

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON
PROPOSED AMENDMENTS TO THE
FEDERAL SENTENCING GUIDELINES

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THURSDAY
MARCH 12, 2015

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The United States Sentencing Commission met in Classrooms A, B, and C, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, D.C., at 8:47 a.m., Patti Saris, Chair, presiding.

PRESENT:

PATTI B. SARIS, Chair
CHARLES R. BREYER, Vice Chair
RACHEL E. BARKOW, Commissioner
DABNEY L. FRIEDRICH, Commissioner
WILLIAM H. PRYOR, JR., Commissioner
JONATHAN WROBLEWSKI, Commissioner (Ex Officio)

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ALSO PRESENT:

T. MICHAEL ANDREWS, Chair, Victims Advisory Group

RICHARD BOHLKEN, Chair, Probation Officers Advisory Group

FRANK O. BOWMAN, III, Floyd R. Gibson Missouri Endowed Professor of Law, University of Missouri School of Law

MICHAEL CARUSO, Federal Public Defender, Southern District of Florida

LEX A. COLEMAN, Assistant Federal Public Defender, Southern District of West Virginia

DAVID DEBOLD, Chair, Practitioners Advisory Group

JAMES E. FELMAN, Chair, Criminal Justice Section, American Bar Association

CATHERINE M. FOTI, Chair, Sentencing Guidelines Committee, New York Council for Defense Lawyers

SHARON HERTZ, M.D., Acting Director, Division of Anesthesia, Analgesia, and Addiction Products, Center for Drug Evaluation and Research, U.S. Food and Drug Administration

JOSEPH T. RANNAZZISI, Deputy Assistant Administrator, Office of Diversion, Drug Enforcement Administration, U.S. Department of Justice

JON M. SANDS, Federal Public Defender, District of Arizona

ERIC TIRSCHWELL, Vice-Chair, Practitioners Advisory Group

HON. BENJAMIN B. WAGNER, U.S. Attorney, Eastern District of California, U.S. Department of Justice

SHARON WALSH, Ph.D., College of Pharmacy, University of Kentucky

ROBERT ZAUZMER, Chief of Appeals, U.S. Attorney's Office, Eastern District of Pennsylvania, U.S. Department of Justice

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TABLE OF CONTENTS

ITEM	PAGE
Introduction	4
Panel 1	
Drugs: Hydrocodone Enforcement Issues and Flavored Drugs	11
Panel II	
Drugs: Hydrocodone Potency Issues	63
Panel III	
Economic Crime: Practitioners	97
Panel IV	
Economic Crime: Advisory & Advocacy	165
Panel V	
Various Proposed Amendments	225

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

(8:48 a.m.)

1
2
3 CHAIR SARIS: Good morning. Thank you
4 all for coming to the hearing today. I am
5 particularly thankful for being here, since I come
6 from Boston -- the snowy tundra of Boston -- and
7 as I have mentioned to other people, we are not only
8 competing for the Olympics, we are competing for
9 the Iditarod.

10 So, there we still have two and a half
11 feet. I saw it in this morning's Boston Globe.
12 And here the green shoots are coming through;
13 spring is here and so are our Commission hearings.

14 I want to thank our distinguished
15 witnesses for coming. We have prosecutors,
16 defense attorneys, probation officers, policy
17 experts and advocates that come from all over the
18 country to share their thoughts on the proposed
19 amendments.

20 Now, let me begin with our discussing
21 the first Panel, which will be on the drug
22 guidelines.

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1 Last year, the Commission took a major
2 step to advance our statutorily mandated purpose
3 of responding to growing prison populations and
4 costs by reducing guidelines levels for most drug
5 trafficking offenses. This year, we are examining
6 the narrower and more targeted issue of the
7 appropriate guideline level for hydrocodone, which
8 was recently rescheduled by the Drug Enforcement
9 Administration.

10 We will hear from experts from the Drug
11 Enforcement Administration and the Food and Drug
12 Administration, and from an Assistant Federal
13 Public Defender, as well as pharmaceutical expert.

14 The following two panels on -- after
15 those -- the two panels on drug issues, we'll turn
16 to economic crime, which has been a major focus for
17 the Commission for the last few years. In fact,
18 it started almost as I became Chair.

19 We've conducted exhaustive outreach,
20 consulted with experts and performed comprehensive
21 data analysis. In September of 2013, we held a
22 symposium in New York at the John Jay College of

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1 Criminal Justice. Participants included
2 stakeholders, prosecutors, defenders, probation
3 officers from all over the country, and we
4 discussed the fraud guidelines.

5 Among other things, we heard
6 stakeholders express concerns about the impact of
7 the loss and victim tables. Beginning in 2012, the
8 Department of Justice acknowledged that the
9 cumulative impact of the two can sometimes be
10 disproportionate in fraud on the market cases.

11 As I explained in more detail at our
12 public meeting in January, this extensive process
13 has -- multi-year process -- has led us to believe
14 that the fraud guidelines may not be fundamentally
15 broken for most forms of fraud, but we have
16 identified some problem areas where changes may be
17 necessary.

18 So, we look forward to hearing from
19 experts today about whether our proposed
20 amendments would be helpful in addressing problems
21 with the guidelines governing economic crime.

22 We will hear on that issue from expert

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1 practitioners, including United States Attorney
2 and a Federal Public Defender, and a Panel of
3 representatives from the Commission's excellent
4 advisory groups, and from important advocates on
5 white collar sentencing issues.

6 We are also considering other kinds of
7 important amendments today. We will hear from a
8 panel of experts to help us resolve a circuit
9 conflict about the so-called single sentence rule,
10 to examine whether changes are necessary to the
11 mitigating role adjustment and to the guideline
12 governing jointly undertaken criminal activity, as
13 well as considering whether and how we should
14 adjust the monetary tables in the sentencing
15 guidelines for inflation.

16 Now, although we are holding the
17 hearing today, our comment period is actually open
18 through March 18th. So, anyone who has not
19 submitted comments or want to submit more, we are
20 here -- we are open to hear from you, in addition
21 to the witnesses on the amendments today.

22 So, welcome to everyone. There are a

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1 few things I'd like to say.

2 Please don't read your statement. I
3 know you've all been warned about 'don't read your
4 statement.' But as a practical matter, we've read
5 your statements. We get them on email; we get them
6 in hard print. We've read your statements. Just
7 give a synopsis of what you have to say. We're
8 sometimes -- we'll have questions for you
9 afterwards.

10 The way it works is, you'll each make
11 your statements, and then we'll ask questions. I
12 also -- it's like -- we have these -- this little
13 light system that goes off, and basically, I give
14 you the hook at some point. So, I'm warning that
15 in advance, so I don't seem rude, if I do that.

16 Now, I'd like to introduce the other
17 members of the Commission. To my immediate right
18 is Judge Charles Breyer; he is a Senior District
19 Judge for the Northern District of California.

20 Judge Breyer has served as a United
21 States District Court Judge since 1998. He joined
22 the Commission two years ago and is now a Vice

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1 Chair.

2 Now, Judge William Pryor also joined
3 the Commission two years ago. You don't see him
4 right now, because he's on an airplane. He comes
5 in from Alabama, and his plane was canceled. But
6 he will be here later this morning. He is a United
7 States Circuit Court Judge for the Eleventh Circuit
8 Court of Appeals, appointed in 2004.

9 Before his appointment to the Federal
10 Bench, Judge Pryor served as Attorney General for
11 the State of Alabama.

12 Next is Rachel Barkow, who also joined
13 two years ago. Commissioner Barkow is a Segal
14 Family Professor of Regulatory Law and Policy at
15 the New York University School of Law, where she
16 focuses her teaching and research on criminal and
17 administrative law.

18 She also serves as the faculty director
19 of the Center on the Administration of Criminal Law
20 at the law school.

21 To my immediate left is Dabney
22 Friedrich, who has served on the Commission since

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1 2006. Immediately prior to her appointment to the
2 Commission, Commissioner Friedrich served as
3 Associate Counsel of the White House.

4 She previously served as Counsel to
5 Chairman Orrin Hatch of the United States Senate
6 Judiciary Committee and as an Assistant U.S.
7 Attorney, first for the Southern District of
8 California and then for the Eastern District of
9 Virginia.

10 Finally, far over to my right is
11 Commissioner Jonathan Wroblewski. Commissioner
12 Wroblewski is the designated ex-officio member of
13 the United States Sentencing Commission,
14 representing the Department of Justice.

15 Mr. Wroblewski serves as Director of
16 the Office of Policy and Legislation in the
17 Department's Criminal Division.

18 So, welcome to everybody again, and
19 we're going to get going on our first panel, and
20 I want to introduce you all and thank you for
21 coming.

22 Joseph T. Rannazzisi. Did I say that

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1 correctly?

2 MR. RANNAZZISI: Perfect.

3 CHAIR SARIS: Is the Deputy Assistant
4 Administrator for the Office of Diversion at the
5 United States Drug Enforcement Agency. He has
6 served in his current position since 2006 and has
7 been employed at the U.S. -- at the DEA since 1986,
8 and next to him is Lex A. Coleman, an Assistant
9 Federal Public Defender in the Office of the
10 Federal Public Defender in the Southern District
11 of West Virginia. He joined the office in 2006,
12 after working in private practice for 14 years. We
13 welcome you, and we'll start with you, Mr.
14 Rannazzisi.

15 MR. RANNAZZISI: Thank you, Chief
16 Judge Saris. Chief Judge Saris, Vice Chair Breyer
17 and distinguished members of the United States
18 Sentencing Commission, good morning. Thank you
19 for the opportunity to represent the Department of
20 Justice today, to discuss the Commission's
21 proposed amendment for a single marijuana
22 equivalency for all hydrocodone offenses, based on

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1 the actual weight of the hydrocodone tablet.

2 In my limited time frame this morning,
3 I'd like to highlight some of the important points
4 outlined in the Department's position paper
5 provided to the Commission.

6 As you know, almost 15 years ago -- for
7 almost 15 years, and after 15 years of looking at
8 the drug, we finally up-scheduled hydrocodone
9 products from Schedule III to Schedule II, and that
10 occurred in 2014.

11 My office, the Drug Enforcement
12 Administration, the Office of Diversion Control
13 was responsible for promulgating that change, and
14 I can tell you, unequivocally, that the change was
15 supported by overwhelming critical scientific and
16 statistical information. That change righted a
17 legal fiction.

18 When the Controlled Substances Act was
19 enacted, Congress placed single entity hydrocodone
20 products, such as Zohydro or the Hysingla ER
21 product in Schedule II, but they placed all of the
22 hydrocodone combination products (HCP) in Schedule

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1 III. It was a fiction to place those Schedule --
2 those combination products on Schedule III rather
3 than Schedule II because they both present
4 comparable abuse liabilities.

5 Not only am I a sworn police officer,
6 but I'm also a licensed pharmacist. I studied all
7 the materials in support of up-scheduling, and I've
8 testified before the FDA public meeting on the
9 issue.

10 When the DEA up-scheduled hydrocodone
11 combination products, we looked very closely at its
12 abuse liability and compared it to oxycodone, and
13 I could tell you that the scientific data, law
14 enforcement data and other evidence established
15 that hydrocodone and oxycodone have substantially
16 similar potencies, abuse potential and adverse
17 health consequences, and public health effects.

18 They're also similar in their chemical
19 structures, meaning in their mechanism of
20 pharmacologic action.

21 The Commission proposed amending the
22 sentencing guidelines to conform to scheduling

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1 parity. The Department supports the changes and
2 specifically recommends that the Commission adopt
3 an actual weight of hydrocodone measured at a
4 marijuana equivalency of one gram hydrocodone to
5 6,700 grams of marijuana. This is purposefully
6 and appropriately the same equivalency of
7 oxycodone.

8 The proposed amendment also provides a
9 single marijuana equivalency for all hydrocodone
10 offenses, based on the actual weight of hydrocodone
11 involved, as opposed to the number of pills
12 involved, or the weight of the pills.

13 The Department believes that using the
14 actual amount of hydrocodone to set offense levels
15 best achieves the goal of proportionality.
16 Hydrocodone is available in varying degrees and
17 dosage strengths in varying combinations. If the
18 number of pills or weight of an entire pill is used
19 to set the offense levels, an offense involving a
20 smaller actual amount of hydrocodone can be greater
21 than the amount of the total pill.

22 Using the actual amount of hydrocodone

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1 will better reflect the defendant's culpability.

2 The Commission has adopted this
3 approach for offenses involving oxycodone, which
4 is also available in varying dosage units and
5 combinations.

6 The Department does not see any
7 justification to treat hydrocodone differently
8 than oxycodone. The Commission proposes a
9 marijuana equivalency, under which one gram of
10 hydrocodone actual equates to either 4,467 or 6,700
11 grams of marijuana. The Department recommends the
12 Commission adopt a drug equivalency of 6,700 grams.

13 Of the two options, an equivalency of
14 6,700 grams mirrors oxycodone and reflects a close
15 relationship between hydrocodone and oxycodone.
16 Both drugs have caused similarly significant harm
17 to the public health. Usage data suggests that
18 hydrocodone abusers freely substitute hydrocodone
19 with oxycodone and heroin, with the ebb and flow
20 and availability and price.

21 Abusers take hydrocodone and oxycodone
22 interchangeably to achieve the same high. Since

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1 2004, both drugs have been responsible for tens of
2 thousands of emergency room visits. On a per
3 kilogram basis, the potential of hydrocodone
4 products associated with death is similar to that
5 of oxycodone.

6 Law enforcement investigation shows
7 that the rates of diversion per kilogram of
8 hydrocodone products distributed have been largely
9 similar to those of oxycodone products, and in
10 fact, for the rogue pain clinics, hydrocodone or
11 oxycodone are the primary drugs distributed out of
12 those clinics, and the only explanation appears to
13 be geography.

14 I hope this brief summary has been
15 helpful. I'm happy to answer any questions you may
16 have to help the Commission develop an appropriate
17 sentencing scheme for hydrocodone, and I
18 appreciate the invitation to testify before you
19 today. Thank you.

20 CHAIR SARIS: Thank you, Mr.
21 Rannazzisi. Mr. Coleman.

22 MR. COLEMAN: Your Honor,

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1 Commissioners, thank you for having me. This is
2 my first time to the rodeo, and I appreciate the
3 interest and invitation.

4 The government has written testimony,
5 and what I've heard from my co-panelists is -- I'm
6 hearing a lot of numbers and data.

7 I'm here as a line defender; I'm here
8 as someone dealing with this daily and representing
9 not just the defender organization, but I believe,
10 the citizens I defend on a daily basis.

11 I heard rogue clinics. I hear all
12 these big numbers suggesting that there is this
13 huge public health impact and that geography is the
14 only thing that distinguishes the drug involved.

15 I am here in part because my district
16 was apparently -- according to two editions of
17 Quick Facts -- the fifth highest oxycodone district
18 for fiscal year 2012 and then 2013.

19 Our Judges read that before we were
20 aware of it. They brought that up in some
21 sentencings, and then we took a look at the raw
22 numbers and saw 55 for fiscal year 2012 and 57 for

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1 fiscal year 2013.

2 These were defendants for fiscal year
3 2012; that was only 31 cases. One of those cases
4 was a Rule 20 transfer in from Virginia, who had
5 some type of opiate conviction in that district and
6 was going to serve her probation in West Virginia.

7 The people who are going to be most
8 heavily impacted by this amendment are not going
9 to be the big pill mills and the doctors. The ones
10 who are going crazy with high, high volumes of
11 opiates that are being illicitly distributed will
12 be readily captured by a unit basis or even the 500
13 multiplier that exists in the drug equivalency
14 table.

15 My clients have been, for example, a
16 gentleman named Jermaine Holland. These are all
17 from fiscal years 2013 and 2014. He was a 31 year
18 old African American male; he was rehabing houses
19 in Bluefield, West Virginia.

20 His attributable drug quantity in the
21 case was eight hydromorphone four-milligram pills.
22 This was done through two controlled buys of

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1 someone coming up to the house.

2 He ended up with a base offense level
3 12, or a marijuana equivalency that actually would
4 have been under the notes (or the "asterisks") in
5 the drug equivalency table.

6 Cayla Lindsay was a 20 year old pregnant
7 Caucasian female; she was arrested on three
8 controlled buys, with a total drug quantity
9 involved of 3.5 oxycodone 30-milligram tablets and
10 five oxycodone 15's. She again, came up with a
11 base offense level, through the marijuana
12 equivalency, of under 12 and had to come up.

13 Robert Black was a 49 year old divorced
14 Caucasian male in Huntington, who did have a
15 record, but then was arrested and prosecuted for
16 10 30-milligram Roxicodone tablets.

17 David Embrey was a 42 year old Caucasian
18 male, visiting Raleigh County from Maryland,
19 coming to see his grandchild his son had had. They
20 found 7.5 Morphine Sulfate 30-milligram tablets in
21 his car, and he was indicted for that in Federal
22 Court.

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1 Without the asterisks on the drug
2 equivalency note, all of these people would have
3 had under base offense level 12 guideline ranges
4 in terms of seriousness. Had all of these tablets
5 been HCP's or hydrocodone, we would have been down
6 toward a base offense level of six.

7 With the shift of Schedule II now, they
8 would have immediately been subjected to 12 levels.
9 They were anyway, because of the drugs involved,
10 but had it been hydrocodone, they would have been
11 subjected to the worst punishment, and if we go to
12 a multiplier of 6,700 grams, even at active
13 ingredient weight, we're looking at substantially
14 higher sentences for them.

15 It's been frustrating enough as a line
16 defender, when I have so many of these types of
17 cases -- and we have some of the big ones, too --
18 but these by far as a higher proportion in my
19 district, that you know, I'm going to them and
20 explaining how they're -- you can't have the
21 benefit of the drugs minus two. You've got a base
22 offense level 12 stuck in your drug equivalency

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1 table.

2 They see that all their buddies who were
3 doing heroin at five grams or more -- or even lower
4 levels pre-guidelines -- getting this two level
5 break and writing in and getting the motions, and
6 we get countless letters from other clients going,
7 "Why doesn't that affect me?" and I have to send
8 them a copy of the drug equivalency table and with
9 that, it's like, "Yes, that's why you still have
10 to do your year and a day."

11 So, this change, while I read the
12 government's testimony and there are certainly
13 statistics out there. If you look at the top five
14 pill districts that have been identified in the
15 country, three of them for fiscal 2013 involved
16 Appalachia. They involve Eastern Kentucky,
17 Eastern Tennessee and the Southern District of West
18 Virginia.

19 You need to understand the demographic
20 of who is there. These are not big-time drug
21 traffickers; these are people who have not had
22 adequate education, who have always had some

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1 economic struggle from them because of the dynamics
2 of West Virginia's economy.

3 The large majority of them are honest
4 people who work very, very hard, and they ruin their
5 knees, their shoulders, their backs in the mines.
6 They're put on pain medication when they're
7 clinically disabled and they have chronic pain
8 issues, and in these poor communities -- oh gosh,
9 I got a red light. I'm sorry.

10 CHAIR SARIS: Finish your sentence.

11 MR. COLEMAN: I'll quickly wrap up.

12 CHAIR SARIS: Get a little of his time.
13 You didn't quite --

14 MR. COLEMAN: Okay, thank you. But in
15 these communities, you already have a type of
16 barter system. "You know, my doctor was gone. My
17 car was broken down. I couldn't get in to Beckley
18 to get my prescription refilled," and they share.

19 Then later, they sell because they need
20 some gas money or they want to buy something to eat,
21 and it -- there are plenty of cases where that
22 expands, but when you see two, three, four levels

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1 transaction -- four pill transactions, these are
2 the ones who are going to be swept up if you leave
3 the HCP's in the drug quantity table, and our
4 position -- to sum that up quickly -- is put the
5 Schedule II hydrocodone combination products
6 (HCPs) back out as a separate part of that advisory
7 note in the drug equivalency table. Change the
8 Schedule II to Schedule III, but make HCPs
9 separate.

10 For the actual single entity, while the
11 defender organization believes we need to
12 restructure this whole thing for reasons that are
13 set forth in our written testimony, certainly in
14 the interim, this year is a stop gap.

15 It is beyond me, how justice has gotten
16 from 1,675 in 2009, to now a full-blown 6,700
17 because we're just like oxycodone.

18 We've cited studies -- nine different
19 studies in our written testimony -- that show the
20 abuse liability is not the same. The market
21 structure is not the same. You do not see -- my
22 question, I guess is -- from the Federal

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1 perspective is, if hydrocodone is par for par with
2 oxycodone, where are the cases?

3 My last hydrocodone case was the first
4 year I got with the Public Defender Officer here
5 in 2006. It was a pharmacist. She was in a six
6 by eight area working and self-medicated. So, she
7 didn't distribute. So, thank you for your time.

8 CHAIR SARIS: Well, thank you.
9 Questions?

10 COMMISSIONER BARKOW: Mr. Rannazzisi,
11 my question. We have comments. You might not have
12 seen them because it's for another Panel actually.

13 But our Probation Officers' Advisory
14 Group had told us that it was their experience in
15 the field and with their contract treatment
16 providers that it turns out hydrocodone really
17 isn't the drug of choice. That, you know, if you
18 -- just in terms of actual usage and practice.

19 They called it a maintenance opiate and
20 an introductory one, but it's not -- you know, they
21 suggested that, if we were to actually look at
22 real-world market dynamics, that they're not

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1 equivalent.

2 So, the probation officers had
3 supported the other ratio -- not the 6,700, but the
4 4,467 -- and I'm just wondering if you comment on
5 why their experience might be different from some
6 of the things that you had cited.

7 MR. RANNAZZISI: Absolutely. Thank
8 you. I deal in real-world market values too. To
9 say that there are different marketplaces for these
10 drugs is not actually accurate. There are
11 different geographic locations where these drugs
12 are dispensed.

13 But if you look back to the early
14 2000's, the number one drug of abuse, the number
15 one in the pharmaceutical realm, the number one
16 drug that was being diverted was hydrocodone.

17 How was it being diverted? It was
18 being diverted over the Internet, and just in one
19 case, we had 34 Internet facilitation sites.

20 Now, the average -- and those -- each
21 Internet facilitation site was a brick and mortar
22 pharmacy.

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1 Now, the average pharmacy in that time
2 period -- in 2006 -- dispensed about 70,000
3 hydrocodone tablets. Those 34 pharmacies
4 dispensed over 98 million tablets in total.

5 Now, where were they going? They were
6 going to places like Kentucky and Tennessee, and
7 in Kentucky it got so bad, that they were following
8 the common carrier trucks to see if they could get
9 their packages off the truck before they're
10 delivered to the locations they were supposed to
11 go to.

12 Now, that all changed after Ryan Haight
13 came into effect. Ryan Haight -- the Ryan Haight
14 Act -- basically shut down the Internet.

15 So, what did we see? We saw a total
16 shift in what was being dispensed. We saw a total
17 shift; Internet went away, and we started seeing
18 pain clinics.

19 Now, what's interesting to note is if
20 you were in Texas, your pain clinics were doing
21 hydrocodone, but if you were in Florida -- which
22 was where all the Internet pharmacies were -- they

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1 moved to oxycodone.

2 So, you the Texas people at hydrocodone
3 and the Florida people at oxycodone, dispensing in
4 huge quantities.

5 Now, we always -- they always said,
6 "Well, why is it that somebody would go from
7 hydrocodone to oxycodone?" Well, it's because you
8 build a tolerance to the drug. Eventually, you're
9 going to need more drug.

10 Now, the problem is up until this year,
11 last year, there was no single entity hydrocodone
12 high-potency tablet. The highest tablet you could
13 get was a 10-milligram hydrocodone tablet. That
14 was it.

15 But what we saw was 15- and 30-milligram
16 oxycodone immediate release tablets, and everybody
17 who couldn't go to those hydrocodone anymore --
18 because they needed 10, 12, 14, 20 tablets to get
19 that same effect -- they started moving to the
20 oxycodone, but it's not because the oxycodone was
21 any more potent. It was because there was more
22 drug active ingredient in the dosage forms.

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1 Now, I would like to see what would have
2 happened if there was a single entity product for
3 the marketplace when all this was occurring, but
4 there wasn't, and we don't know exactly what's
5 going to happen with those single entity products
6 now that hydrocodone is in Schedule II.

7 But I could tell you that if you're in
8 different places of the country -- like I
9 understand that in West Virginia, oxycodone is
10 king. Of course, it is. I've been to West
11 Virginia. Actually, I went up to Oceana, which is
12 near Beckley, and I talked to community groups up
13 there a couple of years ago, and they were saying
14 oxycodone is just ravaging their community.

15 But I could go to several communities
16 in Appalachia or Texas and hydrocodone is the king
17 still, and it will always be the king because now
18 they have these single entity high-potency
19 hydrocodone tablets, and once they're made
20 available -- once they're out in open marketplace
21 -- that's what they're going to be going to.

22 But you don't -- it's not a marketplace

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1 issue. They're both coming out of -- they're both
2 coming out of rogue pain clinics. They're both
3 coming out of dealers; there are dealers who are
4 dealing both drugs.

5 CHAIR SARIS: How many prosecutions
6 have you had for hydrocodone? What is the
7 comparison between that and oxycodone?

8 MR. RANNAZZISI: I can't tell you
9 prosecutions; I could tell you cases.

10 CHAIR SARIS: You mean open
11 investigations?

12 MR. RANNAZZISI: Yes, investigations.
13 Our NFLIS data -- our National Forensic Lab
14 Information System -- when we talk about National
15 Forensic Lab Information System, these are samples
16 of drugs going in that are related to a case.

17 Hydrocodone cases far exceeded
18 oxycodone cases in 2000 to 2008. But there was a
19 substantial shift in 2009. Oxycodone started to
20 be king, and the hydrocodone cases started to go
21 away because there was a shift in Florida.

22 CHAIR SARIS: So, the last few years,

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1 what would you say the differences between --

2 MR. RANNAZZISI: Oxycodone definitely
3 was more than hydrocodone.

4 CHAIR SARIS: Well, do you have like a
5 ballpark number for the two?

6 MR. RANNAZZISI: I could give you the
7 NFLIS -- the number of NFLIS cases.

8 In 2000 --

9 CHAIR SARIS: Say 2012 or 2013 or
10 something -- 2014?

11 MR. RANNAZZISI: In 2012 we had 34,832
12 case samples.

13 CHAIR SARIS: For?

14 MR. RANNAZZISI: For hydrocodone, the
15 hydrocodone products, that was pre-single entity
16 high-potency products. These are just the
17 combination -- the 5-, 7.5- and 10-milligrams
18 pills-- as compared to 41,915 for the oxycodone
19 products.

20 That includes the high-dose oxycodone,
21 the OxyContin 60's and 80's. It includes
22 Percocet, Percodan, which is 5-, 7.5- and

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1 10-milligram tablets. It includes --

2 VICE CHAIR BREYER: When you say cases,
3 what do you mean?

4 MR. RANNAZZISI: When a law
5 enforcement agency does an arrest or search
6 warrant, or an undercover purchase, they take the
7 drugs and they send it into State, Local and Federal
8 labs for analysis.

9 Each one of those drug samples opens a
10 case. They have to have a case number to open it.
11 So, that would be the cases.

12 So, the samples, now, there could be
13 several samples under that case number, but that's
14 the number of case numbers that were opened.

15 COMMISSIONER FRIEDRICH: Mr.
16 Rannazzisi, Mr. Coleman makes a compelling point
17 in his written testimony that the Commission may
18 have strayed off course in 2003, when we changed
19 the marijuana equivalencies for oxycodone, and in
20 his testimony, he says that although heroin is more
21 potent, it is punished less severely with the
22 marijuana equivalency of 1,000 grams.

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1 In your view, is he correct, that we do
2 have a proportionality problem, putting what we do
3 with hydrocodone aside right now? Do you think
4 with the opioids, there is a problem in
5 proportionality between the different drugs?

6 MR. RANNAZZISI: No, and when you're
7 comparing oxycodone to hydrocodone, no.

8 I think that heroin is becoming a
9 problem, but you have to understand that our use
10 of heroin is a symptom of our opioid abuse.

11 In 2011, we had over 16,900 people die
12 of an opioid overdose. That's not heroin. That's
13 drugs like oxycodone, hydrocodone, morphine,
14 methadone, fentanyl and oxymorphone.

15 Only 4,400 people died of heroin that
16 same year. So the --

17 COMMISSIONER FRIEDRICH: Is that
18 because of accessibility, rather than potency?

19 MR. RANNAZZISI: I think that it's a
20 little of both. I think potency has a lot to do
21 with it but so does accessibility.

22 Remember: hydrocodone is the number one

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1 prescribed drug in the United States of all drugs,
2 including antibiotics. It's over 130 million
3 prescriptions written for hydrocodone. So, it's
4 a highly accessible drug.

5 Now, that number is going to go down
6 because of the rescheduling action, but everybody
7 believed that hydrocodone was not as potent because
8 it was in Schedule III. That's where the legal
9 fiction comes in. It should have never been in
10 Schedule III; it should be treated as a very potent
11 opioid, because it is a very potent opioid.

12 So, I believe that the sentencing, if
13 you make it in parity with oxycodone, you're not
14 doing an injustice. You're actually --

15 COMMISSIONER FRIEDRICH: I understand
16 that. I'm just wondering whether oxycodone, as
17 compared to heroin, whether we've got it right.

18 MR. RANNAZZISI: Absolutely. You
19 absolutely have it right.

20 I think that, again, oxycodone is, in
21 my view, more dangerous than heroin because it's
22 a legitimate drug. People don't realize that you

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1 could overdose just as easy on oxycodone as you can
2 with heroin, and it could be used similarly to
3 heroin. It could be injected just like heroin.

4 Those 15- and 30-milligram tablets are
5 being injected. They're being snorted. They're
6 being smoked -- just like heroin.

