.

COMMISSIONER BREYER: Well, then, I don't really think it's very different from what we've proposed except that you are providing a very sort of interesting set of suggestions as to when and how deviations might occur.
Am I right or not? I want to be corrected if I am wrong.

MR. GREACEN: Well, we perceive it as fundamentally different.

COMMISSIONER BREYER: Well, what's the difference? What's the difference? I mean, what you've done in A through L, it's a very intelligent, perfectly sensible list of things that put people in boxes A through O, and if I looked at page whatever it was, 34 of the blue book, I discover another set of factors for putting people in boxes. Actually, they weren't A through O boxes, there were a few fewer boxes -- or maybe there were a few more.

Now, I like a lot of the things on your list, and I didn't like all the ones in your initial list. Some of yours, I don't think are perfect, nor were some of the initial ones, but it seems to me that the approach is identical.

You take assault and battery, you look at a lot of things that put people in boxes, and you put them in some boxes. And if I actually looked at your list, it is pretty similar to the list that was in the first version. I'll bet you took some of the things from there -- or, we both
ended up at the same point, and you have a few things I don't like, to tell you the truth. But that's all all right, that's all right.

I'm trying to get at what is the difference in principle. What is the difference in principle between what you have done in this appendix and what was in the blue book? I don't see it.

MR. GREACEN: We tried to do a whole lot less than the Commission tried to do.

COMMISSIONER BREYER: You have fewer distinctions.

MR. GREACEN: Many fewer distinctions.

COMMISSIONER BREYER: All right. I'll look at the penalties. You have a weapon; you have serious bodily injury; you have whether it is a high government official -- that's one I think I would leave out -- I don't know if it maybe deviates from the guidelines; people can argue about that -- whether he had a weapon, intended to cause serious injury. Did he cause serious permanent bodily injury? Did he cause serious bodily injury? Did he just cause bodily injury? Did he intend to cause injury? Was the victim the President of the United States?

I think those are most of the things that
were in the initial draft. There may have been some others there, and you may have simplified. What else is there?

MR. GREACEN: Many of the things that are in the aggravators are taken out.

COMMISSIONER BREYER: Okay, I see, and you put it over in the discretionary part.

MR. GREACEN: Yes.

COMMISSIONER BREYER: I think that makes sense.

All right. So you have done two things. One is you have taken the initial set of aggravators that were in the assault and battery section and moved them over -- I am sorry to do this, but I am trying to get it clear in my mind. You have taken some of those things and you have simplified it by moving some of those things into the discretionary section.

And the second thing you have done is that you have expanded the discretionary section -- i.e., discretionary meaning, "Judge, depart"; that's what we mean by that, and you have given him broader latitude to do that.

MR. GREACEN: Yes.

COMMISSIONER BREYER: And those are the two differences that you see.
COMMISSIONER BREYER: And there are some other
differences, there are some other difficult problems that
we could talk about, but those are the two differences.

Now, you call yours "charge offense", and we've
called ours "modified real offense", but I don't see that
there is a difference there. I mean, our assault and
battery section refers to 18 U.S.C. 111, but it doesn't mean
it is limited to 18 U.S.C. 111. Do you mean yours to be
limited to 18 U.S.C. 111, that is that the prosecutor has
to charge 18 U.S.C. 111 to plug your guideline in -- or are
you willing, for example, to plug in your guideline if the
offense charge was bank robbery, and during the course of
the bank robbery, the person went off and hit a guard over
the head? Do you mean to do that, or not?

If you don't mean to do it, of course, if you
don't mean to do it, then you've got a real difference; then
you have pure charge offense sentencing -- and of course,
by doing that, you'll hand right to the prosecutor the decision
about whether the person goes to jail for three more years
or not. Do you want a ten-year sentence for bank robbery
or a seven-year sentence when he hit the guard? Whose
decision? The prosecutor's. Is that what you want? That's
MR. GREACEN: Our view is that those considerations for the bank robbery and how the use of violence in the course of the bank robbery is sentence ought to be dealt with under the category of bank robbery.

COMMISSIONER Breyer: And so therefore you want to say that the decision as to whether or not the bank robber who hits the guard over his head, whether or not that person goes to jail for three extra years is the prosecutor's. Today, of course, the decision is the judge's. Today, of course, the judge does take into account the fact that he hit the guy over the head when he imposes that bank robbery sentence. So the ABA is really saying, "We don't like the fact that it's up to the judge today; we want the prosecutor to decide it."

I would be surprised if you're saying that, but I'd certainly be open to listening.

MR. GREACEN: To the extent that the prosecutor by not charging the weapon can limit the maximum sentence to the unarmed robbery, yes, that discretion is unalterably transferred to the prosecutor.

COMMISSIONER BREYER: Oh, no, no, no. It's
much more than that, it's much more than that. Today you can sort of limit what happens by choosing the statutes. As soon as we move to a system where those numbers in the statutes are for real, they don't operate as much of a constraint. I mean, you see a bank robbery statute, and the statute in there will be like up one to twenty years. Now, there is not going to be a constraint in terms of what you charge. The person who charges bank robbery gives the judge enormous discretion to the charge.

Today what happens is that the judge sits there and he reads the pre-sentence report, and he says, "Okay, if this fellow hit the guy over the head in the course of it, I'll up the sentence."

Tomorrow, under our system, in the modified real offense, the same would happen, but only if the judge, after an evidentiary hearing of some kind decides that he really did hit the guard over the head.

Your system will say the judge won't give him the extra three years; it will be up to the prosecutor to decide whether to come in and charge that extra offense, in which case he'll get the extra three years, or not to, in which case, he won't. So what you've done is removed
the discretion from the judge and given it to the prosecutor.

MR. GREACEN: Only to the extent that the maximum sentence allowable under law is so low that the judge cannot apply the guideline. Now, let me explain what I'm trying to say.

The guideline for armed robbery, or for robbery, would set out vignettes.

COMMISSIONER BREYER: Oh. In other words, you're saying when he charges robbery --

MR. GREACEN: He charges robbery.

COMMISSIONER BREYER: -- and now what you are doing is you are telling the judge, "Judge, he's charged robbery, bank robbery. Now up the sentence if he hit somebody over the head."

MR. GREACEN: That's right. That vignette --

COMMISSIONER BREYER: Well, that's what we've written in the blue book. Then we agree. I mean, the blue book says you look to robbery, you look at bank robbery; if in the course of the bank robbery the person committed an assault, then you look and see under the assault section what the punishment for that was, and you add it on.

MR. GREACEN: All right, and that's the part of
it that turns mechanical for us.

COMMISSIONER BREYER: Yes, correct, and I agree with that. But we are going to change that. What we are going to do, instead of just saying add on automatically the penalty for assault, there will be a range of things, and it will come to some kind of discretion, looking at how seriously the guy is hurt, et cetera. All right, good.

I am sorry. I don't mean to -- I am not actually wasting time from my point of view. That is, I am trying to focus -- then, I think what you call "charge offense" really comes down, I think -- and correct me if I'm wrong -- to what we've been calling "modified real offense." That is, you look to the thing charged, and then you add on certain specified things that are written there. Like, a physical injury, hit over the head during the course of the robbery. That's the road map. That's what we're trying to do.

And then the difference between your version and what we have here are things that I think we are moving toward. One is greater discretion to depart; more ranges, less mechanical -- for example, bank robbery, hits the guy over the head. All right. Don't just say, "Judge, add on 22 months." Say, "Judge, look at the situation and add on
between 5 and 15 months, depending on how serious the injury was," for example, or depart if it isn't covered here.

MR. GREACEN: That comes out about the same way as the adjustments notion, yes.

COMMISSIONER BREYER: Yes. So, are we now talking the same language?

MR. GREACEN: I think we are, although --

COMMISSIONER BREYER: See if you can think of a difference, because I want to flush out the difference. Now I think we are on the same track. If we're not, I want to try to get at it.

MR. GREACEN: In both of our systems we are constrained by the maximum sentence under the crime of conviction.

COMMISSIONER BREYER: Oh, yes, but that isn't much of a constraint.

CHAIRMAN WILKINS: We are constrained today by that.

MR. GREACEN: That's right.

COMMISSIONER BREYER: That's not much of a constraint in the new --
CHAIRMAN WILKINS: Let's take out time to study this report that has just been submitted, and we'd like to get back with you, Mr. Greacen, of course, and perhaps use some of this as we move forward in the next few weeks.

MR. GREACEN: It's not copyrighted.

CHAIRMAN WILKINS: Good, good. And we won't criticize the ABA on its guidelines, either, until we have walked in your moccasions a while. But we do appreciate it. That's what's so helpful. People criticize, and we welcome that. That's why we're doing this. But it is far more helpful to us to receive a suggestion or an alternative in the concrete, as you have presented here, so that we can analyze it and study it, rather than talk in general terms about solutions that can be offered and so forth. So we appreciate it very much.

MR. GREACEN: If the Commission had not come out with the preliminary draft guidelines, it would not be getting this kind of response.

CHAIRMAN WILKINS: That's right. We recognize that.

MR. GREACEN: So we are deeply indebted to you for doing that. You weren't ready to put it out, and it
took a good deal of courage to do it, and we admire you
for doing it.

CHAIRMAN WILKINS: Well, we have thickened our
skin and are certainly sensitive to it.

Commissioner Gainer?

COMMISSIONER GAINER: I was just curious, Mr.
Greacen, since you have now attempted walking in the
Commission's moccasins to the extent that you have prepared
Appendices A and B, would you care to hazard a guess as to to
what proportion of the ABA's dissatisfaction is prompted
by the preliminary draft, and what proportion of the
ABA's dissatisfaction would be prompted by the Sentencing
Reform Act itself?

MR. GREACEN: It is my view that, with only
minor exceptions, the ABA supports the statute, and we do
not feel that we have significant quarrels with the statute.

The one major quarrel that we had during the
enactment of the statute was on the appeal, that the ABA standards would allow appeal from any sentence, not just those that deviated from the guidelines. And there may be some other specifics. But in the main, we believe that the statute that you were handed and asked to deal with
allows you to do what you want to do.

COMMISSIONER GAINER: One other matter. You have noted this morning, and you stated in your prepared testimony that you were concerned about a bureaucratic mechanical application of mathematical formulas or models, and contrasted that with what you appeared to find more to the ABA's liking on page 5, where you note "preserving an appropriate degree of discretion for lawyers and judges in the sentencing process."

I see that the Section on Taxation has some independent submission, which I have not yet had an opportunity to go through, but simply in seeing it there, it struck me that there may be an analogy between attempting to extract an appropriate penalty from a criminal defendant and attempting to extract a fair tax from a private citizen.

I was curious as to whether your Section on Taxation might be willing to abandon the "bureaucratic mechanical application of formulas" models in assessing individual tax and go instead to a system that would give an appropriate degree of discretion to lawyers and judges in determining what every individual citizen might
pay as their income tax for the year?

If your section hasn't addressed this matter, I am sure that with some clear thought, they might be able to come up with a clear distinction. That escapes me right now, but should you come across that, I would appreciate hearing it.

MR. GREACEN: I see a profound difference, Mr. Gainer, between the application of the tax laws and the application of the criminal laws.

COMMISSIONER GAINER: Oh, but in the grand tradition, which the ABA is happy to point out on many occasions, I would be interested in hearing what that distinction is.

If it is tradition, I don't think this morning I will prolong the matter further by inquiring.

MR. GREACEN: I think it is a matter of principle that the criminal laws have to do with the deprivation of the liberty of citizens.

COMMISSIONER GAINER: And property.

MR. GREACEN: And property.

COMMISSIONER GAINER: And what else is taxation?

MR. GREACEN: One is not taxed to so many years
in prison.

   COMMISSIONER GAINER: One is taxed to penury on occasion.

   MR. GREACEN: To what? To penury. That is so.

   COMMISSIONER GAINER: I am simply calling into question, as you may see, Mr. Greacen, whether the distinction that you made with such verve is quite as well-founded as the ABA might on occasion like to think and whether a little too much obeisance is not occasionally paid to traditions in the Anglo-American system of justice.

   MR. GREACEN: It is a valid question. We would strongly believe that these principles are ones that are importantly rooted in our Anglo-American traditions, and need to stay there, and they are not just old, encrusted, ancient anachronisms; they are what give life to the freedoms of Americans as opposed to others.

   COMMISSIONER GAINER: Those are grand words, but when you come across the specifics, let me know.

   Thank you.

   MR. GREACEN: Thank you.

   CHAIRMAN WILKINS: Anyone else?

   COMMISSIONER NAGEL: Yes. I have a series of
questions, and due to the lateness of the hour and, I am sure, everyone's increasing appetite, what I'll do is just briefly read them, as you to think about them, and I will furnish you a copy if you would like.

I want to thank you again also for your very thoughtful and constructive suggestions.

In your written testimony, you state that the Commission has focused exclusively on the object of certainty of Federal criminal sentences, apparently overlooking the fairness to which the Congress it give equal weight. And my question is, can you define for us "fairness" and tell us the basis upon which you made the judgment that fairness was not a concern in the preliminary draft.

Second, you indicated that justice requires individualization. I would ask how you recommend that we reconcile that emphasis with the legislative history of the Sentencing Reform Act, one purpose of which was to move away from a system characterized by individualization towards a system characterized by greater uniformity and less disparity.

On page 7, you state that, "Research has shown that judges rarely consider more than half a dozen factors
in determining a sentence in a particular case. I would 
ask if you would provide us for the citations for that 
research since it is at odds with my own reading of the 
research literature, and I think it underlies your emphasis 
on fewer factors.

In addressing the question of current practice,
you state on page 19, "We do not recommend that current 
sentencing practices be enshrined," but later in that 
same paragraph, you recommend that proposed sentences be --
using your language -- "roughly consistent with current 
practice."

My question is how shall we define "roughly 
consistent", and which purposes or principles of sentencing 
would dictate the decision to propose guidelines that are 
"roughly consistent with current practices"?

You indicate that the ABA standards reflect the 
opinion that existing sentence lengths should be decreased. 
And I ask two questions here: First, is there anything 
in our statute or its legislative history from which you 
can infer strong Congressional support for this Commission's 
embracing that same position; and second, do you have any 
data from surveys of the public which would suggest that
the public embraces that same value and would have us do the same?

And my final question is that there is a comment on page 4 that you believe that the ABA's reaction is "an accurate indicator of the Bar's reaction." And just as a point of information, it would be helpful to us to know whether the ABA membership actually voted on your statement after careful consideration of the draft and whether you have taken a systematic survey of the Bar or in some other method to determine the consistency of their reaction with Your own.

As I said, I'll be happy to furnish you with my list. If you want to comment on any of these now, I'd be happy, but in view of the time, I'll also defer.

COMMISSIONER CORROTHERS: Mr. Chairman, I think most of us had some of the same questions, so if we could receive a response in writing, with copies to all of us, I think that would be preferable.

CHAIRMAN WILKINS: Is that satisfactory to you, Mr. Greacen?

MR. GREACEN: I'd be glad to answer those questions.
CHAIRMAN WILKINS: Fine. All right, we'll leave it at that, then.

We'll be back in touch with you and Ms. Robinson as we work through the next couple months, and hopefully, we'll begin to mesh our thinking.

Thank you very much.

MR. GREACEN: Thanks very much.

CHAIRMAN WILKINS: We have two more witnesses before we break for lunch, also representing the American Bar Association; in this case, the Section on Taxation, Mr. John B. Jones and Ian M. Comisky.

Gentlemen, we are glad to see you. We don't intend to rush you now at all. We are very interested in this field, and have done a great deal of work ourselves in looking at this area, and of course, your written submission is probably the most helpful thing that we will have received, because we need to analyze it and try to implement the ideas that you give us.

MR. JONES: Thank you, Mr. Chairman.

Our statement identifies me as Chair of the Section; Ian Comisky is Chair of our Task Force which prepared the written statement. And I really am pleased
to tell you that our oral comments will be brief, because
since I didn't prepare the written statement, I can say I
think it sets forth our position very well.

We are speaking for the Section because we thought
it would be helpful to this group to get down into a large
area of law with rather specific context and be sure that
the Commission understands some of the particular considera-
tions.

I think we also worry that when somebody sits
down to think of a problem about sentencing, they say, well,
let's start with tax because that's easy -- we've got the
dollars, and everything is dollars up and down -- and as
you might imagine, we don't really think that that's a fair
characterization.

My own experience in criminal tax law goes
back to 25 years or so ago when I was working as deputy
to Judge Oberdorfer, from whom you will be hearing later,
and I did have the feeling then, and I am sure it is still
true, that there are two large categories of tax evaders,
and I'd just like to plan them in people's minds so that
they will realize teh disparity of situations with which
one may be dealing.
One category of evaders might be a husband and wife who work very hard to run a retail operation, and they work so hard they don't think Uncle Sam is entitled to a large share of it, and they systematically arrange to keep 10 percent of their business off their books year-in, year-out. And let's just for argument say they evade $10,000 of taxes over three years. I think those are hardcore criminals, if you will.

But another case -- and it comes up all too frequently -- it is part of the problem that everybody is exposed and has duties under the tax system -- people get into situations of stress -- it might be health, marital difficulties, business reverses, what-have-you -- and they get a little bit behind. They miss a year. And there are so many people who do that who just simply can't catch up; they don't know; they can't get their act together in those pressure circumstances enough to write their situation to Uncle Sam, and three years go by, and they are out a lot of money.

But the situation is really quite different from the first case I gave, and of course, there are many variations on that theme, but the dollars involved are not the sole
measure of variety there, and they are very difficult to quantify.

Our second point has to do with severity of sentence, and that's a point that has been made by others. We submitted a rather complex table based on Internal Revenue Service figures. I think perhaps it needs some explanation and detail, which we would be happy to provide to staff. It is long and lengthy. It is clear that the guidelines proposed to apply to the sentences would be a very dramatic, lengthening of sentences in the tax field as well.

It is also true that you talk as if amounts of dollars in tax cases were constant. There are civil dollars and criminal dollars. People put in the indictment what they can prove to criminal standards; there may or may not be other dollars. These guidelines will put a tremendous premium on resolving that, perhaps requiring detailed trials. Tax trials are long, they take a lot of detail and a lot of time on the stand, and it is not very easy to shortcut it.

One thing that seemed to us that was not appreciated by the drafters is the little catch-all of let's add the unlawfully obtained income to the tax deficiency.
in order to obtain length of sentence. Just to take one
obvious case, what if you paid tax on the illegally gained
income. You might have $500,000 of illegally gained income.
The charge was that he forgot $20,000. You have a $10,000
deficiency, or something like that. And then you would add
the $500,000 of illegally gained income, just because it
was illegally gained. And we also think that the presumption
that income is illegally gained has Constitutional dimensions,
particularly in the context of a criminal trial. We say
that you can double or triple the penalties under that
clause. And I guess if you want to take that route,
I'd suggest that we find some tax experts to help you make
it more rational?

We understand what the Commission is driving
at, but it just ain't that easy to do.

We have at the end put five suggestions peculiar
to tax which we are sure that conscientious judges and even
prosecutors would have in mind in determining what was
appropriate sentence. One of the ones -- this draft goes
entirely on the nature of amount of dollars. Obviously,
the percentage of understatement makes a difference. If
somebody has $10,000 of income, it is hard to just find
an innocent explanation forgetting about $5,000. But if, on the other hand, that person has $200,000 of income, it is conceivable that the $500,000 was overlooked.

We agree with the character of the source of income. We think that is somewhat consistent with your own. We do want to see to what extent a particular tax charge relates to tax charges on other people, whether it is isolated, whether it is conspiracy. In tax practice, is is very serious when somebody "cooks the books" in order to hide a tax deficiency. That would be very strong evidence of bad intent and entitled to, under your system, a number of penalty points.

Instructive activities can also take place while the investigation is going on. There can be remedial measures which are taken; if the man, when confronted with the problem, cooperates in the investigation and paying his tax, surely, that is relevant.

