

1 UNITED STATES SENTENCING COMMISSION

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Public Hearing

4

Wednesday, March 17, 2010

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6 Thurgood Marshall Federal Judiciary Building

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One Columbus Circle, N.E.

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Suite 2-500

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Washington, D.C. 20002-8002

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COMMISSION MEMBERS:

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WILLIAM K. SESSIONS III, Chair

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RUBEN CASTILLO, Vice Chair

16

WILLIAM B. CARR, JR., Vice Chair

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BERYL A. HOWELL, Commissioner

20

DABNEY FRIEDRICH, Commissioner

21

JONATHAN J. WROBLEWSKI, Ex Officio

22

ISAAC FULWOOD, JR., Ex Officio

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1 I. ALTERNATIVES TO INCARCERATION/

2 SPECIFIC OFFENDER CHARACTERISTICS

3 Panel A:

4 TRISTRAM J. COFFIN, United States Attorney

5 District of Vermont

6 Panel B.:

7 TERESA M. BRANTLEY, Member

8 Probation Officers Advisory Group

9 Central District of California

10 SUSAN SMITH HOWLEY, Chair

11 Victims Advisory Group

12 Washington, D.C.

13 ERIC A. TIRSCHWELL, Member

14 Practitioners Advisory Group

15 New York City, New York

16 Panel C:

17 MARIANNE MARIANO, Federal Public Defender

18 Western District of New York

19 JAMES E. FELMAN, Co-Chairman

20 Committee on Sentencing, American Bar Association

21 Tampa, Florida

22

1 Panel C (Continued):

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

6 Panel D:

7 THOMAS J. BERGER, Senior Analyst for
8 Veterans' Benefits and Mental Health Issues
9 Vietnam Veterans of America
10 Silver Spring, Maryland
11 ELMORE T. BRIGGS, Clinical Director
12 Kolmac Clinic
13 Washington, D.C.
14 SCOTT H. DECKER, Professor and Director
15 School of Criminology and Criminal Justice
16 Arizona State University
17 MARVIN D. SEPPALA, M.D.
18 Chief Medical Officer
19 Hazelden Foundation
20 Center City, Minnesota

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1 II. RECENCY

2 ANDREA SMITH, Assistant U.S. Attorney

3 District of Maryland

4 MARGY MEYERS, Federal Public Defender

5 Southern District of Texas

6 TERESA M. BRANTLEY, Member

7 Probation Officers Advisory Group

8 Central District of California

9
10 III. ORGANIZATIONAL GUIDELINES

11 Panel A:

12 DAVID DEBOLD, Chair

13 Practitioners Advisory Group

14 Washington, D.C.

15 SUSAN HACKETT, Senior Vice President

16 and General Counsel

17 Association of Corporate Counsel

18 Washington, D.C.

19 KAREN HARNED, Executive Director

20 Small Business Legal Center

21 National Federation of Independent

22 Business, Washington, D.C.

23

1 Panel B:

2 TIM C. MAZUR, Chief Operating Officer

3 Ethics & Compliance Officer Association

4 Waltham, Massachusetts

5 PATRICIA J. HARNED, President

6 Ethics Resource Center

7 Arlington, Virginia

8 JOSEPH E. MURPHY, Director of Public Policy

9 Society of Corporate Compliance & Ethics

10 Minneapolis, Minnesota

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

2 (8:50 a.m.)

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

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

12 Let me introduce, first of all, the U.S.
13 Sentencing Commission. First, to my right is Judge
14 Ruben Castillo. He has served as vice chair of the
15 Sentencing Commission since 1999 – ten years, almost
16 11 years.

17 VICE CHAIR CASTILLO: Almost.

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

21 To my left is Will Carr, who has served as
22 vice chair of the Commission since December of 2008.

1 He was an assistant U.S. attorney in the Eastern
2 District of Pennsylvania from 1981 until his
3 premature retirement in 2004.

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

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

20 Next, to my right is Beryl Howell. She
21 has served on the Commission since 2004. She served
22 as executive managing director and general counsel of

1 an international consulting and technical services
2 firm. She is a former general counsel of the Senate
3 Committee on the Judiciary, and was an assistant U.S.
4 attorney in the Eastern District of New York.

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

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

20 I guess - oh Commissioner Fulwood is here.
21 Isaac Fulwood, Jr., is also ex officio member of the
22 Commission. He serves in that capacity as chair of

1 the U.S. Parole Commission. Welcome.

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

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

8 MR. COFFIN: That would be Vermont, yes.

9 (Laughter.)

10 CHAIR SESSIONS: It is Vermont? Oh!
11 He's United States Attorney for the District of
12 Vermont. Previously — this is Tristram Coffin. He
13 previously served as the director of Paul Frank +
14 Collins, which is a large law firm in Burlington —
15 well, that's "large" relatively speaking — in
16 Burlington, Vermont.

17 He served as assistant U.S. attorney in
18 the District of Vermont for many years. He was an
19 aide to Senator Patrick Leahy, and was a litigation
20 associate in a Boston firm, Hale and Dorr. Mr. Coffin
21 graduated from Wesleyan University and Columbia
22 University Law School.

1 So I welcome you to the Commission. We
2 have a light system here. Because you're the only
3 person speaking for a half-hour period, we've set
4 roughly 15 minutes. One minute before then you will
5 see a yellow light. It's just like the Second
6 Circuit.

7 MR. COFFIN: Okay.

8 (Laughter.)

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

13 MR. COFFIN: Very good.

14 CHAIR SESSIONS: So the floor is yours.

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

18 Thank you for the opportunity to share
19 the views of the Department of Justice on the
20 Commission's proposed amendments to the sentencing
21 guidelines regarding alternatives to incarceration
22 and specific offender characteristics.

1 We commend the Commission for its
2 leadership over the past 25 years and its
3 commitment – as demonstrated by the various regional
4 public hearings held during this past year – to
5 listening and gathering feedback from practitioners
6 regarding the state of federal sentencing since the
7 Supreme Court's decision in *Booker v. United States*.

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

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

20 At the same time, however, the Department
21 is keenly aware of the critical role that
22 imprisonment plays in providing just punishment,

1 deterring crime, removing from our communities
2 offenders who seriously or repeatedly victimize the
3 innocent, and promoting the public's trust and
4 confidence in the criminal justice system.

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

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

14 The first guideline amendment proposed by
15 the Commission, Part A, would create a new guideline,
16 §5C1.3, to expand the availability of
17 nonincarceration sentences for certain drug
18 offenders.

19 Without regard to the applicable zone of
20 the guidelines sentencing table, this amendment would
21 permit imposition of a sentence of probation
22 conditioned upon the offender's participation in a

1 substance abuse treatment program.

2 To be eligible for this alternative
3 sentence, an offender must:

4 (1) have committed a drug offense;

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

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

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

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

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

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

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

1 level dealers;

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

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

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

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

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

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

1 alternative.

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

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

15 Recidivism rates for those who complete
16 drug court programs are eight percent to 30 percent lower
17 than the rates of other similarly situated offenders.
18 This evidence of improved public safety through
19 reduction of recidivism as a result of substance
20 abuse treatment justifies the extension of treatment-
21 based alternatives to incarceration to addicted, low-
22 level drug offenders.

1 We urge the Commission to develop
2 standards for effective substance abuse treatment
3 programs, gathering the best experts on treatment
4 programs, analyzing the available research, and
5 sharing the results of this work with the federal
6 courts as guidance.

7 If the Commission promulgates the Part A
8 amendment, we think that it should make conforming
9 changes to Chapter Five to indicate that the new
10 section regarding incarceration alternatives,
11 §5C1.3 remains the only exception to the general
12 principle under the guidelines that drug addiction is
13 not ordinarily relevant in federal sentencing.

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

20 The Department opposes the expansion of
21 Zones B and C of the guidelines as proposed by the
22 Commission in Part B.

1 While this option would permit more
2 defendants to be eligible for alternative sentencing,
3 it has several drawbacks. Most notably, there is no
4 substantial evidence or research to support such a
5 change to the guidelines which would apply across all
6 criminal history categories of the guidelines, apply
7 across the full spectrum of offense types, and
8 substantially increase the number of federal
9 offenders eligible for non-imprisonment sentences.

10 Extending eligibility for alternatives
11 without limits based on criminal history category
12 would result in inappropriate sentences for offenders
13 whose instant offense may be minor but whose criminal
14 history is significant.

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

21 Another adverse consequence of the
22 proposed Part B amendment would be the increased

1 likelihood that white-collar offenders would receive
2 non-prison sentences.

3 Under the current guidelines, offenders
4 received probation-only or probation-plus-community
5 confinement sentences in the following types of cases
6 at the rates indicated: environmental and wildlife
7 offenses, 81.4 percent; food and drug offenses,
8 66.7 percent; gambling and lottery offenses, 63
9 percent; simple possession of drugs, 60.4 percent;
10 larceny, 56.8 percent; embezzlement, 48.5 percent;
11 antitrust offenses, 47.6 percent; tax offenses,
12 41.2 percent; and other miscellaneous offenses,
13 62.5 percent.

14 If the zones were amended such that more
15 white-collar offenses were eligible for alternative
16 sentencing, it is likely that even fewer white-collar
17 offenders would be incarcerated, undermining the
18 important deterrent effect of jail time in white-
19 collar cases, diluting effective white-collar
20 enforcement efforts, and eroding public confidence by
21 seemingly ignoring the serious harm that white-collar
22 crime inflicts.

1 We note that in 2001 the Commission
2 ultimately declined to adopt its proposed expansion
3 of Zones B and C, acknowledging concerns that such
4 expansion – though greater than the expansion
5 currently proposed – would undermine changes in the
6 economic crime package that had recently been
7 adopted.

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

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

21 For example, in fiscal year 2008 only 29.8
22 percent of federal offenders were white, yet white

1 offenders constituted a much higher percentage of
2 offenders in those offenses most likely to receive
3 alternative sentencing: antitrust, 90 percent;
4 gambling and lottery, 86.6 percent; environmental
5 and wildlife, 75.9 percent; food and drug, 73.1
6 percent; and tax, 71 percent.

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

14 The wholesale expanded use of non-
15 incarceration sentences should not be undertaken in
16 the absence of careful analysis of the types of
17 offenders and the types of offenses to which these
18 alternatives would apply. And it should not be done
19 without assurances that such a change would not
20 jeopardize public safety and the public confidence in
21 imposition of fair and predictable sentences.

1 I would now like to move on to the
2 specific offender characteristics.

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

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

19 The Commission also seeks feedback
20 regarding views as to the relevance of these
21 characteristics to the "in or out" decision – that is,
22 whether to impose a sentence of probation or

1 incarceration – and to the extent that the
2 characteristics are deemed relevant, whether there is
3 a risk that they might be used as a proxy for race,
4 sex, national origin, creed, or socioeconomic status
5 of an offender.

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

10 Offenders who commit similar offenses and
11 have similar criminal histories should be treated
12 similarly. While we recognize that 18 U.S.C.
13 3553(a) directs judges to consider an offender's
14 background, it also directs judges to avoid
15 unwarranted disparities.

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

20 We think that the Commission should
21 reaffirm this principle of federal sentencing policy
22 that has been in place since the Sentencing Reform

1 Act was adopted and should indicate that offender
2 characteristics – outside of criminal history – should
3 generally not drive sentencing outcomes.

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

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

15 (1) further exacerbate unwarranted
16 sentencing disparities; and

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

20 Indeed, discussion of the questions that
21 the Commission poses for comment is complicated by
22 the fact that consideration of how the guidelines

1 treat these five specific offender characteristics is
2 inextricably intertwined with the examination of
3 broader policy issues such as alternatives to
4 incarceration and racial and ethnic disparities in
5 sentencing.

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

20 The Department urges the Commission
21 instead to study these offender factors individually
22 over the coming years and consider issuing research

1 papers to assist courts in how and when these factors
2 are appropriately considered within the context of
3 sentencing outcomes being driven largely by the
4 offense committed and the offender's criminal
5 history.

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

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

20 Further, we do not believe that a
21 defendant's status as a non-citizen warrants a
22 downward departure. We do think that the Commission

1 should consider, as part of the next amendment year,
2 the proposal suggested at one of the Commission's
3 regional hearings for a small sentence reduction for
4 non-citizens who agree to resolve expeditiously any
5 pending immigration removal or deportation matter.

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

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

18 The Commission is uniquely positioned and
19 staffed to provide reliable empirical data and
20 analysis with respect to these issues. The
21 Department looks forward to working with the
22 Commission over the coming years to tackle these

1 complex and evolving issues.

2 Thank you.

3 CHAIR SESSIONS: All right, thank you,
4 Mr. Coffin. Let's open this up for questions.

5 Commissioner Friedrich?

6 COMMISSIONER FRIEDRICH: Mr. Coffin, thank
7 you so much for coming to testify and taking time
8 away from your busy job. It is really helpful to us
9 when we hear from you on these issues.

10 MR. COFFIN: I appreciate that, thank you.

11 COMMISSIONER FRIEDRICH: I have a couple
12 of questions for you relating to the proposed
13 Amendment 5C1.3. I'm wondering, has the Department
14 had a chance to get the Bureau of Statistics, or BOP,
15 or DEA, or any of the entities within DOJ, have you
16 had a chance to estimate how many offenders you
17 expect to benefit from this?

18 MR. COFFIN: The Department has begun
19 looking at that. I don't think the analysis is
20 completed, but the figures I have heard are in the
21 neighborhood of several hundred, a thousandish. So
22 it's not a large number of offenders we're talking

1 about. And that's primarily because of the nature of
2 the federal narcotics docket in most districts now
3 are such that cases at this level are not the central
4 thrust of narcotics prosecutions.

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

9 If you look solely at the preliminary data
10 from fiscal year 2009, what we find looking first at
11 offenders in this paragraph, total offense level of
12 15s who qualify for safety valve, looking at those
13 factors and not whether they're addicts or whether
14 their addiction contributed in any way to the
15 offense, if you look at simply those factors, the
16 potential pool of offenders to benefit is around
17 2000. You have 931 U.S. citizens, and 115 non-U.S.
18 citizens who potentially could take advantage of
19 this.

20 And if you look at where those offenses
21 were committed in 2009, and the nature of the
22 offense, what we find is that the vast majority are

1 marijuana offenses. Seventy percent of the U.S. citizens
2 who would qualify with marijuana trafficking
3 offenses, and 95 percent of non-U.S. citizen. And
4 they're all, the vast majority, 65 to 70 percent, are
5 concentrated in the Western District of Texas – two
6 districts – and the Southern District of California.
7 The remainder of course are concentrated in other
8 border districts, not Vermont and Washington, but
9 southwest border districts.

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

21 In our regional hearings we've had a
22 chance to talk to practitioners in these various

1 areas in the Western District of Texas who indicated
2 that by and large these offenders are not offenders
3 who are drug addicts. They tend to be destitute,
4 desperate people who agree to drive these large loads
5 of marijuana for money. And that's consistent with
6 my experience. You and I both know that the drug
7 cartels don't entrust large amounts of drugs to
8 addicts. It's not a reliable way to get drugs across
9 the border.

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

1 wouldn't we be better off applying more drug
2 treatment both in prison and out of prison to a
3 larger class of offenders, and a larger group of
4 addicts?

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

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

20 MR. COFFIN: Right.

21 COMMISSIONER FRIEDRICH: Do you think we
22 have -

1 MR. COFFIN: I can comment on those
2 questions.

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

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

15 And so first as to the merits of that
16 proposal, because of the nature of their addiction,
17 I've seen in many cases, and you have, too, I'm sure,
18 that deterrence doesn't really work for these people.
19 So they'll get out, and if they don't have drug
20 treatment, they'll just start using again and they
21 will, in order to support their habit, this
22 particular level of people who we're talking about

1 will buy, cut the drugs, sell some of the drugs,
2 inject the drugs, and be right back where they were
3 again either committing low-level state offenses, or
4 wrapped up in the federal system typically as a very
5 low-level person in a larger drug conspiracy.

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

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

20 The problem there is you have typically
21 large-scale commercial, highly commercial, extremely
22 lucrative drug-running operations who are using these

1 low-level folks, and they get caught, and they don't
2 have really a way out of the system. But the way
3 to – and at some levels that's unfair, but the cure to
4 that unfortunately is not just eliminate deterrence
5 for those folks.

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

10 COMMISSIONER FRIEDRICH: So your
11 administrative record for the change you propose in
12 Chapter Five is examples from the state drug courts?
13 They're a different class of offender.

14 MR. COFFIN: Sometimes they are; sometimes
15 they're not. I'm not using – I guess I would not use
16 the term "administrative record" strictly speaking so
17 narrowly. The basis for the Department's view is the
18 experience with the drug courts as understood by the
19 Department, the view of its prosecutors, and the view
20 of the Attorney General is that this is something
21 that can be a viable alternative for this subclass of
22 offenders.

1 With regard to the specific offender
2 characteristics, more broadly, yes, we are agreeable
3 to an amendment to have narcotics addiction be a
4 specific offender characteristic that can matter to
5 sentencing to this extent, but we're not going any
6 further at this point. Even to go further at this
7 point would, in our view, require some additional
8 study and some additional learning.

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

20 So a judge in Illinois, or Vermont, can
21 look to the Sentencing Commission to say, well, this
22 is what this group of people thinks, having studied

1 it, and this is what most judges are doing in this
2 particular kind of case, hmmm, maybe I ought to think
3 about that as I apply that case to the situation
4 before me.

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

12 CHAIR SESSIONS: Ricardo.

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

18 (Laughter.)

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

21 COMMISSIONER HINOJOSA: I have a couple of
22 questions related to each other.

1 You started off by saying that
2 alternatives to incarceration was something that the
3 Department was in favor of. My question is: Why is
4 it then the Department doesn't use pretrial
5 diversions more often in some of these cases? You've
6 got that within your authority and within your power
7 to identify the cases where alternatives to
8 incarceration would be very helpful. Is the
9 Department possibly thinking of sending out something
10 to all the U.S. attorneys across the country about
11 the use of pretrial diversion?

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

14 COMMISSIONER HINOJOSA: That doesn't
15 require guidelines -

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

21

22 CHAIR SESSIONS: We all support

1 Charlie -

2 (Laughter.)

3 MR. COFFIN: Right. Okay.

4 VOICE: Some of us still do.

5 (Laughter.)

6 MR. COFFIN: But it was never a program
7 that, for whatever reason, kind of expanded, took
8 off, flourished much. And me as U.S. attorney I
9 think it's something I think about doing, but it's on
10 my "to do" list and not on my "got it done" list.
11 But I do think that is something that the Department
12 has, and U.S. attorneys currently have the power to
13 do, and would be a good thing to look at. And I
14 think it would be appropriate.

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

21 COMMISSIONER HINOJOSA: The other point
22 that I have as a question is, why is it that the

1 Department talks about alternatives to incarceration
2 but the only one that you're willing to endorse is
3 the one that suggests that we should give some
4 alternative to drug addicts who are creating more
5 drug addicts, or making more drugs available to other
6 drug addicts, as opposed to anybody else, or
7 anything else that the Commission has suggested as a
8 possibility as an alternatives to incarceration?

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

17 Why is that you're not – I know you talk
18 about studies, but there are studies, and there are
19 numbers that are presented to the Commission before
20 we publish something. And so why do you pick just
21 that one, and nothing else, when you have endorsed
22 the idea of alternatives to incarceration?

1 And then you make it a change in the 5H
2 policy that you want to make it very clear that it
3 would be limited to those individuals only, whereas
4 there are drug addicts who commit other crimes
5 because of possibly their drug addiction, but you're
6 not interested in any kind of alternative for them?

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

20 For example, in our district we have one
21 of the drug reentry courts. It appears to be a great
22 program. You go to court and you've got seven or

1 eight folks who are working very hard to stay clean,
2 stay employed, and will get the benefit of a
3 reduction in their supervised release term.

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

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

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

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

22 MR. COFFIN: What do you mean by that?

1 I'm sorry?

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

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

14 CHAIR SESSIONS: Ruben.

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

22 For example, the modest expansion of the

1 zones. Wouldn't you agree that judges already have
2 that discretion, post-*Booker*? That expansion does
3 not require judges to sentence anyone in any fashion.
4 All it does is create some more discretion where
5 discretion might not be available under the advisory
6 guidelines.

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

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

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

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

21 CHAIR SESSIONS: Ninety-nine pages of
22 that, single-spaced.

1 (Laughter.)

2 MR. COFFIN: The point is more one of
3 principle, I think. For this Commission to make
4 changes to the guidelines it should be done in a
5 measured, deliberate way based on empirical analysis
6 and study, and not reactive to the courts giving new
7 powers to judges to vary and to limit the
8 guidelines – limit the application of the guidelines
9 to do things outside the guidelines.

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

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

21 VICE CHAIR CASTILLO: I agree with that.
22 But the moving to specific offender characteristics,

1 right now judges are doing whatever they want to do
2 with these offender characteristics.

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

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

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

22 CHAIR SESSIONS: Because he's older.

1 (Laughter.)

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

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

20 CHAIR SESSIONS: Okay. Commissioner
21 Carr.

22 VICE CHAIR CARR: As Judge Hinojosa

1 mentioned, drug offenses are not the only offenses
2 that drug addicts commit, and commit because of their
3 drug addiction. Do you see any reason why this drug
4 treatment alternative should not be available to drug
5 addicts whose drug addiction causes them to commit
6 other at least nonviolent crimes?

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

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

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

1 under the theft guidelines.

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

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

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

12 CHAIR SESSIONS: Commissioner Jackson.

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

22 MR. COFFIN: Well I don't think there

1 would be significantly more litigation over that than
2 there would be over any other guideline provision.
3 That would get flushed out over time and judges have
4 applied the word "substantially" in many respects in
5 many contexts.

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

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

19 So for example in our district we have,
20 from time to time, these kind of guys I call "pot
21 millionaires." They're 20-something folks. They
22 make a lot of money selling high-grade marijuana

1 smuggled in from Canada. I mean, you know, hundreds
2 of thousands of dollars, not millions of dollars.
3 And they do that because they like the money. It's
4 an economic crime, fundamentally.

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

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

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

20 CHAIR SESSIONS: Commissioner Howell.

21 COMMISSIONER HOWELL: Mr. Coffin, I am
22 going to reiterate my fellow commissioners'

1 thanks for you to come and, as you can tell, I echo a
2 lot of the concerns that they've raised about the
3 Department's position on the alternatives proposal.

