

1 UNITED STATES SENTENCING COMMISSION

2
3 Regional Public Hearing
4 Denver, Colorado
5 November 5, 1986
6

7 Proceedings of a Regional Public Hearing of the
8 United States Sentencing Commission, beginning at 10:00 a.m.,
9 on the 5th day of November, 1986, in the Ceremonial Courtroom,
10 United States Courthouse, Denver, Colorado.
11

12
13 Commissioners Present:

14 William W. Wilkins, Jr., Presiding.

15 Michael K. Block

16 Stephen G. Breyer

17 Helen G. Corrothers

18 George E. MacKinnon

19 Ilene H. Nagel

20 Paul H. Robinson
21

22
23
24 Donna G. Spencer
25 Certified Shorthand Reporter
Denver, Colorado

INDEX

REMARKS OF:

ROBERT MILLER	6
WILLIAM S. PRICE	10
ARTHUR NIETO	43
MARY ANN CASTELLANO	57
TERRY LEE MARTIN	58
LYNN BOGLE	59
HON. JOHN L. KANE	74
MICHAEL BENDER	115
WILLIAM GRAVES	138
PERRY MATHIS	147
DONNA CHAVEZ	163
MARK CRANE	179
HON. BOBBY R. BALDOCK	196
HON. CLARENCE A. BRIMMER	203
TOVA INDRITZ	220
MICHAEL KATZ	243

PROCEEDINGS

COMMISSIONER WILKINS: I will call this hearing to order.

Good morning, ladies and gentlemen, and welcome to this public hearing held by the United States Sentencing Commission.

Let me introduce the Commissioners who are here in Denver today.

To my right is Stephen Breyer. To my immediate right is Ilene Nagel. To my left is Helen Corrothers. In front of us, to my right, is Paul Robinson. In the middle is George MacKinnon, and to his left is Michael Block, and my name is Billy Wilkins.

And I thank all of you for coming, and I am confident we will have a productive and interesting hearing.

During this hearing, we will be focusing on the many issues and many complex issues, which this Commission must ultimately resolve prior to the submission of the guidelines to the United States Congress by April of next year.

This is one of a series of public hearings that the Commission has been holding in Washington, D. C., and areas around the country.

Our next hearing will be held in San Francisco, and then we have a final hearing to be held in Washington, sometime in the first part of December.

1 A few weeks ago, we published what we have entitled
2 a preliminary draft. It identifies many issues that must be
3 resolved. It also sets forth some approaches that can be
4 taken in a guideline system.

5 The Commission voted to publish this preliminary
6 draft, but it did not approve of this draft in any particular
7 way.

8 We did it for this purpose, to generate public
9 comment, to provide a vehicle for extensive public debate,
10 and critical analysis.

11 We have conducted our work as openly as possible.
12 We have enlisted the aid of United States Attorneys, defense
13 attorneys, judges, probation officers, District witness advo-
14 cates, and all those interested in the criminal justice field,
15 working with us in Washington, in preparing this preliminary
16 draft and working on the latest edition.

17 We thought it would be necessary and advisable to
18 put out a document to the public and all those interested
19 in what we are doing could respond back and give us critical
20 analysis, tell us the good and bad, and how to make it good,
21 so when we finally produce a document next April it will be
22 one that reflects the thinking of a wide range of citizens
23 interested in the administration of justice.

24 I want to thank all of you for coming. We recognize
25 the great changes that are going to take place. The Congress

1 has decided we are going to have guidelines. The question is
2 what are they going to look like.

3 We need a lot of help, not only to make them intell-
4 ible. Parole is going to be abolished. Determinative is
5 going to be the name of the game.

6 So, our guidelines are so important that we need to
7 use ever resource in drafting this available.

8 A lot of you have spent a great deal of time and
9 effort and it's reflected in the documents you have submitted.

10 We appreciate that. These documents are not looked
11 at in a cursory fashion, and put aside. They are studied in
12 detail, not only by this Commission, but staff, in a very
13 systematic way, and already many ideas coming in from across
14 the country are being incorporated in new drafts and refine-
15 ments of the preliminary draft we published a few weeks ago.

16 We appreciate very much your helping us in this very
17 important task.

18 The first witnesses today are two very distinguished
19 United States Attorneys, one from the District of Colorado, and
20 one from the Western District of Oklahoma.

21 We have relied very heavily on United States
22 Attorneys throughout the country in assisting us in these
23 issues, as we have heavily on defense attorneys and others.

24 We are very happy to have with us today, Mr. Robert
25 Miller, United States Attorney, District of Colorado, and

1 Mr. William S. Price, United States Attorney from the Western
2 District of Oklahoma.

3 Gentlemen, if you will all come forward, we will be
4 glad to hear from you, and if you will allow us to subject
5 you to some cross-examination, we will appreciate it also.

6 MR. ROBERT MILLER: Judge Wilkins, Members of the
7 Sentencing Commission, I am Robert N. Miller, United States
8 Attorney for Colorado.

9 I appreciate very much this opportunity to appear
10 before you and discuss with you my impressions of the prelimi-
11 nary draft of the sentencing guidelines.

12 The views I am going to express are my own, and
13 not those of the Department of Justice.

14 I appreciate all the work that I know you have put
15 into these guidelines. I also appreciate the opportunity of
16 having been invited once to come back and discuss these.

17 I thought it would be important for me to lay out
18 some of my background so you know where I am coming from when
19 I make my comments.

20 First of all, I have been a lawyer for twenty-one
21 years, and prosecutor for fifteen of those twenty-one years.

22 It has been my experience that imposing an approp-
23 riate sentence is probably the most difficult decision that
24 any Court has to make.

25 I commend the Sentencing Commission for its efforts

1 to bring rationality and standards to this process.

2 It's also notable and important that the Commission
3 has attempted to articulate the many factors and criteria which
4 have been considered by judges over the years in making these
5 decisions.

6 I know that you have had mandates put upon you by
7 Congress in the Act, and I know that you have struggled to
8 try to come up with something that makes sense.

9 I particularly agree with and commend the Commission
10 for the Statement of Purpose that is set out on pages 6 and 7
11 of the draft. Most, if not all, the factors enumerated in
12 Chapter Two, Offense Conduct, and Chapter Three, Offender
13 Characteristics, should be considered in any sentencing of
14 any defendant, I believe.

15 However, I believe that the sentencing process
16 proposed in these draft guidelines is in the end unduly
17 complicated, and procedurally vague, and nearly impossible
18 to implement as a practical matter.

19 Offense conduct and offender characteristics, which
20 must be considered in every case under these guidelines, are
21 human factors, which in my opinion do not lend themselves to
22 a quantification or numerical weighting system as proposed
23 in this draft.

24 Because of this incongruity, the sentencing phase
25 of the criminal case under these proposed guidelines will

1 become bogged down in hearing after hearing to measure by a
2 preponderance of the evidence in most cases aggravating and
3 mitigating factors, degree of cooperation, psychological
4 harm, the role of the defendant played in the crime, and many
5 other factors, which apparently are to be determined in court
6 proceedings under these guidelines.

7 Scarce court resources will be further overburdened.
8 Swift and sure punishment will remain an illusive ideal.
9 Often, under these guidelines, the sentencing phase will
10 require more court time than the trial itself.

11 As a practical matter, it is unclear to me how plea
12 agreements and these guidelines can co-exist. Ninety percent
13 of the criminal cases here and across the nation are plea
14 bargained. If the proposed guidelines are implemented, these
15 pleas by necessity will involve stipulated facts, and there-
16 fore may not reflect, quote, real offense sentencing, in the
17 end.

18 The guilty plea secured by plea bargain may not be
19 a recognition of the defendant's responsibility for the crime,
20 and therefore will not be an appropriate basis for a sentence
21 reduction as proposed in these guidelines.

22 This incompatibility becomes more pronounced when plea
23 bargaining is applied to cases involving multiple counts and
24 multiple crimes.

25 Also left unclear to me is the treatment of lesser

1 included offenses in a plea bargain.

2 Finally, I believe that the harm to victims is
3 definitely something that ought to be considered in every
4 sentencing. But attempting to quantify a victim's physical,
5 psychological and financial harm doesn't seem to me to be
6 feasible, and to change the cornerstone of our present sentenc-
7 ing system from an analysis of the defendant's intent to an
8 analysis of the victim's harm strikes me as inappropriate.

9 As an alternative, perhaps the Commission ought to
10 ascribe a definite term of years to every crime. This term
11 could be calculated from a mean score derived from all sentences
12 imposed in the last three to five years across the United
13 States.

14 This presumptive sentence would be given in each
15 case unless a sufficient number of mitigating or aggravating
16 factors were found to be present. These factors could be
17 compiled from those set out in the draft guidelines under
18 the headings of Offense Conduct and Offender Characteristics.
19 The sentencing judge could be limited to a certain percentage
20 deviation from the presumptive sentence.

21 Such a determinate sentencing scheme would be more
22 uniform than the one we presently have, also enjoy a ration-
23 ality and standardization we presently do not have, yet
24 retains the flexibility to address the human variables.

25 Most importantly, it would not be so complicated

1 that it would unduly prolong every sentencing hearing.

2 That would conclude my comments. I know Mr. Price
3 has some.

4 CHAIRMAN WILKINS: Thank you, Mr. Miller. We
5 will hear from Mr. Price, and talk to both of you. Thank
6 you.

7 MR. WILLIAM S. PRICE: Mr. Chairman and Members of
8 the Commission:

9 Let me first state the views I express are my own,
10 and not that of the Department of Justice.

11 I appreciate the opportunity to appear before the
12 Commission and present my views of the mandatory guidelines
13 for the sentencing of defendants proposed by the Commission.

14 First, let me express my appreciation of the procedure
15 this Commission has followed in receiving ideas and opinions
16 from all quarters concerning these guidelines. I and ten
17 other U. S. Attorneys have had the opportunity to meet with
18 this Commission for several days in a free exchange of ideas
19 before these guidelines were drafted.

20 I realize that these guidelines are a draft to be
21 approved and refined by both these public hearings and later
22 more lengthy sessions between this Commission and various
23 groups such as U. S. Attorneys, which I understand are planned
24 in the future.

25 At the time of our first meeting, I discovered the

1 truly arduous task before this Commission.

2 The Administration and Congress in setting forth
3 mandatory sentencing, abolition of the Parole Board, and formu-
4 lating the perimeters within which this Commission must
5 operate, was in response to a public cry to have the sentences
6 in this country more stringent, more uniform and less control
7 by parole boards.

8 This commendable goal is very difficult to put into
9 practice. A large measure of this cry for change derived from
10 the public's view of the sentencing and parole procedures
11 followed in most states in this country, including the State
12 of Oklahoma.

13 The sentences given in most states have little or
14 no relationship to the time actually served. Defendants
15 receiving large state sentences for violent crime or serious
16 drug offenses are all too often reduced to a few months
17 served by parole boards.

18 We who operate in the federal system have been proud
19 of the fact that this can't happen in federal sentencing.
20 Defendants must almost always serve at least a third of the
21 sentence, and many times much more than that, depending upon
22 the parole guidelines.

23 The parole guidelines in effect have been smoothing
24 out the differences between strict and lenient sentencing in
25 the federal system. The inequities in the current system

1 occur not from the judge imposing too stringent a sentence,
2 because these are equalized by the parole guidelines, but
3 from the judge imposing no sentence at all.

4 Luckily, in our district, defendants committing
5 serious crimes rarely receive probation. I realize other
6 districts are not so fortunate.

7 In reviewing the proposed guidelines in the light
8 of whether they correct the perceived ills, there are a number
9 of good points as well as faults to these guidelines.

10 In general, the guidelines appear to be fairly high,
11 though perhaps not high enough in light of several practical
12 factors that will significantly lower the average sentence
13 given in these guideline objectives.

14 Since over ninety-five percent of the defendants
15 will hopefully continue to plead and a huge percentage will
16 cooperate to some degree, most sentences will be at least
17 forty percent below the guideline amounts. Add to that the
18 human tendency of the judges not to go above the guidelines,
19 where one hundred percent of their decisions will be appealed
20 by defense attorneys, and to far more often go somewhat below
21 the guidelines, where the government will only rarely have
22 the inclination and the resources to appeal and you have an
23 inevitable lowering of the guidelines from theory to practice.

24 The same tendency will cause subjective or
25 factually close hearing questions to be decided in the

1 defendant's favor to avoid appeals.

2 For all these reasons, the higher the sentencing
3 guidelines, the greater the flexibility there is, and the less
4 likelihood of hearings and appeals.

5 The guidelines also seem to be drafted with the
6 premise that moderate to high level white collar crimes deserve
7 some terms of imprisonment. I agree with the Commission that
8 although the prison sentences in white collar crimes don't need
9 to be as lengthy as narcotics or violent crimes, most signifi-
10 cant fraud, public corruption, antitrust and tax cases should
11 involve imprisonment.

12 My primary criticism of the proposed guidelines is
13 in their complexity. The real danger of these guidelines is
14 that in the attempt to find the perfect system that includes
15 all variables, we may totally bog down all our judicial and
16 prosecutive resources in hearings and appeals. The more
17 these subjective factors are found in the guidelines, the
18 greater the likelihood of controversy and appeals, and the
19 more worthwhile cases will have to be declined for lack of
20 prosecutive resources.

21 There are generally too many sub-categories within
22 each offense. There are factors such as psychological harm
23 to victims that are almost impossible to objectively quantify.

24 Certain offenses, such as rape, inevitably involve
25 psychological harm to the victim, and these offenses are rated

1 as more severe because of the likelihood of such harm.

2 But to apply a psychological factor to all offenses
3 is not practical. It does not make sense, for example, to
4 have hearings on every fraud case to determine whether the
5 victim was a little upset, or very upset, in losing his or
6 her money.

7 One additional problem in having too many factors
8 to consider is that it adds to the mathematical complexity of
9 computing the sentence. Perhaps a change in the format of
10 the guidelines could improve this somewhat, but I and others
11 who have reviewed them have found real difficulty in going
12 through all the computations necessary to determine the proper
13 sentence, and this adds to the possibility of human error by
14 judges and probation officers.

15 Another specific suggestion is that prior conviction
16 records, unless the underlying offense is drug-related, do not
17 increase the penalties sufficiently.

18 A judge in our district commented to me that he
19 computed a typical first offense bank robbery came out at about
20 about eleven years under these guidelines, whereas the same
21 bank robber with a previous bank robbery conviction would
22 receive slightly more than a year additional.

23 He and I both agreed that the second instance
24 warranted significantly greater punishment.

25 Also, a criminal history score based primarily on the

1 number of certain types of prior convictions rather than on
2 the basis of prior years served for each prior offense would
3 seem to be less complex and a better measure of criminal
4 background.

5 All of us have seen lengthy rap sheets of felons
6 convicted of numerous serious crimes who have not served as
7 much, if any time, and whose background would not rate nearly
8 as high as they deserve under these guidelines.

9 Currently, defendants with three prior felony convictions
10 for burglary, robbery, narcotics or crimes of violence,
11 caught with a gun, face a fifteen year mandatory sentence
12 without parole. The guidelines provide for a substantial
13 increase in sentence for two prior convictions of this variety
14 but far too small an increase for one such serious conviction.

15 Another area I believe the guidelines to be too
16 lenient is the area of child pornography. Although there
17 is a factor increasing the sentence for children under twelve,
18 the age of the child would be very difficult, if not impossible,
19 to prove in most instances. The guidelines carry a penalty of
20 only about two years, which I believe is too low.

21 Again, instead of a factor for psychological injury
22 in child pornography cases, which would call for a lengthy
23 hearing and appeal and might require the child's testimony,
24 which would add to the injury, the offense guidelines should
25 be raised and the psychological factor should be eliminated.

1 The other fear inherent in any guideline is that
2 the rate of trials will greatly increase and bring the system
3 to a halt.

4 This Commission has attempted to mitigate this
5 problem by allowing totally within the discretion of the
6 trial judge a reduction for acceptance of responsibility
7 and a further reduction for various certified levels of
8 cooperation by U. S. Attorneys.

9 I believe that such provisions are essential to
10 make the system work, but I am concerned that these factors
11 and considerations are clearly made permissive and totally
12 within the discretion of the judge or U. S. Attorney, not a
13 right, subject to hearings and appeals based on these subjec-
14 tive factors.

15 I would support a smaller automatic reduction for
16 a plea of guilty, as this would be an objective standard
17 that would encourage pleas.

18 In conclusion, although these guidelines have their
19 good points, the system overall is too complex, and too
20 difficult to compute, and the profusion of variables will
21 cause the increased likelihood of hearings and appeals in
22 every criminal case.

23 I realize how incredibly difficult your job is in
24 drafting such guidelines under the perimeters set forth by
25 Congress.

1 I also realize how much easier it is to criticize
2 such a task than to propose alternative solutions.

3 It is vitally important to law enforcement that
4 we develop the most workable guidelines possible. I look
5 forward to working with this Commission in future sessions,
6 in helping any way I can in the drafting of these guidelines.

7 I might at the conclusion add a few additional
8 points, that in the relatively short time I had to review
9 the guidelines, I noticed, after I drafted these remarks, some
10 additional things that did cause concern, and I might address
11 those very quickly.

12 One thing that did concern me is under the fraud
13 and deception area, which involves a huge percentage of our
14 crime, there is no factor whatsoever for anything other than
15 actual gain or loss, and this is of great concern on many
16 cases.

17 In other words, if you have an individual that
18 attempted a multi-million dollar fraud, it's going to be
19 considered exactly the same as somebody that attempted a five
20 dollar fraud.

21 It brings to mind specifically a case in Oklahoma,
22 which involved the Governor seeking a multi-million dollar
23 favorable contract for someone, and due to receive a hundred
24 thousand dollars, well, for his -- in kickbacks for his
25 efforts.

1 The thought is that under this fraud and deception
2 guideline, where there must be actual gain, the very fact
3 that law enforcement was able to monitor this crime and catch
4 it before its completion would have caused absolutely no
5 actual gain or loss, and this would be rated as a very nominal
6 crime, and I think that result would have been just devastating
7 under these guidelines.

8 So, there are some other practical things that in
9 looking through these guidelines, I am concerned about, but
10 I think at this time I will go ahead and open it up for both
11 of us to submit to questions.

12 CHAIRMAN WILKINS: Thank you very much, Mr. Price.

13 Do I understand you are concerned that perhaps
14 some of the sentences under these temporary, certainly,
15 guidelines, the numbers are too low, and we just got back
16 from another hearing where we were criticized severely
17 because they were too high.

18 Like trying a case that both sides get mad at you
19 and you are probably doing something right.

20 But I share your concern. These are very tentative,
21 we have to keep in mind, and do two years mean today like
22 six years sentence.

23 One comment that I want to ask you about, Mr.
24 Miller. You talked about the complexity, as you did, Mr.
25 Price, and we are so concerned about the complexity of this,

1 to try and remove the complexity, and any way you can help
2 us do it, we seek that.

3 On the other hand, if we want to recognize, for
4 example, a drug conspiracy to distribute a kilo of cocaine,
5 the mastermind who planned the whole thing, the pilot who
6 flew it in, and the mule who was paid a few thousand dollars
7 to take the cocaine in, they were all convicted of the same
8 statute, conspiracy to distribute.

9 Now, do we want to make a distinction in the
10 sentencing of those people?

11 Should the mastermind get an increased sentence
12 over the mule?

13 And I think you will agree with me, the answer is
14 yes, we want to do that, and to do that, we have got to have
15 a section called "Role in Offense," and we may have to have
16 a hearing so the judge can say, "You are the kingpin. I'm
17 going to give you ten years under these guidelines. And you
18 are the mule. You get three years."

19 How do we make it less complex to identify the
20 characteristics that you as U. S. Attorneys and judges use
21 in reaching appropriate sentence?

22 MR. MILLER: In response to that, it seems to me
23 those decisions are made today not with the benefit of having
24 these guidelines, and it does seem to me that we have, on
25 one hand, it seems to me, a procedure to take away a good deal

1 of judicial discretion, and if we are going to have that, we
2 have got to have a good amount of detail.

3 On the other hand, if we are going to get done what
4 you suggest and have flexibility, I think it means we have
5 got to increase judicial discretion under these guidelines,
6 maybe not take it as far as it is today, which seems to be
7 the trend.

8 But I do think it involves judicial discretion by
9 necessity in all of these examples that you point out, and I
10 do not think that anybody is going to be able to sit down
11 and write every variable that's going to come up and give
12 it a point value and have a probation officer or judge add it
13 up and figure out where they are.

14 I think most judges, and Bill and I were talking
15 before we came down here, maybe we are fortunate in our two
16 districts, but most of our judges can find it out now, and
17 when they do, deliver the appropriate sentence.

18 So I think some narrowing of discretion is in order,
19 but not perhaps as far as has been done in these guidelines.

20 CHAIRMAN WILKINS: Yes, sir, go ahead.

21 MR. PRICE: And, of course, you are caught, as a
22 Commission, within the guidelines the Congress has set forth,
23 which puts you in a position where you cannot determine that
24 law, but one possibility is to have the plea bargaining
25 provision clearly so that the U. S. Attorneys can in the

1 plea bargaining cases determine whether there is major,
2 minor, or whatever, participants.

3 That is at least one possibility that might reduce
4 the number of hearings.

5 I think, too, I wanted to mainly get across in my
6 comments the reason why, or give you all maybe publicly some
7 reason or justification for having the guidelines as high
8 as they are, because I think maybe there are some people
9 that testified here before, have turned around, and simply
10 looked at the guidelines and thinking the average person will
11 serve this amount, and not realizing that the mitigating
12 factors really take care of themselves in this, because if
13 the judge drops significantly below the guidelines because of
14 a true mitigating factor, the odds of the government agreeing
15 with that mitigating factor and not appealing are about
16 ninety-eight percent.

17 So, the higher you have the guidelines, the more
18 real judicial discretion you have, and the less complexity
19 you have, and, so, I think the guidelines are fairly high,
20 for very good reason, and do not let anyone persuade you to
21 go down, and if anything, I would go slightly up.

22 But I think they are very justifiably high, because
23 of the difference between the theory and the reality, and
24 also they really give a combination of the discretion of
25 the judge and the prosecutor acting in concert, give the

1 system some flexibility, because the judge can always drop
2 below the guidelines, if he thinks the prosecutor is obviously
3 not going to care, and he gives some flexibility there,
4 whereas going above the guidelines is always going to involve
5 hearings, appeals and all the process you have.

6 So, plea bargaining is one way. I think having
7 the guidelines as high as possible, believe it or not, adds
8 to the flexibility.

9 CHAIRMAN WILKINS: All right, thank you.

10 Let me ask, any Commissioners to my right have any
11 questions?

12 COMMISSIONER NAGEL: This is for both Mr.
13 Miller and Mr. Price.

14 Mr. Miller, you indicated that in your proposed
15 solution you might suggest that we look at current practices
16 as an anchor, and then specified mitigating or aggravating
17 factors.

18 In view of Mr. Price's concerns about the reduction
19 for plea and cooperation and other factors, and the essentially
20 low sentences we have now, would you be inclined to look at
21 current practice as defined by the sentence that is now given,
22 or current practice as defined by the sentences now served,
23 or some other measure?

24 MR. MILLER: My understanding from the legislation
25 is that that is the study which you already had to make,

1 which is one of the reasons why I used that.

2 I frankly don't know what system you did in conduct-
3 ing the study, but it seems to me that the only fair thing
4 to do would be to look at how much time he actually served,
5 and make some kind of transposition from that to what they
6 would serve under this system, which we all agree is probably
7 going to be more because of the abolition of parole.

8 My suggestion that I put in there, frankly, is
9 a rough guideline at best, but I was hesitant, frankly, to
10 be critical without coming up with something I thought might
11 be workable, because I know it's a tough problem you all have
12 to face, and I'm like Bill, I don't want to sit out here and
13 throw stones unless I have something that I think might work
14 better.

15 But my system would be using the mean that has
16 been imposed across this country in the last three to five
17 years, and thereby come up with something that is apparently
18 acceptable to at least most jurisdictions in the country,
19 and then have these factors that we have talked about on the
20 right hand and on the left hand, and a finding of those, and
21 you all would have to decide whether it takes three aggravat-
22 ing or five aggravating or two to three mitigating to raise
23 or lower that within some kind of boundaries.

24 But I think that gives -- it does what you have
25 tried to do with these guidelines, and that is specify those

1 things that ought to mitigate and ought to aggravate, and
2 then allow judges to have some discretion in finding those
3 and then apply them, rather than saying if you find this, it's
4 worth four points, and if you find this one, it's worth three
5 points.

6 It just doesn't seem to me to be workable in the
7 real world when you get that specific.

8 So, it's a general proposal that I do think has
9 some anchor in reality out here.

10 I don't think we can sit here and say all sentences
11 that have been imposed in our present system are bad, and I
12 think that we go for the mean, translate that from actual
13 time served to actual time of these guidelines, and then give
14 discretion for finding these factors without hearings.

15 It seems to me that anything we do in the sentencing
16 system that makes a sentencing process longer than it is now
17 is going to unduly burden our courts and our entire system.

18 You know, a sentencing now may take twenty minutes
19 in this district, and under these guidelines it's going to
20 take much longer than that in most, and I think it's going
21 to just create an insurmountable problem in court backlog.

22 COMMISSIONER NAGEL: Mr. Price, do you have any
23 difficulty with -- given your concerns earlier about too much
24 jurisdiction or some sentences that are too low -- if we
25 build in a system that is in part replicated in the past?

1 MR. PRICE: Well, I don't think there is a problem
2 especially, well, along two different lines, two worries
3 I think the public and prosecutors have had.

4 For instance, in narcotics cases, the idea that
5 one judge routinely gives probation in some areas of the
6 country, I believe that Congress, believe it or not, while
7 the Sentencing Commission has been meeting, by creating
8 minimum mandatory sentences for certain kinds of offenses
9 has been busily eliminating some of the problems this whole
10 sentencing process was intended to correct.

11 There are now minimums on most serious narcotics
12 cases.

13 There could be some sort of minimum base, which
14 this Sentencing Commission has discussed, somewhere around
15 six months or whatever, on some white collar crimes. That
16 might eliminate the problem with the guidelines as proposed
17 by Mr. Miller. I have not seen it, but from talking to Bob
18 about it, apparently his recommendations were based in part
19 on some kind of procedure followed in the state courts of
20 Colorado.

21 I don't know if this Commission has reviewed that
22 as a possibility, but it would be probably advisable as a
23 possible alternative system.

24 I don't know enough about the system of Colorado
25 to know whether it's likely to work or not.

1 CHAIRMAN WILKINS: Judge Breyer.

2 COMMISSIONER BREYER: Three questions.

3 Mr. Miller, I am addressing your proposal, and I
4 see that you are modeling it after the Colorado idea?

5 MR. MILLER: Yes.

6 COMMISSIONER BREYER: And the difficulty that we
7 have with that, which is set out within pages 15, 16 and 17
8 of the discussion of modified real offense sentencing, what
9 you say, just take the mean of the sentences now served,
10 for what? For what?

11 You see, the state systems, by and large, have a
12 criminal code, where the particular provisions of the code
13 pick out the discrete forms of behavior, like robbery, murder,
14 et cetera.

15 We found that we couldn't do that. Our reasons
16 for not being able to do it were three, really.

17 One of them is we start looking at the U. S. Code,
18 and it doesn't say robbery. It says things like, "Whoever
19 transfers in interstate commerce with intent to promote any
20 unlawful activity."

21 That's a statute, right?

22 MR. MILLER: I understand that.

23 COMMISSIONER BREYER: What's the mean for that?

24 Or even bank robbery. It says something like,
25 "Whoever enters a bank with intent to commit a felony."

1 Now, you can't just look to the particular words,
2 and say, "Well, look at what's charged."

3 And then another problem we have with that is if
4 you took that literally, you would say, well, if they charged
5 sending one fraudulent letter through the mail --

6 MR. MILLER: Yes.

7 COMMISSIONER BREYER: It's a month. Fifty, fifty
8 months. Who decides whether there is going to be one count
9 or fifty?

10 The U. S. Attorney.

11 Who then will decide the sentence entirely?

12 U. S. Attorney.

13 See? I mean there was that problem.

14 Then there was the problem of just not making sense,
15 if we think, well, a person goes into a bank and violates the
16 bank robbery statute, isn't there a big difference whether
17 he has a gun and hits somebody over the head or doesn't?

18 Those are the things that led us away from this
19 simple charge system.

20 Now, if you can think -- I don't mean now, but I
21 mean with your knowledge of how the state court thing has
22 worked out, and if you see a way that we can move towards
23 that, I would be very interested, particularly if you can
24 write it down.

25 MR. MILLER: Well, the only response I would have

1 to that is that it does seem to me it's important not to look
2 at the charges, as you suggest, and my proposal was to look
3 at what the person was convicted of and serving time for,
4 or probation, or whatever it may be.

5 And I certainly agree with you. Bill and I talked
6 about this. Were it that the federal crimes were as specific
7 and neatly divided as the state's, and they are simply not.

8 But I don't know that that's a terribly big impedi-
9 ment to getting to where we want to be.

10 COMMISSIONER BREYER: I agree.

11 MR. MILLER: I am not sure that what we have here
12 solves that problem necessarily. I mean in what we are talk-
13 ing about, frankly, I think you are inheriting those very
14 problems that you identified into these guidelines.

15 COMMISSIONER BREYER: The other thing, that's what
16 I think it comes back to, you, both of you, saying. I thought
17 we had a very good example in Mr. Price -- you see, I'm just
18 as schizophrenic as you -- in the following sentences:

19 "Well, look, this really has to have a lot more
20 discretion to it. You should really have fairly broad cate-
21 gories to define each crime, like bank robbery, and then let
22 them use discretion."

23 And then suddenly, you got worried, because you
24 suddenly thought of the crime of fraud, and said, "Wait a
25 minute, they don't have enough distinction. They ought to

1 have a distinction between attempts, attempts where you can
2 identify the amount of money if it had been stolen and
3 attempts where you can't identify the amount of money, and
4 attempts where that amount of money is likely to be large
5 or small."

6 We are pushed in the same directions. I tend to
7 think a lot of these problems can be solved if we build in
8 discretion.

9 But there is another approach to all these problems.
10 One sort of mind-set says solve them by building in a lot of
11 discretion. A very different sort of mind-set says solve
12 them by every time you find one, proliferate a few more rules.

13 It's really the Department of Justice I think we
14 are getting the most pressure to follow the latter approach.
15 I mean more simply than elsewhere. They are not one hundred
16 percent set on it.

17 But the arguments are if you don't do it that way,
18 you undercut the very purpose of the guidelines to give too
19 much discretion to the judges to pick any old sentence.

20 I put that to you for whatever response you want
21 to make.

22 MR. PRICE: Well --

23 COMMISSIONER BREYER: I tend to be sympathetic
24 to the discretion.

25 MR. PRICE: We think in many ways there should be

1 more discretion, and I think we want not to have white collar
2 crimes continually given probation, for instance, or major
3 narcotics or violent crimes not getting some degree of, you
4 know, some pretty stiff sentence.

5 But, beyond that, we don't have as much -- that much
6 criticism of the judges' discretion in many ways as some do.

7 I think another way you can solve some of these is
8 giving somewhat more leeway to the prosecutor in terms of
9 plea bargaining.

10 I am fearful there is a little bit of tendency to
11 think there is a set crime out there, that, you know, when you
12 talk about multiple bank robberies or multiple checks that
13 have been forged, or whatever, you know what crime there is.

14 What I get fearful about, too, is in the plea
15 bargaining process, under this real offense sentencing,
16 you know a judge is going to be trying to determine what
17 the real offense is, and many white collar crimes or narcotics
18 cases, it's just kind of like when you stopped investigating
19 this crime determines your real offense.

20 You know, he may have defrauded a million people,
21 and you stopped at twenty-five, and if you have that kind of
22 decision or that kind of plea bargaining to determine, or,
23 "We will plea bargain this to twenty-five people, because we
24 really don't know about that two hundred other victims that
25 we would be spending twenty-five years trying to find out

1 about," or in a narcotics case, "We could prove this set of
2 crimes, but we really don't know very well whether there is
3 millions more out there."

4 If there is some kind of judicial review of that
5 plea bargain, by the judge, it starts getting even scarier,
6 because it's going to be hard to determine what is the sub-
7 stantive crime under a real plea bargaining -- real sentence
8 procedure.

9 COMMISSIONER BREYER: One other thing, on your
10 numbers, I am not certain of your gamesmanship kind of theory
11 on the numbers.

12 I mean I thought that these numbers -- I do think,
13 they don't represent anything, the numbers in this. We really
14 haven't made decisions about them, in this draft, and there
15 was no effort to iron them out to make them consistent or
16 reflect actual practice, et cetera.

17 They are what they purport to be, illustrative,
18 so you can figure out what the guidelines are.

19 Well, I would think the judges, most district court
20 judges, will not give a sentence outside the guidelines,
21 whether they think there is an appeal or not an appeal.

22 And some of these numbers, for example, you know,
23 I think it says, for example, a woman from -- you know, there
24 are a lot of women in New York, Judge Weinstein told us, who
25 come from poor African countries, who are persuaded to be

1 couriers. That's the problem with South America. They look
2 innocent. They are on an airplane. They are given a kilo
3 of cocaine.

4 What's an appropriate sentence for somebody who
5 comes from a very poor country, doesn't know quite what's
6 going on?

7 At the moment, what we were told was that judges
8 would not tend to sentence those people, they wouldn't give
9 them forty-five year sentences, and yet this particular
10 number, and that's why it says fifteen years really served,
11 if you get that down to seven and a half by various forms
12 of cooperation, I mean as an experienced prosecutor, do you
13 think you would recommend for such a defendant what would be
14 equivalent now to a twenty-five year term?

15 MR. PRICE: No, but what I think will happen in
16 those kinds of things where the judge and prosecutor both
17 agree, boy, they shouldn't get that, the judge is going to
18 put it way below the guidelines, and the prosecutor is going
19 to cheer.

20 COMMISSIONER BREYER: Maybe you have some judges
21 who would do that, but what would you think, have all or
22 even most judges do that if the guidelines says you can't
23 do it? Don't you think most judges would follow what the
24 guidelines are.

25 I mean my experience with district court judges is

1 by and large they try to follow the law even if there is no
2 appeal in the offing.

3 MR. PRICE: Well, it isn't like this is the law.
4 This is like this is the guidelines that they know are
5 subject to appeal if they are above or below. They are going
6 to very easily drop way down below guidelines if they think
7 that meets the facts of the case. They aren't going to
8 hesitate a minute to do that, especially if they can sit
9 there and look at that prosecutor, and they know in that
10 prosecutor's heart that he or she agrees with them a hundred
11 percent.

12 COMMISSIONER BREYER: Should we recommend the
13 equivalent of the twenty-five year sentence to one of these
14 mules that comes from a South American country or African
15 country? I mean, would you do that?

16 MR. PRICE: No, I wouldn't do that. That is too
17 high. But I'm trying to give you one of the reasons why the
18 guidelines need to be pretty high, and the higher they are,
19 the more discretion comes in.

20 What I was trying to point out is that that's a
21 factor that a lot of people don't know the system, that might
22 be coming from outside and saying, "These guidelines are too
23 high," are not going to realize.

24 CHAIRMAN WILKINS: You are not suggesting we write
25 guidelines for mules. We have got to write them for the

1 average, and then provide discretion so the judge can take
2 care of it.

3 COMMISSIONER CORROTHERS: A question for Mr.
4 Price. Concerning criminal history, you said that we should
5 base this on types of offenses, rather than the length of
6 time that the offender received, and that makes sense.

7 Of course, if you don't use the length of the
8 sentence as an indicator of seriousness, then you need to
9 made sure and know what the offense was.

