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UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

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ATTENDANCE

United States Sentencing Commission

Judge Ruben Castillo, Vice Chair
Judge Michael E. Horowitz
Judge Ricardo H. Hinojosa
Judge Michael E. O'Neill
Judge Deborah J. Rhodes
Judge William K. Sessions
Judge John R. Steer

Panel One

Patrick Gnazzo, Corporate Member,
Ethics Resource Center Fellows Program
Vice President Business Practices, United Technologies Corporation

Kenneth Johnson, Director,
Ethics and Policy Integration Centre

Dov L. Seidman,
Chair and CEO, LRN

Panel Two

Mary Beth Buchanan
United States Attorney for the Western District of Pennsylvania
Chair, Attorney General's Advisory Committee
Member, USSC Ad Hoc Advisory Group for Organizational Guidelines

Linda A. Madrid, Managing Director,
General Counsel, and Corporate Secretary,
CarrAmerica Realty Member, Board of Directors of the Association of Corporate Counsel (ACC)

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Gregory J. Wallance, Partner,
Kaye Scholer, LLP

Panel Three

David Uhlmann
Chief, Environmental Crimes Section
United States Department of Justice

James W. Conrad, Jr.
Counsel, American Chemistry Council

Ronald A. Sarachan
Ballard Spahr Andrews & Ingersoll

Steven P. Solow
Hunton & Williams
Association of Oil Pipe Lines

Panel Four

Barry J. Pollack
Member, Board of Directors, National Association of Criminal Defense Lawyers
Co-Chair, White Collar Crime Committee

Mary Price
General Counsel, Families Against Mandatory Minimums (FAMM)

Jon L. Sands
Federal Public Defender, District of Arizona

Panel Five

Thomas Colantuono
United States Attorney for the District of New Hampshire

Jodi Avergun
Chief, Narcotic and Dangerous Drug Section
United States Department of Justice

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Raymond N. Hulser
Public Integrity Section
United States Department of Justice

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Panel Six

James E. Felman and L. Barrett Boss
Co-Chairs, United States Sentencing Commission
Practitioners Advisory Group

Cathy Battistelli
Chair, Probation Officers Advisory Group

P R O C E E D I N G S

JUDGE CASTILLO: Good morning. We'll get started. I welcome you to this hearing on St. Patrick's Day. We won't have a parade, but we will have a parade of very competent witnesses.

My name is Judge Ruben Castillo. I'm going to preside over this meeting, even though I'm not the chair.

Those of you who follow the commission very closely know that our chair recently resigned, Judge Murphy. Judge Hinojosa, my esteemed colleague both on the District Court and on this commission, has been nominated to be the chair. And everyone in this room is hopeful that that confirmation process goes through quickly, and no one more hopeful than me.

But in the meantime, you're stuck with me presiding. I am going to ask our witnesses to each identify themselves for the record and try and stick to the time limits in fairness to those waiting to testify.

So with that, we'll get started with our first

panel. And I don't know if you have a particular order, gentlemen?

MR. GNAZZO: I think I'm first.

JUDGE CASTILLO: Okay.

MR. GNAZZO: Members of the commission, Judge Castillo, it's an honor to be here, and I appreciate the opportunity to speak on behalf of the Ethics Resource Center.

By way of background, first, my name is Patrick Gnazzo. I'm the vice president of business practices at United Technologies Corporation. I have been in the business of compliance since about 1991 at United Technologies. I worked for the Defense Department for 10 years until 1981 and have been with United Technologies since 1981.

The Ethics Resource Center is an organization that was founded in 1922 and works for the business of nonprofit organizations, schools, and governments to create ethical work environment through education,

research, and training. As a member of the Ethics Resource Fellows Program--United Technologies is a member of the Fellows Program. It's a small group of corporate, government, and nonprofit educational leaders who share an expertise in ethics and who, through cutting-edge research and working groups, are helping organizations better understand ethics in the workplace.

I'm going to confine my remarks to the violations of law in Section 8 that the advisory committee opined that the violations of law provision should be expanded. It was always understood, at least by corporations and by ERC and other organizations, that the violations of law provision talked in terms of criminal violation. And we've operated under that assumption.

The concern that the ERC has and that I have is that if you expand the definition of violations of law to violations of law and regulation beyond criminal activity, it is not a situation where companies ignore

violations of law. It is a situation where a company the size of United Technologies, for example--30 billion, 200,000 employees, 110,000 employees outside or are foreign nationals and work outside the U.S., doing a heavy defense business, highly regulated, elevators at Otis highly regulated, jet engines highly regulated by the FAA--we're in a situation where much of our business involves adhering to regulation, state, local, federal, and worldwide laws that impact our business. And we have compliance programs to deal with that.

But if the commission recommends that in looking at an individual corporation or an individual who does violate a criminal act and the penalty is about to be set, and the penalty then is determined based on the number of violations of law and regulation, I will tell you that on a day-to-day basis, I have 30,000 employees that do defense business, and we constantly work on labor charging as an example of a regulatory issue where employees can, either through mistake or intent, charge

incorrectly. We survey. We audit. We correct when we find it.

If violations of law and regulation impact both labor charging and my drivers for Otis or Carrier when they exceed the speed limit, which would be a violation of law, I find myself in a situation where I'm going to be spending the majority of my time worrying about correcting those issues, when we are spending all of our time ensuring that every issue at the company and every individual at the company adheres to all of the laws, rules, and regulations. But primarily, what we are concerned about is ensuring that none of our individuals impact our shareholders on a day-to-day basis with respect to violations of criminal activity that could cost the company and individuals through their return on investment a huge impact in their investment.

So we do look at everything having to do with state, local, federal regulatory issues in addition to criminal law. But to expand the scope, when a judge

needs to look at adding up points that are going to go against a corporation with respect to fines, how do you then take the positive aspect of a corporation the size of ours--30 billion, 200,000 employees that are doing things 99 percent of the time right on a day-to-day basis?

The analogy that I can give you is that from time to time, I have arguments with my counterparts in the ethics world that we definitely discipline for activity that violates rules and regulations, and the issue sometimes gets on the table--do you give positive points to individuals for doing things right?

My argument has always been you can't do that. You expect people to do it right. You demand that they do it right, and their performance is based on the fact that they do it right. But you can't give them gold stars every time they make sure that they charge properly. And you do everything you possibly can to convince them that they will be punished if they do

things incorrectly.

But lowering the standard from a criminal standard to a should have known, could have known, would have had reason to know puts a huge burden on any corporation. My only suggestion would be I think it's a valid point that corporations should adhere to all laws and rules and regulations. But maybe a note in the preamble would be a very positive step forward with respect to the sentencing guidelines.

To put it into the calculation, I think, can do a huge detriment not only to small companies, but to large companies like myself.

Thank you very much.

MR. JOHNSON: Good morning, Judge Castillo and members of the commission. Thank you for this opportunity to highlight my comments on the proposed amendments.

My name is Kenneth Johnson, and I'm director of the Ethics and Policy Integration Centre located here in

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Washington, D.C.

My interest in this compliance program sort of idea stems from my experience during the Gulf War. It was a horrifying experience in many ways from an organizational perspective, and I came away convinced that there had to be a better way to organize organizations so that they lived their values.

Prior to my call-up, I had been an attorney advising small business, both in the real estate area and entertainment industry in California. I owned my own small business during the S&L crisis that provided service support. So I have a sense of what the challenges are for small businesses. And this will be the thrust of my comments here today, with one exception.

I had intended to discuss some of the fine points that tracked in my recommendations. But in reading through the comments, I am concerned with the same point that my colleague Pat Gnazzo raised on this violations of law. I am concerned that it does not stay

in. I would like to see it stay in for these reasons.

The commission, as I understand it--and when I began doing research in this field, the initial goal was to encourage good corporate citizenship. That was the model. Now it's true that the compliance--the charter of the commission is on compliance with laws, and the federal law and the criminal side. But the purpose of the effective program, as I understood it, was to provide a model and a guide to businesses so that they were able to strengthen their corporate good citizenship.

That being said, while I appreciate the concerns about being tagged for violations of the myriad laws that we have, there are a number of aspects that occurred in the last few years and even over the last couple of decades that really argue this is not an undue burden.

For example, the SEC, in its recent regulations regarding the management reporting on the internal control system, reported favorably on the framework that it used to make the decisions as to what to require of

management. They said that an internal control is a process effected by an entity's board of directors, management, and other personnel, designed to provide reasonable assurance regarding the achievement of objectives in three categories--effectiveness and efficiency of operations, financial reporting, and then compliance with applicable laws and regulations.

So they're saying that a viable system complies with the laws. Not just criminal, but the laws and operations. They then go and touch on some things that the commission's proposed amendments now provide, like risk assessment and evaluation. And they conclude by saying, "The scope of internal control, therefore, extends to policies, plans, procedures, processes, systems, activities, functions, projects, initiatives, and endeavors of all types at all levels of the organization."

And I think that's what the commission was trying to accomplish, that it was trying to get a culture

of the organization that would bring all levels of the organization into trying to do basically the right thing. Clearly, one would not be penalized for having violated something that was not criminal. But I do believe emphatically that the case is that your program needs to aim precisely at complying and not violating law.

Some of the reasons, actually, that Mr. Gnazzo gave--who knows, in many cases, whether a law is criminal or not? And if you really don't know whether a law a criminal or not, then the culture of the organization should be to comply with law. And that's what the program should be aimed at.

In part, I think what's happening is that there's a confusion between the vision of the commission, which is this good corporate citizenship, and the strict requirements of compliance programs. The Foreign Corrupt Practices Act is an example. There are very specific requirements for due diligence, internal reporting, and this sort of thing. Those clearly need to be addressed

specifically, but the broader program, I think, is aimed at this cultural change.

In my written comment, I have included a table that has the various frameworks on one side and then the proposed amendments, provisions on the other side. And I think you'll find they compare very, very favorably.

So I commend--see, another example is the final New York Stock Exchange corporate governance rules, which require a company should proactively promote laws, rules, and regulations, including insider trading. So I don't believe that the sense is the commission is asking too much by saying that for an effective program purposes, it needs to have a focus on the culture of avoiding violations of law, whether criminal or not.

And finally, in many ways, it's a step back from the current guidelines. Because the current guidelines discuss--provide that in terms of definition of an effective program, an organization's failure to incorporate and follow applicable industry practice or

the standards called for by any applicable government regulation weighs against a finding of an effective program to prevent and detect violations of law. So in many ways, the definition is taking away that aspect of it. It's really less onerous in some ways.

And the reason why the industry practice is good is because many violations that show up in federal law, particularly in my experience, relate to quality issues or they relate to time-keeping issues. And in many cases, when you put a program together, you do that in reference to regulations and practices. Otherwise, you're not going to get to compliance with the law. So I would highly recommend that that remain part and parcel of the recommendations because I think it's just good business practice.

Finally, regarding small and medium enterprises, it's a challenge globally, this whole notion of the small and medium enterprise. I have a couple of ideas we recommend considering. One is take some of the language

in the commentary out of--regarding small business--put it into a subsection D. So that you would say this is what the program is for. This is what the seven steps are in B. Here is the risk evaluation piece in C. And D says this is a significant enough issue that we recommend that judges in the organization should take a look at these small businesses.

This is kind of the battle of PowerPoints. I've tried to do some programs on small business, and I can't point to that concern. If we can make a section that says we really do care, then I think that's something I can take. I'm drafting a manual for the Department of Commerce, and we're hoping to take some of the blessing from the commission and the manual to the Small Business Administration. Say, look, this is a real issue the federal government should be involved in.

Second idea might be retain the rebuttable presumption for high-level personnel--I know that's an issue for the Department of Justice--for this reason.

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One should not confuse having an effective program with some other aspects that receive beneficial treatment. I would, for example, recommend removing--make at least a rebuttal presumption, if not removing, the high-level personnel involvement and the self-reporting requirement.

Many cases, people do not integrate--do programs on the small level because they can't see how they're going to keep the boss not involved in some way. So it's not worth trying. And even on the large organizations, many don't do it because the litigation dilemma that the advisory committee pointed so much. So rather than have a policy of self-reporting, they just don't have a program.

Since you give a positive stroke for reporting and for not having the high-level involvement, let the program stand on its own two feet. Do they have a program? If you want to look to see whether leadership or self-reporting is involved in default, then make a rebuttable presumption. But I think that would make it

much easier to sell programs. You just need a program, and you won't be--you will either be benefited by self-reporting or not penalized further by the high-level involvement.

Finally, propose incentives to companies to help business. The European International, the European Bank of Reconstruction Development does due diligence on all of their organizations for organizational integrity. Make that--encourage that that become a requirement. Give a point or two points to large organizations that work with their small businesses to have them comply. This should be relatively easy to do in the defense industry. Not easy, but something that would be an incentive.

Have organizations like banks that get a point or two if they make having their borrowers demonstrate good organizational integrity, including an effective program. I would see that sort of incentive that might work to help small businesses.

Beyond that, the leadership of the commission is to be commended. Appreciate my chance to give comments, and I'll await your questions.

JUDGE CASTILLO: Thank you, Mr. Johnson.

Before we get to questions, we'll let Mr. Seidman proceed.

MR. SEIDMAN: Thank you.

I'm Dov Seidman. I'm the founder and CEO of LRN. It's an honor for me to be before the commission today.

For over 10 years, it's been my and LRN's privilege to work with hundreds of organizations, including some of the world's leading companies, on governance, ethics, and management programs and compliance programs. We've been fortunate to work with these companies to help them communicate with, educate, and certify four million employees around the world on the day-to-day legal and ethical issues they face on the job.

During this time, I believe I've gained some insight on the relationship between law and compliance and the role culture plays in shaping that relationship in the organization. During these same 10 years, I have observed that this commission, through its guidelines, has had the most profound influence on corporate behavior generally and specifically on how companies think about and pursue compliance with law.

That being said, many of us agree with the advisory group that while there has been widespread movement to adopt compliance programs, there's not much evidence that the movement has resulted in effective compliance programs. And that's why we are here today to consider a new set of constructive recommendations from the advisory committee.

Again, I'm honored to be invited to focus on the issue of whether the commission should explicitly recognize in its guidelines the important role ethics plays in establishing effective compliance programs. I

believe the advisory group was right to focus on culture and the dispositive role culture plays in getting the outcome we all want--more respect for the law.

However, by requiring only that an organization promote a culture that encourages a commitment to compliance with law, I believe the advisory group stopped one step short. Principally, I will argue that to understand the very nature of what culture is and how it informs human decisions and actions is to understand that you can't have a culture of compliance unless you also have a culture of ethics.

In making this argument, I'm not asking judges to become moral philosophers, passing categorical or universal judgment on right versus wrong and good versus bad in a corporate context. I agree that we should avoid, as the advisory group suggests, having courts make "determinations of whether a particular organization has adopted a good set of values or appropriate ethical standards."

Instead, I'm simply going to argue that courts can and should evaluate the consistency and the efficacy of a company's efforts to instill values, the result of which will lead to respect for the law. I should remind us that one of the stated purposes of the commission's work, as established in the 1984 enabling statute, is to "reflect the advancement in knowledge of human behavior as it relates to the criminal justice system."

While I believe my arguments stand on their own, I also believe their relevance is particularly apt, given our new knowledge of human behavior informed by the times we are in. So please indulge me as I provide a perspective on these times.

Most people, I believe, believe that the scandals and failures of corporate responsibility were, at their core, not failures of legal compliance, but more profoundly and fundamentally failures to do the right thing. Companies and their leaders forgot the critical distinction pointed out by Justice Potter Stewart that

there is a difference between doing that which you have a right to do and that which is right to do. In their pursuit of their dreams or schemes, people focused on what they legally can do and forgot what they should have done.

We owe the current environment to a loss of ethical rather than simply legal footing. We now find ourselves in a deep crisis of trust in our institutions and our markets, and fundamental questions are being raised about American capitalism and whether ethical capitalism is, in fact, possible.

Consequently, there has been a sea change in how business is conducted and how Wall Street and Main Street, i.e., the public, view business. Combined with the scrutiny from Wall Street, Main Street, government, media, and the public, technology has resulted in a transparent world where all actions--illegal, unethical, good--see the light of day and are instantly retrievable from databases and Web sites.

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In this world where nothing stays hidden, businesses must conduct themselves as though they have nothing to hide. Given this transparency, the market is now ironically regulating corporate behavior and shifting in some respects away from compliance towards corporate reputation and reputational value as they are becoming more central than ever.

Think of it this way. While earnings remain important as ever, companies are increasingly managing themselves to their balance sheet, not just to their profit and loss statements. Compliance tends to focus companies on avoiding millions in fines and penalties, i.e., hits to their P&Ls.

But in this world where accusations of impropriety, rumor, and innuendo have cost companies not millions, but billions in market capitalization--way before legal guilt, if ever, is established--companies are increasingly focused on protecting and strengthening their reputation, which in turn focuses them on ethics,

not just compliance. Because we all know that a good and enduring reputation without ethics is not possible.

During these times, I have also gained some distinct knowledge from my vantage point as a lawyer and a CEO of a business that has been working with companies way "B.E."--before Enron--on their compliance and ethics management programs. Increasingly, companies are combining law and ethics programs. They're following the lead of our most admired companies who have long understood and demonstrated that the more they invest in creating do-it-right cultures, the better it is for business.

In their communication and education efforts, companies are teaching law and ethics and the meaningful connections between law and ethics on the same Web site at the same time. There is growing evidence that when employees come to understand the rationales, the ethical rationales, the ethical underpinnings, the spirit of the law, they become more inspired. Or in the words of the

ad hoc committee, more committed to following.

They will also better navigate gray areas and stay on the right side of the law even when they don't know that there is a law that applies. From my vantage point, companies today are not shying away from explicitly demanding ethics from their employees.

In my opinion, what all of this knowledge about the times we are in and the knowledge about what leading companies are doing suggests is that it's all about culture. After all, corporations are merely legal fictions or abstractions. At their essence, they are communities of human beings held together by a set of values, norms, and standards passed from one generation to the next that govern how decisions and actions are taken. In other words, a culture.

I, therefore, want to commend the ad hoc committee in focusing on a culture that encourages a commitment to compliance with law. But what is the relationship between culture and compliance with law? I

believe there is a spectrum that we can focus on here, a spectrum that I call the spectrum of culture.

We start on one end of the spectrum with a culture of anarchy or lawlessness. We move to blind obedience with law, to informed acquiescence with law, all the way to self-governance, where employees define themselves by a set of values that inspire them to not just follow the law, but to respect it and to ensure that those around them equally respect it.

Compliance is about self-governance by its very nature. And therefore, if we believe that the most powerful form of self-governance is further down the spectrum of culture beyond mere acquiescence with law, then only ethics can get us there.

I'm also rejecting as unfeasible in today's world is that a set of corporate mechanisms and bureaucracies can be created, indeed pure compliance programs that attempt to ensure that everyone acquiesces and complies with the law. Instead, I believe that

compliance with law is, in fact, an outcome--an outcome of a true self-governing culture.

We've seen in the last 14 years a lot of progress in moving along this spectrum. But I believe that programs that focus on compliance alone land on the point of the spectrum of informed acquiescence. Perhaps this is why the ad hoc committee suggested that there is little evidence that compliance programs have actually been effective.

There is a paradox here that by focusing on informed acquiescence, you often get the opposite. You also get ever-increasing bureaucracies designed to enforce compliance with ever-increasing legal and regulatory requirements. And these bureaucracies are often met by cynicism and by clever employees who game the system. Their violations lead to more bureaucracy, and this vicious cycle continues.

Even a company doing well in this game would be challenged in this hyperkinetic, transparent, fast-moving

world. How would a global company build a big enough bureaucracy to ensure that all hundred thousand of its employees in 150 operating companies in 50 countries around the world follow each and every law each and every day? They can't. Even if this company were 99.9 percent compliant, that's still 100 cases every day of noncompliance, 36,500 cases every year of noncompliance.

So what will guide employees when they don't know the law or are confused about it? What will guide them in the gray areas? The answer--only a true self-governing culture, where people are committed to respect the law and to do the right thing.

Self-governance is not about acquiescing to someone else's rules, but about willing choice based on one's free will and values. And since ethics is ultimately about choice, this culture must be an ethical one.

Therefore, I believe that insofar as the commission embraces the centrality of culture, it must

take one more step to embrace cultures of both ethics and compliance. Again, I'm not asking the commission to require courts to delve into relative morality of organizations. Instead, they should evaluate whether companies promote, invest, and encourage a commitment to law and ethics, whatever their ethics might be.

I'm asking courts to evaluate the consistency of a company's efforts to instill values, their own values, that will lead to respect for the law. What I am fundamentally saying is that while ethics is about values, in this context, promoting an ethics culture is a business process, similar to other business processes that courts routinely review, such as internal controls, safety programs, and compliance.

I, therefore, respectfully recommend that the commission take another step along the spectrum of culture to embrace true self-governance, indeed the very spirit of compliance, by explicitly encouraging commitments to both law and ethics.

I'd like to add one final short point. As a CEO who uses bonuses, among other things, to incent my colleagues to reach higher, I believe that mitigating credit works like a bonus. And it's appropriate for the commission to incent companies to reach for higher ethical standards, either by going beyond legal minimums or at times refraining and restraining from taking advantage of legal rights.

I'm not suggesting that you ever punish companies that don't promote ethics by increasing their sentence. A bonus is not punishment. They just won't get the credit, i.e., a bonus.

I urge you to make the underlying commitment to an ethical culture as important as the commitment to compliance, and I thank you, the commission, for the opportunity to appear before you.

JUDGE CASTILLO: Thank you. You went slightly beyond the time, but I didn't want to cut you off.

We're going to open it up for questions. Let me

just put this in perspective. The organizational sentencing guidelines hit their 10-year anniversary in 2001, and then using the term that you just threw out there, way B.Q. Way B.Q, this commission--or way B.E. I guess it goes--before Enron. Way before Enron, this commission, through the leadership of Judge Murphy, set up the advisory committee to improve the organizational sentencing guidelines.

But I guess I'd like to know, just from your perspective as experts, do you all think that the organizational sentencing guidelines without any amendments, just on their own, have been successful or unsuccessful? Just I'd like to get your perspective on that.

MR. GNAZZO: Having been in this business for a long time, I think they are successful. But they're successful at the larger corporation level. I don't think they're quite understood at the smaller company level or the medium-sized company level.

And you have been overtaken by events with respect to Sarbanes-Oxley and the New York Stock Exchange and the Nasdaq. Companies are becoming overly concerned with respect to governance, and that is added to the burden of dealing with effective compliance programs. But I think that large corporations got it a long time ago.

For companies like myself, we were members of the Defense Industry Initiatives back in 1986 and had compliance programs in place as a result of it. But I'm not seeing that level of activity for smaller companies, and it's only until they feel the burden of the sentencing guidelines will they then recognize that they need to put effective programs in place.

I don't know whether it's--I don't know the reason, but it's been effective for large corporations.

JUDGE CASTILLO: Anyone else want to add to that?

MR. JOHNSON: I have a slightly different take

on it. I think they've been very successful in terms of setting a framework. Certainly more programs exist than would otherwise.

However, my sense is that the seven minimum steps, which were intended as a floor, in many cases come very close to a ceiling. That is that the minimum steps have become bundles of best practices. And I've seen organizations that will basically take a best practice here and a best practice there and accumulate it together to have a program--not a paper program. But in many cases, they didn't understand the basis by which one came up with a best practice and how that would apply to their organization.

The best example I think is the varied definitions of ombudsman. I mean, in some cases, the definition of ombudsman in some programs effectively is an ethics officer. And so, I think that what happens is not to say someone didn't give adequate thought to it. But nonetheless, there is such a great difference that

I've seen organizations that will basically pick and choose, put them together, and custom design a program without completely understanding the basis for the best practice or why it should or should not apply in their organization.

That's why I think that the idea of seeing it as a program, as opposed to a compliance program, in many cases, I think, would make more sense. I think this focus on culture is very, very important. And I think that the focus on good corporate citizenship is important as to an effective program.

MR. SEIDMAN: I believe they've been incredibly successful in galvanizing, calling attention, inspiring companies to focus on this issue, talk about these issues, and put programs in place. And as I've said, we've moved far along the spectrum.

At the same time as you focus on something, you gain new knowledge, and this is a very dynamic space. And there are companies that are outstripping the very

requirements you gave them because once they focus on this, they learn and they gain some new knowledge about what works and what doesn't.

And I think it's important for the commission to be in synchronicity, to use one of the ad hoc's words, with evolving new standards. I submit that leading companies are setting higher bars and that knowledge of these higher bars is getting around.

But pausing today, I think there's a lot to celebrate in the last 14 years in terms of where we've arrived.

MR. GNAZZO: Just if I could make one point with respect to the last 10 years, though. From a large corporation's perspective, you're never going to--for the most part, you're not going to see large corporations be found guilty of crimes. They're going to plead at some point in time.

And for large corporations to understand what the plea has--whether their compliance program has

benefited or not, for the overall program, we don't see any impact because we don't see what the Justice Department is able to accomplish and how the Justice Department deals with large corporations. So I have nothing to take back to my board of directors or to my management and saying, see, strong programs benefited them in this way, and weak programs were a deterrent in this way.

Anything that the commission could do to encourage the Justice Department to at least give us some guidelines as to how they are resolving problems with large corporations based on their compliance programs would be very beneficial.

JUDGE CASTILLO: Any other questions?

JUDGE HOROWITZ: Just following up on that, when you mention guidance, I know in certain instances, the U.S. attorney's office sometimes announces when it makes a decision not to charge. Is that the kind of information that would be useful?

MR. GNAZZO: And if they're making a decision not to charge because of strong compliance program, that would be extremely useful.

JUDGE CASTILLO: Commissioner Sessions?

JUDGE SESSIONS: Mr. Gnazzo, you talked about your concern about expansion essentially under the guidelines, the violations of the law. In a sense, when Mr. Seidman talks about ethical culture, that's an expansion. That's certainly--that's hopefully, at least from his perspective, an expansion of the impact of the guidelines on the culture.

And I guess I'd like to hear your response to whether or not we should add ethical considerations?

MR. GNAZZO: Adding ethical considerations would obviously have a good impact on corporations. But my concern is it's very subjective. When you talk in terms of business ethics around the world, I can tell you today that United Technologies Corporation does not use prison labor for soccer balls, to make soccer balls. But we

don't make soccer balls.

And therefore, the subjective nature of whether a company has good, strong ethical programs, if you talk in terms of Europe, they talk in terms of social responsibility. So I like the positive nature of it.

I am concerned that we might box ourselves into whether a corporation is philanthropic by some degree that some judge believes is good, or whether they're not giving enough money to the community is an example that says to me it's very positive. It would look positive. It would benefit a judge in making a decision with respect to penalties. But to the same extent, I worry about the nature of the--the subjective nature of it.

JUDGE SESSIONS: So how would you respond to that, Mr. Seidman? Not to say that judges do this, play one against the other.

[Laughter.]

JUDGE SESSIONS: But how would you respond to the question as to whether there is guidance for a judge

in determining what is ethical?

MR. SEIDMAN: As I said, I don't think the judge should determine what is ethical. I think companies should determine for them, in their context, in their industry, what their aspirations are, what values they need to be consistent with accomplishing their goals. A judge should say, "Do you even have a code of conduct? Do you have stated values?"

They're your own. If you have them, what steps are you taking to promote, encourage, to ensure consistency, to invest, to make sure these are not paper values, but real values?

So I think we're in violent agreement. I, too, would be worried about passing judgments about how soccer balls are being made or philanthropy and who's writing what checks to whom. But rather, tell me what your values are, and I will evaluate what you're doing about weaving them into the culture in the same way I evaluate what you're doing into weaving your compliance program

and respect for the law into the culture.

It's the same analytic, rational, legal judgment about what are you doing about the values you have.

JUDGE CASTILLO: Commissioner O'Neill?

JUDGE O'NEILL: Boy, I have so many questions. It's hard for me to figure out even where to start on this.

When you talked about success, in terms of the programs have been a success, I guess I'd like to have an idea--because it's always a little hard for me to get my mind around this whole area--as to how you sort of measure success. I know if you look at sort of publicly available data in terms of the prosecution of corporations over time, both that, you know, there was--Sarbanes-Oxley was obviously in response to some very well-publicized, you talked about B.E., before Enron, there was Enron, WorldCom, Nasdaq. There's been a number of sort of large corporate scandals.

I notice, as sort of an empirical matter, that

there aren't that many more corporate prosecutions at least that are publicly sort of available. I do notice that since the adoption of the organizational guidelines, there actually have been more companies that have run afoul of law. And that may be a matter of simply, you know, shifting priorities of the Department of Justice. I doubt there is any sort of causal connection between the adoption of the organizational sentencing guidelines and more companies running afoul of the law, for example.

So what I'm wondering, especially given the limited nature of the impact that the Sentencing Commission has in terms of our statutory authority and what kind of a real world impact that we can have upon corporate corporations. Because I always have a little trouble about the Sentencing Commission or judges, for that matter, deciding what ought to be ethical behavior for any industry. And that's why I'm worried about the same concern that you had, sir, about the business--about violations of law versus criminal violations.

When you're dealing with, you know, civil regulatory problems of individual states, when there are violations where people don't know whether or not it's civil or criminal, may not know about the existence of the regulation, about holding people responsible for those sorts of circumstances, given our sort of limited authority.

And so, I guess my twofold question would be how ought we to be measuring success in determining whether or not the organizational guidelines actually have an impact in terms of turning corporations away from actual criminal law violations? And is the Sentencing Commission well positioned to make broad ethical pronouncements about what corporate behavior ought to be? Or ought we to be in the position of creating incentives and disincentives for reporting criminal violations to the government, having some sort of a whistle-blower effect?

