

UNITED STATES SENTENCING COMMISSION

PUBLIC MEETING

Washington, D.C.

Friday, April 5, 2002

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P R O C E E D I N G S

(10:10 a.m.)

1
2
3 MS. MURPHY: I'd like to call the
4 public meeting to order. We have quite a
5 bit on the agenda. I want to welcome
6 everybody here that is a guest. I'd like to
7 make some announcements about some of the
8 things that have happened since we had our
9 last public meeting a couple of weeks ago.

10 At that time, I told you that we
11 were going forward with forming an advisory
12 group on Native American sentencing issues
13 for those Native Americans who are sentenced
14 under the Crimes Act, and since then, we
15 have contacted the people that we had
16 identified as really qualified by experience
17 and personal background for the group, and
18 we have heard back now from almost everybody
19 with a positive response.

20 A chief judge from South Dakota
21 has agreed to chair this group. He is a
22 very experienced person in applying the

1 guidelines and also in working with Native
2 American groups. So we're very happy about
3 that.

4 We did report some on what was
5 going on with our 15-year study at our March
6 public meeting. I mentioned the surveys
7 that we have gotten back from the judges
8 about their views about mandatory minimums
9 and various guideline approaches, and we've
10 got the complete figures now on the
11 responses.

12 The surveys were sent not just to
13 the active judges but also to the senior
14 judges, so the grand total of judges to whom
15 the surveys were sent is greater than the
16 existing judgeships in the United States,
17 because they are built by active judges. So
18 there were 915 sent to district court
19 judges.

20 Of course, those are the judges
21 who actually sentence the individuals who
22 are convicted of Federal crimes. Of

1 that 915, we received 464 responses, which
2 is a 50 percent response, which is excellent
3 in any kind of response, and particularly
4 because it took me about an hour to fill it
5 out. It did take me a significant amount of
6 time.

7 There were 245 sent out to circuit
8 judges. Those judges, of course, are
9 reviewing sentences when there are appeal
10 issues. We received 80 completed surveys
11 back, for a 32 percent response.

12 In addition to the tabulation of
13 the responses, there are many comments that
14 were added, and those will be helpful for us
15 as we continue our work in communicating how
16 the judges who are actually using these
17 guidelines, what their experience is with
18 the many suggestions that we have.

19 We are going to have a workshop on
20 April 12th. Michael O'Neill, do you want to
21 make any comments about that workshop?

22 MR. O'NEILL: We're having a

1 workshop on April 12th, because we want to
2 advise people, particularly academics that
3 have been doing work in the sentencing area,
4 and also people with the Department of
5 Justice who have been instrumental both with
6 providing us with data and work in the past
7 and obviously directly affects our
8 components.

9 Just to explain and outline what
10 it is, the Sentencing Commission is doing
11 with respect to this 15-year report. I
12 think, as all of you know, we talked about
13 this in the past; that we're essentially
14 looking at the statutory goals in sentencing
15 and sponsoring and doing empirical work and
16 relying upon past empirical work that has
17 been done to evaluate the performance of the
18 guidelines in the contents of the statutory
19 directives by Congress.

20 This workshop will be the first of
21 what we hope will be at least a couple in
22 which we will be bring in academics to let

1 them know what sort of methodology we're
2 using, to let them know what the Commission
3 is doing so we can get this information out
4 not only in the academic community but also
5 in the Government community as well.

6 MS. MURPHY: Thank you. We've got
7 quite a few things in the next several weeks
8 involving training and work with others. We
9 have a national training seminar that is
10 going to be held from the 8th to the 10th
11 where the Commission will be present, staff
12 will be present.

13 We will be doing training on the
14 guidelines for probation officers and
15 lawyers who actually are representing the
16 parties on sentencing. We had last year
17 some more than 300 attendees.

18 Pam Montgomery is in charge of
19 arranging this. Do you know what kind of
20 response we're going year?

21 MS. MONTGOMERY: Judge Murphy, the
22 response has been tremendous so far. As of

1 yesterday, we had 250 people registered. We
2 still have a month to go. So we'll have
3 about the same crowd as last year.

4 MS. MURPHY: Then also, in May, we
5 will be meeting with the Criminal Law
6 Committee of the Judicial Conference. We
7 meet with them a couple times a year. They
8 obviously have a great interest in the
9 guidelines and have a lot of expertise.

10 We also are scheduling a meeting
11 together with the Ethics Officers
12 Association. We have, in addition to the
13 Advisory Committee I mentioned about Native
14 Americans, we set up an advisory committee
15 related to the organizational sentencing
16 guidelines, a very timely topic because
17 people are very concerned now about
18 corporate crime and dealing with that,
19 trying to deter it, trying to punish it when
20 it does occur.

21 We have an outstanding group that
22 has agreed to participate. The group has

1 met once last month and they are hard at
2 work. The chair ---- Jones, will be present
3 with us at that meeting and perhaps some
4 others.

5 We also will be involved in a
6 National Sentencing Institute for Judges,
7 which is an opportunity to get the Federal
8 Judicial Center, the Criminal Law Committee
9 of the Judicial Conference and the
10 Sentencing Commission to work together to
11 discuss issues that arise under the
12 guidelines and it is a training opportunity
13 for Federal judges.

14 One thing that I do want to
15 mention because especially those of you who
16 are familiar with the Sentencing
17 Commission's work all know Andy Purdy, who
18 has been our Chief Deputy Counsel, and we
19 relied on him it's hard to say how much; he
20 is going to be going on a detail to the
21 executive branch for a year starting
22 April 15th. He is going to be going to the

1 President's Infrastructure Protection Board.

2 This is related to the need for increased

3 security.

4 Andy, we are sorry to be losing
5 your experience and expertise during this
6 period, but we know that you have a lot to
7 contribute at this other end. We think it's
8 an exciting opportunity for you.

9 MR. PURDY: Thank you.

10 MS. MURPHY: I do want to refer to
11 the fact that we have already done a lot
12 about passing guidelines this year, because
13 we decided that we had so much on our April
14 agenda last year that we thought we would
15 try to move as much forward earlier in the
16 year.

17 So just to recapitulate briefly,
18 we have passed already, and these will be
19 among the guidelines that go to Congress,
20 we've passed a totally new guideline on
21 cultural heritage and national monuments and
22 treasures designed to protect them. We've

1 been working on the cultural heritage aspect
2 of this for two amendment cycles.

3 The events related to 9/11 caused
4 some expansion of our concern this year, and
5 there were a lot of different issues related
6 to that. We feel that we have come up with
7 a very good guideline that covers many
8 aspects of this.

9 We also were asked to look at who
10 falls under "official victim," because it
11 was brought to the our attention that the
12 definition was too narrow in the context of
13 the Bureau of Prisons, for example, where
14 there were others who were in need of
15 protection; and so we have a guideline
16 passed on official victims that will be
17 promulgated.

18 Foreign Corrupt Practices Act. We
19 worked in that area to try to bring that
20 into conformity with guidelines related to
21 public official bribery and commercial
22 bribery.

1 One of the areas that there has
2 been a lot of concern about ever since this
3 Commission came into being and also on the
4 Hill is abuse of sexual conduct in the
5 commercial sex industry and so forth; and we
6 have worked on adjusting the guidelines in
7 that area, too, to protect victims of this
8 kind of conduct.

9 There are some 14 other areas that
10 I'm not going to go into in which we have
11 passed guidelines before today.

12 Which brings us now to our agenda.
13 The first item on the agenda are the minutes
14 of former public meetings. We have a lot of
15 them here. We've been having a lot of
16 public meetings because this year it's been
17 very important to us to get as much public
18 input as we could; and, so, we had public
19 meetings on February 25th, February 26th,
20 March 19th and March 20th. We've had
21 minutes prepared which reflect what occurred
22 at those meetings and the kind of comments

1 that we've received.

2 The Commissioners have had an
3 opportunity to review these minutes, and I'd
4 like to ask now whether there are any
5 motions to approve them or any need for
6 revisions to these minutes.

7 COMMISSIONER JOHNSON: I move they
8 be included.

9 MR. O'NEILL: I'll second it.

10 MS. MURPHY: I hear a breath that
11 makes me think you want to say something.

12 COMMISSIONER STEER: Madam Chair,
13 you are correct, we have had an opportunity
14 to review them. But I fell asleep trying to
15 read them last night; are not the most
16 exciting thing. I missed getting through
17 one set, but I noted one typo on -- I think
18 it's the February 26th set.

19 On page 2, the last paragraph, the
20 third line uses the word "deduction." I
21 think it was meant to be "reduction." But
22 "deduction" could work. That's all I've got

1 to inquire.

2 MS. MURPHY: I think "reduction"
3 was the intent. So if nobody objects, I
4 think we can make that change.

5 MR. KENDALL: Madam Chair, I
6 didn't even get to that point before I fell
7 asleep.

8 COMMISSIONER ELWOOD: Let the
9 record reflect that it accurately reflects
10 the contents of the meeting.

11 MR. KENDALL: I would agree with
12 that.

13 MS. MURPHY: I appreciate the
14 humor, but it could be misleading to those
15 here, because we really are very attentive
16 to what has been said at these meetings, but
17 when you get it together and you're reading
18 through a lot of minutes at one time, it
19 takes a lot of concentration to focus on the
20 detail of it.

21 So if there's no further
22 discussion, then I would ask all those in

1 favor of approving this set of four meeting
2 minutes, with the one change, to say aye.

3 Opposed no.

4 The minutes are approved as
5 corrected. That brings us then to the
6 section of the agenda where we may address
7 amendments, motions for amendments that we
8 want to promulgate and related motions.

9 The first item that we will
10 address is the terrorism area. Terrorism is
11 an area that's been of major concern for
12 everybody. We addressed it last year in
13 amendment on nuclear biological and chemical
14 crimes. So we unfortunately had some
15 foresight about the kinds of problems we
16 were going to be dealing with.

17 Charles Tetzlaff is our general
18 counsel. Could you briefly set the stage
19 here for any action.

20 MR. TETZLAFF: Thank you, Madam
21 Chair. Just for the record, I would like
22 the record to reflect that the Commission

1 has previously been provided with impact
2 information on all relevant amendments.

3 With respect to terrorism, this is
4 a multi-part amendment and it is the
5 culmination of the Commission's swift
6 response and focused effort to respond to
7 the USA Patriot Act of 2001, which the
8 President signed into law a little over five
9 months ago, October 26, 2001.

10 This legislation following the
11 events of September 11th 2001 created a
12 number of new terrorism, money laundering
13 and currency offenses as well as increased
14 statutory maximum penalties for certain
15 preexisting offenses.

16 For ease of identification, the
17 amendment has been divided into six parts.
18 The first four parts address offenses that
19 involve or could involve terrorism. Part A
20 addresses new predicate offenses to Federal
21 crimes of terrorism.

