

UNITED STATES SENTENCING COMMISSION

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PUBLIC MEETING

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THURSDAY,
APRIL 10, 2014

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The United States Sentencing Commission met in the Leonidas Ralph Mecham Conference Center, One Columbus Circle NE, Washington, D.C., at 2:30 p.m., Hon. Patti Saris, Chair, presiding.

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PRESENT

PATTI B. SARIS, Chair
CHARLES R. BREYER, Vice Chair
RICARDO H. HINOJOSA, Vice Chair
KETANJI BROWN JACKSON, Vice Chair
RACHEL BARKOW, Commissioner
DABNEY FRIEDRICH, Commissioner
WILLIAM H. PRYOR, JR., Commissioner
JONATHAN J. WROBLEWSKI, Commissioner (Ex Officio)

STAFF PRESENT

KENNETH COHEN, Staff Director
TOBIAS DORSEY, Special Counsel
KATHLEEN GRILLI, General Counsel

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Adjourn

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

2:30 p.m.

1
2
3 CHAIR SARIS: (presiding) Good
4 afternoon.

5 The meeting is now called to order.

6 Thank you all for coming to this
7 public meeting of the United States Sentencing
8 Commission. Your attendance here is a testament
9 to the extraordinary interest in federal
10 sentencing issues right now, and specifically in
11 the amendments that the Commission is considering
12 today.

13 We have had a massive response to our
14 request for public comment. We received more
15 than 20,000 letters during our public comment
16 period.

17 I want to thank the Members of
18 Congress who submitted letters, Congressman
19 Goodlatte and Senator Grassley, Senators Leahy,
20 Durbin, and Paul, and Senators Feinstein and
21 Boxer, and Congressmen Huffman, LaMalfa,
22 Thompson, Farr, Lamborn, and Cook.

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1 I also want to thank the Criminal Law
2 Committee of the Judicial Conference, the
3 Department of Justice, the Federal Public and
4 Community Defenders, our advisory groups, and the
5 many advocacy groups, law enforcement
6 organizations, and, of course, individuals who
7 submitted their views. Your input was of
8 paramount importance to this process.

9 The issue that has received the most
10 attention is our proposal to reduce the
11 guidelines applicable to the drug quantity table
12 by two levels across all drug types. This is an
13 important question, one which the Commission has
14 grappled with for several years. I'll be talking
15 more about this issue later.

16 We will also be considering amendments
17 today on several other important issues,
18 including responding to the provisions of the
19 Violence Against Women Reauthorization Act of
20 2013, considering whether the guidelines
21 sufficiently address the environmental and other
22 harms caused by cultivation of marijuana on

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1 public lands or trespassing on private land, and
2 resolving several longstanding circuit conflicts.

3 So, I welcome you all to our meeting.

4 The first order of business is to
5 adopt the January 9th, 2014 public meeting
6 minutes. Is there a motion to do so?

7 VICE CHAIR HINOJOSA: So moved.

8 CHAIR SARIS: Is there a second?

9 VICE CHAIR JACKSON: Second.

10 CHAIR SARIS: Is there any discussion?

11 (No response.)

12 All in favor?

13 (Chorus of ayes.)

14 Any opposed?

15 (No response.)

16 The motion is adopted by voice vote.

17 Also, I am reporting, as Chair of the
18 Commission, on several matters.

19 I begin with the National Training
20 Seminar. We are pleased to announce that the
21 Annual National Seminar on Federal Sentencing
22 Guidelines will be held in Philadelphia on

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1 September 17th to 19th, 2014. Information about
2 it is on the website.

3 I also would like to discuss the new
4 version of the Commission's Interactive
5 Sourcebook, which is now available on our
6 website. This version is more user-friendly and
7 has more additional features than the first
8 version. This version will allow users to see
9 sentencing trends across various fiscal years and
10 includes data that is not published in the
11 Commission's Annual Sourcebook.

12 Speaking of the Sourcebook, it
13 together with the Annual Report is also available
14 on our website.

15 And finally -- you can tell we love
16 these facts and data -- the most recent edition
17 to the Quick Facts Series is out and it deals
18 with career offenders. This is the 11th in the
19 series, all of which are available on the
20 website. And they are so popular -- actually, I
21 hear about them all across the country -- that we
22 intend to continue releasing our Quick Facts in

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1 the future.

2 So, the next order of business are
3 votes on the amendments, and I turn this over to
4 our General Counsel, Kathleen Grilli.

5 MS. GRILLI: Thank you, Judge.

6 And this first amendment, proposed
7 amendment, for your consideration is on the
8 Violence Against Women Reauthorization Act. This
9 is a multi-part amendment that responds to the
10 Act, which, among other things, provided new and
11 expanded criminal offenses and increased
12 penalties for certain crimes involving assault,
13 sexual abuse, stalking, domestic violence,
14 harassment, and human trafficking.

15 Part A of the proposed amendment
16 addresses changes to 18 United States Code
17 Section 113, which is the federal assault
18 statute. The Act expanded the scope of Sections
19 (a) (1), (2), (3), and (4) of Section 113, and
20 part (a) of the proposed amendment amends
21 Appendix A to provide additional statutory
22 references for these sections of the statute.

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1 The Act also expanded Section
2 113(a)(7) so that it applies to assault resulting
3 in substantial bodily injury to a spouse,
4 intimate partner, or dating partner.

5 Part (a) of the proposed amendment
6 amends 2A2.3 to revise the two-tiered enhancement
7 for assaults resulting in injury. Specifically,
8 it broadens the scope of the existing four-level
9 enhancement, so that it applies not only to a
10 case in which the offense resulted in substantial
11 bodily injury to an individual who has not
12 attained the age of 16 years, but also to a case
13 in which the offense resulted in substantially
14 bodily injury to a spouse, intimate partner, or
15 dating partner.

16 It makes clerical, stylistic changes
17 to the heading of 2A2.3 by changing minor assault
18 to assault and makes conforming changes to the
19 commentary of 2A2.2 and 2A2.3.

20 The Act established a new Section
21 (a)(8) to 113, which applies to assault of a
22 spouse, intimate partner, dating partner by

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1 strangling, suffocating, or attempting to
2 strangle or suffocate, and provides a statutory
3 maximum term of imprisonment of 10 years.

4 Part (a) of the proposed amendment
5 makes three changes to address Section 113(a)(8).
6 First, it amends Appendix A to reference this
7 section to 2A2.2. Second, as a conforming
8 change, it amends the commentary to 2A2.2 to
9 provide that the term "aggravated assault"
10 includes an assault involving strangulation,
11 suffocation, or an attempt to strangle or
12 suffocate. Third, the proposed amendment amends
13 2A2.2 to provide a three-level enhancement if the
14 offense involves strangling, suffocating, or
15 attempting to strangle or suffocate a spouse,
16 intimate partner, or dating partner.

17 The cumulative impact of Subsections
18 (b)(2), (b)(3), and this new enhancement is
19 limited to 12 levels.

20 Part (a) also amends 2A6.2 to address
21 cases involving the same type of conduct. It
22 currently has a two-level enhancement that

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1 applies if the offense involved an aggravating
2 factor such as bodily injury and a four-level
3 enhancement that applies if the offense involved
4 more than one such aggravating factor.

5 The proposed amendment adds
6 strangling, suffocating, or attempting to strangle
7 or suffocate as a new, separate aggravating
8 factor.

9 Finally, part (a) of the proposed
10 amendments amends the commentary to 5D1.1 to
11 provide more guidance on the imposition of
12 supervised release in cases in which the
13 defendant is convicted of an offense involving
14 domestic violence.

15 Part (b) of the proposed amendment
16 addresses changes to Section 153, commonly
17 referred to as the Major Crimes Act, and Section
18 1152, commonly known as the General Crimes Act.
19 The proposed amendment deletes Appendix A
20 references for both of these statutes.

21 Part C of the proposed amendment
22 addresses statutory changes to 18 United States

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1 Code Sections 2261, 2261(a), and 2262 that were
2 made by Public Law 109-162 in 2006 and expanded
3 and restated by Section 207 of the Act.

4 The proposed amendment amends the
5 commentary to 2A6.2 to expand the definition of
6 stalking in the commentary to conform to
7 statutory changes made in Section 2261(a).

8 Part (d) of the proposed amendment
9 addresses statutory changes made by the Act to 8
10 United States Code 1375(a). Before the enactment
11 of the Act, criminal provisions in this section
12 were set forth in Subsection (d)(3)(C) and
13 Subsection (d)(5)(B). The Act revised and
14 reorganized these criminal provisions such that
15 all criminal provisions are now set forth in
16 Subsection (d)(5)(B).

17 The proposed amendment responds to
18 these changes by revising Appendix A references
19 for offenses under Section 1375(a), Subsection
20 (d). The reference for Subsection (d)(3)(C) is
21 deleted, and offenses under Subsection (d)(5)(B) 1
22 and 2 continue to be referenced to 2H3.1, and

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1 offenses under (d)(5)(B)3 are referenced to
2 (2)(b)(1)1.

3 Part (e) of the proposed amendment
4 addresses offenses under 18 United States Code
5 Section 2423, which were modified by the Act.
6 Section 2423 contains four offenses, each of
7 which prohibits sexual conduct with minors.

8 Sections 2423(a) and (b) were already
9 referenced in Appendix A to 2G1.3. Part (e) of
10 the proposed amendment continues to maintain that
11 reference and amends Appendix A to reference
12 Section 2423(c) and (d) to 2G1.3.

13 Finally, part (f) of the proposed
14 amendment responds to the new Class A misdemeanor
15 at 18 United States Code Section 1597(a) and
16 references this offense to 2X5.2, the Class A
17 misdemeanor guideline.

18 A motion to promulgate the proposed
19 VAWA amendment with an effective date of November
20 1st, 2014, and with staff granted technical and
21 conforming amendment of the wording, would be in
22 order at this time.

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1 CHAIR SARIS: Thank you, Ms. Grilli.

2 Do I hear a motion?

3 COMMISSIONER BARKOW: So moved.

4 CHAIR SARIS: Do I hear a second?

5 COMMISSIONER PRYOR: Second.

6 CHAIR SARIS: Any discussion?

7 (No response.)

8 All right. All in favor?

9 (Chorus of ayes.)

10 Anyone opposed?

11 (No response.)

12 The amendments, which I will not ask
13 you to repeat, are passed unanimously.

14 All right. At this point, what we are
15 doing is moving on to the next amendment, which
16 deals with a circuit conflict relating to Section
17 1B1.10.

