

ORIGINAL
TRANSCRIPT OF PROCEEDINGS

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES

Pages 1 thru 111

**Washington, D.C.
March 15, 1990**

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UNITED STATES SENTENCING COMMISSION

Public Hearing

Proposed Amendments to the Sentencing Guidelines

United States Courthouse, Washington, D.C.

March 15, 1990

BEFORE:

William W. Wilkins, Jr., Chairman;
Helen Corrothers, Commissioner;
Irene H. Nagel, Commissioner; and
George E. MacKinnon, Commissioner

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

CHAIRMAN WILKINS: This will be another in the series of public hearings the Sentencing Commission has held on various issues that we must resolve.

In this case, we are addressing various amendments earlier published for public comment that we will be considering during the next 5 or 6 weeks potentially for promulgation as amendments to the Congress prior to the May 1st statutory deadline.

With that in mind, let me call our first two witnesses to the witness stand. We are very pleased to have Mr. Paul Maloney, Deputy Assistant Attorney General, Department of Justice.

Mr. Maloney will soon be officially, I think, designated the Commissioner--ex-officio Commissioner representing the Attorney General of the United States with the Sentencing Commission. He's already been participating with us.

We're delighted to have you, Mr. Maloney.

With him is Mr. Joe Brown. He's a United States Attorney and one who has served for many years in that capacity or related capacities from the Middle District of

1 Tennessee.

2 He is also--is it Chairman, Mr. Brown, of the
3 Attorney General's Advisory Committee? Is that your title?

4 MR. BROWN: Yes.

5 CHAIRMAN WILKINS: Thank you. Fine. Come around,
6 Mr. Maloney and Mr. Brown. We'd be glad to hear from you at
7 this time.

8 We have your written submissions, I believe. Is
9 that correct?

10 MR. MALONEY: That's correct.

11 CHAIRMAN WILKINS: Fine. We'd be glad to hear any
12 areas you'd like to specifically identify for discussion.

13 STATEMENT OF MR. PAUL MALONEY, DEPUTY ASSISTANT ATTORNEY
14 GENERAL, DEPARTMENT OF JUSTICE

15 MR. MALONEY: Thank you, Judge Wilkins. Thank you,
16 members of the Commission.

17 I am pleased to appear before you today to discuss
18 the amendments recently proposed to the sentencing guidelines.

19 The Department finds that many of the amendments
20 will improve the implementation of the guidelines and we
21 applaud the Commission's efforts in several important areas,
22 including the amendment of the arson guidelines, the

1 guidelines relating to child pornography, and the addition of
2 the new criminal history category for serious offenders.

3 These amendments will foster the purposes of
4 sentencing set forth in their format and assure that serious
5 offenders are punished appropriately. We urge the Commission
6 to adopt these amendments for submission to the Congress by
7 May 1.

8 There are two areas this morning that I would like
9 to specifically address. The first one is acceptance of
10 responsibility for the convenience of the members of the
11 Commission, that's Amendment Number 58, on page 60 of the
12 materials sent out by the Commission.

13 The Commission has asked whether that guideline
14 should be amended expressly to provide the reduction for
15 acceptance of responsibility as not warranted when the
16 defendant first evidences such acceptance after adjudication
17 of guilt.

18 The Department feels very strongly that the
19 guidelines should be amended to establish a deadline for acts
20 evidencing an acceptance of responsibility, but would
21 establish an earlier deadline than that time at which guilt
22 has been adjudicated.

1 Specifically, the guidelines should require the
2 defendant enter a plea or a conditional plea of guilty or
3 nolo contendere prior to the commencement of trial in order
4 to be eligible for the guideline reduction based on accep-
5 tance of responsibility.

6 It's clear to us that there is a pressing need to
7 fine tune the guideline relating to the acceptance of
8 responsibility.

9 From discussions with prosecutors throughout the
10 country, we have learned that many judges grant the two level
11 reduction as a matter of course to defendants who have
12 proceeded to trial, are adjudicated guilty, and then merely
13 state that they accept responsibility for the defense.

14 The Department believes that the allowance of
15 acceptance of responsibility is inconsistent with the
16 rationale for the downward adjustment.

17 It's difficult to reconcile an asserted acceptance
18 of responsibility for committing an offense with a defen-
19 dant's decision to proceed to trial in order to challenge the
20 Government's case.

21 For this reason, we believe that the guideline
22 authorizing reduction should require that the plea be made

1 prior to trial rather than simply before the adjudication of
2 guilt.

3 To allow a defendant to assess the strength of the
4 Government's case during trial, usually testify in an
5 exculpatory manner, and remain eligible for acceptance of a
6 reduction would undermine the intent of the acceptance of
7 responsibility guideline.

8 We recognize that there may be some situations in
9 which a court may wish to depart from a guideline that
10 requires a defendant to enter a guilty or nolo plea prior to
11 the commencement of trial, and the Commission may wish to
12 acknowledge those factors relevant to such a departure.

13 However, an asserted acceptance occurring after the
14 commencement of trial should not simply reflect the calcu-
15 lated decision by the defendant to express regret for the
16 offense after assessing the strength of the case, and should
17 be consistent with the reduced need for punishment generally
18 reflected by the acceptance of responsibility guideline.

19 The Commission has also asked whether it should be
20 more clearly indicated the weight that should be assigned to
21 the entry of a plea.

22 We believe that the entry of a plea of guilty or

1 nolo contendere within the time parameters outlined should be
2 considered significant evidence of acceptance of respon-
3 sibility and the Commission should so state in its commen-
4 tary. However, mere entry of a guilty or nolo plea should
5 not guarantee the reduction.

6 The second area which I'd like to address is
7 firearms and specifically, establishment of a guideline for
8 armed career criminal. For the Commission's convenience,
9 this is Amendment Number 31, page 36.

10 The guidelines relating to firearms offenses needs
11 strengthening. Currently, there is no guideline for armed
12 career criminal, a violation of Section 924(e).

13 We strongly urge the Commission to adopt the second
14 option, as set forth in the proposed amendments. The armed
15 career criminal provision is an enhanced sentencing provision
16 for a violation of the prohibition of a firearm by a con-
17 victed felon in a case where the defendant has the defined
18 three prior convictions.

19 The provision requires a 15 year minimum term,
20 leaves the maximum to the discretion of the court. We
21 believe that there should be a guideline applicable to
22 sentences subject to the armed career criminal provision that

1 includes a range of factors and is consistent with the fact
2 that Congress established the 15 years as only the minimum
3 sentence available under the guidelines.

4 In light of the current absence of guidelines
5 addressing this provision, the 15 year statutory minimum
6 would normally be the guideline offense. Higher sentences
7 would be authorized only based on departure at this time.

8 The defense to which an armed career criminal
9 statute applies is the receipt, possession, or transportation
10 of a firearm by a felon. The enhanced sentencing under the
11 armed career criminal statute is based solely on the number
12 and nature of the past convictions creating the prohibition.

13 It reflects the view that felons with convictions
14 of violent offenses or serious drug offenses should be
15 sentenced to significantly longer terms of imprisonment than
16 other convicted felons in possession of firearms.

17 Option 2, it seems to us, addresses the policy
18 considerations of the statute more fully than does Option 1.
19 The second option increases the sentence depending upon the
20 nature and seriousness of the priors, giving rise to the
21 application of the statutory minimum.

22 By contrast, Option 1 increases the sentence

1 primarily based on the underlying offense for which the
2 defendant may be in court.

3 However, the criminal history provisions in the
4 guidelines are only an approximate measure of the past
5 criminal behavior of the defendant, as would be applied in
6 Option 1. They do not distinguish between violent felonies
7 in a defendant's background. Nor do they distinguish between
8 particular heinous and less serious violent felonies.

9 It seems to us that simply to employ the existing
10 criminal history scoring techniques are unacceptable in the
11 armed career criminal context.

12 We would be pleased to offer the Department's
13 assistance to the Commission and expect to provide views on
14 other issues raised by the Commission in its proposed
15 guideline amendments as it addresses these amendments in
16 further deliberation.

17 My colleague, Joe Brown, Chairman of the Sentencing
18 Guidelines Subcommittee, will address other important areas
19 of concern.

20 I commend the Commission for its important efforts
21 and look forward to working with you in the future as an ex-
22 officio member as of May 1.

1 I thank you.

2 CHAIRMAN WILKINS: Thank you, Mr. Maloney.

3 Mr. Brown?

4 STATEMENT OF MR. JOE BROWN, U.S. ATTORNEY, MIDDLE DISTRICT OF
5 TENNESSEE

6 MR. BROWN: Judge Wilkins, members of the Commis-
7 sion, I likewise am very pleased to be here and I believe the
8 sound system is a little better this year.

9 CHAIRMAN WILKINS: The sound is better. The air
10 conditioning is not though, but we can't have them both.

11 [Laughter.]

12 MR. BROWN: We can't have everything.

13 I likewise on behalf of the U.S. Attorneys ap-
14 preciate the opportunity to appear.

15 One of the concerns, I think, that all of us U.S.
16 Attorneys have expressed is the concern over proliferation of
17 the number of guidelines.

18 Each year as we have more, it becomes more complex
19 to apply the guidelines. The Commission, of course, has the
20 computer program and hopefully will be out with the last
21 November's amendments before too much longer, but we urge the
22 Commission to consider in all cases whether a guideline

1 change is actually necessary. Some may be nice, but are they
2 necessary. So we simply put that in as a caveat.

3 We have recommended a number and do support a
4 number of changes, but, overall, we are concerned that we
5 don't in effect have a new set of guidelines every November.

6 There are two areas that are of particular concern
7 that I would like to address; one is the criminal history.
8 We like very much the proposed Guideline 64 to deal at an
9 additional level of criminal history.

10 As we understand it now, there are about 3 percent
11 of the cases in which there are departures upward because of
12 the criminal history and we think that actually the actual
13 figure in which criminal history exceeds 13 by a significant
14 amount is much more than that.

15 Some judges simply aren't departing because now to
16 take that into account you have to depart upward, and as we
17 understand, it's about 3 percent.

18 There are a number of offenders who have a criminal
19 history substantially in excess of 13. They should simply
20 not get a free ride as they do under the current guidelines.

21 The other problem we have with criminal history is
22 that it tends to also under represent the criminal history

1 because of the consolidation rule that the Commission has
2 used.

3 Where offenses or crimes are consolidated for trial
4 or sentencing, Guideline 4A1.2, Application Note 3, says they
5 ought to be treated as a single sentence.

6 So an individual who is charged and tried with a
7 number of armed robberies, but is either tried jointly or in
8 consolidation of cases, he's only treated as having one
9 conviction.

10 Interestingly enough, in preparation of my tes-
11 timony yesterday, I noticed there's a Ninth Circuit case
12 which specifically declined to follow that application
13 guideline saying it was unreasonable and produced disparate
14 results simply because it depended simply on the fortuitous-
15 ness of being sentenced or tried at a single trial. The
16 Ninth Circuit just simply failed to follow it and said you
17 should count those separately.

18 Our suggestion in this area, to avoid complicating
19 it more than is necessary, is simply to use the multiple
20 grouping rules under 3D1.2.

21 So like robbery, for instance, it would not group
22 under 3D1.2. If it doesn't group under the current

1 guidelines, you wouldn't group it in figuring criminal
2 history.

3 We think this cuts a good balance between not over
4 emphasizing criminal history for a number of check cases, for
5 instance, but on the other hand, for those personal crimes
6 that would not group, we think that the current guidelines
7 seriously under represent the criminal history. We believe
8 that that would be a good workable solution to that problem.

9 The Commission has also asked whether the defini-
10 tion used in connection with career offender guidelines,
11 4B1.1 and 4B1.2, should be amended to have a separate set of
12 instructions for counting prior crimes of violence or
13 controlled substance offenses.

14 Under these, we don't have a separate counting and
15 also, we have the limitations of the 15 years and the 10
16 years, depending on the sentence that was actually imposed.

17 We think on this area that there should be--that
18 this is artificial and we should not--particularly on those
19 areas where we're talking about crimes of violence and
20 serious drug offenses, we should not have those limitations
21 and should consider removing those.

22 The limitations on this area seem to be somewhat

1 inconsistent in dealing with Congress' mandate on career
2 criminals.

3 Paul has already addressed the area of the armed
4 career criminal and I think the same logic would apply there
5 because these are the most dangerous people that we're
6 dealing with.

7 I think it would be appropriate for the Commission
8 to consider exempting violent and serious drug offenders from
9 these time constraints of the criminal history provisions.

10 The other area that I think we're seeing now more
11 and more is revocation of parole and supervised release. We
12 are now far enough into the guidelines that we're beginning
13 to have a number of revocations of these either supervised
14 release or probation.

15 The Commission has proposed two options. Frankly,
16 there's a good bit of discussion among the Department of
17 Justice on this.

18 Generally, we favor Option 2, but on the other
19 hand, there are some good points from Option 1. Option 2
20 seems to--Option 1, at least, goes on the assumption that new
21 criminal behavior will be appropriately sanctioned by the
22 court that has jurisdiction under the underlying offense and

1 that the--as I read it, that the revocation of probation or
2 supervised release will simply be an enhancement for the
3 underlying offense.

4 Option 2 seems to more fairly reflect the nature of
5 the violation giving rise to probation or supervised release
6 revocation.

7 A defendant who commits a very serious offense
8 should not be limited to a maximum term of imprisonment upon
9 revocation of only 18 or 24 months.