So I think we have made these points in our statement, and we are glad to answer questions now or later. We are in Washington and available to meet with you and perhaps perfect this statement a little. I will be glad to answer any questions.
CHAIRMAN WILKINS: Thank you very much.

Perhaps it would be good for us to take a look at your statement in detail and go back to the drawing board a little bit and get back in touch with you. Perhaps you could visit with us, spend a couple of hours. This is where we find a great deal of help from the practitioners in the field, and this is to whom we look for this type of help.

MR. COMISKY: We are available, and we would be delighted to meet with the Commission at its convenience. This obviously is generated by individuals who practice a lot of the time in the criminal tax area in particular, and the comments summarize our major concerns.

Just to go over one point in a tad more detail, we were very concerned in the tax area with differentiating between evasion and tax perjury, number one. We don't believe the guidelines differentiate sufficiently on an adequate basis between a full statement tax offense and evasion offenses. The evasion offenses are treated very severely and very strictly, and the tax perjury charges under 7206(1) and (2) are treated, it appears, with great leniency. In this area, perhaps, going into a lot of the
comments, we believe that tax perjury is often a more serious offense than a tax evasion case, because often tax perjury or false statement is charged where you cannot prove a specific amount of tax due, but the circumstances arise such as in a payoff type situation where improper deductions are being made to generate, for instance, our example was a payoff to an IRS agent, and a small amount of a bribe to an IRS agent could be considered much more serious than an evasion of a significantly greater amount of tax. That is one area we believe the Commission should look at in much more detail, that analogy and that relationship between those offenses.

Again, we would be delighted to meet again and delighted to help in any way we can in the Commission's efforts.

CHAIRMAN WILKINS: We will be back in touch with you.

Do any Commissioners have questions?

COMMISSIONER BLOCK: Yes. I think this is a point of clarification in terms of the background of the drafting of the section. I think two factors should be kept in mind. Part of the drafting was driven by the fact that there are
very few criminal tax cases every year, so every one counts
in the demonstration sense. I think general deterrence is
a very important, very important, concern, so that customizing
sentences to fit into "softcore" and "hardcore", I think
the burden is high here about whether we want to customize
sentences for "hardcore" and "softcore" tax evasion.

The second is that it is written against an over
$90 billion shortfall in taxes, and that's a conservative
estimate. That's the IRS estimate, that the shortfall in
taxes may be some $90 billion. So, one, tax evasion is a
serious problem, and there are very few criminal cases.

So I would just like you to consider that when we get
together again --

MR. JONES: The Tax Section yields to no one
in appreciating the terrific compliance problem. I don't
think that the criminal laws are going to solve it. But if
the sentence is going the right place-- it seems to us
that if the sentences bear some relation so the offense
and the contribution to the compliance problem, you are
going to get better results.

CHAIRMAN WILKINS: Thank you very much.

Well, we're running a little late, and that's
not unusual for these types of hearings, because we get involved with the witnesses, as has been very evident.

We're going to take a short break so that we can stretch our legs -- and the court reporter, perhaps, needs a little break as well -- and we're going to grab a quick bite to eat. We'll come back in 20 minutes. I know we've got other witnesses here who are scheduled to go, and others who we've had to put after lunch, and I appreciate that very much. But we want to get back on schedule as best we can.

So let's take a short break for about 20 minutes.

(Short recess.)
AFTERNOON SESSION

(2:25 p.m.)

CHAIRMAN WILKINS: Our next two witnesses are two judges here from the District of Columbia, the honorable Abner J. Mikva, Court of Appeals, District of Columbia Circuit, and the honorable Louis F. Oberdorfer, United States District Court, here in the District of Columbia. Judges, we are delighted to have you with us.

JUDGE MIKVA: Thank you very much, Mr. Chairman. I will keep my statement brief. I have circulated copies of it to all of you, and I will just give you a few paragraphs from it.

I think perhaps some of my previous nonjudicial experience may be more relevant to some of the comments I want to make. I was in the Congress for five terms and in the State legislature for five terms. I shepherded a new criminal code through the State legislature in Illinois. I was a member of the original Brown Commission, which proposed many of the concepts that are now, I am delighted to see, in your draft. It is nice to know that seeds, even if they are planted a long time ago, sometimes come to fruition. That is encouraging.
But my comments are going to be very general, because first of all you have to understand our Circuit probably has less criminal cases than any other Circuit in the country; because of the unique sovereignty of the District of Columbia, we see less criminal appeals, I would guess, than any other Circuit except perhaps the Federal Circuit. So we are hardly the experts that can complain that we are going to be undone by the mass of appeals that we are going to see.

I will let my distinguished colleague, Judge Oberdorfer, talk about some of the concerns that the District judges have in our Circuit where again, even with a lesser number of criminal cases they are concerned.

But I'd like to talk about the legislative handles that you are dealing with. Perhaps because of our close proximity to the Hill, and because our docket deals so largely with the legislative process, we may be more sympathetic to the Herculean task that you have been given by the Congress.

We are aware of the time constraints that you operate under, and we are aware that you were not authorized to be a study commission or deal philosophically and
thoughtfully about some vague concepts and report back to
the Congress sometime in the future. You were given a specific
mandate to do something real and practical, and I recognize
that 991(b) is a very specific set of marching orders
indeed.

But taking all of those obvious observations
into account, I join in the concern that has been expressed
by others that maybe the Commission may have bitten off more
than the courts are able to chew.

If I can cite on example from my history, the
late Senator Ervin and I collaborated on the Speedy Trial
Act -- I don't mention that around too many trial judges;
they still don't think it is a very good idea, and it certainly
is not a perfect piece of legislation -- but it has worked
reasonably well in achieving the goals that its sponsors
sought to achieve. And that is that, in a much smaller,
obviously, but not too dissimilar way, the Speedy Trial Act
also sought to change some deeply ingrained patterns and
procedures in the Federal courts.

I think that the reason it succeeded was that
it contained some safety valves, some escape hatches, some
pressure-relieving devices that allowed the courts and
the lawyers some leeway in the behavior-changing commands
that the statute put on the courts.

And while it is probably true of all law reform,
I think it is especially true when you are dealing with
Article III judges that judicial reform must be incremental
or it won't be at all.

And I am not unmindful of the mood in Congress
or the mood in the country that led to the statute under
which you labor. I have seen the legislative history, and
I was in Congress for much of the early debate on this whole
concept of sentencing reform. But I don't think that incre-
mentalizing your reform in any way violates your mandate
or Congressional intent.

The statute creates this Commission as an ongoing
body. Since it took us 200 years to get into the mess that
we are in as far as sentencing is concerned, I don't think
it is fair to assume that Congress expected you to solve
the whole thing this year. Congress wanted truth-in-
SENTENCING -- that was a popular, catchy, political phrase
that I heard over and over again which clearly is in the
statute. They wanted to address the problems of disparity
in sentencing. They wanted to emphasize the protection
of society over the previously unsuccessful hopes and aspirations for rehabilitation.

I think those legislative aims and aspirations would not be violated if the guidelines contained some of the relief valves that I've talked about above.

For example, the sentencing guidelines now make probation a very "sometimes" thing. Yet you have heard over and over again that the Federal Probation Service is a well-working, well-functioning institution. I don't think we ought to throw it out. I think the guidelines could authorize some variation of what is now called the split sentence, where the trial judge could calculate the prison sentence under the guidelines but would still be authorized -- and again, I'm putting aside the A and B violations, which clearly probation is not allowed for -- would still be authorized to grant probation. If probation was violated, the defendant would be obligated to serve the guideline sentence. Such a device might alleviate some of the current concerns that the proposed guidelines will simply overwhelm our prisons.

It might also alleviate some of the concerns that plea bargaining either will become a facade or
nonexistent altogether, depending on whether the guidelines leave any running room or not.

And I don't think that it is likely that such a proposal would swallow up the rest of the guidelines. I think the Federal judges understand the awesome responsibility they have for opting for probation as opposed to incarceration. But disallowing it altogether, all at once, it seems to me creates more consequences than our justice system can digest.

I was nodding vigorously -- I apologize for trying to influence the jury -- while one of my predecessors was talking about the need to try to retain the use of restitution as one of the weapons in the arsenal of criminal justice that came into the Federal laws, painfully and with difficulty, and it is there. But there is nothing in the mandate that you were given that says you were supposed to take restitution into account. I think you have to look at the fact that the legislative process itself is incremental, and that all of the previous statutes that were passed didn't get wiped out when Congress set up the sentencing commission.

Let me just say a word about the numbers. If
as it appears, the specific numbers that are on the preliminary draft will mean substantially longer incarceration for more Federal offenders, I earnestly hope you will change those numbers. I say this not because of some compassion for the people who are convicted of violating our Federal laws -- I have been a judge long enough and have visited enough prisons in my life to know that most of the people whom I sent to our prisons deserve to be there -- but my concern is for the institutions and for these precious concepts that I think we are trying to get established in our Federal justice system.

Congress has nowhere indicated its readiness to spend the billions of dollars that would be necessary to house an increased number of Federal prisoners for substantially longer periods than now. If the Federal system of penal institutions becomes overloaded in the same manner that many of our local and State institutions, the fruits of this reform will be very bitter indeed.

We have here in Washington situations where the local law enforcement officials literally have to drive prisoners around in a van, waiting for spaces to open up in the local jail so that they don't violate a
Constitutionally-mandated Federal court order not to put anymore prisoners in that jail. If something like that were to happen to our Federal institutions, I think it would be a disaster.

And I want to say that I read that legislative history as carefully as I know how, and I have read the statute as carefully as I know how -- I was even there for some of the earlier debates -- and I don't think that the language of the statute itself indicates a consensus in the Congress that the present sitting time is inadequate overall. If the consequences of the numbers proposed by the Commission are anywhere near as dire as predicted, the overcrowding problem would overwhelm any good that otherwise might be achieved.

As I indicated to you, my comments were general. We can afford to be dispassionate and objective on our Court of Appeals because, as I say, even with the guidelines as they stand, we would not anticipate seeing too many appeals. But as Federal judges concerned about the entire system of justice, we want to see the Commission's product work. We want to see our colleagues accept it not only as the law of the land, but as something that can alleviate
a problem that we all concede has existed. And as someone personally who has worked in the vineyards for a long, long time, I have a special interest in seeing that the Commission's efforts succeed.

I share the believe of my former colleagues in Congress that the parole system simply was not working as it was being implemented in this country. Whether it could or not under a different set of rules, I don't know, but it wasn't working. And I think that this concept of truth-in-sentencing, of something resembling flat time, was important to come into being, and I applaud the Commission for carrying out that piece of its mandate faithfully.

And as one of your strongest rooters, I hope you can pare back sufficiently elsewhere to allow our courts and our penal system to digest your product. It would be a tragedy if the unintended but predicted chaos of 1987 would force the Congress to revisit the subject in a way that would close up what I consider a very a important window to address the problem of sentencing reform.

I would like to ask if you would hear from my distinguished colleague, Judge Oberdorfer, who can be much more specific than I can.
CHAIRMAN WILKINS: Thank you very much.

Judge Oberdorfer?

JUDGE OBERDORFER: Mr. Chairman, before I get specific, I'm going to speak even more generally than Judge Mikva did about two matters.

I have been sitting here, as you know, today and yesterday, and I was reminded by the testimony of John Jones of the ABA, who was my colleague in the Tax Division, that I spent more years than I like to remember working with the Internal Revenue Service. And I bring to you the thought that when the first Internal Revenue Code of 1913 was adopted by the Congress, first of all, it was a very simple, relatively simple, document then, but the Treasury Department did not then try to undertake to anticipate all the transactions that would be governed by or affected by the Internal Revenue Code.

And I think that that is germane to the recommendation that you heard at least from many judges, and that is, as Judge Mikva just said, take it easy; see how this thing works.

Going back to the Internal Revenue Code for a moment, it was originally sort of a common law, and the
initercises were worked out by an interrelated process of regulation and decision. Supreme Court decisions were very important in the development of tax law.

Then, it got out-of-hand, and as you know, one of the most popular things in recent years has been simplification. You've got an opportunity to do simplification before you have a field full of kudzu.

The other general statement that I'd like to make relates to my observation that every judge -- certainly every District judge whom I've heard here, and I would suspect, every District judge you've heard, and I know every one of my colleagues, at least, those who were at lunch the other day when we had a conversation about this -- are concerned, and I mean very concerned, not lightly concerned, not politically concerned, but concerned as judges, as trustees for the power committed to us by the Constitution and by the President, via confirmation, by vigorous and rigorous screening process.

That led me to where I was yesterday, which was with a jury. And every time we charge a jury, we say in the first paragraph what the function of the court is, and then we say, "The function of the jury is to sit as judges
of the facts." And we reiterate, remember that you are not partisans or advocates in this matter; you are judges. And we don't expect uniformity from juries. The public doesn't expect uniformity from juries.

And I suggest to you that one reason we have been allowed by the Supreme Court and by the Constitution to have expeditious disposition of sentencing proceedings is because traditionally, a sentence has been treated and acted upon as a matter of judgment more than a matter of fact, and that the complications that so concern my colleagues, and I think concern all the District judges, about the procedure that would be involved if we go too far into having to find facts, make findings of fact the way we would after a bench trial, supported only by evidence -- and the law is full of debates about what is evidence -- that you may, and Congress may -- I am not blaming it on you -- may have pulled up anchor from the basis on which we have been allowed to proceed officially, the Constitutional basis, turning a matter of judgment into a matter of fact-finding and a matter of evidence and a matter of adversary process.

That is why I think you've gotten, certainly at our lunch table the other day if you had been there, a
firestorm of concern, not reaction, not rebellion, but concern, by people who have been used, over a lifetime, to large responsibility based on an exercise of their informed and independent judgment. And it may be that this is Congress' problem, not yours. It may be you are just being good soldiers and doing what you're told, and that's fine.

But one of these judges pointed out to you this morning, that subparagraph 20 of some section invites you to go back to the Congress with changes in your mandate. And I suggest to you that you may find your work in the dock in the Supreme Court with at issue scores and hundreds of sentences that have been imposed by a process that was not Constitutional due process.

You all have read the McMillan versus Pennsylvania decision more carefully and prayerfully than I have, but I did read it. It was a five-to-four decision. There is a heavy emphasis, in Justice Rehnquist's opinion, on the fact that they were dealing with a State process. And he talks about this Frankfurttian concept of the States as a laboratory of experiment. And I certainly wouldn't think that a lawyer would violate Rule 11 if he attempted to
raise the question of whether or not, for example, your
preponderance of the evidence suggestion, valid though it
may be with respect to State sentences, has any validity
in a Federal environment.

That is the generality. My specifics are really
an echo -- a pale echo -- of what the other judges have said
this morning. We are concerned about the threatened waste
of the strength of our probation service. We think we have
an outstanding probation office here. I had the privilege
this spring of chairing a search committee for a new
director of our probation office, and I had a chance to interview
those people and look into their work -- I hadn't been familiar
with it, really, before except for the one man who comes
in and advises me on sentences. And I can testify to something
that at least would be the basis for a finding that these
people do remarkably fine work; they prepare, as you know,
our pre-sentence reports. In my case, they confer about
sentences. And they have a hands-on relationship with
Probationers that is remarkable.

Indigenous to our particular document is the fact
that a large plurality of our criminal cases -- and we don't
have the volume of criminal cases that most of you all
have -- a large plurality of our criminal cases are drug-related, either people committing crimes, not just drug crimes, but stealing checks and forging checks and bank embezzlement and those kinds of things, that they wouldn't do except that they are feeding their habits, and we use probation and the drug aftercare facilities of our probation office, we think, very successfully. And of course, even the few criminal cases we have, we get pleas in most of them. We could be drowned by aggressive defense of our drug cases and by -- I don't need to go into it again -- by all of the complications that we see in the procedural hazards, the unexplored procedural world that we will emerge into if we have to have evidentiary hearings on sentences; preponderance of the evidence beyond reasonable doubt isn't really the concern.

Those are my thoughts. Other things that I have here, gentlemen and ladies, are reprieves of what other judges have said better and more carefully than I could, and I would yield to questions.

CHAIRMAN WILKINS: Thank you very much. We appreciate your thoughtful comments.

Questions from Commissioners to my right?
(Pause.)

CHAIRMAN WILKINS: To my left?

COMMISSIONER BREYER: I have one, because I know that both of you very distinguished judges have lots of experience in the area that you are talking about, and I just want to have, perhaps, Judge Mikva reiterate. Listening to Judge Oberdorfer's suggestions -- and I think I would characterize the suggestions, in my mind, under the category of increase the range across which the judge can exercise judgment. That's basically what he is suggesting.

And there are, of course, many, many ways of doing that, through the use of ranges in the guidelines, through the encouragement to go outside, et cetera. But do you think -- because we did hear this morning testimony to the effect that if we did that, Congress, that entity, would disapprove of what we were doing, because to the extent that we increase the range over which judges exercise judgment, we increase the possibility of disparity. Now, that's of course true. But do you, then -- because you particularly, Judge Mikva, I know of few people, if any, more knowledgeable than you in this area, since you worked in Congress on this particular legislation in particular -- do you think that would be
a serious problem were we to adopt this suggestion?

JUDGE MIKVA: First of all, whatever all of you agree on, even if it is unanimous and even if it is attested to by all of the judges and 30 angels standing, swearing on a bible, is going to come in for some criticism in the Congress. I'm not telling you anything you didn't know. There is no conceivable proposal that all 535 prima donnas could agree on. Even when my colleague George MacKinnon was there, it wasn't that collegial a body, and it isn't any more collegial since he left.

I think that the Congress is looking to you to come up with a workable system, and I think that they will respect not only your labors and not only the variety of views that are expressed both on the Commission and that you have taken the trouble to hear, but I think they will respect the notion that you are putting your imprimatur on a set of recommendations that are not the last word in sentencing reform, but the first word in sentencing reform.

If you say, "This is how far we think we can go now, and we're going to look at this and continue to work on some of these areas," Judge Breyer -- I am like Drew Pearson; I guess right on what Congress is going to
do, I am 97 percent right 12 percent of the time -- but it is inconceivable to me that they would veto that effort.

COMMISSIONER BREYER: Thank you.

CHAIRMAN WILKINS: Thank you.

George?

COMMISSIONER MacKINNON: The invitation to go back to Congress is a good suggestion, but we've tried it. We have already been back. And we got our answer, and it was pretty much, "No", absolutely and unqualifiedly "No".

So I just put that in the record so you won't think that we hadn't thought about it.

JUDGE MIKVA: I am aware.

COMMISSIONER MacKINNON: I think, Judge Mikva, your comment about the split sentence, I would suggest that you submit a proposal where we could, within the statutory framework that we are operating here, authorize a split sentence. We have been around now, five or six hearings all around the country, and nobody has ever come up with anything like that, and no person on the Commission has really been able to come up with it, although we have been focusing on a lot of things, and maybe we could if we really got down to some more experimentation. But I'm
sure we would most welcome any suggestion that would achieve that result.

Judge Oberdorfer, having read McMillan versus Pennsylvania, how did you read that case? Didn't you read that that they could go outside and take in -- well, it said that they could take in a factor as a sentencing consideration and weave it into the sentence that was not charged in the indictment.

JUDGE OBERDORFER: I understand they said that, but they also had a big paragraph in there about federalism.

COMMISSIONER MacKINNON: Well, do you think that the States have any more federalism --

JUDGE OBERDORFER: Do I think that the Due Process Clause has a different meaning applied to the States than it does to Federal law? The Supreme Court has a supervisory responsibility over the Federal courts that it doesn't have over the State courts, and there is certainly a body of doctrine. Things change, I suppose, but there was once a body of doctrine, and I think there are probably embers of it still in the fire, and I see them in that case, that say that the Supreme Court should be more deferential to matters of this kind where there are in effect experiments by States,
and that they might well reach a different result.

