

## U.S. COMMISSION ON CIVIL RIGHTS

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## MEETING

- - -

Friday, July 12, 1996

The Commission convened in Room 540,  
YWCA Building, 624 Ninth Street, NW, Washington, D.C.,  
20425, at 9:30 a.m., Mary Frances Berry, Chairperson,  
presiding.

PRESENT:

MARY FRANCES BERRY, CHAIRPERSON

CRUZ REYNOSO, VICE CHAIRPERSON (via telephone)

CARL A. ANDERSON, COMMISSIONER

ROBERT P. GEORGE, COMMISSIONER

A. LEON HIGGINBOTHAM, JR., COMMISSIONER (via telephone)

CONSTANCE HORNER, COMMISSIONER

YVONNE LEE, COMMISSIONER

RUSSELL REDENBAUGH, COMMISSIONER

MARY K. MATHEWS, STAFF DIRECTOR

STAFF PRESENT:

BARBARA BROOKS

KI TAEK CHUN

JAMES S. CUNNINGHAM

PAMELA A. DUNSTON

ORIGINAL

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STAFF PRESENT: (Continued)

BETTY EDMISTON

GEORGE HARBISON

CAROL-LEE HURLEY

JACQUELINE L. JOHNSON

FREDERICK ISLER

STEPHANIE Y. MOORE, General Counsel

VERONIQUE PLUVIOUS-FENTON

CHARLES RIVERA

MIGUEL SAPP, Parliamentarian

ANTHONY K. WELLS, SR.

AUDREY WRIGHT

COMMISSIONER ASSISTANTS PRESENT:

DEEANA L. JANG

CHARLOTTE PONTICELLI

WILLIAM SAUNDERS, JR.

KRISHNA TOOLSIE

CYNTHIA VALENZUELA

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Research and Public Policy at Carnegie Mellon  
University, Pittsburgh, Pennsylvania

James Wootton, Founder and President, Safe Streets  
Alliance, Washington, D.C.

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Laura W. Murphy, Director, American Civil Liberties  
Union, Washington Office

Malcolm C. Young, Executive Director, The Sentencing  
Project, Washington, D.C.

Julie Stewart, President and Founder, Families Against  
Mandatory Minimums, Washington, D.C.

William B. Moffitt, Senior Partner, Asbill, Junkin and  
Moffitt, Washington, D.C., and Treasurer, National  
Association of Criminal Defense Lawyers

## P R O C E E D I N G S

9:55 a.m.

## I. Approval of Agenda

CHAIRPERSON BERRY: Let's go ahead and approve the agenda since time is passing. Could I get a motion either to approve it or something? Motion to approve the agenda.

(So moved)

(Second)

CHAIRPERSON BERRY: All in favor of the agenda, indicate or -- indicate by saying aye.

(Chorus of ayes)

CHAIRPERSON BERRY: Opposed?

(No response)

## II. Approval of Minutes of June Meeting

CHAIRPERSON BERRY: Okay. Approval of the Minutes of the June Meeting. Could I get a motion concerning the minutes of the June meeting?

COMMISSIONER HORNER: I move their approval.

CHAIRPERSON BERRY: Second?

(Second)

CHAIRPERSON BERRY: Okay. It's been moved and seconded. Does anyone have any -- does anyone have any changes or comments on the minutes for June?

(No response)

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1 CHAIRPERSON BERRY: No changes or comments.  
2 Then we're ready for the question. All in favor,  
3 indicate by saying aye.

4 (Chorus of ayes)

5 CHAIRPERSON BERRY: Opposed?

6 (No response)

7 CHAIRPERSON BERRY: Opposed?

8 (No response)

9 CHAIRPERSON BERRY: So ordered.

10 Judge Higginbotham, are you on?

11 COMMISSIONER HIGGINBOTHAM: I am. Apparently  
12 we had some problem of getting disconnected before.

13 CHAIRPERSON BERRY: Right. It wasn't your  
14 problem. I mean you didn't -- it wasn't your fault.

15 COMMISSIONER HIGGINBOTHAM: Okay.

16 CHAIRPERSON BERRY: But thank you for being  
17 on, both of you.

18 III. Announcements.

19 CHAIRPERSON BERRY: Now we go to  
20 Announcements. Let me first announce that Judge  
21 Higginbotham last evening was a recipient of the Spring  
22 Iron Metal, which is the highest award that is given by  
23 the National Association for the Advancement of Colored  
24 People and which has been held by distinguished  
25 Americans of all races for their contributions over a

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1 lifetime in the cause of human rights, and it is a  
2 signal honor, and I think he deserves it, and my only  
3 problem was that I think he's too young, and it hasn't  
4 been a lifetime. So, I just want to congratulate him.

5 ALL: Congratulations.

6 COMMISSIONER HIGGINBOTHAM: Well, thank you.  
7 I appreciate someone thinking 68 is young.

8 CHAIRPERSON BERRY: Other announcements?  
9 Staff Director, do you have any?

10 First, Commissioner Horner, would you like to  
11 introduce your assistant here?

12 COMMISSIONER HORNER: Yes. Patrick Meecham.  
13 Patrick, if you would, stand up, will be coming on  
14 board a week from Monday.

15 CHAIRPERSON BERRY: All right.

16 COMMISSIONER HIGGINBOTHAM: Welcome.

17 CHAIRPERSON BERRY: Welcome.

18 COMMISSIONER HORNER: Be nice to him.

19 CHAIRPERSON BERRY: Commissioner -- I mean  
20 Staff Director, do you have any -- any announcements?

21 STAFF DIRECTOR MATHEWS: I do, Madam Chair.  
22 I wanted to start off by informing the commissioners of  
23 the results of the House Appropriations Subcommittee  
24 and Full Committee mark-up, both of which occurred this  
25 week, on our appropriation for next fiscal year.

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1           The number that the subcommittee agreed to  
2           for us and the Full Committee had the same number is  
3           8.74 million. That is exactly the amount of money we  
4           had this year, and you may --

5           CHAIRPERSON BERRY: It's less than the  
6           appropriation.

7           STAFF DIRECTOR MATHEWS: Well, yes, I was  
8           just going to mention that. Appropriation that we  
9           received in late April for the balance of this fiscal  
10          year was 8.75 million, but the Commission, like all  
11          other agencies, was subject to the rescission that was  
12          also passed, and our contribution was \$10,000.

13          So, 8.74 is the amount of available funding  
14          for this fiscal year, and the subcommittee and Full  
15          Committee mark-ups were that same number for next year.

16          CHAIRPERSON BERRY: When were we at 9.3?

17          STAFF DIRECTOR MATHEWS: We -- the Commission  
18          was at nine million in fiscal 1995. The request for  
19          this year is 11.4. For next year, I should say, but  
20          put forward this year.

21          CHAIRPERSON BERRY: Okay.

22          STAFF DIRECTOR MATHEWS: Okay? The earmarks  
23          are the same as what has been in the appropriation bill  
24          in the past.

25          On the subject of reauthorization, the Senate

1 reauthorization hearing has been scheduled for July 23  
2 at 2 p.m. The House oversight hearing date has not  
3 been precisely set, but it is my expectation that it  
4 will occur either July 24 or 25.

5 My third announcement, Madam Chair, is to  
6 indicate that the state advisory committees in the six  
7 Southern states that have been the hardest hit by the  
8 church fires have been conducting the SAC forums,  
9 community forums. We've had four of these so far.  
10 There are two that will occur next week in South  
11 Carolina and North Carolina, and that process is on-  
12 going with development of executive summaries and  
13 issuance of transcript to shortly follow.

14 CHAIRPERSON BERRY: The -- Commissioner Lee  
15 was at the forum in Louisiana. Very much appreciate  
16 her being there.

17 Commissioner Redenbaugh's assistant was at  
18 the forum in Memphis. Very much appreciate her being  
19 there.

20 And I understand that Commissioner Anderson  
21 and Commissioner George are planning to go to the  
22 forums in North and South Carolina.

23 I have been to all of them so far. I don't  
24 even know what day this is, but they've been very  
25 interesting, very worthwhile. The people have very



1 much appreciated our coming, and the SACs have very  
2 much appreciated commissioners showing up. Some of  
3 them pointed out that it was the first time since  
4 they've been on the SAC, and some have been there for  
5 awhile, that a commissioner had come to their meeting.

6 So, I think it's been well worth it, and I  
7 look forward to the transcripts and the summaries and  
8 whatever the SACs want to do in the way of reporting,  
9 and this is something that's really important for the  
10 Commission, I think, to be involved.

11 I don't know why you gave me this, though.  
12 Am I supposed to read this? Oh, it's just information.

13 STAFF DIRECTOR MATHEWS: Yes.

14 CHAIRPERSON BERRY: Does anyone else -- and  
15 Commissioner George went to the press conference and  
16 meetings that the Christian Coalition had in -- in  
17 Atlanta on June 18th, and he sent us a memo concerning  
18 that.

19 The only other thing I would announce is I  
20 heard yesterday that Congressman Conyers is planning  
21 and the Judiciary Committee are planning to hold some  
22 more hearings, which I think will be on the subject of  
23 the insurance issue.

24 When we were at the SAC meetings in Louisiana  
25 and Tennessee, I asked the U.S. Attorneys, and

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1 Mississippi, the U.S. Attorneys there whether they were  
2 pursuing any complaints concerning insurance, and also  
3 asked the church, the ministers, the deacons or  
4 representatives of the churches, whether they were  
5 experiencing difficulties with insurance.

6 My information and belief is that as a result  
7 of the publicity around this issue, the insurance  
8 companies are leaping eagerly to give insurance to  
9 anyone who wants it. They're even calling up people,  
10 saying are you sure you have insurance? We'd like to  
11 get you insurance. You need some more insurance,  
12 because they don't want to go to a hearing and have  
13 somebody ask them about this. They want to all be able  
14 to come in and say by gosh, we're out there doing the  
15 job. So, I think the publicity around the issue has  
16 been effective.

17 Does anyone -- yes, Commissioner George?

18 COMMISSIONER GEORGE: I just had a question  
19 as to whether the Commission itself has received any  
20 complaints. I encouraged ministers who had been having  
21 problems and feared that they were victims of  
22 discrimination to forward complaints to me or to the  
23 Commission, either to forward to the staff or to the  
24 staff director directly. Have we gotten anything?

25 STAFF DIRECTOR MATHEWS: Madam Chair?

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1                   CHAIRPERSON BERRY: Yes?

2                   STAFF DIRECTOR MATHEWS: We have not received  
3 any complaints directly. I actually have asked staff  
4 to check to see if there were any concerns that they  
5 could determine by doing some calls, and the feedback  
6 in general I got was that they were unable to find a  
7 church that had a concern, but they received -- this  
8 was a very quick turnaround, just in the last day or  
9 two, and not -- they weren't able to reach all of the  
10 people on the first try.

11                   COMMISSIONER GEORGE: Okay. Thank you.

12                   CHAIRPERSON BERRY: The -- and if the  
13 commissioners wish to, we could, of course, send our  
14 usual letter to the Justice Department asking them to  
15 investigate this issue.

16                   The U.S. Attorneys -- the response was  
17 uneven. One U.S. Attorney in Mississippi eagerly  
18 seized on the idea that his office would pursue any  
19 such complaints, and he could think of jurisdictional  
20 basis right there standing at the podium and so on, and  
21 the other U.S. Attorneys simply said that if anybody  
22 complained to them, they'd be happy to do something,  
23 but they weren't quite clear what they should do unless  
24 they heard from on high that there was something they  
25 were supposed to be doing.

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1           So, it's -- I think the issue is -- is -- is  
2 resolving itself as a result of the publicity, and we  
3 might think further on whether we want to do anything  
4 else. So, the other forums then are next week.

5           Are there other announcements?

6           (No response)

7           IV. Staff Director's Report

8           CHAIRPERSON BERRY: If there are no other  
9 announcements, then we would go to the Staff Director's  
10 Report. Does anyone have any questions on the Staff  
11 Director's Report?

12           (No response)

13           V. Continuation of General Programmatic Theme

14                           Discussion

15           CHAIRPERSON BERRY: If not, then can we  
16 discuss the General Programmatic Theme, which is the  
17 major item that we'd like to do today, and it's to  
18 decide -- we will -- just by way of introduction, the  
19 commissioners have approved projects for 1997 and 1998,  
20 and we did that for budget purposes, and what's left  
21 over is for us to decide whether we want a general  
22 programmatic theme, and we are focusing on the one  
23 involving you, I recall, under Number V.

24           Oh, I will also point out that one  
25 commissioner had some concerns, I guess two others

1 joined that commissioner in having some concerns, about  
2 briefings taking up time and time for discussion and  
3 the balance between the two.

4 I have said to the staff director that from  
5 now on, we will wish to be informed as to who the  
6 witnesses are for the briefings. I guess they aren't  
7 witnesses, but the presenters at the briefings at least  
8 a couple of months in advance, so that those  
9 commissioners who want to prepare for the briefing may  
10 be permitted to do so, and that, secondly, the -- the  
11 -- we'll have to look at the agenda in terms of  
12 reserving time to make sure that the commissioners have  
13 time to discuss any items that they want to.

14 After the budget is approved, the  
15 appropriation is approved, some time in the Fall, we  
16 will look again at the priorities or look again at the  
17 projects and make some new determinations as to whether  
18 we need any changes, but right now, we're not sure what  
19 the budget will be. So, we will wait until that  
20 happens.

21 Does anyone have any comments or matters to  
22 discuss concerning this idea of the general  
23 programmatic theme concerning you? Yes, Commissioner  
24 Horner?

25 COMMISSIONER HORNER: Well, Madam Chair,

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1 maybe we should wait until we see what the budget is  
2 for that purpose, too, because then we can deal with  
3 very concrete decision-making.

4 If others wish to address it now, I'd be  
5 willing to do that, but it might be simpler, rather  
6 than having to do it twice, rather than having to cut  
7 back and go forward or whatever.

8 CHAIRPERSON BERRY:- Right. The only-- yes,  
9 Commissioner Redenbaugh?

10 COMMISSIONER REDENBAUGH: Yeah. If I could,  
11 because I think then your response could include both  
12 of our comments.

13 I would join with Commissioner Horner in  
14 that. It seems to me that -- that what we have done is  
15 indicated an interest in a number of programs and  
16 projects, but we haven't resolved either -- not only  
17 haven't we resolved the programmatic theme but haven't  
18 resolved the necessary prioritization of those  
19 projects, and I think the two are -- are co-determined  
20 and can best be done after we size the budget and then  
21 see what we want to do in the next two years.

22 CHAIRPERSON BERRY: It might be well if we --  
23 last time, we started to discuss this youth proposal,  
24 and there were a couple comments made by commissioners,  
25 and then we didn't continue the discussion.

1           If people were willing to do it, we could  
2 have some -- this was on the civil rights implications  
3 for children, and we -- the proposal talks about such  
4 issues as juvenile justice and delinquency prevention  
5 and children and AIDS and children and poverty and  
6 teenage literacy and issues of that kind.

7           And there were some concerns about the  
8 proposal itself, the way it was written by the staff,  
9 as I recall, and whether there were ingredients that  
10 they left out.

11           For example, one commissioner, as I recall,  
12 mentioned the issue of religion as something that might  
13 be -- but I don't think the commissioner said  
14 beneficial, but I'm saying beneficial to help in the  
15 situation. I don't remember who that was, but, anyway,  
16 that suggestion was made, and I don't remember what  
17 other suggestions were made, but there were some  
18 suggestions made concerning the tone and tenor of the  
19 proposal, and the kinds of things the staff was -- was  
20 suggesting, and if we had any other ideas, they perhaps  
21 could be reviewing it and trying to insert some of  
22 those ideas.

23           Commissioner Lee?

24           COMMISSIONER LEE: As I recall, I thought we  
25 needed to have a program theme because of the upcoming

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1 reauthorization hearings and also the budget hearings,  
2 that you need to have some kind of a program planning  
3 proposal.

4 CHAIRPERSON BERRY: No, no, no. Let me --  
5 let me refresh mine and everybody else's recollection.

6 The idea was we're coming to the end of the  
7 racial and ethnic tensions projects. We think we're  
8 coming to the end of them some time in the next few  
9 months, and while we approved a number of projects to  
10 be put in the budget as things that we might do, we  
11 wanted to consider whether we should have a theme  
12 instead, just like we did with the racial and ethnic  
13 tensions, and as I recall, that's what the discussion  
14 was about.

15 We went ahead and we talked about how  
16 commissioners felt about different projects, and we did  
17 that two meetings ago, and we did it three meetings  
18 ago, and we did a little bit of it last meeting, and we  
19 came up with 1997-1998 projects, but the question now  
20 for us is instead of doing all that, do we then want to  
21 say, well, gee, what we really ought to be doing is a  
22 big theme?

23 Now, that's the way the process went last  
24 time. Commissioner Anderson and Commissioner  
25 Redenbaugh will recall this, I'm sure. We had approved



1 projects, and then we went to a -- to a meeting,  
2 retreat, I guess, and we had this discussion and  
3 decided to throw all that out and to do racial and  
4 ethnic tensions instead. Is that what happened?  
5 You're all saying hm-hmm.

6 So, a query for us now is -- and what  
7 motivated that was commissioners' concerns and  
8 discussion, and we just threw out everything we had and  
9 started over again, and it was in the middle of some  
10 kind of cycle, but it's worked out, I think, and the  
11 question for us now that was presented when we got off  
12 on this track was, did the commissioners wish to do  
13 something like that again?

14 I am ambivalent, if I may share for wont of  
15 anybody saying anything. I first thought it was a  
16 great idea to have a theme, and then Commissioner  
17 Higginbotham and Commissioner Horner and others, from  
18 among the themes that were suggested by the staff,  
19 thought that this civil rights implications for  
20 children seemed to have some potency, and we said we  
21 would resolve to discuss it.

22 But now, I am puzzled because I think the  
23 Commission needs to figure out a way, and I've been  
24 struggling with this for years, to deal with things as  
25 they are happening, as well as long-term projects,

1 because we're always being overtaken by events, and I  
2 don't know how we deal with that.

3 COMMISSIONER HORNER: I've -- I've had the  
4 same reaction, and one of the things that I've  
5 concluded is that we ought to be less rather than more  
6 structured in advance because something always happens,  
7 and it seems to me we ought not to burden the staff to  
8 the point that it can't prepare adequately on five or  
9 six weeks' notice for something that occurs or,  
10 alternatively, prepare adequately and then defer an  
11 already-promised or scheduled project.

12 So, I guess my attitude is that we ought to  
13 have, as we've already discussed, a number of priority  
14 projects that we know we can accommodate in a time  
15 frame that would still allow for ad hoc decision-making  
16 several times a year, and that's why I'm no longer as  
17 eager to make a commitment to a sustained theme which  
18 would require us not to react to events as they occur.

19 It seems to me one of the significant  
20 functions of the Commission is to be able to explore  
21 events as they occur, but I'm ambivalent because I see  
22 the advantage in -- in a product that is the result of  
23 a sustained focus over a period of years.

24 CHAIRPERSON BERRY: And we always then feel  
25 like, you know, -- we feel like you're behind and

1 trying to catch up, and then something else happens.

2 Yes, Commissioner Anderson?

3 COMMISSIONER ANDERSON: Well, I'd like to  
4 look at the other side of the coin for a minute, and  
5 that is to say that it seemed to me if we looked at the  
6 racial and ethnic tensions theme that we have, it pre-  
7 dated the L.A. riots. It pre-dated the -- at least  
8 more public emergence of a variety of hate -- hate  
9 groups and white supremacist organizations. It pre-  
10 dated the church burning situation, and it was in a  
11 sense more far-sighted or, at least to look at it a  
12 little bit more differently, more of an early warning  
13 system in some very particular problems, like, for  
14 example, the D.C. public schools.

15 Our hearings as part of this project back  
16 what, four years ago, three years ago, we looked at  
17 problems in the D.C. public schools that we're reading  
18 about today in the Washington Post, and, so, we put a  
19 lot of public officials on notice five years ago that  
20 there were these problems.

21 So, I think in a sense, one could say that  
22 taking a theme and looking at the operation of the  
23 Commission over a four-five year period could be very  
24 beneficial.

25 I think what we cannot do, based on our

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1 experience, is adopt a theme and then be in a sense  
2 sort of undisciplined about the rigorousness by which  
3 we maintain a concentration on that theme.

4 If we had been more disciplined on our theme,  
5 we would be doing the Mississippi Delta hearing how  
6 many months ago, and it would be fit precisely into the  
7 question now, it seems to me, that our SACs are looking  
8 at in terms of church burning.

9 So, we could have been six months ahead of  
10 this power curve, if you will, on this particular  
11 issue.

12 So, I think that my reflection on this would  
13 say either we take a theme and we work very hard to  
14 discipline ourselves to our activities within that  
15 theme, and I think there's a certain amount of  
16 flexibility you have within that, or we don't have a  
17 theme, and we maintain a broad flexibility for various  
18 questions on a more ad hoc basis.

19 But I don't think you can get the benefit,  
20 the maximum benefit from either approach trying to do  
21 both approaches at the same time. So, I mean that's  
22 how I would come out. I would be happy to look at a  
23 central theme, but I think if we were to do that, again  
24 the benefit is more discipline, a tighter time frame,  
25 and try to produce both hearings and reports on a more

1 accelerated basis.

2 CHAIRPERSON BERRY: Well, we -- we were  
3 prescient in picking, those of you who suggested this  
4 racial and ethnic tensions theme, were prescient, and  
5 the press has been impressed with our ability to see  
6 into the future because whenever they are told that we  
7 started this racial and ethnic tensions project, you  
8 know, that many years ago, and how this all fits in,  
9 and how we looked at certain indicators, and we had  
10 this sort of visceral reaction, that this was what we  
11 ought to do, they thought we were really very wise  
12 people.

13 So, maybe part of it is trying to really see  
14 what we think is important, and what we think is likely  
15 based on some escalating kinds of either tensions or  
16 variables or concerns, where we really think the  
17 problem is, which is what we did that time, and feeling  
18 it viscerally and mentally, and saying, well, this is  
19 where we ought to go.

20 We know that this is going to be the issue.  
21 We know this is where the problem -- the major problem  
22 really is, and if that's how we'd have to pick a theme,  
23 if we were going to pick one, and not just do it in  
24 terms of, oh, well, you know, there are three-four  
25 themes, you know, which one can we pick, and maybe

1 that's it.

2 Yes, Commissioner Redenbaugh?

3 COMMISSIONER REDENBAUGH: Yeah. I'd like  
4 to -- I've seen something in the -- in this discussion  
5 that may -- may be useful. I -- I think we have  
6 problems belonging to two different classes of  
7 problems, and we, I believe, are collapsing them  
8 together in our discussion in the following way.

9 Peter Drucker makes the distinction  
10 efficiency and effectiveness, where efficiency is doing  
11 things right and effectiveness is doing the right  
12 things.

13 The selection of a theme, and the one we just  
14 happened to be very prescient, and I -- and I think we  
15 could do that again. It strikes me the problem will  
16 not be solved by either selecting the theme or not  
17 having a theme, but the problem can only be solved by  
18 increasing our efficiency.

19 What I'm saying is the selection of an  
20 appropriate and valid and durable theme has to do with  
21 effectiveness. Getting -- getting our work done inside  
22 of that has to do with efficiency, and I think that is  
23 where we have had the problem, and it is in part a  
24 problem of, as Commissioner Anderson says, that we have  
25 not disciplined ourselves well, and -- and in part, we

1 have taken way too long to do that which we said we  
2 were going to do. That's the efficiency part.

3 It strikes me that whatever theme we adopt or  
4 don't adopt, if we don't have a rigorous system that  
5 allows us to maintain some excess capacity or reserve  
6 capacity for the inevitable occurrences, we will always  
7 be behind and running and unable to catch up.

8 So, I think what's missing is the capacity  
9 that, you know, every fire department has -- has this  
10 problem. They need to size themselves so that they  
11 have excess capacity because they -- they need to  
12 respond to unplanned events.

13 CHAIRPERSON BERRY: Yeah.

14 COMMISSIONER REDENBAUGH: If we -- and, so,  
15 in part, that's my concern about what -- the project  
16 plans that we've submitted for '97 and '98. They  
17 clearly don't leave any excess capacity that would  
18 allow us the flexibility to respond to those urgent  
19 things that will certainly happen.