7 So, in the end, I think that yes, you
8 got it right. It's just bringing the hydrocodone
9 up to the oxycodone, since they're very, very
10 similar drugs.

11 MR. COLEMAN: Sorry, I'm making faces
12 while I hear some of this. Joseph is hitting on
13 some points from his background.

14 CHAIR SARIS: We have to switch the
15 camera right over there.

16 MR. COLEMAN: And some of the data. I
17 have to strongly disagree.

18 You'll note the points made in my
19 written testimony, but keep in mind, Congress set
20 the 1,000 to one with what? Heroin to marijuana.
21 That's why we have the initial focus on heroin,
22 besides it is very illegal.

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1 All this started with the opium poppy;
2 it's got three alkaloids - morphine, thebaine and
3 codeine. What historically has been the biggest
4 addiction problem in the United States going back
5 to the 1800's? Morphine.

6 We have the "Soldier's Disease" after
7 the Civil War. Addiction to morphine. In all
8 these other opioids that we currently use in Europe
9 were developed as alternatives to get the analgesic
10 effect -- without all the consequences and
11 addiction problems -- of morphine.

12 If we look at the definition of opiate
13 in the 1986 Act, it defines it as something that
14 has morphine or morphine-like qualities.

15 So, when you look at the drug
16 equivalency table in the application, you've got
17 a 500 to 1,000 ratio between morphine and heroin,
18 which makes sense because it's pretty accepted that
19 heroin is twice as potent as morphine.

20 Remember that heroin came along, and
21 before they understood what it did metabolically,
22 it was to stop morphine addiction, and then they

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1 found -- and I had a medical chemist tell me, and
2 this was really interesting -- all heroin is, is
3 putting a vinegar molecule on top of a morphine
4 molecule.

5 It gets in the body. It's stripped down
6 for faster application with metabolism, and boom,
7 it goes in.

8 So, when the Germans and Bayer came up
9 with, I believe -- yes, ma'am, the hydrocodone was
10 developed as an attempt to synthesize codeine.
11 It's chemically different because it's from
12 different alkaloids. They're in the same family.
13 It's organic chemistry. They've got the same base
14 five-point structure, but then they differ with
15 what's put on the ends, and you can ask your experts
16 about the chemistry.

17 But these rogue clinics, pain clinics,
18 this is coming back. Again, in my district, I know
19 in Eastern Tennessee, I worked there 14 years. I
20 was on the CJA [Criminal Justice Act] Panel from
21 '98 through 2006. I never had a hydrocodone case.
22 I never heard of too many beyond maybe less than

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1 10 Lortab cases -- that was in the Eastern District;
2 that was in the Chattanooga Division.

3 CHAIR SARIS: Have you surveyed the
4 Federal Defender's offices across the country to
5 see if your experience is indicative?

6 MR. COLEMAN: The defender services
7 did survey different offices, and it's really kind
8 of coming down to what's unique with the five top
9 districts that are identified -- with the exception
10 of Florida -- where they do have some pill mills
11 down there.

12 But I know in the Eastern District --
13 and there are some in the Eastern District
14 Kentucky. The dynamic my co-panelist is
15 describing is -- it's not that it's not existent
16 --

17 CHAIR SARIS: Are the defenders seeing
18 an increase in hydrocodone cases?

19 MR. COLEMAN: No, ma'am.

20 CHAIR SARIS: All right.

21 MR. COLEMAN: I did --

22 CHAIR SARIS: So, you would say your

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1 district is representative?

2 MR. COLEMAN: Yes, ma'am.

3 CHAIR SARIS: All right, I just wanted
4 to --

5 MR. COLEMAN: No, and when Zohydro was
6 approved, when I heard it had no tamper-resistant
7 qualities at all, the first thing was like, my God,
8 this is going to be a contact crush. There are
9 going to be people dying everywhere, and I tried
10 to protect our panels with that when we had our CJA
11 conferences, and did a very lengthy presentation,
12 the whole thing. I got the weights from the
13 manufacturer, because I knew the probation
14 officers and everybody were going to be worrying
15 about the weight.

16 We haven't seen Zohydro approved by the
17 Board of Pharmacy to be distributed in West
18 Virginia yet.

19 So, we seem to be pre-mature and jumping
20 the gun by jacking up the multiplier. Moving to
21 Schedule II has a practical benefit on legal
22 dispensation. Let's give it a year and see how it

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1 works; if the cases spike, we'll know what to do.

2 CHAIR SARIS: Thank you. Judge
3 Breyer?

4 VICE CHAIR BREYER: Well, I was
5 interested in your testimony that you've done
6 extensive scientific inquiry, and I wanted to flesh
7 that out a bit, because this -- are you referring
8 to the inquiry that was done in the rescheduling
9 of the drug?

10 MR. RANNAZZISI: Yes, sir.

11 VICE CHAIR BREYER: And that was --
12 that was -- can you give me a little bit more of
13 a context of that? Flesh it out a bit.

14 MR. RANNAZZISI: Sure. When we do a
15 rescheduling action, our scientists -- we have
16 Ph.D. pharmacologists just like FDA. Our
17 scientists look at all the literature, review the
18 drugs, review the pharmacology of the drug, review
19 the medicinal chemistry of the drug, you know, look
20 at different things regarding receptor affinity,
21 things like that.

22 Their research is done, then it's sent

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1 over to FDA and FDA's research is done, and then
2 it comes back, and then they sit down and they talk.

3 VICE CHAIR BREYER: And how long is
4 this process?

5 MR. RANNAZZISI: Well, for this drug,
6 the process started in 1999, and we finished in
7 2014.

8 VICE CHAIR BREYER: So, it was about a
9 15 year inquiry?

10 MR. RANNAZZISI: Approximately, yes.

11 VICE CHAIR BREYER: And are you
12 familiar with any similar inquiry with respect to
13 marijuana?

14 MR. RANNAZZISI: There have been a lot
15 of studies --

16 VICE CHAIR BREYER: Schedule I, right?

17 MR. RANNAZZISI: Schedule I, correct,
18 sir.

19 VICE CHAIR BREYER: And the FDA claims
20 that there is absolutely no medical use of that?

21 MR. RANNAZZISI: Yes, sir.

22 VICE CHAIR BREYER: And is a similar

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1 inquiry going on with respect to marijuana?

2 MR. RANNAZZISI: There have been
3 several inquiries going on with respect to
4 marijuana, sir. In fact, we've had, I think, at
5 least two reviews where both our scientists and FDA
6 scientists have done those reviews, and they've
7 come back with a -- there is no medical --

8 VICE CHAIR BREYER: Is there presently
9 any inquiry going on with respect --

10 MR. RANNAZZISI: I believe there is.

11 VICE CHAIR BREYER: -- to marijuana?

12 MR. RANNAZZISI: Yes, sir; I believe
13 there is.

14 VICE CHAIR BREYER: And do you have any
15 idea when that is going to come back?

16 MR. RANNAZZISI: Again, that would be
17 a better question to be posed to the FDA.

18 VICE CHAIR BREYER: Okay; thank you.

19 CHAIR SARIS: I was going to -- I,
20 myself, and Boston, haven't seen hydrocodone
21 cases. Maybe they're there. I haven't received
22 any, whereas, really, everyone is focused on

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1 oxycodone, and you -- so, it does strike me
2 geographically, there must be huge differences on
3 what's happening.

4 So, I am interested if you could get the
5 data on how many actual prosecutions there have
6 been and geographically where that is, because it
7 isn't something that at least many of us have had
8 experience with.

9 You say in your testimony, or the
10 Department does -- and I'd be curious about both
11 what you all say -- is that an addict may start with
12 hydrocodone combination tablets, which cost \$5 to
13 \$10 a tablet, then progress to the oxycodone, which
14 is \$30 to \$80 a tablet, and then once she can no
15 longer afford that, she may buy ten bags of heroin.

16 Is that something that is a
17 hypothetical addict or something that you've seen
18 statistically as the course that an addict will go
19 through?

20 MR. RANNAZZISI: That's what we're
21 seeing; that's a reality.

22 What's happening is hydrocodone,

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1 because of its schedule -- because it was scheduled
2 in Schedule III, it was widely available.

3 So, say you're a kid, and you start --
4 either you've been injured and you start taking
5 hydrocodone because a doctor prescribed it, or
6 you're at a party and somebody got into their
7 parents' medicine cabinet and got some hydrocodone,
8 and they pass it around.

9 Some kids have a very, very great
10 euphoric effect when they take this drug. So,
11 they're chasing that effect. So, they want more
12 pills.

13 CHAIR SARIS: So, why would they go to
14 oxycodone? If you're saying that they're
15 equivalent, what was it? Euphoric values? I can't
16 remember what that was.

17 MR. RANNAZZISI: Because --

18 CHAIR SARIS: And it's --

19 MR. RANNAZZISI: Because your body
20 builds --

21 CHAIR SARIS: It seems from this --

22 MR. RANNAZZISI: -- a tolerance.

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1 CHAIR SARIS: -- as if they prefer
2 oxycodone, because it's got a higher potency.

3 MR. RANNAZZISI: Because you build a
4 tolerance to the drug. And remember, we're only
5 dealing with back then, hydrocodone combination
6 products -- the 5-, 7.5- and 10-milligram pills --
7 and it's got aspirin or acetaminophen or ibuprofen
8 in it.

9 When you're dealing with a small
10 quantity and you're building a tolerance to the
11 drug -- and tolerance is not addiction; tolerance
12 is tolerance -- but you need more drug to get that
13 same effect, and pretty soon, you're looking for
14 a stronger, more potent drug.

15 Now, oxycodone is not 10-milligrams.
16 You could find the immediate release oxycodone in
17 a 15- to 30-milligram tablet, and it doesn't have
18 any acetaminophen, and it doesn't have any aspirin.
19 So, they go to that.

20 But those tablets are not \$5 a tablet.
21 Those tablets are between \$20 and maybe \$50 a
22 tablet, and now, as you build a tolerance to that

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1 drug -- to that particular oxycodone -- you need
2 more drug onboard. You can't afford it anymore,
3 because it's just too expensive. You can't afford
4 a \$300 or \$400 a day habit because you're taking
5 multiple pills, so then you go to heroin at \$10 a
6 bag.

7 Heroin is the cheapest opioid on the
8 market right now at \$10 a bag, and that's why
9 everybody is going to it.

10 CHAIR SARIS: Commissioner Friedrich?

11 COMMISSIONER FRIEDRICH: So, you don't
12 agree with Mr. Coleman's testimony, that the
13 quality of the high with oxycodone is greater than
14 hydrocodone?

15 MR. RANNAZZISI: No.

16 CHAIR SARIS: Are you seeing -- you say
17 you don't see very much hydrocodone, Mr. Coleman,
18 but do you --

19 MR. COLEMAN: The migration --

20 CHAIR SARIS: Do you see that
21 progression?

22 MR. COLEMAN: Well, the migration --

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1 the migration isn't based on something -- they all
2 give a euphoric effect, but then as soon as the
3 80-milligram OxyContin dried up, and they got the
4 tamper-resistant qualities in 2010, people started
5 turning to Opana. They started turning to
6 Dilaudid. They didn't immediately go to heroin.
7 There was a big crack down on that, because, well,
8 that's what we were seeing. We weren't seeing
9 hydrocodone or Vicodin or Lortab. Now we see
10 people going to heroin because they are so strung
11 out, they have abused buprenorphine, Suboxone and
12 methadone.

13 At some point, it becomes fungible,
14 just how do we get rid of being dope-sick and
15 getting high?

16 There is a degree of tolerance, sure.
17 There is also a great degree of interchangeability,
18 but when you get down to actual preference -- and
19 we cite that in our written testimony -- you know,
20 nine out of the eight studies we hit on identified
21 a much stronger preference and euphoric --
22 perceived, at least -- euphoric effect with

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1 oxycodone.

2 There is one, and I believe the author
3 of that is going to be testifying on another panel,
4 who says they're the same, but that's not what is
5 being reflected in the field.

6 There is -- the tolerance does have some
7 impact, but once they start getting truly addicted,
8 at that point they want the strongest thing they
9 can get, and it's only when there's nothing to buy,
10 they go to heroin, and hydrocodone is not weaving
11 its way into that mix as an HCP or a single entity
12 product -- at least not where we're working.

13 COMMISSIONER BARKOW: I was just
14 curious, what is the state of the abuse deterrence,
15 which I guess DEA works with the FDA to talk about
16 the potential for abuse of the pills, how easily
17 they're crushed and what not.

18 So, what is out there now that is easily
19 abused, and which ones seem to be ones that have
20 been regulated sufficiently by the FDA? That it's
21 less of a worry? Because I know that was part of
22 this, sort of how easy is it to crush or use in these

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1 kinds of forms. Has the FDA done its job in making
2 sure that these drugs aren't -- I know that's a
3 little -- that's outside of our jurisdiction, but
4 it seems related to the law enforcement needs.

5 MR. RANNAZZISI: FDA, no, FDA is
6 actually pushing the manufacturers towards abuse
7 deterrence. But remember, abuse deterrent
8 formulations don't have anything to do with oral
9 abuse, which is the number one type of abuse.

10 The only thing those abuse deterrent
11 formulations will do is stop them from crushing and
12 snorting, crushing and injecting or crushing and
13 smoking.

14 For instance, the OxyContin, the OP
15 (OxyContin Purdue) tablet, that tablet is very
16 difficult to circumvent. That delivery system is
17 almost impossible to circumvent, and it's done a
18 great job, but that doesn't mean OxyContin is not
19 being abused. It's being abused orally. They
20 double the dose and take a potentiator with it.

21 But in the end, we will see a lot less
22 deaths, if we have a lot more abuse deterrent

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1 formulations for all of the opioids. That is --
2 that is the -- the FDA is right on track. That's
3 the gold standard. If we could get all these
4 drugs, but those Oxy 50s, just so you know the
5 extent of this.

6 OxyContin was not the drug of choice in
7 Florida back in 2008, 2009, 2010, coming out of
8 those pain clinics. They were Oxy 15s and Oxy 30s.

9 Those are immediate release with no
10 abuse deterrents. That was -- OxyContin pre-2010
11 had no abuse deterrent formulation. The delivery
12 system was easily circumvented.

13 But in 2010, 43 percent of all of the
14 oxycodone products, the 15s and 30s were going down
15 into Florida. Forty-three percent of the whole
16 country, oxycodone 15 and 30s were going down into
17 Florida.

18 Okay, OxyContin was not the problem in
19 Florida. It wasn't even close to the problem in
20 Florida. The problem was those immediate release
21 products, and they had no abuse deterrent
22 formulation, and as far as going to oxymorphone,

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1 oxymorphone is another regional drug.

2 If you're in Appalachia, oxymorphone is
3 the drug. But if you're outside of Appalachia, no
4 one is going to oxymorphone.

5 CHAIR SARIS: Mr. Coleman, can I ask
6 you one question on the -- it -- we're about to hear
7 from the experts.

8 MR. COLEMAN: Yes, ma'am.

9 CHAIR SARIS: But we've read the
10 testimony. I mean, the scientific evidence, a lot
11 of it seems to suggest they're equivalent, and you
12 say they're not.

13 Do you have an expert or a particular
14 report you want to focus? You say there are six
15 reports there. Is there a particular expert?

16 MR. COLEMAN: I know Mr. Cicero was --
17 I don't know why he's not a witness before the
18 panel. But I know he was --

19 CHAIR SARIS: So, is there a report in
20 here that we should be reading?

21 MR. COLEMAN: I don't have one from
22 him. We can certainly submit it with the comments

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1 for consideration by the Commission, and would like
2 you to certainly consider that.

3 CHAIR SARIS: It's not cited in here.

4 MR. COLEMAN: There is a -- the Rachel
5 Wightman article from September of 2012 is in our
6 written testimony. That's with the Journal of
7 Medical Toxicology, where they surveyed the
8 leading articles through a pretty rigorous survey
9 methodology, and it was just the relative abuse
10 liability of hydrocodone and oxycodone and
11 morphine, and the consensus from that study and the
12 review of the nine studies they pulled out of 16,
13 again, with a pretty rigorous criteria, it would
14 suggest the abuse liability, at least for oxycodone
15 is substantially greater.

16 CHAIR SARIS: So, you would have us
17 focus on that, rather than the scientific
18 equivalence, in terms of analgesic properties?

19 MR. COLEMAN: The problem with that is
20 that we have one textbook that says they're even.
21 Every pharmacist -- I've tried to consult and talk
22 about it when I was trying to get up to speed on

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1 this, not for the Commission, but in my practice,
2 was you know, it's always relative.

3 It's relative to individual
4 metabolism, body size, and prior opioid use that
5 while we have one textbook that says there is a
6 direct equivalency, it's not the only source out
7 there.

8 We cite some sources in our testimony
9 where they feel they're different, and that alone,
10 I think -- we had proposed we need to study this
11 some more for that reason. We need more sources
12 of information before we just jump up to 6,700 or
13 4,475, and that's why we have proposed, I believe
14 in the HCP is where they are, and if we're going
15 to go to a higher ratio with actual ingredient
16 weight, which really we should do --

17 CHAIR SARIS: So, you -- but you say if
18 we read this Wightman article, that's going to say
19 that it doesn't have the same abuse liability?

20 MR. COLEMAN: Yes, ma'am, absolutely.

21 CHAIR SARIS: Thank you.

22 COMMISSIONER WROBLEWSKI: So, you

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1 cited in that -- if I could, you cite an article
2 that talks about a -- something called the opioid
3 analgesic converter. I don't know if you recall
4 that.

5 But that is one of those where you said
6 there was a difference, and yet, when we looked at
7 it, the table there seemed to say that they were
8 -- that the doses were, in fact, equal or at least
9 overlapping.

10 MR. COLEMAN: I will need to go back and
11 look at that.

12 COMMISSIONER WROBLEWSKI: Okay, if you
13 could cite to us anything that is -

14 MR. COLEMAN: Sure.

15 COMMISSIONER WROBLEWSKI: -- just the
16 difference, because the two articles that you cite
17 seem to suggest something consistent with what the
18 FDA witness is going to be testifying, that the
19 dosages are the same for oxycodone and hydrocodone.

20 MR. COLEMAN: I would simply point out,
21 I will supplement that, but let's say at the end
22 of the day, the consensus is the analgesic effect

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1 is the same.

2 That doesn't validate the 6,700
3 multiplier or that big a difference between heroin,
4 where we have the statutory relationship
5 established, and the 6,700 multiplier we've done
6 since 2003.

7 How deterrent -- how -- what is the
8 deterrent effect of that then, if we look at the
9 numbers, because using the time Joseph was talking
10 about between 2006 and 2012, there were 3,251
11 oxycodone cases and 469 hydrocodone cases. That
12 big a difference, even though --

13 CHAIR SARIS: Just could you say those
14 numbers again?

15 MR. COLEMAN: Yes, ma'am, 3,251 versus
16 469.

17 CHAIR SARIS: And that time period was?

18 MR. COLEMAN: Between 2006 and 2012.

19 COMMISSIONER FRIEDRICH: When heroin
20 abuse is rising, are you all going to be back here
21 in a year or two saying we need to raise heroin up
22 to match oxycodone and hydrocodone?

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1 MR. RANNAZZISI: I can't speak for the
2 Department, but what I can tell you is heroin abuse
3 is rising because of hydrocodone and oxycodone.
4 That's the reason, and if we control hydrocodone
5 and oxycodone, if we could -- if we could limit --
6 limit the amount that's going into the abuse --
7 limit the amount that's going into the drug seeking
8 community, we're going to save lives and we won't
9 have a problem with heroin.

10 Our issue right now is controlling the
11 pharmaceuticals, and if I can make one more
12 comment.

13 CHAIR SARIS: And then we do need to
14 wrap up.

15 MR. RANNAZZISI: Okay.

16 VICE CHAIR BREYER: Before you do, I
17 just want to follow up.

18 Are you saying that if we raise -- if
19 we raise this level, as suggested, the level of
20 punishment, we are then going to reduce the heroin
21 abuse, and there is scientific evidence of that?

22 MR. RANNAZZISI: No, what I'm saying is

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1 --

2 VICE CHAIR BREYER: Or is that a hope?
3 Is that an aspiration? Is it -- is there
4 scientific evidence that supports that statement?

5 MR. RANNAZZISI: There is scientific
6 -- well, there is evidence that shows that people
7 are starting on drugs like oxycodone and
8 hydrocodone and moving to heroin.

9 If we had an addiction specialist at
10 this table, that addiction specialist would say the
11 vast majority of their clients started with
12 hydrocodone and oxycodone.

13 VICE CHAIR BREYER: Well, but you start
14 somewhere. It doesn't necessarily mean that that
15 then causes the higher -- the use -- the use of
16 another drug later on. I mean, that is -- that's
17 -- I've heard of that for now 50 years, that -- and
18 it's been in the field of marijuana.

19 You start with marijuana, people,
20 they're going to be heroin addicts. I mean, I've
21 listened to that.

22 So, the question really is, is there

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1 some controlled satisfactory, scientific evidence
2 that shows that if we raise the penalty for
3 hydrocodone, we will then reduce the incidents of
4 heroin abuse? Is there -- is that what you're
5 saying? There is scientific evidence for that?

6 MR. RANNAZZISI: I don't have any study
7 that shows that, but hydrocodone and oxycodone and
8 heroin is not marijuana. People don't die from
9 marijuana. People don't overdose from marijuana,
10 but they do --

11 VICE CHAIR BREYER: But we know that
12 marijuana is a Schedule I drug.

13 MR. RANNAZZISI: Yes, but we also know
14 that there is a natural progression based on
15 tolerance, from one opioid to another, until it
16 reaches heroin.

17 I mean, I could -- this is not
18 marijuana. This is not the gateway theory. This
19 is -- this is science. You build a tolerance to
20 the drug. Once you build a tolerance to the drug,
21 you need more drug.

22 You have a panel coming up with two

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1 very, very distinguished scientists, Dr. Hertz and
2 Dr. Walsh. They could much better explain
3 tolerance, but eventually, they're going to need
4 more drug onboard if they're chronic users.

5 CHAIR SARIS: All right, we're really
6 over, but Commissioner Friedrich has one burning
7 question and then we're moving onto the --

8 COMMISSIONER FRIEDRICH: Just talk to
9 my original question. Which is more potent,
10 heroin or oxycodone?

11 MR. RANNAZZISI: Relative potency, I
12 think you need to talk to the two doctors that are
13 coming up in the next panel.

14 CHAIR SARIS: And we will. So?

15 MR. COLEMAN: If I could wrap up?
16 Judge Breyer, to answer your question --

17 CHAIR SARIS: Ten seconds, because
18 we're really now way over.

19 MR. COLEMAN: Page 23 of the
20 government's testimony, footnote 20, you will find
21 the exact opposite that this is not -- hydrocodone
22 is not a gateway drug to heroin.

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1 The study cited by the government's own
2 testimony has a different conclusion. The vast
3 majority do not within five years of having used
4 it, which is --

5 CHAIR SARIS: Thank you very much.
6 We'll move onto the next panel.

7 You're all welcome to stand. I say to
8 my juries, stretch in between.

9 Welcome. The experts have arrived.
10 Dr. Sharon Hertz is the Acting Director for the
11 Division of Anesthesia, Analgesia and Addiction
12 Products, Center for Drug Evaluation and Research
13 at the U.S. Food and Drug Administration, and has
14 held that position since September 2014.

15 She's been on the staff at the Food and
16 Drug Administration since 1999, serving in various
17 capacities in the Division of Anesthesia,
18 Analgesia and Addiction Products.

19 Dr. Sharon Walsh joined the University
20 of Kentucky Colleges of Medicine and Pharmacy in
21 2005, is a Professor of behavioral science,
22 psychiatry, and is Director of the Center on Drug

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1 and Alcohol Research.

2 Dr. Walsh's clinical research has
3 focused on pharmacological and behavioral issues
4 and opioid abuse and dependents.

5 So, Dr. Hertz, welcome.

6 DR. HERTZ: Thank you, Chair Saris,
7 Vice Chair Breyer and Distinguished Commissioners.

8 So, I will not read my statement, and
9 I'll go over to say that we've been considering many
10 aspects of this issue over time, as we've also
11 worked to address issues of misuse, abuse and
12 addiction, and pursuant to the specific questions
13 and information that you seek here, I will say that
14 hydrocodone and oxycodone and analgesic products
15 have a number of similarities.

16 So, they are both opioid analgesics.
17 They are both available in immediate release
18 formulations, in combination with other drugs,
19 most frequently acetaminophen and both as single
20 entity extended release formulations, although as
21 stated, only oxycodone is available currently as
22 single entity immediate release product.

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1 Both drugs are now in Schedule II of the
2 Controlled Substances Act and they both share long
3 marketing history and substantial market share.

4 The potency refers to the dose of a drug
5 required to produce a given effect, and there is
6 not a lot of information available about the actual
7 potency for different opioids, the relative
8 potency, but the data that we do have from a variety
9 of sources suggests that hydrocodone and oxycodone
10 are similar in potency, when used as an analgesic
11 for pain management.

12 The relative potency can differ based
13 on different pharmacodynamic effects.

14 However, there are many factors that
15 result in inter-individual variability. I will
16 also just state that our controlled substances
17 staff has reviewed a number of studies, six studies
18 published in the time between 2003 and 2010, and
19 they concluded that based on those studies, single
20 -- hydrocodone single entity and combination
21 products produce similar euphoric effects to
22 morphine and oxycodone in a dose dependent manner.

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1 I'm happy to answer any questions that you have.

2 CHAIR SARIS: Thank you. Dr. Walsh?

3 DR. WALSH: So, am I on? It's a great
4 pleasure to be here today, and I thank the Chair
5 and the panelists.

6 I will try not to read from my
7 statement, and I wanted to actually just give an
8 abbreviated statement that would highlight two
9 points that I felt were the things that I was
10 specifically asked to address with respect to the
11 report.

12 However, after hearing the last panel,
13 there probably are some other things that I would
14 like to add in --

15 CHAIR SARIS: Sure.

16 DR. WALSH: -- maybe during the panel
17 time, and so, in starting out, I'd like to say that
18 what I actually do, aside from those titles, is that
19 I work with the substance abusers every day.

20 So, we do -- we provide treatment to
21 opiate dependent individuals. We enroll them into
22 studies, both as in-patients and out-patients. We

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1 get to know them. So, we know a lot about what
2 their patterns of abuse are, and certainly, we know
3 what it looks like on the ground in Kentucky.

4 I had been in Baltimore in the
5 inner-city for 15 years before that, so I know a
6 lot about what heroin looked like there, as well.

7 So, with that, I'll go on to addressing
8 the two topics that I specifically wrote about, and
9 the first was with respect to having sentencing
10 tied to actual drug weight versus the unit of drug,
11 and I think, in agreement with the prior speakers,
12 it is very clear that using actual drug weight is
13 the only really appropriate answer here.

14 Hydrocodone is available in literally
15 hundreds of different formulations, in
16 combinations with all kinds of other things,
17 sometimes active ingredients that are not
18 narcotics, like antitussives or acetaminophen.
19 There are a lot of inactive ingredients and with
20 the new abuse deterrent formulations, some of those
21 ingredients actually can weigh quite a bit.

22 So, in thinking about trying to

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1 harmonize things, looking at actual weight seems
2 to be the most fair and appropriate approach and
3 this is what has been done with oxycodone, and so,
4 that seems to harmonize between those two.

5 The second issue is a little bit more
6 complicated and this is with respect to trying to
7 determine the severity of sentencing with respect
8 to equivalencies, and so, you've heard a lot about
9 that already this morning, about whether or not
10 oxycodone and hydrocodone are equipotent.

11 So, there are two proposed amendments.
12 One that proposes an equivalency of 4,500 grams and
13 the other that is more severe, that proposes 6,700
14 grams, and that is because the reports that were
15 used, in order to establish those estimates for
16 this consideration, were two different written
17 published sources that have disagreeing potency
18 comparisons.

19 In both cases, those are actually
20 analgesic equivalency tables, and so, I just want
21 to say a word about using analgesic equivalency
22 tables.

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1 This is actually not necessarily a
2 scientific document. It's not necessarily
3 something that has been derived from scientific
4 studies. These are important guidelines that
5 physicians need to have in their back pocket, when
6 they're treating patients with pain and they're
7 trying to convert them from one drug to another,
8 so that they make sure that they don't overdose or
9 underdose somebody.

10 But the way that those data are derived
11 are often unknown, and if you look at the source
12 documents that are in the report, you'll see that
13 many of them don't have any references that
14 actually tie them back to the scientific
15 literature, and that is because some of them are
16 done from clinical experience, and others come from
17 pharmacology textbooks. Some come from studies
18 where people were dosed chronically and maintained
19 on an opioid, and then they were rotated to
20 something else, which is common in terminal care,
21 for instance.

22 But others are with single acute doses,

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1 and you can imagine that all of these things make
2 for a mixed bag of findings, and so, I think that
3 that really defines the reason why you can look at
4 -- I have a stack here of different analgesic
5 tables, and there is a big number of different
6 outcomes, when you compare the drugs.

7 But the other thing to think about, I
8 think that's important, is that when we think about
9 drugs of abuse for which penalties have been
10 devised, really for instance, like with cocaine or
11 hallucinogens, there isn't some clinical
12 therapeutic application that you're going back to,
13 to look at and determine the strength of the drug,
14 and how it's been used clinically to help make
15 decisions about punishments.

16 In this case, it just so happens that
17 the opiates are used as analgesics, and so, that
18 seems to be the reason why there is some reliance
19 on this.

20 In my opinion, I think that the more
21 important thing here is because the drugs that
22 we're talking about, we're talking about them being

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1 abused and not being used as analgesics, is that
2 what's relevant is the relative abuse liability.

