

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON COMPASSIONATE RELEASE AND
CONDITIONS OF SUPERVISION

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WEDNESDAY
FEBRUARY 17, 2016

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The Public Hearing commenced in the Mecham Conference Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, Northeast, Washington, D.C., at 8:45 a.m., Patti B. Saris, Chair, presiding.

COMMISSIONERS PRESENT

PATTI B. SARIS, Chair
CHARLES R. BREYER, Vice Chair
RACHEL E BARKOW
DABNEY L. FRIEDRICH
WILLIAM H. PRYOR, JR.

EX OFFICIO COMMISSIONERS PRESENT

MICHELLE MORALES, Department of Justice

PANEL I: VIEWS FROM THE EXECUTIVE BRANCH

KATHLEEN M. KENNEY, Assistant Director/General
Counsel, Bureau of Prisons, U.S.
Department of Justice
JONATHAN WROBLEWSKI, Principal Deputy Assistant
Attorney General, Office of Legal Policy,
U.S. Department of Justice

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PANEL II: VIEWS FROM THE EXECUTIVE BRANCH

MICHAEL E. HOROWITZ, Inspector General, U.S.
Department of Justice

PANEL III: DEFENSE BAR PERSPECTIVES

MARGARET LOVE, Non-Voting Member, Practitioners
Advisory Group
MARIANNE MARIANO, Federal Public Defender,
Western District of New York

PANEL IV: EXPERT AND ADVOCACY GROUP PERSPECTIVES

MARY PRICE, General Counsel, Families Against
Mandatory Minimums
DR. BRIE WILLIAMS, Associate Professor of
Medicine, Division of Geriatrics,
University of California, San Francisco
JEFFREY WASHINGTON, Deputy Executive Director,
American Correctional Association

PANEL V: VIEWS FROM THE JUDICIARY

HON. RICARDO S. MARTINEZ, Member, Criminal Law
Committee of the Judicial Conference

PANEL VI: STAKEHOLDERS' PERSPECTIVES

VIJAY SHANKER, Deputy Chief, Appellate Section,
Criminal Division, U.S. Department of
Justice
MARIANNE MARIANO, Federal Public Defender,
Western District of New York
DR. VIRGINIA SWISHER, Member, Victims Advisory
Group

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

2 8:50 a.m.

3 CHAIR SARIS: Good morning. Good
4 morning to everyone and welcome to the United
5 States Sentencing Commission's public hearing on
6 two of the current pending amendments to the
7 Federal Sentencing Guidelines.

8 I'd like to extend a warm invitation
9 and welcome to all of you coming here.
10 Especially, we have had bad luck at Valentine's Day.
11 We tend to get ice and snow and storms and I know
12 a lot of you went through a lot just to get here.
13 So, thank you for coming and we look forward to
14 a thoughtful and engaging discussion on these
15 important issues.

16 But before we get started today, I
17 would like to state that the Commission joins the
18 nation in mourning the passing of Justice Antonin
19 Scalia.

20 The Supreme Court and we have all lost
21 a devoted and dedicated public servant who's had

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1 a big impact on federal sentencing. Many of the
2 commissioners have had the pleasure of knowing
3 him on a personal level.

4 I got to know him just a little bit,
5 but some of us -- actually, one of us was actually
6 a law clerk to Justice Scalia, Commissioner
7 Barkow, and we will miss him. And we extend
8 deepest sympathies to his entire family.

9 So, do you want to say a few things?

10 COMMISSIONER BARKOW: Sure. I
11 actually did not come prepared to talk about this
12 today. It's been a very difficult weekend, as
13 I'm sure you can imagine.

14 A lot of people have asked me -- I'm
15 a Democrat, and have asked me, gosh, wasn't it
16 tough clerking for Justice Scalia? And it was a
17 joy and an honor and he is one of the most
18 amazing, brilliant people I have ever met, and
19 what's tough is losing him.

20 So, the only thing I'll say this
21 morning since we are here for a Sentencing

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1 Commission meeting, is he was really a visionary
2 in terms of thinking about how our system works
3 with sentencing.

4 And because of his commitment to the
5 Sixth Amendment and constitutional
6 interpretation, I believe the opinions that he's
7 written in this area, they have been phenomenally
8 wonderful for our society and the functioning of
9 our government.

10 And thanks to the commitment to those
11 issues even when he was a lone voice until he was
12 able to pull together more voices to realize
13 exactly how right he was.

14 Now, we're in a time where I think we
15 have a very good approach to sentencing that
16 takes into account the jury's role in our system
17 and I think we should all be grateful for that.

18 And I miss him very much and I thank
19 you for the moment to reflect upon him. So,
20 thank you.

21 CHAIR SARIS: Thank you, and I know

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1 how difficult that was.

2 So, today we will hear testimony
3 relating to compassionate release, as well as the
4 amendment dealing with conditions of probation
5 and supervised release.

6 I look forward to hearing from many
7 distinguished witnesses, including a judge,
8 senior officials, public defenders, academics,
9 policy experts and advocates, all who share their
10 unique perspectives on the amendments the
11 commission is considering.

12 We will start with a discussion about
13 compassionate release, then turn to another
14 proposed amendment on conditions of supervision.

15 As I will discuss in more detail
16 later, the Commission's proposed amendment on
17 conditions of supervision seeks to make the
18 conditions of release more tailored to a
19 defendant's needs and problems, as well as easier
20 for defendants to understand and probation
21 officers to enforce.

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1 Looking ahead, we have a busy
2 winter/spring. Can't wait for that spring. On
3 March 16th we will be hearing testimony on the
4 other four pending amendments during the cycle.
5 And a full list of those amendments are posted on
6 our website, as well as in the Federal Register.

7 Public comment period for those
8 amendments is open until March 21st. We hope to
9 hear not only from today's witnesses, but also
10 from those of you watching this hearing through
11 our livestream broadcast -- hello to all of you
12 -- about the proposed amendments here today.

13 If you haven't already, please visit
14 our website, www.ussc.gov, to receive updates on
15 the proposed amendments, as well as our reports.

16 Now, I'd like to introduce the other
17 members of the Commission. Immediately to my
18 right is Judge Charles R. Breyer, who is a senior
19 district judge for the Northern District of
20 California and has served as a United States
21 District Judge since 1998. He joined the

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1 Commission in 2013 and serves as vice chair.

2 Next is William Pryor, who also joined
3 the Commission in 2013. Judge Pryor is a United
4 States Circuit Judge for the Eleventh Circuit
5 Court of Appeals appointed in 2004. Before his
6 appointment to the federal bench, Judge Pryor
7 served as the Attorney General for the State of
8 Alabama.

9 Next is Rachel Barkow, who also joined
10 in 2013. Commissioner Barkow is the Segal Family
11 Professor of Regulatory Law and Policy at the New
12 York University School of Law where she focuses
13 her teaching and research on criminal and
14 administrative law. She also serves as the
15 faculty director of the Center on the
16 Administration of Criminal Law at the law school.

17 To my immediate left is Dabney
18 Friedrich, who has served on the Commission since
19 2006. Immediately prior to her appointment to
20 the Commission, Commissioner Friedrich served as
21 Associate Counsel at the White House. She

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1 previously served as counsel to Chairman Orrin
2 Hatch of the United States Senate Judiciary
3 Committee and as an Assistant U.S. Attorney for
4 the Southern District of California, and then for
5 the Eastern District of Virginia.

6 Seated -- where is -- there she is, is
7 Michelle Morales, who serves as the designated
8 ex-officio member of the Commission representing
9 the Department of Justice. Commissioner Morales
10 is the Acting Director of the Office of Policy
11 and Legislation in the Criminal Division of the
12 Department. She first joined that office in 2002
13 and has served as its deputy director since 2009.
14 Commissioner Morales previously served as an
15 Assistant United States Attorney in the District
16 of Puerto Rico.

17 Now, let's turn to our discussion
18 today. The Commission's proposed amendment on
19 compassionate release seeks further comment on
20 whether changes should be made to the
21 Commission's policy statement found in the

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1 guidelines. And if so, how?

2 The proposed amendment contemplates
3 changes to the Commission's policy statement that
4 would revise the list of extraordinary and
5 compelling reasons for an offender to be
6 considered for compassionate release.

7 The Commission believes the issue of
8 compassionate release warrants our particular
9 attention today. After a series of reports
10 calling attention to current practices by the
11 Bureau of Prisons and calling for wholesale
12 changes to the compassionate release program, the
13 Commission included compassionate release as a
14 priority with this amendment cycle.

15 Today's hearing will allow us to hear
16 the views of these distinguished witnesses on
17 whether the Commission should amend its policy
18 statement on compassionate release found in the
19 Sentencing Guidelines at Section 1B1.13.

20 The Commission-proposed amendment
21 included a detailed issue for comment on whether

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1 any changes should be made to this policy
2 statement.

3 The amendment also offered one set of
4 possible changes to the statement that would
5 revise the list of extraordinary and compelling
6 reasons for compassionate release to reflect
7 criteria set forth in the Bureau of Prisons'
8 program statement. Again, I look forward to
9 hearing from our witnesses on this very important
10 subject.

11 Now, I will introduce the witnesses on
12 our first panel representing the Executive
13 Branch. First, Kathleen M. Kenney, who is the
14 Assistant Director and General Counsel for the
15 Federal Bureau of Prisons, Office of General
16 Counsel, and has held that position since 2004.

17 Ms. Kenney has worked for the Bureau
18 of Prisons, which we'll be calling here "BOP" for
19 people who don't know that acronym, in various
20 capacities since 1992.

21 Now, no stranger to any of us, sitting

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1 next to her is Mr. Jonathan Wroblewski who sat
2 right over there for a very long time as the ex-
3 officio member of the Commission. He became the
4 Principal Deputy Assistant Attorney General of
5 the Office of Legal Policy at the Department of
6 Justice in December 2015.

7 Prior to that, as I mentioned, he was
8 Director of the Office of Policy and Legislation
9 for the Criminal Division. And in that position,
10 was sitting at the end of the table as the ex-
11 officio. So, welcome back. We love seeing you
12 in this position.

13 (Laughter.)

14 CHAIR SARIS: So, I think we have the
15 light system. It sort of makes me think I'm an
16 appellate judge. So, it's great. But, anyway,
17 we're going to put on the lights and basically
18 Department of Justice -- folks should be limited
19 to about 10 minutes.

20 We did read your remarks which came
21 in, when was it, late last week and I think all

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1 of us did receive them, and go ahead.

2 MS. KENNEY: Good morning, Chair
3 Saris and other members of the Commission. Thank
4 you for inviting me to join you today to talk
5 about the Bureau of Prisons reduction in sentence
6 or compassionate release authority.

7 While the statute has been in place
8 for many years, we recently expanded our policies
9 implementing this authority. Before discussing
10 our reduction in sentence program, also referred
11 to as RIS, I'd like to give you a brief update
12 about the Bureau generally.

13 The Bureau currently incarcerates
14 approximately 196,000 inmates across the nation.
15 This is a substantial reduction from the nearly
16 220,000 inmates we housed just a few years ago.
17 This reduction is due, in part, to Amendment 782.

18 The decline in our population has led
19 to a substantial reduction in crowding in our
20 institutions and we appreciate the Commission's
21 efforts in passing Amendment 782. It has

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1 contributed greatly to the reduction in our
2 crowding.

3 As crowding decreases and our inmate-
4 to-staff ratio declines, we are able to enhance
5 our reentry programming, programming that is
6 critical to our mission of assisting inmates and
7 returning them to our communities as law-abiding
8 citizens, but we are not out of the woods yet.

9 Overall crowding remains at 19 percent
10 and the crowding at our high-security facilities
11 is at 45 percent. However, we are hopeful that
12 we will continue to see decreases in the size of
13 the inmate population in the next few years.

14 Turning now to the subject of RIS, the
15 first thing I should mention is that the
16 Department views the RIS authority as an
17 opportunity to release a number of offenders who
18 do not pose a danger to the community and who are
19 near death, incapacitated or face other
20 extraordinary and compelling circumstances
21 warranting early release.

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1 However, the goal of the program is
2 not to substantially reduce prison crowding or
3 the prison population. The RIS authority was
4 enacted as part of the Comprehensive Crime
5 Control Act of 1984 and is codified in 18 USC
6 Section 3582.

7 For many years after the law was
8 passed, the Bureau considered RIS requests from
9 inmates with terminal medical conditions
10 initially defined as a life expectancy of six
11 months or less, and later expanded to 12 months
12 or less.

13 Approximately 15 years ago the Bureau
14 again expanded the RIS program to include
15 requests from inmates who suffered from severely
16 debilitating conditions that made it difficult or
17 impossible to attend to self-care.

18 A subsequent expansion included
19 requests from inmates when a life expectancy
20 could not be determined, but the medical
21 condition was so poor there was no hope for

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1 recovery.

2 Later, we expanded our review to
3 include debilitating medical conditions such as
4 amyotrophic lateral sclerosis and other
5 neurological diseases. Finally, we considered
6 inmates who suffered organ failure and were not
7 eligible for an organ transplant.

8 In 2007 at the same time that the
9 Sentencing Commission revised its guidance
10 regarding extraordinary and compelling
11 circumstances for RIS, the Bureau advised wardens
12 that there may be an increase in the number of
13 RIS requests submitted for consideration from
14 inmates at both medical and non-medical
15 facilities.

16 The Bureau continued to review RIS
17 requests for medical circumstances feeling these
18 circumstances were clearly extraordinary and
19 compelling, and further that they were
20 circumstances for which the Bureau could
21 substantiate the facts as they related to the

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1 inmate's health.

2 In April 2013, the Bureau expanded RIS
3 medical criteria to include terminally ill
4 inmates who have a life expectancy of 18 months
5 or less, and for inmates who are either
6 completely disabled or capable of only limited
7 self-care and confined to a bed or a chair more
8 than 50 percent of their waking hours. This was,
9 in part, due to concerns about the scope of the
10 program noted by advocacy groups and others.

11 In August of 2013, the Bureau further
12 expanded RIS to three new categories of inmates;
13 elderly inmates who meet certain criteria
14 regarding age and the length of time served, and,
15 in some cases, medical impairments related to
16 aging; inmates for whom there has been a death or
17 incapacitation of the family member caregiver of
18 the inmate's child; and inmates whose spouse or
19 registered partner has become incapacitated.

20 We have designated a RIS coordinator
21 and an alternate at each facility to assist

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1 inmates and staff with understanding the RIS
2 program and to help process the requests.

3 We established regional social
4 workers to assist staff with release planning.
5 We also increased the number of attorneys
6 reviewing the RIS requests in the Office of
7 General Counsel to further expedite processing.

8 These changes to the RIS policy have
9 resulted in an increase in approvals. In 2012,
10 prior to our amended policy, the Bureau approved
11 39 request. In the past two years, our annual
12 approval rate has averaged 100.

13 Regarding the request of elderly
14 inmates, as of February 1, 2016, the Bureau has
15 approved 31 RIS requests for elderly inmates.

16 It is important to note, however, that
17 the RIS provisions by their very nature are only
18 applicable to a small percentage of Bureau
19 inmates. As such, they will likely have little
20 impact on our overall crowding.

21 For example, almost 60 percent of

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1 older federal inmates were sentenced after
2 reaching age 50. Moreover, within the older
3 inmate population, 13.5 percent of them were
4 convicted of sex offenses, 12 percent were
5 convicted of fraud, bribery or extortion
6 offenses, and 11.8 percent were convicted of
7 weapon offenses.

8 These offenses in many instances weigh
9 against compassionate release due to the
10 seriousness of the offense and public safety
11 concerns.

12 Additionally, the Bureau does not
13 house a large percentage of inmates with
14 significant medical concerns or disabilities.
15 Less than one percent, which equals about 1600 of
16 the Bureau's population, has been identified as
17 medical care level 4, our highest care level
18 reserved for our most seriously ill inmates.

19 Many of those individuals are neither
20 terminal, nor debilitated, but rather undergoing
21 treatment for conditions from which they will

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1 recover.

2 While older inmates, meaning inmates
3 age 50 or older, are more likely to have health
4 conditions requiring full-time assistance than
5 younger inmates, the vast majority, about 97
6 percent of them of older federal inmates, are
7 generally healthy and capable of self-care.

8 In April 2013, the Department of
9 Justice, Office of Inspector General, conducted
10 a review of the RIS program and made 11
11 recommendations for program improvement.

12 The Bureau implemented these
13 recommendations by amending our policy and
14 regulations, providing additional training to
15 staff, establishing an electronic tracking system
16 and database and making information about the
17 program more widely available to the inmate
18 population through the electronic law library,
19 electronic bulletin boards and the admission and
20 orientation handbook.

21 We are planning to provide time frames

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1 for processing requests when our policy is next
2 amended, which will address the final open
3 recommendation of that audit.

4 The Bureau remains committed to our
5 mission of safety, security and effective
6 reentry. We are committed to continuing to work
7 expeditiously to identify potential RIS
8 candidates and conduct thorough review of all RIS
9 requests to ensure deserving inmates avail
10 themselves of the program.

11 Judge Saris, Vice Chair Breyer and the
12 commissioners, I thank you for the opportunity to
13 appear before you today and I look forward to
14 hearing of the Commission's consideration on the
15 proposed amendments. I will now turn it over to
16 Mr. Wroblewski.

17 CHAIR SARIS: Thank you.

18 MR. WROBLEWSKI: Judge Saris,
19 Commissioners, good morning. It's nice to be
20 back.

21 It's my pleasure to be here with my

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1 colleague, Kathy Kenney, to discuss the
2 Department's implementation of the authority
3 granted under 18 USC 3582(c)(1)(A) to seek
4 reduced sentences in extraordinary and compelling
5 circumstances.

6 Ms. Kenney has just discussed the
7 program in general, some relevant data, some
8 changes that we've made to the program, as well
9 as some current statistics.

10 I'm here to share our view of the
11 policy underlying compassionate release and our
12 response to the Commission's consideration of
13 proposed amendments to the relevant guideline
14 provision.

15 There are three topics I'd like to
16 address in my oral statement. The first is
17 coordination between the Executive and Judicial
18 Branches on compassionate release.

19 The second is how the Department has
20 interpreted its duties under the applicable
21 statute. And finally, I'd like to touch on the

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1 Department's ongoing efforts reviewing the
2 program and how we can work together to find the
3 best policy.

4 Under the legal framework created by
5 the Sentencing Reform Act, once a lawfully
6 imposed sentence has been affirmed on appeal, it
7 is presumptively final.

8 To change such a final sentence, there
9 must be an explicit grant of authority from
10 Congress. We think this policy is generally
11 sensible, because in most federal criminal cases
12 the defendant has been zealously represented, has
13 been given the opportunity to fully present all
14 mitigating evidence, and a federal judge with
15 lifetime tenure has been required to consider not
16 only the applicable sentencing guidelines, but
17 also all of the sentencing factors spelled out in
18 Section 3553, including all circumstances
19 surrounding the offense and the offender.

20 The judge, then, is required, as you
21 know, to impose a sentence sufficient, but not

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1 greater than necessary, to achieve the purposes
2 of sentencing.

3 Upending a final sentence was intended
4 to be a rare event. In the Sentencing Reform
5 Act, congress delineated the limited
6 circumstances under which final sentence could be
7 modified.

8 The legislative history of the
9 compassionate release provision is clear.
10 Congress contemplated that such a reduction would
11 be appropriate in only, and I'm quoting here from
12 the Committee report accompanying the Act, only
13 in the unusual case in which the defendant's
14 circumstances are so changed, such as by terminal
15 illness, that it would be inequitable to continue
16 the confinement of the prisoner.

17 Under the compassionate release
18 program, Congress vested the sole power to make
19 a motion for a reduction in sentence in the Bureau
20 of Prisons. It also created a system whereby an
21 inmate could only receive a reduction if both the

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1 Bureau made the motion and a court granted such
2 motion after finding that indeed there were
3 extraordinary and compelling reasons.

4 In making that finding, the court is
5 required to act consistent with the applicable
6 policy statements issued by the Commission.

7 To work well, the compassionate
8 release program requires coordination across and
9 within branches of government. This is why we
10 believe the criteria for extraordinary and
11 compelling reasons should be developed in a
12 collaborative manner and that the criterion in
13 the guidelines manual and the Bureau's relevant
14 program statement should be consistent if at all
15 possible.

16 In our efforts to amend the program
17 statement in 2013, we specifically look to
18 Section 1B1.13 promulgated by the Commission and
19 incorporate its criteria.

20 We believe at this point it would be
21 appropriate to cross-reference the Bureau's

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1 program statement in 1B1.13 to ensure optimal
2 coordination of policy.

3 We think it would be counterproductive
4 and confusing to inmates, their families and the
5 public for the policy statement adopted by the
6 Commission to be significantly inconsistent with
7 the Department's program statement.

8 In contrast, Section 3582(c)(2),
9 which allows sentence reductions based on
10 guideline changes on motion of the defendant, the
11 Bureau of Prisons or the court, that section
12 expressly provides that the court may reduce a
13 sentence on compassionate release, but only here
14 on the motion of the Bureau.

15 Given the law that any reduction of
16 sentences for extraordinary and compelling
17 reasons must be initiated by a department motion,
18 we think any changes to the policy should be done
19 collaboratively.

20 This administration's view of what is
21 extraordinary and compelling reasons for a

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1 sentence reduction is broader than the views of
2 earlier administrations. It is consistent,
3 though, with the view of this Commission as
4 expressed in 1B1.13.

5 We agree with every administration
6 that has implemented the Sentencing Reform Act
7 that the authority to seek reductions in
8 sentences for extraordinary and compelling
9 reasons was not intended by Congress to be a
10 parole-like early release mechanism for older
11 offenders, but rather it was intended as part of
12 a system whose fundamental premise is that
13 offenders should serve most of the sentences
14 imposed by the courts.

15 An overly broad reading of the
16 statutory authority to seek a reduction in
17 sentence for extraordinary and compelling reasons
18 would nullify the principles of certainty,
19 finality and truth in sentencing that undergird
20 the act, as well as the need to avoid unwarranted
21 sentencing disparities among defendants with

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1 similar records who have been found guilty of
2 similar conduct.

3 The Department has never taken Section
4 3582(c)(1)(A) as an open-ended invitation to
5 second-guess the legislative decision to abolish
6 parole, to undermine the guideline sentencing
7 system, or to generally revisit the decisions of
8 courts in imposing sentences. Rather, it has
9 always been seen as a limited authority to
10 address inmates who are near death or profoundly
11 incapacitated or who face other genuinely
12 extraordinary and compelling circumstances.

13 Unlike the suggestion of the Inspector
14 General, we do not believe the compassionate
15 release program provides an appropriate vehicle
16 for a broad reduction in the federal prison
17 population.

18 As Ms. Kenney mentioned, we have
19 reviewed our program statement in 2013, and we
20 are again reviewing it in light of the recent
21 reports of the Inspector General.

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1 Consistent with Recommendation No. 8
2 of the 2015 OIG report, the Department has tasked
3 a new working group with reexamining the
4 Compassionate Release Program Statement.

5 This work is ongoing and we hope we
6 can find a way to collaboratively consider the
7 various suggestions that have been made by the IG
8 and others to amend the current policy.

9 In so doing, we will continue to take
10 into account the SRA's goals of transparency,
11 certainty and truth in sentencing while we strive
12 to equitably meet our goals of public safety and
13 justice in the imperative to ensure humane
14 treatment of infirm and incapacitated offenders
15 and those facing other truly extraordinary and
16 compelling circumstances.

17 Thank you for having us here today,
18 and we welcome your questions.

19 CHAIR SARIS: Thank you. Do you want
20 to jump in?

21 VICE CHAIR BREYER: Yeah, I wanted to

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1 ask -- I don't need a microphone, according to my
2 wife. I have two questions. One of Ms. Kenney,
3 and then one of Mr. Wroblewski.

4 My concern with all of this is not the
5 language that is being used, nor is it really
6 quarreling with what congress said with respect
7 to the -- where the motion resides. My concern
8 is how effective has this policy been
9 implemented.

10 And I note that there are roughly,
11 just taking these figures, and I'm sure that they
12 can be, you know, further refined, but there
13 roughly were 3,000 requests for relief of which
14 about 260 or 300 were granted. So, I mean,
15 that's a very, very small percentage.

16 It may be warranted, it may not be
17 warranted. I don't know, but my concern is that
18 the process takes so long that people who are in
19 this type of situation that otherwise might
20 qualify are not given relief because they died,
21 quite simply. And not so simple for them, but

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1 they, you know, it's become mooted by that.

2 And my question to you is, what is
3 your experience with respect to when a request is
4 made, how quickly does the Bureau act upon it,
5 and what has been the history of resolving these
6 applications?

7 MS. KENNEY: Sure. Judge Breyer,
8 with regard to inmates who are terminally ill,
9 those requests take precedent over any of the
10 other requests that we have.

