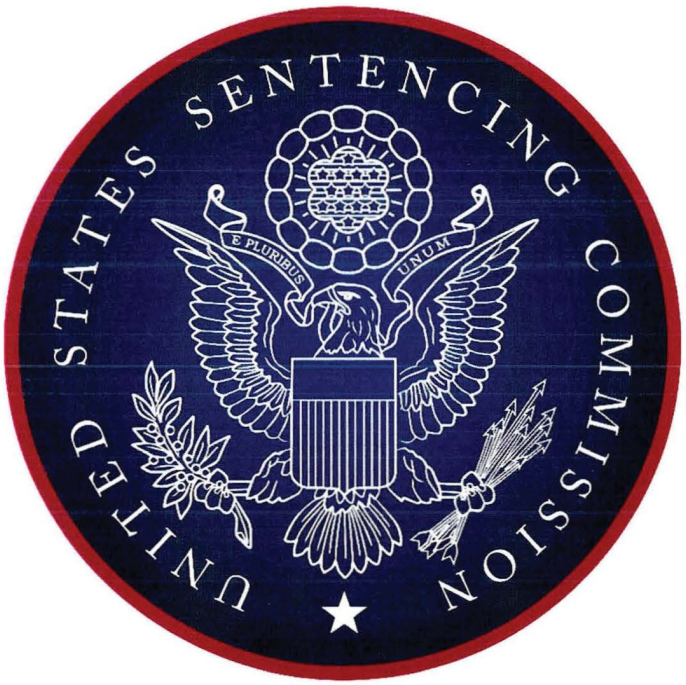
UNITED STATES SENTENCING COMMISSION



TRANSCRIPT

PUBLIC HEARING

MARCH 11, 1987

UNITED STATES SENTENCING COMMISSION
Public Hearing on the Revised Draft of Sentencing Guidelines

Ceremonial Courtroom, U.S. Courthouse, Washington, D.C.
March 11-12, 1987

March 11

10 a.m.	Stephen S. Trott Associate Attorney General, Department of Justice
10:25 a.m.	Hon. Gerald B. Tjoflat, U.S. Court of Appeals, 11th Circuit Hon. James M. Burns, U.S. District Court, Oregon Hon. Charles L. Brieant, Jr., Chief Judge, U.S. District Court, S. NY Committee on the Administration of the Probation System of the Judicial Conference of the United States
10:50 a.m.	Anthony Travisono Executive Director, American Correctional Association
11:15 a.m.	Tommaso D. Rendino President, Federal Probation Officers Association Ralph Ardito Executive Vice President, Federal Probation Officers Association
11:40 a.m.	Eugene C. Thomas President, American Bar Association John M. Greacen Laurie Robinson Criminal Justice Section, American Bar Association
12:05 a.m.	Rev. L. William Yolton Executive Director, NISBCO
LUNCH	
2 p.m.	Edward F. Marek Federal Defenders Advisory Committee
2:25 p.m.	Alan Ellis Scott Wallace National Association of Criminal Defense Lawyers
2:50 p.m.	Robert H. Saltzer Parole and post-conviction consultant
3:15	Break
3:30 p.m.	Kenneth Feinberg Kaye Scholer Fierman Hays & Handler
3:55 p.m.	Hon. Jon O. Newman U.S. Court of Appeals, 2nd Circuit Harold Tyler Patterson, Belknap, Webb & Tyler

March 12

10 a.m.	Professor Stephen J. Schulhofer University of Chicago Law School
10:25 a.m.	Richard Arcara Kurt Wolfgang National District Attorneys Association
10:50 a.m.	Honorable Gerald W. Heaney U.S. Court of Appeals, 8th Circuit Honorable Donald E. O'Brien Chief Judge, N. District of Iowa
11:15 a.m.	Paul Kamenar Executive Legal Director, Washington Legal Foundation
11:40 a.m.	Jeffery Troutt Research Director, Institute for Government and Politics
12:05 a.m.	Lt. J.L. Hughes National Troopers Association

TRANSCRIPT OF PROCEEDINGS

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING

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Washington, D. C.
March 11, 1987

Pages 1 thru 327

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UNITED STATES SENTENCING COMMISSION

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Public Hearing

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Wednesday, March 11, 1987

10:00 a.m.

Ceremonial Courtroom

U.S. Courthouse

Washington, D. C.

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P R O C E E D I N G S

(10:06 a.m.)

CHAIRMAN WILKINS: Let me call this public hearing to order.

I want to welcome everyone here to this, another in a series of public hearings, that the United States Sentencing Commission has been holding, not only here in Washington, but throughout the country.

First, let me introduce the members of the Commission to you. To my far right is Michael Block, Helen Corrothers, and Paul Robinson. To my immediate left is Ilene Nagel, then Stephen Breyer, George MacKinnon, and Ron Gainer, and my name is Billy Wilkins.

We will be focusing this two days of public hearings on a draft of sentencing guidelines which the Commission published in January of this year, and we are working toward meeting the Congressional deadline of submitting sentencing guidelines to the Congress on or before April the 13th of this year.

And I am confident that as in the past, these public hearings will prove very beneficial to the Commission, in assisting us with this very important task.

Our first witness this morning is Stephen S. Trott. Mr. Trott is Associate Attorney General, Department of Justice. He is no stranger to this Commission. We welcome you again, Mr. Trott, and again, I express on behalf of this Commission our appreciation not only to you but to all of the members of the Department of Justice who have given us great assistance over the past 16 months.

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

In the course of the next two days you will hear the last of the formal testimony by organizations and individuals concerning proposed sentencing guidelines prior to their submission to the Congress.

The end of the formal testimony, however, hardly suggests an end to the receipt of your outside advice. That will be ongoing, and perhaps from your standpoint unending. Certainly the Commission in the past has been very accommodating for which we are extremely appreciative, in holding itself open to the receipt and consideration of the many suggestions from the Department.

We have previously forwarded to you extensive general comments on the early preliminary draft in a December

3 memorandum, and specific comments on numerous other occasions.

I will not now restate those comments, but I hope that the Commission will, over the next several weeks, be willing to take the opportunity to test its ongoing efforts against the more broad-ranging concerns expressed in our December 3 memorandum.

We have also forwarded to you many specific suggestions from the attorneys in the Criminal, Tax, Civil Rights, Antitrust, and Lands Divisions with regards to the provisions of the revised draft.

As new considerations arise, we will continue to transmit them to you, with your permission of course.

Given the Commission's ongoing work on the numerous specific matters raised by the Department and by others, I do not intend to comment on those specifics today.

Instead, I would like to concentrate only on matters of broad concern since these are the matters upon which all of us in favor of sentencing reform must agree if the effort is to succeed.

When the Commission submitted its preliminary draft for public comment in September, the Department of Justice was supportive of the Commission's attempt to achieve a

highly sophisticated interrelated sentencing system that would assure uniform results. Others argued strongly against such a sophisticated effort. Partly as a result of multi-directional buffeting, the Commission, in its revised draft, has sought to achieve greater simplicity.

In attempting to achieve that simplicity, however, we are concerned that the current version of the revised draft reintroduces a measure of judicial discretion that, in our view, may be excessively broad.

We recognize, fully, that the Commission is aware that unchecked judicial discretion lies at the very heart of the problem that the Sentencing Act was designed to resolve.

We recognize also that many of the Commissioners have expressed concern about bending too much in the direction of discretion, and have expressed their intention to limit the breadth provided in the revised draft.

Thus, while we recognize that the Commission is, consistent with its stated intention, addressing this matter, the resolution is so central to the system envisioned by Congress, that it is the one issue that we believe, at this time, must be emphasized above all others.

In the current version of the revised draft, broad

judicial discretion appears most obviously in the provisions of Chapter 2, that permit a judge to employ discretion in increasing, or decreasing the sentencing effect to be given particular conduct or results.

Let me make it clear, that we favor, we favor ranges, but ranges that are governed by meaningful standards. A principal focus of our December 3 memorandum was the need to give recognition in the guidelines to the range of effects that various aggravating and mitigating factors might have on the appropriate sentences to be applied in a particular case.

We pointed out that such factors seldom would warrant a set increase or decrease that would fail to take into account the various degrees to which the conduct, or the result should be cognizable.

We were concerned about all or nothing results. Concern from the standpoint of fairness to the public, or to the defendant, and concerned with the standpoint of the great incentive to litigate, whether the case at hand fell on one side of the line or the other.

The solution, we suggested, we believe, lay in ranges of graduated increases or decreases, appropriately keyed to the particular facts of the case. It is the keying

of the guideline ranges to the facts of the case that, in our view, would make them workable. A judge would be directed to pick the description that most closely approximated the case at hand, interpolating between the two descriptions, if necessary, and then applying the point value that the identified description would carry.

Such an approach to ranges would allow the desirable sophistication in sentencing, avoid the invitation to litigation prompted by all or nothing results, and make it clear to the public that variances--and I think this is important--variances in sentences will depend on variances in fact, rather than upon variances in judges.

And we believe that this is fundamentally very important. It is thus the concept of unstructured sentencing ranges that gives us pause, not the concept of ranges itself. We find a great deal of difference between directing judges to employ their discretion with regard to the effect of a pertinent factor, and directing judges to apply a specific result if that factor is present at a described level.

The first approach would rely upon the judgement of over 500 District Court judges. The second approach would rely upon the judgment of the seven Commissioners charged

with this responsibility, I might add, by the Congress of the United States.

While both approaches certainly can reach sensible results in individual cases, no doubt the latter has the distinct virtue of being consistent in application.

If I may, let me give one example. The sentencing choices a judge would face under the revised draft guidelines may be illustrated by looking at a bribery case.

The guidelines authorize the judge to determine the base offense level by selecting a value from the range of offense levels 10 to 15, depending on the extent and duration of the defense--referring to C2(11)--and to enhance it by an additional 1 to 8 offense levels. Overall, therefore, the judge could use an offense level from a range that varied from a minimum, a minimum of eight months, to a maximum of 57 months in prison.

That is a variation of over 700 percent. If the offense involved others, and the defendant's role was one of organization or leadership--and that is not an uncommon fact situation--the guidelines direct the judge to increase the offense level by one to six levels, which could increase the maximum term of imprisonment to 108 months.

After this adjustment, the overall range is potentially eight months to nine years, or 1,350 percent. As can be seen from this example, the wide variation in the offense level for the specific offense is compounded by the application of a general offense characteristic which also provides an unjustifiably broad range.

Two offenders, two offenders with similar backgrounds, convicted of the same bribery offense, with the same degree of involvement, could face vastly different sentences depending on the sentencing predilections of the sentencing judge, despite the fact that both sentences would be applied under a sentencing guideline system.

The approach which we suggest has something more than consistency to recommend it. We believe it also has legality. The Sentencing Reform Act, in its legislative history, makes it crystal clear that disparity caused by broad judicial discretion is the very ill that the Act sought to cure.

The need to avoid unwarranted disparity is stated as one of the Commission's missions. As a specific indication of the degree to which it chose to narrow discretion, the Congress elected to adopt somewhat an arbitrary limit on the extent to which some degree of judicial discretion would

remain in the applications of the guidelines, choosing the figure 25 percent. The Senate Judiciary Committee in its report described the setting of the 25 percent rule as, quote, "of major significance."

It is apparent that the whole concept of the 25 percent limitation would be violated, whether guidelines were to incorporate a broader range once in the final application, or cumulatively in the intermediate stages.

In either instance, the statutory emphasis on facts and consequences, rather than personal reaction, might be violated.

We have heard the argument that the Commission would be presumptuous to fill in factual descriptions to identify intermediate points with specified ranges, since it does not now have all the data that would be necessary for intelligent structuring.

But the statute recognizes that the needed data would not be immediately available. It nonetheless calls upon the Commission to indicate how relevant factors are to affect sentences, arriving at appropriate points within the ranges based upon logic, and the data that do exist, in order to begin some degree of achievement of the specified purposes

of sentencing. The assumption is--as suggested before--that the considered sound judgment of the Commission as to the appropriate starting values will better achieve the purposes of sentencing than the application of the individual judgments of over 500 Federal judges sitting in different courtrooms in different locations around this wide country of ours.

Moreover, that approach is far more capable of intelligent evolution. Sentencing experience under a discretionary system simply will not provide useful data to aid the Commission in better defining the ranges and the points within the ranges.

In our view there is no reason why the Commission cannot reach an adequately predicated determination now, implement it in its guidelines, and revise it, if necessary, in the light of subsequent empirical studies and experience.

As I indicated earlier, we are aware that the revised draft was intended to introduce the concept of ranges without filling in all the blanks, and that the Commission has been making a concentrated effort to describe particular levels within the many ranges.

I have emphasized this matter, therefore, not because the Commission holds a different view, but because

the matter is so fundamentally important, in our view, to the success of the Sentencing Reform Act, that the concern itself warrants a continuous place on the public record.

We are also concerned that the revised draft currently contains other provisions that raise serious questions about discretionary breadth. We have in mind, in particular, the consecutive sentencing provisions of the revised draft which, in our view, do not assure that each act of criminal conduct will result in at least some degree of increase int the applicable sentence, and the probation provisions which are not structured to assure equivalent communitive values to the imprisonment alternatives.

I understand that the Commission may have proposals before it to rectify the first of these additional considerations and will be later addressing the second.

We expect that the final guidelines of the Commission will be able to eliminate unchannelled discretion in these and other areas, and therefore will be able to achieve the purposes of sentencing prescribed by the Congress.

My concentration this morning on our principal concern, that the revised draft bends too far towards unchecked judicial discretion, may import an aura to my

testimony that I have not intended. As this Commission is aware, but some others here may not be, the Department has had high praise for some of the major changes in the revised draft.

In particular we were very heartened to see the inclusion in subchapter Y, Chapter 2, of general characteristics that can be applicable to many kinds of offenses. These common factors, set forth in terms requiring specific judicial action, may prove to be one of the most important facets of the guidelines from the standpoint of capacity for useful and viable evolution.

While our concern regarding the effects of ranges would apply in certain instances here, as well, the overall movement of the Commission in this area is a very, very positive direction.

Also, the inclusion of ranges instead of all or nothing consequences is itself am major improvement, despite our caution as to the need for fact-predicated ranges rather than discretionary-predicated ranges.

The concept is crucial to thoughtful guidelines. It is only the execution that must be ranged into compliance with the statute.

Although your hearings will soon be ended, certainly your receipt of advice, as noted earlier, will not. You will continue to be importuned by those who would simplify and add discretion, and by those who would encourage a sophisticated and more structured approach.

Among the former school of thought are genuine supporters of sentencing reform who appear to fear that the guidelines may attempt too much too soon. But that, with all due respect, is a decision that has been made by Congress and made overwhelmingly, and it is a decision that is not open now to useful second-guessing in our view by anyone.

Among the former critics are those who strongly oppose sentencing reform along the lines directed in the 1984 Act, but again, that battle is also over. The statute has been passed, rejecting that position ion the process.

While the plea for greater simplicity and discretion may on occasion seem very appealing as the Commission struggles to achieve the system envisioned by Congress, that is simply not what Congress has directed.

It is not an easy task that Congress has set out. Indeed, that is a principal reason why it has been assigned to an independent body such as this for full-time work, but that

is the assigned task. Those given the assignment will simply have to complete it in as logical and in as professional a manner as they collectively can.

We in the Department, like many others, will continue among the latter school, those who are fundamentally supportive. We recognize the extraordinarily difficult task facing the Commission. We are gratified by the Commission's readiness to consider all suggestions including ours, and the views of those with a general professional interest in seeing the evolution of guidelines that will meet the important purposes specified by law.

It should be apparent that all the attorneys in our various divisions want guidelines that will achieve appropriate punishment, deterrence, and incapacitation.

It should also be apparent that attorneys in the Criminal Division in particular are looking for guidelines that will withstand litigation in court, and especially on appellate review that will follow.

With these dual interests, fairness to the public and to defendants in achieving the statutory purposes, and legal supportability, we will continue to be available to try to assist the Commission in any way it may find useful.

Mr. Chairman, thank you very much for this opportunity.

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

If the Commission can resolve the concern about the ranges as well as answer the current consecutive problem, which is one of the areas we have left unresolved, do you think these guidelines will be workable, will be practical?

MR. TROTT: Yes, I do. I indicated before that I think you are on the right track here. There is no doubt about it. I certainly haven't had the experience of being a Federal judge, and it's difficult to put oneself in a Federal judge's shoes, but I have spent over 20 years in the courtrooms, both Federal and state, I have worked under many different systems, and I have tried to read this document, as I indicated when I was here before, and in the light of the suggestions that we make, and ask myself is this something that will work? and I believe that you are ont he right track and that it will.

CHAIRMAN WILKINS: Thank you. Any questions from other Commissioners?

COMMISSIONER CORROTHERS: I have one. Mr. Trott, with regard to the ranges, in addition to identifying the

facts, or factors relating to the particular events, you would propose that in each instance, each fact would carry a specific weight, or in every case a specific point value?

MR. TROTT: That is a general description of the approach that we would take.

COMMISSIONER BREYER: I'm sorry. I missed what you said.

MR. TROTT: That pretty much approximates the direction that we are moving in, yes.

CHAIRMAN WILKINS: Thank you. Any other questions? Commissioner Nagel.

COMMISSIONER NAGEL: I wasn't sure I understood your point about probation. You gave three examples of difficulties. One was the range, one was concurrent consecutive, and the third was probation.

Could you just repeat, or elaborate for a second on the probation issue.

MR. TROTT: Well, without getting into great detail, what it appears to us is that there is an imbalance between the way the probationary options are structured in connection with the punishment side of things. One doesn't seem to flow into the other.

We can elaborate that, though, in detail.

COMMISSIONER NAGEL: Could you send us a memorandum with an elaboration on that?

MR. TROTT: Yes, we will give you greater input on that.

COMMISSIONER NAGEL: Thank you.

CHAIRMAN WILKINS: Judge Breyer.

COMMISSIONER BREYER: I have a very serious problem with what you have said, and what you are urging us to do, and I think the most efficient thing is for me to put it out, set it out, and then see what you think.

And if I were to describe it in a nutshell, I'd say that what I fear is the direction you're pushing us in would significantly interfere with the courts' ability to put convicted criminals in prison, and it would interfere to the point where, if our objective--and I think it is an objective--to see that convicted criminals receive swift, sure, and certain punishment--that if that is our objective you've given us a recipe that would prevent us from achieving it.

Now that's to put the conclusion most dramatically. And I want to put it dramatically because I want you to see

what I now see as the problem, and why, with that as the goal, I worry about the direction that you are pushing us in.

All right. Now maybe you can best see it if I go through what I've come to realize over the last year. I call it the "great circle", or the "great paradox" about what we're trying to do, because all of us have gone through the following intellectual steps.

Step one is we see disparity. Step two, as we say, will cure disparity by writing detailed guidelines that try to deal with each individual variation of each individual offense.

Step three is that we realize, once we've done that, that there are just millions of possible combinations and permutations. That our guidelines are far too detailed, that they are far too complex to be workable, and indeed, we haven't even cured all of the different permutations and combinations, they've built unfairness into the system because we still haven't thought of everything. That's step two.

Step three is we will solve the problem through simplicity. We will go back to just a few guidelines. We will push a whole lot of things into one category.

Step four is we realize that that category's too

broad because we're including a lot of people in that category who, in fairness, must be treated differently.

Step five is we cure the problem of step four by saying we will give the judge discretion to treat those different cases inside the broad category differently, and step six is we realize we're back at disparity. All right. So our problem is, how do we break out of the circle?

Now what you're seeing in this document is one approach to the problem. The approach is called "start slowly," build on empirical data, have broad categories, use discretion with guidance, collect information about how the judges react, read their reasons for departure, analyze what they say, and with the help of computers, questionnaires, reasons, time and experience, we find this is a job not for one day, it is a job for 20 years.

So that's what you're seeing, and I think that's one way of breaking out of what I call the great guideline paradox.

Now why do I fear your way? I fear your way for two reasons. Reason number one is that your way builds into the system a thing that you're very familiar with, and I am, too. It's called infinite numbers of hearings. It's called

infinite numbers of appeals. Every time you ask a judge to make a specific factual finding, there will be a procedure, and under the guideline statute as is written today, there will be an appeal, and the appeal will say, "Judge, did the facts bear out this distinction, yes or no?" And you are giving us a recipe, it seems to me--at least this is an instinctive question on which people may differ--but it seems to me you are giving us a recipe for a set of procedures in the Federal courts, that if they are going to really be taken seriously, and they must be--you see--will mean it will be very difficult as a practical matter to put convicted criminals in prison.

Now my second problem with yours is you are asking us to be arbitrary, and why I say arbitrary is, of course where there is empirical data, or sound reason for making a distinction, we should and have and will make that distinction.

Where you ask us to build ranges into something like bribery, fine. Where you ask us to put numbers to subdivisions of possible ways of carrying out bribery, i will tell you that I have not seen the data that would allow us to say this is what is happening. I have not been able to think of all the cases where one might want to subdivide, and I do

not want to be arbitrary.

Rather than picking numbers out of a hat, I would rather let the judges, over time, administer these, see what they do, and analyze the results for logic and consistency.

All right. You want a practical example? I will give you two. One, take the bribery guideline that you started with. Indeed there is a broad range, and now you sit down and tell me, without being arbitrary, based on empirical data, precisely where and how to break that range down.

You may be able to do it to a degree. That is going to be our job over the next few weeks, to see where and how. But if you can't give me the empirical data--and with bribery, I can think of cases ranging from one dollar up to a million dollars.

I can think of cases of bribery of the lowest official in the Federal government to the highest. I can think of cases where what turns on the bribery is the most egregious harm versus what is the least egregious, and because I can't break it down with data, I would prefer to narrow the range with discretion, than to say in advance what is arbitrary.

Compare to that page 154. Have you got the

guideline?

MR. TROTT: Yes, I have.

COMMISSIONER BREYER: Look at page 154. Look at Guideline number Y228.

MR. TROTT: 228?

COMMISSIONER BREYER: Yes. There is an example of a good-faith effort on the part of the Department to come up with, under coercion of duress, something that looks precise. It's not a range anymore. It rather has one, two, three, four and five.

If it's this go down five levels; if it's that, go down four levels; if it's that, three; if it's that, two; if it's that, one. And this is when coercion is going to result in a lower punishment. All right?

Now as I read those three levels, the first three cases are cases where the coercion would make out complete defenses, and so you'd never have such an instance because the guy would have gotten off if he could have proved that.

And then I looked at the latter, C and E, which I don't think are that, and I could in five minutes think of cases that satisfy C which would be less serious than E, and E which could be more serious than C, and I ended up looking

at that guideline and I commend that to you because you can't read all these personally. I want you to look personally at this one, and then think about it for 10 minutes, and say, is that what you really want us to do?

All right. Now you have my whole speech and I will stop. But I wanted you to see the really serious problem that I have when you push us in the direction of trying to write specifically in areas that I do not know about, and I want you to see why I think a more general approach, gathering data, over time, refining that data, will eventually come up with a sounder set of guidelines.

MR. TROTT: Why aren't you simply telling me that no current sitting Federal judge is capable, or able to sentence somebody without being arbitrary and capricious?

Where are the judges finding this information right now that you so seek? Our of the air? I don't know where we go. Are you telling me that for 10 years we should allow every judge to wander between a range without any empirical data?

JUDGE BREYER: No, not ten years.

MR. TROTT: I think the fulcrum of what you said, with which I agree, is that we are looking for--and I quote

your words--discretion with guidance. And I don't have any trouble accepting that formulation of what we're talking about, but guidance we believe has got to be guidance, or else you get the situation that I described earlier, where 500 Federal judges continue to sentence the way you described, and that is just on the basis of who knows what.

And Congress has told us that we don't want to have that anymore, and so we believe that this Commission is fully capable of describing this system without being arbitrary.

I simply can't accept your description of any approach to this as necessarily perforce ending up being arbitrary and capricious in the extent that arbitrary connotes caprice there.

I believe that if you start from the proposition, as you have in this document, that you can adequately describe conduct and attach sanctions to it, that you can also reduce this in the area of ranges.

Now, certainly, you are correct, there is no possible way that we can anticipate all the variations in which offenses can be committed and people commit them, and the strange ways that the criminal mind operates and the effects that it has on people, but I think that we can create

a situation where the discretion, with guidance, is more balanced in favor of the guidance rather than the discretion, and I think that is what we are pushing to.

JUDGE BREYER: Well, what do you want to do with Broadbury? All right. Take Broadbury. I mean, as I read the commentary under Broadbury, it makes fairly clear that the kinds of things that will help a person choose between the range is the amount of money that's at stake, the level of the official, the degree of harm that's likely to flow from acceptance of the bribe.

Now I can say those three things and we can put those in the commentary. But now you want me really to break them down into black letter law how? How, without being arbitrary? Where we can do it we should do it; where we can't do it, I don't think we should make things up.

MR. TROTT: Mr. Chairman, I appreciate the opportunity to engage in this dialogue, but I'm afraid I'm trespassing on the value time of other people, and I would be delighted to answer any more questions, or else in writing, or in whatever other form you or the Commissioners see fit. We can continue this particular dialogue.

CHAIRMAN WILKINS: Thank you very much.

COMMISSIONER MACKINNON: Well, wait a minute. My time isn't so valuable. How would you handle probation? The probation statute in the Title 18 provides--it's very short. "A defendant who has been found guilty of an offense may be sentenced to a term of probation--now that means no prison sentence--"unless the offense is a Class A or B felony." That is over 12 years.

Now that takes in a lot of crimes. The offense is an offense for which probation has been expressly precluded. The defendant is not sentenced to imprisonment on another offense.

Now that's the statute that controls probation. Now how can you say that you have to have a specific guideline that puts every man that makes a particular bribe, say, for $500--he's got to get time--when this statute says he can get probation? And that applies to every sentence up to 12 years.

Now how are you going to meld those two concepts that we have to deal with and give effect to both? That's my first question.

MR. TROTT: I don't want to be flip about this, but it seems somewhat rhetorical. What we can do is present to

you our views on this subject in greater detail to address a question that is a serious one. We believe we can do that.

COMMISSIONER MACKINNON: Well, both of our drafts, nationwide, have brought suggestions from people that it's not broad enough on probation, and anything we've written has complied with the statute on probation. It doesn't get there.

MR. TROTT: We will address your specific question and try to get an answer as soon as possible.

COMMISSIONER MACKINNON: Well, I'm trying to address it, too. Now you talk about disparity, and there's a lot of disparity, and let me say there's a lot of harping on disparity.

And throughout the nation, when we've had our hearings here, I have asked people what kind of disparity they were talking about.

And they're not talking about moderate disparity. Practically every answer to that question, nationwide, was that one man got probation for what another man got ten years.

Now they were talking about wide disparity. And I think that's what Congress was talking about on that phase of it, and that is not the only thing that Congress was thinking about. But don't you think that these guidelines take care of wide disparity?

MR. TROTT: Well, we're concerned that they may not, and I have a whole list of examples I can give you. Somewhere there is a 2,400 percent range available. We can go over those with you if you would care, and submit those specific examples to you in writing.

COMMISSIONER MACKINNON: Well, you will always get that. Now you've undoubtedly had as much experience as I had when I was U.S. Attorney, and the other thing that gets harped on is that we ought to have something for each harm. You can't do that.

MR. TROTT: I avoided saying that at this hearing.

COMMISSIONER MACKINNON: I know it.

[Laughter.]

COMMISSIONER MACKINNON: For each harm. You get a 120-count indictment on mail fraud, and you start putting something in for each harm, and you've got a life sentence for something that the statute probably provides for a five-year maximum.

MR. TROTT: I read with great interest the articulation under sentencing factors that you have set out. "To determine the sentence, all conduct, circumstances and injuries relevant to the offensive conviction, and all

relevant offender characteristics shall be taken into account."

COMMISSIONER MACKINNON: I know that, but I'm bringing up the practicality of how that's going to operate, and I have written it down here specifically before my colleague here whose time is more valuable than mine had commented upon the necessity for specific findings.

The more specific you make this, the more litigation you get into, and you're just inviting--now I'm not against specificity to the extent that it's reasonable. But if you make it too specific, if you make it too tight, to that extent you make it impractical, and a lot of the judges around the country have said it's too tight to begin with. Now they don't think that so much.

But specific findings are a result desirable to be achieved, but they also have their counterpart for producing something that's workable.

MR. TROTT: I guess the question is when is a guideline a guideline, and when is it not. The Congress itself has indicated that there's a 25 percent concern--

COMMISSIONER MACKINNON: I know that, and there isn't any person that, really, around the country, has thought that in many instances, 25 percent was a sufficient

variation to deal with the practicalities of the situations they run into.

MR. TROTT: The problem there is that in order to be faithful to the Congressional mandate that has to be respected--

COMMISSIONER MACKINNON: I know that, and that's what we're faced with. And we will try to comply with it, and we have been.

But how can you say 25 percent? The statute says 25 percent in one section, but then over here it says in probation you can go from 12 years to nothing. Now that's more than 25 percent. So the statute is inconsistent, and how are we going to deal with the inconsistency?

There are other inconsistencies, as you know, throughout the statute, that trespass on the 25 percent variation. How can we deal with those?

MR. TROTT: I'm certain that this Commission will be able to deal with it.

COMMISSIONER MACKINNON: We'll deal with them but--

[Laughter.]

COMMISSIONER MACKINNON: That's all I have.

CHAIRMAN WILKINS: Thank you. Commissioner Gainer.

COMMISSIONER GAINER: The witness has been restrained and declining to point it out, but I would pose the question whether or not the Department had not in the past, in its formal submissions to the Commission, pointed out that if interpreted, as have many others, the provisions that Judge MacKinnon has just referred to, as a provision putting a restraint upon the Commission's ability to go beyond a certain level in providing probation, and if the Department had not also been among those saying that probation was too circumscribed, in the earlier draft by the Commission?

MR. TROTT: That the record would so reflect.

CHAIRMAN WILKINS: Again, thank you very much.

COMMISSIONER BREYER: Thank you. We're just giving you a little taste of our problems.

MR. TROTT: I haven't indicated for a moment that you don't have a very difficult task, and as I said before, we appreciate what I think is the great skill with which you've been approaching this, and the thought description that you described is very complex. I think these are not easy to do, but, by the same token, the mandate from Congress is there to attack the problem as has been described, where there's simply too much discretion. How you reel it in is a

matter of tough judgment.

CHAIRMAN WILKINS: Thank you again, Mr. Trott.

The next witness I will call is Mr. Anthony Travisono. Mr. Travisono is the Executive Director of the American Correction Association. We are calling Mr. Travisono out of order because he will try to make the court house in just a little bit. Thank you. Glad to see you.

Mr. TRAVISONO: Thank you, Judge and members of the commission. It has been a pleasure for me to have been asked to give testimony for the second revision of the sentencing guidelines. Associations and agencies are rarely given the opportunity to appear for a second round, and we certainly appreciate this opportunity. When I first appeared on December 2, I suggested several significant adjustments to the first draft.

This morning I would like to thank the commission for having accepted some of those proposals. Or at least we have the fantasy that it was us who helped make you change your mind on some of the issues and allow me to keep that. As you recall, I suggest that all offenders who serve more than a year in prison be given a term of supervised release, as part of their sentence. The new draft guidelines make that

adjustment.

You will recall that I suggested that you request that the United States Congress extend the length of terms of supervised released imposable under the act, and again the guidelines reflect that recommendation.

However, thirdly, I ask that you seek an amendment that would designate an administrative agency, rather than the courts, to handle the revocation of supervised release. This third aspect of my recommendations has not been addressed at this time, and I would again petition you to seriously consider that proposal.

Before proceeding with a continued list of recommendations, I would like to reiterate, as I did earlier, that the length of the sentence has very little to do with a person's ability to absorb punishment or be effected by rehabilitation efforts.

Correctional professionals, along with many other members of the criminal justice system, still believe that certainty in equity of sentencing is very significant and the most important part of the criminal justice is to convey to the public that the system is fair to both the victim and the offender. The length of the sentence has, at least, one

aspect that significantly bothers the correctional community. That is, the ability of long sentences to clog the correctional system, without any other apparent benefit.

From statistics issued by the Department of Justice through the Bureau of Justice Statistics, it is obvious that there are three ways in which the system is currently being bogged down. We are talking about corrections. The number of new commitments, the lengthening of sentences for those committed, and the reluctance of parole commissions to reduce sentences once a person is within a correctional institution. The statistics show us that the new commitments are not increasing at an alarming rate.

However, the length of sentences, and the reluctance of parole boards to grant parole is causing tremendous crowding. At the current rate there is a 1,000 inmate net growth in the correctional system, state and federal, throughout the United States every week. The public is not able to respond quickly enough to build new correctional facilities, or renovate existing ones.

Therefore, crowding in the United States, is still somewhere between 20 to 100 percent over rate of capacity. This, ladies and gentlemen, remains a major problem of the

criminal justice system. If the system is to work in a manner which most of us would like it to work, everyone who has something to do with sentencing must be conscious of what the ramifications of sentencing are in correctional institutions.

As I examine the sentencing guidelines, on page 10 of your recommendation, it appears that even though the sentences have been reduced from the previous drafts, significantly long sentences have been applied to many persons who commit heinous acts.

Corrections would not respond in a manner in which it is responding if there were enough institutions and enough programs to accept the responsibility they were intended to administer. But it appears that regardless of what era or what generation we find ourselves in, correction faces new and unreachable challenges. The challenges are never within the grasp of correctional professionals. Therefore, continued reluctance to think of corrections as a viable and necessary part of the criminal justice system, entitled to its full share of resources, is never quite earned by those who work in it, or those who depend upon it.

I might say, separately here, without in writing, that the decorum that the court expects within their chambers,

and which this commission would like to have during their hearings, is what we would like to have within a prison environment. We are never given that privilege of having that decorum. It is always a very difficult problem to deal with--the numbers that are sent.

On the other end of the spectrum, I would like to point out that the sanctions of fines is very significant, and ought to be used more frequently, particularly when convicted felons and misdemeanons have the ability to pay. Federal judges have been leveling fines on convicted felons for a long time, but as probation offices and parole offices are well aware, most fines levied are uncollectible. There is also a reluctance of probation staff to be fine collectors, when the job of a probation officer is not designed to fulfill that function.

Courts throughout the United States have shown a reluctance to collect fines. And prosecutors, concomitantly, have the same reluctance. Therefore, no administrative agency of government, to my knowledge, in either the federal or state government, is in a position to be an advocate for the collection of fines. The situation exacerbates the effective use of that sanction. It is not fully understood or fully

appreciated, and therefore it becomes a sanction that is generally seen as a slap on the wrist.

We certainly hope that within the recommendations given to Congress, that the agency given responsibility for collecting fines be given the resources and position in government to be able to have enough clout to make the sanction work well.

In fact, I will go a step further and suggest that because there is reluctance of the government to fund correctional programs in a manner in which they should be funded, 50 percent of all fines collected should be continued to be used for victims' restitution and the remaining 50 percent should be allocated for correctional improvement in both county, state and federal agencies.

We seriously feel that the fines are a major part of sanctioning in the criminal justice system. And unless teeth are placed in the aspect of fining, it will continue to be an area that receives little respect.

