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Before the
UNITED STATES SENTENCING COMMISSION
Public Hearing
Wednesday, March 14, 2012
Federal Judicial Center, Classrooms A-C
Thurgood Marshall Federal Judiciary Building
One Columbus Circle
Washington, DC 20002-8002

The hearing was convened, pursuant to notice,
at 8:22 a.m., before:

- JUDGE PATTI B. SARIS, Chairwoman
- MR. WILLIAM B. CARR, JR., Vice Chairman
- MS. KETANJI BROWN JACKSON, Vice Chairwoman
- CHIEF JUDGE RICARDO H. HINOJOSA, Commissioner
- JUDGE BERYL A. HOWELL, Commissioner
- MS. DABNEY FRIEDRICH, Commissioner
- MR. JONATHAN J. WROBLEWSKI, Ex-Officio Member
of the Commission

COURT REPORTER: Charles Hoffman, Ace-Federal
Reporters

1 PANELISTS:

2 PANEL I: Dodd-Frank Act/Fraud Offenses

3 JOHN BURETTA

4 Deputy Assistant Attorney General

5 of the Criminal Division

6 U.S. Department of Justice

7 KATHRYN NESTER

8 Federal Public Defender

9 District of Utah

10 DAVID DEBOLD, Chair

11 Practitioners Advisory Group

12 MARJORIE PEERCE

13 New York Council of Defense Lawyers

14 New York, New York

15 PANEL II: Dodd-Frank Act/Fraud Offenses (Cont.)

16 SAMUEL BUELL

17 Professor of Law

18 Duke University School of Law

19 Durham, North Carolina

20 SARA STEPHENS, President

21 Appraisal Institute

22 Chicago, Illinois

23

1 PANEL II (Continued):

2 DAVID HOWELL

3 Executive VP and Chief Information Officer

4 McEneaney Associates Inc., Realtors

5 McLean, Virginia

6 TERESA BRANTLEY, Chair

7 Probation Officers Advisory Group

8 PANEL III: Human Rights Offenses

9 AMY POPE

10 Deputy Chief of Staff & Counselor to the

11 Assistant Attorney General of the Criminal Division

12 U.S. Department of Justice

13 MELANIE MORGAN

14 Morgan Pilate, LLC

15 Olathe, Kansas

16 PANEL IV: Drugs/BZP Offenses

17 SCOTT MASUMOTO, Assistant Special Agent in Charge

18 Washington Division, DEA

19 MICHAEL BAUMANN, Ph.D., Staff Scientist

20 Intramural Research Program

21 National Institute of Drug Abuse

22

1 PENNY BEARDSLEE

2 Deputy Federal Public Defender

3 Eastern District of Michigan

4 PANEL V: Miscellaneous Proposed Amendments

5 TRISTRAM COFFIN

6 United States Attorney

7 District of Vermont

8 MARJORIE MEYERS

9 Federal Public Defender

10 Southern District of Texas

11 DAVID DEBOLD, Chair

12 Practitioners Advisory Group

13 TERESA BRANTLEY, Chair

14 Probation Officers Advisory Group

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1 PROCEEDINGS

2 CHAIR SARIS: Okay. For those of you who
3 attend frequently, we have switched ourselves around
4 a little bit. So I am going to introduce everybody
5 and hope in the right order.

6 I welcome you all. For those of you who have
7 come to a lot of these, we have had a lot of hearings
8 in the last month, and this one is an extremely
9 important hearing on all the amendments we are
10 considering. So thank you for coming, and for some
11 of you for coming back.

12 As you know, there is a broad range of
13 amendments we are considering, everything from
14 economic fraud, human rights, some circuit conflicts,
15 and a whole host of things.

16 What I want to do is ask you all to, when you
17 testify, we have read your comments and thank you, to
18 give us your highlights. And before we get going,
19 what I wanted to do is introduce everybody.

20 Mr. Will Carr is still to my right here.
21 He's been vice chair of the Commission since December
22 2008. He served as an assistant United States

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1 attorney in the Eastern District of Pennsylvania from
2 1981 until his retirement in 2004.

3 To my left is Ketanji Jackson who has been
4 vice chair of the Commission since 2010. She was a
5 litigator at Morrison & Foerster, and an assistant
6 federal defender in the Appeals Division of the
7 Office of the Federal Defender in the District of
8 Columbia.

9 Way over here, usually here, is Judge
10 Hinojosa who served as chair and subsequently acting
11 chair of the Commission from 2004 to 2009. He is the
12 chief judge of the United States District Court for
13 the Southern District of Texas, and has been serving
14 that court since 1983.

15 Judge Beryl Howell is way over to the right
16 here. Beryl Howell has been on the Commission since
17 2004. She is a judge of the United States District
18 Court for the District of Columbia, and has served on
19 that court since last year.

20 And Dabney Friedrich has been on the
21 Commission since December 2006. She was associate
22 counsel at the White House; and counsel to Chairman

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1 Orrin Hatch on the Senate Judiciary Committee; and an
2 assistant United States attorney in the Southern
3 District of California and the Eastern District of
4 Virginia.

5 And Jonathan Wroblewski is an ex-officio
6 member of the Commission representing the Attorney
7 General of the United States. He serves as the
8 director of the Office of Policy and Legislation in
9 the Criminal Division of the Department of Justice.

10 So I want to ask, does anybody else have any
11 comments?

12 (No response.)

13 CHAIR SARIS: I see nothing. As you know, or
14 maybe you don't, we do this in the First Circuit,
15 maybe some of the other Circuits do this: red light,
16 orange light, green light system. So when the yellow
17 light goes on, it is a warning signal. The red light
18 is the hook. Now sometimes, you know, we're an
19 active bench, a hot bench, and so that's why we like
20 to make sure people finish their comments. I mean, I
21 don't do it to the word, but you know, sort of
22 obviously roughly that. And sometimes people are so

23

1 energized they don't even notice that the red light
2 is going on. So you might notice me like jumping up
3 and down so I don't have to cut you off.

4 And I do want to emphasize that we've tried
5 to read your comments. So, you know, know that we've
6 done that, and really hit your highlights so we can
7 understand what your big points are.

8 So I think you've been told it's about five
9 minutes apiece - is that right? - so, go ahead. Thank
10 you.

11 MR. BURETTA: Good morning, and thank you.

12 CHAIR SARIS: I want to introduce the panel
13 before we get going on this. And if I can begin with
14 John Buretta, who is the deputy assistant attorney
15 general of the Criminal Division of the Department of
16 Justice. I had a chance to meet you beforehand. He
17 is the deputy assistant attorney general of the
18 Criminal Division. He was an assistant U.S. attorney
19 in the Eastern District of New York and served as
20 that office's chief of the Organized Crime and
21 Racketeering Section. He also was an associate at
22 Cravath Swaine & Moore.

23

1 And then, moving ahead – I think we're going
2 in this order – Kathryn Nester is the federal public
3 defender for the District of Utah. Previously she
4 was an assistant public defender for the Southern
5 District of Mississippi and was in private practice
6 in Jackson, Mississippi.

7 David Debold, a frequent visitor, is a
8 partner at the firm of Gibson Dunn in Washington,
9 DC, and chair of the Commission's Practitioners
10 Advisory Group. Prior to joining Gibson Dunn in
11 2003, Mr. Debold was an assistant U.S. attorney in
12 Detroit, Michigan, and was also on detail to the
13 Commission.

14 And Marjorie Peerce is a member of the law
15 firm of Stillman & Friedman in New York. She is also
16 a member of the New York Council of Defense Attorneys
17 for which she previously served as president and
18 chair of the organization's sentencing guidelines
19 Committee.

20 So welcome. Mr. Buretta.

21 MR. BURETTA: Thank you. Good morning.

22 I promise my comments this morning will be
23

1 shorter than the Department's view paper that was
2 submitted to you, which I think ran about 37 pages.

3 Thank you for the opportunity to appear here
4 to testify on behalf of the Department of Justice
5 regarding the Commission's proposed Dodd-Frank fraud
6 amendments.

7 During the ten years I've had the honor of
8 working at the Department, I've also had the pleasure
9 of investigating and supervising the investigation of
10 a wide array of federal criminal frauds, including
11 fraud on the market, securities fraud, insider
12 trading, pump and dump schemes, commodities market
13 manipulation, bank fraud, mortgage fraud, consumer
14 fraud, and others.

15 And in my current position, I oversee over
16 100 criminal prosecutors in the Criminal Division's
17 Fraud Section under the leadership of Assistant
18 Attorney General Lanny Breuer. These prosecutors of
19 course are working day in and day out pursuing fraud
20 cases throughout the United States in partnership
21 with U.S. Attorney's offices and having tremendous
22 successes.

23

1 In just the past two weeks, the Fraud Section
2 and its U.S. Attorney partners obtained a substantial
3 sentence on insider trading charges in Maryland
4 against a former Food & Drug Administration official.
5 They convicted R. Allen Stanford in Texas for his
6 perpetration of an astonishing \$7 billion Ponzi
7 scheme, and arrested a doctor recently who allegedly
8 generated over \$300 million in fraudulent Medicare
9 billing, the largest single alleged fraudulent
10 Medicare billing scheme in U.S. history.

11 The Department is very grateful for the
12 attention the Commission has devoted to fraud
13 guideline sentencing issues, and for the Commission's
14 willingness to entertain suggestions from the
15 Department of Justice in this regard at the length
16 that we have submitted them.

17 Among the various amendments the Commission
18 is considering, I would like to focus my remarks on
19 the guideline proposals addressing harm to the
20 financial markets and to financial institutions, and
21 also the proposals regarding insider trading and
22 proposed amendments concerning harm to the
23

1 residential housing market, homeowners and banks,
2 from mortgage fraud and other related schemes.

3 The 2008 financial crisis and subsequent
4 economic downturn remind us in the Department
5 constantly of the importance of preserving the
6 integrity of our financial markets. Our nation's
7 financial laws must be vigorously enforced to deter
8 conduct that could in the future impact the viability
9 of our markets.

10 The Department thanks the Commission for its
11 hard work over the past two years in reviewing the
12 sentencing guidelines in light of Dodd-Frank to
13 ensure that the guidelines reflect the gravity of
14 crimes that can impact financial market integrity.

15 For example, one of the proposals forwarded
16 by the Commission is an enhancement for financial
17 crimes that may destabilize a financial market. The
18 Department supports the Commission's proposal and
19 recommends that this enhancement be added to section
20 2B1.1(b)(15) where we think it would provide for a
21 6-level increase when the fraud caused, quote, "a
22 significant disruption of a financial market or
23

1 created a substantial risk of such a disruption,"
2 unquote.

3 This new enhancement, in our view, reflects
4 that some financial frauds can have a dramatic effect
5 on the financial system's integrity in ways that many
6 financial frauds ordinarily would not. For example,
7 deliberate falsification of valuation of assets
8 traded in markets that rely heavily on market
9 participant valuation could have devastating market
10 consequences. Manipulative trading practices that
11 spread misinformation about a class of assets or
12 commodities in order to short the market, for
13 example, likewise can substantially impede the
14 ability of ordinary market forces to facilitate fair
15 buying and selling, and can even disrupt market
16 trading altogether.

17 These market-risking crimes, while not always
18 amenable in some instances to precise gain or loss
19 calculations, nonetheless plainly merit enhanced
20 penalties and we therefore support the Commission's
21 proposal.

22 We also support the Commission's proposed
23

1 amendments to section 2B1.1(b)(15)'s enhancement for
2 conduct that substantially jeopardizes the safety and
3 soundness of a financial institution, and in
4 particular the Department agrees that the proposed
5 enhancement should apply even if government
6 intervention prevented the result contemplated by the
7 enhancement, as in our view the defendant should not
8 receive a windfall when the government saves the day,
9 despite the defendant's best efforts to jeopardize
10 the safety and soundness of a financial institution.

11 And in thinking about this proposal by the
12 Commission, the Department has in mind cases like the
13 recent federal prosecution of Lee Bentley Farkas in
14 Virginia this past year. Farkas, who was the former
15 chairman of Taylor, Bean & Whitaker, one of the
16 nation's largest private mortgage lending companies,
17 engaged in a scheme involving the fraudulent sale and
18 purchase of mortgages and mortgage-backed securities.

19 Now Farkas's scheme contributed not only to
20 the failure of Taylor, Bean, but also to the collapse
21 of Colonial Bank, one of the 25 largest banks in the
22 United States. And when we think about the Farkas

1 case and we envision a scenario in which the
2 government would have been able to stop this
3 collapse, if that had been possible, it is our view
4 that Farkas nonetheless would deserve the punishment
5 that he received having successfully carried out his
6 scheme and caused the collapse of these two very
7 important banks.

8 Another area, insider trading, is of course a
9 very pernicious form of fraud that could threaten the
10 integrity of financial markets and undermine investor
11 confidence.

12 As the convictions stemming from the Galleon
13 cases and related cases in New York have recently
14 demonstrated, insider trading on Wall Street is by no
15 means a crime of days long past, and the Department
16 will continue vigorously to investigate and prosecute
17 the broad scope of insider trading we continue to
18 find.

19 As discussed in our views letter, we very
20 much agree with the Commission that the guideline for
21 insider trading, section 2B1.4, merits amendment. In
22 this respect, the Department respectfully recommends

23

1 an enhancement for insider trading schemes that are,
2 quote, "organized," unquote. This is an evolution in
3 our thinking from a previous proposal that there
4 should be a sophisticated means enhancement.

5 We believe the term, quote, "organized
6 scheme," unquote, which indicates planning and
7 preparation but does not necessarily require
8 complexity or intricacy, best captures the
9 characteristics of a broad class of insider trading
10 schemes that merit enhanced sentences. This
11 enhancement differentiates insider trading schemes
12 involving planning and preparation from, for example,
13 a solitary instance where a tipper passes insider
14 information to a tinee who then quickly trades.

15 In addition, we suggest replacing the
16 proposed 4-level position-of-trust enhancement for
17 insider trading with a separate 2-level enhancement
18 for industry professionals who engage in insider
19 trading.

20 Insider trading by industry professionals
21 merits, in our view, enhanced punishment even where a
22 duty of trust is not owed in connection with the

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1 crime. And I think we point out in our views' letter
2 some examples where a defendant could not be
3 violating the duty-of-trust but nonetheless be acting
4 as an industry professional who merits enhanced
5 punishment.

6 And because the industry professional does
7 have a greater ability to insider trade and faces the
8 temptation to do so with greater frequency and
9 effectiveness than someone who is not a part of the
10 industry, that person also merits greater deterrence.
11 And this class of individual merits greater
12 deterrence.

13 And of course application of the industry
14 professional enhancement that we propose would not
15 exclude application of the 2-level abuse-of-trust
16 enhancement under section 3B1.3, which could apply
17 also in certain circumstances.

18 The Commission has also proposed amendments
19 to the mortgage fraud guidelines in response to the
20 Dodd-Frank Act. And the Commission's proposals
21 address crimes that affect the integrity of the
22 housing and lending markets in communities across our
23

1 country.

2 The Department supports the Commission's
3 proposed amendments relating to mortgage fraud and
4 financial institution fraud which would increase
5 penalties for criminal behavior victimizing
6 homeowners, borrowers, and lending institutions.

7 And in closing, I would like to thank the
8 Commission for affording the Department the
9 opportunity here today to address these important
10 fraud guideline matters. We look forward to
11 continuing to work with the Commission on these and
12 many other important sentencing issues.

13 Thank you.

14 CHAIR SARIS: Thank you. Ms. Nester.

15 MS. NESTER: Good morning, Madam Chair and
16 members of the Commission:

17 It is an honor to speak to you today on
18 behalf of the Federal Public Defenders and Community
19 Defenders across the country.

20 Prior to being appointed by the Tenth
21 Circuit, I practiced law for approximately 19 years
22 in the Southern District of Mississippi. And in the

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1 aftermath of Katrina, I represented numerous
2 defendants accused of fraud charges, as well as those
3 involving mortgage loans.

4 For those of us who routinely defend these
5 cases, we welcome the Commission's meaningful efforts
6 to reduce the impact of the loss and victim tables.
7 Now in order to accomplish this we need to ask
8 ourselves three things:

9 First, does the problem really exist? If it
10 does, what solutions best address the problems? And
11 finally, what risks and costs are associated with our
12 proposed solutions?

13 I think we can all agree there is a problem.
14 Our materials provide you data showing that judges
15 and prosecutors are agreeing that 2B1.1 is resulting
16 in too severe sentences. And as a result, we are
17 seeing more and more downward below-range sentences.

18 The history of the fraud guideline is one of
19 ever increasing severity, primarily justified by the
20 concept of deterrence, but as we now know, the
21 studies show it is the certainty of punishment, not
22 the severity of it, that actually holds the deterrent

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1 effect.

2 So we believe it is imperant that we
3 reexamine these fraud sentences with an eye toward
4 better reflecting all the purposes of sentencing. We
5 propose the following solutions:

6 With respect to the loss table, we have long
7 advocated for a rule that lowers sentences for
8 defendants whose personal gain was substantially less
9 than the loss amount. The Commission's proposal to
10 cap the loss amount table at an arbitrary amount
11 recognizes this problem, but we believe it is too
12 narrow of a fix.

13 We also believe it offers no relief to those
14 who've suffered little or no monetary gain. Instead,
15 we urge the Commission to consider pairing those caps
16 with a departure provision which would allow the
17 court to take into consideration the defendant's gain
18 and other factors.

19 With respect to the victim table, we support
20 both of the Commission's proposals. However, we
21 think your proposal should be paired with a narrowing
22 of the definition of "victim" to only include people

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1 who truly have suffered pecuniary, long-term
2 pecuniary harm.

3 We have also suggested some additional ways
4 the Commission might want to consider lessening the
5 impact of these tables. One suggestion is providing
6 a cap on the loss amount tables, if you're eligible
7 for a mitigating role reduction, like you've already
8 done in the drug tables.

9 Another suggestion is to provide a series of
10 examples in your downward departure commentary giving
11 the court guidance and comfort in considering these
12 other factors.

13 You could cap the cumulative adjustments,
14 such as pile on and on and on, like you've done in
15 the robbery statute, or guideline, I'm sorry. Or you
16 could consider creating a safety valve like you have
17 for drug cases. We stand ready to work with the
18 Commission on any or all of these proposals.

19 As far as the costs, I think the costs of
20 doing nothing is that we continue to pay for
21 increased incarceration that doesn't appear to be
22 serving the purposes of sentencing.

23

1 On the other hand, I think all of these fixes
2 will reduce costly appeals, provide guidance to your
3 judges, and I think just increase confidence in our
4 criminal justice system and our guidelines because
5 we're better accomplishing the purposes of
6 sentencing.

7 With respect to the proposed amendments
8 relating to mortgage loans, our inquiry is a little
9 simpler. First, we don't believe there is a problem
10 in terms of determining credit against loss. Judges
11 are handling the formula that you've already given
12 them across the country. They are able to value
13 loss, and we don't think that it calls for revising
14 that formula at this time.

15 Second, we do not believe the proposed
16 language requiring courts to use the value of
17 collateral at the time of foreclosure makes the
18 situation any better. In fact, we think it creates
19 all sorts of unanswered questions in cases where the
20 collateral has been disposed of in other ways, like
21 deed in lieu of foreclosure, real estate owned sales,
22 short sales. None of those are addressed. So you're

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1 kind of opening Pandora's box there.

2 Also, we have some concerns about the
3 proposal to include administrative costs in loss
4 amount. This seems inconsistent with other areas of
5 the commentary where we recommend these types of
6 damages not be considered. Furthermore, they can
7 much more appropriately be addressed in the
8 restitution stage of sentencing.

9 Finally, we think the costs of creating or
10 implementing these unnecessary amendments could
11 include protracted litigation about what constitutes
12 due diligence. Whether these administrative costs are
13 reasonable or foreseeable under each state's
14 particular laws about foreclosure which could become
15 complex, the number of out-of-state witnesses would
16 increase sentencings as the government attempts to
17 prove the reasonableness of the costs. And also, by
18 singling – I see my time has expired. May I sum up?

19 CHAIR SARIS: Yes.

20 MS. NESTER: Thank you, Your Honor.

21 CHAIR SARIS: Actually, five minutes flows by
22 quickly.

23

1 MS. NESTER: I'm trying to catch my breath.

2 And also we think singling out one form of
3 disposal actually creates more problems than it
4 solves as far as the courts are concerned. So we
5 recommend that instead perhaps the court might want
6 to focus on some more common mitigating factors such
7 as the fact that the ultimate holder of the
8 collateral is rarely the person who was actually
9 defrauded, and frequently has invested and made money
10 on that mortgage on the secondary investment market
11 as well as maybe money servicing the loan, and none
12 of that is being credited in the loss analysis.

13 In sum, we commend the Commission for taking
14 up this issue and if there's one message I can leave
15 you from the field it is that please be sure that any
16 solutions are geared toward actual demonstrable
17 problems, and that they be as narrowly tailored as
18 possible.

19 Thank you for your attention.

20 CHAIR SARIS: Thank you.

21 MR. DEBOLD: Thank you, Judge Saris, and
22 members of the Commission:

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1 On behalf of the Practitioners Advisory
2 Group, it is our pleasure and honor to be able to
3 present the position of private practitioners from
4 the field. And I personally appreciate the
5 opportunity to appear before you again.

6 As you mentioned in introducing me, I served
7 as an assistant U.S. attorney for a number of years,
8 a total of 17 years, in Detroit. I spent about half
9 that time doing trial work, and the other half doing
10 appellate. When I was in the trial-level work, I did
11 mostly white collar prosecutions. So I am familiar
12 with these issues from both sides of the courtroom.

13 And the big picture is, the Commission here
14 is proposing, or requesting comment on basically
15 three categories of amendments in the fraud area.
16 One category is a number of potential enhancements
17 that would generally increase sentences for certain
18 categories of fraud cases.

19 The second category that the Commission has
20 on the table are certain efforts to create uniformity
21 across the country, which would not necessarily
22 increase average sentences but it would depend on
23

1 which approach the Commission takes.

2 And obviously the third category is
3 opportunities for less severe sentences in sentencing
4 outcomes in certain types of cases in the fraud area.

5 As to the first category, I want to echo what
6 you just heard from Ms. Nester, which is that the
7 Commission should ask before it adopts any of the
8 enhancements: Has the need for these enhancements
9 really been established?

10 And as we've discussed before on other
11 occasions in appearing before you and other
12 conversations, fraud sentences tend to be more severe
13 than necessary – not across the board, but in certain
14 categories fraud sentences tend to be more severe
15 than necessary. And we have not seen a situation
16 where judges, or any other commentators frankly, are
17 complaining that there are certain categories of
18 fraud cases where judges as a result cannot impose
19 the sentence that is sufficient but not greater than
20 necessary to serve the purposes of punishment.

21 In the fraud cases you're seeing a greater
22 number of downward departures, a greater number of

23

1 downward variances. If you compare the outcomes in
2 fraud cases to what they were when the guidelines
3 were first adopted and over the years, these
4 sentences are quite severe in a number of cases.

5 For example, in the high-loss securities
6 fraud area, one of the areas that the Commission is
7 proposing to address, the loss table and the specific
8 offense characteristics that often apply in these
9 cases have quickly gotten many defendants past the
10 statutory maximum for account of securities fraud.

11 Let's also take a look at the inside trading
12 area. DOJ is supporting proposals to increase the
13 ranges in this area, and the Commission should fairly
14 ask: Is there really a problem here in insider
15 trading cases?

16 We heard testimony last February from the
17 U.S. Attorney for the Southern District of New York,
18 but what we have not heard is how often the
19 Department of Justice at sentencing in these insider
20 trading cases is offering a principled argument for
21 why the guidelines are not sufficient for that
22 particular defendant.

23

1 We are not hearing from the Department of
2 Justice how often they ask for an upward variance in
3 insider trading cases, which would reflect a true
4 concern that in individual cases these sentences are
5 not severe enough.

6 The Commission should ask how often are these
7 arguments being made? What is the rationale behind
8 the arguments that are being made? Do they match up
9 with the proposals that we're now seeing to increase
10 the insider trading sentencing guideline ranges? How
11 often do judges reject those requests, even though
12 the government has given a convincing reason?

13 They do give in their written testimony an
14 example of the Goffer case in the Southern District
15 of New York, and they're using that and the
16 statements by Judge Richard Sullivan to support an
17 argument that there should be a distinction between
18 what we'll call opportunistic types of insider
19 trading and what the Department is calling more
20 organized insider trading.

21 To be sure, those types of insider trading
22 are different from one another, but the question you
23

1 should ask is: Did Judge Sullivan in that case feel
2 the need to vary upward as a result of that lack of
3 distinction in the guidelines? Did he impose a
4 sentence under the guideline range?

5 In fact, what happened – and we document this
6 on page two of our comments – is Judge Sullivan imposed
7 a downward variance in the very case in which he
8 noted this need for a distinction, which suggests
9 that the guidelines are doing a perfectly good job of
10 accounting for the more complicated insider trading,
11 and they're probably overstating the seriousness of
12 less complicated offenses.

13 Another example: Harm to financial markets.
14 DOJ has not gone back to a single case where they
15 have told you how this new enhancement would apply to
16 a case that we're all familiar with so we can see
17 whether we really do need a 6-level enhancement for
18 this kind of harm, let alone have they told you of a
19 case where the sentence range was inadequate.

20 Until the Department can point to examples
21 where this kind of enhancement should have been
22 applied in the past, we're going to be dealing with a

23

1 very rare, if nonexistent, category of cases where
2 this kind of enhancement is needed. And we urge the
3 Commission not to adopt them simply because there
4 might be some hypothetical case in the future that
5 cannot be addressed by a possible upward departure.

6 We feel that the Commission would be best to
7 look at ways in which to decrease the severity of
8 sentences in some of these higher loss cases. We
9 think that the proposal involving gain is a good
10 first step. There are ways that we would approach it
11 differently, as we set out in our written comments,
12 and I would be happy to answer any questions the
13 Commission may have about how that might be
14 accomplished.

15 Thank you again.

16 CHAIR SARIS: Thank you.

17 MS. PEERCE: Good morning, Judge Saris and
18 other members of the Sentencing Commission:

19 As Your Honor said, my name is Marjorie
20 Peerce. Since 1986, I have been engaged in the
21 practice of criminal defense in a small firm in New
22 York City, Stillman & Friedman. I am the former

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1 president of the New York Council of Defense Lawyers,
2 and formerly testified before this Commission in the
3 mid-1990s.

4 On behalf of the NYCDL, I would like to thank
5 you for inviting us to participate in this process,
6 and we look forward to future collaborations with the
7 Commission as consideration is given to the
8 guidelines. We do intend to submit a more fulsome
9 submission on or before March 19th in response to the
10 Commission's request for comments.

11 Turning to various suggestions, we
12 respectfully submit that the existing guidelines with
13 respect to Dodd-Frank are applicable in resultant
14 cases in a recommended advisory guideline range which
15 is far greater than necessary to accomplish the
16 purposes of punishment for most defendants.

17 We instead urge that the Commission consider
18 amendments to the guidelines and policy statements in
19 the future that work more appropriately to reflect
20 the culpability of individual defendants and reduce
21 the number of exorbitantly high advisory guideline
22 ranges.

23

1 The Commission proposes an enhancement for
2 offenses involving what it characterizes as
3 "sophisticated insider trading." However, the
4 sophisticated nature of insider trading is covered
5 already by the current guidelines, and the proposal
6 is thus unnecessary.

7 The commentary under the existing guideline
8 specifically states that the insider trading is
9 treated essentially as a sophisticated fraud, and the
10 base offense level is higher than other frauds as a
11 result of that.

12 We do not agree with the Department of
13 Justice's modified suggestion of an organized insider
14 trading enhancement. That is an exception which we
15 believe will swallow the rule and the guidelines
16 already take that into account in the base offense
17 level.

18 Similarly, the proposed amendment for
19 enhancement for abuse of position of trust for
20 specific types of defendants is unnecessary because
21 the current guidelines already contain an enhancement
22 for abusing the position of trust under Chapter Three,
23

1 and judges in appropriate cases are taking that into
2 consideration in sentencing – in calculating advisory
3 guideline ranges.

4 We urge that the Commission should aim to
5 eliminate enhancements where the guidelines in those
6 cases are already high enough, and already account
7 for the seriousness of the offense. This would help
8 decrease the necessity of departures and variances
9 from the guidelines and help mitigate the harsh
10 recommendations that the advisory guidelines provide.

11 We have provided in my written testimony at
12 pages three through four a series of proposals for the
13 Commission to consider for adjustments, downward
14 adjustments, in the guidelines – not departures,
15 downward adjustments – that courts can consider to be
16 able to take into account differences between
17 different defendants.

18 And so, for instance, if the defendant was
19 not an organizer, leader, manager, or supervisor, or
20 otherwise involved in the offense, then that could be
21 a downward adjustment beyond the minimal/minor role
22 adjustments. And we give a series of additional ones

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1 at pages three through four.

2 With respect to loss, the Commission has
3 asked for comments on various methods of loss-
4 calculation. We recommend adopting the market-
5 adjusted approach under the *Olis* and *Rutkoske*
6 decisions.

7 With respect to investment fraud, we do not
8 think that Application Note 3(F)(iv) should be repealed.
9 We do believe it should be revised, because the rule
10 does not provide clear guidance as to how to
11 calculate loss in cases of investment fraud,
12 including Ponzi schemes. Accordingly, we encourage
13 the Commission to adopt a revised rule which states
14 that in all cases of investment fraud, including
15 Ponzi schemes, loss must be measured by the net out-
16 of-pocket loss of the victims.

17 The Commission is studying whether it should
18 limit the impact of the loss table, or the victims
19 table, or both, in certain cases sentenced under
20 2B1.1. We applaud the Commission's efforts in this
21 regard, and we believe that the Commission is right
22 to explore and adopt methods for limiting the impact

23

1 of the loss and victims tables, which have been the
2 source of much criticism for their contributions to
3 disproportionately high, harsh sentences.

4 So we believe the Commission should limit the
5 impact if the defendant had relatively little gain in
6 relation to the loss. We do not believe that this is
7 accomplished by specific offense characteristics or
8 caps which focus on only dollar amounts. However,
9 we believe that the Commission may be best in
10 considering meaningful downward adjustments where the
11 loss amount overstated the defendant's culpability,
12 which could include, and would include, a variety of
13 factors such as the role played by the defendant, and
14 whether the defendant's alleged gain is direct or
15 indirect.

16 In this way, the sentencing judge could
17 account for a defendant's culpability and differences
18 in culpability that cannot be truly expressed in
19 dollar amounts.

20 In terms of other approaches to address – we
21 also respectfully believe that if the enhancement of
22 the loss table is above 14 levels, the 4- or 6-level

23

1 adjustment under the victims table should not be
2 applied.

3 We also refer to my comments at pages three
4 through four of suggested downward adjustments in the
5 guidelines for insider trading which the Commission
6 might consider applying in fraud cases in general.

7 Again, on behalf of the NYCDL, I wish to
8 thank you for inviting us, and we look forward to a
9 continuing dialogue with the Commission.

10 Thank you.

11 CHAIR SARIS: Thank you very much.

12 COMMISSIONER HOWELL: Thank you all for being
13 here. These are very important issues, and I think,
14 having reviewed all of your testimony, it has been
15 enormously helpful.

16 I am going to focus my questions on Mr.
17 Buretta. It is really nice to see an alumnus from
18 the Eastern District of New York, although, as I told
19 Jonathan, it makes me feel really old since you
20 didn't join the office until after I -

21 (Laughter.)

22 COMMISSIONER HOWELL: - which was really
23

1 shocking.

2 MR. BURETTA: You look young, I feel old.

3 (Laughter.)

