UNITED STATES SENTENCING COMMISSION

TRANSCRIPT

PUBLIC HEARING

MARCH 12, 1987

TRANSCRIPT OF PROCEEDINGS

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UNITED STATES SENTENCING COMMISSION

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Public Hearing

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Thursday, March 12, 1987

10:00 a.m.

Ceremonial Courtroom

U.S. Courthouse

Washington, D. C.

MILLER REPORTING CO., INC.
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C O N T E N T S

P R O C E E D I N G S

10:03 a.m.

CHAIRMAN WILKINS: I call this public hearing to order. I want to welcome everyone here on this our second day in a series of public hearings that we have been holding, concentrating yesterday and today on the January publication of proposed sentencing guidelines.

We are delighted to have with us as our first witness Professor Stephen J. Schulhofer. Professor Schulhofer is a member of the faculty at the University of Chicago Law School. We are delighted to have you with us.

MR. SCHULHOFER: Thank you very much, Mr. Chairman. I appreciate having the opportunity to comment on these guidelines. The revised draft is a very substantial improvement over the September draft. I think over all the new structure is quite workable.

The details still need a great deal of attention. I find many problems of inconsistency, problems of poor drafting permeating sections of the new guidelines. There also appear to be a good number of substantive judgments that haven't yet been given adequate thought. Rather than trying to run down isolated details, I want to focus on a few of the

broader policy issues that I think have some general significance.

First of all is the question of how much discretion should be left to the sentencing judge. The September draft was much too rigid, and I think there is a danger that the present draft may go too far in the opposite direction. This is a very important issue because once the guidelines go into effect, parole release discretion will no longer be available to mitigate the effects of aberrant decisions by sentencing judges. So discretion under the guidelines, even though it appears to be narrower than discretion under current law, could still prove to generate even greater disparities.

Now, on the other hand, I don't recommend returning to the inflexibility of the September draft. The problem here is one of trying to see how to strike the appropriate balance. One of the areas that is appropriate for some find tuning is the statement of base offense levels as ranges. That leads to wide variations in the authorized sentence.

Commissioner Robinson has raised the question in his dissent whether the existence of those wide spreads violates Section 994(b)(2) of the statute which imposes a 25 percent limitation on the authorized variation. My view is

that some variation is appropriate, and if there is doubt about its propriety under the statute, the appropriate course would be for the Commission to seek a statutory amendment that would confirm that the judge can select among several offense levels.

Taking the statute as it is without any amendment, it can be interpreted to permit variations exceeding 25 percent, but only if three conditions are satisfied. First of all, the Commission must be able to show that present knowledge is inadequate to support a narrower category. Secondly, the range that the Commission does authorize has to be as narrow as available knowledge would permit. And thirdly, the Commission has to identify concrete criteria to guide the judge in making his selection within the range.

Now, the guideline ranges authorized in chapter 2, as you go through them, I think a number of them would meet these three criteria which I think are essential to justifying departures beyond 25 percent--or ranges exceeding 25 percent. Some of the provisions meet that requirement, but I find numerous provisions in chapter 2 that seem doubtful.

For example, there are provisions that authorize the judge to choose and offense level, say between level

seven and level ten without giving any criteria at all to guide his decision. That, I think, is clearly not permitted by the statute.

Secondly, there are kinds of provisions which tell the judge to choose between level seven and level ten, depending on the circumstances of the offense. That, I think, doesn't really amount to any test at all and it would also be vulnerable under the statute.

Thirdly, there are areas where the range that is authorized is really much too wide. One that comes immediately to mind is the bribery provisions, sections C211 and 212, which authorize the sentencing judge to pick any level between 11 and 23. That is simply much wider than really can be justified by lack of available knowledge or material accessible to the Commission.

So I think in all of those areas the ranges have to be narrowed and the criteria have to be identified more specifically in order to legitimate what would otherwise appear to be a violation of this 25 percent limit. Now, the range authorized obviously doesn't have to capture every conceivable case. Under this statutory scheme you can set a narrow range and for the exceptional case the judge remains

free to depart from your guideline.

Now, another area that is of some importance here are the Departures and Adjustments section. There are several pervasive problems there. One, if you look at provisions for departures, they provide various kinds of language telling the judge what to do. Some suggest the judge should increase, others suggest that the judge decrease the offense level. For example, section Y217 tells the judge that he must reduce the offense level under certain circumstances.

Now, what happens if the circumstances specified there are present and the judge says he is going to stay within the range of the offense level identified in chapter? That is, he is not going to reduce the offense level. Is his decision then within the guideline? That is, for purposes of appellate review, is his decision within the guideline or is it a departure from the guideline because he didn't reduce it? Which is what you told him to do. Both interpretations are possible and I think there is just an example of an area where some tighter draftsmanship is really essential to avoid a chaotic situation when these cases get to be appealed.

Now, the Commission requested comment on the

question of whether it is preferable to rely on the Departures approach or the Adjustments approach. Departures are essentially discretionary. They are open-ended, and they are appealable on the merits. Adjustments would be mandatory. They would be narrow and specific. And they would not normally be open to any significant appellant review.

In principle it is clear that the adjustment approach is the preferable. Adjustments structure discretion. They structure it in the first instance in the hands of the sentencing judge, and they minimize the burden on the appellate courts. The problem is whether the Commission is in a position to determine the relevance of these factors with enough specificity to approach them in terms of the specific adjustments. I am a bit pessimistic on that score.

Taking one of these as an example, section Y228 deals with coercion and duress. Now, I suggested a possibility here, a case to think about how this section would work. Suppose a smuggler carries 300 grams of cocaine into the country and he proves that he did that because there was a very seriously threat of bodily injury to one of his children. Applying section Y228, the first question is whether the threatened injury outweighs the harm of the offense that he

committed, which is smuggling a very substantial amount of hard drugs into the country.

How do you determine whether physical injury outweighs the harm of an offense like that? The harms are incommensurable and it seems to me that the problem of trying to compare them is inescapable under this section because it is dealing by definition--it is comparing threats of physical injury on the one hand to non-violent offenses on the other.

COMMISSIONER BREYER: Mr. Schulhofer, may I interrupt you for just a second. I read that section, which was brought over as an example of fine tuning--which I think is a bad example of fine tuning. But if I am right, A, B, and D in that thing would be complete defenses if they are borne out.

MR. SCHULHOFER: That is right. I will come to that too. But I don't think that is a defense of the guidelines the way you have written.

COMMISSIONER BREYER: No. To the contrary, it is a complete criticism.

MR. SCHULHOFER: Yes.

COMMISSIONER BREYER: That section is no good. I agree.

MR. SCHULHOFER: As it stands. I take it that maybe you have heard this ad nauseam yesterday, but I cited in my written statement a number of cases--long standing principles--that make clear that under any of the subtle refinements that you have suggested the defendant has a complete defense under federal law.

The broader point that was suggested to me by looking at that section was how much the draftsmanship is out of sync with current principles on points that aren't really obscure and it is really in that area that I am thinking about this in terms of whether it is appropriate to try to deal with these problems as adjustments.

One approach would be to collate all of your comments, fix all of the glitches, and try to iron things out. The problem is whether there is time available to do the job that is necessary, and it seems to me that it may be that four weeks is not enough to do the job.

It is from that perspective that I would suggest even though in principle adjustments is the right way to go, that the Commission needs to be very cognizant of the problem of making mistakes and needs to be diffident so that unless it is confidant that it has fully absorbed the issues, it

then becomes preferable to stick to departures for the time being and tighten things up over the long run.

A third area is the problem of consecutive sentencing which, as I am sure everyone is aware, is an extremely tough nut to crack. The guidelines tell the judge to decide on the basis of the statutory purposes of sentencing. I don't find that very helpful, and I think it is also going to create problems for the appellate courts in trying to decide when a judge does impose consecutive sentences, whether that was compliance with the statute and the guidelines. I think substantial tightening of the consecutive sentencing is not easy but it is possible, and I have suggested some avenues of approach in my statement.

Now, I want to look at plea agreements. The basic framework adopted by the Commission is quite sound. I think the section on ethical standards for plea agreements presents a very major contribution to truth in sentencing and to certainty in sentencing.

I am concerned that the drafting in some of its details seems to fudge substantive questions at several crucial points. For example, some of the sections tell the judge to make an independent determination about the propriety

of the agreement. Others don't say that the determination should be independent.

Now, did the Commission intend a difference in substance there in using the emphasis on independence sometimes but not other times. It might seem unnecessary to tell federal judges to be independent, but the problem here is that in the context of plea agreements, the practice is precisely for the judges not to be independent, to defer heavily to prosecutors, and in fact there is some case law that requires the judges to defer to decisions of prosecutors, particularly on charge reduction agreements.

So I think if the Commission wants the judges to be independent, as I hope it does, it has to say so explicitly, either by using a word like independence in all the sections, or what I think would be more appropriate and more accurate, instead of using independence, which has the wrong connotations, I think you should say that the judge should make a determination de novo about the propriety of the plea agreement.

Secondly, the guidelines tell the judges to approve departures from the sentencing range only if a reason exists. Now, telling the judges to do something only for a reason is a little bit like telling them to be independent. Either it

is superfluous or it is not communicating the thought that was intended.

As I read it, the guidelines have recognized that some substantive limitations are appropriate. The problem now is the Commission has to be a bit more specific about what those substantive limitations are. For example, is it a reason for departing from the guidelines that the defendant and the government have agreed on a plea, that in itself a reason? Is it a reason to depart that there are problems of proof in the case? Is it a reason to depart that the trial will be expensive?

All of those are possible reasons and it is critical that the Commission be clear about what constitutes a reason. I think other vague terms in the guilty plea section need to be tightened. And thirdly, I think it is important that the Commission provide commentary for this section. These are provision that the federal judges will be using in 80 to 90 percent of their cases, and as they stand these provisions represent--or I think were intended to represent--a substantial change from current practice. So it is very important to explain to the judges concisely, but to explain to them what these provisions mean and what their

animating purposes are.

Now, another problem that needs to be addressed has to do with the severity levels in the guidelines. Some of the severity levels struck me as possibly too lenient, but I think one cannot really comment on that helpfully without having the data which the Commission has not made available for outside comment.

Secondly, the prison impact study is of crucial importance here. Given the amount of discretion that the revised draft leaves to the judges, the conclusions of the prison impact study will be extremely sensitive to the assumptions made about how judges will exercise that discretion. So again, it is important that that prison impact study be carried out with at least three or four sets of alternative assumptions and that results be generated under different assumptions about how that might work.

With respect to some of the specific severity levels, for a first degree murder the Commission provides a mandatory sentence of life imprisonment with no parole. The comments suggest that the Commission thought that result was required by statute. That, to me, reflects a misreading of the provisions that are applicable here.

Under the statute the Commission has discretion to specify any term of years for first degree murder, and in my view life imprisonment without parole for every first degree murder is not appropriate in every case, particularly for first offenders. So that provision should be adjusted.

Now, I want to focus for a minute on section 994(j) which provides that the Commission shall insure that the guidelines reflect the appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.

Now, going through the guidelines, there isn't a single offense anywhere in the guidelines for which the draft expresses a preference for non-incarceration. At most, the draft authorizes non-incarceration as an option together with imprisonment for non-serious cases. There is a serious question about whether that approach--this option concept--complies with section 994(j).

The thrust of 994(j) is to emphasize that the appropriate sentence is something other than incarceration. Another way to see that, I think, is if you turn to the second clause of 994(j), that says that the Commission should

show the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious injury.

Now, I don't think Congress had in mind there that the Commission would just make imprisonment an option for those serious cases, together with probation. Congress there wanted to be sure that imprisonment was the appropriate sentence. And I think the Commission has complied with that mandate very thoroughly in the guidelines. But there isn't comparable compliance of 994(j) because there aren't any offenses for which non-incarceration is indicated as the preferable sentence.

So the first step here would be to take the lowest offense levels and provide that imprisonment is not an authorized guideline option. Now, the judge could still depart from the guideline in an exceptional case.

Secondly, looking at levels seven to ten in the guidelines. At these levels imprisonment can be converted into less costly alternatives. I think that is a very important concept. It is a very sound concept. There may be a question of whether that is going to be workable on a national basis. In some of our smaller or less urbanized

federal districts it is not clear that these conversion options, such as community confinement or home detention could be utilized on a cost effective basis.

In that event I think imprisonment should not become mandatory simply because one of these conversion options is unavailable locally. So judges need some flexibility to cope with that problem.

Thirdly, looking at level 10, probation still remains an option, but when you move to level 11, imprisonment is mandatory for a minimum of eight months. Now, that represents a radical discontinuity which is undesirable in principle, and I think what it is going to mean in practice is tremendous pressure to manipulate the facts, manipulate the circumstances, in order to force the offense from level 11 below.

And I think truth in sentencing is going to be a major casualty there. The solution is to have a transition approach for levels 11 through 13 authorizing conversion of some part of the sentence to one of these less costly alternatives. And I have given some formulas for doing that.

The last point I would make has to do with looking at level 11. At this point imprisonment becomes mandatory,

even for first offenders. And that is perfectly appropriate providing we are talking about offenses that are serious. Section 994(j), again, requires that any offense at level 11 or above be a serious offense. The grading of many of the non-violent offenses in the draft seems not to have given enough emphasis to that requirement.

I have given a number of examples in my statement. I will just mention one or two. If the offender has sold a single stolen automobile with an altered VIN, that's at level 13, means mandatory minimum sentence of 12 months. If the offender has offered a gratuity to a District of Columbia police officer to fix a parking ticket one time that is level 11, which is a minimum eight months in prison.

If a home owner copies 65 videotapes within a six-month period--that is about two per week--that offense is graded at level 16, and it carries a mandatory minimum sentence of 21 months in prison. I was glad when I read that that I don't own a VCR.

There are lots of other examples of that in the guidelines. I think the grading of these offenses for first offenders is much more severe than necessary and more costly for society in situations where a very heavy fine would

really do the job amply.

I have mentioned some other examples in my statement. I won't impose further on your time, but I appreciate very much the opportunity to be here this morning. Thank you.

CHAIRMAN WILKINS: Thank you, professor, and thank you for the very thoughtful written submission which I am sure will prove very helpful to the Commission. Let me see if there are any questions. Commissioner Block.

COMMISSIONER BLOCK: Professor Schulhofer, I wanted to assure that I cheer the prison impact study and we intend to use at least several scenarios in calculating the impact and your observation is well taken that given the amount of difficulty in predicting what exactly the impact will be in some cases, that it will be necessary to get several scenarios.

I wanted to come back, however, to your comment about the conditions under which the 25 percent limit might be lifted. As I understand it, you gave three conditions, and that is, where present knowledge was inadequate, and then use as narrow a range as possible, and then use concrete criteria in that narrow range.

I was looking for a little guidance there. What do you mean by "when present knowledge is inadequate?" I mean,

how would we translate that? We each have our own translation.

MR. SCHULHOFER: What that means to me is that by examining the data that is available to you, the statistical patterns, the probation reports, and so on, you find a wide range of sentencing in existing practice and you find an inability to extract the criteria--the factors--that seem to determine why some judges have been or why some judges should be sentencing sometimes to six months and sometimes to 21 months, an inability to articulate that.

That might be the case for an offense that is very rarely prosecuted and can arise under a wide variety of circumstances. It wouldn't be the case, for example, with bribery where the statute is defined in terms that prohibit, for example, giving gratuities to a District of Columbia police officer and to a member of Congress. I think it is relatively easy for the Commission to identify, for example, the level of authority of the official being approached and something obviously important in the grading of that offense.

COMMISSIONER BLOCK: So you don't look at that as a sufficient condition for using range, it is just a necessary condition?

MR. SCHULHOFER: Yes. Right.

CHAIRMAN WILKINS: Mr. Robinson.

COMMISSIONER ROBINSON: First I want to second the Chairman's thanks. As usual, your comments are very, very thoughtful. You have in your past testimony showed a special insight, I thought, on the plea agreement problem. And because I really don't have that fixed in my own mind, I thought I might just ask you something about that, and a few questions.

One, how will that work? What are the dynamics in practice going to be of the provisions we have here? And then second, which is a more specific question, and it goes to, really, A413, which is a provision you spoke of favorably, if we have--if, in fact--our sentence bargaining, this may be not an issue. Because in application of the guidelines the judge can depart from the guidelines and so on, although we know that many federal judges will resist sentence bargaining.

So you may--depending, we don't know--but you may well have many instances where the application of the guidelines will really depend on this statement of facts under A413. And as I say, you spoke of it favorably. And I guess I have two specific questions.

One is, is it realistic to think that plea agreements

really will set forth all relevant facts, so on and so on, not admit any material facts, so on, not contain, so on? First, is that really realistic? Are we asking something which we know ahead of time simply cannot and certainly will not be done.

And second, let's assume just for the sake of argument that it is not going to be done, that in a typical plea agreement case that is not a sentence bargain, that is really--the pressure, my guess is, will be to bargain over the factual statement upon which the guidelines will apply and that will be the nature of the formulation.

Isn't the appropriate standard, isn't what we should be telling these parties, come to an agreement of facts, but the standard of what facts to include or not include isn't a function of your own ethics or your own morality. I'm just not sure what guidance that gives the parties. Isn't the appropriate standard to the parties something like, how strong is your case on this fact or that fact? Isn't that a more realistic system, (A), and isn't that more of what we want, (B).