Therefore, in conclusion of my comments, I believe that the act, again, should be amended to provide for an administrative agency to impose sanctions for violation of the conditions of supervised release. The various federal

courts should not be responsible for this. Court conducted revocation proceedings will further tax the limited resources of the federal judiciary, resources that will be strained already with other new requirements of this act. While an administrative agency can conduct revocation hearings at the prison or jail where the offender has been confined, court conducted revocation proceedings will have to be held at courthouses, again necessitating the transportation, housing, and supervision of offenders during the proceedings.

Furthermore, government paid personnel would be involved if federal judges conduct the hearings: court reporters, courtroom deputies, law clerks, assistant U.S. attorneys and probation officers.

In addition to the economics associated with agency conducted revocation proceedings, I believe the system would achieve more consistency with a single agency making these decisions rather than having the more than 600 federal judges exercise even limited discretion.

You have proposed guidelines in this area, but I maintain the system would be more effectively operated if removed from the area of judicial authority.

Two, the sentencing guidelines should be examined

further to determine the effect it may have on correctional institutions. And I know, sincerely, that you feel that that is not a part of your responsibility. But we would like you to take a second look at what it really does mean to correctional institutions.

It should be kept in mind that severity of sentences is not the main issue, but certainty and swiftness continues to be the most significant part.

Third, the entire concept of fines as sanctions should be looked at and given a great deal more credence in the collection of fines, and secondly, how fines are used once they are collected. Fining offenders who have no ability to pay does not do anyone any justice. It further hampers the concept of fines, are equitable, and can be used to fulfill one's obligation. Establishing restitution centers such as the states of Georgia, Florida, New Jersey, and Iowa have done, can save dollars that otherwise would go into expensive building programs.

Four, the guidelines should be more specific regarding the use of half-way house programs that tend to decompress the offender's institutional attitude when he or she leaves a correctional institution. Intermediate steps to

return ex-offenders to the community is a very vital part of any criminal justice system. The sentencing commission, I feel, should be more specific in developing guidelines which would allow people to be sent to these half-way houses or community homes as they develop as a part of their sentence.

Gradually entrance into the community is a very important part of correctional programs, particularly in the federal system where a great number of inmates are good supervision risks.

American leaders, in conclusion Mr. Chairman, need to work to raise a nation of American children who do not seek crime as a career pattern of choice, but who are given the opportunity to develop as most good Americans do, and that is law abiding. Many of our young people are denied that opportunity to take their rightful place in a sane, safe society.

Therefore, the proceeds of crime appear to be very large, and that appear to be overwhelmingly attractive, causing us altogether, particularly those of us who work in the criminal justice system, to continue to seek programs and resources that will allow us to meet the ever demanding needs of people who continue to challenge the system. It behooves

all of us, as Americans, to put as much money and resources as possible into the early system of child development in order to give young people the opportunity to seek things that most of us seek as we try to accept our responsibility.

Doom and gloom and crime should be written out of career choice of children. The dollars we in the criminal justice system need to keep fixing young adults is not available, not will it ever be available. Our history has told us that.

Again, thank you for giving me this opportunity this morning. I appreciate the very significant, hard work that you have done, and I know that you will be emulated by the states as this program continues. Thank you.

CHAIRMAN WILKINS: Thank you very much, Mr. Travisono. I think we all agree with you that the two most important aspects of sentencing are certainty and fairness.

Let me ask you this, just generally speaking, do you believe that this approach that we are taking in this draft is the appropriate one and will it be a workable and practical one in the real world?

Mr. TRAVISONO: I think it is a very practical one and with my colleague judges sitting behind me I have a great

faith in judges, that they can use discretion--a great deal of discretion, and make it work well. I do not accept the Department of Justice's premise that you need every little thing spelled out because our nation's prison will be filled again, and again, and again, if we do all that type of specificity.

CHAIRMAN WILKINS: Thank you. Any questions? Mr. Block?

COMMISSIONER BLOCK: Mr. Travisono, I found a great deal of what you had to say on fines and on certainty I agree with. I do have a problem with your discounting completely the length of imprisonment. Is it your position, and the position of the American Correctional Association that there is no significant incapacitation potential in these longer sentences?

Mr. TRAVISONO: No, to the contrary, we believe there is, it is just how long is how long. I mean, a man reaching ag 50, 55, or 60 with a life sentence, and he has served 20 or 40 years already, he has had it. He does not need to be incarcerated. We do not need to pay for his time anymore.

COMMISSIONER BLOCK: That is the super lengths or

the megasentence.

Mr. TRAVISONO: Well, that is what I am speaking of. You have super lengths in here yet, for very many people.

COMMISSIONER BLOCK: You comment was about the megasentences and not generally increasing the length? Moving a robbery sentence from 5 years to 7 years, you can see that as potentially productive?

Mr. TRAVISONO: I do not see any problem with that, I think that is significant.

COMMISSIONER BLOCK: Thank you.

CHAIRMAN WILKINS: Mr. Corrothers?

COMMISSIONER CORROTHERS: I just have a comment. Recognizing that the American Correctional Association is the national voice of corrections in the country and is, in fact, is international, I just would like to say, Tony, that we appreciate your input on behalf of that association for two of these hearings.

Mr. TRAVISONO: Thank you.

CHAIRMAN WILKINS: Questions?

COMMISSIONER MACKINNON: When you said that you wanted supervised release for sentences over a year, you meant sentences imposed for over a year and not necessarily

served?

Mr. TRAVISONO: Imposed.

COMMISSIONER MACKINNON: You are talking about the imposed sentence?

Mr. TRAVISONO: Yes sir.

COMMISSIONER MACKINNON: You also said that sentences ought to be fair to the offender and the victim. Would you add the public to that?

Mr. TRAVISONO: All the time.

COMMISSIONER MACKINNON: Now, the collection of fines--what you say is absolutely true, and I was reading the Judiciary Act of 1789 yesterday, and I noticed this through the years in other statutes, and I know it happens all over the country in various states. I know in my own home state, a lot of government officials used to get paid in proportion to the work they did and by the charges, costs that were imposed upon the people they were dealing with. In other words, if you had 10 people plead guilty and they were fined so much, the magistrate got so much of that for his fee. We have totally done away with that. But do you think that might be acceptable in collecting these fines, if we let some of these United States' Marshals get say 10 percent of the amounts

that they collect?

Mr. TRAVISONO: I am assuming you are not speaking of individually?

COMMISSIONER MACKINNON: Yes, I am talking about individually. That is what the old statute--

Mr. TRAVISONO: No, I have difficulty with that. I think that there would be more of an incentive if we could do it for the system involved as I suggested. If we get a benefit from what is collected rather than going into the general pot of the treasury that is spent by other people who are not concerned, then we do not have as much problem with the idea of collecting. We just will not. We just will not work hard at it. We have evidence of that all over. We have the same problem in the prison industry, Judge. We do not get benefits from what we earn in the prison industry. It goes into the state treasury. It is not in the best interest of everybody to earn extra money. They just do not. They will do their time, but they will not do extra. And I think you are suggesting that if individuals are paid extra, a 10 percent bonus or something, it might work. I do not think we can go back to that concept in our country. I just do not feel that we should.

We got rid of sheriffs taking the food allowances just 10 years ago in some states.

COMMISSIONER MACKINNON: I know that, but it worked for a long time, for a 100 or 150 years people were paid that way by the federal government and by state governments, city governments and everything else, and there were certain abuses to it. But that rule is primarily from the fact that there was joined with the particular sum that they were collecting the discretion by the person who was collecting it to also fix the amount. Now that is not true. Say, if you turn over the collection of fines that are imposed by a judge to United States' marshals. Just a though I was interested in.

Mr. TRAVISONO: I do not think it would work.

COMMISSIONER MACKINNON: You do not think it would work?

Mr. TRAVISONO: It is intriguing maybe to a probation officer who maybe has a million dollars of extant fines in front of him and he goes out and collects them and gets $100,000, a ten percent discount or something, he might work hard at that, but I am not sure that a governmental agency would like it that way. He might not do any other part

of his job.

CHAIRMAN WILKINS: Mr. Gainer?

COMMISSIONER GAINER: Mr. Travisono, I would like to confirm what I hope you already know, and that is that the whole of the commission is very grateful for the contributions you and your organization have made to its work.

On the belated realization that subtlety and circumspection often tends to generate more confusion that what one might envision, I would like to ask you a question point blank. Do you think the fine levels in the current draft are too low?

Mr. TRAVISONO: Yes.

COMMISSIONER GAINER: I would like to ask a second question, and I will assure you I will not presume to ask you a third, or comment upon your second. This is a genuine curiosity. Why do you assume that greater specificity will lead to greater imprisonment? That I honestly do not understand.

Mr. TRAVISONO: Well, I suppose it is a thought that you have when you keep adding on individual pieces of a crime versus the way a prosecutor or a defense lawyer looks at it. You plea bargain down to get someone to be put away.

Both the prosecutor and the defense counsel work in that direction: two years instead of ten. I would think it would work in the reverse manner if you had it by specificity, that you keep building the sentence from an average of five, and it might become an average of 10 or 20 if you build it point by point, and the program that we all seem to agree upon is swiftness and certainty is the issue and not the length of time.

So, I see it as a building block. I do not have the knowledge to know here, Judge, your comment upon the specificity, and Mr. Breyer on yours, on the issue of appeals all the time. That is not my area. But when you get two people behind the bars and they both did the same crime and one gets twelve and one gets 50 for the same thing, but one is in building fund and the other has plea bargained for the same crime. It is a different ballgame in prison than it is in the courtroom. And these two guys have to face each other day in and day out for a long period of time.

So, if they both got 12 we served our purposes, I would expect, swift punishment.

COMMISSIONER MACKINNON: Is that not the improper or incomplete approach to it. The same crime but not the same

criminal.

Mr. TRAVISONO: That is true.

COMMISSIONER MACKINNON: And you have to sentence them both. And the one fellow got 50 years because he had a terribly bad record. He had been in prison 4 times before and the other fellow had a second offense, say. And they start comparing and he says: Well we both committed the same crime. But they were not the same criminal.

Mr. TRAVISONO: That is true. I do not think the guidelines give you the clues yet, Judge, on what that criminal is, it is what he has done. I think you are all fully aware of that. There are many people who commit a crime and only do two years that correctional officials suggest should be there for life because of what they are and the way they operate, but they only offended the law by two years. It is the same concept, I think. Who this person is, rather than what he has done, and it gets reversed occasionally.

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CHAIRMAN WILKINS: Thank you very much. We are delighted to have three distinguished federal judges as our next witnesses: Gerald B. Tjoflat, a member of the United States Court of Appeals for the 11th Circuit, James M. Burns, United States District Judge from Oregon, and Charles L.

Brieant, Jr., who is a Chief Judge of the United States District Court, Southern District of New York. Gerald Tjoflat is the Chairman of the Committee of the Administration of the Probation System of the Judicial Conference of the United States. Judges Burns and Brieant are members of this committee.

Thank you very much for appearing, and we know that you spent a great deal of time studying this latest draft and we look forward to your testimony.

JUDGE TJOFLAT: Thank you very much, Mr. Chairman. Let me begin by saying on behalf of the judiciary that we are very mindful of the tremendous effort that has gone into the guideline drawing process, the task that you have undertaken, and that we are grateful for the energy expended and the great deal of care and thought that have gone into the product you have produced today.

And we also appreciate the fact that you came to our midyear probation committee meeting in February and shared with the committee the work of the commission up to this time. The present draft had just been issued at that time.

Just as a preliminary statement, to describe for the purposes of the record, the role the probation committee performs in the administration of criminal justice in federal

courts. We are charged with overseeing the entire sentencing system and the functioning of probation, and heretofore have conducted sentencing institutes across the United States for a number of years. We have an eight judge committee. Those eight judges have been engaged in about 150 years of sentencing as state and federal trial judges.

An eminent appellate judge, Judge Becker, also of the committee is an appellate judge, but we collectively served about 20 to 25 years, somewhere in there, on state and federal trial court sentencing criminal offenders. In addition, we have a probation division of the administrative office which serves as our staff, and they bring a tremendous amount of wisdom collectively to our effort.

What I will do is make some observations about this draft as we have seen it in the probation committee, and also the criminal law committee of the judicial conference which has communicated to us their views about this draft.

Then, Judge Brieant and Judge Burns will add their two cents worth to what I have said.

My first observation is that this draft is a substantial improvement over the September draft. We think that the methodology that the committee employed in this

draft is superior to the methodology that was employed in September.

We have this criticism about the draft. Although we realize that this is a very difficult area and has much to do with what General Trott testified about, and you questioned him about earlier, and that is to say that we think there are still too many operative facts that need to be found in the sentencing function, and that fewer material operative facts in the scheme would make it work better.

Let me explain. The more facts that are critical to the sentencing decision, in other words, if the judge finds that way, this way, or that way, the offender may not be incarcerated, may or may not be committed to custody in a term of probation, may or may not receive a heavier fine or the like, the impact is as follows. The prosecution or the defense read the guidelines and they read the operative fact issues that have to be decided. The first person who is going to be involved in this process is the probation officer. The more facts that are pertinent to the sentencing decision, that are made material by the commission in its guidelines, the greater the investigation of the probation officer, and the greater room for disagreement between the prosecution and

defense. And the prosecution has an obligation in this sentencing hearing, ordained by the act, to seek the most severe sentence the law will allow by the guidelines and the statute, and defense counsel will serve the same function, that is to say the least severe sentence is imposed.

So, the more operative facts you have the greater the chance you have over facts, and the less chance you have for these facts to be settled prior to the sentencing hearing.

Now, two things occur at the sentencing hearing, depending upon the extent of the factual issues. To the extent that you have a wide open contested set of facts at sentencing, you involve the prosecutor, the defense counsel, and the judge in a greater hearing. And you create a greater basis for appeal. First, as to the facts found, and second as to the guidelines that apply to those facts, because the more operative facts that you have, the more difficult the guideline application of those facts becomes, and the greater the chance for appeal.

Now, an adversary sentencing hearing is not in our view the best thing to happen in dealing with a criminal defendant. If you have a criminal defendant who will be incarcerated or put on probation in, let us say, a partial

incarceration setting, you want him to leave the sentencing hearing without a great deal of bitterness and ready to accept the sanction that the court imposed.

So, the worse thing you can have is a trial by ambush--extenuated sentencing hearing. So, for all those reasons, we think that the less operative facts that the commission requires the court to find, the more efficient the sentencing the process will become and the fairer the sentencing will become, and we think the less disparity you will have.

When you are talking about sentencing disparity you are talking about comparison of operative facts as ordained by the commission through their guidelines. How does one sentence on a given set of operative facts compared with another one. So, we think that if you can make them a little simpler, as it were, the system would work a little bit better.

Now, one last thing before I turn it over to Judge Brieant and Judge Burns and is of concern to the probation committee, and that has to do with prior criminal history.

The statute says, that a sentence must serve one of four sentencing purposes: punishment, general deterrence, specific deterrence, or incapacitation and rehabilitation. A

judge must know the relevance of evidence at a sentencing hearing before he can determine it has any bearing on the sentence at all.

Prior criminal history under this statutory scheme has two sentencing purposes--or say three. One, it could bear on punishment. For example, an offender who has just been arraigned, and has been admitted to bail by a federal judge for robbing a bank or committing some serious offense, who turns right around while he is admitted to bail and commits it over again, commits another one, the same offense, and having been warned by the judge not to do such like things, one could argue that that makes the second robbery more serious than the first one. Prior criminal history, more than likely however, is going to bear on the need to incapacitate the defendant, that is to say that history predicts criminality, or it may bear on the need for more rehabilitative measures to be imposed as conditions of probation.

Now, in your prior criminal history section, there is no mention, either in the guidelines or in the policy statements or comments, as to why a given conduct in the form of record or other conduct, is relevant. I mean, is it relevant to make the offense more serious, that is to say, is

it relevant for the purpose of punishment, or is it relevant for the purpose of incapacitation, you don't say. Let us suppose, for example, that you have an individual who has 6 arrests for committing relatively minor offenses. You can add up 6 points in the prior criminal history. Let's suppose that those minor offenses have no predicting ability at all. An argument can be made that they are not relevant, they are not probative of criminality and therefore they are not relevant to the question whether you need a sentence to be imposed for incapacitation purposes. That is just a short hand example.

So, we think you need to take the criminal history and break it down and say, these kinds of things in an individual's background are relevant to the question of how much punishment should be meted out for the offense of conviction. We think this other kind of criminal history is relevant for the purpose of incapacitation, that is to say, that it indicates a propensity to commit crime, and you have to lock the individual up to deter him from further crimes against society. Or, this prior criminal history, while not probative of, say, the need for incapacitation, may point to a need for certain measures to be imposed as conditions of probation to insure that the individual does not commit more

crime.

With those comments, I turn to Judge Brieant.

JUDGE BRIEANT: Thank you. Mr. Chairman and members of the committee, I would like to begin by echoing Judge Tjoflat's observation. I think the commission worked very hard. Meaning no disrespect, I think you each learned a lot in the process, and that you came out with a far better, more practical approach. I was grateful to the Chairman for attending the probation committee meeting. I shared with him at that time some minor knit-picking on my part as to these guidelines, and I would not waste the time today of the commission to repeat those. They are minor and trivial and yet they may be important to particular cases.

Now, with the adoption of these guidelines, the judges of the other court in New York and the magistrates, and judges elsewhere in the country, are about to start on a great adventure which involves a new learning process for them. It also involves a new learning process for our overworked and underfunded probation people, and for the lawyers who represent the government and defendants.

And I am convinced that it will work if we start out with the understanding that we are making a tremendous

transition from what we used to do in the past. And, if we do not get too hypertechnical, or get too much involved in peripheral fact issues which will clog up the criminal justice pipeline, and lead to worse disparity perhaps than we are trying to correct. I think we must remember, we have to tell those who criticize this effort, that most great reforms in our self-governing nation are achieved by gradualism. There was a perception that the criminal sentences were erratic or unjust or that they had a too wide a range or too much unchanneled discretion.

I am prepared to believe there was a problem. It was not as bad as painted by some. And in solving that problem the solution has to be placed at a reasonable point on that circle that Judge Breyer referred to in his earlier remarks, and try it out, and see how it works in practice, and see if the courts cannot develop as I am sure they will, the common law of guideline sentencing, and a technique of dealing with these things. And then, as soon as possible, when you have the results of practice, the need for changes and amendments will develop and we must trust the commission to deal promptly with those amendments and correct the problems which will show up in actual practice. We have

pinpointed a couple of them, and there are some which we mentioned at the probation committee meeting, and there may even be some that we have not conceived of.

I do not mean to take issue with General Trott. I say that no battle is ever over in our nation, and the tide of popular opinion on major national issues rises and falls as to much public issues far more rapidly than the tide does in the river where it is controlled by the moon. And some of this disparity that everyone sees is really the court doing what the court has done, representing the sovereigns since time immemorial. It is supplying the quality of mercy and we should not take that totally out of the court.

You must recognize that as judges we are engaged primarily in line drawing, and our real concern is with the case that is one the edge, or the case that is unusual. And there are such unusual cases. Or some hypothetical case that we can conceive of where the guidelines as applied would work out with atrocious results, which the community, which we come from and which we serve, simply would not accept.

Perhaps, we should back off and not look at those cases on the edge, and we should look at the great run of criminal sentences which pass through the courts without too

much trouble for anybody, and probably it will do so under the guidelines. And when we come to the specialized case that is one the edge or unique, we hope that this particular draft has made adequate provision to let us deal with it. Judges are resourceful. Judges will find a way to do justice, very conscious of our duty to the public in sentencing, very conscious of our duty of fairness, our duty to the defendants too.

I do not think we are going to get clogged up in too much litigation of peripheral facts. That is the biggest peril that we are facing here. In the time between now and the time you make it final, I urge you to do everything you can to get the factual knit-picking reduced so it does not exceed the real necessity. And we do not get into giving more due process about peripheral facts than is really due in order to get a fair sentence.

I am confident that after a lot of work you have got it close to being right. I do not know that specifics need to be commented on. Judge Tjoflat has mentioned the prior criminal record problem, which is a serious one. The guidelines presently reject any consideration in the imposition of sentence for a criminal who has a severe health problem,

which either makes his incarceration unfair to him and difficult to administer, or which so shortens his life expectancy that a sentence, otherwise fair, becomes more draconian as to him.

We are specifically told that we cannot consider the needs of family and dependents. I think the community from which I came, and in which I have been imposing sentences on a state and federal level for more than 20 years, really will not buy that. I think you have a difficulty. One of our judges has drafted a submission which you will get shortly to the effect whether a drug addict, in some cases, may have his addiction treated as an extenuating circumstance, and I might say similarly, drunkenness may have some effect of an ameliorating nature, which has long been recognized by the common law. We let insane people go entirely, and the drunkard who was drunk while committing his crime has a slightly less significant responsibility than a normal person, but of course greater than that of an insane person. And we may have to allow for that rather than simply taking a rigid expression that, well, it was self-induced, so it is your fault.

I do not want to get into the knit-picking. I think

you have done, finally at long last, an excellent job, and if you would make these few minor adjustments which are being called to your attention now, you should let us try it out, see how it works. You should be quick to correct anything that turns out to have unforeseen effects, and we should see how that great constituency out there that called us into being in the first place, finds it to be, once we start sentencing under it. Thank you very.

TIMB
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CHAIRMAN WILKINS: Judge Burns.

JUDGE BURNS: Members of the Commission, my colleagues in the Judicial Branch of government, I am delighted that you welcome us here today. I add a few bouquets from Brieant to those which have already been tossed to you by Mr. Chairman Tjoflat and by Judge Brieant of the mother court.

You have delivered the product that came out only after care and courage and comprehensiveness. And since I love illiterate, if I get the chance, you should be commended rather than carped at. I am here to commend you, at least briefly.

I wear two hats, Mr. Chairman and fellow Commissioners. I wear the hat of the Probation Committee and I join in what Mr. Chairman Tjoflat and Chief Judge Brieant of the mother court have said, and I am here as Chairman of the Ninth Circuit Guidelines Committee.

I have submitted a written statement which you no doubt haven't had time to read, but I give you very briefly the bottom line presented under the term "overall view" as comparing the January with the September drafts-

The January draft is less rigid and generally less

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harsh and reasonably workable. We didn't spend much time throwing out hats into the air, though, all of us expected increased workload on the prosecutors, defenders, probation officers and District and Circuit Judges as we enter a new stage in November, and all of us expect the Bureau of Prisons to be crowded to the gills within just a few years as a result, and I may say, Mr. Chairman, is the distillation of the seven members of the Ninth Circuit Committee.

When I mention being from the Ninth Circuit, I hasten to add that presence and status somewhat quietly because in general it is the opinion in the legal community that the views of folks from the Ninth Circuit aren't entitled to very much weight. Indeed, two or three terms ago, 25 out of 26 cases that went to the Supreme Court were reversed, giving the Ninth Circuit the highest reversal rate in Supreme Court certiorari history.

However, in behalf of our committee, it consists of two Circuit Judges, each of whom have rich and extensive sentencing background as trial judges, two District Judges, Lee Nielsen, who has about 17 years, and I have got about 15 years in this melancholy vineyard in which we labor, Chief Probation Officer Charlie Varnam, in Sacramento, who has a

long career in probation experience, a U.S. Attorney in Nevada, and a defender in the Western District of Washington, in Seattle, seven of us, and we are pretty much altogether on the views expressed in the draft statement I have submitted, and those of our colleagues in the Circuit, District and appellate judges and other practitioners I think generally agree.

I only add one or two items to what Judges Tjoflat and Brieant have said. The criminal history score, we have a paragraph in there along the lines of what the Chairman said about the necessity of adopting a rationale.

I do add one thing, and if it is in there, I must have missed it. I think it was in the September draft. There should be a statement in which you specifically say that we assume the constitutional validity of the prior conviction at least for purposes of compliance with U.S. v. Tucker, and because I cannot take into account constitutionally an uncounseled prior conviction and I am not sure it is in your draft. If I am correct, it should be in there. I think it was in the September draft. That is kind of nit-picking but pretty important.

There are other kinds of invalidities which may

affect priors, and that opens a real can of worms, but I do urge you to put in U.S. v. Tucker.

Secondly, I think that on page 148 you ask for comments on should you adopt a cert approach as opposed to first and second approaches of the use of the departures in adjustments, and you have suggested that there is some perhaps statutory inability to adopt the third approach, which would be you concort a set of factors which you call adjustments and then, instead of giving them specific points, you give them ranges. It is hard for me to understand what your statutory problem is.

In our event, our committee from the Ninth Circuit generally agrees that what you should do is adopt approaches one and three, and as you would have departures then you would have adjustments, and in the latter circumstances you would have levels which would be open to the sentencing judge. However, I caution you that if you do that, you simply rank more discretion in and subject yourself to those folks who sincerely believe that you have got too much discretion in this current draft already.

Thirdly, I disagee -- I don't think I will prevail on this, but I will say it anyway -- I disagree with you

stoutly and firmly that drug dependency or mental state produced by the use of drugs or alcohol -- we are talking about both kinds -- can never be mitigated, and I dispute that. I mitigate quite frequently, not every day but once a twice a year and I put a drunk bank robber on probation for six months in an alcohol treatment center.

Now, I agree, after November I can't put a bank robber on probation and I will live with that because the Congress said I can. But the point is that sometimes alcohol or drug dependency or overuse in a given setting can in fact mitigate; in other instances, it can in fact aggravate. Your draft in my judgment is deficient by saying it can only aggravate.

Again, however, I compliment you on the enormity of the product and the absolutely magnificent task you have performed, and I am mighty proud of you as fellow colleagues in the Judiciary of the government.

Thank you.

CHAIRMAN WILKINS: Thank you very much, gentlemen.

I do want to say, too, when I met with you at your last meeting, it was evident to me that all of you and the members of your committee and your staff have done an

exhaustive job of studying the guidelines which I know with your busy schedules is a great deal for us to ask of you, but it is most productive to us and we have already circulated your suggestions and they are being considered now as we redraft and refine them in this particular draft that we have been referring to.

The bottom line is I guess as we approach April 13th, we are looking for the bottom line, is the approach with refinements we need to make, but is this approach the way to do, is it workable, is it practical. If you had to say yes or no, what would you say?

JUDGE TJOFLAT: Mr. Chairman, I think we have said it is workable. We have pointed out the problem areas that can be corrected between now and then we think without too much difficulty.

There are some cosmetic drafting problems that are in the current draft, but that is just in the nature of things. We assume that that is an editorial-type problem. Any ambiguity that can be taken out of what has been said in these guidelines as they now exist is going to enhance the criminal justice process and make less room for argument. We cite the methodology that you have used and create a system

that is workable.

CHAIRMAN WILKINS: Thank you.

JUDGE TJOFLAT: And we are open to any questions anybody might have.

CHAIRMAN WILKINS: Sure.

Commissioner Block?

COMMISSIONER BLOCK: Judge Tjoflat, I know that, one, you thought we had too many operative facts in the existing draft, since I assume that you don't want us to create a fact-free environment --

JUDGE TJOFLAT: A what?

COMMISSIONER BLOCK: -- you don't want us to create a fact-free environment in sentence --

JUDGE TJOFLAT: No.

COMMISSIONER BLOCK: -- I would like some guidance from you on what you think the rules would be in redrafting to eliminate, what you say, too many operative facts.

JUDGE TJOFLAT: Well, every time you have an operative fact, an operative fact by definition is going to call for a more severe or a less severe sentence. It is either mitigating or aggravating. There is no neutral in sentencing facts. The more you have an operative fact, the more you

either invite the prosecution or the defense to disagree with the facts presented by the probation officer. You are going to start with the threshold set of facts and that is going to be in the probation officer's presentencing investigation report.

He is operating as an officer of the court and he is going to lay out a set of facts. He is going to have read the guidelines, so he is looking for evidence intending to prove or disprove every fact you deem important. Now he sits down with the lawyers and gives them a copy of the report and they are going to be pushing either to improve the facts or to disprove the facts, depending on whether it is the prosecution or the defense.

All we are saying is as a general proposition, the more facts that you say are critical to the offense, any offense -- bribery was being discussed earlier, or whatever offense, bank robbery -- the more the parties are going to debate the operative facts, the more facts you describe with regard to the defender of the same and there increase the atmosphere for more litigation.

I think the sense that we want to communicate is you cannot have a cystal ball and imagine every conceivable

sentencing scenario that is coming down the road. You have to take -- and I think you have done a good job of it in this draft compared with the prior draft -- take the facts that are generally present in a given offense, just generally so, and the facts with regard to the offender that you think are important for the purposes of incapacitation or rehabilitation, and in a given situation punishment, as I described earlier, and specify those things.

Once you have done that, you have gotten a long way down the road. Then you may want to say to the courts that there are other kinds of considerations that we have already taken into account -- and this would be by way of commentary -- in determining the severity of the offense, and in deciding what to do with the offender. That is the starting point that we think provides a good place for the system to take off and let the problems work out themselves.

If in time you find that judges are going beyond the guidelines -- and that is the problem here -- you get into a semantical argument when we are talking about sentencing range, because until you have the facts you don't have a sentencing range. You don't start with the sentencing range. You start with the operative facts and now the range

applies and the guidelines are fixed once you find the facts.

If the judges are going above or below the guidelines too frequently with the same kind of sentence called for by the guidelines or they are departing altogether from the kind of sentence, the Courts of Appeal are going to be calling the trial judges to task to see whether or not their explanations make sense.

We are talking about a sensible system and if they don't make sense the trial judges are going to be reversed and they are going to be called to impose a sentence of the type called for by the guidelines or within the range, let us say.

If you are not satisfied with that, as you monitor sentencing, you are going to have to make adjustments. I don't see how you can make the adjustments until you have read how the judges articulate their reasons for imposing the sentence, given the facts that they find, and the same with the Courts of Appeals. You can't anticipate everybody.

We are going to react to the sentencing guidelines as you lay them out and then you are going to react as you monitor the impositions of sentences, and that's the way this system was designed by the Congress.

JUDGE BRIEANT: To put it in a concrete way, if I could, the amount of money stolen in the bank robbery is purely forfuitous. It is the amount of money that happened to be in the teller's cage when the bank robber got there. We will be stuck with a certain claim that he never stole anywhere near the amount attributed to him, because there may be a shortage or a deficiency and it was charged to the robbert.

[Laughter]

So you try bank robbery to a jury, the amount of money is not part of the verdict and then we are going to have an audit of the bank for purposes of administering a fair sentence, or should we say a bank robberty is a bank robbery and get the money out of it?

COMMISSIONER BLOCK: You would agree, though, to take that specific example, that there is a difference between a Brinks robberty and a neighborhood bank robberty, and one way to characterize that is to characterize it in the volume of dollars.

There is also a difference between going to three tellers as opposed to one in a bank robbery. The dollars are a substitute for something. Now, I am not arguing, and

I don't think anyone else is arguing, that the precise dollars mean a lot, whether it is $1,001 or $2,001 makes a difference, of characterizing those is to use dollars.

One of the things that we have done in this draft I think is to have overlapping ranges on the dollar amounts. We are not calling for very specific determinations in terms of dollar amounts that drive sentences, but I think on our side we have to be careful not to completely give up the dollars as characterizing different types of events.

JUDGE BRIEANT: You have to make enormative judgments for each of these. The judgment was given to your body, not to us. Is it worth the time and effort of the judicial and probation department, in expenditure of money and time and availability to do the tasks, to adjudicate exactly how much money was taken out of the cage or even within a range? If you make that determination, that is yours to make. It is your job, not mine. But when you decide to make it, you must consider the time and effort and burden on the judicial system of adjudicating this peripheral sentenceing fact which has nothing to do with the onus of a bank robbery, and which I think may be fortuitous. If you don't agree, you will do it the way that you have. Just be

aware that you are costing the system when you do that.

CHAIRMAN WILKINS: Judge Burns?

JUDGE BURNS: Let me furnish one additional comment because it bears on what Judge Brieant was talking about, and General Trott.

The real test of this is how are they going to work, and in the statement that I submitted on behalf of the Ninth Circuit, we have given you six ordinary cases and how they would come out under this.

Judge Brieant was talking about bribery. We have got a case right now, a real case, a guy laid down $500 on the table with the IRS agent. Now, the fact of the business is he is going to get probation in all likelihood because -- and I am not sure he could under this draft -- because he is 56 years old and has cancer in remission, his wife has very nearly a terminal illness, she is a little older, as I recall, he lives in the upper country, upper Eastern Oregon, he is a kind of mill worker, makes about $10 an hour and he has accumulated some money. We would like to put him in jail for a little while, about 30 days, but we have got no place to put him and, given his condition and his wife's condition, I am not going to send him to jail.

Now, I am not at all sure I should have to under your guidelines. I think I would probably, I am not sure. The physical condition of a family member may or may not be a relevant offender characteristics. But that is real life, that is a real case. I deal with real cases every day and that is the test.

CHAIRMAN WILKINS: If you didn't find the ability to do what you think was right, of course, Judge Burns, you would simply depart and state your reason in real life, so that -- we are trying to write guidelines which you have helped us do.

But as the general run of the case, as Judge Brieant pointed out, and there may be cases on the edge on both sides, where you won't find it here and you are going to have to use your best judgment. Congress provided that and it is called an escape hatch, if you will, and thank goodness they did, so in the unusual, the extreme case can be dealt with, simply because guidelines can't be written for those types of cases.

I think Commissioner Corrothers, you have something?

COMMISSIONER CORROTHERS: Yes, concerning the criminal history section. I don't know if I will make you

feel any better, both Judge Burns and Tjoflat, in terms of saying we are going to implement the points you mentioned, but I did already suggest I believe everything that you mentioned. I found it absolutely uncanny.

First, Judge Burns, the uncounseled conviction, if you missed it, I missed it also. I did know about U.S. v. Tucker, but I thought that it seemed a little bit unfair and I thought perhaps we overlooked it, and I did suggest that.

With regards to the points mentioned by Judge Tjoflat, absolutely uncanny, almost in the same order, I have talked about the need for us to determine regarding criminal history, which objectives we are seeking to achieve, which are relevant in which situation, the identification of which kind or types of criminal history that should be relevant for what purpose.

As I recall, I pointed out specifically the length history as I saw it, the nature of the history to get at seriousness, patterns as in history of assaultive and violent crimes.

I also suggested the point you mentioned about identifying types of criminal history that is indicative of accomplishing an objective that could be as a condition, for

example, the drug dependency, rather than an objective being desirable to go over the guidelines or above the guidelines. That would be indicative for protection of the public purposes to have a mandatory condition of release and appropriately reincarcerating upon revocation if the conditions are not strictly complied with.

I thought I would mention that about these specific areas, I have not discussed them with either of you and they are almost in that order. I don't know if these will be adopted, but I thought you might want to know that.

CHAIRMAN WILKINS: Thank you.

Commissioner Robinson?

COMMISSIONER ROBINSON: Yes, I want to raise one issue with Judge Brieant and another with Judge Tjoflat.

Judge Brieant talked quite a bit about gradualism and the need to strike a balance between discretion and guidance and all the intricacies of that, and it seems to me those are thoughtful comments. I agree with a lot of them.

I guess part of my -- the question that comes to my mind, though, aren't those arguments that are appropriately directed to the Congress, that those are just the issues that were at stake in the Sentencing Reform Act and the

Congress has by its specific Sentencing Reform Act provisions resolved a lot of those for us, and you are in a sense asking us to do things that really beyond our power.