10 There is also an assumption, I think, in the
11 guidelines that if there is a new offense, it will be
12 prosecuted.

13 Our experience is not necessarily--that that's not
14 necessarily so. Many times, particularly State prosecutors
15 with their limited resources, overcrowded prisons, if a
16 person is on Federal supervised release or probation, their
17 view is that he's sort of our problem and we ought to take
18 care of it and not bother them with convicting him so we can
19 revoke probation.

20 So a lot of times they're simply going to defer to
21 the Federals and it's going to be up to us to do it, probably
22 without a State conviction in many cases.

1 As I say, we generally prefer Option 2. We believe
2 that it should be revised regarding the minimum prison term.
3 It actually, as I read it, provides that if the court revokes
4 probation, the minimum prison term would not be less than 6
5 months.

6 For some of the minor revocations, it sort of puts
7 the--as I read it, the district judge, if he's going to give
8 imprisonment, he's either got to give some sort of additional
9 half-way house or 6 months in imprisonment.

10 We think on the minor offenses, the petty offenses,
11 that there should be--from Option 1, there should be some of
12 the ability there to use a 1 to 7. Option 1 has a 1 to 7 for
13 those minor offenses.

14 Option 2 really says if the judge is going to
15 actually revoke the probation, he's got to start with 6
16 months imprisonment. We think that maybe a little too much.

17 So actually we recommend a combination of the two,
18 with most of the Option 2 language in there, but the prison
19 terms or the minimum prison terms more or less from Option 1.

20 There's also going to be some technical amendments
21 that need to be done with Guideline 5C1.1, dealing with split
22 sentence and supervised release and we need--we're looking at

1 that, but there seems to be some technical problems, par-
2 ticularly with supervised release and when you revoke
3 supervised release what the maximum terms.

4 We would be glad to work with the Commission on
5 those technical problems because--but in any case, there's no
6 question that the Commission does need to adopt guidelines
7 for supervised release and probation. We are seeing more and
8 more of those cases and right now it's basically--it's either
9 unguided or the language is such that it's very difficult to
10 apply and understand what you should do.

11 Congress in a few of the cases, as you know, has
12 provided mandatory revocations in some of the drug offenses
13 and a statutory punishment, but those cases aside, we do need
14 guidelines for the other cases. Right now, it is essentially
15 unguided and we are seeing a number of those cases coming up.

16 CHAIRMAN WILKINS: Thank you very much, Mr. Brown.

17 I think you have a good point. This is one that
18 we'll have to put into balance each time we decide, and that
19 is, should we issue another guideline this year in this area
20 even though it's an improvement--in our judgment an improve-
21 ment because that means you've got to learn a new guideline
22 or you've got to learn this amendment and you're just one of

1 several thousands of people that have to do it. So that's a
2 real important point.

3 MR. BROWN: And frankly, Judge, we occasionally
4 make mistakes. I'm finding my assistants and other assis-
5 tants, they simply--they've pulled open the new green book
6 and they look at it and then when you start running it, we
7 find that, you know, they should have applied one for an
8 earlier guideline because hopefully it's fairly clear as to
9 which guideline appears.

10 The general rule we use is if it benefits the
11 defendant, he gets the new guideline. If it doesn't benefit
12 him, he gets the old guideline. But sometimes there is
13 argument as to whether it is a benefit or not. There's some
14 you're not real sure about.

15 So each time--it does cause a considerable problem
16 sometime in determining which guideline applies. I ap-
17 preciate the Chairman's comment, but sometimes changes are
18 necessary, but sometimes in may of the areas we may be better
19 to stay with what we've got rather than to try to make too
20 many changes.

21 CHAIRMAN WILKINS: That's right. Sometimes we may
22 see a problem and make a fix, but then if we'd had more time,

1 we would have identified another problem. So we've got to
2 make another fix, you see, and that's what we want to try to
3 avoid.

4 You know abuse in acceptance of responsibility was
5 one of the areas where we left probably the most flexibility
6 and discretion into the trial judge. Because of that, you
7 all are seeing abuses of that discretion that is vested in
8 the trial judge.

9 I just wonder what that rate of abuse would be
10 where the judges--fellows puts the Government to the burden.
11 He puts up perjury testimony and then he's finally convicted
12 and he stands up and says, "Judge, I'm sorry I did it." The
13 judges says, "Okay. Here's two levels."

14 Is that happening a lot out there?

15 MR. BROWN: Judge, we have early statistics that
16 may have even come to the Commission about a year ago, that
17 acceptance of responsibility was being given in about almost
18 30 percent of the cases where there had been a plea of not
19 guilty.

20 I have not seen an update on that, but my impres-
21 sion in talking to other U.S. Attorneys is that it's running
22 substantial.

1 I just had a discussion yesterday with one of my
2 fellow U.S. Attorneys where they had a case, went to trial, a
3 long trial. The defendant denied it, a fairly major fraud
4 case. But after conviction, he came in with a statement,
5 which was clearly written by his defense attorney, but
6 basically they parroted the acceptance of responsibility
7 language out of the guidelines and the Assistant was asking
8 my opinion on an appeal.

9 But the district judge thought--basically said he
10 thought it was sort of lawyer talk, but he felt constrained
11 to give the two level reduction because it tracked the
12 language of the guidelines and the defendant was admitting
13 responsibility even at this belated date and did not think
14 that the Commission's language about early--the timing was
15 sufficient to overcome that.

16 So what apparently we're seeing is the defense
17 attorneys are taking all that language in the guidelines
18 about acceptance, forgetting the part about the earliness of
19 it, and judges are feeling sort of constrained by present
20 guidelines to do something or to give those points.

21 We do feel that's one of the areas that's a very
22 serious problem. We really think that once you've gone to

1 trial it on a full blown trial that really you should not get
2 it. There's just death bed or, I guess, foxhole--that's a
3 foxhole conversion, as far as I'm concerned.

4 CHAIRMAN WILKINS: Thank you.

5 Judge MacKinnon, do you have any questions?

6 COMMISSIONER MacKINNON: Yes.

7 Mr. Brown, if we go to that seventh category, is
8 there going to be any room for departure? You can handle
9 everything with specificity and no room for departure,
10 practically.

11 MR. BROWN: Well, I don't know that the Commission
12 has ever totally foreclosed departures. I think there would
13 be less need for departures. I think--the judge might still--
14 --still should have--will have the option, I would assume, to
15 depart downward if the criminal history overstates the nature
16 and--

17 COMMISSIONER MacKINNON: I'm not talking about
18 departing down. I'm talking about departing up.

19 MR. BROWN: Well, I think there would be less need
20 to. I think the judge would still have that option in case--
21 in an extreme case. I think there will be very few of those
22 cases. I think the option--the level 7 would take care of

1 the great majority of the cases that we presently have, along
2 with the career offender statute.

3 COMMISSIONER MacKINNON: See, that's different than
4 any of other guidelines. We don't cover the whole gamut of
5 the offense with the range of sentencing.

6 MR. BROWN: Judge, you know, I agree you can always
7 find one case, I assume, worst than a level--what would be
8 the new level 7, but I do think that the new level 7 would
9 take care of the vast majority of those cases now--

10 COMMISSIONER MacKINNON: I know it would, but as I
11 say, it's taking care of everything. It leaves nothing to
12 the judge's discretion. If he wants to go way up, he can't.
13 He shouldn't.

14 MR. BROWN: I think he still has the discretion.
15 If even level 7 understates it, I think the judge still has
16 that discretion. I just think there will be far fewer of
17 those cases where it would occur.

18 COMMISSIONER MacKINNON: Of course, this applies
19 elsewhere too in other recommendations on increasing penal-
20 ties to get really to the top of where you ought to be.

21 That's all I have.

22 CHAIRMAN WILKINS: Commissioner Corrothers?

1 COMMISSIONER CORROTHERS: Well, I just want to
2 reiterate, Mr. Brown, what the Chairman said that we are
3 concerned about ensuring that we promulgate guidelines only
4 as necessary. So we perhaps need to work a little harder in
5 that vein.

6 It's consistent with that thought though that I was
7 looking at the criminal history amendment. I found interest-
8 ing your perspective that the 3 percent departure rate upward
9 is perhaps not reflective of the accurate situation and I
10 think you indicated that you think the points more often than
11 we think exceed 13 and it's because of the reluctance on the
12 part of the judges to depart that we don't see it.

13 If that is what you said, I think that's very
14 interesting and I'm hopeful that we will take a look at that
15 and that we see consistent with not promulgating guidelines
16 that we don't have to that it is necessary that we do that.

17 I do have some concern about whether it's neces-
18 sary. I don't have an opinion at this point whether it is or
19 not. I do think we need to take a closer look.

20 I found interesting that you pointed out something
21 specific that we can take a look at.

22 CHAIRMAN WILKINS: Commissioner Nagel?

1 COMMISSIONER NAGEL: Yes.

2 This is addressed to both Mr. Brown and Mr.
3 Maloney. In the course of some interviews that you both know
4 we've been conducting around the country, a suggestion that's
5 repeatedly made by both AUSAs and public defenders is that we
6 consider changing the acceptance of responsibility provision
7 to reflect the fact that at the higher levels there needs to
8 be more of an incentive to a defendant to plead guilty.

9 Now a variety of theories are given beyond the sort
10 of practicality of it, but I guess I would like your response
11 to a proposal that might come up in the course of the
12 question we have addressed in the amendment here that
13 perhaps, I guess, one of two things, either that we increase
14 the reduction for acceptance of responsibility, let's say to
15 three levels for the most timely of pleas, somebody who comes
16 in immediately after indictment or before the indictment, or
17 before the threat of the investigation, et cetera, or perhaps
18 an alternative is that it be increased to three levels when
19 you're talking about something at the higher ranges.

20 Do you have any response to that?

21 MR. MALONEY: Well, I think initially our thoughts
22 are that the two level reduction provides a significant

1 decrease, 35 percent between the top down to the lower range
2 on the given two levels, at least from the standpoint of our
3 deliberations so far.

4 We feel that that's a sufficient incentive to
5 plead. The fact is, a large number of defendants are
6 continuing to plead guilty even with the two level reduction.

7 Of course, you've got the balancing between the
8 need for punishment and incapacitation, which is reduced by
9 the fact that the defendant is pleading guilty, but on the
10 other hand, you've got the concepts of deterrence.

11 We feel at least at this point that the two level
12 reduction strikes the appropriate balance. Reduction for
13 acceptance is also susceptible of overuse unless it's
14 restricted and a greater decrease could result in inap-
15 propriately low sentences for some defendants.

16 MR. BROWN: I would also--if you were saying it
17 only kicks in at the higher level, I don't know how consis-
18 tent with your guidelines you would trigger where you cross
19 from the two to the three. I think that's a--to me is a
20 practical problem of how you would craft that.

21 I'm concerned that the three level, if you make it
22 across the board, may be too much, particularly unless

1 there's a tightening up of the language because right now we
2 feel like the three level is being abused by defendants that
3 go to trial. So that would even make it worse.

4 COMMISSIONER NAGEL: What about the three levels
5 for someone who comes in--it's sort of putting into place
6 real early--Well, it the old first in, best out kind of
7 implementation. Does that make sense? Is that something--I
8 mean we hear that and I don't know how to evaluate what we
9 hear and we hear it from AUSAs as well as defense attorneys.
10 So there's some feeling out there on the part of some people.
11 It may reflect the fact that they don't understand and
12 appreciate that the two levels in the bottom of the range is,
13 as you say, 35 percent.

14 But we're here to be educated and I'm interested in
15 your views.

16 MR. MALONEY: Well, I think if you wanted to
17 explore that, you would have to acutely define how early is
18 early. Perhaps very early is pre-indictment, but not post
19 indictment and, therefore, you get three levels if you do it
20 prior to indictment.

21 I think you're going to have to be very precise,
22 but that raises the question of how much fine tuning do you

1 want to do in this type of situation.

2 I mean if you fine tune prior to indictment and
3 then also fine tune a division between two levels and three
4 levels, somewhere on the offense level scale my off the top
5 of my head impression is that that might be too much fine
6 tuning of that particular guideline.

7 COMMISSIONER NAGEL: Perhaps this is one on which
8 to defer and sort of look and see, but it might be something
9 if you have a sense later on that you might communicate to
10 us.

11 MR. BROWN: We're going to be, I know, submitting
12 some written comments on the guidelines more extensively and
13 perhaps we can address that.

14 CHAIRMAN WILKINS: Thank you very much.

15 You mentioned the 3 percent, Mr. Brown. This is a
16 public hearing. We have a record here. Sometimes these
17 figures take on a life of their own after they become
18 printed.

19 I'm not--I know we've--I've heard the number too.
20 I'm just not real sure that it's 3 percent of the cases
21 represent those who are departing above level or category 6.
22 I think it may say that that's 3 percent of all departures

1 because of an adequacy of criminal history. That might be a
2 level 2 up to a level 3 or a 3 to a 4, but not necessarily
3 all of those are from 6 up somewhere else.

4 But I'm not sure because I don't have that manual
5 here. Maybe one of the staff knows the answer and we can
6 correct it quickly, quickly.

7 STAFF: Three percent of the cases would have a
8 criminal history score in the proposed category 7.

9 CHAIRMAN WILKINS: Okay.

10 STAFF: It has nothing to do with the departure.

11 CHAIRMAN WILKINS: Okay. So that's good.

12 MR. MALONEY: So we're talking approximately a
13 thousand cases of the really hard core offenders.

14 CHAIRMAN WILKINS: Very good. I appreciate that
15 Mr. Hoffman.

16 Thank you, Mr. Brown and Mr. Maloney.

17 COMMISSIONER NAGEL: 1,320 cases, approximately.

18 CHAIRMAN WILKINS: Thank you very much.

19 Our next witness, Mr. Paul Borman, representing
20 Federal and Community Defenders. Mr. Borman has worked with
21 the Commission and has represented the Defenders for some
22 time in various appearances and meetings and so forth.

