

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON PROPOSED AMENDMENTS TO  
THE FEDERAL SENTENCING GUIDELINES

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THURSDAY  
NOVEMBER 5, 2015

+ + + + +

The Public Hearing commenced in the Thurgood Marshall Building, Room 2-500, One Columbus Circle NE, Washington, D.C., at 9:00 a.m., Patti B. Saris, Chair, presiding.

COMMISSIONERS PRESENT

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

EX OFFICIO COMMISSIONERS PRESENT

JONATHAN WROBLEWSKI, Department of Justice

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PANEL I: VIEWS FROM THE JUDICIARY

HON. IRENE M. KEELEY, Chair, Committee on  
Criminal Law of the Judicial Conference of  
the United States

HON. KATHLEEN CARDONE, United States District  
Court, Western District of Texas

PANEL II: VIEWS FROM THE EXECUTIVE BRANCH

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

PANEL III: VIEWS FROM THE PRACTITIONERS

MOLLY ROTH, Assistant Federal Public Defender,  
Western District of Texas

ANGELA CAMPBELL, Eighth Circuit Representative,  
Practitioners Advisory Group

ZACHARY MARGULIS-OHNUMA, National Association of  
Criminal Defense Lawyers

PANEL IV: VIEWS FROM THE FIELD

RICHARD BOHLKEN, Chair, Probation Officers  
Advisory Group

T. MICHAEL ANDREWS, Chair, Victims Advisory  
Group

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

2 (9:05 a.m.)

3 CHAIR SARIS: Well good morning to  
4 everyone. As you know, I am Patti Saris and I  
5 am Chair of the Sentencing Commission and I want  
6 to welcome everyone this morning to the public  
7 hearing.

8 We will hear testimony about a  
9 proposed amendment that the Commission published  
10 in August seeking comment on proposed changes to  
11 Guideline definitions relating to the nature and  
12 impact of a defendant's prior conviction for a  
13 crime of violence.

14 I am very glad to see the members of  
15 the public join us here up in our cozy commission  
16 room, but I'd also say that there are lots of  
17 people I think watching us nationwide because we  
18 are webcasting this proceeding.

19 We are so tech savvy these days, so  
20 hopefully people are watching us across the  
21 country.

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1           The proposed changes that are the  
2           topic of the hearing are primarily intended to  
3           comport the Sentencing Guideline provision  
4           applicable to certain career offenders to the  
5           recent Supreme Court case Johnson v. United  
6           States.

7           In Johnson, the Supreme Court struck  
8           down as unconstitutionally vague a portion of the  
9           statutory definition of violent felony used in a  
10          similar penalty in the Armed Career Criminal Act,  
11          which today I think many people refer to as ACCA.

12          While the Supreme Court in Johnson did  
13          not address sentencing guidelines, the statutory  
14          language the Court found unconstitutionally  
15          vague, often referred to as the residual clause,  
16          is identical to language contained in the Career  
17          Offender Sentencing Guideline.

18          For several years we have been  
19          studying the statutory and guideline definitions  
20          relating to the nature of an offender's prior  
21          convictions.

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1           This has included a study of the  
2 definitions of crimes of violence in the Career  
3 Offender and other guidelines, as well as the  
4 difficulties associated with the categorical  
5 approach used in applying these definitions.

6           In the proposed amendment we attempt  
7 to address these difficulties by the inclusion  
8 of a list of enumerated offenses and possible  
9 definitions for those offenses.

10           We are very interested in hearing  
11 whether the list is over-inclusive or under-  
12 inclusive.

13           We are also interested in your views  
14 about whether the proposed definitions are  
15 workable and if they will achieve their intended  
16 purpose of simplifying the task of enumerating  
17 whether a particular predicate offense qualifies  
18 as an enumerated offense. Will these definitions  
19 make matters more confusing or less confusing?

20           Likewise, we have heard concerns over  
21 the fact in some jurisdictions misdemeanors are

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1 punishable by more than one year in prison and  
2 therefore qualify as predicate offenses under the  
3 current definition of felony.

4 The proposed amendment considers this  
5 concern by requiring that a prior offense be  
6 classified as a felony under the laws of the  
7 jurisdiction in which the defendant was  
8 convicted.

9 We are interested in views about  
10 whether this proposed policy change will  
11 appropriately address the severity concerns or  
12 whether it will add an increased level of  
13 complexity to the career offender determination.