Now, to some extent you anticipated that answer, I suppose, when you say, well, public opinion changes, you know, and changes more than the tide and the moon, but I guess that doesn't really answer it for me, because if the natural conclusion that we would come to if we said you are asking us to do something that the Sentencing Reform Act doesn't permit and you are really making an argument to Congress, the natural conclusion from that is shouldn't we go back to Congress and say to them, you gave us a job to do and we simply can't do it in the terms that you want us to do.

When you say, well, public opinion has changed, maybe people were concerned about disparity before but they aren't as much now, in a sense you are speculating about what Congress would do if you went back. Isn't perhaps the thing to do to go back?

I suppose if one were cynical about this process -- and I guess I am getting caught into that -- I remember the last set of hearings where they were talking about the preliminary draft, and federal judges were sitting down there

saying to us, well, you are right, the Sentencing Reform Act has made you put out this bad thing called the preliminary draft and you should go back to Congress and tell them that that Sentencing Reform Act is a bad thing and it won't let you do what you want to do.

I remember one of the judges said, you know, when you are in the Army and someone tells you to do something that is just wrong, at some point you have to turn around. But then suddenly we have this draft and suddenly we don't need to go back to Congress at all. You know, I don't quite understand that.

I suppose one question is I would like you to speak to the issue of why shouldn't we go back. Well, go ahead with that. I do have sort of a second related issue.

JUDGE BRIEANT: Perhaps I should wait for both questions.

COMMISSIONER ROBINSON: Okay.

JUDGE BRIEANT: It is a great question so far.

Let me say first that I was speaking in a slightly different context when I talked about the change of public opinion. I assume that it is your goal as a Commission to create something that is fair and reasonable and publicly

acceptable, and I assume also that any commission which has an enabling statute under which it is acting will construe its own enabling statute as favorably to its effort as it can, and I am sorely tempted to say that I think you have construed it correctly, but once I do that I am violating my judicial obligation because I may get back to Foley Square and I may be called upon to write some kind of a legal opinion later on, so in a sense your question invites an answer which I cannot give.

But were I situated as you are, I would assume the Congress meant me to do the right thing and do it fairly and reasonably in a practical way. That is not being cynical, that is being practical. And I would construe my statute as favorably to my goal as I can, because I assume once Congress legislates they want you to do something that is feasible and practical and fair, and they don't want you to create some kind of an outrageous thing which, when the public sees it operate, they will be revolted.

Maybe that is as far as I can go in answering it.

JUDGE TJOFLAT: Commissioner Robinson, let me add a note to what Judge Brieant said. As I see the statute, it commands the Commission to categorize offenses, every offense

in the Federal Criminal Code, in terms of the need for the sentence to impose punishment and in terms of the sentence to take into account, if relevant, the need for general deterrence. And the Congress has given you in the statute -- what is it -- seven or eight criteria which you must consider and weigh and balance and give different weights, depending on the offense, in determining the seriousness of the given offense. And you can take other matters into account, and they have left that to you to take them into account.

They have also said you are to draw offender profiles, and defender profiles are to serve two purposes: One is the offender profile may show a need to incapacitate the individual because the individual is going to commit more crime and therefore must be specifically deterred to protect the public.

There is another offender profile and that is an offender profile which describes somebody who needs special conditions of probation in order to lead a law-abiding life when released on probation or on superfised release, and there are eleven criteria that you are to take into account in determining these offender profiles, with the catchall

admonition that the guidelines with regard to offenders were to be neutral with respect to race, creed, et cetera.

Now, I for the life of me cannot understand what the Commission would be asking the Congress, in addition to what the Congress has already said to the Commission.

COMMISSIONER ROBINSON: Well, I suppose one thing we would be asking for is more than 25 percent range. The legislation provides that for each combination of offense and offender characteristics, the guidelines are to generate a range of 25 percent of the minimum, and no more, for each combination of offense and offender characteristic.

JUDGE TJOFLAT: You are talking about a sentence of incarceration. All the Congress has said is that after you have taken all the factors that you think are relevant, you have taken them into account in judging the seriousness of the offense, and after you have drawn an offender profile for purposes of incapacitation and/or rehabilitation -- well, you can't have incapacitation and rehabilitation -- incapacitation or rehabilitation. You are not to sentence anybody under this scheme to incarceration or sentence for the purpose of rehabilitation. But after you have taken that into account, you draw a guideline.

Now, the judge is going to make fact-findings and then he is going to apply the guidelines. Once he has done that, you have a sentencing range.

COMMISSIONER ROBINSON: I am not sure I follow that, Judge. Here is the problem --

JUDGE TJOFLAT: The first problem you have in sentencing is determining, the sentencing judge has got to determine by reading your guidelines against the background of the statute what facts are relevant for sentencing.

If you have a bank robbery and in the guidelines you tell judges that bank robbery is very serious -- I am just using a hypothetical -- it is so serious that you must incarcerate the offender under all circumstances. You have made that enormative decision, taking into account the statutory criteria, and the judge is going to make fact-findings that trigger the severity of the given offense and it depends on how you describe the offense, what facts you say he should take into account that is going to describe the severity, and then the same thing happens with regard to the offender.

COMMISSIONER ROBINSON: Well, as I understand --

JUDGE TJOFLAT: If you don't ever get to the 25

percent issue until you have decided all the facts that you tell the judges they must find, and that is the point we started with. The more facts that you tell the judge he must find, really the fact of the matter is the greater discretion you are going to give the judge.

You can make an argument in opposition to what General Trott said and you can very well demonstrate imperically that the more facts you make judges find, the greater discretion the judge has in imposing the sentence. And why is that? Because human nature tells us that if you make him spend three weeks in a sentencing hearing because of the facts you make him find, he and the lawyers are going to get worn out and the prosecutor is going to prioritize his duties in the prosecutor's office and he is not going to push for this fact or that fact, and the defense counsel isn't going to push for this fact or that fact, and those facts are going to fall away, even though you say they are important, and the judge just doesn't find this fact. Why? Because the prosecutor didn't carry the burden of proof. And he doesn't find some other fact for the defendant because the defendant didn't carry the burden of proof.

So depending on how energetic the judge is and how

many facts he sets out to find, if it takes him all year, he can prescribe in many cases his own sentencing discretion, and I am not describing an illicit motive on the part of a judge, just the pure fact of the matter.

COMMISSIONER ROBINSON: Well, as I understand the Sentencing Reform Act and the history and the movement that led up to it, their primary concern was this problem: Here under (a) and (b) they have identical offenses and identical backgrounds and all factors that are relevant to us.

One appears before Judge A and one appears before Judge B and they get very different sentences.

JUDGE TJOFLAT: Well, the first problem -- if I might interrupt -- the first problem with the prior law was it never told the courts what sentencing purpose was to be achieved by the sentence.

COMMISSIONER ROBINSON: I understand.

JUDGE TJOFLAT: And the courts weren't required to make fact-finding.

COMMISSIONER ROBINSON: I don't think there is --

JUDGE TJOFLAT: So there is really no way of determining whether you had disparity, in some sense.

COMMISSIONER ROBINSON: If we are trying to figure

out what the 25 percent means, it seems to me that what they had in mind was here are two offenders that are identical, and because they come before different judges, those judges, each operating under a totally good-faith rational system may, because they have different philosophies, have very different sentences.

Congress was concerned about that and the way they attempted to resolve that problem was to say for any given combination of offense and offender characteristics, these two people or 16 people, whoever, it shouldn't depend on what judge you end up before, it should depend on your characteristics of your --and therefore for any combination we will make sure that, while there may still be some disparity, we have to have some flexibility in the system, there ought to be at least this 25 percent range to box in the extent of the possible disparity.

That tells me that the 25 percent means just what it says, for every possible combination of offense and offender characteristics, the guideline range ought to be narrow. To come up with interpretation about, well, the 25 percent only applies at the very end of the process and you can have whatever discretion you want, and for any set of

offender or offense characteristics, really 2000 percent disparity between these two judges for the same case is okay.

I suppose the interpretation that you can make of the statute -- and I have heard some of these from some of the judges, and I understand we will get an argument like that from the ABA -- but to me that just ignores why we have the Sentencing Reform Act and disparity.

JUDGE TJOFLAT: That is not going to happen. You are going to collect data and you are going to compare fact-findings. You are going to have a judgment issued by a District Judge. It will have findings of fact and then it will have conclusions of law. He is going to find the facts you tell him to find and then he will put his conclusions down.

COMMISSIONER ROBINSON: Okay. All right. Well, this --

JUDGE TJOFLAT: Just a minute. When you compare sentences, you are going to compare fact-findings, and it is not until you start comparing those that you will know whether there is any disparity in sentencing, and I suggest to you that there is not going to be any great unwarranted disparity in sentencing.

Now, before you make him find facts, the less you are going to have to compare and the greater the argument about disparity.

JUDGE BRIEANT: In a sense, though, we should not be discussing with you how this statute should be construed.

COMMISSIONER ROBINSON: Yes.

JUDGE BRIEANT: It is for you to construe, and ordinarily the practice has been for all good and true bureaucrats -- and I don't use that word disparagingly -- to construe their powers most favorably towards achieving their goal, and I don't see why you can't do that.

COMMISSIONER ROBINSON: I think you are right and I am willing to take the rap for being a bad bureaucrat.

In fact, Judge Tjoflat has raised the second part the question that I have for Judge Brieant, and it really goes to the gradualism issue, and I can see the logic in saying -- and this is what Judge Brieant has been saying from the very beginning of this process, start small, start very modestly and then build -- you have this mechanism for improvement and so on.

Here is my difficulty with that: Given the constraints of the Sentencing Reform Act implications, I don't

see gradualism as a possibility, and here is why. When Congress drafted the Act, they made just the sort of balances that you were talking about before, about guidance and discretion and so on, and part of the balance that they struck that we are absolutely locked into was what they did with the United States Parole Commission.

The tradeoff that Congress had before was to say there is a problem with in a sense dishonesty in sentencing, we have these judges going through symbolic sentencing, they give these sentences that may or may not mean something, and then the real sentencing is done by the United States Parole Commission and that is wrong, we ought to be a lot more straight-forward, and there is a lot of virtue to having the judge sitting on the firing line, have him or her be able to make that decision.

All of that makes wonderful sense to me and I have always supported that. The tradeoff, of course, was, well, we will give these judges real power, but only because we will also provide a lot of guidance, too. That was the tradeoff.

Now, what you are saying to us is it is great to have a system that has a lot of discretion, it is okay that

judges under these guidelines can do for the most part what they do now, with very few exceptions. That is great, and if that were the only consideration in the world, I am not sure I would disagree as much.

My problem is that the United States Parole Commission is going to lose jurisdiction on day one and there is nothing we can do about it. And the notion of -- the gradualism notion which in a vacuum is attractive becomes difficult, if not dangerous, in a context where at that moment when judges get that tremendous power and know sentences really mean something you don't have the imperfect albeit some uniformity inducement for the United States Parole Commission.

JUDGE BRIEANT: What you do have is the tremendous capacity of the common law to deal with kaleidoscopic changes in facts, and you do have access to the appellate process and you do have a vast body of conscientious judges who will study these guidelines and will want to sentence within the spirit of them and will be helped in doing so by prosecutors and defenders and probation officers, and you will be monitoring this with these computers which Judge Breyer described earlier and maybe perhaps even with human beings,

and you will be in a position to issue policy statements quite readily -- and while I understand it is more difficult for you to amend your guidelines, you will be able to do that.

If you want to talk about starting small, a great case which I didn't mention, you've got pages on burglary. What burglaries do we get? We get in our district the young kid who breaks into a vacant officers' housing on West Point military reservation and we wind up with tremendous numbers for him.

Once your computers start telling you about those cases, you are going to revise your burglary guidelines, and I really wonder why you guideline burglary at all since burglary is not usually a federal crime. We do get them. Of course we get them. We get them on the Indian lands also.

COMMISSIONER ROBINSON: Let me say --

JUDGE BRIEANT: It is not worth the effort we went into.

COMMISSIONER ROBINSON: I think you are absolutely right the resiliency of the common law process in a sense, and there is no doubt in my mind that the system will survive. The question is what will be the price that we will pay

between now and the time that all the appellate judges have this straightened out ten years from now, the cost in litigation and fairness to defendants and the fairness to society, I am not sure it is a price you want to pay.

It raises the issue, though -- and this business with the United States Parole Commission is something that really puts it in focus -- shouldn't we be going back to Congress and say, look, you dumpted the Parole Commission, you did these other things and we think the way to go is this gradualism, if that is the ultimate conclusion, but we can see it is inconsistent with dumping the Parole Commission.

Or maybe the proposal you would support was if gradualism is the name of the game, gradually phasing out the Parole Commission only as the uniformity of the judiciary has proven, maybe that is the way.

JUDGE BRIEANT: I don't think the Parole Commission can do a better job than the appellate court, which has three law clerks per judge and two secretaries per judge. I think they will do pretty well to the extent that our judges don't do a satisfactory judge, and I think our judges can do it, as I started at the beginning, and I think our common law system in the courts can do a better job than the Parole

Commission, which did not necessarily function as well as it might have in recent years.

COMMISSIONER ROBINSON: I don't think the strength of the Parole Commission has more than three law clerks per Commissioner or anything else. The thing that the Parole Commission is just the opposite.

JUDGE BRIEANT: I think the courts can do it.

COMMISSIONER ROBINSON: The strength of the Parole Commission is in the fewer numbers, not the larger numbers. Adding three law clerks to every jugdg simply adds the increased possibility for disparity.

I do want in just one last moment, I want to ask Judge Tjoflat one question, and this concerns his suggestion in his discussion earlier about making the system simpler and being more selective about the facts and so on.

Is it possible that one way to make the system simpler and to have the system based on the facts that are relevant and only the facts that are relevant, is to have a system built not on United States Code sections, as this is, that carries with it all the excess baggage and all the 200 years collected absudrity distinctions that the United States Code has in it, but a system that uses as its building blocks

the specific factors that sentencing judges, for example, as a group say are relevant to us.

When I see a fact pattern, what is it that sentencing judges see that is relevant, degree of risk, breach of trust, breach of fiduciary duty, degree of property destruction? Could a system that was considerably simpler, without losing any of the problems of --

JUDGE TJOFLAT: Sure, you could.

COMMISSIONER ROBINSON: -- by simply shifting gears to a conceptually based system, rather than the United States Code system.

JUDGE TJOFLAT: That is exactly what would have happened had the Congress been able to reform the Federal Criminal Code.

COMMISSIONER ROBINSON: Well, why can't we --

JUDGE TJOFLAT: And one of the things that makes your job that much more difficult is that the Congress was unable to revise the Federal Criminal Code. They revised the sentencing model that is to be used in the federal courts but they weren't able to revise the code and --

COMMISSIONER ROBINSON: Does that mean that we should be --

JUDGE ROBINSON: -- that just makes your job tougher. No, Congress needs the code --

COMMISSIONER ROBINSON: That would be a --

JUDGE ROBINSON: -- but that isn't anything the courts have any control over. We are going to sentence offenders pursuant to this sentencing model for offenses they committed under the existing law, and our concern is one of efficiency.

If we rewrite the substantive criminal law in the context of sentencing, and without getting into a very involved discussion of it, you run into lots of questions, due process questions about the offender being put on notice prior to the commission of the crime, that to embark on certain conduct is going to expose him to certain criminal liability for which he is not going to be tried by a jury, and all of a sudden now it is sentencing, he is going to be punished for that conduct. So you have a notice problem, you have an ex post facto problem, you have the question of the right to trial by jury on certain things involved in the overall criminal conduct, and that is the problem.

So you do have a tough problem because Congress did only half a job. Let me add one footnote to what Judge

Brieant said about efficiency in the sentencing process. When the Congress passed the Victim and Witness Protection Act, it had in mind the very thing we are talking about, because in deciding the amount of restitution to order, if any at all in a given case,-- and this Act, by the way, is incorporated into this sentencing model -- the court is to take into account the problem that would be involved in proving the need for restitution and the amount thereof and determining who all the victims are and everything else. You would have to bring an end to the sentencing hearing.

So there is a great deal of discretion accorded the judge in fashioning a restitution order which takes into account the amount of time involved in the sentencing process and such like, and Congress said we don't want to over-burden the sentencing function by sending the judge on any wild goose chase, as my colleague, Judge Burns said, but sending him out to determine an unending list of facts, you see, and that is essentially what we are saying about this sentencing model, is we don't want to see the Commission have us do what the Congress explicitly said do not do when they passed the Victim and Witness Protection Act.

CHAIRMAN WILKINS: Thank you, Judge. Any questions?

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CHAIRMAN WILKINS: George?

COMMISSIONER MACKINNON: What happened to that 27th case in the Supreme Court?

COMMISSIONER BREYER: That was when you followed the first --

COMMISSIONER BURNS: Affirmed. Affirmed, Your Honor.

COMMISSIONER MACKINNON: I know that, but did they commit error or not?

JUDGE BURNS: And that was a precious one percent or three percent, as I recall the figures. It was not my case, by the way.

COMMISSIONER MACKINNON: I would like to talk to you and to Judge Brieant on your attitude with respect to drug addiction as being a mitigation or an aggravating factor.

You said you thought in some instances it might be a mitigating factor, and it shouldn't be considered always as an aggravating factor.

Now, Judge Brieant, they tell me that up in the Second Circuit or in the Southern District that they always give an addict a lesser sentence. In other words, a fellow that's selling to support his habit, they say that he gets less than some fellow that's in it purely for the profit and

doesn't take drugs.

JUDGE BRIEANT: I think that is a fair statement of what current sentencing practices have been. I think it is a consensus of our judges that in many cases addiction or acute alcoholism is a mitigating factor.

That does not necessarily reflect my personal view, but I think in my own sentences that I have attempted to normalize myself with the rest of the judges on our court, and that I have also done that. But I think a strong argument can be made the other way, but the Commission has clearly found it the other way. And I think that's one of the issues that might be required to be revisited.

COMMISSIONER MACKINNON: It is certainly an indication that a man who commits a crime, to commit another crime, is getting off lighter in some instances than a person that just commits one crime.

JUDGE BRIEANT: I could give you a pragmatic argument that the longer you lock the addict up for, the better off society is because when the addict is on the street, he is highly likely to be doing street crimes, which we don't get, but which hurt society.

I merely expressed a view held among the judges. I

don't personally argue it very strongly. It might be that Judge Burns could add more to this discourse than I could.

JUDGE BURNS: I suppose, Judge MacKinnon, the answer I would furnish to you is the great rule I have tried to follow in 20-and-a-half years on the bench; and that is, always remember never to say never or always. You get yourself in trouble.

Certainly, as a trial judge, if I say I always put bank robbers in jail, I never give a drug defendant probation -- at least in the Ninth Circuit, the loser is going to take me up and get me reversed to a fare thee well. As a sentencing judge, if I say always or never, I'm in trouble.

COMMISSIONER MACKINNON: It is just like saying this is the last continuance you're going to get.

JUDGE BURNS: Let me give you a specific example from real life, Judge MacKinnon. I just had the case about two or three weeks ago -- a real case, a real defendant, I sent him to a real jail for a ton of years, it so happened. He was drug dependent to a fare thee well, to the point where he had over bought, and the seller wanted his money to the point the seller was shooting at the defendant's wife. Darn near hit her a couple of times, as well as the kids.

Now, that was a case in which, in my judgment, drug dependency lay at the center of it and, in fact, in my view in that case it mitigated it. He still went to jail for a ton of years, don't worry about that. There is an example.

So it can be a mitigator, I submit, Your Honor.

COMMISSIONER MACKINNON: Another point -- and I think it was you, Judge Burns, that raised it -- was about departure on usual facts. You find the usual facts that happen and you would depart from them.

I am not so sure that that's the theory that ought to be applied on departure. It would seem to me that if the things that are usual should never be the ground for departure.

JUDGE BURNS: If I said usual, I misspoke myself, Your Honor. I certainly didn't mean it. I would have meant unusual by the very nature of the concept of departure.

COMMISSIONER MACKINNON: Yes.

JUDGE BURNS: If I said usual, I retract it and apologize.

COMMISSIONER MACKINNON: The other thing is you talked about burglary.

JUDGE BRIEANT: I think I did.

COMMISSIONER MACKINNON: Judge Brieant. If you

will look at these guidelines around the country - and, of course, there are a lot of burglaries that are committed nationwide in the federal system, on Indian reservations and federal buildings -- we have them a lot around here -- and homes on federal reservations. But in the state concepts, burglary is one of the most difficult subjects that they have had. They've had more arguments about what they ought to give for burglary than a lot of other things, because it involves the attitude of the people to their home, and whether there is some person in the home to begin with, and to what extent they go and they're fearful of ever going back to the house. The psychological factors that develop from burglary can be very troublesome.

I just mention that as to it would reflect some of our own attitude on burglary.

JUDGE BRIEANT: That point is certainly well taken, and I must concede the validity of it.

CHAIRMAN WILKINS: Commissioner Gainer?

COMMISSIONER GAINER: Judge Tjoflat, I'm troubled as a result of your testimony today. I am not troubled by your testimony; I am troubled because I find that, try as I may, I come to the following summarization of it. That

summarization is: "Don't confuse us with the facts."

Now, I know that isn't what you mean, because I know for a long time you have been the supporter of sentencing reform. And I know that with regard to many of the specifics of sentencing reform. I find myself wholeheartedly in agreement with, for example, what you said today with regard to legislative history. I think it's absolutely on point.

But I don't see how one might go about reducing the necessity of fact-finding in a fashion that would be workable. As you know, there are those who feel that it is very important that this Commission, to the best of its ability, specify all the aggravating factors and all of the mitigating factors with regard to offenses, that this is tremendously important if one is going to have a true system that provides guidance.

Those with that view tend to think that the current draft has devolved past the point of simpleness to simplicity, or over-simplicity. Yet there are those who think that this is not so at all, that, indeed, the current draft has not reached the point where it is simple enough to be workable.

They take the view that even if greater sophistication were desirable -- and that's a debatable point -- even if it

were desirable, it is something that has to occur over time.

Those who take that sort of approach generally would have, in broad categorization, one of two sorts of approaches. One would be to specify for an offense a sentence to be imposed in a very straightforward fashion; that is the ultimate of simplicity, saying, for example, that every fraud, every fraud, will carry two years.

Others who take that overall approach would say, no, that isn't the approach that we should be taking. We should be saying instead every fraud will carry between one and four years, depending upon the judge's view of the offense.

Could you tell us, perhaps with a little more detail than I have supplied with that rough outline, the --

JUDGE TJOFLAT: I do not argue the point that you should have a situation in which a judge -- if the only material fact is whether a fraud was committed, that's all, the Commission said we're only interested in whether a fraud was committed. And that's the only relevant -- that's the only material sentencing fact. Well, then, that's all the judge is going to consider with a conviction for fraud.

Now, I think the Commission, having decided that, can't say the judge has discretion to give one year or four

years. That would violate the 25 percent rule. The Commission has decided the kind of sentence and then has arranged so that the statute builds in 25 percent, the six months business.

What I am saying is something like this: The Commission has to decide with regard to a given offense what facts are material for sentencing purposes and why. That frames the issue, let's say, at the sentencing hearing with regard to the offense. We're now trying that offense and here are the material factors and here are how they're weighed.

Now, we turn to the offender. The Commission has got to decide -- and we're talking generally about the criminal history -- what facts are material for what sentencing purpose. Just like we do in a civil case, we frame the issues.

Now, what I said was -- and then once the judge makes the fact-findings, the guidelines are going to apply. It's sort of like laying the footings of a building and then you apply the super structure. You can't know what kind of framework, in terms of a steel super structure, is called for by a building until you lay the footings. The footings are the fact-findings.

Now, my comment was that the more facts that you determine are material, the more facts are going to be

litigated. Because there is no neutral fact in sentencing. If it's neutral, it's not material.

So the government, on one hand, if you had ten facts that have to be found, fact issues that are framed by the guidelines, then the government is going to be pushing for a given finding on each one of those fact issues in one way, because it's going to call for a more serious sentence. And the defendant is on the other side. You're starting with a pre-sentencing report.

COMMISSIONER GAINER: Judge, in general --

JUDGE TJOFLAT: Now, at that point, just in principle -- do you understand?

COMMISSIONER GAINER: I don't know that I agree that the more material facts, the more litigation that would be necessary.

JUDGE TJOFLAT: I think that just -- well, all I'm saying, Mr. Gainer, is just that experience tells us -- well, take the Victim and Witness Protection Act, and you have a case in which you don't know how many victims there are. You can continue to take the hearing and determine how many victims until it's stretched out forever.

It logically flows, it seems to us, that the more

material facts the Commission specifies -- that is, depending on how the fact is found makes a significant difference to the sentencing decision -- the more litigation you're going to have.

COMMISSIONER GAINER: Judge Tjoflat, with regard to that, if an offense were created in a fashion that carried bodily injury and there were a guideline saying if bodily injury exists, increase the penalty by ten points; and if, on the other hand, in another guideline system, the guideline existed that said increase if bodily injury occurred by one to ten points, depending upon whether, at the low end, it was a simple cut or bruise or at the high end permanent mental or physical disablement, with variation in between, and an ability of the judge to interpolate if the facts indicate before him fell between two of those points. Some of us have been going on the assumption that it is far easier for a prosecutor, defense counsel, probation officer and judge to agree that something is around ranges two, three, or four, which may be overlapping ranges, rather than the all or nothing approach of bodily injury and, hence, ten points --

JUDGE TJOFLAT: I'm not arguing the all or nothing approach. What I am saying, though -- and it depends on how

you word the guideline. When you say serious bodily injury, you have two problems. One, you have a fact question, what is serious bodily injury; and you have a legal question, what amounts to serious bodily injury.

And when I said that depending on how many facts become material and how you express the issues, you can create more discretion, that's a classic example.

I could make a finding in a given set or situation or scenario with bodily injury. Judge Brieant could find that it wasn't serious bodily injury. I could find that it was moderate bodily injury, and Judge Brieant could find that it was, indeed, serious. And then we would each interpret the term "serious bodily injury" in a different way, obviously, because all three of us could find it was serious or not serious. You now have the seeds for an appeal on the fact-finding as to what the injury was and an appeal on what does the term "serious bodily injury" mean.

COMMISSIONER GAINER: If there were motivation to appeal, if it caused that great --

JUDGE TJOFLAT: Well, if there's no motivation to appeal, then it's not really -- it's almost not a material fact. Do you follow?

COMMISSIONER GAINER: Yes. Let's assume that situation was in existence but in the following context: the context in which guidelines were very broad, enabling judges to determine for themselves what associated facts were material to this case, a situation in which over a period of time, under the approach that some of the judges have suggested, we would be able to observe judicial conclusions, read the evolving common law, and find the Commission ultimately educated to the point wherein it might be able to specify in its guidelines in 2010 --

JUDGE TJOFLAT: May I say this, interrupt one second? The judges under this model are not supposed to be deciding for themselves what facts are material.

COMMISSIONER GAINER: Then the only issue is at what level does a fact become sufficiently material for either this Commission or a judge to determine that it should have a bearing on the sentence?

JUDGE TJOFLAT: Well, the Commission is going to decide what facts -- call them circumstances, factors or facts, they are pieces of evidence, they are facts -- are pertinent to the sentencing decision. That's the Commission's job.

The Congress has said to the Commission: you

categorize an offense; you decide what facts about a burglary are important for sentencing purposes. Your first job is to decide how serious in a normative sense is burglary, just as a general proposition. How much punishment, if any, needs to be dished out for the commission of the offense, and how serious is burglary in terms of a need for general deterrence. That's a normative call.

COMMISSIONER GAINER: Is that the Commission's first job? Isn't its first job not to ascertain what sort of burglary we are talking about? There are more coming up --

JUDGE TJOFLAT: Well, you may have to have different kinds of burglaries. That's a job for the Commission to decide. I just took a simple one. Let's assume you just had a common law statute called burglary, getting along with the point that Commissioner Robinson was arguing, and we ought to have a revision of the substantive law, but that's a side. We don't have it.

Let's assume you just have burglary. Then you decide how serious is burglary for two purposes: punishment and general deterrence. That's a normative call. Now --

COMMISSIONER GAINER: I'm so persuaded by your distinction between punishment and general deterrence, which

I so strongly favor, that I am inclined not to prolong the argument.

JUDGE TJOFLAT: Well, what I am saying is that you could say to the judges, all we're concerned about in terms of the seriousness of the offense is the commission of a burglary, period. And there are no aggravating circumstances. The individual committed burglary; then the offense calls for a certain sanction, standing alone.

Then you're telling the judge, you now have to look at the offender because the statute requires that. And the question here is whether there should be an incarcerative sentence imposed for incapacitation purposes or not. And if not, whether, if the individual is placed on probation, there should be some conditions that will protect the public; and you tell us what facts are important.

That's why I brought up the point about criminal history. If it's important that the individual had five previous convictions for violent offenses, if that's important for the purposes of incapacitation, then the judge knows immediately what he's got to decide.

COMMISSIONER GAINER: Judge, let me ask you one last summary question, then.

Do I understand correctly that, in general, you think the number of facts that the Commission has determined to be material in the current draft is somewhat too numerous?

JUDGE TJOFLAT: I think it's better than it was in September, but we can go through this draft -- part of it is an editorial problem. It's the way in which the Commission in the draft expresses a fact like seriousness, the adjectives used, which lend themselves to factual debates and lend themselves to interpretation of law debates -- which is what the Judicial Conference, among other things, has suggested that a different standard of review with regard to the application of the guidelines, when that's the claimed error, be revised to give the district judge some deference in interpreting.

COMMISSIONER GAINER: I know what you mean. So that if you had three or four different interpretations, and they're all reasonable, the Court of Appeals would say, well, the district judge interpreted the guidelines in a very reasonable fashion. It's sort of like an agency which is committed to the interpretation of the statute, and we'll go along with the way he's interpreted it rather than substitute our decision. But I didn't mean to get off on that.

Thank you.

CHAIRMAN WILKINS: Judge Breyer.

COMMISSIONER BREYER: It sounds like you've had a good taste of the debate here that's been going on for a year. It's a really interesting document which hasn't been made public, in a sense, but Commissioner Robinson wrote what I think is a really brilliant exposition of this kind of approach in July. And I think the notion of trying to really figure out how you could get all of these factors in, I think it foundered on the rock of practicality. And it's that that I think you have answered the problem --

JUDGE TJOFLAT: We are all concerned with the efficiency of the process and that we can make it so inefficient that it doesn't work.

COMMISSIONER BREYER: And in the Ninth Circuit draft on your Page 5, you give the reaction to it now, which is what I had: it's too much of a straitjacket.

But what I wanted to ask you, when we make this point -- and I've made the point and you made the point -- the people who believe differently come back usually with two approaches. One is, well, we're trying to cure the problem which is you -- namely, me, you know, us -- that there is too

much disparity. And the second, they say, well, it's illegal what we want to do. And I don't know how far you can say -- what I usually say on that is I know I'm not giving a firm legal opinion, but if somebody were to come to me and there's a sign in the park that says "No Pets Allowed," and somebody says, well, I'm coming in with a pet bird or a pet tree -- I'd say, well, you know, that might not be prohibited. I'd say that's an open question.

Can you say, though, despite the problem not passing on it, is it fair to say in your opinion that it's at least an open question that we might have the authority? What I'm thinking of, to be specific, is that there is a sentence in this statute, and it says that the guidelines shall, for each category, establish a sentencing range.

Then it says the maximum of the range shall not exceed the minimum by more than 25 percent. Then it says --

JUDGE TJOFLAT: That's for each category of offense and category of offender.

COMMISSIONER BREYER: Of offender, yes. Then it goes on to give two more things -- there's a lot of words in them, Part C and Part D -- and those talk about establishing categories. And then they give a whole lot of factors to

come in establishing categories.

So what I've been tending to think of, and others have suggested it, that where you have a category -- and that might be the boxes on Page 11 -- or it might be base offense characteristics, there try not to have ranges. But where you talk about specific offense characteristics, where you talk about adjustments, in those areas you are building towards a category. Therefore, you are establishing a category. Therefore, maybe there you could have ranges consistent with the statute.

JUDGE TJOFLAT: Well, Judge Breyer, as I read the adjustments and the departures and all the descriptions that are put in there, they're nothing but tools that are used to find the category of offense and the category of offender. You can put whatever label you want to on them. They all come down to a bottom, and that is, you wind up with a guideline which reflects a category of offense and a category of offender.

COMMISSIONER BREYER: Thank you very much.

CHAIRMAN WILKINS: Again, thank you very much, gentlemen. We're running somewhat behind, so we'll move quickly along. I know Mr. Rendino has an airline schedule

that is pressing him. Mr. Thomas, I know you have a meeting with the Chief Justice, so we will accommodate both of you as best we can. We certainly want to hear from you.

Let me call Mr. Thomas Rendino, who is the President of the Federal Probation Officers Association, and Ralph Ardito, who is Executive Vice President of the same association.

The federal probation officers will play a pivotal role in the implementation of our guidelines, and Mr. Rendino and Mr. Ardito and their organization and fellow probation officers have contributed in a tremendous way to the work of this Commission. For that we are most appreciative, and we are very interested to hear from you because I know you and your representatives have spent a great deal of time studying this draft that was published in January.

Glad to see you.

MR. RENDINO: Thank you very much, Commissioner Wilkins. Good afternoon, Commissioners.

Given the way the schedule has gone, I think I will rely more and more on the written prepared statement that I submitted on Monday. And not to diminish that, I hope you will all read it because it does reflect at least what the FPOA feels on the most salient features of the revised draft

and beyond.

There are just a few comments I would like to make, however, before I leave you. We believe that, particularly beginning on Page 5 of my prepared statement and rushing along, we feel, we sense and we hear a lot about a growing uneasiness in the field which we, at least on the executive board of the FPOA, feel may be based on inadequate information and misinformation about this product.

We realize that the Commission has been under tremendous pressure to get its product to Congress, but unfortunately, once that is done, we don't think you're going to have very much time to relax because we think you're going to have to get into Paragraphs A through D, which you will find on Pages 5 and 6 of our prepared remarks; namely, the public relations effort, the concerted, more focused attention to the obvious training needs that the entire judiciary is going to face, particularly those of us who will be working on these guidelines for the various judges.

We can assist in the ideas presented in Paragraphs A through D through our newsletter, through continuing to correspond with you folks and visiting you here in Washington, and at your hearings around the country, if there are any

further ones. Please call on us. If you don't, we'll be calling you anyway.

We don't know if there are any hidden mine fields in the revised draft -- hidden even from the Commission. But given that, the FPOA is not overly concerned regarding any inconsistencies or disparities which may seem to arise, particularly in the early months and years of this new national policy.

Why? Well, Congress has built into Section 994 of Title 28 the review and revision provisions which we think are extensive, they're mandatory; we will be making ourselves part of that. The Courts of Appeals will become involved with sentencing as never before. Congress itself is going to be making its own independent reviews and suggestions. And the FPOA, given its unique situation in the federal criminal justice system, will be continually receiving information on the impact of these guidelines. We will try to distill these and summarize what is actually going on and present them to the Commission.

