

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES

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MONDAY
MARCH 9, 2026

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The Commission met in Suite 2-500 of the Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Washington, D.C. at 9:30 a.m. EDT, Carlton W. Reeves, Chair, presiding.

PRESENT

- CARLTON W. REEVES, Chair
- LAURA E. MATE, Vice Chair
- CLAIRE MURRAY, Vice Chair
- LUIS FELIPE RESTREPO, Vice Chair
- CANDICE C. WONG, Commissioner
- SCOTT A.C. MEISLER, Ex Officio Commissioner

ALSO PRESENT

- KATHLEEN C. GRILLI, General Counsel

C-O-N-T-E-N-T-S

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

2 (9:34 a.m.)

3 CHAIR REEVES: Welcome to all those in the
4 room and all those who are attending via live stream,
5 I thank each of you for joining us. Again, whether
6 you are in this room or you're attending via live
7 stream, or even if you go back and look to it decades
8 from now, welcome. Thank you.

9 I have the honor, though of opening this
10 hearing with my fellow Commissioners. To my left,
11 we have Vice Chair Claire Murray, Vice Chair Laura
12 Mate, and Scott Meisler, our ex-officio
13 commissioner representing the Department of
14 Justice.

15 To my right, we have Vice Chair Luis Felipe
16 Restrepo, and Commissioner Candice Wong.

17 Our agenda today reflects the dedicated
18 work of our commissioners. We've been busy, and
19 I thank each of them for their dedication and
20 extensive contributions. I'm always honored to be
21 among this group.

22 Of course, though, no matter how dedicated

1 and busy we are, it pales in comparison to the
2 awesome public servants throughout this agency who
3 always make the impossible seem easy. Some of them
4 are in this room, but most of them are not. They
5 make the work we are about to do today possible.

6 They have collected the data, they have coded every
7 pre-sentence report, every judgment and commitment
8 order, every statement of reasons. They have
9 researched and drafted the policies. They have set
10 up this room, and they have done so, so much else
11 to make this hearing possible. On behalf of the
12 commissioners and the public, I thank all of our
13 agency staff for the amazing work you do every single
14 day and every single night.

15 The Commission has issued proposed
16 amendments on career offender, circuit conflicts,
17 sentencing options, and human smuggling. We have
18 already received comments on each of these
19 proposals, and we're so grateful to everyone who
20 has taken the time to share with us your perspectives
21 and insights on ways we can improve our -- our system
22 of justice. We look forward to receiving even more

1 comment before our March 18th comment deadline.

2 So, if you're watching today and have something you
3 want to tell the Commission there's still time.

4 Today we will hear from our witnesses on
5 whether and how citizen guidelines should be
6 amended. Each witness has different views on these
7 subjects. The Commissioners too have different
8 views. But today we are here to listen and to ask
9 questions. To our distinguished -- to
10 distinguished witnesses speaking with us today, I
11 promise you that our extensive journeys and
12 preparations will be worth it. When you speak to
13 the Commission, you will be heard, and you will be
14 read, too. We have read your written submissions.

15 These submissions and your biographical
16 information will be available for the public to
17 access on our website. You know what it is,
18 www.ussc.gov.

19 We've also -- we also have the videos and
20 transcripts of prior hearings on the website,
21 including our hearing from last month about other
22 amendments we are considering this year. I

1 encourage members of the public to read the witness
2 statements and watch our prior hearings. Just a
3 reminder, our website, www.ussc.gov contains so
4 much more on all of the past, present, and even
5 future work of the Commission. At your fingertips,
6 there is data, research, reports, a number of tools
7 to help you understand and utilize your sentencing
8 guidelines.

9 Each panelist, except for the very first
10 one, will have five minutes to speak. Your time
11 will begin when this light turns green. You have
12 one minute left when it turns yellow and no time
13 left when it turns red. If I cut you off, if I cut
14 you off, please understand I'm not being rude, I
15 just can't be rude, right, as we have so much to
16 cover today and a limited time to hear from everyone.

17 For our audio system to work, you'll need
18 to speak closely into the microphones. When all
19 panelists have finished speaking, commissioners may
20 ask you questions. I can promise you that, we will
21 ask you questions. I'm certain again that they will
22 do so, and ladies and gentlemen, thank you for

1 joining us, and I look forward to a very productive
2 hearing.

3 Before I introduce our first panel, I would
4 like to take a moment to recognize my good friend,
5 the chair of the Criminal Law Committee, Judge
6 Edmond Chang. Judge Chang's term as chair of the
7 CLC is ending today, and it'll be the last time that
8 he will --

9 JUDGE CHANG: October 1, but not that I'm
10 counting.

11 CHAIR REEVES: Well, but this is the last
12 time -- well, you're right. We may get you back
13 in here to testify as a CLC on something else, but
14 we believe this might be the last time as chair of
15 the CLC that you'll present testimony to us. And
16 we've been so fortunate to have you, the benefit
17 of your insight and thoughtfulness during his three
18 years as CLC's chair. And the -- Judge Chang and
19 I go back to July -- the week of July 15th. Because
20 July 15th, 2010, was the day that we had our
21 confirmation hearing. We, along with a few other
22 persons, sitting there before, Senator Dick Durbin

1 and Senator Jon Kyle from Arizona. And it has been
2 since that moment in time leading up to that point
3 where we prepared for our hearing, and through that
4 hearing, he has been a trusted colleague and a dear
5 friend. Little did we know that our paths would
6 continue to intersect in the ways that they have
7 over these 15 years, and that's what this judiciary
8 is about.

9 Again, it was 15 years ago that we had that
10 hearing, not knowing what might happen in the
11 future. But the judiciary prepares us to be leaders
12 within the judiciary. They count on the judges to
13 participate, most of which is participating free
14 of charge, but the dedication and the work that we
15 do, not only in our chambers, but the work that we
16 do throughout the judiciary. And Judge Edmond
17 E-Min Chang is a wonderful example of the
18 leadership, the courage, and the persistency that
19 all judges make, and I appreciate everything that
20 you've done, that you are doing, and that you will
21 continue to do, because you are a very young man.

22 So -- so, I expect that we will hear more from you

1 in a number of capacities, because of the leadership
2 that you provided so far, and you're an example from
3 -- for all of us to follow. So I thank you for that,
4 I thank you for our friendship, and I thank you so
5 much for all that you've done, since that July 15th
6 Senate Judiciary Committee hearing, and he -- I
7 think he precedes me by one day, I believe, on our
8 confirmation vote. So he's older than I am when
9 it comes to that. But thank you on behalf of the
10 judiciary, thank you on behalf of the United States
11 Citizen Commission, and thank you, my friend, on
12 behalf of me and all that you've done. So, we know
13 that your prior testimony has given us some humor
14 to think about, and I expect you to open up with
15 something funny today.

16 But having said that, I hope that red
17 carpet allows you to -- you can come on, get ready
18 to stroll and walk down or walk down it now, but
19 you will consist of our first panel. You are our
20 first witness, and you Mr. Chang -- Judge Chang will
21 present perspectives of the Criminal Law Committee
22 of the Judicial Conference of the United States on

1 Sentencing Options and Career Offender. Again, and
2 Ed's, Judge Chang's other job, full time job, he's
3 a district judge of the Northern District of
4 Illinois. Judge Chang --

5 JUDGE CHANG: Thank you --

6 CHAIR REEVES: -- we are ready to hear from
7 you whenever you are, sir.

8 JUDGE CHANG: Thank you. And good
9 morning and good morning to your fellow
10 commissioners. It is, as always, a genuine
11 privilege to speak with all of you and also your
12 staff as well. This has been one of the highlights
13 of my judicial career, is working so directly with
14 the Commission and your staff, and I thank you for
15 all those kind words. It -- I will not miss the
16 20 flights to and from Chicago and DC that I took
17 last year, but I will miss this, I will miss this
18 deeply. And Chair Reeves, I -- ever since that
19 Senate Judiciary Committee panel hearing almost 16
20 years ago now, I have watched your career with
21 enormous heart swelling pride, as you have become
22 a leader in the judiciary, and so I thank you for

1 your service and your friendship and your
2 brotherhood.

3 Okay. Let me make sure I can get through
4 the -- my remarks, the Criminal Law Committee, of
5 course, we follow Judicial Conference policy, and
6 that is to say that we advocate for guidelines that
7 are fair, transparent, workable, predictable and
8 flexible. And so as the Chair pointed out, I will
9 just highlight some comments as to sentencing
10 options and career offender this morning, and I'll
11 note, as I always must, that these remarks reflect
12 the Criminal Law Committee's views and not
13 necessarily the views of the 94 districts and 12
14 regional circuits across the country.

15 On sentencing options, the committee does
16 appreciate the Commission's attempt to highlight
17 for judges that there are alternatives to
18 incarceration right, there are sentencing options,
19 and that there is no presumption that imprisonment
20 is the correct sentence. So we do support the
21 introduction of the -- introductory commentary that
22 would emphasize this to judges. I think it is easy

1 for all of us who are steeped in the federal criminal
2 justice system, and that's all of you and your
3 backgrounds and your expertise and your commission
4 staff, as well. It is all too easy to forget that
5 many judges come to the bench with no experience
6 in the federal criminal justice system whatsoever,
7 and for them, if they take a studious and
8 deliberative approach to learning about the
9 momentous duty to sentence someone, as I'm sure they
10 all do, then they might very well start out by
11 reading the guidelines and the general chapters from
12 front to back, right, including Chapter 5. And I'll
13 confess it has not -- I have not in over a decade,
14 just done that, just like sat down and read the
15 general guidelines provisions. And so an
16 introductory commentary can serve a useful purpose
17 for both those new judges who are learning about
18 sentencing and as a reminder to all of us, even if
19 we have years of experience in the federal criminal
20 justice system, that there are all of these
21 sentencing options.

22 As the Commission's data and the data from

1 the Administrative Office show, probation sentences
2 have decreased significantly over the years. In
3 2011, there was something north of 22,000 persons
4 on probation, and now, most recently, there's just
5 a little over 11,000, so, there's a -- there's been
6 this almost one-half decline in the number of
7 probation sentences imposed.

8 And I think it's also important to point
9 out that when judges do pick probation as the correct
10 sentence, we're doing so generally accurately, the
11 revocation rate is quite low. Eleven percent is
12 the most recent revocation rate for the last year,
13 and so that should give us some confidence that
14 judges can accurately pick probation as the right
15 sentence. So, we do support the introductory
16 commentary that reminds us of all the sentencing
17 options.

18 We do recommend, though, that this
19 introductory commentary have a balanced approach
20 to it. That is to say, as an example, some of the
21 bracketed language in the proposal right now
22 suggests that courts ought to pay close attention

1 to the needs of the defendant, and to consider the
2 resources that we can offer to the defendant, and
3 that is certainly an important consideration. At
4 the same time, there are, of course, other goals
5 of sentencing that are set forth in Section 3553
6 and that does include the nature and circumstances
7 of the offense, the personal history and
8 characteristics of the defendant, and the
9 retributive goals as well, just punishment, promote
10 respect for the law, reflect the seriousness of the
11 offense. So those goals ought to also be part of
12 that introductory commentary to provide that full
13 look to judges reading the commentary.

14 And to that end, Section 994(j), right,
15 is an excellent example, by the way, of even those
16 of us who are steeped in federal criminal law, before
17 you all pointed out 994(j) and the general guidance
18 on the general inappropriateness of prison for
19 someone who has just committed their first offense
20 and has not otherwise committed a serious crime or
21 a crime of violence, I would not have been able to
22 tell you that that language was in 994(j) right.

1 So, that's the kind of very useful purpose that
2 the commentary can point out that there is statutory
3 text that gives that kind of general guidance.

4 At the same time, 994(j), that, you know,
5 the other half of it does say that imprisonment is
6 generally appropriate when a defendant has
7 committed a crime of violence that has caused
8 serious bodily injury. And so, that balanced
9 perspective and introductory commentary, I think,
10 could be useful for all judges.

11 Now, moving on from the introductory
12 commentary, the committee does oppose the addition
13 of a new 5A1.1 that would set forth these additional
14 steps, really in consideration of the sentencing
15 options.

16 The synopsis provided by the Commission
17 with very helpful as always, pointed out that
18 subsection (b) of 5A1.1, would provide instructions
19 or like step by step instructions for courts to
20 consider. And our concern as a committee, is that
21 that would require, or could be interpreted to
22 require judges to go zone by zone, the sentencing

1 options which are set forth in 5A1.1A, if it were
2 to be adopted. And explain why Zone A would not
3 be appropriate, and then why Zone B would not be
4 appropriate, and why Zone C would not be appropriate
5 if we're going to land in Zone D in terms of a
6 straight imprisonment sentence. And that would bog
7 down sentencings, it would add to the litigation
8 burden, because presumably the litigants would also
9 opine on this kind of step-by-step analysis, and
10 the probation officers too would have this extra
11 burden of pre-sentence report. And so, we do oppose
12 adding this additional 5A1.1 especially if the
13 introductory commentary is adopted, which would
14 explicitly remind judges of all available
15 sentencing options.

16 Now on the Zone expansions, which are part
17 of the sentencing options proposals. As you know,
18 the extent of the proposal changes are significant.

19 Right now, Zone B tops out at 8 to 14 months in
20 criminal history category 1. That's the range.
21 This new proposal would bring that all the way to
22 46 to 57 months as the top of Zone B. And similarly,

1 Zone C, right now tops out at 12 to 18 months in
2 criminal history category 1, and it would move down
3 to 87 to 108 months, which is a significant,
4 significant expansion of Zones B and C.

5 From what we have inferred from the data
6 briefing, again, very, very helpfully published by
7 the staff, the data briefing focuses on the
8 re-arrest rates and the different cells of the
9 table, and the idea, I think, being that if the
10 re-arrest rates are low in these cells, then for
11 those who, you know, are situated in those cells
12 that that would justify expanding the zones.

13 Unfortunately, there's not a straight
14 correlation between re-arrest rates and the offense
15 levels. It is -- one, of course, would not expect
16 them to move directly with one another, but it's
17 not even really a rough correlation, and it's just
18 a lot of up and down variation in the re-arrest
19 rates. And so that gives us concern that re-arrest
20 rates are not a very stable way of deciding where
21 the zone expansion ought to fall. And the Committee
22 also is concerned that it's not publicly known like,

1 how many defendants are in -- were sentenced to --
2 in those ranges, and we can't tell from the data
3 briefing.

4 And so if the number of defendants in those
5 ranges is very low, they got probation sentences,
6 and, you know, here's a re-arrest rate, then we're
7 concerned that, again, that's not a stable basis
8 to make a decision on the zone expansion, because
9 that's not enough -- there's just not enough data
10 to do so.

11 In addition to that, like moving on from
12 re-arrest rates, the zones do reflect -- I -- we
13 think sensibly, the seriousness of the offense, as
14 well. It's not just a matter of recidivism rates,
15 but it -- where the zone should fall, but also the
16 seriousness of the offense. And I think we know
17 that from just the structure of the table right now,
18 you -- there are defendants in criminal history V
19 or VI who might very well have high recidivism rates,
20 but they can still be in Zone B, and Zone C, because
21 the offense is just relatively not as serious,
22 right. And at the same time in criminal history

1 category 1, where perhaps the recidivism rate is
2 not high because they've had no prior conviction,
3 it still can be a serious offense, and so that would
4 justify them falling into Zone D.

5 And our letter -- written letter on this
6 provided just a couple of examples in a footnote
7 about how certain -- how serious some of these
8 offenses would be and still fall with -- within Zone
9 C rather than Zone D. And just as an example, in
10 a fraud case with a million-dollar loss that caused
11 substantial hardship to a victim used sophisticated
12 means and -- but the defendant pleads, gets three
13 levels off, that's a 22, that would be still within
14 the new Zone C, and -- I'm sorry there's a new Zone
15 B, despite the range being 41 to 51 months. So,
16 we think the proposed expansion is so steep at this
17 point that it would undermine the seriousness of
18 the offense, as well.

19 So, our recommendation would be to take
20 a look at the data as to what judges are right now,
21 in -- at some of these lower offense levels where
22 we are sentencing defendants, and that might justify

1 a more modest expansion of the zone. So for
2 example, if there are defendants who are in Zone
3 C and we're just sentencing them to probation with
4 some kind of -- some form of confinement, and not
5 giving them a split sentence with prison, and those
6 defendants are succeeding, they're not being
7 re-arrested, and they're successfully completing
8 their terms, then that could justify some expansion
9 of Zone B right, to capture what we're already doing
10 successfully. And the same goes for defendants who
11 are in Zone B, that we're just giving a straight
12 probation sentence without any kind of confinement,
13 you know, whatsoever, and if they're succeeding,
14 well, that could justify an expansion of Zone A,
15 but it would not -- I would wager, it would not
16 justify the expansion to the steepness that is now
17 proposed. So, while the Committee does support
18 some examination so that there can be expansion of
19 the zones beyond where they are now, we would not
20 support the current proposal. So, I'll pause
21 there, if there are questions you'd like to ask,
22 I'd be happy to answer them.

1 CHAIR REEVES: After you, sir. That's VC
2 Restrepo.

3 VICE CHAIR RESTREPO: We're going to miss
4 you, Judge.

5 JUDGE CHANG: I'm going to miss you.

6 VICE CHAIR RESTREPO: What if anything
7 should the Commission do to encourage judges, if
8 appropriate, to consider split sentences? It --
9 it's been my experience, it's a tool, so to speak,
10 that judges don't always think about in terms of
11 split sentences, and I know -- I understand the
12 committee's position with respect to expanding the
13 zones, but is there something we could do in terms
14 of encouraging judges to consider those split
15 sentences?

16 JUDGE CHANG: I mean, I think one
17 possibility would be to look at the data for these
18 split sentences, for the judges who do pick split
19 sentences, and are they succeeding? And if they
20 are succeeding, when you get the word out that your
21 fellow judges are doing this, right, they're picking
22 split sentences, and then they're not getting

1 rearrested at a high rate, and so these split
2 sentences can work. They can give the deterrence
3 effect, but yet not be like a full imprisonment
4 sentence, and so I think --that's the idea too,
5 behind the need to publicize that when we do pick
6 probation, right, when our colleagues pick
7 probation, they are doing it in a way that the
8 revocation rates are very, very low, and that should
9 give confidence to other judges that you can do this,
10 you can pick probation, you can pick a split
11 sentence.

12 VICE CHAIR RESTREPO: Should judges take
13 into consideration the cost of incarceration when
14 fashioning a sentence, understanding that BOP is
15 operating on very thin margins these days?

16 MR. CHANG: Yeah, I mean, you would have
17 to locate that in 3553(a) somewhere. And I think
18 some judges conceive of factors in 3553(a) that
19 account for that, and others would not. And of
20 course, the nine justices on One First Street
21 haven't, you know, opined on that, so we would --
22 yeah we need to get guidance from them, too.

1 VICE CHAIR RESTREPO: Thank you.

2 CHAIR REEVES: To follow up on that
3 question, because that's one that I will -- likely
4 will be asking everybody who comes through here
5 today, because, of course, judges on our PSRs, we
6 receive the information about the cost of
7 incarceration versus supervised release, versus
8 community detention and all of that, and I think
9 the number now is \$51,711 a year for a person who's
10 sentenced to prison. Judges, you know, might have
11 a quibble or figuring out how to deal with it, but
12 what might be CLC's view on whether this policy
13 making body ought to do more about emphasizing what
14 the cost of incarceration is in sort of crafting
15 policies that should guide judges.

16 JUDGE CHANG: Yeah, we've not discussed
17 that as a committee, so I don't want to get ahead
18 of the committee --

19 CHAIR REEVES: Okay.

20 JUDGE CHANG: -- on that. I will say in
21 a related context, the public fisc of course, is
22 important to us, whether it's the judiciary's budget

1 or the executive branch's budget. You know, we all
2 have an obligation to be good stewards of taxpayer
3 money, you know, wherever the money is coming from.

4 And so, in a related context, that is one of the
5 -- the cost of BOP imprisonment being more costly
6 than, you know, pretrial detention, so we're --
7 that's always a balance that we're trying to strike
8 is, you know, where should the dollars fall. And
9 it -- with regard to sentencing, I'm just hesitant
10 to opine on that because the committee has not
11 examined it.

12 CHAIR REEVES: Thank you. VC Mate.

13 VICE CHAIR MATE: Thank you. First, I
14 just want to echo the deep appreciation for your
15 service and your work here with us, and we really
16 appreciate it.

17 JUDGE CHANG: Thank you, Vice Chair Mate.

18 VICE CHAIR MATE: I have a question on the
19 introductory commentary and the -- and one of the
20 concerns that the CLC has raised with 5A1.1, and
21 just -- and I hear that concern about it, you know,
22 perhaps looking like or being interpreted as it

1 needing -- courts needing to go zone by zone and
2 making determinations, and that additional
3 procedural hurdle. If we were to make clear that
4 this was just a road map of what's -- of what these
5 zones look like, like, I know, I struggle to find
6 the zones like, I'm like, wait a minute, where's
7 the description of this? If we were to make -- just
8 kind of make more clear that this is a road map of
9 the zones, a description of the zones, and not an
10 additional sort of requirement of you must, you
11 know, go through each of these things, would that
12 alleviate that concern? And I'm about that first
13 provision in 5A1.1, I recognize it would still
14 persist as to the others, but as to that.

15 JUDGE CHANG: Right, I mean, by -- yeah,
16 the committee doesn't have that, you know, of an
17 overall position. I would say, as a personal
18 opinion on that, that if you didn't have that 5A1.1
19 B, which, you know, purports to be this kind of
20 step-by-step instruction, I think that that could
21 help. I mean, if you just had 5A1.1 A, which, I
22 believe is just -- it's a repeat of the zones, and

1 it -- it's -- I think you can find that in other
2 spots in the guidelines, but having that follow the
3 introductory commentary, and just driving home that
4 there's these different zones, but no step-by-step,
5 you know, analysis needs to be taken. My personal
6 take on that, is that that could be useful.

7 (Off-microphone comments.)

8 VICE CHAIR MATE: Well, this isn't a
9 follow up, this is a separate question. This one
10 goes to the -- this is more about the zones. And
11 as you know, there are a variety of cases at any
12 particular -- this goes to your -- kind of your point
13 about considering offense level and offense
14 seriousness, and like, kind of leaving the
15 recidivism piece aside, but offense seriousness,
16 there are a variety of cases at any particular
17 offense level, and you reference like a person who
18 commits a fraud with a million dollar loss and
19 several aggregating SOCs. But we may also see
20 someone who's like an administrative assistant in
21 a fraud who winds up at that same offense level due
22 to loss amounts and relevant conduct. And as we

1 consider whether to expand the zones, and if so,
2 by how much, should we be pegging those zones to
3 those sort of most serious cases that might fall
4 in that box, the least serious ones, or somewhere
5 in between?

6 JUDGE CHANG: Yeah, I -- there are other
7 ways of dealing with those, I think, scenarios.
8 For example, like a mitigating role adjustment like
9 you -- you would not expect, I would hope that
10 someone who has this, like ancillary role, but has
11 been found vicariously liable for loss in a relevant
12 conduct and so on, that they ought to get some kind
13 of mitigating role adjustment. So they would not,
14 and should not fall within the same offense level
15 as, you know, the examples that we were giving.
16 And I think I'd also want to see, what are the numbers
17 of defendants who, you know, we're getting these
18 like, very low sentences, and getting re-arrested
19 afterwards. I think it's just not -- it's not
20 likely that you will have the defendants differing
21 by role in the same offense level, at least I would
22 hope not, if mitigating role is being applied

1 appropriately.

2 VICE CHAIR MATE: Sure, but let's say
3 that, you know, the loss amount might -- so it's
4 a slightly different loss amount. So you could have
5 someone with more loss but a lower role would end
6 up in the same box. And I think, you know, courts
7 sometimes view that as maybe a different
8 seriousness, even though it's ending up in the same
9 box. And I was -- you know, so I think even within
10 a box, we'll see a range of conduct, whether it's
11 that specific example or otherwise. And I just --
12 I'm struggling with, like, when we're looking at
13 that, there's -- even within our little boxes,
14 there's a range of conduct and when we're thinking
15 about it, should we be contemplating those least
16 serious, most serious, or assuming that they're --

17 JUDGE CHANG: Yeah, I think that's what
18 variances are for where, rather than taking the like
19 non straight forward hypothetical of you know,
20 someone who is -- has either the aggravating role
21 or the primary role, even if they don't have the
22 aggravating role and they fall within that offense

1 level, versus the cases that are like on the edges,
2 I think it makes more sense to look at the core set
3 of cases.

4 VICE CHAIR MATE: Thank you.

5 CHAIR REEVES: Any additional witnesses
6 on this point for Judge Chang? Or not witnesses,
7 questions.

8 JUDGE CHANG: If not, I can move on to
9 crime of violence and career offender?

10 CHAIR REEVES: Please.

11 JUDGE CHANG: Okay. Yeah, and so I want
12 to -- big thank you to the Commission and the staff
13 for continuing to work on the career offender
14 guidelines. This is a multi, multi-year project,
15 and it obviously has been the source of both
16 burdensome litigation and just really irrational
17 results, unrealistic results, and so we -- we are
18 deeply in favor of eliminating the categorical
19 approach as well as the analysis that requires the
20 generic offense examination as well. And so on
21 crimes of violence, and using a list of federal
22 offenses, we would support just a list of federal

1 offenses that would be -- it would be very straight
2 forward to apply, and would take care of the run
3 mill of, you know, cases when -- that, you know,
4 when we're trying to figure out whether a federal
5 conviction is a crime of violence. We have not done
6 a like a tour through Title 18 and -- and the United
7 States Code to ensure that every possible statute,
8 you know, is -- is on that list, I think other
9 stakeholders will -- might be better positioned to
10 do that. But a -- a list for federal offenses, we
11 support that.

12 With regard to -- to state offenses, which
13 is obviously the -- the more difficult question,
14 we do oppose option one, which is to use labels from
15 state offenses, we think that will be both over
16 inclusive and under inclusive, and will again lead
17 to litigation of a different sort, but litigation
18 over whether or not this label actually fits the
19 -- the listed labels and their offenses of course,
20 some legislatures are, you know, prolix, and they
21 have really long labels for their offenses, and
22 others are much more concise. And so it would

1 likely lead again to a lot of disparate results.

2 Option two, which is the taking the state
3 offenses and comparing them, their elements and
4 means to the list of federal offenses, comes
5 wonderfully close, I think, to -- to actually being
6 the -- the proper solution here, as -- as long as
7 -- and I think -- I think the proposal does this,
8 but we -- we wanted to make sure that the -- the
9 text of the guideline would permit the state offense
10 to qualify as a crime of violence by comparing it
11 to the federal offense, of course, minus
12 jurisdictional element, so long as all the elements
13 and means, right, so we don't have to divvy up
14 elements and means, so the elements and means,
15 right, fit one of the listed federal offenses, and
16 even if it's broader, it would still qualify as a
17 crime of violence. And we -- we -- we think that
18 approach would be straightforward, it would not
19 require categorical analysis, and the results would
20 be, we hope, much more realistic than the one the
21 categorical approach currently provides.

22 This change in approach should be, as the

1 proposal suggests, accompanied by ways to exclude
2 a -- a state conviction from qualifying it as a crime
3 of violence, just by the comparison to the list.

4 And we -- so we do support examining the data for
5 some sort of sentence imposed, you know, minimum,
6 right, so under which the conviction would no longer
7 qualify. I think it's -- it would be important to
8 examine recidivism rates for those who were
9 sentenced as career offenders, and, well -- and
10 actually, indeed, those who were not sentenced as
11 career offenders, as to whether a crime of violence
12 from arising from a state offense, gives rise to
13 an additional risk of recidivism, you know, or not.

14 And so although we don't have a particular proposal
15 on the one year or three years or five years or 13
16 months, or, you know, whatever the -- the length
17 of the sentence imposed might -- might be, we think
18 an examination of the data you know, could justify
19 some sort of minimum sentence imposed.

20 I've been saying minimum sentence imposed,
21 rather than sentence served, because it is the
22 committee's view that sentence imposed would be

1 consistent with 4A1.1 as well as alleviate a
2 potentially very difficult fact-finding burden on
3 what was the exact time that a defendant served,
4 and -- and what does that even mean in certain forms
5 of state custody or pre-release custody.

6 But overall, this approach with comparing
7 it to a listed federal offense via all the elements
8 and means, and with an exclusion for minimum
9 sentence imposed, we -- we think can work. Beyond
10 that the proposal offers the possibility of a
11 defendant being able to prove that the state offense
12 that would otherwise qualify as a crime of violence
13 did not result in bodily injury, or is not intended
14 to result in -- in bodily injury, and -- and -- or
15 had a less of a -- less culpable mental state, right.

16 And we -- we do think here too that this exclusion
17 would be a fair one to adopt so long as -- as the
18 proposal suggests that the burden is on the
19 defendant to -- to do so. I -- we think that is
20 a crucial feature of this aspect of the -- the
21 proposal, so that it is not a matter of the -- the
22 government or the probation office compiling facts

1 to try to show that this -- the actual facts of the
2 case matches what -- what the conviction was, right.

3 But we certainly can envision scenarios where there
4 is a mismatch, right, and that it really -- the
5 conduct did not involve a -- a violence or a threat
6 of bodily injury, and it did not, or the defendant
7 did not have the -- the requisite mental state.
8 And if the defendant can show that, then it ought
9 not qualify anymore. So -- so long as the burden
10 is on the defendant to -- to show that we think that
11 that could work and would be a fair exclusion as
12 well.

13 So, those are my -- my -- our thoughts on
14 the crime of violence approach, and I'll -- let me
15 pause there before going to controlled substance.

16 COMMISSIONER WONG: Can you just clarify
17 -- thank you, Judge Chang. Just to reiterate,
18 you've been so wonderful. We really appreciate
19 your service and --

20 JUDGE CHANG: Thank you.

21 COMMISSIONER WONG: -- are thankful we
22 still have you today. On -- when you said the, you

1 know, I know we had a lot of brackets, and you said
2 the bracketed -- numerous brackets made it difficult
3 The CLC letter says, you know, the precondition sort
4 of would be a final version that allows
5 consideration for all elements and all means. Was
6 that one of the bracketed options, as you read it,
7 or would that be?

8 JUDGE CHANG: No, I -- I -- I think -- I
9 think it is not bracketed.

10 COMMISSIONER WONG: Okay.

11 JUDGE CHANG: So, I -- I think it is part
12 of the proposal, and we just want to be very, very
13 certain of that, because that is the -- that's how
14 we alleviates the category approach problem.

15 COMMISSIONER WONG: Okay.

16 VICE CHAIR MURRAY: And I'll add to the
17 chorus we -- we have loved you --

18 JUDGE CHANG: Yes.

19 VICE CHAIR MURRAY: -- Judge Chang, we're
20 really going to miss you. Thank you so much for
21 everything you've done during your tenure.

22 JUDGE CHANG: Thank you.

1 VICE CHAIR MURRAY: I was going to ask,
2 I -- I guess this is similar to Commissioner Wong's
3 question, but do you think we did it, like did that
4 -- did our language get it across? I mean -- and
5 -- and I -- this is putting you a little bit on the
6 spot, but I don't know if you noticed the -- the
7 government has a -- a page 4 of their testimony has
8 like an alternative way to do it, do you think that's
9 clear? I don't know if you've had a chance to look
10 at that.

11 JUDGE CHANG: I -- yeah, I've not looked
12 at the department's proposal. I -- we think you
13 did it.

14 VICE CHAIR MURRAY: You -- you think the
15 language makes -- do you think we need to add
16 something else to make the means elements point
17 clear?

18 JUDGE CHANG: No, I -- I would -- it's just
19 a matter of brackets. Yeah.

20 (Simultaneous speaking.)

21 JUDGE CHANG: Yeah. Right. I think the
22 text is -- is -- is fine, so long as it's not

1 bracketed and it's not an option and it's actually
2 in the proposal, I -- I think you did it.

3 VICE CHAIR MURRAY: Okay.

4 CHAIR REEVES: VC Mate?

5 VICE CHAIR MATE: I have a couple of
6 questions, but I wanted to start with the -- your
7 discussion on the burden shifting aspect of it, and
8 in your written statement, the committee's written
9 statement, there was an explanation of why that
10 burden shifting was important, that there would be
11 some sort of checks on litigation, or maybe some
12 limitations on litigation with defendants concerned
13 about acceptance points or obstruction points going
14 the other way, and I was just curious, like, how
15 you see that operating in practice, like, would --
16 would those kind of checks be applicable in every
17 unsuccessful litigation?

18 Like, if someone challenges this and says,
19 you know what, there wasn't bodily injury and the
20 court disagrees, which I'm sure would happen under
21 this. Would that person then lose acceptance and
22 be possibly subject to obstruction, or would there

1 need to be some language in there about
2 non-frivolous -- I mean, I'm just wondering how that
3 might --

4 JUDGE CHANG: Right, not necessarily,
5 like so, as a first cut of this, the idea is that
6 if -- if the defendant did not have the burden, and
7 it was up -- it was the government had the burden,
8 then the -- the defendant could -- could just put
9 the government to his burden of proof in every case
10 without losing acceptance or obstruction. I mean
11 that -- it is, of course, perfectly valid for the
12 defendant to say, prove it, you know, and -- and
13 so you have to gather the records and -- and so on.

14 And -- and so -- so that's one aspect of shifting
15 it to the defendant, because the defendant has every
16 right to say government prove it if the government
17 has the burden.