1 We're glad to have you, Mr. Borman.

2 **STATEMENT OF MR. PAUL BORMAN, FEDERAL AND COMMUNITY DEFENDERS**

3 MR. BORMAN: Thank you very much, Your Honor.

4 On behalf of all the Federal Public and Community
5 Defenders, we appreciate you invitation to testify here. We
6 also want to thank the Commission for inviting a defender
7 intern to join your staff. Hopefully, that will get going
8 this summer and for setting up a practitioner advisory
9 committee.

10 We commend the Commission for inviting comments on
11 these proposed amendments.

12 A few opening points, while we here who are present
13 today understand the guidelines, which began in 1987 and have
14 been through four different series of amendments, I believe
15 we are looking at the fifth right now, and Mr. Bennett and I
16 and Joe Brown who I've had the opportunity to appear with on
17 many programs understand the guidelines, there's a real
18 problem with the working out of the guidelines.

19 Most of the individuals that are practicing are not
20 even up to speed on the original guidelines. We have had
21 amendments since then that have made them more complex. We
22 have more categories, multipliers, aggravators, mitigators,

1 et cetera.

2 We believe really the most constructive answer that
3 we can provide today is one that the Commission really,
4 yourself and the other Commissioners have mentioned, to use
5 the old railroad crossing maxim, "Stop, look, and listen, and
6 then proceed cautiously."

7 Most of these amendments, we believe, should not be
8 passed. They are not critical to the functioning of the
9 criminal justice system and we really fear that they will go
10 the other way because they will confuse more people and fewer
11 people will understand the guidelines.

12 We would recommend that all of the Commissioners,
13 and indeed take the staff with you if necessary, would be
14 best off to go out in the country to teach the guidelines, to
15 see what's going on in the courts, to talk to the prac-
16 titioners because there really is a crisis in understanding
17 and effectively utilizing the guidelines.

18 Many of the courts do not require the practitioners
19 to go through guideline programs and we would ask that you
20 urge the judges in every district in the country to require
21 that their practitioners in the courtroom attend guideline
22 seminars.

1 These are not easy things you can get by reading
2 once. In addition to that, you may have a case that has a
3 count in '87 and a count in '88 and a count in '89, and you
4 have to use three different sets of guidelines because
5 they've changed different numbers concerning guns or drugs or
6 things like that.

7 So if there is one thing that comes out of this, we
8 hope that there will be a flow down and a caution that we
9 really have to operate in an understanding way on these
10 particular matters dealing with people's lives.

11 U.S. Attorney Brown spoke that he knows that his
12 staff sometimes makes mistakes. Well, defense lawyers also
13 make mistakes and the problem that there you have ineffective
14 assistance of counsel in some situations. I think none of us
15 wants that and I think the guidelines create a situation
16 where many lawyers, because they don't understand them, may
17 be acting--walking cases of ineffective assistance.

18 A second constructive suggestion would be for the
19 Commission to consider setting up a task force to try and
20 simplify the guidelines.

21 Where you have plain English, we've been having
22 that going on in the legal profession where you get in-

1 individuals to try and straighten out writs and other plead-
2 ings. And I think with regard to the guidelines that this
3 may be something that the Commission may want to look into to
4 try and simplify them instead of adding 88 more single spaced
5 spaces of amendments and proposals.

6 Finally, the opening--not so much the opening, but
7 the explanations that accompany the guideline amendments we
8 feel do not have the substance that the Commission would feel
9 comfortable with and that Congress would feel comfortable
10 with in passing the guidelines.

11 Clarification of a guideline is not a basis for
12 adding a new amendment. To better reflect the seriousness of
13 the conduct is not a significant answer.

14 The support based on data, based on research is
15 missing in these and, you know, to use the ad where the woman
16 was there and she kept saying, "Where is the meat?" And I
17 think that's a question that many of these guidelines raise
18 the question of where is the meat that supports them.

19 Going into the guidelines specific proposals
20 themselves, with regard to the introduction and the rewriting
21 of that, on departures it deletes two sentences that we think
22 should be retained to permit the courts, where necessary, to

1 fashion justice through departures.

2 Indeed, we believe that it's through departures
3 that are explained and sent back to the Commission that you
4 all will learn where the guidelines are working, where
5 they're not working, where they need assistance, and where
6 they don't.

7 To try and now plug up any basis for departures or
8 to cut back on the language that authorizes departures I
9 think will hurt the Commission in reaching the research and
10 getting the experiential data that it needs to further
11 develop effective guidelines.

12 Similarly, with regard to plea agreements, the
13 rewrite deletes the last sentence, which we think is impor-
14 tant because, again, that would facilitate where appropriate
15 departures.

16 With regard to sentencing ranges at page 12, the
17 Commission uses 1987 data on that and we would just point out
18 that as of 1990, and Mr. Bennett was fortunate enough to get
19 the information and furnish it to me, inmate numbers have
20 gone from 44,000 to 55,000.

21 With regard to Chapter 1 in the specifics of the
22 guidelines, use of information, we feel very strongly that it

1 would be improper to allow information used in debriefing a
2 defendant to raise the criminal history category.

3 Time and again you have heard that plea bargaining,
4 where done properly, is important to the criminal justice
5 system. If you are going to say to a defendant, "Now if you
6 say something to the U.S. Attorney that indicates a higher
7 criminal history score while you're being debriefed, that may
8 increase your sentence", you're going to cut back on attor-
9 neys that are going to want to allow their clients to go in
10 and talk to the U.S. Attorneys. I think that also violates
11 Rule 11 of Federal Rules of Criminal Procedure and Federal
12 Rule of Evidence 410.

13 With regard to relevant conduct, here we hope that
14 the Commission will revisit this issue because what we have
15 now in many situations is a defendant who pleads guilty to
16 one--say 1 ounce of cocaine and an agent who says, "Well,
17 when I spoke to him over the phone, he could only deliver
18 ounces, but he said he could find a way maybe to get 5
19 kilograms." A lot of time people puff over the phone.
20 Well, the defendant pleads to 1 ounce. The probation officer
21 goes and does a report and the agent says, "Well, this man
22 said on the phone, well, maybe he could get 5 ki's." The

1 judge says, "Well, I think that meets a preponderance
2 standard and I'm going to sentence you based on 5 kilograms,
3 1 ounce."

4 We think this is improper. We think this is really
5 a violation of due process. But more to the point, we think
6 the Commission should require as a minimum a clear and
7 convincing evidence standard for unconvicted conduct to be
8 used in raising the individual's base offense level for
9 sentencing.

10 Now the argument is, well, wait a minute, before we
11 had guidelines a judge could take anything into account that
12 they wanted to. The difference is now whereas before they
13 could take it into account or not, right now if the probation
14 officer says, "Yeah, I think there's a preponderance of
15 evidence that even though he just said that on the phone that
16 maybe he could do it", the judge is given a base offense
17 level that he must follow under the guidelines or depart for
18 specific reasons.

19 So whereas before the judge could do whatever he or
20 she wanted to do, now once the probation officer plugs that
21 in and says 5 ki's and 1 ounce, and the guidelines reflect
22 that, the judge must sentence in that area.

1 So it's not apples and apples. It's a different
2 situation and we think in the interest of fairness and really
3 due process that an individual should be sentenced for the
4 conduct, but here you're going beyond conduct when you use a
5 preponderance standard and you're getting sentenced based on
6 rumor, innuendo, puffing, and things like that.

7 With regard to the larceny, embezzlement, and
8 theft, that's number 5, we object to the suggestion that when
9 there ever is a differential that, well, we ought to clear it
10 up by raising the lower level to the higher level, we could
11 argue that since three of the provisions contain the lower
12 level and only one the higher, why not allow majority rule
13 here and stay with the lower level.

14 Also, another provision deals with robbery and
15 extortion. Well, about a year ago I think you raised
16 robbery. You said that's more severe and now you come along
17 and say, "Well, wait. No, no. They're the same and,
18 therefore, we ought to raise extortion to what robbery is."
19 Well, we don't think everything has to be equal because
20 everything isn't equal and we think robbery is a more severe
21 crime than extortion and that there's no reason just to jack
22 up extortion to meet robbery to make everything even in the

1 world.

2 With regard to number 6 on page 17, larceny,
3 embezzlement, and theft, we object to the new Application
4 Note 3 that eliminates even the present minimal requirement
5 that the judge ascertain the loss based on reasonably
6 reliable information. What it does is set it loose so the
7 judge need only make a reasonable estimate.

8 Again, this relates to the due process aspects of
9 sentencing and it doesn't clarify the note, the so called
10 reason for the amendment. It really eviscerates the old
11 Application Note 3 and we think that something tangible and
12 meaningful should be there when the judge picks an area and
13 not just a reasonable estimate, but based on reasonably
14 reliable information.

15 COMMISSIONER MacKINNON: What number are you on
16 now?

17 MR. BORMAN: That would be number 6, Your Honor, on
18 page 17. On page 5 of my outline, but in the amendments it's
19 number 6 on page 17.

20 With regard to drug offenses, number 15, which is
21 on page 23 again in the materials, we believe that Section
22 2D1.2 should be amended to distinguish cases in which only a

1 portion of the drugs involved meets the criteria of the
2 guideline.

3 With regard to number 16, use of communications
4 facilities, we object to this change on capping the base
5 offense level for this crime.

6 The reasons for the amendments assumes incorrectly
7 that the United States Attorneys are not following Attorney
8 General Thornburgh's memorandum and other Justice Department
9 orders to engage in honest plea bargaining.

10 I believe this is not true. I believe they are
11 following it and that also the reasoning in the paragraph on
12 page 24 of your proposed amendments states incorrectly that a
13 prosecutor can reached a desired result to avoid proper
14 guideline application by a stipulation to the underlying
15 conduct.

16 Well, that's not accurate because a stipulation is
17 not binding on the probation officer or the court and they
18 are searching out the matters. So the stipulations must be
19 honest.

20 With regard to number 27, failure to appear,
21 Section 2J1.6, we object to the change that equates failure
22 to report for service of a sentence with escape.

1 We believe that escape is a totally disparate
2 offense, potentially violent offense and failure to appear is
3 certainly not that if the individual just does not show up
4 for the service of the sentence.

5 COMMISSIONER MacKINNON: What number is that?

6 MR. BORMAN: That was number 27 of the proposals in
7 the Commission's proposed amendments and that's on page 7.
8 That's number 27, page 34, Section 2J1.6. And I will mention
9 those from now on, Your Honor, to key into them.

10 With regard to arson, which is number 28 of the
11 Commission's proposal, page 34, Section 2K1.4, we object to
12 this proposal which removes the element of knowingly creating
13 a substantial risk.

14 We believe that knowingly should be a critical
15 element in raising the offense level in this situation. And
16 the reason for the amendment seems to be boiler plate where
17 it says it does not adequately reflect the seriousness of the
18 offenses. We ask where are the statistics? Where is the
19 data?

20 With regard to number 31, page 36, Section 2K2.6,
21 we ask the Commission to do something here and respond to
22 Congress in a way to ask them to amend the statute.

1 We propose the Commission urge Congress to amend
2 the mandatory minimum 15 year armed criminal/career criminal
3 statute to restrict the coverage of some categories because
4 it is unjustly applied in some instances.

5 An example, you have a retired 60 year old Chrysler
6 worker living in a high crime area who keeps a rifle at home
7 for security. Maybe there have been break-ins in the area.
8 As a youth, 40 years ago, he was convicted of breaking and
9 entering and maybe 37 years ago for a second B&E when he was
10 18 or 20 years old and he was not a good young man at that
11 time. And 25 years ago, he may have possessed some marijuana
12 and been convicted of that. He has been working for 25 years
13 at Chrysler. He's raising a family, never sentenced to jail.
14 If this man is charged with this offense, he is treated as an
15 armed career criminal and must be sentenced to 15 years in
16 jail at a minimum.

17 We believe this is unjust and we ask that the
18 Commission ask Congress to limit the types of categories to
19 perhaps redefine crime of violence to exclude B&Es or require
20 as another alternative that the catchment area of three prior
21 crimes that they have been committed within say the past 15
22 years, unless the defendant has obviously been in jail for 10

1 of those 15 years.

2 Also, I think the Commission should consider asking
3 Congress to limit the prosecution offense--the prosecution of
4 these offenses to where the defendant uses the gun or is
5 involved in committing a violent act while in possession of
6 it.

7 Where you have an individual who has the gun in his
8 home and is involved in no other criminal activity, this
9 individual we do not believe is an armed career criminal and
10 should not be prosecuted in that situation.

11 I realize that in this time and age it's a dif-
12 ficult request, but one that we hope that you will give
13 strong consideration to because we understand and believe
14 that the Commission is interested in a fair and firm and just
15 implementation of the statutes and the criminal laws.

16 We believe that it is part of your obligation under
17 the statute to respond to Congress if a law that they have
18 passed is too strict.

19 Also, we understand that mandatory minimum senten-
20 ces and statutes are matters that the Commission feels
21 undercut the impact of proper guideline sentencing.

22 So we hope that the Commission will give this

1 proposal significant discussion and permit a check of the
2 various prosecutions, a check of the catchment under this
3 statute, to see whether Congress maybe in its rush to get
4 something out for those individuals who are truly dangerous
5 has swept into a mandatory minimum area of prosecution crimes
6 that really do not belong there and that will sentence
7 individuals to long periods of jail who should not be in
8 jail.