As I noted in the prepared statement just briefly, we can't possibly know unless we run thirty or perhaps forty thousand cases through and see what actually the impact is

going to be on the guideline system.

We think that the sentencing table, which is now at Page 10, allows for the grant of probation in more cases than in earlier Commission products, and we're gratified at that, that we were concerned back last July, for instance, that we might end up being probation officers in name only and that there might never be probationers or supervised releasees. The ceiling is now raised, and we feel that we will be probation officers in name also, and we thank you for that.

The current procedure to arrive at a recommended sentence is much simpler, less esoteric -- particularly from a mathematical perspective -- and we're very grateful for that. We see this product as much simpler and not as unnecessarily complicated and difficult as perhaps earlier suggestions were.

We think you're on the right track. We think this is a very workable document. We think that imperfections are going to be found, but so what? If they are not gross imperfections and we can revise and continually review and update as to the mood of the public and the Congress and as to the needs of the criminal justice system, then we're all in this together and we're willing to pitch in.

So it's getting close to lunch time, and I know I've rushed and I'd be willing to stay here as long as you want, should you have any questions.

CHAIRMAN WILKINS: Thank you very much.

Mr. Ardito, do you join in your President's statement?

MR. ARDITO: I do, Chairman Wilkins. I would just like to add one thing. The Commission has heard from judges and prosecutors and lawyers and probation officers, et cetera. I haven't been to all the hearings, and I am not familiar if testimony was taken from clients or people on probation were called in other cities. But I have been in this business for 13 years, and the one variable more than any other that clients under supervision want is fairness. I think that the effort that the Commission has done has also established fairness.

The analogy, I guess, is when individuals on the street who are committing crime know that there is going to be something fair, something swift and something just, we won't get later under post-release supervision, the kinds of bad attitudes that we see from time to time.

But, again, I concur with Tom's statements. I think it's a tremendous product.

CHAIRMAN WILKINS: Thank you very much.

I'm delighted to hear probation officers -- and you represent in the thousands -- who understand the system from the nuts and bolts level better than anybody else tell us that we're on the right track. Because if you believe we're on the right track, then I'm convinced we are.

And as far as your other concerns, perhaps we ought to get together some time soon and begin making plans for developing a probation officers workbook, soon after we publish this, so we can follow right behind it with a how to do it workbook so that this information that you stated we need to get out quickly to the field can be disseminated quickly so that we can all start off on the same foot when we start learning how to use this new system.

I'm sure your association, I hope at least, would volunteer your efforts to us in a joint effort with other judicial committees and with the Judicial Center and the offices. But we'd like to do that if you think it advisable.

MR. RENDINO: Any time, Your Honor.

CHAIRMAN WILKINS: Thank you very much.

Any questions, to my right, to my left?

(No response.)

CHAIRMAN WILKINS: Well, I'm sure it's not a lack of interest, but it's the clock ticking. I know you've got a plane to catch, but we appreciate your written submission. Thank you very much, and we'll be in touch with you.

We are delighted also to have with us the President of the American Bar Association, Mr. Eugene C. Thomas. With Mr. Thomas is the Chairman of the Criminal Justice Section of the American Bar Association and his assistant, first Mr. John M. Greacen and Ms. Laurie Robinson.

Ms. Robinson and Mr. Greacen have appeared before. Mr. Thomas, we are delighted that you have taken your time to be with us. Thank you.

MR. THOMAS: Thank you, Judge Wilkins and members of the Commission. I am grateful for the opportunity to have a few minutes of your time on this fundamental and profound matter pending before this nation.

As the President of the American Bar Association, it has been my duty during the year under way to travel to all parts of the United States meeting with the lawyers practicing in the various communities, but also spending time with the press, with various cross-sections of the communities themselves -- indeed, with as many people in this country as

I could -- listening and speaking in order to bring together a sense of the nation on the matter of justice. I have had the privilege of working with some of you in connection with related matters, in connection with prisons.

So let me report that as this year unfolds, the people of the nation are very focused and concerned with regard to criminal justice and with the work that you are doing.

I have written and spoken to the matters that are concerning you, that you are working upon, and I can report that around the country people watch with a great deal of concern and interest the work product that you are about to produce.

I believe that it is correct to report that the sense of the lawyers in general around American and, I believe, the country itself is one of approval of the direction that you are taking your work at this time, and I think one of understanding of the direction that you initially considered and explored but which now does not appear to be your course and direction.

I think the people of America understand what a profoundly difficult task was assigned to you and remains

your responsibility. Let me, therefore, hasten to broaden the base for these observations and make you aware that the discussions, in addition to involving the section of criminal justice which has worked with you and is represented here and is our germane section of the association regarding criminal justice, my discussions have also gone forward in the council of the section of corporation, business and banking law, with the fellows of the American College of Trial Lawyers and other distinguished groups of lawyers from a variety of points of view. All of them are grateful to you for this difficult and profound undertaking.

I believe the message that I am charged to bring to you today is one of appreciation and approval for the direction that you are now going, and for the decision that you have made to turn your direction as you have. It is also to say America knows there is never a good time for some decisions. There is never a good time for some work. And yet there is never a better time than now.

The needs of improvement in our criminal justice system argue for finding a way to go forward now, do what we can, as well as we can now, and commit ourselves to continue to search for and find improvements every year in the future.

With that in mind, the feeling of the profession as I find it, and as I have tested it by publications in the American Bar Association Journal -- which reaches approximately 380,000 people every month -- the sense is that this concept is so dramatically new and so profound in our system that we should put it in place and move forward, realizing the need to learn, realizing the need to test in the field what exactly will happen.

If the consequence of our changes have adverse effects and we need the experimental period of time and the opportunity to identify and avoid those problems, it would seem that that's do-able if the Commission can find a way to proceed with action now that recognizes immediately the need to begin the learning process in the courts, looking at the cases that are there concerning crimes that have already been committed and would not come within the purview of this set of recommendations in any case, and seeing how they would be handled. And in the year ahead, look again at the matters that come forward and study in field tests and in learning efforts how this would affect the courts if we had to implement immediately.

I suggest on behalf of the lawyers of America that

you go forward with your report urging its adoption and action, but providing in it a buffer period that lets us learn and adjust and be as prepared as possible for the day that it becomes the binding controlling law that must be utilized in the case; nonetheless, letting us examine it as a methodology in the matters that we are handling under the present law for a period of time, perhaps a year.

It is our judgment that to use this as an excuse for delay would be terribly unfortunate, that the time to make the move and lock up the achievements is now based upon the additional improvements that I can already see that you are considering. We feel that there are additional improvements possible. We know that you are here today because you're interested in those. We think that it is important that anything legitimately relevant to the concerns of justice and the effectiveness of our law should be worked into the process, and the Congress surely wants that.

Therefore, let me go forward with one additional observation that we think deserves weight. It is that as the people of America express exasperation with criminality in our time, the people of America have also of late faced the fact that we have over 500,000 people in prisons in this

land, and that they are competing with scarce dollars in the marketplace of taxation and public revenue, scarce dollars that are needed for education, for health care, for roads.

The American people are worried about illiteracy in the jails and prisons, and they know that dollars spent on brick and mortar will not do away with illiteracy.

Americans, in short, have become a sophisticated people about the high price of vengeance. And in exasperation, we have not become irrational.

I can report to you whether it is Tacoma, Washington, where I spoke a month ago, whether it is Miami, Florida, where I spoke yesterday, whether it is Atlanta, Georgia, Memphis, Tennessee, or Los Angeles, California, the same message is coming back: the people do not wish vengeance foolishly imposed upon individuals; the American people want to rehabilitate where it can be done. The American people want to deter, and the American people want to help those who can be helped.

We want safe streets, but we don't think we're going to have them because we lock up people a longer and longer period of time and turn them out more and more illiterate, worse and worse for the psychological abuse of a

terrible experience. The American people do not wish to pay the high price of vengeance foolishly.

Therefore, we believe strongly that all the considerations that logically lead to the best handling of the case, that's what we hope for from your work. We hope there will be no tendency toward arbitrary exclusions of important information because of the results of your work. We sincerely trust, and I think Americans everywhere do, that we can find a way in this country to reduce the number of people in prison, to reduce recidivism, to reduce illiteracy -- yes, and to reduce poverty -- and that your work is at the heart of it because crime is linked to illiteracy, to poverty, drugs, alcohol, and other terrible problems.

So we are here today to applaud your achievements, to thank you for your many explorations of many sound alternatives and for the findings you've made, to urge that we get on with the work, not delay, but at the same time, in a sophisticated way that we are capable of in this country, utilize the time immediately ahead in a buffer so that we can have field trials and a learning period.

And on behalf of the 342,000 people who are the American Bar Association, our assistance, our cooperation in

those field trials is fully available to you. The Criminal Justice Section and other volunteers, the legal aid and the public defenders, the various people who interface day by day with the people we're really talking about here, the people that are being locked up, these people from the profession are available to work with you this month, this year, and next year. It's a continuing effort in a search to wisdom. It isn't a snapshot in time where for a brief moment we saw it all. We appreciate that that's the way it is. We compliment and applaud you and assure you that we also know that's the way it is from your vantage point.

So thank you, we encourage you, and we say you're on the right track, don't stop now. Let us help any way that you think we can. Thank you, sir.

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

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Mr. Greacen, do you have remarks?

MR. GREACEN: Thank you.

It is my happy task to tell you of those areas in which the American Bar Association is still quite uncomfortable with the current draft. You can call me Cassandra.

The principal first problem that we find is the continued constriction of the availability of probation. The

draft continues the policy that was in the preliminary draft that a sentence of probation is not available for any case that requires a sentence of at least of more than six months' probation. That is the minimum in the guidelines, unless the judge is to make a departure.

The American Bar Association testified before you before that it is argued that you are not compelled to that interpretation to that policy by your statute, and that it's an unwise policy. Currently in the federal system, half of the persons sentenced are sentenced to non-incarcerative sentences. That cannot be the case under the stricture of the six-month standard.

We have been trying to find some way of making an empirical comparison of the results under current practice under your guidelines. What we have come up with is the grossest possible comparison.

We took your data, which includes the categories of offenses and the proportion of persons put on probation under those categories. In 85 percent of the categories reported, probation is used at least five percent of the time for those cases.

Under the base offense scores, base offense levels

in the revised draft, we found there are about 500 different categories. Of those categories, probation is available for only 200 of them. So under current practice, probation is used by the federal judges in 85 percent of the categories. Under the guidelines, probation would be permissible under only 40 percent of the categories.

Now, it's an apples and oranges comparison because your categories are different from the research categories. But as just a gross way of looking at it, to us it points out that probation is going to be substantially restricted from the current practice.

What's the solution? The ideal solution would be a separate guideline or series of guidelines that instruct the judge when to use probation and when to use incarceration, separate from the guidelines that specify the length of incarceration once an incarcerative sentence has been determined.

That's an awful lot of work, and you don't have much time left. We encourage you still to follow that course, but if it's impossible, we instead suggest that you raise the floor, at least, and allow the judge under the guidelines to impose probation for a sentence that would have

a minimum of two years or one year rather than the six-month period.

In the statement that we have submitted, we have talked extensively about the policy statements on offender characteristics. We feel that they are much too restrictive as currently drafted. We use the example of age. The Commission has said that it is generally not relevant to the sentencing decision, and it gives two exceptions: for those who are so infirm that they should not be put in prison, and an offender who is below 21 who has an extended history of criminality and, therefore, should be an aggravating circumstance.

We point out in the testimony the judges today use age in a much wider variety of circumstances legitimately, and that those realities should be reflected in the guidelines. We are willing to help in any way we can in the month remaining to make those kinds of changes.

I want to disagree with Judge Tjoflat on the issue of restricting the number of operative facts. I'm sure that the Commission smiles when it sees the witnesses before it argue on exactly the same points that it has argued within itself for years. Now, it is our view in the American Bar

Association, not only that the guidelines should not reduce the number of facts that can be taken into consideration under general principles of fairness and accuracy in sentencing, but that under the statute it is a vain attempt to try to exclude facts. Because it always available to a judge under the statute to use any fact as a basis for a departure; therefore, no matter what the guidelines say, talents prosecutors and defense attorneys can raise issues of fact that will be germane as arguments for departure, whether or not they are arguments under the guidelines.

Our view of this issue is that it is a very real problem, but it is a problem that needs to be solved not by the exclusion of factors, but, rather, the fuller articulation of procedures by which facts can be found and judges can make determinations, like summary judgment determinations that we don't need to find this fact, or that there's not a sufficient raising of that fact. And we find that the lack of detailed procedures in the current draft is, we think, a problem and will plague the implementation of these guidelines unless they are more fully articulated.

We don't have the answer this morning to exactly what those procedures should be, but there are many parallel

endeavors going on in the justice system at large, in the civil area as well as the criminal area, on methods of alternative dispute resolution, reduction of discovery processes in the civil cases. And we think that there are lessons here that can be used to keep the necessary fact-finding within a reasonable expenditure of legal and judicial effort.

That exploration has yet to be done, and it needs to be done before these guidelines can have full legal effect.

We find some ambiguities in the current draft that we think are very problematic. First is what do you mean by the Chapter 4 on plea agreements? Half of the people who read that say this is wonderful, it requires that a plea meet the same standards as a sentence imposed after trial and conviction. The other half read it and say this is wonderful, it means that there's a different standard that can be applied, that if the lawyers can come to the judge with any reason and the judge can determine that that's not violative of the four basic principles of sentencing, that a judge is free to adopt that sentence.

We in the field need that to be explained by the Commission what it intends through that Chapter 4.

We find similar ambiguity remaining in the section on multiple sentences, concurrent and consecutive sentencing. We are particularly concerned about the last paragraph of the commentary that suggests that for a first offender who comes before the judge with multiple current offenses, all of the current offenses will be considered as if they were priors for determining the severity of a sentence to be imposed on any one of those counts. If that is so, we have built an extraordinary multiplier into the sentencing decision in the federal courts.

I remind you that this was a problem that came up in Minnesota with the implementation of the Minnesota guidelines. It is a soluble problem, but it hasn't yet been solved.

The association has gone to considerable study to investigate the question that the Commission poses as to its legal authority to incorporate ranges, both in the specification of base offense levels and in the specification of adjustments or even departures. And the written statement includes an extended report of that analysis which concludes that the Commission does have the statutory authority to incorporate ranges, provided that with each range the judge is given

standards, criteria, or lists of relevant considerations by which to guide his or her decision as to the appropriate point within that range, and that those standards are sufficient to be reviewed on appeal.

That is the end result of our analysis. I'd be glad to go through it with you if you wish.

I also want to point out that we agree with the Commission that there is a legislative change needed with respect to the ex post factor nature of the guidelines, that it is far wiser to have them affect only crimes committed after their effective date, and that that proposal that the Commission has submitted to the Congress is one that we fully support.

President Thomas talked about the importance of a learning or field test period before the guidelines take legal effect. We have outlined one possible way that a field test could be incorporated into the process in our testimony. We know that the Commission has a much fuller sense of the practicalities of how this could be done, but our basic view that we want to present to you is this: that while the document is moving in the right direction, and if you incorporate our additional suggestions, we think will be on

target. It is on target as a novel. It reads beautifully as an overall piece there.

But when you go through, as lawyers will do, and parse every sentence in that novel and every clause of every sentence, there are drafting problems and anomalies and things that are overlooked. That is not to be critical of this Commission. It is to recognize the reality of the enormity of the process and the complexity of the process.

Wouldn't it be much better for the judicial system and the justice process to create a mechanism by which this, the document that the Commission presents to the Congress on April 13th, is put into the field and parallel sentencing is done? And these flaws can be caught and corrected before they start to clog the Courts of Appeals and the Supreme Court with a lot of legal decisions on these matters that are totally unnecessary because the Commission would want to correct them itself. But the correction process is still that six-month process, which means there will be six months' worth of sentencing under every flaw, even after you find it and make a correction to the Congress.

Now, that's what we mean by our suggestion that there be a field test, and we leave it to the wisdom of the

Commission to take that suggestion and find a workable way, together with the congressional committees, of making it a realistic proposal.

Finally, I want to reiterate what President Thomas said. We are willing to work with you in the coming month in any way we can and during any such field test or any other way that we can help the Commission on its important task.

CHAIRMAN WILKINS: Thank you, Mr. Greacen. We all appreciate the help and assistance that you and your group, the ABA, as a whole has given us over the last 16 months.

Mr. Thomas, if you have to leave, we'll understand that. I don't know what your time schedule is, but I don't want you to be late.

MR. THOMAS: Thank you. I may take advantage of the offer, Mr. Chairman.

CHAIRMAN WILKINS: Fine. I am delighted. We do need some legislation that states that only the crimes committed after the effective date, because it's unclear now as to the statute and that the ABA will support us in that effort. We have made that recommendation to the Congress because that would just simply clear up a very glaring ambiguity and a problem that we know will have to be decided

on appeal.

Any questions to my right? Mr. Block?

COMMISSIONER BLOCK: Mr. Grecean, I want to follow up on your suggestion that we move the probation threshold from a six-month minimum to a 12-month minimum.

Without unduly straining this point, it seems to me that what you're suggesting is that we strike at the very heart of the effectiveness of imprisonment as a sanction, that we often hear -- and some of us believe, to some extent -- that it's certainty that is important in the punishment area. And here we now lift the limit to 12 months, we start to allow probation and uncertainty in punishment for a much larger number of convicted offenders.

What's the rationale, other than just wanting to have more probation, for lifting the limit from six months to 12 months?

MR. GREACEN: The Commission is trying to weigh and balance, it's charged by the statute with weighing and balancing many conflicting interests. I have to agree with you that the principle of certainty of punishment would be furthered by leaving it at the six-month level.

But there are other principles that you have to

further. One is the effectiveness of the criminal justice system. When the guidelines require imprisonment of someone for whom a judge cannot conclude that imprisonment makes any sense or is necessary for assuring that this person will lead a crime-free life in the future, why burden the correctional system with that body for that period of time?

Furthermore, you do have the requirement in the statute to minimize the likelihood that the guidelines will lead to an increase -- not an increase in the federal inmate population, but population greater than the capacity. Well, it's already at capacity so it's the same thing.

COMMISSIONER BLOCK: The wording is to minimize the effect on capacity as determined by the Commission. Let me speak to that first and your first point second.

If we were to take the 40 percent that get probation now and give each one of those people in the guidelines six months, and if judges impose those six months, the total capacity of the system would not be strained by more than another ten to fifteen percent. In fact, it is the suggestion of giving short prison terms to those already on probation that posed the least problem in terms of capacity. It's the concentration of punishment for those already serving long

sentences that pose the greatest problem for the capacity of the system.

I think if you want to be consistent there -- and we do -- with the statutory language that one looks to restricting probation as a way of minimizing. If you're going to use imprisonment, that's one way to minimize its impact on the prison capacity.

Let me take your first point, though, about effectiveness. It seems to me that there are four purposes of punishment, three of which are used by imprisonment; unless you can make a very strong case for rehabilitation, imprisonment is consistent with the three functions of punishment.

MR. GREACEN: Deterrence is one. Deterrence is not served solely by imprisonment.

COMMISSIONER BLOCK: No, but it's difficult, I think, in many cases to impose the cost other than by using imprisonment. I have asked a number of times. Maybe you would like to --

MR. GREACEN: There is, I think, this misimpression that when we and other organizations come before you and argue for alternatives to incarceration, that we are talking about softness, and that a non-incarcerative sentence needs

to be a non-punitive sentence.

To the contrary, we strongly argue that non-incarcerative sentences be made punitive.

COMMISSIONER BLOCK: How are you going to do that?

MR. GREACEN: There are a number of ways. One is with the restitution requirement. Another is with the restrictions on a person's activity as part of the conditions of probation, including house arrest.

COMMISSIONER BLOCK: We get that through real examples. I mean, are you suggesting that the punishment for inside trading be house arrest and a palace, and a small -- or even a large -- fine?

I mean, where are you going to use these alternatives? I hear it all the time, but when you get right down to it, it doesn't seem to me likely that you're going to use those in many cases.

MR. GREACEN: The fact of the matter is they're being used now in half of the cases in the federal system.

COMMISSIONER BLOCK: Forty percent.

MR. GREACEN: And it is not going to hell in a hand basket.

COMMISSIONER BLOCK: I guess that's a matter of

perspective. Thank you.

CHAIRMAN WILKINS: Any questions, Judge Breyer?

COMMISSIONER BREYER: It is a very interesting and difficult point. We're never going to find agreement among a large group of people as to what the right number is exactly.

I'll tell you where it has bite. That is, we have been able to get some numbers. That's why the big argument for the evolutionary process is the data isn't gathered in the right categories. And at least if we get something in place, we'll begin to do that.

But our data, which I can go over with you, which is provisional, will set for each of these offenses in the guidelines, see how many people who do not plead guilty -- you know, go to a trial -- what happens to them? How long are they in prison and how many get probation?

See, that's taking your categories, breaking it down. And now I can go through, and you will see that where there is a large number in the category that we have that gets probation now, the following question pops into my mind and the minds of other commissioners: Who is the sub-group? See?

And then we've tried to break out in some instances

the sub-group. Or the sub-group is small and we say that's tough, that's okay, that's for a departure. Or it's large and we think we shouldn't break them out.

Now, my instinct as to the biggest group where it's likely to be large and we're not breaking them out is likely to be in certain white-collar offenses, such as antitrust violations, insider trading and the like.

MR. GREACEN: Tax evasion.

COMMISSIONER BREYER: Yes, tax evasion. And there, there is a strong policy argument that if you could just take some of these people who are violating the law criminally and say, look, you're going to go to prison for a month, okay, two months -- you don't have to make it ten years. You're going to go to prison some of the time, that will have an amazingly concentrating effect on the likelihood of other people committing antitrust, price fixing, insider trading, embezzlement, tax evasion, et cetera.

That's where I think Commissioner Block's point is going to have the largest bite, and you see some of that.

MR. GREACEN: And we support that. We would wholly support that, wholly support that. But we don't believe that the current structure allows it.

COMMISSIONER BREYER: Well, we'll go over that.

MR. GREACEN: Because, you see, so long as the threshold -- the minimum base offense is more than ten --

COMMISSIONER BREYER: You know, I know that. I know that.

MR. GREACEN: -- then you've got to put them away for that full amount. Your one-month sentence isn't available.

COMMISSIONER BREYER: I see that and we'll have to figure that out.

The only other thing I want to point out now, you and Laurie Robinson and the ABA has been enormously helpful throughout this. There's no question about that, and we'll continue that, I hope. And the other thing, I wouldn't put yourself in -- I don't know that you really do disagree with Judge Tjoflat. And I'd keep this in mind, because I think his point, what we've been most worried about, it's not eliminating things to take into account. It's taking those things and writing them in black letter. Because each thing that you write in black letter, the judge has to take into account. And when he has to take it into account, and a lot of time turns on it, there will be a litigated hearing with an appeal.

MR. GREACEN: You're right on that.

COMMISSIONER BREYER: And so you can take it into account. You in your other draft that you suggested took a whole lot of things into account by way of commentary, by way of guidance, et cetera, and then you rightly say you avoid some of the administrative problem.

MR. THOMAS: Judge, may I say to that point, with the permission of the Chair, we think one of the things that can come out of this learning and field testing is going to be the sorting out of some semantical disputes that aren't real and will permit us to handle these trials of issues of fact without glutting the district courts. But the semantical issues, as was evidenced in the discussion today, are as real as they seem in the minds of the speakers, particularly if those speakers are sitting on the bench.

We think that with some working in the field in this way that's been discussed, those matters can be worked out without eliminating the common sense from justice.

COMMISSIONER BREYER: I think it's a very good idea.

MR. THOMAS: May I be excused, Mr. Chairman?

CHAIRMAN WILKINS: Yes. Thank you very much, Mr. Thomas.

COMMISSIONER MACKINNON: Were you practicing law when the federal rules came into effect for the first time and you were allowed discovery and everything else? Had you been practicing before that?

MR. THOMAS: I was admitted to practice, Your Honor, in 1954 as a --

COMMISSIONER MACKINNON: Well, you're way late.

MR. THOMAS: -- federal court law clerk, but my state picked up the federal rules in 1955. Yes, sir.

COMMISSIONER MACKINNON: Well, long early before that, a number of other states did, and we went through exactly the learning process that you're describing that's going to have to be done here. I think it's going to be exactly the same.

MR. THOMAS: Well, except that we will have had that arc in our learning curve.

COMMISSIONER MACKINNON: Yes.

MR. THOMAS: I think it should help us immensely.

COMMISSIONER MACKINNON: Yes. Well, thank you.

I want to ask Mr. Greacen, you said we could use any fact for departure. What did you mean by that?

MR. GREACEN: Certainly, I did not mean that a fact

that is fully included within the guidelines can be used as a departure. But I understood Judge --

COMMISSIONER MACKINNON: Any fact outside the guideline, do you think?

MR. GREACEN: It is germane for a defense lawyer to bring to a sentencing judge virtually any argument as a reason for departure from the guidelines.

COMMISSIONER MACKINNON: Yes, but say it's something that happens every day, doesn't it have to be an unusual fact or circumstance before it can justify mitigation? And to say just any fact -- I mean, nobody is going to think of all the facts.

MR. GREACEN: Right. I agree with your point. It has to be an unusual fact, but I'm also aware of the ingenuity of my colleagues.

COMMISSIONER MACKINNON: Well, so am I.

MR. GREACEN: In devising those arguments.

COMMISSIONER MACKINNON: Thank you.

CHAIRMAN WILKINS: Mr. Gainer?

COMMISSIONER GAINER: Mr. Greacen, you have raised several points in your oral testimony that I think are quite well taken. I'm looking forward to reading your written

version.

I tend to agree with several -- not all, but several -- of the points you have raised with regard to the use of probation. I think you're absolutely right that probation can, with certain well-crafted qualifications and conditions, serve punitive purposes, serve deterrent purposes, and serve incapacitating purposes.

Indeed, the Congress went somewhat out of its way to find out it was removing probation as the suspension of imposition or execution of a sentence, and recognizing it as a sentence in itself.

The difficulty lies in achieving punitive and incapacitating and deterrent effect to a probationary sentence. As you have pointed out, there are various things that can be done. Restitution can be employed with greater frequency and greater effect. Restrictions can be imposed upon an individual's freedom in quite a range. Community service is often raised to the Commission as one mechanism by which some value may be obtained from probation that wouldn't otherwise exist.

Part of the difficulty has been it's very hard, particularly in this area, to put into practice some of those

theories that these particular conditions can serve these goals of sentencing. I was wondering if it would be possible for the section to spend part of its time, as it thinks further about the guideline process, in attempting to come forth with some practical mechanisms that are specific in nature that could be employed to achieve these purposes, and would serve the overall purpose of making it apparent to the public that this is not a walk that the defendant is given; that it is, in fact, a sentence that is going to serve one of the purposes specified by the Congress.

I think that would be very useful. It isn't easy. I don't know if you'll be able to do it. Any suggestions the section might have in this area to the extent they can be fairly specific, I think it would be of great benefit to the Commission in its further work.

MR. GREACEN: I'm foolish enough to accept the invitation.

COMMISSIONER MACKINNON: Counsel, I understood you to say that you thought probation ought to be extended not only to 12 months, but possibly to 24 months. Somebody quoted you as the 12, and I just want to get that straightened out.

MR. GREACEN: We really advocate the 24, but 12 is another point.

COMMISSIONER MACKINNON: Of course, the statute, 3561 says that any person who gets probation, if he's serving the sentence up to 12 -- or if the statute calls for a sentence up to 12 years. That's what 3561 says.

MR. GREACEN: It says that probation is available to any offense with three exceptions: one is a Class A and B felony, which is 20 years --

COMMISSIONER MACKINNON: No, that's 12 years.

A C felony, as I took it, went up to 12 years.

MR. GREACEN: It seemed to me that the last time I looked it up, Your Honor, the A and B were 20.

COMMISSIONER MACKINNON: Well, it can't be for a Class B felony, and a Class B felony is 25 years.

MR. GREACEN: I think the important point is the statute prohibits probation for a crime that must have 20 years sentence -- no, that has a maximum of 20 years.

COMMISSIONER MACKINNON: Well, Class B is 25 years. Class C is not more than 12 years. So I would take it that anything between 12 years and 25 years is a Class B felony.

Go ahead.

MR. GREACEN: I think the important point is Congress drew the line for the unavailability --

COMMISSIONER MACKINNON: Much higher.

MR. GREACEN: -- for probation at somewhere between 12 and 25 years. The Commission has drawn it at six months, and that's the point that we keep trying to make.

CHAIRMAN WILKINS: Anything further?

(No response.)

CHAIRMAN WILKINS: Fine. Mr. Greacen, Ms. Robinson, again, we thank you very much. We look forward to your continued support and cooperation.

MR. GREACEN: Thank you.

CHAIRMAN WILKINS: Our last witness before we break for lunch is the Rev. William Yolton. He's executive director of NISBCO. Come around, Rev. Yolton. Glad to see you. Good afternoon.

REV. YOLTON: Good afternoon. I was going to say good morning originally, I know. You're very patient to hear me again. You're getting copies of my testimony distributed now, and I realize you want to go to lunch. I have a one o'clock board meeting that I was at, I thought.

If you'll look at the text of the testimony and

jump over the preliminaries, and go right away to Page 3, I had wanted to express basic pleasure at the development of the revised guidelines; and recognizing the validity of the criticisms about the difficulties of producing a calculus of how bad an offense is, this is a traditional philosophical problem, too, that has vexed utilitarians, for instance.

What I want to suggest is the problem is built into the question of making judgments around the culpability of an offense. It has to do partly with the fact that our language about it is from the left brain. The left brain always produces a discursive account, and it's limited to what the language allows.

When you try to write out the guidelines, you're in a problem. Whereas, in moral judgments people also work out of the right brain, which is why we need judges. It's a recognition of a template or an image or a pattern in history, a story which, in a sense, helps you recognize in that particular person's situation what is unique about it and what makes you depart from the guidelines and what could never be put into it.

So I am pleased that you are looking at the question of discretion for judges, and that has to be there;

particularly in the kind of cases I am interested in, those are almost always present in the judgments that judges make in determining how much they shall be incarcerated. So it's always going to be somewhat subjective.

So then I want to also say that comes from a moral tradition, from religious images, from the civilization, that are present to us in those decisions about the conduct of others.

I am on Page 4 now. The sentencing table will be easier to implement, but it becomes wooden. The judge is not allowed to take into account the fact that the offenses are juvenile and protected, and I'm unhappy to see that in a sense because POs can get to the information that, in a sense, you're going to be able to use juvenile offenses when they shouldn't be. It seems to me that it's inappropriate, and I think one ought to take the risk and not include those offenses. I also believe that some juveniles will then be sucked into a system that teaches crime.

Then I have a sympathy about the Commission's general problem, that you were instructed, in a sense, to produce guidelines without Congress having done the dirty work of codifying the federal criminal code. It would have

been a lot easier if you had been able to go into your process in which the statutes were already revised. But, in effect, you have to work without a complete package.

So you're compelled to remedy the defects of inconsistent statutes and the variabilities of prosecution and trials retroactively. So I am not being waggish when I say that the tail is not supposed to wag the dog. That's your problem, and I think you recognize it.

But Congress didn't give you a sentencing philosophy, either, and you're supposed to come up with one and you don't have one. I think some people might look at it in comparison, say, to European sentencing patterns and say that if there is one, it's a hidden one which might be said that you'd throw the book at them. I have suggested to others that the Commission has labored mightily, and instead of giving birth to a mouse, it has produced a shrew -- at least in the case of, certainly, the Selective Service violators. The proposals are outrageously harsh. In comparison with the sentencing practices of other civilized nations, these do not seem to reflect, to the extent practicable, advancements in knowledge of human behavior as related to the criminal justice process.

I share the general criticism that the options of

probation and alternative sentencing have not been given sufficient attention. I agree with other commenters that probation is itself a sentencing option and it does not have to come under the 25 percent sentencing range. The general principle of the least restrictive alternative is mentioned but not implemented in the guidelines. Such considerations and alternatives to incarceration are general features of the positions of religious bodies that have conducted studies of the criminal justice system and developed public policy positions. As I have testified to you before, it is often the appropriate sentence for war objectors.

While plea bargaining is permitted out of expediency, since 90 percent of the cases are settled that way, the fact that many conscientious people will not enter into such agreements is not recognized. They are among the ten percent who must face the judge without a deal. Some provision should be made so that expediency is not rewarded over honesty and conscience.

I was disappointed that betrayal of a public trust is not given a special place in the guidelines, perhaps in the section on departures. You've come close to it, but it's not exactly there. I recall Senator Kennedy, in the debates

around S-1, who emphasized at the time he chaired the Committee on the Judiciary this concern. And it's a view shared by many others. His interest in increasing penalties for white collar crimes was partly impelled by the damage to the public trust where the effectiveness of banking and securities industries was impaired. The nearest thing to it is the provision for Disruption of Governmental Function, but that's not broad enough to include many aggravating considerations in the private and independent sectors. Such a consideration may affect many categories of sentencing, and I hope some amendment will be made.

I have looked at the base levels, and they are near the top of permissible range. And sometimes the base level has a maximum that exceeds the statutory maximum.

I am disappointed that the Commission has not really gotten into its study of a comparison of actual sentencing with the proposed sentencing levels. And I made suggestions along those lines in previous testimony, and the staff of NISBCO would be pleased to point the staff of the Commission to about ten extant studies of sentencing of war objectors.

I am sure you will send the clerks back to change

the proposed levels so the report to Congress will not be rejected. I can't figure out how you will ever get the prison space built to accommodate so many so long. We will have surpassed the Soviet Union and South Africa in the proportion of our population incarcerated. We will be number one, for sure.

I was pleased at the section on Altruistic Purpose. That is Section Y217, Page 149. It was included, as I had hoped. Most sentences for war objectors would be reduced by using this factor if it were properly stated. The commentary shows that the drafter of this rule does not understand the issue. Altruism does not refer to reduction of harm but to the motivation to do another good, even another's good, without focusing on one's own good.

The notion of "l'altruisme" comes from August Comte, whose philosophy of positivism profoundly influenced John Stuart Mill and Utilitarianism. Legal philosophers know the tradition through Bentham, but the movement was advanced by the introduction of the ethic of selflessness, compassion, self-sacrifice for the good of another, which is required if civilization is to progress. Comte emphasized that this ethic was especially exemplified in women. Perhaps that's

why fewer of them are in jail. Thus, Comte influenced feminism in the 19th Century, and his ideas, transmitted by American disciples, influenced both legal philosophy and our emerging movement of feminists. Most people don't give him credit. I want him to have his day in court.

It is not that an action reduces this particular harm, but that it advances another good. It is consideration of the total good to the society that allows a judge to reduce the sentence of the conscientious objector, despite the fact that another will be inducted in his place, and the criticism of the particular war will interfere with the political consensus necessary to prosecute the war.