    Just reading the Supreme Court tea leaves, they
didn't put that in there for nothing; somebody asked for
it. And that may be the fifth vote. It is a five-to-four
case.

COMMISSIONER MacKINNON: Well, do you mean that
they would let the States go further —

JUDGE OBERDORFER: Yes.

COMMISSIONER MacKINNON: -- than they think that
the Federal government ought to go?

JUDGE OBERDORFER: Yes.

COMMISSIONER MacKINNON: It would just seem to
me it would be the other way around.

JUDGE OBERDORFER: Well, if the Supreme Court
agrees with you, then this will be all right; if they don't --

COMMISSIONER MacKINNON: The clause is the
same, "due process".

JUDGE OBERDORFER: Well, there is due process
and there is due process, just like there is arbitrary and
capricious and arbitrary and capricious.

COMMISSIONER MacKINNON: Well, my experience on
this is not like Judge Mikva's, who says that criminal
cases are a minor part. When I came on this court for the first ten years, it was our major part, and we had more criminal cases than any Federal court in America. And we dealt with them in all phases.

My question is, you talk about increasing the range -- how do you get around the 25 percent that the statute prescribes?

JUDGE MIKVA: I think that that is one of the limitations that, obviously, you live with, and the range of -- that would be something you would have to go back to Congress for. And let me indicate to you that I didn't suggest that.

Now, when you are actually talking about the numbers, the actual numbers, I think that the statute does say that it shall vary 25 percent. But there are other kinds of judgment factors that can be increased, and indeed you have provided for many of them in your sentencing guidelines. I realize you have been charged with trying to turn the role of a sentencing judge into that of an automobile mechanic, but you haven't done it, and if you tried to do it, you didn't succeed. There obviously is a lot of judgment that a sentencing judge is still going to exercise.
The concern that Judge Oberdorfer and I have is that you have hamstrung the judges in so many areas where again, it isn't that I am making a plea for the dignity or feelings of the district judges -- I don't think the system can work if you overload the evidentiary hearings the way Judge Oberdorfer suggested or if you overload the prisons.

COMMISSIONER MacKINNON: Of course, people that have tried a lot of cases generally, when they get to that problem now, they pretty well handle it at the time of sentencing, whether there is any dispute in the probation report. They don't get into a lot of hearings.

JUDGE MIKVA: But your guidelines suggest that some of these must be done by way of evidentiary hearings. That's part of the problem.

COMMISSIONER MacKINNON: Well, I know what the original draft says.

JUDGE MIKVA: Okay. I have not seen the subsequent draft, and I am delighted to hear that that particular concern has been obviated.

COMMISSIONER MacKINNON: There are a great many things in here, and I cannot overlook at this present time and evade commenting on the fact that Section 991 and
subsequent of Title 28 is by far not our only limitation. It is all the sentencing provisions that are incorporated in the criminal code around 3553 and Title 18. And if you can ever show me a Federal statute that has ever been written that has more things that says you can do and you have to do and other things that you can't do, I have never seen a group of statutes, and they both must be read together, because they refer to each other. I have never seen a statute with greater restrictions.

JUDGE MIKVA: And some of them, Judge MacKinnon, as you know, tell you to march in opposite directions at the same time, and --

COMMISSIONER MacKINNON: They tell you to be "certain" and "flexible".

JUDGE MIKVA: That's right. And one of the ones, it seems to me, that you have to take into account, because this is one that, whether you go back to Congress or not, you are going to end up dumping that in their lap, is where they tell you, "Don't overload the prisons." And that's a specific direction in the statute, and that the guidelines should not be such that they are going to overload the prisons.

Well, you have heard witness after witness suggest
that if the numbers are anywhere near the way they are being
crunched out in the preliminary report, that's exactly what
is going to happen.

COMMISSIONER MacKINNON: Well, this represents
somewhat of a conflict among people in America on a lot
of subjects who think that this particular aspect of the
Criminal law can be made into a science. And you know and
I know that it has a lot of the qualities of an art. And
we are trying to blend the two together to conform to the
statute as best we can.

JUDGE MIKVA: That's why it is so reassuring,
Judge MacKinnon, to know that there are so many Rembrandts
on this Commission.

COMMISSIONER BREYER: With your Congressional
instinct, you say it is easy to say increase the range of
discretion over which the judges will exercise judgment.
Immediately, you pointed out that the statute says 25
percent. Now, the way that I think we can increase the
range of judgment is, let's suppose a bank robber with
one prior conviction -- or what it will say is it will
say, let's say, Level M. Level M is eight to ten years.
That satisfies the statutory requirement of the 25 percent
rule. But in getting to Level M, Judge, if this offender has whacked three people over the head, you can add between one and four levels, depending on how seriously you think that person has been hurt. Now, you see, that's one way of getting discretion in there.

Now, at that point, when we build that kind of judgmental discretion in, we risk the Congressmen saying to us, "Well, wait a minute, I said 25 percent." And of course, at the end of the road, you only have the 25 percent discretion, but in getting to the end of the road, you have enormous discretion. You have violated the theory of the statute.

JUDGE MIKVA: Not if the -- in other words, even the Congress recognized, as Judge MacKinnon just said, that you could not turn this into a perfect science -- indeed, if it were perfectly symmetrical, you wouldn't need the 25 percent leeway. They know that this is --

COMMISSIONER BREYER: So what I just said, you think would be okay?

JUDGE MIKVA: Of course you could, and I think that the answer to the Congress is, "You did not charge us with removing all disparity. We have removed a substantial degree of disparity, and we are going to continue to look
at it."

COMMISSIONER BREYER: All right.

COMMISSIONER MacKINNON: Judge, I want to hold
out to you the hope that you will come in contact with,
that the results of the cases that are appealed in the
Courts of Appeals, will fill in a lot of the blanks in these
particular cases.

Now, it is the history in Minnesota that the
guidelines have been written not in the guidelines, but by
the decisions, totalling over 350, in the Supreme Court
of Minnesota. And you are going to be in the same position.
You are going to have to pass along the reasons that are
given, and that provides a very substantial ground
for ameliorating over-strictness, over-liberality, and
everything else. And it does get back to the courts, and
it is not written in concrete -- but nothing is written
in concrete that is subsequently going to go before a
court. You know that. And I think our court is as
imaginative in that area as any court.

The final thing I want to say is that on
disparity, I don't think any person thinks that disparity
is going to be disposed of. Of course they are going to
be different, and they are going to look different to a lot of people who don't know a lot about what is happening, what kind of a man they had, what kind of an offense they had. They are going to say, well, that's a disparate sentence, as they do today.

But I think you will find that I think the statute is aimed at wide disparity, great disparity. And what we are going to have here is, well, the 25 percent, that's a disparate basis right there. And we are going to have disparity, but it is going to be a more reasonable disparity, recognizing that that's about all you can achieve in this particular area.

I wouldn't worry about the eventual outcome in that respect.

CHAIRMAN WILKINS: Thank you very much, Judges.

Our next witness is Mr. Charles Sullivan. Mr. Sullivan represents Citizens United for Reform of Errants.

Mr. Sullivan, we are delighted to have you with us.

MR. SULLIVAN: Judge Wilkins and Commission members, I think the best way for me to proceed would be to plow through this statement, because I have tried to
state some specific suggestions that I want to be on
the record as correctly stating.

CURE, Citizens United for Rehabilitation of
Errants, is a national prison reform organization whose
membership is comprised of prisoners, ex-prisoners, families
of prisoners, and concerned citizens.

CURE started in Texas in 1972. My wife Pauline
and I are the founders of CURE and presently function as
the national staff here in Washington. Before coming to
D.C. in August of 1985 and expanding CURE to a national
organization, we spent 12 years in Texas as staffpersons
of Texas CURE.

In effect, we try to organize the consumers of
the sentencing guidelines, those persons whose lives are
directly affected. My comments are from that perspective.

Also, I have attended all the hearings of the
Commission here in Washington, and CURE has filed position
papers on all the issues considered at the public hearings.
In this latter regard, I have coordinated prisoner input.

Thus, when I say that my general reaction to the
preliminary draft is extreme disappointment, I feel that
I have a record of involvement to state this position. In
fact, I am amazed that such progressive testimony and discussion could produce a document that does not consider alternatives to incarceration as true punishment.

In reading the draft, I thought for a minute that I was back in the "lock 'em up" State of Texas.

I was hoping that the Sentencing Commission, free from political pressure, would set an example for the States by recommending modifications in the severity of Present sentencing laws, breaking out of the "Can you top this?" demagoguery in regard to sentencing is long overdue.

I would like now to make some specific comments and then return and conclude with the biggest reason for my overall disappointment. This final comment will be from the rehabilitative perspective.

First of all, the specific comments. One, the ability of the government to function effectively and without disruption, on page 21 of the preliminary draft, is a reason to enhance punishment in offenses involving the person. For example, if the victim in a homicide is a government official, then 36 points are added to the base offense value. I would suggest that this principle be applied to the mitigating factors as well as to the aggravating.
Why not a lessening of culpability for those Vietnam
veterans if their criminal behavior can be traced to the
defense of their country?

Two, I would disagree on the classification of
the consumption of alcohol and drugs. At times I would
consider them mitigating rather than aggravating circum-
stances.

Three, there is also token treatment of non-
custodial sanctions in the draft. For example, there is
not any reference to victim-offender reconciliation or to
any other form of mediation. Obviously, victim-offender
mediation is impossible for some types of crimes. But the
guidelines should make reconciliation and reparation the
highest priority of the criminal sanctions, in the same
way the present provision of the guidelines permitting
restitution and community service, merely in combination
with imprisonment, can only compound punishment that is
already excessive.

Four, giving priority to restitution over a fine
is highly desirable. Certainly, a major component of
victim-offender reconciliation is restitution.

Five, there has undoubtedly been a laudable
attempt by the Commission to eliminate economic discrimination in the guidelines, and I congratulate you on this. However, there are still, I feel, some items. Sanction units assigned to economic crimes in the white-collar category are far more lenient than those assigned to street crimes. A comparison of the sanction units for fraud and for burglary reveals how wide this disparity is.

Also, why does the unlawful possession of the ghetto drug, heroin, have a base offense value of 18, while the more middle-class drug of cocaine is considered less serious, at 16?

Of course, I am not suggesting that cocaine be increased to 18, but rather that heroin be reduced to 16.

Six, another suggestion of remedying economic discrimination in the guidelines is the proportionate ability to pay approach. For example, on page 124 of the preliminary draft, acceptance of responsibility for the offense should have, quote, "proportionate to his or her economic status" added to restitution of a substantial nature.

Noncustodial options should be available, too,
for enforcing payment of restitution and fines. These options include extending the period over which the money is to be paid, permitting payment by installment, substituting community service, or omitting the fine in whole or in part when default results from changed circumstances, such as the offender's loss of employment or serious accident or serious illness.

Seven, here, we would like to make a suggestion on further refinement of the guidelines. If the current offense involved is less serious and not related to the previous offense, then a less multiplier should be used than a multiplier for the same type of offense. An example of this would be if someone has in his past a conviction for armed robbery and then is picked up for, say, shoplifting, certainly they should not be given the same weight as if the present current offense is armed robbery.

Of course, CURE supports only an enhancement of the offense if the criminal record indicates the offender is presently serving a felony sentence. This was basically Dr. Burton Scalloway's position, who testified this summer before the Commission. As CURE sees it, juvenile convictions, unajudicated offenses, and completed sentences should be
irrelevant in sentencing.

Eight, there is potential for abuse and psychological injury factored into the base values as an aggravating element. This is particularly disturbing when such a finding can be based only on the preponderance of the evidence.

Nine, the provision for capital punishment was eliminated from the new drug law. The Commission could provide an example to the States, a way out of the legislators' dilemma, if they would also recommend abolishing the Federal death penalty.

Most of these comments have been gleaned from the more extensive comments and analysis in CURE's written submission. This submission consists of two papers -- one from a prisoner, and the other from an individual who has just returned from a northern European, people-to-people study of alternatives to prison crowding. I think you will find both of these perspectives very informative.

I would like to conclude with sharing my experience on rehabilitation in Texas and its application to the guidelines. Almost ten years ago in Texas, the Governor and the legislature decided to get tough with criminals by substantially increasing the severity of sentences. This
get-tough policy, however, was not matched with the doubling and tripling of prison capacity as the policy required. The impact was, obviously, overcrowding. The Federal courts intervened, and the term "rehabilitation" was not only secondary, but was given practically no emphasis as the State confronted its daily overcrowding crisis. This crisis, by the way, included 52 inmate-on-inmate killings over a 21-month period.

Today in Texas, the prison population has somewhat stabilized, due chiefly to a substantial increase in good time, up to three days for one, and a substantial increase in paroles.

However, rumors about mass releases or kickouts, as the prisoners call them in Texas, have replaced any concern for rehabilitation in the mind of the prisoner and in the mind of the administration. As I read the guidelines, I felt like I was back in the Seventies in Texas. It seems to me that you are setting the stage for a tremendous increase in prisoner population. Since you have no direct authority over Federal prison capacity, and we are living in a Gramm-Rudman era, the result will be massive overcrowding of the already-crowded Federal facilities. This in turn will
provoke Federal litigation and daily crisis management.

In my 15 years of experience of working with prisoners and their rehabilitation, I have concluded that there are three elements that must be present in order that a prisoner might begin to habilitate him or herself.

The first is that of uniform sentencing, for which you are striving. Second is due process in sentencing and also in disciplinary infractions in prisons. The third is that a prisoner has to know where he or she stands in relation to release. If this draft of the guidelines is implemented, this third element will be lost, and in my opinion, rehabilitation will be vitiated. Instead of prisoners possibly asking themselves "how best to do my time", they will be laying in, because they will think that the next kickout is right around the corner.

What I'm saying is that if you have guidelines that require, as I think you do, a doubling or tripling of prison capacity, and can't fund this increase, the tail of capacity begins to wag the dog of the guidelines instead of vice versa.

Thus, I ask for the sake of rehabilitation that you make certain, as your Congressional mandate states, that
you take into account the nature and capacity of the penal, correctional and other facilities and services available.

Realistically, however, I think these guidelines as they are presently drafted are the first step toward more prison overcrowding, prison management by crisis, and kickout.

And in this, I would like to recommend that the Commission recommend to Congress that they institute what they call the Michigan Plan or the Prison Overcrowding Act where, basically, if there have to be people released that they are not released en masse, but that nonviolent prisoners, say 30 days are taken off each sentence, so that it is not one of these things where you open the gates of the prison and let out so many, which causes such problems politically, et cetera.

But I think it would be a good time to recommend to Congress, even before the guidelines become implemented, that they pass the Michigan Plan or the Prison Management Act -- it is called different things in different States.

I would like to thank the Commission. I feel that -- and I have said this to many people -- that it is a very open process that you have, and I certainly compliment
you on this. I don't know if, as I've said, the progressive things that you are hearing are registering, but I certainly feel that you have been very open, and I certainly appreciate being asked to testify.

CHAIRMAN WILKINS: Well, you have reminded us of these things on several occasions, Mr. Sullivan, so we are not missing them. But this rough draft, we didn't mean to write Probation out of the law at all. We have no intention to do that. We merely had to draw the line somewhere to move on to some other, what we considered at the time more pressing issues -- that is, a format of the approach we were going to take, and so forth.

MR. SULLIVAN: And in the same way, Judge, the innovative programs that are going, maybe not necessarily -- and I come from Texas, and we don't have a lot of these programs of innovative alternatives to incarceration that are maybe happening in other States -- and I notice that you have visited some of the intensive probation programs, et cetera, victim-offender reconciliation -- these things are happening, not across the country, but in certain States, and hopefully the guidelines will incorporate these types of programs.
CHAIRMAN WILKINS: Well, I am sure they will address many of them. In fact, the statute itself requires us to pay heavy attention to such alternatives to incarceration, the primary being probation and the terms and conditions attendant to it.

Any questions to my right?

COMMISSIONER CORROTHERS: Just a statement to Mr. Sullivan, that we certain won't forget the concept of rehabilitation in our efforts.

CHAIRMAN WILKINS: Commissioner Block?

COMMISSIONER BLOCK: Mr. Sullivan, I just want some sort of a general reaction from you on this notion of the importance of the victim-offender reconciliation. Where does that fit in in the purposes of punishment, and for the purposes of sentencing?

MR. SULLIVAN: Well, I think it is certainly punitive for the offender to have to face the victim, as well as, certainly, providing satisfaction to the victim. But I certainly think that -- in my experience in dealing with prisoners -- most prisoners feel that they are serving their time -- and I'll go back to my experience in Texas, where they pick cotton for the State, and they do all kinds
of things -- and what comes through in my experience in Texas is they don't see why this has any relation to their crime. And I think if you could begin to focus in on the victim, and it does have something to do with the crime, I think it can be punitive, certainly -- I don't think they would like to face the victim -- but it forces, in some of these programs where the victim voluntarily is able if he or she wants to, to sit down with the offender, and the offender is forced to face the consequences of what he or she did, I think that can be very punitive and of course, very effective in turning that person around and making a law-abiding citizen of him -- I would think.

COMMISSIONER BLOCK: So you would see it as rehabilitation.

MR. SULLIVAN: Rehabilitation, and also there is a punitive side to it, as well.

COMMISSIONER BLOCK: Thank you.

CHAIRMAN WILKINS: Any other questions?

(Pause.)

CHAIRMAN WILKINS: Thank you very much. Our next witness is Mr. Cornelius Behan, Chief of Police, Baltimore County Police Department.
Chief Behan, we are pleased that you are here.

CHIEF BEHAN: Thank you, Mr. Chairman, members of the Committee. I thank you very much for inviting me to speak today.

To identify myself just a little bit further, I am currently the President of the Police Executive Research Forum and the past President of the National Executive Institute and currently the Chairman of the National Law Enforcement Steering Committee that was formed a year ago to oppose the passage of the McClure-Voelker bill. My comments will come from a perspective of local law enforcement as opposed to the State or Federal level.

We read the guidelines, and we had some difficulty with them. It may be because of their complexity, or it may be because we are not that familiar with Federal laws. And our attorneys struggled with them. So, realizing that we may not be as knowledgeable as others, we'll make some comments that perhaps will be helpful to the Commission.

The role of local law enforcement in this country is unique. Local police have most of the contacts with the public than any other part of the criminal justice system. The public does not understand the criminal justice system.
They are confused by it; they don't think it works for them.

   As a result they have become more fearful in
many cases, and they have politicized their fear into
action. And we see now many States with victims' rights
legislation. We see committees formed to change and
mandate sentencing, and we now know they are engaged in
court-watching.

   Therefore, our criminal justice system must include
as one of its prime concerns public safety. You have
mentioned it on page 7 of your report. We would suggest
that you might consider putting it right on page 1, with
deterrence, rehabilitation, just punishment, and the other
considerations, incapacitation, that you have. The public
must know that we care.

   The Commission should be commended for its real
offense sentencing guidelines; they are tremendous. The
public doesn't understand plea bargaining. They understand
the crime that happened to them. And as you add mitigating
factors and sanctions on various aspects of the crime as
it happened to them, I know they'll understand it and will
appreciate much more what we are doing. I think they
are just great.
The police have to also handle the fear of crime as well as investigate and solve it. The public's fear is more vicarious than factual. They read, they talk, they listen, and they become fearful not from the experience as much as from hearing about the experience or the after-effects of the experience.

I would draw your attention to residential burglaries. You might consider weighting that just a little bit differently. The burglar is potentially a killer. He also, when he violates a home, sometimes changes the life of that family for the rest of their lives. Three-quarters of residential rapes and robberies start with a burglary.

So the fear of burglary in the home is tremendous, and often people don't get over it when it occurs. And we would suggest that you might want to add a psychological factor to the sentence caused by the violation as well as the other factors caused by the crime itself.

You may want to add more weight to auto theft when the person is deprived of his auto for work, or for some other need. Many people don't have the insurance or the ability to get another car, and they are truly
victimized by losing an auto. You just may want to consider it.