9 With regard the reasons on page 31 where you speak
10 about going beyond the 15 year, we believe that the Commis-
11 sion should not use that 15 year mandatory minimum here as a
12 foundation upon which to build even more severe sentences.

13 The reasons for the amendment provided in number 31 are
14 basically the 15 year statute and we believe that really
15 there are not strong reasons for building upon that and think
16 that the guidelines themselves take into account the behavior
17 that would create just sentences in those areas.

18 With regard to firearm, that is number 32 on pages
19 40 and 41, we object to the enhancement for the loaded
20 firearm available ammunition.

21 We believe this has been assumed in setting in the
22 already high base offense level and we also object to double

1 counting prior drug offenses for violent felonies in Section
2 2K2.1

3 With regard to number 35, which is on page 42 of
4 the Commission's proposals dealing with immigration, we
5 object to using the number of aliens smuggled to increase the
6 base offense level.

7 We believe that the key law enforcement issue is,
8 was the person charged the organizer? And with regard to
9 documents, we contend that the existence of documents or the
10 number of documents is not the issue. The issue should be
11 how many were used. We do not believe this is analogous to
12 counterfeiting where all the money is negotiable on its face,
13 documents require filling in names, pictures, additional
14 individualized preparation, and being specifically tying that
15 individual to that unique document.

16 With regard to escape, this is a matter that I have
17 had the opportunity to address to the Commission before and
18 indeed, a year ago, the Commission did address that to the
19 public in their proposals.

20 We propose a reduction in the offense level from 13
21 to 8 when the escape is from a non-secure custody situation
22 like a half-way house.

1 We do not believe that that type of failing to
2 return after you're out at a job or walking away is com-
3 parable to escape from a prison.

4 Further, we do not believe that the reduction
5 should take into account the offense for which the defendant
6 has been confined. That will obviously have already been
7 factored in by the original sentence and the amount of time
8 that they spent in closed confinement.

9 Picking up on the Commission's suggestion for
10 comment, we believe that the 96 hour, 4 day period that's set
11 forth in 2Pl.1(b)(2) should be extended to 1 week.

12 With regard to number 47, other offenses, we object
13 to the proposed amendment to fill all of the cracks that are
14 ever possible.

15 Where the Commission has failed to carefully craft
16 the specific guideline we believe that you can leave it to
17 the district judges to return to the implementation statutes.

18 It is not critical. If it's not critical to add
19 more amendments, we propose to leave them out.

20 With regard to hate crimes on page 49--I'm sorry--
21 number 49, page 50, Section 3A1.4, we certainly deplore hate
22 crimes, but be object to this amendment because under the

1 present situation it allows a person to be sentenced on rumor
2 and innuendo where a person is charged with any offense.

3 If an agent writes up in the report the person
4 said, "I don't like these kind of individuals", or whatever,
5 you may end up with that factor being added to the base
6 offense level if you create this hate crime category based on
7 the preponderance of the evidence standard.

8 We believe that these can be separately prosecuted.
9 We believe that this factor may form the basis for a depar-
10 ture in a specific aggravated case where it did recently in
11 the Sixth Circuit, but we do not believe that adding this
12 factor to be allowed to be added based on the mere
13 preponderance standard is a positive step.

14 With regard to adjustments, that's number 50, on
15 pages 51 to 54, we object to the proposed amendment in its
16 entirety. We object to the narrowing of the potential for
17 comparative conduct in the first full paragraph on page 52.

18 We believe that relative culpability should take
19 into account the overall criminal enterprise. On page 53,
20 with regard to Section 3B1.1(a), we object to the attempt to
21 pad the number of participants to reach the five person level
22 by including unwitting participants. This defies the plain

1 language of the guideline and we believe it should include
2 those involved in the criminal activity.

3 On page 54, we oppose Application Note 2, which
4 severely restricts the eligibility for the mitigating role
5 adjustment. So if you have what's called in the parlance a
6 mule, someone who is being used by a large narcotics or-
7 ganization on one occasion to carry drugs and that person
8 asked a friend to drive them to the airport to do that and
9 this is a one time trip for a huge organization that may have
10 involved kilograms, this person didn't know that involved
11 that, this person was only carrying a couple of ounces, this
12 amendment would preclude mitigation status for this in-
13 dividual and we think that this is improper and we oppose
14 that.

15 Finally, with regard to this provision, we believe
16 that the commentary to Section 3B1.2 captioned Background
17 should not be deleted.

18 With regard to number 51 on page 55, abuse of
19 position or trust, we believe this provision should not be
20 piggy backed on top of Section 3B1.1.

21 With regard to obstruction of justice, number 53,
22 pages 55 to 57, we object to providing these many creative

1 and wide ranging examples of what conduct might be included.
2 Some of them that we have specified are clearly just catch
3 alls where obstruction of justice can be latched on to where
4 someone in a one sided police interrogation says something
5 incorrect that could be later used under number 11 to treat
6 it as an obstruction of justice, forgetfulness about a
7 criminal record, you may have had something 30 years ago that
8 you forgot about, or number 14, which is providing incomplete
9 information. This is the best example of what we feel really
10 is the pro-prosecution one sided nature of these examples.

11 We think that the judges can understand this based
12 on the guideline and that all these examples are really not
13 good examples, not appropriate examples, and we ask that they
14 not be adopted.

15 Now one matter that has been discussed at length
16 with the Government is acceptance of responsibility. We
17 believe it may well apply when it is first evidenced after
18 adjudication of guilt in a situation where there may have
19 been a trial and no testimony by the defendant just to put
20 the Government to the test of proof, whether there is proof,
21 and whether there's constitutionally based proof. There may
22 be evidentiary issues. There may be other legal issues that

1 merit a trial.

2 With regard to guilty pleas, we believe that there
3 should be a presumptive application of the guideline in this
4 case.

5 Contrary to the discussion that you recently had
6 with Mr. Brown and the Justice Department, we have cases in
7 our district where judges, even where the person pleads
8 guilty, are not giving acceptance of responsibility and then
9 they go through a list of things where you didn't immediately
10 right after you committed the offense turn around and turn
11 yourself in, that shows you didn't accept responsibility, and
12 we're getting problems where with a guilty plea you don't
13 even get it.

14 The focus in the earlier discussion was where you
15 get a trial and you still get it. Well, I guess, you know,
16 maybe different districts have different things, but we
17 certainly believe there should be a presumptive application
18 under a guilty plea and that it should not be foreclosed when
19 a person goes to trial.

20 I think that's a constitutional right to go to
21 trial and that it certainly should not be foreclosed in that
22 situation.

1 With regard to the question raised by Commissioner
2 Nagel, I believe whether there maybe should be a greater
3 amount for acceptance of responsibility where you're up into
4 the mega month offenses and maybe in order to get a plea,
5 rather than just giving two points, you may give five points,
6 some type of sliding scale, I think that is worthy of
7 evaluation as a possible amendment of this provision.

8 With regard to criminal history on pages 60 to 61,
9 number 59, with regard to uncounseled misdemeanor convic-
10 tions, Northwest Airlines provided me an opportunity to read
11 Baldasar in length last night as they kept me in the airport
12 for an hour and that case, as I read it, the proposed
13 background paragraph on 61 is incorrect. That case says, as
14 I read it, that you cannot use uncounseled convictions to
15 increase a sentence or impact on an increase in sentence.

16 At any rate, I don't think that the commentary
17 belongs in there. At least let the sentencing judge decide
18 it and read the case the same way we all would.

19 With regard to expunged convictions, number 62 on
20 pages 62 to 64, we believe the Commission should retain the
21 current treatment of expunged convictions.

22 With regard to number 63 on Section 4A1.2, we

1 believe there's no reason to develop a specific guideline
2 enhancement for prior similar conduct and we don't believe
3 that the Commission either should develop a guideline
4 enhancement in this situation with regard to--it's inherent.
5 The problems in 4A1.2 application are inherent in guideline
6 application and we don't believe they can be corrected by
7 more specific application notes.

8 With regard to number 64, the sentencing table, you
9 spoke of a 3 percent number of cases in this area going
10 beyond number 6. We believe that there is really--we have
11 not found sufficient data in our circuit to justify this. We
12 believe that judges are not hesitant to depart if it calls
13 for that. I think, as Judge MacKinnon pointed out, let's let
14 the judges where appropriate depart. We believe they will
15 where the evidence warrants it without creating a separate
16 category.

17 With regard to number 65 on page 66, we object to
18 the proposed amendment that would require restitution in
19 every case instead of the present language, which says it may
20 be employed in every case.

21 On number 67, page 71, here, again, we ask that
22 Commission respond to Congress on this particular issue on

1 specific offender characteristics.

2 We ask that you recommend to Congress that it amend
3 28 U.S.C. 994(e) to permit the guidelines in appropriate
4 cases, to take into account family ties and responsibilities
5 and community ties of a defendant.

6 We are dealing with human beings and we believe
7 that in this situation these factors may be highly relevant
8 to a proper sentence.

9 In addition, we object to the proposed amendment to
10 Section 581.1 that limits the relevance of age really to the
11 disabled individuals.

12 Again, no data is provided in support of this
13 change, but we think that--we're not saying to go back on
14 guideline sentencing, but we think this is a relevant factor
15 and I think if you look at some of the case law with regard
16 to departures where you have the young individual, where you
17 have the elderly individual, where you have the individual
18 whose the head of a family of 5 children on an offense, where
19 the guidelines would force that, that we think that the
20 individual's specific situation may be indeed relevant and it
21 should be allowed to be considered.

22 Getting close to the close, almost another minute

1 or so, Your Honor, and then I'll be done, number 68, page 73
2 with regard to departures, we object to deleting the third
3 sentence in the first paragraph.

4 We believe it is important to reaffirm that the
5 controlling decision with regard to departures can only be
6 made by the judge at the time of the sentencing. That is
7 where it all happens.

8 Yes, we work with the probation officers. We work
9 with the prosecutors. We work with everyone in the system,
10 but the judge has the final decision and I believe that is
11 where the controlling decision must be made.

12 CHAIRMAN WILKINS: What page is that on?

13 MR. BORMAN: This is number 68 on page 73, where
14 the proposal is to delete the third sentence in the first
15 paragraph of Section 5K2.0.

16 Also, we object to deleting the fourth paragraph of
17 that provision. We believe it is relevant to the issue of
18 departures.

19 With regard to number 69, probation and supervised
20 release guidelines, we oppose this proposal to extend the
21 guidelines to these matters without further study and prior
22 special hearings.

1 We really think that this is a particularly unique
2 area and we ask extra consideration, extra study, hearings on
3 these matters like you have done with organizational sanc-
4 tions.

5 We believe that this increased guideline coverage
6 will further overwhelm judges, probation officers,
7 prosecutors, defense attorneys with the highly complicated
8 guideline system without sufficient corresponding benefit to
9 society.

10 We also consider that in the examination of this
11 that you may also want to do a cost benefit analysis prior to
12 setting forth any specific proposal.

13 In the meantime, again, we believe that the
14 district judges can deal effectively with these matters
15 instead of putting this overlay of separate guidelines.

16 A final point that I have not mentioned in the
17 testimony is we hope that the Commission will devote exten-
18 sive efforts to deal with the development of organizational
19 sanctions and the publication of organizational sanctions.

20 We believe that they are more important than these
21 guidelines, which are already building upon guidelines that
22 have been effect for years and amendments to them that have

1 gone in for the last, I believe, three times so that we now
2 have four different West Publishing Company books to deal
3 with when we're dealing with clients and cases.

4 One of the original motivating reasons for passage
5 of the guidelines in the Senate and in the House was to treat
6 everyone and every organization appropriately, to deal with
7 the monied to organizations, the wealthy organizations, the
8 same way as the poor individuals.

9 The lack of organizational sanctions right now
10 leaves these monied organizations free to go and not be
11 covered by these specific sentencing guidelines and we
12 believe that that should be on the top of your agenda along
13 with going out and teaching the guidelines and working them
14 out so that everyone knows what's going on.

15 We appreciate your attention and any questions, Mr.
16 Bennett and I would be glad to answer.

17 CHAIRMAN WILKINS: Thank you very much.

18 Let me just ask you one, just from your experience,
19 I know you all are in the courtroom a lot, how is role in the
20 offense guideline working in practice?

21 Sometimes it goes up. Sometimes it goes down, but
22 in practice how is it working? I mean, that is, is it

1 working well? Or are there significant problems with it?

2 MR. BORMAN: I think it is a live area and I think
3 it's a good area and I think the Commission will learn based
4 on how the judges are dealing with it.

5 What happens is the defense comes in and says the
6 offense is really this large organization and the prosecutor
7 says, no, it's just this tiny individual and the judge makes
8 the decision based on that.

9 I don't think you can plug all of the gaps through
10 the Commission and through another guideline. The issue is,
11 what is the offense? And I think the judge will see that. I
12 do not think the issues should be limited so that if only one
13 person is charged in the indictment that, therefore, there
14 cannot be a mitigating role in the offense if you come in and
15 you point out that, look, this person was charged as a mule
16 in this occasion because they haven't got enough proof
17 against everybody, but this is part of a large organization.
18 The DEA 6s say that this is part of a huge organization of 30
19 people and that this person only did it once. And just
20 because only one individual is indicted here should not
21 prevent them from getting the benefit of the mitigation
22 factor in the role of the offense.

1 So to the other way, if only person is indicted,
2 but they are Mr. or Miss Big, then we'll play it that way as
3 well, Your Honor.

4 CHAIRMAN WILKINS: That's the way the guidelines
5 work now.

6 MR. BORMAN: Right.

7 CHAIRMAN WILKINS: Right. So you're saying
8 generally speaking, they're working the way you think they
9 ought to work.

