UNITED STATES SENTENCING COMMISSION

Public Hearing

Wednesday, March 17, 2010

Thurgood Marshall Federal Judiciary Building

One Columbus Circle, N.E.

Suite 2-500

Washington, D.C. 20002-8002

COMMISSION MEMBERS:

WILLIAM K. SESSIONS III, Chair

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DABNEY FRIEDRICH, Commissioner

JONATHAN J. WROBLEWSKI, Ex Officio

ISAAC FULWOOD, JR., Ex Officio
I. ALTERNATIVES TO INCARCERATION/

SPECIFIC OFFENDER CHARACTERISTICS

Panel A:

TRISTRAM J. COFFIN, United States Attorney
District of Vermont

Panel B:

TERESA M. BRANTLEY, Member
Probation Officers Advisory Group
Central District of California

SUSAN SMITH HOWLEY, Chair
Victims Advisory Group
Washington, D.C.

ERIC A. TIRSCHWELL, Member
Practitioners Advisory Group
New York City, New York

Panel C:

MARIANNE MARIANO, Federal Public Defender
Western District of New York

JAMES E. FELMAN, Co-Chairman
Committee on Sentencing, American Bar Association
Tampa, Florida
Panel C (Continued):

CYNTHIA EVA HUJAR ORR, President
National Association of
Criminal Defense Lawyers
Washington, D.C.

Panel D:

THOMAS J. BERGER, Senior Analyst for
Veterans’ Benefits and Mental Health Issues
Vietnam Veterans of America
Silver Spring, Maryland

ELMORE T. BRIGGS, Clinical Director
Kolmac Clinic
Washington, D.C.

SCOTT H. DECKER, Professor and Director
School of Criminology and Criminal Justice
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MARVIN D. SEPPALA, M.D.
Chief Medical Officer
Hazelden Foundation
Center City, Minnesota
II. RECENCY

ANDREA SMITH, Assistant U.S. Attorney
District of Maryland

MARGY MEYERS, Federal Public Defender
Southern District of Texas

TERESA M. BRANTLEY, Member
Probation Officers Advisory Group
Central District of California

III. ORGANIZATIONAL GUIDELINES

Panel A:

DAVID DEBOLD, Chair
Practitioners Advisory Group
Washington, D.C.

SUSAN HACKETT, Senior Vice President
and General Counsel
Association of Corporate Counsel
Washington, D.C.

KAREN HARNED, Executive Director
Small Business Legal Center
National Federation of Independent Business, Washington, D.C.
Panel B:

TIM C. MAZUR, Chief Operating Officer
Ethics & Compliance Officer Association
Waltham, Massachusetts

PATRICIA J. HARNED, President
Ethics Resource Center
Arlington, Virginia

JOSEPH E. MURPHY, Director of Public Policy
Society of Corporate Compliance & Ethics
Minneapolis, Minnesota
(8:50 a.m.)

CHAIR SESSIONS: Let's call the meeting to order.

Welcome. Welcome to all of you. This is just an extraordinarily important day for all of us. We get to hear from practitioners and persons who are really invested in the criminal justice process. This is just vital to our determinations that we will make sometime in April and submit to Congress on May 1st.

Let me introduce, first of all, the U.S. Sentencing Commission. First, to my right is Judge Ruben Castillo. He has served as vice chair of the Sentencing Commission since 1999 — ten years, almost 11 years.

VICE CHAIR CASTILLO: Almost.

CHAIR SESSIONS: And has served as a U.S. district court judge in the Northern District of Illinois.

To my left is Will Carr, who has served as vice chair of the Commission since December of 2008.
He was an assistant U.S. attorney in the Eastern District of Pennsylvania from 1981 until his premature retirement in 2004.

Next to my left is Ketanji Brown Jackson. She became vice chair of the Commission last month. Previously she was a litigator at Morrison & Foerster, was an assistant federal defender in the Appellate Division of the Office of the Federal Defender in the District of Columbia, clerked ultimately through various clerkships with Justice Breyer, and also was an attorney with the United States Sentencing Commission in the past.

Next, Judge Ricardo Hinojosa served as chair of this Commission and subsequently acting chair from 2004 to 2009. He's the chief judge of the U.S. District Court for the Southern District of Texas, I think one of the largest districts in the country, certainly in the criminal justice process, and having served on that court since 1983.

Next, to my right is Beryl Howell. She has served on the Commission since 2004. She served as executive managing director and general counsel of
an international consulting and technical services
firm. She is a former general counsel of the Senate
Committee on the Judiciary, and was an assistant U.S.
attorney in the Eastern District of New York.

Next to my left is Dabney Friedrich. She
has served on the Commission since December of 2006.
She served as an associate counsel at the White
House, as counsel for Chairman Orrin Hatch of the U.S.
Senate Judiciary Committee, and as assistant U.S.
attorney in the Southern District of California, and
then also an assistant U.S. attorney in the Eastern
District of Virginia.

Now to Jonathan J. Wroblewski, who has
been with us in various stages of his career for many
years. He is an ex-officio member of the Commission
representing the Attorney General of the United
States. Currently he serves as the director of the
Office of Policy and Legislation in the Criminal
Division of the Department of Justice.

I guess — oh Commissioner Fulwood is here.
Isaac Fulwood, Jr., is also ex officio member of the
Commission. He serves in that capacity as chair of
the U.S. Parole Commission. Welcome.

Well, let's begin with our first panel on alternatives to incarceration and specific offense characteristics. Let me introduce our distinguished guest.

He is the United States Attorney for — I'm sorry, is it Vermont?

MR. COFFIN: That would be Vermont, yes.

(Laughter.)

CHAIR SESSIONS: It is Vermont? Oh!

He's United States Attorney for the District of Vermont. Previously — this is Tristram Coffin. He previously served as the director of Paul Frank + Collins, which is a large law firm in Burlington — well, that's "large" relatively speaking — in Burlington, Vermont.

He served as assistant U.S. attorney in the District of Vermont for many years. He was an aide to Senator Patrick Leahy, and was a litigation associate in a Boston firm, Hale and Dorr. Mr. Coffin graduated from Wesleyan University and Columbia University Law School.
So I welcome you to the Commission. We have a light system here. Because you're the only person speaking for a half-hour period, we've set roughly 15 minutes. One minute before then you will see a yellow light. It's just like the Second Circuit.

MR. COFFIN: Okay.

(Laughter.)

CHAIR SESSIONS: So just like the Second Circuit, the yellow light will go on and you'll have a minute left. Because we want to leave some times for questions.

MR. COFFIN: Very good.

CHAIR SESSIONS: So the floor is yours.

MR. COFFIN: Thank you, Your Honor. It is a pleasure to be here. Mr. Chairman and members of the Commission:

Thank you for the opportunity to share the views of the Department of Justice on the Commission's proposed amendments to the sentencing guidelines regarding alternatives to incarceration and specific offender characteristics.
We commend the Commission for its leadership over the past 25 years and its commitment — as demonstrated by the various regional public hearings held during this past year — to listening and gathering feedback from practitioners regarding the state of federal sentencing since the Supreme Court's decision in *Booker v. United States*.

The Department of Justice has long recognized that in the context of exercising prosecutorial discretion in charging and sentencing decisions, federal prosecutors should consider the availability of alternatives to incarceration.

Indeed, this important principle — which recognizes both that alternative sanctions may be appropriate for certain carefully identified offenders and that alternatives to imprisonment reduce the strain on prison resources and safety — is embodied in the Department's *Principles of Federal Prosecution*.

At the same time, however, the Department is keenly aware of the critical role that imprisonment plays in providing just punishment,
deterring crime, removing from our communities offenders who seriously or repeatedly victimize the innocent, and promoting the public's trust and confidence in the criminal justice system.

Thus, we believe that alternatives should be adopted only when the Commission can avoid undermining the important deterrent effect of the guidelines on more serious offenders and offenses and the other purposes of sentencing.

It is within the framework of these principles that we have reviewed the Commission's proposals regarding alternatives to incarceration and now provide our comments.

The first guideline amendment proposed by the Commission, Part A, would create a new guideline, §5C1.3, to expand the availability of nonincarceration sentences for certain drug offenders.

Without regard to the applicable zone of the guidelines sentencing table, this amendment would permit imposition of a sentence of probation conditioned upon the offender's participation in a
To be eligible for this alternative sentence, an offender must:

(1) have committed a drug offense;

(2) have committed such offense while addicted to a controlled substance;

(3) not have a total offense level greater than some yet-undetermined level between 11 and 16;

(4) meet the requirements of the so-called mandatory minimum safety valve; and

(5) demonstrate a willingness to participate in a substance abuse treatment program.

We believe that the amendment in Part A is targeted and focused on a category of low-level offenders for whom research has shown alternative sanctions may be appropriate and for whom deterrence may be ineffective. We support the amendment.

We also support the Commission's limitations on availability of the drug treatment alternative of Part A to those drug offenders who:

(1) are not subject to a mandatory minimum sentence — i.e., not the mid-level and high-
level dealers;

(2) do not have more than one criminal history point;

(3) did not engage in violence in the commission of the offense;

(4) were not an organizer or leader in the commission of the offense; and

(5) provided debriefing to the government concerning their offense prior to sentencing.

Congress has determined that those drug offenders who would otherwise be subject to a mandatory minimum sentence — i.e., a mid- or high-level dealer — but who are eligible for the safety valve should nevertheless receive at least a two-year imprisonment term.

We believe that to comply with congressional policy — and to avoid initiating a non-incarcerative approach to higher level drug dealers that ultimately would undermine deterrence and public safety — only those offenders who are not involved in a quantity that would otherwise trigger a mandatory minimum sentence should be eligible for this
alternative.

The Department further supports the evidence-based limit of Part A to low-level drug offenders who commit a nonviolent drug offense while addicted to a controlled substance, and when the controlled substance addiction contributed substantially to the commission of the offense.

Existing state drug courts assist nonviolent low-level offenders to overcome substance abuse addictions that contributed to their offense, and studies demonstrate that participation in drug treatment programs imposed through drug courts reduced both recidivism rates and public safety costs.

Recidivism rates for those who complete drug court programs are eight percent to 30 percent lower than the rates of other similarly situated offenders. This evidence of improved public safety through reduction of recidivism as a result of substance abuse treatment justifies the extension of treatment-based alternatives to incarceration to addicted, low-level drug offenders.
We urge the Commission to develop standards for effective substance abuse treatment programs, gathering the best experts on treatment programs, analyzing the available research, and sharing the results of this work with the federal courts as guidance.

If the Commission promulgates the Part A amendment, we think that it should make conforming changes to Chapter Five to indicate that the new section regarding incarceration alternatives, §5C1.3 remains the only exception to the general principle under the guidelines that drug addiction is not ordinarily relevant in federal sentencing.

The second proposed amendment, Part B, would expand Zones B and C of the sentencing table. This zone expansion would take place across the entire sentencing table in each criminal history category and would apply across a myriad of crime types.

The Department opposes the expansion of Zones B and C of the guidelines as proposed by the Commission in Part B.
While this option would permit more defendants to be eligible for alternative sentencing, it has several drawbacks. Most notably, there is no substantial evidence or research to support such a change to the guidelines which would apply across all criminal history categories of the guidelines, apply across the full spectrum of offense types, and substantially increase the number of federal offenders eligible for non-imprisonment sentences. Extending eligibility for alternatives without limits based on criminal history category would result in inappropriate sentences for offenders whose instant offense may be minor but whose criminal history is significant.

There is no evidence indicating that the current guidelines are inappropriate or that such offenders should receive alternative sentencing, or that alternative sentencing would not increase the public safety risks posed by such a class of offenders.

Another adverse consequence of the proposed Part B amendment would be the increased
likelihood that white-collar offenders would receive non-prison sentences.

Under the current guidelines, offenders received probation-only or probation-plus-community confinement sentences in the following types of cases at the rates indicated: environmental and wildlife offenses, 81.4 percent; food and drug offenses, 66.7 percent; gambling and lottery offenses, 63 percent; simple possession of drugs, 60.4 percent; larceny, 56.8 percent; embezzlement, 48.5 percent; antitrust offenses, 47.6 percent; tax offenses, 41.2 percent; and other miscellaneous offenses, 62.5 percent.

If the zones were amended such that more white-collar offenses were eligible for alternative sentencing, it is likely that even fewer white-collar offenders would be incarcerated, undermining the important deterrent effect of jail time in white-collar cases, diluting effective white-collar enforcement efforts, and eroding public confidence by seemingly ignoring the serious harm that white-collar crime inflicts.
We note that in 2001 the Commission ultimately declined to adopt its proposed expansion of Zones B and C, acknowledging concerns that such expansion — though greater than the expansion currently proposed — would undermine changes in the economic crime package that had recently been adopted.

Inasmuch as Congress has increased penalties since 2001 for many economic and other white-collar crimes — for example, antitrust offenses — we see no justification for the changes the Commission currently proposes in this amendment.

Moreover, unwarranted racial disparities in sentencing would likely be exacerbated by the application of Part B to all offenses because, as described above, the offenses most likely to receive alternative sentencing are those in which white offenders already are over-represented compared to their percentage of the total number of federal offenders.

For example, in fiscal year 2008 only 29.8 percent of federal offenders were white, yet white
offenders constituted a much higher percentage of offenders in those offenses most likely to receive alternative sentencing: antitrust, 90 percent; gambling and lottery, 86.6 percent; environmental and wildlife, 75.9 percent; food and drug, 73.1 percent; and tax, 71 percent.

Expanding Zones B and C also would have an adverse impact on sentencing in corruption, civil rights, and many other cases. We think that the Commission should not amend sentencing policy for these offenses without fully studying, understanding, and sharing with all stakeholders the impact of such amendments.

The wholesale expanded use of non-incarceration sentences should not be undertaken in the absence of careful analysis of the types of offenders and the types of offenses to which these alternatives would apply. And it should not be done without assurances that such a change would not jeopardize public safety and the public confidence in imposition of fair and predictable sentences.
I would now like to move on to the specific offender characteristics.

In connection with its review of departures, the Commission has requested comment concerning the relevance and treatment of five specific offender characteristics set forth in Chapter Five, Part H, of the guidelines: age; mental and emotional condition; physical condition, including drug dependency; military, civic, charitable, public service, or employment-related contributions and record of prior good works; and lack of guidance as a youth.

The Commission specifically seeks public comment on whether the current guidelines adequately address these specific offender characteristics given the guidelines' current admonition that these characteristics are "not ordinarily relevant" to departure determinations.

The Commission also seeks feedback regarding views as to the relevance of these characteristics to the "in or out" decision — that is, whether to impose a sentence of probation or
incarceration — and to the extent that the characteristics are deemed relevant, whether there is a risk that they might be used as a proxy for race, sex, national origin, creed, or socioeconomic status of an offender.

We continue to believe that federal sentences should be determined largely based on the offense committed by the offender as well as the offender's criminal history.

Offenders who commit similar offenses and have similar criminal histories should be treated similarly. While we recognize that 18 U.S.C. 3553(a) directs judges to consider an offender's background, it also directs judges to avoid unwarranted disparities.

The overwhelming legislative history of the Sentencing Reform Act demonstrates that Congress intended for offenders who commit similar offenses to be treated similarly.

We think that the Commission should reaffirm this principle of federal sentencing policy that has been in place since the Sentencing Reform
Act was adopted and should indicate that offender characteristics — outside of criminal history — should generally not drive sentencing outcomes.

We are extremely cautious about any revision to the guidelines related to offender characteristics. The Commission has not provided an administrative record that would justify delving into this area, nor has it provided any hint about how it might now regulate offender characteristics.

We are also concerned because we suspect that a significant expansion of departure authority through consideration of these five characteristics — particularly in light of today's advisory guidelines landscape — will:

(1) further exacerbate unwarranted sentencing disparities; and

(2) create a new level of uncertainty and unpredictability in sentencing that gives rise to litigation both at the trial and appellate levels.

Indeed, discussion of the questions that the Commission poses for comment is complicated by the fact that consideration of how the guidelines
treat these five specific offender characteristics is
inextricably intertwined with the examination of
broader policy issues such as alternatives to
incarceration and racial and ethnic disparities in
sentencing.

In today's sentencing climate, where
courts with authority to depart from guidelines
sentences choose more often to vary altogether from
the guidelines because of the perceived complexity of
the departure guidelines and risk of appellate
reversal, there seems no reason to expand departure
authority further; an expansion that would, we
believe, (1) further jeopardize uniformity in federal
sentencing; and (2) undermine the deterrent effect of
guidelines sentences; and (3) potentially obscure the
solutions to ongoing questions regarding the
propriety of alternatives to incarceration for
certain offenders and offenses, and the elimination
of unwarranted sentencing disparities.

The Department urges the Commission
instead to study these offender factors individually
over the coming years and consider issuing research
papers to assist courts in how and when these factors 
are appropriately considered within the context of 
sentencing outcomes being driven largely by the 
offense committed and the offender's criminal 
history.

For example, we think it is important for 
the Commission to study the effects of traumatic 
brain injuries suffered by Iraq and Afghanistan war 
veterans, how such injuries may have affected 
veterans involved in criminal activity, and how 
federal courts should consider these injuries in 
determining an appropriate sentence.

We believe the Commission should hold a 
hearing on this issue, complete thorough research and 
administrative study, and then issue relevant 
information to the federal courts to assist in 
appropriate cases. We think that this kind of 
rigorous study and review is the best way to address 
these kinds of issues.

Further, we do not believe that a 
defendant's status as a non-citizen warrants a 
downward departure. We do think that the Commission
should consider, as part of the next amendment year, the proposal suggested at one of the Commission's regional hearings for a small sentence reduction for non-citizens who agree to resolve expeditiously any pending immigration removal or deportation matter.

We also do not believe that "cultural assimilation" is generally an appropriate ground for a downward departure in an illegal reentry case sentenced under §2L1.2.

In closing, I would like again to thank the Commission for this opportunity to share the views and concerns of the Department of Justice. We believe that the Commission has a critical role to play in addressing alternatives to incarceration and in the continued study and analysis of offender characteristics and what role they should play in sentencing.

The Commission is uniquely positioned and staffed to provide reliable empirical data and analysis with respect to these issues. The Department looks forward to working with the Commission over the coming years to tackle these
complex and evolving issues.

Thank you.

CHAIR SESSIONS: All right, thank you,

Mr. Coffin. Let's open this up for questions.

Commissioner Friedrich?

COMMISSIONER FRIEDRICH: Mr. Coffin, thank

you so much for coming to testify and taking time

away from your busy job. It is really helpful to us

when we hear from you on these issues.

MR. COFFIN: I appreciate that, thank you.

COMMISSIONER FRIEDRICH: I have a couple

of questions for you relating to the proposed

Amendment 5C1.3. I'm wondering, has the Department

had a chance to get the Bureau of Statistics, or BOP,
or DEA, or any of the entities within DOJ, have you

had a chance to estimate how many offenders you

expect to benefit from this?

MR. COFFIN: The Department has begun

looking at that. I don't think the analysis is

completed, but the figures I have heard are in the

neighborhood of several hundred, a thousandish. So

it's not a large number of offenders we're talking
about. And that's primarily because of the nature of the federal narcotics docket in most districts now are such that cases at this level are not the central thrust of narcotics prosecutions.

COMMISSIONER FRIEDRICH: Well that's consistent with the Commission staff's internal research. But let me share some of the figures we've been given and get your reaction to those.

If you look solely at the preliminary data from fiscal year 2009, what we find looking first at offenders in this paragraph, total offense level of 15s who qualify for safety valve, looking at those factors and not whether they're addicts or whether their addiction contributed in any way to the offense, if you look at simply those factors, the potential pool of offenders to benefit is around 2000. You have 931 U.S. citizens, and 115 non-U.S. citizens who potentially could take advantage of this.

And if you look at where those offenses were committed in 2009, and the nature of the offense, what we find is that the vast majority are
marijuana offenses. Seventy percent of the U.S. citizens who would qualify with marijuana trafficking offenses, and 95 percent of non-U.S. citizen. And they're all, the vast majority, 65 to 70 percent, are concentrated in the Western District of Texas — two districts — and the Southern District of California. The remainder of course are concentrated in other border districts, not Vermont and Washington, but southwest border districts.

So it is fair to conclude, I think, that the vast majority of these offenders who would benefit from this provision would be marijuana importers at the border. And if you look at DOJ's proposal, they have total Offense Level 15, and you take into account role adjustment, accepting responsibility, safety valve, we're looking at total Offense Level 22 or 24, which is at the top end, offenders who have 60 to 100 kilograms of marijuana. So 132 to 220 pounds of marijuana coming across the border.

In our regional hearings we've had a chance to talk to practitioners in these various
areas in the Western District of Texas who indicated that by and large these offenders are not offenders who are drug addicts. They tend to be destitute, desperate people who agree to drive these large loads of marijuana for money. And that's consistent with my experience. You and I both know that the drug cartels don't entrust large amounts of drugs to addicts. It's not a reliable way to get drugs across the border.

So my question is: In light of these statistics, I think we all can agree that drug treatment is a good thing; that we should try to provide it to those who need drug treatment, but I'm wondering whether this approach which, one, provides this to [mules], and two, to very, very small classes of offenders; if you take out the [mules], the non-U.S. citizens who probably can't benefit from this at all simply because they're on detainers and they're not going to be eligible, we're looking at a potential pool of 931 offenders. And from that, the vast majority we can reasonably conclude aren't addicts.

If this is the right approach to achieve that goal,
wouldn't we be better off applying more drug treatment both in prison and out of prison to a larger class of offenders, and a larger group of addicts?

So that's question one. Then question two is related to that with respect to Chapter Five, Part H, the Specific Offender Characteristics. You've expressed the view that we should proceed with caution and you're concerned that we really don't have the administrative record we need to make the kinds of changes we're considering, and I agree with you wholeheartedly.

But yet you do think we have the administrative record we need to make the change with respect to drug dependency. And that is — if I'm hearing you correctly, you're proposing that we amend that provision of the guidelines to say that drug dependency is not ordinarily relevant except in this small category of cases.

MR. COFFIN: Right.

COMMISSIONER FRIEDRICH: Do you think we have —
MR. COFFIN: I can comment on those questions.

This proposal that the Department has endorsed is not the be-all and end-all. It isn't intended to address everything. It is intended to address a particular population of low-level drug offenders who do suffer from addiction and whose addiction contributed to the offense that they're convicted of.

That is not the situation with the situation with the marijuana couriers who bring the marijuana from southwest Florida, or the northern border, too. It is kind of an apples and oranges sort of a thing.

And so first as to the merits of that proposal, because of the nature of their addiction, I've seen in many cases, and you have, too, I'm sure, that deterrence doesn't really work for these people. So they'll get out, and if they don't have drug treatment, they'll just start using again and they will, in order to support their habit, this particular level of people who we're talking about
will buy, cut the drugs, sell some of the drugs,
inject the drugs, and be right back where they were
again either committing low-level state offenses, or
wrapped up in the federal system typically as a very
low-level person in a larger drug conspiracy.

So I think that this proposal is narrowly
tailored to address that. Also, I do think there is
a record here of this kind of a thing working, and
that's with the drug courts that have been working
with good success generally over the last 20-plus
years.

So there is a record that this kind of a
program can work and reduce recidivism if you cure
the substance abuse addiction. That isn't to say
that this issue of how you deal with low-level drug
couriers in a large drug organization isn't a
difficult and troubling one. I'm just not sure that
this fix is the thing that you should impose for that
problem.

The problem there is you have typically
large-scale commercial, highly commercial, extremely
lucrative drug-running operations who are using these
low-level folks, and they get caught, and they don't
have really a way out of the system. But the way
to — and at some levels that's unfair, but the cure to
that unfortunately is not just eliminate deterrence
for those folks.

There may be another fix for that that the
Commission should look at, but expanding this fix to
cover that and not having this fix because it doesn't
cover that I don't think solves that problem.

COMMISSIONER FRIEDRICH: So your
administrative record for the change you propose in
Chapter Five is examples from the state drug courts?

They're a different class of offender.

MR. COFFIN: Sometimes they are; sometimes
they're not. I'm not using — I guess I would not use
the term "administrative record" strictly speaking so
narrowly. The basis for the Department's view is the
experience with the drug courts as understood by the
Department, the view of its prosecutors, and the view
of the Attorney General is that this is something
that can be a viable alternative for this subclass of
offenders.
With regard to the specific offender characteristics, more broadly, yes, we are agreeable to an amendment to have narcotics addiction be a specific offender characteristic that can matter to sentencing to this extent, but we're not going any further at this point. Even to go further at this point would, in our view, require some additional study and some additional learning.

Because I think it's really what the Commission can add today. You now, as you all know, have judges under Booker varying from the guidelines, applying non-guidelines sentences more and more frequently. And this Commission I think is tasked more and more with being kind of a lodestar and a point where the importance of some degree of uniformity can, one, be recognized because of justice and fairness and things like that, but also because you've got the resources, and the centralization, and the expertise to provide that kind of counterpoint.

So a judge in Illinois, or Vermont, can look to the Sentencing Commission to say, well, this is what this group of people thinks, having studied
it, and this is what most judges are doing in this particular kind of case, hmmm, maybe I ought to think about that as I apply that case to the situation before me.

And specifically with offender characteristics, this is where the Commission can provide some meaningful guidance, thought, and direction to sentencing courts, instead of just giving them freedom to do what they're doing now by just calling it "departures," as opposed to "variances."

CHAIR SESSIONS: Ricardo.

COMMISSIONER HINOJOSA: Mr. Coffin, thank you for taking time to be with us today. Being the U.S. attorney in the only other state besides Texas to have been a republic at one point, congratulations to you on that.

(Laughter.)

MR. COFFIN: Thank you very much, Your Honor.

COMMISSIONER HINOJOSA: I have a couple of questions related to each other.
You started off by saying that alternatives to incarceration was something that the Department was in favor of. My question is: Why is it then the Department doesn't use pretrial diversions more often in some of these cases? You've got that within your authority and within your power to identify the cases where alternatives to incarceration would be very helpful. Is the Department possibly thinking of sending out something to all the U.S. attorneys across the country about the use of pretrial diversion?

MR. COFFIN: I think that's a great point. I don't have a good answer for that except to —

COMMISSIONER HINOJOSA: That doesn't require guidelines —

MR. COFFIN: You're right. I think it's received lore and handed-down policy over the years. As an assistant years ago, working with Charlie Tetzlaff, we did it some. But we didn't do that much.

CHAIR SESSIONS: We all support
Charlie —

(Laughter.)

MR. COFFIN: Right. Okay.

VOICE: Some of us still do.

(Laughter.)

MR. COFFIN: But it was never a program that, for whatever reason, kind of expanded, took off, flourished much. And me as U.S. attorney I think it's something I think about doing, but it's on my "to do" list and not on my "got it done" list.

But I do think that is something that the Department has, and U.S. attorneys currently have the power to do, and would be a good thing to look at. And I think it would be appropriate.

I chair a subcommittee of the AGAC that deals with criminal practice issues, which are primarily sentencing issues and discovery issues. And I think that's an excellent idea, and I now plan to take that up with our group and talk about that, because I think that's a good point.

COMMISSIONER HINOJOSA: The other point that I have as a question is, why is it that the
Department talks about alternatives to incarceration but the only one that you're willing to endorse is the one that suggests that we should give some alternative to drug addicts who are creating more drug addicts, or making more drugs available to other drug addicts, as opposed to anybody else, or anything else that the Commission has suggested as a possibility as an alternatives to incarceration?

Why is it that the Department is picking that situation, when you have that pattern of — it's the drug addict who's contributing to a drug trafficking offense, which at the federal level is more than personal use amounts; and that the only alternative you have endorsed as a Department is that one, as opposed to any of the others that the Commission has put out for comment?

Why is that you're not — I know you talk about studies, but there are studies, and there are numbers that are presented to the Commission before we publish something. And so why do you pick just that one, and nothing else, when you have endorsed the idea of alternatives to incarceration?
And then you make it a change in the 5H policy that you want to make it very clear that it would be limited to those individuals only, whereas there are drug addicts who commit other crimes because of possibly their drug addiction, but you're not interested in any kind of alternative for them?

MR. COFFIN: Well I think we are interested. But I think that we need to proceed in a measured, deliberate fashion, studying these alternatives; and, really, one of the important things with all of these programs is to – and the programs can be applied without them being in the guidelines in various fashions, both in the state and the federal courts, and through the Justice Department and so forth, and are. But I think it's important as we do these we really engage in some empirical study to see what works and what doesn't work. Because I think we can build a basis of knowledge and learn about what's learning.

For example, in our district we have one of the drug reentry courts. It appears to be a great program. You go to court and you've got seven or
eight folks who are working very hard to stay clean, stay employed, and will get the benefit of a reduction in their supervised release term.

That appears to be something that is working and is successful. But really, the only way we'll — well, it's not the only way, but an important factor to that is to look at that long-term and see if that does have some effect on their recidivism.

So we need to study these things going forward. But let me get back to your question of why is this the only one.

It isn't the only one I think the Department is prepared to endorse. I think it's the only one the Department is prepared to endorse at this time based on the basis of knowledge that we have received. And it's [a] narrowly tailored, carefully crafted approach.

COMMISSIONER HINOJOSA: Have you endorsed a change in the departure language to go to the pre-PROTECT Act language that was in the departure, in the manual?

MR. COFFIN: What do you mean by that?
I'm sorry?

COMMISSIONER HINOJOSA: Well that we would replace the departure language that we have in 5H, as well as 5K, back to what it was pre-PROTECT Act when the Commission changed some of the wording and started using the word[s] "exceptional circumstances" as well as as opposed to "out of the ordinary" or putting us back to where we were before the PROTECT Act as far as the departure language when it came to specific offender characteristics as far as the departure language that we have.

MR. COFFIN: I couldn't tell you. I couldn't give you an answer to that right now.

CHAIR SESSIONS: Ruben.

VICE CHAIR CASTILLO: Yes. I agree with you that if this drug treatment proposal does work, that you're willing to support, there might be room and empirical base to expand it to other crimes, but I share my colleague, Judge Hinojosa's disappointment with this Department in not being willing to support the other alternatives that have been proposed.

For example, the modest expansion of the
zones. Wouldn't you agree that judges already have
that discretion, post-Booker? That expansion does
not require judges to sentence anyone in any fashion.
All it does is create some more discretion where
discretion might not be available under the advisory
guidelines.

One of the things I think the Department
of Justice has to realize is that we are in a fight
for the hearts and minds of our fellow judges. And
we're trying to standardize judges' thinking about
the guidelines.

MR. COFFIN: I understand your view on
that, and the Department recognizes that this is a
modest change that's being proposed. But —

VICE CHAIR CASTILLO: But I'm sure we're
going to hear — not to interrupt you — but a lot of
criticism that it doesn't go far enough. I've
already read tons of mail last night.

MR. COFFIN: I'm sure you're being very
prescient with that.

CHAIR SESSIONS: Ninety-nine pages of
that, single-spaced.
MR. COFFIN: The point is more one of principle, I think. For this Commission to make changes to the guidelines it should be done in a measured, deliberate way based on empirical analysis and study, and not reactive to the courts giving new powers to judges to vary and to limit the guidelines — limit the application of the guidelines to do things outside the guidelines.

