

UNITED STATES SENTENCING COMMISSION  
in conjunction with the  
1998 NATIONAL INSTITUTE ON WHITE COLLAR CRIME

PUBLIC HEARING

THURSDAY, MARCH 5, 1998

"KEY ISSUES: REASSESSING SENTENCES FOR  
FEDERAL THEFT, FRAUD, AND TAX CRIMES"

The United States Sentencing Commission  
met in the Sienna Room, Parc 55 Hotel, San  
Francisco, California, at 1:15 p.m., The Honorable  
Richard P. Conaboy, United States District Court  
Judge, Chair, presiding.

COMMISSION MEMBERS PRESENT:

MICHAEL S. GELACAK, Vice Chair

MICHAEL GOLDMSITH, Commissioner

The Honorable DEANELL R. TACHA,  
United States Circuit Judge, Tenth  
Circuit, Commissioner

EX-OFFICIO MEMBER PRESENT:

MARY FRANCIS HARKENRIDER

STAFF PRESENT:

JOHN H. KRAMER, PH.D., Staff Director

PAMELA MONTGOMERY

DONALD A. PURDY

JIM GIBSON

KEN COHEN

JOHN STEER

PAULA DESIO

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P R O C E E D I N G S

DR. KRAMER: Good afternoon!

I would like to convene this public hearing of the United States Sentencing Commission. I'm certainly pleased that we are able to be here in San Francisco at your session so that we can entertain and receive your testimony and input this afternoon.

This has actually been a series of hearings for the Commission: In October, we had a hearing on loss in Washington, D.C. In December, we had a hearing on manslaughter; February, we had a hearing on telemarketing; today, we have a hearing on fraud and loss tables, and the loss definition, of course. Next week, we will have another hearing in Washington, D.C. which will cover some of these topics, as well as additional topics that are on the Commission's agenda plate.

We want to emphasize that we've done this, and we've tried to open up to receive more testimony, to allow for more input in our decision-making process. So we really welcome this chance to listen to you.

My job, right now, is to introduce the commissioners; and, then, we will start at 1:30 with the panel. We have a very busy afternoon, so I've warned a few of the panelists that we will try to watch the time fairly closely so everybody gets a chance. At the end of the day, we have scheduled a time for unscheduled comments to be made, and

we have two commissioners who have to leave towards the end of the afternoon. I want to make sure we get to that as we have scheduled it. So, apologies if we push you a little bit.

First, let me introduce members of the Commission.

First, we have Mary Harkenrider, who is an ex officio member of the Commission. She is counsel to the Assistant Attorney General for the Criminal Division of the Department of Justice.

Next to her, we have Commissioner Michael Goldsmith, from Salt Lake City. He is a professor of law at Brigham Young University.

Beside Commissioner Goldsmith, we have Judge Deanell Tacha, of Lawrence, Kansas, from the Tenth Circuit, United States Circuit Court Judge, of the Tenth Circuit.

And this very dashing figure, beside me here, is Michael Gelacak. Commissioner Gelacak is vice chairman, and he's from Centreville, Virginia.

To my left, we have the chair, Judge Richard Conaboy, of Scranton, Pennsylvania. He has been the chair, since 1994. He will now take it over and deal with the rest of it.

## **OPENING STATEMENT**



**THE HONORABLE RICHARD P. CONABOY,  
UNITED STATES DISTRICT COURT JUDGE  
CHAIRMAN, U. S. SENTENCING COMMISSION**

JUDGE CONABOY: Thank you, John, very much, and good afternoon, everybody.

As our staff director said, I am Richard P. Conaboy, and I am presently a United States District Judge. I've been a judge since 1962, although I went on the federal bench in 1979.

And I mention that not to indicate that the years passing give you any greater grasp of the issues that are involved; but it is amazing, in the last 35 years, how many changes have taken place in the system of justice that we have in the United States--the best, I'm convinced, anywhere in the world--in how far we've come and how many changes have been made. And, more importantly, in the sentencing area, it amazes me that, for the last 35 years that I know of, we've been struggling with the same problems over and over again, sometimes running into ourselves as we try to come up with solutions, particularly in this very troublesome area of sentencing.

As I indicated to you, when I first went on the bench, there were no Sentencing Guidelines. There was no aspect of being a judge that caused me, and I think

almost any other judge, as much consternation as the very difficult job of imposing a sentence on the criminal defendant.

In many civil cases, you do your best to study the issues that are involved, and listen carefully to the arguments that are made; and, then, you make a decision and, generally speaking, you feel you've tried your best and you made a judgment that's based on reason and good sense, and followed the law as you saw it. That's never quite so with imposing a sentence. You walk away from most sentencing wondering how much was enough and at what point should punishment go beyond what we reasonably think is appropriate in the given case, and was my sentence too severe, or was it too lenient under the circumstances. And why, what end were we trying to achieve in imposing the sentence?

As a result, there was often disparity among courts and judges in imposing sentences, and the implementation of Sentencing Guidelines was the natural outgrowth of a desire to try to put some sense into the sentencing process, and to see that, at least in the federal court system, sentences imposed in California, for similar crimes on similar defendants, were the same as those imposed in New York or Florida, or anywhere else in the country. And it has helped. The concept of Sentencing Guidelines has helped immensely in that area. And it has reduced the disparity that we used to find sometimes in

sentences around this country. And it also has helped, I think, to raise the public perception of how hard we try, in the federal system, to impose sentences that are fair and just. So now judges can look to the Sentencing Guidelines and look to a method which helps them arrive at a given sentence in a given case, and all of that is very good.

One of the big concerns that I have, and others join me in this, is that, as newer people, particularly, take the bench, they will not take the sentencing process and sentencing obligation as seriously, perhaps, as they should.

We had a judge testify before us out in Denver, Colorado about a year ago. He very strongly pointed out to us how sentencing used to bother him. That he would go home the night before a sentence and wouldn't enjoy his supper, and didn't sleep very well, and that he carried it around in his stomach, wondering what was the right thing to do. But he said, "I don't find that anymore, because I come in the morning of a sentence and it's all computed for me, and the sentence is already laid out, and I don't have to worry even whether it's right or wrong; under the circumstances, it's the one commanded by the guideline system."

Well, whether you agree or disagree with that kind of statement or testimony, it's a bothersome thing. And we are struggling, as a Commission, as it's presently peopled nowadays, to constantly remind judges of the great responsibility they

still have when they're imposing sentences. That there are times when a judge must go beyond in the mathematical computation and look carefully to see is this the right sentence under the circumstances. And, if it's not, there are many ways and many times when the sentences must be adjusted to make sure that the sentence does fit the purposes for which sentencing is to be imposed in this country. And we're--in trying to do that, we're looking at the Sentencing Guidelines constantly and bearing in mind that even those who originally drafted and wrote the initial Sentencing Guidelines pointed out very clearly that this was to be a living body of law, subject to change as we learn more about human behavior and as we learn more about how the sentencing process was being carried on in the federal courts. So, we're engaged in this kind of process constantly.

In this fraud and loss and theft area, as you all know, and as John Kramer just pointed out, we have been looking at this now for several years. We've had several other hearings. We've invited people to come in and testify to us and submit to us a variety of suggestions and ideas on what's to be done in this area. Which comprises, by the way, a very, very large portion of the sentences imposed under the Federal Sentencing Guidelines are in the fraud, loss and theft area.

So we appreciate your, all of you who are here today to help us, coming once again to give us your opinions on some of these areas.

We've broken this focus on this part of the guidelines into approximately four areas: One is the definition of loss; the other is the tables that are involved in this. The third is what we call referring guidelines, other guidelines that refer to the tables, and how they will be handled if there are changes to be made. Finally, one of the most important things that we're trying to do, from the standpoint of simplification, is to combine the guidelines, as they now exist, into one guideline. Make it easier for all involved, we hope.

So we've asked, then, and received, and we appreciate recommendations from the Criminal Law Committee, and we received help and advice and guidance from the Practitioners Advisory Group and the Department of Justice, and many other individuals, and we thank you all for your interest in what we're doing. We feel and hope that your suggestions will enable us to make a final determination which will be the most appropriate and the most just under all of the circumstances.

We have several panels here today and a number of people who are going to speak to us. Let me get to the first panel, and John Kramer has agreed to take on the job of keeping track of time here for us. We'll try to not interrupt you; but, just in an effort to try to move this along, maybe remind us, ourselves, if we're over time.

#### **PANEL ON TAX AMENDMENT ISSUES TAX ISSUES ONE**

**AND TWO: PROPOSED CHANGES TO TAX TABLE AND THE  
ENHANCEMENT FOR SOPHISTICATED MEANS**

JUDGE CONABOY: On the first panel here, we have Mark Matthews, who is a Deputy Assistant Attorney General in the Tax Division. Richard Speier, who is Director of Investigation of the Western Region of the Internal Revenue Service.

And we have James Bruton, who is with Williams & Connolly in Washington, D.C., and a former deputy attorney general in the Tax Division.

Charles Meadows of Texas, who is with the Criminal Development Subcommittee of the Civil and Criminal Penalties Commission of the ABA.

Paula Junghans of Baltimore, a great city on the East Coast, of Martin, Junghans, Snyder & Bernstein.

We welcome you all here, and if we can start from left to right, if that doesn't interrupt the way the panel wants to go?

MR. BRUTON: I think, actually, there was an agenda. Mr. Purdy wanted me to start; and, then, we would go down--

JUDGE CONABOY: Very good. All right. Thank you.

**STATEMENT OF JAMES A. BRUTON, III, ESQ.**

**WILLIAMS & CONNOLLY, WASHINGTON, D.C.**

MR. BRUTON: I've been asked--well, first, it's a pleasure to be here, Mr. Chairman, and members of the Commission.

I haven't been before you in a number of years, and it's--I regard it as a great honor to be here today to have my comments heard on the subject of the changes that have been proposed. The way this is set up is: I would go ahead and speak for a few minutes. I think Mr. Matthews will then present his; and, then, the other panelists will present a rejoinder to some of the things that Mr. Matthews says. I think that's way it we'll go.

JUDGE CONABOY: That's fine.

MR. BRUTON: The remarks that I put in, you're missing the last three pages. They are a little long for me to read in this format. So, I'm going to have to condense down a little bit, but they're available. I understand Mr. Purdy has all the pages now so that it actually is a complete record.

The guideline proposals, or the amendments that we're asked to discuss in this panel, relate to, first, possible changes in the sentence--the Tax Loss Table, which is 2T4.1. There are three proposals on the table, two that are in the public statement, and a third which is, I believe, an amalgam of the other two statements. It blends the others.

The Option 1 basically makes no changes in the current table until about

\$40,000; and, then, breaks with more severe sentences, or larger increments of loss applied in the later periods. Although, all these proposed tables go in two-step, rather than one-step, increments, which is the current circumstance.

The Alternative 2 actually decreases the dollar amount at which sentences will produce jail, and, in fact, will actually compel imprisonment by an individual.

And the other provision that we're dealing with, or the third provision, is just the amalgam of the two, which is intended to, I assume, cover the best of both of those issues.

My view on that, or our view, collectively, from the defense bar side is: We should not make a change in the tax tables. I was in Mark Matthews seat in 1993 when we came to the Commission and asked to increase from the levels that existed prior to that time. And, if the Commission recalls, at that time, the broad guidelines, and the tax guidelines, were identical. And the burden that we carried with us was not should we move both of them; but, rather, the only proposal that the Commission would consider at that point was whether to change tax individually. And, so, I carried the burden up with me of having to say: Well, we should make tax independent of fraud.

Our position was--and I think, today, I'm in the unique position of being back before you again defending the guidelines that I defended as a proposal five years



ago. They were a major increase over what had previously existed. Our concern was that not enough taxpayers who had been engaged in fraud would be seeing sentences that produced prison, and that there were too many opportunities for probation, and too many opportunities for alternative sentences. So, we asked the Commission to move that up; and, in fact, that took place.

What I didn't realize at the time, and I was here, and I've mentioned in my remarks that I think I was, at least, involved in sending something up to the Commission virtually every year I was there. So we always had something on the agenda that we wanted you to do, and we were always running up with a new opportunity for change in the guidelines.

I have seen--and I have seen it the hard way over the last five years--that change in the tax area should be approached very cautiously. I say that because of the way tax cases are generated. Tax cases generally take several years, and usually they're closer to the end of the statute of limitations, which is six years, than the earlier part of the statute of limitations. So, if we change the guidelines this year, for all practical purposes, we won't see cases being sentenced, a meaningful number of cases being sentenced, under that for maybe three years, four years, or more years out. In fact, there's still cases involving the 1992 book that are existing now that Mark's office is recommending

prosecution in, as we speak. And that will happen for the next couple of years, in any event.

That's sort of the natural consequence of the nonretroactivity rule that we abide by. But what it puts the position--it creates the position in the tax arena where there is multiple books, and the plea bargaining and the resolution of cases is dependent largely on which book you land in. So that you can have two people sentenced the same year, for the same offense, for roughly the same tax amount, and, yet, you'll have disparate sentences right within maybe a month. So that's a very difficult thing to deal with. I think it creates a perception that just the bad luck of being investigated for this, or another crime, is the issue. Whether one year the offense level should be higher than another year, I think is something of major gravity. And I think it's an issue that lingers with us as time goes on. And I didn't perceive that at the time. I certainly see it now.

Are criminal sentences in tax cases too low?

I came up here in 1993 and argued that we needed deterrence. I was with Mike Dolan, who is the Deputy Commissioner of Internal Revenue Service. I helped him prepare his remarks. And the one thing that I was deathly afraid of is that one of the Commissioners would ask me: How do you know? Because there were studies being undertaken in the Service to try see if one criminal prosecution would increase collections

anywhere else. And there were studies, but they haven't really gotten very far.

The question here is even more precise. Not just whether there is a criminal prosecution, but whether a certain level of jail, for certain offense level, will the desired effect: Detering. The reason why this is important is: Unlike most crimes, I think the federal prosecutors try to prosecute almost every other offense that they can find because the offense needs a response. In the tax arena, the government knows, going in, that it can't even come close to scratching the surface of the number of people who are involved in tax evasion crimes of various kinds.

There's a tax gap, which I'm not even sure how large it is now. It was \$120 billion when I was in the government; and I don't know if it's the same, or roughly the same, each year, a shortfall in collections over what ought to be gotten. And the question is: If you prosecute 1,500 cases a year, what's the effect of that? And, in turn, what's the effect of sending a certain number of people to jail? That is not an answerable question. There are no statistical bases to be able to make that determination.

