

1

2

3

4

* * * * *

5

AMERICAN JUDICATURE SOCIETY

6

COMMISSION ON FORENSIC SCIENCE

7

AND PUBLIC POLICY

8

RETREAT

9

* * * * *

10

11

12

13

14

15 DATE: Sunday, April 2, 2006

16 TIME: 8:41 a.m.

17 PLACE: Grandover Resort & Conference Center
1000 Club Road

18 Greensboro, North Carolina 27407

19

20

21

22

23 Reported by: Dorothy J. M. McGrath

24 Court Reporter

25 Notary Public

1

INDEX OF REMARKS

2	Mr. Sobel	5
	Dr. Fienberg	6
3	Dr. Loftus	7
	Chief Berger	8
4	Mr. Fisher	9
	Dr. Fienberg	10
5	Mr. Fisher	11
	Judge Clarke	13

6	Professor Martin	14
	Judge Clarke	14
7	Professor Martin	15
	Judge Clarke	15
8	Judge Doerfer	16
	Professor Berger	17
9	Professor Faigman	18
	Mr. Williams	19
10	Mr. Travis	21
	Dr. Fienberg	23
11	Mr. Travis	23
	Professor Martin	25
12	Mr. Travis	25
	Mr. Williams	25
13	Mr. Weidman	27
	Dr. Fienberg	28
14	Mr. Fisher	28
	Dr. Fienberg	31
15	Dr. Lew	31
	Chief Berger	32
16	Dr. Cole	34
	Ms. Petrie	35
17	Mr. Fisher	36
	Judge Doerfer	36
18	Professor Berger	37
	Mr. Travis	37
19	Mr. Fisher	38
	Professor Martin	40
20	Dr. Blumstein	41
	Mr. Fisher	43
21	Professor Faigman	43
	Dr. Byers	45
22	Mr. Fisher	47
	Mr. Sobel	48
23	Ms. Mumma	49
	Mr. Fisher	49
24	Dr. Cole	50
	Mr. Fisher	50
25	Mr. Travis	51

1 (Index Continued)

2	Dr. Fienberg	53
	Ms. Petrie	56
3	Dr. Fienberg	59
	Ms. Petrie	60
4	Mr. Fisher	60
	Dr. Fienberg	61
5	Mr. Hammond	62
	Professor Berger	63
6	Mr. Travis	64
	Mr. Hammond	64
7	Professor Martin	64
	Mr. Hammond	64
8	Mr. Travis	64
	Ms. Mumma	65
9	Professor Berger	67
	Mr. Fisher	67
10	Professor Marshall	68
	Mr. Hammond	69
11	Mr. Fisher	69
	Mr. Hammond	70

12	Mr. Fisher	70
	Mr. Hammond	70
13	Chief Berger	70
	Professor Marshall	71
14	Chief Berger	71
	Professor D'Alemberte	72
15	Professor Martin	73
	Dr. Byers	73
16	Ms. Mumma	74
	Mr. Valdez	75
17	Mr. Hammond	75
	Dr. Fienberg	76
18	Mr. Fisher	77
	Dr. Fienberg	77
19	Judge Clarke	77
	Dr. Fienberg	78
20	Mr. Loge	78
	Dr. Fienberg	79
21	Chief Kerlikowske	79
	Dr. Fienberg	80
22	Judge Clarke	81
	Professor Marshall	81
23	Dr. Fienberg	82
	Professor Marshall	82
24	Mr. Hammond	82
	Professor Martin	83
25	Dr. Byers	83

4

1 (Index Continued)

2	Professor Martin	83
	Dr. Fienberg	84
3	Professor D'Alemberte	84
	Dr. Fienberg	84
4	Mr. Sobel	85
	Professor Faigman	85
5	Professor Berger	87
	Professor Faigman	87
6	Dr. Fienberg	87
	Mr. Fisher	88
7	Professor Berger	88
	Mr. Fisher	88
8	Professor Martin	89
	Mr. Fisher	89
9	Dr. Cole	89
	Judge Clarke	90
10	Dr. Fienberg	91
	Professor Faigman	92
11	Dr. Blumstein	97
	Professor Berger	98
12	Dr. Byers	99
	Mr. Travis	100
13	Professor Faigman	101
	Dr. Fienberg	103
14	Chief Berger	105
	Dr. Fienberg	106
15	Professor Berger	107
	Dr. Fienberg	107
16	Mr. Hammond	109
	Ms. Mumma	110
17	Mr. Travis	110
	Dr. Fienberg	111

18 Mr. Travis 111
 Mr. Hammond 111
 19 Dr. Fienberg 112
 Mr. Fisher 112
 20 Mr. Loge 112
 Mr. Fisher 113
 21 Ms. Leary 113
 Dr. Fienberg 113
 22 Mr. Travis 113
 Dr. Blumstein 114
 23 Dr. Fienberg 114
 Mr. Sobel 115
 24
 25

□

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

2 REMARKS OF MR. SOBEL

3 MR. SOBEL: Gary is considering an offer
 4 from U. N. C. Greensboro to join the faculty at
 5 that institution, and he and I have talked
 6 about what a move to Greensboro might mean in
 7 terms of opening up opportunities for Gary to
 8 work with the institute, and Gary would very
 9 much like to have a position at the institute,
 10 and we don't know exactly what that position
 11 might be called, but he's very anxious to
 12 promote his work through the institute in
 13 working with the commission, and while I have
 14 not spoken with him about his specific idea, I
 15 had -- that I'm going to share with you in a
 16 moment -- I had talked with Gary about the idea
 17 of putting before this commission at some point
 18 a set of proposed standards or guidelines based
 19 upon his research and asking the commission to
 20 review that proposal and consider whether it
 21 should be adopted, truly adopted, and what I've
 22 been talking with General Reno about and Steve
 23 about over the past few days is asking Gary if

24 he would key that up for a meeting that might
25 be scheduled for the commission in, say, three

6

1 or four months at which Gary would present a
2 proposed set of standards and guidelines and
3 eyewitness identification procedures, supply
4 the commission members in advance with all of
5 the scientific literature he thought was
6 important to review, and we would not only have
7 Gary present to talk about his research, but we
8 would also have others present that anybody on
9 the commission thought was important to have at
10 the meeting, those both who were in favor of
11 the procedures being recommended by Gary to the
12 institute and those who may be opposed to those
13 procedures for whatever reason so that the
14 commission would have the best and complete
15 information.

16 REMARKS OF DR. FIENBERG

17 DR. FIENBERG: If we were to move ahead on
18 that kind of agenda, I'd want to see the
19 commission take control. And I know a number
20 of others around the table do also. The
21 advantage of this in many senses is, we know --
22 many of us know a lot about this research
23 effort. We know about its importance in a
24 practical way, for example, for departments but
25 also the quality of the research and its impact

7

1 in other ways. On the other hand, if it's just
2 Gary's project, then it's not ours. And so
3 what if -- if there was some consensus about
4 the usefulness of this as a way to jump-start

5 some activities, we would like to appoint a
6 subgroup of the commission that could work with
7 Gary, and it would be our language that would
8 be endorsed by the commission largely
9 influenced, I suspect, by Gary's focus in
10 activities so that it really was a commission
11 product and not simply a Gary wells product.
12 That's good for Gary in the sense that he has,
13 as you heard, an agenda that he would like to
14 move ahead, and he really requires a different
15 kind of activity for it to be a reality in the
16 near term. But we also have an agenda that is
17 not up to that, and I think we collectively
18 have to pursue our agenda, and that's why I
19 think we need to provide that oversight.

20 I think it would be great to have that as
21 a piece of what we're doing and so that --

22 REMARKS OF DR. LOFTUS

23 DR. LOFTUS: Well, I think this is a great
24 idea and particularly for people who are
25 worried about the purse strings. Gary's entire

8

1 salary would be paid by the university. He is
2 currently a distinguished professor at Iowa
3 State as many of you may know and is
4 enthusiastic about this move because of the
5 institute, and he is very interested in having
6 reform in police procedures, but there are many
7 other things that a little eyewitness division
8 of the institute could do, so for example, you
9 know, I think public education is very
10 important. If we could kind of raise the level

11 of consciousness of our citizens who become
12 jurors about eyewitness matters, I mean,
13 that's, you know, another kind of a project
14 that we could get involved in, and maybe we
15 ought to think about just making Gary the --
16 whatever the title is, you know, the head of
17 the eyewitness division of the institute and
18 for a dollar a year or whatever what that going
19 rate is and have a subgroup of this commission
20 that would be his board members or whatever.

21 REMARKS OF CHIEF BERGER

22 CHIEF BERGER: Yeah, I was going to say,
23 as a practical application for law enforcement,
24 so I was very impressed, but during the
25 conversation, I kept thinking of the movie, "My

9

1 Cousin Vinnie." And I just cannot tell you how
2 I think this could really significantly impact
3 us a positive way and its important, practical
4 side you mentioned: Cost. 70 percent of all
5 law enforcement agencies in this country are
6 jurisdictions with under 50 law enforcement
7 sworn people, and therefore, it is so important
8 and it is practical to tell them that now we've
9 got another person inside that loop that is
10 going to have to be deposed, that's going to
11 have to have overtime, but the significance and
12 importance of this far outweighs that, and it
13 will certainly be a marketing job not only to
14 the department heads which I would take
15 responsibility for certainly passing that along
16 with Gil, but to the communities as a whole and

17 see how important this is to try and reduce
18 false identification.

19 MR. SOBEL: Barry?

20 REMARKS OF MR. FISHER

21 MR. FISHER: well, certainly, the wish to
22 hit the ground running and produce something
23 with the imprimatur of the new forensics
24 commission is a worthy goal. I think for at
25 least me and perhaps some others at the table,

10

1 when you talk about forensic science,
2 eyewitness testimony does not quite fit under
3 that particular umbrella. It's there, but it's
4 not there, and I noticed in listening to a
5 number of your presentations that we seem to
6 very subtly slip away from the overall
7 concerns of forensic science in to what could
8 be perhaps better called an innocence
9 commission, so I think we need to try to define
10 what it is this body is all about. Is it an
11 innocence commission? Is it a forensic science
12 commission? Because the way you market this to
13 people who may be considering using or becoming
14 involved in what you're doing is going to take
15 different shapes, depending on how you define
16 what it is you -- we are.

17 REMARKS OF DR. FIENBERG

18 DR. FIENBERG: I think that's a good
19 point. Let me take a stab at this because I
20 think it really is our agenda this morning in
21 many ways. When I was asked to be part of
22 this, my perspective -- it's a broad one -- it

23 involves the interface of science above the
24 traditional things that forensic labs have been
25 associated with but also the new fittings and 11
1 other contributions that science can make quite
2 broadly to the legal litigation enterprise, and
3 I think we have to not leave behind the
4 traditional forensic sciences even if our goal
5 is to move them forward collectively, and so I
6 think that taking on the eyewitness testimony
7 can only be done if it doesn't detract from
8 that other goal, and what I saw as the
9 advantage of doing this is, we have something
10 that's really ongoing that we can assist at
11 relatively minimal costs while we're doing the
12 much harder job of starting that other dialog
13 to change the science component of forensic
14 science more broadly. Now, what's your first
15 priority? If this is going to work, we need to
16 come out of the room with a short list of
17 things that the institute can begin to explore,
18 that we can help the institute explore in
19 subgroups, maybe advising AI and working with a
20 few others so that the next time we meet we're
21 not at ground zero again.

22 REMARKS OF MR. FISHER

23 MR. FISHER: well, let me answer your
24 question this way: I interface with a large
25 number of people because of my profession, a 12
1 number of professional interests, and among
2 those people are academics, law school

3 professors, other crime labs, defense experts,
4 lawyers, judges, and what have you, and when I
5 go around and talk to different people, it's
6 the old story of the blind man and the
7 elephant. We can't seem to actually get our
8 arms around this. Now, I give you a particular
9 example: Simon. Simon's out in the L. A.
10 with -- the L. A. area. We talk every so
11 often. Simon's passion has been fingerprints
12 in that we don't have a database out there, if
13 we don't know what the actual reliability
14 quotient or however you want to call it is.
15 Now, when I talk to judges, Woody, and -- and
16 you ask the question how -- are you going to be
17 willing to accept expert evidence, and I don't
18 have these numbers with -- for, is that going
19 to just exclude me as an expert witness?
20 Because if that's going to put me out of
21 business, then I'm really -- I'm really
22 concerned. So I listened to different
23 groups -- academics, law school professors --
24 who are saying some things that this stuff is
25 unreliable; therefore, it does not meet the

13

1 legal burden of Daubert, Frye, and the Federal
2 Rules of Evidence. Yet as a practical matter
3 in the courtroom, the evidence continues to
4 come in, and I wonder, well, what is the
5 problem? Are we making more out of this? Are
6 we just looking at this strictly as an academic
7 issue versus a practical kind of issue? And I
8 just don't -- I'm getting mixed messages from

9 my perspective. Love to hear from some of the
10 judges.

11 REMARKS OF JUDGE CLARKE

12 JUDGE CLARKE: Actually, the discussion
13 about fingerprints has been a very interesting
14 one. We sometimes forget that fingerprints are
15 being compared, thousands of them every day,
16 with the traditional rest because there's an
17 attempt to identify the person, make sure it's
18 who we think it is or who law enforcement
19 thinks it is, and those are routinely done
20 whether digitally or by hand. Then at the
21 opposite end of the spectrum, I think at that
22 first area there's really no legal controversy
23 or scientific controversy much at all. Then at
24 the opposite end, of course, is a partial
25 latent fingerprint with perhaps a limited

14

1 number of characteristics that can be compared,
2 and that may very well be a ripe area for
3 further research, but at the same time, I think
4 in the overall legal system, if you talk
5 fingerprints, there's no controversy, and I
6 think there's a limited area that the legal
7 system will be interested in, but the partial
8 fingerprint area, I think, is one that deserves
9 an examination, but otherwise, I think many in
10 the legal system would look upon an attack on
11 comparison of fingerprints as something they
12 are not interested in.

13 REMARKS OF PROFESSOR MARTIN

14 PROFESSOR MARTIN: How do you think the

15 system will look at applying -- that this
16 institute said is looking into eyewitness
17 identification as something that needs to be
18 really seriously addressed?