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

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

21 I just wanted to, you know, when it comes

1 to both the alternatives amendment and our specific
2 [offense characteristic] amendment, I think part of what
3 the Commission is tasked to do, and it's been repeated by
4 the Supreme Court, is we're supposed to be a feedback
5 mechanism with the courts. What are the courts
6 actually doing and seeing and how are they reacting
7 to the guidelines in practice.

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

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

21 So I just want to be clear about the
22 Department's position, since you all are sort of

1 joining in this sort of broader debate that we're
2 hearing about, what type of record should prompt the
3 Commission to act?

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

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

13 But just because courts throughout the
14 country are, for example, say this is the case – it
15 may not be the case, but let's say it's the case –
16 they're giving breaks to white-collar defendants.
17 And there is significant disparity say – I don't know
18 it's the case, but let's say it's the case – that
19 African Americans receive longer jail terms than
20 non-African Americans. Would the Commission tolerate
21 that kind of disparity? I think not. Does then the
22 Commission have some role in guidance? I think it

1 does.

2 So I understand your point that you need
3 to take input from the field about what judges are
4 thinking and what they're feeling is the right thing
5 to do in those cases, but I would also suggest that
6 the Commission at this point, more than any other
7 time, needs to provide guidance and leadership by
8 taking a thorough look. And as part of that look,
9 look at what's going on throughout the country and
10 what judges are thinking is the right thing to do and
11 the wrong thing to do, but really study these
12 characteristics carefully and come up with, well,
13 when is a record of public works appropriate to be
14 considered at sentencing? When is it not?

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

21 So I would suggest that it's much better
22 for the Commission to engage in a deliberate study,

1 and I think it is entirely appropriate to consider
2 what courts are doing in the field as part of that
3 study, but don't be driven wholly by that.

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

13 So I was trying to read between the lines
14 in your submission, and let me see if I can actually
15 formulate what I think may be the Department's
16 position. And you can tell me if I'm wrong. But in
17 regard to offender characteristics and those 5H
18 factors, you are not necessarily suggesting that the
19 "ordinarily" and "not relevant" language is
20 appropriate? That is of less concern to you, at this
21 particular point? What is of concern is that the
22 Commission should be providing information to the

1 judges and practitioners out there in regard to the
2 relevance of these factors. I mean, these factors
3 are now relevant.

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

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

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

1 Making that positive statement now I think
2 is important.

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

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

20 CHAIR SESSIONS: With that, I really
21 appreciate your coming down and thanks very much.

1 MR. COFFIN: Thank you very much. I
2 appreciate it. Thank you all.

3 CHAIR SESSIONS: Let's have the next
4 panel.

5 (Pause.)

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

18 Next, Susan Smith Howley is currently the
19 chair of the newly formed Commission's Victims
20 Advisory Group. Ms. Howley has been with the
21 National Center for Victims of Crimes since 1991.
22 She presently served as director of public policy

1 where she manages and coordinates public policy
2 assistance and advocacy efforts. She earned her B.A.
3 in international affairs from Texas Christian
4 University, and a juris doctorate from Georgetown.
5 Welcome.

6 And next, Eric Tirschwell is a member of
7 the Practitioners Advisory Group. He is a partner at
8 Kramer, Levin, Naftalis & Frankel in New York City
9 specializing in white-collar criminal defense and
10 complex civil and Constitutional litigation.
11 Mr. Tirschwell previously served as an assistant U.S.
12 attorney in the Eastern District of New York. He
13 received his B.A. from Amherst College and his J.D.
14 from Harvard. So, welcome.

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

1 to leave this open for questions.

2 So first, Ms. Brantley. Thank you.

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

8 In terms of the alternatives to
9 incarceration, the proposed amendment 5C1.3, on the
10 one hand we were pleased for the opportunity to
11 discuss these topics in connection with the
12 guidelines, but we found some real what we thought
13 would be application problems with the language to
14 5C1.3.

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

1 established ethical and professional standards."

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

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

16 We worry that the proposed guideline blurs
17 the line between treatment and punishment, making the
18 administration of such programs difficult. For
19 example, drug treatment programs treat as rewards
20 certain things like time off from supervised release,
21 or when people go to prison time off from their
22 prison sentence, and state courts typically hold in

1 abeyance convictions on certain crimes. They hold
2 these things out as a carrot.

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

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

13 We had quite a discussion on that from
14 various members of POAG. A very simple example would
15 be that if a treatment program felt that a person had
16 progressed in 60 days to a point where perhaps they
17 don't need to be living there anymore and their
18 treatment would suggest that they move to another
19 living arrangements, how do we square that with a
20 requirement that the sentence imposed that they serve
21 90 days in a treatment facility? They could be
22 taking up a place for someone else who could benefit

1 from that bed. And so we had concerns about that.

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

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

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

22 If drug treatment is imposed as part of

1 5C1.3, how do we credit pretrial drug treatment if
2 they were in a residential facility?

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

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

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

22 During our discussion, POAG members agree

1 that probation officers already seek to identify
2 those defendants requiring special conditions,
3 including drug treatment, and the courts already have
4 the authority to fashion sentences as envisioned by
5 the proposed amendment.

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

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

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

22 In terms of the Part B of this proposed

1 amendment, the proposal to expand Zones C and B in
2 the sentencing table, POAG supports this proposal as
3 it encourages the court to consider alternative
4 sentences for defendants who would otherwise not be
5 eligible under the guidelines for noncustodial
6 sentences, absent a variance or a departure.

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

17 Our initial response was one of gratitude
18 for the forum to talk about this stuff, departures
19 and variances. But we believe that the court already
20 has the authority to consider all the specific
21 offender characteristics highlighted by the
22 Commission for comment under Title 18 U.S.C.

1 3553(a).

2 The highlighted specific offender
3 characteristics are already included in every
4 presentence report, and therefore already provided to
5 the courts for consideration. However, we found that
6 the language in the statute and the language in the
7 guidelines seem to conflict, because the statute says
8 the court shall consider these things, but the
9 guidelines say that they're not ordinarily relevant.

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

15 In terms of the specific, five specific
16 ones: age, mental and emotional condition, physical
17 condition, and drug dependence, military, civic,
18 charitable, or public good works, and lack of
19 guidance as a youth, POAG believes that the five
20 factors as well as other specific offender
21 characteristics in the 5H section should again mirror
22 the language in 3553(a). The "not ordinarily

1 relevant" language in the guidelines, and "shall
2 consider" in 3553(a) appear to conflict.

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

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

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

19 Thank you very much.

20 CHAIR SESSIONS: Thank you.

21 Ms. Howley?

22 MS. HOWLEY: Good morning, Chairman

1 Sessions and members of the Commission.

2 The Victims Advisory Group is pleased to
3 appear before you this morning to offer our comments
4 regarding the proposed amendments to the U.S.
5 sentencing guidelines, but our remarks will be brief.

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

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

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

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

1 addiction or drug use.

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

6 In creating the final version of the new
7 5C1.3, we urge the Commission to ensure that
8 probation conditioned on treatment as an alternative
9 to incarceration be limited to those cases where the
10 crime was significantly related to the addiction, and
11 there is an indication that treatment will be
12 effective as contemplated by the bracketed language
13 in subsections (a)(1) and (2).

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

21 Also, such alternatives should be
22 restricted to cases where the defendant's mental or

1 emotional condition was substantially related to the
2 offense and where treatment is likely to be
3 effective.

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

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

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

20 The Commission has requested comment on
21 whether the contemplated zone changes should apply to
22 all offenses, or only to certain categories of

1 offenses such as white-collar offenses.

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

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

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

20 Each of those factors may be relevant and
21 appropriate for courts to consider. However, the
22 primary focus of courts must remain with the

1 statutory purposes of the sentence which are, as you
2 know:

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

6 (2) to afford adequate deterrence to
7 criminal conduct;

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

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

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

19 Such a connection could appropriately be
20 taken into account in determining which treatment
21 would be effective, and in which manner it could be
22 provided so as to protect the public or the victim

1 from future crimes.

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

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

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

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

22 CHAIR SESSIONS: Thank you, Ms. Howley.

1 Mr. Tirschwell.

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

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

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

18 The Practitioners Advisory Group
19 approaches the issue of specific offender
20 characteristics from what we think of as a practical
21 perspective based on our experience with how the
22 Chapter Five, Part H, language impacts sentencing both

1 within and outside the guidelines' framework, and
2 both expressly and in more subtle ways.

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

8 Take military service as an example. From
9 a practitioners perspective, an argument for leniency
10 on behalf of a defendant who may have an exemplary
11 record of military service encounters a number of
12 contradictions along the way.

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

17 18 U.S.C. 3661 reinforces the over-
18 arching mandate that no limitation shall be placed on
19 the information concerning the background, character,
20 and conduct of a person who appears for sentencing.
21 But under §5H1.11, we are told that a record
22 of military service is not ordinarily relevant to a

1 departure analysis.

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

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

17 However, in our experience, and in our
18 estimation looking forward, we continue to be
19 concerned that the language in Chapter Five, Part H,
20 will continue to be used expressly or *sub silentio*
21 to unjustifiably discourage individualized sentencing
22 decisions based on many relevant aspects of a

1 defendant's history and characteristics such as this
2 example of military service.

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

13 We are also concerned that because Chapter
14 5, Part H, fails to explain the penalogical or other
15 bases for the Commission's determinations that the
16 specified characteristics are ordinarily not relevant
17 to a departure analysis, that we are not in a
18 position to address whether in a particular case the
19 reasoning behind the discouragement makes sense.

20 It is as simple as, "We don't know why
21 these factors have been deemed not relevant, so we
22 can't tell you why in this case they should be

1 relevant." And that I think is a feature of the fact
2 that the guidelines simply are declaratory at this
3 point and not explanatory on these issues.

4 Part of the problem which helps point the
5 way to a solution is the current language in Chapter
6 5, Part H, and in particular the ambiguity regarding
7 the applicability of those provisions to simply a
8 guidelines analysis or, more broadly, to sentences
9 outside the guidelines.

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

17 To reconcile the tensions and
18 inconsistencies, we urge the Commission to: (a)
19 eliminate that portion of Part H that states and
20 suggests, without explaining why, that the specified
21 characteristics are ordinarily not relevant; and (b)
22 preserve and expand Part H to recognize, consistent

1 with 3553(a), that these factors and characteristics
2 should be considered in connection with sentencing.

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

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

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

21 We respectfully suggest that such an
22 endeavor is both unwise and impractical. Whether it

1 is the circumstances of a defendant's upbringing,
2 mental, emotional, or physical condition, military
3 service or other good works, or even age, the
4 relevance of these characteristics in our view is too
5 individualized and too varied from defendant to
6 defendant to translate into describable or
7 quantifiable or one-size-fits-all categories.

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

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

22 Finally, in our view the overall

1 assessment of each defendant's history and
2 characteristics and the relevance of that assessment,
3 if any, to the purposes and goals of sentencing are
4 matters that are best left to the sentencing court to
5 consider on an individualized, case-by-case basis.

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

15 Again, from the practitioners' point of
16 view, we have a defendant who is getting ready for
17 sentencing we have to canvas the case law and try to
18 present to the judge different reasons why certain
19 mitigating factors may be relevant. And we think
20 both from the practitioners' point of view and the
21 point of view of the sentencing court, if there was
22 some kind of centralized depository of that

1 information, some studies, some analysis, without
2 limiting the relevance of the information, that would
3 be very helpful.

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

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

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

1 to respond.

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

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

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

22 When you say don't try to tell judges what

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

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

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

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

1 factors.

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

12 CHAIR SESSIONS: Commissioner Howell.

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

19 I wanted to just talk about two aspects of
20 your testimony, Ms. Brantley. The first is the
21 comments in your written testimony and orally about
22 needing clarification as to who sets the criteria for

1 effective drug treatment centers, or effective drug
2 treatment if judges consider imposing that.

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

16 So I understand the complication with
17 contract officers. They're going out and they're
18 contracting with different drug treatment centers,
19 but what are the standards those contract officers
20 are using to evaluate whether a particular treatment
21 center they're contracting with meets any particular
22 standards?

1 And the contract officers are both
2 figuring out what the standards are for an effective
3 drug treatment program, and then contracting with
4 whoever they think meets the standards they've
5 created is I think how it's working now; as
6 opposed to what we're exploring in our proposal,
7 which is that we have another body that helps set
8 what those standards are to guide contract officers
9 as to who they're contracting with.

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

17 What's your reaction to that?

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

21 In the contracting process you put out a
22 request, and you say I need this treatment service,

1 and I need it to do these things. And what happens
2 if you don't get a response? Or what happens if you
3 get a response that doesn't meet all of those things?

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

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

16 What do those things mean in connection
17 with the drug treatment programs available in a given
18 region? So you might work in a metropolitan center
19 where there might be a hub of well-trained
20 professionals to provide a variety of different
21 services that might not be available right smack dab
22 in the middle of Kansas, for example.

1 you think would be most helpful to have on that kind
2 of real-time basis?

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

10 Criminal history seems to be this wall.
11 And what we don't know about it is, were there
12 similar offenses in the past? Did this person have
13 additional contacts with law enforcement that were
14 considered, that went into deciding what the sentence
15 is? These statistics don't, and can't, address.

16 Another area that - another thing that we
17 sort of daydreamed about, if you will, is what
18 happens if the language in Chapter Five does comport
19 more with 3553(a) so that courts begin to more
20 clearly identify what it is about this person that
21 led to a variance or a departure by Chapter Five
22 subsection, so we can see: Oh, military history.

1 What was it about this person's history?

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

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

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

1 Thank you.

2 CHAIR SESSIONS: Jon.

3 COMMISSIONER WROBLEWSKI: Thank you,
4 Judge.

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

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

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

18 Of course there are other parts to
19 3553(a). For example, there's the overarching part
20 which says that the sentence should be sufficient,
21 but not greater than necessary. I'll underline
22 "sufficient" to reflect the seriousness –

1 MR. TIRSCHWELL: And I'll underline the
2 other part.

3 COMMISSIONER WROBLEWSKI: I understand.

4 (Laughter.)

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

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

19 MR. TIRSCHWELL: I hear a couple of
20 different questions in there. I think we would not
21 have an objection to any new language about the
22 consideration of these specific characteristics being

1 put in a frame of the other 3553(a) considerations,
2 including unwarranted disparities. And I think some
3 of the additional language that we've proposed, while
4 it doesn't specifically reference the unwarranted
5 disparities subprovision, is intended to get at that.
6 In other words, we understand there has to be some
7 frame and sort of limitation that's part of the
8 context.

9 I don't think we – I think we would not be
10 in favor of sort of the language at the end of your
11 question that a sentence should be primarily driven
12 by, which I think is just sort of too – both too
13 simplistic and too broad in the sense that I think
14 3553(a) says it the way it is, the way Congress
15 wants it, the way the courts have to follow it. It's
16 fairly detailed and specific. And I think the
17 weights are what the weights are under that
18 framework.

19 So I wouldn't think – I don't think we
20 would be in favor of that particular emphasis. But
21 the idea that if you're going to consider offender
22 characteristics you should bear in mind that there is

1 this goal of avoiding unwarranted disparities.

2 We underline the word "unwarranted"
3 because in our view often, based on specific offender
4 characteristics, disparities are warranted, and that
5 is sort of the issue.

6 COMMISSIONER WROBLEWSKI: Thank you.

7 CHAIR SESSIONS: Commissioner Jackson.

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

17 MS. BRANTLEY: In a word, yes, our fears
18 are borne out in those kinds of programs. Because
19 people – and maybe even they mean it when they talk to
20 us about wanting drug treatment and needing drug
21 treatment. Not everybody who starts a drug treatment
22 program – for example, we have a drug court in our

1 district that shaves a year off of the supervised
2 release term.

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

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

21 CHAIR SESSIONS: Can I just respond to
22 that, because I agree that you should always have the

1 carrot in front, but my conclusion from this proposal
2 is the direct opposite.

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

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

19 The 500-hour program has as a condition,
20 first of all, that you get 30 months. These people
21 can't get 30 months without an upward departure.
22 These are the low-level drug defendants who are going

1 to get zip for treatment in a prison.

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

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

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

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

22 If we feel that there's a criminogenic

1 need of this offender to receive drug treatment, it
2 is going to be made available. But it's also going
3 to be made available in the programs that exist
4 regionally as opposed to trying to fit some criteria
5 over every drug treatment facility that might exist
6 in say metropolitan areas that don't exist in areas
7 with lower populations, for example, or maybe tribal
8 places.

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

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

21 And it will also complicate the sentencing
22 process by unnecessarily litigating whether or

1 not – how much drugs were involved, for example, to
2 get it down to an 11, 12, 13, whatever, base offense
3 level there is, to decide whether or not this person
4 was addicted at the time, or to decide whether or not
5 this person has substantially contributed, their
6 addiction substantially contributed to commission of
7 the offense.

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

15 CHAIR SESSIONS: Ricardo.

16 COMMISSIONER HINOJOSA: We've talked about
17 3553(a) and its direction to me as a judge, for
18 example, a sentencing judge, about considering the
19 history and characteristics of the defendant, but
20 what if any relevance is there to the statute that
21 set up the Commission at the time that Congress was
22 writing 3553(a) that says the Commission shall

1 assure that the guidelines and policy statements are
2 entirely neutral as to the race, sex, national
3 origin, creed, and socioeconomic status of the
4 offenders?

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

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

16 Do those have any meaning to me as a
17 sentencing judge when Congress is writing those at
18 the same time that they're telling me to consider the
19 characteristics of the offender and the criminal
20 history? Do I just ignore those? Do they mean
21 anything? And what can the Commission do? Do we
22 ignore them now that we're talking about changing

1 Chapter Five? I mean, can we just decide like the
2 Supreme Court decided we'll just X those out and go
3 on to something else?

4 (Laughter.)

5 COMMISSIONER HINOJOSA: I mean, what do we
6 do?

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

11 COMMISSIONER HINOJOSA: Just like in the
12 courtroom, you all have your books open -

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

1 large part of our discussion.

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

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

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

1 what we're proposing.

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

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

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

17 (Whereupon, a recess was taken.)

18 CHAIR SESSIONS: Okay, let's convene.

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

21 First, Marianne Mariano is the Federal
22 Public Defender in the Western District of New York,

1 better known to us in the Second Circuit as "Bou-fa-
2 low."

3 (Laughter.)

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

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

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

22 MS. HUJAR ORR: "Hoo-jar."

1 CHAIR SESSIONS: Hujar Orr, is the
2 president of the National Association of Criminal
3 Defense Lawyers. She practices law in San Antonio at
4 the firm of Goldstein, Goldstein & Hilley. She
5 received her undergraduate degree from the University
6 of Texas at Austin, and her J.D. Degree from St.
7 Mary's Law School. Welcome.

8 So let's first begin with Ms. Mariano.

9 MS. MARIANO: Thank you, Judge. May it
10 please the Commission -

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

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

19 (Laughter.)

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

22 MS. MARIANO: That's my plan, Your Honor -

1 (Laughter.)

2 CHAIR SESSIONS: Really?

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

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

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

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

21 We consider this an encouraging step in
22 identifying alternatives to incarceration for low-

1 level, nonviolent offenders. Substance abuse
2 treatment is absolutely essential, whether inpatient
3 or out, and must be available to more nonviolent
4 offenders.

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

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

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

19 We believe the Commission should recommend
20 drug treatment as an alternative to incarceration for
21 all such offenders who suffer from – nonviolent
22 offenders who suffer from substance abuse disorders,

1 because treatment in the community has proven
2 effective to further public safety by reducing
3 recidivism.

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

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

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

20 Importantly, the probation requirement
21 would exclude first-offenders who are sentenced below
22 a mandatory minimum through application of the safety

1 valve, nearly one-quarter of all drug offenders in
2 fiscal year 2008.

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

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

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

21 Consider the data from fiscal year 2008.
22 By limiting eligibility to Offense Level 16, it would

1 exclude 50 percent of drug trafficking offenders in
2 Criminal History Category I who had received a four-
3 level minimal role adjustment.

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

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

18 Again looking at your own data, 52 percent
19 of all drug offenders fall within Criminal History
20 Category I, but only 22.6 percent of those offenders
21 are involved with crack cocaine cases. This is a
22 disparity between the type of drugs that the

1 offenders are involved in and would exclude many
2 crack cocaine offenders from application of this very
3 important provision.

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

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

19 We do not believe that the guidelines
20 should also require that the substance abuse disorder
21 contribute substantially to the commission of the
22 offense. The requirement creates unnecessary

1 litigation over and over again in every case over the
2 meaning of "substantially." And it fails to
3 recognize the far more complex and complicated
4 relationship between substance abuse and crime.

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

11 In my own district I can tell you that the
12 14 westernmost counties of New York have very
13 different opportunities available to offenders within
14 them. Buffalo and Rochester alone, the two largest
15 cities, have very, very different resources available
16 for our clients.

17 We think that by requiring that the
18 treatment be residential it also fails, the
19 guideline fails to recognize that we do actually get
20 some of our clients out on bail, and many times when
21 they do get released they go directly into in-patient
22 treatment. And those offenders who complete

1 in-patient treatment and are in compliance with their
2 pretrial release conditions should be eligible for
3 application of this guideline, but they will not be
4 admitted back into a residential treatment program if
5 they have successfully completed it.

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

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

20 We would also support the Commission's
21 efforts to amend the guidelines to encourage
22 alternatives to incarceration for defendants with

1 treatment or rehabilitative needs other than
2 substance abuse.

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

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

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

21 As this Commission has recognized, it is
22 important that the federal system offer alternatives

1 to incarceration which provide offenders with life
2 skill programs and substance abuse or mental health
3 treatment. Such programs work, and the zone changes
4 will allow more offenders to benefit from such
5 opportunities within the guidelines framework itself.

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

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

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

21 We believe the 5H factors ought to be,
22 simply stated, relevant; that the Commission ought to

1 remove the "not ordinarily relevant" language and
2 state that they are relevant.

3 This would give judges the ability to
4 consider these very important issues in each
5 individual case, which they are in fact considering
6 under 3553(a). By doing it under the guidelines
7 provisions, the Commission is in a position to better
8 collect data on what the courts are finding relevant
9 about these factors. And we feel that it's important
10 that the guidelines simply state that they are in
11 fact relevant to the purposes of sentencing, and that
12 courts may consider them.

13 CHAIR SESSIONS: Thank you. All right,
14 Mr. Felman.

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

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

1 are imprisoned.

