UNITED STATES SENTENCING COMMISSION

PUBLIC MEETING

Washington, D.C.
Friday, April 5, 2002
MS. MURPHY: I'd like to call the public meeting to order. We have quite a bit on the agenda. I want to welcome everybody here that is a guest. I'd like to make some announcements about some of the things that have happened since we had our last public meeting a couple of weeks ago.

At that time, I told you that we were going forward with forming an advisory group on Native American sentencing issues for those Native Americans who are sentenced under the Crimes Act, and since then, we have contacted the people that we had identified as really qualified by experience and personal background for the group, and we have heard back now from almost everybody with a positive response.

A chief judge from South Dakota has agreed to chair this group. He is a very experienced person in applying the
guidelines and also in working with Native American groups. So we're very happy about that.

We did report some on what was going on with our 15-year study at our March public meeting. I mentioned the surveys that we have gotten back from the judges about their views about mandatory minimums and various guideline approaches, and we've got the complete figures now on the responses.

The surveys were sent not just to the active judges but also to the senior judges, so the grand total of judges to whom the surveys were sent is greater than the existing judgeships in the United States, because they are built by active judges. So there were 915 sent to district court judges.

Of course, those are the judges who actually sentence the individuals who are convicted of Federal crimes. Of
that 915, we received 464 responses, which
is a 50 percent response, which is excellent
in any kind of response, and particularly
because it took me about an hour to fill it
out. It did take me a significant amount of
time.

There were 245 sent out to circuit
judges. Those judges, of course, are
reviewing sentences when there are appeal
issues. We received 80 completed surveys
back, for a 32 percent response.

In addition to the tabulation of
the responses, there are many comments that
were added, and those will be helpful for us
as we continue our work in communicating how
the judges who are actually using these
guidelines, what their experience is with
the many suggestions that we have.

We are going to have a workshop on
April 12th. Michael O'Neill, do you want to
make any comments about that workshop?

MR. O'NEILL: We're having a
workshop on April 12th, because we want to advise people, particularly academics that have been doing work in the sentencing area, and also people with the Department of Justice who have been instrumental both with providing us with data and work in the past and obviously directly affects our components.

Just to explain and outline what it is, the Sentencing Commission is doing with respect to this 15-year report. I think, as all of you know, we talked about this in the past; that we're essentially looking at the statutory goals in sentencing and sponsoring and doing empirical work and relying upon past empirical work that has been done to evaluate the performance of the guidelines in the contents of the statutory directives by Congress.

This workshop will be the first of what we hope will be at least a couple in which we will be bring in academics to let
them know what sort of methodology we're using, to let them know what the Commission is doing so we can get this information out not only in the academic community but also in the Government community as well.

MS. MURPHY: Thank you. We've got quite a few things in the next several weeks involving training and work with others. We have a national training seminar that is going to be held from the 8th to the 10th where the Commission will be present, staff will be present.

We will be doing training on the guidelines for probation officers and lawyers who actually are representing the parties on sentencing. We had last year some more than 300 attendees.

Pam Montgomery is in charge of arranging this. Do you know what kind of response we're going year?

MS. MONTGOMERY: Judge Murphy, the response has been tremendous so far. As of
yesterday, we had 250 people registered. We still have a month to go. So we'll have about the same crowd as last year.

MS. MURPHY: Then also, in May, we will be meeting with the Criminal Law Committee of the Judicial Conference. We meet with them a couple times a year. They obviously have a great interest in the guidelines and have a lot of expertise.

We also are scheduling a meeting together with the Ethics Officers Association. We have, in addition to the Advisory Committee I mentioned about Native Americans, we set up an advisory committee related to the organizational sentencing guidelines, a very timely topic because people are very concerned now about corporate crime and dealing with that, trying to deter it, trying to punish it when it does occur.

We have an outstanding group that has agreed to participate. The group has
met once last month and they are hard at
work. The chair —— Jones, will be present
with us at that meeting and perhaps some
others.

We also will be involved in a
National Sentencing Institute for Judges,
which is an opportunity to get the Federal
Judicial Center, the Criminal Law Committee
of the Judicial Conference and the
Sentencing Commission to work together to
discuss issues that arise under the
guidelines and it is a training opportunity
for Federal judges.

One thing that I do want to
mention because especially those of you who
are familiar with the Sentencing
Commission's work all know Andy Purdy, who
has been our Chief Deputy Counsel, and we
relied on him it's hard to say how much; he
is going to be going on a detail to the
executive branch for a year starting
April 15th. He is going to be going to the
President's Infrastructure Protection Board. This is related to the need for increased security.

Andy, we are sorry to be losing your experience and expertise during this period, but we know that you have a lot to contribute at this other end. We think it's an exciting opportunity for you.

MR. PURDY: Thank you.

MS. MURPHY: I do want to refer to the fact that we have already done a lot about passing guidelines this year, because we decided that we had so much on our April agenda last year that we thought we would try to move as much forward earlier in the year.

So just to recapitulate briefly, we have passed already, and these will be among the guidelines that go to Congress, we've passed a totally new guideline on cultural heritage and national monuments and treasures designed to protect them. We've
been working on the cultural heritage aspect of this for two amendment cycles.

The events related to 9/11 caused some expansion of our concern this year, and there were a lot of different issues related to that. We feel that we have come up with a very good guideline that covers many aspects of this.

We also were asked to look at who falls under "official victim," because it was brought to the our attention that the definition was too narrow in the context of the Bureau of Prisons, for example, where there were others who were in need of protection; and so we have a guideline passed on official victims that will be promulgated.

Foreign Corrupt Practices Act. We worked in that area to try to bring that into conformity with guidelines related to public official bribery and commercial bribery.
One of the areas that there has been a lot of concern about ever since this Commission came into being and also on the Hill is abuse of sexual conduct in the commercial sex industry and so forth; and we have worked on adjusting the guidelines in that area, too, to protect victims of this kind of conduct.

There are some 14 other areas that I'm not going to go into in which we have passed guidelines before today.

Which brings us now to our agenda. The first item on the agenda are the minutes of former public meetings. We have a lot of them here. We've been having a lot of public meetings because this year it's been very important to us to get as much public input as we could; and, so, we had public meetings on February 25th, February 26th, March 19th and March 20th. We've had minutes prepared which reflect what occurred at those meetings and the kind of comments
that we've received.

The Commissioners have had an opportunity to review these minutes, and I'd like to ask now whether there are any motions to approve them or any need for revisions to these minutes.

COMMISSIONER JOHNSON: I move they be included.

MR. O'NEILL: I'll second it.

MS. MURPHY: I hear a breath that makes me think you want to say something.

COMMISSIONER STEER: Madam Chair, you are correct, we have had an opportunity to review them. But I fell asleep trying to read them last night; are not the most exciting thing. I missed getting through one set, but I noted one typo on -- I think it's the February 26th set.

On page 2, the last paragraph, the third line uses the word "deduction." I think it was meant to be "reduction." But "deduction" could work. That's all I've got
to inquire.

    MS. MURPHY: I think "reduction" was the intent. So if nobody objects, I think we can make that change.

    MR. KENDALL: Madam Chair, I didn't even get to that point before I fell asleep.

    COMMISSIONER ELWOOD: Let the record reflect that it accurately reflects the contents of the meeting.

    MR. KENDALL: I would agree with that.

    MS. MURPHY: I appreciate the humor, but it could be misleading to those here, because we really are very attentive to what has been said at these meetings, but when you get it together and you're reading through a lot of minutes at one time, it takes a lot of concentration to focus on the detail of it.

    So if there's no further discussion, then I would ask all those in
favor of approving this set of four meeting
minutes, with the one change, to say aye.
Opposed no.

The minutes are approved as
corrected. That brings us then to the
section of the agenda where we may address
amendments, motions for amendments that we
want to promulgate and related motions.

The first item that we will
address is the terrorism area. Terrorism is
an area that's been of major concern for
everybody. We addressed it last year in
amendment on nuclear biological and chemical
crimes. So we unfortunately had some
foresight about the kinds of problems we
were going to be dealing with.

Charles Tetzlaff is our general
counsel. Could you briefly set the stage
here for any action.

MR. TETZLAFF: Thank you, Madam
Chair. Just for the record, I would like
the record to reflect that the Commission
has previously been provided with impact
information on all relevant amendments.

With respect to terrorism, this is
a multi-part amendment and it is the
culmination of the Commission's swift
response and focused effort to respond to
the USA Patriot Act of 2001, which the
President signed into law a little over five
months ago, October 26, 2001.

This legislation following the
events of September 11th 2001 created a
number of new terrorism, money laundering
and currency offenses as well as increased
statutory maximum penalties for certain
preexisting offenses.

For ease of identification, the
amendment has been divided into six parts.
The first four parts address offenses that
involve or could involve terrorism. Part A
addresses new predicate offenses to Federal
crimes of terrorism.

Examples of such offenses are
terrorist attacks against mass transport,
maliciously giving false information or
threats, interference with security
screening personnel, interference with a
flight crew member, assaulting airport
security personnel, to name but a few.

