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
+ + + + +


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

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

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

The Supreme Court and we have all lost a devoted and dedicated public servant who's had
a big impact on federal sentencing. Many of the commissioners have had the pleasure of knowing him on a personal level.

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

So, do you want to say a few things?

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

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

So, the only thing I'll say this morning since we are here for a Sentencing
Commission meeting, is he was really a visionary in terms of thinking about how our system works with sentencing.

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

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

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

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

CHAIR SARIS: Thank you, and I know
how difficult that was.

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

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

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

As I will discuss in more detail later, the Commission's proposed amendment on conditions of supervision seeks to make the conditions of release more tailored to a defendant's needs and problems, as well as easier for defendants to understand and probation officers to enforce.
Looking ahead, we have a busy winter/spring. Can't wait for that spring. On March 16th we will be hearing testimony on the other four pending amendments during the cycle. And a full list of those amendments are posted on our website, as well as in the Federal Register. Public comment period for those amendments is open until March 21st. We hope to hear not only from today's witnesses, but also from those of you watching this hearing through our livestream broadcast -- hello to all of you -- about the proposed amendments here today.

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

Now, I'd like to introduce the other members of the Commission. Immediately to my right is Judge Charles R. Breyer, who is a senior district judge for the Northern District of California and has served as a United States District Judge since 1998. He joined the
Commission in 2013 and serves as vice chair.

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

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

To my immediate left is Dabney Friedrich, who has served on the Commission since 2006. Immediately prior to her appointment to the Commission, Commissioner Friedrich served as Associate Counsel at the White House. She
previously served as counsel to Chairman Orrin Hatch of the United States Senate Judiciary Committee and as an Assistant U.S. Attorney for the Southern District of California, and then for the Eastern District of Virginia.

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

Now, let's turn to our discussion today. The Commission's proposed amendment on compassionate release seeks further comment on whether changes should be made to the Commission's policy statement found in the
guidelines. And if so, how?

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

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

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

The Commission-proposed amendment included a detailed issue for comment on whether
any changes should be made to this policy statement.

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

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

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

Now, no stranger to any of us, sitting
next to her is Mr. Jonathan Wroblewski who sat right over there for a very long time as the ex-officio member of the Commission. He became the Principal Deputy Assistant Attorney General of the Office of Legal Policy at the Department of Justice in December 2015.

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

(Laughter.)

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

We did read your remarks which came in, when was it, late last week and I think all
of us did receive them, and go ahead.

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

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

The Bureau currently incarcerates approximately 196,000 inmates across the nation. This is a substantial reduction from the nearly 220,000 inmates we housed just a few years ago. This reduction is due, in part, to Amendment 782. The decline in our population has led to a substantial reduction in crowding in our institutions and we appreciate the Commission's efforts in passing Amendment 782. It has
contributed greatly to the reduction in our crowding.

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

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

Turning now to the subject of RIS, the first thing I should mention is that the Department views the RIS authority as an opportunity to release a number of offenders who do not pose a danger to the community and who are near death, incapacitated or face other extraordinary and compelling circumstances warranting early release.
However, the goal of the program is not to substantially reduce prison crowding or the prison population. The RIS authority was enacted as part of the Comprehensive Crime Control Act of 1984 and is codified in 18 USC Section 3582.

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

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

A subsequent expansion included requests from inmates when a life expectancy could not be determined, but the medical condition was so poor there was no hope for
Later, we expanded our review to include debilitating medical conditions such as amyotrophic lateral sclerosis and other neurological diseases. Finally, we considered inmates who suffered organ failure and were not eligible for an organ transplant.

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

The Bureau continued to review RIS requests for medical circumstances feeling these circumstances were clearly extraordinary and compelling, and further that they were circumstances for which the Bureau could substantiate the facts as they related to the
Inmate's health.

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

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

We have designated a RIS coordinator and an alternate at each facility to assist
inmates and staff with understanding the RIS program and to help process the requests.

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

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

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

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

For example, almost 60 percent of
older federal inmates were sentenced after reaching age 50. Moreover, within the older inmate population, 13.5 percent of them were convicted of sex offenses, 12 percent were convicted of fraud, bribery or extortion offenses, and 11.8 percent were convicted of weapon offenses.

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

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

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

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

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

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

We are planning to provide time frames
for processing requests when our policy is next amended, which will address the final open recommendation of that audit.

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

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

CHAIR SARIS: Thank you.

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

It's my pleasure to be here with my
colleague, Kathy Kenney, to discuss the Department's implementation of the authority granted under 18 USC 3582(c)(1)(A) to seek reduced sentences in extraordinary and compelling circumstances.

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

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

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

The second is how the Department has interpreted its duties under the applicable statute. And finally, I'd like to touch on the
Department's ongoing efforts reviewing the program and how we can work together to find the best policy.

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

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

The judge, then, is required, as you know, to impose a sentence sufficient, but not
greater than necessary, to achieve the purposes of sentencing.

Upending a final sentence was intended to be a rare event. In the Sentencing Reform Act, Congress delineated the limited circumstances under which final sentence could be modified.

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

Under the compassionate release program, Congress vested the sole power to make a motion for a reduction in sentence in the Bureau of Prisons. It also created a system whereby an inmate could only receive a reduction if both the
Bureau made the motion and a court granted such motion after finding that indeed there were extraordinary and compelling reasons.

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

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

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

We believe at this point it would be appropriate to cross-reference the Bureau's
program statement in 1B1.13 to ensure optimal coordination of policy.

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

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

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

This administration's view of what is extraordinary and compelling reasons for a
sentence reduction is broader than the views of earlier administrations. It is consistent, though, with the view of this Commission as expressed in 1B1.13.

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

An overly broad reading of the statutory authority to seek a reduction in sentence for extraordinary and compelling reasons would nullify the principles of certainty, finality and truth in sentencing that undergird the act, as well as the need to avoid unwarranted sentencing disparities among defendants with
similar records who have been found guilty of similar conduct.

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

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

As Ms. Kenney mentioned, we have reviewed our program statement in 2013, and we are again reviewing it in light of the recent reports of the Inspector General.
Consistent with Recommendation No. 8 of the 2015 OIG report, the Department has tasked a new working group with reexamining the Compassionate Release Program Statement.

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

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

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

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

VICE CHAIR BREYER: Yeah, I wanted to
ask -- I don't need a microphone, according to my wife. I have two questions. One of Ms. Kenney, and then one of Mr. Wroblewski.

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

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

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

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

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

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

Each individual case has its own
complications whether -- depending on what kind of care the inmate is going to need after, what kind of financial care, but it is certainly the message from our director, from my office, from everybody that -- in any of these cases that are terminally ill, we need to do everything we can to expedite that.

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

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

MS. KENNEY: Yeah.

VICE CHAIR BREYER: I think they were really important, but my question is a bit more specific is because you have a history here, you know, you started keeping these figures at a certain date. You have all these figures.
I would like to know from the Bureau of Prisons, on the average, how many days it takes to process these types of complaints.

I'd also like to know how many inmates died while their request was being considered.

So, do you have the -- I don't know that you have those figures today, but --

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

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

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

VICE CHAIR BREYER: Great.

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

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

MS. KENNEY: Right.

VICE CHAIR BREYER: I understand that
there are other, but the vast majority are medical.

MS. KENNEY: Right.

VICE CHAIR BREYER: And though there are other criteria.

MS. KENNEY: Right.

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

MS. KENNEY: Sure.

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

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

VICE CHAIR BREYER: Okay. Thank you.

MS. KENNEY: Uh-huh.

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

What I am concerned about is that I
think that as it is done today with the Bureau of Prisons contacting, if they do, victims, people who have been wrongfully -- who have been harmed by this offense, that what we've done is indirectly incorporated some of the -- some of the considerations which justified eliminating parole.

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

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

I'm now talking about -- not about health. I'm talking about impact on the
community and victims. Why shouldn't the court have an input on that rather than the Bureau of Prisons?

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

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

The statute gives the director of the Bureau of Prisons a responsibility. And no administration since the Sentencing Reform Act
has viewed that responsibility as simply a mechanical task of making a motion any time an offender reached a certain age or had a certain illness.

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

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

MR. WROBLEWSKI: Sure.

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

Because one thing I couldn't quite gather from your testimony was whether or not BOP maybe looks at what we've said, but has its own list -- and, frankly, its own list is the trumping
list -- or whether or not BOP's view is this is the list from the Sentencing Commission, we'll go through all of those things. If all of those things are satisfied, then we'll go forward and we'll file the motion.

What's the Department's view?

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

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

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

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

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

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

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

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

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

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

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

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

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

At the moment, we don't have that and we think that's a good thing and that we should try to avoid it.
CHAIR SARIS: But as I understand it, I haven't been here forever, but I have now been here six years, we've never done that before. In other words, you haven't called us up and said, oh, we're going to add this limitation onto our program statement, you know, Commissioner, what do you think about it? Are you calling for a brave new day kind of thing that we'll talk? Because as I understand, the Congress told us to do it in the sentencing guidelines.

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

COMMISSIONER BARKOW: Yeah, I share that and just -- I just would like to know how we're not nullified by the Department's view. Like I'm not totally sure what the Department
feels our function is if you get to set those standards and do whatever you want.

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

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

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

CHAIR SARIS: To have their keys turned.

MR. WROBLEWSKI: -- and compelling reasons. Yes. There needs to be the motion from the Justice Department, and there needs to be a
granting of that motion by the court.

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

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

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

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

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

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

MR. WROBLEWSKI: Yes.

COMMISSIONER PRYOR: Isn't the way
the statute is set up is for the judiciary to act as a check on what is basically the preliminary determination by the Bureau that this is an offender who is eligible for release and then the Sentencing Court has the full opportunity to consider these factors?

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

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

MR. WROBLEWSKI: Yes.

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

MR. WROBLEWSKI: Yes.

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

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

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

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

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

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

COMMISSIONER BARKOW: No, I see all of that, but I assume -- just bear with me. Assume I don't read that as a clear textual
indication that says all the authority goes to BOP, because I think it could also be read that, yeah, you get to file the motion. I totally understand that. And if BOP doesn't file the motion, all bets are off.

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

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

And I'm just curious if in the legislative history there is any indication as to which of those two competing interpretations might be --
MR. WROBLEWSKI: Not that I'm aware of.

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

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

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

MR. WROBLEWSKI: No.

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

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

MS. KENNEY: Yes.