10 MR. BORMAN: Yes, yes.

11 CHAIRMAN WILKINS: Mr. Bennett?

12 MR. BENNETT: Commissioner Wilkins, in the District
13 of Maryland, for instance, on guilty pleas, if you take 100
14 percent of the guilty pleas, probably 95 percent of them
15 there is a stipulation in regards to not only relevant
16 conduct, but role in the offense.

17 In those areas where the parties have a disagree-
18 ment on role in the offense, the Chapter 3 adjustments,
19 there's a specific provision in the plea agreement leaving
20 that matter to a contested sentencing hearing. So everybody
21 is put on notice that that matter is going to be subject to
22 proof at sentencing. It's working out very well. I don't

1 see that further tinkering really needs to be done.

2 CHAIRMAN WILKINS: Thank you very much.

3 Judge MacKinnon?

4 COMMISSIONER MacKINNON: You want to delete the
5 third sentence in 5K2.0. That provides the controlling
6 decision as to whether and to what extent departure is
7 warranted can only be made by the court at the time of
8 sentencing.

9 MR. BORMAN: No, we want that in. The amendments
10 propose deletion of it.

11 COMMISSIONER MacKINNON: I know that.

12 MR. BORMAN: We want that in.

13 COMMISSIONER MacKINNON: Have you any evidence that
14 it's being done otherwise?

15 MR. BORMAN: No, but if the change goes in--

16 COMMISSIONER MacKINNON: I know. I know.

17 MR. BORMAN: --then judges may say, "Well, we can't
18 do this and we going to rely more on the probation department
19 or some other individual to do that." We agree wholehearted-
20 ly--

21 COMMISSIONER MacKINNON: Well, how would they do it
22 if they didn't do it at the time of sentencing?

1 MR. BORMAN: Well, they might say, no, I'm going to
2 rely on the probation department's report and then I'm not
3 going to have a hearing. We're worried that taking that out
4 may let judges say we're going to try and sluff off more of
5 our responsibilities to the probation department when they
6 meet with the two lawyers.

7 COMMISSIONER MacKINNON: My question is, how could
8 they do it at any other time than at the time of sentencing?

9 MR. BORMAN: They couldn't legally. We're worried
10 that they're going to make the sentencing a pro facto
11 situation where things really don't have hearings and where
12 there will not be the testimony or the ability to set forth
13 all the information before the judge. That's what we're
14 worried about.

15 Otherwise, we want to know why are they taking the
16 sentence out, Your Honor. If it's in there and if it's
17 working appropriately, then it shouldn't be taken out.

18 COMMISSIONER MacKINNON: Well, a sentence has to be
19 adjudged in a sentencing hearing.

20 MR. BORMAN: That's correct.

21 COMMISSIONER MacKINNON: It can't be adjudged at
22 any other time.

1 MR. BORMAN: That's correct.

2 MR. BENNETT: Well, we just wonder the reason for
3 the deletion. There doesn't seem to be a reason to delete
4 it.

5 COMMISSIONER MacKINNON: You suggest that we ought
6 to go out in the field and find out what's going on.

7 Have you ever heard of an agency that ever went out
8 into the field in the United States on the enactment of a new
9 statute and done half as much as this Commission is doing?

10 MR. BORMAN: I'm not complaining. I'm just saying
11 that I think more needs to be done before more amendments
12 come down.

13 I appreciate the fact that the Commission has had
14 training and Rusty Burress is probably one of the top
15 frequent flyers in the country right now based on all the
16 places he's gone to. He's wonderful. Phyllis Newton was out
17 there in training and all of that.

18 The Commission has done well, but I think that--

19 COMMISSIONER MacKINNON: Well, we've had thousands
20 of people.

21 MR. BORMAN: I understand that and I think more has
22 to be done because they are very complicated and they are not

1 yet being implemented properly--

2 COMMISSIONER MacKINNON: Well, you mean they aren't
3 being read by a lot of people.

4 MR. BORMAN: That's correct. I have a young child
5 and I can say, "Go and read this", and she won't do it, but I
6 think it almost reaches the point where we have to say that
7 you can't practice in that Federal court unless you go to a
8 seminar on these particular guidelines in the criminal
9 defense area or in the prosecution. I know they've been
10 having seminars too.

11 A lot of practitioners, unfortunately, don't know
12 it and I think that to the extent--the reason why we say go
13 out there is because we're faced with 88 single spaced pages
14 of guidelines on top of things that people don't already
15 understand and we say, "Oh, my gosh, here's more stuff that
16 people aren't going to understand when they don't understand
17 what's out there already."

18 I understand what you're saying, Your Honor. They
19 ought to read it. They ought to think about it. But before
20 we add more for them to read and think about, let's get them
21 in on what's there already.

22 MR. BENNETT: Judge, I think a very relevant

1 statistic in this area is I think you're seeing a higher rate
2 of reversals nationwide in the area of the sentencing
3 guidelines than you are in criminal cases generally and it
4 looks to be a number of them, with all due respect, is that
5 district court judges in some respects are not understanding
6 the guidelines and they're being reversed and remanded for
7 failure to follow the guidelines.

8 COMMISSIONER MacKINNON: Well, they might not--you
9 think they might not understand them.

10 MR. BENNETT: Yes.

11 MR. BORMAN: Yes, we really do.

12 COMMISSIONER MacKINNON: Some of them might not
13 want to follow the guideline or want to impose an overly
14 strict interpretation that wouldn't be sustained.

15 You know, I was practicing law when the Federal
16 Judicial Conference amended some rules for civil practice.
17 They're now known as the Federal Rules. They dumped them out
18 to the entire Bar. They affected every civil case in
19 America.

20 And you know how much instruction the lawyers and
21 judges got on those? Zero. Zero. And the judges and
22 lawyers, prosecutors are going to have to put some time on

1 studying these.

2 Now the civil rules now cover my library. They've
3 got a nine page shelf with no instruction. The Government
4 doesn't put out instructions on any other laws, generally,
5 like we're doing.

6 So I just want to say that we're going the extra
7 mile way over to try to get some compliance. Actually, I've
8 listened to you and I've listened to a lot of other people
9 and practically everything you talk about, 95 percent,
10 relates to a drug offense. Maybe drugs and firearms, they're
11 related. And you're not getting into the rest of the
12 guidelines at all in general.

13 I think this merely reflects the fact that we have
14 a very highly unusual situation and mainly the complaints
15 that are drawn go to the severity of the punishment, which in
16 many respects in the sentencing guidelines are based on
17 mandatory statutory penalties.

18 I don't think that a lot of people that are
19 complaining about the guidelines reflect that. The fact that
20 it's reflected in the drug offenses that are dominating the
21 field and flooding courts, and there isn't anything we can do
22 about it except carry out our own job.

1 MR. BORMAN: Well, Your Honor.

2 COMMISSIONER MacKINNON: Now wouldn't you agree
3 with most of the complaints come out of the drug offenses?

4 MR. BORMAN: I think that right now the Government
5 has been putting emphasis, as we know by reading magazines
6 and newspapers, watching television, on drug offenses and gun
7 cases.

8 Our comments deal also with fraud cases, with
9 immigration cases, with other aspects of the criminal law.

10 COMMISSIONER MacKINNON: Yes, but not in anywhere
11 near the degree.

12 MR. BORMAN: No, I think that again, it is not just
13 the mandatory minimum that we have dealt with that are
14 legislated by Congress, but we've also spoken to the guideline
15 impact on these with regard to non-convicted conducts.

16 So I think--

17 COMMISSIONER MacKINNON: You don't think the
18 severity of the punishment is influencing a great bunch of
19 the comment?

20 MR. BORMAN: No question, that plus the prison
21 population and all that.

22 COMMISSIONER MacKINNON: Yes.

1 MR. BORMAN: But I think that goes to the equity,
2 the fairness of the guidelines and also that it cuts across
3 to other offenses.

4 COMMISSIONER MacKINNON: Well, I know, but the
5 equity and fairness is based on--in the major cases that
6 you're talking about are on the mandatory punishments in drug
7 offenses.

8 MR. BORMAN: Some they are, some they aren't.

9 COMMISSIONER MacKINNON: Well, you get them over
10 into career criminals too.

11 MR. BORMAN: Well, one example that your comments
12 bring to mind, Your Honor, about the mandatory minimum, right
13 now if a person buys one gram of crack and then an undercover
14 agent gets involved and says, "Let's do four more buys", so
15 they get to five grams, that puts it up into a very high
16 guideline statute.

17 It raises the question of manipulation of the
18 guidelines by agents who are well trained on how the
19 guidelines can add up to a more severe offense by making X
20 number of buys or talking about a large possible buy.

21 This is something that we are very worried about
22 and that the guidelines, we think, should attend to as to how

1 to avoid manipulation.

2 The theme of the comments in some of the amendments
3 are the fear that plea bargaining is undermining the
4 guideline, that there's manipulation.

5 We worry about manipulation by the Government and
6 by its agents in developing charges or in developing informa-
7 tion that is used to sentence an individual that is not based
8 on true conduct that an individual is convicted of beyond a
9 reasonable doubt or clear and convincing.

10 So, again, the penalties are very harsh. You hear
11 about them, Your Honor, because not just the statutory
12 mandatory minimum, but because the guidelines facilitate--
13 allow things to happen based on the conduct of the U.S.
14 Attorneys and the agents in bringing about these charges and
15 then this unspecified conduct.

16 COMMISSIONER MacKINNON: Do you think that the
17 Government is anywhere near approaching apprehension of the
18 offenders in most of the drug cases?

19 MR. BORMAN: Probably not.

20 COMMISSIONER MacKINNON: Okay.

21 MR. BORMAN: Probably not, but I--you know, the
22 question like that was about 20 years ago and, you know,

1 maybe in the Soviet Union a couple of years ago they had a
2 greater apprehension of criminals and I think they're
3 complaining now in Eastern Europe now that there are more
4 crimes being--taking place, but I think that's a trade off.

5 COMMISSIONER MacKINNON: Thank you.

6 CHAIRMAN WILKINS: Thank you.

7 Commissioner Corrothers?

8 COMMISSIONER CORROTHERS: Mr. Borman, of course, we
9 don't make up our minds until we hear comments and the input
10 and that's why your comments are always so helpful to us.

11 I found interesting your perspective concerning
12 probation and supervised release guidelines that we should
13 perhaps consider special hearings. That hadn't occurred to
14 me. I found that intriguing.

15 Concerning amendment number 25 on page 7 of your
16 testimony, you question the justification for raising the
17 base offense level--this in the civil rights area--your
18 questions that you pose there are relevant and I think we
19 ought to pay attention to the responses to those questions.

20 But I do have a comment and one question for you in
21 that area. Unless you just got off the boat, it's hard not
22 to notice an increase in hate crimes or miss some homicides,

1 i.e., Federal judge, civil rights attorney, or the maiming of
2 an additional Federal judge. It's hard to miss separate and
3 apart from the significant increase and intensity in the
4 violent acts against people and property, examples being the
5 new type of crime where the entire family of Asians are being
6 terrorized in their homes. There has been the foresight to
7 consider that your chances for much more damage is affected
8 if you get the whole family as compared to one person in the
9 park or on the streets; the increase in violence such as the
10 vicious damage to the Jewish Academy in my own home county of
11 Montgomery County.

12 My one question is this, I'm assuming that you feel
13 that we already sufficiently address the seriousness of these
14 offenses. Is that your opinion?

15 MR. BORMAN: No, I think what we do here, Your
16 Honor, is question the justification. We ask for the
17 research into these prosecutions and we hope that the answers
18 will provide the information that is lacking now.

19 We recognize and appreciate the seriousness of
20 these and we hope it is not a growing area. We hope that it
21 is something that is being prosecuted more vigorously now.

22 Unfortunately, it may be a growing area, but we

1 hope that the statistics in the cases that you've mentioned
2 and others will provide the basis for then dealing with this
3 provision and if it does, then at that point, based on the
4 information and research, justify it and then that would be
5 the Commission's responsibility to deal with that.

6 COMMISSIONER CORROTHERS: I guess more specifical-
7 ly, I was wondering in addition to the responses to the
8 questions concerning data, if you think we should not pay any
9 attention to the increase in the events and the experts'
10 testimony. Experts in terrorism have said in talk shows on
11 television that they are appalled at not only the increase
12 and the intensity and that they liken this increase and
13 intensity to terrorism. In fact, they are calling it
14 terrorism.

15 So I guess basically I was concerned that you
16 wanted--that you thought we should also in addition to
17 looking at data in terms of what has happened, if you didn't
18 think we should pay some attention to what is happening,
19 moving on from that--

20 MR. BORMAN: I agree, Your Honor, that we should
21 see what's going on as well as what has happened and I think
22 that in the cases that we have seen there have been depar-

1 tures.

2 I remember sitting at a Commission meeting. The
3 judge in New Jersey with regard to the terrorist--the
4 Japanese terrorist that came in departed up. I think the
5 judges are sensitive to this.

6 We had a Sixth Circuit decision, again, in Western
7 Michigan, where the judge has departed up in such a case. I
8 think that the judges are responsive to this and the question
9 is, the creation of a separate guideline and is that a
10 specific necessity and then, what are the numbers and where
11 are we going.

12 COMMISSIONER CORROTHERS: Of course, we're not
13 creating a guideline. We're increasing the base offense
14 level.

15 MR. BORMAN: I understand.

16 COMMISSIONER CORROTHERS: And the question is, are
17 we already adequately addressing the seriousness of these
18 offenses, or are we not.

19 One last question is also on page 7 concerning the
20 escape amendment, do you have an opinion as to what the
21 levels should be for escape or walk aways from non-secure
22 facilities?