The amendment also expands the
guideline covering Nuclear, Biological and
Chemical, section 2(m)6.1, to cover new
offenses involving possession of biological
agents, toxins and delivery systems.

Part B adds a number of predicate
offenses to Federal crimes of terrorism that
are not now listed in the statutory index,
appendix A.

Part C provides a special
instruction in the attempt
guideline, 2(x)1.1, to provide that the
usual three-level reduction for attempts in
conspiracies does not apply to certain
delineated offenses when a Federal crime of
terrorism is involved.
Part D amends the terrorism adjustment in section 3(a)1.4 by providing a structured upward departure for offenses that may involve either domestic or international terrorism but do not qualify as Federal crimes of terrorism.

The amendment also makes clear that the terrorism adjustment applies to offenses involving harboring or concealing a terrorist as well as obstructing a terrorist investigation.

Part E amends 2(s)1.3, the structuring and failure to report, failure to file, false filing guideline, to incorporate a number of new money laundering provisions created by the Patriot Act.

Part F addresses eight miscellaneous issues relating to terrorism.

I would be remiss if I did not recognize the terrorism team of the staff, consisting of Pam Barron, the team leader, Judy Shoen, Mary Dediere, Vanessa Lock and
Mark Alenbaum. They did a prodigious amount of work in a very short period of time. And like a lot of people both in and out of Government, they responded when needed after September 11th and put in a lot of nights, I know, and weekends to produce the product which you have before you today.

I should also point out that there will be a likelihood that staff will identify other needs for amendments in the terrorism area in the future that we were not able to address at this time because of public notice requirements.

A motion would be in order to promulgate this multi-part amendment with an effective date of November 1st, 2002, and to authorize staff to make technical and clarifying changes.

MR. KENDALL: Madam Chair, I'd like to make a motion. Before I do, I'd like to say a few things and add to Charlie's comments, the, I guess, accolades
that should go to the terrorism team. And also, before I do that, the U.S. Patriot Act itself.

I think that most of us know this, but our ex-officio member, John Elwood, was instrumental and was a major player in drafting the U.S. Patriot Act and taking the time to read it. It's quite a work itself.

In meeting the requirements of that statute, first of all, the Commission was a little bit ahead of the curve in that last year. If you'll recall, we took up Nuclear, Biological and Chemical Weapons.

We talk sometimes about sleepers, things that seemingly don't draw that much attention or focus and sometimes come before us; and it's very unfortunate, for obvious reasons, that that's the case with this piece of legislation and the guidelines going along with it.

This amendment may not have or has not, I don't believe, received near as much
attention as some other matters we've dealt with, only because it is not as controversial as some of the other topics we've taken up this time. If you take the time to go through it, which we'll have, you'll see that it is quite a bit of work that's involved.

So I'd like to add to Charlie's comments, we should be grateful to Pam Barron, Judy Shoen and Vanessa Lock, although I now know her -- and maybe those on the Commission don't know this or others in the room -- it is now Vanessa Lock Hall. Congratulations to Vanessa. She got married last week. Mary Dediere and former staff Mark Alenbaum. I personally believe that the work product here is excellent. I move that we adopt Option One.

MS. MURPHY: Is there a second?

MR. SESSIONS: I second.

MS. MURPHY: Is there any discussion on the motion?
COMMISSIONER STEER: I would just concur with all that Commissioner Kendall has said and join with he and Charlie in commending the staff team.

From my current vantage point, it is sometimes much easier to deal with these issues than from my previous vantage point as a staff member. I have greatest respect for the ability of someone like Pam Barron to take this very complex subject matter, multi parts, in a short period of time and organize the team's resources to address these issues.

Of course, she had a lot of help from the other team members who have been mentioned and other members of the staff and senior staff in reviewing the work. But it is quite an achievement. It makes us I think be in a position to look very responsive to Congress and to hopefully do the right thing.

MS. MURPHY: Any other comments?
COMMISSIONER ELWOOD: It's always kind of hard, I tend to hang back; and it's kind of bad because it means usually all the good material has been used up by the time I actually do talk. But I do want to reiterate what Judge Kendall and Commissioner Steer have said.

It really was a superhuman effort to get this thing turned around in the amount of time that it was. The U.S. Patriot Act was signed into law on October 26th, by which time the amendment cycle was already in full swing; and within just a few meetings of that, we already had a draft amendment that showed an incredible amount of thought and work.

I want to again commend the team for their work on this. I commend the Commission as a whole for their prompt attention to this. It's really remarkable to me that it was done in such short notice.

I mean, one of the things when
this was being passed is, I was there during the discussions, and I thought that there was no way this was going to be addressed in the same cycle. It didn't even occur to me. I thought it was impossible. But it was done and I think they have done an excellent job of it.

MS. MURPHY: Commissioner O'Neill.

MR. O'NEILL: I guess I would also add my remarks in commending those folks on the Sentencing Commission who did such a great job in pulling this together. But I'd also like to take a moment as well and thank the Department of Justice for its responsiveness and the help that it offered in being able to help the Sentencing Commission pull this together in a very difficult time.

In particular, oftentimes given the nature of the Department of Justice and its relationship with the Sentencing Commission, sometimes we are on the same
page and sometimes we are not necessarily always on the same page. But I think that that was really a model of effort on the part of members of the Department of Justice to pull together with us to work in a very collaborative fashion in bringing forth this project; and I think the Department should really be commended as well for its work and its attention to this very timely issue, and also the fact that one of the more important things that I think has been said recently by the Attorney General is the decision to deploy greater resources in the battle on terrorism.

Of the many things that we do, and Commissioner Kendall had mentioned this in his statements, of the many things that we do on the Sentencing Commission and that the Department of Justice does, certainly this is one of the more important things we've been able to do this year, even though it has received less attention.
MS. MURPHY: All those in favor of
the motion say aye. Opposed, no.

It is passed. The next item that
we'll take up is discharge terms of
imprisonment.

Charlie, do you want to lead us
into that.

MR. TETZLAFF: This proposed
amendment responds to the Criminal Law
Committee at the Judicial Conference's
request that the Commission amend 5(g)1.3 to
include discharge terms of imprisonment.

The amendment proposes to amend
the commentary to 5(g)1.3 provide a downward
departure note that enables a court to
depart in a case in which subsection b
pertaining to undischarged term of
imprisonment would have applied if the term
of imprisonment had not been discharged.
This will address also a circuit conflict
that exists.

A motion would be in order to
promulgate this amendment with an effective
date of November 1, 2002, and to allow the
staff to make appropriate technical
clarifying changes.

MS. MURPHY: Commissioner Steer?

COMMISSIONER STEER: I move

adoption of the second revised amendment on

discharged terms of imprisonment.

As outlined by the General

Counsel, it involves a downward departure.

COMMISSIONER CASTILLO: I'll

second it.

MS. MURPHY: As suggested by the

fact that this came to us from the Criminal

Law Committee, this is an area where courts

have had some difficulty in dealing with it;

and that is why we have it on our agenda.

Are there any comments?

COMMISSIONER STEER: As a mover, I

would simply comment that I think we

recognize this as a perhaps less than ideal

solution. As staff and Commissioners got
into the issues and this particular
guideline, we identified a number of
potentially problematic areas that need to
be addressed.

    Even this solution should perhaps
be seen as an interim solution. Perhaps a
better model would be to actually provide a
mechanism for a downward adjustment. But we
are not procedurally in a position to adopt
and perfect that approach at the current
time.

    I hope that this is an issue and
the guideline itself is one which the
Commission will be able to return in the
next amendment cycle and perhaps do a more
complete job.

    MR. KENDALL: Could someone
refresh my recollection on the precise
nature of the conflict?

    MR. TETZLAFF: The conflict was
that some courts had read the guideline as
not allowing any downward departure, and
others could.

MR. KENDALL: There was no other
nuance?

MR. TETZLAFF: We've now made
clear that the Commission feels that it's
okay.

MR. KENDALL: Thank you.

MS. MURPHY: I think there are
some other issues that cases have raised but
that we felt that we weren't able to address
this year. In some ways, the work -- as a
personal comment, after having been on the
Commission now for 2-1/2 years, it is such a
continuing process, it seems it's rare that
we can say, okay, this is put to bed now, we
aren't going to have to deal with this again
in the future because it is complicated.

If there's no further discussion
on this item, I would call for all those in
favor of promulgating this amendment on
discharged terms to say aye.

Those opposed, no. That has
passed. The next item that we'll take up on
the agenda is miscellaneous drug items.
This actually has two steps in it. One is a
proposed amendment that incorporates a
variety of components; and then the other
item, of course, is the cocaine policies.

So I believe, Commissioner
Sessions, that you are going to make a
motion. But we want to get the General
Counsel to discuss the nature of that
miscellaneous amendment.

MR. TETZLAFF: The proposed
amendment addresses four issues. First, the
proposed amendment, and I'm referring to the
second revised proposed amendment pertaining
to drugs, provides for a maximum base
offense level of 30 if a defendant receives
an adjustment under 3(b)1.2, the mitigating
role guideline.