10 Now, I am wondering, because of plea agreements,
11 pertaining to past offenses, would we be able to ascertain
12 what the specific conduct was.

13 MR. PRICE: You're right, there is problems both
14 ways. You know, regardless of which system you choose, you
15 are going to have problems.

16 The hole I found in there, which I want to point
17 out specially, was it looks like the Commission recommendations
18 when it comes to like three prior serious convictions for
19 violent crimes, or narcotics, or whatever, I mean that's
20 built into the statute right now. At least, just really
21 serious, an extra fifteen years over and above, without
22 parole, in addition to any other sentence. You know, you
23 built in two or more prior serious convictions like bank
24 robbery or whatever.

25 The hole I saw was that if you have a bank robbery

1 in front of you, with one prior bank robbery conviction,
2 that's pretty important. That's a lot more important than
3 adding a year or a year and a half to the sentence. That's
4 much more important.

5 And it seems like to me the sentencing guidelines
6 took into account the two or more convictions for those
7 serious things, but the one conviction for something like
8 bank robbery in your past ought to up the sentence a heck of
9 a lot more than what was indicated.

10 So, I guess my first flaw was that it didn't seem
11 like it upped it on those serious offenses, and I was think-
12 ing that delineating those was maybe the most important of
13 all, because I think you would agree that people with prior
14 convictions for narcotics distribution, for armed robbery,
15 for violent crime, whether there is one or two of them, more
16 severe if two, but for one of them ought to up the guidelines
17 very radically, and that's more looking at the type of prior
18 offense, than necessarily the prior sentence served.

19 CHAIRMAN WILKINS: I take it your point is the
20 more serious your crime today, the less the prior record
21 aggravates it; the less serious, the more the prior record
22 aggravates it.

23 It seems to me it should be the other way around.

24 These demonstrate the current practices, these
25 guidelines, but I agree with you, this needs a lot of study.

1 MR. PRICE: Let me say, too, I have some of the same
2 schizophrenia. It's a lot easier to criticize and talk
3 about the complexity, like, for instance, the fraud area, I
4 almost advocate a little more complexity there, and that
5 flies in the face of what I say.

6 The problem I saw in the fraud area was the differ-
7 entiation of time between the perosn that walks in and
8 falsifies a bank loan. A lot of times they falsify the
9 extent of their collateral, or something, or maybe added one
10 or two pieces of collateral they really don't have, or are
11 about to buy, and that's a typical bank fraud case, and you
12 have tons of those, cause a million dollar loss when the guy
13 went bankrupt, so you look back and under your guidelines
14 that guy is a major criminal.

15 That farmer that came in and said he had an extra
16 piece of equipment that he didn't is the biggest criminal
17 in the world. He would go to jail forever, whereas the
18 person that embezzled a million dollars from a bank is about
19 the same variety of criminal.

20 So, there, I am asking in some of these areas I think
21 a little more complexity may be needed, becuase bank loan
22 cases involving losses are a lot different from embezzlement
23 cases or public corruption cases.

24 So, in that area, I am going against my general
25 comments, and saying there needs to be some differentiation

1 because the crimes are so dissimilar.

2 MR. MILLER: I might just toss into that, I guess
3 the other side of that, however, would be either they would
4 be more complex in the guideline form, or they would be
5 more generous in the giving of discretion, and I guess what
6 I am opting for is the latter, because I don't think we can
7 take in New York South American mules any better than we can
8 take in the farming equipment problem in Oklahoma and Colorado,
9 and that doesn't fit in New York, and the New York situation
10 doesn't fit in Colorado.

11 And I think that all points to the fact that we are
12 not going to, even given the next decade, come up with every
13 conceivable situation we could think of, even in this small
14 group, and cover. The only reasonable option seems to me to
15 be to broaden discretion given to the court.

16 MR. PRICE: That does bring into focus what I was
17 really talking about in complexity. Maybe instead of a whole
18 elaborate point system on aggravation or reducing factors,
19 allow them a little more, similar to the Colorado system,
20 is there one of those factors, but have maybe a certain
21 bottom to those, to certain crimes, that, you know, you don't
22 get less than six months, let's say, if it's X seriousness
23 of white collar crime.

24 I think there may be some ways to reduce that
25 complexity, and along that type. That would be a rather

1 radically different approach than from what's here.

2 CHAIRMAN WILKINS: Let me ask the Commissioners,
3 do you have any questions?

4 Commissioner Robinson? George?

5 COMMISSIONER MAC KINNON: Mr. Miller, do you think
6 the present draft conforms to the statute?

7 MR. MILLER: Yes, I do.

8 COMMISSIONER MAC KINNON: You think so?

9 MR. PRICE: It appears to. That's one of the
10 problems. Some of the things we are proposing, I am not
11 sure whether they do or not.

12 COMMISSIONER MAC KINNON: One of the things we are
13 concerned about are regional variances. Is there anything
14 that you conceive about the offenses that you prosecute,
15 in Oklahoma, and in Colorado, that have any peculiar regional
16 characteristics, either as to severity, or mode of execution,
17 or the sentence imposed?

18 MR. MILLER: Well, I think we just touched on one.
19 This entire region being uniquely agricultural, we do have
20 a considerable amount of activity with banks involving
21 agriculture, and I think Bill pointed out that that may not
22 fit in with the classic bank fraud, or bank embezzlement
23 situation, that you see in other regions of the country.

24 COMMISSIONER MAC KINNON: Well, I found out when
25 I was U. S. Attorney that fifty percent of my cases in

1 Minnesota related in some way to agriculture, or to some
2 company that was processing agricultural commodities, and
3 I think that's generally true maybe, west of the Alleghenies
4 and short of the Rockies.

5 Do you both agree that tax violators ought to get
6 some -- reasonably substantial tax violators ought to get
7 some time?

8 MR. MILLER: Yes.

9 MR. PRICE: I agree with it, too, and I like the
10 way -- one of my gripes has been that it seems that judges
11 did one or the other thing in tax cases, either sent them
12 to prison for three or four years or gave them probation,
13 and there wasn't anything in between.

14 There wasn't any, you know, two months, four months,
15 five months, six months sentences, and I have always had a
16 feeling that somebody that is not a huge tax violator, but a
17 moderate, is deterred about as much by a few months sentence
18 as by a three year sentence, and we ought to have more of
19 the type of sentences that are advocated by this Commission
20 in those type of violations.

21 MR. MILLER: Judge, let me just respond one other
22 thing in that regard. The thing that jumped out at me when
23 I read the guidelines is the presumption of illegality of
24 proceeds not reported on a tax charge.

25 The presumption attendant to that guideline struck

1 me as being tenuous at best, and unconstitutional at worst.

2 I guess it goes further in what I was saying about
3 generating hearings, because as I recall that guideline, the
4 presumption was that the proceeds not reported were -- was
5 that it was illegal, and then the burden was on the defendant
6 to prove in fact that they were legal, which to me says that
7 we are going to generate an entire hearing here on the nature
8 of these proceeds not reported, that I think could again
9 prolong this thing much longer than it should be.

10 COMMISSIONER MAC KINNON: You are talking about
11 things that might constitute an offense or an aggravation
12 of an offense?

13 MR. MILLER: Yes.

14 COMMISSIONER MAC KINNON: That doesn't get into the
15 indictment or into the trial.

16 MR. MILLER: Yes.

17 COMMISSIONER MAC KINNON: Well, of course, as the
18 Supreme Court has remarked, sentencing judges have been
19 relying on those matters for years.

20 Let me ask you this. You indicated that you thought
21 the judge ought to review the plea bargaining, and that gets
22 to a further question as to what role do you now play in
23 adjudging sentences?

24 MR. PRICE: Well, really --

25 COMMISSIONER MAC KINNON: In the sentence adjudged?

1 MR. PRICE: Yeah. Well, the main role that we play
2 is that we set a cap, by the type of charge that a person
3 pleads to.

4 COMMISSIONER MAC KINNON: Or which you might want
5 to dismiss --

6 MR. PRICE: Right, so you set some kind of cap,
7 and generally, what I do, is I figure out the number of years
8 that the judge, the best expectation, is likely to give, and
9 then I try to figure out some charge some place that gives
10 him that discretion to give it, and then we also -- I prefer
11 some charge that makes him look better if he is going to be a
12 witness up there, and that's about it.

13 That's usually the way our pleas are determined,
14 is giving the sentencing judge enough discretion to give
15 him -- and I look at the parole guidelines. I try to figure
16 out if under those parole guidelines, would it really matter
17 whether he got twenty years or whether he got five years,
18 would he get out about the same.

19 If he would, who cares whether he got multiple count
20 charges?

21 MR. MILLER: Of course, there is another factor,
22 and that is the matter of the prosecutor's statement, and
23 the statement of offense, especially if it's agreed upon
24 between the prosecutor and defense, we limit it even further
25 or expand it, whichever the case may be, which was the problem

1 I was pointing out earlier, under these guidelines, on plea
2 agreements, and real offense sentencing.

3 COMMISSIONER MAC KINNON: You make a statement
4 about the offense when the judge comes in all ready to impose
5 sentence?

6 MR. MILLER: We have a prosecutor's statement, which
7 sets forth the offense, and that is reviewed by the defense
8 attorney and taken by the Court, and used in sentencing.

9 COMMISSIONER MAC KINNON: Is that customary, usually
10 or always?

11 MR. MILLER: Always.

12 MR. PRICE: Our --

13 COMMISSIONER MAC KINNON: Do you practice that in
14 Oklahoma?

15 MR. PRICE: I would say part of the time it is.
16 It is negotiated, our plea. Part of the time, it's not.

17 When it's rather obvious, it's not.

18 When it's a situation where there are offenses
19 we got him on, and then there is maybe a whole bunch of
20 offenses out there we don't have quite enough to charge, we
21 negotiate as to what it is really going to be included in
22 that offense, because they are going to want to know, are
23 you going to come in and try to dump a whole bunch of things
24 that you might really have a handle on as part of the govern-
25 ment's version of the offense.

1 I would say most cases it is not negotiated, but I
2 would say in a substantial minority of the cases, it is.

3 COMMISSIONER MAC KINNON: That's all I have, thank
4 you.

5 CHAIRMAN WILKINS: Thank you very much, gentlemen.

6 We appreciate your remarks. Please stay in touch
7 with us and keep in mind the statute under which we labor.

8 I believe we all agree we need flexibility, but
9 we must do what the law tells us to do.

10 MR. PRICE: Also we would continue to study these
11 guidelines and come back for any kind of session whatsoever.

12 CHAIRMAN WILKINS: Thank you. I am sure we are
13 going to call on you again.

14 Our next witness is an attorney, Mr. Arthur Nieto.
15 He is the Chairman of the Criminal Law Section of the Colorado
16 Bar and a member of the Spanish Bar.

17 We are glad to have you with us. We appreciate
18 your taking your time.

19 MR. ARTHUR NIETO: I have submitted written
20 remarks. I mentioned in those remarks that I got the prelimi-
21 nary draft about two weeks ago, and during half times and
22 seventh inning stretches I have reviewed it.

23 It is clearly a handful of work. The two weeks
24 of cursory study I have done doesn't really do justice to it.

25 I am here on my own individual capacity, as a

1 human being, defense lawyer, and not as a member of the
2 Spanish Bar or the Criminal Law Section of the Bar Associa-
3 tion.

4 What I did, when I was going through the guidelines,
5 when I finally got through to the guidelines table, the
6 actual numerical table, I made myself a little graph.

7 On the bottom coordinate is the number of sanction
8 units. On the vertical coordinate is the number of months.

9 And I am sure it wasn't coincidental that the
10 graph turned out as it did. Down at the bottom of the
11 sanction units, there is relatively narrow range of months
12 of imprisonment, if you will. At the top, you have a much
13 wider range.

14 And to the extent that one of the goals of the
15 Commission is to eliminate or to avoid unwarranted disparities,
16 I think that by that mathematical configuration what you do
17 is you avoid disparities as between minor offenses, and by
18 the mathematical formulation you in a way allow for greater
19 disparity among different offenders in the higher sanction
20 unit categories.

21 I am not sure if you wanted to do that, and I don't
22 know if it makes much sense to put a greater emphasis on
23 the eliminating disparity at the lower end of the sanction
24 unit scales and allowing for greater disparity at the upper
25 end, and I would ask that you consider that.

1 The formula is in terms of months of incarceration,
2 and you all did direct a good deal of commentary to other
3 forms of sanctions like probation and community corrections,
4 home detention, fines, et cetera.

5 The more you incorporate those alternative sanctions
6 into the months of imprisonment, I think the more you encour-
7 age disparities as between different offenders.

8 I would also suggest that what you might consider
9 is that you consider more use of non-imprisonment sanctions
10 at the lower end of the sanction units and some kind of
11 limitation on the use of non-incarceration type sanctions
12 at the upper end.

13 Mathematically, how you do it, I mean obviously
14 you all are faced with a large task just by trying to reduce
15 human behavior into numbers, and how you do it with non-
16 imprisonment type of sanctions, I have no idea, although
17 I think that minor offenders ought to have those sanctions
18 available much more so than more serious offenders.

19 We could go on for a long time, and the other
20 witnesses certainly have adverted to the difficulty of the
21 task of numerically quantifying human behavior, but the factors
22 that you have all included do appear to be appropriate.

23 I would also suggest that for every defense lawyer
24 and prosecutor that reads these guidelines, you are going to
25 get more suggestions as to other factors that should be

1 included and perhaps factors that shouldn't be, and in the
2 time I have had to study the situation, I certainly don't
3 have any wisdom about that.

4 But assuming that you get to the point where you
5 have the formula, where you have got the numbers more or less
6 settled upon, you invite comments about the way you propose
7 to apply the guidelines, reading from the preliminary draft,
8 it appears to put the major emphasis on having the court make
9 its own analysis.

10 First, you say you flip to a certain section of the
11 book. You find the statute with which you are charged. You
12 go through that and cross-references and indexes, and it
13 appears that the burden is on the court to engage in that
14 analysis.

15 And I would suggest that once you get past this
16 difficulty of putting the number on everything, what might
17 be a workable way to approach it is to have the Probation
18 Department do an initial analysis, perhaps even with the use
19 of some kind of computerized form.

20 I mean that certainly occurred to me as I was
21 reading the guidelines, that this could probably be made
22 into some kind of form.

23 But I would suggest perhaps the Probation Department
24 do an initial study, submit it to both defense counsel and
25 the prosecutor, have them confer. If there are sanction units

1 which they agree upon, then those should be submitted to the
2 Court, and agreed upon, and then if either the defense or
3 the prosecution feels that there is mitigation or aggravation
4 that is reflected in this Probation Department work, thereby
5 then they will try to agree on that, and if they can't,
6 presumably each side will be allowed to present evidence.

7 We suggest a burden of preponderance, and as a
8 practical matter I think that's the burden that's operating
9 now, in sentencing hearings.

10 Perhaps it's a little low. If you are claiming
11 a conduct outside the charged offense for which the defendant
12 needs to be sanctioned, it seems to me like the preponderance
13 is a pretty low burden when you are in that area because you
14 are asking the Court to sanction somebody for criminal conduct
15 that you don't have to prove beyond a reasonable doubt, not
16 even by clear and convincing, so it seems to me some work
17 needs to be done on that.

18 But some of the other witnesses were referring to
19 the possibility that this structure would create terrific
20 backlog in the courts and would unduly complicate the process.

21 I think if you made use of the adversary process,
22 whereby either side can present whatever they think bears
23 on the issue, and the Court makes a decision based on whatever
24 burden is appropriate, that that to a degree streamlines the
25 process and allows the adversary process to work its way

1 through the sentencing.

2 There is an area of your preliminary draft that
3 proposes to I think multiply the sanction units by one-point-
4 two, and particularly drug offenses, and this strikes close
5 to my heart, where a lawyer is involved, and you also
6 referred to members of our skills, trades and learned pro-
7 fessions.

8 I have some difficulty with that. One reason for
9 my difficulty is that I perceived in the last few years,
10 doing a fair amount of drug defense, that the prosecutor,
11 and the government, have been shifting their focus somewhat
12 away from the defendant, and more towards the lawyers.

13 There is forfeiture provisions, and there is RICO,
14 and the CCE statutes that are directed at the lawyers, have a
15 tendency to have a very chilling effect on the vigor with
16 which you approach one of these offenses if you feel it's
17 going to be subject to forfeiture.

18 I don't think I agree with the proposition that
19 in certain drug cases the participation of lawyers is
20 essential. I don't think that's any truer than, say, in
21 securities violations.

22 I would also ask the Commission to think about
23 perhaps the role of doctors in Medicaid fraud cases.

24 This section applies specifically to drug violations.
25 You don't have corresponding sanctions or there is no sanctions

1 for other types of violations, and I see this as part of some
2 of the thinking that has gone into RICO and CCE forfeiture
3 provisions.

4 Besides that, in another part of the guidelines,
5 I suggest that the particular offender shouldn't be sanctioned
6 in a given sentencing proceeding for conduct for which there
7 has already been a sanction, and I submit to you that lawyers
8 that involve themselves in assisting and facilitating the
9 commission of crimes face another sanction.

10 That is the grievance process, and to add another
11 layer on top of that I think strikes me as unduly complicated
12 and it's kind of inconsistent with the other part of the
13 preliminary draft that says, "We are not going to sanction
14 you over and over again for the same conduct. If you have
15 got sanctioned for it, you have got it."

16 Let's go on to what's pertinent at the sentencing
17 hearing.

18 I speak Spanish. I represent a goodly number of
19 immigration criminal cases in this jurisdiction. Not very
20 many are brought, and with few exceptions, the lawyer is
21 appointed by the Court.

22 In this jurisdiction, the vast majority of
23 immigration crime involves Mexican nationals coming from
24 south of the border into Colorado.

25 I looked at the range of sanction units you all

1 have ascribed in this immigration violation, and they appear
2 to me to be quite consistent with what I have seen happening
3 in the last ten years in this jurisdiction.

4 The amount of sanction units resulting in sentencing
5 is around a year, maybe two if there is a lot of cocaine
6 involved, if there is the use of a gun, if there is a lot
7 of monetary amount involved in the smuggling, that looks
8 pretty consistent to me.

9 Mr. MacKinnon was referring to regional considera-
10 tions and how that might affect your thinking about the
11 preliminary draft.

12 I have communicated with lawyers who represent
13 immigration defendants as well as drug defendants in areas
14 closer to the border, Miami, for instance, or El Paso,
15 or California. My perception from those communications
16 is that an immigration case brought in Denver is going to
17 bring the same defendant a goodly higher sentence if the
18 same case is brought in San Diego or Miami, and I think the
19 same is true with drug cases, although to a lesser degree.

20 As you are closer to the border, the defendants
21 are more likely closer to the source of the drugs, and so,
22 I think that there is certain sense to the courts engaging
23 in this regional variation.

24 I think the drug problem in Miami is probably much
25 more aggravated and much more of a local concern than in

1 Colorado.

2 Now, there has been a good deal of politicking
3 and rhetoric lately about drug offenses. The government
4 isn't in favor of the Jar Wars, and the President has pretty
5 much told Congress, "We want to have the death penalty in
6 certain drug cases and we really want to crack down on
7 this crack business."

8 I mention that because drug law is particularly
9 sensitive right now. There are some changes going on right
10 now in the Congress having to do with the immigration law.

11 The point is that as time passes, different types
12 of offenses get more or less emphasis from the government,
13 and I think the good feature about the preliminary draft is
14 the monitoring and measuring function, as a continual part
15 of the process that I think should always be part of the
16 process, particularly immigration.

17 If you look at the course of immigration law over
18 the last two hundred years in this country, immigration is
19 radically different than what it was a hundred years ago
20 and I daresay will be different in the next fifty.

21 I think it's very important for you all to build
22 in a monitoring function that takes account of changes and
23 vital attitudes and the governmental priorities so that we
24 are not stuck with a codified system of numbers that can't
25 be changed to reflect reality.

1 My reservation about that is kind of like with
2 prices of housing. Once the price goes up to a certain
3 level, rarely does it come down. And once you all settle
4 on sanctions at a certain level for a given type of conduct,
5 or characteristic of an offender, I think it's going to be
6 hard to reduce those, but I think the possibility should be
7 there for doing that.

8 That's all I have.

9 CHAIRMAN WILKINS: Thank you very much. I appreciate
10 those remarks.

11 I am interested in your assessment of the area
12 of the guidelines we called "Acceptance of Responsibility."

13 Under current practices today, the defendant who
14 pleads guilty receives a less severe sentence than he would
15 have received if that person stood trial, and the discount
16 varies according to the nature of the crime.

17 But it's a real fact of life, you get a discount
18 for pleading guilty. For various good reasons, perhaps.

19 Do we want to continue that process, or not?

20 And the flip side of that is if we have to write it
21 down, aren't we saying, "You get punished if you stand trial
22 and exercise that constitutional right."

23 We don't want to do that, and what we have said
24 is, "Judge, you may reduce it, whether he stands trial or
25 pleads guilty, you may reduce the sentence under the

1 guidelines up to twenty percent if you find this defendant
2 sincerely accepts responsibility for his or her criminal
3 act." And we give examples of things.

4 What do you think about that, or should we just
5 say, "Stand trial or plead guilty, you get the same sentence."

6 MR. NIETO: Well, I think it's kind of a -- I mean,
7 if that's what the rule is, there are certain ways you can
8 manifest your acceptance of responsibility.

9 As a defense lawyer, you take your client aside
10 and say, "Listen, say these words when you are going before
11 the judge. When you are being interviewed by the Probation
12 Department, be sure to mention how clear your conscience is
13 of your criminality and how sorry you are, and plead guilty
14 and accept the consequences."

15 If that's what the rule is, I suspect that defense
16 lawyers like myself will react to the rule to get maximum
17 benefit for our clients.

18 I don't think in my perception that I have seen
19 clients who stand trial and get convicted of an offense,
20 or plead guilty to that very same offense, and find themselves
21 being penalized for going to trial.

22 I have seen very little, and clients believe that
23 that's the case, and I have counseled a few clients that
24 they shouldn't feel that way.

25 I hope I am never wrong, but I haven't seen that

1 taking place in this jurisdiction.

2 CHAIRMAN WILKINS: Thank you. Any questions to
3 my right?

4 Any questions from any of the Commissioners?
5 George.

6 COMMISSIONER MAC KINNON: How many lawyers, in
7 Colorado, that you know of have been disciplined by the Bar
8 in connection with narcotics?

9 MR. NIETO: Well, I also happen to serve on the
10 Grievance Committee.

11 CHAIRMAN WILKINS: You are a good person to
12 answer the question.

13 MR. NIETO: I dont' have the statistics, but I
14 assure you we get together every six weeks as an entire
15 panel, and from time to time we split up in groups to hear
16 the crime, and it is a fairly routine matter in the grievance
17 process to see lawyers getting involved in using drugs.

18 COMMISSIONER MAC KINNON: In using?

19 MR. NIETO: Right. As far as dealing drugs,
20 distributing drugs, in the few cases that have happened,
21 the Grievance Committee is very quick, frankly at the
22 direction of the Supreme Court, to issue suspension of the
23 license and put the burden on the lawyer to show cause why
24 his license should be reinstated.

25 COMMISSIONER MAC KINNON: How many have been

1 disqualified or suspended?

2 MR. NIETO: Disbarred?

3 COMMISSIONER MAC KINNON: Disbarred.

4 MR. NIETO: For drug offenses?

5 COMMISSIONER MAC KINNON: Yes.

6 MR. NIETO: I can't think of any in the past few
7 years.

8 COMMISSIONER MAC KINNON: Well, it was my experi-
9 ence when I was U. S. Attorney that we got very little help
10 from the Bar disciplinary action when we recommend or call
11 some violation of a lawyer to their particular attention.

12 What did you find out about the drug sentences in
13 Miami, compared to what you impose here in Denver?

14 MR. NIETO: That they are higher, uniformly.

15 COMMISSIONER MAC KINNON: They are higher or
16 uniform?

17 MR. NIETO: Uniformly higher.

18 COMMISSIONER MAC KINNON: Higher, uniformly, higher.
19 Here?

20 MR. NIETO: In Miami.

21 COMMISSIONER MAC KINNON: In Miami. How about
22 California?

23 MR. NIETO: Some of them. This is not based on an
24 empirical study. This is lawyers talking.

25 COMMISSIONER MAC KINNON: I know. We have our own

1 general impression they don't impose as severe sentence for
2 drug offenses, for possession generally, say, or distribution,
3 minor distribution, in Miami, as they do here. It's known
4 as a more serious offense here. That's your conclusion?

5 MR. NIETO: That possession is the more serious
6 offense here?

7 COMMISSIONER MAC KINNON: Possession or distribution.

8 MR. NIETO: No, based on my jawboning with other
9 lawyers, my impression is that possession would be treated
10 more seriously in Miami than here.

11 COMMISSIONER MAC KINNON: Is that right?

12 MR. NIETO: Right, but you have to recognize the
13 source of my information.

14 COMMISSIONER MAC KINNON: Yes, and the quantity.
15 Did you notice any difference between the quantities involved,
16 or did you get down to that level?

17 MR. NIETO: My perception is that you see larger
18 quantities being involved in cases in Miami than, say, in
19 Colorado, because a good amount is distributed by the time
20 it gets to Colorado.

21 COMMISSIONER MAC KINNON: Thank you.

22 CHAIRMAN WILKINS: Thank you very much. We
23 appreciate your testimony and the work you did in preparing
24 for it.

25 We will call our next witnesses up, please.

1 Mary Ann Castellano, who is the Victim-Witness
2 Coordinator in Denver, Colorado, and also we have Victim
3 Advocates with us, who have been active in this field,
4 Ms. Terry Lee Martin, Mr. Lynn Bogle and Ms. Gena Campbell.

5 MS. MARY ANN CASTELLANO: I would like to extend
6 my appreciation to the Commission for this opportunity to
7 address the Commission regarding the issue of psychological
8 injury of the victims of several violations.

9 As Victim Advocate, I am concerned about proposed
10 evaluation of the victim's psychological injury that would
11 as the guidelines state be established by a preponderance
12 of the evidence by expert testimony.

13 I personally feel that would only prolong the pain
14 the victims have had to endure throughout the whole judicial
15 justice process.

16 The victims have experienced the pain of the event,
17 the trial, the confusion of plea negotiations, and now would
18 be asked to submit to a battery of tests to insure that they
19 in fact have been psychologically harmed.

20 This information would then be presented to the
21 Court by expert testimony.

22 This approach would remove from the victims the
23 possible opportunities to address the Court themselves.

24 Who knows more than the victim the psychological
25 pain they have endured, and who can present it better than

1 the victim?

2 The opportunity to address the Court should be
3 afforded to every victim in sentencing, thus allowing the
4 judge to receive the information directly, without the use
5 of an intermediary.

6 This would enhance the ability of the Court to shape
7 the sentence to fit the offense.

8 At sentencing the defendant is accorded the right
9 to address the Court. Let us not forget the victim, and
10 invite them to speak if they so choose at that time.

11 This approach is used in our state courts and has
12 not brought any undue confusion to the sentencing process.

13 In addition, it's considered an essential component
14 in the healing process.

15 Those are my comments, and now, what I would like
16 to do is have two victims of offenses that have been prose-
17 cuted by our office speak to the Commission and they are
18 Ms. Terry Martin and Mr. Lynn Bogle.

19 MS. TERRY MARTIN: I really appreciate this
20 opportunity to be here. It's difficult for me, and I think
21 it's wonderful that you care, and that you allow me to be
22 here.

23 In January of 1983, my husband was abducted from
24 a shopping center. He and his car were taken. His body was
25 found in Kansas three days later, where he had been shot at

1 that time, and the -- the apparent motive for this was to
2 acquire the vehicle, and to leave.

3 It took approximately a year for the criminal to
4 be apprehended. And then, several months later, he was tried.

5 It was -- very difficult. My anger, I think, kept
6 me going during that time, my desire for him to be apprehended,
7 and tried, and sentenced.

8 And I was very gratified by the sentence. It was
9 three hundred years.

10 Before that, the trial and that time, I had been
11 told by my attorney, and friends, in discussing what might
12 happen, what the sentence could be, and I think at that time
13 I was naive to think that a life sentence would be life.

14 I learned during that time that there was a
15 possibility of parole after thirty-three years, and I was
16 really concerned, that this person might be paroled in
17 thirty-three years.

18 To me that was not long enough, so, I will have
19 to say that -- that I was extremely gratified by the sentence,
20 and the belief that he would not be allowed back on the
21 streets, and seeing that in fact happen has enabled me to
22 go on with my life.

23 CHAIRMAN WILKINS: Thank you.

24 MR. LYNN BOGLE: Good morning. I also thank the
25 Commission for the invitation to come and speak to them.

1 About approximately three years ago, I became
2 involved with two gentlemen in a loan fraud scheme.

3 The two gentlemen were from California. Came into
4 Colorado. At that time I was farming or ranching down in the
5 San Luis Valley, southern Colorado.

6 Myself and eighteen -- or seventeen other individuals
7 were victimized by these gentlemen. Initially, they took
8 over six hundred thousand dollars in advances from all the
9 victims. Indirect losses of the scheme totaled over fifteen
10 million dollars.

11 About a year ago, almost to the day now, the trial
12 was held here in this courthouse. Both gentlemen were
13 sentenced separately, or one plea bargained. One went to
14 trial. The one that plea bargained was probably the kingpin
15 of the whole thing.

16 He was already serving a sentence on a similar
17 charge out of California, a four year sentence, in a federal
18 institution. He had, due to the plea bargain agreement, on
19 his eighteen counts, he was sentenced to an additional two
20 years, so making a total of six years he was to be incarcer-
21 ated.

22 The other gentleman went to trial and he was
23 sentenced also to six years.

24 Out of the group of people -- go back a little in
25 history -- group of people involved, about three of the

1 eighteen survived in the agribusiness. The rest have
2 indirectly because of these people or directly have lost
3 their -- all their assets, and had to go into different
4 things, or start over, as I have done, which I am young
5 enough to do it. Some of the people were not young enough
6 to.

7 I lost two million dollars, in assets. I felt
8 very bitter after the sentence, six years, for how many
9 lifetimes of work, and time?

10 I have read part of your guidelines, thumbed
11 through to the fraud section and read part of it.

12 It's a little hard for me to understand. I'm not
13 an attorney. It's a little tough to understand, but I think
14 that these guidelines for white collar crime are not near
15 severe enough. These crimes are just as serious as any other
16 crime, murder, kidnapping, extortion, it's just as serious,
17 white collar crime, but it just seems to be handled by our
18 courts during sentencing as a very light offense.

19 Six years did not justify the crime by any means,
20 and these gentlemen will probably be out on parole in two
21 or three years.

22 Which brings me to another point, restitution
23 within -- as a part of sentencing.

24 I realize it's awfully hard for a court to say,
25 "Okay, retribute back six hundred thousand dollars to the

1 people you bilked it from," because the chances are they
2 don't have it.

3 But there should be ways to enforce after they get
4 out of prison, excuse me, to enforce the restitution process
5 upon these people.

6 I mean they shouldn't stop paying, just because
7 they served six years in prison or five years in prison, or
8 whatever. They should make that a right, to the victim.

9 I also work part time at the Prowers County Sheriff's
10 Department at the present time. We see a lot of cases go
11 to court, that the sentences are reduced drastically because
12 of plea bargaining.

13 I am not an advocate of plea bargaining. I realize
14 that this would speed the judicial system and stop a lot of
15 backlog which the courts already have. But a lot of times
16 the criminal himself, I feel, gets by with a lot less of a
17 sentence, because of a plea bargain agreement.

18 Perhaps this should be addressed a little more
19 seriously in sentencing.

20 Also the restitution, and also I feel the sentences
21 from white collar crimes should be increased.

22 That's about all I have. Thank you, sir.

23 CHAIRMAN WILKINS: Thank you very much. This
24 Commission is very concerned about the rights and feelings
25 and opinions of victims. We have been working with various

1 victim advocate groups without exception.

2 We are very concerned about this idea of psycho-
3 logical harm. It's not anywhere in the federal law you find
4 this as a provision for sentencing, but we all know that
5 judges do and should take that into consideration.

6 The issue, at least the preliminary draft identifies
7 it as an issue, but how do we include this in the sentencing
8 process, and we have suggested one way, and I might add we
9 did not intend to indicate it would exclude the victim from
10 having the right of elocution. We, of course, encourage
11 that.

12 But I think generally what we are grasping for is
13 the best way to include this issue, harm, called psychological
14 injury, in the sentencing process, and we are most interested
15 in hearing how you think we can best do it.

16 Even now, of course, as you give it more flexibility,
17 we think it should be there. The question is how should it
18 be put in there?

19 MS. CASTELLANO: Just in looking over the guide-
20 lines and speaking with other people regarding it, one
21 concern we have, again, is, you know, how will -- you talk
22 about the expert testimony, and does this mean -- maybe the
23 confusion I have -- does this mean the prosecution will have,
24 you know, their doctor, you know, evaluate the victim, and
25 then the defense will have to have theirs, and then the

1 person is brought in, and what will this psychiatrist find
2 and what will the other?

3 And to me that's victimization again. And I guess
4 maybe because here in the state, the victim can get up at
5 that sentencing, and we are not talking about an hour's worth
6 of testimony before the judge, but the Court knows, it has
7 certain questions it would like to ask the victim, and they
8 can get this, the emotional pain and trauma, and at that
9 time, and decide on it.

10 The only concern I have, and I hate to use this
11 phrase, it has been used so much, but this is victimizing,
12 the victim.

13 CHAIRMAN WILKINS: I think the point is well made.

14 COMMISSIONER BREYER: I think that is a good point,
15 because we are debating between two approaches, see what
16 you might then favor, which might be absolutely the right
17 thing to do, is to include the psychological harm, some kind
18 of unusual psychological harm, or psychological harm accompany-
19 ing the crime as an aggravating factor.

20 We say, "Judge, you can go outside the guidelines
21 where this is present," and then for the judge to find out
22 whether it is present, he would have to hear the victim, and
23 that would be done informally.

24 That's something we are thinking about, certainly.

25 The problem with the formal approach is just what

1 you said, you have a big hearing, and everybody hears it.

2 COMMISSIONER CORROTHERS: Mr. Bogle, it would appear
3 that the plea bargain was the difference between a two year
4 sentence and a six year sentence from your testimony, because
5 the first individual you indicated has a prior offense, and
6 that the judge just added two years, which was saying to me
7 he got two years for what he did to you, and he was the
8 leader.

9 The second offender, who got the six years, who did
10 not plea bargain, do you know whether he had a prior record?

11 MR. BOGLE: He did not have a prior record at all.

12 COMMISSIONER CORROTHERS: Was that just a difference
13 of plea bargain that made a difference of four years?

14 MR. BOGLE: Yes. Yes, it was.

15 COMMISSIONER CORROTHERS: Thank you.

16 COMMISSIONER ROBINSON: Ms. Castellano, what
17 would you think about an approach of psychological damage
18 used as criteria, not psychiatric testimony about disorders
19 or something like that, but use more objective criteria,
20 like what sort of dysfunction in this person's real life,
21 like was this person unable to work for a time, did they
22 have to be committed to a doctor's care for a certain period
23 of time, or those sort of dysfunction factors that are
24 essentially within the knowledge of the victim?

25 Now, what that would mean is still that there would

1 be what you might call continuing victimization. That is,
2 you still have the victim give some statement about what the
3 nature of their dysfunction is. You will avoid the battle
4 of psychological experts.

5 MS. CASTELLANO: Right now, why can't the victim
6 impact statements be used? I know they are used effectively,
7 and you do -- you ask about the psychological injuries, the
8 physical injury, the loss of the funds, whatever, all of
9 that. All of those questions are found in the victim impact
10 statement.

11 COMMISSIONER ROBINSON: So you are not opposed to
12 having that sort of information elicited from a victim?
13 What you are opposed to is going beyond to have psychological
14 experts?