4 COMMISSIONER HOWELL: Thank you for that.

5 So I have two questions for you, and one has
6 to do with the question that virtually each of our
7 panelists has asked, which is: Is there really a
8 problem? I think Ms. Nester said, should we be
9 acting to add some of the enhancements that we have
10 proposed, that the Justice Department is urging us
11 to, without a demonstrable problem in terms of where
12 has the Justice Department in insider trading cases
13 or in any case that involves, you know, a significant
14 disruption of a financial market seen sentences that
15 are insufficient to both deter and punish?

16 And so that is one question I have. And then
17 in that context, part of the reason that our
18 amendments have some proposals to start a discussion
19 at least about how to more carefully target the
20 impact of the victims table and the fraud loss table
21 in 2B1.1, which affects not just insider trading and
22 not just fraud cases but a number, at least 33 other

23

1 guidelines, how we can more carefully target that to
2 address what we see in our feedback loop from judges
3 as the increasing variance rate at higher levels of
4 the guidelines that are dependent on the fraud loss
5 table.

6 So, I mean and I think that the addendum to
7 the FPD's testimony sort of lays out quite clearly
8 these increasing variance rates; in addition,
9 increasing from the sponsored rates, which from an
10 analysis I've done on some of these crimes that
11 government-sponsored rate is not just attributable to
12 [5K1.1] substantial assistance motions.

13 So it is attributable to other government
14 motions for reasons other than substantial
15 assistance, which leads me to believe that
16 prosecutors are also reading these guidelines as they
17 apply in some circumstances to be too high, and
18 reaching agreements with the defendant to a more
19 reasonable and acceptable sentence to the government.

20 So my second question is: When the
21 Department says that the Department agrees that it
22 tends to alleviate the impact of the loss and victims

23

1 table in certain securities fraud cases may have the
2 overall curative effect of guiding the sentencing
3 courts to an offense level that still reflects the
4 gravity of the offense, I am heartened.

5 And so I would like you to address how much,
6 and what proposals the Department might support in
7 the Commission's effort to respond to our feedback
8 loop in terms of these variance rates and address the
9 impact of those two tables.

10 So, two questions.

11 MR. BURETTA: Thank you, Judge. Well let me
12 start there with respect to loss and victim tables.
13 And of course we are hopeful that the Commission
14 understands we are trying to take a very calibrated
15 and reasonable approach to an area where we agree
16 that there are instances where the sentences that are
17 called for on occasion by the fraud loss tables do
18 recommend sentences that are higher than they
19 otherwise should be.

20 But the most direct way in which we propose
21 to deal with that anomaly is with respect to the cap,
22 which is kind of like the courier cap that functions

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1 elsewhere in the narcotics guideline that in essence
2 provides a minimal-role cap if certain criteria are
3 met. And we set out I believe six criteria in our
4 views letter.

5 MR. CARR: All of which must be met, right,
6 in terms of your proposal?

7 MR. BURETTA: Correct. Let me make a few
8 general comments, though, about the kinds of cases
9 where we think it is more likely you would be seeing
10 these anomalies and really distinguish those from
11 other classes of cases, because we think it is
12 important to see those differences as the Commission
13 considers potential changes. It is our view that the
14 scenarios where you are most likely to see the
15 anomalies are what we would describe as fraud on the
16 market securities cases.

17 And there you can have high loss amounts
18 generated in a big bore publicly traded stock, but
19 with relatively small impact on any one investor in a
20 large pool of investors who may have been defrauded.
21 And, by contrast, we don't ordinarily see – that's not
22 to say there aren't some exceptions – but we don't

23

1 ordinarily see these guideline disparity issues in,
2 for example, a Ponzi scheme, or an investment fraud
3 case where the individual investors are oftentimes
4 financially ruined as a direct result of the
5 defendant's criminal conduct.

6 And in those cases, we fairly often see
7 courts imposing the very high sentences we – of course
8 Bernie Madoff is probably the hallmark example, but
9 there are many other examples, the A&O case recently
10 in Virginia where people were receiving I believe 60,
11 and 35 years, et cetera.

12 So there are many cases where it depends on
13 the kind of fraud you're looking at as to whether you
14 might more commonly see the kind of anomaly that,
15 Judge, you were describing.

16 The other general point we would like to make
17 is that there are many cases federal courts see where
18 the fraud loss tables do not have a material effect
19 on the sentence in a fraud case either because the
20 gain or loss is difficult to assess, or indeed there
21 wasn't a gain or loss because of market forces that
22 intervened, or because the defendant oftentimes

23

1 didn't intend the gain or loss but nonetheless was
2 trying to commit the crime for other purposes.

3 And from our perspective, it is important to
4 keep that whole class of cases in mind, as well. And
5 we don't see a need, from that perspective, for any
6 adjustment of the fraud loss tables.

7 And so if we keep in mind people who are
8 operating in the industry as a commodities broker, or
9 a broker dealer, those sort of industry
10 professionals, were the people we're most worried
11 about who have the greatest ability to be committing
12 frauds, oftentimes they're committing the frauds not
13 because they're going to get some money in their
14 pocket but because their friend, who is another
15 broker dealer, you know, wants a little piece of
16 information and they're hoping for a little more
17 information a year down the line that will help them,
18 or they're doing it for reputational reasons. And
19 that whole class of fraud cases, which are very
20 important cases, which are very serious, what we
21 should really be looking to deter as much as possible
22 a group of people who you might not call abuse of
23

1 trust position people, but definitely industry
2 professionals who are in a different class than say
3 your ordinary tipee who is sitting at the kitchen
4 table and finds out about some inside information,
5 that class of people isn't captured by the fraud loss
6 tables but they still merit very significant
7 penalties by virtue of their position.

8 And so that transitions from the Department's
9 perspective to a discussion of the enhancements we've
10 proposed. If I could for a moment address the
11 insider trading enhancements, if we look at Judge
12 Richard Sullivan's comments in the recent sentencing
13 that he carried out, we agreed with Mr. Debold that
14 in that particular instance, whether this enhancement
15 exists or not may or may not have made a difference
16 at the end of the day.

17 But the point of Judge Sullivan's comment was
18 not about that, but was about what I think all of the
19 commissioners are always concerned about. And that
20 is, do the sentencing guidelines planning ahead for
21 scenarios that we can envision, are they finely tuned
22 enough? Can they be a little bit more calibrated to

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1 differentiate between important classes of offenders?

2 And I think the point of Judge Sullivan's
3 comments was to say that, as written now the insider
4 trading guideline isn't quite calibrated enough that
5 he can envision, and was thinking about in that
6 particular sentencing class of offenders who are
7 industry professionals, who are very different from
8 the kitchen table tipee.

9 And we think, in light of comments like that,
10 and also frankly in light of Dodd-Frank's directive
11 to really plan ahead and be thinking hard about ways
12 in which we can calibrate and address the fraud
13 guidelines in better ways, it is appropriate to be
14 seriously considering enhancements like the industry
15 professional enhancement, or the organized scheme
16 enhancement. Those are both enhancements we think
17 are reasonable and differentiate very clearly and
18 define classes of offenders.

19 By the same token, lastly – and I'll stop
20 here – but there were a few questions wrapped up
21 there – we have the same view with respect to the
22 significant disruption of financial market

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1 enhancement. And that is, we can easily see
2 situations in which prosecutions can be broad that
3 would trigger such an enhancement, and we think the
4 spirit and the directive of Dodd-Frank is that we
5 should all be planning ahead for those situations, as
6 they may well happen very soon.

7 COMMISSIONER HOWELL: So if I understand your
8 answer correctly, the bottom line on some of the
9 enhancements is that, no, you can't point to any
10 cases now where it has – your inability to cite to
11 those enhancements has in some ways provided an
12 insufficient recommended advisory sentence, but
13 you're planning for the future?

14 MR. BURETTA: That's correct.

15 CHAIR SARIS: Ketanji.

16 CHAIR SARIS: Yes. I would like to just ask
17 about the organized scheme proposal that you make.
18 There is testimony that it swallows the rule, to some
19 extent, with regard to insider trading cases.

20 So I would like to know, in your experience
21 how large is the class of disorganized, unprepared
22 insider trading persons? In other words, we're

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1 making that differentiation, but is it a realistic
2 one? Are there cases being prosecuted of the type
3 that you say we need to make sure that they're not
4 getting a higher sentence?

5 MR. BURETTA:: Thank you for that question.

6 It is a significant class of people on both
7 sides. So with respect to what we'll describe as the
8 opportunistic tipper and tippee, there are many cases
9 that I'm aware of that are even currently being
10 investigated, and the SEC routinely handles these
11 matters along with the Department of Justice where
12 you have the opportunistic employee who finds out
13 some information either about their company, or about
14 another company by virtue of their involvement in
15 some industry, and they pass that to a relative.

16 It is not an organized scheme by any means,
17 but there are a whole host of situations in which we
18 do confront that all the time.

19 By the same token - and I think the cases up
20 in New York really highlighted and frankly educated
21 all of us about what's happening in the business
22 industry - there is other very large class of

23

1 defendants who aren't the kitchen table I found out
2 from my employer some things are about to happen, or
3 being acquired, but it's more insidious. And it is
4 in some ways more important. And that is, you have
5 people in the industry who are constantly talking to
6 each other, finding out nuanced inside information
7 and passing that – again, not always for personal
8 gain; for a lot of other collateral reasons,
9 including potential future gain – and the dozens of
10 defendants who have been prosecuted up in New York
11 really highlight that that is happening. It is a big
12 problem.

13 VICE CHAIR JACKSON: But do we need both? In
14 other words, do you have industry professionals who
15 would not also get the organized scheme? I mean, is
16 there that category? Or can we just cover it with an
17 industry professional SOC and not have to worry about
18 getting judges and litigating whether or not this was
19 an organized scheme?

20 MR BURETTA: So there are certainly instances
21 where there's an opportunistic insider trading by
22 industry professionals. And some of them, not all of
23

1 them, or even most of them, but some of the cases
2 that have been brought up in New York involve that
3 where you have an isolated instance of an industry
4 professional engaging in opportunistic insider
5 trading.

6 By contrast, there are many other instances
7 we've seen up in New York where it is organized; that
8 you have really a network of people who are engaged
9 in insider trading. And so you can easily, through
10 the experience we've had over the last three years,
11 see the differentiation between those classes of the
12 opportunistic industry professional, the
13 opportunistic nonindustry professional, and then by
14 contrast the organized schemes as well.

15 MR. DEBOLD: Could I make a few points about
16 that? One is, I would encourage the Commission to go
17 back and see what happened with the evolution of the
18 more than minimal planning adjustment in the fraud
19 and theft guidelines.

20 It used to be that you got a 2-level
21 enhancement for more than minimal planning or
22 multiple victims. The Commission ultimately took
23

1 that out of the guidelines and accounted for it by
2 the fact that more-than-minimal-planning usually went
3 with a higher loss amount, because they found that
4 judges were almost routinely imposing this
5 enhancement and it was resulting in application
6 questions that were making more work for everybody
7 that was unnecessary.

8 It sounds like the same kind of thing would
9 apply in this context.

10 And the second thing is, if you've got an
11 organized scheme as the triggering factor, then
12 you're generally, I would assume, going to be talking
13 about a scheme that involves more than one person.
14 And you're going to effectively cancel out any minor
15 role adjustment for those people who are the less
16 involved people in that organized scheme.

17 And if there are people who are running an
18 organized scheme, they are going to get an
19 enhancement anyway for leadership, either a 4-level
20 or a 3-level enhancement. So it seems like it's
21 adding to the problem of multiple factors in the
22 guidelines that are accounting for the same kind of

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1 conduct.

2 CHAIR SARIS: All right, Jim?

3 VICE CHAIRMAN CARR: Ms. Nester mentioned, as
4 we often hear, that it's certainty of punishment
5 rather than severity of punishment that deters
6 criminal conduct. I'm not going to ask three defense
7 attorneys how you can work with us to increase
8 certainty of punishment -

9 (Laughter.)

10 VICE CHAIRMAN CARR: - and I will admit to
11 being a skeptic with respect to the extent to which
12 severity of punishment does deter a lot of the kinds
13 of criminals that do get prosecuted in both the state
14 and federal systems, but would the three of you agree
15 that if there is a class of criminals who are likely
16 to be deterred by severity of punishment, they're the
17 people we're talking about this morning?

18 MS. NESTER: I respectfully would feel
19 actually the opposite. I mean, most of the people
20 that we're dealing with here are nonviolent,
21 frequently first-time offenders and have had no
22 experience being in a prison system. And the concept

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1 to this class of criminals is, as your question
2 insinuated, one year in prison has definitely got a
3 deterrent effect on people who are productive members
4 of society, who have jobs, who have supportive
5 families, who have never been in and out of the
6 system. I think it is quite the opposite.

7 VICE CHAIRMAN CARR: But you would say the
8 important thing to them is they know they're going to
9 jail?

10 MS. NESTER: Yes. But the length of jail,
11 whether it's one day, a year, ten years, the fact
12 that they're going to prison is significant to people
13 accused of fraud. And I think that, again, that
14 calls on us to reevaluate, you know, why are we
15 continuing to ratchet up the severity when it doesn't
16 appear to be rationally connected to deterrence?

17 MR DEBOLD: I had a similar reaction when I
18 heard Mr. Buretta talking about the example of the
19 person who was a broker-dealer who is getting
20 information to a friend, not because of personal
21 benefit but because he wants to help further a
22 legitimate business relationship, or a reputational

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1 enhancement within his field.

2 I find it hard to believe that that person,
3 knowing that the penalties are in the two-, three-,
4 four-year range, which is a substantial amount of
5 time for somebody who is a first offender, it is hard
6 to believe those people would find that to be a risk
7 worth taking, or that they would, you know, factor in
8 a greater amount of deterrence because there's a
9 possibility that they might get a higher sentence.

10 And from representing people in this
11 situation and sitting with them and talking through
12 the guidelines, even the possibility of a very small
13 amount of time in prison is something that just
14 scares them to death. It is not a pleasant
15 experience when they contemplate what they are
16 looking at.

17 And, you know, you get into the whole problem
18 of do people really think about those things when
19 they're engaging in that conduct. That is obviously
20 an issue that is hard to measure. But to say that
21 they think, well, gee, if it's only three years, why
22 not? I just don't see it happening.

23

1 MS. PEERCE: I have always said that it's
2 really the clanging of the jailhouse doors behind
3 somebody that provides that deterrence. And to send
4 somebody - I recently had a client sentenced to one
5 month. That client got out and he said: Never
6 again. I never began to contemplate what this would
7 be like.

8 I just don't understand why we think that
9 just continuing to raise the levels and the sentences
10 in some way provides some sort of deterrence. And so
11 I would respectfully submit that keeping the
12 sentences - letting the sentences go lower with the
13 adjustments that we have proposed, for instance,
14 which would result in within-guideline sentences in
15 many instances, not departures, is the way to let
16 judges give the more measured approach to sentencing.

17 MR. CARR: So you'd go to low mandatory
18 minimum?

19 (Laughter.)

20 MS. PEERCE: No. I would absolutely - I
21 absolutely, completely [dis]agree to any mandatory
22 minimums in any case, but certainly white collar

23

1 cases.

2 CHAIR SARIS: Questions?

3 MS. FRIEDRICH: I have a few questions.

4 First, for Mr. Buretta. Your professional position
5 enhancement, the language seems extremely broad to
6 me. You don't restrict it to management positions,
7 or even professionals. You say anyone who regularly
8 participates or assists in creating, issuing, buying,
9 selling, or creating securities or commodities.

10 Doesn't that include potentially a host of
11 clerical positions?

12 MR. BURETTA: I would have to consider a
13 little more whether that class of defendants would be
14 encompassed by the language as implied.

15 MS. FRIEDRICH: Or do you intend that,
16 regardless of how it could be interpreted? Do you
17 think that a clerical worker in a big firm is someone
18 you want to target? Or are you looking more at the
19 true professionals, the management folks?

20 MR. BURETTA: The core of the enhancements do
21 hit directly the broker dealer, the commodities
22 trader, the person who is actually engaged in it.

23

1 But insofar as there is a person who works directly
2 in assisting day in and day out trades and shares
3 many of the characteristics of the professional
4 themselves in terms of their access to information,
5 the frequency with which they could get away, so to
6 speak, with committing the crime, that is the kind of
7 person you would certainly also want to consider the
8 enhancement for.

9 But there may be other obviously mitigating
10 provisions of the guidelines that would fully apply
11 to that clerical person. I'm not sure if a classical
12 clerical person is something that it has in mind, but
13 I'm not sure also that classical clericals, the
14 normal person who is perpetrating the crime, is more
15 often the broker deal themselves or someone who is
16 helping to facilitate trades for the broker dealer
17 even though they're not registered as a broker
18 dealer.

19 And so I think that is what that additional
20 language that you have pointed to is really trying to
21 capture. And if it were a pure clerical person, I
22 think there would be a real debate about whether the
23

1 enhancement even really applies, whether we would be
2 seeking it. And regardless of that, whether a minor
3 or minimal role adjustment might really apply in that
4 situation.

5 MS. FRIEDRICH: Just one more. Ms. Nester,
6 your addendum is very helpful. It certainly does
7 point out the problems that we hear a lot about with
8 regard to the high end of the loss table and the
9 variance in departure rate.

10 But it also illustrates another real core
11 problem at the lower end. As you point out in your
12 testimony, at the fraud table, level 6 through 12,
13 which really translates since many of these fraud
14 defendants are Criminal History Category I, it really
15 translates into Zones B, C, and the first part of
16 Zone D.

17 So to me, this tells me that the problem is
18 really with judges wanting to send these white collar
19 defendants to prison. And we don't have any variance
20 from departure rate below that because in Zones A,
21 and virtually all of B, any sentence, a sentence of
22 zero prison, probation, whatever, is going to be

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1 within range.

2 So your chart also illustrates at the very
3 low end we see, at the lowest end we can see
4 departures or variances. We see them. So it's
5 really a follow-up on Commissioner Carr's question.
6 There's no doubt that Congress wanted the Commission
7 to target penalties so that white collar defendants,
8 certain serious white collar defendants, went to
9 prison. And this seems pretty tailored, and we have
10 a real problem at the lowest end.

11 So how do we address that as a Commission? I
12 agree, ratcheting up doesn't solve the problem. But
13 maybe ultimately what we do need is a mandatory
14 minimum penalty if Congress thinks certain serious
15 fraud white collar defendants should go to prison for
16 a year, or six months, that we need a firm floor
17 here.

18 MS. NESTER: Well, I think that the concern
19 is - and I have listened to Mr. Buretta talk about the
20 Madoffs and the people at the top of the food chain
21 that I think Congress is rightly concerned about, but
22 we have to remember that when we cast our net out to

23

1 bring in the big-time players in New York and
2 everywhere else, when we're bringing in hundreds and
3 hundreds and hundreds of defendants who may be no
4 more than an appraiser who makes \$200 per loan
5 closing, and just happened to be involved in about 20
6 different mortgage loan closings at \$200 a pop,
7 you're bringing in mortgage brokers who make just a
8 small broker fee on every closing, you're bringing
9 in, you know, people that are closing attorneys that
10 are just hanging out a shingle in small town USA
11 doing closings and just turning a blind eye to some
12 goings on at the closings, and these people are the
13 ones that, if we address all fraud as we're looking
14 for Bernie Madoff, we're going to have a horrific
15 impact on hundreds and hundreds of defendants whose
16 culpability is relatively small.

17 And I think that's what you're continuing to
18 see these judges struggling with. When the judge is
19 looking at the appraiser, or the little closing
20 attorney, or the person who did nothing more than
21 hook up a mortgage company and a buyer and made a fee
22 off of it, and the judge is feeling that these tables

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1 are significantly overstating that person's
2 culpability, the judges are concerned that in our
3 attempts to go get Mr. Madoff and friends in New York
4 City, we've got people in Utah, and Mississippi that
5 we're sending away for extremely long periods of
6 time. It doesn't appear to serve the purpose of
7 sentencing. So it is a concern.

8 MS. FRIEDRICH: Certainly it is a concern
9 with Bernie Madoff, but those are being handled under
10 the guidelines. The issue is those fraud defendants
11 who commit up to Level 12 on the loss table. It's
12 \$200,000 worth of fraud. You know, drug defendants
13 dealing that amount of drugs are going to prison.

14 And so in my view, in addition to the problem
15 at the high end, there's a real problem at the low
16 end with respect to those who commit - they may be a
17 mortgage broker, but \$200,000 worth of fraud is, in
18 the views of some policymakers, deserves prison. And
19 we're not seeing that in the guidelines right now.

20 MS. NESTER: Well I think that the statistics
21 we provided said that 78 percent of fraud offenders
22 are going to prison. I have not had a situation

23

1 where a judge felt like if they wanted to send an
2 offender to prison they didn't have the tools to do
3 that under this guideline.

4 I think the more focused that you all are
5 looking at in terms of your proposed changes is what
6 about when the judges are looking for a way not to do
7 that. And there's - I believe we were looking last
8 night, and any judge who wants to sentence someone to
9 more time, the whole section 2B1.1 provides
10 additions. We couldn't find any subtractions in the
11 whole guideline.

12 And I think at some point it has to balance
13 out where the judges have the tools to go either way
14 based on the unique facts of the person in front of
15 them in that particular case, and we urge the
16 Commission to consider that.

17 COMMISSIONER WROBLEWSKI: Thank you, Judge
18 Saris, and thank you all for coming. Mr. Debold and
19 Ms. Peerce, I just want to pick up on some of the
20 things we've been talking about, which is that this
21 guideline, 2B1.1, captures thousands and thousands of
22 different kinds of cases. It's not just frauds. It

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1 goes beyond frauds. But just in the fraud
2 categories, many, many different kinds of cases.

3 One of the concerns that we have raised is
4 about some of the proposals to mitigate the effect of
5 the loss and the victims table is that they don't
6 differentiate between these kinds of frauds.

7 Can you talk a little bit about that? And do
8 you see the value in differentiating? Mr. Buretta
9 talked a little bit about that, you know, the Ponzi
10 schemes, the investment schemes from, for example,
11 fraud on the market, or maybe some other kinds of
12 frauds. Do you see the value of that, as opposed to
13 just let's mitigate the effect of the loss of the
14 victims table?

15 And then for Ms. Nester, I've got one
16 question for you. You talked about, you know, the
17 people who have very little gain. There is a
18 directive that the Commission got from Congress. And
19 the directive specifically tells the Commission to
20 focus on the actual harm, and the potential harm, to
21 the public, to the financial markets, and so forth.

22 How does the Commission reconcile the two?

23

1 So I have those two questions.

2 MR. DEBOLD: On the differentiation question,
3 we agree that the guideline is written to cover a
4 very broad range of offenses, and the loss table
5 covers a very broad range of offenses, as well. And
6 in our comment letter we noted that you can have two
7 very different fraud defendants who have inflicted
8 the same amount of loss, yet the punishment that they
9 deserve I think to any objective observer is very
10 different.

11 And it comes down to things that a loss table
12 cannot measure. Currently it doesn't measure the
13 difference in gain as a portion of loss, and the
14 Commission I think is right to focus on that as a
15 possible mitigating factor.

16 It doesn't distinguish between people with
17 different motives. Some may have what I'll call the
18 imperfect good-faith defense for the conduct they
19 engaged in. They have a legitimate business. They
20 got in a serious jam. They lied on a loan
21 application to try to keep the business going, fully
22 expecting and intending to be able to repay the loan,

23

1 and of course, you know, they end up in court because
2 their efforts were unsuccessful to make the business
3 succeed.

4 That person would be treated the same as a
5 Ponzi scheme operator, or a pump-and-dump stock
6 defrauder who has no intention of ever paying the
7 money back, or doing anything legitimate with the
8 fraud.

9 So there are differences that need to be
10 accounted for, and I think the \$64,000 question is:
11 How do you do that in this guideline? And one of our
12 proposals is to look, you know, very seriously at
13 trying to come up with some very good guidance on
14 structured departures, structured downward
15 departures, encouraged departures that take into
16 account the differences in intent, motive, good
17 faith, that will be ignored if you just focus on
18 things like loss amount.

19 And I suppose, you know, another way to
20 approach it would be to come up with downward
21 adjustments that also try to take those factors into
22 account. But you would have to write them in a broad

23

1 enough way that you're not requiring judges to make
2 very detailed findings that don't really distinguish
3 between what I call the lower culpability fraud
4 defendant and the higher culpability one who deserves
5 a higher punishment than the one.

6 COMMISSIONER WROBLEWSKI: Why are you
7 concerned with requiring judges to make those
8 findings?

9 MR. DEBOLD: Because the difficulty is
10 writing a guideline that converts a, a less culpable
11 motive, intent, et cetera, into a number that should
12 apply equally across the full array of fraud cases.

13 So how do we say that someone who is a less
14 culpable person because they had a good intent, or a
15 good motive, how do we quantify that in relation to
16 the table? And that is why, you know, we think that
17 an encouraged departure provision would at least give
18 judges some flexibility in determining how to assess
19 those with some good guidance from the Commission on
20 what – the things that go into that, maybe some good
21 examples of that, which in turn could allow the
22 Commission to see over time how judges are weighting

23

1 in these different factors, and whether there is a
2 way to make them objective and to build them into the
3 guideline itself so that you have specific offense
4 characteristics reductions that are tied to these
5 factors in a quantifiable, objective manner that
6 increases consistency across the country.

7 COMMISSIONER WROBLEWSKI: But are you
8 comfortable, though, also with differentiating the
9 types of cases? So sometimes, for example, in the
10 commentary there's one rule for a procurement fraud
11 kind of scheme, a different rule for a different kind
12 of fraud. Are you comfortable with that kind of
13 differentiation, as well?

14 MR. DEBOLD: As a general matter we don't
15 have a problem with that. You know, the example that
16 came up in the issues for comment is how to deal with
17 Ponzi schemes. We don't have a problem with the way
18 those are currently treated where you take – you don't
19 do a gross gain/gross loss to all investors and net
20 it out, because in that kind of scheme people would
21 not be giving money to the Ponzi scheme operator but
22 for an illegitimate Ponzi scheme.

23

1 You compare that to a securities fraud case –
2 and this gets to your proposal about how to measure
3 security fraud loss – people are investing in
4 legitimate stock every day, and they're facing market
5 risk every day.

6 If you say that somebody defrauded some class
7 of investors through inflating the value of the stock
8 through an accounting maneuver, and then that stock
9 goes down in value not just because of the accounting
10 fraud but because of market forces, you should not be
11 including those market forces because the market as a
12 whole, the investors as a whole, are going to suffer
13 that nonfraud-related loss anyway. It's just a
14 matter of which person happens to hold that stock.

15 CHAIR SARIS: Doesn't that turn every
16 sentencing into a nightmare?

17 MR. DEBOLD: No, it doesn't.

18 CHAIR SARIS: I have it on the civil side,
19 but I mean essentially it turns every single
20 sentencing into a causation, and a battle of the
21 experts –

22 COMMISSIONER WROBLEWSKI: And isn't that what
23

1 you're proposing with using the Dura Pharmaceuticals

2 —

3 MR. DEBOLD: We're proposing that the court
4 should look at external factors unrelated to the
5 fraud, and try to take those into account. Now, you
6 know, you're not going to get a perfect answer. You
7 don't get a perfect answer in civil cases. But
8 judges do it in civil cases where all that's at stake
9 is how much money gets paid out to victimized
10 shareholders.

11 In these cases, people's time in prison is
12 being affected by these determinations. I think we
13 should be at least as concerned in cases where people
14 are spending more time in prison with coming up with
15 a more accurate, fairly tuned — well-tuned effort to
16 figure out what is the actual harm that was caused by
17 the fraud, as opposed to some other factor that has
18 nothing to do with the fraud.

19 CHAIR SARIS: Did we get to Ms. Nester,
20 because I had a follow-up question here.

21 MR. WROBLEWSKI: We didn't even get to Ms.
22 Peerce.

23

1 (Laughter.)

2 CHAIR SARIS: You go first.

3 MS. PEERCE: I won't take much time. I
4 completely agree with what Mr. Debold said. The
5 guidelines, if you start having judges have to make
6 precise findings, you're coming back to your
7 mechanical, formulistic guideline calculations.

8 And what we're suggesting is to give the
9 judges the ability to have not a checklist, not an
10 exclusive list of what they should be looking at, but
11 a guidance for them for where they can adjust the
12 guidelines down to be able to take into account the
13 person in the mailroom who may have somehow known
14 about the fraud and furthered it along as opposed to
15 the CEO.

16 And I would like, if I could have just one
17 second on your question about the association with
18 the broker dealer, the SEC takes the position that if
19 you're barred from associating with a broker dealer
20 you cannot work as a janitor for that broker dealer.
21 And so therefore, under the language proposed by the
22 Department of Justice, it would apply to your

23

1 secretary who was employed by the broker dealer and
2 didn't even get the information from the broker
3 dealer but traded.

4 And so it's one reason why we think that this
5 is just, again it's a phrase I used in my opening
6 commentary, the exception that swallows the rule.
7 And I think that you'll find yourself with all of the
8 guidelines going up. And when your judges across the
9 country are saying, especially up in my district, and
10 Judge Gleeson, saying bring them down.

11 So I just think that it's just a mistake.

12 JUDGE HINOJOSA: So -

13 CHAIR SARIS: Just a quick follow-up here.

14 MS. NESTER: I'm ready. Just very briefly to
15 address the question posed. I do recognize there's a
16 struggle with the Commission of having to balance the
17 importance according to Congress of the actual
18 potential harm to the public and to markets, while at
19 the same time recognizing that if you have relatively
20 small personal gain that poses a problem for judges.

21 I would submit to you that, first of all, as
22 far as the harm analysis, you know, we admit that the

23

1 loss is not a perfect way to decide what harm is, but
2 it's the way that we're all kind of anchored to at
3 this point. And the loss table, relevant conduct, all
4 of these different tools are going to give you a
5 pretty accurate picture of actual harm. But the same
6 directive that Congress sent also asks the Commission
7 to consider whether your guidelines are reflecting
8 the serious nature of the offense, and the need for
9 deterrence, and whether incarceration is effective in
10 furthering the objectives.

11 And I think it is consistent to recognize,
12 you know, we have these loss figures. We are
13 anchored to them. But there are cases where somebody
14 made just almost no money on this, and that does
15 affect whether the offense is serious, whether the
16 person is, you know, out to harm others, or whether
17 it was opportunistic.

18 And I do think that even though it sounds
19 inconsistent, I do think that judges are asking for
20 that. And I think that you providing them that is
21 not at all inconsistent with the language of the
22 directives you've been given by Congress. Thank you

23

1 for letting me respond.

2 JUDGE HINOJOSA: It was just a question to
3 Ms. Peerce, following up. But doesn't the mailroom
4 employee get taken care of by the Chapter Three
5 adjustment with regards to role in the offense? Or
6 you don't think that's sufficient?

7 MS. PEERCE: I don't think that
8 sufficient, respectfully, and I think that what I'm
9 trying to say is that when you write an enhancement
10 which is so broad that, as we found with the more
11 than minimal planning back years ago, it began to
12 just be mechanically applied in almost every case.

13 And so where you'll be is, perhaps doing this
14 4-level enhancement for that mailroom employee,
15 and then coming down two levels because they get the
16 2-level reduction, not the 4-level reduction,
17 and so you're rising them up by two levels for
18 guidelines which are already too high.

19 And so I just don't, respectfully, see the
20 need for this increase as it is. And I just think
21 that you're going to lead to more litigation over,
22 well, was this person really associated? Do they get

23

1 the minimal minor role adjustment? And I just am
2 suggesting that it makes it more complicated and more
3 formulistic in a way that I don't think is
4 appropriate. And I echo, the Congress did not say,
5 when it said if they're appropriate, all of them need
6 to go up. Congress, you know, going down could also
7 be something that could be considered in figuring out
8 how to revise the guidelines.