The particular example given in the commentary, about aid to aliens on Page 152, could be read as aimed at the churches' assistance to refugees. The sanctuary ministry is condemned because those engaged in saving lives, providing asylum, do also disagree with the Administration's policies. The issue, as the churches have consistently maintained, was the pursuit of another good: the implementation of the Refugee Act of 1980, the U.N. protocol on refugees which the U.S. has ratified. But the initial impetus and the continuing principal reason for the churches and synagogues involvement

in saving lives was not to frustrate the policy of the government, however misguided it might be, but to show compassion for those who suffer. For that reason, the judge in the Phoenix trial did reduce the sentences of those convicted of aiding illegal aliens, though they did not bring them into the country legally or illegally. This very week, however, the Supreme Court, in Immigration Service v. Cardoza-Fonseca, vindicated the position the defendants have taken in cases in Phoenix and Buffalo.

Now, obviously, the situation of war objectors concerns me here. Their offense is set forth at Section M246.

By the way, my printer keeps printing "paragraph" when it should say "section."

As I have testified to you before, in World War II they were one-sixth of the prison population. In the Vietnam era, they became one-tenth of that population. It is a not insignificant category. The commentary does not cross reference to Section Y217, except in a very general way which could be construed primarily to refer to Y212. The war objector could be protected by the proper phrasing of Y217.

The issue, which is now ambiguously stated, needs

to be restated in the commentary to include the long tradition of sentencing those whose altruistic motives were for the sake of good ends which society values, even though the immediate harm that the statute is intended to prevent is not reduced. If that principle were stated, then many war objectors could have their motivations taken into account. Society's interest in honoring conscience, religious traditions, the protection of certain religious communities, and the support of a general moral war against killing maintained even though military effectiveness is impaired. I remind you of studies that show that even as few of 25 percent of those who were supposed to shoot in war actually did. So it's a wide spread, internal of conscience to killing.

I want to focus some more on the issue of Conduct Impairing Military Effectiveness. There were very few prosecutions, if any, under M242 and 243. Why are the guidelines set at nearly the maximum statutory limit? Is there some special report I've not heard about? There is nothing for the defendant to appeal.

Let's look at 245. Let's consider the problems presented by separating out the offenses of Selective Services officials without understanding the effects of their

acts. Because of the element of public trust, such offenses should be enhanced, according to Y212. There is no distinction of the personnel of Selective Service from those subject to the draft penalty provisions in the Military Selective Service Act. As I have urged, it's helpful to do so, and the way the guidelines do it does help.

Let's consider some examples. Selective Service regulations require that local board members to withdraw from deliberations and vote on a case in which the member has interest because of family relationship. There are undoubtedly instances when such a member should have stood down during consideration of a case. That infraction, as an isolated instance, has a limited effect on military effectiveness. It ought to be treated as such, say an offense level of 2. In practice, these offenses are never prosecuted, partly because the prescribed punishment seems so great.

But consider the case of a local draft board that consistently enters into preferential treatment of cases; here, the pattern of misuse of authority is such that a general diminution of trust in the system is serious. Many others are drafted instead of those who got off unjustly. In one such case, the Selective Service System quietly disbanded

the local board in question, but no prosecutions resulted, perhaps to avoid political publicity.

Or take the case of a local board clerk, who in the famous case of Cassius Clay, boasted that the local board never allowed a conscientious objector claim in 22 years. Or the case of Arthur Burkhart Banks, a black actor who portrayed Frederick Webster Douglass on stage and TV. His conscientious objector claim was rejected by the local board, and during imprisonment he was assaulted by guards for being a spokesman for black prisoners unjustly punished for an altercation with white prisoners who were not punished. He was transferred to Terre Haute where his life was daily under threat, and we had to assign a visitor to keep track of him regularly. He was charged with assault on the guards and convicted in the district court. Eventually, the Fifth Circuit reversed both convictions and apologized to him.

CHAIRMAN WILKINS: Reverend Yolton, let me suggest that we have your written statement and we will study that, but if we are going to have any time for questions, we will have to go ahead.

REV. YOLTON: Okay. Let me jump and say you need to look at aiding and abetting; you haven't covered that.

And I've got that on Page 13. And you have to see that most of those cases, if they're treated under the section on aiding and abetting, would receive the same penalty as those they aided and abetted. It seems unreasonable to me because many times, in the Selective Service cases since it's only on the basis of any basis in fact that they're convicted, that a fair hearing would say there was no fine, that the counseling could have been completely impartial.

There are a number of instances that I give in this case, and then I ask about the sentencing levels themselves. You begin at 10, go to 12 and go to 25. At 25 you start at 57 months, and 60 is the maximum the statute provides. What's there to appeal against?

I suggest that perhaps you might have to ask, since it's not in the statute and it's not clear to me, as I read it, that you have the authority to do it. But I'd say that if you believe you have the authority to make these distinctions between peace time and no draft, peace time and a draft, and war time and a draft, you go to levels like 3, 6 and 19. That fits, at least where at this stage we're getting the parole guidelines. But even the parole guidelines are the top of what people get sentenced to. They get dismissed

after that point. They get out.

So just to take the parole guidelines is not to set a reasonable limit. You have to say you're going to get 25 percent above that in your sentencing anyhow.

So when I look at all of this, I hope you will go back, look at the pattern of sentencing, and look at what effect it might have on significant parts of our society. And I want to bring up the case of Hutterites. When you see the damage this might do to the Hutterites, they're now in about a hundred colonies in the United States, mostly in Montana, South Dakota and North Dakota. They came to the United States when there was no conscription. They are all conscientious objectors. In World War I, they were driven off their lands. They fled to Canada. They lost their lands. The governors of those states invited them back during the Dust Bowl and the Great Depression to start tilling the lands again. They're now fertile. They pay their taxes; in fact, because they pay corporate taxes, they pay more than individual income tax. And yet these persons, remembering that Selective Service is already determined, they expect to reject 66 percent of the claims. They may make a decision that for the sake of preserving their communities and their witness that

they will once again have to leave the United States and go to Canada.

It seems to me that if there are such Draconian penalties for conscientious objectors that we will once again have this situation. We've at least recognized it was unjust to do that to the Japanese. No one has ever apologized to the Hutterites for what happened in World War I. And we will have committed the same sort of social crime if we allow these regulations, coupled with the sentencing guidelines, to proceed.

I will continue to do what I can with Selective Service as long as you do what you can with the guidelines.

Now, if we could jump to the very end, I also share a view that you might perhaps ask for another year for your work. And perhaps it will have to be that you'll get benefit from testing the guidelines. That's what I have also proposed, allowing judges to sentence twice -- once using current practices and once using the guidelines. Then you'd have real examples for comparison so that you could then implement a system which would not immediately be subject to great criticism.

I appreciate once again your taking the time.

CHAIRMAN WILKINS: Thank you very much. We will study your written submission at the conclusion of the hearing.

Any questions to my right? Any questions to my left?

COMMISSIONER BREYER: We do have data, but the data has been coming along slowly. And some of these sentences -- there are a lot of words here, and some of them are not -- we're going to revisit a lot and go back and look at that data again.

I take it you have seen the data on draft evasion.

REV. YOLTON: Yes.

COMMISSIONER BREYER: You're particularly interested in a section that's unusually difficult.

REV. YOLTON: That's right, very difficult.

COMMISSIONER BREYER: In my opinion, we will revisit that section. But do you know anything in any of your studies that showed the draft evasion in war time receives a sentence equivalent to Level 25?

REV. YOLTON: No.

COMMISSIONER BREYER: No. I don't either.

REV. YOLTON: I have a good example, one instance, and that's cited in my earlier testimony of Walter Collins.

COMMISSIONER BREYER: Yes, I've got that. And do

you know any reason why it should be so much different from existing practice?

REV. YOLTON: No. I don't see --

COMMISSIONER BREYER: I don't either.

REV. YOLTON: -- new reasons. I don't understand why -- it's the same as involuntary manslaughter. In peace time without a draft it's the same as statutory rape. I just don't see it.

COMMISSIONER BREYER: Thank you very much.

COMMISSIONER MACKINNON: You said that the statistics on imprisonment would exceed the Soviet Union and South Africa. Are you talking about federal offenses or total offenses?

REV. YOLTON: No, our total incarcerative system. You start --

COMMISSIONER MACKINNON: Well, we're not dealing with the states.

REV. YOLTON: You're dealing with ten percent of the prison population now in the federal system. And you would make a dramatic increase, perhaps three to five times the federal population in prisons.

COMMISSIONER MACKINNON: Don't think that. Why,

there's more people incarcerated effectively in one town in Russia than there is in the whole United States in prisons.

Now, you asked why we had M245 in here because it wasn't prosecuted. Well, maybe the reason we got it here is the reason it isn't prosecuted. The fact that there are penalties and they know what they're going to face is a good reason why we'll leave it in. That's the best reason I know of to have a law: so that some person knows if he violates it, he's going to get a severe penalty and consequently he doesn't violate it.

The other thing is, did the Hutterites leave this country during World War II?

REV. YOLTON: Some left during World War II, but not many.

COMMISSIONER MACKINNON: Well, I would hope not, because you said that -- you talked about criticism of a particular war. Now, where does that get into conscientious objectors?

REV. YOLTON: At this stage, I talked about the effects of many of those persons who are, in fact, incarcerated under the Selective Service Act as war objectors are critics of a particular war, for conscientious reasons, generally

recognized by other societies such as West Germany, Great Britain, allow those persons conscientious objection. In the original colonies, 11 already had provisions, and most of them recognized objection to a particular war.

We're doing a conference next month at Catholic University on selective conscientious --

COMMISSIONER MACKINNON: Our conscientious objector decisions now don't allow criticism of a particular war.

REV. YOLTON: No, they do not. That's why you have war objectors in prison.

COMMISSIONER MACKINNON: I just wanted to be assured of that.

REV. YOLTON: They may, nevertheless, as Catholics or Presbyterians or Lutherans, apply their church's teaching in a particular war, the so-called just war teaching, discover that it's not applicable on as much a conscientious basis as, say, a traditional peace church person. They just don't qualify under the law.

COMMISSIONER MACKINNON: Thank you.

CHAIRMAN WILKINS: Thank you very much, Reverend Yolton.

We'll stand in recess now. I want to get back on

schedule the best we can. We have about an hour-and-a-half off now. Let's try to come back at 2:25. That will give us a 30-minute break. We were supposed to be back at two o'clock. We'll hear from Mr. Marek at that time.

(Luncheon recess.)

AFTERNOON SESSION

(2:35 p.m.)

CHAIRMAN WILKINS: I will call this commission hearing to order, please. Paul, ask the commissioners to step in if you see some in there.

Well, I appreciate all of those in attendance bearing with us and we will try to stay on schedule as best we can today and we are delighted to have as our first witness, Edward F. Marek, representing the Federal Defender's Advisory Committee.

We appreciate you attendance today, Mr. Marek, and support and advice and counsel that your Advisory Committee has given us in the past.

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

We appreciate the courtesy the Commission has extended to us as federal defenders and considering our views and our input, we have attempted to formulate our positions not only as criminal defense attorneys representing individuals in the criminal justice process but also out of concern of the administration of criminal justice, itself, in which we have a vital interest and deep respect and concern.

I would like to cover in my remarks this afternoon several areas that we believe are more central to the second draft of the guidelines and to rely upon our written submission to deal with the more specific provisions. We intend in addition to submit a supplemental submission that will deal with the substantive offense section which we were not able to cover in 75 pages of the submission that we were able to file today.

Let me start by also stating that there is much we agree with in the second draft of the guidelines as opposed to the first draft. We agree that with the Commission's use of ranges in formulating categories of offenses and categories of offenders and believe this brings the needed flexibility to the guidelines and is consistent with the spirit and the letter of the enabling legislation.

We suggest that there is a need for a more objective criteria in some of the sections but others contain ample objective criteria to be consistent with the legislation.

We also agree with the Commission's approach on acceptance of responsibility in that difficult area of guilty pleas and with cooperation we believe the Commission's approach is appropriate as well. Also, we totally agree with

the Commission and under rule 11 of the Rules of Criminal Procedure. We are pleased to see that there is a wider range of offenses and offenders for which probation is available as an option in this draft as opposed to the first draft. I use that term with some emphasis, that is probation being an option.

However, we believe that the Commission should go a step further in this regard; and that is to consider adoption of an alternate set of guidelines to govern what we have coined as the "in-out" decision, that is, the threshold decision as to when probation ought to be imposed.

We believe this approach is consistent with several provisions of the Sentencing Reform Act, not the least of which is Section 3553-A, which tells a judge to assess relevant importance, relative importance, of sentencing purposes in addition to or aside from sentencing guidelines and then once the primary or dominant purpose of sentencing in a given case is identified to fashion a sentence accordingly, whether that sentence be probation or term of imprisonment; if it is a term of imprisonment, the length.

To that end we have and we are prepared to submit to the Commission today a draft set of guidelines governing that threshold decision of whether to afford probation or

not, in as well as commentary; because we believe the legislation requires the Sentencing Commission to guide the judge in determining that balance that is called for under Section 3553. We think that Congress knew how to express its desire when it felt probation was either unavailable for a particular offense or offender or inappropriate and it did so in Section 3561; it also did so in various paragraphs of Section 994 when it indicated certain offenders and offenses--that imprisonment was appropriate for certain offenders and offenses. That leaves a whole wide range of areas for which probation may be appropriate as an option. In addition Section 994-J admonishes the Commission that first offenders committing nonviolent offenses that are non-serious ought to be considered for probation and we are concerned that the table that the guidelines contain would not provide probation as an option for some of those individuals.

In this regard, I might also mention that we would respectively suggest that the Commission reconsider the language on page 150 of the commentary of the guidelines that talks about departure which admonishes a judge that in departing from the guidelines that the judge should not depart in kind because our feeling is that the whole notion

of departure is that the sentence called for in the guidelines may be inappropriate and therefore this admonition likewise may be inappropriate.

One of the areas I would like to spend a little time on this afternoon is our concern over procedural due process. We note that the Sentencing Commission has been conscious and concerned over this question of procedural due process and that is reflected in a few areas in the guidelines.

The requirement that the parties exchange the sentencing factors that they will rely on is a reflection of that concern. The requirement or the policy statement that judges provide tentative findings to the parties prior to sentencing and permit them the opportunity then to enter written objections reflects that concern. The reference to Rule 32 of the Federal Rules of Criminal Procedure and the case law reflects that concern.

However, we would suggest that the Commission should go further than that. Rule 32, itself, may be inadequate because it does not explicitly provide for a hearing.

The case law also is inadequate. It is inconsistent across the Circuits. While the Second and, possibly, the

Seventh have formulated case law in this area, the other Circuits have not--many of the Circuits have not--and others have inadequate case law. That is probably because the case law that has grown up around sentencing is based upon a system where a judge need not give reasons for the sentences and there is effectively no appealate review.

We, on the other hand, recommend that the Commission consider a policy statement consistent with the Second Circuit's position in the factor of decisions. For some years, now, the Second Circuit has been requiring hearings at the trial court level where there is a significant sentencing factor in dispute; and, there is some leaway as to how you would define when a factor is important to the sentencing function--whether that is moving one or two or more offense levels. Hearsay is permissible under the Second Circuit's approach but there has to be some corroboration or circumstantial guarantees of trustworthiness.

The Second Circuit backed off of a question of standard approval. We have recommended all along to this Commission that the appropriate standard would be a clear and convincing standard. We think that by a policy statement promulgated by the Commission that you would achieve a goal

of the legislation to avoid disparity because you would have uniform application of the various important sentencing factors. One need only look at several of the sentencing factors contained in the guidelines to gain an appreciation of just how important some hearing scheme is to a fair determination of these factors when they are in dispute.

Extreme psychological injury, for instance. Whether a defendant had--what a defendant's criminal purpose was in committing the offense for conviction. Whether a defendant was reasonably capable of delivering the amount of narcotics under negotiation in an attempt offense and whether there was imminent danger or peril in the coercion area and that whole area in criminal history under paragraph 313 and 315 which bring into consideration such factors as a defendant's dangerousness or the likelihood that he may commit a future criminal offense.

We believe that Sections 313 and 315 open up a virtual Pandora's box of procedural due process concerns that ought to be addressed by a guideline.

I refer to unadjudicated conduct in referring to to Section 315 and 313. We continue to enter an objection to the use of unadjudicated conduct in the guidelines; particularly

those provisions which call for a consideration of conduct that may form a common scheme or pattern of which the offense of conviction is a part. There are a variety of sections in the substantive offense sections which do that. For instance, you can move one to six levels in theft or forgery after multiple transactions. In labor racketeering, you can increase the severity if the offense of conviction is a part of a pattern of corruption.

We believe other jurisdictions that have considered mandatory sentencing guidelines, notably Washington and Minnesota, have be a little more restrictive in their use of unadjudicated conduct. To the extent that this conduct is proven at all, it is proven by much less procedural due process than at a trial but yet a defendant is sentenced for it in a meaningful and real manner.

Criminal history is a particular concern in this area. But in addition to our concern over the paragraphs involving criminal history from a procedural due process point of view, we are also concerned about some other aspects of criminal history. The scoring system that is set up to quickly move a person into a higher offense categories and therfore gives disproportionate value to that as a factor in

relation to the offense of conviction.

We give an example in the position paper that we submitted of a person convicted of simple assault, a misdemeanor, in a state court and as a result received let's say a year or two's sentence of unsupervised probation and within that year or two that individual commits the offense of conviction. You would score two points for recency, you would score two points for his being under control of a criminal justice system and he would score a point for the offense of conviction. So, you would score five which would too quickly for the minor offense of simple assault move an individual up into the higher categories.

We have suggested that probably a dozen changes in our position paper. Some of the more prominent ones is that you give consideration to not counting both recency and control by the criminal justice system; and also, particularly, a concern is not counting misdemeanors as heavily as felonies. You do that in a couple of areas. First of all, you court appoint, a one point under Subsection C for both a conviction for a felony and a misdemeanor; also the threshold of 60 days in Subsection B is simply too low, you will pick up too many misdemeanors in that situation.

And again, just a final word about criminal history from the unadjudicated conduct point of view. We think that that treatment in Section 313 and 315 simply is at war with the whole notion of structured sentencing under mandatory guidelines system. And note with some interest that there is no commentary attached to those sections which are very, very important.

Now just let cover a couple of more subjects in the time allowed to me and they are concurrent sentences and the use of ranges.

The draft states that the Commission is still refining its approach to concurrent and consecutive sentences; therefore we request some particular input in this area.

We believe that contrary to the commentary in this area that there ought to be a presumption, that sentences should be imposed concurrently where you have multiple convictions. To drive this point home, one really only needs to look at the working papers that the Commission is now playing with that would be used by probation officers and courts in formulizing this whole system.

And in the instructions to the working papers they state that you are to complete a separate worksheet for each

crime of conviction. So if you take, let us say, a theft case involving the mail that would be a theft of over $20,000 in value, if you work the separate worksheet for each offense of conviction, let us say, there were five counts and convictions on all five counts, you would have a total presented to the judge of fifty points. And this kind of presentation to a judge simply invites disparity in sentencing.

A presumption of concurrent sentences would avoid this thing and you meet the requirements of Section 994-L already in the guidelines because you do provide an increment for additional harms in all the important areas, for instance, or for most of all the important areas and you could add additional comment in those areas that are left uncovered in this regard.

For instance, theft or forgery, you provide for moving up the offense level from one to six for multiple acts of theft or forgery; that is, per dollar amount. The fraud--you move from three to nine offense levels for fraud where you have a sophisticated scheme. You would include additional points for use in the general provisions for use of weapons or in the property law stable.

So there are increments already built in to the

guidelines which will be captured by the single offense conviction and you can always provide for a judge to go to consecutive sentencing with some additional guidelines.

Now on the question of arraignments. Again we view this as an improvement over the first draft and we believe that it adds flexibility and enhances the fairness of individualized sentences. We believe ranges are authorized by the statute. Wherever the statute talks about certainty in sentencing and avoiding disparity and the legislative history, it also talks about fairness. These are also discussed together. Now we do not believe the statute means or intends zero disparities--Section 3553-A, for instance talks about unwarranted disparity. We believe the use of ranges is an acceptable compromise with the letter and the spirit of the statute and if you add objective criteria where you do not have it already, you will be on safe ground.

For instance on the role of the offense. If you were going to select a score of two out of one to six, you would tell the judge to select that score as factors a, b, and c, for instance, were present. In this way, you provide the structure to the discretion. Mr. Trott talked about unstructured discretion. Well, if you provide objective

criteria, you will provide that structure to the exercise of discretion and you have done that admirably in some areas of the draft; for instance, whether or not there is a physical injury, the degree of the injury is scored a certain way. Whether or not--what kind of property loss is involved and perhaps the best example of what I can come up with is your treatment of fraud, the sophistication of a fraud scheme and using the alternative table in the fraud offense. There, on page 68, you list six or seven specific objective criteria that the judge is to use in deciding whether or not to level three through six.

Now as to concern over "is this too much disparity," I think other witnesses have addressed adequately that concern; that this is a permanent, continuing body, the Commission can review the data that is coming in and can turn the screws, so to speak, if that is necessary. If you need more objective criteria built into the ranges, if you need more specificity built into the ranges, if you have to collapse ranges more, you can do so on the light of empirical data.

And, I think that is what Congress intended. You also have appellate review. And the appeals courts will play

an important part in reining in discretion. I could not but help but think as I sat and listened to Mr. Trott and other witnesses testify about still too much discretion in this draft of the guidelines. But compare the system you have today which on the one hand you have only the maximum penalty to guide the judges and a few statutes that provide for mandatory minimum--that is the only the guideline the judge has today. He has to wing it from there on.

When you compare that and then you compare these two hundred and something pages, how can anybody say that there is a lack of structure and discretion in what the Sentencing Commission is doing now. So we believe those concerns are simply unfounded.

Finally, I would like to make a comment about the Commission's treatment of other offender charactertistics. A few witnesses have mentioned this this morning. That is, how should a court consider such factors as age, education, employment record, vocational skills, family and community ties? We believe the Commission has been a little too restrictive in its treatment of these and it results from, perhaps, a misreading of the legislation and the legislative history. There is a provision in Section 994 that says that

education, vocational skills, employment record and family ties are generally inappropriate in determining a sentence of imprisonment. But it means just that; that is, that we should not use the lack of these factors as a reason for sending someone to jail.

But that does not mean that you can not use them to consider probation or mitigating factor if the criminality is related to the lack of one of these factors. For instance, education or lack of vocational skills.

Finally, we also treat in some detail the Commission's approach to drug dependence and state-of-minds induced by alcohol or drug dependence and believe that they should be leaway accorded to those that have that dependency.

Thank you.

CHAIRMAN WILKINS: Thank you, Mr. Marek, and we appreciate your thoughtful written submissions as I am sure as in the past they will be most helpful to the Commission.

Any questions to my right? Questions?

COMMISSIONER BREYER: Sometimes a wild idea hits me when I am listening to you--I am not committed to this, I am just have listened to you and the ABA on the probation problem.

Is there a way of gearing in to the present

structure, probation that necessarily has attached prison terms so that, you see, now at level ten there is a incongruity. Up to level ten, you can give--the judge can give probation. Level eleven and above, the judge could not give probation without the departing from the guidelines.

Is there a way of phasing in something, like level eleven, if the judge is going to give probation at level eleven, there must be, say, a two-month prison term. At level twelve, the judge gives probation, there must be a four- or five-month prison term. And you see, instead of being such a discontinuity, the judge who chose the probation route would phase in a short sentence.

I have no idea if, (a) that is practical, (b) it is legal or (c) it is desirable.

MR. MAREK: Yes, to all three of those, Judge Breyer. They still split sentence today. I mean that is currently available today, a split sentence where a judge gives probation for three or four or five years on condition that the individual spend the first 30 days--

COMMISSIONER BREYER: There are some words in the statute here that abolish the split sentence. And there are some other words, that is something--why I am only suggesting

looking into--

MR. MAREK: I would have to give that some thought. Nothing comes to mind right away that would prohibit--nothing in the legislation that would prohibit that kind of sentence.

COMMISSIONER MACKINNON: Is there not a sentence that says you can not impose probation with a prison sentence.

MR. MAREK: Yes, there is.

COMMISSIONER BREYER: The judge can not do that; then I wonder what you might look at that there is a thing where a judge can impose a sentence of probation.

Now a sentence of probation can have attached to it conditions. One of the conditions is a condition for remanding to custody to the Bureau of Prisons for nights, weekends or other intervals of time which shall not amount in total to more than one year and what we would have to look at is whether that other intervals of times is meant to accomplish perhaps in a low, you know, with low levels involved, what this sentence is to accomplish.

So it is not obvious.

MR. MAREK: We will give it some consideration.

COMMISSIONER MACKINNON: Well, we have two counts and you gave probation on one and imprisonment on another,

you might skate by it.

How many cases in the Second Circuit require hearings?

MR. MAREK: I do not practice in the Second Circuit, Judge MacKinnon, but I have asked federal defenders who practice in that Circuit and they tell me that there are not that many hearings.

COMMISSIONER MACKINNON: I wouldn't think there would be.

MR. MAREK: Whether or not that would increase under sentencing guidelines, I do not know. I would suggest--well, I think it would increase, but whether it would be intolerable, I have some real question. I think this concern over an explosion of appellate review is not realistic because at first you are going to have a decent amount of appellate review regarding a lot issues but after the law has settled a bit, you are not going to see it.

I know as a defense attorney, if a client wants me to raise an issue or I consider raising an issue, I go and research the law, particularly in that Circuit and see that it is pretty well settled, I am not going to raise that issue.

COMMISSIONER BREYER: There is a problem which we have discussed. The solution is in that Ninth Circuit case.

I can not--do you know it?

MR. MAREK: I can not think of it, either, but I do remember it, yes.

CHAIRMAN WILKINS: Mr. Marek, is the document workable and practical? You are an experienced trial lawyer, what is the bottom line? I know there are some changes, but generally speaking?

MR. MAREK: I thought how I might answer that question if it was posed to me, but I think the question or the answer is relative. Compared to what? Certainly compared to the first draft. There is no question it is much more workable and practical, but you also have to recognize, which I am sure you do as a body, that this is going bring a new dawn on sentencing hearing arena. Sentences are going to be much more complex and if you have a client who feels that the guidelines have been improperly applied to him in a sentence, you are going to have an incentive to take the appeals; and again, going back to my earlier comment, I think that initially you are going to have probably a lot more of appeals filed. But that will even itself out.

So I hope that is some response to your question. It is going to be more difficult day with these guidelines,

but Congress, I am sure, envisioned that when they embarked upon this and the guidelines are going to be a fact of life and we will work with them. But again, this draft appears to us to be much more workable than the first one.

COMMISSIONER MACKINNON: Extending your comment there, you mentioned Congress. Is there any way to write guidelines that would not bring that result about?

MR. MAREK: I do not think so, no.

COMMISSIONER MACKINNON: That is what implicit is in the legislation.

CHAIRMAN WILKINS: Thank you again, Mr. Marek.

Alan Ellis and Scott Wallace are our next witnesses. They are representing the National Association of Criminal Defense Lawyers.

Gentlemen, we are glad to have you.

MR. ELLIS: Mr. Chairman and distinguished members of the Commission, my name is Alan Ellis and I am pleased to appear here today on behalf of the National Association of Criminal Defense Lawyers.

By way of background, I am a vice-president of the Association and I am also the chair of the sentencing commission, laison committee of the association. By way of

background, also, I am a private criminal defense lawyer. My practice is concentrated in the area of post-conviction representation of federal criminal defendants including key negotiations, sentencing, Rule 35 motions, prison and parole letters, habeas and appeals.

COMMISSIONER MACKINNON: Where?

MR. ELLIS: Philadelphia is where I am based at.

COMMISSIONER MACKINNON: Philadelphia or--

MR. ELLIS: Well, I have a national practice, Judge. If I get a case in Philadelphia, it is dumb luck because some federal prisoner has seen my name on the bathroom wall and has called me. Who happens to be sentenced out of Philadelphia, perhaps.

To my right is Scott Wallace. Scott Wallace is the legislative director of NACDL.

At the outset, let me commend the Commission for what we believe to be an excellent second effort here. Quite frankly, we had some concerns whether in fact that how seriously we would be taken in this process as defense lawyers.

I know the statute requires the defense bar to be listened to but, candidly, again I did not know how seriously we would be taken. I am pleased to say that we feel that we

have been appreciated, that we have been listened to, particularly in the areas of key negotiations and cooperation. Perhaps not so much necessarily as defense lawyers but as practicing lawyers who are actually there in the arena day in and day out with practicing prosecutors and we know the effects of guidelines as they are actually going to be on the sentencing process.

There are numerous other specific areas where we applaud the Commission's revised approach and others where we simply have concerns and recommendations for modification before the guidelines final submission to Congress next month. And, let me touch on several of them.

First of all, the modified offense of conviction approach. The commentary in the revised draft indicates a rejection of the "modified real offense approach" in the preliminary draft. Instead it is said that the revised draft uses traditional offense categories and takes as its base the offense of conviction. We commend the Commission's movement away from the use of fixed number of sanction units for each item of unadjudicated misconduct relevant to the offense of conviction but frankly, aside from this consideration, however, we see no real movement from the real offense and

the success spectrum toward the end the of offense conviction end.

What we are confronted with is essentially a modified real offense approach. NACDL strongly opposes the inclusion of unadjudicated misconduct as a sentencing factor. The fact that the sentencing judge is afforded discretion under the revised draft to select a sentence enhancement figure within a limited range of figures does not alter the fact that additional punishment can and in some cases must be imposed on evidence which has not been tested according to any formal, evidenciary standard in the adversarial hearing subject to any procedural due process protections other than the bare opportunity to comment provided by new Rule 32-A1.

We reiterate our support for an approach limited to the offense of conviction plus any misconduct in furtherance thereof. But if the Commission concludes that it is essential to require consideration of unadjudicated misconduct, we would strongly recommend that any disputed sentencing factor be subject to determination in an evidenciary hearing by no less than a clear and convincing evidenciary standard as suggested by Mr. Marek.

At the very least, those disputed factors would go

beyon the offense of conviction plus misconduct in furtherance thereof; that is, factors which venture into this nether-world of uncharged relevant misconduct must be treated with these minimal due process protections.

We are also a little concerned about this distinction between departures and adjustments set forth in part Y of the revised draft. It is not readily apparent to us why some factors qualify for limited departure above or below the guidelines while others are attached to precise numerical adjustments. Both categories seem to include various factors and mitigation of the defendant's state of mind as well as aggravating factors of consequential harm.

Specifically, in response for comments posed on page 148 of the revised draft, we recommend that all of the general provisions set forth in part Y, that is adjustments and departures constitute grounds for departure from the guidelines. As the Commission, itself, notes at page 3, the guide to design to reflect evolutionary process. If the application of a broader range of departures determined at some future time resulted in abuse or unwarranted sentence disparity, well, through data and appellate review, I am confident appropriate modifications can be made at that time.

I think that basically what a sentencing judge should be doing is saying "do I have the typical case in front of me?" "If I have the typical case in front of me, I am going to impose a sentence within the guideline range." "But I do not have the typical case in front of me; then I am going to look for a reason to go below or above the guidelines."

With enough data, with appellate review, I think we are going to wind up with something in the future through the evolutionary process that we all can live with.

Some things we heartily applaud are the inclusion of Section 8411 of the requirement that the government and the defendant within a reasonable time before sentencing exchange written statements of the sentencing factors upon which each intends to rely at sentencing. Practical experience, this--I have regretfully participated in all too few presentence hearings before a sentencing judge. But wherever I have, I found that the sentence results in a fair sentence to both sides, that disputed issues are clarified, hours in the PSI are cleared up and things do not come back to haunt the individual when he is in the correctional process as a result thereof.

This is something that we had recommended in our

first presentation back in December and we are delighted that the Commission has seen fit to adopt and follow our recommendations. We further commend the Commission for recommending in Section A-14 that a court confronting significant disputed sentencing factors notify the parties of its tentative decision and provide a reasonable time for the submission of written objections before imposition of sentence.

We would suggest, however, that the provision could be significantly improved by the addition of natural corollary; that is, the same advance notice provision should apply if the court, sua sponte, plans to rely on a sentencing factor not advanced by either party either an aggravation or mitigation of sentence. And we would also urge that this provision be upgraded from a recommendation to a requirement binding upon the court whenever there is such a dispute.

Another area we want to touch upon is probation. The revised draft in Section A-511 permits imposition of a sentence of probation only if the minimum term of imprisonment is six months or less and only if one or more of three specific conditions are also imposed: intermittent confinement, community confinement or home detention.

Well, there are two important issues that must be

addressed in regards to this provision.

The six-month cutoff for probation would in many cases work in clear frustration of Congressional mandate that the guidelines provide for nonincarcerated sentences for non-violent, first offenders in non-serious offenses and the Commission's general directive in Chapter 5, the sentencing judge should impose the least restrictive sanction compatible with fulfilling the statutory purposes of sentencing.

We urge in this regard that the six-month limit be raised to 12 months which I understand is a little less than the ABA recommended.

There is no apparent justification for a rule which would flatly prohibit a term of probation for offenses just as peace-time evasion of military service, product tampering for the purpose of injuring a business interest--

COMMISSIONER MACKINNON: You don't think so?

MR. ELLIS: Pardon me, sir?

COMMISSIONER MACKINNON: Product tampering? You don't think--

MR. ELLIS: Oh, no. I said for product tampering--not where it would injure an individual but product tampering for the purpose of injuring a business interest.

COMMISSIONER MACKINNON: Well, what the hell is the difference?

MR. ELLIS: We are talking about where someone tried to get an unfair advantage over a competitor as opposed as to where someone actually goes out--

COMMISSIONER MACKINNON: Yea, by putting cyanide in--

MR. ELLIS: Oh, no, I do not mean that, no.

COMMISSIONER MACKINNON: Well, that is tampering.

MR. ELLIS: I am not talking about that, I am talking about a purely economic type of offense. We view that thing very, very differently. Very, very harsh. That is a--as far as we are concerned, that is a crime of violence and should be punished--

COMMISSIONER MACKINNON: Is not one covered in the other, in the statute, is that not what the statute covers?

MR. ELLIS: I think that, again, we are not--there is a--certainly grounds for departure in a situation like that.

COMMISSIONER MACKINNON: Do not let me interrupt you.

MR. ELLIS: We also urge in the cases where minimum

sentences are greater than 12 months that the court should be permitted to require up to one year of that sentence be dischargeable through the incarerative option set forth in Section A-511-A-2.

Indeed, we believe that the sentencing court should have broad discretion to allow an offender to discharge up to 75 percent of a term of imprisonment through non-incarcerative sentencing options through appropriate community service. And, at the inclusion of such a provision of such sentencing guidelines is considered to run afoul of the split sentencing prohibition of 18USC3561(a)3 as Judge Bryer mentioned, we recommend that the Commission consider proposing legislation to specifically authorize it.

This leads to the second issue regarding probation and the revised draft. We urge that greater reliance be placed in the use of community service as a condition of probation and that it be added as the fourth alternative condition to three conditions of probation which would be mandated under A-511(a)2. I personally have had a lot of experience with clients who have been required to perform over 400 hours of community service.

The guidelines recommend that not more than 400

hours of community service be required. In my experience, community service is an ideal solution. It minimizes prison overcrowding, saves public dollars, benefits the community and poses, really, no great on the probation's service.

I have seen clients develop new careers out of humble community service programs, especially those clients who have had wrecked by virtue of the fact that they were convicted of a criminal offense. I have seen them develop new civic responsibility to the community, new ties to their neighbors in a way that no other sentencing options can approach.