15 MS. CASTELLANO: And then it generates another
16 hearing and then we add that part on the other part of the
17 criminal justice system, and you know how long it will take
18 to finally have closure on that.

19 COMMISSIONER ROBINSON: Well, there may be some hard
20 choices here. I'm not sure exactly what Judge Breyer has in
21 mind when he talks about an aggravating factor, if the
22 implication is where you don't have to have a hearing.

23 The hard choice may be either you suffer some sort
24 of hearing or you have guidelines without psychological
25 injury at all.

1 The fact of the matter is that every sentencing
2 under the guideline system will depend on facts, which they
3 all do, will all generate some kind of hearing, then I
4 suppose having one additional thing in the hearing, that
5 being psychological injury, is not significant harm.

6 If you were faced with that choice, that is having
7 the victim actually come into court and say, "This is what my
8 dysfunction is," as opposed to not having it in the guidelines
9 at all, which is your preference?

10 MS. CASTELLANO: I would like to have it there,
11 but I think you can simply fill that by having that through
12 the victim impact statement, and hopefully the Court will
13 allow the victim at sentencing to make a few remarks, and I
14 really believe that that will take care of it.

15 COMMISSIONER ROBINSON: Thank you.

16 COMMISSIONER MAC KINNON: As I see the problem on
17 the expert testimony, vis-a-vis the more lay testimony, with
18 psychological injury you can use both, but -- and I think
19 you were critical of the fact that the present more or less
20 limited it to expert testimony?

21 MS. CASTELLANO: Yes.

22 COMMISSIONER MAC KINNON: Well, I don't think that
23 will survive long. But the other side of the coin is that
24 you ought to have some expert testimony because it's a factor
25 where some expert testimony can be valuable, and to leave it

1 just to the non-expert testimony, you get into a lot of
2 description of factors that don't weigh too heavily with a
3 judge who is experienced in dealing with all these problems,
4 and there are family considerations, and, of course, all of
5 these crimes involve some effect on other individuals, and to
6 get to the point where you are going to limit it to them, and
7 not have some expert testimony, would be a disservice actually
8 to the victim.

9 The other thing is that the victim is a very
10 poor witness in court at the time of the sentencing, to
11 influence a judge on a sentence, and I think experience has
12 proved that the greatest impact on the judge's sentence is
13 the interview that the probation officer has with the victim,
14 and which is communicated to the judge, and that he evaluates
15 it, and in my experience, I have found relatively few victims
16 that wanted to get up in open court, and make some kind of a
17 statement as to a particular offense.

18 I have had victims -- well, when you put them on
19 the stand in a bank robbery, and you ask them if they identify
20 the bank robber, they say, "Yeah, he is over there," and they
21 are afraid to look at him.

22 And a lot of these -- many victims, because of
23 emotional considerations, aren't the best witnesses, in
24 court, and particularly at the time of sentencing, because
25 the judge has made a very thorough review of the case, and

1 I will venture to suggest that most judges have a fair
2 concept of what they are going to adjudge by way of a sentence
3 when they go into court, and they are maybe influenced some-
4 what by the elocution of the defendant or lawyer or something.

5 But I think the general parameters of the events
6 have been made prior to that time.

7 MS. CASTELLANO: I agree with that, but one issue
8 I must take is that I -- I guess because of my role as an
9 advocate, and because I have worked within the criminal
10 justice system at the state level, and I know -- I know
11 victims who, yes, are frightened, they are frightened to
12 testify, and they -- invited to come to the sentencing,
13 they decline. Okay, and that's fine.

14 But there are those, who denied that time -- and
15 for me to have to tell them, or someone to tell that that,
16 "We are going to have this expert testimony as to how you
17 feel," when maybe the most beneficial thing for them to do
18 is to testify before the Court themselves, I don't think
19 that would be appropriate, and I would hope that that would be
20 a consideration, for those who feel they can and would like
21 to do it, that they have a right to do that.

22 COMMISSIONER MAC KINNON: I notice that a number
23 of courts in the country, and yourself here probably in
24 Colorado, do allow that. My recollection is that in England
25 they turned it down cold. I forget exactly the reason now.

1 Well, Ms. Martin, I take it that your offense was
2 prosecuted in state court?

3 MS. MARTIN: No.

4 COMMISSIONER MAC KINNON: It wasn't?

5 MS. MARTIN: It was the kidnapping charge that was
6 the strongest, the --

7 COMMISSIONER MAC KINNON: How did he get a three
8 hundred year sentence in federal court?

9 MS. MARTIN: I'm not -- I can't answer.

10 COMMISSIONER MAC KINNON: You can't answer that?
11 But I just wondered. Well, that is a lot.

12 MS. MARTIN: The criminal earlier this year asked
13 to be brought back to Kansas to be tried for the murder and
14 I was asked at that time by the authorities in Kansas how I
15 felt about it.

16 Fortunately, they gave me some time to think about
17 it. My initial reaction was, yes, bring him back to Kansas
18 and try him for the murder and try him for everything he
19 ever did.

20 However, I realized, he had nothing to lose, by
21 leaving, himself. He had everything to gain by probably
22 attempting a break or something else, and that was his motiva-
23 tion for being brought back.

24 COMMISSIONER MAC KINNON: Yes.

25 MR. WILLIAM GRAVES: Judge MacKinnon, if I might

1 mention that, the sentencing judge in that matter is in the
2 courtroom now and I think he is going to be testifying as a
3 witness.

4 COMMISSIONER MAC KINNON: Thank you. Mr. Bogle,
5 I was wondering about your particular fraud.

6 What was the nature of it? How did it operate?
7 How did he get that money out of those people?

8 MR. BOGLE: Well, it really wasn't very hard. It
9 was a very, very good scheme, probably as -- Bill Farrell,
10 the -- your U. S. Attorney, the U. S. Attorney's Office,
11 prosecuted the case. He has told me it was probably one of
12 the best ones he had ever seen put together.

13 I think it's very good. It's clever. You could
14 check out these individuals from -- which I did. I took a
15 lot of time. I had a private investigator just to check on
16 these guys for me.

17 It ended up being a very fool-proof scheme. It
18 looked very legitimate.

19 COMMISSIONER MAC KINNON: Well, what did he do?
20 What did he offer?

21 MR. BOGLE: Okay, at that time -- I will give you a
22 little history. At that time, agriculture, and still is, in
23 Colorado, was in trouble, as it is all over the country.

24 Traditional lending institutions were not lending
25 expansion capital to any agribusiness, such as your insurance

1 companies, local banks, they were really cutting down on
2 agriculture, because they were so far extended into agricul-
3 ture.

4 So, therefore, these guys came in, and you ended
5 up putting a ten percent front to institute the loan pro-
6 ceedings, of which the loan itself was guaranteed by an
7 annuity, that was also secured by certain real estate and
8 chattel property, of each individual.

9 At that time, you gave them the ten percent
10 advance fees, and they approved the loan, which took some
11 time. It took almost a month to get approval on it.

12 Then at that time they would disburse the funds,
13 to you, to be used as specified within your loan application.

14 Well --

15 COMMISSIONER MAC KINNON: Well -- go ahead.

16 MR. BOGLE: Okay, and at the same time, after you
17 received the loan, there was a portion of that went to commis-
18 sions for them.

19 Of course, as far as it ever got was into the
20 advance fees, and they just rocked along, making excuse,
21 after excuse.

22 COMMISSIONER MAC KINNON: Well, where did the
23 six hundred thousand dollars come from?

24 MR. BOGLE: Okay, those were all advance fees.

25 COMMISSIONER MAC KINNON: Advance fees paid for

1 what? To get a loan?

2 MR. BOGLE: Yes.

3 COMMISSIONER MAC KINNON: From whom?

4 MR. BOGLE: From each individual. Oh, where the
5 loan came from?

6 COMMISSIONER MAC KINNON: Yes.

7 MR. BOGLE: It was supposedly they were arranging
8 it through a -- an international banker, out of New York.

9 COMMISSIONER MAC KINNON: And did -- were the
10 loans actually made for six hundred thousand dollars?

11 MR. BOGLE: No, they were not.

12 COMMISSIONER MAC KINNON: So all the -- the offense
13 was the accumulation of the fees, for a non-existent service,
14 that was never rendered?

15 MR. BOGLE: Yes, I believe it also involved some
16 interstate -- or interstate use of the wire services.

17 COMMISSIONER MAC KINNON: That's what I was wonder-
18 ing, whether it was a mail fraud or wire fraud.

19 MR. BOGLE: Wire and mail fraud.

20 COMMISSIONER MAC KINNON: Wire and mail fraud.

21 Thank you.

22 CHAIRMAN WILKINS: Thank you, all of you, very
23 much. We appreciate your attendance.

24 We are going to stand in recess for not more than
25 ten minutes. We will start back just prior to the noon hour.

1 (The public hearing recessed from 11:49 a.m. until
2 11:59 a.m.)

3 CHAIRMAN WILKINS: We are honored to have as our
4 next witness Judge John L. Kane, United States District
5 Judge, here in Denver, Colorado.

6 Judge, thank you for appearing.

7 JUDGE JOHN L. KANE: Thank you, Judge Wilkins.

8 I suppose as the one judge from this district, that
9 I should depart from the schedule just a moment to welcome
10 all of you to our court, and especially to this particular
11 courtroom. I think it has some bearing on my remarks.

12 If you look to your left, and nearest to you,
13 you will see the portrait of the first judge to occupy a
14 seat on this court, Judge Moses Hallett.

15 When Colorado was a territory, he was a judge, and
16 then he became the federal judge, when the federal District
17 of Colorado was established.

18 He was succeeded by Judge John Lewis, whose daughter
19 is still alive today, and whose husband is the senior partner
20 of one of the largest firms in Denver.

21 Then there is Judge J. Foster Symes, who was a judge
22 here, quite a colorful personality, so I'm told.

23 Judge Lee Knous, who was the Governor of Colorado
24 before becoming a member of this court.

25 On your right, closest to you, and all five of

1 these judges on your right, I must say I have had the privi-
2 lege of being a judge with them, and also of having appeared
3 as an attorney before each one of them.

4 Judge Jean Breitenstein, who passed away this past
5 February, at the age of eighty-five, was frequently called
6 upon by the Supreme Court of the United States to serve as a
7 Master, and served on this court, and then was elevated to
8 the Court of Appeals, where he most certainly was regarded
9 as a judge's judge.

10 Next to him, and still on the bench, as the senior
11 judge on our bench, Alfred A. Arraj, who was eighty just this
12 past September. I was appointed when he took senior status,
13 but I surely state for the record that I have not replaced
14 him.

15 Next to him is Judge Hatfield Chilson, who is still
16 an active member of our court. Judge Chilson is I think
17 eighty-five, or eighty-four, at this juncture.

18 In addition to being a judge of this court, he was
19 at one time a district attorney. At another time, he was the
20 Solicitor General of the U. S. Department of Interior.

21 He and Judge Arraj were appointed, as was Judge
22 Breitenstein, by President Eisenhower, and recently Judge
23 Arraj was inducted into the Colorado Sports Hall of Fame.
24 He was the original inventor of the running jump pass, and
25 he says he did that because he was so short he couldn't see

1 over the linemen in order to throw the ball.

2 Next is Judge William E. Doyle, who died this past
3 January, an extraordinarily distinguished jurist, who was on
4 the state district court in Denver. Before that he was a
5 prosecutor in the Denver District Attorney's Office. He was
6 on the Colorado Supreme Court, and then appointed to this
7 court by President Kennedy, served here, and then was elevated
8 to the Tenth Circuit Court of Appeals by President Nixon.

9 And following him, the last picture is of former
10 Chief Judge Fred Winner, who resigned from the bench after
11 having taken senior status, and now is a practicing trial
12 lawyer, some say once again, and some say as always.

13 I make that introduction, sincerely welcoming all
14 of you here, and also to point out that more than half of the
15 judges of this court are presently alive and either judges
16 or practicing law.

17 This is a very, very young area. In the 1880's,
18 the Colorado Session Laws were printed, in English, in
19 Spanish, and in German, because of the enormous number of
20 German immigrants who came from Russia, from the Volga River
21 Valley, to populate the northeastern part of this state,
22 and all of these different cultures met here in Denver.

23 And, of course, as district judges for the entire
24 district, we try cases in the metropolitan area of Denver.
25 We are also authorized to sit in Boulder. We are authorized

1 and do sit in Grand Junction, Durango, in the southwest
2 corner of the state, and in the city of Pueblo, one hundred
3 twenty miles south.

4 Before going into my formal remarks, I have one
5 other matter I would like to mention, because it was raised
6 just a moment ago, by Judge McKinnon.

7 Before appearing here, I had sent to the Commission
8 a copy of my opinion in the United States vs. O'Driscoll,
9 and another opinion of mine that was United States vs.
10 Hendee.

11 Today, I have given you another opinion of mine.
12 That is United States vs. Jones, and I will refer to that
13 opinion in my formal remarks.

14 But, to answer Judge MacKinnon's question, the
15 opinion which has previously been provided was delivered by
16 me, in open court, when Mr. O'Driscoll, the defendant, was
17 standing to be sentenced, and I did that, and I frankly
18 would do it again today, if called upon to repeat my
19 sentence.

20 The sordid history of Mr. O'Driscoll does not need
21 to be mentioned in detail at this time. Sufficeth to say
22 that I was confronted with a person whom I felt, and clearly
23 everyone else did, that was involved in the case, was a
24 psychopathic killer, who should never see the light of day
25 again without having cross-bar shadows between him and

1 daylight.

2 And the way in which the sentence was done, Judge
3 MacKinnon, was this. Under the kidnapping statute, the
4 penalty is for any terms of years or for life.

5 Had I sentenced Mr. O'Driscoll to life, he would
6 have been eligible for parole consideration in ten years'
7 time.

8 There is another statute. I can't -- it's in the
9 opinion, but I can't recall the specific citation, which says
10 that a judge may sentence a person and fix the parole eligi-
11 bility date, at less than one-third of the sentence.

12 So I sentenced Mr. O'Driscoll to three hundred years
13 on the kidnapping count as any term of years, and fixed his
14 parole date at ninety-nine years.

15 In addition to that, I gave him twenty-five years
16 consecutive to a bank robbery conviction, and I think that if
17 you look at the case and see the history of this particular
18 individual and the record, that you would agree with the
19 Tenth Circuit Court of Appeals when they affirmed that
20 decision.

21 His attorney, as he should have, filed a petition
22 for writ of certiorari, which was denied by the United States
23 Supreme Court.

24 But what I want to state here and now, I think for
25 the first time publicly, in answer to the obvious question,

1 why would I put so much time on an individual, and I did
2 mention that, alluded to it in the opinion itself, and the
3 answer is this, that the United States Parole Commission
4 sought to have the Solicitor General of the United States
5 confess error, in that case, on the petition for certiorari,
6 because, it represented to them, an undue interference with
7 agency discretion.

8 And I mention that because some of the comments I
9 have are naturally based upon the experience that we have
10 had as jurists with the U. S. Parole Commission.

11 I did a Lexus survey, and in the last four years
12 found over a hundred cases in which the U. S. Parole Commis-
13 sion had been involved in some kind of disagreement over
14 their guidelines, and salient factor scores, and things that
15 are used by that commission.

16 I thank the distinguished members of this commis-
17 sion for permitting me to make these few brief comments.
18 The comments are personal to me. I have not sought nor have
19 I received authority to speak on behalf of my fellow judges.

20 Before proceeding further, I think it might be
21 helpful for you to know something about me, so you can form
22 a basis for evaluating my remarks.

23 I was appointed to this bench in December, 1977,
24 and am now completing my eighth year as a district judge.

25 I have not kept an accurate record of the

1 sentencings I have imposed, but a rough estimation is that I
2 have sentenced approximately five hundred people during the
3 past eight years.

4 My sentences have ranged from a suspended fine
5 to three hundred twenty-five years imprisonment. I am sure
6 that in any given sentence, someone has disagreed, but I am
7 pleased to say that I have never been reversed for imposing
8 an illegal sentence.

9 Before coming to the bench, I served first as a
10 prosecutor in a state district attorney's office, then as
11 the first Public Defender in the State of Colorado, and then
12 as a private practitioner.

13 I have appeared in countless cases, ranging from
14 petty offenses to death penalty cases.

15 As I judge, I believe I have a reputation of
16 sentencing on the high side, in violent crimes, especially
17 where weapons and injuries to the person are involved, and
18 average for this district and circuit on other offenses.

19 The pivotal role of a judge under the present
20 system, however, is in deciding whether to sentence or place
21 on probation and whether to revoke probation.

22 I am unaware of any records kept on this basis,
23 and can only guess as to my performance. My guess is that
24 I am low in granting probation, because I frequently use the
25 split sentence option presently available, and I am very high

1 on revocations.

2 I hope that this information is helpful to you.

3 Now, to get down to the business at hand, I want
4 to express my complete and enthusiastic support for appellate
5 review of sentences. As long as sentencing remains a judicial
6 act, and I will have more to say about that in a moment,
7 there is no reason at all why such a critical judicial func-
8 tion should not be subject to review.

9 The greatest danger, however, in the use of guide-
10 lines such as those contained in this commission's preliminary
11 draft, is that the entire process will become trivialized to
12 the point that it advances cynicism and insults justice.

13 I think it would be a foolish waste of your valuable
14 time for me to review the statute and guidelines with you.
15 I'm aware of practices which exist in some other jurisdictions
16 which lend at least a little credence to some of the basic
17 assumptions of your proposed guidelines. Nevertheless, I
18 implore you to consider that national uniformity has never
19 been a wise solution to any sectional problem.

20 I can tell you without fear of contradiction that
21 the judges of this district do not engage in practices which
22 you seek to correct. We do not participate at all in so-called
23 plea bargaining. We never will agree to a certain sentence
24 or even a range of possible sentences in advance of a plea.

25 We do not and never will permit probationers to

1 work as informants, paid or otherwise. We do not sentence
2 anyone without receiving a fully documented and prepared
3 presentence report from our outstanding Probation Department.
4 We do not accept presentence reports from other jurisdictions
5 without review and verification by our own department.

6 Our Local Rule of Practice 202-A provides that no
7 plea agreement involving dismissal of charges will be accepted
8 by the Court unless written notification of the agreement is
9 received at least ten days before the Monday of the week of
10 trial.

11 Further, the judges of this district have refused to
12 accept plea agreements which they have deemed unconscionable
13 or which have attempted to circumscribe the Court's sentencing
14 authority.

15 Finally, cases are not bandied about in this
16 district. The judge who takes the plea or tries the case
17 is the same judge who imposes the sentence.

18 The Commission's assumptions that, and I quote,
19 unwarranted disparity is due to judges not being provided
20 with adequate guidance has absolutely no support from this
21 federal district.

22 The judges of this district are fully advised of
23 local, regional and national sentencing patterns and
24 statistics. Further, our judges are fully advised concerning
25 the entire factual background of charges which are dropped

1 or admitted.

2 In that regard, I have previously presented you
3 with two opinions I have written on individual sentences,
4 and I now submit a third, United States vs. Jones, at 475
5 F. Supp. 1152, which shows you the practice and level of
6 expectation regarding sentencing in this district.

7 It is easy to substitute slogans and catch words
8 for hard thinking. Frequently, the use of slogans is also
9 fraught with peril. I think a perfect example of this sort
10 of dangerous practice is found in your use of the term, and
11 I quote, Real Offense Sentencing System, end of quote.

12 In all candor, my review suggests that it is not
13 a system at all. It is a shallow attempt to put qualitative
14 and sometimes ineffable concepts into quantitative terms.

15 The use of such pseudo-scientific numerology may
16 look good on paper or fit nicely into some computer's data
17 base, but it has no more validity to it than does astrology.
18 In fact, astrology is less harmful because it is less
19 pretentious. In fact, by what sort of legerdemain does the
20 offense of theft have a base value of two, while trespass
21 has six, and advising tax fraud has ten?

22 I would respectfully suggest that the proposed
23 guidelines do not seek uniformity of sentencing, but, rather,
24 the elimination of the judicial function from the sentencing
25 process.

1 If that is indeed the intent, if relegation is the
2 purpose, then why not say so, and take judges out of the
3 process entirely?

4 On the other hand, any judge should be able to look
5 a defendant straight in the eye when imposing sentence, and
6 tell that unfortunate soul exactly why the precise sentence
7 is being imposed. I don't believe the defendant, the victim,
8 or society, deserves anything less, and I make it a point to
9 do so in every case I have.

10 Sometimes it is necessary to include consideration
11 of charges that have been dropped into the sentence computation.
12 Other times, in fact more often, it is not. Should the
13 sentence in any way be affected by the idiosyncratic judgment
14 of an Assistant United States Attorney? Your proposed guide-
15 lines do just that.

16 Has this commission seriously considered the
17 ludicrous nature of sentencing under these proposed guidelines?
18 Am I supposed as a judge to say to a defendant, "You are
19 sentenced to twenty-two months because that is the top of
20 the guideline range. Actually, you scored twenty-eight, but
21 I am giving you the benefit of a doubt because there were no
22 points for transactions outside the United States, and I have
23 made an adjustment by using the cooperation multiplier,
24 because you testified against your brother and sister-in-law."

25 Isn't it better to say to the same defendant,

1 "You were charged with fifteen counts in the indictment and
2 plead guilty to one. The prosecutor in your case always
3 files multiple counts and he always gives away the farm by
4 accepting a plea to one count. The facts, not the counts in
5 the indictment, show that you not only committed the crime
6 charged in Count I of the indictment, but you conspired with
7 others to do it, and what is more serious, you inveigled a
8 young person with no previous criminal record to join with
9 you."

10 Quite frankly, I suggest the latter makes more
11 sense and better justice.

12 I will not burden you further. Sufficeth to say
13 that I will never follow any guidelines which give reductions
14 for guilty pleas, or reward cooperation with the prosecution.
15 I would resign my commission first.

16 I shall avoid comment on the obvious constitutional
17 infirmities which envelop such provisions. I will simply say
18 it is not a judge's function to be a sub-station of the
19 prosecutor's office, any more than it would be to become a
20 branch office of the Public Defender. I believe that to
21 engage in such rationing of justice is blatantly unethical,
22 and I can't imagine anyone who would do it knowing of the
23 ethical violations involved.

24 Since at least the Seventeenth Century, the law
25 in this country has been regarded as an expression of the

1 common consciousness of the people. As judges, we must
2 strive to know and express, not our own sense of right, and
3 certainly not some supercilious formula for uniformity, but,
4 rather, the felt convictions of our culture. That is what
5 this country stands for. These guidelines simply do not help
6 nor will they achieve that end.

7 I suggest you abandon entirely the concept of
8 numerical values and replace it with qualitative guidelines
9 which will assist the judge, in the search for justice,
10 however lacking in the lock-step of uniformity such a search
11 might be.

12 Sentencing should be both historical and systematic.
13 A judge should be required to articulate the inner coherence
14 of the sentence handed down. To relegate this judicial
15 function to a clerical application of arbitrarily determined
16 arithmetic points is neither historical or systematic.

17 Thank you.

18 CHAIRMAN WILKINS: Thank you very much, Judge.

19 Let me say the guidelines under this preliminary
20 draft do not require the judge to discount a plea of guilty,
21 and we went to great lengths to say that.

22 JUDGE KANE: I understand, but it is permitted
23 under the guidelines.

24 CHAIRMAN WILKINS: It is permitted.

25 JUDGE KANE: I think it is a foul practice, and I

1 realize I am stating that forcefully.

2 CHAIRMAN WILKINS: It is a practice you would not
3 agree with, although it is one followed widely throughout the
4 United States?

5 JUDGE KANE: That is why I prefaced by comments
6 by saying I welcomed you here to Colorado and we don't feel
7 we should be victimized by practices in other courts. We
8 simply do not ration justice on that basis in this district.

9 CHAIRMAN WILKINS: I don't disagree with that, of
10 course, but I didn't want you to walk away with the under-
11 standing that we could require you to do something.

12 JUDGE KANE: I understand.

13 CHAIRMAN WILKINS: I guess we could not do that,
14 but we wouldn't do that.

15 I would say this, too. We share many of your
16 concerns. What we seek, though, is someone read the statute,
17 and I know you have, and tell us how you would do exactly
18 what you suggest we do, and yet comply with the law that
19 created this commission.

20 You know, it talks about ranges of twenty-five
21 percent variance.

22 JUDGE KANE: Well, I think there are two things --
23 excuse me.

24 CHAIRMAN WILKINS: Go ahead.

25 JUDGE KANE: I think there are two things I wanted

1 to say about that, Judge.

2 The first is, I don't think there is anything
3 wrong with the Commission going back to Congress and saying,
4 "We think your law needs to be amended. It isn't workable
5 in the way in which you have presented it to us."

6 That seems to me to be a commendable approach to
7 take, and it is certainly not without precedent. Other
8 commissions in the past established by Congress have done
9 the same thing.

10 Secondly, if you look at all of the sentences
11 that are provided by statute, the vast majority of them are
12 five year sentences. Very, very few are in excess of that,
13 and there are some that are less than that.

14 This kind of exercise on a five year sentence I
15 think is ludicrous. It seems to me that a very simplified
16 process could be done by saying for five year sentences
17 the expected sentence is three; if you don't give three,
18 justify it. And then use the various criteria and the
19 things that you have done so well, in identifying the
20 constituent elements of sentencing, to allow those to be
21 used as guidelines for the judge so that the judge can
22 articulate the reason for the sentence.

23 There is no way under these guidelines that, as
24 Mrs. Martin who was here earlier testified and as I sentenced
25 the man that murdered her husband, there is no way in the

1 world under these guidelines that that kind of a sentence
2 could be imposed that would prevent such a person from being
3 released to the public.

4 CHAIRMAN WILKINS: I take issue with that.
5 Indeed, the guidelines would say life without parole is
6 life without parole.

7 JUDGE KANE: Well --

8 CHAIRMAN WILKINS: But, in any event, I understand.
9 We do need to provide for the unusual case, the particularly
10 heinous case, and we need to identify those things, not by
11 example, because there are so many different ways those type
12 of crimes occur, but by telling the judge himself, when
13 you come across this case, you deviate from the guidelines.

14 JUDGE KANE: And it should be done. And there is
15 no reason why judges shouldn't do that, and no reason why
16 they shouldn't be appealed. But I really believe there is
17 no rational basis for taking numbers and trying to crunch
18 them together to come out with this.

19 Life is not an arithmetic exercise. Human experi-
20 ence is not an arithmetic exercise.

21 It has some place, I agree, but I certainly don't
22 think Judge Posner's writings should govern criminal law.

23 If they did, can you imagine what would happen in
24 the Georgia case that Justice White wrote?

25 CHAIRMAN WILKINS: Any questions to my right?

1 COMMISSIONER BREYER: Well, I just say, I want to
2 underscore this, one of the very purposes of the statute is
3 to allow, in fact to require, the very kind of sentencing
4 that you gave in the case that you are talking about.

5 JUDGE KANE: Yes, and I --

6 COMMISSIONER BREYER: Parole is abolished.

7 JUDGE KANE: Yes.

8 COMMISSIONER BREYER: And therefore, the sentence
9 given is the sentence that will be served. Thus, in an
10 egregious case, that's a long sentence, life, it will be
11 served.

12 JUDGE KANE: Under the present system, it's only
13 ten years, and until somebody decides to let the person go.

14 COMMISSIONER BREYER: The other thing, I am quite
15 interested, I mean it's a problem, for example, in the
16 statute, it says, "The Court, on motion of the government,"
17 they amended Rule 35, and it now will read, "The Court, on
18 motion of the government, may within one year after, lower
19 a sentence to reflect a defendant's subsequent substantial
20 assistance in the investigation or prosecution of another
21 person." And -- I mean right in the statute is the notion
22 that you will, or at least you may, lower a sentence to
23 reflect the cooperation of the defendant with the prosecuting
24 authority.

25 JUDGE KANE: Well, I am not an Assistant United

1 States Attorney, and I don't believe that Assistant United
2 States Attorneys should have black robes on and sit in a
3 courtroom, and do that very thing, it seems to me, and I
4 tell people when they come into my court with their lawyers,
5 that whatever deal they make is the U. S. Attorney is a deal
6 between the two of them.

7 I am not going to modify the statutory requirement
8 that exists presently for sentencing, which is set forth in
9 the Jones opinion, which I have given, and it has nothing in
10 there to say that cooperation with the prosecution is
11 supposed to be a mitigating factor for a sentence.

12 COMMISSIONER BREYER: We have been told in sentenc-
13 ing hearings, throughout the country, U. S. Attorneys have
14 told us, non-stop, "If you don't give an enormous discount
15 or permit an enormous discount for cooperation, we won't be
16 able to solve crimes."

17 JUDGE KANE: Oh, that's horsefeathers. We have
18 never done that in this district and Mr. Miller was here
19 earlier and told you. He runs a very fine office and they
20 have a conviction rate that is just as high or higher than
21 anyplace else, and they don't have any difficulty at all.
22 Judging by the increased number of filings, they are doing
23 quite well.

24 The problem as I see it, a trial is supposed to be
25 a search for the truth, and you are suborning witnesses by

1 giving them credits. It's not only a non-judicial act, it's
2 counter productive of the total ethical obligation of the
3 judge to see that truth is discovered.

4 CHAIRMAN WILKINS: Any questions?

5 COMMISSIONER CORROTHERS: Just one comment, to make
6 sure that I understand one area.

7 First of all, nice to see you again.

8 JUDGE KANE: Nice to see you.

9 COMMISSIONER CORROTHERS: How are you? You would
10 propose our elimination of all the mathematical calculations,
11 and that we instead provide a list of criteria and factors
12 to be considered that are obviously relevant within the
13 various offenses, by the judge, within a range. Is that
14 what you are proposing?

15 JUDGE KANE: And I am proposing that in each and
16 every sentence the judge be required to articulate his
17 reasons for the sentence imposed.

18 COMMISSIONER CORROTHERS: Thank you.

19 CHAIRMAN WILKINS: Questions?

20 COMMISSIONER BLOCK: Yes. In terms of -- I can
21 appreciate the problems that you have with our numbers.

22 Let me assure you that Judge Posner had no effect
23 on these guidelines.

24 JUDGE KANE: Well, you know, he is -- he does
25 commendable work in the antitrust law, in terms of economics,

1 but -- I think we are more governed by history than economics.
2 Unless one is a Marxist, I suppose.

3 COMMISSIONER BLOCK: Let me follow up, not that
4 line, but another line of inquiry.

5 On this question of some numbers, but not many,
6 you suggest two approaches. One is to go back to Congress
7 and say, "Well, you are wrong. You should reconstitute that
8 task."

9 Assuming we don't prevail, or we don't take that
10 option, we have a statute --

11 JUDGE KANE: You know as well as I do that it
12 wasn't a Congressman that came up with this concept. Some-
13 body else crunched a bunch of numbers and got a Congressman
14 to sponsor it.

15 COMMISSIONER BLOCK: Let me return to the task at
16 hand, and that is some numbers, but not many.

17 You suggest that, let's say, for a particular
18 generic offense, say, robbery, we have an average, and then
19 we have a bunch of factors that the judge would use to
20 either mitigate or aggravate.

21 Let me just push that a little bit further.

22 Would you be against subdividing robbery into
23 armed robbery and unarmed robbery, and then allowing mitigat-
24 ing or aggravating, or would you require --

25 JUDGE KANE: I think they are factors, but let me

1 give you some examples of how these things work.

2 An eighteen year old young man from an Indian
3 reservation in Wyoming, who gets picked up by two people
4 from California, that are using LSD, and other kinds of
5 controlled substances, and they come into Denver, in this
6 area for the first time in his life. He is staying in a
7 motel room. They bring in some prostitutes, and they start
8 negotiations on drug deals, run out of money, and they rob
9 a bank. Weapons are used, in the bank, in the robbery itself.

10 Is that the same as taking the two accomplices
11 with him, and then the district attorney says, "Well, I'm
12 going to allow you to plead robbery without a weapon."

13 You see, who does he allow to do that? The one
14 that's going to testify for him. Maybe it's not the eighteen
15 year old boy. Maybe it's the twenty-four year old.

16 I don't think that you can look at crimes and put
17 them into such quantitative traces. There has to be a
18 mobility of thought that takes place.

19 COMMISSIONER BLOCK: I think there is reasonably
20 broad agreement among many of us that that general thought
21 is shared.

22 There is the problem of providing bench warrants,
23 of saying, "Okay, here is an average sentence. Go above or
24 below, but tell us why."

25 Well, you have to have that bench warrant. It's

1 not simply the average sentence. .

2 JUDGE KANE: Well, what are you going to do with
3 a five year sentence? You can't plug in as many figures
4 into the five year sentence as you want and have any meaning
5 at all.

6 I'm saying if you are going to be arbitrary and
7 come up with figures, say three. If Congress says five, and
8 we say three is the average sentence. The guy has got a
9 prior conviction, add another year. But to go through this
10 kind of an exercise, when you are talking about a five year
11 sentence, you end up with madness.

12 COMMISSIONER BLOCK: I think the intent -- not
13 intent, but the attempt even in the five year cases is to
14 give three or four or five bench warrants, which there can
15 be variation around.

16 You have to decide somehow what characterizes those
17 bench warrants.

18 I think that's in large measure the way to see
19 the preliminary draft, not necessarily as a scoring technique,
20 but rather as an attempt to set a series of bench warrants.

21 JUDGE KANE: Why not, say, you have got a robbery
22 case that is these guidelines, say, "You should consider the
23 following factors where applicable."

24 That makes a lot more sense to me, than giving
25 some kind of numerical value. Numbers do not equate with

1 magic.

2 COMMISSIONER BLOCK: No.

3 JUDGE KANE: That's what this is. I'm being very
4 gracious not taking the psychoanalytic approach to this,
5 because you know, you could have a lot of fun doing that
6 kind of analysis, obsessive, compulsive personalities,
7 et cetera.

8 I'm just saying by putting these numerical values
9 on, you are creating a false impression.

10 COMMISSIONER BLOCK: Of precision.

11 JUDGE KANE: That's right.

12 Mr. Robinson.

13 COMMISSIONER ROBINSON: Let me ask, if I might,
14 I take it your general point of view is that the variety of
15 human, and including criminal, conduct is so complex that
16 any attempt to try to define it in all variations is hopeless.
17 If we do, we will simply generate an imperfect system we
18 won't like.

19 JUDGE KANE: I don't think it's hopeless. I think
20 that's what judges are to be about.

21 COMMISSIONER ROBINSON: It's hopeless to quantify.
22 Basically, it's something so complex, all we can do is use
23 human experience and judicial judgment?

24 JUDGE KANE: I think it's silly to say that somebody
25 is one hundred sixty-eight point narcotis peddler and somebody

1 else one hundred fiftytwo point narcotics peddler, and come
2 out with a distinction in the sentence they receive based on
3 that kind of quantitative exercise.

4 COMMISSIONER ROBINSON: All right.

5 JUDGE KANE: I think a judge who immerses himself
6 in the culture of his jurisdiction, who understands, is there
7 on a daily basis, understands what's going on and has the
8 advice, and believe me, in our jurisdiction the excellent
9 advice, of a highly trained probation department, is able to
10 make a much better judgment on that than applying to some
11 kind of a computer base that is applied on a national basis.

12 Crime is different in different localities, and
13 it's Orwellian in its nightmarish application.

14 COMMISSIONER ROBINSON: I guess what I am not quite
15 sure I understand about your position, your position obviously
16 has a lot of appeal to us in a lot of respects, but, of course
17 we see it as a somewhat more complex picture, at least I do,
18 and that is there is a cost to having judges retain that
19 ability to do right, take into account a specific individual
20 case, and the cost, of course, is what has been troubling
21 the sentencing reformers for decades, fifteen, twenty
22 years --

23 JUDGE KANE: I think what's troubling --

24 COMMISSIONER ROBINSON: If I may --

25 JUDGE KANE: I'm sorry. I usually interrupt in my

1 court. It's a bad habit.