9 CHAIR SARIS: Let me ask you, you all seem to
10 agree at the very minimum that there is a problem
11 with high-loss security fraud cases, sometimes called
12 "fraud on the market cases." That's the one area of
13 agreement? Is anyone disagreeing with that?

14 (No response.)

15 CHAIR SARIS: All right, so one thing we've
16 been struggling with is what to do about that.
17 Because as many of the commissioners have mentioned,
18 the table affects so many other guidelines. And when
19 you talk about a minimal role cap, that was your
20 solution, basically, right, and what to do about it,
21 how many people would that actually affect, based on
22 your experience? And would a minor role cap do the

23

1 trick?

2 And the second thing is, is there a loss
3 amount at which you almost automatically always get
4 250 or more victims? I mean, are there any - is it
5 piling on, let's say, at the 400 million? You would
6 think that in a high-security loss fraud case that
7 would automatically include 250 victims.

8 So I wanted a sense of, since we all agree
9 that there's one problem here, that's the only thing
10 here, we're not agreeing on a solution at all, if
11 there is one. So I'm just trying to ask the
12 Department, on the Minimal Role cap it seemed like
13 very few people would qualify, right? Maybe only the
14 guy in the mailroom?

15 MR. BURETTA: I could envision many scenarios
16 in which minimal role would apply beyond the mailroom
17 person. There are oftentimes organized schemes in
18 all kinds of different frauds where you do have
19 people who participate for a very limited period of
20 time, who only do one particular thing.

21 You could, for example, in an accounting
22 fraud situation have an accountant who has been

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1 directed in one instance to alter for a particular
2 quarter, in a much larger scheme it spans several
3 years of accounting fraud, to make the change in that
4 book. That person isn't just a clerical worker, it's
5 not a janitor, it's a real accountant. But they,
6 nonetheless, would probably appropriately have the
7 Minimal Role adjustment because of the isolated
8 nature and the low-level nature of their
9 participation in the accounting fraud.

10 So it's actually relatively easy to think
11 about a lot of people in different classes of frauds
12 who would play a minimal role, just as they would for
13 example in a narcotics conspiracy. A lot of these
14 frauds do involve lots of people who play very
15 different roles in the scheme.

16 CHAIR SARIS: Don't we give it to minor in
17 drug?

18 MR. BURETTA: My next point was - the answer
19 is yes. And my next point was, we would certainly be
20 open to the expansion of that cap to also include a
21 minor role. It's not an unreasonable position to be
22 thinking about.

23

1 MS. PEERCE: One of the things we have
2 suggested is that if the loss table adds 14 points or
3 more to eliminate the four and six point increase for
4 victims to try to deal with your double-bang on the
5 loss and the victims table going to 250 victims and a
6 \$400 million fraud question.

7 CHAIR SARIS: What do you think about that?
8 I'd sort of like to get the -

9 (LAUGHTER)

10 MR. BURETTA: A few things. First, there are
11 several approaches that have been put forward,
12 approaches A, B, and C, and for a variety of
13 different reasons we think there are problems with
14 each of those. For there to be, though, some
15 combination for example of B and C that would address
16 a situation where you have an incredibly high dollar
17 amount that by its nature would also encompass many
18 victims, that also is not an unreasonable thing to be
19 considering, and we would really like to consider
20 that further if that's something the Commission is
21 thinking about.

22 Because you can have situations where that
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1 scenario can come up. We agree.

2 MS. PEERCE: You quickly end up in your
3 guideline levels up to where you get to life when you
4 start getting – you add in your six points for
5 victims, you add in your over-\$400 million, and you
6 just start getting way up there in your guideline
7 levels. And we're just suggesting that there are
8 ways to cap it.

9 CHAIR SARIS: I actually have another
10 question. So you say don't do anything unless
11 there's a problem. We hear from our probation
12 officers that there is a problem in trying to
13 calculate loss, particularly in the mortgage fraud
14 area.

15 So you say, okay, if it ain't broke, don't
16 fix, but we're hearing it's broke. So just going to
17 the loss issues in securities fraud and mortgage
18 fraud, you've all successfully attacked each loss the
19 way you come, everyone has a different approach, but
20 would it make some sense to come up with a
21 presumptive approach which could then be rebutted?

22 MR. DEBOLD: I think the problems that the
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1 probation officers are complaining about are what I
2 originally categorized in my testimony as probably
3 more in the category two area where there needs to be a
4 uniform approach. Whatever approach you would choose
5 is not dictated by a concern that sentences are too
6 low, or too high for that matter, but that there
7 needs to be a simpler way or a more consistent way to
8 do it.

9 So in the mortgage fraud area, there is
10 inherent difficulty that usually comes into play when
11 you're trying to figure out what kind of credit, if
12 any credit, the defendant should get because it's a
13 secured loan that's at issue.

14 And so, you know, in those cases there is, in
15 our opinion there really is no easy solution because
16 there are many different ways in which property gets
17 disposed of in those kinds of cases, and it happens
18 at various times from one case to the next.

19 Sometimes it's disposed of very quickly before the
20 defendant is even prosecuted. Other times it's still
21 sitting there waiting to be sold at the time of
22 sentencing. And what we're concerned about in making

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1 the proposed changes in that area is that we don't
2 inadvertently make it even more complicated by
3 creating a special rule, for example, that applies to
4 foreclosure sales that isn't described in a way that
5 it fits into the bigger picture of how credit is
6 generally given.

7 I mean, our general comment there was that if
8 you say this is an example of the general rule, which
9 is that you give credit based at least on the value
10 at the time of sentencing if it hasn't been disposed
11 of, or if it has been disposed of whatever the value
12 was when it was disposed, that is a rule that is
13 sometimes difficult to apply but we really haven't
14 come up with a better idea. And maybe moving the
15 valuation process closer to the offense would take
16 care of certain market factors that might cause the
17 property to lose value.

18 I had a mortgage fraud case where the
19 property sat – and it was multiple properties – sat for
20 a number of years, and it was in Detroit, and the
21 value did not go up over those many years. And so
22 the defendant was really receiving less credit

23

1 because of something that happened from market
2 forces.

3 Now admittedly he caused that harm to the
4 holder of the loan, or the issuer of the loan, but if
5 you back it up closer in time to the time of the
6 offense you're more accurately looking at what the
7 intended harm was, or the actual harm was at the time
8 of the incident.

9 CHAIR SARIS: So you're more interested in
10 the timing?

11 MR. DEBOLD: Well that's one part of it. But
12 what I – I guess I was digressing a bit – what I'm
13 saying is, in terms of the proposal about foreclosure
14 sales, we think that if you say this is an example of
15 how to do it, that will work in some cases. But as
16 the defenders point out, there are a lot of different
17 ways in which property can be disposed of in a
18 mortgage fraud case that don't involve a pure
19 foreclosure sale.

20 And there are some problems with foreclosure
21 sales in some cases where it will over-estimate or
22 under-estimate the seriousness of the offense.

23

1 So the judges should have presumptive rules.
2 We have no problem with presumptive rules, but they
3 should be given the flexibility to say, you know, in
4 this case that just doesn't make sense for any number
5 of reasons. And again, over time the Commission may
6 want to provide more and more examples of how to do
7 it in particular cases as you get feedback from the
8 courts on how these rules are working.

9 MS. NESTER: May I respond just very quickly
10 to that, as well? You know, we like I said were
11 anchored to this loss file. So how long this person
12 goes to jail is directly tied to the values we put on
13 these homes in these hearings. This is what our
14 adversarial process is all about.

15 We get into the courtroom. We fight it out
16 about how much this house is worth, and how much that
17 house is worth, and try to bring our client's time
18 locked up down. Probation is an active participant
19 in those hearings. They're not simple. There's no
20 silver bullet. It's not an easy thing to do. But I
21 certainly think it is important we get that right.

22 And the credit against loss formula that you
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1 all have provided the courts is getting courts to
2 proper valuations. It may not take an hour-long
3 sentencing hearing. It may take a day. It may take
4 two days. But, my goodness, we need to get that
5 right. I mean, how much, the dollars are directly
6 correlating to days in prison.

7 So I for one relish the adversarial process
8 to resolve this. You have given us the formula. We
9 go in there and fight it out. And it is not going to
10 be easy on probation, but it shouldn't be, and that -
11 I would encourage the court to allow us to do what we
12 do in the courtroom on that issue.

13 MR. WROBLEWSKI: But you don't have any
14 objection if the Commission added a note, an
15 application note, with an example along the lines of
16 what Mr. Debold said that said, okay, if it's not
17 sold, we'll look at at least probation; you can look
18 at comparables. I'm not saying that's definitely the
19 answer, but it's an example of a way to find the
20 value of the property even if it hasn't been disposed
21 of.

22 MS. NESTER: My question would be, why do you
23

1 need to tell them that? We're doing it anyway. I
2 mean, that's happening.

3 MR. WROBLEWSKI: They're asking us to tell
4 them that. That's the reason.

5 MS. NESTER: There's nothing now that says
6 you can't look at comparables. I mean, if that's
7 something the probation wants to do, let's get in
8 there and look at comparables. If they want to look
9 at appraisals, if they want to look at tax assessed
10 values, if they want to look at, you know, what the
11 house next door is selling for. I mean, that's going
12 to be up to each case, each judge.

13 And when you start picking one example, you
14 know the road we go down. And I just don't know that
15 it needs to be said, since it's happening anyway.
16 That would be my concern.

17 CHAIR SARIS: Does anyone else?

18 (No response.)

19 CHAIR SARIS: Thank you very much.

20 MS. NESTER: Thank you so much.

21 MR. BURETTA: Thank you so much.

22 (Pause.)

23

1 CHAIR SARIS: So for our second panel – our
2 second panel on Dodd-Frank is going to be about –
3 we'll go from 10:00 to 11:00 – starting off with Sam
4 Buell, who is a law professor at Duke. Previously he
5 was an associate professor at Washington University
6 School of Law in St. Louis, and a visiting professor
7 at the University of Texas School of Law. He was
8 also a federal prosecutor in New York, Boston,
9 Washington, and he was serving as a special attorney
10 on the Enron Task Force. I was sitting here, we were
11 talking say, I recognize him, but he was in our U.S.
12 Attorneys Office at least for a period of time when I
13 was there.

14 And Sara Stephens is the president of the
15 Appraisal Institute. She previously served as the
16 organization's vice president in 2010. She's the
17 owner and principal of Richard A. Stephens &
18 Associates, the oldest appraisal firm in Little Rock.

19 David Howell, who is the executive VP and
20 chief information officer for McEneaney?

21 MR. HOWELL: McEneaney, close enough.

22 CHAIR SARIS: Associates. He was the
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1 president of the Northern Virginia Association of
2 Realtors, a member of the Virginia Association of
3 Realtors' board of directors, and a founder and
4 current chairman of the board of directors of the
5 Metropolitan Regional Information Systems, the largest
6 multiple listing in the U.S.

7 And Teresa M. Brantley, a return witness,
8 Chair of the Commission's Probation Officers Advisory
9 Group. She is a supervisory U.S. Probation Officer
10 in the Presentence Unit of the Central District of
11 California, and has worked for the U.S. Probation for
12 over 12 years. Previously she served as a practicing
13 civil law attorney and a manufacturing engineer.

14 So, Professor.

15 MR. BUELL: Thank you, Judge Saris, and
16 members of the Commission, for the opportunity to
17 testify today about proposed guideline amendments and
18 provisions of the Dodd-Frank Act.

19 I'm not quite sure why I'm on the real estate
20 panel this morning, but I will – it's an area in which
21 I have no expertise other than as a home owner, and
22 so I will not comment on those aspects of the
23

1 proposal and leave that to the esteemed members of
2 the profession.

3 I do want to talk about in my brief time here
4 just a few highlights and principles from my written
5 submission which addresses primarily those areas in
6 which I have views and expertise: insider trading
7 and large market fraud cases.

8 So with regard to insider trading, it is my
9 view, as I set forth in my submission, that the first
10 principles about why we're prosecuting insider
11 trading in the first place would certainly lead to
12 the conclusion that there ought to be prison time in
13 almost all insider trading cases, and it ought to be
14 very clear from a deterrent perspective that insider
15 trading results in a prison sentence. And, that
16 there ought to be some significant time, but that
17 insider trading cases, for some of the reasons that
18 were actually mentioned by members of the defense bar
19 in the first panel, need not necessarily be punished
20 by excessively long terms of imprisonment.

21 Also, I think first principles point to the
22 fact that the more public an insider trading case is

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1 in terms of its significance to the markets and to
2 investors, the more time ought to be involved. The
3 more responsible the violator is a player in market
4 institutions, the more time ought to be involved.
5 And certainly sentences should scale with gain. I
6 think that is something we probably can all agree on.

7 So with regard to the proposed amendments and
8 comments that are in the Commission's materials, my
9 conclusion would be that things ought to be
10 compressed a bit. So I think you could argue
11 certainly for a higher base offense level in insider
12 trading cases.

13 I could see a base offense level of 10 or
14 even 12 in these cases, but a loss table – and I know
15 this would create more work for the Commission – but a
16 loss table that would be special for insider trading
17 cases would I think be quite beneficial. And I don't
18 see any reason why that loss table couldn't be with a
19 lower base – a higher base offense level, a more
20 compressed loss table, and a loss table that would be
21 based on some actual data about the distribution of
22 gains in insider trading cases as they've been

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1 prosecuted over the last perhaps decade so that we're
2 actually arraying our sentences on some scale that
3 reflects what's actually happening in these cases.

4 I do think also that there ought to be some
5 tiered kind of enhancement for one's role in the
6 industry. I think I'm in agreement in part with the
7 Department of Justice that this idea of
8 sophistication doesn't quite capture it. I would
9 urge the Commission to think about something a bit
10 broader, a bit more inclusive, and perhaps a bit more
11 tiered with perhaps a 2- or a 4-level
12 enhancement.

13 It is certainly very significant what
14 position one holds in the industry, and it shouldn't
15 be limited to just those who have a legally
16 designated fiduciary role, or some technical
17 definitional role within the meaning of the
18 securities laws.

19 Finally, in insider trading I urge the
20 Commission to give more thought about to what's meant
21 by "sophistication" in this proposal. That wasn't
22 entirely clear to me. I share some of the

23

1 Department's concern with that.

2 What do we really mean by "a sophisticated
3 insider trading case" beyond one, of course, that
4 involves a higher level of gain, which would be
5 captured by the table.

6 Now moving to, in my brief time here, to the
7 problem of large market frauds, accounting frauds,
8 major and investor frauds, again we're all in
9 agreement I think that sentences at the high end are
10 out of whack; that the guidelines are too clogged to
11 the 2B1.1 – too clogged with too many enhancements.
12 The loss table is not necessarily made for these kind
13 of cases.

14 So my recommendations here would be, again,
15 more work for the Commission but I think it is
16 overdue. This discussion has been going on for a
17 number of years. Why shouldn't we not have a
18 separate – again, a separate loss table for these
19 large public market fraud cases that would be based,
20 like my proposal on insider trading, more compressed
21 and also based on data. Let's scale these sentences
22 according to what the data shows about the loss

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1 amounts in this category of cases that have been
2 prevalent really since Enron. We've not got a decade
3 or more of cases that have been prosecuted like this
4 that we could look to and create some kind of a scale
5 out of.

6 I also would have some skepticism together
7 with the Department about the Commission's
8 suggestions about certain caps or limits for low gain
9 amounts. I think that could be taken into account
10 with a more compressed and tailored loss table for
11 these cases, and perhaps some kind of a role
12 reduction as was discussed in the first panel for
13 minor players in these large frauds.

14 I would urge the Commission to not add yet
15 another specific offense characteristic enhancement
16 for, you know, big, huge cases that really affect the
17 market. We've got so much in 2B1.1 for the big
18 cases. We all know that you can get, without
19 breaking a sweat, in at least a hypo to a sentence of
20 life in prison without parole under the guidelines
21 right now for a large market loss case. And to my
22 mind, that's just not right and I don't think it

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1 reflects anybody's views about how these cases ought
2 to be treated.

3 So please don't add more enhancements for the
4 large cases.

5 And finally, my view on the Loss calculation
6 issue is set forth in detail in my submission and is
7 something I've written about in a law review article
8 that's cited in there, so I won't go into detail
9 there except to say that I disagree a little bit with
10 the members of the defense bar on the first panel as
11 suggesting, you know, it's essential that we get this
12 absolutely right because people – it's about how much
13 time you spend in prison.

14 Well, it's not like loss in an investment
15 fraud lawsuit, or even a securities fraud enforcement
16 proceeding. These are sentencing guidelines. We're
17 trying to create a system that treats like cases
18 alike. It's not getting to some absolutely correct
19 number; it's about having a methodology that is
20 consistent across cases.

21 And I think that you can have that, and have
22 a more simplified method than one that involves

23

1 battles of experts, and two- three-day long
2 sentencing hearings which ultimately I think are
3 going to lead to more disparity, because you're just
4 going to have a lot of randomness in how these issues
5 get decided. It's going to depend on who can afford
6 the best experts, which judges think which experts
7 are more persuasive.

8 I would urge the Commission to find a means
9 of getting away from that. Give judges a simple
10 methodology, something like the one that's set forth
11 in part in the Private Securities Litigation Reform
12 Act. You know, we just cut it off at 90 days in
13 calculating the price after the fraud is revealed,
14 things like that, to make this simple and easier but
15 consistent.

16 Just to conclude, I think there's a larger
17 picture issue at stake in these issues that you're
18 talking about this morning on white collar crime,
19 which is that we're seeing the guidelines I think
20 beginning to lose a little bit of credibility and a
21 little bit of their gravitational force in this area.
22 And that is really a concern, because guidelines are

23

1 intended to further equity in sentencing. And the
2 more that judges begin to pull away from these
3 guidelines under the authority they now have to do
4 so, the less the guidelines are going to be able to
5 keep that gravitational force that produces equity.

6 And so I think it is important that the
7 Sentencing Commission hear the rumblings and try to
8 do things that will, you know, yes, you want the
9 guidelines to be guidelines to steer judges towards
10 good outcomes in sentencing, but the guidelines also
11 need to listen to what's going on on the ground and
12 follow a bit and stay consistent with where things
13 are, lest they become increasingly irrelevant.

14 Okay, those are my comments and I'm happy to
15 hear questions from the panel.

16 CHAIR SARIS: Ms. Stephens.

17 MS. STEPHENS: Good morning, Judge Saris and
18 members of the Commission:

19 My name is Sara Stephens, MAI, CRE, and I'm
20 president of the Appraisal Institute, the largest
21 association of real estate appraisers in the United
22 States. I am here today on behalf of the Appraisal

23

1 Institute and the American Society of Farm Managers
2 and Rural Appraisers.

3 The amendments propose to utilize tax
4 assessments to determine fair market value when
5 property in question has not been cited.

6 We support amending the guidelines to require
7 appraisals prepared in accordance with Uniform
8 Appraisal Standards for several reasons.

9 First, fairness to all parties demand a
10 credible and thorough valuation of the property in
11 question. It should take into consideration the
12 property's condition and quality. Property condition
13 and quality is a significant factor in many
14 distressed properties, as property maintenance can
15 quickly become a concern.

16 Real estate appraisals are different from
17 real estate assessments in many ways, but one of the
18 key distinctions relates to the inspection of the
19 property. Typically, no property inspection is done
20 in conjunction with a tax assessment. Certainly not
21 as of a point in time as envisioned by the amendment.
22 Alternatively, appraisals nearly always involve a

23

1 property inspection.

2 Second, real estate tax assessments utilize

3 mass appraisal techniques which typically are

4 statistical algorithms. These algorithms rely

5 generally on public data, but may be supplemented

6 with real-time information. However, this varies

7 from jurisdiction to jurisdiction. Further, public

8 records often are inaccurate and unreliable.

9 Information about square footages, bedrooms,

10 bathrooms, the existence of a built-out basement, are

11 just some of the features that are often inaccurate

12 in public records.

13 Third, while some jurisdictions reassess

14 property on an annual basis, many do not. There is

15 no commonly accepted reassessment period throughout

16 the United States. Some jurisdictions may reassess

17 annually, or every other year, or every six years.

18 Some have not reassessed property in the past decade.

19 In these situations, the jurisdictions simply

20 may have adjusted the tax rate to pay for public

21 services. In these cases, if a tax assessment is

22 used in the calculation of a mortgage fraud sentence,

23

1 it is likely to overstate the loss to the bank and
2 potentially inflate the sentence of someone convicted
3 of mortgage fraud. For fairness reasons, obtaining
4 an appraisal as of a specific date is far preferable
5 and easily achievable.

6 Finally, assessed value applies in ad valorem
7 taxation and refers to the value of a property
8 according to the tax roles. Assessed value may not
9 conform to market value, but usually is calculated
10 into a market value base. Many jurisdictions
11 estimate tax assessments as worth rather than value.
12 In some states, the actual taxable value for rural
13 land is typically by its agricultural or productive
14 use, and not based on market value. The market value
15 may be assessed at practice and then followed by the
16 productivity or agricultural use value.

17 Beyond the discussion of tax assessments and
18 appraisals, we additionally suggest a special rule
19 include language relating to the qualifications of
20 the appraiser.

21 Lastly, we believe the use of actual sales
22 price may not be entirely consistent with the goal of
23

1 using market value in the formula found in the
2 sentencing guidelines. Banks frequently do not
3 obtain market value for the property. In fact, they
4 often obtain something akin to a liquidation value
5 rather than market value. In these situations, it
6 would appear to us to be unfair to use the actual
7 sales amount of a fire sale property in sentencing
8 guidelines. To do so would be unfairly penalizing
9 someone who has been convicted with an inflated
10 sentence. Here, an appraisal of the property, even
11 when the property is sold, may further enhance the
12 fairness to all parties concerned.

13 Thank you for the opportunity to testify
14 before the Commission. I would be pleased to answer
15 any questions.

16 CHAIR SARIS: Thank you. Mr. Howell.

17 MR. HOWELL: Good morning, Judge Saris, and
18 Commissioners. Thank you for the opportunity to
19 present this testimony and, for the sake of brevity
20 and everyone's sake, it may be easier for me just to
21 say what she said.

22 (Laughter.)

23

1 MR. HOWELL: That is, in sum and substance,
2 an awful lot of the remarks, and truly I don't want
3 to take your time to read some of the same things,
4 but I will try and hit some of the highlights.

5 The assessors do a remarkably good job, given
6 what their task is. But as Sara indicated, it's done
7 on a wholesale basis, not on a retail basis. Rarely,
8 if ever, are the individual properties actually
9 examined. And from a practitioner's standpoint, with
10 20 years – 26 years of experience in doing this, those
11 are the very things: what happens inside the house,
12 how well it's maintained, how poorly it's maintained,
13 whether the basement has been finished, things that
14 don't necessarily reflect in the public record, have
15 an enormous amount to do with the actual fair market
16 value of the property.

17 Again, I won't go through the remarks, for
18 the sake of time, but there are three fundamental
19 problems with tax assessments, to try and use that as
20 prima facie evidence of the fair market value of a
21 property, its time, scope, and purpose.

22 Time assessments are typically done in a time
23

1 frame quite removed from the point of actual sale.
2 As Sara indicated, there is no common standard
3 nationally. In the State of Maryland, assessments
4 are done every three years. And I think everyone in
5 this room, particularly those who live in the
6 Washington area, would acknowledge that market
7 conditions today are different than they were three
8 years ago. And the assessors do a remarkably good
9 job of trying to predict and make judgments about
10 where the market may be three years from now.

11 But again, from a practitioner's standpoint,
12 looking at the individual property, I can't tell you
13 what the value is going to be three weeks from now
14 because conditions vary tremendously on a hyper local
15 basis.

16 In terms of scope, again they are limited to
17 the public record information and some macro economic
18 conditions. And that is indeed limiting in terms of
19 the value.

20 And purpose, again there are some very
21 legitimate or appropriate public policy purposes for
22 why tax assessments are done the way that they are.

23

1 Ultimately it's to establish a fair and equitable
2 base for the purpose of tax collections. And even
3 though, for example in Virginia, and in Washington,
4 DC, and in Maryland, there is a constitutional
5 requirement that properties be assessed at the fair
6 market value – and again they do a remarkably good job
7 on a wholesale basis – the reality is you can't
8 translate that individual tax assessment or what
9 their average performance is down to the individual
10 property.

11 I will just touch on a couple of things. The
12 best way to summarize some of the analysis that we've
13 done, and the analysis in the testimony here is
14 simply something that we've refreshed because we do
15 it on a fairly regular basis. Not surprisingly, many
16 buyers and sellers come to the table and think about
17 using the tax assessment for that property as an
18 indicator. And they will frequently move off of that
19 if one is a seller and sees the assessment. You
20 think your house is worth a lot more. All of a
21 sudden the tax assessed value isn't terribly relevant
22 to that seller.

23

1 And somehow the tables are reversed when one
2 is a purchaser. If that tax assessment is too high,
3 then clearly the tax assessment is wrong. The
4 reality is – not as a dig at assessors – from a
5 statistical perspective, and I'm not a statistician,
6 the sum and substance of these numbers – and frankly,
7 if we'd done this ten years ago, or five years ago, in
8 dramatically different market conditions, it still
9 boils down to the fact that you've got somewhere
10 between a 25 and 33 percent chance of the assessed
11 value of any individual property being within 5
12 percent of what the actual sales price was.

13 And again, that's not a criticism of the
14 assessors. It's just the nature of the process.
15 You've got an equally, and in some chances greater
16 chance than that of it being 5 to 15 percent off,
17 high or low.

18 So the bottom line in this is, using the tax
19 assessment for an individual property, even the most
20 current one, is not going to be a reliable indicator
21 of the value for that property.

22 So the next question, the follow-on logically

23

1 is: Well what would be? And I certainly agree with
2 Sara. With a tremendous tip of the hat to some of
3 the evolving technologies for automated valuation
4 models, from a consumer's perspective you can go
5 almost any place on the Internet to Zillow, and
6 HomeGain, and a variety of places, and pull up records
7 on literally millions of properties and get their
8 particular estimate of value.

9 With no disrespect to them, they're a little
10 better than tax assessments, but not a lot, from an
11 analysis standpoint. And again it's something we
12 look at very carefully. We refresh that research
13 every year for hundreds of properties in the
14 Washington Metropolitan Area.

15 Again, they are very sophisticated
16 algorithms. These are very smart people. But again,
17 none of the properties are actually seen by human
18 beings. These are done by computers, by smart
19 people, but they can't account for the quality of
20 differences between houses.

21 And you can have the same model of the same
22 townhouse in the same development, built at the same

23

1 time by the same builder, and have wildly different
2 prices just based on the condition of the property.

3 So Sara and I haven't met, we hadn't talked
4 before, but the only way to get something that you
5 can really hang your hat on is a dispassionate
6 experienced appraiser who has no interest in the
7 transaction, and who has particular experience in the
8 geography and the type of property.

9 So that is it, and I would be happy to
10 respond to any questions.

11 CHAIR SARIS: Thank you.

12 MS. BRANTLEY: Well, wow. I would say, if
13 you consider all of the factors that have just been
14 set in front of you right now, and also with the
15 previous testimony, and multiply that by 30 or 40
16 properties, now you are in the world of a probation
17 officer trying to figure out how to calculate the
18 guidelines.

19 And our questions aren't what should it do,
20 or where should it go. Our questions are: What does
21 the the guideline mean? And how does it apply to
22 this set of facts and this defendant? And for that

23

1 reason, we are so happy to have the opportunity to
2 once again come in front of you and pretty much beg
3 for some sort of bright-line rule – presumptive,
4 rebuttable, all sounds good to me.

5 I was sitting in the back listening to that.
6 That sounded great, although we didn't discuss that
7 in our meeting in February. But what we're looking
8 for are static figures in an historical perspective,
9 not something that is going to be at the time of
10 sentencing, not something that it would have been but
11 for some other influence, but something static to
12 start with so that we have a guideline range to
13 consider, which is only one of several factors to be
14 considered at sentencing.

15 If you take the probation officer out of the
16 negotiation almost, I think one way of considering
17 some of the testimony I heard this morning was that
18 it was sort of a negotiation, you have to get it
19 exactly right. Well, if you take the probation
20 officer out of that, let that advocacy happen at
21 sentencing, after some sort of bright-line or more
22 static rule has been applied. And for that reason,

23

1 we asked for taking the value of the loan and
2 subtracting some known number from it.

3 We don't have a stake in what that number is.
4 We suggested tax – agreed with the assessed tax value
5 because that's something we can get. We would agree
6 with an appraisal given currently for the value of
7 something at the time perhaps the offense was
8 discovered. Again, a static number at a known point
9 in history.

10 Just give us something to work with so that
11 we can calculate this kind of offense. And that's
12 really all I had to say on the matter. We realize
13 that we only had five minutes to address you, and we
14 thank you very much for the opportunity to do so.
15 But given all of the things set out in the fraud
16 section of the proposed amendments, the thing that
17 screamed to us was: Please, please give us something
18 for mortgage fraud.

19 CHAIR SARIS: Thank you.

20 VICE CHAIR JACKSON: Professor, well first of
21 all thank you all for being here and providing us
22 with your written submissions.

23

1 Professor Buell, in yours I noticed that with
2 respect to insider trading you posited your opinion
3 that no insider trading offense should be sentenced
4 at a period of time longer than ten years. And I was
5 just wondering how you came to that figure?

6 PROFESSOR BUELL: Well that's a good
7 question, because I'm not so sure. And certainly,
8 you know, I have the luxury of being an academic and
9 not sitting on the Commission and having to actually
10 put one's money where one's mouth is on numbers.
11 But, you know, it's not my view that there are never –
12 you know, we could never imagine an insider trading
13 case that would merit more than ten years
14 imprisonment.

15 But I do generally agree with the views
16 expressed by several people on the first panel that
17 certainty of punishment is much more important than
18 length here.

19 My view is that insider trading ought to be
20 associated with a prison sentence in the public mind,
21 both for deterrence purposes and for purposes of
22 maintaining confidence in markets, which is one of
23

1 the main reasons to prosecute insider trading. So in
2 my view there needs to be some kind of real floor -
3 perhaps not an absolutely rigid, inflexible floor,
4 but some kind of a floor.

5 Then there of course has to be some
6 distribution of seriousness as you move up from that
7 floor. But we also have to try to place, as with all
8 crimes, insider trading within a spectrum of criminal
9 offenses that are committed in all different realms,
10 state and federal, across this country, and, you
11 know, generally look at criminal codes historically
12 and as they currently exist across the United states.

13 Sentences of 20 years or more are generally
14 reserved for very serious, violent crimes. You know,
15 sexual assault, murder, violent robbery, other, you
16 know, serious violent crimes like arson or organized
17 forms of crime, whether it be sophisticated narcotics
18 transactions or, you know, other kinds of organized
19 crime - terrorism.

20 It would seem that, it would be my sense that
21 most people in this country would view insider
22 trading as a somewhat significantly less serious

23

1 offense than offenses in those categories. So that
2 would put me in, you know, the range of, you know,
3 does insider trading ever need to be punished up to
4 20 years in prison?

5 And then of course you have to situate it
6 relative to other frauds. And I do think that the
7 harm from insider trading is largely a harm that is
8 serious but diffused across the market. It is a harm
9 having to do with public confidence in markets. It
10 doesn't have the kind of direct, out-of-pocket victim
11 in almost every case that you might see in a Ponzi
12 scheme type case, or even in an accounting fraud
13 case.

14 So one would think, well, okay, perhaps
15 insider trading on the spectrum of frauds ought to be
16 raised somewhere below the big investment frauds.
17 And that tends to push me more down to that ten-year
18 range for most of the most serious cases, with maybe
19 the occasional huge conspiracy at the very highest
20 level of the hedge fund world, for example, being a
21 little bit higher.

22 But I don't pretend to have the magic answer

23

1 here. My point is just that we shouldn't get tunnel
2 vision when we're thinking about white collar
3 offenses. We need to think about proportionality
4 across the criminal justice system and maintaining
5 some sense of relative position among white collar
6 offenses.