By looking at these kinds of things, I think we send a message to the public that we care, that we are truly interested in them, and not just the fairness of our treatment of the defendant.

The police must respond to violence. We must respond in any way we can to any acts of violence, particularly that violence that occurs in conjunction with another crime. The imposed sanctions are a measure of how seriously we look at that. We tend to be soft on violence, and let me just explain that, if I may, for a minute.

The criminal justice system becomes hardened, if you will, to violence, and we see it as another crime. We see so much of it, so much robbery and rape and mayhem, that we don't have all the sensitivity all the time that we should. The subtle forms of violence, terrorist acts, frightening people, racial incidents, domestic violence, are usually not dealt with in the same degree as we do other kinds of crime, yet their impact is tremendous.

The courts as a result are seen as soft on violence when they make decisions, and that is why we have these activist
groups. In Maryland, we have the Anti-Crime Coalition; we have the Roper Committee, and their only reason for being is to get legislation and mandating sentencing where they perceive the courts were kind of weak.

So I would suggest that we look at that very carefully.

The proliferation of handguns and its obvious impact on violence potential must be given high priority. As you know, we lose 20,000 people a year being killed by handguns. Sixty of them are cops, 200,000 more are victims of robbery or assault with handguns.

Therefore the Commission should review its sanctions on handguns, and merely the carrying of it should have a heavy sanction. The use of it should have a heavier sanction. And if they use a machine gun or a silencer, the world should fall on top of their heads.

The National Rifle Association has as one of its prime initiatives in the coming legislature to try to revoke the banning of machine guns as it was passed by Congress last year. If they succeed in their initiative, we'll have machine guns coming out of our ears. And we know that the machine gun is the gun of choice for terrorists,
for drug dealers, and for organized crime, for those who want to attack police and the public. So we should take note of that.

The injuries associated with the crime have been mentioned in the guidelines, but more weight should be considered as to the extent of the injury sustained -- how it affects people in the long term. For example, if an elderly person is knocked down on the street by a robber, or in the home, by a burglar that they walked in on, they may break a hip. For the elderly person, that may be the last injury of their life, and it may be the most sustaining one. The guidelines should reflect that.

As we looked through this, we didn't see terrorism jump out at us in the guidelines. It was mentioned, but we think serious consideration should be given to abductions, bombings, and racial intimidation where terrorism is used.

The Commission might give serious consideration to the insidiousness of family violence. The way we see it, the child that is abused, the spouse that is abused, can't get away; there is no place they can run to. They are the perfect victim. And I think that those who commit
those kinds of crimes should get a message from us that that is not acceptable. They are particularly vulnerable victims, although sometimes the injuries are not always that severe.

We must respond to the repeat offender, and you mentioned that. We know a small number of criminals commit a tremendous amount of our crime. Police and prosecutors are initiating career criminal programs. We have a ROPE Program in Maryland, Repeat Offender Program Experiment.

I am fortunate enough to chair that group.

Most definitions take into consideration the criminal history of juveniles and adults. The Commission should be commended for doing that in its guidelines, taking criminal history into consideration. However, I might suggest that when it comes to juveniles, that you review it -- any imprisonment for serious crime by a juvenile might be considered. Right now, you have some crimes in there, but not all of them. But when a juvenile goes to jail, it is usually for a very, very bad reason -- or, for very, very good reasons, or because of bad acts -- and you might want to consider that important.

Consideration of drug usage is a step in the proper direction. But more weight might be given to the
length of time the person is on the drugs and the number
of drugs they are using at a particular time. I think that
might be worthy of extra mitigation circumstances.

Violation of probation ought to be considered.
As you know, when a person gets arrested certainly in
Maryland and other places for a new offense, the violation
process doesn't begin until the new offense is adjudicated.
That means they are on the street. Yet, the obvious
violations of being out when they shouldn't be, or in wrong
company, or with a gun, are there.

We would suggest you might mention that once a
person has been arrested for a second offense when they
are out on violation of probation, that the process begin
immediately.

You may want to reassess the guilty plea as the
first step toward rehabilitation. The reason I say that
is that repeat offenders use the guilty plea as a way to
step down the charge so they can get away from getting a
record that will make them a repeat offender. They manipulate
the system for their own gain. So guilty pleas are not
necessarily rehabilitative; in some cases, they are just
the opposite. They are a way they abuse the system.
Similarly with drug offenders who enroll in the drug rehab programs, very often they do that just to show that they have gained responsibility since they have been arrested, and it is again, their view how to beat the system, and you might look at that.

The Commission should review its credit for cooperation. In other words, you rightfully notice that when a defendant works and turns over for a police official, that that is a good thing to do, and you have given them weight right through all the mitigating factors. Well, I think that you might consider just giving the weight toward the crime itself that they have caused and not give them any time, any sentencing, forgiveness, for any of the mitigating factors -- the violence they use, the gun they use, and things of that nature. Even though they help us, and even though we are glad to have them turned around, I think they should get the message that if they are going to play that game, they have to pay for it, while it is accepted that the original offense is honored.

A word of caution as I close, that you are going to re-evaluate them as you go along, and that, of course, is a very, very fine thing to do, look at these things and
see how we can do them better. But I caution you about
don't do it on the basis alone of a lack of facilities, or
a lack of judges or a lack of court space. I think we let
our public down when we do that. I would try to avoid,
for example, what I read in the Washington Post where they
are recommending that the good time scores be manipulated
in Washington, D.C. in order to get prisoners out. Well,
we know the dilemma. Gosh, we know what capital budgets
are in our business. But we also know what it means to have
people walk who shouldn't walk. So I would ask you to consider
that.

Mr. Chairman, ladies and gentlemen, those are
my brief remarks. Thank you very much.

CHAIRMAN WILKINS: Thank you, Chief.

Are there questions from Commissioners to my
left?

Commissioner Block?

COMMISSIONER BLOCK: Chief Behan, I'd just like
to acknowledge my thanks to you for bringing to our attention
protection of the public as a central concern of this
Commission. We often lose track of that, I think.

CHIEF BEHAN: Thank you very much.
CHAIRMAN WILKINS: Any other comments or questions?

George?

COMMISSIONER MacKINNON: Chief, to what extent do your policemen participate with Federal authorities in arrests and matters of that character, or in solving crimes?

CHIEF BEHAN: We have never had -- and I have been in the business 40 years, Commissioner MacKinnon -- a better association with the Feds than we have at the present time. We have regular meetings. We exchange officers with the FBI, DEA, Secret Service. My VIP Squad, you can't tell as being any different from the VIP Squad of the Secret Service, because they are trained by them and operate with them when occasion calls for it.

We use the Federal statutes very frequently, because you get better chance of conviction through the Federal statutes, and the resources of the Federal government are given to us constantly, including airplanes and personnel as well as other kinds of help. And it is very good, and improving.

COMMISSIONER MacKINNON: And you turn evidence over to the Federal authorities and vice versa?

CHIEF BEHAN: Yes, when it is required. Sometimes,
they persecute in our courts; other times, in Federal courts. And our district attorneys, State's attorneys, sometimes actually do the prosecuting.

COMMISSIONER MacKINNON: And on arrests of serious offenders, violent offenders, do your policemen sometimes participate with the Federal authorities in joint arrests?

CHIEF BEHAN: Yes, sir, particularly in the drug area. We even have our people sworn in as Federal Marshals so they can operate throughout the State, beyond the jurisdiction of Baltimore County, so that they are covered as they engage in these kinds of activities.

We have people permanently assigned to task forces on the drug level.

COMMISSIONER MacKINNON: That was the point I was coming to, as to whether they shouldn't enjoy the same protection of Federal statutes where Federal officers are shot at or killed or disabled or something, that the actual Federal officer does.

CHIEF BEHAN: Yes, they should. And that's why, when we get into these crimes that go beyond our borders, we have them sworn in by the Federal people, to protect them.
Otherwise, we do have to back away on occasion, because we don't have the protections. But the Feds try very hard to see that we are protected.

COMMISSIONER MacKINNON: So what you would say is that in that situation of joint activity and in dangerous areas, it is being taken care of?

CHIEF BEHAN: Yes, sir, it is.

COMMISSIONER MacKINNON: Thank you.

CHIEF BEHAN: Thank you.

CHAIRMAN WILKINS: Thank you again, Chief.

Our next witnesses are Mr. Jeffery D. Troutt, Research Director of the Institute for Government and Politics, and appearing with him is Mr. Robert B. Kilesemet, who is President of the International Union of Police Associations.

Gentlemen, we are glad to have you.

MR. TROUTT: Thank you very much.

Mr. Chairman, Commissioners, I appreciate the opportunity to appear before you today. I know that you have a difficult job, and I support you, and I believe the American people appreciate the job you are doing.

I would like to express my support for the draft
approach of the preliminary sentencing guidelines. On the whole, I think you have done an excellent job, and I agree with most of your recommendations.

I support you in that you are giving tough determinate sentences for offenders. In this area, I believe the sentencing judges have done a great disservice by imposing sentences that are too lenient. Granted, they do so with the noblest of intentions, but I believe the consequences of the leniency is intolerable.

There is an understandable desire on the part of many judges to give convicted criminals the benefit of the doubt, to give them two, three, four bites of the apple, and impose a sentence which they hope will reform them. However, the fact is that many, if not most, convicted criminals are recidivists who are going to be back before the courts at some future date. That means that somebody somewhere has been and will be again victimized by that criminal. This is a dreadful cost, and the dreadful cost of this leniency is apparent when we consider that crime is the number one killer of young black men.

Strong sentences reflect society's abhorrence of crime and support for the victims of crime. This is
important, but I believe there is an even more compelling reason for imposing strong sentences: protecting potential victims. Each time a criminal faces a sentence in a courtroom, the future of many people hang in the balance. The judge never sees these people. He may never consider them, but their lives will be affected by the judge's decision. When we consider that the number of people who have been victimized by criminals who should have been behind bars, we see that sentencing has an impact in human terms that extends beyond just the individual criminal and his or her family.

In the written statement I gave you, I concentrated on three areas -- drug-related crimes, sexual crimes, and organized crime. In the interest of brevity, I'd like to just talk a bit about drug-related crime, since many of the same factors are present in the other two.

The sentencing guidelines suggest a likely increase for sentences for drug-related offenses. I think that is commendable. Recent polls have shown that the American people believe that drugs are the number one problem today. Lengthy sentences for drug-related offenses properly reflect the American people's revulsion against drugs, and I believe
it has the support of the American people and the Congress and the current Administration.

Drug offenses deserve stiff sentences for many reasons. Chief among them is the fact that drugs are the catalyst for a whole host of other crimes. Drug addicts commit burglaries and armed robberies in order to obtain money to buy drugs, and drug pushers contribute to this by supplying the illegal substances.

At the top of the pyramid, drug dealers often murder the competitors, sometimes in public places, without regard for the lives of innocent persons, including children who can be injured or killed in the crossfire.

Drug abuse isn't a victimless crime. When 50 to 70 percent of those arrested are abusing drugs and the connection between drugs and crime is so overwhelming, it cannot be called victimless. A large portion of crime is drug-related. If we correctly have compassion for drug addicts, we can correctly reach out to help them. But they are not the only victims of the drugs. The victims of drugs are also the victims of drug-related crime and even the economics -- all of us on the whole pay an economic cost for drug-related crime.
I believe imprisonment will benefit both the society and the drug user. Society will benefit because it will be subjected to fewer of the collateral crimes that are associated with drug use, and the drug abuser will benefit in that he or she will be cut off from the source of drugs and have an opportunity to dry out and also, perhaps, there will be some in-prison drug rehabilitation services available to them, and perhaps after some time, the drug abuser will realize that the cost of drugs to that person personally is just too high.

And quite properly, of course, you give stronger sentences to drug smugglers and drug pushers. If for no other reason, we should give them such-lengthy sentences to reflect our revulsion towards drug pushing. But it won't just reflect our indignation. It will assure that these abominable people will not be able to continue to peddle their poisons, especially toward children. And I think that is the most compelling reason to impose stiff sentences on drug pushers.

I would like to mention Judge Jack Weinstein of the U.S. District Court expressed concern to you, I believe it was in New York, about the fact that the sentencing
Guidelines imposed 180 points for some drug-related offenses and then went on to bemoan the fact that many of the people who are convicted of drug smuggling are what he called "mules", or peasant women from South American or Africa who smuggle drugs into the country in order to provide economic relief for their families. With all respect to Judge Weinstein, I think his concern is seriously misplaced. I would ask where is his concern for the protection of innocent people who are injured by drug use, but never appear by his court.

What about the thousands of young Americans who are subjected to peer pressure to use drugs? And why does Judge Weinstein seem to be more concerned about the well-being of the criminal than the well-being of his victim?

This is not to say that we don't have compassion on the very wretched economic state that a lot of Third World women endure and their families endure, but it just doesn't excuse smuggling these kinds of poisons in; this poison kills people. And I don't think we can afford such a policy.

In summary, I'd say in general the sentencing guidelines are a step in the right direction in that they reflect an abhorrence of crime and a firm resolve to
prevent criminals from preying upon innocent citizens.

So on the whole, I reiterate my support for the
sentencing guidelines. And I would also note that I would
urge you not to take prison capacity into account. I believe
that is a function of the legislature and that if prisons
indeed do become more overcrowded as a result of these
guidelines, it will force the Congress to choose between
shorter sentences or building more prisons, and I think
that is very appropriately a legislative determination.

I appreciate the opportunity to testify before
You, and I would welcome any chance to be of further
assistance. The American people have suffered for years
at the hands of unrepentant criminals. The Congress has
given you, the Commission, the power to reform one part of
the system by reducing disparity and setting sentences
so as to promote respect for law and crime. We look to you
with hope and optimism.

Thank you.

CHAIRMAN WILKINS: Thank you, Mr. Troutt.

Mr. Kliesmet?

MR. KLIESMET: My name is Robert Kliesmet, and
I am the President of the International Union of Police
I come here today to talk to you, to thank you for the opportunity to be here and express my views.

This Commission has been charged with a responsibility that is both complex and solemn. I hope that my comments will be of some value to you. I come to you with the perspective of the average street cop. Quite purposefully, I am avoiding the "ivory tower"-type testimony which often dominates discussions of these issues. If we can analogize the problem of crime to a flood, I think we can see the value of such a perspective.

From the mountaintop, you can see where the flood is coming and where it is going, but you can't really see the extent of damage caused by the flood unless you come down from the mountain and spend a little time where the flood is raging.

The "ivory tower" judges and scholars attempt to isolate causes and effects of crime, but they don't see the human cost. The average police officer does. They deal with both the criminal offender and his victim. It is the police officer, more than anyone, who sees the true cost of crime in human terms. It is the police officer,
not the judge, who has the sad duty of informing a wife that she is now a widow. It is the police officer, not the scholar, who daily sees promising young lives destroyed by drugs.

One of the greatest frustrations in a police officer's career occurs when the violent criminal is given what essentially is a slap on the wrist by a lenient judge. Police officers know the cost of crime. They see it every day. They know well that most criminals are not deterred by our criminal justice system because it is simply too lenient. They also know that more often than not, criminals who kill police officers are repeat offenders.

Lenient sentences do more than just frustrate police officers. When courts release dangerous criminals, they undermine public confidence in the criminal justice system and increase the public's fear of crime. At best, the public feels cynical; at worst, it feels helpless.

As a police officer, I have spent many years dealing with criminals and their victims. I know from this experience that some people rape, kill and steal without remorse. People who commit premeditated murder, people who commit rape, people who push drugs on young people, are not simply misguided -- they are evil. They need to be put somewhere
where they cannot harm innocent people. In my prepared written statement, which I'll submit, I cite four examples of abuse of parole and probation. However, in an attempt to be brief, I would ask that you'd read those.

Some have testified that probation is an effective alternative to prison. My belief is this. If a person shows by a criminal act that he poses a threat to society, he should be in prison. Placing dangerous persons on probation in hope that they may be reformed through community service is an unreal expectation. It is playing Russian roulette with the lives of innocent people. Any form of punishment which releases a violent criminal is insufficient, inappropriate and dangerous.

Whatever attempts we make to reform criminals -- and I believe that we should attempt to reform first and sometimes second offenders -- should be made inside prisons, where they cannot harm innocent people in the event reformation proves to be ineffective. A person who has committed a serious crime, for example, murder, armed robbery or rape, has already shown himself to be dangerous. I see no need in giving a sentence of probation in such a case. In fact I believe that it is
counter-productive. A prison sentence is fully justified, and the chances that the criminal will commit another serious crime are too high to risk probation.

Some witnesses have criticized the Commission for the alleged harshness of some of the proposed sentences. They seem to go out of their way to explain what they would call the "root causes" of crime. Chief among these causes is poverty. Where poverty does not cause crime, the apologists for criminal behavior claim that it is a mitigating factor. In other words, the person born into poverty is somehow trapped by sociological forces he cannot control and is drawn into committing criminal acts.

All this ignores the fact that the vast majority of poor people are decent, law-abiding citizens. It also ignores the role of individual choice. The nature of poverty may tend towards increased temptation to commit criminal acts, but that is not relevant in the sentencing process, nor does it mitigate or excuse the criminal act. High-level executives in businesses are undoubtedly faced with many temptations to commit criminal acts ranging from fraud to insider trading; yet, the fact that he or she is faced with this temptation is not a mitigating
circumstance, nor should it be. We demand ethical behavior from such people.

For year, defendants' attorneys in rape cases inferred that the appearance and demeanor of the rape victim enticed the defendant and somehow made this abhorrent act the victim's fault, or mitigated the defendant's guilt. Courts rightly rejected this tactic. The notion that a rapist is not responsible for his act is no longer accepted and fortunately is for the most part behind us. Even so, the notion that poverty somehow mitigates a defendant's guilt or excuses criminal conduct is still popular in some circles. This notion should become equally unacceptable. It simply should not be a factor in sentencing. Courts should assume that sane criminals act out of free will and should sentence accordingly.

One of the witnesses before this Commission took great care to point out that a large number of convicts come from the ranks of the hardcore unemployed. Again, this infers that somehow, unemployment causes crime. Perhaps programs to treat criminals employable skills have their place -- inside prison walls. I, for one, am not prepared to risk the safety of society at
large on the off-chance that the violent criminal will be reformed when he can get a job. The lives of our citizens are too precious to risk in such a cavalier manner.

I would point out that the same witness argued that prison sentences should not be used because it would deprive the families of the convicted offender's potential earnings. This is not merely inconsistent; it is illogical. It ignores the economic consequences of criminal activity. The professional criminal, and even the casual criminal, inflict an economic cost on society far in excess of their contribution through legitimate earnings. Besides, one might ask, from where do the earnings come to support the criminal's family. Are they derived from lawful employment, or are they actually the fruits of criminal activity?

Additionally, much of the harm caused by crime cannot be quantified in economic terms. You can measure and approximate loss of income to a family when the head of the household is murdered; but how do you measure the grief suffered by the survivors? How do you put a dollar value on the humiliation and fear inflicted on the victim of a rape, or the loss of the quality of life when the
elderly are too frightened of crime to venture out of their homes or apartments?

Criminals inflict a huge cost upon society in ways that are quantifiable and unquantifiable. This loss far exceeds the economic loss to the criminal's family.

Some witnesses have bemoaned the unwholesome effect of separating families by imprisoning a criminal parent. This same witness asserts that imprisoning the criminal will somehow cause the children of the criminal to become criminals themselves. If this were said by an ordinary person, we might pass it off as laughably naive. But it was stated by a Federal judge who presumably takes this into account in sentencing.

I assert that the opposite is true. Parents, if not overtly, teach values to their children by example. If the criminal parent remains with his or her children, what values will they impart to their children? Even if they make some conscious effort to teach them honesty or any other virtue, is the child likely to learn the lesson, or will the children instead follow the parents' example? The latter is more likely. If they remain with the family, the children probably run a greater risk of
becoming criminals themselves than they would if the offending parent was incarcerated.