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

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

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

18 The ABA strongly supports the expansion of
19 the zones in the sentencing table. Virtually every
20 state criminal justice system makes use of a wide
21 variety of forms of punishment short of pure
22 incarceration, such as probation, home detention,

1 intermittent confinement, and community service.

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

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

13 By fiscal year 2008, only 7.4 percent of
14 federal defendants received probationary sentences;
15 6.2 percent received split sentences of both
16 imprisonment and home or community confinement; and
17 the remaining 86.4 percent of defendants received
18 sentences of straight incarceration. At the same
19 time, utilization of community confinement has been
20 curtailed and shock incarceration and boot camp
21 programs have been eliminated.

22 The current federal criminal justice

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

10 The current guidelines treat nearly every
11 case as "otherwise serious." In fiscal year 2008,
12 92.6 percent of offenders were sentenced to
13 imprisonment.

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

18 In 1990, both the Judicial Conference of
19 the United States, as well as an esteemed group of
20 experts under the leadership of Commissioner Helen
21 Corrothers, recommended expansion of a wide array of
22 alternatives to incarceration.

1 Ten years later – and I might add, one week
2 and one decade ago, I myself sat in this room and
3 addressed Commissioners Castillo and Sessions to ask
4 for an expansion of the zones. Obviously I was very
5 successful.

6 (Laughter.)

7 CHAIR SESSIONS: And we're still here.

8 (Laughter.)

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

18 In light of these considerations, we
19 believe the Commission's proposed amendments to the
20 sentencing table, while providing judges with greater
21 discretion to impose nonprison sentences simply do
22 not go far enough.

1 Specifically, we would urge the Commission
2 to consider three expansions of its pending proposal:

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

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

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

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

20 Thus it would appear that even after a
21 one-level expansion of the zones, imprisonment would
22 still be required in virtually all the cases that are

1 required under the existing guidelines.

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

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

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

20 The Commission's own extensive study of
21 criminal history and recidivism demonstrates the true
22 first offenders are simply different. They have

1 significantly lower risk of recidivism. This
2 reflects Congress's intuitively correct determination
3 in the enabling legislation that first-time offenders
4 are peculiarly suited to non-imprisonment sentences.
5 That distinction should be reflected in the
6 guidelines.

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

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

16 The relative severity of each offense
17 category is considered and addressed within each
18 guideline, and then channeled into the sentencing
19 table as a product of all pertinent considerations.
20 Never before has the Commission attempted to identify
21 certain categories of offenses for differential
22 treatment within the sentencing table.

1 Such a structure would suggest that the
2 careful calibration of proportionality across all
3 offenses previously underlying the manual no longer
4 obtained. Indeed, it would suggest first time in the
5 history of the guidelines that one set of
6 considerations should govern the appropriate length
7 of a sentence, and yet some other or different set of
8 considerations should inform the in/out question of
9 whether to impose a sentence of imprisonment at all.

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

13 Second, grafting exemptions onto the
14 expanded zones would add considerable and unnecessary
15 complexity. As its presently constructed the
16 proposal would expand the existing zones. So if
17 we're talking about curtailing the applicability of
18 just the expanded portions of the zones to certain
19 parts of the offenses, then you would now have
20 different rules within the same zone. You would
21 essentially have subzones, and that strikes us as
22 again unnecessarily and unduly complex.

1 Finally, we see little reason to believe
2 that any particular class of offender at the same
3 offense level is any more or less deserving of an
4 alternative to incarceration. We see no basis for
5 the suggestion that tax offenders should be treated
6 any more harshly than child pornographers, arsonists,
7 extortionists, burglars, money launderers, and
8 environmental criminals.

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

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

1 community.

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

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

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

22 We appreciate the Sentencing Commission's

1 consideration of the ABA's perspective on these
2 important issues, and are happy to provide any
3 additional information the Commission might find
4 helpful.

5 Thank you for the opportunity to address
6 you this morning.

7 CHAIR SESSIONS: Thank you, Mr. Felman.

8 Ms. Orr.

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

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

18 We have a recommendation that the phrase
19 "not ordinarily" be removed from these policy
20 statements to reflect that these are legitimate
21 factors to consider for sentencing. That is in our
22 written testimony.

1 What I want to emphasize in my oral
2 testimony is the fact that NACDL sees the
3 Commission's role as one of providing substantial
4 guidance to practitioners, to judges, and all those
5 involved in the sentencing process, from the
6 probation officers going forward.

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

16 The goal would be to meet the objectives
17 of both cost effectiveness, but more importantly the
18 effectiveness of penal policy so that any proposed
19 amendment, or information that this Commission
20 provides results in less costly, more effective
21 measures that promote public safety and also are more
22 humane.

1 In addition, NACDL applauds the Commission
2 for making this important and positive step towards
3 providing alternatives to incarceration. In San
4 Antonio, Texas, we're known as "military city USA."
5 We have a number of Army and Air Force Bases. We
6 have the Center for the Intrepid for Vets coming
7 back from military duty, from combat, that our town
8 financed. And the Military has its Center for
9 Military Medicine headquartered in San Antonio, and
10 it's expanding.

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

17 It's these sorts of practices, and
18 history, and real-life experience that I bring to the
19 table, along with the study that the NACDL did on
20 problem-solving courts where we gathered testimony
21 from across the country and did studies on these
22 problem-solving courts that provide alternatives to

1 incarceration that not only work, reintegrating these
2 people into society in a way where they don't re-
3 offend and hold down good jobs, but also work at
4 half the cost of warehousing these individuals and
5 halting the revolving door problem with those with
6 drug addiction problems.

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

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

19 For many of our veterans the same can be
20 said to be true. And even those out of the Service
21 who have drug problems are known to commit other
22 minor offenses because of their drug addiction that

1 insistence upon qualification under the safety valve
2 would surely close the door to them accessing this
3 alternative to incarceration. It would defeat the
4 very purpose that the Commission seeks to serve by
5 having this alternative to incarceration by insisting
6 upon qualification under the safety valve.

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

14 That is, under the mandatory guidelines
15 some of the largest racial disparity in sentencing
16 for minority defendants occurred under the mandatory
17 guidelines in 1999. Insisting upon the safety valve
18 would do the same sort of thing for the reasons I
19 mentioned – many of these drug abusers and addicts
20 have a number of minor offenses, and they're going to
21 have the criminal history. This is because also due
22 to factors not entirely of their own making.

1 Police, necessarily, more heavily patrol
2 poorer neighborhoods, not the wealthier
3 neighborhoods, and not the college campuses where we
4 know that the same number of drug exchanges take
5 place, and merely because of the nature of where
6 these transactions occur they're not as quickly and
7 as readily detected.

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

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

20 I also ask the Commission to consider and
21 move in the direction of providing this sort of
22 probationary sentence and treatment for persons with

1 mental illness and other infirmities that really
2 should be treated by the public health system and
3 diverted from our criminal courts.

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

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

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

1 cause crime.

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

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

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

22 Thank you very much.

1 CHAIR SESSIONS: Thank you, Ms. Orr.

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

4 COMMISSIONER WROBLEWSKI: Thank you.
5 Thank you all for being here. I just have a couple
6 of questions.

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

19 And then I have one other question.

20 MS. MARIANO: It may be helpful to provide
21 a better and more broader answer after this hearing,
22 but my recollection is that that limitation was meant

1 for the Commission in structuring how the guideline
2 itself would function.

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

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

13 COMMISSIONER WROBLEWSKI: And, Jim, one
14 quick question for you. First of all, I think you're
15 selling yourself short on accomplishments over the
16 last ten years. Some examples, on the economic crimes
17 package, for example, as you know penalties were
18 increased on people who were stealing, or involved in
19 frauds involving hundreds of millions of dollars, and
20 they were reduced just in that same rough time
21 period, they were reduced for people who were
22 involved in smaller amounts.

1 You know that this is all about line-
2 drawing, and that's what amendments are about.
3 Explain to me why you think a two-level push on the
4 zone is the right place to draw the line? Why not
5 three levels? Why one level? How do you draw the
6 line?

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

9 (Laughter.)

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

17 You all had a wonderful symposium. It's
18 been studied to death. And to come out of that and
19 say, okay, we're going to do a one-level change just
20 struck me as unduly modest. And for the reasons I've
21 said about the two-level ratchets in most of the
22 guidelines probably wouldn't have much effect at all.

1 I think that there's – and if you survey
2 the judges out there, I think even before *Booker* they
3 felt like they needed more room for alternatives. And
4 I think that it's better for the structure of the
5 guidelines to have them a little more in line with
6 what the judges want to do anyway so that you'd have
7 more consistency.

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

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

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

20 That said, as we outlined in our papers
21 the data shows that these are in fact mitigating
22 factors; that they are used to mitigate sentences and

1 not aggravate sentences. And we do join in NACDL's
2 concern that the idea that mental illness, for
3 example, could be used to give a higher sentence
4 implicates serious constitutional concerns.

5 But our proposal would be to simply open
6 up the language of Chapter Five in order to get a better
7 read on what judges are in fact doing already under
8 3553(a).

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

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

20 CHAIR SESSIONS: Ketanji.

21 VICE CHAIR JACKSON: Ms. Mariano, I am
22 curious about the Defenders' "wait another year"

1 stance. DOJ suggests that moderation is important in
2 fashioning the alternatives to incarceration, and
3 that this is sort of a significant first step in that
4 direction, and I'm just wondering why that's not
5 defenders' approach as well? Isn't something in this
6 regard better than another year of nothing?

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

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

22 The concern is that if it goes into effect

1 as is, the candidate pool will be so small that it
2 won't be actually implemented by the courts. And we
3 think a second year of study for further
4 revisions — we've outlined several — would be useful
5 before it's actually implemented.

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

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

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

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

19 CHAIR SESSIONS: Oh, you do?

20 (Laughter.)

21 CHAIR SESSIONS: I am also reminded of
22 a great expression which I think is applicable to my

1 experience in Washington, D.C., and that is: The
2 perfect is the evil of the good -

3 COMMISSIONER HOWELL: "Enemy" of the good.

4 CHAIR SESSIONS: "Enemy of the good"?

5 (Several nods of agreement.)

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

12 And of course you're suggesting that we
13 come back next year - to a totally different
14 Commission. Totally different members of the
15 Commission.

16 COMMISSIONER HINOJOSA: Not completely.

17 (Laughter.)

18 CHAIRMAN SESSIONS: The body changes.
19 Your consensus is that we should not take a step in
20 regard to drug treatment options because it is too
21 modest? And you think that that is going to impact
22 whether in fact the Commission sometime in the future

1 is going to address this in a much more expansive
2 way?

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

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

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

19 We are simply saying that if we take
20 another year, look at it more and maybe change some
21 of the limitations, at least some of the limitations
22 maybe just simply to the type of offenders who can

1 benefit from this, that next year this amendment
2 would be in the place that we think it ought to be
3 when it first hits the books.

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

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

12 (Laughter.)

13 MS. MARIANO: Some of you just got here.

14 (Laughter.)

15 CHAIR SESSIONS: That was clearly a
16 misstatement.

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

20 CHAIR SESSIONS: Any other questions at
21 all?

22 (No response.)

1 CHAIR SESSIONS: Well thank you very
2 much.

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

6 (Laughter.)

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

9 (Whereupon, a recess was taken.)

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

13 First, Thomas Berger is the executive
14 director of the Vietnam Veterans of America's
15 Veterans Health Council. He is also chair of the
16 Veterans Administration's Consumer Liaison Council
17 for the Committee on Care of Veterans with Serious
18 Mental Illness. He is also a member of the VA's
19 Mental Health Quality Enhancement Research
20 Initiative Depression Workgroup, and the South
21 Central Mental Health Illness Research and Education
22 Clinical Center. Dr. Berger has also served as a

1 Navy Corpsman with the Third Marine Corps Division in
2 Vietnam from 1966 to 1968, and it is a real honor for
3 us to have you testify before us today.

4 DR. BERGER: Thank you.

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

18 MR. BRIGGS: Thank you.

19 CHAIR SESSIONS: Next, Scott Decker is
20 professor and director of the School of Criminology
21 and Criminal Justice at Arizona State University's
22 downtown campus. His research interests include

1 criminal justice policy, gangs, violence, and
2 juvenile justice. Dr. Decker received his
3 undergraduate degree from DePaul University, earned
4 both his master's and Ph.D. in criminology from Florida
5 State University. Thank you for making the long trip
6 from Arizona.

7 DR. DECKER: You're welcome.

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

1 today.

2 DR. SEPPALA: Thank you.

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

5 DR. BERGER: Thank you, Mr. Chairman,
6 distinguished members of the Commission -

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

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

16 I would like to begin by saying it is very
17 important to me personally as a Vietnam veteran, a
18 combat Vietnam veteran, to have been asked to
19 represent an organization that for the greater
20 portion of its life we have been vilified for our
21 service and portrayed as substance abusing, crazed
22 lunatics. And it's changing. I understand that.

1 The motto of Vietnam Veterans of America
2 is: "Never again shall one generation of veterans
3 abandon another." And that's one of the reasons I'm
4 here today is to talk about the mental and emotional
5 and drug dependence conditions suffered by our
6 nation's veterans as a result of their military
7 service, and the impact that your proposed amendments
8 can have on this population.

9 2010 marks the ninth straight year of war
10 for America. There are now more than 23 million U.S.
11 veterans, including 1.7 million and counting from the
12 wars in Iraq and Afghanistan. Almost 5300 OIF and
13 OEF vet warriors have paid the ultimate price, and
14 another 37,000 will forever bear the physical wounds
15 of war. Those are counted under DOD as combat-
16 related. In other words, you have to be in the Green
17 Zone in Iraq, or on a patrol, before you're counted
18 as combat wounded. There's thousands of others who
19 have been wounded in related accidents.

20 And despite the efforts by our military
21 health officials, we can't forget that between 20 and
22 30 percent of our OIF/OEF troops have symptoms of a

1 mental health disorder or cognitive impairment, and
2 that one in six of this group suffers from a
3 substance abuse challenge.

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

9 Today an estimated 60 percent of the
10 veterans in prison have a substance abuse problem.
11 Tonight, roughly 130,000 vets are on the streets
12 homeless, and 70 percent of these folks suffer from a
13 substance abuse and/or mental health condition
14 related to their military service.

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

22 So it's our belief that alternatives to

1 sentencing which incorporate court-mandated,
2 evidence-based, dual diagnosis treatment programs
3 such as those that have been identified clearly by
4 the Institute of Medicine and are already utilized
5 in a number of veterans courts, in combination with
6 nonaddictive biopharmaceuticals where appropriate,
7 can be important steps in that direction.

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

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

21 I need to warn you, however, in terms of
22 your thinking that there's another addiction

1 challenge that's beginning to resurface amongst our
2 veterans. Our veterans are seeking help from the
3 chronic pain that accompanies their war wounds. We
4 have a growing addiction to opioids, as in
5 prescription drug addiction to pain killers such as
6 OxyContin, Demerol, Dilaudid, Vicodin, and codeine,
7 which are available to veterans at virtually no cost
8 through the VA for those 30 percent of our veterans
9 who use the VA.

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

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

21 Of the first 200,000 OEF and OIF veterans
22 accessing the Veterans Health Administration's

1 facilities, the number one reason for presentation
2 was for pain. Number two was PTSD. Primarily back
3 and joint pain.

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

10 In addition, okay, and we know this
11 happens in the civilian population, telescoping or
12 rapid progression from appropriate use to abuse of
13 opioids occurs more frequently in women versus men.
14 This makes prescribing safe and effective pain
15 medicines for female veterans more challenging. And
16 as I said, women represent a larger proportion of
17 U.S. military forces than ever before, about 14 to 15
18 percent, and the proportion in active duty military
19 service is expected to increase. These new female
20 veterans are younger, more likely to identify as
21 belonging to a particular racial minority; they have
22 a high prevalence of mental health disorders, more so

1 than their men colleagues; have higher rates of
2 exposure to combat trauma than previous cohorts of
3 women veterans, and have high rates of exposure to
4 military sexual trauma. And all of this places them
5 at higher risk for chronic pain syndrome.

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

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

18 We are obviously very supportive of the
19 increasing sensitivity of the courts for the unique
20 circumstance of veterans encountering the justice
21 system upon return from combat. I would be remiss,
22 however, if I didn't refer to the lack of alternative

1 and diversionary veterans – or ways to address
2 veterans' drug and substance abuse and mental health
3 problems that came too late for many of my
4 colleagues. There's little doubt, and ample
5 statistical data, however, to substantiate the
6 dismal record that we suffered.

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

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

22 So – and we don't want it to happen to the

1 new kids, as we call them.

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

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

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

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

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

22 (Laughter.)

1 MR. BRIGGS: - I appreciate getting the
2 invite back.

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

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

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

22 These substances have a designated place

1 in the brain to call home. If they couldn't affect
2 the brain, the notion of being "high" would not
3 exist.

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

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

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

21 From a general biological perspective,
22 there are many aspects which relate ultimately to

1 behavior. As the user moves more toward chronic use,
2 tolerance is produced. There is a need for more of
3 the substance to achieve the euphoric effect
4 experienced at earlier levels of use.

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

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

19 The psychological status of persons with
20 substance use disorders also impacts behavior. It is
21 well documented that a number of persons presenting
22 for treatment of the substance use disorders have a

1 co-occurring mental health disorder.

2 Based on best practices in the treatment
3 of substance use disorders for individuals with a
4 substance use disorder, it is the expectation rather
5 than the exception. I provide treatment to probably
6 900 patients. I supervise five clinics. A great
7 majority of folks that present for care have a co-
8 occurring disorder. And that is just in the general
9 population. I've seen statistics that it might even
10 be higher in the criminal justice area.

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

16 What then are the ramifications? Clearly
17 there's a potential for addicts to use substances
18 medicinally to ameliorate symptoms of an underlying
19 mental health disorder. Cessation of the substance
20 use could exacerbate the symptoms. In turn,
21 exacerbation of the symptoms could become a trigger
22 leading to cravings and a return to substance use.

1 For offenders in this category, a dual
2 concern exists. Persons diagnosed with a mental
3 health disorder are often prescribed psychotropic
4 medications designed to reduce the symptoms of the
5 disorder. Should they use a psychoactive substance
6 while taking the medication, the therapeutic benefit
7 is often not met.

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

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

22 This is where the boundaries of the social

1 contract are weakened. It boils down to an issue of
2 development of counterproductive relationships. The
3 more intense the relationship to the substance, the
4 less important the relationship to self, others, and
5 community.

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

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

18 It is important to note that stopping
19 substance use is not the end, it's the beginning. To
20 embrace this concept, it is important to realize what
21 treatment is. Treatment is an organized system of
22 care which relies on assessments to determine

1 offender needs, treatment plans that address the
2 particular needs and an environment conducive to
3 change.

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

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

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

22 You want to educate the person in all

1 aspects of addiction and recovery. Some people need
2 information.

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

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

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

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

1 best interests.

2 I put an example here that someone might
3 be on parole or probation, and the parole or
4 probation officer says: "I want you to get a job.
5 Don't use. Don't commit any crimes. Don't hang out
6 with people that are doing that." And they might have
7 20 years' backup time, and they come up with a urine
8 that's positive for an illicit substance.

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

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

20 SAMHSA in their Treatment Improvement
21 Protocol says more than half of those in the criminal
22 justice system who complete treatment programs and

1 participate in aftercare do not commit new crimes.

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

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

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

14 CHAIR SESSIONS: Thank you, Mr. Briggs.
15 Dr. Decker.

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

20 (Laughter.)

21 DR. DECKER: Seven o'clock here is an hour
22 I don't see back home.

1 VICE CHAIR CASTILLO: You don't have
2 daylight savings.

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

5 (Laughter.)

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

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

1 adding new considerations.

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

7 The average score – this will mean more to
8 you all than some others – was 34, but we did have a
9 42 in there, and that was the fellow who was caught
10 with 8,000 pounds of cocaine. So your data serves a
11 variety of important purposes.

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

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

1 we have 800,000 people on parole.

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

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

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

17 One of the important things that we in the
18 research community look at the Sentencing Commission
19 and sentencing guidelines for is their efforts to
20 limit discretion. So there's a part of me that
21 says – there's a huge part of me that says:
22 Alternatives are very important, very useful; we need

1 more of them, lest we bankrupt ourselves, as many
2 states have learned – on the one hand. On the other
3 hand, the discretion that's introduced by the
4 consideration of other alternatives I think is
5 important to pay attention to.

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

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

19 (Laughter.)

20 DR. DECKER: I'll give you the two

1 highlights of what we think the last ten years of
2 criminological research have produced.

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

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

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

19 The age crime curve roughly goes like
20 this. Peak offending occurs at the age of 21. By 25,
21 that peak has dropped by 50 percent. By 30, it's
22 dropped by 85 percent. And there are those who

1 argue, and the data supports them and is on their
2 side, that with the exception of a couple groups of
3 offenders – alcohol abusers, they don't seem to get
4 better over time; sex offenders, they similarly don't
5 seem to get better over time – but with those two
6 notable exceptions, once an offender moves past the
7 age of 35, their probability of offending is so low
8 that it's a bad investment of our public resources to
9 keep them incarcerated in prison.

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

19 It is important as I look through the five
20 criteria that you propose, the first being age, if
21 you give credit to people for being young you're
22 letting them out in their peak age of offending, and

1 the people who ought to get credit are the people
2 past age 35 - if what we're trying to do is use our
3 resources in a rational, deterrent sort of way.

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

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

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

22 Very little research to guide the decision

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

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

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

22 I think the five characteristics that

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

8 Thank you.

9 CHAIR SESSIONS: Thank you, Doctor.

10 And if we choose not to impose an amendment to say
11 that there should be no incarceration for people over
12 60 —

13 (Laughter.)

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

17 DR. DECKER: We could do that, yes.

18 (Laughter.)

19 CHAIR SESSIONS: Doctor.

20 DR. SEPPALA: Good morning. I really
21 appreciate the opportunity to testify before you
22 today. I am going to go off of my written remarks,

1 as well.

2 I am in recovery from addiction. I
3 dropped out of high school and ended up at Hazelden,
4 the place I work for now, at age 17. I didn't get
5 abstinent and sober until 19. I've been clean and
6 sober for over 34 years. I was able to complete high
7 school – the most important degree I've had because it
8 was the most difficult; then college, ultimately,
9 Mayo Medical School, and psychiatric training and
10 specialization [in] addiction.