2 COMMISSIONER ROBINSON: The cost, of course, is
3 this problem with disparity. Every judge may feel very good
4 when that defendant is, you know, look him in the eye, and
5 you feel like you have given him a sentence, and it's in a
6 sense a personal relationship, and in fact, I have no doubt
7 he feels like you are acting sincerely, and that's part of
8 what justice is all about, that sort of a committed judge
9 making a committed determination.

10 But, of course, the world is more complex than
11 that. He leaves your courtroom and goes to the prison and
12 talks to other prisoners, who maybe didn't appear before you,
13 who may have done the same thing, and they had another
14 committed, very sincere judge, giving a very sincere sentence
15 and maybe not as significant, different jurisdiction in the
16 country.

17 The problem is one of disparity, and as you allow
18 that judicial discretion, which we all think is important,
19 there is inevitably some sort of lack of uniformity, and the
20 challenge, of course, is to come up with some sort of a trade-
21 off. This obviously is not a new problem. We have been
22 living with it for a long time.

23 We did do one thing. We got all the compulsive-
24 obsessive people together and put them in the United States
25 parole community, and they have been doing the real sentencing

1 except in the cases where you are able to subvert the system
2 and cut out the system.

3 But in the majority of the cases, you may feel
4 better, and the defendant may feel better, but, not only then
5 he finds disparity in the sentencing, when he gets to prison
6 he also finds out that it's a charade anyway. It's the
7 United States Parole Commission, for years correcting the
8 natural disparity between judges.

9 My problem is part of what your concern about the
10 statute is a concern you ought to be just as upset about by
11 having the United States Parole Commission.

12 They have numbers. They crank numbers through.
13 They don't take account of these things, and don't even see
14 the people.

15 Under this kind of system, you would at least be the
16 person in charge of crunching the numbers.

17 If that's an alternative, the United States Parole
18 Commission, isn't there some possibility that perhaps we
19 could live with a system that had some numbers in it, and
20 better than what we have now?

21 JUDGE KANE: Well, it's an interesting rhetorical
22 exercise, but let me suggest to you a couple of things.

23 First, if you read any of my opinions about the
24 U. S. Parole Commission, it will be very clear to you I
25 think it should have been abolished before it was ever

1 started.

2 And, secondly, it seems to me that having a judge
3 have discretion, when a judge is on the record, before the
4 public eye, in making a sentence in public, and being
5 required to state his reasons, is a damn sight better than
6 having some anonymous bureaucrat in Washington, D. C. manipu-
7 lating that sentence, without having the faintest idea
8 as to why it was imposed, or paying any attention to it at
9 all.

10 And we had many, many times in which those sentences
11 have been changed by judges, with the use of Rule 35(b),
12 because of the kind of point assessment that that Commission
13 gives, which was totally contrary to the intent of the
14 sentencing judge.

15 And the other thing, when you start talking about
16 disparity, I really can't believe that two bank robbers are
17 going to be at the El Reno federal correctional facility,
18 and say, "Aw, man, boy, this disparity of sentence has
19 really ruined my chance for rehabilitation."

20 It's just the grossest insult in the world to
21 a commonly accepted sense of fairness that, "You got fourteen
22 years and I got twenty-five."

23 I don't believe that. I don't thing it has
24 anything at all to do with disparity of sentence.

25 Let me give you an example. When you commit

1 an aggravated bank robbery, that is with a weapon, in a
2 rural area in Colorado, and you come before the U. S.
3 District Court, you are talking twenty to twenty-five years.

4 And there is a very good reason for that, because
5 the sheriffs and the deputies don't have the manpower or the
6 equipment to go out into these places, and so they know, and
7 the word is out, don't commit your aggravated bank robberies
8 in Colorado, because the judges are tough on that.

9 Now, on the other hand, it seems to me that there
10 is a great deal of sentiment throughout this report about
11 income tax evasion. In some countries, that's considered a
12 sport, not a crime. But in the United States, it's criminal.

13 How am I supposed to sentence, when you take some
14 of these people who are converted to a kind of religious
15 group, in which they have their prayer meetings, and they
16 join some concept that they have a common law right to form
17 a posse and enforce their own laws, and they declare their
18 independence from the United States?

19 Am I supposed to take that person, and give them
20 the same kind of sentence that an income tax evader on Wall
21 Street is getting?

22 That's a regional situation, where we are dealing
23 with demographics, and to me that kind of cultural analysis
24 is exceedingly important.

25 But to give numbers to all this, what does it do?

1 COMMISSIONER ROBINSON: Of course, the United
2 States Parole Commission does not now take into account all
3 those regional disparities you want, and you may think are
4 being, and they use numbers to impose uniformity.

5 JUDGE KANE: Exactly why I think this thing is
6 wrong, because all it is is a recapitulation of the United
7 States Parole Commission practice, and it's a nefarious
8 practice.

9 COMMISSIONER ROBINSON: What you want us to do is
10 now go back, say, "We can't do what you want to do," and also
11 go back, and, oh, by the way, abolish the United States
12 Parole Commission. Let's not go back to the status quo.
13 Let's go back to 1945, where judges have total discretion,
14 and they are the masters of total discretion.

15 JUDGE KANE: I am not asking anything like total
16 discretion for the judge. I am saying judicial process is
17 the way that sentencing should be handled, and a judge should
18 be required to articulate his sentence and those reasons,
19 and that sentence ought to be, for two reasons, subject to
20 appellate review.

21 The first is to see if it follows the guidelines
22 and is a rational judicial act, and the second, to avoid
23 what goes on with courts of appeal now, time and time again,
24 where they look and say, "The judge gave that guy too much
25 time. I don't know why there is an error there, but I'm

1 going to find one."

2 I know why that happens. An appellate judge told
3 me that. "What's going on with that judge? Why is he
4 letting all these people loose?"

5 I'm saying put it out in the open. Make the judge
6 make his findings and subject it to the public eye and
7 subject it to appellate review.

8 We had Mr. Nieto, who was here early this morning,
9 very skillful defense attorney, highly regarded by our court,
10 and he said that according to the jawboning he has with these
11 people down in Miami, that they are giving heavier sentences
12 down there.

13 Well, I don't know. I mean I certainly don't
14 question the accuracy of his reporting. But I know what
15 happens up here. When we get sentences on drug cases, if
16 we have kingpins or if we have wholesalers, they get plenty
17 of time, but if we have the end person who is a car salesman
18 that is buying two units of cocaine, so he can feed his own
19 habit, and sell the other one to the other car salesman, or
20 we have two college students with no prior records that get
21 involved in it, we are not giving them the same kind of time
22 as they are down there where they are dealing on a constant
23 basis. It makes sense.

24 Let me give you another, one final example. I am
25 taking up too much of your time now.

1 COMMISSIONER MAC KINNON: Leave out the word
2 "final." Go ahead.

3 JUDGE KANE: All right, the other example I want
4 to tell you about is embezzlement. Denver is a hub for far
5 beyond the geographic boundaries of Colorado. We get people
6 coming in here from the sandhills of Nebraska. We get them
7 coming in from Wyoming, New Mexico, Utah, and they come into
8 the Denver area.

9 We get young girls, out of high school, that come
10 in and get a job in a bank. And then the bank tells them,
11 "You have got to go have your hair cut, and here is the kind
12 of dress code we have for you." And then they get a lease
13 on an apartment, house, where there are a lot of other young
14 people that live in a certain area, and then the bank says,
15 "Now, you have to get to and from work. We have a great deal
16 for you on a car loan with one of our automobile dealer
17 clients, and so you can get a loan at three percent interest."

18 So, all of a sudden, they are getting paid four
19 hundred dollars a month, and they have got five hundred
20 dollars a month in obligations, and they start tipping the
21 till.

22 Now, if contributory criminality or contributory
23 negligence or contributory insensitivity were defenses, the
24 U. S. Attorney wouldn't file. But we get those young people
25 that come into our courts. Are we supposed to tally up the

1 amount of money they have taken because nobody has bothered
2 to audit the account, and say the volume of money taken by
3 this person over a two or three year period of time is such
4 that probation isn't going to be given?

5 We are supposed to send that little girl from the
6 farm into a prison?

7 I don't think that's right, and that's the kind of
8 thing that we have got to deal with.

9 Now, that's not the same as the con man who comes in
10 or the embezzler who is a sophisticated individual, but you
11 have to look at all of these factors, and formulate a sentence
12 and I say you can't reduce that to numbers.

13 COMMISSIONER ROBINSON: Let me say I really
14 appreciate your candor and color. It's so easy for us to
15 get caught up in the details, and it's nice, a breath of
16 fresh air, to come in, a man with a perspective.

17 JUDGE KANE: Gosh, it's nice to say I have a
18 breath of fresh air. There are other things some people
19 in the audience might say about it.

20 COMMISSIONER BREYER: Well, you know, I take your
21 basic point. I'm used to it, even worse.

22 I take it your basic point is what we should do --
23 we have a rough preliminary draft, which we have flagged in
24 big letters, very preliminary, going to be revised, the
25 numbers aren't serious, et cetera -- we should be injecting

1 lots and lots of discretionary power as well as simplicity,
2 giving lots of flexibility to the judge.

3 My reaction to that is it is not as simple to do
4 that as you might think at first blush, because of the
5 statute. I don't think it absolutely forbids it, but I
6 did not hear the judges at the time it was being enacted
7 giving this kind of testimony to Congress. Might have been
8 a few. By and large, there wasn't this reaction.

9 And having, you know, been a little needling by
10 saying that, I would end by saying I think your basic point
11 about flexibility is well taken, and I would be very, very
12 surprised, to tell you the truth, if the next draft of this
13 commission does not reflect a considerable injection of
14 flexibility, because of statements like yours.

15 JUDGE KANE: As far as I know, Congress has never
16 asked me for anything.

17 COMMISSIONER MAC KINNON: It's a constitutional
18 right to petition Congress that isn't limited to individuals
19 in the street.

20 JUDGE KANE: Judge, we have had in the past --
21 since October of 1984, we have a total of forty-two months
22 of judicial vacancy on this court with an increase in case
23 filings every month, and if I am going to petition anybody,
24 it's going to be the Executive branch to find somebody they
25 think is qualified they can nominate to come here.

1 I don't have any information about these things
2 until suddenly it's already been done.

3 COMMISSIONER MAC KINNON: Well, everybody ought to
4 look at it.

5 I have some questions.

6 JUDGE KANE: Yes, sir.

7 COMMISSIONER MAC KINNON: I don't want to impugn
8 your knowledge or background, but I want to talk about it.

9 JUDGE KANE: All right.

10 COMMISSIONER MAC KINNON: And some of the things
11 that you omitted. For instance, when you were talking about
12 Judge and Governor Knous, you failed to mention that he was
13 the first governor that came from the western slope of Colo-
14 rado, and from Montrose, where he used to practice law.

15 JUDGE KANE: That's right.

16 COMMISSIONER MAC KINNON: You failed to mention
17 that.

18 JUDGE KANE: His son will give me hell about that.

19 COMMISSIONER MAC KINNON: You also failed to
20 mention that Judge Arraj was a member of the 1923 class
21 at the University of Colorado, at Boulder, at the same time
22 I was.

23 JUDGE KANE: Oh, my goodness. Did you know him
24 as valedictorian of the Swink High School Class of 1919?

25 COMMISSIONER MAC KINNON: I think he came from

1 La Junta.

2 JUDGE KANE: Swink.

3 COMMISSIONER BREYER: Judge MacKinnon is too modest
4 to tell you about his football career. It's considerable.

5 COMMISSIONER MAC KINNON: You also failed to
6 mention that Judge Chilson over there was one of the greatest
7 athletes that the University of Colorado ever saw, and
8 when he could only compete for three years, that he made nine
9 letters in three sports.

10 You also said that Colorado was a young area and
11 that they had a considerable import of English, German
12 and Spanish, and, of course, I would be remiss in my
13 historical background if I did not say that one person of
14 Germanic background by the name of Burger was the mother of
15 a person called Byron White.

16 JUDGE KANE: That's right.

17 COMMISSIONER MAC KINNON: And from up north around
18 Fort Collins.

19 You also put in proper perspective the fact that
20 the court sits in Grand Junction, Durango and Pueblo.

21 I graduated from Grand Junction high school, in
22 1923, and my parents are buried in Durango.

23 So, with that background filled in, I would like
24 to ask you a few questions.

25 JUDGE KANE: I have had my butt kicked by senior

1 judges for so long.

2 COMMISSIONER MAC/KINNON: Do you think the guide-
3 lines conform to the statute?

4 JUDGE KANE: I think -- yes.

5 COMMISSIONER MAC KINNON: And you indicated that --

6 JUDGE KANE: But that's not -- that doesn't mean
7 that's the only --

8 COMMISSIONER MAC KINNON: We have a very difficult
9 statutory problem to comply with.

10 JUDGE KANE: I agree with that. I don't think
11 that because I say the guidelines comply that this is the
12 exclusive means of compliance with the statute.

13 COMMISSIONER MAC KINNON: No, there are other ways..

14 JUDGE KANE: Yes.

15 COMMISSIONER MAC KINNON: You attack numbers, but
16 numbers can -- as a matter of fact, you always descend to
17 a number of months, in determining the qualitative degree
18 of a particular offense. Always.

19 JUDGE KANE: Well, not in a life sentence. But
20 that would be --

21 COMMISSIONER MAC KINNON: Well, twenty months,
22 twenty-five months, you talk about, for bank robbery.

23 JUDGE KANE: Judge, I don't want to quibble. I
24 accept your point. I do think there are some exceptions
25 to it. One is under the Youth Corrections Act, with

1 indeterminate sentencing and the other is with a life
2 sentence, and also with special parole term in continuing
3 enterprise statutes.

4 There are some slight variations, but I accept
5 the general point you make.

6 COMMISSIONER MAC KINNON: Now, there is a litany
7 in the legislative history that indicated that the Congress
8 should follow the Minnesota guidelines.

9 That was an unfortunate observation, because I
10 happened to have been admitted to the Minnesota bar in 1929,
11 and stayed out there until 1969 until I went on the court,
12 and I have considerable familiarity with the Minnesota
13 guidelines, and if you follow the Minnesota guidelines, the
14 import of it, and try to translate it to our work, as
15 Congress sort of indicated we should, you have some diffi-
16 culties in finding criticism with some of the things that
17 the present draft is beginning to expose.

18 Now, you said that you couldn't use the gun -- you
19 posed a hypothetical where the man used the gun, but he
20 wasn't charged with it, and couldn't be sentenced for it,
21 but you can.

22 JUDGE KANE: No, I think --

23 COMMISSIONER MAC KINNON: Congress says you can,
24 or the Supreme Court says you can.

25 JUDGE KANE: If I said that, I misspoke, but I

1 believe that's not what I had indicated.

2 My suggestion in the fact situation was that the
3 eighteen year old did not use the gun, but someone else in
4 the offense did. That was the -- he would be charged with
5 aggravated bank robbery as well, is my intent.

6 COMMISSIONER MAC KINNON: Yes, he aided and abetted
7 and he is the principal in the offense.

8 JUDGE KANE: That's correct.

9 COMMISSIONER MAC KINNON: Now, you talk about the
10 intent of the sentencing and how it -- how that should be
11 the controlling factor, and you talked about a sentence of
12 twenty to twenty-five years, but, of course, as you know,
13 that resolved itself really to an actual sentence of seven
14 to seven and a half to eight years, under the sentencing
15 guidelines, so it isn't as sacrosanct as you might think.

16 I would like to give you an example of disparity
17 that you sometimes get into, with sentencing judges.

18 Now, you may not think that that's a problem, but
19 it is, and that's what we were talking about, and through
20 these hearings that we have been going around, I have been
21 talking and asking questions, about what they think Congress
22 was talking about, when they said they wanted us to do away
23 with disparity.

24 And invariably they say, well, one guy gets ten
25 years for something, the other guy gets probation, and, so,

1 really, what they were talking about was wide disparity,
2 and not the moderate disparity that might result from some
3 person looking at one of these factors that we have in here
4 a little different from some other person.

5 And I have lived with that. When I was U. S.
6 Attorney. I had two judges -- I had more than that, of
7 course, but I had two judges. One of them couldn't sentence
8 anybody to prison, and the other one couldn't sleep if he
9 didn't send somebody to prison, and they were sitting right
10 across the hall from each other. And yet, they had their
11 own peculiarities.

12 One of the judges was a devout Roman Catholic, and
13 we brought a counterfeiter before him one day, one of the
14 great counterfeiters of the country, served any number of
15 sentences for counterfeiting, and, of course, you would
16 think that just on the counterfeiting that he would get a
17 terrible sentence, get a maximum sentence.

18 He came before this judge, who was usually the
19 most lenient guy of any judge that you could find in America,
20 and the judge looked down at him, when he came up before
21 him, and he said, "And so you have been married eleven
22 times?"

23 Well, what does that have to do with it?

24 JUDGE KANE: Shows a certain elan vitale that
25 most people don't have.

1 COMMISSIONER MAC KINNON: Now, on the regional
2 aspect, you put income tax on a cultural difference, between
3 something around New York and something around Denver, or
4 maybe Grand Junction.

5 What do you think of the cultural difference, or a
6 difference, regionally, between sentences for income tax
7 evasion in the south and in the north?

8 I'm talking about southern Confederate states.

9 JUDGE KANE: Judge, I -- I have been to the south
10 once in my life. I don't know what the situation is there.
11 I wouldn't pretend to try and sentence on that basis.

12 I -- what I am saying is that there are other
13 factors involved than just merely the offense itself that
14 one has to look at, and I would -- were I to be in the north
15 or south, I would want to look at it.

16 But I just don't know.

17 COMMISSIONER MAC KINNON: Well, when I was U. S.
18 Attorney, I was told by the people in Internal Revenue that
19 they had practically never been able to get a sentence or
20 get a conviction, much less a sentence, for an income tax
21 violation against these terrible federal taxes, in the old
22 Confederate states, and --

23 JUDGE KANE: . They just didn't want to give up that
24 war, did they?

25 COMMISSIONER MAC KINNON: They are still fighting.

1 CHAIRMAN WILKINS: Judge, you know we learned in
2 Atlanta that you all had all the money. That's the reason.

3 COMMISSIONER MAC KINNON: So that's another kind
4 of a regional problem that we have to deal with, Judge.

5 JUDGE KANE: Sure.

6 COMMISSIONER MAC KINNON: I appreciate your
7 testimony.

8 JUDGE KANE: Judge, thank you.

9 CHAIRMAN WILKINS: Judge Kane, thank you.

10 Let me ask you to do this, if you will. Take any
11 section of these guidelines, personal property, securities,
12 just a small portion, if you will, and then write down on a
13 piece of paper what you suggest these guidelines ought to
14 look like.

15 JUDGE KANE: All right.

16 CHAIRMAN WILKINS: So we can see the concrete, as
17 we try to produce in concrete really what you are talking
18 about, and let's analyze it.

19 I don't think we disagree on anything you said.

20 I think the Congress is not going to change the
21 law. I don't believe that's going to happen, but, other
22 than that, we would really like to see what you mean when
23 you say some of these things and apply it to something that
24 says property or taxes or drugs, any section you pick, and
25 see how it works.

1 Maybe we can model the rest of the guidelines
2 after it.

3 JUDGE KANE: I will certainly take a crack at it.

4 CHAIRMAN WILKINS: Thank you very much.

5 JUDGE KANE: Thank you.

6 CHAIRMAN WILKINS: Our next witness is Michael
7 Bender.

8 MR. MICHAEL BENDER: Judge Kane is a very hard
9 act to follow, and I know why he has that sudden interest
10 in astrology.

11 Briefly, let me say I thank the Commission for
12 giving me the opportunity to speak on this subject.

13 Really, it's my first opportunity to say anything
14 to such a prestigious body.

15 Listening to the questions and testimony this
16 morning, I am really awed by the knowledge here. I am very
17 much awed by the guidelines themselves.

18 I frankly can't tell you that I understand them.
19 I have read them several times, but I think the task is
20 Herculean, and the ability to describe a systematic articula-
21 tion for just and equal punishment for criminal conduct to
22 me, at least in my limited experience, is absolutely
23 impossible, and I think that based on the comments, particu-
24 larly that Judge Kane made, and the questions asked of Judge
25 Kane, when it gets all over and done, I think it's most

1 important that there be much, much more flexibility given
2 to the sentencing judge than what these guidelines state.

3 I think that to me is the most overriding concern.

4 The proposed guidelines, the question of Judge
5 Wilkins, to me, as a defense lawyer, with a defense lawyer's
6 background, the most striking aspect was the commentary,
7 which states as an empirical fact that offenders who plead
8 guilty currently receive substantially lower sentences than
9 those sentenced after a trial, and then the commentary
10 suggests that a rationale for this disparity is the first
11 step towards rehabilitation and the guilty plea conserves
12 the resources of the judicial system, and invites public
13 comment.

14 I am really dismayed that a body such as this would
15 lend any type of support, however slight, to what I would
16 view an unconstitutional practice.

17 In my view, if such a practice does occur, it
18 certainly doesn't occur in the United States District Court
19 of the District of Colorado. As Judge Kane said, it violates
20 fundamental jurisprudence.

21 To me, a citizen, rich or poor, no matter how
22 heinous his acts, should be always able to exercise his
23 rights to trial, without fear of sentence.

24 I think the courts are all the constitutional
25 overseer of the individual's rights as well as the individual.

1 When an individual's liberty is at stake, basic
2 aspects of the system, such as the right to put the government
3 to the proof, cannot and should not be denigrated for the
4 sake of expediency and efficiency.

5 The right to a jury trial is unfettered, and should
6 be recognized by all. It's really central to our democracy.

7 Obviously, the remorse of offenders is an appropri-
8 ate consideration for sentencing. However, it should never be
9 linked in my opinion to the offender's decision to seek to
10 put the government to its proof.

11 I guess the second most striking aspect to me is
12 how simply Draconian and punitive these guidelines are.

13 The penalties are far more severe than presently
14 the case in our crime sentencing systems.

15 Divesting the sentencing judge with power to grant
16 probation when fourteen points are shown is unbelievably
17 harsh and certainly not mandated by Congress.

18 This question, as has been asked, I think, is that
19 Congress intended probation and custody be equal alternative
20 sanctions, and as I read the statute it was not the
21 congressional intent to prohibit the grant of probation as
22 an independent sentence.

23 To that extent, at least in my view, I don't think
24 these proposed guidelines comport with the specific statutory
25 language as I read the language, because the guidelines have

1 the impact of limiting probation for any offense which
2 would receive a punishment of greater than six months.

3 As a practical matter, I think the impact of guide-
4 lines such as these is very clear. I can't imagine that the
5 Commission hasn't heard this before. There are going to be
6 more trials. There will be many more sentencing hearings,
7 and there will be many more people spending more time in
8 federal institutions.

9 I can give you some examples from my current
10 practice, which I think indicate some of the problems with
11 the guidelines.

12 Presently I have a tax fraud case, which if you
13 apply the guidelines, would require the imposition of a ten
14 to eighteen month sentence.

15 I don't think that any of us in this room, reviewing
16 the circumstances of this matter, would think that would be
17 an appropriate sanction. I think probation would be approp-
18 riate.

19 However, it is forbidden by these guidelines if
20 they were applied.

21 Another problem which these guidelines impose in
22 terms of a Draconian nature of the sentence is they permit
23 the cumulative sentences in an indictment if the prosecutor
24 is clever enough to charge from different sections of your
25 guidelines.

1 If you add up, you do the point tabulation, you
2 come up with an absolute maximim sentence, statutory maximum
3 sentence, for conduct which I think that most of us would not
4 believe to render or necessitate the maximum sentence provided
5 by law.

6 Specifically, what I am talking about, is if an
7 indictment, for instance, includes charges of both wire fraud
8 and securities fraud, or drug offenses and tax frauds, the
9 guidelines require that those penalties be added up and
10 cumulatively given.

11 I am talking about specifically the case guidelines.

12 I don't think that this is a healthy thing.

13 The actual application of the proposed guidelines
14 to me will be complex, confusing and difficult at best, and
15 in most cases there will be substantially significant fact-
16 finding sentence hearings.

17 Jurisdictionally, in Colorado, the appellate courts
18 refuse to be bound by any sentence recommendation by the
19 prosecution. Fact-findings as to each particular section
20 would result. For example, whether the offender had a minor
21 role, whether the defendant had accepted responsibility for
22 the crime involved, whether the criminal supervised other
23 persons, whether the offender had been involved in a
24 non-charged criminal conduct.

25 I am referring particularly to a section that

1 permits an aggravated sentence under Section 3222(f) if there
2 is non-charged criminal conduct that's alleged, in drug cases
3 determining the actual scale of the offense pursuant to
4 Section D211.

5 Other questions come to mind as to what notice and
6 discovery the government must give when it intends to see the
7 sentence based on aggravated circumstances, what notice and
8 discovery must the Court give the defendant when it is
9 determined that it is concerned about an aggravating circum-
10 stance that is not part of the conviction before the Court,
11 what notice and discovery the defense must give when it intends
12 to present a mitigating circumstance, the role of the Probation
13 Department.

14 To me, these must be addressed by the Commission
15 because due process requires that the information used to
16 determine sentence be accurate.

17 I think it's obvious, looking at these guidelines,
18 that one effect is to require the imprisonment of more
19 persons for longer periods of time.

20 I think that this creates destructive tensions
21 between the two institutions, the courts and public, and
22 causes great loss of confidence by the public in the system
23 itself.

24 The proposed guidelines would create a situation
25 similar to that now existing in our state, where the

1 legislature has dramatically increased the penalties for
2 crimes. As a result, more persons are sent to institutions
3 already crowded, understaffed. The institutions are forced to
4 release some persons. The public and legislature are enraged.

5 If the courts comply with the legislative directives
6 the problems of the institutions continue to mount. A vicious
7 cycle is created, with no hope for intelligent solution.

8 There are a few other matters I would like to draw
9 to your attention.

10 To me, the penalties for drug offenses are totally
11 incommensurate with penalties for other crimes.

12 For example, the sale of one kilogram of cocaine
13 is 144. Well, the basic offense of an offender who holds up
14 a federal bank is 123.

15 In drug offenses, a minor player receives a
16 substantially aggravated sentence because of co-conspirators
17 that may be attributed to him. The drug offender who sells
18 a small quantity of controlled substance, for example, an
19 ounce of cocaine, to an undercover agent, but in negotiations
20 has puffed by claiming he has dealt in substantial quantities,
21 may also receive an aggravated sentence.

22 Because of the manner in which may drug investigations
23 are conducted, that is by an undercover agent who buys a
24 controlled substance, law enforcement personnel are able to
25 determine by the precise quantity purchased the ultimate

1 sentence given the defendant.

2 There may be other instances in which the proposed
3 guidelines to me raise questions of due process violations.

4 They permit the government to circumvent the
5 constitutional requirement that each element of a crime be
6 proved beyond a reasonable doubt.

7 A clear example of this is where the government
8 charges unarmed robbery, under Title 18, U. S. Code, Section
9 2113(a), when in fact a dangerous weapon was used. To sus-
10 tain a conviction, the government must prove the offender
11 committed the robbery by proof beyond a reasonable doubt.

12 If the government obtains conviction of the unarmed
13 robbery, the government may prove the use of the weapon by
14 merely a preponderance of the evidence, and thereby obtain
15 a sentence.

16 It seems to me the real impact of these provisions
17 is to transfer sentencing discretion from the Court to the
18 charging authorities. Prosecutors and law enforcement
19 personnel may control the sentences imposed by creatively
20 selecting and manipulating the charges brought in the
21 indictment.

22 The reduction of sentence disparity, which is
23 obviously a major concern of this commission and the Congress,
24 and the incapacitation of certain types of defendants are
25 goals of this system, but I think there exist other goals,

1 general deterrence and rehabilitation.

2 The criminal system must be respected by the
3 participants, by the public at large, and must strive to
4 achieve all its goals in a fair way.

5 But structurally eliminating the sanction of probation
6 and requiring the imposition of lengthy prison sentences will
7 impose long term guidelines which are inconsistent with
8 criminal justice goals, and do not operate with fairness.

9 Fairness does not equate with numerical uniformity.
10 Fairness means the system must have the capacity to act
11 compassionately and respect the constitutional rights of the
12 accused.

13 I sincerely request that the Commission rethink
14 these guidelines and the significant impact they will have
15 on our criminal justice system and restore to the federal
16 court a power to exercise a greater degree of discretion
17 and even occasionally act with a touch of mercy.

18 Thank you.

19 CHAIRMAN WILKINS: Thank you very much. Let me
20 point out just one or two things, to set the record straight.

21 I think I understand you to have concern with the
22 language in the guidelines that provides the defendants who
23 plead guilty currently receive substantially lower sentence
24 than those who stand trial.

25 Now, that's just a statement. That's not a policy.

1 That's a fact, and we merely said that, so that you
2 and anyone else reading this would understand that's what
3 happens today in the United States of America, and it's
4 between twenty-eight and seventy percent discounted depending
5 on the crime.

6 It is not our decision to do that.

7 Now, let me go on and say the rationale for this
8 disparity is that guilty plea is the first step toward
9 rehabilitation, so forth and so on. That is merely the
10 rationale given, not the rationale of the Commission.

11 Now, bearing in mind that's the true status of the
12 facts today, we tried to address that problem.

13 What we did is say, "Judge, if you find that the
14 individual has accepted responsibility," we gave some ways to
15 do that, "You may take that into account in sentencing."

16 But we did not say, specifically we did not say,
17 that, "You will get an automatic discount for pleading
18 guilty."

19 We also did not say, "You get punished for standing
20 trial."

21 We tried to avoid that problem, but we agreed
22 exactly with what you said, you shouldn't get an automatic
23 discount and shouldn't be punished if you stand trial.

24 With that in mind is waht we were trying to say.
25 In fact, we didn't say it as well as we could.

1 As far as the drug sentences, let me say we are
2 not necessarily dreaming up these sentences and saying we
3 are going to get rough on drugs.

4 I refer to Section 988 of the law. That says if
5 you get a prior drug conviction and get another one you are
6 going to get maximum term, which is fifteen years, around
7 five years which is real time.

8 So the two of these are objectives.

9 We have an obligation in our guidelines. Some of
10 these are directed in it by law, and we are mandated by law
11 to follow the congressional intent.

12 I think the Congress has stepped in and dictated
13 some of the sentences we have, but I agree with you, we have
14 got to build flexibility.

15 As I asked Judge Kane, if you can take a section of
16 the guidelines, any section you like, and show us what you
17 mean by that in concrete, it will be most helpful to us.

18 We can talk all day long, we have got to have more
19 flexibility. We agree on that, but how we get it is another
20 question.

21 So, give us a concrete example, if you can.

22 MR. BENDER: Why not just make granting of probation
23 an alternative sanction, period?

24 CHAIRMAN WILKINS: The law specifically does not
25 allow it. That's a problem. Unless you can tell us within

1 the statute how to do that.

2 MR. BENDER: I guess I am having trouble understand-
3 ing that, and I of course --

4 CHAIRMAN WILKINS: Well, it says the sentence of
5 incarceration is going to be given. There is twenty-five
6 percent variance, or six months, and that variance, only in
7 the zero to six months range does the law allow for an option.

8 COMMISSIONER BREYER: "If a sentence specified by
9 a guideline includes a term of imprisonment, the maximum estab-
10 lished for the range of such a term shall not exceed the
11 minimum of range by more than fifteen years."

12 As you pointed out, we could say the following,
13 "Judge, when you get that bank robber, you have the following
14 choices, you put him in jail for eight years, up to ten years,
15 or you let him go entirely on probation."

16 Maybe that's what the statute means, but it's a
17 pretty odd reading of the statute that would allow the person
18 to give no jail time or eight years, but wouldn't allow
19 three, four, five or six or seven years.

20 I grant you it's technically possible to say we
21 could give an alternative of probation, but it would be an
22 odd reading of that statute.

23 That's why you get the reaction. It's very tough
24 to figure out how we as a commission within this statute say
25 to the judge, "On any sentence, like fifteen, twenty years,

1 you have an alternative of probation."

2 If you can figure out a way of doing it --

3 MR. BENDER: I have also been accused of being a
4 vox populi. I know the Commission --

5 CHAIRMAN WILKINS: No, I would like to have you
6 be one.

7 MR. BENDER: But I guess I dont' quite get that.
8 If you look at 28-994(a)(1), that language seems to say, to
9 me, that the guidelines -- that the Commission should come up
10 with specific guidelines for the grant of probation, as
11 well as the grant of imprisonment and fines.

12 Now, I see nothing inconsistent with the language
13 I think that you are referring to, which is paragraph (b), that
14 the first decision the sentencer must make is whether to
15 impose a sentence of probation or not. Then, once you say
16 no probation, then you get into the guidelines for imprison-
17 ment, and if you look at 18-3551, in all due respect, I
18 think it's very clear, Section (b)(1), where it talks about
19 a sentence of probation, and if you follow it through --

20 COMMISSIONER BREYER: I know what it says. Why
21 don't you send us a memo? I think it would be very interest-
22 ing to have a memo on this legal point.

23 You realize what's bothering me is the sentence I
24 read to you is the law, and I grant you there is nothing
25 that says we could not do the following, "Judge, sentence

1 this bank robber to probation, or if you decide probation is
2 not appropriate, you have to give him eight to ten years."

3 I'm just saying that's a little weird. It's a
4 little weird, because you think it odd to have a commission
5 rule which says, "Judge, it's either no prison, or it's eight
6 to ten years." What about your two, three, four, five, six
7 and seven?

8 If you can figure out an interpretation of the
9 statute that gets around that problem, I think the best
10 thing to do would be to write it down and send it to us,
11 because I would be very interested in reading it.

12 I don't think you can think it out right now.
13 Maybe you can.

14 MR. BENDER: Well, are you referring, Your Honor,
15 to 28-994(b)?

16 COMMISSIONER BREYER: There are lots of other
17 things that give the Commission lots and lots of discretion.

18 The only thing that's bothering me is the sentence I
19 read you, so what I think would be useful is for you to write
20 out --

21 MR. BENDER: I shall.

22 COMMISSIONER BREYER: How one deals with that sen-
23 tence. That's a purely legal point.

24 MR. BENDER: Sure.

25 COMMISSIONER BREYER: It's very complex, and I

1 think it is.

2 MR. BENDER: The only comment I want to make in
3 response to what Judge Wilkins said, I am not exactly familiar
4 with the statistics you quoted. There is probably from an
5 empirical factual perspective a difference which may occur
6 between the plea bargain sentence and a trial, for reasons
7 having nothing to do with punishing a defendant as he seeks to
8 go to trial, but I can only tell this group that I have tried
9 a number of cases in the state courts here and some other
10 federal courts in other jurisdictions, and never once have
11 I ever actually be confronted with a situation where the
12 person I represented was found guilty, was punished, because
13 he exercised his right to a trial, and I don't think that
14 we should permit a judge to automatically, even indicate,
15 that a good reason for giving a sentence reduction is the
16 fact that the person plead guilty.

17 I mean there are plenty of reasons which may indi-
18 cate remorse and so forth.

19 CHAIRMAN WILKINS: We don't say that.

20 MR. BENDER: I know you don't say that, Your Honor,
21 but you give credence from an official party to a practice
22 which I think, at least for whatever it's worth, is certainly
23 not appropriate.

24 And I also think that I have been threatened by
25 prosecutors from many jurisdictions with the same kind of

1 language. You know, "Plead guilty here, or else," and some-
2 how or other, they usually tell you what the "or else" is,
3 and when it comes to time for sentencing, most judges pay
4 attention to the argument, "If they were going to give you
5 such and such before the case went to trial, please don't
6 punish this man because he exercised his right."