18 Now, if the defendant has the burden, I
19 think it -- it's like any other instance in which
20 there is some dispute over a -- a sentencing fact,
21 and whether that dispute is -- is based on some kind
22 of good faith disagreement about the facts or what

1 you can infer from records and so on. Or the
2 defendant truly not accepting responsibility, you
3 know, for a -- a prior conviction, the conduct that
4 led up to that conviction. So it's -- I think it
5 would just be like any other fact and not be
6 automatic, but it would -- it would loom as a
7 consideration for the defendant in -- in deciding
8 whether to make the argument.

9 VICE CHAIR MATE: Thank you. That is all.

10 I have one more question. I don't want to be
11 greedy. My other question is, you know, I
12 appreciate your -- your comment on, you know, the
13 answer to; did we get it, as long as we -- and, you
14 know, in terms of, like, addressing the anomalies,
15 right, like the language would take care of that.

16 I guess my question is, some commenters have raised
17 questions about the sort of potential impact of this
18 sort of approach, and us looking at what, you know,
19 so, yes, we're going to get the anomalies, how much
20 more are we getting? Are we getting things that,
21 you know, what's the impact of this in terms of the
22 crime violence definition?

1 And you know, in other areas, the committee
2 has been very vocal about, you know, asking us to
3 look at the data and study of the data. Is -- should
4 we make sure we're wrapping our arms around the
5 impact of this sort of like -- not just saying with
6 the anomalies get covered, but what is the full scope
7 of what we're proposing here with this crime of
8 violence, and to just understand that --

9 JUDGE CHANG: Yeah, I mean --

10 VICE CHAIR MATE: -- understand that.

11 JUDGE CHANG: Right, I mean -- I think it
12 does seem like this is an area where it'd be very
13 difficult to -- to gather data on. Like so what
14 is going to happen, are we going to sweep in
15 defendants who otherwise ought not, you know, be
16 -- be swept in. But I think the exclusions very
17 much help with that, like the -- the -- the -- the
18 minimum sentence imposed, for example, that would
19 reflect, generally speaking, a state judge deciding
20 that there was either bodily injury or, you know,
21 some -- the state of mind culpability was met, but
22 it wasn't that, you know, wasn't that serious. Or

1 it may be one of those anomalous, you know,
2 convictions under that statute, but didn't really
3 fit the core of that state offense, and so that's
4 why they gave such a low sentence, right. So, that
5 -- that minimum length, I think, will -- will assist
6 in that, and then the exclusions that the defendant
7 can also, you know, bring forth. It would
8 otherwise, I -- I think it would be difficult to
9 study the -- the data.

10 CHAIR REEVES: Yes, VC Murray.

11 VICE CHAIR MURRAY: I have a question
12 about option one, which I know you don't favor.
13 But it -- it seems like there were two -- but some
14 stakeholders did favor more than option two. It
15 seemed like there were two primary protections, one
16 is, the kind of difficulty of formulating the list,
17 which is a point usually well taken, I think it's
18 very hard to make that not over inclusive or under
19 inclusive. The litigation point I was more
20 surprised by, and I'm wondering if -- I very much
21 take your point that the -- the draft as written
22 does not specify what you do when there's not an

1 exact match, right, when some -- when the label is
2 included in a longer label or not. Could we get
3 rid -- because I think of the big advantage of option
4 one as, that it just dispenses with litigation.
5 Could we bring it back into the realm of dispensing
6 with litigation, if we just had a rule of
7 construction? The rule of construction could go
8 either way, right, it could either be, here are the
9 exact words, this must be the exact words that are
10 the title of the statute, and there must be -- there
11 can be nothing else. Or it could be, here are the
12 exact words, they must be contained within the title
13 of the statute. Would that be enough to alleviate
14 the concern about litigation?

15 JUDGE CHANG: Well, yeah, I mean, if you
16 set forth the answer, then I -- I guess we that would
17 alleviate --

18 VICE CHAIR MURRAY: As long as we
19 determine it.

20 JUDGE CHANG: Right, right. I think the
21 -- the concern would be though still, that given
22 the variety of -- of terms that are used by the

1 variety of legislatures, that the results might not
2 make sense.

3 VICE CHAIR MURRAY: Right. It might make
4 you more over or more under-inclusive.

5 JUDGE CHANG: Exactly. Like so, the --
6 the litigation might be tamped down, but the -- the
7 outcomes might not be sensible anymore. If there
8 are no other questions, I'll -- if I -- if I -- if
9 I address the controlled substance offense as last
10 but not least. And that is -- so the -- the
11 committee does oppose option one, which would be
12 to just exclude all state drug trafficking offenses
13 from being a -- a controlled substance offense under
14 the career offender provision. And our concern is
15 based on the -- the fact that -- that doesn't --
16 that doesn't seem necessarily data-driven, that
17 there's -- that we ought to exclude all, you know,
18 state offenses.

19 But we do support some option -- option
20 two, which would be to keep the current definitions
21 -- after the resolution of the circuit conflicts,
22 keep the current definitions, but have some kind

1 of sentence-imposed length as the -- the cut off
2 again. And -- and here, I -- I -- I think the --
3 the Commission has -- has long held the position
4 going back to 2016 now, when the Commission issued
5 this very, very comprehensive look at the career
6 offender provision that the drug trafficking only
7 defendants, they -- they don't recidivate at a --
8 a significantly higher rate than non-career
9 offenders, right. There is a -- there is a -- there
10 was a -- for that snapshot of -- of analysis, there
11 was some modest, you know, increase in recidivism
12 rates for drug trafficking only, but it was quite
13 modest. It was like 54.4 percent compared to 48.7
14 percent for non-career offenders.

15 And so there is reason to believe that the
16 drug trafficking only defendants are being
17 over-punished if we're considering recidivism
18 rates. And so the idea would be to examine the data
19 to -- to -- to see whether there is a minimum sentence
20 imposed for drug trafficking predicate offenses
21 that would essentially equalize, you know, the
22 recidivism rates to non-career offenders. And so

1 they -- they should not be counted, you know, at
2 all. And so we -- we think the answer is out there
3 to -- to pick a -- a -- a minimum sentence length
4 for controlled substance offenses, and we would
5 support picking that and including some kind of cut
6 off for that.

7 Yeah. Well, then I will just end by saying
8 I -- I'm going to look back on this experience with
9 you all with -- with deep fondness and deep gratitude
10 for -- for all that you do. And so thank you very
11 much, and thank you for this Mississippi swag.

12 CHAIR REEVES: All right. Yeah.

13 JUDGE CHANG: I'm looking forward to
14 rooting through my Christmas in March.

15 CHAIR REEVES: Thank you, Judge. We
16 appreciate you.

17 JUDGE CHANG: Appreciate it.

18 CHAIR REEVES: All right. Our second
19 panel provides us with the perspective of our
20 stakeholders on the Proposed Amendments on Career
21 Offender and Circuit Conflicts. These are no
22 strangers to us, so I know you're ready. First we

1 have Robert Zauzmer. Mr. Zauzmer is the Chief of
2 Appeals at the U.S. Attorney's Office for the
3 Eastern District of Pennsylvania, a role he has
4 served in since 1998. From February to -- February
5 2016 through January 2017, he served as the pardon
6 attorney in the Justice Department overseeing the
7 President's clemency initiative aimed at reducing
8 terms of non-violent drug offenders to terms
9 comparable to those that would be imposed under
10 current law.

11 Second, we will hear from Shelley Fite,
12 the deputy director of the Sentencing Resource
13 Counsel for the Federal Public and Community
14 Defenders, where she assists federal defenders and
15 other CJA-appointed counsel with litigating complex
16 sentencing issues. Prior to joining the Sentencing
17 Resource Council, Ms. Fite served as an assistant
18 federal defender and public defender in Wisconsin.

19 We're grateful to have both of you back today, and
20 we look forward to your testimony.

21 Mr. Zauzmer, we're ready when you are, sir.

22 (Off-microphone comments.)

1 CHAIR REEVES: We need to turn on your
2 microphone, sir, I think.

3 MR. ZAUZMER: At this point, I don't
4 believe it's necessary to address again the many
5 shortcomings and harmful effects of the categorical
6 approach, ranging from the tremendous amount of
7 judicial effort required to apply it, to the truly
8 inane and inconsistent results that it often
9 produces. Rather in focusing on the proposals
10 before the Commission, I think it's helpful to
11 concentrate on the doctrines, principal flaw, that
12 it rejects statutes deemed overbroad, such that a
13 truly violent criminal is absolved of the full
14 consequences of his or her recidivist conduct simply
15 because somebody else, even a non-existent
16 hypothetical person, might violate the same statute
17 without comparable violence.

18 The department has long proposed one
19 solution for this problem, and now the Commission
20 has hopefully proposed another. Both solutions
21 approach the issue in similar ways, just from
22 different directions. There are reasons to support

1 both, if properly stated. The department's
2 long-standing proposal is what we term the
3 conduct-based backup that the elements and
4 enumerated clauses in the definition of crime of
5 violence should remain, applying all the
6 hard-fought results of the categorical approach.

7 To ameliorate the overbreadth issue, the
8 government should also have the opportunity, where
9 necessary, to prove the defendant's actual violent
10 conduct. As with the Commission's proposal, that
11 proof like that permitted for all other guideline
12 applications should come from any reliable
13 evidence.

14 One of the Commission's
15 proposals, with respect to a crime of violence, if
16 properly stated, would also go a long way toward
17 fixing the overbreadth problem. Let me say
18 preliminarily that we do not support option one for
19 state offenses, which would replace the current
20 crime of violence definition with a set of vague
21 labels, an approach that would result in extensive
22 litigation and wildly different results, given that
the states apply all manner of names to similar

1 violent crimes. That list would be naturally under
2 inclusive, and even if somewhat sufficient, the list
3 would require more frequent updating than the
4 Commission's amendment cycle allows to avoid
5 inconsistent results across jurisdictions.

6 Instead, the more promising suggestion is
7 option two, in conjunction with a new proposal
8 regarding federal offenses. First, the Commission
9 has sensibly proposed that federal offenses
10 qualifying as a crime of violence predicate may
11 simply be defined by a list of federal statutes that
12 is logical and readily administrable. The key is,
13 there must be a sufficient list to capture the many
14 violent crimes addressed in the U.S. Code. The list
15 included in the Commission's proposal is, we believe
16 only a helpful start, and we will provide the
17 Commission with a complete list of suggestions
18 addressing the many statutes that address crimes
19 such as murder and robbery and similar crimes in
20 Indian Country. Without an appropriate list of
21 federal statutes, the Commission's proposal risks
22 replicating some of the arbitrariness of the

1 categorical approach by excluding truly violent
2 crimes.

3 With regard to state offenses, option two
4 sensibly defines which state offenses qualify by
5 reference to the federal list and through additional
6 definitions. Then this proposal tackles the
7 overbreadth issue by providing for exclusions based
8 on actual conduct that the defendant may establish.

9 Again, this is a logical and helpful approach, but
10 the devil is in the details. We can support this
11 method as an alternative to our proposed
12 conduct-based backup only if the lists and
13 definitions of qualifying federal and state
14 offenses are sufficiently comprehensive and if the
15 exclusions are properly defined and cabined.

16 With regard to those exclusions, we would
17 agree that the crime of violence application should
18 not apply if the defendant shows that any conduct
19 for which he or she was responsible did not involve
20 a threat or attempt to cause bodily injury, result
21 in such injury or create a substantial risk of such
22 injury. In this regard, we suggest the application

1 of the Supreme Court's long-standing definition of
2 bodily injury, not the more restrictive reference
3 to serious bodily injury offered in the proposal.

4 Further, we believe that other adjustments
5 are warranted to assure that the exclusion does not
6 reach any sexual offense against children, whether
7 there is bodily injury or not, and further the damage
8 or intended damage to property also should not be
9 excluded. We also support an exclusion for
10 reckless conduct consistent with current law, while
11 making sure that this exclusion similarly does not
12 exclude accomplice or co-conspirator conduct, and
13 does not reach extreme recklessness, which is the
14 foundation for most murder statutes. So, with
15 respect to violent crimes, we see much that is
16 promising in the Commission's approach, assuming
17 that the new provisions are properly articulated.

18 And we continue to support our conduct-based backup
19 as an alternative.

20 Turning to the issue of drug offenses, as
21 the Commission is aware from the last amendment
22 cycle, the department strongly opposes the

1 suggestion that state offenses should be eliminated
2 as controlled substance offense predicates, a
3 suggestion that not only is in tension with
4 congressional intent, but for all intents and
5 purposes, erase the application of the career
6 offender guideline to three-time drug offenders.

7 The department also opposes limiting controlled
8 substance offenses by reference to the term of
9 imprisonment imposed or served.

10 With regard to the two circuit conflicts
11 regarding the definition of controlled substance
12 offense, the department encourages the Commission
13 to adopt both options too. A controlled substance
14 offense may be defined by either federal or state
15 law; the rule of this Commission has applied for
16 more than 35 years, and the pertinent definition
17 should be that in effect, at the time of a prior
18 offense, consistent with the Supreme Court's recent
19 decision in Brown with regard to ACCA. The contrary
20 options serve no purpose other than to produce
21 mischief, as I will address if time allows during
22 the question-and-answer period.

1 I understand the concern of my friends with
2 the Defenders Association that the career offender
3 guideline produces lengthy ranges, and it is in the
4 interest of their clients to reduce those terms.

5 They therefore support any restriction regarding
6 the definition of crime of violence and controlled
7 substance offense, regardless of what strange and
8 inconsistent results it produces in individual
9 cases.

10 In our view, that is neither consistent
11 with Congress's instructions nor sound policy. We
12 recognize that the career offender provision
13 produces lengthy ranges. That is exactly what
14 Congress intended in stating that a sentence for
15 a career offender should approach the statutory
16 maximum in order to incapacitate serious repeat
17 offenders and protect the public.

18 To the extent this results in an undue
19 term, in individual cases, judges have full
20 authority to remedy that. We do not take any
21 position simply to produce longer sentences. Our
22 view is that the provision should be applied

1 consistently and fairly to like offenders, with
2 judges then left to exercise their discretion to
3 adjust sentences as necessary after accurate
4 calculation of an advisory guideline range. It
5 does not serve the public or the interest of justice
6 to permit arbitrary results that are divorced from
7 the offender's actual conduct.

8 Again, we greatly appreciate the Commission's effort to solve
9 these vexing problems, and I welcome your questions
10 at the appropriate time.

11 CHAIR REEVES: Thank you, Mr. Zauzmer.

12 Ms. Fite?

13 MS. FITE: Thank you. I appreciate the
14 opportunity to testify again on behalf of Federal
15 Public and Community Defenders.

16 In 2015, I went from -- it is, sorry, I
17 can try to be louder. In 2015, I went from being
18 a state public defender to being a federal defender,
19 and I was really shocked by how the career offender
20 guideline operated in our cases. A lot of
21 stakeholders, I think, are pretty used to this
22 system, and they might not feel that same shock,

1 but what I saw, and what's still really the reality,
2 is mostly people who are convicted of instant
3 non-violent drug offenses getting astronomical
4 sentencing ranges, ranges that in 2015 I still
5 associated with my murder clients in state court
6 or my rape clients, and often based on quite mundane
7 priors. And when I say people, it's mostly black
8 men who are getting these astronomical sentencing
9 ranges.

10 Today, I'm happy to talk through all parts
11 of the proposal. I know our initial comment might
12 have been somewhat disappointing that we weren't
13 able to get into the details of the crime of violence
14 proposal, because defenders are still actively
15 meeting and talking through the various problems
16 we've identified, and trying to find solutions, but
17 I'm happy to talk about problems with you guys today,
18 and I can also talk about how some of the
19 department's suggestions would make those problems
20 much, much worse.

21 But for now, I just want to highlight
22 something that we said in our comment, but we only

1 said it in the footnote, and so I'm afraid that you
2 guys might have missed it; which is that judicial
3 opinions these days focus much more on the problems
4 with the categorical approach than the problems with
5 the career offender guideline more generally, but
6 that's because they can't get out of the categorical
7 approach. They have to do this annoying analysis.

8 Post-Booker, they can get out of the guideline
9 range simply by giving a below guideline sentence,
10 and that's what judges are doing in the overwhelming
11 majority of cases. We looked up data from the
12 different districts in Judge Chang's district, the
13 Northern District of Illinois, just one district
14 south of mine, in the last five fiscal years, only
15 7.5 percent of career offender cases got a
16 within-guidelines sentence.

17 So, if the Commission amends 4B1.2
18 focusing on complaints about the categorical
19 approach, rather than sentencing data showing that
20 the under-inclusiveness issue, those anomalous
21 categorical cases, that that's just not the real
22 problem here, then we'll just end up with a career

1 offender guideline that gets farther from 3553(a)
2 and farther from the realities of sentencing.

3 So, we know that commissioners are looking
4 for a way to eliminate the categorical approach,
5 but we hope that commissioners are also serious
6 about ameliorating the bigger problems here, which
7 we think can only be ameliorated by both clarifying
8 and narrowing the definition of crime of violence,
9 and also by reducing as much as possible the number
10 of drug cases that trigger career offender status.

11 And at least in drug cases, there is an
12 easy answer, and that is eliminating state drug
13 priors consistent with the directive. Even if the
14 Commission isn't sure of what to do about the rest
15 of the system, that there is no reason to not move
16 forward with that proposal, which would
17 dramatically simplify application of the career
18 offender guideline, it would resolve both circuit
19 splits and it would result in guideline ranges that
20 are much more appropriately calibrated to the
21 individual facts of the case and the prior
22 convictions. Thank you.

1 CHAIR REEVES: Questions. Oh, okay, VC
2 Mate?

3 VICE CHAIR MATE: Thank you both for all
4 of your work on this issue over the years and for
5 your help today, we really appreciate it. Mr.
6 Zauzmer, I have a question for you about, sort of,
7 you know, the -- I guess it would be either option
8 one or option two, but the list of -- or sort of,
9 what's happening with state statutes, and the scope
10 of that list, and your encouragement that we expand
11 that list. And I guess my question is, if it were
12 our intention to create a list of federal statutes
13 and state offenses that capture like a heartland
14 of violent offenses, recognizing that that would
15 be overbroad in some particular instances, and so
16 we have the exceptions, but also perhaps with the
17 intention that it not be an exhaustive list, that
18 it be a heartland list, and that, you know, the --
19 if there were ones that were missed, those could
20 be handled with variances. Is that a viable
21 approach, or will there always kind of be constant
22 pressure to expand that list?

1 MR. ZAUZMER: I don't know, Commissioner,
2 if there will be -- there would be pressure. I think
3 it would be under-inclusive. We will be providing
4 the Commission, in our final comments, with a
5 comprehensive list in the U.S. Code. It does
6 involve scores of statutes. However, I would also
7 suggest it is the heartland, those statutes do boil
8 down to a very limited number of categories of
9 murder, assault, robbery, the traditional violent
10 offenses. The thing is that the federal code, like
11 most state codes, presents a number of different
12 options, and in our view, it wouldn't be appropriate
13 to artificially limit the list by just simply
14 saying, you know what, we want this list only to
15 have 10 statutes, but we don't want to have 50, or
16 whatever the number is. Take murder, for
17 example, which, of course, is, you know, the
18 ultimate violent crime. One could simply refer to
19 the principal federal murder statute. But there's
20 also a statute for murder of a witness, the 1512.
21 There's a statute for murder of a prisoner.
22 There's a statute for murder of a federal employee.

1 These are frequently charged offenses,
2 unfortunately, and it would be very unfortunate if
3 someone were relieved of their status as a career
4 offender or 2K2.1 enhancement because they murdered
5 a witness, you know, as opposed to just some general
6 murder in federal jurisdiction.

7 And so we're not suggesting an overbroad
8 list, we're just suggesting a list that captures
9 those main offenses, and that's true of state
10 offenses as well. But I think I would suggest, when
11 you look at the list we suggest, and think about,
12 is this the heartland, yes, it is. It is those basic
13 offenses that simply is described in a number of
14 different ways.

15 CHAIR REEVES: You may follow up.

16 VICE CHAIR MATE: It's a slightly
17 different question, but I -- this is one I just
18 wanted to make sure I understood the department's
19 position on the exclusion. Am I correct that the
20 department wants the guidelines to require that the
21 defendant disprove conduct during the offense and
22 disprove relevant conduct as well? So, for

1 example, in order for the physical injury exclusion
2 to apply, the defendant would need to prove no bodily
3 injury occurred during the offensive conviction,
4 and also disprove any uncharged allegations of
5 injury before and after the offense?

6 MR. ZAUZMER: Yes, and we actually have
7 an additional concern regarding co-conspirator and
8 accomplice liability. We've rephrased the
9 Commission's suggestion, I think very slightly.
10 I mean, we do very much appreciate the Commission's
11 suggestion, and we've just rephrased it to make sure
12 it captures conduct, that it captures accomplice
13 liability, and I think the language we used is that
14 during the commission of the offense, in preparation
15 for the offense, or in the course of attempting to
16 avoid detection for the offense, that's a standard
17 approach in the guidelines in federal law in general
18 with regard to criminal liability.

19 VICE CHAIR MATE: And so, just to follow
20 up on that with the recklessness exclusion, a
21 defendant would be ineligible for that recklessness
22 exclusion if he was able to prove that the offense

1 was committed negligently, but he engaged in
2 intentional conduct after to avoid detection of the
3 offense?

4 MR. ZAUZMER: Yes, with a limit. I mean,
5 I don't think it would apply if we're talking about
6 avoiding detection a year later. Generally, what
7 this applies to say, is the robbery in which the
8 person engages in violence while escaping from the
9 scene of the robbery. That's where in the case law,
10 this generally arises if someone is still held
11 responsible for a crime of violence.

12 VICE CHAIR MATE: Thank you. Can I just
13 ask a follow-up to Ms. Fite on that? I was wondering
14 whether the, you know, defenders, have any thoughts
15 on sort of the scope of conduct that should be
16 addressed in those exclusions. You know, it looks
17 like the commenters had sort of a range of
18 suggestions from the departments on all relevant
19 conduct to POAG said, for the recklessness, only
20 look at the mens rea in the offense, you know, as
21 it was charged, and so I was curious about your
22 thoughts on sort of that scope of conduct --

1 MS. FITE: Sure. Well, it'll probably be
2 no surprise that -- I think, what the department
3 as suggesting, would be a huge scope, and it would
4 be impossible to ever, frankly, prove that
5 limitation, but I will say that sort of before even
6 getting to their suggestion, our kind of testing
7 and analysis and thinking and talking to defenders
8 around the country about different offenses, we are
9 already concerned that these are impossible to
10 prove.

11 So, you know, the general concept of, let's
12 have kind of this -- let me say that the thing that
13 I think this proposal gets right, and there's a few
14 things, but one thing that it gets right is sort
15 of what you're talking about, the core violent
16 offenses, these heartland violent offenses, at
17 least for the state offenses, it's kind of a closed
18 list.

19 We understand that we're only looking at
20 convictions for these closed lists. But within the
21 closed list, we know there's a lot of overbroad
22 offenses. Partially, we know that from litigating

1 categorical cases for the last 10 years, but we also
2 know that from our practice, that this covers all
3 sorts of conduct that you would be intending to
4 include and not to include, and it's more or less
5 depending on the individual offense.

6 So, like robbery is one that does have some
7 kind of anomalous cases, like, there are statutes
8 like Washington DC, where it includes pickpocketing
9 in a single offense robbery. So, that's
10 potentially, like, an anomalous problem, or the
11 reckless robberies, where a number of states include
12 kind of shoplifting, you're running out, you
13 accidentally run into somebody on the way out. That
14 can be robbery.

15 But then there's offenses like aggravated
16 assault, where it's not just necessarily anomalous
17 cases, it could be the majority of conduct that it
18 covers is not what we're really talking about, the
19 majority of conduct for some statutes can be
20 reckless or negligent or even accidental conduct,
21 which we're not sure that this quite covers in the
22 exclusion, and so, you know, there might only be

1 for some statutes, only a sliver of conduct that
2 we really want to include.

3 And so the only way that the idea of these
4 kind of self-consciously overbroad things can work
5 is if we have exclusions and limitations that can
6 actually deal with that. The easiest way to deal
7 with that is the prior sentence exclusion. It's
8 simple, it's easy, we can understand what the
9 person's prior sentence is, frankly, even since we
10 filed our initial comment, we're concerned that 13
11 months is by the other limitations, and I can talk
12 more about sentence served yet I want to actually
13 get to the question you're getting to.

14 So, the other two, the sort of bodily
15 injury harm, exclusion limitation, and then the mens
16 rea limitation, are set up in a way where the
17 defendant would have to prove that he did not have
18 any intent to injure. He would have to prove that
19 he did not engage in some sort of non-reckless
20 conduct.

21 Even without the expansion that we're
22 talking about, it has really come to my attention

1 how impossible that would be in a great number of
2 cases, both because that's not the way things are
3 charged or explained in state court, so then what
4 we might have is a client who is explaining that
5 in a statute that can be committed multiple ways
6 with multiple mens rea, I did not do this
7 intentionally, so I don't -- are we putting in an
8 affidavit, and then once we put in an affidavit,
9 if the prosecutor then files a Shepherd document
10 that says, all of the mental states, which is --
11 it's not how they do it in my state, but it is how
12 they do it in some states you know, committed
13 intentionally, recklessly, or is that enough, or
14 is it enough to say that something that they did
15 on their way out of the offense that was intentional,
16 even if the prosecutor specifically charges only
17 with recklessness, which is how they would do it
18 in my state, there is always an intentional act in
19 a reckless offense. So, the sort of classic -- the
20 one that the Supreme Court brings up repeatedly,
21 is like a drunk driving assault kind of thing.

22 There are intentional acts related to the

1 reckless that is what injures the person, and
2 we don't know how to possibly meet those burdens
3 of proof, which makes me think that that profound
4 overbreadth we're talking about. So, I'm thinking
5 of this, in my own mind, as a two-step process.
6 So, we've got step one and we've got step two. The
7 profound overbreadth in step one, we don't have a
8 way to deal with that right now in step two.

9 So, increasing the prior sentence minimum
10 by a lot would go a long way to just reducing the
11 number of cases where we even have to deal with those
12 limitations, because hopefully most
13 non-intentional cases, most non-violent cases,
14 hopefully are going to get the lower sentences, and
15 that will more be clean up, but also we are really
16 concerned about the burden problem.

17 And frankly, we were concerned about the
18 burden problem before, and when we saw the Criminal
19 Law Committee's comment, we became terrified of the
20 burden problem. The idea that our client who would
21 be the only person in the federal courtroom who was
22 there when the crime was committed, and the only

1 person who went to all of the state court
2 proceedings, that their denial that a certain thing
3 happens that would get them out of a limitation,
4 could fail, and then they could lose acceptance,
5 or even get obstruction, and therefore we are going
6 to reduce litigation by kind of terrifying our
7 clients out of raising it, is -- it feels absolutely
8 unacceptable.

9 And so I may be being, you know, getting
10 excited here, but I do think that there are some
11 real problems that might be solvable, but we're
12 still sorting through it, but it probably the prior
13 sentence minimum, much higher, that would simplify
14 things, the burden issue.

15 And then, if I could just say one more thing
16 about the burden issue. Well, sorry, I -- we were
17 looking for cases just in preparation for this
18 hearing where judges were complaining about the
19 categorical approach in the context of career
20 offender, but I just want to say it was really hard
21 to find even the cases that the government has cited
22 in previous comments, they're mostly talking about

1 statutory cases.

2 I mean, there are certainly career
3 offender cases, they're just few and far between,
4 perhaps because most of the sentences are so far
5 below the guidelines, they're not getting as many
6 appeals, but one that we found is the Sixth Circuit
7 case Burris, where Judge Thapar has a concurrence
8 that's well known about how terrible the categorical
9 approach is. And one of the things he talks about
10 is in a conduct-based approach, where the government
11 has the burden, at least it would be on the
12 government if there's a failure of record keeping,
13 because that's record keeping that's making
14 accusations against our client, and that could
15 potentially be a fair system.

16 And so that's just another thing that just
17 very recently, as we're thinking through this more
18 and thinking through this more, that seems like a
19 bigger and bigger problem that needs to be solved.

20 CHAIR REEVES: I've got a question based
21 on what I heard you say in your opening, Ms. Fite,
22 and I appreciate the government responding to it.

1 You indicated that there's a great disparity --
2 racial disparity, with respect to who falls under
3 or who's falling under or caught within this career
4 offend -- career offender guideline and -- and those
5 sentences are -- are great. So, could you
6 elaborate on that and if the government has any
7 response whatever -- whatsoever to -- to this
8 disparity, I -- I would appreciate hearing it.

9 MS. FITE: All right. And -- and that's
10 something that I don't think we really have to prove
11 to the Commission at this point, because the
12 Commission has pointed out the disparity itself.

13 The Department has acknowledged the disparity
14 where this overwhelming -- that it -- it affects
15 black men in a way that it does not affect other
16 racial groups quite a bit related to sort of how
17 states are prosecuting cases. In the 2004 report,
18 I think is particularly interesting because it talks
19 about how the drug trafficking portion of the career
20 offender guideline is particularly problematic
21 because of known racial disparities in how drug
22 crimes are found and prosecuted, which makes the

1 racial disparity appear just, you know, deeply
2 pernicious. I -- I -- so that's a huge problem.

3 There's also a disparity I want to talk
4 about because I do think that there's this one idea
5 that I think some people might have, which is that
6 it's kind of already solving the problem that judges
7 can vary downwards so dramatically. We -- we did
8 point out in our -- in our comment, that while the
9 numbers of compliance with the career offender
10 guideline is extremely low, and I think maybe the
11 lowest in the entire book, on average, when you see
12 the breakdown district by district, it's not the
13 same with every district. So, before I mentioned,
14 you know, the Northern District of Illinois, it's
15 7.5 percent, in my district, it's actually 0
16 percent, a couple -- a couple districts over the
17 Southern District of Illinois, the same circuit.

18 That's one of those top five districts we
19 mentioned, it's -- it's almost 55 percent in -- in
20 your district, Judge, it's -- it's -- I think it's
21 over 50 -- 55 percent or around there, so there are
22 still people being harmed by -- by this guideline

1 right now.

2 MR. ZAUZMER: If I may respond, Your
3 Honor?

4 CHAIR REEVES: Yes.

5 MR. ZAUZMER: Being -- yes, of course,
6 there's always a concern about racial disparity,
7 and it's something that the Commission is focused
8 on, the department is focused on. The problem
9 exists before we get to these recidivism provisions,
10 the career offender provision, the -- and 2K2.1 and
11 others. Because, of course, those recidivism
12 provisions are always going to rest on what were
13 the convictions that the people incurred earlier,
14 and that's what I understand Ms. Fite is referring
15 to when she talks about racial disparity, perhaps
16 in drug prosecutions and elsewhere. So this is a
17 much broader problem that goes beyond what we're
18 talking about today.

19 What I want to focus on today, and this
20 responds to a number of Ms. Fite's comments as well,
21 is simple fairness. That -- that is what has always
22 animated our position regarding the categorical

1 approach. And I would respectfully suggest that
2 this fairness concern should be of concern to a
3 person of any race, or a person who -- any person
4 who is prosecuted. The problem with the
5 categorical approach is that it produces varying
6 results for people who committed exactly the same
7 conduct.

8 You could have a person of a particular
9 race who commits a drug offense or a violent crime
10 in one state, and a person commits exactly the same
11 conduct in another state, but because the statute
12 in that other state is written more broadly, or
13 there's no Shepard document, or what have you, that
14 person is not held responsible.

15 There's a problem of basic fairness where
16 two people in neighboring cells, whether they are
17 of the same race or different races, are serving
18 materially different sentences simply because
19 statutes are written in a different way, even though
20 they committed exactly the same conduct.

21 So our presentation, I think, for many,
22 many years consistently, has been, let's get this

1 on a level playing field. Let's have the same
2 provisions apply equally to people who commit the
3 same conduct. That -- we then have a number of
4 questions left after that, which is, what should
5 -- how should we treat prior offenses, was there
6 racial disparity that a judge should consider, what
7 should the offense levels be, that -- really, I think
8 what Ms. Fite is getting at is that these sentences
9 are often very long. Well, the way to address that
10 is not by some arbitrary method of saying, let's
11 just throw out all state drug offenses, and so we're
12 going to help some people. The way to -- to address
13 it is to adjust the offense levels. But it should
14 be fair and consistent across the board. That is
15 our position, and we think that serves interest of
16 all citizens of the country.

17 CHAIR REEVES: How do you propose
18 adjusting the offense levels?

19 MR. ZAUZMER: Well, we don't have a
20 proposal currently before the Commission, the --
21 the Commission probably does -- has some discretion
22 or Congress' guidance is not totally specific. It

1 says the sentence should be close to the statutory
2 maximum. Now, of course, in all cases, since that
3 was articulated, in many cases, it's never near the
4 statutory maximum because somebody's committed 510
5 offenses, and the statutory maximum is in hundreds
6 of years, and so the Commission has never matched
7 up to that.

8 I think the Commission does have some
9 leeway, and it's something that you may want to
10 consider in an amendment cycle of looking at all
11 of these provisions to make sure that the offense
12 levels are not excessive. And that's where Ms.
13 Fite's statement about the rate of variances comes
14 into play. That's what this commission always
15 looks at. We want to see what our judges around
16 the country doing and take that into account in
17 deciding what the offense level should be. That's
18 what this commission has done since day one. But
19 -- but again, we need to be treating people who
20 committed the same conduct the same, whether it's
21 at these offense levels or at new ones that the
22 Commission may come up with.