When you see the dislocations that are caused, and the relative disparities that are caused, by making a change like this, I think it's one of the things where the government has a very, very heavy burden to come forward and say: This is really what we need, and these are the areas. Not just to put numbers down there, because they

essentially become arbitrary. I could have come in, five years ago, and maybe I should have, by the government's presentation, and argued for more; but how could we know? We wouldn't have known at that time. Should it have been higher? Should we have it 70 percent of all taxpayers, tax evaders, in jail? Should we have 30 percent? What's the right number? That's not an answerable question.

The other thing is that I think we have to be careful when we use the statistics in the tax area to make determinations about these issues of how many people should go to jail. The tax area is unique, in that: There are very many people who are prosecuted for other crimes that end up in the tax arena. Plea bargains go there. There are a lot of resolutions in the government is general enforcement program, which is really relatively small. And the question is: Do these plea bargains, do agreements as to tax loss, do other agreements that go into these things skew the numbers in such a way that, when the Commission attempts to determine whether those numbers have meaning, I don't think they are very useful in that respect. And I think seeing, trying to target a certain percentage of people to be incarcerated is probably--No. 1, it may not work. Because the plea bargaining still has to be put into the equation to determine what the likely outcome would be.

Finally, let me just mention, in passing, or quickly, so I can finish up the

issue with the proposed change in sophisticated means.

The experience of our panel, the defense lawyers, is that we see it raised in almost every case. The statistics show that it is only in 16 percent of the cases that it's actually imposed. I think that tells you, right away, that the plea bargaining issue there may be significant. It also, I think, suggests that the probation offices are becoming more and more accustomed to applying it, and you'll see a natural increase as time goes on.

The real problem that concerns us, or concerns me, particularly, is the initial jump to the level 12 in low-end cases, where there's is sophisticated means or sophisticated concealment. I'm not sure I can tell from the definitions the difference between the two, but the question is: Taking, say, a \$1,000 tax-evasion case, and finding that the individual had altered documents, or created a phony document, or attempted to present some false material to somebody to conceal the crime, that that could be construed as sophisticated means or sophisticated concealment and push that person to a level 12, for that small a tax, it seems to me is close to unconscionable.

I'd say that the courts are well equipped with the existing guidelines to impose the sentences that are needed when there is a showing that there is something egregious that's going on. And I think the problem of compartmentalizing this, both from the tax table and this, is: A thorough investigation, showing multiple years, will tend to

increase in these tax years in a way that other crimes don't. A tax evader who is shown to have engaged in this conduct for eight years, rather than one year, will certainly have more tax loss and spend more time in jail, and the sophisticated-concealment issues will come out more likely.

I'll just conclude with that. I think the others will pick up for me where I have failed to cover things.

Thank you.

JUDGE CONABOY: Pam Montgomery is very kindly holding up signs for us over there, so we won't have to interrupt you if you keep your eye on the signs.

Mark, do you want to proceed, please.

**STATEMENT OF MARK MATTHEWS**  
**DEPUTY ASSISTANT ATTORNEY GENERAL, TAX DIVISION**  
**DEPARTMENT OF JUSTICE**

MR. MATTHEWS: I want to thank you, again, for the opportunity to appear here. This is my second appearance before the Commission. We had an opportunity to speak almost a year ago.

I am not going to read my testimony, but will submit it for the record; but I will mention a couple of the high points in it, or, at least, high points from the

government's perspective. They may be low points from the defense bar's perspective.

The thrust of the testimony is to focus on the need in the tax world for us to increase the severity in the Tax Tables, especially at the low levels. We talked about that last year, talked about some statistical evidence last year, and I think we had some substantial support for the notion of evaluating those Tax Tables at the lower end last year. I just hope that we can act this year and not let another year pass, frankly, for one of the reasons that Mr. Bruton, and that's the delayed effect, particularly in the tax area, for when these go into effect.

We have a huge general deterrence requirement in the tax program. We are trying to deter more Americans on fewer prosecutions than in almost any other area of law enforcement. There are approximately 200 million Americans who are touched by the income tax laws and have an affirmative obligation to citizenship to complete and file those returns, as well as make a payment. We prosecute about 1,500 of those cases a year. And, frankly, when we look at the real legal source income cases that we think have the greatest deterrent effect on the Americans who are not otherwise committing crimes, other than tax crimes, we only have about 700 or 800 prosecutions a year.

To address that, we came up with this tax-gap project. The tax gap is the difference between those sums that should have been reported and paid each year, and the

sums that are actually reported and paid each year. As Jim stated, that is a very large number. It is still over \$100 billion. We haven't gotten it down, since Jim left, despite all of our best efforts. The compliance rate is about 83 percent.

One of the things that--

JUDGE TACHA: But if I understand his point correctly, it is that it got raised in '93, and most of those are not through the pipeline yet. So, how do we know, how do we know, whether, as a matter of fact, it is--I mean, even given your purpose, you can accomplish that?

MR. MATTHEWS: Exactly. I think my point is less made, is honestly less made on an analysis, even though I'm going to talk about where we are in terms of the incarceration right now. It's more of an analysis of the strict application of the dollars to what we know about taxpayers out there in the world. We are very interested in uniformity and fairness in the tax system. We're trying to reach these 200 million Americans. The reason why the Tax Division exists is to see that we try to act in an uniform and fair way.

What I can tell about the Tax Tables, even without having seen the sentencing results, is that it takes something like a \$40,000 tax loss, assuming acceptance of some responsibility, to put a defendant, a putative defendant, into a range in which



there is not a certainty, but a virtual certainty, of some sort of incarceration.

When I look at that \$40,000, and look at the very good statistical evidence about what taxpayers owe what amount of money, that's where I come up with some of the numbers we have in our testimony where we have 95 percent, or more, of the American public literally does not pay enough in taxes, that if they cheated to the full extent of their tax liability for three years, which is the average case, that they could possibly get themselves into an incarceration zone.

I don't even like saying this publicly. This is the only place I do because you are the ones who can effect that. That, I don't--you know, that stands alone, regardless of the incarceration rate. One of the things that Mr. Speiers is going to talk about is the way they look at their program when they go out and make cases. One of the things they look to in their cases is the possibility of the deterrence message, and possibility that someone might go to jail. Now that's not to say that everybody has to go to jail in the tax world, by no means; but we do look--he looks primarily, as he spends his resources, to send that general deterrence message, he looks to that. So, even with the tables, as they are now, we have somewhat, just under 40 percent, of our cases with the defendants receiving some sort of incarceration time, as opposed to the guidelines, as a whole, where it's something like over 80 percent of the cases.

So the break mark for us, you know, 97 percent of the reason why I'm here today is, is not the upper end of the table, although that's important to us and we support that, but the really important break mark for us is that level 12.

Right now, as I understand, Option 2 is the one that would essentially put the Option 12 at the \$30,000. I don't purport to say that \$30,000, I don't--you know, Jim is correct. You know, in a lot of law enforcement, the statistical evidence is hard to gather. The deterrence is something you understand in your gut. And the Commission, in its experience and statistics, I'm not saying that I--that there's some magic about \$30,000. What I do know, from what all we know about all the taxpayers at large, is it will open the range of taxpayers and take the CID's focus, it will give them the opportunity to look not just at the upper end of the taxpayers, a very small percentage of the taxpayers, but expand it further.

That's one of the things we have to do as mission. We have to show that, no matter what your income level is, if you go about a sustained pattern of cheating on your taxes, you will, that will be addressed. Now, you might not have to go to jail, but we will try, will try to address that conduct. So we need to bring that benchmark down.

JUDGE TACHA: You agree with his statement that most of the District Courts are showing a lot of reluctance to send low-end tax violators to prison?

MR. MATTHEWS: Well, when you say "low-end," do you mean low end in--

JUDGE TACHA: Well, what do you--I don't know what anybody means by low end. I guess that's the debate here: Who is low end?

MR. MATTHEWS: Right. I think, you know, it's certainly true that, when we have a defendant who is in a 10, 12, who is in the low-end range, there is some sort of span, or when there is some sort of incarceration, there's no doubt that we have a lot of judges who will, who will give, who will give some sort of probation or split sentence, or some sort of that.

One of the things--and I think that relates to some of the difficult individual judging points, with a judge with an individual defendant. Sometimes, our own statistics hurt us when a judge in a community sees as much tax fraud out there as we do, and you realize that there are millions of other similarly situated people who the system has not addressed. I guess I can understand, in individual case, why that, you know, why that happens, why that judge does that. The beauty of the guidelines are that we don't have to stand with an individual. We take a more systemic view. And I would think that, when we get above that level, when we get above the level 12, we're not going to, we're not going to see all those cases at the low end of the range. Although, as the Commission even

recognizes in its manual, some even small portion of the imprisonment, a very small portion of imprisonment in the tax world, carries a particularly large deterrent effect, given the community we're looking at. These are not people, in the heartland that we're looking at, who are committing other bad crimes out there. I'm not saying tax isn't bad, but their tax is the only violation they're committing here. So, I don't, I hope we wouldn't, wouldn't see that.

I want to be very careful with my time and give Mr. Speier a few moments, despite questions, if I can.

JUDGE CONABOY: Mr. Speier, do you want to proceed.

**STATEMENT OF RICHARD SPEIER, JR.**

**DIRECTOR OF INVESTIGATIONS**

**WESTERN REGION, INTERNAL REVENUE SERVICE**

MR. SPEIER: Thank you very much.

This is my first opportunity to address the Commission; and, on behalf of IRS Criminal Investigation Division, I want to thank you for the opportunity.

Like Mr. Matthews, I'm going to focus my comments primarily on the need to reform the Tax Tables, specifically at the lower end. I'd like to, hopefully, give you some insight as to the way the Criminal Investigation Division does business and the types

of cases that we do work.

Criminal Investigations Division's workload has changed dramatically through the years, from the times where Mr. Bruton was in the Tax Division. I think he saw us go away from the period where we were working almost 50 percent, or more, of our cases in the narcotics and money laundering area. We're no longer there. Sixty percent of the CID resources are addressing what Mr. Matthews referred to as tax-gap type crime, white collar income tax crime, related to legal source income. This represents a tremendous departure from where we were ten years ago, and it's a strategy that is trying to address what--we'll pick a number--\$120-some million tax gap.

MR. MATTHEWS: Billion.

MR. SPEIER: Billion, excuse me. Thank you. We're definitely not that efficient.

Our role in criminal investigation is to provide a deterrent, and we try and commit our investigations to those cases that, if successful, will yield us deterrent publicity. And, in the Western Region, of which I'm in charge, that's basically the western quarter of the United States. IRS Special Agents in those states, and in those IRS districts, are instructed to work those income tax investigations that are likely to yield deterrent publicity and have a very good likelihood of generating prison time. That's pretty much

our yardstick and our guideline.

JUDGE CONABOY: Can I interrupt you there?

MR. SPEIER: Please, sir.

JUDGE CONABOY: I don't know, maybe we shouldn't be interrupting; but I think it's along the same lines that you're talking, Richard.

Several of you now have mentioned the increases that went into effect three or four years ago. Is there any indication that that has had anymore of a deterrent effect, or can you judge that? Somebody has said it's hard to judge.

MR. SPEIER: That's a correct statement: It's very, very hard to judge. I see certain types of tax crime that are increasing, and I can address trends in certain types of tax crime. It's pretty difficult to be directly responsive. I don't have the evidence, statistical type of evidence, to address that.

MR. MATTHEWS: Can I make one minor point?

I have actually spent some recent time speaking to some Europeans, as well, with their tax systems. One of the things I fear, when I'm in bed at night thinking about my job, is: I'm afraid that we are living on some past gas in this country. That we fortunately had a culture, we've had a country where, for a long time, we have a rock solid 80-plus percent compliance in this country because there was a time, and because it's good

publicity, good work, early on in our, in our culture. I worry about the slippery slope when, if and when, the public understood some of the numbers that we actually talk here about here: 10 million nonfilers, less than 200. Not 200,000--10 million, now 200 prosecuted a year. I worry about losing the edge. And, rather than the idea that those cases are increasing--I wish I could prove that. I can't. I think our fear is that, if we don't do what we do and, given the number of our prosecutions, we have only a handful per state each year that get statewide publicity, I guess it's a more guttural, you know, reaction. What happens if we don't get those 2 or 3 cases that get publicity?

JUDGE CONABOY: What I was wondering--and I think probably everyone would agree with that, that that is a major concern. But my question, I guess, goes more to what can you do about that? Is putting people in jail, more people in jail, the only thing, or the right thing, for us to be doing? I don't know whether you can address that in context or not.

MR. SPEIER: Certainly, addressing tax issues, criminal enforcement is only one aspect of this. And, with the criminal enforcement, given that there is only 3,200 Special Agents nationwide addressing all the millions of tax returns that are filed, and those that need to be filed and are not filed, we have to be real choosy about the ones we get. And the ones that we choose to investigate, we need to insure that we get the type of

deterrent publicity that we're looking for; and that is: A message that there is a down consequence to evading your taxes, defrauding the government, or willfully not filing your tax return. We also have to be very cognizant that we don't get into a posture where we media stating that an individual has been indicted and convicted for tax crime and there was no deterrent, there was no prison time. That's obviously something that, in our case selection, we have to be very careful of.

MR. MATTHEWS: She's calling time. We'll have to go on to the next point.

**STATEMENT OF CHARLES M. MEADOWS, JR.**  
**MEADOWS, OWENS, COLLIER, REED, COUSINS & BLAU,**  
**DALLAS, TEXAS**  
**CHAIR, CRIMINAL DEVELOPMENT SUBCOMMITTEE OF THE**  
**CIVIL AND CRIMINAL PENALTIES COMMITTEE**  
**OF THE ABA TAX SECTION**

MR. MEADOWS: My name is Chuck Meadows. This is my first time to be able to address the Commission. I thank you for that opportunity.

I would like to talk about two particular areas: No. 1, and that's, first of all, the lower income. I'm not sure that that's a good allocation of resources of the Service



to prosecute those people. We have civil penalties, 75 percent fraud penalties, that can take care and serve as a deterrent in that area. But the bigger crime, the larger crime, how can we look at that area?

I see, in the guidelines, two proposals. One is to combine the fraud counts with the tax loss issues, which would significantly increase tax penalties, criminal penalties.