11 So I've seen this problem from all angles.
12 I certainly could have been incarcerated as a youth
13 for the things that I did during my active use in a
14 small town in southern Minnesota where people treated
15 me well and didn't do that, for some reason. They
16 let me return to high school and complete that, a
17 remarkable gift. But I got good treatment, and some
18 of my friends and peers did not, and a lot of people
19 do not and end up in the system without adequate
20 treatment and don't have the opportunities that I've
21 had as a result.

22 Addiction is a disease. We know that.

1 The research is in. There's been addiction research
2 going on for 40 years. It was quite esoteric until
3 about 20 years ago. In the last 20 years we have
4 shown the part of the brain involved, the receptors
5 involved.

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

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

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

22 In fact, all rewarding behavior is

1 associated with dopamine. Anything we enjoy, but in
2 particular those things that result in our survival
3 and the survival of any animal result in dopamine
4 release in our brain to be sure that we'll do it
5 again.

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

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

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

20 They're being driven subconsciously –
21 because all this goes on in the limbic system, which
22 is below the level of consciousness; it's where our

1 memory, our learning takes place, as well as our
2 emotional activities, especially the positive
3 emotions – but it's in that limbic system where the
4 dopamine is being released, driving a change in our
5 prioritization. In fact, to the point where people
6 will risk their lives in order to keep using a drug,
7 a remarkably unusual activity for a human being.

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

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

20 We're talking about an illness that does
21 respond much in the way that any chronic illness does
22 to good medical treatments. A paper provided by Tom

1 McLellan and some others a few years ago described
2 this specifically, comparing addiction to coronary
3 artery disease, hypertension, and other chronic
4 illnesses showing that addiction itself has just as
5 good a recovery rate as those illnesses.

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

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

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

22 In my written statements I describe the

1 treatment of health care professionals, and in
2 particular physicians, which I've been doing since I
3 entered the practice of psychiatry and addiction
4 medicine in 1988.

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

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

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

20 It is not standardized in a manner that is
21 adequate at this point, but if you are considering
22 alternatives to imprisonment for folks with drug and

1 alcohol problems, they need mandatory treatments and
2 ongoing monitoring just as these health care workers
3 do to ensure the possibility of recovery.

4 Physicians and pilots have the highest
5 recorded rates of abstinence after treatment for
6 addiction for this very reason, because they have
7 mandatory treatment and ongoing monitoring. The
8 physicians in fact have 75 to 90 percent abstinence
9 rates at five years. In the general public that
10 comes to our treatment programs, that rate is about
11 50 to 55 percent at one year.

12 In other treatment programs, public
13 programs in particular, we would talk in the 30
14 percent rate as a good number of ongoing abstinence.
15 So you can see a part of it is motivation – pilots and
16 physicians want to keep working, and they're highly
17 trained and do not have many options – but the truth
18 is, it is driven by the monitoring and treatment that
19 they get, and the required nature of that. And I
20 would think that anything you do with these
21 populations would be in the same manner.

22 Best practices do exist. NIDA publishes

1 this information. It's readily available. Cognitive
2 behavioral therapies are remarkably important to the
3 treatment of any addicted population, but especially
4 a criminal population as well because they need to
5 change their thinking patterns and start to
6 understand how to relate with other people in the
7 world in a remarkably different manner.

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

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

21 There are insurance exclusions. The very
22 population you're looking at would be excluded from

1 most insurance policies because of their criminal
2 activity, rather than gaining treatment for the
3 addiction that would be covered by their insurance.
4 And so it results in only public treatments being
5 available to this population. That is not
6 necessarily bad, but it is a shifting of
7 responsibility that makes no sense to me.

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

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

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

22 Once again, I really thank you for being

1 here today.

2 CHAIR SESSIONS: Thank you very much,

3 Dr. Seppala. Let's open it up for questions.

4 Commissioner Friedrich.

5 COMMISSIONER FRIEDRICH: Thank you.

6 Mr. Decker and Mr. Seppala, you both talked about the

7 importance of mandatory drug treatment, how that's

8 essential, compared to optional.

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

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

21 And while we've got them in prison we can
22 do a pretty reasonable job, although the rates of

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

12 Absent the follow ups and the booster,
13 they return to baseline very quickly. And your point
14 about physicians and pilots achieving 70 percent
15 success rates after five years, and 50 percent after one
16 year for other sorts of treatments, when you think of
17 offenders who have so many deficits that have to be
18 overcome, they need heavy dose.

19 COMMISSIONER FRIEDRICH: Well the re-entry
20 programs that I'm familiar with in the federal
21 system, and the ones we've heard about recently that
22 are growing across the country, tend to be those that

1 give the defendants an option. You can opt in and
2 get a year off of supervised release.

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

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

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

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

22 But the mandatory treatment is absolutely

1 necessary to get people's attention, get them
2 adequate treatment, and monitor them over time, as
3 Scott described.

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

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

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

1 mandatory.

2 DR. SEPPALA: I agree.

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

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

16 One of the themes the Commission is
17 looking at is the sort of effectiveness of programs,
18 and how you set up standards to determine what
19 programs are going to be effective and not. And so
20 my question is: Is it pretty easy to determine,
21 looking at a program, whether it's the type of thing
22 that will be effective? Is there a checklist? Is

1 there something that, you know, can look at to say
2 this program is likely to work, and this one probably
3 won't?

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

7 VICE CHAIR JACKSON: As a standard for
8 determining –

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

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

18 Also, on the web, SAMHSA, [CSAT], and NIDA
19 have a web site for best practices. It's a variety
20 of programs and interventions that have been shown to
21 have efficacy in the treatment of folks with
22 substance use disorders. Included in that is, as I

1 mentioned, the Treatment Improvement Protocol No. 44,
2 put out by SAMHSA, is totally dedicated to treating
3 offenders with substance use disorders.

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

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

17 COMMISSIONER FULWOOD: It's interesting
18 that we can require mandatory treatment for a sex
19 offender and not do it for substance abusers. Most
20 of the programs are voluntary programs, and people
21 walk away. They get treatment, they walk away, and
22 they come back.

1 There's a tremendous relapse rate. And so
2 having some standard makes a lot of sense to me.
3 Because in the long run, it's cheaper. And what's
4 the release of low-level offenders now is not any
5 public policy, it is cost. It's causing states to
6 release people. There is no investment in
7 supervision. The real investment is someplace else.

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

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

20 Obviously, implicit within that, and
21 perhaps maybe what you're suggesting, is a statement
22 in there that if you fail drug treatment, then you're

1 violated and then you go back. So is that the kind
2 of mandatory drug treatment option that you think
3 would be successful?

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

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

19 And having that, the possibility of
20 reincarceration associated with their treatment, is a
21 huge opportunity for them. Right now, so many people
22 almost count on the judicial system to get folks into

1 treatment. It's an unfortunate and sad statement
2 about our system, but it's hard to get people into
3 addiction treatment.

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

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

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

19 People do need to work. People need
20 places to live. People need health care. Any one of
21 these things could precipitate a relapse. So someone
22 mentioned the cost. It does get expensive, because

1 this person needs to be tracked at various plateaus.

2 So let's say they hit the 90-day mark.

3 Well somewhere in there they'd need a job. Maybe
4 they need job training, vocational training; maybe
5 they need glasses; maybe they need dentures.

6 You know, there's a whole host of things.

7 And to create an integrated system that treatment
8 includes getting them prepared to truly be
9 productive members of society and experience the
10 things that we do by having a job, being able to get
11 a license, being able to address their medical and
12 mental health needs, that's important.

13 CHAIR SESSIONS: Commissioner
14 Wroblewski.

15 COMMISSIONER WROBLEWSKI: Thank you very
16 much, Judge, and thank you all for being here.

17 Professor Decker, I just have a couple of
18 questions. The Commission has been on a little tour
19 around the country holding hearings, and one of the
20 things we have heard on a number of occasions is
21 certainty of sentencing as compared to the severity
22 of sentencing is more important, especially in

1 relation to deterrence.

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

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

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

21 And here's why it's really important. I
22 spend a fair amount of time interviewing offenders on

1 the street and in prison. I've spent some time in
2 federal district court and state courts, and what's
3 really remarkable is to watch defendants for the
4 first time in a federal court who've been on
5 probation, who had suspended imposition of sentence,
6 might have done a 90-day shock in the state system,
7 might have even done two years, appear for the first
8 time in federal court and see everybody get
9 convicted. And not only does everybody get
10 convicted, they get "real time." And you see these
11 guys' jaws drop.

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

1 sentence because we don't really mean it.

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

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

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

15 If the prison sentence means you're
16 forfeiting a large number of important and valuable
17 assets to you, a family, a job, a career, a
18 reputation, a chance to see your children grow up,
19 then that sentence is far more meaningful. And those
20 assets tend to be associated more with certain kinds
21 of offenses and offenders – the white-collar
22 offenders, for example – than they do with your garden

1 variety assaulters and robbers and gun traffickers
2 and drug sellers who tend to lack those assets.

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

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

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

20 But if we give them a shock and say we're
21 going to stay your case for 90 days, and they get in
22 trouble, then you've got the "this time we really

1 mean it" again that they know we don't. And for many
2 offenders, until they get to the federal system, or
3 at the deep end of the state system, we don't really
4 mean it. And they all know that.

5 CHAIR SESSIONS: Commissioner Jackson?

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

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

20 The Urban Institute has also been funded
21 to do cost/benefit analyses as well. And there is a
22 literature out there. It is expensive - I don't

1 recall what your average annual cost to house someone
2 in the federal system is now; I know in my state
3 system it's \$24,000 a year to keep somebody in prison
4 in Arizona, and that's pretty consistent with
5 national averages. But it's more than just swapping
6 one out for the other.

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

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

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

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

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

21 DR. DECKER: Right.

22 VICE CHAIR CARR: Professor Decker, you

1 said that the impact of sentences diminishes after
2 the third or fourth year. What impact is that? And
3 whose measure?

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

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

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

14 DR. DECKER: I'm talking about deterring
15 of their -

16 VICE CHAIR CARR: Incapacitation.

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

19 CHAIR SESSIONS: Well, specific
20 deterrence to them.

21 DR. DECKER: Correct, as opposed to the
22 message we send to society.

1 CHAIR SESSIONS: Ricardo.

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

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

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

21 MR. BRIGGS: Well, I guess my take on it
22 is there's a relapse cycle. This is something we in

1 treatment know about. The end of the relapse cycle
2 is the actual use. There are many things that happen
3 that erode recovery that gets to that point.

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

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

15 So I guess the question is: Do we
16 sanction them because they stop doing that? Or do we
17 wait until they actually use? Apparently in the
18 practice that I supervise – five clinics total – we
19 have probably a thousand patients, and they're mostly
20 white- or blue-collar workers; some involved in
21 criminal justice. We intensify treatment if they
22 use.

1 So, for example, I might refer somebody to
2 Hazelden because an intensive outpatient program is
3 no longer viable for them. Their level of care is
4 just not working. So then we ratchet up.

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

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

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

1 day to diabetics.

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

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

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

17 COMMISSIONER WROBLEWSKI: Right.

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

1 agree with that.

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

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

16 CHAIR SESSIONS: Commissioner Fulwood.

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

22 It is reconnecting people to families.

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

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

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

1 there in the same way they do over in Southeast.

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

3 So we've got to be honest about that.

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

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

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

18 CHAIR SESSIONS: Yes, I just wondered
19 if there's any national studies. I mean, everybody
20 says there's a dramatic increase, or reduction in
21 recidivism rates if you go through successful drug
22 treatment. I just wondered if there's some document,

1 some study out there which says just that.

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

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

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

20 CHAIR SESSIONS: Thirty-four years?

21 DR. DECKER: Yes.

22 CHAIR SESSIONS: I would say that's

1 success, 34 years?

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

4 (Laughter.)

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

9 MR. BRIGGS: Thank you.

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

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1 AFTERNOON SESSION

2 (2:10 p.m.)

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

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

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

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

22 Next, Margy Meyers is back again. She is

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

7 VICE CHAIR CARR: Federal judge.

8 (Laughter.)

9 CHAIR SESSIONS: Federal judge? No.

10 She earned her J.D. from the University of
11 Pennsylvania, graduating Order of the Coif, and *cum*
12 *laude*, and welcome back.

13 And again, Teresa Brantley was introduced
14 previously today. She is a member of the
15 Commission's Probation Officers Advisory Group.
16 She's a probation officer representing the Central
17 District of California, Los Angeles.

18 All right, first, Ms. Smith, we will hear
19 from you.

20 MS. SMITH: Thank you, Mr. Chairman, and
21 members of the [Commission]. Good afternoon, and thank
22 you for the opportunity to be here.

1 I would like to take a moment and
2 introduce myself. Twenty-nine years ago today,
3 actually, March 17th, 1981, I took an oath as a
4 Baltimore City prosecutor. During nine-and-a-half
5 years there I spent six-and-a-half years as a drug
6 prosecutor.

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

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

19 Again as a drug prosecutor my focus
20 continued to be the streets of Baltimore and the
21 streets of Maryland. With the luxury of not having
22 to take whatever landed on my desk, but with an

1 opportunity to investigate beyond the borders of
2 Maryland and the United States, I continued to focus
3 on the money launderers, the facilitators, and the
4 administrators of these criminal organizations.

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

13 I will spare you the glowing accolades on
14 what I think about the dedication and the tireless
15 work of the extraordinary public servants I get to
16 see as regional coordinator. I am, however, very
17 grateful for the career I have enjoyed. And it is my
18 great pleasure to have this opportunity to share the
19 views of the Department of Justice on the
20 Commission's proposed amendments to the sentencing
21 guidelines on the so-called recency provision of
22 Chapter Four of the guidelines.

1 We appreciate the Commission's leadership
2 since the passage of the Sentencing Reform Act, and I
3 would like to commend – we would all like to
4 commend – especially the Commission's collection,
5 analysis, and careful consideration of empirical data
6 in shepherding the evolution of the guidelines over
7 the last two-and-a-half decades.

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

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

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

21 Option 2 would retain recency points, but
22 would preclude the addition of recency points where

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

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

14 The guidelines now appropriately account
15 for this factor in the calculation of the criminal
16 history category with two criminal history points.
17 Furthermore, the commission of an offense after
18 recently having served a significant term of
19 imprisonment is a distinct aggravating circumstance
20 that also correlates with increased risk of
21 recidivism, and the guidelines also appropriately
22 take that circumstance into account with two criminal

1 history points.

2 Because the two factors often coincide,
3 the guidelines as currently drafted already limit the
4 impact of the cumulative application of status and
5 recency points, allowing for a total of three points
6 rather than four. The Commission is now proposing to
7 change that to two points.

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

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

20 Thus, there simply is no justification in
21 the empirical data for changing the way that criminal
22 history scores are assessed with respect to the

1 recency provision in Chapter Four.

2 Deterrence is also a criminal factor in
3 assuring public safety. The certainty that a harsher
4 penalty will result where an offender has both
5 committed an offense while under criminal justice
6 supervision and done so within two years of
7 imprisonment promotes respect for the law and serves
8 to deter persons from crime in the first instance.

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

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

21 Specifically, the Commission should
22 collect and analyze empirical data in an effort to

1 determine whether cumulative application of
2 §4A1.1 and any Chapter Two section that increases an
3 offense level based on criminal history is either
4 redundant and unduly harsh, or – as demonstrated by
5 the data – constitutes just punishment and ensures
6 public safety and promotes deterrence.

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

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

20 In closing, I would like to thank the
21 Commission for this opportunity to share our views,
22 and for its continued commitment to constant review

1 and evaluation of the guidelines to ensure fair
2 sentences and public confidence in our federal
3 sentencing system.

4 Thank you, very much.

5 CHAIR SESSIONS: Thank you, Ms. Smith.

6 Ms. Meyers?

7 MS. MEYERS: Thank you. I too want to
8 thank the Commission for inviting us and giving us
9 the opportunity to speak. I am speaking on behalf of
10 the Federal and Community Defenders.

11 Before I address recency, I have the
12 fortune, or misfortune, of becoming the chair of the
13 Sentencing Committee on April 1st.

14 CHAIR SESSIONS: Let me congratulate
15 you on taking that position.

16 MS. MEYERS: Well, I'm following Judge
17 Hinojosa. It's not enough to come from a big
18 district. We don't have enough to do in South Texas,
19 so I thought I'd take this on, as well.

20 (Laughter.)

21 MS. MEYERS: But I do want to address
22 something that you, Judge Sessions, asked Ms. Mariano

1 about why we are opposing 5C1.3.

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

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

20 In reality, we still see huge disparity
21 about minor role, and years later it's sort of, the
22 Commission did that, and then didn't revisit it. The

1 Commission may revisit it, but our sense is that
2 5C1.3 as written simply will not help any of our
3 clients.

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

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

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

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

22 It is interesting to hear how Ms. Smith

1 and I read the Commission's reports. The Department
2 of Justice says that that report shows that those
3 factors are predictors of recidivism.

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

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

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

22 I think again the empirical analysis

1 demonstrates why that's happening. The Department of
2 Justice's report indicates that most of the
3 recidivism, or there is a great likelihood of
4 recidivism in the first year from release, especially
5 the first year of release from a long sentence.

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

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

20 Also what we see is that recency points,
21 that one point, has the almost automatic impact at
22 the lowest level, as we indicate in our written

1 materials. That's the jump from Category II to
2 Category III. That's where it makes a difference
3 whether you get two points or three points.

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

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

14 As Henry Bemporad said in his testimony in
15 Phoenix, an undocumented alien who returns after
16 conviction for an aggravated felony can have a single
17 conviction, a conviction that by the convicting
18 jurisdiction was deemed worthy of probation at the
19 time, a single conviction will increase the statutory
20 maximum from two to 20, will increase the offense level
21 anywhere from four to 16 points, will count under
22 4A1.1(a) through (c), either one to three points; and

1 what often happens is these defendants who are on
2 probation are caught first by the state, for example,
3 revoked, and so they're found in prison. So it will
4 be three points under 4A1.1(a).

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

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

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

18 I mentioned that the timing is unfair
19 because, first of all, in terms of recency, in
20 contract to perhaps somebody who gets out of jail and
21 says, I don't care — we've all had clients who've done
22 a lot of time, and it's worth it to go smoke that

1 joint; they haven't had a joint for a long time - many
2 of the illegal aliens who return, the timing has
3 nothing to do with the reason for a return.

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

14 And I do have clients who have waited out
15 their period of supervised release. And then of
16 course the judge explains to them, that doesn't mean
17 you can come back. But most of them, the timing of
18 the offense has nothing to do with culpability,
19 especially because, not only is illegal re-entry
20 counted at the back end when they're sitting in
21 prison, it's counted at the front end from the moment
22 the alien first returns.

1 So a defendant could have been living
2 essentially lawfully in the United States – and I know
3 they're here illegally, but otherwise working,
4 supporting their family, for years, and years, and
5 years, and years, but if they entered, that means
6 that they would be counted against them. So they get
7 hit at the back and in the front, and it is unduly
8 harsh.

9 I see I have a yellow light. I would add,
10 if the Commission would consider not requiring, or
11 not recommending supervised release for undocumented
12 aliens, I think that would be helpful. Because in
13 the case of somebody who is deported, there is no
14 supervision. It serves nothing except for the
15 possibility of getting 22 years instead of 20 years.

16 I would, although this is not part of
17 recency in our comments, I would urge, while we're
18 talking about undocumented aliens, the Commission to
19 address the specific conditions, or collateral
20 consequences faced by aliens in not only prison, but
21 for example what we do often in the Southern District
22 of Texas, where aliens are held in ICE custody until

1 the government feels like bringing a charge. Our
2 judges regularly depart, or reduce the sentence for
3 the time in ICE custody.

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

7 CHAIR SESSIONS: Thank you.

8 Ms. Brantley?

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

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

20 I know that there are some questions in
21 the proposed amendments about illegal re-entry
22 defendants and how we might handle Chapter Four in that

1 situation. The one thing that we said resoundingly
2 as a group that we all agreed with each other is, we
3 would hope that the Chapter Four could be applied on its
4 own without too much of a consideration as to what
5 Chapter Two requires us to do. Because we felt like
6 that would become messy to apply.

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

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

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

13 CHAIR SESSIONS: Sure.

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

22 MS. BRANTLEY: That was POAG's position,

1 yes.

2 COMMISSIONER WROBLEWSKI: Okay. And can I
3 ask one question of Ms. Meyers?

4 CHAIR SESSIONS: Yes.

5 COMMISSIONER WROBLEWSKI: Margy, the table
6 that you talked about from that one recidivism study
7 also includes -

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

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

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

20 MS. MEYERS: I can't comment on data I
21 haven't seen, but as I understand that table it says,
22 yes, there may be a factor, and I know what Ms. Smith

1 is talking about is particularly if you consider it
2 alone it is a factor that you consider for
3 recidivism. But when you measure it against all of
4 the other factors looking at Exhibit 6, it really
5 doesn't add very much.

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

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

14 Putting aside for a second the recidivism
15 data, which we look at and we may have different
16 takes on what that data reveals, as we've already
17 seen from the panel discussion, but one other
18 important thing that I think the Commission is
19 statutorily required also to look at is to try and
20 minimize unwarranted disparity. And when we have
21 judges, some judges, who are granting variances
22 because of an overstatement of criminal history — you

1 know, particularly in circumstances where a
2 particular offender has one prior that's counted up
3 to four or five times – an overstatement of criminal
4 history is, for a long time now I think ever since
5 I've been on the Commission, the reason that's given
6 most often for variances, or below-guideline
7 sentences, whether it's a departure or a variance.

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

16 There are different ways to address that
17 overstatement of criminal history for circumstances
18 where a single event can be counted one, two, three,
19 four, five times. So do you think that where there
20 are offenses that are counted that many times that,
21 putting aside the recidivism data, that that is also
22 a reason from what you call the empirically based

1 data in front of us that we should be sensitive to
2 and approach a solution to the recency issue by
3 thinking that that's something we need to address
4 that's also empirical data, the variance reasons are
5 also empirical data we'd be looking at as posing a
6 problem that we need to address?

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

9 COMMISSIONER HOWELL: Well, it's just that
10 people are talking about empirical data. Some people
11 when they talk about empirical data they talk about
12 recidivism data. Some people talk about — you know,
13 it's a much-tossed-around term right now.

14 What's missing from that — and I'm trying
15 to get a sense; it's something I've talked to Mr.
16 Coffin about this morning — as part of that empirical,
17 the review of empirical data that we're looking at,
18 shouldn't we also be looking at variance in below-
19 guideline rates?