19 REMARKS OF JUDGE CLARKE

20 JUDGE CLARKE: Well, there are two aspects
21 of that. That's a fascinating area. I
22 remember hearing my -- in the middle of
23 testimony in cases 20 years ago discussions of
24 that nature, and so lineups, picking people
25 out, that's a very ripe area, I believe.

15

1 REMARKS OF PROFESSOR MARTIN

2 PROFESSOR MARTIN: So that we may be
3 regarded as doing serious work if we announce
4 that we're doing this sort of thing?

5 REMARKS OF JUDGE CLARKE

6 JUDGE CLARKE: Oh, I think so,
7 particularly with the inroads that Gary's work
8 has led to, for instance, in North Carolina and
9 New Jersey and so on. That is a very slow
10 process to get law enforcement to make a change
11 in their procedure. I was really impressed
12 with that number of law enforcement agencies
13 making those changes to sequential lineups to
14 blind compare -- not comparisons -- but blind
15 supervision of those lineups and so on. Now,
16 at the other end, for instance, is testimony in
17 court about eyewitness identification. Now, a
18 I know a lot of this is regional. Depends on
19 the particular portion of the country, but in
20 the last ten years when I was prosecuting

21 cases, jurors don't like eyewitness
22 identification, at least regionally in
23 California, and I suspect in many other
24 locations as well. Then we see some of the
25 examples of the capital verdicts in Illinois, 16

1 and I wonder how in the world could juries
2 convict some of those people, so there's
3 clearly differences between areas of this
4 country.

5 DR. FIENBERG: Yes?

6 REMARKS OF JUDGE DOERFER

7 JUDGE DOERFER: Well, I have experience as
8 a trial judge, as well as -- 19 years as a
9 trial judge and 5 years --

10 MR. SOBEL: Please pick up the microphone.

11 JUDGE DOERFER: Yeah, thanks.

12 DR. FIENBERG: I tend to be able to hear
13 everyone. The people on the periphery can -- I
14 have a louder voice than almost anybody in the
15 world.

16 JUDGE DOERFER: I think we're also trying
17 to make a record as well, so I'm glad to use
18 the microphone. I'm going to say the obvious,
19 I guess, and then fingerprint identification
20 issues and issues relating to eyewitness
21 identification will come up in two contexts:
22 It will come up with a context of whether or
23 not a trial judge is going to allow expert
24 testimony before the jury as to the
25 significance of the eyewitness identification

1 procedures that are used in a given case, and 17

2 that remains somewhat controversial in
3 different jurisdictions.

4 The other intersection is going to be in
5 jury charges. What is the judge going to be
6 required or allowed to say to a jury in terms
7 of how to evaluate certain types of evidence?
8 So there is a limited or specific area where
9 research of this type, I think, might find its
10 way to the courtroom in those aspects.

11 REMARKS OF PROFESSOR BERGER

12 PROFESSOR BERGER: I was trying to think
13 of a way in which to combine the eyewitness
14 project with what I think is very real concern
15 that we not lose track of forensic science, and
16 so I was trying to think in terms of the people
17 who would be doing the work needed for these
18 projects, and I was wondering if somehow, since
19 I think most of the people who would be working
20 on an eyewitness project would probably be
21 psychologists, whether one could perhaps put
22 together some kind of a project on how to
23 instruct jurors -- to inform jurors about
24 expert testimony in terms of what would make
25 sense to them and being able to comprehend it,

18

1 which could then encompass some of the
2 traditional forensic sciences that have
3 probability issues with them and put together
4 really a research team of people who come
5 perhaps from the same discipline but could be
6 working on very different projects, and perhaps
7 that would make it a little easier to somehow

8 run two different projects but one of which
9 would have more to do with the hard forensic
10 sciences, though, coming at it in terms of
11 basic research on the forensic science but
12 rather and have that science then introduced in
13 the courtroom.

14 MR. SOBEL: David?

15 REMARKS OF PROFESSOR FAIGMAN

16 PROFESSOR FAIGMAN: Just on that score,
17 I'm going to add to Margaret's observation. If
18 you look around at the academics who are
19 challenging and nobody's saying that
20 fingerprints -- and we're just talking about
21 partial latent prints. Everybody's going to
22 talk about partial latent prints, but the claim
23 is not that they're unreliable. The claim is
24 that they haven't been verified or validated as
25 reliable. Those are really quite different

19

1 things, but in terms of Margaret's observation,
2 when you look around to the people who are
3 raising questions, they tend to be
4 psychologists. They're methodologists.
5 They're the Michael Saxes of the world. My
6 background is in psychology, and so I actually
7 think, you know, Margaret's point is a very
8 good one that the types of expertise that you
9 will be looking for -- of course, psychologists
10 tend to be trained in statistics. They would
11 probably be the core group that would be
12 interested in eyewitness, also address then
13 some of the forensic identification sciences,

14 and then you'd want to probably add some
15 statisticians to that. I say a little bit more
16 sort of core expertise, but I do think that
17 there's probably going to be a great deal of
18 overlap when you're looking at sort of types of
19 expertise because psychologists are such
20 generalists.

21 REMARKS OF MR. WILLIAMS

22 MR. WILLIAMS: You know, given the limited
23 amount of time that would be available to us
24 this morning, I thought that what we were going
25 to try to do was to establish priorities in

20

1 terms of research agenda. Kicking off a
2 particular project may be one way to get the
3 identification, but it does not establish the
4 priorities, and I think you could get some of
5 the issues that have been put on the table
6 responded to or resolved if we would, in fact,
7 say, look, we start out by making the point
8 that we wanted to try and merge science and
9 law, and it was my impression that the purposes
10 of that merger was to improve the quality of
11 justice within the criminal justice system.
12 Now, there are emerging sciences out there.
13 Forensics is one. This business of witness
14 identification comes somewhere in that
15 parameter, but what will be the priorities of
16 this commission? And if we can establish the
17 things that we consider to be the important
18 issues that we want to address, then it's a
19 question of how do we get the resources and

20 where do we go as far as -- on the priority
21 list, but right now, we really don't have any
22 priorities. We're talking about a variety of
23 different things, all of which sound
24 interesting, some of which sound impressive,
25 but we need to establish priorities.

21

1 REMARKS OF MR. TRAVIS

2 MR. TRAVIS: Let me just bounce off what
3 Hubert just said. I'm trying to think about --
4 so this -- does this opportune moment that's
5 coming our way to identify publicly as a
6 commission -- how do we set a profile for this
7 entire enterprise, and to make a statement for
8 the first time as a commission around a
9 particular issue is -- you know, I would echo
10 the notion that eyewitness identification is a
11 good place to start because the research is so
12 robust, but I'd like to see whatever the
13 priorities are that we come up with, that or
14 others, be under some umbrella that where the
15 commission is making a general statement about
16 the importance of this issue. In other words,
17 we can -- and I don't think this is a
18 particularly hard writing assignment, and I'm
19 not volunteering for it but to sort of take the
20 last --

21 DR. FIENBERG: I'm making my list as you
22 speak --

23 MR. TRAVIS: -- the last two days of
24 discussion basically to say that there's a sort
25 of national need -- there's a national crisis

1 that's overblown with this. There's a --
2 there's an imperative that our system of
3 justice be more scientifically grounded than it
4 is, and there are lots of ways that we can --
5 lots of examples we can point to sort of like
6 DNA exonerations where we have learned in
7 the -- we've learned the hard lessons of not
8 having a system that reflects good scientific
9 principles and work, so coming from that
10 statement of some -- speaking on behalf of some
11 of the national agenda, then you can start to
12 drop down a number of research projects, and
13 you can say -- and so the list can be a list
14 of -- not things that we're going to do
15 necessarily but a list of things that should be
16 done. And it's really a call to Congress.
17 It's a call to university communities. It's a
18 call to the scientific community. Let's call
19 the practitioners to get behind this idea, and
20 then over time, you can sort of say, well,
21 where are we on that agenda, where are we on
22 that list, but I would take Hubert's idea and
23 just sort of try to think about a way to frame
24 this as a larger sort of public policy
25 proposition that the commission should get

23

1 behind, and hopefully, that would help also
2 generate some -- loosen up some money in some
3 places if we say this is a matter of not just a
4 single research project or a single research
5 inquiry, but it's a matter of the justice

6 system and the way the justice system is
7 working.

8 REMARKS OF DR. FIENBERG

9 DR. FIENBERG: Don't give it up. No, let
10 him keep it for a second. So if you
11 articulated that, what are your favorite
12 examples of what goes on that agenda?

13 MR. TRAVIS: well, I think --

14 DR. FIENBERG: Because I think that's what
15 we need to get out on to the table now.

16 REMARKS OF MR. TRAVIS

17 MR. TRAVIS: Right. well, I think we --
18 we have the body of work and eyewitness
19 identification where we can say with high
20 degree of certainty that the research community
21 over the last decade or so has shown that there
22 are better ways and worse ways of doing that
23 work and that it's now time for there to be
24 sort of a national movement towards the better
25 ways and that we as a commission want to push

24

1 that. That's our agenda. We can also say at
2 the same time that the advance of forensic
3 science has led to an explosion of some
4 interests, an explosion of opportunity to
5 use -- to the DNA identification, and that
6 there's a need for the infrastructure that
7 produces those DNA matches to be
8 significantly -- some resource, modernized and
9 prudential and all this sort of stuff. And
10 then the third part of this statement would be,
11 and guess what, there's lots of things that the

12 system now does that don't have adequate
13 scientific basis to indicate that they are --
14 that they're valid, not to say, you know, as in
15 the case of fingerprints that what we're doing
16 is wrong but there's no scientific basis yet,
17 and this is a research agenda, and I would --
18 we could say that the priority part for me is a
19 little hard because as to what the -- how you
20 put somebody at the top of the list as opposed
21 to the bottom of the list. Is it used more
22 often or it's great public salience or it's
23 more -- it's a right for research. I'm not
24 sure how you get to the top or the bottom of
25 the list, but we have a list. We identified a 25

1 list over the past two days, and to go through
2 and write, you know, a page on each one of
3 those and say, well, here's a research agenda
4 for the nation, and, you know, who picks up
5 which one of those? We're not certain, but
6 just to make the statement, I think, would be a
7 powerful voice for us, a statement that
8 research is desperately needed.

9 REMARKS OF PROFESSOR MARTIN

10 PROFESSOR MARTIN: And we can say we want
11 to foster this research. We may not do it
12 ourselves --

13 REMARKS OF MR. TRAVIS

14 MR. TRAVIS: It should be done. It should
15 be done, you know, people around the table who
16 do some of it, not all of it. It should be
17 done in multiple centers, not just those

18 represented here, but there's a moral voice
19 here. It should be done, right?

20 PROFESSOR MARTIN: Exactly.

21 REMARKS OF MR. WILLIAMS

22 PROFESSOR MARSHALL: I would just say that
23 once we establish that agenda then we need to
24 have people with that skill in walking to help
25 us to develop the approach to announce it. You 26

1 know, you know, for example, if we have things
2 that have been used for, let's say, decades and
3 acceptable by the courts like fingerprints, we
4 might want to say that we could strengthen our
5 capacity to add greater validity to the
6 fingerprinting systems that we have in place,
7 and if we structure it properly, we're not
8 going to run in to unnecessary resistance from
9 practitioners and others out there that feel
10 that they're under attack now because our
11 announcement is questioning what they've been
12 historically doing. Now, we're obviously going
13 to question that, what they have historically
14 done, but only for purposes of improving it,
15 and when the judge was up there yesterday at
16 the beginning and he was saying as we tried to
17 implement these things in North Carolina I kept
18 saying that we have the best system in the
19 country. Our purpose is to improve the system
20 that we've got, right? I thought that was a
21 very smart way to approach it. We don't
22 necessarily have to say that we've got the best
23 there is, but if we are using techniques and

24 methods that have been acceptable, the thing we
25 want to do is talk about improving those

27

1 techniques and methods for purposes of
2 improving the quality of justice in our
3 criminal justice system, and that way, you're
4 not going to get people feeling that they're
5 under attack, and they're going to feel that
6 they've got to come back and resist efforts
7 that this organization or commission is trying
8 to make.

9 REMARKS OF MR. WEIDMAN

10 MR. WEIDMAN: Along those lines, something
11 that hasn't come up this morning, was the
12 discussion of creating standards for
13 accreditation and quality control of crime
14 labs. Barry talked about the need for it and
15 how unregulated that group is, and it seems
16 again that can be an area where we can have
17 some real force, can make a real difference,
18 and can be done in a way that doesn't generate
19 the kind of resistance that we need to be
20 fearful of, so if we're thinking about this on
21 a multi-tier agenda and at some level we say,
22 okay, we want something that we can get started
23 on right away, maybe that's the eyewitness work
24 that Sobel developed, then we want a second
25 phase, and that might be, for example, the

28

1 quality control aspects that are mid level in
2 terms of degree of resources we would need to
3 do real hard research, and then you have a
4 third deeper agenda where we're doing much

5 deeper research either ourselves or
6 commissioning in to validation certain kinds of
7 science, but this way, you have something that
8 you're working on and getting out public right
9 away, and then you're kind of stacking them up
10 in an order of density so that we have an
11 ongoing work product.

12 REMARKS OF DR. FIENBERG

13 DR. FIENBERG: Let me just ask Barry, is
14 there a subset of your colleagues who would
15 join with us in the effort to move standards in
16 a more formal way from the area of DNA where
17 there's, I would say, broad agreement about
18 what they should be in to related areas?

19 REMARKS OF MR. FISHER

20 MR. FISHER: I think the level of
21 knowledge about what's going on nationally in
22 the forensic science community is pretty almost
23 nonexistent around the table. There are
24 accreditation certification programs. The
25 problem that I mentioned yesterday was that

29

1 they are largely voluntarily. There are no
2 requirements at the -- few requirements at the
3 state or the federal level that laboratories
4 have to perform at, at some level. Some of
5 these programs are fairly robust. They meet
6 national and international laboratory
7 accreditation standards. They have been
8 endorsed by any number of places, some legal,
9 some administrative, so the question is, how do
10 you formalize some of these things? One of the

11 things I have thrown out in a number of
12 different venues that have yet to take root is,
13 perhaps, some model language for legislators
14 around the states to take up about how to
15 resource and oversee state and local crime
16 labs. There are a few places in New York. New
17 York State has a state commission, Texas,
18 Oklahoma, couple of other places because of
19 some meltdowns that they've had have gone in
20 that direction, but there's no real commonality
21 from one area to another. So this has a
22 connection as a legal component in terms of
23 writing model language. There is a quality
24 assurance component in there in terms of
25 deciding what to adopt and what the

30

1 expectations of government might be, so that
2 may be something to consider taking up.