7 Having said all of that, I will concede, I
8 would be the first one to concede that I think it's
9 the case that one of the things that's so difficult
10 about white collar sentencing in this country right
11 now is I don't believe we have a strong consensus
12 around white collar sentencing in the way we do
13 around some other kinds of offenses.

14 I think, not only within the legal
15 profession, but among the public in general, I think
16 there's a lot of ambivalence and uncertainty about
17 how white collar crime ought to be punished.

18 I think there is generally a consensus that
19 it ought to be treated seriously; that prison ought
20 to be seriously involved most of the time; but when
21 it gets to the question of, you know, are these 5-
22 year crimes, 10-year crimes, 15-year crimes, 20-year

23

1 crimes? Are they sometimes life-in-prison crimes? I
2 think it's difficult to know what the consensus is on
3 that.

4 VICE CHAIR JACKSON?: Thank you.

5 COMMISSIONER FRIEDRICH: Professor Buell, I
6 have two questions. How do we get that firm floor in
7 insider trading cases so that defendants do serve
8 time? That's question one.

9 And then question two is: Can you elaborate
10 a little bit on the point you made in your written
11 testimony that you might favor a position-based
12 reduction within 2B1.1 that would mirror the current
13 enhancement for public company officer/director
14 status?

15 PROFESSOR BUELL: Okay, thanks for those
16 questions. So how do we get a floor? Well, of
17 course, you know, as was mentioned perhaps half
18 in jest this morning, the easiest way to do
19 that is in the statute with a mandatory minimum.

20 Now of course the problem with mandatory
21 minimums is that it has not been, in my experience,
22 the practice of legislatures to build in safety

23

1 valves to statutory mandatory minimums, although I
2 think we did see that in the later statutory change
3 in the drug context. It's been a long time since I
4 practiced in that world.

5 So the problem with the statutory mandatory
6 minimum is that if it in fact is a legislative
7 decision, *ex ante*, that we will never see a case that
8 doesn't deserve this punishment, that is troubling.
9 You know, because there are going to be cases where
10 there are offender-specific characteristics that are
11 truly extraordinary, and, you know, I can see the
12 argument why that kind of ability to move ought not
13 to be taken away from the Judicial Branch entirely.

14 So I'm not sure how else you do it except to
15 perhaps write an insider trading guideline that
16 starts with a base offense level that calls for
17 imprisonment. And, sure, you're still going to have
18 some variance cases, or downward departure cases, but
19 if the guidelines at least make a statement right up
20 front that, you know, this isn't just I guess what is
21 Level 8 now, which puts us in Zone A, that's
22 certainly not a statement that all insider trading

23

1 cases presumptively ought to result in some term of
2 imprisonment even if it's a short one.

3 Your second question was on position-based
4 reduction. So I think my comments on that were
5 geared to the general problem of accounting fraud,
6 investor fraud type cases. And, you know, I'm
7 thinking about – or course I worry a little bit about
8 the extent to which these discussions tend to be
9 dominated by anecdotes rather than overall data, but
10 we can't all help thinking of anecdotes, right? So
11 the case that comes to mind immediately there is of
12 course the *Olis* case, you know, the Dynegy case out
13 of Houston, which was very controversial.

14 And that became sort of an emblematic case of
15 well here's a guy who, you know, seemed to have kind
16 of a mid-level – depending on your view of the facts –
17 a mid-level sort of functionary role in the fraud.
18 He's not a Bernie Ebbers, or a Jeff Skilling, or an
19 Andy Fastow, or somebody who is managing a large,
20 complex fraud, and yet the guidelines don't seem to
21 make that into account. You know, he's on the hook
22 for all of that loss.

23

1 So, you know, public corporations are big,
2 complicated institutions. They have a lot of levels
3 of bureaucracy. It's possible for people to be
4 liable at low levels, and it just seems, especially
5 when there's not, you know, a huge gain in the form
6 of stock options or other things involved, that it
7 would be a good idea to have some ability to take
8 that down a couple of levels off of what otherwise
9 the loss table would require.

10 COMMISSIONER FRIEDRICH: But you don't think
11 the mitigating role provisions do that with the
12 degree of specificity you think is needed to ensure
13 that courts actually give the reductions in those
14 kinds of cases?

15 PROFESSOR BUELL: Well, I suppose that, you
16 know, it certainly has some application in these
17 cases. But it just seems asymmetrical to me to have
18 specific position-based enhancement within-guideline,
19 right, but not specific position-based reductions
20 within-guideline, and then to also have a general
21 role enhancements and reductions. It seems like that
22 ought to be in parallel.

23

1 Or one ought to supplant the other. I mean,
2 if you're going to have – because role is really
3 important in this context. Let's write a guidelines
4 about role in this context, and then say this is what
5 core should apply, not the general role enhancement
6 or reduction guideline that's meant for all the run-
7 of-the-mill cases.

8 COMMISSIONER FRIEDRICH: Thank you.

9 CHAIR SARIS: Judge Howell first, and then
10 you.

11 COMMISSIONER HOWELL: Some of this,
12 Professor, has been answered, but on the one question
13 that Commissioner Friedrich asked, so am I correct in
14 understanding that your position-based reduction that
15 you were proposing was something in addition to
16 supplement the role adjustment in Chapter Three for
17 minimal or minor role?

18 PROFESSOR BUELL: Well I'm not sure I
19 specified that in my written comments.

20 COMMISSIONER HOWELL: You didn't.

21 PROFESSOR BUELL: So I guess my view, again
22 to repeat, I think my view on that would be, look, if

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1 we really think that in these financial fraud cases a
2 lot of what we need to be thinking about in terms of
3 deterrence, in terms of level of desert or
4 punishment, in terms of the message that sentences
5 send to the public about what enforcement is doing in
6 the market context, has to do with who you are and
7 what your role was in the industry.

8 I agree with that. Right? So -

9 COMMISSIONER HOWELL: So you were talking
10 more about the role you played in the actual industry
11 as opposed to role in the offense, which is what is
12 covered by Chapter Three adjustments.

13 PROFESSOR BUELL: Right. So I mean that's a
14 good point. I mean, you know, there's two different
15 concepts which might often overlap. And I guess I'd
16 need to think more about that, right? Because I
17 think role in the industry is very important. Yeah,
18 to what extent did you have seniority? To what
19 extent were you in a management position? To what
20 extent did you have fiduciary duties? To what extent
21 did you tend to be trusted with more kinds of
22 information and responsibility? Or to what extent

23

1 were you, you know, just a following-orders kind of
2 person – although of course that's no defense to
3 fraud – is a little bit different than did you
4 organize others in the offense; or were you organized
5 by others?

6 But they're going to usually correlate in
7 some sense, and I worry in this context generally
8 about double counting, right, and this sort of
9 stacking of levels that results from double counting
10 of essentially the same facts.

11 So just thinking out loud, I mean I think I
12 would lean towards saying that, look, if role is
13 really especially important in big white collar
14 cases, let's write a guideline for that and have it
15 supplant the general role guideline.

16 COMMISSIONER HOWELL: I have one more
17 question for the appraisers. And I just want to make
18 it clear to everybody that Mr. Howell and I are not
19 related.

20 (Laughter.)

21 COMMISSIONER HOWELL: Although my father is a
22 real estate broker in Northern Virginia.

23

1 MR. HOWELL: Oh, no kidding?

2 COMMISSIONER HOWELL: Yes.

3 MR. HOWELL: Is that Pete? Pete Howell?

4 COMMISSIONER HOWELL: Yes.

5 (Laughter.)

6 COMMISSIONER HOWELL: But my question for you
7 is, you know, something that carries over from what
8 Ms. Brantley had talked about. Because I think real
9 estate appraisers generally look at current market
10 conditions. And just as a totally practical
11 question, how easy is it when you're talking about
12 the ability to go into a house to look at its current
13 condition or to make a market appraisal, for you to
14 do an appraisal of the market value of a house
15 perhaps three years ago, depending on when that
16 appraiser -- that assessment of the value of the house
17 is important for a fraud that either was discovered
18 or occurred in the past?

19 MR. HOWELL: I'll take a crack at short
20 answer and then pass that to Sara. From a real
21 estate practitioner's standpoint, that is certainly a
22 more difficult task, without a doubt, but I still
23

1 think the same standards would apply. Looking at the
2 tax assessment from three years previous would be no
3 more accurate at that time than it would be at any
4 other point in the sale.

5 COMMISSIONER HOWELL: But is that the common
6 kind of thing that appraisers do? Is it like
7 appraising the value -

8 MR. HOWELL: We have been asked as
9 practitioners on rare occasions to go back and help
10 people, from estates, to go back 20 years and say
11 this is when my grandson inherited this house, can
12 you give me an idea about what it was worth then?

13 There is enough general information about
14 comparable sales, et cetera, to get a decent idea,
15 but again it gets back to the question, if you can't
16 see the house at the time of the sale, or the time of
17 the gift in that case to see what the condition was,
18 it's a speculative number at best.

19 Sara can address that better than I can.

20 MS. STEPHENS: Thank you for your question.
21 You know, as a part of many of our practices we do a
22 lot of estate work. We do a lot of work which asks

23

1 us to take a look back, and our reports would be a
2 retrospective value of that property. And this is
3 where a couple of things are important I think in the
4 appraisal process.

5 One of them is the geographic competency of
6 the appraiser, and the skills and expertise that that
7 appraiser has, a professional, a person who is
8 trained in the appraisal of that specific kind of
9 property, if you will. And a person who is attuned
10 to the nuances in the market, who will interview
11 buyers and sellers.

12 In our practice, if we are looking back we
13 often go back to the deep chain and begin to try to
14 find the people who were involved in those
15 transactions and try to ask them the questions you're
16 asking: Well, what was the condition of the
17 property? What did it look like? How did you rehab?
18 What did you have to do? To try to help us come up
19 with a supportable, reasonable value for the property
20 at that point in time.

21 And it is not an unusual task for us to be
22 asked to do that. In fact, most of the estate work

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1 we do is retrospective.

2 COMMISSIONER HOWELL: Thank you.

3 CHAIR SARIS: Commissioner Wroblewski and
4 then -

5 COMMISSIONER WROBLEWSKI: Thank you very
6 much, and thank you all for being here. I have got
7 two questions. One is for Ms. Brantley.

8 On the timing of the assessment of the
9 property that was involved in a mortgage fraud, you
10 mentioned almost off-the-cuff that it should be at
11 the time the crime was discovered. Did you pick that
12 particular time out for a reason? It strikes me that
13 if we pick the time that it's discovered, as opposed
14 to the time when it's either disposed or the time of
15 sentencing because we have to pick some point, that
16 we're leaving the risk, the market risk to the victim
17 rather than to the offender. So I'm curious why you
18 said that.

19 And then Professor Buell, on insider trading
20 unlike the fraud guideline, which as you say is
21 loaded with all kinds of enhancements, the insider
22 trading guideline is not. And there may be cases -

23

1 and admittedly they will be atypical – where there
2 will be harms, or potentially harms to the financial
3 markets.

4 So for example there have been a lot of cases
5 that have been described over the course of the last
6 several years relating to the financial meltdown
7 where one company created a certain security, knowing
8 what was in it, and knowing that the assets that
9 backed that security were not particularly good, and
10 at the same time may have put down a bet that that
11 security was going to go bust.

12 And some of those cases, at least as reported
13 in the newspaper, had significant effects on the
14 financial markets. Is there any reason that we
15 wouldn't provide something in there in the guideline
16 that would recognize that?

17 And number two, in that kind of situation can
18 you see where the sentence might be appropriately
19 higher than ten years? So those are my two questions.

20 Ms. Brantley.

21 MS. BRANTLEY: Thank you. We picked that
22 number – picked that date, rather, first to emphasize

23

1 that we need a date certain, so that as long as we
2 have a date upon which valuations should occur, at
3 least we're not revising the presentence report every
4 single day until sentencing happens.

5 And the reason, that's a concept that's
6 already used in relation to loss for unsecured
7 issues, at the time the offense was discovered. I
8 think some of the rationale we say is that if an
9 offender feels like he or she is about to be
10 discovered, and then they start paying back certain
11 victims, you know, to try and reduce their exposure,
12 that they shouldn't - they shouldn't be allowed to
13 mitigate their own culpability in that fashion.

14 So the offense - at the time the offense was
15 discovered - is something that is a concept at least
16 in unsecured fraud. But again, we don't have a stake
17 in exactly what date is used, but just to suggest
18 that at some date certain.

19 COMMISSIONER WROBLEWSKI: Right. So I take
20 it you wouldn't have an objection if it was the date
21 of the plea, or obviously -

22 MS. BRANTLEY: No. And we talked about that.

23

1 COMMISSIONER WROBLEWSKI: Right. And the
2 rules – and the rules of procedure lay out a timing
3 mechanism for developing the presentence report, and
4 obviously you need a time when it's going to cut off.
5 But it doesn't necessarily have to be the time that
6 the crime was discovered.

7 MS. BRANTLEY: Right. And we talked about
8 that, the date of the plea, the date that the
9 information or indictment was filed, we talked about
10 all of those dates and our consensus only settled on
11 this just because it was a concept already in the
12 guidelines.

13 PROFESSOR BUELL: So thank you for those very
14 interesting questions. I have – this is fascinating
15 to me. I want to look into this now, because I have
16 not heard or read of the government thinking about,
17 or actually pursuing a theory of insider trading in a
18 case where, for example, a trading house is shorting,
19 you know, shorting one side of a certain set of
20 transactions while it's selling products on the other
21 side.

22 Now that has been a huge question, right, in
23

1 the financial meltdown about are these fraud cases?
2 Should they be prosecuted? On what theory? I just
3 haven't heard the insider trading theory put forth
4 here. I've heard a more conventional fraud theory
5 that the shorting at the same time is evidentiary as
6 to the fact that you knew the product you sold was a
7 bad product and there were some straight fraud
8 involved in the sale of that product.

9 So I mean if it's that kind of a case, the
10 conventional fraud kind of case, then, yeah, I think
11 the sentence could – you know, this could be the sort
12 of case that merits higher sentences because it's not
13 really an insider trading case.

14 If it is an insider – if the government were
15 pursuing that as an insider trading case, that would
16 be interesting and surprising to me. It may be a
17 theory they ought to be trying. I don't know if it
18 would work. I have to think about it.

19 COMMISSIONER WROBLEWSKI: But how about the
20 cases that are actually being prosecuted in New York
21 involving the hedge funds and the organized
22 collusion? I mean, those have already –

23

1 PROFESSOR BUELL: I understand those to be
2 traditional insider trading cases based on the – maybe
3 we're not talking about the same cases, but I
4 understand those to be cases based on, you know, you
5 found out what's happening at the Goldman Sachs board
6 meeting, or something like that, not – not, you know,
7 your true view of things was that the CDO market was
8 about to crash, but you went ahead anyway with the
9 transaction. And the fact that you were also betting
10 the other side of the housing market shows you knew
11 it was about to crash.

12 So maybe we're talking about different kinds
13 of cases, or I just need to be more educated about
14 what's going on. I would love – you know, if there
15 are specific cases –

16 COMMISSIONER WROBLEWSKI: No, I'm just
17 suggesting that if those cases that have been
18 prosecuted involved harms that eventually had an
19 effect on the entire market for a particular
20 commodity – I'm not saying the ones that we're
21 thinking about that were prosecuted and did – but if
22 they had harms to a particular market, not the entire

23

1 financial system -

2 PROFESSOR BUELL: Okay -

3 COMMISSIONER WROBLEWSKI: - but a particular
4 market, can you see that -

5 PROFESSOR BUELL: Yes, because I see that as
6 a fraud on the market kind of a case, right? I don't
7 see that as an insider trading kind of case in the
8 sense we typically think of insider trading as
9 creating a harm that is - you know, a case that is
10 more about gain to the defendant, where the losses
11 are diffused across the market, where we don't have
12 any real identifiable victim. This kind of case
13 you're talking about sounds to me like an
14 extraordinary sort of case, a case that looks more
15 like an accounting fraud type case than it does an
16 insider trading case, and so perhaps you need an
17 application note about that, or something that would
18 say cases that are really like insider trading cases
19 should be treated more like these other kind of
20 cases.

21 CHAIR SARIS: Judge Hinojosa.

22 COMMISSIONER HINOJOSA: I guess it's an

23

1 appraisal question, or a value question. One of the
2 things we put up was that in a mortgage loan fraud
3 case the collateral value at foreclosure sale would
4 be one that could be used.

5 Do you have any much more reliability on that
6 than you do on the tax assessment, as far as you're
7 concerned, Ms. Stephens and Mr. Howell?

8 MS. STEPHENS: Well I think that again the
9 strength of any kind of sale past the assessment data
10 has to be the fact that it occurred. But in many
11 cases, those foreclosures can be a fire sale. And we
12 would go back to the point that an appraisal at that
13 point at a specific point in time would certainly
14 outweigh any kind of tax assessment or foreclosure
15 sale.

16 We're looking at market value. And I think
17 that if the market value is reinforced by that sale,
18 that's fine. But we need to know what the market
19 value of that property is at that point in time.

20 COMMISSIONER HINOJOSA: Some people expressed
21 the view that it depends on who hires the appraiser
22 sometimes, whether it's the lender or the buyer.

23

1 Because in some of these cases, not cases but in some
2 of these loans, I mean the value comes out almost
3 exactly as the mortgage loan, or whatever; and that
4 that matters some; that it depends on who has hired
5 the appraiser.

6 MS. STEPHENS: I think part of that has
7 changed dramatically with the firewall that's been
8 installed between the lender and the appraiser in
9 many cases, and that's an AMC. And of course -

10 CHAIR SARIS: That's a?

11 MS. STEPHENS: "Appraisal Management
12 Company." AMC is our acronym. And for many
13 appraisers, this is a sore point because these
14 groups, many of them, are looking for two things:
15 very quick turnaround time, and a very low fee. And
16 this is where the comment about geographic competency
17 comes in.

18 You know, we have instances of people
19 traveling 3- and 400 miles into a market to do an
20 appraisal, turns it around in one day, and goes back
21 and writes it up. And without specific geographic
22 market expertise, that appraisal has got to have a

23

1 big question mark in front of it.

2 There's nothing better than that person who
3 is connected boots-on-the-ground to the market that
4 they're working in. So in terms of the influence
5 that either a lender or a buyer might have on the
6 appraiser, a lot of that is gone. Because most of
7 our appraisers now are not being engaged in the way
8 that they typically were three or four years ago to
9 perform a mortgage appraisal.

10 Now outside of that, for example if someone
11 were asked to work with this kind of problem or were
12 asked to come up with a value point in time, a market
13 value, could be a different scenario in terms of
14 selection of the appraiser, et cetera.

15 CHAIR SARIS: Can I ask, just as a factual
16 matter, how much does a good appraisal that you
17 thought was a quality appraisal that we could rely
18 on, how much would it cost?

19 MR. HOWELL: I suspect there are some
20 significant regional differences for that. So, Sara
21 being with the Appraisal Institute can probably
22 answer it better than I can from a national

23

1 standpoint -

2 CHAIR SARIS: In Virginia?

3 MR. HOWELL: - in the Metropolitan Area, a,
4 quote/unquote, "typical appraisal" for a medium-
5 priced house would probably run \$300. But when you
6 get into the million dollar, multi-million dollars,
7 it can easily run into a four figure fee.

8 CHAIR SARIS: And how long would it take?
9 That was going to be my second question.

10 MS. STEPHENS: Well I think that probably
11 typically, again it depends on the amount of time
12 that that appraiser is going to spend. That's how we
13 work. And it might be something in a very active
14 market where the comparables are plentiful and the
15 data can be gathered easily, say a neighborhood where
16 there have been lots of transactions and lots of
17 sales. It might be three to five days.

18 In a rural market where there aren't a lot of
19 comparables, where the research has to be extended,
20 it could be a couple of weeks.

21 CHAIR SARIS: And would you agree - how much
22 would you say the average was across the country?

23

1 How much would it cost?

2 MS. STEPHENS: Again, it depends on the
3 location. I think probably \$300 would be on the low
4 end, maybe, for many, many appraisers in many
5 locations. It could go up to \$1,500, depending on
6 the kind of property.

7 And, you know, again, when an appraiser bids
8 on an appraisal, it is a matter of time spent to
9 gather the data and complete the assignment. And the
10 more active the market, the less time and probably a
11 smaller fee.

12 CHAIR SARIS: So for some, for a minute,
13 probation typically doesn't have money, so unless the
14 Department of Justice or the defenders come up with
15 appraisals, they need to come up with a bright line,
16 as she said. We just need you to tell us what time
17 do we look at, what time period, and some bright line
18 to look at.

19 So assume for a minute that from the get-go
20 unless a litigant brings that into play, you need
21 some other source of data, what would be – would you
22 be better off looking at Zillow? Would you be better
23

1 off looking at a foreclosure sale? Would you be
2 better off giving the judge or the probation officer
3 a list of the kinds of concrete data points to be
4 rebutted then by an appraisal from you folks?

5 MR. HOWELL: And again I hope this doesn't
6 sound like a self-serving comment - I'm not a fan of
7 Zillow, as you can probably tell in my remarks and
8 what's in the prepared testimony - again, with great
9 respect to the technology behind it, if you look at
10 their fine print they even say this is based on
11 publicly available information, and no one should
12 rely on this information as dispositive of the value
13 of the property. And they actually suggest dealing
14 with a real estate practitioner or an appraiser.

15 So I also sympathize - fortunately, not being
16 familiar with the legal process, and I hope I never
17 have to be familiar with the legal process, I
18 certainly understand the need or the benefit for
19 having that bright line. My suspicion is, for
20 example you certainly could use tax assessment data
21 as the - or the most recent tax assessment - as that
22 line.

23

1 My concern would be, is that although that is
2 a readily available number, depending on what the
3 defendant's position is, if it just so happens that
4 the tax assessment that is picked is dramatically
5 different than what the value is, you're going to
6 have people rebut the value if it's in their best
7 interests to rebut it, and you're going to have
8 people say that's a good number if it's in their best
9 interests, to say, yes, that's better than what the
10 actual market value would have been.

11 CHAIR SARIS: But that's what we typically
12 get. So that's fair game. But for a starting line,
13 out-of-the-gate, would the best of the options be -
14 you seem to say foreclosure sales are too iffy, they
15 could be a fire sale particularly in today's world;
16 foreclosure by deed, I recently had a case. That has
17 its issues.

18 I mean, if we were just trying to give her
19 some guidance about where to start, where's the best
20 bet?

21 MR. HOWELL: Yeah, I wish - you know, I'll be
22 just very brief, Sara, I promise. I wish I could

23

1 give you an answer that was an easy answer.

2 Unfortunately, there really aren't any. Because any
3 index that you use, this is going to be done on a
4 broad basis, isn't going to apply to an individual
5 property.

6 So I realize there's going to be budget
7 issues as well, too, but just in terms of the
8 specifics, is there a reliable index or indicator out
9 there? As I said in my testimony, I wish there was,
10 or if we knew somebody that could predict that we
11 would like to hire them. It's impossible.

12 CHAIR SARIS: But how far is Zillow off, or a
13 tax assessment typically off of what you might
14 appraise something?

15 MS. STEPHENS: Judge, let me just address
16 that on a couple of issues.

17 I'm from Arkansas, and in our taxing district
18 if a person is a senior citizen they can freeze the
19 tax assessment on their property at age 65. And that
20 assessment can stay -

21 CHAIR SARIS: That's getting too close for
22 comfort.

23

1 (Laughter.)

2 MS. STEPHENS: I heard you there. But here's
3 the point. If that assessment is frozen and we're
4 looking at the information from that tax assessment,
5 that sentence, that penalty to any person is strictly
6 going to be overstated in some way.

7 And if we're looking at fairness, and if the
8 objective is to be fair with the people about whom
9 we're talking, and about the sentences that are
10 going to be issued, the best way is to have someone
11 who actually looks at that property and opines to a
12 value based on the inspection, the consideration of
13 the sales, and the data that's there.

14 And Zillo and – you know, like he said, that's
15 just a group of people who put together a system to
16 allow Internet access to value. And it's probably
17 price more than value. And, you know, our assessors
18 really are working hard. They've got hundreds of
19 thousands of parcels to deal with, and time frames
20 that are absolutely horrendous.

21 If you're in a taxing district where that tax
22 and that assessment issue is taken care of and kept

23

1 updated, that's very different from some of the
2 groups who don't even do that every ten years.

3 COMMISSIONER HINOJOSA: But -

4 CHAIR SARIS: Go ahead.

5 COMMISSIONER HINOJOSA: But isn't that the
6 point? That the advice to the probation office is to
7 use a common sense approach? There are some taxing
8 districts that are totally up to date and are very
9 good indicators as to what the property is worth, and
10 there's others that are not. And so it depends on
11 where the probation office is, and the court is,
12 where somebody is being prosecuted. Because my own
13 impression is that there are some taxing bodies that,
14 for whatever reason, whether they want to have enough
15 money or, to that effect, have very good property
16 values on their taxing roles, and others that, as you
17 say, it varies and it depends on what the local rule
18 is. And it varies nationally.

19 And so wouldn't the advice to someone who's
20 trying to determine that is, you're just going to
21 have to use your common sense as to what's occurring
22 in your particular area with regards to the value of

23

1 property?

2 MS. STEPHENS: Well I would say that with
3 regard to that comment, that the biggest problem
4 again is the way that properties are appraised or
5 assessed in terms of their value varies different,
6 many times, from the appraised value. Used value for
7 agricultural processes -

8 COMMISSIONER HINOJOSA: There are taxing
9 bodies that have the exact value that they have
10 decided, and are correct with regards to they go to
11 the sales and they figure out what the sales are. I
12 can think of one in our area that does it on a pretty
13 regular basis, and every year my tax value changes
14 depending on what the sales were at a particular
15 location -

16 (Simultaneous comments here.)

17 COMMISSIONER HINOJOSA: - that happens to be
18 an area where it very much depends on people that
19 don't live there having property there, and they want
20 to keep the value up so that they can have the income
21 coming in. And so they use actual values, pretty
22 much.

23

1 MS. STEPHENS: Well I think probably they're
2 one of few. And again, I think we get back to the
3 idea of just simply having someone there looking at
4 that property, looking at the data, looking at the
5 information, and determining a market value.

6 CHAIR SARIS: Just one last question for
7 Professor Buell. So you say that it's important to
8 send the message that you get jail if you do insider
9 trading. Right now it's at an 8, sort of a base
10 offense. You recommended a 10.

11 PROFESSOR BUELL: I said 10 or 12.

12 CHAIR SARIS: 10 or 12. Because a 12 is the
13 first one that gets you into a Zone C.

14 PROFESSOR BUELL: Right.

15 CHAIR SARIS: And if you did that, in your
16 view all these difficult problems of what's
17 "organized" versus "sophisticated," or what's the
18 position of trust and what's not, or would you?

19 CHAIR SARIS: Yeah, with acceptance, though,
20 that's going to put you down at -

21 CHAIR SARIS: That's fair enough, fair
22 enough.

23

1 COMMISSIONER FRIEDRICH: So would you say a
2 14?

3 (Laughter.)

4 PROFESSOR BUELL: I'll meet your 12 and I'll
5 raise you - no -

6 (Laughter.)

7 PROFESSOR BUELL: I don't know. I was never
8 that big of a guidelines geek when I prosecuted. I'm
9 way less of one now in terms of understanding all the
10 particulars of how a level affects things here or
11 there.

12 So I would kind of defer to the Commission
13 and its staff to figure out what that right base
14 offense level would be. Again, I would have a game
15 table. I would have some taking into account
16 position. But I would want to compress that with the
17 idea that there ought to be a presumption that, you
18 know, the decade or so is kind of for the most
19 serious cases. And then you figure out how to get
20 your table to kind of press them in between there.

21 I just - I know we're essentially out of time,
22 Judge, but I just want to mention one other thing

23

1 that hasn't come up in the hearing, and I think is
2 important to say, which is:

3 The sort of an elephant-in-the-room a little
4 bit in this discussion is cooperation. And it is
5 producing cooperators. And I think that one of the
6 reasons why the white collar guidelines have, in some
7 of these big-ticket cases, have gotten so high and
8 are kind of stuck there is because there is actually
9 one huge value in that, which is that those sentences
10 are very scary and they produce cooperating
11 witnesses.

12 And in public company accounting fraud cases,
13 for example, it is almost impossible for prosecutors
14 to make these cases without cooperating witnesses.
15 So – and, you know, I don't have a conclusion about
16 this, it's just something I want to point out.

17 It seems to me slightly evocative of, in some
18 ways of what went on for years with the crack
19 guidelines. I mean, there was no question that the
20 crack guidelines had a very big role, you know,
21 despite all of the reasons why, you know, people
22 thought they were terribly unjust, they had a big

23

1 role in producing, you know, particularly RICO gang
2 murder cases in, you know, in urban districts. And
3 because those guidelines produced cooperators.

4 So, you know, there's something of a tradeoff
5 there that I don't know if it's even appropriate for
6 the Commission to take into account, but I know it
7 must be in the Department of Justice's minds about
8 cooperation.

9 And I would point out that maybe that
10 consideration is a little bit less forceful in the
11 insider trading cases, because it's my impression
12 that those cases, unlike the complex accounting
13 frauds, or what do we do with a mortgage-backed
14 securities case where without witnesses you just
15 can't get to the bottom of it, the insider trading
16 cases are often brought based on documents, now
17 increasingly wiretaps.

18 And so there might be less of a consideration
19 in the insider trading case of, well, the
20 hypothetical sentence needs to be very severe if
21 we're going to expect people to agree to testify.

22 CHAIR SARIS: Thank you very much to

23

1 everyone. I learned a lot. Thank you. I think we
2 all did. Thank you.

3 (Whereupon, a recess was taken.)

4 CHAIR SARIS: All right, so our next panel is
5 on the Human Rights Offenses. We have Amy Pope, who
6 is the deputy chief of staff and counsel to the
7 assistant attorney general of the Criminal Division.
8 Previously she was the senior counsel to the
9 assistant attorney general; counsel in the Criminal
10 Division's Office of Policy and Legislation; counsel
11 to the Senate Judiciary Committee's Subcommittee on
12 Terrorism, Technology, and Homeland Security; and
13 trial attorney in the Civil Rights Division.

14 Melanie Morgan is a founding partner of
15 Morgan Pilate -

16 MS. MORGAN: That's right.

17 CHAIR SARIS: - in Kansas City, and is a
18 faculty member of the National Criminal Defense
19 College. She is the past president and current board
20 member of the Kansas Association of Criminal Defense
21 Attorneys. She also serves as educational liaison
22 for the Federal Courts Advocates Committee on behalf

23

1 of the Kansas City Metropolitan Bar Association.

2 I thank you both for being here, and I know
3 it's probably true for both of you, but Ms. Morgan
4 has taken time out – her family is all skiing – so
5 thank you very much for taking time out from your
6 family vacation to come here on this very important
7 subject.

8 Ms. Pope.

9 MS. POPE: Good morning, Chairwoman Saris,
10 Vice Chairs Carr and Jackson, and Commissioners.
11 Thank you for the opportunity to appear before the
12 Commission today to discuss the proposed amendment
13 for cases involving human rights violations.

14 It is truly a distinct pleasure and privilege
15 to appear before you today.

16 Bringing the perpetrators of human rights and
17 humanitarian law violations to justice is a mission
18 of enormous importance, particularly at a time when
19 atrocities continue to be committed abroad with such
20 alarming frequency.

21 In the context of such crimes, the Justice
22 Department's human rights law enforcement mission is

23

1 both a moral obligation and a legal imperative.