1 MR. BORMAN: Yes, we recommended a level 8, Your
2 Honor.

3 COMMISSIONER CORROTHERS: A level 8?

4 MR. BORMAN: Yes. We know that the Bureau of
5 Prisons, I believe, about a year ago recommended a 10, but we
6 believe an 8 would be appropriate in that situation.

7 COMMISSIONER CORROTHERS: Thank you.

8 CHAIRMAN WILKINS: Commissioner Nagel?

9 COMMISSIONER NAGEL: Yes. Since time is short, let
10 me see if I can move through quickly.

11 First, I want to say that I thought your testimony,
12 both the written and the oral, was understanding for its
13 thoughtfulness, its thoroughness, and its crispness, and I
14 appreciate that.

15 I guess I have only three requests rather than to
16 ask questions and that is, with respect to your comments, to
17 pick up on Commission Corrothers' concern for the hate
18 crimes, your comments about the armed career amendment, and
19 comments, I think, that the Federal Defenders have earlier
20 made about career offenders, and let me take them in se-
21 quence.

22 With respect to hate crimes, there is a recent

1 study that has just come out of California that there
2 apparently is a significant increase in the number of hate
3 crimes.

4 Assuming that those data are correct, I'm just
5 sympathetic to your concern that you think that the amendment
6 that we have proposed perhaps may be over inclusive.

7 So what I would like to do is make a request that
8 you submit--consistent with the statement you make in your
9 testimony that you deplore hate crimes, that you submit an
10 alternative proposal that the Commission might quickly be
11 able to consider, since we've been debating the issue for
12 some time, that would be more targeted to the specific hate
13 crimes that I think you and we all deplore.

14 I don't think the Commission has an intention of
15 having a kind of a broad reaching amendment that goes beyond
16 the scope of what traditionally is thought to be hate crimes.
17 At the same time, we do want to reach them, and that would be
18 very helpful.

19 Second, with respect to the armed career offender,
20 the example you cite, we may disagree about whether breaking
21 and entering is a serious crime, but I think there's still an
22 issue where you make a very good point and that is that the

1 statute is targeted towards a group about whom there is great
2 concern. On the other hand, it may be that the way it's
3 applied is over inclusive and catches people for whom it was
4 never intended.

5 I guess the same comment goes in response to
6 comments you and others have made earlier about the career
7 offender statute.

8 I think there is some sympathy for those concerns
9 and I would ask that perhaps you and your colleagues look to
10 see whether you can propose an alternative in both of those
11 instances that restricts the implementation of the applica-
12 tion of those provisions to the groups intended to be caught.

13 That is, I don't think you're saying that we should
14 lower the sentence for the fifth time armed robber who then
15 is found in possession of a weapon whose about to commit
16 another crime, on the other hand, the guy you talk about
17 whose the 40, 60 year old who 25 years ago, and include,
18 perhaps some notion of a long period of time during which
19 there have been no crimes, the weapon was not involved in a
20 particular crime, et cetera, I mean all the points you make
21 in your example. I would think that that would be very
22 helpful.

1 So if you could submit something like that, that
2 would be very good, and if you could do so in sort of
3 recognition of our timeframe, that would be also helpful.

4 MR. BORMAN: By the 30th of the month, yes, we
5 will.

6 Thank you, Your Honor.

7 CHAIRMAN WILKINS: Thank you, gentlemen. We
8 appreciate your specific comments, but also, the general
9 message that we hear from you, as we heard from the
10 prosecutors, is we should proceed cautiously as we move
11 through this amendment process and perhaps use a high degree
12 of restraint in promulgating additional amendments.

13 MR. BORMAN: Thank you.

14 CHAIRMAN WILKINS: We hear you. Thank you.

15 Our next witness is Chief Probation Officer Tom
16 Rendino. Tom is representing and is President of the Federal
17 Probation Officers Association.

18 Come around, Mr. Rendino. I'm reminded of Inspec-
19 tor Cluso on the Pink Panther who would tell his colleagues,
20 "Chief Inspector Cluso", and this Chief Probation Officer
21 Rendino all the way from Vermont now and Savannah, Georgia.

22 [Laughter.]

1 CHAIRMAN WILKINS: The searching question I have,
2 have you learned to say you all?

3 [Laughter.]

4 MR. RENDINO: In more than one dialogue.

5 CHAIRMAN WILKINS: Well, nice to see you again and
6 we appreciate the help of your association over the past 4
7 years.

8 STATEMENT OF TOM RENDINO, FEDERAL PROBATION OFFICERS ASSOCIA-
9 TION

10 MR. RENDINO: Chairman Wilkins, we are grateful to
11 be represented here again in the 4th consecutive year. We
12 feel it's very important that you hear from the field
13 practitioners in the probation service and your door has
14 always been open.

15 So we have no complaints whatsoever. In fact,
16 endorsing what Judge MacKinnon said, you've gone way beyond
17 that extra mile and we not only enjoy the interaction, but we
18 feel it's been a benefit to everyone concerned from the
19 sentencing judges down to the opposing attorneys and oursel-
20 ves and we anticipate such will continue.

21 Let me open with a negative. I apologize for not
22 having my remarks and my prepared statement printed in

1 advance. The transfer from Vermont to Georgia is as yet
2 incomplete and there's a lot of things that are dangling out
3 there.

4 There will be a statement consistent with the
5 Commission's deadline of March 30th, however, and copies will
6 be mailed to the other participants here today.

7 CHAIRMAN WILKINS: Thank you.

8 MR. RENDINO: Our major area of concern relates to
9 the revision of Chapter 7, the violations of probation and
10 supervised release.

11 The Commission, of course, sets forth two options.
12 Our group went round and round on this and we saw a lot of
13 good language in both options. We have settled on strongly
14 endorsing Option Number 1 based on the structure and I'll get
15 into some details very quickly.

16 However, we do feel there is some good language in
17 Option 2 and I'll address that briefly today, but there will
18 be more detail in the written report, which you will receive
19 in a week or so.

20 We believe that Option 1 is more clear and unam-
21 biguous than Option 2, and that, more importantly, it
22 expresses a philosophy which will enhance respect for the

1 supervision process, that is supervision of the offenders in
2 the community either instead of incarceration or after
3 incarceration.

4 Option 1's clear separation of, for instance, new
5 criminal conduct, which may form the basis of the violation
6 from the separate and distinct failure to abide by the
7 conditions of supervision, we believe, very strongly es-
8 tablishes a more rational basis for accountability than
9 Option 2, and also, mirrors the reality of the situation as
10 perceived by the community and probation officers.

11 In other words, the so called bargain basement or
12 two for one approach to violative behavior will no longer be
13 acceptable explicitly and the criminal will pay a price for
14 his or her new infraction as well as a separate penalty for
15 the earlier conviction which resulted in suspension of part
16 or all of the possible prison term available at that time.

17 We believe that the violator who is on Federal
18 supervision when the new criminal violation takes place
19 commits two breaches; first, there is the new violation of
20 the law; secondly, there is a violation of the terms and
21 conditions of supervision, whether that be probation or
22 supervised release, or whatever it may be called.

1 In short, we view the release conditions as a
2 contract between the court and the accused and violations as
3 a violation of that contract, which would call for separate
4 penalty.

5 Option 1 obviously calls for two separate con-
6 siderations of sanctions for, we believe, two legally
7 separate actions. Option 2 does not, in our judgment, do so,
8 or at least with the clarity that is present in Option 1.

9 In this respect and in general, Option 1 is subject
10 to less interpretation than Option 2. As a result, it is the
11 impression of the FPOA that more consistent application of
12 violation sanctions would result from the Option 1 structure
13 than the Option 2 structure. .

14 Option 1 also provides appropriate latitude to the
15 court in cases involving so called technical violations or
16 violations involving new criminal conduct which is petty or
17 relatively minor, in the words of the Commission.

18 We do have one suggestion, which we believe is
19 minor in tightening up one section and that would be the
20 proposed guideline 7A1.4(c)(1)(a) of Option 1. We believe
21 that for consistency as well as a better opportunity for the
22 court to order an appropriate sanction, the range be from 1

1 to 12 months instead of the 1 to 7 months as currently
2 written.

3 This would provide for an unbroken continuum of
4 sanctions addressing increasingly more egregious violations.
5 The least of the sanctions presently contained in the
6 proposal would be zero time in custody. The next level
7 presently states 1 to 7 months would be the range and we are
8 asking that the 7 be changed to 12 at the top of the range.

9 It seems to logically fit in with the next level,
10 which calls for a 12 to 18 month sanction range and at the
11 top of the list would be 18 to 24 months.

12 Regarding guideline 7A1.4(d)(1) of proposed Option
13 1, we're not clear as to the Commission's intent. For
14 instance, in conjunction with the proposed guideline 7A1.5(a)
15 of Option 1, it could be read as providing that a given
16 defendant be on supervision for life, multiple violations,
17 new terms of supervised release. If that's the Commission's
18 intent, we think that to be ill advised and perhaps punitive
19 of the probation officer rather than the defendant.

20 [Laughter.]

21 MR. RENDINO: At any rate, we think that--

22 CHAIRMAN WILKINS: That's 7A1.5?

1 MR. RENDINO: Excuse me?

2 CHAIRMAN WILKINS: 7A1.5?

3 MR. RENDINO: 7A1.5(a) in conjunction with
4 7A1.4(b)(1).

5 We would appreciate some clarification of the
6 Commission's intent there. Guideline 7A1.5(b) in proposed
7 Option 1 makes very clear and enhances the underlying
8 philosophy of Option 1, which was captivating to the FPOA,
9 namely that a sentence imposed upon revocation is a sanction
10 for failure to honor the conditions of supervision and
11 separate and distinct from any sanction which may be imposed
12 for new criminal conduct. We endorse that view.

13 In brief, Option 2, in our reading of it, would
14 require much more interpretation and calculation than Option
15 1. We see this as unnecessarily complicating the violation
16 procedure as well as prolonging the whole process without
17 ensuring any greater fairness in Option 1. So, therefore, we
18 don't believe it would be necessary. We strongly would go
19 with Option 1.

20 Option 1 would be a good start to structuring this
21 area of our concern. We feel that structuring as opposed to
22 an earlier comment is necessary to keep the guidelines

1 consistent. Although it is not perfect, we feel that it is
2 the best that we can do at this point in time and go with the
3 amendment procedure as experience teaches us what may be done
4 better.

5 The FPOA considered in some depth three other areas
6 that I'll only give brief commentary on because there is no
7 established policy from my organization at this point.

8 These would be the areas of fines, the obstruction
9 of justice, and role in the offense. However, we do have
10 some impressions to relay to you at this time.

11 In the area of proposed amendments to the fines,
12 specifically Section 5E1.2, we believe that the proposed
13 amendment in general clarifies the fine computation and
14 because of that wards against errors in computation and,
15 therefore, in general is fine.

16 We also like the attention given to restitution and
17 the--if you allow me, the escape hatch related to complica-
18 tion in that particular section, that would be in paragraph
19 65, if my recollection is correct, in the sheets handed out
20 by the Commission.

21 As to obstruction, again, a general comment, it
22 appears good to us in the sense that it more accurately

1 describes that particular section of the guideline, but,
2 again, we have a question that may have no basis in anything.
3 It may be just the way things fell. But we noticed that the
4 word "willfully" is taken out of the title of the obstruction
5 guideline and left in the guideline and we wonder if there's
6 some message that we missed between the lines there from the
7 Commission and we'd like some clarification on that also.

8 The examples given, the longer list of examples is
9 also something that would be helpful to all involved. We are
10 tinkering with some of the wording in those. We have about
11 two-thirds of them done and we will have the rest in our
12 written commentary.

13 We are also attempting to develop a list of
14 examples where obstruction should not apply to proffer to the
15 Commission for its consideration.

16 Role in the offense, behind closed doors we're
17 still kicking and scratching, if I may. We hope to have a
18 position on that, but there's really no consensus at this
19 point. It's something we have told ourselves we will have a
20 position on, but that remains to be seen.

21 I'd like to get into an area, if I may, of some-
22 thing that has emerged as a discussion in the FPOA and may be

1 coming before you in the way of written suggestions. In
2 reviewing the guidelines, even before the proposed amend-
3 ments, but now with the amendments it has come out in
4 discussion when all of our board members particularly can sit
5 around the same table and really get into these things, that
6 some enhancements in Chapter 2 may, and I underline may and
7 emphasize may, more properly be addressed, for instance, in
8 Chapter 4. One particular item would be the area of, for
9 instance, prior similar conduct.

10 To give you an explicit example, the current
11 guideline 2L1.1 involving smuggling of unlawful aliens, has
12 as a specific offense characteristic a two level increase if
13 the defendant had previously been convicted of smuggling an
14 unlawful alien.

15 We're wondering for the integrity of the guideline
16 system if that shouldn't more properly be addressed in the
17 Chapter 4 prior record section, just a thought that's coming
18 up and we're searching the guidelines for issues such as
19 this.

20 I'd like to make a few remarks about the assist
21 program. We need an update. We know that one is coming. We
22 need to have the Commission keep it updated. Certainly the

1 technology is available for rapid modification of the program
2 and we see no need to have any backlog in this area.

3 If in fact the Commission is short on resources to
4 do this, my organization will consider supporting you in any
5 way to get those resources. The reason being that assist is
6 a very valuable tool in making the probation officers' work
7 both easier and more accurate. The obvious result is that
8 all parties, the defendant, the prosecution, the judge are
9 all better served and we can't emphasize enough that we need
10 this and we need it updated. We need it expanded.