In fact, I have never seen a bad of case of community service; I have never seen a client who committed another offense--at least arrested for another offense--after having been placed on a community service sentence.

In appropriate cases where an offender in non-violent and he or she is reachable, there is simply no downside to community service; everybody wins.

I think in line with the need for greater imposition of probation, I see a severe prison overcrowding crisis confronting us if the guidelines do go into effect in their present form. The Commission deserves much credit for the

revised drafts, substantial moderation of the harsh imprisonment we evidenced in the earlier draft. It is our preliminary view that the sentencing ranges set forth in the revised draft with certain exceptions are generally fair and rationally related to the Congressional prescribed purpose of punishment.

We would suggest, of course, that final judgment of the appropriateness of the sentencing must await more detailed review of their relation to current sentencing practices; however, there appear to be significant problems, still. In particular, the guidelines for drug cases are excessively severe. For example, in the case of a minor participant, such as an offloader in a trafficking offense involving a thousand kilograms of marijuana, who manifests full responsibility, the lowest possible guideline however would be 23, translating into a term of in prison of 46 to 57 months which with 15 percent reduction for good time comes out to that offender serving approximately 40 months.

In my experience that same offender would serve between 20 and 24 months under present US Parole Commission practices.

Congressman Kastenmeier has noted similar conclusions in a hearing last week in the House under a survey conducted

by his own office where sample case files referred to the Parole Commission to determine sentences under current law compared to sentences to be imposed under the revised draft. In one drug case, the draft calls for 168 months to life for where their sentencing under current law would be only 27 months. Another ranged from 168 months to 40 months under current law.

I realize that when you talk about cooperation realize that we have now effective this past October mandatory minimum sentences in drug cases such as involving 1,000 kilograms of marijuana or more and I recognize further that it is the work off provision and under the work off provision for substantial cooperation the government could move the court not to impose mandatory minimums in which such case the court require to impose a sentence consistent with the sentencing guidelines and I further understand that in those type of cases, the court could depart from this sentencing guidelines.

For example, in a case where I just mentioned 46 to 57 months and go down to probation if the court so desires. But I think as so long as you have got a guideline range in the case of a minor participant who is cooperating fully,

manifested full responsibility, as long as you are starting with a starting point of 46 to 57 months, it is going to take an awful lot for a sentencing judge to really depart significantly and substantially enough from that benchmark guideline range to really convince an offender that he ought to cooperate and I think that in drug cases, the ranges for that reason are just simply still too high.

CHAIRMAN WILKINS: What was the amount of dope involved in the example you gave?

MR. ELLIS: 1,000 kilograms of marijuana, Judge. That comes out to 2,200 pounds of marijuana. The present Parole Commission guidelines between 2,000 and 20,000 pounds of marijuana calls for a first offender to serve between 24 and 36 months. Off loader means a minor participant or peripherally involved. If you have cooperated, I think somebody like that in my experience is probably looking at 20 months, assuming that sentence makes them eligible--

CHAIRMAN WILKINS: Where is the offense level?

MR. ELLIS: Pardon me?

CHAIRMAN WILKINS: Where is the offense level as you see it under the present draft; what does that give you, the basic offense level?

MR. ELLIS: Right now, the basic offense level calls for a 32; when you base it on the adjustments for role in offense and accepted the responsibility, he can go as low as a 23; a 23--

COMMISSIONER BREYER: Those are statutory, the drug thing, you know, is mostly driven by the new statute and, of course, what was--does not require all of the numbers we have put there; the ones we have options on have to be made commenserate with the ones we do not.

You know, it is all the minimum statutes.

CHAIRMAN WILKINS: A level 32 is a mandatory sentence under the anti-drug abuse statute. It is mandatory, we patterned our guidelines after the Congressional Act last fall.

MR. ELLIS: There is, indeed, a mandatory minimum sentence for first offense trafficking in 1,000 kilograms or more of ten years, ten years to life. I have a case right now, one of the first cases I will finance.

If, however, an individual cooperates--let us say he was an off loader, minor participant, first offense, accepted responsibility in the way highlighted by the sentencing drafts. Cooperates to the fullest.

CHAIRMAN WILKINS: Testifies.

MR. ELLIS: Anything he is asked to do, then the government can move that the mandatory minimum not be imposed. Then the guidelines kick in. My prognosis is that under the guidelines, the range for that offender would be 46 to 57 months.

Now I realize for cooperation a court can depart from that. But I am thinking that a judge is going to say "well, he has already gotten a break by not getting the mandatory minimum, why should I give him a further break." "If I give him a further break and go below 46 months, how much below 46 months should I go?"

I know, for example, the Parole Commission right now, at most, will give me 12 months off of an otherwise presumptive parole date for cooperation. How much will a sentencing judge? How far will a sentencing judge go below 46 months in a case I just mentioned?

If he is not going to go very far, then I do not think the impetus is there to cooperate.

COMMISSIONER BREYER: What do we do about it? What is driving it is the statutory minimum.

MR. ELLIS: What more can we say than what we just

said?

CHAIRMAN WILKINS: Page 168 deals with that and also tracks the statute--the individual, I think the statute is not worth much substantial assistance. Then the judge may deviate from those mandatory amounts and give him probation.

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MR. ELLIS: He can, but I think he is going to first look at the guidelines and say 46 to 57 months is what he is going to get.

CHAIRMAN WILKINS: He is going to look at the statutes and see 10 years. That is all 32 says. See, the statute is the same as the guidelines.

MR. ELLIS: But the statute permits a work off. The statute permits, for cooperation, the government to move the court not to impose the mandatory minimum.

Let's say the court says "I agree with you, Mr. Prosecutor, I am not going to impose the mandatory minimum here but the law now requires me to look at the guidelines."

"Okay, the guidelines for this offender, first offender, minor participant, acceptance of responsibility, 46 to 57 months." "Now I realize, Mr. Defense Counselor, that I can go below those guidelines, but I am not so inclined in light of the fact I am not giving him the mandatory minimum

to go that much below the 46 months required by the guidelines."

CHAIRMAN WILKINS: And you say, "wait a minute and look at page 168, now judge, and the guidelines tell you to go ahead and close this book and give my client whatever is just depending of the U.S. Attorney's recommendation, what you observed him do in court, just like we did today, cooperation, we follow the statute on that same admission."

So I am not sure you fears on this is well founded, I am not sure we can do anything about it anyway because our level 32 is the minimum sentence the Congress requires--not the maximum, just the minimum where we peg in.

MR. ELLIS: Well, I think the work off provision comes into play, I do think you can make guidelines, whatever you want irrespective of the mandatory minimum.

I just want to reiterate what was said about drug dependence, about operating always in aggrevation, never in mitigation of punishment. It is kind of ironic, several years ago NACDL sponsored a trip of several defense lawyers to various countries in Europe where we met with our counterparts in the criminal justice system. And, it was interesting to note that the Soviet Union crimes committed under the influence of alcohol abuse are always considered an aggrevating

factor. I wonder whether we just want to be in the same boat as the Soviet Union in this regard.

I think that we should allow the court to tailor an appropriate sentence no less the reformed addict who voluntarily has beaten his habit rather than for the unrepentent junkie forever locked into a cycle of drug dependency and crime. I do not think we should be punishing our sick people who have again voluntarily kicked the habit and gone on to better things.

Two final things. One is diversion. Diversion can be counted in computing the offender score. I have some real concerns with that. I do not do very much state practice now, but I used to do a lot of state practice. For many, many cases where I had clients who did not that for which they were accused of doing or there were real good issues regarding search and seizure and for economic necessity, the client took the diversion program rather than go to trial and have his day in court. He did not want to have to come back to court, he did not want to have the expense of paying his lawyer, he did not want the downside of what happened if I do not win the case; so out of those people, a lot accepted diversion where they really did not do, in fact, that for which they were charged for doing. And I think the count

diversion against them in computing their offender score is a misjustice and I think it is also going to encourage people not to accept diversion programs if, in fact, this may haunt them down the road and it is increasingly overburden--it already overburdens our state courts systems.

Finally, in regard to Rule 35. I realize that this is not part of the draft but we have in the past and still do encourage the Commission to recommend to Congress that present Rule 35 be retained and that it not be put out to pasture in November of this year. As the Commission is well aware of, Rule 35, effective November only permits a reduction of sentence upon motion of the government and only then for substantial cooperation within one year after sentence.

There are many cases where individuals appeal their cases and do not start cooperating until after the one year is over; there are many cases where circumstances change other than cooperation justifying a lesser sentence, one that is left disparate with the sentence that was originally imposed and I would urge the Commission to recommend to Congress that present Rule 35 be retained in its present form for these reasons.

I would thank the Commission for inviting me here

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today and as I say again, for seriously listening for what we had to say in the past. I deeply appreciate it.

CHAIRMAN WILKINS: Thank you very much, Mr. Ellis, and I will say that the NACDL and the entire defense bar has given us a great deal of assistance and we welcome it and we look forward to a continued working relationship with you, Wallace and your association.

Any questions?

COMMISSIONER BREYER: Thank you very much. I hope you will think about this probation thing.

CHAIRMAN WILKINS: Did you have comments that you wanted to make before we--

COMMISSIONER MACKINNON: You are talking about sentencing facts not submitted to an evidentiary hearing and you advocate a clear and convincing standard and you are from Pennsylvania, and the Supreme Court, didn't they hold in McDonald that a mandatory enhancement under the State statute for possession of a gun only had to be supported by a preponderance?

MR. ELLIS: That's correct, constitutionally that is so. I am suggesting that --

COMMISSIONER MACKINNON: You just want us to improve

on the Constitution?

MR. ELLIS: Well, I think that is the minimum standard safeguards that are required by the Constitution. I am not saying that is necessarily the right way to go about it. I think that if we are going to use unadjudicated conduct, let's make sure the person really did what they are accused of doing.

COMMISSIONER MACKINNON: Tell me this: How many -- you have had a lot of criminal cases -- how many cases have you had where you have had a hearing on sentencing?

MR. ELLIS: Well, to tell you the truth, I have had quite a few. Regretfully, though, I get into a lot of cases after sentencing, where a person is doing time, they contact me because their attorney did not object to erroneous material that were in their presentencing investigation report, and in all too many cases I have seen people suffer because they didn't have a sentencing hearing, and had I been the attrorney in the case -- it is easy to second-guess when you are sitting in your office what you would have done, but I think there were cases where there should have been sentencing hearings where there weren't, far too many cases.

COMMISSIONER MACKINNON: But your own actual sentences

aren't a large proportion of your cases, are they? Your hearings aren't a large proportion of your cases?

MR. ELLIS: I would say they are, about 40 percent of my caseload is actual sentencing,

COMMISSIONER MACKINNON: What do you go into?

MR. ELLIS: What do I go into?

COMMISSIONER MACKINNON: Yes.

MR. ELLIS: The first thing I do is if there is anything in the PSI that is going to come back and haunt my client down the road --

COMMISSIONER MACKINNON: What kind of facts ordinarily do you have to litigate?

MR. ELLIS: What do I --

COMMISSIONER MACKINNON: What kind of facts do you have to litigate?

MR. ELLIS: Quantities of drugs, dollar values involved to a particular property offense, allegations in a PSI that my client was one of the major tax evaders and --

COMMISSIONER MACKINNON: Role in the offense?

MR. ELLIS: Role in the offense, yes. Dollar figures, drug amounts, and role in the offense.

COMMISSIONER MACKINNON: Now, you talked about

community service. What type of community service are you talking about generally? Name a few.

MR. ELLIS: One of the things that I have seen that works well is areas involving the elderly. As you are well aware, it is difficult, especially in rural and suburban communities, for the elderly to get around, to get medication, to get to the pharmacy, to get to the doctor, to get to the supermarket. I have seen effective community service doing -- whereby people as a requirement of community service perform these tasks for the elderly, pick them up and take them here, take them there, deliver things to them. I think this is a very needed service. It is not one that people who are not under compulsion to do so actively volunteer to do, and I think it is very effective and it works.

COMMISSIONER MACKINNON: Is that the major type of community service that is required?

MR. ELLIS: I have seen people work -- what I try to do, and I use community service quite a bit, is to try to tailor the community service to my client's assets. For example, if my client has a musical talent, I perhaps would use that client to teach young people in a home for retarded children how to play musical instruments, how to -- if I had

a client who was a barber, I might use his talents in cutting hair at a particular institution where they don't normally have access to --

COMMISSIONER MACKINNON: I could use him right now.

(Laughter)

When you are talking about diversion, you said you had cases where they did not do what they were accused of doing, and yet they pled guilty. I presume though that they did something.

MR. ELLIS: No, they didn't plead guilty, they basically accepted this pretrial probation period where they were told we are going to put the case off for a year, keep your nose clean and at the end of the year if you don't have any other trouble we are going to --

COMMISSIONER MACKINNON: You mean you have a procedure -- this isn't Federal court --

MR. ELLIS: This is State court. Again, most --

COMMISSIONER MACKINNON: You have a provision there whereby they are treated as guilty but they aren't proved guilty and there isn't anything on the record and they hold it off and --

MR. ELLIS: Exactly.

COMMISSIONER MACKINNON: -- and if they don't do right then they come back and run the charge through on them.

MR. ELLIS: Exactly. It is called ARD in Pennsylvania, Accelerated Rehabilitated Disposition. The charge can be put off for two years, keep your nose clean in those two years, we will drop the charge at the end of the two years, after we dismiss it your lawyer can come in and move for an expungement.

CHAIRMAN WILKINS: You would suggest we not use that in our criminal history score, is that correct?

MR. ELLIS: Not use it, because too many people take it because it is the easy way out, rather than having their day in court.

COMMISSIONER MACKINNON: Well, that was what they used to do in the Federal courts sixty years ago and it led to the probation system. They used to call "putting the case on the file," and then they would hold it there and if some thing happened, then they would take it off.

Thank you.

MR. ELLIS: Thank you.

CHAIRMAN WILKINS: Any other questions?

Do you have comments, Mr. Wallace?

MR. WALLACE: I think there are very few things that everybody in this debate on sentencing reform would agree on, but one of them has to be that this process has been tremendously open and we are deeply appreciative of your willingness to hear all of our concerns and to hear everybody's concerns and suggestions.

I want to make one additional point. So far today, and I am sure tomorrow, there has been a ton of extensive meritorious and very constructive suggestions from all quarters, 75 pages of comments from the Federal public defenders, and I gather there is more yet to come.

I think there is too much here for the Commission to do justice to in the next month. The ABA has suggested the possibility of a trial, some sort of pilot project in the Federal courts limited in time or in geographic distribution to test the guidelines. I think there is merit in that, from the point of view particularly of Congress making an educated judgment on the guidelines before they go into effect.

I think what would be unfortunate is if the Commission sent guidelines up to the Congress, that the Congress perceived to have significant issues still unresolved and then 535 loose cannons up on the Hill decided to work their

own special kind of magic on the guidelines to correct any perceived deficiencies and resulted in a product that you might not have wished for yourselves.

I think there is -- I urge the Commission to consider requesting an extension of time to appropriately weigh all of the comments that you have gotten today and that I think you will continue to get until the close of your comment period.

CHAIRMAN WILKINS: Do you think if we extended the time that the comments would cease? Six months from now we will have a flood of comments still coming in.

MR. WALLACE: I am sure that, as you say, the twenty-year process -- it is a long process and it will never stop evolving and improving, but I think there is a cutoff point where the Congress would decide that the product was still so potentially unfinished that they would have to get involved themselves and that would be against the interests I think of -- the whole reason that this Commission has been selected to be experts on this subject and to work their will on it before the Congress gets it.

COMMISSIONER BREYER: Well, I would just suggest that before your organization decides definitely what to

recommend, since we are quite interested in practicalities and, as you know, this version reflects quite a lot of practicalities, you yourselves think long and hard about the practicalities of what is likely to occur and what would or would not occur before making any definite decisions about it and consult widely before making any definite decisions about how you feel about it and what form and how you get changes and the technical changes and other kinds of changes, et cetera.

MR. WALLACE: I am not suggesting that we would be the cause of any unfortunate undertakings on the Hill.

CHAIRMAN WILKINS: Thank you, Mr. Wallace.

Questions?

(No response.)

Thank you very much, gentlemen.

Our next witness is Mr. Robert H. Saltzer, who is a parole and post-conviction consultant.

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

MR. SALTZER: Thank you, sir.

You have heard so far from Mr. Trott and you have heard from a number of other people who are in the fields of penal corrections and like that, and I think I am the first person you have heard from who has actually served time in

a Federal prison. I served an extensive amount of time in Federal prison and I worked on numerous, numerous cases in the Federal prison, representing other inmates, both in front of the U.S. Parole Commission hearings as well as in front of prison authorities vis-a-vis administrative problems that prisoners had within the confines of the institutions.

COMMISSIONER MACKINNON: Where?

MR. SALTZER: Excuse me?

COMMISSIONER MACKINNON: Where?

MR. SALTZER: I was incarcerated in the Federal facilities at Allenwood Federal Prison Camp --

COMMISSIONER MACKINNON: Allenwood?

MR. SALTZER: -- as well as Danberry and the State facility in Somers, Connecticut.

COMMISSIONER MACKINNON: Cincinnati?

MR. SALTZER: Somers, Connecticut, the State Penitentiary in Somers, Connecticut.

I appear here today as a person, as I say, who has spent considerable time behind the walls of various State and Federal facilities and from that experience I believe I can shed some light on what I believe to be some inconsistencies and inherent mistakes that have been included within the draft

document which you have now dated January of '87.

More than anyone, based upon my experience, I believe that the administration of justice within this country has been inherently unfair and has been rife with disparities and inconsistencies.

Having a specific set of sentencing guidelines on which the judiciary can rely I believe will cause these disparities and inconsistencies to be relatively few in the future as opposed to the overwhelming amount that exist at the present time.

While recently at FCI in Danberry I became involved in the representation, as I said before, of numerous inmates before examiners of the U.S. Parole Commission. Time and time again, inmates having exactly the same offense characteristics and in many circumstances inmates being co-defendants of one another were frequently given different presumptive parole dates based upon the whim of the examiners hearing the cases.

Frequently, the examiners of the commission could not help but wonder why the sentencing court judge involved had given such a stiff sentence for an offense which the commission recognized as being within the parameters of a

lesser offense.

Invariably, if the hearing examiner suggested that 4205(g) be invoked where the case be reconsidered by the sentencing court. Invariably, when that recommendation went to the national headquarters of the Parole Commission, it invariably was not invoked and people still retained getting at least a third of their sentence if they were sentenced under the adult guidelines.

I am reminded of one particular case in which three individuals were sentenced to (b)(1) terms. One inmate was given a 3 to 15-year sentence, another inmate was given a 3 to 15-year sentence, and the third inmate was given a 2 to 10-year sentence. They were all involved in smuggling cocaine into the United States and it was a sizable amount.

One inmate was given a 56-month presumptive parole date, one inmate was told to max out, and these were the two who got the 3 to 15-year sentences, and the third inmate, who was given a 2 to 10-year sentence, who would be theoretically less culpable, lesser culpable of the three, was told to max out on his 10-year sentence.

Therefore, the max out on the 10 years under the present system means that he was doing about 74-75 months in

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prison, whereas a person who is more culpable than he was told to do approximately a year and a half less, 56 months, and the third defendant was told to do 9½ years or about 114 months. This is the kind of disparity which I hope sentencing guidelines such as you are proposing will eliminate.

All three persons were convicted in the U.S. District Court for the Eastern District of New York for smuggling cocaine into the United States. Your newly drafted rules would not set an upper limit as to the amount of time one could spend in prison based upon the amount of contraband involved.

At the present time, all three men whom I just referred to would be classified as Level 32 offenders and the minimum amount of time to be sentenced under the applicable law passed last summer, and that translates to 121 to 151 months, which is 10 to 12½ years. This may seem a bit arduous, inasofar as your draft proposal would not have a higher level of incarceration for a person involved with a substantially greater amount of drugs in his possession at the time of his arrest.

Your draft as currently proposed calls for the person to go away from 10 to 12½ years for 5 kilograms of

cocaine. The way the law is written, he might as well go away for the same amount of time if he is involved in 200 kilograms of cocaine. I am suggesting that an inequity exists between the so-called minor dealer who might be involved with a few kilograms, say 5, and a major international drug smuggler who may be involved in multi-ton shipments of contraband.

Under the present rules and regulations of the Parole Commission, as seen in 28 CFR 2.20, chapter 9, sub-chapter (c), cocaine offenses, 921, there is distinctly eight different classifications given over to persons involved in cocaine trade, with the most severe being Category 8.

A Category 8 offender, with a selling factor score of 8, 9 or 10, receives parole theoretically with the service of 100-plus months, with no specific upper limit prescribed in the parole regulations for Category 8 offenders.

Under your draft proposal, a person having merely 5 kilograms would be incarcerated for a minimum term of 121 months, whereas under parole circumstances the person with 5 kilograms will serve a term of between 52 and 80 months as a Category 7 offender. Hence, isn't it a bit disproportionate that in the very same prison a few years from now you may have one inmate serving a 52-month term for his involvement in a

5-kilogram cocaine transaction, while another inmate is just beginning to serve his term for 121 months in prison for the exact same 5 kilogram amount?

It should be noted that if a person is to obtain a Category 8 parole consideration, his cocaine involvement as the law stands right now would have to involve in excess of 15 kilograms. Your draft proposal has as its limit a 5-kilogram threshold. I think there should be a higher categorization and I think this should be taken into consideration.

My suggestion here is that the entire concept of the sentencing guidelines should be reconsidered insofar as the amount of contraband is concerned, so that a more reasonable set of guidelines can be promulgated and taken into consideration with pragmatic realities of the drug trade as it exists today.

One of the aspects that I very much closely follow is the disparity of people incarcerated in the Federal prison system. At the present time, I happen to work with -- I happen to be a consultant to two different law firms in the field of post-conviction release and parole consideration.

I am reminded of a case right now where we have one firm that I am working with that has a case where twelve

different people are involved in an insurance fraud case. The overall amount of insurance fraud was about $2.5 million. In our discovery motion before the U.S. District Court for the District of Connecticut, we have found that all of the co-defendants in that case have the exact same prosecutor's version written in their PSI, unbeknownst to each other, because they were all sentenced at separate times.

However, at the time that the different people were heard by the Parole Commission examiners, some were placed in Category 4, some were placed in Category 5, and some were placed in Category 6, having nothing whatsoever to do with the fact that the judge at the time of sentencing specifically set the parameters as to which particular defendant was culpable insofar as the initial crime was concerned. He gave the most culpable individuals seven and six-year terms, and they all had no previous criminal background, so we are all starting basically at the same scratch point.

Other people were given five-year terms, four-year terms, three-year terms, and some even received probationary terms. What I am driving at is when all the people involved in this particular case went in front of the U.S. Parole Commission examiners in Danberry, because all the co-defendants

as it turned out were sent to Danberry, as it turned out they were in all different parole categories, some in Category 4, some in Category 5, and some in Category 6, and the thing that rankles us the most is the fact that the Parole Commission used the exact same set of facts in determining each of the people's parole prognosis, which shows the tremendous inconsistency and it shows the phenomenal disparity of what happened.

We in particular happened to represent a gentleman who is right now suing the Parole Commission for the abuse of its discretionary purpose in that case, because of the fact that we believe that he was placed in Category 6 when the judge specifically said he is a third-level offender. Now, we know for a fact that he should have been considered a Category 4 offender, which would have called for 14 to 20 months, against his five-year sentence, which would have called for one-third, which would have been 20 months. He was told to max out by the Parole Commission, which relates to 39½ months.

The other problem that I perceive in reading the proposed guidelines is that I don't really think you take into consideration the realities of what overcrowding really

means in the prison system.

Now, I have bandied about earlier this morning the fact that there are 600,000 people in prisons and all kinds of other good stuff. It is really only about 30,000 Federal inmates at any given time. The 600,000 figure is really State facilities, county facilities and everybody put together.

The United States, as it has been discussed early today, has a very high percentage of people who get involved in the criminal justice system. I think the Bureau of Justice Statistics said just a few months ago that at any given time 3 percent of the male population in the United States is involved in the criminal justice system. That is an alarming amount of people involved for a country who has a population of 250 million or whatever it is. That means that 7 million people are involve somewhere along the line in the criminal justice system. That is a lot of people.

The problem with overcrowding in the Federal prison system is the fact that there is not enough money set aside by Congress -- I am not suggesting that you seek that money, I am just suggesting what the reality is going to mean if these laws as you propose them go into effect.

Right now, the overcrowding at Danberry, the

overcrowding at Lewisburg, which is the Level 5 facility, the overcrowding in virtually the entire Federal prison system is so outrageous that they have people sleeping in the halls, people sleeping in gymnasiums, people sleeping virtually everywhere they can put them, and I think that that is very, very wrong.

It can only breed contempt for the system. It breeds a more upward mobility, if you will, of the prisoner to seek better criminal contacts when he gets out. It really is a breeding ground for better criminality. I think alternatives have to be sought and I think alternatives have to be made effective so that the reality of overcrowded prisons really does not become more of a reality in years to come.

I was involved a number of years ago in a case that was in front of Judge Daley regarding the overcrowding of the correctional institution at Danberry, and the eventual finding was that the overcrowding didn't exist as badly as it could. Well, within less than three months after that a ruling came down, the prison population of the main institution at Danberry went from 1,100 inmates to 1,530, and that was in less than three months. They just trucked them in and bused them in as best they could to eliminate crowding in other

Federal facilities. So at any given time, there are a lot of people on bus, as the expression goes.

What essentially also bothers me about the way the guidelines have purported to take into consideration persons' rehabilitation, none of the people on this panel nor any Federal judge can guess what is going to happen once a person goes in behind a wall.

The Parole Commission right now takes into consideration to a certain degree what happens when a person is behind that wall, what happens insofar as how is he treated and how is he treating himself. If he is going to be a person who is a recidivist and he doesn't care, well, then he is getting his minimum amount of statutory good time.

The problem is that occasionally you will find a person who goes to prison and will actually want to self-rehabilitate himself and you will find that person who will take a GED course. I taught the GED program at Danberry and for the 14 months that I taught the GED program at Danberry, we had the highest passing percentage rate of any Federal prison in the United States. We had over 97 percent pass rate of people who took the GED, and this was approximately 35 inmates a month who took the test.

I am saying that I think that a person comes into prison who can't even read or write and a few months or a few years after he has been incarcerated can read and can write, can get some industrial skills in certain instances and get a feeling of better self-esteem and get a feeling of self-worth and a feeling that he can contribute something, to go out and get himself a job, then prison may have been worth it. Occasionally a prison actually makes a better person out of a person, if that person wants to be made that way.

The problem that we have is that there is no incentive whatsoever under this proposed guideline system to take that into consideration, and I find great fault with the fact that right now when a person is maxed out, in other words he has no presumptive parole date, that when a person does approximately two-thirds of his time in prison under whatever the judge gave him for that particular term, and he did not receive a parole date or any kind of parole consideration, he cannot at all be given a certain amount of time off.

Under the way your rules are now construed, he can only get 54 days a year, it is vested time, that is it. It will not take into consideration one bit whatsoever the gains

that he has made while he has been incarcerated. I believe there has to be some sort of incentive system built in. I don't have the answers. I am not saying that the current system that is employed is correct. What I am saying is that under the U.S. Parole Commission rules, 28 CEF 2.60, there is indeed a system that gives superior program achievement to an inmate while he is doing time, and I think that is very important to take into consideration somewhere down the line.

People who are doing eight and nine years in prison are going to need that extra good time off. Right now your system calls for a factor that a person who is given a five-year sentence, he will do approximately 52-53 months. Under the current manner in which a person is sentenced to a five-year term, he does approximately 39½ months, so you are talking of a disparity and an inconsistency here of about 12 to 13 or 14 months.

CHAIRMAN WILKINS: These guidelines to sentence to five years would be someone who is substantially more culpable than the individual who gets five years today, you see.

MR. SALTZER: Not necessarily, sir. Under the fraud statute, I was looking at the fraud statute before, and I was looking at some of the drug statutes, and some of the people

who are getting 50 and 60 months under the newly revised draft guidelines are people who today are getting that same amount of time as a gross amount of time. That is not to say that he is going to do it, I agree with you on that. So today if a person is sentenced in Connecticut or wherever he is sentenced in the United States and he received a five-year sentence, he does 39½ months. Under your system, a person is given a 60-month sentence, will do about 54 months, and I think that somewhere along the line it actually would be 52 months, so there is actually a disparity there of about a year and I don't seem to think that the person would be doing a lesser amount of time under your guideline system as it is currently conceived for the same crimes that a person is right now getting that kind of time.

I also want to address one other question that Judge MacKinnon raised, and that was the question of split sentencing. I myself am a product of the split sentence which Judge Edgington gave me in Connecticut a number of years ago. He sentenced me to a certain term of incarceration, which I did to its completion, to its max, as the expression goes, and I then received a probationary sentence that followed, kowing full well that I was not going to be subject to a

parole term following my incarceration term, because my guidelines were so off the wall that the judge said I am going to give you "a break, but I want you under supervision when you get out," so therefore he gave me a supervised probationary term and I am still currently under that probationary term.

So I think yes, split sentencing by using two counts and stacking them one on top of the other as consecutive sentencing is a workable alternative for the fact that there should be supervision somewhere along the line after a person is incarcerated.

Thank you.

CHAIRMAN WILKINS: Thank you very much. I agree with you, I think we do need several more levels in our drug section to take care of the problems that you just addressed and I hope we will work on that in the next few weeks.

MR. SALTZER: Thank you.

CHAIRMAN WILKINS: Questions? Helen?

COMMISSIONER CORROTHERS: First, Mr. Saltzer, I agree with you, I have no problem with your statement about injustice being in the current criminal justice system and we hope to work to improve that situation. But did I hear you correctly state -- I think I heard you say that no one on

this panel can guess what actually goes on behind the walls? Did I hear that?

MR. SALTZER: Yes, I sort of said that, and I know I said that. There is only I think about two or three people on this panel who have actually been involved. I know that you have been involved in --

COMMISSIONER CORROTHERS: I was just about to correct you. I sort of figured out what goes on behind the wall after twelve years as a warden.

MR. SALTZER: Yes, but to a lot of people, you know, you are dealing in the abstract in this entire matter and I understand that and I can appreciate that. The numbers are so voluminous and what you are dealing with is so necessary to try the concept of disparity and things like that. But the practicality of the matter is that you are dealing with families, you are dealing with lives, you are dealing with the fact that the Bureau of Prisons has this attitude that says if a man is sentenced to more than two years in prison, well, it doesn't matter where the hell they send him, so the person can be sentenced in Connecticut and they give him to the U.S. Marshals Service and two weeks later he is in Sandstone, Minnesota, or he is in Leavenworth, Kansas, and he

never gets to see his family in like three or four or five years.

COMMISSIONER CORROTHERS: What you are saying is prisoners are people, too, and I agree with you.

MR. SALTZER: Yes, very much, and I think that has to be taken into consideration. Every person who goes into the Federal prison just about comes about. There is a very, very rare exception when people die in prison and are given life sentences to the point where they never get out or whatever. Virtually everybody you sentence under the Federal law at the present time gets out of prison, and I think you have to take into consideration the reality of how bitter that person will be once he does get out and how much he really hates the system that put him away, and I think that somewhere along the line that has to be addressed.

Right now in the Federal prison system there are certain units that are used for chemical abuse units, that are used for drug programs and things like that. A lot of it is under-funded and a lot of it is not used to the specific degree that it should be, and I think with this kind of law going into effect, the BOP is going to turn around and say, well, we were always right, we are here strictly for

punishment, we are not here for any rehabilitative procedures, we don't care, we are going to scratch those programs. We will use that money to build more cells, and that is all that is going to happen to the budget. They are just going into the construction business.

I have in front of me a list that Norman Calrson submitted in high Monday morning highlights just a few weeks ago, a list of construction updates of nine different facilities that are either being built from scratch or that are being added onto or whatever, from New Jersey to Florida to Los Angeles to Oregon, to Georgia, to Oakdale, Louisiana, to Inglewood, Colorado, and all they are doing is building more and more because they know they have to accommodate more and more individuals that are going to come down the pike, and I think this is incredible, the fact that we are not taking into consideration alternatives for sentencing. I think it is incredible that the judges as they are today, if they are bound and they are not given discretion, which Mr. Trott doesn't want to give to them, they are not given the discretion to turn around and say okay, you will get a probationary sentence, or okay, you will go below the guidelines or whatever, if that exists then I think there is going to be

real hell to pay insofar as the Federal prison system is concerned.

CHAIRMAN WILKINS: Any questions?

COMMISSIONER MACKINNON: I take it that your offenses were drug related?

MR. SALTZER: Absolutely not.

COMMISSIONER MACKINNON: They weren't?

MR. SALTZER: No.

COMMISSIONER MACKINNON: What kind of offenses were they?

MR. SALTZER: They were white collar offenses, if I can use that generic term.

COMMISSIONER MACKINNON: And you had three?

MR. SALTZER: Yes, I had three of them.

COMMISSIONER MACKINNON: I was wondering if you would submit the names of the three sentences related to the three individuals at Danberry that got three, two of them 3 and 15 and the other one 2 to 10, if you would give us those names, we would like to check them.

MR. SALTZER: Okay. The first entleman who was given 3 to 15 was -- they are all co-defendants of one another --

COMMISSIONER MACKINNON: You don't need to give them now. You can give them --

MR. SALTZER: Okay. I would be more than glad to give them at another time, if you desire.

COMMISSIONER MACKINNON: Yes.

MR. SALTZER: I can tell you that one of them is already out on the street, he is already serving his parole term.

COMMISSIONER MACKINNON: We are not interested in names.

MR. SALTZER: But the one who is doing 2 to 10 is still serving his time at Danberry and the other one has been maxed out and is finishing his time up in --

COMMISSIONER BREYER: The reason that we think it is interesting is sometimes people tell us, oh, these guidelines in front of you, you know, in the brown coffee, will really increase disparity because don't you realize now we have these wonderful parole guidelines, and if the parole guidelines work now to decrease disparity, and so since we already have a pretty good anti-disparity system, this won't do any more good. Is that your impression?

MR. SALTZER: No, I think this entire system that

you recently promulated, as opposed to the one that you did last year, this thing I think will withdraw the disparity that I think and I know existed. I know that there exist phenomenal disparities in cases of people in Federal prison at the present time who are even co-defendants. I am not talking about people who were convicted of the same crime and they were sentenced by a different judge. I am talking about being sentenced by the same judge for the same crime as co-defendants and given different times in prison --

COMMISSIONER BREYER: Because of the parole guidelines?

MR. SALTZER: Yes, because of the parole guidelines, they are not read correctly and they are not --

COMMISSIONER MACKINNON: Because of their role in the offense.

MR. SALTZER: Equally culpable.

COMMISSIONER MACKINNON: Well, that is what you say, but we have the Black Hebrew cases going along here and there were differnt roles in the offense and --

MR. SALTZER: I understand that, but when the judge himself --

COMMISSIONER MACKINNON: What's that?

MR. SALTZER: Excuse me. When the judge himself says that Party A is most culpable, Party B is as culpable as A, but Party C is least culpable of the three, and party C ends up getting more time than either one of the guys above, that is a little peculiar, I think you would have to agree with me.