It just seems to me, and I don't know because

I'm not a businessman, it just seems to me that if I were in that circumstance, however, what would incentivize me to report behavior is if I know that I can get some sort of a downward departure, or I can get some sort of a break. I can get a better plea agreement out of the Department of Justice.

What strikes me that you're very right in terms of wanting to know something from the department in terms of how have companies been able to avoid liability or have been able to obtain, you know, favorable plea agreements by having corporate compliance programs. So those would be sort of my two--

MR. GNAZZO: If I were--from a large corporation, if I were to answer the one part of your question as to the measurement of success, I think you have to measure the success based on the overall nature of the program over a longer period of time.

For example, does the company have a consistent policy with respect to disciplinary action? You can

actually measure success by saying are they disciplining on a regular basis for the same kind of activity, or is it disparate with respect to how they are disciplining or when they are disciplining, depending upon the level of individuals?

So I think--but that's not a snapshot of a year. That's the snapshot of 10 years of disciplinary action after disciplinary action for activities. I hate to bring up a comment that my chairman made at one point in time. But George David said, "When am I going to see no allegations of wrongdoing from you, Pat?" Or from the company. And my answer is, "Not in my lifetime." Or yours. Because human nature being what human nature is.

So in measuring success, you want to see how does the company deal with the issues when they occur. I think the other measurement of success is how open are they to their employees bringing to them issues?

United Technologies has had an open communication program since 1986, when we all agreed to

put in hotlines. We put in an open communication program. To date, we've had 59,000 written dialogues from our employees around the world and 10,000 phone calls or visits to our ombudsman.

JUDGE O'NEILL: Do you keep track of that?

MR. GNAZZO: We certainly do.

JUDGE O'NEILL: And discipline, is that sort of available outside of the corporation?

MR. GNAZZO: Available in what way? We keep it confidential and anonymous, another issue that I raised in a letter that I sent to the commission. But we publicize to our employees the number of communications that we get. We tell management about the issues that are being raised by the employees.

Those 59,000 and 10,000 are not wrongdoing. They're for anything that the employee wants to raise that's business-related, but it sets a tone. And it's a measurement of success that says we're willing to listen to you and respond to you and deal on those issues that

you bring to our attention.

JUDGE O'NEILL: And was this created as a result of the organizational sentencing guidelines?

MR. GNAZZO: No. It was created as a result of the DII, Defense Industry Initiatives. One of the tenets of the Defense Industry Initiatives was that we were to put in hotlines for fraud activity. Our company decided to go one step further with respect to an open communication program for any issue that's business-related.

MR. SEIDMAN: Can I add something to--I agree with Pat that these are issues that you measure over time. I think companies can measure this defensively. What's happening to our fines, penalties? Who's going to jail? Who's not?

Companies are also going on offense figuring out if employees want to work at this company. When people look to their left and they see someone breaking the law, and they look to the right and someone is being

unethical, they become cynical. Companies become less productive and distracted.

And if you look at the quality and safety movements, 50 years ago, we didn't know how to talk about quality and safety, how to precisely measure it. They were values. And people stood at the end of assembly lines and threw away bad products, and that was quality assurance. Or people investigated safety lapses and that was safety.

Today, we talk about quality, once an amorphous value, with incredible precision--TQM and 6 Sigma. We can reduce quality defects in infinitesimal levels because we've designed quality into business processes and have done the same with safety.

And I think where corporations are going is they're going beyond defense. How many fines are we paying? And they're starting to figure out the way they did with quality, what's happening to our business as we invest in these programs? Are employees more engaged?

Are we being more productive? Are we winning in the marketplace?

And I think that over time we should stay tuned. I think we're going to become very precise in these areas that have heretofore been very hard to measure.

JUDGE O'NEILL: And what type of specific guidance can the Sentencing Commission provide at least that can enable you both to measure success and allow that kind of change in corporate behavior? To the extent that we've got any role in that at all?

MR. SEIDMAN: Well, I think the place to do it is in the bonus category and not in the what should be penalized and what not. But more to encourage programs that are more holistic so that people don't split hairs and focus either on just criminal law versus all law or law versus ethics. Even the use of the word "culture," how do we define what a culture is? We're already half-baked, if you will, with some of these amorphous concepts.

So I would encourage us to put pressure on companies and others to figure this out by jumping in with holistic programs, and then we'll see how the next 14 years go.

JUDGE CASTILLO: Any other questions?

MR. JOHNSON: I have one comment. One aspect where I think we'll catch where you're heading, Commissioner O'Neill, is the requirement for regular program evaluation. What will happen is there's a logic to program evaluation. There is a starting point. There's things you're trying to accomplish with known risks. There's cultural aspects. There's things that you need to do. There are benchmarks. There is outcomes. There's all sorts of things.

And I think sort of following what Mr. Seidman had referred to, it's not enough to tell them what measures to follow. But they need to demonstrate that they did a good scan to know what the risks are. They set forth program evaluations. They followed the seven

minimum steps. They used best practice. They did benchmark. They evaluated the program to see if they accomplished those.

And I think internally those will provide the measurements, and it will become a notion of whether or not it was a best practice in terms of evaluation. And very much, as he was indicating, don't say they have to be ethical, per se, but show that they set forth their values and live them. It's an internal matter, and it will be judged on terms of whether or not evaluated properly.

The second thing in terms of success is vocabulary. Vocabulary of good citizenship in these programs has become part of the fabric that it wasn't before, even internationally. I leave for the Slovak Republic on Saturday, and I will talk in terms of the federal sentencing guidelines. Not to say they need to follow--because they don't need to follow in Slovakia--but because it's a good framework, and it's an

endorsed framework by the H&HS, by the Air Force's voluntary disclosure program, and these sorts of things.

It's hard to prove, many cases, the best things. In the evaluation community that I'm part of, it's hard to prove the really good aspects of things. It's the harder numbers, the harder facts you can get that are not the important ones sometimes.

JUDGE CASTILLO: If there are no other questions, I want to thank you all. We will proceed to our second panel.

[Recess.]

JUDGE CASTILLO: Now as I understand it, this panel is going to focus on the advisory group recommendations and the waiver issue that is the issue of when a corporation would have to waive their attorney-client privilege with regard to the implementation of compliance programs in cooperation with the government.

And have you all decided on a particular order?

MS. BUCHANAN: We thought we'd leave that up to you, Judge.

JUDGE CASTILLO: Okay. Well, I'll call on you then, Ms. Buchanan. Always good to see you, and we appreciate you being here and working with the commission. And I'll let you identify yourselves, although you're well known to me.

So why don't you go ahead and state for the record who you are and proceed with your testimony?

MS. BUCHANAN: Thank you, Your Honor.

My name is Mary Beth Buchanan. I'm the United States attorney for the Western District of Pennsylvania and the chair of the Attorney General's Advisory Committee and a member of the ad hoc advisory committee appointed by this commission more than two years ago.

I would like to thank you all for the invitation to invite me to appear before you today and to speak about these important issues surrounding the organizational sanctions and specifically the federal

organizational sentencing guidelines.

And I'd like to commend the commission for having convened the ad hoc advisory group and specifically for permitting me to be a part of it. The Department of Justice believes that the work product that was produced by the ad hoc advisory committee was exemplary. And in almost all aspects, the Department of Justice concurs in the recommendations that were made by the advisory group.

Over the past few years, it has been an especially important time for the organizational sentencing guidelines. During this time, we have seen in very stark terms and on a grand scale the costs to many identifiable victims and to the economy at large.

The crisis that we have seen in corporate America has truly been devastating to so many people--to employees, to shareholders, to really all, large and small. It has undermined public confidence in our financial markets and for a significant time dramatically

reduced consumer confidence.

The consequences of corporate and other organizational crime are why we believe that the advent of the organizational sentencing guidelines some 10 years ago was so significant. We believe that the prevention, detection, and prompt disclosure of organizational offenses by organizations themselves can dramatically reduce criminal behavior.

The organizational guidelines and the complementary policies pioneered by the Antitrust Division and other components of the Department of Justice recognize this fundamental principle of organizational behavior. And we believe that the organizational sentencing guidelines have been a dramatic step forward in promoting corporate compliance by organizations.

We believe that the sentencing guidelines for organizations have not only been a real innovation, but a great success in providing incentives for organizations

to develop and implement these programs. The proposed amendments will communicate to the corporate community with greater emphasis and clarity the federal policy of encouraging self-policing and self-reporting if violations are committed.

Despite our general support for these amendments, we do have concerns over a few specific provisions, and I recognize that the last panel specifically addressed the issue of removing the preclusion for receiving a benefit if the wrongdoing was committed by high-level officials. So I won't spend a lot of time on that issue, but I would like to just make a few points.

Prior to the amendment, there was a preclusion or--prior to the proposed amendment, there was a preclusion for corporations to receive a benefit for an effective compliance program if the wrongdoing was committed by a high-level official. The proposed amendment would remove that preclusion for both small

organizations and large organizations and would create simply a rebuttable presumption.

We don't believe that this would be effective and, in fact, is contrary to what the ad hoc advisory committee found. The committee found that many of the violations that were committed by small corporations were committed by corporations that did not have an effective compliance program. And the committee looked at why that may have existed, and we found that many of these small organizations probably need more effort in education to develop effective programs.

But most of the conduct that was committed by the small corporations was committed by high-level employees. And the whole purpose of these amendments, we believe, is to promote and encourage more compliance from the top down. And to remove this preclusion really sends the wrong message because it is important that for a program to be effective, it must be effective from the top down.

And it would be inconsistent to reward a corporation, particularly when the criminal conduct would be committed by a high-level official. We believe that the ad hoc advisory group did not specifically make this recommendation. The advisory group discussed the problem and suggested that the Sentencing Commission should work with small corporations and try to educate them to develop more effective programs.

Now the second area that the department feels should be enhanced is in the area of waiver of the attorney-client privilege. There has been a tremendous amount of debate, both within the advisory group and beyond, about the circumstances under which organizations should waive or should be required to waive the attorney-client privilege. And I think that the government's position on this point has been very consistent.

We believe that a corporation is required to cooperate with the government in order to receive the

benefit of cooperation. And that cooperation is very simple. Tell the government who committed the offense and what the criminal conduct amounted to, to enable the government to investigate and prosecute that offense.

And if a corporation is able to do that without waiving any privileges whatsoever, then a corporation can still receive the benefit of the reduction for cooperation. However, in some circumstances, some type of waiver is going to be necessary. The advisory group believed that some change in the sentencing guidelines would be necessary to advise the public that waiver is not a prerequisite to receiving the cooperation. But in some circumstances, waiver may be necessary.

The Department of Justice believes that to simply say that waiver is not a prerequisite but in some circumstances may be required is really not sufficient. That if we're going to change the guidelines at all, we should change them to make it clear as to what is required. And that is why the proposed language of the

department is, to be thorough, the cooperation should include the disclosure of all pertinent information known by the organization.

Thorough cooperation may require the organization to waive its work product protection and, in a lesser number of instances, its attorney-client privilege, though waiver is not necessarily a prerequisite to a reduction in culpability score. Substantial weight should be given to the government's evaluation of the extent of the organization's cooperation, particularly where the extent and value of the cooperation are difficult to ascertain.

The proposed language by the government is not necessarily inconsistent with the recommendations made by the advisory committee. It really does two new things. It elaborates on what is meant by cooperation, which is the first sentence, to say that cooperation should include the disclosure of all pertinent information.

And the second thing that it does is it says

that the government's opinion should be given great weight. And I think that the district courts are already doing this. But to make a change to the sentencing guidelines and to not include this language, we believe, would not be consistent with the practice that the courts are already undertaking.

We believe that the swift and certain punishment of financial and other organizational crimes is critical to our country and, in particular, to our country's economy. We believe that the mandatory organizational guidelines have brought a level of certainty to organizational sanctions that simply were not present before the guidelines.

This certainty has, in turn, brought more just punishment, led to greater restitution for victims, and fostered more ethical behavior in corporate America. The organizational sentencing guidelines have helped forge a new ethic and commitment to compliance. Recent events have shown that there is still room for improvement, and

that is why we believe that some changes are necessary to the organizational guidelines.

One of the things that this commission asked the ad hoc advisory committee to do was to pay special attention to what we could do to make sure that compliance programs are more effective. And we believe that the recommendations that have been made by the advisory committee, with the minor revisions that the department has included, will achieve that goal.

Thank you.

JUDGE CASTILLO: Thank you for your testimony, and thank you for your great service on our advisory group.

Let's proceed with Ms. Madrid.

MS. MADRID: Thank you.

Good morning, Judge Castillo and other members of the commission. I also would like to thank you for the opportunity to present comments today.

I am Linda Madrid, and I serve as the managing

director, general counsel, and corporate secretary for CarrAmerica Realty Corporation here in Washington, D.C. We are a real estate investment trust and are publicly traded on the New York Stock Exchange.

I am pleased to appear today on behalf of the nearly 16,000 members of the Association of Corporate Counsel (ACC), formerly known as the American Corporate Counsel Association, and the more than 7,000 organizational entities they represent in 47 countries. The comments I offer today are those of ACC and not necessarily those of my employer, CarrAmerica.

Because outside counsel are not eligible for membership in the Association of Corporate Counsel, we can remain focused solely on the roles and responsibilities of in-house lawyers and thus understand the issues and concerns facing in-house counsel better than any other organization. As you know, in-house counsel are key players in the development, promotion, maintenance, and enforcement as well as the defense of

in-house compliance efforts at corporations.

Working with senior executives and line managers alike, in-house lawyers are both pioneers and day laborers in the company's compliance initiatives. Much of the impact of this commission's work in developing compliance standards is borne directly by in-house lawyers. Therefore, their thoughts and responses to this commission's original guidelines and, most particularly, to the proposed amendments we believe will provide practical instruction to your efforts.

At the request of your staff, we would like to address two points from our written submission in greater detail for you today. First, let me direct your attention to our concerns regarding the issue of expanding the definition of an effective compliance program to cover violations of law beyond criminal conduct. In part, I may be echoing the comments of Mr. Gnazzo, who was on the prior panel. I apologize to that extent, but maybe it should be underscored.

sj

To sanction companies with criminal penalties for the failure to have compliance programs covering noncriminal, possibly regulatory or administrative violations, which are not criminal in nature, is simply wrong. And the ACC believes that taking such action is a dangerous move towards eliminating any meaningful gradation of punishment that is consistent and appropriate with the underlying acts.

In addition, while the proposed guidelines note that the organization size may be a factor in considering meeting compliance expectations, the guidelines are too broad-based and far-reaching. The fact is that the vast majority of organizations subject to these guidelines do not have large legal departments or complex compliance programs in place.

The fact is that, by definition, most companies are not members of the Fortune 500. The fact is that most companies are not involved in high-risk or highly regulated industries that generally mandate development

and maintenance of extensive compliance systems. Quite simply, the fact is that the legal needs of most companies are just not as complex and risky.

Commensurate with size and risk, most businesses have generally developed simple, yet effective compliance systems designed to address criminal behavior in high-risk business lines. In addition, often in-house counsel are working hard side by side with employees, officers, and directors to provide corporate clients with sound legal advice and practical, often daily direction to help ensure the organization meets its legal obligations.

As I said previously, we do not believe that criminally sanctioning companies through sentencing guidelines take into consideration compliance programs relating to noncriminal acts is appropriate. This is especially true if the company did make legitimate and effective efforts to prevent problems from arising in the underlying matter, that is, the criminal activity.

But the advisory group's proposal is especially unfair if we acknowledge that the majority of companies subject to these rules are not likely to have the far-reaching compliance programs the guidelines require so as to receive credit for good faith efforts. There is just not enough time, money, or focus to contemplate training and detailed compliance systems to address every violation of law that an organization could imagine.

To admit this fact is not a cop-out by organizations who do not want to live up to the responsibility of good corporate citizenship. It is just a fact. We believe that resource and attention of both businesses and prosecutors are better spent in areas of greater risk. Accordingly, we request that the commission reject any expanded definition of an effective compliance program as necessarily covering violations of law beyond criminal conduct.

Second, we are concerned about the original guidelines and the proposed amendments' treatment of the

attorney-client privilege as afforded to criminal defendants. We appreciate that the advisory group carefully considered the concerns that have been voiced since the original passage of the guidelines in 1991. The advisory group acknowledges that corporate clients, like individual clients who are criminally charged, consult lawyers in part because the confidentiality of the relationship allows the client to present difficult issues for consideration without worry that the request for counseling will be used against them.

As you are aware, the proposed draft suggests that the waiver of privilege should not be required in order for a company to earn merit points for cooperation with the government's investigation. However, the proposed amendments fall short because they allow the government to demand waiver if the government believes that waiver is necessary to make its case.

The idea that the government gets to make the call is a bit hard to understand. Indeed, we believe

it's hard to imagine a circumstance in which the prosecutors would rather make their case--not make their case from an admission that was made by a defendant during a conversation with his lawyer.

Furthermore, the confidential information, once disclosed to a third party, cannot be returned to the sanctity of the attorney-client relationship. And this has been recently reconfirmed by the California Court of Appeals in the McKesson case. Information divulged to the government, even if the government asserts that it wishes to protect it from further dissemination, is now fodder for every plaintiff's counsel, business competitor, and newspaper in the country. As is usually the case when the lawyer and client's discussions are divulged, these communications will be consumed in highly damaging and often repeated sound bites that may be taken out of context and out of intention.

Previously, it was noted that there could be some circumstances of some waiver that may be necessary.

Under the current law, there is no some waiver under most state laws. You can't be a little waived. You are waived, period.

The benefits of the privilege should be a criminal client's expectation and right. The privilege and attendant work product protections to an attorney's thoughts do not protect facts from the government's investigation of alleged wrongdoing, nor do they prevent clients from disclosing in a cooperative manner all relevant information about the client's activities in question. The only information that is shielded from the government by privilege or work product doctrines is information that reflects the thoughts and advice of attorneys to their clients.

We would ask the commission to give careful consideration to the benefits that privilege offers to our society as well as to our clients. Let there be no mistake. We all win when clients are encouraged, not discouraged, to talk to lawyers about what they can,

should, and must do. It is the privilege that creates the comfort in clients in knowing that seeking legal counsel is good and rewarded behavior.

When the process of receiving advice, however, is used against a client, it sends a message to a client that the client would have been better off having never consulted counsel at all. Ultimately, the client is irrevocably harmed, and the trust between a lawyer and client is fundamentally destroyed when the privilege becomes nothing more than a bargaining chip.

Quite simply, either the privilege exists for corporate defendants or it doesn't. A lawyer's involvement in providing legal advice must be accompanied by the expectation that the client can bring anything of concern to the table. If not, the lawyer will be identified as the person to exclude from all meetings where sensitive, cutting-edge, or difficult issues will be discussed. It is the belief of ACC's member clients, their boards, and their stakeholders that we need more

lawyers in strategic and sensitive meetings and that we need more clients seeking counsel.

Our experience on the front lines of corporate America leads us to the belief that if the attorney-client privilege is seconded to the needs of prosecutors, then the attorney-client relationship will have been undermined in a manner that is both counterproductive to the purpose and intent of this commission's work. And we believe it will be a disservice to the protection of the public and the clients.

To avoid this result, we request that the commission adopt the reforms suggested by the advisory group to change the guideline requirement that the privilege be waived for cooperation to be credited. However, we also request that the commission not include language which would allow the government to request a waiver when they feel they need the information to make their case.

Thank you for the opportunity to make these comments.

JUDGE CASTILLO: Thank you, Ms. Madrid.

We'll proceed to Mr. Wallance. Let me also thank you ahead of time for your service on our advisory group, and I'll let you identify yourself for the record.

MR. WALLANCE: Thank you.

My name is Gregory Wallance. I am a partner at Kaye Scholer, a New York City based law firm. I served for five years as an assistant United States attorney in the Eastern District of New York, and my own practice currently involves representation in white collar cases of individuals in corporations, internal investigations, and corporate compliance.

And I would like to reciprocate and thank the commission and its staff for the opportunity to serve on the advisory group and, in particular, to serve with a very distinguished group of experts and professionals, several of whom are here today.

I would also ask for the indulgence to submit my written testimony separately. Certain aspects I'm not going to get into today, are still being looked at by the advisory group members, in part because I'm a relatively late addition to the panel here.

JUDGE CASTILLO: I think all the commissioners would agree to that.

MR. WALLANCE: I would like, however, to address two issues. First, briefly, the violations of law issue, even though I recognize it was addressed by an earlier panel. And then, second, the waiver issue.

As to violations of law, the commission's mandate from Congress under Section 3553 is to ensure that appropriate sentences reflect, among other things, an adequate deterrence to criminal conduct. So the issue presented is whether guidelines that offer fine leniency to organizations whose compliance programs deter all violations of law, as opposed to those programs who only deter criminal violations, will better achieve that

objective. I believe the answer is self-evident, and there are three points I want to make.

First, a compliance program that only seeks to deter violations of criminal law while offering its employees no guidance or incentives in complying with other laws and regulations, in my view, is on its face deficient. I know no such program. Every compliance program with which I am familiar seeks to deter and prevent all violations of law, regardless of the penalty.

Second, many crimes in the white collar organizational context are distinguishable from noncriminal violations only by the state of mind with which the employee or officer acted. So to be effective in deterring criminal violations, a compliance program must deter the illegal act, regardless of the state of mind with which it was committed. The point is that illegal acts performed with noncriminal intent, unless deterred, run a serious risk of progressing into illegal acts performed with criminal intent.

sj

And the third point is that the existing Chapter 8 guidelines, in fact, require companies to deter noncriminal conduct to be eligible for fine leniency. The existing commentary states that an organization's failure to incorporate and follow applicable industry practice or--and this is the key point--the standards called for by any applicable government regulation weighs against defining of an effective program to prevent and detect violations of law.

The reference to applicable government regulation is unmistakable. An organization's compliance program will be judged by whether it had complied with regulations that, by definition, carry no criminal penalties. This commentary has never been challenged as either outside the scope of the commission's authority or as impracticable or undesirable from a policy point of view.

In short, deterring and preventing violations of criminal law cannot be accomplished with half measures.

sj

If an organization seeks fine leniency, it must be prepared to demonstrate that it attempted to prevent all violations of law.

Now on the subject of waiver, as was evident in our report, the advisory group struggled with the issue of privilege waivers. There is a well-known divergence of views between the Department of Justice and the defense bar. Our recommendation offered a compromise. The compromise was the Application Note 12 to the existing Section 8C2.5--that is some revised language for that application note--and a new application note to existing Section 8C4.1.

The recommendation was the product of an 18-month dialogue between the Department of Justice representative on the advisory group and the group's white collar defense attorneys, several of whom had served in senior positions at the Department of Justice. We viewed the compromise recommendation not as the end of the debate. Indeed, we envision the debate continuing.

But we did view it as a positive step forward.

We were assured that the recommendation had been approved by the Department of Justice only after the recommendation was submitted as part of our report without dissent from the Department of Justice's representative. The Department of Justice then opposed the recommendation.

Their opposition comes in the form as to first on the issue of cooperation, 8C2.5. The Department of Justice proposes to add a sentence giving substantial weight to the government's evaluation of the defendant's cooperation and whether waiver is necessary. And the Department of Justice, on the issue of substantial assistance, opposes our recommended application note outright.

I believe that the department's position is short-sighted, it's unnecessary, and that it's ultimately contrary to their own law enforcement objectives. Overall, the department should be encouraging the kind of

dialogue that our group began. It should be working with the defense bar to further identify areas of common ground, not widening the gap. Specifically, on the issue of cooperation, the advisory group's recommendation left the Department of Justice free to argue to a court that an organization had not cooperated because that organization had failed to waive privilege.

The Department of Justice was also free to argue that its evaluation of the defendant's cooperation should be given substantial weight. But there is no need for this commission to in effect create for the Department of Justice a presumption of good judgment.

As to substantial assistance, the Department of Justice's opposition to the new application note is likewise unnecessary. Nothing in that application note changes the department's exercise of discretion whether to file a downward departure motion based on substantial assistance or in any way expands whatever remedies may be available to a defendant as a result of the failure to

file such a motion.

The department has a strong interest in encouraging organizations to adopt more rigorous compliance standards such as those that have been advocated and identified in our report. But to do that, it must reassure organizations that their compliance efforts will not be used against them unfairly by the department or in third party litigation.

Ultimately, when it comes to the issue of disclosure or waiver of the attorney-client privilege and disclosure of possible wrongdoing, this is only going to be successful if it's built on a foundation of trust between the department and the white collar defense attorneys who must zealously represent their client's interests. The department's proposal, following a year and a half of our efforts to find common ground with the representative on the advisory group, unfortunately sends the wrong message.

And I want to add that I spoke with the chair of

the advisory committee, Todd Jones, who advised me to relay here today that the position presented by the Department of Justice on the waiver issue is, in fact, not consistent with our advisory recommendation and does not reflect the view of the advisory group.

Where do we go from here? First, I urge the commission to reject the department's proposal and adopt the advisory group's recommendation. Second, recognizing that this should only be the beginning of the discussion, our report recommended that the commission, through its unique status and powers as an independent judicial agency within the judiciary, should advance the debate.

Our report discusses a number of proposals, including--without attempting to give it undue weight, but it's worth mentioning here--legislation before Congress, Section 4 of the Securities Fraud Deterrence and Investor Restitution Act. That provision, if enacted, would create a selective waiver doctrine as to documents or written information produced to the SEC,

which advocates its adoption.

Significantly, the SEC sought the adoption of this provision because it wisely recognized that it has a common interest with defense counsel in assuring organizations that their compliance programs and cooperation with law enforcement will not impale these organizations on the horn of what we in our report called the litigation dilemma.

So I appreciate the opportunity to come here today and address the issues and available, as are my colleagues, to answer any questions that you may have.

Thank you.

JUDGE CASTILLO: We'll open it up, and let me just say one thing before I recognize any commissioners.

I think it was interesting the last panel has indicated that the organizational sentencing guidelines has had success. I was, frankly, surprised when the Sarbanes-Oxley Act indicated, I thought, quite gratuitously that the organizational sentencing

guidelines were "obsolete and outdated."

We, as a commission--and I don't take credit for this. Judge Murphy, as our chair, set up an advisory committee of which we've seen two members, and we've seen other members in the previous panel, were on a course to improving the organizational sentencing guidelines. And we appreciate all the effort that has gone into the improvement, which I emphasize again was pre-Enron and pre Sarbanes-Oxley. It's one of the times that the Sentencing Commission should be proud to be way ahead of the curve.

And with that, I recognize Commissioner Horowitz.

JUDGE HOROWITZ: I have several questions. But piggybacking first off of--on the waiver issue. But before getting there, I want to pick up on what Judge Castillo just said and where we, I think, left off with the last panel, which is whether the guidelines should be looking to incentivize companies and how that should

happen and whether they've been successful.

And I noted, Ms. Buchanan, in your statement you talked about how important it was to have companies--to give companies incentives to develop compliance programs, in part to self-police and in part to self-report. And I ask any of the members of the panel to respond to this.

But my sense is that part of the rationale for the original guidelines--organizational guidelines--and part of the rationale going forward is the notion that at sentencing, because that's what we're talking about here, a judge looking at two companies--one that doesn't have a program and never had a program, one that did have a program that was effective but failed in this circumstance--that the judge should be--that the company should be rewarded in some respects, even though the program failed for trying.

And in part, that's because companies that do develop programs and self-police are less likely to commit wrongdoing, and if there is wrongdoing ongoing,

they're likely to find it out sooner and, therefore, mitigate the harm that results from the violations. And that that's the theory for incentivizing companies. And in your expertise, prosecutor defense side, what your thoughts are on why we have the guidelines, the organizational guidelines, and the language about effective compliance programs?

MR. WALLANCE: Well, I would first--if I could just hark back to your remarks. I think that the guidelines have been a spectacular success. I think that the commission deserves enormous credit for, in effect, creating the field of corporate compliance and. above all, for focusing the attention of corporate America on the need for compliance.

I think our recommendation is built on the last 10 years of experience. I think the commission is also to be commended for having impaneled our group. And I think we actually go well beyond Sarbanes-Oxley in the following sense. That what we've attempted to do is pull

together, without being too detailed and too prescriptive and leaving companies enough flexibility to make their own choices, but to pull together all of the essential principles, and they're all interrelated principles, that really govern or should govern corporate compliance and put them in one document.

And I do think that's a contribution that both the guidelines made 10 years ago and, I believe, our report makes in terms of updating those and upgrading them, based on experience, that the legislation that was enacted in the last year or two doesn't contribute.

As to your specific point about why we do these, it seems to me, and I'll leave it at this, that the commission made the wise choice that the time for a company to begin implementing a compliance program is not after some horrible event has occurred that has devastated the company--its shareholders, indeed, the individual lives of many of its officers and employees--but to start before that happens.

It's well within the legitimate exercise of sentencing policy and choices, and I'll leave it at that and defer to my colleagues.

MS. BUCHANAN: The guidelines have clearly been effective. One of the things that we've been focusing on this morning, I think, are those corporations that do commit violations and that get prosecuted. But if a corporation has an effective program, they may not be prosecuted at all, and it's very difficult for us to quantify how many such corporations have committed violations but have not been prosecuted because of their effective programs.

JUDGE O'NEILL: If I may just jump in there? Do you have--does the department have any opposition to making that declination information available so that corporations can have some sort of an idea that, in fact, having a compliance program actually helps?

MS. BUCHANAN: I would have to take that back to the department and give you a response. At this point,

I'm not prepared or in a position to make a commitment on behalf of the department.

But I do think that in most significant investigations, a corporation knows, you know, why it is that they're not being prosecuted. So it is that individual corporation that recognizes that it's received the benefit.