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

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

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

So, while there are some differences,
there were certain categories that you identified
that we did look at those categories and incorporated them into our current program statement.

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

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

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

What I find interesting is if you look at the ALI proposal and if you look at most of
the state provisions that are similar, I think the categories are pretty common.

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

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

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

COMMISSIONER FRIEDRICH: Mr. Wroblewski, what is the timing -- or Ms. Kenney -- of this ongoing review? I'm pleased to hear that you are considering suggestions the IG made
and I'm just curious what are we talking about?

Is this happening now as we speak?

When do you expect it to be complete?

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

COMMISSIONER FRIEDRICH: Of this year?

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

COMMISSIONER FRIEDRICH: I would consider -- I would recommend that you consider carefully some of the suggestions that Dr. Williams from UCSF has made in her testimony particularly with respect to streamlining the procedures, the administrative hurdles.
A number of people will testify today here, point out the difficulty in inmates being able to gather information that you need for you to process their request whether it's the defenders or some other surrogate. That seems a reasonable accommodation to make.

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

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

So, I would hope that you would consider some of those suggestions and of course I would welcome ongoing conversation with this, but I agree with you that the simpler and the
more certain approach is to incorporate BOP's statement.

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

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

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

Because you said in your statement that, you know, these are the -- there's certain offenses like big chunks of --
MS. KENNEY: Right.

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

MS. KENNEY: We absolutely do.

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

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

In the past year or so we've made a point of going back and reviewing the denials at the local level from headquarters to see are we
seeing a pattern here? Are there things that we need to step in and try to correct some behavior?

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

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

COMMISSIONER BARKOW: Okay.

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

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

MS. KENNEY: That's the end of the process. The inmate does have the ability to
file an administrative remedy challenging that decision, but it is the end of the process.

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


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

MS. KENNEY: Sure.

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

And I remember the defense attorneys came to me and as the sentencing judge, I didn't know what it was I could do. There's no clear process for either -- for you all seeking input of the sentencing judge, or the sentencing judge reaching out to you saying, you know, the guy is really Stage 4 cancer and dying. I have no
problem with letting him go, you know, he's old and that sort of thing.

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

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

MS. KENNEY: Right.

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

MS. KENNEY: Thank you.

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

CHAIR SARIS: So, our next panel isn't really a panel. It's one witness, but he's also
Mr. Michael Horowitz is the Inspector General in the Department of Justice, Office of Inspector General, and has held that position since 2012.

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

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

So, you know us well. Welcome back.

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

For the past several years my office has identified overcrowding in federal prisons as
one of the top management challenges facing the Department of Justice. We've even referred to it in our reports as a crisis that the Department is facing, something the Department I think itself has essentially acknowledged.

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

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

CHAIR SARIS: Thank you.

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

Inmate medical costs are a major
factor in these rising costs. In FY2014, the BOP spent 1.1 billion dollars on inmate medical care, an increase of almost 30 percent in five years.

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

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

We've issued two reports recently addressing these issues. In 2013, we issued a report that assessed BOP's use of the program from 2006 to 2011. And last year we issued a report that assessed the new BOP provisions expanding compassionate release eligibility for
inmates age 65 and older.

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

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

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

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

As we noted in our report, the OIG
recognizes that approving and releasing more eligible inmates through the compassionate release program could result in some increase in the number of inmates who are rearrested, but we also noted that the recidivism data we found demonstrated that a carefully and effectively managed program could minimize the risk if careful consideration were given to an inmate's potential risk in the community as part of that assessment process.

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

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

The program statement was released on
the same date in August 2013 as part of Attorney General Holder's Smart on Crime Initiative.

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

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

As I learned earlier today from the testimony, it appears that that number has now grown as a total to about 30 inmates, elderly inmates, in the two and a half years since the statement release, which is obviously somewhat of an increase, but hardly a significant increase in the number of inmates who have been released under these new provisions announced as one of
the pillars of the Attorney General's Smart on Crime program.

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

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

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

CHAIR SARIS: That's sad to hear.

MR. HOROWITZ: And I agree completely. I was struck by that as well when I learned that fact. But according to the studies, an inmate's physiological age averages 10 to 15 years older than his or her chronological age due to the combination of stresses associated with
incarceration and the conditions an inmate may
have been exposed to prior to incarceration.
Indeed, seven state correctional systems from
around the country have defined aging inmates as
those inmates who are age 50 and older.

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

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

We also recommended the BOP consider
eliminating the 10-year minimum time served
requirement that they put in place with the new
aging inmate provisions, so that all aging
inmates would be eligible to apply for consideration for compassionate release once they had served 75 percent of their sentences.

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

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

We found that taking both steps,
reducing the age from 65 to 50 for eligibility consideration, and eliminating the minimum 10-year requirement, would increase the number of aging inmates eligible, using the word "eligible," for consideration from 4,000 or so inmates to 30,000 or so inmates based on that data that we have from FY2013.

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

Nonetheless, as we noted in our prior reports, the Justice Department itself has already determined that aging inmates are a low public safety risk as a general manner, which is
why the provision was put in place.

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

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

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

Thank you, and I am pleased to answer
any questions the Commission may have.

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

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

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

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

What we've also found is that, for example, in putting in place the 10-year rule, we
heard about the danger and the risk that inmates let out under compassionate release, even elderly inmates, for example, would be -- potentially endanger the community.

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

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

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

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

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

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

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

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

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

MR. HOROWITZ: In our review, we found no basis provided to us for why 10 years versus no floor, a five-year floor, a seven-year floor,
a 10-year floor. And of course, you know, from
dealing with the guidelines for an inmate to be
considered for compassionate release or a good
candidate for compassionate release presumably
would have had to have received the time credit.

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

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

So, you're really looking at people
who got 11 to 12 or more years of a sentence who
have to demonstrate that in order to be eligible,
and we were not given any basis for why the 10-year number was picked.

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

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

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

And that has resulted in multiple revised guidance being issued by the BOP whether
it's on medical conditions or otherwise. So, that's been a concern in a number of areas that we've looked at in terms of how this program has been managed.

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

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

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

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

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

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

And so, even if you, for example,
change the eligibility so that you didn't have to
serve 10 years, you had to serve 75 percent or
some percent of your sentence, whatever it was,
there's this question of whether or not any of
that takes -- really means anything. It's the
process that BOP has various places in it where
it's not functioning on all cylinders.
And so, from your experience studying it in terms of improving the process at BOP, is there anything related to that that you can see that we could help with if the standards were clearer?

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

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

MR. HOROWITZ: I think what we've looked at is the BOP standards themselves and the policy statements and any supplementary guidance.
We found the BOP has responded to the concerns as we've identified them and tried to address them.

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

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

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

COMMISSIONER PRYOR: That's because
they have whichever is greater at the end of the -- of that line.

MR. HOROWITZ: Right.

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

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

Did you look at --

MR. HOROWITZ: Yeah.
CHAIR SARIS: Maybe you didn't have access to this.

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

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

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

MR. HOROWITZ: Well, the issue is of course making more people eligible doesn't mean that those are the individuals that would ultimately be approved for release. And that's, I think, one of the things we've seen is that by categorically restricting the people who could be considered, you're potentially losing
individuals who, in fact, are among the sickest and among the, perhaps, safest to be released.

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

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

So, we're talking far less than one percent of those sickest individuals. Many of those may be, and I don't know the answer to this, but many of them may be because they are absolutely barred from being considered because they haven't yet served 10 years of their sentence.
CHAIR SARIS: So, it's the 10-year rule you're really --

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

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

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

MR. HOROWITZ: Well, I think this 75 percent rule still stays in place, right? So, no matter what age you're sentenced at whether
it's 50 or 65, there's still this -- you have to have served three-quarters of your sentence.

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

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

COMMISSIONER FRIEDRICH: One thing we've heard from the past from BOP is that for those inmates who need significant medical care, life-threatening illness, one of the reasons
they're not releasing them is they're having a hard time finding a place for them on the outside to have the care that they will need.

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

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

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

You're potentially shrinking the pool of people who you might think did have release plans in place, but that is clearly a legitimate
and very important reason, a concern.

CHAIR SARIS: Anybody have any other questions?

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

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

But if the only other circumstance other than having served 75 percent of his or her sentence even with inmates being older than the
average age because of their circumstances, doesn't seem to me that just lowering the age in that circumstance to 50 would make sense.

Do you think otherwise?

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

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

COMMISSIONER PRYOR: Right.

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

So, you have these relatively large numbers as you consider, say, 30 people total being released in two and a half years. You have
2,000 inmates over 65 who have been excluded because of the 10-year rule.

COMMISSIONER PRYOR: Right.

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

COMMISSIONER PRYOR: Right.

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

But the people who got age --

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

MR. HOROWITZ: Well, certainly you can make the argument that the latter makes more sense of the two.
COMMISSIONER PRYOR: Okay.

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

CHAIR SARIS: Ms. Morales has a question.

COMMISSIONER MORALES: Yeah. Isn't one of the issues that BOP has is that they have limited resources in order to evaluate all these different requests and all the different factors? And in particular, those release plans that we've discussed, how complicated those are, isn't that an issue? And wouldn't broadening the eligibility pool make that even a -- aggravate that problem making it perhaps harder for the BOP to then identify which of those applicants are
actually more deserving of the release?

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

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

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

And so, from our standpoint the answer should be the Department making an evaluation as to whether to give more resources to BOP rather than just not handling the program the way it needs to be.
COMMISSIONER MORALES: But my question is really about broadening the pool, and wouldn't broadening the pool exacerbate that problem?

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

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

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

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

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

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

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

VICE CHAIR BREYER: 13 percent, okay.

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

VICE CHAIR BREYER: Thank you.

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

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

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

(Whereupon, the above-entitled matter went off the record at 10:12 a.m. and resumed at 10:15 a.m.)
CHAIR SARIS: I think we've lost a couple of our commissioners, but I've just been informed we have 600 people online, so -- watching us. So, here we go. We will have a break after this, I promise.

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

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

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

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

MS. MARIANO: Thank you.

CHAIR SARIS: All sorts of reasons. So, thank you for making that trek. So, our next panel will offer the defense perspectives on compassionate release.
The first witness is Margaret Love, who is testifying today on behalf of the Commission's Practitioners Advisory Group. Ms. Love is a practicing attorney specializing in executive clemency and restoration of rights after conviction, and was the United States pardon attorney for the Department of Justice from 1990 to 1997.

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

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

MS. MARIANO: Yes, I am.

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

MS. MARIANO: Thank you.