14 There is also an issue about when this  
15 determination about whether it's a felony should  
16 be made.

17 As those of you who regularly follow  
18 the Commission's work know this is really an  
19 unusual hearing for us because we typically  
20 consider amendments much later in our cycle.

21 But now we are publishing an amendment

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1 for comment in August and having a public hearing  
2 in November. So why is that?

3 We began seeing litigation over the  
4 impact of Johnson on the Sentencing Guidelines  
5 almost immediately after the decision came down  
6 from the Supreme Court.

7 In light of resulting uncertainty we  
8 decided it would be prudent to begin considering  
9 whether as a matter of policy the guidelines  
10 should also eliminate the residual clause.

11 By statute the Commission may vote on  
12 a guideline amendment any time after the  
13 beginning of a regular session of Congress or in  
14 January, but not later than May 1st of any given  
15 year.

16 Although the Commission traditionally  
17 votes on amendments in April, you all know that,  
18 and delivers them to Congress by May 1st, we may  
19 vote on a proposal that is before us today as  
20 early as January.

21 This is a complicated topic and, you

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1 know, it's one of the most intellectually  
2 difficult ones I have seen since I have been  
3 here.

4 It's a very important topic and we  
5 look forward to hearing from all our witnesses  
6 today as well as to considering public comments  
7 further informing us. The public comment period  
8 remains open at least through November 12, 2015.

9 So, of course, I am going to introduce  
10 my fellow and sister commissioners, and I start  
11 with my immediate right, is Judge Charles R.  
12 Breyer.

13 He is a Senior District Judge for the  
14 Northern District of California. Judge Breyer  
15 has served as the United States District Judge  
16 since 1998 and serves as a Vice Chair of the  
17 Commission having joined the Commission in 2013.

18 Next to him is Rachel Barkow, who also  
19 joined the Commission in 2013. She is the Segal  
20 Family Professor of Regulatory Law and Policy at  
21 NYU School of Law where she focuses her teaching

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1 and research on criminal and administrative law.

2 She also serves as the Faculty  
3 Director for the Center on the Administration of  
4 Criminal Law at the Law School.

5 Now turning to my left is Dabney  
6 Friedrich who has served on the Commission since  
7 2006.

8 Immediately prior to her appointment  
9 on the Commission she served as an Associate  
10 Counsel at the White House and as counsel to  
11 Chairman Orrin Hatch of the United States Senate  
12 Judiciary Committee and as an Assistant U.S.  
13 Attorney for the Southern District of California  
14 and then for the Eastern District of Virginia.

15 Next to her is Judge William H. Pryor,  
16 who also joined the Commission in 2013. He is  
17 the United States Circuit Court Judge for the  
18 11th Circuit Court of Appeals appointed in 2004.

19 Before his appointment to the federal  
20 bench Judge Pryor served as the Attorney General  
21 for the State of Alabama.

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1           And way over to the right next to  
2           Commissioner Barkow is Jonathan Wroblewski. He  
3           is the designated ex officio member of the United  
4           States Sentencing Commission representing the  
5           Department of Justice.

6           Mr. Wroblewski serves as the Director  
7           of the Office of Policy and Legislation in the  
8           Department's criminal division.

9           Now before I get to introducing our  
10          first panel I wanted to ask whether anyone had  
11          any opening statements that they wanted to make.

12                    COMMISSIONER WROBLEWSKI:    I would.

13                    CHAIR SARIS:    Mr. Wroblewski?

14                    COMMISSIONER WROBLEWSKI:    Thank you.  
15          Thank you very much, Judge Saris.    It's a  
16          pleasure to be here and I am glad we are holding  
17          this hearing today.

18                    You may know that last week the  
19          President spoke in Chicago at the Conference of  
20          the International Association of Chiefs of Police  
21          about criminal justice reform.

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1           On Saturday the President's weekly  
2 address also addressed criminal justice reform  
3 and earlier this week he was in New Jersey  
4 visiting an offender reentry program.

5           These are just the latest  
6 manifestations of this Administration's  
7 commitment to criminal justice reform, which goes  
8 back to the very beginning of the Administration.

9           I had the great pleasure of working  
10 with Assistant Attorney General Lanny Breuer in  
11 the Spring of 2009 just a few weeks into the  
12 Administration in preparation for his testimony  
13 before the Senate Judiciary Committee on  
14 eliminating the crack-powder disparity.

15           And in the seven years since we have  
16 made tremendous strides, both with the  
17 Commission, with Congress, and an internal  
18 Department of Justice policy.

19           The Bureau of Prison population today  
20 is now below 200,000. In fact I just checked  
21 the website before I came out here, it's 198,953.