But you make a very good point that if other corporations knew of this information, then they would clearly see the incentive. And so, by improving the organizational guidelines as recommended by the advisory committee, we think that we will be helping corporations to improve their compliance programs and to, one, prevent themselves from being prosecuted in the first place and, second, to receive the benefit for having those effective programs.

JUDGE HOROWITZ: I'll defer to others first.

JUDGE CASTILLO: Okay. Commissioner Steer?

JUDGE HOROWITZ: I'm sorry. Did Ms. Madrid--

JUDGE CASTILLO: Go ahead, Ms. Madrid.

MS. MADRID: Thank you.

I would agree that I believe the guidelines have provided a solid and prudent framework from which to work. I think that I would just underscore that we believe there is some caution that should be taken as you consider further expansion and possible refinements that may be necessary as a result of implementation of the guidelines.

JUDGE CASTILLO: Commissioner Steer?

JUDGE STEER: I'd like to return to the waiver issue and do this with some trepidation because of a number of reasons. But I must say as I listen to what each of you have to say, it seems to me that it's a lot about finding the right words and the tone. There's more commonality here, that I'm hearing at least, than may be evident to some.

First, let me say I am at best mildly interested, if uninterested, in whether or not there's

developed some disagreement between the advisory committee and the department. These issues, you know, they have to be discussed, and there's no set final answer.

But let me ask you about this. I hear three elements that there seems to be an essential agreement on between what all of you are saying. One, waiver of the work product, doctrine, and the attorney-client privilege sometimes is not a prerequisite in all cases for getting a reduction in culpability score for cooperation. Two, the essence of what this calls for is a demonstration of cooperation, providing necessary information to the government to assist it in its investigation. Three, it only makes natural sense that if the judge is in the position of making that determination, he or she will want to defer to what the government has to say about the value of that cooperation.

All three of those things seems to me to make good sense, and it's a matter of finding the right words

to express the ideas. Am I wrong about this?

MS. BUCHANAN: That's correct, Commissioner Steer. And I'd like to begin by saying that with my participation on the advisory committee, I didn't believe that I made an assurance that the Department of Justice would accept this position. I hoped that they would.

You have to remember that we were coming from a position where the Department of Justice believed that no change should be made in the guidelines and that they were fine where they were. And there were many members of the advisory committee and the defense bar who were submitting comments to us to say that we should make an explicit statement that waiver is not a prerequisite. So I was working in good faith with the advisory committee to come up with a compromise that would address the concerns of the advisory committee and address the concerns of the department.

When the department reviewed the report of the advisory committee and the proposed amendments to this

commission, they wanted to make an improvement. They're not necessarily disagreeing with what the advisory committee said. They're simply refining it. And they believe--we believe that if we're going to make any change, recommend any change to the guidelines, that it ought to be the most clear change as possible so that it is absolutely clear what is required and that weight should be given to the government, which, as I said earlier, the courts are already doing.

And to address a point that was made earlier by one of the panelists, we also have to remember that the issue here is cooperation. It's whether the organization has disclosed all pertinent information sufficient for law enforcement personnel to identify the nature and extent of the offense and the individuals responsible.

This isn't something that a corporation has to do. But if a corporation wants to receive the benefit and the three-level reduction, they must cooperate. And they can't cooperate half way. They have to cooperate

thoroughly.

JUDGE CASTILLO: Ms. Buchanan, let me ask you a question about this waiver issue, and it sounds to me that our advisory committee had some robust conversations about this. And let me just say for the public out there, our advisory committee did give notice to the general public, had hearings. And so, this comes as no big surprise to anyone that was following this.

But it seems like this language that was developed from the advisory committee is akin to the language, I guess, of the Missouri Compromise. It's very careful. So we're hesitant to get involved in tinkering. What it says in the compromise language, it says, "However, in some circumstances," and then it goes on, "a waiver might be necessary." The Department of Justice now wants to change it to, "However, in other circumstances." So it's the difference between "some" and "other."

And my question would be, does the Department of

Justice recognize that whether it's "some" or "other," these situations where a company is being asked to waive its attorney-client privilege and get into all kinds of litigation dilemmas, does the department recognize that those other or some circumstances are going to be limited, are going to be the exception rather than the rule? Or does the Department of Justice take some other position?

MS. BUCHANAN: I think that the department's position is fairly set forth in the Thompson memorandum, which states that if a corporation can provide information to the government sufficient to enable it to investigate who committed the offense and what was committed, then waiver is not necessary.

And you're correct, Judge, that we are all saying the same thing, but we're just saying it in a different way. And we think--

JUDGE CASTILLO: If you had to predict, would you say that given your extensive experience in

prosecuting cases, that 80 to 85, maybe 90 percent of the time a company should be able to provide that information allowing the Department of Justice to prosecute without a waiver? Or are you hesitant to make that prediction?

MS. BUCHANAN: I wouldn't want to try to quantify it in those terms. But if a corporation can do it without waiving any of the privileges, then certainly the government would not require a waiver of either the attorney-client privilege or the work product protections.

JUDGE CASTILLO: Okay. Thank you.

Yes. Commissioner O'Neill?

JUDGE O'NEILL: Ms. Buchanan, do you think--sort of two parts here. When a judge is deciding on whether or not and what the ultimate sentence is going to be, do you think at the end of the day that a judge ought to be able to give a company that's ferreted out bad behavior through some sort of a whistle-blower--that has a compliance program in effect, that's ferreted out the bad

behavior--should, in those circumstances, the judge be able to give the corporation a break for having uncovered at an early date the bad behavior?

And should it make any difference whether or not the person who engaged in that bad behavior happened to have been the president or the CEO of the corporation?

Say, for example, I'm just, you know, a low-level in-house counsel, a lawyer. And I discover that there's bad stuff going on, and I bring it to somebody else's attention. And ultimately, that's sort of turned over to corporation counsel, and agreement is made with other executives of the corporation to make that information known. And it happens to involve the CEO of the corporation.

Even if it's a high-level operator within the corporation, ought not still the corporation be incentivized to make sure that that behavior is both disclosed and that the corporation itself receives a break for that disclosure?

MS. BUCHANAN: That's an excellent question, and I think that this is one that we really wrestled with strongly. The issue here is whether the corporation had an effective program. And if the program was effective, then the violation may not have occurred in the first place, or the high-level official wouldn't have been able to circumvent the program. So it really isn't going to help promote effective compliance to reward that person if they're a high-level official.

On the other hand, in that situation of the corporation that truly did everything that they could, and they did detect the violation. They reported it early. That corporation is most likely not going to get prosecuted anyway. So in those situations where you have one bad apple at the top who has done something to violate the law where the corporation could not have done anything to prevent that, then that's the type of situation where it may not be appropriate to prosecute the corporation anyway.

JUDGE O'NEILL: Because I mean, isn't part of really having an effective compliance program--we recognize generally that no program is perfect in terms of its ability to deter misconduct. So isn't really part of having an effective compliance program also incentivizing companies to disclose when mistakes have been made?

Especially if you're talking about, as Mr. Gnazzo from United Technologies pointed out, you've got 200,000 employees scattered across 50 nations throughout the world, operating in all 50 states and the District of Columbia. When you've got violations that occur, isn't it better and isn't it really part of the corporate requirement of corporate compliance to make sure that disclosure is made fairly early? Isn't that part of what we're incentivizing, effectively?

MS. BUCHANAN: Absolutely. And I think that the most difficult situation is when the criminal conduct is committed by the high-level official because we have two

competing principles here. One is to incentivize corporate compliance, and the other is to provide that compliance and that structure from the top down.

And I think that you have to make a decision. You can't have it both ways. And that's why we believe that the corporation should not receive a benefit when you have the wrongdoing committed by the high-level official. And that's, of course, in a situation where we prosecute a corporation.

JUDGE O'NEILL: Is it possible to draw a line between privately held companies and public corporations? Because, obviously, in a privately held company, chances are the people who are at the top are going to be really the owners of a corporation. Whereas, in terms of a publicly traded corporation, the people who are really getting screwed are the stockholders ultimately and may not, in any way and any shape or form, be part of the misconduct that occurs. Is it reasonable to draw a distinction there perhaps?

MS. BUCHANAN: I agree with you. I think that in a small corporation, the person at the top who is potentially committing the violation is also the person that probably holds the greatest amount of stock in the corporation. And when you have a large corporation, it does make it more difficult to identify that particular violation. But again, in that situation, I think that if it is completely unfair to penalize the employees, the stockholders, and other potential stockholders that that corporation may not be prosecuted anyway.

JUDGE CASTILLO: Commissioner Horowitz?

JUDGE HOROWITZ: Turning to the waiver question. I have actually several questions about it. One place that I wanted to start, though, Ms. Buchanan, is at least as early as I believe it was last fall, there was some published reports about how the department was working on a policy, or a new policy or a new guidance in the field about waiver and requesting waiver of the privilege.

I was curious as to whether that policy is going

to be issued, is about to be issued, is not going to be issued? If you can give any update?

MS. BUCHANAN: Sure. In November of 2003, the Department of Justice did produce a document in the United States Attorneys Bulletin, which is available online and which was discussed at the recent white collar crime meeting in Miami last week. The guidance that was put out by the Department of Justice was essentially question and answer with James Comey, which was prepared, you know, at the time that he was the United States attorney for the Southern District, and now the deputy attorney general.

So we believe that this guidance that is contained in the question and answer does really address many of the issues that were brought to the attention of the ad hoc advisory committee. And whether further guidance is going to come out, that's still under consideration. But we believe that this was a very important first step into setting forth what we believe

is necessary for assistant U.S. attorneys to know in terms of when waiver may be required.

JUDGE HOROWITZ: But no policy in place similar to--I know you've spoken about the policy in your office where you personally have to approve waivers of the privilege or request for waivers. There's no policy, though, across the board at the U.S. attorney's offices about who needs to approve and what's--

MS. BUCHANAN: That's correct. Many United States attorneys, including myself, have adopted policies within our own offices that waiver of the attorney-client privilege or work product protection cannot be requested without the approval of the United States attorney. And that's something that many of the United States attorneys have been discussing, but it has not been memorialized into any formal policy by the department.

JUDGE HOROWITZ: Can I just--Mr. Wallance. In this discussion about how often realistically we need to waive, what's really practically speaking at issue here,

my experience--and I'm curious what your experience has been as both in the prosecution and the defense side--is that a competent and intelligent prosecutor, combined with a competent and intelligent defense attorney, can relay facts back and forth without waiving the privilege in almost every circumstance.

And I'm curious as to whether you could provide any examples where waivers were necessary in particular circumstances or where waivers were requested where unnecessary?

MR. WALLANCE: I think the examples I could provide would unfortunately violate the privilege. It's hard--

JUDGE HOROWITZ: That's always the problem.

MR. WALLANCE: But I could agree with you. I do think--and it's not to minimize the importance of the issue, but to put it in perspective that it is possible in most cases to provide the information without waiving privilege. That was the point that Mr. Comey made when

he testified before our advisory group in our hearing I think it was November 2002. It was essentially the point I think he repeated. It's an important point.

But I do think that that's what we were trying to capture in the proposed language was that it isn't required or you can cooperate without waiving, except in limited circumstances. And I do think, Commissioner Castillo, that language is important. And I'm mindful of your reference to the Missouri Compromise, and we all know how that turned out.

But I do think that here, it goes beyond language. There are some substantive issues at stake, and it's not just the tension between the defense bar and the Department of Justice. But our language was really intended to reflect the balance between most of the time it isn't required. There may be some times it is.

And to defer the decision, particularly on cooperation, to the judge, who I think is equipped to make those kinds of decisions, and particularly that last

sentence that was added to the Application Note 12 that we had proposed, would appear to be a direct or indirect signal, if not more than that, that the judge should have less discretion, and it should defer to the Department of Justice.

Nobody disputes that the Department of Justice's opinion is entitled to substantial weight. But enshrining it as a presumption I think sends the wrong message and distorts what I think ultimately should be the judge's final decision of whether cooperation is adequate or not, particularly in the context of the waiver of privilege.

JUDGE CASTILLO: Judge Hinojosa?

JUDGE HINOJOSA: With regards to the waiver, I think there's two different issues at play here. One is waiver with regards to a cooperation deduction of points under the guidelines. The other one is waiver with regards to a departure from the guidelines based on substantial assistance.

sj

My impression is that those may be different from the department's standpoint. My impression also is that cooperation is basically acceptance of responsibility for an individual defendant who has had criminal charges brought against him. And substantial assistance is basically the same. It's cooperation and assistance with regards to prosecuting someone else or bringing forward information that's beneficial to the government.

My impression through the years as a judge has been that when it comes to individual defendants, it does not seem to be a factor for the Justice Department, either in acceptance of responsibility matters or with regards to substantial assistance, to require an individual defendant to waive their attorney-client privilege. It's never been brought to my attention that that is a factor that the Justice Department considers important.

So my question to Ms. Buchanan is why is that

different between an individual defendant as opposed to a corporate defendant?

MS. BUCHANAN: Well, the difference, Judge, is that while the three-point reduction for cooperation is probably more akin to the two- or three-level reduction for acceptance of responsibility, it's not exactly the same. It is different. It's not the same.

JUDGE HINOJOSA: It's slightly different, but not too much.

MS. BUCHANAN: Well, it's not just acceptance of responsibility, it's cooperation. And that's why in those circumstances where waiver is the only way that a corporation can cooperate--for example, if the corporation is relying upon advice of counsel or where the witnesses who would have the information, because of their own liability, will not provide that information--in that type of a situation, the only way to provide that information may be through waiver of privileges.

JUDGE HINOJOSA: And on substantial assistance, which requires that the corporation make a case or provide information at least to a case against another organization and/or an individual not directly affiliated with the organization, how does that become different from substantial assistance on the part of the defendant?

MS. BUCHANAN: Well, substantial assistance is more than cooperation. It's assisting--

JUDGE HINOJOSA: Right. It's strictly up to you as to whether you want to file the motion.

MS. BUCHANAN: And in fact, very few corporations ever receive these additional points for substantial assistance because they rarely do go beyond simply cooperating.

And I would like to point out that I was so concerned about staying within my time period that I didn't mention our position with respect to the substantial assistance. Because we believe that the guidelines should not be changed with respect to

substantial assistance, particularly because, as you point out, Judge, it really is the government's motion.

And we believe that we would create unnecessary litigation if we were to include any additional language on that point.

JUDGE HOROWITZ: Just to correct one thing. I think on the antitrust context, companies regularly receive downward departures for substantial assistance. I believe that's correct?

MS. BUCHANAN: That's correct.

JUDGE CASTILLO: Commissioner Rhodes, did you have your hand up?

JUDGE RHODES: I did.

JUDGE CASTILLO: Okay.

JUDGE RHODES: On the waiver issue again, in choosing what the language should be, I think it's important to focus on what the purpose of the language is. And I heard Ms. Madrid and Mr. Wallance speak in terms of the waiver in connection with litigation dilemma

and the idea that if you do have to waive, then the corporation is faced with litigation dilemma. That is, they could be sued by third parties.

But it seems to me that whether there is some language, no language, or whatever the language is, the language cannot solve the litigation dilemma. The litigation dilemma is there, and it's just a function of the law of attorney-client privilege. And this language, it seems to me, is directed at something different. It's directed at trying to advise the parties and the court of when cooperation is thorough.

And the application note says what cooperation is, when it's required, what it takes to be thorough. And the department's position is thorough cooperation will sometimes require a waiver because we won't get thorough information without that.

And so, if cooperation, rather than the litigation dilemma, is the focus and the purpose of the language, then why is it wrong--then why is the

department's proposal, the most recent proposal contained in the written testimony, page 11, which would move the attorney-client waiver language up toward thorough, where it more clearly modifies what the purpose is?

And then also, what about the third sentence, where when the court is in a similar position, in 5K1.1, and the court is supposed to decide the extent or the thoroughness of a defendant's cooperation, and the court is specifically advised substantial weight in the Application Note 3 should be given to the government's recommendation because, of course, the government knows what its investigation is better than the court knows that.

So my question is, what is the purpose of the language? How do the choices affect the purpose? And what happens if we leave out the third sentence? Then have we modified what the court understands traditionally is its role? The court has the discretion in 5K1.1 to depart as little or as much as it wants or not at all.

And now here, if the court is supposed to perform under this reduction guideline a similar determination of how thorough was that cooperation, why is it not important to state the case completely and thoroughly so that we don't leave something out and mislead the court and parties?

JUDGE O'NEILL: And I'll add in a fourth there. Would the department be willing to support legislation that would limit the disclosure of the waiver of the attorney-client privilege only the government and exclude it from being--deem it not waived as any third parties?

JUDGE RHODES: So--to the whole panel.

MR. WALLANCE: Well, I'd like to break down. There are a number of questions. I'd like to break down first the relevance of the litigation dilemma to these issues, separate the question of cooperation from substantial assistance because they are in different contexts, and third, address the last question that was raised about what other efforts might the department

support, recognizing that they would obviously be the ones to decide on that.

First, I think the litigation dilemma is relevant even to the question of cooperation or substantial assistance because you're the attorney advising the company to waive privilege, and you're going to recognize right away that there are some serious downsides, including the risk of third party litigation. Third party litigation in the last 10 years has become an enormously expensive and potentially catastrophic event for companies. So that's a big downside.

Then you're asking yourself, in terms of making a recommendation, what's the upside for my client? And this is where you're going to want to know, well, what am I buying with this disclosure and the risk I'm taking? And how can I be assured that I will get the benefit of cooperation? And language becomes vitally important.

And again, we spent a year and a half trying to craft that balance. The addition of the language

regarding presumption of good judgment on the department's part, in our view, or in the view of the people on our side of this equation, tips the balance. Maybe it's a question of optics. Maybe it's a question of substance. I'm not certain it matters.

But I think, ultimately, you've got to give some assurance that you're going to get the benefit of that cooperation and that a judge is going to make that decision. It ultimately won't be totally in the hands of the department. That, I think, is the relevance of litigation dilemma to cooperation.

On substantial assistance, and I concede that that's in a different context and presents the issue of where the department has greater discretion. But again, substantial assistance ties right into the question of what is the penalty? If I give you disclosure, if I open up my memos and my notes to you to look at, I open myself up to third party lawsuits since they may be waiving the privilege and handing the evidence against me to those

adversaries. We're not motivated by altruistic considerations. What am I getting?

And so, we need some guidance on how the department is going to exercise its discretion on whether to depart downward. And I think, again, this was crafted in very much the same spirit as cooperation, which was that right balance. In most cases, it isn't required. There will be a few, and we recognize that, and that's the assurance we're looking for. It's an assurance I think the department should want to give us.

Beyond that, though, I agree that, ultimately, this problem cannot be solved by the commission. I do think a legislative solution is the best one. What exactly that legislative solution should be, you know, we had discussion about remedial privileges and so forth. I happen to think that one of the better solutions, and it does resolve the litigation part of this, is the solution that the SEC put forward, which is to create this limited waiver privilege.

When you disclose to law enforcement, then that disclosure will be exempt from third party private litigation. It doesn't solve the issue of cooperation. It doesn't solve the issue of substantial assistance. But it will make this issue a lot more easy for us to deal with in our respective roles if the threat of third party litigation can be eliminated.

MS. BUCHANAN: Well, it is extremely difficult to try to quantify how many times or what percentage a waiver is going to be required. And I just don't think that we can do that.

But we are very consistent in our statements through the Thompson memo, through the testimony of the department at the public hearing, through our written testimony, through the recent question and answer series of James Comey, that we believe strongly that if a corporation can provide cooperation without waiver, then waiver will not be requested.

And beyond that, I don't think that we can be

any more specific as to in how many circumstances that would occur. We probably could correct the myopic imbalance if we reduced the first and second sentence into one. Then we'd still have only two sentences.

I think it's important when you look at litigation involving the guidelines, courts look at the various sections of the guidelines, and they find that if the guideline section includes certain language in one place and it doesn't include it in another, that that was an intentional--it was intentional to leave that language out.

So when you look at the language in 5K1.1, which does include a statement that weight will be given to the government's consideration of the defendant's cooperation, and you don't have that same language here in this section, then it might be said that it was intended to be left out. And we think that because the courts are going to give substantial weight to the government's consideration, it is the government that

knows what information did they have before the corporation cooperated.

They're really in a position to provide that substantial assistance to the court. And I think that if the court is going to consider that substantial weight, we should include it in the amendment.

JUDGE O'NEILL: Does the department support limitation on disclosure to third parties?

MS. BUCHANAN: That's the dilemma. The dilemma is that a corporation has to decide, if you are in that situation where the only way to cooperate is to waive, they have to balance that three points for waiver versus the potential of third party litigation.

JUDGE O'NEILL: Is there any downside to the department in not supporting? Because the department is obviously interested in obtaining the information that it needs. And if it's only a limited class of cases in which it's going to require a waiver of the attorney-client privilege or of the work product

privilege, then it seems to me in that limited number of cases in which it's likely to occur, the department really has no interest in a third party being able to use that information as leverage against a corporation.

So--and the SEC seems to think it's an appropriate proposal.

MS. BUCHANAN: Well, I agree with you that it is the current state of the law that creates litigation dilemma. But I'm not able to comment on proposed legislation in my individual capacity.

JUDGE HOROWITZ: Let me just ask, is it at this point the department doesn't have a position on the pending SEC legislation?

MS. BUCHANAN: That's correct. The government has not--

JUDGE HOROWITZ: Not for or against?

MS. BUCHANAN: The government has not taken a position.

JUDGE HOROWITZ: The Justice Department?

MS. BUCHANAN: Correct. I'm sorry. The Justice Department has not.

JUDGE HOROWITZ: Let me ask Ms. Madrid, since the ACC in their submission talked about the dilemma and asked us to make recommendations to Congress, what the ACC's view is of the SEC's bill on limited waiver. And I know you talked also in your submission about a self-evaluative privilege as well.

MS. MADRID: If I may in answering the question just go back to Commissioner Rhodes's question on the focus of the language and with respect to its purpose. I think with respect to its purpose, that would be a terrific way of looking at it. Unfortunately, you can't look at it in a vacuum because of the impact, the dilemma that we find ourselves in.

And the fact of the matter is you can't waive a little bit. You just can't. So the impact is tremendous. And the dilemma that we've been talking about is one that is real, and to the extent that

legislative initiatives begin, I think they would be the only way--and I am speaking now on behalf of myself--they would be the only way that this could start to be addressed.

To have every court across the country analyze this over and over and over again and potentially coming out with differing positions, but more likely than not coming out with the position that a little bit of a waiver is a complete waiver would just be untenable. To the extent that legislation would start to move and allow for limited disclosure, that would be, I think, the only practical solution to the dilemma, to the extent that it's going to be required for cooperation.

JUDGE CASTILLO: Any other questions? Yes. Commissioner Horowitz?

JUDGE HOROWITZ: Keep going. Let me ask about the set-up right now in 8C2.5 is a one, two, five reduction set-up. One point for acceptance, two points for cooperation, five points for early disclosure, plus

cooperation, plus acceptance.

Have any of you formed any thoughts as to whether the one, two, five should go more akin to what we do with individuals, which is two points for acceptance, perhaps three for cooperation, and leave the five where it is? I wonder if one point is simply too small a number for acceptance of responsibility, where we give two points off to individuals for accepting responsibility. And was that discussed by the advisory committee?

MS. BUCHANAN: The advisory committee, I don't believe, discussed this issue. We believe that the current state of the law--one point, two points, and five points--is sufficient to promote effective compliance.

MR. WALLANCE: I wish it would resolve, if one added extra point, I wish it would resolve the dilemma that we've been addressing for the last hour. But I don't think it would. And that's correct that we did not discuss it.

I think the practical fact is, as somebody pointed out, most corporations don't get to that stage in the sense of having to litigate the appropriate sentence under the sentencing guidelines and then argue about should it be one point or two points. I don't think the one point reduction would really change the equation in terms of the decision whether to waive privilege.

I think, ultimately, the balance is what assurances can the government give me about how this information would be used as regarding the ultimately sentence it will negotiate, as opposed to present to it--and then present to a judge under 11C? As well as what's going to be the risk to third party litigation? I don't think adding one point is going to get us all off the hook of this problem.

JUDGE HOROWITZ: Ms. Madrid?

MS. MADRID: I would echo Mr. Wallance's comments on that, although I would just note that more credit is always better than less. So for what it's

worth.

JUDGE CASTILLO: Any other questions? Then we are going to excuse the panel, and thank you all for your patience.

MS. MADRID: Thank you.

JUDGE CASTILLO: We are running a little bit behind, but we're going to switch gears now from corporate issues to hazardous materials, which might include some version of corporate responsibility.

So we'll go to panel three. Okay. And I think we'll start with the Department of Justice, Mr. Uhlmann.

MR. UHLMANN: Good morning, Judge Castillo and members of the commission.

JUDGE CASTILLO: Good morning.

MR. UHLMANN: A tough act to follow, but I'm David Uhlmann. I'm the chief of the Justice Department Environmental Crime Section. And I'm pleased to have the opportunity to appear before you today to testify in support of a new sentencing guideline for hazmat crime.

sj

It's fitting that the prior panel included, at least in terms of the Justice Department representative, Mary Beth Buchanan from the Western District of Pennsylvania because the problems of hazmat crime were made large and clear immediately after September 11th, when in the Western District of Pennsylvania, several individuals were arrested on charges of fraudulently obtaining commercial driver's licenses, which had endorsements allowing them to carry hazardous materials.

Although the initial fears that those defendants might have terrorist ties proved to be unfounded, their arrests and the subsequent convictions in those cases demonstrated the vulnerabilities of our hazardous material transportation system.

The volume of hazardous material transported in the United States each year is staggering. In 1998, the last year for which data is available, there was over four billion tons of hazardous material shipped in over 800,000 shipments, by air, by rail, by truck, by ship, by

pipeline. And while the vast majority of those shipments are legal shipments, the reality is that even a single incident involving hazardous material poses grave risks from a public health, public safety, and environmental standpoint.

Recognizing those risks, the department nearly two years ago launched a hazardous material transportation initiative. The goal of our initiative is to more strictly enforce our nation's hazmat laws. In doing so, we hope to ensure higher compliance, increased compliance with the hazmat laws, and we hope to make it more difficult for terrorists and others who would seek to do harm to the United States to exploit our hazardous material transportation system.

We've become concerned over the last two years, however, because the existing guidelines for hazmat crime, designed with pollution crime in mind, did not provide adequate sentences for hazmat crime. So what I'd like to do today is address three issues in my oral

testimony. First, why we believe the existing guidelines are inadequate. Second, what changes we believe should be made. And third, why we believe it's critical that the commission act now in this amendment cycle.

In addressing why we believe the existing guidelines are inadequate, I should be clear about where our concerns lie and where they do not. I think everybody on the panel and, indeed, everybody in the room wants to do everything possible to make sure that terrorists don't use hazardous materials as their newest weapon to attack our country.

And we are convinced at the department and the Department of Transportation that we need to do our part and step up enforcement of hazmat laws. And we're hoping that increased enforcement of hazmat laws will have the same positive effect that increased airport security has had, that increased border controls has.

We are not here today, however, to suggest to you that the existing guidelines are somehow inadequate

if terrorists committed hazmat crime. Obviously, there is in Chapter 3 already a substantial enhancement for crimes committed with a terrorist motive. The commission could easily add a cross-reference in the existing guidelines to terrorism provisions and address that concern.

Those aren't the cases, by the way, that my office, the Environmental Crime Section, is likely to prosecute. We prosecute pollution cases. We prosecute regulatory crimes. We might be part of a prosecution like that, but our concern is with the rest of the field and the nonterrorism cases, which fortunately to date is all of the cases and hopefully will always be all of the cases, do not result in sufficient sentences. Why not?

The reason they don't result in sufficient sentences is that the guidelines that they're sentenced under, 2Q1.2, was designed with pollution crimes in mind. And two specific offense characteristics really drive those guidelines. And if you look at the statistics that

the commission puts out, the two specific offense characteristics are one for repetitive releases into the environment, and the second is for discharges without a permit or in violation of a permit.

Those two specific offense characteristics carry 10 offense levels with them. And because those 10 offense levels are typically added in environmental crimes cases to our base defense level of eight, we have an average sentence in the last two years under 2Q1.2 about 16 months. Sixteen months is not exactly a high number. That means we're sentencing oftentimes in the 12, 13, 14 range. You remove those two specific offense characteristics, and we're at probation.

In one of our most recent cases, one announced by the attorney general and the secretary of transportation on September 30, I think demonstrates the problem. It was the prosecution of Emory Worldwide Airlines. Emory pleaded guilty in the Southern District of Ohio to on hundreds of occasions putting hazardous

materials aboard their aircraft without providing notice to the pilots, without taking any precautions to make sure that that hazardous material was onboard safely.

Notwithstanding the significant risks to the pilots and to the general public in that case, if that case--if individuals had been prosecuted in that case, they would have received sentences at the base offense level of eight and nothing more. That in a nutshell captures the problem with the existing guideline.

So let me talk next about what we think should be done. It is certainly possible just to simply increase the base offense level that would apply for hazmat crime or to add a single six- or eight-level enhancement to the existing guidelines as a specific offense characteristic for hazmat crime. We don't believe that's the best approach for two reasons.

First, it would continue to shoehorn hazmat crime, which are quite different in significant ways from pollution crime, into a guideline designed for pollution

crime. But perhaps more important to the commission, if all we do is substantially increase the sentences for every hazmat case, we fail to differentiate between hazmat crime, fail to differentiate between the different types of offenses, which, of course, is the whole purpose of the sentencing guidelines, at least the different specific offense characteristics under the guidelines.