This base offense level cap is
designed to limit the exposure of low-level
drug offenders to increase penalties based
on drug quantities that overstate the
defendant's culpability given the
defendant's role and function in the drug
trafficking offense while also providing a
guideline range of 97 to a 121 months that
is consistent with mandatory minimum
penalties.

The second part to the amendment
deals with Ecstasy offenses. The proposed
amendment amends the typical weight per unit
dose, pill or capsule table and application
note section 11 of 2(d)1.1 to more
accurately reflect the type and quantity of
ecstasy typically trafficked and consumed.

Specifically, the proposed
amendment adds a reference for MDA, the
typical weight per unit table, and sets the
typical weight at 250 milligrams per pill.
The proposed amendment revises upward the
typical weight for MDA from 100 milligrams
to 250 milligrams and deletes the asterisk
previously indicated that the weight per
unit shown is the weight of the actual
controlled substance and not the weight of
the mixture or substance containing the
controlled substance.

The third element proposes to
address the concerns that 2(d)1.8, renting
or managing a drug establishment guideline,
does not adequately punish certain
defendants convicted under 21 U.S.C.
Section 856, establishment of manufacturing
operations.

That statute originally was
enacted to target so-called crack houses,
and more recently has been applied to
defendants who promote drug use at
commercial dance parties frequently referred
to as Raves.

The proposed amendment increases
the maximum offense level under 2(b)1.8(a)2
to level 26. A maximum base offense level
of 26 is appropriate because, in conjunction
with the current instruction, 2(b)1.8(b) not
apply the mitigating role adjustment under section 3(b)1.2, the resulting base offense level would be the same as for an offender sentenced under 2(b)1.1 who receives a four-level reduction for minimum role.

The impact of the maximum offense level increase will be limited, but it will provide increased sentences in appropriate occasions.

Lastly, the proposed amendment clarifies that application of the two-level reduction under 2(d)1.1(b)6 does not depend on whether the defendant is convicted under a statute that carries a mandatory minimum.

This proposed amendment provides an application note in section 21 in 2(d)1.1 that specifically states that application of the two-level reduction will apply regardless of whether the defendant was convicted of an offense and subjects the defendant to a mandatory minimum term of imprisonment.
The proposed amendment also addresses the interaction of 2(d)1.1(b)6 and section 5(c)1.2(b) which provides a minimum offense level of 17 for certain offenders.

A motion would be in order to promulgate this amendment again with an effective date of November 1st, 2002, as well as authorizing staff to make appropriate technical and clarifying changes.

MR. SESSIONS: Madam Chair, I move that the Commission adopt the miscellaneous drug amendment, and I'd like to speak just briefly on this proposal.

The proposal covers a number of separate areas but it is all related. This is intended to be a balanced package. Even though the subject matter of each of these may appear to be distinct, in fact they are all related, it is all one amendment, they all fall or rise together.

I specifically want to talk about
one, and it's something that if you've been
around here for a while you'll understand
that I feel very strongly about; and that's
the first provision, the mitigating role
cap.

That is a provision that's been
brought up before this Commission a number
of times in the past. In fact, it was
almost passed as early as 1991, '92. It's
an issue that has been of concern to many of
us. I commend Commissioner Steer for his
early involvement in this particular issue,
his support of this issue.

It seems to me that this
accomplishes a number of things, and this is
really why I feel so strongly about it,
three things in particular.

The first is it targets persons
who play minor or minimal roles in offenses.
The people who get benefits from this are
not the managers, not the organizers, not
the people who develop the conspiracies, but
they are the small participants. Even though this may create a benefit for those persons, the benefit is relatively limited but it is a significant benefit and it is focused in specifically upon those people.

The second is, it is fair to say that judges across the country, and this is reflected in our responses, believe that drug penalties oftentimes are too high. That results oftentimes in departures.

In particular, there are two areas in which judges, at least from my perspective, believe that the penalties are too high. They are too high with first-time offenders who do not engage in violence. They are also too high when we're dealing with persons who play minor roles and receiving these huge sentences.

That is exactly why this proposal is so attractive to me. It may very well result in a significant reduction in the numbers of departures because ultimately
judges will not feel the necessity of departing to do justice.

The last thing is that one of the criticisms that I heard in the discussions was that judges now are going to have to spend their time deciding whether somebody was engaged in a mitigating or minimal role, a minimal or minor role.

Well, to that criticism, all I can say is hallelujah. It would be a great today when judges spend their time focused in on what people do as opposed to how many grams the person has in their pocket when they are arrested. For that reason, I believe strongly this should be adopted.

MS. MURPHY: Is there a second?

COMMISSIONER CASTILLO: I'll second it.

MS. MURPHY: Any further statements?

COMMISSIONER CASTILLO: I'd just like to commend Commissioner Sessions for
his strong work on this. I think his statements more than express his feelings about this.

I think in the long-run what we're looking at is a moderate change in the penalty. No one should look at this and say there is a wholesale reduction in the way these offenses are being treated. I think it's supported uniformly throughout the criminal justice system.

That's all I've got to say.

MS. MURPHY: Commissioner O'Neill.

MR. O'NEILL: The principal feature that distinguishes the criminal law from other types of law civil law, for example, is the notion of personal culpability, that the mens rea has to occur with the actus reus.

One of the difficulties that I've found just since I've been on the Commission being a Sentencing Commissioner is that the idea in our system, especially with respect
to drug crimes, that quantity seems to play the overarching role in terms of determining someone's culpability and the harm caused to society.

While there is no doubt whatsoever in my mind that quantity is an important measure of harm, and all things being equal, selling more drugs is worse than selling fewer drugs, on the other hand, there are certainly circumstances, and it strikes me that this is one of those circumstances, in which drug quantity may in fact considerably overstate the harm of the individual person who stands before a jury, who stands before a judge for conviction and ultimately for sentencing.

In our Organic Statute in 20 U.S.C. 994(b)2, one of the requirements that the Sentencing Commission has is to determine in fashioning sentences is the circumstances under which the offense was committed which mitigate or aggravate the
It is my view that one thing that the Commission could do as a long range project that's perhaps one of the more important things that we could do is to reassess and really look carefully at whether or not quantity as a measure of determining social harm, whether it's in the drug area or the fraud area, whether in fact quantity has been overused as an estimate of harm and overused as an estimate of culpability.

It may in fact be the case that it has not been. Although, it strikes me just in the time that I've spent both in the Sentencing Commission and prior to that time when I was at the Department of Justice, that in fact we have may have embarked upon a process in which would he overstate individual culpability and individual harm by relying so heavily on quantity.

It's my opinion, and it was my
opinion when I was a staffer on the Hill as well that principally what Congress is interested in is ensuring justice for individuals, and that the worst offenders are treated much more harshly.

I think most of us think, even if we think back to our school days, that the worst offenders are not always necessarily those that are carrying the greatest amount of drugs, but rather, those that actually have the worst intent and those that are most seriously involved in the offense.

I think it's incumbent upon the Commission to reassess this. We've had 15 years of the guidelines in operation now. We're celebrating our 15th anniversary this fall. Perhaps it's a good time to sit back, which is what we are doing in part, at least, in our 15-year review, and looking at and analyzing and assessing these particular areas. Because well need to make sure that we are giving absolutely full attention to
what Congress has required us to do in our Organic Statute and to ensure that we are in fact hitting those people most culpable with the harshest penalties.

Although this mitigating role adjustment is certainly a crude measure of doing that, it brings a certain amount of sanity or a certain amount of justice to those offenders who perhaps might not be as culpable. It's imperfect but I think it's, at least, a step in the right direction; and it's entirely consistent with my belief that those offenders who are most culpable deserve the harshest penalties.

MS. MURPHY: Commissioner Steer.

COMMISSIONER STEER: I intend to support this amendment, but I do have some reservations about the mitigating role cap provision that I would like to state for the record, so to speak.

Before I discuss that, I want to say that I am very pleased that we are able
to include in this provision the other provisions, particularly the one dealing with raising the cap in the so-called Rave clubs, crack house offense guideline.

As to the mitigating role, my reservations are basically these: My comfort level would have been greater if we had capped at level 32, which is what we now use in the guidelines for the measurement of the equivalency to the 10-year mandatory minimum. 30 is pretty close.

I consider it as an independent concept of other enhancements. I would have preferred level 32 as the cap, since we had previously been considering it in the draft form in which there were other enhancements that might sometimes apply, particularly prior drug convictions, sometimes additional enhancements for violence. We do not have these as part of this particular amendment.

Should we ever get to the point of having them, and I hope we will, then what
we will find because there will be differences in the effective date and we have an ex post facto clause, it will hinder the desired interaction of these provisions for a considerable time to come.

My additional hesitancy with regard to the provision, frankly, is rather political. We are anxious to do something on the crack cocaine issue, convince Congress to modify the statutory penalties for that provision.

There is a likelihood that this provision may engender some opposition, perhaps some considerable opposition, in Congress perhaps by the Justice Department. I've questioned whether we will further the larger goal by applying this provision.