22 Examples of such offenses are

1 terrorist attacks against mass transport,
2 maliciously giving false information or
3 threats, interference with security
4 screening personnel, interference with a
5 flight crew member, assaulting airport
6 security personnel, to name but a few.

7 The amendment also expands the
8 guideline covering Nuclear, Biological and
9 Chemical, section 2(m)6.1, to cover new
10 offenses involving possession of biological
11 agents, toxins and delivery systems.

12 Part B adds a number of predicate
13 offenses to Federal crimes of terrorism that
14 are not now listed in the statutory index,
15 appendix A.

16 Part C provides a special
17 instruction in the attempt
18 guideline, 2(x)1.1, to provide that the
19 usual three-level reduction for attempts in
20 conspiracies does not apply to certain
21 delineated offenses when a Federal crime of
22 terrorism is involved.

1 Part D amends the terrorism
2 adjustment in section 3(a)1.4 by providing a
3 structured upward departure for offenses
4 that may involve either domestic or
5 international terrorism but do not qualify
6 as Federal crimes of terrorism.

7 The amendment also makes clear
8 that the terrorism adjustment applies to
9 offenses involving harboring or concealing a
10 terrorist as well as obstructing a terrorist
11 investigation.

12 Part E amends 2(s)1.3, the
13 structuring and failure to report, failure
14 to file, false filing guideline, to
15 incorporate a number of new money laundering
16 provisions created by the Patriot Act.

17 Part F addresses eight
18 miscellaneous issues relating to terrorism.

19 I would be remiss if I did not
20 recognize the terrorism team of the staff,
21 consisting of Pam Barron, the team leader,
22 Judy Shoen, Mary Dediere, Vanessa Lock and

1 Mark Alenbaum. They did a prodigious amount
2 of work in a very short period of time. And
3 like a lot of people both in and out of
4 Government, they responded when needed after
5 September 11th and put in a lot of nights, I
6 know, and weekends to produce the product
7 which you have before you today.

8 I should also point out that there
9 will be a likelihood that staff will
10 identify other needs for amendments in the
11 terrorism area in the future that we were
12 not able to address at this time because of
13 public notice requirements.

14 A motion would be in order to
15 promulgate this multi-part amendment with an
16 effective date of November 1st, 2002, and to
17 authorize staff to make technical and
18 clarifying changes.

19 MR. KENDALL: Madam Chair, I'd
20 like to make a motion. Before I do, I'd
21 like to say a few things and add to
22 Charlie's comments, the, I guess, accolades

1 that should go to the terrorism team. And
2 also, before I do that, the U.S. Patriot Act
3 itself.

4 I think that most of us know this,
5 but our ex-officio member, John Elwood, was
6 instrumental and was a major player in
7 drafting the U.S. Patriot Act and taking the
8 time to read it. It's quite a work itself.

9 In meeting the requirements of
10 that statute, first of all, the Commission
11 was a little bit ahead of the curve in that
12 last year. If you'll recall, we took up
13 Nuclear, Biological and Chemical Weapons.

14 We talk sometimes about sleepers,
15 things that seemingly don't draw that much
16 attention or focus and sometimes come before
17 us; and it's very unfortunate, for obvious
18 reasons, that that's the case with this
19 piece of legislation and the guidelines
20 going along with it.

21 This amendment may not have or has
22 not, I don't believe, received near as much

1 attention as some other matters we've dealt
2 with, only because it is not as
3 controversial as some of the other topics
4 we've taken up this time. If you take the
5 time to go through it, which we'll have,
6 you'll see that it is quite a bit of work
7 that's involved.

8 So I'd like to add to Charlie's
9 comments, we should be grateful to Pam
10 Barron, Judy Shoen and Vanessa Lock,
11 although I now know her -- and maybe those
12 on the Commission don't know this or others
13 in the room -- it is now Vanessa Lock Hall.
14 Congratulations to Vanessa. She got married
15 last week. Mary Dediere and former staff
16 Mark Alenbaum. I personally believe that
17 the work product here is excellent. I move
18 that we adopt Option One.

19 MS. MURPHY: Is there a second?

20 MR. SESSIONS: I second.

21 MS. MURPHY: Is there any
22 discussion on the motion?

1 COMMISSIONER STEER: I would just
2 concur with all that Commissioner Kendall
3 has said and join with he and Charlie in
4 commending the staff team.

5 From my current vantage point, it
6 is sometimes much easier to deal with these
7 issues than from my previous vantage point
8 as a staff member. I have greatest respect
9 for the ability of someone like Pam Barron
10 to take this very complex subject matter,
11 multi parts, in a short period of time and
12 organize the team's resources to address
13 these issues.

14 Of course, she had a lot of help
15 from the other team members who have been
16 mentioned and other members of the staff and
17 senior staff in reviewing the work. But it
18 is quite an achievement. It makes us I
19 think be in a position to look very
20 responsive to Congress and to hopefully do
21 the right thing.

22 MS. MURPHY: Any other comments?

1 COMMISSIONER ELWOOD: It's always
2 kind of hard, I tend to hang back; and it's
3 kind of bad because it means usually all the
4 good material has been used up by the time I
5 actually do talk. But I do want to
6 reiterate what Judge Kendall and
7 Commissioner Steer have said.

8 It really was a superhuman effort
9 to get this thing turned around in the
10 amount of time that it was. The U.S.
11 Patriot Act was signed into law on
12 October 26th, by which time the amendment
13 cycle was already in full swing; and within
14 just a few meetings of that, we already had
15 a draft amendment that showed an incredible
16 amount of thought and work.

17 I want to again commend the team
18 for their work on this. I commend the
19 Commission as a whole for their prompt
20 attention to this. It's really remarkable
21 to me that it was done in such short notice.

22 I mean, one of the things when

1 this was being passed is, I was there during
2 the discussions, and I thought that there
3 was no way this was going to be addressed in
4 the same cycle. It didn't even occur to me.
5 I thought it was impossible. But it was
6 done and I think they have done an excellent
7 job of it.

8 MS. MURPHY: Commissioner O'Neill.

9 MR. O'NEILL: I guess I would also
10 add my remarks in commending those folks on
11 the Sentencing Commission who did such a
12 great job in pulling this together. But I'd
13 also like to take a moment as well and thank
14 the Department of Justice for its
15 responsiveness and the help that it offered
16 in being able to help the Sentencing
17 Commission pull this together in a very
18 difficult time.

19 In particular, oftentimes given
20 the nature of the Department of Justice and
21 its relationship with the Sentencing
22 Commission, sometimes we are on the same

1 page and sometimes we are not necessarily
2 always on the same page. But I think that
3 that was really a model of effort on the
4 part of members of the Department of Justice
5 to pull together with us to work in a very
6 collaborative fashion in bringing forth this
7 project; and I think the Department should
8 really be commended as well for its work and
9 its attention to this very timely issue, and
10 also the fact that one of the more important
11 things that I think has been said recently
12 by the Attorney General is the decision to
13 deploy greater resources in the battle on
14 terrorism.

15 Of the many things that we do, and
16 Commissioner Kendall had mentioned this in
17 his statements, of the many things that we
18 do on the Sentencing Commission and that the
19 Department of Justice does, certainly this
20 is one of the more important things we've
21 been able to do this year, even though it
22 has received less attention.

1 MS. MURPHY: All those in favor of
2 the motion say aye. Opposed, no.

3 It is passed. The next item that
4 we'll take up is discharge terms of
5 imprisonment.

6 Charlie, do you want to lead us
7 into that.

8 MR. TETZLAFF: This proposed
9 amendment responds to the Criminal Law
10 Committee at the Judicial Conference's
11 request that the Commission amend 5(g)1.3 to
12 include discharge terms of imprisonment.

13 The amendment proposes to amend
14 the commentary to 5(g)1.3 provide a downward
15 departure note that enables a court to
16 depart in a case in which subsection b
17 pertaining to undischarged term of
18 imprisonment would have applied if the term
19 of imprisonment had not been discharged.
20 This will address also a circuit conflict
21 that exists.

22 A motion would be in order to

1 promulgate this amendment with an effective
2 date of November 1, 2002, and to allow the
3 staff to make appropriate technical
4 clarifying changes.

5 MS. MURPHY: Commissioner Steer?

6 COMMISSIONER STEER: I move
7 adoption of the second revised amendment on
8 discharged terms of imprisonment.

9 As outlined by the General
10 Counsel, it involves a downward departure.

11 COMMISSIONER CASTILLO: I'll
12 second it.

13 MS. MURPHY: As suggested by the
14 fact that this came to us from the Criminal
15 Law Committee, this is an area where courts
16 have had some difficulty in dealing with it;
17 and that is why we have it on our agenda.

18 Are there any comments?

19 COMMISSIONER STEER: As a mover, I
20 would simply comment that I think we
21 recognize this as a perhaps less than ideal
22 solution. As staff and Commissioners got

1 into the issues and this particular
2 guideline, we identified a number of
3 potentially problematic areas that need to
4 be addressed.

5 Even this solution should perhaps
6 be seen as an interim solution. Perhaps a
7 better model would be to actually provide a
8 mechanism for a downward adjustment. But we
9 are not procedurally in a position to adopt
10 and perfect that approach at the current
11 time.

12 I hope that this is an issue and
13 the guideline itself is one which the
14 Commission will be able to return in the
15 next amendment cycle and perhaps do a more
16 complete job.

17 MR. KENDALL: Could someone
18 refresh my recollection on the precise
19 nature of the conflict?

20 MR. TETZLAFF: The conflict was
21 that some courts had read the guideline as
22 not allowing any downward departure, and

1 others could.

2 MR. KENDALL: There was no other
3 nuance?

4 MR. TETZLAFF: We've now made
5 clear that the Commission feels that it's
6 okay.

7 MR. KENDALL: Thank you.

8 MS. MURPHY: I think there are
9 some other issues that cases have raised but
10 that we felt that we weren't able to address
11 this year. In some ways, the work -- as a
12 personal comment, after having been on the
13 Commission now for 2-1/2 years, it is such a
14 continuing process, it seems it's rare that
15 we can say, okay, this is put to bed now, we
16 aren't going to have to deal with this again
17 in the future because it is complicated.

18 If there's no further discussion
19 on this item, I would call for all those in
20 favor of promulgating this amendment on
21 discharged terms to say aye.

22 Those opposed, no. That has

1 passed. The next item that we'll take up on
2 the agenda is miscellaneous drug items.
3 This actually has two steps in it. One is a
4 proposed amendment that incorporates a
5 variety of components; and then the other
6 item, of course, is the cocaine policies.

7 So I believe, Commissioner
8 Sessions, that you are going to make a
9 motion. But we want to get the General
10 Counsel to discuss the nature of that
11 miscellaneous amendment.

12 MR. TETZLAFF: The proposed
13 amendment addresses four issues. First, the
14 proposed amendment, and I'm referring to the
15 second revised proposed amendment pertaining
16 to drugs, provides for a maximum base
17 offense level of 30 if a defendant receives
18 an adjustment under 3(b)1.2, the mitigating
19 role guideline.