So what we would propose to do is to add specific offense characteristics for the aggravating factors, the aggravating risk factors that are most often present in hazmat crime. There are three that are most readily apparent. One is repetitive violations, which obviously increase the risk associated with hazmat crime. The simple fact that more hazardous material is put into commerce in violation of these important public health and safety laws.

A second is concealment because, as the Emory case demonstrates, concealment of hazardous material aboard any form of transit increases risk. And the third

is hazardous material crime that occurs on passenger modes of transportation, whether it's planes, trains, buses because, obviously, the greater risks are present if the general public is exposed in that way.

And again, a case in the last few years demonstrates what we're talking about. Several years ago, we prosecuted AMR Corporation, which is the parent company of American Airlines, for hazmat crime. They actually pled to illegal storage of hazardous waste, a good job by defense counsel, and not to the hazmat crime. But the hazmat crime in that case and the relevant conduct that was before the judge at sentencing included numerous instances where hazardous material was aboard American Airlines passenger flights in the cargo bay without anybody knowing about it.

Obviously, it shouldn't have been there. Significant risk to the passengers on those aircraft. And the sentence under the existing guidelines, base offense level eight--probation.

sj

Under the proposal that we're making today and that we've made in our prior submissions, we would see an enhancement both for the fact that this was a passenger mode of transportation, an aircraft, an enhancement for the fact that this was--this hazmat was concealed, an enhancement because this occurred on multiple occasions. And we'd have, in all likelihood, a sentence at an adjusted offense level, at least before you get to Chapter 3, of 20, which would be a two- to three-year sentence. Certainly far more appropriate for a crime that puts so much of the public at risk.

Why is it necessary for the commission to act today or at least act perhaps not today, but during this amendment cycle? I'm well aware of the fact that others who will speak after me have suggested that there is neither sufficient cases being brought so far under the hazmat initiative and that there's legislation pending in Congress. And that for both of those reasons, the commission should delay.

We respectfully disagree. We have been prosecuting hazmat crime for the better part of the last 15 years or more. The hazmat laws have not changed appreciably during that entire time. And in the last several years alone, we've prosecuted more than three dozen cases out of our offices and the U.S. attorney's offices that we work with. And we have, as my prior testimony indicates, a pretty good handle on what are the specific offense characteristics that would need to be part of a new guideline for hazmat crime.

With regard to pending legislation, it's worth noting that the pending legislation--I think the primary pending legislation that there is concern about is the hazardous material transportation or the reauthorization act for that law. Similar legislation has been enacted or has been proposed, excuse me, each of the last five years without ever being enacted. So I don't have a crystal ball, but it obviously remains to be seen whether any legislation will be enacted this year.

But most importantly, there is no change in the definition of hazmat crime in that legislation. No change whatsoever in what constitutes hazmat crime. So the body of offenses that you will be covering in a new guideline, if you adopt one, will not be changed if that law is enacted. And perhaps as important, the one change in that law that most significantly affects hazmat crime is that we would increase the sentences for some hazmat crime from 5 to 20 years.

And respectfully, we would submit to the commission that it would be odd for the commission to pass on addressing the clear and obvious shortcomings with the hazmat sentencing law at the very same time that Congress is increasing the maximum sentences for hazmat crime.

In the final analysis, however, our request that you immediately institute a new guideline for the hazmat crime is a reflection of the simple reality that these are serious cases with significant risks to public health

and the environment. We don't believe we should wait until some unfortunate act occurs that makes even more readily apparent the fact that we aren't doing enough today, can't do enough today to deter and punish this crime.

And for that reason, we respectfully request that the commission adopt a new guideline for hazmat crime during this amendment cycle. We greatly appreciate the chance to appear before you today and to testify in support of that new guideline.

JUDGE CASTILLO: Thank you.

We'll proceed with Mr. Conrad. If you could identify yourself for the record?

MR. CONRAD: Thank you, Judge Castillo and members of the commission. I appreciate the invitation here today, especially given that I'm the only member of the panel that is not a present or a former chief of the Environmental Crime Section. So it's quite august company here.

sj

My name is Jamie Conrad, and I'm an assistant general counsel with the American Chemistry Council, which is the second ACC you will have heard from today. And perhaps there's a basketball organization in this afternoon's panel.

We represent the leading companies in the business of chemistry in the United States, including our members account for 90 percent of the domestic production of chemicals, basic industrial chemicals in the United States. And as the result, we generate tremendous volumes of shipments of what are regulated as hazardous materials, whether by pipeline, barge, rail, or truck.

Our members have always taken the safety and security of their hazardous materials shipments very seriously. For a decade and a half, our responsible care codes of management practices have included both the distribution code directed specifically at transportation safety and a product stewardship code designed to ensure that our members both know their customers and make sure

that their customers know how to handle those materials safely.

Another organization, the SOCMA, the Synthetic Organic Chemical Manufacturers Association, represents an even greater number of batch and specialty chemical manufacturers as well, who also are required to comply with the same set of codes.

The major barge, rail, and truck carriers that carry these products are responsible care partners, which require them to abide by the same series of management practices that we do as well. The leading group, the National Association of Chemical Distributors, has a responsible carrier program, which, like ours, also has a third party verification component to it.

Security was a consideration for our members and partners before September 11th, but in the aftermath of that event became an even greater priority. Within two months of the event, we issued a substantial set of transportation security guidelines working with NACD, the

chemical distributors association, and a variety of other industry groups.

In the following June of 2000, we adopted an unprecedented security code for responsible care to promote security throughout the chemical value chain, including transportation. That code requires comprehensive vulnerability assessments, implementation of security measures commensurate with risks. It also includes training and drills, communications with local and federal government and with commercial partners, auditing top-level management commitment, incident reporting, and management of change. So it's a complete suite of measures.

Our organizations have broadly disseminated a tremendous number of guideline materials to implement these security codes in the areas of transportation, including documents on value chain security generally, motor carrier security practices, protocols for assessing motor carrier security, transportation of poison by

inhalation materials by rail, and comparisons of recent DOT security rules, which I'll return to in a moment, with our security code.

And so, armed with these materials, our members and their partners are aggressively securing the shipment of hazardous materials across the country.

Now against that backdrop, let me explain our views, and I suppose I'm somewhat hobbled by reacting to the submission of the department in August, which sketched out some notions in testimony I've read this morning which provides a little more specificity as to the envisioned guideline that the department has in mind, but which is still very much kind of up in the air. And both as to its motivations and as to the things that it addresses.

In terms--as a way of reacting, though, I want to adopt Mr. Sarachan's I think very helpful three-part categorization of hazmat violations as first those involving terrorism. Secondly, nonterrorist releases

that involve a release of some sort. And then third, the violations which are neither terrorist nor release cases.

The first case, I guess, can be dealt with fairly summarily in that the department is now recognizing that the entire chapter of Title 18 U.S. Code and several provisions of the sentencing guidelines ensure that hazmat violations motivated by terrorism are going to be amply punished. Although even yet, throughout the testimony are implications of security as a basis for a motivation for a new guideline, which I have a little bit of a cognitive dissonance with.

But I think our testimony recognizes and the comments we filed discuss the provisions of the U.S. Code addressing terrorism as well as the guidelines, not only 3A1.4, which affects all federal terrorism cases and which calls for an upward adjustment in other terrorism cases, but also 2M6.1, which has to do with weapons of mass destruction and chemical weapons, which is essentially any toxic chemical.

sj

Turning to cases involving releases, the nonterrorist release cases. Application of 2Q1.2 to cases involving sudden releases begins at level 12 and can reach level 29, given enhancements for substantial risk of death or serious bodily injury, which I should think would be the case in virtually all the examples that Mr. Uhlmann cites, the possibility of an evacuation of a community and failure to have a permit.

And I think that's something which we can address even further in the Q&A, but I do feel obliged to speak to it to some extent. Under Department of Transportation regulations, every person transmitting even small quantities of explosives or highly toxic chemicals--whether by motor vehicle, rail, freight container, or in some cases, any mode of transportation--is required to register with the DOT. And that includes 55 pounds of explosives in motor vehicles, rail cars, or freight containers or more than one liter of the most hazardous by inhalation chemicals

by any mode of transportation, including air.

DOT rules further require persons operating commercial vehicles, motor vehicles with most hazardous material shipments to have commercial driver's licenses. And so, I think that the enhancement available for lack of a permit is going to be met in quite a large variety of cases because of the likelihood that this person is neither registered with the DOT as required or obtained a CDL, commercial driver's license.

Which leads us to the third category, the nonterrorist, nonrelease cases. And before the commission determines, I think, that a third category, a third new guideline is required for these, I think it's important to consider, first of all, as I just discussed, that many of these enhancements I think actually do apply--under 2Q1.2 would apply in those cases as well.

Secondly, to consider the great number of voluntary initiatives that voluntary in the sense that they're not mandated by law but required by our

organizations to impose extensive hazmat safety and security measures across the transportation arena of hazardous chemicals.

And third, to bear in mind also that DOT has recently issued new regulations affecting hazardous materials shippers and carriers, requiring them to implement security plans and to train their employees on those plans. Those regulations will ensure that hazardous materials businesses recognize their vulnerabilities to terrorism or to other sorts of crime, that they take steps to minimize them, and that they sensitize their employees to those concerns. There is additionally new TSA regulations requiring criminal background checks for folks requiring commercial driver's licenses.

In sum, we don't--without having seen a proposed guideline, it's not necessarily the case of our organization that we are inalterably opposed to a hazmat guideline versus the use of 2Q1.2. But we are concerned

that the concerns of terrorism and of substantial risk of transportation of hazardous materials on passenger vessels and transportation of hazardous materials on airplanes, that all of these--that these factors are being used as a basis for--could be used as the basis to enhance the potential for greatly increased sentences in the cases that constitute the great majority of hazardous materials shipment, which is hazardous materials by themselves on rail and truck and barges, and cases that don't involve terrorism, don't involve release, don't involve passengers, and don't involve aircraft.

And so, that's really that--it's that tension that's principally our concern. And again, we thank the commission for the chance to speak before you today and be happy to provide further information or answer questions.

JUDGE CASTILLO: Okay. Thank you.

We'll shift to Mr. Sarachan.

MR. SARACHAN: Thank you. And thank you for the

opportunity to speak today. It's an honor.

When I was going to the train station this morning, I heard on the traffic report that there was a jack-knifed tractor trailer, which is something I hear a lot. And every time I hear it, I wonder if that truck was carrying hazardous materials, and I hope that there is not a release of those materials. But I think it's a constant reminder of how vulnerable we are and how important the Environmental Crime Section's initiative in this area is.

I just want to expand on my written comments in which I presented this framework for analysis. And I think it's useful to break down the cases into three categories because each category raises different issues that have different characteristics.

The first one being terrorism, and as Mr. Uhlmann, Mr. Conrad said, that's really not a controversial area. The second category are other hazardous material cases which result in a release to the

environment. And the third category are hazardous material transportation cases with no release, no actual harm.

As for the second category of cases, hazmat violations involving releases, 2Q1.2 specifically addresses offenses involving actual releases. There is four specific offense characteristics that apply. And hazmat violations with an environmental release fall within the heartland of environmental crimes being covered by 2Q1.2.

I used to be a supervisor in the Philadelphia U.S. attorney's office and former chief of the Environmental Crime Section. And especially in that position, we spent a lot of time looking for tools to strengthen the program. One thing we never sought was to enhance sentencing for environmental crimes generally. Our view was that under 2Q1.2 and 2Q1.3, those calculations afforded appropriately tough sentences in the right cases.

And I don't understand the department today to be seeking an increase in sentencing for environmental crimes cases generally. Instead, what I hear DOJ seeking is to correct what they view as a gap, a disparity between the hazardous material cases and the other environmental crime cases.

In the second category, the cases resulting in a release to the environment, there is one source of the perceived gap. That's the specific offense characteristic for permit violation. That's the only difference. But it's true that many environmental crimes cases under 2Q1.2, including very serious crimes, also don't trigger that specific offense characteristic.

For instance, asbestos violations under the Clean Air Act are a very common type of prosecution. It's a very serious crime. Workers are taken off the street--we did many of these in Philadelphia--and they're brought in to scrape asbestos dry off of walls. They're breathing this stuff, and under medical science, a

certain number of them will get serious lung diseases and die. There's no permit violation involved. That specific offense characteristic doesn't apply.

The same is true for vessel cases under the act to prevent pollution from ships, which was another source of an ECS initiative. Those are the cruise ships on ocean waters that dump oil and dump garbage. That initiative brought many important cases. No permit violation.

CIRCLA, which involves hazardous substances released from stationary facilities. No permit violation. Pesticide act, altering defacing labels on pesticides. Very comparable to some of these hazmat violations. No permit violations.

In all of these cases, they would be calculated the same way as the hazmat violations. The specific offense characteristic for the release would apply, but there is no specific offense characteristic for permits in these cases.

I don't have the exact numbers, but I've seen summaries that show that about a third of all cases under 2Q1.2, serious crimes involve cases with no permit violations. So the guidelines would apply the same way as a hazmat violations, and I don't see a case being made to single out hazmat violations from these other serious crimes for special treatment.

Conversely, the other two thirds of the cases, where there is a permit violation, the fact that there is a permit violation is a factor that makes those crimes more serious. So the fact that there is an enhancement for that is rational. It's not a bad thing.

That brings us to the third category of hazmat cases, and those are the ones where there is no release, no actual harm. And I suggest that this is the one category where the analysis should be focused. I think this is also the area of the Department of Justice's principal concern. Because as they express it, in this case, there is neither an enhancement for permit nor for

the release. And as a result, in these cases, there will rarely be jail time.

To some extent, lesser sentences in these cases make sense. If you've got a case where there is no permit violation and there is no actual harm, that's a valid reason for the sentence to be lower than other comparable cases where there are permit violations and actual harm. On the other hand, as the department rightly points out, there are some of these cases that can produce a great risk to the public that isn't otherwise taken into account. And the concern here is not to let those cases sweep up all the hazmat cases.

And in conclusion, I have a few observations to make in that regard. Mr. Uhlmann pointed out the heart of the department's proposal. Certain specific offense characteristics, they all go to risk. They all apply to these cases where there's no actual harm, and you want some surrogate to measure the risk of harm. Concealment, repetitive violations, particularly putting the hazardous

materials on passenger carrying modes of transportation--all go to ways of trying to measure the risk.

I submit that this is a narrow issue and that it should be addressed in a narrow way. Any new guidelines should apply to the no release category of hazmat cases. That's where the disparity matters. Any new guidelines should take into account risk, either with a catch-all such as the one that appears in Chapter 5, which is a departure for significant dangers to public safety.

The department has the surrogates, the specific proposals based on their review of specific cases. I defer to them on that because I don't have the same information to know whether those three specific offense characteristics actually capture the risks in most of these cases. They certainly seem reasonable on their face.

These enhancements should not increase the severity of environmental crimes generally. They should

be just filling in the gap for these hazmat cases. And finally, all other things being equal, if you have a crime that's creating a risk of harm, that should be generally sentenced at a lower level than a comparable crime that produces the actual harm--certainly at no higher level.

To say that a different way, if you have a case with actual harm, it doesn't make sense to me to be applying specific offense characteristics that measure both the actual harm and the risk of harm. To me, that's double counting.

Thank you again.

JUDGE CASTILLO: Thank you.

Let's proceed to Mr. Solow.

MR. SOLOW: Thank you, Mr. Chairman and members of the commission, for the opportunity to appear before you on behalf of the Association of Oil Pipe Lines.

My name is Steven Solow. I am a partner in the law firm of Hunton & Williams. I am also a past chief of

the Environmental Crimes Section, which I know is not a sole requirement for testifying today.

In the interest of time, I would ask that my written testimony be made a part of the record, and I will make some brief remarks, in part because a lot of the concerns of the AOPL have been reflected in the comments of Mr. Conrad and Mr. Sarachan about a proposal here that has come sort of clothed in the robe of anti-terrorism, but which under that guise really is promoting changes that would affect legitimate operators in ways that we have great concerns about.

And just to say a little bit about AOPL, AOPL is deeply concerned about issues pertaining to safety and security of the nation's hazardous material transportation infrastructure. I would point out that we do not carry passengers.

But as detailed in my written comments, previously submitted and attachments provided, the pipeline industry has expended tremendous resources since

9/11 to improve the security of the pipeline infrastructure. And at the same time has enhanced its environmental performance in the same time period, even though the amount of oil transported has increased dramatically.

The industry is keenly aware that its facilities, which include over 160,000 miles of interstate transmission pipelines, are potential targets of terrorists, vandals, or drug traffickers. And the industry is committed to supporting federal oversight of pipeline operations in cooperation with state and local communities to promote cooperation in all of those categories by sharing information on pipelines and pipeline safety. And I will leave out the more specific description of those efforts that are contained in my written testimony.

AOPL does not object to the creation of a new specific offense characteristic in 2Q1.2 that would increase the base offense level for anyone who violated

the law regarding transportation of hazmat when done with the purpose or intent to commit acts of terrorism or for the purpose of committing other environmental offenses. In fact, it's noted that these concerns, as mentioned before, are addressed by existing specific offense characteristics and provisions regarding upward departures in the guidelines.

It should also be noted, as Mr. Sarachan pointed out, that the additional offense level for violation of a permit does not apply to all environmental statutes. We think that, in fact, 2Q1.2 fits very well with both all of the hazmat and environmental crimes that it covers and takes into account the various offense characteristics that apply.

I have to take some issue with one of the examples given by a former colleague, Mr. Uhlmann. He provided a couple of examples of situations in which he said that there had been pleas in cases which would not have resulted in a good result if an individual had been

prosecuted. And that raises two issues. One, the commission has before it a very sparse record. And perhaps Mr. Uhlmann can blame Mr. Sarachan and myself, since we're his predecessors for not giving him more of a record.

[Laughter.]

MR. SOLOW: But it's a very sparse record of cases prosecuted under these provisions for hazmat violations. Since I was personally involved in the prosecution of the AMR case, I have to note that, in fact, if individuals had been prosecuted in that case, an entire planeload of people was evacuated. There would have been a potential enhancement in that case for release and for an evacuation. And thus, there might have been two potential increases in specific offense characteristics in that very case, which is only one of two cases cited to you today.

There may be circumstances where violators of hazardous material transportation laws who are not

otherwise subject to a specific offense characteristic under 2Q1.2 should face greater sanctions. And we recognize that. The examples that have been talked about are the shipper of hazardous cargo who routinely misdescribes their contents to put them through a highway tunnel through Baltimore, or a shipper who routinely failed to adequately describe or quantify the shipments of hazardous material by truck, rail, or air, especially where the method used enhances the risk to the public.

And it should be noted in that regard that on all those modes of transportation, hazardous material can be and is safely shipped all the time. It's a matter of people evading those to add additional materials that are not allowed.

But the guidelines do provide a means to increase sanctions for such a violator. 5K21.4 provides that if national security, public health, or safety were significantly endangered, the court may increase the sentence above the guideline range to reflect the nature

and circumstance of the offense. And the AOPL would urge the department to seek such an upward departure where a violation and where release otherwise does not occur warrant such an increase in sanctions.

But before the commission develops a specific offense characteristic involving hazardous material transportation where there is no release, there should be a more significant empirical basis than exists at this time. Specifically, a history of criminal cases and sentences from which the commission can judge whether and by how much a specific offense characteristic could be devised that would address the relatively limited scenarios described.

The problem with the department's approach is that it uses too broad a brush. The department seeks enhancements of criminal sanctions against otherwise legitimate operators, even where no release occurs, if it can allege there was a failure to provide something.

Now the whole idea of a base offense level is

although some things are to be captured in base offense level, all the things that you're supposed to do right under the law should be captured in that base offense level. And it's only when you go outside of that, you have an aggravating or potentially mitigating circumstance, that the guidelines are supposed to add or detract from the base offense level.

AOPL is willing to work with the department, as it has already worked with numerous federal agencies and state and local governments, to address the dangers of illegal transportation of hazardous material.

Our members live near our pipelines. We travel on the same roads, and we fly in the same planes as everyone else. Hundreds of member employees spend all or most of their days focused entirely on issues related to safety and security. And we commend any effort by the Department of Justice to severely sanction those who seek to use our critical private infrastructure either for purely criminal purposes or who place national security

at significant risk.

We ask that any effort to address those issues be more narrowly tailored to the task, based on a history of enforcement efforts, so that the commission can make a decision based on a larger record of enforcement experience.

Thank you very much.

JUDGE CASTILLO: Thank you very much.

Let me open up the questioning just by saying to the Department of Justice the commission does want to be responsive on this critical issue. One of the problems we're confronting is that this issue of hazmat really came to us a little bit late, probably due to the fact that we have spent the better part of the last year dealing with elements of the PROTECT Act.

So with that, I'll just open it up for questions. Commissioner O'Neill?

JUDGE O'NEILL: Under 49 U.S.C., 46.312, the statutory max there is five years. Right? That we're

dealing with primarily?

MR. UHLMANN: That's correct.

JUDGE O'NEILL: Give the fact that the surface transportation bill is kind of percolating in Congress right now and it's possible, not unlikely, that that statutory maximum could be changed and the penalty structure itself could be changed, doesn't it sort of counsel the commission to wait a little bit?

MR. UHLMANN: I don't think so, Commissioner O'Neill, for two reasons. First of all, as I noted previously, an increase in the maximum that would apply doesn't in any way change the fact, and nor, frankly, do the comments that my colleagues on the panel have made, that the majority of hazmat crime is sentenced today at probation. I mean, that is where our concern lies.

There may be cases, by the way, that should be sentenced to probation, and I'm not here before you to say otherwise. But in the cases where there is significant risks of injury, of significant risk of

death, significant risk of property damage and harm to the environment, we believe to adequately deter and punish hazmat crime, there needs to be jail time available. And we don't believe they're saying that.

The statutory maximum doesn't really change that. It just highlights the problem.

JUDGE O'NEILL: Wouldn't those normally be prosecuted under other statutes, though? If death results or if serious environmental damage results, can't those be prosecuted under those statutes? And isn't it likely, in fact, that they would be?

MR. UHLMANN: No. These are the statutes that we would use. I mean, hazardous material, part of what makes this unique and part of what makes the repeated comparisons to pollution crime in a posit is the fact that these aren't crimes involving wastes. These aren't crimes involving pollutants. These are, as others have acknowledged, crimes involving valuable materials transported in commerce.

And you know, I hate to be responsible for creating cognitive dissonance for anybody, particularly as the lunch hour is approaching--

JUDGE CASTILLO: Don't worry. That always happens.

MR. UHLMANN: Oh, good. I feel better. But that's not, you know, that's not our intent at all. We're not--I'm trying to be honest with the commission in saying we're not here raising a concern that terrorist cases won't be adequately prosecuted. We are here raising a concern that our ability to prevent terrorism cases, our ability to provide homeland security is undermined when there is an important area of homeland security like hazardous material transportation and most of the cases prosecuted under the applicable laws result in very low sentences.

The one other point I should make about your question about the 5 versus 20 years is it's actually--it's in practice not all that significant

because most cases that we prosecute are going to carry, I think there's been some suggestion that we bump right up against that five-year maximum in a lot of cases. But most cases we prosecute are multiple count cases. And you're going to--if you have a sentencing guideline that calls for a higher sentence, obviously, you're going to have consecutive sentences under Chapter 5.

So I'm not--I don't see where the 5-year versus 20-year maximum is all that relevant, except that it demonstrates the belief at least among certain members of Congress that we need tougher sentencing in this area.

JUDGE CASTILLO: Commissioner Steer?

JUDGE STEER: This may be a little bit getting into the weeds. But I don't know the statutes that you deal with that well, but I do know a little bit about guideline writing. And that's where I'm struggling a bit, and I'd like your help.

I don't hear a persuasive case being made, Mr. Uhlmann, for why we have to have a separate guideline and

no consideration of the downside risk if you did create a separate guideline from the standpoint of our institutional objectives of being consistent in punishment and, you know, that have a separate guideline, it always opens up the possibility of charge bargaining and so forth.

But here's the thing that bothers me. You look at the existing guideline, and what are the inadequacies? Well, we have an enhancement for repetitive behavior, but it's all going to releases. Okay? Now I don't understand why that could not be redesigned to cover the kind of repetitive behavior where there is not a release involved.

We have an SOC for, and it's a big hit, nine-level increase, for presenting a substantial likelihood of death or serious bodily injury. But I gather that doesn't apply as broadly as we might want it to in these kind of offenses, where you transport onboard an aircraft or whatever with no discharge. But again,

there is clearly a risk.

And then there's the issue of the permit, you know, which I think is a lousy SOC anyway because it applies now in some kinds of cases where maybe it shouldn't apply, like landfill cases, you know, filling up--dumping some soil to fill up an area. One of the famous or infamous cases that has been before other commissioners. I know a little bit of the history of it, but I don't think these guys. You know, I'm not sure that one, that SOC should have applied to that case, but I gather that it did.

So anyway, my bottom line question is, do we really have to have a separate guideline? Is that the way to go on this, or is it that we need to refashion this existing guideline so that it adequately covers the conduct?

MR. UHLMANN: Commissioner Steer, we're not here before you to suggest that there isn't some areas where there would be overlap between a new guideline and the

existing guideline. And my colleagues have suggested some of them in their oral testimony. We suggested some in our written testimony. If there is an evacuation of a community, that's in the existing guidelines. If there's a disruption of public utilities, that's in the existing guidelines.

The actually really extreme hazmat cases, which, you know, fortunately here are not the majority of cases, do have offense characteristics that are found in the existing guidelines, and we would support importing some of those into a new guideline. And of course, if we did that, we wouldn't be adopting a guideline that was substantially different than what we're doing in other areas, other parts of the guidelines. I mean, there are plenty of areas where you see similar guideline provisions appearing in more than one section.

Our concern is that hazmat crime, as we've gotten deeper and deeper into it, is quite different than environmental crime, what we might call traditional

environmental crime or pollution crime. It is much more about risk than it is about actual harm. And in fact, you know, if you get into the weeds, as you put it, under our existing guideline, so much of the existing guideline is driven--the numbers, the sentences are driven by the cases where actual harm occurred, and that just doesn't happen in the majority of hazmat crimes.

The majority of hazmat crimes are crimes of concealment, an offense characteristic that doesn't fall within the existing guidelines. The majority of hazmat crimes, as you point out, are situations where there is repetitive violations, but they don't involve releases. I mean, God forbid we have even a single release, let alone multiple releases.

And many hazmat crimes, unlike pollution crime, which often occurs in the back 40, and I unfortunately know the case you're talking about and the wetlands case that you're referring to. But, you know, most of our pollution prosecutions don't occur in major populated

areas, don't occur--although they can. They don't occur in the areas where the risk to public health and safety is so great.

So it's trying to develop an effective guideline that would address risk, which really isn't the focus of the existing guidelines. That leads us to believe that we're better off with a new guideline, not to mention the fact that the existing guideline works pretty well for pollution offenses. Your concern notwithstanding, we've gotten results that they don't result in through-the-roof sentences, but they do produce jail time in the cases where they should.

JUDGE STEER: If we went that route, then do I hear--maybe this is more of an inference, I gather you disagree with Mr. Sarachan regarding severity.

Do you think that his paradigm where harm occurs, you know, being punished more severely than risk of harm doesn't necessarily apply here. So that, you know, hazardous materials offenses where there is no

actual harm should be punished more severely? Am I on the right track here for your thinking or not?

MR. UHLMANN: I think you're taking it perhaps a little too far. We're not suggesting that risk cases should be sentenced more severely than the cases where actual harm occur. You know, my quarrel with Mr. Sarachan's comments is twofold.

First of all, I mean, he's focused largely on an area that we fortunately don't see that often. These horrible release cases where, you know, we would concede there is much less concern. We are concerned about the risk cases. And when we look at the risk cases, we see time and again. And you know, we've got two dozen cases in the office right now as part of this initiative that, notwithstanding our best efforts with the commission, are going to get sentences of probation or very minimal sentences because we don't have the risk factors built into the existing guideline.

And we're not seeking to push those, you know,

through the roof or above what might be present for the harm cases involving pollution. But we are seeking the ability to get sentences that will deter that conduct in the future, that will better protect our citizens, and that will punish people for committing the serious crime and, at the same time, doing it in a way that allows some differentiation. And we don't want just an across-the-board hammer. We want to be able to distinguish between different types of crime.

JUDGE CASTILLO: Commissioner Horowitz?

JUDGE HOROWITZ: I have some of the same concerns that Commissioner Steer has about--and I will fess up front to not having prosecuted a Title 49 case before and not being familiar with these other than in preparing for this hearing and our work over the last several months.

But certainly one of my concerns generally with the guidelines is our continuing efforts to complicate the guidelines by adding new guidelines or trying to draw

fine distinctions in ways that I think go beyond what we need in the guidelines. So I agree with what Commissioner Steer says in trying to understand what we really need to address the problem.

And I want to actually break it out somewhat, as Mr. Sarachan did, and talk about the three--he's broken it out into three areas. I assume you disagree with some of how he's described the need for this new guideline in light of those three areas. But I want to take it actually step by step and first focusing on terrorism issues, which is his category one. And you mentioned it briefly about the need to protect homeland security and how this is an important step.

And I want to understand what that need is. Because as I look at this stepping back, we've got a statute that is a five-year maximum, which we may all agree is inadequate. But for now, it's a statutory maximum of five years. We have 3A1.4, which automatically bumps you beyond five years if there is an

intent to simply promote terrorism. You don't even need to show a terrorist act. You need to just show promoting a terrorist act.

What are we missing in the terrorism area that we need to fix in this guideline?