20 CHAIRPERSON BERRY: Well, why don't we do  
21 this then? Why don't we keep in mind for the  
22 discussion we're going to have after we know what the  
23 budget numbers are, these considerations that we have  
24 just discussed as well as others as we think about a  
25 theme, and see where we come out, and then if that's --

1 there's agreement on that, why don't we then go to your  
2 state advisory committee report, Russell, which is the  
3 next item on the agenda?

4 That's the next item on the agenda.

5 COMMISSIONER REDENBAUGH: Yes, I just wanted  
6 to see if there is agreement around what you said.

7 CHAIRPERSON BERRY: Is there agreement to do  
8 that?

9 COMMISSIONER HORNER: Yes.

10 CHAIRPERSON BERRY: There's agreement.  
11 They're all nodding their heads.

12 COMMISSIONER REDENBAUGH: Oh, okay.

13 CHAIRPERSON BERRY: Commissioner George  
14 didn't, but he didn't shake his head either.

15 COMMISSIONER GEORGE: Well, --

16 CHAIRPERSON BERRY: Higginbotham and Reynoso  
17 said nothing. So, we're going to discuss all this  
18 again and think about it.

19 Would you like to say something? You looked  
20 a little --

21 COMMISSIONER GEORGE: Well, I wasn't quite  
22 sure exactly where Russell had left it.

23 COMMISSIONER REDENBAUGH: Well, let me say  
24 then. I think there are two problems that have to be  
25 dealt with separately, and -- and we will make a -- a



1 mistake if we concatenate those two problems, and they  
2 belong to two different classes of problems.

3 COMMISSIONER GEORGE: That when you do the  
4 right thing, that's what economists call effectiveness?

5 CHAIRPERSON BERRY: Oh, he's trying to under-  
6 stand economics. It's impossible for a lawyer to  
7 understand economics.

8 COMMISSIONER GEORGE: It's quite impossible.  
9 A slightly more substantive point. I've always gone  
10 back and forth, I guess, Russell, on this effectiveness  
11 question, of whether the Commission would be more  
12 effective by being a very good debating club, where we  
13 could take things we disagree about and -- and really  
14 get the arguments out there before the public, best  
15 arguments on both sides of a question.

16 If we're going to do that, then we should  
17 take something like affirmative action and just do it,  
18 or whether that's really wasting our time and the  
19 public's money, and what we should be doing is  
20 identifying things that we agree on and trying to find  
21 efficient means of -- of prosecuting an agreed-upon  
22 agenda.

23 An example of something like that is  
24 responding to the -- these church fires, the problems  
25 of racial tension, dealing with an issue like this

1 insurance issue, if in fact it turns out to be a  
2 serious civil rights problem. We'll get behind it and  
3 then try to put the weight of our prestige behind doing  
4 something to make sure that these churches get treated  
5 fairly when it comes to their insurance.

6 When I saw the draft of the children plan,  
7 it's -- it -- it -- it struck me, as I was one of the  
8 commissioners who thought that -- that the whole  
9 approach looked like a liberal approach to things, and  
10 therefore not one that I thought would be very  
11 effective, it struck me that, well, gee, if this is the  
12 route we're going to go down, we're going -- this --  
13 that's the debating chamber route.

14 So, I'm back to wondering, well, should we  
15 really -- should we really do that? So, as I'm trying  
16 to think through whether to have a programmatic theme,  
17 over layered on that is my question of what conception  
18 of the Commission we really should -- should have, and  
19 if -- if -- if we're going to, as I'm inclined -- what  
20 is today -- on Fridays to think, we should -- we should  
21 come up with agreed-upon stuff that we're not going to  
22 fight about and agreed-upon things and push forward,  
23 then -- then I'm inclined to think at this point,  
24 unless we can come up with a theme that's more like the  
25 racial tensions theme, then let's just lay it aside and

1 go matter by matter.

2 Also, just to reinforce your -- I -- I did  
3 say something about religion last time. I checked the  
4 record. It was something very kind about Primitive  
5 Baptists.

6 CHAIRPERSON BERRY: Oh, yes. I appreciate  
7 that. I always appreciate that.

8 Commissioner Anderson?

9 COMMISSIONER ANDERSON: Well, let me just say  
10 to Commissioner Redenbaugh, I think he's right on point  
11 in terms of the relationship of the two. They're  
12 related, but they're independent, and they raise  
13 independent questions that we ought to address  
14 independently.

15 Since we've got into basic philosophy of what  
16 we ought to be doing here, let me just say, I -- I take  
17 a different tack than Commissioner George. I give two  
18 examples of what I think we should be doing in the  
19 racial tensions project and in a future project.

20 The first example would be the Asian American  
21 study, which I thought we did something very important  
22 by identifying the very realistic way what the  
23 situation is, and what some of the mis-perceptions are,  
24 and I think that report had a very concrete effective  
25 result because it, I believe, changed the way a number

1 of people look at the problem or look at the problem  
2 today. I think that's one important thing we can do,  
3 and I think if we're careful and steadfast, we can come  
4 to agreement on many more areas that accomplish that  
5 result.

6 The second kind of thing I think we can do  
7 more of is what we saw just last time I think we met or  
8 the time before on the taxi situation. There, you had  
9 an example of what works or at least what was  
10 represented to us as working, and I think we can do  
11 more of that if we put our minds to it.

12 We cannot solve all of the problems, but I  
13 think what this Commission can do better than most  
14 other agencies, we can find what is working to address  
15 a particular problem, and we can highlight a model that  
16 is effective in addressing a particular problem, and,  
17 so, those are the kind of things that I would like to  
18 see this Commission do now.

19 In the process of that, we will have lots of  
20 debates that are a result of different philosophies and  
21 experiences, etc., but I think what we are uniquely  
22 equipped to do is to see things in a way that maybe run  
23 counter to the general public wisdom or accepted wisdom  
24 which often is not too wise, and, secondly, because we  
25 have kind of a broad basis of information based on the

1 SACs and our own Washington staff is to understand what  
2 is working that can actually solve some of these  
3 problems and present that to the nation, and, so,  
4 that's the kind of thing I'd like to see us be doing.

5 CHAIRPERSON BERRY: Okay. Well, we can have  
6 this -- we have had this philosophical discussion from  
7 time to time. We will continue to have it, and I, like  
8 you, Commissioner George, I think it's because we're  
9 professors. Some days, I think we should just come  
10 here and just have a good old donnybrook and argue with  
11 each other substantively about an issue and see who can  
12 win the most debating points. Throw some red meat on  
13 the table and go for it. Then other days, I think, oh,  
14 why? It's a waste of the taxpayers' time and money,  
15 and that's not what we're here for. So, I don't know.  
16 It depends on whether it's Monday or Friday.

17 But if -- with that, though, I'm prepared to  
18 go on to the SAC committee report, unless somebody else  
19 has -- yes? --

20 STAFF DIRECTOR MATHEWS: All I want to do is  
21 indicate that as a result of this discussion, that the  
22 staff will complete the preparation of the fiscal 1998  
23 budget request without inclusion of any programmatic  
24 theme.

25 CHAIRPERSON BERRY: And then we will revisit

1 this issue, though, in October, and we will discuss --  
2 again, I remind commissioners, that doesn't mean we  
3 can't change priorities. We do it all the time, and  
4 Commissioner Horner is nodding her head as an old OMB  
5 person, young OMB person, that it's okay to do that.

6 So, that -- we're not foreclosing it. We're  
7 just trying to get the budget process out of the way.

8 VI. State Advisory Committee Report

9 CHAIRPERSON BERRY: Okay. SAC Report,  
10 Commissioner Redenbaugh, your committee. Appreciate  
11 your report. How would you like to proceed?

12 COMMISSIONER REDENBAUGH: Well, I'm not quite  
13 sure. But let me say that the task force which was  
14 made up of four commissioners, myself, Commissioners  
15 Horner, Reynoso and Lee, have made recommendations to  
16 improve -- have made recommendations to -- to  
17 articulate the process for SAC appointments.

18 Some of the recommendations go under the  
19 category of merely bringing into practice prior  
20 recommendations which I -- I think we have departed  
21 from unintentionally, and the other recommendations are  
22 new recommendations.

23 So, the four of us have looked at this, have  
24 made these recommendations. I understand there's  
25 comment from the regions and from the staff director in

1 opposition to some of these recommendations.

2 I think maybe we should consider those  
3 comments.

4 CHAIRPERSON BERRY: Okay. Do you,  
5 Commissioner Higginbotham and Vice Chair Reynoso, have  
6 a copy of this with you?

7 COMMISSIONER HIGGINBOTHAM: I'm having  
8 trouble hearing you.

9 CHAIRPERSON BERRY: Do you have these SAC  
10 appointment process recommendations before you?

11 COMMISSIONER HIGGINBOTHAM: I don't have them  
12 before me because they were in my Washington office,  
13 and I planned to, you know, be there, but because of  
14 the plane problem, I'm stuck here in the hotel.

15 I have read those. So, I think I have a  
16 recollection.

17 CHAIRPERSON BERRY: Okay. He's in the hotel.

18 VICE CHAIR REYNOSO: This is Commissioner  
19 Reynoso. I do have a copy.

20 CHAIRPERSON BERRY: You do?

21 VICE CHAIR REYNOSO: Yeah.

22 CHAIRPERSON BERRY: Okay. Well, the -- the --  
23 - basically what they do, Commissioner Higginbotham, --  
24 can you hear me now?

25 COMMISSIONER HIGGINBOTHAM: Yes, I can.

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1           CHAIRPERSON BERRY: What they do is to say  
2 that we want to verify that clear standards or criteria  
3 have been established and are being followed for  
4 assessing the SAC member packages.

5           This -- we're talking about the -- the -- the  
6 appointments to the state advisory committee, and the  
7 -- I'm trying to find my copy. I don't want that. I  
8 want the actual -- this one -- the actual report.

9           COMMISSIONER HIGGINBOTHAM: While you're  
10 looking at it, if I may, I had one or two concerns, and  
11 I guess it was a concern suggested, but it's sort of  
12 almost a presumption that because someone has served,  
13 that they will be reappointed.

14          CHAIRPERSON BERRY: Oh, yeah.

15          COMMISSIONER HIGGINBOTHAM: Am I correct?

16          CHAIRPERSON BERRY: Right. That there is --  
17 we have a policy that people who are serving, if  
18 they're not reappointed, they can appeal. If they  
19 object to not being reappointed, they can appeal to the  
20 Commission. That's -- and I had some concerns about  
21 that, too. I know it's a policy, and it's -- it's --  
22 the recommendation is to continue that, but -- and I  
23 know it was put in in the first place, I recall the  
24 discussion, to see to it that people were not removed  
25 from SACs for political or ideological or some personal



1 pique reasons, but it has resulted in some people  
2 staying on the SAC who -- whose contributions, if I  
3 might put it politely, are de minimis, but who still  
4 stay there, and if there are efforts made to get rid of  
5 them, then they, you know, feel like they have a right  
6 to be there, an entitlement, as it were, and, so, I  
7 don't know what the balance is, and whether we can do  
8 anything about that, making sure that people aren't put  
9 off for pernicious reasons, at the same time that we're  
10 able to have more flexibility.

11 But I do know the point, and Commissioner  
12 Horner wants to address it.

13 COMMISSIONER HORNER: I think perhaps one way  
14 to resolve the question is to make it clear that the  
15 policy is that we do not presume reappointment, but  
16 that if an individual very much wants to be reappointed  
17 and isn't, there is a -- a -- a channel of  
18 communication open to explain why to the Commission..

19 I think it's just a matter of a sentence or  
20 two, and we really could overcome an unacceptable  
21 presumption and still keep the channel open.

22 CHAIRPERSON BERRY: So, we would -- how would  
23 that be, if we addressed it that way? Simply made it  
24 clear that there's no presumption? Commissioner  
25 Higginbotham, can you hear me?

1                   COMMISSIONER HIGGINBOTHAM: That's no  
2 problem.

3                   CHAIRPERSON BERRY: Okay. That would be  
4 helpful.

5                   The -- so, these recommendations. One is  
6 verify the clear standards or criteria have been  
7 established and are being followed for assessing SAC  
8 member packages, and the -- the staff director and  
9 the -- the regional directors, their only comment on  
10 that, and I'm only doing this because you don't have  
11 the materials with you, I think others have them, --

12                   COMMISSIONER HIGGINBOTHAM: Then please  
13 don't.

14                   COMMISSIONER REDENBAUGH: No. I think it's  
15 very helpful to me, too.

16                   CHAIRPERSON BERRY: It's helpful to  
17 Commissioner Redenbaugh, even though he knows all the  
18 recommendations. He doesn't know the comments, I  
19 guess.

20                   The recommendation can be implemented, they  
21 say, the regional directors and the staff director, by  
22 ensuring that the AIs, the instructions, reflect the  
23 standards that are already there in the state advisory  
24 committee handbook, and, so, they think that that's --  
25 they don't really have any objections to that.

1           The second one is ensure that commissioners  
2 are provided with a specific listing of all agencies  
3 polled for suggestions of new SAC members and with  
4 responses from those agencies.

5           Right now, we are supposed to do that, but  
6 the committee believed that the information was too  
7 sketchy in terms of making sure that all sorts of  
8 sources were polled for suggestions. So, theyare  
9 making sure that we want to have a specific list of all  
10 the places that they called or talked to or whatever to  
11 get these names.

12           The staff director and the regional directors  
13 say that this is problematic. They don't much like  
14 this recommendation in that it's not always possible to  
15 know what the results of a recruitment effort are  
16 because the forms arrive with no indication of who  
17 asked the person to send it in. Further, recruitment  
18 is often targeted to the needs of the committee.

19           For example, if they need to increase a  
20 particular ethnic group or some particular  
21 representational factor, and, so, they don't seem to  
22 much like that recommendation. If -- I'm not sure it's  
23 responsive, but -- yes, Commissioner Horner?

24           COMMISSIONER HORNER: Madam Chair, I think  
25 that if there is a need to recruit from a particular

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1 ethnic group, that it's perfectly okay to express that  
2 desire and to list the groups consulted nonetheless,  
3 list them, and in order to prevent anyone's sense that  
4 only -- that it's unbalanced -- an unbalanced  
5 consultation, simply explain why the consultation  
6 appears to be unbalanced but isn't.

7 I don't understand the process. What are  
8 CCR-16 forms?

9 CHAIRPERSON BERRY: Staff director, do you  
10 know what a CCR-16 is?

11 STAFF DIRECTOR MATHEWS: When a new  
12 appointment package is given to the commissioners,  
13 there is this form summarizing the bio of the  
14 individual recommended SAC member, and then usually  
15 following that, or most often, I should say, there's a  
16 resume, but there's this form that is a summary.

17 COMMISSIONER HORNER: Well, then why -- it  
18 says it would be a problem to list the sources of  
19 recruitment because the forms arrive with no indication  
20 of who asked the person to send it in.

21 Am I to understand that a name would simply  
22 come in over the transom, a self-volunteered self-  
23 nomination? Is that what you're talking about?

24 STAFF DIRECTOR MATHEWS: Occasionally, that  
25 happens. People express interest.

1           COMMISSIONER HORNER: But surely we would  
2 consult with additional organizations, even in that  
3 circumstance, wouldn't we?

4           STAFF DIRECTOR MATHEWS: Okay. Commissioner  
5 Horner, the -- the forms themselves do not have an  
6 indication of which organization may have stimulated  
7 this form to be submitted, and that's really the point,  
8 that the regional directors cannot always -- sometimes  
9 they can, but they cannot always relate their outreach  
10 phone calls to organizations and what actually comes  
11 in.

12           Sometimes yes, sometimes no. So, that is the  
13 point trying to be made here by the comment on this  
14 recommendation.

15           COMMISSIONER HORNER: Well, I don't see that  
16 there would be any problem in saying we don't know  
17 whether this person has a sponsoring organization and  
18 no one has.

19           STAFF DIRECTOR MATHEWS: Right.

20           COMMISSIONER HORNER: I mean, in other words,  
21 it's just transparency we're after here.

22           STAFF DIRECTOR MATHEWS: Yeah.

23           CHAIRPERSON BERRY: So, it's what -- what  
24 is -- it's two separate issues. Inform the Commission  
25 what organizations were polled, and then if the person,

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1 the nominee, came from a specific organizational  
2 sponsor, then you can say that, if you know it, and if  
3 you don't, say, well, I don't know whether this came  
4 from there or wherever. So, it's two separate  
5 questions, I guess.

6 COMMISSIONER HORNER: Right.

7 CHAIRPERSON BERRY: Yes, Commissioner -- yes,  
8 Commissioner Lee?

9 COMMISSIONER LEE: I think the committee  
10 brought this up as a courtesy to the organizations or  
11 individuals who make these recommendations because  
12 often they don't hear from the commissioners of the  
13 status of the nominees.

14 So, this is just a courtesy to let them know  
15 how the process has been moving on these particular  
16 individuals or whatever. So, it's more or less a  
17 courtesy call and also to remind the -- the -- the  
18 regional office to -- when they're doing the  
19 recruitment effort, to be more broad based, and that  
20 was the purpose of this recommendation.

21 CHAIRPERSON BERRY: Yes, Commissioner George?

22 COMMISSIONER GEORGE: I believe it is still  
23 the case that when we recharter a SAC, the materials  
24 that are provided by the staff director include a list  
25 of the organizations that have been consulted to get

1 nominations for that particular SAC, right? So, we'll  
2 see that Alabama is being rechartered, and the -- I  
3 don't know -- the NAACP, the Catholic Archdiocese, so  
4 forth and so on, are listed there as people that have  
5 been concerned.

6 Now, we don't know which of the individuals  
7 being put forward for us comes from which of those  
8 organizations. That would be useful to know, but I  
9 take it we wouldn't be changing anything about the  
10 reporting of which organizations were consulted in the  
11 first place, that it would still have that reporting.

12 CHAIRPERSON BERRY: The more you ask the  
13 question, the more I'm wondering about why we have the  
14 recommendation, because we already have on the form,  
15 you just said that, and I remember that, it lists  
16 organizations that were consulted. There's somewhere  
17 on the form.

18 COMMISSIONER GEORGE: And I believe it's  
19 not -- that's not exemplary. It's exhaustive.

20 CHAIRPERSON BERRY: Right.

21 COMMISSIONER GEORGE: We're told everybody  
22 who was consulted.

23 CHAIRPERSON BERRY: So, maybe what the  
24 recommendation is, is that we're -- that the committee  
25 believes that they need to list everybody who was

1 consulted, and the committee believes that they didn't.  
2 Is that what the point is or what? Want me to do that  
3 again?

4 COMMISSIONER REDENBAUGH: No, no. I don't  
5 think it will help me focus. I think this is one of  
6 the recommendations that -- that we are recommending,  
7 that it's already -- already in place, and we're only  
8 recommending that it be followed.

9 CHAIRPERSON BERRY: Oh, I see.

10 COMMISSIONER REDENBAUGH: Is that not the  
11 case?

12 CHAIRPERSON BERRY: Oh, that's what you mean  
13 by ensure. Ensure. Oh, I see. You're saying please  
14 do what you're supposed to be doing already.

15 COMMISSIONER REDENBAUGH: Hm-hmm.

16 CHAIRPERSON BERRY: Oh, okay. All right.

17 COMMISSIONER REDENBAUGH: So, we can discuss  
18 not doing that which we've already agreed to do.

19 CHAIRPERSON BERRY: No, no, no, no, no, no.

20 COMMISSIONER REDENBAUGH: But --

21 CHAIRPERSON BERRY: All right. So, this is  
22 just to reiterate that we're supposed to do this.

23 COMMISSIONER GEORGE: I think the key thing -  
24 - I -- I-have just been reminded by Commissioner  
25 Redenbaugh's assistant, the key thing here would be



1 that the list be exhaustive rather than exemplary.

2 So, instead of saying organizations such as  
3 and then a few examples, just a list of all the  
4 organizations that were in fact consulted. That might  
5 be the change.

6 CHAIRPERSON BERRY: Well, could we -- could  
7 we say that -- that -- actually, what it is, we're  
8 supposed to give a specific listing already, and we do  
9 sometimes have them.

10 COMMISSIONER GEORGE: Sometimes.

11 CHAIRPERSON BERRY: So, maybe what we should  
12 do is just say ensure that the policy of providing us  
13 with the specific listing of all agencies polled is  
14 followed, rather than making this -- I thought you were  
15 proposing some new -- is followed. Okay. We're making  
16 sure that it's followed.

17 Yes?

18 STAFF DIRECTOR MATHEWS: The aspect of this,  
19 that the regional directors were particularly honing in  
20 on, is this last sentence in the recommendation, which  
21 says, "The packages should also state clearly whether  
22 or not those contacts have in fact yielded any actual  
23 recommendations."

24 Now, that is not something that has been  
25 routinely done.

1           CHAIRPERSON BERRY: The last sentence in the  
2 recommendation.

3           STAFF DIRECTOR MATHEWS: In the  
4 recommendation. You have my comment.

5           CHAIRPERSON BERRY: The recommendation.

6           STAFF DIRECTOR MATHEWS: I'm looking at the  
7 recommendations from the task force.

8           COMMISSIONER HORNER: Madam Chair, --

9           CHAIRPERSON BERRY: Yes, Commissioner Horner?

10          COMMISSIONER HORNER: -- I think the purpose  
11 of this is to permit the commissioners to know if a  
12 particular group or collection of groups were  
13 recommending candidates who were rejected by the staff.

14          We want to know, for instance, if some  
15 organization in some state of some consequence in the  
16 civil rights arena is proposing a candidate, and the  
17 staff is selecting an alternative candidate.

18          In other words, it's information that allows  
19 us to understand what's going on. So, we can --

20          STAFF DIRECTOR MATHEWS: That in my mind is a  
21 different aspect of the process.

22          CHAIRPERSON BERRY: In other words, it's that  
23 if the Catholic Archdiocese was contacted, and they  
24 didn't suggest anybody, --

25          COMMISSIONER HORNER: We should know that,

1 and if they did suggest somebody, --

2 CHAIRPERSON BERRY: -- they would say no  
3 recommendation suggested.

4 COMMISSIONER HORNER: And if they did suggest  
5 anybody, we should know that, too.

6 CHAIRPERSON BERRY: Right.

7 STAFF DIRECTOR MATHEWS: But that is not on  
8 here.

9 COMMISSIONER HORNER: What does that --

10 STAFF DIRECTOR MATHEWS: At least that is not  
11 my interpretation. Okay. So, I -- this is very  
12 helpful clarification, if that's what was intended.

13 COMMISSIONER GEORGE: Okay. The sentence  
14 says, "The packages should also state clearly whether  
15 or not those contacts, NAACP, Catholic Archdiocese,  
16 have in fact yielded any actual recommendations for  
17 prospective members", but I -- I think I see what the  
18 staff director's problem is.

19 It's one thing to know whether the NAACP in  
20 Alabama made the recommendation. We also need to know  
21 whether -- okay. Now we know a recommendation was  
22 made. We need to know, all right, who is the  
23 recommendee coming from that organization, and have  
24 they in fact been proposed to us for selection? Yeah?  
25 Right?

1                   COMMISSIONER HORNER: I -- I don't know  
2 whether we need to know the name of the person or  
3 whether we need only to know that such a recommendation  
4 was made.

5                   CHAIRPERSON BERRY: I don't think we need to  
6 know the second. I think if we know all the rest of  
7 it, --

8                   COMMISSIONER HORNER: I think that's --

9                   CHAIRPERSON BERRY: -- I think that's  
10 sufficient.

11                   COMMISSIONER HORNER: If we know, if we know  
12 that the NAACP of Alabama has made a recommendation,  
13 and the staff has chosen instead the recommendation of  
14 some other organization or no organization, --

15                   COMMISSIONER GEORGE: That somebody else --

16                   COMMISSIONER HORNER: -- we then know, if  
17 we're concerned that the NAACP not be ignored or over-  
18 looked, we have the opportunity of checking then and  
19 saying then, well, who was the person.

20                   COMMISSIONER GEORGE: Okay. Let me see if I  
21 have this right then. We -- we need to know whether  
22 the group made a recommendation, and we need to know  
23 whether the recommendation has been accepted. We don't  
24 need to know who the person is.