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1 It's the first time since the first term of the  
2 George W. Bush Administration that the prison  
3 population has been below 200,000.

4 We believe that public safety can be  
5 achieved better by using prison resources more  
6 carefully and reinvesting the savings into more  
7 productive public safety investments.

8 However, all of these efforts and all  
9 we have already achieved are threatened if we  
10 don't collectively have the thoughtfulness, the  
11 wherewithal and the fortitude to develop a policy  
12 that consistently identifies the most dangerous  
13 offenders and provides substantial prison terms  
14 to incapacitate them.

15 There is a debate raging whether crime  
16 is going up across the country and to what extent  
17 it is going up across the country. Where is it  
18 going up? How much is it going up? What should  
19 be done about it?

20 Tom Edsall, a columnist in the New  
21 York Times, had an op-ed about the very

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1 neighborhood in which we are sitting today. He  
2 described how violent crime is rising here on  
3 Capitol Hill and the raging discussion on the  
4 local LISTSERVs that have followed.

5 If we don't have a sensible policy  
6 that addresses violent offenders as quickly as  
7 you can say "crime of violence" the progress  
8 that we have made and are making will be reversed.

9 Now there are plenty of reasons, you  
10 know, plenty of excuses not to implement such a  
11 sensible policy. There are 50 state criminal  
12 codes.

13 Many definitions, for example, as  
14 Judge Cardone mentions kidnapping. There are  
15 imprecise categories. No matter how we try to  
16 define who are dangerous offenders those  
17 categories will not be perfect, they will not be  
18 precise.

19 And we have a history that has led us  
20 to use the categorical approach in the  
21 Guidelines, but the empirical data is clear and

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1 we believe the solutions are out there to be had.

2 A small number of offenders are the  
3 repeat violent ones. These offenders repeatedly  
4 offend and re-offend.

5 Violent offenders more often re-  
6 offend violently and there can be a consistently  
7 applied backup to the categorical approach that  
8 can rigorously and carefully identify these  
9 offenders relying on what judges do every day and  
10 in every sentencing hearing, and that's  
11 evaluating facts.

12 If we act responsibly we believe that  
13 we can keep the trends of lower violent crime and  
14 lower prison population going.

15 If we fail to do the unpleasant task  
16 of identifying and incapacitating those dangerous  
17 offenders we will likely see the trends change.

18 That's what we believe this hearing  
19 is all about and I am looking forward to all the  
20 testimony today. Thank you, Judge Saris.

21 CHAIR SARIS: Thank you. Anything

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1 else?

2 All right. So I have the pleasure of  
3 introducing our first panel. We are delighted  
4 to have Judge Keeley and Judge Cardone here today  
5 to provide us with a view from the judiciary.

6 Judge Irene Keeley really needs no  
7 introduction. She's been here before as a  
8 friend. She is the Chair of the Criminal Law  
9 Committee of the Judicial Conference and, I  
10 should say long-term, but then I figured that  
11 might not be, so a long-term Judge in the United  
12 States District Court for the Northern District  
13 of West Virginia.

14 Judge Kathleen Cardone, I've not  
15 known as long, but it's been a pleasure getting  
16 to know her. She is a United States District  
17 Judge for the Western District of Texas, the El  
18 Paso Division, appointed in 2003.

19 She testified before the Commission  
20 at the 25th Anniversary hearing held in Austin  
21 in November 2010 and attended the Commission's

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1 roundtable in 2014 discussing the problems with  
2 the categorical approach and definitions of  
3 crimes of violence.

4 So we begin with Judge Keeley. No  
5 time limit, no lights, we're whatever, we're just  
6 thrilled to hear from you, Judge Keeley.

7 HON. KEELEY: Thank you Judge Saris.  
8 By the way in West Virginia it wouldn't be long-  
9 term it would long in the tooth, so I really  
10 appreciate what you said.

11 (Laughter.)

12 HON. KEELEY: Judge Saris and Members  
13 of the Commission, on behalf of the Criminal Law  
14 Committee of the Judicial Conference of the  
15 United States I thank you for providing us the  
16 opportunity to comment on proposed changes to the  
17 Sentencing Guidelines definitions of crime of  
18 violence and related issues.

19 The topic of today's hearing is  
20 important to the Judicial Conference and judges  
21 throughout the nation.

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1           We applaud the Commission for  
2           undertaking its multi-year study of statutory and  
3           guideline definitions relating to the nature of  
4           a defendant's prior conviction and the impact of  
5           such definitions on the relevant statutory and  
6           guideline provisions.