The First Circuit, just in January, released an opinion, *United States v. Brennick, B-r-e-n-n-i-c-k*. I do not have a citation for that. But, in that case, it recognized the difficulty in computing tax loss versus fraud loss. Someone steals \$200,000 from the bank and doesn't pay it back, we know pretty much what the loss is. But in the tax loss area, we apply an arbitrary percentage, 29 percent or 34 percent, or 20 percent in the case of nonfilers. We have even different calculations of tax loss among the tax loss guidelines. We don't have one consistent guideline. And I know, from the judges, at least my experience is, you don't want to conduct an audit in your courtroom to determine actually what the tax loss is. You don't have the time to do that. We need to have at least some--and that's one reason, I think, that justifies the lower penalties in this area, because we know we're dealing with an arbitrary figure.

The second area I would deal with is just simply the two-level increase that has been proposed for higher crimes, instead of going up one level each time. Would the

Commission consider the possibility of having the judges, the District Judges, have the opportunity to make a sentence within that two-level increase so that they can have the discretion to view the loss? Instead of having automatically go up two levels, maybe they should be able to say it goes up one or two levels depending upon the judges determination of loss. I know we've gone away from getting judge's discretion in that area in order to try to make more uniform sentencing, but there are differences in the crimes that are committed.

Those are the two points I'd like to emphasize in addition to my written remarks.

MR. GOLDSMITH: The problem with that latter point, at least in theory, though, is that it violates the 25 percent rule. That the sentencing needs to be within 25 percent of the upper range, needs to be within 25 percent of the lower range. If you allow the judge discretion to go up and down two levels, that goes well beyond the parameters of 25 percent. So that alone, without any accompanying criteria, would not be possible under the statute.

MR. MEADOWS: That issue, though, if you go into that level by jumping two levels, you're going to set up a situation where there will be more appeals, in my opinion as a practitioner. Because you are no longer going to have an overlap at the

District Judge level where the appellate court can say there is harmless error here because a 33-month sentence falls within both guidelines. When you go up two levels, the lowest guideline sentence will be higher than the highest guideline sentence for the previous offense, and you're going to have a gap in there. That loss area is going to mean more litigation over what that loss number was. It's going to have a real meaningful impact.

Now, appellate courts say harmless error, don't worry about it, you could sentence from that guideline range. But, if you go to two levels, and maybe you should just go to one level, if, in fact, that's the statute; but I would oppose the two-level increase because of that reason.

JUDGE CONABOY: Paula.

**STATEMENT OF PAULA JUNGHANS, ESQ.**

**MARTIN, JUNGHANS, SNYDER & BERNSTEIN**

**BALTIMORE, MARYLAND**

MS. JUNGHANS: Good afternoon.

My name is Paula Junghans. I appreciate your inviting me to speak today.

Since I'm last, I'll try to be quick. I would like to talk for a few minutes about the deterrence issue, which seems to be the focus of Mr. Matthews' and Mr. Speier's proposals.

I've been doing criminal tax cases for 21 years. I've represented dozens of people who have been prosecuted and hundreds more who are committing tax evasion, who have either not been caught at all, or who have not been recommended for prosecution.

I haven't yet met a single person who told me that, when he was committing his crime, he sat down and calculated what his potential sentence was going to be. I don't think that's what deterrence comes out of. I think what deterrence comes out of is what Mister, is what the government representatives recognize, and that is the possibility of being caught. The way to achieve that, in my view, is for--and I realize you can't control this entirely--is for Congress to allocate to the Internal Revenue Service more money for more enforcement. It is not to impose harsher enforcement on smaller existing cases.

It seems to me the proposals that we're talking about here will involve spending a lot of money on additional beds in jails, and nobody is talking about where that money is going to come from.

I also do not understand what appears to be the perception that anything other than jail does not serve as a deterrent. Community confinement is a punishment. Home detention is a punishment. Being a felon is an enormous punishment, particularly if

you prosecute people who are professionals and who have collateral consequences coming out of their convictions. Those range of punishments are in place now, and will be in place, as well, with these harsher penalties. But to focus the effort, it seems to me, on harsher penalties, on smaller cases, is the wrong cure.

I think we all agree what the problem is, but I think that's the wrong cure.

And I don't think that what we have now under the '93 guidelines is broken; and, therefore, I don't we should fix it.

JUDGE CONABOY: Does anyone want to respond to that? Mark, Richard?

MR. MATTHEWS: Without taking too much time, there have been a couple of references, I think, by all the defense attorneys to the notion of the government aiming at the small guy, or the low-end taxpayer. The numbers that we're trying to talk about I don't think, by any means, reach into low-end taxpayers. We're saying that there's 95 percent of the taxpayers are essentially beyond the reach of the imprisonment possibility.

Again, I agree, there are cases where imprisonment is not appropriate. That is a sanction, a felony punishment is. But we are trying to broaden the range, and it's not to reach down to the little guy. It's to reach into the upper middle class, with the

possibility of imprisonment in some of these cases. So, I--you know, there was reference to a thousand dollar tax case. Those don't exist. I mean, we are talking about much bigger cases than that.

One last point is: We talked about \$40,000/\$30,000. Remember, those are--there was the notion of the difficulty of computing that. And nobody wants to do all this. I don't think that's happening in the courtrooms in tax cases. We're so careful about that. That \$40,000 represents what we call the "criminal numbers" in the tax world, as opposed to the civil numbers.

In most of our tax-gap cases, the agents are trained to avoid the gray areas. Don't--you know, we focus on where--you know, tax cases are difficult enough to convict as it is. You're trying to show real, show the jury real, willfulness, to show what they're doing. You focus on the black and white tax crimes. And our average cases, there may be as many as two times, three times the civil numbers. Those aren't included in the calculations most of the time. Not to say we ignore relevant conduct. Those have not been investigated. So it's not as--I don't think the defendants are suffering, for any of this gray area, the notion of tax cases.

MR. BRUTON: If I may just add one point, though, that Mr. Matthews has referred to, to the possibility of incarceration. The fact is that, under the current

guidelines the possibility of incarceration exists at every single level from zero right on up the scale. It's the certainty of incarceration that the government is trying to deal with, and the question is: Are the courts capable of responding to this in situations where they feel that there's an appropriate case before them that requires the right kind of sentence? It seems to me they've got the tools and I don't think we can assume that they're not willing to exercise that authority.

MR. GOLDSMITH: May I question, Mr. Chairman?

JUDGE CONABOY: Yes.

MR. GOLDSMITH: Focusing on this \$40,000 amount, I see that the thoughts being expressed here is that the provision will hit the little guys too hard. But to produce a tax loss for \$40,000, we're talking about, for example, deductions that have been overstated to the tune of \$150,000.

MS. JUNGHANS: Only in a one-year case.

MR. BRUTON: Only in a one-year case.

MR. GOLDSMITH: In a one-year case, okay. So, you know, over a three-year span of time, so it's \$50,000 per year, which is a fair amount of money. I mean, I'm kind of wondering what kind of little people we're talking who are overstating deductions like \$50,000 a year.

MR. BRUTON: I gave an example in my paper, that \$5,500 a year. The single year case, makes \$40,000 a year, and \$5,500 evaded during that year, which wasn't an outlandish number. If that same evader is found by the IRS to have done that in eight years, you've broken your \$40,000 mark immediately.

The IRS--one of the questions here is how thoroughly do you investigate the cases? And the question is: Do you make tax cases, such that very little investigation can go in, with the certainty of a one-year case, where you can't differentiate taxpayers? One person who does it one year is different than another person who does it eight or nine years, and the government can reach back beyond the statute of limitations and produce that, and they do in most cases.

MR. GOLDSMITH: Well, would you concede that, if it were done in the situation of a one-year violator, that this is a tax loss of \$40,000, in those circumstances, wouldn't this appropriate all other things being equal?

MR. BRUTON: Conceivably, but I can say this: It is rare. Historically, the IRS has prosecuted multi-year cases for a reason. The reason is that a single year is not an attractive case to prosecute so they bring multiple cases. I think the judges on the Commission probably have, if they've seen a single-year case, it would be a rarity. It's just--I've seen them maybe a couple of times in my whole career.



MR. MATTHEWS: We don't do eight-year cases, which is what it took in the example. We don't have judges finding relevant conduct over eight years. It's the difference between the one year, \$150,000 a year, and the eight years. We're not touching much of that difference, I think, by option 2.

MR. GOLDSMITH: Do you know what the increase would be in terms of the incarceration? Excuse me, I'm sorry.

JUDGE CONABOY: That's all right, but we'll have to end with this question.

MR. GOLDSMITH: Do we know what the increase would be in incarceration by changing the figure \$40,000 to \$30,000? Are we talking about, all of a sudden, dramatically increasing the number of prison beds and the number of people that would be close to this?

MR. MATTHEWS: You know, I saw something the staff had put together in trying to determine impact. I guess--I don't think it's that much, honestly, in the case of agreement. I think maybe we can provide something--

MR. GOLDSMITH: I'd like to see if you can get that.

MR. MATTHEWS: I will do that.

MR. SPEIER: I would further, just quickly, argue that there is no way

that, given that, that we would lower our standards of what we're going to be investigating. We're still going to be looking at the most, best deterrent taxpayers, most egregious taxpayers, in any given district, in any given area.

DR. KRAMER: Before we--I would ask the panel to remain; but we want to move to Justin Thornton now, who is--we're a little behind schedule, but we'll try to get to you. And, then, what we'll allow is some questioning for everyone when Justin finishes.

So, if you're ready, Justin, you may begin.

**STATEMENT OF JUSTIN THORNTON, ESQ.**  
**CO-CHAIR, TAX ENFORCEMENT SUBCOMMITTEE,**  
**ABA WHITE COLLAR CRIME COMMITTEE**

MR. THORNTON: Thank you, Your Honor.

Judge, I'll be as brief as I can here with my remarks in order to keep the dialogue going.

I've been practicing in the criminal sector for 20 years now; the first 10 years as a prosecutor, and the the past 10 years in private practice. Also, I might offer the disclaimer that, while I am holding an ABA leadership role in the criminal tax area, I'm also a member of the Practitioners Advisory Group. I'm appearing here and expressing my own personal view, not those of any professional organization with which I'm affiliated.

With that, I understand and I appreciate the Commission's desire to simplify the Sentencing Guidelines. The point that I would like to make here today, though, is that criminal tax cases really are different than other kinds of fraud cases and should be treated accordingly. And I join my other panel members, for the defense bar, in our opposition to the adoption of the proposed changes to the guidelines for the tax, for tax expenses.

The '93 amendments still aren't in effect now. It's as if we have a cake baking in the oven, which isn't out yet, and we're asked to change the recipe. And, so, I would urge the Commission to consider just not adopting any of these options at this point. Criminal tax cases, as it's been mentioned, have a six-year statute of limitations. They span multiple years. They have all the pattern of filing. Defendants are subject to subsequent and severe civil tax adjustments, with interest and penalties, in the tax area, unlike in your usual fraud case.

Proof of a tax loss, as Mr. Meadows pointed out, it really is subject to complex, technical tax laws. And I think it's fair to say the recidivism is much lower in the tax area than it is in other fraud areas. And, importantly, most judges in tax cases, I believe it is fair to say, are sentencing at the low end of a particular guideline level. Accordingly, they already have the discretion, under the current guidelines, to impose lengthier

sentences should they wish to do so.

I also concur with my fellow panelists that the empirical data is just simply not existent at this time to establish, I think, a good reason that the guidelines should simply be increased, for the jail time to be imposed on tax criminals, for purposes of deterrence. I don't think the data is there to show that, if one goes to jail longer and reads about it in the paper, there is going to more deterrence.

I will tell you that I think there is deterrence about the publicity which the IRS will seek to achieve whenever there is a tax indictment. As night follows day, there will be a press release when there is an indictment charging someone with tax offenses. The public can read about it in the paper, that the maximum penalties are 5 years per count, and they go to jail for 15 or 20 years. There's some deterrence right there.

Now what happens to alternatives to incarceration, I don't know that those are inappropriate to be imposed in tax cases. Nor am I convinced that, in a normal tax case, that home detention, for instance, is not an appropriate sentence. I was surprised--I had a client, one time, who told me he'd much rather do his time in the federal penitentiary than to spend an equal amount of time with his spouse in home detention.

I would urge the Commission not to adopt any of those.

JUDGE CONABOY: Let me just ask, before I ask some of the other

Commissioners, allow them some questions, on the statute of limitations and the fact that some of the, as you said, the 1993 amendments haven't kicked in, would that create a dilemma if we were to follow that reasoning, that we would never change them because we'd always have that problem?

MR. THORNTON: I think we at least wait to see what the effect is.

JUDGE CONABOY: How long do we wait? I mean--

MR. THORNTON: Until we have the necessary empirical data, I don't know the answer to that. But that data simply does not exist at this point. And I agree with Mr. Bruton, the point that he makes, where you can have two tax defendants, down the hall from one another in the same federal courthouse, receiving disparate sentences, depending upon which guidelines are in effect. And, here, we're being asked to look at even, yet, another set of guidelines.

JUDGE TACHA: But that's happening in a lot of areas.

JUDGE CONABOY: Do you have any information on recidivism?

MR. THORNTON: I don't have any information. It is, it is very low. I mean, and I--I mean, I think it's sort of understandable from the nature of the crime and the subjects.

JUDGE CONABOY: So you don't contest that?

MR. THORNTON: I don't contest it. It's not, it's not a business where we have repeat people. We're trying to deter the repeat offender. We're trying to deter the first-time offender, really.

JUDGE CONABOY: Commissioner Gelacak, you have some questions?

MR. GELACAK: Yeah, I guess.

Mr. Matthews, I take it, from your comments, your concern over this \$120 billion tax gap, or whatever it is, that you would, by the nature of that number, you'd support a change from the current IRS system to a value-added tax that we could--

(Laughter.)

MR. MATTHEWS: One of the blessings of my job is that they tell me not to address tax policy. I enforce the laws that are there. I don't--if they change to that, we'll try to bring those cases.

MR. GELACAK: Well, if you enforce tax policies, then I'm also kind of dazzled by your statement you don't comment on tax policy. I'm kind of dazzled by the statement that you presented us. On page 5--

MR. MATTHEWS: Page 5?

MR. GELACAK: This is your statement.

MR. MATTHEWS: Sure.