1 MS. FITE: So --

2 CHAIR REEVES: Ms. Fite?

3 MS. FITE: I -- I guess I just want to be
4 clear, although, you know, defenders have many times
5 expressed that the categorical approach is kind of
6 the best of -- of bad worlds, and honestly,
7 struggling through additional possibilities makes
8 me realize how challenging this is, that, you know,
9 the Supreme Court came up with the -- but I -- but
10 I think I am here to talk about to the extent that
11 the Commission does decide to move away from the
12 system to make sure that that system does not
13 compound the bigger problems, and our fears that
14 as written this would compound the bigger problems.

15

16 In terms of whether the Commission could
17 sort of recalibrate 4B1.1 for lower offense levels,
18 boy, I mean, that would be fantastic, and we would
19 love to see a proposal like that in the future.
20 The one time the Commission did something like that,
21 the Department of Justice challenged it -- and the
22 Supreme Court struck it down.

1 So there, I think, is probably some
2 nervousness around the idea of lowering the ranges
3 themselves in the career offender. The one place
4 we know the current -- the Commission has a lot of
5 discretion, is in the definitions in 4B1.2 that get
6 someone into the career offender category in the
7 first place, that -- that sort of launches those
8 4B1.1 definitions.

9 And so while it would be wonderful to talk
10 in the future about recalibrating those ranges, in
11 the meantime, there is real harm happening to real
12 people, and there could be additional, compounded
13 harm if the categorical approach is abandoned in
14 a way that is not self-consciously and thoughtfully
15 talking about shrinking these numbers to some
16 extent, that can happen this year; 4B1.2 can happen
17 now, because the Commission has repeatedly
18 exercised its discretion to make those broad --
19 those definitions broader than necessary.

20 CHAIR REEVES: And I guess, to follow up
21 on a question that I asked Judge Chang. This --
22 Mr. Zauzmer, goes to the Department of Justice which

1 oversees prosecutions and the BOP, the career
2 offender sort of guideline, and people who are
3 serving those sentences, probably fewer people in
4 prison because of the guidelines, but they're
5 serving much lower sentences, I think -- I think
6 we'll agree on that.

7 But my question, though, is -- as a you
8 -- you mentioned in your opening that, but Congress
9 told us to be the policy making by -- well, excuse
10 me, Congress -- that is what Congress intended.
11 Those long ranges, I think is an encapsulation of,
12 I think, what you said, but with respect to our role
13 as a policy making body, what's the Department's
14 views on how we ought to guide judges with respect
15 to thinking about, you know, the cost of
16 incarceration or -- or is that a place for us, or
17 is that a place for judges in particular, anything,
18 because if someone is -- I think, when I started
19 out 15 years ago, the -- the annual cost of
20 incarceration was \$27,000 a year. That was my first
21 sentence that I imposed.

22 I'm preparing for a sentencing in a few

1 weeks, and of course I mentioned that that number
2 is now over 50 -- 50 -- think it's \$51,000, a year,
3 and I just think about the enormous pressure on BOP's
4 budget and the programs and things that they're
5 required and mandated to do. What is the
6 Department's view on whether this commission as a
7 policy-making body ought to be sort of infusing
8 those numbers into how we shape policy for judges
9 to think about?

10 MR. ZAUZMER: Well, I respect the very
11 thoughtful concerns. I have to echo what Judge
12 Chang said, which is that it is not a 3553 (a) factor.

13 It is, as the Supreme Court has told us many times,
14 the function of Congress to set sentencing law, and
15 Congress can certainly take it into account in its
16 directives to the Commission. The -- but again,
17 I'm -- when -- on the issue that I'm -- I'm privileged
18 to be here about today regarding the categorical
19 approach and the circuit conflicts that we haven't
20 spoken too much about, I have to get back to our
21 basic position which is -- which is fairness. The
22 -- the issue of whether the sentences are too long

1 and whether that imposes a financial burden on the
2 country and -- and specifically on the Bureau of
3 Prisons, is the second issue that comes after, are
4 we treating equally situated people the same way.

5 And -- and that concern about money, the concern
6 about some sentences being too long, that to us,
7 just does not justify this very arbitrary system
8 that we've had now for many years involving the
9 categorical approach.

10 CHAIR REEVES: Okay. You should respond
11 at all, Ms. Fite. I mean you may, if you do.

12 MS. FITE: I mean, I think you probably
13 know that I -- I am also, my number one concern is
14 fairness. I think I'm looking at it from a slightly
15 different angle than the government, and I think
16 that -- that the days that a human being is spending
17 in prison based on a sentencing range that kind of
18 -- I -- I don't think it would exist at all if the
19 Commission were just trying to make good sentencing
20 policy; I think that is profoundly unfair. And so
21 I think it's time to think about, what does Congress
22 require of the Commission, and should the Commission

1 go anything beyond what Congress is requiring for
2 a system that's not producing fair sentences when
3 you are working so hard to create this overarching
4 guideline system that, while it has plenty of flaws,
5 it's at least taking into account the facts of the
6 case, the circumstances of the prior convictions
7 and those sorts of things.

8 MR. ZAUZMER: May I make one other
9 comment, Your Honor?

10 CHAIR REEVES: Yes, sir.

11 MR. ZAUZMER: That's right. I -- I want
12 to just -- talk one second about the circuit
13 conflict, because I think that just illustrates the
14 fairness issue and the categorical approach issue
15 just on steroids. One of the -- one of the circuit
16 conflicts, involves whether we should rely on the
17 federal definition of a controlled substance or the
18 state definition. Every time that issue has
19 arisen, and it arises with ACCA, it's only based
20 on a completely absurd distinction. The state and
21 federal distinct definitions of all the main
22 controlled substance offenses are the same; heroin,

1 cocaine, whatever. People find these minuscule
2 differences in definition, and therefore try to
3 absolve everybody who was involved in some state
4 with that controlled substance.

5 The one example that has come up -- and I'll
6 say this very quickly, involves Ioflupane, which
7 is this derivative of cocaine. In 2015 it was
8 removed from the federal schedule because this one
9 type of 123 Ioflupane it's called, was invented for
10 a very specific reason to aid in the radioactive
11 diagnosis of Parkinson's disease. It's the only
12 thing it's used for. There is no market for it,
13 there is no psychoactive effect of it, no cocaine
14 dealer has ever heard of it. Once that was removed
15 from the federal schedule, many states did not
16 update their definitions. They say cocaine is
17 cocaine.

18 And so we have decisions after 2015 saying
19 that in those states, under ACCA, in those states
20 where the definition was not updated, the state
21 definition is -- of cocaine is now overbroad with
22 regard to the federal definition, because it

1 includes 123 Ioflupane, this Parkinson's
2 assessment. The -- this is inane, but what happens
3 is, in the state of New York right now, actually,
4 it's because of this other isomer issue that I don't
5 have time to talk about, but which is equally inane,
6 in the state of New York right now, cocaine dealers
7 have not committed serious drug offenses under ACCA,
8 they're -- they're off the hook. Whereas next door
9 in New Jersey, in Pennsylvania, I think in
10 Connecticut, we don't have the same problem.

11 That's the fairness issue. How is it that
12 somebody in New York faces a completely different
13 and lower sentence based on their prior activity
14 in distributing any quantity of kilograms of cocaine
15 when the person next door is held responsible. We
16 just need to get this right. We just need to get
17 this on the same level playing field. It should
18 be the state definition. It should be the time of
19 the offense, because no one's ever come up with a
20 distinction in these definitions that is not as
21 absurd as what I'm talking about. And then after
22 that, decide, all right, what sentences result, and

1 are we satisfied with those sentences.

2 CHAIR REEVES: VC Murray?

3 VICE CHAIR MURRAY: Thanks. Thanks to
4 both of you for all your help on these -- these issues
5 over the lot you know, the last few years, especially
6 over the last few months, that I have lots of
7 questions for you, some of which I think are more
8 like speed dial questions than right now questions.

9 But I do have a question for right now about the
10 circuit conflict, so I -- I take your point, Mr.
11 Zauzmer, very much about the First Circuit conflict,
12 about the state versus federal, about how adopting
13 a federal only schedule imports the -- all the things
14 that people who don't like the categorical approach
15 really don't like about it.

16 Does the Second Circuit split have the same
17 problem, I couldn't -- I -- my sense was that it
18 did not, like -- that -- either way you go on the
19 Second Circuit split, you don't end up importing
20 the categorical approach or the tail wagging the
21 dog stuff, but it seemed like that the government
22 submission sort of indicated the other so -- so

1 imagine a world where on the First Circuit split,
2 you go for the state and federal option, right, so
3 you don't have the categorical approach going from
4 there, but you go with, say, the -- the time of
5 sentencing option on the Second Circuit split.

6 Would that import the categorical approach, my sense
7 was that it would -- it would not; do you disagree
8 with that?

9 MR. ZAUZMER: I -- I have to think through
10 whether I would call it the categorical approach
11 Commissioner Murray, but it still involves the same
12 kind of absurd outcome. And again, because
13 definitions don't change in material ways over the
14 years. So say, for example, you have a state that
15 did do the Ioflupane exception, in 2015 it followed
16 lock sync with federal law. What that means is
17 under option one for the -- for the Second Circuit
18 conflict, if somebody is now being sentenced and
19 they had a state cocaine offense in that state from
20 before 2015 if we're looking at the time of
21 sentencing that -- they no longer have a qualifying
22 prior conviction, because the definition now is

1 narrower than it was then.

2 Right now, it doesn't include Ioflupane,
3 then it did, that defendant, of course, has no idea
4 what Ioflupane is, he or she was on the street
5 selling cocaine, so it's the exact same problem.

6 We see the same problem -- this also comes up most
7 often involving marijuana. The definition was
8 changed in 2018, most states followed along with
9 the federal action in removing hemp from the
10 definition of marijuana.

11 So if somebody is sentenced today, and
12 we're looking at the definition today, the marijuana
13 offense from before 2018 is overbroad because it
14 included hemp back then, and they are off the hook.

15 The fact that I don't know of any prosecution
16 anywhere involving distribution simply of hemp, it
17 becomes irrelevant. That is -- it's a categorical
18 issue, to answer your question.

19 VICE CHAIR MURRAY: Do you agree with Ms.
20 Fite, do you think that it's also a categorical
21 approach issue, if you go with option one, whichever
22 the -- the time of sentencing is?

1 MR. ZAUZMER: Yes. What you're doing is,
2 you're saying categorically the offense as we look
3 at it now, at the time of sentencing, that offense
4 that they committed in 2009, is categorically
5 overbroad. At that time, the definition of
6 marijuana included hemp, maybe your offense
7 included hemp, even though we know for a fact it
8 didn't, and therefore, when we look at it today,
9 we can't rely on that earlier conviction.

10 That's why for both of these circuit
11 conflicts, I -- I don't think anybody's ever come
12 up with an example of where it really matters for
13 a -- a really material reason. What this is, is
14 just an effort to come up with slight changes in
15 definitions over the years in order to randomly
16 absolve people, and once again, it's going to vary
17 from state to state, and just produce these very
18 unfair results.

19 VICE CHAIR MURRAY: Ms. Fite, do you see
20 those same administrative problems with option one,
21 and then also in your submission, you just turned
22 to administrative problems in option two, like

1 people having to look at old codes.

2 And I guess I was less sure about that,
3 because it seemed to me that you would just look
4 at what the person was convicted of, and so, like,
5 if they were convicted of a controlled substance
6 offense back in the day, then presumably there was
7 a controlled substance offense back in the day.
8 So I'd love -- I'd love to hear your administrative
9 thoughts too.

10 MS. FITE: And I think --

11 MR. ZAUZMER: Oh, I'm sorry. Was that to
12 me or? Oh, I'm sorry.

13 MS. FITE: So, you know, I -- I can see
14 why -- why my friend is focusing on Ioflupane, I
15 think, a -- a -- sort of another very realistic
16 example is marijuana, which is being descheduled
17 in many states throughout the country. That is a
18 real difference that is happening and where folks
19 are deciding this is no longer appropriately
20 controlled, watching someone become a career
21 offender on the basis of a drug that is no longer
22 controlled, even in the state that arrested them

1 or that convicted them, that's a -- that's a real
2 problem that I think we can all understand.

3 I also want to say I disagree 100 percent
4 that we don't have hemp convictions. We don't
5 generally -- we don't -- law enforcement doesn't
6 generally test the percentage of THC in marijuana,
7 but there are certainly plenty of cases of people
8 involving, you know, sort of homegrown marijuana
9 and stuff that's not from -- being shipped over from
10 Mexico that is very likely, very likely hemp
11 quantities.

12 And I even -- I mean, this is an informal
13 conversation, so take this for what it's worth, but
14 in chatting with somebody in my own state, they were
15 like, oh, yeah, no, the stuff he had, we -- we're
16 pretty sure that the THC level is -- is minimal,
17 like he wasn't really a professional drug dealer.

18 These things happen. We wouldn't know about them.
19 We would have no way of knowing.

20 But I think the bigger issue that we're
21 talking about is -- is the -- the First Circuit split
22 on the state drugs. And I just want to say that

1 first of all, the fact that a lot of states have
2 been taken out of this system, like -- I mean,
3 correct me if I'm -- if I'm wrong, because I'm not
4 entirely sure on the facts, but I think that at this
5 point, most drug convictions in New York State just
6 do not count at all, and it's -- the sky has not
7 fallen.

8 So those state drug convictions have been
9 removed in some states, and the beat goes on, they
10 are applying the guidelines. I think it shows the
11 workability of a system where state drug priors are
12 removed, and judges are still able to apply career
13 offender guideline ranges where appropriate and
14 where not, then they move over to the 2D1.1 ranges
15 where they're going to get something that's more
16 closely aligned with the particulars of the case.

17 VICE CHAIR MURRAY: Do you have thoughts
18 at all on that second circuit split, on
19 administrability, on the two sides? I thought I
20 read your submission to say that going with the time
21 -- time the -- the crime was committed would be
22 difficult to administer, and that was surprising

1 to me, because in my mind, that's the easiest thing,
2 right, you see if the person has been convicted of
3 something, right, so clearly there was a crime at
4 that time. And in terms of time sentence, do you
5 see it the same way that Mr. Zauzmer does, where
6 it would effectively excise whole statutes based
7 on tail wagging the dog type stuff or no, do we have
8 anomalies there?

9 MS. FITE: I don't see -- I mean, so I don't
10 love that we're talking about a world in which we
11 use whatever the state -- whatever the state said,
12 but -- so in a world in which we -- we're relying
13 on the state definition, and we're just getting to
14 the second one, I think I agree with you there's
15 not serious administrative problems. I mean, there
16 would be some level of kind of comparing old statutes
17 against new statutes. I don't think it's too big.

18
19 I will say that adopting both of the --
20 of the department's permission -- positions, of kind
21 of whatever the state said and whatever it was back
22 then is really just a way of saying there is no

1 analysis at all. There's no discussion, because
2 we know it was prohibited at the time, they got
3 convicted of it. So like, if you have a conviction
4 and whatever state called it a controlled substance
5 offense back then, then it just counts.

6 It -- it is incredibly easy, and I wouldn't
7 be able to argue it's not the easiest thing, but
8 it's also the least fair thing, and it's a way that
9 we can guarantee that not only are we not bringing
10 the numbers of career offenders down in a world in
11 which we have plenty of districts giving well under
12 10 percent of within range guidelines, but we would
13 expect to see it go up, particularly where we have
14 large states that currently have drug offenses that
15 don't count, that change alone, we would see just
16 a huge boom in the number of career offender cases.

17
18 Also in the number of cases where judges
19 are having to either, you know, deviate dramatically
20 from the career offender guideline, or if they're
21 in a district that has a culture of following the
22 guidelines more closely, the -- the clients there

1 just lose and they get higher sentences.

2 CHAIR REEVES: I know Commissioner Wong
3 was attempting to ask a question.

4 COMMISSIONER WONG: Sorry, I know we're
5 over length, so just to return to the Second Circuit
6 conflict, and one of the arguments we've heard in
7 favor of option two is just following on the heels
8 that it follows naturally from the Supreme Court's
9 decision on -- on the ACCA issue in Brown.

10 So I wonder if you could each just hum a
11 couple bars here, Ms. Fite, on why a disconnect
12 between that scenario and this would not be
13 problematic or would still make sense, and then Mr.
14 Zauzmer on, why, maybe, if you did have a disconnect
15 that would create some logical absurdities, or felt
16 like it?

17 MS. FITE: Well, the Supreme Court in
18 Brown specifically reserved the idea of talking
19 about the guidelines because they understand the
20 guidelines have a different baseline rule than the
21 statutes do. I -- I don't know how many circuits
22 have looked at it since then, but I know at least

1 the Fifth Circuit has looked at it since then and
2 found that the rule in Brown doesn't apply because
3 the guidelines apply differently, and so I don't
4 really see that this would be challenging to apply
5 in any way. It is normal that there are statutory
6 recidivist provisions that simply do not work the
7 same way the career offender guideline does.

8 MR. ZAUZMER: I commend to the Commission
9 the -- the discussion in Brown, it -- it discussed
10 in detail why it's administrable, it's fair,
11 somebody committed a -- a serious drug offense, and
12 they are accountable for it. If they were
13 intentionally violating the narcotic statute at the
14 time. And the fact of the matter is, as I said,
15 if you look at their conduct, they also violated
16 the -- those statutes as they exist right now.

17 And we're simply -- by adopting option two,
18 as we urge the Commission to do, we're simply
19 removing an arbitrary way for somebody to escape
20 responsibility. I -- I hear my friend Ms. Fite
21 saying the same thing over and over again, we need
22 to reduce the number of people subject to this

1 guideline. It's not the way to do it by creating
2 inconsistent results.

3 It's not fair to say that nobody in New
4 York anymore qualifies under the -- the career
5 offender provision, and okay, fine, the sky hasn't
6 fallen. Well, the sky has fallen on everybody in
7 all the other states who doesn't get the benefit
8 of that. The sky falls on people in the state of
9 New York who are victims of criminal conduct and
10 see people being treated differently depending on
11 where they live. We just need to get this fair and
12 straight, and I think Brown expresses why this is
13 a very fair approach in assessing recidivism.

14 MS. FITE: Just to be clear, I mean, the
15 sky hasn't fallen, so we should make that the rule
16 for the whole country.

17 CHAIR REEVES: Thank you. Thank you so
18 much for your testimony.

19 MR. ZAUZMER: Thank you.

20 CHAIR REEVES: Our third group of
21 panelists will provide us with the perspectives of
22 two of our advisory groups on the proposed

1 amendments on Career Offender and Circuit
2 Conflicts. First, we will hear from Susan Walsh,
3 the Second Circuit representative to our
4 Practitioners Advisory Group. Ms. Walsh is a
5 partner at Vladeck, Raskin & Clark, PC in New York
6 City, where she represents individuals in
7 employment and criminal defense cases.

8 Second, we have the chair of our Probations
9 Officers Advisory group, Joshua Luria, who will be
10 testifying on our proposed offender amendment. Mr.
11 Luria is an Assistant Deputy Chief Probation Officer
12 in the Middle District of Florida.

13 Third, also from our Probation Officers
14 Advisory Group, we will hear from Melinda Nusbaum
15 on our proposed circuit conflicts amendment. Ms.
16 Nusbaum is a vice chair of our POAG and is currently
17 a supervisory probation officer in the Central
18 District of California.

19 Ms. Walsh, thank you for coming again.
20 We're ready to hear from you.

21 MS. WALSH: Thank you very much, Judge
22 Reeves, it's a pleasure for me to be here. Of

1 course, I'm here on behalf of the Practitioners
2 Advisory Group, but it's a personal privilege for
3 me to appear again and I'm here probably repeatedly
4 by geographic proximity, and I'm happy to report
5 that the sky was not falling when I left New York,
6 and I hope that it remains in place when I return.

7 The PAG poses eliminating the ever so
8 popular categorical approach for a number of
9 reasons, but should the Commission go forward with
10 the revisions to the career offender guideline we
11 support option one for both the crime of violence
12 and the controlled substance offenses.

13 Gratefully, I come from a deep bench of
14 practitioners who practice in the courts across the
15 country every day. The vast majority, if not all
16 of us, are on Criminal Justice Act panels, and we
17 speak from practical experience as lawyers and also
18 as how we see our clients and what we see happening
19 in the courtrooms every day.

20 For decades, the courts and the
21 commissions have recognized that the career
22 offender guideline is the harshest, the least

1 empirically grounded, and the most disparity
2 producing, generating excessive sentences, which
3 disproportionately impacts defendants of color.

4 And respectfully, the problem that there
5 is racial disparity beginning somewhere else before
6 the career offender guidelines come into play, is
7 not the answer from a policy perspective.

8 Compounding that kind of disparity that may take
9 place in the state courts around the country with
10 a draconian career offender guideline, is worse.

11 So, regardless of where the institutional
12 disparity takes place, as far as racial injustice
13 is concerned, the policy making function of this
14 court on the federal level, should address it and
15 not compound it.

16 Our position at the PAG is that the
17 proposal that expands its reach rather than narrows
18 it, should be viewed with extreme caution. There
19 is a comprehensive body of case law that's developed
20 guiding the application of the categorical
21 approach. Eliminating it would unwisely expand its
22 application -- the application of the guideline,

1 and it would lead to the type of litigation back
2 to square one that critics of the categorical
3 approach repeatedly decry.

4 Whatever the flaws in that approach, it
5 avoids re-litigation of old cases, which requires
6 litigants to locate stale evidence, refresh faded
7 recollections, chase down long-lost witnesses in
8 an effort to establish facts from long ago in a
9 previous conviction, and it unfairly, in the PAG's
10 estimation, places the burden on defendants to do
11 so.

12 The problem with the career offender --
13 with -- with the career offender guidelines, don't
14 stem from the approach, it stems from the guideline
15 itself. They're overly punitive. They lack
16 empirical justification, and as every stakeholder,
17 from judges, defenders, commission, and even the
18 DOJ, have recognized that.

19 The categorical approach also respects
20 constitutional boundaries, Supreme Court has
21 required elements-based methods for determining
22 predicate convictions, and rejected fact-based,

1 conduct-based and accusation-based alternatives.

2 In PAG's estimation, the Commission's
3 proposal flips the structure on its head and will
4 generate exactly the kind of daunting fact-finding
5 the category -- the categorical approach is designed
6 to prevent.

7 Ten years ago, the Commission urged
8 Congress to reform the career offender directive
9 because of the unjust sentences. This proposal
10 would move in the opposite direction in our
11 estimation. While we support simplifying the
12 guidelines when doing so, promotes fairness, but
13 jettisoning the categorical approach would do the
14 opposite in our estimation, it would make it more
15 -- more complex.

16 That said, should the Commission adopt one
17 of the proposals? The PAG's position is that option
18 one for the crime of violence is the best option.

19 It supports -- we support the permissions, proposed
20 exclusions and the limitations on the scope of the
21 crime of violence. Option one addresses the too
22 complicated to apply criticisms. It's easy for

1 judges, it's easier for practitioners, and it's
2 easier for probation officers to apply.

3 If the state has labeled a certain offense
4 as a crime that's included on option one's list,
5 the offense presumptively qualifies, no further
6 analysis is needed. Overbreadth issues will
7 inevitably arise, but they can be addressed by the
8 exclusions and the limitations.

9 Option two would complicate the analysis.

10 We think it's antithetical to the Commission's
11 stated desire to simplify. It would require
12 judges, practitioners, and probation officers to
13 determine how a crime is defined. It invites the
14 same kind of complaints regarding the categorical
15 approach that flooded the Commission's inbox over
16 the years. Determining how a state court is defined
17 is not all that different than asking someone to
18 list the elements, as such, the same problems with
19 interpreting confusing legal terms and potentially
20 having to utilize statutory interpretation to
21 define such terms are going to occur.

22 The only major difference is there is a

1 substantial body of case law under the categorical
2 approach upon which courts and practitioners do and
3 can rely. For example, under option two, domestic
4 violence is listed as an offense defined as
5 committing an act with intent to kill or injure a
6 spouse, intimate partner or dating partner.
7 Spouse, potentially easily defined, but what of
8 intimate partner, what constitutes intimate
9 partner?

10 And what of people who say every day in
11 courtrooms where I practice that we're common law.

12 Well, we don't have common law, actually, but
13 people don't know that. They think they're common
14 law. Does that count? How long do you have to be
15 intimate, how long does a partnership have to last,
16 does every state afford the same legal definition?

17 These are the types of things that we as the PAG
18 think option two invites litigation.

19 It's not simple, and will result to equal
20 or similar amount of litigation and take us back
21 to square one. For those reasons, if the Commission
22 is to retain -- decides not to retain the categorical

1 approach, we should -- we believe that option one
2 is the better alternative.

3 We also support option one as the best
4 alternative for the controlled substance offense.

5 The Commission's own data from 2024, 18 percent
6 of the defendants sentenced under the career
7 offender guidelines received within range regarding
8 the controlled substance. That speaks volumes
9 about how this career offender guideline is being
10 applied and how the judiciary views it.

11 We think that the Controlled Substances
12 Act should control in terms of the definition for
13 much the same reasons as we say, option one, it is
14 closest to the best fix, although it may remain
15 over-inclusive, nevertheless, the federal drug
16 prosecutions in our -- in our experience, generally
17 involve the most serious, the largest quantities
18 of drug offenders, not state offenders. Option one
19 is preferable because it's simplest, it -- it
20 underscores the priority of simplification, is
21 straightforward, easier to apply, and will avoid
22 unnecessary litigation.

1 I see commissioners, I'm out of time, so
2 forgive me for being long winded, it's my trademark,
3 but I'll end there and see if there are any questions
4 or anything that I can sneak in during the question
5 period. Thank you very much.

6 CHAIR REEVES: Thank you, Ms. Walsh.

7 Mr. Luria?

8 MR. LURIA: Thank you to the Commission
9 for the opportunity to provide POAG's perspective
10 on the proposed amendments related the Career
11 Offender Guidelines and Circuit Conflicts. We --
12 we recognize that they're related.

13 I'll address the career offender
14 amendments. We appreciate the Commission's
15 continued effort to address the complexity of the
16 career offender guidelines. POAG supports the
17 proposed amendments in option one, which replace
18 the categorical and modified categorical approach
19 with a designation-based approach. POAG believes
20 this approach will simplify the process and provide
21 more consistent outcomes. This approach can also
22 better capture the actual conduct of the defendant.

1
2 We encourage the Commission to expand the
3 list of the offenses that are included in this
4 approach. For example, conduct that constitutes
5 rape can have a variety of titles beyond rape or
6 sexual assault. States call similar conduct sexual
7 battery, criminal sexual penetration, or criminal
8 sexual conduct, to name just a few.

9 We also believe there are other offenses
10 that are not included that should be, such as
11 aggravated battery, carjacking, escape, aggravated
12 discharge of a firearm, domestic violence, and
13 others. We recognize that listing all the titles
14 of offenses that are crimes of violence would be
15 a huge undertaking and create an extremely long
16 list. A lengthy list does not reduce the simplicity
17 of the method.

18 The appendix that helps connect federal
19 offenses with the appropriate Chapter 2 reference
20 is extremely long but incredibly easy to use. The
21 definition "Has an element the use, attempted use
22 or threatened use of physical force against the

1 person of another" is 18 words and has created
2 thousands of hours of argument and tens of thousands
3 of pages of written assessments by probation
4 officers, attorneys, and judges. We believe that
5 even if the list were to swell to be many pages,
6 it would still be simpler in its application than
7 those 18 words creating certainty and clarity.

8 We recommend that you further clarify
9 designated to include that the words listed should
10 be part of the title, though do not necessarily need
11 to be the entire title. A person who has been
12 convicted of aggregated assault with a weapon should
13 not be considered outside of the crime of violent
14 -- violence definition, simply because the
15 designation also includes other attributes within
16 it, such as "with a weapon."

17 POAG does not support option two. We
18 believe this method removes some complexities, but
19 introduces new complexities. We observe that it
20 will operate more broadly than the current drafted
21 option one, the methodology of continuing to compare
22 elements and within this option, the means of

1 achieving the elements, adds more complexity and
2 would probably function like a conduct-based
3 approach would likely result in more litigation and
4 longer hearings.

5 We believe that the Commission could
6 simplify the approach in the proposed exclusions
7 section by discounting any crime of violence that
8 scores only one criminal history point. By
9 contrast, if supervised and unsupervised probation
10 is used, there are types of supervision that would
11 not qualify despite being similar to probation.
12 Additionally, it would also introduce challenging
13 -- challenges in obtaining records as sometimes the
14 records related to probation terms are unclear or
15 unavailable. Using a criminal history
16 consideration that is clear, as is already
17 established, will be clearer and more workable.

18 POAG is opposed to the bodily injury
19 limitation. This invites relitigating of
20 circumstances and mens rea considerations that are
21 from investigations that could have happened more
22 than a decade ago. The evidence in these cases may

1 be extremely hard to come by. If there were
2 victims, they may no longer be available --
3 available to meaningfully contribute to the
4 inquiry. POAG does support the use of a
5 recklessness standard or negligence standard
6 limitation, but we recommend that this limitation
7 be made based on the statute of conviction, rather
8 than a conduct -- than a conduct-based approach.

9 Again, it is common for convictions to be old and
10 evidence to become stale in passing years.

11 As for controlled substance offenses, POAG
12 was divided on what to recommend. I believe that
13 option two, in conjunction with the resolution of
14 the circuit conflicts, amendment towards including
15 both state and federal offenses, would resolve --
16 resolve a lot of the disagreements within our group.

17 POAG was split between sub options 2A and 2B which
18 are both workable and use the existing criminal
19 history scoring. We would not support the use of
20 a time served metric, as those records are
21 inconsistently available. With that, I turn it
22 over to Melinda.

1 CHAIR REEVES: Thank you.

2 Ms. Nusbaum?

3 MS. NUSBAUM: Thank you for the
4 opportunity to share POAG's perspective on the issue
5 of circuit conflicts. POAG supports defining a
6 controlled substance offense by reference to either
7 state or federal law, and we also support using a
8 time of original conviction approach. In our view,
9 these approaches simplify the analysis and promote
10 more consistent outcomes. We recognize that these
11 approaches may increase the number of qualifying
12 predicate offenses. We also acknowledge research
13 indicating that individuals who qualify as career
14 offenders solely because of prior controlled
15 substance convictions often receive downward
16 variances and may have comparatively lower
17 recidivism rates.

18 POAG believes, however, that these
19 concerns are better addressed through
20 sentence-based limitations within the career
21 offender guideline as previously discussed.
22 Rather than introducing more complexity,

1 uncertainty, and inconsistency into the definition
2 of controlled substance.

3 POAG supports option two, which defines
4 controlled substance to include any substance
5 controlled under either federal or state law. This
6 approach is simpler because it eliminates a complex
7 comparison between state and federal drug schedules
8 and lessens the need for divisibility.

9 In contrast, a federal only definition,
10 as proposed in option one, requires courts to
11 determine whether the state statute includes
12 substances covered by the Federal schedules,
13 including references to salts, isomers, and
14 analogs. Even relatively small differences
15 between state and federal definitions can require
16 specialized scientific and legal expertise beyond
17 what judges, attorneys, and probation officers
18 typically possess.

19 For example, California's methamphetamine
20 includes the term geometric isomers, which does not
21 appear on the federal schedule. That difference
22 led courts to conclude that, on its face, the statute

1 is overbroad, and those convictions did not qualify
2 as predicate offenses. The Ninth Circuit later
3 concluded, based on heard expert testimony, that
4 geometric isomers of methamphetamine do not exist,
5 and these convictions now qualify as predicate
6 offenses.

7 If a court determines that a state statute
8 is overbroad, it must then conduct a divisibility
9 analysis and determine whether each substance is
10 an alternative element which must be charged and
11 proven to a jury, making the statute divisible or
12 merely an alternative means of committing the same
13 offense, making the statute indivisible. That
14 determination is so complex that circuit courts have
15 certified these questions to state supreme courts
16 to confirm whether a substance is an element or a
17 means of committing an offense.

18 Even if the statute is divisible, outcomes
19 depend on availability and specificity reported in
20 Shepard documents, which vary across districts and
21 even within districts. Simply put, two defendants
22 who trafficked in the same drugs, even one covered

1 by the federal schedule, could face different
2 federal consequences based solely on statutory
3 drafting, record availability, and record
4 specificity.

5 Turning to the Second Circuit conflict,
6 POAG also supports option two, a time of conviction
7 approach, which provides a fixed historical
8 reference point. A time-of-sentence approach, as
9 proposed in option one, requires courts to compare
10 drug schedules across multiple time periods.
11 States may amend their drug schedules, so this
12 analysis depends on the date of the original
13 conviction, amendments to the state drug schedules,
14 and the date of the Federal sentencing. These dates
15 may be separated by several years, making the
16 analysis prone to error.

17 Federal drug schedules also change over
18 time. For example, industrial hemp was included
19 within the federal definition of marijuana, but
20 removed from that definition in 2018. Under a time
21 of sentence approach, a prior federal conviction
22 for marijuana, even one that does not involve hemp,

1 could be excluded as a qualifying offense on this
2 basis. This results in disparities based on when
3 a person committed the offense, rather than the
4 conduct itself. Thank you for your time.