7 CHAIRMAN WILKINS: Well, I appreciate your -- we
8 are trying to strike a balance, so, for example, a defendant
9 may feel motivated to make voluntary restitution to the
10 victim, and the judge -- I would think would be a fact a
11 judge could consider, might consider, and say we don't want
12 to tie the judge's hands.

13 This is one of the areas we can build in discretion,
14 build in some flexibility, so the judge is not locked into
15 simply the facts of the offense and not some of the defendant's
16 conduct, if it was good conduct and given under the right
17 circumstances.

18 But your point is well made. I will say that I
19 don't think the statistics are wrong that people generally
20 speaking across the country don't sentence as harshly for
21 guilty plea as those who stand trial, for good reason or bad
22 reason.

23 Commissioner Robinson, do you have a question?

24 COMMISSIONER ROBINSON: Yes, I was actually fairly
25 sympathetic to your concern that the guidelines, the

1 application of the guidelines might be affected by the
2 particular charging pattern of the prosecutor, for two
3 obvious reasons.

4 One is that ought to be within the judge's control,
5 and not the prosecutor's control, and, second, of course,
6 there are differences in charging patterns. You could get
7 reintroduction, not with the judge you are appearing before,
8 but the prosecutor charging, and it seems to me there are
9 some ways of avoiding that. One of them is to have the
10 guidelines based on an offense of conviction. Of course,
11 that has it's own problems.

12 Then, in a sense, it's not the prosecutor by himself
13 but the parties, or defense counsel and the prosecutor, who
14 can effectively determine the application of the guidelines,
15 and, of course, that's a significant deviation from current
16 practice.

17 Judges know, whatever the offense of conviction
18 may be, may be unarmed bank robbery is the plea, but they
19 don't ignore the fact that a gun is there, and once more,
20 that's what the United States Parole Commission does not
21 simply look at the conviction.

22 If that's not a viable alternative, how is it
23 otherwise we can limit a particular prosecutor's ability
24 through his charging to affect the guidelines?

25 Another is to have a real unrestricted system, that

1 is have a system look at what was done and have it not based
2 on -- not only a conviction or charging pattern, either.

3 My guess is that some defense counsel may not like
4 that, and I would like to hear whether that's troubling to
5 you or not.

6 But one interesting point there is to see that this
7 using the charging pattern in some way is a way of restricting
8 the liability of your client.

9 The alternative might well be, and we certainly
10 have gone back and forth on this, and the Commission I don't
11 think has a real position on real offense or modified real
12 offense or what kind of modified real offense, but that
13 certainly is an option.

14 Is that more attractive to you, or less?

15 MR. BENDER: Your question raises a lot of questions
16 in my own mind. Let me try out some different suggestions.

17 First of all, I don't see why you couldn't as
18 already is done in Colorado, in federal courts, require the
19 prosecution to file a statement of what their -- essentially
20 set forth the claim, because I think, as you pointed out
21 in the report, that there are aspects of the statutory
22 language that have nothing to do with an -- an element in
23 the crime that has nothing to do with the sentence.

24 To a large extent, that solves as a practical
25 matter some of the problems you raise.

1 Another suggestion is simply don't provide the
2 cumulative sentencing in the way that the draft does.

3 I don't think you and I can sit and figure out for
4 every pattern of criminal conduct how you could aggravate a
5 mail fraud or a drug case or a tax fraud and securities fraud,
6 for what is basically the same crime.

7 So, that's one suggestion.

8 I think the kind of things that Judge Kane was
9 talking about, what a real conviction sentence consists of,
10 to me make a lot of sense. I think we have something similar
11 to that kind of thing in state court, where you have an
12 articulation of a sentence by the Court, and you have a
13 right of appeal, and there is a right of elocution, in a
14 serious evidentiary way, as to aggravating or mitigating
15 facts.

16 I also think the thing that's obviously troubling
17 the Commission is the enormous disparity in sentencing, which
18 I think kind of underlies the value of your question, and
19 I think part of that is being done by the operation of the sta-
20 tute, itself. The Parole Commission has effectively been
21 abolished. NARA is eliminated. B(2) sentences are taken
22 out. Youth Offender Act is no longer here.

23 Their limiting of the discretion is going forward,
24 not just the Court's discretion, but also the Parole
25 Commission's discretion.

1 I don't know if I have answered your question
2 specifically. I --

3 COMMISSIONER ROBINSON: Some people would argue
4 that abolishing the Parole Commission is throwing us back
5 into the disparity problem, that they are the one central
6 force that brings uniformity that doesn't come out of the
7 district courts, and by abolishing them you are throwing the
8 weight of having to have uniformity back onto the district
9 court, and therefore, the problems, the differences in
10 charging patterns, the differences between judges, that
11 would have been corrected by the Parole Commission now won't
12 be.

13 MR. BENDER: I agree with that, and that is certainly
14 true in some circumstances, but if you have a narrow sentenc-
15 ing range and you have a determined sentencing system, which
16 is what I think this envisions, which means to me that there
17 are a specific number of years that are to be given, and if
18 I think as Judge Kane pointed out, the majority of the
19 maximum sentences that courts can give is five years, there
20 is a limit to the amount of discretion that can actually
21 be given under those sentences.

22 It's further limited when you have articulated
23 aggravating and mitigating factors that a court must state
24 fully in this particular case.

25 So I think there is -- there still will be some of

1 that sentencing disparity, but I guess, from that point of
2 view, of the way in which the system operates, and the
3 examples given, and the questions to Judge Kane, it's very
4 significant that there be a sensitivity between the sentencer
5 and the defendant, to feel it was being sentenced appropriate-
6 ly, even though it may differ to some degree between a judge
7 in Minnesota and a judge here.

8 I think that's awfully significant.

9 CHAIRMAN WILKINS: Thank you very much, Mr. Bender.
10 We look for -- wait a minute, I think Judge MacKinnon has a
11 question.

12 COMMISSIONER MAC KINNON: You think it's an un-
13 constitutional practice to give less for a guilty plea?

14 MR. BENDER: Solely because of the fact that the
15 person plead guilty, yes.

16 COMMISSIONER MAC KINNON: Yes. Yes.

17 MR. BENDER: Yes.

18 COMMISSIONER MAC KINNON: You do?

19 MR. BENDER: Yes.

20 COMMISSIONER MAC KINNON: Well, the Supreme Court
21 doesn't think so. But every person, most defense lawyers,
22 that have come in, have said that.

23 But you must be aware what the Supreme Court has
24 said with respect to it.

25 MR. BENDER: I am.

1 COMMISSIONER MAC KINNON: But they don't give any-
2 thing additional for standing trial. But the reason that
3 some people get what they think is something additional for
4 standing trial is that when they go into trial, the United
5 States Attorney comes out with all of the terrible facts
6 involving the offense, which would have been more or less
7 subordinated if they had just come in and plead guilty and
8 it hadn't been published in the newspapers for a week or so
9 and every person really realized what the man did.

10 Those are the things that realize -- that cause him
11 to get a greater sentence, in my opinion, on these particular
12 offenses.

13 The other point is don't you think that the prose-
14 cution in federal court gets its analysis of the offense
15 before the judge in the probation report?

16 Don't you think the probation officer gets the
17 file from the United States Attorney or talks to them about
18 a particular case, in writing his report, if he is concerned
19 about the details, that is particularly if a man did plead
20 guilty?

21 Isn't that the same thing as filing your statement
22 that you do in state court?

23 MR. BENDER: I'm not sure I understand the question,
24 Your Honor. This is --

25 COMMISSIONER MAC KINNON: Well, you suggested that

1 they ought to file a statement of the offense, and I say
2 don't you think that the -- that the United States Attorneys
3 ought to do that? Don't you think that the United States
4 Attorney's position on a particular offense is articulated in
5 the report from the Probation Office?

6 MR. BENDER: Of course.

7 COMMISSIONER MAC KINNON: Yes.

8 MR. BENDER: It's also articulated in this district
9 by a defendant's statement.

10 COMMISSIONER MAC KINNON: In addition to the federal
11 side?

12 MR. BENDER: Yes. My point was only in response
13 to the question Commissioner Robinson asked me, as to whether
14 or not I felt some version of real offense sentencing be
15 adopted, and that is to indicate that the fact-finding process
16 be accurate before somebody is sentenced, so the Court and
17 defendant may have notice of real offense factors, and that
18 be included in the statement.

19 COMMISSIONER MAC KINNON: Well, the statute requires
20 now or will that the statement of reasons for the offense
21 be stated in open court, period. That's the language of
22 the statute. The information upon which he bases the
23 sentence.

24 Thank you.

25 CHAIRMAN WILKINS: Thank you, Mr. Bender. We

1 appreciate your comments and the work that you did prior to
2 coming, and we look forward to your comments coming soon.

3 Bill, let me ask you, do you want to testify now
4 or wait until after lunch?

5 MR. WILLIAM GRAVES: Let's do it now.

6 CHAIRMAN WILKINS: Good. We are delighted to have
7 with us William Graves, Chief Probation Officer here in
8 Denver, and Perry Mathis, who is the Chief U. S. Probation
9 officer in Kansas City, Kansas.

10 We're delighted to have you both. I might add that
11 probably no one group of individuals has supported and worked
12 with the United States Sentencing Commission like the proba-
13 tion officers have, and, of course, they have a vested
14 interest. Whatever we come up with, they are going to be on
15 the first line, trying to figure it out.

16 So, we are delighted you are here, and appreciate
17 it.

18 MR. WILLIAM GRAVES: Thank you for your comments,
19 Your Honor. We certainly do, and I certainly do appreciate
20 the comments.

21 Mr. Chairman and Commissioners: I am William D.
22 Graves, Chief Probation Officer for the District of Colorado.

23 I have previously testified before the Commission
24 on July 15, 1986, and at that time provided a biographical
25 information sheet. However, in brief, my graduate training

1 is in corrections and administration. I have over twenty-six
2 years of professional experience, administering institutional
3 and community center programs. I have been a United States
4 Probation Officer for fifteen years, eight of those years
5 as Chief Probation Officer for this district.

6 I am the Western Regional Representative to the
7 Probation Division's Chief Management Council, and am active
8 with numerous associated professional groups and working
9 committees.

10 I have reviewed the preliminary draft of the
11 United States Sentencing Commission. I have also been
12 privileged to have been involved in responding to policy
13 issues parior to the preliminary draft and am gratified to
14 see many of the suggestions I and others have made have been
15 incorporated.

16 I am limiting my statement now to a summary state-
17 ment, but I have provided a more detailed written statement
18 that I would hope the Commission would review when it sits
19 down to make modifications after testimony is taken across
20 the country.

21 First, I am going to comment on disparity.

22 Disparity is a complex problem and I believe it is
23 predominantly created prior to a judge becoming involved in
24 a criminal case.

25 Law enforcement agencies have control of what

1 crimes they investigate, what individuals they arrest, what
2 cases they refer for prosecution.

3 Prosecutors similarly have considerable discretion
4 what cases they accept, which cases they decline.

5 The greater disparity, though, occurs as the
6 prosecutor and defense counsel become involved in charge
7 bargaining.

8 The reduction of the disparities is a superordinate
9 goal of the Commission, and the national policy on charge
10 and plea bargaining is as much needed as sentencing policy.

11 I take real exception that judges aren't provided
12 with guidance on sentencing. The U. S. Probation Department
13 nationwide provides judges with a statistical analysis of
14 what has happened previously to offenders of the same crime
15 and provides the Court with an analysis with guide ranges
16 currently used by the Parole Commission for defendants with
17 similar background.

18 This is not to say there isn't a disparity. That
19 represented is much more dramatic than warranted, in my
20 opinion.

21 Perhaps a tune-up of the existing mechanism,
22 rather than an overhaul, would have been sufficient.

23 Policy issues, modified real offense sentencing
24 system, the system tht the Commission proposes, is closely
25 akin to the practices of this court. The court relies on

1 the facts of the conviction offense to impose sentence.

2 My concern with adopting the proposed guideline is
3 that it might restrict what the Court is allowed to consider
4 and might incur a shift in the sentencing function to the
5 prosecutor.

6 The Commission has addressed that issue and has
7 noted that its mandate is reduce disparity, not transfer its
8 source.

9 An important point in adopting either a modified real
10 offense sentencing system or allowing the judge to consider
11 all conduct is to insure the policy is well known to the
12 defendant prior to the plea.

13 For example, our court currently advises defendants
14 that the Parole Commission is going to consider unadjudicated
15 counts in determining the length of time before release on
16 parole.

17 The overriding concern of the modified real offense
18 sentencing system is that the Court must be allowed sufficient
19 latitude to impose a just and fair sentence.

20 Automatic reduction for guilty pleas, it is my
21 firm conviction that to reward people for entering guilty
22 pleas is to punish those others who take advantage of consti-
23 tutional rights to a trial.

24 The alternate approach of regarding a person who
25 takes responsibility for their behavior is a much more

1 palatable approach, and less likely to be reviewed by the
2 appellate court.

3 Rewarding cooperative defendants I don't feel is
4 a proper place for the Court to be involved, and I have
5 stated my reasons for that in my previous correspondence.
6 The prosecution is capable of rewarding cooperative defendants
7 through charge bargaining.

8 Criminal history, the requirements are going to
9 require a re-emphasis of the information contained in the
10 presentence report. I do think it important to factor
11 criminal history into sentencing calculations. Either
12 alternative provided by the Commission would work.

13 The use of a table format appears easiest to use
14 and an approach that would result in the least calculation
15 error.

16 The Commission asked for comments on the appropriate
17 relationship between criminal records and sentence.

18 I suspect at this time it's going to be beyond
19 the Commission's capability to determine which offenders
20 are likely to recidivate.

21 What seems proper for the Commission to do is
22 establish openly and publicly that those inmates who do
23 recidivate are going to serve longer sentence.

24 In addition, what should be emphasized is the
25 offense that a person has been convicted of in the past.

1 That's my opinion. The offense, not the amount of time that
2 was imposed.

3 Sanctions for probation, I do think the Commission
4 will want to consider assigning sanction units for probation
5 with percentage under a high activity supervision or with
6 special conditions that require an abridgement of liberty,
7 for example, community service, community treatment center
8 residence, urine screens, et cetera, receiving more sanction
9 units.

10 This would provide the Court with some greater
11 flexibility to grant probation where the case facts warrant
12 it.

13 Our attempts at application have indicated that
14 the sentencing envisioned by the guidelines are exceptionally
15 more severe than sentences currently being meted out by this
16 Court.

17 In plain language, it would appear that grant of
18 probation would occur in only the most minor of cases.

19 Conditions of probation supervised release, I
20 found that the conditions of probation supervised release
21 suggested by the Commission to be well done. I suspect they
22 might get some adverse counsel on the third party risk
23 condition.

24 We have had hearings in closed cases in our court,
25 and that seems to have worked well. An addendum to the

1 Commission might be simply to suggest that questionable
2 cases be reviewed by the Court.

3 The only other item of note is that restitution
4 can become a mandatory condition of supervision, if it is
5 under the Strict Restitution Act.

6 It is our understanding that restitution under that
7 act is not affected by change in the probation status.
8 For example, revocation, the restitution is seen as an
9 independent sentence.

10 Violations of probation and supervisory release,
11 the number approach is extremely cumbersome and invites error
12 in computation. It is over-complex.

13 I make that same objection to the charging guide-
14 lines. It seems to me a somewhat similar, less arithmetic
15 system could evolve from the mandate.

16 Application problems, in my letter of October 29,
17 I outlined some problems we had in attempting to apply the
18 guidelines to real cases.

19 I provided a specific example, a young woman plead
20 guilty to a felony fraud, granted probation with a number of
21 special conditions, including community treatment, community
22 service and restitution.

23 I had our supervisors and two senior probation
24 officers attempt to score that relatively simple case with
25 the Commission's guidelines.

1 Each of the officers reported that the instructions
2 were difficult to follow, that it wasn't easy to decipher
3 the meaning of the terms used in the guidelines, and taken
4 together it doesn't flow -- did not flow logically to a
5 common conclusion.

6 Each officer came up with different results, and
7 in fact, the only item that the officers agreed on were where
8 to find a particular offense in the guideline book. The index
9 was well done. And all agreed that this woman breached a
10 fiduciary trust. Otherwise, nothing was scored the same.

11 The officers all agreed, though, that this woman
12 would have had to have gone to prison for at least ten months,
13 and one officer felt she would have to do a minimum of a
14 twenty-six month sentence.

15 A special note. I am sure a number of these
16 disparity problems would be remedied somewhat through train-
17 ing and experience.

18 Our officers reported taking some thirty minutes to
19 apply the guidelines, but I imagine it would take the Court
20 much longer than that to resolve controverted items. I am
21 sure that it could result in a mini-trial of what applies and
22 what doesn't.

23 I was shocked that the Court had such low discretion
24 in the matter and would have had to sentence this woman to
25 prison, when in our estimation and the Court's she need not

1 be there.

2 There are two final areas I would like to address
3 that could become potential areas of abuse if not headed off
4 early by the Commission.

5 I fear that defense counsels, prosecutors, probation
6 officers and the courts, could begin looking for loopholes
7 that would allow the Court to focus on the human factors that
8 come into every case.

9 I realize that the law limits the range of sentences
10 possible in the guidelines, but would hope that some adjustment
11 can be made of those guidelines to allow for a broader range
12 of cases where probation could be considered.

13 The second possible area for abuse might be the
14 prosecutor's use of the sentencing process to circumvent due
15 process rights of the defendants during trial.

16 It strikes me that it might be far easier to prove
17 certain aggravating factors at a preponderance of the evidence
18 hearing, rather than at a more stringent beyond a reasonable
19 doubt standard necessary at trial.

20 I agree with the Commission's assessment that there
21 can't be a perfect system for sentencing that takes into account
22 every variable, every time, and precisely the same way. Were
23 it that simple, we wouldn't need judges. We would simply score
24 a defendant's current offense, his previous behavior, and then
25 have the computer intone a sentence. That would insure that

1 there was no disparity, but it certainly wouldn't be perceived
2 by the public or a defendant as a humane way to conduct human
3 affairs.

4 It's a matter of delicate balancing, and I certainly
5 have no easy answer beyond the hope that there would be signi-
6 ficant room for judicial discretion.

7 I again appreciate the opportunity to have input
8 into the Commission's deliberations, and certainly wish you
9 well as you wrestle with these very large issues.

10 I assure you that the United States probation system,
11 and I believe I can speak for the entire system, stands ready
12 to assist in this task in whatever manner it can.

13 THE COURT: Thank you very much.

14 Mr. Mathis.

15 MR. PERRY MATHIS: Commissioners, my name is Perry
16 Mathis. You may be able to tell as I get into talking that
17 I am really not a midwesterner. I moved to the midwest from
18 Alabama. I was a probation officer in the federal courts in
19 Alabama for about sixteen years, and worked as a supervising
20 probation officer in that court before moving to the District
21 of Kansas. I have been in the District of Kansas now since
22 October, 1983, as the Chief Probation Officer.

23 I appreciate the opportunity of being here to address
24 you today. I realize that you have one of the most tremendous
25 tasks that I think Congress has given to one agency in

1 accomplishing a mandated goal of restructuring an entire
2 criminal sentencing process.

3 It was my desire to be very positive about the
4 sentencing guidelines when I was invited to appear here. I
5 regret that an honest answer from my viewpoint as a federal
6 probation officer doesn't allow me to do so.

7 The non-binding Senate Resolution in 1984, which was
8 to be used as a guide prior to the enactment of the guidelines,
9 indicated that federal prison space must be treated as a
10 scarce resource, and prison resources should be reserved for
11 those violent and serious offenders who posed the most
12 dangerous threats to society.

13 Courts were urged to consider the general appropri-
14 ateness of imposing a sentence other than imprisonment in the
15 cases in which the defendant has not been convicted of a crime
16 of violence or otherwise serious offense.

17 It seems reasonable to me to believe that Congress
18 intended for that resolution to continue as a goal after the
19 guidelines go into effect.

20 Congress has abolished parole in its present form,
21 and it appears that the preliminary guidelines have abolished
22 probation as an alternative to incarceration. Whereas super-
23 vised release has been substituted for parole, incarceration
24 appears to have been substituted for probation.

25 This is partially evidenced in the statement that the

1 guidelines were designed in order to give an offender who
2 commits a minor violation probation.

3 I understand more about that after hearing from you
4 today, and realizing that it's really not the guidelines, it's
5 your interpretation of what Congress has mandated you to do.

6 My impressions during the last nineteen years in the
7 Federal Probation Service are that the federal judges sit with
8 reason and mostly give fair sentences. The Bureau of Prisons
9 maintains fairness in their dealings with prisoners. The U.S.
10 Parole Commission has paroled and revoked parole for good reason
11 and has administered the system according to the laws and
12 regulations governing them.

13 Sometimes we haven't agreed with what they have
14 done, but they are bound by certain regulations, as other
15 agencies are bound by those regulations.

16 U. S. probation officers have accomplished their
17 responsibilities in an excellent manner, and have always
18 worked in the best interests of society. I think this is
19 evidenced in the fact that during 1984 the success rate for
20 probationers under supervision was ninety-six percent. In
21 1985, the success rate is ninety-five percent, and in 1986, the
22 success rate was ninety-five percent.

23 This was presented in my earlier written presentation
24 to you. To me, this indicates that probation could be used
25 more, not less, than it is presently being used.

1 The guidelines must be flexible enough to keep non-
2 violent and less dangerous offenders out of the prison system.

3 We have always been primarily concerned with the
4 public safety. We have always focused toward intensive pro-
5 bation supervision.

6 We read articles now about intensive probation super-
7 vision, and some people think that that is a new thing. But
8 some of those people have case loads of fifteen to twenty.
9 Intensive supervision is not a new idea in the federal system,
10 but staff is required to accomplish it.

11 Home detention is a relatively new concept, but it
12 can be done with the equipment which will allow sufficient
13 monitoring.

14 The federal probation officer's probation case load
15 has also included felonies. We have been successful to a high
16 degree.

17 The figures for sentencing in my judgment are much
18 too high and will not allow probation where it has been shown
19 to be effective in the past.

20 The more regulations we have, the more difficult it
21 will be for probation officers to get their work done. We
22 as probation officers are so wrapped up now in reports and
23 statistics that we have become paper shufflers instead of
24 people workers.

25 Scoring mechanisms, determining if a defendant

1 violated probation conditions classified as less serious or
2 more serious would put us in a box. There is no cookbook for
3 classifying human behavior, which you have recognized, and I
4 know you are now wrestling with that fact.

5 The sentencing guidelines appear to me to build
6 disparity into themselves. Some of that disparity favors
7 those who seem to be more serious, violent-prone offenders,
8 and punishes non-violent offenders.

9 As an example, the method of determining the
10 quantity of drugs. It is certainly easier for an officer to
11 look at the total weight of the substance, rather than the
12 purity, but in my opinion it can lead to longer sentences for
13 the user-street dealer than for the main supplier.

14 Scoring directions say if any mixture contains any
15 amount of controlled substance, the entire amount of mixture
16 shall be considered in measuring the quantity.

17 A supplier may have fifty grams of cocaine at eighty
18 percent purity. A user-street dealer may have fifty grams at
19 twenty percent purity. Both offenders receive a base score of
20 sixty-six and would be subject to fifty-four to sixty-six
21 months.

22 If the user-street dealer had two hundred grams of
23 cocaine at a purity of twenty percent, he would have the same
24 amount of cocaine as the supplier, who had fifty grams at
25 eighty percent, and yet, because the mixture weighed more,

1 then he would score seventy-two and he would receive a
2 sentencing guideline of sixty to seventy-four months.

3 I submit that the supplier is the more dangerous
4 and the more serious offender. He is also the one who can
5 present more information to the U. S. Attorney to get his
6 sentence reduced by forty percent.

7 The U. S. Attorney will control much of the sentenc-
8 ing before the case even reaches the point of a reduction for
9 cooperation, yet the courts continue to allow plea negotiations
10 as they presently allow.

11 A case involving drug violations in our district
12 illustrates this point. Two separate indictments and one
13 information was filed against Offender A. Indictment One
14 involved the distribution of seventy-eight grams of cocaine.
15 Indictment Two involved the distribution of six-point-seven
16 grams of cocaine. The information involved the distribution
17 of one gram of cocaine.

18 The U. S. Attorney negotiated a plea to Indictment
19 Two, and the information, in return for Indictment One, which
20 was seventy-eight grams of cocaine.

21 The sanction units dropped from sixty-six for the
22 seventy-eight grams of cocaine to fifty-six units for the
23 other indictment and information.

24 Directions for the application of the modified real
25 offense indicate that the Court is barred from considering the

1 seventy-eight grams in the Indictment ONE, because dismissal
2 of that indictment as I understand it would constitute
3 conduct for which further prosecution is barred.

4 The answer to the question that's raised by the
5 Commission, to what extent should power to influence the
6 sentence vest in the prosecutor rather than the judge, I
7 think is quite evident, in this instance.

8 A U. S. Attorney could attempt in these instances
9 to influence sentencing to a greater degree, so controls are
10 necessary and may be exercised by the Court, which they do
11 now, in refusal to accept a guilty plea.

12 Another possibility might be establishment of a
13 national charge-plea negotiation guideline, which was suggested
14 by Chief Graves.

15 Another example of disparity, in my opinion, against
16 the least dangerous non-violent offender is a bank embezzler,
17 as an example, who takes twenty-five thousand dollars.

18 The reference is B-211. The base score is twenty-four.
19 The offense value from the property table and/or the twenty-
20 five thousand dollars is sixteen in this case. Directions
21 require us to add six to the value, since money was embezzled.
22 We have a base value of twenty-four, which calls for a sentence
23 of twelve to eighteen months. The embezzler may have been able
24 to make restitution. Probably cannot supply significant
25 information to the U. S. Attorney. But must go to jail.

1 Compare that to a defendant who constructs his own
2 explosive device, takes it to a government building, and is
3 charged under 18 U.S.C. 844, reference is K-215. The base
4 value of that offense is twelve.

5 Even the guidelines indicate that the violation
6 is a substantial danger to the public and is rarely inadver-
7 tant or for personal security.

8 The offender may be placed on unconditional probation
9 with no added controls.

10 A firearms violation, under 18 U.S.C. 922, carries
11 a five year maximum sentence, which is the same maximum sen-
12 tence for the bank embezzler referred to earlier.

13 Reference under K-221 shows a base value of six.
14 If it's a short barrel shotgun, add twelve to the base value,
15 for eighteen. If we don't take into consideration the mitigat-
16 ing or aggravating circumstances, just as we did in the
17 embezzlement case, we have a potentially violent offender
18 who qualifies for a sentence of six to twelve months, whereas
19 the bank embezzler qualified for a sentence of twelve to
20 eighteen months.

21 I suggest the guidelines may be putting the wrong
22 defendant in jail for a longer period of time.

23 The U. S. Attorney can double the sentence reduction
24 adjustment by certification of cooperation. In my opinion,
25 in order for an offender to be taking advantage of that

1 mitigation, he or she would probably have to be involved in
2 other criminal activities to a large degree, before coming
3 into the system, or they would have to be intimately associated
4 with the criminal element.

5 The sophisticated criminal can end up with a
6 reduced sentence, whereas the loan offender who has no such
7 involvement or knowledge must suffer those consequences.

8 How does the bank embezzler in a small town know of
9 other similar or unrelated crimes in a community to give the
10 U. S. Attorney enough information to have their sentence
11 reduced by twenty, thirty or forty percent?

12 Will the U. S. Attorney even ask the question for
13 cooperation?

14 This system appears unfair to many offenders, allows
15 the truly serious offender to influence the sentence more than
16 the judge's own discretion will allow.

17 Offenders involved in more criminal behavior can cause
18 mitigating circumstances to have more effect on their sentence
19 than those who are less involved.

20 This seems to allow unfair disparity and further
21 removes sentencing from the Court. The Court can adjust a
22 sentence twenty percent, by acceptance of responsibility, and
23 yet the U. S. Attorney can cause the sentence to be adjusted
24 by forty percent, by certification of cooperation.

25 The supervisory release program is a substitute for

1 parole. The federal probation officer is accustomed to
2 dealing with these types of offenders and processing through
3 the U. S. Parole Commission. The Probation Service staff
4 has frequently been called upon to take emergency actions
5 by taking violators into custody, modifying conditions to
6 require in-patient drug treatment and halfway house place-
7 ment.

8 The offender on supervised release will present
9 many more problems than the offender on probation, just as
10 the offender on parole now presents more problems than the
11 offender on probation.

12 The courts will have the responsibility, and I
13 feel that it will add significantly to the court time and
14 may delay our ability to respond to emergency situations,
15 since the process apparently will change from an administra-
16 tive one to a judicial determination.

17 Case jurisdictions will have to be transferred in
18 some instances before the case can be processed or the
19 offender will have to be transferred to an original district
20 for a hearing.

21 This not only delays actions, but it causes addi-
22 tional work for the Court, and it may be a frequent occurrence.

23 I also note that we will continue to have offenders
24 on parole, long after the Parole Commission ceases to exist.

25 I urge you to look at the idea of somehow establishing

1 some kind of administrative body within the system that
2 could take care of the supervised release program, rather
3 than to put it back to the courts.

4 The courts have done the sentencing. They have
5 pronounced that defendant is to serve three years supervised
6 release. I wonder if there is a way that revoking that
7 supervised release could be administratively handled,
8 rather than go back through the judicial process.

9 I realize that the congressional directive must
10 be carried out, but it's my hope that we can have a trial
11 run by delaying implementation for a year or so after the
12 guidelines are approved in final form, allow the Probation
13 Service to double our efforts and to provide the needed
14 information in selective cases and then determine the effect
15 of some of these guidelines.

16 Of course, the problems of defense and prosecution
17 objections to the computations will remain unknown during
18 this time and we would not know the method of resolving those
19 objections.

20 If that is not possible, then I suggest that
21 consideration be given to putting the guidelines into effect
22 for those offenses involving a person, Part A of your guide-
23 lines, and offenses involving drugs, Part D of your guide-
24 lines, and give the system an opportunity to adjust.

25 I know that you can take the statistics over the

1 last few years and basically determine what type sentence
2 would have been imposed if the present guidelines were in
3 effect. You cannot determine the practical problems which
4 would have existed, and that is one of my concerns.

5 Placing the entire guidelines into effect at one
6 single time, in my opinion, could overtax the system greatly.

7 I appreciate the opportunity of being here and
8 talking to you. I appreciate the efforts that you are making
9 to comply with the law as Congress has directed.

10 I gave you some written comments prior to my
11 arrival here that went into much more detail than I have gone
12 into today.

13 I realize that it is not very beneficial to you
14 to come in and give a lot of criticism, without giving you
15 some alternatives to consider. I hope that I have been able
16 to accomplish that in the written comments I have given.

17 CHAIRMAN WILKINS: You have. We appreciate it.

18 Mr. Graves, you used the guideline. I want you
19 to understand it was not the fact that detailed and thorough
20 reports were not submitted. That is the fact. We referred
21 to the fact that there is not somewhere in the system to
22 apprise some other judge in some other court in the nation.
23 The presentence reports always are most detailed.

24 I will ask you to take a look and see any specific
25 examples where you think we can build some more discretion

1 into the system, where we can provide more use of probation
2 than we currently are, because we share that concern.

3 MR. GRAVES: I will do that.

4 CHAIRMAN WILKINS: Thank you very much, and Mr.
5 Mathis, purity is something we debated a long time, so we
6 had to either include purity or not include purity.

7 We haven't decided not to include purity. We just
8 didn't put it in this draft because that makes it even more
9 complicated. Sixty percent. Fifty percent. How would you
10 suggest we include your suggestion?

11 MR. MATHIS: Well, it might make it more complicated
12 but the system is set up now to include purity in our reports
13 that we prepare.

14 Most of the time we get the purity from the DEA
15 agent or U. S. Attorney's files, and that information is
16 placed in the presentence report.

17 The U. S. Parole Commission I believe factors in
18 purity. I'm not sure. I don't have their guidelines, but
19 I think they have a system where they do factor in purity.

20 To me, that -- if it does complicate it a little
21 bit more, it will make it more fair to these defendants than
22 the present way of doing it, because I don't -- from what I
23 interpret it, we could end up with a person with lesser
24 amount of cocaine getting a larger sentence, and I don't
25 believe --

1 CHAIRMAN WILKINS: Well, let's assume that you --
2 if we had points for purity level and the report says it's
3 eighty-two percent purity, that means as a defendant I am
4 going to do more time than if it's seventy percent pure.

5 That's what I am talking about.

6 MR. MATHIS: Yes.

7 CHAIRMAN WILKINS: I can say, "I want that checked
8 by my own chemist and I want that chemist from Washington
9 here so he can testify." That's the problem we have been
10 talking about.

11 MR. GRAVES: I might add it happens quite a bit now.

12 CHAIRMAN WILKINS: It does? I'm not familiar with
13 it happening that much. I know as a sentencing judge, when
14 they say, "We don't believe it's that pure," I say, "I am
15 not going to take that into consideration."

16 When you have to put a number in, DEA was concerned.
17 They said, "We can't fly agents all over the United States
18 all the time."

19 We are wrestling with that. How do we do it from
20 a practical standpoint?

21 MR. MATHIS: I think you will get a very similar
22 argument by doing it the other way. I think the person will
23 come in and say right the opposite, "Even though I only had
24 a pound or two hundred grams, you are sentencing me more than
25 the fellow who had the same amount, or more, cocaine, than I

1 actually had."

2 CHAIRMAN WILKINS: Well, there won't be a contest
3 over purity, because the U. S. Attorney will be well aware.

4 Any questions to my right?

5 COMMISSIONER CORROTHERS: A comment before my
6 question. Mr. Mathis, on the supervised release area, in
7 this area, I share your concern about the tremendous problems
8 involved there.

9 I would be interested in having people like you and
10 Bill and other people with tremendous experience looking at
11 that area as a separate area and writing down for us, or
12 describing a model in detail of how you think the supervised
13 release ought to work.

14 I really would be interested in seeing that as a
15 separate thing, because I know all the tremendous problems
16 and we have got a bucket of worms in that area.

17 My question is, Mr. Mathis, you are proposing in
18 your written testimony that some consideration be built
19 into the guidelines for cooperation subsequent to sentencing.

20 I think you said while on probation or during
21 supervised release.

22 My question is would you also feel that considera-
23 tion should be built in and given to the individual who
24 cooperates or continues to do so during incarceration?

25 MR. MATHIS: I believe you probably are referring

1 to working as an informant.

2 COMMISSIONER CORROTHERS: You mentioned -- you used
3 the word cooperation. You did refer to informants, but you
4 also used the word cooperation, which could be as an inform-
5 ant, with new information, or it could be related to a case
6 where they had initially started to cooperate and continued
7 to do so, going out to trial, I assume, as cases developed,
8 that we have now.

9 I forget what page that's on.

10 MR. MATHIS: Maybe you are talking about page 7,
11 the attachment, probation requirements, agreement to act
12 as an informer or special agent, where I mentioned that even
13 sometimes cooperation would have to continue even after final
14 sentencing.

15 I really had not thought about that, but my
16 initial -- just from the top of my head, would indicate to
17 me that if it continued and -- and after the person went
18 into custody, serving a prison sentence, that perhaps a
19 motion could be filed by the U. S. Attorney.

20 I don't know -- could they file motions under
21 Rule 35 for a reduction of sentence based on cooperation
22 after the sentence had taken place?

23 That would be one way of taking care of it.

24 CHAIRMAN WILKINS: Thank you. Any other questions?

25 Gentlemen, thank you very much. We look forward

1 to continuing to work with you and I am sure we will hear
2 from you soon.