3 I think as I said yesterday that there are
4 a number of things that need to be done in the
5 short run, and one of the things is to
6 introduce this effort to the wider forensic
7 science community. I only happened to find out
8 about it because I literally stumbled on it on
9 the Internet. I search for these things. Lot
10 of people don't even know, like the fellow said
11 yesterday that the crime labs and medical
12 examiner's offices around the United States,
13 what the heck the American Judicature Society
14 is, and somebody commented to me that they
15 proud that I couldn't even pronounce
16 judicature -- judicature. I worked on it

17 before I came. So there is this education
18 component, both from the practice in forensic
19 science laboratory people and administrators,
20 as well as the legal profession. I think that
21 there are opportunities here to act as a bridge
22 between these two groups and lay out some of
23 these issues in a non-accusatory,
24 non-pejorative kind of way which has a tendency
25 of really setting people on edge and not

31

1 wanting to deal with individuals and go from
2 there.

3 REMARKS OF DR. FIENBERG

4 DR. FIENBERG: Now, you represent the same
5 constituency from the other N. C. A. A. final
6 estate.

7 REMARKS OF DR. LEW

8 DR. LEW: I would echo what has been said
9 already that we need to establish our
10 priorities and agenda, and I come from the
11 very -- I come from a realm where I deal in the
12 very concrete and in hard evidence because
13 that's my goal, and I guess my perspective is
14 that I see that juries are -- there are some
15 things that juries seem to be more swayed by or
16 convinced by, and hard evidence is one of those
17 things. Now, I'm fascinated by eyewitness
18 testimony and all the topics that I've been
19 presented at this retreat, and I would love to
20 learn more about them, but I wonder if perhaps
21 we need to first concentrate on things that are
22 definitely more concrete and can be presented

23 to juries as hard evidence, to be followed up
24 by topics where there are more -- or not as
25 concrete and more, perhaps, interpretive or

32

1 more so-called social psychological. Now, I
2 had some other thoughts too, but I'm sorry,
3 still recovering from a trip out of the country
4 last week, and I'm still sick. Maybe if I can
5 add additional comments if I think about them.

6 REMARKS OF CHIEF BERGER

7 CHIEF BERGER: Let me just, if I could,
8 which I think I would be remiss if I didn't
9 mention this: It was brushed on just briefly,
10 and I think it could be a significant role that
11 we could play in the disclosure. As mentioned
12 the first day we were here, the backlog of DNA
13 samples that have not been tested, and I think
14 from my perspective and a couple of folks here
15 in regards to the other side, the victims,
16 standing up for those victims which I think is
17 extremely important also, there was a 14 year
18 old girl in my community that awoke one night
19 when a 46 year old guest of the family decided
20 to go ahead and bunk in with her without her --
21 you know, without her inviting him, and
22 subsequently, because she had lied before, the
23 family did not believe that this man had taken
24 advantage of her. Subsequently, after finding
25 some rather bizarre physical evidence, they

33

1 eventually had her tested. He, seeing a
2 television show and because he had had a

3 vasectomy, believed that he could not have DNA.
4 Let me tell you what the tragedy was is, when I
5 took over my appointment, I reviewed all our
6 sexual battery cases and discovered that many
7 of them had been submitted but not tested at
8 all, and the Florida part of law enforcement is
9 under criticism of them. They're a very good
10 organization. Their backlog is eight months,
11 and I felt as convicted to either exonerate him
12 or prove his guilt, and I actually had to infer
13 myself to go to the head of that department to
14 say, this is abomination, this is wrong, this
15 is ethically wrong, we can't allow this to
16 happen, but it has happened, and that
17 disclosure -- and I don't know if Florida is
18 just unique or if this is around the country,
19 but if it is, it's something that we certainly
20 need to bring forward, and from a theoretical
21 or research capability, that could be a
22 significant role we could play to announce
23 that, that, you know, our governments have got
24 to realize what's going on here. We're relying
25 so much on DNA, but on the other hand, we are

34

1 not taking advantage of it, and we're not
2 properly funding it to make sure -- again, from
3 both sides -- to exonerate people or, in fact,
4 to use it against them to take these people off
5 the street.

6 REMARKS OF DR. COLE

7 DR. COLE: I was just going to say, I
8 mean, I'm interested in fingerprint research

9 obviously, but taking off on what Larry said
10 and what Barry said, there's also room, I
11 think, for policy research at a high level.
12 One thing, for example, is, you know, Scheck
13 and Neufeld's number one suggestion is
14 independent crime laboratories. Barry said in
15 his slides yesterday he doesn't think that's
16 the solution. There could be policy research
17 saying, you know, what do we think about this.
18 I don't know of any such research.
19 Paul Giannelli wrote very nice articles arguing
20 for the need for crime laboratories, but
21 they're arguments. I could imagine arguing
22 that one in school, doing policy research on
23 this, and on the other issues that Larry
24 raised: Accreditation and so on. There are
25 models out there. The Forensic Science Service 35
1 is a private for-profit corporation, so there
2 could be policy research that evaluates what we
3 want to do with labs and how we control them,
4 and that could be another level of research.
5 I'm trying to imagine who's going to be in
6 those offices and whether they're going to be
7 engineers or psychologists or -- and one
8 possible answer is policy researchers.

9 REMARKS OF MS. PETRIE

10 MS. PETRIE: I agree, and I think that we
11 need to have a policy. That should be part of
12 our agenda because if you don't impact policy
13 at that level, all the other concrete things
14 you do will be a fix and, you know, temporary

15 fix and move on. You're not really changing
16 the way people think about the issues, and
17 there are so many concrete problems like the
18 DNA, backlogs like the fact that there's money
19 out there now for DNA backlog but no extra
20 money for doing the current cases, so if you're
21 a sexual assault victim this weekend and they
22 don't arrest anybody, your sample might sit
23 there for years and years and years and never
24 get -- so there are all kinds of issues,
25 concrete issues there. I think we need to get 36

1 the policy people at a higher level thinking
2 about this differently, and that's kind of part
3 of what, I think, Jeremy was saying, it's a
4 call for action and --

5 REMARKS OF MR. FISHER

6 MR. FISHER: Incidentally, the name of
7 this commission is the Commission on Forensic
8 Science and Public Policy. It says so right
9 here.

10 REMARKS OF JUDGE DOERFER

11 JUDGE DOERFER: Yeah, thanks, Barry. I
12 was just going to mention that. I mean, we had
13 to limit the number of words in the name of
14 this institute, and we actually spent a fair
15 amount of time trying to figure out what we
16 should call it, but I think the public policy
17 aspect of it is certainly one we always kept,
18 and the question was, how much do we insert
19 before or after "forensic," so and then science
20 is obviously the core issue, and probably

21 forensic science is one that we could focus on,
22 but my point of view and from a legislative
23 history point of view, I don't think we're
24 going -- contemplated that we would be just
25 limited to a sort of hard forensic evidence

37

1 aspects. Anything that's scientifically
2 relating to public policy in the justice system
3 is certainly in my understanding part of the
4 broad mandate.

5 REMARKS OF PROFESSOR BERGER

6 PROFESSOR BERGER: well, in terms of
7 policy issues, I would really be interested in
8 knowing -- we know that the labs are
9 underfunded -- as to just what is the work that
10 they do. How much of it is done on drug
11 testing as compared to DNA testing, and should
12 one make some recommendations as to, given the
13 lack of funds, what priorities should be within
14 labs, or is this just something that happens
15 because people have been hired and that's the
16 work they've been doing and, you know, things
17 go on that way? In light of developing
18 technology, really does one have to have a
19 future plan for how one thinks that those
20 limited resources should be spent.

21 REMARKS OF MR. TRAVIS

22 MR. TRAVIS: For me this conversation is
23 very welcome because I think it indicates a
24 need for sort of a national voice on these
25 issues of the labs and their capability, you

38

1 know, of keeping up and backlogs but raising

2 the question about our methodology as a
3 commission, and I think what Barry was alluding
4 to sort of politely is the fact that there's a
5 lot of work that's already been done in the DNA
6 lab, in the crime lab world, already a lot of
7 accreditation standards, maybe not enough, but
8 I think for us to weigh in on those questions
9 we would have to -- we want to spend a fair
10 amount of time with those sectors, people
11 representing those entities, and what comes to
12 mind so that the image I have is some sort of
13 public hearings or some sort of wave that so
14 this question about our methodology, how can we
15 operate so that we can bring in people to
16 basically help us understand what the issues
17 are, the complexity, the cost issues, and so
18 the idea of hiring policy analysts would be to
19 help the commission understand a very
20 complicated set of policy and related policy
21 questions before speaking, before we say
22 something public.

23 REMARKS OF MR. FISHER

24 MR. FISHER: I was having a sidebar here,
25 but, no, for example, do you know that last

39

1 year the Bureau of Justice assistance published
2 a document, the census of crime labs in the
3 United States, and defined what the backlog
4 levels are, what the resource problems are.
5 It's B. J. S.? Excuse me, B. J. S. published
6 it. There are studies that have been written.
7 This particular one has been done by

8 Joe Peterson, formerly University of Illinois,
9 Chicago, pretty well respected in this
10 particular area. He did pretty exhaustive
11 study. He had people contacting every single
12 crime lab in the country to get a snapshot of
13 what was going on, so there is information out
14 there, and I guess this particular body needs
15 to get itself somehow educated about that, and
16 one of the things that just as an operational
17 pragmatic thing is, it probably would behoove
18 you to set up some sort of list serv computer
19 network so people can post things on a website
20 or something and be blasted out to the other
21 commission members so there would be some kind
22 of dialog, and people would be -- know what was
23 going on. I'm regularly clipping news articles
24 over the Internet about this problem or that
25 problem, and I have my little core group of

40

1 people that I send these little things out.
2 I'm happy to send it out to you all. There are
3 a number of others that are around there that
4 are doing things like this to give people
5 much -- of it is just anecdotal information,
6 perhaps news stories about what's going on, but
7 you can get a better sense of some of the
8 issues.

9 MR. SOBEL: Krista, have we set that up?

10 MS. MAEDER: Yes.

11 MR. SOBEL: We have set that up?

12 MS. MAEDER: The list serv, yes.

13 MR. SOBEL: Yes. Well, we'll get the

14 information out to you, but that's been set up.

15 REMARKS OF PROFESSOR MARTIN

16 PROFESSOR MARTIN: Do you think the guy
17 who did this study would come and talk to us if
18 we invited him?

19 AUDIENCE MEMBER: Sure.

20 PROFESSOR MARTIN: I mean, I think that's
21 what I'm hearing. You know, I just pull in
22 those resources so and inform ourselves. The
23 list serv is really important too, although I
24 think that face-to-face sort of thing really is
25 going to inform us.

41

1 REMARKS OF DR. BLUMSTEIN

2 DR. BLUMSTEIN: Let me try to get some
3 structure to the priority issue. I think there
4 are multiple priority questions: One is,
5 what's the priority setting for the commission,
6 and what are the priorities for the institute
7 which is going to be staffed? There are two
8 kinds of issues that I sense floating around:
9 One is, establishment of standards,
10 promulgation, which to a degree is something
11 that the commission does and which it asks the
12 institute to generate information that will
13 help solidify those standards, but it's the
14 commission that has to have the voice to
15 establish those standards, and there are
16 clearly many areas in which that can be done
17 and has to be done. As we develop priorities,
18 we could start out by looking for a wish list,
19 trying to generate a wish list of what we think

20 would be neat and important, but priorities are
21 also set by opportunities that we have in terms
22 of who might be available in what realm, and
23 that's where the Gary question comes up as
24 clearly an area in which we would want to
25 consider a mixture of research and standards,

42

1 and that one I find to be very neat because it
2 provides the opportunity for things to be done
3 in the institute that will inform the
4 commission as an early way to start getting our
5 feet wet both in the interaction between the
6 two and the role of the commission in setting
7 standards. A third way in which priorities get
8 set are related to funding opportunities, and
9 it might be nice to have a wish list that we
10 might start peddling, but it also would be
11 useful to see which elements on the wish list,
12 not necessarily the first one, funding
13 opportunities respond to so that it strikes me
14 that, number one, one very neat opportunity
15 derives from the opportunity to start a witness
16 identification which I think is widely
17 appreciated as a major flaw in our overall
18 concern about enhancing the quality of justice
19 in the United States and elsewhere, and then to
20 try to find -- having accepted that
21 opportunity, which I think moves us forward in
22 important ways, what are the next places we
23 want to look, and it strikes me that looking in
24 the area of crime labs broadly in terms of
25 identifying capability that is not uniquely

1 associated with fingerprints but associated
2 with a whole issue of developing knowledge
3 about research on the quality of the wide
4 variety of information that that comes out of
5 crime labs, and that would be the next place I
6 would want to look partly to bring some balance
7 of that kind of technology, science, research
8 quality weighed against the more psychological
9 systems related activity associated with the
10 witness, so that seems to start aiming some of
11 the directions in which I think we can start
12 looking.

REMARKS OF MR. FISHER

13
14 MR. FISHER: Another place to start, I
15 sent Al and included it in the booklet a status
16 needs report that a number of forensic science
17 groups work with along with the National
18 Institute of Justice year or so ago that was
19 submitted to Congress, and it's a high level
20 look at a number of areas that are concern --
21 the concerns of operational laboratories and
22 practitioners in forensic science.