On the contrary, when faced with these pressures I would suggest the Commission needs to be more rigorous about providing that regimented analysis and rationale for what it does. Because, really, you guys are the only entity around in federal sentencing that can provide that centralizing force and that kind of central clearinghouse and source of guidance.

Otherwise, if you say anything goes then truly anything will go and we won't be able to get back here.

VICE CHAIR CASTILLO: I agree with that.

But the moving to specific offender characteristics,
right now judges are doing whatever they want to do
with these offender characteristics.

Let's just take the five that we're
studying. Right now the guidelines say they're not
ordinarily relevant. There's a total disconnect with
judges. When they read that, they just put down the
manual and they don't want to look at other
provisions. And I think we are losing a lot of
judges with that type of language.

Would the Department at least agree that
we should revise that to say that they could be
relevant? What should we say about the five
characteristics?

MR. COFFIN: You're exactly right. The
Commission has to maintain its relevance. I can't
tell you now on behalf of the Department of Justice
what the magic words will be. But what I think is
more important than just to say they're relevant, age
is relevant — everybody's got an age, obviously; you
can kick that one around probably a lot more than me,
but what —

CHAIR SESSIONS: Because he's older.
(Laughter.)

MR. COFFIN: I don't know. What is important is that you guys provide — "you guys," that this Commission provide guidance and meaningful discussion to judges out there of why these characteristics are relevant. Because, otherwise, you will have judges who think they're doing the right thing but you could end up looking the early statistics with significant sentencing disparity and could be significant sentencing disparity that flows into some of our forbidden factors, or ends up with different kinds of offenders, white-collar offenders for example, somehow seeming to get on the national basis a lot more of the breaks than less well-heeled offenders.

And that is another crucial function of this Commission, to be that check on making sure that those principles are upheld that provide fairness for people of different classes and ethnic backgrounds.

CHAIR SESSIONS: Okay. Commissioner Carr.

VICE CHAIR CARR: As Judge Hinojosa
mentioned, drug offenses are not the only offenses
drug addicts commit, and commit because of their
drug addiction. Do you see any reason why this drug
treatment alternative should not be available to drug
addicts whose drug addiction causes them to commit
other at least nonviolent crimes?

MR. COFFIN: In principle, not
necessarily. However, the devil is in the details
with these things and it would be necessary to
describe what one means by, for example, "low-level
embezzler," or "theft" defendants.

So let's say you've got the bank teller
who is embezzling money from the bank to support his
heroin addiction. All right? Now under the
guidelines, under the theft guidelines, it's a pretty
low-level offender on the sentencing guidelines who
has an intended loss $200,000.

In my experience, that would be unusual
for someone to be embezzling $200,000 to support a
drug habit. You know, tens of thousands of dollars
certainly; maybe even a little more than that. But
you're talking about a pretty low-level offender
under the theft guidelines.

So you're really I'm not sure going to have in the federal system that many bank tellers, or small-time theft defendants who are doing these crimes because of their drug addiction.

VICE CHAIR CARR: It sounds like we don't have too many drug offenses, either.

MR. COFFIN: Well, just from my own experience — I guess that's the only thing I can draw on — I would think there would be more drug offenders than bank tellers. That's my experience.

CHAIR SESSIONS: Commissioner Jackson.

VICE CHAIR JACKSON: I'm curious about the Department's position on this "substantially contributed" language. I'm wondering whether that's crucial to the Department's support of this guideline? And if so, why? Is there empirical evidence that suggests that "substantially contributed" is important in a way that outweighs the criticism that it opens the guideline up to litigation over the issue of what is "substantial"?

MR. COFFIN: Well I don't think there
would be significantly more litigation over that than
there would be over any other guideline provision.
That would get flushed out over time and judges have
applied the word "substantially" in many respects in
many contexts.

I think it is important that the drug
addiction substantially contribute to the offense
because the notion for this is that you need the drug
treatment to provide the replacement for what a
deterrent should be.

These offenders, because they're driven by
an insatiable physical dependence for narcotics,
don't — jail is not a deterrence for them in the way
that jail is a deterrence for someone who might be
considering committing a white-collar offense. And
so if you don't have that linkage, then you don't
have that situation where the justification for the
alternative is met.

So for example in our district we have,
from time to time, these kind of guys I call "pot
millionaires." They're 20-something folks. They
make a lot of money selling high-grade marijuana
smuggled in from Canada. I mean, you know, hundreds of thousands of dollars, not millions of dollars. And they do that because they like the money. It's an economic crime, fundamentally.

But if they were to come into court, I would not think it would be the right sanction for them to say, "Well, I've got a pill addiction as well and so I should get a probationary sentence, even though the motivation for my crime is primarily economic." Because really then you're taking away the deterrence for what is primarily an economic crime by not having that requirement that the drug addiction substantially committed to their offense.

VICE CHAIR JACKSON: So "substantially" is "primarily" in your, in the Department's standards?

MR. COFFIN: I don't think it's necessarily "primarily." I think "substantially" would be a meaningful, not tangential, significant contribution. That's me.

CHAIR SESSIONS: Commissioner Howell.

COMMISSIONER HOWELL: Mr. Coffin, I am going to reiterate my fellow commissioners'
thanks for you to come and, as you can tell, I echo a lot of the concerns that they've raised about the Department's position on the alternatives proposal.

I was stunned, actually, to be frank, at the Department's position in support of Part A and not Part B. I wanted to explore with you a little bit about this assertion that we don't have an administrative record, at least for Part B.

Some of the comments that you have made, both in your written testimony and orally, is that among the — that as part of the record that the Commission should look at in determining what amendments to the guidelines might be appropriate and our policy statements, because certainly it's related to this same question: We should essentially not consider as part of that record the variance in departure rates that we are noting across the country by judges, and that in fact that is one part of what we consider an important part of our record. We should put that aside.

I just wanted to, you know, when it comes
to both the alternatives amendment and our specific [offense characteristic] amendment, I think part of what the Commission is tasked to do, and it's been repeated by the Supreme Court, is we're supposed to be a feedback mechanism with the courts. What are the courts actually doing and seeing and how are they reacting to the guidelines in practice.

And for the expansion of the zones, Part B of our alternatives proposal, what we've seen is in a significant portion of the cases in the zones' offense levels that are being affected, courts are on their own in significant percentages sentencing people at the lower level to get them into a different zone.

So — and, you know, for the specific offense characteristics, clearly the variance rate shows that courts are finding the guideline manual departure provisions in Chapter Five useless in terms of giving them any assistance in evaluating the offenders appearing before them.

So I just want to be clear about the Department's position, since you all are sort of
joining in this sort of broader debate that we're
hearing about, what type of record should prompt the
Commission to act?

What do you perceive the Commission's
appropriate action to be when it sees growing
variance rates? And should that be part of our
record when we're looking at these guidelines?

MR. COFFIN: That's an interesting
question because I can see your point of, hey, you've
got these hundreds of courts throughout the country
who are kind of laboratories for what's right and
what's wrong.

But just because courts throughout the
country are, for example, say this is the case—it
may not be the case, but let's say it's the case—they're giving breaks to white-collar defendants.
And there is significant disparity say—I don't know
it's the case, but let's say it's the case—that
African Americans receive longer jail terms than
non-African Americans. Would the Commission tolerate
that kind of disparity? I think not. Does then the
Commission have some role in guidance? I think it
So I understand your point that you need to take input from the field about what judges are thinking and what they're feeling is the right thing to do in those cases, but I would also suggest that the Commission at this point, more than any other time, needs to provide guidance and leadership by taking a thorough look. And as part of that look, look at what's going on throughout the country and what judges are thinking is the right thing to do and the wrong thing to do, but really study these characteristics carefully and come up with, well, when is a record of public works appropriate to be considered at sentencing? When is it not?

Because otherwise I'm concerned that if you let the district courts throughout the country and the sentencing judges go forward without any guidance from the Commission, then there really won't be a whole lot left of the sentencing guidelines and the Sentencing Commission.

So I would suggest that it's much better for the Commission to engage in a deliberate study,
and I think it is entirely appropriate to consider what courts are doing in the field as part of that study, but don't be driven wholly by that.

CHAIR SESSIONS: Can I just flesh out that position just a little bit more? We are in a situation in which we have to in a sense sell the guidelines to judges. As Commissioner Howell has just said, judges look at 5H factors and say this is ridiculous because they've got 3553(a), so they go right to 3553(a) guidelines, at least in terms of offender characteristics become insignificant, in fact very counterproductive, frankly.

So I was trying to read between the lines in your submission, and let me see if I can actually formulate what I think may be the Department's position. And you can tell me if I'm wrong. But in regard to offender characteristics and those 5H factors, you are not necessarily suggesting that the "ordinarily" and "not relevant" language is appropriate? That is of less concern to you, at this particular point? What is of concern is that the Commission should be providing information to the
judges and practitioners out there in regard to the relevance of these factors. I mean, these factors are now relevant.

So my question is, first, do you have any objection to the removal of this language, "not ordinarily relevant," which is essentially being rejected by the courts, and then expressing the interest of the Commission to explore further guidance to practitioners and judges, either now — you object now — or into the future?

In other words, do you have any objection to removal of "not ordinarily relevant"?

MR. COFFIN: I can't at this point in this position consent to the removal of that language on behalf of the Department of Justice. But let me say this, which I feel comfortable saying: The Department thinks it is important for the Commission to make a statement reinforcing that there is an importance to some degree of uniformity in sentencing, and that primarily an offender's sentence should be driven by the nature of the offense and their criminal history. And that similar crimes should be treated similarly.
Making that positive statement now I think is important.

That being said, under post-Booker, all these factors are pertinent and they all come into play. And the Commission again can play an incredibly crucial role in guiding that discretion. They are going to be applied. They are applied all the time in all sorts of ways.

But the purpose of the Commission is to apply those factors in a way that helps enhance the cause of justice. And by providing some meaningful assessment and guidance to judges for them to learn from, to understand what other judges are doing, to benefit from this Commission's central ability to organize, and study, and collect empirical data and analysis, and teach, they can learn from that and that will further their application of those in the case before them in a way that will lead to better justice, I think.

CHAIR SESSIONS: With that, I really appreciate your coming down and thanks very much.
MR. COFFIN: Thank you very much. I appreciate it. Thank you all.

CHAIR SESSIONS: Let's have the next panel.

(Pause.)

Okay, good morning. Welcome again back to the Sentencing Commission. Let me introduce this panel. Teresa Brantley is a member of the Commission's Probation Officers Advisory Group, better known as POAG to us. She is a supervisory U.S. probation officer in the Presentence Unit of the Central District of California. Ms. Brantley has a bachelor's degree in mechanical engineering, and a law degree. Prior to joining the probation office she served as a practicing civil law attorney, and as a manufacturing engineering. What an incredibly interesting background.

Next, Susan Smith Howley is currently the chair of the newly formed Commission's Victims Advisory Group. Ms. Howley has been with the National Center for Victims of Crimes since 1991. She presently served as director of public policy
where she manages and coordinates public policy assistance and advocacy efforts. She earned her B.A. in international affairs from Texas Christian University, and a juris doctorate from Georgetown.

Welcome.

And next, Eric Tirschwell is a member of the Practitioners Advisory Group. He is a partner at Kramer, Levin, Naftalis & Frankel in New York City specializing in white-collar criminal defense and complex civil and Constitutional litigation.

Mr. Tirschwell previously served as an assistant U.S. attorney in the Eastern District of New York. He received his B.A. from Amherst College and his J.D. from Harvard. So, welcome.

Now let me try to explain the system. We let this go a little longer, but because of the numbers of persons who are going to testify we are going to try to keep you as close as possible to ten minutes. So at about nine minutes the yellow light will go on, and then try to wrap up at that particular point because we want to leave this — as you can tell, the commissioners like to ask questions, and we like
to leave this open for questions.

So first, Ms. Brantley. Thank you.

MS. BRANTLEY: Well on behalf of POAG I want to deeply thank you for the opportunity to address you here today. I understand you do have a copy of our position paper, so let me just jump right in.

In terms of the alternatives to incarceration, the proposed amendment 5C1.3, on the one hand we were pleased for the opportunity to discuss these topics in connection with the guidelines, but we found some real what we thought would be application problems with the language to 5C1.3.

The first of which is the terms "residential," the phrase "addicted to a controlled substance." Later on in a different guidelines it talks about "licensed, certified, accredited, or otherwise approved by the relevant state [regulatory] agency." And also the "well-trained, qualified, and experienced" language. And the "experienced in the evaluation and treatment of participants who follow
established ethical and professional standards."

Now it sounds like wonderful language and, yes, that's what we all want to do, but the reality is that we are limited by region in terms of what's available to us. And quite often people who work in these drug treatment facilities, many of them — I couldn't give you a statistic on how many — but there's going to be people involved in the treatment program that are graduates of the program. And that's just the way drug treatment works.

So this language we felt would sort of conflict with what we're already doing, or it could possibly conflict with what we're already doing. And also it might interfere with how we contract with our drug treatment providers in terms of the language.

We worry that the proposed guideline blurs the line between treatment and punishment, making the administration of such programs difficult. For example, drug treatment programs treat as rewards certain things like time off from supervised release, or when people go to prison time off from their prison sentence, and state courts typically hold in
abeyance convictions on certain crimes. They hold
these things out as a carrot.

What this does is it gives people the
reward in the front end. And so we worry about the
motivation for people to continue on through a drug
treatment program.

We also worry that there is no day-for-day
equity between treatment programs and punishment,
meaning treatment programs have their own schedules
that include a determination when an offender has
successfully completed a program. And that could
vary from region to region.

We had quite a discussion on that from
various members of POAG. A very simple example would
be that if a treatment program felt that a person had
progressed in 60 days to a point where perhaps they
don't need to be living there anymore and their
treatment would suggest that they move to another
living arrangements, how do we square that with a
requirement that the sentence imposed that they serve
90 days in a treatment facility? They could be
taking up a place for someone else who could benefit
from that bed. And so we had concerns about that.

The proposed guideline sets criteria which is too narrow and fails to capture those offenders most in need of drug treatment services. It omits non-drug offenders who have a history of drug use, and those with higher criminal history categories for example who could benefit from drug treatment.

We need further guidance, we believe, from the way this guideline is particularly written to determine how, if at all, drug treatment commenced prior to sentencing would be credited against treatment ordered under the proposed guideline.

For example, it is not uncommon for people to find themselves in residential drug treatment as part of pretrial. In various districts there's case law that says pretrial detention, detention to make sure that the person shows up for all the sentencing and such, is not necessarily credited against a sentence that might be imposed later on. And now this would pull drug treatment into that discussion, too.

If drug treatment is imposed as part of
5C1.3, how do we credit pretrial drug treatment if
they were in a residential facility?

We worry that offenders will exaggerate
their drug history to meet the requirements of this
new guideline. We worry that there will be
additional litigation, for example, in terms of the
amount of drug, to bring it down to a base offense
level that would qualify for this and unnecessarily
complicate the sentencing process in that sense.

And we also worry that applying the
phrases like "what does it mean to be addicted" and
"substantially contributed," we feel like those are
areas that will lead to additional litigation in the
sentencing process.

Most importantly, we really had a great
concern about cost. Is this a program that probation
and pretrial services administers? And then, worry
about how this might affect their contracting
process? Or is this something that the BOP would
fund, for example? And we just don't know where it
would fit.

During our discussion, POAG members agree
that probation officers already seek to identify
those defendants requiring special conditions,
including drug treatment, and the courts already have
the authority to fashion sentences as envisioned by
the proposed amendment.

It was also noted that those defendants
who are facing lengthy terms of imprisonment are
eligible for placement in the BOP's 500-hour
treatment program which makes them eligible for
reduction in actual time served.

We believe that, rather than promulgating
a new guideline, the goals of the proposed amendment
might better be addressed through adding departure
or variance language in Chapter Five.

Nevertheless, since probation officers are
already identifying grounds for departures or
variances for defendants for whom guideline ranges
appear greater than necessary to achieve the
sentencing objectives of Title 18 U.S.C. 3553(a),
POAG does not believe that this new guideline is
necessary at this time.

In terms of the Part B of this proposed
amendment, the proposal to expand Zones C and B in the sentencing table, POAG supports this proposal as it encourages the court to consider alternative sentences for defendants who would otherwise not be eligible under the guidelines for noncustodial sentences, absent a variance or a departure.

In terms of specific offender characteristics, I've got to tell you what's not in the paper here is the kind of lively discussion that we had during these two topics, actually. You might see later on in our position paper, for example, very short responses that says we ran out of time to talk about this, because we were talking about the other stuff. And specific offender characteristics we wrote very little, but we had a lot to say to each other.

Our initial response was one of gratitude for the forum to talk about this stuff, departures and variances. But we believe that the court already has the authority to consider all the specific offender characteristics highlighted by the Commission for comment under Title 18 U.S.C.
The highlighted specific offender characteristics are already included in every presentence report, and therefore already provided to the courts for consideration. However, we found that the language in the statute and the language in the guidelines seem to conflict, because the statute says the court shall consider these things, but the guidelines say that they're not ordinarily relevant.

POAG recommends that the guidelines be amended to clarify that the court should consider these factors, either alone or in combination, to determine the appropriate sentence for a particular offender.

In terms of the specific, five specific ones: age, mental and emotional condition, physical condition, and drug dependence, military, civic, charitable, or public good works, and lack of guidance as a youth, POAG believes that the five factors as well as other specific offender characteristics in the 5H section should again mirror the language in 3553(a). The "not ordinarily
relevant" language in the guidelines, and "shall consider" in 3553(a) appear to conflict.

In terms of providing guidance to the court, POAG believes it would be more helpful for the courts to have the sentencing statistics already gathered and published by the Commission and provided annually available to the courts on a more frequent basis as guidance.

POAG believes that this would be far more helpful than any attempts to define or limit the circumstances under which specific offender characteristics might be considered. The very nature of such factors — by the very nature of such factors, their relevance is different in every case.

And in terms of what changes to make to Chapter Five, that's one of those spots where we said we ran out of time because we were talking about the other things.

Thank you very much.

CHAIR SESSIONS: Thank you.

Ms. Howley?

MS. HOWLEY: Good morning, Chairman
The Victims Advisory Group is pleased to appear before you this morning to offer our comments regarding the proposed amendments to the U.S. sentencing guidelines, but our remarks will be brief.

The Commission proposes creating a new guideline, 5C1.3, to provide the court authority to impose probation rather than imprisonment in certain low-level drug offenses.

The VAG does not oppose this change. We note that the offenses under consideration do not appear to involve crimes with direct and proximate victims, and we support added flexibility for courts in sentencing low-level drug offenders.

At the same time, we do want courts to bear in mind that even drug offenses are not victimless crimes. The drug trade has a direct impact on a community's safety and can keep neighbors prisoner in their homes.

Drug use has also been tied to theft and other crimes committed in order to support an addiction, or violent crimes that are fueled by
addiction or drug use.

However, we recognize that probation conditioned on treatment may be a more effective sentence option than incarceration, especially for the low-level drug offenses under consideration here.

In creating the final version of the new 5C1.3, we urge the Commission to ensure that probation conditioned on treatment as an alternative to incarceration be limited to those cases where the crime was significantly related to the addiction, and there is an indication that treatment will be effective as contemplated by the bracketed language in subsections (a)(1) and (2).

The Commission also invited comments on whether there should be an exception or alternatives to incarceration for mental illness. Such alternatives may be warranted in some cases, but only where a sentencing alternative can be imposed without causing a risk to public safety, or a risk to any identified victim.

Also, such alternatives should be restricted to cases where the defendant's mental or...
emotional condition was substantially related to the offense and where treatment is likely to be effective.

On request of the victim, the court should impose conditions of no contact with the victim or victim's family even in those cases.

Victims have many concerns, including a desire to prevent reoffending by the person who offended against them. And in addition, many victims know their offenders. In the case of offenders with mental illness, the victim often shares a desire that the defendant receive effective treatment for the mental illness.

We do want to reiterate to the Commission that even in cases involving offenders with mental illness, victims must retain the rights to be informed, present, and heard throughout the process as well as the right to be protected — reasonably protected from the accused.

The Commission has requested comment on whether the contemplated zone changes should apply to all offenses, or only to certain categories of
offenses such as white-collar offenses.

While we have no specific recommendations regarding the application of the modest zone changes proposed, we do wish to remind the Commission that white-collar crimes can themselves have a profound impact on victims, causing devastating financial as well as psychological and even physical effects.

While such offenders may not pose the same danger of violence to the community or individual safety as violent offenders, incarceration may be warranted for purposes of punishment and deterrence in many of those cases.

The Commission has also requested comment on whether certain offender characteristics should be considered at sentencing, such as age, mental and emotional conditions, physical condition including addictions, military, civil, charitable, or public service, and lack of guidance as a youth or similar circumstances.

Each of those factors may be relevant and appropriate for courts to consider. However, the primary focus of courts must remain with the
statutory purposes of the sentence which are, as you know:

(1) to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense;

(2) to afford adequate deterrence to criminal conduct;

(3) to protect the public from further crimes of the defendant; and

(4) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment.

Where the specific offender characteristics are relevant to those purposes of the sentence, they should of course be considered. For example, the drafters raised the problem of the apparent impact of the trauma sustained in military service on a defendant's propensity for violence.

Such a connection could appropriately be taken into account in determining which treatment would be effective, and in which manner it could be provided so as to protect the public or the victim.
from future crimes.

In so doing, the court should continue to consider any deterrence factor in sentencing, and of course consider the seriousness of the offense and the consequences on the victim.

However, to treat such trauma as an excuse for criminal behavior, or to state that such trauma obviates other goals of sentencing, is not in the public interest.

Similarly, to treat youth, mental illness, addiction, or lack of guidance as a reason to avoid culpability for an offense where the offender retained the recognition that his or her actions were wrong turns our criminal justice system on its head and denies victims the justice they are due.

Thank you for the opportunity to represent the interests of crime victims. As you consider these amendments, the VAG is happy to answer any additional questions or provide additional information as you move forward with your deliberations.

CHAIR SESSIONS: Thank you, Ms. Howley.
Mr. Tirschwell.

    MR. TIRSCHWELL: Thank you. Good morning, everybody. On behalf of the Practitioners Advisory Group, I want to thank all the Commissioners for the opportunity to address the issues on the agenda this morning.

    As I know you know, the PAG, as we call ourselves, strives to provide the perspective of those in the private sector who represent individuals charged under the federal criminal laws.

    We very much appreciate the Commission's willingness to listen to us and to consider our thoughts. I am going to limit my comments this morning to specific offender characteristics, and our forthcoming comment letter will also address alternatives to incarceration, among many other issues forthcoming.

    The Practitioners Advisory Group approaches the issue of specific offender characteristics from what we think of as a practical perspective based on our experience with how the Chapter Five, Part H, language impacts sentencing both
within and outside the guidelines' framework, and both expressly and in more subtle ways.

We believe that maintaining Part H in its current form, where the specified characteristics are deemed ordinarily not relevant to a guidelines' departure analysis, is at a minimum and for reasons that have been explored this morning confusing.

Take military service as an example. From a practitioner's perspective, an argument for leniency on behalf of a defendant who may have an exemplary record of military service encounters a number of contradictions along the way.

Under § 3553(a) military service appears to be plainly relevant, because the judge must consider a number of factors, including the history and characteristics of the defendant.

18 U.S.C. 3661 reinforces the overarching mandate that no limitation shall be placed on the information concerning the background, character, and conduct of a person who appears for sentencing.

But under §5H1.11, we are told that a record of military service is not ordinarily relevant to a
departure analysis.

So what do we do as defense lawyers? We argue for a variance, as again has been alluded to this morning, under 3553(a). But often, not withstanding that Chapter Five, Part H, is limited to departures, we are met with the argument, whether from the government, sometimes from the court, or both, that the Sentencing Commission as a matter of policy has already determined that such service is not ordinarily relevant.

Now we recognize that the courts are doing an increasingly good job of late in explaining how, just because certain characteristics may be discouraged as a matter of guidelines' analysis, that doesn't mean that they can't be relied on for a variance under 3553(a).

However, in our experience, and in our estimation looking forward, we continue to be concerned that the language in Chapter Five, Part H, will continue to be used expressly or *sub silentio* to unjustifiably discourage individualized sentencing decisions based on many relevant aspects of a
defendant's history and characteristics such as this example of military service.

In our view, the tension between the guidelines and 3553(a) not only damages the coherence and legitimacy of the overall sentencing regime, it also leads to a different kind of disparity of treatment, a disparity between defendants who find themselves in front of judges who tend to defer to the guidelines' advice and policy, and other judges who are less inclined to defer to the guidelines and are more inclined to simply analyze the factors as a whole under 3553(a).

We are also concerned that because Chapter 5, Part H, fails to explain the penalogical or other bases for the Commission's determinations that the specified characteristics are ordinarily not relevant to a departure analysis, that we are not in a position to address whether in a particular case the reasoning behind the discouragement makes sense.

It is as simple as, "We don't know why these factors have been deemed not relevant, so we can't tell you why in this case they should be
relevant." And that I think is a feature of the fact that the guidelines simply are declaratory at this point and not explanatory on these issues.

Part of the problem which helps point the way to a solution is the current language in Chapter 5, Part H, and in particular the ambiguity regarding the applicability of those provisions to simply a guidelines analysis or, more broadly, to sentences outside the guidelines.

And in the wake of Booker, we believe that the Commission at a minimum should clarify that this part of the Guidelines Manual is addressing offender characteristics only within the departure context. Then, after a court considers the possibility of a departure, it can move on to conducting an analysis more broadly under 3553(a).

To reconcile the tensions and inconsistencies, we urge the Commission to: (a) eliminate that portion of Part H that states and suggests, without explaining why, that the specified characteristics are ordinarily not relevant; and (b) preserve and expand Part H to recognize, consistent
with 3553(a), that these factors and characteristics should be considered in connection with sentencing.

We have proposed specific language in the written testimony, and it will be in our letter that will follow, that would read as follows:

In determining whether a departure is warranted, as well as in determining the length and other attributes of the sentence within the applicable guideline range, the court may consider individually or in combination the following factors among other relevant aspects of the defendant's history and characteristics, and we then list the various offender characteristics.

The Commission's request for comments, and again as others have alluded to this morning, suggests the possibility that the Guidelines Manual might be further amended to provide specific guidance as to when and how each identified characteristic or set of characteristics ought to impact the sentencing decision in individual cases.

We respectfully suggest that such an endeavor is both unwise and impractical. Whether it
is the circumstances of a defendant's upbringing, mental, emotional, or physical condition, military service or other good works, or even age, the relevance of these characteristics in our view is too individualized and too varied from defendant to defendant to translate into describable or quantifiable or one-size-fits-all categories.

It is also our experience that when the Commission provides specific but necessarily limited examples of categories or circumstances where departures may be justified, the impact is, again from our perspective, the undesirable reaction that this means that in all other circumstances relating to a specific characteristic a departure is not appropriate.

We believe that the history and characteristics of a defendant should be viewed, and typically are viewed, by sentencing courts in combination with the other facts and circumstances of both the offense and the offender, as opposed to in isolation.

Finally, in our view the overall
assessment of each defendant's history and characteristics and the relevance of that assessment, if any, to the purposes and goals of sentencing are matters that are best left to the sentencing court to consider on an individualized, case-by-case basis.

One thing that I think we do agree with the Department of Justice on, and some of the suggestions by the commissioners this morning, is that it would be useful for the Sentencing Commission to be a resource on these issues, and to study what the courts are doing — as people have mentioned this morning — and to provide some sort of central place where district judges can look for guidance on these issues.

Again, from the practitioners' point of view, we have a defendant who is getting ready for sentencing we have to canvas the case law and try to present to the judge different reasons why certain mitigating factors may be relevant. And we think both from the practitioners' point of view and the point of view of the sentencing court, if there was some kind of centralized depository of that
information, some studies, some analysis, without
limiting the relevance of the information, that would
be very helpful.

I see the orange light is on, so let me
just wrap up. To the extent the Commission is
concerned, and others are concerned about opening the
floodgates, we have proposed some language which we
think would remind the sentencing court in the
context of considering factors like this that it
needs to be sure that the circumstances are relevant
and are sufficiently distinguishing from other cases
and other similarly situated defendants to justify
leniency or other consideration. And we have also
proposed language to address the concern about the
use of forbidden factors getting mixed in with some
of these specific offender characteristics.

So with that, let me thank you again for
the opportunity to address the Commission and I would
be glad to answer questions.

CHAIR SESSIONS: All right. We will
open it for questions, but in light of your most
recent statements I would like to ask the first one
to respond.

Essentially what you're suggesting is that we remove the language "not ordinarily relevant," and then we should not give guidance to judges about the relevance, let's say, of particular factors like age, et cetera.

I've been on the Commission for a long time, and for years — years — I've heard defenders in particular, practitioners, asking us to give guidance to people in the system about relevant sentencing factors. Not necessarily to tell people what to do. I mean, that's the subtle distinction here. Not necessarily to say you shall do this, or you shall not do that, but rather than that, give as experts of sentencing policy, give information to judges.

Now that information might very well include, let's take age, the relevance of age on the question of recidivism, or culpability. And it could be followed up with extensive studies describing those various attributes. That's exactly what the Department is essentially calling for.

When you say don't try to tell judges what
to do in applying factors, are you really saying give us information, tell us how age is relevant to recidivism, et cetera; just don't tell us what to do in a particular circumstance? Give us the background information, all the research, all the studies, and then let judges and practitioners decide how to apply them?

Do you agree that we should be functioning in that kind of way?

MR. TIRSCHWELL: Yes. And perhaps I wasn't clear enough. What we think is a bad idea is to try to say, for example, you know, X number of years of military service warrants a three-level departure based on the following factors. That kind of more mechanical structure for consideration these offender characteristics.

But I would agree with your description of what would be useful, which is guidance as to how these characteristics may be relevant to the various considerations in sentencing. That's the discussion and the argument that goes on, as you all know, every day in the district courts when we talk about these
factors.

And we argue that age, for example, as you mentioned as an example, an older defendant is less likely to recidivate and therefore takes it outside the heartland of the guidelines, or is a basis for a variance. So absolutely I think we are in support of collecting and getting the wisdom of the Sentencing Commission in the context of a process of collecting what social science tells us, what district judges and the circuits are doing around the country, the sorts of reasoning that has been articulated.

CHAIR SESSIONS: Commissioner Howell.

COMMISSIONER HOWELL: I want to thank all of you for your very helpful testimony, and Mr. Tirschwell for your very constructive comments on our proposals, as always. We always depend on POAG, as well, for your insights, your group's insights into application issues.

I wanted to just talk about two aspects of your testimony, Ms. Brantley. The first is the comments in your written testimony and orally about needing clarification as to who sets the criteria for
effective drug treatment centers, or effective drug
treatment if judges consider imposing that.