MR. GELACAK: I assume it's yours. It was handed to me. I assumed it was handed to me by you. On page 5, the first full paragraph, you say: "We believe ...," and I assume you're speaking for the Tax Division:

"We believe that, unfortunately, the current Tax Table does not do a good enough job of making the possibility of imprisonment upon conviction for a tax violation enough of a realistic threat for many taxpayers."

Do you really mean to say that?

MR. MATTHEWS: Yes.

MR. GELACAK: So you're--

MR. MATTHEWS: I don't know what portion of it you're going to quibble with. I'm happy to hear--

MR. GELACAK: Well, I'd like to quibble with the language "of a realistic threat," if you will. I've been around, maybe I've been around too long, but I've never seen anybody come in and say that the purpose of their mission was to create a threat to the American public.

MR. MATTHEWS: Well, I--I see your point. I don't think the--I'm using a

term of art, "realistic threat." I don't mean to say that the IRS has threatened people. I think--

MR. GELACAK: Well, what do you mean, sir?

MR. MATTHEWS: Well, I do think that you do want a perception on the part of the American public that, if they engage in tax crimes of the kind of magnitude, complexity, where the willfulness is so evident--the very few cases that we pull out of the tens of millions of Americans who probably could potentially be charged, we're down to about 700 of those. Yes, I do want the people to believe that, if they put themselves, committed those sorts of acts against the tax system, which funds all of our government, our national defense, our roads, our highways, that, yes, there is a realistic threat, realistic possibility--I could use the words, "realistic possibility," if that would be--that's what I mean.

MR. GELACAK: But isn't what you're saying now the point--we've had this debate before, and I doubt that either one of us is going to change the other's mind. But Ms. Junghans was correct, I think, in saying that what you're talking about is the need for more enforcement dollars.

You started to draw some analogy, which I had a little trouble following, about how IRS enforcement was better years ago because of some initial success. I take it,



by that, you meant some initial success in prosecutions. But I have to be honest with you. I honestly believe that, if I were to walk outside this building right now, and I asked a thousand people, the first thousand people that I came in contact with on the street, if they could tell me of all of the terrible tax prosecutions that have caused them some concern, I don't believe I'd come with one case.

I don't think anybody cares about the prosecutions. I think you care about the prosecutions. I think the prosecutions are important. I think people who evade the law ought to be in some way dealt with, but I don't think 1,500 cases a year deters anybody from doing anything. And I don't think dollar figures deter people doing those things. I think we're talking about the need for more law enforcement, perhaps. I personally think, I think the value-added tax is a better solution to getting at that number than you do, and I'm a Democrat.

(Laughter.)

I just don't buy your arguments for deterrence. I know you have to come up here and make them. And I remember, I remember, because I was here. I was here and I remember the Tax Division and the IRS coming up and saying: These changes are enough. These changes will do it. Now, we're not sure that they did anything. We don't know what they did; but whatever it is they did, we need more of it. It's kind of a strange

way to go about making policy, I guess.

I'm not sure I've asked you a question.

MR. MATTHEWS: No. I think you stated--I think there probably is a difference in our view of deterrence. And given the--I think, probably, the difficulty for each of us to prove it statistically in some way, you're sort of there. And, you know, my view, my conversations with people, the number of audiences I speak to, you get humorous, yet nervous, laughter about the possibility of a criminal case, and that leads me to believe that there are a lot of people at some level who do fear that possibility when they're filling out those returns, and they're thinking about, well, are the recipes there, or should I exaggerate this, or what about that deduction, or what about my--but I don't think we can convince each other. But I will take you up on the more resources. I'd love to double my 1,500, if we could do so.

MR. GELACAK: I wish you the best of luck. I'd be happy to support your request for--if you think it will help you in any way--your request for more resources. I don't know if my support is going to help you.

MR. MATTHEWS: I might take you up on that.

JUDGE CONABOY: Judge Tacha, do you have any other questions? I'm going to down the table, Mike.

MR. MATTHEWS: Sure.

JUDGE TACHA: No, no.

JUDGE CONABOY: Mike, do you have any questions.

MR. GOLDSMITH: I want to stress that, notwithstanding the apparent orientation of my questions, I have not made up my mind about this issue at all. Having said that, though, Mr. Thornton, I'm unsure of your example about how the IRS certainly achieved significant deterrence by issuing a press release, saying that someone is subject potentially to 10 to 15 years imprisonment for a tax violation. That would be very hard to do under the present tables. For example: Right now, they would have to take more than \$80 million to be at offense level 26, than if you had two sophisticated means and two of something else. I mean, we're going to be at level 30, which produces, at that point, a maximum of 10 years.

MR. THORNTON: I'm sorry. I'm addressing only the issue of deterrence as it relates to maximum penalty. I'm not suggesting that one could reasonably get there under the guidelines. It's just a matter of statutory maximum penalties as it relates to deterrence.

MS. JUNGHANS: Might I say something? I mean, I think Justin's point, which all of us have experienced, is: It's very interesting that, when the IRS issues these

press releases, it always reports what the potential statutory maximum is. It never reports what the guideline application would be, because it doesn't--and, frankly, whether the guideline application came out at 14 months or 18 months, I seriously doubt would make any difference. They want the statutory maximum. They don't want people to know what the guidelines are.

MR. MATTHEWS: I mean, the reasons why we don't try to put guideline calculations into the announcement of an indictment, and we're--

JUDGE CONABOY: You can't figure out the guidelines.

MR. MATTHEWS: You can't figure that out.

(Laughter.)

I mean, I think we'd be in real trouble if we were trying to do that math, and we try to, try to get away from, you know, it's 10 counts, so it's 50 years. That happens in districts. I'm not going to deny that. They add it up that way. To the extent that we see them in the Tax Division, we try to bring that back and talk about a realistic--you know, there are 10 counts, each of which are 5 years. So, we're not intentionally making the point we're being accused of making.

JUDGE CONABOY: That's a good point, though, in many ways.

Because, traditionally, not only in tax prosecutions, not only in federal prosecutions, when

there is an indictment, there is an arrest, the maximums are always mentioned. We use an example of a sign that's up on of the ski lodges, up where I live, that has a huge sign, right at the bottom of the ski lift, there's a huge sign that says: "Every person, including children, must have a ski lift ticket. Violators will be punished to the full extent of the law. \$500 penalty, or 10 years in prison." You got to figure, for a ski lift ticket, that's pretty severe.

MR. MATTHEWS: Especially for children.

MR. GOLDSMITH: I'd rather spend 10 years in prison than ski Pennsylvania.

(Laughter.)

JUDGE CONABOY: Mary Harkenrider, do you have questions?

MS. HARKENRIDER: No.

JUDGE CONABOY: Okay. Well, we thank this panel. We want to move to the next panel because we are very close to time, and we appreciate your comments very, very much.

**ISSUES ONE AND TWO: PROPOSED CHANGES TO FRAUD AND  
THEFT TABLES AND PROPOSALS TO DELETE  
"MORE-THAN-MINIMAL PLANNING" AND ADD**

**"SOPHISTICATED MEANS"**

JUDGE CONABOY: All right. This panel is proposed to talk about changes to the tables and the proposal to delete "more-than-minimal planning" and add "sophisticated means," and other matters, if you wish to do so.

Let me just introduce, first, Gerald Goldstein, who is a another Texas here today, former president of the National Association of Criminal Defense Lawyers.

And, by the way, I probably should have stated, at the beginning, and I think it's probably true, Gerald, with your situation, that none of our speakers here today, or panelists, are here representing or speaking on behalf of their associations; but they are appearing here, rather, as individuals. We want to make that clear, that we're not trying to associate any of the various groups that these people belong to with the comments that are made here today.

MR. GOLDSTEIN: That's correct, Mr. Chairman.

JUDGE CONABOY: If I didn't make that disclaimer, I'm sure the group would.

And David Axelrod is from Columbus, Ohio and a former assistant U.S. Attorney in Florida, and a former trial lawyer with the Tax Division of the Department of Justice.

Mary Spearing is the Chief of the Fraud Section of the Department of Justice, and a former U.S. Attorney in the Third Circuit, or in the Eastern District, and appeared, occasionally, in the Middle District.

MS. SPEARING: Yes, before Your Honor.

JUDGE CONABOY: With great distinction.

Katrina Pflaumer is the U.S. Attorney for the Western District of Washington.

Finally, Ephraim Margolin--is it Margolin?

MR. MARGOLIN: Yes.

JUDGE CONABOY: Very good. Mr. Margolin is a former president of the National Association of Criminal Defense Lawyers and from San Francisco.

We've had sunny weather for a few days.

MR. MARGOLIN: You are welcome to my city.

JUDGE CONABOY: Well, we thank you all for being here. I guess, Gerald, you're going to lead off the commentary.

**STATEMENT OF GERALD H. GOLDSTEIN, ESQ.**

**GOLDSTEIN, GOLDSTEIN, AND HILLEY**

**SAN ANTONIO, TEXAS**

MR. GOLDSTEIN: Mr. Chairman, Commissioners, fellow gentle persons,

I'd like to address the overriding concern that I have about the general policy consideration--reflected, by the way, in both of the new options regarding the loss tables--that there is a perceived need to raise penalties for economic offenses to achieve what I think we all can agree is a laudatory objective of better proportionality of guideline penalties between economic crimes and other offenses of comparable seriousness.

I think the defense bar generally--I think I can speak for the defense bar, generally, that we don't quarrel with a need for a punishment rationale that reflects proportionality between economic crimes often committed by white collar corporate types in boardrooms, that they ought to be similarly situated in terms of punishment to similarly situated serious crimes committed by minority members or disadvantaged use on the street. In fact, I find myself representing more and more, as they are described, three-piece, flannel-mouth types, as opposed to gang colors. And the idea that we should treat the poor and the disadvantaged that find their way into the criminal justice system more severely than the well-heeled is something that I think is offensive to the defense bar, as it probably is to you.

However, I would suggest to you that the empirical data that the Commission has generated does not support the commonly held notion that these, that the



typical offender of an economic crime is a well-heeled fat cat, with a high-priced, high-powered defense lawyer. Your own figures indicate that, for the most part, they are minor-league small-timers, who are represented, generally speaking, by public defenders or appointed counsel under the CJA.

There is no question that disproportionality between the high sentences meted out against drug offenders, compared to those in fraud and theft cases, is offensive. It's offensive to all of us. But I would suggest to you that that is as much a result of congressionally mandated minimum mandatory sentences and political reality as it is to any rationally based sentencing policy. And even if we could get parity between the two, I'd suggest that you can achieve that in ways without yet again raising the penalty scheme for economic crimes.

That's not the only means of reaching parity. You had this fight once before in the powder versus crack cocaine situation; but we find ourselves, like a gutter ball, going in the same direction each time. And as desirable as some sort of proportionality may be, raising sentences for economic crimes to the draconian level of drug offenses may create more problems than we will be solving.

I'd like to suggest to you that whether we're talking about the definition of loss, or whether we're talking about loss tables, and granted the goal of reduced litigation

is a laudatory one, I'd suggest to you that 90 percent of these criminal cases are resolved by plea. That the sentencing hearing is, in reality, the only real criminal hearing most citizens, accused of crime in America today in federal court, receive. And, as far as hearing go, with all due candor, it's a sham. You get more due process when they take away your food stamps, under *Goldberg v. Kelly* than when they take away your liberty at a federal sentencing hearing. You have no confrontation rights. There's no rules of evidence, and hearsay is the rule, rather than the exception. I mean, any defense lawyer will tell you what it's like to--what are you going to do, cross-examine the probation officer about what an agent told him about what some undisclosed confidential informant told him?

And, so, whatever we say about these loss tables, the actual determination is made that a citizen watches being made is a fairly hopeless, hopeless process in terms of what we normally consider to be process that's due. And these are factual findings. We've gone from a purely discretionary system to a factual finding.

The American College of Trial Lawyers, not your liberal bastion of defense lawyers, criminal defense lawyers, has even issued a pamphlet, "The Law of Evidence in Federal Sentencing Proceedings." I image you're familiar with it. But it suggests the danger of having a system that's going to be the only hearing somebody is going to have on a sentencing process without any rules.

MR. GOLDSMITH: I'm surprised it's that thick.

MR. GOLDSTEIN: Actually, it's fairly interesting reading. And what these, primarily civil lawyers--some of you might be familiar with the American College. I was not a member of this committee, but I am a fellow. I did go to some of these meetings and it was interesting to watch these--

One of the problems is that, what's driving this constant upward spiral of the need to constantly move up the Sentencing Guidelines, I would suggest, is our perception of the public's perception. Quite frankly, if we went over to the real lawyers, the civil lawyers, that try cases in civil courts everyday, they wouldn't know what we were talking about.

The general public, I would suggest to you, still has the perception that the federal sentencing scheme is this revolving door that paroles people long before their sentences are up. And perhaps if we spent some of the money that we're going to spend on all these beds we're going to have to build and staffing these new prisons on educating the general public, maybe we'd find out what deterrence might mean.

We don't know, and I was interested, and I won't reiterate it because I think you all--I'm appreciative of the--everybody is concerned about the fact that we don't know what the deterrent effect is of the last upward movement of these guidelines. This

will be the third time we've raised the economic guidelines. And, while that natural tendency is understandable, it is, I would suggest, not based on any empirical data, but, rather, on anecdotal concerns that many of us have.

What we're going to do under either of these new proposals is create a whole new universe of first-time fraud offenders, with judicially mandated prison sentences. We're going to limit Title III District Judges discretion to impose home detention, and alternative means of confinement, all without any congressional intervention, and without any empirical data to back it up.

A good example would be, for example, the safety valve for first-time offenders, despite the congressional, at least mandate, that first-time offenders be treated in some fashion other than by imprisonment. We've got a safety valve for drug offenders, but we don't have a safety valve for first-time economic offenders. Why not? What is the difference? Why shouldn't they be given the same opportunity as their brethren and sisteren [sic] of the criminal law, defendant class?

The Criminal Law Committee of the Judicial Conference, for example, appears to be a proponent of increasing the guidelines for economic crimes; and, yet, the empirical data that the Commission has generated indicates that the District Judges obviously are sentencing at the low end of the current guidelines. Don't do what they say,

do what they do. They appear to be satisfied with the punishment scheme, if they are not even sentencing at the high-end of the guidelines.