18 MS. GRILLI: Thank you, Judge.

19 This proposes amendment responds to
20 two circuit conflicts involving the effect of a
21 mandatory minimum sentence on the guideline range
22 and resentencing proceedings under 18 United

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1 States Code Section 3582(c)(2) and the
2 Commission's Policy Statement at 1B1.10.

3 Circuits are split over what to use as
4 the bottom of the range in order to apply
5 1B1.10(b)(2)(B) in two distinct situations where
6 the amended guideline range, as determined by the
7 Sentencing Table, is below an applicable
8 mandatory minimum.

9 First, there are cases in which the
10 defendant's original range was above the
11 mandatory minimum, but the defendant received a
12 sentence below the mandatory minimum pursuant to
13 a government motion for substantial assistance,
14 and the amended guideline range, as determined on
15 the Sentencing Table, is below the mandatory
16 minimum.

17 Second, there are cases in which the
18 defendant's original guideline range, as
19 determined by the Sentencing Table, was at least
20 in part below the mandatory minimum, and the
21 defendant received a sentence below the mandatory
22 minimum, pursuant to a government motion for

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1 substantial assistance.

2 The proposed amendment generally
3 adopts the approach of the 3rd and the District
4 of Columbia Circuits, which have taken the view
5 that the bottom of the amended range would be the
6 bottom of the Sentencing Table guideline range,
7 not the applicable mandatory minimum.

8 It amends 1B1.10 to specify that, if
9 the case involves a statutorily-required minimum
10 sentence and the court had the authority to
11 impose a sentence below that statutorily-required
12 minimum sentence, pursuant to a government motion
13 to reflect the defendant's substantial assistance
14 to authorities, then, for purposes of 1B1.10, the
15 amended guideline range shall be determined
16 without regard to the operation of 5G1.1 and
17 5G1.2.

18 A motion to promulgate the proposed
19 amendment with an effective date of November 1st,
20 2014, and staff given authority to make technical
21 and conforming amendment authority, is
22 appropriate at this time.

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1 VICE CHAIR HINOJOSA: So moved.

2 VICE CHAIR BREYER: Second.

3 CHAIR SARIS: All right. So, at this
4 point, is there any discussion on this?

5 Vice Chair Jackson first.

6 VICE CHAIR JACKSON: Sure, I'll go
7 first.

8 I would like to go on record to
9 explain why I cannot support this amendment. I
10 have struggled with this decision, especially in
11 light of its implications for certain defendants
12 who might benefit as a result of our prior
13 amendments to the guidelines that implemented the
14 Fair Sentencing Act of 2010. I was, and still
15 am, a supporter of the Commission's unanimous
16 decision in 2011 to reduce the guideline
17 penalties for crack offenses, pursuant to the
18 Fair Sentencing Act, and to make that reduction
19 retroactive.

20 So, it would seem logical that I would
21 also support today's amendment to 1B1.10, as an
22 effort to give that relief the broadest possible

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1 effect. In my view, however, today's amendment
2 misreads the statutes and distorts the guidelines
3 to achieve that end and, as a result, does more
4 harm than good.

5 As you know, this amendment is
6 technical and complicated and is, therefore,
7 difficult to understand and to explain. So, I
8 won't try to describe it, except to say that,
9 generally speaking, it would permit a defendant
10 who originally received a substantial assistance
11 departure and got a sentence that was below the
12 mandatory minimum to be considered for an
13 additional substantial assistance discount, as a
14 result of the Commission's determination to
15 revise the guidelines and to make that change
16 retroactive.

17 This amendment is troubling to me for
18 two main reasons. First, because I think it is
19 manifestly inconsistent with the substantial
20 assistance and retroactivity statutes and
21 guidelines as they current exist. And second,
22 because I think that adopting this amendment will

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1 unnecessarily introduce an unwarranted disparity
2 between cooperating crack defendants who were
3 sentenced previously, that is, prior to the Fair
4 Sentencing Act, and similarly-situated defendants
5 who are being sentenced today.

6 Briefly, in regard to the first point,
7 I think this amendment necessarily requires a
8 reinterpretation of 5G1.1(b) in substantial
9 assistance cases, which I think is perhaps not
10 authorized and is certainly not prudent.
11 5G1.1(b) says that, if the statutory minimum is
12 greater than the otherwise applicable guideline
13 range, then the statutory minimum shall be the
14 guideline sentence, period.

15 Today's amendment adds the implicit
16 caveat "unless the defendant has provided
17 substantial assistance," in which case the
18 statutory minimum is of no moment and the
19 otherwise applicable guideline range shall be the
20 guideline sentence for the purpose of determining
21 the sentence to be imposed.

22 In addition to not being explicitly

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1 stated in 5G1.1, this new rule is problematic
2 because the statute that governs the substantial
3 assistance departure says nothing about
4 determining the sentence to be imposed without
5 regard to the statutory minimum.

6 In fact, in my view, Section 3553(e)
7 of Title 18 plainly establishes that it was
8 Congress' intent that a defendant who would have
9 otherwise been subject to a mandatory minimum,
10 but has provided substantial assistance, is
11 authorized to get a break from the mandatory
12 minimum and, therefore, the mandatory minimum is
13 the starting point below which a court is
14 authorized to sentence. I see today's amendment
15 as ignoring this statutory mandate.

16 I think this amendment is also
17 inconsistent with Title 18 3582(c), which is the
18 statute that gives the court authority to
19 consider retroactive application of new guideline
20 amendments in a particular case. 3582(c) permits
21 a court to lower a sentence that was previously
22 imposed when, and only when, the defendant was

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1 originally sentenced, quote, "based on a
2 sentencing range that has been subsequently
3 lowered by the Sentencing Commission," end quote,
4 and when the reduction is consistent with the
5 Commission's Policy Statements.

6 As I read this statute and the cases
7 that interpret it, a cooperating defendant who
8 originally received substantial assistance and
9 got a departure and went below the mandatory
10 minimum does not qualify for retroactivity. Why
11 not? Because his original sentence was based on
12 the extent of his cooperation, and not the
13 guideline range at all.

14 Moreover, in all likelihood, the
15 sentencing range in his case has not been
16 subsequently lowered by the Sentencing
17 Commission. It was, and still is, the statutory
18 minimum, pursuant to 5G1.1.

19 And the problems with this amendment
20 are not just confined to its inconsistencies with
21 the statutes. I believe that a rule that
22 authorizes courts to disregard the statutory

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1 minimum in substantial assistance cases in the
2 retroactivity context wreaks havoc on the
3 guideline manual as well.

4 Our current Section 1B1.10 already has
5 an exception for cooperating defendants which
6 states that, when retroactivity is considered,
7 quote, "a reduction comparably less than the
8 amended guideline range may be appropriate".
9 This makes sense if, as 5G1.1 says, the amended
10 guideline range is the statutory minimum. So
11 that a cooperating defendant's comparable
12 reduction is a discount from the statutory
13 mandatory minimum.

14 But, with today's amendment, the
15 Commission would be doing something totally
16 different. It would be deciding that, for this
17 one category of defendants, the amended guideline
18 range for reduction purposes is not the statutory
19 minimum, but what the guidelines otherwise would
20 have called for if there were no statutory
21 minimum.

22 As a practical matter, what this means

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1 is that a court applying amended 1B1.10 is in a
2 substantial assistance situation is authorized to
3 depart downward from the new guideline range in
4 order to reward cooperation, when the mandatory
5 minimum is the obvious and, indeed, the only true
6 starting point for determining the extent of a
7 downward departure on substantial assistance
8 grounds.

9 In other words, this amendment
10 diverges dramatically from the ordinary departure
11 framework because it establishes a departure that
12 does not compare cooperating defendants to non-
13 cooperating defendants who otherwise would have
14 been subject to the mandatory minimum and gives a
15 discount to the cooperator, but, instead,
16 compares cooperating defendants to some imagined
17 category of non-cooperating defendants who
18 somehow live in a world without mandatory
19 minimums and, thus, might have received a
20 sentence within the revised guideline range. And
21 so, to award cooperation, it puts cooperating
22 defendants in a position to receive a discount

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1 that is even lower than that.

2 This is a bizarre result because we
3 live in a world today where non-cooperating
4 defendants would have not been able to receive
5 the revised guideline sentence, and there's no
6 question that the mandatory minimum term of
7 imprisonment would have applied to cooperating
8 defendants as well, but for their substantial
9 assistance.

10 Which brings me to my final and
11 perhaps most important point, which is this: I
12 believe that this amendment creates, rather than
13 resolves, unwarranted disparity. Because the
14 Commission would be giving courts the
15 authorization to disregard the mandatory minimum
16 for cooperating defendants only in the
17 retroactivity context, it is clear to me that a
18 crack defendant who provides substantial
19 assistance today would be at a substantial
20 disadvantage. When his sentence under the
21 guidelines is calculated, the court would be
22 required to follow 5G1.1. And as a result, if

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1 his guideline range is lower than the mandatory
2 minimum, the mandatory minimum would become his
3 guideline sentence, and any substantial
4 assistance departure would proceed from there.

5 But if that same cooperating defendant
6 was sentenced before the Fair Sentencing Act, by
7 virtue of this amendment, he would be entitled to
8 his cooperation reduction, which, by the way, he
9 already got, but he would be entitled to have
10 that recalculated in a manner that would require
11 the court to start from the lower revised
12 guideline range rather than the mandatory minimum
13 when determining the degree of reduction.

14 Because I cannot in good conscience
15 accept a guidelines that treats today's
16 cooperating crack defendant differently than
17 former cooperating crack defendants, and also
18 because I think that the guidelines and statutes
19 as currently written do not permit this result, I
20 cannot vote for this amendment.

21 CHAIR SARIS: Thank you.

22 Did you want to say something, Dabney?

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1 COMMISSIONER FRIEDRICH: Yes.

2 I, too, oppose --

3 CHAIR SARIS: Commissioner Friedrich?

4 COMMISSIONER FRIEDRICH: I, too,
5 oppose this amendment because I believe it is
6 inconsistent with the statutory and the
7 guidelines schemes that Congress and the
8 Commission has set up with respect to cooperating
9 defendants and resentencings.

10 In addition, like Judge Jackson, I
11 also do not believe that this decision will
12 decrease disparities across circuits and
13 districts and, in fact, may even increase
14 disparities even within the same courtroom.

15 For these reasons, I oppose this
16 amendment.

17 CHAIR SARIS: All right. Thank you.

18 Anybody else? Judge Hinojosa?

19 VICE CHAIR HINOJOSA: I would like to
20 show why there is a circuit split on this matter.
21 I, on the other hand, find it very easy to find
22 how, under the present statutes and the

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1 guidelines, this is the appropriate step to take.
2 And I say that having reviewed the statute, the
3 guidelines, and the reasons for this amendment.