I just wanted to — and this is something
that we've heard in comments from other people about
that portion of our proposed amendment. I just
wanted to explore with you a little bit about whether
you think the Commission should have a role in
setting standards in terms of accumulating from our
hearings and our research what the best practices
are, and what that research reflects as to what makes
an effective program; as opposed to contract
officers. I'm not sure what the qualifications are
of contract officers to figure out whether a
particular drug treatment center meets certain
standards.

So I understand the complication with
contract officers. They're going out and they're
contracting with different drug treatment centers,
but what are the standards those contract officers
are using to evaluate whether a particular treatment
center they're contracting with meets any particular
standards?
And the contract officers are both figuring out what the standards are for an effective drug treatment program, and then contracting with whoever they think meets the standards they've created is I think how it's working now; as opposed to what we're exploring in our proposal, which is that we have another body that helps set what those standards are to guide contract officers as to who they're contracting with.

I just wanted to delve a little deeper into the questions that you are raising about taking some of the authority away from contract officers. It's not really taking authority away from them; it's more giving the Commission a bigger role in helping to synthesize all of the best information about what makes effective treatment.

What's your reaction to that?

MS. BRANTLEY: Well we talked about that at length, and here's how our discussion sort of plays out.

In the contracting process you put out a request, and you say I need this treatment service,
and I need it to do these things. And what happens if you don't get a response? Or what happens if you get a response that doesn't meet all of those things?

And whether or not all of these things can be met — and by "these things," I mean language like you've included in the drug treatment description in connection with 5C1.3, because they might not be available from region to region.

So what's our alternative then? To have no drug treatment because maybe all of the staff members are people who used to — who actually graduated from the program, and then maybe we might choose — say that they don't meet the experience with the evaluation and treatment, or well trained and qualified and experienced?

What do those things mean in connection with the drug treatment programs available in a given region? So you might work in a metropolitan center where there might be a hub of well-trained professionals to provide a variety of different services that might not be available right smack dab in the middle of Kansas, for example.
COMMISSIONER HOWELL: So it's the practical implementation issues.

MS. BRANTLEY: Yes.

COMMISSIONER HOWELL: Okay. Well, that's interesting. The next question I have, and I think it sort of leads to some of the questions between the chairman and Mr. Tirschwell, and it's something I found quite intriguing because it's something that the Commission is talking about, having more timely sentencing statistics that's available out in the field, more timely than in our Sourcebook.

I was interested in hearing from you about what kind of statistics would be most helpful. You know, as we are contemplating how to use our technical infrastructure to push out, or make available our statistics, both departure rates, variance rates, by guideline offense level, by perhaps even incorporating some specific offense characteristics, some departures and how they're being used for specific offenses, a lot of the really rich information that we put out in our Sourcebook.

Were you able to discuss among POAG what
you think would be most helpful to have on that kind
of real-time basis?

MS. BRANTLEY: Actually, we did. And we
sort of engaged in a what-if in a perfect world kind
of daydreaming for a moment, and we said to
ourselves, the one piece of data that doesn't seem to
exist in say the Booker statistical report that came
out, and the most recent one that just came out a
couple of days ago, is criminal history.

Criminal history seems to be this wall.

And what we don't know about it is, were there
similar offenses in the past? Did this person have
additional contacts with law enforcement that were
considered, that went into deciding what the sentence
is? These statistics don't, and can't, address.

Another area that — another thing that we
sort of daydreamed about, if you will, is what
happens if the language in Chapter Five does comport
more with 3553(a) so that courts begin to more
clearly identify what it is about this person that
led to a variance or a departure by Chapter Five
subsection, so we can see: Oh, military history.
What was it about this person's history?

As opposed to skipping all of that because of the confusion of "not ordinarily relevant" versus the 3553(a) "shall consider," and just sort of putting it all in a lump sum that says under 3553(a) the history and characteristics of the defender.

So we thought if the language was a little more congruent between those two things, would judges in their sentencing factors be more specific then about what they considered? And, gee, wouldn't that be nice?

COMMISSIONER HOWELL: Well and that is certainly one of the important policy questions of the Commission is looking at the Chapter Five specific offense characteristics, that with the higher variance rate we are losing some of the transparency that we as a Commission need in order to have that very important feedback from the field that understands what is going on, for not just us but for policymakers and other judges who want to make sure that they are not creating unwarranted disparity by looking at what's going on around the country.
Thank you.

CHAIR SESSIONS: Jon.

COMMISSIONER WROBLEWSKI: Thank you, Judge.

Mr. Tirschwell, I just want to ask you a couple of questions about the specific offender characteristics.

As you can see, we are all struggling with this seemingly disconnect between 3553(a)(1) that says, judges, you shall consider the history and characteristics of the offender; and the language in Chapter Five which says, these factors are not ordinarily relevant.

One of the things you've suggested, and others have suggested, is that — and Judge Sessions asked you about — is the idea of we'll take out the "not ordinarily relevant" part.

Of course there are other parts to 3553(a). For example, there's the overarching part which says that the sentence should be sufficient, but not greater than necessary. I'll underline "sufficient" to reflect the seriousness —
MR. TIRSCHWELL: And I'll underline the other part.

COMMISSIONER WROBLEWSKI: I understand.

(Laughter.)

COMMISSIONER WROBLEWSKI: And to reflect the seriousness of the offense. And there's the other consideration in I think it's (a)(6) that talks about similar offenses, and similar records should be treated similarly.

Would you have any objection to adding to your proposed language so that judges know that, yes, offender characteristics shall be considered — you must consider them — but you must consider them within this larger context? And in essence the larger context seems to be that those offender characteristics in most cases should have limited impact, and that the sentences should largely be driven to reflect the seriousness of the offense.

MR. TIRSCHWELL: I hear a couple of different questions in there. I think we would not have an objection to any new language about the consideration of these specific characteristics being
put in a frame of the other 3553(a) considerations, including unwarranted disparities. And I think some of the additional language that we've proposed, while it doesn't specifically reference the unwarranted disparities subprovision, is intended to get at that. In other words, we understand there has to be some frame and sort of limitation that's part of the context.

I don't think we — I think we would not be in favor of sort of the language at the end of your question that a sentence should be primarily driven by, which I think is just sort of too — both too simplistic and too broad in the sense that I think 3553(a) says it the way it is, the way Congress wants it, the way the courts have to follow it. It's fairly detailed and specific. And I think the weights are what the weights are under that framework.

So I wouldn't think — I don't think we would be in favor of that particular emphasis. But the idea that if you're going to consider offender characteristics you should bear in mind that there is
this goal of avoiding unwarranted disparities.

We underline the word "unwarranted"

because in our view often, based on specific offender characteristics, disparities are warranted, and that is sort of the issue.

COMMISSIONER WROBLEWSKI: Thank you.

CHAIR SESSIONS: Commissioner Jackson.

VICE CHAIR JACKSON: Ms. Brantley, you emphasized a concern about whether or not the alternatives would skew the motivation for defendants to go through them, et cetera, and I'm just wondering about the experience of the drug courts and alternatives that are currently in place, and my understanding is successfully so, and whether you all considered those? And are your fears borne out in those types of programs?

MS. BRANTLEY: In a word, yes, our fears are borne out in those kinds of programs. Because people – and maybe even they mean it when they talk to us about wanting drug treatment and needing drug treatment. Not everybody who starts a drug treatment program — for example, we have a drug court in our
district that shaves a year off of the supervised
release term.

And people mean it in the moment when they
say, yes, I want drug treatment, and I want to go to
drug court, and I want to get this benefit. They
drop out because they can't, or didn't for some
reason. And so putting it, without having that
carrot in front of them, you have to do these things
before the reward, we're afraid that people who are
overemphasized in the front may be well meaning at
the time, but once they've been sentenced then they
can show up in the drug treatment and say, "Oh, I just
said that because I wanted the time off, and I'm not
even going to come here."

There's really — you know, in terms of
re-sentencing the person, that window has closed. So
we see people dropping out of the drug treatment they
have available to them now, even with this carrot in
front of them. So, yes, I believe that our fears are
borne out by that.

CHAIR SESSIONS: Can I just respond to
that, because I agree that you should always have the
carrot in front, but my conclusion from this proposal is the direct opposite.

I mean what basically would happen, frankly, is that if a person received probation it would be with the condition that they successfully complete drug treatment. And therefore, when they start drug treatment if they fail drug treatment, they're brought back on a violation of probation and they're facing a sentence which is in fact larger than they would have faced if they had been sentenced, because we're talking about Offense Level 16. I guess I'd ask you for that response.

But there's another thing that you said, which I guess I would disagree with. You talked about the 500-hour program being available. What is a part of, I would say, the benefits of this proposal is that this proposal would encourage treatment for the people who would never get it in prison.

The 500-hour program has as a condition, first of all, that you get 30 months. These people can't get 30 months without an upward departure. These are the low-level drug defendants who are going
to get zip for treatment in a prison.

The Defenders also brought up in their memo about how difficult it is to get into the 500-hour program at this point, that so many people are held back. In fact, we've had testimony to that effect.

So two of the major observations that you made, that there's not a carrot in front, I think is not accurate. And that treatment should be available for these folks in prison is also not accurate, because they would never qualify for the programs that exist today.

I'm sorry to debate you. I don't mean to debate you, but do you want to respond to that?

MS. BRANTLEY: We talked about this. First I have to say that treatment is available for everybody, because we recommend them and judges impose them as special conditions of release. So they are getting drug treatment. And it doesn't matter to us in probation in terms of what we recommend how long or how short their sentence is.

If we feel that there's a criminogenic
need of this offender to receive drug treatment, it is going to be made available. But it's also going to be made available in the programs that exist regionally as opposed to trying to fit some criteria over every drug treatment facility that might exist in say metropolitan areas that don't exist in areas with lower populations, for example, or maybe tribal places.

So I hear what you say that people with certain kinds of sentences wouldn't get treatment in prison, and I understand the practicalities of that, but as a group POAG knows that people get the treatment that they need anyway. And we feel that this – so we don't need this new guideline to see that people get the treatment that they need.

We just think that this new guideline is going to complicate the process by adding into it definitions that are difficult to interpret at this moment until we have some anecdotal information at least on how it might work.

And it will also complicate the sentencing process by unnecessarily litigating whether or
not — how much drugs were involved, for example, to
get it down to an 11, 12, 13, whatever, base offense
level there is, to decide whether or not this person
was addicted at the time, or to decide whether or not
this person has substantially contributed, their
addiction substantially contributed to commission of
the offense.

And often, people with more criminal
history give us more history of knowing whether or
not this person has a drug problem by the nature of
their prior convictions. So we just don't believe as
a group that this guideline is necessary to achieve
the goals of getting this group of people the
treatment that they need.

CHAIR SESSIONS: Ricardo.

COMMISSIONER HINOJOSA: We've talked about
3553(a) and its direction to me as a judge, for
example, a sentencing judge, about considering the
history and characteristics of the defendant, but
what if any relevance is there to the statute that
set up the Commission at the time that Congress was
writing 3553(a) that says the Commission shall
assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of the offenders?

Does that automatically take those out from 3553(a), since Congress in writing 3553(a) obviously also wrote this statute? Are those factors that as a sentencing judge I should look at?

And then we go on to the ones that indicate that the Commission shall find the following is generally inappropriate to determine whether somebody goes to prison or the length of imprisonment. And there's a whole list of those also, including family ties, and responsibilities, and community, and other activities.

Do those have any meaning to me as a sentencing judge when Congress is writing those at the same time that they're telling me to consider the characteristics of the offender and the criminal history? Do I just ignore those? Do they mean anything? And what can the Commission do? Do we ignore them now that we're talking about changing
Chapter Five? I mean, can we just decide like the Supreme Court decided we'll just X those out and go on to something else?

(Laughter.)

COMMISSIONER HINOJOSA: I mean, what do we do?

MS. BRANTLEY: Well we did talk about that in our POAG meeting. We did have — we all had different code books open, and someone had 3553(a), and —

COMMISSIONER HINOJOSA: Just like in the courtroom, you all have your books open —

MS. BRANTLEY: Yes, and we had that one open, too, and I don't have an answer for you from POAG's position. But we did note what appears to be inconsistencies, and sort of felt that, you know, in terms of prohibited items like, as you mentioned, like race and that sort of thing, we assumed from the beginning of our discussion that those were simply not something that we would ever encourage the court to consider. And in our experience we'd never seen it considered. So it really didn't wind up being a
large part of our discussion.

But then we fall back to the 3553(a) "shall" versus that section, and the guidelines, "not ordinarily relevant." They don't seem to go together. And I think maybe if — and someone asked a question earlier about going back to the pre- post — the pre-PROTECT Act. Maybe if we did, then maybe we could gather data that tells us what sections in Chapter Five are really being used, and then maybe we would have information about what "ordinarily relevant" means. I just think we don't have it.

MR. TIRSCHWELL: I was just going to say, briefly, the proposal that we made would reaffirm what I think Congress has said. I don't think the Commission should, or certainly we're not suggesting that the guidelines should ignore, or not remind sentencing judges that certain characteristics are off limits.

I think the ones we're talking about today were the ones where Congress sort of left it open. And as to those, I don't think the Sentencing Reform Act or any of the statutory provisions would limit
what we're proposing.

Then you have the third category where Congress has said "usually not relevant," and that obviously has to be the starting point; that's what the statute says. But even there obviously there's room for cases where it may be relevant.

CHAIR SESSIONS: Well I want to thank you very much for coming. I think Commissioner Howell has actually said it, but I will reaffirm it, that the groups that advise us have incredible weight and significance in our deliberative process, and we really appreciate all of your work, all of your hard work.

So let's take a break at this point. If we can reduce it to ten minutes, we're getting a little closer to the time.

(Whereupon, a recess was taken.)

CHAIR SESSIONS: Okay, let's convene.

Well, welcome, and thank you all for coming. Let me introduce the panel.

First, Marianne Mariano is the Federal Public Defender in the Western District of New York,
better known to us in the Second Circuit as "Bou-falow."

(Laughter.)

CHAIR SESSIONS: Having been in that office since June of 1995. Previously she was a law clerk with the Honorable Carol Heckman, U.S. magistrate judge. She received a bachelor of arts degree with honors from the State University of New York at Binghamton, and a law degree *cum laude* from the State University of New York at Buffalo.

Welcome.

Next, I guess this is the one person who needs no introduction to any of us, James Felman, co-chair of the Committee on Sentencing of the ABA. He's a partner at Kynes, Markman & Felman in Tampa, and serves as a member of the Governing Council of the ABA Criminal Justice Section, and I understand, [the Practitioners] Advisory Group. Mr. Felman received a B.A. from Wake Forest, then a J.D. from Duke.

Next, Cynthia Eva, is it "Hoo-har"?

MS. HUJAR ORR: "Hoo-jar."
CHAIR SESSIONS: Hujar Orr, is the president of the National Association of Criminal Defense Lawyers. She practices law in San Antonio at the firm of Goldstein, Goldstein & Hilley. She received her undergraduate degree from the University of Texas at Austin, and her J.D. Degree from St. Mary's Law School. Welcome.

So let's first begin with Ms. Mariano.

MS. MARIANO: Thank you, Judge. May it please the Commission —

CHAIR SESSIONS: I would just remind everyone that we're going to have the green lights, then at nine minutes the yellow lights, and then the red lights at the end. And we want to really — obviously we want to open this up for questions.

MS. MARIANO: Just like at the Circuit, Your Honor, I am going to keep my head down when the light goes on yellow.

(Laughter.)

CHAIR SESSIONS: Are you going to read the 99-pages? That's my question.

MS. MARIANO: That's my plan, Your Honor —
(Laughter.)

CHAIR SESSIONS: Really?

MS. MARIANO: No. But I did read the 99 pages, as well, several times, so I share the Commission's pain. But we wanted to make sure we provided the most in-depth comments we could to this very important —

CHAIR SESSIONS: It's extraordinarily well written, frankly.

MS. MARIANO: That commendation goes to others, and the Commission is well aware of who staffs our Guidelines Committee. They're very, very excellent lawyers.

Looking first at 5C1.3, the Federal, Public, and Community Defenders really applaud the Commission for turning in this direction and looking at alternatives to incarceration. We really are encouraged by this proposal. But we do urge the Commission to defer consideration for another amendment cycle to consider further refinement.

We consider this an encouraging step in identifying alternatives to incarceration for low-
level, nonviolent offenders. Substance abuse
treatment is absolutely essential, whether inpatient
or out, and must be available to more nonviolent
offenders.

However, the current proposal is too
restricted in its reach. It unnecessarily limits
eligibility by offense level, criminal history
category, and by requiring that substance abuse
disorder contributes substantially to the commission
of the offense.

By limiting the proposed application of
this guideline to a narrow range of drug offenses the
proposal unnecessarily excludes many nonviolent
offenders who suffer from substance abuse disorders.

The National Center on Addiction and
Substance Abuse at Columbia University found that a
full 86 percent of federal inmates were substance-
involved in 2006.

We believe the Commission should recommend
drug treatment as an alternative to incarceration for
all such offenders who suffer from — nonviolent
offenders who suffer from substance abuse disorders,
because treatment in the community has proven effective to further public safety by reducing recidivism.

Further, by requiring imposition of probation this proposal automatically excludes those convicted of A and B felonies because they are ineligible for probation, although they can receive a sentence of time served plus a period of supervised release.

Many defendants convicted of A and B drug felonies are low-level, nonviolent first-time offenders with substance abuse disorders. They are the individuals that this provision is meant to reach.

In fact, according to your own statistics, requiring a term of probation would largely exclude offenders involved with cocaine, methamphetamine, and heroin, while benefitting those involved with marijuana and prescription drugs.

Importantly, the probation requirement would exclude first-offenders who are sentenced below a mandatory minimum through application of the safety
valve, nearly one-quarter of all drug offenders in fiscal year 2008.

I disagree with my colleague who testified on behalf of the Department of Justice that mandatory minimums signal kingpin or mid-level offenders. That has just not proven to be the case in the 20-some-odd years of history of mandatory minimums.

We know this because Congress itself recognized it with the safety valve provision. They are by definition low-level, nonviolent offenders that Congress itself identified as deserving of relief. Many have substance abuse disorders and they are the individuals who could benefit most from this proposal.

We further believe that Level 16 is too low, and it should not be limited by offense level. Drug quantity is a poor measure of a person's actual role in the offense. Level 16 actually all but eliminates offenders that we think the Commission intends to help.

Consider the data from fiscal year 2008. By limiting eligibility to Offense Level 16, it would
exclude 50 percent of drug trafficking offenders in Criminal History Category I who had received a four-level minimal role adjustment.

The same data shows that this limitation would exclude 70 percent of those in Criminal History Category I who received a two- or three-level minor role adjustment. This seems to be an exception that could swallow the rule. It disqualifies too many people who would otherwise benefit by community-based treatment.

We also believe that by incorporating the requirements of the safety valve, including the requirement that the defendant have no more than one criminal history point, the Commission further limits this alternative to people in Criminal History Category I and therefore excluding many people who could benefit.

Again looking at your own data, 52 percent of all drug offenders fall within Criminal History Category I, but only 22.6 percent of those offenders are involved with crack cocaine cases. This is a disparity between the type of drugs that the
offenders are involved in and would exclude many crack cocaine offenders from application of this very important provision.

We cite in our written testimony two studies that prove that treatment works, regardless of criminal history. And in fact one of those studies found that people with extensive criminal histories actually seemed to benefit more. And intuitively, and based on my experience, it seems to me that that would be the case. Because my clients who avail themselves of the opportunity to participate in drug treatment tend to have hit rock bottom, and you generally don't hit rock bottom without amassing something of a criminal history.

We think that limiting it to Criminal History Category I discourages — I'm sorry, fails to provide this very important alternative to those who truly could benefit from it most.

We do not believe that the guidelines should also require that the substance abuse disorder contribute substantially to the commission of the offense. The requirement creates unnecessary
litigation over and over again in every case over the meaning of "substantially." And it fails to recognize the far more complex and complicated relationship between substance abuse and crime.

Finally, we would urge the Commission not to require residential treatment as a condition of probation. Residential treatment may not be the most effective treatment in every case. It fails to take into account regional differences in terms of resources, which is what we’ve heard from POAG.

In my own district I can tell you that the 14 westernmost counties of New York have very different opportunities available to offenders within them. Buffalo and Rochester alone, the two largest cities, have very, very different resources available for our clients.

We think that by requiring that the treatment be residential it also fails, the guideline fails to recognize that we do actually get some of our clients out on bail, and many times when they do get released they go directly into in-patient treatment. And those offenders who complete
in-patient treatment and are in compliance with their
pretrial release conditions should be eligible for
application of this guideline, but they will not be
admitted back into a residential treatment program if
they have successfully completed it.

In that same vein, we appreciate that the
Commission is interested in encouraging treatment
over imprisonment, but we feel that it should not
try to set standards as to what an effective drug
treatment program is. We think that is better left
to federal and local treatment agencies who have the
expertise and experience to draw on.

Encouraging the use of substance abuse
treatment as an effective criminal justice sanction
is a matter of national policy and an important,
important policy in consideration of this Commission.
Precisely which type of program to use in any given
case, however, is of necessity individualized
questions that are better left to local districts.

We would also support the Commission's
efforts to amend the guidelines to encourage
alternatives to incarceration for defendants with
treatment or rehabilitative needs other than substance abuse.

We would encourage alternatives to incarceration for defendants with mental illness, developmental, intellectual, or cognitive disabilities, impulse control disorders, combat-related trauma, or PTSD, or other nonviolent offenders who could benefit from work or educational programs.

We believe these programs will show, and the Commission's own report on the symposium that was held on alternatives concludes, that these programs reduce the likelihood of recidivism and therefore promote respect for the law and the safety of the public.

Turning to the zone amendment, the Defenders support this proposal. We view it as a positive step toward including the availability of nonprison sentences or sentences that do not involved lengthy prison terms.

As this Commission has recognized, it is important that the federal system offer alternatives
to incarceration which provide offenders with life
skill programs and substance abuse or mental health
treatment. Such programs work, and the zone changes
will allow more offenders to benefit from such
opportunities within the guidelines framework itself.

CHAIR SESSIONS: Your time is up. You
also have a couple of — I guess, briefly, your
position in regard to offender characteristics and
recency, do you want to just describe briefly what
your position is and just briefly why?

MS. MARIANO: Recency I think will be
handled this afternoon. But with offender
characteristics, I know this Commission has heard
testimony from the Defenders on this issue.

We believe that 5H should be removed and
made a historical note, but we understand that the
Commission doesn't believe it has the authority to do
that. Barring that, we've offered some language on
how to rewrite the introductory section, and I will
rely on our written comments with respect to that.

We believe the 5H factors ought to be,
simply stated, relevant; that the Commission ought to
remove the "not ordinarily relevant" language and

state that they are relevant.

This would give judges the ability to

consider these very important issues in each

individual case, which they are in fact considering

under 3553(a). By doing it under the guidelines

provisions, the Commission is in a position to better

collect data on what the courts are finding relevant

about these factors. And we feel that it's important

that the guidelines simply state that they are in

fact relevant to the purposes of sentencing, and that

courts may consider them.

CHAIR SESSIONS: Thank you. All right,

Mr. Felman.

MR. FELMAN: Chair Sessions, and
distinguished members of the United States Sentencing
Commission:

The American Bar Association strongly
supports the Commission's proposals to expand the use
of alternatives to incorporation. We are all
familiar with the recent statistic that for the first
time in our nation's history more than one in 100 of us
are imprisoned.

The United States now imprisons its citizens at a rate roughly five to eight times higher than the countries of Western Europe, and 12 times higher than Japan. Roughly one-quarter of all persons imprisoned in the entire world are imprisoned here in the United States.

The federal sentencing scheme has contributed to these statistics. In the last 25 years since the advent of the sentencing guidelines and the mandatory minimum sentences for drug offenses, the average federal sentence has roughly tripled in length.

The time has come to reverse the course of over-incarceration and the proposals set forth by the Commission represent positive, if modest, steps in this direction.

The ABA strongly supports the expansion of the zones in the sentencing table. Virtually every state criminal justice system makes use of a wide variety of forms of punishment short of pure incarceration, such as probation, home detention,
intermittent confinement, and community service.

In the federal criminal justice system these alternatives have been greatly curtailed since the advent of the guidelines. In addition to average sentence lengths tripling, imprisonment rates have increased dramatically in the guidelines era.

In 1984, roughly one-third of defendants received sentences of probation without any term of incarceration. This reflected the considered judgment of the Judiciary as a whole that in nearly one-third of cases the purposes of sentencing could be fully achieved without any period of imprisonment.

By fiscal year 2008, only 7.4 percent of federal defendants received probationary sentences; 6.2 percent received split sentences of both imprisonment and home or community confinement; and the remaining 86.4 percent of defendants received sentences of straight incarceration. At the same time, utilization of community confinement has been curtailed and shock incarceration and boot camp programs have been eliminated.

The current federal criminal justice
system, in which a prison sentence is the default sentence and alternative sentences remain the relatively rare exception, is not what Congress envisioned in 1984 when it instructed the Commission to, quote, "ensure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."

The current guidelines treat nearly every case as "otherwise serious." In fiscal year 2008, 92.6 percent of offenders were sentenced to imprisonment.

Proposals to increase alternative sentencing options in the guidelines date back nearly as far as the guidelines themselves and have been the subject of considerable study.

In 1990, both the Judicial Conference of the United States, as well as an esteemed group of experts under the leadership of Commissioner Helen Corrothers, recommended expansion of a wide array of alternatives to incarceration.
Ten years later — and I might add, one week and one decade ago, I myself sat in this room and addressed Commissioners Castillo and Sessions to ask for an expansion of the zones. Obviously I was very successful.

(Laughter.)

CHAIR SESSIONS: And we're still here.

(Laughter.)

MR. FELMAN: The reasoning underlying the recommendations of the Judicial Conference and the Corrothers Working Group have only grown stronger, and the need to expand alternative sentencing options more compelling with each passing year. I would note the burgeoning prison population, and of course the development of the Booker advisory regime in which the judges have discretion to do some of these things anyway.

In light of these considerations, we believe the Commission's proposed amendments to the sentencing table, while providing judges with greater discretion to impose nonprison sentences simply do not go far enough.
Specifically, we would urge the Commission to consider three expansions of its pending proposal:

Number one, expand the zones by two offense levels rather than one.

Number two, eliminate the distinction between Zones B and C.

And number three, create a new Criminal History Category Zero for true first offenders.

First, expanding the zones by only one level is simply too modest a step to achieve compliance with the Congressional directive to ensure sentences other than imprisonment for nonviolent first offenders. If the zones were expanded by only one level, this would have virtually no practical effect in the vast majority of cases — those involving economic crimes, tax offenses, drug offenses, and many more — because the quantity adjustments driving the offense levels for those offenses increase in two-level increments.

Thus it would appear that even after a one-level expansion of the zones, imprisonment would still be required in virtually all the cases that are
required under the existing guidelines.

We do not know what the Commission's data shows about the anticipated impact of this proposal, but it would appear likely to be quite small.

Second, the proposed amendment continues the requirement that defendants in Zone C must be sentenced to a term of imprisonment of at least half the minimum term of the guideline range. This restriction on the types of sentences available for certain defendants seems more reflective of the former mandatory guidelines regime in which the zones were initially created. We simply don't believe that the distinctions between Zones B and C is necessary and unduly complex in light of the advisory regime.

Third, the Commission should create a new Criminal History Category 0 for true first offenders. As presently constructed, Criminal History Category 1 includes both first offenders and offenders who have criminal records.

The Commission's own extensive study of criminal history and recidivism demonstrates the true first offenders are simply different. They have
significantly lower risk of recidivism. This reflects Congress's intuitively correct determination in the enabling legislation that first-time offenders are peculiarly suited to non-imprisonment sentences. That distinction should be reflected in the guidelines.

We urge the Commission not to limit the applicability of the zone changes by category of offense for several reasons.

First, such an exemption would do unneeded violence to the historical structure and framework of the Guidelines Manual. From its inception the manual has stood as an effort to provide proportional punishments across the entire spectrum of federal offenses.

The relative severity of each offense category is considered and addressed within each guideline, and then channeled into the sentencing table as a product of all pertinent considerations.

Never before has the Commission attempted to identify certain categories of offenses for differential treatment within the sentencing table.
Such a structure would suggest that the careful calibration of proportionality across all offenses previously underlying the manual no longer obtained. Indeed, it would suggest first time in the history of the guidelines that one set of considerations should govern the appropriate length of a sentence, and yet some other or different set of considerations should inform the in/out question of whether to impose a sentence of imprisonment at all.

The ABA is unaware of any justification for such a departure from the past practices of guideline structure.

Second, grafting exemptions onto the expanded zones would add considerable and unnecessary complexity. As its presently constructed the proposal would expand the existing zones. So if we're talking about curtailing the applicability of just the expanded portions of the zones to certain parts of the offenses, then you would now have different rules within the same zone. You would essentially have subzones, and that strikes us as again unnecessarily and unduly complex.
Finally, we see little reason to believe that any particular class of offender at the same offense level is any more or less deserving of an alternative to incarceration. We see no basis for the suggestion that tax offenders should be treated any more harshly than child pornographers, arsonists, extortionists, burglars, money launderers, and environmental criminals.

We fear that political considerations will lead to a constant tinkering with the eligibility for alternatives based on whatever "crime de jour" is making headlines at the time. We urge the Commission to expand the use of alternatives to incarceration, and to do so equally for all offenses deemed of equal severity for all other purposes in the guidelines.

The ABA applauds the Commission's leadership with respect to drug treatment alternatives. As noted, the ABA has long supported the use of alternative sentences for offenders whose crimes are associated with substance abuse or mental illness, and who pose no substantial threat to the
community.

We would urge the broadest possible application of a drug treatment alternative. But I must say that, although the ABA is strongly supportive of the proposed alternatives to incarceration for drug treatment, that support is accompanied by one caveat.

Because the proposal as currently formulated may have an impact on an exceedingly small number of offenders, it is essential that the Commission couple its amendment with a policy statement explaining that the drug treatment alternatives in the amendment are not intended to be exclusive, or to occupy the field.

If the amendment were written or construed by courts to mean that alternatives to imprisonment for drug treatment are only appropriate in the narrow class of cases subject to the amendment, then the amendment may well have the unintended effect of actually being a step backward in the expansion of drug treatment alternatives to incarceration.

We appreciate the Sentencing Commission's
consideration of the ABA's perspective on these important issues, and are happy to provide any additional information the Commission might find helpful.

Thank you for the opportunity to address you this morning.

CHAIR SESSIONS: Thank you, Mr. Felman.

Ms. Orr.

MS. ORR: Thank you very much for inviting and allowing the NACDL to appear before you, Chairman Judge Sessions, and distinguished Members of the Commission:

Our written testimony has been submitted to the Commission last week, and so I plan to just touch on some key elements. I will start off with NACDL's position with regard to the Chapter Five, Part H factors.