In summation, I would like to reiterate that I reject the notion that sane individuals are not responsible for their own behavior. Courts must recognize that criminals intentionally commit criminal acts and should take this into account in the sentencing process. Among these people are murderers, rapists and drug dealers. These people should be given lengthy prison sentences so that they will not pose a further threat to the innocent public.

I thank you.

CHAIRMAN WILKINS: Thank you very much.

Questions?

COMMISSIONER BAER: I would like to compliment both of you, particularly Mr. Troutt, for your very good testimony about the relationship between drug use and crime. It is a well-known fact that a large number of the bank robbers in this country say they robbed these banks in order to support their drug habit. In that type of case, do you consider that drug addiction as an aggravating factor or a mitigating factor?
MR. TROUTT: I would consider it definitely an aggravating factor. While certainly, it is unconstitutional to incarcerate someone for the status of being a drug addict, the fact is, I believe it is aggravating because if the person is that desperate for drugs that they are going to commit a bank robbery, then I think the chances are excellent that they are going to commit another crime if we don't impose some sort of sentence on them that gets them away from people that can be harmed by those crimes.

COMMISSIONER BAER: So if, in looking at offender characteristics, we give some sanction units for this, you would support that?

MR. TROUTT: Yes.

COMMISSIONER BAER: The second question is to both of you. You both did a good job of describing some criminal behavior. What percent of these people are going to be back on the streets within two, three, five, ten, fifteen years, or whatever?

MR. KLIESMET: Are you talking about persons who were incarcerated?

COMMISSIONER BAER: I'm talking about everybody who goes to prison; what proportion are going to come back
out?

MR. KLIESMET: Well, eventually all of them.

COMMISSIONER BAER: Unless they die in prison.

MR. KLIESMET: Yes.

COMMISSIONER BAER: Okay. Now, should those people
be supervised? Should that be part of the system?

MR. KLIESMET: Do you mean probation kind of
supervision?

COMMISSIONER BAER: No. They are not on probation,
obviously; they have already been in prison. Should they
be supervised after their release from prison. That is
the question.

MR. KLIESMET: Well, certainly I believe in
supervision. However, I am not a believer in parole. I
am a believer in determinate sentencing. If you do the
crime, you do the time.

COMMISSIONER BAER: Well, I didn't ask that.
You are answering the wrong question. I said after they
serve a determinate sentence -- we agree there is going to
be a determinate sentence -- after they serve that
determinate sentence, should they be supervised? Should
that be public policy?
MR. KLIESMET: I don't think that they should be supervised in the sense that they have an agent who watches their behavior. However, I think that the local police should be notified that this person has been released from prison, and they should be aware that one of the problems of American policing is we don't know who is out on parole because the Parole Department doesn't have liaison with the police department to let us know who is out of prison and where they are. That is one way of keeping some kind of supervision over persons who have been released from prison.

COMMISSIONER BAER: So the police department ought to give the supervision?

MR. KLIESMET: Well, it would give general supervision. I don't mean they would make any stops; however, they would be aware that this person is in the neighborhood or in the environment.

COMMISSIONER BAER: Mr. Troutt?

MR. TROUT: I think I differ slightly from Mr. Kliesmet on that. I would think that perhaps some minimal amount of supervision would be in order, just to see if they immediately lapse into that type of a lifestyle again.
However, if we are going to incarcerate someone and give them the kind of sentence that they should get, I think that perhaps, once they have paid their debt to society, we should minimize our supervision.

COMMISSIONER BAER: Do you have any research about these drug users that go to prison, how many of them never use drugs again after they come out of prison?

MR. TROUTT: No, I don't. I'd be happy to look that up for you.

COMMISSIONER BAER: I would suggest that you do that.

MR. TROUTT: Okay.

COMMISSIONER CORROTTHERS: Would you be in favor of every person who has a period of incarceration to undergo a period of supervision upon release after serving the determinate sentence, or just certain offenders for certain specific offenses?

MR. TROUTT: To be honest with you, I don't know.

MR. KLIESMET: I would venture to say that I think that it may be appropriate.

CHAIRMAN MacKINNON: George?
COMMISSIONER MacKINNON: Mr. Kliesmet, where do you come from?

MR. KLIESMET: I was a police officer for 28 years in the city of Milwaukee, Wisconsin.

COMMISSIONER MacKINNON: Your name would suggest that.

MR. KLIESMET: However, I am Polish.

COMMISSIONER MacKINNON: I wonder if you could give us some examples from your experience of what you consider to be a "slap on the wrist"?

MR. KLIESMET: Well, a police officer arrests --

COMMISSIONER MacKINNON: I mean, get down to some specific cases.

MR. KLIESMET: Well, I can give you one right here, which I didn't read to you, but I'll take the time to read it to you.

It is in regard to a bank robber in Northern Virginia who was tried and convicted in the court of the eastern section of Virginia. In 1974 he went to prison -- and he had a criminal record that dated back to the Forties; he had been in and out of the system -- but in 1974, he robbed the Stafford County Bank. He was apprehended, taken
to trial, convicted, and sent to prison for 15 years. He
was paroled after five years. The Parole Board went so far
as to terminate his parole after two years. In 1983,
he again robbed the same bank. Apparently, he didn't learn
anything in prison, but he went out to see if he could do
the job right this time. He was apprehended and convicted
and sent back to prison a second time.

In 1985, he was placed on parole again --

COMMISSIONER MacKINNON: Is this Federal or
State?

MR. KLIESMET: -- these are all Federal violations
under the Federal court system --

COMMISSIONER MacKINNON: Where was he sentenced
in the first instance -- in Virginia?

MR. KLIESMET: In Virginia. Both times in
Virginia.

The third time, while on parole for the second
armed robbery, he held up the same bank a third time. That
was in May of this year. Fortunately, or unfortunately,
in the shoot-out that resulted during the apprehension, he
was shot and killed. However, the seriousness of it comes
in that a police officer was shot and wounded.
Those are the concerns that the police have about people who are let in and out of prisons and just do not learn anything through rehabilitation and do these serious kinds of crimes.

COMMISSIONER MacKINNON: How long did he serve on his second sentence?

MR. KLIESMET: On his second sentence, he served two years.

COMMISSIONER MacKINNON: Did you have any experiences in Milwaukee?

MR. KLIESMET: Oh, I had a lot of experiences in Milwaukee.

I can tell you a story about a State that had one party in power that built the prison; the subsequent election had the other party in power, and they sold the State prison to the Federal government, and the subsequent party got enough money to build another prison, but didn't get re-elected, and the next party spent two years arguing about where the prison is going to be. Now they have another administration in there, and he finally said, "The prison is going to be here, and we are going to build it and put people in jail."
I can talk about experiences in Wisconsin on the issue of overcrowding and sending people to jail, and it depends on who is in power; it is a political issue rather than an issue that the criminal justice system wants to deal with directly.

COMMISSIONER MacKINNON: Minnesota sold Sandstone to the Federal government to build Oak Park, and now they are taking Wisconsin prisoners.

MR. KLIESMET: Yes, I know, because one of our Governors sold the prison.

COMMISSIONER MacKINNON: Thanks a lot.

CHAIRMAN WILKINS: Thank you both very much.

MR. TROUTT: Thank you.

CHAIRMAN WILKINS: Mr. Rory McMahon is the Secretary of the Federal Probation Officers Association. This association has provided a great deal of assistance to the Commission over the past 12 months, as have individual members of this Association and other probation officers. So, Mr. McMahon, we are delighted to see you, and we will be glad to hear from you at this time.

MR. McMAHON: Mr. Chairman, I am Rory J. McMahon, Secretary of the Federal Probation Officers Association and
a senior U.S. probation officer working in the Southern
District of Florida, assigned to the Fort Lauderdale office.

I wish to thank you, Chairman Wilkins, and all
of the distinguished members of the U.S. Sentencing Commission,
for allowing us the opportunity to address you today
regarding the recently promulgated sentencing guidelines
draft.

I would like to begin my remarks today by thanking
all of the judges and several other distinguished speakers
that have testified during the past two days, expressing
their unqualified support and appreciation for the U.S.
Probation Service.

I would also like to comment on two sections,
General Comments, and Specific Recommendations.

First, we would like to make some general comments
about the overall guidelines and their implementation. Then
I will make specific comments and recommendations regarding
issues of specific concern.

The efforts and progress of the Sentencing
Commission in addressing the basic injustices and uncertainty
of present sentencing practices and the development of a
truth-in-sentencing system are laudatory. Based upon a
review of the draft and prior discussions with members of
the Commission, it is apparent that the U.S. probation system
will maintain an integral role in the new sentencing guidelines
system.

We strongly recommend that the Commission give
concrete support by whatever means are available and
appropriate to ensure that U.S. probation offices are ade-
quately trained and staffed to facilitate Congressional
intent and implement Commission guidelines into reality.

As a member of the Panel of Working Probation
Officers that convened in Washington, D.C. in July to work
with the proposed set of guidelines, I experienced first-
hand the complexity and additional responsibility that will
be thrust upon the U.S. Probation Service upon adoption of
the guidelines. I realize that the U.S. District Court
judges will rely heavily, if not solely, upon the calculations
and interpretations of these guidelines formulated by the
U.S. probation officer.

As a result of these additional responsibilities
and duties assigned to the probation system, there needs
to be a concomitant increase in the resources available
to the probation division as well as a review of the workload
formula and staffing patterns to assess the impact of these
guidelines on personnel staffing.

We urge that the Commission use its considerable
power and influence with the Congress to ensure that funds
are available to the probation division, the administrative
office, and the Federal Judicial Center to enable probation
officers to perform their vital role in this process.

Additionally, we urge the Commission to consider
and if deemed appropriate, recommend to the Congress that
the U.S. probation system be allowed to retain a certain
percentage of the fines collected by our agency and specifi-
cally earmark those funds for the training and resources
needed for implementation of the sentencing guidelines.
Certain proposals of the Commission, such as the home
detention concept, can most appropriately be performed
through the use of electronic monitoring equipment, which
will require the purchase or lease of expensive hardware
and software. In view of the fact that probation officers
are responsible in most cases for the collection of fines,
we see that it is appropriate for a percent of those funds
to be allocated for the use of the probation system.

With respect to our specific comments and
recommendations, these are primarily concerning the probation and post-release supervision sections of your draft. While realizing that the Commission has primarily addressed the categorizing of crime and assigning numerical sanction units to them in this draft, the comments regarding probation and supervised release leave the reader uncertain as to the Commission's expectations as to what are the purposes and philosophy of both probation and post-release supervision. This uncertainty lends itself to certain perceived problems in the implementation of the proposed concepts regarding supervision conditions, methods and manners of formulating and filing violations, sanctions for violation of probation and post-release supervision, and other concepts proposed in the draft, such as home detention.

As an example, nowhere in Chapter III is the need for the cooperation with the U.S. Probation Office by the defendant ever mentioned. There needs to be built into the process a mechanism for mitigating or aggravating adjustments provided for the cooperation, attitude, and responsiveness of the defendant with the probation officer. Otherwise it is not in the defendant's best interest to cooperate with the officer assigned to conduct the
pre-sentence investigation. The defendant's cooperation can only hurt him or her by disclosure of such things as prior record, financial and employment irregularities, and other damaging information that may result in the aggravation of his scoring. Conversely, without his cooperation, the job of the U.S. probation officer becomes much more difficult.

We recommend that cooperation with the U.S. probation officer be included in Section Part (b), Post-Offense Conduct. Furthermore, we recommend that perjured statements to a U.S.P.O. and attempts to destroy or conceal information or material evidence should be considered an aggravating factor and scored appropriately.

With respect to the conversion of sanction units into sentences, we favor a combination of Options 1 and 3. In order for the guideline system to work efficiently, in our view, there needs to be a requirement that the judge use all the sanction units accumulated by the defendant, including a minimal range required as a term of imprisonment when needed. The balance of the sanction units should then be satisfied with nonimprisonment sanctions such as probation, post-release supervision terms, and other appropriate
considerations.

With respect to the conditions of supervision, we recommend that certain vague, unenforceable terms and descriptions be either clarified or avoided. The word "promptly" in Condition G should be changed to a more specific time frame, such as "two days" or "within 72 hours", which we believe is clear and less likely to lead to misunderstanding or inability to be clearly enforced by the court.

Additionally, in Condition H, we submit that "maintain reasonable hours and associate with law-abiding persons" is vague and unenforceable. We recommend that the condition read, "The offender shall not associate with individuals with criminal convictions unless granted permission to do so by the probation officer."

Furthermore, we recommend that the Commission propose the adoption of wording for the imposition of certain special conditions of supervision -- special conditions such as financial disclosure for white-collar criminals, employment and travel restrictions for the third party risk offender, and conspiratorial offender, and search conditions for the narcotics trafficker and violent offenders should all be worded similarly to avoid
misunderstanding and unenforceability. We have submitted written suggestions as to the recommended wording for the Commission's consideration.

The violation of probation and post-release supervision section of the draft is of concern to us. It is speculated that the proposed revocation terms for violators are unacceptably low. Our reading of Chapter V suggests that if an offender is convicted of an A or B felony, subsequently released to post-release supervision, and commits a lesser technical violation, revocation will result in service of a six-month period of additional incarceration following which there will be no resumption of the up to three years of supervision.

In essence, the post-release offender can dispense with his three-year supervision term by committing a lesser technical violation which will result in service of a six-month term and no further supervision. We believe that a number of offenders, in particular the career criminal and organized crime offender, would prefer to serve the six months than be responsible to a probation officer for three years. We believe that this highlights a flaw in the revocation process that needs to be addressed by
the Commission. We further suggest that this process needs to be more clearly defined and refined to ensure that supervision terms are meaningful and provide more control than the historical "paper tiger" image of community supervision.

In conclusion, we thank the Commission for allowing this Association and U.S. probation officers individually to have input into the formulation of these sentencing guidelines. We offer to the Commission our continued interest and availability to continue to work closely with you in your task of clarifying, completing, enlarging and defining the remaining section of the guideline and sentencing structure.

We remain at your disposal for whatever task you deem appropriate and in the interest of the Federal probation system.

We thank you for this opportunity to provide comment, and we congratulate you on the outstanding job that you have done under the most trying of circumstances.

Mr. Chairman, this completes my prepared remarks. I will be happy to respond to any questions the Commission may have.
CHAIRMAN WILKINS: Thank you, Mr. McMahon, not only for those remarks but for what you have given us in the past.

I might say that in my judgment no group has given us any more assistance than Probation Officers throughout the last 12 months of the life of this Commission, and we are going to continue to call upon you individually and your Association and other probation officers to assist us.

Of course, we recognize that you recognize you have a vested interest in this, because you certainly will play a pivotal role in the implementation of the guidelines.

Questions or comments from my right?

COMMISSIONER BAER: I'd like to commend you on what I thought was a pretty good idea about possibly using some of the sanction units or then the term after the person leaves prison. My question is, do you see us being able to do this under the present law, or will we need to ask Congress for a law change? I think the idea is good in terms of public protection.

MR. McMAHON: I think that it can be done within the existing structure of the law. I think that the judge
should be required to use all the sanction units that are calculated at the time of the sentencing, and if part of those units are used for a term of imprisonment, the balance could be used for imposing terms of either probation or post-release supervision and/or conditions such as home detention and things of that nature.

COMMISSIONER BAER: You're saying the judge could do that under current law?

MR. McMATHON: That would be our reading of it.

COMMISSIONER BAER: It is an area you might want to look into further.

CHAIRMAN WILKINS: Any other comments or questions?

(Pause.)

CHAIRMAN WILKINS: Hearing none, thank you again. Our next witness, Mr. Wayne Lapierre, is Executive Director of the Institute for Legislative Action, representing the National Rifle Association. We are delighted to have you, Mr. Lapierre.

Who is this with you?

MR. LAPIERRE: Richard Gardner, with the Deputy General Counsel, National Rifle Association.
CHAIRMAN WILKINS: Good. Mr. Gardner, we are
delighted to have you as well.

MR. GARDNER: Thank you.

MR. LAPIERRE: Thank you, Mr. Chairman and Members
of the Commission.

We appreciate on behalf of the NRA members being
given the opportunity to testify. More than six months ago,
the NRA gave testimony in front of this Commission on the
general topic of truth in sentencing as it relates to fire-
arms-related criminal violations. That testimony continues
today to represent NRA's policy in this regard.

The sentencing guidelines published in the
Federal Register of October 1st represent a common sense
approach to an issue of very real concern to millions of
Americans.

The National Rifle Association heartily supports
the principles outlined in the sentencing guidelines which
could serve the legislatures and courts of the 50 States
as a model for constructing their own sentencing policy
with relation to firearms misuse and violent crime.

There are several facets of the Commission's
proposed guidelines I would like to single out as being
specifically supported by the National Rifle Association.

We applaud the recognition that protecting the public from criminal misuses of firearms and other dangerous felons is a primary goal of sentencing policy. The NRA also supports your treatment of all deadly devices as a factor in sentence enhancement. Too many such policies focus solely on firearms, to the exclusion of all other dangerous or deadly devices.

The NRA's nearly 3 million members, as well as 60 million other firearms owners, are also happy to learn of the enhancement penalties for theft where the object stolen is a firearm.

Likewise, we support the sentence enhancement proposed by the Commission for receipt of stolen property where that property is a firearm.

These two provisions when combined with the recently-enacted reforms of our Federal firearms laws, P.L. 99-308, which makes it a Federal felony for any individual, not just a licensed dealer, to transfer firearms to a member of the prohibited categories, we believe should aid law enforcement in addressing the black market of firearms. This activity, study after study by the Justice Department has proven, is a major source of criminally-acquired
firearms.

The NRA, however, also believes that some clarification regarding sentencing policy for conduct relating to the Gun Control of 1968 is necessary. Under Section (k)(221), and wherever the word "rifle" appears, we would suggest adding the words, "or shotgun", for reasons of precision.

Also under section (k)(221)(a)(1), we oppose the Commission assigning fully three times the offense value unit to a handgun as opposed to a long gun.

Likewise under (k)(221)(a)(6), we oppose the addition of an extra three points to the base offense value where a violation involved a handgun distinguished from a long gun.

Essentially, we believe these provisions represent -- and our members believe -- a mistaken conception of the handgun as a crime gun. In fact, the only difference between a handgun and a long gun is about ten minutes and a hacksaw.

Criminologist James Wright of the University of Massachusetts at Amherst, Gary Klack of Florida State University, and other authors of most comprehensive studies
of firearms laws and criminal acquisition of firearms have deplored policies which might encourage the substitution of long guns for handguns. These arbitrary and artificial distinctions between types of firearms could lead to the following type of scenario: An offender willfully sells four handguns to a prohibited person. The total sanction units for that offense would be 27, resulting in a prison term of between 16 and 22 months. Yet if that same offender willfully sells four rifles to a prohibited person, the total sanction units would be 15, for a sentence of four to ten months in prison. Again, the NRA urges that distinction be eliminated.

Finally, the major concern of the NRA relates to the nature of enhanced penalties for carrying firearms during and in relation to the commission of a crime of violence for drug trafficking offenses. It was the intent of Congress when it passed Public Law 99-308 that these sentence enhancements be mandatory minimum sentence, not subject to probation or parole. If the reported method for computing time off in the guidelines would in any way have the effect of reducing this sentence enhancement for criminal misuse of firearms, the NRA would oppose these
provisions in their present forms.

Notwithstanding the concerns just stated, we would like to commend the Commission for its fine work, and we appreciate being given the opportunity today to comment.

CHAIRMAN WILKINS: Thank you very much.

Mr. Gardner?

MR. GARDNER: I have no additional comments.

CHAIRMAN WILKINS: Fine. Well, we appreciate not only the -- do we have a written submission from you?

MR. LAPIERRE: Yes, you will.