11 We, too, are concerned that an inmate
12 -- should an inmate die during the process, and
13 to try to streamline and expedite the process we
14 took out the regional director as a layer of
15 review that was in our previous regulations. We
16 did that in 2013. And we have also dedicated
17 some more staff at the institution as far as
18 having a RIS coordinator. We've done more
19 training. We also have added the regional social
20 workers to assist with release planning.

21 Each individual case has its own

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1 complications whether -- depending on what kind
2 of care the inmate is going to need after, what
3 kind of financial care, but it is certainly the
4 message from our director, from my office, from
5 everybody that -- in any of these cases that are
6 terminally ill, we need to do everything we can
7 to expedite that.

8 In our next amendment to our policy,
9 we will be putting in time frames, guidelines for
10 staff to follow. And I think that will have a
11 huge impact on assisting us with getting these
12 things through as quickly --

13 VICE CHAIR BREYER: That's fine, but
14 what is your -- and I appreciate the steps that
15 you've taken.

16 MS. KENNEY: Yeah.

17 VICE CHAIR BREYER: I think they were
18 really important, but my question is a bit more
19 specific is because you have a history here, you
20 know, you started keeping these figures at a
21 certain date. You have all these figures.

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1 I would like to know from the Bureau
2 of Prisons, on the average, how many days it takes
3 to process these types of complaints.

4 I'd also like to know how many inmates
5 died while their request was being considered.
6 So, do you have the -- I don't know that you have
7 those figures today, but --

8 MS. KENNEY: I don't have the figure
9 on --

10 VICE CHAIR BREYER: -- could you
11 supplement the record?

12 MS. KENNEY: -- the average -- I can
13 supplement the record on the average number of
14 days.

15 VICE CHAIR BREYER: Great.

16 MS. KENNEY: And you're looking for
17 terminal cases; is that right?

18 VICE CHAIR BREYER: That's right. I
19 mean, I know that there are other --

20 MS. KENNEY: Right.

21 VICE CHAIR BREYER: I understand that

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1 there are other, but the vast majority are
2 medical.

3 MS. KENNEY: Right.

4 VICE CHAIR BREYER: And though there
5 are other criteria.

6 MS. KENNEY: Right.

7 VICE CHAIR BREYER: So, if you could
8 supplement the record --

9 MS. KENNEY: Sure.

10 VICE CHAIR BREYER: -- I'd appreciate
11 it.

12 MS. KENNEY: And I do have the data
13 on -- in 2015, 11 inmates died while their request
14 was pending.

15 VICE CHAIR BREYER: Okay. Thank you.

16 MS. KENNEY: Uh-huh.

17 VICE CHAIR BREYER: I'd like to ask
18 Mr. Wroblewski a question, if I can. You and I
19 have had discussions in the past about where the
20 authority comes from with respect to reductions.

21 What I am concerned about is that I

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1 think that as it is done today with the Bureau of
2 Prisons contacting, if they do, victims, people
3 who have been wrongfully -- who have been harmed
4 by this offense, that what we've done is
5 indirectly incorporated some of the -- some of
6 the considerations which justified eliminating
7 parole.

8 In other words, it was not the Bureau
9 of Prisons or the Executive Branch to determine
10 a particular sentence. That was solely the
11 judiciary. And one of the criticisms of the pre-
12 guideline process was the Parole Commission and
13 their adjudication.

14 Why is it that the Bureau of Prisons
15 is particularly well-suited for conducting the
16 inquiry as to the impact on the community in terms
17 of one of the 3553(a) factors rather than a court
18 looking at it who imposed the sentence, took
19 those factors into consideration?

20 I'm now talking about -- not about
21 health. I'm talking about impact on the

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1 community and victims. Why shouldn't the court
2 have an input on that rather than the Bureau of
3 Prisons?

4 So, while the motion -- while the
5 motion would have to be made under the statute by
6 the Bureau of Prisons, the Bureau of Prisons
7 could seek the opinion of the trial court, the
8 sentencing court, as to what impact it would have
9 on victims, because I don't think that runs afoul
10 of the statute like your views.

11 MR. WROBLEWSKI: Yes, Judge Breyer.
12 Thanks so much for the question. We think that
13 the mechanism that you suggest may very well be
14 a reasonable one. And we're going to be thinking
15 about it as part of our working group, and, again,
16 we're happy to have this collaborative dialog and
17 this is part of it, but that's not what the
18 statute is now.

19 The statute gives the director of the
20 Bureau of Prisons a responsibility. And no
21 administration since the Sentencing Reform Act

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1 has viewed that responsibility as simply a
2 mechanical task of making a motion any time an
3 offender reached a certain age or had a certain
4 illness.

5 Every administration has taken the
6 position that part of our responsibility is to
7 ensure that public safety is not undermined and
8 that we'd only make the motion if all of the
9 circumstances warrant it, not just if a person
10 reaches a particular age.

11 COMMISSIONER BARKOW: Can I ask just
12 a quick clarification --

13 MR. WROBLEWSKI: Sure.

14 COMMISSIONER BARKOW: -- question on
15 that? When you're making that decision, does the
16 Department feel bound by what the Sentencing
17 Commission says the factors are?

18 Because one thing I couldn't quite
19 gather from your testimony was whether or not BOP
20 maybe looks at what we've said, but has its own
21 list -- and, frankly, its own list is the trumping

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1 list -- or whether or not BOP's view is this is
2 the list from the Sentencing Commission, we'll go
3 through all of those things. If all of those
4 things are satisfied, then we'll go forward and
5 we'll file the motion.

6 What's the Department's view?

7 MR. WROBLEWSKI: So, if you take a
8 look at our program statement, you'll see that we
9 have a long list of factors that go beyond the
10 specific medical criteria or non-medical
11 criteria.

12 I would argue that those factors are
13 consistent with the Commission's guidelines,
14 because the Commission's guideline in 1B1.13
15 requires courts to look at all the 3553(a)
16 factors. And that's basically what our list is.

17 COMMISSIONER BARKOW: Well, let's say
18 we came up with a -- just, I mean, maybe the
19 current state isn't ideal for this question, but
20 let's say we came up with a list and we said, you
21 know, these are the four things. These four

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1 things. Only these four things.

2 Would the Department's view be, yes,
3 those are the four things and only the four things
4 we look at? Or would the Department's view be,
5 actually, we believe there's also Items 5 through
6 8. And if we don't find 5 through 8, we're not
7 filing the motion.

8 I'm just trying to get a sense of what
9 your view is on the scope of your authority.

10 MR. WROBLEWSKI: No administration
11 has ever felt bound by the Commission's
12 guidelines. The Commission's guidelines as we
13 read the statute, is to guide courts once a motion
14 is filed.

15 The government's responsibility is
16 laid out in the statute --

17 COMMISSIONER BARKOW: Right, which
18 I'm looking at.

19 MR. WROBLEWSKI: -- and it says that
20 the director of the Bureau of Prisons may, not
21 must, file a motion if there are extraordinary

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1 and compelling reasons.

2 CHAIR SARIS: So, as I understand your
3 position, it's that we should cross-reference the
4 program statement so that we'll be consistent.

5 I mean, is that -- am I reading that
6 correctly?

7 MR. WROBLEWSKI: Well, I think our
8 position is a little -- is a little -- goes beyond
9 that.

10 What we're saying is if the Commission
11 believes that there are changes that should be
12 made to the program, we think that we should have
13 an ongoing dialog and try as best we can to
14 collaboratively come up with a policy that can be
15 both embodied in the Bureau of Prisons' program
16 statement, and in the Commission's guidelines
17 that are consistent. And if we can't get there,
18 we may end up with competing policies.

19 At the moment, we don't have that and
20 we think that's a good thing and that we should
21 try to avoid it.

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1 CHAIR SARIS: But as I understand it,
2 I haven't been here forever, but I have now been
3 here six years, we've never done that before.

4 In other words, you haven't called us
5 up and said, oh, we're going to add this
6 limitation onto our program statement, you know,
7 Commissioner, what do you think about it?

8 Are you calling for a brave new day
9 kind of thing that we'll talk? Because as I
10 understand, the Congress told us to do it in the
11 sentencing guidelines.

12 I mean, maybe ours can be improved,
13 but they told us to set the standards, not simply
14 defer to you. So, I was surprised when I read
15 it here that we should just simply cross-
16 reference the program statement as, okay, this is
17 what meets our duty.

18 COMMISSIONER BARKOW: Yeah, I share
19 that and just -- I just would like to know how
20 we're not nullified by the Department's view.
21 Like I'm not totally sure what the Department

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1 feels our function is if you get to set those
2 standards and do whatever you want.

3 I mean, I guess I don't really
4 understand where there's any affect to the
5 Commission's role in the statute under the
6 Department's reading of it.

7 MR. WROBLEWSKI: The statute
8 specifically says that the Commission is to
9 promulgate guidelines that are to be used by
10 courts to decide whether to grant the motion. It
11 does not talk about setting guidelines to tell
12 the Justice Department when to make a motion.

13 And so, there are two separate
14 responsibilities. There are two keys that have
15 to be turned for somebody to receive a reduction
16 in sentence for extraordinary --

17 CHAIR SARIS: To have their keys
18 turned.

19 MR. WROBLEWSKI: -- and compelling
20 reasons. Yes. There needs to be the motion from
21 the Justice Department, and there needs to be a

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1 granting of that motion by the court.

2 VICE CHAIR BREYER: But why is the
3 Bureau of Prisons particularly well-suited for
4 making determinations about how victims are
5 viewing this type of release?

6 Why are they better than the judges
7 who have to do it? They have to do it in the
8 first instance when they sentence the person.

9 And I'm trying to figure out, because
10 I think it's used as an excuse, by the way, but
11 I don't know, I think that I don't know that there
12 is a prohibition, as an example, under the
13 statute that they couldn't -- the Bureau of
14 Prisons in determining whether to make the motion
15 or not couldn't seek the court's input as to
16 whether or not it would be inconsistent with some
17 of the 3553(a) factors.

18 May be duplicative, I understand that,
19 but it -- the problem I see, as you point out,
20 two keys, but the first key goes first. That is,
21 we don't even get these cases unless a motion is

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1 made.

2 And I'm just trying to figure out why
3 you wouldn't want the court's input on that
4 issue, because it seems to me the courts are
5 better suited. And that's what the Sentencing
6 Guideline -- the Sentencing Reform Act
7 recognizes, better suited than have been the
8 Parole Commission in making that type of
9 determination.

10 MR. WROBLEWSKI: So, excuse me. I
11 think your suggestion, Judge Breyer, is a good
12 one. And I will make certain that we consider
13 the idea of seeking the judge's, you know,
14 sending a letter, for example, to the sentencing
15 judge and seeing what that judge's opinion is,
16 but the fact of the matter is that the statute is
17 what it is at the moment and --

18 COMMISSIONER PRYOR: Well, let me
19 make a suggestion for you.

20 MR. WROBLEWSKI: Yes.

21 COMMISSIONER PRYOR: Isn't the way

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1 the statute is set up is for the judiciary to act
2 as a check on what is basically the preliminary
3 determination by the Bureau that this is an
4 offender who is eligible for release and then the
5 Sentencing Court has the full opportunity to
6 consider these factors?

7 Could be the same factors, could be
8 other factors, but to consider them independently
9 as a check, if you will, on the Executive Branch's
10 determination.

11 It's not that we don't have a role to
12 play. It's just our role is at the back end
13 instead of the front end, right? Isn't that the
14 way this works?

15 MR. WROBLEWSKI: Yes.

16 COMMISSIONER PRYOR: That doesn't
17 make us -- our role nullified. It just means it
18 comes at the end, not at the beginning, right?

19 MR. WROBLEWSKI: Yes.

20 COMMISSIONER BARKOW: Do we have any
21 indication from the legislative history that

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1 congress had in mind -- and I feel guilty even
2 asking about the legislative history, I got to be
3 honest with you. But do we have any indication
4 from the legislative history that congress had in
5 mind BOP with this robust, all-inclusive role?
6 Because I just -- I don't see it in this very
7 brief statutory structure.

8 And the part I'm having a hard time
9 making sense of is why that would be, because
10 given the questions that Judge Breyer has asked,
11 it just seems kind of crazy that if I were to
12 think of all the possible places to put a
13 unilateral decision where if the Department says
14 no, it never goes any further, to put that in
15 BOP.

16 It seems to me that it would make more
17 sense to have it be, let the Commission think
18 about all of the factors and put those in, and
19 then BOP follows those factors having been set
20 out. And so, both BOP and the judge take into
21 account the things that the Commission has laid

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1 out.

2 And so, I'm just kind of curious and
3 I think the statute can be read either way, you
4 know. I think it's got -- it's got room for --
5 is there something in the legislative history
6 that -- I get the rarity part that you mentioned,
7 but anything else that suggests that?

8 MR. WROBLEWSKI: So, I'm going to
9 channel at great risk my inner Justice Scalia and
10 look to the text of the statute itself.

11 The text of this particular provision
12 gives the authority to the Director of the Bureau
13 of Prisons. In the same very section for
14 different motions, for motions for reduction of
15 sentence based on a change guideline applied
16 retroactively, the congress gives the authority
17 to the Director of Bureau of Prisons, the
18 defendant and the judge.

19 COMMISSIONER BARKOW: No, I see all
20 of that, but I assume -- just bear with me.
21 Assume I don't read that as a clear textual

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1 indication that says all the authority goes to
2 BOP, because I think it could also be read that,
3 yeah, you get to file the motion. I totally
4 understand that. And if BOP doesn't file the
5 motion, all bets are off.

6 But when BOP is thinking about whether
7 to file a motion, there's really two possible
8 interpretations. One is the one that Judge Pryor
9 mentioned, which is that BOP takes into account
10 whatever it wants and then the Sentencing
11 Commission's role is just to guide the judge once
12 it gets there. So, if anything, all we do is
13 limit how many can get granted.

14 The other view would be the Commission
15 sets the policy statement that applies to this
16 entire structure both at the front end for BOP,
17 and for the judge afterward.

18 And I'm just curious if in the
19 legislative history there is any indication as to
20 which of those two competing interpretations
21 might be --

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1 MR. WROBLEWSKI: Not that I'm aware
2 of.

3 COMMISSIONER PRYOR: Would it make
4 any sense for the Sentencing Court to be
5 considering the front end determination when it
6 considers things like terminal illness of the
7 inmate, medical condition, spouse -- wouldn't BOP
8 have far more expertise about those issues than
9 the Sentencing Court?

10 MR. WROBLEWSKI: We believe the
11 Bureau of Prisons and the prison authority will
12 have the best ability to look at certain
13 circumstances. At the same time, we do recognize
14 what Judge Breyer has spoken about.

15 COMMISSIONER PRYOR: But the
16 Sentencing Court is not going to know what the
17 medical condition of any inmate is, right?

18 MR. WROBLEWSKI: No.

19 CHAIR SARIS: So, let me -- if we were
20 to change our list, we have a lot of people urging
21 us to do that, and maybe this is Ms. Kenney, what

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1 actual impact would it have?

2 You have a whole program statement
3 which someone obviously spent a lot of time
4 thinking about expanding in 2013.

5 MS. KENNEY: Yes.

6 CHAIR SARIS: For us to just
7 incorporate it essentially freezes that into law.
8 Maybe the next head of the Bureau of Prisons might
9 not like that. I mean, it has that problem.

10 But if we were to differ from you and
11 say, well, there's certain things we think are
12 too limited or should be expanded, does that have
13 an impact on your thought process?

14 MS. KENNEY: I would say it has. You
15 know, in 2007 when the Commission came up with
16 the guidelines that are now effect when we had
17 our DOJ Working Group at the time, which was
18 formed in 2011, it did inform our decision-making
19 that came to be the current program statement.

20 So, while there are some differences,
21 there were certain categories that you identified

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1 that we did look at those categories and
2 incorporated them into our current program
3 statement.

4 CHAIR SARIS: And if we said "should,"
5 you should file a motion where certain things are
6 present, would that have an impact on you?

7 MS. KENNEY: I think that -- I think
8 the Department's view on that is that that does
9 raise the separations of powers issue that we
10 would -- we recognize that the Commission may
11 want those motions filed, but we do think the
12 statute in and of itself gives the director
13 complete authority on filing a motion, or not
14 filing a motion.

15 MR. WROBLEWSKI: We think the
16 better approach, again, is to continue this
17 discussion, find out where the Commission thinks
18 the program should either be expanded or
19 contracted.

20 What I find interesting is if you look
21 at the ALI proposal and if you look at most of

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1 the state provisions that are similar, I think
2 the categories are pretty common.

3 And of course we can have a great
4 debate with the Inspector General and others
5 about whether someone is elderly at 50 or 55 or
6 60 and even the experts are all over the place
7 about that, but I think the general categories
8 that the Commission identified, we have embraced.

9 We think that the general categories
10 in the American Law Institute proposal that's
11 pending are basically the same. There are
12 disagreements about when we should file and not
13 file.

14 I think that is better directed to
15 Congress. And, again, we're happy to discuss
16 that and perhaps, you know, work together to
17 address that.

18 COMMISSIONER FRIEDRICH: Mr.
19 Wroblewski, what is the timing -- or Ms. Kenney
20 -- of this ongoing review? I'm pleased to hear
21 that you are considering suggestions the IG made

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1 and I'm just curious what are we talking about?

2 Is this happening now as we speak?

3 When do you expect it to be complete?

4 MS. KENNEY: The work group is ongoing
5 and we hope to have some consensus and results by
6 early spring -- late spring, early summer.

7 COMMISSIONER FRIEDRICH: Of this
8 year?

9 MS. KENNEY: Of this year. Now, that
10 would require if we're going to make changes to
11 our program statement, we will need to negotiate
12 that, those changes with our union. So, I can't
13 -- I can't predict an actual implementation date,
14 but the work in the Department of Justice we
15 anticipate being done by the summer.

16 COMMISSIONER FRIEDRICH: I would
17 consider -- I would recommend that you consider
18 carefully some of the suggestions that Dr.
19 Williams from UCSF has made in her testimony
20 particularly with respect to streamlining the
21 procedures, the administrative hurdles.

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1 A number of people will testify today
2 here, point out the difficulty in inmates being
3 able to gather information that you need for you
4 to process their request whether it's the
5 defenders or some other surrogate. That seems a
6 reasonable accommodation to make.

7 I thought you made some excellent
8 points about the vagueness of medical terms and
9 the need to consult with medical experts both
10 within BOP, as appeared did not happen the first
11 round at least according to IG, as well as
12 outside.

13 And then, finally, the difficulties
14 with making clear prognoses with short-term
15 death. Many doctors can't say within 18 months
16 this person will die, but, yet, the expectation
17 or the likelihood, the probability is.

18 So, I would hope that you would
19 consider some of those suggestions and of course
20 I would welcome ongoing conversation with this,
21 but I agree with you that the simpler and the

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1 more certain approach is to incorporate BOP's
2 statement.

3 Given BOP's track record on this, the
4 statement that's before us right now I'm not
5 confident, as you say, will bring the desired
6 results. So, I'm encouraged that you're
7 continuing this process.

8 COMMISSIONER BARKOW: Could I just to
9 get a sense of those 11 inmates who passed away
10 while their request was pending, do you kind of
11 go back and try to figure out where in the process
12 things went wrong and if there were any lessons
13 learned there and I guess related to that?

14 I'm just curious if, you know, what
15 the holdup is. You know, was it uncertainty
16 about the medical condition, or was it
17 uncertainty about how to weigh that against
18 whatever it is that they did?

19 Because you said in your statement
20 that, you know, these are the -- there's certain
21 offenses like big chunks of --

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1 MS. KENNEY: Right.

2 COMMISSIONER BARKOW: And I'm curious
3 for those, you know, is it any weapons offense,
4 or are they just kind of out, or do you look at
5 the underlying facts of the case to say it was a
6 weapons offense, but this person actually, you
7 know, it was in the house locked away, but they
8 got shot, I mean, do you go into that level of
9 detail?

10 MS. KENNEY: We absolutely do.

11 COMMISSIONER BARKOW: Is that what, I
12 mean, I guess I'm just trying to figure out what
13 the holdup was in those 11 cases, if you have --

14 MS. KENNEY: I don't have the
15 specifics on each of those cases as to where --
16 at what point in the process where the inmate
17 passed away, but it is certainly something that
18 we do take a look at.

19 In the past year or so we've made a
20 point of going back and reviewing the denials at
21 the local level from headquarters to see are we

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1 seeing a pattern here? Are there things that we
2 need to step in and try to correct some behavior?

3 The one thing I think that has been a
4 very positive change is Director Samuels made a
5 focus of saying if anybody meets the objective
6 criteria, I'd like to see them.

7 So, even if you have concerns with
8 public safety or other things, note those and
9 send them up to me and we'll make sure we're
10 looking at it as a more national reaching that
11 kind of consensus.

12 COMMISSIONER BARKOW: Okay.

13 MS. KENNEY: So, we have seen more
14 cases that have come up to Central Office. But
15 to your point as to where the slowdown is on those
16 particular 11 cases, I don't know that. We can
17 certainly go back and look at it.

18 COMMISSIONER BARKOW: If the warden
19 says no, that's the end of the --

20 MS. KENNEY: That's the end of the
21 process. The inmate does have the ability to

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1 file an administrative remedy challenging that
2 decision, but it is the end of the process.

3 VICE CHAIR BREYER: Okay. So, could
4 you then in addition to what I've asked for --

5 MS. KENNEY: Uh-huh. Sure.

6 VICE CHAIR BREYER: -- could you take
7 those 11 inmates and advise us when they applied
8 and where they were in the process at the time
9 that their -- that they passed away?

10 MS. KENNEY: Sure.

11 CHAIR SARIS: And I should add to that
12 the one time in 22 years I've had a compassionate
13 release issue, the person actually did die before
14 it was resolved.

15 And I remember the defense attorneys
16 came to me and as the sentencing judge, I didn't
17 know what it was I could do. There's no clear
18 process for either -- for you all seeking input
19 of the sentencing judge, or the sentencing judge
20 reaching out to you saying, you know, the guy is
21 really Stage 4 cancer and dying. I have no

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1 problem with letting him go, you know, he's old
2 and that sort of thing.

3 So, if we really, I mean, this is
4 beyond our purview. Our job is to set the
5 standards for the judges, but I think it's
6 incredibly unclear as to what role, if any, the
7 trial judge has at your stage even if it's just
8 providing information how to do it.

9 And I certainly agree with the other
10 statements that you all should be reaching out to
11 the sentencing judge for the 3553(a) factors.
12 That could be helpful to you.

13 MS. KENNEY: Right.

14 CHAIR SARIS: So, anything else at
15 this point? Okay. Thank you very much.

16 MS. KENNEY: Thank you.

17 (Whereupon, the above-entitled matter
18 went off the record at 9:38 a.m. and resumed at
19 9:40 a.m.)

20 CHAIR SARIS: So, our next panel isn't
21 really a panel. It's one witness, but he's also

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1 from the Executive Branch.

2 Mr. Michael Horowitz is the Inspector
3 General in the Department of Justice, Office of
4 Inspector General, and has held that position
5 since 2012.

6 Under his leadership, the OIG issued
7 several reports about compassionate release.
8 Before joining the OIG, Mr. Horowitz was a
9 partner in the Washington, D.C. Office of
10 Cadwalader, Wickersham & Taft.

11 Like Mr. Wroblewski, Mr. Horowitz
12 also served as a commissioner from 2003 to 2009.
13 It's hard to believe it was that long ago, and
14 was the Department's ex-officio member prior to
15 that.

16 So, you know us well. Welcome back.

17 MR. HOROWITZ: And it's good to be
18 here. Thank you for having me testify on this
19 important issue on compassionate release.

20 For the past several years my office
21 has identified overcrowding in federal prisons as

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1 one of the top management challenges facing the
2 Department of Justice. We've even referred to
3 it in our reports as a crisis that the Department
4 is facing, something the Department I think
5 itself has essentially acknowledged.

6 As of December 2015, BOP facilities
7 were 20 percent over rated capacity and its
8 inmate-to-correctional officer ratio remains
9 troublingly high.

10 The BOP has the largest budget of any
11 Justice Department component other than the FBI
12 accounting for 26 percent of the Department's
13 budget. Over a third of the Department's
14 spending goes to the BOP and it employs -- sorry.

15 CHAIR SARIS: Thank you.

16 MR. HOROWITZ: And the BOP employs 37
17 percent of the Justice Department staff. Almost
18 one out of every four Justice Department
19 employees works for the Federal Bureau of
20 Prisons.

21 Inmate medical costs are a major

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1 factor in these rising costs. In FY2014, the BOP
2 spent 1.1 billion dollars on inmate medical care,
3 an increase of almost 30 percent in five years.