With that said, you know, I'm going to vote for it because I think it is the right thing to do.

The Washington Post headline this morning, speaking of the President's remarks
about the Middle East, basically said, enough is enough. That's sort of the way I feel about the measurement of quantity when we're talking about mitigating role drug offenders.

My colleagues who see these cases as judges have, you know, a more direct feel for this. I have to rely on other experiences. But some years ago, I think my feelings began to be colored by experiences that when I first went into Federal prisons, some of the women's institutions where we visited as part of sentencing institutes and we met with offenders who were in prison, some of them for 20, 25 or 30 years for offense behavior that might have involved a fairly large quantity of drugs, crack, or sometimes other drugs.

But it was pretty clear from what we learned about their offense behavior, and sometimes one can't believe the entirety of what an offender says, but we had other
information that they were mitigating role
defendants and yet their sentence was very long.

I think that started me thinking that, you know, what good are we doing in
terms of the purposes of sentencing by, you know, this particular sentencing approach.
Over the years, that initial belief that I was exposed to I think has, you know, been
emphasized time and time again.

So I think it's time that we move on this issue; and, for those reasons, I'm going to support the amendment.

MR. SESSIONS: I want to say this. There is a fourth advantage, and it has to
do with this Commission itself.

When we first started, obviously it was after a controversial period, we met with members of the United States Senate. I will always remember the comment from two senators in particular. That is, try to arrive at consensus. If you arrive at
consensus, your voice will be heard much more clearly than if there is disparity or if there's a difference of opinion, significant difference of opinion, and in a sense, your decisions will be given a whole lot more credibility, a whole lot more weight and the Commission itself will be respected to a much great are extent.

Now, to arrive at consensus, I mean, involving a group of seven who have different approaches to life and different approaches to many of these issues is extraordinarily difficult, but it's an important process; and once we have done that, we are all really bound to advocate for the position that we've taken as a commission. Because, basically, the Commission's viability in this political world is dependent upon all of us really advocating for the positions that the Commission has taken.

What you will see is what I think
is a tremendous step forward taking controversial issues and through negotiating and bargaining and listening to each other, come to a sense of consensus.

I think that as a result, tomorrow and the day after it means that what we decide here will be given much greater weight and also that this will be a much stronger institution. Quite frankly, out of all of this, perhaps that is the greatest expression of what we've done today.

MS. MURPHY: Are there any other comments about this motion?

Then all in support of the amendment, the miscellaneous drug amendment, say aye.

Those opposed, no. With that, it passes. That brings us to the other part of the agenda on --

MR. TETZLAFF: Madam Chair, could I at this point -- following this amendment, again, as I indicated at the beginning, we
have provided prison impact information and retroactivity analysis to the Commission under Rule 4.1. If a motion were to be made with respect to retroactivity, it might be appropriate to make it now.

MR. SESSIONS: But it could be made at a later time as well.

MR. TETZLAFF: That's correct, if the rule were waived at a later time.

MS. MURPHY: Is there at the present time a motion on retroactivity with respect to this amendment?

Failing a motion, we can consider that later.

That brings us to the other item on our agenda related to drugs, and that is the cocaine policy. The Commission put this on our agenda in our planning meetings in May and June. The reason that we did that is because the commissioners, staff here and many others have been concerned about whether there should be changes made to
Federal sentencing policy related to cocaine.

There are many who have criticized the policy as perhaps too quantity-driven but as creating an unfair disparity in sentencing crack cocaine defendants as opposed to defendants who are convicted of powder offenses.

We were also aware in addition to the concerns of that type that had been raised that this could be a good opportunity to take this up, because we knew then that there was interest on the Hill among some key members of Congress to do something about this.

We also believed that there was information out there of one type or another that was new information related to the nature of trafficking in crack and tracking in powder, so we took that up on our agenda.

We have been working through the year to develop our position on this; and as
we got closer to today's date, we also had
to take up the idea how best to proceed,
what to do about our emerging position.

I must say that the commissioners
and the staff have worked very hard on this.
We feel it's a very important area. We have
gotten a lot of input.

Consistent with our governing
statute, we have published notice of our
interest in this and the possible ways we
might proceed with it and we have gotten a
lot of written feedback from a variety of
groups.

We also scheduled these public
hearings in February and March and we
invited many people and groups to come and
testify. We had very interesting testimony
that came from advocacy groups, that came
from scientists, that came from people with
expertise in the area.

We tried to get law enforcement
people also to come in the February
meetings, but they weren't available at that time. In March we did get testimony significantly from the Department of Justice representing the position of the executive branch. We've also gotten written material from others.

In addition to that, we have two advisory groups which I mentioned earlier today. Those are ad hoc advisory groups that we have created in the Native American area and in the organizational sentencing guideline area that will be working for a period of 18 months.

The Commission has two standing advisory groups. One is representing the United States probation officers, who, of course, are the front-line troops, so to speak, when individuals are going to be sentenced, because they prepare recommendations that the lawyers representing the parties then are familiar with and that the judge may rely quite a bit
on in developing the judge's sentencing position for a particular defendant. So we have the benefit of their expertise.

We also have an advisory group which represents those that are in the practice of representing defendants in Federal prosecutions, and they have been very helpful to us.

We referred to the Criminal Law Committee of the Judicial Conference also. That's among the groups that we got the input from.

We got a very significant letter from two powerful senators in the course of the year, Senator Leahy and Senator Hatch, asking us to make a report to Congress about cocaine sentencing, and advising Congress are there improvements that should be made and what would they be. The letter asked for information on specific areas, is there new data, are there new reports from scientists or experts in the field, and so
forth.

So simultaneously, we're considering a possible amendment in this area, preparing the drafts of the report that would be responding to this significant opportunity.

We also have been very aware of the fact that legislation has been introduced related to this by Senator Sessions and Senator Hatch. Also, a number of commissioners have conferred with sponsors and with the staff there about what they are proposing and about various things the Commission has been considering.

We have a wealth of data available to us, because we get data related to every sentencing of every Federal defendant that appears in the United States courts.

We also have a research staff, and during the year they have been working very hard to pull out this data about people who have actually been sentenced, what are the
cases like that have actually been sentenced as powder cocaine traffickers and particularly as crack cocaine traffickers; and we've been looking to see whether there's new information on the nature of the trafficking, the nature of the markets.

There's evidence that the crack markets have matured and are not characterized by some of the same alarming features that they were at the time that the legislation was originally passed, and that some of the fears that were present about crack-baby syndrome and so forth are not borne out by scientific investigation.

So both as to the nature of the trafficking and as to the effects of these drugs, there is we believe significant new information.

Well, this approach for us is complicated by the fact that there are the mandatory minimum sentencing statutes.

Congress controls the nature of
these statutes. The Sentencing Reform Act is the statute that created the Sentencing Commission, gave it its responsibilities, gave it its powers. There are many responsibilities that were given to the Commission, but the two that I want to mention right now are, one, the ability to promulgate amendments and, the significant part of this, to promulgate amendments that will become effective in the absence of congressional action, they will become effective within a six-month period.

But Congress also gave the Commission the responsibility and duty to advise it on Federal criminal policy and in particularly, obviously, sentencing policy.

So we have had to consider which of these approaches we should use at this time.

Some of the points in favor of going forward with an amendment at this time would be that from the perspective that we have been thinking, it would be an
improvement in respect that it could be made right now in respect to crack policy. However, it would create any disparity because of the fact it would be in effect de-linking those who don't come under mandatory minimum sentences, it create glitches that would create disparities that people have indicated they would be concerned about.

Our overriding concern, though, has been to select the approach that we feel we have the best chance to effect the desired change, which can only be done with the cooperation of Congress. For that reason, I believe the commissioners have asked me to indicate a desire united decision, a unanimous decision, work that out with a lot of thought.

There's always new information involved in sentencing things and a lot of concern and we feel the weight and responsibility. But we have arrived at the
decision that the best approach for us at this point is to concentrate on this report that we're going to make to Congress which has been requested and to make recommendations to Congress in that report.

Someone has said that the Commission could bring either heat or light or both to this issue, and we have decided that we can do best by bringing light as opposed to heat at this point.

We hope to have this report ready by mid-May. We are in agreement on some of the components that will be in this report, and I'll mention some of those right now.

One, we don't believe that there is a need to increase powder penalties. We don't think there needs to be any change in sentencing in respect to powder cocaine. We don't see that there's been a case made that these sentences are too low.

Our recommendation will contain then a combination of a recommended change
as far as the amount of crack that should
trigger the mandatory minimums to reflect a
mid-level trafficker, which is what Congress
was seeking to do with mandatory minimums,
and a combination of sentencing enhancements
that we believe would go towards getting the
more serious offenders, which is what
Congress wanted to do.

So we haven't worked out all of
the details here, but we are in agreement at
this time that, as opposed to the current
five-gram trigger for the mandatory minimum
of five years, that an amount that would be
not less than 25 grams would be the way we
will go, because we believe that that
reflects the mid-level kind of trafficker
that Congress is concerned about.