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

MS. LOVE: Yes.

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

Okay? Thank you.

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

I'm personally very pleased to be here having testified at the Commissioner's very, very first hearing on this subject in 2006 almost exactly 10 years ago.
I'd like to make three points. The first is -- goes to this issue of structure and legislative history.

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

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

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

The Sentencing Court would then decide whether the defendant's sentence should be modified applying general principles of sentencing. That is not how it works at least, in part, because of this Commission's modest view
of its policymaking role over the years.

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

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

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

Because a government motion is jurisdictional, the court has no ability to act
even when it is sympathetic to a defendant's situation.

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

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

If the Commission develops a detailed set of extraordinary and compelling reasons and a range of examples applying those criteria as required by 994(t), this will facilitate an appropriate role for the courts in administering the statutory scheme and guard against unwarranted disparity.
The clearer and more precise the policy developed by the Commission, the easier it will be to hold the Justice Department accountable for applying it in particular cases.

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

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

I was really struck by Ms. Morales' comment about the difficulty that BOP has in determining whether individuals who meet the
criteria are deserving. I believe that that's a
decision for the court to make, with all due
respect.

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

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

We have a particular concern about the
criteria for non-terminal illness and disability
which seem unnecessarily complex and limiting,
and about the age-related criteria.

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

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

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

We have appended to our testimony a marked-up version of Commission's proposed amendment to 1B1.13 and would be happy to answer
any questions you may have about it.

CHAIR SARIS: Thank you.

Ms. Mariano.

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

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

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

Individuals who are dying or who are
desperately needed at home to care for aging parents or sick children are being kept in prison longer than necessary.

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

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

And second, we, the defenders, can help. The Commission should encourage the Bureau of Prisons to reach out to defense counsel or the defender in deciding whether -- sorry, before deciding whether an inmate meets the criteria for
As to our first point, we encourage the Commission to adopt a comprehensive guideline that defines extraordinary and compelling circumstances independent of the Bureau of Prisons policy and makes clear that the BOP should file a motion for a sentence reduction if those criteria are met.

In our view, Congress did not intend to delegate exclusive authority to the Bureau of Prisons in deciding what extraordinary and compelling reasons merit a motion for a reduced sentence. Congress explicitly gave the Commission that role, the role of setting the standard, and gave the judiciary the penultimate role of determining whether a person should have a reduced sentence. The statutory scheme is clear and the Commission must lead.

In addition to defining extraordinary and compelling circumstance, the Commission...
should also amend the guideline to instruct the
director of the BOP to file the motion when the
criteria set forth are met. There is sound legal
basis for doing so and it could have legal affect.

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

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

Even if the guideline is not binding,
the Commission's independent work on expanding
Section 1B1.13 is essential and its guidance on a compassionate release will likely have an anchoring affect and play a significant role in BOP decisions and when to file a motion.

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

Defenders can help.

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

The BOP collects information from the U.S. Attorney, the prosecuting attorney at times, the victims and the Office of Probation and Pretrial Services, when making this life-and-death decision on whether an individual meets the criteria for compassionate release.
This fact-finding, decision-making process would be more equitable and much improved if the BOP also involved defense counsel who can help gather the many records the individual is required to produce.

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

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

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

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

CHAIR SARIS: Thank you.

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

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

COMMISSIONER PRYOR: Yeah.

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

The second -- very informal contact, obviously. The second actually was just this past year. The Bureau did, in fact, make the
motion. The judge did, in fact, ask Probation for the release plan and was inclined to grant it. And Probation refused to approve the home where the person would be sent to live with his family, because it was Section 8.

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

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

So, no, they do not contact us at all. But in this instance because the family was very excised and the person was very near death, we
were able to provide assistance.

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

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

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

So, the first one is, you know, are you standing by that that public safety is not something for BOP? And then if you assume that
it is, it's got to be something that BOP takes into account before they file the motion. The question would be whether that kind of swallows up any other reform, because, you know, I understand what both of you have been saying about how we could give more specifics, how we could give more examples, how we could go through all of that. But if at the end of the day, BOP will weigh that against public safety.

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

MS. LOVE: I was struck in reading the statute, I had never read it the way I did in the past couple of weeks, where the 3582(c)(1)(a)(2),
which is the three strikes, 30-year authority, does task BOP with determining as a matter of eligibility whether the defendant is a risk. However, that same authority is not in (c)(1) -- or (a)(1), I should say. And that was sort of interesting to me.

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

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

COMMISSIONER BARKOW: So, you're saying if BOP -- I'm going to give you a stylized hypothetical here. Okay. So, just bear -- but BOP looks at someone and they say, oh, my gosh,
the prison record is, you know, off the charts. This person has really been -- had lots of behavioral problems in prison, but they meet the terminal illness and the age requirements. So, we'll go ahead and we'll file the motion and we'll just have the -- but we'll tell the court we don't think you should grant it.

That's the model that you think this imposes?

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

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

MS. LOVE: Well, I'm not sure where you're reading that in the statute.
COMMISSIONER BARKOW: Well, so that's

MS. LOVE: It's the court.

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

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

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

And that, we strongly believe, is not
appropriate to keep a case from the court. That
those are factors that the court weighs, and
that's certainly the way we read the statute.

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

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

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

Be that as it may, I can't rewrite statutes, much to the relief of the general public. However, I think your suggestion is an interesting one, which is that perhaps an ameliorating factor can be if you involve the defense early on in this process, at least they're in the position to point out things to
the director that may be useful in determining in an outcome whether or not to make the motion.

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

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

It is not a parole proceeding. The Sentencing Reform Act is clear we do not have parole. It is a sentencing reduction, which is
an adversarial proceeding in our point of view.

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

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

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

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

I can't think of a situation where
cancer hasn't been raised or a severe mental illness or some such. I mean, it comes up routinely in sentencing hearings and sometimes I'll vary based on the fact the person has cancer.

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

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

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

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

So, to suggest that foreseeability is
now a disqualifier seems to me to ignore some of the factors.

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

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

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

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

MS. LOVE: I have had a case in which
that occurred and I have heard stories of other
cases. I don't know whether it's a flat policy
that if the judge mentioned it that a case can
never go back. I don't know that.

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

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

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

So, there are many people who may have
had a condition at the time of their sentencing
to which the court felt they could do nothing
about. So, there are a number of people within
the BOP that would fall into that category as well. Thank you.

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

(No response.)

CHAIR SARIS: Thank you very much.

MS. MARIANO: Thank you.

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

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

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

So, our next panel -- our final panel, actually, addressing compassionate release
presents the perspectives of experts and advocacy groups.

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

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

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

She also currently serves as Medical Director of the San Francisco VA Geriatrics Clinic where she attends on the San Francisco VA Acute Care for Elders Unit. She is board certified in geriatrics, hospice and palliative
Dr. Williams has authored or co-authored numerous publications on the topic of compassionate release.

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

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

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

She, as I understand it, I'm not sure if I get the story correctly, but the plane was hit by lightning. And then she got on a train
that broke down. So, she actually did everything humanly possible to be here, but she has submitted short of running --

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

(Laughter.)

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

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

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

CHAIR SARIS: Yes.
MS. PRICE: And I will just note that it sounds like Professor Stith has extraordinary and compelling reasons --

(Laughter.)

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

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

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

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

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

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

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

On November 2nd, 2014, his wife suddenly and unexpectedly passed away and left behind their three minor children. No family member could take them in and the children were
taken in by kind neighbors.

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

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

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

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

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

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

After his wife's death, the neighbors
who took the children in became overwhelmed with
the round-the-clock responsibilities for which
they were not trained. Mistakes were made. The
child landed in the hospital for a while.
In October 2015, they announced they could no longer care for the children. The small family was separated. The younger children went off to another state to live with a relative. That relative refused to take Junior, the eldest with the medical concerns.

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

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

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

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

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

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

CHAIR SARIS: Thank you.

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

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

My work as an academic focuses on older and seriously ill prisoners and I also train criminal justice professionals in geriatrics and palliative care.
So, the issues that bring me here today are three-fold. First, the precipitous rise in the number of older prisoners. Second, a rise in illness-related prison mortality. And third, that evaluations of compassionate release which we heard this morning have revealed opportunities for improvement.

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

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

This is because as you heard a little bit before, many prisoners experience so-called accelerated aging, which they appear to be on
Because age-related compassionate release policies are intended for prisoners whose incarceration will require considerable complex healthcare and potentially considerable health-related needs at high cost, the definition of older prisoners should take into account this concept.

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

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

For example, as we heard a little bit this morning, requiring at least 10 years served runs the risk of penalizing the exact prisoners for whom the policy is intended to reach, those who have served a reasonable proportion of a relatively short sentence who are not deemed --
or unlikely to be deemed to be a safety risk.

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

Next, I have two recommendations about eligibility criteria for prisoners with serious or life-limiting illnesses. First, I recommend that medical eligibility criteria reflect the limitations and the science of prognosis. Unfortunately, prognosis is a very difficult and inexact science. When it's applied correctly, it provides merely a probability of death over a very general time frame.

For many serious illnesses, it's
actually extremely difficult to pinpoint the
exact month or day in which a patient will die.
And because of this, physicians are very
unwilling and uneasy and very reluctant to
prognosticate at all.

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

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

So, I strongly recommend that in
addition to life expectancy, sort of an estimated
number of months, eligibility criteria include
this other perspective, a physician's assertion
that a prisoner with a serious condition is on an
end-of-life trajectory that's heading towards 24-
hour nursing care in the upcoming months.

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

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

I recognize this might be beyond the
Commission's purview, but I have to say it as a
medical professional.
And I'm going to end with four very brief recommendations that I elaborated on in my written testimony that are related to some of the health-related administrative burdens that can limit access to compassionate release.

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

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

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

And fourth and finally because very few correctional healthcare providers are trained
specially in the care of older and seriously ill patients, I recommend training select medical and custodial care in geriatrics and palliative care, and also on how to implement whatever final compassionate release policy is developed.

Thanks so much for your time and attention.

CHAIR SARIS: Thank you.

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

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

As background, the American Correctional Association is the oldest and largest professional correctional organization
in the world.

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

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

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

However, the cost associated with providing them with their constitutionally mandated care and treatment is an enormous
obligation on the federal budget just as it is for the state correctional systems with aging offender populations.

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

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

Whether they are offenders or elderly or both, sometimes those with serious illness feel guilty about their circumstances. In
particular, the guilt stems from the perceived hardship or burden it imposes on others physically, emotionally and financially.