4 One reason for the growth in medical
5 costs is the aging inmate population. Inmates
6 age 50 and older are the fastest growing segment
7 of the BOP's inmate population, increasing 27
8 percent from 2009 to 2014. By contrast during
9 that same period, inmates under age 50 decreased,
10 actually, by approximately three percent.

11 To help address the burden of both
12 overcrowding and prison costs, we found in our
13 reviews that the Department should more
14 effectively utilize programs such as
15 compassionate release.

16 We've issued two reports recently
17 addressing these issues. In 2013, we issued a
18 report that assessed BOP's use of the program
19 from 2006 to 2011. And last year we issued a
20 report that assessed the new BOP provisions
21 expanding compassionate release eligibility for

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1 inmates age 65 and older.

2 In our 2013 review, we found the BOP's
3 compassionate release program had been poorly
4 managed and implemented inconsistently resulting
5 in, among other things, deaths of inmates waiting
6 to have their applications considered.

7 We also found on average that only 24
8 inmates were released each year through the
9 compassionate release program.

10 Our review also found that the
11 Department had not evaluated recidivism rates for
12 inmates who had been granted compassionate
13 release. The OIG, therefore, undertook such an
14 evaluation and found a recidivism rate of about
15 3.5 percent for inmates released through the
16 compassionate release program.

17 By comparison, the BOP has used the
18 general recidivism rate than the Department has
19 for federal prisoners, an estimate of as high as
20 41 percent.

21 As we noted in our report, the OIG

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1 recognizes that approving and releasing more
2 eligible inmates through the compassionate
3 release program could result in some increase in
4 the number of inmates who are rearrested, but we
5 also noted that the recidivism data we found
6 demonstrated that a carefully and effectively
7 managed program could minimize the risk if
8 careful consideration were given to an inmate's
9 potential risk in the community as part of that
10 assessment process.

11 On the same day we issued our report,
12 the BOP issued its new compassionate release
13 statement that sought to address the issues that
14 we identified in our report.

15 In 2015, we issued our second review.
16 And in that one we assessed, as I noted, the
17 Department's modification of its compassionate
18 release program statement which sought to expand
19 a number of elderly inmates eligible to apply for
20 compassionate release.

21 The program statement was released on

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1 the same date in August 2013 as part of Attorney
2 General Holder's Smart on Crime Initiative.

3 In the first 13 months after the BOP
4 announced its expansion of compassionate release
5 eligibility for elderly inmates, we found that
6 only two inmates were released under the new
7 eligibility programs.

8 Specifically, we found that 93 elderly
9 inmates applied for the non-medical provision
10 resulting in two release, while none of the 203
11 inmates who applied, elderly inmates who applied
12 under the medical provision had been approved for
13 release.

14 As I learned earlier today from the
15 testimony, it appears that that number has now
16 grown as a total to about 30 inmates, elderly
17 inmates, in the two and a half years since the
18 statement release, which is obviously somewhat of
19 an increase, but hardly a significant increase in
20 the number of inmates who have been released
21 under these new provisions announced as one of

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1 the pillars of the Attorney General's Smart on
2 Crime program.

3 Based on the results of our review,
4 the OIG found that the BOP could do more to
5 improve its compassionate release program much
6 like we had found in our review from 2013.

7 Our report made a number of
8 recommendations that the Department and the BOP
9 should consider, including one that would lower
10 the eligibility age from age 65 to age 50.

11 Multiple studies, including one
12 published by the BOP's own National Institute of
13 Corrections, recommended that inmates be
14 considered aging starting at age 50.

15 CHAIR SARIS: That's sad to hear.

16 MR. HOROWITZ: And I agree
17 completely. I was struck by that as well when I
18 learned that fact. But according to the studies,
19 an inmate's physiological age averages 10 to 15
20 years older than his or her chronological age due
21 to the combination of stresses associated with

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1 incarceration and the conditions an inmate may
2 have been exposed to prior to incarceration.
3 Indeed, seven state correctional systems from
4 around the country have defined aging inmates as
5 those inmates who are age 50 and older.

6 We found that lowering the eligibility
7 provision to age 50 could assist the BOP in
8 addressing its overcrowding issues particularly
9 in its minimum and low security institutions
10 where inmates age 50 and older represent 24
11 percent of the population in FY2013.

12 We also found that reducing the
13 eligibility age could result in cost savings. We
14 found that based on BOP's cost data, BOP spent
15 approximately \$881 million, or 19 percent of its
16 total budget, to incarcerate aging inmates, those
17 50 and over, in FY13.

18 We also recommended the BOP consider
19 eliminating the 10-year minimum time served
20 requirement that they put in place with the new
21 aging inmate provisions, so that all aging

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1 inmates would be eligible to apply for
2 consideration for compassionate release once they
3 had served 75 percent of their sentences.

4 We found the 10-year provision
5 excludes almost half of the BOP's aging inmate
6 population, because many sentences are actually
7 too short to be considered for compassionate
8 release under the provision.

9 We were particularly concerned about
10 this provision, because it categorically
11 prohibits early release consideration for aging
12 inmates who did not receive at least a 10-year
13 prison sentence even though those inmates are
14 likely to be the best candidates for early
15 release consideration precisely because they were
16 given lower sentences and almost certainly got
17 less serious criminal convictions. And they,
18 therefore, pose a less risk of danger to the
19 community. Yet, they are categorically removed
20 from consideration under the policy statement.

21 We found that taking both steps,

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1 reducing the age from 65 to 50 for eligibility
2 consideration, and eliminating the minimum 10-
3 year requirement, would increase the number of
4 aging inmates eligible, using the word
5 "eligible," for consideration from 4,000 or so
6 inmates to 30,000 or so inmates based on that
7 data that we have from FY2013.

8 We recognize that not all inmates age
9 50 and over are appropriate candidates for
10 compassionate release. As a former prosecutor,
11 I completely understand that concern. And that
12 the evaluation will necessarily include many
13 factors such as the nature and circumstance of
14 the inmate's offense, the criminal history, the
15 inmate's conduct in prison, the inmate's release
16 plans and whether release would undermine the
17 deterrent effect of the punishment imposed.

18 Nonetheless, as we noted in our prior
19 reports, the Justice Department itself has
20 already determined that aging inmates are a low
21 public safety risk as a general matter, which is

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1 why the provision was put in place.

2 For that reason, we found reevaluating
3 the compassionate release eligibility provisions
4 for aging inmates could substantially increase
5 the pool of eligible inmates.

6 Let me make clear that when I talk
7 about expanding the pool of inmates, I'm talking
8 about those eligible for applying for
9 compassionate release, not those that actually
10 should be released. That's a decision that would
11 be made, as the prior discussion indicated,
12 through a variety of processes. What our reviews
13 focused on were the eligibility of the
14 applicants.

15 Within that larger pool of eligible
16 inmates, we believe the BOP could further
17 identify more aging inmates presenting low risk
18 to public safety if released resulting in reduced
19 overcrowding and cost savings to the Justice
20 Department.

21 Thank you, and I am pleased to answer

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1 any questions the Commission may have.

2 CHAIR SARIS: So, if I jump right in,
3 if we -- if you -- we lowered it to 50, let's say
4 we did everything you want, what about the basic
5 argument, well, we're, at most, hortatory to the
6 BOP, you know? The BOP has its own jurisdiction
7 and could simply say no.

8 What is your thought about that impact
9 of the guideline change would be? You've studied
10 this program.

11 MR. HOROWITZ: Yeah. You know, from
12 our standpoint, the issue really is, has been and
13 really what we're charged with is not making
14 policy, but looking at how the Department has
15 implemented policies and handled the policies.

16 And what we found in both reviews that
17 even under the standards that they put in place,
18 it had not been managed effectively and there
19 wasn't clarity around the program.

20 What we've also found is that, for
21 example, in putting in place the 10-year rule, we

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1 heard about the danger and the risk that inmates
2 let out under compassionate release, even elderly
3 inmates, for example, would be -- potentially
4 endanger the community.

5 And one of the things, as I said in
6 my statement, we noted was, well, if that's a
7 concern, the 10-year rule really makes little
8 sense, because you are then only making eligible
9 the most serious inmates for consideration and
10 that's going to result in numbers like we're
11 seeing, which is -- I understand the Department
12 noting that the overcrowding problem that they're
13 facing can't be resolved simply through
14 compassionate release.

15 And that's certainly something that
16 we've never in the OIG in our report suggested
17 for a minute, but what we have found is that it
18 is one of the few tools the Department has been
19 given by Congress to deal with these issues on
20 the back end, which are inmates already in jail
21 who have served a lengthy period of their

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1 sentence.

2 And what we found is that the
3 Department hasn't used that tool that Congress
4 has given it effectively by putting the rules in
5 place that they have, and by then even using the
6 rules they've put in place in evaluating their
7 program.

8 VICE CHAIR BREYER: Well, I'm trying
9 to figure out why the Bureau of Prisons or the
10 DOJ is in some manner released from the very sorts
11 of things that the sentencing judge has to do.

12 As an example, when the judge
13 sentences a defendant, one of the 3553(a) factors
14 is the danger that this person presents to the
15 community of future crimes.

16 Okay. And we are taking a hard, hard
17 look at recidivism to see whether or not given
18 the sentence that's imposed, this person really
19 does have a risk of recidivism.

20 What I'm trying to figure out is where
21 does this 10-year come from? Where is the

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1 science behind the 10 years?

2 I don't see it. I'm unaware of it,
3 but is there something that the Justice
4 Department or the Bureau of Prisons have figured
5 out that 10 years? Because it looks to me that
6 all they are saying is, we want to make sure that
7 somebody receives an adequate punishment. And
8 that for the most serious offenses where a person
9 has been sentenced 120 months or longer, we want
10 to make sure that they have done the 10 years.

11 That's fine. That's a factor. And I
12 don't have any quarrel with the punitive aspects
13 of punishment, but I -- if, in fact, what you are
14 going to do is let people out because they
15 otherwise qualify for release, I'm trying to
16 figure out where is the inquiry, where is the
17 science based upon the 10-year rev and five year
18 or some other time.

19 MR. HOROWITZ: In our review, we found
20 no basis provided to us for why 10 years versus
21 no floor, a five-year floor, a seven-year floor,

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1 a 10-year floor. And of course, you know, from
2 dealing with the guidelines for an inmate to be
3 considered for compassionate release or a good
4 candidate for compassionate release presumably
5 would have had to have received the time credit.

6 VICE CHAIR BREYER: But I would say
7 that any sentencing judge looking at this and
8 looking at the criteria would say it's
9 irrelevant. It's irrelevant to the
10 consideration of what sentence I should impose,
11 because I'm going to -- because if it's going to
12 be at least -- a person has to serve at least 10
13 years, fine. Okay. It's not my concern.

14 MR. HOROWITZ: Right. And to add to
15 that if you've served at least ten years, you've
16 probably got a sentence of at least 11 to 12
17 years, because you need the good time to be
18 considered.

19 So, you're really looking at people
20 who got 11 to 12 or more years of a sentence who
21 have to demonstrate that in order to be eligible,

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1 and we were not given any basis for why the 10-
2 year number was picked.

3 Frankly, one of the things we
4 identified in both our first report and in the
5 most recent report was a concern about the lack
6 of data on metrics or other information kept by
7 the Department just generally on, for example,
8 recidivism rates was the most obvious, but
9 timeliness standards were not in place.

10 We made that recommendation in our
11 2013 report. We're still waiting. That's still
12 open, as you heard, and we're still waiting for
13 that timeliness standard to be put in place.

14 We found the possibility of
15 inconsistent decisions across wardens in
16 institutions, because it's a decentralized
17 process that's done at the warden level. And
18 when we interviewed wardens, we heard varying
19 views on what the standards meant to them.

20 And that has resulted in multiple
21 revised guidance being issued by the BOP whether

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1 it's on medical conditions or otherwise. So,
2 that's been a concern in a number of areas that
3 we've looked at in terms of how this program has
4 been managed.

5 COMMISSIONER BARKOW: Just one quick
6 question and one other -- did you receive the --
7 your request to get the minutes of the meetings
8 of BOP with their various stakeholders?

9 I know you had asked for those by July
10 31st, 2015.

11 MR. HOROWITZ: Yeah, on that, that's
12 the recommendation in our most recent report
13 where we asked for a report by July 31 of last
14 year.

15 What we learned was that the group was
16 not constituted and didn't meet until December of
17 last year, December 2015. We were given a
18 PowerPoint presentation that was used as part of
19 that meeting. And we're told that that was, in
20 essence, the record of the meeting.

21 We're obviously disappointed that

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1 we're going to be coming up in April on the one-
2 year anniversary of the issuance of our report
3 and the working group has just gotten started.
4 And, to our knowledge, hasn't made much progress.

5 COMMISSIONER BARKOW: So, the follow-
6 up to that or the related question to that is,
7 you know, so there's a couple different things
8 that we're looking at, at this hearing. One is
9 kind of what the substantive standard should be,
10 but in some sense, it doesn't matter if the
11 process by which BOP processes these or it's just
12 so delayed and riddled with inconsistencies among
13 wardens, things like that.

14 And so, even if you, for example,
15 change the eligibility so that you didn't have to
16 serve 10 years, you had to serve 75 percent or
17 some percent of your sentence, whatever it was,
18 there's this question of whether or not any of
19 that takes -- really means anything. It's the
20 process that BOP has various places in it where
21 it's not functioning on all cylinders.

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1 And so, from your experience studying
2 it in terms of improving the process at BOP, is
3 there anything related to that that you can see
4 that we could help with if the standards were
5 clearer?

6 I mean, you know, putting aside they
7 just view them as advisory in any event and not
8 pay attention to them, but is it the lack of
9 clarity that is a problem for the wardens on a
10 case-by-case basis that slows them down so Dr.
11 Williams' suggestions would be helpful?

12 Is it that there's some other -- what
13 could the substantive standards do, I guess, is
14 what I'm asking, to help improve the process?
15 Because it seems like a lot of the things at BOP
16 are out of our control. We can't dictate how
17 they process these kinds of things, but could we
18 help with the clarity of our standards?

19 MR. HOROWITZ: I think what we've
20 looked at is the BOP standards themselves and the
21 policy statements and any supplementary guidance.

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1 We found the BOP has responded to the
2 concerns as we've identified them and tried to
3 address them.

4 And so, for example, they've issued
5 multiple new guidances on medical conditions and
6 considering medical conditions, but that, we
7 found, remains an issue, we found that in our
8 most recent report, as a source of confusion.

9 We were -- and we also found that what
10 was seemingly clear in the statement about it
11 being 10 years or 75 percent turned out to be a
12 conflict. I mean, 10 years is 10 years and 75
13 percent is 75 percent. There shouldn't be much
14 room there, but what it turned out to be the case
15 was that the word "or" was really "and."

16 And so, the BOP had interpreted the
17 statement to be both requiring 10 years and 75
18 percent and we found that the wardens and others
19 who had to handle the statement to be confused by
20 that issue.

21 COMMISSIONER PRYOR: That's because

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1 they have whichever is greater at the end of the
2 -- of that line.

3 MR. HOROWITZ: Right.

4 CHAIR SARIS: We're so data-driven,
5 as you know, that the staff put together
6 statistics on recidivism at different age groups,
7 which I thought was very helpful in trying to
8 understand what should be the right age.

9 So, between 51 and 55 there's a 26.8
10 percent recidivism rate. Whereas if you're over
11 65, it's 13 percent, about half. So, I don't
12 understand that we should take into account the
13 very learned testimony of the experts on
14 geriatrics, something I'll probably be
15 increasingly leaning on, however, in terms of
16 recidivism it really -- it's really a stark
17 difference, the age 65 to 50. And at what level
18 -- we can't totally say it's irrational to pick
19 one versus another in terms of public safety.

20 Did you look at --

21 MR. HOROWITZ: Yeah.

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1 CHAIR SARIS: Maybe you didn't have
2 access to this.

3 MR. HOROWITZ: We didn't have access
4 to precisely that, but we did have access to
5 general studies that indicate the same issue,
6 which is why we undertook our own recidivism
7 review on the compassionate release program. And
8 we're, you know --

9 CHAIR SARIS: But you can understand
10 why it's 3.5 percent if they are only taking
11 people who are about to die, I mean, you know.
12 So, as you say, it would likely go up.

13 But if you made everyone eligible, you
14 might see statistics like that after age 50.

15 MR. HOROWITZ: Well, the issue is of
16 course making more people eligible doesn't mean
17 that those are the individuals that would
18 ultimately be approved for release. And that's,
19 I think, one of the things we've seen is that by
20 categorically restricting the people who could be
21 considered, you're potentially losing

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1 individuals who, in fact, are among the sickest
2 and among the, perhaps, safest to be released.

3 And so, you know, for example, just in
4 terms of data, 65 and older in medical
5 institutions, and I'm using our 2013 data that we
6 had, there were at that point 582 of the 4,000
7 plus 65 and older inmates in medical centers.
8 So, those are among the sickest individuals.

9 You heard testimony that 1600 inmates
10 are in Stage 4 facilities, which are among the
11 sickest. And yet if you consider how many
12 elderly inmates total in two and a half years
13 have been released under the program, we're
14 talking about 30.

15 So, we're talking far less than one
16 percent of those sickest individuals. Many of
17 those may be, and I don't know the answer to this,
18 but many of them may be because they are
19 absolutely barred from being considered because
20 they haven't yet served 10 years of their
21 sentence.

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1 CHAIR SARIS: So, it's the 10-year
2 rule you're really --

3 MR. HOROWITZ: Well, I think that was
4 the starkest one that stuck -- that eliminates
5 half the population. So, whether you chose age
6 50 or 65 if you have a 10-year rule, you basically
7 cut in half the number of inmates eligible to be
8 considered right off the top. They just can't
9 be considered, period.

10 COMMISSIONER FRIEDRICH: Two quick
11 questions. One is I think DOJ testified that --
12 or someone will, that almost 60 percent of BOP's
13 older population began serving their sentences
14 after age 50.

15 I'm just curious if we were to drop
16 the age limit to 50, do you have any thoughts on
17 whether or how it should affect those who are
18 sentenced after that age?

19 MR. HOROWITZ: Well, I think this 75
20 percent rule still stays in place, right? So,
21 no matter what age you're sentenced at whether

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1 it's 50 or 65, there's still this -- you have to
2 have served three-quarters of your sentence.

3 So, it's not as if it's a get-out-of-
4 jail-free card because of your age. It's when
5 should you be considered by the BOP and
6 ultimately by the sentencing judge for
7 consideration for possible release given all of
8 the potential concerns, severity of the crime,
9 inmate's history, medical condition, deterrent
10 need for the sentence, other factors the judge
11 and the BOP need to consider.

12 So, it's really what we've looked at
13 just to be clear, is not about who should be
14 granted compassionate release, it's about this
15 issue of is the program being run well and do the
16 categorical decisions being put in place make
17 sense given the data we're seeing?

18 COMMISSIONER FRIEDRICH: One thing
19 we've heard from the past from BOP is that for
20 those inmates who need significant medical care,
21 life-threatening illness, one of the reasons

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1 they're not releasing them is they're having a
2 hard time finding a place for them on the outside
3 to have the care that they will need.

4 Is that something that you found in
5 your investigation? And if so, what percentage
6 do you think that accounts for some of the folks
7 dying in prison?

8 MR. HOROWITZ: Yeah, we -- that was a
9 concern and it was a concern we heard about in
10 our reviews. We didn't get data on that from the
11 BOP. I'm not sure if they now have such data.

12 That was, you know, among the various
13 issues of trying to sort through this was the
14 data issue, but that is clearly an issue that
15 needs to be in place. There has to be a release
16 plan, which is again why, in our view, is you
17 sort of put in place restrictions on who can even
18 apply.

19 You're potentially shrinking the pool
20 of people who you might think did have release
21 plans in place, but that is clearly a legitimate

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1 and very important reason, a concern.

2 CHAIR SARIS: Anybody have any other
3 questions?

4 COMMISSIONER PRYOR: I'm puzzled. It
5 seemed to me -- you've looked at our proposed
6 amendment, right? And the circumstances, our
7 list of circumstances, No. 4, we have the 65-year
8 requirement for a defendant who suffers from a
9 chronic or serious medical condition related to
10 the aging process. That's someone who's served
11 at least 50 percent of his or her sentence. It
12 would seem to me it would make a lot of sense to
13 lower that age for that circumstance.

14 But when you look at Circumstance 5,
15 which I think is what Commissioner Friedrich was
16 referring to that has the 10-year requirement,
17 dispensing with the 10-year requirement might
18 make sense.

19 But if the only other circumstance
20 other than having served 75 percent of his or her
21 sentence even with inmates being older than the

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1 average age because of their circumstances,
2 doesn't seem to me that just lowering the age in
3 that circumstance to 50 would make sense.

4 Do you think otherwise?

5 MR. HOROWITZ: Well, I think on this
6 issue and these considerations, I think the real
7 question is how broad a pool of eligible
8 applicants do you want to try and create?

9 Because between age 50 and 65 you have
10 about, if I have the numbers here, there are
11 14,000 inmates who are over 50 and received less
12 than a 10-year sentence.

13 COMMISSIONER PRYOR: Right.

14 MR. HOROWITZ: So, you have that
15 group. And then you have inmates age 65 and
16 older who have received less than a 10-year
17 sentence, is about 2,000. And all the data I'm
18 using, by the way, is from FY2013.

19 So, you have these relatively large
20 numbers as you consider, say, 30 people total
21 being released in two and a half years. You have

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1 2,000 inmates over 65 who have been excluded
2 because of the 10-year rule.

3 COMMISSIONER PRYOR: Right.

4 MR. HOROWITZ: And to us, that made
5 little sense.

6 COMMISSIONER PRYOR: Right.

7 MR. HOROWITZ: Particularly when the
8 chief argument that we heard in opposition or as
9 a concern about compassionate release was the
10 safety issue, which is obviously a very
11 legitimate issue.

12 But the people who got age --

13 COMMISSIONER PRYOR: Lowering the age
14 requirement in that circumstance doesn't make
15 nearly as much sense, does it, as it would for
16 those who are suffering from the serious or
17 chronic medical condition and have served half
18 their sentence.

19 MR. HOROWITZ: Well, certainly you
20 can make the argument that the latter makes more
21 sense of the two.

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1 COMMISSIONER PRYOR: Okay.

2 MR. HOROWITZ: We're not in a
3 position, frankly, to make a policy judgment on
4 it. We're much more in the point of laying out
5 what the numbers look like and allow others like
6 the Department and like policymakers such as the
7 Commission to decide what the right place to set
8 things is.

9 CHAIR SARIS: Ms. Morales has a
10 question.

11 COMMISSIONER MORALES: Yeah. Isn't
12 one of the issues that BOP has is that they have
13 limited resources in order to evaluate all these
14 different requests and all the different factors?

15 And in particular, those release plans
16 that we've discussed, how complicated those are,
17 isn't that an issue?

18 And wouldn't broadening the
19 eligibility pool make that even a -- aggravate
20 that problem making it perhaps harder for the BOP
21 to then identify which of those applicants are

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1 actually more deserving of the release?

2 MR. HOROWITZ: Well, I think we've
3 found and heard concerns from BOP about staffing
4 levels and the support and ability to go through
5 them, but I don't think, frankly, that should be
6 the basis for not having considered for this
7 program those who are eligible or should be
8 eligible for it or who are the sickest inmates.

9 It, frankly, argues for the Department
10 putting more resources into addressing these
11 issues.

12 We found in a number of places,
13 frankly, in our aging inmate report which went
14 beyond the compassionate release program, where
15 BOP needed additional staffing in a variety of
16 areas to support aging inmates.

17 And so, from our standpoint the answer
18 should be the Department making an evaluation as
19 to whether to give more resources to BOP rather
20 than just not handling the program the way it
21 needs to be.

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1 COMMISSIONER MORALES: But my
2 question is really about broadening the pool, and
3 wouldn't broadening the pool exacerbate that
4 problem?

5 MR. HOROWITZ: And I think at that
6 point it just becomes a question of whether the
7 Department is supportive of the program and going
8 to put in place the resources to address it.

9 It's certainly been our concern that
10 the way the program has been handled as we saw in
11 2013 and more recently, that the timeliness has
12 been an issue.

13 We found that, you know, in our first
14 report, that about 13 percent of the inmates had
15 died while waiting to have their compassionate
16 release application be considered. 28 out of, I
17 think, 200 or so. A pretty high number.

18 So, something the Department, we
19 think, and BOP needs to address.

20 VICE CHAIR BREYER: I'm sorry. I
21 wasn't going to ask a question, but --

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1 CHAIR SARIS: Last question.