We also believe that, in
combination with enhancements for offenders
who discharge or brandish firearms, who use
dangerous weapons, who inflict bodily injury
in connection with crack trafficking, who
involve protected locations, schools, protected individuals, pregnant individuals, minors, who have prior drug felonies, trying to get away from just looking at it as a matter of quantity. So our recommendation will contain that.

We also have talked about let's look at the societal harm for the particular drugs. Congress has created a pattern of looking at drugs with certain quantity amounts. Because of the way the system is set up, you need to think about how a particular drug relates to others.

Last year, when we were working on Ecstasy, we spent a lot of time looking, well, what does Ecstasy really compare with when we're looking at the charts of these drug sentences.

So we want to look and I think the report is likely to reflect an assessment about the societal harm of cocaine relative to some of the other drugs and we expect
that to be a component. So we view this
time that we're in the posture that we have
here as a real opportunity to work with
Congress to effectuate some desired change.

We believe that our report will
receive considerable attention, careful
attention I would say, among the other
branches. Because we're an independent
agency, we are an independent agency within
the judicial branch, but we have to be
working with the other branches of
Government as well as the judiciary. And we
believe that this will be seriously looked
at and that it will generate hearings and
opportunity for your involvement, everybody
here in the room and elsewhere, that's
interested.

Finally, I would like to say on
behalf of the Commission that we really
appreciate all of the input that we've got
in writing, in the form of testimony in our
public hearings, in the form of all the
informal contact that there may have been
with the commissioners or staff and in the
communication we've had with people on the
Hill and in the executive branch.

We have a resolve to continue in
this effort and to reach the maximum
effectiveness that we can achieve here, but
we do need your continued interest as we go
forward.

The floor would now be open if any
other commissioner wants to make a
statement.

Justice Castillo.

COMMISSIONER CASTILLO: I just
want to say that this is in some ways not a
hard decision, and in some ways one of the
hardest decisions to make.

First and foremost, as our Chair
has stated, I think we need a constructive
and honest dialogue with Congress and all
the other participants in this process. We
will proceed with the report which will make
recommendations on this difficult issue, and
I hope and I know Congress and the public
will read our report carefully as well as
our recommendations.

This issue unfortunately has
became a political maze which the Commission
has struggled with for far too many years.
But today, we conclude in no uncertain
terms, I believe, that the hundred-to-one
differential is not valid or supportable.

This has been a near unanimous
view of all the participants in the criminal
justice system. It is a view shared by
virtually all the Federal judges, as
indicated by their survey to this
Commission. It's a view indicated by the
U.S. probation officers. It's a view
indicated by front-line law enforcement
officers who put their lives on the line
every day in service for their country.

That is why to me personally the
position that we have just heard from the
Department of Justice last month is disappointing. But nevertheless, I want to engage in a constructive dialogue with the Department of Justice; and I hope they evaluate our report just like we have evaluated theirs, that is, without any emotion, without any ad hominem attacks, without getting into some of the detractions from the issue.

Because in the Department of Justice's own report, there are two facts to me that are glaring. One, and this is quoting from their report, controlling for like amounts of cocaine in 2000, crack defendants convicted of trafficking in less than 25 grams of cocaine received an average sentence that was 4.8 times longer than the sentence received by an equivalent powder defendant.

That means, for every year, it's 4.8 for low-level crack defendants. This is one of their worst differentials
that they showed; and it's only exceeded by
this next differential, which is that, for
defendants with the lowest criminal history,
the very point where it shouldn't be, the
ratio between the average crack and powder
sentences for the lowest amount of drugs, so
now we're taking the lowest criminal
defendant history and the lowest amount of
drugs, the differential is the worst, which
is 8.3 to one. That is, for every one year
a powder defendant serves, it's 8.3 for a
crack defendant.

Those are precisely the points
where I think our country can do better and
should do better.

Let me just say what I don't think
this is an issue about, because I think we
need to be clear; it's not an equalization
issue. It's not a wholesale reduction of
penalties. It's not a racism issue.

I would counsel people to read
very carefully Professor Randall Kennedy's
book "Race, Crime and The Law," where he discusses this very issue, because I think to inject race into this difficult issue sends it spiralling along the wrong manner.

It also is not a terrorism issue. We shouldn't inject that type of emotional issue into this. This is a domestic issue, and the transformation of powder cocaine into crack cocaine does not directly relate to terrorism.

This Commission has dealt with terrorism. We dealt with it today. We dealt with it a year ago. We'll continue to deal with terrorism.

But what is this issue? It's a human issue. When we talk about 8.1 years for every one year; it's a human issue. There are human faces in jail today that we should be doing better about. It's a fairness issue.

In that sense, I don't mean to minimize the perception of racism, but we
should be clear this is not racism. It is fundamentally a resource issue, resource in the sense that because these penalties are not justified by current data, we can use our resources better than we're using them right now.

So I hope people study the report. People will question why we didn't pass an amendment today. Perhaps there were votes for an amendment. But I believe in our relationship with Congress, which is why I've reluctantly concluded to support a recommendation as opposed to an amendment.

I know that my faith in Congress will be vindicated once they see our report. We're not talking about wholesale reductions in the penalties. We're talking about moderate reductions. I would hope that all parties interested in this issue help us engage in a constructive dialogue with Congress. We need everyone's help in order to get this done.
I hope that history will judge today that we made the right choice. I'm mindful that even the membership of this fine Commission, of which I am proud to be part of and I respect every single member here, might change; and I hope that doesn't happen.

But in the end, I reluctantly conclude that we have to have faith in our system of Government and that because of the relationship of the mandatory minimums as expressed by our Chair to this problem, this is a problem that uniquely needs to be totally solved by Congress; and to pass an amendment today would be a mistake and, so, I'm going to join in making the recommendations that will be forthcoming.

Thank you.

MS. MURPHY: Does anybody else want to make a comment?

MR. KENDALL: I would make one.

Judge Castillo just said that he thought
that this is an issue that needs to be
totally resolved by Congress. I hope that
they do. I agree that the prudent thing to
do at this point is to recommend action to
Congress. So that's why I'm in agreement
with the action that we're taking today.

But I would also like to remind
everyone that it was once said, and I'm
paraphrasing here, justice delayed is
justice denied. If you believe there is an
injustice in this area, the longer the delay
in curing it, the longer there is a problem.

I would add, and this was said in
some format but I wanted to state it myself,
that I agree with what was said by -- I
believe the Chair said this; if I'm
misspeaking, correct me -- but there is not
credible evidence out there to believe that
powder cocaine penalties should be raised.

I also agree with what Judge
Castillo said, that crack cocaine is a more
serious drug than powder cocaine, and I'm
convinced from what I've heard, seen and 
read and from people that have heard the 
issue and that I have talked to that it is. 

I just have serious doubts, as 
obviously do many, that it's a hundred times 
more serious. That's what this debate is 
all about and has been for quite some time. 

I agree with what Professor 
O'Neill said earlier and what he pointed out 
that while quantity is a factor, some of us 
feel that quantity-driven drug penalties are 
not the best way to capture moral 
culpability, but other factors such as the 
enhancements which were published for 
comment should receive more emphasis. 

Also, some commissioners believe 
strongly that rather than picking some ratio 
tied to the mid-level dealer, whoever that 
person is and whatever they look like and 
whatever criteria is used to determine who 
is a mid-level dealer, that the better 
approach might be to benchmark crack
penalties to other serious drugs that cause
similar societal harms such as heroin and
methamphetamine.

MS. MURPHY: Anybody else?

Commissioner Riley.

COMMISSIONER REILLY: Thank you,

Madam Chair.

I want to concur in what everyone
has said so far. I also want to I think
commend the staff, because probably one of
the most difficult things about Government
service that we've all been in for a number
of years is the ability to get people's
attention, to get policymakers' attention
about what needs to be done.

In 1995, we thought we had the
attention and we did. Unfortunately,
Congress did not agree with what the
Commission did back then. But I think by
virtue of the staff we have, the excellent
work that they have done, the ability that
we have had to have input from the testimony
that we have heard over the course of a
number of months on this issue has achieved
what I think is so necessary in the
legislative process and that is to get the
attention of Congress.

The fact that we have two members
of the United States Senate and probably
many others who are willing to join in the
cause of trying to correct some of the
inequities and the fact that we received a
letter yesterday from 13 members of the
House of Representatives is an indication to
me, as a former legislator, that we are
getting the attention of the Hill in regards
this issue.

I think the fact that we need to
collaborate with them and work with them and
provide them with the materials that the
staff has accumulated and have been so
important to each one of us on this issue
will be critical in terms of getting any
action done that's positive and that will
result in taking care of the issue and some
of the problems that we all will see in
terms of the real justice of what we're
trying to accomplish.

So I commend Judge Sessions, the
Chairman and Commissioner Steer for taking
the time to go to the Hill. I think more of
that needs to be done. I think, quite
candidly, where we are now is we all, and
when I say, "we all," I'm talking about
those who are interested in this issue that
are not members of the Commission, it
becomes a lobby effort; it becomes an effort
to sell to the Members of Congress the fact
that based on the information we have, this
is the problem we see, the report will
certainly be a valuable tool to them, and
ultimately, I imagine that they will respond
accordingly and will take the necessary
action to correct.