25                   CHAIRPERSON BERRY: Well, we will know

1 whether if the NAACP of Alabama made a recommendation,  
2 and the person who's being suggested is not associated  
3 with them. We'll know that because this form will  
4 say --

5 COMMISSIONER HORNER: Right.

6 CHAIRPERSON BERRY: -- all kinds of things,  
7 but we won't have any --

8 COMMISSIONER HORNER: We won't deal with this  
9 until there is a recommendation for an appointment, and  
10 as part of dealing with the recommendation for  
11 appointment, we need to know what organizations were  
12 polled, and what organizations made recommendations  
13 which were obviously rejected since we're dealing with  
14 the appointment which survived.

15 CHAIRPERSON BERRY: Which we can figure out  
16 for ourselves --

17 COMMISSIONER HORNER: Yeah.

18 CHAIRPERSON BERRY: -- from looking at the  
19 form.

20 COMMISSIONER HORNER: Inference.

21 COMMISSIONER GEORGE: I'll trust you guys.

22 CHAIRPERSON BERRY: So, with that  
23 clarification, this is the existing policy, but we're  
24 saying please follow it.

25 Now, staff director, do you understand the

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1 policy?

2 STAFF DIRECTOR MATHEWS: I understand the  
3 conversation. I am not sure this is the current  
4 policy.

5 CHAIRPERSON BERRY: It's -- it's that listed  
6 on the form as they do now in the packages, where this  
7 nominee -- the nominees' associations. There's a space  
8 for that on the form.

9 But they also put on there what organizations  
10 were contacted, and did they recommend. It will say  
11 Catholic Diocese contacted, zero or one or whatever,  
12 two recommendations. NAACP of Alabama contacted, you  
13 know, five recommendations and zero recommendations,  
14 and that's what will -- does that -- I mean if that  
15 what people are saying?

16 COMMISSIONER HORNER: And if that isn't the  
17 policy, why don't we just make that the policy?

18 CHAIRPERSON BERRY: And if for some reason  
19 they can't do that, then I mean that's what this  
20 recommendation, I think, is saying.

21 COMMISSIONER GEORGE: Okay.

22 CHAIRPERSON BERRY: Unless I've misunderstood  
23 it.

24 COMMISSIONER GEORGE: I think we are making a  
25 new policy, and I think it's a good one.

1                   STAFF DIRECTOR MATHEWS: Yes, this is a new  
2 policy.

3                   CHAIRPERSON BERRY: So that to the extent  
4 possible, this is what they would be doing.

5                   Now -- okay. So, that's now the  
6 recommendation. That's what we understand to be the  
7 recommendation.

8                   Now, the next one -- recommendation ~~is~~ that  
9 the staff director must ensure that commissioners are  
10 given the final SAC package one month before the next  
11 scheduled meeting. That is current policy. We're  
12 saying make sure that that happens. That's already the  
13 policy.

14                   COMMISSIONER GEORGE: Yeah.

15                   CHAIRPERSON BERRY: People are looking  
16 puzzled. It is the policy.

17                   Now we get to new recommendations, although  
18 one of these we just discussed turns out to be a new  
19 recommendation. Require of the staff director to  
20 provide commissioners with a status report regarding  
21 their recommendations for prospective SAC appointees.

22                   The idea is if commissioners recommend  
23 someone to be approved and appointed to the SAC, give  
24 the commissioners status reports on what is happening  
25 to theirs, and that this would be done either oral or

1 written within one month of receiving the  
2 recommendations.

3 Now, what did they say? They said, regional  
4 directors and the staff director, they're concerned  
5 about this strict one-month requirement for contacting  
6 commissioner recommendations.

7 COMMISSIONER GEORGE: This is Recommendation  
8 5?

9 CHAIRPERSON BERRY: 5. And because they --  
10 they're saying that to give them only a month to make  
11 sure that they do contact these people, consider them,  
12 interview them and so on, might interfere with their  
13 staff's regular programming duties.

14 COMMISSIONER HORNER: Madam Chair? That's  
15 not how I -- that's not how I read this, and maybe I  
16 better -- I read it that it's simply a requirement for  
17 a status report. The report might be I have not yet  
18 had time to contact this individual.

19 In other words, it's not that we're  
20 requesting that the process be accomplished in one  
21 month, simply that after one month has passed, the  
22 recommender be apprised of whether any action has been  
23 taken or not, and what that action is, and if the staff  
24 hasn't had time, no -- you know, so be it.

25 CHAIRPERSON BERRY: So that the staff,

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1       though, interpreted it in their statement to mean that  
2       they had to contact the person.

3               COMMISSIONER REDENBAUGH:  No, that was not  
4       our intention.

5               CHAIRPERSON BERRY:  So, it's not the  
6       intention of the committee, and the intention of the  
7       committee is only that they get a status report on  
8       either nothing's happened, something's happened, or  
9       whatever.

10              Recommendation Number 6.  Require the staff  
11     director to provide commissioners with an accurate  
12     statement of the authorized size of the state advisory  
13     committee under consideration, and it points out in the  
14     last meetings we have considered the size of state  
15     advisory committees, and that the sizes seem to be all  
16     over the map, and the question is, how do we figure out  
17     what size -- what is the authorized size of a SAC, and  
18     that the staff director would tell us that..

19              Now, their response is what?  This procedure  
20     can be implemented and incorporated into the  
21     administrative instruction.  Okay.

22              So, Recommendation 7.  Whenever a SAC  
23     increase is proposed, require the staff director to  
24     ensure that the package under consideration contains  
25     sufficient explanation as to why an increase in size is

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1 necessary, and it points out that when we were  
2 considering the Mississippi SAC, we had this question  
3 about the size, and we were told sometimes it's to  
4 create a better balance, and we go what balance, and  
5 what areas, and the staff says the reasons  
6 necessitating an increase in SAC membership should be  
7 reviewed. Explanations for changes can be incorporated  
8 into the SAC package.

9 So, I take it you don't object to that? That  
10 is what this says?

11 STAFF DIRECTOR MATHEWS: I do not object to  
12 that. I would just want to draw out here the  
13 consideration of what appears to me to be retaining all  
14 active, interested current SAC members. That seems to  
15 be the way the process has -- is currently being  
16 implemented, and then adding for consideration a  
17 balance which could be some younger members. It could  
18 be members of a different ethnic group.

19 But the difficulty becomes the SAC --  
20 retaining all of those characteristics and  
21 considerations within the previously-approved SAC size,  
22 and what I hear quite frequently from regional  
23 directors is that in order to balance all those  
24 variables out, there's a need to increase the SAC size  
25 or to eliminate some of the current active, interested

1 SAC members.

2 So, it's a very difficult position that they  
3 are in, and I really wanted to -- to -- to put that on  
4 the table.

5 CHAIRPERSON BERRY: So, in other words, we  
6 have created a very difficult position for them when we  
7 tell them on the one hand keep people, and they're  
8 worried about if they throw somebody off, we will be  
9 upset, and the person will appeal, and they'll be told  
10 you shouldn't have done that, but then we say add some  
11 younger members, add this, and then they say, well, how  
12 will we do this? We'll just increase the size. And,  
13 so, that we've now given them a very difficult  
14 balancing act here.

15 COMMISSIONER REDENBAUGH: Could I -- I don't  
16 think we have said retain people. In fact, we said  
17 earlier there is not a presumption of reappointment.  
18 So, I think we ought to speak to that issue.

19 What do we want to do? I don't -- I don't  
20 have a -- a preference to retain people.

21 CHAIRPERSON BERRY: Okay. Commissioner Lee?

22 COMMISSIONER LEE: I think for this  
23 recommendation, we -- we merely wanted to have some  
24 kind of an understanding when you're increasing the  
25 SAC, let's say a state like Wyoming, what is the

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1 explanation of them having this equal number of members  
2 compared to a state, say, California? What -- what is  
3 the rationale? What are the financial considerations  
4 that we all need to better understand before we approve  
5 the expansion of the SACs?

6 Merely just because you want to bring more  
7 people, eventually you may have 30-40 people who are  
8 really eager and interested in serving on a SAC, but  
9 there has got to be some kind of uniform policy of how  
10 do you expand the SAC, that you can apply uniform --

11 COMMISSIONER HIGGINBOTHAM: Commissioner Lee,  
12 could you please keep your voice up?

13 COMMISSIONER LEE: Oh, I just finished  
14 talking. So.

15 CHAIRPERSON BERRY: Well, she just said that  
16 she's concerned about when we might increase it up to  
17 30 or 40 members, unless we have some kind of more  
18 reasoned elaboration of the -- of the rationale.

19 Commissioner George?

20 COMMISSIONER GEORGE: There are costs and  
21 benefits to any policy. I for what it's worth have a  
22 very strong view about this, and I'm strongly in favor  
23 of the bias that we do have in the program toward re-  
24 appointing people, unless they haven't been showing up  
25 for meetings or they've been, you know, not -- not --

1 not pulling their fair share of the load, and -- and so  
2 forth.

3 I -- my -- my experience on the Commission  
4 leads me to worry about retaliation against SAC  
5 members, that -- that that's inappropriate, and  
6 therefore I'll be more comfortable, and I think there  
7 will be less cause for a lot of our fussing here at the  
8 Commission over SAC appointments if we leave the  
9 situation pretty much the way it is, where there is a  
10 de facto presumption of -- of reappointment but not a  
11 legal -- a legal entitlement.

12 I -- I realize that that does come with the  
13 cost that the Chairman has pointed out, but there's no  
14 perfect system here. Some things have to be traded  
15 against others, and my experience is that the prudent  
16 course here is to -- to keep things the way they are.

17 CHAIRPERSON BERRY: Now, we earlier said, I  
18 think it was Commissioner Horner who suggested this,  
19 and we all went ah-ah-ah-yes, that there should be no  
20 presumption that people are reappointed. However, they  
21 do have the right to appeal if they are not  
22 reappointed, and they feel that they should be, and,  
23 so, what we need to do is to send clearly to the  
24 regional directors, if we expect them to implement  
25 this, a signal as to what exactly we expect, and if we

1 are going to say go ahead and keep the size as it is so  
2 that we don't have problems about who was -- I mean if  
3 you worry that somebody's going to complain, and then  
4 when you have to fill in some of these other variables,  
5 we will understand when you add more people. That's  
6 one thing, up to some certain number or something. I  
7 don't know.

8 Or the presumption is you will reappoint, but  
9 just make sure you can show it was not for some, you  
10 know, reason that shouldn't have been done, some  
11 reason, then we won't complain about that either. They  
12 need to know what it is we want them to do.

13 Yes?

14 COMMISSIONER GEORGE: I interpreted  
15 Commissioner Horner's suggestion as suggesting that we  
16 make clear that there's not a de jure, a legal  
17 presumption of reappointment, but as a matter of fact,  
18 for as long as I've been on the Commission, there has  
19 been a bias in favor of reappointment in the sense that  
20 we are not starting from scratch.

21 When it's time to recharter a SAC, we know  
22 that most people will be reappointed. Some -- some  
23 won't be, some won't want to be reappointed, some will  
24 have never shown up for a meeting, and so forth, but  
25 the majority will be reappointed, and I -- I would --

1 I'm suggesting that we keep that de facto presumption,  
2 but I agree with Commissioner Horner that it shouldn't  
3 be a de juri presumption that the person has a legal  
4 vested right and is going to litigate with us about.

5 COMMISSIONER HORNER: That is the distinction  
6 I intended, and I was not clear.

7 COMMISSIONER GEORGE: Yeah. Okay.

8 CHAIRPERSON BERRY: Commissioner Anderson,  
9 and then Commissioner Redenbaugh.

10 COMMISSIONER ANDERSON: Well, we could look  
11 at it in the other way, and that is to say that one of  
12 the real benefits of the SAC system is two things.  
13 It's (1) to give citizens who are not professional  
14 government employees a term of service and experience  
15 on this SAC so that then they can go back into their  
16 community in whatever leadership role they have with a  
17 leadership ability that has been augmented because of  
18 their service and experience on the SAC.

19 The second thing it does is it brings in  
20 leaders from the community on to the SAC, and, so, you  
21 could argue that what we really ought to be thinking  
22 about in the SAC is a complete turnover --

23 CHAIRPERSON BERRY: Every time.

24 COMMISSIONER ANDERSON: -- every time,  
25 bringing all new people in, creating, you know, wave

1 after wave, maybe wave is too dramatic, but group after  
2 group of leaders who are going to go back, and at the  
3 same point, same time, give all these organizations the  
4 reasonable expectation that when we do have a  
5 reauthorization, we're not just looking for two people,  
6 and therefore, you know, they're one of 30  
7 organizations being asked to recommend for two slots,  
8 but they're now being asked to recommend for 12 slots.  
9 So, the recommendation really may result in new people  
10 coming on board.

11 What I don't want to see happen is for people  
12 who -- well, let me put it this way. I think the SACs  
13 must have a free and open exchange, and you want  
14 diversity, and you want people to speak their mind, and  
15 you don't want people looking over their shoulder  
16 wondering whether I'm not going to be reappointed if I  
17 say this or I vote this way or I do that, and that's  
18 probably an exaggerated fear where it exists, but  
19 nonetheless I think the idea that people, under our  
20 current system, they must have the ability to write in  
21 and say, look, I feel I've been unfairly treated or  
22 whatever, just so we have that safeguard.

23 But if you move in the other direction, say,  
24 look, everybody's going off, and all new people are  
25 coming on, you don't have that problem. I hope that

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1 people understand they're one-termers, and they just do  
2 the best they can.

3 CHAIRPERSON BERRY: And the attractiveness of  
4 that proposal -- that -- that -- that borders on genius  
5 there, Commissioner Anderson. The attractiveness of it  
6 is that commissioners who are concerned about  
7 representation from certain organizations or certain  
8 positions can then look not at the individual who's  
9 sitting there, but to make sure that somebody from that  
10 particular vantage point is there, and you get that  
11 kind of turnover rather than, you know, Joe Blow has  
12 got to be there every single time, and, so, it makes  
13 for an entire -- and it gives us a different mix of  
14 people to interact.

15 I mean I like it, and having gone out there  
16 now to some of these SACs, and when you go out there  
17 next week, you may think your proposal is even more  
18 attractive.

19 Do our -- do our friends on the phone have  
20 any comments on this? Is that the last recommendation?  
21 No, that's not the last one.

22 The last one is ensure that commissioners are  
23 given the opportunity to conduct a more thorough review  
24 of SAC appointment issues while addressing the need to  
25 meet SAC rechartering deadlines.

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1           What this is about is making sure that we  
2           have time to consider the -- the -- the rechartering  
3           and the appointments, and, so, this is a new procedure  
4           where we would get the package for review at least  
5           three months before the rechartering date, not a month  
6           before, but three months before rechartering. Oh,  
7           three months before rechartering. This has nothing to  
8           do with appointments one month before, and we could  
9           raise any questions.

10           Now, the regional directors say that this  
11           would impact their workload, and that they don't think  
12           this requirement is needed. If all of the other  
13           recommendations are implemented, they don't see why  
14           we'd need this one. That basically is their answer.

15           STAFF DIRECTOR MATHEWS: Madam Chair, --

16           CHAIRPERSON BERRY: Yes?

17           STAFF DIRECTOR MATHEWS: -- of all the  
18           recommendations, the one -- this is the one the  
19           regional directors felt the strongest about and  
20           expressing their concern. They stressed to me the  
21           three-month time frame and how difficult that would be  
22           for them to implement.

23           CHAIRPERSON BERRY: Commissioner Redenbaugh?

24           COMMISSIONER REDENBAUGH: As now, it's one  
25           month?

1           STAFF DIRECTOR MATHEWS: It's one month for  
2 commissioner review, yes.

3           COMMISSIONER REDENBAUGH: Well, I guess if we  
4 haven't reviewed it to our satisfaction, we can hold it  
5 over.

6           STAFF DIRECTOR MATHEWS: Right.

7           CHAIRPERSON BERRY: We can always do that.

8           STAFF DIRECTOR MATHEWS: Right.     ≡

9           COMMISSIONER GEORGE: We have done that.

10          CHAIRPERSON BERRY: We have done that in the  
11 past, yes.

12          COMMISSIONER HORNER: It would require an  
13 affirmative vote to hold it over or it requires an  
14 affirmative vote to --

15          COMMISSIONER REDENBAUGH: To accept.

16          COMMISSIONER HORNER: -- to accept the  
17 recharter? Yeah.

18          CHAIRPERSON BERRY: It would require an  
19 affirmative vote to accept the recharter.     ≡

20          COMMISSIONER REDENBAUGH: No, I'm -- that problem  
21 can be solved without a regulation.

22          CHAIRPERSON BERRY: Okay. Then we don't need  
23 Recommendation 8 at all.

24          COMMISSIONER REDENBAUGH: No. Let's delete  
25 that.

1 CHAIRPERSON BERRY: Recommendation 7, based  
2 on the discussion here, commissioners are not clear,  
3 and -- and -- and I mean they're not clear about how  
4 they want to solve this problem.

5 COMMISSIONER REDENBAUGH: I think there are  
6 two problems.

7 CHAIRPERSON BERRY: Excuse me. Commissioner  
8 Redenbaugh was speaking, and then I'll recognize you,  
9 Judge.

10 Commissioner Redenbaugh?

11 COMMISSIONER REDENBAUGH: I -- I -- I think  
12 there are two issues that are separate. Recommendation  
13 7 requires disclosure. It doesn't require or prohibit  
14 an increase in the SAC size, but disclosure and --  
15 and -- and justification.

16 So, I -- I think 7 doesn't necessarily begin  
17 to get at the problem raised by Anderson and George.  
18 It goes in a different direction. So, I mean we  
19 could -- we could agree with 7 and still not solve this  
20 -- this problem, and I'm -- I kind of like the idea of  
21 the more rapid turnover --

22 CHAIRPERSON BERRY: Hm-hmm.

23 COMMISSIONER REDENBAUGH: -- for the -- you  
24 know, for the reasons, you know, argued by Commissioner  
25 Anderson. So, anyway, that's -- I just wanted to make

1 clear that this -- this is a reporting requirement, not  
2 a size limitation.

3 CHAIRPERSON BERRY: Okay. Judge  
4 Higginbotham?

5 COMMISSIONER HIGGINBOTHAM: Well, on this  
6 whole question of de facto or de juri, I think that  
7 we've got to be very careful of concertizing people  
8 into positions. When you look at state which has  
9 three-four million citizens, I find it very, very  
10 difficult to come up with a rational explanation as to  
11 why anyone who has served a term, even having served it  
12 honorably, should have any presumptions in his or her  
13 favor.

14 I think there's a great advantage of  
15 pluralism. Organizations change over periods of time.  
16 The assigners of values change in terms of what  
17 organizations are doing.

18 So, I just prefer substantial flexibility for  
19 all this whole approach, giving someone the right to --  
20 to complain if they feel as if that -- that there's  
21 something unfair in their not being reappointed. But  
22 outside of having some alternative remedy, I just think  
23 we should be very, very careful suggesting even a de  
24 facto.

25 I mean why should there be a de facto

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1 presumption of appointment in a state where there are  
2 five million citizens, and you say that this individual  
3 is supposed to come ahead of 4,900,000 others?

4 CHAIRPERSON BERRY: Well, there may be, as  
5 Commissioner Anderson suggested, and the comment that I  
6 made afterwards, there may be a presumption that there  
7 ought to be someone with that perspective and/or even  
8 recommended by that kind of organization on the-- on  
9 the body.

10 COMMISSIONER HIGGINBOTHAM: Well, I'm not  
11 arguing with the perspective. I'm talking about the  
12 person.

13 CHAIRPERSON BERRY: Right. The particular  
14 individual.

15 COMMISSIONER HIGGINBOTHAM: The pluralism and  
16 diversity on the board then -- I mean on the -- on the  
17 committees, but I'm not for guaranteeing an individual  
18 the right to be the spokesperson.

19 CHAIRPERSON BERRY: Okay. I'm going to  
20 recognize Commissioner Horner, and then we're going to  
21 wrap this up because we have our briefing, and we -- I  
22 want to assure those who have been willing to come that  
23 this will not take long, and we don't expect you to sit  
24 out there and wait while we finish up this business.  
25 Was that what you were going to say?

1           COMMISSIONER HORNER: I was going to say  
2 that, and -- and also just to suggest that one of the  
3 concerns I think some people are feeling that we need  
4 to think about for the time when we do discuss this and  
5 decide on it, is that there's some concern that if the  
6 staff doesn't like a point of view of an individual,  
7 that the staff will selectively not wish to reappoint  
8 that individual simply because they will view that  
9 individual as not helpful to the cause at hand, and I  
10 think one of the underlying concerns here is that we  
11 prevent that from happening, but I agree, we need to  
12 discuss this another day.

13           CHAIRPERSON BERRY: Okay. And we can discuss  
14 it, keeping in mind the ideas that have been suggested  
15 here.

16           It sounds, Commissioner Redenbaugh, like most  
17 of the recommendations are agreeable to the  
18 commissioners.

19           COMMISSIONER REDENBAUGH: I'd like to put  
20 this in the form of a motion, that we adopt all but 8.

21           CHAIRPERSON BERRY: All but 8?

22           COMMISSIONER REDENBAUGH: I think 8 was the  
23 one we deleted.

24           CHAIRPERSON BERRY: Right.

25           COMMISSIONER REDENBAUGH: And that 7 be

1 understood to be a reporting requirement, not a  
2 limitation.

3 COMMISSIONER HORNER: Second.

4 COMMISSIONER ANDERSON: Point of information.

5 CHAIRPERSON BERRY: Yes, Commissioner  
6 Anderson?

7 COMMISSIONER ANDERSON: That, I take it,  
8 would include Recommendation 3 as amended by the Chair.

9 CHAIRPERSON BERRY: Which now is a new  
10 recommendation.

11 COMMISSIONER REDENBAUGH: Yeah. Yeah. Yes,  
12 I think, is the answer, and I also anticipate that we'd  
13 come back to this question of basically term limits  
14 another day.

15 CHAIRPERSON BERRY: And we would discuss that  
16 another day.

17 COMMISSIONER REDENBAUGH: Discuss that  
18 another day, and because I'm -- I'm very interested in  
19 the notion of term limits as applied to everybody but  
20 myself.

21 CHAIRPERSON BERRY: Commissioner George?

22 COMMISSIONER GEORGE: Just to clarify. My  
23 understanding is that the amendment of Recommendation  
24 3 is to the effect that the commissioners will be  
25 informed as to which organizations were consulted, and



1 whether those organizations made recommendations, and,  
2 if so, how many recommendations. We will then infer  
3 whether or not the recommendations -- any of the  
4 recommendations of a particular organization have been  
5 accepted. Have I got that right now?

6 CHAIRPERSON BERRY: That's basically it.

7 COMMISSIONER GEORGE: Yeah. Okay. Mary, is  
8 that your understanding, too?

9 STAFF DIRECTOR MATHEWS: With -- with the  
10 additional statement that the regional directors and I  
11 may not always know which recommendations trace back to  
12 which organizations were originally contacted.

13 COMMISSIONER GEORGE: But we will be told  
14 when you don't know?

15 STAFF DIRECTOR MATHEWS: To the extent we do  
16 know.

17 COMMISSIONER GEORGE: But -- but if you don't  
18 know, there will be an indication that we don't know  
19 where this --

20 STAFF DIRECTOR MATHEWS: Right, right. As  
21 long as we have that understanding, it's fine.

22 COMMISSIONER GEORGE: Okay.

23 CHAIRPERSON BERRY: Okay. Ready for the  
24 question. All in favor, indicate by saying aye.

25 (Chorus of ayes)

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1 CHAIRPERSON BERRY: Opposed?

2 (No response)

3 CHAIRPERSON BERRY: The -- it's approved  
4 unanimously.

5 The only other item we had on the agenda was  
6 the SAC report from Indiana. Is that SAC report a  
7 routine enough matter or does somebody have debating  
8 points to make?

9 COMMISSIONER GEORGE: Routine.

10 CHAIRPERSON BERRY: Okay. Then can I get a  
11 motion to approve?

12 COMMISSIONER GEORGE: So moved.

13 COMMISSIONER HORNER: Second.

14 CHAIRPERSON BERRY: All right. All in favor  
15 of approving the Indiana SAC report, indicate by saying  
16 aye.

17 (Chorus of ayes)

18 CHAIRPERSON BERRY: Opposed?

19 (No response)

20 CHAIRPERSON BERRY: Thank you. So ordered.  
21 Any future agenda items?

22 (No response)

23 CHAIRPERSON BERRY: With that, then I move --  
24 I'll entertain a motion that we adjourn this part of  
25 the meeting. I guess we recess. That's what we do.