20 MS. SMITH: I would definitely agree with
21 that. I think inherent in any sentencing system
22 that's advisory is discrepancy. And I think we can

1 look at it to understand where it's going. I'm not
2 sure there's a lot that can be done about it,
3 otherwise.

4 I mean, we can learn from it. But I'm not
5 sure in an advisory system, from what I'm seeing, I'm
6 seeing variances because someone's going to be
7 deported so they get a downward departure, so they
8 sit in jail less time. I'm seeing variances because
9 someone's being held in a local facility that's less
10 desirable than another local facility because of
11 overcrowding. We don't have a federal pre-detention
12 center.

13 COMMISSIONER HINOJOSA: In this case we
14 are actually seeing — actually 4A1.3 is being used a
15 lot by judges with regards to a departure. Criminal
16 history over-representation is one of the *Guidelines*
17 *Manual* departures that is actually being used quite a
18 bit.

19 And so the question is, what message is
20 that to us? Do we need to — isn't that part of what
21 we look at as far as numbers? If part of our
22 empirical data is the recency forms that we get, and

1 that therefore shouldn't we be looking at that to
2 make some changes with regards to criminal history?
3 Or do we just let it sit there and pile up and
4 pretend like nothing's happening?

5 MS. SMITH: You're asking me if I think
6 that is essentially a message from the bench?

7 COMMISSIONER HINOJOSA: No. The point is,
8 isn't that empirical data?

9 MS. SMITH: Sure it is.

10 COMMISSIONER HINOJOSA: And cannot the
11 Commission rely on that?

12 MS. SMITH: Sure it is.

13 COMMISSIONER HINOJOSA: And isn't it then
14 unfair to say that we don't have any empirical data
15 at this point to make any decision with regard to
16 this issue?

17 COMMISSIONER HOWELL: Because you're just
18 citing your interpretation of one element of data,
19 recidivism data, and there's lots of other data that
20 you're not talking about, which is the variance rate.

21 MS. SMITH: You would absolutely have to
22 consider all the data that you have, absolutely.

1 COMMISSIONER HOWELL: Thank you.

2 MS. SMITH: Sorry that was so difficult.
3 My apologies.

4 CHAIR SESSIONS: Ketanji is next. Go
5 ahead.

6 VICE CHAIR JACKSON: Ms. Smith, I am
7 interested in the interaction between the
8 Department's position on the recency provision and
9 its position on the alternatives. Because we heard
10 testimony on a previous panel that substance abusers
11 are more likely to re-offend, and re-offend quickly
12 right after they get out.

13 And, you know, DOJ's position on recency
14 seems to undercut the position on alternatives for
15 low-level drug offenders who have this kind of
16 cycling problem because those who are more likely to
17 be helped by the alternatives that I understand DOJ
18 endorses would also be more likely to be ineligible,
19 or deemed ineligible, for those alternatives by
20 virtue of the recency provision alone, because you
21 could get in two points automatically as a result of
22 this cycle.

1 So I'm just wondering. I don't know if
2 you're authorized to comment on that interaction,
3 but -

4 MS. SMITH: I'm actually probably not
5 prepared to comment on the alternatives. It's not
6 something I'm up on. But what I can tell you, in my
7 experience I'm not dealing with drug offenders - with
8 drug users. And I realize they're still out there in
9 a lot of courts, but the ones that I see are the
10 violent offenders.

11 VICE CHAIR JACKSON: As the recidivists?

12 MS. SMITH: As the recidivists, and as the
13 one the day they get out of jail they strap on a gun
14 and they're right back out there. Those are the ones
15 that cause outrage for me, that cause what I see as
16 the most public harm and the violence that is done.

17 That is where I'm coming from. And I
18 can't comment to the alternatives and the
19 interactions, I'm sorry.

20 VICE CHAIR CASTILLO: My question, Ms.
21 Smith, and thank you for your testimony, goes back to
22 Ms. Meyers' written testimony. Are you prepared - and

1 if you're not, that's fine – to comment on her looking
2 at the empirical data, looking at in particular our
3 AUC curve, and where it shows I think at page 92 and
4 93 of her testimony that the empirical research shows
5 that recency points are not a reliable predictor of
6 future criminal conduct, even when combined with
7 status points.

8 Do you want to comment on that?

9 MS. SMITH: I understand that it is not a
10 significant – that is my understanding, that it's not
11 as significant as status, and that it is
12 statistically insignificant in combination with
13 everything. I do understand that that is what the
14 study says. Not because of my own evaluation – I
15 changed my major in college to avoid statistics –

16 MS. MEYERS: Me, too.

17 (Laughter.)

18 MS. SMITH: – I got lost in it, and my
19 eyes clouded over, but I do acknowledge that there
20 is that, absolutely.

21 VICE CHAIR CASTILLO: So that is something
22 we have to consider along with your anecdotal

1 testimony -

2 MS. SMITH: Certainly.

3 VICE CHAIR CASTILLO: - as to what's going
4 on in Baltimore.

5 MS. SMITH: And I believe across the
6 country, along with a lot of places, and I believe
7 the people we are most concerned about are not being
8 impacted by recency, because that's not who we're
9 prosecuting.

10 COMMISSIONER HINOJOSA: Ms. Brantley, you
11 made the statement that you thought if it was limited
12 to a case - that if we made an adjustment with regards
13 to the recency points here with a situation where in
14 Chapter Two we had had an SOC that increased the
15 offense level based on that particular offense, that
16 it would be difficult then to not have to worry about
17 applying the recency points? Why would that make it
18 difficult to factor in?

19 MS. BRANTLEY: Thank you for giving me the
20 opportunity to clarify that. Here's what we talked
21 about during our discussion and during our meeting,
22 which is: If criminal history is calculated

1 differently depending on which Chapter Two offense we
2 have to apply in that case, we worried about how we
3 would deal, or even frankly if we would need to deal,
4 with the possibility that the same defendant, the
5 exact same defendant, the exact same criminal
6 history, who is charged with an offense that brings
7 him or her into Chapter Two [Part] L, versus for example that
8 exact same defendant charged with an offense that
9 would bring them under maybe Chapter Two [Part] B, that they
10 could possibly have different criminal history
11 categories. That's all.

12 COMMISSIONER HINOJOSA: That would be
13 true, but then the [Chapter] Two [Part] B didn't have
14 a big increase in the SOCs with regards to the offense
15 level, which would put them at a much lower level when
16 we go across the table to put them into the criminal
17 history. So that would be the reason, because then
18 you would have to keep in mind that in some cases
19 we'll do this, and in other cases we won't do this.

20 MS. BRANTLEY: That is part of our
21 discussion. But we also worried that that would
22 become part of a litigation process, because we do

1 have offenders who are charged with more than one
2 offense, including an illegal re-entry case. And
3 there would not be a single criminal history score
4 then.

5 COMMISSIONER HINOJOSA: Oh, you're
6 concerned when there's two counts in a particular
7 case, as opposed to – but normally wouldn't that be
8 taken care of in what we do with multiple counts,
9 that there are points added and you end up at a
10 certain level, and then the criminal history category
11 would still be considered?

12 I mean, you'd take care of it through the
13 multiple-count calculations. Because we always end
14 up with one offense level. We don't end up with two
15 offense levels.

16 MS. BRANTLEY: I'm not sure I understood
17 that.

18 COMMISSIONER HINOJOSA: Well whenever we
19 have two counts, we have a way in the manual as to
20 how we still end up with one offense level that
21 applies to both counts. And then you have to – you
22 know, the manual says run those concurrent, but you

1 add points depending on what the situation is. So
2 you still wouldn't have two offense levels, or two
3 criminal history categories, you'd have one offense
4 level.

5 MS. BRANTLEY: With two criminal history
6 categories.

7 COMMISSIONER HINOJOSA: And so once you
8 factored it in, and even though there were two
9 counts, it would still count as you've already
10 factored it into the base offense level.

11 MS. BRANTLEY: If I'm understanding this
12 correctly -

13 COMMISSIONER HINOJOSA: We could talk
14 about this later. We're probably taking up -

15 MS. BRANTLEY: We would end up with one
16 base offense level, or one offense level, but what do
17 we do with the two, possibly the two criminal history
18 scores, then.

19 COMMISSIONER HINOJOSA: Well you wouldn't
20 end up with two, because once you've got the one
21 offense level you've already - you've used the
22 enhancement in determining that offense level, and so

1 you wouldn't have two criminal history categories;
2 you would just have one criminal history category
3 because you'd have one offense level to begin with
4 once you put them together.

5 MS. BRANTLEY: I think the fact that you
6 and I are having this exchange tells me that we would
7 see some difficulty in applying this.

8 COMMISSIONER HINOJOSA: Well it would be
9 the same kind of exchange I have with probation
10 officers in the courtroom, so you might as well see
11 it my way -

12 (Laughter.)

13 COMMISSIONER HINOJOSA: Or, I have with
14 the defense attorneys or the prosecutors.

15 (Laughter.)

16 COMMISSIONER HINOJOSA: This is simple.
17 Let's not make it complicated.

18 MS. MEYERS: Your Honor, I think actually
19 there is precedent for doing it in the relevant
20 conduct provisions where you don't count, in criminal
21 history points, the conviction that was relevant
22 conduct. That's messier and more complicated than

1 saying, oh, this prior conviction raised the offense
2 level.

3 MS. BRANTLEY: It's not simple, though,
4 because in the Ninth Circuit we have case law -

5 MS. MEYERS: Nothing's simple there.

6 (Laughter.)

7 MS. BRANTLEY: - but we have case law that
8 says certain things are not relevant conduct in the
9 illegal re-entry setting.

10 COMMISSIONER HINOJOSA: What I was hoping
11 you wouldn't say, and you didn't, is that it has
12 something to do with the documents, and that somehow
13 that would present a problem like it does with
14 regards to the prior history to a [2L]1.2, but that's
15 not an issue as far as you're concerned, right?

16 MS. BRANTLEY: Oh, that's always an issue,
17 but -

18 (Laughter.)

19 COMMISSIONER HINOJOSA: But not with
20 regards to the criminal history aspect of it?

21 MS. BRANTLEY: - I don't think this makes
22 it harder or easier, yes.

1 CHAIR SESSIONS: Commissioner

2 Friedrich?

3 COMMISSIONER FRIEDRICH: Ms. Meyers, if I
4 could follow up on a point you made earlier today,
5 which is I think you indicated that a new offense
6 occurring within a year of release is material in the
7 sense that it's a good indicator of recidivism? Did
8 I misunderstand you?

9 MS. MEYERS: No -

10 COMMISSIONER FRIEDRICH: A year, as
11 opposed to two years. You made some distinction
12 between -

13 MS. MEYERS: Well according - the
14 Department of Justice has a report studying 1994
15 offenders that reflects that first year is where a
16 lot of new offenses, or where recidivism is most
17 likely to occur. Keeping in mind that recidivism
18 includes violations of supervision and arrest. So it
19 isn't necessarily conviction.

20 So my point is, I think similar to what I
21 think Commissioner Jackson was talking about, is that
22 period is the risky period, not because they're bad

1 people but because it's hard to re-enter. And to say
2 that somehow they're more culpable because they
3 haven't solved their drug problem isn't fair.

4 CHAIR SESSIONS: Well thank you. I
5 just have one response, or question of you,
6 Ms. Meyers. I noticed that you've taken a very
7 strong position in regard to drug treatment.
8 Obviously this proposal is the first representation
9 at any time anywhere that drug treatment was relevant
10 in terms of sentencing.

11 And the Federal Defenders feel so strongly
12 about this, I wonder if you can review your files and
13 forward to me any proposal that the Federal Defenders
14 have ever made in regard to guideline changes to
15 incorporate drug treatment?

16 Because I have been here for ten years, and
17 I don't think I've ever seen a proposal - but I may be
18 wrong. You may have proposed it before, but if you
19 could just review your files -

20 MS. MEYERS: I can tell you there's no
21 such thing. I don't think there is. And that's why
22 I say, I think we're thrilled that the Commission is

1 looking at it. But we want to honestly tell you that
2 this proposal won't help any of our clients. And
3 we're just afraid that if this proposal happens – if
4 this is the first step, that's wonderful. If it's
5 the end, it won't have helped any of our clients.

6 CHAIR SESSIONS: Okay. Well I
7 appreciate your testimony.

8 MS. MEYERS: Thank you.

9 CHAIR SESSIONS: Thank you, very much.

10 MS. SMITH: Thank you. I do apologize for
11 running over. I had no idea how long I spoke.

12 CHAIR SESSIONS: Ironically, you
13 stopped just as it turned red – in fact I think you
14 stopped before it turned red, as I remember. When
15 she said "I noticed the light is yellow," I went, oh,
16 no, I didn't know.

17 (Laughter.)

18 (Pause.)

19 MS. HACKETT: [Placing St. Patrick's Day
20 ornamentation on the table] I wanted to dress with
21 sufficient decorum, but my DNA requires me to wear
22 the green somehow, so I'm just going to project that.

1 CHAIR SESSIONS: That's terrific. How
2 can we look at you and ask you a serious question?

3 (Laughter.)

4 CHAIR SESSIONS: Well, welcome. First
5 I want to introduce all three of you. Dave Debold is
6 co-chair of the U.S. Sentencing Commission's
7 Practitioners Advisory Group. He practices with
8 Gibson, Dunn & Crutcher in appellate, Constitutional,
9 and securities litigation, white-collar defense and
10 investigations practice groups. Prior to joining the
11 firm, Mr. Debold served as an assistant U.S. attorney
12 in Detroit. He received his B.A. from Wayne State,
13 his J.D. from Harvard. And, as always, welcome.

14 Next is Susan Hackett. It's going to be
15 difficult to ask you anything here -

16 MS. HACKETT: I can take it down -

17 CHAIR SESSIONS: No, that's okay.

18 (Laughter.)

19 VOICE: You just get credit on your
20 compliance program.

21 (Laughter.)

22 CHAIR SESSIONS: That's right. She is

1 senior vice president and general counsel of the
2 Association of Corporate Counsel. She joined ACC in
3 1989 and has held a number of roles and
4 responsibilities over the years. Prior to joining
5 that group, she was transactional attorney with
6 Patton Boggs in Washington. She received her B.A.
7 from James Madison College at -

8 MS. HACKETT: At Michigan State
9 University.

10 CHAIR SESSIONS: - at Michigan State
11 University, and a J.D. from the University of
12 Michigan Law School. So, welcome.

13 And Karen Harned - is it Har-ned, or -

14 MS. KAREN HARNED: Harned.

15 CHAIR SESSIONS: Harned - has served as
16 executive director of the Small Business Legal Center
17 of the National Federation of Independent Business
18 since 2002. Prior to joining the Center she was an
19 associate at Olsson Frank & Weeda, in Washington,
20 where she specialized in food and drug law,
21 represented small businesses and trade associations
22 before Congress and federal agencies. She received

1 her B.A. from the University of Oklahoma, her J.D.
2 from George Washington University Law School. And,
3 welcome.

4 So, Mr. Debold, we will start with you.

5 MR. DEBOLD: Thank you, Mr. Chairman, and
6 thank you members of the Commission.

7 I am pleased to have the chance to testify
8 before you again this year on behalf of your
9 Practitioners Advisory Group. Before addressing some
10 of the particulars of the Chapter Eight items that are
11 under consideration, I would like to take a minute to
12 put them in context.

13 Chapter Eight of the *Guidelines Manual* differs
14 in a significant way from the provisions that govern
15 the sentencing of individual defendants. In contrast
16 to the extensive body of case law that interprets and
17 applies Chapters One through Seven of the manual, there are
18 almost no judicial decisions that are specific to
19 Chapter Eight.

20 There are probably three main reasons for
21 this.

22 First, the government simply investigates

1 far fewer organizations than it does individuals.

2 Second, even in those instances where the
3 government does take action, it often does so through
4 nonprosecution or deferred prosecution agreements.
5 And in those cases, there's no opportunity for a
6 judge to assess the guideline calculation, to the
7 extent one is even conducted in the course of those
8 negotiations and agreements.

9 And finally, even in cases where there are
10 convictions of organizations, the parties usually
11 negotiate a plea that avoids any kind of ruling on
12 how to interpret or apply the Chapter Eight provisions.

13 So although guilty pleas by individuals
14 will still generate a large number of appeals and
15 decisions interpreting the guidelines for
16 individuals, the same has not been true for
17 organizations.

18 As a result of this, the Commission
19 receives very little formal feedback on the operation
20 of Chapter Eight, certainly very little from judicial
21 opinions. In other words, the Commission speaks
22 through its provisions that it places in Chapter Eight,

1 but it hears very little back about how well it has
2 spoken, including whether the provisions are easy to
3 apply or result in appropriate sentencing ranges.

4 Practitioners are therefore left to apply
5 those provisions without the benefit of case law
6 that, by resolving ambiguities, might promote more
7 consistent application.

8 That reality makes it very important in
9 our view for the Commission to exercise even more
10 care when it considers changing the language in
11 Chapter Eight.

12 My written testimony includes the PAG's
13 comments on each of the Chapter Eight proposals. Today I
14 would like to cover the comments that are
15 specifically related to the issue for comment.

16 The Commission has asked for comment on
17 whether it should amend the manual to broaden the
18 availability of a three-point reduction that applies
19 if an organization has an effective compliance and
20 ethics program. This reduces the organization's
21 culpability score.

22 A disqualifier that applies if a high-

1 level personnel or substantial authority personnel
2 was involved in the offense would be eliminated under
3 this issue for comment if three conditions are met.

4 First, the individuals with organizational
5 responsibility for compliance in the organization
6 would need to have direct reporting authority at the
7 board level.

8 Second, the compliance program must have
9 been successful in detecting the offense prior to
10 discovery or reasonable likelihood of discovery
11 outside of the organization.

12 And third, the organization must have
13 promptly reported the violation to the appropriate
14 authorities.

15 We applaud the Commission for its efforts
16 to make this three-point reduction in the culpability
17 score available in more cases. The Commission's data
18 for fiscal year 1995 through fiscal year 2008, a
19 13-year period, show that a total of only three
20 organizations have ever received this reduction, this
21 three-point credit.

22 Now it's not possible to tell from the

1 publicly available data what accounts for the extreme
2 rarity of this credit. Anecdotally we understand,
3 and it's our experience, that the automatic
4 disqualifier of high-level personnel was somehow
5 involved or aware of or even just wilfully ignorant
6 of the offense, will frequently stop the analysis on
7 both sides as to whether the company had an effective
8 compliance program.

9 The effectiveness disqualification is also
10 felt well beyond the sentencing context for which the
11 Commission has data. In negotiating NPAs and DPAs,
12 the government frequently requires a payment of a
13 hefty fine which it calculates by starting with a
14 Chapter Eight fine range, and that range becomes a
15 benchmark for gauging the final fine that will be
16 imposed under these agreements.

17 So an organization that earns a lower
18 culpability score, for example, through having an
19 effective compliance program, will see its fine
20 reduced accordingly.

21 The disqualifier based on the role of
22 high-level personnel can do violence to proportionate

1 sentencing. Imagine two large corporations in a
2 particular industry whose employees have colluded to
3 fix prices. And assume that they are equally
4 culpable in all respects except for two.

5 In the first corporation the employee who
6 engages in the crime is able to carry out his scheme
7 without the awareness or even willful ignorance of
8 any one who is deemed high-level personnel.

9 At the other corporation, however, a
10 single high-level person, the price-fixer's manager,
11 ignores warning signs of the subordinate's criminal
12 conduct.

13 The second difference to assume is that
14 the leadership at the first corporation has
15 steadfastly refused to put any sort of compliance
16 program in place, despite being frequently urged to
17 do so by outside counsel.

18 The second corporation, however, has
19 implemented a state-of-the-art compliance program and
20 invested millions of dollars, thousands of person-
21 hours in making it as effective as possible. In
22 fact, because of the systems that the second

1 corporation puts in place under the effective
2 compliance program, that is what causes the
3 wrongdoer's unit manager to receive warning signs of
4 trouble that he ultimately ignores.

5 So even though the corporation with the
6 effective compliance program is plainly less
7 culpable, given all the efforts that it's put into
8 place, it would get no credit under the current
9 version of the guidelines for those efforts. The
10 fine range would be calculated as if it had no
11 compliance program at all, just like the first
12 corporation.

13 And it would suffer that fate solely
14 because of the willful ignorance of one person at a
15 high level of personnel within the company. And even
16 worse, it would get an aggravating adjustment because
17 the compliance program had alerted the high-level
18 person to the offense, while the corporation without
19 the program and therefore no alert to the high-level
20 personnel, would not receive that increase.

21 As a result, the company that has done the
22 right thing could receive a significantly higher

1 sentence.

2 Now the issue for comment suggests a
3 revision that would help to avoid this anomaly, and
4 we endorse adopting it with two changes.

5 First, we would not automatically
6 disqualify a corporation whose compliance program
7 vests a portion of the reporting authority with
8 someone other than the person who has, quote,
9 "operational responsibility for the program."

10 We believe that the Commission's current
11 direct-report requirements for gauging whether a
12 company has an effective compliance and ethics
13 program are sufficient. In other words, the manual
14 currently reserves effective compliance and ethics
15 program credit for an organization where the
16 individual or individuals that has operational
17 responsibility reports periodically to high-level
18 personnel and, as appropriate, to the governing
19 authority, which includes an audit committee of the
20 board of directors.

21 The application notes to this provision
22 state that typically such reporting by the individual

1 or individuals with operational responsibility should
2 occur no less than annually.

3 In our view, the manual therefore already
4 strikes a fair balance on this direct-reporting
5 issue. Rather than create a rigid dictate, it sets
6 general requirements containing flexibility that's
7 needed to account for the wide variations between the
8 smallest of companies and the largest of
9 multi-national corporations.

10 The details of a compliance program that
11 might work well for a small, single-site
12 manufacturing facility with 50 or fewer employees are
13 not necessarily the same that would apply, or should
14 apply to a large organization like AT&T or
15 ExxonMobil.

16 We are also aware of no data that show
17 that organizations that follow the reporting
18 requirements from their compliance people to the
19 board and the current manual are somehow failing in
20 those responsibilities, nor have we seen any
21 assessments of the advantages or disadvantages of
22 changing that reporting requirement.

1 If the Commission's concern is that
2 compliance programs meeting the current requirements
3 are deficient, a better solution would be to create a
4 presumption that the proposed new requirement
5 suffices and then allow the defendant, or require the
6 defendant to establish that it is unlikely that the
7 new required reporting provision, the direct-
8 reporting provision, would have produced a
9 meaningfully different result under the
10 circumstances.