2 Our work in this area, along with similar
3 efforts underway in other countries and before other
4 international tribunals, seeks to send the strongest
5 possible message of deterrence to would-be
6 perpetrators. Namely, that no matter how far they
7 flee from the scenes of their ghastly crimes, no
8 matter how well they succeed in eluding detection,
9 safe haven will never be available for them anywhere,
10 but particularly not in the United States.

11 The Department of Justice has been
12 aggressively and consistently pursuing human rights
13 violators and war criminals for more than three
14 decades.

15 In 1979, Attorney General Benjamin Civiletti
16 created the Office of Special Investigations within
17 the Criminal Division. Its mission was to
18 investigate and civilly prosecute the perpetrators
19 of World War II war crimes.

20 Over a 30-year span, OSI was responsible for
21 the denaturalization and removal of 107 Nazi
22 criminals, and the exclusion of 180 Nazi and Japanese
23

1 suspects.

2 It eventually became clear that, just as the
3 Nazi criminals had succeeded in emigrating here and
4 escaping detection, perpetrators of other post-war
5 human rights violations had managed also to get
6 entrance into the United States.

7 There is no central program for investigating
8 and prosecuting these cases, and the federal action
9 really had been uneven. So in December 2004,
10 Congress passed the Intelligence Reform and Terrorism
11 Prevention Act which, among other things, directed
12 that OSI investigate and prosecute denaturalization
13 cases involving individuals who participated in
14 extrajudicial killings, torture, and war crimes.

15 Around the same time in 2003, the Criminal
16 Division established the Domestic Security Section
17 and assigned to it the responsibility, among other
18 things, the criminal prosecution of human rights
19 violators and war criminals.

20 In recognition of DSS's and OSI's close
21 working relationship and commonalities, in March 2010
22 following consultation with Congress and passage of
23

1 the Human Rights Enforcement Act, the Criminal
2 Division created the Human Rights and Special
3 Prosecution Section.

4 Today, HRSP, as we call it, the National
5 Security Division, the U.S. Attorney's Office, the
6 FBI's Genocide and War Crimes Program, we work
7 together closely with other agencies, particularly
8 ICE of the Department of Homeland Security, the
9 Department of State, and the Department of Defense,
10 and we lead the government's anti-human rights
11 violations efforts.

12 The Department has developed a multi-faceted
13 response to human rights violations. Of course our
14 very first line of defense is to keep the human
15 rights violators from entering the United States in
16 the first place.

17 We work very closely with our partners at the
18 Department of State and Homeland Security to do that.
19 Along those lines, President Obama issued a
20 proclamation just this past August expanding our
21 authority to deny entry into the United States for
22 aliens criminally involved in war crimes, crimes

23

1 against humanity, or other violations of human
2 rights.

3 But when these criminals do manage to make it
4 into the United States, the federal government moves
5 swiftly to deny them safe have here. As you know,
6 our arsenal now includes federal jurisdiction over
7 several substantive human rights crimes, including
8 torture, war crimes, genocide, and the recruitment or
9 use of child soldiers.

10 The direct prosecution of these particular
11 crimes is not always possible, however. For example,
12 the conduct might have occurred prior to the
13 effective date of the statute. Or the perpetrator
14 may not fall within the particular jurisdictional
15 limitations of the given statute.

16 In these situations, the Department and its
17 law enforcement partners look to other basis for
18 prosecution, including statutory provisions
19 criminalizing immigration fraud, naturalization
20 fraud, and false statements.

21 Our legal arsenal also includes civil
22 denaturalization actions which can pave the way for

23

1 removal proceedings by ICE or extradition to face
2 justice for crimes in their home country.

3 While it is true the Department has only
4 prosecuted one substantive human rights violation to
5 date – specifically that against Chuckie Taylor for
6 human rights crimes committed in Liberia – we
7 anticipate that there will be more in the future.

8 There also have been several immigration and
9 denaturalization proceedings against human rights
10 violators in several years.

11 Not only has Congress recently expanded our
12 ability to prosecute the human rights crimes, but our
13 partners at ICE and our partners at FBI has
14 significantly increased their resources to
15 investigate and prosecute these crimes.

16 ICE alone has testified that it has more than
17 200 open investigations that could support criminal
18 charges.

19 For this reason, the time is right for the
20 Sentencing Commission to take action. What is clear
21 is that the sentencing courts that have looked at
22 this issue are all over the place, and they are

23

1 seeking a benchmark. And the Commission is the
2 appropriate body to do that.

3 Our letter sets forth our arguments in more
4 detail, and I am happy to answer any questions you
5 might have.

6 CHAIR SARIS: Thank you. Ms. Morgan.

7 MS. MORGAN: Thank you. Thank you, all of
8 you, for including me in this hearing today. It was
9 important to me for a number of reasons to be
10 present. And I want to share with you primarily the
11 reason why I felt so strongly about this subject.

12 Recently, back in 2009, I became involved in
13 the defense of a case by a man by the name of Lazare
14 Kobagaya. And Mr. Kobagaya was charged with unlawfully
15 obtaining his citizenship and immigration fraud.

16 His case, not the result of it but just the
17 facts and the things that were learned from that
18 case, I believe are very instrumental in the
19 Commission's decision on this particular amendment.

20 So if you'll bear with me, I want to take you
21 8,000 miles away. I want to take you 20 years back,
22 or 18 years back to the little country of Rwanda.

23

1 And in Rwanda between 1990 and 1994, there was a
2 civil war going on. And that civil war culminated in
3 a genocide in which close to a million people were
4 killed.

5 Mr. Kobagaya, who is now an 85-year-old
6 grandfather, was a Burundian refugee living in
7 Rwanda. And during that time period, he was actually
8 trying to repatriate to his country of Burundi when
9 the genocide occurred.

10 And when the invading RPF army, which is now
11 the ruling party of Rwanda, took control of the
12 country, Mr. Kobagaya, his wife, the children who
13 still lived there, fled Rwanda along with one to two
14 million other people.

15 Most of these people left on foot. They took
16 only with them the belongings that they could carry.
17 And for days they walked a path to safety to the
18 country that was then Zaire and is now known as the
19 Congo. And they quickly filled these refugee camps.
20 And the living conditions there were harsh. They
21 were dirty. They were cramped. They were unsafe.
22 The food was scarce, the water unclean, and for many

23

1 existence was day by day.

2 Now Mr. Kobagaya and his family were some of
3 the lucky ones, because he had a child that lived in
4 the United States, and that child organized a relief
5 effort. Not knowing where his parents were, not
6 knowing where his siblings were, he still nonetheless
7 went over to Zaire and went camp to camp to camp
8 until he was able to locate his family. Because
9 there's no phones, there's no Internet for folks to
10 communicate with one another.

11 And then he was able to make arrangement for
12 his parents to get to Kenya, and that's where the
13 emigration process occurred.

14 Now in the course of litigating this case and
15 conducting investigation, we really had to find out
16 what happens when a person applies for immigration?
17 What is that process that they go through?

18 And I want to walk you through that. When
19 they go to these various embassies wherever they may
20 be stationed, whether they be in an African country,
21 some country in South America, Central America, or
22 Asia, they walk into these countries and the forms

23

1 are in English.

2 And there is a translator who may translate
3 for them. That may be a family member. It may be
4 somebody there. And there may not be a perfect
5 translation. The goal is just to get the paperwork
6 completed. And there is a number of reasons why a
7 person might lie on that application. Maybe lie
8 about where they have lived. Maybe lie about where
9 their family members are.

10 And those motivations have nothing to do with
11 what transpired in their country. They have
12 everything to do with a fear of retaliation. They
13 have everything to do with survival and trying to get
14 somewhere where they can actually exist, have food,
15 water, and their basic needs met.

16 I know this, because when I went to Africa in
17 the course of this case, a number of times, I heard
18 these heart-wrenching pleas of individuals who asked
19 me to help them get to the United States, and who
20 were willing to say anything if they thought that it
21 would help them get here.

22 It is with that background, Commissioners,
23

1 that I offer you my testimony.

2 Our position is that the Commission make no
3 changes to the guidelines as they stand. They
4 adequately address right now the human rights
5 violations, and so there is no need to fix something
6 that is not broken.

7 When I say that, I refer to the fact that
8 there is talk now, or the proposal is to create now a
9 substantive human rights violation. And yet, we have
10 very specific murder, torture, genocide by reference
11 back to that, to the murder, we have specific Chapter
12 Two guidelines that can deal with the actual underlying
13 conduct.

14 We have Chapter Three enhancements, and we have
15 Chapter Five enhancements. And those, working together,
16 address the problem. Right now, as the government
17 has acknowledged, there is one case. And that case,
18 that individual, received 97 years. I would suggest
19 that that means that something is working.

20 As far as the human rights amendment – and I
21 will just be brief because I note my time is up – I
22 believe that the amendment to the immigration fraud

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1 provision is problematic on a number of grounds. And
2 the strongest, the most problematic is that we are
3 talking about convictions, we're talking about
4 criminal conduct that cannot be proven otherwise.

5 And so to lump that into a sentencing, we
6 then start talking about proving foreign conduct in
7 an American courtroom using a variety of rules and an
8 extremely difficult proof levels, or quality of
9 proof, at enormous cost.

10 The rest of the reasons that support our
11 opposition to the amendment is contained in my
12 written testimony, so I would be happy to entertain
13 any further questions that the Commission would have.

14 CHAIR SARIS: Thank you. Question? Go
15 ahead.

16 VICE CHAIR JACKSON: My turn? Good morning.
17 Thank you both for coming.

18 Ms. Pope, you admit, and said in your
19 testimony, that there's really only been one
20 substantive human rights violation case at the time.
21 And that presents something of a challenge from the
22 sentencing standpoint, because the way the guidelines

23

1 ordinarily work is that we look at how cases are
2 playing out in courtrooms, and we determine then what
3 factors judges are looking at with respect to
4 sentencing, and that all plays in to our
5 determination of how a guideline should operate.

6 So I am wondering, you know, given that we
7 really don't know the sentencing concerns based on
8 actual cases, given the lack of number of cases, how
9 you suggest we deal with it.

10 I mean, are the proposed factors the right
11 factors? Are there other things that you would
12 consider? And why is this the time to act, do you
13 say, from your perspective?

14 MS. POPE: You asked a number of different
15 questions. Let me try to break them down.

16 The first question is why is now the time to
17 act? As you said, there is only one case, but ICE
18 has already dedicated significant number of
19 resources, as has the FBI. ICE has publicly
20 testified before the Lantos Commission that they have
21 over 200 cases that will support a criminal
22 prosecution or removal.

23

1 Obviously I can't speak to what the
2 Department has under review at the moment, but we
3 certainly anticipate that there will be more cases in
4 the future.

5 The second question, though, is that there
6 isn't sufficient guidance in the guidelines now to
7 direct a court. There are several cases that we've
8 brought under immigration fraud, but [they] just
9 highlight some of the issues that a sentencing court
10 would deal with.

11 For example, in the case of Eriberto
12 Mederos, which was a – he was a Cuban government
13 official who was responsible for handling certain
14 Cuban dissidents within a mental hospital where he
15 would administer electroshocks to the dissidents
16 while they were being held on a floor that was
17 covered in feces and urine. That kind of conduct
18 doesn't easily fit into the guidelines.

19 Is that an aggravated assault? If it's an
20 aggravated assault, then does it – do we count the
21 serious bodily injury because the defendants
22 experienced extreme pain? I mean, there's not

23

1 necessarily lasting injury.

2 I mean, these kinds of things are not easily
3 discerned within the existing guidelines.

4 VICE CHAIR JACKSON: Can I ask you a follow-
5 up?

6 MS. POPE: Sure.

7 VICE CHAIR JACKSON: That sort of assumes
8 that those things are true, from the government's -
9 and maybe they are from the government's perspective,
10 but do you anticipate that we would have, in the
11 context of sentencing, litigation around the extent
12 to which the government's allegations with respect to
13 these foreign crimes occurred?

14 I mean, I can imagine that -

15 MS. POPE: Absolutely.

16 VICE CHAIR JACKSON: - defendants would have
17 lawyers who would dispute -

18 MS. POPE: Of course.

19 VICE CHAIR JACKSON: - that this defendant
20 was involved in that kind of behavior. So we have to
21 sort of cross that bridge before we even get to how
22 this should be properly classified in the guidelines.

23

1 And what do you say about turning, you know,
2 sentencing proceedings into full-fledged trials with
3 regard to these types of allegations?

4 MS. POPE: Well I would say that we use the
5 trial and the jury to try those issues. That's what
6 we did in the case against Chuckie Taylor. It was
7 actually a jury that heard the evidence. It was a
8 jury that made a decision that torture had occurred.

9 With respect to the immigration cases, there
10 are juries that are hearing the evidence about the
11 lie.

12 VICE CHAIR JACKSON: And do they have to be -
13 and so is it the government's position that those
14 types, in an immigration case, of facts would have to
15 be charged and proven to the jury?

16 MS. POPE: If the government is proceeding
17 along the basis that the defendant lied on his
18 naturalization application because he engaged in
19 persecution, or because he tortured, then, yes.

20 And that's exactly, in Ms. Morgan's case, one
21 of the issues that was before the jury. Now in that
22 case, the jury decided that there was insufficient

23

1 evidence of persecution. But that's what juries do
2 every single day in every single case, and we
3 wouldn't expect anything else in one of these human
4 rights cases.

5 COMMISSIONER HINOJOSA: Ms. Pope, I guess you
6 raise the interesting point by using the specific
7 example of the Cuban situation.

8 MS. POPE: Yes.

9 COMMISSIONER HINOJOSA: Obviously that did
10 not happen within the jurisdiction of the United
11 States. And so then I suspect that if that case were
12 brought, there might be some jurisdictional
13 challenges to that prosecution.

14 So then you go to your fallback, this is an
15 immigration case if that person had ended up in the
16 United States, and perhaps lied in their application
17 for immigration status.

18 And then you point out, in response I guess
19 to Ms. Morgan's point, which is there are all sorts
20 of factual issues that develop in these cases, that
21 you could have a jury trial. I guess you could have
22 a jury trial in the immigration court with regards to
23

1 whether they were a lie, but in the present system at
2 least under the criminal law it appears that you're
3 asking the Commission then to put enhancements in the
4 immigration guideline, but that wouldn't be the
5 charge. The charge is simply lying in your
6 immigration papers. That is not going to the jury.
7 I mean, it's a charge of you lied in your
8 application, but it's going to be the judge that has
9 to decide, well, did you lie because you may have
10 committed certain things in your country?

11 And then we have the whole issue of the
12 evidence, as Commissioner Jackson has pointed out
13 here, that that becomes a mini-trial on the 4A count
14 as opposed to the charge of actually saying that.
15 And one of the reasons you may have only brought one
16 of these is because of this whole factual situation
17 of what evidence can you present for something that
18 happened in Cuba that would be admissible in a
19 federal court in the United States.

20 And isn't this a matter that should be
21 handled at the immigration level, and the charge
22 should be the immigration violation, and then the

23

1 person gets deported?

2 MS. POPE: You asked a number of different
3 questions and I'm going to try to take them on.

4 On the question -

5 COMMISSIONER HINOJOSA: Recognizing that the
6 Cuban situation is kind of odd because I don't know
7 that we deport anybody to Cuba.

8 MS. POPE: Well that is one of the issues,
9 whether we can deport other people. There are
10 several - we have many, many cases where the home
11 country, the country in which the conduct actually
12 occurred, does not want to take this particular
13 individual.

14 In fact, our first recourse is to, and our
15 first preference, is that the defendant be tried in
16 their home country. But as you well know, there are
17 many countries that don't have functioning judicial
18 systems; that don't have the capability or capacity
19 to prosecute.

20 COMMISSIONER HINOJOSA: But how do we get
21 around the jurisdictional issues, that this didn't
22 occur in the United States? What's the charge here?

23

1 MS. POPE: So the jurisdictional issue
2 specifically on the immigration violation? Or
3 specifically -

4 COMMISSIONER HINOJOSA: Well, no, let's say
5 you're charging the person with a human rights
6 violation under the statute, not the immigration
7 situation. Isn't there going to be a jurisdictional
8 question here as to do we have to show some
9 connection to the United States here, or what do we
10 have to do here?

11 MS. POPE: Well as you know, Congress has
12 recently modified several of these statutes to
13 provide additional jurisdictional hooks. So that if
14 someone is present in the United States, they could
15 be tried - there would be jurisdiction to try them.
16 So that's what's happened - well, in fact Chuckie
17 Taylor was a U.S. citizen. But because he came into
18 the United States, he brought himself under our
19 jurisdiction.

20 That is really a decision for Congress.
21 They've done it in a number of other cases unrelated
22 to human rights cases -

23

1 COMMISSIONER HINOJOSA: It has to be reviewed
2 by the Supreme Court, also.

3 MS. POPE: Sure. But there is – it's not
4 specific to just the human rights violations. As you
5 know, providing material support to terrorists, other
6 terrorist statutes. Just yesterday we had a
7 conviction in the DC District Court on a narco
8 terrorism case. All of those cases have
9 extraterritorial jurisdiction. In all of those
10 cases, the judge and juries are grappling with it.

11 COMMISSIONER HINOJOSA: But aren't those
12 cases – you're providing the support for materials
13 here. I mean, you're doing something in the United
14 States, right?

15 MS. POPE: But the conduct is the conduct
16 that's occurring abroad. The impact of a defendant
17 who commits a human rights violation abroad and then
18 comes into the United States, the impact on the
19 United States is that in particular this country was
20 founded on a principle that we are not a sanctuary
21 for human rights violators. We in fact provide
22 sanctuary to the persecuted.

23

1 So you have a case like the Kielbasa Negaywu
2 (phonetic) case, which is in Atlanta, where you have
3 an Ethiopian victim of violence and torture
4 confronting her accuser in an elevator because he had
5 managed to gain asylum in the United States.

6 So we're creating a situation that is
7 completely at odds with what the United States stands
8 for, and a fairly consistent policy across the three
9 branches of government.

10 CHAIR SARIS: Can I ask, you had an
11 interesting debate in your papers about what to do
12 about these military units.

13 MS. POPE: Right.

14 CHAIR SARIS: Really, that was one that sort
15 of hit the defenders' third rail. And as far as you
16 were concerned, I imagine that is an important thing
17 that you could easily prove, that someone lied about
18 what military unit they were in.

19 So I imagine that this would turn into a
20 situation where you could easily prove, sort of like
21 a little debate between the two of you, you could
22 easily prove someone lied about a military unit? Is
23

1 this how this would come up? And then the question
2 would become: Does that automatically trigger a
3 presumption or an enhancement that you've engaged in
4 human rights abuses?

5 Is this how this, as a practical matter, in
6 an immigration context will come up? Or will you
7 have better proof than that?

8 MS. POPE: So —

9 CHAIR SARIS: And I know you feel strongly
10 about that, too. So maybe start with you, and then
11 go there.

12 MS. POPE: Okay. So the United States has
13 brought over 20 cases in which we've alleged that the
14 defendant lied about his military service. In our
15 proposal to the Commission about how to sentence
16 someone like that, we propose only a very modest
17 enhancement. We do not count lying about military
18 service — and it's not just military service; it's
19 military service within a unit that is known to have
20 committed human rights abuses.

21 So if you were in the particular unit that we
22 know was responsible for killing 800 Muslim boys in

23

1 the former Yugoslavia, that's information that we
2 want to know.

3 Now in those cases we may not have, and are
4 not pursuing evidence that that particular individual
5 engaged in the human rights offense. And we do not
6 suggest that that person should be sentenced similar
7 to a person who actually did engage in the human
8 rights offense, and we are proving that they engaged
9 in the human rights offense.

10 The issue there is simply that our U.S.
11 government officials in the State Department and the
12 Department of Homeland Security were denied the
13 opportunity to do the kind of investigation they
14 would have done if the defendant had been truthful
15 about his military service.

16 So in our examples in our proposal, we are
17 saying a modest increase because you lied about your
18 participation in that unit, but that is nowhere close
19 to the kind of enhancement we would like to see for
20 someone who actually participated in human rights
21 violations.

22 CHAIR SARIS: So you would anticipate – the

23

1 way this is worded I understand is our issue – but
2 would you anticipate having to prove that this
3 individual defendant was the person who tortured a
4 prisoner, or this person is the one who raped a group
5 of women.

6 MS. POPE: Yes.

7 CHAIR SARIS: The involvement in the military
8 unit.

9 MS. MORGAN: Yes. And we have a number of
10 cases. One is the case against Voskovitch (phonetic),
11 which is in Oregon. All we know is that that particular
12 individual is part of this unit that was engaged in
13 these human rights abuses. That person, we'd say,
14 should get maybe a year in prison. Versus the case
15 against Marco Boskitch (phonetic) who was part of a
16 unit and admitted to killing significant numbers of
17 civilians as part of that unit.

18 We think that's very appropriate for courts
19 to distinguish.

20 CHAIR SARIS: All right, so she's willing to
21 say, yes, I own up to it. I have the burden, just
22 not of proving just belonging in a military unit, but

23

1 this person actually went out and tortured, killed,
2 and raped, does that solve your problem?

3 MS. MORGAN: It does not. You know, what I
4 hear is that, well, these individuals need to have
5 some sort of enhancement applied to them because they
6 denied the United States government the opportunity
7 to further investigate.

8 That is what immigration fraud is, just all
9 alone that, you know, if you lie about something
10 particular on your application, regardless of what it
11 is, you denied the, whatever the agency is, you
12 denied them the opportunity to further question and
13 make a determination whether or not that they would
14 be admissible, or whether or not they could have
15 qualified for citizenship.

16 And I think there's nothing about the fact
17 that they are, you know, part of this group that in
18 and of itself should warrant that particular kind of
19 enhancement.

20 And I throw out to you this example, this
21 horrible example actually, that is going on right
22 now. The American soldier who in Afghanistan, he

23

1 leaves his unit, he goes out and he just slaughters,
2 kills, I think the – I don't remember what the last
3 count was, 16, 20 individuals.

4 Now the other – this person supposedly is
5 acting alone, but the fact that there's other people
6 in his military unit, would those people be
7 accountable for something simply by virtue of the
8 fact that they are in the same unit?

9 Because really what we're saying is, look,
10 this is a guilt-by-association concept. And your
11 question to me, or what I heard you, you know, asking
12 was, you know, what is the, you know, sort of what
13 are you willing to prove up? What are you going to
14 prove up in this context?

15 And it also dovetails with the question that
16 you asked, Commissioner Jackson, about how do you
17 envision that this is going to play out? Are we
18 going to have actually trials on this? And the
19 government's response, Ms. Pope's response, was:

20 Well, no, this is all going to come out in a jury.

21 Well, actually most cases don't go to a jury.
22 Most cases don't have a trial. Most cases actually

23

1 end up with some sort of a plea. And then we do
2 actually have this full-blown issue. Because you
3 don't have to charge something in a charging document
4 in an indictment for them to be considered
5 potentially at sentencing.

6 And that is the problem, that a person might
7 say, well, I'm guilty of immigration fraud because I
8 lied about where I actually live. So I don't have a
9 defense to that. I'm going to go ahead and plead
10 guilty, get my two levels off for acceptance of
11 responsibility, and go through the process.

12 And then, woah, lo and behold, what happens
13 at sentencing? All of a sudden we have this issue,
14 and we're in a five-week trial. Because I assure you
15 that is how long it's going to take when we start
16 talking about having to litigate issues about whether
17 or not a person was involved with a human rights
18 offense.

19 VICE CHAIR JACKSON: Ms. Morgan, can I follow
20 up on that? You know, you said in your testimony
21 that there are a number of reasons why a person might
22 lie on their immigration application, and that's

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1 certainly true.

2 But would you concede that there is some
3 differentiation to be made with respect to
4 motivation? I mean, the person who lies for some
5 innocuous reason would you say is less culpable than
6 someone who is lying because they are seeking safe
7 harbor from prosecution or retaliation in their own
8 country based on their war crimes? Or is that just
9 not – or are we just treating everybody who lied on
10 their immigration application the same for
11 culpability purposes?

12 MS. MORGAN: I think for culpability purposes
13 that we – I mean, the crime itself is, is the
14 immigration violation. And so we treat that the
15 same. Because when we start trying to differentiate
16 then why a person lies, we start getting into then
17 motives, and then mitigating, you know, mitigating
18 factors –

19 VICE CHAIR JACKSON: Everybody's going to say
20 "we like Miami Beach," you know what I'm saying,
21 like – and so what I'm struggling with is whether or
22 not we treat that person – you know, the person who

23

1 lies for an innocuous reason, you know, generally
2 speaking, the same as someone who lies because they
3 feel that the United States is the place to go for
4 people who, you know, have done these horrible things
5 in their home countries and they know that the United
6 States, even if they're found out as to having been a
7 liar on their immigration application, will give them
8 a slap on the wrist as opposed to perhaps other
9 countries.

10 MS. MORGAN: But I guess that that is where
11 my concern would come in, is because with this
12 particular enhancement then what we're saying is the
13 level of proof that is required - basically what we're
14 saying is, look, we're going to start doubling and
15 tripling what we normally would say for an
16 immigration violation, which is a base offense level
17 of 8 or 11, we're going to start doubling and
18 tripling those, if we can establish that the reason
19 that you lied, or the potential reason that you
20 lied -

21 VICE CHAIR JACKSON: So it's a proof thing.
22 You agree that if we could - if we could prove, if the
23

1 person did plead to I was in a military unit and I
2 killed a thousand people, or whatever, and so that's
3 not a disputed fact, that person in an immigration
4 case should be treated differently than someone else
5 who lied for a different, say, less innocuous reason?

6 MS. MORGAN: But I think, I guess my concern
7 would be, is that is the relationship between that
8 immigration offense and that human rights violation.
9 And that's where I see that there's the biggest
10 problem.

11 There are going to be human rights violators,
12 I'm sure, that immediately might come fill out their
13 application and come to the United States. There are
14 going to be lots and lots of others that it will be
15 years, if not decades, later before their documents
16 are filled out and they come to the United States.
17 So where is that correlation?

18 There is sort of this presumption that
19 perhaps if you are from a particular country where,
20 you know, that's war torn, or is filled with civil
21 strife, and you are on the losing side, you are the
22 Hutu in a country that is Tutsie dominated, or, you

23

1 know, you're on the wrong side in the Bosnian
2 conflict, that there's sort of then this presumption
3 because you were on that side that you may have been,
4 or you're more likely to be aligned with, you know, a
5 particular type of conduct, or you might have a
6 particular motivation.

7 And that is what I think is most troubling to
8 me, because although I acknowledge that there may be
9 some countries that we cannot remove those individual
10 to, by and large the vast majority of these
11 individuals, once they have these convictions, they
12 are then going to their countries. And those
13 countries, the countries that are entitled to deal
14 with those individuals on their own terms, on their
15 own law, then they are able to do so.

16 I think it was the judge in the Bosta (phonetic)
17 case who said, when he was trying to make a decision about
18 what penalty should apply, and certainly deciding
19 that immigration fraud wasn't enough, and the
20 government had wanted something for involuntary
21 manslaughter to do that analogous procedure, he said:
22 Look, I'm not going to do that because we don't have
23

1 universal jurisdiction here.

2 He was very concerned about the fact that we
3 would take something that was so far attenuated from
4 the actual crime of conviction and try to use that,
5 bootstrap it in to something they couldn't do
6 independently.

7 And I think that that is a real concern that
8 this Commission needs to be focused on.

9 COMMISSIONER WROBLEWSKI: Can I just follow
10 up on that for just a second?

11 CHAIR SARIS: Sure.

12 COMMISSIONER WROBLEWSKI: Because — were you
13 here, by chance, for the first couple of panels?

14 MS. MORGAN: Yes.

15 COMMISSIONER WROBLEWSKI: And there was a lot
16 of talk about the importance of doing exactly what
17 you're suggesting we shouldn't be doing, which is to
18 get at intent, to get at the circumstances of the
19 crime. It seems like that's the nature of sentencing
20 certainly post-*Booker*. And you're suggesting that
21 the immigration crime, for some reason, we shouldn't
22 be getting at the circumstances of it.

23

1 If the circumstances of it are that it's a
2 lie about involvement in a military unit, why is that
3 different than looking at the circumstances of the
4 crime? And isn't that what's required by the Supreme
5 Court, by 3553(a)? And isn't this what we hear all
6 the time, that we need to get to the circumstances
7 surrounding the offense and the offender? Isn't this
8 precisely the dog, not the tail wagging the dog?

9 MS. MORGAN: I respectfully disagree with
10 that. I don't think that this is that particular
11 situation. Because, I mean, the crime - I don't think
12 we can get away from the fact that the crime that we
13 are talking about is the immigration violation.

14 The crime is not the substantive offense of
15 the human rights violation. That is a completely
16 different, separate and distinct offense. The person
17 did not go out and commit the immigration offense so
18 that they could say in three, five, ten years later,
19 or commit the substantive offense and say well I'm
20 doing this so that I can later go ahead and commit an
21 immigration, you know, fraud violation against the
22 United States.

23

1 If the idea is that we want to, you know,
2 start treating people, you know, consider the
3 circumstances of the offender as well as the
4 circumstances of the offense, there is such a wide
5 range, though, of conduct that is included.

6 You're talking about, under the government's
7 proposal, preliminarily if you, you know, if you lie
8 about your human rights involvement, what if your
9 human rights violation was simply incitement to
10 genocide? And if you don't know what incitement to
11 genocide is, it basically means that you were
12 standing around and doing nothing while, you know,
13 genocide was occurring.

14 What if that was -

15 MS. POPE: Well -

16 MS. MORGAN: - is that the same as?

17 MS. POPE: Oh, I disagree.

18 MS. MORGAN: Well, and I can only say that
19 from, you know, my experience with the Rwandan case
20 because we actually had to then interpret Rwandan
21 law. And guess what? That is pretty much what
22 Rwandan law says.

23

1 But, but I guess the difference between,
2 let's just say, someone who then does a beating,
3 someone who commits a rape, someone who commits a
4 murder, there should be – shouldn't there be some
5 discrepancy between those and the way that this is
6 structured? It's more just were you involved with
7 it, and not just actually looking at the underlying
8 conduct.

9 But then if we go back to the underlying
10 conduct, then again we're actually sentencing for an
11 offense that the person was never either charged with
12 or convicted with.

13 MS. POPE: Can I respond to that? Or do you
14 have another question.

15 CHAIR SARIS: And then Commissioner Friedrich
16 has one, and I don't know if anyone else does. So,
17 yes, respond.

18 MS. POPE: My brief response is that not only
19 is it appropriate, but Congress specifically directs
20 the Commission and sentencing courts to take into
21 consideration the nature and circumstances of the
22 offense, and the history and the characteristics of
23

1 the offender.

2 So it is wholly appropriate. You have a ten-
3 year statutory max on which a judge is entitled to
4 consider an appropriate penalty. Right now, the
5 sentencing guidelines treat someone who stole a loaf
6 of bread and lied about it, or someone who committed
7 a DUI and lied about it, exactly the same as Alberto
8 Jordan (phonetic) who in Guatemala not only threw a
9 live baby into a well, but then brought hundreds of
10 other villagers to a well where they were slaughtered
11 and thrown down into the bottom of the well.

12 So it is absolutely appropriate for courts to
13 consider that. And it is absolutely appropriate for
14 the Sentencing Commission to provide some benchmarks
15 so that courts are not sentencing all over the place.

16 CHAIR SARIS: Thank you. Commissioner
17 Friedrich, and then Judge Hinojosa.

18 COMMISSIONER FRIEDRICH: Ms. Pope, I just
19 want to make sure I understand DOJ's proposal in the
20 immigration context.

21 You are recommending a three-tiered approach.
22 At one end of the spectrum you say it would apply to

23

1 offenders who lie about their membership in a
2 military or a paramilitary organization. And on the
3 other end, those who lie about their own involvement
4 involving large numbers of victims. Correct? And
5 what you're recommending are offense levels that
6 would put at the low end someone around the range of
7 five years, and the high end, the other end of the
8 spectrum, that the max is around ten, right?