1 We recess to go to the briefing.

2 COMMISSIONER REDENBAUGH: Or do we adjourn?

3 CHAIRPERSON BERRY: Do we adjourn? Adjourn  
4 or recess? Somebody tell me.

5 STAFF DIRECTOR MATHEWS: We adjourn, if  
6 you're done with the meeting.

7 CHAIRPERSON BERRY: Okay. We're done with  
8 the meeting. So, we adjourn. Motion to adjourn.

9 COMMISSIONER ANDERSON: So moved.

10 COMMISSIONER HORNER: Second.

11 CHAIRPERSON BERRY: It's not debatable. So,  
12 we adjourn the meeting.

13 (Whereupon, the meeting was adjourned.)

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1           Briefing on Three Strikes and You're Out - Mandatory  
2           Life Sentences After Three Felony Convictions

3           CHAIRPERSON BERRY: Okay. We'll go to the  
4 briefing. We would ask the invited guests who were so  
5 agreeable to come to this briefing on the first panel  
6 to please come forward, and we apologize for delaying  
7 you for a few minutes.

8           COMMISSIONER HIGGINBOTHAM: Madam Chair?

9           CHAIRPERSON BERRY: Yes, Judge?

10          COMMISSIONER HIGGINBOTHAM: On the briefing,  
11 I presume that we will have the tapes available?

12          CHAIRPERSON BERRY: Yes, yes, Judge  
13 Higginbotham.

14          COMMISSIONER HIGGINBOTHAM: Yeah. If I have  
15 to cut off just because we've finished the official  
16 business, I want to see if I can get a plane out of  
17 here, I'll just go through the tapes, and I'm most  
18 appreciative for this session, and I'll review the  
19 materials carefully.

20          CHAIRPERSON BERRY: All right. Thank you  
21 very much.

22          COMMISSIONER HIGGINBOTHAM: Okay. Thank you.

23          CHAIRPERSON BERRY: Let me just say that on  
24 behalf of the commissioners, I welcome all of the  
25 panelists to this Briefing on Civil Rights Implications

1 of Three Strikes and You're Out Felony Sentencing Laws,  
2 and I thank everyone for appearing today to share your  
3 information and insights with us on this important  
4 issue.

5 We're well aware that public concern over  
6 violent crime is real, that it has captured the  
7 attention of government at all levels with good reason,  
8 and that elected officials, police and the judiciary  
9 are continually looking for better ways to reduce  
10 serious crime and assure that violent criminals are  
11 caught and locked up, and we all want to be more secure  
12 in our homes and on the streets, but yet all kinds of  
13 questions have been raised in news reports and by civil  
14 rights groups about the rigid application of the three  
15 strike sentencing laws, such as the one in California  
16 recently declared unconstitutional.

17 Some claim that these laws unintentionally  
18 discriminate against certain people, in particular  
19 people of color, and various researchers, policy-makers  
20 and taxpayers ask how much crime reduction has been  
21 achieved from three strikes laws, and other people want  
22 to know whether there are alternative, more cost-  
23 effective ways to reduce serious violent felonies that  
24 do not have a disparate impact on racial minorities.

25 The Commission is very interested in this

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1 subject in terms of a lot of the work we do, and that's  
2 why we have these briefings, to inform the work, and it  
3 is intended to explore the civil rights dimensions of  
4 these and other related issues connected to three  
5 strikes sentencing, and we are glad that you were  
6 willing to come here today to help to us to learn more  
7 about it.

8 Our first briefer is the Fairfax County --  
9 Fairfax Commonwealth's Attorney, Mr. Horan, Jr. Is Mr.  
10 Horan here? He's not here?

11 Does -- he is not here. Anybody know --  
12 okay. Well, in that case, we will go to Mr. Caulkins.  
13 Mr. Caulkins is actually a professor, Professor  
14 Jonathan Caulkins, who is an Associate Professor of  
15 Operations Research and Public Policy at Carnegia  
16 Mellon University School of Public Policy, and he's  
17 also Co-Director of Rand's Drug Policy Research Center.

18 He -- his research focuses on modeling and  
19 analyzing criminal justice and drug policy  
20 interventions, and his recent research interests  
21 include estimating the effects of mandatory minimum  
22 drug sentences, analyzing the implications of  
23 alternative goals for drug policy, and comparing the  
24 cost effectiveness of various drug and crime control  
25 measures.

1 Thank you very much for coming, and please  
2 proceed, Professor Caulkins.

3 Panel 1

4 PROFESSOR CAULKINS: Thank you.

5 I'd like to add that I am a co-author of  
6 Rand's Report, "Three Strikes And You're Out: Updated  
7 Benefits and Costs of California's New Mandatory  
8 Sentencing Law". I have a copy of that report, and  
9 also of a brief summary of that, that I can leave for  
10 the Commission.

11 CHAIRPERSON BERRY: We'd very much like to  
12 have it.

13 PROFESSOR CAULKINS: In my 10 minutes, I'd  
14 like to try to do three things. The first is to  
15 summarize the principle findings of that report. The  
16 second is to discuss a few insights the project team  
17 obtained through conducting the study, and, third, to  
18 make two comments about racial disproportionality in  
19 sentences under that law.

20 The principle finding of the Rand study was a  
21 prediction that if the California three strikes law  
22 were fully implemented, and I do stress the "if", then  
23 the law would have both a substantial impact on serious  
24 and violent crime in California and would cost  
25 California taxpayers dearly.

1           More specifically, we predicted that over  
2 time, the law would lead to a 28 percent reduction in  
3 serious and violent crime committed by adults, and it  
4 would cost an average of \$5.5 billion a year. If one  
5 divides the \$5.5 billion a year by the roughly 340,000  
6 serious and violent crimes averted per year, it works  
7 out to be about \$16,000 per serious or violent crime  
8 averted.

9           We went on to predict that one way or  
10 another, the law would not be fully implemented. \$5.5  
11 billion is an enormous price tag, even for a state as  
12 large as California.

13           I don't have time to detail the methodology  
14 by any means, but very briefly, focused on the  
15 incapacitative benefits of incarceration, that is the  
16 belief that incarcerating criminals prevents them from  
17 committing crimes against members of the general public  
18 while they're behind bars. It largely ignored the  
19 possibility of deterrence, rehabilitation, replacement  
20 and crimino-genetic effects of incarceration or, more  
21 precisely, it assumed that some of those factors tended  
22 to offset each other, leading to incapacitation as the  
23 dominant effect.

24           Through the course of conducting that study,  
25 we obtained a number of interesting insights, of which



1 I'll mention three this morning. The first is that  
2 it's almost nonsensical to talk about the effects of  
3 three strike laws in general. Their effects, both  
4 positive and negative, depend enormously on how the  
5 laws are written, particularly with regard to what  
6 violations count as strikes and/or trigger other  
7 provisions of the law.

8 For instance, laws that are highly targeted  
9 can be much more cost effective than those that cast a  
10 broader net.

11 A second insight is that the costs associated  
12 with incapacitation, particularly prison, are really  
13 the dominant costs of these laws to the taxpayers.  
14 They can certainly clog courts, and they can certainly  
15 drive up judicial costs dramatically in percentage  
16 terms, but to put it very simply, multiple years in  
17 prison cost a lot more than a trial.

18 So, from the taxpayer's perspective, the  
19 dominant cost comes from the incapacitation --  
20 incarceration, rather.

21 The third insight is that with California's  
22 three strikes law, the third strike provisions are not  
23 responsible for the majority of either the costs or the  
24 reductions in crime. That may sound very odd. You  
25 might think that the third-strike provisions are at the

1 heart of the law and would be responsible for all of  
2 its impact, but the California bill included other  
3 important provisions. Doubling sentences after  
4 conviction for the first felony, serious felony, I  
5 should say, eliminating probation, and cutting back on  
6 good time in a way very similar to the so-called Truth-  
7 in-Sentencing laws.

8 We estimated that a, quote unquote, second  
9 strike only version of California's three strike law,  
10 one that omitted the third strike 25 years to life  
11 sentences would achieve 85 percent of the crime  
12 prevention benefits and cost 75 percent as much as the  
13 full package itself.

14 Finally, I'd like to make two comments about  
15 the law and racial disproportionality in sentencing.  
16 These comments are not based directly on the report and  
17 hence are attributable to me, not to my co-authors and  
18 certainly not to Rand as an institution.

19 The report didn't even address racial  
20 disproportionality in sentencing. It focused on the  
21 crime reduction impact, and the cost to the taxpayers.

22 The first of these two comments is that I'm  
23 confident that the additional prison year sentence  
24 under the three strikes law will fall  
25 disproportionately on minorities relative to minority

1 representation in California's population.

2 Such disproportionality also pertained under  
3 the sentencing system that was in place before this  
4 law, and it would likely be true for any of a wide  
5 range of sentencing regimens in no small part because  
6 minorities are arrested and convicted at rates which  
7 are highly disproportionate to the minority share of  
8 the population, both in California and in the nation  
9 more generally.

10 So, in discussing racial disproportionately  
11 in sentencing with respect to a three strikes law or  
12 any sentencing reform, I think it's important to ask  
13 compared to what? There's no one reference. So, I'm  
14 not going to argue that there's one reference that's  
15 the appropriate one, but my appeal is simply that any  
16 analysis should explicitly identify what the base case  
17 or alternative is to which the law in question is being  
18 compared with this regard.

19 The second comment is that I'd like to say a  
20 few words about sentences for drug offenders under  
21 California's three strikes law, and I preface that by  
22 pointing out that not only are minorities arrested for  
23 drug offenses at a rate which is disproportionate to  
24 minority share of the general population, but also at a  
25 rate which is disproportionate to minority share in the

1 population of people who have used an illicit drug in  
2 the last 12 months.

3 With rare exceptions, such as selling drugs  
4 to a minor, drug law violations do not meet  
5 California's statutory definition of a serious or  
6 violent crime. So, they don't count as strikes.

7 However, when someone with a strike already  
8 is convicted of a drug law violation, they're not  
9 eligible for probation. Their sentence is doubled, and  
10 good time is substantially limited.

11 Likewise, although in the California law, the  
12 first two strikes have to be serious or violent  
13 felonies as defined in California statute, the third  
14 strike can be any felony, including a drug felony, and  
15 in fact, there are some other separate statutes which  
16 promote, quote unquote, a misdemeanor conviction to be  
17 like a felony conviction.

18 So, there are cases in which even a mis-  
19 demeanor drug law violation can count as a third strike  
20 and hence trigger the 25 year to life sentence.

21 We know a fair amount about how incarcerating  
22 drug offenders for long sentences affects drug use,  
23 drug prices, spending on drugs, and somewhat less  
24 precisely the impact on drug-related crime.

25 The answer of the impact of incarcerating

1 drug sellers on crime depends on a variety of  
2 parameters describing who it is exactly that you're  
3 incarcerating and a variety of factors related to the  
4 incarceration. What went on in the arrest, what  
5 quantity of drugs were seized and so on.

6 So, there's no single number of crimes  
7 averted per year incarceration for a drug offender, but  
8 in general, such incarcerations are not as cost<sup>ly</sup>  
9 effective as the other components of this California  
10 three strikes law, and I could elaborate on reasons why  
11 during the question and answer period.

12 So, one might conclude that a reasonable  
13 recommendation is that drug offenses be excluded from  
14 these laws. For every recommendation, there are  
15 certainly exceptions, but if the goal is to control  
16 serious and violent crime, meting out long sentences to  
17 drug offenders is rarely a cost effective way of  
18 achieving that goal.

19 Furthermore, excluding drug law violations<sup>---</sup>  
20 from three strikes laws would ameliorate at least  
21 partially some of the racial disproportionality in the  
22 burden of sentencing generated by those three strikes  
23 laws.

24 CHAIRPERSON BERRY: Interesting. Thank you  
25 very much.

1 I wanted to remind Commissioner Redenbaugh, I  
2 don't know if he heard this, that you said that the  
3 three strikes you're out laws cause a 28 percent  
4 reduction in serious crime, but the cost was \$5.5  
5 billion, which worked out to \$16,000 for crime, is that  
6 right?

7 PROFESSOR CAULKINS: I'd like to split one  
8 hair. It was a 28 percent reduction in adult crime.  
9 The three strikes law really doesn't affect crime by  
10 juveniles. If you factor in juveniles, it would only  
11 be about a 22 percent reduction in total crime, but 28  
12 percent reduction in adult crime.

13 CHAIRPERSON BERRY: And how many dollars?

14 PROFESSOR CAULKINS: 5.5 billion was our  
15 estimate.

16 CHAIRPERSON BERRY: Works out to about --

17 PROFESSOR CAULKINS: \$16,000 per serious or  
18 violent crime averted.

19 COMMISSIONER REDENBAUGH: Yeah. Thank you  
20 for that.

21 CHAIRPERSON BERRY: He's always interested in  
22 numbers. So, that's why I -- okay. Thank you very  
23 much, and we will get to the questions as soon as we've  
24 had our other presenter.

25 Mr. Horan is not here yet because, as the

1 prosecutor, he happens to be in court.

2 Mr. James Wootton is President of Safe  
3 Streets Alliance, which he founded as a national  
4 organization to reduce violent crime. Most recently,  
5 the Alliance has focused on building support for truth-  
6 in-sentencing, requiring that convicts serve at least  
7 85 percent of their sentences, and Mr. Wootton helped  
8 draft a truth-in-sentencing constitutional amendment  
9 that was sponsored in the Congress and approved by the  
10 House 377 to 50 in April.

11 He was Deputy Administrator of the Justice  
12 Department Office of Juvenile Justice and Delinquency  
13 from 1983 to 1986, and helped create the National  
14 Center for Missing and Exploited Children.

15 Thank you very much for being with us.

16 MR. WOOTTON: Thank you, and thank you for  
17 having me.

18 I want to start out by saying that when I was  
19 asked to speak, I -- I said that our organization  
20 basically did not take a position on three strikes and  
21 you're out because our main focus has been on truth-in-  
22 sentencing, and I was interested to hear Professor  
23 Caulkins say that the elements of the three strikes law  
24 in California had the greatest crime effect included  
25 the truth-in-sentencing effects that took place even

1 before the third strike, which to some of us who have  
2 been involved in this have wondered at the notion that  
3 you wait until the third strike to impose the entire  
4 sentence because the main goal, it seems to me, of the  
5 justice system is to do justice, and all of the other  
6 goals are corollaries to that or ancillary to that, and  
7 -- and they're also included in the -- discounted in  
8 the Caulkins study or the Rand study, which is the  
9 rehabilitative effect, the deterrence effect, of doing  
10 justice.

11 And, so, the question, I think, that society  
12 is -- is grappling with in -- in the face of what they  
13 see as the explosion of violent crime, which I want to  
14 remind everybody is up over 500 percent since 1960, it  
15 may be down slightly for adults in the last couple of  
16 years, but it is -- it is also -- we're also facing the  
17 increase in the -- in the homicide rate for juveniles.

18 But we are in an environment in which we have  
19 accepted a level of violence in our society that we  
20 would not have contemplated in the early '60s, and we  
21 went from 1960 to having about 750 people in prison for  
22 every 1,000 violent crimes to in 1980 having about 220  
23 people in prison for every 1,000 violent crimes, and  
24 during the '80s, the prison building activity that went  
25 on actually increased the number of people in prison to



1 about 440 people in prison, and at that point, the  
2 steep rise in violent crime was arrested, and we've  
3 seen a slight decrease in violent crime.

4 Since I associate myself with the findings of  
5 the Rand Corporation, that there would be a substantial  
6 reduction at some cost, I would like to say something  
7 about the cost issue.

8 Our estimate is that for every robber who is  
9 taken off the street, that you are going to save for  
10 that robber that you've taken off the street about  
11 \$550,000 a year, and the way we arrive at that is that  
12 another Rand study found that a robber on a self-report  
13 basis commits between 60 and 62 robberies a year.

14 If you take the 60 robberies a year and  
15 multiply that times about a \$12,000 cost per robbery,  
16 you come up with about \$500-550,000 a year that's saved  
17 by keeping that robber off the street.

18 Now, if the cost is \$16,000 per serious and  
19 violent crime, and we're not comparing apples and  
20 apples here, I understand that, so the -- we would be  
21 conceivably losing in a cost benefit analysis \$4,000 a  
22 year if you implemented the full three strikes.

23 You might be willing to lose that, however,  
24 if you thought that doing justice as opposed to the  
25 cost benefit or the sort of pragmatic effect of keeping

1 people in prison was worth doing that.

2 But then we have to get to the question of  
3 justice, and the perception of justice, and the -- and  
4 the -- and -- and my observation of the debate with  
5 regard to the disparate impact of changes in sentencing  
6 law on racial minorities is that the question to be  
7 asked isn't whether there's a disparate impact, but  
8 whether or not there is in fact a greater amount of  
9 crime occurring in the minority communities for which  
10 it would be appropriate that there be a disparate  
11 impact.

12 And there have been a number of studies that  
13 have tried to address this in different ways. The --  
14 the most, I think, persuasive is a study that was done  
15 by the Justice Department in -- in a victim report  
16 study in which the victims were asked whether or not  
17 their assailant was of a certain minority, and the  
18 prediction, based on that study, was that the assailant  
19 was a black about 50 percent of the time, and that is  
20 about the proportion of the people in -- of the  
21 incarcerated individuals who are black in the system  
22 today.

23 The other -- the other observation that I  
24 make of a statistical nature is that the homicide --  
25 the risk of homicide between blacks versus whites in

1 this country is about one in 30 black men is going to  
2 be the victim of a homicide, about 1 in 278 white men  
3 are going to be the victim of a homicide, and about 90  
4 percent of the victims of black assailants are black,  
5 and therefore again there is an indicator, not an  
6 absolute proof, that there is a disproportionate amount  
7 of violent crime occurring in the black community.

8           There have been other studies that indicate  
9 -- and this is a very tough societal decision, and it's  
10 one that we're being pushed to because of the wave of  
11 violent crime, is that the -- are we going to reserve  
12 prison space for only violent offenders versus white  
13 collar offenders or other types of non-violent  
14 offenders, and that's where people are being pushed,  
15 and therefore is it more just to have prison sentences  
16 only for violent offenders, and the violent crimes are  
17 being committed disproportionately apparently by  
18 minorities, or should we in order to maintain a sense  
19 of justice across the system build enough prisons so  
20 that violent and non-violent offenders receive  
21 sanctions that are proportionate to their crime, even  
22 though they may not both be seen as an immediate danger  
23 to the community which the incapacitation effect of the  
24 system would indicate or normally be aimed at?

25           I'll say one final thing about this selective

1       incapacitation issue, and the Rand Corporation are the  
2       people who sort of broke the ground on this, but it was  
3       based on a study that was done by Marvin Wolfgang, who  
4       was a professor at the University of Pennsylvania, and  
5       everybody knows these statistics today, but they're  
6       probably worth reviewing to understand what the public  
7       policy goal is that's at stake.

8                He did a study of a cohort of people who were  
9       born in 1946. So, this was well before there was any  
10      sense of breakdown of the family or any sense that this  
11      was all taking place in minority communities or inner-  
12      city or anything like that, and the birth cohort in  
13      Philadelphia in 1946 was found to have -- be divided  
14      roughly and most importantly into two sections.

15               Seven percent, six to seven percent of that  
16      birth cohort was responsible for 60 to 70 percent of  
17      the serious crime. It was responsible for 75 percent,  
18      I think, of rapes and robberies, and responsible for  
19      virtually all of the murders.

20               So, this seven percent got identified as the  
21      high crime part of the distribution within that cohort,  
22      and, so, the people in the -- in the criminal justice  
23      world started saying to themselves, perhaps if we could  
24      concentrate on that seven percent and get those seven  
25      percent off the street, we'd have the greatest crime

1 control effect by getting that seven percent off the  
2 street.

3 The -- the early career criminal activities  
4 and the enhancements which were the precursors of the  
5 enhancements that now are labelled three strikes and  
6 you're out were again an attempt to get at that high  
7 rate offender population and get those high rate  
8 offenders off the street, having -- making the best use  
9 of the police and prisons and courts and all the costly  
10 resources.

11 So that the initial recommendation or at  
12 least observation of Rand in selective incapacitation  
13 is that you would have the greatest crime control  
14 effect by focusing on those people.

15 Well, there's a couple problems with that,  
16 and Peter Greenwood, who was one of the original  
17 authors of that, has noted that one of the things you  
18 have to do is you have to be in the business of  
19 predicting or making a decision on your incarceration  
20 decision by predicting that the person you're  
21 incarcerating is going to continue to offend and by  
22 taking them off the street, you're -- you're preventing  
23 the offending of who you're predicting is going to  
24 offend, and that is a very popular notion.

25 People like to think that you're having these

1 crime control effects by taking the potential future  
2 offender off the street.

3 My problem with that, and it's my problem,  
4 frankly, with the arguments that the death penalty is a  
5 deterrent, is that if you are using those kinds of  
6 arguments, you could justify taking a whole host of  
7 people off the street, and you would then stop taking  
8 them off the street only at the point that you decide  
9 that this was -- you know, that your cost of doing this  
10 was greater than the crime control effect that you're  
11 having.

12 I would like to emphasize we have to take --  
13 we can only punish people based on the crimes that  
14 they've committed, and maybe in the past crimes,  
15 they've committed crimes that require enhanced  
16 sentencing based on the past crimes that they've  
17 committed, but you're still doing it on a justice  
18 basis, not a kind of scientific determinism basis,  
19 which I think could be -- you know, lead to a lot of -  
20 pernicious kinds of outcome, and I'll -- and I'll say  
21 one of the kinds of attempts that's been made to narrow  
22 the scope of the people who get this selective  
23 incapacitation is the civil commitments statute of  
24 Washington State.

25 They decided that they wanted to declare

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1 people to be a sex offender and therefore commit them  
2 civilly again, and then a civil standard about whether  
3 they would be released.

4           Again, it was an attempt to narrow the  
5 population, so the cost was less, and the crime control  
6 benefit was the greatest.

7           I disagreed with the decision in California  
8 as to making the third strike a felony as opposed to a  
9 violent felony. I thought it was over-inclusive. I  
10 thought it would have a greater cost than it would in  
11 terms of a benefit.

12           I'm interested in the -- the notion that the  
13 third strike being a drug felony would perhaps have  
14 that same effect. It would be over-inclusive without  
15 having an appropriate crime control benefit.

16           I will say I think that the voters of  
17 California probably are feeling a certain level of  
18 frustration now with the Supreme Court out there saying  
19 that there is no legislatively-imposed scheme that  
20 could take away the discretion of the courts to decide  
21 whether or not to count previous strikes, and I think  
22 that there's going to be some further sorting out of  
23 what the -- whether or not that is the constitutional  
24 limit of the legislative power to tie the hands of the  
25 court, which would go across a full range of mandatory

1 sentences and maybe range of sentences generally.

2 But on balance, my -- my -- my concern is  
3 that we create in this country a sense that the  
4 sentences that are being meted out are based on  
5 individual justice being done, and that the support for  
6 the justice system is not that it is a social  
7 experiment that is using cost benefit analysis to  
8 decide how big a part of a certain potential population  
9 we're going to lock up, but, instead, it is one where  
10 people have a sense that when they come before the bar  
11 of justice, that the victims and the defendant are  
12 going to be given individual justice.

13 I want to make one last observation, and that  
14 is that I'm -- I'm very concerned about the -- the  
15 perception that a whole segment of the population is at  
16 risk of becoming violent offenders, and by that, I mean  
17 the young black male population.

18 I think that a stereotype is developed and  
19 has been to some extent encouraged by well-meaning  
20 people who think this is a way to encourage resources  
21 being spent on that population, and, so, the -- the  
22 argument is that if we're going to reduce crime in that  
23 population, we want to make sure that we spend more  
24 money on prevention programs or programs that we can  
25 style as crime prevention programs.



1           And I would urge people to make their case  
2 for social programs to that segment of the population,  
3 not on the basis that every one of those young men is  
4 at risk of becoming a -- what we would call a serious  
5 habitual offender, because most of the people in that  
6 population are good, you know, law-abiding, excuse me,  
7 young people who have -- who are just as much the  
8 victims of the serious habitual offenders in their  
9 midst as anybody. They are more the victims than  
10 anybody else, and the -- all our studies show that  
11 Marvin Wolfgang was right, although it's even a  
12 narrower population, 94 percent of the young people who  
13 come in contact with the juvenile justice system never  
14 come back. Four percent come back habitually. It's  
15 only two percent -- I mean four percent come back on a  
16 regular basis. Two percent come back habitually.