4 Under Title 18 Section 3553(e), it is
5 clear that Congress has indicated that, once you
6 provide cooperation and assistance, and the
7 Justice Department has filed a motion, the
8 mandatory minimum no longer applies. So,
9 therefore, the mandatory minimum is not the
10 guideline range in those cases, per statute,
11 because of the fact that the statute itself says
12 the mandatory minimum does not apply in your
13 particular case.

14 And so, to me, it's not difficult,
15 then, to realize that, with 3553 and 5K1.1,
16 allowing a court to sentence someone below the
17 guideline sentence, that the mandatory minimum is
18 not the starting point for those defendants. And
19 I think some of the courts that have ruled on
20 this have come out the same way. So, I don't
21 find this a difficult thing at all.

22 3582(c)(2), on the other hand, Title

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1 18, is the one that gives the Commission the
2 authority to determine under what conditions
3 actions of the Commission can be made to be taken
4 retroactively. And that's what the Commission is
5 doing in this particular case if it votes in
6 favor of allowing these defendants to get a
7 further reduction if the Sentencing Court
8 determines that to be the case.

9 This is no different than any other
10 defendant who has received a departure or a
11 variance and having their sentences reduced. The
12 only difference here is that, actually, Congress
13 has indicated that these individuals, cooperating
14 defendants, are very different. There is a
15 policy reason why these defendants are different
16 because in many cases, certainly on the Southwest
17 border, they have placed their lives and the
18 lives of their relatives in danger by cooperating
19 and assisting. The fact that they cooperate and
20 assist has made other cases and, therefore, other
21 defendants who may sometimes be more involved in
22 these particular defendants to have their

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1 prosecution brought before the court.

2 There is a policy reason why Congress
3 and the Commission, both by statute and
4 guidelines, have indicated that these defendants
5 are different. And so, it should come as no
6 surprise that some of us feel very strongly that
7 they should be treated the same way as everybody
8 else who has had the opportunity to have their
9 sentences reduced. And for those particular
10 reasons, I am firmly in support of this
11 amendment.

12 CHAIR SARIS: Anyone else?

13 (No response.)

14 All right. I think it is time to call
15 the roll.

16 MR. COHEN: Commissioner Barkow?

17 COMMISSIONER BARKOW: In favor.

18 MR. COHEN: Vice Chair Breyer?

19 VICE CHAIR BREYER: In favor.

20 MR. COHEN: Commissioner Friedrich?

21 COMMISSIONER FRIEDRICH: I oppose the
22 amendment.

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1 MR. COHEN: Vice Chairman Hinojosa?

2 VICE CHAIR HINOJOSA: Favor.

3 MR. COHEN: Vice Chair Jackson?

4 VICE CHAIR JACKSON: Opposed.

5 MR. COHEN: Judge Pryor?

6 COMMISSIONER PRYOR: I oppose.

7 MR. COHEN: Chair Saris?

8 CHAIR SARIS: Aye, in favor.

9 MR. COHEN: Judge, the motion carries.

10 CHAIR SARIS: All right.

11 All right. The next issue that we
12 come to is a circuit conflict relating to the
13 felon in possession guideline, 2K2.1.

14 MS. GRILLI: Yes, this proposed
15 amendment clarifies how principles of relevant
16 conduct apply in cases in which the defendant is
17 convicted of a firearms offense, that is, being a
18 felon in possession of a firearm, in two
19 situations.

20 First, when the defendant unlawfully
21 possessed one firearm on an occasion and a
22 different firearm on another occasion, but was

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1 not necessarily convicted of the second offense.

2 And second, when the defendant
3 unlawfully possessed a firearm and also used that
4 firearm in connection with another offense, such
5 as robbery or attempted murder, but was not
6 necessarily convicted of the other offense.

7 One application issue arises when the
8 defendant unlawfully possessed a firearm and used
9 that firearm in connection with another offense,
10 and the court must determine whether the in-
11 connection-with offense under Subsection
12 (b) (6) (B) and (c) (1) satisfy the requirements of
13 the relevant conduct guideline.

14 A second application issue arises when
15 the defendant unlawfully possessed one firearm on
16 one occasion and a different firearm on another
17 occasion, and the court must determine whether
18 both firearms fall within the scope of any
19 firearm under Subsections (b) (6) (B) and (c) (1).

20 The proposed amendment clarifies that
21 Subsection (b) (6) (B) is not limited to firearms
22 and ammunition cited in the offense of

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1 conviction, but amends Subsection (c)(1) to limit
2 its application to firearms and ammunition cited
3 in the offensive conviction.

4 The proposed amendment also makes
5 conforming changes to the commentary clarifying
6 the relevant conduct analysis that applies to
7 this question and providing examples.

8 A motion to promulgate the proposed
9 amendment with an effective date of November 1st,
10 2014, and granting technical and conforming
11 amendment authority to staff, would be in order
12 at this time.

13 CHAIR SARIS: Thank you.

14 Do I hear a motion?

15 VICE CHAIR JACKSON: So moved.

16 CHAIR SARIS: Do I hear a second?

17 COMMISSIONER FRIEDRICH: Second.

18 CHAIR SARIS: All right. Is there any
19 discussion?

20 COMMISSIONER BARKOW: Yes, I would
21 like to say something.

22 While I'm in favor of this amendment

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1 because it at least limits the use of the cross-
2 reference to those offenses committed with the
3 same firearm or ammunition cited in the offensive
4 conviction, instead of any other firearm that a
5 felon in possession may use, I don't think it
6 goes far enough.

7 Under the guidelines as they now
8 operate, and even after this amendment, a
9 defendant's sentence must be increased on the
10 basis of any crime committed with a firearm named
11 in the indictment that judge finds by a mere
12 preponderance of the evidence that the defendant
13 committed. And this applies whether the
14 defendant was acquitted of that offense or if the
15 crime was never charged or charged but dismissed.

16 While the problems of using acquitted,
17 uncharged, and dismissed criminal conduct are
18 particularly pronounced, in my view, with a
19 continuing status offense, like felon in
20 possession, because it is so sweeping and has no
21 limiting principle other than the requirement
22 that the person be a felon and that the weapon

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1 used as a firearm, I believe there's a deeper
2 issue regarding the guideline's use of cross-
3 references and its approach to relevant conduct
4 that I believe we should address.

5 The use of acquitted conduct is the
6 most disturbing. I know of no other guideline
7 regime that uses it, and I don't believe the
8 federal system should because of the disrespect
9 it shows the jury's verdict. And I believe the
10 majority of federal judges, when asked, have
11 agreed.

12 But the use of dismissed and uncharged
13 conduct raises issues as well. It makes sense,
14 in my view, for a guideline system to specify how
15 aggravating factors that are not themselves
16 chargeable as crimes should be used to draw
17 distinctions among defendants who commit the same
18 offense. That's the core function of a guideline
19 regime, to specify offense characteristics and
20 offender characteristics that are not themselves
21 able to be charged separately as crimes, but are,
22 nonetheless, relevant to culpability and drawing

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1 important distinctions among offenders.

2 But it's a different story when
3 prosecutors seek to increase a defendant's
4 sentence on the basis of conduct that could be
5 charged as a separate criminal offense, but when
6 prosecutors opt, instead, to get a sentencing
7 increased for that same conduct without going
8 through the constitutional process for finding
9 defendants guilty of offenses.

10 If we allow prosecutors to seek to
11 increase sentences on the basis of uncharged,
12 dismissed, and acquitted conduct, we allow them
13 to shortcircuit the carefully-crafted protections
14 established by the framers. Any system that does
15 that deserves a much closer look, in my view, to
16 make sure it's not simply a scheme that replaces
17 our constitutional protections in the name of
18 expedience.

19 I hope we can make the consideration
20 of acquitted conduct and the use of cross-
21 references a priority in the coming year or the
22 years ahead. I would also like to take a broader

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1 look at relevant conduct in general when it is
2 being used as an end-run around the
3 Constitution's protections.

4 With respect to this particular issue,
5 my preference would be to delete the cross-
6 reference in 2K2.1(c)(1) and to limit the
7 application of 2K2.1(b)(6)(B) to firearms or
8 ammunition cited in the offensive conviction.
9 But I will settle for this amendment as at least
10 a step in the right direction.

11 CHAIR SARIS: Thank you.

12 Anything else?

13 (No response.)

14 All right. All in favor?

15 (Chorus of ayes.)

16 Anyone opposed?

17 (No response.)

18 All right. Unanimously adopted.

19 Ms. Grilli?

20 MS. GRILLI: Yes, Your Honor.

21 This proposed amendment has the effect
22 of lowering the term of imprisonment recommended

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1 in the guidelines applicable to a particular
2 offense or category of offenses. In light of
3 that, is there a motion pursuant to Rule 2.2 of
4 the Commission's Rules of Practice and Procedure
5 to instruct staff to prepare a retroactivity
6 impact analysis of the felon in possession
7 amendment?

8 CHAIR SARIS: Thank you.

9 Do I hear a motion?

10 (No response.)

11 Hearing none, this fails for lack of
12 a motion.

13 Thank you.

14 Next, we move on to a circuit conflict
15 relating to supervised released terms under
16 5D1.2.

17 MS. GRILLI: Thank you.

18 This proposed amendment addresses
19 differences among the circuits in the calculation
20 of the guideline range of supervised released
21 under 5D1.2 in two situations.

22 First, when there is a statutory

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1 minimum term of supervised release and, second,
2 when the instant offense of conviction is a
3 failure to register as a sex offender under 18
4 United States Code Section 2250.

5 First, there appears to be differences
6 among the circuits in how to calculate the
7 guideline range of supervised release when there
8 is a mandatory minimum term of supervised
9 release. Part (a) of the proposed amendment
10 addresses this circuit conflict by adopting the
11 approach of the 7th Circuit which concluded that,
12 when there is a statutory minimum term of
13 supervised release, the statutory minimum term
14 becomes the bottom of the guideline range or, if
15 it equals or exceeds the top of the guideline
16 range provided in 5D1.2, it becomes a guideline
17 range of a single point at the statutory minimum.

18 In addition, the proposed amendment
19 provides a new application note, providing
20 examples and explaining how this is intended to
21 work.

22 Second, there appears to be

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1 differences among the circuits in how to
2 calculate the guideline range of supervised
3 release when the defendant is convicted under 18
4 United States Code Section 2250, which is failing
5 to register as a sex offender. Circuits have
6 reached different conclusions about whether a
7 failure to register offense is a sex offense for
8 which the guidelines recommend a life-term
9 supervised release.