20 This base offense level cap is
21 designed to limit the exposure of low-level
22 drug offenders to increase penalties based

1 on drug quantities that overstate the
2 defendant's culpability given the
3 defendant's role and function in the drug
4 trafficking offense while also providing a
5 guideline range of 97 to a 121 months that
6 is consistent with mandatory minimum
7 penalties.

8 The second part to the amendment
9 deals with Ecstasy offenses. The proposed
10 amendment amends the typical weight per unit
11 dose, pill or capsule table and application
12 note section 11 of 2(d)1.1 to more
13 accurately reflect the type and quantity of
14 ecstasy typically trafficked and consumed.

15 Specifically, the proposed
16 amendment adds a reference for MDA, the
17 typical weight per unit table, and sets the
18 typical weight at 250 milligrams per pill.
19 The proposed amendment revises upward the
20 typical weight for MDA from 100 milligrams
21 to 250 milligrams and deletes the asterisk
22 previously indicated that the weight per

1 unit shown is the weight of the actual
2 controlled substance and not the weight of
3 the mixture or substance containing the
4 controlled substance.

5 The third element proposes to
6 address the concerns that 2(d)1.8, renting
7 or managing a drug establishment guideline,
8 does not adequately punish certain
9 defendants convicted under 21 U.S.C.
10 Section 856, establishment of manufacturing
11 operations.

12 That statute originally was
13 enacted to target so-called crack houses,
14 and more recently has been applied to
15 defendants who promote drug use at
16 commercial dance parties frequently referred
17 to as Raves.

18 The proposed amendment increases
19 the maximum offense level under 2(b)1.8(a)2
20 to level 26. A maximum base offense level
21 of 26 is appropriate because, in conjunction
22 with the current instruction, 2(b)1.8(b) not

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apply the
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provide increased
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clarifies
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on whether
a statute
an application
that specifically
the two-level
regardless
convicted
defendant
imprisonment.

mitigating role adjustment under
(b)1.2, the resulting base offense
would be the same as for an offender
under 2(b)1.1 who receives a
one-level reduction for minimum role.

The impact of the maximum offense
increase will be limited, but it will
provide increased sentences in appropriate
cases.

Lastly, the proposed amendment
clarifies that application of the two-level
reduction under 2(d)1.1(b)6 does not depend
on whether the defendant is convicted under
a statute that carries a mandatory minimum.

This proposed amendment provides
an application note in section 21 in 2(d)1.1
that specifically states that application of
the two-level reduction will apply
regardless of whether the defendant was
convicted of an offense and subjects the
defendant to a mandatory minimum term of
imprisonment.

1 The proposed amendment also
2 addresses the interaction of 2(d)1.1(b)6 and
3 section 5(c)1.2(b) which provides a minimum
4 offense level of 17 for certain offenders.

5 A motion would be in order to
6 promulgate this amendment again with an
7 effective date of November 1st, 2002, as
8 well as authorizing staff to make
9 appropriate technical and clarifying
10 changes.

11 MR. SESSIONS: Madam Chair, I move
12 that the Commission adopt the miscellaneous
13 drug amendment, and I'd like to speak just
14 briefly on this proposal.

15 The proposal covers a number of
16 separate areas but it is all related. This
17 is intended to be a balanced package. Even
18 though the subject matter of each of these
19 may appear to be distinct, in fact they are
20 all related, it is all one amendment, they
21 all fall or rise together.

22 I specifically want to talk about

1 one, and it's something that if you've been
2 around here for a while you'll understand
3 that I feel very strongly about; and that's
4 the first provision, the mitigating role
5 cap.

6 That is a provision that's been
7 brought up before this Commission a number
8 of times in the past. In fact, it was
9 almost passed as early as 1991, '92. It's
10 an issue that has been of concern to many of
11 us. I commend Commissioner Steer for his
12 early involvement in this particular issue,
13 his support of this issue.

14 It seems to me that this
15 accomplishes a number of things, and this is
16 really why I feel so strongly about it,
17 three things in particular.

18 The first is it targets persons
19 who play minor or minimal roles in offenses.
20 The people who get benefits from this are
21 not the managers, not the organizers, not
22 the people who develop the conspiracies, but

1 they are the small participants. Even
2 though this may create a benefit for those
3 persons, the benefit is relatively limited
4 but it is a significant benefit and it is
5 focused in specifically upon those people.

6 The second is, it is fair to say
7 that judges across the country, and this is
8 reflected in our responses, believe that
9 drug penalties oftentimes are too high.
10 That results oftentimes in departures.

11 In particular, there are two areas
12 in which judges, at least from my
13 perspective, believe that the penalties are
14 too high. They are too high with first-time
15 offenders who do not engage in violence.
16 They are also too high when we're dealing
17 with persons who play minor roles and
18 receiving these huge sentences.

19 That is exactly why this proposal
20 is so attractive to me. It may very well
21 result in a significant reduction in the
22 numbers of departures because ultimately

1 judges will not feel the necessity of
2 departing to do justice.

3 The last thing is that one of the
4 criticisms that I heard in the discussions
5 was that judges now are going to have to
6 spend their time deciding whether somebody
7 was engaged in a mitigating or minimal role,
8 a minimal or minor role.

9 Well, to that criticism, all I can
10 say is halleluiah. It would be a great
11 today when judges spend their time focused
12 in on what people do as opposed to how many
13 grams the person has in their pocket when
14 they are arrested. For that reason, I
15 believe strongly this should be adopted.

16 MS. MURPHY: Is there a second?

17 COMMISSIONER CASTILLO: I'll
18 second it.

19 MS. MURPHY: Any further
20 statements?

21 COMMISSIONER CASTILLO: I'd just
22 like to commend Commissioner Sessions for

1 his strong work on this. I think his
2 statements more than express his feelings
3 about this.

4 I think in the long-run what we're
5 looking at is a moderate change in the
6 penalty. No one should look at this and say
7 there is a wholesale reduction in the way
8 these offenses are being treated. I think
9 it's supported uniformly throughout the
10 criminal justice system.

11 That's all I've got to say.

12 MS. MURPHY: Commissioner O'Neill.

13 MR. O'NEILL: The principal
14 feature that distinguishes the criminal law
15 from other types of law civil law, for
16 example, is the notion of personal
17 culpability, that the *mens rea* has to occur
18 with the *actus reus*.

19 One of the difficulties that I've
20 found just since I've been on the Commission
21 being a Sentencing Commissioner is that the
22 idea in our system, especially with respect

1 to drug crimes, that quantity seems to play
2 the overarching role in terms of determining
3 someone's culpability and the harm caused to
4 society.

5 While there is no doubt whatsoever
6 in my mind that quantity is an important
7 measure of harm, and all things being equal,
8 selling more drugs is worse than selling
9 fewer drugs, on the other hand, there are
10 certainly circumstances, and it strikes me
11 that this is one of those circumstances, in
12 which drug quantity may in fact considerably
13 overstate the harm of the individual person
14 who stands before a jury, who stands before
15 a judge for conviction and ultimately for
16 sentencing.

17 In our Organic Statute in 20
18 U.S.C. 994(b)2, one of the requirements that
19 the Sentencing Commission has is to
20 determine in fashioning sentences is the
21 circumstances under which the offense was
22 committed which mitigate or aggravate the

1 seriousness of the offense.

2 It is my view that one thing that
3 the Commission could do as a long range
4 project that's perhaps one of the more
5 important things that we could do is to
6 reassess and really look carefully at
7 whether or not quantity as a measure of
8 determining social harm, whether it's in the
9 drug area or the fraud area, whether in fact
10 quantity has been overused as an estimate of
11 harm and overused as an estimate of
12 culpability.

13 It may in fact be the case that it
14 has not been. Although, it strikes me just
15 in the time that I've spent both in the
16 Sentencing Commission and prior to that time
17 when I was at the Department of Justice,
18 that in fact we have may have embarked upon
19 a process in which would he overstate
20 individual culpability and individual harm
21 by relying so heavily on quantity.

22 It's my opinion, and it was my

1 opinion when I was a staffer on the Hill as
2 well that principally what Congress is
3 interested in is ensuring justice for
4 individuals, and that the worst offenders
5 are treated much more harshly.

6 I think most of us think, even if
7 we think back to our school days, that the
8 worst offenders are not always necessarily
9 those that are carrying the greatest amount
10 of drugs, but rather, those that actually
11 have the worst intent and those that are
12 most seriously involved in the offense.

13 I think it's incumbent upon the
14 Commission to reassess this. We've had 15
15 years of the guidelines in operation now.
16 We're celebrating our 15th anniversary this
17 fall. Perhaps it's a good time to sit back,
18 which is what we are doing in part, at
19 least, in our 15-year review, and looking at
20 and analyzing and assessing these particular
21 areas. Because well need to make sure that
22 we are giving absolutely full attention to

1 what Congress has required us to do in our
2 Organic Statute and to ensure that we are in
3 fact hitting those people most culpable with
4 the harshest penalties.

5 Although this mitigating role
6 adjustment is certainly a crude measure of
7 doing that, it brings a certain amount of
8 sanity or a certain amount of justice to
9 those offenders who perhaps might not be as
10 culpable. It's imperfect but I think it's,
11 at least, a step in the right direction; and
12 it's entirely consistent with my belief that
13 those offenders who are most culpable
14 deserve the harshest penalties.

15 MS. MURPHY: Commissioner Steer.

16 COMMISSIONER STEER: I intend to
17 support this amendment, but I do have some
18 reservations about the mitigating role cap
19 provision that I would like to state for the
20 record, so to speak.

21 Before I discuss that, I want to
22 say that I am very pleased that we are able

1 to include in this provision the other
2 provisions, particularly the one dealing
3 with raising the cap in the so-called Rave
4 clubs, crack house offense guideline.

5 As to the mitigating role, my
6 reservations are basically these: My
7 comfort level would have been greater if we
8 had capped at level 32, which is what we now
9 use in the guidelines for the measurement of
10 the equivalency to the 10-year mandatory
11 minimum. 30 is pretty close.

12 I consider it as an independent
13 concept of other enhancements. I would have
14 preferred level 32 as the cap, since we had
15 previously been considering it in the draft
16 form in which there were other enhancements
17 that might sometimes apply, particularly
18 prior drug convictions, sometimes additional
19 enhancements for violence. We do not have
20 these as part of this particular amendment.

21 Should we ever get to the point of
22 having them, and I hope we will, then what

1 we will find because there will be
2 differences in the effective date and we
3 have an ex post facto clause, it will hinder
4 the desired interaction of these provisions
5 for a considerable time to come.

6 My additional hesitancy with
7 regard to the provision, frankly, is rather
8 political. We are anxious to do something
9 on the crack cocaine issue, convince
10 Congress to modify the statutory penalties
11 for that provision.

12 There is a likelihood that this
13 provision may engender some opposition,
14 perhaps some considerable opposition, in
15 Congress perhaps by the Justice Department.
16 I've questioned whether we will further the
17 larger goal by applying this provision.