17           It's that two percent who are responsible for  
18 the most serious and violent crime among the seven  
19 percent, and those are the people who most of the  
20 community wants to see identified and either their  
21 criminal behavior suppressed by better prevention  
22 programs or law enforcement or, if that doesn't work,  
23 for them to be removed from the community.

24           So, I think that there is a danger today of  
25 stereotyping the offenders and -- and not supporting

1 the law enforcement activities that will make that  
2 whole population less at risk of being victims of  
3 crime.

4 CHAIRPERSON BERRY: Okay. Thank you very  
5 much, both of you.

6 Any of the commissioners have questions for  
7 either one of the panelists? Commissioner Redenbaugh?

8 COMMISSIONER REDENBAUGH: Yeah. I'll start  
9 with Dr. Caulkins. The -- and I apologize for missing  
10 the early part of what you said, but I appreciated the  
11 Chair including me with an update.

12 The 28 percent reduction in violent crime,  
13 how closely can you -- can you estimate causality  
14 between that and the changes in laws, particularly  
15 three strikes and truth-in-sentencing?

16 PROFESSOR CAULKINS: I'm not sure exactly  
17 what you're asking.

18 COMMISSIONER REDENBAUGH: Well, you spoke  
19 about the 28 percent reduction in violent crime. Let  
20 me -- that was over what time period?

21 PROFESSOR CAULKINS: That's sort of a steady  
22 state result. The impact is less in the first few  
23 years, of course, in part because many of the people  
24 who you incarcerate for long sentences would have in  
25 the absence of the law been incarcerated for a short

1 sentence anyhow.

2 So, for the first years, the effect is  
3 smaller, but it reaches that within a half dozen years  
4 or so.

5 COMMISSIONER REDENBAUGH: And -- and when did  
6 this law go into effect?

7 PROFESSOR CAULKINS: It was passed in March  
8 of 1994.

9 COMMISSIONER REDENBAUGH: '94. So, the 28  
10 percent is a prospective?

11 PROFESSOR CAULKINS: Correct.

12 COMMISSIONER REDENBAUGH: So, this is a --

13 PROFESSOR CAULKINS: Literally, it's an  
14 average reduction over a 20-year time horizon, but by  
15 the time you get out to five or six years, it looks a  
16 lot like the average.

17 COMMISSIONER REDENBAUGH: Hm-hmm. Okay.

18 CHAIRPERSON BERRY: Commissioner Horner?

19 COMMISSIONER HORNER: First, I'd like to ask  
20 Mr. Wootton if you have a written version of your  
21 remarks or something that would contain much of the  
22 same information.

23 MR. WOOTTON: Yes, and I'd be glad to provide  
24 it.

25 COMMISSIONER HORNER: Would you provide it,

1 please? Thank you. Because there was a lot in there  
2 that I had never heard or read, especially the figures  
3 at the end.

4 You used a figure of 500 -- I know that  
5 your -- your argument is, and I agree with it fully,  
6 that justice is the primary consideration, but I do  
7 have an interest in the economic consequences of crime,  
8 and the figure of \$550,000 a-year saved for each robber  
9 taken off the street -- do you have any figures that  
10 would give us information on the suppression of  
11 economic activity because of the fear of crime?

12 I'm just thinking, I had an armed robbery a  
13 block from my house last week. Last night, I decided  
14 not to go out and spend \$20 at the grocery store  
15 nearby, and boarded-up windows are beginning to appear  
16 in my segment where I usually shop on Connecticut  
17 Avenue.

18 Is there any way to know whether we would  
19 have increases in economic activity disproportionate to  
20 the costs of suppression of street crime?

21 MR. WOOTTON: There have been some studies,  
22 and I'd be glad to share them with you.

23 COMMISSIONER HORNER: Can you tell me in some  
24 whether there is a perceptible correlation or a -- I  
25 should say a demonstrated correlation between street

1 crime and suppression of economic activity on those  
2 streets or not?

3 MR. WOOTTON: Yes, there is.

4 COMMISSIONER HORNER: Okay.

5 MR. WOOTTON: And -- and -- and a fairly  
6 growing body of literature is trying to address that,  
7 and I'd be glad to share that.

8 COMMISSIONER HORNER: Okay. Thank you.

9 CHAIRPERSON BERRY: Commissioner Anderson?

10 COMMISSIONER ANDERSON: Yes, thank you.

11 I have a couple of quick questions. First,  
12 you said the law went into effect in '94. So, in fact,  
13 the effect of it, we're not going to see for a number  
14 of years. So, people who say that it has X effect or  
15 it has no effect, really we're going to have to wait a  
16 little while.

17 PROFESSOR CAULKINS: Some of the provisions  
18 will have effect quickly. For instance, the  
19 elimination of probation will have an effect very  
20 quickly because if, under the old law, you would have  
21 left somebody out on probation, but with the new law,  
22 they serve time, that takes effect very quickly.

23 The impact of the third strike 25 year to  
24 life sentences, that piece of it doesn't take effect  
25 very quickly because most of those people would have

1 served some amount of time, more than a year or two  
2 under the old law.

3 So, it comes into effect in phases in some  
4 sense, and in the first year or two, you would expect  
5 impacts of like five or eight percent reductions.

6 COMMISSIONER ANDERSON: Have you seen that  
7 kind of effect?

8 PROFESSOR CAULKINS: That -- that is about  
9 the size of the directions in California, which may be  
10 attributable to the three strikes law, although Paul  
11 Greenwood often says it's truly remarkable that  
12 California's three strikes law has had a commensurate  
13 effect in all 50 states simultaneously, that there's a  
14 national trend going on at the same time, and sorting  
15 out what is national trend because of other phenomenon  
16 are going on and what is attributable to the law is not  
17 possible.

18 COMMISSIONER ANDERSON: Now, I heard the  
19 other day that someone was contending that nine out of  
20 10 violent crimes are committed by individuals between  
21 the ages of, say, 20 and 40, and that when you get plus  
22 40 in age, it turns out to be roughly one out of 10.

23 Now, I don't know whether that's accurate or  
24 not, but they were using that figure to argue that  
25 what's really essential in the three strikes provision

1 is the second strike, which usually comes into effect  
2 in the early 20s or late 20s, and therefore by doubling  
3 the sentence at that point, you take individuals out of  
4 that high-risk 20 to 40 age bracket and release them in  
5 their 40s or later, and that's where the very important  
6 effect is, but that would seem to be consistent with  
7 your findings.

8 PROFESSOR CAULKINS: Yes, I actually would  
9 have expected the nine out of 10 to have had to go back  
10 to include some of the teenage years to be more like 12  
11 to 40, but your basic point that older people commit  
12 less crime, especially the less violent crime, is  
13 absolutely true, and therefore very long sentences have  
14 less preventive effect during those out years because  
15 the person very possibly would not have been committing  
16 crime even if they did not -- were not kept in prison  
17 as long.

18 That is something that we consider, and it is  
19 one of the reasons why the three strikes law is less  
20 cost effective than some alternatives that we looked at  
21 that stress more certainty of sentences and moderate  
22 length sentences rather than extremely long sentences  
23 for some people.

24 COMMISSIONER ANDERSON: I'd like to ask Mr.  
25 Wootton just a final question, and to begin by saying I

1 agree with you, as I understand you to say, that  
2 justice ought to be the primary rationale for the  
3 criminal justice system, not necessarily deterrence or  
4 rehabilitation or predictability.

5 Given that, are we not seeing in the third  
6 strike issue an indirect public argument as to what a  
7 just sentence is or are we seeing something very much  
8 different?

9 MR. WOOTTON: You know, it's funny, I spoke  
10 before the American Bar Association, and I said to them  
11 that they should embrace truth-in-sentencing or they're  
12 going to get mandatory sentences, and I think that the  
13 public's perception is that -- that the sentence given  
14 at trial won't be served, however much the perception  
15 is that that time that the sentence given might --  
16 might have been a just sentence, and that this debate  
17 has been largely driven by some very high profile  
18 anecdotes, and the three that I cite most regularly are  
19 the tourist murders in Florida, the murder of Michael  
20 Jordan's father, and the murder of Polly Klass, and the  
21 Polly Klass murder, I think, had a fairly significant  
22 impact on the three strikes referendum in California,  
23 although it wasn't necessarily Polly's father who was  
24 leading that effort.

25 I think that -- I was going to say the



1 interesting thing about the -- the taking this beyond  
2 the crime prone years is that I think there's a  
3 perception that justice is only served by taking this  
4 beyond the crime prone years, that the crime control  
5 effect is -- is only indirectly driving the public  
6 demand for the longer sentences, that the -- the -- the  
7 cases that get the -- the high profile are cases where  
8 people feel like the person should get the death  
9 penalty or should go to prison for life, and -- and I  
10 think that there's a -- a perception that the -- that  
11 life without parole, and there's been a number of  
12 fairly again high profile cases where people got life  
13 without parole, it was commuted, they were released,  
14 they committed, you know, some horrible crimes upon  
15 being released, that the more the system's hands could  
16 be tied to follow through on what it would take to be a  
17 just sentence in the beginning are good things.

18           The problem is in the current environment,  
19 and we're a group that pushes for truth-in-sentencing.  
20 We don't push for mandatory minimums, and we don't push  
21 for three strikes, and we don't take a position on the  
22 death penalty, is that there is a need to have a  
23 rational trustworthy alternative to overly punitive  
24 sentences being mandated because of a lack of trust in  
25 the system, and we get, as you can imagine, we look at

1 the press clips from around the country from various  
2 things that happen, but in some states, you'll get  
3 juries sentencing people to 500 years in prison in the  
4 hope that they'll serve 10 or 15, and, so, I think that  
5 the -- the debate would be rationalized significantly  
6 if there got to be some faith that what -- that there  
7 was a higher correlation between what the people that  
8 represent, their legislators, wanted to see as  
9 punishment, and what actually occurred in the justice  
10 system.

11 So, I think that there's a lot of reaction to  
12 that, and that -- and some could describe it as an  
13 over-reaction. My sense is, as I think Peter and you  
14 all have -- have kind of alluded to, is that there are  
15 going to be corrective mechanisms within the system to  
16 push us to something that is perhaps more rational than  
17 what's happening in the debate today.

18 COMMISSIONER ANDERSON: Thank you.

19 CHAIRPERSON BERRY: Commissioner Lee?

20 COMMISSIONER LEE: Professor Caulkins, in  
21 despite of the California Supreme Court decision last  
22 week, do you have any projection, let's say, within the  
23 next five or 10 years what the prison population is  
24 going to be because of three strikes?

25 PROFESSOR CAULKINS: We have projections of

1 what would happen if the law were fully implemented,  
2 and --

3 COMMISSIONER LEE: And what would --

4 PROFESSOR CAULKINS: -- I didn't review the  
5 numbers before coming here, but it's a more than  
6 doubling.

7 It's very hard to predict what will actually  
8 happen. The state supreme court ruled that judges  
9 could discount strikes, and then Tuesday of this week,  
10 the state assembly passed a law that said no -- no.  
11 I'm sorry. Passed a bill that said not in the case in  
12 which the person has been previously convicted of a  
13 violent felony in which the third strike is either  
14 serious or violence or one other situation --

15 COMMISSIONER HORNER: Or been released from  
16 prison within the last five years.

17 PROFESSOR CAULKINS: Thank you. Which is now  
18 going to go to the Senate and who knows how the Senate  
19 will -- will handle that.

20 We also have an impression that something  
21 like 40 percent of cases in which prosecutors could  
22 pursue the third strike 25 years to life, they don't in  
23 one form or another. So, there's the whole world of  
24 prosecutorial discretion, whereas the court case in the  
25 assembly bill addressed judicial discretion.

1           There's also a scenario which is that the  
2 state doesn't build enough prisons to keep up with  
3 this, and there may be the possibility of a federal  
4 judge taking over the California prison system because  
5 of over-crowding.

6           There are a lot of different scenarios. How  
7 it actually plays out is very hard to predict. We can  
8 only say what would happen if things went through as  
9 the -- as if the law were going to be fully  
10 implemented.

11           CHAIRPERSON BERRY: If I understood -- yes,  
12 Commissioner Redenbaugh?

13           COMMISSIONER REDENBAUGH: Just a follow-up on  
14 that. What assumptions did you make about the -- the  
15 change of behaviors?

16           PROFESSOR CAULKINS: On the part of?

17           COMMISSIONER REDENBAUGH: Potential  
18 criminals.

19           PROFESSOR CAULKINS: Essentially none. The  
20 motivation for that is that there's a large literature  
21 on deterrence and trying to empirically observe  
22 instances in which punishment has been enhanced and --  
23 and there's been a response on the part of criminals.

24           - It would take a long time to adequately  
25 summarize it, but in very short summary, you really

1 don't see much empirical evidence of deterrence.

2 This is a different law. This is a much more  
3 highly-publicized, much more draconian law. To the  
4 extent that it does succeed in deterring criminals,  
5 then it could have effects more positive than -- than  
6 what we projected.

7 COMMISSIONER REDENBAUGH: Is it thought that  
8 if a career criminal had two strikes and was in the two  
9 strike position, they might leave California?

10 PROFESSOR CAULKINS: It's talked about a lot.  
11 There are -- you get great anecdotes about interviews  
12 with two strike felons who say exactly that, that  
13 they're going to leave.

14 I don't think that anyone has come up with a  
15 serious estimate of how much of that happens, nor would  
16 I -- I'd be skeptical that anyone could. That's  
17 obviously very difficult thing to -- to count or to  
18 measure.

19 COMMISSIONER REDENBAUGH: Okay. Thank you.

20 CHAIRPERSON BERRY: What has been the -- what  
21 has been the history of sentencing reforms and changes  
22 on deterring criminals? Do -- are most criminals  
23 deterred by the prospect of whatever sentence they -- I  
24 mean what is the history of -- what -- what -- what  
25 does the literature show in terms of if you change the

1 sentence to X, Y or Z, over time, I mean?

2 I must confess to you that I teach a course  
3 in which I have to read all this literature. So, I  
4 just want to make sure I haven't missed something.

5 But what has been the impact historically of  
6 sentencing changes on deterring criminals from --  
7 particular criminals from engaging in certain kinds of  
8 offenses, to your knowledge? Either one of you.

9 PROFESSOR CAULKINS: My summary of the  
10 literature would be it is mixed, inconclusive, and it's  
11 very hard to come up with what you would consider to be  
12 strong scientific evidence.

13 CHAIRPERSON BERRY: Right. But what does the  
14 literature also show about the public belief in changes  
15 in sentencing having a deterrent effect?

16 PROFESSOR CAULKINS: I think the public  
17 believes there is a deterrent effect.

18 CHAIRPERSON BERRY: Right. So that -- do you  
19 agree with that, Mr. Wootton, or do you have anything  
20 else to add to that?

21 MR. WOOTTON: Well, only that Justice put out  
22 a paper saying on making confinement decisions. The  
23 thing that they cited in that said that there was a --  
24 a 1.1 percent impact on the increase, that there's a  
25 slight impact on -- on the reduction in crime over and

1 above the actual incapacitation effect of the person  
2 that you're putting away.

3 CHAIRPERSON BERRY: Right. So, we have a  
4 consistent wish and hope on the part of the public at  
5 any point in history that changing the sentence somehow  
6 is going to deter, and we have consistent evidence that  
7 we can't prove that it does, and that we may see a 1.1  
8 percent effect.

9 When I listened to both of you, and you in  
10 particular, Professor Caulkins, it seemed to me that  
11 there was a lot of irrationality in this process. If I  
12 understood you correctly, Professor Caulkins, if we  
13 were to exclude drug offenders who didn't engage in  
14 violent crime but had drug offenses, that this would  
15 not be inconsistent with the public concern about  
16 violent crime, which seems to be where the public is  
17 concerned, and it would also reduce the numbers and  
18 reduce the costs of the -- of the sentencing of people  
19 to prison. Did I hear you correctly or was I  
20 mistaken?

21 PROFESSOR CAULKINS: I think that's a fair  
22 summary.

23 CHAIRPERSON BERRY: Then there must be some  
24 other reason why we are incarcerating drug offenders  
25 under the three strikes you're out, something other

1 than the concern about violent crime or is it just that  
2 the public doesn't draw a distinction or would it be  
3 better to change the law so that you excluded non-  
4 violent offenders from -- which is what I think Mr.  
5 Wootton was suggesting, not necessarily drugs but other  
6 kinds of offenses from this, if that's where the public  
7 is concerned or what would be the answer?

8           PROFESSOR CAULKINS: Well, I certainly think  
9 that the law could be changed, and my hunch is that  
10 would be a good change to make. You can offer a  
11 variety of hypotheses about why the average Californian  
12 walking down the street supported the law, despite that  
13 provision.

14           Certainly there was not a great deal of in-  
15 depth knowledge about the details and the provisions.  
16 I -- many people had no knowledge whatsoever that there  
17 was anything except a third strike law. I've given  
18 talks in a variety of settings describing our study,  
19 and I often do a little poll and a show of hands and  
20 ask Californians in the audience, so, what do you think  
21 would happen with this law if we got rid of the third  
22 strike provision, and the typical reaction is there  
23 wouldn't be anything left. So, there's a great deal of  
24 ignorance. They may not have known.

25           I think even on the part of the people



1 drafting the law, they may not have anticipated the  
2 large fraction of the third strike sentences that would  
3 go to people who -- who did not commit a serious or  
4 violent offense a third time. Obviously they did for  
5 the first two.

6 So, it may not have been the intention. It  
7 may have been in some sense a mistake by people  
8 focusing on other aspects.

9 CHAIRPERSON BERRY: Uh-huh. Yes,  
10 Commissioner Horner?

11 COMMISSIONER HORNER: Madam Chair, I might  
12 just offer a hypothesis as to why people want to  
13 incarcerate drug criminals and not just violent  
14 criminals, and that hypothesis might be fear that their  
15 children will be -- will be enticed into drug  
16 addiction, which many people would feel would be  
17 comparable to experiencing a violent crime themselves.

18 I would far prefer to be knocked over the  
19 head with a gun than to have either of my children  
20 addicted, and therefore I would prefer to put a drug  
21 dealer or a user likely to become a dealer in jail  
22 equally with putting in someone who would hold me up  
23 with a gun.

24 PROFESSOR CAULKINS: It's very plausible.  
25 Another common misconception on the part of the public

1 concerns the efficacy of incarcerating individual drug  
2 sellers and failing to make the distinction between the  
3 provision of a black market good and another kind of  
4 crime.

5           Incarcerating a pathological rapist  
6 presumably reduces the number of rapes that the general  
7 public experiences. Incarcerating someone who provides  
8 a black market good for which there is a fairly large  
9 and robust market may have much, much less impact  
10 because it's relatively easy for that person's labor to  
11 be replaced by somebody else.

12           CHAIRPERSON BERRY: You mean there are only a  
13 limited number of rapists, pathological rapists?

14           PROFESSOR CAULKINS: You would hope so. You  
15 would hope that incarcerating one wouldn't generate a  
16 second. But when there's a market, and a potential  
17 employment, there is the potential for that  
18 replacement.

19           COMMISSIONER HORNER: But at 16,000 a year,  
20 it's well worth it to keep putting people who might  
21 cause your children to become addicted away, even if  
22 they weren't suppressing economic activity in poor  
23 neighborhoods.

24           PROFESSOR CAULKINS: There are a million to  
25 two million people who have sold an illicit drug in the

1 last 12 months in this country. There are millions  
2 more who would be willing to. It's a lot of people.

3 CHAIRPERSON BERRY: Did you have your hand  
4 up, Commissioner Anderson? Yes, Commissioner Anderson?

5 COMMISSIONER ANDERSON: What do you say to  
6 the contention that so many violent crimes accompany an  
7 activity but for the violent part of it would -- would  
8 be a very small monetary value? For example, you cited  
9 the example of the purse snatching in California, where  
10 the woman who resisted the purse being snatched then  
11 was shot dead.

12 MR. WOOTTON: I didn't cite that example.

13 COMMISSIONER ANDERSON: Isn't that -- isn't  
14 that the -- the -- the Polly -- oh, that's the  
15 kidnapped girl. But there's another -- maybe it's  
16 Richard's, but, in any event, the woman who resisted  
17 the purse snatching. She is -- she is murdered.

18 The convenience store clerk resists giving  
19 over the \$30 or the hundred dollars in the drawer, he's  
20 shot dead. The same thing with the gas station  
21 attendant.

22 But for the murder, it is a crime of very  
23 small monetary value, and in fact, you might say that  
24 many murders accompany the crime of small monetary  
25 value.

1           So that the third offense being of small  
2 monetary value, and therefore not an aggravated felony,  
3 may simply relate to the fact that the woman let go of  
4 the purse or the clerk, you know, smiled when he handed  
5 over the money or -- or did not look crosswise at -- at  
6 the robber.

7           So that the rationale behind the third  
8 offense not necessarily being an aggravated or serious  
9 felony is that.

10           MR. WOOTTON: Well, I haven't spoken yet on  
11 the reason -- the reasoning that went into the choice  
12 between a felony versus a violent felony, and as I  
13 said, I supported the Brown version that was a  
14 serious -- a violent felony as opposed to a non-violent  
15 felony, and it really only has to do with whether or  
16 not you're putting -- using this sanction for the right  
17 kind of crime, and -- and avoiding the pizza case that,  
18 you know, everybody has sort of made the poster child  
19 of three strikes being inappropriately draconian.

20           One of the things that we don't know is that  
21 if we stopped incarcerating drug dealers, for instance,  
22 at the rate we're incarcerating drug dealers, whether  
23 or not we would -- we would -- we are not inadvertently  
24 but we are always predictably locking up people who are  
25 violent, but we're not locking them up for a violent

1 crime.

2 In other words, you put Al Capone in prison  
3 for a violation of IRS Code, but you're also locking up  
4 somebody that was killing a lot of people. So, those  
5 are sort of hard to know.

6 As to the -- as to the question -- the very  
7 example that you represented, Mark Cohen, who did the  
8 study on the cost of crime, said, and these are violent  
9 crime acts that you're describing because they use the  
10 force or the threat of the use of force, and usually a  
11 weapon, is that robbery has some kind of statistically  
12 predictable risk of death, and if you take robberies in  
13 large numbers, there are going to be a number of times  
14 that they end up in somebody being murdered or shot,  
15 and that's part of the cost on an actuarial basis of  
16 robbery generally.

17 Some robberies where a death actually does  
18 occur, the cost is far above \$12,000, and, so, his  
19 study was trying to tease out of the data and using  
20 jury awards and some other techniques to compare what  
21 the actual, you know, surrogate costs would be.

22 But again I think the goal has to be doing  
23 justice, and if we move too far away from doing  
24 justice, these things won't be implemented.  
25 Prosecutorial discretion will be used to avoid

1 implementing them. Judges will refuse to implement  
2 them at risk of being overturned. Juries won't convict  
3 because they -- they don't think that the sentence that  
4 the person is facing is fair, you know.

5 Fairness and justice are intangibles, but in  
6 my experience in practicing law, that is what the  
7 system tries to do. So, I think the -- the debate has  
8 to be how do we create a system that is perceived by  
9 everyone as being fair, and I think that the -- again,  
10 the reason three strikes was -- occurred was some very  
11 high profile cases where people had been let out of  
12 prison after not serving what was perceived at the time  
13 that the judge or jury gave the sentence as being a  
14 fair sentence. They served so much less than that,  
15 went on to commit another violent crime, that everybody  
16 says we have got to fix a system that seems to feel  
17 like it has the discretion to overturn the will of the  
18 people in these cases on a regular basis, and -- and  
19 that's why again we -- we support truth-in-sentencing.  
20 over maybe some of these more draconian kinds of  
21 solutions.

22 PROFESSOR CAULKINS: If I could add a quick  
23 comment in response to your example, in California law,  
24 all robberies are at least serious. If they involve  
25 great bodily harm, the use of a firearm or the use of

1 another deadly weapon inside a residence, then they are  
2 even violent, not just serious.

3 So, the examples you were citing would have  
4 been included as third strikes if the California three  
5 strike law had required the third strike to have been a  
6 serious or violent crime.

7 COMMISSIONER ANDERSON: I don't want to  
8 continue this too long, but my point was on, for  
9 example, the purse snatching. The purse snatching  
10 would not be, right, or would it?