3 We are going to take a short recess. We are
4 running a little late. It's almost two-fifteen.

5 We will start back at two-forty-five sharply,
6 with our next series of witnesses.

7 Thank you.

8 (The Commission recessed from 2:13 p.m. until
9 2:47 p.m.)

10 CHAIRMAN WILKINS: We are delighted to have with
11 us as our first witness Donna Chavez. She is an Assistant
12 Attorney General of the Navajo Nation.

13 We are delighted that you are here, and look forward
14 to hearing from you.

15 MS. DONNA CHAVEZ: Thank you, Mr. Chairman and
16 Commissioners.

17 I am Donna Christensen Chavez, and I work with the
18 Navajo National Department of Justice.

19 The Navajo Nation, as many of you may know, lies
20 within the States of Arizona, Utah and New Mexico, and is about
21 roughly the size I think of maybe the State of West Virginia.

22 I have come here to give you just some very brief
23 comments and reactions on the draft guidelines, but I first
24 want to give you an idea of what perspective I am coming
25 from.

1 I am not a criminal defense attorney and have not
2 practiced in the federal system, and in fact the attorneys
3 who work in the Navajo Nation Department of Justice, none
4 of those attorneys do that type of work except one small arm
5 of the government, which is funded and called a Legal Aid
6 Office, and which is funded by our government. It does do a
7 very small amount of federal practice in the criminal area.

8 However, we are very much impacted by the work that
9 I see that you are charged with doing, in that we have many
10 Navajo citizens who come before the federal courts for
11 sentencing under the Major Crimes Act.

12 I was a little reluctant to come because I did not
13 have written comments gathered from the many people that
14 the Attorney General wants to receive information from to
15 present to you, but she felt it was wonderful of you to take
16 the time to invite us to be present, and I should in any
17 event go ahead and come.

18 So many times the federal agencies forget that
19 Indian tribal governments are viable entities and need to be
20 considered and need to be consulted on issues which impact
21 on us, so I again thank you.

22 There are some points of particular concern that
23 I and others who briefly looked at them, proposed guidelines,
24 that I and others have reacted to.

25 First, I think I need to let you know that

1 traditional Navajo people do not necessarily break their per-
2 ception of justice into discrete phases of the criminal
3 process which would allow the separation of the idea of
4 sentencing from the accusatory and trial phases.

5 Local Navajo communities are much more likely to
6 see crime and punishment as just one single process that
7 should require local input.

8 Consistency and fairness as they relate to the
9 four purposes of sentencing that you outlined in your pro-
10 posed guidelines would take on a very different aura from
11 that perspective, and so I want to ask your indulgence if I
12 address some issues that might be seen by you perhaps as
13 being out of the narrow domain of sentencing.

14 As I stated a while ago, the Indian defendants
15 that are appearing in federal court come before the court
16 because of violations of the Major Crimes Act, which was
17 adopted in 1885, to bring within federal jurisdiction
18 felonies committed by Indian people in Indian country, and
19 that then removed from our own local Indian communities,
20 including the Navajos, the immediate ability to accuse,
21 determine guilt, and set punishment for the most serious of
22 crimes, in their own cultural manner, and then placed upon
23 the United States that burden to insure enforcement of laws.

24 Regrettably, I must tell you that since assuming
25 that obligation in 1885, and you know at that time the crimes

1 were I think at the number of seven and they have been
2 expanded to fifteen enumerated crimes, the federal prosecu-
3 tion has been, in the eyes of most Indian tribes, including
4 the Navajo Nation, as woefully lacking.

5 There are many reasons for this. That we have
6 Bureau of Indian Affairs and Federal Bureau of Investigation
7 staff who are primarily responsible for conducting law
8 enforcement investigations. However, in reality, it tends
9 to be the Navajo Nation who really has to deal first line
10 with these crimes as they happen, and the problems become
11 large when we have three agencies trying to work together
12 on a felony event.

13 This places many stresses on the local communities,
14 because very often as the result of those stresses, crimes
15 often go unpunished and felony declinations are extremely
16 high.

17 The Navajo Nation invited the United States of
18 America, through the Justice Department, to sit down with
19 us and the Bureau of Indian Affairs, about a year and a half
20 ago, to see what we could do to address the declination
21 problem, which we thought was unreasonably high, and the
22 very first thing that happened when we sat down with both
23 of the federal agencies, Justice and BIA could not come up
24 with any kind of statistics that meant anything to anyone
25 in terms of declination. No one could tell us what the

1 accurate figures are.

2 So we took it into our hands to start beginning to
3 compile the records to see if we can.

4 All I can say is it's extremely high, and it's
5 complicated by the fact that you have various jurisdictions
6 and because there are three states, you have three federal
7 jurisdictions.

8 Until a few days ago, the tribal courts in this
9 country were limited in terms of the type of punishment
10 they could mete out to defendants.

11 Under the Indian Civil Rights Act of 1968, the
12 limitations placed by Congress on tribal courts for criminal
13 offenses was six months and five hundred dollars in fines.

14 It is my understanding that the President's
15 omnibus drug bill has a rider in there that increases the
16 power of the Indian tribal courts to levy fines of five
17 thousand dollars, and it increases their ability to sentence
18 criminal defendants to one year, and that may be very helpful
19 to tribal courts in dealing with these local problems I
20 discussed, where we have misdemeanor jurisdiction.

21 The point of all this is to provide necessary
22 context to understanding concerns of Navajos when viewing
23 federal sentencing as part of the total enforcement efforts.

24 The failure to supply federal law enforcement
25 results in prosecutions that are arbitrary, and so in like

1 manner sentences received for similar crimes do seem dispro-
2 portionate.

3 Further, the delays I have talked to you about, and
4 the problems, the internal jurisdictional problems I have
5 talked to you about, sometimes become such long and
6 unreasonable delays that I think it does happen with the
7 Indian culture, and the Navajo culture in particular, that
8 the local people will arrive at some type of a cultural
9 restitution as a means of solving a problem that they do not
10 wish to rely on the federal government to resolve.

11 And so, that's something that happens, and yet, I
12 think that that may be a problem for federal prosecutors,
13 who decide to take a case he does not wish to refer to that
14 cultural disposition, a case, the disposition being between
15 members of both families.

16 I received a data sheet from one of your staff
17 administrators, and I do not believe it was within the
18 booklet I reviewed this morning as I was coming here, but I
19 recall in that data sheet there was a comparison between
20 Indian defendants and non-Indian defendants who had
21 received -- or the average length of sentences, and I think
22 maybe you are familiar with that particular document that
23 I am speaking of, and I think that that document suggests
24 that Indian people do receive lesser sentences than their
25 non-Indian counterparts, but I think that in discussing this

1 with my colleagues who have worked on the reservation and
2 with law enforcement people, that the disparity would tend
3 to disappear or reverse if first time offenders only were
4 taken into account, because Indian offenders, particularly
5 for the more serious crimes, tend to have much lower recidi-
6 vism rates, very much lower, probably maybe to a point of
7 significance. I'm not sure.

8 That's data that I would be happy to try to locate,
9 if you don't have that available, although you may well.

10 However, if the problem in the federal system
11 with regard to that information is as difficult as we found
12 it in terms of declination, I am not sure that we will ever
13 find out.

14 There is another factor, or the other important
15 factor for this Commission to consider in my view is that
16 the local Indian communities do have a large and direct
17 stake in this process, sentencing process.

18 They have a very great stake, and for this reason.
19 I think that one suggestion I might made is that the Commis-
20 sion consider the sentencing of Indian defendants in view
21 of local community input resources as an alternative, and
22 one suggestion I might make might focus on one section of
23 your report, specifically on the federal responsibilities
24 to Indian communities, becuse of the unique trust relation-
25 ship which exists between the federal government and the

1 Indian communities and discuss how those obligations would
2 be met in the sentencing phase of the federal judicial
3 system.

4 I am aware that some United States Probation
5 Offices, in particular, the one in New Mexico, has made a
6 real effort to locate and hire a probation officer who was
7 bilingual in the Navajo language, and sent this man to work
8 on my particular reservation, the Navajo, and that has
9 certainly been helpful I would assume in preparing presentence
10 reports that take into consideration some of the cultural
11 factors that I have been talking to you about.

12 In looking over the guidelines again very briefly,
13 I have not studied them in depth, but it sort of jumps out
14 at me, that the role of the probation officer is certainly,
15 it seems to me, increased to a large degree by the require-
16 ments set forth in having to interpret and apply the factors
17 which are present.

18 I don't want to belabor discussion on the complex
19 nature of the booklet. I think that's been discussed enough
20 in the short time that I was here, so I won't bore you with
21 emphasizing that, other than to say I certainly found it
22 complex.

23 I think I have a great concern that if in sentencing
24 when one's criminal history is viewed, and where points will
25 be possibly added to offenses, that any view of that criminal

1 history, be it state, foreign or tribal courts, convictions,
2 certainly should require I would think some intense study
3 by the judiciary as to whether or not that individual defen-
4 dant did indeed receive due process protections, particularly
5 whether that person has a legal counsel, say as a starter,
6 and I think you mention that in the booklet that that is
7 certainly something that is of concern.

8 The Navajo Nation has a very sophisticated tribal
9 court system, when compared with other tribal courts that I
10 am aware of, in that all of the practitioners must be
11 licensed in the Navajo Bar Association, which requires taking
12 an examination, and passing it, before you are allowed to
13 practice.

14 Many of us are licensed attorneys in other
15 jurisdictions, others are not.

16 However, our court system, as I said, is changing,
17 and changing much for the better. We presently have a few
18 licensed attorneys on the bench, whereas a year ago we did
19 not have even one, and so you see, in the more serious cases,
20 you see representation, you see legal counsel, more often
21 than not, when there is a serious charge within the tribal
22 court system.

23 That is not certainly necessarily so in other
24 tribal courts, and so I think it will be important to look
25 at those due process concerns, rather than just attaching

1 a number as to whether or not there was a conviction on the
2 record.

3 And as I said, though, I think that that needs to
4 be looked at, in any event, because even a civil case that
5 is brought into another court to look at, another jurisdic-
6 tion, it's like a state case, that the second state will
7 certainly look behind the first state's judgment to see that
8 there was minimal due process, so it should certainly be
9 present in the criminal.

10 Before you ask me for this, I will present written
11 suggestions for some of the information I have just given
12 you, and I am aware that we have been told it would be nice
13 to have this by early December, and you shall so have it,
14 but there are a number of people who are sitting down with
15 me working on it, and we have to get back together.

16 And one of the big areas that we talked about, that
17 is the group that worked with me, was the idea of cultural
18 restitution, and how important that was or was not, and was
19 our particular tribe changing such that we would discard that
20 notion, or was it something that we could still say a majority
21 of people believed in and should be respected by the federal
22 system, so we will put together these ideas for you in
23 writing.

24 I hope that I have made a little bit of sense, and
25 I thank you for inviting us, for inviting me to be here.

1 CHAIRMAN WILKINS: Thank you very much. We do
2 look forward to receiving your written submission.

3 Any questions to my right?

4 COMMISSIONER CORROTHERS: Ms. Chavez, with regard
5 to criminal history, you were concerned that in the case of
6 tribal court dispositions that there would be some intensive
7 study to determine if due process has occurred.

8 Are you saying that in the case of violent offenses,
9 such as murder, that if subsequent to this study it is found
10 that the offender did not have appropriate counsel, that
11 that be -- are you suggesting that events so far as criminal
12 history is concerned be discounted, or are you saying that
13 it be disregarded completely?

14 MS. CHAVEZ: I am just saying that it should be
15 looked into.

16 Let me give you an example that might help. Okay,
17 the tribal courts do not have jurisdiction in the first
18 place to look -- to take a murder case. However, because of
19 the felony declination problem I have articulated to you, if
20 the federal government declines, say, a homicide case, we can
21 still through concurrent jurisdiction pursue that crime as a
22 lesser included crime within our statute if it is present.

23 If we did so, and that person did not have legal
24 counsel, but we charged them with aggravated assault, and they
25 did not have counsel, it would go down on the record, as

1 aggravated assault, and so, I am not saying that you should
2 look at that case and say, well, just because he didn't have
3 counsel we should disregard it, but you should have enough
4 records available for you to -- for the judge to be able to
5 make a decision as to whether there were adequate protections
6 and I think you can't just retry that case, however. You
7 can't just retry that case based on a record where there
8 wasn't a record, you know, where maybe there was just a
9 guilty plea, or which would normally be the case, by the
10 way, if there was no counsel, just be a guilty plea, and you
11 would not get behind whether there was in fact a bona fide
12 case.

13 CHAIRMAN WILKINS: Any other questions?

14 COMMISSIONER MAC KINNON: What is the population
15 of the Navajo Nation?

16 MS. CHAVEZ: Oh, now, you have to ask me a hard
17 question. I suppose -- I think we are very prolific, Your
18 Honor, but I think we are nearing one hundred and ninety
19 thousand, maybe close to two hundred, growing very rapidly.
20 The average age I think under twenty-five, easily.

21 COMMISSIONER MAC KINNON: And is the relationship
22 with the federal government controlled by any treaty?

23 My recollection from living in that area was that
24 there was no treaty.

25 MS. CHAVEZ: There is a treaty, that was established

1 between the Navajo government and the -- the Navajo tribe
2 of Indians and federal government in 1868.

3 COMMISSIONER MAC KINNON: Does that affect this
4 at all?

5 MS. CHAVEZ: I think it does, Your Honor, to the
6 extent that because of that political relationship that
7 evolved out of that treaty, there is -- there is what we
8 call a trust responsibility on the part of the United States
9 government, and I feel that part of the -- and part of that
10 trust responsibility comes with keeping law and order and
11 providing adequate safety for the Indian beneficiaries, for
12 the Navajo beneficiaries, and so since that is in the treaty
13 language, it seems to me that there is an obligation to work
14 with those beneficiaries, in looking at this problem.

15 COMMISSIONER MAC KINNON: Is there any relationship
16 that differs between that and the Utes?

17 MS. CHAVEZ: I -- are you speaking of like the
18 Ute Mountain Utes or Southern Utes?

19 COMMISSIONER MAC KINNON: Southern Utes I think are
20 close to you.

21 MS. CHAVEZ: I am not sure of what type of relation-
22 ship they have with the United States. They may have a
23 treaty also.

24 COMMISSIONER MAC KINNON: Now, you said -- I think
25 they did have a treaty. Does the law address individual

1 Navajos, or -- that is, off the reservation, your law, or is
2 it confined to offenses committed on the reservation?

3 MS. CHAVEZ: It's confined to offenses committed on
4 the reservation, by Indians. The Code reads by Indians. At
5 this time there hasn't been a definitive ruling as to whether
6 that means only Navajos or other Indians, and so most tribes
7 are applying it to any Indian on the reservation.

8 COMMISSIONER MAC KINNON: Has there been any conten-
9 tion that -- of double jeopardy between tribal court trials
10 and federal trials?

11 MS. CHAVEZ: I am sure that there have, but there
12 have been successful prosecutions. There have been successful
13 prosecutions that I am aware of by the tribal courts, arising
14 from the same facts, that resulted also in the prosecution
15 in a federal court.

16 I don't think it happens often. I think practical
17 reality is if one body will -- you know, pursue, the other
18 one doesn't.

19 But I am aware that it has happened, and I can't cite
20 you the case law anywhere.

21 COMMISSIONER MAC KINNON: I presume the Navajos
22 have a written language?

23 MS. CHAVEZ: No, Your Honor, the Navajos do not have
24 a written language.

25 COMMISSIONER MAC KINNON: And how do they communicate

1 in writing, solely in English?

2 MS. CHAVEZ: No, Your Honor. Are you speaking within
3 the judicial system, or period?

4 COMMISSIONER MAC KINNON: Generally.

5 MS. CHAVEZ: Well, we communicate in both languages.
6 There are --

7 COMMISSIONER MAC KINNON: Orally?

8 MS. CHAVEZ: Orally, we communicate in Navajo and
9 in English, and within our court system, our courts are
10 required, I mean our judges are required to speak both
11 languages, so often the court session if all parties speak
12 Navajo will be held in Navajo, but it's a court of record,
13 so that if -- if it's a criminal matter, of course, it's
14 placed into English so that it can become a matter of record.

15 COMMISSIONER MAC KINNON: Thank you. My last
16 suggestion is that you put your suggestions together promptly,
17 because the Commission is working, and the sooner you get them
18 in, the more likelihood they are to have a real impact that
19 you want them to have.

20 MS. CHAVEZ: Thank you, I will.

21 COMMISSIOENR MAC KINNON: Thank you.

22 CHAIRMAN WILKINS: Professor Block.

23 COMMISSIONER BLOCK: Yes, just a quick follow-up
24 to the question that you raised about the fact that you thought
25 we should take special consideration of the trust relationship.

1 Would you expand that for a moment? What would you
2 think that in our role we could do more formally in the trust
3 relationship?

4 MS. CHAVEZ: Well, I think that's going to come as
5 a written report. However, I think that at least as a policy
6 matter, a written recognition of that relationship and your
7 responsibilities to those communities might be a starter.

8 The -- as I -- well, I didn't point out, but I
9 will -- I think that federal judges, many of the federal
10 judges that have presided over these Major Crimes cases have
11 really worked hard to -- in sentencing, to listen to the
12 cultural differences, to determine if they should mitigate,
13 so that they understand the perosn, before they apply the
14 sentence.

15 But, going back to your question, if it is going
16 to be -- if you are going to have written guidelines and so
17 many of the people that will be brought in on some of these
18 crimes, under this law, will be Indians, by virtue of federal
19 action, and I think that's why there needs to be a recognition
20 of that responsibility.

21 COMMISSIONER BLOCK: Thank you. I encourage you to
22 get that in.

23 COMMISSIONER MAC KINNON: One other question. How
24 many tribal courts do you have? Do you have one, or are
25 there several?

1 MS. CHAVEZ: We have our -- our reservation is --
2 and I guess when I say reservation, I should say Navajo
3 Indian Country, because it's treaty land and then additional
4 land that was annexed and placed in trust, and we call it
5 Navajo Indian Country, as does the federal government, for
6 purposes of the Major Crimes Act, that's divided into five
7 agencies or districts, court, if you will, and those districts
8 each have a district court judge, and then we have an appellate
9 court called the Navajo Nation Supreme Court, and that court
10 issues written decisions, and we have a court reporter system
11 and has three judges to sit on it.

12 COMMISSIONER MAC KINNON: Where do they sit?

13 MS. CHAVEZ: They sit in Window Rock, Arizona,
14 which is the capital of our government.

15 COMMISSIONER MAC KINNON: Thank you.

16 CHAIRMAN WILKINS: Thank you very much.

17 MS. CHAVEZ: Thank you.

18 CHAIRMAN WILKINS: We have with us today the
19 distinguished Chairman of the Antitrust Section of the ABA,
20 a member of the law firm of Hopkins and Sutter, Mr. Mark
21 Crane. We appreciate your taking your time to be with us
22 today, and we have received your written submission already.

23 MR. MARK CRANE: Mr. Chairman, Members of the
24 Commission:

25 I want to thank the Commission, on my behalf, on

1 behalf of the other leaders of the Antitrust Sections who
2 have signed the written testimony, for the opportunity to
3 appear before you today, for a second time, this time to
4 comment specifically on the guidelines.

5 Since the written submission, two other members of
6 our leadership, including our immediate past chairman, have
7 indicated a wish to sign the testimony, and I would like
8 permission to substitute with Ms. Hayes a copy of the testimony
9 signed by the other two people. Otherwise, it is identical
10 to what you have already received.

11 I thought I would summarize very briefly the five
12 major points that we made in testimony, and comment on two
13 aspects of them where perhaps we had some additional thoughts
14 that were not expressed in writing, and then submit to
15 questions.

16 I know that -- is this on? I think I lost my
17 sound. Plug come off?

18 COMMISSIONER BREYER: I think I kicked it.

19 MR. CRANE: Well, Judge, that's one way to shorten
20 oral argument.

21 I have a fairly strong voice. Perhaps I can be
22 heard without the mechanical amplification.

23 Our testimony makes five points, which I will only
24 cover briefly, because I know that you have had an opportunity
25 to read it.

1 First, we strongly endorse the conclusion of the
2 Commission that the seriousness of an antitrust conspiracy
3 should be measured by the amount of commerce involved, rather
4 than by the so-called antitrust injury, which would govern
5 a civil proceeding.

6 Our reasons for that were set forth in our first
7 written testimony, on June 10, and have been briefly repeated
8 in our recent written testimony, and I will not repeat them
9 here.

10 Secondly, we believe that the minimum jail terms
11 for individuals under the guidelines escalates too fast.

12 And that's a point to which I wish to come back.

13 Third, we believe that individual fines for persons
14 convicted of antitrust offenses should be based upon their
15 ability to pay, rather than on a harm-caused basis.

16 The indication in the guidelines is that a harm-
17 caused basis was going to be -- is going to be used, because
18 the fine will be tied to the amount of commerce involved, and
19 yet, you invite comments on the question of whether a
20 harm-caused basis or ability to pay basis is preferable.

21 Because the harm caused by an antitrust offense is
22 generally caused more by the corporate entity rather than the
23 individuals and benefits the corporate entity more than the
24 individuals and because any fine tied to harm caused would we
25 believe in most cases be so much in excess of the executive to

1 pay, we believe the ability to pay standard is preferable, and
2 I refer you again to the written testimony for a more detailed
3 explication.

4 As far as corporate fines are concerned, we believe
5 that the schedule creates fines which vastly exceed the
6 statutory maximum setting forth guideline fines for conspira-
7 cies with commerce involved exceeding fifty million, whereas
8 the guideline reaches a maximum with a conspiracy involving
9 merely two million dollars. We believe this can only bring
10 disrepute on the guidelines because they are unrealistic in
11 connection with the statutory maximum, and, frankly, would
12 be confistictatory if imposed at the level presented in the
13 guidelines. I will return briefly to that.

14 Finally, we believe the corporate probation is
15 unnecessary and ineffective in most cases where there is an
16 antitrust conviction, and again the reasons are set forth
17 in the written paper.

18 Let me amplify just two points going beyond what's
19 in the written paper.

20 First, there is the question of how to effect lower
21 minimum jail terms. A possibility would be to simply lower
22 the base offense value of the antitrust crime, so that the
23 minimum sentence in the regular jail table would not exceed
24 six months, and that is what we propose, on page 7 of our
25 paper.

1 We realize that this reduces the maximum sentence
2 as well, because the table is tied to both minimums and
3 maximums.

4 We suggest that perhaps the reduction in the maximum
5 is also acceptable, for several reasons.

6 First, history would show that the maximum sentence
7 authorized by the statute, of three years, has never been
8 imposed in an antitrust case, and nothing close to it has
9 ever been imposed.

10 Even if the guidelines which we suggest, which would
11 bring the maximum sentence I believe to eighteen months,
12 under normal circumstances, were to be adopted, it would
13 constitute a major increase in the jail sentence for antitrust
14 crime, where the sentences usually run in the two, three or
15 four month range.

16 Secondly, we believe that the guidelines are not
17 designed to necessarily reach the statutory maximum in many
18 cases, and I understand from the staff this is because there is
19 no parole provided for in the guidelines.

20 Indeed, your guidelines do not provide for a maximum
21 sentence which would reach the three year maximum.

22 We propose that, for other reasons, when there is a
23 person in control of the conspiracy, where the guidelines
24 provide for a multiplier of one-point-two, that that multiplier
25 should be increased so that the judge has discretion to

1 multiply by one-point-two to one-point-five, in recognition of
2 the different roles people can play in conspiracies, and if
3 you were to do that, our schedule of base offense values would
4 result in a maximum sentence for a controlling co-conspirator
5 of twenty-seven months, only three months less than yours.

6 Finally, I would like to talk for just a moment
7 about our proposed scale for corporate fines.

8 We have vastly reduced the percentage of commerce
9 from the fifty percent test, which is used in the guidelines,
10 to a sliding percentage starting at ten to fifteen percent,
11 and running down to one to five percent, and we use a regres-
12 sive system, that is the first commerce effective carries a
13 larger percentage than the subsequent commerce effective.

14 Our feeling is that the lower fines when coupled
15 with the treble damage remedy which already exists will be more
16 than sufficient to both punish and deter.

17 Perhaps in the smaller conspiracies there is a
18 conscious decision to try and beat the system by the price
19 fixed. In larger conspiracies, in our experience, the
20 executives are not that -- that thoughtful. They try to
21 solve a particular competitive problem, but without a balanc-
22 ing of, "Will we be able to get away with it? And if we do,
23 will the penalty be so small it will be a profitable thing
24 still to do?"

25 We think that kind of exercise is not something they

1 engage in.

2 We feel with our schedule, with treble damage, that
3 would be sufficient to deter and punish.

4 We think there is some rough analogy between our
5 position and the position the guidelines take on page 168 when
6 they talk about how much of the injury should you take into
7 account when there are multiple injuries, and the example
8 was a bus crash, one person or a number of persons are
9 injured, and we believe that what I would call a regressive
10 schedule of percentages would be justified the same way. As
11 the amount gets up, the amount becomes sufficient to both
12 deter and punish without taking into account a percentage
13 which applies the same percentage of fine to each percentage
14 of commerce that is involved.

15 With those complementary comments, Mr. Chairman,
16 I know you are running late, it's getting late in the day, I
17 would be happy to answer questions, and I would refer to
18 details in support of our position in the written paper we
19 have given.

20 CHAIRMAN WILKINS: Thank you. Your written
21 submission goes into detail as well. We appreciate that one.

22 Any questions?

23 COMMISSIONER BREYER: There is one.

24 MR. CRANE: Yes, Judge.

25 COMMISSIONER BREYER: Something I wasn't certain

1 about what you said. I thought there was a -- where the
2 guideline now would apportion the amount of commerce by
3 dividing the total amount of commerce by the number of par-
4 ticipants, and then you thought that -- well, suppose it was
5 a very small participant.

6 To a degree, the small participant would be taken
7 care of by the role in the event, particularly if the judge
8 has in consideration what the role of the offense is.

9 Would you also need to take care of it by somehow
10 diminishing the share of the commerce, you might say in a
11 price fixing? Everyone there agrees, if it's going to fall
12 apart -- I grant you there could be some totally -- but
13 unless -- I mean unless people basically go along, small and
14 large alike, it won't stand up.

15 Why is the small one any less guilty than the large
16 one? Why should he get a lesser term? Unless you want to
17 adjust for role in the offense, which is different.

18 MR. CRANE: Let me -- let me be sure I understand.

19 We made two points, and I think you are talking about
20 our concern with the guidelines which said that you could
21 attribute to a corporate co-conspirator either his share of
22 commerce or his per capita portion of the commerce involved.

23 COMMISSIONER BREYER: Whichever is greater.

24 MR. CRANE: Whichever is greater, and not the
25 question of whether the individual executive --

1 COMMISSIONER BREYER: And you think that's all
2 right for the individual?

3 MR. CRANE: No, I think -- let me cover both, if
4 I may.

5 COMMISSIONER BREYER: I was thinking individual.

6 MR. CRANE: All right, let me talk about the
7 individual. It seemed to us that the way you had it set up,
8 the individual, the apportionment among the individuals would
9 be first to look at their employers and see what share the
10 employer has, and then to give the judge the discretion to
11 apportion among the individuals indicted and convicted from a
12 single employer.

13 And we have two problems with that. One is that
14 one company with a ten percent share and another company with
15 a ten percent share, both indicted and convicted, one has one
16 regional manager who gets caught and the other has two, it
17 seemed to us it is unfair to apportion among the two, but
18 stick one with the entire commerce of an employer.

19 Our experience is these conspiracies are usually
20 regional and that the better way is to look at the commerce
21 that the individual was responsible for in determining how
22 much commerce there was for purposes of determining his jail
23 term and his fine.

24 CHAIRMAN WILKINS: Questions?

25 COMMISSIONER BLOCK: Yes, I have a couple of

1 follow-up questions on fines.

2 I find the notion of regressive fine somewhat
3 perplexing, as I would have this very crude notion that
4 antitrust violations are done for profit, and I believe I
5 have no reason to doubt your report that they are not super-
6 calculated.

7 It still seems to me somewhat strange that in fact
8 we give a volume discount, that in a sense the fines would --
9 which are monetary, so the cost of this activity would
10 decrease and the scale of activity increase.

11 Now, the best example I can understand, imprison-
12 ment is a very different phenomenon, but from a rational
13 calculating point of view, the value of imprisonment, because
14 it takes up over time diminishes as you start piling up more
15 and more years.

16 The same I don't think is true of dollars, so I
17 think the analogy of page 168, if I understand the logic, is
18 not clear.

19 Could you perhaps expand on these regressive fines
20 for me?

21 MR. CRANE: Yes, certainly. First of all, I don't
22 suggest that the analogy is perfect. I simply suggest there
23 is something similar about the two.

24 Secondly, we start with the premise that the commerce
25 involved is a proxy, but not an exact proxy, for the harm.

1 As we point out in our paper, even your assumption
2 of perhaps the general overcharge, ten percent, may vary
3 dramatically between various --

4 COMMISSIONER BLOCK: Yes.

5 MR. CRANE: So, it's very rough, and commerce is
6 a proxy even for that, and therefore I don't think that the
7 argument that the more -- the larger the offense necessarily
8 the larger the harm follows.

9 It may be a very rough proxy, but it is only that.

10 And clearly, our fine increases as the offense
11 increases in size. It's simply the percentage relationship
12 which decreases, and the judge has some discretion, so that
13 he can take that into account.

14 That's Point Number One.

15 Point Number Two, we do have piled on top of this
16 the treble damage action, which gives you some treble -- some
17 kind of judicial determination of harm.

18 Point Number Three, we believe that these fines get
19 so large that judges simply won't impose them.

20 One of the things that has struck me over the
21 years, we have got very large treble damage awards, half a
22 billion dollars, one hundred fifty million dollars. They are
23 almost always reduced either by the trial judge or Court of
24 Appeals, and I think if you get one of these conspiracies,
25 with very large fines, the judge simply won't follow your

1 guidelines, and this is a way to deal with that, because the
2 total dollars get just too big in the real world.

3 Fourth, we are concerned about the impact of a fine
4 that is fifty percent of sales, or even anything close to it,
5 on the competitive viability of the company in the future.

6 It's a peculiar result to impose a fine which
7 could -- for an antitrust offense, which could either force
8 a company out of business, or force it from being as vigorous
9 a competitor, and we don't think it's necessary either to
10 punish or deter, because the numbers get so big.

11 I have been involved in a civil case, and I don't
12 want to identify the industry, because indictments were never
13 brought, even though there was an investigation, where I
14 represented a company, one of the small fry in the industry,
15 somewhere between five and ten percent, but in five years
16 about three hundred fifty million dollars in commerce was
17 affected, and the conspiracy had gone on for much more than
18 five years if you believe the plaintiff's allegation.

19 We could have been a small fry with perhaps a billion
20 dollars worth of commerce, and your guidelines would come up
21 with five hundred million or, even if you cut the percentage
22 down, to two hundred fifty million dollars, I don't think it
23 would be ever imposed, and we are the small fry.

24 I suppose the last point I would make in response
25 to Judge Breyer, my impression is in many industries where you

1 have several large companies, you don't have to have everybody
2 go along, simply have to be price followers.

3 COMMISSIONER BLOCK: I guess I am still puzzled
4 because you bring up the treble damage as monetary fine.

5 I think there are two issues there. One, in many
6 of the bid rigging cases we have seen recently, there aren't
7 any treble damage follow-ups. In some sentences all we have
8 is fines and imprisonment.

9 The second point is I think equally troublesome.
10 If you use treble damages, that could also bankrupt the firm.

11 But the idea that somehow the fine be some multiple
12 of the benefits, you can't have it both ways, treble damages
13 following some multiple of the gains or harm, and then the
14 fines have a different pattern, and saying, well, the reason
15 the fines are different is because they might put the firm
16 out of business, but the treble damage provision is fine.

17 MR. CRANE: But the treble damage doesn't in fact
18 put it out for a couple of reasons. One is you are talking
19 about a percentage of the profit, which may be very different
20 from a percentage of the sales.

21 Secondly, in fact, that all shakes out in the court
22 proceeding, either in the settlement proceedings or in the
23 court proceedings, because the result simply is not something
24 that people can't pay, because the damages have to be paid.

25 There is no point of getting damages that can't be

1 paid, no point of putting somebody in jail in bankruptcy.

2 But with your guidelines, there isn't that
3 flexibility, unless they go outside the guideline, and I am
4 resisting the concept of a guideline that would do those
5 things.

6 If you question the regressive nature, you can start
7 with a much smaller percentage and have it the same, but then
8 I think you get the too small fines for the conspiracy.

9 I would say in some of these road building, bid
10 rigging cases, to which you refer, you have another factor
11 at work, and that is the actual physical individual
12 co-conspirator is often the president of the firm, and there
13 you have all kinds of penalties at work that don't exist when
14 senior management is insulated from the conspiracy just
15 because it didn't get up that far, and you are punishing
16 forty, fifty, sixty thousand dollar a year regional managers.
17 The treble damages bite is on the individual defendant, then
18 jail bite is on the firm. All right.

19 COMMISSIONER MAC KINNON: Would you have any objec-
20 tion to the imposition of injunctions as additional disposi-
21 tion?

22 MR. CRANE: No, Your Honor. I don't think I would.
23 Particularly if they were imposed in a parallel civil proceed-
24 ing, as is often the case today.

25 COMMISSIONER MAC KINNON: What about in a criminal

1 proceedings imposing them?

2 MR. CRANE: Well, I think that gets to the question
3 of probation. I think probation is the criminal equivalent
4 of civil injunction.

5 COMMISSIONER MAC KINNON: Well, it isn't, because
6 it doesn't continue as long. An injunction continues
7 forever.

8 MR. CRANE: I suppose you could get the -- well,
9 let me say first, most injunctions don't continue forever,
10 and particularly in the antitrust field, where current trends
11 even by the federal government is to clear --

12 COMMISSIONER MAC KINNON: Well, they are still
13 trying to get rid of injunctions granted back in the Nineties.

14 MR. CRANE: That's true, but the antitrust enforce-
15 ment authorities have taken the initiative to try and remove
16 those because the competitive conditions change.

17 I am involved in one now wherein the firms that
18 existed at the time the 1942 cease and desist injunction
19 by the SEC was entered, only about a third of them exist,
20 and indeed several have merged into a single firm, and the
21 injunction no longer makes any sense, because of changed
22 conditions, so I think any attempt to put long term injunc-
23 tions would fly in the face of experience of antitrust
24 injunctions over the years.

25 The current trend is to say ten years, and we will

1 look at it.

2 I would have no problem with injunction as a
3 concept, as part of a criminal proceeding, if there is a way
4 to impose it, but you would have to have two things.

5 One, the kind of hearing that you have now, before
6 you put an injunction in, and, two, some system so that the
7 injunction was self-executing, because as we point out in our
8 paper, many of the quasi-injunctive conditions that would
9 be imposed as part of the parole would be fairly vacuous,
10 i.e., don't violate the law again.

11 Or something that has to be self-executing, because
12 it's too hard to have a probation officer, too expensive to
13 have it audited on a regular basis, but to the extent you
14 think an effective probation, the kind we explain in our paper,
15 should extend beyond the probation period, I would have no
16 trouble with incorporating an injunction.

17 COMMISSIONER MAC KINNON: Well, probation as continu-
18 ing punishment or anything like that has a limited ability,
19 but if you get an injunction you could come in with a contempt
20 action.

21 MR. CRANE: Correct.

22 COMMISSIONER MAC KINNON: And that's pretty good,
23 and you don't have to limit it to three years.

24 MR. CRANE: I agree with that, and it's not the
25 limitation on time that I have any problem with. It's the

✓
1 type of hearing that you would need to set it up, effectively,
2 and the conditions, and if the conditions --

3 COMMISSIONER MAC KINNON: Well, generally, when
4 they are caught in those particular situations, why, they
5 will agree to an injunction.