5 CHAIR REEVES: Thank you. Any questions
6 of this panel? Judge Restrepo?

7 VICE CHAIR RESTREPO: Ms. Walsh, is -- do
8 I understand the practitioner's advisory group's
9 position to be, at bottom, leave well enough alone?

10 MS. WALSH: As far as the career offender
11 guideline --

12 VICE CHAIR RESTREPO: Yeah.

13 MS. WALSH: -- and not abandoning the
14 categorical approach --

15 VICE CHAIR RESTREPO: Right.

16 MS. WALSH: -- essentially, not
17 abandoning the categorical approach, yes. I mean,
18 we do think that there is much room for improvement
19 in the career offender guideline, and we do favor
20 option one over option two, were the Commission to
21 go in that direction, but we don't -- we don't think
22 it's a good guideline, that's where --

1 VICE CHAIR RESTREPO: Right, so you -- so
2 just don't do anything?

3 MS. WALSH: Well, I don't want to overstep
4 my mandate here, speaking on behalf of -- of the
5 group, but we would favor not abandoning the
6 categorical approach.

7 VICE CHAIR RESTREPO: Right. Ms.
8 Nusbaum, question for you in terms of tethering the
9 -- tethering the predicate to the time of the
10 original conviction, right, the predicate
11 conviction. Have you folks thought at all about,
12 for instance, the -- the -- the changing landscape
13 in marijuana laws, and what impact that might have,
14 so many states have come to the conclusion, in
15 essence, decriminalize a lot of these marijuana
16 laws, or you know, would -- so tethering the -- your
17 -- your current sentence to a predicate conviction
18 has really been vacated?

19 MS. NUSBAUM: Yes. So for instance, in
20 New Jersey, those marijuana convictions are now
21 considered expunged convictions, so they would not
22 garner any criminal history points, so they would

1 not be used as a predicate offense for career
2 offender purposes. Similarly, in -- when -- when
3 we're looking at just an application standpoint,
4 it's very difficult, because, for instance, in
5 California, in 2017, marijuana change -- the
6 definition of marijuana does -- excluded hemp, so
7 the federal statute or the federal schedule did not
8 change until 2018. So when you're looking at a
9 prior marijuana conviction, you're looking at the
10 2017 date, the 2018 date. So from an application
11 standpoint, it's very difficult when different
12 schedules have been changed.

13 CHAIR REEVES: VC Mate?

14 VICE CHAIR MATE: Just a quick follow-up
15 on that. Have all states that have changed their
16 marijuana laws also expunge those convictions such
17 that none of those priors are counting under our
18 criminal history rules.

19 MS. NUSBAUM: Not all of them have, but
20 I know new -- New Jersey has, and I think that that's
21 -- that's the state I know for sure that has expunged
22 it.

1 CHAIR REEVES: Ms. Walsh, I think you
2 indicated, or at least I've heard today, the career
3 offender sort of guideline that judges are
4 sentencing below those guidelines, and I guess,
5 about 80 percent of the cases, and suggest that
6 something needs to be recalibrated. If you, if --
7 if PAG has thought about how such a recalibration
8 could happen, could you -- could you share that with
9 --

10 MS. WALSH: Yes, well, like my very
11 well-respected colleagues, you know, we are still
12 grappling with the concepts ourselves. To be
13 clear, the -- the PAG's position is that it is a
14 flawed guideline, the career offender guideline,
15 and there's tremendous problems with it, and we
16 think that that is reflected in the statistics that
17 Your Honor just recounted. And because it is so
18 draconian, and because there are such geographic
19 disparities that also speak to the -- the conflicts
20 -- the circuit conflicts. We favor a time of
21 sentencing approach, and think that the controlled
22 substance act list, for example, for controlled

1 substances, is the prefer -- is the preferable
2 option in terms of how to deal with overbreadth on
3 the -- on the criminal substance portion of the
4 Career Offender Act, we think, as the PAG that
5 portion could be addressed separately from the
6 particularly more complex crime of violence.

7 There's no reason why the Commission has to
8 amend both portions at this -- at this stage, but
9 a simplification in the career offender guidelines
10 with respect to controlled substance and limiting
11 it to the -- the substances that are on the CSA would
12 be a simplified approach in keeping with the
13 Commission's thoughts, and also would in very --
14 in all likelihood, limit that -- that enormous
15 variance that we're seeing across the country in
16 terms of the application of the guideline to
17 controlled substance offenses in particular too.

18 CHAIR REEVES: Mr. Luria, I -- when you
19 were doing your opening, did I hear you say it's
20 -- it's difficult for you all to determine the time
21 served aspect of -- of -- of whether -- when -- so
22 tell me, I want to make sure I heard you correctly.

1 MR. LURIA: Certainly. The time served
2 component, I know it -- it appears in a variety of
3 spots within the -- the -- the amendment. Our
4 experience without those records is that it can be
5 very -- very difficult to obtain them in certain
6 jurisdictions, the amount of time that they've
7 actually served in custody. If we have trouble
8 getting those documents, it's very likely the
9 defendant will also have trouble getting those
10 documents, even though they're the ones who served
11 that time. And it just creates a disparity of
12 records, essentially, that's our biggest concern
13 with it, is that, firstly, it adds another record
14 that we're trying to get.

15 But also, we have a history of trying to
16 get those records already, because a lot of the --
17 the date of release is really important in terms
18 of those 4A1.1(a)'s. But also when you have
19 multiple offenses that they're sentenced under and
20 they have one release date, it's unclear necessarily
21 where -- where that release date was for count one
22 versus count three, and so that becomes another --

1 another metric that can be very difficult to try
2 to untangle. The system is not designed to really
3 clearly capture that well.

4 CHAIR REEVES: So -- so is the alternative
5 then, you suggest then, not time served, but time
6 imposed?

7 MR. LURIA: Time imposed. Certainly,
8 that's almost always clear, the judges is -- is by
9 the nature of sentencing, it's very clear in the
10 amount of time that they're imposing, those records
11 oftentimes are -- are available. So it also kind
12 of lends itself a little bit more towards a real
13 sense of the seriousness, when you have
14 circumstances where the amount of time the defendant
15 served, there can be a variety of reasons why
16 defendant might have been released earlier,
17 certainly related to -- to good conduct and other
18 things, but it's just unclear, you know, it's just
19 unclear in those circumstances.

20 CHAIR REEVES: I know in -- in
21 Mississippi, judges have a range of options and
22 serving people and some -- in sentencing people,

1 and sometimes that might come at a - a plea of --
2 a guilty plea. I've seen instances where a drug
3 trafficking offense for somebody decades ago
4 received a 20-year sentence, but with 19 years, 364
5 days suspended. And I'll assume then that that,
6 you know, if we're looking at career offender down
7 the road, it's still a substance, a crime that's
8 about a substance -- a substance offense, I guess.

9 But that would be easy to determine, right?

10 MR. LURIA: Absolutely, and -- and already
11 we -- we take into account suspended segments of
12 sentences, and removing them out. You know, part
13 of the reason why we like the criminal history
14 component of it, it's -- it's already well
15 established, we're very used to it. It -- it leans
16 heavily into the way the records already kept, that
17 suspended sentence, we would look at the amount of
18 time remaining on that sentence that -- that was
19 -- that was actually imposed in terms of absent the
20 -- the suspended portion.

21 CHAIR REEVES: Yes. Commissioner Wong?

22 COMMISSIONER WONG: Thank you. Mr.

1 Luria, POAG's supported the labels approach, option
2 one -- the labels approach, option one on crime of
3 violence. And one of the criticisms or concerns
4 we heard with that is that there can inject -- that
5 could inject some arbitrariness, because different
6 jurisdictions may use the same label to cover very
7 different offenses.

8 I'm just wondering, from POAG's
9 experience, whether you actually do have that sort
10 of cross district perspective, whether you
11 generally do -- do you think that degree, knowing
12 that there's probably going to be some arbitrariness
13 from any kind of approach here, is overstated,
14 because by and large, you do see most things being
15 covered under the same label or some label on this
16 list? And also, if you have any response to the
17 issue that's been raised, that certain states do
18 not have labels at all?

19 MR. LURIA: So, we definitely do see that
20 there's a broadness in -- in the way that these --
21 this conduct is -- is titled. Part of the reason
22 why we're in our articulation, we would see -- we'd

1 recommend a broader list, that broader list is not
2 intended to catch more conduct. It's actually to
3 better capture the conduct. So you could have pages
4 and pages of titles and not have substantially more
5 conduct. It's just how you -- how you capture that
6 conduct might look different. I think the -- the
7 rape example is a really good one in terms of that,
8 because there's such a varied way that that -- that
9 conduct is captured in jurisdictions.

10 And it's worth, I think, for the Commission
11 to look into that, to try and capture all those
12 different jurisdictional title differences. If
13 that makes the list swell to even pages, it's not
14 more conduct that's being captured, it's just a
15 broader list. It's still very easy. It's kind of
16 similar to that appendix kind of style, where, if
17 you guys have a list, and you say that, that is what
18 it is that makes it very easy in terms of -- of
19 application. I know that there's probably a lot
20 of work that might go into that, but it also saves
21 a lot of work, you know, down -- downstream here,
22 in terms of trying to figure out how to apply this

1 coming up with that list and -- and that designated
2 list, it -- it could become a much more easy
3 application.

4 CHAIR REEVES: Any other questions of this
5 panel? Okay, any last words from this panel? You
6 all get a few extra seconds. Thank you so very much
7 for your testimony. We appreciate your brief
8 comments as well. Thank you.

9 We are now hearing from members of our
10 other advisory groups, who will present their
11 perspectives on our proposed amendments on Career
12 Offender and Circuit Conflicts. First, we will
13 hear from Mr. David Safavian, who will provide us
14 with the perspectives of our newly formed Sentence
15 Impact Advisory Group. Mr. Safavian is a lawyer
16 and Chief Operating Officer of Unify.US, a
17 non-profit policy organization based here in
18 Washington, DC. In 2009 Mr. Safavian was sentenced
19 to 12 months imprisonment, and two years of
20 supervised release for obstruction of justice and
21 false statements. He was later pardoned in 2020.

22 Next, we have Jami Johnson of our Tribal

1 Issues Advisory Group. Ms. Johnson is an enrolled
2 member of the Choctaw Nation of Oklahoma. She is
3 an assistant Federal Public Defender for the
4 District of Arizona, where she represents indigent
5 defenders, primarily in Federal Criminal Appeals.

6 In rounding out this panel, we have Mr.
7 Christopher Quasebarth, who is the chair of our
8 Victims' Rights Advisory Group. Mr. Quasebarth is
9 a senior staff attorney for the Maryland Crime
10 Victims Resource Center. Thank you all for being
11 here. Mr. Safavian, I turn it over to you, sir.

12 MR. SAFAVIAN: Good morning, Chairman,
13 members of the Commission. Let me -- let me just
14 start real quick by saying thank you. I'm honored
15 to be part of the Sentence Impact Advisory
16 Commission, and I can't tell you the number of people
17 I've spoken with who have also been impacted, either
18 because members of their family or they themselves
19 have been incarcerated, and the number of people
20 who are grateful that you all have given a voice
21 to many of the voiceless are just -- it's
22 overwhelming whenever I go out.

1 Let me start with since -- since leaving
2 prison about 15 years ago, I've worked in
3 conservative politics, and a lot of my work deals
4 with policy at the federal and the state level,
5 specifically on criminal justice reform. I have
6 worked to bring transparency, public safety, public
7 confidence and fairness to the criminal justice
8 system from the -- the right side of the political
9 ledger. I was there when President Trump signed
10 the First Step Act, and I was proud to have a small
11 part in -- in the passage of that.

12 SIAG has written some pretty lengthy
13 comments for your consideration that go beyond my
14 oral testimony. I don't want to repeat what's
15 already in the record. But I do want to focus on
16 the career offender enhancement in 4B1.1. Let me
17 -- let me begin with, every parent understands --
18 I'm the father of two daughters, understands the
19 concept of graduated punishment. Lesser
20 discipline for first time mistakes with more serious
21 action for repeated conduct, and -- and that, I
22 think, is what the current offender enhancement is

1 trying to get at.

2 However, for 4B1.1 to really have effect
3 from the perspective of -- of a layperson, it's got
4 to be somehow understandable, and unfortunately,
5 in its current form, it's not. The average
6 layperson the career offender enhancement is not
7 much more than, and please don't take this the wrong
8 way, the equivalent of a Magic 8 Ball. We shake
9 it and see what comes up, and, you know, you end
10 up with either five or 15 or a lifetime hit. And
11 it's inconsistently applied.

12 From our perspective I think the main
13 problem with 4.0 -- or 4B1.1 is that the state
14 conviction is the state convictions which trigger
15 the enhancements. Unfortunately, states treat
16 crimes of violence and controlled substances in so
17 many different ways, and quite frankly, that's just
18 as the founders expected, right, they expected the
19 states to be the laboratories of liberty.

20 So, for example, breaking into a vending
21 machine in Oklahoma, where I do a lot of work, is
22 considered a burglary. It's not in Virginia, but

1 breaking into a boat the Old Dominion is, and it's
2 considered a serious felony as well. Possessing
3 marijuana in Idaho, of any amount, is a controlled
4 substance offense, whereas in Oregon, you can go
5 a few miles across the state line and you can --
6 you can have as much as eight ounces in your house.

7 That's a lot of pot, by the way.

8 So, how do we ensure that career offenders
9 and the enhancement is applied consistently across
10 jurisdictions in a way that's kind of
11 understandable? I'm -- I'm not saying that we need
12 to dumb down the guidelines to make it easy for
13 everybody to understand, but there has to be some
14 rationality at least apparent to the layperson.
15 And unfortunately, I think I disagree with -- with
16 -- partially disagree with the Practitioners
17 Advisory Group and Ms. Walsh. Our view is that the
18 categorical approach does lead to some arbitrary
19 results, either understating or overstating the
20 need for sentence enhancement. As such, we on the
21 SIAG urge the Commission to abandon it altogether.

22 I do want to be respectful of the

1 Commission's time and rely on those written
2 comments, but suffice to say, for violent crimes,
3 we preferred option two, limiting inclusion of state
4 statutes to those which share the common elements
5 of specific federal laws. And with respect to
6 controlled substances, we strongly support
7 eliminating references to state law altogether and
8 defining predicate offenses for the purposes of
9 4B1.2.

10 I will say that in our discussion, SIAG
11 contemplated opposing changes to career -- career
12 offender amendments altogether. Our concern, like
13 that of the practitioners, is that the amendments
14 might undercut exceptions or limitations or the
15 substantial case law that's involved in meaningful
16 constraints for purposes of 4B1.1. Efforts to
17 promote uniformity and clarity are important, but
18 they shouldn't result in definitional expansions
19 that increase the number of people subject to this
20 enhancement. We're really concerned about that.

21 Safeguards to ensure principles of
22 proportionality must be preserved, and circuit

1 conflicts have to be resolved, obviously, in a
2 manner that promotes national consistency. But our
3 view is that they should be resolved in a way that
4 narrows, not expands the reach of the enhancements.

5 Uniformity should not function as a tool for --
6 uniformity which should function as a tool for
7 fairness, shouldn't be a mechanism for amplifying
8 sentence severity.

9 With that, I will conclude my remarks and
10 turn it over to my colleague.

11 CHAIR REEVES: Thank you. Ms. Johnson?

12 MS. JOHNSON: Thank you, Chair Reeves, and
13 thank you to the Commission for inviting me to share
14 TIAG's thoughts about the proposed career offender
15 amendment.

16 As I hope that -- that TIAG's written
17 submission makes clear, when you're talking about
18 enlarging, particularly the federal definition of
19 crimes of violence, what you were talking about is
20 enlarging the number of Indians on Indian
21 reservations who are going to be subject to the
22 career offender advancement -- of enhancement.

1 Prosecution for federal crimes of violence are
2 hugely disproportionately concentrated in Indian
3 Country. TIAG understands and appreciates the
4 criticism of the categorical approach, at the same
5 time, these complaints appear to be less urgent in
6 the context of federal statutes for a number of
7 reasons.

8 First, the criticism of the categorical
9 approach that we've all heard, arbitrary, random,
10 all of the words that we've heard this morning,
11 usually involves complaints that states because
12 they are free to define crimes in any way that they
13 choose don't define their crimes in ways that line
14 up perfectly with federal statutes. And so there
15 are these outliers that cause whole categories of
16 behavior to fall outside the -- the definition.
17 This isn't true when the statute of conviction is
18 a federal crime to begin with.

19 Many federal crimes are already crimes of
20 violence. Second degree murder, voluntary
21 manslaughter, assault with a dangerous weapon,
22 assault with intent to commit murder, strangulation

1 of a dating partner, all three of the robbery
2 offenses, bank robbery, Hobbs Act robbery, federal
3 enclave robbery, these are already crimes of
4 violence, and these are things that we see
5 prosecuted all the time in Indian country.

6 The only statutes on the list that the
7 Commission has proposed that actually involve --
8 that are not crimes of violence, are currently not
9 held to be crimes of violence, because they involve,
10 what I would agree is rarely prosecuted conduct.

11 I understand the Southern District of New York has
12 recently held that first degree murder is not a crime
13 of violence, first degree murder is also a mandatory
14 life imprisonment offense. We're not seeing people
15 with priors for first degree murder. Aggravated
16 sexual abuse is also not currently a crime of
17 violence. The lowest offense level you can get for
18 aggravated sexual abuse is 34, people are not
19 getting out of prison and committing multiples of
20 -- of this particular crime.

21 And second, unlike with state laws,
22 Congress is entirely in control of the scope of the

1 wording of federal laws. If Congress was
2 frustrated that 18 U.S.C. 11 -- 113(a)(6), which
3 is assault resulting in serious bodily injury, was
4 not a crime of violence, because it can be and often
5 -- very often is committed recklessly, Congress
6 could very easily bifurcate that statute, as it has
7 done with the manslaughter statute, and have an
8 intentional assault resulting in serious bodily
9 injury subsection, and a reckless assault resulting
10 in serious bodily injury subsection. And the
11 result would be that the intentional assault
12 resulting in serious bodily injury would be crime
13 of violence, and the reckless one would not be.

14 So, the Commission's proposal with respect
15 to the federal statutes, is a proposal to act where
16 Congress has not. And the proposal we are concerned
17 will have the effect -- effect of shifting the burden
18 of avoiding the harsh penalties of the career
19 offender guidelines to communities that can least
20 afford to bear that burden.

21 To give the example of the Navajo Nation,
22 the Navajo Nation is home to 170,000 people. It

1 is three times the size of New Jersey. It has 18
2 grocery stores. About a third of the people on the
3 reservation lack access to electricity or running
4 water, this is not because they didn't pay their
5 bill and their -- their services got turned off.

6 There are no wires or pipes coming to their houses.

7 About half speak a language other than English at
8 home, and about 10 percent do not speak English or
9 do not speak it very well. Investigation is
10 difficult and resource intensive. Most places on
11 the reservation are four to six hours away from --
12 from Phoenix, and investigations often require
13 multiple trips to speak with witnesses to gain
14 trust.

15 So, when we're looking at prior assaults
16 on the Navajo reservation and trying to figure out
17 whether this was intentional or reckless conduct,
18 that is an extremely resource-intensive discussion,
19 and it's resource-intensive also for the district
20 courts that are located in this jurisdiction.
21 We're relatively lucky in Arizona, we have the
22 border. Phoenix is a large city, so we have a lot

1 of resources. We have a lot of judges, we have
2 probation officers, we have a AUSAs and federal
3 defenders. The district of South Dakota, which has
4 huge numbers of Indian cases, it's very much what
5 is done in that district. It has three active
6 district judges. Montana has three active district
7 judges. North Dakota has two, and the Eastern
8 District of Oklahoma, the entirety of which,
9 including the courthouse itself, is located on a
10 reservation, has one and a half, it shares a judge
11 with the Northern District of Oklahoma. They have
12 lower numbers of probation officers, lower numbers
13 of AUSAs, and lower numbers of federal defenders.

14 So, this proposal, which we are very
15 concerned is going to require intensive
16 investigation of old offenses, which burdens
17 defendants, also burdens victims, who may have to
18 come to court and testify about a crime that happened
19 15 years ago, is going to really disproportionately
20 fall in these very rural areas, and they're going
21 to be hard to do, and they are going to place lots
22 of burdens on defendants in the -- in the court.

1 I -- you know, I heard the -- the criticism
2 of the Criminal Law Committee this morning that the
3 burden needs to be on the defendant to avoid
4 frivolous litigation. I was hesitant to disagree
5 with the -- with a federal judge, but you know, 3E1.1
6 requires acceptance of responsibility for the
7 offense, which I have always interpreted to mean
8 the present offense. I have certainly never in my
9 practice been threatened with loss of acceptance
10 of responsibility for litigation over past
11 offenses, which we do very regularly in Arizona,
12 primarily because of all of our immigration cases.

13 I think that responsible practice in all of these
14 cases, even if it doesn't result in litigation, is
15 going to require significant investigation, and
16 placing that burden on defendants in tribal
17 communities is -- is extremely burdensome.

18 I also want to speak briefly, there's been
19 a lot of talk about the state prior offenses, and
20 I'm going to leave that I can certainly answer if
21 -- if the Commission has questions. But I want to
22 talk about the drug priors briefly. I understand

1 the -- the congressional directive, and I understand
2 the -- the tensions there, TIAG nevertheless
3 supports a -- a time-served approach, precisely
4 because all of the drug crimes on the reservation
5 are going to be federal.

6 And so you do see on reservations
7 prosecutions for very minor drug offenses all the
8 time, because the feds -- the federal government,
9 is who has jurisdiction in those cases. And so an
10 elimination of state priors is not going to do as
11 much to ameliorate some of the really harsh
12 penalties that we see when those individuals being
13 affected are -- are Indians in Indian country, so
14 thank you, and I -- I welcome your questions.

15 CHAIR REEVES: Thank you, Ms. Johnson.

16 Mr. Quasebarth?

17 MR. QUASEBARTH: Thank you, Commissioner,
18 Chair Reeves, good morning. You all have taken on
19 some difficult tasks for yourselves, and the
20 Victims' Rights Advisory Group, thank you very much.
21 Appreciate your listening to how victims may be
22 affected by your proposed guideline amendments --

1 amendments.

2 When we talk of career offenders, we're
3 speaking of recidivist violent or drug trafficking
4 criminals, and we know that there are victims.
5 Congress directs the Commission shall assure that
6 the guidelines specify a sentence to a term of --
7 of imprisonment at or near the maximum term
8 authorized for this category of defendants.

9 For fiscal year, 2023 your victim research
10 shows the following. Of nearly 6700 victims in
11 federal cases involving force or threat against the
12 person, death, 725 victims, and bodily injury 2334,
13 were the most common harms identified. Of over
14 36,000 victims in federal sex offenses, information
15 was collected on 17,000 of those victims, 98 percent
16 of those victims are juveniles. In federal drug
17 offenses, of almost 1600 victims' deaths, 511
18 victims and bodily injury, 560 were the most common
19 harms, and 23 percent of the victims in drug offenses
20 were juveniles.

21 Meanwhile, your 2017 research shows
22 recidivist rates for violent offenders at 69

1 percent, drug trafficking offenders at 54.4
2 percent, and mixed violent and drug trafficking
3 offenders at 69.4 percent. That same 2017 research
4 reports that career offenders often receive
5 sentences below the guidelines range, especially
6 for drug trafficking only. And drug trafficking
7 only offenders are sentenced less severely than
8 other career offenders. Amendments to reduce who
9 qualifies as a career offender does not provide fair
10 and just outcomes for victims, will not protect
11 public safety, and is contrary to Congress --
12 congressional intent.

13 As to the crimes of violence, VRAG supports
14 the elimination of the categorical approach. The
15 fines proposed option one, will not properly cover
16 the varying breadth of state statutory language,
17 so we support with modifications the proposed option
18 two definition with each of its bracketed inclusions
19 and subject to broader additions as may be suggested
20 by the Department of Justice.

21 We ask you to reject proposed subparagraph
22 sections 4B1.2(a)(3), which are the exclusions, and

1 section 4A, B, and C, the limit -- the limitations,
2 each disqualify violent crimes not because of the
3 act committed, but because of the sentence imposed,
4 or whether there was or was intended to be bodily
5 harm, or whether the defendant was reckless or
6 negligent.

7 We think that these disqualifications
8 diminish the violent harm that was committed on the
9 victim. Some victims may be unable to freely speak
10 of that harm, so there's not a good record of what
11 that harm is. Some may be pressured to ask for a
12 lesser sentence depending on the type of offense,
13 especially in sex crimes. Some crimes of violence,
14 including sexual offenses, firearms offenses,
15 kidnapping, and human trafficking offenses, may not
16 include any specific type of bodily injury, yet they
17 are crimes of violence. Litigation over bodily
18 injury may cause further invasion of victims,
19 medical, and personal privacy and further victim
20 trauma.

21 I want to speak about the circuit
22 conflicts, because that kind of ties into the

1 controlled substance of career offenders as well.

2 With circuit conflicts, we strongly recommend that
3 the Commission adopt option two for each of the
4 circuit conflicts. Option two in each proposal
5 adopts the approach of the majority of circuits as
6 to the first conflict, the use of prior state
7 controlled substance offenses, those majority
8 opinions signify they're based on the plain text
9 of guidelines section 4B1.2(b), so they're relying
10 on the text of the guidelines that already exist.

11 As to the second conflict, which version
12 of the drug schedule to apply, the majority is
13 looking backward approach as to whether the
14 controlled substance was controlled at the time of
15 the prior conviction, rather than at the time of
16 the current sentencing, is also blank based on the
17 plain language of the guidelines sections 4B1.1(a)
18 and 4B1.2(c). So it just seems to make more logical
19 sense to follow that majority.

20 Going back to controlled substances in
21 career offenders, we strongly recommend that the
22 Commission not adopt option one, which is just

1 focusing on the federal offenses for the reasons
2 we just announced. We think it should be broader
3 and include the state offenses.

4 Additionally, based on your data briefing,
5 option one seems to infer or imply that 75 percent
6 of the recidivist career offenders sentenced in
7 fiscal year 2024 would have their sentences reduced
8 if state-controlled substances were eliminated from
9 consideration. That seems to us to be contrary to
10 the intention of Congress for the guidelines to
11 punish and deter recidivist criminal conduct.

12 The VRAG recommends the very first part
13 of option two which reorders section 4B1.2(b)(1),
14 but leaves intact -- that -- intact that controlled
15 substances include both federal and state offenses.

16 VRAG strongly recommends that you do not adopt
17 either sub option 2(a), sub option 2(b) or sub option
18 2(c) each of which amend 4B1.2(c) to disqualify
19 recidivist drug trafficking offenders. Again, not
20 based on their conduct, but we think unreasonably
21 based on a minimum sentence length requirement for
22 the prior conviction. We have strong concerns that

1 the adoption of those sub options would be contrary
2 to the intention of Congress for the guidelines to
3 punish anti-terror recidivist criminal conduct.

4 Be happy to take any of your questions. Thank you
5 very much.

6 CHAIR REEVES: Thank you, Mr. Quasebarth.

7 Any questions for this -- Judge -- Judge Restrepo,
8 please.

9 VICE CHAIR RESTREPO: Mr. Safavian, I'm
10 sorry. Is that -- am I pronouncing that right?

11 MR. SAFAVIAN: Yes, sir.

12 VICE CHAIR RESTREPO: Sir, I'm curious as
13 to why your group opted for option two in terms of
14 the burden shifting piece. So have you -- have you
15 -- can you walk me through the -- the rational of
16 the burden shifting and -- and Ms. Johnson explains
17 some of the problems she sees from the perspective
18 of her clients in terms of this burden shifting,
19 in terms of losing points for acceptance or getting
20 points for obstruction. Could you just walk me
21 through the --

22 MR. SAFAVIAN: Yeah, we -- I will tell you

1 it was a close call in our -- in our discussion.

2 But what -- what we found in option two, we like
3 the fact that the guardrails, particularly the mens
4 rea guardrail and the -- the limitation for
5 negligent and reckless conduct, that was a strong
6 selling point for -- for our advisory group, and
7 as we thought more about it, the -- the application
8 of option two seemed to be a little more -- what's
9 the right word?

10 I guess, for -- for us, it covered -- to
11 be honest, those circumstances where the status quo
12 under applied and over applied it -- it -- I don't
13 -- I'm going to -- I'm going to butcher this, but
14 quite frankly, it allowed for the flexibility to
15 address what the Commission and what the guideline
16 was willing to get at, which is people who either
17 aren't public safety threats and the -- and the
18 guideline is over broad, or people, quite frankly,
19 that may still be public safety threats that the
20 guideline is under broad. And so as we look through
21 that, we thought that option two covered both of
22 those bases a little bit better while maintaining

1 those guidelines or the -- the -- the limitations.

2 CHAIR REEVES: Thank you. Commissioner
3 Meisler.

4 COMMISSIONER MEISLER: Just one discrete
5 question, I think, for -- for Ms. Johnson. I'm
6 wondering, we just heard from Mr. Luria and the --
7 the previous panel about some of the difficulties
8 that the probation officer have in gathering, I
9 guess, state kind of state prison records, taking
10 by your nodding you -- you also share that.

11 And so I'm wondering if your preference
12 for option, I guess, 2(c) on controlled substances
13 offenses stems from the fact you mentioned before
14 that your -- your clients are primarily tribal
15 defendants, obviously tribal commissions don't
16 count under the criminal history of rules and then
17 you're seeing federal drug offenses as the primary
18 controlled substance offenses there. Does that
19 explain why you have more confidence that those
20 records would be obtainable, to your clients?

21 MS. JOHNSON: No, I -- I think that
22 primarily what -- what was motivating our choice

1 of -- of -- 2(c) is that, so obviously, tribal
2 defendants can leave the reservations, and very
3 frequently do, especially a lot of smaller
4 reservations that are located near cities in
5 surrounding states. We do see tribal defendants,
6 people who live on reservations, who have state
7 priors, and particularly state drug priors, they
8 leave the reservations to -- to do whatever they're
9 going to do.

10 And that a lot of the states in which
11 reservations are located, I think Utah and Idaho
12 are ones in particular in my experience, where
13 we will see outside -- it seems like Chair Reeves
14 has had some experience with Mississippi, where,
15 you know, we see somebody who -- who received a
16 12-year sentence, and, you know, I've had the
17 experience of having somebody sit in front of me
18 and I said, well, two years ago, you were sentenced
19 to 12 years like, are you on escape status, like,
20 what's going on? And they're like, "No, I took a
21 couple of classes, and they let me out after 18
22 months."

1 And I think that, you know, I think there
2 are political pressures involved in that. I think
3 that there are certain states where politicians like
4 to pass laws with very harsh sentences, because it's
5 popular with voters. At the same time, people don't
6 want to pay for the amount of prisons that it would
7 take to actually incarcerate people for that long,
8 and so the sort of compromise that gets worked out
9 that very long sentences are imposed and rather
10 short sentences are actually served.

11 And I understand the difficulties with
12 documents, I think particularly when people are
13 serving sentences for multiple counts, but I feel
14 like there has to be some way to limit, to
15 acknowledge the person who served 18 months of a
16 -- of a 20-year sentence.

17 And so that is why we were with option C,
18 and a lot of these -- well, I didn't do a 50-state
19 survey, but I will say that this is a very -- a
20 phenomenon that we see in a lot of the states that
21 kind of surround reservations.

22 CHAIR REEVES: I want to ask -- oh, I'm

1 sorry you -- no -- no, because you had your hand
2 up after Ms. Meisler, that's right. Go ahead.

3 VICE CHAIR MATE: Right.

4 CHAIR REEVES: No, no. Go ahead. I'm
5 sorry.

6 VICE CHAIR MATE: Thank you. And thank
7 all of you for being here today, we appreciate it.

8 Ms. Johnson, I had a question for you on kind of
9 the impact of the crime of violence proposed
10 changes, and you raised concerns about the impact,
11 specifically in Indian country. Is there
12 additional data we should be gathering and
13 considering, whether it's specific to Indian
14 Country or otherwise, and kind of listening to Judge
15 Chang earlier today about -- that there may be just
16 some things we can't get data on to and for that
17 would be really difficult.

18 Are there other sorts of things we should
19 be looking at to fully sort of understand or get
20 our arms around the impact of the changes here,
21 whether it's qualitative or some sort of sampling,
22 or I was just curious whether you had any thoughts

1 on those.

2 MS. JOHNSON: Sure. Well, TIAG has asked
3 for many years for Native Americans to be broken
4 out as a separate category within the sentencing
5 commission data, which they currently are not. So,
6 usually in the -- the Commission's data reports that
7 come out, we can, as a committee, only detect
8 potentially disproportionate impacts on Native
9 Americans when we see that the other group has --
10 has gotten very large, which, of course, other also
11 includes mixed race individuals, includes Native
12 Americans living off of reservations.

13 So -- but when that other number starts
14 going up, that's when we start having concerns, and
15 I -- I think that breaking out Native Americans is
16 a separate category. And observing when the number
17 of Native Americans impacted goes up would be a good
18 first start. And the data report for last year's
19 career offender proposal did suggest that there was
20 going to be a dramatic increase, I think, up to like,
21 6 percent of the people who would be affected. I
22 don't remember the number precisely, but it's --

1 it's available, would be other which we took as
2 largely a stand in for -- for Native American.