MR. SCHULHOFER: I don't think the provision as it stands is unrealistic at all. The government would have

investigated the case very thoroughly by the time that it gets to indictment. And nearly all of the relevant facts and circumstances for purposes of sentencing will already be available to the government in its file.

The defense has an obvious incentive to investigate and bring out mitigating factors. I don't have any reason to think that defense would forego that route. Thirdly, you have the probation officer's presentence report. I made the comment in my statement that I think it is undesirable to leave the judge discretion whether to defer sentencing pending receipt of the presentence report. Except for minor cases the judge should have the probation service report before him before he makes a final decision whether to accept or reject a plea.

I don't think it is realistic. I don't say that this will be--

COMMISSIONER MACKINNON: You don't think it is unrealistic.

MR. SCHULHOFER: Thank you, Judge, yes. I'm sorry that I mis-spoke. I don't think it is unrealistic at all. There will, of course, be instances of noncompliance. We have statute against bribery in this country and we know that

it goes on. But the idea here is to say what the norm is and there is no reason to expect that you wouldn't have, by and large, very substantial compliance with this section.

Secondly, I think it is desirable. I don't think it is appropriate to take the approach that you were suggesting, for this reason. When you tell the parties to come to an agreement about what the facts are you are really telling them to come to an agreement about what sentence they want. And they will then pick the fact that is necessary to generate the right sentence.

Now, it might be possible in a world of full information, no transactions costs and no conflicts of interest, it might be possible to produce sufficient and just results in a situation like that. But on the planet earth those assumptions aren't satisfied, and I think Congress recognized that, because the statute requires the Commission to have guidelines so that the sentencing decision remains in judicial hands.

The effect of the approach that you are suggesting, or at least hypothetically trying to work through, the effect of that approach would be to transfer the sentencing decision to the parties. And that is precisely what Congress wanted

to stop.

COMMISSIONER ROBINSON: Well, let me make sure we understand. My point goes to plea agreement cases and the nature of the plea agreement statement of facts as called for under 413. The notion of hiding facts from the judge--the notion of, for example, not having an absolutely complete probation report, of course, I would disagree with.

The question is, if under A413 in a plea agreement you are asking the parties to come to some sort of statement, essentially you are saying you think we should foreclose the possibility of a prosecutor saying, all right, here is a fact, I don't know whether I could prove it at trial or not, and in consideration for your plea I will, in a sense, give you a break on all of these questionable facts. That is something that you think we should let prosecutors do?

MR. SCHULHOFER: I don't think we should under any circumstances allow the prosecutor to keep relevant circumstances from the court. What he can say is, here's a fact but we are not sure we can prove it. Whatever the doubts are, whatever the ambiguities are should be placed before the judge. Then the judge can decide whether it is appropriate to depart from the guidelines.

COMMISSIONER ROBINSON: So if defense counsel says look, you know full well that there is not way you could prove that fact at trial, I will plead as long as we both agree you won't mention it, that's something we should not let happen?

MR. SCHULHOFER: That's right.

COMMISSIONER ROBINSON: This is my first question. Would you describe how you see the process as working. How will the process--the plea agreements and sentence bargaining process--work under these provisions?

MR. SCHULHOFER: It's fairly common now, at least in most large federal districts, that plea agreements are reduced to writing and negotiated in some detail. As I see the process, those agreements would now have an additional section that would set forth the relevant facts and circumstances.

It would then be presented to the judge and it would be for the judge to decide the relevance of the circumstances disclosed for sentencing purposes. It wouldn't be up to the parties to decide, we don't think this should be relevant, therefore we are not going to let it come before the judge at all.

COMMISSIONER ROBINSON: I understand the procedures. I'm asking you the sort of harder question. You may not be able to answer. I'm asking you to speculate about, given these procedures as set out, how much actual plea agreement will we get, what will be the real world motivation for it, how much sentencing bargaining will we get? I'm asking you a question that none of us know the answer to for sure, but you have some special expertise, really, in the area and maybe your speculation is better than ours.

MR. SCHULHOFER: Well, it's a large an important question. I hesitate to speculate at great length in a context like this. First of all I think the question is, what guilty plea rate do you expect to emerge? I expect the guilty plea rate to be essentially unaffected. But that's partly dependent on assumptions about how some of the ambiguities I mentioned are resolved.

In general, I think the system adapts very quickly to things like this and we will find a way to generate the results in terms of plea rates that have existed before. In terms of its effect on sentences, I think that is a crucial area and I think that the way this will work will be to substantially reduce variance and generate a much greater

degree of predictability and a much greater degree of uniformity in guilty plea sentencing. That's the overriding objective and I think this will accomplish it.

COMMISSIONER ROBINSON: Why will the guilty plea rate stay the same? I mean, now we know exactly why people plead, because they get some very significant discount in charge bargaining. Where does the motivation come under this system where we have a full statement of all the facts that goes to the judge and then he has an obligation to--unless there is actually a sentence agreement--he has an obligation to apply the guidelines on that full statement of facts.

MR. SCHULHOFER: Well, I think first of all it's going to come from the provision on the acceptance of responsibility. I know that that's not a mandatory reduction, but most federal defendants don't have a great deal of bargaining leverage and they are going to pin their hopes on that, and the prospect of getting a reduction there will be the only hope that they have that will be enough, and they will plead guilty.

There will be some cases where there may be substantial doubts about factual guilt, substantial prospects for acquittal, where the defendant will say, I'm not interested

in that, I'm going to go to trial. That might happen.

The guilty plea rate might drop if it is true that we have lots of defendants with substantial prospects for acquittal who are taking bargains today. If that is true there may be some rise in the rate of cases going to trial. I would think it is appropriate for those cases to be tried. I hope that that isn't true in our federal system today. But if it is true, some of those cases will go to trial, and that also would be an improvement.

COMMISSIONER ROBINSON: Thank you very much.

CHAIRMAN WILKINS: Any other questions? Stephen

COMMISSIONER BREYER: Yes, Judge. The consecutive/-concurrent problem is a pretty big problem, and you have said things that both suggest we should have greater specificity. But if we do have greater specificity it becomes awfully complex. And if we don't have greater specificity then your criticism that maybe there's too much discretion will apply.

And so, what I want to know is how--I mean, I'll give you a concrete example. A defendant on three separate occasions sells heroin. On one occasion 10 grams, on another occasion 50 grams, and on another occasion 150 grams. He is charged in three counts. He is convicted of all three.

Very well. The present rule, as the guidelines now state it, the sentencing judge will ignore the 30 and 10 grams and will sentence on the basis of 150 grams, period. I take it that that is also the rule in Minnesota; is that right?

MR. SCHULHOFER: I'm not sure about the rule in Minnesota.

COMMISSIONER BREYER: Well, most of the states that I have looked at the guidelines for, and that's true as well in D.C. The recent D.C. guidelines say that sentences are concurrent, unless there is some special thing, and sometimes there is.

And I take it the reason they have come to that is not that that is desirable, but they haven't been able to figure out something better. So what do you suggest that we do? Of course, I'll tell you another bad thing about the present system. The prosecutor, by juggling the counts, could create a single offense involving 150, 180, or maybe 190. And so that's another problem.

What do you suggest? Do you want us to say, take all of the heroin in every count, or in every overt act mentioned in the indictment if the conviction was for a conspiracy, and add? And then, what do we do if in fact one

of the counts involved heroin but another PCP? And what do we do if in fact one was PCP, one was heroin, then there was some marijuana, and a few pep pills?

Now, do you want us to draw up several tables of conversion? And now what do you do if in fact in one of the counts it wasn't even drugs, it was some other thing involving money? Do you want us to add the money? Do you add the money to the heroin? I mean, what do you say, do you want to add the money to the heroin to somebody destroying a vase worth $15,000?

You will both say--and you reflect both--if we say no, it is just too complicated, then we will be criticized for allowing enormous disparity within the system. If we say yes and draw up tables and conversions and rules, either they will be complex or not, and if they aren't complex we will be accused of being arbitrary, and if they are complex we will be told it is unworkable.

All right. So now all of that is encapsulated in your two paragraphs here. What you say is, the Commission needs to be much more specific. Fine. How?

MR. SCHULHOFER: Well, how much time do I have to answer?

COMMISSIONER BREYER: Well, you could write it all down. I would like about--

MR. SCHULHOFER: Okay. I agree--I think the fundamental point you have made and which I agree wholeheartedly with is that whatever you do you are going to get criticized. That goes with the territory. There is no way around it.

With respect to this problem, I think one solution is, the adding approach that you have suggested is precisely what you have done with respect to theft and fraud. You add together the amounts. The same thing with respect to income tax evasion, insider trading, and so on.

COMMISSIONER BREYER: But it doesn't say here add together the amounts in separate counts, or does it.

MR. SCHULHOFER: Yes, they do.

COMMISSIONER BREYER: You think add the separate counts?

MR. SCHULHOFER: For financial transactions? I'm speaking now of fraud, theft, and taxes. I believe it does, and I believe that is appropriate. I would hesitate to do that with respect to drugs only because the statute contains rigid mandatory requirements that turn on the amount of the drugs involved. So there is a complexity there.

But in principle, apart from that statutory constraint, an additive approach would be appropriate.

COMMISSIONER BREYER: What would you do with the statutory--

MR. SCHULHOFER: I'm sorry. Do you want me to address the drugs?

COMMISSIONER BREYER: If you want.

MR. SCHULHOFER: In particular, I think the appropriate thing there--and in suggesting this I know that I can be criticized too--the appropriate approach, it would be generally a preference for concurrent sentences, period, no exceptions.

Now, what it means to say no exceptions is that the judge can depart from it for a stated reason subject to appellate review, so that you don't have to try to imagine every case where it would be appropriate to have consecutive sentences. All the guidelines have to say is concurrent sentences. And if it is an atypical case you explain to us why.

Now, the draft, as I read it, doesn't take that approach. The draft says the judge must impose consecutive sentences if it is necessary to satisfy the statutory

purposes of sentencing.

Let me find the page and you can help me. I think it is--is it 190-something?

COMMISSIONER BREYER: It is 192.

MR. SCHULHOFER: Okay: "Concurrent sentences shall not be imposed in the following cases--." And (B) is: multiple counts of an indictment, if concurrent sentences, would not adequately serve the statutory purposes of sentencing."

So if the judge says, I don't think this is going to adequately serve the statutory purposes of sentencing, by making that finding he has required himself to impose consecutive sentencing.

COMMISSIONER BREYER: I think that sounds sort of permissive. I read it as permissive.

MR. SCHULHOFER: Well, this is an area where it could be better drafted. It should be stated in such terms to say that if the judge is really persuaded that concurrent sentences are inadequate to satisfy the statutory purposes then he can depart from the guidelines. But then he has to be sure of his ground and we can develop a case law for that as time goes on.

I don't have the answer here, but I think we can

set up a structure that would permit an answer to be generated, and my concern is that the present structure wouldn't do that.

CHAIRMAN WILKINS: Of course, the problem is that if we've got separate bank robberies and we use the concurrent, the second and third bank robberies are, in effect a free ride. At least there is a perception of that, and we don't want to create that.

But we don't want to give three consecutive sentences of 20 years a piece for 60 years for three bank robberies, because that would be unreasonable. And so therein lies the problem. We want to somehow capture in the first sentence reflecting the seriousness of the second and third offense and put that in all one sentence that we impose on the first count. That is what we are trying to achieve and I think that is where you are going as well.

MR. SCHULHOFER: Yes, that's how I would want to achieve it. I don't think that there would be a free ride in the sense--first of all, if amounts of money are involved you can add the amounts of money. In fact, I think the present guidelines require it.

Secondly, the fact that there are multiple sentences puts the defendant in jeopardy of a guideline departure. And

if someone is trying to work out this problem rationally they will know that it is not a free ride.

Thirdly, it may be--I would have to work through the criminal history computation, but it may be that the existence of three of four bank robberies would affect the computation of the criminal history score. There are a number of possibilities here.

CHAIRMAN WILKINS: That's one possibility. Questions? George.

COMMISSIONER MACKINNON: I think you have been as helpful to us as any witness we have had during our hearings. I mean, not today, but in your prior appearances.

MR. SCHULHOFER: Thank you, Judge.

COMMISSIONER MACKINNON: You suggested some change in the word "independent" and you wanted to substitute "de novo". De novo from what? This is the first review.

MR. SCHULHOFER: Well, it would be the parties--perhaps de novo is not an ideal word. I was concerned that independent doesn't quite convey the meaning either, because a judge is independent. But what has happened here is that the parties--the prosecutor and the defense counsel--have determined that there is reason to depart from the guidelines

and the judge should be told that he should decide whether there is reason and he should do it from scratch, without giving any weight to the fact that they think that that's the appropriate disposition.

COMMISSIONER MACKINNON: Well, of course, he ought to weigh their evaluation to the extent that he finds it to be reasonable.

MR. SCHULHOFER: I would want him to weigh the reasons that they give on the merits, but the mere fact that they had reached the decision shouldn't in itself be a reason for deference. What we are running up against is case law--case law in the period before guidelines existed, obviously, which said that in that context the judge was required to defer to the prosecutor's decision.

I'm thinking, for example, of the United States against Amadown in the D.C. Circuit. Those decisions require the judge to set--

COMMISSIONER MACKINNON: Don't rely on that too much. But go ahead.

MR. SCHULHOFER: Well, I've already written that I thought the Amadown decision was incorrect, even under prior law. But it certainly would be inappropriate and contrary to

Congressional intent under these guidelines. But we are dealing with habits of doing business among the judiciary and among, particularly, practitioners, which Amadown reflects. And that is that the judge shouldn't reject the parties decision unless he has extraordinary reasons. And I think what the Commission wants to say is that that process should be turned around, and the judge who should essentially make the decision de novo.

COMMISSIONER MACKINNON: Of course, the prosecutor does have jurisdiction and prosecutorial decision making authority. But of course, when you come on to a plea agreement, you are a little passed that initial stage.

MR. SCHULHOFER: Absolutely. There is nothing to stop the prosecutor from dismissing counts under Rule 46, I believe, without any contingency. But as soon as he is saying, I'm going to dismiss the count only if there is a conviction--only if there is a guilty plea--then he is implicating the authority of the court. And he should not have the right to do that without the judge passing on its propriety.

COMMISSIONER MACKINNON: Now, you said that this draft on plea agreements changed the current practice. In

what respect?

MR. SCHULHOFER: First of all it requires complete disclosure of the circumstances.

COMMISSIONER MACKINNON: Well, I know. But I'm talking about practice. They generally do that, don't they?

MR. SCHULHOFER: It's not my impression that they do disclose to the judge all of the circumstances. I think current practice is probably more like what Commissioner Robinson described.

COMMISSIONER MACKINNON: Well, some people indicated in our hearings that those things happen sometimes, but I didn't take it that it was the general practice to withhold facts from the judge about a gun, if there was a gun, or any other material fact.

MR. SCHULHOFER: Well, we may be trying to decide whether the glass is half full or half empty. But I think there has certainly been--it hasn't been a uniform practice and there hasn't been a clear sense that it was improper to withhold facts from the judge.

COMMISSIONER MACKINNON: You don't think so?

MR. SCHULHOFER: I don't think so. It depends on the circumstances. Some things would be inappropriate but

not everything. The prosecutor can withhold counts or dismiss counts. That's the clearest example. The prosecutor can drop a charge.

COMMISSIONER MACKINNON: Yes, but he can't walk before a judge and say this is the case when it isn't?

MR. SCHULHOFER: That's right. He certainly cannot misrepresent the facts.

COMMISSIONER MACKINNON: You were talking about the level seven to ten and the practice in rural communities and the inability for some of these things to work in rural communities. Of course, they can use local jails.

MR. SCHULHOFER: If we are talking about intermittent confinement--

COMMISSIONER MACKINNON: That's what I meant.

MR. SCHULHOFER: --nights and weekends, they can work out a contractual arrangement subject to the approval of the locality. Although it is less true in rural areas, local jails tend to be pretty well overstuffed and the local authorities may or may not agree to take federal prisoners.

The other problem is that the judge might think the appropriate solution was home detention or community confinement, which, as I understand the term "community confinement"

as used here to refer to a treatment program of some sort. That may not be available in Montana or in other federal districts around the country.

I'm not an expert in this area, but reading the draft I wondered whether the Commission had taken a close look at the availability of programs like this in the less heavily populated federal districts.

COMMISSIONER MACKINNON: Well, I have mentioned it occasionally.

MR. SCHULHOFER: I beg your pardon.

COMMISSIONER MACKINNON: I say I have mentioned it occasionally. What do you think the proper punishment ought to be for copying videotapes?

MR. SCHULHOFER: I think the statute authorizes a fine of up to $250,000 and I think that somewhere between-- I'm not sure I would be willing to say how close to the statutory maximum it should be, but I don't see why a fine wouldn't be appropriate. I might even, for a repeat offender, I don't see any reason why he shouldn't face imprisonment. But I think 21 months of imprisonment for a first offender, to me, not speaking only of my personal preferences, I don't think it can be reconciled with section 994(j).

COMMISSIONER MACKINNON: You were objecting to the time of confinement?