MR. UHLMANN: I think this the--what others, Mr. Conrad called the cognitive dissonance issue. I am not here before you suggesting that the terrorism--that the ability of the criminal division and the relevant U.S. attorney's office to prosecute terrorism case is going to be compromised by the existing hazmat guideline. Because you are absolutely right, there is a place right in Chapter 3. It gets us, I think, to level 32, criminal history category of 6.

That's--it is more than five years in jail, but you're going to be prosecuting under Title 18. You're going to have the statutory maximum you need. It's going to be 20 years to life, and I'm not here saying that that's a problem.

What I am saying, and again, this is, I think--I don't think it's a cognitive dissonance issue. I mean, it's, you know, when there was a sweep through the airports here in Washington about a year and a half ago, the attorney general announced all of the arrests. And it was a whole host of people who didn't have any business being in secured areas of airports for one reason or another.

That means some of it was INS issues. Some of it was just security background check issues. But they arrested all of these folks, and the attorney general went to great pains to say these aren't people with terrorist ties.

But in doing everything we can to more strictly control what happens at airports, we make it harder--we hope--for terrorists to do their dirty business at airports. And that's the link here. I mean, we are trying to, as the former deputy attorney general used to put it, button down America in all areas where we have

potential vulnerability.

Hazmat crime is a tremendous area of vulnerability. The risks are great. And we're trying to make sure we have a sentencing system that makes people take those risks seriously, and it's, frankly, not about what Mr. Solow called legitimate operators. It's about people who willfully--this is a willful statute--willfully violate our nation's hazmat laws, commit crime. Do they face a sentence other than probation? And does that, if we end up with a very loose system, do we have homeland security risks?

So I mean, that's the connection we're trying to draw. But we're not trying to say that the terrorism cases won't be adequately sentenced.

JUDGE CASTILLO: Judge Sessions? Hold on.

JUDGE SESSIONS: That's--I will say cognitive dissonance aside, that's the concern that I hear, and it's actually a separate concern that I have. People use terrorism in all kinds of different ways. And I had

thought that you're not necessarily trying to increase penalties because of terrorism directly, but you're trying to use the word "terrorism" to suggest that there's this overlying problem, and as a result, we have to move as a commission quickly.

And I'm hard pressed to figure out why we have to move quickly in light of the fact that we have three of the chiefs of the relevant division of the attorney general's office having said that this has been a problem which has existed for years, if not I don't know how long you both were there, or all of you were there, but decades. I mean, it's essentially the same problem that existed before.

And you know, I have somewhat of a concern that terrorism is used as a way of trying to push people into doing things on other areas. But now you've raised the second question. That is you're using terrorism as I shouldn't say as an excuse, as motivation to essentially increase the criminal penalties of totally unrelated

offenses. Because, well, these offenses should be treated more severely because it tells the people that--it tells terrorists out there that it's much more likely they'll get caught.

And that raises incredible issues about what? Are we going to increase penalties universally across all areas of the criminal justice system because we want to tell terrorists out there that we treat everything seriously, and that will reduce terrorism? That doesn't sound logical to me, quite frankly.

And it, you know, it creates a real concern for what we do here. Because if, in fact, we use this terrorism justification to universally increase penalties, I think we're doing a great disservice to the people--well, a great disservice.

MR. UHLMANN: Commissioner Sessions, I--no, I agree with you that there is a danger when we talk about homeland security issues that it's inflammatory, that it can--there's a fear factor, if you will, that is not what

we're about here. And that's why I've gone to pains to try and distinguish the terrorism cases and say I'm not saying that your rules or the existing guidelines are inadequate for terrorism cases.

What I'm saying is that, you know, we've learned, for better or worse--maybe we should have learned it sooner--but after September 11th, we learned that there are a whole host of areas in our free society and a society that will hopefully always remain free, where we had vulnerabilities. And hazardous material transportation is one of those areas, where we've got an exposed flank, if you will.

And we haven't historically had the level of enforcement of our hazmat laws, which are very important public health and safety laws, separate and apart from terrorism. They are very important laws. We hadn't prior to September 11th probably had sufficient levels of enforcement.

We are working hard to change that. We have

devoted a lot of resources to changing that. It's not that we didn't prosecute the cases before. Both of my predecessors prosecuted cases under the hazmat laws. But we have dramatically increased the level of resources we're committing to it because we believe and our colleagues at the Department of Transportation believe that if we get better compliance with the hazmat laws, if we get people paying more attention to making sure that we are lawfully shipping hazardous materials, it's going to be harder for terrorists to exploit that system for their evil purposes.

And that's it. I'm not trying to say more than that. It's just we're trying to make it harder for terrorists. We're not trying to send a message to them. We're just trying to, you know, for lack of a better way of putting it, we don't want to have a sloppy system. We don't want to have real loose security because that makes it easy for them, and we're trying to make it hard for them.

JUDGE SESSIONS: By enhancing criminal penalties, you're arguing that that necessarily makes it more difficult, and as a result, it contributes to the fight on terrorism?

MR. UHLMANN: Well, we're all about deterrence, right? The whole point of sentencing or at least a major point of sentencing is deterrence. And deterrence is about--in this context, the deterrence is critical, and it's critical to achieving a higher level of compliance. So it's a sentence has come in with deterrence, promoting compliance, therefore, hopefully having a better system overall and one that's harder for terrorists to exploit.

MR. SOLOW: Mr. Chairman, if I could comment briefly just on that, and that is we've been hearing about the need for deterrence and the need to address these issues. And again, it has always been my view of the Sentencing Commission that it is an empirically based entity, that it focuses on what it has before it in a meaningful way.

sj

It is very hard to respond to the notion of a couple of dozen of cases that we have not yet seen. But in the material that we have before us, we don't have a record that says there is this massive need for an enhanced deterrence against what would apply to legitimate operators.

Now if Mr. Uhlmann is saying this is not intended to apply to legitimate businesses of any kind, but only to criminals who are attempting to, you know, use the nation's infrastructure to commit crimes, we've said that's not something we have a problem with. But I share with Commissioner Sessions the view that there are many roads to enhancing security.

The Association of Oil Pipe Lines is only one of many industry associations that has put its hand out to the government. It has provided more information about themselves to the government. It has worked closely with the federal, state, and local governments to try and enhance security. They do not want a sloppy system.

They do not want an unsafe system. They do not want exposure of vulnerability.

And the notion that the means to that end are wrapped up in an enhancement of punishment that will fall on legitimate operators, as is now being proposed, is not empirically before us, been supported as a basis for doing something today.

JUDGE CASTILLO: Yes. Commissioner Rhodes?

JUDGE RHODES: I have a question. Because the examples--it was talked a lot about terrorism and buttoning down, locking the doors. But I have a question about the risks that exist apart from terrorism and our ability to assess the need for further punishment for those cases, the mainstream of cases.

And the examples that were chosen for the testimony--for example, Emory--involved legitimate business, and these cases have been prosecuted for 15 years. So my question is, what additional information do we need, how many more Emory cases do we need to know

whether or not something like concealment and the risks posed by concealment through legitimate nonterrorists should be addressed?

Or you know, the three isolated areas--don't we know enough about those risks from the cases we already have? Anybody?

MR. SOLOW: Well, I mean, I think that part of the problem is that, you know, in comments presented on the recent provisions to change the hazardous materials transportation act, it was noted that of the penalties collected by the Department of Transportation that in no instance has a violator received the maximum penalty available.

And we usually think of--we have all talked about the evolution of enforcement of regulatory crimes as proceeding stepwise, that it begins at a level of administrative sanctions or enforcement assistance, of civil sanctions, and then finally criminal sanctions. And if we're in a situation where we are not yet seeing

that the administrative regulatory people are throwing their hands up and saying, "We have a disaster in the making here," it just seems like we're leap-frogging over at that point.

JUDGE RHODES: Are you suggesting we wait for a disaster?

MR. SOLOW: No. I'm just suggesting that what we haven't seen is a basis empirically at this point for leaping into a situation where we're saying the people we need to punish more are those not related to terrorist activities and not in situations related to releases. But in situations where there has been no release and where the concern is that you create such a broad applicable category that you simply sweep in a whole group of people and organizations and entities that are in the middle of a process of working with the U.S. government, with state and local governments to improve security.

And I'm not sure how that advances the cause of

security, if that's what's being tried to do here.

JUDGE CASTILLO: Yes, Judge Hinojosa?

JUDGE HINOJOSA: Are we left with the impression that it's Justice Department policy then not to proceed on a criminal basis unless there has already been some civil punishment assessed in the past? That most of these cases have had that already happen?

MR. UHLMANN: I think that's dead wrong, and it was wrong during Mr. Solow's tenure, and it was during Mr. Sarachan's tenure. It's not a prerequisite to bring a criminal case that there be a prior civil administrative violation.

JUDGE HINOJOSA: No. I wanted to know has that been the policy?

MR. UHLMANN: That has never been--that has never been our policy. It is true, and I think what Mr. Solow is making reference to and then misapplying, respectfully, it's true that in new areas of the law, we tend to allow the law to develop first in the

administrative context and the civil context.

We don't want to be--I mean, there are lots of things said about what we do. We don't want one of them to be that we've--you know, we're snaring unsuspecting individuals in a complex web of new laws. They had no idea the conduct was criminal. And so, we tend to let the law develop. Particularly when there are ambiguities in the law, we tend to let the law develop in the administrative and civil area first. And Mr. Solow is absolutely right about that.

But these aren't new laws. I mean, these are laws that are at least 15 years old. And although we haven't enforced at the level we're enforcing at today because, you know, as I've already conceded, perhaps we are late to the game, we have in the aggregate over those last 15 years seen enough cases to know what they are. We are today prosecuting enough cases, and we can't do anything about the two dozen we've got in the office today because they all involve crime that was committed

before November of this year, which is the earliest we can make a change for.

But we're worried about that future pipeline and trying to ensure that at least in those future cases we get the deterrence, which today we're only going to be able to get by really talking this one up and saying this is really important, and we're going to be doing more of this. In the future, people are hopefully going to be sentenced to greater sentences.

JUDGE CASTILLO: Yes?

MR. CONRAD: I think the one way to think about the interaction of the civil and criminal regimes in this area is to bear in mind that the Department of Transportation has recently initiated a comprehensive regulatory program for hazardous material security intended to get exactly at this problem of sloppy, you know, trucks are left with engines running and things are done that would facilitate terrorism, which is, as Mr. Uhlmann's clarified, it's really the fundamental

gravamen, I think, of the concern.

That program only became effective in September, and I think it would behoove us to allow that program to take effect because I would respectfully submit that because it forces everybody who registers to be involved in the hazmat business to develop plans and to train employees, that is likely to be more effective in terms of buttoning up conduct than this perspective that, well, now instead of going to jail for 5 years, you might go to jail for 20.

And then with respect to risk, I'm actually fascinated. I've never heard federal employees diminish the risks of environmental crimes, which were typically described as the worst, most horribly risky crimes ever, and I'm fundamentally befuddled as to really whether environmental crimes or hazmat crimes are more dangerous. But I do think that the answer is some amount of data collection as to how many times people have died in either case and then perhaps a little more rigorous

discussion about the risks.

But they certainly are topics regulated by environmental regulation that involve the potential for fixed facilities to blow up catastrophically. That seems to me to pose the same kind of risks as blowing up airplanes accidentally.

MR. SOLOW: If I could just add one thing to respond a little further to Commissioner Rhodes? I think that one of the things that is happening to industries, pipeline industries and other industries, is they are undertaking the risk assessment of their facilities, of their operations, and looking to find ways to reduce the very risks you're talking about, to prevent catastrophic occurrences, and doing so, as I keep saying, very much in a spirit of cooperation with the government.

And I guess there is a sense within the industry of sort of turning around and being surprised that the response is to say, "and we also need a bigger stick to whack you with," when there has not been an empirical

case that we're not stepping up to the plate on this issue.

If the issue is to take it out of the context of legitimate operators trying to do their work, whose regulatory failures are not at issue, but those trying to abuse the system. As I've said, our association and I don't think any industry association has objections to that. These are people we are all trying to do something about.

JUDGE RHODES: And I guess it could be said that the penalties, at least something more than probation might be seen to enforce the regulations, both internal and civil, that are being promulgated?

MR. SOLOW: Right. And as I've said, there's not a clear record to me yet that that's going to be the case in every one of the instances. The department is not here saying that, as I think Mr. Conrad has correctly pointed out, the transportation of hazardous waste is an area of risk.

The fact is that if you are a generator of hazardous waste and you give your hazardous waste to a transporter who is not properly handling it under RCRA, there is no permanent enhancement involved, and if there's no release, you're in the same sentencing category. And I don't hear them saying that this is something that needs to be addressed differently.

So we think that there are serious risks in this area. We think that they are addressed in the guidelines. We're willing to work with the department to find ways to address other risks that they're concerned about. We're just concerned they're coming in too broadly here.

JUDGE CASTILLO: If there are no other questions, let me thank our panel three panelists. And on behalf of especially all the former DOJ people on this commission, it's good to see that former DOJ people are maintaining a livelihood of sorts.

[Laughter.]

sj

JUDGE CASTILLO: Let me say that I've done such a poor job as presiding commissioner that we're well behind our schedule. We're scheduled to take a 45-minute lunch break, and that's what we're going to do. I expect that we will start with panel four at 1:35, panel five at 2:15, and finally, panel six at about 3:05, if everything goes well.

Thank you for your patience.

[Recess.]

sj

AFTERNOON SESSION

[1:45 p.m.]

JUDGE CASTILLO: Okay. Are we going to proceed in the order that you're listed?

MR. SANDS: No, Judge.

JUDGE CASTILLO: You're going to go first, Mr. Sands?

MR. SANDS: Since we are defense counsel, we thought we would change the line-up.

JUDGE CASTILLO: Well, let me, on behalf of the commission, congratulate you for your meritorious appointment as federal public defender. Let me also say I know you're a big Arizona baseball fan, and as they said in the movie "Miracle," you had your time. Now it's the Cubs' time. So with that, you may proceed, Mr. Sands.

MR. SANDS: Judge, I extended the invitation to have this hearing out in Phoenix, where the Cubs are playing and there's plenty of free strikes and everything

else. But--

JUDGE CASTILLO: No one told me about that.

MR. SANDS: Well, you see? Your staff is keeping it from you, and there are plenty of caps.

But I know that the commission is running a little late. And while we're are asserting our right to testify, I think that the DOJ panel that follows us should waive their right, and you can give them acceptance, and I'm sure--

[Laughter.]

MR. SANDS: --for three points. And that way, the departure can be approved.

But with that said, I would like to thank the commission for inviting the federal defenders to testify in front of you, and we appreciate the opportunity. And I wanted to say that we appreciated the opportunity in the past, especially in front of Judge Murphy. This being St. Patrick's Day, I'm sure that it's a special time for her, too.

sj

JUDGE CASTILLO: Well, let me just say she scheduled this meeting on this day.

MR. SANDS: So she's here in spirit if rather than conduct.

I want to start with an old review of principles. This commission and past commissions set sentencing policy according to 3553, which is punishment that is just and that is only as much as is necessary. And we believe that the commission has to keep this in mind when it's looking at the current amendments and the proposals.

The commission also has the duty to look at the data and statistics and to ask the questions whether there is a need for such raises, whether just raising penalties for the purpose of raising punishment is really serving the cause of justice, of punishment, and of fairness.

And we believe that, in many cases, the commission in looking at these penalties should not raise

them, that just raising them does not serve the ends. That the commission should listen to the concerns of the judges and judiciary and the defense bar and to go with a "go slow" approach. Piecemeal legislation, piecemeal amendments, a pell-mell approach to many things does not serve the cause of justice or sentencing.

And indeed, we are seeing, I am afraid, what I have termed a ratcheting up of penalties without purpose or, in sort of a slang, "the big creep." The big creep is penalties being raised without a basis. I don't think that the commission knows whether raising penalties of white collar two levels, four levels is really serving the purpose of deterrence.

I know from our experience in other types of crime that a person who's facing 10 years is not going to say, well, I'm going to do this crime because it's 10 years and not 12 years. That is just not human nature. The penalties at this point are high enough to serve the deterrence effect. And so, what purpose in general would

just raising them be?

One of the unintended purposes, though, is to shift guided judicial discretion away from the judiciary to the prosecutor. Because what is happening is the penalties are being raised to such an extent that anything that can reduce them is not in the hands of the court, but in the hands of the AUSA and the Department of Justice.

Now we can see this over the past several years. The 5K2, the substantial assistance, now the third point for acceptance. Now the fast track, which is controlled by the government. All of this is taking sentencing away from a coalition of the prosecutor and the judges to solely the prosecutor.

And this is the point that was criticized in George Fish's recent study of plea bargaining, the triumph of plea bargaining in America, saying that has been this fundamental shift toward the prosecutor, and it has ramifications for the system.

With that in mind, let's turn quickly to some of the amendments. We are facing an amendment to get rid of the cap. The cap was set at 30 for those that have a minor role. This was a cap that was just put in just recently, and we really don't have the time or the statistics to see if it's working. It seems, though, that it's serving its purpose in the cases that we have cited.

It is also a way, as this commission has said in the past, to get away from using just quantity as a marker of culpability. It's a tyranny of quantity that drives so many of the drug sentences. And couriers, these are the people who are least culpable, really don't know what they're getting into.

I know that the commission expects props, and I don't want to disappoint. But what happens, judge and commissioners, on the border is that couriers are met by people--Juan or John or Smith--and says for $500, $1,000, take this bag in your car across the border. In Arizona

now, the cars are running and people are just running into them, driving them across and dropping them off on the store across the way. They don't know what's in the bags. They have no idea.

It could be, in the worst case--the suspense builds--a kilo of or the five kilos of coke, here being sugar. But they wouldn't know it's in the trunk. Or in another case, it could be that famous leafy green substance, here Mexican oregano. But they don't know. Or finally, it could be, worst of all, which is dog treats for Labradors made in Mexico. So--

[Laughter.]

MR. SANDS: --they simply--that one is for the commissioner. Notice it is a Labrador. It took us some time finding that.

So they don't know. And so, when we set a cap of 30 for those that are found least culpable, they should just--that should be the ceiling. And the government is free to argue that they knew more, that

they are not culpable, or that they had the knowledge. So the cap should not apply.

We are also finding from your own statistics that we're looking at about 6 percent that it may apply to. But the word from the field is that it's even less. Most of these mitigating role is also done with the acquiescence of the government. The government is agreeing that the defendants have a minor role, or mitigating role. It's very, very rare that the government opposes it and the court gives it. So that should be taken into account.

The same principles also apply for aberrant conduct, which the Department of Justice is saying is not necessary. We would urge the commission to take the time to see if its amendments, which it has done the past several years in which I've testified, on the past several years are working out. The Department of Justice should have the comfort of knowing that they can review it under a de novo standard under the PROTECT Act for

those departures that they feel is not necessary.

Finally, in terms of the homicide amendments, we would urge the commission to go slow in the sense that these affect predominantly Native Americans, as the advisory group report indicates. To start raising the involuntary has that ripple effect that goes to voluntary manslaughter and to second-degree murder. There is no statistical basis saying that it must be raised. It's being raised because of a desire of proportionality.

But that way, every sentence should be raised until we're all at the level 43 from the get-go and there is only a departure down at the discretion of the government. So we would urge the commission in looking at these amendments, and also at immigration and the pornography, to take a go slow approach, to only do what's necessary, and to keep in mind that the punishment should not be more than what is necessary.

JUDGE CASTILLO: Thank you very much.

Who will proceed next? Mr. Pollack?

MR. POLLACK: Yes. Thank you.

JUDGE CASTILLO: Yes.

MR. POLLACK: Let me, first of all, just take a brief minute to introduce myself as a first time testifier before the commission.

I am on the board of directors of the National Association of Criminal Defense Lawyers and a co-chair of its White Collar Crime Committee. I've been practicing as a criminal defense lawyer for about a dozen years now, about 10 of them in private practice and two as an assistant federal public defender in the District of Maryland. I'm presently a partner at the law firm of Nixon Peabody.

As a first time testifier, I did not realize that I was expected to bring visual aids. And so, unfortunately, I have not. But, please, if Jon will keep out the dog snacks during the testimony will give you something to look at.

On behalf of the National Association of

Criminal Defense Lawyers, I would like to commend many of the written comments that the commission has already received, not only from my co-panelists but from the Electronic Frontier Foundation, the Association of Corporate Counsel, and, in particular, the Practitioners Advisory Group, which I think has some very important and thoughtful things to say about the mitigating role. And I know that representatives of that group will be here later today.

As a co-chair of the White Collar Crime Committee of the National Association of Criminal Defense Lawyers, I'd like to focus my comments on two areas--Chapter 8 and the public corruption proposed amendments.

I know you've heard a lot about Chapter 8 already. I don't know if there is anything I can possibly say that you haven't already heard, but I will give it a try.

One thing that strikes me about the proposals on

the compliance programs is the radical expansion of what is expected of a compliance program to go from a compliance program that is intended to prevent and detect criminal violations to a compliance program that is intended to prevent and detect any of the myriad civil, administrative, regulatory provisions that might be found anywhere in the CFR.

It strikes me that there is a real dichotomy between that expectation and the way that we treat individuals under the sentencing guidelines. For purposes of individual sentencing under Section 4A1.2, the commission has basically decided, and I think rightfully so, that most regulatory violations are wholly irrelevant to what is the appropriate sentencing range to give somebody for a criminal violation.

Thus, the guidelines say that we should never consider, for example, minor traffic violations in determining somebody's criminal sentence. We should rarely consider such purely regulatory offenses as fish

and game violations in deciding what somebody's criminal history is and, therefore, what sentencing range they're going to receive.

If actual regulatory violations by an individual are irrelevant to the criminal sentencing process, I have to wonder why it is that a corporation or organization would be expected to have a broad-ranging compliance program to prevent such violations, even in the absence of any actual violation, and why the failure to have such a broad-ranging program should be relevant to that organization's culpability for purposes of criminal sentencing.

Lastly, and very briefly, I would like to touch on the waiver of attorney-client privilege, which I know you've heard much about and has been much discussed, and just join the National Association of Criminal Defense Lawyers in raising some of the objections that I know have been raised elsewhere.

In addition to what we believe should be the

absolute right of any individual organization to get counsel and to have frank and candid exchanges with counsel, I'd like to point out just very briefly additional problems with rewarding or requiring waiver, either for purposes of cooperation or substantial assistance or in any way taking it into account in culpability and thus giving an incentive to corporations to waive.

The third party waiver problems, of course, have been discussed. The fact that you're causing an organization to decide whether or not to expose itself to substantial third party liability by waiving. I think it is also very unfair to uncounseled employees who talk to corporate counsel, believing that what they are going to say is going to be remaining confidential, and they don't understand that that privilege can be waived at any time by the corporation.

And finally, I think an area of litigation that we're going to see a substantial amount in will be

litigation arguing that the corporation is really acting as an agent of the government when the corporation knows that it's gathering information that it's going to turn over to the government. And that is going to present 5th Amendment issues, Miranda issues, and a whole host of other issues that I don't think we've really seen yet but will see if corporations are continuing to be coerced into waiving their privilege.

I'd now like to turn to the public corruption guidelines, and the proposed amendments in public corruption, obviously increasing the base level and the other proposals, seem to me to indicate that the commission believes that public corruption offenses are not presently severely enough punished under the sentencing guidelines. And I'd like to take just a moment to question that premise.

One thing that is unique about the public corruption guidelines is how the monetary component of that guideline is calculated, very differently from the

2B1.1 fraud guideline. Rather than the monetary component simply being the amount of the loss, it is the greater of the amount of the loss, the amount of the bribe paid, or the amount of the benefit received. And that difference between the public corruption guideline and the other monetary fraud guidelines already leads to substantial and severe penalties for public corruption.

I want to take just a couple of real world examples from my own practice. In case A, my client, Mr. Smith, acted as a consultant to a government contractor, and he paid a bribe of $50,000 to a government official in order to obtain for his client a government contract. He was paid for his services a couple of hundred thousand dollars from that contractor who, in fact, got the government contract.

However, what the government acknowledged at sentencing was that this government contractor fully deserved, in an untainted process, to obtain that government contract. The government contractor performed

very well on that government contract and, in fact, the government was so pleased with the services of that government contract that it continued to give it new modifications and renewals, vastly expanding the scope of the original government contract.

So at sentencing, we all agreed that the amount of the bribe paid was $50,000, and the government agreed that the amount of the loss to the government was zero. However, the government contractor over a period of several years had made in excess of $9 million in profit on those contracts. And so, at sentencing, the monetary component of the sentence was $9 million, despite the fact that my client had paid a $50,000 bribe and the amount of the loss was zero.

If this were a fraud offense, the monetary enhancement would be zero. Instead, it's $9 million.

Case B that I'd like to take from my own cases is the case of an individual, another government contractor who paid a bribe to a government official.

The government official had made it quite clear to him that if he wanted to get government contracts with his agency, there was one and only one way to do that. That was to pay to play, and that's exactly what my client did.

And on numerous occasions, in order to get a contract, he would pay a bribe, a contract that he should have gotten without paying the bribe. Again, the government had no questions whatsoever about my client's work that was provided to the government under that government contract, and the government agreed that the amount of the loss to the government was zero as a result of this offense conduct.

However, my client was sentenced on the dollar amounts of the bribes that he paid. He received no benefit from paying those bribes. The government official received the benefit.

In light of the unique nature of the public corruption guidelines, I believe that under the current

iteration of the guidelines, particularly with the recently enhanced 2B1.1 tables, there is absolutely no need to further amend the public corruption guidelines for more severe sentences. I believe the sentences are already dramatically more severe than they are with any other financial offense.

Finally, I'd like to note that the present cross-references in the public corruption guideline already address many of the problems that are--I believe animate the proposals. For example, the cross-reference that if the bribe is paid in order to engage in other underlying criminal conduct, the sentence is to be determined by that underlying criminal conduct. So I believe the severity of the present sentence, along with the cross-references, already assures adequate punishment for public corruption offenses.

Thank you.

JUDGE CASTILLO: Okay. We'll proceed on to a person well known. Mary Price.

MS. PRICE: Thank you so much. Thank you very much for inviting us.

Julie Stewart, who usually sits in this chair and testifies to the commission, sends her regards and also her regrets. Although I have to confess there are not too many regrets as she and her husband and daughters are in Guatemala right now, and I have to wonder if they're coming back. I expect that they will. But she did ask me to tell you that she hoped you would do the right thing today and down the road.

I want to talk pretty much exclusively about the mitigating role cap effort and reserve, however, a few minutes of my time to touch on compassionate release. Two years ago, the commission unanimously did do the right thing. You made a tremendous gesture, and you took a stand on one of the most troubling aspects of drug sentencing guidelines, which is the over-reliance of the guidelines on drug quantity.

At a time when sentences for drug defendants and

other kinds of defendants were going up, you voted to ameliorate the effect of "one factor fits all" kinds of sentencing. You know many people have said it. We've said it certainly a lot at FAMM that drug sentences are enormously overstated.

It's long been recognized that sentences, especially for low-level participants in drug conspiracies, can be ferocious and unconscionably long. They are driven by excessive mandatory minimum sentences. They're driven by conspirator liability, and they're driven by relevant conduct rules that elevate drug quantity into a near total proxy for culpability.

So we were delighted when you proposed the cap, and we were thrilled when you passed it unanimously. And we are so dismayed that you now choose to revisit this issue, even before the ink dried on the 2002 amendment practically. And we urge you in the strongest terms leave, at least for now, the cap undisturbed because it was the right thing to do, number one, and, number two,

because we don't have enough information to even evaluate whether and how it's working.

In April 2002, when Judge Murphy announced the cap proposal, which eventually a version became incorporated into the guidelines, she explained that it was designed to limit the exposure of low-level drug offenders to increased penalties based on drug quantities that overstate the defendant's culpability, given role and function in the offense. It also would provide a guideline range, she said, that is consistent with mandatory minimum penalties.

At that time, a number of commissioners, some movingly and some very compellingly, about their support for the cap. Commissioner O'Neill, for example, you expressed your hope that the commission might use this opportunity as a time to revisit the issue of the reliance of quantity, which has been overused as an estimate of harm and culpability. And while you characterized the drug cap as a crude measure to ensure

that the least culpable are punished less harshly, you nonetheless said that it brings a certain amount of sanity and justice to sentencing of the least culpable offenders.

Commissioner Steer, you reached back to an experience from years ago. You talked about a time when you went to visit prisoners at the behalf of the sentencing institute, you met with people who were serving 20 and 25 and even 30 years for drug offenses, and you were sure that some of those people were probably mitigating role eligible at least.

You expressed some reservations at the time that you voted for the cap. But you voted for it, you said, in your words, because it was the right thing to do.

In our written submission, I tried to tell you a few of the many stories that fill our files of people who are serving very, very long sentences based almost principally on drug quantity. I just passed their pictures around, but I think you've seen them.

sj

Daisy Diaz, who the prosecutor and the probation officer said was merely a decoy. That was her entire role on the boat that went to the Bahamas and picked up and dropped off. And she had so little knowledge about this, they had to use the jaws of death to open the boat to get to the drugs. I mean, she says to this day that she didn't know about it. She won't be released until 2008.

Tammy Bloom--and she received nearly the longest sentence, by the way, in that--in the drug conspiracy. Tammy Bloom, who received a sentence longer even than her husband, the ring leader of the offense who got her involved, who ran two drug smuggling operations, including one with his mistress in an entirely separate household. She won't leave prison until 2015.

And Lauri Gibson, who was used to doing what her boyfriend told her to do. She met an informant to pick up some money owed to her boyfriend, and her 151-month sentence was eventually reduced for mitigating role.

None of these people, I should say, received the cap. They were all prior to the cap. But they were people who received minor or minimal role adjustments.

And as I said, our files are filled with the Tammys and the Daisys, the Lauris, people who followed boyfriends and husbands and others into drug conspiracies.