11 MR. WOOTTON: Without a weapon, it might not.

12 COMMISSIONER ANDERSON: Right.

13 PROFESSOR CAULKINS: Depending on the  
14 circumstances, it could be prosecuted as a robbery, if  
15 the person is confronted. So, it depends whether it  
16 looks like a pick pock or not.

17 COMMISSIONER ANDERSON: All right.

18 CHAIRPERSON BERRY: Commissioner Lee?

19 COMMISSIONER LEE: I'm from California. So,  
20 I just remember the use a gun, go to prison law that we  
21 had, in which a gentleman who was doing a research  
22 paper using a loaded gun went to a store just to prove  
23 how easy to have been incarcerated, and sure enough, he  
24 was sent to jail because of that use a gun, go to jail  
25 law.

1           And my question is, you mentioned earlier  
2           that the prosecutors have really wide discretion, even  
3           with the eventual passage or whatever that the state  
4           legislators are going to do with the three strike.

5           If prosecutors of different counties have  
6           such wide discretion in how to apply three strike, do  
7           you see any potential problem with fairness, as  
8           Commissioner Anderson said, the fairness of the  
9           applicability of this law to specifically certain  
10          populations?

11          PROFESSOR CAULKINS: Yes, the potential  
12          exists.

13          CHAIRPERSON BERRY: Okay. Commissioner  
14          George?

15          COMMISSIONER GEORGE: Mr. Wootton, I wanted  
16          to follow up with you a little bit your stress on the  
17          importance of retributive goals of the -- of the  
18          judicial system.

19          There are a lot of studies which show a great  
20          divergence in attitude and -- and belief between  
21          popular opinion and a lead opinion about -- about a lot  
22          of things.

23          I mean one example would be capital --  
24          capital punish -- I mean if you just take the first 750  
25          names in the Trenton phone book and ask them about



1 capital punishment, you're going to get a different  
2 outcome than if you poll the Princeton faculty about  
3 capital punishment.

4 Now, I'm wondering if there's a similar  
5 divergence of opinion among professionals in the -- and  
6 academics in the criminal justice area, do you find  
7 that while the public broadly believes in the  
8 retributive justification for punishment, that a lead  
9 opinion is much more oriented towards scientific --  
10 much more skeptical retributive ideas, much more  
11 inclined to make value judgments based on judgments  
12 about deterrence in rehabilitation and -- and all of  
13 these other things, apart from the retributive  
14 justification for -- for punishment, and, if so, does  
15 that in your experience affect the kind of information  
16 that those within the system and academics who study  
17 the system, kind of information that they bring to the  
18 public policy-making table?

19 MR. WOOTTON: Yes, very much, and I think  
20 that most of the professionals that I've encountered  
21 have and still encounter as I go around talking about  
22 these kinds of things, are less persuaded that the  
23 goals of the criminal justice system ought to be  
24 punishment or retributive.

25 I -- one professor from California, who I

1 won't name, although I don't think he'd be embarrassed  
2 in being named, has written recently that he doesn't  
3 think there should be any retributive aspect to our  
4 decision to incarcerate.. It should be all done on a  
5 pragmatic decision to restrain people who don't have  
6 good -- an ability to control their impulses, and he  
7 said that his conclusion was based on having a son that  
8 had attention deficit disorder and some other kinds of  
9 what he took to be genetic kinds of problems, that led  
10 to his having very firsthand experience with what he  
11 took to be a lack of ability as a matter of will on the  
12 part of criminals to control their behavior; therefore,  
13 the rationale for punishment, the rationale for -- for  
14 retribution is eliminated if there is no, you know,  
15 appropriate responsibility that can be lodged in the  
16 actor, and I think that the -- the skewing of the  
17 population between the Princeton faculty and the -- and  
18 the Trenton phone book would -- you would have a  
19 skewing of -- of the sense that people -- the man on  
20 the street thinks people ought to be held responsible  
21 for what they do because they're making free will  
22 decisions about what they do, and the more educated  
23 might be willing to attribute it to some kind of either  
24 scientific or environmental determinism that the person  
25 who's committing the crime is doing it because of the

1 family they were raised in, maybe some genetic factors,  
2 the environment, the neighborhood, lack of opportunity,  
3 you know, a whole host of reasons, and I can tell you  
4 from my experience in the juvenile justice system, when  
5 you're looking at a 13 or 14 year old who is beginning  
6 their life of crime, they look more like a victim than  
7 a victimizer, but fairly soon, when they graduate to  
8 doing crimes in which they are putting the rest of the,  
9 you know, neighborhood and everybody else at risk,  
10 whether or not they've had a bad childhood, and I would  
11 almost stipulate they've had a bad childhood, I can  
12 tell you the statistics of the profile of the serious  
13 habitual offender, and most don't have fathers in the  
14 home, most have seen some kind of abuse or been abused.  
15 They've witnessed violence. About two percent of the  
16 family produce about 80 percent of the violent  
17 criminals, and these are violent families, largely.

18 So, these people are -- I mean they have  
19 three strikes against them sort of from the time  
20 they're born, and the question that society, I think,  
21 grapples with continually, and I don't think ever comes  
22 down sort of hard on one side or the other, is can you  
23 hold somebody responsible that's had such a rotten  
24 start in life?

25 Is it fair to do that? And -- and then the

1 victim's people who are now finding their voice are  
2 saying, but is it fair for us to then be the victims of  
3 leaving these people on the street?

4 COMMISSIONER GEORGE: Let me shift to another  
5 point that you raised which interested me, and again I  
6 won't ask you to -- to name names, but you mentioned  
7 well-intentioned people who say or imply that every  
8 member of the class of African American males under --  
9 I don't know if you stipulated as young, under 18,  
10 whatever it is, are potential criminals.

11 Now, do you have in mind here sort of people  
12 on the street or politicians or do you have in mind  
13 here criminologists whose studies should be faulted for  
14 making such -- I'm just trying to get at what level the  
15 people are that you're finding fault with on this  
16 particular score.

17 Has this affected serious studies as far as  
18 you know, or is this just the kind of -- something that  
19 politicians are pre-supposing or the man on the  
20 street's thinking?

21 MR. WOOTTON: I would attribute that mostly  
22 to politicians and the media and not so much to serious  
23 scholars. I would say serious scholars would be more  
24 careful in defining what the at-risk population was.

25 COMMISSIONER GEORGE: But --

1 MR. WOOTTON: I'm not saying it's devoid in  
2 academia, but I would say that the offenders, who I  
3 think have the most impact, are in the media and  
4 politicians.

5 COMMISSIONER GEORGE: And you do say, and  
6 your very startlingly statistics would bear this out,  
7 that in the African American male population, you are  
8 disproportionately likely to be a victim. You cited  
9 those astonishing --

10 MR. WOOTTON: Right.

11 COMMISSIONER GEORGE: -- homicide --

12 MR. WOOTTON: That's right.

13 COMMISSIONER GEORGE: -- statistics as a --  
14 as a criminal.

15 Thank you.

16 CHAIRPERSON BERRY: Okay. Well, in the  
17 interest of time, we are going to thank you very much  
18 for the briefing, and this was very useful information  
19 that we will be able to use in our deliberations, and  
20 thank you very much for coming.

21 PROFESSOR CAULKINS: Thank you.

22 MR. WOOTTON: Thank you.

23 CHAIRPERSON BERRY: We would call now the  
24 next panel.

25 VICE CHAIR REYNOSO: Mary?

1 CHAIRPERSON BERRY: Yes?

2 VICE CHAIR REYNOSO: This is Cruz.

3 CHAIRPERSON BERRY: Yes.

4 VICE CHAIR REYNOSO: I'm sorry to say that I  
5 cannot hear well enough to follow the discussion. So,  
6 I'm going to get off the phone and just go over the  
7 transcript.

8 The thing -- those matters that I have been  
9 able to hear have been really very instructive. I'm  
10 just sorry that I can't hear well enough to follow the  
11 discussion, but I'll be reading this in the transcript.

12 CHAIRPERSON BERRY: Okay. All right.

13 VICE CHAIR REYNOSO: Okay. Thank you.

14 CHAIRPERSON BERRY: Thank you.

15 Panel 2

16 CHAIRPERSON BERRY: We'd ask Laura Murphy,  
17 Malcolm Young, Julie Stewart and William Moffitt to  
18 please come forward. We need another chair? We need  
19 another chair, staff folks.

20 We have -- at this time of year, Laura, we  
21 should be in Ben and Jerry's rather than here.

22 But in any case, let me just welcome you and  
23 thank the panel for agreeing to come, and Laura Murphy,  
24 who is our first presenter, has been before us before  
25 and has been very agreeable to come to discuss with us

1 a number of issues of concern.

2 She's been Director of the Washington Office  
3 of the American Civil Liberties Union since February  
4 1993, and as head of that office, she develops and  
5 directs the federal legislative and executive efforts  
6 of the organization.

7 She has lobbied for the mandatory minimum  
8 sentencing safety valve in the 1994 Omnibus Crime Bill,  
9 among a whole host of -- of legislative measures where  
10 she has been very much involved.

11 She has also been a congressional and  
12 California legislative assistant before that, and we  
13 welcome you, and please proceed.

14 MS. MURPHY: Thank you, Madam Chair.

15 I make a request because -- because this  
16 issue of three strikes you're out goes far beyond the  
17 narrow issue of -- of what the implications of three  
18 strikes you're out are. They go to the whole question  
19 of bias in the criminal justice system, and the use of  
20 mandatory minimums in the criminal justice system.

21 Three strikes you're out is a mandatory  
22 minimum sentence. It is just different from other  
23 mandatory minimum sentences in the way that it assures  
24 the imposition of a particular sentence, in this case,  
25 mandatory life imprisonment for a convicted felon.

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1           So, I -- the request that I'd like to make is  
2           that I am able to submit four documents for the  
3           Commission's review. One is a University of Dayton Law  
4           School Law Review article by Nikichi Taifa, former  
5           colleague at the ACLU, who worked very closely with the  
6           Congress on Three Strikes You're Out.

7           The second is a Center on Juvenile Justice  
8           and Criminal Justice study, which is a California-based  
9           study, "Young Africa Americans and the Criminal Justice  
10          System". It was just released in February of 1996, and  
11          a lot of the information there is pertinent to your  
12          deliberations.

13          The third is a friend of the court brief  
14          filed by the NAACP Legal Defense Fund and the ACLU in  
15          U.S. v. Armstrong, a case that looked at the selective  
16          prosecution of African Americans in the criminal  
17          justice system for crack violations in Los Angeles.

18          And, finally, an Evaluation of Mandatory  
19          Minimum Sentences prepared by the Center -- the  
20          Campaign for an Effective Crime Policy.

21          CHAIRPERSON BERRY: Thank you very much, and  
22          we will review those.

23          MS. MURPHY: As I said, the -- the -- a --  
24          the federal three strikes you're out law is the issue  
25          that the ACLU has worked the most on, and for the



1 purpose of my presentation, I will limit my remarks to  
2 the federal statute.

3 I think it's important to talk about the  
4 federal statute because it sets -- it stands as a -- a  
5 national model in many cases for the states, and I  
6 think there were about 14 states that had three strikes  
7 you're out laws prior to the adoption of a federal  
8 three strikes you're out law, and now there are about  
9 20 states that have three strikes you're out or some  
10 sort of repeat offender statute.

11 This federal law was adopted as a part of the  
12 Crime Control and Effective Law Enforcement Act of  
13 1994. That's also known as the Omnibus Crime Bill that  
14 President Clinton signed into law.

15 It allows or requires life imprisonment for a  
16 person convicted of a serious felony if that person has  
17 two or more final convictions for a serious violent  
18 felony or one prior conviction for a serious drug  
19 offense and one or more convictions for a serious  
20 felony. Each offense must have occurred on separate  
21 occasions and be separated by a conviction.

22 The definition of a serious violent felony  
23 includes any felony that is punishable by a maximum  
24 term of imprisonment of 10 years or more or that has an  
25 element -- has as an element the use, the accepted use

1 or threatened use of physical force against the person  
2 of another that by its nature involves a substantial  
3 risk that physical force against the person of another  
4 may be used in the course of committing an offense.

5 So, for example, the serious violent felonies  
6 that would be included would be murder, manslaughter  
7 other than involuntary manslaughter, aggravated sexual  
8 abuse and arson.

9 The reason why I go into this detail about  
10 the definition of federal three strikes you're out  
11 statute is because the definition itself raised -- may  
12 raise some civil rights concerns.

13 For example, I was wondering whether or not a  
14 person convicted of numerous church burnings would be  
15 eligible for three strikes you're out provision, and  
16 it's interesting that Congress carved out exceptions  
17 for arson and robbery in its deliberations in that if  
18 you -- if the defendant could establish clear and  
19 convincing evidence that there was no threat to human  
20 life, then these become non-qualifying felonies.

21 So, if a defendant in a church burning can  
22 prove that they were setting the fire at night or, you  
23 know, knowing that no one would be in the church and  
24 knowing that no one, you know, there were no guards in  
25 the church, perhaps they would -- they would be viewed

1 ineligible for this mandatory minimum sentence. I just  
2 thought that was a little interesting.

3 Then I think the question about the use of  
4 drug offenses as a -- as a strike was raised in the  
5 earlier panel and is of great significance here. The  
6 definition of the drug offense category is extremely  
7 troubling because it's based on the amount of drugs  
8 involved and not on the individual's degree of  
9 culpability for trafficking in certain quantities.

10 Thus, an unwitting low-level drug courier who  
11 merely drives a tractor-trailer truck full of crack  
12 cocaine or powder cocaine is -- will receive the same  
13 level of punishment that someone who masterminded the  
14 importation of that substance or set up the  
15 distribution mechanism or actually procured people to  
16 sell it to children.

17 So that we think that there are some grave  
18 inequities created by establishing a drug offense based  
19 merely on the amount of drugs and not on the degree of  
20 culpability.

21 We know that in particular, there is a  
22 federal statute calling for the punishment of people  
23 who use crack cocaine, and those people who are  
24 convicted under the crack cocaine statute receive  
25 punishment that is 100 times more than those who are

1 convicted of trafficking in powder cocaine, and whites  
2 tend to be prosecuted under the powder cocaine statute  
3 rather than the crack cocaine statutes, even though  
4 whites use crack cocaine in greater numbers, and that  
5 seemed to be of some issue, and I would refer you to  
6 our brief in the U.S. v. Armstrong, and I'd just like  
7 to quote from the brief.

8 "A recent survey of prosecutions for crack  
9 cocaine offenses conducted by the Los Angeles Times  
10 revealed that not a single white offender who had been  
11 convicted of a crack cocaine offense in the federal  
12 court serving the Los Angeles Metropolitan Area since  
13 1986 -- that not a single white offender had been  
14 convicted, despite the fact that whites comprise a  
15 majority of crack users."

16 And this is also based on a study by Dan  
17 Wikle, "War on Crack Targets Minorities Over Whites",  
18 and also a study by the Sentencing Project.

19 Also, the -- the use of non-violent drug  
20 offenses as a strike leading to the three strikes  
21 you're out punishment also raises the issue of  
22 prosecutorial discretion because what we're finding is  
23 that in many jurisdictions, prosecutors will decide  
24 more often than not to prosecute minorities under the  
25 tougher federal standards than go forward with the

1 state law as -- as the basis for prosecution, which  
2 tends to be less harsh.

3           Prosecutorial discretion contributes to the  
4 widening gulf between juvenile and adult African  
5 Americans and other offenders incarceration rates.  
6 While the total number of white juveniles brought to  
7 court on drug charges in 1990 exceeded the total number  
8 of blacks by 6,300, a far greater number of white  
9 youths were sent home without being tried, were  
10 released to drug counseling programs or were placed on  
11 probation. Consequently, 2,200 more blacks than whites  
12 ended up in correctional facilities, and that comes  
13 from a story by Ron Harris, also of the L.A. Times,  
14 "Hands of Punishment Falls Heavily on Black Youth".

15           All right. So that again, I just wanted to  
16 describe what three strikes you're out is -- means at  
17 the federal level, and how the definition itself raises  
18 some problems.

19           I guess the question you would like to know  
20 is from our perspective, what's wrong with three  
21 strikes. There are several issues. One, it violates  
22 the proportionality requirement of the 8th Amendment in  
23 our view. The 8th Amendment basically has been  
24 interpreted by the Supreme Court to say that the  
25 punishment ought to fit the crime, and we don't believe

1 that life imprisonment is appropriate in all cases.

2 There's no reason, for example, that a judge  
3 should not be able to distinguish between someone who  
4 commits three crimes, like kidnapping, rape and murder,  
5 from someone who is a first-time drug courier, who is  
6 69 years old and may have committed two violent  
7 felonies 30 years before. I mean that just doesn't  
8 seem to make sense to us, that those people ought to be  
9 treated as equally as harsh.

10 If you look at the statistical evidence, you  
11 know that a person in their 60s is not likely to be a  
12 repeat offender and is more expensive to incarcerate,  
13 and there are just a number of issues that -- that are  
14 -- accompany the -- the whole question of  
15 proportionality like that.

16 We also think that three strikes is  
17 unnecessary given the already stringent U.S. sentencing  
18 guidelines. The U.S. Sentencing Commission is charged  
19 with the responsibility of making recommendations to  
20 the federal judiciary as to the appropriate amount of  
21 time that should be spent by convicted felons for  
22 particular crimes.

23 They do this based on an analysis. It is not  
24 an emotional analysis. They take into account what  
25 kinds of deterrent effects certain penalties have, and

1 our presentation before the United States Congress  
2 showed without a doubt that the U.S. Sentencing  
3 Commission recommendations for sentences were very,  
4 very stringent, especially as compared to most state  
5 punishments.

6 Thirdly, there's no evidence that public  
7 safety is enhanced, and there is some evidence that  
8 three strikes you're out may actually lead to an  
9 increase in crime.

10 Now, there's a great deal of argument about  
11 the -- the public safety enhancement issue, and I --  
12 I'd like to look at the Rand study carefully, but our  
13 view is that a lot of people end up on -- in -- in  
14 incarceration at the state and the federal level who  
15 are non-violent criminals, and precisely because of the  
16 way the laws are drafted to include non-violent drug  
17 offenders.

18 So, as --

19 CHAIRPERSON BERRY: Laura, you've got to wrap  
20 up.

21 MS. MURPHY: Okay. All right. Lastly, the  
22 reason we are opposed to three strikes you're out is  
23 because we believe that it exacerbates the existing  
24 problems of racial discrimination within the criminal  
25 justice system because of its disproportionate

1 application to African Americans, the poor and to other  
2 racial minorities.

3 We've already -- I will provide in my written  
4 statement that I hope to provide to you within the week  
5 evidence of how African Americans fare in general in  
6 the federal criminal justice system, and we know  
7 without a doubt that race is a significant factor in  
8 deciding who to target, whom to target, who to stop,  
9 who to detain, who to search and arrest, and also race  
10 is a significant factor in the length of incarceration.

11 That's pretty much it, and I'll be happy to  
12 answer any additional questions at the end of the  
13 panel.

14 Thank you, Madam Chair.

15 CHAIRPERSON BERRY: Okay. Thank you. Thank  
16 you very, very much.

17 Malcolm Young is Executive Director of The  
18 Sentencing Project, which he founded in 1986 to promote  
19 national sentencing and corrections reform.

20 He also directed The Sentencing Project of  
21 the National Council on Crime and Delinquency. He has  
22 been a criminal defense lawyer and a professor and  
23 various roles, and thank you very much for coming  
24 before us.

25 Please proceed, Mr. Young.



1           MR. YOUNG: Well, thank you very much, Madam  
2 Chairman, members of the Commission, and to Staff  
3 Director Mary K. Mathews, who was kind enough to  
4 coordinate the invitation.

5           I also appreciate the informality that was  
6 stressed by your staff in the letter because I received  
7 the invitation just before I left on some travel and  
8 then vacation and -- and came back just before -- from  
9 travel just before appearing today.

10           So, I am not, as you suggested, submitting  
11 prepared remarks. I did, however, have the opportunity  
12 to send over a report which we recently published in  
13 October of '95, "Young Black Americans in the Criminal  
14 Justice System Five Years Later", and it's my under-  
15 standing that this has been made available to you for  
16 whatever use you want.

17           If that's by any chance not the case, I  
18 certainly would like to offer this report today.

19           CHAIRPERSON BERRY: Okay.

20           MR. YOUNG: It -- it does touch upon some of  
21 the issues that I will be discussing, and that I think  
22 may be of concern to the Commission.

23           In addition, I also have a request. Three  
24 strikes and you're out is of great interest and concern  
25 to The Sentencing Project, and also to the other groups

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1 that we work with, and I believe that the Campaign for  
2 Effective Crime Policy, an organization of criminal  
3 justice professionals and experts across the country,  
4 will be in some way issuing some kind of report or  
5 analysis of three strikes.

6 I know that it's not ready now, and I'm not  
7 certain what the time line is, but I would be very  
8 pleased to submit that report as well to the  
9 Commission.

10 CHAIRPERSON BERRY: All right. We will  
11 receive it and review it. Thank you.

12 MR. YOUNG: Now, after spending 22 years  
13 focused on criminal justice issues as a practitioner  
14 and -- and national offices, I did, after receiving  
15 your invitation, spend some time reflecting upon the  
16 context for what my remarks might be to you today.

17 Your question, as I understood it, was what  
18 were the civil rights implications of the three strikes  
19 laws, a question that's very apparent, but one that we  
20 don't always attend to.

21 We've been critical of the three strikes laws  
22 for reasons of effectiveness in crime control and for  
23 the overall impact on race and class groups.

24 I heard for a portion -- a portion of this  
25 earlier panel's presentation that I was -- that I

1 observed, some discussion of these issues, and I'm  
2 tempted, I must say, to depart from what I planned to  
3 say to respond to those comments, but I'm going to  
4 refrain from that temptation, unless your questions  
5 lead me that way, except to add, I think, an important  
6 perspective, which I think will be helpful to my  
7 remarks, and that is this.

8           That three strikes and you're out laws, both  
9 at the federal and the state level, are not by any  
10 means the be all and the end all or even a significant  
11 new direction in criminal justice policies in the  
12 United States.

13           As my office has documented, it is well known  
14 the United States locks up more of its population,  
15 incarcerates and punishes more of its population than  
16 almost any other country in the world. We have  
17 increased the use of incarceration fourfold since the  
18 1970s, and, so, laws, such as three strikes and you're  
19 out, which will undoubtedly and are undoubtedly having  
20 the effect of increasing incarceration are not new.

21           The trend in this country has been going on  
22 for several decades, and we are in a position to  
23 observe the results of increasing incarceration, and we  
24 must be aware when we talk about laws like three  
25 strikes and you're out, though we're not operating in a

1 vacuum, but we have been experimenting with the use of  
2 incarceration and punishment for again many decades,  
3 and -- but there is a tradition or history here to draw  
4 from. I think that perspective, at least from my  
5 remarks, may be important.

6 Now, what I wanted to say to you in the time  
7 I have is that it does seem to me that there are at  
8 least two areas of concern for civil rights in three  
9 strikes and you're out laws.

10 The first of these, and I think the most  
11 apparent and probably the one we would all agree on, is  
12 the laws that are unequally applied with discriminatory  
13 result, if not discriminatory intent, are -- must -- on  
14 racial and ethnic minorities and other groups are not  
15 to be tolerated and are to be faulted and should be  
16 challenged and changed wherever possible.

17 Certainly in the three strikes legislation,  
18 there is every opportunity for discriminatory  
19 application of these laws, and I think some of those \_  
20 opportunities have already been discussed before this  
21 panel.

22 There is thought to be a shift toward  
23 prosecutorial discretion which takes out of the hands  
24 of the judge the ability to determine the sentence for  
25 individuals that appear before the court, and there is

1 some evidence in California and perhaps in some other  
2 states that this discretion results in a discriminatory  
3 or disproportionate application to blacks and other  
4 minorities in the criminal justice system.

5 We know, for instance, in California, that  
6 those sent to prison under the three strikes and you're  
7 out law -- those sent to prison under the three strikes  
8 laws, 13 times more African Americans are included in  
9 that group than are white Americans, and this is true  
10 even though African Americans in California constitutes  
11 seven percent of the population and 20 percent of the  
12 felony arrests compared to the 25 percent of the three  
13 strikes and you're out inmates who are white, although  
14 they constitute 53 percent of the population and 33  
15 percent of the felony arrests.