MR. SCHULHOFER: Yes. I think it is too long, and I think any imprisonment for a first offender for a non-violent offense of that kind violates the statute.

COMMISSIONER MACKINNON: You might compel them to look at the videotapes.

Thanks a lot.

CHAIRMAN WILKINS: Commissioner Gainer.

COMMISSIONER GAINER: As a result of the clarifying inquiries of the Chairman and the responses thereto concerning your views on consecutive and concurrent sentences, I have nothing left to add other than to confirm Judge MacKinnon's observation that your contributions to the work of this Commission certainly have been as helpful as those of any single witness. Thank you.

MR. SCHULHOFER: Thank you very much.

CHAIRMAN WILKINS: Thank you, Professor. We will be in touch.

Our next witnesses are Richard Arcara and Kurt Wolfgang. No strangers to this Commission, they represent the National District Attorneys Association.

Thank you for coming. We are delighted that you are with us.

MR. ARCARA: Mr. Chairman and members of the United States Sentencing Commission, I believe I am already three minutes beyond my allotted time.

My name is Richard Arcara and I speak today on behalf of the National District Attorneys Association. Our Association represents the interests of the state and local prosecutors from throughout the United States.

As you know, the National District Attorneys Association has worked closely over the past year with the Commission as it has proceeded with its monumental task of meeting the Congressional mandate to promulgate sentencing guidelines.

We presented testimony at the December hearings on the preliminary draft issued by this Commission. We are pleased to note that certain of our proposals dealing with plea bargaining and cooperation with authorities have been incorporated into the revised draft.

We also are pleased that our suggestion that judicial discretion be enhanced by allowing the sentencing judge to choose from a range of values for particular offense charac-

teristics relevant to the offensive conviction appears to have been considered during the formulation of the new part Y, General Provisions, dealing with departures and adjustments.

From the perspective of the National District Attorneys Association, the revised guidelines represent in some ways stepping back from the dramatic impact that the preliminary guidelines would have had. However, we believe that the revised guidelines represent a fresh new start and do contain a workable framework for effective sentencing guidelines.

They represent the beginning of an evolutionary change in sentencing practices and begin the changeover from the unfettered judicial discretion to a structured discretion which hopefully will lead to a reduction of unwarranted disparity in sentencing.

We wish to commend you on the overall quality of the revised sentencing guidelines. Our Association generally supports the approach taken by the Commission in the guidelines, though we make some recommendations for your further consideration.

This Commission has so far met many of the major complaints against the preliminary guidelines with a measured

response. As you will recall, we endorsed in large part the preliminary guidelines. Yet, upon reflection and consideration of the views expressed by other groups and individuals during the initial hearings, we accept the need for certain modifications. Therefore, we do endorse the approach taken by the revised guidelines.

However, the National District Attorneys Association opposes any efforts to retreat from the new positions taken in the revised draft. We would be concerned of any efforts to increase the availability of any further alternate sentences dealing with probation where incarceration, we believe, is required.

We would oppose any reduction in the sentencing levels assigned by the Commission where they would be set below present sentencing practices and any efforts to expand the number of mitigating departures or adjustments under the general provisions. We would oppose any efforts to reduce the enhancement effect that a defendant's criminal history has on determining the ultimate sentence length under the revised guidelines. In our opinion, any changes will seriously compromise the Commission's ability to meet its Congressional mandate.

Beyond these general comments I would like to address a number of specifics. First, the sentencing length. No greater decision has to be made by the Sentencing Commission than the bottom-line issue of sentencing length for specific crimes and the availability of non-incarcerative sentences, notably probation, for convicted felony offenders.

The Congress has set forth certain sentencing parameters for the Commission to follow. Congress has directed that crimes of violence or violation of the drug laws perpetrated by prior felons shall be severely punished by near maximum terms of imprisonment. Substantial terms of imprisonment are required when an offender has two or more prior felony convictions.

By and large these mandates have been adopted by the revised guidelines. We believe that the sentencing guidelines must reflect the need for tough sentences for all violent and otherwise serious crime and for violations of the drug laws. Guidelines which provide for firm sentences of incarceration are consistent with the Congressional mandate under which you operate.

The Congress has stated that, quote: "In many cases current sentences do not accurately reflect the seriousness

of the offenses, and that the Commission shall not be bound by such average sentences and shall independently develop a sentencing range."

We submit that such language is nothing less than a call by the Congress for longer sentences of incarceration than are presently being assessed. We fear that the Commission has sought to answer the attacks on the preliminary guidelines by a modification of the sentencing ranges which the preliminary guidelines proposed.

It is our opinion that the Commission has reduced the sentences contained in the preliminary guidelines and has essentially set sentencing lengths to reflect the current sentencing practice, the very practice which Congress has said does not accurately reflect, in many cases, the seriousness of the offense.

We are encouraged, however, by your explicit acknowledgement that the Commission views the sentencing guidelines to be evolutionary in nature. We recognize this Commission will monitor and measure the actual sentencing practices as they develop under the guidelines. But more importantly, we urge the Commission to review the historical sentencing practices which serve as a basis for sentencing

set herein, and as necessary, make changes to more accurately reflect the seriousness of each particular offense.

In addition, the Commission must closely monitor the application and the use of aggravating departures and adjustments contained in the general provisions of the revised guidelines. Many of these are unstructured and without specific adjustment levels established by the Commission.

For example, very little guidance is given in setting an appropriate penalty where the defendant's conduct was extreme, caused a death, what we get is another criminal purpose. We believe that heavy hitting judges may overuse such provisions and the light hitting judges may seek to basically ignore them. We view their existence and proper use as sentencing enhancements as crucial to the imposition of an appropriate sentence and to ending unwarranted disparity.

We call upon the Commission to attempt to give more guidance in the use of these departures and adjustments. In each instance of departure an attempt should be made, either in the guidelines or in the commentary, to set forth specific criteria for the imposition of specific level increases or decreases which may be appropriate in given circumstances.

We urge you not to treat current sentencing levels as being enshrined in stone, but to remain the subject for future modification and enhancement.

The availability of probation. We note that the Commission has significantly increased the availability of probation as an alternate sentence in many felony convictions under these revised guidelines. Probation remains an available alternative any time the minimum sentence under the guidelines is not more than six months.

For example, under the guidelines a conviction for the theft of up to $50,000 allows for a probationary sentence for a first time offender, yet, we believe this to be a serious offense and that the judge should not have that type of discretion for that amount of money involved in a theft.

Likewise, property destruction by an arson fire without intent to cause death or without using an explosive device allows for a probationary sentence despite the amount of damage caused.

Under the preliminary guidelines, probation was not available when a minimum sentence was required. We ask you to go no further in facilitating the imposition of probation as an alternative to sentence. In felony cases probation is

simply not adequate in many instances to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment.

Probation is not always effective as a deterrent to criminal conduct and it fails to incapacitate a defendant or to protect the public from further crimes of a convicted defendant. More important than that, probation does little for a convicted defendant's rehabilitation. It simply does not meet the basic needs of the sentencing as defined by Congress.

Furthermore, the imposition of unwarranted probationary terms for convicted felony offenders is one of the bases for Congress' displeasure with sentencing disparities and with the uncertainty found in the present sentencing system.

In addition, as a sentencing method probation has not reached its projected expectations. In our opinion, probation has been used on a regular basis as a dumping ground for many felony offenders, notably as a reaction to prison overcrowding.

While this alternative to prison appears to be less costly from some points of view, any apparent cost saving can be outweighed by the cost of the future crimes against our

sentences who are placed in jeopardy by releasing felons on probation.

The National District Attorneys Association believes that probation should be available for minor crimes committed by first time offenders where there exists some strong compelling mitigating circumstance to justify such action in the sound exercise of reasonable judicial discretion. We believe that any further changes to allow the imposition of more probationary sentences will seriously undermine the utility of these sentencing guidelines.

The role of the defendant in the offense. The Commission's handling of the defendant's role in the offense, I believe, merits some comment. We view the sentencing enhancements contained in Part Z as being clearly appropriate. Reductions where defendant voluntarily withdraws from a conspiracy or voluntarily abandons participation in a crime are likewise appropriate.

However, we believe that a reduction of up to six levels for a defendant being a minor participant in the offense as defined in the commentary may be inappropriate and should be eliminated or a definition severely restricted. We view this as a substantial reduction.

For example, if a first time offender's offense level under the guidelines is 16, he would be subject to a sentencing range of 21 to 27 months. With a six-level reduction he would qualify for probation, which would allow for a wide disparity.

A minor participant is not defined as merely a person who has a limited role in the offense. The definition also includes one who is not in the position to make decisions affecting the offense or to benefit substantially from its commission. We suggest that this language may be overbroad and all-inclusive.

We have little quarrel with allowing judges discretion to reduce the sentence for an uninvolved lookout. However, in many instances planners, directors, or controllers of criminal conduct are far removed from the actual participation of the crime. They employ the mules, the bagmen and the couriers to engage in the criminal conduct. These willing participants--the couriers--engage in the criminal conduct without being in a position to make decisions affecting the offense and do not necessarily benefit substantially from the commission.

Each would appear to meet and qualify for treatment

under these guideline categories. Clearly, a mitigation for such individuals who intentionally and voluntarily engage in criminal conduct should not be countenanced under these guidelines. We have no objections to reductions where duress or coercion is present. However, if the government can establish an appropriate mens rea in the necessary criminal conduct, the voluntary participant should be required to face the full consequences of his actions, whether he has a limited role in the offense or not.

This is so because without any such participation the crime may not have been possible. What we are concerned about here is that fact that in a drug deal when you have large amounts of drugs that are being transported, under your definition the courier could be considered a minor participant. And yet, he may receive $10,000 for that and we just feel that that definition is a little too overbroad and it would eliminate to a large degree the deterrent factor which is necessary.

And if you do transport--in the example I just gave--drugs, you have a strong likelihood of receiving a substantial sentence, and even though your role may be minor, but for that carrying it would not otherwise have occurred.

Finally, the cooperation in plea dispositions, a convicted criminal's willingness to cooperate with the authorities is a valid consideration in sentencing. Cooperation is a significant mitigating factor which helps distinguish offenders for purposes of sentencing. In many cases cooperation by knowledgeable offenders is the only way to create, conduct and complete investigations aimed at discovering other criminal conduct.

In our testimony in December we called for the adoption of guidelines which would allow for up to 100 percent reduction in sentence upon the recommendation and evaluation of the United States Attorney. We thank the Commission for substantially adopting that point of view.

The guideline procedure would allow a judge to reward effective and significant cooperation and provides the necessary incentive for a defendant to cooperate with the government. In December we called for significant changes in the proposed handlings of plea dispositions. We noted that plea dispositions account for an overwhelming percentage of all criminal convictions and cooperation by a convicted criminal is often made a part of that plea agreement.

We are pleased with the adoption in the guidelines

of procedures which substantially incorporate the plea agreement contained in Rule 11 of the Federal Rules of Criminal Procedure.

In conclusion, the National District Attorneys Association believes that the revised guidelines promulgated by the Commission is a commendable effort in the development of fair sentencing guidelines. We support the basic structure and the format of the guidelines. We believe that this Commission is proceeding in the correct path for the development of a final Sentencing Guidelines and we would like to thank you for giving us an opportunity to express our views.

CHAIRMAN WILKINS: Thank you, Mr. Arcara, and thank you, Mr. Wolfgang. We appreciate the meaningful contributions that the National District Attorneys Association has provided in the past and we look forward to a continued working relationship with your organization.

Questions to my right. Any questions? Judge Breyer.

COMMISSIONER BREYER: Mr. Arcara, thank you for the testimony. It was very helpful.

One, as to probation, I'll tell you the problem, and I'm saying this deliberately because I see your position on it. And I want to soften it a little bit to face a

problem which I think came out yesterday.

One of our aims, I think, or there is a pretty broad consensus that an aim ought to be to take certain white collar crimes--antitrust, tax evasion, maybe insider trading, et cetera--where there is a lot of probation given that the moment and say, look, let's substitute for some of that probation a short prison sentence. Because even a short prison sentence will likely have, we think, a pretty strong deterrent effect. All right?

MR. ARCARA: Yes, sir.

COMMISSIONER BREYER: Now, take that as an objective. Now, one of the problems with the way it is written now is there is a discontinuity that up to level ten the judge can substitute probation, period. But then when he gets to level 11 he must sentence to eight months. And if that is the kind of choice, the judge has to get either eight months or probation, there is going to be big pressure towards the probation with a lot of these particular crimes.

And so one idea that was percolating yesterday was to provide a transition in levels such that we went from--you could have total probation as an alternative, but then have a level, the next level--maybe level 11--would say probation

must be accompanied by a two-month prison sentence, you see. And phase it in so that maybe you catch up totally by level 15.

Now, I don't want you to commit your organization to something like that, but I just want you to see that in principle are you as opposed to some kind of transition where you have a prison sentence accompanying the probation, and try and phase it in in the guidelines?

MR. ARCARA: I think that sounds reasonable, Judge. I really do. In listening to the discussion with the previous speaker, I think that is a reasonable position to take.

COMMISSIONER MACKINNON: You commented favorably on plea negotiation--or the credit for pleas, and cooperation. What was your view on plea negotiation?

MR. ARCARA: Your Honor, I heard the earlier discussion and I take issue with what was said. I believe that during the plea discussions or negotiations that go on today that the courts are fully apprised of all the facts and the details and I can't imagine any responsible attorney--prosecutor or defense lawyer--misleading the court of withholding any information.

Now, certain information you may not want to make

public, and I think that there are provisions in the guidelines to deal with that. Certainly, if someone is cooperating at the present time, you don't want to announce that to the world, that that person is cooperating with the government to make further cases.

As far as the plea negotiations, I guess in my experience I have probably handled tens of thousands of plea negotiations with defense lawyers. And most of the time I feel that as a result of plea negotiations that the result that is reached by the parties is acceptable to the court.

We're not going to regularly--or even irregularly-- it is very rarely where a court rejects a plea agreement. There are many reasons. Maybe because the judge just wants to get rid of the case. But when you have a defense lawyer and a prosecutor sitting down and involved in hard plea negotiations and they come to an agreement, it is very rare that a court would reject that plea agreement.

And I feel very comfortable with that. As long as the court is fully apprised of all the facts and circumstances, I think that most plea agreements can be worked out by the parties, and that unless there is something unusual or something that would clearly indicate that there is an

injustice about to occur as a result of this, I think that the parties should have that latitude, and the court as the final reviewer to make sure that there isn't going to be an injustice here.

I mean, if the government is pleased with it and the defense is pleased with it, I think that by and large that satisfies the requirement and the court should, in its wisdom, make sure that there is not going to be an injustice.

COMMISSIONER MACKINNON: Then you would say that what is written in these guidelines is not a substantial variation from what happens now?

MR. ARCARA: I don't believe it is, Your Honor. And we were pleased that you incorporated Rule 11.

COMMISSIONER MACKINNON: What percentage of plea agreements operate now under written agreements, to your knowledge, say in your own local?

MR. ARCARA: When I was in the U.S. Attorneys Office, we would only put it in writing when we felt that there was--when we really wanted to cross all of our "T"s and dot our "I"s. In other words, it would be, for one reason or another, a little sensitive. In my present experience, only rarely, in the District Attorneys Office, do we actually put

it in writing.

We put it on the record in detail, and putting it in writing really doesn't add anything, unless you are in a real touchy--and the two lawyers may not necessarily trust each other in the sense that when they go into the courtroom they feel that maybe the other party may take advantage of the situation. But putting it in writing versus putting it on the record, I don't know if it really makes a heck of a lot of difference as long as you are being totally candid. So in my experience it is rare.

COMMISSIONER MACKINNON: Well, it makes them face up to the situation.

MR. ARCARA: Well, Your Honor, so does just going in a courtroom and laying out all the facts and the details in the agreement.

COMMISSIONER MACKINNON: Well, of course, you get a lot of different plea situations where you have had little or no minimal contact about the plea, where you have had considerable contact, and where you have engaged in extensive discussion. And those are all variables.

But generally, the United States Attorneys around now would at least--let me say this, in the larger areas they

seem to say that most of them are written, where they have some agreement that they want to present.

I think we had it on the record before, but I would like to have you state where you are from and what your background and experience is.

MR. ARCARA: I'm from Buffalo, New York, Your Honor. I served six years as an Assistant United States Attorney. I served six years as a United States Attorney. I served under three Presidents. I resigned to run for District Attorney six years ago and I have been the District Attorney for Erie County for the past six years. I am presently the President of the National District Attorneys Association and the President-elect of the New York State District Attorneys Association.

COMMISSIONER MACKINNON: Thank you ever so much.

MR. ARCARA: Thank you.

CHAIRMAN WILKINS: Thank you very much.

We are pleased to have as our next witness two federal judges; the Honorable Gerald W. Heaney, a member of the United States Court of Appeals for the 8th Circuit; and the Honorable Donald G. O'Brien, who is the Chief Judge of the Northern District of Iowa. Gentlemen.

JUDGE HEANEY: Good morning. Judge O'Brien and I are very pleased to be here this morning and to have been here through the day yesterday. If nothing else, listening to the various points of view of these witnesses convinces us that your job is a very, very difficult one and we want to extend our thanks to you for undertaking it, and I'm sure that I speak for the judges of our circuit in expressing that view.