23 MR. SOBEL: David?

REMARKS OF PROFESSOR FAIGMAN

24
25 PROFESSOR FAIGMAN: Yeah, on the issue of

44

1 just being very concrete and just so it's in
2 Al's notes, during the two days, I just made
3 notes of things that came up that I thought
4 would be interesting to look in to. I'll just
5 sort of list them, but it addresses Jeremy's

6 concerns: One is preservation of evidence,
7 creating standards for and evaluating the
8 different approaches; second would be
9 mechanisms to limited polarization of states'
10 experts, trying to respond to the problem --
11 the inevitable problem of experts on both sides
12 ending up polarizing their testimony and, in
13 some way, distorting it as a result; a third
14 category I would call information contamination
15 which is both witnesses being affected by the
16 existence of other evidence that's available,
17 but also and, I think, in some ways more
18 importantly experts being contaminated by the
19 existence of other experts, and that addresses
20 the possibility of using double blind
21 techniques; a fourth one is co-acting evidence,
22 administration of labs; then a fifth one I have
23 is eyewitness identification course; sixth one
24 I have is representation issues, particularly
25 giving defense counsel support, some sort of

45

1 support networks to assist them in
2 understanding basic statistics, research
3 methods, and possibly giving them resources to
4 meet some of the more complex forensic science
5 that they have to contend with; seventh one is,
6 searchable police databases regarding the
7 Youngblood modus operandi issue strikes me that
8 that's a very doable, concrete project; and the
9 eighth one is Margaret's suggestion of actually
10 having training of contrary experts or experts
11 because most experts in the world in this area

12 are -- work for the police departments or state
13 agencies, and there really are no -- there is
14 no cadre of experts. It tends to be people
15 like myself and Simon Cole and others that just
16 get sort of picked up from time to time to kind
17 of help out on the other side; and then the
18 seventh is the tunnel vision issue which I
19 think that, you know, in terms of standards and
20 making concrete recommendations is something
21 that we can certainly address.

REMARKS OF DR. BYERS

22
23 DR. BYERS: Can I ask -- one of the things
24 that I tried to ask in talking with David and a
25 couple of other people is the issue about

46

1 science education in law school, and how does
2 it fit and what is it and where is it? Is
3 there a way to actually learn what it is? I
4 mean, there are -- how many law schools are
5 there in the country? Couple of hundred? And
6 there are graduating 30 plus thousand lawyers a
7 year, each one must have a curriculum, right,
8 that's measurable? And it seems, you know,
9 we've soft of developed the axiom that lawyers
10 don't understand and aren't interested in
11 science. I think around the table I could that
12 the evidence is very much to the contrary, but
13 if -- right, right, I know how to ascertain
14 biases and things like that, but if this is an
15 issue and understanding the nature of evidence
16 and science and even going forward in trying to
17 understand how standards are going to be

18 developed and what they're going to do, the
19 legal community has to be very much involved.
20 I'm just trying to get -- we're very off, but,
21 okay, in terms of accreditation here, why not
22 accredit lawyers in this business as well? But
23 is there a way to transport those courses which
24 appear to be good in certain contexts in to
25 others so that not every law school has to, you 47
□
1 know, re-engineer the wheel? what is there?
2 what proportion of students are interested in
3 and do take science based courses in law
4 school? And David said that it's 30 out of 420
5 students per year at Hastings, which is -- I
6 mean, I have to admit, in medical school, that
7 there are fewer students than that that take
8 courses on the law, and in fact, there are
9 almost no courses that I'm aware of where law
10 and medicine intersect. But a relatively easy
11 job and something that would be important, I
12 think, in the law schools is to measure and
13 assess what's being taught and ask whether or
14 not those courses can be transported,
15 immobilized easily and that there is a way to
16 introduce science back in to the legal
17 curriculum.

REMARKS OF MR. FISHER

18
19 MR. FISHER: Is there a -- I'm not
20 familiar with the -- the structure of the
21 A. J. S. You have a publication. You have an
22 annual meeting. Are you thinking about
23 inserting any of these discussions in either of

24 those --

25 REMARKS OF MR. SOBEL

48

1 MR. SOBEL: The answer is yes to all three
2 questions. We have a publication,
3 "Judicature," and for those of you who are on
4 the commission and have not previously been
5 members of A. J. S., you're being made members,
6 so you'll start receiving "Judicature."

7 DR. FIENBERG: I got my first copy about
8 two weeks ago.

9 MR. SOBEL: Good. And, you know, you'll
10 see a transcript, an edited transcript, of
11 yesterday's presentations and some introductory
12 remarks and articles associated with those
13 transcripts in a future issue of "Judicature."
14 We also have quarterly board meetings and two
15 large meetings a year: A midyear meeting and
16 an annual meeting, and there will be
17 undoubtedly discussion at those meetings about
18 what's taking place here this weekend and the
19 plans for both the institute and the
20 commission. Beyond that, we hope to very soon
21 develop some publications that are unique to
22 the institute that will be distributed not only
23 to members of A. J. S. but people generally
24 interested in the improvement of the
25 administration of justice and specifically how

49

1 science can be used to improve the
2 administration of justice, and we'll be looking
3 at everybody at this table for suggestions as
4 to who should be receiving that literature.

5 REMARKS OF MS. MUMMA

6 MS. MUMMA: In response to the comment
7 about science in the law schools, I completely
8 agree with you, and on the other side of that,
9 I think every university is going to be looking
10 at establishing a forensic program now. We're
11 seeing them pop up all over the place, so what
12 kind of standards are going to be established
13 with those programs with people coming out as
14 forensic majors and how will their training
15 actually be and how much further would they
16 gain from the legal side and what the impact
17 they actually have on the law when they come
18 out and call on the forensic scientists.

19 REMARKS OF MR. FISHER

20 MR. FISHER: Again, there is an
21 accreditation program that's been developed,
22 funded through N. I. J. to do just that. It is
23 accredited, and undergraduate and graduate
24 programs are from degrees with forensic
25 science, so again, it's a lack of what's

50

1 happening in the field.

2 REMARKS OF DR. COLE

3 DR. COLE: Wouldn't you agree that an area
4 of concern is that these undergraduates know
5 science, not in the law?

6 MR. FISHER: Well, yeah, they're
7 heavily --

8 DR. COLE: But that's the thing you'd
9 worry about most --

10 MR. FISHER: Right, if you ask --

11 DR. COLE: -- with this cropping up of
12 forensic science, correct --

13 REMARKS OF MR. FISHER

14 MR. FISHER: -- right. If you ask people
15 about higher scientists to work in government
16 crime labs, we're looking for topnotch
17 chemists, biologists, biochemists. I'm not
18 particularly interested in someone that has a
19 particular course in criminal law or criminal
20 procedure, just that they'll pick it up along
21 the way. I want them to be good scientists to
22 start with, and we recognize that. We
23 presented that issue to -- a number of years
24 ago to N. I. J., and I don't know if Jeremy was
25 still there at the time or not, but they

51

1 thought that initial effort to develop some
2 standards for these programs and then another
3 organization after that publication came out,
4 the American Academy of Forensic Sciences,
5 adopted those and created an education
6 commission which is in the process of being
7 adopted by the United States Department of
8 Education as approved academic accrediting
9 program.

10 REMARKS OF MR. TRAVIS

11 MR. TRAVIS: So like Al Blumstein, I've
12 been trying to sort of organize the discussion,
13 and someone had proposed a variant on Al's
14 structure. He was talking about four different
15 things, and these are just sort of headings of
16 activity for the commission and the institute

17 supporting the commission. The headings are
18 something on an eyewitness, sort of what we
19 would call forensic psychology. There may be
20 some other things, but right now, eyewitness is
21 at the top of the list; the second would be
22 something on the infrastructure of science
23 labs, backlogs, etcetera; third would be on the
24 forensic science research agenda, and we
25 haven't come up with this list, but I think the

52

1 list we've developed over the past couple of
2 days would include at a minimum arson, bite
3 marks, fingerprints, and we should work on that
4 list; and fourth, this last discussion has been
5 sort of science in the courts: How do we
6 prepare lawyers, how do we -- how do we think
7 about expert testimony, how do we think about
8 tunnel vision, what's the law school agenda,
9 how do we as a general proposition think about
10 elevating the level of sophistication within
11 the courts and people working in the courts,
12 lawyers in particular, and include jurors as
13 well, level of sophistication on science, so on
14 each of those four topics, we have some things
15 that we could do pretty quickly. On
16 eyewitness, we could start to organize a set of
17 standards based on the work of Gary and Beth
18 and others. On labs and infrastructure we
19 could -- again, the desk would be filled by
20 some people with -- trying to figure out with
21 the help of Barry in Barry's -- Barry's world,
22 so what would be the right voice for this

23 commission on the forensic science research
24 agenda. We could list the questions, and if we
25 want to get a little bit more ambitious, even 53

1 commission members of the commission or others
2 to develop a research agenda of those
3 questions, not do the research but just say,
4 what is the question, how would we want to
5 pursue a research inquiry, and what might it
6 cost so we have sort of a commission's wish
7 list that we can bring to Congress or
8 foundations or other places. The fourth one I
9 was clear about, but I think there's-- there's
10 some emerging themes here about how we could
11 increase the sort of the intellectual
12 resources, the sophistication of the system
13 about science.

14 REMARKS OF DR. FIENBERG

15 DR. FIENBERG: I would like to take two of
16 these items off the table for the rest of the
17 discussion and both the prerogatives of the
18 cochairs in appointing groups from the
19 commission to oversee the activities in the
20 first two areas, either by your speaking or not
21 speaking, you may have ended up on lists that I
22 would be compiling, and I will talk to some of
23 you on the break that I'm about to call and
24 others subsequently, but my goal would be to do
25 two things: To see if we could actually move 54

1 forward very quickly in the first of these
2 domains because, in the sense we're better

3 organized, that's the eyewitness testimony and
4 have that perhaps move toward our first public
5 statement and our agenda in that area, and
6 that's going to be the primary goal of that
7 group; and then secondly, to build a plan for
8 the next meeting to be focused on the
9 laboratory standards issue and how we can move
10 from things like DNA standards to a broader set
11 of standards where it really represents the
12 best of science with the best of forensics
13 science labs and that be a second agenda where
14 we might actually have that as our program,
15 bringing you the relevant additional people to
16 the table at our next meeting so that that
17 could be the next agenda setting item before
18 too long and then, after the break, come back
19 to what you were calling the forensics science
20 research agenda and see if we can articulate
21 that list a little bit more in the kinds of
22 activities that might sit either within the
23 institute or that the institute could spawn.
24 So for those of you who you think may not have
25 gotten on my list, you should feel free to tell

55

1 me that you'd like to volunteer, and otherwise,
2 I will volunteer in all of your behests, and
3 everybody will have an assignment by the time
4 we've left, even if you've think you've evaded
5 it. I would like to call a 15 minute break,
6 and we'll come back and really try to dig in a
7 little on that agenda setting after.

8 (RECESS TAKEN.)

9 DR. FIENBERG: We have a variety of issues
10 on the wall. There are two things I wanted to
11 begin with. At one level, we as a commission
12 can, although we're still inventing our role,
13 serve as a coordinator of activities across
14 multiple domains: The commissions on the
15 institute which we're advising and help setting
16 the agenda for but institutes of places like
17 Jay in Massachusetts, there's activities,
18 David's institute. Another key thing that's
19 going to go on in the next two years is a major
20 study that -- the National Research Council.
21 Congress, in its wisdom, earmarked funds for
22 this study, a study that had been proposed in a
23 somewhat different form a couple of years ago
24 by the committee on science and technology. Is
25 that what title? I have always --

56

1 PROFESSOR BERGER: Science, technology,
2 and law.

3 DR. FIENBERG: And law. The chair is
4 Kennedy and a member --

5 PROFESSOR BERGER: Which is a member of as
6 well.

7 DR. FIENBERG: Yeah, and Margaret is a
8 member of that, so we have another example of
9 interlocking directorates at some level, and I
10 asked Carol if she'd tell us a little about
11 what that study is supposed to be about and
12 where it's at so we could at least have that in
13 our collective thoughts as we bring our agenda.

14 REMARKS OF MS. PETRIE

15 MS. PETRIE: well, the purpose -- my
16 understanding is that the purpose of the
17 earmark was that Congress was unhappy with the
18 way that money was being allocated, especially
19 that it was all being spent for DNA backlogs
20 and there were all these other backlogs, and
21 they were hearing from a field around the
22 company, probably from you, Gary, that there
23 were other kinds of needs, and so they
24 earmarked \$1.5 million for the academy to do a
25 study of the basic state of the forensic

57

1 sciences, and the statement of work was
2 embedded in the legislation itself, and I
3 haven't memorized the seven tasks that were in
4 there, but they did fall in to three basic
5 categories: One was the resource needs of
6 labs, including things like the staffing needs,
7 the quality of the staff, the kinds of staffing
8 you would need to get rid of backlogs in a
9 variety of areas and so forth; a second area
10 was basically what kind of research and
11 technology development are needed to further
12 the various disciplines of the forensic
13 sciences such as fingerprints and tool marks
14 and especially the identification sciences, but
15 essentially, they're supposed to look at that
16 across the board; and then a third broad
17 category was sort of the technical assistance
18 and best practices categories: You know, what
19 kinds of things could you document that labs
20 are doing well and so forth, and then there was

21 this little task about the role of forensic
22 sciences in Homeland Security which no one
23 quite knows what to make of, but something will
24 happen. And it's my understanding that the
25 committee on science, technology, and the law

58

1 has sent a proposal over to N. I. J., and
2 they're waiting now for the -- a response and
3 to receive the money, but we're quite sure that
4 it's going to happen because of Senator Shelby
5 who has insisted that this be done, and he's
6 very insistent but that it happens, so at some
7 point this year, that study will begin, and
8 it's going to be sort of parallel in what
9 you're doing --

10 DR. FIENBERG: A two year study?

11 MS. PETRIE: It's a two year study.

12 (DISCUSSION OFF THE RECORD.)

13 MS. PETRIE: How much money?

14 AUDIENCE MEMBER: A million and a half is
15 not going to go very far.

16 MS. PETRIE: No, it's not.

17 DR. FIENBERG: No, but it's an academy
18 study as opposed to a research effort --

19 MS. PETRIE: Yeah, that's right.

20 DR. FIENBERG: -- and I think people need
21 to understand that that -- as we were talking
22 about yesterday, the N. R. C. does some things
23 especially well. It doesn't do the research.