CHAIRMAN WILKINS: Good, good. We appreciate not only your submission today, but the support and assistance your Association has given us in the past...

Are there any comments or questions from any Commissioner?

Commissioner Block?

COMMISSIONER BLOCK: I just had a short question of clarification on the distinction between long guns and handguns. It was my impression that handguns are somewhat more concealable, and in that sense an enhanced penalty for their use in the commission of a crime would make some sense.
MR. LAPIERRE: Well, we believe any criminal with five minutes can sit down and make a long gun concealable also; therefore, there really is no distinction.

COMMISSIONER BLOCK: Thank you.

CHAIRMAN WILKINS: George?

COMMISSIONER MacKINNON: My question goes to the same point. What you are talking about is a sawed-off Shotgun. Well, we can say it's a sawed-off shotgun. As I recall the Federal statute, that's what it talks about.

MR. LAPIERRE: Well, we believe the main problem is a person misusing any firearm in a crime, so whether it be a rifle, a shotgun or a handgun, the problem is the person misusing that, and that's what the sentencing guidelines should focus in on.

COMMISSIONER MacKINNON: Well, how many firearms offenses or how many crimes committed in part by firearms offenses are committed by rifles as opposed to handguns?

MR. LAPIERRE: There are crimes committed with rifles. The greater percentage would be with handguns.

COMMISSIONER MacKINNON: By far, by far. And the reason for that is because they are more adaptable
to that particular crime, and a rifle is not, because a man has to conceal his gun. Ordinarily, when he is going to commit a bank robbery or a lot of others, and run around the country before he gets to a certain place, he can't be carrying a rifle around on Main Street downtown without attracting a lot of attention.

MR. LAPIERRE: Again we would come back to the point that it only takes five minutes to turn a rifle --

COMMISSIONER MacKINNON: Yes, but we are talking about the commission of crimes. We are not talking about what you can do with a rifle or what you can do with a shotgun.

Now, the English go so far as to say anything simulating a handgun. Would you go for that? Certainly, a lot of crimes are committed by simulated firearms -- that is, toy guns that look like firearms or concealed weapons or the appearance of concealed weapons.

MR. LAPIERRE: Our position is we believe the distinction should be any firearm used in a violent crime, and that's what the sentencing guidelines should focus in on.

COMMISSIONER MacKINNON: I know, but I was asking
you about whether it ought to go further and deal with
simulated firearms, or imitation firearms.

MR. GARDNER: Judge, if I might, I think we would
not support that kind of distinction, because of course,
simulated firearms, or the hand in the pocket, are things
where the potential for danger obviously doesn't exist
as it does with a real firearm. And I think that the key
is the potential for danger.

COMMISSIONER MacKINNON: But you can't tell when
you are looking at a Colt 45 whether it is loaded or not.
It might be unloaded. And of course, the ability to put
some force on is not there. And certainly, it creates the
appearance, and that is what is the real, vital factor
in the offense.

MR. GARDNER: That would create the offense, but
if we are talking about what kind of penalty is appropriate,
whether an enhanced penalty is appropriate, the deadliness
or actual ability of the instrumentality to cause injury
should be a significant factor.

COMMISSIONER MacKINNON: Well, what's the
difference whether you actually create the fear by something
that is capable of doing it, or whether you do it by
something that isn't capable of doing it, but has exactly
the same reaction on the victim? What's the difference?

MR. GARDNER: The difference is if it is an
imitation firearm or the hand in the pocket, you in fact
can't do the damage. And in fact I would suggest that if
you put the same kind of penalty on both, you may tend to
encourage the use of actual functioning firearms and not
the other kind of thing, so that the potential for hazard
is going to be increased.

COMMISSIONER MacKINNON: Well, I just tell you
that that's the way they do it in England.

MR. GARDNER: Well, they also don't have a Bill
of Rights in England.

CHAIRMAN WILKINS: Thank you again very much.
Did you have a comment, Mr. Lapierre?

MR. LAPIERRE: Judge, the only comment is a follow-
up. In terms of firearms in crime, the real problem from
NRA's point of view are the repeat offenders who continually
skirt the criminal justice system time and time again, and
in terms of guns showing up in crime, the people that are
using them are that class. They are not the normal American
citizens out there. And we believe that is why these
sentencing guidelines that really toughen the penalty for
violent use of a firearm in a crime would really help cut
crime out there involving firearms.

COMMISSIONER MacKINNON: Yes, but when you get
down to the mere possession of a firearm, not particularly
in a crime (inaudible), when that extends to a rifle or
to a shotgun, a full-length rifle or a full-length shotgun,
it isn't practical in a lot of communities. People have
them all around their houses all the time, and yet some
of these laws make that seem to be illegal.

CHAIRMAN WILKINS: Thank you.

MR. LAPIERRE: Thank you, Mr. Chairman.

CHAIRMAN WILKINS: Our next witness is the Executive
Legal Director for the Washington Legal Foundation, Mr. Paul
D. Kamenar. Mr. Kamenar, we appreciate you letting us call
you out of order, and we are delighted to hear from you.

MR. KAMENAR: Thank you very much, Mr. Chairman.
I was scheduled to testify this morning, and because I
was running late, I was bumped, and I understand I missed
an invitation to lunch. I appreciate that, and if this
hearing goes on much longer, I would accept one for dinner.
But I had better get my two cents in now while I have a
chance.

Our foundation is a national, nonprofit, public interest law and police center with approximately 200,000 members nationwide. We devote a substantial part of our resources to areas of criminal justice reform, judicial accountability and crime victims' rights.

As part of our Court Watch Project, we all too often see cases where judges both at the State and Federal level impose undue lenient sentences for violent crimes such as murder, rape, child molestation, and so forth, giving probation or minimal prison terms. In that regard we applaud the general approach taken by this Commission in these proposed guidelines which would increase the length of incarceration periods for most Federal offenses. And we agree heartily with the reasons for this as stated on page 7 of the draft, namely, that the purpose of this is to provide just punishment, i.e. retribution, and deterrence and protecting the public from future criminality.

Accordingly, probation should be used only for the most minor nonviolent offenses. In reviewing these draft guidelines and hearing some of the testimony this morning regarding what this would do in terms of restricting
judges' flexibility, et cetera, I am reminded of a letter that was written by Thomas Jefferson to Enman Pendleton on August 26 of 1776. Jefferson, as you know, as a member of the House of Delegates in Virginia, sought far-reaching legislative reforms. He was successful in getting passed his bill for religious freedom, but he was unsuccessful in replacing Virginia's harsh criminal code with one that he considered more in line and humane.

Jefferson describes his penalogical views to Pendleton as follows: "The fantastical idea of virtue and the public good being a sufficient security to the state against the commission of crimes, which you say you have heard insisted upon me by some, I assure you was never mine. It was only the sanguinary hue of our penal laws which I meant to object to.

"Punishments, I know are necessary, and I would provide for them, strict and inflexible, but proportion to the crime. Death might be inflicted for murder and perhaps for treason, if you would take out of the description of treason all crimes which are not such in nature; rape and so forth, punished by castration; all other crimes, by working on high roads, river galleys, and a certain time
proportioned to the offense. Laws thus proportionate and mild should never be dispensed with. Let mercy be the character of the lawgiver, but let the judge be a mere machine. The mercies of the law will be dispensed equally and impartially to every description of men. Those of the judge or of the executive power will be the eccentric impulses of whimsical, capricious, designing man." And the letter goes on.

I guess there is something for everybody in Jefferson's letter here. Capitol punishment, we believe, is a Constitutional and appropriate punishment for certain heinous crimes. On the other hand, castration would certainly be not tolerated in today's society.

To the extent that the guidelines would transform judges into "mere machines" or, as Judge Hill this morning said, "a bean-counter", I guess is necessary to some extent to reduce what we see as the capriciousness of the sentencing authorities that led Congress to pass this law in the first place.

As a footnote, I would note that Jefferson did not include incarceration as one of his suggested forms of punishment. "Working on river galleys", as set forth,
can be referred to today, I guess, as community service.

At this point I would like to address those areas of the draft which are of particular concern to our Foundation. First of all, with respect to capitol punishment, as you know, certain Federal crimes do provide for that -- espionage, homicide, aircraft hijacking and so forth. On page 21 of your report, section (a)(211), expressly and properly refers to the availability of the death penalty for homicide level one. However, the Commission has not developed any guidelines on this sentence and when it should be imposed. We think that the Commission has the authority to do so and urge the Commission to do so under section 944(a)(1), (a)(2), and (b). In (a)(l), Congress mandated that the Commission's duty is to promulgate guidelines in determining the sentence to be imposed in a criminal case, including probation, fine and incarceration, including but not limited to. I would submit that the death penalty can also have your guidelines formed as well. There are those who think that the Federal death penalty is unconstitutional under Furman versus Georgia. However, in that case, the Supreme Court has never touched or said one word about the Federal death penalty sentencing
laws, and indeed the first Federal judge to address this issue in 1984 issued an opinion saying that the Federal death penalty law for espionage can be applied, and we filed a brief in all the Walker spy cases which I will submit as an exhibit, arguing why the death penalty is Constitutional.

However, this Commission is not in a role to determine the Constitutionality of the law, but I would suggest that if you do not include capitol punishment in your guidelines, that you make some kind of a preface indicating that the Commission's failure to do so does not in any way indicate that capitol punishment is inappropriate for any crime that does allow for capitol punishment or otherwise take a view one way or the other on that.

Turning to the standard of proof on pages 8 and 9, this was of some subject to the hearings this morning about McMillan versus Pennsylvania, whether you should have the preponderance of the evidence standard.

We don't think that you should have that standard. I don't think it is required. I read briefly the McMillan versus Pennsylvania case. I agree with Judge Oberdorfer that that dealt with State law and is not applicable at the Federal level. The difference there, and I think Judge
MacKinnon brought this out as well, or at least raised this issue, and I'd like to perhaps clarify it if I can, the difference is McMillan dealt with the statute, saying there was a preponderance of evidence needed for this crime of whether you carried a weapon as an incident that could be used by the sentencing authority as opposed to an element of the crime. And all the court said in McMillan was that Pennsylvania can do that. If they want to have a preponderance of the evidence standard, fine. They didn't say you even had to have that. But the petitioner in McMillan was saying, "No; we need a higher level, clear and convincing."

The court said, "No, you don't need that." That was the holding. It didn't say that everything else needed a preponderance of the evidence. In fact, it focused on due process applying to the fact of conviction, not on the sentencing authority. And it was careful to point out in the Speck case, and I'll read from McMillan, where the court said in Speck, "The conviction of a sexual offense otherwise carrying a maximum penalty of ten years exposed the defendant to an indefinite term to and including life imprisonment for post-trial findings of other offense
characteristics," et cetera. And there the Supreme Court said, "Wait a minute. We need some due process there, confrontation and cross-examination."

But in all these cases you are all dealing with, you are never going above the maximum level provided by Congress, and that is all you are doing is as an agency of the judicial government is to give guidelines to the judges as to what range, in this already permissible level of sentencing, you can impose.

Therefore, I think the due process does not require the preponderance of the evidence standard. I think it would just cause needless litigation that would get this Commission bogged down in getting these guidelines enacted, and I would heartily recommend that they be eliminated.

The modified rule of sentencing, we generally support. We have some problem with some of those examples that were given. For example, you gave the hypothetical on page 16 that a cocaine distributor who had a shotgun in his apartment, that you can't use that shotgun. We think that a sentencing judge could consider the shotgun as related to the offense. Most drug dealers possess illegal
weapons to protect their illegal business from other
drug dealers or dissatisfied customers. It would be
different if the offense was, say, check forgery, but we
do not think it is a big difference whether the cocaine
distributor was busted in his apartment where the gun
was located, or on the front sidewalk in front of his
apartment. So I think the sentencing authority of the judge
should be kept broad in terms of what can be considered.

A few other minor points real quickly. The multiple
offenses, in terms of multiple rapes, multiple bank robberies,
we think that the sentencing authority can consider all
of those even though they were not all charged and convicted.
We think that just because there was no necessarily legal
connection between each one, the criminal should not benefit
from the fact that he is engaged in a crime spree by
himself. I mean, you stated that if he was conspiring with
another then, yes, it is okay to add them up and we can
consider it, but if he conspired with himself, so to speak,
then he gets a break, and we don't think he should.

With respect to the issue of drugs, we think that
the Commission cannot go far enough in this area in terms
of assigning high offense values. I am not sure whether
the Commission addressed, besides cocaine, the issue of crack. I think the Parole Commission has rule-making proceedings on this, and I think it might be helpful to look at what they are doing in terms of what offense values to assign to the distribution of crack.

Finally, in terms of child offenses, we were very surprised to see that on page 30, criminal sexual conduct with a minor, the base offense is only 12 offense units -- I thought that was a typographical error -- which means a child rapist may be given probation or up to zero to six months for --

CHAIRMAN WILKINS: What page is that?

MR. KAMENAR: On page 30. "Criminal sexual conduct with a minor. If the offender committed criminal sexual conduct with a minor absent circumstances of any forced or coercion, the base offense value is 12."

Most child rapists don't really use kinds of force or coercion; they lure their innocent victims to that crime.

CHAIRMAN WILKINS: No, no, wait a minute. This is dealing with a specific Federal statute that is usually referred to as "statutory rape". This is where you've
got consenting individuals. It only has a maximum, I think, of one year, statutory maximum penalty.

MR. KAMENAR: Okay. I still think that that level is still too low. Statutory rape, 12 years old, I don't know whether you could consent --

COMMISSIONER MacKINNON: You can't go any higher.

The statute limits it to a year.

CHAIRMAN WILKINS: You see, if the victim is under age 12 --

MR. KAMENAR: Then, under your guidelines, you could take six off of that and therefore -- can they be put on probation?

CHAIRMAN WILKINS: Yes.

MR. KAMENAR: Okay. Our position is there should be minimum jail time for raping a child. I am sorry.

CHAIRMAN WILKINS: Yes, but this is not raping a child. This is statutory rape -- a 17 year-old boy and a 15 year-old girl --

MR. KAMENAR: No, no. You've got "12 years Old".

CHAIRMAN WILKINS: No, no. If the child is
under 12 --

MR. KAMENAR: Under 12, but if they are 12 and one day. We are not talking about 17 and 18 year-olds fooling around in the backseat of a car.

CHAIRMAN WILKINS: All the State statutes do this. This is not rape in the traditional sense.

MR. KAMENAR: Fine. We disagree. Let's move on.

I think that it is also outrageous that in terms of force and violence being used that you just refer simply back to (a)(222) and (a)(225), under their cross-references, where you say, "If the victim has suffered Physical injury, add the appropriate offense value." We think that with respect to raping children -- and this includes people under 12, because that's where that kicks in -- if a man rapes a three or four year-old baby, and there is physical violence, obviously, that it should not just simply go back to what the adult things are; but I think you should double the amount that is used for when children are involved.

My goodness, we treat juveniles differently when they are criminals in our juvenile justice system;
shouldn't we treat them differently when they are victims of these heinous crimes?

CHAIRMAN WILKINS: We should; we should do that. The guidelines do that. But you have got to factor in some other things, like the vulnerable victim statute --

MR. KAMENAR: No. It says here, under (b)(1), "If the victim suffered physical injury, add the appropriate offense value from (a)(222)-(a)(225)," which is assault and battery.

COMMISSIONER BREYER: What section are you looking at?

MR. KAMENAR: I'm looking on page 30, section (a)(233) --

COMMISSIONER BREYER: I think that you understand that the offense that (a)(233) is talking about is where, without any force, deception or violence, a man and a woman make love, both wanting to do it. Now, that's an offense under a statute if in fact one of the parties is young enough for it to qualify as statutory rape.

Now, there aren't many people, I think, where the two parties involved are reasonably old, i.e., more than adolescents, there aren't many people who would say...
that those people should go to jail for long periods of time. Now, maybe your Foundation thinks that. If they do think that, I think it's novel. I mean, there may be people who think that. I am not saying -- it is not idiotic to think that. I just haven't come across it.

MR. KAMENAR: Okay, but look at (a)(1), Judge. It says if the victim was under age 12.

COMMISSIONER BREYER: Now you have serious problems when they get quite young, because they may be pre-adolescent --

MR. KAMENAR: And they may be babies, and there is a lot of that going on.

COMMISSIONER BREYER: Right, right, right. But remember, still, that we are basically focusing on a case in which there is no force, violence or deception. Now, as soon as you get to a young person even in that situation, these guidelines are pretty tough, because even in that situation they say five years in jail, you see, where you get to the child who is pre-adolescent.

But I want to be sure that you are focusing on what we are talking about. Now, if you think that that five years in jail is too little -- I don't think
you could actually impose it if the prosecutor prosecutes
under the statute that we are talking about because of
the one-year maximum. But I mean, we are now talking
in sort of an ideal world. I just want to be certain
that we are talking about the same thing. Now, what
precisely do you think is wrong here?

MR. KAMENAR: I think if the maximum is one
year, obviously you can't give more than one year.

COMMISSIONER BREYER: Right.

MR. KAMENAR: I agree with you there. I was
under the assumption that there was another law other
than statutory rape whereby if a young child of four,
five or six years old is forcibly raped by an adult--

COMMISSIONER BREYER: Okay. That's a different
section. My goodness, you are absolutely right.

MR. KAMENAR: That's a different section.

CHAIRMAN WILKINS: Oh, yes.

COMMISSIONER BREYER: Yes, that's a different
section.

MR. KAMENAR: Okay. Nevertheless, I would
still say that whatever cross-references you do have --
do you have it enhanced for if the victim is a minor?
COMMISSIONER BREYER: We sure do. Look at (4)(232) and (231), and even in the one you were talking about --

MR. KAMENAR: Well, okay, then I misspoke. I want to make clear that if the victim is a minor, that it is doubled or whatever.

COMMISSIONER BREYER: Oh, it's a lot.

CHAIRMAN WILKINS: And I might add the Congress has recently passed a statute dealing with this area, and of course, we are using that as a model for the new draft. It changes some of this, but it still makes a distinction.

MR. KAMENAR: Okay. In my prior testimony before the Commission, I think I gave an example of a Federal judge where children were molested on a military base, and the judge gave the man probation and he was allowed to be back in the community. The parents were very upset about that, and I was just afraid that under these guidelines, he wouldn't see any jail time.

Finally, I would just like to say with respect to the issue of fines, we recommend that in each and every case, whether there is probation or not, that the judge
impose a fine to constitute either restitution and/or court costs. Even if the criminal does not have much money, a fixed amount should be set, and a percentage should be ordered to be paid to the victim and/or the court.

The statute, I realize, says that imprisonment cannot be used as a form of rehabilitation. However, it is our view that the payment of a fine of restitution is a form of rehabilitation and serves that salutory purpose because, even by paying a fine, the criminal has a sense or acknowledgment that he is responsible for the damage caused to his victim. And even if it is only ten dollars a month, the fact that out of his money he is being paid in the jail prison system for prison industries, et cetera, that he is using to buy his cigarettes, records, and what-have-you, that he knows a certain percentage of that has to go to the victim or the court.

I think it is just a matter of principle that in each and every case, a fine must be imposed in some form or another.

Thank you very much.

CHAIRMAN WILKINS: Good. Thank you very much.

Any questions or comments?
(Pause.)

CHAIRMAN WILKINS: Thank you again.

Pete Shields is Chairman of Handgun Control, Incorporated. Mr. Shields, we are delighted to have you with us today.

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

I am pleased to testify before you on behalf of Handgun Control, a public citizen organization with one million members and supporters, working to promote legislation to curtail gun violence.

Besides speaking for Handgun Control, I also speak to you today as a victim of violent crime, as a father of a young man who senselessly lost his life to a handgun violence. Thus I am particularly and personally concerned with the proposals of the Sentencing Commission as they relate to firearms.

I would first like to commend you for the outstanding job you are doing in reaching out to the public for comments. I especially appreciate the effort you have made to keep Handgun Control informed of your progress, and I am delighted to have the opportunity to
testify today.