11 This would have the advantage of
12 preventing per se disqualification of organizations
13 that acted appropriately in implementing a program,
14 and for which greater direct reporting by an
15 individual with operational authority would not have
16 made a difference in that case.

17 The second and third proposed requirements
18 in the issue for comment deal with detection and
19 self-reporting of the underlying offense conduct.
20 The danger here is that the proposal would further
21 exaggerate the value of self-reporting in comparison
22 to other mitigating or other aggravating factors.

1 The manual has already what is in effect a
2 three-point credit for a company that self-reports,
3 as opposed to doing other things such as accept
4 responsibility or cooperate.

5 So it is already fair to ask whether self-
6 reporting, which gets three points, is really three
7 times as valuable as full cooperation, which by
8 itself gets one point and when combined with accepts
9 responsibility effectively gets two points. That's
10 under the current approach.

11 Under the approach that's being suggested
12 in the issue for comment, the corporation with an
13 effective ethics and compliance program would lose
14 out on a total of six points on a scale that only runs
15 from zero to ten if an imminent threat of disclosure
16 of the conduct arises before the corporation finds
17 itself capable of self-reporting.

18 The self-reporting credit gets a lot more
19 emphasis under the suggested requirement in the
20 proposal. There's no reason to place that much
21 weight on a single factor, especially when the
22 difference between a corporation that qualifies and

1 one that does not qualify can be as insignificant as
2 waiting an extra day or two to marshal the relevant
3 facts.

4 Indeed, a corporation could have the best
5 compliance program and still not find out about the
6 offense, or find out about it after an investigation
7 was already underway, because the person with
8 knowledge took the information to the authorities
9 rather than reporting it within the compliance
10 program.

11 It is important to note that during that
12 same time period I mentioned earlier only 22
13 corporations or organizations have received credit
14 for self-reporting. So again, it would put a lot of
15 emphasis on one factor that is already pretty rarely
16 granted.

17 If some aspect of self-reporting is
18 incorporated, we would suggest that you focus on
19 whether the corporation engaged in conduct that is
20 inconsistent with compliance program credit. That
21 formulation would place attention on whether the
22 corporation's culpable conduct undermines its case

1 for receiving credit.

2 As I said at the outset, the Practitioners
3 Advisory Group appreciates the opportunity to offer
4 input not only on Chapter Eight but the other issues that
5 are being raised in this amendment cycle, and we
6 continue to look forward to working with the
7 Commission in the coming months and years ahead.

8 CHAIR SESSIONS: Thank you, Mr. Debold.

9 Ms. Hackett, are you ready?

10 MS. HACKETT: Yes. Is that sufficient for
11 your purposes [referring to the microphone].

12 ACC appreciates the opportunity to offer
13 you our perspectives on the proposed amendments and
14 the additional issue that is up for comment today,
15 all relating to Chapter Eight of the corporate guidelines
16 manual.

17 For those of you who are less familiar
18 with the Association of Corporate Counsel, let me
19 just introduce it briefly to you. ACC is the Bar
20 Association for in-house lawyers. That means that
21 our membership is limited to those who are employed
22 to provide legal services within a corporate entity.

1 We were founded in 1982 as the American Corporate
2 Counsel Association, or ACCA, and about five or six
3 years ago changed the name to the Association of
4 Corporate Counsel because of the increasing interest
5 of our current membership in the U.S. in multi-
6 national practice issues, and the increasing number
7 of members who were outside of the U.S. as well.

8 We now have over 26,000 individual members
9 working in over 10,000 public, private, and not-for-
10 profit organizations in more than 70 countries. The
11 vast majority of our members, however, are in the
12 U.S. or working in multi-national companies that are
13 subject to U.S. jurisdictional issues, and thus all
14 of our members are very interested in the *Guidelines*
15 *Manual*.

16 Many have direct responsibility for and
17 the rest have indirect responsibility for the
18 company's compliance programs, as well as the
19 company's defense in the event of a compliance
20 failure.

21 Because of the extremely large number of
22 companies and industries represented in our

1 membership and the breadth and depth of our members'
2 expertise across every substantive practice area and
3 within every aspects of the company's management and
4 compliance leadership structures, ACC is hopefully a
5 representative voice of the in-house bar positioned
6 uniquely to offer some relevant perspectives to the
7 Commission's proposals.

8 An introduction to our comments and
9 perspectives would be to share with you that we
10 believe the impact of the messages sent by the
11 Commission on what ACC members do to implement
12 effective compliance programs on a daily basis cannot
13 be understated.

14 Anecdotally I will tell you that in
15 preparation for these comments today I heard from
16 over 150 different organizations who responded within
17 a month or so of a call going out asking if people
18 had relevant comments, or were interested in
19 reviewing drafts, and most of those companies
20 participated actively in drafting these comments.
21 I'm sure you now have great sympathy for me today
22 with a 150-member drafting committee from a variety

1 of organizations out there.

2 But in our written statement we have
3 detailed a number of concerns in the proposals before
4 you today. That statement should now be with you. I
5 did not wish to, obviously, go through every one of
6 them in detail and will leave you at your leisure to
7 read through them.

8 I wanted to spend my few minutes with you
9 highlighting some of the concerns that seem to be the
10 most commonly raised, or that seemed to have the
11 greatest amount of impact, if you will, in the
12 members looking at the issues before us.

13 First, we would like in our verbal summary
14 to ask the Commission to consider adding additional
15 detail to the Commission's requirement that the
16 organization, quote, takes "reasonable steps to
17 respond appropriately" if criminal conduct is
18 detected, and to prevent further similar criminal
19 conduct, including making any necessary modifications
20 to the organization's compliance and ethics program
21 as detailed in §8B2.1(b)(7).

22 We suggest that the Commission consider

1 adding the following language at the end of that
2 clause: "The need for, method, or appropriate
3 extent of any of these measures will vary according
4 to the circumstances and the relevant compliance
5 challenges the company seeks to address."

6 Additionally, the proposed language in the
7 same section includes the following statement: "The
8 organization may take the additional step of
9 retaining an independent monitor to ensure
10 adequate assessment and implementation of the
11 modifications."

12 ACC believes that this language, while
13 perhaps intentioned merely as an articulation of an
14 option, by virtue of being singled out for recitation
15 by the Commission may become a presumptive practice
16 that companies are expected to consider or
17 implement.

18 We suggest that the monitor reference be
19 removed for reasons we fully articulate in our
20 written submission, and that David Debold has also in
21 his Practitioners Advisory Group memo covered most

1 eloquently.

2 We also request similarly that the
3 reference to monitors in the probation proposals
4 likewise be removed. We believe that the repeated
5 insertion of a, quote, monitor option, unquote,
6 into the *Guidelines Manual* suggests that the
7 Commission sees the practice as some kind of best, or
8 common practice that judges should consider quite
9 routinely, rather than what we would see as a nuclear
10 option that most folks who have ever worked in a
11 situation involving a monitor would perceive it to
12 be.

13 Secondly, we ask the Commission today to
14 consider, or to reconsider the proposal suggesting
15 that document retention policies are a good indicator
16 of a specific conduct that evidences compliance
17 commitment and high-level and substantial authority
18 personnel when judging whether a company has an
19 effective compliance and ethics program.

20 The Commission's proposals include two
21 instances of bracketed language to clarify what is
22 expected of high-level and substantial authority

1 personnel.

2 ACC is particularly concerned about new
3 references to document retention policies in the
4 bracketed language, and our comments focus on two
5 concerns.

6 First, whether it is appropriate to judge
7 the efficacy of a company's compliance efforts by
8 whether its senior managers are responsible for
9 companies' record-management programs – namely, asking
10 the question: Is that really what an effective
11 compliance program is primarily about?

12 And secondly, whether the Commission, if
13 it truly thinks that record management is a
14 bellwether of effective compliance programs truly
15 meant to focus its attention on document retention as
16 the sole-cited factor.

17 Essentially ACC believes that
18 §8B2.1 places too much emphasis on one specific
19 element of a corporation's operations, and chooses
20 for that emphasis a corporate function – namely,
21 records management – that is not even primarily
22 related to corporate compliance initiatives.

1 Further, passing the topic of records
2 management with the wording "document retention"
3 creates an implicit belief that the Commission is
4 interested in strong document retention policies,
5 rather than good records management, which also
6 includes setting policies for that which is to be
7 retained, as well as that which is to be destroyed,
8 archived, retrieved, or better managed.

9 One could infer from the Commission's
10 proposed language that the Commission believes that
11 the company that is engaged in effective compliance
12 keeps everything forever.

13 Of course the ability to produce all
14 responsive and relevant documents related to a legal
15 or compliance problem is certainly very important,
16 but those needs sit on top of the larger corporate
17 interest in managing data and records generally and
18 those are ancillary to a company's overall document
19 requirements and burdens.

20 It is unlikely that most people in the
21 corporate world would consider records management and
22 responsibility to be so closely linked in terms of

1 overall compliance program success by legal
2 compliance or executive management.

3 We would suggest that these concepts
4 therefore be decoupled and referenced to document
5 retention policies removed from the guidelines.

6 If the Commission decides that there is a
7 need to reference records management issues in the
8 guidelines, ACC requests that it not be so closely
9 tied specifically to document retention, and that
10 your focus should be properly placed not on defining
11 what appropriate record management tactics are but
12 rather on sound and enforceable document-hold
13 policies that could be more appropriately related to
14 legal and compliance efforts.

15 Thirdly, we ask that the Commission
16 consider our thoughts on the issues set out by the
17 Commission for comment regarding encouraging self-
18 reporting.

19 The Commission asked interested parties to
20 address whether the Commission should allow an
21 organization to receive the three-level mitigation
22 for an effective compliance program, even when high-

1 level personnel are involved in the offense.

2 The draft offered for comments proposes
3 three conditions for receiving the credit. We wish
4 to address two of them.

5 First though let us say that ACC supports
6 efforts by the Commission to make the three-level
7 mitigation more available in more cases.

8 As to the condition, however, that the
9 company must be able to evidence direct reporting
10 authority to the board for the individuals with
11 operational responsibility for compliance in the
12 organization, we think the concept has merit but the
13 wording is flawed.

14 The term "direct reporting relationship"
15 is not well defined and is subject to broad
16 misinterpretation in the corporate context, if what
17 we're understanding is the Commission's intent to be
18 that they want to make sure employees with concerns
19 get to share those concerns with the board if they're
20 not getting action in the company.

21 But within a company, a reporting
22 authority has to do with the company's organizational

1 chart and who supervises whom, as in to whom do you
2 report.

3 The term describing the targets of this
4 proposal as those with operational responsibility
5 for compliance, is also ill-defined in the corporate
6 context and could lead to problems. Who are the
7 individuals who have operational responsibility for
8 compliance in any given company?

9 Does this mean persons with some, or any
10 level of compliance responsibility in their jobs or
11 on their teams?

12 Is this person the chief compliance
13 officer?

14 How does one define who the person with
15 operational authority is in a company that does not
16 have a formal compliance function?

17 ACC suggests that what is important in
18 this proposal is that the board has access to reports
19 from concerned employees, and that concerned
20 employees can be assured that their concerns will
21 reach the board if they're valid.

22 Thus, the Commission might better assert

1 that an effective corporate compliance program must
2 be able to evidence some kind of effective
3 communications procedure.

4 The guidelines should not dictate
5 reporting details or whom the appropriate and
6 responsible leader must be, but rather should seek to
7 assure that there are accessible lines of
8 communications established that allow both concerned
9 employees and the board the confidence that the
10 company's systems will assure that the board hears
11 concerned employees with important stories to tell.

12 The last of the three requirements is also
13 of concern to ACC: that the organization seeking
14 credit promptly reported the violation to appropriate
15 authorities.

16 This criterion is an appropriate
17 consideration in theory, but as written this language
18 may impede the ability of a company that has done
19 what it should to prove that it now should receive
20 credit for its efforts.

21 It is rarely clear when a problem surfaces
22 whether the company has a problem or not. It is far

1 more likely that something is overheard by someone,
2 or doesn't look right in some kind of a report or
3 document; maybe in a few days, or a few weeks,
4 someone with whom this particular irregularity has
5 been shared, likely some place like the proverbial
6 water cooler, will then make a decision to raise this
7 issue to his or her superior.

8 Then it takes time to get the issue from
9 the superior to a responsible person with compliance
10 or legal responsibilities who can then consider how
11 to investigate the concern and respond to the person
12 who raised the concern.

13 If there is a legitimate concern to be
14 raised, whoever is investigating the issue needs to
15 put something together that is credible and
16 sufficiently documented to allow the company's
17 leaders to decide if this is an offense that needs to
18 be reported to the government, and that process takes
19 time.

20 Taking adequate time to investigate a
21 concern that is raised should not be punished under
22 the guidelines. From the 20/20 hindsight perspective

1 of a judge who now knows that a failure did occur,
2 the actions of the person who didn't know if a
3 problem existed some months, or maybe even some years
4 back, may not seem expeditious upon review.

5 CHAIR SESSIONS: Ms. Hackett, your time
6 is up, if you can just wrap up?

7 MS. HACKETT: Sure I will. Thank you.

8 ACC believes that best thinking in
9 corporate legal compliance and the methods by which
10 companies can assure compliant behaviors are changing
11 in important ways.

12 Today it is increasingly likely that
13 compliance is a shared business and legal
14 responsibility between in-house lawyers and many
15 others in the company at all levels of leadership,
16 from the C suite to the line worker.

17 In a growing number of substantial public
18 companies, and in highly regulated industries, it is
19 more common to see the growth of a separate
20 compliance and ethics department that reports outside
21 of the legal department's line of authority and
22 coordinates with legal to create innovative and

1 business organized teams focused on particular tasks
2 or assuring behaviors.

3 What we see as the necessary result in
4 this expansion of thinking and what constitutes the
5 structure and format of effective compliance programs
6 and best practices is the creation of a broader array
7 of leading practices designed for particular
8 purposes, and thus we encourage the Commission to
9 focus therefore on the outcomes they wish the company
10 to achieve and not necessarily on particular tactics,
11 practices, or formats that those kinds of companies
12 must employ in order to achieve effective compliance.

13 Thank you for the extra time.

14 CHAIR SESSIONS: Okay. Thank you. All
15 right, Ms. Harned.

16 MS. KAREN HARNED: Thank you for inviting
17 me to provide comments regarding the Sentencing
18 Commission's proposed changes to its Chapter Eight of its
19 *Guidelines Manual*.

20 My name is Karen Harned, and I serve as
21 executive director of the National Federation of
22 Independent Business, Small Business Legal Center.

1 We are the legal arm of NFIB.

2 NFIB is the nation's leading advocacy
3 organization representing small and independent
4 businesses. NFIB's national membership spans the
5 spectrum of business operation ranging from sole
6 proprietor enterprises to firms with hundreds of
7 employees.

8 While there is no standard definition of
9 "small business," the typical NFIB member employs ten
10 people, and has gross sales of roughly \$500,000 a
11 year. The NFIB members is a reflection of American
12 small business, and I am here today on their behalf
13 to share a small business perspective with the
14 Sentencing Commission.

15 The vast majority of small business owners
16 treat their employees and customers like their
17 extended family. They work hard to do what is right,
18 but their informal and unstructured nature and more
19 limited financial resources mean that sometimes they
20 are going to require greater flexibility in creating
21 policies and solutions.

22 Today I will provide insight into how

1 small businesses differ from larger corporations and,
2 as a result, areas where we think the sentencing
3 guidelines could be improved to account for those
4 differences.

5 Proposed changes to §8B2.1,
6 Application Note 3, Subsection (b) (2):

7 First, the proposed amendment to
8 Application Note 3 on the Application of Subsection
9 (b) (2) would require that both high-level personnel
10 and personnel with substantial authority know the
11 organization's document retention policies.

12 We question the need for this language,
13 given that document retention is already part of an
14 effective compliance program. We are concerned that
15 inclusion of language that requires knowledge of
16 specific policies will undermine small organizations'
17 abilities to adopt less formal policies as they are
18 currently allowed to do, as we understand it, under
19 Application Note 2(C) (iii).

20 Small businesses are less likely than
21 large organizations to have written and formally
22 adopted policies, including document retention

1 policies. However, the lack of a written policy does
2 not mean that the small business owners don't take
3 these issues seriously.

4 Take for example one of the most basic
5 policies a small business can adopt, an employee
6 leave policy. An NFIB survey of small business
7 owners shows that only ten percent of small businesses
8 have a written family leave policy, and only 13
9 percent have a written medical leave policy.

10 Despite the lack of written policies, 93
11 percent of small business owners granted the last
12 request for medical leave. The other seven percent
13 reported that they were able to resolve the
14 employee's request for time off some other way.

15 If only ten percent to 13 percent of small
16 business owners have formally adopted something as
17 simple as an employee leave policy, it is highly
18 unlikely that they will have written policies for
19 more complicated areas like document retention.

20 Instead, a small business is likely to
21 have adopted a simple, informal policy that is likely
22 to be over- rather than under-inclusive.

1 For example, take the hypothetical used
2 book store. The store's informal policy is to retain
3 all financial records for ten years, but this policy
4 has never been written down. The policy was adopted
5 by the store's part-time bookkeeper after a brief
6 consultation with the owner. The bookkeeper
7 maintains the records and periodically audits the
8 books to ensure that the store retains all financial
9 records.

10 This would be typical of how small
11 businesses make decisions about how to retain their
12 records. Under the proposed amendment, if the
13 store's manager, who has substantial authority to
14 make purchases and manage staff, was unaware of the
15 unwritten ten-year document retention policy, the
16 business could be ineligible for mitigation even if
17 all documents were in fact retained for ten years by
18 the bookkeeper.

19 The same result could occur if the owner
20 later forgot the exact retention policy he had
21 adopted with the bookkeeper, even if the policy was
22 currently being enforced.

1 An amendment that would better serve both
2 small and large organizations would be to eliminate
3 this all-or-nothing approach to effective compliance
4 and ethics programs. Instead, adopting a sliding
5 scale that allows reductions based on the degree to
6 which an organization satisfies the ECEP criteria in
7 §8B2.1.

8 Under the current system, an organization
9 that meets six of the seven requirements for an
10 effective compliance program receives the same
11 mitigation as an organization that meets none of the
12 requirements. This is an unduly harsh penalty and it
13 creates a disincentive for an organization to
14 implement critical parts of a compliance program.

15 Second, the amendments would add a new
16 application note interpreting subsection (b) (7).
17 This application note requires that the organization
18 pay restitution to victims and strongly encourages
19 self-reporting.

20 We are concerned that this additional
21 language undermines the flexibility organizations
22 currently have under subsection (b) (7) to adopt an

1 appropriate response to potential violations.

2 Small business owners do not have the same
3 access to corporate counsel, regulatory experts, and
4 investigators that the larger corporations do. A
5 survey of small business owners found that one out of
6 every five – I'm sorry, that's not right – two out of
7 every five small businesses consulted an attorney for
8 advice about their business in the past 12 months.

9 Small business owners may not even know
10 that their company is criminally liable for a
11 violation by an employee, particularly in a *malum*
12 *prohibitum* offense.

13 Small business owners are most likely to
14 discover new rules by stumbling across them in the
15 ordinary course of business. Eighty-two percent report
16 discovering new rules this way. Once they become
17 aware of a new rule, 62 percent research the rule
18 themselves, and only 21 percent use an outside expert
19 like an attorney to research the rule.

20 A 2005 report on the organizational
21 sentencing guidelines by the Association of
22 Corporate Counsel found that small organizations were

1 sentenced disproportionately under the guidelines.

2 One reason cited was that small organizations are
3 less likely to have a counsel on hand to advise them
4 of the benefits of self-reporting and cooperation.

5 Often it may not be clear whether a
6 criminal violation has even taken place. There may
7 be some evidence that is only available to the
8 government or to third parties. In these cases it
9 may not be possible for an organization to determine
10 on its own that a violation has occurred, triggering
11 the need to self-report.

12 And with respect to the payment or
13 restitution, it may be very difficult for a small
14 organization to determine who the victims of the
15 crime are, and what the appropriate loss amounts are,
16 let alone have the financial resources to make full
17 restitution to a victim before sentencing.

18 My experience working with small business
19 owners does bear this out. They want to do what is
20 right, but they also do want to protect their legal
21 rights. A typical small business owner who discovers
22 a violation is likely to take steps to prevent

1 reoccurrence, and also to make restitution to
2 possible victims.

3 However, they are unlikely to self-report,
4 especially in cases where they lack the
5 sophistication to determine with certainty that an
6 illegal act has occurred. Small business owners who
7 take appropriate remedial actions should not be
8 punished for failing to self-report a potential
9 violation.

10 The proposed amendment to Application Note
11 6, Application of Subsection (b) (7) undermines the
12 flexibility organizations are currently allowed in
13 crafting an appropriate response under subsection
14 (b) (7). A similar problem is seen in 8C2.5(f) (2)
15 which denies mitigation points if an organization
16 does not promptly self-report.

17 The flexible language 8B2.1(b) (7) and
18 §8C2.5(f) (2) should be retained. The
19 proposed application note should, instead, state that
20 restitution and self-reporting may be part of an
21 appropriate response. 8C2.5(f) (2) should also be
22 amended to adopt the more flexible language of

1 8B2.1(b)(7).

2 For example, take a hypothetical small
3 company who provides web design services to
4 businesses throughout the country. A routine billing
5 audit reveals that one developer has engaged in a
6 systematic program of over-billing clients for
7 development time in an effort to pad his own
8 paychecks.

9 Upon discovering this, the business
10 terminates the rogue developer, institutes new
11 policies that require the sales manager to verify all
12 development time, and issues refunds to all of their
13 affected clients.

14 Under the current rules, if the employer
15 did not take the additional step of self-reporting
16 the fraudulent billing to the authorities, they would
17 be ineligible for mitigation.

18 Third, the Commission has requested
19 comments on proposed amendment 8C2.5(f)(3). This
20 amendment would allow sentence mitigation even when
21 high-level officials are involved if the chief
22 compliance officer reports directly to the board of

1 directors.

2 Our concern is that, as proposed this
3 mitigation would not apply to many small businesses.
4 Small business organizations often lack the rigid
5 internal structure of a corporation. Roughly half of
6 small businesses are organized as either a
7 proprietorship, partnership, or LLC. For these
8 organizations, there is no board of directors and no
9 hierarchy of chief officers and executives.
10 Instead, the owner or managing partner has likely
11 taken on the informal role of chief compliance
12 officer.