COMMISSIONER MACKINNON: Well, that doesn't happen too often.

MR. SALTZER: I tend to disagree with you and I will tell you why: The GAO did a study a number of years ago of the Parole Commission and in that study it showed that about 90 percent of the people who were in front of the U.S. Parole Commission examiner panels usually receive -- and I use the word "usually" -- usually receive guideline considerations. However, 5 percent went below the guidelines and 5 ot 6 percent went above the guidelines, and the ones that were above the guideline consideration cases, the Parole Commission invariably said, well, we saw different factors here we didn't originally see when we heard the first guidelines, but we are letting the first guideline anyway because we have already given the presumptive date. They back themselves into their answer and they are trying to justify their answer

and I think that is incorrect.

COMMISSIONER MACKINNON: Well, that is the way people make decisions. Sometimes they make them one way and sometimes they make them the other.

MR. SALTZER: I can also cite another case where we right now are litigating --

COMMISSIONER MACKINNON: I don't need any right now, but let me get at this.

MR. SALTZER: Okay.

COMMISSIONER MACKINNON: You said that you needed an incentive system. Now, we have had an incentive system and the general consensus of the Nation is that it hasn't worked.

MR. SALTZER: The parole incentives haven't worked.

COMMISSIONER MACKINNON: Yes.

MR. SALTZER: I am talking about the incentive system of good time.

COMMISSIONER MACKINNON: What's that?

MR. SALTZER: I am talking about an incentive system of good time.

COMMISSIONER MACKINNON: Sure, I know.

MR. SALTZER: Good time as it is currently used in the Federal prison system consists of statutory good time,

meritorious good time, industrial good time, and like that, all of that would be eliminated under the new rules.

COMMISSIONER MACKINNON: Yes.

MR. SALTZER: The only thing that will be there is the 54 days a year if that is the time. So a person can literally just sit in his bunk all day long --

COMMISSIONER MACKINNON: That is right and that is the theory that this Act is proposed on.

MR. SALTZER: And I think that is wrong.

COMMISSIONER MACKINNON: Well, you have got to talk to Congress about that.

MR. SALTZER: I know that as well.

COMMISSIONER MACKINNON: And you talk about the -- actually, this overcrowding is a problem between the Commission and the Congress and every person who says, well, you are going to overcrowd your prisons. Everybody knows that the prison population is going to increase, whether we pass this law or not, it is going to increase a very substantial portion in the next five years. We all have been told that.

But the other thing I want to point out to you is this: The population of this Nation is increasing and that is one of the substantial reasons for the increase in the

prison population.

MR. SALTZER: I understand that.

COMMISSIONER MACKINNON: You have just got more people.

MR. SALTZER: We also have I believe a higher disparity of wealthy to poor people in the United States that we are experiencing. I think the poor people right now are the ones that resort to a life of crime, are becoming more and more infused with the idea that if they can't get it one way they are going to get it another way, with or without the penalties that could be inflicted upon them in either State or Federal courts, and I think that in and of itself is a societal problem and not one that I think can be fully addressed by this particular Commission at this time.

COMMISSIONER MACKINNON: Well, I lived in the Depression days when there were a lot of poor people --

MR. SALTZER: I understand that.

COMMISSIONER MACKINNON: -- and we didn't see that too much.

MR. SALTZER: I understand that kind of pressures of the Depression. My parents have told me a lot about what happened during the Depression and the like, but I think that

we didn't have the driving pressures then as you do now, the possibility of drug oriented culture, and you didn't have a lot of other pressures that exist today that existed forty or fifty years ago, and I think that is --

COMMISSIONER MACKINNON: Of course, we spent billions in the meantime --

MR. SALTZER: That's true.

COMMISSIONER MACKINNON: -- to take care of the so-called poor people.

MR. SALTZER: These are societal problems that I don't think can be addressed by this particular Commission.

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

MR. SALTZER: Thank you very much.

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COMMISSIONER MACKINNON: Are we going to take a break?

CHAIRMAN WILKINS: We will take a 10-minute break.

[Short recess.]

CHAIRMAN WILKINS: We have as our next witness the former Chairman of the New York Sentencing Commission, Mr. Kenneth Feinberg, a member of the law firm of Kaye, Scholer, Fierman, Hays and Handler. And we appreciate your coming and appearing today.

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

Because of the time, I will summarize very briefly a couple of points I would like to make so that we can go on to our final witnesses today.

Basically what I am going to state today is a more formal presentation of what informally I have been discussing with the various members of the Commission and the staff in an effort to get these guidelines in appropriate form.

I should say at the outset that my testimony today is altogether different in tone and color from that when I testified in New York months ago. At that time, I had expressed serious doubts and reservations about the guidelines that were initially promulgated by the Commission. I now have a quite different view.

I believe that this latest draft is light years improvement. I could certainly support this draft when and if it is sent to the Congress for consideration. I have a few doubts that I do think I wish to express to the Commission at this time, doubts which can hopefully, if dealt with, assure that the product sent to Congress is approved and is accepted.

Let me state at the outset that I do think it important that one of the most serious obstacles to the credibility of the Commission product has apparently been removed. And that is the vote on capital punishment. I think that whatever one thinks about that issue, I think that the courage of the Commission in rejecting capital punishment guidelines as part of this draft as part of its consideration of what is sent to the Congress is a major, major step in assuring the type of bipartisanship and credibility that is absolutely essential if the Commission's guidelines are to be deemed acceptable and supported in a bipartisan way. And I think that again courage is the appropriate word.

I would say that there are three issues that this Commission should continue to address in the next few weeks which will help assure acceptance by the Congress of these

guidelines. And, more importantly, assure that the guidelines themselves are met with a credibility because credibility, I think, is the key to the final effort that is presented to the Congress.

First, the Commission, more than any other issue, the Commission must direct its final eleventh hour attention to the problems of data. That is, the numbers that are reflected in this present draft. I am talking really about two problems: the impact of the draft guidelines on prison population, and the methodological basis for these numbers, both in the base offense levels as well as in the specific offense characteristics, the level ranges, et cetera.

I am very concerned that the Commission's product will be criticized and jeopardized if it cannot justify, based on existing sentencing and correctional data, the numbers that are reflected in these current draft guidelines. Despite all the other work done by the Commission in promulgating these guidelines, drafting and redrafting the guidelines, if there is a perception that these guidelines will result in a large substantial increase in prison time and prison population, then I have serious reservations that the guidelines can be enacted or will pass muster.

What I would urge the Commission to do is, in developing a prison impact statement, have a second impact statement that shows what existing sentencing practices will do to the prison population, not simply what the guidelines will do since, in areas such as drugs, drug offenses and some other areas, or specific crimes, statutory minimums and statutory mandatory sentences preclude any guideline flexibility. And I think it would be helpful if the Commission compared the two in sending up its recommendations so that the Congress could see for itself what it hath wrought in promulgating statutes that call for very specific inflexible sentencing.

But the data bothers me greatly because of the charge that will surely be leveled at this Commission's product, that it is too harsh or that it does not reflect, even as a basic starting point, actual time served today under existing sentencing practices.

Second is the question of discretion. Here I would urge that the Commission continue in its present course of maximizing the discretion that should be imposed or should be permitted of our sentencing judges. I say this for political reasons more than substantive reasons. Although a strong

argument can be made that discretion in these draft guidelines will result in continued uncertainty or disparity in sentence, I think that at least initially, as we begin the evolutionary process for these guidelines, that we should have as much discretion as possible, particularly in the twin areas of departure and adjustments. In those two areas, I would urge may instead of shall.

Even as to specific offense characteristics, I go back to a point that, as the Chairman knows I have made to this group before, if the specific offense characteristics in the guidelines cannot match up with actual time served data so that the characteristic isn't grounded in some sort of known existing sentencing practice. Then, there too, I would urge may instead of shall; discretion instead of rigidity.

But, in any event, data is my first point. The increased use of discretion as a way to avoid early problems in the implementation of these guidelines is to be welcomed.

Finally, the third area, ranges. Now, here I have been taken to the woodshed, not only by the Chairman and by the other members of this Commission, but by Judge Newman and Judge Tyler and others whose judgment cannot be easily discarded. And I would say this: if we are talking about two

polar extremes, great detail on the one hand, or unlimited discretion or variation on the other, it seems to me I will come around and welcome the use of ranges, at least when we talk about specific offense characteristics where there is an absence of data to justify, at least in the existing sentencing practice, to justify the characteristic. And I can understand the use of ranges when it comes to adjustments, where again unlimited discretion might do violence to the idea of circumscribed sentencing power on the part of a judge.

However, I have not been convinced that in two other areas of these guidelines ranges are a good idea. I think the reasons well articulated and convincingly stated by Commissioner Robinson, the idea of sentencing ranges as to base offense levels is unwise and, in my mind, might very well be for the reasons stated by Commissioner Robinson, illegal.

And, therefore, when it comes to the base offense levels, I would urge no range, at least no range that violates the 25 percent rule. And I still continue to believe that when it comes to departure for reasons that Judge Newman will explain much better than I could, it seems to me that when it comes to departure, it should be unlimited

discretion since there are other safeguards built into the guidelines system, appellate review and stated reasons, that will assure, I think, over a relatively short period of time an absence of abuse.

So I have come around to the notion, however, with specific offense characteristics and adjustments, that the ranges in this draft and contemplated by the drafters are acceptable and probably will be useful in implementing the guidelines.

Let me make two concluding points.

First, I want to just comment, if I may, in two minutes on the two arguments that I have been hearing over and over again in the press and in the community, in the sentencing guideline community, two criticisms of these guidelines, which I do not share.

The first is that the new product that is being circulated confers too much discretion on our sentencing judges. You can put on one hand the number of times in the last decade I have disagreed with Ron Gainer when it comes to sentencing policy. But on this one let me say that whatever the substantive arguments may be against too much discretion, I am very concerned about the political and practical

implications of limiting discretion too quickly, too fast.

I believe, and I think Judge Tyler has said this publicly and privately, that over a relative short period of time, two, three, four years, we will, I think, this Commission will move in the direction based on evidence coming in as to how these guidelines function.

I think Ron Gainer and Paul Robinson may very well be justified in concluding that we have to go further in limiting sentencing discretion. My problem is a political one, as well as I have some substantive disagreements, but I do not believe at the outset, as we evolve this new system in place, that it is a wise course to follow by limiting this discretion the way, as I understand it, the first draft would do, or even some of the arguments for cutting back on this latest version.

It seems to me that this is an ongoing commission that can monitor these guidelines and as we get into this, we may see--and I believe we will see a need for some more circumscribed sentencing discretion.

But I urge the Commission not to go that route initially. I think credibly it will not fly; politically, it could be very damaging to getting this commission's product

off on the right foot.

The second and final point: I have heard a lot about this latest draft resulting in more disparity than we have gotten now under existing law. I could not disagree more with that statement. That is the statement being made, it seems to me, by the very same people who saw that the parole commission, in existing law, under the guise of leveling out sentences at that stage and undercutting existing disparity, that it was the very parole commission that because we did not have consolidated sentencing function in the court, but it was divided between the commission and the sentencing judge; it was the very commission that promoted disparity by having sentencing judges second-guess what the appropriate sentence should be by trying to second-guess what the parole commission would do even under its own guidelines.

I note with some interest that many of those who criticize this draft were the same who vigorously supported abolishing parole release and consolidating the sentencing function in the judge.

Even if it is true that that may happen, it seems to me that over again a one-year or two-year period of time,

this ongoing commission will be in place to promulgate additional guidelines with more detail to correct that threat.

In conclusion, I urge the commission not to extend the April deadline. I think that would be a big mistake. I urge the commission to work on the data. I wish Commissioner Block were here, since he is the one who I will hold personally accountable for these figures.

I am confident that if the commission works in these few remaining areas--discretion, ranges, and data--that what the commission sends to the Congress will not only be approved, but will be a major step forward in improving the quality and justice of our federal criminal justice system and a credit to everybody on the commission.

Thank you.

CHAIRMAN WILKINS: Thank you, Mr. Feinberg. We appreciate your interest and the great assistance that you have given us over the life of this commission.

Questions to my right?

MR. ROBINSON: Yes, I do.

CHAIRMAN WILKINS: Go ahead, Mr. Robinson.

MR. ROBINSON: You have been one of the major advocates of the commission relying on current sentencing

practices.

MR. FEINBERG: As a starting point.

MR. ROBINSON: Yes. As a starting point.

I certainly see the attractiveness of that, especially when it is a big bad world out there and a lot of people are just waiting to criticize the commission. There is a certain shelter that you can find and saying, "Well, we are just doing what is being done now."

My problem with that is that I think the Sentencing Reform Act asks us to do something significantly different. I think it speaks to that very issue. It criticizes the United States Parole Commission.

One of the reasons that the parole commission--that approaches is appropriately abolished, and you are right, that I have always very strongly advocated consolidating sentencing authority in the judge.

One of the objections to the parole commission was that their guidelines were generated by just the sort of practice that you are telling me about now: that is, using current sentencing as somehow the magic number.

Here is the difficulty I have with that. Let's assume you have Judge A, B, and C and each one in their own

mind has a clearly rational policy, philosophy of sentencing and each one, for their own sentences, gives a sentence which they can explain; they have some sort of rationale for.

The problem, of course, is that when you have then averaged the sentences from Judges A, B, C, you end up with an average that those sentences--those averages--have no rational basis; it simply does not logically follow because each sentence individually may be a rational one, that the average somehow is.

My problem is that the Sentencing Reform Act makes relatively clear that our job is not to just keep doing what we have been doing all along but, rather, our job is--and that is why they go to the whole point of setting out the sentencing purposes so on and so on, we are to rationally calculate what the sentences are. We are supposed to be able to give explanations for what we do.

The data that we ought to be interested in, in addition to current practices, are data like: What are public perceptions about the relative seriousness of various kinds of offenses?

I would not dispute that current sentencing practices has some place in the variety of things we should

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be looking to. But the idea of starting with it, I think, is not doing what we have been asked to do.

MR. FEINBERG: I have a couple of comments about that.

First, I want to emphasize that I am not suggesting that actual sentencing practices be the end-all of your effort. As I th-nk the statute points out, actual time served data should be considered by the Commission initially in deciding where it will go from that data.

So I do not think there is any necesary inconsistency to what we are saying. I am not certainly suggesting that the Commission shall take as gospel actual sentencing practices and not touch a nit or tittle of that data. That is first.

Second, perception is reality in this business, and if you have got an average nationwide for bank robbery, X years in prison, you and I may debate for a good deal of time over the sentencing philosophy of various judges that enter into that averaging, but I assure you, Paul, that as a political matter and maybe even as a substantive matter, that average of what a person actually serves in prison, regardless of what the varying sentencing philsophies of a particular judge may be in Montana versus the Southern

District of New York, is very, very helpful, it seems to me, in giving some credibility and credence to where the Commission is coming out on some of these numbers, and that is really the third answer I have for you, which I am sure you will agree with me on this, and that is in the absence of any other philosophy as to where the consistent philosophy, as to where these numbers are coming from.

It seems to me that relatively speaking, using average time served data as a place to start is far preferable than simply saying it really can't be justified any other way. So if one wants to oppose the guidelines on the ground that there is no consistent sentencing philosophy, I can understand that position. I don't agree with it, but I can understand it.

But to say that in the absence of a coherent sentencing philosoph, therefore the numbers are just out there without any sort of basic justification, I think is politically naive and substantively unsound.

COMMISSIONER ROBINSON: Let me ask one other question. One of your other major themes, which Judge Breyer has joined you in from the beginning, starts small -- we talked a little about this this morning -- starts small, with minimal

guidelines that don't have much ambition and then build on them over time, they sort of have a foundation concept. Of course, that is appealing. We are a permanent Commission and there is a lot of work to be done and there is a tremendous amount of wisdom out there from sentencing judges that we don't have but we can tape into as time goes on with the review procedures, a wonderful idea.

Here is my difficulty with that, that this refinement process notion will work fine if in fact you have a structure and you have basic guidelines building blocks that make sense. If, for example, you are talking about fraud cases or property destruction cases and you have as the basic elements those things about fraud cases generally that we don't like, we can look at what judges do and we can argue about have we got the distinctions right.

My problem is that this guideline system is not based on those factors, the building blocks for this are not those factors that judges think are relevant. The building blocks for this are the absurdities and inconsistencies and historical accidents of the United States Code, and I just don't see that that is a foundation that we can build on.

Doesn't it make more sense to have even a modest

system -- and at this point if we are going to horse-trade over this, a year ago I would have said this is wonderful, let's go for a modest system, and maybe it is too late for that now. But why not, why can't we have even a modest system that is based on rational conceptual factors, the things that judges talk about when they are talking about a fact pattern that is relevant, not based on bizarre notions of the United States Code sections?

MR. FEINBERG: Well, you and Ron Gainer and myself and Judge Breyer and a lot of other people worked on and recognized the absurdities of the existing United States Criminal Code. I mean I agree with that. I certainly have put in my dues in trying to get that changed.

But it seems to me that in the end really what it comes down to is a phrase I like to use in discussing this whole problem of the perfect being the enemy of the good, or using your language, the modest being the enemy of whatever you consider this immodest proposal.

The fact of the matter is I have a good deal of difficulty criticizing your basic approach to guidelines. I think that there is a lot of what you want to do is something that I think is appropriate. Where I disagree with you I

think in the end or at the beginning is I think that you can't get the Congress or the Federal judiciary or the practicing attorneys before that Federal judiciary to buy it, at least not now.

I am maybe too cautious in my view. I go back again to what Judge Tyler has told me and the members of this group informally, that maybe in five years from now we will see something much more akin to the basic approach that you look for, but I don't think that this is such an irrational product. I don't think that it is so wanting in conceptual basis. I think that it is a worthy effort and if it lacks some of the pure consistency that you look for, I still think that compared to the existing law of sentencing currently on the books, I again say it seems to me that we would be better off with this product than no product. That is where I have a sharp disagreement with your dissent.

Whatever the problems, I think we are far better off moving ahead on this approach and monitoring this approach and developing data on this approach and altering this approach than going back to, you know, the sort of ephemeral square one in the hopes that we can develop the perfect product. I don't think that perfect product is obtainable now.

COMMISSIONER ROBINSON: Thank you, Mr. Chairman.

CHAIRMAN WILKINS: Mr. Nagel?

COMMISSIONER NAGEL: I have a question. I am really trying to resolve for myself where you are in your advice. I thought I knew and then I heard you say something in response to Commissioner Robinson and now I am not sure.

As you know, I have spent the better part of my professional life collecting and analyzing the kinds of data on which you urge us to rely, and we have talked about this many times.

The data in their current state, while they are in the best possible state, given the time and the availability, are very imperfect estimates. Given the tremendous imperfection in those estimates, I have trouble understanding why in the fact of what I want to reread to you -- I know you are familiar with it, but let me just reread it -- is a statement in the mandate: "The Commission shall not be bound by such average sentences and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 355(a)," et cetera.

Given that we know how imperfect are these data, because of the statistical limitations and, more importantly,

because of the time limitation, and given what seems to me to be perfectly clear in the statute, that Congress did not intend us to mirror current practice, but I think much more clearly intended that we examine current practice as one possible contribution to a decision that should ultimately be independent and in accordance with the purposes as stated in the legislation, then I have trouble with what I think is your sort of consistent emphasis that we should start now by basing the sentences on current practice.

And if I am quoting you right, originally you said that if we didn't do so, that we would seriously jeopardize the lieklihood that our guidelines would be accepted. I keep thinking that if we do that, what you are advising us to do, we will in fact seriously jeopardize that they will be accepted, (a) because it flies in the face of what Congress told us we ought to do, and (b) because those data are very imperfect. It is the average of many sentences, but those averages can be broken down to be many different averages, given all of the particulars we know affect those sentences.

So we know apriori that those estimates are estimates with a tremendous amount of slough, and people who have a great deal of expertise and experience with statistics will

rail back and tell you that. They will say, look, they have a place, they have value, they give you some anchor, but you can't hold onto that anchor.

So my problem is when you encourage us to do that, I worry that you are encouraging us to go down a path that may politically be comfortable now but will be very uncomfortable later, and then I hear you say to Commissioner Robinson, well, I am not saying to do this. Then I thought to myself, then what is it you want --

MR. FEINBERG: Here is what I want you to do.

COMMISSIONER NAGEL: Yes, tell us what it is your are suggesting.

MR. FEINBERG: Here is what I want you to do: Your 43 base offense levels -- well, let's not get into the base offense levels. Here is what I would like you to do: I would like you to take the actual time served data that you have now --

COMMISSIONER NAGEL: That is what we took.

MR. FEINBERG: -- which is imperfection --

COMMISSIONER NAGEL: We took those.

MR. FEINBERG: -- with their imperfections, and use that data (a) to justify your proposed sentence guideline

lengths by mirroring that data except (b) in those areas where the Commission makes a judgment that that data is a good starting point, but we think white collar crime should be increased to 10 percent, or that X should be decreased by Y percent.

What I am really suggesting to you is that in the absence of going about it that way, what is your way? Is your way to say independently we just decided in my judgment that Y should be X? If that is what you are going to say --

COMMISSIONER NAGEL: No, no. I agree with what you are saying. There are sort of two polar extremes though, and that is the point I want to make. There is A sitting in your office and dreaming the dreams based on nothing.

MR. FEINBERG: Right.

COMMISSIONER NAGEL: And then there is B hugging a set of data as if they gave you the answer or the average, and I want to urge you to sort of rethink before you give us advice, as you have a great deal of experience and expertise, that B may have as many pitfalls as A --

MR. FEINBERG: B will have no political pitfalls at all, I do not believe. I mean if the Commission did do nothing more or less than send up guidelines that actually

tracked existing sentencing practices, there would be some howls from some Congressment, but --

COMMISSIONER NAGEL: Okay. If that is true, then --

MR. FEINBERG: -- because it has made an independent judgment that the actual time --

COMMISSIONER NAGEL: -- then I want to know truly, because you were there, why did it say here the Commission shall not be bound -- that is easy -- and shall independently develop -- why did it say that?

MR. FEINBERG: Because of the recognition that the Commission may decide that in certain designated crimes and certain designated characteristics of the offender that actual time served data does not reflect what should be appropriate.

COMMISSIONER NAGEL: Let me ask you this: Would you think it appropriate if we started with current practice as an anchor but not the anchor and then we proceeded to say in each instance in which the Commission could articulate a good reason for differentiating the recent congressional action, data on recidivism, data on deterrence, whatever, that you then shifted that number and you would have no problem with that?

MR. FEINBERG: As usualy, Irene, we agree. I mean I would have no problem with that, but beware, all I am really suggesting is beware of the political pitfalls when you start evolving your numbers away from existing sentencing practices, particularly beware of what your sentencing practices will mean to prison population.

I would urge this Commission, before it sends up its guidelines, to sit down with Norm Carlson and Al Bronstein, among others pahaps, and go over the numbers with them and get their reaction, because I think it would be very, very helpful.

COMMISSIONER NAGEL: Yes, you raised an issue earlier on which I should have responded to. Commissioner Block and Commissioner Corrothers are working on this, and Commissioner Block has been handling the numbers and he is not here. We have separated out our estimates of our guidelines on prison impact, looking first at the impact as a function of congressional action, independent of any Commission action and, as you would expect, it is enormous for what they did with the special offender provisions and the drug act and what we could do is miniscule in comparison, but we have done that and we would continue to do that, but we are doing what you ask in terms of all of those data collection efforts.

CHAIRMAN WILKINS: Further questions?

COMMISSIONER BREYER: You answered my question, I thought. Did you and Commissioner Nagel disagree? Am I right that you both agreed that the choice is that existing practice are off the wall, that you prefer existing practice to off the wall, and you are afraid --

COMMISSIONER NAGEL: I wouldn't agree with that.

COMMISSIONER BREYER: -- but best of all would be to have a rational coherent reason for the number, which is where it departs from existing practice and explains why? Is that right?

COMMISSIONER NAGEL: No, but we can talk about it.

CHAIRMAN WILKINS: Questions?

COMMISSIONER MACKINNON: I just have one question. Is the basis for your support of existing practice based upon a relative fairness to the sentencing population or is it because of a fear of increasing the prison population?

MR. FEINBERG: I am more concerned about the latter, very frankly.

COMMISSIONER MACKINNON: Okay. That is all I want to know. You have some concern about the other?

MR. FEINBERG: I am not sure I understand the -- the

unfairness of the system?

COMMISSIONER MACKINNON: No, the way it has generally been functioning.

MR. FEINBERG: I think it has been unfair the way it has functioned, but --

COMMISSIONER MACKINNON: But most people think it is too light.

MR. FEINBERG: I am not sure -- what concerns me more about too light or too harsh is the same people, some getting too harsh and the others getting too light. That is really of more concern to me than the absolute question of harshness or lightness, disparity.

COMMISSIONER MACKINNON: Thank you.

MR. FEINBERG: Thank you very much, ladies and gentlemen.

COMMISSIONER NAGEL: Thank you.

Let me ask Judge Newman and Judge Tayler to come forward.

CHAIRMAN WILKINS: Judge Newman is a member of the United States Court of Appeals for the Second Circuit and Judge Tyler is a former Federal Judge and Deputy Attorney General of the Ford Administration, and is a partner in the

law firm of Patterson, Belknap, Webb & Tyler. We are delighted that the both of you gentlemen could join us today and we look forward to your testimony once again.

JUDGE NEWMAN: Thank you, Mr. Chairman. I appreciate the Commission affording us a renewed opportunity to express our views here.

I have prepared a written statement of testimony which I won't read but which I will give to the Commission, but I would like to touch on some of the topics.

I think in the final month that the Commission has, it ought to, if only for ten minutes, step back and consider its task in large. You have been at this now for many months and you have got 30 fearful days, if I may say, to finish your task, and I suspect there is a temptation to be so enmeshed in details and controversy that you might even lose sight of the overall task, and I want to just start with that.

You were charged with putting into practice a revolution in the administration of criminal justice in the Federal system. You cannot underestimate -- you cannot overstate, I should say, the significance of the change you have been asked to make, and you have been asked to make this change under a statute that gives you a variety of conflicting

signals, not surprising from a statute that emerged from over ten years of contentiousness in the Congress that itself reflects a variety of viewpoints.

So I don't quarrel that Congress gave you conflicting signals. I simply emphasize that as you approach your task of trying to figure out what final set of guidelines to send up in April.

They dolt you to carry out various sentencing purposes. They told you to consider many, many factors. They told you to individualize sentences. They told you to have fair sentences. They told you to have the top of the guideline no more than 25 percent of the bottom. There are so many signals, and it is not possible to do to the hilt everything they told you to do.

So you are inevitably going to have to fashion a product which accommodates to the extent possible the basic objectives they set before you. It is going to be the initial set of guidelines in April, not the last. It may seem like the last, because it is number three on your current agenda, but bear in mind it is the first set of guidelines, not the last.

And bear in mind as you send this up that you are

starting a new era of Federal sentencing in which there are great uncertainties. No matter what your guidelines say, whether it is this draft or the earlier one in September, or whatever you come up with in April, no matter what they say, we will not know until considerable time has been achieved under it, at least two major areas.

We will not know to what extent judges will sentence outside the guidelines and be affirmed on appeal. That may turn out to be one percent of the time, it may turn out to be 30 percent of the time. We just don't know.

The second thing we don't know is to what extent there will be sentence bargaining between prosecutor and defense counsel which your current guidelines permit. We don't know to what extent it will be tendered to a Distrift Judge and to what extent the judge will accept it. Again, it may be as little as one percent, it may be as high as 20, 30 or more.

Those two variables as to which I think it is impossible to predict seem to me to count in favor of what has been called both today and earlier a flexible approach and an evolutionary approach.

You have gone a long way down the road towards

discretion and I want to start with that topic because I want to urge you to go a bit further down that road. I realize there is a controversy over discretion, even a legal controversy, and I am not here to pronounce judgment on it, but only to state some of the considerations.

Your present version introduces discretion at at least six junctures in the process. You have discretion at base level computation, you have discretion at offense characteristics, you have discretion at Part Y adjustments, again at Part Z adjustments, again at post-offense conduct characteristics, and Part C of Chapter III, and finally at departures.

As to all of those stages, there are always going to be two choices. First, does the judge have any discretion of whether to make the adjustment, and, secondly, does the judge have circumscribed degrees of discretion. You have made different decisions as you have gone through each stage, and indeed not always the same decision within each stage.

I would urge you at the base level of decision-making to go with a single level, not to have a range, even though I am going to urge you to have broad discretion everywhere else, I want to start by expressing the view that you

should have a single level for the offense, because I think that is probably more consistent with the statutory mandate and in conjunction with broad discretion throughout the adjustments will prevent a more defensible rational coherent package of guidelines.

If you start with a base level and a precise number, then it seems to me for my taste that you would do well to have all other adjustments discretionary with the sentencing judge, both as to the decision of whether to make the adjustment and to what extent, within a range.

I realize that the Commission may well wish not to have the decision discretionary as to offense characteristics, at least not to all. You may want to vary on that. You may want to say there are certain offense characteristics, we want the judge to make an adjustment if ever that circumstance is present. I urge you to even resist that, but I recognize that there may be a strong consensus to have some offense characteristics mandatory, but if you make some of them mandatory, I urge you to express them always as a range so that the courts at least in the beginning of this process will not get bogged down in an endless series of fact determinations as to whether the adjustment should be two levels

or three levels. That is a needless hearing, it hardly matters, your ranges healthily overlap and so the time served could be the same either way for many of these, so I think you should always have ranges for all the adjustments.

Once you get past offense characteristics, I would urge you very strenuously to leave all the decisions as to whether to make the adjustment to the sentencing judge, at least for the first go-round of these guidelines. As we learn what judges are doing, as we learn whether they are sentencing above or below the guidelines, as we learn whether they are being affirmed or reversed, as we learn whether plea bargaining or sentence bargaining is doing far more to the system than anybody expected, then you can come back and say we notice certain areas where we think the discretion should be more circumscribed, or we even want to say you must make an adjustment for a certain fact up or down.

But I urge you not to get us into some of the situations you have now, for example, why 225 says that there shall be a six-level adjustment for permanent injury, a four-level adjustment for serious injury. You need only to look at the hundreds and thousands of Social Security disability cases to see how difficult it is to determine permanent injury.

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That is not something that you can simply decide in a five-minute sentencing hearing. And yet you have said that in every case where there is physical injury, there must be a determination of whether it is permanent or only serious, and two levels ride on the outcome. I would urge you to say as to that, as an example of the others, let the judge, when there is injury to person, increase within a range of two to six. And they will use their judgment, and sometimes it will be four, and sometimes it will be five, and sometimes it will be six. That little degree of disparity is hardly worth thousands and thousands of hearings on whether the injury is permanent or only serious.

When you get to the departures, I would suggest the decision should have no bounds at all. Departures are really a decision by the judge under the statute to depart from the guidelines themselves. So, I think you should neither tell the judge he must depart nor even tell him he should, nor tell him by how much.

If the judge feels that the sentence should be above or below the guidelines, under the statutory standard, then the judge should do that, and on appeal we will find

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out what is going to happen.

But I think, as you occasionally now say he should make a departure, occasionally you even say by how much, if you feel you want to say normally a departure in a certain area should be by so much, that might be useful. But I would not want to circumscribe that type of departure.

Let me move on to other topics.

Probation--you have very helpfully taken a significant step in preserving the probation option by making it available when the minimum range is no more than six months. That will help but it will still substantially cut back the use of probation as it now exists in federal practice.

I urge you to give serious consideration to increasing that threshold up to a year so that probation, a rigorous form of probation, can be used; and if under experience of the first year, you think it is being overused and you want to cut it back, there will be time to cut it back. But if you start off by cutting it back too far, an awful lot of people will go to jail under circumstances where it may be they ought not to go. And

if you are going to have that type of probation as an alternative to six-month or twelve-month sentencing, I urge you not to lock it in as you now have, with mandatory month-to-month comparisons which match community detention or home detention with length of service. A probationary sentence may well, as an alternative to six months or a year of jail, as an alternative may well include one month or two months or three months of halfway house confinement. But the fact that the sentence might have been nine months does not mean that the community detention necessarily must be nine months. That just may not be appropriate. And probation officers have a wealth of judgment to recommendation to sentencing judges as to what might be the appropriate length of time in a community treatment center, a halfway house, or home detention.

So, I would leave that flexible, but I would carry it up to one year. Some would even urge you to go up to 18 months. I think if you are now at six months and I can persuade you to go to a year, that would be a significant step.

On severity, which has been discussed--I

understand the point that you have been charged by statute to use your judgment as to what you think the severity level should be. I do not urge you to necessarily start every ascertainment of level with the time served. But I do ask you to do this: once you have determined the levels you are about to propose between now and April, I think it is fair to ask you in every case to compare your level with time served. Not necessarily as a point of departure, to say, well, this time served out of just three years and so we are going to do for a year. But whatever basis you come to it, if you can determine, as Commissioner Nagel said, if you can get the data on deterrence--I do not know where you will find it--but if you can get it, and dermine that for a certain offense in your judgment five years is the right time, before you publish five years at least look to see how does it compare with time served. For all the imperfections of the data on time served, it at least represents the net result of what over 600 sentencing judges have done and what a parole commission has done to adjust those sentences.

We are talking about time served, after all, not

sentences.

If you end up with a level significantly above average time served, then it seems to my you should at least ask yourselves have we got a good reason for being significantly above. And if you have not, you ought to cut back near to time served.

If you have an articulable, sound basis for going higher and you can defend it, that is your judgment. But I think you take on a lot of opposition if you take those levels too high above time served without a defensible justification.

I quickly turn to two other things.

My statement gives you several minor adjustments, problems that I see in the draft, and I am sure there are many others.

I want to urge you with your tables to consider compressing them into fewer steps. You can do that without any significant sacrifice to the objectives you want to achieve. Most of your dollar tables now are in about 10 or 12 steps. You could compress them to five and have each level, each bracket of dollars, include two levels. And you would have achieved the purpose of having those who

commit offense with relatively more money face relatively more time. But you would not have created quite the degree of complexity you have now with 12 levels.

And throughout your draft I would urge you to be careful about some of your provisions of, shall I say, less visibility that have within them a degree of rigidity, which once they become seen in practice I think are going to be a problem.

Let me give you one example. You have a provision that says that if a person violates probation or supervised release, the time to be served must be consecutive to the time then being served, even if the time then being served is for the same activity as the probation violation. In other words, a fellow is given a three-year suspended sentence. He was picked up on state charges, and he was given a year. Today--and I think Judge Wilkins can recall from his days on the District Court--if that person was brought in for probation violation, you might make the sentence concurrent. You might say, no, I am going to charge you an extra three months, six months. But it is unlikely, unless the conduct was quite outrageous, you would automatically impose the full three years

consecutively.

That is what these guidelines now require.

I simply urge you, whenever you have a provision here that requires that type of heavy severe punishment, you ask yourself, are we sure we want to be for that in April, at least of '87. Maybe April of '88. Maybe April of '89. But I urge you not to go for those rigid, automatic penalties until we have lived with these guidelines for a while and see what happens.

I do not want to intrude further on Judge Tyler's time.