18 With that said, you know, I'm
19 going to vote for it because I think it is
20 the right thing to do.

21 The Washington Post headline this
22 morning, speaking of the President's remarks

1 about the Middle East, basically said,
2 enough is enough. That's sort of the way I
3 feel about the measurement of quantity when
4 we're talking about mitigating role drug
5 offenders.

6 My colleagues who see these cases
7 as judges have, you know, a more direct feel
8 for this. I have to rely on other
9 experiences. But some years ago, I think my
10 feelings began to be colored by experiences
11 that when I first went into Federal prisons,
12 some of the women's institutions where we
13 visited as part of sentencing institutes and
14 we met with offenders who were in prison,
15 some of them for 20, 25 or 30 years for
16 offense behavior that might have involved a
17 fairly large quantity of drugs, crack, or
18 sometimes other drugs.

19 But it was pretty clear from what
20 we learned about their offense behavior, and
21 sometimes one can't believe the entirety of
22 what an offender says, but we had other

1 information that they were mitigating role
2 defendants and yet their sentence was very
3 long.

4 I think that started me thinking
5 that, you know, what good are we doing in
6 terms of the purposes of sentencing by, you
7 know, this particular sentencing approach.
8 Over the years, that initial belief that I
9 was exposed to I think has, you know, been
10 emphasized time and time again.

11 So I think it's time that we move
12 on this issue; and, for those reasons, I'm
13 going to support the amendment.

14 MR. SESSIONS: I want to say this.
15 There is a fourth advantage, and it has to
16 do with this Commission itself.

17 When we first started, obviously
18 it was after a controversial period, we met
19 with members of the United States Senate. I
20 will always remember the comment from two
21 senators in particular. That is, try to
22 arrive at consensus. If you arrive at

1 consensus, your voice will be heard much
2 more clearly than if there is disparity or
3 if there's a difference of opinion,
4 significant difference of opinion, and in a
5 sense, your decisions will be given a whole
6 lot more credibility, a whole lot more
7 weight and the Commission itself will be
8 respected to a much great are extent.

9 Now, to arrive at consensus, I
10 mean, involving a group of seven who have
11 different approaches to life and different
12 approaches to many of these issues is
13 extraordinarily difficult, but it's an
14 important process; and once we have done
15 that, we are all really bound to advocate
16 for the position that we've taken as a
17 commission. Because, basically, the
18 Commission's viability in this political
19 world is dependent upon all of us really
20 advocating for the positions that the
21 Commission has taken.

22 What you will see is what I think

1 is a tremendous step forward taking
2 controversial issues and through negotiating
3 and bargaining and listening to each other,
4 come to a sense of consensus.

5 I think that as a result, tomorrow
6 and the day after it means that what we
7 decide here will be given much greater
8 weight and also that this will be a much
9 stronger institution. Quite frankly, out of
10 all of this, perhaps that is the greatest
11 expression of what we've done today.

12 MS. MURPHY: Are there any other
13 comments about this motion?

14 Then all in support of the
15 amendment, the miscellaneous drug amendment,
16 say aye.

17 Those opposed, no. With that, it
18 passes. That brings us to the other part of
19 the agenda on --

20 MR. TETZLAFF: Madam Chair, could
21 I at this point -- following this amendment,
22 again, as I indicated at the beginning, we

1 have provided prison impact information and
2 retroactivity analysis to the Commission
3 under Rule 4.1. If a motion were to be made
4 with respect to retroactivity, it might be
5 appropriate to make it now.

6 MR. SESSIONS: But it could be
7 made at a later time as well.

8 MR. TETZLAFF: That's correct, if
9 the rule were waived at a later time.

10 MS. MURPHY: Is there at the
11 present time a motion on retroactivity with
12 respect to this amendment?

13 Failing a motion, we can consider
14 that later.

15 That brings us to the other item
16 on our agenda related to drugs, and that is
17 the cocaine policy. The Commission put this
18 on our agenda in our planning meetings in
19 May and June. The reason that we did that
20 is because the commissioners, staff here and
21 many others have been concerned about
22 whether there should be changes made to

1 Federal sentencing policy related to
2 cocaine.

3 There are many who have criticized
4 the policy as perhaps too quantity-driven
5 but as creating an unfair disparity in
6 sentencing crack cocaine defendants as
7 opposed to defendants who are convicted of
8 powder offenses.

9 We were also aware in addition to
10 the concerns of that type that had been
11 raised that this could be a good opportunity
12 to take this up, because we knew then that
13 there was interest on the Hill among some
14 key members of Congress to do something
15 about this.

16 We also believed that there was
17 information out there of one type or another
18 that was new information related to the
19 nature of trafficking in crack and tracking
20 in powder, so we took that up on our agenda.

21 We have been working through the
22 year to develop our position on this; and as

1 we got closer to today's date, we also had
2 to take up the idea how best to proceed,
3 what to do about our emerging position.

4 I must say that the commissioners
5 and the staff have worked very hard on this.
6 We feel it's a very important area. We have
7 gotten a lot of input.

8 Consistent with our governing
9 statute, we have published notice of our
10 interest in this and the possible ways we
11 might proceed with it and we have gotten a
12 lot of written feedback from a variety of
13 groups.

14 We also scheduled these public
15 hearings in February and March and we
16 invited many people and groups to come and
17 testify. We had very interesting testimony
18 that came from advocacy groups, that came
19 from scientists, that came from people with
20 expertise in the area.

21 We tried to get law enforcement
22 people also to come in the February

1 meetings, but they weren't available at that
2 time. In March we did get testimony
3 significantly from the Department of Justice
4 representing the position of the executive
5 branch. We've also gotten written material
6 from others.

7 In addition to that, we have two
8 advisory groups which I mentioned earlier
9 today. Those are ad hoc advisory groups
10 that we have created in the Native American
11 area and in the organizational sentencing
12 guideline area that will be working for a
13 period of 18 months.

14 The Commission has two standing
15 advisory groups. One is representing the
16 United States probation officers, who, of
17 course, are the front-line troops, so to
18 speak, when individuals are going to be
19 sentenced, because they prepare
20 recommendations that the lawyers
21 representing the parties then are familiar
22 with and that the judge may rely quite a bit

1 on in developing the judge's sentencing
2 position for a particular defendant. So we
3 have the benefit of their expertise.

4 We also have an advisory group
5 which represents those that are in the
6 practice of representing defendants in
7 Federal prosecutions, and they have been
8 very helpful to us.

9 We referred to the Criminal Law
10 Committee of the Judicial Conference also.
11 That's among the groups that we got the
12 input from.

13 We got a very significant letter
14 from two powerful senators in the course of
15 the year, Senator Leahy and Senator Hatch,
16 asking us to make a report to Congress about
17 cocaine sentencing, and advising Congress
18 are there improvements that should be made
19 and what would they be. The letter asked
20 for information on specific areas, is there
21 new data, are there new reports from
22 scientists or experts in the field, and so

1 forth.

2 So simultaneously, we're
3 considering a possible amendment in this
4 area, preparing the drafts of the report
5 that would be responding to this significant
6 opportunity.

7 We also have been very aware of
8 the fact that legislation has been
9 introduced related to this by Senator
10 Sessions and Senator Hatch. Also, a number
11 of commissioners have conferred with
12 sponsors and with the staff there about what
13 they are proposing and about various things
14 the Commission has been considering.

15 We have a wealth of data available
16 to us, because we get data related to every
17 sentencing of every Federal defendant that
18 appears in the United States courts.

19 We also have a research staff, and
20 during the year they have been working very
21 hard to pull out this data about people who
22 have actually been sentenced, what are the

1 cases like that have actually been sentenced
2 as powder cocaine traffickers and
3 particularly as crack cocaine traffickers;
4 and we've been looking to see whether
5 there's new information on the nature of the
6 trafficking, the nature of the markets.

7 There's evidence that the crack
8 markets have matured and are not
9 characterized by some of the same alarming
10 features that they were at the time that the
11 legislation was originally passed, and that
12 some of the fears that were present about
13 crack-baby syndrome and so forth are not
14 borne out by scientific investigation.

15 So both as to the nature of the
16 trafficking and as to the effects of these
17 drugs, there is we believe significant new
18 information.

19 Well, this approach for us is
20 complicated by the fact that there are the
21 mandatory minimum sentencing statutes.

22 Congress controls the nature of

1 these statutes. The Sentencing Reform Act
2 is the statute that created the Sentencing
3 Commission, gave it its responsibilities,
4 gave it its powers. There are many
5 responsibilities that were given to the
6 Commission, but the two that I want to
7 mention right now are, one, the ability to
8 promulgate amendments and, the significant
9 part of this, to promulgate amendments that
10 will become effective in the absence of
11 congressional action, they will become
12 effective within a six-month period.

13 But Congress also gave the
14 Commission the responsibility and duty to
15 advise it on Federal criminal policy and in
16 particularly, obviously, sentencing policy.
17 So we have had to consider which of these
18 approaches we should use at this time.

19 Some of the points in favor of
20 going forward with an amendment at this time
21 would be that from the perspective that we
22 have been thinking, it would be an

1 improvement in respect that it could be made
2 right now in respect to crack policy.

3 However, it would create any disparity
4 because of the fact it would be in effect
5 de-linking those who don't come under
6 mandatory minimum sentences, it create
7 glitches that would create disparities that
8 people have indicated they would be
9 concerned about.

10 Our overriding concern, though,
11 has been to select the approach that we feel
12 we have the best chance to effect the
13 desired change, which can only be done with
14 the cooperation of Congress. For that
15 reason, I believe the commissioners have
16 asked me to indicate a desire united
17 decision, a unanimous decision, work that
18 out with a lot of thought.

19 There's always new information
20 involved in sentencing things and a lot of
21 concern and we feel the weight and
22 responsibility. But we have arrived at the

1 decision that the best approach for us at
2 this point is to concentrate on this report
3 that we're going to make to Congress which
4 has been requested and to make
5 recommendations to Congress in that report.

6 Someone has said that the
7 Commission could bring either heat or light
8 or both to this issue, and we have decided
9 that we can do best by bringing light as
10 opposed to heat at this point.

11 We hope to have this report ready
12 by mid-May. We are in agreement on some of
13 the components that will be in this report,
14 and I'll mention some of those right now.

15 One, we don't believe that there
16 is a need to increase powder penalties. We
17 don't think there needs to be any change in
18 sentencing in respect to powder cocaine. We
19 don't see that there's been a case made that
20 these sentences are too low.

21 Our recommendation will contain
22 then a combination of a recommended change

1 as far as the amount of crack that should
2 trigger the mandatory minimums to reflect a
3 mid-level trafficker, which is what Congress
4 was seeking to do with mandatory minimums,
5 and a combination of sentencing enhancements
6 that we believe would go towards getting the
7 more serious offenders, which is what
8 Congress wanted to do.