10 Part (a) responds to the application
11 issue by amending the commentary to 5D1.2 to
12 clarify that offenses for failure to register are
13 not sex offenses. Accordingly, offenses under
14 Section 2250 are not covered by Subsection (b) of
15 5D1.2.

16 A motion to promulgate the proposed
17 amendment with an effective date of November 1st,
18 2014 and granting technical and conforming
19 amendment authority to staff would be in order at
20 this time.

21 CHAIR SARIS: Thank you.

22 Do I hear a motion?

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1 COMMISSIONER BARKOW: So moved.

2 CHAIR SARIS: Second?

3 VICE CHAIR JACKSON: Second.

4 CHAIR SARIS: Any discussion?

5 (No response.)

6 All in favor?

7 (Chorus of ayes.)

8 Anyone opposed?

9 (No response.)

10 All right. Unanimously passed.

11 The next one involves alien smuggling.

12 MS. GRILLI: This amendment responds
13 to concerns that have been raised about cases in
14 which aliens are transported through dangerous or
15 remote geographic areas, such as along the
16 southern border of the United States.
17 Specifically, aliens transported through such an
18 area may face the risk of starvation,
19 dehydration, or exposure.

20 The proposed amendment adds to
21 existing parenthetical in the guidelines that
22 refers to an existing enhancement in 2L1.1 that

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1 currently provides examples of the wide variety
2 of conduct to which the specific offense
3 characteristic could apply and adds the
4 following: "or guiding persons through or
5 abandoning persons in a dangerous or remote
6 geographic area without adequate food, water,
7 clothing, or protection from the elements".

8 A motion to promulgate the proposed
9 amendment with an effective date of November 1st,
10 2014, and granting technical and conforming
11 amendment authority to staff, would be in order
12 at this time.

13 CHAIR SARIS: Thank you.

14 Do I hear a motion?

15 COMMISSIONER PRYOR: So moved.

16 CHAIR SARIS: Do I hear a second?

17 COMMISSIONER BARKOW: Second.

18 CHAIR SARIS: Any discussion?

19 (No response.)

20 All in favor?

21 (Chorus of ayes.)

22 Anyone opposed?

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1 (No response.)

2 It carries unanimously. Thank you.

3 Next, we move on to 5G1.3, which talks
4 about how to handle other terms of imprisonment.

5 MS. GRILLI: Yes, this proposed
6 amendment addresses certain cases in which the
7 defendant is subject to another term of
8 imprisonment, such as an undischarged term of
9 imprisonment or an anticipated term of
10 imprisonment.

11 The proposed amendment is in three
12 parts. Part (a) addresses cases in which a
13 defendant is subject to an undischarged term of
14 imprisonment that is relevant conduct but does
15 not result in a Chapter 2 or 3 increase. This
16 part amends 5G1.3(b) to require a court to adjust
17 the sentence and impose concurrent sentences in
18 any case in which the prior offense is relevant
19 conduct under the provisions of 1B1.3(a)(1),
20 (a)(2), or (a)(3), whether or not it also formed
21 the basis for a Chapter 2 or Chapter 3 increase,
22 making conforming changes to application notes.

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1 Part (b) addresses cases in which the
2 defendant is subject to anticipated state term of
3 imprisonment that is not yet imposed and is
4 relevant conduct to the instant offense of
5 conviction under the provisions of Subsection
6 (a) (1), (a) (2), or (a) (3) of 1B1.3.

7 The proposed amendment creates a new
8 Subsection (c) similar to 5G1.3(b)(2) that
9 directs the court to impose the instant offense
10 to run concurrently with the anticipated period
11 of imprisonment if Subsection (a) of 5G1.3 does
12 not apply.

13 Finally, part (c) of the proposed
14 amendment addresses certain cases in which the
15 defendant is an alien and is subject to an
16 undischarged term of imprisonment. Specifically,
17 it amends 2L1.2 to provide a departure provision
18 for certain cases in which the defendant is
19 located by Immigration authorities while the
20 defendant is serving time in state custody,
21 whether pre- or post-conviction, for a state
22 offense.

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1 The new departure provision states
2 that in such a case where it is not currently
3 covered by an adjustment under 5G1.3(b) or a
4 departure under 5K2.23, the court may consider
5 whether a departure is appropriate to reflect all
6 or part of the time served in state custody from
7 the time Immigration authorities locate the
8 defendant until service of the federal sentence
9 commences, that the court determines will not be
10 credited to the federal sentence by the Bureau of
11 Prisons. The provision also sets forth factors
12 for the court to consider in determining whether
13 to provide such a departure.

14 A motion to promulgate the proposed
15 amendment with an effective date of November 1st,
16 2014, and granting staff technical and conforming
17 amendment authority, is appropriate at this time.

18 CHAIR SARIS: Do I hear --

19 VICE CHAIR BREYER: So moved.

20 CHAIR SARIS: Second?

21 COMMISSIONER BARKOW: Second.

22 CHAIR SARIS: Any discussion?

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1 (No response.)

2 All in favor?

3 (Chorus of ayes.)

4 Any opposed?

5 (No response.)

6 Carries unanimously.

7 There is another matter here?

8 MS. GRILLI: Yes, Part (a) of the
9 proposed amendment has the effect of lowering the
10 term of imprisonment recommended in the
11 guidelines applicable to a particular category of
12 offenses. In light of that fact, is there a
13 motion pursuant to Rule 2.2 of the Commission's
14 Rules of Practice and Procedure to instruct staff
15 to prepare a retroactivity impact analysis of
16 Part (a) of the 5G1.3 amendment?

17 CHAIR SARIS: Do I hear such a motion?

18 (No response.)

19 Hearing none, it fails for lack of a
20 motion.

21 We move on to marijuana.

22 MS. GRILLI: Yes, this proposed

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1 amendment responds to concerns about the
2 environmental and other harms caused by marijuana
3 cultivation operations. Offenses involving
4 marijuana cultivation are generally sentenced
5 under 2D1.1.

6 The proposed amendment amends 2D1.1 to
7 provide a two-level enhancement that applies if
8 (a) the offense involved the cultivation of
9 marijuana on state or federal land or while
10 trespassing on a tribal or private land, and (b)
11 the defendant receives an adjustment for
12 aggravating role under 3B1.1.

13 The proposed amendment also provides
14 a new application note stating that such offenses
15 interfere with the ability of others to safely
16 access and use the area, and also pose or risk a
17 range of other harms such as harm to the
18 environment. It clarifies that this new
19 enhancement may be added cumulatively, that is,
20 together with the existing environmental
21 enhancement in Subsection (b) (13) (A) of 2D1.1.

22 A motion to promulgate the proposed

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1 amendment with an effective date of November 1st,
2 2014, and granting technical and conforming
3 amendment authority to staff, is appropriate at
4 this time.

5 CHAIR SARIS: Thank you.

6 Do I hear a motion?

7 VICE CHAIR BREYER: So moved.

8 CHAIR SARIS: Second?

9 COMMISSIONER FRIEDRICH: Second.

10 CHAIR SARIS: Any discussion?

11 (No response.)

12 All in favor?

13 (Chorus of ayes.)

14 Any opposed?

15 (No response.)

16 Carries unanimously.

17 Now, drugs.

18 MS. GRILLI: This proposed amendment
19 revises the guidelines applicable to drug
20 offenses. It changes how the Base Offense Levels
21 in the Drug Quantity Table incorporate the
22 statutory mandatory minimum penalties.

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1 Specifically, the proposed amendment
2 amends the Drug Quantity Table in 2D1.1, so that
3 quantities that trigger the statutory mandatory
4 minimum penalties trigger Base Offense Levels 24
5 and 30 rather than 26 and 32. Under the proposed
6 amendment, 2D1.1 continues to reflect the minimum
7 Base Offense Level of 6 and the maximum Base
8 Offense Level of 38 that are incorporated into
9 the Drug Quantity Table across all drug types.

10 It also continues to reflect the
11 minimum Base Offense Levels and maximum Base
12 Offense Levels and associated drug quantity caps
13 that are incorporated into the Drug Quantity
14 Table for particular drug types.

15 In the proposed amendment, the various
16 minimum and maximum Base Offense Levels and drug
17 quantity caps are associated with new drug
18 quantities. The proposed amendment makes
19 parallel changes to the Quantity Tables in 2D1.11
20 which apply to offenses involving chemical
21 precursors of controlled substances. Section
22 2D1.11 is generally structured to provide Base

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1 Offense Levels that are tied to, but less severe
2 than the Base Offense Levels in 2D1.11 for
3 offenses involving the final product.

4 Finally, the proposed amendment makes
5 certain clerical and conforming changes to
6 reflect the changes to the Drug Quantity Tables.

7 A motion to promulgate the proposed
8 amendment with an effective date of November 1st,
9 2014, and granting technical and conforming
10 amendment authority staff, and waiving Rule 4.1
11 of the Commission's Rules of Practice and
12 Procedure which requires consideration of
13 retroactivity at the time of promulgation of an
14 amendment, but has the effect of reducing the
15 term of imprisonment required by the guidelines,
16 is appropriate at this time.

17 CHAIR SARIS: Thank you.

18 Do I hear a motion?

19 COMMISSIONER BARKOW: So moved.

20 CHAIR SARIS: Do I hear a second?

21 VICE CHAIR JACKSON: Second.

22 CHAIR SARIS: Is there discussion?

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1 Now I know there is. So, I'm going to go in
2 order of seniority here. So, Judge Hinojosa?

3 VICE CHAIR HINOJOSA: I guess I'll go
4 first.

5 CHAIR SARIS: Yes, as the Vice Chair.

6 VICE CHAIR HINOJOSA: I speak in favor
7 of this amendment. I was on the Commission on
8 2007 and 2010 when we dealt with regards to a
9 reduction of two levels for crack cocaine. I
10 thought it was the appropriate thing to do then.
11 And after the amount of years that have passed,
12 we have been proven to have been correct.

13 We also conformed this to the 2010
14 Fair Sentencing Act with regards to crack, and
15 our studies have shown that the recidivism rate
16 of those defendants is the same or lower compared
17 to those defendants who have served their full
18 terms before the reduction in the crack cocaine
19 sentences. That makes it much easier for any of
20 us to support this because it shows that there is
21 no increase in recidivism rates in having reduced
22 those sentences by two levels.

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1 This reduction is a proposal, also,
2 for a reduction of the Sentencing Guidelines for
3 drug trafficking offense which at the same time
4 remains consistent and within the mandatory
5 guideline statutes, the mandatory minimum
6 statutes of the Congress. And so, in no ways are
7 we in any way departing from the mandatory
8 minimums established by statute within the
9 guidelines.