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

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

The public correctional policy on correctional healthcare adopted by ACA requires healthcare programs for offenders include comprehensive medical, dental and mental health
services, and that such programs should establish hospice services for the terminally ill offenders supported by a compassionate release program for those who qualify.

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

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

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

43 states provide special services for offenders who are chronically or terminally ill,
including chronic care clinics, separate housing units, palliative care, hospice services, skilled nursing, separate prison hospitals and inpatient medical referral centers like in the Bureau of prisons.

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

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

In Louisiana, the Angola Prison operated by Warden Burl Cain, had a great hospice program that included the use of inmates to take
care of those inmates who aren't able to be released. And it's showing great, great promise.

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

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

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

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

MR. WASHINGTON: I think in different
cases, especially in the case of New York and in Kansas, they've built in a network where the process runs through the Department of Corrections, but they also have to have advice and consent from the judge and/or the Parole Board and also victims. So, there's a mechanism for them to be able to contact all of those entities to get a response.

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

How does that work? Would you say that's been a success? Would you say that it results in a lot of people who are ostensibly, you know, low in terms of recidivism? Has it
been successful? Not successful?

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

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

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

Do you have any information on that?

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

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

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

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

VICE CHAIR BREYER: Do you have a
sense of cost? Do you have a sense of how much in terms of medical costs are devoted to end-of-life care?

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

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

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

Secondly, there's a real question about what is a healthcare-related cost? I mean, do you -- are the costs associated with officers who are -- two officers who are standing with a comatose patient in a hospital, you know, collecting their overtime, is that a health-
related cost, or is that a corrections cost? So, there's some questions about how to even really start to drill down and what exact healthcare-related costs are.

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

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

MS. PRICE: And I'll just add I think that the Office of Inspector General report
discusses the medical costs as they relate to aging prisoners in the Federal of Bureau of Prisons. So, that information should be available at least for them.

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

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

What would your exact wording be?

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

We're very good at saying the person in front of me is probably going to die in the next 48 hours. And I'm really good at saying a seven-year-old girl is probably going to live for another 80 years. And then everything sort of
in the middle depends on what the condition is that I'm being asked about.

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

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

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

So, what I would say is that in terms of terminology, number one, it will be important
to think about different trajectories of end-of-life illness which is why I say "serious" and "advanced" life-threatening condition with profound cognitive or functional impairments.

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

CHAIR SARIS: So, the exact language would be?

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

CHAIR SARIS: I'm a lawyer.

(Laughter.)

DR. WILLIAMS: Just kidding. The exact terminology would be advanced -- serious advanced illness with a clear terminal trajectory.
CHAIR SARIS: You know, I just read a compelling book over the weekend, "When Breath Turns to Air." I don't know if anyone has had a chance to read that about a 37-year-old that was diagnosed with -- a neurosurgeon with stage 4 lung cancer.

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

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

DR. WILLIAMS: Yes, there are graphs. And there are -- there are very clear sort of four or five general trajectories and they differ where, you know, there are trajectories, like I said, the metastatic solid tumor cancer, there are -- there is an advanced illness that is sort
of very quickly and has a very profound cliff
where people sort of move along and then
suddenly, you know, there's just a matter of a
couple of weeks and then they've died. There's
sort of the sputtering decline.

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

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

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

CHAIR SARIS: How about --
DR. WILLIAMS: -- there's a 50 percent chance that this person is going to be dead?

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

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

CHAIR SARIS: So, actually --

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

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

DR. WILLIAMS: Is moving --

CHAIR SARIS: Is moved in the --

DR. WILLIAMS: -- in that direction.
CHAIR SARIS: -- right direction there.

DR. WILLIAMS: Yes. Yes.

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

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

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

DR. WILLIAMS: Well, it's hard to make a general sweeping kind of opinion about that, because there are so many different types of diseases that cause death.
What I would say is, again, from my perspective we're talking about medical eligibility for evaluation. And so, this is sort of the first gatekeeping door.

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

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

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

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

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

MS. PRICE: It probably happens at all
levels. It was an important step to remove the regional office review that Kathleen Kenney mentioned to you earlier. That took out a step that could take quite a long time because the regional offices, you know, would sometimes sit on these for a fairly long period of time.

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

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

And while that was happening, as I understand it, a lot of these decisions were
sitting in the Central Office, because even though the wardens had forwarded opinions, there wasn't sort of this finality about what is our actual final determination of what an elderly prisoner is with a medical condition.

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

And even though it had been enunciated already by the Sentencing Commission that this was a ground and the Bureau of Prisons says that they had advised the institutions about what the Sentencing Commission had provided as grounds for compassionate release, the staff were unaware and said, look, you need to go read our manual, because this clearly does not fall within this. So, lots of time was wasted right there.
So, on a case-by-case basis I can't always tell and I certainly am not inside the process enough to know, but I do know that sometimes certainly there are significant delays once, as this gentleman's recommendation is certainly undergoing, there are significant delays once a recommendation from a warden reaches the Central Office.

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

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

DR. WILLIAMS: Variations on a theme.

CHAIR SARIS: We'll just go down to Judge Pryor. We'll just go right down the --
COMMISSIONER PRYOR: Dr. Williams, when you get to your recommendations in Recommendation 3, you recommend corresponding with your first recommendation lowering the age of eligibility for those with qualifying medical conditions to 55 or 50.

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

DR. WILLIAMS: That's a great question.

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

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

MS. SPEAKER: I like her.

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

COMMISSIONER FRIEDRICH: Dr. Williams --

DR. WILLIAMS: Yes.

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

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

COMMISSIONER FRIEDRICH: I mean, I know you haven't, but --
DR. WILLIAMS: Yeah, so I have -- I have worked a bit with two different states, really, people who are making recommendations to their policies and sort of weighed in on those two policies.

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

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

Even if they don't have dementia, per se, they have some degree of cognitive incapacity that would make the process of petitioning and pulling all the work together and identifying
sort of all the processes that they need to follow to make the petition successful extremely problematic.

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

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

COMMISSIONER FRIEDRICH: Thank you.

CHAIR SARIS: Judge Breyer.

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

And because I don't quite know what it
means to say otherwise qualify since under the statute I think the Bureau of Prisons could take into account any number of things, I think the interesting question is how many of these people who applied would qualify under the medical aspect of it, but under the other aspects which are the other 3553(a) factors, would not in the warden or the director of prison's judgment.

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

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

VICE CHAIR BREYER: Well, I'm trying to figure out, I mean, I don't know that I want more motions or fewer motions. I'm just trying to figure out what's going on. What is happening? How long is it taking? Why are these
people denied compassionate release? What's the reason for it?

Is the reason medical? Is the reason the victims? Is the reason the nature and circumstance of the offense?

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

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

In the case of Michael Mahoney, whose case I discuss in this case -- in our testimony, rather, because the nature of his offense
although when one took a close look at it, the judge himself asked for the motion to be presented.

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

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

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

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

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

And I do thank Ms. Price and Ms. Williams for the -- and Dr. Williams for the sort of heartbreaking stories that you brought before
Undoubtedly, again, this is a very difficult topic and these are very sad situations, but we are talking today mostly about the idea of broadening the pool of motions that the Bureau of Prisons will be filing.

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

In Dr. Williams' case, for example, it's only the BOP. The BOP actually recommended it, not the BOP, but the State prison system. In the case of Ms. Price's example, it just seems to me that it would be -- it could, again, as I mentioned before in my question to Mr. Horowitz, I worry that broadening the pool would actually take away from the most eligible applicants.
And if you -- can you talk about your thoughts about how broadening the pool, the impact that that would have on cases such as the ones you raise?

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

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

I don't worry about the resource issue. I know you raised that question earlier about whether or not this would take away resources if we're going to go out there and sort of hunt up all these people who are aging and so on and so forth, but really what you're talking about is resources that are currently being spent
on an aging population that's extraordinarily expensive to support and maintain with dignity.

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

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

CHAIR SARIS: Did you want to jump in?

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

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

COMMISSIONER PRYOR: I mean, it seems
to me that if you broaden the pool, perhaps more
will get consideration, but it doesn't change the
problem with the example that you provided us,
right?

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

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

COMMISSIONER PRYOR: It doesn't.

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

COMMISSIONER PRYOR: Right.

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

COMMISSIONER PRYOR: Well, then the -

MS. PRICE: The problem that I have -
COMMISSIONER PRYOR: But the second part of her question is that if we broaden the pool, though, that will mean more motions or more requests for BOP to file motions, and that will necessarily tax whatever finite resources BOP has.

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

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

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

COMMISSIONER PRYOR: They're going to be necessarily spent, right?
MS. PRICE: Yes.

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

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

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

I mean, that is a motion that can be readily taken. You can take away from the Bureau
of Prisons the worrying about whether he deserves
to be released, has he served enough time in
prison, was his crime particularly heinous?

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

VICE CHAIR BREYER: But I agree --

MS. PRICE: Knows --

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

MS. PRICE: The Bureau of Prisons --

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

You go through that process. That may
or may not, may or may not broaden the pool. I
don't know, but at least it may address the problem that I see, which is you have 3,000 people apply, you have 250 people pass, go through it, and there's something going on here.

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

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

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

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

MS. PRICE: Thank you very much.

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

(Laughter.)

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

(Pause.)

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

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

CHAIR SARIS: Still is the morning.

So, as I mentioned, we're turning now to
And I first want -- the Commission's proposed amendment for public comment on supervised release is a result, didn't come out of nowhere, it's a result of collaboration with the Criminal Law Committee, which has studied the current conditions in light of recent court precedent, as well as the Commission's own multi-year review of federal sentencing practices relating to conditions of probation and supervised release.

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

So, I look forward to all our witnesses today and I'm pleased to begin with Judge Martinez, who is testifying on behalf of the Criminal Law Committee of the Judicial
I know how much time you all have spent on this. You have also been experienced, Judge, as a judge in the Western District of Washington since 2004, and the new chief judge out there.

So, welcome, Judge Martinez.

HON. MARTINEZ: Thank you.

CHAIR SARIS: As much time as you want.

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

As you indicated, the thrust of my oral comments today are on the conditions of supervision. However, having sat through the morning and listening to the panelists speak on
compassionate release, let me just point out a couple things to the Commission on that issue.

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

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

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

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

Because of that, we have recommended,
and the Judicial Conference has approved, seeking legislation that permits the early termination of supervision terms for those individuals.