3 So, we've done studies in our
4 laboratory, examining the relative abuse liability
5 of these drugs directly.

6 I will say that there are very defined
7 criteria that are approved and codified by the Food
8 and Drug Administration. The Food and Drug
9 Administration requires these types of studies for
10 new drug approvals, and these studies are used to
11 inform the Drug Enforcement Agency about
12 scheduling decisions.

13 With respect to the former speaker who
14 referenced a review article that concluded that
15 oxycodone was more potent than hydrocodone by
16 review of some number of papers, most of those
17 studies were actually done in normal healthy
18 controls, and the FDA guidelines recommend that
19 abuse liability studies be conducted in a target
20 population, and that is the people who -- that are
21 actually abusing the drug, because if I were to give
22 the panel morphine or heroin, and I asked you how

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1 much you liked it this morning, you might not like
2 it very much, because you probably are not a heroin
3 or morphine user, and lots of people, if you've had
4 the experience in the hospital of having an opiate
5 say, after a surgical procedure, it's very, very
6 unpleasant.

7 So, when you're thinking about abuse
8 liability, it's really important to target the
9 population who self-selected. They know --
10 they're using these drugs. They like these drugs,
11 and so, if you're interested in the like-ability
12 of these drugs or the street value of these drugs,
13 that's the population that you want to study, and
14 there actually are only a handful of studies.

15 So, the one review article that was
16 referenced, many of those studies don't actually
17 qualify under what the FDA would recommend.

18 So, with that being said, I can tell you
19 that we have directly examined, within the same
20 subjects, a whole range of doses of oxycodone,
21 hydrocodone and hydromorphone given orally under
22 very controlled laboratory settings, and we find

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1 that the drugs are very, very similar, with respect
2 to the profile of effects.

3 They produce all positive effects.
4 There is no negative effects in this population,
5 unlike in normals, and then there is a more
6 sophisticated statistical technique that can be
7 used, that is accepted in pharmacology for
8 understanding how to actually calculate with
9 validity, the relative potency between or amongst
10 drugs and in this case for that study, we were able
11 to use those data, and do this Finney bioassay, and
12 we found significant findings, where we had valid
13 comparisons across a number of different measures,
14 both subjects telling us how much they like the
15 drug, observers who were in the room, watching how
16 intoxicated the person is, but not knowing what
17 dose they got that day, and then also, some
18 objective measures, like physiological responses
19 to the opiates.

20 What we found was that the relative
21 potency estimate was .929, and what that means is
22 that .929 milligrams of oxycodone is needed to

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1 achieve the effects of one milligram of
2 hydrocodone.

3 So, it's not one-to-one. But it's
4 quite -- it's about as close to one-to-one as you
5 can get, with respect to not just these abuse
6 liability outcomes, but also some other objective
7 markers.

8 So, that is really the end of what I had
9 wanted to share with two specific topics, but if
10 I have permission, I'd like to go on to say one other
11 thing, and that is one of the things that didn't
12 come up in the discussion with the earlier panel,
13 you know, if these drugs are equal in their potency
14 and equal in their euphoric effects, and in fact,
15 hydrocodone has actually historically been more
16 available, why do we hear more about oxycodone and
17 why is that more of a problem?

18 One of the things that wasn't raised is
19 the fact that hydrocodone has historically been
20 available only in these combination products, and
21 people who are escalating their drug use, they may
22 -- they may remain an oral user, but more often than

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1 not, when someone is actually really getting into
2 trouble, they're going to escalate to use a
3 different route of administration that provides a
4 better drug delivery.

5 So, they'll start crushing and snorting
6 the drug, because you get better bang for your buck
7 that way. That's a very -- that's an official
8 pharmacological term there. You get improved
9 bio-availability, but from their perspective, it's
10 a better high for less money, for the same pill.
11 Or you inject it, where you get 100 percent of the
12 active ingredient and none of it is going into your
13 gut and being excreted out without getting the fun
14 of it.

15 The problem with hydrocodone products
16 is that opiate abusers know that acetaminophen is
17 dangerous. Everyone knows that it -- and they know
18 people who have landed in the hospital in liver
19 failure, because of this. And so, they know that
20 it hurts when they snort it, and that people can
21 develop holes in their septum that don't heal, and
22 ulcerations.

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1 So, we don't see people escalating
2 their use with hydrocodone products, I think
3 largely from the reports of all the people that we
4 see, because of the fact that it hasn't been
5 available as a single entity product.

6 It is now. We all know that. Zohydro
7 was in the news. It was a big controversial thing.
8 It really, from my perspective, where we are, it
9 hasn't penetrated the market. But we now are doing
10 a study with it and it costs more than \$500 for one
11 bottle.

12 So, that doesn't surprise me that it
13 hasn't really penetrated the marketplace yet, and
14 also some -- because of the concerns about it not
15 having abuse deterrent protection, a lot of
16 formularies actually are not putting it onto their
17 formulary. So, I think it's a little bit
18 challenging to get.

19 So, with that, I'll stop and take any
20 questions.

21 CHAIR SARIS: Thank you. That was
22 very helpful.

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1 COMMISSIONER WROBLEWSKI: I have a
2 couple of questions. Dr. Walsh, do you agree with
3 the statements that were made in the last panel,
4 that the increase in heroin use is related to
5 pharmaceutical use and abuse. That's number one.
6 And then, in addition to the changes in the
7 guidelines, are there any steps, beyond criminal
8 penalties that you think we should, as the
9 Commission, recommend to Congress or the Office of
10 National Drug Control Policy, to address this
11 serious problem?

12 DR. WALSH: So with respect to the
13 first question, whether I agree that the
14 prescription opiate epidemic has led to an increase
15 in heroin abuse, I think the evidence is strongly
16 supporting that that is the case.

17 So, and a lot of it is an unfortunate
18 byproduct of effective strategies that the
19 government has used to try to crack down on
20 prescription drug abuse.

21 So the FDA has been very committed to
22 encouraging pharmaceutical companies to develop

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1 abuse deterrent formulations. The new OxyContin
2 formulation essentially suppressed its use.

3 I mean, we have data from Appalachia
4 that are just remarkable in looking at the decline
5 in abuse. In a cohort of drug abusers that we're
6 following, and at the time that that drug came on
7 the market and the old one was pulled off the
8 market, people immediately moved to 30 milligrams
9 of a generic oxycodone product.

10 But what has happened in addition, of
11 course, is that there are prescription monitoring
12 programs that are really enforcing things much more
13 rigidly with physicians. Physicians are becoming
14 more aware of prescribing practices and require --
15 there are now some requirements for additional
16 education for physicians.

17 The DEA has been much more active with
18 physicians, they are investigating physicians who
19 are prescribing high volumes.

20 So, with all of that, what that has led
21 to is an increase in the street price for
22 prescription opioids, and a declining

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1 availability, and so, I know that for the last
2 couple of years, the sales for oxycodone have
3 actually gone down nationally, which -- and that's
4 provided an opportunity for a new marketplace,
5 where we have Mexican heroin being transported into
6 places where it never was.

7 I can tell you that 10 years ago, moving
8 from Baltimore, which has always been a heroin city
9 as they like to say, when I came to Kentucky, there
10 was no heroin and everyone that came through my
11 door, and I interviewed about what they were using,
12 and they were all using prescription opioids.

13 They looked the same as heroin abusers.
14 The degree of their disease and disorder was just
15 as extensive, but they had not experienced heroin,
16 and if they told me that they ever had, I knew it
17 was because they had been someplace else. They had
18 gone to Chicago, or they had been to Cincinnati.
19 We just didn't have it in our area.

20 Now, in 2015, I can tell you that
21 virtually every person that walks through the door
22 is using heroin. Not alone. They're using it to

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1 supplement their prescription opiates. But the
2 heroin is much cheaper, and so, we're seeing more
3 advances to intravenous use, as well.

4 Then your second question, is there any
5 --

6 COMMISSIONER WROBLEWSKI: Other
7 steps.

8 DR. WALSH: Yes, are there other steps
9 that can be done?

10 So, I have to confess that because I'm
11 a scientist and I'm very treatment oriented, that
12 I have not done much research on how the impact of
13 laws work on suppressing use.

14 What I know is that I see people using
15 all the time, and so, we haven't eradicated the
16 problem.

17 I think that there are a number of
18 different strategies that are being implemented
19 right now and they're working. It's just that
20 there is a balloon effect, and to your point earlier
21 about people advancing, you know, from marijuana
22 to another drug, these actually are all in the same

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1 class of drugs.

2 So, that -- it's a little bit different.
3 You know, once you are dependent, physically
4 dependent and you need that drug, any one will do.
5 It will substitute and suppress your withdrawal
6 symptoms.

7 So, I think the one thing that I would
8 say is that I really did hear the prior speaker's
9 concerns about whether or not the penalties were
10 balanced with heroin, and I realized in looking
11 back that, I don't know or understand historically,
12 how all of that evolved. But, I do know that we
13 have science that could inform it, just as though
14 we are talking about the science today, and that
15 if that was something that was under consideration,
16 that we could apply that, and there are data on
17 heroin potency that we could look at, to see whether
18 or not the penalties were in balance.

19 COMMISSIONER FRIEDRICH: Dr. Walsh,
20 that was the question I was about to ask you.

21 Your testimony is very compelling,
22 suggesting that these penalties for oxycodone and

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1 hydrocodone should be equivalent. But what I'm
2 wondering, based on all the testimony we've read,
3 is whether we've got it right across the table, and
4 you've certainly suggested that actual weight is
5 the way to go, and our table right now doesn't do
6 that across the board.

7 So, I was going to ask you if you had
8 a sense as to whether these drugs are calibrated
9 appropriately, proportionately to other drugs, and
10 it sounds like you don't have an opinion right now.

11 DR. WALSH: So, I don't have an
12 informed opinion. We all have opinions, right?

13 I don't have an informed opinion
14 because I haven't had enough time to really look
15 at it, but I was really -- I was so amazed that all
16 of the penalties were tied back to marijuana, when
17 I first got the report to review, and I didn't
18 really understand how that came to be.

19 Then when I saw Mister -- I read Mr.
20 Coleman's testimony, and I actually wrote to the
21 people who were organizing my visit and I said, "You
22 know, I didn't think I was asked to change the whole

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1 system."

2 Like, this -- he's really recommending
3 quite a few changes. I thought that I was being
4 asked to comment very specifically on the
5 pharmacology. But, I think that there is some
6 merit to the things that he's saying, and if that
7 was something that the Commission wanted to visit,
8 that I would be willing to help with that, because
9 I actually do think that we have data that can
10 inform that, and I'm not going to sit here in
11 judgment and say that the way that it's arranged
12 is not correct, because I don't really feel like
13 I understand enough.

14 COMMISSIONER FRIEDRICH: But you do
15 agree that we should move to actual weight, rather
16 than --

17 DR. WALSH: Yes.

18 COMMISSIONER FRIEDRICH: -- mixtures
19 and --

20 DR. WALSH: Yes, I mean, there are --
21 well, actually, Dr. Hertz can speak to this
22 probably more carefully than I can, because she

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1 knows a lot about drugs that are in the pipeline.
2 Maybe you can't because of confidentiality, but you
3 know, there are many drugs that are being developed
4 say, as abuse deterrent agents, where the weight
5 of the excipients or the other ingredients are a
6 lot more, a lot more than the weight of the active
7 drug.

8 So, if someone is being punished for the
9 plastics that are in there, for instance, or
10 whatever, that would be really most unfortunate,
11 because they you could have someone who has pure
12 tablets and has -- you know, I mean, so, it just
13 makes it for a -- it makes it for an uneven playing
14 ground.

15 So, I think that that, to me, is very
16 logical.

17 CHAIR SARIS: Can I ask you, Doctor
18 Hertz, just a follow up on that?

19 So, as I'm understanding this, it's
20 very helpful that Dr. Walsh is saying that the
21 reason people weren't using the hydrocodone,
22 rather than the oxycodone is because it was in

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1 combination with acetaminophen, is that right, and
2 now that we've got these single release tablets,
3 that that may change.

4 So, what does the FDA think about when
5 they approve these drugs that can actually create
6 the abuse liability?

7 DR. HERTZ: So --

8 CHAIR SARIS: Maybe I'm backing into
9 something, but hydrocodone, it sounds like wasn't
10 such a big problem because it was in combination
11 with these other things, and now, we have Zohydro.
12 As you know, there's a big case up in Massachusetts
13 on this.

14 DR. HERTZ: I am aware. As a
15 representative of my agency, I can say that our
16 appearance here today is limited to providing the
17 Commission with scientific information related to
18 relative potency of hydrocodone and oxycodone, and
19 I'm not able to offer information related to other
20 policy issues. I know that's not a satisfactory
21 answer, but --

22 VICE CHAIR BREYER: Well, perhaps I ask

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1 this question.

2 If I understand the testimony today, it
3 is that drugs are being developed and being
4 approved, and being encouraged, in a sense, that
5 will have some abuse characteristics to it, in
6 order to curb --

7 DR. HERTZ: Abuse deterrents.

8 VICE CHAIR BREYER: I'm sorry, abuse
9 deterrents that will discourage the inappropriate
10 use of the drug.

11 DR. HERTZ: Yes.

12 VICE CHAIR BREYER: Is that -- that's
13 correct?

14 DR. HERTZ: That is true.

15 VICE CHAIR BREYER: And that that has
16 some real weight, that is to say that if you analyze
17 the drug that will be a significant component in
18 the weight.

19 DR. HERTZ: Yes.

20 VICE CHAIR BREYER: And so, it would
21 seem to me, if both of those things are true, it
22 would be odd, it would be odd to punish in a more

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1 severe way, a drug that has the abuse deterrent than
2 one that would not. It would be absolutely
3 counter-intuitive that one would give a more severe
4 sentence to the -- to drugs that have an abuse
5 deterrent, than one that does not.

6 DR. HERTZ: Yes, I can say --

7 VICE CHAIR BREYER: If the idea is to
8 discourage the use of unsafe drugs or without a
9 prescription.

10 DR. HERTZ: Yes, several of the
11 approaches to develop abuse deterrent products can
12 add a substantial amount of weight, can double or
13 triple the weight even of the actual tablet,
14 without changing --

15 VICE CHAIR BREYER: Double or triple?

16 DR. HERTZ: -- without changing the
17 amount of opioid in the tablet.

18 VICE CHAIR BREYER: Okay.

19 COMMISSIONER BARKOW: So, on the
20 actual weight issue, so, I'm thinking about our
21 drug policy overall, and it's actually unusual for
22 us to look at the actual weight in other context.

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1 So, you know, we don't see how pure the
2 cocaine is or for other drugs, and the argument
3 there has been, that I've seen, has been well,
4 that's because that's not the market. Is it really
5 about that? You know, you kind of buy or sell in
6 doses and it's not so much about purity.

7 I'm just curious if either of you have
8 a sense in your experience, if this market is
9 different, in terms of people paying attention to
10 the dose amounts on the tablet, or is it something
11 that if we think actual weight is the thing that
12 matters here, it's something we should think about
13 broadly for all of our drugs, because it turns out
14 all the things you were saying would transfer to
15 the other drugs that we look at.

16 The counter-argument I've seen there
17 has just been yes, but the market isn't reflecting
18 that in the same way.

19 So, I'm just curious if you could
20 comment on what this market might look like, in
21 terms of the drugs.

22 DR. WALSH: Yes, so, it may -- all of

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1 this, for me participating today, has been fun, to
2 be able to read all the background and to think
3 about some of the questions that I haven't thought
4 about before, and that's one in particular, because
5 there are big differences between drugs that are
6 only sold illicitly, where someone goes to the
7 street corner or their favorite dealer, and they
8 don't actually know what they're getting, right,
9 and the test of whether or not it's good or not is
10 whether they decide to come back and buy more.

11 So, when you arrest someone and they're
12 in possession of cocaine, for instance, or heroin,
13 you have no idea what the purity of that is.

14 So, we could do a test in the laboratory
15 and find out what the absolute relative potency of
16 heroin is to oxycodone, for instance, but what is
17 sold on the street could be 80 percent pure heroin
18 or it could be 20 percent pure heroin, and the rest
19 of it could be quinine or something like that, and
20 you -- and you just have no way of knowing that,
21 and I had asked the DEA, Mr. Rannazzisi earlier
22 about whether or not for all arrests, like do you

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1 test purity, so that you can assess what the
2 punishment should be? Like, do you know actually
3 what number of milligrams somebody was holding?

4 So, we were having that discussion, and
5 I think with the pharmaceuticals, it does make a
6 difference because we know exactly what's in it,
7 and so do the consumers. They know, you know, so,
8 if you buy a Xanax, you know what's in it. If you
9 buy an Oxy 30, you know what's in it.

10 But back to, you know, another aspect
11 of the weight issue, if you have a five milligram
12 tablet, which is not currently -- well, maybe with
13 the high single, I'm not sure, of hydrocodone, but
14 then you have another hydrocodone that also has 325
15 milligrams of Tylenol in it, you know, the weight
16 there is very different, but the actual amount of
17 active drug is the same.

18 CHAIR SARIS: So, it's interesting,
19 I've learned a lot, just listening to the two of
20 you.

21 So, essentially, the scientific
22 equivalent -- scientifically, they're equivalent,

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1 in terms of potency, but on the street, people want
2 oxycodone because it's -- they get it in the purer
3 form more easily, at least until this other product
4 came out.

5 DR. WALSH: Right, because it's more
6 flexible because you can use it by snorting, you
7 can inject it. You shouldn't. It's not a good
8 idea, because it's got things in there that aren't
9 good for you, but it doesn't have acetaminophen in
10 it necessarily.

11 So, I think that that plays a big role.
12 I think one of the things that we're talking about
13 and one of the things that FDA has to be thinking
14 about, whether they're allowed to say it publically
15 or not, you know, is that what the concern is, is
16 that, you know, once Zohydro got onto the
17 marketplace, and that was very controversial,
18 although you had no choice because they had proven
19 efficacy, right, and --

20 CHAIR SARIS: She can't say --

21 DR. WALSH: No, I mean, I think that the
22 rules are that if they can demonstrate safety in

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1 the population and efficacy, then it has to be
2 approved, and I think that that was the basis for
3 the FDA approval, although they took a lot of flak
4 for that.

5 I think that, you know, there are -- the
6 concern is that now that there's this precedent
7 that there will be more single entity hydrocodone
8 products, and it's going to become exactly like
9 oxycodone, so that, you know, it's just -- it's a
10 big bubble and there is a bunch of opioids that you
11 can choose from, and if you squeeze here, and you
12 prevent, you know, this one from being available
13 by cracking down, it expands someplace else, and
14 that's where we see the heroin expansion coming.

15 COMMISSIONER BARKOW: Can I follow up
16 on Commissioner Wroblewski's question then, in
17 terms of, you know, things we would recommend to
18 Congress or policy things?

19 Is it the case that the FDA, in making
20 this approval process, doesn't take into account
21 abuse potential, sort of the off label abuse kinds
22 of things? Like, would it be the case, your hands

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1 are tied, you have to say yes, without considering
2 that doing it, is that a legislative fix?

3 DR. HERTZ: I can answer that.

4 COMMISSIONER BARKOW: Okay.

5 DR. HERTZ: So, we can take abuse
6 liability into consideration when we approve a
7 product with an abuse liability, and we do look at
8 it in the context of the armamentarium and the
9 relative risks.

10 So, we do, and that is within our
11 authority.

12 DR. WALSH: And they did, with the
13 Zohydro, and that's how we know each other, and then
14 if I'm correct, then that information gets sent
15 onto the Drug Enforcement Agency for them to make
16 decisions about where to place something in the
17 schedule.

18 COMMISSIONER BARKOW: But I mean, you
19 have to find that the benefits, in terms of -- like
20 how much pain relief do people need?

21 Some of these numbers seem, you know,
22 to a layperson, I'm just trying to think in terms

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1 of the kind of pain relief that people would need
2 for pain management or the kind of controlled
3 setting in which they'd have it, whether they're
4 hospitalized or what not.

5 Is it that kind of cost benefit that you
6 do, to try to figure out where the drug would be
7 administered, the risk to an abuse population? Is
8 it a pretty broad scale inquiry like that?

9 DR. HERTZ: I'm looking over my
10 shoulders to see if anyone is holding a break sign
11 or not.

12 But what I can tell you is --

13 CHAIR SARIS: You've got five minutes.

14 DR. HERTZ: That wasn't the sort of
15 break I was looking for.

16 But when we approve an opioid product,
17 we look at how it compares to what already exists,
18 and I can tell you with regard to any recent
19 approvals, that we have not approved anything
20 stronger than comparable other products on the
21 market, and in fact, if we look at some of the
22 information that we've discussed here about

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1 relative potency and look at what is available with
2 other prior existing opioids, one can see that
3 Zohydro is, in fact, no stronger than what has
4 already existed using these rough relative potency
5 estimates.

6 When we think about the needs of
7 individual patients, we know that there is a very
8 wide range in needs, and we know that there is a
9 lot of individual variability on many factors that
10 will influence the amount of an opioid analgesic
11 that they will need, both in the short term and the
12 long term.

13 So, what we try to do is ensure that
14 within the spectrum, when we approve a product,
15 that it's meeting a need that it has adequate
16 evidence of efficacy and safety in the intended
17 population for the indication, and we also look at
18 it from a public health perspective, as well.

19 VICE CHAIR BREYER: Dr. Hertz, if I
20 might, later on in our hearing today, we're going
21 to address the issue of drugs which are flavored
22 in a way that might be attractive to children, to

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1 youth.

2 I know you're here only on the
3 hydrocodone, but obviously, we have the example of
4 what's happening in Colorado with respect to
5 marijuana, and I am interested because of your --
6 the previous witness has told us that the FDA is
7 conducting a study or studies, in determining
8 whether there was any medical justification for the
9 use of marijuana.

10 My question to you is, do you have any
11 prediction as not -- as to outcome, but as to when
12 the results of that study would be known to the
13 public?

14 DR. HERTZ: Yes, I'm not entirely sure
15 of exactly what that study is that was referred to.

16 I know that there are analyses underway
17 of existing data, and I know that there is interest
18 in the medical community, but I don't have
19 specifics that I could share a time table for,
20 because I am not directly involved in that.

21 VICE CHAIR BREYER: Okay, thank you.

22 CHAIR SARIS: I'm actually glad -- I

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1 was going to ask you, Dr. Walsh, you see so many
2 boots on the ground in Maryland and Kentucky. Have
3 you see any issues of marketing these drugs to
4 children, through special packaging or advertising
5 or colors or flavors?

6 DR. WALSH: Not with the opioids
7 specifically, we haven't.

8 I mean, what our concerns about with
9 children largely, surround the medications that
10 are already in the home, that are in prescription
11 bottles, sitting around, available and the idea
12 that because it comes from a doctor, it's
13 legitimate and safe, and that leads to, you know,
14 these pill parties, where high schoolers are -- you
15 know, who really have almost no drug experience
16 what so ever, you know, suddenly find themselves
17 taking some really potent opiate, and you know,
18 tragically having some terrible outcome.

19 But we haven't seen -- we haven't seen
20 that, and I haven't heard about that, as the -- as
21 the heroin marketplace has infiltrated in the
22 Lexington area, the bluegrass area.

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1 CHAIR SARIS: Thank you. Any other
2 questions? Thank you very much, and we'll take a
3 brief recess, I guess a break, and we'll be back
4 here at 10:30 a.m. for economic crime. Thank you.

5 (Whereupon, the above-entitled matter
6 went off the record at 10:15 a.m. and resumed at
7 10:30 a.m.)

8 CHAIR SARIS: Moving on to two panels
9 involving the economic fraud amendments.

10 The first panel consists of
11 practitioners, and I want to remind, in case you
12 weren't here, about our red light system. So
13 please, don't read your statement, and at some
14 point the hook comes, so -- and then we're very
15 active, the group. So, we'll jump in at the end
16 of all of the presentations.

17 We begin with the Honorable Benjamin B.
18 Wagner who is the U.S. Attorney for the Eastern
19 District of California. He previously served as
20 Chief of the Special Prosecutions Unit, which is
21 responsible for prosecutions of public corruption,
22 financial fraud, tax evasion and corporate fraud.

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1 Michael Caruso has been the Federal
2 Public Defender for the Southern District of
3 Florida since 2012. He joined the office in 1997.

4 Eric Tirschwell is the -- did I say that
5 right?

6 MR. TIRSCHWELL: Yes.

7 CHAIR SARIS: Good, is the Vice-Chair
8 for the Practitioners Advisory Group. He is a
9 partner at Kramer, Levin, Naftalis & Frankel, LLP,
10 and his practice focuses on white-collar criminal
11 defense and related litigation.

12 Catherine M. Foti is the Chair of the
13 Sentencing Guidelines Committee for the New York
14 Council of Defense Lawyers. She's a partner at
15 Morvillo, Abramowitz, Grand, Iason & Anello, PC.

16 Welcome to everybody. We begin with
17 Mr. Wagner. Thank you.

18 HON. WAGNER: Thank you very much.
19 Thank you for having me here this morning. I
20 appreciate the opportunity. It's also, as one of
21 the earlier speakers said, it's my first time to
22 the rodeo, so I appreciate being here.

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1 As Your Honor mentioned, I've been the
2 U.S. Attorney in the Eastern District of California
3 for a little over five years. Prior to that, I was
4 an Assistant U.S. Attorney in the office for about
5 17 years, including nine years as a supervisor.

6 So, in that time period, I have handled
7 a lot of different types of economic crimes, all
8 types of crimes, but investment frauds, tax
9 evasions, Federal program fraud, and of course,
10 I've supervised a lot of people who have handled
11 those kinds of cases.

12 The Eastern District of California
13 covers about 50 percent of the area of the State
14 of California. We have about eight million
15 residents. In case there is anyone from Congress
16 listening, we really need more judges.

17 We have about 90 Assistant U.S.
18 Attorney authorized positions, we're what within
19 the department is categorized as a large district.

20 Over the last five years, we have
21 prosecuted a wide variety of economic crimes cases,
22 particularly heavy in the mortgage fraud area. We

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1 were very hard hit by that.

2 Over the last five years, we have
3 convicted something in excess of 230 defendants in
4 mortgage fraud cases, and those are a wide variety
5 of types of conduct. Some of them are cases which
6 targeted financial institutions, and so those tend
7 to be smaller numbers of victims, but large dollar
8 amounts. Other types of cases has huge numbers of
9 victims, targeting distressed homeowners,
10 foreclosure rescue schemes, that sort of thing.
11 Often smaller dollar amounts, but very profound
12 impact on a large number of victims.

13 We also have charged and resolved a lot
14 of investment fraud scheme cases over the last few
15 years. We just finished sentencing, I think, what
16 is the largest Ponzi scheme in the history of the
17 Sacramento area. It ran for about ten years. The
18 defendant fleeced his victims for a net loss of
19 about \$108 million.

20 We had a similar case last year,
21 involving a larger number of victims and about \$45
22 million in loss.

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1 In my brief comments to start this
2 morning, I just wanted to touch on a couple of
3 things. Obviously, the submission by the
4 Department was quite voluminous. I just wanted to
5 touch on two or three issues.

6 The first is, I am quite concerned that
7 the amendments as a whole -- taken as a whole, will
8 create a considerable confusion and difficulty in
9 the sentencing of financial fraud cases under
10 §2B1.1, and may sow the seeds of error for appeal
11 and are going to cause considerable difficulty for
12 judges, practitioners and probation officers.
13 And the specific problem that I'm concerned about
14 has to do with the kind of Balkanized way in which
15 the -- in the course of the sentencing proceedings,
16 you have to evaluate the defendant's conduct in
17 different ways, in different parts of §2B1.1.

18 Under the relevant conduct rules
19 generally, and the amendment that's proposed
20 today, which we generally support, to §1B1.3, of
21 course, you consider defendant's conduct and all
22 acts and omissions of others that were within the

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1 scope of the activity that the defendant jointly
2 agreed to undertake, were in furtherance of that
3 activity and were reasonably foreseeable to the
4 defendant.

5 So, that would be the general --
6 obviously the general rule, as you go through
7 §2B1.1. But, under the amendments, under the
8 proposed amendment to the intended loss, that would
9 be determined by what the defendant purposely
10 sought to inflict, the losses that he would
11 purposely -- he or she purposely sought to inflict,
12 and I'm concerned that that is looking at the same
13 sort of conduct, but looking at it through a
14 different lens.

15 Then when you get to the sophisticated
16 means proposal §2B1.1(b)(10), that the lens there,
17 under the proposed amendment, is that the
18 sophisticated means would only apply to that
19 conduct in which the defendant aided, abetted,
20 counseled, commanded, induced, procured or
21 willfully caused that conduct which is
22 sophisticated.

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1 So, my concern is that it puts --
2 sentencing is already fairly complex, in large
3 significant cases under §2B1.1, and you
4 essentially have to slice the conduct three
5 different ways under three different standards,
6 and that is going to create, I think, tremendous
7 confusion in the course of the sentencing of those
8 cases.

9 I wanted to say just a moment, I see my
10 yellow light is on. I just wanted to say just
11 briefly about the fraud on the market proposal,
12 which is -- and I can elaborate this more -- in
13 greater detail, as we go on with the panel.

14 But it seems to me that that is a
15 proposal designed to address a very small number
16 of cases, but definitely significant cases, large
17 cases, and there may be important ways in which we
18 need to look at those large cases, but it's a policy
19 that is intended to target a very small number of
20 cases, but I think will create mischief in a much
21 larger number of cases, as many other types of
22 defendants who are not strictly fraud on the market

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1 defendants are going to attempt to get within the
2 scope of that proposal of using gain rather than
3 loss.

4 I noted that in the end of Mr. Felman's
5 statement for the next panel, I think in the very
6 last page of his statement, he made the point that
7 there is really no principle distinction between
8 the fraud on the market cases and other types of
9 cases, and that he believes that gain should
10 generally be used in fraud cases.