16 We know anecdotally that there are instances  
17 reported in examples of disparate treatment from  
18 jurisdiction to jurisdiction, and because of the  
19 different racial make-ups of jurisdictions, we can  
20 assume that there is some disparity introduced in that  
21 fashion.

22 So, there ought to be, must be, and I'm sure  
23 is a concern for the opportunity for disparate  
24 application of these laws which vest great discretion  
25 in the prosecutor's office.

1           On the other hand, and from that perspective,  
2           and to be fair, I think it must be said, that the shift  
3           toward prosecutorial -- increased prosecutorial  
4           discretion is not new, and it is somewhat unique to the  
5           criminal justice system that all outcomes are  
6           determined not by any one decision-maker but by a host  
7           of decision-makers acting in series and not coordinated  
8           among each other, police, prosecutors, judges, —  
9           probation officers, parole officers.

10           So that I think it's quite possible that the  
11           potential misuse of prosecutorial discretion could be  
12           slightly exaggerated, and this is not perhaps the sole  
13           or largest area of concern, but it is certainly an area  
14           of concern for those concerned -- interested in civil  
15           rights.

16           The second area of concern, as I thought  
17           about the civil rights issues that are implicit in  
18           three strikes legislation, is that even if laws are  
19           fair on their face and appear to be drafted so that ..  
20           their impact will be neutral, if they have a disparate  
21           impact upon racial minorities or women or other  
22           protected groups, which is not related to or made  
23           necessary by the legitimate objectives, then these laws  
24           should be closely examined by those who are concerned  
25           with civil rights, and this seems to me to be

1 particularly true in the criminal justice system  
2 because of the opportunity for various exercise of  
3 discretion, various application of the laws throughout  
4 the process, the role of the many decision-makers that  
5 lead to the results in most criminal cases.

6 This observation bears upon our work at The  
7 Sentencing Project, and the facts that we have reported  
8 nationally. As you may know, our first report on  
9 African Americans in the criminal justice system was  
10 issued in 1989, and then we -- at that time, we  
11 reported the one in four young black males in the  
12 United States was involved in the criminal justice  
13 system by being incarcerated or being under parole or  
14 probation.

15 The report that I believe I sent over to the  
16 Commission earlier, which we issued in October of last  
17 year, reported that for 1995, that role or rate of  
18 participation had increased from 21 in four to now one  
19 in three in 1995, and there are similar gross increases  
20 in the participation in the system and the control of  
21 the system by Hispanics and particularly by women and  
22 particularly by African American women in the system.

23 So that since 1989, the rate at which African  
24 American women, for instance, have been involved in the  
25 criminal justice system has jumped 78 percent.

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1           Now what I'd like to do is to simply comment  
2 on -- I gather that this report may not be before you.  
3 So, I will --

4           CHAIRPERSON BERRY: Why don't you -- it came  
5 to the Commission. I don't think the commissioners  
6 have read it.

7           MR. YOUNG: Well, at this -- I'd like to --

8           CHAIRPERSON BERRY: Summarize so that we can  
9 have time for questions after we finish with the  
10 presenters.

11           MR. YOUNG: So, if I might, Madam Chair, I  
12 will just focus on one small aspect -- one aspect of  
13 that report.

14           In the 1995 report that we issued last year,  
15 we were able to document better than we had in 1994 the  
16 fact that the participation and the increase in  
17 participation of African Americans and other minorities  
18 with whom we are concerned in the criminal justice  
19 system was not related to their increased or rate of  
20 participation in crime.

21           We did this by examining what happens to  
22 African Americans in the general population who are  
23 arrested and convicted and sentenced to prison for the  
24 offense of drug possession, which reasonably is related  
25 to drug use in this country.



1           We know in this small area from surveys by  
2 NIDA and other organizations and agencies that the rate  
3 of drug use by African Americans and white Americans is  
4 roughly similar, that it's about 12 percent of the  
5 white population or the overall population that uses  
6 drugs on an occasional basis, and about 13 percent of  
7 African Americans use -- reported using drugs on an  
8 occasional basis.

9           So, we have it about on equal footing for  
10 participation in the offense of illicit use of  
11 controlled substances, and what happens after -- from  
12 that point on explains what the impact of the current  
13 criminal justice system on a large portion of the  
14 African American population that is in it, because  
15 while the drug use is drug -- occasional drug use is  
16 reasonably constant between -- equal between African  
17 Americans and the overall population, African Americans  
18 constitute 35 percent of those who are arrested for  
19 possession offenses, and 55 percent of those who are  
20 convicted, and 74 percent of those who are sentenced to  
21 prison for possession of -- of controlled substances.

22           So, we felt that this -- this -- this  
23 statistical information documents without question the  
24 racial impact of the operation of the system, and our  
25 feeling is that when the impact is this disparate in

1 outcomes where the participation is equal, then  
2 examination of the impact of civil rights -- on civil  
3 rights of the affected population, African Americans  
4 and Hispanics, is -- cries out for the attention of  
5 this Commission and of those who are concerned with  
6 these issues.

7 I would like to therefore invite and  
8 encourage the Commission's further inquiries and -- and ..  
9 focus on an issue that is of greatest importance to the  
10 country, and one which I do not think has been  
11 adequately addressed within the criminal justice .  
12 community to this point to any extent at all.

13 CHAIRPERSON BERRY: Okay. Thank you. Thank  
14 you very much, and we will have some questions for you  
15 in a minute.

16 Julie Stewart is the President of Families  
17 Against Mandatory Minimums, a national organization  
18 that she founded in 1991 after her brother was  
19 sentenced to five years in federal prison on a  
20 marijuana-growing conviction.

21 Before that, she was Director of Public  
22 Affairs for three years at the Cato Institute.

23 Go right ahead, Ms. Stewart.

24 MS. STEWART: Okay. Thank you.

25 I don't want to spend time repeating a lot of

1 what's already been said. I certainly can agree with  
2 much of what the two panelists before me said as well  
3 as the two who were -- who spoke earlier.

4 I do want to note that I've got a summarized  
5 version of the Rand study. I don't know if they  
6 submitted one to you at all. I didn't bring it for  
7 your purposes, but I have it here, and I'd be happy to  
8 give it to someone to make copies of.

9 CHAIRPERSON BERRY: Why don't you, just in  
10 case -- I think we have it, but just in case, we'd be  
11 happy to receive materials.

12 MS. STEWART: Okay. Good. Because it's  
13 certainly worth you looking at.

14 I wasn't -- I wasn't clear in being invited  
15 to speak here whether you were focusing on the federal  
16 three strikes law or three strikes laws in general.  
17 So, my remarks kind of go --

18 CHAIRPERSON BERRY: In general.

19 MS. STEWART: -- to both. All right.

20 I think that one of the -- first of all, I'd  
21 say that the U.S. Sentencing Commission has done a very  
22 good job of looking at sentencing issues. As you know,  
23 that's their responsibility, and I feel that they have  
24 quite expertise on this.

25 They have not done too much on three strikes

1 law. When I called to asked them if they had any -- if  
2 they had tracked it at all to see who's being  
3 incarcerated, they said no.

4 I don't know if the Department of Justice is  
5 tracking it federally or if the Bureau of Prisons is,  
6 but at this point, there seems to be no data available  
7 on federal three strikes law, which is a little bit  
8 troubling.

9 But there are -- and having said that, I  
10 would say because we have a U.S. Sentencing Commission,  
11 we do not need a federal three strikes law, which is  
12 exactly what you've already said, but I just want to  
13 reiterate that, how absolutely insane it is for us to  
14 layer on another sentencing system on top of the U.S.  
15 Sentencing Commission's job of -- of determining  
16 sentences, and they already had offender sentences that  
17 would put someone in prison for life if you had two or  
18 three prior offenses. So, it's totally redundant to  
19 have a federal three strikes law.

20 Having said that, I will say that there are  
21 lots of mechanics involved in both the federal and the  
22 state three strikes laws that need to be addressed.  
23 One of them certainly is race, and it's been talked  
24 about very thoroughly here, but I would just point out  
25 because I think in some ways, this may be a little bit

1 new to you, that the way in which you get a strike is  
2 very important, and there are lots of -- there -- there  
3 are lots of studies, and -- and there's a lot of  
4 evidence that shows in fact that blacks and Hispanics  
5 do receive mandatory minimum sentences more often than  
6 whites, who are both arrested for the same crime.

7 Now, what happens then is that those people,  
8 if their sentence, at least in talking about the  
9 federal three strikes law, if their sentence is of 10  
10 years or more, that qualifies as a strike.

11 Now, the strike -- the -- the drug that's the  
12 most easy to get, the easiest drug to get a 10-year  
13 qualifying strike under is crack, and crack is the drug  
14 that is predominantly used by the African American  
15 community or at least they're convicted. Actually, the  
16 use is different, but they're convicted for it more  
17 often than whites.

18 So, right there, they've got a strike, where  
19 a white defendant with 499 grams of powder cocaine or  
20 even 500 grams of powder cocaine would not have a  
21 strike, but five grams of crack -- 50 grams of crack  
22 cocaine would.

23 So, I think it's important to understand how  
24 you accumulate strikes, and there's definitely racial  
25 disparity built into the accumulation of the strikes,

1 partly for the crack reason.

2 Another reason is cooperation, and there have  
3 been studies done. In fact, I have one here. It's my  
4 only study, but I can certainly make a copy or give you  
5 the name of it, if you don't already have it, done by  
6 the Federal Judicial Center.

7 CHAIRPERSON BERRY: We do have it.

8 MS. STEWART: You do have it? Okay. Because  
9 the statistics in here are excellent about -- about the  
10 consequences of mandatory sentences, and basically  
11 three strikes is just another mandatory minimum.

12 But they have found, if -- I guess you've  
13 already read this study, that blacks tend to not  
14 cooperate and provide substantial assistance as easily  
15 as whites or as readily as whites do, and, so,  
16 therefore, they are not being offered reductions in  
17 sentences.

18 Again, in that cooperating and negotiating  
19 stage, a black defendant who does not cooperate is more  
20 likely to get stuck with that strike, that 10-year  
21 minimum sentence, whereas a white defendant who may  
22 cooperate will get below that level and won't have that  
23 strike used against him.

24 Now, there's certainly lots of evidence about  
25 prosecutorial selection in who -- you know, selective

1 prosecution. Let's just assume that there is no  
2 selective prosecution, and everyone is offered -- both  
3 black and white are offered equal opportunities to --  
4 to -- to -- to agree -- to cooperate.

5 Even if that's true, there are still  
6 unintended racial consequences. For whatever reasons,  
7 blacks are still getting the sentences that are higher,  
8 even if they're offered equal -- equal opportunities to  
9 cooperate and get reduced sentences.

10 I think it's important to recognize that the  
11 triggering strikes are easily -- easily -- are more  
12 easily applied in often non-white cases, and then  
13 another aspect of the triggering strike, again this is  
14 in the federal law, is one of the definitions of a  
15 prior is any other offense punishable by a maximum term  
16 of imprisonment of 10 years or more that has the  
17 element or use of force blah-blah-blah-blah, but -- so,  
18 a maximum term of punishment of 10 years or more.

19 Now, different states carry different --  
20 maximums for the same crimes. For instance, a burglary  
21 in Ohio might have a maximum of 10 years, whereas a  
22 burglary in Indiana might have a maximum of seven.  
23 Those are identical defendants, but the one in Ohio is  
24 going to get a strike because it's a 10-year maximum;  
25 the one in Indiana won't.

1           So, again, there's so much arbitrariness  
2 built into this three strikes law, the way that it's  
3 written, that it ends up creating disparity, whether  
4 it's racial or disparity between -- between like  
5 defendants even.

6           So, I think that those are sort of my main  
7 points. I do want to say we at the -- at the -- at  
8 Families Against Mandatory Minimums get lots of cases  
9 from individuals who have been sentenced to a whole  
10 variety of mandatory sentences, and one that was sent  
11 to us recently, an article that was sent to us was  
12 about an inmate in California, and I've heard of other  
13 inmates who have faced this -- who have done this as  
14 well, but he committed suicide rather than face his 25  
15 years to life sentence. He had two prior burglaries  
16 from 1983. His instant offense was stealing about a  
17 \$180 worth of video cassettes.

18           Granted, you know, that's an extreme  
19 reaction. We hope that not too many people will choose  
20 that path, but I just don't -- I see that it is a -- it  
21 is an option for inmates who feel what's the point,  
22 what's the point of staying in prison for my whole  
23 life, or felons that are faced with that choice, and  
24 the man was only 32 years old.

25           And then one -- one last point. Someone



1 earlier, I believe -- I can't -- it may have been Mr.  
2 George, who's left, but was asking something about what  
3 is a just sentence, and I think that it's a really  
4 important question for you to consider, and it's  
5 something that The Sentencing Commission has talked  
6 about, and I applaud the chairman who was -- was the  
7 person who really brought this to the attention of a  
8 commission meeting one time because they're doing a  
9 study on what is just punishment.

10 In fact, on the 17th of this month, next  
11 week, they're having -- they're reporting on it, and he  
12 said that he -- a lot of the public is urging longer  
13 sentences and tougher sentences, and, you know, let's  
14 put everybody away for life.

15 But he said that he had recently read about a  
16 case in Saudi Arabia or some -- actually, it may not  
17 have been Saudi Arabia, but another country, Third  
18 World country, where they stoned a woman to death who  
19 was an adulteress, and the public sat around and  
20 clapped as they were stoning her to death.

21 Does that mean that it's just punishment? In  
22 other words, the public's opinion is important, but we  
23 also have to temper it with some rational thinking and  
24 some studies that prove or try to disprove whether or  
25 not prison works, and I mean that's why -- why you all

1 and The Sentencing Commission and members of Congress  
2 are in leadership positions, to lead, not to follow.

3 So, I urge you to keep that in mind as you  
4 work on this issue.

5 CHAIRPERSON BERRY: Thank you very much, Ms.  
6 Stewart. We appreciate that, and there will be some  
7 questions.

8 Mr. William Moffitt is the Senior Partner  
9 with Asbill, Junkin and Moffitt, a D.C.-based law firm,  
10 where he specializes in state and federal criminal  
11 defense and constitutional litigation.

12 We want to thank you very much for being with  
13 us, and please proceed with whatever summary you'd like  
14 to give.

15 MR. MOFFITT: Much of what I would have liked  
16 to have said to you -- I'm also here on behalf of the  
17 National Association of Criminal Defense Lawyers, an  
18 officer in the association, and much of what has been  
19 said to you are things that I wanted to say if I were  
20 at the other end of the panel.

21 But I would like to begin by saying that the  
22 National Ministry of Justice in The Netherlands  
23 conducted a study to determine whether America was more  
24 criminal than anywhere else, and I think these are  
25 important things for us to be mindful of.

1           You are more likely to be burglaried in  
2           Australia or New Zealand, and you are more likely to be  
3           robbed with violence in Spain. You are more likely to  
4           be robbed without violence in Spain, Canada, Australia,  
5           and New Zealand, and you are more likely to be raped or  
6           indecently assaulted in Canada, Australia, or Western  
7           Germany, and I think we have to bring some rationality  
8           to our discussion about crime.

9           As a member of the NACDL, and as a criminal  
10          defense lawyer, I am concerned that our crime policy is  
11          being set at the 5:00 news hour, by what appears in the  
12          5:00 news.

13          I think we must be mindful of one of the most  
14          astounding figures or -- or -- or pieces of information  
15          that came from the Rand Study was that one in 10  
16          children in this country are abused or neglected, that  
17          we have a crime problem in the face of that statistic  
18          is -- is -- it should be obvious to all of us why we  
19          have the crime problem.

20          Let me address briefly some of the issues  
21          that have been addressed by other members of this  
22          panel. I think the first civil rights real issue for  
23          those of us who practice criminal law is that it is  
24          virtually impossible in our society to review the  
25          exercise of prosecutorial discretion.

1           We certainly can review the exercise of  
2       judicial discretion, and there is a whole host and  
3       wealth of case law on the issue of abuse of judicial  
4       discretion. So, when a judge exercises a sentencing  
5       decision or a -- a -- a situation as to whether a  
6       particular individual is treated a certain way, most  
7       often, we have the right to review that, if the judge  
8       abuses that discretion.

9           In the context of prosecutorial discretion,  
10       the Armstrong case, which Ms. Murphy has -- has  
11       mentioned, indicates that we virtually have no right to  
12       review the exercise of prosecutorial discretion or even  
13       study or understand or acquire the discovery for such  
14       review, and I think it is an important factor to  
15       understand that much of our crime policy now is being  
16       made by 26 and 27 year old prosecutors who have very  
17       little experience in life, rather than judges, who were  
18       chosen because of their experience and the wealth of  
19       knowledge that they bring to these types of decisions.

20           I also think that you must also understand  
21       from the perspective of the trial lawyer that whether a  
22       particular defendant goes to trial in a particular  
23       crime -- a particular charge is often an issue of mere  
24       risk assessment, and as we promote more draconian  
25       sentencing schemes, what happens is people sacrifice

1 their risk, that risk, and they sacrifice their right  
2 to go to trial because of the nature of the risk that  
3 trial imposes.

4           Already we have a sentencing scheme in the  
5 federal system that rewards a person for pleading  
6 guilty, and, consequently, I suggest, punishes a person  
7 for exercising what we have all come to understand as  
8 the full fruition of the rights that a person has when  
9 they are accused of a crime. They are given -- three  
10 points are deducted for acceptance of responsibility.

11           You can imagine the tremendous power that a  
12 prosecutor, who is now exercising discretion, brings to  
13 bear on a particular accused when they are confronted  
14 with an issue of whether or not a three strikes type of  
15 law is going to be applied to a given defendant, and  
16 the assessment of risk, which obviously resulted for  
17 that young man you just discussed, that my colleague  
18 here has just discussed, and whether or not a  
19 particular defendant waives every one of his rights and  
20 decides to plead guilty to a lesser charge or perhaps  
21 cooperate in an effort to avoid the draconian  
22 sentencing that is offered by three strikes you're out.

23           I think the final thing I would like to say  
24 to you is that those of us in the NACDL are very  
25 concerned about the metaphors that are used in our

1 discussion in crime today as a policy.

2 We have -- in my lifetime, I have lived for  
3 the last 40 years with a war on drugs and a war on  
4 crime, and the meaning of that to me is that war is a  
5 very interesting thing. It is -- it is won very often  
6 by the notion of attrition. How many on the other side  
7 can we kill until they ultimately surrender?

8 And we must understand when we use that  
9 metaphor, we're not talking about people outside the  
10 United States. We are talking about our own citizens,  
11 and this war that we have declared on both crime and  
12 drugs is a war that we have declared on our own.

13 When you read the Rand study and realize that  
14 something as simple as creating incentives for  
15 graduation has a much more profound and remarkable  
16 effect on the potential for crime than any of these, I  
17 would suggest to you, fast boot-type solutions and --  
18 and sound bite solutions to the crime policy problem in  
19 this country, these are serious problems. They are  
20 difficult ones, and we must respect each side in the  
21 discourse, but we must also be aware that the public  
22 must not be whipped into a frenzy, I would suggest,  
23 looking for sound bite solutions because what we're  
24 going to end up with is the kind of statistical balance  
25 where we incarcerate in this country seven times

1 proportionately more than any European country, where  
2 incarceration has become the only solution that we look  
3 at, where every one of our resources or virtually every  
4 one of our resources is placed at the back end of the  
5 system as opposed to at the front end, where we should  
6 be addressing issues of prevention and understanding  
7 the nature of what it is we need to do to prevent the  
8 crime problem.

9           We have created a perception in this country  
10 that everyone in this country must live in fear, and  
11 the citizenry has responded to that perception by -- by  
12 allowing and permitting the most draconian criminal  
13 justice system that exists in the world today.

14           We place more of our citizens in jail than  
15 anywhere else, and we need to be concerned about that.  
16 I would suggest to you that once we incarcerate, once  
17 we create felons, once we make felons, we create  
18 individuals who have far less of a stake in this  
19 society, and why should they care when they can't be  
20 employed, when they can't find a means to partake in  
21 what we all consider the American dream? Why should  
22 they give a damn?

23           We must address these problems in a very  
24 different way than we've decided to address them. We  
25 cannot, ladies and gentlemen, I suggest, build enough

1 jails to incarcerate enough people to make the over-  
2 whelming effect the public wants.

3 CHAIRPERSON BERRY: Thank you.

4 MR. MOFFITT: We can't afford it, and --  
5 and -- and it would be unjust in any way, and one final  
6 thing, if I might. While everyone in here has talked  
7 about their concerns about the perception of justice,  
8 it is much more than a perception that I am interested  
9 in as a lawyer.

10 Our system requires justice. It doesn't  
11 require merely a perception of justice. It is  
12 completely out line, and we must do something.

13 Thank you very much.

14 CHAIRPERSON BERRY: Thank you.

15 I would like to turn to my colleagues for  
16 whatever questions, but I only have one question after  
17 listening to this whole discussion. Why is it that the  
18 public seems not to care very much about most of the  
19 things that the four of you have talked about, that  
20 despite your concerns about disparate sentencing,  
21 despite your concerns about the crack powder cocaine  
22 disparity, which has been aired in the media and  
23 publicly and in public debate and in the Congress and -  
24 - and, you know, it's been -- it's out there, that most  
25 people still think that it's fine to -- to pursue the



1 law in this way, that the Supreme Court in the  
2 Armstrong case didn't seem to go along with the  
3 arguments that were made in the briefs, that your  
4 concern about not incarcerating drug offenders, people  
5 thinking that's okay to do, your concern about  
6 prevention instead of punishment and incarceration?  
7 People keep building more and more jails. Citizens  
8 demand more and more jails, the building of them, and  
9 that's happening all over the country.

10 Why is it that these -- these criticisms that  
11 you make seem to be falling for the most part on deaf  
12 ears? Is it that they're invalid or is it that  
13 something else is going on?

14 MS. MURPHY: If I may respond, Madam Chair?

15 CHAIRPERSON BERRY: Yes.

16 MS. MURPHY: I think that the public has the  
17 capacity to understand these issues, if we treat the  
18 public respectfully. If you go into a black  
19 neighborhood, and you tell them that, you know, you're  
20 going to sentence all the people who distribute crack  
21 cocaine to stiff sentences, they'll say yes, right on,  
22 I'm for stiff sentences, but if you also go into that  
23 same neighborhood and talk to the same minority  
24 leadership and tell them that their kids are getting  
25 disproportionately tougher sentences than kids in other

1 neighborhoods, they are sophisticated enough to under-  
2 stand the distinctions there.

3 We embarked in August of 1993, and I think  
4 that's when I met Julie Stewart and worked with Mark  
5 Bower from The Sentencing Project, and I met Bill  
6 Moffitt, we had a conference on Capitol Hill on the  
7 disparity between crack and powder cocaine, and the  
8 civil rights groups did not want to touch that issue  
9 with a 10-foot pole. They did not think that the  
10 criminal justice sphere was an appropriate area to  
11 discuss civil rights, and we had to go and meet with  
12 people, meet with members of Congress, meet with  
13 leadership in the civil rights community, and it was  
14 through a public education campaign that we were able  
15 to at least get the Congress to vote to have this issue  
16 put to a study.

17 We still are, you know, -- the Congress still  
18 will not do anything about the disparity between crack  
19 and powder cocaine, but I am convinced that as we  
20 engage in this battle to put justice back into the  
21 criminal justice system, that once people understand  
22 the information, look at the statistics, look at the  
23 factual basis, look at the -- whether or not  
24 incarceration is a deterrent, that the tide will  
25 change.

1 I think you could say the same thing about  
2 Jim Crow many years ago. Why didn't the public stand  
3 up and say this was wrong, that separate but equal was  
4 an unacceptable doctrine?

5 I think it takes time, but I think we are on  
6 our way, and that is why I am so grateful to you that  
7 the U.S. Commission on Civil Rights is beginning to  
8 delve into the criminal justice arena.     

9 MR. MOFFITT: Perhaps if I might?

10 CHAIRPERSON BERRY: Yes.

11 MR. MOFFITT: I will tell you that I am very  
12 concerned and part of the reason a million men showed  
13 up in Washington last year was the crack and powder  
14 disparity. It was in the same week that Congress was  
15 voting on that issue, that those million men showed up.  
16 They were a million African American men, and their  
17 voices on this issue were not heard.