13 We support the idea of allowing sentence
14 mitigation in these types of cases. However, in
15 order to be applicable to all business organization,
16 the amendment should allow mitigation when those with
17 operational responsibility for compliance report
18 directly to an owner, managing partner, or someone
19 with general management authority.

20 Again, we recommend removing the strict
21 self-reporting requirement and replacing it with a
22 more flexible standard. An organization that detects

1 a potential offense should be allowed to respond by
2 taking appropriate actions.

3 Appropriate actions may include making
4 restitution, taking steps to prevent reoccurrence,
5 and possibly self-reporting to the appropriate
6 authority.

7 Thank you for letting me comment today,
8 and I hope that this has led you to understand more
9 the differences that we experience as small business
10 owners, as opposed to our larger counterparts.

11 CHAIR SESSIONS: Thank you, Ms. Harned.

12 So let's open it up for questions.

13 Commissioner Howell?

14 COMMISSIONER HOWELL: Yes. Thank you all
15 very much for your very helpful comments. We always
16 like to hear from everybody, but particularly from
17 small businesses because our statistics do show that
18 most of them organizations sentenced under Chapter Eight
19 are, by virtually 90 percent, have fewer than 500
20 employees. So it is very helpful to hear your
21 comments about how we can make Chapter Eight more
22 flexible and useful in terms of guidance for smaller

1 organizations.

2 Ms. Hackett, you know I appreciate your
3 comments that for the seventh minimal requirement
4 your organization members thought it would be helpful
5 to have additional guidance on what the seventh
6 minimal requirement means by "the organization shall
7 take reasonable steps to respond appropriately to the
8 criminal conduct."

9 In fact, for the seventh minimal
10 requirement for an effective compliance program there
11 is no application. That was part of the reason our
12 proposed amendment adds for the first time some
13 application to help explicate what the Commission has
14 in mind by that requirement. It's really a two-part
15 requirement for an effective compliance program, not
16 just responding to the criminal conduct appropriately
17 when it's been detected, but then also in addition
18 fixing the compliance program, to the extent there
19 were gaps in it.

20 Our Practitioners Advisory Group, whom we
21 depend on regularly in every amendment cycle, has
22 suggested language that would revise our proposal for

1 an application note to that provision, and I wondered
2 whether you had had time to look at it?

3 MS. HACKETT: We have taken a look at it.
4 We did not have a consensus as to whether or not the
5 language did the job, if you will. If you are
6 willing and able to allow us to, we would love to
7 have the opportunity to send you, once more a
8 consensus could be joined, or even reports of
9 alternate perspectives.

10 COMMISSIONER HOWELL: That would be much
11 appreciated.

12 MS. HACKETT: We would be very pleased to
13 have that opportunity.

14 COMMISSIONER HOWELL: Right. Because I
15 mean I think that the Practitioners Advisory Group,
16 as always, has pointed out I think quite constructive
17 comments on the language that we proposed, and to the
18 extent that their language proposals are amenable to
19 your membership, as well as yours, it would be very
20 interesting to hear your comments on that proposed
21 language.

22 MS. HACKETT: We are pleased to be asked.

1 Thank you.

2 CHAIR SESSIONS: Just before you go on,
3 you should know that any submissions that you want to
4 make should be done quickly, as we vote in early
5 April. So, not to put you under the gun –

6 (Laughter.)

7 MS. HACKETT: I'll just turn to David.

8 (Laughter.)

9 CHAIR SESSIONS: Just copy what he has
10 to say. He doesn't need to respond –

11 (Laughter.)

12 MS. HACKETT: No, I would be happy to do
13 so. We did receive actually quite a lot of different
14 ideas there, and that was one of the difficulties in
15 drafting this, was trying to find a consistent voice
16 that we could truly say represented the Association's
17 position. But what I hear you saying is that maybe
18 the submission of a variety of voices could be just
19 as helpful, even if it wasn't ACC's articulated
20 position, but things that we have collected from
21 people in the field who might be able to inform your
22 process as well.

1 COMMISSIONER HOWELL: Well don't
2 misunderstand me, because I think to the extent that
3 you can, with your hard labor -

4 MS. HACKETT: Synthesize?

5 COMMISSIONER HOWELL: - synthesize and
6 create a consensus among your group, that would be
7 great.

8 MS. HACKETT: We will do our best. I
9 thank you for that opportunity.

10 COMMISSIONER HOWELL: And Dave Debold has
11 started with I think a really good starting point on
12 changes.

13 MS. HACKETT: Yes.

14 COMMISSIONER HOWELL: I appreciate that
15 all three of you are fairly supportive of the
16 Commission's attention to expanding the eligibility
17 for the three-point reduction in the culpability
18 score for having an effective compliance program; but
19 that you have concern over the conditions that the
20 Commission is setting for expansion of that
21 eligibility when a high-level individual is involved.

22 I mean, other than - if I can approach this

1 from, rather than criticizing the conditions that we
2 set, what conditions do you think would be
3 appropriate for that expansion?

4 I mean, as it currently stands now and has
5 since the organizational guidelines were issued, the
6 involvement of a high-level person has always been a
7 disqualifier for getting this reduction because it
8 means that the tone at the top for having an
9 effective compliance program has been set because a
10 high-level person has been involved, and so you don't
11 deserve the three-point reduction in your culpability
12 score.

13 If we are going to expand it, even when
14 there's a high-level involvement, what conditions do
15 you think would be appropriate, if any?

16 MR. DEBOLD: Well in our comments we were
17 mostly reacting to the proposal from the Commission,
18 or the description of the issue for comment.

19 I mean, we really do not see a need to
20 have additional requirements if you take away the
21 requirement, or take away the disqualifier for high-
22 level personnel. And the reason is, high-level

1 personnel, especially in a large company, can cover a
2 wide number of people, including somebody who is
3 high-level within a unit of the corporation.

4 And that does not necessarily mean that
5 the company has a defective compliance program, or an
6 ineffective compliance program. There's always going
7 to be the risk that you're going to have one or more
8 people who is not with the program, if you will, and
9 you're going to also always have – and remember that
10 the disqualification applies not just if they're
11 involved, but also if they were willfully ignorant,
12 which is more than negligence, but nonetheless it
13 doesn't take much for one person in a company to
14 basically ruin the credit for the entire corporation
15 by having willful ignorance, or willful blindness.

16 So we don't think that the other
17 requirements that you propose are necessary. That
18 said, we have proposed ways to address some of the
19 concerns with them. The last aspect of it, which is
20 the self-reporting thing, what I didn't get a chance
21 to say in my oral testimony but it's in the written
22 testimony, is that you might consider making it more

1 of a – if the corporation has done something that's
2 inconsistent with this credit in the area of self-
3 reporting, in other words they did become aware of
4 the problem, because they don't always become aware
5 of it before the government does, and nonetheless for
6 no valid reason they failed to report it to the
7 government, then might deny them the credit because
8 that might be inconsistent with having an effective
9 compliance program.

10 You know, if you discover the problem, you
11 ought to report it. If they haven't discovered it,
12 then they can't self-report it. So having a self-
13 reporting requirement in a second place now in the
14 guidelines we think is unnecessary.

15 COMMISSIONER WROBLEWSKI: Can I follow up
16 on that?

17 CHAIR SESSIONS: Yes.

18 COMMISSIONER WROBLEWSKI: I'm not an
19 expert on compliance programs or organizational
20 liability, so I apologize in advance if I say
21 something that just seems foolish to you, and please
22 let me know if you think so, but my understanding of

1 organizational criminal responsibility to begin with
2 is about not that the leaders of the organization
3 necessarily were involved, somebody else committed a
4 crime, but that there was a leadership breakdown;
5 that that's why we have organizational responsibility
6 as opposed to just individual responsibility.

7 Now we also have a provision that we say
8 we want organizations – one of the ways they show
9 leadership is to have an effective compliance
10 program. Now obviously if you have a crime
11 committed, the program hasn't been effective, by
12 definition, initially.

13 But then, but we're saying, and the
14 Commission has always said, that when the leaders
15 themselves of the organization are involved in the
16 criminal conduct, we don't care about the effective
17 compliance. As you say, it's a disqualifier, because
18 if there's a compliance program and they're told to
19 report to the leaders and the leaders are involved in
20 the criminal conduct – and I know this is overly
21 simplistic but this is the way I'm looking at it – and
22 they report to the leaders, that program almost by

1 definition is not effective.

2 And so what I think one of the things the
3 Commission was looking at here was to say, look,
4 maybe we need to broaden it down and say it can be
5 effective if the people who can identify the problem
6 are going to report to people who are not the
7 wrongdoers, so directly to the board of directors.

8 If we take that out, if we take that
9 limitation out, and take the small business example
10 that you specifically mentioned, Ms. Harned, which is
11 you have a small business. The leader of the
12 organization is involved in the criminal conduct, or
13 willful blindness, is the compliance officer for the
14 program – how in the world can we say, how can we set
15 up a system that says that actually is an effective
16 compliance program unless we have some sort of report
17 around that leader to somebody else who is
18 independent?

19 MR. DEBOLD: Well your question I think
20 does in some ways make it a little bit too
21 simplistic, because high-level personnel, which is
22 the disqualifier, covers a broad number of people,

1 not just the CEO or the top people who are the
2 highest level officers of a company.

3 You can have a company where there is one
4 individual among these high-level personnel who has
5 gone off the reservation, or is not doing their job
6 and is willfully ignorant of something that is going
7 on below them, and still have an effective compliance
8 program that won't necessarily pick that up because
9 other people are not – who, you know, under the
10 program would properly report it, are not aware of
11 it.

12 And so that's where you get into the
13 problem of saying your program, even though it's not
14 perfect, and the guidelines recognize that by
15 definition it doesn't have to be perfect because the
16 corporation wouldn't be up for sentencing if it was
17 perfect, the guidelines already recognize that an
18 effective compliance program doesn't have to be
19 perfect. And in the situation here, a judge could
20 still look at the program and say, even though
21 there's one individual who's at a high level, who was
22 involved, or was willfully ignorant, we still like

1 the fact that the corporation went to the effort of
2 putting a program in place, and it's an effective
3 program by all the standards set forth in - you know,
4 there's seven requirements in the manual - and so,
5 yes, you committed a crime, somebody on behalf of the
6 corporation, as an agent of the corporation,
7 committed a crime that the corporation can be
8 prosecuted for, but we're going to give you a lower
9 sentence because you did go to the trouble of putting
10 together one of these programs.

11 That's the difference. And that's why,
12 even though one high-level person may have been
13 involved, you still ought to be able to look at the
14 corporation and say it's different from the
15 corporation that had no compliance program at all.

16 MR. DEBOLD: But don't you think at the
17 very least that program, to be considered effective,
18 has to have some sort of mechanism to report around
19 the high-level person who was willfully blind, in
20 your example?

21 COMMISSIONER WROBLEWSKI: But you're
22 assuming that that high-level person is standing in

1 the way of the reporting in that corporation.

2 MR. DEBOLD: I'm not assuming that. I'm
3 just saying, shouldn't it be a requirement that
4 there's a way around that for the reporting? If it's
5 not standing in the way, you don't have to worry
6 about it; but if it is standing in the way, then
7 shouldn't there be a way around it?

8 COMMISSIONER WROBLEWSKI: Well I think the
9 way it's set up now, it does reward companies - the
10 way the guideline is written now - rewards a company
11 where people can report to the compliance officer,
12 and the compliance officer, through the hierarchy,
13 can get the information to the board with occasional
14 reporting to the board with occasional reporting to
15 the board as set forth in the application note. That
16 doesn't mean that there is some - that all these high-
17 level personnel who might conceivably be involved in
18 the crime are somehow standing in the way of that
19 being reported.

20 I think the way it's set up now you don't
21 have that kind of a problem to try to work around.

22 CHAIR SESSIONS: Are you done?

1 COMMISSIONER WROBLEWSKI: Yes.

2 CHAIR SESSIONS: Does anyone else have
3 any questions?

4 (No response.)

5 CHAIR SESSIONS: Well, we're right at a
6 quarter of just about, so right on time. So thank
7 you very much for coming and testifying. I
8 appreciate the green.

9 MS. HACKETT: Happy St. Patrick's Day to
10 all of you.

11 CHAIR SESSIONS: Thank you.

12 Let's take a 15-minute break. We will
13 reconvene at four o'clock.

14 (Whereupon, a recess was taken.)

15 CHAIR SESSIONS: Unbelievable, we're
16 actually starting right on time. So thank you for
17 coming.

18 Let me begin by introducing the panel.
19 First, Tim Mazur is chief operating officer of the
20 Ethics & Compliance Officer Association. He has
21 previously served as vice president, ethics, at
22 Countrywide Financial Corporation; and regional

1 ethics and privacy officer for Blue Cross/Blue Shield
2 in Colorado. He began his career in ethics and
3 compliance as a consultant working with KPMG, the
4 Council for Ethics in Economics, and the Ethics
5 Resource Center. He received a B.A. in political
6 science from San Diego State University; and a
7 masters, an M.B.A. from George Washington University.

8 Next, Patricia Harned – are you related to
9 the previous?

10 DR. PATRICIA HARNED: We are, but we've
11 never met before today.

12 CHAIR SESSIONS: Really? Are you going
13 to have a family gathering?

14 DR. PATRICIA HARNED: We are.

15 (Laughter.)

16 CHAIR SESSIONS: Or establish a
17 relationship.

18 DR. PATRICIA HARNED: We'll draw a
19 genealogical tree once we're done here.

20 (Laughter.)

21 CHAIR SESSIONS: I mean, it is not one
22 of the names that you see on a regular basis, so it

1 must be something.

2 DR. PATRICIA HARNED: You've made a
3 contribution to the Harned family today.

4 (Laughter.)

5 CHAIR SESSIONS: Ms. Harned was named
6 president of the Ethics Resource Center in 2004. Dr.
7 Harned's recent research activities include directing
8 the 2007 National Business Ethics Survey, ERC's
9 comprehensive measure of ethical conduct and
10 employee attitudes, and its companions, the 2007
11 National Government Ethics Survey and the National
12 Nonprofit Ethics Survey. Dr. Harned serves as a
13 member of the Standing Advisory Group of the Public
14 Company Accounting Oversight Board. She also serves
15 on the editorial board of the *Public Integrity*
16 journal. Dr. Harned holds a bachelor of science in
17 education degree from Elizabethtown College in
18 Pennsylvania, a masters of education from Indiana
19 University; and a doctorate in philosophy of
20 education from the University of Pittsburgh.
21 Welcome.

22 Next, Joseph Murphy is director of public

1 policy for the Society of Corporate Compliance and
2 Ethics. He is president of Joseph E. Murphy, P.C., a
3 firm specializing in compliance and ethics advice to
4 companies and other organizations, and of counsel to
5 Compliance Systems Legal Group. Previously
6 Mr. Murphy served as senior corporate compliance
7 attorney for Bell Atlantic in Philadelphia; as an
8 associate with Wolf, Block, Schorr and Solis-Cohen.
9 Mr. Murphy received a B.A. from Rutgers, a J.D. from
10 the University of Pennsylvania Law School. Welcome.

11 So let's begin, Mr. Mazur, with you.

12 MR. MAZUR: Thank you.

13 Chairman Sessions and distinguished
14 members of the Commission, thank you for inviting me
15 to represent the Ethics and Compliance Officers
16 Association, or ECOA, and its members to discuss
17 the proposed amendments to Chapter Eight of the
18 *Guidelines Manual* regarding the sentencing of
19 organizations.

20 The ECOA is a founding leader of the
21 ethics and compliance field and serves as the sole
22 association exclusively for ethics and compliance

1 officers and members of their teams around the world.

2 The ECOA's more than 1100
3 members – including the largest number of ethics and
4 compliance officers in any organization
5 worldwide – span hundreds of organizations from the
6 largest multinational corporations to city, state,
7 and federal government agencies, to medium- and
8 small-sized businesses, to nonprofit organizations.
9 They are located in 25 countries but represent
10 employees in over 200 nations. In fact, our
11 executive director, Keith Darcy, likely would be
12 sitting in this very chair today if he weren't
13 traveling from Malaysia to South Korea as he meets
14 with Asian ethics and compliance leaders.

15 One of the best qualities of the ECOA is
16 the diversity of our members' professional
17 backgrounds. While early compliance programs were
18 led only by attorneys, the modern field of ethics and
19 compliance draws from many domains.

20 This evolution reflects the fact that
21 excellence in ethics and compliance requires that the
22 E&C team possess or have access to not only legal

1 expertise but organizational development, audit,
2 program planning and evaluation, communications,
3 organizational behavior, and many other functions,
4 including business ethics, which is my area of
5 expertise.

6 I have worked in ethics and compliance for
7 23 years, including stints as an ethics officer at
8 two Fortune 500 corporations, before joining ECOA's
9 leadership team in 2006.

10 On receiving your proposed amendments in
11 January, the ECOA surveyed our members' opinions on
12 each proposal and the issue for comment. We are very
13 pleased with the number and detail of responses they
14 offered. It is with these results in mind that I
15 deliver the following comments.

16 Note that it would take longer than my
17 allotted ten minutes to fully address all the issues
18 associated with each proposed amendment. Therefore,
19 what follows are brief comments on the most important
20 issues. We offer greater detail, including alternate
21 language, in our formal written submission.

22 First, many ECOA members support the

1 proposal that amends the Commentary to 8B2.1
2 clarifying the remediation efforts required to
3 satisfy subsection (b) (7). Regarding monitors, our
4 members prefer language akin to an independent,
5 qualified third party to distinguish between a
6 voluntary decision to engage an independent verifier
7 and a court-ordered mandate to hire a monitor.

8 Second, also regarding the Commentary to
9 8B2.1, the ECOA supports the Commission's efforts to
10 hold high-level and substantial authority personnel
11 to high standards regarding knowledge of E&C risks,
12 though there is concern over the decision to
13 highlight only document retention. While there is
14 broad agreement on the importance of document-
15 retention policies, and records management in
16 general, we believe that emphasis on this one risk
17 could motivate disproportionate attention compared to
18 more important risks. Fifty-six percent of our
19 survey respondents disagree with the proposed
20 addition to the Commentary that high-level and
21 substantial authority personnel "should be aware of
22 the organization's document retention policies."

1 while 13 percent remained neutral on the amendment.

2 Third, many ethics and compliance officers
3 support the amendment to Application Note 6 which
4 clarifies that, when an organization periodically
5 assesses the risk that criminal conduct will occur,
6 the "nature and operations of the organization with
7 regard to particular ethics and compliance functions"
8 should be included among the other matters addressed.
9 That said, they again disliked – that is, 79 percent
10 did not support – the special focus on document
11 retention policies. When asked what policy, if any,
12 should merit special attention in the commentary, the
13 most common response was the code of ethics or a
14 similarly named document, since that collection of
15 standards is comprehensive and includes all the risk-
16 related policies that the organization has already
17 determined should be read by all employees.

18 Fourth, it may not surprise you that what
19 attracted the most attention from ECOA members was
20 not one of the proposed amendments but the issue
21 published for comment – namely, whether to encourage
22 direct reporting to the board by responsible ethics

1 and compliance personnel by allowing an organization
2 to benefit from a three-level mitigation of the
3 culpability score, even if high-level personnel are
4 involved in the criminal conduct.

5 Respondents to our survey overwhelmingly
6 support this idea, with important qualifications. At
7 the top of their list of concerns is the need to
8 clarify what "direct reporting authority" means.

9 We respectfully ask the Commission to
10 clarify that this phrase means that the individual
11 with operational responsibility for ethics and
12 compliance must regularly provide reports to the
13 board of directors and have unrestricted access to
14 report to the board any ethics and compliance
15 concern.

16 Their next qualification responds to the
17 requirement that, to earn credit the program must
18 successfully detect the offense prior to discovery or
19 reasonable likelihood of discovery outside the
20 organization.

21 While ECOA members responded favorably to
22 the spirit of this requirement, they are concerned

1 that it could, as written, become a loophole that
2 undermines their efforts. They fear that the
3 organization could have an excellent E&C program that
4 deserves the credit, but could lose the credit if,
5 for example, an employee first describes the offense
6 to a spouse or a friend before contacting the ethics
7 officer.

8 To the extent your issue for comment calls
9 attention to the relationship between the ethics and
10 compliance program and the board, the ECOA asks the
11 Commission to seriously consider pursuing a goal that
12 the U.S. Securities and Exchange Commission achieved
13 with its requirement that boards meet or exceed a
14 minimum standard for financial literacy.

15 With the support of 72 percent of our
16 survey respondents, we believe that, for the same
17 reasons motivating that SEC response to the Sarbanes-
18 Oxley Act of 2002, the federal sentencing guidelines
19 should support a requirement that boards of directors
20 meet or exceed a minimum standard for ethics and
21 compliance literacy.

22 Some may feel that 8B2.1(b)(4) already

1 motivates board-level training, but in practice it
2 doesn't, given that most organizations perceive the
3 current language to simply mean that they must train
4 their employees yet need only communicate to their
5 board.

6 Given the power and influence of boards
7 with regard to program oversight, as well as the
8 growing complexity of ethics and compliance issues,
9 we assert that mere periodic communication to the
10 board is insufficient and that board-level ethics and
11 compliance training should be required.

12 In conclusion, the ECOA thanks the
13 Commission for setting aside time and other resources
14 to periodically update the guidelines. I know
15 personally that many valuable lessons are learned
16 every day in ethics and compliance programs across
17 the United States. The best of these are reflected
18 at ECOA events, and should continue to be
19 incorporated into your periodic updates.

20 As the standard bearer for the integration
21 of ethics into compliance programs, the ECOA asks you
22 to consider that the best path toward achieving the

1 goals of the guidelines is to pursue every
2 opportunity to motivate ethical behavior rather than
3 solely require compliant behavior.

4 A final point comes from the recent study
5 by the Conference Board, entitled "Ethics and
6 Compliance Enforcement Decisions: The Information
7 Gap."

8 Evidence demonstrates that what is most
9 needed to achieve the goals of the guidelines is
10 stronger proof that making the effort to honor the
11 letter and spirit of the law truly does matter to the
12 U.S. government.

13 This concludes my prepared remarks. Thank
14 you again for this opportunity to contribute to the
15 hearing, and thereby to your decision making. Please
16 know that the ECOA and its members stand ready to
17 assist the Commission in any way.