9 MS. POPE: That's correct.

10 COMMISSIONER FRIEDRICH: And in between,
11 graduated according to number of victims? Is that
12 it?

13 MS. POPE: Well their involvement – there
14 certainly have been cases where someone is part of a
15 military unit that is committing human rights
16 abuses, that's involved in extrajudicial killings,
17 but not at the level of 50, not at the level of 100,
18 or 200, or, you know, some of the cases that we've
19 seen. So we think it's entirely appropriate for
20 courts to distinguish between someone who has
21 perpetrated significant numbers of extrajudicial
22 killings, for example, and someone who was merely
23

1 within the unit and stood by as these abuses were
2 committed.

3 COMMISSIONER FRIEDRICH: So your proposal,
4 one, is just the straight lie; the second is the lie
5 about their own involvement; and the third would be
6 the lie about the uninvolved of 50 or more -

7 MS. POPE: Of 50 or more victims, yes.

8 COMMISSIONER FRIEDRICH: Okay, so they'd be
9 five in between ten. And then those, just to clarify,
10 those are not facts that the Department would - the
11 prosecution would prove to the jury; these are
12 sentences for the judge?

13 MS. POPE: They're sentencing issues because
14 these are the sentencing guidelines. Like any
15 special offense characteristic, they're sentencing
16 issues for the judge to consider, yes.

17 But it's also true that when we are
18 prosecuting someone for lying on their naturalization
19 application, we are specifying the nature of the lie.
20 So, for example, in the Kobagaya case, one of the lies
21 that was alleged was that he'd been involved in
22 persecution. And that is true for all of the cases

23

1 where we have evidence.

2 We're specifically saying the lie here was
3 that this person did not participate in a genocide.
4 This person did not – so we are putting that evidence
5 before the jury.

6 But as in any case that ultimately gets to
7 the sentencing judge, the sentencing judge can
8 consider evidence if it's reliable, if it's been
9 established beyond a preponderance, that a jury did
10 not convict time.

11 COMMISSIONER FRIEDRICH: No, I understand.
12 But your charging document, isn't it – I can see
13 that you charge the lie about not being a member of
14 an organization. Do you in fact plead then the lie
15 about not committing crimes against others involving
16 more than 50 people? Is that the way you plead in
17 that specificity?

18 MS. POPE: Yes, we do. That is the way that
19 we've done it. And that is the evidence that is
20 going before a jury.

21 COMMISSIONER FRIEDRICH: And they have
22 special verdict forms so the jury can decide –

23

1 MS. POPE: Exactly. This is the lie. This
2 is the lie. Right.

3 COMMISSIONER FRIEDRICH: But you may have ten
4 lies, right? The jury needs to find one, right?

5 MS. POPE: Right.

6 COMMISSIONER FRIEDRICH: Okay.

7 MS. POPE: There may be -

8 COMMISSIONER FRIEDRICH: You get that
9 evidence before the jury, right?

10 MS. POPE: Yes.

11 COMMISSIONER FRIEDRICH: But the jury doesn't
12 have to find on each, correct? Correct me if I'm
13 wrong.

14 MS. POPE: That's absolutely right. It's
15 like a drug case, right, where a -

16 COMMISSIONER FRIEDRICH: It's a framing
17 issue.

18 MS. POPE: Right. We present the case to the
19 jury. This is the nature of the lie, and it's the
20 jury's decision, well, yes, he did lie about being a
21 member of this military unit, but you have not proven
22 to us that he lied about participating in -

23

1 COMMISSIONER HINOJOSA: That would be in the
2 immigration case?

3 MS. POPE: That's what we've done in our
4 immigration cases.

5 COMMISSIONER FRIEDRICH: But you just need
6 one.

7 COMMISSIONER HINOJOSA: In the criminal
8 immigration case?

9 MD POPE: Yes, in our criminal immigration
10 cases. Well you do just need one, but if we have not
11 established, if the only lie we've established is
12 that you -

13 COMMISSIONER FRIEDRICH: No, no, I know it's
14 perfectly appropriate for judges to decide these
15 issues at sentencing. I'm just - I was confused by
16 your response to Commissioner Jackson's question
17 about you do prove all of these up, because, yes,
18 while it's possible the jury checks all ten, you could
19 have the conviction for one, just they lied about
20 being a member of a group, or some other lie, right?
21 They lied about where they're from, right? It
22 doesn't have to be a lie about these enhancements.

23

1 It could be, but it's not essential to your
2 conviction, right? What we're really talking about
3 is a judge, for the most part, in most cases,
4 determining this at sentencing, right?

5 MS. POPE: Right. Because the range of
6 conduct that's now established under the advisory
7 guidelines is zero to six months. Then, yes, almost
8 all the value of it, the weight of it, is determined
9 in sentencing.

10 CHAIR SARIS: Last question.

11 COMMISSIONER HINOJOSA: I guess it's not
12 clear to me. Your statement is that in immigration
13 fraud cases you have charged and proven to a jury
14 that the lie was that they committed some kind of
15 human rights violation?

16 MS. POPE: It depends on the case.

17 COMMISSIONER HINOJOSA: And the jury actually
18 was asked to say yes or no on the jury verdict form,
19 rather than they just lied about some involvement in
20 something?

21 MS. POPE: It depends on the case. In the
22 cases in the -- in the 20-some cases we have, where all

23

1 we know is that the defendant engaged – was part of
2 the military unit that engaged in human rights
3 violations, that is the issue, that the defendant
4 lied about his military service, right?

5 But in that case, we're not seeking the
6 enhancement that he participated in human rights – you
7 know, killed a certain number of people. We don't
8 have that evidence.

9 COMMISSIONER HINOJOSA: We don't have that
10 enhancement –

11 MS. POPE: But there are cases, and in
12 Kobagaya, I think Ms. Morgan can speak to this, there
13 was – there were multiple lies at issue and a jury did
14 not convict on all of the lies.

15 MS. MORGAN: That's correct. I mean, they –
16 but –

17 COMMISSIONER HINOJOSA: But that was in the
18 immigration court.

19 MS. MORGAN: Yes – no, in a criminal court,
20 but the interesting thing about it is, like one of
21 the alleged lies was that he answered "no" to the
22 question: Have you ever committed a crime for which
23

1 you have not been arrested, charged, or convicted of?

2 And he answered No.

3 So you didn't actually get to these kind of
4 special factors that you're addressing. And the
5 reality is, while that may be their current practice
6 to include some of these factors that they're seeking
7 to create an enhancement for, or a supporting
8 enhancement for, they don't have to put those in
9 there.

10 And then that creates, our concern is, that
11 instead of a trial issue, it becomes a sentencing
12 issue, and at sentencing when you start talking about
13 having a trial about whether or not someone committed
14 a particular offense, the logistics of actually
15 bringing witnesses over, identifying that particular
16 evidence, just becomes unfathomable.

17 COMMISSIONER HINOJOSA: Just one real quick.

18 Ms. Pope, you pointed out that history and
19 characteristics of the defendant, because of
20 [3553(a)(1)] in fact becomes very important. So my
21 question to you is:

22 The Commission in deciding what to do with
23

1 regards to foreign convictions, with regards to
2 criminal history which is so important with regards
3 to history and characteristics of the defendants, in
4 4A1.2 says: "Foreign sentences: Sentences resulting
5 from foreign convictions are not counted, but may be
6 considered under §4A1.3," which is Adequacy of
7 Criminal History Category.

8 Would you be satisfied then, in the
9 immigration guideline to have either an application
10 note or something with regards to guidance, with
11 regards to upward departures, since the maximum is ten
12 years with regards to someone who lies with regards
13 to a certain type of – the lie is a certain type of
14 lie, as opposed to just lying about your age or
15 something else to that effect? Would that be
16 satisfactory to the Justice Department?

17 MS. POPE: I think that's better than
18 nothing, but I don't think it's enough. And the
19 reason I say that is because, if you look at the
20 cases where we've charged immigration violations or
21 naturalization violations, you see a wildly varying
22 range of sentences.

23

1 You see, if you read through the sentencing
2 transcripts, you see courts completely uncertain as
3 to what to rely on. Is this a person who is escaping
4 detection for prosecution in his home country? Is
5 this a person who should be sentenced for the torture
6 and murder of people?

7 You know, so you just see the courts are
8 really at a loss as to what to do with this
9 information. And I think the detrimental impact of
10 that is that there's no certainty, and there's no
11 consistency, and I think that's at odds with our
12 sentencing jurisprudence. And that's exactly why you
13 all are the body that has the best expertise and
14 judgment to weigh in on this issue and provide
15 guidance to courts.

16 CHAIR SARIS: Thank you both. It was a
17 wonderful presentation.

18 MS. POPE: Thank you.

19 MS. MORGAN: Thank you.

20 CHAIR SARIS: Okay. Lunch.

21 (Whereupon, a luncheon recess was taken.)

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AFTERNOON SESSION

CHAIR SARIS: Good afternoon, thank you to all for coming back, and this panel is on drugs and in particular BZP. Not taking them – Especially BZP, which I actually personally have never heard of until we got an inquiry from the – from a court asking us to consider this issue. So, to do that we have Scott – I'm going to say this wrong, if I get this wrong correct me, Masumoto?

MR. MASUMOTO: That's correct.

CHAIR SARIS: Okay. An assistant special agent in charge at the Washington Division of the Drug Enforcement Agency. Previously he held numerous positions with the DEA, both within the DEA and in the field.

Michael Baumann, Dr. Baumann, is a staff scientist at the National Institute of Drug Abuse in its Intramural Research Program, and an instructor in the Department of Biology at Morgan State University. Previously Dr. Baumann held positions in the Research Program as a research biologist and a staff fellow. He's the author of many publications and a frequent

1 speaker on neuropharmacology and drug addiction.

2 Welcome.

3 Penny Beardslee is the deputy federal
4 defender for the Eastern District of Michigan.
5 Previously she served in the State Appellate
6 Defenders Office in Detroit, and is the first vice
7 president and chair of the Education Committee for
8 the Criminal Defense Attorneys of Michigan. Welcome
9 to you as well.

10 So, I'm not sure whether you were here this
11 morning, so you haven't seen our fabulous light show.
12 Basically what happens is it's green and then goes
13 warning light at yellow, and then red light is the
14 hook, although we of course, let you go a little
15 over. So we're very interesting in what you have to
16 say, and for those who weren't here earlier, we have
17 read your statements, so it's really good to hit the
18 highlights.

19 Sir, you can go first. Okay?

20 MR. MASUMOTO: Am I on? Okay.

21 Madam Chair and Sentencing Commission, I
22 appreciate the opportunity to appear before you today

23

1 to discuss changes you are considering to the U.S.
2 sentencing guidelines. In light of the inconsistent
3 application of the guidelines in BZP cases, we urge
4 the Commission to amend section 2D1.1 to provide
5 a specific reference for BZP, Benzylpiperazine, and
6 the drug equivalency table and Application Note 10.
7 In doing so, the Commission should use a marijuana
8 equivalency for BZP. There is one-tenth the
9 equivalency for amphetamine actual. The Drug
10 Enforcement Administration (DEA) has no objection for
11 permission proposal for the adding to the guidelines
12 a list of chemical offenses, the safety valve
13 adjustment, which is now part of section 2D1.1.

14 BZP is a synthetic designer drug often abused
15 in combination with 1-(3-(Trifluoromethylphenyl)
16 -piperazine (TFMPP), and that controlled substance
17 as well as with other controlled and uncontrolled
18 substances. These combinations are promoted to
19 young people as a substitute for 3,4-
20 Methylenedioxyamphetamine (MDMA), known as ecstasy,
21 at raves and other all night dance parties.

22 BZP has no known medical use. It acts as a
23

1 stimulant in humans and produces euphoria and
2 cardiovascular effects increasing the users heart
3 rate and systolic blood pressure. Some hospital
4 emergency department admissions have been due to
5 sharply increased body temperatures that often result
6 from BZP use. BZP is largely produced overseas.
7 Reporting suggests that BZP powder and pills can be
8 ordered on the Internet from bulk chemical supply
9 companies in some foreign countries. Illicit
10 distribution of BZP in the U.S. involves smuggling
11 bulk powder through drug trafficking organizations
12 (DTOs) from foreign sources of supply. Most BZP is
13 smuggled into the U.S. from Canada. U.S. DTOs
14 generally handle wholesale and retail distribution,
15 and there have been instances of violence attributed
16 to these DTOs. The bulk powder is mostly processed
17 into capsules and tablets. And BZP tablets marketed
18 as ecstasy have turned up in a wide array of colors
19 bearing imprints commonly seen on MDMA tablets, such
20 as crowns, hearts, butterflies, smiley faces, or
21 bull's head logos. A particular concern is the
22 seizure of BZP, TFMPP tablets in and around schools
23

1 where their resemblance to candy or children's
2 vitamins, places young children at risk for
3 accidental ingestion.

4 As of February 2010, BZP combination tablets
5 were sold for approximately ten dollars per pill at
6 the retail level. Distribution of BZP is no longer
7 minor in comparison with MDMA distribution, as DEA
8 had earlier reported in 2001. DEA data reflects that
9 over 380,000 tablets containing BZP were seized in
10 2007. With that number, more than doubling to over
11 one million tablets in 2008. By 2010, the numbers of
12 seizures soared to nearly 2.2 million tablets.

13 Substances regulated under the Controlled Substances
14 Act (CSA) and referenced in section 2D1.1 often
15 share core chemical structures that allow scientists
16 to group substances into chemical classes, such as
17 phenethylamines, opiates, tryptamines, etc. Among
18 the controlled substances listed in section 2D1.1
19 there are no other substances of the piperazine
20 structural class, which would include BZP.

21 Although some studies show that BZP is
22 between one-tenth and one-twentieth as potent as

23

1 amphetamine, these studies measures different
2 effects. The study most relevant to measuring abuse
3 liability in humans reported a ten-fold difference
4 between BZP and amphetamine. In this study, subjects
5 reported that the subjective effects of a 100
6 milligrams of BZP were similar to those of ten
7 milligrams of amphetamine. This finding supports a
8 marijuana equivalency for BZP of one-tenth that of
9 amphetamine actual. We understand the some experts
10 have testified that the combination of BZP and TFMPP
11 is mostly closely analogous to MDMA, and that some
12 sentencing courts have adopted this conclusion.

13 The studies for the BZP-TFMPP combination of
14 BZP in combination with other substances are limited
15 and inadequate. The understanding of these substance
16 combinations is at its infancy, and therefore, we
17 cannot speak with authority as to the the effects of
18 various BZP combinations and proportionalities at
19 this time. Conversely, there are ample published
20 scientific studies showing that the pharmacological
21 effects of BZP are similar to those of amphetamine.
22 In light of the available scientific information, we

1 believe that the appropriate comparison for BZP
2 alone, or in combination with TFMPP, is amphetamine.

3 Part B of the proposed drug amendments would
4 add to the guidelines for listed chemical offenses,
5 the safety valve adjustment, which is now a part of
6 section 2D1.1, and that implements – and that
7 implements congressional drug sentencing policy. As
8 I noted at the outset, DEA has no objection to this
9 proposal. Judge Saris, Vice Chairs Carr and Jackson,
10 and Commissioners, on behalf of the Department and
11 DEA, I want to thank you for your continued interest
12 in drug sentencing, as well as for this opportunity
13 to discuss DEA's views regarding BZP and the safety
14 valve adjustment for listed chemicals. And I'm
15 pleased to answer any questions that you have.

16 CHAIR SARIS: Thank you very much. Doctor
17 Baumann.

18 MR. BAUMANN: Judge Saris and members of the
19 Commission, thank you for giving me the opportunity
20 to provide testimony about the designer drug
21 Benzylpiperazine, or BZP. As already mentioned, I'm

22

1 a staff scientist at NIDA and I've spent more than 20
2 years studying the mechanism of addictive drugs. So
3 I feel uniquely qualified to present evidence based
4 testimony that can contribute to the decisions of the
5 Committee.

6 My colleagues and I have published a number
7 of articles describing the pharmacology of BZP
8 related substances in peer review journals. My
9 testimony will address four specific issues, some of
10 which that have been touched upon: drug
11 classification, molecular mechanism, effects of the
12 drug in animals and humans, and then the co-
13 administration of BZP with other substances.

14 In terms of general drug classification, BZP
15 is a stimulant. BZP has a chemical structure with
16 similarities to amphetamine. Therefore, it's not
17 surprising that BZP administration produces feelings
18 of euphoria and increased energy; analogously effects
19 of amphetamine-type stimulants. BZP exerts these
20 psychoactive effects by increasing the amount of
21 chemical messenger, or transmitter dopamine, in the
22 brain. Specifically in areas related to pleasure.

23

1 Repeated administrations of this drug will cause
2 repeated increases in dopamine. This results in
3 habitual use of the drug – hallmark feature of
4 addiction.

5 Number two, the molecular mechanism of BZP is
6 most similar to that of methamphetamine. Like all other
7 stimulants, BZP interacts with transporter proteins
8 on the surface of dopamine nerve cells. These
9 transporters – they are channel-like pumps which move
10 dopamine molecules from the outside of the cell to
11 the inside. BZP binds this protein and reverses the
12 normal direction of transmitter flow. Thereby,
13 dumping large amounts of dopamine outside of the
14 cell. It's a very specific mechanism of action, it's
15 known as transporter-mediated release. BZP's
16 classified as a dopamine releaser similar to the
17 controlled substance methamphetamine. It's
18 noteworthy that BZP also releases the transmitter
19 norepinephrine by interacting with norepinephrine
20 transporters. So it not only effects dopamine, but
21 it also effects norepinephrine.

22 Number three, the pharmacological effects of
23

1 BZP. These effects mimic those produced by
2 methamphetamine. The effects of BZP in animals and
3 humans are mediated by the release of dopamine in the
4 brain and the release of norepinephrine from nerves
5 that lead to target organs, such as the heart. In
6 rats, BZP administration stimulates forward
7 locomotion, walking and running, and repetitive
8 movements such as up and down head motions. This
9 hyperactivity mimics the effects produced by
10 methamphetamine. BZP is about one-tenth as potent as
11 methamphetamine as a stimulant. Therefore, it takes
12 ten milligrams per kilogram of BZP to elicit effects
13 that are similar to one milligram per kilogram of
14 methamphetamine in animal models. Repeated
15 administrations of BZP cause locomotive sensitization
16 or reversed tolerance. This means that the same dose
17 of drug can have a much greater effects after
18 repeated doses. The occurrence of sensitization in
19 rats suggests that some effects of BZP might
20 intensify with repeated doses in people. And indeed
21 patents admitted to emergency rooms after high dose
22 exposure to the drug can exhibit psychotic symptoms,
23

1 such as agitation, paranoia, hallucinations.

2 Rats can be trained to self-administer BZP.
3 Since most drugs self-administered by rats are abused
4 by humans, it's likely that BZP has high potential
5 for abuse. The drug causes serious cardiovascular
6 changes, increased heart rate, irregular heartbeats,
7 elevated blood pressure, and after high doses,
8 increased body temperature and multisystem organ
9 failure can be life threatening.

10 As already noted, BZP is sometimes taken in
11 combination with other substances. It's taken in
12 combination with other controlled substances, legal
13 designer drugs, and alcohol. In particular, BZP is
14 taken with drugs to stimulate the serotonin system,
15 such as TFMPP. TFMPP binds the serotonin receptors
16 and releases serotonin. The combination of BZP plus
17 TFMPP has effects in animals and humans that closely
18 resemble those controlled by the controlled substance
19 MDMA, or ecstasy. It's important to note that the
20 effects of BZP alone and the effects of BZP in these
21 combinations are not the same. Prior to the DEA
22 scheduling of BZP, the combination of BZP plus TFMPP,
23

1 was sold as legal ecstasy in retail shops and on
2 Internet websites.

3 Within the context of drug combinations, it's
4 important to note that BZP inhibits liver enzymes
5 which help to breakdown other drugs. Because of this
6 effect, BZP can impair the metabolism of co-
7 administer illegal substances and prescribed
8 medications, leading to dangerous accumulations of
9 such substances in the body which can cause toxicity.
10 Substantial evidence from animals and humans
11 indicates that these drug interactions involving BZP
12 contribute to adverse effects, especially seizures -
13 the occurrence of seizures, chronic seizures in
14 humans.

15 To summarize, BZP is a designer drug with
16 significant risks from producing harmful effects,
17 especially when taken repeatedly at high doses, or in
18 combination with other drugs. The effects of BZP are
19 most similar to those produced by methamphetamine,
20 though BZP is about one-tenth as potent. Because BZP
21 increases dopamine concentration in the brain and
22 areas associated with pleasure, the drug has a

23

1 potential for abuse. Cardiovascular effects can be
2 dangerous. When BZP is taken with other substances,
3 the resulting pharmacological effects can be
4 different than BZP alone. The actions of BZP on
5 liver enzymes may increase the propensity for drug to
6 drug interactions, leading to toxicity.

7 Finally, I wish to express my sincere
8 gratitude to Judge and members of the Commission for
9 giving me this opportunity to provide the testimony.

10 CHAIR SARIS: Thank you. Ms. Beardslee?

11 MS. BEARDSLEE: I too thank you, Your Honor,
12 Madam Chair, Commissioners, for inviting me here to
13 talk about this very important subject. I think the
14 theme we are trying to convey is please proceed with
15 caution. We just don't have enough science out there
16 to make definitive decisions. And as we've learned
17 over history, it is easier to ratchet up than it is
18 to ratchet down. It is our position that the
19 Commission should use the lowest BZP conversion rate
20 that has been used by various courts across the
21 country. I highlighted a few of them in my chart
22 that I have submitted to the court, and that is the

23

1 one to one hundred ratio, which is consistent with
2 the methylphenidate, Ritalin, as well as with the
3 one-twentieth of amphetamine.

4 And I think two circumstances from the past
5 should also guide you. We all know how difficult it
6 was to deal with the crack guidelines. Those were
7 ratcheted up based on what I believe was inadequate
8 science at the time, but there was hysteria, and
9 there is a difference between substantial evidence
10 from a science perspective, and substantial evidence
11 in terms of increasing the amount of time someone has
12 to spend in prison. And I think that should be kept
13 in line. It turned out that there was incomplete
14 science with crack and it took us decades to fix it.

15 We are seeing similar issues arising with
16 MDMA. In 2001, at that time there were studies
17 primarily on animals, and now that the time has gone
18 on and we have a number of studies on humans, we're
19 finding that the effects are not as severe as was
20 originally thought. In fact, I spoke a little bit in
21 a footnote about the *McCarthy* case out of the

22

1 Southern District of New York where there was a lot
2 of expert testimony in that case. And it — It seems
3 clear that the science is not there to support that
4 MDMA is causing a number of the harms that would —
5 that were believed back in 2001. [The] judge [in]
6 *McCarthy* used the 200 to 1 ratio. And I think the judge
7 in the *McCarthy* case used that because he didn't
8 believe that MDMA should be treated more severely
9 than cocaine. And I think you should keep those in
10 mind when you're looking at how you handle these
11 cases. There is little science out there to indicate
12 that either BZP or BZP in combination with other
13 drugs, causes significantly detrimental effects.

14 The DEA talks about the one-tenth — It's one-
15 tenth less severe than amphetamine for the people who
16 are abusers of amphetamine. That study was based on
17 three humans. That's not sufficient in my mind to
18 enhance somebody's sentence.

19 In terms of treating BZP and TFMPP as MDMA, I
20 urge the Commission to not do that. I don't believe
21 there is — DEA itself in May 2010, said there are no
22 scientific studies saying — to show that these two

23

1 drugs mimic the effects of MDMA, and even chemically-
2 -Mr. Baumann – Dr. Baumann's report is that is it less
3 than that of the combination of them. It's less
4 severe than MDMA in its effects. So we have little
5 science available to indicate that these EP with
6 TFMPP is like MDMA and is as severe as MDMA.

7 And there is also questions on whether MDMA
8 is appropriate in its own right. So I urge you to
9 not tie it to that because we've already got
10 questions in that and in scoring MDMA alone. It's
11 our position that the Commission should not treat the
12 various combinations of substances found in these
13 pills differently and should focus on setting a ratio
14 for BZP. And I do acknowledge that's going to cause
15 some problems. Cases have come through with labs
16 that come back in these cases, and I have the notes.
17 The labs that come back in these cases are so variant
18 in terms of makeup and quantity. They range from BZP
19 alone, BZP with MDMA, BZP with TFMPP, and that's
20 within one case a lot of times. They range in the
21 quantities. And I did make, I want to say I made a
22 mistake and a misstatement in my – about the

23

1 quantities – I didn't turn over the page where I did
2 the second step in the math, and I had put that there
3 were quantities of between 12 to 13, to 200 grams,
4 it's actually – The figure in these BZP's is
5 milligrams, not grams. That figure was for the
6 total, which I then divided by the number of pills.
7 And we're seeing sometimes that it's not measurable.
8 We're seeing that it's sometimes measured as low as,
9 maybe, 30 to 40 milligrams. The most I have ever,
10 that I have seen in any of them was in a case
11 involving a very large shipment, and only two of the
12 exhibits had over one milligram, 100 milligrams.

13 So, with the DEA's remark about 100
14 milligrams at 10 milligram – to the 10 milligram
15 amphetamine – these pills are not – the average typical
16 pill is not coming out as high, as we are seeing it
17 at below 100 milligrams. I have a lot of other
18 things to say –

19 CHAIR SARIS: Can you summarize it in a few
20 minutes, the big points?

21 MS. BEARDSLEE: I think that the science is
22 not there yet, it's just not there yet, and I think

23

1 we should look to the 1 to 100. Let's see some
2 studies come out. I'd like to see some studies
3 involving humans. We haven't seen any of those. And
4 then if we find with further study that there needs
5 to be an increase, then we can always come back and
6 look at that.

7 CHAIR SARIS: Thank you very much. Yes.

8 COMMISSIONER HOWELL: Let me just -- I have a
9 question for Mr. Masumoto and a question for Ms.
10 Beardslee. But first, I want to start off by saying
11 to Ms. Beardslee, I just thought your testimony was
12 incredibly helpful in all of the work that went into
13 summarizing the expert reports. That was really, I
14 thought, enormously illuminating actually, and helped
15 put this whole issue in context.

16 I want to make sure that I understand that
17 from the FPD's perspective, you have some dispute
18 with DOJ, and I want to talk to Mr. Masumoto about
19 just how much of a dispute there is, about the
20 marijuana equivalency chart that we should use, ratio
21 we should use. But, does the FPD agree that when the
22 cases showing all of the math that we should move

23

1 forward in providing a marijuana equivalency for BZP?

2 That wasn't clear from your testimony.

3 MS. BEARDSLEE: Yes, I do agree with you.

4 COMMISSIONER HOWELL: You do agree with that
5 step?

6 MS. BEARDSLEE: I don't want to keep seeing
7 the -

8 COMMISSIONER HOWELL: All over the place -

9 MS. BEARDSLEE: Particularly line in -

10 COMMISSIONER HOWELL: I have to say that was
11 also very illuminating from your testimony, to see
12 how courts are going all over the place, so thank you
13 for that.

14 As I understand the discrepancy between what
15 the FPD is asking us to do, and I really do take to
16 heart the caution about not starting off high, only
17 to learn when the science becomes clearer that oops
18 we set it too high, because it is very difficult to
19 ratchet down as opposed to ratchet up. And as I see
20 the difference between FPD's very experienced, well
21 documented sort of analysis of the experts and the
22 cases with courts figuring this out, and individual

23

1 pieces based on expert testimony presented to them.
2 The DEA's view is it shouldn't be 1 to 100 grams of
3 marijuana, but 1 to 200 grams marijuana as the
4 ratio. Which really doesn't seem to be that
5 significant a difference when even from the 2007 DEA
6 report it said that BZP was – had a 10 to 20 degree of
7 less potency to amphetamine. So, I was just sort of
8 curious, why is DEA – because of the 10 to 20 less in
9 potency compared to amphetamine, is DEA then opposing
10 not proposing a, marijuana equivalency that's 10
11 times less potent than amphetamine, as opposed to the
12 20 times less potent than amphetamine? Why did you
13 opt for the 10 as opposed to the 20 less in potency?

14 MR. MASUMOTO: Well, while it's true that
15 there is not a whole lot of literature comparing BZP
16 to MDMA, or BZP to methamphetamine or any combination
17 thereafter, there is a body of scientific literature
18 that supports the notion that BZP is one-tenth the
19 strength of amphetamine.

20 COMMISSIONER HOWELL: But isn't that
21 literature also, I mean, isn't it sort of a little
22 bit all over the charts, so that scientists can

23

1 give themselves a little wiggle room to say it's 10
2 to 20 less in potency?

3 MR. MASUMOTO: Well, previously there have
4 DEA published reports that said 10 to 20. The
5 position we're taking today is that it's one-tenth.
6 Ten percent-

7 COMMISSIONER HOWELL: And the position you're
8 taking today is because of new research since 2007
9 report?

10 MR. MASUMOTO: It's the research that was
11 cited by our drug scientist to mean that there's
12 ample body of scientific literature to support the
13 one to ten versus the - I'm sorry, one-tenth versus
14 the one-twentieth posture.

15 MS. BEARDSLEE: Can I?

16 CHAIR SARIS: Dr. Baumann, can I follow up on
17 your question with Agent Masumoto?

18 COMMISSIONER HOWELL: Sure. Our comment put
19 out - -the question indicated that DEA's different
20 conclusions are based on the fact that some were
21 tests performed on subjects with a history of
22 amphetamine dependance, and for those it's a tenth as
23

1 potent as opposed to a twentieth as potent for other
2 folks.

3 And my question really to all of you is, is
4 that consistent with what we've done in the past? I
5 mean, do you look at this sort of amphetamine-
6 dependent people, is that the right benchmark, or is
7 it the larger population? And if it is amphetamine
8 in your view, why? Why is that, rather than just the
9 general population?

10 MR. MASUMOTO: Well, you know, I frankly - I
11 don't know that answer and I'll have to get that
12 answer to the Commission. But I don't know if naive
13 patients and substance naive groups have been
14 considered in the past, versus people that have been
15 users already.

16 CHAIR SARIS: Dr. Baumann, do you know?

17 DR. BAUMANN: Yes, so I think what's going on
18 there, is that the subjects that are drug experienced
19 are tolerant to the effects of the drug, and that's
20 why they're, it's 1 to 20 in normals and 1 to 10 in
21 the experienced users. That's probably where the
22 difference is coming in.

23

1 CHAIR SARIS: So it's - It's a tenth as potent
2 for the ones that who are using it? It seems
3 backwards, but a twentieth is potent for those who
4 haven't used amphetamines?

5 DR. BAUMANN: That's right. That's right.
6 And so -

7 CHAIR SARIS: It takes more or the other way
8 around?

9 MS. BEARDSLEE: It takes more for them -

10 CHAIR SARIS: The ones that have been using
11 it, takes more?

12 MS. BEARDSLEE: Right.

13 CHAIR SARIS: So why isn't it a twentieth - as
14 one twentieth as potent for the users of
15 amphetamines?

16 DR. BAUMANN: Part of the confusion here
17 might be the fact that I brought up the sensitization
18 stuff in rats, which is reversed tolerance, okay?
19 But it turns out that in human subjects who have
20 really used a lot - a lot of these rat studies what
21 they do is they expose the animals a few times, wait

22

1 a while and then give it to them again. A lot of
2 this sensitized towards enhanced effects of these
3 from these animal studies, are related to
4 conditioning effects, so there's a level of
5 anticipation when the animal goes back into the area
6 where it gets the drug, and so this enhances the
7 effects of the drug.

8 But in people, it turns out that in many
9 cases repeated stimulant users, and I'm talking about
10 folks that are really taking a lot or dependent on
11 it, are tolerant they are not sensitized, they're
12 actually tolerant. They require more drug to get the
13 same effect.