11 I think that is a widespread view among
12 defense counsel, and I think there are going to be
13 a lot of ways in which they are going to argue to
14 sentencing judges, that they ought to go to this
15 new proposal, that their offense, even if it's not
16 strictly fraud on the market, is analogous to it,
17 that they should get the benefit of that.

18 So, I think it's going to create issues
19 that are much broader than the narrow set of cases
20 that it was intended to address. I look forward
21 to your questions. Thank you.

22 CHAIR SARIS: Thank you. Mr. Caruso.

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1 MR. CARUSO: Thank you, Judge. I
2 first wanted to start by thanking the Commission
3 for soliciting the defender's views on this
4 important subject, and personally inviting me to
5 speak and join the conversation.

6 As you know, economic crimes constitute
7 a significant part of the federal court's docket,
8 and a significant portion of all federal public
9 defenders' offices' caseload, where the public
10 perception may be that these are strictly
11 white-collar crimes and white-collar offenders,
12 and that the federal public defender focuses on
13 drugs and guns and immigration. Nothing could be
14 further from the truth.

15 Day in and day out, all over the
16 country, and specifically in the Southern District
17 of Florida, where I am from, our lawyers are dealing
18 with a heavy caseload of economic crimes, and based
19 on our experience with §2B1.1, given that our
20 clients are the largest consumers of that guideline
21 in the federal system, and also based on the
22 statistics that the Commission has generated, our

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1 belief is that this guideline is not properly
2 calibrated.

3 If you look at first the statistics, you
4 see that for the vast majority of the cases the
5 within-guideline sentences being imposed by
6 federal judges are very low. For the vast majority
7 of cases, the statistics seem to indicate that the
8 within-guideline rate is 35 percent.

9 I don't think any reasonable person
10 could say that that's a properly calibrated
11 guideline.

12 We also know that from seeing the extent
13 of the variance and the vast majority of cases,
14 whereas the numbers may be clearer at the high end,
15 if you look at the percentages, you see again for
16 the vast majority of cases federal judges are
17 varying from this guideline at a rate of 19 to 24
18 percent in cases involving \$30,000 in loss to a
19 million.

20 So, whereas, at the low end, a sentence
21 reduction of two months or four months or six
22 months, the result doesn't seem significant. When

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1 you look at the percentage, I think that
2 demonstrates that the extent of the variances are
3 significant, and our position of course is that,
4 you know, any extra day in prison that doesn't need
5 to be served should not be served, because of the
6 enormous impact that prison has on our clients
7 individually and their families.

8 But it also has a practical effect,
9 because even at the low end, when you're talking
10 about a reduction of two, four, six months, you're
11 talking about the decision as to whether to put a
12 person in prison solely, just prison time, versus
13 giving that person a split sentence.

14 So, for example, it's a difference
15 between in Zone D, where there has to be a term of
16 imprisonment with compared to being in a lower
17 zone, where there could be a straight probation or
18 a split sentence.

19 So, I think the Commission needs to
20 focus on the impact of the variance rate and the
21 extent of the variances at the lower ends, and I
22 think you will come to the conclusion that the

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1 guideline is not properly calibrated.

2 That being said, we believe that the
3 Commission's proposals all move in the right
4 direction, except for the Commission's decision
5 not to tackle the loss table head on.

6 But the other proposals that the
7 Commission has set forth all move in the direction
8 of basing a sentence on a person's individual
9 culpability.

10 So, if we look to inflate the
11 inflationary adjustments, stealing \$5,000 today is
12 much different than stealing \$5,000 in 1987.
13 That's just a fact of life.

14 If we look at the sophisticated means
15 proposal, we would like that proposal limited to
16 sophisticated conduct that was caused by the
17 defendant.

18 There seems to be no rational
19 punishment policy for punishing a person more
20 severely just because of the happenstance that he
21 or she aligned themselves with clever criminals.
22 We should focus on the -- we should focus in meting

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1 out punishment on the person's own conduct.

2 We think also the victims proposal
3 moves in the right direction. We would suggest a
4 modification. We would suggest an elimination of
5 the victims table and a replacement with the
6 substantial financial hardship question, because
7 again, there is a problem in our view with the
8 victims table, in that it overlaps with the loss
9 table. It's duplicative, and we think it gets to
10 a much better answer, with regard to a person's
11 moral culpability and responsibility, to focus on
12 the substantial financial hardship that that
13 person has caused, and we would limit it to
14 financial hardship.

15 You know, we think the guidelines
16 already account in a departure provision for
17 non-financial hardship, and we believe that if
18 non-financial hardship was included, that would
19 actually have the impact of raising sentences in
20 this area because of the cumulative effect of the
21 victims table and the hardship question, and we
22 don't think at this point in time, when sentences

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1 are already too long, that the Commission should
2 be moving toward raising sentences.

3 With regard to intended loss, again, I
4 think that's a move toward focusing on a person's
5 personal culpability. You know, we've cited a
6 number of cases in our materials of rather
7 extensive conspiracies. We cited a telemarketing
8 fraud case but we have it in the healthcare field,
9 the mortgage fraud field and the securities field,
10 where the crimes are being perpetrated in an office
11 setting with a large number of people, and people
12 at the lower end, who are essentially performing
13 as functionaries, are drawing a limited salary, but
14 because the people at the high end of the hierarchy
15 are intending a greater loss, they're not only
16 getting hit with sophisticated means or a victims
17 adjustment, but they're also getting an intended
18 loss adjustment up from actual loss.

19 So, we think again, the Commission's
20 proposals are moving in the right direction,
21 focusing on an individual's culpability in
22 determining what present sentence they should

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1 serve. Thank you.

2 CHAIR SARIS: Thank you.

3 MR. TIRSCHWELL: Good morning, and on
4 behalf of the Practitioners Advisory Group, for
5 which as you said, I serve as Vice-Chair, I want
6 to thank everybody on the Commission for the
7 opportunity to address you this morning.

8 We strive to provide the perspective of
9 those in the private sector who represent
10 individuals and organizations charged under the
11 federal criminal laws.

12 Perhaps not surprisingly, economic
13 crimes are, for many of us, a large, if not the
14 largest portion of our dockets, so we are
15 especially appreciative of your willingness to
16 listen to us and consider our thoughts this
17 morning.

18 In our written testimony we have
19 reiterated our abiding belief that -- which we've
20 expressed on numerous occasions to the Commission,
21 that instead of proposing what we respectfully
22 submit are only modest adjustments, the Commission

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1 should undertake a more wholesale revision of the
2 fraud and related economic crimes guidelines.

3 That said, and notwithstanding our
4 continuing hope that at some point the Commission
5 will consider such larger scale revisions, we're
6 here this morning to applaud you all for the
7 proposals that we're discussing today.

8 We do believe that these proposals at
9 least begin the hard work of moving toward a
10 sentencing framework for economic crimes that
11 takes greater account of many non-law-centric
12 considerations, which I think we've been
13 advocating, should be elevated in the sentencing
14 considerations.

15 So, what I thought I'd do is focus on
16 two particular issues where I think we've made some
17 fairly concrete proposals.

18 The first is the victims table, and in
19 particular, we agree with the Commission's
20 decision to try to reduce the impact of the
21 enhancement for victim numerosity standing alone.

22 We believe where no victim has been

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1 substantially harmed, the loss enhancement in
2 subsection §2B1.1(b)(1) sufficiently captures the
3 magnitude of the harm caused by the fraud.

4 So, we have endorsed the Commission's
5 suggestion raised in the first issue for comment,
6 to limit the victims -- the impact to the victims
7 table, where no victims were, in fact,
8 substantially harmed by the offense.

9 Our proposal is that the Commission do
10 so by eliminating the current §2B1.1(b)(2)
11 entirely, which enhances, as you know, based solely
12 on numerosity without regard for substantial harm,
13 and we've advocated instead replacing it with the
14 new proposed §2B1.1(b)(3), Option 2, which as laid
15 out, provides for the enhancement if, and only if,
16 the offense resulted in substantial hardship to at
17 least one victim.

18 We think that by making substantial
19 harm to even a single victim, the trigger or the
20 initial aggravator, and then providing for
21 additional enhancements where larger numbers of
22 victims suffered substantial harms, Option 2 will

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1 adequately account for victim impact aggravators
2 not already captured in the loss calculation in
3 §2B1.1(b)(1), but will eliminate or at least
4 substantially reduce some of the double-counting
5 and redundancy problems that have been identified
6 and talked about in decisions of the current
7 §2B1.1(b)(2).

8 The second issue I wanted to talk about
9 briefly was -- or is the fraud on the market
10 proposal.

11 We endorse the Commission's suggestion
12 that all fraud on the market cases be sentenced
13 under §2B1.4, and that's sort of a broader
14 potential change than some of the proposals
15 suggest, but we see many benefits to moving these
16 kinds of cases to §2B1.4.

17 Section 2B1.4 already relies on gain
18 rather than loss, which as we understand what the
19 Commission seems to be expressing at this point,
20 is something that has been recognized as a place
21 where some movement in fraud on the cases is
22 warranted.

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1 We don't think §2B1.4 would require
2 dramatic modification to bring in these fraud on
3 the market cases. The lengthy list of specific
4 offender characteristics set out in §2B1.1 are
5 largely inapplicable in fraud on the market cases.
6 So, we don't think there would be a need to
7 wholesale, import or cross-reference those
8 specific offense characteristics.

9 There are a couple that may be
10 applicable in fraud on the market cases. We
11 mentioned in our written testimony, §2B1.1(b)(19),
12 which relates to defendants who are officers,
13 directors, registered persons or investment
14 advisors. That certainly seems like it would
15 apply, and there may be one or two other provisions.

16 But for the most part, we think that
17 moving these cases over to §2B1.4 would really
18 simplify and really better capture the new proposed
19 focus on gain.

20 We are concerned, and we noted this in
21 our testimony, that the proposal as written is too
22 narrow. It applies, as proposed, only to cases of

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1 the submission of false information in a public
2 filing, and we've suggested that that should be
3 expanded to include misleading disclosures or
4 material omissions. Many of the fraud on the
5 market cases involve not necessarily affirmatively
6 false information. So, that's one suggestion that
7 we've made.

8 We've also raised concerns about the
9 proposed floor that the Commission has laid out.
10 We didn't see any persuasive explanation for why
11 a floor would be necessary, and so, while we agree
12 that relying on loss in fraud on the market cases
13 should be set aside, we think that replacing it with
14 sort of what looks like an irrebuttably presumed
15 baseline amount of gain, without any real basis or
16 explanation for where that comes from, would
17 re-inject some arbitrariness into the offense
18 level calculation.

19 So, we're strongly urging the
20 Commission not to impose any floor if this change
21 is made. So, thank you, and I'll be happy to answer
22 any questions.

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1 CHAIR SARIS: Thank you. Ms. Foti?

2 MS. FOTI: Thank you. Good morning,
3 Judge Saris and distinguished members of the
4 Commission.

5 So, I have the benefit of going last,
6 which allows me to echo what my panel, the two
7 defense attorneys on this panel have said.

8 It is interesting, I think, that the
9 three defense attorneys here all really have the
10 same position, and I think we have lengthy
11 testimony that is very similar, some differences,
12 but the NYCDL's position is that there is still
13 significant problems with the economic crime
14 guidelines, and we really think we should start
15 over again.

16 In particular, we support the ABA Task
17 Force report that you will hear about in the next
18 panel. But that report basically says let's look
19 at this and let's try a different way of approaching
20 the problem of economic crimes.

21 Again, I think the fact that three
22 panelists here with extensive experience in

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1 criminal defense, have echoed the problems that
2 defendants are facing with these guidelines is
3 significant and something I would hope the
4 Commission really takes to heart.

5 Specifically, what we are hoping is for
6 an approach to the economic crimes that we defend,
7 which is much more particularized, much more
8 focused on an individual defendant's culpability.

9 In addition, on the sophisticated means
10 enhancement, we recommend that -- we recommend that
11 the Commission amend the enhancement to specify
12 that it applies, as it is suggested, to the
13 defendant's own conduct, and focuses on the same
14 kind of offense the defendant is accused of.

15 Now, on the fraud in the market, the
16 NYCDL believes that the 2012 amendments to the
17 guidelines for economic crimes did not properly
18 address the issues with fraud in the market.

19 So, we do support using §2B1.4 as the
20 guideline, similar to what Mr. Tirschwell has
21 suggested. We believe that it is conceptually
22 similar, because it is dealing with insider trading

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1 and the issues are conceptually similar to fraud
2 in the market cases.

3 Also, we believe that the lack of the
4 very specific offense characteristics make that --
5 make that guideline much easier to apply, much
6 easier to deal with in fraud on the market cases.

7 What we would suggest, and we've stated
8 -- said in our testimony, is that if we do use fraud
9 -- use §2B1.4 for fraud on the market cases, that
10 that guidelines comes with the presumption of
11 sophisticated means, given the fact that there is
12 a suggestion that the sophisticated means be
13 amended to focus more specifically on individual's
14 conduct, that there be an additional adjustment
15 placed under §2B1.4, that would focus on whether
16 or not there was, in fact, sophisticated means used
17 in a particular case.

18 There certainly could be fraud in the
19 market cases where an individual defendant did not
20 use sophisticated means.

21 Generally, the NYCDL believes that
22 reliance on either loss or gain does not properly

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1 account for culpability of defendants.
2 Notwithstanding that, we think the suggestion that
3 gain be used in fraud in the market cases is, in
4 fact, a good suggestion and we would support that,
5 and in connection with -- and the issue of
6 adjustment for inflation, we certainly would
7 support that and we would suggest that that be
8 implemented every four years.

9 Again, on behalf of the NYCDL, I thank
10 you very much for inviting me here today, and I look
11 forward to your questions.

12 CHAIR SARIS: Thank you. Can I -- I'm
13 going to start with a letter the Department of
14 Justice sent us, literally three years ago, I
15 noticed, March 12, 2012 and --

16 HON. WAGNER: I'm sure I haven't read
17 that letter.

18 CHAIR SARIS: And it basically -- it
19 says, "The Department has also observed that the
20 impact of the loss in victim tables and securities
21 fraud cases involving fraudulent statements to the
22 market can sometimes be disproportionate and that

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1 as a result, some sentencing courts are departing
2 downward dramatically from the guidelines."

3 That refrain was echoed at the
4 Symposium on Economic Crimes held in 2013 at the
5 John Jay College of Criminal Justice. In fact, it
6 was because of all the stakeholders, including the
7 Department of Justice, that we actually started
8 engaging in this multi-year study, the table, which
9 is on the web and everyone has seen before, started
10 showing the dramatic departures at about \$1 million
11 in loss.

12 As the Defenders point out, there is
13 some before that, but the dramatic stuff happens
14 at over \$1 million.

15 So, I'm trying to figure out what -- the
16 Department of Justice doesn't like a lot of our
17 proposals or the suggestions. What are you
18 proposing to deal with this?

19 HON. WAGNER: So, I think the issues
20 here, as I suggested in my opening statement, the
21 number of cases at the very high end is very, very
22 small. I think in that data, I think it reflects

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1 something like 56 cases out of -- in 2012, out of
2 8,500 defendants sentenced under §2B1.1, only 56
3 involved loss amounts of over \$50 million.

4 So, I don't think we have a serious
5 disagreement that there is a tweak of some sort that
6 is needed to address some of these cases at the high
7 end. Not every one of these cases is over-valued
8 at the high end.

9 We had a mortgage fraud case recently
10 in my district, in which the defendant was
11 sentenced to 35 years in prison by Judge Muller,
12 who was appointed by this President, not known as
13 a very severe sentencer, but that was a case in
14 which the loss amount was tremendous. There was
15 a huge amount of victims, very predatory behavior,
16 the worst kind of white-collar type of case you
17 could imagine.

18 So, not every high dollar case, I think
19 is necessarily over-scored by the guidelines, but
20 there probably are some.

21 I think there was an interesting
22 proposal in Mr. Bowman's submission, which I think

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1 the Commission should consider, about collapsing
2 the top four levels in the loss table and looking
3 at whether or not you should end it at everything
4 over \$20 million, that is -- is 22 levels, and that
5 that's your cap.

6 I'm not necessarily saying that's the
7 right thing to do, but I think that is certainly
8 worth --

9 CHAIR SARIS: That's a tweak worth
10 considering.

11 HON. WAGNER: That's a tweak worth
12 considering. It is a tweak worth considering, and
13 so, it's not that there isn't something that should
14 be done here.

15 I think with the fraud in the market
16 proposal, the language that was just put in, in
17 2012, on the downward departure, seems to be being
18 utilized, and I think we ought to give that a
19 chance.

20 Our concern really is that with this
21 fix, in my view, is it going to create more problems
22 than it solves, which isn't to say there isn't a

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1 problem that needs some attention.

2 COMMISSIONER WROBLEWSKI: So, I have
3 two questions. Mr. Caruso, you talked a lot about
4 how the guidelines treat jointly undertaken
5 activity, and as I'm sure you know, there's a long
6 history in the law and the penal code and the
7 guidelines, for dealing with jointly undertaken
8 activity.

9 The Commission is considering a
10 proposal to address that, in particular, this
11 amendment year, and part of relevant conduct is
12 designed to limit the exposure of a person for a
13 jointly undertaken activity.

14 Your testimony suggests that at least
15 for sophisticated means and intended loss, that we
16 should eliminate all responsibility for activities
17 of others that were part of jointly undertaken
18 activity.

19 So, for example, and tell me if I have
20 the testimony wrong. So, if somebody is involved
21 in some sort of fraud that involves sophisticated
22 hacking, and hires a person to do that programming

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1 and hacking, that the individual who did the hiring
2 should not be held responsible because of that
3 individual person did not engaged in sophisticated
4 means.

5 So, that's one question, if you could
6 address that.

7 Then to Mr. Tirschwell and Ms. Foti, you
8 spoke about fraud on the market and using the
9 insider trading guideline.

10 There was a directive that came from
11 Congress in the Dodd-Frank Act, which told the
12 Commission to focus on the harms and the actual and
13 possible harms that are done to victims and the
14 market.

15 Do you think it's consistent with that
16 directive, for the Commission to have a sentencing
17 scheme that focuses on the gain and on the
18 perpetrator, rather than on the victims?

19 MR. CARUSO: Thank you, Commissioner.
20 First, I would disagree with your premise.

21 The defenders don't view the jointly
22 undertaken activity portion of the guideline as a

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1 limiting principle. You know, in our experience
2 collectively and in my experience individually,
3 the jointly undertaken activity component of the
4 guideline sweeps in a broad array of conduct and
5 increases punishment for our clients, as opposed
6 to limiting it, and our proposal, you know,
7 drafting upon the Commission's proposal, is to
8 limit punishment for those who actually cause the
9 harms, as opposed to sweeping in those who, for
10 whatever reason, associated themselves with the
11 people who created the harms.

12 So, for example, in your hacking
13 example, I don't believe the defenders would have
14 any issue with both of those persons being held
15 accountable for sophisticated means. Both the
16 person who designed the scheme and the person who
17 caused the hacking activity.

18 You know, what we're looking to limit
19 the sophisticated means adjustment is to those
20 people who willfully cause the sophistication.

21 So, if this is hacking activity, and
22 there are other participants, so perhaps the

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1 computer that's being used to commit the hacking
2 breaks, but the hacker has a DUI, so he can't drive
3 and he's going to draw the line in committing
4 criminal conduct at that point.

5 So, he needs someone to drive him to the
6 computer store, and he hires our client, and our
7 client knows he's engaged in this hacking activity.
8 Drops him off at the computer store, brings him back
9 to pick up the computer.

10 That person, we believe, had no part in
11 willfully causing the sophistication, although he
12 has participated in the conduct and is going to be
13 sent to prison for that activity, we think the
14 Commission should draw the line by increasing
15 punishment only for those who willfully cause the
16 sophistication.

17 COMMISSIONER FRIEDRICH: Mr. Caruso,
18 is it the better way to get consistent with the
19 manual as a whole, to focus on role, greater role
20 reduction for that individual, because in the drug
21 courier case, the person carrying the pounds across
22 the border is part of a larger conspiracy and can

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1 be, depending on the facts, held responsible for
2 the larger drug couriers, but yet, he did just one
3 importation.

4 So, is it the better approach,
5 consistent with the first principles in our manual,
6 to work on role for those folks, minimal role,
7 perhaps?

8 MR. CARUSO: I would love to get
9 minimal role in that case, Your Honor, but our
10 experience shows that we don't get minimal role.

11 COMMISSIONER FRIEDRICH: But
12 shouldn't the Commission be focused on getting at
13 that problem from the role provision, as opposed
14 to the sophisticated means because of the way the
15 guidelines are designed with relevant conduct?

16 MR. CARUSO: You know, I believe that
17 because the loss table is the primary driver of this
18 guideline, it's not sufficient to ameliorate the
19 harshness of the guideline by looking to another
20 area of the guideline.

21 I mean, I think there is a real reason
22 within the fraud guideline that the Commission

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1 wants to set a guideline, and judges want to punish
2 more severely, those who create a sophisticated
3 scheme, for the reasons that have been addressed
4 by the Commission earlier.

5 But I think the problem has to be
6 addressed within the guideline because people are
7 going to get the upward adjustment.

8 So, it's only fair if people are getting
9 the upward adjustment under the guideline, if they
10 didn't do anything to willfully cause the
11 sophistication, they shouldn't then get it, only
12 to be deducted out later on, because to them, in
13 practical terms, it's not a benefit.

14 They get the two levels up for
15 sophistication and then they -- and then they get
16 it, you know, back in the -- in a minor role
17 reduction. They're still left at the same level,
18 and we don't think that takes care of the issue.

19 CHAIR SARIS: Commissioner Barkow and
20 then Commissioner --

21 COMMISSIONER BARKOW: So, this is just
22 on that same point.

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1 I guess I'm not quite sure. So,
2 normally in the law, we don't think about somebody
3 causing someone else to do something, right.
4 That's just not foundational, criminal law. So,
5 we use aiding and abetting, right?

6 So, if we were to use your suggestion
7 on page 15, and I think this gets at what Commission
8 Wroblewski was asking, there would be a conflict
9 with all the rest of criminal law, in the sense
10 that, you know, I can't cause you to do something.
11 That's not how we do it.

12 So, I'm wondering if it would address
13 what you had just said, if we talked about
14 intentionally aiding and abetting such conduct,
15 right. If we had that same idea, instead of saying
16 causing, but you are intentionally aiding and
17 abetting the conduct of the hacker, because I'm not
18 so sure causality -- that would be a whole new
19 concept or for criminal losses, we don't normally
20 think of one person causing some other person to
21 do something. We've always used aiding and
22 abetting.

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1 So, I just don't know how adopting this
2 proposal might actually play itself out in the
3 Courts, and I'm wondering what you think about
4 instead saying, intentionally aiding and abetting
5 or willfully doing it.

6 MR. CARUSO: I think willfully aiding
7 and abetting is better than what is being proposed,
8 but I would disagree with you, in the sense that,
9 you know, I think the substantive criminal law and
10 what we're doing in sentencing, they're different
11 concepts, as you know.

12 I think there are provisions in the
13 guideline, you know, especially in, you know, the
14 upward role adjustment scenario, where people are
15 held accountable for directing others to do
16 something.

17 So, I view if I hire you to do something,
18 if I say to you, "Listen, I have this great scheme,
19 but I don't know how quite to execute it, so I want
20 to hire you to do this hacking job, will you do it,"
21 in my view, that is causation, you know, because
22 you're entering into an agreement with that person,

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1 to cause the hacking activity, whether you want to
2 call it -- I would say it gets closer to directing,
3 as opposed to aiding and abetting.

4 My hesitancy in agreeing to any aiding
5 and abetting language is then, that sweeps in the
6 driver that's taking the hacker to fix the
7 computer, because that is aiding and abetting. He
8 is intentionally doing it, and it serves no
9 rationale for punishment, to punish the mere driver
10 or errand runner, for participating in a scheme
11 that someone else made complex.

12 COMMISSIONER WROBLEWSKI: But that
13 driver is only going to be swept in if it is part
14 of the jointly undertaken activity, as defined by
15 the Commission, and the Commission is likely to
16 make that clear, that there has to be an agreement.
17 It has to be part of the agreement.

18 So, he's only going to be held liable
19 if he knows what's going on, he's agreeing to the
20 whole enterprise and so forth.

21 MR. CARUSO: But in my example, he
22 meets that criterion, and we see this not only in

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1 your hacking example, but in healthcare fraud.

2 You know, my office represented a woman
3 who became, you know, a nominee owner of a
4 healthcare clinic. All she did was sign her name
5 to a piece of paper, and then her function in the
6 healthcare fraud was to drive the real owner of the
7 fraud around town, because that person couldn't
8 drive.

9 At sentencing, our client got held
10 accountable for every loss the healthcare clinic
11 caused, sophisticated means and the victims -- the
12 victim enhancement, and in our view, since she was
13 a mere functionary in this criminal activity, and
14 her punishment was driven overwhelmingly by the
15 loss, we think that the line should be drawn there,
16 and she shouldn't be held accountable for victim's
17 enhancement or sophisticated means, even though
18 she aided and abetted the crime.

19 CHAIR SARIS: Judge Breyer?

20 VICE CHAIR BREYER: Mr. Wagner, let me
21 start out in the area of agreement.

22 I certainly agree with you that your

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1 district is overwhelmed by the number of cases. It
2 actually is the district that leads the United
3 States in cases per Judge, and has for a number of
4 years, and so, I have no -- I wish I could do more,
5 to assist in getting judicial resources to your
6 district. You do a fine job.

7 CHAIR SARIS: He's going to plan on
8 coming down and visiting.

9 VICE CHAIR BREYER: I would, actually,
10 with the Eastern District. It's a wonderful
11 district and they are overwhelmed.

12 But I wanted to -- I've been intrigued,
13 because I sort of have one idea about the victim's
14 table, that by virtue of the testimony that's been
15 submitted, I'm now trying to rethink it, and
16 especially in light of what happened in New York
17 in the symposium, where the victim's group got up
18 and said, "Look, you're measuring the wrong thing
19 here. You're measuring numerosity. You're not
20 measuring impact," and impact is really, when you
21 go back to the very fundamentals of the guidelines,
22 the guidelines, when they were set up, was to

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1 measure harm.

2 So, harm may be characterized by
3 numbers, but it's not necessarily the case that you
4 have harmed, caused that much greater harm by
5 having 1,000 victims who lose a dollar, than 10
6 victims who lose a lesser amount, or the same
7 amount, but cumulatively the same amount.

8 So, I'm interested from a prosecutor's
9 point of view, what if we were to change that
10 victim? What if we were to say, "Look, let's get
11 rid of the victim's table?"

12 In one sense, that is we simply won't
13 count the victims, but we will count the victims
14 who have received whatever you want to say,
15 substantial harm, individual harm, significant
16 harm. If we look at it that way, is that in any
17 way, impact, though I also understand that you have
18 the general argument and the general objection that
19 we've made things -- that we're making things more
20 complicated.

21 I'm sympathetic to that, to one -- at
22 one level, but I'm also mindful of the fact that

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1 sentencing is individualized. The Congress of the
2 United States, in the statute and the Supreme Court
3 has said that we must give an individualized
4 sentence.

5 So, the fact that Judges may have to
6 work harder or make distinctions, is not
7 discouraging, at least to this Judge, that -- to
8 engage in that enterprise. I understand that.

9 But from a prosecutor's point, I'd like
10 to know, if we were to reconfigure the victim's
11 table in a way that measures harm caused to that
12 particular victim, does that make any difference,
13 or would it impede your ability to prosecute, or
14 on the other hand, would it be more gratifying or
15 satisfying to a prosecutor to know that if somebody
16 has been substantially harmed by it, even though
17 it may be a smaller number of people, the Court is
18 going to take that into consideration?

19 HON. WAGNER: One area in which we, I
20 think agree with a lot of our co-panelists is our
21 support for Option 2 in the victim adjustment, and
22 I think it's terrific, that the Sentencing

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1 Commission is considering introducing the concept
2 of looking at the substantial harm that is done,
3 the serious harm.

4 So, I think that is a big step forward
5 and we support that.

6 We don't support the idea of sort of
7 doing away with the numerosity, with the quantity,
8 as well as the quality, sort of, of the harm that
9 is done.

10 I don't agree that the counting victims
11 is duplicative of counting the loss amount. In the
12 mortgage fraud type of cases, for example, in a \$10
13 million case, it's quite a different situation,
14 where that \$10 million was extracted from three
15 banks versus 300 desperate home owners, and I think
16 for that reason, you can't just say, "Well, they're
17 both \$10 million cases," and I think there, what
18 I like about Option 2 is it looks at both of the
19 breadth of the conduct, the number of victims and
20 sort of the depth of it, were they substantially
21 harmed?

22 I think all of those are relevant

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1 considerations for the Court.

2 The one thing, as a practical matter,
3 since that's what you're asking about, that we
4 suggested as a tweak to Option 2, which I really
5 would advocate, is the top level in the proposal
6 for substantial harm is at 25 victims, and as a
7 prosecutor, if I'm preparing that case for
8 sentencing, you don't know which 25 victims the
9 Court may agree are ones that suffered substantial
10 harm.

11 So, you've got to work up maybe 30 or
12 40 victims, and you know, sort of present facts
13 relating to all of those different victims to the
14 Court, so that you have a decent shot of hitting
15 your 25.

16 I think that's an awful -- and I agree
17 that just because sentencing is hard doesn't mean
18 it's not important for the Courts to do, but I think
19 it may needlessly add an extra layer of difficulty
20 for probation officers and the Courts and the
21 practitioners, to sort of litigate, you know, 40
22 different cases of how hard were you harmed, and

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1 it ought to be capped at about 10, in which it both
2 measures the substantial harm, but doesn't impose
3 sort of an incremental additional burden on
4 everybody.