So I just wanted to make those
statements. I concur in what everyone has
said so far. But I do think the staff has
done a marvelous job putting together a lot
of material that, quite candidly, I'm not
even sure we even had the ability to have
back in '95, because things have changed and
we now have a much better extract of what
has occurred in this regard.

Thank you.

MS. MURPHY: Those are helpful
remarks. If there are no other statements
at this time, we have a number of other
items on the agenda that we will proceed on
to.

The next item is the proposed item
on career offenders and offenders under
Section 924(c) and 929(a.)

Charlie, if you would remind us
about that.

MR. TETZLAFF: This proposed
amendment provides special rules in the
Career Offender Guideline, 4(b)1.1,
and 5(g)1.2, sentencing on multiple counts
of conviction, for determining and imposing
a guideline sentence in the case in which
the defendant is convicted of an offense
under 18 U.S.C. Section 924(c) or 929(a)
and, as a result of that conviction, is
determined to be a career offender under our
Career Offender Guideline.

The amendment supplements
amendment 600, effective November 1st, 2000,
in which the Commission first dealt with
this complicated area. In amendment 600,
the Commission decided that offenses
under 924(c) and 929(a) can qualify as prior
crimes of violence or prior controlled
substance offenses for purposes of the
Career Offender Guideline.

The Commission deferred until this
amendment cycle addressing the more
complicated issues of whether convictions
under 924(c) and 929(a) can qualify as
instant offenses and, if they do so qualify,
how the sentence would be imposed.
Promulgation of the proposed
guideline in front of you reflects the
Commission's decision that the amendment,
while somewhat complex, is necessary to
comply with 28 U.S.C. Section 994(h).

From an operational point of view,
this amendment would achieve the goals of
first permitting 924(c) or 929(a) offenses,
whether as the instant or prior offence
conviction, to qualify for career offender
purposes; and, secondly, to ensure that in a
case in which such an instant offense
establishes the defendant as a career
offender, the resulting guidelines sentence
is determined under section 4(b)1.1 using a
count of conviction that has a statutory
maximum of life imprisonment.

At this time, a motion would be in
order to promulgate the amendment with the
effective date of November 1st, 2002, and to
authorize staff to make appropriate
technical and conforming changes if needed.
COMMISSIONER STEER: Madam Chair,

I so move.

MS. MURPHY: Is there a second?

COMMISSIONER CASTILLO: I'll second.

COMMISSIONER STEER: I would like to briefly speak in support of the amendment.

The thrust of this proposal, as I see it, is to ensure compliance with a directive in Commissions Organic Statute 994(h) as it has been construed in a Supreme Court decision, Lamonte.

There are three aspects of that I'd like to touch on. One is the relative complexity. I'd like to make a few comments about the statutory mandate and perhaps where my meandering takes us, a few comments about how do I think the Lamonte decision is relevant to the policy-making that we are considering at this time.

First, the complexity of this
provision is not something that anyone would
embrace as a goal in and of itself, but I
think as some of the public's comments has
recognized, the complexity is really
inherent in the conflict between a statutory
mandate under 924(c) event of a minimum
consecutive sentence and trying to marry
that in any kind of way with the sentencing
guidelines in its proportional or percentage
increases that are provided there.

    Given those two competing systems,
the total avoidance of complexity I think is
not possible. We can only try to make a
provision such as this as understandable as
possible and minimize the complications.

    That, I think we have done working
with groups, particularly the Probation
Officers Advisory Group, who always are such
a great resource when it comes to these
issues, and also with the help of a very
dedicated staff.

    I want to again thank the staff,
particularly the team of drafters. They all contributed on this, as have Ms. Montgomery and Mr. Purdy, and have all worked with me to try to get this in as good a shape as we could.

The Probation Officers Advisory Group has been absolutely great. They have reviewed various iterations. They have suggested improvements, and we have tried to incorporate them.

Now, in some ways, this proposal might be said is actually a rather simple in terms of the way you would apply the guidelines for a 924(c) offense. You don't go through the usual process of determining a offense level, specific offense characteristics, various adjustments in Chapter 3, rather, in those situations in which the defendant qualifies as a career offender.

Here, I want to underscore a point, that we are not broadening the scope
of crime of violence or control substance offense. This offense, the 924(c), would only be career-eligible under the same circumstances that it has always qualified as a prior conviction, and that has been the case for a number of years; i.e., only if the underlying offensive conviction in the 924(c) offense is itself a qualifying crime of violence or a controlled substance offense.

Nothing about that has changed. In those circumstances, basically what the Court does is fast-forward to this new special rule, picking up and applying the acceptance of responsibility adjustment that is pertinent. In that special rule, we basically have made it as simple as we possibly can.

There is basically a comparison between ranges, one of the ranges from a career offender table that has only three lines in it corresponding to the acceptance
responsibility; and the other comparison
that must be done in order to avoid
anomalous results is to be cognizant of what
the guideline range, if you're in a multiple
count case, would be if you didn't have
the 924(c) that guideline range plus
the 924(c).

This is not complicated. It's
basically picking whatever range has the
higher minimum, taking a point within it and
then allocating the sentence among the
counts. Which, again, if you've got
a 924(c) involved, a multiple 924(c),
sometimes you have to get out your pencil.
But this is grade school arithmetic and it
is not something that is unduly complicated.

That takes me back to the
statutory mandate. The statutory mandate is
part of our original act and it is very
clear. It leaves some definitional tasks
for the Commission. But the Commission has
long ago decided that a 924(c), under the
circumstances that I described, is a qualifying offense for career offender purposes. We just haven't faced it as the instant offense.

But this is not like some other directives that we get that have wiggle room and fuzzy terms. This statutory mandate is very clear. It says to the Commission, under the circumstances where you have basically a three-time loser, you must provide a guideline range so that it is at or near the statutory maximum.

That brings me to what I see as the possible relevance of Lamonte. I think I could best illustrate that by a couple situations.

Imagine the situation where there is only a 924(c) conviction. Without this, the Commission is basically saying under the current situation that the mandatory minimum for a 924(c) offense, which is what you get under the current guideline application, is
at or near the statutory maximum of life imprisonment.

Folks, that won't wash. That's not even close in terms of Lamonte. The lesson in Lamonte is that the Commission came clean, fast and loose with these terms and can't use concerns about how prosecutorial discretion might be exercised as a reason to not comply with the statutory mandate.

Or another example, if you want to take it, suppose you have a 924(c) offense in conjunction with a drug offense that has a 120-month maximum, a 10-year or a 20-year maximum. Under the current rules, we are effectively saying that a sentence as low as 12-1/2 years meets the statutory mandate of being at or near life.

Again, I don't think that is a fair interpretation, an instruction of what Lamonte means in this context.

So for me, you know, I always work
to avoid complexity, but when the statutory
directive is clear, you know, I don't think
that the Commission has as an option to say,
well, we're just not going to do it because
it's complex and, you know, some may not
want to deal with the complexity.

What we should do, in my opinion,
is as we have done here is try to make it as
simple and as understandable as possible;
and then if anyone wants to join, as I have
said, to try to convince Congress to change
the statute, I'm more than willing to try to
help them.

Thank you.

MS. MURPHY: Any other comments on
this particular measure?

Commission O'Neill.

MR. O'NEILL: I waded into this
with a certain degree of trepidation. Like
I do oftentimes when I'm having a little bit
of a difficult time getting my mind around a
particular guideline amendment that we're
proposing or when I see that something
doesn't quite sit with me as perfectly as I
might want it to, oftentimes I'll create a
hypothetical or try to use an actual case to
see how the thing would apply and play out.

Although this is certainly not a
perfect world or a perfect guideline
amendment, after having re-read the
amendment itself with some degree of care,
after having last night, after our dinner,
revisited the Organic Statutory mandate
in 994(h) and actually having gone to the
pain of re-reading Lamonte, a decision with
which Commissioner Elwood and I have a
degree of familiarity that probably we
shouldn't have, I am going to support this
guideline amendment ultimately because I do
think at the end of the day that it does
ultimately support what Congress has
directed us to do in 994(h).

I think that, as Commissioner
Steer has pointed out, although it's an
imperfect fix, I think the difficulty and the complexity that it results in a result actually of the statutory directive and the way that it works ultimately with 924(c) and 929(a). I think in some respects, it's unavoidable.

I commend staff and I commend Commissioner Steer for having worked through what ultimately seems to be quite a knotty problem in coming up with what I think is a reasonable application of what Congress would expect us to do under these circumstances.

One other thing that I would like to add is that I hope we are in the process of establishing perhaps the greatest data set for recidivism as a result of the recidivism studies that we are doing that has yet to be assembled, and my hope is that when we reconsider criminal history categories, when we look at the impact or the effect of the recidivism work that we're
doing now, we plight also want to consider coming back to the career offender guideline itself and reconsidering it in that context, as well, because I think that it merits a certain amount of rethinking perhaps at this stage of the game.