9 So we haven't worked out all of
10 the details here, but we are in agreement at
11 this time that, as opposed to the current
12 five-gram trigger for the mandatory minimum
13 of five years, that an amount that would be
14 not less than 25 grams would be the way we
15 will go, because we believe that that
16 reflects the mid-level kind of trafficker
17 that Congress is concerned about.

18 We also believe that, in
19 combination with enhancements for offenders
20 who discharge or brandish firearms, who use
21 dangerous weapons, who inflict bodily injury
22 in connection with crack trafficking, who

1 involve protected locations, schools,
2 protected individuals, pregnant individuals,
3 minors, who have prior drug felonies, trying
4 to get away from just looking at it as a
5 matter of quantity. So our recommendation
6 will contain that.

7 We also have talked about let's
8 look at the societal harm for the particular
9 drugs. Congress has created a pattern of
10 looking at drugs with certain quantity
11 amounts. Because of the way the system is
12 set up, you need to think about how a
13 particular drug relates to others.

14 Last year, when we were working on
15 Ecstasy, we spent a lot of time looking,
16 well, what does Ecstasy really compare with
17 when we're looking at the charts of these
18 drug sentences.

19 So we want to look and I think the
20 report is likely to reflect an assessment
21 about the societal harm of cocaine relative
22 to some of the other drugs and we expect

1 that to be a component. So we view this
2 time that we're in the posture that we have
3 here as a real opportunity to work with
4 Congress to effectuate some desired change.

5 We believe that our report will
6 receive considerable attention, careful
7 attention I would say, among the other
8 branches. Because we're an independent
9 agency, we are an independent agency within
10 the judicial branch, but we have to be
11 working with the other branches of
12 Government as well as the judiciary. And we
13 believe that this will be seriously looked
14 at and that it will generate hearings and
15 opportunity for your involvement, everybody
16 here in the room and elsewhere, that's
17 interested.

18 Finally, I would like to say on
19 behalf of the Commission that we really
20 appreciate all of the input that we've got
21 in writing, in the form of testimony in our
22 public hearings, in the form of all the

1 informal contact that there may have been
2 with the commissioners or staff and in the
3 communication we've had with people on the
4 Hill and in the executive branch.

5 We have a resolve to continue in
6 this effort and to reach the maximum
7 effectiveness that we can achieve here, but
8 we do need your continued interest as we go
9 forward.

10 The floor would now be open if any
11 other commissioner wants to make a
12 statement.

13 Justice Castillo.

14 COMMISSIONER CASTILLO: I just
15 want to say that this is in some ways not a
16 hard decision, and in some ways one of the
17 hardest decisions to make.

18 First and foremost, as our Chair
19 has stated, I think we need a constructive
20 and honest dialogue with Congress and all
21 the other participants in this process. We
22 will proceed with the report which will make

1 recommendations on this difficult issue, and
2 I hope and I know Congress and the public
3 will read our report carefully as well as
4 our recommendations.

5 This issue unfortunately has
6 become a political maze which the Commission
7 has struggled with for far too many years.
8 But today, we conclude in no uncertain
9 terms, I believe, that the hundred-to-one
10 differential is not valid or supportable.

11 This has been a near unanimous
12 view of all the participants in the criminal
13 justice system. It is a view shared by
14 virtually all the Federal judges, as
15 indicated by their survey to this
16 Commission. It's a view indicated by the
17 U.S. probation officers. It's a view
18 indicated by front-line law enforcement
19 officers who put their lives on the line
20 every day in service for their country.

21 That is why to me personally the
22 position that we have just heard from the

1 Department of Justice last month is
2 disappointing. But nevertheless, I want to
3 engage in a constructive dialogue with the
4 Department of Justice; and I hope they
5 evaluate our report just like we have
6 evaluated theirs, that is, without any
7 emotion, without any ad hominem attacks,
8 without getting into some of the detractions
9 from the issue.

10 Because in the Department of
11 Justice's own report, there are two facts to
12 me that are glaring. One, and this is
13 quoting from their report, controlling for
14 like amounts of cocaine in 2000, crack
15 defendants convicted of trafficking in less
16 than 25 grams of cocaine received an average
17 sentence that was 4.8 times longer than the
18 sentence received by an equivalent powder
19 defendant.

20 That means, for every year,
21 it's 4.8 for low-level crack defendants.
22 This is one of their worst differentials

1 that they showed; and it's only exceeded by
2 this next differential, which is that, for
3 defendants with the lowest criminal history,
4 the very point where it shouldn't be, the
5 ratio between the average crack and powder
6 sentences for the lowest amount of drugs, so
7 now we're taking the lowest criminal
8 defendant history and the lowest amount of
9 drugs, the differential is the worst, which
10 is 8.3 to one. That is, for every one year
11 a powder defendant serves, it's 8.3 for a
12 crack defendant.

13 Those are precisely the points
14 where I think our country can do better and
15 should do better.

16 Let me just say what I don't think
17 this is an issue about, because I think we
18 need to be clear; it's not an equalization
19 issue. It's not a wholesale reduction of
20 penalties. It's not a racism issue.

21 I would counsel people to read
22 very carefully Professor Randall Kennedy's

1 book "Race, Crime and The Law," where he
2 discusses this very issue, because I think
3 to inject race into this difficult issue
4 sends it spiralling along the wrong manner.

5 It also is not a terrorism issue.
6 We shouldn't inject that type of emotional
7 issue into this. This is a domestic issue,
8 and the transformation of powder cocaine
9 into crack cocaine does not directly relate
10 to terrorism.

11 This Commission has dealt with
12 terrorism. We dealt with it today. We
13 dealt with it a year ago. We'll continue to
14 deal with terrorism.

15 But what is this issue? It's a
16 human issue. When we talk about 8.1 years
17 for every one year; it's a human issue.
18 There are human faces in jail today that we
19 should be doing better about. It's a
20 fairness issue.

21 In that sense, I don't mean to
22 minimize the perception of racism, but we

1 should be clear this is not racism. It is
2 fundamentally a resource issue, resource in
3 the sense that because these penalties are
4 not justified by current data, we can use
5 our resources better than we're using them
6 right now.

7 So I hope people study the report.
8 People will question why we didn't pass an
9 amendment today. Perhaps there were votes
10 for an amendment. But I believe in our
11 relationship with Congress, which is why
12 I've reluctantly concluded to support a
13 recommendation as opposed to an amendment.

14 I know that my faith in Congress
15 will be vindicated once they see our report.
16 We're not talking about wholesale reductions
17 in the penalties. We're talking about
18 moderate reductions. I would hope that all
19 parties interested in this issue help us
20 engage in a constructive dialogue with
21 Congress. We need everyone's help in order
22 to get this done.

1 I hope that history will judge
2 today that we made the right choice. I'm
3 mindful that even the membership of this
4 fine Commission, of which I am proud to be
5 part of and I respect every single member
6 here, might change; and I hope that doesn't
7 happen.

8 But in the end, I reluctantly
9 conclude that we have to have faith in our
10 system of Government and that because of the
11 relationship of the mandatory minimums as
12 expressed by our Chair to this problem, this
13 is a problem that uniquely needs to be
14 totally solved by Congress; and to pass an
15 amendment today would be a mistake and, so,
16 I'm going to join in making the
17 recommendations that will be forthcoming.

18 Thank you.

19 MS. MURPHY: Does anybody else
20 want to make a comment?

21 MR. KENDALL: I would make one.
22 Judge Castillo just said that he thought

1 that this is an issue that needs to be
2 totally resolved by Congress. I hope that
3 they do. I agree that the prudent thing to
4 do at this point is to recommend action to
5 Congress. So that's why I'm in agreement
6 with the action that we're taking today.

7 But I would also like to remind
8 everyone that it was once said, and I'm
9 paraphrasing here, justice delayed is
10 justice denied. If you believe there is an
11 injustice in this area, the longer the delay
12 in curing it, the longer there is a problem.

13 I would add, and this was said in
14 some format but I wanted to state it myself,
15 that I agree with what was said by -- I
16 believe the Chair said this; if I'm
17 misspeaking, correct me -- but there is not
18 credible evidence out there to believe that
19 powder cocaine penalties should be raised.

20 I also agree with what Judge
21 Castillo said, that crack cocaine is a more
22 serious drug than powder cocaine, and I'm

1 convinced from what I've heard, seen and
2 read and from people that have heard the
3 issue and that I have talked to that it is.

4 I just have serious doubts, as
5 obviously do many, that it's a hundred times
6 more serious. That's what this debate is
7 all about and has been for quite some time.

8 I agree with what Professor
9 O'Neill said earlier and what he pointed out
10 that while quantity is a factor, some of us
11 feel that quantity-driven drug penalties are
12 not the best way to capture moral
13 culpability, but other factors such as the
14 enhancements which were published for
15 comment should receive more emphasis.

16 Also, some commissioners believe
17 strongly that rather than picking some ratio
18 tied to the mid-level dealer, whoever that
19 person is and whatever they look like and
20 whatever criteria is used to determine who
21 is a mid-level dealer, that the better
22 approach might be to benchmark crack

1 penalties to other serious drugs that cause
2 similar societal harms such as heroin and
3 methamphetamine.

4 MS. MURPHY: Anybody else?

5 Commissioner Riley.

6 COMMISSIONER REILLY: Thank you,
7 Madam Chair.

8 I want to concur in what everyone
9 has said so far. I also want to I think
10 commend the staff, because probably one of
11 the most difficult things about Government
12 service that we've all been in for a number
13 of years is the ability to get people's
14 attention, to get policymakers' attention
15 about what needs to be done.

16 In 1995, we thought we had the
17 attention and we did. Unfortunately,
18 Congress did not agree with what the
19 Commission did back then. But I think by
20 virtue of the staff we have, the excellent
21 work that they have done, the ability that
22 we have had to have input from the testimony

1 that we have heard over the course of a
2 number of months on this issue has achieved
3 what I think is so necessary in the
4 legislative process and that is to get the
5 attention of Congress.

6 The fact that we have two members
7 of the United States Senate and probably
8 many others who are willing to join in the
9 cause of trying to correct some of the
10 inequities and the fact that we received a
11 letter yesterday from 13 members of the
12 House of Representatives is an indication to
13 me, as a former legislator, that we are
14 getting the attention of the Hill in regards
15 this issue.

16 I think the fact that we need to
17 collaborate with them and work with them and
18 provide them with the materials that the
19 staff has accumulated and have been so
20 important to each one of us on this issue
21 will be critical in terms of getting any
22 action done that's positive and that will

1 result in taking care of the issue and some
2 of the problems that we all will see in
3 terms of the real justice of what we're
4 trying to accomplish.