24 MS. PETRIE: Right.

25 DR. FIENBERG: It does research planning.

59

1 It does research assessment and bringing

2 together results. It results -- it addresses
3 complex. It doesn't necessarily resolve it on
4 issues and --

5 MS. PETRIE: And this one sort of calls
6 for research recommendations and also policy
7 recommendations which are not the usual thing,
8 you know, from an academy study. The reviewers
9 really make you justify policy recommendations
10 and so --

11 REMARKS OF DR. FIENBERG

12 DR. FIENBERG: The other thing that --
13 somebody asked me about this last night with
14 regard to yesterday's discussion. The academy
15 works in strange ways. To try to explain its
16 processes to anyone is very difficult because
17 nobody quite knows what they all are, but even
18 if we were directly funding something, we would
19 not control it. Nobody controls it, and so the
20 appointment process alone has so many
21 convoluted components. There will be overlap
22 with whatever activities we engage in, but what
23 they are and who they involve Lord only knows,
24 and lists rise and fall, and people go on and
25 off for reasons that almost nobody could

60

1 predict in advance.

2 REMARKS OF MS. PETRIE

3 MS. PETRIE: Right, and then the committee
4 also basically, within the parameters of its
5 broad charge, decides its own approach, and we
6 have no idea what that will be until the
7 committee is formed and they happen to meet,

8 so --

9 REMARKS OF MR. FISHER

10 MR. FISHER: I give you just a couple of
11 little background. There are half a dozen
12 forensic organizations who started at the
13 advice of some people in the administration
14 several years ago to form a consortium of
15 forensic science organizations, and we did. We
16 hired lobbyists, and that's how we wound up
17 getting this language in this piece of
18 legislation. We wanted to have -- have this --
19 these very same things looked at. That
20 language was specifically put in by this
21 particular group with the assistance of our
22 advocate in Washington. The business about the
23 Homeland Security is that we initially talked
24 to the justice department and expressed a
25 concern that at the state and local level there

61

1 was no place at the table for forensic science
2 laboratories to deal with Homeland Security
3 issues like mass casualty identifications for
4 DNA, the justice department was totally
5 unwilling to deal with this because they said
6 this was Homeland Security, so we decided,
7 okay, they don't want to deal with this, let's
8 just recommend it and go elsewhere, and so
9 initially, it was supposedly -- we thought that
10 N. I. J. might have been the right place, but
11 we -- with discussions with people at national
12 academies to -- to cede it over there. Whether
13 we made the right decision, I'm sure we did now

14 that I met you. I've known Ann for a number of
15 years and that through discussions with her
16 that's how we orchestrated that, but that's
17 some background on how this happened.

18 REMARKS OF DR. FIENBERG

19 DR. FIENBERG: Anything more on the --
20 okay. What I'd like to concentrate on for the
21 last hour as we see people slip away -- I guess
22 I now see at least one that slipped -- is two
23 kinds of issues: Things that are broad policy
24 issues on which the commission can opine and
25 bring to public attention and thus parts of

62

1 that agenda that really require integrated
2 research, some of which will go on in the
3 institute itself, and I had at the break
4 conversations with a number of people who
5 wanted to raise one of these in particular.
6 Larry, why don't you kick off that?

7 REMARKS OF MR. HAMMOND

8 MR. HAMMOND: I'd like to propose to the
9 group in the category of things that we, I
10 hope, can all agree on that it would be a good
11 thing and an opportunity that we shouldn't
12 forego to make a statement that goes with us as
13 we leave here that talks about one of the
14 issues that we've all batted around many times
15 in the last 48 hours, and that's the importance
16 of preserving evidence and information and
17 assuring to the greatest extent possible access
18 to that information, both as a matter of public
19 policy and as forensic scientists. You can't

20 do your work if you don't have the information,
21 and so a broad statement that speaks in favor
22 of preserving evidence at all stages of the
23 criminal justice process, both for the benefit
24 of victims and for the benefit of people who
25 are in the criminal justice system, seems to me 63

1 to be an important thing, and I haven't seen it
2 as controversial, and having served on the DNA
3 task force with the A. B. A., we had many
4 controversial issues, but preserving biological
5 evidence, whether it's a rape kit or whether
6 it's the DNA that's already been sampled, seems
7 to me to be an important and uncontroversial
8 issue but one that we ought to be speaking
9 about.

10 REMARKS OF PROFESSOR BERGER

11 PROFESSOR BERGER: Is this limited to
12 biological evidence?

13 MR. HAMMOND: Well, I would not limit it
14 to biological evidence.

15 PROFESSOR BERGER: Yeah.

16 MR. HAMMOND: At this point, I would
17 simply make a broad statement in favor of
18 preservation of all evidence. We can use
19 biological evidence as an example.

20 PROFESSOR BERGER: Yeah.

21 MR. HAMMOND: But I think we ought to
22 speak broadly.

23 PROFESSOR BERGER: Yeah. I'm thinking of
24 the white car, yeah.

25 DR. FIENBERG: You know, how big is the --
Page 51

1 REMARKS OF MR. TRAVIS

2 MR. TRAVIS: And for how long?

3 DR. FIENBERG: And for how long?

4 REMARKS OF MR. HAMMOND

5 MR. HAMMOND: well, I mean, I'm happy to
6 put a footnote on this to say that the
7 commission or the institute will examine some
8 of the relevant public policy issues that
9 affect law enforcement and affect participants
10 in the criminal justice system, but the
11 principle that ought to be elevated here is
12 preserving evidence so that it can be examined.

13 REMARKS OF PROFESSOR MARTIN

14 PROFESSOR MARTIN: You also said access to
15 it. Now, what did you mean by that --

16 REMARKS OF MR. HAMMOND

17 MR. HAMMOND: And access, that -- I mean,
18 I think we ought to be in favor of the
19 broadest, open access to evidence in the
20 criminal justice world as we can have.

21 DR. FIENBERG: Jeremy?

22 REMARKS OF MR. TRAVIS

23 MR. TRAVIS: Larry, I guess I'm just not
24 quite sure what you're asking us to say yes to
25 when you say that we should make a statement,

65

1 but I mean, the mind starts to come up with
2 questions about how long access -- we heard
3 from Gil Kerlikowske or one of the other chiefs
4 some of the warehouses that have cars in them.
5 Is this until somebody has served their

6 sentence? Until all appeals are exhausted?
7 You know, seems to me if we're going to make a
8 statement there's some work that's needed
9 before you make a statement as to what some
10 illuminating principles are, but -- or
11 limitations on the principle rather. I think
12 we would get some broad agreement, but what is
13 it we're actually saying about the operational
14 dimensions of the principle to preserve
15 evidence?

16 REMARKS OF MS. MUMMA

17 MS. MUMMA: Many of the states currently
18 have statutes that they have defined how long,
19 whether it's -- until the person is released
20 from incarceration or post appeal, or they have
21 defined for themselves how long. The problem
22 is, because law enforcement or clerk offices
23 say, well, we don't know what biological
24 evidence is or we don't have a place to keep it
25 or we're not sure if it's just for law

66

1 enforcement or it also applies to court
2 officials or clerks, there's -- you can find
3 the vagueness in statutes that allows you to
4 say we can't follow it. I don't think the -- I
5 think that the state should determine for
6 themselves how long that they want to keep
7 evidence and what kind of public policy they
8 want to follow themselves, but a statement from
9 this commission saying we endorse the
10 preservation of evidence at some level and the
11 consideration of how should that be done,

12 the -- you know, we're looking in North
13 Carolina of having a commission meeting next
14 week where we're looking at four cases from
15 1987 that were resolved through the DNA
16 databank because the evidence was preserved, so
17 the benefits for law enforcement in addition to
18 the benefits for the wrongfully convicted
19 are -- cover the nation, but it just -- I think
20 the statement can be made in a broad enough way
21 that we're not trying to define specific
22 policy, and we're giving states some discretion
23 by endorsing -- looking at the topic and
24 finding solutions instead of everybody saying,
25 we can't do the job because it's not specific

67

1 enough.

2 REMARKS OF PROFESSOR BERGER

3 PROFESSOR BERGER: But the statutes you're
4 talking about are biological evidence statutes.
5 These are post conviction DNA statutes that
6 have preservation of evidence. I think the
7 proposal is for a much broader view of evidence
8 and, you know, I think that leads to lots of
9 other issues. One thing, obviously, the DNA
10 doesn't take up very much room, and there are
11 going to be different ways in which one is
12 stored, so I think one has real issues here.
13 On the other hand, with the biological evidence
14 as we can see from the DNA cases, holding it
15 until the person has exhausted his appeals is
16 really not enough. It has to be until the
17 person is released, and even that is not enough

18 because in terms of the three strike laws that
19 are out there, someone might want to have -- be
20 exonerated long after he's released from
21 prison, so I think there's some very difficult
22 issues here.

23 REMARKS OF MR. FISHER

24 MR. FISHER: The statement that Margaret
25 made that it's an easy thing to do barely

68

1 touches the challenges. We keep on building
2 more and more large walk-in freezers about half
3 the size of this room at a clip because this is
4 not just little cuttings. We -- we have
5 clothing that is -- may not have been admitted
6 into evidence that's -- that the police are
7 holding on to that's not processed, that has to
8 be stored. It's a sizeable issue, and we found
9 that laboratories typically are not going to
10 test every single spot of blood on a particular
11 garment, so one of the things that we -- we
12 have found is, well, what about this other spot
13 over here? Couldn't that have been some other
14 person because you don't know until you do it,
15 and I think that also requires to save all
16 these things for a later date. So it's -- I
17 agree with the basic premise, but there are
18 definitely operational issues and cost issues
19 for police departments.

20 REMARKS OF PROFESSOR MARSHALL

21 PROFESSOR MARSHALL: There's no question
22 that there are operational issues, and they go
23 even beyond what Margaret spoke about. You

24 have to do it post execution as well and
25 preserving evidence for the sake of research, 69
1 but the question is, did all those details cut
2 against a general policy, for example, that
3 urges states to adopt evidence preservation
4 policies that are sensitive to the needs of law
5 enforcement in terms of storage but also
6 sensitive to the needs for information and
7 later to access for potential exculpation and
8 inculpation of the actual guilty. Now, that's
9 not a very meaningful statement, but it does
10 sort of put us into the subject area without
11 coming close to trying to tackle the specific
12 problems, and I'm wondering if that goes down
13 the line that Larry is suggesting for us.

REMARKS OF MR. HAMMOND

14
15 MR. HAMMOND: I think it does and I just
16 think that putting on the table the importance
17 of keeping evidence available as a principle,
18 there are a lot of people who are in your
19 business, Barry, who don't see it as a
20 two-sided issue --

REMARKS OF MR. FISHER

21
22 MR. FISHER: No, I agree with the
23 principle, but you're going to have some police
24 departments that are going to bellyache about
25 doing that, and if they had their druthers, 70
1 they would probably rather not.

REMARKS OF MR. HAMMOND

2
3 MR. HAMMOND: well, let me add one other
4 possibility then. One thing we could do is, we

5 could make a broad general statement of the
6 type that Larry just summarized and then -- and
7 then task the institute to address the
8 complexities that the law enforcement and
9 police departments --

10 REMARKS OF MR. FISHER

11 MR. FISHER: And incidentally, sometimes
12 this evidence is in the control of the courts.

13 MR. HAMMOND: I know.

14 MR. FISHER: It's submitted into evidence,
15 and the clerks have to deal with it.

16 REMARKS OF MR. HAMMOND

17 MR. HAMMOND: But that's part of the
18 reason for having a statement, that there are
19 lots of players in this business who have a
20 whole different set of perspectives. Just
21 saying that it's a good idea for evidence to be
22 available and accessible seems to me to speak
23 well to all of those entities.

24 REMARKS OF CHIEF BERGER

25 CHIEF BERGER: well, I would just --

71

1 again, theoretically, I wholeheartedly agree
2 and I think my peer group, my fellow chiefs,
3 would say the same thing, the agencies, but all
4 government's local, and that's the problem.
5 You know, that state law can say you made it,
6 but it's unfunded liability, and we're
7 constantly having to deal with these
8 limitations, and there's just so much of that
9 pie that has to go -- and 92 percent of your
10 budget, the personnel costs, you've got

11 80 percent capital, and we've got to update
12 record systems and CAD systems and whatever.
13 It's just very difficult. I wish there was a
14 way that we could resolve this, and maybe some
15 day it will all be digitized, you know.

16 REMARKS OF PROFESSOR MARSHALL

17 PROFESSOR MARSHALL: That's consistent
18 with law enforcement side.

19 CHIEF BERGER: Yes.

20 PROFESSOR MARTIN: That's the side that
21 says we understand there are limitations, but
22 to the extent possible, this also, the other
23 side, ought to be considered.

24 REMARKS OF CHIEF BERGER

25 CHIEF BERGER: Absolutely, I agree, but

72

1 again -- like we're dealing with our state
2 house right now, and they've already got four
3 or five unfunded mandates, which it sounds
4 great when they get on T. V. and say this is
5 what we're going to do, we're going to mandate
6 this. And then when it gets down to us at the
7 local level, we're saying, okay, there's
8 another 80 hours of training that, again, not
9 even the courtesy of asking us, what kind of
10 impact will that have in regards to your
11 mission to try and protect our society.

12 REMARKS OF PROFESSOR D'ALEMBERTE

13 PROFESSOR D'ALEMBERTE: well, actually,
14 Larry's already made the point I wanted to
15 make, and that is, this presents us with a time
16 to look at how this process works with the

17 adoption of a very general statement, which I
18 think there's a lot of consensus about, and
19 then instructions to the institute to develop a
20 detailed proposal to bring back the commission
21 may be exactly the kind of model we're looking
22 for in this whole process. So it seems to me
23 that this is a very interesting thing to have
24 on the table because it also makes us think
25 about how we do our work.

73

1 REMARKS OF PROFESSOR MARTIN

2 PROFESSOR MARTIN: Could the general
3 statement include the commission's urging the
4 states to fund these unfunded mandates? I
5 mean, as a matter of principle, certainly, we
6 could adopt that as a suggestion to the states
7 that these departments would at least feel that
8 we're at least thinking about you.

9 REMARKS OF DR. BYERS

10 DR. BYERS: I think it's a very
11 interesting proposal from a completely
12 different perspective, and that is that it says
13 evidence is not static. And that is just
14 exactly what's happened with DNA; that is, the
15 technology has been developed, the technology
16 that was never realized or even imagined in
17 1987, 19--- you know, 1984, whenever samples
18 were collected, is going to happen, you know,
19 over -- as years go by, and that this is an
20 acknowledgement that evidence is not static,
21 but it develops and in the face of technology
22 going forward and that, I think, that if the

23 statement is embedded in something like that,
24 recognizing that technological developments
25 will change the nature of the evidence as time 74

1 goes forward, that it becomes a very powerful
2 acknowledgement and forward -- for the
3 institute and a commission like this that put
4 its imprimatur on the idea that we are in a
5 very dramatically changing world and that we
6 don't yet know what the parameters of change
7 are going to be.