The judges of our circuit are pleased that the initial draft of the guidelines has been modified to give district judges greater discretion in the sentencing process. We continue to believe, however, as did several of the witnesses yesterday that the standards for probation are still more severe than they should be, that sentences will be significantly longer than they are under present practice, that there is a danger that some persons will be denied due process, and that, unfortunately on the basis of the information that we now have, that disparities are not going to be eliminated.

We feel that as a first step, even though it is late in the day and even though your report is due in April, that you should move towards a simpler set of guidelines based

on an offense of conviction model. And the simplified version of the grid contained in your revised draft and the Minnesota Guidelines would be a good starting point for that effort.

Now, having said that and having listened to the Commission members the last few days, I gather that there is a strong feeling on the part of the Commission that you want to complete your job and you want to get something to Congress by April 13th, and in that light I want to give you some additional suggestions.

I do, however, want to urge very strongly that this is a revolutionary and a massive change and it is one that is well worth your while, going to Congress and asking for additional time if you feel that time is necessary.

Now as to some specific comments. As I indicated before, it is our view that we are going to sentence more people to prison for longer periods of time than we do at the present, that fewer offenders will be eligible for probation, that adjustments and departures will be the rule rather than the exception, and what I consider to be one of the most significant problems that remains in the guidelines is that the sentence attributable to uncharged conduct, to unadjudicated

conduct, will often be more significant than the sentence attributable to the charged conduct. And I am going to say something more about that a little later on.

We are also convinced that the probation officers will undoubtedly have the most important role under the new sentencing guidelines. Not only will they have a primary and perhaps decisive fact finding role in most cases, but they will also have an important judgmental role. You cannot go through these guidelines without becoming aware of those facts, and every chief probation officer in our circuit have called me and have expressed that concern to me. Particularly, they don't reject it. They are willing to accept it, but they have other duties in terms of supervision of persons who are on probation.

In our view there will be great pressure on district court judges to accept plea bargains that fix sentences. Judge O'Brien can give you, perhaps, a little better idea of that than myself, but to my knowledge our judges uniformly across the circuit reject bottom-line bargaining.

In other words, they simply will not participate in plea bargaining where the United States Attorney and the

defendant have agreed on the sentence, and they don't want to change. If there is one thought that they have expressed to me is that they don't want to be put in that position. And I think that the very nature of these guidelines drives them in that direction.

And the reason for that is that a defense counsel who is worth his salt is not going to agree to plead his client guilty unless he has a good idea as to what the bottom line is, and the prosecutors are going to want to know what the bottom line is, and in addition, in the busy districts, they are going to be concerned about keeping their calendars current.

Now, inevitably, there is going to be serious dispute over factual issues that affect the sentence. I don't think that the guidelines are clear enough as to how these disputes are to be resolved, and I think they are going to require resolution in many cases.

As I understand them, and my understanding may be imperfect, if there are factual disputes at the present time, we have a presentation from the defense counsel, we have a presentation from the prosecutor, and the probation office has made their investigation and this comes to the court and

here are three or four factors; did the person have a gun or didn't he? When he robbed the bank on his way out did he hit the little old lady over the head with the butt of his gun on the way out? And there is an obvious dispute.

Well, this dispute is going to have to be resolved, and unfortunately, as I will develop as I go on, the resolution of this dispute may mean more in the ultimate sentence that the person gets than the base offense conduct. And here we are resolving that dispute by a much lesser standard of evidence than we have for the resolution of the base offense conduct.

Now, I also feel that there will be a significant number of additional appeals under this system. I think that has been pointed out by other witnesses, and we are just going to have to live with that as best we can, although we might have eliminated it.

Now, I want to talk a little bit about the length of the sentences. When we got the revised draft guidelines, what we did was, before they came out I had solicited from each of four probation offices, presentence reports of persons who had gone through the system and whose cases had been resolved. There were 20 in all, and I sent those cases

out to four of the most experienced and best probation offices that we have in the center.

And the results that came back are shown in the chart that I have presented to you, and the fact is that even after you exclude the impact of the drug law and the Special Offender Act, that the length of sentence was nearly doubled, the gross length of sentence of these 20 people.

Not only that, but there was wide disparity among each of these probation officers, and in every case the chief probation officer told me that he had called in his most experienced people and they had gone over these reports together.

Now, I think the only way that you and we can be satisfied as to the impact that these guidelines are going to have, not only in terms of length of sentence, but also in terms of disparities is if you could take a larger sample than we were able to take in the limited period of time that we have and furnish presentence reports--and I don't know what the statistician would say, whether it should be 200 or 300, something in that area, I've been told--and then furnish those to ten of our best probation officers in the United States and ask them to go through the exercise that we did in

the 8th Circuit.

And I don't think that there is any other way that we are going to be able to answer the question of what impact this is going to have on prison population or whether the guidelines are written clearly and specifically enough so that we will know whether or not the disparities have been eliminated. And I know that that will take some time, but I don't know of any other way that we can achieve it, because if you go to the raw statistics, and we know now that about half of the people are sentenced to prison, another half are given probation or an alternate sentence to incarceration, but in order to get a comparable statistic under these guidelines, you have got to go beyond the base offense.

And the only way that you know what the final answer is going to be is if you know how these probation officers or judges are going to be reading the guidelines and what they are going to say that this requires.

Now, I understand you are in the process of having some additional statistical studies done. I don't know what the nature of those studies are and I would must commend to you doing a study of the type that we have done.

Now, with respect to probation, I would like to

take issue with the prior speaker, and without repeating what I said the first time that I was here, the experience of our district judges in our circuit, and for that matter, according to the testimony of the chief probation officer nationwide, have been excellent.

As I said before, Judge Isley has kept more comprehensive statistics as to the result of probation than any district judge in the United States, and his statistics indicate that 95 percent of the people that he has placed on probation have no further criminal record, and he has been keeping records ever since he went on to the district court and is now the Chief Judge for the Eastern District of Arkansas.

I would also call your attention to the recent publication of Senator Armstrong and Senator Nunn, entitled Alternatives to Incarceration, where they state that in adopting the Comprehensive Crime Control Act, the Senate intended to create a rebuttable presumption that non-confinement alternatives are to be used for non-violent and non-dangerous offenders.

They note that this policy will save money, ease prison overcrowding, result in punishments that are productive to the victim and the community and are less destructive to

offenders. And I think that I would certainly concur wholeheartedly with Mr. Feinberg, who was here yesterday, in his statement that unless we are able to assure the Congress that these guidelines are not going to result in a radical change in policy with respect to probation, and unless we can establish that we are not going to be putting a lot more people in prison, that these guidelines stand a good chance of being rejected. And I think that that would be too bad after all of the work and effort that has been put in over the last ten or fifteen years in this matter.

Now, as I indicated to you, the studies that we made indicated that there were great disparities among the probation officers. Now, I realize that in addition to the guidelines, there will probably be a workbook or something put out by the probation service, that there will be training sessions, and all of this. But I'm not sure that when all of this is done that when we have one human being judging the conduct of another human being, that when there is a much discretion in this system that there is, that the disparities are going to be eliminated.

Now, the final point that I want to make is one that hasn't been made by the other speakers, and yet to me,

it is, perhaps, the most important one, in part because it is the only point that others have not made. And that is that these case studies that we had revealed the great weight that the guidelines place on conduct other than that necessary to establish the offense of conviction.

For purposes of analysis we broke the sentence into two elements, that that is to be proved to obtain a conviction, and then the non-adjudicated conduct. And this analysis is shown on the fourth chart that I have and it shows that the non-adjudicated conduct was as important in determining the ultimate sentence as the offense of conviction conduct.

And this is a matter of great concern, because the practical result is that in many cases the conduct proved beyond a reasonable doubt is less important than the conduct which only needs to be proved by some evidence.

Now, let's take an example from your own workbook. You say on page 3 of the guidelines that related conduct not included in the offense of conviction may be used to aggravate or mitigate a sentence but it does not carry the weight of a separately charged and convicted offense, and I subscribe to that principle.

Then we go over, however, to page 17 of the

workbook and we look at an example that you have there with respect to assault. And the base level of the offense is 15. The guideline sentence for a simple assault is 18 to 24 months. Now, let's assume that the person was charged and pled guilty to a simple assault, and when the reports come in it appears that a dangerous weapon was displayed, that the assault had been planned, that the victim was permanently injured, and that there was more than a single victim.

Now that adds 15 levels. Now, if you speak in terms of levels, that means that the unadjudicated conduct was as important as that that had been adjudicated. But if you speak in length of time served--and this where a simple assault has been charged--that increasing this from level 15 to level 13 increases the sentence range from 18 to 24 months to 97 to 121 months. In other words, that's over a 400 percent increase.

Now, can this happen? Of course, it can. And the thing that bothers me is that I'm representing a defendant and he's charged with a simple assault. I cannot plead my client guilty to that simple assault until I have some idea as to what's going to be in that probation report. So most of the judges that I have talked to feel that under this

system that what is going to happen is that we are going to have to develop some kind of a pre-guilty plea sentence report.

COMMISSIONER BREYER: What happens now compared to what happens then?

JUDGE HEANEY: What happens now?

COMMISSIONER BREYER: Yes. A guy comes in, its assault, he shoots somebody and permanently injures them. What happens now?

JUDGE HEANEY: Well, if a person comes in now he doesn't ordinarily have the presentence report, but he's relying on the discretion of the district judge, what his counsel tells him that the district judge does in similar cases, and he's relying on his ability and the fairness of the judge and his ability to convince him as to what his sentence is going to be. Now, that's the practical way that it works at the present time.

But now the judge doesn't have that leeway, because we are telling him that if there was a gun, that unless you want him to depart, you have got to add four levels. If the assault was planned you have got to add three levels. So, I mean, these are no longer left to the discretion of the judge. And he is going to--every defendant is going to have

an entirely different attitude.

Now, another thing. Let's say that the bank robbery case, the maximum for a simple bank robbery now is 20 years. An individual comes in and he pleads guilty, and when the presentence report comes in, the judge looks at it, and he used a gun, he got $100,000 and he hit the little old lady over the head on the way out of the bank.

So the judge is going to feel, if the person doesn't have any priors, that because of that aggravated conduct that he is going to put him towards the top of the range. But in practical terms that person is only going to serve about a third of that sentence, and so he is not so upset about it.

But now he is talking about real time, and for every single factor that affects his score he is going to serve additional real time. And so if that is the case, then there has got to be a fact finding procedure to resolve these difficulties, or we are going to have real due process problems.

Now, we have talked about the role of the probation officer. I know that you all realize how important it will be, and when we consider the impact, it seems to me that it is absolutely essential that either you or the general

accounting office understand that we are going to have to augment the probation officers in the field.

Every chief judge that I have talked to told me to tell you that. Every chief probation officer told me to tell you that, because they simply are not going to be able to do this job unless they have the additional staff to do the job.

Now, the district court's role. Here again--and I've talked about this a little bit--but the district courts are very concerned as to precisely how their role is to be played out, particularly in the guilty plea situations. And unless guilty pleas continue to be forthcoming in 90 percent of our cases, the whole system is going to break down.

One of the judges that was here yesterday that I talked to estimated that in New York alone that this requirement would mean that they would have to have four additional district judges in the Southern District of New York if they were to comply with the fact finding procedures that he feels are essential to meet the requirement of this Act.

Now, in closing, I think that I would like to recommend very strongly that you take whatever time is essential to do the impact studies that are necessary and satisfy yourself that you, in reality, are going to be

eliminating disparities and to satisfy yourself on the impact on prison sentences, to satisfy yourself on the impact of probation, and to satisfy yourself that the guilty plea process is going to continue to work as effectively as it has worked in the past.

JUDGE O'BRIEN: Mr. Chairman, if there are no questions of Judge Heaney, I wonder if I could say a few things.

CHAIRMAN WILKINS: Yes, sir.

JUDGE O'BRIEN: I know that you are running late and I appreciate that. There are a lot of things that I would like to visit about, but I think that there are a couple of messages. One is that I would like to commend you. You have worked hard. It has been a great education sitting over here--this is my fourth day of listening--and it has been a great education.

Why would Judge Heaney and I come here and stay four days? Do you think we are retired or something and we don't have anything to do? I have 200, over the average, civil cases and a lot of criminal cases, but there is only one way I can describe to you why we spent four days here.

The last time that we were here, December 3rd, or something like that, I was missing a conference out in

Phoenix of the 8th and 10th Circuit Judges. And so when I got done here I flew to Phoenix.

I got there about midnight and it takes a while to get to the hotel and things. So I got up a little late. The meeting started promptly at eight o'clock. I was a little late, about 8:10, and I snuck in and sat in the back.

They stopped the meeting. They said, Don O'Brien is here. He has been in to the Sentencing Commission, and let's get a report from him. I said, I'll give you a report later. No, we don't have anything more important than this, come up here. So they stopped the proceedings, I went up in front. They want to know everything that they can find out about it.

There's 100 judges there. More than that, maybe, the 8th and 10th Circuits together. They want to know like Butch Cassidy and the Sundance Kid, who are those guys, about you. They wondered who the devil is doing this and where are we at.

I explained to them that I had visited with friends of all yours and had some background on each of you and gave them that background. They were all good reports. I told them you were smart and good looking and conscientious, and I

believe that.

But they really have a great interest. And I'm not a celebrity in that group, but that day I was. They wanted me to keep talking, and when I did finish, a couple of them grabbed me in the back and said, come here, I want to talk to you about this and that.

I couldn't walk down the hotel corridors or anything else. I was stopped for a couple of days. The reason is that this is a real intrusion into their lives. And intrusion is the wrong word, but take it respectfully. It is just such a change, that they have no idea. And that's why they are saying, you better go back there and see what is going on, and so forth.

Now, you've got their attention, is what I want to tell you. It is very important to you. It's like--and I don't know just how this would work, and I'm sure there would be some constitutional problems, but if everybody who got a grade in law school that didn't like it could get an immediate hearing in front of a federal judge and have it all brought out and have the professors brought in there and cross-examined, that's almost the kind of a situation that they find themselves in.

Now, they understand, however, that they have got to face up to the facts. And I realize guidelines are set, but I wanted to say to you, I sit here and gentlemen--Mr. Gainer from the Justice Department, I think, would be especially interested in this, at least something to take back over to Justice--this is out of the Miami Herald of December 4th. Somebody sent it to me.

And it says--they are putting in a new bill in Florida to do away with the guidelines in Florida--and here is what they said. They said that the survey that they made showed that 60 percent of the circuit judges want to see sentencing guidelines abolished, as do 100 percent--Mr. Gainer--of the states attorneys.

The switch was, on the other hand, 92 percent of the state's public defenders, all of whom responded to the survey, want sentencing guidelines continued. I say that to you not to try to abolish the law or anything, but those of you who are urging may in a year wish you hadn't urged so much, is what I'm getting at.

I think if you could just kind of take it a little slow, it reminds me of little league baseball. I played ball as a kid, and finally my boys got to the right age, and they

said, will you coach a little league team, and I said yes. They handed me a book about as thick as your sentencing guidelines, and they said, these are the rules for little league baseball. I said, God, I won't be able to comprehend those.

Now, you have done a good job, and I'm not running you down on that, but the facts are that if you can keep it fairly simple it will help. This is a tough job, sentencing people. I think I'm lucky. I grew up--I've been a prosecutor over half of my life.

And as such I was in courts a lot, and so I don't really sweat it as much as some of the other judges. The ones who really sweat are the guys and ladies who had civil practice all their life and never been in a federal criminal courtroom, or any kind of a courtroom. And they just really agonize.

And Professor Robinson, you talked yesterday about the matter of judges are going to have some new power in this situation. And I would say that I don't quite agree, if I understood you correctly. I think judges have thought they had the power all along. They have sweated it out. They have woke up in the middle of the night, they have been

thinking about the problems of how much am I going to give this person and so forth.

The do not, almost universally, worry or think about, what is the Parole Commission going to do, because they have no idea what the Parole Commission is going to do. I had a biker come in front of me, and he came in front of me in his biker's clothes and he said flat out, I sell cocaine for a living.

And I said to myself, to heck with you. So I gave him what I could, and I think it was 30 months. He was back on the street in my home town in about six months. I asked how come, and they said well, he had only sold a gram, and a gram, the Parole Commission sends him back in about six months.

Now, the point is that I sweated it out and thought I was doing what I should be doing. I'm not running down the Parole Commission, but what I would like to say to you is that under the new guidelines, as I see it, it will almost be a relief for some of these judges whose background is only civil, because it will be just like punching the computer, and they will do it and they will abide by it.

What will I do? I'll tell you, I think it is going to be not so tough for me. Here's the way I feel about it.

Judge Heaney is going to have to reverse me very plainly about five times before I will catch on. And the reason for that is this, it is not that I care about getting reversed. You appellate judges understand that sometimes you reverse me, I don't even read your opinions. I figure if they don't have any more brains than that I don't want to read it. I say that respectfully.

COMMISSIONER MACKINNON: May I speak for this side?

JUDGE O'BRIEN: Yes, sir. I say that respectfully, but what I mean is this, and I'm going to quit in a minute because I know I'm taking a lot of time.