5 VICE CHAIR BREYER: Do you think we
6 ought to expand the term of harm to include
7 non-financial harm, that is to say, you may have
8 an identity theft case. You may have a person who
9 didn't lose a dollar, but now, must spend the next
10 two or three years, trying to sort out their credit
11 record, and trying to get financial assistance.

12 So, as a matter of analysis, it's going
13 to be very hard to quantify it, but it's not hard
14 to qualify it.

15 HON. WAGNER: Right. I do support that,
16 and I think one of the things that has been -- I
17 think it has been a welcomed trend, that Courts have
18 increasingly -- because of victim's rights
19 legislation and so on, the harm done to the victims
20 has assumed an increasingly important part in
21 sentencing.

22 But one thing that has been

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1 under-valued, I think is the harm that results from
2 these sorts of crimes that are not necessarily
3 measured by well, your cashier's check that was
4 stolen was for \$3,000 or whatever.

5 There are a lot of consequences that
6 deserve a place in there. So, we support the idea
7 of it not being limited to financial harm.

8 Now, one thing that I will say, and so,
9 in that respect, we agree with the Victims Advisory
10 Group, but one thing that I would caution, however,
11 that we disagree with the Victim Advisory Group is,
12 they had a suggestion to have sort of five different
13 levels of harm, of substantial harm, significant
14 harm, life-altering harm and then two levels if
15 it's in between those, five different level swing.

16 That, to me, imposes a tremendous
17 burden in trying to litigate between someone, well,
18 you suffered significant harm, but it wasn't really
19 substantial, and trying to measure this person,
20 what they felt was significant, that person was
21 substantial.

22 That really complicates things, and I

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1 understand it's well intended, but I think it
2 doesn't add substantially to the general Option 2
3 as it exists, which is just measuring harm, which
4 I think should include --

5 CHAIR SARIS: Thank you.

6 VICE CHAIR BREYER: One other
7 question, if I can. On the loss on the fraud on
8 the market --

9 HON. WAGNER: Yes.

10 VICE CHAIR BREYER: -- if you can't
11 successfully measure loss, that is to say
12 scientifically, it's simply too uncertain to
13 measure. Yet gain, in a particular case, may be
14 easier to mention -- to use.

15 Would you say that that would be a
16 satisfactory alternative?

17 HON. WAGNER: I think it is certainly --

18 VICE CHAIR BREYER: Or a preferable
19 one?

20 HON. WAGNER: Certainly, in individual
21 cases, if it is really impossible to measure loss,
22 and there may well be cases like that, then in that

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1 case, starting with gain, and saying, "Well, let's
2 look at the gain," I think it may not -- depending
3 on the case, it may be a somewhat reasonable proxy
4 to start with or it may not be.

5 As a general matter, what I'm concerned
6 about with the fraud on the market proposal is that
7 it carves out a sub-section of fraud cases where
8 you're looking at gain, as opposed to every other
9 fraud case, and there doesn't seem to me, sort of
10 a principle distinction, why these particular
11 cases should be looking at gain, except that it's
12 -- they're high dollar and that it's very
13 complicated.

14 CHAIR SARIS: Thank you. Judge Pryor?

15 COMMISSIONER PRYOR: So, Mr. Wagner, I
16 noticed in your -- in the limited time that you had,
17 you did not address inflation area adjustments, but
18 I take it, you're here to defend the Department's
19 position on that issue.

20 HON. WAGNER: I'll do my best.

21 COMMISSIONER PRYOR: Good luck. I
22 found it singularly un-persuasive, and I'm having

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1 a hard time understanding how it advances either
2 just deserts or crime control, to say that
3 punishment should increase by operation of
4 inflation. How can that be?

5 HON. WAGNER: So, inflation, obviously,
6 is a fact of life. It affects across the board,
7 sentences, fines, penalty assessments, and
8 etcetera.

9 COMMISSIONER PRYOR: Right.

10 HON. WAGNER: Congress hasn't taken any
11 action to index those other factors to inflation.
12 They haven't, to my knowledge --

13 COMMISSIONER PRYOR: We're not
14 proposing indexing. I notice that you're --
15 you're -- the letter says, "Congress hasn't seen
16 fit to index for inflation." This is, for the
17 first time in nearly 30 years, deciding to adjust
18 the loss table, to account for inflation.

19 That is very different from an annual
20 indexing for inflation.

21 HON. WAGNER: Right, right. It seems to
22 me a little bit of an odd thing, when Congress

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1 hasn't taken any action, or to my knowledge, asked
2 the Commission to do this.

3 There doesn't seem to be -- aside from
4 the -- I don't at all, dispute the effect of
5 inflation over time, but we're talking about
6 factors that have nothing to do with the
7 defendants, with the offense conduct, with the 18
8 U.S.C. § 3553 factors. This is sort of a totally
9 extraneous consideration, which would result in a
10 trimming of the loss tables, effectively the
11 sentencing effect, and it seems, after 30 years,
12 in a period of historically low inflation, a
13 somewhat odd thing to do at this point.

14 If I could just make two points though.
15 If the Commission doesn't accept --

16 COMMISSIONER PRYOR: Let's -- I'm
17 puzzled by all of that, but go ahead.

18 HON. WAGNER: If the Commission does go
19 forward with an inflation adjustment, I would have
20 two observations.

21 One is, I think if it does, then it's
22 -- I think there is no principled reason not to do

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1 it for fines, that if you're going to do it for loss

2 --

3 COMMISSIONER PRYOR: But there are ex
4 post facto concerns there.

5 HON. WAGNER: Well, and there are other
6 concerns, which I think were pointed out --

7 COMMISSIONER PRYOR: That don't
8 operate in the loss table.

9 HON. WAGNER: Well, not for -- I mean,
10 for new offenses, for somebody who commits an
11 offense now.

12 COMMISSIONER PRYOR: Well, you would
13 have to account for that. You would have to
14 account for when the crime was committed.

15 HON. WAGNER: Yes, yes.

16 COMMISSIONER PRYOR: But that's --
17 that is different, materially different than with
18 the loss tables.

19 HON. WAGNER: Yes, for those -- for that
20 time period where you're talking about cases that
21 have been --

22 COMMISSIONER PRYOR: We're talking

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1 about --

2 HON. WAGNER: -- committed, as of the
3 date, but not yet sentenced, certainly in that
4 bubble, as with a lot of adjustments by the
5 Commission.

6 The other factor, which I think was
7 pointed out by the Probation Officers Advisory
8 Group is that at the high end of the fine table,
9 you -- if you adjust for inflation, you go over the
10 statutory maximum for an individual for a single
11 count, which then creates a situation where the
12 high dollar exposure people get a break by virtue
13 of the cap, that others don't.

14 The only other thing I would add is
15 that, I know that the proposal was made to do this
16 every four years, and I'm concerned that that would
17 create a lot of instability and delay in the system.
18 I know that --

19 COMMISSIONER PRYOR: I think the
20 proposal is only that it would be considered every
21 four years.

22 HON. WAGNER: And if I were a defense

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1 attorney and I was three years between -- I would
2 do everything I could to stall my sentencing, until
3 that next time, to see if my guy was going to get
4 a break.

5 COMMISSIONER PRYOR: Well, this period
6 of historically low inflation, it wouldn't really
7 make much of a difference, would it?

8 HON. WAGNER: It might not. Certainly,
9 today it probably wouldn't, but if --

10 COMMISSIONER PRYOR: Don't you think
11 that this has something to do with the Commission's
12 obligation to reduce unwarranted disparities?

13 HON. WAGNER: Yes, but --

14 COMMISSIONER PRYOR: That's one of the
15 section 3553(a) factors, isn't it?

16 HON. WAGNER: Sure, and I think the
17 Commission has --

18 COMMISSIONER PRYOR: So, how can it be
19 that -- how can it be that someone who was sentenced
20 30 years ago should get effectively, a lower
21 sentence for the same crime that someone today
22 commits, and that where Congress and the Commission

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1 have not adopted any kind of new policy, but the
2 person today who commits essentially the same
3 crime, but by operation of inflation, is now going
4 to get a harsher sentence?

5 That's an unwarranted disparity, isn't
6 it?

7 HON. WAGNER: But there are dollar
8 amounts throughout title 18, United States Code,
9 for lots of different amounts --

10 COMMISSIONER PRYOR: Yes, but --

11 HON. WAGNER: -- and those have --

12 COMMISSIONER PRYOR: -- I mean,
13 Congress is doing a broad range, and it's not saying
14 it can't be revisited, right.

15 But we have a much narrower range for
16 setting a guideline range, right, that ought to
17 account for these kinds of, you know, contemporary
18 concerns in a way that a large, wide statutory range
19 does not. Isn't that right?

20 HON. WAGNER: I think it probably is,
21 although the Commission has had the opportunity,
22 and has looked generally at the loss table for a

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1 lot of reasons over the years, and has, for whatever
2 reason, not adjusted them downward, and doing it
3 this way, as kind of an inflationary haircut, I
4 think is not -- I don't -- I don't really see the
5 -- an inflation, it seems to me, is a fact of life
6 --

7 COMMISSIONER PRYOR: But what's wrong
8 --

9 HON. WAGNER: -- and has been for 30
10 years.

11 VICE CHAIR BREYER: You may not like
12 the way we're doing that, and I was equally puzzled
13 by the Justice Department's response. But what's
14 wrong with it?

15 I mean, you're not saying when Congress
16 passed these -- you know, passed on the loss table
17 years ago, years ago, they thought, "This is
18 great," because now, we're capturing these people
19 and guess what? We're going to capture more people
20 over time, because inflation generally goes up over
21 time.

22 They didn't contemplate that it would

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1 never be changed.

2 HON. WAGNER: Maybe not. I don't think
3 Congress has expressed --

4 VICE CHAIR BREYER: They haven't
5 expressed a view, but why wouldn't they equally
6 think that the Sentencing Commission, who is
7 looking at this all the time, and who is instructed
8 by Congress, to make appropriate amendments as
9 circumstances warranted it, why wouldn't they
10 think this is your job?

11 They don't want to have to look at it
12 all the time. I don't understand why the Justice
13 Department doesn't even recognize that.

14 You ought to embrace this position, not
15 reject it.

16 HON. WAGNER: Well, there may be good
17 reasons for looking at the loss tables, and
18 adjusting them, as I suggested at the outset,
19 particularly at the high level.

20 So, it's not -- it's not that they
21 should be frozen for all time. I just think
22 introducing this concept --

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1 VICE CHAIR BREYER: Fifty years?

2 HON. WAGNER: -- after 30 years -- I'm
3 sorry?

4 VICE CHAIR BREYER: It's 50 years
5 instead of 30.

6 CHAIR SARIS: Commissioner Friedrich,
7 yes?

8 COMMISSIONER FRIEDRICH: Mr. Wagner,
9 just following up on this.

10 If the Commission were to take this
11 action and adjust for inflation, don't the
12 defenders have a point that the year we should use
13 as a benchmark is 1987, given that the Commission,
14 neither the Commission nor Congress has ever
15 explicitly addressed inflation.

16 Yes, there have been other amendments
17 to §2B1.1 over time, but given that this has never
18 been an issue, aren't there proportionality
19 concerns and other reasons why we should go back
20 to 1987 and be uniform, to the extent we do this
21 at all?

22 HON. WAGNER: I mean, I think it should

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1 be uniform. I don't really have an opinion, as to
2 what the starting point should be.

3 COMMISSIONER BARKOW: Can I ask one
4 question, just on this?

5 I have this -- I have the same puzzling
6 reaction. This has been fun.

7 So, I'm just wondering, is it -- is the
8 Department of Justice of the view that we're doing
9 this as a back-handed way to lower loss, because
10 that's not what this proposal is.

11 So, I'm just kind of -- I'm just
12 wondering --

13 HON. WAGNER: No.

14 COMMISSIONER BARKOW: -- if I could
15 state it that this is a good government suggestion,
16 that applies, as you can see, across a range of
17 places in the whole manual, that has never
18 accounted for the passage of time.

19 So, we have decades now of money, you
20 know, I wish I could have -- like, it doesn't make
21 any sense to me, just as a matter of governance,
22 to not account for inflation.

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1 So, I guess if you took it outside the
2 loss table box and thought about it more generally,
3 is the government still is opposed to the idea?

4 HON. WAGNER: Well, you know, I'm not
5 questioning the Commission's motives to doing
6 that. I'm just saying --

7 COMMISSIONER BARKOW: Well, you said
8 it was a haircut.

9 HON. WAGNER: Well, that's the effect of
10 it. I think that's the effect of it.

11 From a prosecutor standpoint, you're
12 going to take people who are sentenced at one level
13 last month, and then get a lower sentence next
14 month, by virtue of the --

15 VICE CHAIR BREYER: Well, by that we
16 can do anything. We could only -- by that law --

17 HON. WAGNER: Yes, I mean --

18 VICE CHAIR BREYER: That's the
19 government's logic. We just shouldn't do anything
20 at all.

21 HON. WAGNER: No, as I've said, there may
22 be -- there may be good reasons to revisit the loss

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1 table, and particularly, certain areas of it.

2 But in general, I mean, in title 18 in
3 the Criminal Justice System, you know, it's not
4 like a sort of the Social Security Administration
5 where they are dealing constantly with these types
6 of issues.

7 Generally, it's a policy matter.
8 Congress sets these policies, and it has not been
9 an area where they have generally --

10 COMMISSIONER BARKOW: But it is
11 interesting that the last time they looked at it
12 was right before the Commission was founded. I
13 mean, you know, they thought about this in 1987 and
14 then, you know, here we are.

15 HON. WAGNER: Yes, right.

16 COMMISSIONER BARKOW: It seems
17 temporally that the thought is there is an agency
18 that can account for it.

19 CHAIR SARIS: So, let me jump for a
20 minute to the defense, since we have three sitting
21 here.

22 As you can tell, we're going to --

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1 MR. CARUSO: We're doing okay.

2 CHAIR SARIS: Always know when you're
3 winning the argument.

4 Let me say, we have struggled a lot with
5 fraud on the market. That was primarily -- the
6 Judges in New York have been struggling with that
7 issue. We've struggled with it, and come up --
8 it's hard to calculate loss, and we put it out
9 there, a proposal possibly to consider gain.

10 But by your referencing it, no one sort
11 of has actually, I think of any of the comments,
12 no one has embraced that, all right.

13 But you've put it in insider trading,
14 and the concern I have is that at some point, we
15 heard about this guy in New York who was an
16 executive and he was a good guy, and he was trying
17 to save his company, and so, he didn't gain
18 anything. He just had his salary, but he lied and
19 it caused millions and millions of dollars of loss.

20 Now, if you put it in insider trading,
21 there's no gain, and you don't have a floor, this
22 guys is looking at zero to six, all right.

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1 I understand why the defense community
2 loves this. I get it, but what I'm trying to
3 understand is, the reason for a floor, and maybe
4 this is just sort of a fact check, by looking at
5 what Judges in the field are doing, and maybe you
6 shouldn't use median. Maybe you should average.
7 I mean, there are different ways of doing it.

8 But the way of having a floor is some
9 sense that that's a really serious crime, even if
10 you didn't personally gain from it, all right.

11 So, I wanted to know how -- I'm not
12 saying our proposal is the perfect one. It may be
13 terrible. You know, it's why you put it out there.

14 But how would you deal with the very
15 real issue, even if it's only seven cases or over
16 the course of 15 years, you know, a handful of
17 cases, these fraud on the market cases, where gain
18 doesn't quite capture it, and loss is so hard to
19 figure out, and that the high end is not followed
20 anywhere?

21 Your proposal can't fly, right? We
22 can't be giving zero to six months, or would you

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1 say that we should? Yes?

2 MS. FOTI: No, I agree that, I mean, it
3 would be difficult to support a position where
4 someone like that would get zero to six.

5 But I think what you've done, in terms
6 of the floor, is that there is no -- you know, there
7 has to be exceptions then. So, there has to be a
8 much more well-developed discussion, as to you
9 know, as to the situations in which that floor would
10 apply.

11 Unfortunately, it seems that the floor
12 would apply in the situations that we're concerned
13 about, which is where you have someone who has
14 gotten, you know, a very small gain, in a very large
15 conspiracy, and potentially that floor is going to
16 apply though, and that's the concern.

17 The real problem with fraud in the
18 market is the lack of consideration of the market
19 forces, right?

20 So, that's why we do support the gain,
21 because the market forces are --

22 CHAIR SARIS: But suppose --

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1 MS. FOTI: -- very, very difficult.

2 CHAIR SARIS: -- there's no gain and
3 millions and millions of dollars of loss? All
4 right, that's not -- we've heard examples of that.

5 MS. FOTI: Right, I think that -- my
6 only thing I was going to suggest is, certainly
7 there could be a provision put in for a departure.

8 I mean, that -- many things in -- many
9 times, the guidelines provide for those concerns,
10 by providing for reasons why a departure might be
11 appropriate upward.

12 COMMISSIONER WROBLEWSKI: But that's
13 exactly what we have now. You just want the
14 presumption to start at zero and depart up.

15 Right now, we have start at loss and
16 depart down. That's exactly what we have.

17 MR. TIRSCHWELL: Well, I think the
18 question is what is the more common case that the
19 general rule should apply to and what are the
20 exceptions, and it seems to me, my experience and
21 our experience, talking to the practitioners is
22 that it is unusual, the case you described, Judge

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1 Saris, is I think the exception, not the rule.

2 It is much more common in a fraud on the
3 market case, that the individuals who perpetrated
4 the fraud on the market actually are gaining.

5 There certainly are cases where they're
6 not, but there is -- and if that is the norm, then
7 I think the idea is to set the guideline based on
8 the more common set of cases, and then whether it's
9 through a departure in an unusual case, I would
10 suggest that that case you described is an unusual
11 case, or there are enhancements, for example, if
12 there are cases where the victims suffered millions
13 of dollars of losses --

14 CHAIR SARIS: But there aren't, if you
15 put it in insider trading, right?

16 MR. TIRSCHWELL: Well, there are
17 certain enhancements that I think could be
18 cross-referenced.

19 VICE CHAIR BREYER: Let me follow up on
20 that, Judge Saris.

21 I mean, maybe I come from an unusual
22 district, and I'm an unusual Judge, both of which

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1 everyone in the room will agree with, but I've had
2 at least three of these cases, and I will tell you
3 that the losses are, you know, are very, very hard
4 to measure, very inexact. Everybody from Judge
5 Frank H. Easterbrook to Judge Jed S. Rakoff, to all
6 over the political spectrum has said, "This
7 situation of trying to measure the market, except
8 in the pump and dump cases, is really inadequate.
9 It's false science. It doesn't work."

10 However, your suggestion of putting in
11 the insider trading, which sounds good, bothers me,
12 because they're very different cases.

13 Somebody working on a tip, while it's
14 improper and while it's a crime, is very different
15 from the Chief Financial Officer signing a
16 statement that gets filed with the SEC, upon which
17 purportedly, the entire market operates on, and
18 that is a different crime.

19 So, the idea of putting a base in there
20 and not have the loss definition, but having a
21 substantial base in there is an attempt to try to
22 address the issue of where you can't measure loss,

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1 but the crime is serious, and therefore, it's
2 worthy of something more than zero to six months.

3 I don't know if you want to respond to
4 that, but that -- it just seemed to me, I have a
5 little bit of the apples and oranges, when I hear
6 about insider trading.

7 MR. TIRSCHWELL: I don't disagree that
8 those kinds of cases are often deserving of
9 something more substantial than zero to six.

10 You know, the insider -- and I think
11 when we suggested that those cases be sort of
12 imported into the insider trading, I mean,
13 obviously, there needs to be adjustments made to
14 the insider trading guideline, to broaden it.

15 There is a base or a floor in the insider
16 trader guideline for an organized scheme to engage
17 insider trading in 14, so, it's sort of the lowest
18 of the suggested floors in the proposal.

19 So, you know, if the Commission thought
20 there has to be some baseline, there is an analog
21 in the insider trading guideline already, and you
22 know, whether you want to call it an organized

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1 scheme related to, you know, a fraud on the market
2 or a false statement in a public filing, or you
3 wanted to tie it to something with a substantial
4 impact on the market and a floor there, that -- you
5 know, that wouldn't be, I think, unreasonable to
6 address that concern.

7 I think what we were particularly
8 focused on and concerned about is, you know, a floor
9 of something like 22 levels. When the floor starts
10 to rise to a fairly substantial level, then I think
11 you are introducing a certain arbitrariness that
12 wouldn't be justified.

13 But I think it may not be our first
14 preference, but a more measured floor, a lower
15 floor, something maybe similar to what is already
16 in the insider trading guideline, you know, might
17 be more of a reasonable compromise there.

18 CHAIR SARIS: I know we're past our
19 time for the Panel. Does anyone have any other
20 questions?

21 I want to thank you very much.

22 HON. WAGNER: Thank you.

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1 CHAIR SARIS: Thank you for coming.

2 VICE CHAIR BREYER: Judge Saris and I
3 will be in the Eastern District soon to try all
4 those cases.

5 HON. WAGNER: Wonderful.

6 VICE CHAIR BREYER: Maybe we can get
7 Judge Pryor, as well.

8 HON. WAGNER: You can have all our cases.

9 COMMISSIONER PRYOR: I'm on the
10 Circuit Court.

11 VICE CHAIR BREYER: Well, you can
12 review our cases.

13 CHAIR SARIS: Thank you. We're just
14 standing and stretching. We're going right to our
15 other Panel, and then --

16 Okay, we're all set. Okay, so,
17 welcome. You notice we're a shy lot here. So,
18 many of you have been to this rodeo before.

19 I begin with T. Michael Andrews, the
20 Chair of the Victims Advisory Group, he is also the
21 Managing Attorney for the D.C. Crime Victim's
22 Resource Center and an Assistant Professor at the

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1 University of Maryland, University College in the
2 Public Safety Department.

3 He previously worked at the Department
4 of Homeland Security and before that, served as an
5 Assistant U.S. Attorney in the District of Arizona.

6 Richard Bohlken is the Chair of the
7 Probation Officers Advisory Group. He has been a
8 member of the Probation Officers Advisory Group
9 since 2010. Mr. Bohlken is the Assistant Deputy
10 Chief Probation Officer in the District of New
11 Mexico.

12 James E. Felman is the Chair of the
13 ABA's Criminal Justice Section and Liaison to the
14 Sentencing Commission. He is a named partner at
15 -- I should know this, Kynes, Markman & Felman in
16 Tampa, Florida. His practice focuses on criminal
17 matters and some related civil litigation.

18 Frank Bowman has taught at the
19 University of Missouri School of Law since 2005.
20 Before entering academia, Professor Bowman was an
21 Assistant United States Attorney in the Southern
22 District of Florida from 1989 to 1996, and didn't

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1 you do a brief stint at the Sentencing Commission?

2 MR. BOWMAN: I was -- yes, I was Special
3 Counsel to the Commission.

4 CHAIR SARIS: Thank you. We begin
5 with Mr. Andrews. Thank you.

6 MR. ANDREWS: Thank you, and good
7 morning to the Commission and Chair. I thank you
8 for this opportunity to come here and speak about
9 very important issues, and that is victim's rights
10 and the impact of economic crimes on victims.

11 But I would be remiss if I didn't say
12 that I'm humbled to be here. I'm following the
13 footsteps of a good friend of mine, who served as
14 Chair on the Victims Advisory Group, named Russell
15 Butler, and I hope to follow in his footsteps and
16 the path that he has laid out.

17 I have submitted for the Commission,
18 written testimony and I would ask that that be
19 incorporated into any record that is before the
20 Commission to consider.

21 I did briefly just want to highlight
22 three issues that I hope we can take up in the next

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1 hour, that relate to victims.

2 The first is, as the Commission is
3 aware, victims' crime in relation to economic crime
4 is tremendous.

5 I can tell you that as a managing
6 attorney who runs a crime victims -- pro bono crime
7 victims clinic, it is one of the most centered
8 parts, in terms of what we deal with, with the
9 day-to-day public, whether it is identity theft or
10 fraud or your simple theft, the impact on victims
11 is tremendous.

12 The second, which kind of dovetails, is
13 our proposal. We know that one size doesn't fit
14 all within terms of victims, and we have proposed
15 some options for the Commission to consider to help
16 identify those truly hard impact victims, whether
17 it's life-altering, substantial, those I think
18 need to be characterized, so they can cover those
19 victims that have been hit the hardest.

20 Then the third, the psychological and
21 trauma that also goes along with those economic
22 crimes that impact victims.

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1 I think there should be an opportunity
2 for the Court to consider how that impact affects
3 those victims.

4 Now, I'd tell you that happens all the
5 time, but it doesn't, but for those one or two
6 percent of those victims that have that severe
7 traumatization as a result of being defrauded or
8 impacted, that will go a long way for them to have
9 their day in Court.

10 Again, I'd like to thank the Commission
11 and the Chair, for giving me this opportunity, and
12 I stand ready to answer any questions that you have
13 before me. Thank you.

14 CHAIR SARIS: Thank you.

15 MR. BOHLKEN: Good morning. I also
16 would like to thank the Commission, the Commission
17 Chair and the other Commissioners, for giving me
18 this opportunity to participate.

19 You have POAG's written testimony. I
20 did want to highlight a few things, first on the
21 inflationary adjustment. POAG agrees that the
22 guidelines should be adjusted periodically to keep

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1 everything relative to inflation and to the value
2 of the dollar. We think that it is people being
3 punished today, compared to people -- defendants
4 being punished 10 years ago, that's created an
5 unwarranted sentencing disparity between the two.

6 On the inflationary adjustments, we did
7 want to point out that in the robbery guideline,
8 the special offense characteristic that has the
9 table of actual losses in it, we didn't see a lot
10 of cases that had robberies involving substantial
11 or a loss of \$10,000 or more.

12 So, if we did increase that table, it
13 would effectively do away with that. It's applied
14 very infrequently now.

15 I'd like to also address briefly, the
16 intended loss. We couldn't arrive at a consensus
17 on Option 1 or 2, but the one thing that we did agree
18 on is that it -- in intended loss, we would be
19 looking at a different standard than we look at
20 currently in relevant conduct, and we believe that
21 that could cause some confusion or misapplications
22 by narrowing what we look at in relevant conduct,

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1 and then narrowing it in what we look at in the
2 intended loss.

3 On the victims table, we preferred the
4 Option 1. We think Option 2 could be overly
5 burdensome for probation officer, to try to -- try
6 to verify the substantial hardship of 25 or more
7 individual victims.

8 We did think that if there was a fraud
9 case or a §2B1.1 case, where there were numerous
10 victims substantially harmed, it could be
11 addressed through a departure or variance.

12 As far as the sophisticated means goes,
13 POAG supported the Commission's version and its
14 corresponding commentary.

15 The one thing that we would recommend
16 or suggest is additional examples or case scenarios
17 in the commentary that would talk about applying
18 sophisticated means enhancements, relative to the
19 offenses of the same kind.

20 Once again, thank you for giving me the
21 opportunity to be here today and I'm ready to answer
22 any questions you might have.

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1 CHAIR SARIS: Thank you.

2 MR. FELMAN: Chair Saris,
3 distinguished members of the United States
4 Sentencing Commission, good morning.

5 Since 1988, I've been engaged in the
6 private practice of Federal Criminal Defense Law,
7 with a small firm in Tampa, Florida. I'm a former
8 Co-Chair of your Practitioners Advisory Group,
9 including the years 1998 to 2001, the so-called
10 economic crime package.

11 I'm appearing today on behalf of the
12 American Bar Association for which I serve as Chair
13 of the Criminal Justice Section. Thank you for
14 letting me be here.

15 In my more than 25 years of doing this,
16 there are two things that have struck me. The
17 first is the broad array of the people that I've
18 represented who have committed these kinds of
19 crimes, and the second is the increasing severity
20 of the punishments that I have to advise them that
21 they face.

22 The first jury trial I conducted, I

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1 represented a Vice President of a bank that
2 committed a fraud on a government program, and he
3 learned of it, and it took him a while before he
4 personally made the decision to stop it, after
5 reporting it to his supervisor.

6 The bank was indicted and his
7 supervisor and he were indicted, and we went to
8 trial, which you could do in those days. It was
9 a pre-guidelines case, and even though we were
10 convicted -- he was convicted, the Judge sentenced
11 him to probation.

12 It seemed a fitting result, he was
13 disgraced. He lost his -- well, his good name. He
14 lost everything that every meant anything to him.
15 Of course, he never re-offended.

16 Had it been a guidelines case, he would
17 have been looking at six years. Today, those
18 guidelines have more than doubled, and we would
19 have had to have sentenced him to 13 years and he
20 would have died in prison.

21 On the other hand, I've also
22 represented people who are true predators, people

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1 who intend to steal money and do, and put it in their
2 pocket and try to walk off with it, and have they
3 -- could they have stolen more, they would have.

4 The moral span of the people that I see
5 is so varied, and it's quite a challenge to write
6 a guideline that captures this variety.

7 But unfortunately, the first guideline
8 effort was pegged to the drug guideline in its
9 severity, which we now recognize, was too high.

10 It was raised again multiple times over
11 the years. The initial set of guidelines, the laws
12 could drive your sentence by no more than a factor
13 of five.

14 Under the current guideline, the laws
15 can drive your sentence by a factor of 40.

16 Unfortunately, the amendments don't do
17 anything about what I take to be the core severity
18 and complexity and over-emphasis on loss and not
19 enough emphasis on culpability, and in my humble
20 opinion, this is Clemency Project 2020 waiting to
21 happen.