7           We also thank you for considering  
8           whether to promulgate these guideline amendments  
9           to address questions that had been or may be  
10          raised by the Supreme Court's recent decision in  
11          Johnson v. United States.

12          The Judicial Conference has  
13          authorized the Criminal Law Committee to act with  
14          regard to submission from time to time to the  
15          Sentencing Commission of proposed amendments to  
16          the Sentencing Guidelines, including proposals  
17          that would increase the flexibility of the  
18          Guidelines.

19          In carrying out these duties the  
20          Committee relies on the conference commitment to  
21          a sentencing guideline system that is fair,

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1 workable, transparent, predictable, and  
2 flexible.

3 The Criminal Law Committee is  
4 generally in favor of the Commission's proposed  
5 amendments, particularly those intended to  
6 address or anticipate questions raised by  
7 Johnson.

8 As you know, the definition of the  
9 term "crime of violence," for purposes of the  
10 Career Offender Guideline has been the subject  
11 of substantial litigation in the federal courts.

12 We support any efforts to resolve the  
13 ambiguity and simplify the legal approaches  
14 required by Supreme Court jurisprudence.

15 Additionally, as you know, our  
16 Committee has repeatedly urged the Commission to  
17 resolve circuit conflicts in order to avoid  
18 unnecessary litigation and to eliminate  
19 unwarranted disparity in application of the  
20 guidelines.

21 The Commission's proposed amendment

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1 would reduce uncertainty raised by Johnson while  
2 making the guidelines more clear and workable.

3 In Johnson the Supreme Court held that  
4 an increased sentence under the residual clause  
5 of the ACCA's definition of violent felony  
6 violates due process because the clause is  
7 unconstitutionally vague.

8 As the Commission has explained in its  
9 Notice of Proposed Amendment in the Federal  
10 Register the Guidelines definition of crime of  
11 violence in Section 4B1.2 was modeled after the  
12 statutory definition of violent felony.

13 The Guidelines definition is used in  
14 determining whether a defendant is a career  
15 offender under 4B1.1 and is also used in certain  
16 other guidelines.

17 While the statutory definition of  
18 violent felony in the ACCA and the Guidelines  
19 definition of crime of violence in 4B1.2 are not  
20 identical in all respects as we all know the  
21 residual clauses are.

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1           The Criminal Law Committee strongly  
2 supports the proposed amendment to delete the  
3 residual clause from the guideline definition of  
4 crime of violence.

5           As you know there is now a circuit  
6 conflict regarding whether the residual clause  
7 in the Sentencing Guidelines is  
8 unconstitutionally vague in light of Johnson.

9           The Eleventh Circuit has found that  
10 the vagueness doctrine does not apply to the  
11 Sentencing Guidelines while the Tenth Circuit has  
12 held that the residual clause in the Sentencing  
13 Guidelines is unconstitutionally vague.

14           Another circuit, the Eighth, has  
15 remanded a case to the District Court with  
16 instructions to consider the defendant's claim  
17 that the guidelines definition of crime of  
18 violence is vague and violates due process.

19           Deleting the residual clause while  
20 maintaining the elements and enumerated clauses  
21 would reduce confusion and complexity by

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1 providing a definition of crime of violence that  
2 conforms closely to the statutory definition.

3 Notably, in 1988 a Sentencing  
4 Commission working group recommended that the  
5 career offender guideline definition of crime of  
6 violence should closely match the statutory  
7 definition of violent felony in the ACCA.

8 Moreover, in 1991 another Commission  
9 working group noted that, and I am quoting,  
10 "confusion may result if a crime is considered a  
11 crime of violence under Title 18 but not under  
12 the Sentencing Guidelines."

13 Because of the similarities between  
14 the statutory and guideline definitions, courts  
15 have also frequently treated cases dealing with  
16 these provisions interchangeably.

17 Elimination of the residual clause  
18 and close conformity with the definition of  
19 violent felony in the ACCA would also be  
20 consistent with efforts to simplify the  
21 Guidelines.

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1           Since 2014, the Commission has  
2 identified simplification of the Guidelines  
3 structure as a public priority.

4           The Criminal Law Committee has long  
5 supported attempts to simplify the operation of  
6 the Guidelines, including harmonization of the  
7 language used in specific offense characteristics  
8 shared across the Guidelines.

9           The Commission's current examination  
10 of guideline simplification provides an  
11 opportunity, in our view, to resolve differences  
12 in language across guidelines and statutes and  
13 eliminating the residual clause would be  
14 consistent with this goal.