3 This year's data report was much more
4 limited. And I don't -- and I'm not a data analyst,
5 I don't know quite the reason for that. I don't
6 know if it was a time thing or just lack of available
7 data, but I -- I do think that separately identifying
8 Native Americans as a category in the Commission's
9 data would be a good and important first step for
10 any kind of -- of analysis that we done.

11 CHAIR REEVES: Mr. Safavian, I -- I did
12 note from you all submissions -- your submission,
13 but for SIAG, you said, uniformity, I believe should
14 function as a tool for fairness, and we were sort
15 of talking with that, I think, with DOJ or Mr.
16 Zauzmer earlier. But you say uniformity should
17 function as a tool for fairness, not as a mechanism
18 for amplifying sentencing severity. Sometimes I
19 believe those goals of uniformity and fairness might
20 be at a tension point. Is -- is there any way you
21 can reduce the tension? You suggested that tension
22 between the two can be reduced, if there is any

1 tension between the two?

2 MR. SAFAVIAN: Chairman, I'd have -- I'd
3 have to think that through a little bit, but yeah,
4 I -- I do fall back, and if I understand your
5 question, right, I fall back on, yeah, there -- you
6 always have the opportunity for downward departure
7 or -- or going below the guideline range. My
8 experience, and maybe I'm just a little cynical,
9 you know, my -- my grandfather, who raised me, always
10 said, you hope for the best, but you plan for the
11 worst, and a system that the -- the norm opens up
12 the door to over punishment, absent a special --
13 absent a downward departure, is less -- less
14 favorable from our perspective, than something that
15 allows for that degree of leniency and reflection
16 of -- of what actually happened to trigger that
17 offense.

18 I understand the tension between fairness
19 and uniform application, but we don't want -- in
20 our -- in our view, every crime is unique, because
21 every victim and every offender is unique, and we
22 don't want to go down the road of a one size fits

1 all sentencing solution under the rubric of
2 uniformity, we would rather have you know, you all
3 who wear the black robes and get paid to judge to
4 make those determinations with as much flexibility
5 as possible, if that makes sense and answers your
6 question.

7 CHAIR REEVES: Okay, thank you. Thank
8 you. The other question I have specifically for
9 -- for -- for you in particular -- not you in
10 particular --

11 MR. SAFAVIAN: Yeah.

12 CHAIR REEVES: -- but for your -- for your
13 working group. You all -- that working group sort
14 of focuses in on persons and family members who have
15 sort of suffered sentences that the courts have
16 imposed. Could you speak in terms of how our --
17 how the career offender guideline itself, how --
18 how you all view that, because those sentences end
19 up being, I think, on average, 200 and some months,
20 or 180 some months, particularly if they have --
21 if the judges don't vary downward, 10 years or more
22 in prison. Could you tell us about that?

1 MR. SAFAVIAN: Yeah, the impact, I -- I'm
2 a little torn here, because people subject to career
3 offender, yes, they're mothers, fathers, brothers,
4 sisters, sons and daughters, who can end up being
5 on a -- at the end of -- or subject to a very, very
6 long sentence. And in that circumstance, we want
7 to make sure that the sentence and the enhancement
8 in particular really fit the conduct, right. This
9 is why our perspective was, if we're going to err
10 on the side -- and on one side or the other, we want
11 to err on the side of giving more flexibility a
12 little and -- and narrowing the scope of career
13 offender.

14 The flip side of that is I'm also a -- a
15 father and a husband, and we also see people who
16 are -- who are truly victimized by -- by individuals.

17 And we want to -- I -- I don't want to say, make
18 sure, but you all need to have the flexibility to
19 mete out the sentence that is appropriate given that
20 specific conduct. When we talked about this as a
21 group, I think the group as a whole wanted to --
22 I mean, if we could, you know, riffing off of --

1 off of the Practitioners Advisory Group, we'd love
2 to see it, the career offender, eliminated
3 altogether, because it's problematic for so many
4 reasons that Ms. Walsh said.

5 That said, that wasn't within the scope
6 of what we were asked to comment on but, I -- I will
7 tell you that from our perspective, the career
8 offender enhancement is such a big stick to wield,
9 and it is wielded in such a way that people don't
10 quite understand it, and it undermines our, you
11 know, the family members ability to understand why
12 a father is going away for 200 months, and so we
13 -- we tried to calibrate our comments to reflect
14 what the question you had asked which is, which is
15 the better option, but I will tell you that, from
16 the SIAG perspective, we -- we would love to see
17 it done away with altogether, and giving judges the
18 ability to go down or go up based on the specific
19 conduct involved, and you know, use prior
20 convictions as -- as a factor, but not necessarily
21 in -- in such a mathematical rubric like you've got
22 right now.

1 CHAIR REEVES: Thank you. Any further
2 questions? I have one for Mr. Quasebarth. Then
3 obviously you -- trying to balance the approaches
4 that we ought to view, and I think VRAG is suggesting
5 that maybe sort of expand the both -- the crimes
6 of violence and maybe even drug substances offenses,
7 even though judges currently are -- are mostly, you
8 know, varying downward from the career offender
9 guidelines, could you help me figure out how we can
10 calibrate the -- the -- the two, that is relevancy,
11 you know, with respect to the judge's role and
12 relevancy of what we're doing as far as maintaining
13 the guideline level and what judges are doing on
14 the ground. Is -- is there any advice from a
15 victim's perspective that you can give?

16 MR. QUASEBARTH: Right, I don't think you
17 know we're saying, punish people more, you know,
18 and victims have a wide variety of -- of needs they
19 want. But when we're looking at career offenders,
20 we're looking at people who've been here more than
21 once, and in these limited categories, crimes of
22 violence and controlled substances, both of which

1 directly affect victims.

2 I think judges have discretion right now,
3 and -- and I think your data shows that that -- they
4 drop below the guidelines. I think as a group, we
5 would have concern that if you were to lower the
6 guidelines, that we're still going to see reductions
7 for judges, because they have that -- that
8 flexibility, and judges should have that
9 flexibility to look at -- on a case-by-case basis,
10 the defendant that's in front of them, but also the
11 harm that was committed against the victims that
12 are in front of them as well.

13 So I, you know, we appreciate the
14 challenges that you all are taking on to try to find
15 that particular balance, but I -- I -- I think there
16 is a way for you to do that, working with these
17 options you have, and you've had, you know, a lot
18 of -- a lot of good discussion here, even, you know,
19 from the Probation Officers Advisory Group, which
20 we often align directly with, and we have some
21 differences today in the way that we were looking
22 at things. So I -- I -- I -- I think it can happen,

1 specifically how you do it, I -- I don't know, other
2 than what we've told you already.

3 CHAIR REEVES: One of the salient points
4 that I saw in the defenders, and I didn't get a chance
5 to ask them about it, is a footnote they had, in
6 their submission is where they number of court
7 cases, I believe, where judges lamented the fact
8 that a defendant might have committed the controlled
9 substance offense at 18 or 19 years old, and here
10 we are a third offense, 30 years -- 20 years later,
11 basically, and the controlled substance offense
12 being the trigger for the career offender guideline
13 later on, you know, somebody who's now 45, 50 years
14 old, and -- and maybe -- and the substance -- the
15 controlled substance offense happened at the time
16 when they were 18 or 19, under whatever reasons,
17 in that triggering the career offender, and now that
18 person might be facing as much as 20 years or for
19 some third crime.

20 How can you help us deal with that? And
21 I'm looking to all three of you with respect to that
22 answer, if you have any comment on it. I know you,

1 I'm pretty sure you read that comment. Yeah. Ms.
2 Johnson, yes?

3 MS. JOHNSON: To the extent that it's
4 possible under the congressional directive, I think
5 eliminating priors that no longer score for criminal
6 history would be a big step in the right direction,
7 as is done in some of the other guidelines that are
8 -- that are present in the book. Because you're
9 right. Somebody -- somebody who -- who did a couple
10 of things once, when they were 18, is now 45 is hardly
11 making their career as being a criminal.

12 They've likely done a lot of things in
13 between and this is something that we see a lot in
14 Indian Country, because a lot of crimes are
15 motivated by substance use, and people -- people
16 do things, they straighten out their lives, and
17 relapse happens, and they may have had 20 years of
18 -- of great conduct in between, and have a personal
19 family tragedy, so I -- I think that to the extent
20 that it's possible with congressional directive,
21 I -- I have not discussed this with TIAG, but I
22 suspect that we would be just based on the tenor

1 of our conversation, in favor of not counting
2 offenses that no longer score because they're too
3 old.

4 MR. SAFAVIAN: Chairman, I would -- I --
5 I don't think that's a bad -- bad play. I would
6 think it through in terms of putting some temporal
7 limitations on when you can count, when you can't,
8 particularly in the drug offense category, I think
9 that may be a little more pertinent. I'm thinking,
10 actually, to a case from your home state where a
11 woman was pulled over by a sheriff, they found a
12 roach clip in her car, and she ended up doing a
13 65-year hit under state law because of their repeat
14 offender statute there.

15 And it seems to me that if, particularly
16 in the drug offender case category of cases, if you
17 have a, you know, it's going to be an arbitrary
18 period, but a period of time between offenses or
19 offenses over a very elongated period of time. If
20 -- if -- there is a way to discriminate amongst
21 those, or to knock some of those out, because a guy
22 who is picked up doing marijuana when he's 19 in

1 college, and at 45 he's got a oxycodone problem that
2 started off as a back problem, and somewhere in
3 between, he gets hit up on -- on another -- another
4 one, it seems like a particularly heavy and
5 inflexible approach to dealing with the underlying
6 problem, which is, we want to get at reoffenders
7 and public safety threats, but reoffenders that
8 pose, you know, that pose a -- a safety issue.

9 So if -- if there was some way to limit
10 the application of career offender, particularly
11 in the drug space, to those charges over the last
12 decade. I'm -- I'm -- I'm flying a little blind
13 here, but -- but doing some sort of temporal
14 limitation, I think that addresses that type of
15 problem.

16 CHAIR REEVES: Would you add anything, Mr.
17 Quasebarth?

18 MR. QUASEBARTH: This was not an issue
19 that we discussed, so yeah, I -- I can't really speak
20 to -- to that issue as well, but obviously we'll
21 follow your good judgment and the decisions you
22 make.

1 CHAIR REEVES: Thank you. Our good
2 judgment comes from what we see and hear from you
3 all, so we -- we appreciate your testimony today,
4 your written submissions, it's now time for us to
5 take our lunch break. Please join us back at 1:45
6 p.m.

7 (Whereupon, the above-entitled matter
8 went off the record at 12:39 p.m. and resumed at
9 1:50 p.m.)

10 CHAIR REEVES: Welcome back. I'd now
11 like to introduce our fifth panel for the day, which
12 will present the perspectives from our stakeholders
13 on our proposed amendment on sentencing options.

14 First, we have Nicholas Linder, who is the
15 Chief of the Criminal Division at the U.S.
16 Attorney's Office for the Southern District of
17 Indiana. Mr. Linder previously served as re-entry
18 coordinator, where he led the U.S. Attorney's
19 Office's participation in the Southern District of
20 Indiana's two federal re-entry courts.

21 Second, we will hear from Tina Woehr, the
22 Research Director for the National Sentencing

1 Resource Counsel for the Federal Public and
2 Community Defenders. Before joining the SRC, Ms.
3 Woehr was an Assistant United States Attorney in
4 the District of Arizona and in the Southern District
5 of Texas.

6 Mr. Linder, kick us off for the afternoon,
7 sir.

8 MR. LINDER: Thank you, Chair Reeves. I
9 appreciate it very much. Good afternoon. We
10 appreciate, as always, the opportunity to offer our
11 views to the Commission.

12 It is, of course, important to ensure
13 judges thoughtfully consider the kinds of sentences
14 available, as 3553(a) requires, when imposing a
15 sentence. And overall, we think the current system
16 does that well.

17 We do not see a compelling need for these
18 proposed amendments. And conversely, we believe
19 some of them risk significant unintended
20 consequences.

21 Our witness statement submitted in advance
22 outlines well our views on these subjects, so I won't

1 recount that at length. I'll just underscore a few
2 key points.

3 First, while we appreciate, as always, the
4 Commission's compilation and presentation of
5 sentencing data, we do not believe the data, in
6 particular the percentage of defendants who receive
7 probationary sentences, is clearly indicative of
8 a judicial lack of awareness or aversion to
9 non-prison sentencing options.

10 Instead, in our view, the data reflect
11 judges' thoughtful consideration of, and parties'
12 advocacy about, the appropriate sentence in each
13 individual case, within the context of eligibility
14 for probation under law and the kinds of cases upon
15 which the Department focuses its limited resources.

16 Therefore, we would be very hesitant to
17 make a normative judgment about whether the
18 percentage of probationary sentences is too low,
19 and then craft policy to try to push that percentage
20 up.

21 In our view, the Commission's focus should
22 be on whether judges are sufficiently aware of, and

1 appropriately consider, sentencing options when
2 imposing a sentence that's sufficient, but not
3 greater than necessary. And, in our experience,
4 judges are aware of sentencing options and consider
5 them very carefully.

6 As outlined in our witness statement, the
7 legal framework governing our sentencing process
8 currently is replete with reminders about all the
9 factors judges should consider, including various
10 non-incarceration options, whether that be the
11 current guidelines with 1B1.1(a)(8) listing out the
12 sentencing options or Chapter 5 itself discussing
13 at length those options, including listing them out
14 in the current introductory commentary to Chapter
15 5.

16 More than that, during the sentencing
17 process itself, the pre-sentence report
18 specifically outlines the various options
19 available, the probation officer provides guidance
20 about what sentence to impose, and, of course, the
21 parties advocate for the proper sentence.

22 In my experience, when defense counsel

1 believes advocating for a probationary sentence is
2 in their client's interest, they do so forcefully.

3 And when imposing sentence, the court is required
4 to address the defendant's chief arguments and
5 mitigation in explaining their reasons under
6 3553(a), lest they risk reversal on appeal.

7 Ultimately, we believe judges truly try
8 to get it right. The sentencing data is the result
9 of thousands of individualized, well-informed,
10 seriously considered decisions about what the
11 appropriate sentence is in a given case.

12 We do not believe judges need still further
13 reminders, or worse, in our view, additional
14 procedures regarding the sentencing options
15 available to them. Indeed, we see significant
16 downsides to these proposals.

17 In particular, as Judge Chang noted this
18 morning, the proposed Section 5A1.1 risks
19 procedurally confounding the traditional two-step
20 process that courts have become well-accustomed to
21 post-Booker.

22 The proposal seems to re-inject

1 3553(a)-like discretion into the guidelines, which
2 runs counter to the very reasons behind the
3 Commission's recent and wise work to excise
4 departures and simplify the guidelines.

5 If the Commission feels it must further
6 remind judges that probation or other non-prison
7 options are available, we would propose proceeding
8 more modestly by adding neutrally crafted,
9 streamlined commentary to Chapter 5.

10 Likewise, we do not believe the proposed
11 zone expansion is warranted, including by the data,
12 as Judge Chang noted this morning.

13 And we have serious concerns about the
14 expansion of Zones B and C at Criminal History
15 Category I, especially squaring such
16 non-incarcerative sentences with 3553(a) at those
17 high offense levels and the burden and risk such
18 sentences would place on probation officers,
19 victims, and even defendants themselves.

20 Thank you. And with that, I look forward
21 to your questions.

22 CHAIR REEVES: Thank you, Mr. Linder.

1 Ms. Woehr?

2 MS. WOEHR: Thank you, Chair. Good
3 afternoon. My name is Tina Woehr. I want to thank
4 you for having me today.

5 I'm the Research Director for the
6 Sentencing Resource Counsel. And before that, I
7 was an Assistant Federal Public Defender in the
8 District of Arizona and the Southern District of
9 Texas. And ahead of today, I've spoken with
10 colleagues from across the country.

11 We support this amendment. Part A gives
12 important clarity and guidance on the type of
13 sentence available, such as a fine, probation,
14 hybrid sentences, or imprisonment before moving on
15 to the question of sentence length.

16 And we support Part B's zone expansion,
17 which would highlight more sentencing options for
18 more people, although it could go even further.
19 We have suggested some changes in our comment, but
20 we support this amendment on balance for three
21 primary reasons.

22 First, the manual's current default

1 outcome of prison is not neutral. And failure to
2 give guidance on the sentence type also not only
3 runs afoul of the Sentencing Reform Act, but also
4 leads to disparities that I've seen firsthand.

5 When I worked in Texas, almost no one got
6 probation, even if they were in the lower zones.

7 And for clients doing well on pre-trial release,
8 this could upend their lives. They would lose
9 housing, lose jobs, even custody of their children.

10 Then I went to Tucson, where judges were
11 more willing for certain individuals who are ready
12 for the support and rehabilitation that probation
13 could provide to give probation or alternative
14 sentences, even if they were in higher zones.

15 Take my client, Yenny (phonetic), for
16 example, a single mother of 19 years old, whose
17 family lost their home when her father was deported.

18 Yenny's friend offered her a chance to make a little
19 money, and she made the biggest mistake of her life.

20 She ended up involved in a body carrier
21 drug scheme, but she got out on pre-trial release.

22 And she did really well, working on top of studying

1 for her GED.

2 The court took a chance and gave her
3 probation. She enrolled in classes to become a
4 medical assistant on top of her full-time job and
5 taking care of her child.

6 She did so well that the court terminated
7 her probation early. Yenny's family, child, and
8 community were all better off having her as a
9 successful working mother, but her story would have
10 ended much differently if she had been sentenced
11 in Texas.

12 The good news is that Part A of this
13 amendment will help address these disparities by
14 reminding judges of the available sentencing
15 options in each case, which they must do already
16 under statute. And with no criminal history, Yenny
17 would fall into the expanded Zone B of this
18 amendment, which would highlight additional
19 sentencing options for people like her.

20 Second, social science confirms what I
21 learned from representing people just like Yenny
22 who thrived with alternatives. The literature

1 highlights the importance of promoting protective
2 factors, such as employment, education, pro-social
3 ties, and healthy attitudes, all of which can buffer
4 against future recidivism.

5 This amendment does exactly that by
6 expanding access under the guidelines to the
7 rehabilitation that alternatives can provide,
8 unlike the over-crowded, over-priced, unsafe, and
9 under-staffed BOP facilities.

10 One note, DOJ and POAG seem to be
11 misreading the literature on supervision when they
12 claim that this amendment risks leading to
13 over-supervision and higher recidivism risks.

14 That's incorrect. The articles that they
15 cite focus on the importance of narrowly tailoring
16 conditions to the needs of the person at hand to
17 ensure best outcomes, not incarceration as a better
18 alternative.

19 We agree that over-conditioning can lead
20 to poor results, which is why we support this
21 amendment, particularly the proposed introductory
22 commentary language, which reaffirms the importance

1 of considering the unique circumstances of the
2 person being sentenced.

3 And by the way, when it comes to general
4 deterrence, we know that it's the certainty of
5 getting caught, not the severity of the sanction,
6 that matters the most.

7 Finally, the proposal will add clarity,
8 not confusion, to the manual. And it will finally
9 bring it in line with the statutory mandate.

10 Part A neither adds a new step, nor does
11 it mandate outcomes for anyone. 5A1.1 simply
12 structures and solidifies an important decision
13 point that, per statute, courts should already be
14 thinking about, but often are not because the
15 guideline structure currently obscures it.

16 In this way, the proposal builds on last
17 year's supervised release amendment, which stressed
18 the importance of making an individualized
19 assessment at another over-looked but statutorily
20 mandated decision point in sentencing.

21 To be clear, probation and alternatives
22 are tough. People lose their liberty, their

1 privacy. They can't move, change jobs, leave the
2 district without permission, and they can be
3 re-sentenced to full prison terms if they mess up.

4 Alternative sanctions are punishment, but
5 they also carry unique rehabilitative potential,
6 unlike prison. In sum, both statute and social
7 science support this amendment.

8 The disappearance of alternatives has
9 plagued past commissions. This Commission finally
10 has a chance to change that, and we urge you to take
11 it. Thank you.

12 CHAIR REEVES: Thank you.

13 Any questions of this panel? Yes.

14 VICE CHAIR RESTREPO: Mr. Linder,
15 notwithstanding the Department's objections, as it
16 were, to these proposals, do you think the
17 Commission should encourage judges to more
18 seriously consider split sentences? It's
19 something that some of us think is not often
20 considered and is not used enough, so to speak.

21 MR. LINDER: I guess I'll begin with my
22 original comments, which were, I think the

1 Guidelines Manual as it is currently does certainly
2 offer the description of split sentences. What I
3 take your question to be is highlighting the
4 possibility that they exist.

5 VICE CHAIR RESTREPO: Right.

6 MR. LINDER: And, I would be -- in my own
7 experience, judges do seem to be well aware of the
8 full range of possible options, particularly at
9 sentencing and working closely with the probation
10 officer, whether those conversations in chambers
11 or even out during the hearing itself.

12 In my experience, it does not appear that
13 judges are unaware of the options available to them.

14 And as I noted in my introductory comments, the
15 guidelines presently do a lot to remind judges of
16 what those options are.

17 So, I suppose I would say, again, as we
18 noted, if the Commission were inclined to take a
19 step of reminding judges what already exists, I
20 would probably recommend taking that step in the
21 introductory commentary rather than creating an
22 additional sort of procedural regime.

1 But to the extent that's necessary at all,
2 I'm not terribly sure. My own experience doesn't
3 necessarily bear that out.

4 CHAIR REEVES: And following up on that
5 point, I think in your comment you mentioned, or
6 in your written comments, I guess, that lengthier
7 terms of supervision might be more
8 counterproductive, I think is the word that was
9 used.

10 MR. LINDER: They can be.

11 CHAIR REEVES: Hmm?

12 MR. LINDER: They can be.

13 CHAIR REEVES: They can be. And I guess
14 juxtapose that to being in prison as far as a term
15 of imprisonment versus a long-term supervision or
16 -- in suggesting that it's counterproductive, could
17 you just explain that?

18 MR. LINDER: So, when we see -- I'll just
19 use my own experience. What I'm thinking about are
20 countless supervised release violation proceedings
21 where the defendant would far rather take a smaller
22 stint in BOP than a lengthier stint on paper.

1 In fact, that is very common, the outcome,
2 because the defendant, again, in my experience,
3 feels that the restrictions on their liberty win
4 out and perhaps that the lack of guidance will lead
5 them -- causes them greater risk of reincarceration
6 in the future.

7 Whereas a period of service in BOP and then
8 release, again, in the defendant's view, is less
9 likely to lead to reincarceration in the future.

10 So, that's sort of the experience that, in part,
11 we're drawing on.

12 In addition to, on the other side of that,
13 the resources required oftentimes for these
14 particularly split sentences or home incarceration,
15 ankle monitoring, any kind of monitoring of that
16 nature, that puts a great strain on the probation
17 office and can -- I think what I mean is this.

18 When someone is trying to put their life
19 back together and then violates and is put back in
20 BOP, that can be far, far more disruptive than simply
21 serving their time and getting out.

22 Now, of course, it depends highly on the

1 individual circumstances of the person being
2 sentenced, whether they are able to put together
3 those sort of pillars of pro-social relationships,
4 employment, and housing.

5 But if they're not, then what they often
6 see is -- they don't have hope in coming out and
7 would rather take that time in BOP and not have the
8 possibility of future incarceration hanging over
9 their head.

10 CHAIR REEVES: How often is it that
11 someone is released from BOP and that's not followed
12 by a term of supervision for which they can violate
13 and then go back to BOP?

14 MR. LINDER: Yeah. On supervised
15 release, for example, in the violation context,
16 which is kind of where this comes up most frequently,
17 where the defendant themselves is given the choice,
18 right, and they choose prison, that's not uncommon.

19 Now, after an initial term of
20 imprisonment, supervised release is very common,
21 of course. But the sort of examples that I'm
22 drawing on, which, again, the data I'm looking at

1 is my own experience and those of my colleagues,
2 of the choices of the defendants and their counsel
3 themselves electing to go with the BOP approach
4 rather than an additional term of intensive
5 supervision.

6 CHAIR REEVES: And I'm pretty sure Ms.
7 Woehr has an opposite view. Or maybe not an
8 opposing view, maybe not opposite, but I'm sure you
9 have something to say about my questions. And I
10 -- frankly, I pose those to you.

11 MS. WOHR: Thank you, yes. And it could
12 just be that Mr. Linder's district, being a smaller
13 district -- I believe there were 352 cases sentenced
14 there in fiscal year 2024. And so, things could
15 be different.

16 I have worked primarily in large
17 districts. To give you an idea about Arizona, in
18 that time frame, there were 3,900-plus people
19 sentenced. In Texas, there were close to 6,000.

20 So, bigger districts could operate
21 differently, but I think my experience and the data
22 bear out that initial terms of supervised release

1 after imprisonment terms are quite common.

2 I know the Commission took steps last year
3 to make supervised release more individually
4 tailored. And we've yet to see in the data how
5 that's changing things, but I will say that our
6 lodestar here is that sentencing has to be
7 individualized.

8 And so, I would never tell a client what
9 they should want when it comes to taking a term of
10 prison or taking a term of supervision. That's a
11 conversation that counsel will have with their
12 clients and figure that out. And everyone's
13 situation is different.

14 But the answer to that, and that's what's
15 in the articles that have been cited by the
16 government as well as POAG, show the importance of
17 narrowly tailoring supervised release or probation
18 conditions to that person's needs.

19 That way, we can right-size it on the front
20 end to avoid problems on the back end later.
21 Over-conditioning does lead to those problems, but
22 if we are narrowly tailoring, as we should be under

1 the Risk-Need-Responsivity framework, we can avoid
2 those problems.

3 And so, I don't think it makes sense to
4 compare these articles talking about the dangers
5 of over-conditioning to prison because they're
6 simply different forms of punishment.

7 I think the other issue when we talk about
8 resources is, first of all, we're pouring money into
9 BOP, which we know these facilities are unsafe,
10 failing structurally, also under-staffed, et
11 cetera. And the Commission does have that
12 statutory mandate to consider that.

13 And so, we could be shifting resources away
14 from prison towards more community-based sanctions
15 that can be just as, if not more, effective at
16 preventing recidivism and promoting
17 rehabilitation.

18 And then the final point on that is we
19 already have -- I don't know the exact numbers, but
20 we already have U.S. probation supervising massive
21 numbers of people on supervised release.

22 And so, that could be something that shifts

1 if they switch the supervised release caseload to
2 a probation caseload or a community confinement
3 caseload up front. We can shift some of those folks
4 that got prison and supervised release to these
5 alternative sanctions up front.

6 CHAIR REEVES: VC Mate?

7 VICE CHAIR MATE: Thank you.

8 Thank you both for joining us again today.

9 I know you've been here before, and we appreciate
10 all of your help.

11 In terms of this concept of courts already
12 are aware of these options, they're in Chapter 5,
13 they've been there, everyone -- the parties are
14 aware and can make arguments.

15 One thing in 2023, the Commission issued a
16 demographic disparities report that was looking at
17 sentencing disparities and found that most of those
18 disparities were arising from that in/out decision.

19 So, the disparities we're seeing in sentencing are
20 coming from that in/out decision.

21 Are there -- do any of the things that we've
22 proposed in this amendment, or if not, are there

1 other things in the guidelines that are related to
2 this that we should be considering that might help
3 address that problem that we identified in 2023?

4 And that's for both of you.

5 MS. WOHR: Sure. I also recall from the
6 Commission's 2015 alternatives report, it found
7 that there were racial disparities in who was
8 getting alternative sentences also related to that,
9 which is part of our proposal to actually consider
10 expanding the zone expansion even further to folks
11 in Criminal History Categories II and III, because
12 there are so many racial disparities baked into
13 criminal history scores.

14 But beyond that, as I mentioned
15 previously, this structural change to Chapter 5 does
16 a really good job of flagging this -- as you say,
17 Vice Chair, this choice is already embedded in the
18 statute. Judges should already be thinking about
19 this.

20 3553(a) tells us, not once but twice, to
21 consider kinds of sentences, but it often goes
22 overlooked. So, what is proposed here is very

1 important because it shines a light on that decision
2 that is statutorily mandated but so often
3 overlooked.

4 I had to go back and look at some old PSRs.

5 And I found, because it's come up today, in front
6 of judges -- and again districts can differ, but
7 in my districts, the sentencing options, buried at
8 the very end, there would be one line saying that,
9 well, statutorily this is a Class C felony, so this
10 person is eligible.

11 And then the next sentence says, but
12 because they have fallen to Zone D, they are not
13 eligible. No sort of nuance on that.

14 And that can be very -- I think especially
15 for judges in more guideline-centric districts, and
16 that also changes on the district, but certain
17 districts have very high guideline adherence rates.

18 So, in these districts that are very wedded
19 to the manual, that is taken as gospel. And so,
20 having this change structurally is very important
21 to shine a light on this decision.

22 MR. LINDER: So, I think from our

1 perspective, we're certainly concerned about
2 disparity. And I think about a different
3 disparity, perhaps, than what you might be referring
4 to, and that is the disparity between types of
5 offenses.

6 And the Commission has undertaken a
7 significant amount of work recently with respect
8 to first-time offenders, particularly non-violent
9 offenders or offenders that don't have firearms,
10 and offering or crafting a structure that reduces
11 advisory guideline sentences for those offenders.

12 And our concern would be that these proposals
13 enhance that disparity.

14 So, we're further giving that first-time
15 offender under Chapter 4 reduction and other
16 changes, particularly, say, if considered in 2B1.1
17 or other changes, where we're sort of driving down
18 the fraud or white-collar offenders.

19 But the other folks who are prosecuted
20 under statutes that are not eligible for probation,
21 for instance, anything with a mandatory minimum,
22 many, many drug offenses, anything with a firearm,

1 are not going to be eligible for those offenses.

2 I think you're really only widening that
3 disparity with particularly the proposed zone
4 expansion in this amendment.

5 So, you have the folks, again, who are
6 getting the benefits of being a first-time
7 non-violent offender with no firearms, who are
8 getting their offense level reduced, and then with
9 the zone expansion are able to get probation,
10 whereas drug offenders who are facing a 5-to-40 or
11 ten-year mandatory sentence are ineligible.

12 And so, again, when I hear disparity in
13 this framework, that's what we're thinking about.

14 And I want to note one other point, which
15 is, I don't think it -- we mentioned this in our
16 written statement. I mentioned it briefly here.

17 The government has very, very limited
18 resources. And it's not surprising that we're
19 focusing on offenders that have criminal history,
20 that have firearms, that are violent, that, if
21 involved in a drug offense, are chargeable under
22 statutes where probation is ineligible.

1 And so, again, with its limited resources,
2 where the department is focusing on those first-time
3 offenders to give, I suppose, a further windfall
4 in that regard, we don't think is warranted.

5 VICE CHAIR MATE: I may not have said this
6 when I talked, but the report was about demographic
7 disparities. So, when everything else was
8 controlled, there were demographic differences in
9 what courts were doing with that in/out decision.

10 And so, I guess I was wondering whether
11 additional guidance, or maybe not even additional
12 guidance, just putting things at the beginning,
13 whether some of that calling attention to it,
14 whether you would expect that to have any effect
15 on that aspect.

16 MR. LINDER: You know, I don't know. My
17 experience is that judges are really, really
18 thoughtful. I guess I'll say two things. One is
19 that they're very thoughtful.

20 We noted this in our writing, but if you
21 talk to any federal judge, they're going to say
22 criminal sentencing is the most serious, if not one

1 of the most serious, things that they do. I do think
2 judges do try to get it right.

3 Secondly -- I lost my train of thought
4 there.

5 VICE CHAIR MATE: It's okay, I didn't mean
6 to -- you did great.

7 MR. LINDER: Yes. No, I'm sorry.

8 VICE CHAIR MATE: Thank you.

9 CHAIR REEVES: Any additional questions
10 of this -- no, no, go ahead.

11 MR. LINDER: I remember it. There we go.
12 So, I think this is a kind of a conceptual problem
13 in thinking about the components of Chapter 5 that
14 could kind of layer on a new process.

15 Judges don't -- and again, in my
16 experience, whether that be as a law clerk or a
17 practitioner -- don't tend to make this decision
18 in sort of a rote way. The rote aspect of the
19 sentencing process is the two-step post-Booker
20 process.

21 It's calculate the guidelines, exercise
22 discretion. That's it. And that's what the

1 Supreme Court tells us to do. There's not this step
2 in the middle that says in/out before discretion.

3 There just isn't one, and I think logically there
4 isn't one.

5 When the judge is sitting in chambers with
6 their law clerks, with the probation officer about
7 what the right sentence is, they're considering.

8 They've calculated the guidelines. They've done
9 that portion of the process, and then they're
10 exercising their discretion under 3553(a).

11 And again, I think the Commission wisely
12 recognized that's how it really works in chambers.

13 And when the judge takes the bench, they have a
14 sense of where they want to go. They're going to
15 hear the advocacy of the parties.

16 I think judges are human. They're not
17 machines. They're not going to be able to make this
18 sort of in/out decision shorn of all context without
19 the 3553(a) factors.

20 And so, the point about, well, can we
21 change the in/out decision, I guess I want to note
22 that I don't think it's made that way. I don't think

1 the in/out decision -- and nor should it be -- I
2 don't think our two-step post-Booker system aligns
3 with that.

4 Instead, it's a consideration of all the
5 appropriate factors under 3553(a). And then
6 folding in what options; length of sentence; if
7 probation, what types of conditions, whether those
8 make sense; all of those are baked in kind of all
9 at the same time.