10 The guidelines will continue to have
11 enhancements for those defendants that are
12 aggravators, whether it's for possessing a
13 firearm, committing violence in relationship to
14 their drug trafficking offense, as well as anyone
15 who has an aggravating role, as well as all the
16 other enhancements that are within the guideline
17 system to enhance the penalties due to those
18 individual defendants who have committed
19 aggravating circumstances in conducting their
20 drug trafficking offenses.

21 I want to thank all of those who have
22 sent thousands of comments on this particular

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1 issue. This is one where we have received a lot
2 of comment. This has been extremely helpful to
3 the Commission with regards to our making a
4 decision today, and it is an example of how
5 comments to the Commission can help and affect
6 the decisions of the Commission and an important
7 part of the input that we get.

8 Two years ago the Justice Department
9 was reluctant to support a two-level reduction,
10 and, in fact, did not support such a reduction.
11 I would like to thank the Justice Department's
12 support for this reduction in this cycle, as
13 shown by the personal testimony of the Attorney
14 General Eric Holder himself before the Commission
15 on this particular issue.

16 I do have to add, however, that I have
17 been surprised at the Attorney General's steps
18 taken to proceed with this reduction outside of
19 the legal system set up and established by the
20 Sentencing Reform Act of 1984.

21 As you all know, the Commission in the
22 Act is given the authority to promulgate and

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1 amend guidelines on a yearly basis. And in the
2 Act itself, Congress has preserved its right to
3 reject any potential promulgation of or amendment
4 to any guidelines made by the Commission itself
5 after the Commission has acted, meaning that if
6 Congress does not reject a guideline amendment,
7 it will not go into effect until November 1st of
8 this year if we vote in favor of this amendment.
9 So, this amendment does not become law until
10 November 1st of this particular year, if we do
11 vote in favor of this amendment.

12 When the Attorney General testified
13 before us, he failed to mention that the night
14 before at around 11:00 p.m. the Department had
15 ordered all of the Assistant U.S. Attorneys
16 across the country -- and it is not clear to me
17 whether it was supposed to be not opposed or to
18 argue for. In fact, the U.S. Attorneys in front
19 of my court have said they have been asked to
20 argue for the two-level reduction in all drug
21 trafficking cases before the Commission has acted
22 and before Congress has had the opportunity to

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1 vote its disapproval of the Commission's actions,
2 if Congress is so inclined, which is certainly
3 the right that they have preserved for themselves
4 in the Sentencing Reform Act of 1984.

5 It would have been nice for us to have
6 known and been told beforehand that this action
7 had been taken. So any of us who would have
8 liked to have asked the Attorney General under
9 what basis under the Title 18 Section 3553(a)
10 factors the courts were being asked by the
11 Justice Department to follow this request. If it
12 was because the Attorney General had spoken in
13 favor of this proposal, that is a dangerous
14 precedent because Attorneys General in the past
15 have consistently expressed opinions to the
16 Commission on guideline promulgation and
17 amendments, many times for an increase and
18 sometimes for a lowering of the penalties, but
19 none have ever then asked the courts to proceed
20 with increases or decreases simply because the
21 Attorney General has spoken in support of them
22 before the Commission, before the Commission has

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1 acted and before the Congress has exercised its
2 statutory right not to act.

3 This action of the Attorney General
4 has been taken in total disregard of one of the
5 seven factors of Title 18 Section 3553(a), the
6 need to avoid unwarranted disparity. The reason
7 I say that is because judges have contacted me
8 and were surprised by the actions of the Justice
9 Department on this matter and expressed their
10 dismay at it.

11 Not having been aware of this before
12 the Attorney General Holder testified before us,
13 I have informed them that I have no answer to the
14 question on what basis, other than it is in favor
15 of it, the Justice Department is asking the
16 courts to ignore the process set out in the
17 Sentencing Reform Act of 1984.

18 The way it has created disparity is
19 some judges, some even in the same courthouse,
20 have decided to proceed with the request while
21 others have said, "No, I will wait for the legal
22 process that follows."

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1 Having said this and having made these
2 comments, it in no way diminishes my support for
3 this particular amendment. In fact, I find it
4 the right thing to do, as I have studied this and
5 as I have reviewed this, and I find it the
6 appropriate thing to do.

7 I also would like to say that it is
8 important for us to remember that this is a small
9 step that in no way takes out the necessity of
10 Congress to address this issue with regards to
11 the statutes before it on this particular matter.
12 This is important for us to realize.

13 The Commission has consistently said
14 and, in fact, has sent the message to Congress,
15 that Congress should reduce the current statutory
16 mandatory minimum penalties for drug trafficking.
17 The provisions of the Fair Sentencing Act of 2010
18 which Congress passed to reduce the disparity in
19 treatment of crack and powdered cocaine should be
20 made retroactive. Congress should consider
21 expanding the so-called safety valve, allowing
22 sentences below mandatory minimum penalties for

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1 non-violent, low-level drug offenders to
2 offenders with slightly greater criminal
3 histories that currently permitted, and that the
4 safety valve provision, and potentially other
5 measures providing relief from current mandatory
6 minimum penalties, should be applied more broadly
7 to extend beyond drug offenders to other low-
8 level, non-violent offenders in appropriate
9 cases.

10 I hope that no one takes the action by
11 the Commission today, if we decide to vote in
12 favor of this statute, as diminishing the need
13 for Congress to address these.

14 I have to say, on a personal note, I
15 was raised in a family where political
16 discussions were frequent, especially at the
17 dinner table, since one parent was one party and
18 the other parent was another party. And during
19 those discussions, the ones that we had the
20 least-lively debates about were matters involving
21 criminal justice and education because those are
22 two issues that should unite us, regardless of

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1 political affiliation.

2 And I hope that the unilateral actions
3 of any of the stakeholders in no way diminishes
4 the need for us as a Commission to act in a
5 bipartisan fashion and certainly the need for
6 Congress to act in a bipartisan action on these
7 particular important issues for the country.

8 Thank you.

9 CHAIR SARIS: Thank you.

10 Vice Chair and Judge Jackson?

11 VICE CHAIR JACKSON: Thank you.

12 In the discussion leading up to
13 today's vote, the Commission considered a number
14 of good reasons for supporting the amendment to
15 reduce the drug penalties in the guidelines
16 across the board, including that this measure can
17 help the Commission to fulfill its statutory
18 obligation to address prison overcrowding in a
19 manner that is consistent with public safety.

20 This is certainly an important concern
21 that justifies this amendment, but I want to make
22 clear that my vote today will also be cast based

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1 on a slightly-different concern. That is my
2 strong belief that lowering the Base Offense
3 Levels for drug penalties is necessary in order
4 for the guideline system to work properly.

5 As it currently stands, the guidelines
6 typically prescribe a Base Offense Level for drug
7 trafficking offenses that is tied to the quantity
8 of the drug that is attributable to the defendant
9 who is being sentenced. Under the guideline
10 system, this Base Offense Level is the starting
11 point for the calculation of an offense level
12 that is supposed to account for the seriousness
13 of an offense, including the defendant's
14 culpability in committing that offense.

15 But what we have seen time and again
16 is that, if the Base Offense Level, that is, the
17 amount of imprisonment that the guidelines
18 prescribe for drug quantity alone, is set at a
19 very high point, there is less opportunity for
20 the remaining specific offense characteristics in
21 the guideline, which include many of the factors
22 that really differentiate serious and dangerous

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1 drug trafficking offenders from low-level drug
2 trafficking offenders, to operate. In other
3 words, it is as if that one factor, drug
4 quantity, which applies to low-level dealers and
5 high-level traffickers alike, drives so much of
6 the guideline penalty analysis that it actually
7 becomes more difficult for judges who want to
8 follow the guidelines to sentence drug offenders
9 proportionately, that is, to take into account
10 not only how much of a drug the defendant has,
11 but also any significant aggravating or
12 potentially mitigating factors such as violence
13 or the defendant's role in the offense.

14 I support today's amendment as a step
15 toward recalibrating the drug guidelines so that
16 they can function better in assisting judges to
17 assign meaningful penalties that account for the
18 entirety of a defendant's culpability and
19 conduct.

20 CHAIR SARIS: Thank you.

21 I think next Commissioner Friedrich.

22 COMMISSIONER FRIEDRICH: I, too,

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1 support this amendment to lower the Sentencing
2 Guideline levels that apply to most federal drug
3 trafficking offenders because it is a measured
4 one, it will alleviate the problem of prison
5 overcrowding, result in substantial savings over
6 time, and it is consistent with the statutory
7 scheme established by Congress for drug
8 trafficking offenders.

9 I note that this amendment has the
10 support of the Criminal Law Committee of the
11 Judicial Conference, the Department of Justice,
12 as well as a number of Members of Congress on
13 both sides of the aisle.

14 Pursuant to this amendment, guideline
15 sentences in drug trafficking cases will continue
16 to be linked to the statutory mandatory minimum
17 penalties established by Congress. Historically,
18 the initial Commission made a rational decision
19 to set the drug trafficking guideline ranges
20 above the statutory mandatory minimum penalties
21 to provide an incentive for defendants to plead
22 guilty and to cooperate in investigations.

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1 Since that time, however, Congress and
2 the Commission have taken steps to de-emphasize
3 the role of drug quantity in sentencing. The
4 Commission has added, consistent with
5 congressional directives, more than a dozen
6 specific offender characteristics, the vast
7 majority of which enhance offenders' sentences
8 above the Base Offense Levels that the Commission
9 initially set.

10 Congress and the Commission have also
11 added statutory and guideline safety valve relief
12 to 2D1.1. Moreover, the Commission's experience
13 with the 2007 crack amendment suggests that
14 lowering drug guideline sentences to be on par
15 with, rather than above, statutory mandatory
16 minimum penalties will not have a significant
17 effect on the number of trials or the frequency
18 to which offenders cooperate with the government.
19 Indeed, the trial and cooperation rates for crack
20 offenders have remained relatively stable since
21 the Commission's 2007 two-level reduction in
22 crack penalties.

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1 As a result of this amendment, the
2 sentence imposed for the average drug trafficking
3 offender will be reduced by 11 months. Some in
4 Congress and in the law enforcement community
5 have expressed concerns about the effect this
6 reduction in penalties will have on public
7 safety. It is important to note, as Judge
8 Hinojosa noted, that this amendment will not
9 undermine the application of the career offender
10 guideline, mandatory minimum penalties, or any
11 other aggravating factor under the guidelines.