MS. MURPHY: If I could make a footnote to that. There was a rather cryptic reference to Commissioner O'Neill and Commissioner Elwood's connection with Lamonte. For those who don't know, they happened to clerk for two different United States Supreme Court justices, and therefore, have this relationship.

Commissioner Sessions.

MR. SESSIONS: Perhaps because I'm from a rural state, when I start to read this, I think about trees and forests. When I first came out to the Commission and got all this advice from judges, it's too complex, it's too long, it's too non-understandable and you need simplify it.
In fact, this Commission has time and again engaged in efforts to simplify the guidelines.

What we're doing in this particular amendment, even though I really appreciate all the work to try to simplify it as much as possible, is add a new level of complexity that is going to be extraordinarily difficult for people to follow.

I appreciate that perhaps when you get into the guideline itself, it might be simple math. But to get into the guideline is going to take a real effort.

I really enjoy listening to Rusty do the training, all of the humor. The fact is next year, if this passes, 90 percent of his lecture and the questions that are asked will relate to 924(c), and that's not what really people should be focused in upon.

We're going to end up spending all our time training people on a guideline
which affects 160 people per year. So then you say to yourself, trees and forests.

Step back. Is it really necessary that we get so detailed and complex over such a small inside guideline kind of issue? I think we're missing something here. So I'm going to vote against it.

MS. MURPHY: Any other comments?

COMMISSIONER CASTILLO: I have looked at this, and I agree with Commissioner O'Neill that the Congressional directive and the Lamonte decision require us to get into this complex area.

Now, we can throw up our hands and say it's too complex and we just can't do this, but we haven't done that with other guidelines.

I commend Commissioner Steer for taking what has been a two-year path to try and undertake this, along with staff, along with the assistance of probation officers. I think that this is required and we need to
do it.

I agree with Commissioner O'Neill that a complete re-looking at the Career Offender Guidelines is perhaps in order down the road as well as if there do turn out to be some problems with this guideline, I would be happy to go back and try and fix it. But right now, I'm convinced that this is as good as it's ever going to get.

MS. MURPHY: Anybody else? I ask the staff director, then, to call the roll.

MR. MCGRATH: Vice-chair Castillo?

COMMISSIONER CASTILLO: Yes.

MS. MURPHY: This is on the position, on the motion.

MR. MCGRATH: Vice-chair Sessions?

MR. SESSIONS: No.

MR. MCGRATH: Vice-chair Steer?

COMMISSIONER STEER: Yes.

MR. MCGRATH: Commissioner Johnson?

COMMISSIONER JOHNSON: No.
MR. MCGRATH: Commissioner Kendall?

MR. KENDALL: No.

MR. MCGRATH: Commissioner O'Neill?

MR. O'NEILL: Yes.

MR. MCGRATH: Chair Murphy?

MS. MURPHY: Yes.

MR. MCGRATH: The motion passes.

MS. MURPHY: The next item on the agenda is alternatives to incarceration.

I'll have Charlie lead us into that.

MR. TETZLAFF: This amendment, the revised proposed amendment on alternatives to imprisonment, seeks to increase sentencing alternatives in Zone C of the sentencing table in Chapter 5, Part A. There are three options before you for your consideration.

Option 1 amends the sentencing table by combining Zones B and C, thereby
providing offenders of offense levels 11
and 12 of the sentencing options currently
available in Zone B.

Option 2 also increases sentencing
alternatives in Zone C but differs from
Option 1 in that first, it does not combine
Zones B and C; and secondly, that it limits
the use of home detention for defendants in
which the minimum of the guideline range is
at least eight months; in other words,
current Zone C.

In such cases, the defendant must
satisfy the minimum of the applicable
guideline range by some form of confinement,
but unlike Option 1, the defendant must
serve at least half of that minimum in a
form of confinement other than home
detention.

Option 3 increases sentencing
alternatives in Zone C of the sentencing
table similar to Option 1 and it limits the
expansion of the sentencing options
available in Zone B to offenders in criminal history category one of Zone C of the sentencing table.

This option provides these less serious offenders with the same sentencing options available for defendants in Zone B but only to those in category one and offenders in categories 2 through 6 will not benefit from these additional sentencing alternatives.

A motion would be in order to promulgate one of these three optional amendments with an effective date of November 1, 2002, with staff being authorized to make technical and clarifying changes.

MR. KENDALL: Madam Chair, I'd like to make a motion. The first question, what does this proposed amendment do, Option 1 -- I'm going to set Option 2 aside. Option 1 and Option 3 are similar. The difference exists in the scope based upon
criminal history category.

This proposed amendment, at least
the Option 1 version of it, the less
restrictive as between one and two, is
favored by the Criminal Law Committee of the
Judicial Conference of the United States,
who represent the Federal judges of this
country. The Probation Officers Advisory
Group, who represent probation officers of
this country, is also in favor of this
amendment.

I'm making these statements before
I make a motion just to articulate why I'm
pushing this forward. Contrary to the
statements made by some opponents of these
proposals, the options proposed do not lower
any penalty for anyone. All they do is to
provide the judge with the tool to help the
defendant serve his or her sentence imposed
someplace other than prison, such as a
halfway house or home confinement. Again,
the sentence is not lowered but it's still
served.

Furthermore, at the levels we are talking about, 11 and 12, only defendants whose sentence is 16 months or less is affected.

Further, a judge can still put low-level tax cheats and fraudsters in prison if the evidence warrants it.

The statistics show today that currently those in Zone C now don't get the split sentence but serve the entire sentence in prison without the benefits of Zone C with regard to the split sentence over 50 percent of the time.

Rather than a split sentence, the option for the judge is either home confinement or halfway house or some community-based facility that those numbers are going to change.

Again, what we're talking about is allowing the judge to view each case on a case-by-case basis with these low-level
offenders and make the in-or-out decision.

By providing this after the judge hears the case and hears both sides, by providing an alternative to prison, what that does is facilitate -- through electronic monitoring of home confinement or through confinement of a community facility where those facilities are available, it allows the defendant to continue employment, support his dependents and make restitution to the victims of his or her crime if there is one. It also frees up a prison bed for someone who is a more serious offender.

I am going to move for adoption of Option 3, and I'm doing that for the following reason: Option 3 is less restrictive. We started this debate talking about it a couple years ago; the view was to provide some alternative to prison for nonviolent first offenders.

Option 1 includes those individuals who are not first offenders and
that is a further restriction on it. I realize that there has been some debate about delaying it and waiting on the recidivism issue, and I understand that. But, again, we talk about the ability to come back, the Court has the ability to come back and revisit the issue.

I would urge the commissioners to vote on this proposal based on the remarks and the merits of the proposal itself. I would move, Madam Chair, for adoption of Option 3.

MS. MURPHY: Is there a second?

COMMISSIONER JOHNSON: I second.

MS. MURPHY: Is there further discussion? Commissioner Castillo.

COMMISSIONER CASTILLO: Yes. I do want to say that, through this amendment cycle, I have flip-flopped on this amendment, and I've reluctantly come to the conclusion of voting no on this amendment, for the following reasons:
One, while I commend Commissioner Kendall for bringing some flexibility, and I think flexibility needs to be brought to low-level, especially non-violent, first-time offenders, my concern, and it's been raised and it's a concern that I raised during the amendment cycle discussions, was as to white-collar criminal offenses and the fact that we had just passed our economic crime package last year and we really do not have the data for how that has played out in the field.

That coupled with some showing that has been made by the Department of Justice, particularly with regard to antitrust as well as tax and other offenses generally in the category of white-collar criminal offences, leads me to conclude that the best approach would be to study this further and to look at it in connection with the recidivism study and a complete re-looking at criminal history, and perhaps
along with an adjustment of some of these white-collar criminal offenses, but this means that this cannot be done this amendment cycle and that it's going to need further study. I commit to coming back to this issue, but I will reluctantly vote no today.

MS. MURPHY: Commissioner O'Neill?

MR. O'NEILL: I also intend to vote no on this, and I do so for several different reasons.

Perhaps first and foremost is that we are in the process right now conducting the recidivism study which allows the opportunity to look at criminal history categories to make a determination as to whether or not criminal history categories need to be adjusted.

I voted in part with respect to the amendment to the Career Offender Guideline because I believed that we had a statutory mandate by Congress that I take
seriously in terms of giving that amendment some effectuation.

Similarly, I do feel like the Commission has an obligation to follow what Congress had laid out for us in 28 U.S.C. 994(j). That requires that the Commission shall ensure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment cases in which the defendant is a first offender who has not been convicted of a crime of violence or otherwise serious offense.

I consider that language to be just as binding on us as I do with respect to 920 U.S.C. 994(h). For that reason, I think it's important for us to look at this as a piece to ensure that when we do our review of the criminal history categories that we do what Congress has asked us to do and, namely, to treat first-time offenders who are accused of or not accused of
violating certain offenses that Congress
didn't find particularly serious in a
different manner in which we treat other
offenders.