10 And I think appropriately so because it
11 should be, as Ms. Woehr said, individualized. And
12 that's what the Supreme Court has told us to do.

13 CHAIR REEVES: What's wrong with giving
14 judges just that introductory remark about what they
15 might do?

16 I remember Judge Chang mentioning that.

17 I think he said, I had to be reminded looking at
18 the statute. The statute says, for a first-time
19 offender, a sentence for something other than
20 imprisonment ought to be the first consideration.

21 I think he candidly admitted, I was
22 reminded of that when you all made that in your rule

1 the other year. So, what's wrong with at least just
2 laying it out to judges?

3 MR. LINDER: So, two things. One, I think
4 our baseline position is we really do think that
5 the guidelines do lay it out pretty well already.

6 Again, in Chapter 1, there's a note about
7 options. Chapter 5 already has introductory
8 commentary that lists out the options. And of
9 course, the entirety of Chapter 5 is all about the
10 options, pages and pages of the options.

11 So, I do think it's largely there, plus
12 PSRs, advocacy, all of that. There's a lot of,
13 appropriately so, reminding judges how to tailor
14 individualized sentences.

15 So, with respect to -- look, if the
16 Commission believes that judges need an additional
17 reminder about this, I think where we would go is
18 think about how to do this both in a balanced,
19 neutral way, which I think was a bit of Judge Chang's
20 point this morning about adding the rest of 994(j),
21 I think it was.

22 But I think also, the key is really

1 harkening back to 3553(a). Sentencing judges don't
2 exercise discretion under 994. It's a different
3 law. And 994 pertains to this group, but the person
4 imposing sentence is dealing with 3553(a).

5 And so, I wouldn't want to detract from
6 that or distract from that. It's to focus on that
7 individualized assessment on those factors. So,
8 that's why in our opening statement here, we
9 balanced neutral but also streamlined.

10 I think maybe a slight disagreement that
11 we might have with Judge Chang's view is rather than
12 adding more to that introduction, you might consider
13 removing some and making it more streamlined.

14 CHAIR REEVES: Thank you.

15 Ms. Woehr, you want to close us out on that?

16 MS. WOEHR: I would, yes. Just from my
17 perspective, having practiced in very busy
18 districts -- and what I mean by that is I've had
19 six sentencings over the course of an hour, hour
20 and a half. These are busy districts.

21 And so, yes, we do have the statutes. When
22 we look to 3582 or 3562, probation or imprisonment,

1 they send you to 3553(a). And what does 3553(a)
2 say?

3 Well, (a)(3) says kinds of sentence;
4 (a)(4) says kinds of sentence again and the range.

5 But that can get so easily lost, especially when
6 you have this Guideline Manual and busy districts
7 that are looking to the manual.

8 You open Chapter 5, and the first thing
9 you see is the prison table. It's a table of ranges.
10 The unit of measurement is imprisonment.

11 And by the way, this amendment doesn't
12 change that. This amendment isn't opening the
13 floodgates. It's just shining a light on the
14 different options that exist, both statutorily and
15 under the manual, in a way that can get very lost
16 in these busy, high-volume, guideline-centric
17 districts.

18 And so, this does an important service by
19 adding in this reminder. And it's not a different
20 step. It's not a new step, and it is statutorily
21 required. We're all still in step one. Calculate
22 the guidelines and the range.

1 This is still step one, and it's built in
2 right now. So, 1B1.1, you still have (a)(7) and
3 (a)(8) in the manual right now still direct you to
4 look at the guideline range and the types of sentence
5 available.

6 So, this isn't new. It's just adding more
7 clarity to what should already be considered.

8 Thank you.

9 CHAIR REEVES: Thank you all so much for
10 your testimony. We're going to move on to the next
11 panel. Thank you so much.

12 MR. LINDER: Thank you.

13 CHAIR REEVES: I want to make sure
14 everybody's comfortable. This is our tightest
15 panel. That's all right, that's all right. We've
16 got Ms. Walsh back again. That's my good friend.

17 This is our sixth group of panelists, who
18 will provide us our advisory groups' perspectives
19 on our sentencing options proposed amendment.

20 Again, we have Susan Walsh on behalf of
21 the Practitioners Advisory Group. Again, we have
22 Joshua Luria on behalf of our Probation Officers

1 Advisory Group.

2 New for today's information is Dr. Shaneva
3 McReynolds, and she'll share with us the views of
4 the Sentence Impact Advisory Group. Dr.
5 McReynolds' commitment to improving the criminal
6 justice system is multifaceted and informed by her
7 own personal experience.

8 In 2008, she lost her first husband to gun
9 violence. Seven years later, she fought
10 successfully for her current husband's release from
11 a 235-month sentence for a crack cocaine conspiracy.

12 She is now the president of FAMM, a
13 national non-profit organization dedicated to
14 creating a fair and effective justice system.

15 Fourth, and new to us, we will hear from
16 Chief Justice Gregory Smith on behalf of the Tribal
17 Issues Advisory Group. Justice Smith is a justice
18 on seven Native American Tribal Supreme Courts,
19 sitting in five different states, and is currently
20 Chief Justice of three of those courts.

21 You're something else.

22 He also serves as the Chief Judge of the

1 United States Department of the Interior's Court
2 of Indian Appeals.

3 And last, we have Ms. Michelle Means, who
4 will provide us with the perspectives of our
5 Victims' Rights Advisory Group. Ms. Means is a
6 former Federal Probation Officer in the districts
7 of Arizona and California. She obviously has
8 various perspectives, as well. She retired in
9 2022, after 22 years of federal service.

10 We're going to start with Ms. Walsh
11 whenever she's ready.

12 MS. WALSH: Thank you so much. I'd also
13 like to just reiterate that, on behalf of the PAG,
14 it is so valuable and important to us to have a voice
15 here and to make sure that our voice is heard.

16 I'm grateful for the opportunity to be the
17 representative of the PAG. And humbly, even if I'm
18 not the most articulate member of the PAG, I'm the
19 most present one here. So, I will do my very best.

20 For starters, the PAG absolutely applauds
21 the introductory language that's proposed and the
22 concept of elevating the in-and-out decision into

1 the guidelines.

2 We don't see the -- and we don't support
3 the zones, frankly. We think that they are a relic
4 of pre-Booker days, and that they are potentially
5 in conflict with the 3553(a), and that if the goal
6 is of simplification, the zone overlay does not
7 further that goal.

8 That said, the language that is proposed,
9 which we are to comment on, we think could be tweaked
10 a little bit to make it better. And we applaud the
11 expansion of the zones.

12 And elevating the concept of punishment
13 is something and can be something and has been
14 considered by Congress in enabling statutes and
15 otherwise to be more than just a prison default,
16 particularly in statutes that call for probation
17 as a sentence.

18 To have the guidelines or the zones cabin
19 the determination to be prison by default in months
20 is contrary to 3553(a) and is present in the current
21 zones and even in the proposed expansion of zones.

22 I, too, note that even the most

1 distinguished and esteemed of the judiciary among
2 us, Judge Chang, I was taken back to hear him say
3 that he was not familiar and needed to be reminded
4 with that very statute that says individuals --
5 994(j), the guidelines should reflect the
6 appropriateness of imposing a sentence other than
7 imprisonment in cases in which the defendant is a
8 first offender who has not been convicted of a crime
9 of violence.

10 I represented a 50-year-old man,
11 first-time offender, non-violent offender, a
12 white-collar crime, up from very humble beginnings
13 to a middle-class job that, as a result of his
14 arrest, lost that job.

15 Raising two school-aged children,
16 stretching themselves, the couple, to pay for a
17 mortgage and a home, scrambled to find another job
18 while the case was pending, a much lower-level job
19 as a delivery person for a major delivery
20 institution. Worked up until the day of
21 sentencing.

22 This 50-year-old parent, supporter of

1 his -- was Guideline Level 15, 18 to 24 months on
2 the current guidelines. That is Zone B. And that
3 is the problem with the current overlay of the zones
4 and the anchoring effect and prison as the first
5 start of the default as to how we look at punishing
6 people.

7 994(j) says, of course that shouldn't be
8 the default. The statute itself -- it was a
9 misdemeanor. The guideline range was higher than
10 the statutory maximum.

11 So, this is a real world consequence of
12 the zone determination and why the in/out decision
13 needs to be elevated and gratefully why, in that
14 particular case, it was, because the gentleman would
15 have lost his job, the ability to support those two
16 school-aged children, even by a short split
17 sentence, even by an intermittent sentence.

18 Which, by the way, after the judge imposed
19 30 days of incarceration, reconsidered and gave 30
20 days of weekends.

21 To get a person in custody for weekends
22 was no light lift. The BOP absolutely opposes it.

1 The government supported the BOP's decision.
2 Having someone come in and out of jail on the
3 weekends was a security risk, forget about it.

4 In 25 years of practice in federal court,
5 I confess, until last year, I never saw an
6 intermittent federal sentence or a weekend
7 sentence. Split sentences, we do in the state
8 system, no problem, quite often.

9 And if you think that's not punishment or
10 a slap on the wrist, the psychology of having to
11 say goodbye to your family, your job, every weekend
12 for 15 in a row and the dread of what pillow that
13 you're going to lay your head on those two nights
14 is quite significant.

15 So, elevating the in-and-out decision is
16 extremely important if there are judges of such
17 caliber that hadn't considered it. The
18 introductory language, I can't stress how important
19 it is.

20 So, I'll set aside the PAG's disagreement
21 with the need for zones altogether. We don't think
22 that they are necessary. But I do think the judges

1 carefully consider when they make their sentencing
2 decisions, and I do think they are quite difficult,
3 but I don't think there is extraordinary awareness
4 as to what is available.

5 The decision to give my client 30 days of
6 weekends on a first-time, non-violent, 50-year-old,
7 full-time employed father shouldn't be a downward
8 movement on a misdemeanor that is maxed out at a
9 year. That's an upward movement from zero.

10 And that's what the Commission,
11 gratefully, is considering and should continue to
12 consider. We shouldn't consider first how much
13 jail. We should first consider what are the other
14 alternatives. And indeed, there's no question
15 those other alternatives are punishment, as well.

16 CHAIR REEVES: Thank you, Ms. Walsh.

17 Mr. Luria?

18 MR. LURIA: Thank you, again, to the
19 Commission for the opportunity to provide POAG's
20 perspective, this time on sentencing options.

21 POAG did not have strong opinions
22 regarding Part A. While we did not see a strong

1 need for the change, it does provide some additional
2 clarity. It does seem to highlight the sentencing
3 options that are currently available.

4 We do not think the recitation of the
5 sentencing factors is necessary at the end, as it
6 is well outlined in other areas of the guidelines
7 and widely understood.

8 We do unanimously oppose the proposed
9 change outlined in Part B. We believe that the
10 adoption of Part B may lead to the unintended
11 consequence of raising recidivism rates amongst
12 low-risk defendants and possibly moderate-risk
13 defendants.

14 Over the years, there has been a large
15 number of evidence-based studies on the amount of
16 supervision necessary for individuals who present
17 different risk levels.

18 What those studies show is that when you
19 over-supervise low-risk defendants, their
20 recidivism increases. This principle has been a
21 foundational consideration to our evidence-based
22 approach, guiding the national supervision

1 standards.

2 Placing a defendant on home detention or
3 community confinement necessitates frequent
4 contact with the defendant. The expansion of home
5 detention in Criminal History Category I cases will
6 mean that low-risk defendants will have more
7 supervision contact.

8 Over-supervising low-risk defendants will
9 likely lead to higher recidivism rates within that
10 population.

11 The POAG is also concerned that there could
12 be some unintended interaction with the new First
13 Step Act provisions. This would specifically go
14 to split sentences. The Bureau of Prisons,
15 especially for low-risk inmates, provides
16 opportunities for incremental reintroduction to
17 society.

18 Defendants are placed in community
19 confinement centers near the end of their sentence
20 and, most often, end up being on home detention
21 through the remainder of their term with the BOP.

22 At sentencing, it is unknown if the

1 defendant will qualify for that type of incremental
2 approach and, if so, how much of that time will be
3 in community confinement and how much on home
4 detention. This could cause some frustrating
5 outcomes for defendants.

6 Further, if a defendant has spent the
7 majority of their probation or supervision on home
8 detention and violates their conditions, there are
9 not many intermediate sanctions available.
10 Imprisonment or community confinement, maybe
11 increase the length of their home detention or
12 supervision if that is a statutorily available
13 option.

14 Lengthy periods of home detention appear
15 to have diminishing returns after six months and
16 more so past 12 months. A person who is
17 rehabilitating needs autonomy to practice good
18 decision-making.

19 Additionally, the consequences of
20 less-serious poor decisions need intermediate
21 sanctions in order to address them. Ideally, ones
22 that do not cause the total loss of progress the

1 defendant has made. We do not think that this
2 provides a structure that allows for enough
3 intermediate sanction considerations.

4 We are also concerned about the disparity
5 of opportunities this offers. The defendants who
6 have a Criminal History Category I may have also
7 received the zero-point reduction and safety valve,
8 while excluding others who may have narrowly missed
9 those reductions.

10 It would make more sense to give more
11 opportunities to those with a higher criminal
12 history category.

13 Defendants who have total offense levels
14 of 7, 8, or 9 have likely committed offenses that
15 are probably on the less-serious side of things.

16 However, because of their high risk level, their
17 recidivism will likely not be negatively impacted
18 by increased supervision. Whereas a Criminal
19 History Category I defendant, who has a total
20 offense level of 29, would still be eligible for
21 a split sentence under this plan.

22 Defendants who have a total offense level

1 of 27, 28, or 29 have engaged in some serious
2 criminal conduct to get a level that high,
3 especially when considering all the applicable
4 reductions available to them. The seriousness of
5 the offense should be an attribute reflected in
6 appropriate balancing of the zones.

7 Lastly, we are concerned about resources.

8 We do not think there are sufficient community
9 confinement centers to meet what could be the
10 increased demand that would result from this
11 amendment.

12 With these facilities being used for BOP
13 cases and for intermediate sanctions, the demand
14 is already higher than the supply. Bed space wait
15 lists for these facilities is measured in days and
16 weeks. With this adjustment, that wait could be
17 substantially increased.

18 Location monitoring is also very demanding
19 on probation officers. It requires
20 around-the-clock attention and response, is very
21 resource heavy.

22 Resources can, of course, be reallocated

1 over time. However, we would still be moving those
2 resources towards the defendants who need them the
3 least. Worse yet, those resources are also moving
4 towards the defendants that the study suggests may
5 be hindered by them.

6 Again, thank you for the opportunity to
7 share our perspective.

8 CHAIR REEVES: Thank you, Mr. Luria.

9 Dr. McReynolds?

10 DR. McREYNOLDS: Thank you,
11 Commissioners. We appreciate the decision to
12 elevate sentencing options as a policy priority this
13 amendment cycle.

14 So, SIAG, the Sentence Impact Advisory
15 Group, supports expanding Zones B and C so that
16 courts may have a meaningful option to impose
17 punishment that protects public safety while
18 preserving proportionality. Incarceration should
19 not be reflexive where alternative sanctions can
20 achieve accountability and protect public safety.

21 I want to explain why sentencing options
22 matter, not abstractly, but personally. In

1 October of 2024, on her 21st birthday, my daughter
2 was arrested at an airport while attempting to board
3 an international flight.

4 She had been manipulated by an older,
5 abusive partner into transporting a suitcase that
6 she was told contained untaxed tobacco. It, in
7 fact, contained 17 kilograms of marijuana.

8 She was charged under 21 U.S.C. 953, the
9 exportation of a controlled substance. Under the
10 applicable penalty provision, the offense carried
11 a statutory maximum sentence of five years in
12 federal prison. In plain terms, my daughter was
13 facing federal prison.

14 At that time, she was struggling
15 significantly with her mental health. Even a short
16 custodial sentence would have been destabilizing
17 and would not have enhanced public safety.

18 She accepted a plea agreement. And the
19 conditions of that plea agreement, while difficult,
20 resulted in one year of supervised release.

21 The supervision was not easy. Probation
22 officers came to our home, sometimes during family

1 gatherings. She struggled to secure employment
2 because of her federal charge. The accountability
3 and the restrictions were real, but she was home.

4 She was able to rebuild in a stable
5 environment. She escaped an abusive relationship.

6 She did secure employment that she still maintains
7 today. Most importantly, she began to heal.

8 Supervision functioned as punishment, but
9 that punishment allowed rehabilitation instead of
10 compounding the harm.

11 My husband's case, whom all of you have
12 heard before, his experience reflects another
13 dimension of sentencing options. My husband was
14 originally facing a ten-to-life sentence for a
15 non-violent drug offense.

16 He ultimately served 11 years and seven
17 months of that sentence through legislation,
18 eventually applied retroactively. That's what
19 allowed him to return home early.

20 His transition back to the community did
21 not require years of supervision. In fact, he spent
22 22 hours in home confinement -- 22 hours in a halfway

1 house and then four months on home confinement.
2 And his five-year term of supervised release was
3 terminated after 11 months because his probation
4 officer observed his productivity.

5 Since returning home -- many of you know
6 our story -- he founded and started a logistics
7 company where we only employ returning citizens.

8 He has personally petitioned for and obtained
9 expungement of both his juvenile and adult records
10 in Illinois, and he has helped many others do the
11 same.

12 His record since release reflects not only
13 compliance but contribution. It also demonstrates
14 that lengthy incarceration is not always necessary
15 to achieve accountability, deterrence, or public
16 safety.

17 For these reasons, SIAG supports expanding
18 Zones B and C to promote uniformity and
19 proportionality. The Commission should provide
20 guidance that prevents disparity where identical
21 guideline ranges produce different sentencing
22 options based solely on the criminal history

1 category. Consistency remains essential to the
2 guidelines' legitimacy and to public confidence.

3 The Sentencing Reform Act directs that
4 sentences be sufficient, but not greater than
5 necessary. Expanding Zones B and C gives courts
6 the flexibility to impose those sentences that
7 protect the public and promote accountability
8 without exceeding what is necessary.

9 As SIAG, we urge the Commission to adopt
10 the expansion of Zones B and C with guidance that
11 ensures fairness, consistency, and national
12 application. Thank you for your time.

13 CHAIR REEVES: Thank you.

14 Chief, Chief, Chief Judge?

15 MR. SMITH: Greg will work fine. Thank
16 you, sir. I'm Greg Smith with the Tribal Issues
17 Advisory Group.

18 As has already been pointed out, I've got
19 a bit of an odd situation where I can tell you what
20 it looks like in New York, Arizona, Wisconsin,
21 Oklahoma, Nebraska, doing the same basic laws and
22 how they differ, but also living in Fort Campbell,

1 Kentucky.

2 I've been on the CJA panel. I was on it
3 for 25 years. And at Fort Campbell, if you go down
4 Gate 4 through the entry gate, you go to the first
5 red light, you turn right, you're in Kentucky. You
6 turn left, you're in the great State of Tennessee.

7 But two feet, using just DUI as an example,
8 Tennessee has a mandatory minimum. You've got to
9 do jail time. Kentucky, you don't even necessarily
10 lose your license. Two feet, night and day
11 difference. Judges do need guidance.

12 The Chairman of this respected panel has
13 said we need to get away from the addiction of
14 incarceration. In a law review about a year and
15 a half ago, it was pointed out that to incarcerate
16 for a year is about \$50,000; to do probation is about
17 \$5,000.

18 The STAR Program, which the Vice Chair
19 handles, one of the things that he noted was that
20 a lot of the people going through the program get
21 to the end, and they don't have anybody telling them
22 what they did right. The only thing they've ever

1 seen in a court system is being told you're not good
2 enough, you're wrong, you're bad.

3 Ben Franklin had a rule about holes. If
4 you're in one and you want out, quit digging.
5 That's on the defendant. But it can also help, like
6 the STAR Program, to have somebody reach down and
7 at least offer a hand up.

8 Respectfully, this honorable panel can
9 offer discretion. And in Tennessee, we speak by
10 metaphor. And I'll apologize, I can't do it near
11 as quick as anybody else has done it so far. But
12 we have an expression, a short pencil is better than
13 a long memory.

14 Let's step back 17 years, shortly after
15 Booker, the 25th year of the Commission's
16 guidelines. And in that, then-Judge Kavanaugh,
17 about the same time as two of the members would have
18 been clerking for him, said, it seems to me the
19 guidelines are, in fact, way too complicated. This
20 change makes it clearer.

21 Judge Nancy Gertner, who the Chairman has
22 said was one of the heroes of reforming, had said,

1 in my judgment, the greatest danger is not that
2 judges will exercise the new discretion of Booker,
3 but that they won't when they should.

4 The courts have shown, time and time again,
5 they're going to do what's called a guided
6 discretion if offered that. There's a bibliography
7 from one of the members of this panel that
8 specifically says, here's how you argue it. And
9 I will tell you, I've tore that thing to pieces over
10 the years.

11 The point is, the courts of this country
12 have been put in charge not because they need to
13 be led around like a mule, but because they have
14 enough sense to make their own mind up and to look
15 at all the facts and determine what's in the best
16 interest of justice. That means for victims. That
17 means for prosecutors. That means for defendants.

18 The guided stretch that's being offered
19 here is not going free will, pre-guidelines. This
20 is just saying, when you hear all the facts, as the
21 judge, you're in the best position to make the
22 sentence. And that should be done. Thank you.

1 CHAIR REEVES: Thank you, Justice Smith.
2 Ms. Means?

3 MS. MEANS: Chair Reeves, Vice Chair, and
4 members of the Commission, one thing I wanted to
5 say is I retired from Colorado and not California.

6 CHAIR REEVES: I'm sorry. Did I say
7 California?

8 MS. MEANS: Might be a minor -- that's
9 okay. It's kind of a big difference, district wise.

10 CHAIR REEVES: It is.

11 MS. MEANS: Thank you for the opportunity
12 to allow me to provide public comment on your
13 proposed amendments on behalf of the Victims Rights
14 Advisory Group, or VRAG.

15 As you are aware, we are appointed to
16 assist you in considering how victims and survivors,
17 who are key stakeholders in this process, may be
18 affected by important guideline decisions that you
19 make.

20 With regard to the addition of Part A, VRAG
21 does support providing the courts with guidance on
22 selecting sentencing options. However, with

1 respect to the proposed language of 5A1.1(b), that
2 appears to us to center on the defendant's needs
3 while forgetting victim safety.

4 So, we urge the Commission to add the
5 following considerations to 5A1.1(b): whether the
6 sentencing option adequately addresses victim
7 safety and considers the defendant's access to or
8 the proximity to the victim, whether the option
9 allows for meaningful restitution to the victims
10 and consideration of the need to protect victims
11 and the community from further crimes by the
12 defendant.

13 With regard to Part B, VRAG definitely
14 opposes the expansion of Zones B and C. In fact,
15 we reviewed the Commission's own data, which was
16 the public data briefing on sentencing options.
17 And that showed us the stark reality of who would
18 benefit from this expansion.

19 For example, the data showed that under
20 current Zone C, six percent of defendants have
21 violent offense convictions, but with the
22 expansion, that would double to 12 percent.

1 Additionally, four percent of Zone C
2 defendants have received weapon enhancements or
3 convictions under 18 924(c), but with proposed
4 expansion, that would actually triple to 12 percent.

5 With the proposed expansion, more
6 defendants would possibly also be eligible for
7 either a probation sentence with community
8 confinement or home detention or a split sentence,
9 a prison sentence which substitutes some period of
10 incarceration for community confinement or home
11 detention.

12 One of VRAG's biggest concerns is the
13 possibility of dangerous defendants being placed
14 on home detention in one of those above instances.

15 The amendment assumes several things: that
16 electronic monitoring provides reliable location
17 tracking, that probation officers always supervise
18 offenders closely, that violations are detected and
19 addressed quickly, and that victims are generally
20 safer.

21 But in reality, home detention often
22 places the offenders back in the community exactly

1 where the victims were. And sometimes, it's
2 additional victims, such as their family. And it's
3 where their children go to school, where they work,
4 where they shop.

5 For victims, this could mean unexpected
6 encounters and a disrupted sense of safety in their
7 own neighborhoods. While at the same time, each
8 time an offender leaves their home, this could
9 provide opportunity to have contact with the
10 victims.

11 VRAG notes that the current sentencing
12 system already provides flexibility, and judges are
13 aware that they are able to depart or vary from
14 guideline recommendations under the 18 U.S.C.
15 3553(a) factors. So, this expansion is not
16 necessary.

17 Though we do urge the Commission to reject
18 Part B expansion entirely, should the Commission
19 proceed with the expansion of these zones, we've
20 requested the following safeguards be implemented:

21 That defendants convicted of the following
22 be excluded from the expansion, regardless of their

1 guideline range.

2 And that would be those convicted of
3 violent offenses, offenses where a weapon
4 enhancement applies, sex offenses, offenses
5 involving victims under 18, those over 65 or those
6 with disabilities, defendants with prior protective
7 order violations in their criminal history, and
8 offenses against the same victim as any other prior
9 conviction.

10 And interestingly, I also learned today
11 about 28 U.S.C. 994(j). And I note that within
12 that, it does mention that crimes of violence, those
13 kinds of sentencings, should not be considered for
14 imprisonment -- I mean, be considered for probation
15 services.

16 Additionally, should the expansion occur,
17 we did provide in our written commentary a long list
18 of suggestions that we thought would be important
19 if the expansion occurs. But the few I wanted to
20 quickly note is:

21 We would suggest there be victim
22 notification of the proposed community placement,

1 the victim right to be heard on safety concerns at
2 sentencing. Realizing there's time for the impact
3 statement, but this might be a further consideration
4 they would need if they knew the offender was going
5 to be placed within the community.

6 And geographic restrictions to include
7 minimum distance requirements for victims'
8 residence, workplace, and their children's schools.

9 And as always, thank you for considering the VRAG's
10 involvement in this amendment cycle.

11 CHAIR REEVES: Thank you all so much.

12 Turning to my colleagues, any questions
13 for either of the panelists?

14 Judge Restrepo?

15 VICE CHAIR RESTREPO: Dr. McReynolds, in
16 your written testimony, you noted that the
17 recidivism rate for the CARES Act folks was at about
18 less than one percent.

19 How should we weigh that experience, the
20 experience we had with the CARES Act, against
21 concerns raised by others that expanding home
22 confinement risks over-supervising low-risk

1 individuals?

2 DR. McREYNOLDS: I want to be careful here
3 to make sure that my response reflects the Sentence
4 Impact Advisory Group as a whole. We talked about
5 that briefly.

6 I think that something gets lost on the
7 idea of home confinement. And you don't have,
8 clearly, enough time for me to go into that today
9 because I did live that through my husband. It's
10 not simple.

11 And so, with a recidivism rate of less than
12 one percent with those stringent guidelines, I think
13 it basically should substantiate or validate that
14 it is a form of punishment that does work.

15 I can't speak to the resources that it
16 requires across all the different districts. I can
17 only speak to how difficult it was for my husband
18 and my home. It almost feels like that in itself
19 sets an individual up to fail.

20 And so, if you have less than one percent
21 recidivism rate for individuals that came home
22 through CARES Act or my husband's situation, I think

1 that we should look at reallocating resources to
2 returning individuals to their community, utilizing
3 home confinement more as an option, and maybe kind
4 of spending some time understanding how each
5 district handles the home confinement, if you will.

6 We live in Illinois, and there was no --
7 Ms. Means mentioned it. What is it? Sorry, the
8 electronic monitoring, none of those things. There
9 was a phone call that came multiple times, through
10 the day and night.

11 We slept in shifts to answer the phone
12 because we were told if he missed a call, he was
13 going back. You make adjustments. He went to
14 work. He went to school. He was home.

15 And I don't know how much money it cost
16 the system to have an individual call us at 2:00
17 in the morning, 3:00 in the afternoon, 4:15, or 6:09,
18 but it worked. And it was very tedious.

19 We survived it. We're still married
20 today. I hope that answers your question.

21 CHAIR REEVES: Any other questions?

22 VC Mate?

1 VICE CHAIR MATE: Thank you all so much
2 for being here this afternoon and taking the time
3 for all of your thoughtful remarks. I appreciate
4 it very much.

5 Justice Smith, I had a question for you
6 in terms of the potential impact of these proposed
7 changes in Indian Country.

8 MR. SMITH: Yes, ma'am.

9 VICE CHAIR MATE: My understanding is that
10 many tribal members face federal sentencing for
11 conduct that would be handled at the state level
12 elsewhere.

13 MR. SMITH: Yes, ma'am. Actually, a
14 MacArthur Foundation report from 2023 said that
15 Native Americans are incarcerated 38 percent higher
16 than any other nationality group in the U.S. Part
17 of the reason for that is that a reservation is a
18 sovereign entity in and of itself.

19 The one that I'm listed here on, Saint
20 Regis Mohawk, both is in Upstate New York and across
21 the Canadian border. So, you've got to figure out
22 which set of laws, but none of them would be New

1 York State in and of itself unless there's an
2 agreement.

3 So, the fact that a reservation, the Gila
4 River in Arizona, is its own nation, unless they
5 adopt Arizona's, you're looking at jumping to the
6 federal, which the guidelines place a higher amount
7 of start time for incarceration than most states
8 do.

9 And since they can't get into the state
10 just from where the arrest was, very similar to Fort
11 Campbell's one court, one judge, one courthouse,
12 but depends on did you turn right or left at Gate
13 4, it works the same way in Indian Country.

14 Depending on where they're standing when
15 they're arrested, that may take them out of what
16 would have probably been probation in state court.

17 VICE CHAIR MATE: Thank you. That's
18 helpful.

19 And so, I guess what I was wondering is
20 whether you think a broader range of options with
21 those kind of expanded zones, B and C, for federal
22 courts who are sentencing folks, whether that

1 broader range would help alleviate those
2 disparities between what's happening in state court
3 and federal?

4 MR. SMITH: I think very much so, ma'am.
5 I don't think I've ever met a single judge that
6 said, I need less discretion than I have.

7 Some other people may think that, but I
8 do think that it would help because if the judge
9 looks and knows if you had been three miles down
10 -- there's a thing called checkerboarding in Indian
11 Country where literally next-door neighbors, one
12 is still tribal land, one is reverted back to state,
13 and it's a different set of rules.

14 So, yes, it would give the federal judge
15 considerable more leeway, more discretion to figure
16 out what's the fair answer, not what's on paper.

17 And as the Chairman's U.S. v. Mississippi
18 case talked about, sometimes what's on paper versus
19 what's in practicality application doesn't line up.

20 That's a case where it doesn't line up. It gives
21 the judge the ability to even the scales of justice.

22 VICE CHAIR MATE: Thank you.

1 MR. SMITH: Yes, ma'am.

2 CHAIR REEVES: Now that you've put that
3 cup down, Mr. Luria, I'm going to ask you and Ms.
4 Walsh to sort of debate with one another.

5 MR. LURIA: I'm going to need more water.

6 CHAIR REEVES: Because I think in your
7 written submission, you mentioned that keeping the
8 zones, the zones are somewhat complicated. And
9 judges, I think you say, are really not adhering
10 to them. They're sort of varying from them. And
11 I assume that means varying downward from the zones.

12 If the judges are varying down from the
13 zones, why should we not follow the judges and take
14 the zones down?

15 Ms. Walsh, I think, was saying that the
16 zones have had an anchoring effect and judges have
17 used that to go up. So, help me out with that.

18 MR. LURIA: Certainly. So, there are
19 certainly judges who will vary to get to a zone.

20 Perhaps they were in Zone D or they're in Zone C,
21 and they wanted to put them on probation and get
22 them to a point where home detention, a set amount

1 of that. And it might even be less than what the
2 low end would be in that circumstance to achieve
3 it.

4 So, a lot of times the variances that we're
5 talking about, they're not varying to create a split
6 sentence at certain things or to vary to give them
7 24 months or something like that. They're varying
8 to give them a lower option within what would be
9 the Zone B.

10 They're going to where the zone is and
11 saying, we'll give them -- we'll treat them as if
12 they're in that location, but there are also judges
13 who are much more rigidly adherent to what the
14 guidelines have to say.

15 So, when the zones are expanded, there
16 might be a message saying, please use the zone and
17 vary as you'd like to get to a spot you think is
18 appropriate, either split sentence or probation and
19 give a term of home detention or community
20 confinement that meets the needs you think are
21 there.

22 There are some who are going to look at

1 that same movement and say, no, let's have a split
2 sentence of 88 months, 44 months in, 44 months on
3 home detention, and done. That's a heck of a
4 sentence in terms of the amount of home detention
5 somebody's getting at that point.

6 So often -- we've talked previously, a few
7 weeks ago -- it feels like last week -- about
8 rehabilitation and so forth. That is, as I said,
9 one of our focuses as well. And rehabilitation
10 where somebody stays on home detention for 44
11 months, you're not giving that person a lot of time
12 to learn how to live without you.

13 And I think that's really what we want,
14 to get them to a point where they can make
15 independent decisions, certainly with some
16 guardrails, and gradually remove those guardrails
17 until the point where they're doing what they can
18 and should on their own.

19 Having zone sentences that are that high,
20 there will be people who are much more rigidly
21 adherent to it. And I don't think it necessarily
22 produces an outcome that -- an intended outcome.

1 CHAIR REEVES: Ms. Walsh?

2 MS. WALSH: I think that those
3 considerations speak to the PAG's concern that the
4 zones implicitly or explicitly suggest limitations
5 on a judge's discretion.