We have a recommendation that the phrase "not ordinarily" be removed from these policy statements to reflect that these are legitimate factors to consider for sentencing. That is in our written testimony.
What I want to emphasize in my oral testimony is the fact that NACDL sees the Commission's role as one of providing substantial guidance to practitioners, to judges, and all those involved in the sentencing process, from the probation officers going forward.

This Commission is in the unique position, and has such abundant talent and ability and wisdom and experience, that it can provide through hearings and other methods the kind of information that these criminal justice stakeholders need, by gathering research, looking to what the social sciences provide about all these sentencing factors that courts need to consider in light of Congress's charge that they do so.

The goal would be to meet the objectives of both cost effectiveness, but more importantly the effectiveness of penal policy so that any proposed amendment, or information that this Commission provides results in less costly, more effective measures that promote public safety and also are more humane.
In addition, NACDL applauds the Commission for making this important and positive step towards providing alternatives to incarceration. In San Antonio, Texas, we're known as "military city USA."

We have a number of Army and Air Force Bases. We have the Center for the Intrepid for Vets coming back from military duty, from combat, that our town financed. And the Military has its Center for Military Medicine headquartered in San Antonio, and it's expanding.

So we have a large segment of our population that are disabled Vets, and Vets with drug addiction, PTSD, and other problems. We also have our share of the homeless, and San Antonio tries to treat persons with mental infirmities through the Haven For Hope.

It's these sorts of practices, and history, and real-life experience that I bring to the table, along with the study that the NACDL did on problem-solving courts where we gathered testimony from across the country and did studies on these problem-solving courts that provide alternatives to
incarceration that not only work, reintegrating these
people into society in a way where they don't re-
offend and hold down good jobs, but also work at
half the cost of warehousing these individuals and
halting the revolving door problem with those with
drug addiction problems.

It is within this wealth of testimony,
study, and personal history in my home town that I
testify to the Commission that what works is
rehabilitation, and that the operation of a safety
valve, requiring that before someone can access this
alternative to incarceration will close the door to
the very people that the Commission intends to help.

Many of these people in the Haven For Hope
program, for example, have a number of minor
convictions for vagrancy and the like that may
disqualify them for the safety valve when they have
drug or mental health problems.

For many of our veterans the same can be
said to be true. And even those out of the Service
who have drug problems are known to commit other
minor offenses because of their drug addiction that
insistence upon qualification under the safety valve would surely close the door to them accessing this alternative to incarceration. It would defeat the very purpose that the Commission seeks to serve by having this alternative to incarceration by insisting upon qualification under the safety valve.

If the idea is to decrease recidivism and move these persons with drug addictions out of the criminal justice system and back integrated into society, then the safety valve will end up in treating only the very people that the most recent study out of this Commission worries about treating differently.

That is, under the mandatory guidelines some of the largest racial disparity in sentencing for minority defendants occurred under the mandatory guidelines in 1999. Insisting upon the safety valve would do the same sort of thing for the reasons I mentioned – many of these drug abusers and addicts have a number of minor offenses, and they're going to have the criminal history. This is because also due to factors not entirely of their own making.
Police, necessarily, more heavily patrol poorer neighborhoods, not the wealthier neighborhoods, and not the college campuses where we know that the same number of drug exchanges take place, and merely because of the nature of where these transactions occur they're not as quickly and as readily detected.

So I know that the Commission's intent is not to benefit the child of a wealthy family with a two-parent home where there's better supervision, or where there's less police patrol and thus fewer arrests for drug-related offenses like burglary and the kinds of offenses, theft, that help feed a drug habit. But that would be the unintended result of requiring the safety valve before one could qualify for this drug treatment.

That having been said, it's very important to do this, and I applaud the Commission for making these positive steps in that direction.

I also ask the Commission to consider and move in the direction of providing this sort of probationary sentence and treatment for persons with
mental illness and other infirmities that really
should be treated by the public health system and
diverted from our criminal courts.

It is along this line that I would like to
mention our deep concern — that is, NACDL's deep
concern — that in the Commission's report and
amendment commentary there was a question about
whether mental illness should ever be considered as a
basis for an upward departure in sentence.

NACDL wishes to voice its very deep
concern about the Constitutionality of such a
suggestion that there should be an increase in
sentence when someone has a mental illness.

Further, NACDL finds it very troublesome
that the Commission is considering that an offense
must have had drug addiction contribute substantially
to the commission of the offense, not only for the
reasons mentioned by the Public Defenders because
it's troublesome, it will lead to a lot of
litigation, but it's troublesome for another reason.
Because we know from empirical data, from factual
studies, and from history that drug addiction does
cause crime.

Requiring it to "substantially contribute"
might mean someone would have to be high on drugs
before they could qualify for this program. It has
such a vague meaning that it may again have the
unintended result of excluding the very people that
you wish to help and remove from the criminal justice
system from gaining access to that assistance. It's
unworkable, and it's not something that should be
included within the amendment.

I will now touch briefly on some of the
Chapter Eight suggestions, and just mentioned three of them since I can't be here this afternoon. Those
are:

Requiring mandatory restitution; mandatory
reporting of corporations; and excluding white-collar
offenses from the zone adjustments are unworkable.
And using this one-size-fits-all approach to every
defendant, whether an organizational defendant or an
individual, we find leads to much mischief and really
inappropriate sentencing.

Thank you very much.
CHAIR SESSIONS: Thank you, Ms. Orr.

Let's open it up for questions. Commissioner Wroblewski?

COMMISSIONER WROBLEWSKI: Thank you.

Thank you all for being here. I just have a couple of questions.

Ms. Mariano, when the safety valve was created Congress directed the Commission that for people who are involved in quantities that trigger a mandatory minimum that the sentence should be no less than 24 months of imprisonment. Do you think — and you testified about going far beyond the offense levels that the Commission published for comment on the alternative, the drug treatment alternative. Do you think that that directive to the Commission from the safety valve no longer restricts the Commission? Or is there any limitation on the Commission's ability?

And then I have one other question.

MS. MARIANO: It may be helpful to provide a better and more broader answer after this hearing, but my recollection is that that limitation was meant
for the Commission in structuring how the guideline itself would function.

What we know is that people who get safety valve also get 5K, and also get departures. So they do in fact receive sentences below 24 months for other reasons.

My recollection of that legislation is that for guideline purposes and structure that was guidance to the Commission that the safety valve in and of itself shouldn't result in a sentence below. But safety-valve defendants routinely get sentences below. I've had many who get probation.

COMMISSIONER WROBLEWSKI: And, Jim, one quick question for you. First of all, I think you're selling yourself short on accomplishments over the last ten years. Some examples, on the economic crimes package, for example, as you know penalties were increased on people who were stealing, or involved in frauds involving hundreds of millions of dollars, and they were reduced just in that same rough time period, they were reduced for people who were involved in smaller amounts.
You know that this is all about line-drawing, and that's what amendments are about. Explain to me why you think a two-level push on the zone is the right place to draw the line? Why not three levels? Why one level? How do you draw the line?

MR. FELMAN: You're right, it should be three.

(Laughter.)

MR. FELMAN: The Corrothers Working Group suggested five. I guess, you know, two is what I proposed on behalf of the Practitioners Advisory Group a decade ago. I don't have a better answer. I mean, I think that one just seemed like so little. I mean, there's been so much work done on alternatives to incarceration.

You all had a wonderful symposium. It's been studied to death. And to come out of that and say, okay, we're going to do a one-level change just struck me as unduly modest. And for the reasons I've said about the two-level ratchets in most of the guidelines probably wouldn't have much effect at all.
I think that there's—and if you survey the judges out there, I think even before Booker they felt like they needed more room for alternatives. And I think that it's better for the structure of the guidelines to have them a little more in line with what the judges want to do anyway so that you'd have more consistency.

So, yes, I mean did I pull two out of the air? Of course. But, you know, three sounds better.

VICE CHAIR CARR: Ms. Mariano, is it your position that specific offender characteristics can only be used to depart or vary downward and never to go up?

MS. MARIANO: The Defenders' position is that the guidelines themselves should simply indicate that they're relevant; that the guidelines shouldn't encourage them for use as upward departures, nor do we suggest language that they can only be used for downward departures.

That said, as we outlined in our papers the data shows that these are in fact mitigating factors; that they are used to mitigate sentences and
not aggravate sentences. And we do join in NACDL's concern that the idea that mental illness, for example, could be used to give a higher sentence implicates serious constitutional concerns.

But our proposal would be to simply open up the language of Chapter Five in order to get a better read on what judges are in fact doing already under 3553(a).

VICE CHAIR CARR: So you think it's generally inappropriate, or never appropriate to vary or depart upward based on specific offender characteristics?

MS. MARIANO: Well I suppose "generally inappropriate" would have to be the language of the two options that you present, Commissioner Carr. I think that the data shows that they are in fact mitigating. But we are not asking the Commission to write a guideline to say to a judge "never" in either direction.

CHAIR SESSIONS: Ketanji.

VICE CHAIR JACKSON: Ms. Mariano, I am curious about the Defenders' "wait another year"
stance. DOJ suggests that moderation is important in fashioning the alternatives to incarceration, and that this is sort of a significant first step in that direction, and I'm just wondering why that's not defenders' approach as well? Isn't something in this regard better than another year of nothing?

MS. MARIANO: We wrestled with the unseemliness of not wanting at least something, but in the end we feel that a second year of study with further revisions could affect so many more people, and our concern, Commissioner, is that oftentimes when these guidelines are implemented they're not amended and changed, and certainly not in the near future. It takes a lot of time for there to be changes to the amendment.

Here the statistics show that this will affect, or be available, I should say, to a really small pool of candidates. And in that small pool of candidates, only a handful will be substance abuse dependent — sorry, substance dependent — so as to be eligible.

The concern is that if it goes into effect
as is, the candidate pool will be so small that it
won't be actually implemented by the courts. And we
think a second year of study for further
revisions — we've outlined several — would be useful
before it's actually implemented.

But we are encouraged by the direction the
Commission is taking, and we do recognize that it is
an important policy development.

CHAIR SESSIONS: Can I follow up on
that? I'm interested in your discussions. I'm
reminded of an expression that Commissioner Howell
made to the U.S. attorney from Vermont today. After
reading the Department's position, she said she was
stunned.

And I would say, when I read your report I
was stunned —

COMMISSIONER HOWELL: I had another word
for defenders, but —

CHAIR SESSIONS: Oh, you do?

(Laughter.)

CHAIR SESSIONS: I am also reminded of
a great expression which I think is applicable to my
experience in Washington, D.C., and that is: The perfect is the evil of the good —

COMMISSIONER HOWELL: "Enemy" of the good.

CHAIR SESSIONS: "Enemy of the good"?

(Several nods of agreement.)

CHAIR SESSIONS: Okay, it's the enemy of the good. We are in an interesting situation in which the Department of Justice is advocating for the adoption of a proposal for a drug treatment option for judges, and we have the Defenders, the Federal Defenders of the United States, opposing it.

And of course you're suggesting that we come back next year — to a totally different Commission. Totally different members of the Commission.

COMMISSIONER HINOJOSA: Not completely.

(Laughter.)

CHAIRMAN SESSIONS: The body changes.

Your consensus is that we should not take a step in regard to drug treatment options because it is too modest? And you think that that is going to impact whether in fact the Commission sometime in the future
is going to address this in a much more expansive way?

I mean, is there a debate among defenders in regard to that particular position that you're taking? Because I find it most extraordinary.

MS. MARIANO: Well I would not categorize our position as opposing it. The Commission has asked issues for comment on the proposal itself, and we have provided it, because our statutory obligation is to provide input to this Commission on what we think the amendments ought to be on behalf of the community we represent. And we take that very, very seriously.

We are not motivated by only — or only by what is politically feasible, but we do understand the constraints of politics. And, Judge, if you're saying this is it, now or never, the Defenders would obviously say now.

We are simply saying that if we take another year, look at it more and maybe change some of the limitations, at least some of the limitations maybe just simply to the type of offenders who can
benefit from this, that next year this amendment would be in the place that we think it ought to be when it first hits the books.

But the proposal for comment did not say now or never, defenders, what do you think? It said: defenders, what do you think? And on behalf of that community and the people we represent, we are obligated to let you know what we think.

CHAIR SESSIONS: I did misspeak. There are some of us who will not be here. I didn't mean to suggest we're all leaving.

(Laughter.)

MS. MARIANO: Some of you just got here.

(Laughter.)

CHAIR SESSIONS: That was clearly a misstatement.

VICE CHAIR CARR: And, Jim, when you're back in 2010 there's a chance that a different Jackson will still be here.

CHAIR SESSIONS: Any other questions at all?

(No response.)
CHAIR SESSIONS: Well thank you very much.

MS. MARIANO: Thank you. I apologize for going over my time. Despite my joke, I actually didn't notice.

(Laughter.)

CHAIR SESSIONS: Okay, our next panel begins at quarter of 12:00, so let's take a break.

(Whereupon, a recess was taken.)

CHAIR SESSIONS: Let's reconvene. This is a panel I'm very excited to hear from. Let me first introduce the various members of the panel.

First, Thomas Berger is the executive director of the Vietnam Veterans of America's Veterans Health Council. He is also chair of the Veterans Administration's Consumer Liaison Council for the Committee on Care of Veterans with Serious Mental Illness. He is also a member of the VA's Mental Health Quality Enhancement Research Initiative Depression Workgroup, and the South Central Mental Health Illness Research and Education Clinical Center. Dr. Berger has also served as a
Navy Corpsman with the Third Marine Corps Division in Vietnam from 1966 to 1968, and it is a real honor for us to have you testify before us today.

DR. BERGER: Thank you.

CHAIR SESSIONS: Next, Elmore Briggs, we welcome back. He's clinical director of the D.C. office of the Kolmac Clinic. He's a nationally certified counselor, licensed clinical professional counselor, licensed substance abuse treatment practitioner, and master addiction counselor. He has served in a variety of clinical settings in both direct services and addiction health care management. Mr. Briggs completed his undergraduate work at Mercer University, his graduate work at Johns Hopkins University where he obtained a master of science degree in clinical community counseling with specialty in addictions. Welcome back.

MR. BRIGGS: Thank you.

CHAIR SESSIONS: Next, Scott Decker is professor and director of the School of Criminology and Criminal Justice at Arizona State University's downtown campus. His research interests include
criminal justice policy, gangs, violence, and
juvenile justice. Dr. Decker received his
undergraduate degree from DePaul University, earned
both his master’s and Ph.D. in criminology from Florida
State University. Thank you for making the long trip
from Arizona.

DR. DECKER: You're welcome.

CHAIR SESSIONS: And next, Marvin
Seppala is Chief Medical Officer at the Hazelden
Foundation and serves as adjunct professor, assistant
professor at Hazelden Graduate School of Addiction
Studies, and is a member of the board of the American
Society of Addiction Medicine. His responsibilities
include overseeing all interdisciplinary clinical
practices at Hazelden, maintaining and improving
standards for evidence-based practices, and
supporting growth strategies for residential and
nonresidential addiction treatment programs and
services throughout the country. Dr. Seppala
received his undergraduate degree from Drake
University, and his M.D. at the Mayo Medical School.
And again, thank you for traveling to be with us
today.

DR. SEPPALA: Thank you.

CHAIR SESSIONS: So let us begin now with Mr. Berger.

DR. BERGER: Thank you, Mr. Chairman, distinguished members of the Commission—

CHAIR SESSIONS: Actually before you start, I just want to describe the light system— I don't know if you all saw that— but it's a ten-minute system. At one minute to go it turns to the yellow, and then we'll ask you to wrap up, because we really enjoy discussions and learn from discussions, so we look forward to that.

DR. BERGER: Again, thank you very much for inviting me.

I would like to begin by saying it is very important to me personally as a Vietnam veteran, a combat Vietnam veteran, to have been asked to represent an organization that for the greater portion of its life we have been vilified for our service and portrayed as substance abusing, crazed lunatics. And it's changing. I understand that.
The motto of Vietnam Veterans of America is: "Never again shall one generation of veterans abandon another." And that's one of the reasons I'm here today is to talk about the mental and emotional and drug dependence conditions suffered by our nation's veterans as a result of their military service, and the impact that your proposed amendments can have on this population.

2010 marks the ninth straight year of war for America. There are now more than 23 million U.S. veterans, including 1.7 million and counting from the wars in Iraq and Afghanistan. Almost 5300 OIF and OEF vet warriors have paid the ultimate price, and another 37,000 will forever bear the physical wounds of war. Those are counted under DOD as combat-related. In other words, you have to be in the Green Zone in Iraq, or on a patrol, before you're counted as combat wounded. There's thousands of others who have been wounded in related accidents.

And despite the efforts by our military health officials, we can't forget that between 20 and 30 percent of our OIF/OEF troops have symptoms of a
mental health disorder or cognitive impairment, and
that one in six of this group suffers from a
substance abuse challenge.

Now either because of or in addition to
these untreated conditions and the compounded social
issues that go along with that, unprecedented numbers
of veterans are turning up in our courts. And where
do many end up?

Today an estimated 60 percent of the
veterans in prison have a substance abuse problem.

Tonight, roughly 130,000 vets are on the streets
homeless, and 70 percent of these folks suffer from a
substance abuse and/or mental health condition
related to their military service.

Now Americans are very grateful for our
veterans' service, but we've got to ensure that our
gratitude is extended to all our veterans. So the
unique consequences of combat call for unique
solutions to reduce the growing number of
veterans being processed through the criminal
justice system.

So it's our belief that alternatives to
sentencing which incorporate court-mandated,
evidence-based, dual diagnosis treatment programs
such as those that have been identified clearly by
the Institute of Medicine and are already utilized
in a number of veterans courts, in combination with
nonaddictive biopharmaceuticals where appropriate,
can be important steps in that direction.

Now we know that stress — you have PTSD,
you have anxiety disorders and other kinds of things
related to your military service — has an established
role in the induction of relapse as well in substance
abusers, and that exposure to stress is a potent cue
for relapse in these individuals.

Now given the disproportionately high rate
of co-morbidity with post-traumatic stress disorder
in veterans, and an even higher rate of military
sexual trauma in women veterans, it is important to
see why more compassion and more treatment options
and greater sentencing leeway should be given to our
nation's veterans.

I need to warn you, however, in terms of
your thinking that there's another addiction
challenge that's beginning to resurface amongst our veterans. Our veterans are seeking help from the chronic pain that accompanies their war wounds. We have a growing addiction to opioids, as in prescription drug addiction to pain killers such as OxyContin, Demerol, Dilaudid, Vicodin, and codeine, which are available to veterans at virtually no cost through the VA for those 30 percent of our veterans who use the VA.

I say "resurface" because the American history of opioid use and abuse and addiction began with our veterans during and after the Civil War when opioids were widely prescribed to alleviate solders' acute and chronic pain.

But moving forward 130 years or so, the warriors coming back from Iraq and Afghanistan experience persistent pain. They're being deployed for longer duration, more frequency, and that increases the likelihood of chronic pain, even in the absence of physical injury, folks.

Of the first 200,000 OEF and OIF veterans accessing the Veterans Health Administration's
facilities, the number one reason for presentation was for pain. Number two was PTSD. Primarily back and joint pain.

Furthermore, amongst the first 100,000 seen at the VA between 2001 and 2005, 25 percent received mental health diagnoses. So I've already pointed out that the research shows a significant interrelationship between mental health issues and substance abuse disorders.

In addition, okay, and we know this happens in the civilian population, telescoping or rapid progression from appropriate use to abuse of opioids occurs more frequently in women versus men. This makes prescribing safe and effective pain medicines for female veterans more challenging. And as I said, women represent a larger proportion of U.S. military forces than ever before, about 14 to 15 percent, and the proportion in active duty military service is expected to increase. These new female veterans are younger, more likely to identify as belonging to a particular racial minority; they have a high prevalence of mental health disorders, more so
than their men colleagues; have higher rates of exposure to combat trauma than previous cohorts of women veterans, and have high rates of exposure to military sexual trauma. And all of this places them at higher risk for chronic pain syndrome.

My point in bringing all of this up is to put everybody here on notice that we should have deep concerns about our female veterans and their propensity for rapidly developing substance abuse disorder. Our current health care systems are not prepared to deal with this, particularly the VA, because the VA is a male-oriented system.

As I noted at the beginning of my testimony here, I really appreciate the opportunity to provide some observations in regards to the U.S. Sentencing Commission's proposals to amend the sentencing guidelines.

We are obviously very supportive of the increasing sensitivity of the courts for the unique circumstance of veterans encountering the justice system upon return from combat. I would be remiss, however, if I didn't refer to the lack of alternative
and diversionary veterans — or ways to address veterans' drug and substance abuse and mental health problems that came too late for many of my colleagues. There's little doubt, and ample statistical data, however, to substantiate the dismal record that we suffered.

Vietnam veterans' legacy documents a country unprepared and unsympathetic to our struggle with mental illness and substance abuse. DOJ and BJS reports reflect that by 1985 almost one-quarter of the federal and state prison population were veterans.

Although early BJS reports had some discrepancies because not all institutions identify their veterans — they don't ask if people have served in the U.S. Military — but in 2004 BJS Special Report substantiated the numbers of justice-involved veterans noted in the VA's National Vietnam Veterans Readjustment Study of 1987, estimated that fully 36 percent of Vietnam veterans had been arrested and 11 percent of that was with felony convictions.

So — and we don't want it to happen to the
new kids, as we call them.

In summary, VVA and the Veterans Health Council solidly support diversion programs and alternative sanctions as the principal method of treating veterans encountering our nation's first-responders and justice agencies.

I would just like to remind the group here that a veteran like Audie Murphy, who was the most highly decorated veteran in World War II, would be placed behind bars, or possibly even worse, as he struggled with his mental illness, his PTSD problems, and substance abuse problems and adjustments to domestic life if he were around today.

Thank you very much. I'd be glad to answer questions.

CHAIR SESSIONS: Thank you very much, Mr. Berger. Mr. Briggs.

MR. BRIGGS: Thank you, Mr. Chairman. I appreciate the opportunity from the Commission to come back a second time. I don't know if that's rare in D.C. or not, but —

(Laughter.)
MR. BRIGGS: — I appreciate getting the invite back.

My theme for this testimony centers on my belief that treatment for persons with substance use disorders works and recovery is possible. This belief does not extend singularly one-to-one to every addicted individual. However, it does include a number of offenders for whom addiction underpins their criminal acts.

While the acts themselves are not excusable, it is prudent to look at the catalyst in an effort to diminish its effect. Accomplishing this task could reduce the potential for recidivism. Therefore, I lend my support for treatment of substance use disorders as an alternative to incarceration.

At its core addiction is typified by obsession, compulsion, loss of control, denial, and continued use despite adverse consequences. These substances are considered psychoactive in that their primary impact is in the brain.

These substances have a designated place
in the brain to call home. If they couldn't affect
the brain, the notion of being "high" would not
exist.

Further, they alter the normal functioning
of the central nervous system. Therefore, a person
diagnosed with a substance use disorder essentially
has a brain disease. Psychoactive drugs cannot
create sensations of feelings that do not have a
natural counterpart in the brain system.

This disease brings with it a variety of
biopsychosocial implications. The notion of a user
of psychoactive substances having a "hijacked brain"
centers on their continued use of a psychoactive
substance and precipitating a loss of executive brain
function leading to diminished logic, disregarding of
consequences, and ultimately poor decision-making.

Poor decision-making is often the case
when a crime is committed. An appropriate treatment
response addresses these biopsychosocial bases of
addiction.

From a general biological perspective,
there are many aspects which relate ultimately to
behavior. As the user moves more toward chronic use, tolerance is produced. There is a need for more of the substance to achieve the euphoric effect experienced at earlier levels of use.

Using more of the substance and stopping its use could precipitate withdrawal. And withdrawal is the body's attempt to rebalance itself after the sensation of prolonged use of a psychoactive substance.

At some point, the use of the substance is centered more on maintenance than euphoria. The primary objective at this juncture is to avoid withdrawal. There's a tendency to do what it takes to obtain the substance and relieve the discomfort. The instrumental strategies employed can range from lying to an employer because of a hangover, to committing a crime to obtain funds to purchase elicit drugs.

The psychological status of persons with substance use disorders also impacts behavior. It is well documented that a number of persons presenting for treatment of the substance use disorders have a
co-occurring mental health disorder.

Based on best practices in the treatment of substance use disorders for individuals with a substance use disorder, it is the expectation rather than the exception. I provide treatment to probably 900 patients. I supervise five clinics. A great majority of folks that present for care have a co-occurring disorder. And that is just in the general population. I've seen statistics that it might even be higher in the criminal justice area.

Many offenders experience an extraordinarily harsh existence as a result of their substance use. That includes psychiatric symptoms. Their condition relative to their lifestyle might never be diagnosed and treated.

What then are the ramifications? Clearly there's a potential for addicts to use substances medicinally to ameliorate symptoms of an underlying mental health disorder. Cessation of the substance use could exacerbate the symptoms. In turn, exacerbation of the symptoms could become a trigger leading to cravings and a return to substance use.
For offenders in this category, a dual concern exists. Persons diagnosed with a mental health disorder are often prescribed psychotropic medications designed to reduce the symptoms of the disorder. Should they use a psychoactive substance while taking the medication, the therapeutic benefit is often not met.

Additionally, persons with co-occurring disorders are known to have issues and problems with medication dose and compliance. They simply don't take the medication. The behavior of persons who are experiencing emotion instability along with craving and compulsion is often irrational and impulsive. Again, commission of a crime or a continuation of a criminal lifestyle could occur.

The nature of irrationality and compulsiveness plays out in a social context. At the most basic level the addicted individual begins to form an attachment to the substance, which diminishes their social attachment, which could include family, friends, and society as a whole.

This is where the boundaries of the social
contract are weakened. It boils down to an issue of development of counterproductive relationships. The more intense the relationship to the substance, the less important the relationship to self, others, and community.

Broken families, chronic health issues, and crime are some of the byproducts of this type of relationship. The notion of a maladapted relationship also reflects my testimony in 2006. Many recovering offenders have moved toward embracing the social contract and have become productive members of the community.

They do not reflect the person they were in active addiction. Addiction is a chronic disease. The disease can be arrested. It can move into remission. For many offenders the appropriate intervention is treatment, not incarceration.

It is important to note that stopping substance use is not the end, it's the beginning. To embrace this concept, it is important to realize what treatment is. Treatment is an organized system of care which relies on assessments to determine
offender needs, treatment plans that address the
particular needs and an environment conducive to
change.

And as Mr. Berger mentioned, the use of
evidence-based practice. So I'm not talking about
flying by the seat of our pants; I'm talking about
evidence and research practice.

There is a broad base of knowledge that
applies. One, in a biopsychosocial way, is the
Addiction Severity Index, which looks at medical
status, employment and support, alcohol and drug use,
legal status, family, and psychiatric. And those are
some of the things that are involved in providing
treatment for the whole person.

There are many types of modalities of
treatment. For each of them, an appropriate course
of care is responsive to the deficiencies in each of
the areas I just mentioned. The obvious goal is to
reduce the deficiencies in any areas identified as
needing corrective interventions. The operational
goal, regardless of modality, is fourfold.

You want to educate the person in all
aspects of addiction and recovery. Some people need information.

We want to be able to help them to begin to self-diagnose. That is, to see the disease in themselves, hopefully stimulating a need to make the argument for change.

Third is the development of recovery resources. People can't recover in isolation. And people can't recover if they are an offender and they're hanging out with people who are continuing to use and commit crimes.

And fourth, which is very important, is personal responsibility. The patient, the offender, has a responsibility to treat their disease. That is important.

The ability to accept personal responsibility requires a significant change in thinking and behavior. My intent is not to paint support of treatment for offenders with a broad brush. However, I believe that many offenders with substance use disorders are not cognitively structured to make decisions in their or society's
best interests.

I put an example here that someone might be on parole or probation, and the parole or probation officer says: "I want you to get a job. Don't use. Don't commit any crimes. Don't hang out with people that are doing that." And they might have 20 years' backup time, and they come up with a urine that's positive for an elicit substance.

I don't think people, by nature, just voluntarily say I want to give up my freedom. That to me is a lack of a cognitive ability to engage executive function.

I wanted to end on a couple of pieces here. Oh, one, in terms of treatment. There are a lot of science and evidence-based treatment. The SAMHSA, NIDA, they all have information on offender treatment. There's information on best practices. There's information on what level of care is appropriate for a person.

SAMHSA in their Treatment Improvement Protocol says more than half of those in the criminal justice system who complete treatment programs and
participate in aftercare do not commit new crimes.

Most prisoners who serve mandatory sentences but get no treatment commit new crimes and start using drugs or alcohol soon after release.

What I'm talking about is the ability to provide a level of care which can promote cognitive restructuring. Not drinking and not drugging is not the end; it's the beginning. You can incarcerate someone, and let's say they don't use for five years; it doesn't mean their thinking has changed.

So I see I have the red light, so I will end on that, and if you have questions I will be glad to answer them. Thank you.

CHAIR SESSIONS: Thank you, Mr. Briggs.

Dr. Decker.

DR. DECKER: Thank you. And thanks to Raquel Wilson for helping on the arrangements to get here. It's not the five-hour flight, it's the three-hour time change that's the dilemma.

(Laughter.)

DR. DECKER: Seven o'clock here is an hour I don't see back home.
VICE CHAIR CASTILLO: You don't have daylight savings.

DR. DECKER: We have plenty of daylight without daylight savings.

(Laughter.)

DR. DECKER: Some of which I brought here today.

This is an interesting experience for me to testify here. I spent nine years on the Missouri Sentencing Commission, so I got all the letters you get from the prisoners, and the prisoners' families, and the victims' families, for a nine-year period. And when I served on our sentencing commission in Missouri before I moved out west, I served with our director of corrections, Dorris Schreurro [phonetic], who has since come back to work with Ms. Napolitano here in Washington. And we formulated the sentencing guidelines. So I was there on the ground for all of those discussions about the role of deterrence versus rehabilitation versus retribution, and those I think are relevant every day in which you look at the sentencing guidelines, particularly when you consider
adding new considerations.

I would also say thank you. You made available to me in 2001 Sentencing Commission data for the 34 highest level drug smugglers in the federal prison system, 32 of whom I interviewed in 11 different federal prisons.

The average score — this will mean more to you all than some others — was 34, but we did have a 42 in there, and that was the fellow who was caught with 8,000 pounds of cocaine. So your data serves a variety of important purposes.

A couple of sort of touchstone points that I think are worth, for me, keeping in mind. Each year 660,000 prisons are released to American society out of state and federal prisons, and the challenge for us is: What do they look like when they come back? Because 94 percent of everybody who goes away comes back.

The idea that we've locked them up and thrown away the key is not exactly true. Two-thirds of that 660,000 who come out are back locked up in somebody's facility within a three-year period. And
we have 800,000 people on parole.

The sentencing guidelines play — and as a criminologist I tried to look at the challenges of the changes within the context of what the research literature shows.

In 1918, the Bureau of the Census published a report called "The Negro Population" in which they noted that, while Negroes — as they were then called — were 11 percent of the population, they were 22 percent of the prison population.

And in the some 90 years since that time, you would hope that that ratio would have gotten better. It's gotten worse. The percent of the population accounted for by African Americans in the prison population has grown relative to their percentage in the total U.S. population.