A couple of years ago, Senators Sessions and Hatch proposed a cap in their drug sentencing reform bill. And Senator Sessions, when he introduced this bill, remarked that the primary focus of the mandatory minimums and the sentencing guidelines on quantity has resulted in a blunt instrument that data now shows is in need of refinement. And they then proposed the cap, which, of course, wasn't adopted into law but would have reduced sentences to as low--would have capped base offense levels at as low as level 30.

We are particularly troubled that you revisit the cap now before there's been enough information before

the sentencing system has had what the defenders call the ability to absorb the effects of the cap. We don't have any information. I don't have data to cite back to you to say this is how it's working or it's not working.

We don't know if it isn't working, if people are getting too long sentences. We don't know if judges are avoiding providing the cap because they abhor the fact that sentences are too low. We simply don't have the information, and we really, really encourage you to let this filter through and see how it's working.

A criminologist whose name I can't remember at the moment says when the only instrument you own is a hammer, every problem begins to look like nails. The mitigating role cap provides an instrument that is gentler than a hammer, that helps us to individualize these defendants. It's extremely important so in light of the terrible outcomes that quantity driven sentencing nearly guarantees. In light of the recency of the amendment and the dearth of the information about its

impact, we urge you most strongly to stay your hand right now.

Compassionate release. I understand that you will not this year again be publishing a proposed policy statement concerning compassionate release. That you had hoped you would be able to do to provide guidance to federal judges who are considering what is euphemistically known as compassionate release.

I've written to you twice in the past about this issue. I'm not the only one. The Practitioners Advisory Group is concerned, and the American Bar Association has also urged you to act on this issue.

I know you've been very, very, very busy with lots of things, organizational guidelines. But organizations aren't dying in prison without this guidance. And the Bureau of Prisons, which is charged with forwarding motions for sentence reductions to the sentencing judge, are reluctant to act frequently on these petitions. There are many, many requests for

compassionate release, very few that get forwarded.

We believe that their reluctance is due, in part, to the fact that there is not guidance concerning compassionate release, and there is a lot of confusion out there, even within the Bureau of Prisons. So that's a void that you can fill and do a great deal of good in the process.

In the absence of a policy statement, the Bureau of Prisons is probably understandably reluctant. They keep the jailhouse keys. It's not in their purview to grant mercy. These are cases that are absolutely deserving of mercy. People who are too ill, too demented, too emotionally unstable. Some people who are dying for whom mercy is the appropriate response.

So I encourage you at your earliest opportunity to do this, to give guidance so that we can begin to release some of these people.

Thank you so much.

JUDGE CASTILLO: Thank you.

And let me just say on the topic of compassionate release, the commission recognizes that it has a statutory obligation and we, because of other factors beyond our control, mostly caused by that big white building on top of a hill close to here, we've had to give our attention to other matters. But we're still hopeful to get to this in the upcoming cycle.

At least that is my personal hope. I don't know if I'll be here, but I will try.

MS. PRICE: Thank you. And I understand. I understand that you've been tremendously busy. We certainly have been along with you on some of those travels, so thank you.

JUDGE CASTILLO: And there's one other thing I want to say before we open it up for questioning. I don't mean to pick on you, Mr. Pollack, but I will tell you that there is one thing that you said that I have to totally disagree with. And I wanted you to know that face to face.

I've lived in Chicago all my life, and I have to tell you public corruption has, continues to be a problem. I served as a prosecutor there. I prosecuted a lot of public officials. I now sentence a lot of public officials. We have had governors convicted. We have one that's under indictment. I have personally sentenced two mayors, at last count about 31 attorneys. It's ridiculous. One judge sentencing 31 attorneys.

This is the one area, in addition to the corporate area, where I think people do pay attention to what the sentencing guidelines are, and a lot of these are lawyers before they've become public officials. So I feel very strongly about public corruption.

The purpose of this hearing is not to debate you, but I wanted you to know that straight up. That I am one of the persons on this commission that is trying to increase the penalties for public corruption because I've seen what it has done in our district, and it has been a disaster.

So that's all I'm going to say. I'll open it up for questioning.

MR. POLLACK: I'm sorry. May I just briefly respond to those comments?

JUDGE CASTILLO: Sure.

MR. POLLACK: I do appreciate your making them. I did not mean to suggest for a second that public corruption is not a problem. What I mean to suggest is that the present sentencing guidelines provide judges the tools to punish public corruption very harshly. Particularly situations where you have high-ranking officials, where you have pervasive public corruption, there is an express approval of upward departures in the appropriate circumstances.

So my comments were not to suggest that public corruption should not be punished, nor that it is not a problem, simply that the tools presently exist to punish it appropriately so in the right circumstances, in a significantly more severe fashion than other financial

crimes are punished.

JUDGE CASTILLO: One, as I said, I'm not going to debate you. The tools might exist. But, unfortunately, my study of the problem nationwide has shown tools are not being used. That's all I'm going to say.

Any questions? Commissioner Horowitz?

JUDGE HOROWITZ: I think John has one.

JUDGE CASTILLO: Oh. Commissioner Steer?

JUDGE STEER: Well, let me just echo your comments on compassionate release. I think it's appropriate that you remind us. I think the interest among commissioners on this subject is broader than it might appear. It's just one of those things where we haven't gotten it done.

But you know, I hope that you will remind us again as we set about finishing this amendment cycle and moving to the next one and set our priorities for next year. It is an unfulfilled statutory mandate. We

probably are not as close to having a common vision as to what it should be.

You know, I may have some interest that I've long had that we address this matter. But I've made no secret of the fact that I prefer that it be started as a rather narrow, limited thing, but something more than what the Bureau of Prisons maybe has at present time. We'll just have to see. So do keep on.

Now on the mitigating role cap. That's a tough issue in many ways because one for which I have a lot of sympathy, but one that I've had some rethinking. And you know, isn't it appropriate--you folks, Jon and Mary in particular, remind us of the interactive cumulative effect of enhancements when we're going in the upward direction, and some courts have recently done that, even in opening up a new possibility of a downward departure. You know what I'm talking about, you know? Something I'm sure we're going to argue to expand it.

But don't we have to look at the interactive

cumulative effects going down as well? And the mitigating role cap, a situation where, you know, it grants a reduction as much as eight levels. Then you've got a reduction for the mitigating role itself. In many cases, you get safety valve as well, which gets you out from under a mandatory minimum.

And that, you know, can be as much as a 14-level reduction, all turning on a finding that the defendant has a mitigating role. Don't we have to look at that as well?

MR. SANDS: No--

JUDGE SESSIONS: Okay. Next case.

[Laughter.]

MR. SANDS: Part of the problem is that over the years, there's been this tremendous ratcheting up of quantities of mandatory minimums, everything. This is a lowering in a very specified area, which is a court has to find that there is a minimal or minor role. So it's that group that is less culpable. And then it only sets

the cap at 30. So only those that are--that has quantity above that level 30.

Even if everything is given, a minimal role, all these are reductions, safety valve, you are still looking at a substantial amount of punishment. It's not as if they are going home. They are still staying in the Bureau of Prisons. It's just not for quite as long.

MS. PRICE: Everything he said, and that it's an abstraction that we're talking about. Granted, it's an abstraction with, you know, we can do the math and go down 8 levels or 14 levels. But we really don't know what's going on, and I think that that is--until we have more information, it's hard for me to even respond.

We know at the most extreme level that may be what's happening. I might argue that's appropriate, but I can't say anything without knowing what's happened so far. And I really--I urge you to move slowly and cautiously in this area. It felt like the right thing to do two years ago. I'm not sure why it's no longer the

right thing to do. We knew about the possibilities then, and nothing's changed.

JUDGE CASTILLO: Yes. Judge Hinojosa?

JUDGE HINOJOSA: Well, and I guess this is to whoever wants to answer this question. Do you think it's ever appropriate to consider the types of drugs and the amounts of drugs with regards to a sentence? The amount of the weight? I mean, whether it's a person with a mitigating role or no mitigating role, is it ever appropriate to actually consider what type of drug it is and the amount?

MR. SANDS: Yes. Yes. You may have a situation in which the person has 30 tons of heroin--I mean, you have to look at that, Judge--versus a little baggie of marijuana versus the circumstances of the case. It may be a situation in which a person would qualify for the level 30, but the judge could find that there were exceptional circumstances and to depart upward since it would be an unusual case.

This is just an adjustment in Chapter 2. It is not an inflexible bright line.

JUDGE CASTILLO: Commissioner O'Neill?

JUDGE O'NEILL: Mr. Sands, a couple of questions. One is arguably a little beyond the scope of your testimony right now. But I was just wondering whether or not--it sort of ties in with the mitigating role discussion, whether or not you've seen sort of an effect in your district since the PROTECT Act was passed, and whether or not you feel, especially given the PROTECT Act and limitations on downward departures, whether you feel that the mitigating role cap is more significant now?

MR. SANDS: Policy. Hmm. What we are finding is that the judges are looking toward role more, especially because we are at a border district where aberrant conduct used to have that play and where other considerations were taken into account.

Now, given the PROTECT Act, role is being

scrutinized, and the government is joining us in saying that these are minor or minimal role. We have not seen a cap yet at level 30. That hasn't clicked in. But it may be applicable in another case. Given the sea changes that we have seen with the PROTECT Act, with changes, we should let things work their way out.

JUDGE O'NEILL: Have you seen the government frequently object to a press for the application of the mitigating role cap?

MR. SANDS: Not in my district, because the government is usually joining us on various matters. It was my U.S. attorney that said he owned the departures in our district. He still does, you know? So we are frequently doing substantial assistance and other things. It really isn't that much of a factor.

But in that rare case, it's another tool to get rid of the quantity--of the tyranny of quantity.

JUDGE CASTILLO: Judge Sessions?

JUDGE SESSIONS: There's a question that came to

me when you were talking. Is the mitigating role cap, anecdotally, most important in the border areas or most important in other areas? And in particular, I will say that in the last month to two months, although I know a judge has gotten in trouble for talking about cases that they've had, but I would say that I imposed sentences pursuant to the mitigating role cap in four cases.

All involved, ironically, women, couriers for boyfriends in crack cocaine. And the crack cocaine conspiracy involved more than 50 grams. All right? That put it right at 30--right at 32, essentially. And in fact, statistically, the vast majority of sentences that will be impacted by the mitigating role cap are at 32, or up to 34, and the 38 is extraordinarily rare.

MR. SANDS: Right.

JUDGE SESSIONS: My question is, do you have experience at the border versus other places to suggest that really the cases that are being impacted are crack cocaine, girlfriend, or courier cases as opposed to the

large conspiracies across the border?

MR. SANDS: Let's change the "girlfriend" to "companion," and then we have "companion, courier, and crack."

JUDGE SESSIONS: I'm sorry. Was that politically incorrect?

MR. SANDS: No. It's--

JUDGE SESSIONS: You would tell me if it was, but--

MR. SANDS: It's a trilogy. It's three Cs that we learn about in trial practice, you know? So it is usually--at the borders, it's usually the boat that the decoy was on. It's usually the girlfriend that's told to just make contact. Yes. It is the cases.

JUDGE CASTILLO: Any other questions?

MS. PRICE: Can I just mention something?

JUDGE CASTILLO: Yes.

MS. PRICE: The kinds of questions that you just asked, both of you, indicate to me that we don't have

enough information. I mean, you don't seem to have it there and, happily, Jon can provide some of it. But I know that there's a great deal more out there.

And the commission--what the commission does very well is gather data and analyze data and sort out what data teaches you. It may make your decision different from your decision. But nonetheless, it is a prerequisite to making reasoned judgments and particularly when you want to repeal something so fresh and so important.

JUDGE HINOJOSA: I have one last question.

JUDGE CASTILLO: Yes. Judge Hinojosa?

JUDGE HINOJOSA: And I think it was touched in some of your written materials, but maybe you can expand on this a little bit. If it was the desire of the commission to revisit this, what suggestion would you have with regards to any other adjustment that could be worked with to try to satisfy some of the concerns you have expressed here if it wasn't the mitigating role cap?

And I think Mr. Pollack maybe mentioned something in his--somebody mentioned something in the written statement.

MR. SANDS: Well, I guess we're back to the graduated approach then in which we're looking at various factors. I suppose the commission could start looking at the types of drugs and start making distinctions between the drugs. But then you avoid the bright line. What the commission could do is put a favored basis for a departure if it is or if the judge feels that it is a certain type of "bad drug."

As the commission has seen, we go through these waves of this is the worst drug of all time. We had the crack. We had meth. We had ecstasy. We--steroids is coming down. God forbid the Cubs should be involved in that.

[Laughter.]

MR. SANDS: The Diamondbacks--I might add.

JUDGE SESSIONS: You're on public record now.

MR. SANDS: Well, you know, one has to stick by their team. It's one of those situations where you can use that adjustment. If the court wishes to impose a floor--well, I am just rambling. What we can do is give you something written.

JUDGE CASTILLO: Okay. Anything else?

JUDGE HINOJOSA: I do appreciate the idea--

MS. PRICE: Do no harm is what I say--sorry.

JUDGE CASTILLO: I think Judge Hinojosa really has his eye on those tasty snacks. He has certain constituents, let's put it that way, that could benefit from them.

Thank you very much, and we'll proceed to the next panel. Thank you.

[Recess.]

JUDGE CASTILLO: Let me thank this next panel for your extreme patience. We're way off our timeline, thanks to me. Are we going to go in the order that you're listed in, or do you want to go in some other

order?

MR. COLANTUONO: Whatever order the commission prefers.

JUDGE CASTILLO: We're totally flexible, at least as to this issue.

MR. COLANTUONO: I think I'm first.

JUDGE CASTILLO: Okay. Then we'll start with you, Mr. Colantuono.

MR. COLANTUONO: Thank you very much.

Honorable members of the commission, I am Tom Colantuono, the United States attorney for the District of New Hampshire. It is an honor for me to be here today to testify in support of the pending proposal to amend the sentencing guidelines for possession or use of fraudulent immigration documents, including U.S. passports.

With me, to my left, today are Mark Zuckerman, an assistant United States attorney from my office, who has prosecuted many passport fraud cases. And two

members of the State Department's Diplomatic Security Service, the law enforcement arm that investigates passport and related frauds--Mike Johnson, the special agent in charge of the service's Miami office, and Walt Dearing, the office director of the service's Boston office.

We are here to stress the importance of the pending document fraud guideline amendment proposals that would provide appropriate penalties for crimes and criminals that pose significant security risk to the country. In the last two years, my office has prosecuted about 43 passport fraud cases arising from fraudulent passport applications filed with the National Passport Center in Portsmouth, New Hampshire.

The National Passport Center adjudicates nearly all of the applications for passport renewals filed with the State Department and a significant percentage of the applications for initial passports filed nationwide. More than seven million U.S. passports were issued

worldwide in fiscal 2003. More than two million of those came through the National Passport Center in New Hampshire.

Acquiring and fraudulently using a U.S. passport is a serious crime and should be so treated by the sentencing guidelines. Let me read to you an excerpt of a letter sent to the commission by Secretary of State Colin Powell. I think the secretary's letter itself and the excerpt bring home the urgent need to promulgate the proposed amendment in this area.

The secretary writes, "Maintaining the integrity of U.S. passports and visas is a critical component of our global effort to fight terrorism, in addition to ensuring that our immigration policies and laws are enforced. A U.S. passport establishes U.S. citizenship and identity, making it the most widely accepted and versatile identity document in the country.

"It is considered the gold standard of all passports and is used by our citizens not only to visit

foreign countries and enter the United States, but also domestically to establish bank and credit card accounts, cash checks, apply for a driver's license, apply for welfare and unemployment, and to conduct activities that require proof of U.S. citizenship.

"I believe the new guidelines will be a clear signal that the United States government recognizes the severity of passport and visa fraud and the importance of maintaining border security."

As the secretary's letter points out, the gravity of the passport fraud problem can be assessed by considering the benefits and privileges that an alien can unlawfully obtain by fraudulently procuring a U.S. passport. These include access to almost every country in the world and years of unlimited freedom of travel into and out of the United States, unencumbered by immigration laws or any security initiatives that screen and track noncitizen visitors.

A passport can also enable its holder to vote in

United States elections, obtain military and other employment, purchase and own firearms, receive federal benefits, and bypass supervision by the Bureau of Immigration and Customs Enforcement. These national security implications distinguish passport crimes from other forms of identity fraud and require a stronger law enforcement response.

Most passport fraud offenses are class C felonies punishable by up to 10 years of imprisonment. However, the sentencing guidelines currently provide only a base offense level of eight, which means in most cases a probationary sentence. We do not believe such a sentence adequately reflects the seriousness of passport fraud offenses, nor is consistent with other guideline provisions which address, for example, the unauthorized use of any means of identification to obtain any other means of identification.

Adopting the proposed amendment, which would increase the base offense level to 12, will correct this

inconsistency and will result in a more appropriate sentencing range than the current guidelines provides. The amendment removes passport fraud from the class of violations that poses the least risk of incarceration for offenders. The pending proposal would also build in the specific offense characteristic that is present in all passport fraud cases so as to bring the penalty for passport fraud into alignment with the penalties for similar crimes under Section 2B1.1.

If the commission has any questions about the specifics of this proposal or about specific aspects of passport fraud investigations and prosecutions, my colleagues here can assist in addressing them. Our message to you is that this issue is a priority for the Department of Justice, a priority for the Department of State, and a serious national security concern that we strongly believe the commission should address in this amendment year.

Overall, we believe that in order to maintain

the integrity of U.S. passports, the repercussions of someone fraudulently applying for or obtaining a U.S. passport must be significantly increased from current policy. The proposed amendment accomplishes this, and we would urge its adoption.

Thank you.

JUDGE CASTILLO: Let me just thank you, Mr. Colantuono, on behalf of all my fellow commissioners for taking the time out of your busy schedule and waiting patiently to testify. Let me also say that we certainly appreciated the letter we received from the Secretary Powell. We certainly understand the importance of the issue, and we thank his esteemed colleagues for being here.

Since I do think we're going to switch topics, are there any questions my fellow commissioners might have of Mr. Colantuono on this topic?

JUDGE O'NEILL: Do we have any sort of a description of the nature--you said there were 43 cases

prosecuted, and that was--

MR. COLANTUONO: In New Hampshire.

JUDGE O'NEILL: In New Hampshire?

MR. COLANTUONO: Yes.

JUDGE O'NEILL: And that was out of the how many cases that were processed through New Hampshire?

MR. COLANTUONO: Two million applications.

JUDGE O'NEILL: Two million applications and 43?

MR. COLANTUONO: Yes.

JUDGE O'NEILL: Do we have any idea of what the nature of those--did any of those 43 prosecutions involve acts of, you know, potentially getting documents for purposes of furthering terrorism crimes or--

MR. COLANTUONO: As I said in my testimony, I'm going to defer to Mark Zuckerman, who's leading our effort in that field. He can address exactly the kind of cases because he's doing the prosecutions.

JUDGE CASTILLO: You can come up here, Mr. Zuckerman.

MR. ZUCKERMAN: Thank you.

To date, the answer in short is no. The majority of our cases have--the overwhelming majority of our cases have not involved, in the final analysis, terrorist acts. A few of them had that--raised that concern initially. But eventually, that did not turn out to be the case.

Most of these cases involve individuals who are in the United States illegally, who then, to further their illegal presence, file a fraudulent application with the Department of State to obtain, as Secretary Powell says, the gold standard of the United States passport.

JUDGE O'NEILL: Because my concern is always, well, a number of different crimes that we have in our panoply of crimes could potentially be a terrorist offense or could be used by terrorism. My worry is always using terrorism as sort of that heavy hammer to jack up the penalties for other sorts of crimes.

So it concerns me a little bit, and I guess I would be a little bit more comfortable almost if I had a better idea of among those 43 crimes whether there were something more serious. So what the absolute penalty should be. And that's what, I guess, my concern is.

Because certainly if somebody is then goes on to commit a terrorism offense or goes on to commit any sort of a serious offense, obviously, there are other statutory provisions that can be used to get at them as well. That's just sort of my concern that I always express.

MR. ZUCKERMAN: Would you like me to address that? Very briefly, let me be clear. Although our initiative in this area grew out of concerns that were raised in the wake of 9/11, this is not motivated by concerns about terrorism principally.

What we've learned through an initiative to look into what's going on with the National Passport Center that's located in the District of New Hampshire, was that

the penalties were at a level eight, 0 to 6, did not adequately address the nature of the crime. Which, as we point out in our written submissions, similar crimes are treated more appropriately at higher offense levels throughout the guidelines.

So essentially, we had a discontinuity here, which is most pointedly pointed out when a false Social Security number is used. You know, the guideline for that, 2B1.1, would fix the offense level at 12 just for use of a bad Social Security number to obtain another form of identification. That's almost part and parcel of every passport fraud case because a Social Security number has to be listed, yet the offense level for the targeted offense of passport fraud is eight, the base offense level.

So really what this is, is our hope to bring some balance and some consistency to the guidelines, specifically with respect to passport fraud, visa fraud as well.

JUDGE O'NEILL: So a 12 might even be too low then?

MR. ZUCKERMAN: In--well, the proposed amendment carries with it specific offense characteristic enhancements that we believe address the variance of passport fraud where an increase in the offense level would be appropriate. So in our judgment, a 12 fixes it at about the right place.

JUDGE CASTILLO: Commissioner Steer?

JUDGE STEER: Should we draw a distinction between passports and the other types of documents that are currently treated under the same guideline? For example, you mentioned visas. But should there be a distinction between the two, other naturalization documents? I know that goes a little beyond your territory, but between the two of you, you could answer?

MR. ZUCKERMAN: We've considered that, and I think, in our considered judgment, working with our colleagues at the Department of State, think that 12 is

appropriate across the board for the types of documents that 2L2.2 addresses, including visas and as well as passports and other documents which are filed with the government under oath to obtain some benefit that the applicant is not entitled to generally by dint of the fact that they're not in the United States legally to begin with.

So we think it's an appropriate level at which to set the base offense level.

JUDGE SESSIONS: But is that--

JUDGE CASTILLO: Go ahead.

JUDGE SESSIONS: Is that consistent with the earlier testimony in which--well, in fact, Secretary Powell's letter in which he talks about the gold standard of the U.S. passport. That's essentially why you're here, I thought. You're talking about making sure that the U.S. passport is not obtained fraudulently.

But then so there is--at least by way of your argument, there's a distinction between the passport and

the other documents. And so, why then do you say does it not, in fact, minimize the importance of your argument that, you know, increase everything else the same way you would with a passport? Shouldn't there be a distinction between obtaining this gold standard passport and other kinds of documents?

MR. ZUCKERMAN: Again, I think that the specific offense level amendments address that. The 12 would apply in the passport case to somebody who filed a fraudulent application for the passport but didn't obtain it. The specific offense characteristic amendments would address somebody who actually managed to succeed in deceiving the government and obtaining that passport and then yet another characteristic for actually using the fraudulently obtained passport.

So I think the proposed amendment tries to address two things that I think address your question. That is raising the base offense level generally for these types of documents--passport, visa, and so forth.

But with--specifically with respect to the gold standard passport, if you will, when there is a further act besides merely applying for it--using a fraudulent application, actually receiving it, and then further use of it--to appropriately increase the offense level. So I think there was a concerted effort to strike that balance.

JUDGE SESSIONS: Well, a corresponding argument or issue is that, obviously, you're asking for an increase in the base offense level of four levels. That particular section, 2L2.2, applies to a whole variety of offenders. So that when you increase the base offense level, as opposed to have a specific offense characteristic, you know that you're going to be affecting, you know, a lot of people who are not necessarily targeted by your proposal.

And I guess I wonder if you've thought about that. I wonder if you've thought about alternatives so that if, in fact, you're looking for passport fraud, for

instance, you thought about focusing a little bit more on that actual offense while not impacting all of the other persons who may not be related in any way to passport fraud or visa fraud.

MR. ZUCKERMAN: I think the point's well taken. And in short, there was, I think, considerable discussion about how to best approach the issue. And I think that once the--our view was looking at all the crimes, for example, false claim of U.S. citizenship also goes to this guideline that increasing the guideline across the board for the base offense level was appropriate, given the nature of the other offenses that are tied to 2L2.2. and then to address, as I've said, the passport issue with the specific offense characteristics.

So we did give consideration to that. I understand your point.

JUDGE CASTILLO: Any other questions? Then we'll switch topics and go to Ms. Avergun. Thanks for your patience. I understand you have a visual

presentation, too.

MS. AVERGUN: I do. I myself am a first time testifier, but being a trial lawyer, I perceived the need for visual aids and did bring some. As you know, I am--

JUDGE SESSIONS: So the visual aids comes with trial practice? Is that where--

MS. AVERGUN: Yes, that's the hallmark of a trial lawyer. I hope that's been your experience.

JUDGE CASTILLO: A good trial attorney always has a visual at 2:45 in the afternoon.

MS. AVERGUN: We're right there, Judge. I'm the chief of the Narcotic and Dangerous Drug Section at main Justice, and before that, I was an AUSA in the Eastern District of New York.

I'm particularly gratified to be here to speak on this very important topic of GHB sentencing and their analogues. The department strongly urges the commission to significantly increase the sentencing guidelines for offenses involving GHB and their analogues.

sj

Of the two options under consideration by the commission, the Department of Justice recommends option one, which would establish base offense levels of 26 and 32 for offenses involving 1 gallon and 10 gallons, respectively, of GHB. I've submitted a prepared statement to you, which I ask would be made part of the record.

GHB is a central nervous system depressant that's abused to produce euphoric and a hallucinogenic high. A clear liquid, GHB is often ingested with alcohol, which compounds its effect. Symptoms of GHB abuse include drowsiness, nausea, unconsciousness, severe respiratory depression and, in extreme cases, coma.

GHB is a club drug frequently abused by those who are part of the club scene and has been associated very strongly with date rape and overdose cases at nightclubs and parties. In March 2000, it was scheduled under Schedule 1 of the Controlled Substances Act.

Why are we so concerned about GHB? The reason

is that this drug presents a unique combination of factors that make it imperative that we protect against the harm this drug causes by fashioning the most severe justifiable sentences.

It's used by predators to facilitate sexual assault. It is a club drug primarily taken by young people and marketed to young people in the 18 to 30 age bracket. It is often used in combination with alcohol, ecstasy, or ketamine. It is easily manufactured from legitimate cleaning solvents and easily concealed as a clear liquid, which facilitates its distribution. And finally, the profit margins associated with this drug are tremendous.

In recommending option one, we've concluded that one gallon is the quantity which defines the mid-level dealer, whom we say is the appropriate person to get that base offense level 26. Who are these mid-level traffickers? They are the individuals who distribute GHB or its analogues at the lower end, but not the lowest

end--not the retail end of the distribution chain.

A mid-level trafficker might acquire pure GBL from his source of supply, manufacture it into GHB by simply adding lye, and then sell it to a low-level trafficker for redistribution in capful quantities at rave parties. Alternatively, some mid-level distributors simply repackage GBL or GHB in diluted quantities for distribution on the club scene.

Let me give you a couple of examples of fairly common cases involving mid-level traffickers, which illustrate why we favor this one gallon option for level 26. These examples are based on actual cases.

In Florida, a person familiar with the club scene wanted to obtain GHB to distribute at a college party. He arranged to purchase it from his source of supply, whom we considered to be the mid-level distributor. The cost was between $400 and $600 a gallon. The mid-level distributor picked up several gallons from his own supplier and repackaged it into two

one-gallon jugs, which were then distributed by retail-level distributor at the college party in capful or vial full quantities. And this first photo is the vial, a typical size, between one to five milliliter vial of what a user would take that GHB in.

In another example in Florida, a drug trafficker bought a gallon of GBL. He diluted it in a 14 to 1 ratio with water and placed it into 540 32-ounce bottles which he sold for $60 a bottle. This is the one-gallon container. The drug dealer made 540 of these 32-ounce bottles with just this one gallon of GBL.

And of course, you can't drink this as the GBL. That would kill you. People who take it, take it in capful quantities of one to five milliliters at a time. And with our conservative estimates, we estimate that this makes 700 to 1,200 doses of GBL for consumption.

In another case, we found during Operation Webslinger, which was DEA's seminal Internet trafficking drug case, a drug trafficker in Alabama made three

purchases over a three-day period from his source of supply. Each purchase was for roughly a half gallon of butane diol, which is the analogue, for $150.

The distributor then sold it on his Web site, called "G is for us," as a floor cleaner, and he had about 50 customers, before he was arrested, who purchased the analogue in the ounce and pint quantities.

Finally, another Operation Webslinger distributor purchased about two gallons per months of butane diol from his source of supply. He repackaged it in bottles, labeled it as organic solvent in 32-ounce, 4-ounce and 2-ounce bottles, and I'll just quickly go through these pictures. These are the bottles that are sold for about $60 to $80 and sold by the people who are then selling it, taking it to the clubs to distribute.

This is some examples of mid-level distribution paraphernalia, all of which is seized. In the picture on the extreme left, that's about an eighth of a gallon of GHB, which was just purchased in a kit and sent through

the mail.

The Nestor case, which is on the right, that picture shows about 9.5 gallons of GBL, which he sold, and it was used as an analogue. And then on the bottom, two one-gallon containers of GHB. You can't really tell from this photo, but the GHB is such a toxic chemical that it actually started to burn through the water label, the label on the bottle of water.

These typical examples illustrate why the department strongly supports one gallon as the quantity that defines the mid-level trafficker. The guidelines need to reflect the reality that neither mid- nor high-level traffickers are distributing 55 gallon drums of GHB. You might have heard of one such case where that happened, but that case really was an anomaly and, in fact, it is very difficult to obtain that quantity of GHB at a time.