2 VICE CHAIR BREYER: Two-thirds? Your
3 analysis is that two-thirds of these individuals
4 have died while they're --

5 MR. HOROWITZ: No, I'm sorry. 28
6 percent. A quarter of them -- I'm sorry, 28 out
7 of 200 or so. 13 percent.

8 VICE CHAIR BREYER: 13 percent, okay.

9 MR. HOROWITZ: Thank you. I'm sorry.

10 VICE CHAIR BREYER: Thank you.

11 MR. HOROWITZ: That was under, to be
12 clear, the old program, the program that was in
13 place prior to 2013 when we issued our report.

14 CHAIR SARIS: Well, thank you very
15 much for testifying and for all the work you've
16 done in this area.

17 Why don't we all stand up and stretch
18 as we hit the third panel.

19 (Whereupon, the above-entitled matter
20 went off the record at 10:12 a.m. and resumed at
21 10:15 a.m.)

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1 CHAIR SARIS: I think we've lost a
2 couple of our commissioners, but I've just been
3 informed we have 600 people online, so --
4 watching us. So, here we go. We will have a
5 break after this, I promise.

6 I think I'll start with the
7 introductions. I'm sure Judge Breyer will be
8 here in one second.

9 So, thank you for making it. I
10 understand Ms. Mariano had a particularly
11 difficult -- did you have a tough trip up here?

12 MS. MARIANO: I did. I did, Your
13 Honor. It's a little snowy in Buffalo. We've
14 had a good winter, except for yesterday.

15 CHAIR SARIS: Yes. So, glad you did
16 make it.

17 MS. MARIANO: Thank you.

18 CHAIR SARIS: All sorts of reasons.
19 So, thank you for making that trek. So, our next
20 panel will offer the defense perspectives on
21 compassionate release.

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1 The first witness is Margaret Love,
2 who is testifying today on behalf of the
3 Commission's Practitioners Advisory Group. Ms.
4 Love is a practicing attorney specializing in
5 executive clemency and restoration of rights
6 after conviction, and was the United States
7 pardon attorney for the Department of Justice
8 from 1990 to 1997.

9 She is joined by Marianne Mariano, who
10 has been the Federal Public Defender for the
11 Western District of New York since 2008. She has
12 also served on the Federal Defender Sentencing
13 Guidelines Committee, served as a detailee to the
14 Commission, and has testified for the federal
15 public defenders at other commission hearings.

16 She's also a detailee, right, to the
17 Criminal Law Committee; is that right?

18 MS. MARIANO: Yes, I am.

19 CHAIR SARIS: So, she does all sorts
20 of good work cross the country. Welcome back,
21 and I'm glad you made it through that ice storm

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1 in Buffalo.

2 MS. MARIANO: Thank you.

3 CHAIR SARIS: So, I think, Ms. Love,
4 are you the first?

5 MS. LOVE: Yes.

6 CHAIR SARIS: Okay. And here I think
7 the -- I don't know if you've been warned about
8 the light system. I don't know if you heard
9 before, but I think here it's five minutes apiece
10 or so and then we pepper you with questions.
11 Okay? Thank you.

12 MS. LOVE: I'm very, very pleased to
13 be here, Judge, and commissioners. And I'd like
14 to say on behalf of the Practitioners Advisory
15 Group that we are very, very grateful for the
16 Commission's inclusion of this item on its list
17 of priorities for the coming amendment cycle.

18 I'm personally very pleased to be here
19 having testified at the Commissioner's very, very
20 first hearing on this subject in 2006 almost
21 exactly 10 years ago.

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1 I'd like to make three points. The
2 first is -- goes to this issue of structure and
3 legislative history.

4 Congress intended this statutory
5 sentence reduction authority to be administered
6 primarily by the judiciary. To this end, it
7 designed a balanced tripartite decision-making
8 structure.

9 This commission was tasked under 28
10 USC 994(t) with defining what constitutes
11 extraordinary and compelling reasons warranting
12 sentence reduction.

13 BOP was to identify defendants in its
14 custody who met the Commission's criteria and
15 then bring them back to the attention of the
16 Sentencing Court.

17 The Sentencing Court would then decide
18 whether the defendant's sentence should be
19 modified applying general principles of
20 sentencing. That is not how it works at least,
21 in part, because of this Commission's modest view

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1 of its policymaking role over the years.

2 BOP has played all three decision-
3 making roles. It applies its own policies to
4 determine when a case warrants sentence
5 reduction. And those policies include
6 consideration of factors that are committed to
7 the Sentencing Court under 3553(a) such as
8 seriousness of the offense and likelihood of re-
9 offending.

10 In this regard, the United States
11 Attorney's Offices have played -- come to play a
12 very key role in BOP's decision-making process
13 frequently discouraging filings that BOP might
14 otherwise be inclined to make.

15 This is where a lot of cases get
16 stuck, frankly, and we have heard from -- I have
17 heard from many people who have handled cases
18 where a case gets stuck in the U.S. Attorney's
19 Office and is never seen again.

20 Because a government motion is
21 jurisdictional, the court has no ability to act

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1 even when it is sympathetic to a defendant's
2 situation.

3 The upshot is that what congress
4 intended as a judicially-administered safety
5 valve, a word that appears three or four times in
6 the legislative history, is instead controlled by
7 an executive agency responsible for prosecutions,
8 which generally bring defendants back to court
9 only when they are at death's door.

10 The second point I'd like to make is
11 that this Commission can restore the proper
12 balance to the decision-making process under
13 3582(c)(1) by vigorous exercise of its
14 policymaking authority.

15 If the Commission develops a detailed
16 set of extraordinary and compelling reasons and
17 a range of examples applying those criteria as
18 required by 994(t), this will facilitate an
19 appropriate role for the courts in administering
20 the statutory scheme and guard against
21 unwarranted disparity.

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1 The clearer and more precise the
2 policy developed by the Commission, the easier it
3 will be to hold the Justice Department
4 accountable for applying it in particular cases.

5 In turn, if the Department confines
6 its gatekeeping role to deciding whether the
7 Commission's criteria apply in particular cases,
8 courts will then be able to play their intended
9 part in determining whether the defendant
10 circumstances considered as a whole warrant
11 sentence reduction.

12 For this reason, we agree that the
13 revised 1B1.13 ought to include a provision
14 stating that the director of BOP should not
15 withhold a motion if a defendant meets all of the
16 criteria, any of the criteria, I should say,
17 listed as extraordinary and compelling reasons in
18 1B1.13.

19 I was really struck by Ms. Morales'
20 comment about the difficulty that BOP has in
21 determining whether individuals who meet the

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1 criteria are deserving. I believe that that's a
2 decision for the court to make, with all due
3 respect.

4 The third point that we want to make
5 is that congress intended a broader scope for
6 this judicial sentence reduction authority than
7 is reflected in the current 1B1.13, or the BOP
8 program statement.

9 The legislative history of the
10 Sentencing Reform Act indicates that the safety
11 valve in 3582(c)(1) was intended to apply
12 whenever a defendant's changed circumstances make
13 continued confinement inequitable -- and that's
14 a phrase that comes directly out of the senate
15 report -- not simply when a defendant is ill, or
16 disabled, or aging, though we believe even these
17 compelling reasons are too narrowly drawn in the
18 current 1B1.13.

19 We have a particular concern about the
20 criteria for non-terminal illness and disability
21 which seem unnecessarily complex and limiting,

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1 and about the age-related criteria.

2 We also urge the Commission to make
3 clear that compelling reasons need not have been
4 unforeseen at the time of sentencing. The only
5 limit in the statute on the Commission's authority
6 is that rehabilitation alone should not be a
7 basis for sentence reduction.

8 The appearance of the word "alone"
9 seems to suggest that rehabilitation has some
10 relevance and may be considered.

11 In conclusion, we encourage the
12 Commission to use its full policy-making
13 authority to broaden and clarify the existing
14 eligibility criteria under 1B1.13 and to give
15 serious consideration to including additional
16 categories of changed circumstances such as
17 changes in the law that have not been made
18 retroactive.

19 We have appended to our testimony a
20 marked-up version of Commission's proposed
21 amendment to 1B1.13 and would be happy to answer

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1 any questions you may have about it.

2 CHAIR SARIS: Thank you.

3 Ms. Mariano.

4 MS. MARIANO: Thank you. I'd like to
5 thank the Commission for giving me the
6 opportunity to testify today on behalf of the
7 federal public and community defenders regarding
8 compassionate release and later regarding
9 conditions of supervision.

10 I'd like to thank our Sentencing
11 Resource Council for preparing our written
12 testimony. I am particularly thankful that it
13 is not 100 pages long, but I wouldn't want our
14 brevity to be read as our opinion that this is
15 unimportant. Quite to the contrary.

16 Defenders are pleased that the
17 Commission is revisiting the compassionate
18 release guideline. It is important to do so, and
19 to do so now, because the current process is
20 broken.

21 Individuals who are dying or who are

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1 desperately needed at home to care for aging
2 parents or sick children are being kept in prison
3 longer than necessary.

4 To fix this problem, we support the
5 proposed amendment submitted by the Practitioners
6 Advisory Group and agree with the reasons set
7 forth in their testimony as to why the changes
8 are necessary.

9 In my oral remarks today, I want to
10 focus on two things. First, the Commission has
11 a very important role to play in addressing the
12 current problem with compassionate release
13 because Congress delegated to the Commission, not
14 the Bureau of Prisons, the authority to define
15 extraordinary and compelling reasons that should
16 trigger a motion for a reduction in sentence.

17 And second, we, the defenders, can
18 help. The Commission should encourage the Bureau
19 of Prisons to reach out to defense counsel or the
20 defender in deciding whether -- sorry, before
21 deciding whether an inmate meets the criteria for

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1 compassionate release.

2 As to our first point, we encourage
3 the Commission to adopt a comprehensive guideline
4 that defines extraordinary and compelling
5 circumstances independent of the Bureau of
6 Prisons policy and makes clear that the BOP
7 should file a motion for a sentence reduction if
8 those criteria are met.

9 In our view, Congress did not intend
10 to delegate exclusive authority to the Bureau of
11 Prisons in deciding what extraordinary and
12 compelling reasons merit a motion for a reduced
13 sentence.

14 Congress explicitly gave the
15 Commission that role, the role of setting the
16 standard, and gave the judiciary the penultimate
17 role of determining whether a person should have
18 a reduced sentence. The statutory scheme is
19 clear and the Commission must lead.

20 In addition to defining extraordinary
21 and compelling circumstance, the Commission

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1 should also amend the guideline to instruct the
2 director of the BOP to file the motion when the
3 criteria set forth are met. There is sound legal
4 basis for doing so and it could have legal affect.

5 Under well-established principles of
6 administrative law, the BOP's construction of
7 3582 is not entitled to deference, because
8 Congress spoke directly as to which agency or
9 authority should define extraordinary and
10 compelling reasons, and it is this one. There
11 is no gap for the BOP to fill, no weight need be
12 given to its policy statement by this commission.

13 Moreover, even if it could be argued
14 that congress left a gap, the BOP -- and the BOP
15 has now filled it, the decision-making process on
16 whether or not to file a motion is not entitled
17 to deference because it's unreasonable, which
18 we've outlined in greater detail in our written
19 statement.

20 Even if the guideline is not binding,
21 the Commission's independent work on expanding

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1 Section 1B1.13 is essential and its guidance on
2 a compassionate release will likely have an
3 anchoring affect and play a significant role in
4 BOP decisions and when to file a motion.

5 The BOP exists over time and despite
6 its testimony here today, we fully believe this
7 Commission taking the lead will influence that
8 important agency. Finally, we can help.
9 Defenders can help.

10 The most startling thing in preparing
11 for this today was how very little contact we
12 have with this issue. The BOP should be
13 encouraged to solicit information from counsel -
14 - excuse me, defense counsel, before declining to
15 seek a reduction for an inmate.

16 The BOP collects information from the
17 U.S. Attorney, the prosecuting attorney at times,
18 the victims and the Office of Probation and
19 Pretrial Services, when making this life-and-
20 death decision on whether an individual meets the
21 criteria for compassionate release.

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1 This fact-finding, decision-making
2 process would be more equitable and much improved
3 if the BOP also involved defense counsel who can
4 help gather the many records the individual is
5 required to produce.

6 Counsel can also confirm, clarify or
7 refute information provided by the prosecutor, or
8 contained in the PSR ensuring that the BOP has
9 accurate information upon which to base its
10 decision.

11 As the process stands now, there are
12 horrible inequities. Inmates of means can and
13 do hire counsel to fight for them while indigent
14 languish without help in their hour of need. We
15 can help.

16 Accordingly, we request the
17 Commission to encourage the BOP to contact
18 defense counsel of record or the federal defender
19 in the district where the person was sentenced,
20 or where they will be released.

21 If the BOP is unwilling to notify

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1 defense counsel before deciding whether a motion
2 to file compassionate release should be filed, it
3 should at least notify counsel when the decision
4 to make the motion is made and the issue sent to
5 the court. Thank you.

6 CHAIR SARIS: Thank you.

7 COMMISSIONER PRYOR: I have a
8 question on that last point. Do they not serve
9 counsel with a copy of the motion?

10 MS. MARIANO: No, they do not. We
11 are -- I have been in the Defender's Office for
12 21 years, Your Honor.

13 COMMISSIONER PRYOR: Yeah.

14 MS. MARIANO: I have had contact with
15 two issues. One was a white-shoe law firm
16 attorney from New York contacting me to see if I
17 could help when a motion got stuck in chambers in
18 our district.

19 The second -- very informal contact,
20 obviously. The second actually was just this
21 past year. the Bureau did, in fact, make the

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1 motion. The judge did, in fact, ask Probation
2 for the release plan and was inclined to grant
3 it. And Probation refused to approve the home
4 where the person would be sent to live with his
5 family, because it was Section 8.

6 Well, Section 8 does not bar a person
7 who is terminally ill from temporarily, as that
8 is temporary, living with a loved one, but the
9 Probation Office, and I had come from a district
10 with a great Probation Office, did not act and
11 did not act timely. And the BOP actually did
12 reach out -- or suggested the family reach out
13 for us.

14 And when we got the call from the
15 family, we contacted the BOP who was grateful for
16 our assistance. We have many contacts especially
17 through our reentry program that can facilitate
18 this.

19 So, no, they do not contact us at all.
20 But in this instance because the family was very
21 excised and the person was very near death, we

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1 were able to provide assistance.

2 COMMISSIONER BARKOW: This is -- I
3 guess it's for both of you, but I'll start off
4 with Ms. Love.

5 In your testimony, you had mentioned
6 that -- or suggested that maybe DOJ in filing
7 this motion shouldn't take into account the
8 public safety factor for -- I'm looking at Page
9 4. When looking at -- so, it's footnote 7, that
10 it doesn't look like the Department's authorized
11 in deciding whether this exists to take into
12 account whether defendant is a danger to public
13 safety, because another provision explicitly says
14 it. And so, the idea is it's cited here.

15 I got to admit that struck me as --
16 we certainly have in the guidelines, public
17 safety, and 3553(a) would have public safety be
18 part of it. And so, it's a two-parter.

19 So, the first one is, you know, are
20 you standing by that that public safety is not
21 something for BOP? And then if you assume that

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1 it is, it's got to be something that BOP takes
2 into account before they file the motion. The
3 question would be whether that kind of swallows
4 up any other reform, because, you know, I
5 understand what both of you have been saying
6 about how we could give more specifics, how we
7 could give more examples, how we could go through
8 all of that. But if at the end of the day, BOP
9 will weigh that against public safety.

10 And if you assume, but maybe I'm wrong
11 and you can convince me that it's not in there,
12 but if you assume public safety has to be
13 something that BOP takes into account, then I'm
14 not sure where it gets us at the end of the day,
15 because it seems like a lot of this is BOP saying,
16 no, because it's just we're weighing it and we
17 just think the public safety weighs too high and
18 we're not going to file it.

19 MS. LOVE: I was struck in reading the
20 statute, I had never read it the way I did in the
21 past couple of weeks, where the 3582(c)(1)(a)(2),

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1 which is the three strikes, 30-year authority,
2 does task BOP with determining as a matter of
3 eligibility whether the defendant is a risk.
4 However, that same authority is not in (c)(1) --
5 or (a)(1), I should say. And that was sort of
6 interesting to me.

7 Obviously, BOP has information
8 relating to discipline and different things that
9 have gone on that will be tremendously important
10 for the court to know. And of course the court
11 will take that into account as a matter of
12 3553(a).

13 But as a matter of threshold
14 eligibility, the way we read the statute, it
15 doesn't look to us as if that should be a
16 disqualifying factor at the threshold, but should
17 be taken to the court.

18 COMMISSIONER BARKOW: So, you're
19 saying if BOP -- I'm going to give you a stylized
20 hypothetical here. Okay. So, just bear -- but
21 BOP looks at someone and they say, oh, my gosh,

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1 the prison record is, you know, off the charts.
2 This person has really been -- had lots of
3 behavioral problems in prison, but they meet the
4 terminal illness and the age requirements. So,
5 we'll go ahead and we'll file the motion and we'll
6 just have the -- but we'll tell the court we don't
7 think you should grant it.

8 That's the model that you think this
9 imposes?

10 MS. LOVE: Well, frankly, yes. I
11 think as a matter of statute, reading the
12 statute, that's the model, yes.

13 COMMISSIONER BARKOW: What would be
14 your response to DOJ's argument, though, that it
15 says they're supposed to look at the 3553(a)
16 factors? That, you know, all of this BOP has
17 this gatekeeping role. And as long as they're
18 supposed to look at 3553(a), they've got to take
19 into account safety there.

20 MS. LOVE: Well, I'm not sure where
21 you're reading that in the statute.

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1 COMMISSIONER BARKOW: Well, so that's
2 --

3 MS. LOVE: It's the court.

4 COMMISSIONER BARKOW: But the idea
5 would be that's going to be the court's decision,
6 but DOJ anticipating that they're filing a motion
7 in good faith with the court, should also be
8 prepared to say that they think it meets those
9 criteria as well.

10 MS. LOVE: Well, again, as a matter
11 of eligibility we think that the clearly defined
12 reasons that the Commission puts forth ought to
13 be what brings a case to the court.

14 The big problem with this statute,
15 frankly, if you look at the program statement
16 carefully after the reasons are defined, there's
17 a list of seven factors. And those seven factors
18 include the seriousness of the offense.

19 And that, we strongly believe, is not
20 appropriate to keep a case from the court. That
21 those are factors that the court weighs, and

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1 that's certainly the way we read the statute.

2 VICE CHAIR BREYER: I think there's a
3 lot of confusion based upon the fact that I don't
4 actually think this statute is workable. And I
5 think it's a confusion over the roles of what you
6 want the various institutions to play.

7 I think Judge Pryor's point is
8 excellent about who better should determine the
9 health of the person and so forth than the Bureau
10 of Prisons. Absolutely. I would give enormous
11 deference to that.

12 Who better to determine the nature and
13 circumstances of the offense? The judge.
14 Prison judge knows almost nothing about it.

15 Be that as it may, I can't rewrite
16 statutes, much to the relief of the general
17 public. However, I think your suggestion is an
18 interesting one, which is that perhaps an
19 ameliorating factor can be if you involve the
20 defense early on in this process, at least
21 they're in the position to point out things to

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1 the director that may be useful in determining in
2 an outcome whether or not to make the motion.

3 So, my question to you is, under the
4 law, is it your understanding that the federal
5 public defender can represent these people at
6 this stage of the proceedings? Because
7 traditionally you don't have a public defender
8 representing defendants in this -- in a writ, in
9 other types of proceedings. So, I'd like your
10 answer on that.

11 MS. MARIANO: Sure. Well, since 2008
12 this Commission has given us plenty of work under
13 3582 with all of the retroactive guidelines. And
14 it has differed district to district and maybe
15 circuit to circuit on defender involvement, but
16 most jurisdictions do involve the defender on
17 sentencing reductions. And that's what this
18 statute is.

19 It is not a parole proceeding. The
20 Sentencing Reform Act is clear we do not have
21 parole. It is a sentencing reduction, which is

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1 an adversarial proceeding in our point of view.

2 I would also say that ethically as an
3 attorney I have an ongoing obligation to my
4 clients to provide them with a duty of loyalty.

5 I have many of the records the BOP
6 seeks for these individuals. I can get other
7 records very readily. So, I do think that there
8 is authority for us under 3582 and the CJA to
9 take on the limited role that I envision, Your
10 Honor.

11 I do think that indigent people in the
12 Bureau of Prisons are not abandoned by the Sixth
13 Amendment, nor are there obligated attorneys to
14 continue to fight for them in every appropriate
15 avenue.

16 CHAIR SARIS: I have a question on
17 foreseeability. So, post-Booker every defense
18 attorney worth her gold is going to raise with me
19 the person's physical problems if they've got an
20 illness.

21 I can't think of a situation where

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1 cancer hasn't been raised or a severe mental
2 illness or some such. I mean, it comes up
3 routinely in sentencing hearings and sometimes
4 I'll vary based on the fact the person has cancer.

5 I've already sort of reduced the
6 sentence, or, frankly, often the Assistant United
7 States Attorney agrees to reduce it because of
8 that.

9 So, at what point -- I understand
10 you're saying that it's a flat cutoff, you know,
11 that compassionate release can't be granted if
12 the court considered it. But at some point when
13 I consider cancer, I just know the person has
14 cancer, I'm not thinking they're at final stages
15 of death.

16 So, I see it as being a factor, but
17 maybe not a brick wall. How would you word it?

18 MS. LOVE: I think the foreseeability
19 issue is a bit of a red herring. I mean, aging
20 is always foreseeable.

21 So, to suggest that foreseeability is

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1 now a disqualifier seems to me to ignore some of
2 the factors.

3 Now, it is used as a basis for
4 refusing to file. I have had a case myself where
5 BOP said, well, exactly as you say, the person
6 had early stages of cancer. Therefore, we are
7 not going to file.

8 We think that just as you suggest,
9 Judge, you may have known that it was a mild or
10 early stage, but if it gets to Stage 4 or a very
11 serious stage, you may well feel that allowing
12 the person to go home to die with their family is
13 a compassionate and appropriate thing.

14 So, the foreseeability issue, it seems
15 to me, is for the court certainly where illness
16 is concerned.

17 CHAIR SARIS: But your impression is
18 that right now it's a -- if the Judge mentions it
19 or varies based on it, the BOP won't file the
20 motion at all?

21 MS. LOVE: I have had a case in which

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1 that occurred and I have heard stories of other
2 cases. I don't know whether it's a flat policy
3 that if the judge mentioned it that a case can
4 never go back. I don't know that.

5 MS. MARIANO: Your Honor, I'm not sure
6 that I understand the BOP to look that closely at
7 what happened at the sentencing hearing. The
8 fact that the condition existed at the time of
9 sentencing is what I think is considered.

10 And I would note that there are a lot
11 of individuals for whom the court can exercise no
12 discretion, because they suffer from mandatory
13 minimums.

14 Before Booker, it was also mandatory
15 guidelines and your physical health was a
16 discouraged factor for departure from those
17 guidelines.

18 So, there are many people who may have
19 had a condition at the time of their sentencing
20 to which the court felt they could do nothing
21 about. So, there are a number of people within

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1 the BOP that would fall into that category as
2 well. Thank you.

3 CHAIR SARIS: Anybody else have any
4 questions? Anything else?

5 (No response.)

6 CHAIR SARIS: Thank you very much.

7 MS. MARIANO: Thank you.

8 CHAIR SARIS: Now, our break and, so,
9 we should come back here -- we have our last panel
10 on this and we'll have a 15-minute break. So,
11 we'll be back here at five of.

12 (Whereupon the above-entitled matter
13 went off the record at 10:42 and resumed at 10:54
14 a.m.)

15 CHAIR SARIS: Hello. Hope you're all
16 back out there. There are apparently -- how many
17 -- we think there are hundreds of people
18 watching. So, I'm really pleased that you're
19 able to do that.

20 So, our next panel -- our final panel,
21 actually, addressing compassionate release

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1 presents the perspectives of experts and advocacy
2 groups.

3 The first witness is Mary Price, who
4 has been the general counsel for Families Against
5 Mandatory Minimums, FAMM, since 2000. She
6 directs the FAMM Litigation Project and works on
7 federal sentencing reform.

8 Among other publications, she is the
9 author of "The Answer is No: Too Little
10 Compassionate Release in the U.S. Prisons,"
11 published by FAMM and Human Rights Watch in 2012.

12 The next is Dr. Brie Williams, an
13 Associate Professor of Medicine and Associate
14 Director of Tideswell -- did I pronounce that
15 right? I did, good -- at the University of
16 California, San Francisco.

17 She also currently serves as Medical
18 Director of the San Francisco VA Geriatrics
19 Clinic where she attends on the San Francisco VA
20 Acute Care for Elders Unit. She is board
21 certified in geriatrics, hospice and palliative

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1 medicine and internal medicine.

2 Dr. Williams has authored or co-
3 authored numerous publications on the topic of
4 compassionate release.

5 Mr. Jeffrey Washington will testify
6 next. He has served as Deputy Executive Director
7 of the American Correctional Association since
8 1995.