One of the important things that we in the research community look at the Sentencing Commission and sentencing guidelines for is their efforts to limit discretion. So there's a part of me that says — there's a huge part of me that says:

Alternatives are very important, very useful; we need
more of them, lest we bankrupt ourselves, as many
states have learned — on the one hand. On the other
hand, the discretion that's introduced by the
consideration of other alternatives I think is
important to pay attention to.

The other thing I would say, sort of in a
preamble sense, is how important your actions are.
When we in Missouri decided we wanted sentencing
guidelines, we looked to the U.S. Sentencing
Commission and said: "What are they doing there?
Can we copy what they do? Can we adopt what they
do that works for them and make it work in Missouri?"

So your actions will be a signal to the
states and the jurisdictions both with and without
sentencing guidelines, and what you do with regard to
these proposed changes will in a sense reverberate
across the country. So you give a college professor
ten minutes —

(Laughter.)

DR. DECKER: I'll give you the two
highlights of what we think the last ten years of criminological research have produced.

If I were to distill, you know, all the formula, and the journals, and the articles, there would be two things that I would say. One is, we know victimization precedes offending.

We talk a lot about delinquency prevention. We ought to have victimization prevention. Because the majority of kids who enter delinquency are victimized before they become delinquent. So we ought to be doing something at the front end to prevent victimization.

The other thing we know, and we know it well, we know it for women and for men, for Blacks, Latinos, Native Americans, Asian Americans, Hispanics, we know it from three dozen countries around the world, we know it for different offender types, is what we call the "age crime curve."

The age crime curve roughly goes like this. Peak offending occurs at the age of 21. By 25, that peak has dropped by 50 percent. By 30, it's dropped by 85 percent. And there are those who
argue, and the data supports them and is on their side, that with the exception of a couple groups of offenders – alcohol abusers, they don't seem to get better over time; sex offenders, they similarly don't seem to get better over time – but with those two notable exceptions, once an offender moves past the age of 35, their probability of offending is so low that it's a bad investment of our public resources to keep them incarcerated in prison.

Now we may keep them in prison for a variety of other reasons – retribution, somebody who takes another life; somebody who commits a heinous offense; my drug smugglers who brought thousands of pounds of cocaine into the country – there may be other reasons to keep people behind bars, but in terms of deterrence for them, in terms of rehabilitation, there seems little or no reason to keep them behind bars.

It is important as I look through the five criteria that you propose, the first being age, if you give credit to people for being young you're letting them out in their peak age of offending, and
the people who ought to get credit are the people past age 35 — if what we're trying to do is use our resources in a rational, deterrent sort of way.

There is a good deal of research in the area of mental and emotional conditions, as well as physical conditions, and particularly drug dependence. One of the things we know is that mandatory, supervised drug treatment works. Voluntary, casual treatment doesn't provide very good results. But mandatory, supervised drug treatment works.

Similarly, while there is a relationship between mental and emotional conditions and involvement in crime, the criminal justice intervention makes worse mental and emotional conditions, treatment can improve them.

So sentencing someone to prison because their underlying emotional or mental condition led them to act out is going to make them a worse individual when they get out, and we know that almost all of them get out.

Very little research to guide the decision
about the role of military, civic, charitable, public
service, or employment related contributions of prior
good works. It would be nice to know that people who
volunteer for Habitat for Humanity, who serve the
needs of HIV patients, who work in hospice clinics,
are more easily rehabilitated, require shorter
sentences, but there isn't criminological research
that bears on that. That doesn't mean it's a bad
idea, because the purposes of sentencing and the
goals of sentencing are varied.

I found the "lack of guidance as a youth"
to be an interesting consideration. Because it's
exactly those youth who have a lack of guidance as
youths who grow up in single-parent families, in
concentrated disadvantage who are more likely to get
in trouble earlier, and to stay in trouble.

So again — and it may sound self-serving
coming from someone who will turn 60 this year — but
what we know from the age crime curve is that, as
people age their involvement in crime declines, and
decreases significantly.

I think the five characteristics that
you're considering represent an important effort to reduce the use of penal sanctions when effective alternatives matched to individuals are available. As you deliberate these considerations, I hope you keep in mind the role that they can play in introducing unwanted discretion into sentencing decisions.

Thank you.

CHAIR SESSIONS: Thank you, Doctor.

And if we choose not to impose an amendment to say that there should be no incarceration for people over 60 —

(Laughter.)

CHAIR SESSIONS: — maybe the better approach would be, don't commit the crime in the first place, do you think?

DR. DECKER: We could do that, yes.

(Laughter.)

CHAIR SESSIONS: Doctor.

DR. SEPPALA: Good morning. I really appreciate the opportunity to testify before you today. I am going to go off of my written remarks,
I am in recovery from addiction. I dropped out of high school and ended up at Hazelden, the place I work for now, at age 17. I didn't get abstinent and sober until 19. I've been clean and sober for over 34 years. I was able to complete high school – the most important degree I've had because it was the most difficult; then college, ultimately, Mayo Medical School, and psychiatric training and specialization [in] addiction. So I've seen this problem from all angles. I certainly could have been incarcerated as a youth for the things that I did during my active use in a small town in southern Minnesota where people treated me well and didn't do that, for some reason. They let me return to high school and complete that, a remarkable gift. But I got good treatment, and some of my friends and peers did not, and a lot of people do not and end up in the system without adequate treatment and don't have the opportunities that I've had as a result. Addiction is a disease. We know that.
The research is in. There's been addiction research going on for 40 years. It was quite esoteric until about 20 years ago. In the last 20 years we have shown the part of the brain involved, the receptors involved.

We can show you brain scans of any of the drugs of abuse and describe the absolute action of those drugs in the brain, and show where it affects the brain, and how addiction alters the brain.

We know that, as Moe described, the decision making associated with people in active addiction is altered not just because they're using drugs and alcohol, but because their brains have been frankly altered. The frontal cortex itself has been altered in a manner in which judgment and decision making no longer functions in the way that it used to.

We know that dopamine, the primary neurotransmitter, kind of the final common pathway of all these drugs of abuse, is also involved in all survival behavior.

In fact, all rewarding behavior is
associated with dopamine. Anything we enjoy, but in particular those things that result in our survival and the survival of any animal result in dopamine release in our brain to be sure that we'll do it again.

You know, we enjoy eating. We're going to do it again. And after awhile we don't even have much dopamine release with the activity; it's the thought of the activity that precedes it.

The same with sleep, social interaction, fluid intake, sexual activity for survival of the species itself perhaps the most important activity of all is associated with dopamine release.

All the drugs of abuse provide a supraphysiologic release of dopamine, way above that release associated with normal rewarding activities. And so for the addicted, once it's absolutely in place they no longer have a choice in regard to whether they're going to keep using or not.

They're being driven subconsciously — because all this goes on in the limbic system, which is below the level of consciousness; it's where our
memory, our learning takes place, as well as our emotional activities, especially the positive emotions — but it's in that limbic system where the dopamine is being released, driving a change in our prioritization. In fact, to the point where people will risk their lives in order to keep using a drug, a remarkably unusual activity for a human being.

And it is because of this reprioritization in dry states that this can occur; that the individual, once addicted, doesn't recognize anything as important as the continued use of drugs or alcohol.

And so, to commit an illegal act is not really that bad a thing; at a subconscious level, the continued use of the drug is more important than life itself. So we're dealing with remarkably powerful factors here at a subconscious level that we don't even fully understand yet. And yet, treatment does work, as Moe described.

We're talking about an illness that does respond much in the way that any chronic illness does to good medical treatments. A paper provided by Tom
McLellan and some others a few years ago described this specifically, comparing addiction to coronary artery disease, hypertension, and other chronic illnesses showing that addiction itself has just as good a recovery rate as those illnesses.

If you look at the course of hypertension, people don’t necessarily follow their diets and take their medications, and often relapse in the first year to high blood pressure; just as people who are supposed to be staying abstinent from drugs and alcohol might not continue to attend self-help meetings and discontinue therapy and find themselves using a drug and require further treatment.

Evidence-based practices do exist for this population, and it is necessary to look at the research and base any of your decisions on the research.

I think that anyone in the criminal justice system does require mandatory treatment. It would be the only reasonable route to take in regard to the treatment of this illness.

In my written statements I describe the
treatment of health care professionals, and in particular physicians, which I've been doing since I entered the practice of psychiatry and addiction medicine in 1988.

Health care workers run a remarkable risk to the public if they're continuing to use drugs and alcohol in the workplace. And in fact, they often obtain their drugs in the workplace.

Anesthesiologists in particular get addicted to the most powerful medications known to man. They get addicted to the things they put us to sleep with. Fentanyl would be an example. Fentanyl is 200 times more powerful than heroin, and yet we don't hear much about the deaths of anesthesiologists around the country monthly.

These drugs require, if we're going to ask people to go back into the health care workplace, remarkable monitoring and mandatory treatments. That is what occurs in almost all 50 states.

It is not standardized in a manner that is adequate at this point, but if you are considering alternatives to imprisonment for folks with drug and
alcohol problems, they need mandatory treatments and
ongoing monitoring just as these health care workers
do to ensure the possibility of recovery.

Physicians and pilots have the highest
recorded rates of abstinence after treatment for
addiction for this very reason, because they have
mandatory treatment and ongoing monitoring. The
physicians in fact have 75 to 90 percent abstinence
rates at five years. In the general public that
comes to our treatment programs, that rate is about
50 to 55 percent at one year.

In other treatment programs, public
programs in particular, we would talk in the 30
percent rate as a good number of ongoing abstinence.

So you can see a part of it is motivation — pilots and
physicians want to keep working, and they're highly
trained and do not have many options — but the truth
is, it is driven by the monitoring and treatment that
they get, and the required nature of that. And I
would think that anything you do with these
populations would be in the same manner.

Best practices do exist. NIDA publishes
this information. It's readily available. Cognitive behavioral therapies are remarkably important to the treatment of any addicted population, but especially a criminal population as well because they need to change their thinking patterns and start to understand how to relate with other people in the world in a remarkably different manner.

There are barriers that exist. I have listed a few of the "not in my backyard" sorts of things. It is hard to get sober living situations for people in recovery from addiction. It is hard to get a house placed in a suburb or a community where people don't want a bunch of addicts hanging around. And I would say, I'm one of them. I just happen to not be using anymore.

And yet, we don't limit this sort of thing in a way that allows for such housing options for people that really require it. Because without that, it is very difficult to stay sober and abstinent, especially for the criminal population.

There are insurance exclusions. The very population you're looking at would be excluded from
most insurance policies because of their criminal activity, rather than gaining treatment for the addiction that would be covered by their insurance. And so it results in only public treatments being available to this population. That is not necessarily bad, but it is a shifting of responsibility that makes no sense to me.

Other barriers also exist in discriminatory laws. Drug felons lose their driver's licenses. It's kind of hard to get to your appointments, to get to AA meetings, or NA meetings, and the like, if you don't have a driver's license.

You can't get student loans. Fortunately, I never got any criminal charges and I was able to get student loans, or I wouldn't be sitting before you today. They can't receive public assistance such as welfare, Section 8 housing, and food stamps.

These things limit the ability to become abstinent dramatically. It isn't just a matter of altering sentencing. There's other issues that really need to be examined as well.

Once again, I really thank you for being
here today.

CHAIR SESSIONS: Thank you very much, Dr. Seppala. Let's open it up for questions.

Commissioner Friedrich.

COMMISSIONER FRIEDRICH: Thank you.

Mr. Decker and Mr. Seppala, you both talked about the importance of mandatory drug treatment, how that's essential, compared to optional.

How is our criminal justice system — how effective are the current options in the criminal justice system in terms of meeting need? Do we have the kinds of programs we need? Are they sufficiently mandatory enough to be effective, in your view? Or should we be doing things differently? And I'm focusing on the federal system.

DR. DECKER: No. The mandatory treatment is expensive. Mandatory treatment requires lots of follow up. One of the keys for addiction treatment isn't just what you get in treatment, it's the follow up, and in a sense the boosters that you get.

And while we've got them in prison we can do a pretty reasonable job, although the rates of
drug use among prisoners when we do urinalyses in prisons, we get five to ten percent of the prisoners who do test positive for illegal drugs – because where there's a demand, it's hard to control that demand for drugs, particularly given the profits involved. We do a pretty reasonable job within prison. It's when people get out, in that re-entry process, and it's one of the reasons why there's so much attention at federal and state levels on re-entry. They're very expensive. They're good when they've got follow ups and boosters.

Absent the follow ups and the booster,

they return to baseline very quickly. And your point about physicians and pilots achieving 70 percent success rates after five years, and 50 percent after one year for other sorts of treatments, when you think of offenders who have so many deficits that have to be overcome, they need heavy dose.

COMMISSIONER FRIEDRICH: Well the re-entry programs that I'm familiar with in the federal system, and the ones we've heard about recently that are growing across the country, tend to be those that
give the defendants an option. You can opt in and
get a year off of supervised release.

So to me that seems very optional, rather
than just you're going to do drug treatment for this
amount of time, period. So I'm interested. That, in
your view, is not mandatory enough to be successful?

DR. SEPPALA: That would be my
description, as well. I think it just has to be —

COMMISSIONER FRIEDRICH: Because what
we're hearing is that you need to provide incentives
to get them to opt in, versus you need to just flat-
out require. That's what we hear again and again.

DR. SEPPALA: Yes. There's good data from
the general population that shows that 95 percent or
more of the people that enter addiction treatment
are there because someone else has forced them in,
whether it's the courts, whether it's their wife,
their employer. So they don't show up because one
day they woke up and said that this would be a great
day to go to treatment for my addiction. They don't
even recognize it.

But the mandatory treatment is absolutely
necessary to get people's attention, get them adequate treatment, and monitor them over time, as Scott described.

DR. DECKER: By the time they get to your system, they've learned to play the game. And if the game says I can get out by signing this form and coming to a few meetings, I get another year on the street? Sign me up.

DR. SEPPALA: I know people that, because the treatment system in the State of Oregon where I was living before Minnesota, allowed for an alternative to imprisonment, but it was the same length of time, many of the folks would just say, oh, the heck with that, I'll just go do my time in treatment, it's easier. It's really unfortunate.

DR. BERGER: I realize that we're talking about the federal system, but I do a lot of work with Judge Russell and his Erie County Court up in New York. They've had no recidivism, because the bottom line is, if you don't go to your meetings, take your medications and stuff for one year, you're behind bars, period. There are no exceptions. It's
mandatory.

DR. SEPPALA: I agree.

MR. BRIGGS: And another case for mandatory — I've worked in nonprofit programs, so I've worked with CSOSA clients, and pretrial here in D.C., that when it comes to an option I wonder how could we expect the addicted person to make a decision with the same brain that kept them in trouble. So I would say mandatory, because I don't think that addicted folks, especially early on, are going to make decisions in their best interests.

VICE CHAIR JACKSON: I had a question. I know Dr. Seppala talked about best practices existing with regard to treatment programs, and Mr. Briggs also brought this up.

One of the themes the Commission is looking at is the sort of effectiveness of programs, and how you set up standards to determine what programs are going to be effective and not. And so my question is: Is it pretty easy to determine, looking at a program, whether it's the type of thing that will be effective? Is there a checklist? Is
there something that, you know, can look at to say
this program is likely to work, and this one probably
won't?

DR. BERGER: The Institute of Medicine has set standards for certain kinds of treatment programs. That's a good place to start.

VICE CHAIR JACKSON: As a standard for determining —

DR. BERGER: The Institute of Medicine. And you have to ask for specific reports. I'll be able to send you the one on veterans.

MR. BRIGGS: The criteria we use, which the doctor will be familiar with, is ASAM, the American Society of Addiction Medicine, has a Patient Placement Criteria that, if used with good assessment, could determine the level of care a person needs.

Also, on the web, SAMHSA, [CSAT], and NIDA have a web site for best practices. It's a variety of programs and interventions that have been shown to have efficacy in the treatment of folks with substance use disorders. Included in that is, as I
mentioned, the Treatment Improvement Protocol No. 44, put out by SAMHSA, is totally dedicated to treating offenders with substance use disorders.

And as the doctor said, there's a lot of information and research out there.

DR. SEPPALA: It's true that all exists, but there isn't a single checklist. That would be the unfortunate thing. I would think a group could be commissioned to provide that. We actually thought about publishing such a thing, because we're instituting basically "the list" in our programs, and am sure other folks have as well, but there's not a checklist that exists right now that you could just go down and say, okay, they do this, this, and this. You would have to kind of take that list from the information that they've described.

COMMISSIONER FULWOOD: It's interesting that we can require mandatory treatment for a sex offender and not do it for substance abusers. Most of the programs are voluntary programs, and people walk away. They get treatment, they walk away, and they come back.
There's a tremendous relapse rate. And so having some standard makes a lot of sense to me. Because in the long run, it's cheaper. And what's the release of low-level offenders now is not any public policy, it is cost. It's causing states to release people. There is no investment in supervision. The real investment is someplace else.

CHAIR SESSIONS: Just before I pass it on to you, could I just follow up with that mandatory. The proposal here that we're talking about would, for a low-level, nonviolent offender who has to meet certain criteria, that the judge would have the option to impose probation.

I think envisioned within that is an order from a judge saying that, rather than a period of imprisonment, which could be up to 21 months, that the person is released on probation, and as a condition of probation they participate in residential drug treatment.

Obviously, implicit within that, and perhaps maybe what you're suggesting, is a statement in there that if you fail drug treatment, then you're
violated and then you go back. So is that the kind
of mandatory drug treatment option that you think
would be successful?

DR. SEPPALA: I think that is absolutely
the minimum that would be required. Because without
that, you are dealing with a population, as has been
stated earlier, is just going to find ways around it.
Addiction, as I was describing, drives people in a
remarkable way.

When we look at it with physicians, we say
we're smart, they're smart, they're desperate, we're
not, they're going to find a way to beat the system.
And so the more mandatory the system is, the better —
and the longer. Treatment research really does show
that 90 days for the general population seems to be
kind of the magic number of adequate treatment, but
much longer for this particular population because of
the other necessary features of their treatment.

And having that, the possibility of
reincarceration associated with their treatment, is a
huge opportunity for them. Right now, so many people
almost count on the judicial system to get folks into
treatment. It's an unfortunate and sad statement about our system, but it's hard to get people into addiction treatment.

DR. BERGER: It is, right. But this is tied back to your question that these treatment programs, even if we could find one that met the checklist, okay, has to include other elements.

As Moe has mentioned, and my colleagues, people have to have a job. They have to have access to housing. They have to have transportation. Or they're going to be hanging out again with the folks that got them — who will get them in trouble again, and the whole thing breaks down.

MR. BRIGGS: Treatment has to occur along a continuum. So we've got abstinence. You want to achieve that on admission. And while that's going on, you've got a huge case management process along that continuum.

People do need to work. People need places to live. People need health care. Any one of these things could precipitate a relapse. So someone mentioned the cost. It does get expensive, because
this person needs to be tracked at various plateaus. So let's say they hit the 90-day mark. Well somewhere in there they'd need a job. Maybe they need job training, vocational training; maybe they need glasses; maybe they need dentures. You know, there's a whole host of things. And to create an integrated system that treatment includes getting them prepared to truly be productive members of society and experience the things that we do by having a job, being able to get a license, being able to address their medical and mental health needs, that's important.

CHAIR SESSIONS: Commissioner Wroblewski.

COMMISSIONER WROBLEWSKI: Thank you very much, Judge, and thank you all for being here. Professor Decker, I just have a couple of questions. The Commission has been on a little tour around the country holding hearings, and one of the things we have heard on a number of occasions is certainty of sentencing as compared to the severity of sentencing is more important, especially in
relation to deterrence.

I am curious if you agree with that. If you agree that there's a difference in terms of the deterrent value based on the type of offense. So, for example, a white-collar offense versus a drug trafficking offense.

And then finally, a question about people who have committed more than one crime. Do you think it is significant if someone commits a second crime very close in time to having committed or been found guilty of a prior crime, as opposed to a longer period of time? Do you agree that that's a significant factor, or should be a significant factor in sentencing?

DR. DECKER: First with regard to the deterrence thing, in an earlier career I was a deterrence studier. If you were to stack up the research that supports certainty versus that that supports severity, it would be about ten to one certainty matters.

And here's why it's really important. I spend a fair amount of time interviewing offenders on
the street and in prison. I've spent some time in federal district court and state courts, and what's really remarkable is to watch defendants for the first time in a federal court who've been on probation, who had suspended imposition of sentence, might have done a 90-day shock in the state system, might have even done two years, appear for the first time in federal court and see everybody get convicted. And not only does everybody get convicted, they get "real time." And you see these guys' jaws drop.

The problem is what we call the "this time we really mean it." From the first time you went to the principal, and then you saw the juvenile court judge, and then you saw the state judge, and you had nine or ten bites at the apple; somebody looked at you and said, "this time we really mean it." And what that offender knows is: No, you don't. I'm going to get off again. Or I'm going to get a minimal sentence. Or I'm going to get one day of — for every good day I serve, I'm going to get a comp day off. I'm going to get all kinds of ways to reduce my
sentence because we don't really mean it.

And you all in the federal system, you're the ones — I mean, you know, we all put our right hand on the grid — you all really mean what you say. And for many offenders, this is the first time they're hearing that.

So certainty is far more powerful than is severity. The impact of sentences tends to diminish after about the third or the fourth year.

The other question is: Does it vary by offense? And the answer is, it depends. Of course that's always the answer, but part of what it depends on is prior record. And part of what else it depends on is what other assets you have in your life.

If the prison sentence means you're forfeiting a large number of important and valuable assets to you, a family, a job, a career, a reputation, a chance to see your children grow up, then that sentence is far more meaningful. And those assets tend to be associated more with certain kinds of offenses and offenders — the white-collar offenders, for example — than they do with your garden
variety assaulters and robbers and gun traffickers and drug sellers who tend to lack those assets.

COMMISSIONER WROBLEWSKI: And then the last question is the two offenses close together, does that matter compared to the second offense being further away from the prior?

DR. DECKER: For people who get to your system, they're enmeshed in a lot of offending. In the work I've done with the juvenile court, the average kid did 12 offenses that they could have been sent away for before they got sent away. And those were 16-year-olds.

So fast-forward to the 28-year-old who appears before the judge who is looking at your grid. And if you do the math and the multiplications, they're enmeshed in hundreds and hundreds of offenses, and that timing is probably not as important because there are so many underlying offenses by the time they get to the federal system.

But if we give them a shock and say we're going to stay your case for 90 days, and they get in trouble, then you've got the "this time we really
mean it" again that they know we don't. And for many
offenders, until they get to the federal system, or
at the deep end of the state system, we don't really
mean it. And they all know that.

CHAIR SESSIONS: Commissioner Jackson?

VICE CHAIR JACKSON: Professor Decker, I
am hearing from everyone on the panel that the kind
of treatment that's going to be really effective is
likely to be costly. And I'm curious as to whether
any of you, actually, are aware of any studies that
have compared the cost of effective treatment for
these populations versus imprisonment and recidivism
and the cost to society, et cetera, of that kind of a
cycle?

DR. DECKER: Faye Taxman, who I suspect
has testified here in the past, and who's right down
the road in Baltimore, has done probably the best
cost/benefit analyses of drug treatment versus
imprisonment.

The Urban Institute has also been funded
to do cost/benefit analyses as well. And there is a
literature out there. It is expensive — I don't
recall what your average annual cost to house someone
in the federal system is now; I know in my state
system it's $24,000 a year to keep somebody in prison
in Arizona, and that's pretty consistent with
national averages. But it's more than just swapping
one out for the other.

Taxman's work, and the Urban Institute's
work, there's lots of good cost/benefit studies.
It's a complicated question.

DR. BERGER: The GAINS institute, as
well, which is funded by SAMHSA.

CHAIR SESSIONS: I've read somewhere in
somebody's report of $7 to $1?

DR. SEPPALA: That came out of the
California study associated with their state program,
Proposition 36, that actually diverted people from
prison into addiction treatment. That's a worthwhile
study to examine, as well.

CHAIR SESSIONS: So the savings was
between $1 and $7.

DR. DECKER: Right.

VICE CHAIR CARR: Professor Decker, you
said that the impact of sentences diminishes after
the third or fourth year. What impact is that? And
whose measure?

DR. DECKER: The deterrent impact — some of
it is because of the age crime curve. We get
somebody in at 24. We let them out after five years,
so they're 29, and those are life-significant years in
the life course. So that's part of it.

We achieve about as much deterrence with a
three- or four-year sentence as we get with an eight-
or ten-year sentence.

VICE CHAIR CARR: Are you talking about
the deterring of others?

DR. DECKER: I'm talking about deterring
of their —

VICE CHAIR CARR: Incapacitation.

DR. DECKER: — their offending, that's
correct, and what they do when they get out.

CHAIR SESSIONS: Well, specific
deterrence to them.

DR. DECKER: Correct, as opposed to the
message we send to society.
CHAIR SESSIONS: Ricardo.

COMMISSIONER HINOJOSA: Some of the people I've had on supervised release or probation that are in drug treatment program, sometimes I'm told by specialists that you expect a relapse in cases, and so my question is: How do you distinguish then if that's somewhat expected in certain cases where there's still a possibility of loss of addiction with regards to certainty in the minute you relapse you're going to be sent to prison?

DR. BERGER: With all due respect, sir, there is not a disease out there where that probability of relapse isn't there. It depends on the individual's circumstances.

COMMISSIONER HINOJOSA: But my question was, during the treatment, and then there's a report to me that there's been a relapse, and if you take the position that you suggested that automatically you go to prison, do we just give up on that person? What's the suggestion under that fact situation?

MR. BRIGGS: Well, I guess my take on it is there's a relapse cycle. This is something we in
treatment know about. The end of the relapse cycle is the actual use. There are many things that happen that erode recovery that gets to that point.

When I talk about people relapsing, I'm saying this is something you must do; you stop doing it. But I don't think that a person should be resentenced, or sanctioned if one defines relapse only as actual use.

For example, I think you mentioned meetings. People – we suggest sober supports. Well when people don't do that, there's a consequence, because we already know what's going to happen if there's this base of planning that promotes recovery and you stop doing it. That's a relapse.

So I guess the question is: Do we sanction them because they stop doing that? Or do we wait until they actually use? Apparently in the practice that I supervise – five clinics total – we have probably a thousand patients, and they're mostly white- or blue-collar workers; some involved in criminal justice. We intensify treatment if they use.
So, for example, I might refer somebody to Hazelden because an intensive outpatient program is no longer viable for them. Their level of care is just not working. So then we ratchet up.

In treatment people are sent first to the least-restrictive environment to meet their needs. I think it is different with offenders. I guess I don't know. I wouldn't.

COMMISSIONER WROBLEWSKI: Mr. Briggs, could I ask you a follow-up? There's this Project HOPE program that's been promoted and that's out in Hawaii that does have very short, but I think it's jail term. So even if it's a very short relapse, some sort of shock jail term even for just one single dirty urine. Is that a good thing, in your opinion?

MR. BRIGGS: I would support that. See, that piece makes sense to me as long as they can do that and get back re-engaged in treatment. Because let's say, if I were a diabetic, a relapse is I stop doing my blood sticks, you know, checking my blood sugar. I stop exercising. I start, you know, eating crazy. Well, that's a relapse, and it happens every
day to diabetics.

Unfortunately, it's a difference if someone is an offender. But I'm just pointing out the relapse. So if say someone had a dirty urine and they went to jail for five days, whatever it is, then I'd want them to come back and re-engage in treatment. And maybe the next time, if something happens, it's a longer stay. I don't know. I think it's graduated sanctions.

COMMISSIONER WROBLEWSKI: I think so. I think it's shorter than five days, maybe—

MR. BRIGGS: — something along those lines, I'm not opposed to. What bothers me is that the notion that if I had say a ten-year sentence and I went out and I had a drink, that I'd go back to serve a ten-year sentence.

COMMISSIONER WROBLEWSKI: Right.

MR. BRIGGS: And what really is troubling is, in early recovery if I go out and have that drink I'm simply following my job description. I don't know enough to really grasp the ramifications of that. But to send me back for ten years, I don't
agree with that.

[UNDETERMINED SPEAKER]: You know one of the things I think that everybody needs to keep in mind that was hinted at and what fits in with what Moe just said is there are chemical changes that cause physical changes to the brain in those centers that have to do with decision-making and that sort of thing, and that he talked about, the dopamine stuff. This is all going on, what Moe was referring to.

So this whole business about the going back for ten years, if that happens because you have a drink if you've only been in treatment for 30 days, you compare that with somebody who's been in treatment for a year, and whatever, and you'd see there'd be a difference there.

CHAIR SESSIONS: Commissioner Fulwood.

COMMISSIONER FULWOOD: I suppose my thought is that what we may be missing is the fact that treatment is a continuum, it's not a single process; it's a continuum. And that there are all these other things that support treatment.

It is reconnecting people to families.
It's what we try to find on the federal side also, especially related to these black males who disappear from their families, is reconnecting them to families, and having a support system where, if the person falls they get up. Families help you get up and back on your feet. And these folks oftentimes don't have families.

And so it's this continuum process that becomes important. And having some national standard for treatment. Because most of the programs are 28 days, not three months; they're 28 days, which is insufficient, especially if the person started using drugs at the age of 12. You know, you're not going to send them for 28 days and he's going to be cured. That's not going to happen.

I mean, that's the reality of what happens on the street, and it's also the reality of what communities face. We're not going to police Georgetown in the same way we police Southeast Washington, D.C. That's not going to happen. That's the politics of it. The police are not going to go up in Georgetown and lock up those white kids up
there in the same way they do over in Southeast.

It's not going to happen, nowhere in America.

So we've got to be honest about that.

That's why you get these huge numbers that are disproportionate. And those are realities that we have to trace.

CHAIR SESSIONS: I just have one other question, or just ask for some advice. In policymaking, recidivism rates is a very significant factor. Do you have the most recent studies comparing the recidivism rates of people who have completed, successfully completed extensive drug treatment programs, as opposed to those who went to prison without drug treatment programs?

DR. BERGER: Sir, I'd be glad, as I said, to get the figures for the Buffalo court, which is obviously a county/state court, but I'll get that.

CHAIR SESSIONS: Yes, I just wondered if there's any national studies. I mean, everybody says there's a dramatic increase, or reduction in recidivism rates if you go through successful drug treatment. I just wondered if there's some document,
some study out there which says just that.

MR. BRIGGS: SAMHSA has that, which is some of what the Treatment Improvement Protocol 44 is about. They have the — what's that, the [inaudible], the Drug — they've got so many of these acronyms — anyway, SAMHSA has that information. There's information on treatment.

COMMISSIONER WROBLEWSKI: Judge, we can also get through the Office of [our] National Drug Control Policy some tremendous amount of information about drug courts, and the effectiveness of drug courts. We can provide that.

DR. DECKER: You should know what the research community measures now is not "success," but what we measure is "time to failure." And that says something about the paradigm that guides this. And the goal of many of these programs is to increase the number of days before failure, as opposed to complete success.