22 What I've tried to do about that is to

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1 assemble under the auspices of the American Bar
2 Association, a task force of the people that I most
3 respected in this area, and we've done our best to
4 write what we think would be a preferable
5 guideline.

6 But at the end of the day, we understand
7 that the Commission's options are limited to some
8 of what has now been published in its views. So,
9 I will address that.

10 I would say that the assumption may be
11 that where the culpability considerations that our
12 task force identified, but which are not in the
13 guideline are present, the Judges depart, and know
14 that you all see that Judges depart from the
15 guidelines.

16 What I want to emphasize is that not all
17 Judges do that. There are Judges out there who
18 look at what you do as sacrosanct, and they don't
19 depart, generally speaking, unless there is really
20 an overwhelming reason to, and something that you
21 all have indicated is okay.

22 What doesn't happen is Judges departing

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1 for no good reason. That is not happening, and
2 that is why I urge you to consider the expansion
3 of the application note, regarding the
4 circumstances in which a downward departure may be
5 appropriate, so that Judges who are confronted with
6 these culpability considerations have been
7 essentially told by the Commission, these are
8 legitimate considerations.

9 You could craft it as more -- as
10 narrowly as you need to. You can make it that
11 Judges have to articulate why they're doing what
12 they're doing.

13 I don't see frivolous departures.
14 What I see are Judges who are not comfortable
15 departing because this Commission has not yet said
16 that it would be appropriate.

17 I do think that though, that the
18 standard should not be whether the guideline is
19 broken or not. It should be whether it can be
20 improved, and I think this application would
21 improve it, and I think that Judges do indicate
22 their dis-satisfaction at a lower point in the loss

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1 table.

2 When I look at the Commission's data
3 briefing, it seems to me that the rate of
4 non-government below range sentences goes to 30
5 percent at \$30,000, and it stays there pretty much
6 flat across the table, and the extent of the
7 variance hits 25 percent at around \$120,000, and
8 that percentage stays pretty constant.

9 So, I do have things today about the
10 specific amendments that the guideline has
11 proposed, but I see that the red light is on, so
12 I'll wait to respond to questions on this. Thank
13 you.

14 CHAIR SARIS: Thank you. Professor
15 Bowman.

16 MR. BOWMAN: I want to thank Judge
17 Saris and the members of the Commission for your
18 kind invitation to me, to testify here today. It's
19 always a pleasure to come back and talk to old
20 friends at the Commission and to make new ones.

21 By curious coincidence, it's almost
22 exactly 20 years since I was serving as Special

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1 Counsel to the United States Sentencing Commission
2 on detail from the Justice Department, and Andy
3 Purdy, who was then, I think Deputy General Counsel
4 of the Commission, came to me and asked me to begin
5 thinking with him and others about how loss might
6 be better defined and how the economic crime
7 guidelines could be improved.

8 That conversation sucked me into the
9 maw of §2B1.1, from which I've never completely
10 escaped. Jim and I have been in that maw together
11 for almost a quarter of a century. Now, I'm not
12 going to repeat here, the long story of how §2B1.1
13 was created, as a consolidation of the then
14 separate fraud and theft guidelines or the effect
15 of the Sarbanes-Oxley Act on what we've produced.
16 I've laid all that out in my written testimony and
17 several tedious law review articles, which you're
18 at liberty to read.

19 Instead, I will merely say that while
20 much of what we did back then made good sense, with
21 respect to the sentences prescribed, certainly for
22 the most serious economic offenses, we screwed up.

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1 And that screw up was promptly exacerbated by
2 Congress and the Commission, and the grip of the
3 moral panic that was caused by Enron and the -- and
4 the wave of corporate scandals of that period.

5 The basic structural error, the way we
6 screwed up, arises from the interaction of three
7 factors. The logarithmic structure of the
8 sentencing table. The loss table, which now adds
9 so very many offense levels for high loss cases.
10 And the number of specific offense characteristics
11 and role adjustments that are customarily
12 applicable to these very same cases.

13 The result of that structural error is
14 the guidelines, if honestly applied, and I
15 emphasize if honestly applied, routinely generate
16 sentencing ranges that neither judges nor anyone
17 else take seriously.

18 I was therefore, gratified to read
19 Judge Saris' statement accompanying the current
20 round of proposed amendments to §2B1.1, in which
21 she suggests that the economic crime guidelines for
22 cases with less than \$1 million dollars in loss seem

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1 to be okay, but that sentences for what she refers
2 to as, quote, "the highest dollar values over \$1
3 million in loss do not", as she said, hew fairly
4 closely to the guidelines.

5 I inferred from that statement that the
6 Commission recognized the problem with high loss
7 cases, which is to say a loss table that is pitched
8 too high interacting with a host of SOCs and role
9 adjustments, and I assume therefore, that the
10 Commission would propose amendments to cycle to fix
11 it. To my surprise, and I think to the surprise
12 of a fair number of folks, that's not what is being
13 proposed here.

14 There are only two proposed amendments
15 that would, I think, really affect the sentences
16 of high loss offenders, the proposed inflation
17 adjustment, even that's not why you meant to do it,
18 and the reduction in the size of the multiple victim
19 enhancement. Neither of those would, of course,
20 affect all high loss defendants, and neither would
21 change the guideline ranges of those that they do
22 affect very much.

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1 Now, I can only surmise that the
2 Commission doesn't really believe that there's a
3 problem with high loss cases, and I've been kind
4 of puzzling over how that could be so. Indeed,
5 like the Grinch, I have puzzled and puzzled until
6 my puzzler is sore. Now, you'll be able to tell
7 me if I'm right about this. But what I think may
8 have happened is that you may perhaps, have been
9 misled by, or perhaps may have misinterpreted your
10 own data, and here is what I imagine at least some
11 of you to be thinking.

12 You recognize that there are some cases
13 in which the fraud guidelines, if honestly applied,
14 generate unrealistically high census, cases where
15 the offense levels end up being multiple levels
16 higher than the level 43 required for a life
17 sentence, cases where in consequence, the
18 guidelines treat stealing as orders of magnitude
19 worse than murder. And you recognize also, I
20 assume, that even below that stratospheric
21 improbability, there are cases where the
22 guidelines prescribe multi-decade sentences for

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1 people who don't deserve it.

2 But perhaps you think that those -- that
3 such cases are rare and therefore, of not -- of not
4 much systemic concern. Why might you think that?
5 Well, that's a bit hard for me to figure, because
6 if we take Judge Saris' benchmark of cases over \$1
7 million in loss as being the problem, we find that,
8 at least as of 2012, the data set that was analyzed
9 by your staff, there are actually 1,444 such cases,
10 a full 17 percent of all the fraud cases sentenced
11 that year under §2B1.1.

12 Parenthetically, by the way, from the
13 point of view of the loss table itself, eight of
14 the 16 steps on the loss table concern loss more
15 than \$1 million. So, half of the loss table, and
16 17 percent of the actual cases, fall into the
17 presumptively problem category. Therefore, you
18 must be thinking, I guess, that only a few of the
19 1,400 cases over \$1 million are really a problem,
20 and you may perhaps be supporting that conclusion
21 in a number of ways.

22 First, you might think well, everybody

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1 is telling us that a big part of the problem is the
2 interaction of the loss table with specific offense
3 characteristics that correlate with large loss.
4 But the staff is showing statistics that say most
5 of the high loss cases have very few SOCs.

6 So, the thing that everybody is
7 complaining about really isn't a problem most of
8 the time. But as I point out in some detail in my
9 written statement, those statistics are, if I may
10 be so blunt, plainly bogus. Not that they don't
11 accurately report what is showing up in PSIs, they
12 do.

13 But what shows up in the PSI in a plea
14 bargain case, which is to say, 98 percent of all
15 federal cases, is what the parties have agreed to,
16 and what your own statistics show you, if you look
17 at them carefully, is the fact that in high loss
18 cases, the parties are plainly bargaining away all
19 or most of the applicable SOCs.

20 If you take a look, for example, at
21 Figure 8 of the data -- staff data briefing, which
22 shows that in cases over \$1 million, 47 percent of

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1 the defendants in that category supposedly engaged
2 in no conduct that triggered even a single SOC, and
3 another 33 percent engaged in conduct with only --
4 which only triggered one.

5 Thus, 80 percent of \$1 million frauds
6 in that year had only -- had either zero or one SOC,
7 and reading across the table, we are to believe that
8 67 percent of \$2.5 million frauds have either zero
9 or one SOC. Fifty-seven percent of \$7 million
10 frauds, 65 percent of \$20 million frauds, and 66
11 percent of the \$200 million and \$400 million frauds
12 supposedly had only zero or one SOC. That's
13 obviously bologna. Nobody believes that.

14 As anyone who has ever handled any cases
15 like that can tell you, it's just not possible to
16 commit frauds of that size without triggering at
17 least, and most times, multiple SOCs. So, what's
18 happening? Well, plainly, the parties are
19 bargaining away routinely, most of the SOCs and
20 high loss cases, because applying the guidelines
21 honestly to the facts of those cases would generate
22 sentences that no defendant would agree to plead

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1 to and, frankly, very few judges would agree to
2 impose.

3 But interestingly, even then after the
4 parties have potentially rigged the outcome,
5 judges are still declining to impose the suggested
6 sentences to an ever-increasing extent as loss
7 amounts go up from \$1 million, as figure 6 of the
8 briefing shows. Now, I'm about to finish here, but
9 the second data point on which you may be relying,
10 in concluding that not much needs to be done, is
11 the survey of the judges, in which they express
12 generalized satisfaction with the guidelines for
13 most cases.

14 But I'd suggest to you that that general
15 conclusion shouldn't really afford you much
16 comfort. In the first place, in discussing high
17 loss cases, cases more than \$1 million, where by
18 definition, we're only talking about 17 percent of
19 the cases. So, the fact that the judges are happy
20 with most of the cases, most of the time, isn't
21 really -- really isn't germane.

22 But more to the point, the phenomena of

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1 ramping -- rampant factor bargaining in high loss
2 cases means that judges are rarely confronted with
3 the implications that the current guidelines
4 honestly applied, and as an advisory regime, even
5 when they are confronted with the guidelines
6 calculations they're uncomfortable with, they
7 can't undo -- blithely ignore it.

8 But none of this, I think should give
9 you, as a sentencing commission, any comfort at
10 all. If the data shows, as I think it plainly does,
11 that you are stewards of guidelines which for an
12 identifiable class of defendants are so out of
13 whack that all of the parties of the system
14 routinely evade them, in order to achieve
15 sentencing outcomes they can live with, then I
16 don't think the proper response for you to say is,
17 well, in effect, no harm, no foul.

18 Rather, it ought to be to all for the
19 applicable guidelines, so that lawyers and judges
20 can take them seriously, as meaningful guides to
21 proper sentences in high loss cases ought to be,
22 and I know my time has long since passed, so I'm

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1 not going to talk about the particular measures
2 that I'd suggest, that you might use to try bring
3 about that end, but I'd be happy to do so in the
4 questioning period.

5 CHAIR SARIS: Thank you.

6 VICE CHAIR BREYER: Mr. Felman, you
7 wanted to address some specific proposals, and I'd
8 like you to do that.

9 MR. FELMAN: Thank you. Well, the
10 adjustment for inflation, for the reasons stated
11 by the Commissioners, seems a good idea. I think
12 it is frankly, adjusting not just for economic
13 inflation, but in my view at least, adjusting for
14 political inflation. This is something that ought
15 to be done.

16 The victim piece, I do think should be
17 limited to economic harms. Once you get into
18 non-economic harms, and there is already an upward
19 departure provision there for unusual non-economic
20 harm, these are things that parties don't know.
21 Generally, prosecutors are looking for how they're
22 going to prove my client's guilt. They're not

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1 looking into what are the non-economic emotional
2 harms that the victims might have suffered, so when
3 we sit down to plea bargain a case, neither of us
4 know what the guidelines are going to be, and I
5 think when you put into the guideline, facts that
6 the parties don't know, it's problematic, and
7 frankly, I think is going to be the subject of a
8 lot of collateral litigation. And bear in mind,
9 you're a system where there are no rules.

10 There is no discovery here. I'm not
11 going -- the government is not going to have to give
12 me anything about these victims. I don't know how
13 I'm going to litigate what their non-economic harms
14 are. So, I think for a lot of reasons, it ought
15 to be kept to the economic harms. Bear in mind that
16 in Chapter 3, you already have an adjustment for
17 vulnerable victims.

18 CHAIR SARIS: To jump in, do you get that
19 information about the economic harms and the
20 bargaining?

21 MR. FELMAN: No.

22 CHAIR SARIS: So, you're not getting

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1 any of that?

2 MR. FELMAN: At least the prosecutor
3 could know it or it sometimes -- I mean, there are
4 no rules of discovery at all, frankly, governing
5 sentencing. So, they don't have to tell me what
6 the discovery is anyway.

7 VICE CHAIR BREYER: Well, under
8 §6A1.3, you're entitled to a hearing if you want
9 to dispute it, if it's a material thing, and are
10 you saying the judges wouldn't direct the
11 prosecutor to present, in a discovery format, that
12 type of evidence that he or she is going to rely
13 on for the sentencing hearing?

14 MR. FELMAN: Some judges may, but it's
15 at a point in the process where it's after we've
16 already tried to negotiate the resolution of the
17 case. So, what I'm saying that it works better as
18 a system, when the parties to the negotiation, know
19 the relevant facts. But I also think that frankly,
20 it's the victim issue that could be dealt with much
21 more simply.

22 You already have an adjustment in

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1 Chapter 3 where the victims are vulnerable, and
2 then you have an additional objection -- adjustment
3 on top of that for a large number of vulnerable
4 victims. I think in the ordinary case, the reason
5 loss is being used is to measure harm. We're not
6 measuring loss for the sake of measuring loss.
7 We're doing it to measure relative culpability of
8 different defendants who commit these crimes.

9 Ordinarily, the amount of the loss
10 ought to reflect the impact on the victims. So,
11 it seems to me that in an advisory system, as
12 opposed to a binding system, we can be more general
13 here, and we could say something to the effect that,
14 where there is unusual victim impact, either in
15 terms of number or effect on an individual or a
16 group of individual victims, increase by plus-two
17 or plus-three, or you know, whatever you want to
18 do there.

19 But you could combine both concepts,
20 put it in an adjustment and put a number on it, but
21 you don't need to worry about vulnerability because
22 that's in Chapter 3, and you don't need large

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1 numbers of vulnerable, because that's in Chapter
2 3, and ordinarily in most cases, the loss ought to
3 do it.

4 So, that was my thinking about the
5 victims. I think we're still stuck in a binding
6 mind set, where we think we have to lay everything
7 out in so much detail and this is a plus-two and
8 that's a four, we're just not there anymore. On
9 the sophisticated means, I obviously would want to
10 see that tightened up. I see it basically as a
11 trial penalty, often. If you go to trial, it was
12 sophisticated, if I'm bargaining, they're willing
13 to say, okay, if you plead, it's not, and that's
14 just not how a system ought to be.

15 I would note that 18 U.S.C. § 2, the
16 aiding and abetting statute, does use the word
17 "cause". So, the idea of causes is not totally
18 foreign to us, and so, I don't know whether the
19 defender language is what the Commission would want
20 to use, but I don't think the idea of cause would
21 be a new thought.

22 On the fraud on the market, I didn't

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1 have a specific suggestion, in terms of whether it
2 should or shouldn't go to the insider trading
3 piece. I don't think there would be a zero to six
4 months, because you'd get the role adjustment, you
5 get a number of victim adjustments, you get the
6 sophisticated mean adjustments if you're -- if you
7 used those to cross-reference over.

8 I would just have the same concern, that
9 some -- the floor, if it's set too high, it's like
10 a mandatory minimum. I mean, now all of the
11 sudden, the judge's hands are tied based on one
12 consideration, where we all know there is a rich
13 mix of circumstances that might be appropriate.
14 So, if you're going to use floors, I think you want
15 to use them carefully, and not set them so high that
16 it has some of the same defects that we see with
17 mandatory minimums. In terms of intended loss --

18 CHAIR SARIS: So, what should it be?

19 MR. FELMAN: Well, I mean, I guess the
20 suggestion was level 14. You know, I think that
21 gets you jail and then you go up from there, for
22 a leadership role, and a number of victims.

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1 (Simultaneous speaking)

2 MR. FELMAN: It's just as empirical as
3 everything else.

4 COMMISSIONER WROBLEWSKI: Actually,
5 the Commission is looking at this --

6 CHAIR SARIS: It doesn't -- we looked
7 at --

8 COMMISSIONER WROBLEWSKI: -- at the
9 data of where Judges are sentencing now. The
10 Commission is looking at empirical data to come up
11 with a number.

12 MR. FELMAN: In that case, I withdraw
13 my suggestion. It's based on the --

14 VICE CHAIR BREYER: No so fast.

15 MR. FELMAN: I mean, in any event, you
16 have to understand when I answer a question like
17 that, it's not on behalf of the American Bar
18 Association, for certain, and it's just me talking.
19 The only thing I was going to say about intended
20 loss is that the idea that we would treat losses
21 that are solely in the mind of a person as hoping
22 they would come about, identically with actual

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1 loss, is really problematic to me.

2 I mean, I see cases where the loss
3 happened, and they took the money. My clients, if
4 they're predators, they intend all the loss in the
5 world, but it ain't going to happen, and so, you
6 really shouldn't weigh intended loss the same as
7 actual loss. If you're going to do it, crank it
8 back as tight as you can. At least make it be the
9 losses that are intended by the defendant.

10 When you get into losses that are solely
11 in the minds of somebody else, even if they're
12 reasonably foreseeable, which these days,
13 everything is with the benefit of hindsight, you're
14 really risking unwarranted disparity between the
15 true predators and the mopes, if you will. So, I
16 think that intended loss was always intended to be
17 subjective, but it would be improved if it was
18 limited to the defendant's individual subjective.

19 CHAIR SARIS: Thank you. I was going to
20 jump in and ask, Professor Bowman. I enjoyed
21 reading your remarks, because you've been in the
22 trenches, trying to figure it out, and I notice how

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1 many times you said, I went down that rabbit hole
2 and now I've changed my mind. So, it's been a very
3 difficult area, and I notice the Department of
4 Justice just sort of embraced your tweak of lopping
5 off the --

6 MR. BOWMAN: I was stunned.
7 Delighted, but stunned.

8 CHAIR SARIS: -- lopping off the top
9 ends, but let me ask you this. What was the issue
10 that we have with directives, and there is a
11 directive, which is not a mandatory one, but a
12 discretionary one, but what Congress asked us, to
13 ensure that the guideline offense levels and
14 enhancements under §2B1.1 are sufficient for a
15 fraud offense when the number of victims adversely
16 involved is significantly greater than 50.

17 So, one of the things that your piece
18 doesn't discuss or address is the role of
19 directives. Congress has been so active in this
20 area, so that let's say, you lop off some -- I am
21 not saying we are, but you lop off some amounts,
22 you've recommended this, but then the big issue is

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1 the victim table, and you struggle with that.

2 Should it be quantitative? Should it
3 be qualitative? Should it be some combination of
4 the two? But something -- but Congress is quite
5 interested in actually having us think a little bit
6 about the number of victims over 50, at least
7 Congress thinks is more than one victim.

8 So, how would you -- you know, you said
9 that you -- you haven't yet dealt with specific
10 proposals, but we're right there, specific
11 proposals. If you lopped off a certain amount or
12 whatever, as the Department of Justice is willing
13 to take the tweak, you still -- still, what do you
14 do with these victim tables?

15 MR. BOWMAN: Well, first of all, I
16 would support the Commission's proposal to reduce
17 the number of levels associated with the number of
18 victims. I think that is a good idea to start with,
19 particularly because of the whole logarithmic
20 effect, as we go up particularly at high levels.
21 I mean, a six level increase essentially doubles
22 your sentence, I mean, which is, I think -- so, 250

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1 victims doubles your sentence, which I think is
2 crazy. So, dropping that down, I think makes good
3 sense in the first instance.

4 I guess in here, I think maybe I'll pick
5 up on something that Mr. Felman just said, and that
6 is that I think in a particularly in an advisory
7 era, I think maybe the court -- or the Commission
8 should continue to -- or should begin to think about
9 adding provisions to the guidelines that are more
10 in the nature of guidance, right.

11 So, for example, one could say with
12 respect to either number of victims, or for that
13 matter, with respect to victims who have suffered
14 some sort of qualitative degree of harm, you might
15 say -- might rather than adding or subtracting
16 offense levels, you might put in a provision that
17 essentially suggests a departure or suggests that,
18 for example, the presence of a certain number of
19 victims over say, a level of 50, would be a factor
20 the judge might consider in sentencing at the top
21 end of the advisory range.

22 I mean, that's something we -- you know,

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1 actually for decades now, we've forgotten the fact
2 that there are ranges, right? I mean, there is a
3 bottom end that basically, most judges seem to
4 sentence at most of the time, but there is a whole
5 range in here, and the Commission has not given much
6 in the way of guidance about where a judge might
7 want to sentence in that range.

8 So, if you want to talk about that,
9 rather than adding another two levels or three or
10 six or 10 or whatever it is, you might say, well,
11 this is a factor that a judge should consider within
12 the range, or if it's -- or the judge could consider
13 as a departure, rather than ramping up the number
14 of levels. And I think particularly in this
15 guideline, rife as it is with all of these SOCs with
16 their logarithmic effect and high loss cases, I
17 think you should be very, very reluctant to be
18 adding any new SOCs at all. It not only adds
19 complexity, but in cases over \$1 million, it's
20 almost always going to have a huge multiplying
21 effect on the ultimate guideline range.

22 CHAIR SARIS: Thank you. Professor

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1 Barkow and then Jonathan.

2 COMMISSIONER BARKOW: So, my question
3 is somewhat related to this, which is -- well, maybe
4 not entirely. So, it's the question of how much
5 we do that's specific to the fraud guideline,
6 versus how it relates to the rest of the manual.
7 So, this is really for you, Mr. Felman, because of
8 the ABA proposal, but part of what the ABA proposal
9 really focused on was this idea of what it called
10 the culpability, or you might think of mens rea,
11 and that's just not the way the guidelines manual
12 overall, approaches sentencing, right.

13 So, the ABA has a really interesting
14 proposal that is grounded in fundamental concepts
15 of culpability and criminal law, and yet, it's not
16 the approach of the manual. So, you know, one
17 issue is, is there a reason that -- you know, fraud
18 gets the special culpability treatment, right, but
19 we don't do it for drug quantity. We don't say did
20 you -- you know, what was your mens rea, with
21 respect to the quantity of the drugs, you know, it's
22 just it is what it is, and that would be the way

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1 it would work with the whole rest of the manual.

2 So, you know, so, one issue I think that
3 at least I have, I won't speak for anybody else,
4 is, you know, how to think about piecemeal fixing
5 of the guidelines manual, versus issues that are
6 broader, and then, you know, Professor Bowman's
7 point is about the logarithmic nature of the table
8 is -- you know, it may have particularly pernicious
9 effects when it meets this particular guideline,
10 but that's true for everything, because that's the
11 way the whole table works.

12 So, you know, one issue is just whether
13 you have given any thought to the fraud context as
14 being specifically the place to tackle these, or
15 whether they're so fundamental that really, those
16 kinds of issues have to be the big-think thing that
17 the Commission does, as it rethinks a guideline
18 regime in an advisory world, because it just seems
19 like some of these transcend the specifics of
20 fraud.

21 MR. FELMAN: There were two areas in
22 particular that our task force just couldn't get

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1 away from the obvious comparison. The first was
2 drugs, because that guideline is driven by
3 quantity, just as the fraud guideline is driven by
4 loss. The other area in which we have strong ABA
5 policy are the child pornography guidelines, where
6 there are instances where you could get more time
7 for looking at pictures, than actually molesting
8 the child, as I understand it.

9 So, without question, there may be
10 aspects of this manual that could dramatically be
11 improved by a wholesale revision. Now, I don't do
12 a lot of bank robberies or immigration. There may
13 be similar places --

14 CHAIR SARIS: Glad to know that.

15 MR. FELMAN: Well, not personally yet,
16 but there may be other places in the manual, and
17 my sense is that the reason that the fraud guideline
18 is such a great place to start, and we need to start
19 somewhere, unless you want to start on it all. I
20 mean, I guess one approach can say, well, I don't
21 want to do anything until I'm doing it all, but I
22 don't know that you have to take that approach.

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1 I think you could start here, and say,
2 let's see how it works, is because peculiarly, I
3 think that this guideline captures a much broader
4 array of not only types of offenses, but at least
5 in my judgment, types of offenders, and so, I think
6 that it does lend itself to a fundamental rework,
7 and I don't think you have to wait to write the whole
8 book, but obviously, there are other parts of the
9 book that, as you point out, I think are exactly
10 the same sorts of issues.

11 MR. BOWMAN: I suppose if that question
12 was partly directed to me, I mean, I think I
13 probably share much of what Jim has had to say, with
14 the addition that I don't -- assuming you're going
15 to start somewhere, it may be -- whether it's to
16 go the ABA direction or to simply try some things
17 this guideline, that you haven't tried elsewhere,
18 it's not a bad place to start, right?

19 I mean, there's two approaches. You can
20 try to -- if you're going to try to re-invent the
21 universe, I mean, you're going to sort of start in
22 a small corner of the universe and see how it works

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1 out, or you can try to do, you know, go back to the
2 beginning and do the whole seven days thing.

3 Maybe it's not a bad idea to start in
4 one corner of the universe and see if your ideas
5 actually, you know, play out in practice, and I
6 think there is some areas for -- that you could
7 experiment on here that would make sense, and
8 moreover, I think the problem, in my view, the top
9 end of the guideline is so fouled up right now that
10 you really need to do -- you need to do something,
11 and more than you're doing.

12 CHAIR SARIS: All right, thank you.
13 We're going to go down. Everybody has questions.

14 COMMISSIONER WROBLEWSKI: Yes, so,
15 I'll try to be quick.

16 CHAIR SARIS: Go down the --

17 COMMISSIONER WROBLEWSKI: For Mr.
18 Felman, the ABA proposal specifically directs
19 judges to consider non-economic harm. So, can you
20 explain that with your testimony? And then for
21 Professor Bowman, you were around in 2001, when the
22 Commission did a tremendous amount of research, of

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1 empirical analysis, of public hearings and decided
2 to amend the loss table, lowering the loss table
3 in some areas and raising the loss table in other
4 areas, looking at all the purposes of sentencing,
5 balancing them out, coming up with something.

6 If the Commission decides to make an
7 inflationary adjustment, can you first of all,
8 explain what the Commission did, and whether you
9 agree or disagree with me? And if the Commission
10 makes an inflationary adjustment, why should it
11 go back before 2001, at a time when the -- at a time
12 when the Commission examined all the purposes of
13 sentencing and made adjustments, considering all
14 of the aspects of sentencing we're supposed to
15 consider?

16 MR. FELMAN: So, I don't think there is
17 any inconsistency. What I'm saying is, the task
18 force approach to victims was to say, look,
19 counting the number doesn't make any sense. Let's
20 look at what happened to them. So, we came up with
21 just general categories of victim impact, minimal,
22 low, moderate, high, something like that, off the

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1 top of my head and it was based on a mix of all
2 information, including potentially extreme
3 non-economic harm.

4 But it's much more of an advisory kind
5 of an approach. I think that here, these
6 guidelines, if you're going to stick -- you know,
7 we're only going to look at what the impact was,
8 and it's going to be plus-two and that's it, well,
9 then we ought to keep that to economic impact and
10 leave these other unusual circumstances to upward
11 variances or upward departures, which are already
12 there. That's been in the book for a long time,
13 and which ought to stay there. So, I don't think
14 there is a difference of approach there.

15 CHAIR SARIS: Okay, thank you.

16 MR. BOWMAN: But with this, I think
17 there -- it was a question addressed to me, as well.
18 Well, Commissioner Wroblewski. I think with
19 respect to what happened in 2001, I might disagree
20 with you a little bit about what we did in 2001,
21 in terms of the loss table, because your
22 characterization of it, I think is that -- gives

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1 the idea that perhaps it was a little more
2 systematic and perhaps scientifically based than
3 I think it was.

4 I think it was more -- I mean, there was
5 certainly some considerations of purposes of
6 sentencing and so forth. But I think what happened
7 with the loss table is also an awful lot of
8 horse-trading, with various of the players wanting
9 different things, and what we got was a loss table
10 which increased, you know, the table at the top and
11 decreased it a little bit at the bottom, and I --
12 my own personal sense, and I don't know if Jim has
13 a different one, is that that was primarily the
14 outcome of a bunch of horse-trading, rather than
15 a whole heck of a lot of really scientific thought.

16 But the other thing that I think is
17 clear and I -- about that, which I put in my written
18 testimony, is that the trouble with what happened
19 in 2001, with respect to the guideline as a whole,
20 is that the processes -- that 2001 economic crime
21 package proceeded essentially on two tracks.

22 On the one track, there were the people

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1 who were worried about severity, and they were
2 working on the loss table, and on the other hand,
3 there were the people who were worried about sort
4 of loss definition. That was mostly what I did,
5 and the trouble is that the two sides of those --
6 the two tracks basically didn't intersect very
7 much.

8 We didn't really think very carefully
9 about what would happen when you took the increased
10 loss table and you put together with what we were
11 doing on the loss and reconfiguration of definition
12 side. Very few people actually sat down to figure
13 out what the intersection of those things would do,
14 except for Jim, who did point that out.

15 With respect to your last question is,
16 you know, what -- should you go back before 2001.
17 I mean, I take your point, which is these numbers
18 were considered, by horse-trading or
19 scientifically, in 2001 and they were set at that
20 point. Does it make sense to go back historically
21 before that? Probably not.