8 REMARKS OF MS. MUMMA

9 MS. MUMMA: Yeah, the -- the cases that
10 have not been resolved, I'm sure law
11 enforcement is anxious to preserve that
12 evidence. You go into agencies that the
13 evidence is in plastic bags and under desks and
14 next to heaters and is not being preserved in
15 order to be able to solve that case in the
16 future. There's no question that the
17 majority -- I won't say the majority -- but a
18 lot of people who are in prison will say
19 they're innocent until it comes to push comes
20 to shove and you say we're going to destroy the
21 evidence in this case unless there is some
22 reason to not destroy it. What we're seeing in
23 departments is that they have the option to get
24 defendant and counsel of record approval to go
25 ahead and destroy the evidence, but they're not 75

1 following that option, so they're keeping
2 evidence that you don't need to keep, and the

3 evidence they do need to keep they're not
4 keeping properly. So I think it -- I totally
5 agreed with the broad policy, but if the
6 institute was to look at the details, I think
7 details should include what evidence can be
8 destroyed. We don't need to keep everything.
9 Some states do have statutes where there's
10 consequences for a defendant to seek future
11 testing, and if it -- you know, guilty's found,
12 there's consequences for that. So I think
13 that's something the institute should consider
14 as well.

15 REMARKS OF MR. VALDEZ

16 MR. VALDEZ: Larry, I'm just wondering
17 what you mean by accessible because it seems to
18 be inconsistent with proper storage that I'm
19 aware of. I mean, accessible to the courts?
20 To counsel?

21 REMARKS OF MR. HAMMOND

22 MR. HAMMOND: Well, what I was basically
23 saying, again, as a matter of general principle
24 is that -- that evidence in criminal cases
25 ought to be available to people who care about

76

1 it. I mean, there -- and that does mean that
2 in some cases defense counsel will actually be
3 able to go and sit down and look at the
4 evidence. As you know, there's some places
5 where that's not routinely done. You live in a
6 very strange world in New Mexico. As far as I
7 know, you're the only state where people
8 actually go in to the medical examiner's office

9 and talk to them freely without having to put
10 on a prosecutor's hat in order to do it. But
11 I'm not -- I understand that there are lots of
12 issues about access, but the general principle
13 that -- that people who care about criminal
14 justice ought to be able to have access to the
15 information is one, I think, that we can safely
16 embrace.

17 REMARKS OF DR. FIENBERG

18 DR. FIENBERG: I get the sense that there
19 is agreement in principle but not necessarily
20 in details of language or on implementation,
21 and so what I would like to propose is not that
22 we adopt a particular statement today but that
23 we have agreed to that sense of what the nature
24 of the statement we would like to make and that
25 I appoint another group that will produce a

77

1 carefully reasoned statement with enough of the
2 provisos that we have not done really foolish
3 things pushing the boundaries in ways that are
4 not implementable and that we get that back on
5 the table at our next meeting. So this is
6 something that would be very short-term
7 turnaround on, but we need to really get the
8 language right if it's going to work.

9 REMARKS OF MR. FISHER

10 MR. FISHER: Is this something that you
11 would propose for the institute to do or the
12 commission?

13 REMARKS OF DR. FIENBERG

14 DR. FIENBERG: No, this is a commission

15 activity. This is a commission drafting
16 activity. It's a statement about principle,
17 but it's going to have carefully constructed
18 language that recognizes some of the realities
19 of the implementation and looks forward in the
20 way that Peter was suggesting to the things
21 that we haven't thought about as evidence that
22 will impact the courts more broadly.

23 REMARKS OF JUDGE CLARKE

24 JUDGE CLARKE: I was just going to say,
25 there is a significant -- one of the benefits

78

1 that Margaret pointed out of the post
2 conviction statutes is, there's a significant
3 body of case law and statutes about evidence
4 access. Sometimes we forget the post
5 conviction DNA statutes are first and foremost
6 an access-to-evidence issue, and they have been
7 collected and cataloged by more than one
8 organization that's available, so I think
9 you're right. That would be a good exercise --
10 not exercise -- a good task for the institute
11 because I don't think it would be as
12 significant as we might otherwise think due to
13 the previous work of other organizations.

14 REMARKS OF DR. FIENBERG

15 DR. FIENBERG: I have a list of six people
16 to appoint, and I'm hoping that we can actually
17 have such a statement on the table the next
18 time we meet to perhaps tweak a little but with
19 some luck circulated in advance so that we
20 don't have to tweak it at the table.

060402.txt
REMARKS OF MR. LOGE

21
22 MR. LOGE: Quick question: Is part of the
23 mandate of this group that you're -- part of
24 the mandate of this group that you've just
25 volunteered to come up with draft legislation,
79
1 or is --

2 DR. FIENBERG: No.

3 MR. LOGE: -- it issue a statement that
4 then sort of -- what -- what do you imagine
5 happening as a result of this statement?

6 REMARKS OF DR. FIENBERG

7 DR. FIENBERG: Well, that's an issue for
8 us to take up again afterwards when we see what
9 the statement is. This is a statement -- if I
10 had -- I think I have the sense of the people
11 who are at the table -- is a statement of
12 principle in support both of justice and the
13 role of scientific evidence, and we are not
14 drafting legislation at this table, and we're
15 trying to facilitate in a different kind of
16 way.

17 REMARKS OF CHIEF KERLIKOWSKE

18 CHIEF KERLIKOWSKE: Though, I respectfully
19 disagree, I don't think we're asking for it. I
20 mean, I'd love to see the commission end today
21 at this meeting and not say, gee, we'll have
22 this statement ready for the next thing. I
23 don't think Larry's asking for anything that's
24 all that difficult. Aren't we kind of
25 over-complexing this thing? I mean, can't the

1 commission end this first meeting with a broad

2 statement that says, look, in this rapidly
3 changing world of -- it's important that law
4 enforcements and the other parts of the
5 criminal justice system address the issues and
6 look carefully and thoughtfully at how evidence
7 will be preserved and that it will be made to
8 all extent possible accessible? I mean, I'd
9 love to see like a real product, and I don't --
10 I think we're over-tweaking this thing. Maybe
11 I'm over-lawyering this.

12 (DISCUSSION OFF THE RECORD.)

13 REMARKS OF DR. FIENBERG

14 DR. FIENBERG: I don't think that there's
15 any disagreement about that as a principle.
16 The question is, what are the words, and I
17 think that as the first pronouncement we make
18 we should be careful about the words. That's
19 all. So it's not that we're sending your group
20 off to do deep deliberation, but getting the
21 words and getting them done carefully, I think,
22 goes beyond that minimal statement, and so it's
23 happening to back up paragraphs to go with it
24 when somebody says, so what does that mean that
25 I guess I hear concern about.

81

1 REMARKS OF JUDGE CLARKE

2 JUDGE CLARKE: As perhaps a hybrid
3 approach, could there be an effort on the part
4 of whatever group you think is appropriate to
5 put words on paper and then to circulate that
6 very rapidly through the list serv so that
7 there could then be reaction --

8 DR. FIENBERG: Absolutely.

9 JUDGE CLARKE: -- from the commissioners
10 and it wouldn't have to await the next meeting?
11 Perhaps something could come together more
12 quickly. Just a thought.

13 REMARKS OF PROFESSOR MARSHALL

14 PROFESSOR MARSHALL: And the other way to
15 address Larry's and, I think, Gil's concern
16 that we have something concrete perhaps could
17 be another level which is that we agree as a
18 commission to adopt language that speaks to the
19 question of preservation of evidence so we've
20 done something at least, we've voted on
21 something, even though we don't have that
22 language, but to adopt some policy, the
23 specifics of which could be worked out at the
24 next meeting.

25 REMARKS OF DR. FIENBERG

82

1 DR. FIENBERG: well, I thought that we had
2 the sense that we were doing that, so that's
3 not the issue. The only issue is what the
4 language will be.

5 REMARKS OF PROFESSOR MARSHALL

6 PROFESSOR MARSHALL: The only question I
7 had is whether Gil and Larry really wanted some
8 official statement and that is that we are in
9 the process of drafting such a policy. I don't
10 know if I'm misreading that sentiment for
11 action.

12 REMARKS OF MR. HAMMOND

13 MR. HAMMOND: And I guess maybe that goes
Page 66

14 to a question that you all haven't resolved,
15 but I believe you shouldn't allow this moment
16 to pass without some important statement about
17 what you're doing. An amazing thing has
18 happened here, and it may not happen again. We
19 may not have the good fortune to get so many of
20 the commissioners all together at the same time
21 in the same place. It seems to me that some
22 kind of statement that would be publicly
23 available and distributed is an important thing
24 for us to do. And among the things that we've
25 talked about, this issue seems to me, at least

83

1 in principle, seems to be the least
2 controversial and the most closely tied both to
3 forensic science and public policy. But if
4 you're not going to make any statement, then
5 you can put this off until the next meeting,
6 but I think you should make a statement.

REMARKS OF PROFESSOR MARTIN

8 PROFESSOR MARTIN: Good journalistic
9 principle could be applied here; that is, less
10 is more. In other words, the simplest -- we're
11 developing policy. Less is more. It's just a
12 simple statement. We are developing a policy
13 on this issue. We think it's very important,
14 and we want to express our support for the
15 preservation of evidence in the United States
16 because of the rapidly changing conditions.
17 Something of that sort. Just very simple.

REMARKS OF DR. BYERS

18 DR. BYERS: As an experienced journalist

20 could you -- I was just asking you, as an
21 experienced journalist, you could put something
22 on paper and have it in writing.

23 REMARKS OF PROFESSOR MARTIN

24 PROFESSOR MARTIN: I'll get my laptop and
25 do it right here. If you would like, you can

84

1 tell me what you want said.

2 REMARKS OF DR. FIENBERG

3 DR. FIENBERG: I think that I -- and
4 I'll -- before we officially adjourn, I want to
5 see if there's a sense of what we say we have
6 done when we leave which is in 35 minutes, and
7 this was sort of the third agenda item. I
8 would like to take 20 to 25 to see if we can
9 move along a little bit of that discussion that
10 we began before the break about what is -- what
11 is the forensic science research agenda that we
12 want to see embedded both in the institute as
13 its ongoing activities and to encourage in the
14 collateral enterprises, the other institutes
15 around the country.

16 REMARKS OF PROFESSOR D'ALEMBERTE

17 PROFESSOR D'ALEMBERTE: And, Steve, may I
18 suggest that maybe that agenda should not just
19 be research agenda but also education agenda?

20 REMARKS OF DR. FIENBERG

21 DR. FIENBERG: The education agenda is a
22 piece of what we're going to do, but I don't
23 think we can do both of them, discuss both of
24 them now. There will be a group that addresses
25 that also so that we have a structured

1 discussion when we come back to it. So Jeremy
2 started a list that said "Arson, bite marks,
3 fingerprints."

4 REMARKS OF MR. SOBEL

5 MR. SOBEL: Okay. David, David had given
6 is a list which we put up on the wall there.

7 REMARKS OF PROFESSOR FAIGMAN

8 PROFESSOR FAIGMAN: Yeah, on these
9 specific questions, I guess I would -- you
10 know, like Jeremy's categorization approach, I
11 think pattern recognition is maybe a way to
12 describe it and that would actually give the
13 institute a certain amount of flexibility
14 because I think that there are certain research
15 questions that transcend specifics, so pattern
16 recognition does that and maybe, though we want
17 to support research that looks at more a global
18 question and then we also want to support
19 research that will test specifics and on the
20 specifics underlying it on the part of that
21 condition, I would suggest that I think
22 fingerprints mainly because it is very high
23 profile, it's something that the courts deal
24 with, it happens a lot. I think that there are
25 very substantial and profound issues at the

1 margins. I agree with Woody's observation
2 that, you know, a lot of fingerprinting is
3 really just not controversial, don't need to
4 worry about it, but at the margins, there may
5 be some significant issues, and it's something

6 that's going to garner a great deal of
7 attention, especially if we come up with
8 something. I would not put bite marks
9 necessarily on this. I think bite marks pay is
10 a very weak subject. The payoff is not there.
11 Police labs are not doing it. It's occurring
12 in court, but it's not a high quantity subject.
13 I would put firearms, and Al may have a comment
14 that we can't go in to detail, but I think
15 firearms and tool mark is something that is
16 also very high volume, presents very
17 controversial, difficult, statistical problems.
18 It's something that we ought to garner a good
19 deal of research attention to. So I put the
20 two at the top of my list, fingerprints and
21 firearms and all mark. And then I would add
22 because it's not really a pattern recognition,
23 the arson. I think arson is an area where
24 there is a good deal of research available out
25 there, some very good underlying science. It

87

1 hasn't all been organized in a way that was
2 useful or actually implemented by those who are
3 sort of practicing fire investigators or
4 explosion investigators, and I think there's
5 entire areas that are under research, and
6 there's also an area that we can find a lot of
7 mainstream scientists to do the work. Arson is
8 very concrete, you know, materials based
9 science, and I think that they're out there
10 to -- to find and to support. So that would be
11 my sort of focus.