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

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

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

The conditions of supervision define the sentence to be executed, establish behavioral expectations for defendants, and provide the probation officer with tools to keep informed and bring about improvements in a defendant's conduct and condition.
Discretionary conditions of supervision are differentiated into either "standard" and "special" conditions.

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

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

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

The standard conditions in the national judgment form were last approved by the Judicial Conference of 2011.
Over the last year the Committee has reviewed the standard and most common special conditions to assess whether all of the standard conditions are required for supervision in all cases.

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

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

In May of 2014, the Seventh Circuit issued the opinion in United States v. Siegel where it summarized the common, but largely unresolved problems in the imposition of conditions of supervised release. And one of the
most serious problems identified by the court is that the conditions are often vague and inadequately defined.

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

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

An additional problem is the large
number and variety of possible discretionary conditions. According to that court, the sheer number may induce haste in the judge's evaluation of the probation service's recommendations and is doubtless a factor in the frequent failure of judges to apply the sentencing factors set out in 3553(a) to all the recommended conditions included in the sentence.

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

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

Since Siegel, the Seventh Circuit has reiterated and expanded upon these concerns in numerous additional opinions. It has vacated or
expressed concern about individual standard and special conditions for a variety of reasons, including being too vague, being overbroad, not including a knowledge requirement for violation, and not having an adequate justification for how that condition is reasonably related to either the offender or the offense characteristics, how they are reasonably related to the relevant statutory sentencing factors, and how they involve a minimal deprivation of liberty.

So, in response to this developing case law, individual districts in the Seventh Circuit and other circuits have reexamined their practices concerning the recommendation and imposition of standard and special conditions.

Some districts have changed the wording of the conditions. Some have reduced the number of standard conditions and included the recommended conditions and a more comprehensive justification in the pre-sentence report.

At the national level, the DOJ has
requested that the Commission amend the conditions of supervision and commentary in the Guidelines Manual to specifically address the concerns of the Seventh Circuit.

As the DOJ reasoned, courts and litigants within that circuit are addressing the concerns of the Seventh Circuit in a variety of ways. They are spending a great deal of time and effort proposing and reviewing responses to conditions prior to sentencing and justifying those conditions at sentencing case-by-case often struggling to find the appropriate support and justifications for various conditions of release.

We feel that some level of national uniformity in standard conditions is necessary for a variety of reasons. First, they represent core supervision practices required in every case.

Second, approximately 20 percent of offenders under supervision were sentenced in districts other than the district of supervision.
Finally, uniformity in standard conditions ensures efficient policy development and training at the national level.

In February of last year the Committee asked the AO to conduct a comprehensive review of the standard and most common special conditions. This review included an analysis, exhaustive analysis of case law and numerous discussions between AO staff and probation officers concerning legal policy and practical issues surrounding the recommendation, imposition and execution of conditions of supervision.

As a result of these efforts, AO staff proposed revisions to the standard conditions on the national judgment form.

Additionally, it developed a document to provide policy guidance to judges, probation officers, prosecutors, defense attorneys and other criminal justice practitioners.

The document describes the legal authority, model condition language, purpose,
including reference to any criminological research, and method of implementation for the standard conditions and the most common special conditions.

One purpose of that document is to provide notice to the defendant of the standard and special conditions.

Additionally, it may assist the parties in determining when specific special conditions are appropriate and in providing individualized justifications for the conditions.

Finally, the document may even aid appellate courts when reviewing the imposition of conditions in those individual cases.

In November of last year, the AO distributed drafts of the proposed standard conditions and guidance document to judges, probation officers, DOJ and federal defenders, and it solicited feedback which was then used to make necessary revisions.
Additionally, AO staff collaborated with the Sentencing Commission staff with the intent of harmonizing the conditions listed in the Guidelines Manual with those on the national judgment form.

At our next meeting in June, our committee will consider whether to approve the issuance of the new guidance document and amend the national judgment forms.

Our committee supports the Commission's proposed amendments to revise, clarify and rearrange the standard conditions of probation and supervised release. The proposed language is more clear and plainly worded.

Additionally, many of the proposed conditions include a requirement that the defendant knowingly violate the conditions.

Finally, the proposed amendments remove a number of requirements from the list of standard conditions because they are not applicable in every case or otherwise addressed
by other conditions.

Indeed, the Senate Report accompanying the Sentencing Reform Act makes clear that the list of possible conditions in the statute, which includes supporting dependents, meeting family responsibilities, refraining from excessive use of alcohol, is only suggestive.

It may be helpful to provide a more detailed discussion regarding several of the proposed changes. First, the Committee supports the proposal to remove the current standard condition requiring that the defendant support his or her dependents and meet other family responsibilities.

This condition would not be reasonably related to the history and characteristics of the defendant if he has no dependents or family obligations.

Additionally, the scope of the term "meet other family responsibilities," is vague and unclear.
A group of probation officers that assisted with the review of these standard conditions unanimously agree that the term is vague and often leads to uncertain and inconsistent enforcement.

Of course if a probation officer or court determines that a condition requiring support of dependents or the satisfaction of other family responsibilities is necessary, then that probation officer and the court may recommend and impose such a requirement as a special condition.

Secondly, the Committee is in favor of the proposal to remove the current standard condition requiring the defendant to refrain from excessive use of alcohol.

Again, the Senate Report accompanying the Sentencing Reform Act made clear that it is not intended that this condition be imposed on a person with no history of excessive use of alcohol and that to do so would be an unwarranted
departure from the principle that conditions must be reasonably related to the general sentencing factors.

Now, to be sure, alcohol use may, in individual cases, have a criminogenic effect or inhibit the satisfaction of other conditions such as maintaining employment or supporting families.

If a probation officer or court determines that an alcohol restriction condition is necessary, then the probation officer and court may make such a recommendation and impose such a requirement as a special condition in the individual case.

It's also noteworthy that the probation officers who assisted with the review of these standard conditions also unanimously agreed that the current standard condition prohibiting excessive use of alcohol is vague, very difficult to enforce and really not valuable as a supervision tool.

In fact, the officers opined that it
is more common and effective to request alcohol
treatment and a complete alcohol ban if it is
determined in any individual case that such a
condition is reasonably related to the nature and
circumstances of the offense and the history and
characteristics of that defendant.

Third, the Committee agrees with the
proposal to add as a standard condition the
requirement that the defendant not own, possess
or have access to a firearm, ammunition,
destructive device or other dangerous weapon.

This condition promotes the public
safety and reduces safety risks posed to
probation officers. To the extent that the
nature and circumstances of the offense or the
history and characteristics of the defendant
indicate that a prohibition on possessing other
types of weapons is necessary, probation officers
may recommend that as a special condition.

Fourth, with regard to the current
standard condition requiring that the defendant
answer truthfully questions of the probation officer, the Commission seeks comment on whether the defendant should answer truthfully or, instead, be truthful when responding to the questions of the probation officer.

The Commission requests feedback on both the policy and Fifth Amendment implications of these options.

The purpose of the current "answer truthfully" condition is to build positive rapport and facilitate an open and honest discussion between the probation officer and the defendant.

Accurate and complete information about the nature and circumstances of the events and the history and characteristics of the defendant is necessary to implement effective supervision practices.

The probation officer attempts to develop and maintain a positive relationship with the defendant through transparent communication
and the implementation of evidence-based correctional practices.

Our committee believes that a condition requiring that the defendant answer truthfully the questions of probation officers, along with policy guidance directing probation officers how to ensure that Fifth Amendment rights are not violated, satisfies constitutional requirements.

The Committee does not support the alternative proposal to require only that the defendant be truthful when responding to the questions of the probation officer.

Such a condition, in our opinion, would interfere with the probation officer's ability to establish open communication with the defendant and it would allow defendants to refuse to answer questions about compliance with conditions of supervision.

For instance, if it is determined that a defendant has several risk factors for
recidivism including such things as negative social networks, antisocial cognitions, educational or vocational deficits, the probation officer may arrange a meeting with the defendant and ask questions such as, who were you hanging out with last night? Why were you yelling at your wife? Why didn't you go to work today?

If the defendant refuses to answer and he is subject to a condition to be truthful when responding to questions, then the probation officer would only be able to note in the file that the defendant refused to answer, criminogenic risk factors would not be addressed, the court would not be informed.

If the defendant is subject to a condition requiring her to answer truthfully questions, the probation officer could submit a report to the court that the defendant declined to answer questions.

The court can then schedule a hearing, question the offender in camera, if necessary,
about why he or she declined to answer the questions.

If the court determines that the invocation of the privilege is not valid because there is no realistic chance of incrimination, then the court can instruct the defendant to answer those questions.

The Commission also requests comment about whether it should clarify that an offender's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's questions shall not be considered a violation of this condition.

The Committee supports including such a clarification in the commentary of the Guidelines Manual.

In April of 2011, the Committee approved this type of guidance for defendants convicted of sex offenses when it endorsed a new sex offender management procedures manual for
probation and pretrial officers.

Under the approved guidance, if the defendant refuses to answer a specific question during an interview on the grounds that it is incriminating, the probation officer is instructed not to compel the defendant to answer the question through threat of revocation.

If there is any uncertainty about whether that invocation of the privilege is valid, the probation officer is instructed to refer the matter to the court to make the final determination.

Our committee believes that adding this guidance to policies concerning all types of offenders would address any Fifth Amendment concerns without having unintended consequences on the ability of probation officers to effectively supervise defendants.

And finally, the Commission seeks comment on the condition of supervised release requiring the defendant shall notify the
probation officer of any material change in the
defendant's economic circumstances that might
affect the defendant's ability to pay any unpaid
amount of restitution, fines or special
assessments.

This condition is currently listed as
a standard condition in the Guidelines Manual,
but not on the national judgment form.

The Commission seeks comment on
whether this condition should be made a special
condition rather than a standard one.

Our committee supports classifying
this obligation as a special condition, again,
because it may not be applicable in all cases.

In many cases, there is no fine or
restitution imposed and the special assessment is
usually paid while the defendant is in the Bureau
of Prisons.

For those defendants who are released
to the community with any outstanding criminal
monetary penalties, a requirement to notify the
probation officer of a change in economic circumstances can be address by requesting or imposing a special condition.

I want to take a few minutes to discuss other measures that the Criminal Law Committee is working on relating to the conditions of supervision.

At the national level, some guidance currently exists concerning the imposition of standard and special conditions of supervision.