CHAIR SESSIONS: Thirty-four years?

DR. DECKER: Yes.

CHAIR SESSIONS: I would say that's
success, 34 years?

DR. SEPPALA: I always kid my colleagues that I was a treatment failure.

(Laughter.)

CHAIR SESSIONS: Well I really appreciate, on behalf of all of us, the conversation which has been most informative and really very interesting. Thank you very much for coming.

MR. BRIGGS: Thank you.

(Whereupon, at 1:05 p.m., the meeting was recessed for lunch, to reconvene at 2:10 p.m., this same day.)
(2:10 p.m.)

CHAIR SESSIONS: I think we're set to go. Thank you very much for coming long distances, although you were here this morning, so thanks for coming back.

Let me introduce the panel. First, Andrea Smith is current regional coordinator for the Mid-Atlantic Region for the Organized Crime and Drug Enforcement Task Force. She is an assistant United States attorney in the District of Maryland. A prosecutor for 29 years, Ms. Smith has been recognized numerous times for excellence in the prosecution of organized crime. She has her B.A. in American studies from George Washington University, her J.D. from the University of Baltimore Law School. Welcome.

MS. SMITH: Thank you very much for having me.

CHAIR SESSIONS: Thank you for driving the long distance from Maryland.

Next, Margy Meyers is back again. She is
the Federal Public Defender for the Southern District of Texas, having served in that office since 1983, except from 1992 to '97 when she was in private practice specializing in criminal defense work. She earned her B.A. from Yale, graduating summa cum laude and phi beta kappa. Is there any higher than that?

VICE CHAIR CARR: Federal judge.
(Laughter.)
She earned her J.D. from the University of Pennsylvania, graduating Order of the Coif, and cum laude, and welcome back.
And again, Teresa Brantley was introduced previously today. She is a member of the Commission's Probation Officers Advisory Group.
She's a probation officer representing the Central District of California, Los Angeles.
All right, first, Ms. Smith, we will hear from you.

MS. SMITH: Thank you, Mr. Chairman, and members of the [Commission]. Good afternoon, and thank you for the opportunity to be here.
I would like to take a moment and introduce myself. Twenty-nine years ago today, actually, March 17th, 1981, I took an oath as a Baltimore City prosecutor. During nine-and-a-half years there I spent six-and-a-half years as a drug prosecutor.

In a city with a notorious murder rate, and with ten percent of its population addicted to heroin, I handled every file that landed on my desk. I saw predominantly people with little or no choices, and people that made terrible choices.

Then crack hit Baltimore. It was unprecedented. Several of my cases expanded into federal court. Twenty years ago this coming September, through the graces of the United States Attorney in Maryland, Breckenridge Wilcox, and those that have followed, I have served as an assistant United States attorney.

Again as a drug prosecutor my focus continued to be the streets of Baltimore and the streets of Maryland. With the luxury of not having to take whatever landed on my desk, but with an
opportunity to investigate beyond the borders of Maryland and the United States, I continued to focus on the money launderers, the facilitators, and the administrators of these criminal organizations.

By and large, addicts do not figure into the landscape. Since 1995 I have had the privilege to be the regional coordinator for the Mid-Atlantic Region for OCDEF. In that capacity I have reviewed hundreds — actually, thousands of cases, from Pittsburgh to Philadelphia, Wilmington, Delaware to D.C., Richmond, Roanoke, and Wheeling, ten judicial districts in all.

I will spare you the glowing accolades on what I think about the dedication and the tireless work of the extraordinary public servants I get to see as regional coordinator. I am, however, very grateful for the career I have enjoyed. And it is my great pleasure to have this opportunity to share the views of the Department of Justice on the Commission's proposed amendments to the sentencing guidelines on the so-called recency provision of Chapter Four of the guidelines.
We appreciate the Commission's leadership since the passage of the Sentencing Reform Act, and I would like to commend — we would all like to commend — especially the Commission's collection, analysis, and careful consideration of empirical data in shepherding the evolution of the guidelines over the last two-and-a-half decades.

We are here today to urge that the same evidence-based decision-making process is employed in connection with the Commission's review of the recency provision of the criminal history score.

Due to the concern regarding the number of times a single conviction potentially can be factored into the computation of an offender's criminal history category, the Commission is proposing two options for amendment of §4A1.1 of the guidelines.

Option 1 would eliminate recency points entirely for all offenders regardless of the offense committed.

Option 2 would retain recency points, but would preclude the addition of recency points where
the so-called "status" provision of the subsection 4A1.1(d) also applies. As a result, under Option 2 only a total of two points would be added to the score of an offender who qualifies both for status and recency enhancements to the calculation of his criminal history category.

We cannot endorse either version of the proposed amendment. Committing an offense while under any type of supervised criminal justice supervision — be it probation, supervised release, imprisonment, or state parole — is an aggravating circumstance that correlates with a greater risk of recidivism.

The guidelines now appropriately account for this factor in the calculation of the criminal history category with two criminal history points. Furthermore, the commission of an offense after recently having served a significant term of imprisonment is a distinct aggravating circumstance that also correlates with increased risk of recidivism, and the guidelines also appropriately take that circumstance into account with two criminal
Because the two factors often coincide, the guidelines as currently drafted already limit the impact of the cumulative application of status and recency points, allowing for a total of three points rather than four. The Commission is now proposing to change that to two points.

This Commission's research has shown that status and recency each make an "independent and statistically significant contribution" to predicting recidivism and that each has "high predictive strength."

Notably, the Commission's criminal history category model — which is the basis for Chapter Four of the criminal history guidelines — of the sentencing guidelines, and the U.S. Parole Commission's salient factor score — both respected and both validated recidivism-risk assessment tools — rely on both status and recency to predict recidivism.

Thus, there simply is no justification in the empirical data for changing the way that criminal history scores are assessed with respect to the
Deterrence is also a criminal factor in assuring public safety. The certainty that a harsher penalty will result where an offender has both committed an offense while under criminal justice supervision and done so within two years of imprisonment promotes respect for the law and serves to deter persons from crime in the first instance.

Because a sentence calculated based on an offender's eligibility for cumulative status and recency enhancements to his criminal history category is grounded in recidivism, research, and data, such a sentence is just, even if harsher, and further serves the goals of deterrence.

That said, we do believe that it is wise for the Commission to study and consider the impact of the guidelines, like §2L1.2, for example, that provide for an increase in an offender's offense level in circumstances where any subsection of 4A1.1 of the guidelines also applies.

Specifically, the Commission should collect and analyze empirical data in an effort to
determine whether cumulative application of §4A1.1 and any Chapter Two section that increases an offense level based on criminal history is either redundant and unduly harsh, or — as demonstrated by the data — constitutes just punishment and ensures public safety and promotes deterrence.

I believe in my 29 years of experience, I believe it has provided me an extraordinary opportunity to get to know the federal criminal defendant. There are defendants that need some meaningful opportunities and deserve a second chance. With the current advisory nature of the guidelines, this appropriate compassion and leniency is widely available and widely applied.

Then there are those defendants that must be kept away from society as long as possible. They are persistent recidivists. For these defendants, again with the advisory nature of the guidelines, we need all the tools we currently have.

In closing, I would like to thank the Commission for this opportunity to share our views, and for its continued commitment to constant review
and evaluation of the guidelines to ensure fair
sentences and public confidence in our federal
sentencing system.

Thank you, very much.

CHAIR SESSIONS: Thank you, Ms. Smith.

Ms. Meyers?

MS. MEYERS: Thank you. I too want to

thank the Commission for inviting us and giving us

the opportunity to speak. I am speaking on behalf of

the Federal and Community Defenders.

Before I address recency, I have the

fortune, or misfortune, of becoming the chair of the

Sentencing Committee on April 1st.

CHAIR SESSIONS: Let me congratulate

you on taking that position.

MS. MEYERS: Well, I'm following Judge

Hinojosa. It's not enough to come from a big

district. We don't have enough to do in South Texas,

so I thought I'd take this on, as well.

(Laughter.)

MS. MEYERS: But I do want to address

something that you, Judge Sessions, asked Ms. Mariano
about why we are opposing 5C1.3.

And that is, we certainly appreciate any
effort by the Commission to offer alternatives to
incarceration, particularly for people with drug
problems. But after canvassing all of our members
and hearing the data that we heard this morning, it
appears to us that none of our clients will benefit
from it. And we are afraid, in terms of political
considerations, that if this is what we get that
that's all we'll get. And it may be foolish to say
it's not enough, wait till next year, but we're
concerned that if this is done then there won't be a
next year to reach those who really need the
alternative.

And I think about in my mind the example
of minor role, where the Commission has tried to
address giving people minor role who should get it.
There was an amendment that essentially adopted the
Eleventh Circuit position.

In reality, we still see huge disparity
about minor role, and years later it's sort of, the
Commission did that, and then didn't revisit it. The
Commission may revisit it, but our sense is that 5C1.3 as written simply will not help any of our clients.

I think if the Commission has it in its power today to at least broaden 5C1.3 to address—to not limit it to offenders, particularly drug offenders, then at least that would reach more people whether they're white-collar offenders or not.

But I've never in my life had a drug offender who was a [Level] 16 or less. I mean, that's just coming from South Texas where we have more drugs.

Turning to recency—and I think the reason I am here is because I am from South Texas where we do see these recency and being under criminal justice sentence impacting especially aliens, and especially aliens who come in on illegal re-entry sentences.

But I don't want to limit our comments to those people, because we applaud and agree with the Commission that eliminating the recency point, as suggested in proposal one, is appropriate.

It is interesting to hear how Ms. Smith
and I read the Commission's reports. The Department of Justice says that that report shows that those factors are predictors of recidivism.

Looking at Exhibit 5 from the same report, what we see is that those factors even in combination — that is, being under a criminal justice sentence and being recently released — will predict recidivism in one out of 1,000 cases. It is de minimis and there is no reason for it now that the Commission has had the chance to review the data.

I recognize that recidivism is not the only measure in the criminal history score. The other measure is culpability. I know that some of the judges agree with the Department of Justice that there is some greater culpability by the defendant coming out of prison, being under a criminal justice sentence, and violating or committing a new crime.

We have all been in front of judges who look at your client when they were so nice and gave them probation and they're back a month later with a drug offense, and the judge just feels let down.

I think again the empirical analysis
demonstrates why that's happening. The Department of Justice's report indicates that most of the recidivism, or there is a great likelihood of recidivism in the first year from release, especially the first year of release from a long sentence.

When, as we heard earlier in the morning, people don't have jobs. They haven't had drug problems addressed. They've lost family contacts. They've forgotten how to live in the community. They are in fact through no culpability more at risk of recidivism during that time period, and it makes more sense to deal with them in that fashion.

Also, if they're under a criminal justice sentence it's not as if they will get off scott free. The judge who imposed the sentence, or the Parole Commission man isn't here, but the Parole Commission, if they're under a sentence, then they can be revoked for that sentence. It's not as if that will not be taken into account.

Also what we see is that recency points, that one point, has the almost automatic impact at the lowest level, as we indicate in our written
materials. That's the jump from Category II to Category III. That's where it makes a difference whether you get two points or three points.

Now it could jump you anyway, but those are the lowest level offenders and it doesn't make sense to automatically add that point.

Turning to what seemed to drive the interest, which is the undocumented aliens and the illegal re-entry cases. I want to reiterate how and why these recency points and these criminal justice points are unfair, result in unduly harsh sentences, and the Commission has that data now in the context of illegal re-entry.

As Henry Bemporad said in his testimony in Phoenix, an undocumented alien who returns after conviction for an aggravated felony can have a single conviction, a conviction that by the convicting jurisdiction was deemed worthy of probation at the time, a single conviction will increase the statutory maximum from two to 20, will increase the offense level anywhere from four to 16 points, will count under 4A1.1(a) through (c), either one to three points; and
what often happens is these defendants who are on
probation are caught first by the state, for example,
revoked, and so they're found in prison. So it will
be three points under 4A1.1(a).

The status of being under a sentence will
be counted. The recency will be counted, as I want
to get to, because of the fiction that the offense
continues until the defendant is found by an
immigration officer.

So the defendant who is sitting in prison
who would be quite happy to end the offense of being
here illegally by going home is prevented from doing
so by the fact of his incarceration.

And finally, the other time it may be
counted, if they've already had a federal conviction,
is they're on supervised release and they face a
revocation.

I mentioned that the timing is unfair
because, first of all, in terms of recency, in
contract to perhaps somebody who gets out of jail and
says, I don't care — we've all had clients who've done
a lot of time, and it's worth it to go smoke that
joint; they haven't had a joint for a long time — many
of the illegal aliens who return, the timing has
nothing to do with the reason for a return.

We've cited in our written materials, and
I know Judge Hinojosa sees this all the time, of
aliens who return because, for example, of some
family emergency where a child, or a parent is ill.
We have a client who we talk about in our materials
who was threatened by the Zetas. He had set up a
pharmacy. And so he returned. And he returned, or
they returned, within two years of release, but it
has nothing to do with culpability. It's just an
accident of when they returned.

And I do have clients who have waited out
their period of supervised release. And then of
course the judge explains to them, that doesn't mean
you can come back. But most of them, the timing of
the offense has nothing to do with culpability,
especially because, not only is illegal re-entry
counted at the back end when they're sitting in
prison, it's counted at the front end from the moment
the alien first returns.
So a defendant could have been living essentially lawfully in the United States — and I know they're here illegally, but otherwise working, supporting their family, for years, and years, and years, and years, but if they entered, that means that they would be counted against them. So they get hit at the back and in the front, and it is unduly harsh.

I see I have a yellow light. I would add, if the Commission would consider not requiring, or not recommending supervised release for undocumented aliens, I think that would be helpful. Because in the case of somebody who is deported, there is no supervision. It serves nothing except for the possibility of getting 22 years instead of 20 years. I would, although this is not part of recency in our comments, I would urge, while we're talking about undocumented aliens, the Commission to address the specific conditions, or collateral consequences faced by aliens in not only prison, but for example what we do often in the Southern District of Texas, where aliens are held in ICE custody until
the government feels like bringing a charge. Our judges regularly depart, or reduce the sentence for the time in ICE custody.

Finally, I would urge the commissioners to encourage a departure for aliens who return for noncriminal reasons. Thanks.

CHAIR SESSIONS: Thank you.

Ms. Brantley?

MS. BRANTLEY: Thank you again for the opportunity to talk about recency. The POAG members really — this was a brief discussion for us, because for us it's an application issue.

We feel, though, that recency is a distinct harm; and the way the guidelines are set up currently measure that harm distinctly. But if change is going to happen, then we actually would recommend Option 2, so that it's an either/or, a maximum of two points, rather than taking recency off the table altogether.

I know that there are some questions in the proposed amendments about illegal re-entry defendants and how we might handle Chapter Four in that
situation. The one thing that we said resoundingly as a group that we all agreed with each other is, we would hope that the Chapter Four could be applied on its own without too much of a consideration as to what Chapter Two requires us to do. Because we felt like that would become messy to apply.

And that was the extent of our comments in our paper.

CHAIR SESSIONS: Thank you. So let's open it up for questions.

COMMISSIONER WROBLEWSKI: Can I just ask one quick question right there?

CHAIR SESSIONS: Sure.

COMMISSIONER WROBLEWSKI: Are you suggesting that — because one of the things the Department suggested in the testimony is looking at those crimes along the lines that Ms. Meyers suggested, talked about, where the Chapter Two adjustment includes criminal history. Are you suggesting you don't think that's a good idea because there will be some complexity in application?

MS. BRANTLEY: That was POAG's position,
COMMISSIONER WROBLEWSKI: Okay. And can I ask one question of Ms. Meyers?

CHAIR SESSIONS: Yes.

COMMISSIONER WROBLEWSKI: Margy, the table that you talked about from that one recidivism study also includes —

MS. MEYERS: The Commission one or the DOJ one?

COMMISSIONER WROBLEWSKI: The Commission one, I'm sorry, the Commission one. It also includes some data on the salient factor score and the different elements of the salient factor score, which has a larger — a less *de minimis*, if that's the right way to say it — and then there have also been some other studies of the salient factor score that suggest that those things are less *de minimis*.

Do you have a thought about some of that other data? You mentioned the one in 1,000.

MS. MEYERS: I can't comment on data I haven't seen, but as I understand that table it says, yes, there may be a factor, and I know what Ms. Smith
is talking about is particularly if you consider it alone it is a factor that you consider for recidivism. But when you measure it against all of the other factors looking at Exhibit 6, it really doesn't add very much.

COMMISSIONER HOWELL: I thank you all for your excellent testimony, and you, for your double time.

So, Ms. Smith, one of the things that I was interested in exploring with you is your comment about how there is a lot of widely applied variation right now, and what your interpretation of the recidivism data is.

Putting aside for a second the recidivism data, which we look at and we may have different takes on what that data reveals, as we've already seen from the panel discussion, but one other important thing that I think the Commission is statutorily required also to look at is to try and minimize unwarranted disparity. And when we have judges, some judges, who are granting variances because of an overstatement of criminal history — you
know, particularly in circumstances where a particular offender has one prior that's counted up to four or five times — an overstatement of criminal history is, for a long time now I think ever since I've been on the Commission, the reason that's given most often for variances, or below-guideline sentences, whether it's a departure or a variance.

Compared to those judges who just follow the guidelines, creating an unwarranted disparity between defendants similarly situated, because some judges are viewing it as an overstatement, other judges are giving variances, and a lot of judges are giving variances for overstatement of criminal history, that is also empirical data based on the variances that we as a Commission should address.

There are different ways to address that overstatement of criminal history for circumstances where a single event can be counted one, two, three, four, five times. So do you think that where there are offenses that are counted that many times that, putting aside the recidivism data, that that is also a reason from what you call the empirically based
data in front of us that we should be sensitive to
and approach a solution to the recency issue by
thinking that that's something we need to address
that's also empirical data, the variance reasons are
also empirical data we'd be looking at as posing a
problem that we need to address?

MS. SMITH: Let me make sure I understand your question.

COMMISSIONER HOWELL: Well, it's just that people are talking about empirical data. Some people when they talk about empirical data they talk about recidivism data. Some people talk about — you know, it's a much-tossed-around term right now.

What's missing from that — and I'm trying to get a sense; it's something I've talked to Mr. Coffin about this morning — as part of that empirical, the review of empirical data that we're looking at, shouldn't we also be looking at variance in below-guideline rates?

MS. SMITH: I would definitely agree with that. I think inherent in any sentencing system that's advisory is discrepancy. And I think we can
look at it to understand where it's going. I'm not sure there's a lot that can be done about it, otherwise.

I mean, we can learn from it. But I'm not sure in an advisory system, from what I'm seeing, I'm seeing variances because someone's going to be deported so they get a downward departure, so they sit in jail less time. I'm seeing variances because someone's being held in a local facility that's less desirable than another local facility because of overcrowding. We don't have a federal pre-detention center.

COMMISSIONER HINOJOSA: In this case we are actually seeing — actually 4A1.3 is being used a lot by judges with regards to a departure. Criminal history over-representation is one of the Guidelines Manual departures that is actually being used quite a bit.

And so the question is, what message is that to us? Do we need to — isn't that part of what we look at as far as numbers? If part of our empirical data is the recency forms that we get, and
that therefore shouldn't we be looking at that to make some changes with regards to criminal history?
Or do we just let it sit there and pile up and pretend like nothing's happening?

MS. SMITH: You're asking me if I think that is essentially a message from the bench?

COMMISSIONER HINOJOSA: No. The point is, isn't that empirical data?

MS. SMITH: Sure it is.

COMMISSIONER HINOJOSA: And cannot the Commission rely on that?

MS. SMITH: Sure it is.

COMMISSIONER HINOJOSA: And isn't it then unfair to say that we don't have any empirical data at this point to make any decision with regard to this issue?

COMMISSIONER HOWELL: Because you're just citing your interpretation of one element of data, recidivism data, and there's lots of other data that you're not talking about, which is the variance rate.

MS. SMITH: You would absolutely have to consider all the data that you have, absolutely.
COMMISSIONER HOWELL: Thank you.

MS. SMITH: Sorry that was so difficult.

My apologies.

CHAIR SESSIONS: Ketanji is next. Go ahead.

VICE CHAIR JACKSON: Ms. Smith, I am interested in the interaction between the Department's position on the recency provision and its position on the alternatives. Because we heard testimony on a previous panel that substance abusers are more likely to re-offend, and re-offend quickly right after they get out.

And, you know, DOJ's position on recency seems to undercut the position on alternatives for low-level drug offenders who have this kind of cycling problem because those who are more likely to be helped by the alternatives that I understand DOJ endorses would also be more likely to be ineligible, or deemed ineligible, for those alternatives by virtue of the recency provision alone, because you could get in two points automatically as a result of this cycle.
So I'm just wondering. I don't know if you're authorized to comment on that interaction, but —

MS. SMITH: I'm actually probably not prepared to comment on the alternatives. It's not something I'm up on. But what I can tell you, in my experience I'm not dealing with drug offenders — with drug users. And I realize they're still out there in a lot of courts, but the ones that I see are the violent offenders.

VICE CHAIR JACKSON: As the recidivists?

MS. SMITH: As the recidivists, and as the one the day they get out of jail they strap on a gun and they're right back out there. Those are the ones that cause outrage for me, that cause what I see as the most public harm and the violence that is done.

That is where I'm coming from. And I can't comment to the alternatives and the interactions, I'm sorry.

VICE CHAIR CASTILLO: My question, Ms. Smith, and thank you for your testimony, goes back to Ms. Meyers' written testimony. Are you prepared — and
if you're not, that's fine — to comment on her looking at the empirical data, looking at in particular our AUC curve, and where it shows I think at page 92 and 93 of her testimony that the empirical research shows that recency points are not a reliable predictor of future criminal conduct, even when combined with status points.

Do you want to comment on that?

MS. SMITH: I understand that it is not a significant — that is my understanding, that it's not as significant as status, and that it is statistically insignificant in combination with everything. I do understand that that is what the study says. Not because of my own evaluation — I changed my major in college to avoid statistics —

MS. MEYERS: Me, too.

(Laughter.)

MS. SMITH: — I got lost in it, and my eyes clouded over, but I do acknowledge that there is that, absolutely.

VICE CHAIR CASTILLO: So that is something we have to consider along with your anecdotal
testimony —

MS. SMITH: Certainly.

VICE CHAIR CASTILLO: — as to what's going on in Baltimore.

MS. SMITH: And I believe across the country, along with a lot of places, and I believe the people we are most concerned about are not being impacted by recency, because that's not who we're prosecuting.

COMMISSIONER HINOJOSA: Ms. Brantley, you made the statement that you thought if it was limited to a case — that if we made an adjustment with regards to the recency points here with a situation where in Chapter Two we had had an SOC that increased the offense level based on that particular offense, that it would be difficult then to not have to worry about applying the recency points? Why would that make it difficult to factor in?

MS. BRANTLEY: Thank you for giving me the opportunity to clarify that. Here's what we talked about during our discussion and during our meeting, which is: If criminal history is calculated
differently depending on which Chapter Two offense we have to apply in that case, we worried about how we would deal, or even frankly if we would need to deal, with the possibility that the same defendant, the exact same defendant, the exact same criminal history, who is charged with an offense that brings him or her into Chapter Two [Part] L, versus for example that exact same defendant charged with an offense that would bring them under maybe Chapter Two [Part] B, that they could possibly have different criminal history categories. That's all.

COMMISSIONER HINOJOSA: That would be true, but then the [Chapter] Two [Part] B didn't have a big increase in the SOCs with regards to the offense level, which would put them at a much lower level when we go across the table to put them into the criminal history. So that would be the reason, because then you would have to keep in mind that in some cases we'll do this, and in other cases we won't do this.

MS. BRANTLEY: That is part of our discussion. But we also worried that that would become part of a litigation process, because we do
have offenders who are charged with more than one offense, including an illegal re-entry case. And there would not be a single criminal history score then.

COMMISSIONER HINOJOSA: Oh, you're concerned when there's two counts in a particular case, as opposed to — but normally wouldn't that be taken care of in what we do with multiple counts, that there are points added and you end up at a certain level, and then the criminal history category would still be considered?

I mean, you'd take care of it through the multiple-count calculations. Because we always end up with one offense level. We don't end up with two offense levels.

MS. BRANTLEY: I'm not sure I understood that.

COMMISSIONER HINOJOSA: Well whenever we have two counts, we have a way in the manual as to how we still end up with one offense level that applies to both counts. And then you have to — you know, the manual says run those concurrent, but you
add points depending on what the situation is. So you still wouldn't have two offense levels, or two criminal history categories, you'd have one offense level.

MS. BRANTLEY: With two criminal history categories.

COMMISSIONER HINOJOSA: And so once you factored it in, and even though there were two counts, it would still count as you've already factored it into the base offense level.

MS. BRANTLEY: If I'm understanding this correctly —

COMMISSIONER HINOJOSA: We could talk about this later. We're probably taking up —

MS. BRANTLEY: We would end up with one base offense level, or one offense level, but what do we do with the two, possibly the two criminal history scores, then.

COMMISSIONER HINOJOSA: Well you wouldn't end up with two, because once you've got the one offense level you've already — you've used the enhancement in determining that offense level, and so
you wouldn't have two criminal history categories;
you would just have one criminal history category
because you'd have one offense level to begin with
once you put them together.

MS. BRANTLEY: I think the fact that you
and I are having this exchange tells me that we would
see some difficulty in applying this.

COMMISSIONER HINOJOSA: Well it would be
the same kind of exchange I have with probation
officers in the courtroom, so you might as well see
it my way —

(Laughter.)

COMMISSIONER HINOJOSA: Or, I have with
the defense attorneys or the prosecutors.

(Laughter.)

COMMISSIONER HINOJOSA: This is simple.
Let's not make it complicated.

MS. MEYERS: Your Honor, I think actually
there is precedent for doing it in the relevant
conduct provisions where you don't count, in criminal
history points, the conviction that was relevant
conduct. That's messier and more complicated than
saying, oh, this prior conviction raised the offense
level.

MS. BRANTLEY: It's not simple, though,
because in the Ninth Circuit we have case law —

MS. MEYERS: Nothing's simple there.

(Laughter.)

MS. BRANTLEY: — but we have case law that
says certain things are not relevant conduct in the
illegal re-entry setting.

COMMISSIONER HINOJOSA: What I was hoping
you wouldn't say, and you didn't, is that it has
something to do with the documents, and that somehow
that would present a problem like it does with
regards to the prior history to a [2L]1.2, but that's
not an issue as far as you're concerned, right?

MS. BRANTLEY: Oh, that's always an issue,
but —

(Laughter.)

COMMISSIONER HINOJOSA: But not with
regards to the criminal history aspect of it?

MS. BRANTLEY: — I don't think this makes
it harder or easier, yes.
CHAIR SESSIONS: Commissioner Friedrich?

COMMISSIONER FRIEDRICH: Ms. Meyers, if I could follow up on a point you made earlier today, which is I think you indicated that a new offense occurring within a year of release is material in the sense that it's a good indicator of recidivism? Did I misunderstand you?

MS. MEYERS: No —

COMMISSIONER FRIEDRICH: A year, as opposed to two years. You made some distinction between —

MS. MEYERS: Well according — the Department of Justice has a report studying 1994 offenders that reflects that first year is where a lot of new offenses, or where recidivism is most likely to occur. Keeping in mind that recidivism includes violations of supervision and arrest. So it isn't necessarily conviction.

So my point is, I think similar to what I think Commissioner Jackson was talking about, is that period is the risky period, not because they're bad
people but because it's hard to re-enter. And to say
that somehow they're more culpable because they
haven't solved their drug problem isn't fair.

CHAIR SESSIONS: Well thank you. I
just have one response, or question of you,
Ms. Meyers. I noticed that you've taken a very
strong position in regard to drug treatment.
Obviously this proposal is the first representation
at any time anywhere that drug treatment was relevant
in terms of sentencing.

And the Federal Defenders feel so strongly
about this, I wonder if you can review your files and
forward to me any proposal that the Federal Defenders
have ever made in regard to guideline changes to
incorporate drug treatment?

Because I have been here for ten years, and
I don't think I've ever seen a proposal — but I may be
wrong. You may have proposed it before, but if you
could just review your files —

MS. MEYERS: I can tell you there's no
such thing. I don't think there is. And that's why
I say, I think we're thrilled that the Commission is
looking at it. But we want to honestly tell you that this proposal won't help any of our clients. And we're just afraid that if this proposal happens — if this is the first step, that's wonderful. If it's the end, it won't have helped any of our clients.

CHAIR SESSIONS: Okay. Well I appreciate your testimony.

MS. MEYERS: Thank you.

CHAIR SESSIONS: Thank you, very much.

MS. SMITH: Thank you. I do apologize for running over. I had no idea how long I spoke.

CHAIR SESSIONS: Ironically, you stopped just as it turned red — in fact I think you stopped before it turned red, as I remember. When she said "I noticed the light is yellow," I went, oh, no, I didn't know.

(Laughter.)

(Pause.)

MS. HACKETT: [Placing St. Patrick's Day ornamentation on the table] I wanted to dress with sufficient decorum, but my DNA requires me to wear the green somehow, so I'm just going to project that.
CHAIR SESSIONS: That's terrific. How can we look at you and ask you a serious question?

(Laughter.)

CHAIR SESSIONS: Well, welcome. First I want to introduce all three of you. Dave Debold is co-chair of the U.S. Sentencing Commission's Practitioners Advisory Group. He practices with Gibson, Dunn & Crutcher in appellate, Constitutional, and securities litigation, white-collar defense and investigations practice groups. Prior to joining the firm, Mr. Debold served as an assistant U.S. attorney in Detroit. He received his B.A. from Wayne State, his J.D. from Harvard. And, as always, welcome.

Next is Susan Hackett. It's going to be difficult to ask you anything here —

MS. HACKETT: I can take it down —

CHAIR SESSIONS: No, that's okay.

(Laughter.)

VOICE: You just get credit on your compliance program.

(Laughter.)

CHAIR SESSIONS: That's right. She is
senior vice president and general counsel of the
Association of Corporate Counsel. She joined ACC in
1989 and has held a number of roles and
responsibilities over the years. Prior to joining
that group, she was transactional attorney with
Patton Boggs in Washington. She received her B.A.
from James Madison College at —

MS. HACKETT: At Michigan State
University.

CHAIR SESSIONS: — at Michigan State
University, and a J.D. from the University of

And Karen Harned — is it Har-ned, or —

MS. KAREN HARNED: Harned.

CHAIR SESSIONS: Harned — has served as
executive director of the Small Business Legal Center
of the National Federation of Independent Business
since 2002. Prior to joining the Center she was an
associate at Olsson Frank & Weeda, in Washington,
where she specialized in food and drug law,
represented small businesses and trade associations
before Congress and federal agencies. She received
her B.A. from the University of Oklahoma, her J.D. from George Washington University Law School. And, welcome.

So, Mr. Debold, we will start with you.

MR. DEBOLD: Thank you, Mr. Chairman, and thank you members of the Commission.