9 Previously, Mr. Washington served in
10 the Standards and Accreditation Department as
11 Acting Director at ACA, and as Administrator,
12 Deputy Administrator and Regional Administrator
13 dating back to 1986. So, you certainly are
14 extremely knowledgeable.

15 Now, the one sad thing, there's an
16 empty chair there for an old friend of mine,
17 actually, Professor Kate Stith, who I went to law
18 school with. She tried to get here.

19 She, as I understand it, I'm not sure
20 if I get the story correctly, but the plane was
21 hit by lightning. And then she got on a train

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1 that broke down. So, she actually did everything
2 humanly possible to be here, but she has
3 submitted short of running --

4 VICE CHAIR BREYER: I wouldn't push
5 my luck.

6 (Laughter.)

7 CHAIR SARIS: So, she has submitted
8 very, very interesting testimony about her work
9 on the ALI. And she -- American Law Institute.
10 She is a professor of law at Yale Law School and
11 is currently serving as an advisor for the
12 American Law Institute Project, Model Penal Code:
13 Sentencing, and by appointment of Chief Justice
14 Rehnquist on the Advisory Committee of the
15 Federal Rules of Criminal Procedure.

16 We very much miss having her here, but
17 we do have her testimony for the record. So, Ms.
18 Price.

19 MS. PRICE: Thank you so much for
20 inviting me to testify today.

21 CHAIR SARIS: Yes.

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1 MS. PRICE: And I will just note that
2 it sounds like Professor Stith has extraordinary
3 and compelling reasons --

4 (Laughter.)

5 MS. PRICE: As you know from my
6 written statement, which I'm not going to recount
7 here, I believe that the compassionate release
8 program is not used as intended, because the BOP
9 has arrogated to itself the decision of whether
10 a prisoner who otherwise meets the criteria
11 actually deserves to be released.

12 Until the BOP relinquishes that role,
13 we will continue to see stories like the ones
14 contained in my statement of prisoners denied not
15 because they didn't meet the criteria, but
16 because the BOP believes they should not go home.

17 As it turns out, right after I
18 submitted my testimony last week, I received a
19 letter from a prisoner that convinced me again
20 that the question that you asked at the end of
21 the issue for comment is the most important

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1 question of all.

2 Should the Commission provide that the
3 BOP not withhold a motion if defendant meets any
4 of the circumstances listed as extraordinary and
5 compelling reasons in Section 1B1.13?

6 And I think absolutely that should be
7 done. And here is what I learned from the
8 prisoner who wrote to me and from his *pro bono*
9 counsel with whom I consulted afterward.

10 In 2004, he was sentenced 300 months
11 for convictions stemming from his operation of an
12 asbestos abatement company. His crimes were
13 serious, nonetheless, nonviolent.

14 He has excelled in prison. He's
15 bettered himself, assisted others and achieved
16 and received commendations from wardens and from
17 staff.

18 On November 2nd, 2014, his wife
19 suddenly and unexpectedly passed away and left
20 behind their three minor children. No family
21 member could take them in and the children were

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1 taken in by kind neighbors.

2 No one in the family had stepped up
3 when on March 30th, 2015, the father requested a
4 compassionate release from the warden. A month
5 later the warden recommended to the Bureau of
6 Prisons that they release this gentleman, because
7 they could find no family member willing and able
8 to take care of the children.

9 While the lack of any family caregiver
10 alone should be enough to prompt a motion for
11 compassionate release to the court, as is
12 evidenced by it being one of the examples that
13 you use for extraordinary and compelling reasons,
14 this family has faced very, very special
15 challenges.

16 As the warden's recommendation to the
17 Central Office of the Bureau of Prisons pointed
18 out, the eldest child, Junior, was born with
19 multiple congenital and developmental conditions
20 that make him extremely medically fragile.

21 He had VACTERL syndrome, a series of

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1 congenital malformations, and renal and limb
2 abnormalities, among other things. He suffers
3 as well from autism. He must have special
4 treatments throughout the day to help his body
5 eliminate waste and his medication and antibiotic
6 regimen must be closely monitored and strictly
7 adhered to. He's had 14 surgeries in his 15
8 short years of life, including the implant of a
9 donor kidney, which is the only kidney he has.

10 In short, he requires constant round-
11 the-clock personal care to keep him alive,
12 maintain his dignity and help him thrive.

13 Both his parents were specifically
14 trained to provide for those needs, and both did
15 so until his father was incarcerated for offenses
16 that occurred before he was born.

17 After his wife's death, the neighbors
18 who took the children in became overwhelmed with
19 the round-the-clock responsibilities for which
20 they were not trained. Mistakes were made. The
21 child landed in the hospital for a while.

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1 In October 2015, they announced they
2 could no longer care for the children. The small
3 family was separated. The younger children went
4 off to another state to live with a relative.
5 That relative refused to take Junior, the eldest
6 with the medical concerns.

7 Today Junior lives in a foster home
8 with strangers and the State having looked and
9 failed to find a family member to take Junior in,
10 is taking steps to declare Junior neglected by
11 his father. The finding of neglect is the first
12 step in the process of terminating parental
13 rights.

14 15 months have passed since the death
15 of the mother. Nine months have gone by since
16 the warden recommended the father's release. His
17 letter to me expressed his deep concern for his
18 children's emotional well-being and especially
19 the terrible toll that these losses have taken on
20 his eldest son Junior. Yet, no one has
21 communicated with the father officially regarding

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1 the recommendation -- since recommendation was
2 made, rather.

3 The father did learn informally that
4 the division that advises the Office of General
5 Counsel about compassionate release was
6 recommending against the release, because it
7 could not be proven that there was no family
8 member capable of caring for all the children.
9 A request for an opinion with the U.S. Attorney's
10 Office has been pending for some time.

11 That no family member will take Junior
12 in has been clearly established by the State's
13 effort to find a family member and then moving to
14 terminate the father's rights.

15 This prisoner clearly meets the
16 criteria enunciated by the Commission in Section
17 1B1.13. Something else has to be going on here
18 and I don't know if your proposed guidance to the
19 Bureau of Prisons to not withhold a motion if the
20 prisoner meets the criteria would result in this
21 prisoner's release. I would hope so, but it's

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1 up to the judge.

2 I do believe that including that
3 guidance should send a clear message from this
4 body to the Bureau of Prisons to confine itself
5 to the task of determining who in this population
6 meet the criteria that you enunciate and move
7 into court for their release. The rest should
8 be up to the court. Thank you.

9 CHAIR SARIS: Thank you.

10 DR. WILLIAMS: Judge Saris and the
11 commissioners, thank you very much for the
12 opportunity to talk today.

13 As Judge Saris said, I'm an Associate
14 Professor of Medicine at UC San Francisco where
15 I specialize in geriatrics, which is the care of
16 older adults and in palliative care, which is the
17 care of the seriously ill.

18 My work as an academic focuses on
19 older and seriously ill prisoners and I also
20 train criminal justice professionals in
21 geriatrics and palliative care.

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1 So, the issues that bring me here
2 today are three-fold. First, the precipitous
3 rise in the number of older prisoners. Second,
4 a rise in illness-related prison mortality. And
5 third, that evaluations of compassionate release
6 which we heard this morning have revealed
7 opportunities for improvement.

8 I'll offer my medical perspective on
9 these three issues, and I offer my opinion that
10 there really is a critical role for the medical
11 profession in health-related policies. And I
12 applaud you for inviting me today.

13 I'll start with three policy
14 recommendations related to older prisoners.
15 First, I would recommend that the Commission
16 recommend to the Bureau of Prisons that they
17 lower the age of eligibility for evaluation of
18 age-related release policies to 55 years.

19 This is because as you heard a little
20 bit before, many prisoners experience so-called
21 accelerated aging, which they appear to be on

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1 average 10 to 15 years older than they are.

2 Because age-related compassionate
3 release policies are intended for prisoners whose
4 incarceration will require considerable complex
5 healthcare and potentially considerable health-
6 related needs at high cost, the definition of
7 older prisoners should take into account this
8 concept.

9 The most conservative approach here
10 would use -- would be to use the age of 55 or
11 older.

12 Second, I recommend eliminating
13 requirements of a minimum number of years served
14 before older prisoners can be assessed for
15 compassionate release.

16 For example, as we heard a little bit
17 this morning, requiring at least 10 years served
18 runs the risk of penalizing the exact prisoners
19 for whom the policy is intended to reach, those
20 who have served a reasonable proportion of a
21 relatively short sentence who are not deemed --

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1 or unlikely to be deemed to be a safety risk.

2 Third, I agree with this concept of
3 adding a terminology like aging-related chronic
4 or serious medical conditions to eligibility
5 guidelines, but I caution that it will be very
6 important to list specific examples of what is
7 meant by those chronic or serious medical
8 conditions to ensure that the policy includes
9 serious conditions that are common with advanced
10 age such as advanced dementia and debilitating
11 physical impairment.

12 Next, I have two recommendations about
13 eligibility criteria for prisoners with serious
14 or life-limiting illnesses. First, I recommend
15 that medical eligibility criteria reflect the
16 limitations and the science of prognosis.

17 Unfortunately, prognosis is a very
18 difficult and inexact science. When it's applied
19 correctly, it provides merely a probability of
20 death over a very general time frame.

21 For many serious illnesses, it's

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1 actually extremely difficult to pinpoint the
2 exact month or day in which a patient will die.
3 And because of this, physicians are very
4 unwilling and uneasy and very reluctant to
5 prognosticate at all.

6 And when they do, multiple studies
7 have shown that physicians are far more likely to
8 actually overestimate prognosis. So, they
9 expect that their patients are going to live much
10 longer than they actually do, but physicians are
11 much better at prognosticating the trajectory of
12 serious illness.

13 And what I mean by this is that it's
14 easier for a physician to say that within the
15 next several months this patient in front of me
16 is bound to develop such profound cognitive or
17 mental or physical incapacity that they are going
18 to require 24-hour nursing care if they have not
19 died already.

20 So, I strongly recommend that in
21 addition to life expectancy, sort of an estimated

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1 number of months, eligibility criteria include
2 this other perspective, a physician's assertion
3 that a prisoner with a serious condition is on an
4 end-of-life trajectory that's heading towards 24-
5 hour nursing care in the upcoming months.

6 I also recommend that this definition
7 of serious illness be expanded to reflect
8 terminal illnesses that are often profoundly
9 debilitating for several years before they lead
10 to death. Things like end-stage dementia where
11 people can live for multiple years, certainly
12 months, or end-stage organ disease like heart
13 failure where they are quite debilitated.

14 Second, I recommend that the
15 compassionate release policy should be reviewed
16 by a panel of healthcare professionals on a
17 regular basis to ensure that it keeps pace with
18 current medical evidence.

19 I recognize this might be beyond the
20 Commission's purview, but I have to say it as a
21 medical professional.

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1 And I'm going to end with four very
2 brief recommendations that I elaborated on in my
3 written testimony that are related to some of the
4 health-related administrative burdens that can
5 limit access to compassionate release.

6 So, the first is that it's going to be
7 important to include guidelines for the
8 appointment and training of surrogates for those
9 prisoners who may meet eligibility criteria, but
10 are simply unable to initiate or complete the
11 application process themselves either because
12 they're too sick, too cognitively impaired or
13 have too low health literacy.

14 Second, I recommend streamlining the
15 review process. We heard a little bit about that
16 this morning.

17 Third, I recommend developing a fast-
18 track options for prisoners who are deemed by a
19 physician to face imminent death.

20 And fourth and finally because very
21 few correctional healthcare providers are trained

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1 specially in the care of older and seriously ill
2 patients, I recommend training select medical and
3 custodial care in geriatrics and palliative care,
4 and also on how to implement whatever final
5 compassionate release policy is developed.

6 Thanks so much for your time and
7 attention.

8 CHAIR SARIS: Thank you.

9 MR. WASHINGTON: Good morning. Thank
10 you for the opportunity for me to be able to
11 testify on behalf of the American Correctional
12 Association regarding compassionate release.

13 In considering your decision on the
14 proposed amendments, I'd like to provide you with
15 some context regarding the care and treatment of
16 offenders and corrections, some of the challenges
17 corrections professionals face and end-of-life
18 planning in correctional settings.

19 As background, the American
20 Correctional Association is the oldest and
21 largest professional correctional organization

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1 in the world.

2 We represent all disciplines within
3 corrections profession. Adult and juvenile.
4 Prisons and jails. Community corrections,
5 academics and others. Our members come from
6 local, state, federal and private prisons and
7 international.

8 ACA promotes excellence in
9 corrections by offering several forms of
10 professional development, certification,
11 facility accreditation and by regularly
12 publishing research and surveys to the field.

13 As you are well aware, the current
14 federal offender population and many states
15 populations have risen to unsustainable levels.
16 Roughly 10 percent of the current federal
17 offender population is over the age of 55. We
18 heard some of that this morning.

19 However, the cost associated with
20 providing them with their constitutionally
21 mandated care and treatment is an enormous

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1 obligation on the federal budget just as it is
2 for the state correctional systems with aging
3 offender populations.

4 It is estimated that 3300 inmates die
5 of natural causes each year. As offenders age,
6 it's critical that corrections accommodate the
7 needs of its geriatric or terminally ill
8 offenders.

9 The ACA's public correctional policy
10 on correctional healthcare states that
11 incarcerated individuals or those in custody of
12 criminal justice and juvenile justice agencies
13 have a legal right to adequate healthcare in
14 accordance with generally recognized
15 professional standards utilizing comprehensive
16 holistic approaches that are sensitive to
17 cultural, age, gender responsive needs for a
18 growing and diverse population.

19 Whether they are offenders or elderly
20 or both, sometimes those with serious illness
21 feel guilty about their circumstances. In

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1 particular, the guilt stems from the perceived
2 hardship or burden it imposes on others
3 physically, emotionally and financially.

4 The question becomes how can we
5 possibly secure quality care for offenders as
6 they die? Correctional facilities are crowded.
7 Thus, stretching the facility's staff and
8 resources to their limits and beyond. Healthcare
9 budgets are lean and often insufficient.

10 ACA has several standards through its
11 accreditation process throughout our publication
12 manuals requiring facilities and agencies to meet
13 chronic care and special healthcare needs of all
14 offenders either through available resources
15 within the agency, or by timely transfer of an
16 offender to an appropriate treatment facility
17 that can meet their needs.

18 The public correctional policy on
19 correctional healthcare adopted by ACA requires
20 healthcare programs for offenders include
21 comprehensive medical, dental and mental health

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1 services, and that such programs should establish
2 hospice services for the terminally ill offenders
3 supported by a compassionate release program for
4 those who qualify.

5 For corrections, like in the
6 community, care for the terminally ill should
7 start long before the final weeks of life. 28
8 correctional systems in the United States offer
9 special care, treatment and programming for
10 geriatric offenders.

11 A number of systems also accommodate
12 the needs of geriatric offenders in special
13 sections of one or more of their units. Iowa,
14 Louisiana and Texas have complete facilities
15 dedicated to the geriatric care.

16 13 states have laws in place for early
17 release of geriatric offenders. However, most
18 of these jurisdictions combine the requirements
19 for those for terminally ill offenders.

20 43 states provide special services for
21 offenders who are chronically or terminally ill,

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1 including chronic care clinics, separate housing
2 units, palliative care, hospice services, skilled
3 nursing, separate prison hospitals and inpatient
4 medical referral centers like in the Bureau of
5 prisons.

6 26 states have statutes in place for
7 the early release of terminally ill offenders
8 under the title "compassionate release."
9 Conditions for release include being mentally
10 incapacitated or physically incapable of engaging
11 in criminal activity, receiving clemency approval
12 from the governor or having a life expectancy
13 less than one year.

14 There are a number of departments.
15 The Maine Department of Corrections provides
16 great hospice programs for those individuals who
17 are within their care. And Maine has been very
18 successful in what they've done.

19 In Louisiana, the Angola Prison
20 operated by Warden Burl Cain, had a great hospice
21 program that included the use of inmates to take

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1 care of those inmates who aren't able to be
2 released. And it's showing great, great promise.

3 They've put that program in six of
4 their other facilities. They've also received
5 an award from the American Hospital Association
6 for what they do.

7 And in the State of New York they have
8 two forms of release. One, medical parole. And
9 the other, parole that's done by a full board
10 that takes a look at those cases on a case-by-
11 case basis.

12 Also in New York, the warden at
13 facilities -- I'm sorry, the Commissioner with
14 advice from the wardens have been given the
15 ability to also release individuals from the
16 facility if that's necessary. Thank you.

17 CHAIR SARIS: Do any of the states
18 have anything that look like our system where you
19 go back to the court, or is it all the power
20 within the warden or the Parole Commission?

21 MR. WASHINGTON: I think in different

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1 cases, especially in the case of New York and in
2 Kansas, they've built in a network where the
3 process runs through the Department of
4 Corrections, but they also have to have advice
5 and consent from the judge and/or the Parole
6 Board and also victims. So, there's a mechanism
7 for them to be able to contact all of those
8 entities to get a response.

9 COMMISSIONER BREYER: I was
10 interested in your written testimony that New
11 York State had a rule about 50 percent. You have
12 to have served 50 percent of the term. And that
13 would be across the board, not just terminally
14 ill, but elderly and so forth, though it
15 disqualified certain offenses for being
16 considered. I think it was 50 percent of non-
17 violent offenders.

18 How does that work? Would you say
19 that's been a success? Would you say that it
20 results in a lot of people who are ostensibly,
21 you know, low in terms of recidivism? Has it

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1 been successful? Not successful?

2 MR. WASHINGTON: I've not done enough
3 research or have the information to be able to
4 convey that to you. What I was able to do was
5 to find the different programs that are in effect
6 around the country.

7 I'd be happy to provide that
8 information to --

9 VICE CHAIR BREYER: I'd be interested
10 to see whether New York, you know, we want to
11 take a look -- I do, anyway -- want to take a
12 look at other states that have this program and
13 try to figure out whether it makes sense to have
14 like 10 years, or it has X percentage, or it makes
15 sense to restrict it to certain types of
16 offenses. So, I would be very interested in the
17 success.

18 Do you have any information on that?

19 DR. WILLIAMS: Just a few weeks ago
20 in the New York Times, a colleague of mine wrote
21 about one of her patients who was in New York,

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1 one of the New York State prisons.

2 So, here's a 60-year-old prisoner.
3 He had metastatic liver cancer. It had rendered
4 him virtually paralyzed. He was going to be
5 eligible for parole within the year. His wife
6 and children were desperate to care for him at
7 home. Everybody agreed that there was a good
8 parole plan in place and a hospice care plan in
9 place.

10 His prison physician had already
11 petitioned for early release several months ago.
12 His health declined quickly in prison while he
13 was awaiting New York to make a decision. He was
14 admitted to a nearby hospital, which was
15 approximately two hours away from where his wife
16 and children lived.

17 On the night he died, his wife was in
18 her car making the long drive home and a date to
19 review his application was scheduled for over a
20 month after the day that he died.

21 VICE CHAIR BREYER: Do you have a

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1 sense of cost? Do you have a sense of how much
2 in terms of medical costs are devoted to end-of-
3 life care?

4 And I know that that's a sort of soft
5 term that you really have to define, but do you
6 have -- can you give us some information on that
7 subject?

8 DR. WILLIAMS: So, two answers. One
9 answer is what we do know is that older adults
10 account for approximately four to nine times the
11 cost of younger prisoners to incarcerate.

12 Some of the problem with understanding
13 exactly what healthcare-related costs are is that
14 first of all many states are not actually
15 obligated to release some of that information.

16 Secondly, there's a real question
17 about what is a healthcare-related cost? I mean,
18 do you -- are the costs associated with officers
19 who are -- two officers who are standing with a
20 comatose patient in a hospital, you know,
21 collecting their overtime, is that a health-

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1 related cost, or is that a corrections cost? So,
2 there's some questions about how to even really
3 start to drill down and what exact healthcare-
4 related costs are.

5 I will say that recently we looked at
6 one state and I'm not actually sure if this is
7 publicly available data, so I have to find out
8 before I give the Commission the information
9 about this, but we looked at one state and we
10 looked at prisoners who had died within the last
11 two years and we found that healthcare-related
12 costs were exorbitantly higher in the last year
13 of life than they were on average for Medicare
14 recipients in the community.

15 And those are just the very specific
16 hospitalization and healthcare-related costs.
17 So, I can't exactly answer your question. What
18 I can say is that if you're asking about costs,
19 the answer is really, really high.

20 MS. PRICE: And I'll just add I think
21 that the Office of Inspector General report

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1 discusses the medical costs as they relate to
2 aging prisoners in the Federal of Bureau of
3 Prisons. So, that information should be
4 available at least for them.

5 CHAIR SARIS: I understand you're
6 objecting a little bit to putting a certain time
7 period on what "terminal" means, because you say
8 the doctors can't predict.

9 So, I understand what you're
10 recommending is just using the word "terminal"
11 and "chronic."

12 What would your exact wording be?

13 DR. WILLIAMS: So, great question. I
14 guess I would backup for a minute and say
15 physicians can prognosticate in certain
16 circumstances, you know.

17 We're very good at saying the person
18 in front of me is probably going to die in the
19 next 48 hours. And I'm really good at saying a
20 seven-year-old girl is probably going to live for
21 another 80 years. And then everything sort of

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1 in the middle depends on what the condition is
2 that I'm being asked about.

3 So, there's certain solid tumor
4 metastatic cancers where the end-of-life
5 trajectory is very clear and it's very
6 predictable, and I can make a recommendation
7 about that.

8 What's less easy to make a prognosis
9 about is some of the debilitating conditions that
10 are becoming more and more common with an aging
11 prisoner population. Things like dementia.
12 Things like profound functional impairment.
13 Things like end-organ disease like liver failure
14 and heart failure.

15 Some of these conditions actually have
16 more of a kind of oscillating trajectory where
17 it's very difficult to see where in that process
18 the patient necessarily is until way at the end
19 of their condition.

20 So, what I would say is that in terms
21 of terminology, number one, it will be important

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1 to think about different trajectories of end-of-
2 life illness which is why I say "serious" and
3 "advanced" life-threatening condition with
4 profound cognitive or functional impairments.

5 And so, I think that there are times
6 when a physician can say this is a patient with
7 a terminal life-limiting illness, but there are
8 times when we can say this is a life-limiting
9 illness with a clear trajectory towards cognitive
10 and functional impairment in the next one to two
11 years.

12 CHAIR SARIS: So, the exact language
13 would be?

14 DR. WILLIAMS: I'm an academic. Are
15 you really asking me to make an exact --

16 CHAIR SARIS: I'm a lawyer.

17 (Laughter.)

18 DR. WILLIAMS: Just kidding. The
19 exact terminology would be advanced -- serious
20 advanced illness with a clear terminal
21 trajectory.

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1 CHAIR SARIS: You know, I just read a
2 compelling book over the weekend, "When Breath
3 Turns to Air." I don't know if anyone has had a
4 chance to read that about a 37-year-old that was
5 diagnosed with -- a neurosurgeon with stage 4
6 lung cancer.

7 And it's now coming to me as you are
8 speaking, there was a point at which he says to
9 his doctor, tell me about the graph. How long
10 do I have to live? And she knew and wouldn't
11 tell him, because they don't want to take away
12 hope, I guess, is the theory.

13 But what was true from that book,
14 anyway, I just want to know if you agree, is that
15 actually there are graphs out there.

16 DR. WILLIAMS: Yes, there are graphs.
17 And there are -- there are very clear sort of
18 four or five general trajectories and they differ
19 where, you know, there are trajectories, like I
20 said, the metastatic solid tumor cancer, there
21 are -- there is an advanced illness that is sort

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1 of very quickly and has a very profound cliff
2 where people sort of move along and then
3 suddenly, you know, there's just a matter of a
4 couple of weeks and then they've died. There's
5 sort of the sputtering decline.

6 So, there are a lot of different
7 trajectories, but there's a lot of different ways
8 that people die, but really they fall into four
9 or five overarching trajectories.

10 CHAIR SARIS: And is 18 months
11 consistent with that with most, I mean, they keep
12 expanding it. Six, 12, 18. I think they're
13 trying to be expansive.

14 DR. WILLIAMS: Yeah, I think that
15 they're trying to be expansive. And I think the
16 question really is how much do you want the
17 physician -- how much do you want to pin down the
18 physician? What's the wording that the physician
19 has to say? This person is going to be dead in
20 18 months? Is it --

21 CHAIR SARIS: How about --

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1 DR. WILLIAMS: -- there's a 50 percent
2 chance that this person is going to be dead?

3 CHAIR SARIS: Oh, likely. More
4 likely true than not true that the person --

5 DR. WILLIAMS: More likely true than
6 not true. I would agree with that. So, more
7 than 50 percent likelihood that the person is
8 going to be dead in the next 18 months. Because
9 what happens is even if they're not dead, they're
10 probably going to need 24-hour nursing care in
11 those 18 months.