18 That has always been a problem in this  
19 society, and disparate treatment, I would suggest to     
20 you, Madam Commissioner, we are not as -- as African  
21 American people, we are not strangers to disparate  
22 treatment in the criminal justice system.

23 This is a criminal justice system that has  
24 never been fair with regard to African Americans, and  
25 it would be a remarkable accomplishment if we could

1 ever make it fair.

2 The problem here is that people are willing  
3 to accept that unfairness if they are afraid, and the  
4 politicians in this country have exploited that fear  
5 for their own purposes. So, we cannot have a rational  
6 discussion about these issues because people are  
7 frightened, and what we must understand is that our  
8 country is -- is not very much different from many  
9 countries.

10 This is a problem that we have suffered with,  
11 but a face has been given to crime, a face, and the  
12 only face that has ever been given to crime in this  
13 country, and certainly in the 1988 campaign stands as a  
14 metaphor for that, is the face of an African American.

15 There are certainly other crimes being  
16 committed in this society by people other than African  
17 Americans, but the face of the 5:00 news portrays crime  
18 in this country as being a problem in the African  
19 American community, and -- and we must understand that,  
20 and that is not a community that our society has ever  
21 really been willing to address itself to in any real  
22 way, I would suggest.

23 MS. STEWART: I would just add that I think I  
24 didn't give a damn who was in prison until my brother  
25 was arrested, and I think that's true with a lot of

1 people. They don't care about AIDS. They don't care  
2 about whatever until it happens to them. I think  
3 that's a human nature sort of trait, and one thing that  
4 I think we are trying to do is to help people  
5 understand how prison in this rapid and vast  
6 incarceration of our citizens and non-citizens affects  
7 us individually.

8           If you can put it even into pocketbook terms,  
9 if you can say it's costing you this many dollars or if  
10 you can somehow, you know, turn it into something  
11 tangible and real for the general public, who has not  
12 yet been affected, I think it becomes a much more real  
13 issue for them, and in California, the American Bar  
14 Association did a study -- a report on their three  
15 strikes law, and one of the people it interviewed,  
16 actually the author of the Three Strikes Report, said  
17 if we buy the prison space this will require, then the  
18 options are to raise taxes, which hardly seems a  
19 political option, or to completely cut off funding for  
20 other services, like public education or pollution  
21 control or fire-fighting.

22           It's when those kinds of programs are -- are  
23 affected that the general public will become more  
24 interested in this, and then I would also just add that  
25 there has been some work done on educating the public,

1 and the public right now sees the option of  
2 incarceration or let them go free, and they don't see  
3 any middle ground, and The Ed McConnell Clark  
4 Foundation did a good study in Delaware, where they  
5 took some people and sort of gave them a scenario of  
6 the defendant and, you know, what would you do with  
7 them, and overwhelmingly, they all said incarcerate,  
8 and then they spent the day teaching them about some  
9 other intermediate punishments and stuff like that, and  
10 at the end of the day, there was a much greater mix of  
11 what they would do with that defendant based on these  
12 other alternatives. So, the public needs a lot of  
13 educating.

14 CHAIRPERSON BERRY: Yes, Mr. Young?

15 MR. YOUNG: I wonder if I might respond  
16 briefly, but I hope not to duplicate what has been  
17 said.

18 I think the answers are five or six short  
19 ones right off the jump. First of all, historically,--  
20 there was a dramatic increase in crime in the '60s,  
21 running into the '70s, so that there was a factual  
22 basis for a concern about crime, sufficient to, as a  
23 second reason, lead to considerable fear, not a totally  
24 unrational fear for many segments of the American  
25 population, and that this fear existed and came into

1 play in the late '60s and the '70s.

2 Third. There was then a leadership failure,  
3 if you will, a political demagoguery that's focused  
4 around crime now for again decades. Spiro Agnew was  
5 charged with the responsibility of making a political  
6 campaign based upon people and typically towards those  
7 who were soft on crime, and he spoke out strongly on  
8 that issue, until, of course, his own case came to  
9 court.

10 But to be bi-partisan and going to the fourth  
11 factor, government role in crime prevention changed  
12 markedly with Lyndon Baines Johnson and the Democrats,  
13 when the LEAA was established, and for the first  
14 time, --

15 CHAIRPERSON BERRY: Law Enforcement  
16 Assistance Administration.

17 MR. YOUNG: Correct. Thank you. I always --  
18 I -- I've been the beneficiary of that agency in my  
19 history, but I've always stumbled over their full name.

20 But that agency funneled a lot of federal  
21 money for the first time in to law enforcement that had  
22 been a traditional state responsibility, and that  
23 responsibility has continued until, combined with the  
24 political rhetoric and the excesses there, now another  
25 Democratic Administration has focused up to \$22 billion

1 on punishment and prison building, and this has had an  
2 impact on the realities of policy and on the fears that  
3 people have.

4 And then as another factor, and these are not  
5 in chronological order, the role of the media, which  
6 has been much commented upon, is prominent here with  
7 the Vietnam era type of living room presentation of  
8 violent crime, now you can see it. Just as we saw the  
9 deaths in Vietnam on our televisions, now you can see  
10 the impact of violent crime, perhaps in an exaggerated  
11 way, in your own room at night when you go home. This  
12 is bound to increase that fear that began with a valid  
13 factual basis.

14 And then, last, in coming to where I think  
15 Ms. Murphy and Ms. Stewart brought you, I think, are  
16 issues of race and class, and my experience as a lawyer  
17 in criminal justice in 22 years, and with The  
18 Sentencing Project and our work, our research, and our  
19 observations has been -- well, it's been documented and  
20 reported, but I would personalize it, if I might, for  
21 just a minute.

22 I live in Montgomery County. I have children  
23 in high school there. I know what Montgomery County  
24 citizens do in the Bethesda-Potomac region with kids  
25 who get into trouble with the law, kids who get into



1 trouble with narcotics. I know this through the  
2 experience of my own children's friends, and I listened  
3 when the commissioner commented about that concern this  
4 morning, and it stirred these thoughts in my mind.

5 What happens to those children is that a lot  
6 of resources are spent on counseling, on help, on  
7 assistance, and sometimes a lot of money is spent to  
8 keep them out of the criminal justice system, a  
9 criminal justice system that statistically, factually  
10 in application is designed and operates for the poor,  
11 the racial and ethnic minorities, the people who ride  
12 buses, not airplanes and trains, in this country, and  
13 that is why I think this is a totally appropriate area  
14 of concern for the United States Commission on Civil  
15 Rights.

16 Three strikes and you're out, which will  
17 aggravate the phenomena we have documented and about  
18 which I spoke earlier, the disparate treatment of  
19 minorities in the criminal justice system. Three  
20 strikes and you're out, which can only aggravate the  
21 present situation, and other criminal justice issues  
22 are of utmost concern, should be, I hope, pray and  
23 recommend that they will be, through this Commission.

24 And that concludes my response to your  
25 question.

1                   CHAIRPERSON BERRY: Commissioner Lee?

2                   COMMISSIONER LEE: Okay. I just have a quick  
3 question. You mentioned that there was a fourfold  
4 increase in incarceration during a certain period of  
5 time.

6                   Was there a corresponding drop in crime rates  
7 during that same period, and if it were, can you  
8 honestly say it was directly attributed to these  
9 incarcerations?

10                  MR. YOUNG: The answer to the last question  
11 first, in my opinion, you cannot honestly say that the  
12 decrease in crime rates was linked to the increase in  
13 incarceration.

14                  However, perhaps more important, because  
15 there are those who will contest that and may have  
16 contested that here, more important is that  
17 historically, certainly since 1972, roughly, and the  
18 mid-'70s, when incarceration took off like a rocket,  
19 okay, if you look at any graphs, against the history  
20 since the turn of the century of the very level rate  
21 and number of incarceration, running in the 100-200, --  
22 under 200,000 range, crime at various times in various  
23 categories decreased, and at other times, in some  
24 categories, increased.

25                  So that if you take -- look at the data over

1 a particular period of time or a chosen period of time,  
2 you can -- you can document in quotation marks that  
3 crime or categories of crime decreased while  
4 incarceration was increasing.

5 But if you look at the aggregate picture, you  
6 can't do that because you've got incarceration going up  
7 like a rocket on its flight and crime generally  
8 fluctuating.

9 Now, it's convenient for a number of reasons  
10 to look at, for instance, 1980 as a year. It makes  
11 sense. It's the turn of a decade. It was a point at  
12 which crime was an issue, but 1980 was a peak year.  
13 1979-1980 was a peak year for crime, and many  
14 comparisons that are made now reflect on 1980 and  
15 showed a decrease in crime, and that matched, of  
16 course, an increase in incarceration, and some would  
17 say that that increase in incarceration was --  
18 explained the decrease in crime.

19 But in the mid-1980s, several categories of  
20 crime, particularly the ones that concern the public  
21 most, violent crime and homicides, went on an upswing.  
22 So, if you happened to look at 1984-85 as your base  
23 year instead of 1980, for some of the same criminal  
24 justice data, you'd find crime rates increasing in  
25 several categories, and you still have that remarkable

1 increase in incarceration.

2 In fact, it's an increasing increase, and  
3 since 1990-92, there have been documented decreases  
4 again in crime, and, of course, we have the increasing  
5 incarceration. So, this does leave some people free to  
6 interpret that the crime decrease is linked or, you  
7 know, is tied to incarceration.

8 For three strikes and you're out, and this  
9 may have been commented on earlier, I wasn't here for  
10 all of the presentation, this is particularly relevant  
11 in California where proponents of three strikes have  
12 cited a six or larger percentage decrease in serious  
13 and violent crime in that state in the two years since  
14 three strikes and you're out was in place and  
15 operating.

16 But what needs to be said is that that crime  
17 decrease began two years in advance of three strikes  
18 and you're out coming into place.

19 CHAIRPERSON BERRY: The testimony we had --  
20 the presentation we had before you came from the man  
21 who did the Rand study, --

22 MR. YOUNG: Right.

23 CHAIRPERSON BERRY: -- the Rand study, was  
24 that he didn't have any evidence that it was three  
25 strikes that caused -- he thought it was two -- second

1 strike of the three strikes that may have -- enforcing  
2 that part of it, no parole and the rest of it, --

3 MR. YOUNG: Okay.

4 CHAIRPERSON BERRY: -- and serving the  
5 sentences.

6 MR. YOUNG: Thank you, and I -- I would -- I  
7 would have assumed that since I know of that report,  
8 and -- and I assume, too, that he may have referred to  
9 other factors, such as a decrease in unemployment,  
10 decrease in the numbers and the crime-prone age group  
11 of the population.

12 CHAIRPERSON BERRY: No, he didn't refer to  
13 those.

14 MR. YOUNG: Well, I was referring to them.  
15 There was a 106,000 fewer males, young males, in the  
16 crime-prone age of the population at the end of the  
17 two-year period on three strikes and you're out than  
18 there were at the beginning.

19 So, demographics may explain the decrease in  
20 crime. So, the answer that, in conclusion, we give in  
21 our office and that I think is the fair one, and it  
22 probably is what I think I heard the gentleman from  
23 Rand say, is that there really cannot be any kind of  
24 weighty link between this remarkable increase in  
25 incarceration of which three strikes and you're out is

1 but a small part, and the changing crime rates.

2 CHAIRPERSON BERRY: Commissioner Horner, do  
3 you have any questions?

4 COMMISSIONER HORNER: Yes, and I'm not going  
5 to go into all of them in the interest of time. I --  
6 listening to the presentations has reinforced my own  
7 sense of how complicated these issues are.

8 As I -- and if you'll just bear with me very  
9 briefly, I'm going to have one quick question, and then  
10 the rest, I'll have to forebear for reading materials  
11 that you've submitted.

12 I -- unlike you, Mr. Young, you're a guy.  
13 You're not a female. You've raised your children in  
14 the suburbs. I raised my children on the south side of  
15 Chicago and in Northwest D.C., and I -- although I am  
16 acutely aware of the degree to which people sell  
17 products on the 10:00 news by giving us lurid  
18 presentations of violent crime, I also think that it is  
19 deceptive to the dialogue that must occur on this  
20 subject not to acknowledge the legitimacy of fear that  
21 people have, and as long as people don't acknowledge  
22 the legitimacy of fear, especially fear for one's  
23 children, I think we can't have a good conversation  
24 about how to handle the outcome of the fear that people  
25 are experiencing.

1           The statistic -- the -- the issue, the issue  
2 of disparate impact is a very sensitive one that needs  
3 much more direct encounter because I have read plenty  
4 of things that say there is a disparate impact, and  
5 some of those things have a subset that says that's  
6 because of racism, and another has a subset that says  
7 that's because of unintentional outcomes of well-  
8 intended laws or even proper laws.           ≡

9           For instance, you mentioned the resources  
10 that people who have resources, presumably white,  
11 devote to their children when they get into trouble  
12 with the law.

13           The first resource that prevents young well-  
14 off white kids from ending up in jail is the presence  
15 of a mother and a father in the home prepared to assure  
16 the judge they're going to watch closely and this kid  
17 won't damage the public again, and, so, the unintended  
18 consequence of single parenthood is unprotected  
19 children who cannot assure the judge that the public  
20 will be protected from their violent acts if they  
21 aren't incarcerated.

22           Now, you can put up against that phenomenon a  
23 powerful characterization of callous and racist  
24 behavior, too, and it's very, very difficult to sort  
25 this all out, very, very difficult.

1           Ms. Stewart, you feel outraged that an  
2           injustice -- I don't know the details of what happened  
3           with your brother. I've had a family member  
4           incarcerated for selling drugs. It is not clear to me  
5           that I would prefer that that family member have  
6           remained on the street and able to sell to young people  
7           who became my children.

8           MS. STEWART: I never said that..     —

9           COMMISSIONER HORNER: I know you didn't. I'm  
10          just trying to express my sense of the complexity of  
11          this, and therefore I think it's very important that  
12          people who feel that the current system is damaging  
13          young black men inappropriately be very, very careful  
14          when they talk about things like crack cocaine and  
15          powder cocaine.

16          I have read, for instance, that the reason  
17          these laws were disproportionately passed was not  
18          because a bunch of legislators decided that they wanted  
19          to put black kids in jail but prevent white yuppies  
20          from having to go to jail for the same illicit  
21          pleasures, but that there was a great fear about the  
22          reported stronger addictiveness of crack cocaine, its  
23          association with violence and so on.

24          Now, if these things are all false, there's  
25          one way that people who feel the way you do could show



1 your bona fides and get to the table on this discussion  
2 in a serious way, and that is to urge that the  
3 penalties for powder cocaine be raised to the levels  
4 for crack cocaine, thereby removing the disparate  
5 impact.

6 You see, that way, you would show you were  
7 deeply concerned about drug use and not just concerned  
8 about the phenomenon of large numbers of young black  
9 men being incarcerated.

10 I personally don't think the country can go  
11 on like this, putting more and more people in jail. It  
12 is a nightmare, and it reverberates against our history  
13 in particularly unsavory ways. But I also feel deep  
14 resentment at the constraints upon my personal liberty,  
15 my family's liberty and the deterioration in our  
16 economic circumstances associated with crime.

17 So, we got to work this out. We need some  
18 very honest discussions, it seems to me, and an ability  
19 to put facts, histories, and statistics in a direct way  
20 one against the other, not just debate how to remove --  
21 because I keep reading one set of articles in this  
22 publication and one set in that publication, and I  
23 don't know which set is correct, and I don't have an  
24 all-powerful judge to tell me.

25 I need to hear the direct back and forth, and

1 this is useful for that purpose.

2 CHAIRPERSON BERRY: Thank you.

3 MS. STEWART: I have three responses.

4 CHAIRPERSON BERRY: Each one of you will get  
5 a chance. That's very powerful. They want to respond.

6 COMMISSIONER HORNER: And I know you can't  
7 all say all that's in your hearts and minds to respond  
8 to what I said just as I've held back a fair amount,  
9 too, and I hope we can do this another day or maybe in  
10 person directly over lunch or something, but --

11 MS. MURPHY: I just -- I -- I have to say a  
12 couple of things because I'm a single mother, and I'm  
13 deeply offended by the notion that having two parents  
14 in the home is a guarantee or a great -- affords  
15 necessarily greater protection to children at risk.

16 I have a young black son who's six years old,  
17 and I'm very worried about him, and I -- and I have a  
18 lot to fear, too. I was married to a man at one point  
19 who was a partner in a Beverly Hills law firm who was  
20 routinely stopped in Beverly Hills because he drove a  
21 sports car, and now there is a lawsuit that is -- is --  
22 is -- has finally come about because there are many,  
23 many professionals who are stopped and whose children  
24 are stopped because they -- officers assume that they  
25 have stolen the car that they're in or they've stolen

1 the clothes that they've had.

2 So, yes, you fear a certain set of things  
3 that are based on factual information that you get from  
4 the evening news, but I want you to know that I fear a  
5 certain set of things that are based on direct personal  
6 experience and factual information that I get from the  
7 evening news, which is selective prosecution, selective  
8 stop and search, and selective arrest, and I don't  
9 think that I'm any less qualified to raise my son in a  
10 moral and lawful fashion than many parents I know who  
11 are at home in Montgomery County or in any other part  
12 of -- upstate New York or wherever you find middle-  
13 class neighborhoods, both smoking pot, both doing  
14 drugs, and both not caring about the outcome of their  
15 kids.

16 Secondly, on the point about the  
17 pharmacological differences between crack and powder  
18 cocaine, the conference that we put together in August  
19 of 1993 on Capitol Hill brought those scientists to  
20 Washington, D.C., and they presented evidence about the  
21 propensity for violence created by both drugs, and they  
22 found that there was no difference on the system, on  
23 the nervous system, between crack and powder cocaine,  
24 and those findings were later upheld by the U.S.  
25 Sentencing Commission's own report, that the disparate

1 Cocaine and Powder Cocaine. That's not our words.  
2 It's The Sentencing Commission's own study.

3 Some of what Laura just said is in there, and  
4 one of the other things, you suggested that we raise  
5 powder cocaine penalties. Again, I mean we work in  
6 this field a lot. So, we know the statistics off the  
7 top of our heads. 68 percent of the people arrested  
8 for powder cocaine federally are non-white. That would  
9 not solve the racial disparity between crack and  
10 powder. It would simply lower the powder amount to  
11 five grams of powder cocaine, which again are the low  
12 level, you know, users and small-time dealers who are  
13 largely non-white.

14 Federally, 68 percent of the people being  
15 sentenced for powder cocaine are non-white. So, again,  
16 it would not solve the racial part of the problem.

17 So, I guess those are the two points I want  
18 to make, and, of course, it's hard, as you sat there  
19 and listened to us politely, it's hard to sit here and  
20 politely listen to some of what you've said because,  
21 yes, we come up with our own biases. We're also very  
22 entrenched in this issue. We've done a lot of  
23 research.

24 I have fully supported the incarceration of  
25 my brother. I testified before Congress, saying it was

1 speak about crack and powder cocaine, we don't speak on  
2 a blank slate, I would suggest, that just happened  
3 recently.

4 If you -- the history is detailed in the book  
5 by Dr. David Mustel from Harvard University and  
6 detailed in many other books. For instance, a book  
7 called "Against Excess", and "America's Longest War".

8 So, to talk about this, what I am concerned  
9 about, and what I have to tell you is I am not  
10 concerned about getting longer sentences for anyone.  
11 We -- we don't have any problem with giving people long  
12 sentences in this country. We give longer sentences  
13 than any country in our heritage and tradition.

14 The question here is whether these long  
15 sentences are just and appropriate and solve the  
16 problem that we're here to address, and I would suggest  
17 that they don't, and I think you have to -- you cannot  
18 detach America from its history, and we cannot deny  
19 that history in our discussions about the present.

20 CHAIRPERSON BERRY: Okay. Last comment?  
21 Yes?

22 MR. YOUNG: Well, I welcome the opportunity  
23 to respond to Commissioner Horner, and I don't know if  
24 this goes outside the rules of what you're supposed to  
25 do in Washington on these things or not, but, you know,

1 it was kind of clear to me when I sat in earlier that  
2 if one was putting people into categories, one might  
3 say, from your comments, that you are on the other side  
4 of an issue. Whether that's fair or not is irrelevant,  
5 because what I want to say is I think you've opened the  
6 door. Your comments opened the door to a very useful  
7 line of discussion, and I just want to give two  
8 examples, which I think would benefit the debate that  
9 goes on in other agencies and other institutions in  
10 this city immensely.

11 And I think people, whatever their persuasion  
12 are, should welcome the invitation you made to be  
13 direct in their comments and to get some issues out.

14 The first of the two sort of responses I  
15 have, just to make the point of how I welcome your  
16 comments, are, well, yes, of course this is a complex  
17 issue, and I'm glad to hear you say that. The problem  
18 has been that so many people in authority and positions  
19 of responsibility have regarded crime issues as simple  
20 with one solution.

21 And there is a basis for fear. I've tried to  
22 say that. But fear has never been the best decider of  
23 public policy, you know, in war, in peace, or in any  
24 other issue, and I'm going to get personal again.

25 I grew up in the era of polio as an epidemic

1 in this country. Had -- you know, I sometimes think  
2 that the current war on crime is somewhat akin to had  
3 our political leadership stood up and said, we ought to  
4 be afraid of polio, it's killing our children and  
5 putting people in -- in terrible machines for the rest  
6 of their lives, build hospitals, build hospitals, build  
7 hospitals.

8 But, instead, because of what was known and  
9 our belief in science, the money went into research,  
10 and that was the response, of course, that led to the  
11 solution, and I think that in the crime area, there are  
12 many, many opportunities to similarly move beyond fear  
13 and simplistic solutions to inquire as to what might be  
14 done to solve those problems, and that's my second  
15 response.

16 You invited one of those. When you mentioned  
17 your concern, you mentioned my reference to the  
18 children in my neighborhood and said most of them grew  
19 up probably with two parents and in pretty stable  
20 homes, and God knows I don't want to argue about that  
21 factually, it might be an interesting research project,  
22 but I understand the perspective, and I think in large,  
23 that's correct.

24 My response is that for the children who are  
25 in single parent or otherwise difficult situated homes

1 or non-homes in the inner cities, in rural urban  
2 poverty areas, you know, the question should be how do  
3 we substitute for the lack of the resources that we  
4 have in the stable -- you know, in the stable  
5 neighborhoods, and the answer that we seem to be giving  
6 more and more through three strikes and you're out, and  
7 particularly now through the current sweep in juvenile  
8 law revision is for those people, we will substitute by  
9 bringing the full force of the criminal law and  
10 criminal punishment to bear, and my point is, and  
11 that's not what we would do if we had the same problems  
12 in our neighborhood.

13 And I think that this is a very positive  
14 invitation that you've made, that what needs to be done  
15 is to examine the deficiencies and ask, how do you  
16 respond to those deficiencies?

17 Sometimes, it will be through the use of  
18 criminal law, policing and even incarceration. That  
19 much is true. But in other instances, and the example  
20 of poor children without adequate homes or the subject  
21 of abuse and neglect, the response is they've got to  
22 come from other places than the criminal justice  
23 system, and that's -- what I think you invite is to  
24 move -- and I again hope the Commission will go in that  
25 direction.



1                   COMMISSIONER HORNER: And we could follow up  
2 that discussion with a discussion of the contention you  
3 just made that the question is how do we substitute for  
4 the lack of a stable home, and I would ask -- I would  
5 say let us ask how we can demand the creation of stable  
6 homes, but we could have a talk about that.

7                   MR. YOUNG: We would not be talking about  
8 building prisons and filling them with three strike  
9 offenders. We would be talking about other issues, and  
10 -- and what I said earlier in trying to, you know, in  
11 -- in my comments on -- on laws that seem to be fair in  
12 their place, and when they -- when they have -- they  
13 result in disparate outcomes, you know, I would say  
14 then that what needs to be done is to examine other  
15 responses that produce better or equally good results  
16 without the civil rights implications that those laws  
17 have.

18                   Thank you.

19                   CHAIRPERSON BERRY: Okay. Thank you,  
20 Commissioner Horner, for stimulating this -- these  
21 responses, and we will revisit this issue again, and I  
22 want to thank the panel. Thank you all very much.

23                   (Whereupon, the commission meeting was  
24 adjourned.)

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REPORTER'S CERTIFICATE

This is to certify that the attached  
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In the Matter of: COMMISSION MEETING

were held as herein appears and that this is the  
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Official Reporter.

Dated: JULY 12, 1996