In conclusion, because I know we've got a lot to do here, may I just suggest that, rather than raise the economic crime sentences to the level--and I would suggest irrationally high level--of drug offenses and enable proportionality, I would suggest we're trading one problem for a bigger one. It's unsound policy, and I'd suggest it's unsound economics. Perhaps we could spend that money informing the public that building, staffing and maintaining prisons at a cost that they could be sending most of these folks to Harvard, quite frankly, for a good year, is irrational criminal justice policy. More importantly, to them, in their pocketbooks, it's irrational economic policy.

JUDGE CONABOY: Thanks, Gerald.

David, are you going to proceed next?

MR. AXELROD: Yes, sir.

**STATEMENT OF DAVID AXELROD, ESQ.**

**VORYS, SATER, SEYMOUR & PEASE**

**COLUMBUS, OHIO**

MR. AXELROD: Thank you, Mr. Chairman, Commissioners. I haven't had an opportunity to address the Commission, for some years now. I appreciate the

opportunity to do so now.

I did discuss, in some detail, in my written statement the proposed adjustments for more-than-minimal planning, or in the change in the way that would be handled, and proposed specific offense characteristics for sophisticated concealment. Rather than repeat that, I'm going to direct myself to some what I think are bigger picture issues which relate to those two specific offense characteristics.

The major points that I want to make to the Commission today are: These sorts of changes should only be considered as part of an overall plan for rationalizing how we view and how we sentence economic crimes, and they should only be viewed in context of one another. I don't think that it's proper or particularly useful to look at them one at a time because none of them operate in a vacuum. They all operate together and they combine to achieve, sometimes, results that are beyond that which might be expected when you consider them only one at a time.

My two major criticisms of the proposed amendments are that they are overly complex and they will result in what I view as unwarranted increases in sentences imposed on defendants even at the middle levels of the loss table. I'm not going to address myself to the upper levels of the loss tables. I think that that's already been discussed and will be discussed further. But, even at the middle level, sentences would rise in what I

view as a fairly dramatic way.

Furthermore, I don't believe that these sorts of specific offense characteristics are required to deal with the concern that courts need a bit more flexibility in reflecting the planning and the evils that come with sophisticated concealment in imposing sentences. I think that can be appropriately dealt with simply by recognizing the court's authority to depart upward in cases involving unusual sophistication and unusual efforts at concealment.

I want to comment a bit about the complexity.

The adoption of these sorts of specific offense characteristics that we're talking about. These, the two that I've discussed in my written testimony, and all of the ones that are under discussion in connection with the economic crimes amendments, introduce or increase specific problems in the sentencing process.

I may be too late, in fact, I think I am about 10 years too late, with the comment that trying to go over, with your client, how he or she is going to be sentenced shouldn't resemble preparing an income tax return, but it does. And it probably has about the same rate of accuracy and error, and we're now proposing, I suppose, to add additional kinds of schedules. We're going to have a Schedule C now, and, someday, we may be talking about net operating loss carryovers in connection with sentencing. And I

don't think that's particularly desirable.

You don't need a specific offense characteristic for every feature that may be present in a crime. Some features of the acts which comprise criminal activity are not appropriate measures of culpability and others punish the same harms so that you have redundancy. What specific offense characteristics do do, in my 10 years of experience, that dealing with the guidelines, is they invite litigation in every case. If you adopted a specific offense characteristic that says that there's a 2-level bump and a 12-level floor for crimes of unusual sophistication, then, my experience teaches that aggressive assistant U.S. Attorneys will be advocating that in almost every fraud case. And I don't think that's particularly desirable, either.

Another problem with them is that they're too inflexible. The original Sentencing Commission recognized the need for flexibility in dealing with various features of criminal activity when it prepared the first set of guidelines and adopted commentary that is still in Chapter 1, Part A. When the Commission said that the appropriate relationships among different factors are exceedingly difficult to establish, or they are often context-specific, we deprive the courts of the ability to deal with the context in which violations occur, and in which these features occur, when we adopt the mechanical specific offense characteristics.



Another problem that specific offense characteristics create is: They introduce, they have the potential to introduce, the very sort of disparity that the guidelines were intended to eliminate. The original Commission, in the commentary in Chapter 1, gave a hypothetical that I think tells something about these proposed amendments, and I'm going to read it. This is offered as an illustration of how a sentencing system, tailored to fit every conceivable wrinkle of each case, would become unworkable.

What the Commission wrote was:

"For example: A bank robber with or without a gun, which the robber kept hidden, or brandished, might have frightened, or merely warned, injured, more seriously or less seriously, tied up or simply pushed, a guard, teller or customer, at night or at noon, in an effort to obtain money for other crimes, or for other purposes, in the company of a few, or many, other robbers for the first or fourth time."

That was given as an example of bad practice in sentencing. And I think

that, when we consider adopting too many new specific offense characteristics, we're working our way towards.

The other problem is that I think we're going--

MR. GOLDSMITH: Mr. Axelrod, let me just interrupt for a moment, if I can. How many new sophisticated offense characteristics are you talking about that makes this too many?

MR. AXELROD: Well, it's not, it's not strictly a numerical function, but I've reviewed all the proposals for redefinition of loss, and the one that would have been--I don't think it's in the February working draft; but was 2F1.1B7. It had a number of different features that could have generated a two-level bump, or four levels, if there were more than--if more than one was present, and there's sophisticated means. There will be more-than-minimal planning that will disappear. Then, there's the issue of whether or not there should be a sophisticated offense characteristic for only minimal planning. We're talking about making this significantly more complex than it needs to be. Those sorts of things can be dealt with through departure authority where unusual planning, unusual concealment, or less than typical planning or concealment are present.

MR. GOLDSMITH: Isn't the ballpark issue here, the ball game issue, and the one you're really focusing on now, sophisticated means? If that's the case, we're really

only talking about one characteristic here.

MR. AXELROD: Well--

MR. GOLDSMITH: The definition of loss involves a variety of other issues, but your principal concern seems to be sophisticated means. That may pass and fail on it's merit, having to do with whether it's appropriate to have that can of enhancement, as such. But I don't see that adding that specific--that single specific offense characteristic adds much by way of complexity. It may be that it's too broadly framed, or too narrowly framed, or that there may be other problems with it. But just adding that sophisticated offense characteristic, specifically an addition of one characteristic, as such--

MR. AXELROD: Well, my problem with these--yes, sir?

JUDGE CONABOY: Commissioner Goldsmith has run you out of time.

MR. GOLDSMITH: I'm sorry. My apologies.

JUDGE CONABOY: He even says nasty things about Pennsylvania skiing.

He spares no one.

MR. GOLDSMITH: I would rather listen to your answer, though, than ski Pennsylvania.

JUDGE CONABOY: We'll get back to that, but let's move this along.

Mary, you're going to go next.

MS. SPEARING: Yes.

**STATEMENT OF MARY SPEARING, ESQ.**

**CHIEF, FRAUD SECTION U.S. DEPARTMENT OF JUSTICE**

MS. SPEARING: Mr. Chairman, members of the Commission, this is my first time appearing before the Commission, and I'm pleased to be here.

Ms. Pflaumer and I are going to address all of the remaining issues. I'm going to first deal with the loss tables more than minimal planning and sophisticated means as sentencing factors; and, then, she's going to deal with the definition of loss.

JUDGE CONABOY: Would you move the mic over, please. I don't know whether this room is---

MS. SPEARING: As an initial matter, we urge the Commission to move ahead to revise the loss tables; and, at the same time, enact the changes closely related to that revision. These issues are ripe for decision. The Commission has received extensive public input on these issues over multiple guideline cycles.

Turning to the proposed revision of the fraud and theft loss tables, we applaud the Commission for recognizing the importance of improving the tables that, to a significant extent, control the sentences applicable to myriad of white-collar offenses. The Commission has proposed two options to amend the loss tables in the fraud and theft

guidelines, and is also considering a third option developed in April 1997.

Recognizing that all of the options improve the current sentencing structure, the Department prefers option No. 2, especially in the mid- to high-dollar range, where it increased sentences more quickly for offenses of dollar amounts between \$70,000 and \$1.2 million. Offenses at these levels are serious and common. The loss amount for approximately 25 percent of the defendants sentenced in fiscal year 1996 under guideline 2F1.1 fell within this range. Option 2 would place an offender, who commits a fraud of just over \$70,000 at offense level 16; and one who commits a \$1.2 million fraud at level 22.

By contrast, options 1 and 3 rise more slowly for offenders in the \$70,000 to \$1.2 million range. For example: Both of these options would place a defendant, whose offense involves just over \$70,000, a offense level 14, 15 to 21 months, or even a split sentence, with as little as 5 months of imprisonment after acceptance of responsibility, exactly where such an offender is under the current guidelines if the offense involved more-than-minimal planning, as the vast majority do.

Similarly, a \$1 million option 2 would result in an offense level of 22, while options 1 and 3 would produce offense level 20, just one level above the current level, with more-than-minimal planning.

To deter serious offenses in the range of \$70,000 to \$1.2 million, improvement in the fraud and theft loss tables is vitally needed. All three options recognize this need where larger dollar amounts are involved. At amounts of \$1.2 million and greater, all three options are the same and reflect significant increased over current sentences.

We applaud the Commission in recognizing the seriousness of these expense offenses and urge the Commission to acknowledge the need for increases in the mid- to high-dollar range.

I want to turn my attention to more-than-minimal planning and sophisticated means.

We support the deletion of the enhancement for more-than-minimal planning or scheme to defraud more than one victim. We view the deletion of these factors and their incorporation into the loss tables as a positive step in reducing litigation. However, the goal of reduced litigation will not be realized if courts are permitted to reduce sentences based on minimal planning.

We strongly oppose the addition of language providing a reduction in the offense level because of limited, or insignificant planning, or simple efforts at concealment, as proposed. The table does not incorporate more-than-minimal planning at all offense

levels; therefore, no basis at all exists for a reduction at the lower dollar amount.

More importantly, however, if minimal planning is allowed or not prohibited as a basis for departure, defendants will likely argue it in most cases. The result will be that minimal planning will become a frequent litigation issue, just as more-than-minimal planning has been a litigation issue under the current guidelines, and uneven results will be likely. The net effect will simply be to shift the burden from the prosecution to the defense without eliminating the factor from consideration.

A balance approach would be for the Commission to adopt language prohibiting a downward departure on the basis of minimal planning and upward departure on the basis of more than minimal planning, as presented by the Commission in an issue for comment. The promulgation of such language would signal to all parties that the Commission had adequately taken into account the issue of minimal planning and more-than-minimal planning, as reflected in the loss tables.

If, on the other hand, the Commission remains silent on the departure issue, that silence will likely result in litigation as defendants and prosecutors seek to test the views of the Courts of Appeals on minimal planning as a basis for downward departure and more-than-minimal planning as a basis for upward departure. This is an issue the Commission should decide before a circuit complaint develops.

The Commission has also proposed a specific event characteristic providing a two-level increase for sophisticated concealment, or for either sophisticated concealment or commission of the offense from outside the United States. An enhancement for sophisticated means used to impede the discovery of the existence or the extent of the offense currently is found in the Tax Evasion Guidelines.

The proposed new factor for fraud and theft guidelines would expand an existing sophisticated offense characteristic in the fraud guideline, which provides the floor of offense level 12 if an offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct. The proposed enhancement would broaden this concept to apply to other means besides the use of foreign bank accounts. Few options are presented. We prefer the one that specifically provides for the commission of the offense from outside the United States.

Thank you.

JUDGE CONABOY: Thank you, Mary.

Katrina, do you want to proceed?

MS. PFLAUMER: Do you want me to proceed to loss definition, Mr. Chairman? I'm prepared to speak on that. Or, should we proceed to Mr. Margolin?

JUDGE CONABOY: We were going to move to that next, but--



MS. PFLAUMER: That's what I'm going to speak on. We tried to save more time for that because we think it's maybe a little more complex.

JUDGE CONABOY: All right. While, why don't we just hold that, for a minute, and let me see. Is there--we were going to give some time for responses. Ephraim, you were going to lead the, according to my notes here, a response to some of these comments.

MR. MARGOLIN: I'll be glad to try.

JUDGE CONABOY: All right. You can proceed, if you will.

**STATEMENT OF EPHRAIM MARGOLIN, ESQ.**

**SAN FRANCISCO, CALIFORNIA**

MR. MARGOLIN: I would like to suggest three major areas of my concern. The first area has to do with the whole notion that, every time a body politic gets together, the result is increased penalties, the notion of increasing penalties under whatever banner. Because narcotics get very heavy sentences, or whatever, we do not think of reducing narcotics. We think of increasing everybody else. And, before you know it, the result of that is that, in my mind, we're getting a society which is bound to penal solution to the point where other solutions become impossible to accomplish.

My second point has to do with the number of increases. It is true that the

present law does have something like 20 or 25 different hundred dollars or less silly situations. And, yes, it is necessary to do something about that. I think that it is totally out of whack with what people make and how people live.

However, when you look at the three options, which I have--which were given to me, I see three different areas of concern.

The first one has to do with the small cases. And, in the small cases area, it would seem to me that, if you went, say, to under \$50,000, if you stated that in that area, as an experiment, judges will be given greater authority for downward departure. If you simplify the whole thing into four or five different data, you would be doing us a lot of favor.

I do not know the empirical basis for what you have here, but the very closeness of some of the arguments, here are one or two things: \$30,000, one thing; \$40,000, one thing; \$50,000. They are equally kind of your thoughts. I mean, where do they come from? The suggestion I am making is sufficiently broad at least to start a discussion over the introduction of simplification and downward departure.

The final thing is: You know, I go to court, I reach the time of sentencing, I have an inconsequential guy whose life now is going to be impacted forever; and, in the final account, the importance of your guidelines to me is whether I reached level 12.

Because, until that point, most people will not get the benefit of the doubt. Those who deserve it might, because the judge has the power at that point to impose probation or house detention, or whatever, rather than prison. And by playing the game of numbers, as we do in our different plans, this gets lost. And it is very important for me that you realize this is 30 or 40 percent of all the cases. And those cases need to be looked at with some, I wouldn't say compassion; I will say with some logic.

JUDGE CONABOY: Thank you. Anyone else have any comment on any of the matters we've covered? We're going to move to the revisions to the loss--

MS. PFLAUMER: Could I respond to that?

JUDGE CONABOY: Sure, sure.