12 CHAIR SARIS: So, actually --

13 DR. WILLIAMS: And a physician feels
14 much better about saying that than they do about
15 the exact date.

16 CHAIR SARIS: -- the BOP is -- so, if
17 that's the standard, the BOP actually is sort of
18 --

19 DR. WILLIAMS: Is moving --

20 CHAIR SARIS: Is moved in the --

21 DR. WILLIAMS: -- in that direction.

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1 CHAIR SARIS: -- right direction
2 there.

3 DR. WILLIAMS: Yes. Yes.

4 COMMISSIONER BARKOW: So, I have a
5 couple questions. First, for Dr. Williams, with
6 the list that you have, is there any concern with
7 any of these about malingering?

8 Because I'm just going to guess that
9 part of the delay of the Department or the Bureau
10 is making sure someone really is as ill as they're
11 saying they are.

12 So, when thinking especially about
13 dementia or things, will all of these be pretty
14 easily validated, proven, or is it the kind of
15 thing that is subject to debate and it may be
16 more difficult for an inmate to actually show
17 this is a real thing?

18 DR. WILLIAMS: Well, it's hard to make
19 a general sweeping kind of opinion about that,
20 because there are so many different types of
21 diseases that cause death.

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1 What I would say is, again, from my
2 perspective we're talking about medical
3 eligibility for evaluation. And so, this is sort
4 of the first gatekeeping door.

5 And then of course, I mean, there's -
6 - I can only imagine and I also know that there's
7 a whole host of considerations that come into
8 play. I mean, people are being watched when they
9 don't know they're being watched. There are
10 medical records that may document when the
11 disease happened, whether or not there have been
12 improvements or unexpected worsenings, you know,
13 in the week before request for release, you know.
14 So, I think that there's a whole slew of
15 documentation that is incorporated into decision-
16 making that is beyond just the diagnosis.

17 What I would say is, you know, 50
18 percent of people over the age of 80 have
19 dementia. That in the criminal justice
20 population, this is a lot higher.

21 There have been insufficient studies

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1 to show how high the burden of severe age-related
2 cognitive impairment, dementia is in the criminal
3 justice population, but suffice it to say early
4 studies are showing an extremely high number of
5 people have this.

6 And so, I think that question of
7 malingering, you know, when you look at
8 population estimates, that is also something that
9 goes into ferreting out what is malingering and
10 what is real diagnosis.

11 COMMISSIONER BARKOW: And also for
12 Ms. Price, I'm curious where you see the -- where
13 are the delays happening at -- if you have a sense
14 from the -- so, you gave the example of the warden
15 was for it and it's the Central Office that seems
16 to have slowed things down. And then it seems
17 like in other instances it's that there's no
18 filing by the -- do you have a sense if there is
19 any rhyme or reason into kind of where the
20 bottleneck occurs?

21 MS. PRICE: It probably happens at all

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1 levels. It was an important step to remove the
2 regional office review that Kathleen Kenney
3 mentioned to you earlier. That took out a step
4 that could take quite a long time because the
5 regional offices, you know, would sometimes sit
6 on these for a fairly long period of time.

7 I think that there are probably delays
8 at all levels. One of the things that the
9 Inspector General's report on compassionate
10 release pointed out, is that there was confusion
11 at all levels of the Bureau of Prisons about its
12 own criteria and its own guidance on this.

13 And so, there were delays, perhaps,
14 for example, in determining some of the elderly
15 prisoners who were made eligible in 2013, there
16 was a great deal of confusion, nonetheless, at
17 the institution level about those criteria. So,
18 they had to write new guidance for them and add
19 that to the -- so, that slowed everything down.

20 And while that was happening, as I
21 understand it, a lot of these decisions were

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1 sitting in the Central Office, because even
2 though the wardens had forwarded opinions, there
3 wasn't sort of this finality about what is our
4 actual final determination of what an elderly
5 prisoner is with a medical condition.

6 So, I think some of it has to do with
7 institutions not being clear. I tell the story
8 of a woman who, like the gentleman I just
9 discussed, lost her husband who was caring for
10 their children. And several times she reached
11 out to staff to help her with a compassionate
12 release.

13 And even though it had been enunciated
14 already by the Sentencing Commission that this
15 was a ground and the Bureau of Prisons says that
16 they had advised the institutions about what the
17 Sentencing Commission had provided as grounds for
18 compassionate release, the staff were unaware and
19 said, look, you need to go read our manual,
20 because this clearly does not fall within this.
21 So, lots of time was wasted right there.

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1 So, on a case-by-case basis I can't
2 always tell and I certainly am not inside the
3 process enough to know, but I do know that
4 sometimes certainly there are significant delays
5 once, as this gentleman's recommendation is
6 certainly undergoing, there are significant
7 delays once a recommendation from a warden
8 reaches the Central Office.

9 Now, they're also reaching out to the
10 U.S. Attorney and there may be delays associated
11 with that, but, again, I don't have an inside
12 track on that at all.

13 COMMISSIONER BARKOW: Do any of you
14 know is there any model out there where there
15 isn't a gatekeeping function done by the
16 Department of Corrections, if there's any
17 alternative model without flooding the courts or
18 what -- is this it? Is this like the --

19 DR. WILLIAMS: Variations on a theme.

20 CHAIR SARIS: We'll just go down to
21 Judge Pryor. We'll just go right down the --

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1 COMMISSIONER PRYOR: Dr. Williams,
2 when you get to your recommendations in
3 Recommendation 3, you recommend corresponding
4 with your first recommendation lowering the age
5 of eligibility for those with qualifying medical
6 conditions to 55 or 50.

7 My question is from your perspective
8 just from a medical perspective, is there really
9 any reason to have an age requirement for that
10 one at all?

11 DR. WILLIAMS: That's a great
12 question.

13 COMMISSIONER PRYOR: And so to remind
14 you what they are, I mean, you suffer from a
15 chronic --

16 DR. WILLIAMS: I think that that's --
17 yeah, that's a great point and I would say no.
18 Actually, you make a great point, but in
19 geriatrics what we say is age is just a number.

20 MS. SPEAKER: I like her.

21 (Laughter.)

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1 DR. WILLIAMS: There are 70-year-olds
2 who run marathons. And there are 30-year-olds
3 who are, you know, multiple gunshot wound victims
4 who are paralyzed and they look much more like -
5 - they develop many more of the sort of so-called
6 accelerated aging characteristics that we think
7 of for people in their 80s, and they're 30. So,
8 I think that you're absolutely right and I would
9 agree with that assessment.

10 COMMISSIONER FRIEDRICH: Dr. Williams
11 --

12 DR. WILLIAMS: Yes.

13 COMMISSIONER FRIEDRICH: -- just
14 curious. Have you worked with institutions other
15 than BOP to help them set their standards? Have
16 you worked with --

17 DR. WILLIAMS: Well, to be clear, I
18 actually have not worked for the BOP to set
19 standards.

20 COMMISSIONER FRIEDRICH: I mean, I
21 know you haven't, but --

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1 DR. WILLIAMS: Yeah, so I have -- I
2 have worked a bit with two different states,
3 really, people who are making recommendations to
4 their policies and sort of weighed in on those
5 two policies.

6 COMMISSIONER FRIEDRICH: And are
7 there other models that have incorporated the
8 surrogate recommendation which seems to make a
9 lot of sense?

10 DR. WILLIAMS: Yeah. So, actually at
11 one point, if I'm not mistaken, New York State
12 had a surrogate model. The surrogate model makes
13 a lot of sense, because it's really grounded in
14 the science of palliative care, which really does
15 show us that the vast majority of people who have
16 a terminal illness, whatever we decide to call
17 it, have cognitive capacity.

18 Even if they don't have dementia, per
19 se, they have some degree of cognitive incapacity
20 that would make the process of petitioning and
21 pulling all the work together and identifying

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1 sort of all the processes that they need to follow
2 to make the petition successful extremely
3 problematic.

4 And, frankly, older adults have been
5 shown -- older prisoners have been shown to be
6 the population who is sort of the most
7 unbefriended and least likely to have continuing
8 relationships with people outside.

9 So, they don't sort of have
10 necessarily the same likelihood of a built-in
11 surrogacy sort of community that could come to
12 their aid as well.

13 COMMISSIONER FRIEDRICH: Thank you.

14 CHAIR SARIS: Judge Breyer.

15 VICE CHAIR BREYER: Yeah, I was
16 alerted with your choice of words that there are
17 people who otherwise would qualify, Ms. Price,
18 yes, to -- for compassionate release, but didn't
19 or weren't -- or the motion was made too late or
20 something of that nature.

21 And because I don't quite know what it

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1 means to say otherwise qualify since under the
2 statute I think the Bureau of Prisons could take
3 into account any number of things, I think the
4 interesting question is how many of these people
5 who applied would qualify under the medical
6 aspect of it, but under the other aspects which
7 are the other 3553(a) factors, would not in the
8 warden or the director of prison's judgment.

9 So, my question to you is, has there
10 been that type of analysis? Have you looked and
11 said, look, if they only just did the medical,
12 but didn't do the other 3553(a) factors, what
13 would the statistics show?

14 MS. PRICE: I don't know of any study.
15 I mean, certainly it would show more motions, if
16 that's what you're getting at.

17 VICE CHAIR BREYER: Well, I'm trying
18 to figure out, I mean, I don't know that I want
19 more motions or fewer motions. I'm just trying
20 to figure out what's going on. What is
21 happening? How long is it taking? Why are these

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1 people denied compassionate release? What's the
2 reason for it?

3 Is the reason medical? Is the reason
4 the victims? Is the reason the nature and
5 circumstance of the offense?

6 We have the New York situation where
7 maybe certain offenses you simply don't qualify,
8 and I think the research that would be helpful
9 would be what is going on? And, also, how long
10 it takes.

11 MS. PRICE: Well, I do know of a
12 number of cases, we talk about them in our report
13 and they're discussed elsewhere, a number of
14 cases where people who clearly met the criteria,
15 were soon to die, nonetheless, were not released
16 because in the Bureau of Prison's opinion they
17 hadn't served a long enough sentence that has
18 been cited, their crime was too serious.

19 In the case of Michael Mahoney, whose
20 case I discuss in this case -- in our testimony,
21 rather, because the nature of his offense

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1 although when one took a close look at it, the
2 judge himself asked for the motion to be
3 presented.

4 So, there are a number of reasons
5 extraneous to the determination that the person
6 fits underneath the 1B1.13 criteria, or even the
7 Bureau of Prison's medical criteria that are
8 cited by the Bureau of Prisons for the
9 proposition that they're not going to bring the
10 motion.

11 And of course once the motion is
12 presented, the court has no jurisdiction to
13 consider this.

14 The gentleman who I talked about today
15 in my testimony, there's no way, I mean, he
16 happens to have a lawyer who's sort of sending
17 material and information to the Bureau of
18 Prisons, but there's no way for him to
19 meaningfully interact with this conclusion that
20 has been reached by at least one component of the
21 Bureau of Prisons that there is somebody out

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1 there who is going to take care of this children.

2 There is no process. And if this was
3 to move into the courtroom, if the Bureau of
4 Prisons was going to bring the motion, they can
5 say, look, we think there might be somebody out
6 there, at least somebody could step into that
7 process and say, no, Judge, there really isn't
8 and here's the evidence. We have the State
9 moving to terminate his parental rights for this
10 very reason, but they never get to that point.

11 COMMISSIONER MORALES: I want to
12 thank the whole panel, but in particular Dr.
13 Williams. I think your testimony is exactly the
14 kind of information that the working group that
15 we talked about earlier that the Department is
16 heading can focus on in order to develop new
17 guidance. So, I thank you for that in
18 particular.

19 And I do thank Ms. Price and Ms.
20 Williams for the -- and Dr. Williams for the sort
21 of heartbreaking stories that you brought before

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1 us.

2 Undoubtedly, again, this is a very
3 difficult topic and these are very sad
4 situations, but we are talking today mostly about
5 the idea of broadening the pool of motions that
6 the Bureau of Prisons will be filing.

7 And I -- can you tell me what you think
8 the -- it seems to me from what you've told me,
9 that both of these cases that you mentioned, of
10 course Dr. Williams is a state court, so it's not
11 quite applicable, I don't see how broadening the
12 pool at BOP would actually have any impact on
13 those types of cases.

14 In Dr. Williams' case, for example,
15 it's only the BOP. The BOP actually recommended
16 it, not the BOP, but the State prison system. In
17 the case of Ms. Price's example, it just seems to
18 me that it would be -- it could, again, as I
19 mentioned before in my question to Mr. Horowitz,
20 I worry that broadening the pool would actually
21 take away from the most eligible applicants.

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1 And if you -- can you talk about your
2 thoughts about how broadening the pool, the
3 impact that that would have on cases such as the
4 ones you raise?

5 MS. PRICE: The statute calls for the
6 motion to be brought when a prisoner presents
7 extraordinary and compelling reasons. And I
8 think that the reason we're talking about
9 broadening the pool at all is because it's been
10 so narrow for so long.

11 There are more reasons why people
12 ought to at least be considered for a reduction
13 in sentence than have reached the courts until
14 now.

15 I don't worry about the resource
16 issue. I know you raised that question earlier
17 about whether or not this would take away
18 resources if we're going to go out there and sort
19 of hunt up all these people who are aging and so
20 on and so forth, but really what you're talking
21 about is resources that are currently being spent

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1 on an aging population that's extraordinarily
2 expensive to support and maintain with dignity.

3 We're talking about maintaining
4 people who are dying in prison who need round-
5 the-clock care, who they have to train prisoners
6 to do hospice care for them, because the staff
7 are not trained, eligible or able and maybe
8 can't.

9 So, yes, let's broaden the pool as
10 broadly as we can. And I think what it will do
11 in the balance is if we're moving some of the
12 people who are the most expensive people to
13 maintain the system, we'll actually make more
14 resources available. And I think that was the
15 point of Mr. Horowitz' report as well.

16 CHAIR SARIS: Did you want to jump in?

17 COMMISSIONER PRYOR: Yeah, I do. I
18 don't see how that's responsive to her question.

19 MS. PRICE: Oh, sorry. Maybe I
20 didn't understand.

21 COMMISSIONER PRYOR: I mean, it seems

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1 to me that if you broaden the pool, perhaps more
2 will get consideration, but it doesn't change the
3 problem with the example that you provided us,
4 right?

5 I mean, if that person was eligible
6 under the current criteria and is not getting
7 relief, how does broadening the pool help it?

8 MS. PRICE: Right, broadening the
9 pool does not help it.

10 COMMISSIONER PRYOR: It doesn't.

11 MS. PRICE: I'm sorry, I didn't
12 understand the question. No, it doesn't. My
13 point about presenting that story wasn't about
14 broadening the pool. You already broadened the
15 pool to include him.

16 COMMISSIONER PRYOR: Right.

17 MS. PRICE: That was a change that the
18 Commission wisely made a couple of years ago.

19 COMMISSIONER PRYOR: Well, then the -
20 -

21 MS. PRICE: The problem that I have -

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1 -

2 COMMISSIONER PRYOR: But the second
3 part of her question is that if we broaden the
4 pool, though, that will mean more motions or more
5 requests for BOP to file motions, and that will
6 necessarily tax whatever finite resources BOP
7 has.

8 Now, whether or not -- I understand
9 your response on that is there's a lot of money
10 to be saved for those who are released through a
11 proper program. That would be true now, right?
12 And maybe even more true if the pool is broadened.

13 But if you have more requests, then
14 whoever is administering this program is going to
15 be -- is going to have to devote more resources
16 to the additional requests, right?

17 MS. PRICE: I think those are
18 resources that would be well spent, because at
19 the end of the day they will free up resources.

20 COMMISSIONER PRYOR: They're going to
21 be necessarily spent, right?

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1 MS. PRICE: Yes.

2 COMMISSIONER PRYOR: Not just well
3 spent. I mean, it's going to be absolutely
4 necessary, because there are going to be more
5 requests.

6 MS. PRICE: There are already
7 exhaustive inquiries now into these individual
8 cases that deal not just with whether they meet
9 the criteria, as this gentleman clearly does, but
10 as to whether he should be released.

11 The point of my story was to say
12 whatever we advise about broadening the criteria
13 and the rest of the criteria, the one thing that
14 we absolutely hope that you will do is to say
15 once the Bureau of Prisons makes that
16 determination that this is a person who meets the
17 criteria enunciated by the Sentencing Commission
18 that there is no family caregiver available, take
19 that to the court.

20 I mean, that is a motion that can be
21 readily taken. You can take away from the Bureau

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1 of Prisons the worrying about whether he deserves
2 to be released, has he served enough time in
3 prison, was his crime particularly heinous?

4 This is something that the court
5 knows. Knows when he was sentenced.

6 VICE CHAIR BREYER: But I agree --

7 MS. PRICE: Knows --

8 VICE CHAIR BREYER: I understand
9 that, but I'm concerned about the way the statute
10 reads. And I don't know that the court has
11 jurisdiction to decide any of these things absent
12 a change in the statute.

13 MS. PRICE: The Bureau of Prisons --

14 VICE CHAIR BREYER: And I think we can
15 make any recommendations we think are
16 appropriate, but I really think that this process
17 where you're deeply concerned about it can
18 benefit from an analysis as to; one, what is going
19 on, and; two, is it medical or is it otherwise?

20 You go through that process. That may
21 or may not, may or may not broaden the pool. I

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1 don't know, but at least it may address the
2 problem that I see, which is you have 3,000 people
3 apply, you have 250 people pass, go through it,
4 and there's something going on here.

5 Now, it may be that anybody takes
6 advantage of it. I understand that. So, numbers
7 don't tell the whole story, but time between
8 making a motion and resolution of the decision
9 does take time. And it will take resources.

10 And I guess your answer to DOJ is, and
11 response to that question is, look, it may take
12 more resources. You don't deny that at the front
13 end it takes more resources, but it may result in
14 the savings if, in fact, somebody is eligible for
15 it.

16 MS. PRICE: Absolutely. And I agree
17 with you that more needs to be done to understand
18 where the delays occur and why they occur. And
19 I think we should also note why there are denials,
20 why are people actually denied. And that
21 information is not made available at least so

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1 far.

2 CHAIR SARIS: Thank you very much.
3 This is extremely helpful and I hope you stay
4 involved, Dr. Williams, and I learned a lot.
5 Thank you.

6 MS. PRICE: Thank you very much.

7 CHAIR SARIS: I know how much FAMM
8 does and ACA. So, thank you very much. And to
9 Professor Stith, wherever you are, we miss you.

10 (Laughter.)

11 CHAIR SARIS: We're moving on now to
12 conditions of probation and supervised release.
13 I learned my lesson. No standing, no stretching.
14 Takes too much time.

15 (Pause.)

16 CHAIR SARIS: I guess I can still say
17 "good morning," Judge.

18 HON. MARTINEZ: Good morning. Still
19 is morning, yes.

20 CHAIR SARIS: Still is the morning.

21 So, as I mentioned, we're turning now to

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1 conditions of probation and supervised release.

2 And I first want -- the Commission's
3 proposed amendment for public comment on
4 supervised release is a result, didn't come out
5 of nowhere, it's a result of collaboration with
6 the Criminal Law Committee, which has studied the
7 current conditions in light of recent court
8 precedent, as well as the Commission's own multi-
9 year review of federal sentencing practices
10 relating to conditions of probation and
11 supervised release.

12 This proposed amendment revises,
13 clarifies, rearranges conditions of probation and
14 supervised release found in the manual. In
15 general, the changes are intended to make the
16 conditions more focused and precise, as well as
17 easier to understand and to enforce.

18 So, I look forward to all our
19 witnesses today and I'm pleased to begin with
20 Judge Martinez, who is testifying on behalf of
21 the Criminal Law Committee of the Judicial

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1 Conference.

2 I know how much time you all have
3 spent on this. You have also been experienced,
4 Judge, as a judge in the Western District of
5 Washington since 2004, and the new chief judge
6 out there.

7 So, welcome, Judge Martinez.

8 HON. MARTINEZ: Thank you.

9 CHAIR SARIS: As much time as you
10 want.

11 HON. MARTINEZ: Judge Saris and
12 members of the Sentencing Commission, on behalf
13 of the Criminal Law Committee of the Judicial
14 Conference of the United States, thank you so
15 very much for providing us the opportunity to
16 comment on proposed amendments to the sentencing
17 guidelines.

18 As you indicated, the thrust of my
19 oral comments today are on the conditions of
20 supervision. However, having sat through the
21 morning and listening to the panelists speak on

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1 compassionate release, let me just point out a
2 couple things to the Commission on that issue.

3 As we indicated in our written
4 comments, our committee defers to your
5 Commission, does not offer any comment about what
6 changes, if any, you should make. However,
7 remember now, federal probation officers develop
8 and implement the supervision plans for inmates
9 who are compassionately released to the
10 community.

11 That federal supervision program is
12 designed to address criminogenic risks and needs
13 rather than general medical or geriatric care.

14 Under current law, someone who is
15 released to the community even for a
16 compassionate release, they are required to
17 complete at least one year of supervision.

18 It makes little policy or financial
19 sense to keep these offenders under supervision
20 in our -- from our perspective.

21 Because of that, we have recommended,

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1 and the Judicial Conference has approved, seeking
2 legislation that permits the early termination of
3 supervision terms for those individuals.

4 I don't need to remind you that
5 supervision of these people poses dramatically
6 different in resource-intensive challenges that
7 have to be considered.

8 Now, turning to the conditions of
9 supervision, the Committee is in favor of the
10 Commission's proposed amendments to revise,
11 clarify and rearrange the conditions of probation
12 and supervised release.

13 These amendments are consistent with
14 changes that we recently endorsed after an
15 exhaustive review.

16 The conditions of supervision define
17 the sentence to be executed, establish behavioral
18 expectations for defendants, and provide the
19 probation officer with tools to keep informed and
20 bring about improvements in a defendant's conduct
21 and condition.

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1 Discretionary conditions of
2 supervision are differentiated into either
3 "standard" and "special" conditions.

4 Standard conditions represent core
5 supervision practices required in every case to
6 fulfill the statutory duties of probation
7 officers.

8 Special conditions provide for
9 additional restrictions, correctional
10 interventions or monitoring tools as necessary to
11 achieve the purposes of sentencing in the
12 individual case. And in the case of probation
13 or parole, they provide for additional sanctions.

14 Our committee has had an active and
15 ongoing role in developing, monitoring and
16 recommending revisions to the conditions of
17 supervision both before and after the Sentencing
18 Reform Act.

19 The standard conditions in the
20 national judgment form were last approved by the
21 Judicial Conference of 2011.

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1 Over the last year the Committee has
2 reviewed the standard and most common special
3 conditions to assess whether all of the standard
4 conditions are required for supervision in all
5 cases.

6 The language for some of the standard
7 and common special conditions can be refined and
8 additional guidance can be provided concerning
9 the appropriate language and the legal and/or
10 criminological purposes of the standard and most
11 common special conditions.

12 As I'm sure you're aware, this review
13 was prompted in part by the Seventh Circuit
14 opinions in recent years expressing concern about
15 the wording of standard and special conditions
16 and the manner in which they were imposed.

17 In May of 2014, the Seventh Circuit
18 issued the opinion in United States v. Siegel
19 where it summarized the common, but largely
20 unresolved problems in the imposition of
21 conditions of supervised release. And one of the

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1 most serious problems identified by the court is
2 that the conditions are often vague and
3 inadequately defined.

4 A second problem is that the probation
5 office's pre-sentence report or sentencing
6 recommendation generally suggests conditions of
7 supervised release with only brief
8 justifications. Judges then often merely repeat
9 the recommendations and do not explain how they
10 comport with the sentencing factors listed
11 specifically in 3553(a).

12 One reason for this, according to the
13 court, is that the sentencing hearing may be the
14 very first time in which defense counsel learns
15 of the probation office's recommendation for
16 conditions of supervised release. Without
17 advance notice, counsel may have nothing to say
18 about the conditions. The judge may, therefore,
19 be less likely to question them about those
20 conditions.

21 An additional problem is the large

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1 number and variety of possible discretionary
2 conditions. According to that court, the sheer
3 number may induce haste in the judge's evaluation
4 of the probation service's recommendations and is
5 doubtless a factor in the frequent failure of
6 judges to apply the sentencing factors set out in
7 3553(a) to all the recommended conditions
8 included in the sentence.

9 And finally, because conditions are
10 imposed at the time of sentencing, the sentencing
11 judge often has to guess what conditions are
12 likely to make sense when the offender is
13 eventually released.

14 Obviously the longer the sentence, the
15 less likely that guess is to be accurate.
16 Conditions that may seem sensible at the time of
17 sentencing may not be so sensible many years or
18 even decades later.