12 REMARKS OF PROFESSOR BERGER

13 PROFESSOR BERGER: And as well, trace
14 evidence, fibers, that kind of --

15 REMARKS OF PROFESSOR FAIGMAN

16 PROFESSOR FAIGMAN: Okay. Yeah, I agree.
17 That's also a good subject.

18 REMARKS OF DR. FIENBERG

19 DR. FIENBERG: So I point out that -- and
20 we triggered this discussion a little
21 yesterday. It's very interesting when people
22 invoke words to describe their areas of
23 research because in different communities the
24 words mean very different things. I happen to
25 be part of a community that thinks that pattern

88

1 recognition is what it does, and it does it
2 with statistical tools, with now very large
3 scale data minding methodologies, heavy
4 investments from computer science in
5 particular, focused on very large scale
6 databases, extraction of features. These are
7 all elements of a community where in some sense
8 I'm the only representative at the table and
9 I'm on the edge, and so I -- I think that if --
10 if we invoke the word pattern recognition to
11 describe it, what you're really saying is that
12 you're looking to this in a different way than
13 we've looked at it in the past, and that raises
14 lots of issues --

15 REMARKS OF MR. FISHER

16 MR. FISHER: well, although in a crime lab
17 sense when you say pattern recognition it means

18 none of the things that you're talking about --

19 REMARKS OF PROFESSOR BERGER

20 PROFESSOR BERGER: I understand that.

21 That's exactly why I'm raising the issue.

22 REMARKS OF MR. FISHER

23 MR. FISHER: And there may be some

24 homogenation that --

25 PROFESSOR BERGER: Absolutely, absolutely.

89

1 REMARKS OF PROFESSOR MARTIN

2 PROFESSOR MARTIN: But does that turn off

3 the crime lab people or --

4 MR. FISHER: It's neutral.

5 PROFESSOR MARTIN: So we still look like

6 we knew what we were talking about. I'm

7 serious. I -- I'm really --

8 REMARKS OF MR. FISHER

9 MR. FISHER: For us it would be a new way

10 of looking at this kind of information and

11 perhaps coming up with different -- better

12 conclusions.

13 REMARKS OF DR. COLE

14 DR. COLE: I don't disagree with Margaret

15 or David on these topic areas that you

16 identified. There are two things I thought of

17 that we could do. One is to make a -- instead

18 of doing research is to make a statement of

19 what research needs to be done in these areas,

20 and there are some such statements from the

21 N. I. J., the F. B. I. has -- has made one, but

22 these are -- you know, to my mind, don't

23 quite -- are fairly artfully worded and don't

24 quite get at the scientific issues, and I think
25 there would be room to make a statement of what 90

1 research needs to be done that would be more
2 precise and yet not so explosive as to upset
3 people. And then the second thing would be the
4 principles of forensic analysis that would
5 relate to the tunnel vision contamination
6 issue, things like should forensic analyses be
7 blind, should analysts be blind to the suspect,
8 should they not be looking at knowns when
9 they're looking at unknowns. That would cut
10 across these areas. Independence of crime
11 labs, again, I mentioned before, would be
12 something general. I mean, that didn't seem to
13 get a lot of attraction as the other issue.

14 REMARKS OF JUDGE CLARKE

15 JUDGE CLARKE: I was just going to mention
16 about some of these pattern recognition
17 areas that I -- I like that term. I think that
18 is fairly descriptive, but they're still
19 discrete. Hair comparison, for instance,
20 microscopic hair comparison is declining in
21 significance due to biological testing of the
22 hair so that many laboratories use it at most
23 as a screening device as opposed to rendering
24 any significant conclusions. Questioned
25 documents, I think, are a pattern, but then 91

1 that's a unique area because by statute or case
2 law in most states even non-experts are allowed
3 to render an opinion about whether handwriting
4 or a printing came from a particular

5 individual. It's really sort of a quasi-expert
6 opinion from just a lay individual. And an
7 area that I -- as an attorney, I never wanted
8 to present the evidence and didn't, although
9 many do, is blood stain pattern interpretation,
10 which frequently is done by law enforcement
11 officers as opposed to forensic scientists,
12 although there are many forensic scientists who
13 do it as well, and I've often thought that was
14 an area highly ripe for investigation.

15 REMARKS OF DR. FIENBERG

16 DR. FIENBERG: Let me ask David a
17 question. So you have this list. We have a
18 label to wrap around it. In what sense -- this
19 discussion has gone more to what the condition
20 might say is important and not necessarily to
21 what you might do and embed in an institute.
22 So what activities could an institute take on
23 that would have immediate term impact. We'd be
24 up to now to discussing the short-term impact;
25 that is, the things that we could move ahead

92

1 quickly. When you're talking about research in
2 these areas, we're not talking about a quick
3 fix, and that's -- it seems to me somebody's
4 got to do the work, and question is, how do we
5 get the institute doing some of this work?

6 REMARKS OF PROFESSOR FAIGMAN

7 PROFESSOR FAIGMAN: well, I think that
8 you're exactly right. You need to look at it
9 as kind of a rolling payoff system almost, and
10 so I think Simon's suggestion has the more

11 immediate short term, six months to a year
12 where very concrete substantial things can be
13 done, used to collect information, they can
14 claim issues, they can provide the commission
15 with policy statements or judgements that have
16 to be made, and that's going to be something
17 that can be ongoing. In the short term, I
18 think the institute also at the very same time
19 should be in business because, you know, we're
20 doing the Institute of Hastings. I thought
21 through such a problem, and just again in a
22 very concrete way, and the science director at
23 the institute for A. J. S. is going to have to
24 deal with the question of how do you promulgate
25 grant proposals and how do you work with

93

1 scientists to create grant proposals. I'm a
2 little bit concerned with the suggestion that
3 the institute itself would ever do any
4 research. At Hastings, we're not going to do
5 any research ourselves. We're going to use sort
6 of an N. S. F. like review of grant proposals.
7 We'll work with the scientists to help them
8 massage their research hypotheses to make them
9 as legally relevant as possible. We'll give
10 them the legal expertise the scientists
11 wouldn't have. But I think one of the things
12 the institute needs to start doing is
13 identifying teams of scientists, the people who
14 do pattern recognition, statistics, and signal
15 detection theory and approaching them and
16 saying, you know, do you have graduate students

17 who would be interested in doing this pattern
18 recognition in new context? Was it Joel at the
19 National Academy, you know, who's starting to
20 think about, you know, here would be something
21 we would -- who would be somebody that we would
22 talk to, to say, hey, we're interested in
23 moving in this direction. And one of the
24 things that Joel, you know --

25 PROFESSOR BERGER: This is Joel Cohen from 94
1 Rockefeller University.

2 PROFESSOR FAIGMAN: Right, and he did a
3 presentation in November at the National
4 Academy on, if I was doing research on
5 fingerprinting, this is the way I would start
6 approaching it. And he basically stood up and
7 said, I would like to know from the legal and
8 forensic community what I'm missing, what I
9 need to do in order to do good empirical
10 research, and so understand, you know, I told
11 you all that he's kind of a model for these
12 institutes of mainstream scientists who are,
13 you know, curious about these subjects, who
14 want to bring their expertise in statistics or
15 otherwise to bear on what are really novel
16 problems. And so I would suggest at the
17 institute in the short term to be in the
18 business of identifying mainstream scientific
19 disciplines that would do this sort of
20 research, naturally, contacting them, having
21 conversations with them. Possibly you can jump
22 to commissioners as well, and then I think

23 you -- what I would provide as the model, I
24 guess, the model that I chose is then telling
25 them, to the extent one is available, that they 95

1 need to start putting together grant proposals
2 like they would for N. S. F., perhaps a little
3 bit less bureaucratically cumbersome than
4 N. S. F. does, but nonetheless, they have to
5 actually give us where they're going. They
6 have to create a budget. There's just a lot of
7 detail stuff that the institute is going to
8 have to oversee, but commissioners would be
9 available to the research scientists to help
10 them. So if they -- you know, if Joel called
11 me up and said, well, you know, I'm working out
12 this grant proposal and it has some language,
13 but I'm not really sure how this fits in, I
14 would say, E-mail, you know, me what you have,
15 I'll read it over, I'll mark it up, and I'll
16 send it back to you. If I can't do it, you
17 know, I'll send it on to Simon or whoever. So
18 I think that's something the institute can do
19 in a very concrete way in the short term.

20 And then you're right, it's going to take
21 some time. Grant proposals take time to write.
22 Again, you have to be -- the realization has to
23 be that the grant proposal is good. You know,
24 we want to get it funded so you can have the
25 money there, and I don't know what the

96

1 financial situation is, but there's also going
2 to be a situation where grant proposals will

3 come in that don't get accepted, you know, and
4 somebody has to review grant proposals. I
5 assume the commissioners will be available, but
6 they may be outside people: Joe Peterson,
7 Robert Rosenthal, you know, Michael Sax. There
8 are other people out there that you may be able
9 to call upon as outside reviewers. Again, you
10 know, I review proposals all the time for
11 N. S. F., and they just write me nice E-mails,
12 and they thank me afterwards, and that's what,
13 I think, we'll have to do.

14 And so there's sort of that -- you know,
15 and many of you scientists have much more
16 experience. I tend to on the back end, but I
17 think that -- it's that sort of bureaucratic
18 model that we need to build, but in a sense,
19 because the scientists don't have the expertise
20 in the law or in the forensics, we're going to
21 have to be there to help them massage, develop,
22 and amend their grant proposals to make them
23 as, you know, weakly relevant as possible, as
24 doable as possible, but we can't get so
25 involved with it that we still have to have

97

1 that -- we have to have some independent review
2 for the merit of it. We'll have to cube it up
3 if there's going to be X amount of money, and
4 we may have five or six more grant proposals
5 than we can fund, and so we may say this is
6 first priority, this is second priority.
7 N. S. F. does it that way as well. And so
8 that's what obviously has to begin. There's a

9 lot of work to be done over the next year in
10 getting up to speed on that, and I'm sure we'll
11 slip and fall in some ways and learn from it,
12 but that's what I would suggest as a concrete
13 matter that we go forward on.

14 REMARKS OF DR. BLUMSTEIN

15 DR. BLUMSTEIN: Let me just modify that.
16 I would think that this is sort of laissez
17 faire emerging from the institute. I would
18 think the commission would also want to
19 identify issues in which it wants research done
20 and would provide guidance to the staff at the
21 institute to do -- address certain issues and
22 would share with the staff at the institute
23 responsibility for fundraising on issues that
24 we care about. So I see a two way process:
25 what one is investigator initiated work at the

98

1 institute; the other is issues that we emerge
2 with of salient importance to the larger
3 questions we are concerned with and then the --
4 that then the staff at the institute would pick
5 up on that and generate proposals and there
6 would be interaction.

7 REMARKS OF PROFESSOR BERGER

8 PROFESSOR BERGER: Yeah, I mean, I think
9 that also one of the jobs would be to let the
10 relevant scientific communities know that there
11 are opportunities out here. I mean, just as
12 epidemiologists and toxicologists nowadays
13 think that, you know, there are all kinds of
14 people out there who would like the product of

15 my work because of lawsuits that are going on,
16 I think that for people who will get identified
17 in relevant disciplines ought to know that
18 there is interest in having their work go into
19 certain areas so that I think it's not just the
20 question of getting grants from individuals. I
21 think one has to contact relevant fields and
22 also perhaps foundations that deal with people
23 in relevant fields because it seems to me that
24 they could be the ones to develop some of these
25 proposals within individuals.

99

1 REMARKS OF DR. BYERS

2 DR. BYERS: Can I ask a question? Is
3 there a way of quantifying the way new
4 information that's introduced into the judicial
5 system or into the legal system? You know, for
6 example, when the C. R. was developed --

7 PROFESSOR FAIGMAN: I write law review
8 articles, but they're mainly ignored.

9 DR. BYERS: When P. C. R. was developed as
10 a technique, one of the issues about it was, in
11 order to create evidence based on P. C. R., you
12 have to destroy the information that was
13 available. Now, one of the things about
14 pattern recognition, it sort of flies in the
15 face of, I think, sort of the traditional
16 thinking of things is that you're developing,
17 in a sense, meta-evidence; that is, you're
18 looking -- you're extrapolating from something
19 that you can feel in a sense, you know, that
20 you can put your fingers on to a concept and

21 it's the concept that is now being used as
22 evidence. Is there a way for the taking those
23 concepts as they develop and creating
24 strategies for which they become useful so that
25 this institute would have a voice in saying

100

1 that as new ideas develop we have a way of
2 thinking about and implementing the -- these
3 new approaches to evidence.

REMARKS OF MR. TRAVIS

4
5 MR. TRAVIS: Marshal asked the question
6 about what could the institute do. I think one
7 of the challenges here is to -- that David
8 alluded to and Margaret as well is to draw in
9 sort of mainstream scientific disciplines into
10 this area of science, and the role the
11 institute would play or science director would
12 play would be to sort of think entrepreneurly
13 about who those individuals might be who are
14 sort of close to this area of scientific group
15 but not actually doing it, right? And then
16 convene a small group of them around the
17 question of -- like the one Dave gave us -- of
18 somebody, whoever this person was, standing in
19 front of another group of researchers and
20 saying, here's how I would approach it, and
21 this is starting to develop a community
22 interest in this area of research inquiry, and
23 out of that could come a proposal. So it's a
24 little different from the model of saying,
25 let's find one P. I. and say -- or a couple of

101

1 them and say, you know -- try to stimulate a

2 broader community of scientists who would want
3 to take on some of these topics, and so the
4 institute in this model becomes the convener,
5 the catalytic agent that brings those people
6 together so that you have a broader and perhaps
7 even a more highly prospective or grant
8 potential group of scientists who can take
9 these thing on and might actually -- might want
10 to make it happen.

11 REMARKS OF PROFESSOR FAIGMAN

12 PROFESSOR FAIGMAN: We said that -- and
13 it's especially important to the institute to
14 understand that we're really aiming for the
15 graduate students, just to be honest. I mean,
16 it's not going to be the John Cassiopeias at
17 Chicago that are going to do this research
18 perhaps right at the start. It's going to be
19 the fact that John has six graduate students
20 who need money who are doing something, you
21 know, that is along the same lines and this
22 gives them, you know, master theses and Ph.
23 dissertations to do, and so what, I think, the
24 institute should be looking for are research
25 teams. And now it may be that, you know, in

102

1 science the principal investigator will be the
2 big name, but what we're really expecting --
3 and I think the payoff is there as well -- is
4 that as graduate students start to do these
5 kinds of research we're creating a new
6 generation of scientists who will go out and do
7 some of this research and some other stuff, and

8 they will create more graduate students, and I
9 think that's what we're looking to do is to
10 really impact. I mean, I have often been
11 accused of thinking perhaps too big, but we're
12 looking for a revolution here in all honesty.
13 we're looking to change the nature and the face
14 of forensic science to bring in -- you know, to
15 change the last 100 years where forensic
16 science was a police science. And what we're
17 saying is, we need to somehow figure out a way
18 to bring it into the main -- the academy, and I
19 think we need to realize we're looking at major
20 universities with lots of graduate students.
21 You know, N. I. H., M. I. M. H., N. S. F., you
22 know, it's all declining funding. The reality
23 is, they need money, and if we can -- and I
24 don't know if we'll have it, but if we can find
25 it and we can present really interesting,

103

1 dynamic subjects that is really within their
2 disciplines anyway, as Steve said, a new way of
3 thinking about pattern recognition, new
4 subjects to study, that's what we're looking
5 for, and I think that's a great challenge.