If I agonize night and day and I write up a habeas corpus thing and I write it up both ways; I'm going to grant him relief or I'm not going to grant him relief, and I almost sign the one where I'm granting him no relief, and I say I can't do that, and my gut says I can't do it. I sign it, it goes to the circuit, four months later they would reverse me. I say fine. It didn't hurt their gut as much as it hurt me.

So, that is what judges are going to do now. When it gets right down to it, they are going to go away from the guidelines if they can't stomach the situation.

Now, I'm going to quit in a minute, but I agree

with you, Judge Breyer, that we ought to have a situation where you can give probation and still give them a sentence. I've been doing it for quite a while, and the way I do it is I give them probation, and I give them 60 days to do, and I do it on 30 weekends in a row, from Friday night at six o'clock until Sunday night at six o'clock.

Now it looks on the statistics like probation, but boy, those people don't like it, and 60 days in a county jail, they don't have anything to do, they don't have any pool tables, they don't have anything else. They sit for 48 hours. And I think it is a good thing and I think it works.

Now, I still have a lot of things I would like to say, but I'm going to quit. But I want to just check one thing here. The thing that may be saving, and I hope you don't define it any more, is the word "altruistic" that you have on page 149. If I understand what that means, that may help my gut. Thank you.

CHAIRMAN WILKINS: Thank you very much, Judge O'Brien and Judge Heaney.

You know, when I was a district judge, Judge O'Brien, I use to feel exactly the same way you did. In fact, I would call the 4th Circuit the Court of Intermediate

Errors. But now that I am an appellate judge, I have a whole different view of matters.

You know, Judge Heaney, you have gone to a lot--and Judge O'Brien--a lot of effort to score all of these cases, and I might add, that's what we are doing to, in-house, and using probation officers coming in. It's a clinical testing effort and it has been most beneficial.

I want to say though, after we got what you had submitted to us I had one our in-house probation officers to score it to determine why there was disparity in the results that you submitted. And there are three basic reasons. One, the concurrent/consecutive problem has not been resolved, as we point out, and we have got to find an answer to that.

The other was a choice between the ranges that the guidelines permit that perhaps may need to be tightened down, but at least it was within the guidelines. And the third reason was honest mistakes made by your probation officers who don't have an instruction booklet.

Now, I can understand why. You get this thing cold and you try to figure the thing out. For example, I just want to point out a couple of cases, and I'm not going to go through all 20 of them. In fact, we didn't get through but

about 15 of them, just taking a look at them last night.

But you know, under the Cunningham case where the fellow made a false statement and submitted false information to the SBA and defrauded the government out of $69,000. Our guidelines would score that a level 12, which is between 12 and 18 months sentence, which in my mind is probably about right as far as the sentence is concerned.

But one of the officers scored it a level 22, whereas your other officer scored it the same as our probation officer did. And I wondered why he got so high. Well, he read the presentence report and he read in there that there was some indication that there was an arson committed. And in fact, it was during the investigation for this fire they uncovered the fact this guy defrauded the SBA, and so he scored him for an arson, rather than the fraud that he committed on the government.

The Cotton case where the fellow forged stolen checks, he received a $2,000 Treasury check and he forged it an put it in a fictitious bank account, and he also was convicted of possession of a weapon. One of your probation officers came up way down the line on his level, but he had a note that said the didn't have page two of the presentence

report, and that's where all the information was about the weapon that the other officers actually picked up.

And there was a perjury case, or Uli perjured himself before the grand jury and all of the officers scored it the same as ours did, within the range, except one. One went to the bid rigging section, disregarded perjury, and he sentenced him for bid rigging, since that was kind of the subject of the grand jury inquiry, was bid rigging where this fellow did commit perjury.

So I think that some of problem is with our guidelines, and we recognize that we are going to use your information to try to correct these errors that we have, but a lot of is the inability of probation officers in the field who haven't been working in this process who get this thing cold and say, now score, go ahead and sentence somebody, but don't have this instruction booklet and don't have any direction, and it is a difficult thing to do without it.

JUDGE HEANEY: The training and the instruction book will help, but the ultimate test is in the field, because they aren't going to be scored by a single person in a single office in Washington. These are going to be scored by probation officers and district judges throughout the

United States.

And if I could just leave one point with you here today, it would be to take a minimum of 200 actual cases when your final guidelines are completed and to send those 200 cases out to the best probation officers that we have, together with any instructions that you want to give them. And I'll predict to you right here and now that if you do that that you are going to have a high degree of disparity and that you are going to have more people being put in jail for longer periods of time and fewer people getting probation.

And I don't think you should send it over to the Congress until you have gone through that exercise. I don't think it is fair to you. I don't think it is fair to the judges, and I don't think it is fair to the Congress. Because I don't think that any other kind of a study is really going to bring out this problem.

And I would hope that when you do that study not only do you ask for that but that you make the kind of an analysis that we made as between adjudicated and non-adjudicated conduct. Now, if our primary aim is to eliminate disparity, after listening to all of this testimony, I don't think there is any other way to do it, other than to go to a very simple

offense of conviction model.

Now, if that is a goal but not the only goal, then we can go to this system which is going to permit individual human beings to make these other decisions, and unfortunately to make it on less than evidence beyond a reasonable doubt.

CHAIRMAN WILKINS: Well, I think you are right. We do need to test this thing over and over again and we need good instruction to probation officers. But when we have brought them in and spent some time with instruction on how to do it and then let them score, we don't find the same errors occur that occurred when you are out isolated in the field without having the ability to understand what's going on.

JUDGE HEANEY: I'm sure that would help.

CHAIRMAN WILKINS: Questions to my right. Professor Robinson.

COMMISSIONER ROBINSON: First, let me thank you, as the Chairman has, for all of your work. I don't think any witness has undertaken as ambitious a project as you have and I now everybody appreciates it. And the disparity point is very significant.

I'm struggling with one other point that is significantly touched on, and I really don't have this sorted

out in my own mind. If you've been sitting here for a few days you can tell, and it is this plea bargaining business, and that will be, we hope, 90 percent of the cases, and it is still not clear to me how it is all going to work.

Part of the problem, of course, is can we predict exactly how the process will go. And one of the issues is, for example, will we or won't we have a lot of cases disposed on stipulated factual agreements between the parties? That's certainly one way of avoiding factual disputes and long hearings and so on. And that's one approach, to structure a system that has these stipulated facts.

JUDGE HEANEY: My guess is that there will be a lot cases that will be disposed of by stipulated facts, particularly when the district judge has confidence in the United States District Attorney and has confidence in the defense attorney and in his own probation office. I think that a lot of them are going to be resolved on that kind of a basis of necessity, because it makes the system work.

But the problem is that our judges, unless they change 180 degrees, are not going to be willing to accept a bottom-line bargain. So even if there is a stipulated set of facts, there is going to be some uncertainty existing in the

mind of that defendant as to what's that going to mean, and so he is going to have his lawyer attempting to predict these values and, as I understand your guidelines, the probation officer should really come up and say this is what I think and give it to the judge and give it to the other parties, and so there can be some argument on it.

And so I think that's the way it is going to work in most cases. Now, another example is in the complex case where we are dealing with major increases in time because of associated conduct. Those, I think, are going to result in a lot of additional evidentiary hearings. I don't think that there is any way that that can be avoided.

COMMISSIONER ROBINSON: The way you read these guidelines, are stipulated facts permitted?

JUDGE HEANEY: As I read the guidelines, they are not permitted. You can give them, but I mean, the judge doesn't have to accept them. The judge can either reject the stipulated facts or accept them. Is that the intention of the Commission?

COMMISSIONER ROBINSON: I'm not sure. There may or may not be an intention of the Commission.

What about the particular thing I was talking about

with Professor Schulhofer about parties agreeing on facts that were not disputed but parties agreeing that in their stipulated facts they would leave out. The probation report may have a full disclosure of all sorts of tangential ambitious facts, but the parties might agree that there are some facts that simply could not be proved at trial or even under some lesser standard, therefore they agree to leave them out.

That's something, I take it, you think would not be permitted by the guidelines. Would you generally approve of that policy or not?

JUDGE HEANEY: Don, why don't you answer that?

JUDGE O'BRIEN: Well, I think as a practical matter they might be left out, but the probation officer would know it, and a probation officer would hardly not tell the judge. So as a practical matter I think the judge is going to know anyway. So then he has to say, well, okay, if you don't think it is relevant, if you really can't prove it, then I'm going to block it out and not figure on that.

JUDGE HEANEY: Now, there's one interesting example that was brought up at the seminar that you and I were at the other day, and that was by the former district attorney

for the Southern District of New York, who was very concerned about the fact that pre-indictment plea bargaining in complex cases was now becoming the rule. And she noted that in the Boesky case that there is hardly any way that even in the best of good faith that anybody other than the person who is handling the case in the district attorneys office can really know all of the facts that are involved in that.

And her concern, as you remember, was not only how you were going to resolve that problem, but also with the revolving door problem of so many young lawyers going into the prosecutor's offices in big cities and then going out to represent career criminals and having a bad situation develop in these very complex cases where the only way that a judge can possibly know the facts is to accept the honest representation of the lawyers or go to trial. I mean, the two-, three-or four-month trial.

COMMISSIONER ROBINSON: Thank you very much, Judges.

CHAIRMAN WILKINS: Commissioner Nagel.

COMMISSIONER NAGEL: Judge Heaney, I want to thank you especially for your very thoughtful and ambitious analysis and provide you with some information about what is ongoing in the Commission which perhaps will be somewhat

reassuring.

We have underway a set of analyses. We've taken a sample of bank robbery cases, heroin, embezzlement, and fraud. And for each of these samples we are doing three kinds of analyses. One is, we are looking at the bases for unwarranted disparity among sentences that have been meted out by federal judges in the past, and looking, too, at the range of sentences, the dispersion, what percent got probation, what percent got split, and then if an imprisonment sentence was given, the amount of time.

And then we are looking at the range for the same cases resentenced under the guidelines. And as the guidelines are revised we can repeat the exercise, so we can see whether we have improved our ability to reduce unwarranted disparity, and we can also hopefully see what remains as unwarranted disparity and the sources for that unwarranted disparity.

And then, at the same time we are keeping logs of individual difficulties with making the same judgment call on the same case. So we have a series of groups of individuals sentencing the same case and then indicating where they make a judgment call. If the judgment call is different, then we have a notation of that so we can go back and look to see if

the problem is with the language, with the specificity, et cetera.

So there is ongoing, at least, a current commitment to, I think, some of the concerns you raise, and we will certainly take your analysis into account and try to consider the points you have raised. But we are headed in the same direction and worrying about the same problems.

JUDGE HEANEY: Thank you very much.

CHAIRMAN WILKINS: Judge Breyer.

COMMISSIONER BREYER: I would just add to what Commissioner Nagel says when she says ongoing. There's a little sentence in here which you might have missed, because it wasn't really publicized too much. On page 201 it says: "Summary data on estimates of current sentencing practices are available on written request."

I mean, we have information. We have gone through 10,000 FIPSIS reports. It's a little awkward to get it around for the reason that it's under continual revision and it reflects the guidelines and the guidelines reflect it, and there is this back and forth interaction.

But I have a piece of paper--I mean, I have a copy of this, see--and I have a staff person go through and

translate as to each guideline as best possible, in parentheses, a number, which is either from the FIPSIS report or the Parole Commission, and that number tells me what the present practice is as a guesstimate, sometimes, a good estimate, sometimes, very accurate, sometimes, from our 10,000 FIPSIS reports.

And then in parentheses after that I have the percentage of people who were put on probation. And then next to that I have what the parole guideline would be for that offense. And that's revised continuously, because it's amazing how sketchy the information can be, even with 10,000 reports, because people never have the opportunity to collect it with the same categorization that we are now imposing. And it's hard to say do it even now, because that categorization will change.

That's why there is a need for this evolutionary concept. But is isn't correct to imply that we are sort of operating in an informational void, because we are not. That is, we are not operating in a void, and we are going to operate in less of a void yet, because these same numbers, Commissioners Block and Nagel, Rhodes, and Norm Carlson are sitting there with groups of people, including a professor

from MIT who is down here.

This is career, operational research in prisons. And they are producing models which will give us feedback to the best possible extent--we already have some--on what will happen to prison population in various categories.

That is, it may not be the greatest work in the world, but it is pretty hard for any of us to see now how to do better, given the data that we have. So we are not in an informational vacuum. Now, where we found the greatest increase in prison population is in the area of drugs. And of course, in that area we have a statute that has mandatory minimum sentences.

So it is not surprising to me that your parole officers will go through and find large increases. Where they find increases from other areas, I would imagine they are operating on the bases of guesses, or possible information derived from one judicial district but not across the board. They may be able to do better than our 10,000 FIPSIS studies, they may not. So I'm interested in that.

But I want you to see that we are not operating in a vacuum. I also want you to realize that we do have Rusty Burroughs, who is a former probation officer. He does have

teams of people. Many of these people who are doing this include probation officers. They have called groups in, and they are going through it guideline-by-guideline to see how they are going to be implement in practice.

That is not something we are starting tomorrow. That's something we started weeks ago. And of course, it is difficult to make all of this public in some written form because it keeps changing. And the reason it keeps changing is because we have this iterative process.

And believe me, we are far from getting a perfect solution to these problems. But nonetheless, I want you to realize that there is what Commissioner Nagel says. There is as a rather serious informational effort which will be filled with holes. All we can say is that there are human beings operating it, and data is incomplete, and they're trying, and we're trying.

JUDGE HEANEY: And I am reassured in part, but I would be a good deal more reassured if you were to take, as I indicated before, a sample of sufficient size, and distribute that out in the field to probation officers who are working in the field, of actual cases that have occurred --

COMMISSIONER BREYER: No, we take actual cases. I

mean, our 10,000 cases are actual cases. They are real cases.

JUDGE HEANEY: But I mean, obviously, you can't send 10,000 cases--

COMMISSIONER BREYER: No, no, but I mean we have 10,000 cases which are not only in the computer, but are there physically with generic descriptions, and then they'll go and select from the 10,000 pieces of paper which are coded, those presentence reports which reflect, let's say, the crime of bank robbery committed with a gun--I mean, it's not done perfectly, and I accept that indeed there should be field tests, et cetera. I think that is a very good idea.

But I also want you to see that it isn't that we're just making these things up.

JUDGE HEANEY: If I could just request that when you reach the final draft of your guidelines, and have your statistical information available, that I surely would like--

COMMISSIONER BREYER: Well, it is available in summary form now, if you want to look at it. Now I am doing this a little deliberately because I fear--if you were here yesterday--I mean, I fear the Department of Justice, to a degree, in trying to get more detail, to have more specificity,

to have more distinctions--and this is an honest disagreement that some of us have--is marching in the wrong direction.

And this is an honest disagreement and it doesn't involve ideology or anything. It's a disagreement about which way the guidelines should go in terms of practicality and stopping disparity, et cetera.

But what I fear is that this piece of paper that you have now written will be picked up, and used to march a 100 percent down the wrong field.

You see, because what you have in front of us, which will have general public circulation, is a document where you say you gave this, these 20 cases, to four probation officers, and they reached a lot of different results. And that could be used as a reason for saying let's have a lot more detail, which I think is the opposite of what you want to suggest.

So we did go through this last night, and we read 15 cases of the twenty, and my recollection, having gone through this and compared it, is six of those cases, of the fifteen, all came to the same result.

Nine of the cases they didn't. Now where they didn't, much of the explanation is that they were inadequately

trained, and that can reflect one of three things.

They went to the wrong guidelines. There's no statutory index which, in the future, would direct them to them to the right one.

Second, there were certain physical mistakes. Like one of them in the Ayres case has page number 5 on one page, and he turned the page and he wrote down nine, you see, at the top of the next page.

All right. That's going to be true throughout. I mean, that kind of thing will always happen.

Third, they didn't have the information in the presentence report. They didn't have the information as to past criminal conviction. They didn't have the information, in some instances, about the money.

Now, the majority of things were that kind of nature, which I think are curable regardless of what they look like.

Then, as the chairman said, there were a couple other things which reflect guidelines problems, and that's primarily concurrent consecutive.

JUDGE HEANEY: Now I'd like to comment on what you've said. First of all, if you want to eliminate disparity

without offending any concepts of due process, you move towards a Minnesota model. That is the way that you get minimum disparity, by having a model that is based exclusively on the offense of conviction.

And then that means if the government wants a longer sentence, they have to charge it, and either prove it in court, or get the person to plead guilty to it, and then the judge has no alternative but to sentence pursuant to that.

Now as you move away from that you are bound to get more disparity, and the further away you move, the more disparity you will get, and in addition, you begin to run into due process problems in terms of what kind of a hearing is a defendant entitled to in terms of this collateral conduct that assumes great importance.

Now, the other way you move towards it is like in Professor Robinson's model in which you take every conceivable form of human conduct, and you put a number on it, and then you can eliminate disparity.

But the problem with that is that you have tremendous due process problems. So what we're looking for is a balance between preserving some discretion in the District Judge because you can't enumerate every element of human conduct,

eliminating disparity and trying to preserve the constitutional rights of persons who are charged with a crime.

And it's a real balancing job.

COMMISSIONER BREYER: Your basic point, it seems to me, is very well-taken, but I'm not sure you used a happy example, because frankly, if you say assault, and somebody punches somebody in the nose--Defendant 1--and Defendant 2 assaults a person by shooting him with a gun and permanently injuring him, that's a pretty strong case for distinguishing in the sentence that those two people get.