For instance, under Section 3563(d) and 3583(f), the court is required to direct that the probation officer provide the offender with a written statement that sets forth all the conditions to which the sentence is subject and that it's sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

Under Judicial Conference policy, in recommending a unique special condition, probation officers should ensure that the
recommended wording is clear, legally sound and meets the intended purpose.

The federal supervision model is founded on the conditions of supervision and comprised of strategies that are sufficient, but no greater than necessary, to facilitate achievement of the desired outcome.

Every supervision activity should be related to the statutory purposes for which the term of supervision was imposed and the related objectives established for that individual case.

Special conditions are to be sought by probation officers only when the deprivation of liberty or property they entail are tailored specifically to address the issues presented in the individual case.

Before recommending special conditions, probation officers should consider all of the mandatory and standard conditions that may already address any particular risk or need.

If the officer determines that the
mandatory and standard conditions do not adequately address those risks and needs, he or she then should consider recommending a special condition.

Under Judicial Conference policy, courts are further discouraged from adding additional conditions to the list of standard conditions such as substance abuse testing or treatment since they impose an obligation on the probation office that has implications for both staffing and funding.

When considering special conditions, probation officers should avoid presumptions or the use of set packages of conditions for groups of offenders and keep in mind that the purposes vary depending on the type of supervision.

Officers should ask first whether the circumstances in this case require such a deprivation of liberty or property to accomplish the relevant sentencing purposes at this time.

For defendants facing lengthy terms of
imprisonment, probation officers should truly consider whether the risks and needs present at the time of sentencing will be present when the defendant returns to the community.

In some cases, it may be very appropriate to avoid recommending special conditions until such time as the defendant is preparing to reenter the community.

Despite the existing national guidance, the Committee feels that it may be necessary to provide further guidance concerning the language and justification for standard and special conditions to assist the courts with ensuring that condition language is clear and legally sound, providing the required justification for conditions, and providing proper notice to defendants about the types of conditions that may be imposed.

AO staff is in the process of finalizing a document to provide guidance to the judges, probation officers, prosecutors, defense
attorneys and other criminal justice practitioners.

The document describes the legal authority, model condition language, purpose, including references to research where applicable, and method of implementation for the standard conditions, as well as the most common special conditions.

At our June 2016 meeting, the Committee will consider whether to approve the issuance of the new guidance document.

In addition to this document, the Committee will also assess whether to recommend any changes to policies or procedures to provide defendants with sufficient notice and justification for discretionary conditions before and during the sentencing hearing.

This could be achieved by having probation officers include proposed conditions in the pre-sentence report or sentencing recommendation.
Additionally, our committee will assist--

CHAIR SARIS: I'm just wondering--at some point we're going to want to jump in with questions.

HON. MARTINEZ: I'm almost done.

CHAIR SARIS: All right.

HON. MARTINEZ: All right.

Additionally we will assess whether to endorse or recommend changes in policies and procedures regarding the imposition and modification of discretionary conditions at the time the defendant is released from prison.

Finally, any changes in condition language, policies and procedures requires training for effective implementation.

Our committee will collaborate with the Federal Judicial Center and others to provide all necessary training for judges and probation officers.

Once again, thanks to the Sentencing
Commission for providing us the opportunity to comment on these proposed changes to the sentencing guidelines.

As we have always in the past, the members of our committee look forward to working with the Commission to ensure that our sentencing system is consistent with the central tenets of the Sentencing Reform Act.

CHAIR SARIS: Thank you very much, and we very much appreciate the collaboration as well. These proposals came over from Criminal Law.

I didn't realize it would generate so many comments, actually, from both -- from everybody. And we're about to hear from folks, but I want to know if there are any questions.

VICE CHAIR BREYER: I have a couple of questions. I wanted to address the point that I think you answered spontaneously today in light of the supervised release, compassionate release.

Is it your understanding that if
somebody is -- I've been on 19 years and I've never had one of these cases.

Is it your understanding that if somebody is released on compassionate release, that they would then be placed on supervised release and they are out of the custody of the Bureau of Prisons?

So, it's different from, quote, a halfway house where they're still in the custody of the Bureau of Prisons. Your understanding is that they simply go over to the Probation Department.

HON. MARTINEZ: In the 15 and a half years that I've been on the federal court bench, I've never had one of these either, but that is exactly my understanding that under current law they would have to serve at least one year of supervised release.

VICE CHAIR BREYER: Okay. The second question I have is that at least in our circuit, please, and you are in our circuit, the way I
have dealt with these conditions that may no
longer be applicable is that when the defendant
is returned to the District or is in the District
in which the conditions were imposed in 80
percent of the cases or otherwise, and the
probation officer believes that a condition is
inappropriate or that a different condition
should be added, I then would get a request. We
get requests all the time to modify and so forth.

Do you find that satisfactory? Is
that something that -- rather than bringing the
defendant in front of the judge for the
recitation of all those conditions, they go in
front of the probation officer.

The probation officer says, you may
not remember what happened eight years ago, but
here were the 12 conditions. I want to go over
them with you to make sure that in the passage of
time you still understand them. And if there is
one that is inappropriate, whatever reason, they
then come to the court.
Do you follow that practice?

HON. MARTINEZ: That's exactly what we do in our district. And as you're aware, you know, as time goes by, judges retire and then other judges come on board.

I inherited several judges' caseloads from prior sentencings. And many, many times when those people are finally released, we will get modifications simply from their probation officer.

Now, remember, if the defendant objects to any of those modifications, then they have a right to bring it back into court.

But for the majority of time, I'll say well over 90 percent, the defendant agrees and we simply sign off on it and modify it.

VICE CHAIR BARKOW: Thank you.

CHAIR SARIS: Commissioner Barkow.

COMMISSIONER BARKOW: Yeah, I was just curious in the issue about -- the Fifth Amendment issue that comes up in terms of
requiring people to answer truthfully, one of the proposals we got from the defenders was this language, which I'm just going to read to you and see if this is a compromised position, if this covers what your concerns would be.

What if we said something along the lines of the defendant must -- defendant must answer truthfully or be truthful when responding to the questions asked by the probation officer regarding compliance with the conditions of supervision, but the defendant remains free to exercise the Fifth Amendment right against self-incrimination when the question is posed, a realistic threat of incrimination in a separate criminal proceeding.

Would something like that balance the interest of needing the open communication when you're talking about anything related to the conditions of supervision, but at the same time reminding the defendant that if it's anything that might be self-incriminating, you have this
Fifth Amendment right.

HON. MARTINEZ: Our committee does not make that specific recommendation, but I think that your suggestion makes some sense. Clearly, you know, offenders in supervision retain their constitutional right against self-incrimination.

In my opinion, it really comes down to training. Because if an officer has any doubt about whether that refusal to answer is legitimate, it can always be referred to the court for a finding. And that's what we would recommend.

COMMISSIONER BARKOW: Okay. Thank you.

CHAIR SARIS: Let me ask this. In the 22 years now I've been on the bench, I've never had most of these issues come up.

They come up in child pornography, but for the most part they come up later in revocations or requests for modifications, not at
sentencing.

So, and for the first time I've actually started thinking about the difference between a standard condition and a special condition, but it's generally not litigated.

And the big question that I have, which I guess is an overarching philosophical issue, is sometimes we keep imposing conditions. There's the standard conditions, and then I add to them the special conditions to the point where when someone comes out, they've got so much they have to comply with, you know.

I often say batterers programs and mental health programming and drug treatment programming and vocational education and, you know, blah, blah, blah and it goes on and on.

And most of these people have just come out of prison. Maybe they don't need it anymore, or maybe it's just asking too much of somebody when they're just coming back.

And so, some of, I think, the debate
was should this be a standard condition or a special condition? And I'm wondering whether in your experience that makes -- we should be pushing more into the special and then we should be focusing more when they come out, as to what they need.

HON. MARTINEZ: That's exactly what we're saying. I've been a judge for 26 years now in the state system and the federal system. I've sentenced hundreds of defendants.

In the federal system, you're right. The only time we've had an issue in court has been on the child pornography people, because those are very specialized conditions.

You're also talking about prohibiting them from using computers, being connected to the internet, which now, you know, is almost necessary to be able just to get along and survive and get a job, but I agree with you that we can very easily end up over-supervising people and putting way too many conditions on their
For a lot of these people, now, remember, many of these defendants got there in criminal court because they couldn't follow all the rules at that point, and we are loading more rules onto their plate. Placing too many of those, I think, is almost guaranteeing that they are going to fail.

Research has shown that supervision should be targeted towards higher-risk, higher-need offenders. It also has shown that if you over-supervise low-risk people, that actually results in a worse outcome in the long run.

So, yes, we have to be careful about doing that. I agree with you.

CHAIR SARIS: Any questions? Anybody else have anything?

VICE CHAIR BREYER: I just want to thank you for being on the -- being on the Criminal Law Committee. It is an extraordinarily valuable committee for the Sentencing Commission.
I've seen it now work and you really are the voice of the judiciary coming in and talking to us from a judge's point of view. The sentencing guidelines are directed to judges. So, thank you so much for your service. It's very, very valuable.

HON. MARTINEZ: Thank you very much.
VICE CHAIR BREYER: I know I speak on behalf of --
HON. MARTINEZ: This is my favorite committee. Thank you.
CHAIR SARIS: Thank you. Last, but by no means least, our final panel of the morning.
(Pause.)
CHAIR SARIS: You ready?
MR. SHANKER: I'm ready. No longer good morning.
(Laughter.)
CHAIR SARIS: Absolutely correct.
MR. SHANKER: Judge Saris --
CHAIR SARIS: Wait. No, I've got to
introduce you.

MR. SHANKER: Oh, I'm sorry. I'm sorry. I thought no introduction required.

CHAIR SARIS: No introduction needed, but let me just quick go through it. So, I'll tell everyone who you are, because we have lots of people out there listening.

So, the first witness is a representative from the Department of Justice, Vijay Shanker. Mr. Shanker currently serves as Deputy Chief of the Appellate Section in the United States Department of Justice where he worked since April 2005.

Before then he practiced law in D.C. in the areas of white collar criminal defense, complex civil litigation and appellate litigation.

So, you've seen both sides of this.

MR. SHANKER: Yes.

CHAIR SARIS: Mr. Shanker is joined by Marianne Mariano for the federal defenders.
I already -- everyone knows her. So, I need not go on.

And then Dr. Virginia Swisher is testifying on behalf of the Commission's Victims Advisory Group. Dr. Swisher is the founder, director and CEO of Problem Solving Consultants, a conflict resolution consulting service.