12 For example, drug trafficking
13 offenders who use or possess a dangerous weapon,
14 including a firearm, use or threaten violence,
15 play an aggravated role, or have criminal history
16 will continue to serve longer terms of
17 imprisonment than less culpable offenders.

18 The Commission is mindful of the
19 potential risk to public safety and fully intends
20 to track and study the recidivism rates of the
21 offenders who benefit from this amendment. Based
22 on the Commission's study of crack offenders who

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1 benefitted from the 2007 crack guideline
2 amendment, the Commission anticipates that the
3 recidivism rates for drug trafficking offenders
4 who benefit from this amendment will not be any
5 different than they would have been without this
6 amendment.

7 The Commission's 2010 recidivism study
8 of crack offenders, which tracked them for two
9 years, and the Commission's most recent study,
10 which tracked offenders for five years,
11 consistently reflect that the recidivism rates
12 for crack offenders who were released early are
13 comparable to the recidivism rates of comparable
14 offenders who receive no sentencing reduction at
15 all.

16 I further support this amendment
17 because it will help alleviate the growing prison
18 population and the economic burden on the Bureau
19 of Prisons. The Commission estimates that over
20 the course of the next five years this amendment
21 will reduce the federal prison population by more
22 than 6500 prisoners, resulting in substantial

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1 savings for American taxpayers over time.

2 I should add that I agree with Judge
3 Hinojosa's comments regarding the Department of
4 Justice's failure to respect the legal process
5 that the Congress and the Commission established
6 to amend the Sentencing Guideline Manual.

7 And I note that, while I urge Congress
8 to support this amendment, I also encourage
9 policymakers to consider legislative reforms that
10 accomplish more than simply lower federal
11 sentences. As recent Commission research has
12 highlighted, sentencing disparities are
13 increasing at the national, regional, and local
14 levels, and even within courthouses. If we
15 continue to aspire to have a criminal justice
16 system that furthers the stated goals of the
17 Sentencing Reform Act and treats similarly-
18 situated defendants similarly, no matter where
19 their crimes are committed and no matter who the
20 prosecutor or judge is, we must pursue
21 legislative reforms that increase the degree of
22 uniformity and certainty in the federal

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1 sentencing system.

2 It has now been nearly a decade since
3 Justice Breyer noted in United States v. Booker
4 that the ball lies in Congress' court. Yet,
5 Congress has taken no action to address the ever-
6 growing sentencing disparities in our federal
7 courts. And the answer to this problem is not
8 congressional inaction nor is it disparate
9 charging practices by the Department of Justice.

10 As members of this Commission,
11 Congress, and the Department of Justice consider
12 legislative reforms that lower the severity of
13 federal sentences, I also urge consideration of
14 constitutional legislative reforms that will
15 further the important and laudable goals of the
16 Sentencing Reform Act.

17 CHAIR SARIS: Thank you.

18 COMMISSIONER PRYOR: I favor the
19 proposed amendment of the Drug Quantity Table and
20 Section 2D1.1 of the Sentencing Guidelines. The
21 amendment respects the general framework of the
22 guidelines and existing penalties by maintaining

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1 its incorporation of all statutory mandatory
2 minimum sentences.

3 The amended table continues to use the
4 minimum offense level of 12 for certain Schedule
5 1 and 2 controlled substances and the maximum
6 offense level of 38. The amendment ensures that
7 the maximum of the sentencing range does not
8 exceed the minimum by more than the greater of 25
9 percent or six months, and the amendment helps
10 reduce, although it does not eliminate, the
11 likelihood that the federal prison population
12 will exceed the capacity of the prisons.

13 The amendment updates the drug
14 guideline to reflect two significant changes in
15 law since the adoption of the first Guidelines
16 Manual in 1987.

17 First, in contrast with the original
18 manual which provided a single specific offense
19 characteristic for use of a firearm or other
20 dangerous weapon, Section 2D1.1 now contains 14
21 enhancements and three downward adjustments,
22 which enable District Courts to distinguish

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1 between serious and minor offenders.

2 Second, since the adoption of the
3 original manual, Congress has adopted the safety
4 valve which allows District Courts to sentence
5 some drug offenders below the statutory mandatory
6 minimum sentences that would otherwise apply to
7 their crimes. The safety valve has enabled
8 prosecutors to encourage low-level offenders to
9 plead guilty more often than before.

10 The amended guideline will allow all
11 these provisions to work in tandem with the new
12 Base Offense Levels to ensure that drug offenders
13 receive sentences that are sufficient, but not
14 greater than necessary, to comply with the
15 purposes of sentencing.

16 The amended guideline modestly reduces
17 the starting point for calculating a guideline
18 range for drug offenders. The amended guideline
19 respects the primary role of Congress in
20 establishing the boundaries for sentencing drug
21 offenders, and the amended guidelines should
22 assist the federal judiciary in fulfilling its

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1 role of sentencing drug offenders in a fair and
2 rational manner.

3 The substantial number of public
4 comments we received about this amendment aided
5 our deliberations, and I am grateful for them.
6 But, like Judge Hinojosa, I regret that before we
7 voted on the amendment the Attorney General
8 instructed the United States Attorneys across the
9 nation not to object to defense requests to apply
10 the proposed amendment in sentencing proceedings
11 going forward.

12 That unprecedented instruction
13 disrespected our statutory role as an independent
14 Commission in the Judicial Branch to establish
15 sentencing policies and practices under the
16 Sentencing Reform Act and the role of Congress as
17 the Legislative Branch to decide whether to
18 revise, modify, or disapprove our proposed
19 amendment.

20 We do not discharge our statutory duty
21 until we vote on a proposed amendment, and
22 Congress, by law, has until November 1st to

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1 decide whether our proposed amendment should
2 become effective.

3 The law provides the Executive no
4 authority to establish national sentencing
5 policies based on speculation about how we and
6 Congress might vote on a proposed amendment. I
7 appreciate the Attorney General's personal
8 appearance before the Commission last month and
9 his helpful comments in support of this
10 amendment, but I hope that we can avoid in the
11 future the kind of improper instruction that he
12 sent federal prosecutors before we voted on the
13 amendment.

14 But, nevertheless, like Judge Hinojosa
15 said earlier, I agree with the amendment and I
16 favor the amendment.

17 And I echo Commissioner Friedrich's
18 call that Congress also address the legal reforms
19 that need to take place statutorily that would
20 make our sentencing system more consistent and
21 rational.

22 CHAIR SARIS: Thank you.

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1 Commissioner Barkow?

2 COMMISSIONER BARKOW: Thanks.

3 So, I am going to echo a lot of what
4 my colleagues have already said.

5 I support this proposal. While I
6 believe that drug quantities should play a role
7 in a defendant's sentence for a trafficking
8 offense, and that defendants who deal in larger
9 quantities should get higher sentences than
10 defendants who deal with smaller quantities, it
11 is not the only critical factor in a defendant's
12 sentence.

13 The many special offense
14 characteristics we have in 2D1.1 capture other
15 key variables, including, for example, the use of
16 violence or the threat of violence or the use of
17 a dangerous weapon. The guidelines also direct
18 judges to focus on a defendant's role in a drug
19 trafficking operation, accounting for aggravating
20 roles and mitigating ones.

21 These are all important and relevant
22 factors, but, like Judge Jackson suggested, I

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1 don't believe their current relative weights in
2 yielding a sentence under the guidelines
3 accurately reflect a defendant's culpability.
4 Quantity overwhelmingly drives a defendant's
5 sentence, even though it is a poor surrogate for
6 culpability and dangerousness, particularly as
7 compared to special offense characteristics
8 dealing specifically with role and violence.

9 Quantity's disproportionate impact is
10 particularly true when we are talking about drug
11 conspiracies. Kingpins, couriers, and street
12 peddlers in a conspiracy are held equally
13 responsible for the same quantity amounts because
14 the relevant conduct rules make them all
15 responsible for the reasonably foreseeable
16 quantities distributed by their organizations.
17 But, of course, those individuals are not the
18 same, and their roles are far more important than
19 the quantity in assessing their individual
20 culpability.

21 As a result, while I applaud this
22 amendment because it lets specific offense

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1 characteristics play a greater role in a
2 defendant's sentence relative to quantity, I
3 would like the Commission to continue to pursue
4 the question whether the guidelines are doing
5 their best to accurately reflect a defendant's
6 culpability and achieve a proportionate
7 sentencing structure or whether the guidelines
8 need further adjustment, either in the treatment
9 of quantity, the mitigating and aggravating role
10 adjustments, or our approach to relevant conduct.

11 For example, I agree with those
12 commenters who have urged us to consider whether
13 we should have conforming amendments to lower the
14 mitigating role cap in 2D1.5. I also agree that
15 we should consider whether our relevant conduct
16 rules need to change with respect to quantity in
17 conspiracies. We also should consider whether we
18 need to increase some special offense
19 characteristics, such as the ones for violence.

20 In terms of this specific amendment,
21 I agree with the commenters who argue that there
22 is no principled reason for not lowering the top

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1 category, Level 38, by two. I see no reason to
2 carve out these quantities from the two-level
3 reduction. I don't think it makes sense to lower
4 the floor of the table from Level 12 because it
5 would treat traffickers on par with those who
6 merely possess drugs in some cases, but I don't
7 see why we don't lower the ceiling.

8 These quantities are no different from
9 any of the others we're considering in terms of
10 deciding whether a two-level reduction is
11 appropriate. Here, too, quantity is relevant,
12 but it is exercising too much of a pull on the
13 overall sentence when role in the offense, use of
14 violence, and other factors should be doing much
15 more.

16 That said, I think this amendment is
17 a significant step in the right direction. The
18 Sentencing Reform Act mandates that the
19 Commission take into account the capacity of
20 available correctional facilities and minimize
21 the likelihood that the federal prison population
22 will exceed its capacity. We are well over the

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1 federal prison population right now, and we noted
2 that this would guide our policy priorities this
3 year. And I think this is a perfect
4 illustration.

5 As Commissioner Friedrich noted, it
6 will save over 6500 prison beds in five years.
7 And the Department of Justice informs us that it
8 is critical to shift some of its budget from
9 prisons to other law enforcement needs, in the
10 name of public safety. You can't have an
11 effective public safety system that spends most
12 of its money on prisons but neglects the need for
13 police and prosecutors.

14 Indeed, we know from recidivism study
15 after study that the odds of detection matter
16 more for deterrence than the length of a
17 sentence. And that's borne out by our own data
18 studying our prior two-level reduction in
19 sentences for crack offenders, as many of the
20 other Commissioners have noted. Those released
21 earlier did not have higher recidivism rates than
22 similarly-situated defendants who served their

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1 full sentences. You can shave off time in these
2 sentences, free up funds for law enforcement
3 needs, as our Attorney General requested, and
4 protect the public just as well, if not better.