**STATEMENT OF KATRINA C. PFLAUMER, ESQ.**

**UNITED STATES ATTORNEY**

**WESTERN DISTRICT OF WASHINGTON**

MS. PFLAUMER: I'm surprised to hear how many inconsequential guys Mr. Goldstein and Mr. Margolin represent.

MR. GOLDSTEIN: I cop to it.

MS. PFLAUMER: The tables proposals, as I understand them, have very little effect at that range. In fact, in some cases, the proposal would lower the guidelines at

that range.

I think the area that is of critical importance to the justice department--and I think I am supposed to be speaking for them, actually, my organization--is the area of cases above \$70,000, particularly between \$70,000 and \$1.3 million, which is an area where we think that the penalties are improperly low and should be raised. That is an area, as Mary Spearing said, of importance to us and represents about 25 percent of the cases which have a huge impact on the public.

MR. MARGOLIN: Would you agree with me, then, on everything under \$70,000?

MS. PFLAUMER: I think the tables, as proposed, agree with you. I would not, from the standpoint of the Justice Department, agree with you that a \$50,000 theft might not and should not be assumed to include more-than-minimal planning, if that's where you're going.

MR. GOLDSTEIN: I think one of the places we're going is the hopes that we might, if we're going to ratchet up at the higher end, we might think about providing more secure due process rights in the process of determining those by whatever definition we establish, and providing greater discretion to District Judges in the areas where we're at a point where there still is some discretion to exercise. That would be by, perhaps,

moving in two directions. If we're going to move up after \$70,000, move down below it.

JUDGE CONABOY: All right. Well, I thank all of you, again. I'm going to--do you want to ask some questions?

MR. GOLDSMITH: I do.

JUDGE CONABOY: Let me ask each of you, then--what I'm afraid of is that some of you want to leave early, and I'd like to get everybody in before people have to leave. So, let me ask each of you to keep your questions brief.

Mike Gelacak, Commissioner Gelacak, do you have any questions, brief questions?

MR. GELACAK: Brief questions. Well, just one, I guess.

I'm fascinated by the Department's argument, if you will, that what is the best way to go about this is to eliminate the requirement for them to prove up any more-than-minimal planning. Because, it seems to me, that the only logical conclusion of making that go away is that the people who are going to suffer are the people who don't have more-than-minimal planning. They are going to get whacked. What's wrong--what offends me, not today, but what offends me all the time with this argument is: What is wrong with the prosecutor having to prove more-than-minimal planning? It seems to me that's the job.

MS. SPEARING: Well, if one of the goals is to reduce litigation, and--

MR. GELACAK: Well, I don't think the goal, for me, is to reduce litigation. Either you can prove that or you can't. We shouldn't give that to you on a platter.

MS. SPEARING: Well, if--but, if one of the goals is to reduce litigation, and you look at one of the factors in sentencing where prosecutors have sought and succeeded in a high percentage of cases in proving more-than-minimal planning, it would seem that you ought to build it into the tables, rather than have that litigation ensue in every case. The---

MR. GELACAK: Why? So that those people, who do not engage in more-than-minimal planning, should suffer a higher penalty? That's the logical consequence, isn't it?

MS. SPEARING: No. The logical, the logical point is to avoid what is already existing in every--why make the prosecutor in every case prove what is in every, in almost every case, in terms of the higher guideline? I mean, the elimination of more-than-minimal planning is not built into the lower end of the guidelines--

MR. GELACAK: Because I always understood our system of justice to be designed to protect the least amongst us. And that would be the individual, or two, or

three, or ten, or fifty, who do not engage in more-than-minimal planning. Why should they go to jail automatically? Why should their time be increased automatically because everybody else does, we don't want to have to take our time proving that?

MS. SPEARING: I think, in the end, the usual situation where we have a uniform rule that builds it into the table, where there is a presumption that, at a certain point, you probably had to plan, more than minimally, to steal \$50,000. If you're the extraordinary teller, who had \$50,000 at hand in his or her drawer, and took it out and took off out of the bank that afternoon, I am sure that you would get a downward departure motion--

MR. GELACAK: Well, but we just heard--

MS. SPEARING: I know.

MR. GELACAK: We just heard the argument that we should not have that downward departure. We should do it both ways. We should eliminate--we should include it in the bump, and we should also not allow the departure for minimal planning.

MS. SPEARING: Well, there will be other--there will be other downward departure bases if you put it in as more-than--as less-than-minimal planning itself. What I'm saying is, is that you're opening up yourself to the same problem that we have now, which is: Different standards and different courts, endless fact hearings, different ideas

about what more or less minimal planning is. But there are other bases for downward departure, which are usually that the less culpable person, who is not seriously involved with the scheme. When you're up at that size of a scheme, it's almost never a single person. That's just a reality of it.

JUDGE CONABOY: Can I move to Commissioner Tacha? Do you have any questions?

JUDGE TACHA: No.

JUDGE CONABOY: Commissioner Gelacak, or Goldsmith? Go on, say it.

MR. GOLDSMITH: No, go on. I'll hold back.

This issue is one that point in conflicting directions. For example: The need for reform in this area, I think, is illustrated by a statement in the Federal Sentencing Reporter, recently, by a leading scholar in this country, in which he said:

"Under the current guidelines, a defendant can steal a very substantial sum without being required to serve any prison time. For example: A first-time offender must steal more than \$70,000 before his sentence to



imprisonment is mandated. And the amount rises to \$200,000 for a one-time occurrence involving only minimal planning."

So, on the one hand, I see that as problematic with the current guidelines and something the needs to be addressed. On the other hand, I am--I'm have been troubled, for quite some time, about the fact that the judges, as represented by the Judicial Conference Criminal Law Committee, have apparently been pushing for, or have endorsed the need for an increase in the area; but the numbers suggest that the judges have not been sentencing at the high end of the range. And so, I'd like to ask our Justice Department representatives if they could possibly explain that apparent anomaly?

JUDGE CONABOY: Mary, can you explain why judges are not?

MR. GOLDSMITH:--being too low, why are they all of sudden saying--

MS. SPEARING: I can explain--

JUDGE CONABOY: Without naming any judges.

MS. SPEARING: I can describe our frustration with judges not sentencing at the high end of the range. But I can't, I can't explain why, on the one hand, they see that the tables are not adequate in terms of loss, the guidelines are not; and, yet, they don't take advantage of the situations where they can sentence higher.

MS. PFLAUMER: In my experience, it's the presentation with an individual before you in your courtroom, and the sympathetic factors of that individual, which presents you with a choice. You have a range that's available to you, and you may stay proportionally in that range, given that this is what is deemed to be the appropriate sentence for this offense, for this law, I find this person to this degree of sympathetic. Whereas, if you ask me where this range should be, I will tell you, as the overwhelming majority of judges did in response to surveys, the appropriate range for this should be higher.

MR. GOLDSMITH: I've read the survey and I'm concerned, I'm most concerned, that next time they're going to come back and say: These penalties, for white-collar crime, are too draconian and need to be lowered.

JUDGE CONABOY: David, we need to--

MR. GOLDSMITH: That's the--

JUDGE CONABOY: Let me hear David.

MR. AXELROD: I think the answer is something entirely different; and that is: As we sit here today, and we look at the loss tables, it's an abstraction, and we're not dealing with concrete cases. When judges are faced with human beings and real facts, real cases, they find that the loss tables and phases give them the opportunity to impose

sentences that are as severe as they feel they need to. As a result, you find that the overwhelming majority are sentenced, as Commissioner Goldsmith pointed out, at the middle and bottom of the guidelines.

JUDGE CONABOY: Gerald, were you going to say something?

MR. GOLDSTEIN: I can only say that it's the difference of perception and reality. I understand all these anecdotal speculation about what might be if it weren't like it is. What we need to look at is the empirical data. The judges, obviously, have plenty of room to exercise that limited amount of discretion we give them, and they seem to be exercising it at the low end. And, by and large, whether it's because they are confronted with real situations, in real life, effecting real people, rather than sitting around here picking, with a pointy pencil, and just saying: Well, we're going to change the difference between \$30,000 and \$40,000.

That's not a criticism of you. It's what I was trying to do, and I was sitting there trying to do it. It's an impossible task in the abstract. It's why, perhaps, we're going in the wrong direction. But whichever direction we go, what we might want to look at is: What is reality? What are they doing? When they've got that kind of discretion, they use it at the low end. Maybe that ought to tell us something about whether we need to right--

MR. MARGOLIN: It is a difference between the rhetoric and practice,

yes.

JUDGE CONABOY: Let me be arbitrary here. Mary, do you have questions?

MS. HARKENRIDER: No.

JUDGE CONABOY: If not, we want to move on.

Well, let me thank you. Some of you are going to remain on this last one. I want to get to this definition of loss issue. So, can we thank this panel. Those of you, who are not on it, we'll excuse you, and Mark Flanagan is going to be added.

### **NON-TAX ISSUE THREE PROPOSED REVISIONS**

#### **TO DEFINITION OF LOSS**

JUDGE CONABOY: Mark Flanagan is from Washington, D.C., and is chairman of the Subcommittee on Procurement Fraud, of the ABA White Collar Crime Committee, and a former Assistant U.S. Attorney. A lot of U.S. Attorneys interested in this now. Let's see, the rest remain the same here.

Mark, if you're ready, which you like to proceed and make your comments. We're into, now, the proposed revision to the definition of loss, which is, as we all know, is an extremely important area that we're struggling with. We would appreciate, again, the input that all of you give you to us on this.

**STATEMENT OF T. MARK FLANAGAN, ESQ.**

**MC KENNA & CUNEO, WASHINGTON, D.C.**

MR. FLANAGAN: Thank you, Judge Conaboy.

Good afternoon. I'm glad to be here. I've been following closely, over the last year, some of the work of the Commission, having to do with the proposed amendments for the theft and fraud guidelines.

I think it's a critical concept, one of the most critical concepts you've been discussing here this afternoon. And I encounter it, really, in two ways in the work I do. First of all, in sentencing, it obviously comes up. But it also comes up, very importantly, in negotiations, in resolving things that are short of going to trial and having indictments, where you need really firm guidelines to predict what would be happening. And there's a lot of disparity in the various jurisdictions around the country as to what the definition of loss is and how it works.

If I had any theme here today, I think the Commission has the opportunity to move forward to clarify and improve upon the definition now, while still having uniformity and proportionality. I think Judge Rosen, in the hearing in October that you had held, had noted that about 20 percent of all cases involved the loss provisions. And some of the work I did, in looking at some of the data, showed that 35 percent of

organizational sentencing involved the theft, fraud, mostly the fraud, guidelines.

In coming here today, I'm going to keep these remarks very brief. I had prepared some other remarks; but, after reading the written statement of the Justice Department, I really decided to make some more global remarks in light of that written statement. And I'd like to make three comments.

The first comment is: I believe the bedrock of the theft and fraud guidelines--and let's concentrate more on the fraud--is the definition of loss. You form, first, the definition. You take all the harm that would go into the definition; and, then, you go to the loss tables. The Justice Department is inviting the Commission to only go forward with the loss tables at this time, and to table, if you will, the definition of loss, claiming that it would be too impractical to go forward at this time, too tough to go forward at this time.

I really disagree with that format, for several reasons. First of all, I think the Commission, in its February Working Draft, has already gone a very long way in tackling some of the tough problems; and, I think, in short order, they could resolve any remaining issues. Also, I think it just is not the right way to go. It is putting the cart before the horse. I think, first, you need to address the definition, and then move to the loss tables. Otherwise, it is very difficult to assign and give real meaning to your loss tables if

you don't have a definition that the courts are uniformly dealing with across the country, and that the prosecutors and defense counsel are also uniformly dealing with.

The second comment really deals with the treatment of gain. In the written statement I prepared, and elsewhere, I have argued that I believe gain is really something that should be a grounds for departure. That the ordinary focus should be on the loss to the victim. The Commission, in its current February Working Draft, has elevated gain into one of several factors. I still believe it would be better grounds for departure.

The Justice Department, however, is arguing and urging that gain should be part of the core definition of loss. I think that's a fundamental change to do so. Right now, in your February Working Draft, that would mean that you would be taking your concepts of actual loss and intended loss and, now, adding gain into the mix. I think that is just going to unnecessarily make something that needs to have clarity more complex and you will muddy the waters. I don't think it's the way to go.

A third comment has to do with the overall theme. I think, if you had to isolate one issue that the definition of loss should have, that issue is to have a causation standard in your guidelines. In the work that I've read about, in the October hearing, in the commentators, there is almost uniform acclaim that you need to do that, and your February Working Draft does just that.

The Justice Department seems to walk around that issue. And I don't think it is really the time or the place, when you are so close, to take the loss tables and go forward with them and not to simultaneously be addressing the definition.

Thank you very much.

JUDGE CONABOY: Thank you, Mark.

Katrina, were you going to come in at this point?

MS. PFLAUMER: Yes, if I may. Thank you.

JUDGE CONABOY: I didn't mean to skip over Mary. If you want to comment on this one, too.

**STATEMENT OF KATRINA C. PFLAUMER, ESQ.**  
**UNITED STATES ATTORNEY WESTERN DISTRICT**  
**OF WASHINGTON**

MS. PFLAUMER: We tried to save our ten-minute segment for the loss definition because we think that that is an area that has received less comment that is less fully developed and, frankly, is really not quite ready for enactment. We do think that the fraud tables are sufficiently distinct and serve a different purpose, and that the public comment has been slowly received and they're fairly well refined, and would hope that you go forward with the fraud tables.



I think that there is an obvious relationship between the two; but what we don't have, and I don't think we will have in the foreseeable future, is a way of measuring what exactly the change in the loss definition is going to do to the various levels of the fraud table. Therefore, waiting and saying that they're linked is fine; but, unless we can measure the impact and the linkage, there is no real reason to separate the two. From our point of view, we should go forward with the changes in the loss table that have been fully--excuse me, in the punishment tables that have been fully discussed, and continue to work with you on trying to revise the loss definition.

Our understanding of the purposes of revising the loss definition is to simplify the fraud and theft guidelines, to reduce litigation, and to better reflect the seriousness and culpability of the offender. We appreciate the proposed loss definition expands the coverage in a significant way, and we think that that is a positive step.

In the present guidelines, consequential damages are limited to two small classes of cases: defense procurement fraud and product substitution. The proposed definition would expand that concept through the use of a well, we believe, well-understood term, "reasonably foreseeable harm," that criminal lawyers deal with on both sides of the bar at the present time.