6 REMARKS OF DR. FIENBERG

7 DR. FIENBERG: Let me make a stab at
8 summarizing where, I think, we've come. I
9 don't need the mike --

10 DR. BYERS: They want it so they can
11 record you.

12 (DISCUSSION OFF THE RECORD.)

13 DR. FIENBERG: I see that we've created an
Page 83

14 agenda for the commission, and apart from the
15 institute in the short term and the near term,
16 and I have five items, and in a sense -- and
17 this gets back to Larry's request -- we might
18 try to capture this in writing in some way to
19 share more broadly after it comes in.

20 So item number one, the commission has
21 agreed that there is critical importance to the
22 preservation of evidence for scientific
23 evaluation in the administration of justice,
24 and we will try to prepare a more detailed
25 statement in the very near future that

104

1 articulates how that might be advance -- how we
2 may advance that agenda as item one; two, we've
3 recognized the importance of the formal
4 development of procedures and approaches for
5 enhancing the validity and the effectiveness of
6 eyewitness testimony, and we're hoping to bring
7 forward in the near-term proposals that will
8 move that agenda ahead in both a research
9 domain and in the implementation in a variety
10 of legal jurisdictions. The former, the
11 preservation of evidence, is something we're
12 hoping to circulate a statement on very quickly
13 among the commissioners. The latter we're
14 hoping to develop between now and the next
15 meeting in order to be able to have an agenda
16 on the table that shows where the institute and
17 commission sees itself, position with regard to
18 that issue and perhaps issue a statement coming
19 out of the next meeting.

20 We want to coordinate in advance the
21 infrastructure and standards associated with
22 forensic laboratories and the testing of
23 forensic evidence, and we're looking to do this
24 in collaboration with the lead forensic
25 organizations, in order to bring together the 105

1 constituencies that the commission represents
2 in both science and the law with the
3 constituencies in the forensic science area,
4 especially as they relate to laboratories. We
5 hope to have a program in this area at the next
6 meeting so that that can be advanced as well.

7 And then there are two other areas that we
8 expressed priorities about where we still need
9 to develop our agenda and our mode of
10 operation. The first is the development of new
11 forensic science -- a new forensic science
12 research agenda under the broad rubric of
13 pattern recognition. And the last is the
14 critical role at the end -- of education at the
15 interface of science and law so that science
16 can play a more positive role both in legal
17 education and in the development of long-term
18 standards for the introduction of science as
19 evidenced in legal proceedings. That's a big
20 agenda. How will we proceed? I have five
21 lists of names. Yes?

22 REMARKS OF CHIEF BERGER

23 CHIEF BERGER: Before you -- I just --
24 yeah, and I'm not sure if it may have been
25 incorporated one of those, but I just -- I feel

1 very compelled, again, bring forward and I kind
2 of sketch it that we the commissioner are
3 concerned with either real or perceived backlog
4 of biological and other forensic evidence
5 that's stockpiling in our labs.

6 REMARKS OF DR. FIENBERG

7 DR. FIENBERG: I think this is presumed
8 under at least two of those agendas.

9 PROFESSOR MARTIN: It might helpful to be
10 a little more explicit.

11 DR. FIENBERG: I -- no. Let me argue
12 against being explicit in the list but -- but
13 very explicit in the agenda. Okay. It's
14 explicit in the agenda as it relates to the
15 preservation of evidence because you can't talk
16 about that unless you really talk about the
17 backlog, and it has to do with the role of
18 laboratories and their interface with the
19 system, and I think it's very explicit there.
20 And I think we have to figure out how we deal
21 with this. I -- it's a critical issue for
22 everybody, and so it's not that I'm trying to
23 wash that away. I think we have to figure out
24 the strategy for embedding this along with
25 other things in the agenda so --

107

1 CHIEF BERGER: I understand. I just
2 didn't want it to get sucked up into one
3 another and then years later we say, didn't --
4 shouldn't we make a remark about the backlog.

5 DR. FIENBERG: No, I -- very good point.

6 PROFESSOR D'ALEMBERTE: Good for you.

7 DR. FIENBERG: Margaret?

8 REMARKS OF PROFESSOR BERGER

9 PROFESSOR BERGER: If Gary wells is going
10 to move to the University of North Carolina --
11 I have no idea what the timing is on this or
12 whatnot, but if it were before the next
13 meeting, then it would be sort of a pity to
14 move -- miss the opportunity to link that with
15 the -- the initiative of doing something about
16 eyewitness testimony. So I wouldn't wait until
17 the next meeting to say something about it.

18 REMARKS OF DR. FIENBERG

19 DR. FIENBERG: So let me just -- somebody
20 asked what will these committees look like.
21 They will be committees of the commission
22 because if we are collectively going to do
23 something it should be commission members who
24 bring it back to the table. I -- I don't think
25 it should simply be those who are officially

108

1 commission members when we have relevant
2 expertise at hand, whether it's Larry Hammond
3 with experience in one domain or Gary wells in
4 another, and I would expect that if --
5 especially if Gary is on the verge of accepting
6 a position locally that the next time we
7 collectively see him he will have not only a
8 role in our discussion as an ex-officio member
9 of that committee but probably a title as a
10 scientific member of the institute. And one of
11 the great things about creating institutions

12 that have no rules is that you can create
13 titles that suit the occasion, and I think that
14 he's somebody very worthy of such a title, and
15 I'm sure that those in charge of the institute
16 will take heed of that and bring back a title
17 that we think is quite appropriate, but I
18 envision that Gary will play a critical role in
19 that type kind of activity. So, in fact, what
20 you're going to get from Al, who will take my
21 notes and polish them up and add some players
22 to the -- to the list, is a request to serve on
23 a group, and there will be a designated chair
24 of each subgroup and the time line to reporting
25 that. The one with the very short time line is

109

1 the one being led by Larry and John who are
2 going to write the draft statement for us on
3 the preservation --

4 PROFESSOR MARTIN: There it is. Sorry to
5 keep you waiting.

6 REMARKS OF MR. HAMMOND

7 MR. HAMMOND: I can try and read it.
8 It'll take just a minute to read it if you'd
9 like me to. Here is what Larry Marshall and I
10 came up with, and it may not be perfect, but I
11 think it captures what we're talking about.

12 The American Judicature Society Commission
13 on Forensic Science and Public Policy is
14 identifying an agenda of priorities for future
15 research and evaluation. Fundamental to the
16 work of the commission and institute is the
17 preservation of evidence and appropriate access

18 to evidence in both resolved and unresolved
19 criminal cases. As the recent revolutions in
20 forensic DNA testing teach us, science
21 continues to develop, and in the years to come,
22 science will have the capacity to conduct
23 forensic testing that may not be carried out
24 today. For these reasons, the commission urges
25 state and local governments to adopt evidence 110

1 for preservation policies that while sensitive
2 to the fiscal and physical burdens that
3 long-term preservation places upon law
4 enforcement also is sensitive to the compelling
5 need properly to preserve physical evidence for
6 future testing so as to ensure that the guilty
7 are convicted and the innocence not.

8 PROFESSOR MARTIN: Too long.

9 MR. HAMMOND: Cut it.

10 REMARKS OF MS. MUMMA

11 MS. MUMMA: You have a point that it's not
12 just law enforcements but the courts because,
13 if the evidence is introduced at trial, it's
14 usually not maintained by law enforcement, so
15 that's where the clerks say, this doesn't apply
16 to us.

17 REMARKS OF MR. TRAVIS

18 MR. TRAVIS: Maybe this was discussed on
19 the first day when I wasn't here, but is --

20 DR. FIENBERG: No, it wasn't. There were
21 no procedural questions discussed the first
22 day.

23 MR. TRAVIS: Are we -- have we decided to

24 make a statement, like a public press available
25 statement? Is there USA Today banging down our 111

1 door to have us say something? Do we want to
2 take this opportunity, and if so, will we state
3 this, an agenda that'll be laid out, Steve?

4 REMARKS OF DR. FIENBERG

5 DR. FIENBERG: That's why I wanted first
6 to present the summary of where I thought we
7 had come, and you notice there were two or
8 three minutes left.

9 REMARKS OF MR. TRAVIS

10 MR. TRAVIS: But I -- my own view is that
11 your statement of an agenda which incorporates
12 this aspiration is a more compelling public
13 statement, if you want to make one, than
14 focusing solely, as important as it is, on the
15 preservation of evidence, a statement as to our
16 work over the last two days.

17 REMARKS OF MR. HAMMOND

18 MR. HAMMOND: Steve, let me make a
19 proposal. I think that what both you and
20 Jeremy have said is right, and maybe what we
21 could do is we, could take your summary and
22 someone who's a better wordsmith than I am
23 could incorporate that and the essence of this
24 into something that would be a statement or a
25 press release that could being circulated by 112

1 E-mail to people. If -- if there are -- if
2 there are comments that people want to make in
3 the next couple of days, they can make it.

4 REMARKS OF DR. FIENBERG

5 DR. FIENBERG: So I don't know what the
6 time frame is, but that was my intention of
7 appointing a subcommittee was to be sure that
8 we had gone through this and then have the
9 opportunity to circulate it for comments.
10 It -- it's not that people are objecting to
11 anything in the principle. It's discussion of
12 the words.

13 REMARKS OF MR. FISHER

14 MR. FISHER: Was a press release issued
15 about this meeting because it seemed like
16 Rich Roy's article in USA Today --

17 REMARKS OF MR. LOGE

18 MR. LOGE: There was. There is press
19 interest in this institute. My office spent a
20 lot of time on the phone with national and
21 local media last week, and folks are
22 interested, and they said -- most reporters
23 said, if you've got a statement of principle,
24 let us know. This sounds really interesting.

25 REMARKS OF MR. FISHER

113

1 MR. FISHER: So I think that just to help
2 jump-start this thing, to get something get out
3 to the media will be worthwhile.

4 REMARKS OF MS. LEARY

5 MS. LEARY: Jeremy said you wanted to
6 attract the attention of other scientist,
7 people who never heard of the American
8 Judicature Society, and they'll read that, and
9 they'll say, wow, this is really interesting, I
10 want to know more, this is kind of thing I want

11 to get involved, I want to bring my grad
12 students into this, whatever.

13 MR. FISHER: So you want to create a buzz.

14 REMARKS OF DR. FIENBERG

15 DR. FIENBERG: Well, I would like to see
16 the broad statement as part of the agenda and a
17 very separate and targeted statement on the
18 issues because I don't want it to be subsumed
19 within the agenda either. So I -- I think
20 we're really talking about a pair of releases.

21 REMARKS OF MR. TRAVIS

22 MR. TRAVIS: The timing would be -- timing
23 is everything. First one would be the broad
24 agenda --

25 DR. FIENBERG: Yes.

114

1 MR. TRAVIS: -- and capture this. I would
2 do it -- I would do it within the next 24
3 hours.

4 REMARKS OF DR. BLUMSTEIN

5 DR. BLUMSTEIN: I think the tension here
6 is between trying to get a statement out on
7 this clearly important issue and the degree to
8 which it looks more ad hoc rather than part of
9 the broader agenda, and I think Jeremy's
10 comments and other comments suggest let's --
11 let's not take this one ad hoc issue and throw
12 it out first but, rather, let's look at the
13 broader agenda of the commission and the
14 institute and let this be a part of that which
15 will therefore make it less ad hocky and more
16 something that derives from the broader agenda

17 of the commission and institute.

18 REMARKS OF DR. FIENBERG

19 DR. FIENBERG: My expectation is that we
20 will really have a working group with the draft
21 back to people very, very soon and that this is
22 a wonderful start to it. On behalf of
23 Attorney General Reno, William Webster who
24 really regretted that he had to leave on Friday
25 because of other obligations, the co-chairs

115

1 want to thank you. I confess I did not know
2 what we were doing when we came here, so you
3 are not alone. And I look forward to working
4 with all of you on the real work of the
5 commission as we move ahead. Al is going to do
6 all the hard work over the next little while in
7 helping the organization, but we hope that you
8 will do some of the heavy lifting as well.

9 MR. FISHER: Al, do you have an idea of
10 when future meetings are going to be?

11 DR. FIENBERG: We were talking about maybe
12 something as early as the third week in July,
13 and then after that, it's really -- it's hard
14 to organize these. We will circulate some
15 proposed dates as soon as we can. We have not
16 coordinated our calendars.

17 REMARKS OF MR. SOBEL

18 MR. SOBEL: And on behalf of A. J. S.
19 headquarters, I want to thank each and every
20 one of you for being here. It's just been a
21 real pleasure to sit in a room with all of you
22 and listen to your comments and your thoughts

23 about how we can progress as we move the
24 institute commission forward. Thank you.

25 MS. RENO: Thank you all. Your work is so 116

1 important.

2 DR. BYERS: I must say, I think you've
3 done an absolute remarkable job of getting
4 people together and creating an environment for
5 which exchange is free and open and very
6 useful.

7 MS. RENO: That's great.

8 DR. BYERS: I don't see this very often.

9 (APPLAUSE)

10 (PROCEEDINGS CONCLUDED AT 11:50 A.M.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

117

1 STATE OF NORTH CAROLINA
2 COUNTY OF FORSYTH

2

060402.txt
REPORTER'S CERTIFICATE

3
4 I, Dorothy J. M. McGrath, a Notary Public,
5 do hereby certify that the foregoing proceedings
6 occurred before me on Sunday, April 4, 2006, and
7 this transcript is a true record of the events as
8 they occurred.

9 I further certify that I am neither
10 attorney or counsel for, nor related to, or employed
11 by any attorney or parties or counsel employed by
12 the parties hereto or financially interested in the
13 action.

14 IN WITNESS WHEREOF, I have hereto set my
15 hand this 14th day of April, 2006.

16
17
18
19
20
21
22
23
24
25

Dorothy J. M. McGrath, Notary Public
My Commission Expires 03/18/08

□