14 CHAIR SARIS: Right, so I guess I'm just
15 confused because according to the our notice for
16 comment, maybe this is correct, is that BZP is about
17 28 times less potent than amphetamine. Okay, but in
18 subjects with a history of amphetamine dependence,
19 it's ten times less potent?

20 DR. BAUMANN: That's right, that's right.

21 CHAIR SARIS: So we're going with the more
22 conservative estimate -

23

1 DR. BAUMANN: Yes, yes.

2 CHAIR SARIS: - by doing this, what DEA is
3 proposing here today?

4 DR. BAUMANN: Yes.

5 CHAIR SARIS: You're putting aside the
6 Ritalin issue, but - - right?

7 MS. BEARDSLEE: I think you're using the
8 exception rather than the norm.

9 CHAIR SARIS: But doesn't that benefit you if
10 we look at the amphetamine-dependent people?

11 DR. BAUMANN: It's 1 to 20.

12 CHAIR SARIS: I'm totally, is anybody else
13 confused?

14 I would think the defenders want us to use
15 the amphetamine.

16 MS. BEARDSLEE: One-tenth is for the abusers.

17 DR. BAUMANN: That's right.

18 CHAIR SARIS: Right.

19 MS. BEARDSLEE: That's the abusers. One-
20 tenth is for the abusers.

21 CHAIR SARIS: You say -

22 (multiple voices, inaudible)

23

1 MS. BEARDSLEE: One-[tenth] as potent – It's just
2 one whole sentence – as potent, right? For people who
3 abuse. People who are regular abusers, it's one-
4 tenth. The normal, normal user is one-twentieth as
5 potent as –

6 VICE CHAIR JACKSON: Because the normal user
7 can have smaller amount to reach the same effect?

8 MS. BEARDSLEE: Exactly.

9 VICE CHAIR JACKSON: Then the addicted
10 person?

11 MS. BEARDSLEE: Exactly.

12 VICE CHAIR JACKSON: So it's one-twentieth
13 for the normal person to get to the same effect?

14 DR. BAUMANN: Yes, that's correct, yes.

15 CHAIR SARIS: So the user – The user needs
16 more in the pill to get to the same effect?

17 (multiple voices, inaudible)

18 CHAIR SARIS: The users get there more
19 quickly?

20 DR. BAUMANN: The users need – Let's just turn
21 it into milligrams. The users need 10 milligrams,
22 and the normals need 20. Sorry, sorry-

23

1 MS. BEARDSLEE: No, it's -

2 DR. BAUMANN: The users need less.

3 CHAIR SARIS: The users need less. The users
4 need ten, so why -

5 DR. BAUMANN: The users need less to achieve
6 the same effect. I'm getting confused.

7 CHAIR SARIS: So why do we users rather than
8 the regular population? Why is that our benchmark
9 rather than the normal person on the street? With
10 respect to other drugs, do we start with the abuser?
11 Do we -

12 MS. BEARDSLEE: I can't figure anywhere
13 you're basing -

14 CHAIR SARIS: Who takes this stuff? Is it a
15 kid at a rave, or is it somebody who's sitting on a
16 street taking these, a lot of it? Abusers? Who's
17 taking it?

18 MR. MASUMOTO: Well, Chairman, the actual of
19 who's taking it, the demographic is youngsters, young
20 adults, in that rave party environment. They're the
21 ones that are using it. So, and - and -

22 CHAIR SARIS: So would you call them the
23

1 regulars, or are they immune to it already?

2 MR. MASUMOTO: Unless they're entry gateway
3 drug - they're using it. I mean.

4 CHAIR SARIS: But I'm trying to figure out
5 which pot, you have two, one-tenth and one-twentieth.
6 Who is the typical user of this? The regular person
7 or the one who is already an abuser? Do you know?

8 MS. BEARDSLEE: I don't think that there - The
9 science does not support - There's not a strong
10 science out there that says there is a significant
11 addictive effect from BZP. The science is not there
12 on that. That's why we maintain it should be one-
13 twentieth.

14 MR. WROBLEWWSKI: Dr. Baumann didn't you just
15 testify that there's-

16 DR. BAUMANN: That's not true. I mean, the
17 drug is self-administered in a rodent models, it's
18 self-administered in non-human primates, and it's
19 about a one to ten potency compared to methamphetamine
20 and amphetamine. Because there is such a change-.

21 CHAIR SARIS: Is that equivalent - I'm now -
22 it's meth and amphetamine?

23

1 DR. BAUMANN: There about the same, so, what
2 happens in the animal literature they're using – most
3 of the time they are using methamphetamine as the
4 comparison drug. And that's why I focused on
5 methamphetamine, because there's more literature on
6 animal administration in controlled settings. But I
7 think the 1:10 is what we find compared to
8 methamphetamine.

9 CHAIR SARIS: In animals?

10 DR. BAUMANN: In animals. But that's in
11 monkeys and also in rats. And there's very – It's
12 true that there's very little literature in the
13 humans, and I think this study that people are
14 talking about is a really old study that was from the
15 70's, if I'm not mistaken. But there is newer – So,
16 one thing I would like to say, is there is newer
17 information on this. I mean, there's a lot of
18 clinical studies that have shown that BZP is a
19 stimulant.

20 CHAIR SARIS: Could you or Agent Masumoto,
21 could you all provide us with the more recent
22 studies? Can we get that for the record?

23

1 MR. MASUMOTO: I will do my best to get that
2 information to the Commission, yes.

3 JUDGE HINOJOSA: Can we simplify this whole
4 thing by legalizing it again?

5 (Laughter.)

6 MR. MASUMOTO: Well, going back to the
7 chair's question about who's using this, I said, a
8 young demographic in the party rave kind of scene,
9 but in the larger context, and we're talking about a
10 naive user, entrance user versus somebody who's been
11 abusing it. The Commission should take into
12 consideration that BZP is seen in the larger context
13 with MDMA. Most times law enforcement encounters,
14 and I'm sure the public defender would agree- that
15 most encounters are thought to be MDMA or ecstasy,
16 and only after a laboratory analyze are we
17 determining that BZP is the active component as a
18 primary or secondard active ingredient.

19 CHAIR SARIS: Anybody?

20 MS. BEARDSLEE: Anecdotal, the users describe
21 BZP as needing a lot more of them.

22 CHAIR SARIS: Say that again.

23

1 MS. BEARDSLEE: They need a lot more of them.
2 The users who think that they are getting MDMA think
3 they need, they describe that they need more of these
4 BZP pills to even get close to that.

5 CHAIR SARIS: Who do you see at the users
6 going across the federal defender population?

7 MS. BEARDSLEE: What we're seeing in these
8 cases is not the rave party people, we're seeing - I
9 mean, some of our clients are users of the substances
10 that they're - and I don't know that - I can't say that
11 my clients are selling significantly to the rave
12 users, but I do think that the rave users probably
13 are the most, a larger amount of them.

14 MR. WROBLEWSKI: Ms. Beardslee, do you agree
15 that this is marketed as MDMA, that the people who
16 are buying that they don't know they are buying BZP,
17 it's advertised as MDMA, and that's the intent of the
18 sellers?

19 MS. BEARDSLEE: The reality is, yes. Yes,
20 but I also believe it's less severe, and less potent,
21 and there's less milligrams in these pills. We're
22 not seeing pills that are coming at the 100 milligram

23

1 that the DEA is talking about.

2 MR. WROBLEWSKI: Right, but were you here by
3 chance were you here all this morning?

4 MS. BEARDSLEE: I wasn't here all of this
5 morning, I almost saw the human rights.

6 MR. WROBLEWSKI: Once again, you know, this
7 morning there were a number of your colleagues who
8 talked about the importance of getting into the
9 intent of the offender, and that's why I'm asking
10 about this.

11 MS. BEARDSLEE: The intent of the — I can't
12 think of any, you know — We shouldn't be penalizing
13 what the intent is, we should penalize what — the
14 Commission itself looks to the harms —

15 MR. WROBLEWSKI: Can I quote you on that when
16 we get to the frauds? The fraud part?

17 (Laughter.)

18 MS. BEARDSLEE: Yeah, that's the other thing.
19 But in terms of drugs, I think that is important to
20 look at the harms, because that's what we're
21 concerned about, is what that does to society.

22 JUDGE HINOJOSA: But with regards to that,
23

1 the other drugs that we have on in the marijuana
2 guideline manual, we convert to marijuana. I guess
3 my question is, cocaine for example, does it take
4 more of cocaine for someone who is a habitual user,
5 versus somebody who's a first time user, with regards
6 to, and how does that compare to BZP?

7 DR. BAUMANN: Yes, I think so. It takes
8 more - Well, certainly, I have more experience with
9 ecstasy -

10 JUDGE HINOJOSA: Well okay -

11 DR. BAUMANN: There's profound tolerance to
12 ecstasy, so that people will start to stack doses to
13 try and recapture the original effect.

14 JUDGE HINOJOSA: So this is cross of drug
15 line, as to -

16 DR. BAUMANN: Well - The regular user needs a
17 certain amount versus the first one.

18 JUDGE HINOJOSA: Yes.

19 CHAIR SARIS: Just to go back to my question,
20 who are these people? Whose selling it for the most
21 part? Are they street dealers

22 JUDGE HINOJOSA: Our client.

23

1 CHAIR SARIS: Allegedly. Are they street
2 dealers on the corner?

3 DR. BEARDSLEE: This is not a homogeneous
4 group, they are across the board. We have the – Well,
5 there was one U.S. Attorney in Washington referred
6 to the hired labor who's driving drugs across the
7 border to a dealer here. We see the dealers here,
8 and the dealers here are ranging – ranging from low
9 level numbers to high level. The 1,000 to 200,000.
10 It's not a very homogeneous group, I don't believe.

11 CHAIR SARIS: Would you agree with that?

12 MR. MASUMOTO: And again, I revert back to my
13 comments about law enforcement encounters largely
14 with BZP, largely in the context of MDMA, and the
15 trafficking organizations are in the apex top players
16 that are, for the most part, off our shores.

17 Getting it to transportation and distribution
18 cells that in large measure have been transported
19 across our U.S./Canada northern border. A lot of our
20 concentrated seizures are along the northern border
21 with ports of entry and such. And, get distributed
22 through, just like any other contraband, cocaine,

23

1 heroin, marijuana, methamphetamine, throughout the
2 country by distributors -

3 CHAIR SARIS: They tend to be the ecstasy
4 type distributors?

5 MR. MASUMOTO: Well, if you are taking BZP,
6 yes. Because BZP is most -

7 CHAIR SARIS: It's marketed as ecstasy, as
8 we've been hearing?

9 MR. MASUMOTO: Yes.

10 CHAIR SARIS: Agent Masumoto, based on Dr.
11 Baumann's testimony that most all drug users, with
12 the different types of drugs, need more of the drug
13 to get the same effect over time, just the question I
14 asked you earlier about whether when you set the
15 marijuana equivalencies for these other drugs,
16 whether you look at the habitual user, like you
17 appear to be doing here, or just the average person.
18 If you could give us some additional information on
19 what your baselines were for those other drugs, that
20 would be helpful for us in looking at whether we
21 should apply the baseline of the user here, rather
22 than the average person.

23

1 MR. MASUMOTO: And I will get that
2 information to the Commission.

3 CHAIR SARIS: Anything else?

4 MS. BEARDSLEE: I would note, you know,
5 there's a Michigan High Intensity Drug Market
6 Analysis. BZP was not on that, it didn't make the
7 list. And I think the schools are reporting a higher
8 use of heroin, and now our U.S. Attorney's Office was
9 telling us that the seizures are not as often BZP,
10 but they're now this bath salt, cathinone, cathinone
11 type substance. So you may have another substance
12 coming your way.

13 CHAIR SARIS: We'll have you back next time,
14 huh? Anybody else? Thank you. Thank you very much.
15 We're a little ahead of schedule, but I'm willing to
16 keep going if we've got. Do we have everyone here
17 for the next panel? Who's here? Thank you very
18 much. Let's do a quick switch here.

19 (Change of panel.)

20 CHAIR SARIS: Alright, so our last panel of
21 the day involves miscellaneous. Everything from
22 *Shepard-Taylor* to cigarettes, so why don't I

23

1 introduce our panel. For someone who leaves now, you
2 will never understand what I meant.

3 Tristram Coffin is the U.S. Attorney for the
4 District of Vermont. Previously he served as
5 director at Paul Frank + Collins, a law firm in
6 Burlington, Vermont, as an AUSA in the District of
7 Vermont, as counsel to Senator Leahy on the
8 committee – on the district committee – Subcommittee on
9 Technology and the Law, and a litigation associate at
10 Wilmer – excuse me – Hale and Door, now WilmerHale, in
11 Boston. That dates your resume here.

12 MR. COFFIN: It does, doesn't it.

13 CHAIR SARIS: Marjorie Meyers is the Federal
14 Public Defender for the Southern District of Texas –
15 Judge Hinojosa's district. Previously she served as
16 an assistant federal defender and also specialized as
17 a criminal defense attorney at the law firm of
18 Bennett, Secrest and Meyers.

19 David Debold – I must tell you, you are like a
20 prince for coming back again, and again, and again,
21 so thank you very much. He represents the
22 Commission's Practitioners Advisory Group. And

23

1 Teresa Brantley another frequent visitor, always
2 welcome, always good ideas, who represents the
3 Commission's Probation Officers Advisory Group.

4 So, we have our light system, I think
5 everyone knows it by now. I think everyone's been
6 here at least once. You, have you?

7 MR. COFFIN: The time before, I think I was
8 upstairs.

9 CHAIR SARIS: Oh, alright, so it's basically,
10 it goes red when the time is up. Alright. But we
11 are very, very lax, so -

12 MR. COFFIN: But I'll try to keep it brief.

13 CHAIR SARIS: Okay. Go ahead Mr. Coffin.

14 MR. COFFIN: Thank you Judge Saris. I
15 appreciate the chance to appear here before you and
16 testify on behalf of the Department of Justice and
17 Federal Prosecutors across the nation regarding the
18 Commission's proposals for guideline amendments which
19 this year deal with many diverse sentencing issues.

20 I'm here to discuss a number of the
21 Commission's proposed amendment, all told nine. The
22 Department's written submission explains the position

23

1 of the Department of Justice on all of these. As I
2 have limited time, I'd like to focus my remarks on
3 just one issue, the categorical approach.

4 The Commission has proposed amending the
5 guidelines to specify the types of documents that may
6 be considered in determining whether a prior
7 conviction fits within a particular category of
8 crimes for purposes of sentencing enhancements.

9 We recommend the adoption of Option Two,
10 under which the sentencing court could consider a
11 broad array of relevant, reliable information in
12 deciding whether a prior conviction can be used for
13 enhancement purposes under the guidelines. Option
14 2D would permit the use of four types of documents
15 specified in *Shepard*, specifically: the terms of
16 the charging document, the terms of the plea
17 agreement or transcript of colloquy between judge and
18 defendant, in which the factual basis for the plea
19 was confirmed by the defendant, any explicit factual
20 finding by the trial judge to which the defendant is
21 sentenced and some comparable judicial record of this
22 information. We would also permit the consideration

23

1 of any uncontradicted internally consistent parts of
2 the record from the earlier conviction and any other
3 parts of the record from the prior conviction,
4 provided that the information is such other parts of
5 the record has sufficient indicia of reliability to
6 support its probable accuracy as per the policy
7 statement on disputed factors; that resolving
8 disputed factors as such in 6A1.3.

9 As the Commission points out, in determining
10 a particular prior or contributing – whether prior
11 conviction can be used to enhance a sentence under
12 the guidelines, lower courts have by analogy followed
13 the categorical approach in *Taylor* and *Shepard*. In
14 both *Taylor* and *Shepard*, however, the Supreme Court
15 was addressing this sentencing enhancement under
16 section 924(e), the Armed Career Criminal statute,
17 for prior convictions defined in (e)(2)(B) of section
18 924. Because the guidelines are not interpreting
19 section 924(e) and because they are advisory only,
20 the Commission is free to adopt guidelines that
21 operate in a manner different from the statutory
22 scheme. We believe it should do so here.

23

1 Option 2D best comports with the district
2 court's statutory duty to consider the defendant
3 criminal record, as well as the underlying conduct if
4 reliably proved in determining his sentence under
5 section 3553(a). It also furthers the broad purposes
6 of section 3661, which provides that no limitations
7 shall be placed on the information concerning the
8 background, character and conduct of a person
9 convicted of an offense which a court may receive
10 and consider for the purpose of imposing an
11 appropriate sentence. And, it reflects the Supreme
12 Court's traditional understanding of the sentencing
13 process as expressed in *Nichols*, which is less
14 exacting in the process of establishing guilt. As a
15 general proposition, a sentencing judge may
16 appropriately conduct an inquiry broad in scope,
17 largely unlimited by the rest of the kind of
18 information he may consider or the source from
19 which it may come.

20 Option 2(d) is also most consistent with the
21 proposition expressed in *Watts and Pepper*, that even
22 information about acquitted conduct may be considered

1 for sentencing purposes as long as it has sufficient
2 indicia of reliability to support its probable
3 accuracy. The admitting sentencing court's
4 consideration of relevant reliable information about
5 a prior conviction, only to the four types of
6 judicial documents listed in *Shepard* unnecessarily
7 hinders the court's ability to fulfill its statutory
8 duties. These limits have also spawned substantial
9 and unnecessary litigation about what constitutes a
10 judicial record of information comparable to that
11 continued in the charging document, a plea agreement,
12 or a transcript of colloquy between judge and
13 defendant, in which the latter confirmed that they
14 have factual basis for his plea. And an explicit
15 factual finding by the judge to which the defendant
16 assented. This litigation has been cited repeatedly
17 by judge, probation officers, prosecutors, and
18 defense attorneys alike, as the biggest single
19 application issue under the guidelines. We believe
20 Option 2D is most consistent with the Supreme
21 Court's jurisprudence, best effectuates
22 congressional policy as set up in section 3661, and

1 would most effectively address the single biggest
2 application issue, and best serves the purposes of
3 sentencing, including the goal of eliminating
4 unwarranted sentencing disparities.

5 For these reasons, I urge the Commission to
6 adopt Option 2D. In closing, I would like to thank
7 the Commission again for affording the Department
8 this opportunity to advocate our position. I look
9 forward to continuing its work with the Commission to
10 achieve fair and improved sentencing policies.

11 CHAIR SARIS: Ms. Meyers.

12 MS. MEYERS: Not surprisingly, I disagree.
13 I'm going to focus on three issues. I'm actually
14 going to reverse them: categorical approach, burglary
15 of non-dwelling, and sentencing imposed. All of
16 which – and the reason I choose these issues is they
17 all do address guidelines that result in exhorting
18 huge sentencing increases based on a defendant's past
19 criminal record. And to quote the First Circuit in –
20 I don't know if it's "jiggey" or *Giggey*, their en banc
21 case on burglary – in which the First Circuit rejected
22 the idea that burglary of a non-dwelling is per se a

23

1 crime of violence. They emphasize that the per se
2 approach has been criticized as sweeping within its
3 reach defendants who are not violent career offenders
4 and so do not pose such risks to the public as to
5 warrant prolonged imprisonment. The human and fiscal
6 costs of such unnecessary imprisonment are
7 considerable. To respond to the Department of
8 Justice's claim that revising the categorical
9 approach is the fairest and is consistent with
10 Supreme Court precedent au contraire.

11 The Supreme Court has repeatedly said that
12 the categorical approach – and it is not just based on
13 statutory mandates – that the categorical approach is
14 the most efficient and the fairest way of evaluating
15 prior convictions. And if any other approach will
16 result in endless mini-trials and litigation.

17 Imagine the case, if we are going to go into the
18 nature of prior convictions where the government
19 comes in and the defendant has been convicted, maybe
20 charged, with burglary of a dwelling – convicted of
21 burglary of a building, that's the result of plea
22 negotiations, it is the result of evaluation by

23

1 adversary parties in a determination of what they can
2 or cannot prove.

3 When we go in and say, "But judge, yes he was
4 convicted of aggravated assault, but it really wasn't
5 an aggravated assault." What we get from the judge
6 is, "I have to respect the state court's
7 determination, I have to respect what they were
8 convicted of." And the Department of Justice when
9 it's on the other side, would have us say, "Yes, the
10 parties negotiated a plea to some other offense, but
11 you need to go behind it." And the difference between
12 when we rely on other documents in the instant case,
13 versus the prior case, is that we are talking of
14 problems of timing and of distance.

15 If I have a defendant charged in McAllen,
16 with illegal re-entry, and his prior conviction is
17 burglary or aggravated assault in 1994 in Utah, I
18 have a duty – if we are going behind those documents –
19 to re-litigate and reinvestigate that offense. I
20 have a duty, the Supreme Court says under *Wiggins*,
21 and it is virtually impossible to do that. What the
22 Supreme Court recognizes is that the categorical

23

1 approach gives all of us equal access to the
2 conclusive documents that determine what the
3 defendant was convicted of. And that is the fairest
4 approach and it is the approach that results in the
5 least litigation.

6 Yes, the courts have had difficulty with
7 that, and in our prior statement, we talked about the
8 problems with the categorical approach. The problem
9 is not the approach, it's not broken, we've got it.
10 We struggled with it for ten years, but the courts
11 understand it. What is broken are multiple definitions.
12 And that what this will do is, you do the categorical
13 approach, for example, under 2L1.2, to figure out
14 whether it's an aggravated felony under the guideline,
15 that is [2L1.2](b)(1) – whatever it is – [2L1.2](c),
16 or it's aggravated felony. It could be an aggravated
17 felony under the guideline because you reject the
18 categorical approach. And then it's not an
19 aggravated felony under the – under the – under the
20 statute. That makes no sense whatsoever.

21 Turning to the issues of burglary of a non-
22 dwelling and sentences imposed, which are somewhat
23

1 related. Not surprisingly, we suggest that you
2 specify that burglary of a non-dwelling is not a
3 crime of violence. I know that shocks everybody.
4 But the reason for that is they are different
5 offenses. Every jurisdiction in the country, whether
6 it's state jurisdictions; whether it's the federal
7 jurisdiction; whether it's the federal guidelines;
8 recognize that burglary of a habitation, or burglary
9 of a dwelling, is a more serious offense than
10 burglary of a non-dwelling. Traditionally of course,
11 it was the only burglary, but it is also – It has a
12 greater risk of violence, and it has a very – Anyone
13 who has had their dwelling burglarized realizes that
14 it's an intrusion into your privacy that no other
15 burglary – burglary of a dwelling does not involve.

16 This issue of whether burglary of a non-
17 dwelling involves a risk of violence. As the Supreme
18 Court noted in *James*, where the Supreme Court said –
19 held only that attempted burglary of a residence has
20 a serious risk of – serious risk of injury to a
21 person. We don't have the statistics for that. As
22 Justice Scalia has said over and over again, this

1 residual idea, we don't have the statistics, we don't
2 even know what the residual prong means, and if we
3 really have our druthers, you would just get rid of
4 the residual prong, which of course is only in
5 4B1.2 and not in 2L1.2, nor should it be.

6 But there is a real difference between
7 burglary of non-dwelling and burglary of a dwelling,
8 and again these are cases, as the Commission knows,
9 where there are a lot of variances, both in career
10 offender and in 2L1.2. The variance rate where you
11 have 16 levels on 2L1.2 is greater than 50 percent.
12 It's even greater than 50 percent in the Southern
13 District of Texas. Because 16 levels is in many
14 cases too high and adding a burglary of a non-
15 dwelling to that would make it even worse.

16 Finally, turning to sentence imposed. It is
17 not surprising that in the circuits that represent
18 almost all defendants charged with illegal re-entry
19 that the courts have said that the sentence imposed,
20 if it's more serious, that that has to have occurred
21 prior to the deportation. That follows the statute.
22 The statute has a bright line: "Were you deported

1 after conviction of an aggravated felony?"

2 It also makes sense, as the courts have
3 pointed out, to look at what was the defendant – what
4 had the defendant done prior to their deportation,
5 rather than when they returned. The Department of
6 Justice talks about yeah, but if they revoke, then
7 they're bad dudes – they don't say it that way.

8 But, that's already captured in criminal
9 history. And more significantly, and I know
10 probation recognizes this. It's interesting, there's
11 a divide between north and south, those on the
12 border. The Department of Justice says, "Well,
13 usually they're revoked for something else, and it
14 isn't as if they're just serving their state time
15 before they come into federal custody." My
16 experience is that's nonsense. We often get
17 defendants whose only reason for revocation was that
18 they returned illegally. Sometimes they weren't even
19 caught first by the state, they were caught first by
20 the ICE who turns them over to the state, who revokes
21 them, who gives them five years, and then when they
22 think they are going home, ICE picks them up and they

23

1 get a federal charge. And so, in fact, as indicated
2 by the most recent Tenth Circuit case, that's exactly
3 what happened. ICE picked him up, turned him over to
4 the state, he was revoked only for returning
5 illegally and the Tenth Circuit rightly recognized
6 that the sentence imposed referred to the time prior
7 to deportation.

8 Thank you.

9 MR. DEBOLD: Good afternoon and thank you for
10 having me back to speak on the separate panel on
11 behalf of the Practitioners Advisory Group. I'm
12 going to limit my oral statement to the provision
13 that Ms. Meyers was just speaking of, the sentence
14 imposed language in 2L1.2. I will say that this is
15 an issue near and dear to the hearts of the PAG
16 members who are in the Fifth, Ninth, and Tenth
17 Circuits, where they do tend to have the experience
18 that you just heard described. Which is that quite
19 frequently the conduct, at least, of somebody's
20 earlier sentence being increased because their prior
21 probation or parole, or supervised release was
22 revoked, was the fact that they did re-enter the

23

1 United States after being deported. So, just to be
2 clear about what we're talking about here, we're
3 talking about an enhancement if the defendant was
4 deported and then illegally re-entered the U.S. after
5 a conviction, and he was deported after a conviction
6 for a felony; that's a drug trafficking offense for
7 which the sentence imposed exceeded 13 months.

8 Everybody agrees that if the sentence imposed
9 before the deportation was a 12-month sentence, then
10 that 16-level enhancement would not apply, and
11 instead there would be a 12-level enhancement for a
12 lesser drug trafficking offense. The problem occurs
13 when somebody then re-enters the United States.
14 Because they've illegally re-entered the United
15 States, they're in violation of the conditions of
16 their post-sentence release on the drug offense, and
17 they can get that sentence revoked and end up having
18 more time added; which will mean that their original
19 sentence of 12 months has something added to it and
20 that puts them over the 13 month threshold.

21 The problem then becomes that two people that
22 are otherwise similarly situated will end up getting

1 different enhancements, either a 16-level enhancement
2 or a 12-level enhancement; depending on, as Ms.
3 Meyers said, which jurisdiction gets a hold of them
4 first and imposes the penalty for their conduct. In
5 other words, whether the federal court gets a hold of
6 them first and sentences them for illegal re-entry
7 after deportation, or whether they end up being
8 prosecuted by the other jurisdictions, sometimes the
9 state jurisdiction, for the violation of the terms of
10 their earlier sentence, and therefore, the sentence
11 gets increased.

12 This kind of disparity really is
13 indefensible. Why the person ends up being handled
14 by the state, versus the federal first, that's after
15 they re-entered the United States, has often very
16 little to do with things other than whether which
17 jurisdiction got a hold of the person first; who they
18 were arrested by; whether they were arrested in a
19 different state than where the prior conviction, the
20 prior drug conviction occurred. Whether the state
21 has a consecutive versus concurrent sentence type of
22 presumption, versus the federal system. None of

23

1 these things can justify treating those two
2 individuals differently. And our experience is the
3 same in the border districts as the probation
4 department has reported which is that quite
5 frequently the reason why the prior sentence is being
6 lengthened, if you will – the prior drug sentence – is
7 precisely because the person has committed the
8 illegal re-entry offense. And then sometimes it's
9 the violation of their release after their serving
10 their prison sentence on the drug case to be in the
11 United States illegally. It's a new crime.

12 For all of those reasons, including the fact
13 that person is still going to have a higher criminal
14 history score by virtue of having the revocation time
15 added to the prior drug sentence, they're also going
16 to get higher points for having committed the illegal
17 re-entry while they were still on parole, or while
18 they had recently – while they were on parole or if
19 they were on some other sort of supervision. So it's
20 not like they are getting a free pass for that extra
21 criminal conduct that gets counted by adding to their
22 earlier sentence.

23

1 So for all those reasons, we encourage the
2 Commission to take the approach in which the sentence
3 imposed is based on the sentence that was imposed
4 before the person returns to the United States in one
5 of these illegal re-entry cases.

6 CHAIR SARIS: Thank you. Ms. Brantley.

7 MS. BRANTLEY: Thank you, and thank you again
8 for allowing me the opportunity to provide you some
9 feedback from our discussions from the Probation
10 Officers Advisory Group. I want to comment on the
11 categorical approach. And in listening to the
12 sentence imposed information here, I just want to
13 offer one comment. And mostly what I want to do is
14 talk to you for just a second about what isn't in our
15 paper. I think on both of these issues, sentence
16 imposed and categorical approach, you'll find that
17 ultimately we couldn't come to a consensus on some of
18 the requested comments.

19 So what I wanted to tell you was some of the
20 things that we discussed as one of the background and
21 why we couldn't reach a consensus. And as to
22 sentence imposed, it is true that those members who
23

1 represent the POAG, who represent border districts,
2 said precisely what two of my fellow panel members
3 have said. But then members from non-border
4 districts had exactly the opposite approach which
5 was, I've never seen a case come to me for illegal
6 re-entry that was not revoked for some other criminal
7 conduct. Although now that I'm listening to Ms.
8 Meyers, I don't know if that's a result of them
9 having being turned over to the state authorities by
10 ICE or not. So I have no comment as to that.

11 As to the categorical approach, it would seem
12 like initially to us, it was a fairly simple matter
13 to say that at least Option A, under – or Part A,
14 under either Option One or Two, is sort of a no-
15 brainer, because that's what we do anyway; we were
16 fairly concise and clear on that. That's exactly
17 what we do. We were clear that we did not like
18 either Part B or D of Options One or Two, because
19 both of them contain as one of the considerations,
20 uncontradicted and internally consistent
21 documentation, and I realize that that comes from the
22 Supreme Court dictum, but we decided that that was an

1 application nightmare to decide just what that meant.

2 We really were split and had some pretty
3 heated discussion about what it means to have indicia
4 of reliability such to support a probable accuracy.

5 But I would tell you this, when I started doing this
6 15 years ago, I could walk into a courthouse, I could
7 show my badge, and usually there was a separate
8 window that law enforcement could go to. Which
9 meant that I could just get to the front of the line
10 just a little sooner, or there was a clerk who dealt
11 only with federal or law enforcement officers. And
12 often if I built a rapport with them, they would let
13 me go in back and make my own copies of documents,
14 and these would be carbon copies of documents that
15 were filled out during a hearing and they're
16 handwritten.

17 Today, that's not at all what it looks like
18 to go and get court documents. There's fewer and
19 fewer clerks available to help with interface with
20 members of the public, so I am in line with everybody
21 else and I'm not complaining about that, but it's

22

1 just another element of obtaining records that maybe
2 you weren't aware of.

3 And, in trying to become more efficient, a
4 lot of the courthouses are sort of moving away from
5 handwritten documents, and they're moving into
6 documents and notes that they can save
7 electronically. So, they - We make arrangements with
8 them and they give us access to their database so
9 that we can print out those electronic dockets and
10 don't have to go to the courthouse and wait in line
11 with 50 other people to get it.

12 Now please don't interpret my comments to
13 mean that we're unwilling to work hard, because we
14 are willing to work hard and do what it takes to make
15 sure that the court has what it needs to have for
16 sentencing. But the issue is that what the documents
17 look like are a little different than some of these
18 documents being listed here today for consideration
19 for the categorical or modified categorical analysis.