I am pleased to have the chance to testify before you again this year on behalf of your Practitioners Advisory Group. Before addressing some of the particulars of the Chapter Eight items that are under consideration, I would like to take a minute to put them in context.

Chapter Eight of the Guidelines Manual differs in a significant way from the provisions that govern the sentencing of individual defendants. In contrast to the extensive body of case law that interprets and applies Chapters One through Seven of the manual, there are almost no judicial decisions that are specific to Chapter Eight.

There are probably three main reasons for this.

First, the government simply investigates
far fewer organizations than it does individuals.

Second, even in those instances where the government does take action, it often does so through nonprosecution or deferred prosecution agreements. And in those cases, there's no opportunity for a judge to assess the guideline calculation, to the extent one is even conducted in the course of those negotiations and agreements.

And finally, even in cases where there are convictions of organizations, the parties usually negotiate a plea that avoids any kind of ruling on how to interpret or apply the Chapter Eight provisions.

So although guilty pleas by individuals will still generate a large number of appeals and decisions interpreting the guidelines for individuals, the same has not been true for organizations.

As a result of this, the Commission receives very little formal feedback on the operation of Chapter Eight, certainly very little from judicial opinions. In other words, the Commission speaks through its provisions that it places in Chapter Eight,
but it hears very little back about how well it has spoken, including whether the provisions are easy to apply or result in appropriate sentencing ranges.

Practitioners are therefore left to apply those provisions without the benefit of case law that, by resolving ambiguities, might promote more consistent application.

That reality makes it very important in our view for the Commission to exercise even more care when it considers changing the language in Chapter Eight.

My written testimony includes the PAG's comments on each of the Chapter Eight proposals. Today I would like to cover the comments that are specifically related to the issue for comment.

The Commission has asked for comment on whether it should amend the manual to broaden the availability of a three-point reduction that applies if an organization has an effective compliance and ethics program. This reduces the organization's culpability score.

A disqualifier that applies if a high-
level personnel or substantial authority personnel was involved in the offense would be eliminated under this issue for comment if three conditions are met.

First, the individuals with organizational responsibility for compliance in the organization would need to have direct reporting authority at the board level.

Second, the compliance program must have been successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization.

And third, the organization must have promptly reported the violation to the appropriate authorities.

We applaud the Commission for its efforts to make this three-point reduction in the culpability score available in more cases. The Commission's data for fiscal year 1995 through fiscal year 2008, a 13-year period, show that a total of only three organizations have ever received this reduction, this three-point credit.

Now it's not possible to tell from the
publicly available data what accounts for the extreme rarity of this credit. Anecdotally we understand, and it's our experience, that the automatic disqualifier of high-level personnel was somehow involved or aware of or even just wilfully ignorant of the offense, will frequently stop the analysis on both sides as to whether the company had an effective compliance program.

The effectiveness disqualification is also felt well beyond the sentencing context for which the Commission has data. In negotiating NPAs and DPAs, the government frequently requires a payment of a hefty fine which it calculates by starting with a Chapter Eight fine range, and that range becomes a benchmark for gauging the final fine that will be imposed under these agreements.

So an organization that earns a lower culpability score, for example, through having an effective compliance program, will see its fine reduced accordingly.

The disqualifier based on the role of high-level personnel can do violence to proportionate
sentencing. Imagine two large corporations in a particular industry whose employees have colluded to fix prices. And assume that they are equally culpable in all respects except for two.

In the first corporation the employee who engages in the crime is able to carry out his scheme without the awareness or even willful ignorance of any one who is deemed high-level personnel.

At the other corporation, however, a single high-level person, the price-fixer's manager, ignores warning signs of the subordinate's criminal conduct.

The second difference to assume is that the leadership at the first corporation has steadfastly refused to put any sort of compliance program in place, despite being frequently urged to do so by outside counsel.

The second corporation, however, has implemented a state-of-the-art compliance program and invested millions of dollars, thousands of person-hours in making it as effective as possible. In fact, because of the systems that the second
corporation puts in place under the effective compliance program, that is what causes the wrongdoer's unit manager to receive warning signs of trouble that he ultimately ignores.

So even though the corporation with the effective compliance program is plainly less culpable, given all the efforts that it's put into place, it would get no credit under the current version of the guidelines for those efforts. The fine range would be calculated as if it had no compliance program at all, just like the first corporation.

And it would suffer that fate solely because of the willful ignorance of one person at a high level of personnel within the company. And even worse, it would get an aggravating adjustment because the compliance program had alerted the high-level person to the offense, while the corporation without the program and therefore no alert to the high-level personnel, would not receive that increase.

As a result, the company that has done the right thing could receive a significantly higher
Now the issue for comment suggests a revision that would help to avoid this anomaly, and we endorse adopting it with two changes.

First, we would not automatically disqualify a corporation whose compliance program vests a portion of the reporting authority with someone other than the person who has, quote, "operational responsibility for the program."

We believe that the Commission's current direct-report requirements for gauging whether a company has an effective compliance and ethics program are sufficient. In other words, the manual currently reserves effective compliance and ethics program credit for an organization where the individual or individuals that has operational responsibility reports periodically to high-level personnel and, as appropriate, to the governing authority, which includes an audit committee of the board of directors.

The application notes to this provision state that typically such reporting by the individual
or individuals with operational responsibility should occur no less than annually.

In our view, the manual therefore already strikes a fair balance on this direct-reporting issue. Rather than create a rigid dictate, it sets general requirements containing flexibility that's needed to account for the wide variations between the smallest of companies and the largest of multi-national corporations.

The details of a compliance program that might work well for a small, single-site manufacturing facility with 50 or fewer employees are not necessarily the same that would apply, or should apply to a large organization like AT&T or ExxonMobil.

We are also aware of no data that show that organizations that follow the reporting requirements from their compliance people to the board and the current manual are somehow failing in those responsibilities, nor have we seen any assessments of the advantages or disadvantages of changing that reporting requirement.
If the Commission's concern is that compliance programs meeting the current requirements are deficient, a better solution would be to create a presumption that the proposed new requirement suffices and then allow the defendant, or require the defendant to establish that it is unlikely that the new required reporting provision, the direct-reporting provision, would have produced a meaningfully different result under the circumstances.

This would have the advantage of preventing per se disqualification of organizations that acted appropriately in implementing a program, and for which greater direct reporting by an individual with operational authority would not have made a difference in that case.

The second and third proposed requirements in the issue for comment deal with detection and self-reporting of the underlying offense conduct.

The danger here is that the proposal would further exaggerate the value of self-reporting in comparison to other mitigating or other aggravating factors.
The manual has already what is in effect a three-point credit for a company that self-reports, as opposed to doing other things such as accept responsibility or cooperate.

So it is already fair to ask whether self-reporting, which gets three points, is really three times as valuable as full cooperation, which by itself gets one point and when combined with accepts responsibility effectively gets two points. That's under the current approach.

Under the approach that's being suggested in the issue for comment, the corporation with an effective ethics and compliance program would lose out on a total of six points on a scale that only runs from zero to ten if an imminent threat of disclosure of the conduct arises before the corporation finds itself capable of self-reporting.

The self-reporting credit gets a lot more emphasis under the suggested requirement in the proposal. There's no reason to place that much weight on a single factor, especially when the difference between a corporation that qualifies and
one that does not qualify can be as insignificant as waiting an extra day or two to marshal the relevant facts.

Indeed, a corporation could have the best compliance program and still not find out about the offense, or find out about it after an investigation was already underway, because the person with knowledge took the information to the authorities rather than reporting it within the compliance program.

It is important to note that during that same time period I mentioned earlier only 22 corporations or organizations have received credit for self-reporting. So again, it would put a lot of emphasis on one factor that is already pretty rarely granted.

If some aspect of self-reporting is incorporated, we would suggest that you focus on whether the corporation engaged in conduct that is inconsistent with compliance program credit. That formulation would place attention on whether the corporation's culpable conduct undermines its case
for receiving credit.

As I said at the outset, the Practitioners Advisory Group appreciates the opportunity to offer input not only on Chapter Eight but the other issues that are being raised in this amendment cycle, and we continue to look forward to working with the Commission in the coming months and years ahead.

CHAIR SESSIONS: Thank you, Mr. Debold.

Ms. Hackett, are you ready?

MS. HACKETT: Yes. Is that sufficient for your purposes [referring to the microphone].

ACC appreciates the opportunity to offer you our perspectives on the proposed amendments and the additional issue that is up for comment today, all relating to Chapter Eight of the corporate guidelines manual.

For those of you who are less familiar with the Association of Corporate Counsel, let me just introduce it briefly to you. ACC is the Bar Association for in-house lawyers. That means that our membership is limited to those who are employed to provide legal services within a corporate entity.
We were founded in 1982 as the American Corporate Counsel Association, or ACCA, and about five or six years ago changed the name to the Association of Corporate Counsel because of the increasing interest of our current membership in the U.S. in multi-national practice issues, and the increasing number of members who were outside of the U.S. as well.

We now have over 26,000 individual members working in over 10,000 public, private, and not-for-profit organizations in more than 70 countries. The vast majority of our members, however, are in the U.S. or working in multi-national companies that are subject to U.S. jurisdictional issues, and thus all of our members are very interested in the Guidelines Manual.

Many have direct responsibility for and the rest have indirect responsibility for the company's compliance programs, as well as the company's defense in the event of a compliance failure.

Because of the extremely large number of companies and industries represented in our
membership and the breadth and depth of our members' expertise across every substantive practice area and within every aspects of the company's management and compliance leadership structures, ACC is hopefully a representative voice of the in-house bar positioned uniquely to offer some relevant perspectives to the Commission's proposals.

An introduction to our comments and perspectives would be to share with you that we believe the impact of the messages sent by the Commission on what ACC members do to implement effective compliance programs on a daily basis cannot be understated.

Anecdotally I will tell you that in preparation for these comments today I heard from over 150 different organizations who responded within a month or so of a call going out asking if people had relevant comments, or were interested in reviewing drafts, and most of those companies participated actively in drafting these comments. I'm sure you now have great sympathy for me today with a 150-member drafting committee from a variety
of organizations out there.

But in our written statement we have
detailed a number of concerns in the proposals before
you today. That statement should now be with you. I
did not wish to, obviously, go through every one of
them in detail and will leave you at your leisure to
read through them.

I wanted to spend my few minutes with you
highlighting some of the concerns that seem to be the
most commonly raised, or that seemed to have the
greatest amount of impact, if you will, in the
members looking at the issues before us.

First, we would like in our verbal summary
to ask the Commission to consider adding additional
detail to the Commission's requirement that the
organization, quote, takes "reasonable steps to
respond appropriately" if criminal conduct is
detected, and to prevent further similar criminal
conduct, including making any necessary modifications
to the organization's compliance and ethics program
as detailed in §8B2.1(b)(7).

We suggest that the Commission consider
adding the following language at the end of that clause: "The need for, method, or appropriate extent of any of these measures will vary according to the circumstances and the relevant compliance challenges the company seeks to address."

Additionally, the proposed language in the same section includes the following statement: "The organization may take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications."

ACC believes that this language, while perhaps intentioned merely as an articulation of an option, by virtue of being singled out for recitation by the Commission may become a presumptive practice that companies are expected to consider or implement.

We suggest that the monitor reference be removed for reasons we fully articulate in our written submission, and that David Debold has also in his Practitioners Advisory Group memo covered most
eloquently.

We also request similarly that the reference to monitors in the probation proposals likewise be removed. We believe that the repeated insertion of a, quote, monitor option, unquote, into the Guidelines Manual suggests that the Commission sees the practice as some kind of best, or common practice that judges should consider quite routinely, rather than what we would see as a nuclear option that most folks who have ever worked in a situation involving a monitor would perceive it to be.

Secondly, we ask the Commission today to consider, or to reconsider the proposal suggesting that document retention policies are a good indicator of a specific conduct that evidences compliance commitment and high-level and substantial authority personnel when judging whether a company has an effective compliance and ethics program.

The Commission's proposals include two instances of bracketed language to clarify what is expected of high-level and substantial authority
personnel.

ACC is particularly concerned about new references to document retention policies in the bracketed language, and our comments focus on two concerns.

First, whether it is appropriate to judge the efficacy of a company's compliance efforts by whether its senior managers are responsible for companies' record-management programs — namely, asking the question: Is that really what an effective compliance program is primarily about?

And secondly, whether the Commission, if it truly thinks that record management is a bellwether of effective compliance programs truly meant to focus its attention on document retention as the sole-cited factor.

Essentially ACC believes that §8B2.1 places too much emphasis on one specific element of a corporation's operations, and chooses for that emphasis a corporate function — namely, records management — that is not even primarily related to corporate compliance initiatives.
Further, passing the topic of records management with the wording "document retention" creates an implicit belief that the Commission is interested in strong document retention policies, rather than good records management, which also includes setting policies for that which is to be retained, as well as that which is to be destroyed, archived, retrieved, or better managed.

One could infer from the Commission's proposed language that the Commission believes that the company that is engaged in effective compliance keeps everything forever.

Of course the ability to produce all responsive and relevant documents related to a legal or compliance problem is certainly very important, but those needs sit on top of the larger corporate interest in managing data and records generally and those are ancillary to a company's overall document requirements and burdens.

It is unlikely that most people in the corporate world would consider records management and responsibility to be so closely linked in terms of
overall compliance program success by legal compliance or executive management.

We would suggest that these concepts therefore be decoupled and referenced to document retention policies removed from the guidelines.

If the Commission decides that there is a need to reference records management issues in the guidelines, ACC requests that it not be so closely tied specifically to document retention, and that your focus should be properly placed not on defining what appropriate record management tactics are but rather on sound and enforceable document-hold policies that could be more appropriately related to legal and compliance efforts.

Thirdly, we ask that the Commission consider our thoughts on the issues set out by the Commission for comment regarding encouraging self-reporting.

The Commission asked interested parties to address whether the Commission should allow an organization to receive the three-level mitigation for an effective compliance program, even when high-
level personnel are involved in the offense.

The draft offered for comments proposes three conditions for receiving the credit. We wish to address two of them.

First though let us say that ACC supports efforts by the Commission to make the three-level mitigation more available in more cases.

As to the condition, however, that the company must be able to evidence direct reporting authority to the board for the individuals with operational responsibility for compliance in the organization, we think the concept has merit but the wording is flawed.

The term "direct reporting relationship" is not well defined and is subject to broad misinterpretation in the corporate context, if what we're understanding is the Commission's intent to be that they want to make sure employees with concerns get to share those concerns with the board if they're not getting action in the company.

But within a company, a reporting authority has to do with the company's organizational
chart and who supervises whom, as in to whom do you report.

The term describing the targets of this proposal as those with operational responsibility for compliance, is also ill-defined in the corporate context and could lead to problems. Who are the individuals who have operational responsibility for compliance in any given company?

Does this mean persons with some, or any level of compliance responsibility in their jobs or on their teams?

Is this person the chief compliance officer?

How does one define who the person with operational authority is in a company that does not have a formal compliance function?

ACC suggests that what is important in this proposal is that the board has access to reports from concerned employees, and that concerned employees can be assured that their concerns will reach the board if they're valid.

Thus, the Commission might better assert
that an effective corporate compliance program must be able to evidence some kind of effective communications procedure.

The guidelines should not dictate reporting details or whom the appropriate and responsible leader must be, but rather should seek to assure that there are accessible lines of communications established that allow both concerned employees and the board the confidence that the company's systems will assure that the board hears concerned employees with important stories to tell.

The last of the three requirements is also of concern to ACC: that the organization seeking credit promptly reported the violation to appropriate authorities.

This criterion is an appropriate consideration in theory, but as written this language may impede the ability of a company that has done what it should to prove that it now should receive credit for its efforts.

It is rarely clear when a problem surfaces whether the company has a problem or not. It is far
more likely that something is overheard by someone,
or doesn't look right in some kind of a report or
document; maybe in a few days, or a few weeks,
someone with whom this particular irregularity has
been shared, likely some place like the proverbial
water cooler, will then make a decision to raise this
issue to his or her superior.

Then it takes time to get the issue from
the superior to a responsible person with compliance
or legal responsibilities who can then consider how
to investigate the concern and respond to the person
who raised the concern.

If there is a legitimate concern to be
raised, whoever is investigating the issue needs to
put something together that is credible and
sufficiently documented to allow the company's
leaders to decide if this is an offense that needs to
be reported to the government, and that process takes
time.

Taking adequate time to investigate a
concern that is raised should not be punished under
the guidelines. From the 20/20 hindsight perspective
of a judge who now knows that a failure did occur,
the actions of the person who didn't know if a
problem existed some months, or maybe even some years
back, may not seem expeditious upon review.

CHAIR SESSIONS: Ms. Hackett, your time
is up, if you can just wrap up?

MS. HACKETT: Sure I will. Thank you.

ACC believes that best thinking in
corporate legal compliance and the methods by which
companies can assure compliant behaviors are changing
in important ways.

Today it is increasingly likely that
compliance is a shared business and legal
responsibility between in-house lawyers and many
others in the company at all levels of leadership,
from the C suite to the line worker.

In a growing number of substantial public
companies, and in highly regulated industries, it is
more common to see the growth of a separate
compliance and ethics department that reports outside
of the legal department's line of authority and
coordinates with legal to create innovative and
business organized teams focused on particular tasks
or assuring behaviors.

What we see as the necessary result in
this expansion of thinking and what constitutes the
structure and format of effective compliance programs
and best practices is the creation of a broader array
of leading practices designed for particular
purposes, and thus we encourage the Commission to
focus therefore on the outcomes they wish the company
to achieve and not necessarily on particular tactics,
practices, or formats that those kinds of companies
must employ in order to achieve effective compliance.

Thank you for the extra time.

CHAIR SESSIONS: Okay. Thank you. All
right, Ms. Harned.

MS. KAREN HARNED: Thank you for inviting
me to provide comments regarding the Sentencing
Commission's proposed changes to its Chapter Eight of its

My name is Karen Harned, and I serve as
executive director of the National Federation of
Independent Business, Small Business Legal Center.
We are the legal arm of NFIB. NFIB is the nation's leading advocacy organization representing small and independent businesses. NFIB's national membership spans the spectrum of business operation ranging from sole proprietor enterprises to firms with hundreds of employees.

While there is no standard definition of "small business," the typical NFIB member employs ten people, and has gross sales of roughly $500,000 a year. The NFIB members is a reflection of American small business, and I am here today on their behalf to share a small business perspective with the Sentencing Commission.

The vast majority of small business owners treat their employees and customers like their extended family. They work hard to do what is right, but their informal and unstructured nature and more limited financial resources mean that sometimes they are going to require greater flexibility in creating policies and solutions.

Today I will provide insight into how
small businesses differ from larger corporations and, as a result, areas where we think the sentencing guidelines could be improved to account for those differences.

Proposed changes to §8B2.1,

Application Note 3, Subsection (b)(2):

First, the proposed amendment to Application Note 3 on the Application of Subsection (b)(2) would require that both high-level personnel and personnel with substantial authority know the organization's document retention policies.

We question the need for this language, given that document retention is already part of an effective compliance program. We are concerned that inclusion of language that requires knowledge of specific policies will undermine small organizations' abilities to adopt less formal policies as they are currently allowed to do, as we understand it, under Application Note 2(C)(iii).

Small businesses are less likely than large organizations to have written and formally adopted policies, including document retention
policies. However, the lack of a written policy does not mean that the small business owners don't take these issues seriously.

Take for example one of the most basic policies a small business can adopt, an employee leave policy. An NFIB survey of small business owners shows that only ten percent of small businesses have a written family leave policy, and only 13 percent have a written medical leave policy.

Despite the lack of written policies, 93 percent of small business owners granted the last request for medical leave. The other seven percent reported that they were able to resolve the employee's request for time off some other way.

If only ten percent to 13 percent of small business owners have formally adopted something as simple as an employee leave policy, it is highly unlikely that they will have written policies for more complicated areas like document retention.

Instead, a small business is likely to have adopted a simple, informal policy that is likely to be over- rather than under-inclusive.
For example, take the hypothetical used book store. The store's informal policy is to retain all financial records for ten years, but this policy has never been written down. The policy was adopted by the store's part-time bookkeeper after a brief consultation with the owner. The bookkeeper maintains the records and periodically audits the books to ensure that the store retains all financial records.

This would be typical of how small businesses make decisions about how to retain their records. Under the proposed amendment, if the store's manager, who has substantial authority to make purchases and manage staff, was unaware of the unwritten ten-year document retention policy, the business could be ineligible for mitigation even if all documents were in fact retained for ten years by the bookkeeper.

The same result could occur if the owner later forgot the exact retention policy he had adopted with the bookkeeper, even if the policy was currently being enforced.
An amendment that would better serve both small and large organizations would be to eliminate this all-or-nothing approach to effective compliance and ethics programs. Instead, adopting a sliding scale that allows reductions based on the degree to which an organization satisfies the ECEP criteria in §8B2.1.

Under the current system, an organization that meets six of the seven requirements for an effective compliance program receives the same mitigation as an organization that meets none of the requirements. This is an unduly harsh penalty and it creates a disincentive for an organization to implement critical parts of a compliance program.

Second, the amendments would add a new application note interpreting subsection (b)(7). This application note requires that the organization pay restitution to victims and strongly encourages self-reporting.

We are concerned that this additional language undermines the flexibility organizations currently have under subsection (b)(7) to adopt an
appropriate response to potential violations.

Small business owners do not have the same access to corporate counsel, regulatory experts, and investigators that the larger corporations do. A survey of small business owners found that one out of every five — I'm sorry, that's not right — two out of every five small businesses consulted an attorney for advice about their business in the past 12 months.

Small business owners may not even know that their company is criminally liable for a violation by an employee, particularly in a malum prohibitum offense.

Small business owners are most likely to discover new rules by stumbling across them in the ordinary course of business. Eighty-two percent report discovering new rules this way. Once they become aware of a new rule, 62 percent research the rule themselves, and only 21 percent use an outside expert like an attorney to research the rule.

A 2005 report on the organizational sentencing guidelines by the Association of Corporate Counsel found that small organizations were
sentenced disproportionately under the guidelines.

One reason cited was that small organizations are less likely to have a counsel on hand to advise them of the benefits of self-reporting and cooperation.

Often it may not be clear whether a criminal violation has even taken place. There may be some evidence that is only available to the government or to third parties. In these cases it may not be possible for an organization to determine on its own that a violation has occurred, triggering the need to self-report.

And with respect to the payment or restitution, it may be very difficult for a small organization to determine who the victims of the crime are, and what the appropriate loss amounts are, let alone have the financial resources to make full restitution to a victim before sentencing.

My experience working with small business owners does bear this out. They want to do what is right, but they also do want to protect their legal rights. A typical small business owner who discovers a violation is likely to take steps to prevent
reoccurrence, and also to make restitution to possible victims. However, they are unlikely to self-report, especially in cases where they lack the sophistication to determine with certainty that an illegal act has occurred. Small business owners who take appropriate remedial actions should not be punished for failing to self-report a potential violation.

The proposed amendment to Application Note 6, Application of Subsection (b)(7) undermines the flexibility organizations are currently allowed in crafting an appropriate response under subsection (b)(7). A similar problem is seen in 8C2.5(f)(2) which denies mitigation points if an organization does not promptly self-report. The flexible language 8B2.1(b)(7) and §8C2.5(f)(2) should be retained. The proposed application note should, instead, state that restitution and self-reporting may be part of an appropriate response. 8C2.5(f)(2) should also be amended to adopt the more flexible language of
For example, take a hypothetical small company who provides web design services to businesses throughout the country. A routine billing audit reveals that one developer has engaged in a systematic program of over-billing clients for development time in an effort to pad his own paychecks.

Upon discovering this, the business terminates the rogue developer, institutes new policies that require the sales manager to verify all development time, and issues refunds to all of their affected clients.

Under the current rules, if the employer did not take the additional step of self-reporting the fraudulent billing to the authorities, they would be ineligible for mitigation.

Third, the Commission has requested comments on proposed amendment 8C2.5(f)(3). This amendment would allow sentence mitigation even when high-level officials are involved if the chief compliance officer reports directly to the board of
directors.

Our concern is that, as proposed this mitigation would not apply to many small businesses. Small business organizations often lack the rigid internal structure of a corporation. Roughly half of small businesses are organized as either a proprietorship, partnership, or LLC. For these organizations, there is no board of directors and no hierarchy of chief officers and executives. Instead, the owner or managing partner has likely taken on the informal role of chief compliance officer.

We support the idea of allowing sentence mitigation in these types of cases. However, in order to be applicable to all business organization, the amendment should allow mitigation when those with operational responsibility for compliance report directly to an owner, managing partner, or someone with general management authority.

Again, we recommend removing the strict self-reporting requirement and replacing it with a more flexible standard. An organization that detects
a potential offense should be allowed to respond by
taking appropriate actions.

Appropriate actions may include making
restitution, taking steps to prevent reoccurrence,
and possibly self-reporting to the appropriate
authority.

Thank you for letting me comment today,
and I hope that this has led you to understand more
the differences that we experience as small business
owners, as opposed to our larger counterparts.

CHAIR SESSIONS: Thank you, Ms. Harned.
So let's open it up for questions.

Commissioner Howell?

COMMISSIONER HOWELL: Yes. Thank you all
very much for your very helpful comments. We always
like to hear from everybody, but particularly from
small businesses because our statistics do show that
most of them organizations sentenced under Chapter Eight
are, by virtually 90 percent, have fewer than 500
employees. So it is very helpful to hear your
comments about how we can make Chapter Eight more
flexible and useful in terms of guidance for smaller
Ms. Hackett, you know I appreciate your comments that for the seventh minimal requirement your organization members thought it would be helpful to have additional guidance on what the seventh minimal requirement means by "the organization shall take reasonable steps to respond appropriately to the criminal conduct."

In fact, for the seventh minimal requirement for an effective compliance program there is no application. That was part of the reason our proposed amendment adds for the first time some application to help explicate what the Commission has in mind by that requirement. It's really a two-part requirement for an effective compliance program, not just responding to the criminal conduct appropriately when it's been detected, but then also in addition fixing the compliance program, to the extent there were gaps in it.

Our Practitioners Advisory Group, whom we depend on regularly in every amendment cycle, has suggested language that would revise our proposal for
an application note to that provision, and I wondered
whether you had had time to look at it?

MS. HACKETT: We have taken a look at it.

We did not have a consensus as to whether or not the
language did the job, if you will. If you are
willing and able to allow us to, we would love to
have the opportunity to send you, once more a
consensus could be joined, or even reports of
alternate perspectives.

COMMISSIONER HOWELL: That would be much
appreciated.

MS. HACKETT: We would be very pleased to
have that opportunity.

COMMISSIONER HOWELL: Right. Because I
mean I think that the Practitioners Advisory Group,
as always, has pointed out I think quite constructive
comments on the language that we proposed, and to the
extent that their language proposals are amenable to
your membership, as well as yours, it would be very
interesting to hear your comments on that proposed
language.

MS. HACKETT: We are pleased to be asked.
Thank you.

CHAIR SESSIONS: Just before you go on, you should know that any submissions that you want to make should be done quickly, as we vote in early April. So, not to put you under the gun —

(Laughter.)

MS. HACKETT: I'll just turn to David.

(Laughter.)

CHAIR SESSIONS: Just copy what he has to say. He doesn't need to respond —

(Laughter.)

MS. HACKETT: No, I would be happy to do so. We did receive actually quite a lot of different ideas there, and that was one of the difficulties in drafting this, was trying to find a consistent voice that we could truly say represented the Association's position. But what I hear you saying is that maybe the submission of a variety of voices could be just as helpful, even if it wasn't ACC's articulated position, but things that we have collected from people in the field who might be able to inform your process as well.
COMMISSIONER HOWELL: Well don't misunderstand me, because I think to the extent that you can, with your hard labor —

MS. HACKETT: Synthesize?

COMMISSIONER HOWELL: — synthesize and create a consensus among your group, that would be great.

MS. HACKETT: We will do our best. I thank you for that opportunity.

COMMISSIONER HOWELL: And Dave Debold has started with I think a really good starting point on changes.

MS. HACKETT: Yes.

COMMISSIONER HOWELL: I appreciate that all three of you are fairly supportive of the Commission's attention to expanding the eligibility for the three-point reduction in the culpability score for having an effective compliance program; but that you have concern over the conditions that the Commission is setting for expansion of that eligibility when a high-level individual is involved.

I mean, other than — if I can approach this
from, rather than criticizing the conditions that we set, what conditions do you think would be appropriate for that expansion?

I mean, as it currently stands now and has since the organizational guidelines were issued, the involvement of a high-level person has always been a disqualifier for getting this reduction because it means that the tone at the top for having an effective compliance program has been set because a high-level person has been involved, and so you don't deserve the three-point reduction in your culpability score.

If we are going to expand it, even when there's a high-level involvement, what conditions do you think would be appropriate, if any?

MR. DEBOLD: Well in our comments we were mostly reacting to the proposal from the Commission, or the description of the issue for comment.

I mean, we really do not see a need to have additional requirements if you take away the requirement, or take away the disqualifier for high-level personnel. And the reason is, high-level
personnel, especially in a large company, can cover a wide number of people, including somebody who is high-level within a unit of the corporation.

And that does not necessarily mean that the company has a defective compliance program, or an ineffective compliance program. There's always going to be the risk that you're going to have one or more people who is not with the program, if you will, and you're going to also always have — and remember that the disqualification applies not just if they're involved, but also if they were willfully ignorant, which is more than negligence, but nonetheless it doesn't take much for one person in a company to basically ruin the credit for the entire corporation by having willful ignorance, or willful blindness.

So we don't think that the other requirements that you propose are necessary. That said, we have proposed ways to address some of the concerns with them. The last aspect of it, which is the self-reporting thing, what I didn't get a chance to say in my oral testimony but it's in the written testimony, is that you might consider making it more
of a — if the corporation has done something that's inconsistent with this credit in the area of self-reporting, in other words they did become aware of the problem, because they don't always become aware of it before the government does, and nonetheless for no valid reason they failed to report it to the government, then might deny them the credit because that might be inconsistent with having an effective compliance program.

You know, if you discover the problem, you ought to report it. If they haven't discovered it, then they can't self-report it. So having a self-reporting requirement in a second place now in the guidelines we think is unnecessary.

COMMISSIONER WROBLEWSKI: Can I follow up on that?

CHAIR SESSIONS: Yes.

COMMISSIONER WROBLEWSKI: I'm not an expert on compliance programs or organizational liability, so I apologize in advance if I say something that just seems foolish to you, and please let me know if you think so, but my understanding of
organizational criminal responsibility to begin with
is about not that the leaders of the organization
necessarily were involved, somebody else committed a
crime, but that there was a leadership breakdown;
that that's why we have organizational responsibility
as opposed to just individual responsibility.

Now we also have a provision that we say
we want organizations — one of the ways they show
leadership is to have an effective compliance
program. Now obviously if you have a crime
committed, the program hasn't been effective, by
definition, initially.