18 CHAIR SESSIONS: Thank you, Mr. Mazur.

19 Ms. Harned?

20 DR. PATRICIA HARNED: I'll turn this
21 microphone so you can hear me. Is that sufficient?
22 Okay. Thank you.

1 First, Michael Oxley, our chairman, asked
2 me to offer his regrets that he was unable to be
3 here. He's the person that's formally listed on the
4 agenda, but I'm the president of the Ethics Resource
5 Center, and I am very grateful to be able to be here
6 in his stead. Thank you so much for the opportunity
7 for us to offer our remarks.

8 First let me take a moment and tell you a
9 little bit about the Ethics Resource Center. We are
10 the country's oldest nonprofit organization dedicated
11 to the advancement of high ethical standards and
12 practices in public and private institutions.

13 We are a research organization. And based
14 on that focus, we have created objective benchmarks
15 to measure the effectiveness of ethics and compliance
16 programs.

17 We are probably best known for our
18 National Business Ethics Survey, which we field every
19 two years to represent the U.S. workforce in their
20 perspectives of ethics in the workplace. We drew on
21 the results from the 2009 study from NBES to comment
22 on some of the proposed amendments by the Commission.

1 In 2007 we also published a paper called
2 "Leading Corporate Integrity: Defining the Role of
3 The Chief Ethics and Compliance Officer." It is also
4 relevant to today's discussion. I should point out
5 that the two organizations with me participated in
6 that effort, and I'll come back to what that paper
7 represented. In fact, Joe Murphy was one of the
8 major contributors in authoring that paper.

9 ERC specifically commented on three
10 specific points proposed for Chapter Eight. The first
11 pertains to reasonable steps after criminal conduct
12 is detected. Overall we were very supportive of the
13 Commission's effort to try to clarify what
14 constitutes "reasonable steps." That is for one
15 primary reason.

16 We have seen in our research consistently
17 that misconduct is widespread in organizations. In
18 2009, our National Business Ethics Survey showed that
19 nearly one in two employees in the past year observed
20 some form of misconduct taking place in their
21 organization.

22 Now our measures go beyond just criminal

1 activity. We also asked if they observed conduct
2 that violated an organization's code of conduct. But
3 consistently we have seen that every organization
4 will eventually be in a position of detecting some
5 form of criminal misconduct, and that's why the
6 Commission's efforts are so important.

7 Our specific comments in that section
8 pertain to the suggestion that after remediation an
9 organization should assess its ethics and compliance
10 program. Again, we think this was an essential
11 suggestion, but we also think that the language
12 doesn't go far enough.

13 Following the detection of criminal
14 conduct, organizations should not only assess their
15 ethics and compliance programs, they should be
16 encouraged to assess their organizational cultures.
17 This is for two reasons.

18 First, in situations where criminal
19 conduct has taken place, we've seen time and time
20 again that cultures existed where employees who were
21 aware that wrongdoing was occurring were afraid to
22 raise it. And in some cases we've seen situations

1 where employees felt pressured to engage in criminal
2 activity just to be able to do their jobs. Culture
3 was a factor in the instances that took place.

4 The second reason organizations should be
5 encouraged to assess their cultures is that culture
6 we have seen in our research is the single largest
7 determinant of the extent to which further activity
8 will take place. We found in our research that when
9 an organization takes measures to implement the seven
10 steps that you have suggested for an effective
11 compliance and ethics program, and they've
12 established a strong ethical culture in their
13 organizations, misconduct is reduced by as much as 75
14 percent, reporting doubles, and retaliation against
15 whistleblowers is almost eliminated.

16 But this is because an effective program
17 and a strong culture are in place. The two are very
18 closely connected. And importantly, assessment of a
19 program does not necessarily include assessment of a
20 culture, and that's why we would encourage you to
21 make that explicit in the guidelines.

22 The second section that we commented on

1 pertained to recommended conditions of probation for
2 organizations. We focused specifically on the
3 submission of information to the courts by an
4 organization under probation.

5 We suggested that organizations that are
6 under probation should not only provide the court
7 with a schedule for their implementation of an ethics
8 and compliance program, but they should also explain
9 how they will measure the effectiveness of those
10 programs. And in progress reports they should
11 comment on how they are doing in implementing the
12 program, in part based on those measures.

13 Thanks to the 2004 amendments to the
14 guidelines, it has become common practice in the
15 ethics and compliance field to not only establish
16 metrics for program establishment, but to identify
17 specific outcome measures. What will be different
18 because the program is in place and it's having an
19 impact?

20 They are usually things like reduced
21 misconduct, employee pressure to comprise standards,
22 reporting retaliation. And program effectiveness is

1 determined in part based on those outcome measures.

2 Now it is likely that organizations that
3 are placed under probation would establish those
4 metrics as a part of the program implementation, but
5 unless it's explicitly stated they may not be
6 compelled to share that with the courts. And in
7 fact, federal officials would be well served by being
8 able to see these metrics and hold organizations
9 accountable to them.

10 The third issue that we've commented on
11 had to do with three-point mitigation for an
12 effective program when high-level personnel are
13 involved. And we suggested two important changes for
14 the Commission to consider.

15 First, if the employees responsible for
16 the ethics and compliance program are among the high-
17 level individuals involved in the criminal activity,
18 we suggested that mitigation should not be applied.
19 This would help ensure that companies not only are
20 selecting individuals for oversight of the ethics and
21 compliance program who have a personal commitment to
22 integrity, but also that they're skilled and well

1 placed to be able to withstand the pressures that
2 come when high-level individuals are engaged in
3 criminal activity.

4 The second comment we made was to suggest
5 that the Commission shouldn't identify specifically
6 the board or a board committee as the specific
7 reporting relationship for the individual with
8 operational responsibility for compliance.

9 Organizations vary widely. Some have boards. Some
10 don't. Some have boards with fiduciary
11 responsibility. Some don't.

12 In 2007, ERC worked with our colleagues in
13 the field in five nonprofit organizations that really
14 are the leaders in our industry to discuss how to
15 define the adequate role and responsibility and
16 reporting relationship for a chief ethics and
17 compliance officer. And we spent a great deal of
18 time talking about this issue.

19 In the end, because of the differences in
20 organizations rather than suggesting a specific
21 reporting relationship we identified four principles
22 that we felt, if satisfied, would suggest that this

1 person had adequate access to the governing authority
2 and a proper situation in an organization. And we
3 suggest that the Commission lean on the good work of
4 our nonprofits in trying to address this issue
5 yourselves.

6 The four principles included the
7 following:

8 That the individual with operational
9 responsibility for compliance in the organization
10 should be held accountable to the governing authority
11 while carrying out the fiduciary responsibilities
12 that are delegated to them;

13 Second, independent to raise matters of
14 concern especially when they involve individuals who
15 are high-level employees, without fear of reprisal or
16 a conflict of interest;

17 Third, sufficiently connected to company
18 operations in order to build an ethical culture that
19 advances the objectives of the business; and

20 Finally, provided with authority to have
21 decisions and recommendations taken seriously at all
22 levels of the organization.

1 This paper is available on ERC's website.
2 We are happy to furnish it to you if it would be
3 helpful to you. We would suggest that some of the
4 thinking that's already been done might be helpful to
5 you.

6 And with that I'm going to stop. Thank
7 you again for the opportunity. I'm happy to answer
8 any questions that you may have.

9 CHAIR SESSIONS: Thank you.

10 Mr. Murphy?

11 MR. MURPHY: Thank you for inviting SCCE
12 to participate in today's hearing. A little bit
13 about SCCE.

14 SCCE is a professional organization that
15 champions ethical practice and compliance standards
16 in organizations of all kinds, and provides resources
17 for compliance professionals. With our sister
18 organization, HCCA, we represent over 8000 members
19 and have certified over 3000 compliance and ethics
20 professionals.

21 An an active participant globally in this
22 field, including as a consultative partner to the

1 OECD Antibribery Working Group in its own work in
2 promoting compliance and ethics programs, we have
3 seen how important the Sentencing Commission's
4 trailblazing leadership in this field has been.

5 We have drawn on this leadership in
6 promulgating a code of professional ethical standards
7 for compliance and ethics professionals that we
8 publish for global use in eight different languages.
9 We have developed books, articles, videos,
10 conferences, and an interactive social network and
11 web site dedicated to proselytizing the Sentencing
12 Commission's underlying message of responsible
13 corporate citizenship through the use of effective
14 compliance and ethics programs.

15 I would like to focus on three points in
16 these remarks, two related to the discussion topic on
17 giving credit for programs despite high-level
18 participation in misconduct, and one to suggest an
19 additional modest revision to the guidelines'
20 standards relating to incentives.

21 First, we believe the proposal to provide
22 that a compliance and ethics program would still be

1 able to receive credit even if a high-level person is
2 involved in an offense as long as the organization
3 has taken certain responsible steps is an excellent
4 and important change.

5 It recognizes that the involvement in an
6 offense by one manager, whatever the position, is not
7 the same as involvement by senior management. This
8 change would conform the sentencing guidelines to
9 actual practice where corporations today may employ
10 dozens, if not hundreds, of managers in positions of
11 high responsibility.

12 It is not only possible but unfortunately
13 likely that there will be infractions involving at
14 least a limited number of such persons. No program
15 can prevent all such violations, but an effective
16 program should be able to achieve the steps called
17 for in this proposed change.

18 A company that has fully empowered its
19 compliance officer and that at some point discovers
20 and reports a violation involving a senior manager
21 has gone quite far in qualifying as a good citizen
22 corporation.

1 The Commission has hit a key point in the
2 focus on having the compliance person report to the
3 highest governing authority as one condition for this
4 credit. And I would note, it's not necessarily board
5 of directors; it's highest governing authority,
6 whatever that is in any organization.

7 In a groundbreaking study including all
8 three of the organizations in this panel, and
9 actually the report that Dr. Harned mentioned, it was
10 reported that many compliance professionals in the
11 current environment are set up for failure.

12 For compliance programs to work in
13 addressing the most serious forms of corporate crime,
14 the compliance professionals need this positioning to
15 get the job done.

16 However, the reference to the compliance
17 officer's reporting authority to the highest
18 governing authority needs to be clarified and
19 enhanced. In the business context, the word
20 "reporting" could mean simply sending reports to the
21 board which may be more or less detailed and
22 informative – and more or less censored by senior

1 management.

2 But it can also mean being the one who
3 determines whether you get promoted, financially
4 rewarded, or fired. If the compliance officer is to
5 be positioned so that he or she can stand up to a
6 senior manager who is determined to engage in illegal
7 conduct, both types of reporting relationship to the
8 highest governing authority are important. It
9 requires empowerment and independence for a
10 compliance and ethics officer to do this. And we
11 will suggest specific language in our comments to
12 achieve this result.

13 And finally, although the reference to
14 incentives was added into the standards in 2004,
15 application of this element in practice has been
16 quite limited.

17 The SCCE in a recent survey on this point
18 heard back from compliance professionals that
19 incentives are being under-utilized in compliance
20 programs. And this was a survey we did entitled
21 "Compensation, Performance, Compliance and Ethics,"
22 done in May 2009.

1 In fact, when the Federal Acquisition
2 Regulation was recently revised to require compliance
3 programs among major government contractors, the
4 significance of this point of incentives was so
5 poorly understood that the reference was completely
6 missed in the mandatory standards.

7 Yet, incentives are clearly drivers in
8 organizational conduct and are included in a variety
9 of other compliance and ethics program standards that
10 SCCE has reviewed around the world, ranging from
11 compliance program standards published by competition
12 law enforcement authorities in India and the UK, to
13 generic cross-industry standards for compliance
14 programs published in Australia.

15 SCCE has even produced and posted on our
16 web site a full white paper on incentives in
17 compliance programs. This is "Building Incentives In
18 Your Compliance & Ethics Program," January 2009.

19 We recommend adding to the existing one-
20 word reference to "incentives" in the sentencing
21 guidelines Item 6 an explanation in the commentary.
22 We have drawn the language from some excellent

1 material promulgated by the Canadian Competition
2 Bureau in its 2008 Compliance Program Bulletin.

3 Those are my comments and I am happy to
4 respond to any questions.

5 CHAIR SESSIONS: Thank you, Mr. Murphy.
6 Let's open it up for questions.

7 COMMISSIONER HOWELL: I have two
8 questions.

9 CHAIR SESSIONS: Okay, Commissioner
10 Howell.

11 COMMISSIONER HOWELL: First, Dr. Harned,
12 you talked about having an additional requirement so
13 that companies would assess their culture, and I just
14 wanted to know if you could address how people would
15 go about assessing a culture. That's for you.

16 And then, Mr. Mazur, I didn't actually
17 catch the last part of what you were saying, but you
18 were talking about an information gap. And we live
19 with information and data, and it's one of our
20 responsibilities to make sure we're providing good,
21 useful data for people to understand what's going on
22 in our criminal justice system.

1 So to the extent, I sort of didn't
2 understand your point about the information gap. And
3 what other information about organizational
4 sentencing or otherwise you think would be helpful
5 from the Commission, I'd like you to address that.

6 So, Doctor?

7 DR. PATRICIA HARNED: Well assessment of
8 culture is certainly both an art and a science. It's
9 a little bit like assessing the personality of an
10 organization, and certainly it is always a challenge
11 to try to do that.

12 But by the same token, there are generally
13 accepted metrics that have been developed over time
14 through research to help an organization identify
15 what its culture is.

16 When you talk about the ethical culture
17 of an organization, it generally involves things
18 like the tone being set from the top, what is the
19 expectation that leaders at the highest levels of
20 organization are communicating as being important,
21 both formally and informally.

22 Second, to what extent are employees being

1 supported by their immediate supervisors when it
2 comes to actually following the standards on a day-
3 to-day basis?

4 A third element of it has to do with the
5 extent to which what is written and codified as the
6 standards of the organization are actually being
7 followed on a day-to-day basis. Does the code really
8 matter? Do people know that it's there? Do they
9 actually follow it when they have issues that they
10 don't know how to resolve?

11 And then the last part of it has to do
12 with peer support for one another on an individual
13 interfactional level. Are people really supporting
14 each other and upholding the standards?

15 So there are lots of different metrics for
16 culture. It can and has been measured, and again
17 it's culture as defined as those kinds of things
18 that the formal and informal standards of how things
19 are really done.

20 COMMISSIONER HOWELL: And the actual
21 methodology you would use to go about doing such a
22 measure is surveying people?

1 DR. PATRICIA HARNED: There are different
2 ways to go about doing it. Over time, two in
3 particular have sort of emerged. There's a
4 quantitative method of surveying employees to get
5 their perceptions of what the standards are and how
6 well they are followed.

7 There is also a qualitative effort. Lots
8 of organizations will conduct focus groups to try to
9 get a sense from the employees about what it's really
10 like to work in that organization, or a combination
11 of the two.

12 COMMISSIONER HOWELL: Thank you.

13 MR. MAZUR: I will follow on to that,
14 because the ECOA worked with the ERC in 2007 on this
15 issue, and another example is a pre-testing and post-
16 testing after a large initiative in communication and
17 training so that you'll get a sense of the knowledge
18 of what the standards are, and what are the
19 implications of not honoring the standards. In the
20 beginning of 2008 you go through 15 months of a
21 training and communications program, and then you do
22 it again afterward and you really get different

1 results with regard to the level of comfort with what
2 are the standards, and also a fear of retaliation up
3 or down, their willingness to call the help line, and
4 things like that.

5 In respect to the point that you made, I
6 made reference to a specific document which included
7 that phrase the Conference Board published last year
8 entitled "Ethics and Compliance Enforcement
9 Decisions – the Information Gap." And just like my
10 colleagues did, I would be happy to make the document
11 available to the Commission after today and before
12 the deadline.

13 The analysis took a look at the reality
14 that you all know very well that relatively few
15 organizations specifically have engaged the
16 guidelines when it comes to being sentenced. And
17 many of them, as was mentioned in the previous panel,
18 were quite small.

19 But the fact is, for those of us who are
20 very involved with this field, we know that the
21 guidelines have a tremendous impact on organizations.
22 And from interacting with representatives of the

1 Department of Justice we know that they have
2 tremendous impact at various levels.

3 It seems to us that the only challenge is
4 that there's no one who is specifically tracking the
5 extent to which the guidelines do impact and affect a
6 variety of decisions along the path toward
7 sentencing. No one is tracking it, and no one is
8 communicating it.

9 COMMISSIONER HOWELL: And are you talking
10 specifically to the fact that, since the Sentencing
11 Commission only gets documents relating to convicted
12 organizations that we do not receive at all - although
13 I guess if we requested it we might get some -
14 nonprosecution and deferred prosecution agreements so
15 that we can incorporate in our analysis in a totally
16 confidential way, purged of identifying information
17 about the organization being sentenced, information
18 about how much credit was given for the compliance
19 program, how the fine was calculated, all the other
20 kinds of information that we can glean from convicted
21 organizations?

22 MR. MAZUR: Yes. It is what I'm referring

1 to, and the document does. And even broader than
2 that, the extent to which sometimes decisions
3 associated with whether or not to pursue an
4 indictment will be affected by the extent to which a
5 high-quality program might make a difference in the
6 decision at that level.

7 Again, it's important to the three of us
8 and the community of which we're a part to know that
9 it's there. There isn't anyone involved who doesn't
10 know that it's happening, but there just doesn't
11 happen to be anybody on your side of the fence who is
12 taking the time to assemble that data and then make
13 it available. And if you did, it would just make a
14 tremendous difference for ethics and compliance
15 officers who are trying to persuade higher management
16 who have many, many things competing for their
17 attention of the value of investing in a program like
18 this.

19 CHAIR SESSIONS: How would you get that
20 information, other than I suppose from deferral
21 agreements, deferred prosecution agreements from the
22 government? I mean, how would you get that?

1 MR. MAZUR: Well you would get it from
2 there, but I mean prosecutors have a – when they go
3 through a case and have to make decisions about what
4 they're going to pursue, they go through a process of
5 analysis. And there have been instances when they've
6 willing to share with the ECOA the extent to which
7 they have made a decision whether or not to even
8 pursue a case based on – again, not naming the
9 organization or something like that – but just helping
10 us understand, you know, that it does truly make a
11 difference in difficult decisions that have to be
12 made at all levels of the process.

13 And so it would simply be a matter of a
14 process developed I think in the Department of
15 Justice where they would, at various levels of the
16 process, ask the U.S. attorneys' offices, were these
17 considered? Did the compliance program make a
18 difference? Was it a factor anywhere, yes or no? If
19 so, to what extent?

20 I didn't say it would be easy; I just said
21 it would be important.

22 CHAIR SESSIONS: Okay. Any further

1 questions at all?

2 COMMISSIONER HOWELL: Well, just one last
3 question.

4 CHAIR SESSIONS: Sure.

5 COMMISSIONER HOWELL: In our last panel
6 one of the witnesses said that, you know, document
7 retention programs – it was superfluous for us in our
8 proposed amendment to even mention document retention
9 programs because they are clearly part of the
10 compliance programs.

11 Another witness said that document
12 retention programs and records management is really
13 not part of compliance programs.

14 So we had people with very different views
15 about the role of records management and compliance
16 programs. And I just wondered whether you all had a
17 view, either about records management and how much
18 they should or should not be subject to compliance
19 programs, interest and assessments? And if you
20 could comment on that.

21 MR. MURPHY: If I could start, actually I
22 think the views are relatively consistent that the

1 specific reference to records retention, or document
2 retention or document management really is out of
3 place in the guidelines.

4 For example, if you recall in the
5 guidelines it has a reference to risk assessment and
6 prioritization. I don't think you want companies to
7 view records retention as an issue that they want to
8 prioritize and focus on.

9 So I believe there's a concern that adding
10 that type of reference could actually tend to
11 trivialize the guidelines and push people more
12 toward thinking of the guidelines as a paper
13 exercise. So the consistent message that I heard
14 from that panel and from this panel, and from our
15 comments, is it's just out of place.

16 Records retention and management has its
17 own place, and people will deal with that as is
18 appropriate in their companies, the same as they deal
19 with any other risk. In my own private practice, I
20 have not run across this issue. I have not had
21 people saying to me, gee, what do we do about
22 records retention, in the context of the guidelines.

1 So I think the general view is, it is just
2 unnecessary.

3 MR. MAZUR: I'll say that obviously we
4 asked our members to respond in the survey, and they
5 actually – that's why you saw me refer to the spirit
6 of it. They actually supported its reference,
7 because you know it came up in your proposed
8 amendments in two ways.

9 The first way was with the reference to
10 the high-level and substantial authority personnel.
11 Because you know that records management is not a
12 risk like Foreign Corrupt Practices Act, and
13 antitrust, and this and that. It's kind of a
14 metarisk. What you're asking in that proposal is
15 that for these high-level personnel that the
16 integrity of the program is connected to whether or
17 not they have an effective records management
18 program.

19 So that part of it, the members came back
20 that our members didn't mind that at all, because, to
21 answer your question, yes, records management is a
22 part of ethics and compliance programs. And so the

1 ethics and compliance officers who are members at the
2 ECOA care deeply that it's done effectively and
3 getting the business units to honor the standards
4 that they design.

5 The concern that our members had was the
6 second reference, when it came to suggesting that
7 this being, as Joe just referenced, the only one risk
8 that was mentioned that all employees should be
9 focused on. That's an instance where we think it's
10 misplaced.

11 And the impact, though, of even the first
12 reference, it all comes down to what will it actually
13 mean? And I am nervous that if you leave it in, for
14 example, just with the high-level personnel, we will
15 be working with our members to make sure that they
16 don't accidentally think that you're sending a
17 message that that risk is more important than the
18 other. We'll remind them that it's kind of a
19 metarisk, it's a facet of the program, but not one of
20 the risks itself, and encourage them. Because it
21 would be so tempting for the very first time that
22 they see you enunciate a single risk like that, very

1 tempting for them to take 50 percent of their budget,
2 move it away from valuable things and then devote it
3 just to that, which would be a mistake.

4 COMMISSIONER HOWELL: Thank you.

5 CHAIR SESSIONS: Any other questions?

6 (No response.)

7 CHAIR SESSIONS: Well thank you very
8 much for coming. It is very much appreciated by all
9 of us. Enjoy the beautiful day in Washington, D.C.

10 MR. MAZUR: Thank you.

11 MS. PATRICIA HARNED: Thank you.

12 MR. MURPHY: Thank you.

13 CHAIR SESSIONS: So we will recess
14 until 5:30.

15 (Whereupon, at 4:45 p.m., Wednesday, March
16 17, 2010, the public hearing of the United States
17 Sentencing Commission was adjourned.)

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