19 Since Siegel, the Seventh Circuit has
20 reiterated and expanded upon these concerns in
21 numerous additional opinions. It has vacated or

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1 expressed concern about individual standard and
2 special conditions for a variety of reasons
3 including being too vague, being overbroad, not
4 including a knowledge requirement for violation,
5 and not having an adequate justification for how
6 that condition is reasonably related to either
7 the offender or the offense characteristics, how
8 they are reasonably related to the relevant
9 statutory sentencing factors, and how they
10 involve a minimal deprivation of liberty.

11 So, in response to this developing
12 case law, individual districts in the Seventh
13 Circuit and other circuits have reexamined their
14 practices concerning the recommendation and
15 imposition of standard and special conditions.

16 Some districts have changed the
17 wording of the conditions. Some have reduced the
18 number of standard conditions and included the
19 recommended conditions and a more comprehensive
20 justification in the pre-sentence report.

21 At the national level, the DOJ has

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1 requested that the Commission amend the
2 conditions of supervision and commentary in the
3 Guidelines Manual to specifically address the
4 concerns of the Seventh Circuit.

5 As the DOJ reasoned, courts and
6 litigants within that circuit are addressing the
7 concerns of the Seventh Circuit in a variety of
8 ways. They are spending a great deal of time and
9 effort proposing and reviewing responses to
10 conditions prior to sentencing and justifying
11 those conditions at sentencing case-by-case often
12 struggling to find the appropriate support and
13 justifications for various conditions of release.

14 We feel that some level of national
15 uniformity in standard conditions is necessary
16 for a variety of reasons. First, they represent
17 core supervision practices required in every
18 case.

19 Second, approximately 20 percent of
20 offenders under supervision were sentenced in
21 districts other than the district of supervision.

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1 Finally, uniformity in standard
2 conditions ensures efficient policy development
3 and training at the national level.

4 In February of last year the Committee
5 asked the AO to conduct a comprehensive review of
6 the standard and most common special conditions.
7 This review included an analysis, exhaustive
8 analysis of case law and numerous discussions
9 between AO staff and probation officers
10 concerning legal policy and practical issues
11 surrounding the recommendation, imposition and
12 execution of conditions of supervision.

13 As a result of these efforts, AO staff
14 proposed revisions to the standard conditions on
15 the national judgment form.

16 Additionally, it developed a document
17 to provide policy guidance to judges, probation
18 officers, prosecutors, defense attorneys and
19 other criminal justice practitioners.

20 The document describes the legal
21 authority, model condition language, purpose,

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1 including reference to any criminological
2 research, and method of implementation for the
3 standard conditions and the most common special
4 conditions.

5 One purpose of that document is to
6 provide notice to the defendant of the standard
7 and special conditions.

8 Additionally, it may assist the
9 parties in determining when specific special
10 conditions are appropriate and in providing
11 individualized justifications for the
12 conditions.

13 Finally, the document may even aid
14 appellate courts when reviewing the imposition of
15 conditions in those individual cases.

16 In November of last year, the AO
17 distributed drafts of the proposed standard
18 conditions and guidance document to judges,
19 probation officers, DOJ and federal defenders,
20 and it solicited feedback which was then used to
21 make necessary revisions.

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1 Additionally, AO staff collaborated
2 with the Sentencing Commission staff with the
3 intent of harmonizing the conditions listed in
4 the Guidelines Manual with those on the national
5 judgment form.

6 At our next meeting in June, our
7 committee will consider whether to approve the
8 issuance of the new guidance document and amend
9 the national judgment forms.

10 Our committee supports the
11 Commission's proposed amendments to revise,
12 clarify and rearrange the standard conditions of
13 probation and supervised release. The proposed
14 language is more clear and plainly worded.

15 Additionally, many of the proposed
16 conditions include a requirement that the
17 defendant knowingly violate the conditions.

18 Finally, the proposed amendments
19 remove a number of requirements from the list of
20 standard conditions because they are not
21 applicable in every case or otherwise addressed

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1 by other conditions.

2 Indeed, the Senate Report
3 accompanying the Sentencing Reform Act makes
4 clear that the list of possible conditions in the
5 statute, which includes supporting dependents,
6 meeting family responsibilities, refraining from
7 excessive use of alcohol, is only suggestive.

8 It may be helpful to provide a more
9 detailed discussion regarding several of the
10 proposed changes. First, the Committee supports
11 the proposal to remove the current standard
12 condition requiring that the defendant support
13 his or her dependents and meet other family
14 responsibilities.

15 This condition would not be reasonably
16 related to the history and characteristics of the
17 defendant if he has no dependents or family
18 obligations.

19 Additionally, the scope of the term
20 "meet other family responsibilities," is vague
21 and unclear.

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1 A group of probation officers that
2 assisted with the review of these standard
3 conditions unanimously agree that the term is
4 vague and often leads to uncertain and
5 inconsistent enforcement.

6 Of course if a probation officer or
7 court determines that a condition requiring
8 support of dependents or the satisfaction of
9 other family responsibilities is necessary, then
10 that probation officer and the court may
11 recommend and impose such a requirement as a
12 special condition.

13 Secondly, the Committee is in favor of
14 the proposal to remove the current standard
15 condition requiring the defendant to refrain from
16 excessive use of alcohol.

17 Again, the Senate Report accompanying
18 the Sentencing Reform Act made clear that it is
19 not intended that this condition be imposed on a
20 person with no history of excessive use of
21 alcohol and that to do so would be an unwarranted

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1 departure from the principle that conditions must
2 be reasonably related to the general sentencing
3 factors.

4 Now, to be sure, alcohol use may, in
5 individual cases, have a criminogenic effect or
6 inhibit the satisfaction of other conditions such
7 as maintaining employment or supporting families.

8 If a probation officer or court
9 determines that an alcohol restriction condition
10 is necessary, then the probation officer and
11 court may make such a recommendation and impose
12 such a requirement as a special condition in the
13 individual case.

14 It's also noteworthy that the
15 probation officers who assisted with the review
16 of these standard conditions also unanimously
17 agreed that the current standard condition
18 prohibiting excessive use of alcohol is vague,
19 very difficult to enforce and really not valuable
20 as a supervision tool.

21 In fact, the officers opined that it

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1 is more common and effective to request alcohol
2 treatment and a complete alcohol ban if it is
3 determined in any individual case that such a
4 condition is reasonably related to the nature and
5 circumstances of the offense and the history and
6 characteristics of that defendant.

7 Third, the Committee agrees with the
8 proposal to add as a standard condition the
9 requirement that the defendant not own, possess
10 or have access to a firearm, ammunition,
11 destructive device or other dangerous weapon.

12 This condition promotes the public
13 safety and reduces safety risks posed to
14 probation officers. To the extent that the
15 nature and circumstances of the offense or the
16 history and characteristics of the defendant
17 indicate that a prohibition on possessing other
18 types of weapons is necessary, probation officers
19 may recommend that as a special condition.

20 Fourth, with regard to the current
21 standard condition requiring that the defendant

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1 answer truthfully questions of the probation
2 officer, the Commission seeks comment on whether
3 the defendant should answer truthfully or,
4 instead, be truthful when responding to the
5 questions of the probation officer.

6 The Commission requests feedback on
7 both the policy and Fifth Amendment implications
8 of these options.

9 The purpose of the current "answer
10 truthfully" condition is to build positive
11 rapport and facilitate an open and honest
12 discussion between the probation officer and the
13 defendant.

14 Accurate and complete information
15 about the nature and circumstances of the events
16 and the history and characteristics of the
17 defendant is necessary to implement effective
18 supervision practices.

19 The probation officer attempts to
20 develop and maintain a positive relationship with
21 the defendant through transparent communication

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1 and the implementation of evidence-based
2 correctional practices.

3 Our committee believes that a
4 condition requiring that the defendant answer
5 truthfully the questions of probation officers,
6 along with policy guidance directing probation
7 officers how to ensure that Fifth Amendment
8 rights are not violated, satisfies constitutional
9 requirements.

10 The Committee does not support the
11 alternative proposal to require only that the
12 defendant be truthful when responding to the
13 questions of the probation officer.

14 Such a condition, in our opinion,
15 would interfere with the probation officer's
16 ability to establish open communication with the
17 defendant and it would allow defendants to refuse
18 to answer questions about compliance with
19 conditions of supervision.

20 For instance, if it is determined that
21 a defendant has several risk factors for

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1 recidivism including such things as negative
2 social networks, antisocial cognitions,
3 educational or vocational deficits, the probation
4 officer may arrange a meeting with the defendant
5 and ask questions such as, who were you hanging
6 out with last night? Why were you yelling at
7 your wife? Why didn't you go to work today?

8 If the defendant refuses to answer and
9 he is subject to a condition to be truthful when
10 responding to questions, then the probation
11 officer would only be able to note in the file
12 that the defendant refused to answer,
13 criminogenic risk factors would not be addressed,
14 the court would not be informed.

15 If the defendant is subject to a
16 condition requiring her to answer truthfully
17 questions, the probation officer could submit a
18 report to the court that the defendant declined
19 to answer questions.

20 The court can then schedule a hearing,
21 question the offender in camera, if necessary,

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1 about why he or she declined to answer the
2 questions.

3 If the court determines that the
4 invocation of the privilege is not valid because
5 there is no realistic chance of incrimination,
6 then the court can instruct the defendant to
7 answer those questions.

8 The Commission also requests comment
9 about whether it should clarify that an
10 offender's legitimate invocation of the Fifth
11 Amendment privilege against self-incrimination
12 in response to a probation officer's questions
13 shall not be considered a violation of this
14 condition.

15 The Committee supports including such
16 a clarification in the commentary of the
17 Guidelines Manual.

18 In April of 2011, the Committee
19 approved this type of guidance for defendants
20 convicted of sex offenses when it endorsed a new
21 sex offender management procedures manual for

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1 probation and pretrial officers.

2 Under the approved guidance, if the
3 defendant refuses to answer a specific question
4 during an interview on the grounds that it is
5 incriminating, the probation officer is
6 instructed not to compel the defendant to answer
7 the question through threat of revocation.

8 If there is any uncertainty about
9 whether that invocation of the privilege is
10 valid, the probation officer is instructed to
11 refer the matter to the court to make the final
12 determination.

13 Our committee believes that adding
14 this guidance to policies concerning all types of
15 offenders would address any Fifth Amendment
16 concerns without having unintended consequences
17 on the ability of probation officers to
18 effectively supervise defendants.

19 And finally, the Commission seeks
20 comment on the condition of supervised release
21 requiring the defendant shall notify the

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1 probation officer of any material change in the
2 defendant's economic circumstances that might
3 affect the defendant's ability to pay any unpaid
4 amount of restitution, fines or special
5 assessments.

6 This condition is currently listed as
7 a standard condition in the Guidelines Manual,
8 but not on the national judgment form.

9 The Commission seeks comment on
10 whether this condition should be made a special
11 condition rather than a standard one.

12 Our committee supports classifying
13 this obligation as a special condition, again,
14 because it may not be applicable in all cases.

15 In many cases, there is no fine or
16 restitution imposed and the special assessment is
17 usually paid while the defendant is in the Bureau
18 of Prisons.

19 For those defendants who are released
20 to the community with any outstanding criminal
21 monetary penalties, a requirement to notify the

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1 probation officer of a change in economic
2 circumstances can be address by requesting or
3 imposing a special condition.

4 I want to take a few minutes to
5 discuss other measures that the Criminal Law
6 Committee is working on relating to the
7 conditions of supervision.

8 At the national level, some guidance
9 currently exists concerning the imposition of
10 standard and special conditions of supervision.

11 For instance, under Section 3563(d)
12 and 3583(f), the court is required to direct that
13 the probation officer provide the offender with
14 a written statement that sets forth all the
15 conditions to which the sentence is subject and
16 that it's sufficiently clear and specific to
17 serve as a guide for the defendant's conduct and
18 for such supervision as is required.

19 Under Judicial Conference policy, in
20 recommending a unique special condition,
21 probation officers should ensure that the

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1 recommended wording is clear, legally sound and
2 meets the intended purpose.

3 The federal supervision model is
4 founded on the conditions of supervision and
5 comprised of strategies that are sufficient, but
6 no greater than necessary, to facilitate
7 achievement of the desired outcome.

8 Every supervision activity should be
9 related to the statutory purposes for which the
10 term of supervision was imposed and the related
11 objectives established for that individual case.

12 Special conditions are to be sought by
13 probation officers only when the deprivation of
14 liberty or property they entail are tailored
15 specifically to address the issues presented in
16 the individual case.

17 Before recommending special
18 conditions, probation officers should consider
19 all of the mandatory and standard conditions that
20 may already address any particular risk or need.

21 If the officer determines that the

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1 mandatory and standard conditions do not
2 adequately address those risks and needs, he or
3 she then should consider recommending a special
4 condition.

5 Under Judicial Conference policy,
6 courts are further discouraged from adding
7 additional conditions to the list of standard
8 conditions such as substance abuse testing or
9 treatment since they impose an obligation on the
10 probation office that has implications for both
11 staffing and funding.

12 When considering special conditions,
13 probation officers should avoid presumptions or
14 the use of set packages of conditions for groups
15 of offenders and keep in mind that the purposes
16 vary depending on the type of supervision.

17 Officers should ask first whether the
18 circumstances in this case require such a
19 deprivation of liberty or property to accomplish
20 the relevant sentencing purposes at this time.

21 For defendants facing lengthy terms of

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1 imprisonment, probation officers should truly
2 consider whether the risks and needs present at
3 the time of sentencing will be present when the
4 defendant returns to the community.

5 In some cases, it may be very
6 appropriate to avoid recommending special
7 conditions until such time as the defendant is
8 preparing to reenter the community.

9 Despite the existing national
10 guidance, the Committee feels that it may be
11 necessary to provide further guidance concerning
12 the language and justification for standard and
13 special conditions to assist the courts with
14 ensuring that condition language is clear and
15 legally sound, providing the required
16 justification for conditions, and providing
17 proper notice to defendants about the types of
18 conditions that may be imposed.

19 AO staff is in the process of
20 finalizing a document to provide guidance to the
21 judges, probation officers, prosecutors, defense

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1 attorneys and other criminal justice
2 practitioners.

3 The document describes the legal
4 authority, model condition language, purpose,
5 including references to research where
6 applicable, and method of implementation for the
7 standard conditions, as well as the most common
8 special conditions.

9 At our June 2016 meeting, the
10 Committee will consider whether to approve the
11 issuance of the new guidance document.

12 In addition to this document, the
13 Committee will also assess whether to recommend
14 any changes to policies or procedures to provide
15 defendants with sufficient notice and
16 justification for discretionary conditions
17 before and during the sentencing hearing.

18 This could be achieved by having
19 probation officers include proposed conditions in
20 the pre-sentence report or sentencing
21 recommendation.

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1 Additionally, our committee will
2 assist --

3 CHAIR SARIS: I'm just wondering --
4 at some point we're going to want to jump in with
5 questions.

6 HON. MARTINEZ: I'm almost done.

7 CHAIR SARIS: All right.

8 HON. MARTINEZ: All right.

9 Additionally we will assess whether to endorse or
10 recommend changes in policies and procedures
11 regarding the imposition and modification of
12 discretionary conditions at the time the
13 defendant is released from prison.

14 Finally, any changes in condition
15 language, policies and procedures requires
16 training for effective implementation.

17 Our committee will collaborate with
18 the Federal Judicial Center and others to provide
19 all necessary training for judges and probation
20 officers.

21 Once again, thanks to the Sentencing

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1 Commission for providing us the opportunity to
2 comment on these proposed changes to the
3 sentencing guidelines.

4 As we have always in the past, the
5 members of our committee look forward to working
6 with the Commission to ensure that our sentencing
7 system is consistent with the central tenets of
8 the Sentencing Reform Act.

9 CHAIR SARIS: Thank you very much, and
10 we very much appreciate the collaboration as
11 well. These proposals came over from Criminal
12 Law.

13 I didn't realize it would generate so
14 many comments, actually, from both -- from
15 everybody. And we're about to hear from folks,
16 but I want to know if there are any questions.

17 VICE CHAIR BREYER: I have a couple
18 of questions. I wanted to address the point that
19 I think you answered spontaneously today in light
20 of the supervised release, compassionate release.

21 Is it your understanding that if

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1 somebody is -- I've been on 19 years and I've
2 never had one of these cases.

3 Is it your understanding that if
4 somebody is released on compassionate release,
5 that they would then be placed on supervised
6 release and they are out of the custody of the
7 Bureau of Prisons?

8 So, it's different from, quote, a
9 halfway house where they're still in the custody
10 of the Bureau of Prisons. Your understanding is
11 that they simply go over to the Probation
12 Department.

13 HON. MARTINEZ: In the 15 and a half
14 years that I've been on the federal court bench,
15 I've never had one of these either, but that is
16 exactly my understanding that under current law
17 they would have to serve at least one year of
18 supervised release.

19 VICE CHAIR BREYER: Okay. The second
20 question I have is that at least in our circuit,
21 please, and you are in our circuit, the way I

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1 have dealt with these conditions that may no
2 longer be applicable is that when the defendant
3 is returned to the District or is in the District
4 in which the conditions were imposed in 80
5 percent of the cases or otherwise, and the
6 probation officer believes that a condition is
7 inappropriate or that a different condition
8 should be added, I then would get a request. We
9 get requests all the time to modify and so forth.

10 Do you find that satisfactory? Is
11 that something that -- rather than bringing the
12 defendant in front of the judge for the
13 recitation of all those conditions, they go in
14 front of the probation officer.

15 The probation officer says, you may
16 not remember what happened eight years ago, but
17 here were the 12 conditions. I want to go over
18 them with you to make sure that in the passage of
19 time you still understand them. And if there is
20 one that is inappropriate, whatever reason, they
21 then come to the court.

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1 Do you follow that practice?

2 HON. MARTINEZ: That's exactly what
3 we do in our district. And as you're aware, you
4 know, as time goes by, judges retire and then
5 other judges come on board.

6 I inherited several judges' caseloads
7 from prior sentencings. And many, many times
8 when those people are finally released, we will
9 get modifications simply from their probation
10 officer.

11 Now, remember, if the defendant
12 objects to any of those modifications, then they
13 have a right to bring it back into court.

14 But for the majority of time, I'll say
15 well over 90 percent, the defendant agrees and we
16 simply sign off on it and modify it.

17 VICE CHAIR BARKOW: Thank you.

18 CHAIR SARIS: Commissioner Barkow.

19 COMMISSIONER BARKOW: Yeah, I was
20 just curious in the issue about -- the Fifth
21 Amendment issue that comes up in terms of

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1 requiring people to answer truthfully, one of the
2 proposals we got from the defenders was this
3 language, which I'm just going to read to you and
4 see if this is a compromised position, if this
5 covers what your concerns would be.

6 What if we said something along the
7 lines of the defender must -- defendant must
8 answer truthfully or be truthful when responding
9 to the questions asked by the probation officer
10 regarding compliance with the conditions of
11 supervision, but the defendant remains free to
12 exercise the Fifth Amendment right against self-
13 incrimination when the question is posed, a
14 realistic threat of incrimination in a separate
15 criminal proceeding.

16 Would something like that balance the
17 interest of needing the open communication when
18 you're talking about anything related to the
19 conditions of supervision, but at the same time
20 reminding the defendant that if it's anything
21 that might be self-incriminating, you have this

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1 Fifth Amendment right.

2 HON. MARTINEZ: Our committee does
3 not make that specific recommendation, but I
4 think that your suggestion makes some sense.
5 Clearly, you know, offenders in supervision
6 retain their constitutional right against self-
7 incrimination.

8 In my opinion, it really comes down to
9 training. Because if an officer has any doubt
10 about whether that refusal to answer is
11 legitimate, it can always be referred to the
12 court for a finding. And that's what we would
13 recommend.

14 COMMISSIONER BARKOW: Okay. Thank
15 you.

16 CHAIR SARIS: Let me ask this. In
17 the 22 years now I've been on the bench, I've
18 never had most of these issues come up.

19 They come up in child pornography, but
20 for the most part they come up later in
21 revocations or requests for modifications, not at

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1 sentencing.

2 So, and for the first time I've
3 actually started thinking about the difference
4 between a standard condition and a special
5 condition, but it's generally not litigated.

6 And the big question that I have,
7 which I guess is an overarching philosophical
8 issue, is sometimes we keep imposing conditions.

9 There's the standard conditions, and
10 then I add to them the special conditions to the
11 point where when someone comes out, they've got
12 so much they have to comply with, you know.

13 I often say batterers programs and
14 mental health programming and drug treatment
15 programming and vocational education and, you
16 know, blah, blah, blah and it goes on and on.

17 And most of these people have just
18 come out of prison. Maybe they don't need it
19 anymore, or maybe it's just asking too much of
20 somebody when they're just coming back.

21 And so, some of, I think, the debate

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1 was should this be a standard condition or a
2 special condition? And I'm wondering whether in
3 your experience that makes -- we should be
4 pushing more into the special and then we should
5 be focusing more when they come out, as to what
6 they need.

7 HON. MARTINEZ: That's exactly what
8 we're saying. I've been a judge for 26 years now
9 in the state system and the federal system. I've
10 sentenced hundreds of defendants.

11 In the federal system, you're right.
12 The only time we've had an issue in court has
13 been on the child pornography people, because
14 those are very specialized conditions.

15 You're also talking about prohibiting
16 them from using computers, being connected to the
17 internet, which now, you know, is almost
18 necessary to be able just to get along and survive
19 and get a job, but I agree with you that we can
20 very easily end up over-supervising people and
21 putting way too many conditions on their

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1 supervision.

2 For a lot of these people, now,
3 remember, many of these defendants got there in
4 criminal court because they couldn't follow all
5 the rules at that point, and we are loading more
6 rules onto their plate. Placing too many of
7 those, I think, is almost guaranteeing that they
8 are going to fail.

9 Research has shown that supervision
10 should be targeted towards higher-risk, higher-
11 need offenders. It also has shown that if you
12 over-supervise low-risk people, that actually
13 results in a worse outcome in the long run.

14 So, yes, we have to be careful about
15 doing that. I agree with you.

16 CHAIR SARIS: Any questions? Anybody
17 else have anything?

18 VICE CHAIR BREYER: I just want to
19 thank you for being on the -- being on the
20 Criminal Law Committee. It is an extraordinarily
21 valuable committee for the Sentencing Commission.

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1 I've seen it now work and you really
2 are the voice of the judiciary coming in and
3 talking to us from a judge's point of view. The
4 sentencing guidelines are directed to judges.

5 So, thank you so much for your
6 service. It's very, very valuable.

7 HON. MARTINEZ: Thank you very much.

8 VICE CHAIR BREYER: I know I speak on
9 behalf of --

10 HON. MARTINEZ: This is my favorite
11 committee. Thank you.

12 CHAIR SARIS: Thank you. Last, but
13 by no means least, our final panel of the morning.

14 (Pause.)

15 CHAIR SARIS: You ready?

16 MR. SHANKER: I'm ready. No longer
17 good morning.

18 (Laughter.)

19 CHAIR SARIS: Absolutely correct.

20 MR. SHANKER: Judge Saris --

21 CHAIR SARIS: Wait. No, I've got to

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1 introduce you.

2 MR. SHANKER: Oh, I'm sorry. I'm
3 sorry. I thought no introduction required.

4 CHAIR SARIS: No introduction needed,
5 but let me just quick go through it. So, I'll
6 tell everyone who you are, because we have lots
7 of people out there listening.

8 So, the first witness is a
9 representative from the Department of Justice,
10 Vijay Shanker. Mr. Shanker currently serves as
11 Deputy Chief of the Appellate Section in the
12 United States Department of Justice where he
13 worked since April 2005.

14 Before then he practiced law in D.C.
15 in the areas of white collar criminal defense,
16 complex civil litigation and appellate
17 litigation.

18 So, you've seen both sides of this.

19 MR. SHANKER: Yes.

20 CHAIR SARIS: Mr. Shanker is joined
21 by Marianne Mariano for the federal defenders.

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1 I already -- everyone knows her. So, I need not
2 go on.

3 And then Dr. Virginia Swisher is
4 testifying on behalf of the Commission's Victims
5 Advisory Group. Dr. Swisher is the founder,
6 director and CEO of Problem Solving Consultants,
7 a conflict resolution consulting service.

8 Dr. Swisher previously worked for 20
9 years as a federal probation officer. Where?

10 DR. SWISHER: District of
11 Connecticut.

12 CHAIR SARIS: District of -- oh, a New
13 Englander. So, why don't we get going with you?
14 You are chomping at the bit. Come out of the
15 box.

16 MR. SHANKER: That's right. Judge
17 Saris and members of the Commission, thank you
18 for the opportunity to share the views of the
19 Department of Justice on the Commission's
20 proposed amendments to the sentencing guidelines
21 regarding conditions of probation and supervised

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1 release, Sections 5B1.3 and 5D1.3.