In fact, at the mid level, the vendors are distributing multi-quart quantities, which are capable of

producing thousands of dosage units. Equally important under option one, the commission proposes 10 gallons as the amount for large-scale traffickers, who would receive a base offense level of 32. Ten gallons of GHB is capable of producing approximately 10,000 dosage units, and we believe that this quantity fairly reflects the activities of a large-scale distributor.

In contract, under option two, the commission proposes 5 gallons as the quantity necessary for a base offense level of 26 and 50 gallons as the amount for large-scale traffickers. In the department's views, that quantity, particularly the 50-gallon quantity, is far too high and would expose the public to too serious a harm if we had to wait for a 50-gallon distribution to come along before a 10-year sentence could be imposed.

I would also like to address the issue of parity between the proposed guidelines for GHB and other controlled substances. And here, I have to commend your staff for working with us very closely in discussing

these issues and trying very hard to come to an understanding of how best to sentence this very dangerous drug.

And as you probably know, your staff believes that heroin is a better comparable for this drug for sentencing purposes than we believe. We believe that MDMA, or ecstasy, is really the right drug to compare. And that that provides the appropriate comparison for GHB for sentencing guidelines purposes.

Young people perceive that ecstasy and GHB have similar hallucinogenic effects, even though in reality ecstasy, or MDMA, is a stimulant and GHB is a depressant. But both drugs are often taken with alcohol. They're marketed the same way to the same population often.

Under the current guidelines that you have for ecstasy, that exist for ecstasy, a mid-level ecstasy offender who distributes 800 pills will receive a base offense level of 26. And as I pointed out to you before, this one gallon of GHB is capable of producing

approximately 757 dosage units at that 5-milliliter vial size or 1,200 in this 1-milliliter capful size, making it fairly analogous to the ecstasy--to ecstasy at level 26. Accordingly, option one, as you propose, provides reasonable sentencing parity for mid-level traffickers at appropriate quantities for two comparable drugs.

Just to elaborate on the heroin point and why we don't think it's a good comparison. It's not a club drug. And equally important, it's not a predatory drug that is used as an offensive weapon to carry out a greater societal harm, date rape. Every one of the 757 to 1,200 dosage units in a gallon of GHB carries the potential for sexual assault.

GHB needs an appropriate guideline that recognizes the unique features of this dangerous drug. In sum, the department supports option one with the base offense level of 26 for mid-level traffickers and a base offense level of 32 for GHB traffickers.

Thank you for the opportunity to discuss this

important issue.

JUDGE CASTILLO: Yes. Questions? Commissioner O'Neill?

JUDGE O'NEILL: Whenever I look--obviously, drug sentences are always very difficult to do. And oftentimes, we have to do them in comparison with other drugs. And for my own purposes and my own guide, I tend to look at sort of two things.

First is what's the harm that the drug provides to the individual, and then what's the broader social harm that the drug has associated with it? Is it the department's position that GHB is a more harmful drug either with respect to the individual or to society than, say, heroin or methamphetamine?

MS. AVERGUN: I think that it's an extremely harmful drug, Commissioner O'Neill. There is no other drug that is used as a predatory drug such as this, which would be both a harm to society and a harm to the individual. It subjects the user to the potential of

being sexually assaulted.

JUDGE O'NEILL: But I mean, if that actually happens, obviously the person is also liable for a sexual assault, presumably, as well?

MS. AVERGUN: Correct. But if we're talking about mid-level traffickers and seeking to protect society in general, it would be very difficult for any prosecutor to associate that mid-level trafficker with the ultimate distributor at the retail level in the club who might have distributed to either an unsuspecting or an unwilling woman who was then assaulted.

JUDGE O'NEILL: Do we have data on sexual assaults with respect to this drug?

MS. AVERGUN: Yes, and that's included in my testimony about how many cases of sexual assault involve GHB, how many emergency room admissions might relate to sexual assault.

However, I do caution that it is very difficult to detect GHB. It metabolizes very quickly in the body.

But there is some data in my written testimony about how often GHB and sexual assault are associated, and there is a high incidence of that.

JUDGE CASTILLO: Given your position as chief of narcotics for the Department of Justice, does the department keep some type of formal or informal ranking of the dangerousness of drugs?

MS. AVERGUN: We do not. But it is possible that DEA does. There are a lot of data through drug-affiliated organizations that probably do. But as federal prosecutors and in my role as sort of the overseer of federal prosecutors, we do not keep that data.

JUDGE CASTILLO: But in your mind, you see this drug as being more dangerous than heroin?

MS. AVERGUN: I don't want to say that it's more dangerous than heroin. Heroin has its own dangers, certainly. It's very dangerous to the individual. This is extremely addicting. The effects are dangerous.

There have been documented instances of death, and it is unique in its definition as facilitating sexual assault and use by predators.

JUDGE CASTILLO: While we have you here--

MS. AVERGUN: Yes.

JUDGE CASTILLO: --do you want to say anything about the mitigating role cap? I don't want to put you on the spot.

MS. AVERGUN: No, that's fine. I just want to make sure that I can. My predecessor--

[Laughter.]

JUDGE HINOJOSA: You've been unleashed.

MS. AVERGUN: My predecessor in my job, John Roth, testified before the commission several years ago about how strongly the Department of Justice opposed that. And I agree 100 percent with his testimony. We have seen a number of cases where people are deterred from--where prosecutors' jobs are made more difficult because of that level 30 cap.

We strongly oppose the cap. We opposed it when it was enacted, although certainly understand the arguments about the Daisys and the other women who my predecessor panelist referred to. But in most cases, it paints with too broad a brush and results in inadequate punishment for culpable people, which can be adequately taken care of by other guidelines. And in fact, hinders prosecutors from doing their jobs in many instances, which means that other drug dealers are not caught.

JUDGE CASTILLO: And on that note, I would invite you to submit, on behalf of the department, your top 10 list of these egregious cases. I would like to see that, and I would like to see that as soon as possible because this might come to a vote in the first week in April. So that's all I'm going to say.

I will--Judge Sessions?

JUDGE SESSIONS: I'm sorry. Top 10? I was just going to ask--

JUDGE CASTILLO: Top 10 egregious cases that

have used the mitigating role cap to create an injustice as perceived by the Department of Justice.

JUDGE SESSIONS: Oh, okay. No, I was just wondering what you were asking for.

JUDGE CASTILLO: Okay. Commissioner Steer?

JUDGE STEER: That's me.

MS. AVERGUN: I'm sorry. I was just taking notes.

JUDGE STEER: That's all right. Go ahead. You preferred to compare the seriousness to ecstasy. Is ecstasy, you know, it seems to me--and you correct me--but it doesn't pose the same risk of sexual assaults as this drug? On the other hand, the testimony that we received when we set those penalties--and you know, we did the best we could--was that it posed much greater harms with respect to the intrinsic harm of the drug itself on the body, the possibility of brain damage from a relatively small amount of doses.

So it seems to me don't those concerns have to

be balanced there? Are there others like GHB that pose a comparable risk of sexual assaults?

MS. AVERGUN: Well, GHB, its analogues ketamine, Rohypnol, those are all classified as date rape drugs. And I don't mean at all to suggest by my testimony that GHB is not intrinsically damaging to the individual user. I think that there is some data in my testimony that suggests--

JUDGE STEER: No. But you wouldn't put it in the same class as ecstasy?

MS. AVERGUN: I don't think that I'm qualified to say exactly what the relative chemical impacts are. I'm sorry.

JUDGE CASTILLO: Commissioner O'Neill?

JUDGE O'NEILL: I went back to the testimony. One thing that I had a question. It says DEA has documented 15 sexual assaults involving 30 victims who were under the influence of GHB. And of the 711 drug positive urinalyses sampled from the victims of alleged

sexual assault, 48 tested positive for GHB.

Is that over the course of a single year, for the year, or--it cited the uniform crime reports of the ONDCP. Was that a single year or a period of a couple years?

MS. AVERGUN: I believe that that's over a period of years, Commissioner O'Neill.

JUDGE O'NEILL: So over a period of years.

JUDGE STEER: That's about 7 percent.

JUDGE O'NEILL: I don't mean to minimize, obviously, the seriousness of the offense, of course. It's just that in terms of comparing it to like heroin, which has so many emergency room mentions, you know, in state and federal cases both, and given the fact that we have pretty good documentation with respect to the larger sort of social impact of heroin use, I'm trying to figure out what a good analogue is.

I'm not convinced quite yet that ecstasy is the best analogue, especially given the fact that the

testimony that we had before from the DEA was that, as Commissioner Steers pointed out, that ecstasy itself, with respect to the individual, was a much more harmful drug.

MS. AVERGUN: We would be happy, if you are interested, to submit additional detailed facts about how harmful to the individual GHB is, if you feel that that's not sufficiently addressed, to perhaps help enhance our argument.

JUDGE STEER: I think that would be helpful because I don't think it is--you did mention something about it. But you know, ecstasy, that was the main focus of the testimony--

JUDGE SESSIONS: But I do think it would be really almost impossible to be able to rank in seriousness all of the various drugs because each of them contributes in various different ways toward the harm that people experience or society experiences.

MS. AVERGUN: That's exactly right. And we're

trying to be as general as possible in the application of these laws, and you can't account for every situation. So I would agree with you that it is hard to rank and compare.

But we just feel very strongly that because of the population to whom ecstasy is marketed, how it is marketed, the general perceived effect of it, why people take it, it is much more similar to MDMA than to heroin. And those are important factors, we think, in evaluating what the appropriate sentence is, not merely the pharmacological effect on an individual.

JUDGE O'NEILL: But we do get objective data in terms of like emergency room visits, deaths related to, violence associated with the drug, those sorts of--and those are certainly the arguments made in favor of like crack cocaine, for example. That crack was--and the department has continued to maintain that crack, for example, is much more serious than even regular cocaine. So there are seemingly rough, of course, objective means

of determining the general social harm of an individual drug.

And of course, with respect to ecstasy, there has been more recent data that suggest that perhaps some of the data that we relied on in setting the ecstasy penalties may not have been correct.

JUDGE SESSIONS: But if you use like hospitalization statistics, heroin would, I'm sure--well, I'm not sure, but I would guess heroin would be at the top.

JUDGE O'NEILL: Absolutely.

JUDGE CASTILLO: Commissioner Rhodes?

JUDGE RHODES: Yes. I just wanted to point out on page 3 of your written testimony, I believe you do refer to emergency room. That is, at least part of the information--

MS. AVERGUN: Yes. Yes, we talk about GHB emergency room mentions at about 1,282. And Commissioner, you asked me over what period of time, and

we can provide that information to you.

JUDGE CASTILLO: Any other questions of Ms. Avergun? Thank you very much. Let's go to Mr. Hulser.

MR. HULSER: Thank you, commissioners.

I appreciate the opportunity to appear before the commission today to discuss the proposed amendments to the public corruption sentencing guidelines. Over the past several months, I've enjoyed the opportunity to meet with Sentencing Commission staff, and I appreciate their willingness to hear our concerns and work toward an effective public corruption guideline.

At the outset, it should be clear the Justice Department supports the central components of the proposed amendment to the public corruption sentencing guidelines. My remarks today, I'd like to just focus briefly on those aspects in the proposed amendments on which there is currently more than one proposal or option under consideration.

First, whichever option is selected, the

proposed amendments are going to increase the base offense levels for corruption offenses, and we strongly support that change. Public corruption is not simply another form of financial crime. It constitutes an abuse of government power and authority.

Where public corruption exists, it betrays the public trust and erodes public confidence in our government institutions in a way that financial crimes do not. These are serious crimes that undermine our government processes, and it's important that both potential offenders and the public at large understand that these crimes will be met with stiff penalties.

I'd like to address two areas of concern regarding the base offense levels. First, in the amended guidelines, we urge the commission to use the simplest structure and the most straightforward methodology possible. We're concerned that a corruption guideline that is either confusing or awkward will elicit a negative reaction and detract from achieving the

commission's goals.

We've reviewed a recent proposal which sets forth alternative base offense levels for three different classes of defendants. And we believe that the structure of the resulting guideline and the interplay between the base offense level and the specific offense characteristics is unnecessarily confusing. We strongly recommend that the commission instead continue to use the structure that's most familiar to prosecutors, probation officers, and judges. That is a single base offense level, followed by a series of specific offense characteristics, which may or may not apply in the given case.

The second area of concern regarding base offense level involves the two-level enhancement for cases involving more than one bribe or extortion. It is our understanding that the commission is considering two options for the base offense levels. Option one would retain the current two-level enhancement for more than

one bribe or extortion as a specific offense characteristic. And option two would eliminate that characteristic and fold the two-level increase into the base offense level.

We support option one. We believe it is appropriate to have a distinct mechanism in place for prosecutors, probation officers, and judges to account for those instances that involve more than one criminal exchange. Retaining the two-level increase as a specific offense characteristic will provide an appropriate and flexible mechanism to achieve a fair and just result in each case.

Moving on from the base offense level to the proposed specific offense characteristics, I note that the proposed amendments provide higher offense levels for public officials who are corrupted than for the individuals who corrupt them. We support that change. However, the proposed commentary goes on to include a new definition of public official that we see as unnecessary

and potentially troubling.

Put simply, all cases that are sentenced under these guidelines are corruption cases. And we're not aware of any corruption case in which the status of a defendant as a public official or nonpublic official was unclear to the court or to the parties at the time of sentencing.

When corruption charges have been resolved through a jury verdict or a guilty plea, there's no question which defendant was corrupted. As a result, we do not believe that the courts will have any difficulty in applying the enhancement for public officials, and we recommend against including a specific definition.

We also see a potential downside to including this unnecessary definition. Corruption, as you know, takes many forms, and we're concerned that a definition, no matter how carefully formulated based on what we know now, will fail to include within its specific terms some defendant who holds a unique position of trust that we

are unable to foresee today.

An example comes to mind. In the United States v. Margiotta, the defendant was a party chairman in Nassau County, New York, and in that position, he had direct and substantial influence over government decisions, although he held no official position. Based upon his de facto authority, he was convicted of honest services fraud.

That party chairman's position might not fall within the parameters of a particular definition of the term "public official." But there was no question that Margiotta was a corruption case and no question that the party chairman was the person who was corrupted. We believe that defendant should receive a two-level enhancement applicable to public officials.

Given the number and the variety of state and local government systems in our country, there may be other unique positions like this that elude definition, but that would warrant the application of the public

official enhancement. For these reasons, we oppose including a specific definition of the term "public official."

Finally, the proposed amendments provide a new enhancement for corruption offenses that involve permitting persons or cargo to enter the United States unlawfully and for offenses that involve providing government identification documents. These particular forms of corruption may threaten the security of the United States, and we agree that the sentences imposed in these cases should reflect that serious risk.

We note that the commission is considering two different formulations of this enhancement, and we support the broader version of the enhancements. Under that broader formulation, the enhancement will apply to all defendants if the offense involved providing unlawful entry into the United States or providing a government identification document. It will not be limited to defendants who personally provided the unlawful entry or

government identification documents.

As we see it, this new enhancement will increase--will address the seriousness of the risks that are created by this particular form of corruption. That is the enhancement is designed to increase the offense level for a certain type of offense and not simply for a particular type offender, such as a Border Patrol agent.

As a result, we recommend using the broader language in order to capture all participants in a joint criminal enterprise. The more narrow formulation could potentially lead to results that are not consistent with our understanding of the purposes for this enhancement.

For example, consider a case in which a broker or middle man collects payments from multiple aliens and provides corrupt payments to an administrative government employee who enters fraudulent data into a computer system that's used by Border Patrol agents, immigration officials, or an agency that provides driver's licenses. We believe that that broker and the administrative

employee have created risks to our security and should receive the two-level sentencing enhancement.

Under the more narrow formulation, however, they would not receive the enhancement because they did not personally provide unlawful entry or an immigration or identification documents. And without this enhancement, the offense level for these defendants would be precisely the same as the offense level for defendants who engage in a scheme that corrupts any other government function. For these reasons, we recommend that the commission adopt the broader formulation of this enhancement.

I'd be happy to answer any questions the commissioners may have.

JUDGE CASTILLO: Let me just use my prerogative to tell you I don't have any questions. I fully support the Department of Justice in this effort. I commend your 13 years in this arena. It's a difficult arena. I think these offenses are different than financial crimes. It goes to the very heart of our democracy.

My state had a primary election yesterday. It was a waste of time for the voters to vote somebody into office if people are going to sell that office or materially assist in the sale of that office.

So I commend your work, and I'm going to turn over presiding of this meeting to Vice Chair Steer, as I handle a phone call.

Thank you.

JUDGE STEER: Let me turn to other commissioners, if you have any questions?

JUDGE HOROWITZ: Just a couple questions. On the issue of the two levels for more than one bribe, whether to fold it in or not fold it in. Having done a number of cases on the corruption side as a prosecutor, one of the concerns I had is leaving that as a litigated issue--potentially litigated issue at a sentencing hearing and also the notion that I've dealt with many cases where there have been two, five, 10 bribes that are far less serious than cases with one bribe.

What's the justification for keeping that if you agree that there are many cases where one bribe is far more severe than, say, two bribes or more than two bribes?

MR. HULSER: I think one thing we try to do is have some flexibility for the court in assessing the defendant's conduct and the relative seriousness of that conduct. If it's one bribe and it involves an awful lot of money, of course, we're going to have an enhancement that takes full account of that.

If it's a series of bribes, what we're looking at is a case in which the person has repeatedly corrupted their position. And if it is the same person who repeatedly takes a bribe of the major magnitude that you're describing, we think that's more serious than the person who just takes that serious bribe one time.

So I think our view is simply that it provides a mechanism that the judges can use, prosecutors and probation officers can use to effectively get at the

seriousness in each individual case.

JUDGE HINOJOSA: Have you given some thought that the reason somebody may have taken it just once is because they were arrested immediately? And that if someone's got the propensity for having taken this one bribe one time, it probably means they would have done it more than once?

MR. HULSER: Commissioner, if we have ever caught someone after the first time they took a bribe, I would be mighty surprised.

[Laughter.]

MR. HULSER: The way public corruption cases work, often we have to investigate them using predication, which means there was some reason to go at investigating this person in the first place. So I think it would be the rare case in which we--

JUDGE HINOJOSA: Well, you catch them at the border on a regular basis. At the crossing, if someone takes a bribe one time, it is not unusual for them to be

caught that time.

MR. HULSER: I think that's fair. And in those cases, those people would not receive enhancement for more than one. And I think we have to go with the conduct that we have. We can't try to guess whether this person who offered it would have offered it many times or whether the person who received it and accepted it would have done so many times. We have to go with the conduct we've got.

JUDGE STEER: Judge Sessions?

JUDGE SESSIONS: I was wondering whether, in addition, you want some flexibility? In other words, if you've some difficulty in proof regards to the number of bribes, you could provide flexibility in variable.

But the reason I ask, I was going to raise a question. I also agree strongly about public corruption, although in Vermont, we don't have--as in New Hampshire, we don't have a whole lot of public corruption. I don't think we have any, or at least I don't think so.

Why, by the way, is New Hampshire upside down? It's upside down.

[Laughter.]

JUDGE SESSIONS: My question is isn't there a viable argument to be made, position to be taken that an elected official should be treated differently than a person who is not an elected official or somebody, in fact, who offers the bribe to an elected official? I mean, isn't there a way in which we could actually specifically delineate the base offense level or perhaps do it by specific offense characteristic to treat them differently?

Because what's interesting about this public corruption statute is we're not talking about quantities, although they're relevant, obviously. We're talking about the nature of the violation of public trust. And obviously, a person who is an elected official is involved in a much more serious violation of public trust than a person who's not.

sj

MR. HULSER: Let me address that based on my understanding of what the proposed amendments will do. It is my understanding that an elected official, under the proposed amendments, or a government official in a high-level decision-making or sensitive position all receive a substantial enhancement and will have a minimum offense level of 18.

If you've got a situation where one defendant is the elected official who was corrupted and the other person is a defendant who corrupted that person, offered the money, under the proposals, the elected official will have two additional points over and above the person who corrupted them because they will receive an enhancement for being a public official to begin with.

So there is some effort to address both of those concerns, I think.

JUDGE HOROWITZ: In your submission to us, the department is proposing a base of 12, I gather? Which, of course, with a plea would mean potential probationary

sentence.

Is it the department's view that there are certain bribery cases, public corruption cases that warrant falling within the category B? Because I know there's been a lot of back and forth, particularly given the commission's prior work on the guidelines, which is a higher base, to suggest otherwise. I'm curious about that proposal.

MR. HULSER: Sure. I think that the results we achieve through our proposal are ultimately the same in almost all cases because a defendant who is not a public official under what I think the commission is considering will also be at a level 12 as a base. And we do think the following, that the series of enhancements that are available, that will account for the dollar value, the number of bribes involved, the level of the person involved, whether it involves threats to the national security--all will enable the courts to achieve an appropriate sentence that is--that will require prison.

There are bribe cases that we can envision where a relatively low-level official would accept a cash bribe, and a one time instance, one that we know of. It can be a small amount of cash. Somebody could be offered $50 for using their government credit card to buy something. That offense, even under the government's proposal, for the government official who misused the card would be at a 14 because there would be a 12, plus they would get additional points for being a government official. So they would be outside the probationary range.

The person who offered that $50 might then be in the probationary range, and we think there are cases in which that would be appropriate.

JUDGE STEER: I had one question on a relatively minor issue, and that is your preference for no definition of "public official" as to a definition. If the definition that our staff have proposed is fixed to address the local party boss--it could be a state party

boss, that sort of a situation--would you be okay with having a definition?

The reason that I think it is important for the process is because these guidelines, like all guidelines, start with a work-up by the probation officer. And a point of reference, I think, is helpful there, just as it is helpful with respect to who is in a high-level or sensitive position.

MR. HULSER: Sure. I think that two responses to whether the proposed definition and the change to it to include the Margiotta situation. The problem is the proposed definition that they're working toward still doesn't include Margiotta.

It's not about that person's party position and selection of people for party nomination. It's about them having de facto authority, even though they don't hold any official responsibility or government position. So if they're going to try to capture that situation, I would recommend using the term "de facto authority."

But secondly, the problem is we're not really just concerned about Margiotta. That's the one that comes to mind now. Under the bribe statutes, we can charge someone with interstate transportation and aid of racketeering if they violate a local bribery statute in one of our 50 states. We can charge them with ITAR if they use the mails or interstate facility to promote that crime.

The different states all have very different formulations of who would qualify has a defendant under those local bribe statutes, and Margiotta was one example of that. There are many others, and there are many other configurations of state governments and local governments. Who has exactly what authority and whether they're on the government payroll or are an advisor. So our view is if you try to amend it to fix this hole, there's going to be another one. We just don't know what all of them are.

And the second thing I would say about this is

this. If you want to provide some guidance, perhaps the simplest thing to do is just simply provide a statement that this term is to be interpreted broadly. We could then cite to two of the cases that are out there that address these kinds of issues.

One is the Supreme Court case Dixon, which defines public official very broadly under Section 201, and then maybe we could cite the Margiotta so that people know we want to interpret this broadly, so that anybody who holds any position of trust will get this enhancement rather than going through a specific enumeration of the factors.

JUDGE STEER: Appreciate your comments. Any other questions for members of this panel? If not, we will excuse the members of this panel and ask that Jim Felman, Barry Boss, and Cathy Battistelli--Cathy here?

All right. Jim, you and Barry are listed first on the program, but you have the right to defer if you would like.

sj

MR. FELMAN: We decided in advance that Cathy really should be--

JUDGE STEER: I thought you might.

MS. BATTISTELLI: They voted without my knowing. So they told me majority rules.

MR. FELMAN: You may only get one vote.

JUDGE STEER: Cathy, the floor is yours.

MS. BATTISTELLI: I'd like to thank the commissioners for the opportunity to represent POAG at this process and about having a chance to evaluate the proposed amendments. POAG views our role in this process not so much as deciding public policy, but as the language that we're provided, is it something that we can work with and understand and apply easily?

Very often, we're called upon in court, as most of you know, to help judges interpret the language and what does this mean? And that's how we view the amendments. We've decided not to weigh in on a number of issues this time or in determining which base offense

levels should be appropriate because, in our view, that's really a matter of policy that needs to be established by the commission. Rather, again, we'd like to look at specific language.

I'd like to focus some of my comments on some of the issues you've heard so far today, and I'd like to start with the immigration guideline. One of the issues we had a very difficult time with that proposed amendment is the issue of--for the enhancement in the case someone's a fugitive from another country. That would be almost impossible, I'd say, for us to gather.

We have enough of a difficult time trying to establish criminal records from other districts at times, especially in a timely fashion. We do have access to Interpol, and they are very cooperative with us. But sometimes we receive the information six months after the person is sentenced. So we don't think we'd be able to be of assistance to the court in establishing whether that person is a fugitive from another country.

Secondly, we had a concern why they were a fugitive. Were they, you know, fleeing from some type of religious prosecution or political issues, and should that weigh in? We didn't think this was an issue that had been appropriately addressed. And then there also seems to be some inherent conflict in the guidelines in that Chapter 4 you can't count a foreign criminal conviction, yet you'd use that issue, a mere warrant, to give an enhancement in Chapter 2.

Lastly, we can't consider arrest warrants or criminal arrests for a defendant in determining criminal history points or why should this person get another enhancement in the immigration guideline.

I think there is a concern about the information that's provided to us from the parties. One of the suggestions was that whether the language should track the provisions found in 8 U.S.C. 1327, which is what we would propose, and that way, it would be incumbent upon the DOJ to provide that information at the time they

charged the case.

It's very difficult for us to determine whether someone came into this country with the purpose or intent to commit a drug trafficking crime or a crime of violence. And we just don't feel we'd have enough information provided to us. Even if the Department of Justice sometimes does have that information, it may result in people being treated in a disparate manner.

Finally, on--I listened to the U.S. attorney from my district testified before in the AUSA on the passport fraud cases, and just--this is not from POAG's perspective, but merely from my mine. And I would just like to note that being from New Hampshire, I've seen those 43 cases that have been prosecuted. And I would note that most of those people were allowed out on PR bail during the proceedings before they pled guilty. And the majority of them, if not all, received sentences of probation.

That even with the option of where they might

have been falling into a 0 to 6 range, the government was more often than not recommending the sentence of probation. And again, that's just my personal note after listening to the other people.

JUDGE CASTILLO: So we don't have soft judges in New Hampshire, or what's going on?

MS. BATTISTELLI: Well, I don't know. You can ask Judge Sessions about that. He's familiar with them.

JUDGE CASTILLO: Okay.

MS. BATTISTELLI: They--it's most of the people that I've seen come in on those passport fraud cases, there has been no indication that there is any connection to terrorist activity. They're usually hard-working individuals who have families in this country now, and they are resulting in immigration deportation proceedings after this conviction. And it's creating a hardship on that.

And for the most part, they're not even living in our state. They're coming from New York and other

districts, where, in some cases, that district has declined prosecution. But for a variety of reasons, our district has gone forward with the prosecutions. But again, that's not POAG's--I want to make clear, that's not POAG's perspective.

With regard to the mitigating role cap, I'd like to indicate that as a group, we've talked about how it's working so far. No one on the group has had any application difficulties with how it's currently working, and we were surprised to see a proposal.

And looking at the new proposal, we found some very specific language difficulties with the language we were presented. The first thing, it may seem very basic, but it talks about, refers to the defendant's Chapter 2 offense level. Now on POAG, I'd say we have some seasoned officers, which is not necessarily the case with officers throughout the country. You have a lot of districts that have no training programs in place for brand-new probation officers or don't have the

opportunity to attend the national training in Miami or even circuit-wide training.

So we try to look at the languages. If we're having problems understanding what is meant, what's the impact going to be in the field? And there are--we looked at that language, we said, "Okay, is this based on the base offense level? Is this based on after you've given other enhancements?"

So we were very confused at that. So we thought that perhaps that language needed to be cleared up if the commission decides to go into this route.

We also noted that currently some defendants, those specifically sentenced using 2D1.2, currently receive the benefit of a mitigating role adjustment, whereas under this version they would not. We didn't know if that was the commission's intent or not. There are a number of guidelines that have a cross-reference application going over to the 2D1 guideline. Is it the commission's intent to limit that, or would those

individuals still have the ability to receive a mitigating role adjustment?

So we request some application language on that as to what the commission's intent is. And again, we've asked for this several times, and I know the commission likes to allow judges discretion on these issues, but it would be very helpful to have some guidance on what does qualify for a mitigating role.

It's very, very difficult for us at times making that determination, depending on what circuit we're in. It's an issue that gets raised every time, and I think for the group's perspective, the times that we've seen this mitigating role applied, usually the Department of Justice has agreed to it. So we're not seeing a lot of cases where it's giving us protracted sentencing hearings, which I think was our first concern when we saw this adjustment come into play.

With regard to the child pornography guidelines, we would highly recommend that you do away with the

cross-references and consolidate these guidelines. And I don't say that--I can't say that strong enough. And I say that even after we've combined the 2B and the 2F guidelines, and there may have been some follow-up with that combination and some effects that we hadn't considered.

But these hearings result in--these application difficulties result in lengthy hearings. And for those of you that are judges and you have these cases, it comes down to sometimes half an hour to an hour discussion in court as to whether the intent was to cross over to the receipt. Was it merely possession? Should there be a difference? And so, for that reason, we would suggest that you consolidate it.

Whenever possible, we agree with simplifying the guidelines. I know that's a tough job, and I know that's been the commission's intent for a number of years to try to make it easier. But we strongly urge you to do that.

I've had a chance to review staff recommendation

for option three, which is something new and not published for comment. And quite frankly, it mirrors most of POAG's discussion. We did have a concern with option two in that I think the same issues would result in trying to make decision-making authorities as to what the difference is between possession and receipt.