Despite this improvement, this improvement is accomplished with

reasonably foreseeable harm that enfolds consequential damages. We fear that the proposed definition, in its present state, really will complicate and confuse and spawn litigation, rather than reduce litigation. We'd like the loss definition to be the subject of more time and study.

The three issues I want to touch on briefly here are: The treatment of gain, the credit against loss, and the departures that are listed in the proposal.

It is the position of the Department that gain can be a useful tool in a small minority of cases. That minority of cases is where there is no loss, or whether the loss is very difficult to calculate, not across the board.

Those kinds of cases that we see in our office are where someone pretends to be doctor, pretends to be a lawyer, serves the clients. It is very difficult to say, to measure the service that the client got, versus what they would have gotten with a real lawyer or a real doctor; but it's certainly not what they bargained for.

Another example would be where a drug company fails to perform tests and falsely certifies that it has, puts a product on the market that we can't say has really hurt anyone yet; but they're certainly not buying what they think they're buying.

Those are the kinds of cases where the loss is zero or it's very difficult to calculate, but the gain to the drug company may be immense. The gain to the fake doctor

or lawyer may be immense.

So, we would propose that gain be used, and that it should be used, as a third type of measurement of loss; that is: in 2A, as opposed to 2B, because it's really not--it's a proxy for loss; it's not a measurement of loss. And again, I think that we would avoid the issues that Mr. Flanagan worries about if we recognize that it's in that small minority of cases where there is no appreciable loss, or where it's impossible to calculate.

We certainly don't want to be in an inadvertent situation that could result from the way it's phrased now, where gain is proposed as an alternative in every case, where people look at it as an alternative when it is less than the loss.

The second issue I wanted to raise briefly is credits against loss. Again, we have problems with the proposed definition here in this area. Primarily, that the treatment of credit will result in greatly enlarged litigation over whether the defendant provided an economic benefit, the value of the benefit, the timing of the benefit. The problem is that this credit, which now, in the present guideline, is only in a very small group of cases in 7(b) would be extended across the board, and the problem areas would be expanded.

The proposed credit rules also fail to reflect some of the items or services that may carry no economic benefit, such as I just talked about, or, for instance, a case where you sugar water being sold as orange juice. There may be a fair-market value to the

sugar water; but, again, it is not the value of what they're selling, which is, supposedly, orange juice. So the credit with fair-market value should be considered in light of what the victim thinks the victim is getting, in other words, the intended transaction.

The proposed credit rule also presents a problem with regard to property pledged, or otherwise provided as collateral. Where the value of the collateral stays the same or increases, the credit will eliminate loss in a rising market. And this is a substantial problem in the cases we have of HUD fraud, where it is a rising real estate market in many of our cities. You then fail to distinguish between the defendant who walks into the bank meaning to commit a \$50,000 fraud, and a defendant who walks in intending to commit a \$5 million fraud, and who reaps the windfall of the rising real estate values.

So, again, we feel we need to work through a variety of these scenarios and apply them in the area of credit.

Thirdly, the area of departures. We feel that the departures that are proposed are, in some cases, overly broad and not limited to factors that signify an unusual case. And I see Mr. Goldstein's earlier argument about the numbers of sentences and what we can take from that empirical data. Since the empirical data is that the overwhelming number of departures are to go downward, I think we can clearly say that we don't need anymore bases for downward departures.

MR. GOLDSTEIN: So the suggestion is 11 up and 4 down.

MS. PFLAUMER: In any case, the first is the one that says if a primary objective of the offense was a mitigating or nonmonetary objective. This promises a great deal of expanded litigation. I've never met a corporate executive who didn't tell you that what he was doing was for the good of the company and to keep the employees in the company.

Three additional downward departure considerations also reflect troubling inconsistency with the general rules that are proposed on loss and the definition. The first is that the offense was committed in an inept manner. The inept downward departure is one that troubles a lot of us in a lot of different districts.

To give you an example: In my district, we have a lot of militiamen who are passing false paper because they have decided that the governor was not properly sworn in, and, so, the state owes them \$4,000, and they are entitled to write their own cashier's checks on the \$4,000. Now, if you look carefully at these cashier's checks, you will understand that these are inept and probably shouldn't be cashed. But should the state or should the Federal Government be--or should the persons be not held responsible if the person representing the government didn't get that message?

JUDGE TACHA: Mr. Chairman, can I just interrupt. I am apologizing to

you and to all the people who are after you. I have a pre-existing commitment. I have to go. But I will, I assure you, listen very carefully to the tapes, and I have a law clerk listen very carefully.

MS. PFLAUMER: All of ours in in writing.

JUDGE CONABOY: I was trying to squeeze in as much as I could. I knew that some of our--that's why I've been pushing everybody a little bit. I appreciate your all rushing as much as you can.

MS. PFLAUMER: I have very little more, a couple more notes on the difficulty, the tension between some of the principles that are stated in this definition and the proposed downward departures.

One is for a credit, so to speak, where a defendant has made complete, or substantially complete, restitution prior to the detection of the offense. That is a principle that obviously ought to be taken into account, but it runs counter to the definition of credit that has been the proposal that we have now, or at least was its intention. Where is this going to be handled?

The last downward departure where I think there's a potential tension with the general rule is in the area of the loss which has been substantially increased by an improbable or intervening cause. Again, this runs at some odds or tension with things that

are now included in the core definition.

Other members of the Justice Department have asked to be sure mention a couple of other very serious concerns here. One of those is the elimination of the protected computer section. That's an area where we're seeing very scary and enlarging crimes happening everyday.

The interest area, where we have in our written testimony opted for option B, and the attempted and partially completed defenses section which we think should be there.

JUDGE CONABOY: Give me that last one again?

MS. PFLAUMER: The attempted and partially completed offenses.

JUDGE CONABOY: Oh, yes.

MS. PFLAUMER: We've tried, in our written testimony, to outline the chief concerns that we have, and we want to continue to work with the Commission on this definition of loss. We think things are going in the right direction, but we really question whether we are at the point now where using this definition would really simplify or make more fair the guidelines.

DR. KRAMER: Thank you very much, Katrina.

Jerry or David, did you want to get some response in here to these

assertions?

MR. AXELROD: Yes, please.

**STATEMENT OF DAVID AXELROD, ESQ.**

**VORYS, SATER, SEYMOUR & PEASE, COLUMBUS, OHIO**

MR. AXELROD: I think the three defense lawyers, the four defense lawyers at the table, are all in agreement with the government, that the definition of loss is not yet well enough developed for the Commission to proceed with it. Where we disagree is with the idea that the Commission should proceed with changing the loss tables, simply because the proposed changes in the loss tables have received public comment.

The problem is: The comments that have been received may be invalidated by what happens to the definition of loss. The loss tables are predicated on a determination that certain conduct should be punished at a certain level. And, if the loss table, if the loss tables are changed to accomplish that and the definition of loss is expanded, it can completely skew the work that the Commission does on the loss tables and completely destroy the assumptions on which the loss tables are established.

A perfect example is consequential damages. If particular conduct under the present loss definition is determined to be punishable at a level 15--just to pick one out of the air--and then the definition of loss is expanded to include consequential damages,



the numbers could skyrocket, and the same conduct that the Commission has previously decided should be punished at level 15 suddenly might be at level 25.

So you need to have the definition of loss in place before you decide how to amend the table. The solution, of course, is to wait and not to do either one of them until the Commission is prepared to do both of them, and that is the course that I advocate.

One other word about consequential damages, which is something that concerns me. We need to keep in mind why we talk about loss; and that is because it's a measure of culpability. And consequential damages, I do not believe are a valid measure of culpability.

I mean, I deal with people who are facing sentencing and who commit crimes all the time. Normally, I say all of my clients are innocent; but, occasionally, one of them may have done something. And I know that criminal defendants think about gain and they think about loss when they decide what crimes to commit. One thing they don't think about is consequential damages. Because that is not something that enters into their thought processes when deciding what they're going to do, it doesn't really measure how culpable they are. It doesn't measure their personal blame-worthiness. We use it in contract cases and in other contexts because we are more concerned with establishing

dollars for the sake of establishing dollars. Here, we try to establish dollars only for the sake of establishing culpability, and I don't think consequential damages does that.

JUDGE CONABOY: Gerald, do you want--

**STATEMENT OF GERALD H. GOLDSTEIN, ESQ.**

**GOLDSTEIN, GOLDSTEIN & HILLEY, SAN ANTONIO, TEXAS**

MR. GOLDSTEIN: I don't think it will come as a shock to anyone that some of my clients have an unfortunate familiarity with the facts of the offense, as well. I also don't think it will come as a shock to anyone that all the prosecutors think we ought to up the guidelines and have more upward departures, and all the defense lawyers think we ought to lower guidelines and have more downward departures.

JUDGE CONABOY: We hear that occasionally.

MR. GOLDSTEIN: And I think Commissioner Goldsmith's suggestion about the reality check when the District Judges are sentencing at the low end of the guideline range, and the fact that--I think Katrina pointed it out very correctly--there are a lot more downward departures than there are upward departures it is an indication that, with respect to real people, in real life situations--if we're going to have a reality check here--both the level of sentences and the numbers and direction of departures is an indication that the District Judges in this country, when it comes down to the hard

decision in reality, find that the current guidelines are severe enough.

Lastly, I want to readdress the continuing return to the theme of reducing litigation. I understand that's necessary. I watch what happens in courtrooms, and I realize that the real litigators, the lawyers that practice in the civil bar, never get there cases in most of your courts. At the same time, it seems to me that, while that may be a legitimate goal, litigation was a natural and built-in consequence of the Federal Sentencing Guidelines.

When we had absolute discretion in sentencing, nobody appealed the sentence because you weren't going to get anywhere, and you were told that in advance. When we built the guidelines, we built in a specific, fact-specific, fact-finding process in which we have no rules, no one knows where we're going, and we built in an appeal process. We told everyone: This is where we're going to be in litigation. So, the fact that altered the goal of reducing litigation shouldn't blind us to the fact that it ought to be a fair process. Fair, with respect to, I think, what many of you have described as the disparity with the have-nots, not having the same consideration for the lack of planning that the haves might have, and consideration for the due process rights of everyone, from the top of the ladder to the bottom, when they get into this process. I don't think that we should throw out the baby with the bath water.

JUDGE CONABOY: We have some members of the audience. I would like the panel members, if you could, even if you have to move from here, to kind of remain, because we may have some more questions for you. But I'd like to get in--hear from others, as well as the questioning. I know Professor Bowman was ready to give us some comments, and there may be others. So, if you don't mind, I'm going to move to that area at this point.

Just give us another chair.

MR. BOWMAN: I can do it from here, Judge.

JUDGE CONABOY: Can you do it from there.

MR. BOWMAN: I assume that's what Andy had in mind.

**TESTIMONY FROM MEMBERS OF THE AUDIENCE**

**STATEMENT OF FRANK BOWMAN VISITING PROFESSOR**

**GONZAGA UNIVERSITY SCHOOL OF LAW**

MR. BOWMAN: I want to keep this, keep my comments brief. I want to thank the Commission, once again, for having the forbearance to listen to me once again on this subject. The details of my comments are contained in the written statement that you have from me, so I'm going to try not to repeat myself. That said, I'm going to disagree with everybody on the panel, in one way or another.

First of all, I think that this--I'm confining my comments now to the redefinition of loss. I believe this is a desirable reform. I think you are very, very close to bringing it to fruition.

Unlike virtually everybody up there, I think it is doable in the time frame that you have remaining in this year. I'm not saying it necessarily will be done, but I think it can be done. And an awful lot of the objections that are--you hear to this particular proposal that you have are fixable. I think they're fixable in reasonably short order. If you have the will to fix them, and if you put some pressure on the interested groups not merely to say what's wrong with this proposal; but, more particularly, if they have a particular complaint about a portion of the proposal, to come forward with specific language that would fix the complaint that they have.

I think that the Justice Department, in a number of places, has provided some commendable first steps in that direction, because of the document that's been provided you by Ms. Pflaumer and Ms. Spearing contains a number of places in which they've actually suggested some alternative language. Regardless of the merits or demerits of that particular language, I think that, in each case, that's a step forward and one that I think the Commission should encourage within the limits of its power.

With respect to specifics--again, I'm not going to get into details, because

I've written you a long and tedious paper on that subject--a couple of things I want to say.

First, I think that the draft that you currently have, the one that's dated February 20, 1998, should not be adopted as it currently stands. I agree with the Department to this extent: I think, if it were adopted as it currently stands, it would be cause far more problems than it would be worth. But I think the problems with it are discrete. I think they can be fixed. And, in particular, I will try to prioritize the ones that I think need fixing the most.

I think that the section, with respect to credits against loss and time of measurement, needs significant rethinking. Simply because, in its current form, in ways I outline in my written remarks, I think it's almost entirely unusable and so complicated, requiring, as it would, the measurement of things on many different dates and in rather confusing ways. I think it has to be fixed. That's the primary one.

To my mind, if I were emperor of the universe, that the would be the deal breaker. That would be the thing that, if it were not fixed, I could, I could never support this proposal. But I think it can be fixed, and I think it's the one thing that you need to--that you should focus your attention on the most.

Second on that list of things that really ought to be, perhaps absolutely must be, addressed would be departures, particularly the one for inept manner, which I

think is just an invitation to chaos. And in that regard, I agree with the Department.

Extremely desirable things I think you should address, but which are not absolutely necessary, are: There are some small fixes I think you should make in the core definitions, some changes in wording to eliminate some complexity.

I think it would be desirable--as had been suggested from the panel already, and as I think the judges, the Judicial Conference is likely to suggest--I think the addition of some definitions of some core concepts, particularly definition of how you would like to see foreseeability treated by the courts, would be extremely useful. I think I simply can't agree with the notion that foreseeability, reasonable foreseeability, is so well-understood a concept that we all know what it means. In fact, if you think about it for only a moment, you recognize that reasonable foreseeability is a term which is used in very, very different ways, in different areas of the law, and I think it would be very appropriate for the Commission to consider how you want it used, at least in general terms, in the criminal law context, and to define reasonable foreseeability in a way that gives the judges some guidance as to whether you want this to be an extraordinarily torts-like foreseeability inquiry, or a more limited one. I myself, as I think the Commission knows, favor a much more limited one.