2 I am Vijay Shanker. I am Deputy Chief
3 of the Criminal Division's Appellate Section. I
4 have represented the Department in dozens of
5 criminal cases involving probation or supervised
6 release and I recognize the importance of the
7 issues the Commission is addressing.

8 The Department appreciates the
9 Commission's efforts to revise and clarify the
10 conditions of supervised release and probation.

11 As a general matter, the Department is
12 in favor of the Commission's desire to resolve
13 ambiguities and simplify the guidelines and we
14 think the proposed amendments include a number of
15 improvements.

16 We do, however, have several concerns
17 which are addressed more fully in our written
18 submission. And I will speak to just a few of
19 those today.

20 First, the Department recommends that
21 the proposed fourth standard condition of both

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1 probation and supervised release should read as
2 follows: "The defendant must answer truthfully
3 all questions asked by the probation officer."

4 The current condition states that a
5 defendant shall answer truthfully all inquiries
6 by the probation officer.

7 The Department believes that the
8 proposed deletion of the word "all" could be read
9 as a substantive reduction in the defendant's
10 obligations and is unwarranted.

11 In addition, in response to the
12 Commission's solicitation of comment, the
13 Department's view is that there is no basis for
14 altering the condition to require the defendant
15 only to, quote/unquote, be truthful when
16 responding to questions by the probation officer,
17 nor is there a basis for including a proviso that
18 an offender can invoke his Fifth Amendment
19 privilege against self-incrimination in response
20 to a probation officer's question.

21 First, as the Supreme Court has

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1 recognized, imposing a general obligation to
2 respond truthfully to a supervision officer's
3 questions does not conflict with the right
4 against compelled self-incrimination.

5 Second, there is no requirement that
6 a probationer be affirmatively advised of his or
7 her Fifth Amendment right against self-
8 incrimination so long as a condition of probation
9 merely requires a probationer to appear and
10 answer truthfully rather than requiring the
11 probationer to choose between making an
12 incriminating statement and jeopardizing his or
13 her conditional liberty by remaining silent.
14 There is no Fifth Amendment concern.

15 Restricting this condition or
16 interjecting Miranda-like cautions about self-
17 incrimination into the supervision context where
18 there is no legal basis for doing so, could
19 curtail questioning of or responses by
20 supervisees regarding offenses they may have
21 committed to the detriment of both supervision

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1 interests and law enforcement interests.

2 Second, the Department recommends
3 that the conditions requiring defendants to
4 refrain from excessive use of alcohol and to
5 support dependents and meet other family
6 responsibilities be retained as standard
7 conditions.

8 Excessive alcohol use contributes to
9 criminal behavior, hinders rehabilitation and
10 conflicts with other conditions of supervision,
11 including those relating to employment and family
12 support obligations.

13 Vagueness concerns can be addressed by
14 making the language more specific and indeed the
15 Department suggests that the condition be
16 rewritten to say that the Defendant must follow
17 any instructions of the probation officer to
18 limit or refrain from the use of alcohol.

19 This would enable probation officers
20 to assess whether the extent of alcohol used by
21 their supervisees is interfering with their

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1 rehabilitation or compliance with other
2 supervision conditions and to issue remedial
3 instructions.

4 Similarly, we suggest that the
5 standard condition relating to family
6 responsibilities be rewritten as follows: The
7 defendant must meet any legal obligation to
8 support or make payment toward the support of any
9 person and must follow any instructions of the
10 probation officer with respect to meeting other
11 family responsibilities.

12 In the Department's view, the special
13 condition proposed by the Commission is too
14 limited and fails to account for the fact that
15 meeting the full range of legal and social
16 obligations to one's children, spouse and parents
17 is conducive to rehabilitation and should be
18 promoted as an aspect of supervision.

19 Finally, the mandatory condition
20 concerning compliance with the Sex Offender
21 Registration and Notification Act, or SORNA, is

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1 inconsistent with applicable law.

2 As currently drafted in the
3 guidelines, the condition assumes that there are
4 some states in which SORNA does not apply. For
5 those states, it improvises a non-SORNA set of
6 registration requirements for sex offenders based
7 on provisions of older laws that SORNA repealed.

8 SORNA, however, is a federal law and
9 its requirements apply to sex offenders in all
10 states regardless of whether the state has
11 implemented SORNA's requirements in its
12 registration program.

13 The condition would correctly reflect
14 the law if formulated to track the corresponding
15 statutory language as follows: If the defendant
16 is required to register under the Sex Offender
17 Registration and Notification Act, the defendant
18 shall comply with the requirements of that Act.

19 In closing, I would again thank the
20 Commission for this opportunity to share the
21 views and concerns of the Department of Justice.

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1 The Commission's efforts to clarify
2 the supervision conditions guidelines are
3 commendable and the Department looks forward to
4 working with the Commission on this important
5 issue. Thank you.

6 CHAIR SARIS: Thank you.

7 MS. MARIANO: Good afternoon. The
8 federal public and community defenders appreciate
9 the Commission's decision to review the
10 conditions of supervision in your interest in
11 making the conditions easier for our clients to
12 understand.

13 However, we question the necessity of
14 many of the standard conditions as standard
15 conditions instead of special conditions and we
16 are concerned about the over-breadth and
17 ambiguity of some of the proposed language.

18 For too long the focus of sentencing
19 has been on how long a person's prison sentence
20 should be, and too little focus on other aspects
21 of the sentence, including supervision.

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1 Supervised release primary purpose is
2 to facilitate reintegration of a defendant into
3 the community thereby reducing the chances of
4 recidivism and protecting the public, but the
5 long list of blanket conditions does not serve
6 that purpose.

7 As a threshold matter, we believe the
8 Commission should reduce and limit the number of
9 standard conditions making most special
10 conditions for several reasons.

11 First, the slate of conditions
12 undermines the statutory requirement that the
13 court make specific findings when imposing
14 additional conditions of supervised release,
15 including the requirement that any condition be
16 reasonably related to a specific 3553(a) factor
17 and that it involved no greater deprivation of
18 liberty than is reasonably necessary to serve
19 that purpose.

20 The standard conditions do not require
21 such findings and ignore the need for

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1 consideration of the history and characteristics
2 of the defendant.

3 For example, the proposed standard
4 condition regarding the notification of third
5 party risk to another person or organization
6 should be a special condition.

7 Not only is the condition not
8 applicable in every case, it is also now
9 sufficiently narrow, because it fails to specify
10 the nature of the offense or characteristics of
11 the defendant that pose the risk, facts that must
12 be tailored by the court to the specific
13 defendant.

14 Moreover, one-size-fits-all
15 conditions are not compatible with the approach
16 to supervision that the U.S. probation system has
17 been trying to implement.

18 According to the evidence-based
19 practices of probation and pretrial services,
20 conditions of supervision should be directed
21 toward a particular criminogenic need.

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1 If conditions of supervision are to be
2 consistent with that approach, there should be
3 few standard conditions and more special
4 specifically targeted to the needs and
5 responsivity of the individual defendant.

6 For example, the travel restriction.
7 If a defendant resides near the border of a
8 federal judicial district, it may be appropriate
9 for him to routinely leave the current district
10 to facilitate employment, healthcare needs or
11 reintegration with family.

12 The condition that he may not
13 knowingly leave the federal judicial district
14 without permission is not appropriate as a
15 standard condition, but must be tailored to the
16 defendant and possibly the District's specific
17 circumstances, and I believe it often is.

18 Studies have shown that extensive
19 standard conditions of supervision may be
20 unnecessarily burdensome.

21 Rather than help reintegrate a person

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1 into the community, too many conditions can set
2 him or her up for failure.

3 Defenders' experience shows the
4 technical violations leading to revocations even
5 where there's no evidence of criminal activity
6 and where the defendant might otherwise succeed
7 at reintegration.

8 One example is the condition regarding
9 full-time employment. For some of our clients,
10 this is simply unattainable possibly because they
11 are elderly when they are released, or they're
12 infirm or mentally -- physically or mentally
13 infirm after they've served a lengthy prison
14 sentence.

15 The same is true of a GED condition
16 that seems completely appropriate not only to the
17 court, but maybe the parties involved, when
18 imposed on a 20-something-year-old defendant, but
19 who isn't going to be released until he's in his
20 40s.

21 For these reasons we urge the

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1 Commission to limit the number of standard
2 conditions making many of them special conditions
3 to be imposed by a court on a case-by-case,
4 defendant-by-defendant basis.

5 Defenders will rely on our written
6 testimony regarding our concerns as to specific
7 conditions. However, I will briefly address the
8 one condition that was highlighted in the
9 Commission's issue for comment. Specifically,
10 the condition that a defendant shall answer
11 truthfully the inquiries of a probation officer.

12 We appreciate the Commission's
13 interest in the supervisee's Fifth Amendment
14 concerns against self-incrimination, which is not
15 sufficiently protected under the current
16 language.

17 Under the current language, a
18 supervisee may be placed in the position of
19 having to choose between answering the question
20 truthfully and incriminating himself, or not
21 answering and face revocation. However, we do

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1 not believe that language proposed by the
2 Commission, either option, is sufficiently clear
3 and does not adequately convey to the average
4 supervisee that he or she need not answer every
5 inquiry posed by the probation officer.

6 Accordingly, we've proposed the
7 language that has been read by Commissioner
8 Barkow in the previous -- to the previous panel.

9 It is our position that this
10 straightforward language will make clear both the
11 obligations and the rights of the supervisee, and
12 we applaud the Criminal Law Committee's position
13 that invoking your Fifth Amendment right would
14 not be grounds for a revocation. Thank you.

15 CHAIR SARIS: Thank you.

16 Dr. Swisher.

17 DR. SWISHER: Judge Saris, if I could
18 update my credentials since my bio information
19 was submitted, I was recently appointed as a lead
20 faculty area chair for the College of Security
21 and Criminal Justice for the University of

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1 Phoenix at the Tempe, Arizona campus. So, it
2 really is good morning still for me, but good
3 afternoon.

4 CHAIR SARIS: Lucky you in that
5 beautiful climate there.

6 DR. SWISHER: And I'm loving watching
7 your winter from Arizona. Thank you, Judge.

8 I would like to thank you and all the
9 commissioners for the opportunity to represent
10 the Victims Advisory Group at this important
11 hearing.

12 At this time, I would like to focus or
13 take a few minutes to reiterate our comments that
14 were put into our written testimony concerning
15 the proposed amendment on third party risk.

16 In the current conditions at Sections
17 5B1.3(c) and 5D1.3(c), third party notification
18 shall be made either by the defendant as
19 instructed by the probation officer, or the
20 probation officer if risks are posed by the
21 defendant's criminal history, personal history or

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1 characteristics.

2 Under the proposed amendment, the
3 language of the standard conditions at both
4 sections would be modified from a "shall" to a
5 "may" while removing the probation officer's
6 ability to make independent notification of the
7 defendant.

8 As currently presented, the proposed
9 amendment states that if a probation officer
10 makes a determination that a defendant under
11 supervision poses a risk to another person or an
12 organization, the defendant may be required to
13 notify that person of the risk.

14 The proposed amendment does clearly
15 state that if the defendant is instructed to make
16 notification, that he must or she must comply
17 with that instruction.

18 It is the position of the Victims
19 Advisory Group that removing the emphasis
20 inherent in the word "shall" and eliminating the
21 probation officer's ability to make independent

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1 notifications, may create a situation where
2 individuals or the community are put at risk.

3 If a risk has been determined, the
4 probation officer is not required to ensure third
5 party notification is made as would be the case
6 with the language such as "shall make
7 notification," but rather the probation officer
8 may require the defendant to make the
9 notification.

10 Follow-up by the probation officer may
11 or may not occur. As stated in the proposed
12 amendment, the probation officer may contact
13 individuals and confirm that notification has
14 been given.

15 If the probation officer confirms that
16 the defendant has not made notification, the
17 proposed amendment does not clearly permit the
18 probation officer to make that notification.

19 The current condition is enforced in
20 those situations where a defendant clearly
21 victimized members of the community in the

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1 commission of the offense of conviction.

2 I note that a third party notification
3 is not required in all instances and
4 implementation of the current guideline can vary
5 from circuit to circuit.

6 For example, there are differences in
7 the way the current guideline is implemented in
8 the Second Circuit and the way it is implemented
9 by the districts in the Ninth Circuit.

10 If the proposed amendment is adopted,
11 the variation has the potential for increasing
12 the chances that the community is at risk of
13 future victimization by defendants on
14 supervision.

15 Maintaining the third party risk
16 condition in its current mode will provide the
17 sentencing court with a valuable tool to try to
18 prevent any further victimization of the
19 community by a defendant for as long as
20 supervision continues.

21 Retaining the current language may

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1 also help inform the general public and reinforce
2 a sense of confidence within the community that
3 the court truly does take the protection of the
4 community very seriously, a message that may also
5 resonate with the defendant and perhaps enhance
6 the deterrence goal of sentencing.

7 Judge Saris and commissioners, thank
8 you for considering my comments on behalf of the
9 Victims Advisory Group.

10 CHAIR SARIS: Judge Breyer.

11 VICE CHAIR BREYER: Mr. Shanker, let
12 me turn to the DOJ's position with respect to
13 whether an individual can be required to answer
14 truthfully, especially in cases in which he or
15 she may be incriminating themselves.

16 The Ninth Circuit says you don't.
17 Ninth Circuit, you know, which a number of us
18 have to follow, the law is different from your
19 stated policy. So, how do you deal with that?

20 If, in fact, the person retains his or
21 her Fifth Amendment privilege, it is not a basis

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1 for revocation of probation that that person
2 failed to respond to a question.

3 How do you deal with that?

4 MR. SHANKER: Your Honor, we agree
5 that a probationer or supervisee retains the
6 Fifth Amendment right not to answer a question
7 that would give them -- that would put them
8 between the option of answering and incriminating
9 themselves or being punished. And so, we don't
10 disagree with that.

11 The question is, do they have to be
12 affirmatively advised of that fact --

13 VICE CHAIR BREYER: Okay. That's
14 what I didn't understand. In other words, the
15 part that you're objecting to is the duty of the
16 probation officer to advise a person that he or
17 she need not answer --

18 MR. SHANKER: Correct.

19 VICE CHAIR BREYER: -- questions on a
20 Fifth Amendment --

21 MR. SHANKER: Now, I will say --

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1 VICE CHAIR BREYER: You're not
2 quarreling with the exercise of the privilege.

3 MR. SHANKER: No, absolutely not.

4 VICE CHAIR BREYER: You're quarreling
5 with --

6 MR. SHANKER: If a probationer
7 invokes his or her Fifth Amendment right in
8 response to a question, as I think Judge Martinez
9 said, that could be taken to a court to determine
10 whether the invocation is appropriate or not.

11 VICE CHAIR BREYER: Thank you. I
12 think I misunderstood your comment and --

13 MR. SHANKER: I will add, though, not
14 to belabor the point, though, that the mere fact
15 of being required to appear and answer a
16 probation officer's questions does not in and of
17 itself put the Fifth Amendment choice to the
18 defendant. It's being asked a question that
19 might or might not incriminate him.

20 VICE CHAIR BREYER: I think that's
21 right. And I think if it were otherwise, you

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1 would defeat a lot of the purpose of supervised
2 release, which is to try to --

3 MR. SHANKER: Exactly.

4 VICE CHAIR BREYER: -- give some
5 guidance to the people and to protect victims on
6 an ongoing basis.

7 MR. SHANKER: Exactly.

8 VICE CHAIR BREYER: I thank you for
9 your answer.

10 CHAIR SARIS: I suppose one of the
11 debates is how much power should be on the
12 probation officer versus the court.

13 So, I know in the area of drug testing
14 in our circuit, the court decides how frequent
15 the drug testing is and not the probation
16 officer.

17 So, you're suggesting an area of
18 excess alcohol that it should be the probation
19 officer making the call as to what's excessive.

20 Is that your proposal?

21 MR. SHANKER: Well, I think that the

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1 proposal would be that the probationer must
2 follow the probation officer's instructions with
3 respect to refraining from or limiting alcohol
4 use.

5 So, at some level we are relying on
6 the judgment, the discretion and the experience
7 and expertise of the probation officers and I
8 think that's what the conditions are founded on.

9 The whole principle behind conditions
10 of supervised release are founded on those
11 principles, judgment and discretion of the
12 probation officer.

13 The courts are overburdened. We
14 don't want to involve the courts in all of those
15 questions.

16 I think the reason that the Department
17 has proposed phrasing this in terms of an
18 instruction by the probation officer is, in part,
19 to eliminate the vagueness concern that courts
20 have raised about the blanket use of the word
21 "excessive use."

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1 CHAIR SARIS: Other than the Seventh
2 Circuit, I come back to, you know, sort of at
3 some point, and I've been a judge a long time and
4 the issue has never come up. So, I'm trying to
5 just figure out how widespread an issue this is
6 for both of you who see the nation as a whole
7 where the people are litigating how much is
8 excessive alcohol or how much is too much child
9 support or how much is overuse of the risk
10 notification.

11 I get it that sometimes maybe these
12 are overused and Seventh Circuit is worried about
13 it, but is this a national problem that you've
14 seen?

15 MR. SHANKER: You know, from our
16 perspective in criminal appellate, we have seen
17 the vast majority, if not all of these decisions,
18 coming from this one court, the Seventh Circuit.

19 VICE CHAIR BREYER: But then maybe you
20 can answer it this way, because I think the battle
21 that we have -- not battle. I glorified it. The

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1 discussion that we're going to have is, what
2 should be standard? What should be special? And
3 we understand -- at least I understand when you
4 say these conditions ought to be standard in
5 terms of desirability.

6 That is, if I were running a Sunday
7 school, I'd like to have the person pay for his
8 obligations for support. I'd like the person not
9 to drink excessively. I'd like this, I'd like
10 that, I'd like that.

11 So, if I -- I could put a big list of
12 standard conditions out there in terms of
13 desirable conduct, ways to avoid criminal
14 conduct. But if you accept the logic of the
15 Seventh Circuit, if you accept their logic,
16 they're saying all of these conditions should be
17 looked at in terms of the individual probationer
18 and the problem that that individual probationer
19 has demonstrated.

20 And I'm sort of saying basically the
21 same thing. What has that person demonstrated

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1 to the court?

2 And so, what is -- what's wrong?
3 Maybe I could ask it this way: What's wrong if
4 we take this collection of desirable conduct and
5 put it into special conditions where that
6 defendant seems to have a lackey, you know. Is
7 anything harmed?

8 CHAIR SARIS: And the court looks at
9 it.

10 VICE CHAIR BREYER: And the court
11 looks at it. Is there anything harmed by that?
12 I mean, let me tell you, all you have to do is
13 sit and listen to these judges sentence.

14 It's mind-numbing. It is mind-
15 numbing and I know, I know they don't hear half
16 the things that we say. And the judge's modus
17 operandi is to get through it as quickly as
18 possible, because they have so many of these
19 conditions.

20 And I guess my question is, what law
21 enforcement purpose is hindered, not furthered,

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1 by putting these things as special conditions
2 rather than general conditions?

3 MR. SHANKER: I think the primary risk
4 with that approach is that the conditions can be
5 excluded inadvertently or otherwise. And they -
6 - in addition, the concerns that may be placed in
7 special conditions might arise later on and might
8 not be in place when the defendant --

9 VICE CHAIR BREYER: We do have a
10 vehicle for that.

11 MR. SHANKER: There is. There is.
12 But that, again, takes up the court's time. And
13 if we put these in the standard conditions and
14 they may not apply in a hundred percent of the
15 cases, they may not apply to that defendant at
16 all, the probation officer has the discretion and
17 the judgment to basically not -- to basically
18 ignore that condition with respect to that
19 particular defendant.

20 I guess with due respect not to flip
21 the question --

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1 VICE CHAIR BREYER: I hear that all
2 the time.

3 CHAIR SARIS: I know. Right when
4 someone says that, they're about to --

5 MR. SHANKER: To flip the question, I
6 guess the question is what harm is there in having
7 these as standard conditions if when in cases
8 where they don't apply the probation officer
9 doesn't have to --

10 VICE CHAIR BREYER: Well, there is
11 some harm in making pronouncements that are
12 irrelevant to the particular --

13 MR. SHANKER: Well, so then I would
14 go back to Judge Saris' question, which is that
15 we really are not seeing -- as much as the Seventh
16 Circuit has suggested with a long list of
17 hypotheticals, we are not seeing these problems.

18 We are not seeing a lot of revocations
19 on this, the Commission's own study has found.
20 And so -- and I don't want to monopolize my --

21 CHAIR SARIS: Do you see a lot of

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1 these issues being debated in the context of
2 sentencing? Maybe they come up in revocations.

3 MS. MARIANO: So, they do come up in
4 revocations, but I would say this that I do think
5 it is a national problem within which maybe we've
6 all been complicit.

7 My federal defender colleagues in the
8 Seventh have led the charge in these cases and I,
9 frankly, applaud them for it.

10 I have litigated these issues. I
11 litigated a case called Peterson, which we cite
12 in our papers. That client got probation. So,
13 of course his conditions were front and center
14 and I was successful for him on appeal, one of
15 which was the risk assessment that wasn't
16 tailored specifically to him, among other
17 conditions.

18 CHAIR SARIS: Risk of --

19 MS. MARIANO: Third party
20 notification. Sorry. I think I said "risk
21 assessment," which is an entirely other thing.

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1 I apologize.

2 I also say what is the harm in setting
3 the standard conditions that actually apply to a
4 specific defendant at the outset and to allow
5 probation to come back -- standard and special.
6 Let me qualify of course there's special
7 conditions in almost every one of our cases.

8 In my district, we actually get
9 written notice in the PSR of the special
10 conditions. And so, those often do get litigated
11 at sentencing, but the standard conditions, this
12 blanket 14-condition list, I feel, has been
13 largely ignored nationally --

14 CHAIR SARIS: Right.

15 MS. MARIANO: -- and often doesn't
16 apply. And I also going back again to this third
17 party risk assessment, you know, I'm in a ban-
18 the-box state. So, what does that mean and why
19 is that being delegated to the probation office
20 to decide?

21 I think the error, the judgment has to

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1 include only the conditions that the judge finds
2 on a case-by-case, defendant-by-defendant basis
3 apply, and probation will come back if
4 circumstances change after a lengthy sentence.

5 But as a national problem, I just
6 think we're all complicit because there is such
7 lengthy terms of in prison usually front and
8 center that our clients are asking us to fight on
9 that and a lot of this has gone by the wayside.

10 DR. SWISHER: If I may, in the
11 District of Connecticut a Second Circuit decision
12 came down. It was interpreted that it would be
13 the judge at the time of sentencing who would
14 impose the third party notification.

15 It caused a paradigm shift in how it
16 was -- how it was determined for each defendant
17 to have this happen, but it has worked, to my
18 understanding.

19 I have been in contact with the deputy
20 chief there and she's indicated that it continues
21 to work. That at the time of sentencing if a

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1 third party risk has been identified through the
2 course of the pre-sentence investigation, that
3 they will impose that condition.

4 And if the person goes away to prison
5 and comes back and that risk has been reduced,
6 the probation officer can say to the judge, this
7 is going to work.

8 Or if the person comes back and the
9 risk has increased, the probation office can go
10 back and ask for a modification. And because it
11 will create a more onerous set of conditions,
12 there is usually a hearing, but it resolves
13 itself.

14 It seems to be working, because that
15 way it's being tailored for that particular
16 individual.

17 CHAIR SARIS: Thank you.

18 COMMISSIONER FRIEDRICH: Ms. Mariano,
19 you mentioned that you get notice of special
20 conditions in the PSR.

21 MS. MARIANO: Yes.

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1 COMMISSIONER FRIEDRICH: Is that a
2 national practice, or is that just your district?

3 MS. MARIANO: It is our district and
4 I think it may actually be throughout the Second
5 Circuit, but I can't speak definitively, but
6 there were some Second Circuit decisions
7 particularly in the sex offender area that
8 suggested that would be a good practice, because
9 we brought it up on review having not really
10 litigated some of that in front of the district
11 court. So, now it's presented to us in the PSR.

12 I don't know if it's done -- it's
13 certainly not done nationally. I don't know if
14 it's circuit-wide, but I would suspect it is.

15 CHAIR SARIS: Any other questions
16 here?

17 (No response.)

18 CHAIR SARIS: I want to thank you all.
19 It's very interesting. I really wasn't sure what
20 to expect on this one, but you all made it very
21 lively.

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1 So, thank you very much for your
2 comments, for coming here through the snow and
3 into -- actually, it turns out it is quite
4 beautiful outside, but wasn't necessarily so.
5 Thank you very much.

6 (Whereupon, at 12:45 p.m., the meeting
7 in the above-entitled matter was adjourned.)

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