5 So I commend Judge Sessions, the
6 Chairman and Commissioner Steer for taking
7 the time to go to the Hill. I think more of
8 that needs to be done. I think, quite
9 candidly, where we are now is we all, and
10 when I say, "we all," I'm talking about
11 those who are interested in this issue that
12 are not members of the Commission, it
13 becomes a lobby effort; it becomes an effort
14 to sell to the Members of Congress the fact
15 that based on the information we have, this
16 is the problem we see, the report will
17 certainly be a valuable tool to them, and
18 ultimately, I imagine that they will respond
19 accordingly and will take the necessary
20 action to correct.

21 So I just wanted to make those
22 statements. I concur in what everyone has

1 said so far. But I do think the staff has
2 done a marvelous job putting together a lot
3 of material that, quite candidly, I'm not
4 even sure we even had the ability to have
5 back in '95, because things have changed and
6 we now have a much better extract of what
7 has occurred in this regard.

8 Thank you.

9 MS. MURPHY: Those are helpful
10 remarks. If there are no other statements
11 at this time, we have a number of other
12 items on the agenda that we will proceed on
13 to.

14 The next item is the proposed item
15 on career offenders and offenders under
16 Section 924(c) and 929(a.)

17 Charlie, if you would remind us
18 about that.

19 MR. TETZLAFF: This proposed
20 amendment provides special rules in the
21 Career Offender Guideline, 4(b)1.1,
22 and 5(g)1.2, sentencing on multiple counts

1 of conviction, for determining and imposing
2 a guideline sentence in the case in which
3 the defendant is convicted of an offense
4 under 18 U.S.c. Section 924(c) or 929(a)
5 and, as a result of that conviction, is
6 determined to be a career offender under our
7 Career Offender Guideline.

8 The amendment supplements
9 amendment 600, effective November 1st, 2000,
10 in which the Commission first dealt with
11 this complicated area. In amendment 600,
12 the Commission decided that offenses
13 under 924(c) and 929(a) can qualify as prior
14 crimes of violence or prior controlled
15 substance offenses for purposes of the
16 Career Offender Guideline.

17 The Commission deferred until this
18 amendment cycle addressing the more
19 complicated issues of whether convictions
20 under 924(c) and 929(a) can qualify as
21 instant offenses and, if they do so qualify,
22 how the sentence would be imposed.

1 Promulgation of the proposed
2 guideline in front of you reflects the
3 Commission's decision that the amendment,
4 while somewhat complex, is necessary to
5 comply with 28 U.S.C. Section 994(h).

6 From an operational point of view,
7 this amendment would achieve the goals of
8 first permitting 924(c) or 929(a) offenses,
9 whether as the instant or prior offence
10 conviction, to qualify for career offender
11 purposes; and, secondly, to ensure that in a
12 case in which such an instant offense
13 establishes the defendant as a career
14 offender, the resulting guidelines sentence
15 is determined under section 4(b)1.1 using a
16 count of conviction that has a statutory
17 maximum of life imprisonment.

18 At this time, a motion would be in
19 order to promulgate the amendment with the
20 effective date of November 1st, 2002, and to
21 authorize staff to make appropriate
22 technical and conforming changes if needed.

1 COMMISSIONER STEER: Madam Chair,
2 I so move.

3 MS. MURPHY: Is there a second?

4 COMMISSIONER CASTILLO: I'll
5 second.

6 COMMISSIONER STEER: I would like
7 to briefly speak in support of the
8 amendment.

9 The thrust of this proposal, as I
10 see it, is to ensure compliance with a
11 directive in Commissions Organic
12 Statute 994(h) as it has been construed in a
13 Supreme Court decision, *Lamonte*.

14 There are three aspects of that
15 I'd like to touch on. One is the relative
16 complexity. I'd like to make a few comments
17 about the statutory mandate and perhaps
18 where my meandering takes us, a few comments
19 about how do I think the *Lamonte* decision is
20 relevant to the policy-making that we are
21 considering at this time.

22 First, the complexity of this

1 provision is not something that anyone would
2 embrace as a goal in and of itself, but I
3 think as some of the public's comments has
4 recognized, the complexity is really
5 inherent in the conflict between a statutory
6 mandate under 924(c) event of a minimum
7 consecutive sentence and trying to marry
8 that in any kind of way with the sentencing
9 guidelines in its proportional or percentage
10 increases that are provided there.

11 Given those two competing systems,
12 the total avoidance of complexity I think is
13 not possible. We can only try to make a
14 provision such as this as understandable as
15 possible and minimize the complications.

16 That, I think we have done working
17 with groups, particularly the Probation
18 Officers Advisory Group, who always are such
19 a great resource when it comes to these
20 issues, and also with the help of a very
21 dedicated staff.

22 I want to again thank the staff,

1 particularly the team of drafters. They all
2 contributed on this, as have Ms. Montgomery
3 and Mr. Purdy, and have all worked with me
4 to try to get this in as good a shape as we
5 could.

6 The Probation Officers Advisory
7 Group has been absolutely great. They have
8 reviewed various iterations. They have
9 suggested improvements, and we have tried to
10 incorporate them.

11 Now, in some ways, this proposal
12 might be said is actually a rather simple in
13 terms of the way you would apply the
14 guidelines for a 924(c) offense. You don't
15 go through the usual process of determining
16 a offense level, specific offense
17 characteristics, various adjustments in
18 Chapter 3, rather, in those situations in
19 which the defendant qualifies as a career
20 offender.

21 Here, I want to underscore a
22 point, that we are not broadening the scope

1 of crime of violence or control substance
2 offense. This offense, the 924(c), would
3 only be career-eligible under the same
4 circumstances that it has always qualified
5 as a prior conviction, and that has been the
6 case for a number of years; i.e., only if
7 the underlying offensive conviction in
8 the 924(c) offense is itself a qualifying
9 crime of violence or a controlled substance
10 offense.

11 Nothing about that has changed.
12 In those circumstances, basically what the
13 Court does is fast-forward to this new
14 special rule, picking up and applying the
15 acceptance of responsibility adjustment that
16 is pertinent. In that special rule, we
17 basically have made it as simple as we
18 possibly can.

19 There is basically a comparison
20 between ranges, one of the ranges from a
21 career offender table that has only three
22 lines in it corresponding to the acceptance

1 responsibility; and the other comparison
2 that must be done in order to avoid
3 anomalous results is to be cognizant of what
4 the guideline range, if you're in a multiple
5 count case, would be if you didn't have
6 the 924(c) that guideline range plus
7 the 924(c).

8 This is not complicated. It's
9 basically picking whatever range has the
10 higher minimum, taking a point within it and
11 then allocating the sentence among the
12 counts. Which, again, if you've got
13 a 924(c) involved, a multiple 924(c),
14 sometimes you have to get out your pencil.
15 But this is grade school arithmetic and it
16 is not something that is unduly complicated.

17 That takes me back to the
18 statutory mandate. The statutory mandate is
19 part of our original act and it is very
20 clear. It leaves some definitional tasks
21 for the Commission. But the Commission has
22 long ago decided that a 924(c), under the

1 circumstances that I described, is a
2 qualifying offense for career offender
3 purposes. We just haven't faced it as the
4 instant offense.

5 But this is not like some other
6 directives that we get that have wiggle room
7 and fuzzy terms. This statutory mandate is
8 very clear. It says to the Commission,
9 under the circumstances where you have
10 basically a three-time loser, you must
11 provide a guideline range so that it is at
12 or near the statutory maximum.

13 That brings me to what I see as
14 the possible relevance of *Lamonte*. I think
15 I could best illustrate that by a couple
16 situations.

17 Imagine the situation where there
18 is only a 924(c) conviction. Without this,
19 the Commission is basically saying under the
20 current situation that the mandatory minimum
21 for a 924(c) offense, which is what you get
22 under the current guideline application, is

1 at or near the statutory maximum of life
2 imprisonment.

3 Folks, that won't wash. That's
4 not even close in terms of *Lamonte*. The
5 lesson in *Lamonte* is that the Commission
6 came clean, fast and loose with these terms
7 and can't use concerns about how
8 prosecutorial discretion might be exercised
9 as a reason to not comply with the statutory
10 mandate.

11 Or another example, if you want to
12 take it, suppose you have a 924(c) offense
13 in conjunction with a drug offense that has
14 a 120-month maximum, a 10-year or a 20-year
15 maximum. Under the current rules, we are
16 effectively saying that a sentence as low
17 as 12-1/2 years meets the statutory mandate
18 of being at or near life.

19 Again, I don't think that is a
20 fair interpretation, an instruction of what
21 *Lamonte* means in this context.

22 So for me, you know, I always work

1 to avoid complexity, but when the statutory
2 directive is clear, you know, I don't think
3 that the Commission has as an option to say,
4 well, we're just not going to do it because
5 it's complex and, you know, some may not
6 want to deal with the complexity.

7 What we should do, in my opinion,
8 is as we have done here is try to make it as
9 simple and as understandable as possible;
10 and then if anyone wants to join, as I have
11 said, to try to convince Congress to change
12 the statute, I'm more than willing to try to
13 help them.

14 Thank you.

15 MS. MURPHY: Any other comments on
16 this particular measure?

17 Commission O'Neill.

18 MR. O'NEILL: I waded into this
19 with a certain degree of trepidation. Like
20 I do oftentimes when I'm having a little bit
21 of a difficult time getting my mind around a
22 particular guideline amendment that we're

1 proposing or when I see that something
2 doesn't quite sit with me as perfectly as I
3 might want it to, oftentimes I'll create a
4 hypothetical or try to use an actual case to
5 see how the thing would apply and play out.

6 Although this is certainly not a
7 perfect world or a perfect guideline
8 amendment, after having re-read the
9 amendment itself with some degree of care,
10 after having last night, after our dinner,
11 revisited the Organic Statutory mandate
12 in 994(h) and actually having gone to the
13 pain of re-reading *Lamonte*, a decision with
14 which Commissioner Elwood and I have a
15 degree of familiarity that probably we
16 shouldn't have, I am going to support this
17 guideline amendment ultimately because I do
18 think at the end of the day that it does
19 ultimately support what Congress has
20 directed us to do in 994(h).

21 I think that, as Commissioner
22 Steer has pointed out, although it's an

1 imperfect fix, I think the difficulty and
2 the complexity that it results in a result
3 actually of the statutory directive and the
4 way that it works ultimately with 924(c)
5 and 929(a). I think in some respects, it's
6 unavoidable.

7 I commend staff and I commend
8 Commissioner Steer for having worked through
9 what ultimately seems to be quite a knotty
10 problem in coming up with what I think is a
11 reasonable application of what Congress
12 would expect us to do under these
13 circumstances.

14 One other thing that I would like
15 to add is that I hope we are in the process
16 of establishing perhaps the greatest data
17 set for recidivism as a result of the
18 recidivism studies that we are doing that
19 has yet to be assembled, and my hope is that
20 when we reconsider criminal history
21 categories, when we look at the impact or
22 the effect of the recidivism work that we're

1 doing now, we might also want to consider
2 coming back to the career offender guideline
3 itself and reconsidering it in that context,
4 as well, because I think that it merits a
5 certain amount of rethinking perhaps at this
6 stage of the game.