20 And here's what we argue about and worried
21 about. I realize that this proposal speaks in its -

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1 couched in its language it says, that if you need to
2 do this analysis to go beyond the fact of conviction
3 and the statutory definition of the prior offense. I
4 realize it says that in there. But we're afraid that
5 that's going to get somehow whitewashed and we're
6 going to find ourselves in every case, and maybe even
7 for criminal history points, saying, "If all I have
8 is this electronic docket, well then it can't even
9 get criminal history points now." That's what we're
10 afraid is going to happen. So, that was the reason
11 why we couldn't reach consensus beyond Option A,
12 which is what we're already doing for the modified
13 categorical approach.

14 We sought, sort of unintended, but ultimately
15 resolved issues happened. For example, with 2L1.1,
16 when it was initially modified some years back to add
17 the different levels based on criminal history,
18 something we didn't see coming was that now there was
19 a new argument that none of the criminal history
20 should get points, because it's happening during this
21 offense – this continuing offense that started when a
22 person entered, and ended when a person was found.

23

1 So none of it should get criminal history points,
2 because that makes it relevant conduct; because it
3 happened during the offense of conviction. Ultimately
4 it took while -- but ultimately that was resolved and
5 said, no that's not how we calculate criminal
6 history. But this just has the potential in our view
7 to veer off into a direction that we are sitting here
8 not able to articulate or anticipate at this time,
9 and if it means that we have to have a handwritten
10 document of -- or a judgment or the actual documents
11 that are no longer being stored onsite by county
12 courthouses anymore, I just think that's an issue you
13 should be aware of before you make a decision.

14 Thank you.

15 CHAIR SARIS: Thank you. Go ahead.

16 VICE CHAIR JACKSON: First of all, thank you
17 all for being here, our last panel. It's never easy.
18 Ms. Meyers, I understood from your written testimony
19 that the defenders object to any version of the
20 categorical approach language that was proposed. You
21 know, including the Option A which -- some would say
22 was an attempt to just codify the *Shepard/Taylor*

23

1 approach. And as I understood your testimony – or
2 that was written, the problem seems to be that the
3 language in Option A did not suggest that the
4 Commission, or that the guidelines would be satisfied
5 by the pure categorical approach, that sort of – you
6 know, that you are automatically going beyond just
7 the statute. So, if one could cure that problem;
8 say, set it up so that the categorical approach is
9 the first step and then if need be because the
10 language of the statute and ambiguities – you have to
11 go to the modified categorical approach, then you do
12 the *Shepard/Taylor*. Would the defenders at that
13 point be excepting of, and kind of an Option A that –
14 Yeah, should we just leave it alone no matter what.
15 We think you should leave alone – the Supreme Court
16 told everybody what to do and they forgot it, but
17 certainly Option A tries to track what *Shepard* says
18 and our main concern was this idea that courts seem
19 to think that you jump to modify it in every case;
20 and you don't. But, to the extent track *Shepard*, we
21 don't think it's necessary, but that's the only
22 option that we think is acceptable and workable.

23

1 Thank you.

2 VICE CHAIR CARR: While we're on the same
3 subject, I'm a little confused by the idea that
4 Option D somehow makes it less reliable other than
5 making more documents available. Back to Ms.
6 Brantley's point, obviously a docket sheet that is
7 clear, and everyone understands what the person was
8 convicted of, would be reliable under some
9 circumstances to be able to justify the enhancement.
10 It's like the - It takes us away from operating in the
11 fiction that this conviction never occurred, as
12 opposed to we know it did and we have reliable
13 information that it did. And it doesn't take away
14 from the fact that the approach will still be with
15 some of the cases where you have a statute that can
16 be violated in different ways. Obviously, the docket
17 sheet may not solve that problem. And so we still
18 have reliability, but we're not limited to certain
19 documents when we know for a fact that there's only a
20 specific way a statute can be violated. We have the
21 conviction; we're convinced it was a conviction; and
22 no one is denying it or presenting evidence that it
23

1 didn't occur; and so, what's the problem with that,
2 other than it may increase somebody's sentences
3 because we actually have – We can show that under the
4 guidelines at least, the determination would be
5 correct.

6 MS. BRANTLEY: Is that to me?

7 JUDGE HINOJOSA: Yes.

8 MS. BRANTLEY: Okay.

9 JUDGE HINOJOSA: Because I had people nodding
10 their head yes in agreement, so it has to be –

11 (Laughter.)

12 MS. BRANTLEY: The problem with D as I
13 understand it is, it's throw in everything and see
14 what happens.

15 JUDGE HINOJOSA: No, it's –

16 MS. BRANTLEY: I mean, it's –

17 JUDGE HINOJOSA: You're just going to have
18 your argument that there are three different ways
19 this statute can be violated judge, and you still
20 cannot prove what portion of the statute my client
21 actually violated, and so you win. But, there are
22 other situations where that argument is not

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1 available, we just don't have these other documents
2 and we still have the docket sheet or the abstract of
3 judgment, and sometimes the abstract of judgment will
4 actually use the statutory section that was violated;
5 and so why can we not rely on that when everyone in
6 the courtroom knows that there is this prior
7 conviction?

8 MS. BRANTLEY: There's so many options, I'm
9 not sure that we're talking about the same thing. As
10 I understand D, D is throw it all together. It's -

11 JUDGE HINOJOSA: You still have - You have to
12 be still convinced that the person violated that
13 particular statute as one would ordinarily understand
14 that aggravated assault is, for example. As opposed
15 to case law that says, that's not an aggravated
16 assault, or whatever. Or we say, that's not sexual
17 abuse of a minor, for example.

18 MS. BRANTLEY: I think you have to be
19 convinced that the defendant was convicted of
20 violating that statute. So, to the extent we're
21 talking about California abstracts of judgment - and
22 that's a big problem because a lot of these cases are

23

1 in California – It may be that you could say that the
2 abstract of judgment is sufficient for the California
3 Department of Corrections to rely on, and you can
4 look at that abstract to say, okay he was actually
5 convicted of delivery of drugs rather than
6 transporting drugs. But to go beyond that and talk
7 about, well, the affidavit says something, or – I
8 mean, that's what – That last option really –

9 JUDGE HINOJOSA: I mean, obviously, you would
10 still have to be convicted of the particular thing,
11 as opposed to just some affidavit and the statute,
12 take the actual conviction is now related to the
13 affidavit, as opposed to what you're actually
14 convicted of. I think that's what this means, as
15 opposed to – It just says, you don't have to have a
16 judgment itself as opposed to a conviction of a
17 particular statute being clear.

18 MS. BRANTLEY: D, as I read D, D allows you
19 to look at police reports, and affidavits in support
20 of complaints, and that's what we object to. If what
21 you're saying is there are jurisdictions that don't
22 have nice little judgment like the federal judgment
23

1 has, that the judgment everybody understands reflects
2 what that person was convicted of, that's fine. But
3 we would object to a police report that says, that
4 the defendant entered res - a house at 3553 Washington
5 Avenue and the defendant was convicted of burglary of
6 a building not a house. And in fact, in *Jackson* in
7 the Fifth Circuit case the defendant did enter a
8 house, but it hadn't been occupied for eight years
9 and he was convicted of burglary of a building and
10 the Fifth Circuit recognized that that was a burglary
11 of a building conviction. And so, you should not -

12 JUDGE HINOJOSA: Maybe we have a difference
13 here, but certainly in my mind, this would be - You
14 would still have to be convicted of this certain
15 crime, it's just that we don't have to have these
16 actual documents as listed in the Supreme Court cases
17 to prove this. It will solve the problem of what
18 portion of a statute - You still would have to be
19 convicted of an aggravated assault, or not just
20 because the underlying affidavit said something, as
21 opposed to what you're actually convicted of. And
22 maybe that's where we have a difference of opinion

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1 here as to what you think this means, as opposed to –
2 that we're actually going to go back and read that.

3 VICE CHAIR JACKSON: Yeah, on the same
4 subject, Mr. Coffin, it was interesting to me that
5 your testimony suggested that the Option D, in your
6 view, would be somewhat more efficient and lead to
7 solving some of the application problems; when my
8 instinct is that it would actually make them worse.
9 Because you would have two different standards. It
10 would – at least – At a bare minimum, you would have
11 the Supreme Court precedent which is applying in
12 certain contexts with regard to this same
13 categorization, you know, is this a crime of
14 violence, or whatever, under the statutes. And you
15 would have a different procedural operation going on
16 with regard to the guidelines if we accepted Option
17 D. So, I'm wondering about whether or not you think
18 that that would led to more litigation – or
19 application problem –

20 MR. COFFIN: I think it would for a couple of
21 reasons. First of all, the situation regarding the
22 statutory application and definitions is fairly

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1 narrow in circumstances, ACC – Armed Career Criminal –
2 and some immigration offenses. And similarly in the
3 guideline context, it's been fairly narrow context as
4 well. The immigration guideline, and career
5 offender. We have a way that's been shown to work
6 well, I think, in the guidelines for defining facts,
7 figuring out what those facts are, and it's set out
8 in section 6A1.3. And all Option D would allow is to
9 let the court look at the information, that the
10 probation office gets; and in my experience in our
11 probation office, anyways, it does an actual job in
12 getting information. I'm sure there are
13 difficulties. My guess is as things become more and
14 more online, there will be more access to
15 information as there is in other context.
16 Anyway, we get the information on whatever the fact
17 is; could be a record of conviction. The court looks
18 at it and makes a decision. If the information, the
19 judge finds to be reliable, the parties each have a
20 chance to argue about whether it's reliable or not
21 and so forth, and it may help the judge make a
22 decision about what the real situation that was going
23

1 on in this prior conviction is. It may not, in which
2 the case the judge is free to disregard that. But we
3 got the situation, if you look at the *Shepard* case,
4 out in Massachusetts, the Massachusetts burglary
5 statute, which prohibited breaking into a building,
6 ship or car, and it wasn't clear what the person had
7 done on the face of the charging documents in the
8 plea, and so forth. And yet it's clear in the
9 affidavit – supporting affidavit in his complaint,
10 that, you know, it was a dwelling they were talking
11 about. And indeed the court even looked at the
12 complaint to determine whether there was a
13 conviction –

14 VICE CHAIR JACKSON: So you may disagree with
15 *Shepard*, but we're not writing on a clean slate. I
16 mean, it exists – It exists with regards to certain
17 things. I mean, maybe you're right if this wasn't a
18 question that had not been addressed and the
19 Commission was looking at this for the first time and
20 what documents should we use. But now the Supreme
21 Court has spoken to that in one context.

22 MR. COFFIN: The Supreme Court is looking to

23

1 statutes, and by analogy we've adopted this approach
2 in the guidelines. Only by really analogy. You can
3 do what you want to do in writing this guideline, and
4 the guideline as written has not been without its
5 problems. And my suggestion is really, if we stop
6 having fights about what the documents are we can
7 look at, and let judges who are excellent at perusing
8 through this stuff and making facts with us helping
9 out along the way, we'll get to the merits of the
10 issue and just make a decision; and that will be less
11 problematic.

12 CHAIR SARIS: Do you want to go first, and
13 then Jonathan, okay?

14 COMMISSIONER FRIEDRICH: Ms. Meyers, help me
15 understand your point in advocating that we restrict
16 ourselves to the categorical approach as the Supreme
17 Court has defined it. I understand your point why
18 it's the most efficient for sure.

19 MS. MEYERS: Uh-hmm.

20 COMMISSIONER FRIEDRICH: You also said it's
21 the fairest approach and you said, based on timing
22 and distance issues; and I think your example was,

23

1 say you've got a a defendant who has a 1994 assault
2 in Utah -

3 MS. MEYERS: Uh-hmm.

4 COMMISSIONER FRIEDRICH: Now why wouldn't
5 you, through discovery, have the same access to the
6 same documents that the government's going to try to
7 rely on to prove whether -

8 MS. MEYERS: A, we don't. I mean, you just
9 heard about the probation's problem, we can't get
10 police reports.

11 COMMISSIONER FRIEDRICH: But if they're going
12 to rely on a police report, they're going to have to
13 turn it over to you in the court.

14 MS. MEYERS: But the police report isn't good
15 enough. We all know - and this is the difference
16 between - You rely on police reports for relevant
17 conduct. Now we don't like that, but we recognize
18 that's the law. The difference is, that's this case.
19 I not only get the police report, I have access to
20 the discovery in this case.

21 When I get a police report from 15 years ago,
22 it's highly unlikely that I can go to the scene and

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1 investigate that. It's highly - Or it's often the
2 case, that I can't go talk to the witnesses. All I
3 have in the face of the police report is putting my
4 client up there and saying, well it didn't happen
5 that way. And we all know that without some
6 corroboration, that's not going to be good enough.
7 For example, to show you the problem with police
8 reports that seem to be facts that can't be
9 contradicted. I had a case - Well, I had a case in
10 which the defendant was arrested for supposedly
11 trespassing and they happen to find a gun on his
12 person, which is why it was a federal case. And the
13 police report said he came through a hole in the
14 fence. This was a public housing property. When we
15 went out to the property, the hole in the fence as a
16 gate that had no gate on it. I can't do that in Utah
17 15 years ago. I can't challenge the police report.
18 I can't investigate it.

19 COMMISSIONER FRIEDRICH: So your issue is
20 just - you do have your client, but you don't want to
21 present your client - but once you do, it's not
22 uncontradicted. I mean, once your client says -

23

1 MS. MEYERS: No, but it's not uncontradicted.
2 If you've got a police report and a defendant, I
3 don't know that a judge could apply in this say, I'm
4 going to adopt a plea - -

5 VICE CHAIR JACKSON: It would depend on the
6 meaning of contradicted, right? I mean, if
7 contradicted was enough just to say, we disagree Your
8 Honor, then maybe. But if contradicted is you go to
9 prove that - and she's saying, how can I find the
10 evidence when it's 15 years ago?

11 MS. MEYERS: It's also - It isn't like the
12 court doesn't consider it, we're talking about a
13 guideline. The government talks about no limitation.
14 The judge is free in the right case where they really
15 think the person committed a burglary, we have cases
16 like that, judges do this. Yeah Ms. Meyers, you win,
17 it's only a four level increase, but your client
18 committed a burglary and they depart up -

19 COMMISSIONER FRIEDRICH: So they abuse -

20 CHAIR SARIS: Some courts do follow the
21 stead, you just don't want the guidelines because you
22 don't want -

23

1 MS. MEYERS: I recognize that courts do
2 follow it and that has been affirmed. They usually
3 don't go as high as it would be, but the problem is
4 the guideline's the starting point; and on prior
5 convictions we're starting way back. We're starting
6 behind the eight ball because we don't have access to
7 that information.

8 CHAIR SARIS: Mr. Wroblewski.

9 COMMISSIONER WROBLEWSKI: So, Ms. Meyers,
10 isn't - this whole discussion sort of - it reminded - it
11 sort of seems to me that it's forgotten that we're in
12 a post-*Booker* world. You talk about that, I think I
13 there's sort of an assumption that this is going to
14 be the most efficient way forward. But you described
15 an example, where the defendant is found guilty of a
16 burglary and we're not quite sure if it's a burglary
17 we're drawing our self with. Let's say we find this
18 1994 conviction, and it's categorically a burglary of
19 a dwelling. Okay, the documents say clearly it's
20 categorically a burglary of a dwelling. Don't you
21 have an obligation, now because of *Booker* and
22 3553(a), to find out - to try and find out, to

23

1 investigate – to find out whether that dwelling may
2 have been abandoned for many years; may not have been
3 used as a dwelling for over a decade; may have been
4 used as a flophouse; and present it if in fact those
5 were the case – if in fact those were the facts of the
6 case, to present that to a judge? And if you have
7 that obligation, then we're not in this efficient
8 pre-*Booker* world, we're in a world where we have to
9 go and investigate what happened. You have to go
10 investigate it. Perhaps the prosecutor has to go
11 investigate it. And then present it to a judge. So
12 it seems to me that I don't quite understand the
13 efficiency.

14 And then secondly, on sentence imposed, what
15 if the Commission limited the revocations that might
16 count to non-reentry offenses. So, for example, if
17 the defendant came back in and committed a new crime,
18 a state crime, has nothing to do with reentry, and
19 then the revocation happened and the person was
20 sentenced to greater than 13 months. If they limited
21 that, wouldn't that address the problems and concerns
22 that you have Mr. Debold?

23

1 MS. MEYERS: To answer, the difference is the
2 starting point. And we all know the starting point
3 makes the difference. It makes a difference whether
4 it's a guideline enhancement or whether it's a
5 departure. Because the reality is, if we've got to
6 go to that of, is it really a burglary, most judges
7 will not depart. They say, "okay, this is good
8 enough," or they're going to go up a year, two
9 years – they're not going to start in 77 months
10 instead of 30 months.

11 And that's what makes the difference. I
12 mean, when the government says no limitation on
13 information, yeah, we're in a post-*Booker* world.
14 They can bring that information in, but the reality
15 is there are very few upward departures. There are
16 very few upward departures because the guideline is
17 already so high. And so, yeah, if it's really going
18 to be a fight, I've got to sit down with my client
19 and say, "Hey, if I litigate this, are we going to
20 win it?" But the reality is, most of the time even
21 if the judge considers it, they're not going to 77
22 months. They're not going as high. So that's why it

23

1 makes a difference what the starting point is.

2 COMMISSIONER WROBLEWSKI: But shouldn't the
3 starting point - Shouldn't the starting point be
4 actually based on the facts?

5 MS. MEYERS: The starting point - It says
6 after conviction. And the other problem is the
7 starting point. These are cases where the
8 defendant's sentence is being dramatically increased,
9 not on what he did in federal court, but in what he
10 did before. Every client I've ever had says, "Yep, I
11 paid, I already paid for that." They're right. Are
12 you really going to increase somebody who crosses the
13 border - that's the problem with the guideline in
14 general. That's the problem with career offender.
15 You're not punishing them for what they did, you're
16 punishing them for what they were punished for
17 before. And to go back to these prior convictions,
18 which are already counted in criminal history; which
19 are already counted in offense levels; to go back and
20 litigate these and start higher up based on what the
21 parties at the time decided was not what they would
22 be convicted of. It's not fair and results in

23

1 sentences that are too high.

2 MR. DEBOLD: So the question to me about what
3 if the new conduct was other than the reentry itself.
4 You do run into some line drawing problems, because a
5 lot of times a person's - say they were given parole
6 or supervised release, a lot of times that gets
7 revoked for reasons other than - it's for new conduct,
8 but it's not necessarily a new crime. It can be
9 noncriminal conduct that's a condition or probation
10 and parole, that will end up basically exaggerating
11 the sentence that was already imposed that was below
12 13 months, so that it now goes above 13 months. And
13 our position is, that because if that is a new crime
14 and that is the reason why their prior sentence was
15 revoked and added to, but that's going to get caught
16 up in criminal history. They're going to get -
17 They're going to get punished for that. There's no
18 question. They're going to get punished for that in
19 their criminal history score. The question is, do
20 you have this additional four level increase on the
21 offense level side of the equation based upon a new
22 criminal conduct that is already going to be counted
23

1 in the criminal history. And we think the cleanest,
2 easiest way, and for frankly the fairest way, is to
3 treat these people in this situation the same. Count
4 it in criminal history if it's a new crime and – but –
5 but don't redefine what the prior offense was if when
6 we are talking about drug trafficking and whether it
7 was more or less than 13 months.

8 COMMISSIONER WROBLEWSKI: I guess back to Ms.
9 Meyers. But you do realize that – I'm sure you
10 recognize that it isn't the guidelines that increase
11 these punishments, it's as you and I have been around
12 for a long enough time to remember the maximum was
13 two years for an illegal reentry, and then it goes –
14 It got changed to ten years if you've been deported or
15 removed after committing a felony, and 20 years if
16 you've been deported or removed after committing an
17 aggravating felony, and then we have that whole
18 statutory list of aggravated felonies. Some of them
19 also actually rely on the imposition of a sentence of
20 at least one year.

21 So my question is, but you would not have an
22 objection to Option D if what – If what this would be

23

1 trying solve would be strictly the idea of: we know
2 there's been a conviction; we just don't have all
3 these other documents and it is a conviction for a
4 particular statute that definitely would be an
5 aggravated assault; and we're not relying on them for
6 something they weren't convicted of, but rather just
7 trying to impose our own ideas as to what they should
8 have been convicted of; as opposed to what they
9 actually got convicted of, you wouldn't have a
10 problem with Option D if that's what it meant to do,
11 right?

12 MS. MEYERS: A) I don't think that's - That's
13 not the way it would be interpreted, but yes, I do
14 have a problem with it.

15 COMMISSIONER WROBLEWSKI: But if - What is the
16 problem with that?

17 MS. MEYERS: Under the statute you can't do
18 it. Under aggravated felony, you can't do it, you've
19 got to decide what they were convicted of.

20 COMMISSIONER WROBLEWSKI: Right, but if you
21 have documents that you actually know what they were
22 convicted of, and we just don't have these particular

23

1 lists of documents here that you interpret as what
2 the Supreme Court is requiring, but we do have
3 documents that make it clear that was what they were
4 convicted of. Not what we think they should have
5 been convicted of, but what they were actually
6 convicted of. Because we have that on a pretty daily
7 basis.

8 MS. MEYERS: But Option D allows – because it
9 incorporates this internally inconsistent or not,
10 which the Supreme Court rejected. That's what
11 Justice O'Connor said that's a descent, and they said
12 you cannot look at that. They said you can only look
13 at what it's convicted of. Now, if it were talking
14 about are jurisdictions where you can't come up with
15 any document that's in the *Shepard* approved list, so
16 we have to find a document that tells us what you
17 were convicted of, I think we could live with that.
18 But if we're talking about, "well, the complaint
19 says" –

20 COMMISSIONER WROBLEWSKI: But we have a
21 docket sheet and we know exactly what they were
22 convicted – they've destroyed everything else, but it
23

1 tells us they were convicted, and the statute is
2 clear what they were convicted of, you would have no
3 problem with that? Just - even though we don't have
4 the indictment; we don't have the actual judgment,
5 because they've already destroyed the record, but we
6 have a docket sheet that says, "convicted of
7 violating such and such." That would be clear to all
8 of us, we just don't have these other documents,
9 would that be okay?

10 MS. MEYERS: I think they're problem is a
11 docket sheet is like minutes written by the courtroom
12 deputy and I'm not convinced that there they're
13 reliable.

14 COMMISSIONER WROBLEWSKI: But you -

15 MS. MEYERS: But that's - I don't think that's
16 D. I think that's A, I think that's your first
17 option. D allows everything but the kitchen sink.

18 COMMISSIONER WROBLEWSKI: The first option
19 that you have has its own - somewhat of a catchall,
20 some comparable -

21 MS. MEYERS: Yeah.

22 COMMISSIONER WROBLEWSKI: - reflective of
23

1 this information. I suppose if a judge said, "well,
2 the docket sheet is reflecting what is in the
3 charging document because it says you were convicted
4 of such and such," and that's where they would've
5 gotten that information, then at least you have a
6 more cabined kind of analysis. But I think the
7 concern is, if you go beyond as Ms. Meyers said, this
8 is what - this is what the Supreme Court allows when
9 you're doing the statutory analysis of what's a
10 violent felony under 924(e), for example. And, to
11 keep things consistent and also to avoid this
12 potential - I mean, we've seen this in other areas
13 where - where when you're saying, "what were they
14 convicted of?" It almost becomes, you know, one of
15 these, you know - Does that mean what the judge
16 actually found them guilty of or what they admitted;
17 does that mean what they actually did; they're
18 convicted; but they really did something different,
19 and that's part of the conviction. It becomes a very
20 difficult issue when you allow the consideration of a
21 lot of these other records beyond the ones that are
22 defined in the Supreme Court case law that we have to
23

1 struggle with already.

2 CHAIR SARIS: So in a related area, I've
3 struggled a lot with the burglary of a dwelling or of
4 a non-dwelling. And it split the circuits three
5 ways. In fact, sometimes splits a circuit
6 internally, as to what to do. And I think some
7 circuits refer to the fact that, you know, why is -
8 The Sentencing Commission hasn't addressed this. So
9 it's a very difficult issue and I'm trying to
10 understand, if you went with the middle approach - and
11 with some buildings would be a risk of violence; a
12 restaurant, say; or some place where there might be
13 people; another might be a shed in the middle of the
14 woods where you wouldn't be so worried. So I imagine
15 the First Circuit approach is the compromise in some
16 ways which is the mid-way, but how could you possibly
17 do that without bringing in all these other
18 documents? How would you figure out what happened as
19 to whether it really was the shed or whether it was a
20 restaurant where people are likely to be? I'd just
21 like to know how everyone thinks this would play out
22 in practice.

23

1 COMMISSIONER WROBLEWSKI: Well, I think it
2 would if - if you know -

3 MS. MEYERS: I think that's why it doesn't
4 work. I think you should say, it is or it isn't, and
5 it's a case by case - How does it play out in a
6 district court and then how does it play out in
7 appeal in terms of reviewing whether the district
8 court is right?

9 COMMISSIONER WROBLEWSKI: I think a lot of
10 these comments really go to the weight as opposed to
11 the admissibility of what we're talking about here.
12 You know, let the courts decide this. Get the
13 information, such as we can find it, and sort through
14 it. It isn't everything in the kitchen sink. It's
15 everything that has sufficient indicia reliability,
16 which is what the standard's been used under the
17 guidelines to admit information for question -
18 resolve sentencing disputes under the guidelines.

19 MS. MEYERS: But we didn't go with your
20 approach, which was just every burglary -

21 MR. DEBOLD: Let me follow up on that. I
22 understand the Commission's and court's struggle with
23

1 this issue, we think the Second Circuit approach is
2 appropriate, but the Department I also think – it's
3 fair to say, let's find some reason in, you know,
4 applying the same approach or advocating for moving
5 toward a broader set of documents to be considered in
6 the – under the response to categorical approach
7 issues in this dwelling versus non-dwelling issue.
8 So, in many, many situations it would be self-evident
9 whether it was a burglary of dwelling or a K-Mart
10 store. In the oddball situations, the courts
11 certainly a vehicle to sort through and proceed with
12 approximate caution in calling something a dwelling
13 or not a dwelling, and addressing that.

14 And of course these are advisory guidelines,
15 so there's truly outlier kind of situations and there
16 always are. The courts have the flexibility to
17 address certain issues.

18 CHAIR SARIS: So what do you want the
19 definition of burglary to be if you've been putting
20 aside the *Shepard* issue?

21 MR. DEBOLD: We advocated the definition to
22 be that a burglary of a non-dwelling is a violent

23

1 crime; however, we are not opposed to the third
2 option posited by the courts, and that's not - I've
3 been authorized to say that.

4 CHAIR SARIS: Which is the middle option?

5 MR. DEBOLD: The middle - I guess the middle
6 option, not the third option. Which is look at the
7 other documents and information to determine the
8 specific situation regarding the particular burglary
9 rate. Was it a burglary of a dwelling, or was it
10 actually that raised a serious risk of harm -

11 CHAIR SARIS: The judge will make this - Like
12 the shed in the woods isn't, but the restaurant is?

13 MR. DEBOLD: Exactly.

14 CHAIR SARIS: So you'd want us to look at the
15 whole ballpark of information, and by preponderancy
16 evidence decide whether -

17 MR. DEBOLD: - Preponderance of the evidence
18 and make a decision -

19 CHAIR SARIS: Decide whether there's a risk
20 of violence?

21 MR. DEBOLD: And there's a standard of review
22 to deal with that on appeal too.

23

1 CHAIR SARIS: So doesn't anybody else have?

2 COMMISSIONER HINOJOSA: Just one final point,
3 on the 50 percent departure that's fast track
4 included, I guess?

5 MS. MEYERS: Yes, it is. It's actually the
6 Southern District of Texas in 2010 was 59 percent
7 from the 16 levels, and it was about -

8 COMMISSIONER HINOJOSA: But it included the
9 fast track?

10 MS. MEYERS: Yes, it did but as you know we
11 don't have much fast track in the state.

12 COMMISSIONER HINOJOSA: We did in 2010.

13 MS. MEYERS: Two divisions.

14 COMMISSIONER HINOJOSA: But it was -

15 (Laughter.)

16 COMMISSIONER HINOJOSA: But it was a huge
17 portion -

18 MS. MEYERS: But it's 34 percent of the non-
19 fast track sentences. Now granted a lot of them are
20 slightly over-represented in criminal history.

21 COMMISSIONER HOWEL: Can I ask? If you
22 wanted the middle option, to which is the First

23

1 Circuit option for what I'll say, which is - you know,
2 is neither dwelling or - not - excuse me. It's not
3 just categorically a non-dwelling, but it's something
4 in between, wouldn't a judge have to look at all this
5 stuff?

6 COMMISSIONER HINOJOSA: It'd be hard not to.
7 I mean, going back to Ms. Meyer's example. We're not
8 talking about what happened in this case, we're
9 talking about what happened in some case - it could
10 be, you know, many years ago, and what information is
11 available to test whether there's a - you know -
12 potential risk of injury, whatever that language is.

13 MS. MEYERS: And the residual prong is not,
14 was it dangerous in this case, it's the nature of the
15 crime, is it dangerous, so you'd have to - I mean,
16 which doesn't rule out, is it a restaurant; or is it
17 a restaurant that there's a guard there because the
18 whole point in most of the building burglaries
19 nobody's even there.

20 COMMISSIONER HOWELL: But then don't I have
21 to go beyond -

22 MS. MEYERS: Yes, you do, and that's why -

23

1 that's the problem. That's why -

2 COMMISSIONER HOWELL: A through D?

3 MS. MEYERS: - and that's the problem.

4 That's why -

5 COMMISSIONER HOWELL: You want both the
6 checks - you, you - I can't go with the middle option
7 unless I also go with an expanded record, right?

8 MR. DEBOLD: I think that's right, and the
9 court will make a decision on whether there's a
10 serious risk of harm based on the record before it,
11 or not. And if it wasn't, the record was bare on
12 that, that would be a good result.

13 MS. MEYERS: That prong only exists in
14 Chapter Four, so it makes no sense to apply it in 2L1.2,
15 because there is no danger of injury. You would only
16 be applying in Chapter Four, which is burglary as
17 opposed to in 2L1.2.

18 CHAIR SARIS: Anybody else have any? It's
19 been -

20 I'm sorry -

21 MS. BRANTLEY: I apologize, there was one
22 comment that I left off earlier in relation to

23

1 sentence imposed. That I just wanted to share with
2 you what an illegal reentry charge looks like in my
3 district, which may be the exception, and not
4 something for consideration. But when we talk about
5 before deportation or after deportation, in my
6 district we'd have to say, which one. Which
7 deportation. Because a typical charge will look
8 like, on March 14, 2012, Teresa Brantley was found in
9 the United States after having committed aggravated
10 assault and burglary of a dwelling, and after having
11 been deported – after having been deported on February
12 1, 1980, and March 1, 1985, and February 1, 2000, and
13 June 1, 2010; which deportation?

14 CHAIR SARIS: The one the government proves.

15 JUDGE HINOJOSA: It would happen to be
16 whatever one they plead to, and whatever one they had
17 the proof of at the time of the guilty plea. And if
18 the person had been deported and convicted of that
19 before that deportation, we have had that issue –
20 We've had for some reason, that at the time of the
21 plea they mentioned the 2001, but didn't mention the
22 2010. It's clear case law is, well, then we can't

23

1 count that as prior to your deportation.

2 CHAIR SARIS: Thank you.

3 MS. BRANTLEY: Thank you.

4 JUDGE HINOJOSA: Do you disagree?

5 CHAIR SARIS: We've got two good defense
6 attorneys right here.

7 (Laughter)

8 CHAIR SARIS: Thank you very much, it was
9 very helpful.

10 (Adjourned.)

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