Federal criminal law intersects with firearm laws in two respects -- first and most importantly, the Federal government through the Gun Control Act of 1968 and the Federal Firearms Act of 1934, regulates commerce in firearms and other destructive devices. The important interrelation of this regulatory function and violent crime in America is apparent from statistics provided by the Treasury Department's Bureau of Alcohol, Tobacco and Firearms.

In 1985, of the 3,137 defendants arrested by ATF for violating Federal firearms laws, 65.2 percent were narcotics dealers or users, 54 percent had prior felony records, 29 percent had a history of violence, 18 percent were domestic or international gun traffickers, 11 percent were illegal manufacturers or converters of machine guns, and over 10 percent were organized crime members.

In short, defendants charged with violating Federal firearms laws are not, quote, "law-abiding citizens snagged in the net of red tape." Violators of these laws are dangerous criminals whose firearms violations expose
thousands of Americans to further violence.

The preliminary guidelines procedure for calculating sentences for violations of these crucial Federal laws wisely distinguishes among firearms, recognizing that handguns because of their concealability pose a greater threat to live than do long guns and that automatic weapons are more dangerous than conventional firearms. And of course, this section also recognizes the danger of those sawed-off guns that were referred to shortly before.

However, Handgun Control respectfully urges that the Commission reconsider the offense values it has preliminary assigned for violation of the Gun Control Act and the National Firearms Act.

Based on our understanding of the preliminary draft, we believe that the offense values assigned for violations of Federal firearms laws would result in sentences that were too lenient if the violators' violations were viewed in terms of their potential for further injury. Or, stated somewhat differently, Federal firearms violations often constitute the first crucial link in a chain of violent criminal activity, and thus, penalties of those violations should be substantial.
Consider, for example, the sentences that would be imposed under the guidelines for the following hypothetical crimes. First, an individual illegal manufacturers two machine guns and delivers those machine guns to an individual whom he knows has previously served time for drug trafficking. If convicted, the machine gun manufacturer would be sentenced to two or two and a half years.

A second example. An individual who purchases a dozen Saturday night specials, the gun most frequently used in violent crime, in a State where purchase laws are lax, and who then sold those handguns, no questions asked, on the streets of New York City, would face a sentence of 10 to 16 months.

Considering the high potential for further violence, injury or death set in motion by these crimes, we think the draft guidelines are far too lenient.

Handgun Control's specific legislative agenda has always included the passage of mandatory sentences for those who use handguns or other firearms to commit a crime. We were pleased that Congress chose to establish mandatory sentences for armed, violent Federal felons in 1984 and for armed drug offenders in 1986.
It is not clear, however, from our review of the guidelines, which offenses the Commission considers crimes of violence for enhancing sentencing. For example, Homicide I and II would obviously qualify. Does this list of crimes of violence, though, include other levels of homicide -- burglary, abduction, or unlawful restraint?

To the extent that these crimes are not crimes of violence, we strongly urge that the sentences for those and other crimes against persons and property be enhanced if the offender is armed with a gun.

Specifically, rather than focusing primarily on the outcome, we believe that your inquiry should also focus on the potential risk of injury. In other words an armed burglar who steals $100 is more dangerous than an unarmed burglar who steals $10,000 and should be sentenced accordingly.

Similarly, an individual who uses a gun in an unsuccessful abduction may be more dangerous than an unarmed criminal who commits a successful abduction.

In addition to these general comments, we specifically want to draw your attention to the following provisions. First, reckless and negligent homicide.
Here, our first concern involves relative weight given to the use of a firearm. The guidelines assign a base value of 30 for homicide caused by the defendant's reckless conduct and a base value of 12 for homicide caused by defendant's negligent conduct. In the case of reckless conduct, the base value increases by 12 if the defendant uses a weapon and by 6 in the case of negligent behavior.

Ironically, however, the reckless or negligent use of a firearm in connection with homicide is only half as costly in sentencing terms as is being under the influence of any intoxicating substance. Being intoxicated adds 24 to 12 offense units for reckless and negligent homicide.

I respectfully urge the Commission to reconsider this ratio.

I also note that the guidelines do not distinguish between the use of firearms versus other weapons. Because a gun has such a high propensity for inflicting serious injury or death when used negligently or recklessly, we recommend that the Commission consider an additional offense value for use of a firearm.

Second, assault. We are assuming that an assault constitutes a crime of violence and so falls under the
mandatory penalty provision where the offender is armed. Accordingly, we were puzzled by the distinction drawn between threatening with a firearm, discharging the firearm, and causing injury with the firearm. If assault falls under the mandatory provisions, these distinctions seem irrelevant. If assault is not considered a crime of violence, then we are indeed puzzled as to what is a crime of violence.

Third, stolen property. The 1981 Final Report of the Attorney General's Task Force on Violent Crime estimated that between 65,000 and 225,000 handguns are stolen each year in the United States and that a significant portion of guns used in crimes had been stolen. We respectfully suggest that the Commission reconsider the offense totals it gives to those who steal and receive stolen firearms.

For theft of a firearm, the guidelines would take the basic theft offense value of 2, add 12 because a firearm is involved, and then add enhanced values depending on the value of the property stolen. If the total value of property stolen is less than $1,000, the increased offense value is 4. This means that an individual stealing 30 Saturday night specials would be looking at a total
offense value of 18. This translates into 6 to 12 months of imprisonment.

If these 30 guns were received by another for resale, the recipient offense total would also be 18.

Thus, under the preliminary guidelines, the individual who arms 30 people who presumably cannot qualify for lawful purchase of guns may spend only 6 months in prison. On the other hand, he has exposed dozens and dozens of individuals to serious risk of death or injury. The lives of tens of thousands of people in this country are shattered every year by handgun violence. I know first-hand the agony and the anguish felt by the victims of senseless violence, as my son was murdered with a handgun in 1974.

Enhanced sentences for those who use guns in crimes is one of the most important positive steps that can be taken, and Handgun Control and I personally strongly support them.

I do hope that the members of the Commission carefully review my comments and suggestions and reconsider the offense values it has preliminarily designed for violations of the Gun Control Act and the National Firearms
Act. If done, I believe these already impressive guidelines would be improved.

Thank you.

CHAIRMAN WILKINS: Thank you very much.

The first example you spoke of where you said the sentence would be two to two and a half years, if the sentence were going to be six to seven years, does that sound more in line with what you think would be appropriate?

MR. SHIELDS: Yes -- I am not a lawyer, and I am not an expert in the criminal justice field. I just think you have to weigh the balance here. But the two to two and a half years, in my book, is just far too low.

CHAIRMAN WILKINS: I have the same problem that perhaps you are having with this, and I have to stop to remind myself that two years is really six years, three years is really nine years. You see, if we keep thinking about it in today's world and then compare it to the guideline world, because this two to two and a half years would have to be all served. There won't be any parole. So that has to be kept in mind.
MR. SHIELDS: Okay. I think about it all the time, because the killer of my son is in prison for life, and I am waiting for that call one of these days where he has only served eight to ten years, and somebody is saying he is coming up for parole. And I want to go up there and testify and say keep him there.

CHAIRMAN WILKINS: I appreciate your feelings on that. I meant to say that we all need to keep thinking in those terms -- perhaps two and a half years is not sufficient sentencing; I am not arguing that -- but when we look at these sentences, we need to consider the fact that we are probably viewing them from today's world, and so we have to multiple by three, you see, in order to get a real comparison.

But I appreciate very much your views.

MR. SHIELDS: I guess my fundamental point here is that we give heavy weight to the potential for injury when somebody is carrying, using, trafficking in these deadly handguns, which are the primary weapon of crimes of violence in this country.

CHAIRMAN WILKINS: Yes, thank you.

Comments or questions?
Commissioner Breyer?

COMMISSIONER BREYER: Yes. I appreciate your keeping track of this, and in a way, you have put your finger on a problem that is a little bit more difficult technically than you may realize. I think some of the odd results that you get come from the fact that when we look to the statute, it governs an enormously broad range of different kinds of activities, and it is hard for us in the guideline to break down a statute like section 922 into all its constituent parts, of which there may be thousands in there -- you know how long a statute that is; it is a very long statute -- and then sort of put separate penalties for each. That is a problem we are going to have to grapple with, because if we try to break it down too finely -- in which case, if we break it down, we can take your guy who sells the five guns and treat him more harshly than somebody else who has just made a technical mistake. If we do that, we are going to run into some of the problems that the judges have this morning. If we don't to that, we are going to have to leave it up to the judges to use their discretion in aggravating, and we are going to have to
compromise those two things.

So I think that your looking at the next version and keeping the cases you have in mind and then seeing specifically how they would be treated, I think would be helpful. So I urge you to continue to do that.

MR. SHIELDS: Thank you.

COMMISSIONER MacKINNON: You talked about selling 12 Saturday night specials on the street as being an offense. What was that offense?

MR. SHIELDS: Well, it is an offense of the Federal firearms laws.

COMMISSIONER MacKINNON: What -- registration or lack of registration, or what -- just the mere sale?

MR. SHIELDS: Well, no. Across State lines.

COMMISSIONER MacKINNON: He needs to bring them across State lines and sell them.

MR. SHIELDS: That's right, that's right.

COMMISSIONER MacKINNON: Now, you talked about assault. Well, there are two things; there are assault and batter. Assault is not battery. And you said assault is a crime of violence. Well, many times, in many definitions, it falls short of being a crime of violence.
MR. SHIELDS: Even if the person is carrying a firearm?

COMMISSIONER MacKINNON: I say many times under certain definitions, it falls short of being an actual crime of violence, just assault.

Now, assault is putting some person in threat. And many times, some courts consider it to be short of the accomplishment, which would be a battery. But generally, many statutes talk about assault with a firearm, and more or less give it the same kind of a sentence as they would a crime of violence, although it might not technically meet the same definition as a crime of violence.

Now, you talked about the "odd results" that you get in some of these cases. Actually, what you mentioned was that some cases do bring about odd results. Well, a judge can say under these guidelines and under the law -- and we anticipate they will come to the same conclusion that you do -- that this is an "odd result", and therefore, it justifies an increased penalty, and I am giving it, and that's my reason for imposing this sentence. And the defendant can appeal, and the Court of Appeals would say, "We'll throw your case out", and that's the way
the statute contemplates taking care of "odd results";
they let the judge deal with it. So they are not uncorrect-
able.

MR. SHIELDS: Well, I am glad, because some
of them, you know, the negligence --

COMMISSIONER MacKINNON: Well, a lot of people
here have been dealing with these things as thought they
were absolutes. Well, in many respects they are absolutes.
But they can be appealed, and they can be increased or
decreased. And if the experience in the Federal system
is anything like it was in Minnesota, you're going to
have a number of appeals when you start out, and you are
going to settle some of these questions. And the judges
are going to write some of these guidelines. And consequent-
ly, we hope more justice will result.

Thank you.

MR. SHIELDS: Thank you.

COMMISSIONER ROBINSON (presiding): Any other
questions?

(Pause.)

COMMISSIONER ROBINSON: Thank you very much,
Mr. Shields. We appreciate your coming.
Is Scott Wallace here? If you would come up.

Mr. Wallace is from the NACDL, National Association of Criminal Defense Lawyers. Alan Ellis, I understand, is still sick.

MR. WALLACE: That's right. We appreciate your willingness to reschedule to suit him, but he is still indisposed with a bad case of the flu.

My name is Scott Wallace, and I am Legislative Director of the National Association of Criminal Defense Lawyers. In view of the lateness of the hour, I will not try to go over the entire statement of Mr. Ellis, but let me just highlight a few important points.

I would call your attention particularly to our expressions of concern about the modified real offense sentencing system and the preponderance of the evidence test that is applied to sentencing determinations.

The main issue that I would like to highlight is something that has been discussed a lot in the last couple of days here, and that's the question of prison overcrowding and how it should be considered in the formulation of these guidelines.

We recognize that some members of this Commission
have expressed reservations about giving prison capacity any voice in the formulation of the guidelines. As Mr. Trott said yesterday, to do so would be to put the cart before the horse. We sincerely understand this reluctance. In an academic sense, doing justice — that is, the rightness an appropriateness of a particular punishment for a particular crime — must be absolute and should be. Whatever our own view of what the just punishment ought to be, we all would like to see it applied fairly and consistently without regard to what Mr. Trott referred to as artificial limitations on money and prison space.

But we are not now in an academic forum. These guidelines are going to be administered in the real world, in a criminal justice system dominated by artificial limitations, a stingy Congress, and the perpetual tradition of making do with inadequate resources.

Indeed, in the forum we are in today, there is really no point in discussing at all the issue of whether prison overcrowding must be considered by the Commission in formulating the guidelines. Congress has already resolved the issue: It must be considered. And if the Commission disagrees, its sole recourse is to go.
back to Congress with one of two recommendations: One, that Section 994(g), the one mandating that the guidelines be designed to minimize overcrowding, be repealed; or two, that $10 billion or whatever it takes be appropriated to build new Federal prisons.

But unless and until either of these happens, the Congress' mandate stands and must be followed. We would simply like to emphasize that it need not be followed in an arbitrary, inconsistent or artificial way.

We would encourage the Commission to borrow a concept from the recently-enacted Tax Reform Act, the concept of revenue neutrality -- that is, that you can dramatically change the law, rewrite national priorities, get tougher with some people and lighten the burden on others, all without changing the bottom line -- the amount of revenue taken in.

There may be disagreement now about the need to have a neutral bottom line. But it was a "given" in the tax debate handed down from the President and accommodated by the entire Congress, and in the sentencing area as well, it is a "given", handed down by Congress to this Commission, and it does not belong in this debate to...
question the need for it.

What we are advocating, then, is a notion of incarceration neutrality, that is, that whatever you decide to do to restructure sentencing priorities, the bottom line, the Federal prison population relative to prison capacity, must not increase. In fact, since we are already dealing with a Federal prison overcrowding rate of some 50 percent, as Mr. Carlson testified yesterday, the goal should be to decrease it, not just a little but to zero percent, the point where population would not exceed capacity at all. At that point, the Congress' mandate would clearly be met. Obviously built into this concept would be foreseeable annual increases in prison capacity so that the bottom line could inflate over the years in line with reasonable expectations of new Congressional appropriations for Federal prison construction, based on historical appropriations patterns for the buildings and facilities account of the Federal prison system.

In this regard, though, we note that although Federal prison construction has been on a four-year spending spree, adding between 1,000 and 2,000 new beds each...
fiscal year from 1984 to 1988, the Department of Justice, according to its budget submission to the Congress for fiscal year 1987, plans to build not a single new space in the years 1989 through 1991. The plan is to level off for those three years at a rated capacity of $31,866. And yet, those same budget materials state that the overcrowding rate at that time, at the time they were prepared, which was 42 percent, was unacceptably high and that the 1984 Crime Control Act will further increase the inmate Population.

And yesterday Mr. Carlson testified that the draft guidelines would lead to "a potential dramatic further increase in the Federal prison population". We would urge the Commission to set priorities. We can't send everybody to prison. And we can't increase current sentence lengths by 225 percent, as Judge Heaney's study in the 8th Circuit that he explained this morning indicates would happen under the proposed guidelines. Choices have to be made, priorities assigned; whom do we most want to send to prison? Obviously, hardcore, repeat, violent offenders. Whom might equally well be punished by a combination of imprisonment plus some appropriately
tailored, nonincarcerative alternative? For which offenders is there the least compelling need for incarceration?

Which could be diverted?

There is a broad, imaginative and ever-expanding array of promising alternatives to incarceration out there. For offenders on the lower rung of the culpability ladder, whoever you decide they may be, such alternatives must be provided.

That concludes my statement.

Thank you.

CHAIRMAN WILKINS: Thank you very much.

Any questions?

Commissioner Block?

COMMISSIONER BLOCK: I just want to follow up on these "promising alternatives". Can you enlighten me about the "promising alternative punishments" that we might use or might suggest for offenders?

MR. WALLACE: Well, they depend on the specific offense involved, but many of them are out there already: Fines, restitution, community service.

COMMISSIONER BLOCK: Would you say for securities violations, antitrust violations, and certain frauds that
we use only fines and save the prison capacity?

MR. WALLACE: No. The determinations are yours, of course, to make as to what particular offenses should merit solely an alternative or a combination of prison sentence plus some alternative. In a case like Mr. Boesky, for example, which was discussed yesterday, a combination might be appropriate, where he might actually be more hurt by having to cough up a tremendous amount of money, or as much hurt as going to prison for an appropriate length of time.

COMMISSIONER BLOCK: So you might save the prison capacity by not incarcerating white-collar criminals and in fact using the prison capacity for just street crimes?

MR. WALLACE: No, I am not recommending a distinction between white-collar crime and street crime.

COMMISSIONER BLOCK: I am just trying to find out where you use these promising alternatives. People who commit street crimes don't have a lot of resources to pay fines, nor can they pay restitution.

MR. WALLACE: Well, money is only one alternative.

COMMISSIONER BLOCK: Well, what do you do?
MR. WALLACE: Well, say you have a first offender, violent offender, someone who has committed a street burglary, who has no money of his own, a street robbery, you could structure -- and this has been done in an infinite number of very imaginative ways -- require him to perform community service for a victims' organization, to become aware of the humanity of the people who he has violated.

COMMISSIONER BLOCK: Do you think that is an adequate punishment both to show the seriousness of the offense and to deter?

Do you think putting that in the guidelines is a wise public policy?

MR. WALLACE: I think if you are talking about first offenders, of course --

COMMISSIONER BLOCK: Well, you want them to be last offenders. It seems to me you are breeding career criminals.

MR. WALLACE: Our bottom line also is deterrence, and I think that is a most important --

COMMISSIONER BLOCK: If you treat first offenders that way, you are creating career offenders.
MR. WALLACE: Well, we disagree.

COMMISSIONER BAER: What about the drug users?

In the Federal system, about a third of the new commitments are for drug users, and many of those are first offenders; in fact, the biggest ones are sure to be first offenders. What are you advocating for those?

MR. WALLACE: Well, I guess I would like to respond further in writing. We have several experts on drug offenses who might be able to help answer that more specifically than I can. But I will be pleased to respond with a more detailed answer.

CHAIRMAN WILKINS: Thank you.

Commissioner Nagel?

COMMISSIONER NAGEL: Yes. The legislation under which we operate begins with a statement of four purposes of sentencing, and dramatically absent from those purposes is to determine sentences so as to manage prison capacity.

One question I have is why you think that was not included if it was the Congress' intent that we use sentences as a way to manage capacity.

Furthermore, the legislative history reveals
that there was an amendment proposed which would have
had existing capacity dictate the sentences, and in fact,
that amendment was to the best of my recollection overwhelmingly
rejected -- I think the vote was 93-to-1. So it was not
that Congress did not consider the policy you are advocating,
but I believe that it considered it and rejected it.

My question to you is on what basis do you
advise us to act in what would appear to be direct contra-
diction to the legislation under which we operate?

MR. WALLACE: Well, the four purposes to which
you refer, as I understand, are the purposes of punishment.

COMMISSIONER NAGEL: No; they are the purposes
of sentencing.

MR. WALLACE: The purposes of sentencing.

COMMISSIONER NAGEL: Right. But what might have
been included is that one purpose of sentencing is to
manage prison capacity, is to be assured that no more
than the existing number of persons are sentenced to
imprisonment such that there is no additional overcrowding,
et cetera. In fact, in some States, that has been a purpose.
I think it is quite well-known that that was an overall
purpose or an overriding concern in the Minnesota
determination of their sentences. And the amendment was
Proposed to Congress that we follow the Minnesota pattern,
and as I say, to the best of my recollection, Congress
specifically rejected that by a 93-to-1 vote.

MR. WALLACE: Well, I would suggest a distinction
between the purposes of sentencing and the purposes of
the sentencing guidelines.