7 MS. MURPHY: If I could make a
8 footnote to that. There was a rather
9 cryptic reference to Commissioner O'Neill
10 and Commissioner Elwood's connection with
11 Lamonte. For those who don't know, they
12 happened to clerk for two different United
13 States Supreme Court justices, and
14 therefore, have this relationship.

15 Commissioner Sessions.

16 MR. SESSIONS: Perhaps because I'm
17 from a rural state, when I start to read
18 this, I think about trees and forests. When
19 I first came out to the Commission and got
20 all this advice from judges, it's too
21 complex, it's too long, it's too
22 non-understandable and you need simplify it.

1 In fact, this Commission has time and again
2 engaged in efforts to simplify the
3 guidelines.

4 What we're doing in this
5 particular amendment, even though I really
6 appreciate all the work to try to simplify
7 it as much as possible, is add a new level
8 of complexity that is going to be
9 extraordinarily difficult for people to
10 follow.

11 I appreciate that perhaps when you
12 get into the guideline itself, it might be
13 simple math. But to get into the guideline
14 is going to take a real effort.

15 I really enjoy listening to Rusty
16 do the training, all of the humor. The fact
17 is next year, if this passes, 90 percent of
18 his lecture and the questions that are asked
19 will relate to 924(c), and that's not what
20 really people should be focused in upon.

21 We're going to end up spending all
22 our time training people on a guideline

1 which affects 160 people per year. So then
2 you say to yourself, trees and forests.

3 Step back. Is it really necessary
4 that we get so detailed and complex over
5 such a small inside guideline kind of issue?
6 I think we're missing something here. So
7 I'm going to vote against it.

8 MS. MURPHY: Any other comments?

9 COMMISSIONER CASTILLO: I have
10 looked at this, and I agree with
11 Commissioner O'Neill that the Congressional
12 directive and the *Lamonte* decision require
13 us to get into this complex area.

14 Now, we can throw up our hands and
15 say it's too complex and we just can't do
16 this, but we haven't done that with other
17 guidelines.

18 I commend Commissioner Steer for
19 taking what has been a two-year path to try
20 and undertake this, along with staff, along
21 with the assistance of probation officers.
22 I think that this is required and we need to

1 do it.

2 I agree with Commissioner O'Neill
3 that a complete re-looking at the Career
4 Offender Guidelines is perhaps in order down
5 the road as well as if there do turn out to
6 be some problems with this guideline, I
7 would be happy to go back and try and fix
8 it. But right now, I'm convinced that this
9 is as good as it's ever going to get.

10 MS. MURPHY: Anybody else? I ask
11 the staff director, then, to call the roll.

12 MR. McGRATH: Vice-chair Castillo?

13 COMMISSIONER CASTILLO: Yes.

14 MS. MURPHY: This is on the
15 position, on the motion.

16 MR. McGRATH: Vice-chair Sessions?

17 MR. SESSIONS: No.

18 MR. McGRATH: Vice-chair Steer?

19 COMMISSIONER STEER: Yes.

20 MR. McGRATH: Commissioner

21 Johnson?

22 COMMISSIONER JOHNSON: No.

1 MR. McGRATH: Commissioner

2 Kendall?

3 MR. KENDALL: No.

4 MR. McGRATH: Commissioner

5 O'Neill?

6 MR. O'NEILL: Yes.

7 MR. McGRATH: Chair Murphy?

8 MS. MURPHY: Yes.

9 MR. McGRATH: The motion passes.

10 MS. MURPHY: The next item on the
11 agenda is alternatives to incarceration.

12 I'll have Charlie lead us into
13 that.

14 MR. TETZLAFF: This amendment, the
15 revised proposed amendment on alternatives
16 to imprisonment, seeks to increase
17 sentencing alternatives in Zone C of the
18 sentencing table in Chapter 5, Part A.
19 There are three options before you for your
20 consideration.

21 Option 1 amends the sentencing
22 table by combining Zones B and C, thereby

1 providing offenders of offense levels 11
2 and 12 of the sentencing options currently
3 available in Zone B.

4 Option 2 also increases sentencing
5 alternatives in Zone C but differs from
6 Option 1 in that first, it does not combine
7 Zones B and C; and secondly, that it limits
8 the use of home detention for defendants in
9 which the minimum of the guideline range is
10 at least eight months; in other words,
11 current Zone C.

12 In such cases, the defendant must
13 satisfy the minimum of the applicable
14 guideline range by some form of confinement,
15 but unlike Option 1, the defendant must
16 serve at least half of that minimum in a
17 form of confinement other than home
18 detention.

19 Option 3 increases sentencing
20 alternatives in Zone C of the sentencing
21 table similar to Option 1 and it limits the
22 expansion of the sentencing options

1 available in Zone B to offenders in criminal
2 history category one of Zone C of the
3 sentencing table.

4 This option provides these less
5 serious offenders with the same sentencing
6 options available for defendants in Zone B
7 but only to those in category one and
8 offenders in categories 2 through 6 will not
9 benefit from these additional sentencing
10 alternatives.

11 A motion would be in order to
12 promulgate one of these three optional
13 amendments with an effective date of
14 November 1, 2002, with staff being
15 authorized to make technical and clarifying
16 changes.

17 MR. KENDALL: Madam Chair, I'd
18 like to make a motion. The first question,
19 what does this proposed amendment do,
20 Option 1 -- I'm going to set Option 2 aside.
21 Option 1 and Option 3 are similar. The
22 difference exists in the scope based upon

1 criminal history category.

2 This proposed amendment, at least
3 the Option 1 version of it, the less
4 restrictive as between one and two, is
5 favored by the Criminal Law Committee of the
6 Judicial Conference of the United States,
7 who represent the Federal judges of this
8 country. The Probation Officers Advisory
9 Group, who represent probation officers of
10 this country, is also in favor of this
11 amendment.

12 I'm making these statements before
13 I make a motion just to articulate why I'm
14 pushing this forward. Contrary to the
15 statements made by some opponents of these
16 proposals, the options proposed do not lower
17 any penalty for anyone. All they do is to
18 provide the judge with the tool to help the
19 defendant serve his or her sentence imposed
20 someplace other than prison, such as a
21 halfway house or home confinement. Again,
22 the sentence is not lowered but it's still

1 served.

2 Furthermore, at the levels we are
3 talking about, 11 and 12, only defendants
4 whose sentence is 16 months or less is
5 affected.

6 Further, a judge can still put
7 low-level tax cheats and fraudsters in
8 prison if the evidence warrants it.

9 The statistics show today that
10 currently those in Zone C now don't get the
11 split sentence but serve the entire sentence
12 in prison without the benefits of Zone C
13 with regard to the split sentence over 50
14 percent of the time.

15 Rather than a split sentence, the
16 option for the judge is either home
17 confinement or halfway house or some
18 community-based facility that those numbers
19 are going to change.

20 Again, what we're talking about is
21 allowing the judge to view each case on a
22 case-by-case basis with these low-level

1 offenders and make the in-or-out decision.

2 By providing this after the judge
3 hears the case and hears both sides, by
4 providing an alternative to prison, what
5 that does is facilitate -- through
6 electronic monitoring of home confinement or
7 through confinement of a community facility
8 where those facilities are available, it
9 allows the defendant to continue employment,
10 support his dependents and make restitution
11 to the victims of his or her crime if there
12 is one. It also frees up a prison bed for
13 someone who is a more serious offender.

14 I am going to move for adoption of
15 Option 3, and I'm doing that for the
16 following reason: Option 3 is less
17 restrictive. We started this debate talking
18 about it a couple years ago; the view was to
19 provide some alternative to prison for
20 nonviolent first offenders.

21 Option 1 includes those
22 individuals who are not first offenders and

1 that is a further restriction on it. I
2 realize that there has been some debate
3 about delaying it and waiting on the
4 recidivism issue, and I understand that.
5 But, again, we talk about the ability to
6 come back, the Court has the ability to come
7 back and revisit the issue.

8 I would urge the commissioners to
9 vote on this proposal based on the remarks
10 and the merits of the proposal itself. I
11 would move, Madam Chair, for adoption of
12 Option 3.

13 MS. MURPHY: Is there a second?

14 COMMISSIONER JOHNSON: I second.

15 MS. MURPHY: Is there further
16 discussion? Commissioner Castillo.

17 COMMISSIONER CASTILLO: Yes. I do
18 want to say that, through this amendment
19 cycle, I have flip-flopped on this
20 amendment, and I've reluctantly come to the
21 conclusion of voting no on this amendment,
22 for the following reasons:

1 One, while I commend Commissioner
2 Kendall for bringing some flexibility, and I
3 think flexibility needs to be brought to
4 low-level, especially non-violent,
5 first-time offenders, my concern, and it's
6 been raised and it's a concern that I raised
7 during the amendment cycle discussions, was
8 as to white-collar criminal offenses and the
9 fact that we had just passed our economic
10 crime package last year and we really do not
11 have the data for how that has played out in
12 the field.

13 That coupled with some showing
14 that has been made by the Department of
15 Justice, particularly with regard to
16 antitrust as well as tax and other offenses
17 generally in the category of white-collar
18 criminal offences, leads me to conclude that
19 the best approach would be to study this
20 further and to look at it in connection with
21 the recidivism study and a complete
22 re-looking at criminal history, and perhaps

1 along with an adjustment of some of these
2 white-collar criminal offenses, but this
3 means that this cannot be done this
4 amendment cycle and that it's going to need
5 further study. I commit to coming back to
6 this issue, but I will reluctantly vote no
7 today.

8 MS. MURPHY: Commissioner O'Neill?

9 MR. O'NEILL: I also intend to
10 vote no on this, and I do so for several
11 different reasons.

12 Perhaps first and foremost is that
13 we are in the process right now conducting
14 the recidivism study which allows the
15 opportunity to look at criminal history
16 categories to make a determination as to
17 whether or not criminal history categories
18 need to be adjusted.

19 I voted in part with respect to
20 the amendment to the Career Offender
21 Guideline because I believed that we had a
22 statutory mandate by Congress that I take

1 seriously in terms of giving that amendment
2 some effectuation.

3 Similarly, I do feel like the
4 Commission has an obligation to follow what
5 Congress had laid out for us in 28
6 U.S.C. 994(j). That requires that the
7 Commission shall ensure that the guidelines
8 reflect the general appropriateness of
9 imposing a sentence other than imprisonment
10 cases in which the defendant is a first
11 offender who has not been convicted of a
12 crime of violence or otherwise serious
13 offense.

14 I consider that language to be
15 just as binding on us as I do with respect
16 to 920 U.S.C. 994(h). For that reason, I
17 think it's important for us to look at this
18 as a piece to ensure that when we do our
19 review of the criminal history categories
20 that we do what Congress has asked us to do
21 and, namely, to treat first-time offenders
22 who are accused of or not accused of

1 violating certain offenses that Congress
2 didn't find particularly serious in a
3 different manner in which we treat other
4 offenders.