Dr. Swisher previously worked for 20 years as a federal probation officer. Where?

DR. SWISHER: District of Connecticut.

CHAIR SARIS: District of -- oh, a New Englander. So, why don't we get going with you? You are chomping at the bit. Come out of the box.

MR. SHANKER: That's right. Judge Saris and members of the Commission, thank you for the opportunity to share the views of the Department of Justice on the Commission's proposed amendments to the sentencing guidelines regarding conditions of probation and supervised
release, Sections 5B1.3 and 5D1.3.

I am Vijay Shanker. I am Deputy Chief of the Criminal Division's Appellate Section. I have represented the Department in dozens of criminal cases involving probation or supervised release and I recognize the importance of the issues the Commission is addressing.

The Department appreciates the Commission's efforts to revise and clarify the conditions of supervised release and probation.

As a general matter, the Department is in favor of the Commission's desire to resolve ambiguities and simplify the guidelines and we think the proposed amendments include a number of improvements.

We do, however, have several concerns which are addressed more fully in our written submission. And I will speak to just a few of those today.

First, the Department recommends that the proposed fourth standard condition of both
probation and supervised release should read as follows: "The defendant must answer truthfully all questions asked by the probation officer."

The current condition states that a defendant shall answer truthfully all inquiries by the probation officer.

The Department believes that the proposed deletion of the word "all" could be read as a substantive reduction in the defendant's obligations and is unwarranted.

In addition, in response to the Commission's solicitation of comment, the Department's view is that there is no basis for altering the condition to require the defendant only to, quote/unquote, be truthful when responding to questions by the probation officer, nor is there a basis for including a proviso that an offender can invoke his Fifth Amendment privilege against self-incrimination in response to a probation officer's question.

First, as the Supreme Court has
recognized, imposing a general obligation to respond truthfully to a supervision officer's questions does not conflict with the right against compelled self-incrimination.

Second, there is no requirement that a probationer be affirmatively advised of his or her Fifth Amendment right against self-incrimination so long as a condition of probation merely requires a probationer to appear and answer truthfully rather than requiring the probationer to choose between making an incriminating statement and jeopardizing his or her conditional liberty by remaining silent. There is no Fifth Amendment concern.

Restricting this condition or interjecting Miranda-like cautions about self-incrimination into the supervision context where there is no legal basis for doing so, could curtail questioning of or responses by supervisees regarding offenses they may have committed to the detriment of both supervision
interests and law enforcement interests.

Second, the Department recommends that the conditions requiring defendants to refrain from excessive use of alcohol and to support dependents and meet other family responsibilities be retained as standard conditions.

Excessive alcohol use contributes to criminal behavior, hinders rehabilitation and conflicts with other conditions of supervision, including those relating to employment and family support obligations.

Vagueness concerns can be addressed by making the language more specific and indeed the Department suggests that the condition be rewritten to say that the Defendant must follow any instructions of the probation officer to limit or refrain from the use of alcohol.

This would enable probation officers to assess whether the extent of alcohol used by their supervisees is interfering with their
rehabilitation or compliance with other supervision conditions and to issue remedial instructions.

Similarly, we suggest that the standard condition relating to family responsibilities be rewritten as follows: The defendant must meet any legal obligation to support or make payment toward the support of any person and must follow any instructions of the probation officer with respect to meeting other family responsibilities.

In the Department's view, the special condition proposed by the Commission is too limited and fails to account for the fact that meeting the full range of legal and social obligations to one's children, spouse and parents is conducive to rehabilitation and should be promoted as an aspect of supervision.

Finally, the mandatory condition concerning compliance with the Sex Offender Registration and Notification Act, or SORNA, is
inconsistent with applicable law.

As currently drafted in the guidelines, the condition assumes that there are some states in which SORNA does not apply. For those states, it improvises a non-SORNA set of registration requirements for sex offenders based on provisions of older laws that SORNA repealed.

SORNA, however, is a federal law and its requirements apply to sex offenders in all states regardless of whether the state has implemented SORNA's requirements in its registration program.

The condition would correctly reflect the law if formulated to track the corresponding statutory language as follows: If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act.

In closing, I would again thank the Commission for this opportunity to share the views and concerns of the Department of Justice.
The Commission's efforts to clarify the supervision conditions guidelines are commendable and the Department looks forward to working with the Commission on this important issue. Thank you.

CHAIR SARIS: Thank you.

MS. MARIANO: Good afternoon. The federal public and community defenders appreciate the Commission's decision to review the conditions of supervision in your interest in making the conditions easier for our clients to understand.

However, we question the necessity of many of the standard conditions as standard conditions instead of special conditions and we are concerned about the over-breadth and ambiguity of some of the proposed language.

For too long the focus of sentencing has been on how long a person's prison sentence should be, and too little focus on other aspects of the sentence, including supervision.
Supervised release primary purpose is to facilitate reintegration of a defendant into the community thereby reducing the chances of recidivism and protecting the public, but the long list of blanket conditions does not serve that purpose.

As a threshold matter, we believe the Commission should reduce and limit the number of standard conditions making most special conditions for several reasons.

First, the slate of conditions undermines the statutory requirement that the court make specific findings when imposing additional conditions of supervised release, including the requirement that any condition be reasonably related to a specific 3553(a) factor and that it involved no greater deprivation of liberty than is reasonably necessary to serve that purpose.

The standard conditions do not require such findings and ignore the need for
consideration of the history and characteristics of the defendant.

For example, the proposed standard condition regarding the notification of third party risk to another person or organization should be a special condition.

Not only is the condition not applicable in every case, it is also now sufficiently narrow, because it fails to specify the nature of the offense or characteristics of the defendant that pose the risk, facts that must be tailored by the court to the specific defendant.

Moreover, one-size-fits-all conditions are not compatible with the approach to supervision that the U.S. probation system has been trying to implement.

According to the evidence-based practices of probation and pretrial services, conditions of supervision should be directed toward a particular criminogenic need.
If conditions of supervision are to be consistent with that approach, there should be few standard conditions and more special specifically targeted to the needs and responsivity of the individual defendant.

For example, the travel restriction. If a defendant resides near the border of a federal judicial district, it may be appropriate for him to routinely leave the current district to facilitate employment, healthcare needs or reintegration with family.

The condition that he may not knowingly leave the federal judicial district without permission is not appropriate as a standard condition, but must be tailored to the defendant and possibly the District's specific circumstances, and I believe it often is.

Studies have shown that extensive standard conditions of supervision may be unnecessarily burdensome.

Rather than help reintegrate a person
into the community, too many conditions can set him or her up for failure.

Defenders' experience shows the technical violations leading to revocations even where there's no evidence of criminal activity and where the defendant might otherwise succeed at reintegration.

One example is the condition regarding full-time employment. For some of our clients, this is simply unattainable possibly because they are elderly when they are released, or they're infirm or mentally -- physically or mentally infirm after they've served a lengthy prison sentence.

The same is true of a GED condition that seems completely appropriate not only to the court, but maybe the parties involved, when imposed on a 20-something-year-old defendant, but who isn't going to be released until he's in his 40s.

For these reasons we urge the
Commission to limit the number of standard conditions making many of them special conditions to be imposed by a court on a case-by-case, defendant-by-defendant basis.

Defenders will rely on our written testimony regarding our concerns as to specific conditions. However, I will briefly address the one condition that was highlighted in the Commission's issue for comment. Specifically, the condition that a defendant shall answer truthfully the inquiries of a probation officer.

We appreciate the Commission's interest in the supervisee's Fifth Amendment concerns against self-incrimination, which is not sufficiently protected under the current language.

Under the current language, a supervisee may be placed in the position of having to choose between answering the question truthfully and incriminating himself, or not answering and face revocation. However, we do
not believe that language proposed by the Commission, either option, is sufficiently clear and does not adequately convey to the average supervisee that he or she need not answer every inquiry posed by the probation officer.

Accordingly, we've proposed the language that has been read by Commissioner Barkow in the previous -- to the previous panel.

It is our position that this straightforward language will make clear both the obligations and the rights of the supervisee, and we applaud the Criminal Law Committee's position that invoking your Fifth Amendment right would not be grounds for a revocation. Thank you.

CHAIR SARIS: Thank you.

Dr. Swisher.

DR. SWISHER: Judge Saris, if I could update my credentials since my bio information was submitted, I was recently appointed as a lead faculty area chair for the College of Security and Criminal Justice for the University of
Phoenix at the Tempe, Arizona campus. So, it really is good morning still for me, but good afternoon.

CHAIR SARIS: Lucky you in that beautiful climate there.

DR. SWISHER: And I'm loving watching your winter from Arizona. Thank you, Judge.

I would like to thank you and all the commissioners for the opportunity to represent the Victims Advisory Group at this important hearing.

At this time, I would like to focus or take a few minutes to reiterate our comments that were put into our written testimony concerning the proposed amendment on third party risk.

In the current conditions at Sections 5B1.3(c) and 5D1.3(c), third party notification shall be made either by the defendant as instructed by the probation officer, or the probation officer if risks are posed by the defendant's criminal history, personal history or
characteristics.

Under the proposed amendment, the language of the standard conditions at both sections would be modified from a "shall" to a "may" while removing the probation officer's ability to make independent notification of the defendant.

As currently presented, the proposed amendment states that if a probation officer makes a determination that a defendant under supervision poses a risk to another person or an organization, the defendant may be required to notify that person of the risk.

The proposed amendment does clearly state that if the defendant is instructed to make notification, that he must or she must comply with that instruction.

It is the position of the Victims Advisory Group that removing the emphasis inherent in the word "shall" and eliminating the probation officer's ability to make independent
notifications, may create a situation where
individuals or the community are put at risk.

If a risk has been determined, the
probation officer is not required to ensure third
party notification is made as would be the case
with the language such as "shall make
notification," but rather the probation officer
may require the defendant to make the
notification.

Follow-up by the probation officer may
or may not occur. As stated in the proposed
amendment, the probation officer may contact
individuals and confirm that notification has
been given.

If the probation officer confirms that
the defendant has not made notification, the
proposed amendment does not clearly permit the
probation officer to make that notification.

The current condition is enforced in
those situations where a defendant clearly
victimized members of the community in the
commission of the offense of conviction.

I note that a third party notification is not required in all instances and implementation of the current guideline can vary from circuit to circuit.

For example, there are differences in the way the current guideline is implemented in the Second Circuit and the way it is implemented by the districts in the Ninth Circuit.