COMMISSIONER NAGEL: Well, this was specific
to the sentencing guidelines. And how do you reconcile
your advice to us in view of the legislative history and
that specific amendment?

MR. WALLACE: Let me address that amendment,
then, first. The amendment was targeted at zeroing in
on existing capacity. We are not suggesting that the
Federal prisons should not be permitted to expand. That
was basically a moratorium on prison construction amendment.

What we are suggesting is not that Congress
should be precluded from appropriating money for new prison
spaces. Obviously, that is necessary. We are trying
to foster a recognition that Congress is institutionally
reluctant -- perhaps incapable -- of providing adequate --

COMMISSIONER NAGEL: How do we know that, by
the way, in the absence of proposing sentences to them
that conform to the purposes and then letting them make
that decision independent of our second-guessing that
ahead of time? That's really the question?

MR. WALLACE: Well, the basis for my own personal
thoughts on that is from having worked for four years
in the Senate, in part on the Senate Judiciary Committee,
working on prison overcrowding issues and handling repeated
efforts by Republican Senators for whom I worked, to
provide additional funding for prison construction -- one
year, an amendment for $600 million; the next year, in
the face of a 60-to-33 defeat on that amendment, an amendment
for $200 million; the next year, an amendment for $25
million. We got the $25 million one, but it was like
pulling teeth, and that was in the context of the 1984
Crime Control Act.

COMMISSIONER GAINER: Mr. Wallace, do you think
it might have helped you in that situation if you had
had in being at that time a sentencing commission saying
that, as a result of the logical application of our guidelines
that we have developed, developed in order to meet theour Congressionally-specified purposes of sentencing,
we find that an additional 8,500 beds are going to be
necessary in the next three years, and if they are not
provided, unfortunately, we are going to have to dump
on the streets a variety of individuals who we think full
well justify incarceration. Would that not have helped
you? Would it not be somewhat a different situation next
year or the year after that, when there is in being a
commission designed to look at these things and to make
recommendations to the Congress?

MR. WALLACE: Certainly, the fact that such
a recommendation comes from an independent bipartisan
commission has historically enhanced almost any proposal
that has been put to Congress. They love independent
commissions, and they generally treat them with great
deferece, especially when they establish them themselves.

The issues, though, remain the same, and just
recently in the last couple of months, and mentioned in
our statement, in the 1986 Drug Act, there was a lot
of discussion about the increased prison population that
would result from the stiffer sentences in the drug area.
Republicans and Democrats alike agreed on that fact, and
the House had lengthy discussion of how much money they
should add for prison construction. They concluded they should add $1 billion over the course of three years to fund the construction of 17 new Federal prisons. The Senate, faced with Gramm-Rudman and budget realities, came back and said, "Well, our proposal is one new prison, about $90 million." They compromised -- two new prisons, $98.7 million. That's the reality.

Now, you might be able to get a little bit more by virtue of the Commission requesting it, but that's historically the way it has gone, and I think that is what you have to start from.

COMMISSIONER NAGEL: Doesn't that undermine your earlier point, which is that we should have prison capacity drive the determination of sentence proposals; and if in fact Congress has demonstrated that it is willing under certain circumstances, why shouldn't be separate those decisions, that is, do what I think the legislation expected us to do, which is to determine the sentences according to the four mandated purposes, and then if there is an increased need as a result of an impact study, then you go to Congress and you make your arguments, and then they can act as an independent legislature, which
was the position being advocated earlier by one of the witnesses.

What would be the basis for arguing that we should second-guess now, a priori, ahead of time, and then let that determine the sentences?

MR. WALLACE: Well, I don't think anybody can argue that you have to have a crystal ball to see what kind of money is going to be appropriated. And in fact, the statute doesn't require you to do that. It simply says that you should formulate the guidelines so as to minimize the risk that population shall exceed capacity. And they don't even say by how much. Perhaps it could be argued that that provision contemplates a permissible, 30, 40 percent overcrowding rate. At the time that the provision was enacted, Federal prison overcrowding stood at 42 percent. Perhaps it could be argued that that is acceptable under the language of the provision, and you have at least that much fudge room from 42 percent down to zero for you to have a guess about what will be constructed next year.

But I think one thing is sure, and that is that you cannot go above that, significantly above that,
certainly, because that doesn't fall under the heading of minimizing overcrowding. And if you take current overcrowding rates, and you have a 225 percent increase in sentence length, I don't see how you're going to get below the 42 percent overcrowding rate.

COMMISSIONER BREYER: Well, you don't know what it is going to be, as I don't know what it is going to be. I mean, I don't know what the numbers are going to be, so I doubt that you know what the numbers are going to be.

MR. WALLACE: Well, I am just speaking from reasonable-certainty. It is sort of like everyone's gut feeling about the President's economic program: increase defense spending, cut taxes, and logic will tell you although he assures you otherwise that it probably is not going to produce a reduced deficit. I'm just trying to go on common sense.

COMMISSIONER BREYER: I'm saying that you don't know what the recommendation of the Commission is going to be in terms of length, I suppose, because I don't know what they are going to be. Since I don't know what they are going to be, I doubt that you know it.
MR. WALLACE: Oh, certainly.

COMMISSIONER BREYER: And so there is a lot of "what if-fing", I think, going on in respect to the impact on the prisons. That is, Congress has just passed a set of laws that create some new crimes and have mandatory sentences for a whole lot of drug crimes, and they have changed the immigration law to impose criminal penalties on employers who hire aliens, I take it, so if this Commission disappears from the face of the earth tomorrow, I suspect that there will nonetheless be additional criminal defendants who are convicted of new and different crimes.

So the extent to which whatever we recommend in a whole variety of areas creates a significant increase in prison population over and above what will happen in the future anyway, I think at this point is pretty speculative.

I agree with you 100 percent, and I think everybody does, that this Commission will follow the statutory instruction that the sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons as
determined by the Commission. I mean, that's the statement in the law, and I don't know anyone on the Commission who does not intend to follow the law.

MR. WALLACE: Well, obviously, I am not anticipating what your next version of the guidelines will look like, but my comment is directed solely at the preliminary draft that we have before us.

COMMISSIONER NAGEL: I would add just one further thing, and that is when you reconsider this issue, you may want to separate out the potential impact over the short-run versus the long run, and that it may be that you may have a short-run increase, but it may also be that you may have a short-run increase, but it may also be that you will have a long-run decrease as a function of the deterrent effect of the short-run increase. That is at least possible, and I think should be entertained.

MR. WALLACE: If in the short run, there is 100 percent prison overcrowding rate, then in the short run, the courts are going to mandate early releases, and everything that you are trying to do here will be frustrated by that.

CHAIRMAN WILKINS: Judge MacKinnon?
COMMISSIONER MacKINNON: There are just a couple of points I wanted to clear up. First of all, I probably ought to comment that roughly, my understanding is we have about 44,500 prisoners in the Federal institutions at the present time, and the expectation is that without any change whatsoever, that by 1990, 1991, that is going to amount to 51,000 prisoners -- apart from what we do, completely.

The other matter that I wish to address my thoughts to is the Minnesota situation. Now, you heard a lot of misstatements about what happened in Minnesota or what the Minnesota situation is. And I will tell you what it is.

The prison population in Minnesota today is substantially what it was years and years and years ago. It is slightly higher, about 4.47 percent as opposed to 4.4 four years ago, all through the years. It has remained fairly constant.

Now, all of this talk about the Act being limited to prison population, and it has some language in there, they have one of the most modern and one of the best prisons in America, and the capacity is way
underutilized.

As a matter of fact, as you noted when I talked to the gentleman from Milwaukee, he reflected the fact, which I knew, that Minnesota is presently taking Wisconsin prisoners in order to fill up the prison. They have got to go outside to get prisoners to fill up the prison. So it has not had any impact on prison capacity to that extent.

Now, I know you didn't make any statement about that, but I just wanted to get that on the record at the close at this particular time.

CHAIRMAN WILKINS: We appreciate your attendance, and we also appreciate the work or your organization which has been working with us over the past year, and we are sure we will continue to have a working relationship with Defense Attorneys.

MR. WALLACE: Thank you very much. We certainly appreciate your receptivity and your interest in hearing us. It is very much appreciated.

CHAIRMAN WILKINS: Thank you.

In keeping with the policy of the Commission during these regional hearings, we invite anyone who
has comments to come forward and address the Commission
on any related subjects dealing with the guidelines or
policies of the Commission.

Mr. Santorelli?

I was going to recognize you. Mr. Santorelli
is in private practice now, as I understand it, and was
formerly the Administrator of LEAA.

MR. SANTORELLI: Yes, and I as too young when
I held the job. As I think back now, I would have done
some things differently.

Thank you, Mr. Chairman, for permitting me
to share a few moments of your time, especially at this
late hour. I am particularly pleased to renew some
relationships with some members of this Commission who
are old colleagues, and I am particularly delighted to
see that you have Ron Gainer on this Commission, whose
life I shared and whose job I shared at a previous time
in my life when we were shoulder-to-shoulder on these
same issues, and I have a tremendous impression of deja
Vu, and I hope that you will represent some of those same
views in-house as I will try in the next few minutes.

I am also pleased to see Judge MacKinnon here,
whose views I have long admired when I was a lowly
assistant U.S. attorney, 212 years ago, I think, Judge.
Again, thank you.

I represent no one in an organizational sense,
although I am a council member of the ABA's Section on
Criminal Justice and have had a hand in writing the views
that you heard earlier I think, today, from John Greacen.
So I will make no attempt to engage in what I will call
"technical analysis" of this proposal.

I have to commend this Commission for its
labors and its patience on hearing many witnesses, some
of whom I did not have the pleasure of hearing and will
probably repeat, and if I am redundant, excuse me.

I am here out of a personal passion to share
with this Commission some views that might go unnoticed
because I and Ron Gainer tread some of these same paths
before.

Commissions are sort of a way out of a thorny
problem for government when it doesn't have a clear idea
of what it wants to do, and also when it wants to delegate
some of its difficult responsibilities. In a sense, you
are an arm of the Congress, to find facts for it and
to report back to it.

I would urge you from the outset, as a veteran
of the old Brown Commission, reform of the Federal criminal
law, and S.1 that followed it, and the efforts to reform
the criminal law in an unpopular time when many vested
interests were involved, particularly lawyers who had
well-developed notions of what jurisprudence should mean
and what the terms of the criminal statutes should mean,
and judges who had vested interests in their interpretations,
and it all failed, even though it was a good idea.

This also sounds like a good idea, but it is
truly a thorny thicket, because from my own personal
perspective, I think you have been given a job to do
which does not address the problem that gave rise to the
frustrations that created this effort at dealing with
a thing called "certainty of sentencing" or "certainty
of punishment".

I think from my own view that this Commission
and the rather complex, narrow, and perhaps too directive
statute that you have gotten, is a result of what the
Congress too often does. It is reactionary to a problem
that is intractable.
I have spent 22 years of my life — far shorter than some of you on this Commission — in the criminal justice field, half of it from the prosecution and reform side — I was once a prosecutor before I got to LEAA, and I was once Ron Gainer before I got to LEAA — and for the last 11 years, I have been in private practice, seeing the other side of this process and seeing how it actually works.

The theory of equality or nondisparity in sentencing is a dangerous theory, in my opinion, in a criminal justice system whose fundamental values are individual justice, the application of individual and tailored responses. Once we allow ourselves to think of the criminal justice system as a monolithic, inexorable, mechanistic, functioning, computer-model-based methodology of handling wrongdoers, we are in great danger.

The Congress is careless, in my judgment, after these 22 years of responding to the problem of crime, because it doesn't know what to do. It passes statutes in the face of fundamental underlying problems. It makes more criminal laws, it creates more prosecutors, -- more criminal laws than the country needs, in my opinion,
giving rise to more lawyers than are needed in my opinion, and not enough places to put persons convicted of crime.

In a sense, it is not quite a copout, but it is close to that. And I don't want you to feel so squeezed and restrained by the statute to relieve a pressure that is not being relieved. In a sense, I see this Commission's function as an expression of the frustration that there is not enough certainty in apprehension and conviction. It is not enough certainty in sentencing, and in a sense, that is sort of a misleading function to have to perform, because it takes people off the hook of where the uncertainty comes about in crime, recidivism, and the likelihood of the creation of crime.

You are dealing only with that minimal fraction, that tiny fraction at the end of the pipeline that the system has caught. Yes, it is true — recidivism at that point can be prevented by longer sentences, but such a fractional kind of dealing with the problem. And I don't want us to take ourselves off the hook as a system, saying this is some kind of a solution of panacea.

I know this is a big mouthful, and perhaps it is something that the Commission doesn't need to hear.
in public, but I am constrained to say it, because I sit here and I watch the reinvention of the wheel. I watch the Congress -- for whom I worked once as counsel to the Judiciary Committees of both the House and Senate -- struggle with a problem and try to find mechanisms that are not really fundamentally responsive to the problem.

If you feel the courage, after having heard much testimony, perhaps not to take on the burden yourselves, of your own opinion, but to say that reflected in the testimony you have heard over and over again, as that this concept of uniformity in sentencing and trying to follow the excessive guidelines, in my opinion, that the statute puts out to you, many witnesses felt that this was not a significant answer. And if you feel courageous enough to ask for further guidance in a revision of the statute, or to make recommendations beyond or in a direction other than the statute, I would encourage you to do so.

I find that there are not enough voices in our country willing to deal honestly and fundamentally with some of the issues that we see. Instead we tinker with the system.

I am not here to give you a personal analysis
of your statutory proposal. It is in my judgment something You feel constrained to develop within the statute. I am troubled by it because it seems to be heading towards a mechanism, semi-computer profile way of dealing with human conduct, and I am disturbed by that. I don't want us to go in that direction.

Why am I disturbed by that? I have been participating in a previous system, and let me tell you how it turned out. And this comes as no surprise to Commissioner Baer, with whom I have shared my views personally, and I hold him in no respect responsible for this, except it is an inexorable natural result of bureaucracies. I worked on, and Ron Gainer with me, a long time ago in 1970 and 1971, all think called guidelines for the Parole Board, next Parole Commission. And they were meant by us to be guidelines. And we were, in good-hearted, normal, human, cornfed boys' view, that this would be interpreted by the Parole Board and Commission and Commissioners in the light in which it was written, and we put in the language that these were merely guidelines, that they were not presumptions, and they were not to be inexorably followed, and that they were in fact just guidelines, and that we
expected plenty of times in which they would not be
applicable, because there is an individual, humanistic
function to be performed by the Parole Commission -- judgments
made, intelligently as men can, on the conduct of men,
based on efforts to evaluate them, yes, the most imperfect
of sciences, but the most perfect of our human endeavor
in this country, and that is not to have machines run
the criminal justice system.

But what has happened? I have seen the
results of our well-intentioned efforts. I have practiced
before, in effect, the Parole Commission -- not the Commission
itself, but its hearing examiners -- in representing
individual defendants who are entitled to some human
consideration after having been convicted and evaluated
and incarcerated and spent time. And what do I find?
I hate to tell you. The guidelines have become either
a machine, relied upon by the lazy -- I do not with to
impute that to any one person on the Parole Commission
staff, now -- or the fearful, or the unwilling to take
risks or make judgments.

Hearing officers say to me, "You may have
made a persuasive case, Mr. Santorelli," or, "Yes, these
may be proper considerations -- but I don't think my regional commissioner or director is going to approve them, because there is no willingness to, or there is a presumption against" -- or a bunch of weasel words which all come out to the same thing: they hide behind the guidelines as the easy way out.

We all know from our government service there is damned little reward for sticking your neck out. There is very little reward in the system for being courageous or deviant or making judgments; there is a great reward for making no waves and following the rules. And we are rule-oriented as a society -- regulation, rule, guideline, et cetera.

I have seen the mountain. Our efforts to do guidelines have produced a fractional result in the Parole Commission. Only a few cases are decided outside of the guidelines -- certainly, not what we intended when we began this process.

Now, I take these moments of your time from my own personal passion to share with you what happens to guidelines. And the more precise and the more complex and the more categorical guidelines are, the more they
are relied upon.

I long for a system in which judges are given the function that I think we hope judges were created to give, and that is to make judgments and not be restricted by, hemmed in by, too much pontification from on-high -- and that is not this Commission, but it is the Congress which likes to make rules and laws, and you are merely their instrument.

If you can look into the future as to how these guidelines might be applied, I would ask you as part of your function to do that. I am troubled by what guidelines become.

I have one more thought, and in my moment of emotion -- you will have to forgive an Italian-American for having emotions -- I would like to consult my notes for a second.

(Pause.)

I recognize that there is a desire in our system to be certain that some crimes or all crimes are punished by something predictable called incarceration. But we all know in our hearts that very little rehabilitation or non-recidivism is inculcated by a period of time in
jail. So we look at the prison as a place to hold people, perhaps to prevent for sure their recidivism. Fair enough. But is that something that should be the subject of a mechanical formula, or is that something that we should continue to rely on the best of human instincts to make judgments about? I for one think so. I do not believe that in many cases, many criminal cases -- first of all, I believe our system to over-criminalize human conduct -- but in many criminal cases, that an extended period of time in jail serves any useful purpose.

And I have always preferred, from my own experience in this system, a rational parole system. I recognize that the Congress has some doubts about that, considering its statutory enactment of terminating the existence of a Parole Commission, and I think that is wrong. I think that is a wrong direction for our criminal justice system.

I don't know whether you share that view. I don't know what other witnesses have had to say about it. But I believe that a combination of tailored sentences, with some incarceration and extensive periods of supervised release, is a more not only humane, but likely to be realistic. It is unrealistic to think that we can put
all of the criminals that are convicted in jail for long enough to prevent their recidivism. It is just theory in the face of experience.

Now, I know those are a lot of words. They are not all as organized as a written presentation might have been, but frankly, a written presentation would bore me if I were sitting on the other side of that bench.

I just wanted you to have those few views.

I certainly come to you from no high chair of government officialdom or a small chair of representation of an organization. They are strictly 22 years of experience in this town, in this system, in this Federal government.

And thank you very much for letting me be this expostulative.

CHAIRMAN WILKINS: Thank you. Thank you for sharing your thoughts and opinions with us.

Do any Commissioners have questions, comments, for Mr. Santorelli?

George?

COMMISSIONER MacKINNON: I am reminded by Mr. Santorelli's comments, whom I greatly respect, of the hearings that were run on the Public Housing Act back
in 1933. They went on for a long time. And they had a bunch of people, contractors primarily and purveyors of synthetic equipment and materials and everything else, and they put their testimony in, and there were a couple of people who had been actually building homes all over America and knew something about it, knew something about the quality of the material that they were talking about, and they couldn't get a word in. And finally, if you will look at those very extensive hearings, on the last day, for about the last half-hour, they finally listened to these three or four people that really knew something about it. And they told them that what they were doing was buying a bunch of synthetic junk, and that they were going to be putting it into public housing, and they were going to be creating new slums. Now, that is 53 years ago, and of course, it has all come to pass. But there were only a couple people who made that remark, and they made it at the very end of these hearings, and the people in Congress were holding them off, trying to stop them from testifying.

We have not tried to stop Mr. Santorelli, and I respect his views very much. I merely want to tell
you that Mr. Santorelli is the principal author of the present judicial system in the District of Columbia, and very active and very successful and very competent in everything he ever did, and I appreciate your views.

Thank you very much.

MR. SANTORELLI: With that, I should be thought to be wise than to speak and be thought to be otherwise.

Thank you,

CHAIRMAN WILKINS: Does anyone else have any questions or comments?

(Pause.)

CHAIRMAN WILKINS: Thank you very much.

MR. SANTORELLI: Thank you, Mr. Chairman.

CHAIRMAN WILKINS: Would anyone else like to address the Commission? If so, please come forward.

(Pause.)

CHAIRMAN WILKINS: Seeing no more takers, we stand adjourned.

(Whereupon, at 5:40 p.m., the Commission was adjourned.)