JUDGE HEANEY: No doubt about it. My only point was, or the reason I put the example is, that if a prosecutor wants to convict a person of an assault in which bodily injury is effected, and a gun was used, that's what he ought to charge. That we hadn't ought to charge a very simple assault, and then increase the sentence by 400 percent.

COMMISSIONER BREYER: Charge it where? Under the Federal law he'll just charge a violation of Section 111.

JUDGE HEANEY: Well, it's your example--

COMMISSIONER BREYER: And he'll have a manual, and that manual will say charge 28USC.111, and then it'll have the elements of that crime and--

COMMISSIONER GAINER: If it has jurisdiction.

JUDGE HEANEY: But it's your example. I mean, it's your example, and the only reason I used it is because it was therein the book, and the extremes of 18 to 24-months, and 91 to 127-months struck me immediately as being something that I would be very, very, concerned about.

COMMISSIONER BREYER: Why?

JUDGE HEANEY: Why?

COMMISSIONER BREYER: Why isn't it right to put a person who shoots somebody--I mean, why shouldn't you put that person in jail for 97 months. He took a gun and he shot--

JUDGE HEANEY: Well, that isn't the question, whether we should put him there, but you shouldn't put a person in jail for four times longer than you would for a simple offense, unless that person either admits to the conduct by pleading guilty, unless he goes to trial, and that evidence is developed of conduct, or unless we have some kind of an alternative sentencing procedure which is going to give him his day in court.

COMMISSIONER BREYER: And what happens right today to that person? That's why I asked you. He's convicted

under 28USC.111, and it's assault, and the presentence report says--what happens? Is there a due process hearing? No. What happens?

JUDGE HEANEY: There is a mightily different situation now because we're not dealing with real time, now. We're dealing--

COMMISSIONER BREYER: You mean the person who's convicted of--

JUDGE HEANEY: We're dealing with one-third time. In most of these cases we're dealing with one-third time, and so if the judge gives him the maximum, he isn't going to serve the maximum. He may serve a little more than a third, but he isn't going to serve anywhere near the maximum sentence that he could be given.

COMMISSIONER BREYER: Right. I mean, you sentence these people. If you have a case in front of you of a person convicted of assault, and in fact this person has shot somebody with a gun and nearly killed him, won't you give a sentence that will lead to a significantly greater time served than where the defendant's just punched somebody in the nose?

JUDGE HEANEY: Significantly greater, but 400

percent in actual time, I don't think you can find any examples of any sentences where that is being done now.

JUDGE O'BRIEN: I would say in answer to your question, and certainly you would take that into consideration, and certainly you've give them a tougher jolt, yes.

COMMISSIONER BREYER: A lot tougher?

JUDGE O'BRIEN: A lot tougher. But I think his point is that you get that, where he has actually went through the process now, he's had his plea bargain if he's going to have one, he's had a presentence report, he's had everything else, and he finally comes up in front of the judge and the judge can still consider that because it's part of it. Now maybe I'm misunderstanding as far as Judge Heaney, but I think he's talking about a situation where it doesn't really come up in front of the judge. That you're adding that on as factors that happen in addition to the basic charge.

Now I can't deal with assault too well because like Mr. Gainer says, I never get any assaults in front of me, so I don't know that--I think they do, for example, on Indian land, and things like that. I don't have those kind of cases, so I can't give you a practical thing. But I'm going

to answer your question by saying, yes, if the conduct is bad, they're going to get an extra jolt.

JUDGE HEANEY: Let's take an example that occurs every day. A person robs a bank and he uses a gun. Now why shouldn't the prosecutor, if he wants to get the additional time for the gun charge the gun?

COMMISSIONER BREYER: I'll give you one reason why. One reason why is that if they want to charge it right now as a separate offense, they have to, I gather, take that offense that carries a mandatory five-year minimum.

JUDGE HEANEY: No, no, there's a separate statute. As I understand it, there's a separate statute on robbing a bank and using a dangerous weapon, which gives a 25-year sentence instead of the 20-year sentence.

COMMISSIONER MACKINNON: There are several sub-divisions in 21.13.

JUDGE HEANEY: But the basic point I want to make is that in most circumstances, if a prosecutor intends to rely on associate conduct to substantially enhance a sentence, that he should charge that conduct.

COMMISSIONER BREYER: In most. As long as you say most everybody agrees, and then it becomes the question which

extra things, and where you have an awfully appealing case of yes, there should be, is where somebody, say, really hurts another person, uses a gun, in conjunction with an offense where there is no obvious way to charge it.

I mean, we all know that they get big enhancements right today, and they have no hearing, and so you see, that's the--I'm not disagreeing with you, perhaps, as much as I sound. It's a question of where and--all right.

CHAIRMAN WILKINS: Other questions?

COMMISSIONER MACKINNON: Judge, I'm not going to recuse myself here even though I come from Minnesota, and I used to play baseball around Grandview Park in Sioux City, but I've got a couple of questions. First of all, do you think you need any written thing for a court to hold a hearing?

JUDGE HEANEY: There's some confusion now as to just exactly how--they're not certain as to how they're to resolve these, and it might be helpful.

COMMISSIONER MACKINNON: You're familiar with what they did in McDonald, where there was a mandatory sentence for a gun in the state guidelines, and the Supreme Court said that it only had to be proved by a preponderance of the evidence.

You were talking about the Minnesota guidelines. They just approved a sentence of five times the presumptive sentence for rape, approved by a court of appeals and refused by a supreme court.

JUDGE HEANEY: In Minnesota, they have departures in about 11 percent of the cases, half of which are up and half of which are down, and until the case that you spoke of, Judge MacKinnon, their general rule was and remains that they will not approve any departure that is in excess of a 100 percent.

COMMISSIONER MACKINNON: Yes. Twice. Judge O'Brien, I was wondering if you thought that the judge ought to accept the bottom line in some agreement?

JUDGE O'BRIEN: Well, the way I used to, I wouldn't do it, but I've been thinking as we sit here, and for the last two days, trying to figure out, if I had a good attorney for the defendant that I trusted, and I had a good U.S. Attorney who would level with me over the years, and they came in and they said: Look, Judge, here's the guidelines, here's the situation, here's what my guy says, what do you think? And now we're talking about whether it might be three years or seven years, or something like that.

I would ask a bunch of questions. I would get right down to the nitty-gritty, and I would say you guys aren't holding back a thing?, I want to know, and we talk plain in our court.

Finally, if it got down to where it looked like they had really worked it out, I might say to them this: All right. I'm going to tell you lawyers yes, but I'm not going to say that in court, and I'm going to say to the defendant, and everybody else, that I am not going for this a 100 percent because I don't want the lawyers that I can't talk like this to, and other people to be coming in here--or if we've got some U.S. Attorneys there that I feel are green and young, and therefore I have to check their work a little bit and ask them more questions, I wouldn't want a precedent like that. But to try to answer your question, I'd say yes, if I thought they were good experienced lawyers.

COMMISSIONER MACKINNON: And depending on how much you assuredly knew about the case, you would tell them, if there's anything shows up in the presentence report that's a variance of this, I reserve a right to come to some different conclusion?

JUDGE O'BRIEN: Yes. I would.

COMMISSIONER MACKINNON: And in giving the sentence, say you gave him nine years, you would recognize that you were actually giving him practically three years under ordinary circumstances, wouldn't you?j

JUDGE O'BRIEN: At the present time you're talking about?

COMMISSIONER MACKINNON: Yes.

JUDGE O'BRIEN: Yes.

COMMISSIONER MACKINNON: Well, I go back a little longer than some of these judges, and I know that's the way they all thought. We always thought that whenever the sentence was imposed it was a third of the sentence, do it a good time, and the parole commission. The other thing is, do you think there's anything in these guidelines that don't comply with the statute?

We've got a statute to work with here, and, do you think there's anything that violates the statute?

JUDGE O'BRIEN: Well, I've been listening for the last couple days, and some of the judges--I believe one from New York--Noland or something like that--I can't think for sure of his name--but he said to you you're getting conflicting signals. And at that time I think he made a good point.

So I think that if you took it as no conflicting signals, that's one thing. If you say, and you believe as a Commission, that you're getting conflicting signals, then I'd have to say to you there probably are some things.

And I think the way that I would work that, I'd take that Section 20(a), I think it is, or Section 20, and I'd say to them, look, we did think we got conflicting signals, we just couldn't reconcile this particular problem here, and we think you ought to take Section 20, we recommend that you say so and so and so and so.

And one of the things I'd recommend right now would be Judge Breyer's thought that you can give some time and give probation, and I think there's other things you could recommend. I hope that answered your question, Judge.

COMMISSIONER GAINER: What's the Section 20 you're referring to, Judge? I'm sorry.

JUDGE O'BRIEN: Well, it's the one that says--I think I've got it right here. This is 28.995, Section 20. It says "You shall make recommendations to Congress concerning modification or enactment of statutes."

You have that right, I believe, and it's strong in there. The last time I was here, I urged you to take a

stronger look at 20 than at some of the others there, but, you know, I'm not saying that that's paramount, but I really think that 20 is clear.

And I would say to Congress: Gentlemen, you gave us conflicting signals, and we worked at it real hard, but we'd hope you'd give us a couple of quick code changes or something.

COMMISSIONER MACKINNON: Well, you were talking about Judge Brieant from New York, and I think the discussion related to the difficulty probably between probation, as read in the statute, and the way it is in the guidelines, and to the extent that they conflicted with the other provisions in the statute.

There isn't any question but what--I don't say there are any specific contradictions, but there are a lot of implied--not a lot of. There are some implied contradictions in the statute that we have to resolve.

But on the whole, you don't think that the guidelines don't comply with the statute in a general way?

JUDGE O'BRIEN: I think they do. I'm like James the Just from Judge Burns who was here yesterday. I haven't thrown my hat in the air yet over the final draft, but I would say yes. I certainly don't know of anything that is

outright unconstitutional from my point of view.

COMMISSIONER MACKINNON: Just to supplement Judge Heaney. There have been 350 cases decided in the Minnesota court, three hundred on--these are on departure--three hundred on aggravation and fifty on mitigation. And we've looked at them all.

COMMISSIONER BREYER: Maybe I might add one thing, because you've put in an awful lot of work on this, and I think we all appreciate a lot. And we sat down, as I say, last night and read through, in detail, till fairly late, about fifteen of those cases that you worked on, and for whatever it's worth, my intuitive impression, having gone through that is, if you think that it makes a case that the guidelines are all somehow totally mixed up, and so forth, I don't think it makes that case out.

If in fact you think that that data that you've gone through makes out a case, which I think is your basic point, that simplicity is necessary, that when you think it's very simple, think again and make it simple. If you think it makes that case out, I agree 100 percent, because no matter what we come up with, this is going to be administered by people in the field.

And if it's too complex and they cannot administer it, what we will substitute for a process is sends convicted people to prison, is a process which sends convicted people to endless hearings. And I think that's your basic point, and I think that the data that you provide us with is supportive of that.

So I think that the work you have gone through is appreciated.

JUDGE O'BRIEN: Mr. Chairman, could I correct a mistake. I said a moment ago, in answer to Judge MacKinnon, that I didn't think that I found anything in there that was unconstitutional. I didn't mean to use the word unconstitutional. I meant contrary to the statute. Excuse me.

CHAIRMAN WILKINS: Thank you. Judges, thank you again very much.

JUDGE HEANEY: Well, thank you very much for permitting us to come.

CHAIRMAN WILKINS: Thank you. Our next witness is Paul Kamenar. Mr. Kamenar is executive legal director of the Washington Legal Foundation, an organization that has been working with the Commission from its inception.

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

and Commissioners. Just to follow up the reference to the "Butch and the Sundance Kid" quote by Judge O'Brien.

I think when the question was asked, who are those guys?, Butch answered, "I don't know but they sure are good." And I hope that characterization is applicable to this Commission, although after my testimony you may think otherwise in terms of some of the areas I want to address.

First of all, just as a preliminary matter, I would like to express my disappointment at the Commission's vote the other day on the capital punishment guidelines.

As you know we're very strongly in support of this Commission issuing those guidelines, but I think that what the Commission should do, is that if it doesn't go ahead with those guidelines, to follow my prior suggestion, and that is at least insert in the report to the Congress something to the effect that the omission of these capital sentencing guidelines does not indicate that capital punishment cannot be opposed where it's provided for under current Federal law, and perhaps even to recognize that there are legitimate arguments that Rule 32 of the Federal Rules of Criminal Procedure may provide for the sentencing procedures that would pass constitutional muster.

Turning to the guidelines before us today, I have a few stylistic suggestions, if I might. I mean, we're all talking about making those whole process simple, and I must admit, when I first started to look at this, I had a little trouble trying to find my way around the guidelines, and I'm looking at page five which begins the instructions on how you compute the sentences.

The whole book is, as you know, is set up with six numerical chapters, and then within each chapter you have alphabetical parts, A through Z, and then within those parts you have numerical sections, and yet the guidelines are reversed in a way that it starts with the part and then goes into--I don't know if that's been mentioned before. Has it? It's just so counterintuitive reading it, that, for example, homicide is Section A2.11. And reading statutes, your CFR sections, or anything else, your first number is the larger part.

And it just drove me bananas trying to look at this and figure out where am I? Am I in offender characteristics or in offense characteristics? I would suggest that following: to begin the section with the larger category, which is the--for example, in homicide instead of A2.11 you

would want to have 2A.11.

But maybe even better than that, we may want to, since we're looking--if you'll look at the instructions on page 5, 1 through 8 or 10, whatever it is--Chapter 1 is not computed in there. Chapter 1 is sort of an overview.

I would suggest that you may want to eliminate the overview chapter, take the Chapter 1 off, and begin your offense characteristics with Chapter 1, and your offender characteristics with Chapter 2, since those are the two primary categories we're looking at here. I think it's very simple to have one is offense, two is offender, and then 3, 4 and 5 are your miscellaneous provisions. So that when everybody sees a "1", automatically, their mind registers we're talking about offense characteristics, and when they see the "2", they know that we're talking about offender. And then you get into your subparts.

And even there you have--for example--and there's these special offense characteristics--all of them have a subsection "a", but there's never any subsection "b"'s there, and again, why make it more confusing than it?

You may want to use a point, like, you know, 2(a)11.3 instead of another subsection "a". Again, we're

trying to keep this as simple as possible, and although I've had some familiarity with this process I found it really troubling to go back and forth.

And then when you get to your instructions you probably should have that arranged in a way that flows logically. In other words, instruction number one talks to you about going to Chapter 3, or in my system, Chapter 2, Part A.

You may want to, you know, start with the beginning, or rearrange it some other way, and then on item number four here, you say, "Refer to general provisions, Chapter 2."

Well, general provisions is Part Y, so why not put Part Y in there as you did in step number one? You have Chapter 3, Part A, so let the reader know you're talking about Part Y. And that may even be important because in step number four you say, "Refer to general provisions, Chapter 2, and make any appropriate adjustments to the offense level."

Well, Part Y has two subparts. You have the departures which is one, and adjustments which is two. Now I'm not sure, when you said make appropriate adjustments, are you supposed to only look at the adjustment category, capital A, or a small "a", adjustments, meaning both departures and

adjustments?

So I think there could be a better job done just in trying to clean up some of the organizational aspects of it. In terms of the substantive comments that I have, just briefly, I'll go into some of them and won't take too much time.

But as a general matter, I share some of the concerns that Commissioner Robinson had in his dissent, in terms of the fact that the ranges seem to be too large, and it greatly exceeds the 25 percent specified in the statute thereby resulting in numerous disparities.

In some cases I think the base levels should be higher, and I'll just mention a few in a minute. The departure category, I can understand some of the concerns there, although in looking at those departures I may agree with most of them because they would involve an increased sentencing or base levels, and in general our organization is supportive of stronger and tougher sentences.

On the other hand, I might add, by the way, there is the departure under Section Y.217, altruistic purposes, which brings some problems--I remember a case a couple years ago, Judge MacKinnon, up in Minnesota where some anti-war demonstrators were charged with breaking into a defense

contractor--I think it was Sperry-Rand--and taking hammers and destroying vital defense computers, about $30,000 worth, and Federal Judge Miles Lord gave them probation saying, you know, you did this for altruistic purposes, the ones who should be in jail are the warmongers who make these bombs, and--

COMMISSIONER MACKINNON: Do you justify that?

MR. KAMENAR: I'm sorry?

COMMISSIONER MACKINNON: Do you justify that?

MR. KAMENAR: No, I'm saying what Judge Miles did was wrong thereby, and what this would do would basically give him further support for doing those kind of things, as well, for example, the judge in Texas, recently, when he sentenced those convicted of violating alien smuggling laws as part of the sanctuary movement, he praised their altruistic motives for breaking Federal law. And I don't know whether you may want to retain that provision--

COMMISSIONER BREYER: Well, he'd get appealed.

MR. KAMENAR: I'm sorry?

COMMISSIONER BREYER: I mean, now, though, if this goes into effect, he'd get appealed. The prosecutor could appeal--

MR. KAMENAR: He could appeal it but he's going to lose, because all the appellate court has to say is whether or not the departure was reasonable, unreasonable.