The other issue for comment that we felt very strongly about was that these should be offense-based guidelines. It seemed inconsistent to us that one guideline would be carved out to be defendant only specific, whereas the rest of the book is based on relevant conduct. So we could not figure out what the purpose was, and I'm not sure if my friends up here at the table might address that or not. But it just seems inconsistent to us.

There's also sometimes inconsistencies in the guidelines themselves if some of the specific offense characteristics are offender based and some are offense based, and I think that could result in confusion to the

regular probation officer in trying to make those determination each and every time. So in that respect, we think as long as relevant conduct is still in play and still in the book that these guidelines should be based on relevant conduct.

We do--had no problems with the proposed definitions that were suggested. We find them very, very helpful. There was a concern about the lack of instruction for counting the number of images. That is an issue that we would request some guidance on. There was also a concern that if you do combine the possession and the trafficking guidelines, where you receive an enhancement under the possession guideline for the number of items and then you also receive another enhancement for the number of images, whether that's permissible double counting or not.

In that respect, if the commission decides it is, we would just request an application note indicating that it was permissible double counting, or if it's not,

to tell us. But to give us some guidance, and whether that be in an application note or in some of the commentary in Appendix C, it would just be helpful when we get objections, because we will get objections on that issue, is to have some reference to point people to.

We do not think there is a problem with the enhancement for definitions for sadistic or masochistic or depictions of violence. No one on the group has any problem applying that enhancement. We do not recommend that the commission adopt any language for that. We find that it's very easy to determine, especially based on the case law, and we'd rather have the broad discretion in that area.

The travel act guidelines we support. We think there are a lot of issues with regard to travel act cases, and having a separate, standalone guideline is positive.

With regard to conditions for supervision and probation, this is one area of policy where we thought we

did have some area of expertise. And the group felt unanimously at the first vote that it should be limited. It should not be prohibited. We felt very strongly on that.

And I think that's because those of us who are dealing with these people find that a computer today is like having a TV set. Everyone's household has them, and it would be very hard for us to monitor if someone has a computer in their home and their child's using it for homework or whatever purposes, we have the technology at this point to monitor computer usage. And there are software products out there that allow us to do that.

That we felt that there are a lot of reasons why someone has a legitimate need to have access to a computer despite their conviction. And rather, we would prefer the language it be of limited with the supervision by the probation officer, which I believe some case law has supported that.

The homicide and assault guidelines we felt,

quite frankly, are some of the easier guidelines in the book to use, just like the robbery guidelines. So if it ain't broke, don't fix it. We like the simplification.

And the only other problem that we potentially saw was with the new guideline under use of a minor and that we would just request some direction as to how grouping of these counts would impact us. Right now, there is no instruction as to which grouping rule they would fall under, or if you had multiple counts of this conduct because it seems like, you know, how would you group it?

And just some language. Would you group it under rule D? Or would you group it--you don't have the same victim or scheme. There's no language in there. So whichever way you decide on that, just some instruction would be helpful.

So I'd like to thank you for the opportunity to address you, and I'll turn it over to my compatriots here at the desk.

MR. FELMAN: I guess I'm going to go first. I think all of you all know that, mercifully, this will be the last time you'll ever have to listen to Barry and I, at least in our capacity as co-chairs of the Practitioners Advisory Group. So I think we felt it appropriate to begin by thanking the commission for putting up with us over however many years it's been now--at least four or so.

JUDGE CASTILLO: Well, we want to thank you. If this is going to be your last hurrah, we can't believe it.

MR. FELMAN: I suspect you'll miss me about like a sore tooth. I guess we have sort of a feeling of a combination of "thanks for the memories" and Richard Nixon's "you won't have us to kick around anymore."

[Laughter.]

MR. FELMAN: But having said that, and I regret that--

JUDGE CASTILLO: You're not going to start

crying now, are you?

MR. FELMAN: No. I might. I don't know. Let's see how it goes at the end. And I regret that Judge Murphy is not here as well, as I would have--

JUDGE SESSIONS: You know he came back after he said that.

[Laughter.]

MR. FELMAN: Perhaps some foreshadowing. I don't know.

Well, in any event, I'm going to address the public corruption amendments, and I think Barry is going to talk about mitigating role cap and aberrant behavior. And although we'll be happy to do our best to try to answers questions about the other proposed amendments, in light of our limited time and you all have been sitting here for a long time now, we'll limit our comments to those things, at least initially.

I selected the public corruption guideline for comment because I think, at least in my view, it

exemplifies a number of things that I would draw observations about. First, I approached this subject--particularly having heard Judge Castillo's comments earlier and Judge Session's comments earlier, and I can take a vibe as well as anybody else--with the sense that I'm peculiarly disadvantaged in even trying to discuss this issue because I've never sentenced anybody.

I certainly have never witnessed the variety of public corruption cases that the judges on the commission have, and so it may be that much of what I say is just simply irrelevant and not of particular significance in light of the depth of experience that you all bring to this issue.

But as a process matter, it just does seem to me, as an outside observer, that what we're doing today or considering today is, again, and I think this sort of parallels what has become a trend, we're talking about increasing penalties for a crime. I read what was published for comment. I haven't had access to anything

else, so I do not know whether there is some data out there that backs this up.

Judge Castillo made reference to his study, but I take that to be sort of a euphemism in the sense of your anecdotal experience and discussions.

JUDGE CASTILLO: It's more than that, but keep going.

MR. FELMAN: I take it it's not available for me to read?

JUDGE CASTILLO: We'll make all our data available to you, as we generally do, Jim.

MR. FELMAN: Okay. I guess I just--I haven't seen or maybe haven't taken the time to find what it is that suggests that there is a need to increase these penalties beyond just a general sense that it seems appropriate. And that is just of concern to me in a sense of process. Because I think that history teaches us that when we raise penalties, it is exceedingly difficult to go back.

I was testifying before the ABA Justice Kennedy Commission not long ago, and I was prepared to make the statement to them that in the history of our nation, the United States Congress has never once passed a bill to reduce the penalty for a crime. I was corrected as I began to prepare that because, evidently, in 1970 or thereabouts, the mandatory minimums for drug penalties were repealed.

So they did that, and we can see how that all worked out. But gosh, you know, when we--

JUDGE O'NEILL: The second Congress did as well.

MR. FELMAN: The second did? I was not aware--well, I'll have to get that from you.

It is a matter of historical study necessary to find examples of our legislative branch reducing the penalties for a crime. And this commission's efforts to do so with crack cocaine are quite an illustration of how difficult it is for this commission, although this commission has, on occasion, been able to make minor

adjustments, in some cases significant ones, in a downward direction. It's difficult, and I think you appreciate that now, given what you're looking at with the mitigating role cap.

And so, before we take, just as an example today, the public corruption guidelines and raise the penalties, I think we want to make darned sure we're doing the right thing because you may not be able to ever go back. Or it will be exceedingly difficult to go back. And so, if you're going to raise them, obviously, we want to be very careful about what we do and do it in a careful way, and it leads me to my next observation about process.

And this is where you'll really miss me. But you know, I sat here, and I listened to the Department of Justice representative talk about all the meetings that he had with your staff. And I read in his Department of Justice submission about how over the last several months, they worked so closely with the commission about

these issues.

As co-chair of your Practitioners Advisory Group, this would be my first opportunity to talk to you about this issue. And evidently, I'm talking about the wrong draft because this fellow was talking about options A and B and what not. And it's a draft that's not published for comment and I don't have. So I can't even talk to you about it. And--

JUDGE CASTILLO: What he was talking about were the Department of Justice's suggestions. They're not our suggestions.

MR. FELMAN: Oh. Well, it does--maybe I'm wrong then because it seems to me sometimes what happens is that the staff moves past what gets published for comment with other--

JUDGE CASTILLO: It's not the staff moving, it's the Department of Justice proposing.

MR. FELMAN: Okay.

JUDGE CASTILLO: We cannot control their

proposals. But you know, your point about process is well taken. Keep going.

MR. FELMAN: Okay. In any event, the other piece of it is that I have a concern that at times the guidelines are insufficiently connected to the federal criminal code against which they are written. What you are looking at today is the guideline, for example, that governs 1346, which is the deprivation of the intangible rights to honest services. And if you read 1346, it's not even a criminal provision. What it is, is a definition in the mail and wire fraud statutes and perhaps others that grew out of the McNally case.

And so, what you are, in my view, talking about are cases that are really at the farthest reaches, intellectually, of criminal law. You're talking about conduct that is almost a question of breaches of ethics as opposed to crime. It's an intangible right to honest services, and I think the courts have really struggled with what that is and how far a reach that is as compared

to your good old-fashioned theft or fraud.

What we're proposing to do now, as I understand it, is take the definition section and essentially say that if you violate the mail fraud statute in a way that relies on that definition, the penalty for that will be higher. The base offense level for an intangible harm will now be two or three or four levels higher than the base offense level for actually causing a tangible harm.

Now I realize there may be other adjustments that come into play, but it just seems to me, as a student of the federal criminal code, that I just have a difficult time defending the guidelines on an intellectual matter. To say that somehow it should be a higher base offense level if you don't cause a tangible harm and it's just sort of some ethereal sense of an ethics breach than if you just steal the money.

And that leads me to another point, which is the what occasionally happens is a disconnect with other guidelines. We have all of the guidelines now for

economic crimes, and I already have experienced in my limited practice a disconnect between those guidelines and the corruption guidelines, and I think it gets exacerbated by these amendments. And I tried in my written submission to give some examples of that.

If you take the amendments that you're talking about doing, a low-level minor official who accepts a $10,000 bribe will be sentenced one level higher than that same low-level official who steals $120,000 from the public fisk just because of the disparity between the economic guideline and what you're now talking about doing with the public corruption guideline.

I had a case in which I represented a gentleman who ran a rehab clinic for pregnant women who were addicted to crack cocaine, and it was an inpatient program, and Medicare paid for that. In order to find pregnant crack-addicted indigent women who were willing to drop what they were doing and to participate in his inpatient program, he bribed the local health workers.

He offered them $250 for every pregnant crack-addicted woman they could find to persuade them to drop what they were doing and participate in his Medicare-funded program.

Now there was no dispute that it was an appropriate program, that it was billed for correctly, that it provided the services, that the services were necessary, that the services weren't available cheaper anywhere else. But he was sentenced under 2C1.1., the offense of bribery of a public official.

And by the time they got done calculating the benefit, the profits he made off of the contract, his offense level was four levels higher than--he paid $5,000 of bribes for the referral of 18 pregnant crack-addicted women that he successfully treated, presumably. His offense level under the 2C guideline as it exists now, without any amendment, was four levels higher than if the 18 pregnant crack-addicted women did not exist, he had no treatment program whatsoever, and he just sat in his

garage and submitted the bills completely bogusly and stole the money.

And it would have been four levels lower if he had done that. That is a result that I can't defend as a rational result under the sentencing guidelines.

I can understand frustration that there are other types of public corruption cases governed by these guidelines where the current penalty seems to be too low. I would urge you to look carefully at the variety of other cases that are also covered by this guideline and the fine line between fraud or other economic crimes that are governed by these guidelines and the ones that will now be covered by the public corruption guidelines.

And there's already 6 or 7 versus 10 there. Now we're talking about making it a 6 or 7 versus 12 or maybe even 14. And you're going to find some very difficult to justify results if that is done.

The multiple bribe issue--I had multiple bribes in that case, and I remember the judge looking at me and

saying, "I know I have to give you the plus two here. I really don't understand why it's worse to get--to pay two $5,000 bribes and one $20,000 or one $10,000 bribe. Seems arbitrary to me. I would get rid of it."

Of course, you know, predictably I would say don't fold it into the base offense level, however, just get rid of it. If you fold it in and make it count in every case, then you are really exacerbating the problem that I am talking about.

I'm sure I've way exceeded my five minutes. So I'll turn it over to Barry.

MR. BOSS: That was completely contemplated, so I'll keep my remarks particularly short.

I also just want to thank the commission for really the courtesy and the attention that you've given to Jim and me in this job. We really appreciate it. And we've seen you, as we have, struggle with a lot of these issues. It's been a very active time on the commission.

I can't say we're really happy about some of the

things that developed during our tenure, but we don't feel personally responsible for it, though we do fully accept responsibility.

I want to talk about two things very briefly, because I know you've heard a lot about the mitigating role cap. We really think that this is one of the most important issues that you're facing during this amendment cycle. And I think that a lot of what Jim said about process folds into the whole mitigating role issue.

It really seems just to be a proposal in search of a problem, rather than a problem that has previously existed where we're now looking for a solution. There is no data that we can see that suggests there really is a problem here. I hear Commissioner Steer say, "Well, look, we look at these enhancements, and we look at how when we increase there's this cumulative role of the increases and how disproportionate that can make a sentence."

And certainly, we don't think you should not

look at that when it comes to the mitigating role cap. But the problem is we've got to do it in a way which makes sense. This only came into effect in 2002. We're now less than two years into it, and there has not been any of this data collected. There hasn't been the opportunity to take a good objective look at it.

As Jim points out, the one thing we all know is the commission did a very bold, difficult thing when it adopted the mitigating role cap, and it really did something that was good and was necessary. If it undoes it now, it's not as though it's going to be easy to go back to it. It's always much easier, politically and otherwise, to raise penalties, to roll back the mitigating role cap. That can be done in the future.

But if the commission prematurely takes the mitigating role cap away or eviscerates it to some extent, we know from history how difficult it will be to ever get back there. And so, I urge the commission, it's not the same as it is when we're talking about increasing

punishments, which the commission really does on a regular basis every cycle. When it comes to decreasing, before you revoke that authority, I really hope that you'll have all of the data in front of you and make a very reasoned considered decision because history teaches us we don't often get to revisit that issue.

And particularly, with the mitigating role cap, where we already have mandatory minimums, where in our experience as well as apparently the probation officers', the mitigating role downward adjustment is only given in cases 90 percent of the time where the Department of Justice consents to that. So they are, in large measure, holding the keys to that departure in any case.

We think in light of the PROTECT Act--and I know one of the commissioners made that point, and I didn't catch who it was--it becomes even more necessary because we've reduced further the ability to depart downward, to recognize certain extraordinary circumstances and reduce the discretion of judges in that regard. So these little

avenues we have to recognize that less culpable defendants can get a lower sentence are things which on the defense side we very jealously guard. And we hope that the commission will be very, very careful before it takes that limited authority away from the judiciary.

The second issue that I want to talk about very briefly is aberrant behavior, and I don't know to what extent the commission is really seriously considering that. I think it's just an issue for comment. But clearly, the commission is concerned about the role of criminal history and to what extent we should be making adjustments to the criminal history scores as opposed to using an aberrant behavior departure, and that actually is an issue that the practitioners share as one that's important.

But we think the commission should finish its criminal history study and make one uniform overarching change, which recognizes and hopefully implements the mandate of 994J, which suggests that for first time

offenders and nonviolent crimes, we should be trying to get them alternatives to incarceration.

So with that, I will conclude my remarks. We really appreciate the opportunity to again appear before the commission and hope that we can remain active in a lower level capacity with the PAG.

JUDGE CASTILLO: Let me just on behalf of the commission thank all three of you and tell you that your testimony is always taken very seriously, and during my tenure here, as well as the tenure of all commissioners here, it has made a difference in our deliberations. And I want you to know that.

And with that, we'll open it up for any questions. Judge Sessions?

JUDGE SESSIONS: Well, Jim, I really have appreciated your contribution for years. It's not that you've--that we've necessarily agreed on everything. It's that you challenge us in some important ways. And also you provide, you know, a different insight, and

that's incredibly valuable.

And as is your pattern, you've done it again, and in two particular ways. And the first is, I think, well taken. The staff has a very close relationship, consults on a regular basis with the Department of Justice. There's no question about that. And there's a number of very valid reasons, and that should not be limited any way. The Department of Justice oftentimes has all of--has a lot of information which is extraordinarily helpful.

What you're suggesting is that there should be more direct efforts on the early stages with staff--staff to staff or staff to the defense system, whether it's federal defenders or criminal defense lawyers--to talk.

MR. FELMAN: I would hearken the example of the money laundering amendment, and I think Paul Adagio and Courtney Simmons were involved in that. And what we did there is we had a series of meetings over at the department, where Barry and I would meet with the

Department of Justice folks and with the commission staff on a very early level, before pen got put to paper or at that time.

And I think that if you talk to the department folks who were involved at that time, Jonathan Ribluski, I think sat in on some of those meetings. It was back when Larry Kirkpatrick was the ex-officio. But there were other folks from the criminal division. I think they'll tell you that they were productive sessions, at least from the standpoint of understanding where each other was coming from.

And what we did is we talked about, just in broad terms, what's the right structure for a guideline. And then when we got to decisions that were really policy questions for the commission like what should the offense level be, we would just bracket those. And we ended up coming up with a reasonably consensus draft to send to the commission with brackets, and the commission then held a meeting with the department and with us, and we

talked about the brackets. And then the commission went with the department on each issue in the brackets.

[Laughter.]

MR. FELMAN: But we felt so much better about the process. And I would just commend that as a model in appropriate circumstances. I mean, the staff's time is obviously limited at some point, and they get tired of talking to us, too.

JUDGE SESSIONS: My follow-up question is, do you see a diminishment of that? Do you see the staff making less of an effort to reach out to the criminal defense bar?

MR. FELMAN: I think the staff legitimately has a concern that they don't want to get in front of you all, and they also don't--and communicate something to us that before they really know what you all are thinking. And I think they also feel uncomfortable about releasing things to us that are not public.

And I think that if you all really want to look

at this issue, I think that you need to talk with staff a little bit more closely about getting them to feel comfortable that they're not getting in trouble. Because, obviously, they work for you, and they don't want to do anything that that they're concerned that you all will not appreciate.

So I think that if you want to see staff interact more with the defense community, I think they'd be happy to. I think they'd want to hear that from you all that you all want to see that happen more. And obviously, we'd be happy to see that.

JUDGE SESSIONS: The second thing that you're challenging us on is obviously public corruption. And it is true that I made a statement. Obviously, Ruben made a statement. You probably are surprised that he and I made a statement of that particular type.

MR. FELMAN: I've heard you all both say that before, and I knew that. I wasn't surprised.

JUDGE SESSIONS: Been fairly consistent. And

the idea, of course, is that--well, we can debate this. I shouldn't--I should ask this in the form of a question, right?

I mean, as opposed to incremental punishment in regard to drug quantity or dollar amounts, public corruption goes right to the heart of the system. It is unto itself an extraordinarily serious offense because it undermines the whole system of government that we have. And doesn't that suggest that that kind of offense unto itself should be treated differently, irrespective of whether a large dollar amount is involved or is not?

MR. FELMAN: Absolutely. And I think particularly where you have a high-level public official who has some sort of a sensitive position or elected position, and I have no problem intellectually defending the current--what is currently a plus eight for that sort of person. And I always felt like that was there to address just that issue particularly.

Part of it is that these statutes do apply to a

wide range of activities. And you know, we're also talking about gratuities. And those are misdemeanors, by and large, which by definition do not involve a quid pro quo.

And I think there's an example in the department's materials of somebody on a city council who's casting a vote to award a contract for a company that he actually has a financial stake in. And it just begs sort of the question of whether or not--that could run the whole gamut. That same conduct could be pretty egregious if this is a company that had no business getting that contract and that person went and lobbied the other city council members and got them to get that contract, and the contract didn't turn out very well.

It could also be, on the other side of the spectrum, a contract fully deserving of being awarded, that would have been awarded anyway, that this guy's vote was just not causally connected to what took place, and it was essentially an oversight on his part not to

abstain from that vote.

And so, what I find in my utterly limited experience, and that's why I began by saying you all have seen so many more of these kind of cases and have a vastly superior vantage point to make this call, but just in the smattering of cases that I have seen, the sentences where you're talking about a real undermining of public confidence had been pretty stiff.

And what I'm suggesting is that there are other kinds of conduct that don't necessarily really differ that much from the economic arena. And in those kinds of cases, I think that we want to try to at least have it in the same ballpark as an outright theft. I mean, it would certainly undermine my confidence in a public official if I knew he was lining his pockets by stealing out of the treasury. But that's not under these guidelines, that's under the theft guideline.

JUDGE SESSIONS: And finally, the third point that you've challenged us on, it seems to me, is the

sense that we're continuing to increase penalties in a system which is generally perceived to be quite severe. And I think it is important to recognize that we are continuing to increase penalties.

But in defense of the commission, at least from this perspective on the commission, I think you're not exactly right when you suggest that penalties are not limited or restricted in some significant way. We heard from judges directly and in a strong way and also from the criminal defense bar. Minor drug defendants who play minor roles, that's where they feel the worst when they impose sentences, and we responded to that, I think, totally appropriately.

So those of us who are, you know, quite dismayed sometimes to see the continuing flood of increased penalties take some heart in those small, little victories that occasionally come our way. That's not a question. That's just--

MR. FELMAN: May your courage in that regard be

rewarded and continued.

JUDGE O'NEILL: I'm sorry. I'm surprised that you didn't say something about the fact that we were looking at the public corruption cases and the public corruption base offense levels, comparing that--especially considering the fact that I think a number of commissioners feel like those are particularly important crimes and particularly serious crimes, and comparing those to some of the drug offenses, which certainly at least some of us would suggest perhaps aren't as serious as fundamental public corruption cases, especially when you're dealing with elected or appointed officials.

MR. FELMAN: If I thought there was a possibility that argument would lead to you all reducing the penalties for drug crimes, well--

JUDGE CASTILLO: Commissioner Horowitz?

JUDGE HOROWITZ: Briefly, for Ms. Battistelli, since I'm fairly new now on the commission, one of the

things, picking up on your simplification point--I enjoyed meeting with POAG when they were here a month or two ago. One of the things I'd certainly be interested in for the next cycle are those guidelines that POAG thinks are most in need of simplification.

What are the guidelines that probation officers are having the most difficult time with and courts are having the most difficult time with?

MS. BATTISTELLI: Accessory after the fact is one. The circular logic you get into when you start applying the cross-references. But I'm sure we could put together a list.

JUDGE HOROWITZ: And that's what I think would be helpful because I think in terms of a starting point, certainly your organization and your officers are probably as best positioned as anybody to tell us what are the handful of guidelines that need simplifying.

MS. BATTISTELLI: We'd be glad to do that.

JUDGE CASTILLO: Any other questions, comments?

JUDGE O'NEILL: Yes.

JUDGE CASTILLO: Commissioner O'Neill?

JUDGE O'NEILL: Ms. Battistelli, we're probably all feeling challenged at this point, but my one other question. One thing I've noticed as I've sort of immersed myself in trying to understand disparity, geographic disparity. One of the things that I've really sort of noticed is that it seems that, district to district, the way in which the probation officers actually conduct the interviews and conduct the reports, there seems to be a fair amount of variety in terms of whether or not people do sort of a from the ground up investigation or largely accept, you know, what the prosecutors are proffering.

And I've often wondered as a principal means of combating untoward disparity in the guidelines and in the whole sentencing process whether or not there's been any sort of much thought or much consideration given to unifying and making fairly standardized throughout the

country the way in which probation officers conduct the interviews and conduct the reports?

MS. BATTISTELLI: And that is an issue for us. And unfortunately, due to current budget situations and staffing issues, I think we're going to see a trend toward possibly more government versions in the pre-sentence report. There are a number of districts that the officers don't write the offense conduct. The government submits it.

JUDGE O'NEILL: And that's got to--the defense bar has got to be concerned about that, and I would imagine the judges would be concerned about it as well.

MS. BATTISTELLI: As are the probation officers.

JUDGE O'NEILL: The different districts are doing different things, it strikes me that's problematic.

MS. BATTISTELLI: It is.

JUDGE STEER: But could I just interject on this? It's not--isn't it not the case that you have a national pre-sentence report how-to-do manual?

MS. BATTISTELLI: Yes. We have a model. Yes.

JUDGE STEER: It has recently been revised. It is not the fault of a lack of standards. What it is, with all due respect, it is the judges in the various districts who insist on doing it differently and the culture of the district, by and large.

But bottom line, the probation officers have to work for the judges. And it's because the judges, you know, as we're finding out on everything from submission--insist on doing things differently and not in departing from this that you can't have that degree of uniformity that I agree with you. It would, I think, address some of these disparity concerns.

MS. BATTISTELLI: The 107 highly recommends that probation officers do an independent investigation and not rely on facts from the government, but include all information from investigative reports to defense statements. But in a number of districts, defendants don't speak to us about the offense anymore. The defense

attorneys advise them not to.

JUDGE HINOJOSA: But that's not a direction from the judges, is it?

MS. BATTISTELLI: No.

JUDGE HINOJOSA: In fact, do you know of any district where the judges have said don't follow the 107 framework?

MS. BATTISTELLI: I believe Rhode Island. And the only reason I say that is because there was a new chief that was appointed in Rhode Island, and that's part of my circuit, probably about four or five years ago. And Rhode Island always had the standard practice of incorporating the government version.

And the chief that was hired came from I believe it was the Tampa district, and he went to the chief judge and said he thought their officer should be doing an independent version. And the chief judge at the time said, no, he liked it the way it was being done.

JUDGE STEER: And then there's Colorado.

There's Northern District of Florida. There's, you know, Missouri. You know, just to name a few. But I didn't say just judges. I said the culture of the district because I do agree sometimes, you know, that is what controls--

MS. BATTISTELLI: And it's also an issue when there's binding stipulations and the information we receive, and whether, just as a policy issue, does the probation officer in preparing the report do an independent calculation versus our findings, or does a probation officer prepare the report in support of the binding stipulation? And that can vary district to district.

JUDGE O'NEILL: Well, I'm glad at 10 minutes after 4:00 we've opened up a new can of worms.

[Laughter.]

JUDGE STEER: Such an interesting one, though.

JUDGE CASTILLO: Let me just say that Vice Chair Steer seems to be pretty familiar with this. In four and

a half years serving on the commission, this is the first I've heard that any chief judges anywhere in the country are not following what I think is the ideal practice of relying on a neutral officer as opposed to relying on the U.S. attorneys.

And I, for one, and I think I can get commission support on this, would be willing to talk to any chief judge about why they would be departing from this national preferred practice. And of course, any chief judge will be free to tell me to pound sand. And I'm used to that kind of treatment.

[Laughter.]

MS. BATTISTELLI: I think it's a matter of practice from the chief probation officer in some districts and time constraints. If, like in the District of Boston, I think they have 35 days from the initial to--

JUDGE CASTILLO: Right.

MS. BATTISTELLI: And within 35 days, given

their workload, that they don't necessarily have a chance to write a completely independent version. So they may use most of the government version and then look through reports and see what else is there that can be added.

And unfortunately, I think there are many of us who are concerned, and this was an issue that we were going to raise at the Miami training session for POAG's group is this issue. Since we obviously will be doing more reports with less officers being hired, how can we come out with the same work product, the same quality product that the judges expect of us without shortchanging the process?

JUDGE CASTILLO: Well, I urge you to identify the problematic districts. Bring it to our attention, and we will take whatever action we think is appropriate.

MS. BATTISTELLI: Actually, the AO may have some of that research because I know they go out and do audits on a regular basis, and that's usually because they do not support that. So they may already have the districts

that are doing that.

JUDGE O'NEILL: Even if it's budget related as well because that's important to know as well. If there aren't sufficient resources within the district to provide for the model, that's important for us to understand as well.

JUDGE CASTILLO: Any other questions, comments, Pandora's boxes to open?

JUDGE O'NEILL: Well, I had one other--

JUDGE SESSIONS: Just in regard to the pre-sentence reports. How about in the early disposition states or areas? Are you developing techniques to expedite the process?

MS. BATTISTELLI: I think some districts are going to a sort of a compromise. It's a joint version of facts signed off on by the government and the defense attorney as this is the version that will be included, covering all the guideline issues. And I'm not sure what some of the--I know in some districts they do have that

expedited process, but it's pretty much bare bones, I think. Maybe Judge Hinojosa can answer that?

JUDGE HINOJOSA: We don't have it, but it is in some of the districts on the border. Just a quicker version.

MS. BATTISTELLI: There's no verifications?

JUDGE HINOJOSA: It's almost like a pretrial services report.

MS. BATTISTELLI: Right. It's--

JUDGE HINOJOSA: It's an expanded pretrial service--

MS. BATTISTELLI: And sometimes the criminal records adjust the cap.

JUDGE HINOJOSA: That is just my understanding.

MS. BATTISTELLI: Right. It's pretty much pretrial services report for part C, sometimes a joint stipulated version of facts for part A if--you know, there's usually some requirement, I think, that the defendant have minimal criminal history or no criminal

history.

And for the most part, nothing's verified. It's just turn it around very quickly. I'm not sure what changes have been made since the departure language has been added.

JUDGE HINOJOSA: Although I suspect with the national fast track program, there may be an effort to make this more of a national way to handle this rather than independent, each district handling it differently. That's just a suspicion on my part.

JUDGE CASTILLO: Well, let me end this proceeding in particular by addressing Jim. I'm glad you brought up the money laundering example. Because a lot of people, my four and a half years on the commission, just come to me and say, "Is that all you do is go to D.C. and raise penalties?"

And I think to say that is such a disservice to the working men and women of this commission, aside from the commissioners. I hope that when you return to Tampa,

you realize that you've had really significant victories which are difficult in this time and era that we're in. And I'd venture to say, to go to a softer note, that your winning percentage might be higher than some of Chicago's winter--and I emphasize winter--sports teams.

[Laughter.]

JUDGE CASTILLO: We'll end for today. Thank you.

[Whereupon, at 4:12 p.m., the hearing was adjourned.]

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