6 MR. CRANE: I agree with that, Your Honor.

7 COMMISSIONER MAC KINNON: At least, that's been
8 my experience.

9 MR. CRANE: And that would be an injunction, though
10 usually in a parallel civil proceeding might never be tried.

11 COMMISSIONER MAC KINNON: Or by consent.

12 MR. CRANE: Or by consent, and I would have no
13 objection to that, but I have some question as to how you
14 frame that in a guideline.

15 COMMISSIONER MAC KINNON: Just say that injunction
16 might be considered an alternative subject to agreement.

17 MR. CRANE: I would have no objection to that,
18 Your Honor.

19 CHAIRMAN WILKINS: Thank you very much, Mr. Crane.

20 MR. CRANE: Thank you, Mr. Chairman and members
21 of the Commission. On behalf of myself and my colleagues,
22 I appreciate the opportunity to come and speak to you.

23 CHAIRMAN WILKINS: Our next witness is two federal
24 judges, Bobby R. Baldock, United States Court of Appeals
25 for the Tenth Circuit, and Clarence A. Brimmer, Chief Judge,

1 United States District Court, Cheyenne, Wyoming.

2 Judges, thank you so much for being with us today.
3 We look forward to hearing from you.

4 HONORABLE BOBBY R. BALDOCK: Mr. Chairman and
5 Members of the Commission, we do thank you for the oppor-
6 tunity to appear here.

7 I want to first state that my statements are kind
8 of an overview outline form. I do have my comments here
9 that I will be happy to furnish to the Commission, if you
10 desire that they be given.

11 First, I want to take this opportunity to express
12 our gratitude to the Commission for the work that you have
13 undertaken, excellent job, and when we go through the draft
14 that you prepared, and to see the details you have put in it.

15 I want to thank you for the explanation of the
16 modified real sentencing and identifying and discussing the
17 issues raised by the guidelines. Also the approach has been
18 to balance the formative nature of what the undertaking is
19 that you proceeded on and I do commend you for that.

20 I also want to address three items in my comments:

21 First, the issue which will come up where the
22 defendants plead guilty, without a trial, and the next one,
23 the issue that concerns me, where the defendant is actually
24 tried and convicted. And then, finally, on the fines and the
25 supervised probation.

1 As to the issue that concerns me where the
2 defendants plead guilty, first, there is a potential for
3 having an extended trial on the sentencing only.

4 The vast majority of the defendants in criminal
5 matters plead guilty, and under the present guidelines as
6 I understand them, the trial judge must first find the base
7 offense, or the base offense value, for the offense that the
8 defendant pleads to, and add values for specific offense
9 characteristics of what you call them. Then he must consider
10 whether to apply cross-references, whether to increase the
11 total offense value.

12 And what conduct the trial judge may consider in
13 deciding specific offense characteristics and whether to
14 increase the sentence raises questions, because the burden
15 of persuasion for proving aggravating circumstances is on
16 the government, and the government must prove those offense
17 characteristics or adjustment factors.

18 Likewise, the burden of persuasion is on the
19 defendant to prove the mitigating offender characteristics
20 applying, which would reduce the total offense value.

21 Where the case goes to trial, the trial judge can
22 make these decisions on aggravating and mitigating factors
23 more easily because he has seen and heard the evidence.

24 But where he is merely accepting a guilty plea,
25 there may be the need for an extensive hearing, because a

1 judge needs an evidentiary basis for his decision.

2 For example, most defendants will claim acceptance
3 of responsibility, which is worth a twenty percent reduction
4 in the total offense value.

5 I found that from your pages 123 and 124. But at
6 what point in time? If the defendant has contested this
7 matter, and then has it on appeal, and you have the defendant
8 before you sentencing him, he is not going to claim a twenty
9 percent reduction because of remorse. He is still claiming
10 that he is denying ever having committed the offense.

11 Now, many of the statements that the defendant will
12 make at this guilty plea will tend to be self-serving, and
13 the trial will need to be had, but at least be limited to
14 testimony, or otherwise you are going to have a four or five
15 day hearing on mitigating circumstances.

16 I also maintain that the way that the decisions
17 are running right now that the defendant will be entitled
18 to fully present all mitigating factors, not limited, but
19 all mitigating factors, and if you cut him off, there is
20 going to be an appeal to the effect he was not given the
21 opportunity to fully present the mitigating circumstances.

22 Now, as to the reduction in the discretion of the
23 trial judge, in considering aggravating and mitigating
24 factors, is also these problems where the defendant pleads
25 guilty, the prosecutor and defense attorney have discretion

1 to determine what factors the judge will consider.

2 The prosecutor may use his discretion in deciding
3 aggravating factors and what aggravating factors will be
4 proved is his decision. He will put forward only those that
5 he wants to put forward.

6 In practice, I would expect to see wide-spread
7 sentencing bargaining.

8 You do have the pleas already. The parties will
9 have agreed beforehand as to what characteristics apply and
10 what the sentence will be. The trial judge may never know
11 about the other factors and would not be able to consider
12 them if the prosecutor does not pursue them.

13 Any overworked prosecutor may disregard character-
14 istics which should be considered, thereby creating sentencing
15 disparity. Rather than the judge making the disparity, there
16 would be the prosecutor making sentencing disparities.

17 The prosecutor has tremendous discretion to bar-
18 gain not only for the offense, but also for the sentence.

19 Judges presently exercise discretion in sentencing
20 on the theory that they are neutral. Obviously, a party,
21 such as the government, is not a neutral person.

22 Other matters that bother me in regard to the plea
23 bargain or the defendant that pleads guilty is the judicial
24 scrutiny on the plea and the sentence bargains should be
25 limited.

1 Under the present law, the trial judge must be
2 satisfied that there is a truthful, factual basis for the
3 plea.

4 While certain factors which ought to be considered
5 might not be given in the sentence bargain, judicial inter-
6 vention in plea and sentence bargain should be discouraged.
7 That is not the place for the judge. Such intervention
8 conflicts with the judge's impartial role and judges should
9 not act as prosecutor.

10 There also could be a conflict where the defendant
11 claims he was a tremendous help to the government, i.e. as
12 the guidelines provide to a forty percent reduction in
13 sentence. The government does not agree, and the judge must
14 decide. The defendant will say, "I cooperated. I led to the
15 conviction. I am entitled to forty percent." The government
16 says no. The judge is the one that's going to have to
17 decide what about that. The judge may have to learn about
18 those matters, which will come before him, in resolving this
19 issue.

20 This is why I favor allowing the U. S. Attorney
21 complete discretion in this area, without judicial review
22 of such discretion.

23 On the issues that concern me where the defendant
24 is tried and convicted, the trial judge should be able to
25 consider any trial evidence, in deciding aggravating and

1 mitigating factors. That should be clearly set forth from the
2 very beginning.

3 If the trial judge hears the evidence and the
4 testimony that was presented through a two, three or four
5 week trial, then he should be allowed to consider all of
6 that, that he has sat through and heard. Having seen the
7 trial, it should be expressed that the trial judge may
8 rely on any evidence, whether or not the government elects
9 to pursue such factors at the sentencing phase.

10 Now, there is the problem of conviction on lesser
11 included offenses. May the trial judge sentence the defendant
12 based on elements the jury did not find to be proved beyond
13 a reasonable doubt? I.e., the jury convicts on a lesser
14 included offense, not involving the use of a weapon, but
15 the judge may think that there was a use of a weapon. At a
16 preponderance hearing, the jury has said, "We don't find
17 him guilty of that."

18 Are you now going to allow the judge to sentence
19 him for that?

20 That just patently seems unfair to me. I cannot
21 under any stretch of the imagination figure how that should
22 be included in the sentencing guideline.

23 Other concerns that bother me in regard to this,
24 the treatment on rare aggravating or mitigation circumstances
25 should be left to the Congress. There is a potential for

1 judicial intrusion upon the legislative decisions as to
2 what constitutes a crime or a defense, that judges are
3 allowed to consider the wisdom of the law, in passing upon
4 the sentencing, i.e., your example of euthanasia.

5 Homicide is defined as homicide. If Congress
6 desires to make euthanasia an offense, that's where it belongs,
7 not putting the burden upon the sentencing judge to say,
8 "I'm going to weigh that particular matter."

9 In the southwest, we are oftentimes faced with the
10 situation of the illegal alien and the problem where people
11 are coming into this country because there is no work at
12 all in the country they are coming from.

13 Those matters are hard-pressed for judges to
14 consider, and if the Congress wants the offense changed,
15 they should do it. Don't push the poor judge any further
16 than he is being pushed in that matter already. I don't favor
17 such discretion being placed with the courts.

18 In regard to probation and fines, violations of any
19 conditions of probation should not result in partial credit
20 for successful time of probation. To grant any credit for
21 successful time on probation disturbs the incentive for
22 staying out of trouble when you are out on probation. If
23 you are going to get the good time anyway, why bother?
24 Either stay clean or lose it all.

25 The home detention as a condition of probation or

1 supervisory release will put too great a burden on the
2 U. S. Probation.

3 Your draft indicates a high degree of contact would
4 be required. This would be too hard on the probation
5 officer, who has many other clients on probation to start
6 with. I think the employment roll is going to go ten-fold
7 if that continues.

8 For reasons stated in the draft, i.e., fair ability
9 to pay approach in the imposition of fines, it does no good
10 to fine a person five hundred dollars when they are indigent
11 to begin with and they had court-appointed counsel, and then
12 the judge says, "I am going to fine you five hundred dollars,"
13 when there is no basis any way for him to pay that fine.

14 With those, that concludes my comments. I would
15 like to defer to Judge Brimmer, if he has some.

16 HONORABLE CLARENCE A. BRIMMER: Thank you, Judge
17 Baldock.

18 Judge Wilkins, and Members of the Commission,
19 on behalf of the smallest district of the judicial districts
20 of the national, let me thank you for the opportunity to be
21 heard.

22 It was only this year that I became chief of a
23 tribe of two. Until then, I was the only judge in the
24 District of Wyoming, except for my senior judge, to whom
25 I will refer in just a moment.

1 Let me also, like the others, express my awe at
2 the Herculean task that has been put before you, and the
3 magnitude of the efforts of the Commission to approach those
4 labors.

5 And before the questioning, let me also say this,
6 that I was only given this assignment last Friday. At that
7 time, I commenced a review of the sentencing guidelines.
8 I do not pretend that my review of them is even comprehensive
9 and it certainly isn't adequate.

10 However, there are some things that occur to me
11 that perhaps are worthy of commenting on.

12 In general, I think that most of my comments have
13 been already touched on by many of the others, and all I can
14 do is perhaps second the motions of Judge Kane as well as
15 some of the rest of the speakers who have been here.

16 First, let me say this, in general the complexity
17 of the sanctioned unit systems greatly concerns me.

18 While the conscientious judge will always give
19 sentencing procedures a larger part of his time than any other
20 duties, the extreme complexities of these new procedures will
21 require an unduly large amount of judicial time, as you have
22 already heard, and that's already limited, and it's going to
23 be to the detriment of other judicial duties.

24 The end result of such complexity could well be
25 the development perhaps on down the line of a specialized

1 sentencing judge, one who has become expert in sentencing
2 procedures.

3 To require that sort of sentencing specialization
4 might be unfair to that person, as well as to other judges
5 of the court, to say nothing of the defendants in criminal
6 cases.

7 Heretofore, district judges have been generalists.
8 I submit that they should remain that way, for it's to the
9 advantage of the defendants in criminal cases to come before
10 a man with broad general experience, rather than a specialist
11 in one niche of the criminal law, namely, that of tallying
12 sanction units for sentencing.

13 In addition, the complexity of the new system is
14 surely greater than the patience and will to learn of many
15 senior judges, who are now rendering effective judicial
16 assistance to their courts, but who in the future may be
17 driven further into judicial retirement by such new and
18 complex procedures as those proposed in these guidelines.

19 It will surely take a plethora of sentencing
20 institutes and instructional sessions before the bench and
21 bar are completely comfortable with these new procedures.

22 In any criminal corrections meeting such as this,
23 sentencing disparities is always a problem.

24 Let me say this, that as previously proved by
25 the Parole Commission, we can assign specific salient factor

1 scores to an individual based on his background and his
2 situation, but the one thing that we tend to lose sight of
3 as we begin assigning numbers is the human factor that's
4 present in every case before any U. S. District Judge
5 throughout the nation.

6 This human factor for many years has been inter-
7 preted by the probation officer or by the judge during the
8 sentencing hearing, and it's something which regrettably is
9 about to be taken away through legislation.

10 Each district judge can surely present cases to the
11 Commission where the human factor brought about a sentence
12 to probation, where all other factors indicated a need for
13 incarceration, and where the probation term then subsequently
14 proved beyond any doubt to be the appropriate sentence.

15 The Bureau of Prisons statistics show continuing
16 growth of the federal prison population and serious over-
17 crowding in institutions, but the guideline table contained
18 in the preliminary draft on page 141 shows that sanctioned
19 units totalling fourteen or more will require the Court to
20 impose some term of imprisonment.

21 I feel strongly that the Commission needs to re-
22 evaluate its very low number of sanctioned units for the
23 availability of probation. Perhaps some other guideline
24 could be written into the sentencing options to utilize
25 again the human factor in determining the grant of probation.

1 Also, I think the geography plays an important
2 part in this whole process. A case involving a couple of
3 ounces of cocaine in Wyoming, or perhaps a few thousand
4 dollars in a bank fraud, is surely an important case in
5 Wyoming, and it needs to be treated with a severity that it
6 would not be treated with in any of our large coastal cities.

7 Those kinds of cases would be lost, probably
8 wouldn't even be prosecuted, in any of the big cities of
9 America.

10 Judges are selected from the areas in which they
11 sit, and the needs of the judicial district are considered
12 when they are selected. The human factor in each case I
13 feel then is a strong need for consideration in eliminating
14 sentencing disparity.

15 Modified real offense sentencing procedures is
16 always a major concern in a sparsely populated judicial
17 district such as Wyoming, where criminal cases are so highly
18 visible.

19 By limiting the Court to imposing a sentence
20 solely for the offense on which a defendant might enter a
21 guilty plea, and not allowing the Court to consider the
22 overall offense severity might likely prompt disrespect for
23 the courts and the judges.

24 Allowing sentencing only on the offense to which
25 an offender enters a plea of guilty transfers too much power

1 to the United States Attorney's Office through the plea
2 bargaining process. Defendants in Wyoming are well aware
3 that the Court imposes sentences on overall offense severity
4 at the time they enter their guilty pleas. This has had
5 rather a salutary effect on plea bargaining in our courts.

6 I feel strongly that a sentence should be imposed
7 for the criminal offense and all of the aggravating acts
8 connected therewith.

9 Should the United State Attorney be empowered to
10 bargain away acts which the Court cannot consider at sentenc-
11 ing, then it seems to me that judges will have to defer
12 accepting plea bargains until the completion of the presentence
13 report.

14 In the matter of rewarding cooperation, the Court
15 in Wyoming has always given strong consideration to defendants
16 who cooperate with the United States during the criminal
17 investigation and prosecution.

18 However, I would discourage the Sentencing
19 Commission from incorporating fixed automatic reductions
20 for the established guidelines. Again, too much power is
21 being placed in the hands of the United States Attorney's
22 Office. The United States Attorney uses dismissal of
23 counts of an indictment or an actual reduction of charges in
24 exchange for cooperation. Then to further reduce that
25 lesser sentence, even further, would not promote respect for

1 the law or for the court.

2 Also, in the matter of criminal history, I
3 personally do not feel that one prior conviction should
4 automatically exclude anyone from the opportunity to be
5 placed upon probation.

6 In reviewing the proposed guidelines, I was unhappy
7 to see that the split sentence has been eliminated as a
8 sentencing option. I have personally seen that procedure
9 serve as a great purpose in many different cases.

10 I would encourage the use of sanction units for
11 probation, if this could -- if this would provide greater
12 latitude in the granting of probation.

13 Such sanction units could easily determine high
14 activity supervision with appropriate special conditions of
15 probation.

16 And finally, with regard to violation of supervised
17 release, I personally believe that each person released from
18 confinement needs a period of supervision in the community.

19 I support your current guidelines and conditions
20 of release in the preliminary draft, but I recommend that
21 the Commission review the penalties for violation of the
22 conditions of supervised release.

23 As I understand it, the concurrent proposal for
24 holding the violator in contempt of court, under 18 United
25 States Code, Section 401, seems to me to be a poor solution.

1 It could easily result in a person who was
2 originally sentenced for a relatively minor offense being
3 required to serve the same penalty for violation as another
4 person who is originally sentenced for a very serious offense.

5 And, finally, what attitudes will be developed by
6 sentencing judges through this process? Will the judge,
7 without meaningful discretion, really care anymore, when
8 shopping bag sentencing has dictated the total sentence
9 like the tape on a supermarket cash register?

10 It would be a tragedy if he didn't care anymore,
11 but I submit this is a strong possibility.

12 CHAIRMAN WILKINS: Thank you, Judge.

13 As I understand it -- ask both of you -- you would
14 like a guideline system that says if you accept your responsi-
15 bility for your criminal act as determined by the sentencing
16 judge, the judge may in his total discretion award some
17 consideration for that, be it one percent, ten percent,
18 or twenty percent?

19 JUDGE BRIMMER: Amen, Brother.

20 CHAIRMAN WILKINS: I thought that was what we were
21 trying to do in this guideline, but we need to go back,
22 because I completely agree with what you said.

23 You see, that would build a great deal of discretion
24 in the system. Someone gets up, self-serving remarks, "I'm
25 sorry I did it," you simply disregard it, wouldn't have to

1 regard that type of conduct.

2 Judge, I wanted to ask you, if you would -- I know
3 you have only been given this assignment a short period of
4 time, but let me assure everyone that we are not directly
5 drafting this preliminary draft or any other guidelines in a
6 complex manner because we want to make it complex.

7 We don't know any better way to do it. We are
8 searching for it.

9 If you could tell us how to reduce complexity and
10 still provide a system that allows the sentencing judge
11 to distinguish this defendant from this defendant and
12 thereby promote fairness, that would be --

13 JUDGE BRIMMER: I don't believe you can do that.
14 I basically agree with Judge Kane that the Commission ought
15 to go back to Congress and tell them that they have given
16 them a task that is an impossible task, and ought to be --
17 the legislation under which you are laboring ought to be
18 revised.

19 CHAIRMAN WILKINS: Well, I don't think that's a
20 real possibility.

21 JUDGE BRIMMER: I heard you when you said you
22 didn't think that was a likelihood.

23 CHAIRMAN WILKINS: We have got a few amendments
24 of opened up discretion, very little, and that was like
25 pulling hen's teeth, so I don't think we are going back on

1 that.

2 That's why the document is so complex, as everyone
3 says. We have tried to identify factors that distinguish
4 one bank robber from another bank robber, and the more
5 factors you have, the more complex. At least the more
6 crunching of large numbers of people in one category, and
7 that may produce some unfairness.

8 I know you appreciate our task. Please give us
9 some thoughts, some suggestions, in real concrete suggestions,
10 what you would do, in this section dealing with fraud, "You
11 could make it less complex and yet accomplish the same goal
12 as the legislation, moving this Section A, or taking out this,
13 whatever."

14 It would be most helpful to us.

15 And I think your comments on cooperation are well
16 taken. I am sure we have visited in that area, and there
17 are several ways we can deal with allowing the judge the
18 discretion of, as he has today, to take cooperation into
19 account with sentencing, and I think we are all committed to
20 deal with that.

21 Any questions to my right?

22 COMMISSIONER NAGEL: Judge Brimmer, I was curious
23 and interested very much that you lamented the loss of the
24 human factor which often prompts probation in a sentence, as
25 we do in those cases probation was ultimately thought to be

1 beyond a doubt the appropriate sentence.

2 Do you do any follow-up, or is there some basis
3 for drawing your conclusion that probation was the appropri-
4 ate sentence? Is there some way you can help to enlighten
5 us to know how we can know that probation is the appropriate
6 sentence, especially in those cases where it would not
7 have ordinarily been given, but it was in fact given for
8 this human factor, as you call it?

9 JUDGE BRIMMER: On direct answer to your question,
10 I don't do any statistical follow-ups, but I do follow up on
11 the offenders that I sentence.

12 I check with my Chief Probation Officer almost
13 constantly on how so and so is doing, and he reports to me
14 when they are on probation, and I follow the probation
15 process sort of on the side, but I haven't kept a statistical
16 record.

17 But I do know that the old senior judge that is with
18 us on the bench, and I am quite sensitive to his concerns,
19 and that's why I mentioned that point about the senior
20 judges, but he always had an old saw that said if he made
21 a mistake in sentencing a man to probation, he could always
22 correct it, but if he made a mistake in sentencing him to
23 prison, he might not be able to, and this is what I was
24 really saying on that point.

25 COMMISSIONER BREYER: You may not have had a lot

1 of time, but it seems to me you got to the heart of the
2 matter.

3 The problem throughout is the problem of discretion,
4 which undercuts the guidelines, versus proliferating rules,
5 which becomes unworkable. That's what we are trying to
6 balance.

7 And one of the questions which I know is a very
8 tangential point, but it has come up, and I was curious
9 that you mentioned it, Judge Baldock, is fines.

10 One of the reasons, one of the difficulties that
11 popped out, when we began to think of gearing fines to a
12 defendant's ability to pay, which takes place in certain
13 European countries, I think called the daiphon, percentage
14 of wages, who would we know what his ability to pay is?

15 He would say, "Oh, no, I have no money," and the
16 prosecutor says, "Oh, yeah, you're very rich, you have money
17 stashed all over the world." Then there will be a big hearing
18 and he may not produce his IRS certificate, but the very fact
19 that he doesn't hold a steady job may prove he is quite
20 capable of paying, devotes his full time to something.

21 We saw so many arguments, we couldn't figure out
22 a practical system of working out gearing ability to pay
23 to fine.

24 Do you have any thoughts on that?

25 JUDGE BALDOCK: Yes, because I don't think

1 practically it's as complicated as we want to lend to the
2 process.

3 Every one of you have already had in most instances
4 where a person comes in and says, "I cannot even afford an
5 attorney." He has got an elaborate system he goes through
6 with the magistrate, approved by the federal District Court,
7 says, "You're right, you should have counsel." So that part
8 of the problem is already over.

9 Surely to goodness, although this is what leads
10 to the problem with the Commission, there are some judges
11 that do not have the sense to understand that that's a
12 problem.

13 COMMISSIONER BREYER: Well, if a person is impecun-
14 ious, he probably can't afford a fine, period. But when you
15 get beyond that and try to gear amounts of fines among those
16 who do have any income, maybe there is a way of some discre-
17 tion on it.

18 JUDGE BALDOCK: I think the problem lies when
19 you get down with if the fine stays there, the key to it is
20 ability to pay and if you have to have a hearing where the
21 prosecutor comes in and says, "You can pay," and he has got
22 to prove it, and the defendant says, "I can't," and he is
23 defending this, a decision must be made.

24 I don't see that as an overriding problem. I
25 just think it should be based upon the ability to pay.

1 CHAIRMAN WILKINS: How about corporate fines?
2 Fines against the corporation?

3 JUDGE BALDOCK: Well, I listend to the gentleman that
4 went before us, and I am like the Commission member here when
5 he was talking about the bus accident.

6 Again, that is -- I think even more so, you are
7 going to have to have the hearings there, because if a fine is
8 apropos and it should be imposed, then the judge is going to
9 have to take time to hear it, and do what the Commission or
10 what the guidelines recommend.

11 CHAIRMAN WILKINS: Should that be based on ability
12 to pay as far as the corporation or dealing with the corporate
13 defendants?

14 Is it wise within a motive to regain a loss of --
15 I don't know -- I --

16 JUDGE BALDOCK: That's the -- then you have got the
17 problems of -- well, if you fine a person two hundred fifty
18 million dollars, you have for all practical purposes put him
19 out of business. I can't say maybe he shouldn't be out of
20 business. I don't know. That depends on the type of violation
21 you have got. Just have to wait and see on that particular
22 case

23 CHAIRMAN WILKINS: Any other questions? George.

24 COMMISSIONER MAC KINNON: You talked about disagreeing
25 with home detention. There is a new thing that's arisen.

1 You think it might be quite appropriate in a number
2 of instances, where you have defendants that have some physical
3 infirmity, some disease or something of that charcter, that
4 they might be better cared for by their local physician at
5 home, under a home detention sentence?

6 JUDGE BALDOCK: Judge, let me say that as far as
7 my disliking the home detention, no, I think that is an area
8 that should be expanded similar to the halfway house.

9 What I am saying is to put the burden then upon
10 the probation officer to have to supervise and maintain that
11 type of situation, it's just unduly cumbersome.

12 If the person is a candidate for that type of
13 service, then I think there has to be a great deal of latitude,
14 almost like on your own recognizance, rather than put that
15 additional burden on the probation people.

16 They have got enough serious problems, where if the
17 Court feels that that type of sentencing should be given,
18 you are dealing with an offender that is pretty much not
19 going to be a repeat offender.

20 COMMISSIONER MAC KINNON: Whether or not -- to the
21 extent to which the Court, a court, might consider other
22 counts and counts that are dropped, and things of that
23 character, the statute provides this:

24 "No limitation shall be placed on the information
25 concerning the background, character and conduct of a person

1 convicted of an offense, which a court of the United States
2 may receive and consider, for the purpose of imposing an
3 appropriate sentence."

4 Absolutely without limit.

5 JUDGE BALDOCK: On a convicted offense.

6 COMMISSIONER MAC KINNON: On a convicted offense.

7 JUDGE BALDOCK: Yes, but that's different in my
8 opinion from the -- the aggravating and mitigating circum-
9 stances that may not have arisen to a convicted offense,
10 i.e., whether or not the person committed the offense of
11 armed robbery of a bank versus an unarmed robbery, and they
12 choose in a plea not to disclose that fact to the trial court.

13 COMMISSIONER MAC KINNON: This says not limited to
14 the convicted offense. It says on the conduct of a person.
15 In other words, goes back to prior history.

16 Now, incidentally, on that particular issue, there
17 have been some cases involving the extent to which the Parole
18 Commission can consider offenses of that nature, and certainly
19 it gets to exactly the same issue.

20 Now, the Third -- well, the Tenth Circuit, your
21 own circuit, held in Robinson vs. Hayden, back in '83, that
22 they can consider counts dismissed by the plea bargain.

23 The Third Circuit held that they -- the Court could
24 consider counts dismissed with prejudice.

25 The Eighth Circuit held that they could consider

1 cases dismissed, counts dismissed in a plea bargain, and the
2 Fifth Circuit had the same conclusion. Those are all --

3 JUDGE BALDOCK: They can consider them, but my point
4 is the power that lies in the hands of the prosecutor of not
5 disclosing.

6 Right now, when you take a plea bargain, you must
7 consider the factual basis for the truth of the plea, and
8 if the prosecutor and defense lawyer agree that this is going
9 to be what he is going to be charged with, this is going to
10 be the guidelines, to the extent where does it say that they
11 are obligated to tell that trial judge of all these other
12 circumstances?

13 COMMISSIONER MAC KINNON: I get your point on that.
14 You agree with the validity of this?

15 JUDGE BALDOCK: Oh, yes.

16 COMMISSIONER MAC KINNON: And you want to keep the
17 prosecutor straight?

18 JUDGE BALDOCK: Yes.

19 COMMISSIONER MAC KINNON: Well, so do I. And the
20 statute says that he has to prosecute offenses. And if he
21 doesn't, why, he is going to be subject to a little discipline
22 by the United States Department of Justice, but, that's our
23 present understanding. They are going to issue -- well, they
24 have already issued some standards, that were at the end of
25 the prior administration, in '80. They didn't get implemented

1 or haven't been implemented too much since then, maybe, but
2 we are given to understand that they will share their burden,
3 in that respect, but we can do some things on that respect
4 ourselves, I think in our guidelines.

5 CHAIRMAN WILKINS: Any other questions?

6 Thank you very much.

7 Over the last few months, the Federal Public
8 Defenders have given us a great deal of assistance.

9 We are delighted to have with us two Federal Public
10 Defenders, Tova Indritz from Albuquerque, New Mexico, and
11 Michael Katz, from Denver, Colorado.

12 We call on the Federal Public Defenders time and time
13 again, and we appreciate the response that we have been given
14 in the past. We appreciate your attendance today, and we
15 look forward to a continued working relationship with you as
16 individuals as well as your organization.

17 MS. TOVA INDRITZ: Thank you very much. My name
18 is Tova Indritz. I am the Public Defender for the District
19 of New Mexico. I have been in the Public Defender's Office
20 for ten years, five years as assistant, and five years as head
21 of the office.

22 In that time, I have personally represented hundreds
23 of indigent defendants, and my office has represented literally
24 thousands of clients.

25 A great many, but not all of our defendants reach

1 the sentencing phase and our district covers the whole State
2 of New Mexico.

3 I have reviewed the preliminary draft of the sentenc-
4 ing guidelines promulgated by this Commission, and I appreciate
5 very much the opportunity to come and share my views.

6 As you mentioned, the federal defenders, although
7 all independently appointed by our respective Circuit Courts
8 of Appeals, have cooperated, because we feel that the sentenc-
9 ing guidelines is a very important matter, and we can devote
10 somewhat more time than the private CJA panel attorneys, who
11 may take one or two cases a year.

12 Nevertheless, our goals dictate that we share and
13 cooperate in sharing our views.

14 I wanted to today share some of my own thoughts,
15 but in concert with the papers which the federal defenders
16 are in the process of preparing for submission.

17 I want to address two very narrow specific issues,
18 and then to the extent I have time talk about several broader
19 concerns that I have.

20 First, I want specifically to address the area of
21 foreign convictions being counted in criminal histories.

22 The present guidelines propose that sentencings
23 resulting from foreign convictions are counted if they are
24 criminal for conduct committed in the United States.

25 I have represented several persons in New Mexico

1 state prisons who have elected to return to Mexico, and one
2 case Canada, under the prisoner transfer treaties that are in
3 effect in the United States and every other country, whereby
4 persons convicted in one country but citizens of another
5 country, can elect to return and serve out the sentences in
6 their home country.

7 In June of this year was the first time I had an
8 opportunity to go overseas, and represent a person who was
9 imprisoned elsewhere, and I was sent to Peru to represent an
10 American who was in the Nocho Prison, which is reputed to be
11 one of the worst of the prisons in the world.

12 Other federal defenders have been sent similarly
13 to Turkey, Mexico, Bolivia and Canada, and other countries, to
14 represent Americans incarcerated there who wish to return to
15 the United States.

16 That was a very interesting experience for me to go
17 to Peru. I saw firsthand and I was in a Peruvian prison on
18 two occasions during the week that I was there.

19 It is very difficult to convey to Americans, partic-
20 ularly to Americans who are not involved with the criminal
21 justice system, the reality of what is a real act of justice
22 and due process, as we perceive it in our country's criminal
23 justice system.

24 One night when I was in Lima, I took out to dinner
25 a Peruvian prosecutor and criminal defense lawyers. They were

1 very interested in how the United States criminal justice
2 system functions, and asked me a lot of questions about how
3 the criminal justice systems operate, and I explained our
4 system of jury trials, burden of proof, presumption of inno-
5 cence, and the requirement of the unanimous jury verdict to
6 either acquit or convict.

7 I told them as an example about a recent trial in
8 my office where one of my assistants represented a defendant
9 who was charged with murder, and the jury had acquitted the
10 individual.

11 The prosecutor, the Peruvian prosecutor, with whom
12 I was having dinner, was really shocked to hear this story.
13 The prosecutor was very taken aback with my explanation of the
14 jury system and the need for unanimity. When I told her that
15 the jury had acquitted, she said, "You mean the jury does not
16 have to do what the prosecutor tells them to do?"

17 She could not conceive of a possibility of an
18 acquittal in the Peruvian courts, and was really genuinely
19 surprised to hear of a possibility.

20 United States Consul officials with whom I worked
21 in connection with this prison transfer also told me that once
22 a person is charged with a crime in the Peruvian system, there
23 is no possibility other than finding of guilty. The only
24 question is how long it will take.

25 I want to bring to the Commission's attention the

1 case from the distinguished Second Circuit Court of Appeals,
2 which is at 621 F.2d 1179, a 1980 case, from the Second
3 Circuit, and in that case four Americans had been tortured
4 and wrongly convicted in Mexico.

5 They transferred back to the United States under
6 the U.S.-Mexico prison transfer treaty to serve out their
7 sentences.

8 One of the provisions, by the way, under the statute
9 implementing the prisoner transfer treaties is that a foreign
10 crime be one that is also a crime in the United States, and I
11 cite the citation in my paper.

12 That is the sole condition, of course, that this
13 Commission would apply.

14 The four individuals were caught, were convicted
15 of narcotics offenses, so it does meet that requirement of
16 dual formality.

17 The Second Circuit describes in great detail in
18 that opinion, those convictions under Mexican law are, in
19 the words of the Second Circuit, manifested a shocking insen-
20 sitivity to the dignity as human beings and were obtained
21 under a criminal process devoid of even a scintilla of rudi-
22 mentary fairness and decencies.

23 These U. S. citizens brought a habeas corpus action
24 to set aside the convictions. The Second Circuit accepted as
25 true the very detailed descriptions of electrical shock to

1 genitals, hanging by handcuffs from the ceiling, extortions
2 and tortures, set out in that opinion.

3 However, the Court held that in the interest
4 of enabling future Americans detained in what the Court
5 described as brutal, outrageous and horrible conditions of
6 Mexican prisons, in the interest of allowing those future
7 Americans to return home, under the treaty, the Court
8 decided that it could not overturn these particular
9 petitioners' convictions, notwithstanding that they were
10 improperly obtained.

11 In that Resoto opinion the Court gave examples of
12 other countries' tortures and brutalities, and the opinion
13 also refers to the congressional hearings on the situations
14 of Americans in Mexican prisons. I cite in the paper which
15 I have submitted the citation for the hearings.

16 The movies, "Midnight Express," "Missing," and
17 "Kiss of the Spiderwoman," are fictional, but they do not
18 portray fiction.

19 Where this country's panoply of rights, including
20 rights of due process, cross-examination, presumption of
21 innocence, burden of proof beyond a reasonable doubt for
22 the prosecution and the right to effective assistance of
23 counsel, and to appointed counsel do not exist, then it
24 seems to me foreign convictions should not be counted.

25 Likewise, where police practice torture, coerced

1 confessions and the like, they should not be counted.

2 Because it would be difficult for the courts and
3 probation officers and difficult for foreign policy relations,
4 too, to analyze whether, for example, a conviction in Britain
5 or Canada may be comparable to our own in terms of the defen-
6 dant, whereas a conviction in Turkey, Mexico, Peru, Bolivia
7 or somewhere else may not be so comparable, it seems to me
8 the better rules for this Commission to adopt is foreign
9 convictions ought not to be counted at all.

10 One indication of congressional intent in that
11 regard is in the prisoner transfer treaty portion of the
12 statute, which is at 18 USC 4112. Congress specifically
13 provided that persons who transfer back to the United States,
14 pursuant to this prisoner transfer treaty, are not saddled
15 with disability of a person who would have had such a convic-
16 tion in our country, and they do not meet the political or
17 or civil rights, and so I would ask this Commission to consider
18 not counting foreign convictions for the reasons I discussed.

19 The second specific area that I would like to talk
20 about are Indian tribal convictions.

21 About twenty percent of the cases handled by my
22 office in New Mexico arise on Indian reservation land. We
23 have several hundred such cases over the year.

24 In New Mexico we have nineteen Indian pueblos,
25 Mescalera, Apache and Santa Clara reservations, and a very

1 amount of the Navajo, although it is a minority, of the
2 reservation.