22 MR. FELMAN: Having been there --

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1 CHAIR SARIS: We just need to make sure
2 we get through --

3 MR. FELMAN: I have one comment. I
4 would say to this Commission, that which I said to
5 the Commission in 2001, because we could see what
6 this meant. History will judge this period as a
7 time in which we experimented for the first time,
8 with the imprisonment of non-violent first-time
9 offenders, for periods previously reserved only
10 for those who had killed someone. This is Clemency
11 Project 2020 waiting to happen.

12 CHAIR SARIS: Thank you. Judge Breyer?

13 VICE CHAIR BREYER: I'd like to ask
14 you, Mr. Andrews, in your submission, you recommend
15 -- you say recommendation Option 3 on page two, with
16 respect to victims, and I was impressed by your
17 choice of words, because you say victim impact, you
18 said substantial, you say, if the offense resulted
19 in significant financial or other hardship to one
20 or more victims, and you used the term "or other
21 hardship".

22 So, I think maybe there is a consensus

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1 on this, maybe not quite, but almost, that that
2 would then capture people who are victims of
3 identity theft, where they may not have lost any
4 money, but they're spending years trying to
5 straighten out their financial credit, or their
6 credit. Was that your intention? Are those the
7 words, the so-called magic words that one would put
8 in this, in order to capture that type of conduct?

9 MR. ANDREWS: That's exactly right.
10 You know, we're living in the reality of the
11 different types of economic crime victims today
12 that are a lot different perhaps, than earlier on.
13 So, it's tough to capture all the possible type of
14 victims out there that are being harmed by
15 predators out there. So, you're exactly right.
16 We're trying to make it at least as open, so folks
17 can get -- fall right into those.

18 VICE CHAIR BREYER: Thank you.

19 CHAIR SARIS: Judge Pryor?

20 COMMISSIONER PRYOR: So, I have good
21 news and bad news, Professor Bowman. The good news
22 is, at least speaking for me, is that what you

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1 imagined we thought, isn't what we thought.

2 MR. FELMAN: Well, that's good, I
3 guess.

4 COMMISSIONER PRYOR: So, the bad news
5 is perhaps we just haven't figured out a good way
6 to deal with the 15 percent problem. So, we have
7 a guideline that for 85 percent of the offenders,
8 the judges think works most of the time. And for
9 15 percent, it doesn't, and maybe we just haven't
10 figured out a good way of dealing with that, in a
11 way that we would have to explain to Congress, is
12 something different from just lowering
13 punishments, for the fraudsters who cause the most
14 harm, at least in dollar amounts.

15 MR. BOWMAN: If I might respond to
16 that. I mean, one of the things -- I think you can
17 fix it. I think there are a number of ways to do
18 that. You just have to work carefully -- I think
19 you have to -- and I've suggested some mechanisms
20 by which I think you can bring sentences for that
21 15 percent back within a reasonable range.

22 I guess one of the things I would say,

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1 I guess I'm a little puzzled by, I mean, even though
2 I spent 10 years in the Department of Justice, I'm
3 a little puzzled by the Department's apparent
4 resistance to the kinds of things that might change
5 that.

6 If I am in AUSA, in a high loss case,
7 I'd really like some guidelines that when we run
8 the calculations honestly, not jiggering the
9 numbers, but honestly, you come up with a sentence
10 that I can walk in front of any of you as judges
11 and say, Judge, this -- the guidelines, which the
12 Commission seriously means, they really thought
13 about this, prescribes 20 years for this joker, and
14 I want you to impose that 20 years, and nobody is
15 kidding you. We really mean that, and the
16 Commission means that, and you know they mean that.

17 I want that. So, why the Justice
18 Department seems to be so deeply reluctant to
19 adjustments that would produce that outcome is a
20 little bit of a surprise to me, and in terms of
21 selling it to Congress, if that's the thing, that
22 to me, is the way to sell it, right? We want

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1 guidelines that we can actually take seriously and
2 therefore, the judges will use to impose serious
3 penalties on serious offenders.

4 COMMISSIONER PRYOR: I can only speak
5 for myself, but you know, there may be a lot of
6 sympathy on the part of some of us, about how we
7 rethink the guidelines in an advisory world, but
8 starting or isolating -- starting with or isolating
9 the fraud guidelines, from the larger perspective
10 that we have to deal with, I think it's a hard sell.

11 CHAIR SARIS: Any other questions at
12 this point? I just -- I had a question for you,
13 Professor Bowman. You suggest a cap, basically of
14 a cumulative effect of all the SOCs at 10. That's
15 -- your proposal, it actually --

16 MR. BOWMAN: Right.

17 CHAIR SARIS: -- while I get it, it
18 still would often bring a 20 to 30 year sentence.

19 MR. BOWMAN: Right, I mean, I actually
20 --

21 CHAIR SARIS: In other words, your
22 proposals aren't doing much more than -- for many

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1 of these, the stat cap is about there anyway,
2 regardless of whether it's hitting at 43, you got
3 a 30 year statutory max.

4 MR. BOWMAN: I am not wedded to the cap
5 of ten in the ABA's proposal. Matter of fact,
6 after I, you know, after I wrote that and I sent
7 it off, I said, you know, that's probably too high.
8 Because I think what we should -- here's the last
9 thing I would say, I guess. I think what all of
10 us, and I think what the Commission should learn
11 to think in terms of is not offense levels, but
12 multiples of, you know, sentencing, that is to say
13 when you say, let's add two -- let's add a two level
14 enhancement, realize when you say that, you just
15 increase somebody's --

16 VICE CHAIR BREYER: So, that is the -
17 (Simultaneous speaking)

18 MR. BOWMAN: Pardon?

19 VICE CHAIR BREYER: That is -- what the
20 real objection here --

21 CHAIR SARIS: Yes.

22 VICE CHAIR BREYER: -- and we've talked

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1 about this and struggled with it, and yes, a very
2 good argument could be made that it's not
3 appropriate to have a logarithmic effect, because
4 adding 'x' doesn't correspond to twice the harm,
5 four times the harm, ten times the harm.

6 So, isn't that really what's going on
7 here? You're saying, look, I want to put in some
8 caps, because it's the caps that can possibly
9 ameliorate the adverse impact of the logarithm
10 effect, not the harm effect, but the logarithm
11 effect. Isn't that what you're saying?

12 MR. BOWMAN: Right, and I'm saying that
13 because unless either Congress steps in and amends
14 the enabling legislation to eliminate the
15 so-called 25 percent rule, or you, as a Commission,
16 decide that you're going to revisit the
17 interpretation of that statute, which was made by
18 this Commission many years ago, so that you don't
19 believe that's true anymore, you're stuck with the
20 logarithm.

21 So, I make the proposal not because I
22 think in a perfect world, this is the best thing

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1 to do, maybe if you were reinventing the world.
2 What I am saying is, you're stuck with that, so if
3 you're dealing with a set of cases, the top 15
4 percent, when you know that you're starting out at
5 a very high number, because you got \$1 million or
6 \$5 million or \$7 million of loss, ask yourself how
7 much more than that should any specific offense
8 characteristic ever multiply somebody's sentence,
9 and I think you ought to be able to arrive at some
10 conclusion about that. Twice? One time? Two
11 times? Three times? And if you figure out what
12 that number is, there is the cap.

13 MR. FELMAN: The other way that I'll
14 ask it sometimes in advocating for a departure is,
15 is my client's crime really that much worse because
16 of "x"? What would the penalty be, just based on
17 the loss, and then how much have we tacked on,
18 because each one adds on top of the other, and then
19 also, what else could he have done and still scored
20 the same? You have to look at the rest of your
21 guidelines manual, and half the time, my client
22 could have poisoned the public water supply and

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1 scored lower. So, you need to also look at it, in
2 terms of what else is in the rest of the manual by
3 the time you've piled all these things on.

4 VICE CHAIR BREYER: Wouldn't advise
5 them to do that.

6 MR. FELMAN: I haven't yet.

7 CHAIR SARIS: All right, well, any
8 other questions? Thank you very much. This has
9 been very helpful. We'll figure it out over lunch
10 and be back here at 1:30 p.m. with the answer.
11 Thank you.

12 (Whereupon, entitled matter went off
13 the record at 12:30 p.m. and resumed at 1:35 p.m.)

14 CHAIR SARIS: Okay, so the job of this
15 group is, after lunch, to keep us all energized.

16 I want to thank you all for coming. Let
17 me introduce folks. It's our -- so, welcome to
18 Robert Zauzmer, who is the Appellate Chief in the
19 U.S. Attorney's Office for the Eastern District of
20 Pennsylvania.

21 He received a BA from the University of
22 California at Los Angeles in 1982, and his law

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1 degree is from Stanford.

2 So, David Debold is well known to us,
3 is the Chair of the Practitioners Advisory Group,
4 PAG. He is a partner at the law firm of Gibson Dunn
5 & Crutcher, LLP, practicing in the firm's Appellate
6 and Constitutional Law, Securities Litigation and
7 White Collar Defense and Investigations Practice
8 Groups.

9 Richard Bohlken is back for round two,
10 after this morning, and he was on a previous Panel.

11 Jon Sands has been in the Federal Public
12 Defender's Office in the District of Arizona since
13 2004, and a frequent testifier here. He loves it.
14 He keeps coming back for more. He joined that
15 District as an Assistant Federal Public Defender
16 in 1987.

17 Welcome to all of you. I think all of
18 you were here this morning, but just in case you
19 weren't, there is the red light that will go off,
20 and then the hook, and then we jump in, after
21 everybody is done. Thank you.

22 MR. ZAUZMER: Thank you. Thank you

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1 very much, Your Honor.

2 Good afternoon, Commissioners. Thank
3 you very much for having me back. It's an honor
4 again to appear on behalf of the Department of
5 Justice here, to talk about several issues, as you
6 know, first with regard to the single sentence
7 rule.

8 The Department supports the amendment
9 that would adopt the view of the Sixth Circuit, to
10 correct this quirk, regarding the single sentence
11 rule that prevents the application in a handful of
12 cases involving career offenders.

13 We think it's fairly obvious that
14 somebody should not avoid a recidivism provision
15 simply because they committed extra crimes that
16 were also prosecuted and sentenced at the same
17 time, as the predicate crime of violence or drug
18 trafficking conviction.

19 We have submitted a detailed letter,
20 which gives particular suggestions on how to do
21 this, because it affects not just the career
22 offender provision, but also other recidivism

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1 provisions in the guidelines, and I'm happy to
2 answer any questions and get down into the details
3 of that, that's in our letter.

4 Second, with regard to the mitigating
5 role suggestion, the Department, I think in
6 agreement with my friends here on the Panel,
7 largely agrees with the suggestions that the
8 Commission has made, agreeing that a mitigating
9 role should be measured against the average
10 participant in the same offense, as opposed to
11 being measured against the same type of offense in
12 general.

13 It's just much more practical and
14 simpler to impose, would relieve quite a burden on
15 the parties and the judge, in particular cases.

16 So, we support that and we also have no
17 objection to the suggestion that there should be
18 an additional list of factors that may be included,
19 in defining what is a mitigating role. The
20 important thing there, of course, is to make clear
21 that it's a non-exclusive list, because of course,
22 these cases are all different, and it shouldn't be

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1 binding.

2 The one objection that we do have, and
3 again, I'm happy to address this in response to
4 questions, involves the change regarding people
5 who are already being sentenced only for the
6 conduct involved in their own offense, usually drug
7 quantity or fraud amount.

8 The suggestion -- it already says in the
9 guidelines that such people are not precluded from
10 a mitigating role adjustment, even though their
11 sentence is already limited to their own conduct.

12 The suggestion has been made, and there
13 is no explanation given why, of changing it to 'may
14 receive' as opposed to 'not precluded'.

15 This has already been read, as we see
16 from the testimony introduced by my defense
17 colleagues here; it's already being read as a
18 suggestion that more of these people should get
19 reductions and that doesn't make sense to us, for
20 the reasons explained in my letter. It's
21 basically giving a bonus to people for engaging in
22 criminal conduct with other people, as opposed to

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1 engaging in criminal conduct by themselves, which
2 is against the ordinary principles of sentencing.

3 So, that's the one part of the
4 mitigating role suggestion that we do not agree
5 with, and I'll address that more, if you like.

6 Finally, with regard to relevant
7 conduct, again, the main proposal that's been made
8 by the Commission, no disagreement from us, as long
9 as it's made clear that this is not a substantive
10 change.

11 Our basic view regarding the relevant
12 conduct provision, specifically with regard to
13 jointly undertaken activity, is that it's not
14 broke. It doesn't need to be fixed. The courts
15 well understand this.

16 The suggestion that has been made is to
17 make it clear, break down in the rule that the
18 conduct has to be within the scope of the agreement
19 that the person has reached. That's already in the
20 commentary, and we have no objection to that being
21 in the text of the rule itself, as long as it's made
22 clear that there is no substantive changes

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1 intended.

2 In preparation for my testimony, I did
3 review cases from all the Circuits, to make sure
4 that our understanding is right, that judges
5 basically get this, and I didn't find any authority
6 in any of the Circuits that suggest that this is
7 a problem, that there are judges out there who don't
8 understand that jointly undertaken activity has to
9 be within the scope of the person's agreement, and
10 that it's not necessarily as broad as a conspiracy
11 that the person might have been convicted of.

12 These issues were settled by this
13 Commission back in 1992, and it appears that it's
14 been faithfully applied by the courts ever since.

15 I mean, you all know well, that in the
16 early days of this Commission, this may have been
17 the number one issue of how to sort out relevant
18 conduct after the initial guidelines were
19 published, and it was sorted out by 1992, and we
20 think that it's well understood and that further
21 adjustments really aren't necessary, and then it
22 comes down to a case by case adjudication, that

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1 judges have to engage in.

2 So, again, I welcome your questions and
3 I look forward to discussing it further, and thank
4 you for having me.

5 CHAIR SARIS: Thank you.

6 MR. DEBOLD: Good afternoon, Judge
7 Saris and members of the Commission. As I neared
8 the end of my second and term-limited final term,
9 as the Chair of the PAG --

10 CHAIR SARIS: Oh, really?

11 MR. DEBOLD: -- my pleasure to be
12 before you, speaking once again, about proposed
13 amendments. It was sort of a walk down memory
14 lane, to hear Professor Bowman talk about his time
15 at the Commission 20 years ago. For me, it was 24
16 years ago, serving in that same capacity, when I
17 was with the Assistant U.S. Attorney.

18 So, as my colleague has said, I've
19 followed a lot of these issues over those many
20 years.

21 The two topics that I want to address
22 in my oral testimony today are the relevant conduct

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1 provision and the mitigating role provision that
2 the Commission has proposed amendments for.

3 Obviously, there is some overlapping
4 principles with these two provisions, the most
5 common element of them obviously is, they both
6 address situations where a defendant is not acting
7 alone.

8 Under the relevant conduct provision
9 that you are looking at, and this amendment cycle,
10 it's what conduct by other persons gets counted in
11 the sentencing of the defendant, as long as that
12 conduct was part of the same jointly undertaken
13 criminal activity, and then of course, in the
14 mitigating role provision, the question is, after
15 you've determined that universe of conduct and
16 you've done your Chapter 2 calculations, what --
17 in what way is the defendant's role, if it's
18 mitigating in some way, going to lead to a lower
19 recommended punishment?

20 As the Commission knows, the PAG has
21 long recommended changes to the first of those
22 provisions in general, the relevant conduct

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1 guideline, for at least two reasons.

2 The first being that the punishment
3 often times is not very closely related to what the
4 defendant's culpability is for the criminal
5 conduct as a whole, and secondly, for purposes of
6 consistency, we found that despite what you may see
7 if you go to the reported cases in the Federal --
8 in the Federal Reporter, you're going to see each
9 Circuit more or less, agreeing on what the
10 principles are, but as you all know, very few of
11 the cases make their way up to the Court of Appeals,
12 especially when there is a guilty plea.

13 So, what's really going on, you need to
14 pay attention to is what district court judges are
15 doing on a case by case basis, and I know that's
16 one reason why the PAG exists, is to get our
17 experience in those sort of, in the trenches type
18 situations, and our experience has been that judges
19 do often times take different approaches to what
20 jointly undertaken criminal activity at defendant
21 should be held responsible for.

22 So, we're very glad that the Commission

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1 is addressing and to the extent, is in the current
2 amendments, as proposing to make clearer that
3 there's a three-part test, the first part being
4 what is the universe of activity that the defendant
5 agreed to be -- to jointly undertake with the other
6 individuals, and then of course whether the other
7 conduct that they're going to be held accountable
8 for was in furtherance of that same universe of
9 activity and finally, to what extent the defendant
10 foresee it or intended or what other level of
11 knowledge, if you will, should apply there.

12 On the first factor, we do appreciate
13 the Commission offering greater guidance and we do
14 suggest extending that out a little bit, based on
15 the factors that are identified in the case that
16 we cite from the Second Circuit, United States v.
17 Studley [47 F.3d 569 (2d Cir. 1995)], and I think
18 that those factors are very helpful and that would
19 be useful for district judges to have the benefit
20 of that in the guideline provision.

21 On the third factor, there is an
22 important difference between the foreseeable

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1 consequences of one's own acts, which as my
2 colleagues' letter points out, we frequently hold
3 people responsible for the foreseeable
4 consequences of their own acts, but it gets much
5 more attenuated in terms of responsibility, when
6 you're talking about the foreseeable consequences
7 of a foreseeable act of another person, who is
8 supposedly acting in furtherance of the same
9 activity, and we think that that is a line that
10 often times, will, if it's drawn the way that it
11 currently is in many courts, it leads to greater
12 punishment than is warranted by the circumstances.

13 On the mitigating role provision, as an
14 initial matter, we are in agreement with the
15 Department of Justice on how to resolve the Circuit
16 split. As a general matter, we think that Chapter
17 2 is where you look at what the offense conduct is,
18 and in Chapter 3, is when you start looking more
19 closely at the defendant's part in that offense
20 conduct, not a perfect division. Sometimes there
21 are things in Chapter 2 that also are defendant
22 specific, but it's a good general principle that

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1 we have found to be workable, and therefore, it
2 would be most sensible to have a judge look at the
3 person's role with respect to the criminal activity
4 that has already been accounted for in Chapter 2,
5 under the Chapter 2 guidelines.

6 Stepping back though, we do disagree
7 with the Department on whether or not judges are
8 using the reduction, under the mitigating role
9 provision for either a minor or minimal
10 participant, at a rate that is commensurate with
11 the facts of the cases that come before the judges.

12 There are a very small number of cases
13 where this reduction is awarded, and we think that
14 there are a number of situations where defendants
15 do play, but it's truly a minor role, even though
16 they might be essential to the scheme, even though
17 their own conduct has been limited already, and we
18 think that the amendments that are proposed here,
19 along with our suggestions and our letter and my
20 written testimony are a good way to try to get
21 judges to recognize that more frequently.

22 CHAIR SARIS: Thank you.

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1 MR. BOHLKEN: Good afternoon. Again,
2 I want to thank all of the Commissioners for the
3 opportunity to be here today and the opportunity
4 to speak and participate in these panels.

5 POAG submitted a letter and I just
6 wanted to highlight a few points on the single
7 sentence rule, the jointly undertaken criminal
8 activity, relevant conduct and the mitigating
9 role.

10 First on the single sentence rule, the
11 POAG prefers the approach, the United States v.
12 Williams [753 F.3d 626 (6th Cir. 2014)] approach
13 that predicate offenses be evaluated independently
14 when multiple convictions are being considered as
15 a single sentence for criminal history scoring
16 purposes.

17 The one potential application issue
18 that POAG highlighted are potential circumstances
19 where different time periods may be applicable when
20 multiple counts are independently examined.

21 The example that's in the commentary of
22 the amendment kind of highlights that, the one that

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1 has a trespass conviction, has two years
2 imprisonment, grouped with the robbery conviction
3 one year imprisonment, and this example, two
4 different time periods would have applied under
5 §4A1.2(e), 10 and 15 years.

6 So, there will be circumstances in
7 which the single sentence would have received
8 criminal history points, but the predicate
9 conviction in this case being the robbery, would
10 not have.

11 POAG also believes that any predicate
12 conviction that independently receives one
13 criminal history point should apply as a crime of
14 violence or controlled substance offense,
15 regardless of whether or not they have four or more
16 one point convictions.

17 As for the jointly undertaking criminal
18 activity, POAG is pleased with the revisions to
19 §1B1.3, and making the three part analysis
20 structure more visible within the relevant conduct
21 guideline.

22 Circuit representatives observed that

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1 this area of application is often misunderstood and
2 misapplied, and the members all agree that this
3 change will encourage fidelity to correct
4 guideline application principles.

5 Regarding the possible policy changes,
6 the Option A and Option B, raising the state of mind
7 requirement, a majority of POAG members believe
8 that a more restrictive state of mind requirement
9 would be a significant policy change to the
10 guidelines. As a potential consequence,
11 defendants could potentially have a greater
12 incentive to falsely deny or frivolously contest
13 what is now considered relevant conduct.

14 Option B, we believe this change would
15 place prosecutors in a position to have a greater
16 influence on the ultimate sentence of a defendant.
17 The system, as it exists now, defendants are
18 generally treated consistently for the acts of
19 others.

20 As far as mitigating role, POAG
21 believes limiting the assessment of a defendant's
22 role in the criminal activity, rather than the

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1 activity in a typical crime doesn't rectify the
2 disparities that we see across the country, of how
3 mitigating role is applied, and it may also even
4 have the reverse effect, and cause more division
5 of how it's applied across the country.

6 We believe consistency is very
7 important, given the impact of the mitigating role
8 cap in §2D1.1.

9 One recommendation POAG has is for the
10 Commission to study Circuits that less frequently
11 apply mitigating role, and study circuits that
12 apply it more often, and kind of do an examination
13 of the case law, of why -- what the barriers are
14 for not applying it and what the case law is for
15 applying it, and in the greater number of cases in
16 some districts. Thank you.

17 CHAIR SARIS: Thank you.

18 MR. SANDS: I'm gratified and honored
19 to be in front of the Commission, testifying on
20 behalf of the Federal Public Defenders. It is an
21 important function that the Commission has in front
22 of it, and the Defenders play a key role in advising

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1 and commenting on the amendments.

2 We have submitted extensive comments,
3 and I wish to thank Denise Barrett and Laura Mate
4 of the Sentencing Research Council, for their
5 diligent work.

6 I had prepared remarks, but I sat here
7 this morning, and I heard the various panels and
8 the Commission wrestle with various aspects, and
9 I am going to take a step back and say, why are these
10 amendments and why, in the case of one, isn't it?

11 In terms of mitigation, the 'why' is
12 obvious. It cuts across drugs, it cuts across
13 fraud, it cuts across every type of offense.

14 The original sin from our point, of the
15 Commission was linking culpability with the
16 amount. That sin can be expiated with a role, with
17 culpability. Time and time again, when we have
18 been in front of the Commission, we have urged you
19 to look again at role in the offense.

20 Last year is an example. We introduced
21 you to Oscar. Molly Roth testified for us. Oscar
22 is a courier that was bringing drugs across the

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1 border. His family was ill. He was trying to make
2 a quick buck to help his family, and he was caught.

3 We argue that there should be a
4 roll-back in the drug offense level, and
5 Commissioner Wroblewski said, "Well, of course
6 he's going to get a mitigating a role adjustment.
7 Of course, he will be reduced, because his role as
8 courier is not as significant as others."

9 Well, the stats that we have provided,
10 and that your staff know, indicates the wide
11 disparity unwarranted between districts.

12 We have the Eastern District of New
13 York, where 30 percent are given minimal or minor
14 role, and then the middle District of Florida,
15 where only five percent, both of those are dealing
16 with the various types of drugs.

17 Turning to the border, we have Arizona,
18 where we're looking at roughly 10 percent, I think
19 actually nine percent, getting mitigated role.
20 Right next door, in Southern California, we're
21 looking at 70 percent and almost 73 percent, where
22 New Mexico is looking at 40 percent of those getting

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1 minimal.

2 Texas is looking at, I believe, 20
3 percent in Texas Southern and 30 percent in Texas
4 Western.

5 How could we justify Oscar, the
6 courier, going on a highway and seeing a sign saying
7 El Paso or Las Cruces? He goes to El Paso and gets
8 caught, he's going to have three out of 10 chance.
9 Las Cruces, he's looking at seven out of 10 chance,
10 if he gets diverted to Arizona, he would get me,
11 but unfortunately, he would only get mitigating
12 role 10 percent of the time.

13 That needs to be changed. Same with
14 fraud. This is a chance for the Commission to
15 really look at role and to expand it broader.

16 In addition, borrowing from inflation,
17 we think the Commission should actually increase
18 the role for minimal -- increase the adjustment for
19 minimal or minor.

20 As the drugs and fraud and penalties
21 have ratchet up, the role has stayed the same. If
22 we go back to 1987, there is an argument that it

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1 should be terribly reduced.

2 In terms of single sentence, as the
3 yellow light comes on, why? It doesn't affect but
4 a handful and it respects the state court judge who
5 has given the sentence. She felt it was
6 appropriate. Let it lay.

7 The problem is with career offender,
8 which everyone agrees, sweeps too broadly. To do
9 this little tinkering would be just to exacerbate
10 an already unfair situation, and lastly, in terms
11 of jointly undertaken, we believe, with my
12 co-panelists, that a restructuring is in order to
13 make it clearer, and it goes to intent.

14 All of these things are looking at what
15 the person really intended to do, before we put him
16 in prison. I'd be happy to answer any questions.
17 Thank you.

18 CHAIR SARIS: Thank you. Okay, I'll
19 jump in. So, I start with what I thought was sort
20 of sleeper, which was single sentence, and it
21 seemed as if the Williams case logically had it
22 correct, and then I started getting worried, and

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1 when I saw the Department say, and we should do it
2 for §2L and we should do it for §2K and we should
3 do it for -- I forget what it all, but adding and
4 adding and adding, and I understand logically, why
5 you did that.

6 So, but I'm really trying to figure out,
7 because Williams was a career offender case, which
8 has some statutory obligations that come with it.

9 So, I want to understand this across the
10 board from the prosecutors, the defense attorneys,
11 the probation officers.

12 What is happening in the field? I'm
13 told from my people that it's impossible -- it's
14 very difficult to code for this, to figure out what
15 is actually happening with these multiple
16 sentences, and to know whether or not your proposal
17 to add in §2L and §2K, and your suggestion that in
18 fact, it's going to dramatically change how career
19 offender people.

20 So, what is happening in the field right
21 now? Maybe I can talk to -- start with the
22 prosecution. Do you -- in the United States of

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1 America, are most people following the Williams
2 case, the Eighth Circuit or the Sixth Circuit, I
3 guess it is?

4 MR. ZAUZMER: The issue comes up
5 infrequently, Your Honor. We don't have data.
6 The Commission doesn't have data. We can only
7 speak from talking to all of our colleagues, that
8 it comes up occasionally around the country, but
9 not very often.

10 We had one case in the Third Circuit I
11 can speak of, where we lost it, the case came back
12 for re-sentencing, because of the King v. United
13 States [595 F.3d 844 (8th Cir. 2010)] application of
14 the single sentence rule.

15 So, it does happen, but it's not a large
16 number. Our view on this is, it's an obvious
17 mistake. It's easy to correct.

18 The Commission has suggested an obvious
19 correction, and we advocate it.

20 CHAIR SARIS: But let me ask. So, to
21 your knowledge, would that be changing the practice
22 in the immigration cases in huge numbers, that we

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1 don't know about?

2 MR. ZAUZMER: Not at all, and you know,
3 I was going -- you know, my colleague Mr. Sands in
4 his submission, said both, this is a minor thing,
5 in fact, in very few cases, and then said it will
6 drastically increase the application of the career
7 offender.

8 I don't believe the second part of that
9 is correct. I don't think this would have a
10 significant effect on any of these provisions.
11 We're talking about, it's just a logical fix.

12 CHAIR SARIS: Is it possible
13 afterwards, to just do a survey and find out how
14 often this issue comes out?

15 MR. ZAUZMER: We'll be happy. I can
16 tell you the quasi sort of survey I did, as you know,
17 I'm part of the Appellate Chief's Working Group of
18 the Department. I asked all my colleagues
19 informally around the country, and the answer I got
20 back is what I have given you, which is that some
21 people have seen it, but this doesn't come up often.
22 If you'd like more than that, we're happy to do it.

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1 CHAIR SARIS: So, from the point of
2 view of the Defense Attorneys, does this come up
3 any place?

4 MR. SANDS: It comes up very rarely,
5 but when it does come up, it has the pernicious
6 effects of greatly increasing the sentence, as we
7 pointed out in Williams.

8 The fact is that it hadn't come up for
9 the 15 years that the Sixth Circuit -- sorry, that
10 the Eighth Circuit case was on the books. It's
11 just not coming up in the field.

12 I have spoken with the Defenders. It's
13 very, very rare. I've spoken with my colleague
14 from the probation office and he's not seeing it,
15 but when you start going across various offense
16 levels, immigration, firearms, you're moving from
17 Chapter 4 to Chapter 2 and you get these pernicious
18 effects, and we would urge the Commission, if
19 they're going to deal with career offender, deal
20 with it honestly, deal with it broadly. Don't
21 tinker in this, which really just affects a few
22 cases and a judge can sentence with an upward or

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1 with a down.

2 CHAIR SARIS: And from the probation
3 point of view, do most people follow in Williams?

4 MR. BOHLKEN: Your Honor, I did do an
5 informal survey of all of the Circuit reps and all
6 their points of contact across the country, and
7 this is extremely rare, as my colleagues have said,
8 and I also asked them, "Well, how do you train new
9 probation officers on this very topic," and to be
10 honest with you, they all said, "This is too complex
11 to try to train a new officer on, so we haven't
12 trained it, to be honest."