COMMISSIONER BREYER: Did they say it was reasonable in the case that you've just presented?

MR. KAMENAR: Well, if you're guidelines say altruistic, saying that they had a better motive, I mean, isn't it reasonable, if these people sincerely believed that they were trying to stop World War III, that that's reasonable to--you know--it was in the eyes of the beholder there. So I think you may just be getting in some quicksand there, although, you know, I'm not sure the prosecutor may want to spend time appealing these kinds of sentences. He's got other fish to fry, and why--I'd just hope that that appeal process will check that problem.

And perhaps maybe this is some of the tension that's caused by a lot of the disparities, because of the fact that the judge is not required to--in all cases impose your guideline--he may do so, but he can depart from it if the court finds aggravating or mitigating circumstances that was, quote, not adequately taken into consideration. End quote.

Now your commentary says not adequately taken, says

that the judge is not required to go through the record here again and see whether it was adequate or not, but he may, or the defense attorney may say that, or the prosecutor say, look, even though it was considered by the Commission, it wasn't adequately considered. I don't know.

But I think perhaps the tension is caused by what the duties of the Commission are in 991, et cetera, and what the role of the judge is, and that this unreasonable phrase, which the judge has that latitude, is perhaps you're trying to give him some guidance on how that's to be interpreted, by allowing for some of these departures and adjustments.

But just looking at two specific offenses that concerned us. One was the espionage. It was not in your first draft and this, of course, is of concern to us because of our involvement in the Walker spy cases.

It is on page 97 and 98, I think is the espionage, and particularly Section M233 which was Section 794, which is the offense that John Walker was convicted or as well as his cohorts.

The base offense level is thirty, you have there, which translates to about eight to ten years in prison. I think that is too low for such a crime.

And then your special offense characteristic is, if it involved transmittal of top secret in time of war, increase it to the offense level of 43. I'm not sure what you mean by in time of war.

I mean, we are certainly in a time of low-intensity warfare around the world in many areas.

COMMISSIONER MACKINNON: That's a technical term used in all the statutes.

MR. KAMENAR: Does that mean a declaration of war by Congress? I see some heads shaking, some "I don't knows." I don't know. Because if it is, I would have you--

COMMISSIONER MACKINNON: I say that there are a lot of adjudications on it.

MR. KAMENAR: And what's the result of those? In other words, during the Vietnam War, John Walker was transmitting information during that period of time.

What I'm getting at is--you know--I would suggest you increase the base-offense level--

COMMISSIONER MACKINNON: Well, do you think we ought to define executive emergency, in effect?

MR. KAMENAR: No. I just think that if secret or top secret information was gathered and transmitted in time

of hostilities or conflict--

COMMISSIONER MACKINNON: Well, the general term is declared executive emergency, or national emergency.

MR. KAMENAR: Well, I don't think we necessarily have to go that far, especially if you increase the base-offense level in that particular category.

The other area that I was concerned with, and I'll conclude on this part, is the issue of drugs. We heard a little bit about that this morning, and my overall impression is that the punishments do not adequately reflect the severity of the crime, and the epidemic we have here in this country.

Yes, the new law does provide for mandatory minimum sentences, and of course that should be complied with, but where there is no minimum required I think this Commission should increase the base levels.

For example, on page 46, where we're talking about trafficking in drugs, you start--this is for Schedule 1 or Schedule 2 drugs or controlled substances. You start at a level 12, which translates only into about 10 or 16 months for someone dealing with 200 marijuana plants or 20 grams of cocaine, or less than 20 grams of cocaine, etcetera, so it

could be nineteen.

I think, unless there's some kind of essential requirement that these may be--there's too many categories here. I think that the base-offense level should be at least doubled from level 12 to 24, which would give you almost five years, as a guideline, for someone who's dealing in drugs.

These are causing widespread death and torment to our whole society. Just reading this, it just sort of struck me odd, as if, would the Commission want to engage in these kinds of disparate guidelines, if, for example, if someone had laced Tylenol pills with ten capsules of cyanide in ten different bottles, and then somebody else did one, and did twenty bottles, and then somebody else did thirty-nine. And therefore we should make some kinds of distinctions in sentencing these kinds of people who are out trying to kill society. I think we're basically, in doing that, getting away from the forest for the trees here, and I would think that if you're going to have this same number of different categories, to at least rachet up the base level, so that at least for the first category for Schedule 1 and 2 drugs, that it's at least 24 as an offense level.

And then looking at the Schedule 3, 4 and 5 drugs,

I was totally surprised to find that this Commission would recommend that a drug trafficker of Schedule 5 drugs, be given a level 6, which is zero to six months and obviously eligible for probation. That's on page 50.

I would think that anybody who is dealing with illegal drugs should be given a minimum sentence, even though the law and the statute there's a requirement, I think this commission, which is duty-bound to reflect the serious nature of the crimes involved here, especially this area of drug abuse and drug dealing, that for traffickers it should be just a given, that if a trafficker is brought into court and convicted, he, or she knows they're going to jail.

COMMISSIONER BREYER: What is Schedule 5?

MR. KAMENAR: I don't have the--

COMMISSIONER BREYER: No, but I mean what are you talking about? What's an example of a Schedule 5 drug?

MR. KAMENAR: I don't have those examples in front of me.

COMMISSIONER BREYER: Well, how do you know it's too low? I mean, if you don't know what the drugs are--

MR. KAMENAR: I know it's an illegal drug and the fact it's on Schedule 5.

COMMISSIONER BREYER: Well, we know it isn't marijuana.

MR. KAMENAR: It's a crime. It may be quaaludes, it may be diet-reducing pills, or something.

COMMISSIONER MACKINNON: Well, in Schedule 5 you're getting pretty well down the scale.

MR. KAMENAR: Getting too far down the scale in my view, in terms of the amount of time that--

COMMISSIONER MACKINNON: But I mean the more serious drugs are up above, as I recall it.

MR. KAMENAR: That's right.

COMMISSIONER MACKINNON: And five is pretty far down the scale.

MR. KAMENAR: Pretty far down, but nevertheless, because of the drug problem we have here in this country, I don't think that just because one drug is not as bad as the other, in effect what you're saying is, well, you know, certain drug traffickers are not as bad as other drug traffickers, and yes, that may be true, but I don't know if this commission wants to go so far as to say certain drug traffickers should get probation.

COMMISSIONER MACKINNON: But that's what the

statute says.

MR. KAMENAR: The statute says has to get probation? I don't think so.

COMMISSIONER MACKINNON: No, no. The statute says that one drug trafficker is different than another.

MR. KAMENAR: That's right, but different does not necessarily mean that you have to stretch it out from the lowest to the highest. You could start maybe midway and make your gradations go into the higher end of the scale.

COMMISSIONER BREYER: You could. If you want to know how is this is written, how did this come out this way, there is a new statute in Congress--you are the first person I've heard testify, that this new statute is somehow too soft. I mean, it's a pretty tough statute. We then have a staff who has gone to the Drug Enforcement Agency. They have taken the new statute. They have by and large tried to replicate in these guidelines the punishments that are there in the statute.

Now I personally have not yet gone over every word in such detail, although I've gone over a lot of words, to have a firm judgment about whether or not every word in this drug section is right.

We've checked it with the DEA, the Department of Justice, the statute, and people in the field who work in it.

All right. Now I think you're absolutely reasonable to come in and say we found a couple of words here in this guideline and we think the sentence is too low.

But I think it's fair to ask you, before you make up your mind that that sentence is too low, that you would at least know what the drugs are on Schedule 5 so that we then can make a judgment about whether or not it really is too low--

MR. KAMENAR: Fine. I mean I would think that you should know because you're the ones that's writing the regulations, not me. I mean, I think the burden of proof is on you. But let's throw out the Schedule 5 and just look at Schedules 1 and 2. Again--

COMMISSIONER GAINER: Did I understand correctly, that the real heart of your concern in this area is that with regard to actual trafficking in serious Schedule 1 and 2 drugs, even though the sentence suggested by the Sentencing Commission may be above the minimum directed by the Congress, it does not in all instances adequately reflect, in your view, the fact that many of these drugs can cause widespread

deaths or other very serious consequences.

And therefore that the heart of your concern was that the Commission may not adequately be taking advantage of the high end of the range already provided by the Congress. Am I misstating your--

MR. KAMENAR: I think that basically is a correct analysis, because if you look at page 46, there are asterisks by certain levels which is footnoted. The statute specifies a mandatory minimum sentence, and that's where it results in serious bodily harm.

Well, you know, people are OD-ing every day and it's very rare for the officials to take that drug, and find out who sold it to that person, and then find out who was the trafficker that led to that death. I think what the Congress is saying is at least where we know for sure, this is the mandatory minimum. But drugs are killing people all the time and I thin these guidelines should reflect that.

Just because the police have a hard time trying to trace that substance, you know that trafficking in drugs is a death-dealing business.

And I think to say well, some drugs are not as bad as others, et cetera, I don't care who you talk to at the

Drug Enforcement Agency, et cetera. I'm here representing our organization and our 100,000 members who think that you're being too soft on the drug dealers, and you can take that opinion, and if you think you're just barely complying with the congressional mandate, fine, go ahead. But if this is what goes through we're going to be contesting that all the way up to the Congress.

COMMISSIONER GAINER: I should caution you, you are at a disadvantage representing only 100,000. We had one witness yesterday representing the people of the nation.

MR. KAMENAR: I think my views, though, speak fora lot of people on this, I really do, and I think if the American people know that this commission is recommending that drug traffickers, regardless whether it's a Schedule 5, or it's a quaalude and not crack, that a lot of concern of the American people--

COMMISSIONER MACKINNON: I think you will find that what is in here is from the statute, period.

MR. KAMENAR: The names the drugs and the categories of the drugs.

COMMISSIONER MACKINNON: Yes.

MR. KAMENAR: That may be but--

COMMISSIONER MACKINNON: And the sentences.

MR. KAMENAR: That's what this whole body is about.

COMMISSIONER MACKINNON: And the sentences.

MR. KAMENAR: No. Only the ones that are asterisked reflect the statutory minimum.

COMMISSIONER BREYER: You get the statute and the statute has certain fixed stars, and what we tried to do was to produce a set of sentences that seemed proportionate to the fixed stars. I mean, it wasn't a question of policy of whether, is it too tough or is it too lenient or whatever it is. I mean, these have been written to, say, forget whether it's too tough or too lenient, et cetera.

Rather, we have a statute. The statute has fixed stars there. And let's try to produce a set of sentences that's commensurate or proportional with what Congress told us in this statute.

MR. KAMENAR: And I think they told you mandatory minimums.

COMMISSIONER BREYER: Yes, that's right. But some, you know, they are awfully high. Like, it is hard, for example, to have more than life. I mean, you know, some of those mandatory minimums, it doesn't take too long under the

statute for a really serious drug dealer to have mandatory life.

MR. KAMENAR: Well, I understand, but there are serious drug dealers and less serious drug dealers and I think the less serious ones are being, basically, given somewhat of a loophole in a lot of respects.

COMMISSIONER BREYER: Well, you could move up more close--you know, you could try to move up faster. You could move up on a straight line, and you could try to move up fast, or you could try to move up slow.

There are various ways of doing it, but--

MR. KAMENAR: I understand, but I think that you can take your base offense level, which is 12, and double that and jack every other one up and you will not be violating Congress' provision. And I don't see how that could be a violation and it reflects our view about the nature of the crime involved.

Thank you very much.

CHAIRMAN WILKINS: Thank you very much. We'll take a look at what you have said, and maybe we need to go back and revisit, because this is the first time anyone has criticized us for being too low on the drug table. In fact, the criticism has been just the opposite because of the

tremendous increase over present capacity.

MR. KAMENAR: The present is just a shame.

CHAIRMAN WILKINS: Yes, it is, and that's why we have changed it. And I don't have the schedules in front of me, but I do know schedule five is codeine and cough syrup, for example, and if I sell you some cough syrup with codeine, I don't know that necessarily I ought to be locked up for too long for doing that sort of thing.

MR. KAMENAR: Forty-nine kilograms, or whatever, of codeine or cough syrup can mean something else, too. I mean, there is a difference.

CHAIRMAN WILKINS: We are dealing with--I think schedule five, generally speaking, is a prescription-type drug.

MR. KAMENAR: Maybe for those, though, you can do sort of that mixed probation/mandatory sentence that Judge Breyer had mentioned.

CHAIRMAN WILKINS: Right.

MR. KAMENAR: But the notion that drug dealers, regardless of what substance, are going to be able, as a guideline from this Commission, to get probation from zero to six months is, I think, not appropriate.

COMMISSIONER GAINER: But again, Mr. Kamenar, the

heart of your testimony, or at least part of the testimony with regard to the drug levels, was that the most serious forms of drug trafficking may not be treated harshly enough?

MR. KAMENAR: That's correct. And schedule one and two, that's where I'm focusing on, and just only the schedule three, four, and five that I noticed that it can even let people go on probation.

CHAIRMAN WILKINS: Thank you very much. Our next witness is Mr. Jeffery Troutt, Research Director for the Institute of Government and Politics. Mr. Troutt, glad to see you again.

MR. TROUTT: Thank you very much, Mr. Chairman and Commissioners. My name is Jeffery Troutt. I'm the Research Director for the Institute for Government and Politics. I would like to say that I am honored to be able to appear before you again and to give my testimony. I again hope that it is beneficial.

After studying the revised sentencing guidelines, I have concluded that they represent an improvement over current sentencing practices. Thus, if given the choice between the current system and this draft, I would choose the latter. I think all things considered you have done a good

job with an extremely complex subject matter and under circumstances that are difficult.

However, I believe there are serious problems with the draft which, coupled with the Commissions refusal to promulgate guidelines on the death penalty on the single issue of lifers who kill prison guards could lead an observer to the conclusion that the Commission is becoming soft on crime.

I don't believe that that's what the Congress intended when it passed the Comprehensive Crime Control Act of 1984. Perhaps it is the result of the fact that the battle for sentencing reform is being waged inside the beltway and not in the heartland.

When a member of the Washington elite threatens to destroy this Commission if it promulgates guidelines on an issue that 85 percent of the American people support, that person is not speaking for the American people. I believe the American people want a sentencing system that is tough and determinative. However, a lot of people inside this beltway don't. I respectfully urge you, therefore, to listen less to the Washington elite and more to the average American.

There are four areas in the revised draft sentencing guidelines where I believe they could be improved. First,

many of the base offense levels are too low. Second, they give unacceptably broad discretion to sentencing judges. Third, they provide too much leeway for probation as an alternative to imprisonment, and finally, they allow the sentencing judge to depart from the guidelines when he or she views them as quote, "inadequate," unquote, and in some cases allows the judge to ignore them altogether.

Many of the base offense are so low that they may not adequately deter crime or reflect society's abhorrence with criminal conduct. For example, involuntary manslaughter, on page 14, carries a base offense level of between 10 and 14. This translates into a sentence of between six and 21 months.

Charges of involuntary manslaughter are generally brought against drunk drivers who kill someone in traffic mishap. A sentence of six months for that person is simply too low. Even though the commentary recommends that drunk drivers receive the maximum sentence, that recommendation is not binding on the courts.

Insider trading carries a base level of eight, which results in a sentence of between two and eight months. Even when you add the specific offense characteristics in

section F211, the maximum sentence only is 33 months. For rational arbitrageur I think it might be well worth risking that amount of time and perhaps even just getting probation in order to make a large profit.

I would also point out that I agree with Commissioner Breyer that prison is necessary for a lot of these white collar crimes, including insider trading and antitrust violations. I think they will deter those type of crimes, just because I have a feeling that people who like to wear silk socks and drive dragwires don't want to go to jail.

CHAIRMAN WILKINS: You think they are too late at this point?

MR. TROUTT: Pardon me?

CHAIRMAN WILKINS: You think the ranges are too low, the levels for white collar offenders?

MR. TROUTT: Yes. I would raise them. I will discuss probation a little later, but I would recommend that for those crimes that some amount of time be served.

I think there may be a possible problem in some antitrust-type crimes--monopolization, things like that--where the defendant is not sure whether his or her conduct is criminal or not. You might in that case want to provide for

probation where the defendant had a reasonable basis to believe that his or her conduct was legal.

COMMISSIONER BREYER: They won't prosecute that for criminal. The department--and, in fact, that turns out to be true. We looked through how many prosecutions there were for something other than price fixing in the last two or three, zero.

MR. TROUTT: Zero. That may be true during this Administration. But the next Administration may change their antitrust policy. So that is something to consider.

COMMISSIONER BLOCK: Other antitrust offenses are a separate category, Mr. Troutt.

MR. TROUTT: Pardon me?

COMMISSIONER BLOCK: Other antitrust offenses are a separate category not carrying the same punishments as price fixing.

COMMISSIONER BREYER: Your point is right, though.

MR. TROUTT: Thank you. Treason, on page 94, carries a base offense level of 30, which corresponds to between 97 and 121 months imprisonment. Espionage and some of the related crimes--or at least most of the related crimes on pages 97 and 98--carry base offense levels of 24 to 30.

Given the gravity of these crimes, I think the offense level is simply too low.

I would recommend that if we are not going to be executing spies and traitors, that they be given a mandatory life sentence, with the exception that the judge should be able to reduce that if he finds that the defendant has satisfactorily cooperated with the government.