But then, but we're saying, and the
Commission has always said, that when the leaders
themselves of the organization are involved in the
criminal conduct, we don't care about the effective
compliance. As you say, it's a disqualifier, because
if there's a compliance program and they're told to
report to the leaders and the leaders are involved in
the criminal conduct — and I know this is overly
simplistic but this is the way I'm looking at it — and
they report to the leaders, that program almost by
definition is not effective.

And so what I think one of the things the Commission was looking at here was to say, look, maybe we need to broaden it down and say it can be effective if the people who can identify the problem are going to report to people who are not the wrongdoers, so directly to the board of directors.

If we take that out, if we take that limitation out, and take the small business example that you specifically mentioned, Ms. Harned, which is you have a small business. The leader of the organization is involved in the criminal conduct, or willful blindness, is the compliance officer for the program — how in the world can we say, how can we set up a system that says that actually is an effective compliance program unless we have some sort of report around that leader to somebody else who is independent?

MR. DEBOLD: Well your question I think does in some ways make it a little bit too simplistic, because high-level personnel, which is the disqualifier, covers a broad number of people,
not just the CEO or the top people who are the highest level officers of a company.

You can have a company where there is one individual among these high-level personnel who has gone off the reservation, or is not doing their job and is willfully ignorant of something that is going on below them, and still have an effective compliance program that won't necessarily pick that up because other people are not — who, you know, under the program would properly report it, are not aware of it.

And so that's where you get into the problem of saying your program, even though it's not perfect, and the guidelines recognize that by definition it doesn't have to be perfect because the corporation wouldn't be up for sentencing if it was perfect, the guidelines already recognize that an effective compliance program doesn't have to be perfect. And in the situation here, a judge could still look at the program and say, even though there's one individual who's at a high level, who was involved, or was willfully ignorant, we still like
the fact that the corporation went to the effort of
putting a program in place, and it's an effective
program by all the standards set forth in — you know,
there's seven requirements in the manual — and so,
yes, you committed a crime, somebody on behalf of the
corporation, as an agent of the corporation,
committed a crime that the corporation can be
prosecuted for, but we're going to give you a lower
sentence because you did go to the trouble of putting
together one of these programs.

That's the difference. And that's why,
even though one high-level person may have been
involved, you still ought to be able to look at the
corporation and say it's different from the
corporation that had no compliance program at all.

MR. DEBOLD: But don't you think at the
very least that program, to be considered effective,
has to have some sort of mechanism to report around
the high-level person who was willfully blind, in
your example?

COMMISSIONER WROBLEWSKI: But you're
assuming that that high-level person is standing in
the way of the reporting in that corporation.

MR. DEBOLD: I'm not assuming that. I'm just saying, shouldn't it be a requirement that there's a way around that for the reporting? If it's not standing in the way, you don't have to worry about it; but if it is standing in the way, then shouldn't there be a way around it?

COMMISSIONER WROBLEWSKI: Well I think the way it's set up now, it does reward companies — the way the guideline is written now — rewards a company where people can report to the compliance officer, and the compliance officer, through the hierarchy, can get the information to the board with occasional reporting to the board as set forth in the application note. That doesn't mean that there is some — that all these high-level personnel who might conceivably be involved in the crime are somehow standing in the way of that being reported.

I think the way it's set up now you don't have that kind of a problem to try to work around.

CHAIR SESSIONS: Are you done?
COMMISSIONER WROBLEWSKI: Yes.

CHAIR SESSIONS: Does anyone else have any questions?

(No response.)

CHAIR SESSIONS: Well, we're right at a quarter of just about, so right on time. So thank you very much for coming and testifying. I appreciate the green.

MS. HACKETT: Happy St. Patrick's Day to all of you.

CHAIR SESSIONS: Thank you.

Let's take a 15-minute break. We will reconvene at four o'clock.

(Whereupon, a recess was taken.)

CHAIR SESSIONS: Unbelievable, we're actually starting right on time. So thank you for coming.

Let me begin by introducing the panel.

First, Tim Mazur is chief operating officer of the Ethics & Compliance Officer Association. He has previously served as vice president, ethics, at Countrywide Financial Corporation; and regional
ethics and privacy officer for Blue Cross/Blue Shield in Colorado. He began his career in ethics and compliance as a consultant working with KPMG, the Council for Ethics in Economics, and the Ethics Resource Center. He received a B.A. in political science from San Diego State University; and a masters, an M.B.A. from George Washington University.

Next, Patricia Harned — are you related to the previous?

DR. PATRICIA HARNED: We are, but we've never met before today.

CHAIR SESSIONS: Really? Are you going to have a family gathering?

DR. PATRICIA HARNED: We are.

(Laughter.)

CHAIR SESSIONS: Or establish a relationship.

DR. PATRICIA HARNED: We'll draw a genealogical tree once we're done here.

(Laughter.)

CHAIR SESSIONS: I mean, it is not one of the names that you see on a regular basis, so it
must be something.

DR. PATRICIA HARNED: You've made a

contribution to the Harned family today.

(Laughter.)

CHAIR SESSIONS: Ms. Harned was named

president of the Ethics Resource Center in 2004. Dr. Harned's recent research activities include directing

the 2007 National Business Ethics Survey, ERC's

comprehensive measure of ethical conduct and

employee attitudes, and its companions, the 2007

National Government Ethics Survey and the National

Nonprofit Ethics Survey. Dr. Harned serves as a

member of the Standing Advisory Group of the Public

Company Accounting Oversight Board. She also serves

on the editorial board of the Public Integrity

journal. Dr. Harned holds a bachelor of science in

education degree from Elizabethtown College in

Pennsylvania, a masters of education from Indiana

University; and a doctorate in philosophy of

education from the University of Pittsburgh.

Welcome.

Next, Joseph Murphy is director of public
policy for the Society of Corporate Compliance and
Ethics. He is president of Joseph E. Murphy, P.C., a
firm specializing in compliance and ethics advice to
companies and other organizations, and of counsel to
Compliance Systems Legal Group. Previously
Mr. Murphy served as senior corporate compliance
attorney for Bell Atlantic in Philadelphia; as an
associate with Wolf, Block, Schorr and Solis-Cohen.
Mr. Murphy received a B.A. from Rutgers, a J.D. from
the University of Pennsylvania Law School. Welcome.
So let's begin, Mr. Mazur, with you.
MR. MAZUR: Thank you.
Chairman Sessions and distinguished
members of the Commission, thank you for inviting me
to represent the Ethics and Compliance Officers
Association, or ECOA, and its members to discuss
the proposed amendments to Chapter Eight of the
Guidelines Manual regarding the sentencing of
organizations.
The ECOA is a founding leader of the
ethics and compliance field and serves as the sole
association exclusively for ethics and compliance
officers and members of their teams around the world.

The ECOA's more than 1100 members — including the largest number of ethics and compliance officers in any organization worldwide — span hundreds of organizations from the largest multinational corporations to city, state, and federal government agencies, to medium- and small-sized businesses, to nonprofit organizations. They are located in 25 countries but represent employees in over 200 nations. In fact, our executive director, Keith Darcy, likely would be sitting in this very chair today if he weren't traveling from Malaysia to South Korea as he meets with Asian ethics and compliance leaders.

One of the best qualities of the ECOA is the diversity of our members' professional backgrounds. While early compliance programs were led only by attorneys, the modern field of ethics and compliance draws from many domains.

This evolution reflects the fact that excellence in ethics and compliance requires that the E&C team possess or have access to not only legal
expertise but organizational development, audit,
program planning and evaluation, communications,
organizational behavior, and many other functions,
including business ethics, which is my area of
expertise.

I have worked in ethics and compliance for
23 years, including stints as an ethics officer at
two Fortune 500 corporations, before joining ECOA's
leadership team in 2006.

On receiving your proposed amendments in
January, the ECOA surveyed our members' opinions on
each proposal and the issue for comment. We are very
pleased with the number and detail of responses they
offered. It is with these results in mind that I
deliver the following comments.

Note that it would take longer than my
allotted ten minutes to fully address all the issues
associated with each proposed amendment. Therefore,
what follows are brief comments on the most important
issues. We offer greater detail, including alternate
language, in our formal written submission.

First, many ECOA members support the
proposal that amends the Commentary to 8B2.1
clarifying the remediation efforts required to
satisfy subsection (b)(7). Regarding monitors, our
members prefer language akin to an independent,
qualified third party to distinguish between a
voluntary decision to engage an independent verifier
and a court-ordered mandate to hire a monitor.

Second, also regarding the Commentary to
8B2.1, the ECOA supports the Commission's efforts to
hold high-level and substantial authority personnel
to high standards regarding knowledge of E&C risks,
though there is concern over the decision to
highlight only document retention. While there is
broad agreement on the importance of document-
retention policies, and records management in
general, we believe that emphasis on this one risk
could motivate disproportionate attention compared to
more important risks. Fifty-six percent of our
survey respondents disagree with the proposed
addition to the Commentary that high-level and
substantial authority personnel "should be aware of
the organization's document retention policies."
while 13 percent remained neutral on the amendment.

Third, many ethics and compliance officers support the amendment to Application Note 6 which clarifies that, when an organization periodically assesses the risk that criminal conduct will occur, the "nature and operations of the organization with regard to particular ethics and compliance functions" should be included among the other matters addressed. That said, they again disliked — that is, 79 percent did not support — the special focus on document retention policies. When asked what policy, if any, should merit special attention in the commentary, the most common response was the code of ethics or a similarly named document, since that collection of standards is comprehensive and includes all the risk-related policies that the organization has already determined should be read by all employees.

Fourth, it may not surprise you that what attracted the most attention from ECOA members was not one of the proposed amendments but the issue published for comment — namely, whether to encourage direct reporting to the board by responsible ethics
and compliance personnel by allowing an organization

to benefit from a three-level mitigation of the
culpability score, even if high-level personnel are
involved in the criminal conduct.

Respondents to our survey overwhelmingly
support this idea, with important qualifications. At
the top of their list of concerns is the need to
clarify what "direct reporting authority" means.

We respectfully ask the Commission to
clarify that this phrase means that the individual
with operational responsibility for ethics and
compliance must regularly provide reports to the
board of directors and have unrestricted access to
report to the board any ethics and compliance
concern.

Their next qualification responds to the
requirement that, to earn credit the program must
successfully detect the offense prior to discovery or
reasonable likelihood of discovery outside the
organization.

While ECOA members responded favorably to
the spirit of this requirement, they are concerned
that it could, as written, become a loophole that undermines their efforts. They fear that the organization could have an excellent E&C program that deserves the credit, but could lose the credit if, for example, an employee first describes the offense to a spouse or a friend before contacting the ethics officer.

To the extent your issue for comment calls attention to the relationship between the ethics and compliance program and the board, the ECOA asks the Commission to seriously consider pursuing a goal that the U.S. Securities and Exchange Commission achieved with its requirement that boards meet or exceed a minimum standard for financial literacy.

With the support of 72 percent of our survey respondents, we believe that, for the same reasons motivating that SEC response to the Sarbanes-Oxley Act of 2002, the federal sentencing guidelines should support a requirement that boards of directors meet or exceed a minimum standard for ethics and compliance literacy.

Some may feel that 8B2.1(b)(4) already
motivates board-level training, but in practice it doesn't, given that most organizations perceive the current language to simply mean that they must train their employees yet need only communicate to their board.

Given the power and influence of boards with regard to program oversight, as well as the growing complexity of ethics and compliance issues, we assert that mere periodic communication to the board is insufficient and that board-level ethics and compliance training should be required.

In conclusion, the ECOA thanks the Commission for setting aside time and other resources to periodically update the guidelines. I know personally that many valuable lessons are learned every day in ethics and compliance programs across the United States. The best of these are reflected at ECOA events, and should continue to be incorporated into your periodic updates.

As the standard bearer for the integration of ethics into compliance programs, the ECOA asks you to consider that the best path toward achieving the
goals of the guidelines is to pursue every
opportunity to motivate ethical behavior rather than
solely require compliant behavior.

A final point comes from the recent study
by the Conference Board, entitled “Ethics and
Compliance Enforcement Decisions: The Information
Gap.”

Evidence demonstrates that what is most
needed to achieve the goals of the guidelines is
stronger proof that making the effort to honor the
letter and spirit of the law truly does matter to the
U.S. government.

This concludes my prepared remarks. Thank
you again for this opportunity to contribute to the
hearing, and thereby to your decision making. Please
know that the ECOA and its members stand ready to
assist the Commission in any way.

CHAIR SESSIONS: Thank you, Mr. Mazur.

Ms. Harned?

DR. PATRICIA HARNED: I'll turn this
microphone so you can hear me. Is that sufficient?

Okay. Thank you.
First, Michael Oxley, our chairman, asked me to offer his regrets that he was unable to be here. He's the person that's formally listed on the agenda, but I'm the president of the Ethics Resource Center, and I am very grateful to be able to be here in his stead. Thank you so much for the opportunity for us to offer our remarks.

First let me take a moment and tell you a little bit about the Ethics Resource Center. We are the country's oldest nonprofit organization dedicated to the advancement of high ethical standards and practices in public and private institutions.

We are a research organization. And based on that focus, we have created objective benchmarks to measure the effectiveness of ethics and compliance programs.

We are probably best known for our National Business Ethics Survey, which we field every two years to represent the U.S. workforce in their perspectives of ethics in the workplace. We drew on the results from the 2009 study from NBES to comment on some of the proposed amendments by the Commission.
In 2007 we also published a paper called "Leading Corporate Integrity: Defining the Role of The Chief Ethics and Compliance Officer." It is also relevant to today's discussion. I should point out that the two organizations with me participated in that effort, and I'll come back to what that paper represented. In fact, Joe Murphy was one of the major contributors in authoring that paper.

ERC specifically commented on three specific points proposed for Chapter Eight. The first pertains to reasonable steps after criminal conduct is detected. Overall we were very supportive of the Commission's effort to try to clarify what constitutes "reasonable steps." That is for one primary reason.

We have seen in our research consistently that misconduct is widespread in organizations. In 2009, our National Business Ethics Survey showed that nearly one in two employees in the past year observed some form of misconduct taking place in their organization.

Now our measures go beyond just criminal
activity. We also asked if they observed conduct that violated an organization's code of conduct. But consistently we have seen that every organization will eventually be in a position of detecting some form of criminal misconduct, and that's why the Commission's efforts are so important.

Our specific comments in that section pertain to the suggestion that after remediation an organization should assess its ethics and compliance program. Again, we think this was an essential suggestion, but we also think that the language doesn't go far enough.

Following the detection of criminal conduct, organizations should not only assess their ethics and compliance programs, they should be encouraged to assess their organizational cultures. This is for two reasons.

First, in situations where criminal conduct has taken place, we've seen time and time again that cultures existed where employees who were aware that wrongdoing was occurring were afraid to raise it. And in some cases we've seen situations
where employees felt pressured to engage in criminal activity just to be able to do their jobs. Culture was a factor in the instances that took place.

The second reason organizations should be encouraged to assess their cultures is that culture we have seen in our research is the single largest determinant of the extent to which further activity will take place. We found in our research that when an organization takes measures to implement the seven steps that you have suggested for an effective compliance and ethics program, and they've established a strong ethical culture in their organizations, misconduct is reduced by as much as 75 percent, reporting doubles, and retaliation against whistleblowers is almost eliminated.

But this is because an effective program and a strong culture are in place. The two are very closely connected. And importantly, assessment of a program does not necessarily include assessment of a culture, and that's why we would encourage you to make that explicit in the guidelines.

The second section that we commented on
pertained to recommended conditions of probation for organizations. We focused specifically on the submission of information to the courts by an organization under probation.

We suggested that organizations that are under probation should not only provide the court with a schedule for their implementation of an ethics and compliance program, but they should also explain how they will measure the effectiveness of those programs. And in progress reports they should comment on how they are doing in implementing the program, in part based on those measures.

Thanks to the 2004 amendments to the guidelines, it has become common practice in the ethics and compliance field to not only establish metrics for program establishment, but to identify specific outcome measures. What will be different because the program is in place and it's having an impact?

They are usually things like reduced misconduct, employee pressure to comprise standards, reporting retaliation. And program effectiveness is
determined in part based on those outcome measures.

Now it is likely that organizations that are placed under probation would establish those metrics as a part of the program implementation, but unless it's explicitly stated they may not be compelled to share that with the courts. And in fact, federal officials would be well served by being able to see these metrics and hold organizations accountable to them.

The third issue that we've commented on had to do with three-point mitigation for an effective program when high-level personnel are involved. And we suggested two important changes for the Commission to consider.

First, if the employees responsible for the ethics and compliance program are among the high-level individuals involved in the criminal activity, we suggested that mitigation should not be applied. This would help ensure that companies not only are selecting individuals for oversight of the ethics and compliance program who have a personal commitment to integrity, but also that they're skilled and well
placed to be able to withstand the pressures that
come when high-level individuals are engaged in
criminal activity.

The second comment we made was to suggest
that the Commission shouldn't identify specifically
the board or a board committee as the specific
reporting relationship for the individual with
operational responsibility for compliance.
Organizations vary widely. Some have boards. Some
don't. Some have boards with fiduciary
responsibility. Some don't.

In 2007, ERC worked with our colleagues in
the field in five nonprofit organizations that really
are the leaders in our industry to discuss how to
define the adequate role and responsibility and
reporting relationship for a chief ethics and
compliance officer. And we spent a great deal of
time talking about this issue.

In the end, because of the differences in
organizations rather than suggesting a specific
reporting relationship we identified four principles
that we felt, if satisfied, would suggest that this
person had adequate access to the governing authority and a proper situation in an organization. And we suggest that the Commission lean on the good work of our nonprofits in trying to address this issue yourselves.

The four principles included the following:

That the individual with operational responsibility for compliance in the organization should be held accountable to the governing authority while carrying out the fiduciary responsibilities that are delegated to them;

Second, independent to raise matters of concern especially when they involve individuals who are high-level employees, without fear of reprisal or a conflict of interest;

Third, sufficiently connected to company operations in order to build an ethical culture that advances the objectives of the business; and

Finally, provided with authority to have decisions and recommendations taken seriously at all levels of the organization.
This paper is available on ERC's website.

We are happy to furnish it to you if it would be helpful to you. We would suggest that some of the thinking that's already been done might be helpful to you.

And with that I'm going to stop. Thank you again for the opportunity. I'm happy to answer any questions that you may have.

CHAIR SESSIONS: Thank you.

Mr. Murphy?

MR. MURPHY: Thank you for inviting SCCE to participate in today's hearing. A little bit about SCCE.

SCCE is a professional organization that champions ethical practice and compliance standards in organizations of all kinds, and provides resources for compliance professionals. With our sister organization, HCCA, we represent over 8000 members and have certified over 3000 compliance and ethics professionals.

An an active participant globally in this field, including as a consultative partner to the
OECD Antibribery Working Group in its own work in promoting compliance and ethics programs, we have seen how important the Sentencing Commission's trailblazing leadership in this field has been.

We have drawn on this leadership in promulgating a code of professional ethical standards for compliance and ethics professionals that we publish for global use in eight different languages. We have developed books, articles, videos, conferences, and an interactive social network and web site dedicated to proselytizing the Sentencing Commission's underlying message of responsible corporate citizenship through the use of effective compliance and ethics programs.

I would like to focus on three points in these remarks, two related to the discussion topic on giving credit for programs despite high-level participation in misconduct, and one to suggest an additional modest revision to the guidelines' standards relating to incentives.

First, we believe the proposal to provide that a compliance and ethics program would still be
able to receive credit even if a high-level person is
involved in an offense as long as the organization
has taken certain responsible steps is an excellent
and important change.

It recognizes that the involvement in an
offense by one manager, whatever the position, is not
the same as involvement by senior management. This
change would conform the sentencing guidelines to
actual practice where corporations today may employ
dozens, if not hundreds, of managers in positions of
high responsibility.

It is not only possible but unfortunately
likely that there will be infractions involving at
least a limited number of such persons. No program
can prevent all such violations, but an effective
program should be able to achieve the steps called
for in this proposed change.

A company that has fully empowered its
compliance officer and that at some point discovers
and reports a violation involving a senior manager
has gone quite far in qualifying as a good citizen
corporation.
The Commission has hit a key point in the focus on having the compliance person report to the highest governing authority as one condition for this credit. And I would note, it's not necessarily board of directors; it's highest governing authority, whatever that is in any organization.

In a groundbreaking study including all three of the organizations in this panel, and actually the report that Dr. Harned mentioned, it was reported that many compliance professionals in the current environment are set up for failure.

For compliance programs to work in addressing the most serious forms of corporate crime, the compliance professionals need this positioning to get the job done.

However, the reference to the compliance officer's reporting authority to the highest governing authority needs to be clarified and enhanced. In the business context, the word "reporting" could mean simply sending reports to the board which may be more or less detailed and informative — and more or less censored by senior
management.

But it can also mean being the one who determines whether you get promoted, financially rewarded, or fired. If the compliance officer is to be positioned so that he or she can stand up to a senior manager who is determined to engage in illegal conduct, both types of reporting relationship to the highest governing authority are important. It requires empowerment and independence for a compliance and ethics officer to do this. And we will suggest specific language in our comments to achieve this result.

And finally, although the reference to incentives was added into the standards in 2004, application of this element in practice has been quite limited.

The SCCE in a recent survey on this point heard back from compliance professionals that incentives are being under-utilized in compliance programs. And this was a survey we did entitled "Compensation, Performance, Compliance and Ethics," done in May 2009.
In fact, when the Federal Acquisition Regulation was recently revised to require compliance programs among major government contractors, the significance of this point of incentives was so poorly understood that the reference was completely missed in the mandatory standards.

Yet, incentives are clearly drivers in organizational conduct and are included in a variety of other compliance and ethics program standards that SCCE has reviewed around the world, ranging from compliance program standards published by competition law enforcement authorities in India and the UK, to generic cross-industry standards for compliance programs published in Australia.

SCCE has even produced and posted on our web site a full white paper on incentives in compliance programs. This is "Building Incentives In Your Compliance & Ethics Program," January 2009.

We recommend adding to the existing one-word reference to "incentives" in the sentencing guidelines Item 6 an explanation in the commentary. We have drawn the language from some excellent
material promulgated by the Canadian Competition
Bureau in its 2008 Compliance Program Bulletin.

Those are my comments and I am happy to
respond to any questions.

CHAIR SESSIONS: Thank you, Mr. Murphy.

Let's open it up for questions.

COMMISSIONER HOWELL: I have two
questions.

CHAIR SESSIONS: Okay, Commissioner
Howell.

COMMISSIONER HOWELL: First, Dr. Harned,
you talked about having an additional requirement so
that companies would assess their culture, and I just
wanted to know if you could address how people would
go about assessing a culture. That's for you.

And then, Mr. Mazur, I didn't actually
catch the last part of what you were saying, but you
were talking about an information gap. And we live
with information and data, and it's one of our
responsibilities to make sure we're providing good,
useful data for people to understand what's going on
in our criminal justice system.
So to the extent, I sort of didn't understand your point about the information gap. And what other information about organizational sentencing or otherwise you think would be helpful from the Commission, I'd like you to address that.

So, Doctor?

DR. PATRICIA HARNED: Well assessment of culture is certainly both an art and a science. It's a little bit like assessing the personality of an organization, and certainly it is always a challenge to try to do that.

But by the same token, there are generally accepted metrics that have been developed over time through research to help an organization identify what its culture is.

When you talk about the ethical culture of an organization, it generally involves things like the tone being set from the top, what is the expectation that leaders at the highest levels of organization are communicating as being important, both formally and informally.

Second, to what extent are employees being
supported by their immediate supervisors when it
comes to actually following the standards on a day-
to-day basis?

A third element of it has to do with the
extent to which what is written and codified as the
standards of the organization are actually being
followed on a day-to-day basis. Does the code really
matter? Do people know that it's there? Do they
actually follow it when they have issues that they
don't know how to resolve?

And then the last part of it has to do
with peer support for one another on an individual
interfactional level. Are people really supporting
each other and upholding the standards?

So there are lots of different metrics for
culture. It can and has been measured, and again
it's culture as defined as those kinds of things
that the formal and informal standards of how things
are really done.

COMMISSIONER HOWELL: And the actual
methodology you would use to go about doing such a
measure is surveying people?
DR. PATRICIA HARNED: There are different ways to go about doing it. Over time, two in particular have sort of emerged. There's a quantitative method of surveying employees to get their perceptions of what the standards are and how well they are followed.

There is also a qualitative effort. Lots of organizations will conduct focus groups to try to get a sense from the employees about what it's really like to work in that organization, or a combination of the two.

COMMISSIONER HOWELL: Thank you.

MR. MAZUR: I will follow on to that, because the ECOA worked with the ERC in 2007 on this issue, and another example is a pre-testing and post-testing after a large initiative in communication and training so that you'll get a sense of the knowledge of what the standards are, and what are the implications of not honoring the standards. In the beginning of 2008 you go through 15 months of a training and communications program, and then you do it again afterward and you really get different
results with regard to the level of comfort with what
are the standards, and also a fear of retaliation up
or down, their willingness to call the help line, and
things like that.

In respect to the point that you made, I
made reference to a specific document which included
that phrase the Conference Board published last year
entitled "Ethics and Compliance Enforcement
Decisions – the Information Gap." And just like my
colleagues did, I would be happy to make the document
available to the Commission after today and before
the deadline.

The analysis took a look at the reality
that you all know very well that relatively few
organizations specifically have engaged the
guidelines when it comes to being sentenced. And
many of them, as was mentioned in the previous panel,
were quite small.

But the fact is, for those of us who are
very involved with this field, we know that the
guidelines have a tremendous impact on organizations.
And from interacting with representatives of the
Department of Justice we know that they have tremendous impact at various levels.

It seems to us that the only challenge is that there's no one who is specifically tracking the extent to which the guidelines do impact and affect a variety of decisions along the path toward sentencing. No one is tracking it, and no one is communicating it.

COMMISSIONER HOWELL: And are you talking specifically to the fact that, since the Sentencing Commission only gets documents relating to convicted organizations that we do not receive at all — although I guess if we requested it we might get some — nonprosecution and deferred prosecution agreements so that we can incorporate in our analysis in a totally confidential way, purged of identifying information about the organization being sentenced, information about how much credit was given for the compliance program, how the fine was calculated, all the other kinds of information that we can glean from convicted organizations?

MR. MAZUR: Yes. It is what I'm referring
to, and the document does. And even broader than
that, the extent to which sometimes decisions
associated with whether or not to pursue an
indictment will be affected by the extent to which a
high-quality program might make a difference in the
decision at that level.

    Again, it's important to the three of us
and the community of which we're a part to know that
it's there. There isn't anyone involved who doesn't
know that it's happening, but there just doesn't
happen to be anybody on your side of the fence who is
taking the time to assemble that data and then make
it available. And if you did, it would just make a
tremendous difference for ethics and compliance
officers who are trying to persuade higher management
who have many, many things competing for their
attention of the value of investing in a program like
this.

    CHAIR SESSIONS: How would you get that
information, other than I suppose from deferral
agreements, deferred prosecution agreements from the
government? I mean, how would you get that?
MR. MAZUR: Well you would get it from there, but I mean prosecutors have a – when they go through a case and have to make decisions about what they're going to pursue, they go through a process of analysis. And there have been instances when they've willing to share with the ECOA the extent to which they have made a decision whether or not to even pursue a case based on – again, not naming the organization or something like that – but just helping us understand, you know, that it does truly make a difference in difficult decisions that have to be made at all levels of the process.

And so it would simply be a matter of a process developed I think in the Department of Justice where they would, at various levels of the process, ask the U.S. attorneys' offices, were these considered? Did the compliance program make a difference? Was it a factor anywhere, yes or no? If so, to what extent?

I didn't say it would be easy; I just said it would be important.

CHAIR SESSIONS: Okay. Any further
COMMISSIONER HOWELL: Well, just one last question.

CHAIR SESSIONS: Sure.

COMMISSIONER HOWELL: In our last panel one of the witnesses said that, you know, document retention programs — it was superfluous for us in our proposed amendment to even mention document retention programs because they are clearly part of the compliance programs.

Another witness said that document retention programs and records management is really not part of compliance programs.

So we had people with very different views about the role of records management and compliance programs. And I just wondered whether you all had a view, either about records management and how much they should or should not be subject to compliance programs, interest and assessments? And if you could comment on that.

MR. MURPHY: If I could start, actually I think the views are relatively consistent that the
specific reference to records retention, or document retention or document management really is out of place in the guidelines.

For example, if you recall in the guidelines it has a reference to risk assessment and prioritization. I don't think you want companies to view records retention as an issue that they want to prioritize and focus on.

So I believe there's a concern that adding that type of reference could actually tend to trivialize the guidelines and push people more toward thinking of the guidelines as a paper exercise. So the consistent message that I heard from that panel and form this panel, and from our comments, is it's just out of place.

Records retention and management has its own place, and people will deal with that as is appropriate in their companies, the same as they deal with any other risk. In my own private practice, I have not run across this issue. I have not had people saying to me, gee, what do we do about records retention, in the context of the guidelines.
So I think the general view is, it is just unnecessary.

MR. MAZUR: I'll say that obviously we asked our members to respond in the survey, and they actually — that's why you saw me refer to the spirit of it. They actually supported its reference, because you know it came up in your proposed amendments in two ways.

The first way was with the reference to the high-level and substantial authority personnel. Because you know that records management is not a risk like Foreign Corrupt Practices Act, and antitrust, and this and that. It's kind of a metarisk. What you're asking in that proposal is that for these high-level personnel that the integrity of the program is connected to whether or not they have an effective records management program.

So that part of it, the members came back that our members didn't mind that at all, because, to answer your question, yes, records management is a part of ethics and compliance programs. And so the
ethics and compliance officers who are members at the ECOA care deeply that it's done effectively and getting the business units to honor the standards that they design.

The concern that our members had was the second reference, when it came to suggesting that this being, as Joe just referenced, the only one risk that was mentioned that all employees should be focused on. That's an instance where we think it's misplaced.

And the impact, though, of even the first reference, it all comes down to what will it actually mean? And I am nervous that if you leave it in, for example, just with the high-level personnel, we will be working with our members to make sure that they don't accidentally think that you're sending a message that that risk is more important than the other. We'll remind them that it's kind of a metarisk, it's a facet of the program, but not one of the risks itself, and encourage them. Because it would be so tempting for the very first time that they see you enunciate a single risk like that, very
tempting for them to take 50 percent of their budget, move it away from valuable things and then devote it just to that, which would be a mistake.

COMMISSIONER HOWELL: Thank you.

CHAIR SESSIONS: Any other questions?

(No response.)

CHAIR SESSIONS: Well thank you very much for coming. It is very much appreciated by all of us. Enjoy the beautiful day in Washington, D.C.

MR. MAZUR: Thank you.

MS. PATRICIA HARNED: Thank you.

MR. MURPHY: Thank you.

CHAIR SESSIONS: So we will recess until 5:30.

(Whereupon, at 4:45 p.m., Wednesday, March 17, 2010, the public hearing of the United States Sentencing Commission was adjourned.)