Finally, the final thing I want to see is simply, I guess, a reiteration of the

point with which I began. I think this can be done. I think what the Commission needs to do is to invite and, frankly, place some pressure on the participants, the institutional participants, and the interest group participants, to come forward not only with complaints, but with specific proposals, specific language that would fix the problems that they have. I think time remains enough to do that. I think you should force them to do that. And, if you do, I think you can do this job within the time remaining. And I think what you will have when you're done is a reform of the guidelines that will be simplifying and that will, indeed, be an appropriate, lasting and desirable legacy of your tenure and at this particular period of the Commission's existence.

JUDGE CONABOY: Thank you very much.

MR. GOLDSMITH: Before you leave, let me turn to my--well, I certainly concur that we ought to encourage the various participants to come up with language that might somehow help us forge a compromise. Along those lines, I'd like to ask you if you, time permitting in your busy schedule, if you could try to provide language you think might help.

MR. BOWMAN: Commissioner Goldsmith, I think I've actually done that.

JUDGE CONABOY: He's already done that.

MR. GOLDSMITH: Well, I've never seen your statement.



MR. BOWMAN: I have, in fact, attached--what I've done in the statement that you have is: I've gone through the February 20, 1998 proposal pretty much line by line, and I've suggested, working off that draft, specific changes that I think would meet a number of the concerns, among them many of the concerns raised by the Justice Department. I don't suggest that those, that that's the last word; but, in effect, I think what I was trying to do is to say this is doable and here's at least one way that you might do it.

MR. GOLDSMITH: Good. I'll take a closer look at your statement. Thank you.

MR. BOWMAN: Thank you.

JUDGE CONABOY: I think I saw some other hands of people who--yes, would you use the microphone for us, please, and would you, each of you who comment, if you would, identify yourselves and who you represent, if anyone.

**STATEMENT OF DAVID COHEN, ESQ.**

**SAN FRANCISCO, CALIFORNIA**

MR. COHEN: Hi! My name is David Cohen. I'm a federal criminal practitioner here in San Francisco.

I've been practicing federal criminal defense for approximately 10 years. I got my first federal criminal case in 1988, not long after November 1, 1987, so I consider

myself to be a person who has practiced during the course of the guideline era.

What I've noticed, other than the change in the color of the books during the time--and, by the way, I've never had the opportunity to look the Commission in the eye before, which I'm relishing.

(Laughter.)

MR. GOLDSMITH: Do you think the book should have pictures?

MR. COHEN: Pictures, changing the colors. Changing the colors have been, have been good.

The one thing that I've noticed is a trend toward more complicated guidelines and fatter books. And almost universally, the amendments have resulted in increased sentences.

I know the safety valve has been instituted and there have been other minor exceptions. But, for the most part, the guidelines have gotten higher and higher. And it's very, very difficult, and I haven't seen any ability for them to be reduced. The only time that there was a significant proposal to reduce the guidelines in 1996, in connection with fraud, in connection with money laundering and crack, the only amendment that was rejected by Congress.

My concern is that, when you talk about raising the guidelines, whatever

the merits, there's a significant risk because you're not going to be able to lower them politically. I mean, politically, it's very, very difficult. I'm very, very concerned, and I just wanted to raise this with the Commission because you guys and women are trying to do a good job. But the problem is, is that this is an election year. You raise them, it's instituted, it's very difficult to lower them. I noticed, in 1997, there weren't significant amendments of this type, such as the ones in '96 or '98 that were proposed.

So, I just urge the Commission to be very, very careful because the defendants aren't here. And it's very rare for people to be able to speak directly to the Commission. I'd urge the Commission--it would be nice if politics were not involved, but politics is involved--and I'd urge the Commission to very, very careful in raising guidelines in general, and these guidelines in particular. And I'd just like to say that, I think, on behalf of many, many people who are appearing for sentencing in courts everyday.

Thank you.

JUDGE CONABOY: Thank you, Mr. Cohen.

Now, there are some others, I think. Yes, sir.

**STATEMENT OF EARL J. SILBERT, ESQ.**

**MEMBER, PRACTITIONERS ADVISORY GROUP**

MR. SILBERT: Mr. Chairman, members of the Commission, my name is

Earl Silbert. I'm a member of the Practitioners Advisory Group.

From the time of the promulgation of the regulations, of the Sentencing Guidelines, in the area of theft and fraud, I've been concerned about the primary emphasis, almost dispositive emphasis, they have placed on the concept of loss.

As a prosecutor, for 15 years, and 10 as Assistant U.S. Attorney, and 5 as the United States Attorney, I always thought and practiced the principle, as did our office in the District of Columbia, that, in investigating and prosecuting fraud cases, you follow the money. That is: You look to see who gained the money. It was not our experience that I had, both as a prosecutor and confirmed as a defense attorney, that defendants thought in terms of loss of their victims. They thought in terms of gain. And to me, and our staff, that was the proper measure to assess their culpability and the nature of both the prosecution and the punishment that they should receive.

For example: If you had a fraud procurement case, in which a middle manager participated in a widespread conspiracy to commit fraud in the government contract, for which the loss might have been, say, \$300,000 or \$400,000, and that middle manager received no gain. In our view, the person who stole \$100,000 from his employer, or her employer, and put that money in their pocket, was more culpable and deserving of greater punishment. Yet, under the guidelines, as they are now, as they were promulgated,

and as they are under consideration, under your consideration, the reverse would be true: The person, who participated in that fraud for \$300,000 or \$400,000, would receive a significantly greater punishment than the person who put \$100,000 in his or her own pocket.

It is for that reason that I would suggest, or just express my concern, that there is an inhumane quality about measuring the time that a person will serve in prison based primarily on the amount of loss, the numerical amount of loss, that he or she caused, without further consideration of the other factors that, in our--in my experience primarily as a prosecutor, with the appropriate measure of their culpability.

The second ground, the second point, I would welcome the opportunity simply to make is--and it's been articulated here earlier--is: In trying to assess and look at the role of sentencing in white-collar crime, and considering the purposes of the criminal law, our experience--and, again, I'm drawing primarily on my experience as a prosecutor--was that there were a number of cases in the area of theft and fraud that did not require imprisonment. There were a number that did. And I certainly, as a prosecutor--if you check the record--was active in seeking confinement in appropriate cases involving theft and fraud. In order to accomplish the purposes of the criminal law, whether you're looking at the punishment, or retributive factor, the deterrent

factor--which, to us, was always the primary factor in the area of theft and white-collar crime--the sentence of imprisonment of 6 months, a year, year-and-a-half, and two, accomplished all the purposes that the criminal law could fairly and appropriately serve. And sentences above and beyond that, in terms of the necessary or appropriate punishment, but particularly in terms of the necessary deterrence, both deterrence of the individual and deterrence of others, was simply not necessary.

Now, it's easy. There was always the temptation in our office to seek increased enhancements of penalties and punishment. I'm somewhat disappointed with my friends in the Department that they seek that today. Because, as I look at the guidelines that you have in the theft and sentencing factors, I respectfully submit to you that, by and large, they do provide for adequate punishment if you look at the overall purposes and evaluate the overall purposes of the criminal law.

I would urge and suggest to the Commission that, in assessing whether or not to increase the tables, the loss tables, that they consider not only the measure, the amount of incarceration, but whether or not the appropriate factors are being considered in evaluating what I think is the bedrock of our criminal justice process, which is moral culpability in the commission of crimes and the appropriate steps that we, as a society, should take to respond to it.

Thank you.

JUDGE CONABOY: Thank you very much.

**STATEMENT OF JAMES E. FELMAN, ESQ.**

**SAN FRANCISCO, CALIFORNIA**

MR. FELMAN: Thank you members of the Commission. I simply cannot resist a microphone in front of you all. It's Jim Felman. I'm also with the Practitioners Advisory Group. You've heard some of what I have to say in October.

I want to emphasize one point that Mr. Silbert has just made about gain. I don't think any fair-minded person can differ with the proposition that someone who gains zero is fundamentally different from the person who gains 100 percent of the loss. I don't think any fair-minded person can differ with that. Knowing that doesn't answer the problem.

I noted in what you published for comments had a proposed downward departure where gain was significantly different from loss. That has been deleted from the February draft. I imagine because there was probably a concern that, with that as departure ground, it would apply to too many cases. Everybody would be arguing in many, many white-collar cases that gain is significantly less so there should be a departure, and the purposes of guideline sentencing would be undermined.

First, I have to say that you have to worry when an obviously agreed-upon mitigating factor would apply in too many cases. That ought to bother you a little bit. Now, what to do about it? I, of course, would be in favor of having the downward departure suggested.

I agree with the proposition of using loss as a first point. If I could think of some mathematical way to average gain and loss, or take both of them into account somehow in setting the offense level, I'd do it. It's too complicated. I can't do it. You have to start somewhere. I'm okay with starting with loss. But, if you've got an obviously undisputable serious mitigating factor that applies in many, many cases, you've got to do something with it, if you're going to do your best. Uniformity is easy. But if you're going to do your best at distinguishing among different levels of culpability, it's an issue that ought to be addressed. I would only suggest that, if you're not comfortable with it as a departure ground, you consider it as a sophisticated offense characteristic.

I never thought I'd be here in front of this Commission asking for a sophisticated offense characteristic because it invites litigation. If we can't have the departure ground, I'm here to ask for it. Give me one point. I don't want to argue about how much it is. Those are political issues. I'm talking about making it rational in trying to differentiate different degrees of culpability. I don't think it would require that much



litigation if you're going to have to consider gain, anyway, to figure out whether it's more or less loss--although, I can't agree with that.

I would urge you to consider Mr. Silbert's point. As a suggestion for how to enact it if you're not comfortable with the downward departure, use it as a sophisticated offense characteristic.

I'll mention the consequential damages. If you include them in all cases, as the February draft does, they will probably engender more litigation, in the real world, than any amendment consideration that you've got.

I practice criminal defense law. I go to sentencing from time to time. And I can tell you, as a defense lawyer, that, if consequential damages are included, it will be very much more complicated. I don't know how you could--how to describe that adequately, except to say that, if in a typical case, where consequential damages were excluded, the loss is generally about what we just tried this case about, where it's what we negotiated the plea agreement about. Consequential damages have nothing about either. They are generally about information that is not going to be in the possession of the prosecutor's office, that's not going to be in the possession of the defense attorney, it's not what the case was about. It's about consequential things that happen to the victim later on. We're going to show up at a sentencing hearing and I'm going to get a bill for the victim's

lawyer's fees. I'm going to get a bill for the time that the victim took to detect the offense.

The complexity of these issues is going to be enormous.

If you look at the factors that are considered consequential damages when they're counted, you're talking about very fact-intensive litigation. And, if you get back to the point that the whole point of it is to just make it a rough surrogate for culpability, it's litigation that is completely not worth the trouble to measure culpability. I would urge you not to include consequential damages in all cases.

I'll finish by just pointing out that I would note that, before we had guidelines, a lot of people got probation. And I didn't think there was any hue and cry that that was such a horrible thing. The Commission made a political judgment that, for white-collar offenses, the penalty should be higher than pre-guidelines experience. So there was a decision made to increase penalties for white-collar cases when, for pre-sentencing practices, unlike everything else, when the guidelines were first enacted. Two years later, you did it again, in 1989, when you raised the tables. I don't know why. And, now, we're talking about doing it again. In my judgment, without any empirical basis to suggest why this is necessary, I would at least urge that you do it in connection with the definitional issues. If we don't know what the impact of the definitional issues are going to be on how much loss gets included, how can we make a decision to increase the tables

now and worry about an unknown additional increase later?

Finally, the sophisticated concealment, as it's currently drafted, I think is far too broad. It applies to anyone who makes deliberate steps to make their offense difficult to detect. I would suggest anyone who fails to do that ought to get a downward adjustment for diminished mental capacity. That needs to be rethought, if it's going to be there at all.

Thank you.

JUDGE CONABOY: Is there anyone else? We can take one more; and, then, I think we'll have to conclude.

**STATEMENT OF BENSEN WEINTRAUB, ESQ.**

**MIAMI, FLORIDA**

MR. WEINTRAUB: Thank you. My name is Bensen Weintraub. I'm an attorney in Miami.

I have one comment, which is common to each issue that we discussed today, starting with the proposed increases in the tax tables, to the 2F guidelines, as well; and that is: It appears to me that the guideline amendments under consideration appear to be inconsistent with the enabling legislation which created the Commission.

The principle of parsimony is specifically incorporated into the Sentencing

Reform Act, and I fail to see how the discussion of this type, which necessarily increases the guideline range, provides for the type of sentences within the purpose of--within the meaning of 3553(a) that mandates that a court impose a sentence that is sufficient, but not greater than necessary. I think, at this juncture, the amendments are clearly greater than necessary, particularly in the absence of empirical evidence to substantiate the lack of deterrent value as to the existing guidelines.

Thank you.

JUDGE CONABOY: Thank you very much.

Well, I thank all of you for coming, and we're almost on time. We had hoped to finish at 3:40. I think it's a little bit beyond that, but I'd rather conclude on that note.

We do appreciate--as we demonstrate here again today, some of these issues are very ticklish, very hard to resolve, particularly in a way to resolve them that everyone would agree is the best way. I guess that's the essence of our system. If we ever get to that point, God help our clients; they'll all be in trouble.

I think we reiterated here in many ways how difficult the whole process of sentencing is; and, that, perhaps, some thought has to be continually given to the idea that, when we're depriving people of their freedom, we have to give them at least as much due

process as when we deprive them of their property. That's an age-old concept in this country, and we're sliding away from it a little bit. It was mentioned here today, in passing, by a number of people, the old concept of plea bargaining has replaced, in large measure, the concept of taking each other on in a competitive way in the courtroom, for better or worse.

We need committed people. We need concerned people. And I can just tell you, from all of the discussions we've had at the Sentencing Commission, everyone is struggling with this in trying to arrive at the best conclusions we can.

So, we thank you all again, and we'll consider the meeting adjourned at this point.

(Whereupon, at 3:50 p.m., the hearing was concluded.)

## C E R T I F I C A T E

I hereby certify that this is the transcript of the proceedings held before the

UNITED STATES SENTENCING COMMISSION

on Thursday, March 5, 1998 at San Francisco, California, in the "Key Issues: Reassessing sentences for federal theft, fraud and tax crimes," and that this is a full and correct transcription of the proceedings.

JAMES W. HIGGINS, CVR

Reporter