6 Of course, we're not talking about
7 sentencing people outside of the statutory regime
8 here. We're talking about people that by statute
9 can get a sentence of probation or intermittent
10 confinement, setting aside the zones and the
11 guidelines.

12 So, what concerns me is when there's talk
13 of expanding zones to help people or give people
14 a windfall, it betrays that we are talking about
15 prison as the default measure of punishment.

16 And that is not what Congress intended in
17 a lot of these statutes. And it is not what 3553(a)
18 says, and it is not in keeping with judicial
19 discretion that we've had pre-Booker.

20 So, that is one of the reasons why the PAG
21 says, get rid of the zones. But to the extent that
22 they're being expanded, it's to more accurately

1 reflect what happened in 2011 when so many more
2 people were actually sentenced to probation.

3 The costs in terms of overseeing people
4 in alternative means of incarceration doesn't
5 account for the thing that I get in the back of every
6 PSR, too, that says how much the -- if that's not
7 something for the Commission as a policy-making
8 decision body to consider, I don't know what the
9 heck it's doing there in the back of every single
10 one of my PSRs either.

11 How much does it cost on all of these
12 different kinds of supervision? So, cost of
13 supervision is a factor that should be considered,
14 but the collateral cost -- for example, for my
15 client's family, that guy would lose his job just
16 with 30 days in jail.

17 And what is the collateral cost of that,
18 finding a new job, finding new housing for that
19 family? Separation of families and the damage that
20 that does sociologically to the community and to
21 that little family unit, it's incalculable.

22 So, these are not windfalls by expanding

1 the zones. On the contrary, if you think about the
2 zones as starting at a non-incarceratory position,
3 then you'd think about the guidelines with prison
4 time being worse and worse and worse as opposed to
5 probation, intermittent confinement, and split
6 sentence being better and better and better for the
7 defendant.

8 And it's just a new paradigm in terms of
9 how we urge the Commission to think about
10 alternatives. Thank you.

11 CHAIR REEVES: I have a question for you
12 there, Chief Judge-Justice, Chief Justice.

13 MR. SMITH: Greg's still fine.

14 CHAIR REEVES: In our proposed guideline,
15 I think we used the words that we should consider
16 the needs of the individual defendant. And I heard
17 you say the Native American community, 38 percent
18 more.

19 MR. SMITH: Right.

20 CHAIR REEVES: And I'm also thinking about
21 what Ms. Johnson testified to earlier about the
22 number of communities without electricity and

1 running water.

2 And thinking about the needs of the
3 individual defendant, do you think our guidelines
4 should include something about cultural ties, or
5 something in that effect, to sort of take in
6 consideration the uniqueness of our tribal
7 communities?

8 MR. SMITH: Very much so. And just like
9 your mental health, U.S. v. Mississippi talked about
10 the fact that even if the rules are saying give the
11 ability to go get help, if it's 400 miles away, you
12 can't get it.

13 And with that, I'll use one example that
14 I think is fairly extreme but hits home to what
15 you're asking. If you think about the photograph
16 of Iwo Jima and the flag being planted, one of the
17 people that were in that photograph was Ira Hayes,
18 who was a member of the Gila River Indian Community.

19 Without acknowledging the cultural issues
20 that he was facing because he was the only person
21 in his whole unit from his community that survived,
22 they sent him on USO tours, not understanding that

1 it was a disgrace to him to have survived when all
2 of his buddies died fighting. And so, he's getting
3 to relive it all over the country.

4 And today, if most people said Ira Hayes,
5 they wouldn't think the flag at Iwo Jima. They
6 would think about the Johnny Cash song, Drunk Ira
7 Hayes, who, because of not taking his cultural
8 issues into effect, basically pressured him into
9 drinking himself to death.

10 So yes, very much, they need to be
11 considered.

12 CHAIR REEVES: Yes, Dr. McReynolds?

13 DR. McREYNOLDS: Sorry, I know this is
14 unsolicited. This thought keeps coming up, and I
15 would be remiss if I didn't say it before we left
16 today.

17 All things dealing with the carceral
18 system talks about the fiscal part of it, right.

19 What is the cost of incarceration? You enumerated
20 that. And what is the cost of probation or home
21 confinement?

22 But how do you enumerate home confinement

1 or any of those things when you have individuals
2 -- and I can represent two, my husband and my
3 daughter -- that don't require extensive
4 supervision? How do you put a cost on that when
5 there is no one calling to check in on them after
6 a certain amount of time?

7 That individual, that probation officer,
8 they're now focused on someone else. So, they're
9 not checking in on them because they have shown that
10 they are productive, that they have learned and
11 rehabilitated, right.

12 And so, they're in the community. And in
13 my daughter's case, was told by her probation
14 officer, you've done such a great job in this first
15 six months. We don't have to check on you, right.

16 That gets lost. And we're always talking
17 about the cost of either decision here, but no one
18 can enumerate that cost.

19 And I think, a lot of times, these examples
20 hinge on the worst offender, if we could title
21 someone the worst offender, but there are more
22 offenders that don't fit that description that do.

1 And I think, at times, that gets lost on the system
2 at hand.

3 I know that was unsolicited, but I just
4 wanted to share that with all of you because there
5 is no cost to -- there's no one calling my daughter
6 every single day or showing up to her house after
7 the first six months, right.

8 She's doing a great job, and her term of
9 supervision will end in three months. So, that
10 individual that was responsible for supervising her
11 is focusing their efforts somewhere else. And I
12 don't think that should be lost on this Commission.

13 CHAIR REEVES: Yes?

14 VICE CHAIR MURRAY: I have a question for
15 Ms. Means. I was reading with interest your -- and
16 you spoke about it, too -- your list of
17 recommendations in terms of if we were to go forward
18 with Part B, the kind of guardrails.

19 MS. MEANS: Yes.

20 VICE CHAIR MURRAY: Some of them, I think,
21 might be required or at least encouraged by the CBRA.

22 MS. MEANS: Yes.

1 VICE CHAIR MURRAY: Some of them, we
2 probably don't have the ability, even if we wanted
3 to, to mandate on courts, but we could suggest them
4 to courts.

5 And I know it's already kind of a fallback
6 decision for you, but if we were to suggest some
7 of these things in terms of resource reallocation
8 and enhanced monitoring, et cetera, to courts, how
9 much would that -- how far would that go in us
10 reaching your concerns?

11 MS. MEANS: Well, I think, of course, for
12 VRAG, we're talking about just a portion of the
13 convictions that involve victims, correct? So,
14 we're already talking about convictions that,
15 essentially, not all are violent because some are
16 fraud or things like that.

17 But I think, of course -- well, my
18 experience is there's not always victims at the
19 sentencings. And so, it's not always maybe
20 forefront for the court to consider that in
21 sentencing, even just a general part of sentencing.

22 But if we somehow are getting to an area

1 where we are looking at those that involve crimes
2 -- victims, excuse me --

3 CHAIR REEVES: You're falling off.

4 MS. MEANS: Yes, let me -- I'm kind of at
5 the edge of the table.

6 CHAIR REEVES: That's all right.

7 MS. MEANS: That's okay. I have a whole
8 seat here.

9 VICE CHAIR MURRAY: That might be part of
10 it.

11 MS. MEANS: Fair enough. But I do think
12 that there should probably be an extra push during
13 the sentencing proceedings if you are considering
14 releasing a defendant, soon-to-be offender, into
15 a community-based home detention or community
16 confinement as an extra enhancement of, hey, we
17 really also need to factor in how this may impact
18 the victim, whether the victim is in court or not
19 for the actual sentencing.

20 That's going to be really crucial if you're
21 considering especially home detention because, like
22 I've reiterated before, often times, they go back

1 into the community. And that would be even my
2 experience in the tribal cases. Clearly the
3 victims are usually, typically pretty close to those
4 defendants.

5 So, it feels like it's -- I understand the
6 need to be suggestion and maybe not so much as a
7 direction in the Guideline Manual, but I think it
8 would be a crucial consideration for the judges in
9 addition to, of course, sentencing impact to think
10 through those options (audio interference) with
11 home detention or even prison sentence, but in the
12 back end when they're coming out, I need to factor
13 in these things.

14 It must be almost in addition to the
15 3553(a) factors, articulating that a little bit more
16 to make sure that those victims are the other party
17 that are considered, not just for sentencing, but
18 those concerns if they're out in the community.

19 CHAIR REEVES: Thank you so much.

20 All right, this concludes with this panel.

21 We thank you all. We're going to take about a ten
22 to 15-minute break, I think, before we head -- right?

1 I have to look to guidance. We're going to take
2 about a ten to 15-minute break, and we'll be right
3 back about last two panels, we'll wrap it up for
4 the day. Thank you all so much.

5 (Whereupon, the above-entitled matter
6 went off the record at 3:17 p.m. and resumed at 3:35
7 p.m.)

8 CHAIR REEVES: Welcome back. I'd now
9 like to introduce our seventh panel, which will
10 present stakeholders' perspectives on our proposed
11 human smuggling amendment.

12 First, we have Christina Giffin. Ms.
13 Giffin is the Senior Deputy Chief and Deputy Chief
14 of Programs, Policy and Legislation in the Human
15 Rights and Special Prosecutions Section in the
16 Criminal Division of the Department of Justice,
17 where she oversees the section's legislative and
18 programmatic work across all portfolios.

19 Second, we have Francisco Morales, who is
20 a Senior Litigator for the Federal Public Defender's
21 Office for the Southern District of Texas. Mr.
22 Morales joined the Southern District of Texas at

1 office in 2009, but he's been a lifelong public
2 defender since 1998.

3 Ms. Giffin, please tell us what we need
4 to hear.

5 MS. GIFFIN: Thank you so much,
6 Commissioner. And thank you for hearing us today
7 on this important issue.

8 The Department has advocated for changes
9 to the smuggling guidelines for many years, based
10 on our experience of the inherently dangerous and
11 increasingly large-scale nature of smuggling
12 enterprises.

13 Alien smuggling presents the dual and
14 deadly harms of risk to our national borders and
15 security and, as importantly, the risk to human life
16 and limb.

17 Those who profit from these harms to the
18 tune of hundreds of thousands of dollars should be
19 held responsible in line with the scale of the harms
20 they cause.

21 Overall, we support versions of each of
22 the proposals under consideration, but because they

1 are quite detailed, I'll limit my remarks to some
2 key points.

3 I'll start by describing some of the kinds
4 of serious cases we are confronting, touch on the
5 statute at issue, and finish by describing how the
6 proposed changes help ensure the guideline is
7 calibrated to fully account for the numerous,
8 egregious, and separate harms that are common in
9 these cases.

10 The kinds of alien smuggling cases we are
11 seeing have changed dramatically over the last five
12 to seven years. Smuggling enterprises have become
13 increasingly commercialized and globalized in that
14 time frame, leading to a corresponding increase in
15 severe criminal conduct.

16 While smuggling events can vary widely in
17 methods and scale, it's worth noting a few trends.

18 First, as I've mentioned, smuggling organizations
19 are getting bigger, seeking ways to move more people
20 for more money.

21 This leads to an increase in large-scale
22 casualty events, like those in which dozens and

1 dozens of people are packed into the back of tractor
2 trailers for transport over many hours without
3 access to water or air conditioning, leading to
4 tragic results.

5 Second, as access to crossing points at
6 the southern border decreases, maritime smuggling
7 events are increasing, branching into parts of
8 Southern California and Florida.

9 These cases often involve small or
10 unseaworthy vessels loaded, again, with dozens of
11 people, far more than their safe capacity, traveling
12 at night, in open seas for long periods, subject
13 to uncontrollable and rapidly changing weather
14 conditions, again, leading to tragic results.

15 Finally, we are seeing smuggling activity
16 increasing along our northern borders. Here, we
17 see smuggling enterprises moving small to
18 medium-sized groups on multiple occasions, leading
19 them into harsh, wintry conditions at night, where
20 they are sometimes abandoned and left to freeze to
21 death.

22 A through line in all of our cases is the

1 threats and violence, including sexual violence,
2 carried out against those being smuggled while they
3 are being smuggled.

4 Given the breadth of these harms, it's
5 worth reiterating that 1324 specifically provides
6 that punishment shall be imposed for each alien
7 smuggled and increased statutory maximums for when
8 aliens are transported in a manner that endangered
9 their lives. That statutory framework recognizes
10 the real and present danger posed to each and every
11 person smuggled.

12 In our experience, the more people
13 smuggled, the more risky, and the more likely it
14 is to result in injury or death. And these bigger
15 operations and bigger events are increasing as it
16 becomes more complicated to move people, requiring
17 more expertise and bigger operations.

18 To address this increasing risk, the
19 guideline should impose incremental increases in
20 punishment corresponding to increases in harm.
21 With that in mind, I'll touch briefly on these
22 proposals and how they meet the goal of imposing

1 consistent, appropriate sentences tailored to the
2 scope and scale of the crime.

3 First, the additional gradations to the
4 alien table at (b)(2) provide a much more targeted
5 way to impose calibrated sentences. In short,
6 smuggling six people does not pose the same risk
7 that smuggling 24 people does. Even more so,
8 smuggling 25 is not the same as smuggling 100, and
9 like should be treated alike.

10 Second, with respect to the proposed
11 changes regarding injuries and death, we continue
12 to recommend that the guideline should impose
13 enhancement for each person harmed, killed, or put
14 at risk.

15 Recognizing the Commission has a different
16 approach, we've proposed two alternatives to the
17 options you've presented to address a more
18 calibrated approach again. And I look forward to
19 questions on that.

20 Finally, the amendments on sexual assault,
21 including the cross-reference and the addition of
22 abusive sexual contact, are vital and long overdue.

1 We categorically disagree with the suggestion that
2 sexual abuse is uncommon during smuggling events.

3 To the contrary, there is ample reporting
4 indicating sexual abuse is rampant along smuggling
5 routes where people are isolated from their
6 communities, unable to seek assistance, at the mercy
7 of their smugglers and inherently coercive
8 environment.

9 We have many examples of cases like this,
10 including those in which minors were subjected to
11 multiple instances of sexual assault, including
12 rape. This fact pattern is not uncommon, and this
13 cross-reference will ensure that sexual violence
14 does not go unpunished.

15 Sexual violence and sexual assault must
16 be treated seriously for all victims and should be
17 sentenced seriously and consistently across the
18 board. Thank you, and I look forward to your
19 questions.

20 CHAIR REEVES: Thank you, Ms. Giffin.

21 Mr. Morales?

22 MR. MORALES: Thank you, Chair Reeves and

1 Commissioners, for the opportunity to speak on
2 behalf of the defenders.

3 We are uniquely positioned in that we
4 represent both smugglers and those being smuggled,
5 who are later held as material witnesses, who are
6 later prosecuted for illegal entry and illegal
7 re-entry. So, we're very unique in that regard.

8 In my nearly three decades of practice as
9 a borderlands public defender, I have handled 3,779
10 cases involving both human smugglers and the
11 migrants who sought the service of human smugglers
12 to enter and to make their way north into the United
13 States. I could be my own judicial district.
14 These are some of their stories.

15 My clients include people like Sarah
16 (phonetic), a single mother from Texas working
17 full-time but failing to make ends meet, who got
18 recruited on social media to make extra money.

19 Someone else had already led the group of
20 undocumented folk into the United States, but there
21 was an interior checkpoint 75 miles north of the
22 border. The migrants could either have hiked

1 through the brush to get around the checkpoint or
2 paid to get a ride around the checkpoint.

3 Sarah picked up the migrants south of the
4 checkpoint. And the migrants got into the trunk
5 of her car, utilizing the foldable back seat where
6 they had airflow and could communicate with her,
7 but this is what Sarah did because she was desperate.

8 Consider the stories of someone like Pedro
9 (phonetic). Pedro, who paid someone, who paid
10 someone, who paid someone, who recruited someone
11 like Sarah to help get further into the United
12 States.

13 Pedro's parents spent their life savings
14 to send Pedro to make his way to the United States,
15 to work and make money to send back home to his
16 mother, who was gravely ill but could not afford
17 any treatment at all. And so, this is what Pedro
18 and his family did out of their own desperation.

19 Now, first, a note of what most of these
20 offenses really look like. They are market-driven,
21 cooperative offenses where the line between the
22 smuggler and the smuggled is fluid and fine.

1 A migrant can be asked to take the wheel
2 to drive and be convicted of smuggling. A migrant
3 who previously made it successfully across might
4 get recruited to guide a group in the brush.

5 A migrant might be assigned to prepare food
6 for the group for a discount on his smuggling fee
7 and then become a conspirator in the smuggling.
8 This fluidity, among other things, tells you that
9 there is a difference between human smuggling, what
10 I see, and human trafficking.

11 What I've seen, and what defenders all
12 along the border can tell you, is that there is often
13 little difference between humans smuggled and their
14 smugglers. Both are desperately trying to make a
15 better life.

16 Defenders oppose each of the unnecessary
17 and unstudied increases because they will fall
18 largely on Hispanic people in low-income border
19 communities.

20 They'll also fail to make migrants any
21 safer, and they will compound the problems in this
22 broken guideline by treating many heartland cases

1 as if they were aggravated. The proposals are not
2 supported by the Commission's own data and will not
3 further serve the purposes of sentencing.

4 It is because of meeting people like Pedro
5 and Sarah and the thousands of others that, quite
6 frankly, I am taken aback by this proposal full of
7 enhancements that will unnecessarily drive up
8 sentencing ranges in regular cases the way that the
9 proposed expanded number of migrants and
10 concealment SOCs will.

11 And I know that the expanded risk and harm
12 SOCs will do nothing to make our migrant clients
13 safer, while exposing our smuggling clients to
14 potentially longer sentences for actions they did
15 not commit, did not foresee, do not condone, up to
16 and including the acts of immigration agents.

17 And the involvement of actual cartels or
18 coercion is extremely rare. The world described
19 by the Department in its comment on this proposal
20 is not a world in any way grounded in the thousands
21 of smuggling cases I've seen, nor is it supported
22 by Commission data.

1 The violence and mistreatment I hear about
2 from my migrant clients most often is not at the
3 hands of smugglers, but from the immigration agents
4 who detain and arrest them.

5 With our deep knowledge of these cases,
6 borderlands defenders understand what might not be
7 obvious to those less familiar with these cases,
8 and that is that 2L1.1 is a fundamentally broken
9 guideline.

10 This is compounded by the fact that the
11 witnesses in these cases are often removed from the
12 country long before sentencing, meaning our clients
13 can face additional years of prison based on
14 expansive enhancements based solely on reports by
15 immigration agents, with no chance for us to
16 investigate.

17 Perhaps this is why data show that most
18 of our smuggling clients receive sentences below
19 their guideline ranges, even in the aggravated
20 cases.

21 Further, guidelines increases do not deter
22 smuggling offense conduct. And strict liability

1 enhancements cannot deter any conduct whatsoever,
2 nor will these proposals achieve just punishment.

3 The current guideline is already so broad
4 that it can easily capture the harms at issue here.

5 And in the outlier cases involving multiple
6 injuries or sexual harms, judges adequately find
7 tools in the guidelines, other adjustments, and
8 3553(a) to reach an appropriate sentence.

9 To be clear, I am not downplaying at all
10 the seriousness of the rare cases that garner
11 headlines because I've seen them. I have also seen
12 them.

13 We, too, want our migrants to be safe, and
14 we want them to be treated with dignity because we
15 represent them day in and day out, every day. But
16 more unempirical enhancements cannot address the
17 root cause of harms in these cases and will compound
18 the many flaws of this broken guideline, which is
19 why I urge the Commission to reject the proposed
20 amendment.

21 After hearing the stories of 3,779 clients
22 on both sides of the smuggling ledger, I'm here to

1 answer your questions about what is really happening
2 on the ground.

3 CHAIR REEVES: Thank you, Mr. Morales.
4 Any questions for this -- Commissioner
5 Wong?

6 COMMISSIONER WONG: Thank you, Ms. Giffin
7 and Mr. Morales. Thanks so much for being here.

8 I'm hoping you can both help speak to
9 whether or not federal sentencing statistics on
10 smuggling cases, which is what we have focused on,
11 whether they do or do not tell the full picture of
12 what is going on in the real world.

13 A, I guess I would ask, would it surprise
14 you to know that at least the Commission has not
15 been able to find a large number of cases as we
16 evaluate these smuggling cases?

17 And B, if there are other sources of data
18 we should be looking to outside of federal criminal
19 convictions that can give us a better, fuller
20 picture of what's going on and the scope of the
21 problem?

22 MS. GIFFIN: Thank you. It doesn't

1 surprise me to learn that the -- your question
2 doesn't surprise me.

3 The data doesn't fully track what we are
4 seeing. And the data isn't -- because of the way
5 the guideline is currently structured, it doesn't
6 give us real insight into the increase in mass
7 casualty events and large-scale casualty events.

8 And it certainly doesn't give us real
9 insight into the frequency of sexual abuse that's
10 happening because the sexual abuse part of the
11 guideline is hidden within (b)(7) and not broken
12 out specifically. It's hard to track and hard to
13 get our hands around it.

14 And that's true of sexual assault across
15 the bar. As we know, sexual assault is
16 under-reported, under-prosecuted. And anything we
17 can do to sort of tease out that important crime
18 and address within the guidelines, I think we should
19 do so.

20 We do know that smuggling events are
21 increasing over time, roughly 50 percent from fiscal
22 '13 to '23, or maybe it's '14 to '24. I'm

1 forgetting.

2 As far as our research goes, we are seeing
3 that in the first five years of that decade, there
4 were smaller numbers of mass casualty or large
5 casualty events. But in the last five years, we're
6 seeing those headlines.

7 And so, they're not, as my colleague has
8 suggested, outliers, but a symptom of what we are
9 seeing across the board that the guidelines haven't
10 caught up to because we can't capture within the
11 guidelines, given that they're not capturing each
12 and every injury, each and every death.

13 They're not capturing what we're seeing,
14 the 53 people dying in backs of tractor trailers,
15 the 11 people dying in a boat for the fifth time
16 that this specific smuggler has brought people
17 across in unsafe vessels. There's just not that
18 kind of data.

19 I think with respect to the sexual abuse
20 in particular, as you'll see in our letter, there
21 is reporting that we've reported to some of your
22 staff already from the New York Times, from Doctors

1 Without Borders -- that's been picked up by UNDOC
2 -- that does talk about the prevalence of sexual
3 violence. And I think that that's a good source
4 for your consideration going forward.

5 COMMISSIONER WONG: And the statistic you
6 mentioned earlier, has that been collected
7 somewhere systematically?

8 MS. GIFFIN: Not that I know of.

9 COMMISSIONER WONG: Where does that
10 statistic come from?

11 MS. GIFFIN: So, we looked at the mass
12 casualty events that we could find on Lexis to try
13 to determine what are the sizes of the people at
14 risk and who are dying there.

15 And what we saw -- this is anecdotal. This
16 isn't based on data from the Sentencing Commission,
17 but what we could find on our research was that from
18 fiscal year '15 to -- sorry, not fiscal year --
19 calendar year '15 to '20, large-scale casualty
20 events were in the range of four or five to ten.

21 And of course, what we're seeing in '20
22 to '25 is the dozens, 50s, those kinds of mass events

1 that we've all seen in the headlines.

2 CHAIR REEVES: Yes, VC Murray? And then
3 VC Restrepo.

4 VICE CHAIR MURRAY: Thanks to both of you
5 for being here.

6 I have a question primarily for Ms. Giffin,
7 but very happy to hear from both of you, which is,
8 one of the sort of counterarguments we hear to this
9 amendment, either in the form we've published it
10 or in the form you're suggesting, is that there is
11 already a high variance rate in the smuggling cases,
12 both in those minor cases but even in the aggravating
13 cases.

14 What's the kind of counterargument in your
15 mind for that? Are there some cases that are
16 masking other cases where that rate isn't there?

17 I'm interested in what you're thinking.

18 MS. GIFFIN: So, we're tracking the data
19 that says a significant number of smuggling cases
20 are sentenced below-guidelines range.

21 And I think there are a number of reasons
22 for that that weigh in favor of what we're talking

1 about here, because a significant number of those
2 cases are sentenced for substantial assistance or
3 fast-track authority that is early disposition.

4 And so, early disposition really gets at
5 some of the smaller-scale cases that my colleague
6 was talking about.

7 And to be clear, we don't disagree that
8 there are smaller-scale events. We're not aiming
9 to sentence across the board everybody who is
10 engaged in minor smuggling events, and early
11 disposition below-guidelines sentence range show
12 that that's true.

13 When we have first-time offenders with
14 small numbers of people that are being brought
15 across in one-off events, those are eligible for
16 early disposition. And that brings that within
17 below-guidelines.

18 It's also true that we use substantial
19 assistance and we have to in these cases, as in many
20 criminal cases, because these are increasingly big
21 organizations.

22 And in order to get at those most culpable,

1 you have to work with the people who are less
2 culpable and give them the substantial assistance
3 that they're entitled to.

4 VICE CHAIR MURRAY: So, is it your thought
5 that if you back out the EDP cases and the 5K cases,
6 that we won't see as much or much of a variance rate?

7 MS. GIFFIN: I think you wouldn't see as
8 much, but I also think it's as important for this
9 Sentencing Commission to be taking account of the
10 increasingly criminal nature of these large-scale
11 smuggling organizations and to lead the judiciary
12 to take that more seriously, as well.

13 I credit my colleague's experience. I'm
14 sure he's been working for a very long time and has
15 seen some of these small-scale events, but that's
16 not what we're seeing over time.

17 We are seeing this increasingly
18 industrialized nature of smuggling moving into
19 bigger organizations. And judges need the ability
20 to be able to say, we need to take this more seriously
21 as it becomes a more complicated crime.

22 MR. MORALES: If I could respond to both

1 questions sort of together, if I might, there is
2 a certain charm to fidelity and empiricism. And
3 that charm is that we can say, this is what's
4 happening.

5 We're not just pointing to a headline and
6 trying to make policy based on a headline. We're
7 trying to find the heartland. What's really going
8 on out there? And over time, my nearly 30 years,
9 this is what we see over and over.

10 That doesn't dismiss the fact that certain
11 bad things happen occasionally. They do. In fact,
12 I think the most notable tractor trailer case, a
13 tragic event, was in Victoria, Texas.

14 That's my division. That's the division
15 I cover. It was before I got there. That's when
16 we started taking note, but these things have not
17 increased. We haven't seen the data support that.

18 Just a general spidey sense about what may
19 be going on out there is not good enough. I think
20 when we rest and rely on the data that's out there,
21 that's where we make good policy.

22 CHAIR REEVES: Judge Restrepo?

1 VICE CHAIR RESTREPO: I'm curious as to
2 whether -- this for both of you, really -- since
3 January of '25, have the numbers gone down
4 appreciably at the border in terms of both illegal
5 crossings and human smuggling or trafficking?

6 MR. MORALES: Yes.

7 MS. GIFFIN: Yes.

8 MR. MORALES: Yes.

9 VICE CHAIR RESTREPO: Dramatically?

10 MR. MORALES: Dramatically, since the
11 last year of the Biden administration. That's when
12 we started seeing it.

13 MS. GIFFIN: I agree. They have gone
14 down, and that is what's leading to what we see in
15 increases in the maritime smuggling and northern
16 border effects.

17 Some of my colleagues have described this
18 as the balloon effect. When you squeeze off one
19 area, you're going to see these smuggling
20 enterprises try to move into different areas. And
21 so, we're seeing that move into different border
22 areas as a result of that.

1 VICE CHAIR RESTREPO: Are the
2 demographics coming from the north the same as the
3 demographics coming from the south?

4 MS. GIFFIN: I don't have numbers, but
5 anecdotally, no. We're seeing more, again,
6 globalized, different kinds of smuggling
7 organizations from a demographic standpoint.

8 VICE CHAIR RESTREPO: Mr. Morales, in the
9 jurisdiction of Morales, 3,700 plus, how many of
10 those involved transnational organizations or
11 cartels?

12 MR. MORALES: None, none. As a matter of
13 fact, the Commission's own data supports that, as
14 well. Fewer than five percent, I think, of the
15 cases involve cartels. And that's reflective of
16 what I'm seeing.

17 And even if some did involve cartels, which
18 I'm sure they're out there at some point, what does
19 that have to do with people like Sarah, who got hired
20 by someone, who hired that person, who hired that
21 person, who recruited Sarah? Sarah has nothing to
22 do with the cartel, and she's just someone who finds

1 herself in that desperate strait.

2 VICE CHAIR RESTREPO: How often are the
3 leaders of these transnational organizations
4 prosecuted?

5 MR. MORALES: Never. I have not seen it.

6 VICE CHAIR RESTREPO: Ms. Giffin, do you
7 have any anecdotal evidence as to how often, if ever,
8 the leaders of these organizations are prosecuted?

9 MS. GIFFIN: I'm pausing only because the
10 definition of transnational criminal organizations
11 is not something, I think, we're settled on right
12 now. What I can say is, we are looking at the
13 leaders of these organizations as consistently as
14 possible.

15 So, when you look at the mass casualty
16 events -- for example, there was a case, U.S. v.
17 Fermin Montilla, in which multiple people were
18 smuggled. And what we looked at were the people
19 who were the most seriously involved.

20 That's true across the bar, whether or not
21 they are coded or numbered as TCO events. I'd have
22 to get back to you.

1 VICE CHAIR RESTREPO: How often do the
2 individuals get even organizer/leader-type points?

3 MS. GIFFIN: I'm sorry, I don't have those
4 numbers.

5 VICE CHAIR RESTREPO: Okay.

6 MR. MORALES: Judge Restrepo, I have seen
7 a leader/organizer on people who recruit the human
8 trafficker -- the human smuggler, excuse me. So,
9 I have seen that.

10 The other thing I think is important is
11 precisely the reason, the matter that you brought
12 up is why we oppose the quantification changes to
13 (b)(2), because you're going to be placing on the
14 shoulders of the people who are least culpable the
15 massive amounts of numbers that they don't get to
16 control. They don't control logistics, quantity,
17 numbers, or the whereabouts and destinations.

18 In fact, I was here a year ago in this same
19 spot talking about 2D1.1 and why the quantity table
20 was a bad thing for trying to decide culpability.

21 And then, we urged this Commission and this
22 Commission adopted the process of placing drug

1 courier reductions and low-level minor sales,
2 street-level dealers, in a way to sort of blunt the
3 idea that quantity is a good reflection of
4 culpability.

5 Yet here we are a year later, thinking in
6 this context, under 2L1.1, that quantity again is
7 a good describer of culpability when it's not,
8 precisely because of what Judge Restrepo said.
9 There are people way on up the chain who are never
10 going to be the ones responsible and held
11 responsible.

12 MS. GIFFIN: If I could briefly respond,
13 of course, we have to prove foreseeability in order
14 to sentence people appropriately.

15 And I would counter my colleague's
16 argument that the additional gradations here when
17 we're talking about smuggling people do allow us
18 to take into account more gradations, more of what
19 people are specifically responsible for based on
20 the conduct that they undertook.

21 VICE CHAIR MATE: Thank you both for being
22 here. I've heard from both of you that perhaps the

1 data that we've looked at so far isn't giving us
2 a full picture of what's going on. And I don't think
3 any of us have the direct border experience
4 ourselves.

5 And so if we were to try to understand more
6 about what these cases look like and what's going
7 on to make decisions about what the guidelines
8 should look like, what steps should we take? What
9 data should we look at? What qualitative work
10 should we be doing?

11 MR. MORALES: I have to be honest. I'm
12 taken aback by the suggestion -- not badly taken
13 aback. I'm just taken aback by the notion that we
14 should place things into a 1.1 so that we can study
15 them more adequately to prove that we needed them
16 in the first place which is what I think the
17 suggestion is that's coming from the department.

18 But I think the things we can look at is
19 to look at the pre-sentence reports, look at the
20 statement of reasons why a judge did a particular
21 thing. They did an increase based on, say, death
22 or injury or serious bodily injury. And I took a

1 -- maybe because I'm a masochist.

2 But I took a look at 201.1 for the last
3 30 years which is roughly the amount of time I've
4 been practicing. And that 201.1 has grown an awful
5 lot. It's grown a lot. So in one respect when we
6 say it's a flawed guideline, it's because it didn't
7 use good empiricism or statistics to make the
8 increases it has.

9 But over the years, it has addressed
10 various things to the point now 201.1 is covering
11 everything we're seeing, including sexual abuse
12 which is treated as serious bodily injury. So to
13 the extent that we need to study, more which it
14 sounds like what the department might be saying,
15 studying this issue more is better than just putting
16 something into 201.1 to decide whether we needed
17 it in the first place. So that's my suggestion.

18 MS. GIFFIN: I was not suggesting that we
19 undertake this guideline in order to prove that it's
20 necessary. I was pointing out accurately that what
21 we see of sexual abuse, even in the PSARs, isn't
22 fully accounting for what we know is happening.

1 And that is because of the way the data is broken
2 out.

3 And that is why I think if we look at some
4 of the outside data that we'll cite in our letter,
5 I think we should look at the PSARs but take into
6 account that even that isn't necessarily going to
7 capture especially all the sexual assault because
8 people are sentencing for serious bodily injury on
9 aye or nay. So if they sentence on serious bodily
10 injury for some other injury and then sexual assault
11 isn't counted because that enhancement has already
12 applied, that won't necessarily give you a sense
13 of the scale of it. So we're going to have to look
14 at outside sources, and those outside sources are
15 reliable ones as you'll see. I believe I was going
16 to make another point, but I have lost it in the
17 moment. Sorry.