I just emphasize, as I did at the outset, you are involved in an extraordinarily new, innovative, revolutionary process. The reason for beginning slowly is because there are so many unknowns in how it will work. And if we do not guess correctly how it will work--and I do not think we know how it is going to work for sure--we risk in numerous case serious injustice, either to the offender or to the community. And we ought not to take the risk of either to any extent more than we need to. By starting slowly, by having flexibility, by watching the system in operation and then making the adjustments, you can both

ensure that this venture gets a fair chance to start and that as it starts, it will be gradually improved into a workable, sensible system.

Thank you, Mr. Chairman.

CHAIRMAN WILKINS: Thank you, Judge.

Judge Tyler?

JUDGE TYLER: Mr. Chairman and members of the Commission, of course it is always very difficult to follow Judge Newman on any subject. Let me address, however--and in doing so, I am sure I will pick up on some of the things he said, but I think they are important to perhaps specify a little further. Before I do that, let me say that this draft is one which indicates that you have come a long, long way since last summer. I would even think that the Republic would not fall down if you did not change a word, jot, or tittle and sent this up on April 10; but I do think that within a period of 30 days with hard work, there are some things that can be done. And I even dare suggest that after your final report is sent up to the Congress, that there will be a chance to at least do smoothing and technical changes. I cannot imagine that

the Congress of the United States would turn those down.

I want to go back a bit in history because I understand that the Department of Justice this day, in fact, and in the past has argued against discretion, or certainly any more flexibility. I can understand that, and indeed I would not say that at some point in the future maybe discretion can be narrowed, for example, in certain offense and offender characteristics there will develop a consensus which will allow discretion to be narrowed and almost certainly as experience comes in.

But in 1975--and I am aware that my old colleague Ron Gainer is here, and I do not want to get in a recollection argument with him, but certainly I felt, and others who discussed this whole concept--and it was only a concept then--recognize that this would be an evolving procedure if we ever did have guidelines and that at the start we would have to be cautious, if only as Judge Newman points out, to make sure that we do not do some offender a monumental unfairness and we do not do the community an unfairness. To which I would add that the district judges are going to have difficulty. When you come to something as comparatively revolutionary as this draft,

it is not going to be easy. And for those reasons, I would support the flexibility arguments in the presentation of Judge Newman without exception.

Let me add to that, if a casual reader, expert or non-expert in whatever has gone on in sentencing practice in the past, would have a little difficulty. If you look at the report as a whole, it is very difficult, particularly when you read chapter three, you look at parts X, Y and Z, and you deal with departures, there is a clearcut inconsistency as between use of ranges and being specific.

I mention that because I happen to agree with the approach advocated by Judge Newman that you start out with a base offense not having ranges. The reason for that is very simple. You are asked to carry many pails of water on two shoulders alone. And you have the 25 percent leeway. On the other hand, you are being asked to be fair. You are asked to do individual sentencing. And the discretion should come other than in the basic offense chapter.

But when you are doing the work, as Judge Newman

advocates, if you are going to allow discretion, fetter it with ranges. In doing that, it seemed to me that you will clarify across the board everything including chapter three, parts X, Y and Z, and so on. If you look at the language, there is a great deal of latent ambiguity which, I understand, can be cleared up and will be. But the main point, of course, is, for those such as Stephen Trott and others who argue that your present draft is too flexible, I would respectfully disagree flatly. And I would even urge that, from the point of view of the Department of Justice it might not be such a good idea in early going, particularly where, as I said earlier, there is a relatively good chance in a year or two or three or four years, where the Commission will have a great deal of data, including appellate decisions, a consensus which will indeed emerge because even if you did not have ranges, you did not have specified points, you have no idea what this document would do over a period of years to bring judges into line. Do not forget that in the sixties merely the publication of the Parole Commission guidelines, which are very general and very broad, the data which we sentencing judges got for the first time in our courts as to what

other judges were doing, did an awful lot educate us and to bring us away from certain rough disparities. Even then, you have done a job which goes further even without assigning points or ranges. You have made all the judges think about things that they ought to think about. This is a noble task as far as that even.

So, all the more reason I would urge a sense of keeping flexibility in the joints. And historically, I would argue that people have always anticipated there would be flexibility and discretion. There is really no way to go, and to start out, as apparently the Department of Justice argues, without discretion might not be very helpful to our 94 United States Attorneys and their assistants across the land. And it might not be very helpful to the Criminal Division when you get into some of the binds that you can get with the best of drafting.

Let me turn to a subject which I know is referred to in Judge Newman's written submission, which, of course, he allowed me to read. He did not have time to mention it. It is in the tax offenses section. There is a very clear ambiguity to anybody who has been a prosecutor or a defense lawyer or a judge in tax cases. As you will remember,

there you have a very definitive keying of what happens in the sentencing process to stated deficiencies. You have a table of deficiencies. The problem is that there are two kinds of deficiencies in the world of the Tax Division at the Department of Justice and the IRS. There are criminal deficiencies, and there are civil deficiencies. And they are wildly different, frequently.

This can be cured, I think, very simply by simply saying which type of deficiency do you mean. Another way of illustrating this very simple point, but it is very important for any observer who has been through this as a lawyer or judge, is that many a criminal tax case recites deficiencies which are admittedly different than those final deficiencies which the taxpayer will get later on when he faces his civil liabilities to the Interanl Revenue Service. And they can differ wildly.

I would ask you simply to think about that because it is easy to cure, even on a definition basis.

Let me go into the current numbers under the heading of Robbery.

As this Commission knows, certainly as well if not better than I do, once again today in our federal prisons

there are somewhere between 50 and 60 percent of our offenders who are there because of drug offenses or robbery, particularly bank robbery offense. You know that. These numbers seems to me to be a little high, particularly when you look at the section and the comment on robbery. You will find that you key this to people who commit robberies with a firearm or a dangerous instrumentality. This makes me wonder about two problems. A harsh sentence for many so-called bank robbers, which you might not really intend; and, more than that, an overfilling of our prison population, which you do not intend.

Let me illustrate what I mean. In the big city of New York, in my 13 years on the bench we had many bank robbers who were alcoholics who would in with a gun made out of wood, hand a note to one of our branch banks, and under the policy then and now they would be given money. They were not really felonious types of the worst sort at all. Correspondingly, in the Eastern District of New York, which does not have all the vertical congestion that the Borough of Manhattan does, there are one- and two-story taxpayer banks throughout Long Island, Nassau and Suffolk Counties, many of which are isolated, which today and in the past

have been a target for juveniles who are on a folly, or young adults, to use that phrase from the current Federal Code. No previous offenses, not nice boys, I will agree, but would be tempted to go in and try and hold up a bank. Even for somebody other than juveniles, treating these men as first offenders, some of these numbers are going to get badly out of whack right at the start without any real correctional need.

I focus on that because it is so obvious and it also gets into an area where we know the Bureau of Prisons population will probably continue to be swollen for bank robbers, in any event.

Let me turn to another specific. Again Judge Newman mentioned this, but I want to key into what he said about section A511(a)(2), where you seem to mandate that 30 days be spent at home or in a halfway house or somewhere else. With all due respect, ladies and gentlemen, these are things that probation officers and judges know an awful lot about than a commission knows about or should know about.

There are so many awkwardnesses in this as a mandatory thing that I really urge you to soften that.

I happen also to agree with Judge Newman, by the way, that some rigidity is still there if you require that you cannot give probation to somebody other than a person who would get six months. That is going to create a great deal of fussing and difficulty and criticism from most of the sentencing judges when they understand this, if they do not already. And it is not really very helpful to start with because it is not really very necessary.

To go back to A511(a)(2), there are all kinds--one of our great virtues is one of our weaknesses in this country--is there is incredible diversity among our 94 sentencing courts. That means there is incredible differences, diversity as to the facilities available to a sentencing judge and his probation officer.

I do not care how expert you are now in that, you can never keep up with that. And to say that you have to go 30 days here or 30 days there, it just does not make sense from any sentencing perspective or objective.

Finally, let me say that this idea of sending somebody back to his home, the regrettable fact is, as you surely must know, there are a lot of homes that no responsible sentencing judge wants to send an offender back

to. And that just is not the grist for your mill.

Finally, let me suggest that--and I urge as others have, this afternoon and, I assume, this morning have done--I do hope you send this draft, changed as I am sure, and hope, it will be, up on the 13th of April. I do hope you feel free to make what I call technical changes in language. I cannot imagine the Congress being upset or indeed doing anything but welcoming that right up into the summer. And surely the Congress knows that perfection is not to be delivered at their door in April or even maybe next year. And that is very important. I hope the critics of this Commission understand that. And I hope you understand that because things can change.

You know, we are regarded all over the western world as being the harshest sentencers that exist in the western world. You may not agree with that. I may not agree with that. But that is the universal perception. England, Sweden, Australia, Canada. So, mark you, you are not to be criticized if you look to what has happened in the past.

Do not be bound be it, you do not have to be. I am sorry, Commissioner Nagel, but I really do not think

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there is that much difference between you and Mr. Feinberg. I am going to have to speak to Mr. Feinberg. And when he quotes me all the time, quote me when I am not here. You have been very polite in that capacity.

Thank you.

CHAIRMAN WILKINS: Thank you very much, Judge Tyler.

Questions?

COMMISSIONER ROBINSON: Yes, just a few.

Both of you touched on issues that are obviously--

CHAIRMAN WILKINS: I am sorry, there seems to be something wrong with your microphone, Commissioner.

That's better.

COMMISSIONER ROBINSON: Both of you have touched on issues that were obviously of some concern to me, whether what we want to do adheres to the Sentencing Reform Act, to the rationality of using current sentencing averages, to the use of code sections versus conceptual bases for the guidelines. And those issues are issues that we have either talked about or have been raised here today.

So, let me just pass all those for a second.

While not agreeing with what you said, let me just put it in sort of a hypothetical view. Let's assume that all that you say is true about these guidelines being legal and rational, and so on. You both seem to admit that at some later time, whether it is three, four, five years, it is entirely appropriate to have more specificity after we have had some history with the courts applying guidelines. That is the ultimate goal, to take these ranges and reduce them over time, as we become more sure of ourselves.

So, in a sense, those of us who disagree with your views on providing discretion now, in a sense we are really just arguing about this transition stage, in a sense: what kind of a system are we going to have during the start-up five years? And I guess the question I have is, if there is already provided in the statute a means, an escape hatch, if you will, that is particularly useful during the start-up period, that is the departure rule, if judges are never going to be forced to give a sentence that they think is not just during that five-year period, why is it not adequate to simply say, well, we do not need all these ranges and everything else? We already have a departure principle that judges can use. What's more is,

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where the advantage, I suppose--and this is, I think, part of the legislative scheme--by using the departure principle as the escape valve rather than all the ranges, we have appellate review. And that is part of the legislative design.

That is the feedback system. That is the way that we are going to get where we want to go five years from now quicker, by having the appellate courts in the beginning, where there is the greatest amount of uncertainty about the guidelines, have them more involved because they are looking at every departure.

Why isn't that adequate? Why do we need that and the ranges?

JUDGE TYLER: We will go first with Judge Newman, or I will go first.

Two points: first of all, as a practical matter, even though there is the departure principle, keep in mind the judges do not want to solve every sentencing problem by simply saying, well, I'll depart from the guidelines. Whatever judges may say for the record, I maintain they will welcome some governance by guidelines. So I do not think that you can mean--I must misunderstand you. You

do not mean to say that you should have no discretion otherwise, because a judge can just depart from the guidelines. I cannot believe you mean that.

COMMISSIONER ROBINSON: I think the system has built into it discretion without the range. It is the judge, after all, who ultimately decides what facts the guidelines have to be based on. There is discretion. I guess my question is, what is the compelling need for the additional discretion that is provided by the ranges that we do not already have that will avoid the injustices that you use as your rationale for having the ranges?

I mean, if your response is, oh, the judges are going to feel so intimidated by the guidelines, even though there is departure available, they are going to tend to follow them anyway.

JUDGE TYLER: To answer you, it seems to me that what you are doing with ranges, you are still fettering discretion, as compared to what is going on now.

Second of all, you are dealing with concepts which do not on any data basis I know leave themselves to sensible, objective quantification.

Third of all, there are degrees of various

considerations which you cannot put in even the broad and prolix English language in a way that quantifies what should be done.

I still do not understand what you mean by throwing in the point about departure, because I am sure that people are not going to want to simply say, well, I am fed up with the guidelines, or I don't agree with them and therefore I am just going to depart. It may well be that you are not saying that, but that is what I heard you say.

COMMISSIONER ROBINSON: Let's assume you had a place where you want to put a range in. And part of it is because, as you say correctly, we cannot quite come up with the criteria to know with any real precision where a judge should fall and how much weight he should get. And if we agree that eventually we can come up with some specificity, the real disagreement then on this range point is, what is the fastest and most efficient way of getting to the point of having that criteria. One could make the argument that the best way to sort out those criteria problems is by having judges, when they think the guidelines, you know, will generate inappropriate results, have them take a crack

at specifying the criteria and have the Court of Appeals mechanism help us flesh out what the criteria is. That seems to be what the legislative plan is, that having the Court of Appeals forcing that judge to state his reasons and then having the Court of Appeals review it and comment on it, that that is the mechanism to get us as quickly as we can with criteria that we can depend on five years from now.

Why is not that an adequate system?

JUDGE TYLER: Judge Newman will take over.

JUDGE NEWMAN: Let me try.

It is possible that the prediction that underlies your question is correct, that if you are very precise in all your factors, you will force judges to depart and to articulate their departure, and you will then have appellate courts recognizing the legitimacy of those departures and the type of evolution of discretion that you want may happen. I am not saying that is impossible. What I am saying is, as you and I sit here today, neither of us knows whether that will happen.

My suspicion, my prediction is quite different from yours. My prediction is that judges, initially at

least, will be very reluctant to depart. I have already discussed, ever since the guidelines first appeared with judges and the whole issue of appellate review has come up, I cannot begin to tell you how often a judge has said to me, a district judge: well, at least if I go within the guidelines, there is no appeal.

Now, you may say: well, that's an off thing for a person with life tenure to say; why is he so worried about an appeal? I am simply reporting to you reality. Judges tend to do the thing that is not appealable. Now, maybe in the world of guidelines a new pattern will emerge and they will depart. But we do not know it yet. And if they depart, we do not know what the appellate courts will say. And this I can give you a prediction; again, I cannot be certain. But if the first 50 cases of departures that go to the appellate court result in 80 percent reversals, the departure rate will plummet.

Now, I do not know what the reversal rate will be any more than I know what the departure rate will be. But the reason we ought not to go your route and be rigid now and count on departures and appellate review is because if I am right and you are wrong, lots of people

will do lots of time that you, as you sit here now, are predicting the judge would have departed and not given him that time. And that is a risk not worth taking with anybody's liberty. It is too great a risk based on a prediction of how district courts and appellate courts will operate under a new system that none of them has ever lived in in their lives. That is my answer.

COMMISSIONER ROBINSON: Thank you.

JUDGE TYLER: I think, Professor Robinson, really I would be willing to bet that most judges are really going to try very hard, once they understand that they are going to be appeals not only within but--I mean, not only on a departure but within the guidelines, they are going to welcome and try to adhere as best they can. I would think that, as a matter of prudence and pragmatism, it would be easier there even to deal with ranges, particularly since it is impossible to quantify otherwise relevant criteria which should be thought about.

Of course, it is very easy for me to say, having been gone 12 years, that I never would worry about appeal at all. Of course, I do not think I would be very truthworthy on that.

I think the point is they do worry. They do not want to do something that is wrong. They do not want to do something that is monstrously unfair. And they do not want to do something that offends the community or hurts the community which surrounds the sentencing process. Those are all things which seem to me, as has been suggested, which will lead them to want to work with the guidelines and want to have them evolve. And then, as you say, the process will help.

Can I give you a little example?

This is not a prediction. This is the past. It has been urged upon district judges under existing law to explain the reasons for their sentences. The sentencing policies of the Second Circuit recommend that. The Judicial Center recommends it. Judges throughout the country generally refrain from saying very much about the reasons for sentencing. When you ask them why, they will say: no judge ever got reversed for the unarticulated reasons for his sentence.

CHAIRMAN WILKINS: Thank you very much.

COMMISSIONER GAINER: Judge Tyler, Judge Newman, you have indicated today that this Commission is charged

with nothing less than implementing a revolution. There was a revolution. And you two were principal players in that revolution. If not a Thomas Jefferson and a Thomas Paine, you were at least major debaters against the Torries; there is no doubt about that. While the battle cry in the former revolution may have been "no taxation without representation," that in this instance was, "no unbridled discretion." That revolution was successful. And yet we have today here appearing before us two of the participants in that revolution who are doing nothing less than urging us as a Commission to adopt the views of George III.

I cannot tell quite whether this is as a result of perceived political expediency, as Mr. Feinberg professes has motivated him, or whether you have doubts as to the validity or the basis for that original revolution. Whichever it is, you are in essence asking the Commission today to adopt the Articles of Confederation and not to consider the Constitution.

And what do we learn from the Articles of Confederation other than, after waiting ten years, that they just do not work.

In this far less important and far more modest sort of revolution, there is an additional factor. The Declaration of Independence for this group says, "Thou shalt specify no more than 25 percent permissible discretion." When Mr. Trott was here today, he did have in mind very clearly the concerns of what would happen within the Criminal Division and the concerns of what would happen within the offices of the U.S. Attorneys. With this provision providing the 25 percent limitation, there is very great concern that, if exceeded cumulatively, there would be an overturning en masse of every single sentence in case that has come up.

It was a very great concern.

JUDGE TYLER: I am sorry. Your voice dropped off there. There would be what?

COMMISSIONER GAINER: The concern is, Judge Tyler, the concern motivating the department at this juncture is that, if guidelines are moved toward highly discretionary guidelines, that permit variances along the way before getting to the end of the guideline process, variances which cumulatively exceed the 25 percent limit, there is at the very least a serious risk that this will

be found to violate the mandate of the statute. If that is so, we are facing the prospect of wholesale overturning of sentences.

This is a very serious concern. It, along with the concerns--

JUDGE TYLER: When you say a wholesale overturning, what do you mean by that? In the appellate courts?

COMMISSIONER GAINER: What I mean, Judge Tyler, is there is a real concern that this would not be lawful under the statute that this Commission is charged with operating under.

JUDGE TYLER: Oh, I see what you mean. I beg your pardon.

COMMISSIONER GAINER: And we acknowledge, certainly, one can debate whether 25 percent variation means a 25 percent variation at the end or a 25 percent variation in the total discretion a judge may exercise before getting up to the point of imposing sentence. As long as there is that risk, the Commission will have to be very, very careful in structuring its guidelines.

(begin tape 11)

That concern, plus the concerns that led to this revolution I would think would suggest taking what reasonable means would be possible to restrain and channel discretion so that it would not be the exercise of pure discretion but making findings of fact along the way to determine where the facts of this particular case fit into the factual patterns described by the Commission in attaching numbers and weights to those factors. It's that which was the motivation.

MR. TYLER: Well, let me start. First of all, it seems to me that historically since the middle seventies, no one has ever assumed, and there is nothing in the statute that I read to say this, that there is an expectation that there will be complete uniformity of sentencing in the United States system. The goal, as I've always understood it, was to eradicate gross disparities and to get sentencing judges at least to focus on the same considerations, and to try their best to have some uniformity simply from that process. Second of all, as been pointed out to you today and I'm sure on other days, if you look at the statute, you're asked to do a number of things which are really not in harmony. And it seems to me that if you think about it, you've already achieved a great deal in that area. First of all, you've

heard this afternoon that not only Judge Newman and myself but others think that under basic fence approach, there should not be any ranges at all. And that one of the reasons I think that people who say that say that is that they recognize that you've got to carry water to recognize that Congress has said you've got to live by the twenty-five percent rule. But Congress has also said that you've got to do a whole host of other things, all of which are really requirements of exercise of discretion; fairness, individualized sentencing, et cetera, et cetera.

It seems to me that your current draft is a long step forward to approaching and achieving those, in some ways, irreconcilable or conflicting objectives.

Third of all, we're not arguing for no or unfettered, I should say we're not arguing for unfettered discretion. Quite the contrary. Fettered discretion is embraced in ranges. So that I think that all the argument seems to be between us in this colloquy is perhaps degree and not really much more than degree.

MR. NEWMAN: Well, you raise first a policy question and then a legal question. On the policy question, those of us who supported guidelines did anticipate some

narrowing of discretion but by no means the elimination of it. Indeed, you cannot eliminate discretion from the administration of criminal justice. If you were to end it in the sentencing system, it would reemerge in the prosecution system. It's like quick-silver, you push it one place, it crops up somewhere else.

The statute and your current draft, however it's adjusted, goes a long way towards structuring discretion. The elimination of parole is a major narrowing of discretion. Your guidelines do a lot to structure discretion. I think the emphasis from the beginning, if you go back to Marvin Frankle's book, was never to eliminate discretion, it was to structure it.

In urging, as a policy matter somewhat more discretion than you have now, I'm not suggesting you go back to the beginning, I'm not suggesting you reinstitute parole, I'm not suggesting you say to a judge the maximum for armed bank robbery is twenty-five so just pick anything from zero to twenty-five. That's the present system. I like the idea that you would pick a base level for bank robbery, at whatever level you think is appropriate. That's an enormous structuring of discretion right there. If you pick a base

level for tax evasion, I'm anxious to know what it is. Right now, half the federal judges in America lock up first offender tax evaders and half don't. I want to know what you think. And if were still a sentencing judge, I would think long and hard about departing from your sense of whether a tax evader ought to go to jail because Congress told you people to give us the guidance whether he should go to jail as a first offender. So once you pick that base level, you structure discretion. By giving the judges the discretion whether to adjust and within ranges how much to adjust, you simply carry out all those other objectives of the statute which Judge Tyler mentioned, individualization, fairness, justice, there are lots of objective set forth in this statute, and they are all very important. So on the policy issue I come down exactly as Judge Tyler. I think it's a matter of degree, but it is surely not undoing the statute or going back on the effort that led to this.

Now on the legal question, I'm not here to give an advisory opinion, but--

COMMISSIONER GAINER: You may consider this a controversy if not a case.

MR. NEWMAN: It surely is a controversy. I

recognize that there will be litigation over the validity of your product. Every defense lawyer in America is going to challenge the sentence on any ground available. That ought not to deter you from coming up with a sensible, coherent, and fair product. They're going to challenge the Constitutionality of you as a Commission. That does mean that you should just fold up your tent and quit and say there's no sense in putting out a product.

Now, on a specific one, and I don't want to dick it, the Statute says twenty-five percent ranges. You've given twenty-five percent ranges. The question will be raised: have you violated either the letter or the spirit of that provision by giving discretion to the judge as to how the judge determines which twenty-five percent bracket to fall into. I will make you this prediction right now that when that challenge is made, there will appear in my court a brief signed by Mr. Trott which will make a brilliant defence of the validity of the sentence that the district judge has posed. If it was so, that no plausible argument could be made for discretion on these ranges, I would be here urging you to do it. I don't want to see a futile task. I don't want see your whole product shot down over something that's

obviously illegal. But it is so obvious there is at least a plausible, strong, coherent argument to be made that ranges and discretion are quite compatible with the overall statutory scheme. That you ought not to shrink from doing it, you ought not to risk injustice just because there's a possibility of a legal challenge. You've got a strong argument on your side. Your department will make it brilliantly when the time comes, and then we'll have to see what happens.

COMMISSIONER GAINER: Judge, on the point of law, why in the world would you encourage us to run the serious risk of illegality whether or not you think a brilliant brief would be filed by the Department of Justice? It seems an unnecessary exercise when fairness can be achieved, when flexibility can be achieved, other than through raw discretion. On the policy point--

MR. NEWMAN: But the only other way is to departure.

COMMISSIONER GAINER: No, that is not the only other way. There are many other ways. There are innumerable other ways other than simply saying, Judge, pick some figure between one and ten. And when you pick that figure, go to the next page, then pick a figure between twenty and thirty. If you are going to take an approach like that--

MR. NEWMAN: Well, now, wait a minute--

COMMISSIONER GAINER: We have over 1000 percent, and it doesn't seem to me to be a necessary risk to take. When you take a situation establishing a base value for an offence, there is a perfectly legitimate argument that can be made that you should take a base value for Judge Tyler's bank robber who comes in with a fake pistol. But is there not also an argument that can be made that you would establish a value for bank robbery that ranges between X and Y depending or not on whether or not a weapon was used and many persons were in danger and a couple of other common factors.

MR. NEWMAN: Well look, let me deal with it this way, cause I know the time is late. I'm not suggesting that for every factor you have ten level variations. I haven't suggested that. Where you've given variations, most of them are quite narrow, where you've already decided to go for variations. One to three, occasionally one to six. If you want to cut it down to one to four, I'm not here to quibble over whether it should be three or four as a range. I'm not suggesting ten. I'm not suggesting a series of tens so that the judge can go from zero to forty-three. That would be absurd.

What I am suggesting is, as I indicated, that instead of saying he should hold a hearing to decide whether the bodily injury was permanent or serious, so the level can go from four to six and add another, what, three months. Tell him that he can go between four and six for injury. And he hears a little testimony about the injury, he says I think that's a six injury, the other judge says I think that's a five injury. But they don't have to make precise findings subject to review on permanency, seriousness, those are the things.

Now you said why risk illegality. I really don't believe that doing that kind of modest use of ranges takes on any significant risk of illegality. They're already going to be challenges to your product what ever you do. But to have that modest degree of discretion I don't think adds to the risk of illegality. But what it does do is avoid serious injustice because, go back to the exchange Professor Robinson and I had. If the judges do not depart to the extent he apparently believes they will, and if when they do depart they get regularly reversed, which will inhibit departure, you are then going to see some people sentenced within a guideline to three years who should have gotten probation,

and to fifteen who should have gotten four years. And there will be no parole, the only safety valve with be the petition of the Bureau of Prisons which will have to be used sparingly. And that's the greater risk. With the liberty of the people who may be misused as we start this experiment.

COMMISSIONER GAINER: I may have misinterpreted your earlier statement. It may be cured by my reading of your written one. Am I to understand now that your complaint was not about the necessity of compelling a judge to choose between bodily injury and serious bodily injury with the consequence of your recommending that he be given a range without that guidance, but that you would, in fact, if not favor, accept the guidance of points within a range with decriptors set forth by the Commission. In short, do you accept the concept of describing what would lead to level six, what would lead to level five and level four, allowing the judges to interpolate if something falls in between. Recognizing that no litigator is going to litigate to the death something that is going to result in three months up or down. Prosecution certainly is not. It will give up on the point and say that if the judge and the defense counsel think it's bodily injury instead of serious bodily injury, that is

not going to encourage a great deal of litigation.

MR. NEWMAN: Oh, well, I've just got to disagree with that. Now, I really just find it hard to even contemplate the thought that people won't litigate three month differences in their sentence.

COMMISSIONER GAINER: In that case--

MR. NEWMAN: I'm not talking about defense lawyers who make enormous fees representing a well-heeled insider trader. I'm talking about the people who pass through the criminal courts of this country. First, they are mostly represented by public defender organizations who litigate to the hilt. They're on salary and they might as well litigate to the hilt, and they do a wonderful job. I have no quarrel.

Secondly, after the case is over, these people go to prison where they have very little to do except make legal challenges, and if you think that a three month difference in a mans jail time isn't going to be litigated, I just want to disagree.

COMMISSIONER GAINER: My point was they have to have someone to litigate against, Judge Newman.

MR. NEWMAN: You mean the government is going to give up every time there's a 2250 filed?

COMMISSIONER GAINER: Yes.

MR. NEWMAN: That say's I should get three months less. And they'll nickel and dime you all the down, three months here, three months here, three months here. Well, that's a litigating posture i haven't yet seen from the Department of Justice, I must say.

COMMISSIONER GAINER: You haven't seen the guidelines to be implemented, Judge Newman.

MR. NEWMAN: And I don't mean this Department of Justice, I mean the one I worked for. I mean the Department of Justice institution.

COMMISSIONER GAINER: There's no doubt about the fact that there is going to be a great opportunity for litigation, but U.S. attorneys will be encouraged to minimize it to the extent possible. And they are not going to be encourage to litigate to the death. Those instances in which there would be minor differences of fact that would lead to minor differences in sentencing and would not warrant taking judicial time with extensive debate or extensive hearings. The whole concern that we have, however, is mitigated, or is eliminated, in fact, if ranges can be applied that would have specific factual descriptions indicating at what level

various facts would trigger a particular sentence. If that was what you were suggesting, with the opportunity for interpolation, there would be no difference.

MR. NEWMAN: Let me be clear. What I oppose is the present version, and to use the same example that says, if the injury is serious, you get four, if it's permanent, you must get six. That obliges the judge to make a finding. Is it serious or permanent? I would have no quarrel with an adjustment that said: for personal injury, you may adjust between, let's say, two and six. And some commentary that say's: normally, if the injury appears likely to be long lasting, the judge should consider and normally apply the top of the range. If it appears minor, he should start at the bottom of the range and proportionately within. Whatever prose you want to advise the judge on that, I have no problem with. But right now you have said four levels for serious, six levels for permanent. And I think you've converted the criminal justice system into the Social Security Disability system, as far as fact finding. And that would just be incredible. It's that type of thing. I have no problem with guidance, no problem with commentary that gives sensible guidance to the judge how to use discretion in that range.

And then, after the first year, if you don't like the product, then begin to find out what happens as you introduce more specificity.

COMMISSIONER GAINER: I see this now as more a difference of degree rather than a difference of fundamentals.

CHAIRMAN WILKINS: Judge MacKinnon, do you have a question?

COMMISSIONER MACKINNON: Yes. There's been a lot of talk about departure and how much you can rely on it. Mr. Feinberg want on at great length, and he had it pretty well defined, but he left out one thing. And everybody's left out one thing. There isn't anything in here, or has anybody suggested, as to the basis as to when to depart.

MR. NEWMAN: Yes, I think you have covered it.

COMMISSIONER MACKINNON: Well, you tell me where it's covered.

MR. NEWMAN: I think you've covered it very well. On page 150, you started with the statutory standard and you've added some guidance. Perhaps there's room even for more, but you said: "A sentencing judge may depart form the guidelines when an aggravating or mitigating factor is present to an extreme degree or under extraordinary circumstan-

ces supporting a reasonable conclusion that a factor substantially similar to that confronting the sentencing judge was not likely considered in the applicable guidelines." I think that is very helpful guidance.

COMMISSIONER MACKINNON: Very helpful, but do you think it's sufficient and adequate? Don't you think that a person under that basis could depart regularly in certain instances?

MR. NEWMAN: Judge, now you're asking me to look into my crystal ball.

COMMISSIONER MACKINNON: But that's a critical point.

MR. NEWMAN: It is.

COMMISSIONER MACKINNON: Yes.

MR. NEWMAN: And my whole point is I don't know the answer to that question. If you're simply asking me could a judge, will some judge read that generously, yes.

COMMISSIONER MACKINNON: Well, and will he read the same circumstances many times to qualify it?

MR. NEWMAN: A judge will.

COMMISSIONER MACKINNON: Sure.

MR. NEWMAN: We've got, what is it, six-, seven-hundred district judges.

COMMISSIONER MACKINNON: That's why I say that it doesn't give an adequate standard.

MR. NEWMAN: Well, if there is a way of giving even more guidance as to what the Commission has in mind as to when departures are appropriate, I'd welcome it. I think you will have difficulty drafting much more than this. But the real point is that even though one judge somewhere may depart regularly, and another judge somewhere will depart never, what neither of us knows is what will the general majority of those six-, seven-hundred sentencers do. And we need to know that before we put in too much rigidity.

COMMISSIONER MACKINNON: Well, in my view, we have to get to the unusual circumstance. The one that isn't likely to appear frequently and put it in some basis of that character, because every judge in the imagination will find a number of things that they can rely on regularly.

MR. NEWMAN: Well, I would urge you to go slowly in trying to anticipate all of the unusual circumstances. The whole point--

COMMISSIONER MACKINNON: I'm not trying to anticipate them. I'm just trying to characterize them.

MR. NEWMAN: Well, the statute starts with the

characterization, and your commentary begins to characterize it a little more.

COMMISSIONER MACKINNON: Yes.

MR. NEWMAN: And maybe you can say a little more about that. I would hope whatever you say about it would be of an encouraging nature to a sentencing judge.

COMMISSIONER MACKINNON: Now the next thing is about how many time are you going to have these appeals. Now I don't know how your court is, but when we handle criminal appeals here, every case that was tried downstairs was appealed. And the lawyer was paid and they all came up. Now isn't that the way yours operate?

MR. NEWMAN: Precisely.

COMMISSIONER MACKINNON: Well if you get an appeal, don't you think they're going to add one on the sentence?

MR. NEWMAN: Yes.

COMMISSIONER MACKINNON: Well then every case is going to be appealed.

MR. NEWMAN: Well, let me just emphasize that the departure issue is not the only precipitator of the appeal.

COMMISSIONER MACKINNON: Oh, I know.

MR. NEWMAN: Indeed, I think those district judges

who say: well if I sentence outside the guidelines, I'll be appealed, are missing the point that if they sentence inside the guidelines, they will be appealed on the ground of misapplication.

COMMISSIONER MACKINNON: Right.

MR. NEWMAN: Indeed, my prediction, and I don't say I know because these are just my predictions. My guess is that in the first year, the reversal rate of sentence within the guidelines will be a little higher that outside because the opportunity of a misapplication of a highly complex 200 page document. The opportunity for error there is greater than for simply abusing your discretion under the statutory standard.

COMMISSIONER MACKINNON: That's the end of my contribution.

CHAIRMAN WILKINS: Mr. Breyer.

COMMISSIONER BREYER: We know this judge who keeps departing purposely will be in trouble in the first circuit, the second circuit, and the D.C. circuit, we think. If I can put Judge Newman on the spot a little bit. Do you want to say anything? My uncle, who I was very fond of because he was from Minnesota, would say he liked corn on the cob very

much, indeed, but not enough to eat. So, my question is: you are a very strong critic of the September draft, and now having read through that September draft and read again through this draft, what do you think overall?

MR. NEWMAN: Clearly, it's a major improvement. It would have been very difficult for me to support the September draft. I hope I will not have to decide, up or down, whether to support or oppose this draft, because I hope your April version will make enough nice adjustments so that there will be no question I will be able to support it.

I suppose, are you asking me if I only had this one, what would I do? I would probably support it because I think it is worth finding out what's going to happen in a world of guideline sentencing, than seeing the system shelved and never knowing. But I really would rather work towards modest improvements so that I can support enthusiastically the April version as I expect to do.

CHAIRMAN WILKINS: Gentlemen, thank you very much. We are indeed indebted to both of you. We've called upon you in New York, we've corresponded for your advise and counsel over the last year and you've always responded. We appreciate your participation in this hearing and we simply thank you

very much.

MR. NEWMAN: Thank you, Mr. Chairman.

CHAIRMAN WILKINS: All right, in keeping with our policy, is anyone in attendance who wishes to address the Commission. If so, please come forward. No one seems to take me up on that so we'll stand in recess until 10:00 in the morning.

(Whereupon, at 6:15 p.m., the proceedings adjourned to reconvene at 10:00 a.m., March 12, 1987.)