5 I think that the best and most
6 appropriate way to do that is in concert
7 with our recidivism study, which hopefully
8 will be completed, at least the information
9 we need for revising criminal history
10 categories, next year, which is one of the
11 reasons that I'm strongly in favor of and
12 hope to be lobbying our fellow commissions
13 that we re-look at criminal history category
14 one during the course of the next amendment
15 cycle.

16 Similar to Commissioner Castillo,
17 I also feel that it's important that we do
18 not inadvertently give white-collar
19 criminals a benefit by enacting something
20 like this.

21 I was very persuaded and
22 appreciative of the Department of Justice

1 and the information they provided to us with
2 respect to the potential effect on
3 white-collar criminals. I think we need to
4 look carefully at the base offense levels
5 for white-collar criminals even at the low
6 end.

7 We don't know, as Commissioner
8 Steer has pointed out, what the entire
9 effect of the economic crimes package that
10 we just enacted last year will have on
11 sentences. Similarly, we want to make sure
12 that those people who have the greatest
13 culpability get the most serious penalties.

14 I think that there's a fair amount
15 of agreement, at least at this table, that
16 among the most serious offenders in terms of
17 their moral culpability tend to be those
18 individuals who through premeditation plan
19 to bring about a scheme or plan and bring it
20 to fruition and then are apprehended. Those
21 are the individuals in part that the entire
22 Sentencing Reform Act was designed to stop

1 to provide a deterrent for individuals,
2 white-collared criminals in particular, who
3 have great moral culpability in committing
4 the offenses that they do, and in having in
5 some respects far more impact upon the
6 economy and upon the individuals than even
7 other types of offenders who have been
8 treated harshly.

9 But, in any event, it's for those
10 reasons that I plan to vote against the
11 current proposal, but do think,
12 nevertheless, that this is an important area
13 for the Commission and it's incumbent upon
14 the Commission to review.

15 MR. SESSIONS: I'd just like to
16 say that I agree in particular with the last
17 statement that Michael has just made. This
18 is obviously a very difficult issue for me
19 for a lot of reasons. But I'm also
20 certainly sensitive to the concerns of the
21 Treasury Department, the Tax Division.

22 This is not intended to highlight

1 a break for persons who engage in
2 white-collar crime that involves a lot of
3 planning, a lot of forethought, and in my
4 view, a significant culpability.

5 So I think what I'd like to say is
6 that this will be coming up again very soon,
7 and I'm sure next year, and would like to
8 work with the Treasury. If they've got
9 concerns that this could result in a
10 significant reduction in penalties for these
11 kind of offenses, then we'll adjust that to
12 work with them.

13 At the same time, my view is that
14 there is a need to expand judicial
15 discretion at these low levels. So I'd like
16 to work with the Commission and work
17 indirectly with the Department of Justice to
18 see if all of their concerns can be resolved
19 and at least my view that the judicial
20 discretion should also be advanced at this
21 level.

22 MS. MURPHY: Any other comments?

1 Tim, would you call the roll.

2 MR. McGRATH: On the pending
3 motion to adopt Option 3, Vice-chair
4 Castillo?

5 COMMISSIONER CASTILLO: No.

6 MR. McGRATH: Vice-chair Sessions?

7 MR. SESSIONS: No.

8 MR. McGRATH: Vice-chair Steer?

9 COMMISSIONER STEER: No.

10 MR. McGRATH: Commissioner
11 Johnson?

12 COMMISSIONER JOHNSON: Yes.

13 MR. McGRATH: Commissioner
14 Kendall?

15 MR. KENDALL: Yes.

16 MR. McGRATH: Commissioner

17 O'Neill?

18 MR. O'NEILL: No.

19 MR. McGRATH: Chair Murphy?

20 MS. MURPHY: I haven't yet spoken
21 on this. I would just say that this was
22 originally part of our two-year topic on

1 criminal history, and we did separate it out
2 earlier this year on the thought that this
3 might be a piece that could be done this
4 year.

5 There have been shown to be some
6 unintended consequences that present some
7 problems that I think we need to think more
8 about. So I think we are going to be
9 considering it again next year. For these
10 reasons, I vote no.

11 MR. McGRATH: The motion fails.

12 MS. MURPHY: The last category on
13 our agenda today is acceptance of
14 responsibility. Charlie, would you lead us
15 into that, please.

16 MR. TETZLAFF: I would draw your
17 attention to the second revised proposed
18 amendment, entitled "Acceptance of
19 Responsibility."

20 The amendment is proposed in two
21 parts. Part one proposes to amend
22 Section 3(e)1.1, the Acceptance of

1 Responsibility Guideline, by deleting
2 subsection (e)1, which provides an
3 additional one-level reduction if the
4 defendant timely provides complete
5 information to the Government concerning his
6 own involvement in the offense.

7 Under this amendment, a defendant
8 who accepts responsibility nor the offense
9 would receive a two-level reduction under
10 subsection (a) and an additional one-level
11 reduction only if the defendant timely
12 notifies the authorities of his intention to
13 plead guilty.

14 This proposal is intended to save
15 both judicial and governmental resources by
16 providing defendants a stronger incentive to
17 timely plead guilty.

18 The proposed amendment also
19 includes language that provides that the
20 additional one-level reduction is not
21 precluded in the case of a defendant who
22 does not notify the authorities early in the

1 process of the defendant's intention to
2 enter a guilty plea because of a delay for
3 goods cause.

4 Part two of this amendment
5 resolves a circuit conflict regarding
6 whether the Court may deny an acceptance of
7 responsibility reduction when the defendant
8 commits a new offense unrelated to the
9 offense of conviction.

10 The majority of circuits have held
11 that the sentencing courts may consider new
12 criminal conduct, i.e., conduct occurring
13 after the charge of defendant has been
14 charged with the instant offense such as a
15 subsequent drug use or the commission of the
16 new offense when determining whether an
17 adjustment for acceptance of responsibility
18 is warranted.

19 The Sixth Circuit, the sole
20 minority circuit, has held that the Court
21 may not look at post-indictment conduct
22 unrelated to the offense of conviction.

1 This proposed amendment presents
2 two options that implement the majority
3 view. Option 1 proposes to amend the
4 commentary to include the commission of any
5 other criminal conduct while pending trial
6 or sentencing on the instant offense as one
7 of the considerations that the Court may
8 look to in determining whether to grant
9 acceptance of responsibility.

10 Option 2 makes clear that a
11 defendant who commits additional similar
12 criminal conduct or additional serious
13 dissimilar criminal conduct while pending
14 trial or sentencing on the instant offense
15 ordinarily is not entitled to a reduction
16 under this guideline.

17 A motion would be in order at this
18 time to first promulgate Part One, that is
19 deleting subsection (b)1 of the Acceptance
20 of Responsibility Guideline, with an
21 effective date of November 1st, 2002, and
22 authorize staff to make conforming and

1 technical changes.

2 COMMISSIONER STEER: Madam Chair,
3 I move Part One.

4 MS. MURPHY: Is there a second?

5 COMMISSIONER CASTILLO: I'm not
6 seconding, but I'd like to explain why I
7 think there is not going to be a second.

8 I have spoken strongly against
9 taking up this amendment at this point. My
10 preference is to defer consideration of
11 this. I don't believe that at this point
12 deleting (b)1 is appropriate. I think it's
13 worthy of further study. I think at this
14 point it would send the wrong message.

15 Part of acceptance of
16 responsibility is in fact a complete
17 revelation on the part of the defendant to
18 Government authorities to prevent
19 unnecessary use of Government resources.
20 But ultimately I think various groups have
21 studied acceptance of responsibility in the
22 past, and I would think we should study this

1 further.

2 I just happened to pull up a law
3 review from my alma mater and studied it. I
4 want to continue to study this. I think we
5 can bring about some real solutions to the
6 acceptance of responsibility issue including
7 the Circuit conflict.

8 So I'm not seconding this motion
9 because I would like to study it further,
10 and I think other people feel the same way.

11 MS. MURPHY: Does anybody else
12 want to say anything about this? Or a
13 second?

14 Hearing no second, the motion
15 would fail for lack of one.

16 MR. TETZLAFF: I was going to get
17 to Part Two. It would be appropriate. This
18 again involves a circuit conflict issue.

19 A motion would be appropriate to
20 promulgate Part Two with an effective date
21 of November 1st, 2002, and would also
22 authorize staff to make appropriate changes

1 or corrections if needed.

2 Keep in mind in this Part Two
3 there are two options. So if one were to
4 make a motion, it would be helpful if you
5 selected one or the other option.

6 MR. KENDALL: Madam Chair, I'd
7 like to make a motion. I would like to move
8 that we adopt Part Two, Option 1; and I do
9 so for the following reasons.

10 COMMISSIONER JOHNSON: Option 1 or
11 Option 2?

12 MR. KENDALL: Option 1. Here is
13 why.

14 COMMISSIONER JOHNSON: The one we
15 just heard?

16 MR. KENDALL: No. That's Part
17 One. Part Two, Option 1.

18 I thought when I first saw this
19 that this was a rather creative way to
20 handle this because it was originally in
21 promulgated amendment with two different
22 parts to it. Some might be for one part and

1 not for the other and forced, like with the
2 drug combination we did earlier, the drug
3 miscellaneous, where we had four or five
4 different items where you might be against
5 one discreet component of it and you still
6 have to cast a vote one way or another that
7 does not give you flexibility. Doing it
8 this way does provide the flexibility.

9 By going with Part Two, Option 1,
10 we don't have to get into the acceptance of
11 responsibility issue that we talked about
12 and came to the conclusion that we did.

13 However, by this procedure, we can
14 easily resolve the Circuit conflict by
15 adopting Option 1, which does represent the
16 majority view, and we talked about that
17 yesterday, and it allows the judge to decide
18 based on the facts of a given case of
19 whether or not something has or hasn't been
20 done in a new offense that is inconsistent
21 with acceptance of responsibility.

22 We've talked about before the

1 example of someone who is a drug addict and
2 who needs drug treatment, that may or may
3 not indicate an acceptance or lack thereof
4 for the given offense at hand. It allows
5 for that determination to be made on an ad
6 hoc basis rather than in those Circuits that
7 hold to the minority position, the judge
8 does not have that flexibility and,
9 therefore, acceptance is denied.

10 So for those reasons, I move for
11 adoption of Part Two, Option 1.

12 MS. MURPHY: Is there a second to
13 the motion?

14 MR. KENDALL: Looks like, John, we
15 should have cut a deal.

16 MS. MURPHY: Not hearing a second,
17 the motion fails for lack of one.

18 That then brings us, I believe,
19 unless there is some other dangling task we
20 need to do.

21 MR. TETZLAFF: I have nothing
22 further, Madam Chair.

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MS. MURPHY: Thank you.

That concludes our agenda for today. We'll adjourn the meeting at this time.

(Whereupon, at 12:20 p.m., the PUBLIC MEETING was adjourned.)

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