If the proposed amendment is adopted, the variation has the potential for increasing the chances that the community is at risk of future victimization by defendants on supervision.

Maintaining the third party risk condition in its current mode will provide the sentencing court with a valuable tool to try to prevent any further victimization of the community by a defendant for as long as supervision continues.

Retaining the current language may
also help inform the general public and reinforce a sense of confidence within the community that the court truly does take the protection of the community very seriously, a message that may also resonate with the defendant and perhaps enhance the deterrence goal of sentencing.

Judge Saris and commissioners, thank you for considering my comments on behalf of the Victims Advisory Group.

CHAIR SARIS: Judge Breyer.

VICE CHAIR BREYER: Mr. Shanker, let me turn to the DOJ's position with respect to whether an individual can be required to answer truthfully, especially in cases in which he or she may be incriminating themselves.

The Ninth Circuit says you don't. Ninth Circuit, you know, which a number of us have to follow, the law is different from your stated policy. So, how do you deal with that?

If, in fact, the person retains his or her Fifth Amendment privilege, it is not a basis
for revocation of probation that that person failed to respond to a question.

How do you deal with that?

MR. SHANKER: Your Honor, we agree that a probationer or supervisee retains the Fifth Amendment right not to answer a question that would give them -- that would put them between the option of answering and incriminating themselves or being punished. And so, we don't disagree with that.

The question is, do they have to be affirmatively advised of that fact --

VICE CHAIR BREYER: Okay. That's what I didn't understand. In other words, the part that you're objecting to is the duty of the probation officer to advise a person that he or she need not answer --

MR. SHANKER: Correct.

VICE CHAIR BREYER: -- questions on a Fifth Amendment --

MR. SHANKER: Now, I will say --
VICE CHAIR BREYER: You're not quarreling with the exercise of the privilege.

MR. SHANKER: No, absolutely not.

VICE CHAIR BREYER: You're quarreling with --

MR. SHANKER: If a probationer invokes his or her Fifth Amendment right in response to a question, as I think Judge Martinez said, that could be taken to a court to determine whether the invocation is appropriate or not.

VICE CHAIR BREYER: Thank you. I think I misunderstood your comment and --

MR. SHANKER: I will add, though, not to belabor the point, though, that the mere fact of being required to appear and answer a probation officer's questions does not in and of itself put the Fifth Amendment choice to the defendant. It's being asked a question that might or might not incriminate him.

VICE CHAIR BREYER: I think that's right. And I think if it were otherwise, you
would defeat a lot of the purpose of supervised release, which is to try to --

MR. SHANKER: Exactly.

VICE CHAIR Breyer: -- give some guidance to the people and to protect victims on an ongoing basis.

MR. SHANKER: Exactly.

VICE CHAIR Breyer: I thank you for your answer.

CHAIR SARIS: I suppose one of the debates is how much power should be on the probation officer versus the court.

So, I know in the area of drug testing in our circuit, the court decides how frequent the drug testing is and not the probation officer.

So, you're suggesting an area of excess alcohol that it should be the probation officer making the call as to what's excessive.

Is that your proposal?

MR. SHANKER: Well, I think that the
proposal would be that the probationer must follow the probation officer's instructions with respect to refraining from or limiting alcohol use.

So, at some level we are relying on the judgment, the discretion and the experience and expertise of the probation officers and I think that's what the conditions are founded on.

The whole principle behind conditions of supervised release are founded on those principles, judgment and discretion of the probation officer.

The courts are overburdened. We don't want to involve the courts in all of those questions.

I think the reason that the Department has proposed phrasing this in terms of an instruction by the probation officer is, in part, to eliminate the vagueness concern that courts have raised about the blanket use of the word "excessive use."
CHAIR SARIS: Other than the Seventh Circuit, I come back to, you know, sort of at some point, and I've been a judge a long time and the issue has never come up. So, I'm trying to just figure out how widespread an issue this is for both of you who see the nation as a whole where the people are litigating how much is excessive alcohol or how much is too much child support or how much is overuse of the risk notification.

I get it that sometimes maybe these are overused and Seventh Circuit is worried about it, but is this a national problem that you've seen?

MR. SHANKER: You know, from our perspective in criminal appellate, we have seen the vast majority, if not all of these decisions, coming from this one court, the Seventh Circuit.

VICE CHAIR BREYER: But then maybe you can answer it this way, because I think the battle that we have -- not battle. I glorified it. The
discussion that we're going to have is, what should be standard? What should be special? And we understand -- at least I understand when you say these conditions ought to be standard in terms of desirability.

That is, if I were running a Sunday school, I'd like to have the person pay for his obligations for support. I'd like the person not to drink excessively. I'd like this, I'd like that, I'd like that.

So, if I -- I could put a big list of standard conditions out there in terms of desirable conduct, ways to avoid criminal conduct. But if you accept the logic of the Seventh Circuit, if you accept their logic, they're saying all of these conditions should be looked at in terms of the individual probationer and the problem that that individual probationer has demonstrated.

And I'm sort of saying basically the same thing. What has that person demonstrated
to the court?

And so, what is -- what's wrong?

Maybe I could ask it this way: What's wrong if we take this collection of desirable conduct and put it into special conditions where that defendant seems to have a lackey, you know. Is anything harmed?

CHAIR SARIS: And the court looks at it.

VICE CHAIR BREYER: And the court looks at it. Is there anything harmed by that? I mean, let me tell you, all you have to do is sit and listen to these judges sentence.

It's mind-numbing. It is mind-numbing and I know, I know they don't hear half the things that we say. And the judge's modus operandi is to get through it as quickly as possible, because they have so many of these conditions.

And I guess my question is, what law enforcement purpose is hindered, not furthered,
by putting these things as special conditions rather than general conditions?

MR. SHANKER: I think the primary risk with that approach is that the conditions can be excluded inadvertently or otherwise. And they - in addition, the concerns that may be placed in special conditions might arise later on and might not be in place when the defendant --

VICE CHAIR BREYER: We do have a vehicle for that.

MR. SHANKER: There is. There is. But that, again, takes up the court's time. And if we put these in the standard conditions and they may not apply in a hundred percent of the cases, they may not apply to that defendant at all, the probation officer has the discretion and the judgment to basically not -- to basically ignore that condition with respect to that particular defendant.

I guess with due respect not to flip the question --
VICE CHAIR BREYER: I hear that all the time.

CHAIR SARIS: I know. Right when someone says that, they're about to --

MR. SHANKER: To flip the question, I guess the question is what harm is there in having these as standard conditions if when in cases where they don't apply the probation officer doesn't have to --

VICE CHAIR BREYER: Well, there is some harm in making pronouncements that are irrelevant to the particular --

MR. SHANKER: Well, so then I would go back to Judge Saris' question, which is that we really are not seeing -- as much as the Seventh Circuit has suggested with a long list of hypotheticals, we are not seeing these problems. We are not seeing a lot of revocations on this, the Commission's own study has found. And so -- and I don't want to monopolize my --

CHAIR SARIS: Do you see a lot of
these issues being debated in the context of sentencing? Maybe they come up in revocations.

MS. MARIANO: So, they do come up in revocations, but I would say this that I do think it is a national problem within which maybe we've all been complicit.

My federal defender colleagues in the Seventh have led the charge in these cases and I, frankly, applaud them for it.

I have litigated these issues. I litigated a case called Peterson, which we cite in our papers. That client got probation. So, of course his conditions were front and center and I was successful for him on appeal, one of which was the risk assessment that wasn't tailored specifically to him, among other conditions.

CHAIR SARIS: Risk of --

MS. MARIANO: Third party notification. Sorry. I think I said "risk assessment," which is an entirely other thing.
I apologize.

I also say what is the harm in setting the standard conditions that actually apply to a specific defendant at the outset and to allow probation to come back -- standard and special. Let me qualify of course there's special conditions in almost every one of our cases.

In my district, we actually get written notice in the PSR of the special conditions. And so, those often do get litigated at sentencing, but the standard conditions, this blanket 14-condition list, I feel, has been largely ignored nationally --

CHAIR SARIS: Right.

MS. MARIANO: -- and often doesn't apply. And I also going back again to this third party risk assessment, you know, I'm in a ban-the-box state. So, what does that mean and why is that being delegated to the probation office to decide?

I think the error, the judgment has to
include only the conditions that the judge finds on a case-by-case, defendant-by-defendant basis apply, and probation will come back if circumstances change after a lengthy sentence.

But as a national problem, I just think we're all complicit because there is such lengthy terms of in prison usually front and center that our clients are asking us to fight on that and a lot of this has gone by the wayside.

DR. SWISHER: If I may, in the District of Connecticut a Second Circuit decision came down. It was interpreted that it would be the judge at the time of sentencing who would impose the third party notification.

It caused a paradigm shift in how it was -- how it was determined for each defendant to have this happen, but it has worked, to my understanding.

I have been in contact with the deputy chief there and she's indicated that it continues to work. That at the time of sentencing if a
third party risk has been identified through the course of the pre-sentence investigation, that they will impose that condition.

And if the person goes away to prison and comes back and that risk has been reduced, the probation officer can say to the judge, this is going to work.

Or if the person comes back and the risk has increased, the probation office can go back and ask for a modification. And because it will create a more onerous set of conditions, there is usually a hearing, but it resolves itself.

It seems to be working, because that way it's being tailored for that particular individual.

CHAIR SARIS: Thank you.

COMMISSIONER FRIEDRICH: Ms. Mariano, you mentioned that you get notice of special conditions in the PSR.

MS. MARIANO: Yes.
COMMISSIONER FRIEDRICH: Is that a national practice, or is that just your district?

MS. MARIANO: It is our district and I think it may actually be throughout the Second Circuit, but I can't speak definitively, but there were some Second Circuit decisions particularly in the sex offender area that suggested that would be a good practice, because we brought it up on review having not really litigated some of that in front of the district court. So, now it's presented to us in the PSR.

I don't know if it's done -- it's certainly not done nationally. I don't know if it's circuit-wide, but I would suspect it is.

CHAIR SARIS: Any other questions here?

(No response.)

CHAIR SARIS: I want to thank you all. It's very interesting. I really wasn't sure what to expect on this one, but you all made it very lively.
So, thank you very much for your comments, for coming here through the snow and into -- actually, it turns out it is quite beautiful outside, but wasn't necessarily so. Thank you very much.

(Whereupon, at 12:45 p.m., the meeting in the above-entitled matter was adjourned.)