11 There are a lot of ideas. We had a fine meeting
12 with Phyllis Newton earlier in the week, at least half of my
13 board, and we had a receptive audience. We realize the
14 Commission has its own resource shortages, but from the field
15 we've had officers back away from assist and it's just going
16 to be more difficult to get them back to it once we get the
17 updated version and we need it.

18 I will conclude my remarks with that and, again, I
19 apologize, but you will have our written report in a week or
20 so.

21 CHAIRMAN WILKINS: Thank you, Mr. Rendino. We
22 appreciate your testimony and all of the help that you and

1 your association have given us.

2 Judge MacKinnon?

3 COMMISSIONER MacKINNON: Where are they deleting
4 the word "willfully" in 5E1.2?

5 MR. RENDINO: In the title, Your Honor, in the
6 title of the guideline.

7 COMMISSIONER MacKINNON: Fines for individual
8 defendants?

9 MR. RENDINO: No, this is in the obstruction of
10 justice guideline.

11 COMMISSIONER CORROTHERS: I think he was talking
12 about obstruction. I don't know what that would be.

13 MR. RENDINO: That would be page 55 of the proposed
14 amendment package, which was sent out, toward the bottom of
15 that page.

16 COMMISSIONER MacKINNON: I thought we were talking
17 about 5E1.2.

18 MR. RENDINO: We're talking about 3C1.1. I'm
19 sorry.

20 COMMISSIONER MacKINNON: 3C1.1?

21 MR. RENDINO: Yes.

22 COMMISSIONER MacKINNON: That's 55.

1 MR. RENDINO: Page 55 of the handout.

2 COMMISSIONER MacKINNON: Page or--

3 MR. RENDINO: Page 55.

4 COMMISSIONER MacKINNON: --number?

5 MR. RENDINO: Paragraph 52.

6 COMMISSIONER MacKINNON: Okay. Thanks.

7 Is "willfully" in the statute?

8 MR. RENDINO: I don't recall, Your Honor.

9 COMMISSIONER MacKINNON: Is it used below in the--

10 MR. RENDINO: It's in the guideline itself, but
11 it's removed from the title.

12 CHAIRMAN WILKINS: Is it in the statute Mr.
13 Hoffman?

14 MR. HOFFMAN: The title was being amended.
15 Willfully is in the guideline itself and because the title
16 was being amended to add a number of words, keeping willfully
17 in the title just did not appear necessary--

18 COMMISSIONER MacKINNON: Thank you.

19 MR. RENDINO: That's the clarification we needed.
20 Thank you.

21 CHAIRMAN WILKINS: Commissioner Corrothers?

22 COMMISSIONER CORROTHERS: Does that satisfy you

1 that there is no substantive change indicated by the removal
2 of the word?

3 MR. RENDINO: Yes, it does.

4 COMMISSIONER CORROTHERS: Just a comment, you've
5 certainly been of great assistance to us over the years and I
6 personally value beyond words the contribution of probation
7 officers not only to us, but to the entire field of the
8 criminal justice system.

9 Beyond that, I just wanted to congratulate you,
10 Tom, on your elevation to the post of Chief and wish you
11 success on your transfer from Vermont to Georgia, as well as
12 wish you success in your new position.

13 MR. RENDINO: Thank you very much.

14 COMMISSIONER CORROTHERS: I look forward to
15 receiving your written testimony for study.

16 MR. RENDINO: Thank you.

17 CHAIRMAN WILKINS: Commissioner Nagel?

18 COMMISSIONER NAGEL: I would just like to add my
19 congratulations and say that we have here heard testimony
20 that the AUSAs lament the fact that not all of the AUSAs are
21 intimately familiar with the guidelines and similarly the
22 Federal Defenders.

1 In the course of our travels across the country in
2 research, the group that I think stands out as the single
3 group most knowledgeable about the guidelines to date has
4 been the probation officers and I would congratulate you and
5 your fellows for the extraordinary effort you have put on and
6 would hope that you would work with the Commission to help us
7 to arrive at a point where everyone in the field, including
8 Federal Defenders, private defense Bar, and Assistant U.S.
9 Attorneys is up to speed. I think if we work together, we
10 can do that and then feel more comfortable about the system.

11 So I just want to thank you.

12 MR. RENDINO: Thank you.

13 CHAIRMAN WILKINS: You're going to submit to us as
14 soon as you can the other specific--

15 MR. RENDINO: Yes, it will be in typing on Monday
16 when I get back to my office.

17 CHAIRMAN WILKINS: Great, because we're going to
18 begin a really thorough study, the Commissioners that is and
19 our staff, as soon as this hearing concludes, starting
20 tomorrow for the next 10 days.

21 So we appreciate it and you've made some good
22 suggestions already and I know there will be others in your

1 written testimony.

2 Thanks a lot.

3 With Mr. Sam Buffone's permission, I'd like to call
4 Scott Wallace out of order, if I might. He has a schedule
5 that he's trying to maintain.

6 We're delighted to have Scott Wallace with us
7 again. Mr. Wallace represents the National Association of
8 Criminal Defense Attorneys, who have been very helpful to us
9 in providing testimony and comment over the years and we look
10 forward to a continued relationship.

11 Mr. Wallace?

12 STATEMENT OF SCOTT WALLACE, NATIONAL ASSOCIATION OF CRIMINAL
13 DEFENSE ATTORNEYS

14 MR. WALLACE: Thank you very much, Judge Wilkins.

15 I regret that Benson Weintraub cannot be here
16 today. He's got an emergency hearing up in Baltimore that
17 took him away, but he'll be back this afternoon in time for
18 the Advisory Committee Meeting.

19 You have heard some excellent testimony from the
20 Federal Defenders and you'll hear some more from the American
21 Bar Association. We are in substantial agreement and support
22 the specific comments of the Federal Defenders and we will

1 not--I will not this morning try to rehash that material.

2 But I will instead highlight a couple of key issues
3 on a more broad plane, if you will. I want to begin by
4 discussing an important issue that I know that the Commission
5 has given a great deal of thought to, the subject is statutory
6 mandatory minimums and what the Commission can do about them.

7 We are aware and deeply appreciative of the fact
8 that the Commission, as reflected in a letter from you, Mr.
9 Chairman, to Senator Nunn in 1988, has expressed grave
10 reservations about the wisdom of statutory mandatory mini-
11 mums.

12 As you know, the Defense Bar shares your concerns
13 in this regard that mandatory minimums operate, as you say,
14 crudely, that they are rendered obsolete by a successful
15 guideline system, and that they frustrate the goal of system
16 wide consistency in sentencing.

17 Obviously, Congress is having some difficulty
18 getting this message. Even though you have said, we have
19 said, Federal judges across the country have said it, and the
20 Federal Courts Study Committee has virtually shouted it,
21 still Congress passes more mandatory minimums simply because
22 it is so hard for the many members of Congress who know the

1 problems to actually take the political risk of appearing
2 soft on crime.

3 Last October, we witnessed the bizarre spectacle of
4 the Senate Judiciary Committee Chairman rising to offer
5 eloquent and well documented opposition to an amendment
6 creating new mandatory minimums and to mandatory minimums in
7 general and then stating that he was nevertheless prepared to
8 accept the amendment without a vote.

9 And the horrors stories melt. The best researched
10 article I've ever seen written on mandatory minimums appears
11 in this month's American Lawyer magazine. I will furnish a
12 copy for your information.

13 In it is the story of Susanna Sanchez Robles, a
14 dirt poor low level mule who got the mandatory 10 years. She
15 has five daughters now totally dependent on welfare. The 5
16 year old cries every evening. The 6 year old keeps asking
17 her on the phone when she is coming home.

18 As the father of a 7 year old girl, it moves me to
19 tears to think about these children and their pain and
20 confusion, and the trouble that they can get into between now
21 and 1998, when their mother comes home.

22 Who exactly is being punished here? What is being

1 gained? Can't we think of some other way to punish this
2 woman?

3 Only this Commission has the clout to get through
4 to the Congress on this issue. We urge you to go one
5 important step further than you already have to make a formal
6 recommendation to Congress under Section 994(w), upon
7 analysis of the experience to date under the guidelines, for
8 legislation repealing all statutory mandatory minimums.

9 I would stress that this is not just the policy
10 debate about how much discretion to give sentencing judges.
11 It is more even than a question of fairness to individual
12 defendants. It is a matter of urgent national imperative.

13 There is simply not enough prison space and not
14 enough tax payer dollars, and not enough political will to
15 produce the dollars necessary to keep pace with current
16 incarceration policy.

17 It has been estimated that the new 5 year mandatory
18 minimum for crack possession alone will add more than 50
19 million dollars per year in Federal prison costs. That's for
20 400 offenders per year.

21 Last year, we saw the largest Federal prison
22 appropriation in the Nation's history. The system currently

1 more than 50 percent over capacity is going to be more than
2 doubled in size by 1995. One might think that this should
3 take care of prison overcrowding in 1995. Not so. GAO
4 reports that even with this unprecedented building binge the
5 system will still be about 50 percent overcrowded in that
6 year.

7 The States are mimicking the Federal affection for
8 mandatory minimums. The Governor of Alabama has just
9 proposed a 1 year mandatory minimum for all drug users. The
10 States will spend 11 billion dollars on prison construction
11 this year, more than President Bush's entire budget for
12 housing.

13 A particularly painful recent statistic is that
14 one-quarter of the Nation's young black males are now in
15 prison or under some form of correctional supervision.

16 We all know we cannot keep this up. It is not a
17 question of whether the system will break down or the dollars
18 will run out. It is simply a question of when.

19 It's a little like global warming. No matter how
20 clear the predictions, until it actually happens it's hard
21 for legislators to rouse themselves to act and maybe this
22 week's weather in Washington will create the necessary push

1 to start discussions on that.

2 Let me be clear that we do not by any means confine
3 our carping to unnecessarily harsh sentencing laws written by
4 Congress. These concerns apply not just to the question of
5 statutory and mandatory minimums, but to a number of amend-
6 ments developed by this Commission for consideration today
7 such as those raising base offense levels, broadening the
8 range of non-convicted conduct which may be considered, or
9 toughening the role in the offense adjustments.

10 We feel strongly that any changes in the guidelines
11 which would increase sentence lengths or the number of
12 offenders subject to imprisonment must be subjected to the
13 closest scrutiny. They must be supported by solid and broad
14 based empirical evidence of the inadequacy of the pre-
15 existing guideline and if such evidence is lacking and only
16 anecdotal evidence is available, we would suggest that the
17 most that should be done is to add commentary that a depar-
18 ture may be warranted under specified circumstances.

19 Changes must also be no more severe than is
20 absolutely necessary to effectuate the purposes of sentenc-
21 ing, as required by Section 3553(a) and they must favor non-
22 incarcerative sanctions for first time and non-violent

1 offenders, as required under 994(j).

2 In this regard, we suggest that the Commission make
3 one additional important proposal for legislation, the
4 removal of the 6 month or 25 percent rule in 994(b)(2), which
5 has been construed to tie the Commission's hands in the full
6 implementation of 994(j).

7 And just in case you are wondering whether I was
8 going to address any of the specific issues upon which the
9 Commission actually asked for comment, I would like to touch
10 on amendment 12 implementing the new statutory mandate for a
11 substantial period of incarceration for jeopardizing the
12 safety and soundness of a financial institution.

13 By fits and starts, Congress is giving signals that
14 it understands some of the problems with mandatory minimums.
15 As you may know, this provision started out as a mandatory
16 minimum, but cooler heads in the Senate Judiciary Committee
17 got the language changed.

18 At other times in recent years, provisions that
19 started out as mandatory minimums have turned into directions
20 that the Sentencing Commission provide a specified base
21 offense level for a particular crime.

22 We think that the Commission should be sensitive to

1 the differences between these approaches and where the
2 statute does not specify a number adjustment or base level,
3 it should be taken as a signal that the guidelines should not
4 either, that the Congress was recognizing that there was a
5 broad range of possible conduct which could substantially
6 jeopardize the soundness of a financial institution and that
7 the severity of the threat and the precise size of the
8 adjustment should be left to the informed wisdom of the
9 sentencing judge.

10 Finally, we add our voice to the call for a longer
11 period of public review and comment on proposed guideline
12 amendments. It is becoming increasingly clear that whatever
13 the Commission sends to the Congress becomes law. Congress
14 has not the time or the interest to enact a statute modifying
15 any portion of any guideline submission.

16 There is no independent congressional review, no
17 hearings, no committee reports, no floor debate. As a
18 practical matter, what this Commission does is make Federal
19 law and we strongly feel that the process should be open
20 longer than a few weeks for a more thorough outside review
21 with guideline amendments being published at least 6 months
22 before their submission to the Congress.

1 In this regard, let me express our deepest ap-
2 preciation for the establishment of the Practitioners
3 Advisory Group. We hope this will add a great deal to the
4 openness of the process, to the comprehensiveness of the
5 Commission's deliberations, and to the effectiveness and
6 workability of the Commission's product.

7 I would add, however, that we are still hopeful to
8 have a more sustained presence in the Commission, a Commis-
9 sioner or at least a full-time staff member with criminal
10 defense expertise, not to make problems for the Commission,
11 but to help make solutions.

12 I appreciate this opportunity to appear before you
13 today and I'll be happy to answer any questions you might
14 have.

15 CHAIRMAN WILKINS: Thank you very much.

16 As you may know, we are working with Mr. Borman.
17 An Assistant Public Defender or perhaps a Public Defender
18 will be working on a rotating basis with our staff in the
19 future as we've been bringing in probation officers and
20 Assistant U.S. Attorneys. So we look forward to that.