5 All government efforts should be
6 subject to scrutiny for effectiveness and for
7 making sure the benefits outweigh the costs, and
8 sentencing should be no different.

9 Because this amendment is consistent
10 with public safety, a concern for the federal
11 prison population, and a step toward making the
12 drug guidelines more key to a defendant's
13 culpability, I am happy to support this
14 amendment.

15 I would also just like to say, since
16 this has been my first year on the Commission,
17 that it has been a pleasure working on this and
18 every other issue before the Commission this
19 year. Our care, my fellow Commissioners, and the
20 staff represent the absolute best in government
21 service, and it has been an honor to be part of
22 this team.

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1 CHAIR SARIS: Thank you.

2 Jonathan Wroblewski, the ex officio
3 Commissioner from the Department of Justice.

4 COMMISSIONER WROBLEWSKI: Thank you
5 very much, Judge Saris.

6 I was hoping to just thank the
7 Commission. And actually, let me start by doing
8 that. I want to echo what Commissioner Barkow
9 has just stated. It's an honor to serve with
10 each and every person who is here representing
11 the Commission today, to work with the staff, and
12 to work on these very important issues.

13 Members of the public, you can all be
14 very, very well assured that every person here at
15 this table takes all of these issues tremendously
16 seriously, devotes tremendous effort and energy
17 and thought to all of the issues, and that they
18 do their best and are absolutely committed to the
19 American people and to justice.

20 All of that being said, to have
21 members of this Commission and to have federal
22 judges talk about what the Attorney General has

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1 done as outside the legal system, a disregard for
2 the law, ignoring the process, being improper,
3 those are very, very serious charges, and it's
4 something that I feel obligated to speak about.

5 Last month, after it was announced
6 that the Attorney General sent guidance to
7 federal prosecutors across the country, some of
8 the Commissioners were very, very upset, and they
9 explained to me their concerns, as they have
10 explained them to you today.

11 And I left and I took those complaints
12 very seriously. And I went back to my office and
13 I looked up the law. I looked at the
14 Constitution. I looked at the United States
15 Code. I looked at the Federal Rules of Criminal
16 Procedure. I looked at the Sentencing Guidelines
17 Manual. I looked at the cases of the United
18 States Supreme Court, the cases of the Court of
19 Appeals.

20 And I looked for a requirement there
21 for the Attorney General to advocate for a
22 guideline sentence in every case. And, of

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1 course, I didn't find that there.

2 What I found was that there is a
3 three-step process to sentencing since the Booker
4 decision. Two of those steps are very closely
5 tethered to the guidelines. They require that a
6 court calculate the guidelines as they are in the
7 Guideline Manual. They require that the courts
8 consider various grounds for departure.

9 But, then, there is this third step.
10 The third step is to ensure that a sentence is
11 sufficient but not greater than necessary to
12 serve the purposes of sentencing as laid out in
13 3553(a), that third step.

14 And this gets me to the guidance that
15 the Attorney General issued back in March when he
16 testified. The guidance he issued directed
17 United States Attorneys to calculate the
18 guidelines, to first calculate the guidelines as
19 they are in that red Guidelines Manual that is
20 sitting right there. And that will be the
21 direction to prosecutors until November 1st of
22 2014. Calculate the guidelines as they are in

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1 the Guideline Manual. Respect the Manual and
2 respect the process here at the Commission.

3 However, the guidance went further,
4 and it went further because the law goes beyond
5 that. And it asks the prosecutors to make a full
6 and complete and individualized assessment of the
7 aggravating and mitigating factors in every case.
8 And after making that, if there were a motion
9 that were made for a variance to reflect the
10 policy embodied in the guideline amendment that
11 is going to be promulgated today, not to object
12 to that. And why? Because, again, it is our
13 obligation, as officers of the court, to make
14 recommendations to the court about sentences that
15 are sufficient but not greater than necessary.
16 That is the law. That is our requirement.

17 The Attorney General sat in this very
18 room a month ago and said that, on behalf of this
19 Administration, that in the mine-run case, in
20 many, many cases, that the current guidelines
21 that are in that red Guidelines Manual are
22 sufficient but greater than necessary to serve

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1 the purposes of sentencing.

2 And so, when it came time to give
3 guidance to our prosecutors, it was important --
4 we think legally obligated -- to tell the courts,
5 be candid with the courts, yes, complete step
6 one; complete the guidelines as they are in the
7 red Guideline Manual, but when it's time for that
8 third step, sufficient but not greater than
9 necessary, to give our best assessment, that is
10 our obligation as officers of the court, to give
11 our best assessment of what is sufficient but not
12 greater than necessary. And that's what the
13 Attorney General asked our prosecutors to do.

14 Now why is this more important than
15 just a theoretical discussion? Well, because
16 since the Attorney General testified on March
17 13th until today, approximately 1,500 individuals
18 have been sentenced across the country on drug
19 trafficking charges. And between today and
20 November 1st, when that Guidelines Manual is
21 replaced by a new Guideline Manual, approximately
22 13,000 individuals will be sentenced for drug

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1 trafficking offenders. Each of those people are
2 entitled to a lawful sentence, as that law has
3 been determined by the Supreme Court of the
4 United States, which means they're entitled to a
5 sentence sufficient but not greater than
6 necessary to serve the purposes of sentencing.

7 Now none of this is easy. What the
8 Commission is about to do is not easy, and our
9 obligation, as prosecutors and as officers of the
10 court, is not easy. Not everyone agrees with
11 this amendment, and not everyone agrees with the
12 approach that we have taken.

13 But let me say that I believe what the
14 Commission is doing today, all of the amendments,
15 including this one, is in the finest traditions
16 of the United States Sentencing Commission. But
17 let me also say that I personally believe that
18 what the Attorney General did not only is lawful,
19 but it is in the finest tradition of the United
20 States Department of Justice.

21 Thank you, Judge Saris.

22 CHAIR SARIS: Thank you.

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1 VICE CHAIR HINOJOSA: I would like to
2 respond to that.

3 CHAIR SARIS: Yes, but briefly.

4 VICE CHAIR HINOJOSA: I'm a bit
5 surprised about the response from Commissioner
6 Wroblewski. I have a lot of respect for him,
7 have worked with him through two Administrations
8 where he has presented different viewpoints of
9 different Attorneys General and different Justice
10 Departments. And I admire his work very much.

11 But he and I have had this
12 conversation where I have indicated to him that I
13 was surprised that his statement, and meaning the
14 Department's I guess, that this was going to be a
15 request not to oppose a reduction, has really
16 turned out in the courtrooms as a request for the
17 reduction of two levels within the guidelines,
18 based on the Attorney General's change of
19 viewpoint, I guess, because two years ago the
20 Justice Department itself testified that they
21 were not ready to proceed with a two-level
22 reduction.

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1 As I continue to feel, this is a
2 dangerous precedent because the Attorney General
3 himself, through the Justice Department, has
4 asked for increases within the Manual. And I
5 don't understand why that doesn't make those
6 sentences not sufficient with regards to his
7 viewpoint that the Manual should be increased.
8 It's sufficient but not greater than necessary.
9 We can't excuse and forget the sufficient part of
10 it.

11 And so, it's kind of a surprise to me
12 that this is the statement that is being made
13 here with regards to, all of a sudden, because
14 the Attorney General says so, that somehow this
15 is to be read into 3553(a) factors any more than
16 the public defenders saying so whenever the
17 public defender or the defense attorney makes the
18 argument, "I don't think this is sufficient." "I
19 think this is greater than necessary."

20 The Justice Department, the prosecutor
21 is one person, representing one side; the defense
22 attorney is another person, representing the

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1 other side. And their viewpoints are equal when
2 it comes to the presentations in the courtroom.
3 And so, just because the defense attorney is
4 asking for a particular sentence doesn't make it
5 any more correct with regards to the 3553(a)
6 factors than that of the prosecutor asking for
7 the same thing.

8 CHAIR SARIS: Thank you.

9 I know that at least one of my
10 Commissioners needs to make a plane. So, I have
11 my remarks, which I will put in the record, and I
12 will talk about later after the vote.

13 But, at this point, what I would like
14 to do is get to the vote. Do I hear a motion?

15 COMMISSIONER BARKOW: So moved.

16 VICE CHAIR BREYER: Second.

17 CHAIR SARIS: And, actually, we
18 already did that and we had the discussion.

19 At this point, all in favor?

20 (Chorus of ayes.)

21 Anyone opposed?

22 (No response.)

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1 It carries unanimously.

2 Now, we get to another question.

3 MS. GRILLI: Yes. In light of the
4 fact that this amendment has the effect of
5 lowering penalties for a category of offenses or
6 offenders, is there a motion, pursuant to Rule
7 2.2 of the Commission's Rules of Practice and
8 Procedure, to instruct staff to prepare a
9 retroactivity impact analysis of the drug
10 amendment?

11 VICE CHAIR BREYER: I so move.

12 CHAIR SARIS: Is there a second?

13 VICE CHAIR JACKSON: Second.

14 CHAIR SARIS: All in favor?

15 (Chorus of ayes.)

16 Anyone opposed?

17 (No response.)

18 It carries unanimously.

19 All right. The last item of
20 business --

21 MS. GRILLI: Yes.

22 VICE CHAIR BREYER: Could I? Madam

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1 Chair, just one quick comment --

2 CHAIR SARIS: One.

3 VICE CHAIR BREYER: -- if I can?

4 Anybody who knows me knows how odd it
5 is that I'm the only person who hasn't spoken at
6 this.

7 (Laughter.)

8 And I want to say that I, of course,
9 incorporate many of the sentiments expressed by
10 my colleagues. But, in particular, Commissioner
11 Barkow pointed out what a privilege it has been
12 to work with this staff, the Chair, and my fellow
13 Commissioners.

14 I have, in the years that I have been
15 involved in public service, never had the
16 privilege of working with such fine people as I
17 have in this exercise.

18 And also, I don't want today's session
19 to be overshadowed by the fact that we were
20 unanimous in reducing these drug quantities. And
21 we come from very different perspectives and
22 different experiences, but we were unanimous.

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1 And as they say today, what is the
2 takeaway? The takeaway is the unanimity of the
3 Commission with respect to this important item.

4 I also think the takeaway is the fact
5 that we have a lot of work ahead of us, and we
6 have the energy on the Commission. We have the
7 experience of the Commissioners. We have the
8 dedication of the staff. And it's not going to
9 end here. This is really an ongoing process, and
10 it's a pleasure for me to be a part of it.