I recognize that it is sometimes necessary to make deals with spies in order to get their cooperation so that we know what information they gave and what we can do to correct the situation. Thus, I would recommend that you give the trial judge some discretion within reasonable limits, 25 percent, something like that, if a traitor cooperates with the government.

These are just a few examples of offenses for which the base offense level is too low. I would urge you to consider raising the base offense levels for these crimes and for many other crimes. I suggest that you look at them and ask again if the base level is too low.

The Commission's implementing legislation provides that if a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established

for such a term shall not exceed the minimum of that range by the greater of 25 percent of six months, except that if the maximum term of the range is 30 years or more, the maximum may be light.

Many of the ranges within the guidelines exceed the statutory mandated at 25 percent maximum deviation. In fact, when specific offense characteristics are considered, the amount of deviation becomes dramatic. Commissioner Robinson, in his dissent, points out that the range runs as high as 3,200 percent in some cases.

While most of the possible sentences are not this dramatic, there are many which exceed the statutory mandate. Assault, for example, which carries a base offense level of 15, can be raised by between one and four points, depending on the judges decision. This makes for levels of between 16 and 19.

At the lowest level, 16, the minimum sentence is 21 months. At the highest level, 19, the maximum sentence is 37 months. That's a difference of about 56 percent, all within the discretion of the sentencing judge.

Counterfeiting, which carries a base level of six, is increased between six and nine levels, depending on the

judge's decision, if the defendant is in possession of counterfeiting devices. This makes for levels of between 12 and 17. At 12 the minimum sentence is 10 months. At 17 the maximum sentence is 30 months. So between 10 and 30 we have a 300 percent deviation, all within the discretion of the sentencing judge.

Bribery, even without specific characteristics, carries a level of between 10 to 14, which calls for a sentencing range in between six and 24 months. When you add that to bribery for the purpose of influencing an official of the United States, the level rises between one and eight. That gives us between 11 and 23, which altogether makes for a difference of 712 percent.

And when you take transporting obscene matter and you add the specific characteristics, you end up with levels between seven and 12, which gives a one month and 16 month deviation, which is a deviation of about 1,600 percent.

What's clear from this list is that the Commission has given trial judges an enormous amount of discretion. The combination of a wide variance in sentencing for a base offense and for specific offense characteristics has resulted in sentence ranges which violate the Sentencing Reform Act's

clear 25 percent limitation.

Judges simply have too much discretion. Convicted criminals guilty of essentially the same acts will receive a wide range of sentences under these guidelines, depending on the predilections of the sentencing judge. I don't think that is fair to the defendants and I don't think it is fair to the society.

It is a maxim of the law that we treat two people similarly situated in the same way. Under the current system and under many sections in these guidelines, the criminal sentence can be severely circumscribed or aggravated, depending upon whatever judge fate chooses for him or her. This amounts to treating two people similarly situated in a different manner, and I believe it is unfair.

The easiest way to fix much of the disparity problem is to eliminate wide ranges of specific offense characteristics and wide ranges for base offense levels. Instead of having a range, for example, of between one and four, have a range of two or a range of three. This will help provide for certainty in sentencing.

Probation. I believe probation suffers from some of the same defects as parole, the most important of which is

that it releases people who pose a threat to society. Also, I don't believe probation has much deterrent value. It presents only a minor burden to the criminal, and when a criminal receives probation, in many ways he may feel he has one his case, because he is not serving time.

I believe that a month or two in prison is a stronger deterrent to crime than a year or two on probation. Therefore, I urge you to consider at least circumscribing the use of probation. Perhaps along those lines you could have a minimum amount of time that should be served in prison for whatever time on probation a person gets, for example, a month for every year of probation--a month in prison. That would help relieve the prison overcrowding problem that we are trying to deal with and it would also have that deterrent effect.

In regards to the guidelines allowing judges to refuse them under certain circumstances, laws which cannot be enforced are essentially meaningless. Unfortunately, much of the hard work that you have done in putting these guidelines together will be rendered meaningless by several provisions--over 100, according to Commissioner Robinson's count--which allow judges to ignore or bypass the guidelines altogether.

I believe this is an invitation to unbridled judicial activism.

Granted, judges must give a reason for not using the guidelines, but that will not be enough to hinder judges who are determined to avoid them. Time and time again courts have demonstrated a fertile imagination in manufacturing legalistic excuses to thwart or to ignore the law, and consciously or unconsciously, there is a distinct trend on the part of judges to impose their will into the legislative will.

There is no reason to believe that they will stop doing this once your guidelines are passed. The result of that will be that any judge who does not like the final guidelines will be able to find an excuse to refuse to apply them. Today we had a judge come to you and tell you essentially the same thing. We had a judge come and say, if I feel in my gut the sentence is wrong, I'll find a way to get around it.

Whatever reasons they give for not applying them will probably be subjected to only minimal scrutiny by appellate courts. A few decisions will be reversed, but most will be rubber stamped, regardless of how strained the court's reasoning is. As long as the guidelines allow judges to exercise the option not to apply them, they will be law in

name only. They will be de jure mandatory but de facto voluntary, and I don't believe that is what the Congress intended when it passed the Sentencing Reform Act.

I therefore urge the Commission to consider eliminating or severely circumscribing judicial discretion in this matter. By doing so you will be upholding the will of Congress and the rule of law, because I don't think we can go to criminals and demand that criminals abide by the law when our judges are unwilling to do so.

In conclusion I would like to say that I support the work of this Commission as reflected by the revised draft sentencing guidelines. You have done a good job in an extremely problematic area of the law. The guidelines represent an improvement over the current sentencing system.

However, there are four areas where I believe they could be improved; some of the base levels are too low, they need to be raised; revised sentencing guidelines give judges too much discretion; probation should be severely circumscribed; and the final guidelines should eliminate or circumscribe the ability of judges to ignore the guidelines.

I thank you for the opportunity to address to address you.

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

MR. TROUTT: I would also note--and I want get into it in public comment here--but you had asked for comment on the advisability of sentencing attempted criminal conduct in the same manner as completed acts of criminal sexual assault, and I provided a couple of pages on there.

I would just say that considering that a rapist could transmit the disease AIDS to a victim, I would think that we would want to give such a person an incentive to stop at some point.

COMMISSIONER BREYER: You think treat them differently?

MR. TROUTT: Pardon me?

COMMISSIONER BREYER: You think treat them differently?

MR. TROUTT: Treat them differently. I mean, not--

COMMISSIONER BREYER: Not punish the attempt?

MR. TROUTT: Yes. We need to reflect society's abhorrence of that, but a 20 or 25 percent reduction in sentence for someone who stops their attack and it is not because they are apprehended or pursued, I think would may save somebody's life some time. Thank you very much.

CHAIRMAN WILKINS: Any questions? Judge MacKinnon.

COMMISSIONER MACKINNON: You thought that there was too much probation? Was that the general mark that you made? Too lenient on probation?

MR. TROUTT: Well, yes, I think so. Because I don't believe that probation is that much deterrent to crime.

COMMISSIONER MACKINNON: Have you read the statute?

MR. TROUTT: Yes, I have. Leave it for six months or less.

COMMISSIONER MACKINNON: Well, I know, but the statute doesn't even have that limitation.

MR. TROUTT: Yes, I recognize that.

COMMISSIONER MACKINNON: It says every case.

MR. TROUTT: I realize that. And I'm not saying you should not use probation. What I would like to say is that when you give probation, is that you consider having some sort of mandatory time served in prison, whether it is a week per year or a day per month of probation, something like that. I think that will go a long way towards deterring crime, and for the criminal whose life is not affected that much by probation, it gives that person a reason to think twice before they commit another crime.

COMMISSIONER MACKINNON: How many cases of appeal have you handled before the United States Courts of Appeal?

MR. TROUTT: None.

COMMISSIONER MACKINNON: And still you are going to predict how the courts are going to act?

MR. TROUTT: Well, I know that appellate courts--in law school I had to read, you know, a lot of appellate cases, and I know that they are probably going to come up with some reasonable basis type standard for--

COMMISSIONER MACKINNON: Don't think it.

COMMISSIONER BREYER: The 1st Circuit is certainly going to be reasonable.

MR. TROUTT: I'm sure your circuit will. But I think I've seen enough, or at least read enough cases where judges have rubber stamped bad decisions by district courts.

COMMISSIONER MACKINNON: And they have overturned some good decisions.

MR. TROUTT: Yes.

CHAIRMAN WILKINS: Commissioner Gainer.

COMMISSIONER GAINER: Mr. Troutt, yesterday we had a couple of witnesses who suggested that they did not think the Commission's guidance with regard to alcohol use was

probably the best tack to take. They were critical of the provision that indicated that alcohol abuse alone is not a reason for imposing a sentence below the guidelines.

I was wondering whether in light of your concern about drunk drivers being charged with involuntary manslaughter whether you had had an opportunity to think through this particular provision and might have a view on that?

MR. TROUTT: I did read that provision. I didn't think about it that much when I was reading it, but I did read it. It seems to me that the fact that someone has used alcohol, or any other drug, should in no way mitigate their blame. People are responsible for what they do, and if they involuntarily ingest alcohol, they are responsible for the way they behave, period

I would say the same thing as drugs. In fact, I might consider the use of alcohol to be an aggravating circumstance, and that perhaps someone who commits a crime drunk should be given a more stronger sentence.

COMMISSIONER BREYER: It's just the problem of writing anything that says never. Because the thing that happens, you say never and some case will come along and you will be sitting there, just as much as if it were me, and you

say, my God, there's a case, and we can't think of it, so you start saying--of course, normally, you are totally right.

But should we say never? Something will happen and come up and it always does, and it would just never occur to us there could be a case like that, and low and behold--it isn't a question of different philosophies or anything--but there it is right in front of you and what do you do in that case. That is the problem with saying never.

COMMISSIONER GAINER: I assume that you think it is probably safer to say never than to say something else?

MR. TROUTT: Yes, I do. And I think you can't always make the law based on what the unforeseeable circumstances will be. The guidelines as they are now allow the judges to depart from--

COMMISSIONER BREYER: Depart in a very unusual case, and that is the safety valve.

MR. TROUTT: You can circumscribe that. You can even circumscribe their ability to depart now and still give them authority that if a bizarre case arises--

COMMISSIONER BREYER: That's sort of a nit picking.

MR. TROUTT: I think we can do both.

COMMISSIONER GAINER: Mr. Troutt, the Commission

has appreciated the views imparted in the past by you and Mr. McGuigan. I see from Mr. McGuigan's filed statement that he is about to give up giving advice to the Sentencing Commission.

Let me suggest that he not give up. You will find that the Commission sometimes does not agree with the views of your organization. On other occasions it does, and probably every Commissioner here on occasion has felt it might be best to give up. Nonetheless, the Commission would be poorer if it did not have your views and we do appreciate them and I hope you will communicate that to Mr. McGuigan as well.

MR. TROUTT: Thank you, I will. And along those lines I would say I recognize that this Commission is an ongoing process and I know that Mr. McGuigan and I will continue to participate. Recent actions have discouraged and disheartened us, but I'm not giving up.

CHAIRMAN WILKINS: Thank you very much.

MR. TROUTT: Thank you.

CHAIRMAN WILKINS: In keeping with our policy, anyone in attendance who wishes to address the Commission may do so at this time by coming forward.

MR. SULLIVAN: Mr. Chairman and Commission members,

my name is Charles Sullivan and I'm with the organization Citizens United for Rehabilitation of Errants. It is a prison reform organization comprised mainly of families of prisoners, ex-offenders, concerned citizens, and prisoners. And I would just like to make one point.

I believe--and I hope you do--that the more overcrowding that you have in the prisons, the more disparity. And I'm wondering--and I have, of course, been sitting here and sitting at many other hearings--but it seems like at times I wonder whether, as some of the Commission members have said--we are going to increase the prison population, or it is going to be increased by the drug bill or whatever.

But I feel, and I say this based on the experience that I had in Texas for 12 years lobbying on prison reform, at the present time Texas is basically trying to find ways to relieve its prison population. And I wonder if five years from now you will be writing guidelines on how to release prisoners.

I think, too, politically, you are going to be blamed for overcrowding. You are going to be blamed for the impact of the drug bill, because I don't think Congress is going to blame itself. And there are going to be people who

are against the Commission who are going to use the excuse of overcrowding as a way to put you out of existence.

I think that you are so close to the anti-drug legislation that everybody is just going to couple those together and I think--like I say, Congress is not going to blame itself for doing it. Politically, you are the person that they can blame down the road for the overcrowding.

So I guess what I'm saying to you, and I certainly think you ought to recommend more prison capacity. But I don't think you should be a prison building lobby with these guidelines. And that's the problem, that if you take an look at the capacity that you do have now and you set your guidelines accordingly, where is going to be the pressure to build more prisons.

So what you have got to do is to continue to create an overcrowding situation so that you can get into a situation where you have more prisons, and so you keep that pressure on. And I realize that I'm talking about something very, very different than what is the general direction of the Commission, to look at what you have, the capacity of what you have presently, not next year or a couple of years, and set your guidelines according to that capacity.

That's just basically what I'm saying.

CHAIRMAN WILKINS: Thank you, Mr. Sullivan. Of course, that's an issue that has been debated in the halls of Congress and this Commission will too in just what role prison capacity shall play in the work that we do.

But we appreciate you appearing and sharing your view with us. Does anyone have any questions? Commissioner Gainer.

COMMISSIONER GAINER: Mr. Sullivan, surely you wouldn't want this Commission to recommend guidelines that would not achieve adequate deterrence incapacitation for punishment, would you?

MR. SULLIVAN: No.

COMMISSIONER GAINER: Consequently, if found that in order to achieve those mandated results, increased prison capacity would be necessary, I take it that you would wish the Commission to fulfill that responsibility. And may I assume also that you would wish the Commission not to bow to political whims from whatever direction they are blowing, from the Hill or from elsewhere?

MR. SULLIVAN: Definitely.

COMMISSIONER GAINER: And I think that the Congress

probably appointed this Commission to take a lot of heat that it might not have wanted to have taken. And should it not take that heat if it feels in its heart that that is the just way to approach matters?

MR. SULLIVAN: Right. I feel that you have, as your mandate states, you are to recommend. If you recommend with these guidelines we need 25 more prisons--okay, I oppose building prisons, et cetera. Fine. I will try to stop in any way I can the building the prisons because I feel we should have a moratorium on prison construction.

But as the mandate says, if you recommend that, that's fine. My concern is, you are setting the guidelines up with a hidden agenda, because of the pressure, that you are going to create an overcrowding crisis.

COMMISSIONER GAINER: Is it the Commission that is creating the crisis if it is following Congressional direction?

MR. SULLIVAN: Okay, here's my point. If you create an overcrowding crisis, I think then you defeat the purposes of sentencing.

COMMISSIONER GAINER: Who is creating the crisis, sir?

MR. SULLIVAN: Excuse me?

COMMISSIONER GAINER: Who is creating the crisis?

If the Commission follows its responsibility to indicate what the American public feels is just, what it feels is necessary to incapacitate, what it feels is appropriate to deter--if it does that and if, in any event, people still commit crimes at a rate that is going to require incarceration under those guidelines to a greater extent that has occurred in the past, is it this Commission's fault?

Are you suggesting that it abdicate the assigned responsibility in order to achieve what you would feel would be a just result?

MR. SULLIVAN: The purpose of the Commission is to reduce disparity.

COMMISSIONER GAINER: No, sir. The purpose of the Commission is to deter.

MR. SULLIVAN: Okay.

COMMISSIONER GAINER: To punish.

MR. SULLIVAN: Okay.

COMMISSIONER GAINER: To rehabilitate.

MR. SULLIVAN: Okay.

COMMISSIONER GAINER: And to incapacitate.

MR. SULLIVAN: Okay. I feel in an overcrowding situation every one of those purposes are lost. There is no

deterrence, because there are people who know that they are not going to be sent to prison. This is what is happening in Texas right now.

There is no incapacitation. There is no rehabilitation. You can forget about rehabilitation in an overcrowding crisis situation. What happens is all the purposes of sentencing are lost in an overcrowding situation.

COMMISSIONER GAINER: So we achieve those purposes by undersentencing?

MR. SULLIVAN: No. You achieve those purposes by--its like filling up a bucket of water. Okay. You fill up the bucket, you only have so much. Now, I feel there is pressure that if you pour more water, you keep pouring more water than what the bucket will fill, then there will be pressure to get a bigger bucket. Yes, that may be true.

But what's going to happen is there is going to be water on the ground, or whatever. Not everybody is going to receive a uniform sentence.

COMMISSIONER GAINER: Water on the ground is better than blood on the ground, and that's what you will have on the ground.

MR. SULLIVAN: There will be blood on the ground as

well. You could have a prison riot or whatever. Okay. What I'm saying is all of the purposes of sentencing will be lost if you set up an overcrowding crisis. And I think that is the direction of what you are doing. And certainly disparity is going to be lost.

COMMISSIONER GAINER: You are candid. We disagree.

CHAIRMAN WILKINS: Thank you very much. Does anyone else wish to address the Commission?

No one else coming forward and we will stand adjourned.

[Whereupon, at 1:30 p.m., the hearing was adjourned.]