21 MR. WALLACE: We really appreciate that.

22 CHAIRMAN WILKINS: You know the issue you mentioned

1 about the financial institution and that, that amendment is
2 being proposed and that language, of course, was language
3 from a statute that we supported. In fact, we were somewhat
4 instrumental, I think, in having it changed from some minimum
5 mandatory.

6 But if we don't respond to the Congress, then it's
7 a clear signal to them that we're not being responsive. They
8 should enact minimum mandatories. So that's kind of where we
9 find ourselves. We have to be very careful to respond to
10 general signals that they give us as opposed to minimum
11 mandatories because the alternative, as far as you're
12 concerned, and the I think the system is a whole lot worst
13 off. So that's where we're coming from.

14 MR. WALLACE: Well, there may be various ways to
15 deal with that, but we would suggest a large latitude for the
16 sentencing judge. The question of whether there has been
17 substantial jeopardy to the safety or soundness of a finan-
18 cial institution depends on so many variables that a flat--as
19 you have suggested in one of your options, a flat three level
20 adjustment maybe too constrictive. Size of institutions
21 differs. The amount of the jeopardy can differ as well.

22 CHAIRMAN WILKINS: Right. I see what you mean.

1 Well, let me ask of Judge MacKinnon, any questions?

2 COMMISSIONER MacKINNON: It's all a matter of
3 proof, isn't it?

4 MR. WALLACE: On that question of the financial
5 institution jeopardy?

6 COMMISSIONER MacKINNON: Sure.

7 MR. WALLACE: Sure. Our concern is simply that
8 once the quantum of proof has been met that the judge have a
9 certain amount of leeway to select the adjustment level.

10 COMMISSIONER MacKINNON: Thank you.

11 COMMISSIONER CORROTHERS: We will be getting a copy
12 of your testimony?

13 MR. WALLACE: We have furnished it day before
14 yesterday.

15 COMMISSIONER CORROTHERS: You did?

16 MR. WALLACE: It's the statement of Benson
17 Weintraub.

18 COMMISSIONER CORROTHERS: Oh, okay. Thank you.

19 CHAIRMAN WILKINS: Commissioner Nagel?

20 COMMISSIONER NAGEL: I would just like to thank you
21 again for your assistance and your thoughtful testimony.

22 MR. WALLACE: Thank you.

1 CHAIRMAN WILKINS: We'll get into more of these in
2 detail at our hearing this afternoon or our meeting this
3 afternoon as well. So we look forward to--you're coming
4 then, aren't you?

5 MR. WALLACE: Yes.

6 CHAIRMAN WILKINS: Yes. Good. We look forward to
7 seeing you.

8 MR. WALLACE: Thank you very much.

9 CHAIRMAN WILKINS: Representing the American Bar
10 Association and the Chairman of the Practitioners' Working
11 Group, and an attorney here in Washington, D.C., is Mr. Sam
12 Buffone .

13 I know that we're going to be meeting with you
14 later on this afternoon, but we'd be glad to hear perhaps a
15 summary of your testimony and the pertinent points you'd like
16 to make at this public hearing.

17 Thank you.

18 MR. BUFFONE: Thank you, Mr. Chairman, members of
19 the Commission.

20 I'm going to--well, first of all, I'd like to
21 clarify that I'm here in my capacity as a spokesperson for
22 the American Bar Association.

1 I am going to deviate from my prepared comments--

2 CHAIRMAN WILKINS: I didn't mean to indicate

3 otherwise. You do serve as Chairman, but you're not

4 representing the Practitioners' Working Group here, is that

5 what you were--

6 MR. BUFFONE: That's correct.

7 CHAIRMAN WILKINS: Good. Glad you cleared that up.

8 MR. BUFFONE: Just to clarify for those who are

9 here.

10 CHAIRMAN WILKINS: Thank you.

11 COMMISSIONER MacKINNON: And what part of the ABA

12 do you represent?

13 MR. BUFFONE: The Criminal Justice Section, Your

14 Honor, and I serve as Chairman of the Criminal Justice

15 Section's Committee on the United States Sentencing Commis-

16 sion.

17 I'm going to deviate from my prepared comments for

18 three reasons and the first is that seeing the hour of the

19 hearing now and knowing that we're going to have an oppor-

20 tunity to discuss this with you this afternoon; second, I was

21 quite moved by Scott Wallace's testimony that was not a part

22 of the written submission by Benson Weintraub and I found his

1 perceptive comments about mandatory minimum sentencing and
2 the incredibly difficult tasks that face the Commission
3 served to focus for me much of what I think is important and
4 it should be brought to the Commission's attention.

5 Thirdly, I think that this hearing is turned into
6 sort of an annual review of the Commission and I hadn't
7 planned to contribute to that, but I think I will.

8 I think the last year has been a water shed year
9 for the Commission and one that you deserve to be congratu-
10 lated on. From our narrow perspective, we want to add our
11 voice to those who have congratulated you on establishment of
12 the Practitioners' Advisory Group.

13 I'd like to renew our frequently expressed praise
14 of the Commission for the work that has been done in the
15 organizational sanctions area and the extended deliberative
16 process that the Commission has gone through to make sure
17 that every aspect of public comment has been brought to your
18 attention.

19 We believe that the last year has placed the
20 Commission at a crossroads and the amendments that stand
21 before the Commission are reflective of the choices that you
22 have to make at those crossroads.

1 We at the American Bar Association, as I have
2 testified at every occasion when I appear before this
3 Commission, ground our testimony in our standards for
4 criminal justice not to be ritualistic, the standards,
5 however, were a commitment to the guideline process that were
6 in place long before the Sentencing Reform Act was passed.

7 We have had a dedication to the establishment of
8 guidelines and the guideline process for well over a decade.
9 We view with encouragement the fact that we think the
10 guideline debate is largely behind us.

11 There now is acceptance of the concept of
12 guidelines, the reality of guidelines, and the fact that
13 there can be both a workable guideline system and a Sentenc-
14 ing Commission that can function as an expert administrative
15 agency to turn those guidelines into an organic working
16 document that can accomplish all of the ends, both envisioned
17 by our criminal justice standards and the Sentencing Reform
18 Act.

19 I am here today to be critical of some of what I
20 see in the process by which these amendments were adopted
21 because I think it focuses, once again, the critical issues
22 that the Commission faces when you stand at the crossroads.

1 The first is the amendment process itself leaves an
2 inadequate amount of time for organizations such as the
3 American Bar Association to adequately respond to the depth
4 of information contained in the amendment process.

5 We have suggested in our written comments in the
6 future annual amendments be released by December the 15th. I
7 understand that that will place great strains on the Commis-
8 sion, but we think that such an early comment period is the
9 only way to get effective analysis and public comment on the
10 guidelines.

11 I take to heart a comment that Chairman Wilkins
12 made a few moments ago that you have heard from many that the
13 watch word should be to proceed cautiously. We add our voice
14 to that. We believe that the guidelines as in place should
15 be amended with extreme caution and that where the Commission
16 makes even minor editorial changes, you should be aware that
17 those on the outside, practitioners and interested parties
18 such as ourselves, look for every signal and even a minor
19 change in guideline commentary, editorial changes in Chapter
20 1, can be viewed with extreme significance, especially over
21 difficult areas such as departures, offender characteristics,
22 role in the offense, and real offender systems.

1 Those difficult decisions that were made by the
2 Commission and to a large extent the practicing Bar has lived
3 with should not be changed without clear directives from this
4 Commission indicating that you are changing them in the
5 rationale for change.

6 That brings me to my second point, which is the
7 necessity for clear statement of reasons for guideline
8 amendments. Perhaps our greatest criticism with this
9 amendment package is the failure to adequately state reasons.

10 We found too often that there was a brief clause or
11 one sentence explaining the rationale for the amendment when
12 we know that much more went into the Commission's delibera-
13 tive process.

14 You've been kind enough to share with us many of
15 the staff working papers. We've attended the meetings and we
16 know some of what you went through in reaching these amend-
17 ments. We think that you should state for the public the
18 reasons why you made the choices that you did and share much
19 more of the deliberative information so that people can
20 understand the difficult choices that you did make, the
21 rationale behind them, and the data underlying them so that
22 there can be more focus comments on the choices that were

1 made.

2 Our third area of criticism is that we believe that
3 the amendment process should be more firmly grounded in
4 current practice.

5 Now let me explain that a bit. I don't know that I
6 can say with certainty that it is not, but it presents at
7 least the impression from the written materials that it may
8 well be, and that is the absence of comments on things like
9 departures under existing guidelines.

10 If you are adding an amendment to a guideline
11 because of current practice, and I would cite Commissioner
12 Corrothers' reference to hate a crimes, a very difficult
13 area, I think it would be valuable to find how many times
14 district court judges have departed over the course of the
15 last amendment period because of hate crime type situations.
16 What kinds of information have you gotten from the public?
17 Have you received letters, solicitations, phone calls about
18 these particular areas?

19 All of that kind of information that indicates the
20 reasons why you're acting should be brought to the public's
21 attention and should be part of the record of the amendment
22 process.

1 We believe that guideline amendments should be
2 grounded in current practice, that the Commission should look
3 first to those areas where Congress has spoken and those
4 areas where there are clear indications from departures and
5 information coming from the field that you have a real
6 problem.

7 My fourth area that I would be critical in, and
8 this is a criticism we have expressed in the past, we believe
9 that the Commission should adopt regulations governing the
10 amendment process. Those regulations could follow the form
11 of many other administrative agencies that have regulations
12 governing their rule making process. Those regulations
13 should provide with some specificity the comment process that
14 you're going to go through, the kinds of information you're
15 going to make available to the public, what sort of delibera-
16 tive process you're going to go through in passing the
17 regulations, and what you expect of those who comment from
18 the public.

19 If that's a project that interest the Commission,
20 we would be pleased to assist in whatever way we could in
21 proposing regulations or in doing anything else that would
22 help you.

1 Finally, along those same lines, during my last
2 testimony before the Commission on April 7th of last year on
3 guideline amendments, we suggested the adoption of something
4 that would be akin to a prison impact statement that would
5 carry forward the Commission's responsibilities under 994(g)
6 to assess the prison impact of the guidelines.

7 We believe that you should do that on a guideline
8 by guideline basis. That's not to say that it should always
9 be determinative of your decision, but you should at least
10 state what you believe the impact will be of your proposed
11 guidelines so that it could be made part of the decisional
12 process.

13 I apologize for the lateness in the submission of
14 our written testimony. We were only able to get it to you on
15 the--right before my testimony began. I'll be pleased to
16 answer any questions that you may have.

17 CHAIRMAN WILKINS: Thank you very much.

18 You have made some very helpful comments and
19 suggestions over and above just the amendments. I guess we
20 will probably focus on that more specifically this afternoon,
21 but we'll take to heart what you said about the regulations.

22 MR. BUFFONE: In our written testimony we have an

1 item by item analysis of those amendments that we thought
2 were significant. I am constrained to say, though that I've
3 been told my by membership that I should advise the Commis-
4 sion that those views do not necessarily reflect all of the
5 committee. That's a function of the limited amount of time
6 that we had and our inability to circulate comments, incor-
7 porate everyone's positions and come out with a consensus
8 position, as we have in the past.

9 CHAIRMAN WILKINS: Thank you.

10 Judge MacKinnon?

11 COMMISSIONER MacKINNON: Well, actually the ABA is
12 incapable of coming out with an ABA position on anything like
13 this, as a matter of fact, in the detail--

14 MR. BUFFONE: No, I disagree, Judge MacKinnon. I
15 understand that the ABA has had--has been subject to justifi-
16 able criticism for its inability to speak with one voice, but
17 our criminal justice standards and the chapter on sentencing
18 was adopted by the House of Delegates, has been approved--

19 COMMISSIONER MacKINNON: After how many years?

20 MR. BUFFONE: Well, they've been in place for over
21 a decade.

22 COMMISSIONER MacKINNON: I know, but it took them

1 10, 12 years, didn't it?

2 MR. BUFFONE: It took them over 10 years to adopt
3 them and I think that's reflective of the fact that it truly
4 does represent the position of the American Bar Association.

5 COMMISSIONER MacKINNON: But it is a very difficult
6 thing for the ABA to come out on current amendments and come
7 out with a position better than you can present as Chairman
8 of the particular committee studying the particular item.
9 You can't get, how many, 10, 12 thousand or 20 thousand
10 members to--

11 MR. BUFFONE: You're right, Judge, there is the
12 institutional problem that I cannot speak for all of our
13 membership. I mean I'm delegated authority and we report to
14 our membership, but certainly we haven't cleared these
15 comments with anywhere near the majority of our membership.

16 COMMISSIONER MacKINNON: And I don't think you
17 ought to have to apologize for it.

18 CHAIRMAN WILKINS: Thank you.

19 Commissioner Corrothers?

20 COMMISSIONER CORROTHERS: Nothing.

21 CHAIRMAN WILKINS: Commissioner Nagel?

22 COMMISSIONER NAGEL: I just want to say we'll look

1 forward to hearing from you all this afternoon. Thank you
2 again.

3 MR. BUFFONE: Thank you.

4 CHAIRMAN WILKINS: Thanks again. We're see you
5 this afternoon.

6 In keeping with our policy, the floor is now open
7 for anyone who would like to address the Commission on any
8 relevant topic, guidelines or anything else.

9 [No response.]

10 CHAIRMAN WILKINS: All right. Thank you very much.

11 This public hearing stands adjourned. We will
12 reconvene in the Commission Hearing Office at 2 o'clock this
13 afternoon.

14 [Whereupon, at 11:40 a.m., the hearing adjourned.]