I think that the best and most
appropriate way to do that is in concert
with our recidivism study, which hopefully
will be completed, at least the information
we need for revising criminal history
categories, next year, which is one of the
reasons that I'm strongly in favor of and
hope to be lobbying our fellow commissions
that we re-look at criminal history category
one during the course of the next amendment
cycle.

Similar to Commissioner Castillo,
I also feel that it's important that we do
not inadvertently give white-collar
criminals a benefit by enacting something
like this.

I was very persuaded and
appreciative of the Department of Justice
and the information they provided to us with respect to the potential effect on white-collar criminals. I think we need to look carefully at the base offense levels for white-collar criminals even at the low end.

We don't know, as Commissioner Steer has pointed out, what the entire effect of the economic crimes package that we just enacted last year will have on sentences. Similarly, we want to make sure that those people who have the greatest culpability get the most serious penalties.

I think that there's a fair amount of agreement, at least at this table, that among the most serious offenders in terms of their moral culpability tend to be those individuals who through premeditation plan to bring about a scheme or plan and bring it to fruition and then are apprehended. Those are the individuals in part that the entire Sentencing Reform Act was designed to stop
to provide a deterrent for individuals, 
white-collared criminals in particular, who 
have great moral culpability in committing 
the offenses that they do, and in having in 
some respects far more impact upon the 
economy and upon the individuals than even 
other types of offenders who have been 
treated harshly. 

But, in any event, it's for those 
reasons that I plan to vote against the 
current proposal, but do think, 
nevertheless, that this is an important area 
for the Commission and it's incumbent upon 
the Commission to review. 

MR. SESSIONS: I'd just like to 
say that I agree in particular with the last 
statement that Michael has just made. This 
is obviously a very difficult issue for me 
for a lot of reasons. But I'm also 
certainly sensitive to the concerns of the 
Treasury Department, the Tax Division. 

This is not intended to highlight
a break for persons who engage in
white-collar crime that involves a lot of
planning, a lot of forethought, and in my
view, a significant culpability.

So I think what I'd like to say is
that this will be coming up again very soon,
and I'm sure next year, and would like to
work with the Treasury. If they've got
centers that this could result in a
significant reduction in penalties for these
kind of offenses, then we'll adjust that to
work with them.

At the same time, my view is that
there is a need to expand judicial
discretion at these low levels. So I'd like
to work with the Commission and work
indirectly with the Department of Justice to
see if all of their concerns can be resolved
and at least my view that the judicial
discretion should also be advanced at this
level.

MS. MURPHY: Any other comments?
Tim, would you call the roll.

MR. McGrath: On the pending motion to adopt Option 3, Vice-chair Castillo?

Commissioner Castillo: No.

MR. McGrath: Vice-chair Sessions?

Mr. Sessions: No.

MR. McGrath: Vice-chair Steer?

Commissioner Steer: No.

MR. McGrath: Commissioner Johnson?

Commissioner Johnson: Yes.

MR. McGrath: Commissioner Kendall?

Mr. Kendall: Yes.

MR. McGrath: Commissioner O'Neill?

Mr. O'Neill: No.

MR. McGrath: Chair Murphy?

Ms. Murphy: I haven't yet spoken on this. I would just say that this was originally part of our two-year topic on
criminal history, and we did separate it out earlier this year on the thought that this might be a piece that could be done this year.

There have been shown to be some unintended consequences that present some problems that I think we need to think more about. So I think we are going to be considering it again next year. For these reasons, I vote no.

MR. McGrath: The motion fails.

MS. Murphy: The last category on our agenda today is acceptance of responsibility. Charlie, would you lead us into that, please.

MR. Tetzlaff: I would draw your attention to the second revised proposed amendment, entitled "Acceptance of Responsibility."

The amendment is proposed in two parts. Part one proposes to amend Section 3(e)1.1, the Acceptance of
Responsibility Guideline, by deleting subsection (e)(1), which provides an additional one-level reduction if the defendant timely provides complete information to the Government concerning his own involvement in the offense.

Under this amendment, a defendant who accepts responsibility nor the offense would receive a two-level reduction under subsection (a) and an additional one-level reduction only if the defendant timely notifies the authorities of his intention to plead guilty.

This proposal is intended to save both judicial and governmental resources by providing defendants a stronger incentive to timely plead guilty.

The proposed amendment also includes language that provides that the additional one-level reduction is not precluded in the case of a defendant who does not notify the authorities early in the
process of the defendant's intention to
enter a guilty plea because of a delay for
goods cause.

Part two of this amendment
resolves a circuit conflict regarding
whether the Court may deny an acceptance of
responsibility reduction when the defendant
commits a new offense unrelated to the
offense of conviction.

The majority of circuits have held
that the sentencing courts may consider new
criminal conduct, i.e., conduct occurring
after the charge of defendant has been
charged with the instant offense such as a
subsequent drug use or the commission of the
new offense when determining whether an
adjustment for acceptance of responsibility
is warranted.

The Sixth Circuit, the sole
minority circuit, has held that the Court
may not look at post-indictment conduct
unrelated to the offense of conviction.
This proposed amendment presents two options that implement the majority view. Option 1 proposes to amend the commentary to include the commission of any other criminal conduct while pending trial or sentencing on the instant offense as one of the considerations that the Court may look to in determining whether to grant acceptance of responsibility.

Option 2 makes clear that a defendant who commits additional similar criminal conduct or additional serious dissimilar criminal conduct while pending trial or sentencing on the instant offense ordinarily is not entitled to a reduction under this guideline.

A motion would be in order at this time to first promulgate Part One, that is deleting subsection (b)1 of the Acceptance of Responsibility Guideline, with an effective date of November 1st, 2002, and authorize staff to make conforming and
technical changes.

COMMISSIONER STEER: Madam Chair,

I move Part One.

MS. MURPHY: Is there a second?

COMMISSIONER CASTILLO: I'm not seconding, but I'd like to explain why I think there is not going to be a second.

I have spoken strongly against taking up this amendment at this point. My preference is to defer consideration of this. I don't believe that at this point deleting (b)1 is appropriate. I think it's worthy of further study. I think at this point it would send the wrong message.

Part of acceptance of responsibility is in fact a complete revelation on the part of the defendant to Government authorities to prevent unnecessary use of Government resources. But ultimately I think various groups have studied acceptance of responsibility in the past, and I would think we should study this
further.

I just happened to pull up a law review from my alma mater and studied it. I want to continue to study this. I think we can bring about some real solutions to the acceptance of responsibility issue including the Circuit conflict.

So I'm not seconding this motion because I would like to study it further, and I think other people feel the same way.

MS. MURPHY: Does anybody else want to say anything about this? Or a second?

Hearing no second, the motion would fail for lack of one.

MR. TETZLAFF: I was going to get to Part Two. It would be appropriate. This again involves a circuit conflict issue.

A motion would be appropriate to promulgate Part Two with an effective date of November 1st, 2002, and would also authorize staff to make appropriate changes.
or corrections if needed.

Keep in mind in this Part Two there are two options. So if one were to make a motion, it would be helpful if you selected one or the other option.

MR. KENDALL: Madam Chair, I'd like to make a motion. I would like to move that we adopt Part Two, Option 1; and I do so for the following reasons.

COMMISSIONER JOHNSON: Option 1 or Option 2?

MR. KENDALL: Option 1. Here is why.

COMMISSIONER JOHNSON: The one we just heard?


I thought when I first saw this that this was a rather creative way to handle this because it was originally in promulgated amendment with two different parts to it. Some might be for one part and
not for the other and forced, like with the
drug combination we did earlier, the drug
miscellaneous, where we had four or five
different items where you might be against
one discreet component of it and you still
have to cast a vote one way or another that
does not give you flexibility. Doing it
this way does provide the flexibility.

By going with Part Two, Option 1,
we don't have to get into the acceptance of
responsibility issue that we talked about
and came to the conclusion that we did.

However, by this procedure, we can
easily resolve the Circuit conflict by
adopting Option 1, which does represent the
majority view, and we talked about that
yesterday, and it allows the judge to decide
based on the facts of a given case of
whether or not something has or hasn't been
done in a new offense that is inconsistent
with acceptance of responsibility.

We've talked about before the
example of someone who is a drug addict and who needs drug treatment, that may or may not indicate an acceptance or lack thereof for the given offense at hand. It allows for that determination to be made on an ad hoc basis rather than in those Circuits that hold to the minority position, the judge does not have that flexibility and, therefore, acceptance is denied.

So for those reasons, I move for adoption of Part Two, Option 1.

MS. MURPHY: Is there a second to the motion?

MR. KENDALL: Looks like, John, we should have cut a deal.

MS. MURPHY: Not hearing a second, the motion fails for lack of one.

That then brings us, I believe, unless there is some other dangling task we need to do.

MR. TETZLAF: I have nothing further, Madam Chair.
MS. MURPHY: Thank you.

That concludes our agenda for today. We'll adjourn the meeting at this time.

(Whereupon, at 12:20 p.m., the PUBLIC MEETING was adjourned.)