3 In the written submission I provided last week,
4 I stated at page 9 that under 25 U. S. Code 1302, the Indian
5 tribal courts can't impose a sentence more than six months
6 imprisonment and five hundred dollars fine.

7 However, since I prepared that paper, on October
8 27, the President signed the Antidrug Abuse Act of 1986, which
9 in one sentence changes that, so as Donna Chavez testified
10 now the tribes will be able to impose up to one year imprison-
11 ment and five thousand dollars fine, but still retaining juris-
12 diction, so I want to specifically make that correction to my
13 paper so it will be up to date.

14 Our proposal, the proposal on use of prior convic-
15 tions, which the federal defenders have submitted, proposes
16 that misdemeanor convictions may not be counted at all for
17 reasons set forth in that paper, and, of course, then tribal
18 convictions would not be counted.

19 But as long as misdemeanors are being counted, I
20 want to address specific problems of tribal convictions.

21 It is not quite clear to me from the guidelines,
22 but it says they were counted the same as other convictions,
23 so I assume, for example, disorderly conduct would only
24 count if thirty or more days in jail were given, whereas
25 public intoxication wouldn't count at all.

1 But under 25 U.S. Code 1302, in the Civil Rights
2 Act, there is no right to appointed counsel in tribal courts.

3 The great majority of Indian defendants, both those
4 appearing in tribal courts and federal courts, are indigent
5 and cannot afford counsel. Some tribal courts have different
6 rules about allowing the lawyers to participate, and exclude
7 lawyers who are not part of the tribe, on the theory they
8 jeopardize their traditional control over tribal members.

9 I would say that counsel in tribal courts is rare.

10 The Navajo have paralegals, who they call advocates,
11 most simply high school graduates who have some additional
12 training, but for the most part people are represented by
13 advocates, whereas in the pueblo courts and Apache courts
14 it is extremely seldom someone is represented by counsel
15 at all.

16 As you heard earlier, most of the tribal judges are
17 not lawyers.

18 The U. S. Civil Rights Commission has recently
19 been investigating allegations and abuses in tribal courts.
20 There is indication that abuses do occur, and even where they
21 operate with the utmost good faith, the quality varies widely
22 from one tribe to another. They are poorly funded and have
23 limited access to training.

24 I recall one client of mine who was arrested,
25 brought before a tribal judge, tried and convicted and

1 sentenced, all in less than a half an hour.

2 In that case, I later made an agreement with the
3 tribal judge that the sentence would be suspended, if my
4 client would leave the reservation and not return for a year.

5 There is no requirement that the offense be an
6 offense in the non-Indian legal world. For example, in the
7 Jicarilla two offenses punishable by jail and fine are
8 wearing curlers in the courtroom and wearing pouches.

9 The problem I have is translating those prior
10 convictions into the predicate for enhancing a sentence in
11 the federal system.

12 There is a lack of due process in many tribal
13 courts, a lack of counsel in most tribal court situations,
14 and a lack of appointed counsel in every tribal court situation
15 that I am aware of.

16 I urge the Commission not to count any tribal court
17 convictions, and I would be glad to answer questions about
18 that.

19 My position is that only counseled convictions
20 should be counted in any event, including convictions in
21 federal and state courts.

22 The question that the Commissioner asked in one
23 situation, what if there had been a murder, I don't think
24 how serious the allegation originally raised, federal or
25 state court, or whatever is controlling, and there is a need

1 for counsel, and there is a need for an opportunity to show
2 that perhaps there is self-defense involved or the opportunity
3 for a person to defend themselves, and in order to utilize a
4 prior conviction to actually enhance the sentence, which is
5 what is happening here, rather than limiting it, one factor
6 as it is now is that it should be limited to counseled
7 convictions.

8 I would like to address some specific areas, and I
9 will be real brief and conclusory and respond to questions,
10 because some of my comments repeat what other people have
11 said.

12 I believe very much in the tenets of our criminal
13 justice system, presumption of innocence, burden of proof upon
14 the government, proof beyond a reasonable doubt as a standard
15 to deprive someone of their freedom, a right to see and hear
16 the evidence against one, to confront and cross-examine
17 witnesses, compulsory process for writs, and the right to
18 jury trial, and to the extent that some of those rights are
19 derogated by this numerical system and kind of slide into
20 not having an opportunity for the government to prove another
21 crime beyond a reasonable doubt, but rather enhancement of
22 some other sentence, I would urge the Commission not to do that.

23 For example, to the extent that the defendant has
24 the burden of proving unreported income as in fact legitimate
25 income, that reversal of the burden of proof seems to me

1 improper.

2 There should be a due process hearing, to allow
3 presentation of evidence, because here we are facing someone
4 spending an extra year in jail based on some other allegation,
5 which to me is just as serious as being charged with that in
6 a separate crime, where they would have these rights.

7 The guidelines are terribly complex. There will be
8 lots of people who will have different views on what they
9 mean. It's going to lead to a lot of litigation.

10 It seems to me it will require much more funding
11 for probation offices to do all this work.

12 My office frequently offers seminars for private
13 attorneys who are willing to undertake Criminal Justice Act
14 appointments. Some of those are people who may only take a
15 case or two in federal court a year, and to ask them to
16 master the system is really I think too much to ask.

17 I have read them and I am not sure that I fully
18 understand them.

19 The guidelines call for sentences that are far too
20 long. In every instance that I thought of a case that I have
21 or have had recently and looked at the guidelines, not only
22 were the guidelines far longer than the sentences imposed, but
23 in many instances far longer than the statutes under which the
24 person was convicted allowed.

25 The Commission is, of course, well aware what we have

1 now is symbolic sentencing, fifteen years in the prison, and
2 that's what the public reads in the newspapers, and yet that's
3 not nearly what the person serves.

4 So, to the extent that we take away good time, take
5 away parole, take away opportunities for early release, we
6 need to think about what will happen and what's going to
7 happen is there is going to be increasing logarithmically
8 the number of person years served.

9 Even now the prisons are overcrowded. Just recently
10 they were sent from La Tuna in El Paso to the county jail
11 facilities in New Mexico.

12 At the same time, Bernalillo County Detention
13 Center, which is the county where Albuquerque is located, and
14 is the biggest county in New Mexico, increased their rate
15 for federal prisoners from sixty-two dollars fifty cents a
16 day to ninety dollars a day, so the Marshals have had to move
17 the prisoners who were pretrial in our jail other places.

18 The local jails may be a short term solution, but
19 they are certainly not a long term solution in terms of
20 housing federal prisoners.

21 One exception always is murder cases. We have a
22 disproportionately large number of murder cases in New
23 Mexico for our size, our share of cases in the federal system,
24 because of the reservation jurisdiction.

25 Right now, in my office, we have four, in fact when

1 I left yesterday afternoon a fifth murder case in my office.

2 Two of those are cases where brothers are charged
3 with -- two men are charged with killing their brothers. One
4 is a battered wife who is charged with killing her husband,
5 and one is a case of self-defense involving two young men
6 who were slightly acquainted and got into an altercation.
7 The one that came in yesterday is a juvenile case, and I
8 really don't know what that is about yet.

9 But under these new procedures, the person will
10 end up doing a minimum of a thirty year sentence, which with
11 good time means twenty-five years actually being incarcerated.

12 That is far longer than people are looking at
13 now. Now, someone with a life sentence is eligible for
14 parole after ten years, and if there are not aggravating
15 circumstances involved, such as a felony murder, or something
16 of that nature, ten years is a reasonable expectation of
17 parole.

18 So we are looking at dramatically increased
19 sentences. Of course, as I mentioned, it's going to use up
20 a lot more resources. I foresee a lot more trials, much
21 more litigation of the meaning of sentences, the meaning of
22 the guidelines as applied to the sentences imposed, much
23 more lengthy hearings.

24 I am concerned about the lack of procedural due
25 process in the sentencing process, that the government should

1 carry the burden and any new burden is beyond a reasonable
2 doubt.

3 For example, one concern I have is the guideline
4 that was perjury or obstruction of justice, that the sentence
5 should be increased by a certain numerical factor, when those
6 are things the government can prosecute for, and if the
7 government were to prosecute those offenses, then there is
8 burden of proof and the standard of proof that obtains in
9 your normal criminal case.

10 So what would happen here is that the burden of
11 proof slips down and the person ends up being incarcerated
12 for the very same thing that he might be if he got convicted.

13 I would urge this Commission not to slip below the
14 level of rights we have in a normal criminal case.

15 Also I don't see how the Commission can enforce
16 the double jeopardy prohibition so someone could not subse-
17 quently be prosecuted for perjury. That would certainly
18 change when jeopardy commences under the current state of
19 the law.

20 CHAIRMAN WILKINS: You are probably right. You
21 couldn't say you couldn't prosecute. But you could say the
22 sum would be zero if you convicted for perjury.

23 MS. INDRITZ: And it would have to come back and
24 be reduced.

25 CHAIRMAN WILKINS: Well, if you couldn't -- this

1 conviction percentage is zero, you see, so nobody would
2 prosecute for it.

3 MS. INDRITZ: Well, then it counts as a new
4 conviction in certain other contexts, let's say, habitual
5 offender, and so on.

6 I feel that judges are entrusted with discretion
7 in many areas, civil rulings and so forth, and it seems to
8 me that there should be more opportunity for discretion for
9 judges in the criminal sentencing area.

10 There are so many factors that are really hard,
11 and I would say impossible to quantify. The age of the
12 defendant. Sometimes it cuts one way, sometimes it cuts
13 another way. The health of the defendant. The balance
14 of the offense.

15 The ordinary federal crime has a five year
16 statute of limitations. I often find myself representing
17 someone who is charged with something which occurred three
18 years ago.

19 The availability of resources in the community,
20 and influence of family members. Availability of foster
21 care for children.

22 The very last sentencing I happened to have in
23 federal court was last week, and it was a young man who was
24 charged with assaulting his brother. I personally interviewed
25 the brother, who was allegedly the victim in the case, and

1 he told me, that is the brother, that he had started the
2 fight, and tried to get my client to fight, and my client
3 refused to fight him.

4 The brother insisted, and said, "I want you to
5 come out." My client said, "No, I don't want to fight,"
6 and the brother started hitting, and my client started
7 defending himself, and at that point it escalated.

8 The brother also told the prosecution he didn't
9 want to allow law enforcement. There was a very strong case
10 of self-defense. On the other hand, some questions of
11 whether my client had over-reacted.

12 Under these guidelines, my client would be looking at
13 ninety points under the guidelines, ninety sanction points,
14 and yet the judge was able to take into account the self-
15 defense aspect, the fact that my client was enrolled in a
16 vocational school for Indians, which were living in the
17 dormitory setting and receiving counseling, and the judge
18 felt that the appropriate sentence was probation.

19 CHAIRMAN WILKINS: This is a terribly delicate
20 area. We have talked about it all the time. You tell us
21 what the guidelines should say to take care of that situation.

22 If you can do that today, it's worth all our trip
23 out here and back twenty times over.

24 MS. INDRITZ: Well, let me tell you how the U. S.
25 Attorney plugged into that. He knew he had a pretty weak

1 case because of the self-defense. My client was originally
2 charged with a 20 year offense. We ended up entering into
3 a plea agreement of simple assault with a maximum penalty.

4 The sentencing judge was looking at either three
5 months in prison, or letting my client continue on the
6 vocational schooling he was at and doing pretty well, and I
7 think wisely the judge felt putting him on three years
8 probation, three years of supervision, with three months
9 of prison still hanging over his head --

10 CHAIRMAN WILKINS: I don't argue with the way
11 it was worked out. I am asking you to tell us what we can
12 say in these guidelines that will allow for that same
13 conclusion, allow for substantial justice to be done.

14 Brothers fighting brothers. We can't write
15 guidelines for brothers fighting brothers. But it does
16 happen.

17 MS. INDRITZ: Happens a lot.

18 CHAIRMAN WILKINS: Friends drinking and one
19 stands up to the other.

20 MS. INDRITZ: We see a lot of that.

21 CHAIRMAN WILKINS: Tell us what we can say.

22 MS. INDRITZ: All right. One thing, it seems to
23 me what the statute calls for is a preliminary determination
24 by the trial judge whether probation is appropriate or not,
25 and only if the judge determines that probation is not

1 appropriate does he then turn to the guidelines, however
2 they end up being structured, and I think that's one of the
3 deficiencies in the guidelines, that there is not a separate
4 set of suggested characteristics for the judge to take into
5 account in deciding whether probation or not probation is the
6 appropriate track to look at, and then when the judge gets
7 on that track of probation or track of imprisonment, then
8 he goes and looks at a straight set of guidelines how long
9 the imprisonment should be for, and that brings up the
10 question you asked before.

11 COMMISSIONER BREYER: Maybe it isn't weird.

12 MS. INDRITZ: No, I don't think it's weird.

13 COMMISSIONER BREYER: You said the judge decided
14 not to send him to prison at all, in your case. If he
15 decided not to put him on probation, it is twenty years.

16 MS. INDRITZ: Just an example, just along those
17 lines we were talking about, but yes, I think there are some
18 instances where that's the decision the judge has to make.

19 COMMISSIONER BREYER: But just having him
20 depart -- I mean normally you go to twenty years in this
21 kind of thing. After all, we can't see everything. Brother
22 fighting brother. Depart. That's what departures are for,
23 where we can't see everything in the world.

24 MS. INDRITZ: Well, as one of the previous
25 witnesses said, I think the judges make a very good faith,

1 conscientious effort to follow the law, whether they agree
2 with it or not, to the extent this is what they perceive.

3 COMMISSIONER BREYER: We could write it as a
4 departure policy, some unusual situation, the victim
5 provoked to a significant degree, or euthanasia or something,
6 the classical reason for giving a lighter penalty.

7 I mean we can't write our guidelines with our
8 unusual cases in mind, but if you find an unusual case, judge,
9 you are not supposed to follow the guidelines, that's another
10 case for departure.

11 MS. INDRITZ: In the national case, that may be
12 a reason.

13 COMMISSIONER BREYER: You are saying in the
14 regional --

15 MS. INDRITZ: Our cases of violence that we
16 handle almost all come off of the Indian reservations.
17 Sometimes there is a case on the military base, or something
18 like that, but, other than perhaps a very aggressive bank
19 robbery, mostly we do not have cases of violence except
20 on the Indian reservations.

21 I can tell you, in ten years, only once can I
22 remember a question of identity. Always people who know
23 each other, primarily family members, and primarily where
24 alcohol is involved, not only on the part of the defendant,
25 but on the part of most if not all the victims and witnesses.

1 CHAIRMAN WILKINS: I agree with you, but we can't
2 say if an Indian kills an Indian, it's not as serious as if
3 it's a non-Indian.

4 I don't think that's what the courts are saying,
5 it's not as serious if it had occurred --

6 MS. INDRITZ: Well, for example, Donna Chavez
7 was talking about cultural restitution. I see that some-
8 times where the tribe will, sometimes through the tribal
9 courts, or sometimes not, have arranged sort of mediated
10 settlement between the families, and the victim's family
11 says, "We don't want this guy to go to prison," and the
12 family members -- I mean I had a case last fall where my
13 client was charged with killing his uncle, and the family
14 all got together and said, "You know, we lost one person.
15 It was partly his fault, and we don't want this kid to go
16 to jail."

17 So, I think the two answers to the question are,
18 one, a consideration of probation versus incarceration as
19 a threshold issue separate from these guidelines, and,
20 secondly, more opportunity for discretion on the part of the
21 trial judges, who really are the only ones who can take into
22 account the particular facts which may seem unusual or may
23 not be so unusual.

24 COMMISSIONER BREYER: Well, you have have something
25 unusual to the country as a whole, but nonetheless of the

1 particular community it may be premeditated crimes are less
2 common and provoked more common, even though it's unusual in
3 that community, in which case we don't have to write a
4 guideline I wouldn't think that governs all kinds of family
5 relationships which may be common in some parts of the world,
6 and not in others.

7 MS. INDRITZ: I think that's the reason there
8 should be more room for discretion.

9 COMMISSIONER BREYER: Depart.

10 CHAIRMAN WILKINS: Allow for departure, brother
11 against brother, friend against friend, acquaintance against
12 acquaintance, drinking buddies against drinking buddies. I
13 mean it's a whole group of cases you are talking about.
14 But they have to know, "Judge, this is not something we
15 wrote guidelines for." It has to be just more than that.

16 COMMISSIONER BREYER: There are various forms
17 of provocation. Is there some element of provocation
18 involved?

19 MS. INDRITZ: Oftentimes, and oftentimes, there
20 is alcohol involved.

21 COMMISSIONER BREYER: Perhaps if it's alcohol
22 involved, it's a diminished state of mind. That is the
23 intent is less.

24 MS. INDRITZ: I agree with that, yes.

25 COMMISSIONER BREYER: Maybe we could put it in

1 those terms.

2 MS. INDRITZ: But that's only one of the factors
3 which I think are not --

4 COMMISSIONER BREYER: Well, the thing to do is
5 write a departure policy, and you could look at that and
6 try to figure out what other things ought to be in there.

7 That's possible. I mean you could have an escape
8 clause, you know, and say, "We haven't thought of everything,"
9 and time will -- time and monitoring and appellate court
10 decisions and just looking and seeing what happens that will
11 identify it for us.

12 MS. INDRITZ: One thing I want to say before I
13 turn it to my colleague is that there should be more atten-
14 tion paid to non-incarceration.

15 There are a lot of community resources that often-
16 times can provide much more supervision than even the half-
17 way house. For example, this client of mine who is at a
18 vocational school, but there are many other resources
19 throughout the country and thinking as one of the previous
20 witnesses said, federal resources are scarce and looking to
21 non-violent offenders being placed in community resource
22 centers.

23 But I think sometimes violent crimes, those people
24 are also good candidates, and are not likely to repeat those
25 offenses.

1 CHAIRMAN WILKINS: Thank you very much. Mr. Katz.

2 MR. MICHAEL KATZ: Mr. Chairman and Members of the
3 Commission, I know the hour is late. You have heard other
4 speakers. Mr. Miller, Judge Kane and myself, Bill Graves,
5 all seem to have the same sort of thoughts.

6 Let me first tell you I was a prosecutor for two
7 years in South Dakota, taught for two years at the University
8 of Colorado, several years as Assistant Public Defender
9 and I have been Federal Public Defender for two years.

10 I have entered a lot of guilty pleas, and there is
11 a little door to your left which is the way most of my
12 clients exit from this courtroom. Takes them up to the
13 Marshal's lock-up.

14 I have to say, though, despite the fact many of my
15 clients have walked out in custody, that I by and large have
16 no complaints about the way the sentencing system is operated
17 in the Federal District Court in Colorado.

18 I think that the interests of the victim, the
19 defendant, the circumstances in each offense, has been
20 taken into account.

21 I don't feel my clients have been punished for
22 going to trial. I feel by and large the judges have balanced
23 all the factors that go into determining sentence in each
24 case, have wrestled with those factors, and reached fair
25 and just sentences, and I think if we were to chart those

1 sentences by the type of case, crimes of violence versus
2 non-violent, I don't know that we would find that we would
3 see much consistency.

4 Most cases are unusual cases. If I can get back
5 to a point made by Judge Baldock, I can entertain to the
6 extent you are content to be entertained, with some unusual
7 cases.

8 Skyjacking case, forty-eight year old school
9 teacher, Teacher of the Year in Adams County, became
10 increasingly alcoholic, married man, family and home, who one
11 night was in a bar in a little town called Louisville, drink-
12 ing with his friends, and on a dare said he could go down
13 to Stapleton Airport and walk on a plane and take it to
14 Ireland, and take some prisoner. It was that confused.

15 He did that. He went down. He had a knife.
16 Went right through, onto the plane, nobody detected it.
17 Walked into the cockpit and said, "Take this plane to Ireland."

18 He was convicted. Had a trial. It was an insanity
19 defense, involving alcohol and intoxication. It was a
20 tragic case.

21 He was convicted, and Judge Matsch, who sentenced
22 him in that case, had only one of two options, either proba-
23 tion or twenty years minimum sentence for skyjacking. He
24 didn't want to do that, but he had to. So he used 4205(b)(2),
25 indeterminate sentence, and wrote some very strong letters

1 to the U. S. Parole Commission about believing this man
2 should be released.

3 COMMISSIONER BREYER: You have just given exactly
4 what was bothering me about interpreting the statute in such
5 a way, we are supposed to say probation or twenty years,
6 nothing in between.

7 MR. KATZ: That's right, that is a problem.

8 The man was released after three years. As far
9 as I know, it's been four or five years, he has been success-
10 ful on parole. He is being supervised.

11 That's an unusual case. But it's not uncommon.

12 I mean that I think that human nature is perhaps
13 subject to those kinds of expression. Cases don't come to
14 us neatly wrapped and packaged. Bank robbers aren't all
15 the same. Homicide cases aren't all the same.

16 I represented another -- I will give you one
17 other example. I represented a young Navajo Indian on a
18 kidnapping charge.

19 He had grown up and never been off the reservation.
20 Age of eighteen, he enlisted in the U. S. Army, and came to
21 Colorado Springs, Fort Carson. He was, to say the least,
22 in cultural shock. Didn't have the language skills.
23 Abused, ridiculed, abused psychologically by the other young
24 men in his troop.

25 One night, after drinking, he decided to go back

1 to Shiprock,, Arizona. Intoxicated, he went out and went
2 to a parked car, where there was another military man with
3 a child sleeping in the back seat, and put the knife to the
4 man's neck and said, "Drive me to Ms. Indritz' hometown of
5 Albuquerque," which he did, and my client caught a Greyhound
6 bus back to the reservation, and he was convicted on kid-
7 napping and placed on probation, and he should have been on
8 the facts of that case.

9 He was also placed into a community treatment
10 center and he successfully completed his probation.

11 I guess the comment I have to the Commission is
12 who need to go to prison? What's the purpose of prison?

13 In my experience, very few need to go to prison.
14 The one who needs to go needs to go for a long period of time
15 to protect the public. The vast majority don't need it.

16 But these guidelines are going to put those
17 people in prison.

18 My philosophy may be obviously not in the main-
19 stream of what the American people want, or what perhaps
20 wiser people who have had a chance to study this problem
21 want, but that's my impression having been on both sides
22 of the system for thirteen years.

23 Secondly, you can't use a mechanical formula
24 for determining how much weight to be given each of these
25 aggravating and mitigating factors.

1 My solution would be broaden the range of possible
2 punishments. Ms. Indritz indicated make probation a decision
3 that comes first. If not probation, a jail sentence.

4 Broaden the range as much as possible and don't
5 build in all the aggravating and mitigating factors. Allow
6 the judges to use those factors to go perhaps on occasion to
7 extremes. In either direction. I will take my chances with
8 a three hundred year sentence that Judge Kane imposed on
9 somebody. It was a justified sentence. I know that case.

10 I will also take my chances of probation on the
11 skyjacking case.

12 Finally, don't put us in a position where the
13 integrity of the system is compromised. If you force prose-
14 cuting attorneys and defense lawyers to play games with
15 these equations, we will find a way to do it. I can assure
16 you of that. Or we will try a lot more cases. Maybe a
17 combination of both.

18 But we will try to find a way to try to put
19 blinders on the judge or probation office. We will find a
20 way to distort what happened. Find some offense that will
21 fit in the result the prosecutor and defense lawyer desire
22 will be reached.

23 I think you do disservice to the system. As it
24 is now, the judge can track it, and by the same token there
25 is due process.

1 And I am concerned that there is a difference,
2 between saying, as Judge MacKinnon said, doesn't the judge
3 have a right to consider everything?

4 Yes, he does, but if you require a judge to make
5 a determination, a specific determination, on, for example,
6 percentage, and to then assess a point value, or to weight
7 that, it's extremely -- it's not only difficult, but I think
8 it leads to some artificial results.

9 I would rather have the judge say, and judges
10 have said to my clients, "I have watched you during that
11 trial. I didn't see remorse in your eyes. I watched you
12 when the victim's mother testified. I didn't see any concern,
13 even concern that the court reporter perhaps was showing or
14 the clerk of the court was showing for the plight of that
15 person."

16 I have no trouble with that being considered,
17 but you can't -- you can't make it so concrete. It can't
18 be that concrete and still work.

19 I have other specific comments, but I think they
20 are addressed in my paper.

21 CHAIRMAN WILKINS: Well, thank you very much.

22 Any questions to my right?

23 Anyone have any questions?

24 COMMISSIONER MAC KINNON: Ms. Indritz, I read
25 your testimony. I thought it was very good.

1 MS. INDRITZ: Thank you.

2 COMMISSIONER MAC KINNON: And on your actual
3 testimony and your statement, if we were to follow your
4 recommendation about foreign convictions, there isn't any
5 country in the world that would comply with your requirements.

6 Absolutely. English, Scottish courts, convictions,
7 we couldn't consider them. They don't apply reasonable
8 doubt in Great Britain. They have a majority verdict in
9 Scotland. No country in the world could comply with your
10 requirements.

11 MS. INDRITZ: Your Honor, I think when we are
12 talking about taking someone's freedom for a period of time,
13 we need to apply the standards in this country, and I don't
14 know whether there are countries that meet our standards or
15 not, but I think the diplomatic problem of considering some
16 countries and not others is one to take into account, and it
17 is my recommendation that no foreign convictions be considered
18 as part of the past criminal conviction scoring methodology.

19 COMMISSIONER MAC KINNON: Well, in some respects,
20 people consider the English system as superior to ours.

21 MS. INDRITZ: Perhaps it is. I don't know. I
22 know that Congress in passing 18 U.S.C., Section 4112, decided
23 that even someone who transfers back to this country under
24 the prisoner transfer treaty which we now have with England
25 are, like the people who transfer back here from Mexico,

1 Turkey, Thailand or any other country, not considered to
2 have a felony in terms of civil rights.

3 There is a distinction between, I think, in light
4 of that statute that Congress has passed, that no foreign
5 conviction should be counted. That's the position I would ask
6 the Commission to undertake, Your Honor.

7 COMMISSIONER MAC KINNON: You appreciate the
8 difficulty of that, and, certainly, we will take -- take
9 Hauptmann, the Lindbergh kidnapper. He was convicted in
10 Germany of climbing up a ladder and getting into a person's
11 house and stealing something. He climbed up a ladder in New
12 Jersey, and went into a window, and stole the Lindbergh baby.

13 Don't you think that was a fair matter to be
14 considered?

15 MS. INDRITZ: We have on the one hand what Mike
16 was talking about, taking into account, all the things judges
17 are now permitted to take into account.

18 We have, on the other hand, this Commission's
19 proposing to cast in numerical formulae prior convictions,
20 and I think in regard to counting that as a prior conviction,
21 no foreign convictions should be counted.

22 COMMISSIONER MAC KINNON: They don't have to be
23 counted, but they can be considered.

24 MS. INDRITZ: But there is a specific formula
25 here where you add up convictions. I am saying for those

1 purposes that no foreign conviction should be included in that
2 tally. That's the position I'm taking.

3 COMMISSIONER MAC KINNON: I will say --

4 MS. INDRITZ: I think also, Your Honor, if I
5 might respond to that, I think this whole system imposes
6 on all the court personnel, the judges, defense lawyers,
7 the probation officers probably most, and to add to that the
8 burden of sort of making an evaluation on violation of the
9 criminal justice system any criteria is just too much to ask.

10 COMMISSIONER MAC KINNON: You were talking about
11 an instance where the sentence was longer than the maximum
12 provided. That can't be.

13 MS. INDRITZ: I undertand that can't be, but that's
14 just an illustration about how long these guidelines are.

15 COMMISSIONER MAC KINNON: That's how long?

16 MS. INDRITZ: In terms of looking up the points.
17 I added up the points and turned to page 140. In a number
18 of instances --

19 CHAIRMAN WILKINS: We would like to see those.
20 Of course, the statute maximums prevail, but I would be
21 interested to see how they exceed the numbers. All the
22 factors have been taken in, except perhaps drugs. There
23 the statute said you must sentence.

24 MS. INDRITZ: Well, for example, vehicular
25 homicide, three years imprisonment. If it involves alcohol,

1 which every involuntary manslaughter that we have had in the
2 office, or almost all of them do, you could right away get up
3 to sixty-four points. Adding up the involuntary manslaughter,
4 plus alcohol, and it translates into more than three years.

5 CHAIRMAN WILKINS: Did you take any of the other
6 factors into account?

7 MS. INDRITZ: Not even adding if the guy has any
8 prior record or anything. But right before, off the bat,
9 fifty-four points is somewhere between forty and fifty --
10 fifty-six points is forty-four to fifty-four months.

11 So, that's one example that I can think of right
12 off the bat that's over the statutory limit, and I just --
13 not that I think a person would do more than the statute,
14 but illustrative of how high they are.

15 COMMISSIONER MAC KINNON: Did I understand you
16 to say that you didn't think perjury committed during the
17 trial should be considered?

18 MS. INDRITZ: I am saying that people -- in my
19 view --

20 COMMISSIONER MAC KINNON: You want them charged
21 separately?

22 MS. INDRITZ: I think that people should be
23 sentenced for what they got convicted for, and if they got
24 convicted for Crime A, they should be sentenced for A, not
25 A, B and C.

1 I see, for example, times where the prosecutor
2 brings an indictment that has multiple counts, and I say to
3 my client in my counseling session with them, "You know, we
4 both agree that they can surely convict you of Count I, and
5 we think we have a good chance on Counts II, III and IV, but
6 they are offering a plea bargain, plead to Count I."

7 And my client says, "I'm not guilty of Counts II,
8 III and IV." I say, "Yes, the very best result we could get
9 on trial is a conviction on Count I, and nothing on the
10 others, so it's a reasonable plea offer."

11 An example, a defendant of mine was charged with
12 transporting illegal aliens. Evidence quite strong.
13 Another count, he assaulted an immigration officer. In my
14 view, the immigration officer assaulted him. And he wanted
15 to go to trial, to prove he didn't assault the immigration
16 officer, but we were offered a plea.

17 I said, "If we go to trial, that's where we are
18 going to be, anyway," so he pleads to that, and I have a real
19 problem with the judge then penalizing my client for assault-
20 ing this immigration officer, and maybe I should have gone
21 to trial so that he could have been acquitted of that count,
22 and therefore it couldn't be taken into account under these
23 guidelines. If these guidelines were adopted, in this case
24 I would have told him to go to trial, just for that reason.

25 COMMISSIONER MAC KINNON: You heard me read all the

1 cases where counsel dismissed and everything else, and they
2 can still be considered, and the courts upheld that, but I
3 believe you come down to perjury, and perjury committed at
4 trial can be considered by the sentencing judge, and the
5 Supreme Court has said it is an exercise of judicial discre-
6 tion, by evaluating the defendant's personality and his
7 prospects for rehabilitation. That's where that stands today.

8 Now, what you are advocating is something that
9 more or less the court has passed on.

10 So far as Mr. Katz is concerned, I was wondering
11 whether that instance you gave whether the man got credit for
12 a guilty plea?

13 MR. KATZ: Which instance?

14 COMMISSIONER MAC KINNON: Well, the first one.
15 You started off --

16 MR. KATZ: The skyjack?

17 COMMISSIONER MAC KINNON: Yes.

18 MR. KATZ: Well, what I was referring to, under
19 the present sentencing he had to receive a sentence of
20 twenty years. He did receive a sentence of twenty years.

21 COMMISSIONER MAC KINNON: In your practice,
22 generally do you find they do get credit for guilty pleas?

23 MR. KATZ: I think to some extent. I think
24 that the Court -- there are certainly certain cases where
25 the Court knows that there is an issue to be tried, and the

1 defendant is not punished for trying that case.

2 My experience has been that I can't see any differ-
3 ence between the sentence the defendant received in that case
4 as opposed to other defendants similarly situated on pleading
5 guilty.

6 I think on occasion, on the other hand, a defendant
7 goes to trial and shows no remorse and no issue to litigate,
8 I am certain that sentence would be higher.

9 COMMISSIONER MAC KINNON: You understand your
10 proposals to eliminate aggravating and mitigating circum-
11 stances, that would result in giving the judge complete
12 discretion, which would in effect repeal the statute. That's
13 the way it operates.

14 MR. KATZ: I understand. I said broaden the
15 guidelines as much as possible and don't build in the
16 mitigating and aggravating factors.

17 COMMISSIONER MAC KINNON: Well, we wouldn't
18 have to have any guidelines.

19 MR. KATZ: I have a real problem with this law
20 and these guidelines.

21 MS. INDRITZ: Could I respond to your last
22 comment?

23 COMMISSIONER MAC KINNON: Sure.

24 MS. INDRITZ: First of all, I would say I am not
25 advocating perjury, but in most cases if the jury convicts,

1 it is because the jury didn't believe the defendant, so
2 that circumstance then is not necessarily perjury.

3 COMMISSIONER MAC KINNON: It carries more
4 judgmental decision than just something outside of the
5 court proceeding. You feel that the jury has in some way
6 passed upon it?

7 MS. INDRITZ: Well --

8 COMMISSIONER MAC KINNON: Is part --

9 MS. INDRITZ: Well, not on the question of
10 perjury. I mean I think perjury as a criminal offense
11 indictable on its own is far more than simply the jury not
12 accepting the defendant's version of it in the context of
13 the testimony of all the witnesses in the case, and there is
14 some possibility that this guideline about perjury may mean
15 that in any case where the defendant testifies, and the jury
16 obviously doesn't buy his side of the story, because they
17 convicted, in any case the defendant testifies, there may
18 possibly be that kind of enhancement, and I don't think
19 that's really what the Commission contemplated in putting that
20 in there, but there is certainly that possible interpretation
21 and possibly that's something that should be cleared up.

22 CHAIRMAN WILKINS: Thank you very much.

23 I hope that you will write to us with more ideas.
24 This idea of complexity, you tell us how to take some of the
25 complexity out. You may come up with some real good ideas,

1 something concrete. In this section of harm against the
2 property of persons, do this. Sometimes in the late hours
3 of the evening, you may come up with a brainstorm.

4 I know you have put a lot of thought and study
5 into it. It's obvious from your testimony. Please don't
6 forget about it in the next few months.

7 COMMISSIONER MAC KINNON: What does U. S. versus
8 Tucker hold? You mentioned that.

9 MS. INDRITZ: The Tucker case is included in the
10 paper which the federal defenders submitted, and rather than
11 going into detail, it holds uncounseled convictions cannot
12 be used to enhance a sentence, and also the judge can take
13 many factors into account, but not an uncounseled conviction.

14 CHAIRMAN WILKINS: Thank you again.

15 MS. INDRITZ: Thank you.

16 CHAIRMAN WILKINS: In keeping with our policy,
17 anyone who wishes to come forward and offer any testimony
18 and make any comments is free to do so at this time.

19 Anybody like to have any comments? Have any
20 comments to make?

21 Seeing no volunteers, we will stand in recess.

22 Thank you very much.

23 (Whereupon, at 5:15 p.m., the public hearing was
24 closed.)

25

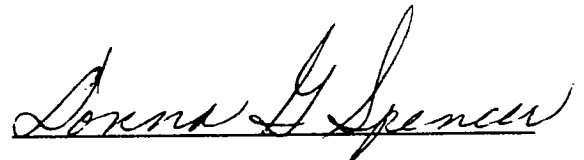
REPORTER'S CERTIFICATE

I, Donna G. Spencer, Certified Shorthand Reporter and Registered Professional Reporter, do hereby certify that I was present at and reported in machine shorthand the proceedings in the foregoing Public Hearing of the United States Sentencing Commission, held in Denver, Colorado, on the 5th day of November, 1986.

Further that I thereafter reduced my shorthand notes to typewritten form, comprising the foregoing verbatim transcript of such public hearing.

Further that said verbatim transcript is a full and accurate record of said public hearing.

Dated at Denver, Colorado, this 12th day of November, 1986.



Donna G. Spencer
Certified Shorthand Reporter