13 But I found one Circuit that actually
14 had a case. Most of the responses were, "We've
15 never seen one of these cases." But I had a recent
16 one in the Ninth Circuit that was relayed to me,
17 where the judge did side with more the King side
18 of it, and based on the rule of lenity, and but for
19 a majority of all of the officers across the
20 country, they see a predicate offense in a group
21 that's a single sentence, and they're going to
22 count the predicate offense. That's the way

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1 they're doing it now.

2 So, the way they're doing it now --

3 CHAIR SARIS: Are all the -- from all
4 the recidivist --

5 MR. BOHLKEN: Exactly, all the
6 guidelines, they're -- if they see a predicate
7 offense in there, they're counting it. They're
8 counting it, and like I said, that is pervasive
9 across the country.

10 We did look at the amendment and we
11 believe that the amendment is -- clarifies the
12 issue for us, and makes the application easier.

13 VICE CHAIR BREYER: You have invited
14 questions, so, I'd like to accept the invitation.

15 In the submission from the Justice
16 Department, I'm now talking about the change of
17 language, with respect to mitigating role, and it
18 changes or the proposal is to change it from "not
19 precluded" from a reduction for mitigating role
20 versus "may receive".

21 Then you say, well, you say two things
22 about it. You say this apparently nudges someone

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1 in -- the judge in favor of something that would
2 result in a lesser sentence, which I think you're
3 absolutely right. I mean, that's the point of it.

4 The point is that you want the judge to
5 consider, "not precluded" doesn't mean that the
6 judge considers something. You actually want to
7 highlight the fact that the judge ought to consider
8 this, in sentencing.

9 But you say that the Commission hasn't
10 given any reasons for this change, or for this
11 proposal, and you have information that is contrary
12 to what Mr. Sands is saying.

13 What Mr. Sands is saying, based upon his
14 viewing of the statistics, there is a fairly wide
15 and significant disparity among judges' practices
16 with respect to this adjustment. Do you have
17 evidence to the contrary, because our job is to try
18 to avoid these disparities.

19 MR. ZAUZMER: Of course, I do. Let me
20 make a couple points on that, if I may, Your Honor.
21 Thank you for the question.

22 I think what Mr. Sands is talking about,

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1 very valid points, is different from what this
2 amendment is about, if I may -- once we study it.

3 The amendment focuses on one type of
4 mitigating role, which is the person who is being
5 held responsible for only for his own conduct,
6 despite the fact that he or she was part of a broader
7 organization. That is one limited subset.

8 Mr. Sands is looking at the world of
9 mitigating role adjustments, whether somebody is
10 held responsible for their own conduct or joint
11 activity, and he has identified these disparities
12 that may very well exist, and so, my answer is, I
13 think it's totally appropriate and the Department
14 would be happy to participate, for the Commission
15 to examine this issues that Mr. Sands has raised.

16 Right now, we don't have enough data to
17 know, as I think he himself said, we don't have
18 enough data to know what disparity is really going
19 on here. Simply to say that one district has 10
20 percent and the next one over has 70 percent tells
21 us only part of the story.

22 We also need to know how do these

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1 districts charge, are they charging people with
2 jointly undertaken activity, such that a
3 mitigating role adjustment then becomes more
4 likely, or are they carefully only charging people
5 who are coming across the border with a specific
6 amount and then a mitigating role adjustment is
7 less likely.

8 I don't know where we get the data to
9 study things like that, but we need that kind of
10 information, but my real point here is that this
11 amendment only targets one little subset, and that
12 -- and not in a way that is really necessary, given
13 the language that's already there.

14 VICE CHAIR BREYER: It's the
15 difference between what is necessary and whether
16 something is, as a matter of policy, something that
17 is going to be adhered to or at least considered.

18 It was not the intention of the proposed
19 amendment to change the policy. I mean, what it
20 was, was to have judges consider it, and there is
21 a real difference, I know, in the administration
22 of sentences.

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1 If something is -- if the word is, you
2 can't consider it, or you're not precluded from
3 considering it, rather, as it is here, then the
4 judge says, "Okay, I could if I wanted to."

5 When it said, "May consider," it is
6 something that a defense lawyer or a prosecutor
7 would encourage a judge to think about, in terms
8 of sentencing.

9 So, if you're against the thing in
10 principle, then you're also against the preclusion
11 of it. But if you accept that it can be considered,
12 I don't know why there is a really principle
13 difference between saying it can't be considered
14 -- I mean, it can be -- it can't be prevented from
15 being considered on the one hand, versus may be
16 considered on the other. There is a semantical
17 difference, and I'm concerned about whether as a
18 matter of principle, you're saying.

19 MR. ZAUZMER: No, Your Honor, we would
20 welcome, if a commentary were added, one line
21 saying what you just said, which is that this is
22 not a change a policy, it's simply to assure that

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1 judges are aware of it, our objection, you know,
2 fritters away at that point.

3 Our concern was that, and it was read,
4 you know, looking at the defense testimony that was
5 submitted here, Ms. Foti, who was here this
6 morning, who is not here now, she -- her group from
7 New York supported this amendment because they said
8 it should cause courts to apply the mitigating role
9 adjustment more frequently.

10 The defenders went further and they
11 suggested we just eliminate -- that they -- the
12 language should actually encourage the application
13 of this reduction to everybody.

14 If what Your Honor is suggesting --
15 well, I think their language --

16 VICE CHAIR BREYER: Everybody.

17 CHAIR SARIS: All right.

18 MR. ZAUZMER: -- was that it said
19 people who are in this situation, where they've
20 already -- are they only being held accountable for
21 what they trafficked, never the less "should
22 generally be considered for an adjustment". So,

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1 they're going even further.

2 If what Your Honor is suggesting is, we
3 want to make it clear to judges, you can do this,
4 we think judges already know it, but if it needs
5 that reminder, and we cited, I think a case from
6 the Eleventh Circuit, that -- or the Seventh
7 Circuit, rather, that reversed the lower court,
8 because they didn't understand it.

9 But, so, if more explanation is needed
10 fine, but we would suggest that the Commission make
11 clear, this is not a change in policy. This is not
12 a suggestion for example that the defenders would
13 advocate.

14 VICE CHAIR BREYER: But you do see that
15 practically speaking, it's so much -- to tell a
16 judge that something may be considered, is so
17 different from saying, "You're not precluded,"
18 hasn't that been your experience?

19 MR. ZAUZMER: I will never argue with
20 Your Honor over the interpretation of language like
21 that.

22 VICE CHAIR BREYER: Why? You'd

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1 probably win.

2 COMMISSIONER PRYOR: The distinction
3 still eludes me.

4 VICE CHAIR BREYER: No, I mean, we've
5 had discussions about it, and I certainly
6 understand. I am just saying that I've seen enough
7 defense lawyers who are -- who feel that maybe they
8 ought not to make the argument to the judge, that
9 this adjustment to be made, on the basis that it
10 simply says, the judge could if he wanted to, rather
11 than the change in the language to say it may be
12 considered, because that is an invitation, I agree,
13 it's an invitation to the judge to think about it.

14 MR. ZAUZMER: Well, I can also tell you
15 if it makes the Commission feel any better, I mean,
16 I was there before 2001, when the Department took
17 the position and many Circuits agreed that a person
18 in this situation was simply ineligible, that if
19 you were held accountable only for your quantity,
20 you were ineligible.

21 I made those arguments in Court. We
22 understand the adjustment that the Commission made

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1 in 2001, by saying 'not precluded'. I and my
2 colleagues have not made that argument since.

3 CHAIR SARIS: I heard it a month ago.

4 MR. ZAUZMER: Except for that person
5 that we need to --

6 VICE CHAIR BREYER: Except for the
7 Third Circuit, right?

8 COMMISSIONER PRYOR: But your own
9 letter said that the Eleventh Circuit, which had
10 adopted the position that you said was the right
11 position, took the Commission's change as an
12 adoption of its position, right?

13 MR. ZAUZMER: It was artfully said, but
14 the Eleventh Circuit is certainly in sync --

15 COMMISSIONER PRYOR: Which would mean
16 they didn't change anything. I would assume the
17 Department's lawyers are arguing in the Circuit.

18 MR. ZAUZMER: No, I acknowledge that it
19 changed the arguments the Department made. We
20 argued flatly against the mitigating role
21 adjustment. We now recognize, except for that
22 wayward AUSA in Boston, we recognize that it is

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1 permissible and we will make appropriate arguments
2 on the facts in each case.

3 MR. SANDS: That wayward AUSA jointly
4 undertook this ability and should be punished.

5 CHAIR SARIS: In all fairness, though,
6 I mean, I don't want to get stuck on this one, but
7 it is the -- it was the culture in Massachusetts
8 that if you were a courier with 'x' amount of drugs,
9 and you were only being attributed to that amount
10 of drugs, that you didn't get minor role reduction,
11 and then I hear, this great thing being on the
12 Commission, well, in other parts of the country,
13 people are routinely getting that -- would you
14 agree with that?

15 MR. BOHLKEN: Yes, in New Mexico, like
16 my fellow panelist just brought up, 73 percent of
17 the time, you get a role reduction in New Mexico,
18 and 40 percent of that 73 is a minimal role.

19 So, in back-packer cases coming across
20 the border, they're held responsible for the amount
21 of marijuana that they have on their back, but they
22 also get the minimal role.

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1 But you know, in some districts, it's
2 built into the fast-track program too.

3 COMMISSIONER FRIEDRICH: I was going
4 to agree with Judge Breyer. The intent of the
5 Commission here is not to change policy, but just
6 to ensure that judges actually consider whether
7 they should give it.

8 But it doesn't address the big issue
9 that we considered before, and the position used
10 to be in these Circuits that you are precluded if
11 you're the back-packer and you're responsible only
12 for what's on your back or you're the person driving
13 the load in, and there --

14 CHAIR SARIS: But I think your
15 microphone isn't on.

16 COMMISSIONER FRIEDRICH: Sorry.

17 CHAIR SARIS: So, there were --

18 VICE CHAIR BREYER: Could you say that
19 again?

20 COMMISSIONER FRIEDRICH: Let me
21 repeat. I do agree with Judge Breyer that we don't
22 -- but so, the Commission wants to ensure that

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1 Courts consider this, and I'm speaking for myself,
2 I'm okay with this.

3 But the bigger issue is what Mr. Sands
4 points out. When I was in AUSA in San Diego, every
5 single importation case, the defendant was charged
6 routinely, with that amount they brought in, and
7 they routinely got minus-two, rarely got
8 minus-four, but you contrast that with the Western
9 District of Texas, with Middle District of Florida,
10 and we have these different cultures, and different
11 District Court judges are just -- it's the culture
12 of the Court is to give it or not to give it.

13 So, unless the Commission says no, in
14 all cases or yes in all cases, I don't know that
15 we're going to do anything to eliminate the
16 disparity across the country. Do you all
17 disagree?

18 MR. ZAUZMER: Can I make a point on
19 that, Commissioner?

20 MR. SANDS: Language matters. Words
21 matter. A grudgingly "can consider" is sort of the
22 presumption not to, may or better yet, "should

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1 consider" is more than a nudge. It is a direction
2 that you need to look at the Chapter, to look at
3 the individual and as we suggested in our wording,
4 his role and participants in similar schemes.

5 It's a way of having a judge focus on
6 this. It makes no sense in Las Cruces for someone
7 to get 70 percent chance and then just across the
8 river in El Paso, to only have a 30 percent chance,
9 while in San Diego, it's close to 70, Arizona, nine
10 percent.

11 We need to do something and our language
12 and the change would affect that.

13 MR. BOHLKEN: One point I wanted to
14 make in the discussions that I've had -- been
15 involved in with mitigating role, the term that
16 always seems to come up is, was the participant
17 essential to the drug trafficking conspiracy, and
18 by that logic, the courier is always going to be
19 essential. So, how would they ever get the
20 mitigating role, and I was looking for the language
21 in the guideline. I was just thumbing through it
22 real quick, and I couldn't find it.

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1 I might have read that in some case or
2 something like that, but the language that I come
3 up -- that language of essential to the drug
4 trafficking conspiracy, when you want to examine
5 that sentence alone, it -- you can pretty much
6 preclude everybody from getting a mitigating role.

7 It's hard to fit somebody into that
8 category and in -- like John said, in the border
9 district that I'm from, we don't look at couriers
10 that way. They aren't couriers. They are
11 essential to the drug trafficking conspiracy, but
12 they're less culpable than other participants in
13 that drug conspiracy.

14 So, we feel that the mitigating role
15 does apply, but that's not a universal approach
16 across the country, in any -- it's very -- this is
17 probably the one guideline that we find on POAG,
18 that is the most dissimilarly applied across the
19 board, across the country, this one guideline.

20 COMMISSIONER PRYOR: I'd hate to -- you
21 haven't had your opportunity to respond. But if
22 you did get that language from case law, I really

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1 wonder whether a change by the Commission,
2 especially one where the distinction still alludes
3 me, is going to make much of difference, if the
4 governing case law of the Circuit --

5 CHAIR SARIS: Excuse me, I think your
6 microphone --

7 COMMISSIONER PRYOR: But if the case
8 law would suggest that you're not eligible, then
9 this slight change in wording by the Commission is
10 not going to make any difference, is it?

11 MR. DEBOLD: But it's -- they're
12 interpreting a guideline, which the Commission
13 could change the language on.

14 I agree on the not -- you know, if
15 they're essential to the scheme, they shouldn't be
16 disqualified, if that's the language that --

17 COMMISSIONER PRYOR: Yes, but so, if we
18 change it from 'is not precluded' to 'may', that's
19 going to have a seismic shift in the case law in
20 the Circuits?

21 MR. DEBOLD: No, it won't and our
22 position has been that it's -- it's a helpful

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1 addition among other things, including the factors
2 that we've identified in our written testimony, of
3 things that a judge should consider in deciding
4 whether there's a mitigating role.

5 We do think -- we agree, I think we all
6 agree that the Courts do need more guidance and,
7 perhaps, more examples.

8 What you've proposed is helpful, but I
9 don't think it's going to be enough in the long run.
10 I think this is something the Commission is going
11 to want to come back to, if you aren't able to
12 address it more fully this time around, because we
13 are talking on this one issue, about a very small
14 change that, you know, is good as far as it goes,
15 but it's not going to solve the problem.

16 MR. ZAUZMER: The point I was going to
17 make, and I think it echoes, Your Honor, if I may,
18 it echoes what you're saying, which is that this
19 change that is being suggested doesn't get at the
20 problem that everybody is talking about.

21 I hear the problem people are talking
22 about is couriers coming across the border, or

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1 somewhere else and there may be a disparity in the
2 way -- and I don't know, in the way people are
3 treated in San Diego and El Paso or wherever.

4 That needs to be studied. We need to
5 know how they are charging those cases. Is there
6 a disparity? Why is it there?

7 This proposal, however, applies to
8 every mitigating role. It applies to fraud cases.
9 It applies to robbery cases. It applies to
10 everything, and doesn't seem necessary unless the
11 Commission believes, we need to make this language
12 suggestion, make clear it's not a change in policy;
13 it's just a reminder, fine.

14 But this is not getting at the issue
15 that everybody else is discussing.

16 CHAIR SARIS: If you narrowed it down
17 to this particular problem, which is the courier
18 or back-packer problem, where across the country
19 -- we continue to hear it's being disparately
20 applied, could we carve it out -- would the
21 Department agree that if somebody -- those factors
22 we laid out, if there was not much gain and if

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1 someone had narrow view of the scope of the
2 conspiracy, in general, they should get a minor
3 role reduction, which would pretty much pick up
4 most couriers?

5 MR. ZAUZMER: I think probably. I
6 don't have the final authority to tell you right
7 now, because it hasn't been --

8 CHAIR SARIS: I know, I said that
9 before, I thought I'd get away with it again.

10 MR. ZAUZMER: Right, but no, I'll tell
11 you, generally, yes, we would agree. I can also tell
12 you about courier cases that we've handled, where
13 you would not apply the mitigating role adjustment,
14 where you have people who are regular committed
15 couriers, it's what they do for a living, and you
16 would not give them a mitigating role adjustment.

17 So, we need to make sure what the
18 language says, so that it's not just across the
19 board, every courier gets a mitigating role
20 adjustment.

21 CHAIR SARIS: Well, sure, but if we
22 sort of put a little thumb on it, through an

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1 example, which is what people are suggesting, for
2 the classic one everyone struggles with, which is
3 the person that doesn't make much money and doesn't
4 know the scope of the conspiracy, but is actually
5 carrying, you know, the ounces across, or the --
6 a border, or even in a truck, which I see, you would
7 say that that example would at least cabin the
8 possible damage of saying too generally, but also
9 get rid of some of this disparity in way consistent
10 with DOJ policy.

11 MR. ZAUZMER: I think it's possible and
12 I think it's a very good thing to look at and address
13 promptly.

14 MR. SANDS: It should be a minimal.

15 CHAIR SARIS: Okay.

16 MR. SANDS: Can't the percent -- can
17 the point -- I mean, judges should say --

18 CHAIR SARIS: You would say that person
19 was minimal?

20 MR. SANDS: Yes, because you can pick
21 up someone across the border, if that person says
22 no, you just go across. They are fungible.

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1 Unfortunately, the people use them as just a driver
2 at that time.

3 VICE CHAIR BREYER: But Mr. Sands, I
4 think actually you highlight the problem for
5 judges, which is that judges will take a look at
6 cases, the one you've just cited, and the one
7 you've cited and come up with -- maybe come to very
8 different conclusions, as to how culpable that
9 person was.

10 What -- the reason for the change in the
11 language was to try to get judges across the
12 country, to consider it, to think about it, to have
13 it presented to them.

14 They came -- they may adopt your view.
15 They may adopt your view, fine. There will always
16 be these disparities, and by the way, they may be
17 warranted, given local circumstances, given the
18 repeat nature of the offender, or the offender's
19 continuing participation and so forth.

20 But that's going back, so, I want to
21 leave here with a firm idea that if we put it in
22 -- if we make sure that it's not viewed as a change

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1 of policy, just look at it that way, made it clear,
2 then you don't have a problem with it.

3 MR. ZAUZMER: That's correct.

4 COMMISSIONER BARKOW: So, I have a
5 different line of question, and it's really for Mr.
6 Debold and Mr. Zauzmer, and that is whether in
7 jointly undertaken activity, we should have a
8 requirement that it be charged under Pinkerton v.
9 United States [328 U.S. 640 (1946)] or some other
10 form of conspiracy, and what I wanted to get a sense
11 of is, the government said if we were to make that
12 requirement, that would inevitably result in the
13 filing of additional charges, in order to assure
14 that the defendant is properly charged.

15 But the advisory group's comment was,
16 "Yes, do this. This would be a good thing." I
17 mean, would that still be your view, if the
18 Department is saying, "What we'll just do in
19 response is start charging more people with
20 conspiracy."

21 I was trying to get a sense of the lay
22 of the land here, in terms of what is the

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1 government's current view on what you charge in a
2 conspiracy, because I think that you just have two
3 different conceptions of whether -- you know, I
4 think the government is of the view, we want the
5 extra sentencing, so we'll start charging more, if
6 that's what we have to, and right now, we're not
7 charging it, because we're getting it anyway under
8 this provision, and I take it, the advisory group's
9 vision of this is, if you really want this, we'd
10 rather have -- maybe you'd rather have them charge
11 it, because you think in some cases, the government
12 actually won't charge because they're not charging
13 it, means that they don't want the extra sentence.

14 So, I see two different visions of what
15 this would actually do, and I'd like it if you could
16 both comment.

17 MR. DEBOLD: Yes, I did get a chance to
18 look briefly at the written testimony, and it
19 doesn't change our view on that.

20 I will say though that the change that
21 we view as more important and probably more
22 workable is the first of those two that we discuss

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1 in the written testimony, which is to raise the
2 intent requirement.

3 We think that actually is the more
4 important one, and probably -- I mean, I recognize
5 that there is the risk of inconsistency that comes
6 with the -- you have to charge it for it to apply,
7 because then you do put the decision in the hands
8 of the prosecutors, and that does make it harder
9 for consistency across the country.

10 But in this situation, we're kind of
11 dealing with the lesser of evils, but we do think
12 that if you raise the intent requirement and have
13 the other changes that are in there, and that we
14 also recommend, that that's probably the best way
15 to approach the issue, although we do still
16 advocate the change that you were asking us both
17 about.

18 MR. ZAUZMER: Well, there are a number
19 of pieces to the answer, Commissioner.

20 The government generally does charge
21 conspiracy. There are all sorts of good reasons
22 for the government to have a conspiracy charge.

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1 But there will be cases in which by the
2 time you get to sentencing and you have a fuller
3 understanding of the facts and you're presenting
4 all of the relevant facts to the judge, it is
5 appropriate to argue that there was jointly
6 undertaken activity, even if there wasn't a
7 conspiracy charge.

8 So, our only suggestion in the letter
9 was is this going to push a prosecutor to
10 prophylactically add conspiracy charges even where
11 those few situations where that might not have
12 happened --

13 COMMISSIONER BARKOW: Would that be
14 consistent with the U.S. Attorney's Manual though,
15 to prophylactically charge? That seems like not
16 acceptable under your charging --

17 MR. ZAUZMER: It could -- obviously, we
18 follow the manual and it would depend on the
19 circumstances, but let me add that the reason I just
20 take exception to the fraud in general is that
21 Pinkerton liability and conspiracy liability, this
22 Commission has direct -- this was one of the results

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1 of 1992, is broader than jointly undertaken
2 activity, for which somebody is responsible.

3 So, it doesn't -- it would be odd to say
4 we need to charge somebody with this broader
5 liability, Pinkerton liability, as established by
6 the Supreme Court, is much broader than many
7 people's relevant conduct.

8 It would also be inconsistent with one
9 of the basic understandings of the guidelines,
10 which is that it looks to the real offense and not
11 to the charging.

12 The reason, as I understand it from
13 Judge Wilkins writings for that original
14 proposition that we're going to base the guidelines
15 not on the number of charges the government can
16 bring against you, but on what you actually did,
17 is to reduce the government's power, is to reduce
18 the prosecutor's power, to control the sentence,
19 by the number of charges that they bring.

20 So, these are -- these ideas that I
21 think are inconsistent with the way the guidelines
22 have been set up, which is to look at the person's

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1 specific agreement with jointly undertaken
2 activity, and to look at the real offense, and then
3 decide what is the person's relevant conduct.

4 So, there are a lot of reasons, we don't
5 think Pinkerton and conspiracy really fit here.
6 What is happening here is the person is convicted
7 of an offense; the person is convicted of what the
8 government has charged. There is a statutory
9 maximum, and this Commission is giving a guideline
10 to suggest where within that maximum the sentence
11 should be imposed. That should include jointly
12 undertaken activity, for reasons that the criminal
13 law has always looked at jointly undertaken
14 activity as being a more serious factor, for
15 purposes of sentencing.

16 So, I know that's a lot of things I said,
17 but there are just a number of reasons that we don't
18 agree with that.

19 MR. DEBOLD: If I could just talk.
20 There is one part of that, which I am not sure that
21 it was clear from what -- of what we're proposing.

22 I agree with the statement that

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1 conspiracy and sometimes Pinkerton liability can
2 be broader than what this guideline is meant to get
3 at.

4 But our proposal would be to make that
5 the gate, and then you still have the other three
6 points. It has to be within the scope of the
7 criminal activity that the defendant agreed to
8 jointly undertake, furtherance of and either
9 intent or reasonably foreseeable.

10 I think requiring it as a charging
11 decision by the government will serve an important
12 purpose of putting the defense on notice,
13 especially in a guilty plea situation, that they
14 are looking at that factor of exposure.

15 CHAIR SARIS: Commissioner
16 Wroblewski.

17 MR. SANDS: So, there is --

18 CHAIR SARIS: Did you want to jump in?
19 I'm sorry.

20 MR. SANDS: Briefly.

21 CHAIR SARIS: I'm sorry, I didn't see
22 that, go ahead.

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1 MR. SANDS: Just briefly. The
2 advantage of Pinkerton or Option A is a heightening
3 in the intent. The government would have to prove
4 it beyond a reasonable doubt. There would have to
5 be a specific intent for Option A. Those are good
6 things.

7 Second, I have to correct the record.
8 The move toward real offense sentencing was not to
9 limit the power of the government. It was to
10 expand the power of the prosecutor, and we would
11 take issue with that.

12 COMMISSIONER WROBLEWSKI: Mr. Debold,
13 and maybe now for Mr. Sands, as well.

14 There is an application note in the
15 guideline manual right now, that talks about an
16 example of two people that are driving to a bank
17 robbery. One is the driver and one is actually
18 going to go in the bank and rob the bank, and the
19 driver says, "I know you've got a gun. Just don't
20 shoot the gun," okay, and of course, the guy goes
21 in and he goes and he shoots the gun and he kills
22 somebody.

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1 Now, if I get your position correctly,
2 it would -- the shooting would not be counted under
3 the guidelines, because it was not intended by the
4 defendant, under your proposal.

5 So, that example would have to be
6 removed from the guidelines, if your example, and
7 the policy that you're suggesting, were adopted by
8 the Commission, am I getting that right?

9 MR. DEBOLD: Where conduct was not
10 intended by the defendant, even though within the
11 scope of the activity that the parties undertook,
12 yes, that would be our position.

13 MR. SANDS: A better twist would be
14 that the driver, a girlfriend says, "Just go in with
15 a note. We just need the money for a hit. We don't
16 want any trouble. Don't hurt anyone," and then the
17 boyfriend, bad things happen. The girlfriend
18 would be limited then.

19 CHAIR SARIS: Always go with the
20 girlfriend.

21 MR. ZAUZMER: If I can comment on that.
22 Again, it's similar to the answer that I was giving

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1 to Commissioner Barkow.

2 These are substantial changes in long
3 time criminal law. The United States Supreme
4 Court, long before Pinkerton. Pinkerton was just
5 the ultimate expression of it, has looked to
6 reasonably foreseeable conduct as the scope of a
7 conspirator's liability.

8 There are reasons for that bedrock
9 principle of law, going back hundreds of years.

10 Sure, we could look at it from the
11 perspective of the defendant who is sitting in the
12 car, who does not want to be responsible for the
13 person shot inside the bank.

14 But if we look from the perspective of
15 the victim, it's the same thing that my colleague
16 Mr. Wagner was talking about this morning, with
17 regards to the economic crime.

18 If we look at it from that perspective,
19 here we have a driver who participated in the
20 robbery, facilitated it, brought the person there,
21 is ready to speed him away and is responsible for
22 what is reasonably foreseeable, intent has never

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1 been a requirement.

2 COMMISSIONER BARKOW: Well, I just
3 have to add, I don't think that's a bedrock
4 conception and that's why Federal conspiracy law
5 is brought in the Federal system because most
6 states don't go as far as Pinkerton does.

7 I mean, it is an expansion of where the
8 common law viewed -- which was -- which was usually
9 accessory liability, where you did have to have an
10 intent.

11 I mean, it's not to say that's not what
12 the Federal law is now, but it isn't true that
13 that's a universal conception of what multi-actor
14 liability would consist of.

15 MR. ZAUZMER: Sure. Well, I
16 appreciate the focus on Federal law, and that, of
17 course, is what we're dealing with here, and thus,
18 appropriate Federal sentencing.

19 CHAIR SARIS: Can I -- in my district,
20 typically conspiracy is charged together with the
21 substantive count. I don't know if that's true
22 across the country, but you almost always see the

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1 conspiracy, the 18 U.S.C. § 846 and then you see
2 the individual distribution.

3 I don't know if that's the issue. Is
4 that required by the manual and is that true across
5 the country, because I'm not sure how much this
6 debate makes a difference.

7 MR. ZAUZMER: It's not required, but
8 like I said before, Your Honor is exactly right,
9 conspiracy charges are brought when the prosecutor
10 at the outset of the case believes it's useful and
11 appropriate to charge conspiracy.

12 So, we're not -- we probably are not
13 dealing with a lot of cases, in which it's not
14 there, but still for purposes of sentencing, we
15 believe that the Commission got it right in looking
16 at again, you're within the statutory maximum for
17 the offense of conviction. That can't be changed,
18 but there will be jointly undertaken activity where
19 there may not be a conspiracy charge in a particular
20 case.

21 As long as you're not exceeding the
22 statutory maximum, that shouldn't be a concern.

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1 CHAIR SARIS: Is that true in your
2 other districts, that conspiracy counts are
3 usually brought, as well?

4 MR. SANDS: Yes, yes, it's usually a
5 trifecta.

6 CHAIR SARIS: And in New York?

7 MR. DEBOLD: Yes, I've seen it, which
8 is why I don't think it's going to be -- it would
9 be a big burden on the government to have that kind
10 of gate, as I said. It gives notice.

11 So, basically, he's defending the
12 cases, where the government decides not to bring
13 a conspiracy charge, and then lo and behold, we get
14 to sentencing, and the defendant is suddenly
15 hearing that they're going to hold him accountable
16 for conduct that was jointly undertaken, without
17 any kind of notice in the charging document, that
18 that's what was on the horizon.

19 So, you know, I think in that situation,
20 and an example that we heard from Commissioner
21 Wroblewski, yes, you're going to have two different
22 people with different culpability. The guy who

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1 goes in and uses the gun, even though the discussion
2 was, "Let's not use it," the question is not whether
3 they're both guilty of a crime. They're both
4 guilty of a crime. The question is, who is more
5 culpable and what level of culpability should --
6 or what level of conduct should you hold the person
7 who is in the car responsible for it, and when you
8 have the cases where that just doesn't make sense
9 to a judge, you depart.

10 CHAIR SARIS: Thank you very much. You
11 kept us wide awake after lunch. It was very
12 engaged debate. Thank you very much for coming.

13 (Whereupon, the above-entitled matter
14 went off the record at 2:30 p.m.)

15

16

17

18