11 CHAIR SARIS: All right. Thank you.

12 Ms. Grilli?

13 MS. GRILLI: Yes, Judge, the next item
14 of business is a possible vote to publish an
15 issue for comment regarding retroactivity of the
16 drug amendment. As already noted, the amendment
17 has the effect of reducing the term of
18 imprisonment recommended in the guidelines
19 applicable to a particular offense or category of
20 offenses.

21 So, the issue for comment seeks
22 comment on whether the Commission should list the

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1 entire amendment or one or more parts of the
2 amendment in Subsection (c) of 1B1.10, as an
3 amendment that may be applied retroactively to
4 previously-sentenced defendants.

5 It also asks whether the Commission
6 should provide further guidance or limitations
7 regarding the circumstances in which, and the
8 amount by which, the sentences may be reduced.

9 A motion to publish the issue for
10 comment with a 60-day comment period, and staff
11 authorized to make technical and conforming
12 amendments, would be in order at this time.

13 I would note that, if the Commission
14 does vote to publish this, this issue for comment
15 will not appear in The Federal Register until
16 after May 1, at which time the amendments
17 delivered to Congress will also be published in
18 The Federal Register.

19 CHAIR SARIS: Do I hear a motion?

20 VICE CHAIR HINOJOSA: So moved.

21 CHAIR SARIS: Do I hear a second?

22 COMMISSIONER FRIEDRICH: Second.

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1 CHAIR SARIS: Any discussion?

2 (No response.)

3 All in favor?

4 (Chorus of ayes.)

5 Any opposed?

6 (No response.)

7 It carries unanimously, as has
8 everything else. Except for 1B1.10.

9 (Laughter.)

10 All right. So, at this point, I know
11 that Judge Breyer had to get out of here. So, I
12 am now going to make my comments.

13 It is the prerogative of the Chair to
14 go last because how thrilled I am that, with
15 respect to this Drug Quantity Table, there was an
16 unanimous vote.

17 And likewise, the wonderful Commission
18 that has been able to act in a bipartisan way on
19 this important amendment.

20 The Commission first considered
21 whether to reduce the guideline levels in the
22 Drug Quantity Table by two levels across all drug

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1 types in 2010, when we were adjusting crack
2 sentencing levels in response to the Fair
3 Sentencing Act. We decided not to act on the
4 proposal then, but return to this issue this year
5 as part of our overall focus on finding ways to
6 reduce cost of incarceration and overcapacity of
7 prisons without endangering public safety.

8 Reducing the federal prison population
9 has become urgent, with that population almost
10 three times where it was in 1991. Federal
11 prisons are 32 percent over capacity, and federal
12 prisons spending exceeds \$6 billion a year,
13 making up more than a quarter of the budget of
14 the entire Department of Justice, and reduces
15 resources available for prosecutors and law
16 enforcement, aid to state and local law
17 enforcement, crime victim services, and crime
18 prevention programs, all of which promote public
19 safety.

20 We take the responsibility of
21 considering this issue very seriously and have
22 given significant consideration to the arguments

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1 both for and against the drug amendment.

2 Many factors support adoption of this
3 modest amendment, and many of my colleagues have
4 said that. When the Drug Quantity Tables were
5 set at the current level above the mandatory
6 minimum penalties, drug quantity was the primary
7 driver of drug sentences. There was only one
8 specific other offense characteristic in the Drug
9 Guideline. Now there are 14 specific offense
10 characteristics, including enhancements for
11 violence, firearms, aggravating role, and a whole
12 host of other factors to help ensure that
13 dangerous offenders receive long sentences.
14 Quantity, while still an important proxy for
15 seriousness, no longer needs to be quite as
16 central to the calculation.

17 Originally, Drug Guideline levels were
18 set above the mandatory minimum penalties. So
19 that, even for the lowest-level drug offenders
20 with minimal criminal history, there would still
21 be some room for their sentences to move down
22 before hitting the mandatory minimum. That way,

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1 these offenders would have had some incentive to
2 plead and cooperate.

3 Since then, Congress added the safety
4 valve which provides for sentences below
5 mandatory minimum levels for low-level offenders
6 and gives those offenders substantial incentive
7 to cooperate. It is no longer necessary to set
8 the guidelines above mandatory minimum penalties
9 to encourage low-level offenders to cooperate.
10 That is why it is appropriate that the amended
11 guideline would continue to link guideline ranges
12 to existing mandatory minimum penalties, but
13 would place mandatory minimums within the
14 guideline ranges, rather than below the ranges,
15 for those with a low criminal history level.

16 So, this modest reduction in drug
17 penalties is an important step toward reducing
18 the problem of prison overcrowding at the federal
19 level. It reduces the penalties by an average of
20 11 months, or about 17 percent, for 70 percent of
21 all offenders for all drug types.

22 Within five years, the federal prison

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1 population would be reduced by more than 6500.
2 Over time the effects could be much greater.
3 Indeed, the offenders sentenced in just the first
4 year after the change would over time serve
5 almost 14,000 fewer years than they would have
6 without the change.

7 The Commission has recommended that
8 Congress reduce mandatory minimum penalties for
9 drug offenses, which would have a greater impact
10 on prison cost and populations, and we'll
11 continue to work with the bipartisan Members of
12 Congress who have cosponsored legislation to do
13 so.

14 The more modest amendment we vote on
15 today stays within the current statutory
16 framework, but still would be a significant step
17 towards addressing this problem of overcrowding.

18 So many of those who submitted public
19 comment to the Commission, many of you sitting
20 here today, support the proposed amendment,
21 including defense attorneys, civil rights
22 organizations, sentencing reform organizations,

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1 faith groups, Right on Crime, the Chairman of the
2 Senate Judiciary Committee, and other prominent
3 bipartisan Senators, and the Department of
4 Justice.

5 I have also listened very carefully to
6 those who do not support the amendment, including
7 the National District Attorneys Association, the
8 National Association of Assistant United States
9 Attorneys, the Chairman of the House Judiciary
10 Committee, and the Ranking Member of the Senate
11 Judiciary Committee.

12 We have immense respect for the hard
13 work law enforcement officers do to keep us safe,
14 and we are sensitive to law enforcement concerns
15 that reducing drug sentences will undermine
16 public safety, including threatening the
17 reduction in crime rates we have experienced over
18 the last several decades.

19 So, I'm getting pretty old. I
20 personally remember the high levels of violence
21 in American cities in the 1980s, the high-profile
22 tragedies like the death of Len Bias, and the

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1 great worry about crack babies. I understand the
2 concern about going back to those days.

3 The Department of Justice supports
4 this amendment, and Attorney General Holder
5 testified here that it would not undercut public
6 safety.

7 Our recent experience with reducing
8 sentences for federal crack cocaine offenders
9 suggests the same, and it is consistent with the
10 experience of many states.

11 In addition, existing guideline and
12 statutory enhancements for career offenders and
13 for traffickers who use weapons or violence help
14 to ensure that the most serious offenders receive
15 very substantial sentences.

16 We have also crafted the amendment we
17 vote on today -- we've just voted on unanimously
18 -- such that there will not be any reduction in
19 sentences for drug traffickers with the highest
20 quality of drugs. We will continue monitoring
21 drug sentencing, as we have consistently done, to
22 determine whether there are additional

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1 modifications that need to be made to ensure that
2 the most harmful conduct results in the
3 appropriate sentences.

4 We have given careful consideration to
5 public safety in making this decision today, and
6 we will continue to focus on it going forward.

7 Now I know that there has been a
8 particular concern about increases in the use of
9 heroin and the devastating effect of that drug.
10 That is why I made a point of asking the Attorney
11 General at our March hearing about whether this
12 amendment would undercut the Department's efforts
13 to address the growing heroin epidemic, and he
14 assured us that it would not.

15 I am convinced that this amendment is
16 a modest, well-thought-out step to appropriately
17 reduce prison costs and overcapacity. It updates
18 the Drug Guidelines to account for changes in the
19 law and guidelines over the past several decades,
20 and reflects our careful consideration of data,
21 of the data here.

22 Working in conjunction with existing

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1 guideline and statutory provisions that ensure
2 severe sentences for those who use firearms or
3 violence or traffic in the largest quantities of
4 drugs, the amendment will not undermine public
5 safety. That is why I will vote for this
6 amendment.

7 Now, as you heard, we just voted
8 unanimously on another issue. Over the next few
9 months, the Commission will be studying the issue
10 of whether the drug amendment should apply
11 retroactively, which we are statutorily required
12 to consider. This is a complex and difficult
13 issue and requires a different analysis than the
14 decision we made today about reducing drug
15 sentences prospectively.

16 The Commission will take into account,
17 as it always does when considering retroactivity,
18 the purposes of the amendment, the magnitude of
19 the change, and the difficulty of applying the
20 change retroactively, among other factors.

21 I know the Commission will carefully
22 consider this issue, and many stakeholders will

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1 have strong views. I do not know how it will
2 come out, but we will carefully review data and
3 the retroactivity impact analysis we have
4 directed staff to conduct, as well as public
5 comment, in order to ensure that we weigh all
6 perspectives.

7 We have finished all of our votes
8 today.

9 I want to thank again all of you for
10 coming and all of the Members of Congress,
11 judges, organizations, members of the public, who
12 have submitted comments and contributed so much
13 to the process.

14 Once again, I echo all the
15 Commissioners in saying we are a terrific
16 Commission.

17 (Laughter.)

18 I mean, that's sort of self-
19 congratulatory. But, really, we work so well in
20 a bipartisan way, and this process has been based
21 on data and intense friendship and collaboration
22 of working together. And it's a very enormous

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1 amount of pride that I have in chairing this
2 Commission.

3 So, I think, is there any other
4 business here? I probably shouldn't ask that so
5 openly here.

6 (No response.)

7 Do I hear a motion to adjourn?

8 VICE CHAIR HINOJOSA: So moved.

9 CHAIR SARIS: Is there a second?

10 VICE CHAIR JACKSON: Second.

11 CHAIR SARIS: Would we like to have
12 statements, going in seniority, on this?

13 (Laughter.)

14 Okay. All in favor?

15 (Chorus of ayes.)

16 Anyone opposed?

17 (No response.)

18 So, we now adjourn, and I look forward
19 to seeing you all.

20 Thank you.

21 (Whereupon, at 4:01 p.m., the meeting
22 was adjourned.)

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This is to certify that the foregoing transcript

In the matter of: Public Meeting

Before: US Sentencing Commission

Date: 04-10-14

Place: Washington, DC

was duly recorded and accurately transcribed under
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Neal R. Gross

Court Reporter

NEAL R. GROSS

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