18 VICE CHAIR MATE: Thank you.

19 CHAIR REEVES: Yes, Commissioner Wong.

20 COMMISSIONER WONG: Can I just follow up
21 on that? So are you each seeing instances where
22 you know that the case involved more sexual abuse

1 than is reflected in the PSAR?

2 MR. MORALES: No for me.

3 MS. GIFFIN: Yes, and we're seeing
4 instances in which even when sexual assault is
5 accounted for in sentencing, it is insufficient.

6 So the case I was referring to before, United States
7 v. Jimenez-Bautista, involved multiple sexual
8 assaults against a minor, including rape, over the
9 course of a smuggling event. And the sentencing
10 guideline for that individual within a guideline
11 range was 64 which accounts for the entire smuggling
12 event and the rape of a minor girl as well as the
13 multiple sexual assaults. It just isn't
14 commensurate with what we see if we had the cross
15 reference which would take that sexual assault much
16 more seriously as it should be.

17 MR. MORALES: Could I follow up? When
18 very bad things happen in these 201.1 contexts, the
19 department has got tremendous tools at its disposal.

20 They could charge serious bodily injury right off
21 the top and have a zero to 20 year as a possibility.

22 They could charge multiple counts of any

1 case it involves. If they're not doing that, that's
2 -- I don't know why that's happening. But they
3 could certainly do that.

4 And also at the end of the day, there's
5 still 3553. That judge is going to look at 3553
6 and say, this is a little worse than what I'm used
7 to. This is a little worse than what we have seen.

8 And they can use 3553 because it's always
9 the north start. And so I think there's adequate
10 ways to cover all this in 201.1 as it stands already.

11 As I suggested earlier, being a little flawed
12 because there was no empiricism for the changes over
13 the years, yes.

14 But at the same time, it's handling
15 everything. So two things can be true at the same
16 time. And I think those two things are true at the
17 same time.

18 MS. GIFFIN: If I could just respond, I'm
19 not sure I fully tracked the point about charging.

20 But what I will say is we shouldn't be relying on
21 3553 to hope that judges all get to the right place.

22 The point of the guidelines is to create an

1 understanding, a shared understanding across the
2 judiciary of the seriousness of the crime and how
3 they should be sentencing consistently across
4 jurisdictions and across -- addressing the scope
5 of the harm at issue.

6 CHAIR REEVES: I have a question I didn't
7 get a chance to ask. I've been given the red light.

8 (Laughter.)

9 CHAIR REEVES: Mr. Morales, you opened,
10 I think, with the comment that you have represented
11 the trafficker and the traffickee.

12 MR. MORALES: Not in the same case,
13 though, Chair.

14 CHAIR REEVES: I mean, but other instances
15 where the person who's being smuggled is also being
16 prosecuted --

17 MR. MORALES: Yes.

18 CHAIR REEVES: -- by the government.

19 MR. MORALES: Yes. Case in point, one of
20 the examples I gave was where a smuggled -- a person
21 smuggled then is told, hey, drive the car. We're
22 already on this side. And they get prosecuted

1 because they're the ones that are then transporting
2 the rest of the folk.

3 So that fluidity and that fine line is what
4 I kept reference. These flip on that right away.

5 Or in the instance of someone who is in charge of
6 feeding the group, one of the persons who was
7 smuggled, they can become a part of the conspiracy
8 in that way as well. And so we've seen those things
9 happen all the time.

10 CHAIR REEVES: And because you're in your
11 own jurisdiction, 3779. In all seriousness, Ms.
12 Giffin was talking about instances of persons being
13 molested, raped. Do you find that in Texas where
14 you practice if the state authorities ever prosecute
15 those type of cases? Because we've sort of heard
16 that in our own discussions trying to figure this
17 out. Do they or do they not prosecute those type
18 of cases?

19 MR. MORALES: They do. The problem they
20 run into sometimes is that the person who's making
21 the allegation won't be kept. They'll be deported
22 or sent away or otherwise.

1 So it makes it a little difficult for them.

2 But that is a possibility. They can get in on the
3 ground floor which is usually where the outcry
4 occurs to begin with sometimes.

5 CHAIR REEVES: That DHS --

6 (Simultaneous speaking.)

7 MR. MORALES: Correct. No, no, that the
8 outcry by the person making the allegation then is
9 made aware to the state authorities. And then they
10 begin to investigate, so --

11 MS. GIFFIN: If I could respond briefly.

12 CHAIR REEVES: Yes, ma'am.

13 MS. GIFFIN: It is very difficult. I'm
14 not saying it doesn't happen but it is very difficult
15 for state authorities sometimes to prosecute these
16 sexual assaults because the victim in question can't
17 identify where she was raped or assaulted. So the
18 state may or may not have jurisdiction.

19 And the federal government may or may not
20 have jurisdiction if they can't prove where it
21 happened. So we are not seeing that, a sufficient
22 number of state cases, especially in the light of

1 if a federal case is going forward, state
2 authorities will often try to leave the prosecution
3 to the federal authorities to cover which means that
4 crime never gets addressed. I'd also like to
5 briefly touch on my colleague's point with respect
6 to smuggling and trafficking being different.

7 They are, in fact, different crimes. But
8 we are seeing that they move fluidly into each other.

9 So what may begin as a voluntary smuggling event
10 quickly turns into a trafficking event where people
11 are being held, again, isolated from their
12 communities with no access to authorities.

13 They are being subjected to coercion,
14 whether sexual assault or other kinds of assault.

15 Their families are being extorted for additional
16 money. They're being kept against their will in
17 various locations. The idea that these --
18 voluntariness moves fluidly and people are able to
19 take agency is not what we are seeing in these large
20 scale operations. Thank you.

21 MR. MORALES: And each of those four if
22 I could say, coercion, extortion, sexual assault,

1 involuntary detention, those are all matters
2 covered by 201.1 right now.

3 CHAIR REEVES: I thank this panel. Thank
4 you so much for your testimony. We appreciate it.

5 We have your written comments. Thank you so much.

6 Our final panel will present the
7 perspectives of our advisory groups on our proposed
8 human smuggling amendment. First, we'll have Ms.
9 Susan Walsh who will provide the perspective of the
10 Practitioner's Advisory Group. Then we'll have Ms.
11 Melinda Nusbaum who will provide the perspective
12 of our Probation Officers' Advisory Group.

13 We'll then turn to Ms. Jami Johnson who
14 will provide the perspective of our Tribal Issues
15 Advisory Group. And closing us out will Michelle
16 Means on behalf of our Victims' Rights Advisory
17 Group. Thank you all for closing us out. You're
18 on deck.

19 MS. WALSH: Thank you so very much. Yes.

20 I will be uncharacteristically brief because of
21 the hour and also because of the frequency of which
22 you've heard my voice today.

1 (Laughter.)

2 MS. WALSH: But not because of the lack
3 of seriousness to the topic at hand or, of course,
4 the PAG's position on it. We oppose it. We oppose
5 this amendment for many of the reasons that my
6 colleague in the previous panel articulated so ably.

7 I will say that our advisory group, the
8 PAG, has very limited experience with this
9 particular guideline. And I think that informed
10 both our recommendation to oppose it and also
11 informs why caution is advised here. This is a
12 discrete area and a discrete area of the country.

13 And because there is -- because of that
14 and the PAG's inexperience with this particular
15 guideline, the lack of empirical data or a study
16 in support of such a proposal and such an amendment
17 really gave us great pause in saying how we could
18 objectively support it even in the absence of our
19 own practical experience. We think that it is
20 counter to the Commission's historical reliance on
21 data as the foundation for the amendments and that
22 it also runs counter to the Commission's own stated

1 laudatory goal of simplification. So increasing
2 the guidelines -- amending this guideline is
3 particularly problematic.

4 Also that 55 percent of the cases sentenced
5 under this guideline within the last fiscal year
6 were below the range. Again, as it did with my
7 previous comment, speaks volumes about whether or
8 not broadening this is necessary or well advised.

9 It reminds me and others on the PAG of the mischief
10 that happens with the loss tables, expanding those
11 over the years which proved to be particularly
12 problematic in how the guidelines were applied
13 across the country.

14 So adding additional -- amending this
15 guideline to add additional number of victims seems
16 unwise. We also think that some of the enhancements
17 based on multiple deaths or injuries are already
18 contained in the cross reference in the current
19 guideline and have to the extent that the Commission
20 is considering the TCO factor, mens rea is, of
21 course, of paramount concern which we have spoken
22 before the Commission before in the past on other

1 guidelines. Mens rea must be a cornerstone of the
2 moral underpinning of any guideline or justice
3 system in the PAG's view.

4 So we think it runs counter to the
5 simplification concept. And for those reasons and
6 because of the acknowledged lack of data or any
7 empirical study on the need for this expansion, we
8 oppose it. Thank you.

9 CHAIR REEVES: Thank you, Ms. Walsh. Ms.
10 Nusbaum.

11 MS. NUSBAUM: Thank you, Chairman Reeves
12 and the Commission for the opportunity to provide
13 commentary on the issue of human smuggling on behalf
14 of the Probation Officers' Advisory Group. POAG
15 recognizes that this is a significant issue, that
16 only a limited number of districts regularly handle
17 these cases. Our testimony reflects feedback
18 primarily from border districts with substantial
19 experience applying this guideline.

20 POAG supports the revised structure at
21 (b)(2) which adds tiers based on the number of
22 individuals smuggled, transported, or harbored.

1 POAG discussed that the number of individuals
2 smuggled is a meaningful proxy for an organization's
3 scope, profit motivation, and risks posed and can
4 also help assess the defendant's culpability.

5 Lowering thresholds and increasing offense levels
6 better differentiates larger scale operations from
7 lower level conduct while still accounting for each
8 individual smuggled.

9 POAG also supports the amendment at (b)(6)
10 which accounts for the serious risks involved when
11 transporting individuals in overcrowded or
12 concealed conditions. District courts have
13 adopted different approaches to capture this
14 conduct. And this enhancement may provide greater
15 clarity and consistency.

16 POAG also recommends clarifying language
17 to (b)(6) which may provide more consistent
18 application. The phrase, trunk or engine
19 compartment, may be too narrow as individuals are
20 transported in truck beds, cargo areas, tractor
21 trailers, or concealed in small vessel spaces.

22 POAG suggests broader language referencing

1 non-passenger areas with examples that are
2 illustrative rather than exhausted.

3 Similarly, the term, substantially more
4 passengers and the rated capacity is vague and has
5 been interpreted differently by courts. Because
6 most vehicles and vessels provide stated maximum
7 capacities, triggering the enhancement when the
8 rated capacity is exceeded would promote greater
9 uniformity and more accurately reflect the dangers
10 of overcrowded transportation. POAG further
11 supports the proposed subsection (b)(7) which
12 addresses harm that is separate and distinct from
13 the risks articulated in (b)(6).

14 This enhancement addresses the risk of
15 smuggling individuals under particularly dangerous
16 conditions such as denying them access to food or
17 water or leaving them exposed to extreme heat or
18 freezing temperatures without protection from the
19 elements. POAG supports enhancements for criminal
20 sexual abuse or criminal sexual contact,
21 recognizing that forcible sex acts and
22 non-consensual sexual touching are serious and

1 distinct harms. This enhancement accounts for this
2 harm when the sexual conduct is reported.

3 Upon further consideration, POAG is
4 concerned with the inclusion of this conduct at
5 (b)(7) as it would be hard to show that there was
6 a substantial risk of sexual conduct occurring and
7 instead believes this conduct is better captured
8 under the enhancement at (b)(8)(A) which applies
9 only if the sexual conduct actually occurs. POAG
10 believes enhancements addressing the nature of the
11 offense and resulting injury are appropriately
12 offense based while the cross reference
13 encompassing sexual conduct should be defendant
14 based. Cross references generally refer to
15 guidelines that result in significant higher
16 offense levels.

17 POAG believes that the increased penalties
18 should remain grounded in defendant specific
19 findings to better reflect the defendant's
20 culpability. The majority of POAG supports Option
21 2 for subpart (8)(b) which increases penalties when
22 multiple individuals suffer permanent or life

1 threatening injuries or death. Option 1 by
2 contrast increases penalties without
3 distinguishing between the different types of harm,
4 equating an additional bodily injury with an
5 additional death.

6 As provided in our written submission,
7 POAG recommends a hybrid approach that provides some
8 incremental increase for additional injuries while
9 reflecting gradations of harm, reserving the
10 largest increases for cases where multiple severe
11 injuries are present. Finally, with respect to
12 potential enhancements for a transnational criminal
13 organization, POAG believes that the proposed tier
14 structure and conduct based enhancements more
15 effectively address large scale operations.

16 However, if an additional enhancement is
17 adopted, POAG suggests that the definition align
18 with existing statutory language to promote clarity
19 and consistent application. Probation officers
20 familiar with these cases also expressed that this
21 enhancement may likely be applied infrequently as
22 investigations generally do not uncover the full

1 scope of the criminal activity, especially for lower
2 level participants. Thank you for your time.

3 CHAIR REEVES: Thank you, Ms. Nusbaum.
4 Ms. Johnson.

5 MS. JOHNSON: Thank you. And once again,
6 thank you for the opportunity to speak to you on
7 behalf of the Tribal Issues Advisory Group. The
8 Tribal Issues Advisory Group is a very diverse group
9 of people.

10 I am a federal public defender. I know
11 you hear from me a lot. But the group itself has
12 one federal judge, two tribal court judges, a member
13 of -- an employee of the Department of Justice, the
14 Department of the Interior, the dean of a law school,
15 two federal defenders, and a practitioner.

16 So we are a diverse group. And there's
17 a lot more consensus among the group than you might
18 imagine given our diverse backgrounds. And we are
19 all interested in issues that involve tribal
20 communities. I think that as you've heard from the
21 other two practitioners, this is a very regionalized
22 problem.

1 And one of the reasons that I'm here is
2 I'm the only member of TIAG who really practices
3 along the southwest border. And there are
4 reservations along the southwest border, including
5 most notably the Tohono O'odham reservation which
6 actually spans the United States, Mexico, and is
7 frequently used as a smuggling corridor. And also
8 tribal members sometimes get roped into smuggling
9 activities themselves.

10 And which brings me to another point about
11 TIAG which is that we do not just sit around and
12 talk about the interests of Native American
13 defendants in federal court. We also talk about
14 tribal interests and what is good for tribes and
15 tribal communities. And these are sometimes in
16 tension.

17 With all of that said, we were not
18 unanimous. An overwhelming majority of TIAG
19 opposes these amendments. And it's based in large
20 part upon our -- TIAG has not seen the problems that
21 the Department of Justice has identified existing
22 in substantial numbers in the real world.

1 I, myself, I practice in Arizona now. I
2 formerly practiced in the southern district of
3 California. So I have practiced in two of the five
4 border districts. I can't say that I have done the
5 District of Morales over there.

6 But I've done a lot of these cases, both
7 representing people being smuggled and also
8 representing smugglers. The typical case, and this
9 is true of our reservation communities,
10 non-reservation communities, is a person, sometimes
11 a single parent, very often a young person, maybe
12 a college student who gets paid a few hundred dollars
13 and is told to drive their car to a point near the
14 border and drive some people to another point. And
15 they'll be paid a few hundred dollars.

16 That is the overwhelming majority of the
17 cases that we have seen. And while the department's
18 enforcement priorities have changed over time, I
19 have not seen a change in the actual behavior. For
20 the vast majority of the first years of my practice,
21 the people who engaged in this behavior, unless
22 there were aggravating factors like use of a weapon,

1 someone who was injured, flight from law
2 enforcement, received misdemeanor offers, pleaded
3 to Class B misdemeanors of assisting, aiding and
4 abetting attempted illegal reentry.

5 So TIAG does not think that this proposal
6 is necessary to address problems that exist along
7 the border with one exception. And even that one,
8 I think that we would ask for some modifications.

9 We do understand that there is a problem with the
10 grouping rules such that if multiple people are
11 injured in a single incident that that does not
12 result in an increase in offense level even if the
13 person is convicted of multiple counts.

14 And that seems inequitable with respect
15 to what we see also in tribal communities. So if
16 a Native American person on a reservation drives
17 recklessly and injures -- permanently injures or
18 causes life threatening injuries to a person is
19 convicted of two counts which is a fact pattern we
20 see very often. They receive a two level
21 enhancement.

22 It's unclear to us why if a Native American

1 person along the border drives a car with some
2 undocumented people in it and recklessly injures
3 two people in the car why the enhancement in that
4 case would be more than two levels. So we do think
5 that any enhancement ought to track the multi-count
6 grouping rules enhancement. And thank you. I
7 welcome any questions that you would have.

8 CHAIR REEVES: Thank you, Ms. Johnson.
9 Ms. Means.

10 MS. MEANS: Thank you again for allowing
11 me to be here to speak on behalf of the Victims'
12 Rights Advisory Group. I wanted to add that we're
13 kind of a unique group as well because out of the
14 nine of members, four of the members actually reside
15 in Arizona. And they're victim advocates and/or
16 victim counsel that represent victims.

17 And so they are uniquely aware of the
18 border. And, of course, I also had the experience
19 coming from the District of Arizona. I handled
20 human smuggling cases on the probation level. So
21 when we met in a group, we were privileged enough
22 to have four and a half, let's say, members who were

1 aware of this situation, and that's kind of where
2 our statement comes from.

3 VRAG does support the proposal to increase
4 the guideline range exposures in 201.1 with respect
5 to human smuggling. But we recommend that the
6 offense enhancements be greater than currently
7 proposed to reflect the extreme harm caused by the
8 criminal conduct. So therefore, we're
9 recommending the enhancement begin with the offense
10 involving three unlawful aliens instead of six.

11 Each proposed new level should then be
12 increased by at least two more than proposed and
13 with the two highest levels actually being increased
14 by five or more levels. Because crimes of this
15 nature exploit the desperation of non-citizens
16 seeking to enter the United States, treating them
17 as commodities and exposing them to harm and abuse.

18 In an enterprise where human beings are seen as
19 dollar signs, alien smuggling coordinators, and the
20 drivers who further advocate for their agendas are
21 incentivized to transport as much cargo as possible.

22 Each human being smuggled should give rise

1 to a higher guideline range exposure, just as the
2 guidelines currently account for the difference in
3 drug weights, punishing defendants who transported
4 greater quantities of drugs more harshly than those
5 with lighter loads. But here, unlike drug
6 trafficking cases, typically the defendants are
7 aware of the number of humans in their charge. And
8 they knowingly placed each of these people at risk.

9 The conditions in which aliens are
10 transported are often dangerous, inhumane, and
11 unsanitary. They are often ordered to crouch
12 inside car trunks. They seldom have seatbelts.

13 They are sometimes crowded in the beds of
14 tractor trailers, driven at high speeds through the
15 desert, or trapped in rollover accidents. These
16 circumstances dramatically heighten the risk of
17 serious injury or death. With regard to the
18 enhancement for the criminal sexual contact, we
19 support that enhancement.

20 Humans being smuggled into the United
21 States are often subjected to sexual abuse and
22 exploitation, actually even from other smuggled

1 aliens. The victims, sometimes they're
2 unaccompanied minors or they're vulnerable adults,
3 suffer intense trauma that includes post-traumatic
4 stress and long lasting emotional and psychological
5 harm. Sexual offenses devastate victims and have
6 lasting consequences for families, highlighting the
7 urgent need for sentencing enhancements that
8 reflect the severity of both the physical and
9 psychological risks involved in human smuggling
10 operations.

11 VRAG also supports enhancements for
12 multiple deaths or injuries but recommends a
13 combination of Options 1 and 2 which would consider
14 the several different options of the death, the
15 injury, and the permanent or life threatening bodily
16 injury. We further recommend the enhancements
17 should be higher to remain consistent with the
18 purpose of the sentencing and the dangerousness of
19 these offenses. VRAG also recommends that the
20 offenses be offense based to accurately reflect
21 the nature, scope, and harm caused by the criminal
22 conduct rather than the characteristics of the

1 offender.

2 Each additional alien smuggled, each death
3 or injury, and each instance of sexual abuse or
4 exploitation represents a discrete harm directly
5 caused by the offense. Enhancements should be thus
6 tied to these factors to ensure that these sentences
7 are proportional to the severity of the conduct.

8 VRAG supports the addition of a specific offense
9 characteristic to 201.1 that would address the risk
10 associated with human smuggling offenses committed
11 by members of transnational criminal organizations
12 or TCOs.

13 TCOs operate through illegal means and are
14 a threat to the national and economic security of
15 the United States. TCOs pose ongoing and evolving
16 threats to the public, especially near border
17 communities. Finally, VRAG supports the
18 application of the enhancement to all participants
19 working with or for a TCO regardless of their role
20 or status within the organization.

21 TCOs rely not only on leaders and
22 organizers but on participants who perform lower

1 level tasks. Each participant in the TCO
2 contributes to the ability to conduct large scale
3 coordinated criminal activity across borders that
4 often result in violence and create a risk of serious
5 physical injury or death. Thank you.

6 CHAIR REEVES: Thank you. Any questions
7 for this panel? Yes, VC Mate and then Commissioner
8 Meisler.

9 VICE CHAIR MATE: Thank you all for being
10 here again today to the bitter end. We appreciate
11 it. Ms. Johnson, I had a question for you about
12 something I read in TIAG's statement on this.

13 Can you elaborate a little bit on TIAG's
14 experience with how the (b)(2) table for the number
15 of individuals smuggled works? I took from the
16 statement that the number of individuals involved
17 is based on sort of our relevant conduct rules which
18 makes sense, not necessarily the number of people
19 in a specific car. Could you speak a little bit
20 about how that plays out in these cases?

21 MS. JOHNSON: Sure. So certainly there
22 are cases a large number of individuals in a tractor

1 trailer. I've never had one of those cases because
2 they're extremely rare. Generally speaking, what
3 we see is one person driving a car and a number that
4 rarely exceeds six and more like three or four inside
5 the passenger part of the car. That would be the
6 normal case, the overwhelming majority of cases that
7 we see. So when we start getting into --

8 CHAIR REEVES: Ms. Johnson, turn your
9 microphone on, please. Thank you.

10 MS. JOHNSON: I'm sorry. So when you
11 start getting into the enhancements, very often what
12 you have somebody who when they are arrested say,
13 yes, this is the second time that I've done it.
14 Or maybe somebody is aiding and abetting an
15 operation.

16 So it becomes relevant conduct. And the
17 numbers become harder to determine with any degree
18 of precision. And so when you have a table that's
19 adding extra levels of precision about something
20 that is inherently imprecise -- and sure, if
21 somebody drove a car twice, they could probably say,
22 I had three people each time.

1 But groups that are walking through the
2 desert, sometimes, as Mr. Morales said, somebody
3 might be the cook. But they might themselves being
4 smuggled. And they may have no real understanding
5 of how many other people in the group are actually
6 being smuggled versus being leaders in the smuggling
7 organization. And I think it invites a lot of
8 litigation over fine grades of conduct that really
9 are not provable with any degree of accuracy because
10 we just don't see that many cases, at least in the
11 southern district of California and in the district
12 of Arizona where somebody is getting an enhancement
13 for 12 people because they have 12 people in a car.

14 CHAIR REEVES: Commissioner Meisler.

15 COMMISSIONER MEISLER: A question for Ms.
16 Nusbaum, maybe for Ms. Means based on your
17 experience as well as an Arizonian. But I guess
18 I'm just focusing here on POAG's submission on page
19 12. You report that counts of sexual conduct during
20 certain stages of the smuggling operations are
21 fairly common.

22 You also talk about the possibility of

1 making any cross reference the Commission adopts
2 defendant based rather than offense based. We've
3 heard today, I think, from other stakeholders that
4 there potentially could be proof problems based on
5 the nature of allegations in these cases. Would
6 you have any concerns based on your experience about
7 proof problems arising if there were a need to
8 establish a defendant based cross reference in this
9 setting?

10 MS. NUSBAUM: So from the districts that
11 we heard from, what was reported to us was that many
12 of the smuggling cases are identified during vehicle
13 stops, so when the smugglers are moving victims
14 between locations. But the accounts of the sexual
15 abuse are actually occurring in the stash houses.

16 So the defendants themselves that they're seeing,
17 it's limited because of the relevant conduct.

18 It's not within the scope. Their scope
19 was to transfer them from one location to another.

20 So some of the reports of the sexual conduct is
21 not actually included in the PSAR or not accounted
22 for.

1 For cases where they are in a stash house,
2 it's just like with any other victim. You would
3 have to look at the statement and see if you think
4 it is credible. And so we would have to find out
5 maybe a little bit more information. I can provide
6 some later in our final position paper about that.

7 But --

8 COMMISSIONER MEISLER: It sounds like the
9 information is attainable. But is it fair to say
10 that maybe there's less of an incentive to go into
11 detail in the PSAR? Because right now, you don't
12 need to go into that detail?

13 MS. NUSBAUM: Right, because it's not
14 within the scope of that defendant's relevant
15 conduct. But there has been reports by individuals
16 who are more -- who handle these case more frequently
17 that they do see reports of sexual conduct
18 occurring. But it's not within the scope of that
19 defendant's relevant conduct because they're
20 usually stopped during the vehicle pursuits.

21 COMMISSIONER MEISLER: Did you have
22 anything to add?

1 MS. MEANS: I do not have anything to add.

2 COMMISSIONER WONG: Can I --

3 (Simultaneous speaking.)

4 CHAIR REEVES: Yes, Commissioner Wong.

5 COMMISSIONER WONG: Sorry. Just a quick
6 follow up to that. Ms. Nusbaum, in those scenarios,
7 are the sexual abusers in the stash houses the people
8 being prosecuted -- the same people being
9 prosecuted? Or is that part of the proof problem,
10 that there are other people involved that are not
11 --

12 MS. NUSBAUM: It's more -- sorry. It's
13 more difficult because the stash houses are very
14 concealed. And so there's not always information
15 about where the individuals are being transported
16 to.

17 Some of that is the issue about how the
18 case is being investigated similar to, like, what
19 I described in the transnational organizations
20 because it will stop at the car or the vehicle or
21 the boat that's being captured. And there's no
22 further investigation. But anecdotally, they've

1 heard about the individuals who are being smuggled
2 have experienced some type of sexual abuse.

3 MS. JOHNSON: Sorry. Can I weigh in on
4 proof issues --

5 (Simultaneous speaking.)

6 CHAIR REEVES: Yes, you may.

7 MS. JOHNSON: And this has relevance to
8 what we saw in Indian Country. So I'm going to tell
9 an analogous story from Indian Country. Around
10 2015, 2014, Congress passed a law that made it a
11 felony -- made strangulation of an intimate partner
12 a felony.

13 And this was to address the fact that quite
14 often, strangulation wouldn't result in serious
15 bodily injury. And so there would be no federal
16 jurisdiction on reservations. And strangulation
17 is a significant harm.

18 And what we saw immediately in the
19 aftermath of that -- and I'm not criticizing this,
20 I'm just describing what happened, was that the FBI
21 every time they interviewed a victim of domestic
22 violence started asking a lot of pointed questions

1 about strangulation that they had not previously
2 been asking. And so we saw a lot more allegations
3 of strangulation. Again, I'm not criticizing this.

4 That's entirely appropriate. We have a
5 concern in the smuggling context that if there is
6 the opportunity for this enormous cross reference
7 based on allegations that may not have any physical
8 evidence in support of them that it is going to
9 create incentives to ask a lot more pointed
10 questions of people about sexual assault. And in
11 this very particular context where you have
12 non-citizens coming into the United States who are
13 not familiar with the laws of the United States,
14 who are themselves at risk of prosecution that
15 people may feel pressured to give people the answer
16 that they incorrectly perceive is the right answer
17 that's going to get them out of trouble, right?

18 People are coming from countries where the
19 rule of law might not exist in the same way that
20 it does in the United States where you get out of
21 encounters with law enforcement by bribing them or
22 by otherwise telling them what they want to hear

1 which is a very prevalent practice in a lot of the
2 places where people are coming from. And I have
3 also -- I have represented material witnesses and
4 people being smuggled. I believe the vast majority
5 of them have been honest about their experiences.

6 I am aware that some of them are not and
7 have said things that are just demonstrably untrue.

8 And I think it's because they're afraid, right?

9 They're in the country illegally.

10 They are themselves committing a crime.

11 And these people are very often very rapidly moved
12 out of the country. They are here for maybe two
13 weeks. They get a statement.

14 They are not available for cross
15 examination at sentencing. They are not available
16 at trial. And we have a concern that you're going
17 to get a 19-year-old tribal kid who picks up somebody
18 who out of fear and because they think it's what
19 the agent wants to hear makes a false allegation.

20 And then that person is removed. And then
21 what are we doing at sentencing? The person is now
22 looking at a cross reference to an offense level

1 of 34 with no ability to cross examine that person,
2 no ability to get them back into the United States,
3 no ability to do anything about it.

4 And that just seems very unjust. And I
5 would like to make clear, we discussed this, TIAG
6 fully supports prosecuting anyone who commits a
7 sexual assault. And we are not arguing that these
8 people should not be prosecuted. We are just
9 concerned that at a very low standard of proof that
10 people could be looking at very outsized sentences
11 at such a low standard of proof.

12 CHAIR REEVES: I have a question. If we
13 make the transnational criminal organization and
14 enhancement in one of our proposals, trying to
15 figure out what that criminal organization is and
16 what a person's role in it, a courier or whatever,
17 how would the probation office -- because you'll
18 do the initial investigation, I would imagine, on
19 the enhancement, trying to figure out if the
20 enhancement applies. Would it be difficult for
21 you, a very low level person, like, I think Ms. Means
22 mentioned, everybody in the chain possibly being

1 subject to the enhancement? How would you go about
2 trying to determine whether that person had any
3 knowledge or some knowledge of the organization for
4 which they might be working?

5 MS. NUSBAUM: Yes, POAG addressed this in
6 our written submission as well. But the probation
7 officers that were familiar with the cases were
8 concerned that it would be applied infrequently just
9 because of the investigation. It would be very
10 difficult usually for somebody who's just
11 couriering somebody from one place to another to
12 be able to tie them to a larger transnational
13 organization. So POAG was not in favor of including
14 an additional enhancement on that basis.

15 CHAIR REEVES: And Ms. Johnson, I know you
16 defend cases even on appeal in your area. And I
17 heard Mr. Morales say that he really never dealt
18 with or heard transnational organizations being
19 indicted, I guess, or prosecuted. What about your
20 experience?

21 MS. JOHNSON: I have the same experience.
22 I have no -- I've never had or seen a smuggling

1 case where I was aware -- other than as a theoretical
2 matter that there was a translation organization
3 involved. And when I say a theoretical matter, if
4 there's meth being sold somewhere in Iowa, very
5 likely that meth was produced by some sort of
6 transnational criminal organization in Mexico.

7 We would normally say that the person who's
8 selling the meth on the street corner in Iowa is
9 part of a transnational criminal organization.
10 These smuggling cases that I have experienced are
11 sort of the same. I'm sure -- or I'm not sure
12 actually.

13 There very well may be somebody getting
14 people from Guatemala into Mexico. The people who
15 are getting arrested are not people who have any
16 knowledge of that who have any information about
17 it. And I think that if you told them they were
18 part of a transnational criminal organization, they
19 would be very confused by that allegation. I
20 haven't seen it.

21 CHAIR REEVES: Any other questions of this
22 panel? Well, thank you all for closing us out.

1 We appreciate you so much. And so with that, sit
2 tight while I -- I have a script here.

3 (Laughter.)

4 CHAIR REEVES: With that, I'd like to
5 bring our hearing on these January 26th proposed
6 amendments to an end. On behalf of my fellow
7 Commissioners, I want to thank each of the panelists
8 who have come before us today and each panelist who's
9 come to us during this entire cycle. Thank you for
10 your service.

11 Thank you for your comments. Thank you
12 for your testimony. I also want to thank our staff
13 as always who do the real hard work for us day in
14 and day out, night in and night out.

15 I also want to thank you viewers at home
16 for listening. Thank you for paying attention to
17 the work that we do. Now that we've heard the
18 testimony, we will consider this testimony.

19 Now that we've received your written
20 comments, we will continue to review and evaluate
21 and consider our own perspectives based on your
22 testimony and your written comments. We will use

1 that testimony and those comments to make sentencing
2 policy that we hope will be right and it will be
3 fair and that it will be just. I'm losing my voice.

4 One final reminder about our continued
5 work. The comment period on the proposed
6 amendments we discussed today is still open. We
7 look forward to hearing from you by March 18th.

8 Our work continues. Your work continues.

9 www.ussc.gov tells you everything you need to know
10 about our sentencing manual, our sentencing policy,
11 and our criminal justice system. So please use that
12 tool and be informed and stay informed. With that,
13 this meeting is now adjourned. Thank you.

14 (Whereupon, the above-entitled matter
15 went off the record at 4:46 p.m.)

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1 C E R T I F I C A T E

2 This is to certify that the foregoing transcript
3 was duly recorded and accurately transcribed under
4 my direction; further, that said transcript is a
5 true and accurate record of the proceedings; and
6 that I am neither counsel for, related to, nor
7 employed by any of the parties to this action in
8 which this matter was taken; and further that I am
9 not a relative nor an employee of any of the parties
10 nor counsel employed by the parties, and I am not
11 financially or otherwise interested in the outcome
12 of the action.

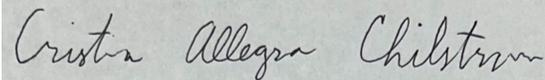
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