15           In addition to deleting the residual  
16 clause, the Commission proposes amending Section  
17 4B1.2 to revise the list of enumerated offenses  
18 moving all to the Guidelines and providing  
19 definitions for the enumerated offenses in the  
20 commentary.

21           The Committee supports moving all

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1 enumerated offenses to the Guideline to make  
2 application more simple and clear.

3 Additionally, the Committee supports  
4 the proposal to include burglaries only of  
5 dwellings in the list of enumerated offense. To  
6 be sure some of the burglaries of non-dwellings  
7 excluded by this definition involve serious  
8 offenses by defendants that may pose a danger to  
9 the community, and our Committee discussed this  
10 at length.

11 Courts, we believe, may account for  
12 these situations through the elements clause of  
13 Section 4B1.2 or by departing or varying when the  
14 facts within the criminal history category under-  
15 represent the danger posed by the defendant.

16 Moreover, while we generally support  
17 close conformity between the statutory definition  
18 of violent felony and the ACCA and the Guideline  
19 definition of crime of violence, the balance of  
20 considerations by Congress when enacting  
21 penalties for armed career criminals under the

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1 ACCA may have been different when it included all  
2 burglaries in the statutory definition of violent  
3 felony.

4 Under the career offender guideline  
5 the court must analyze both the instant offense  
6 of conviction and the defendant's prior offenses  
7 of conviction.

8 To be a career offender the court must  
9 find first that the instant offense is a felony,  
10 that it is a crime of violence or a controlled  
11 substance offense, and, second, that the  
12 defendant has at least two prior felony  
13 convictions of either a crime of violence or a  
14 controlled substance offense.

15 To implement the requirement that the  
16 offense be a felony, the definitions in 4B1.2  
17 specify that the offense must have been an  
18 offense under federal or state law punishable by  
19 imprisonment for a term exceeding one year.

20 The Commission proposes adding an  
21 additional requirement, that the offense must

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1 also have been classified as a felony or a  
2 comparable classification under the laws of the  
3 jurisdiction in which the defendant was  
4 convicted.

5 The Committee opposes adding an  
6 additional requirement that the offense must also  
7 have been classified as a felony or a comparable  
8 classification under the laws of the jurisdiction  
9 in which the defendant was convicted.

10 It supports retaining the current  
11 definition of a felony because it is clear,  
12 concise, and uniform.

13 The current definition of felony in  
14 the career offender guideline also conforms to  
15 definitions in other guideline sections which is  
16 consistent with efforts to simplify the  
17 guidelines.

18 In 1991, a Sentencing Commission  
19 working group noted that the Commission had  
20 considered a proposal to include only those  
21 felonies so designated by the state.

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1           But then it rejected the proposal due  
2           to concerns that use of state labels could create  
3           disparity among offenders with similar criminal  
4           histories.

5           In 2000, the Seventh Circuit noted  
6           that the current definition "makes considerable  
7           sense" because "by ignoring how crimes in  
8           different jurisdictions are classified and  
9           looking instead to what punishment is authorized  
10          a court can avoid the vagaries of sentencing  
11          defendants on the basis of idiosyncratic or  
12          unusual felony misdemeanor classifications."

13          In cases where the current definition  
14          of felony does not adequately represent the  
15          defendant's criminal history, the Court may, of  
16          course, depart or vary from the criminal history  
17          category of the Guidelines to account for the  
18          circumstances of the individual case.

19          As this Committee has stressed in the  
20          past departures provide the flexibility needed  
21          to assure adequate consideration of circumstances

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1 that the Guidelines cannot adequately capture and  
2 provide judges the ability to exercise  
3 individualized judgment based on the facts.

4 Over the years the Judicial  
5 Conference and the Committee have advocated  
6 criminal history departures to account for the  
7 dangerousness of defendants or to otherwise  
8 address the inadequacy of the criminal history  
9 score based on either degree of risk or type of  
10 risk.

11 If the Commission believes that the  
12 current Guidelines definition of felony does not  
13 adequately represent the defendant's criminal  
14 history in all circumstances the Committee  
15 recommends that the Commission account for these  
16 circumstances not by changing the definition of  
17 felony, but by providing guidance for how and  
18 when departures from the criminal history  
19 category may address these circumstances.

20 Section 2L1.2 sets forth a definition  
21 of crime of violence that contains a somewhat

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1 different list of enumerated offenses and does  
2 not contain a residual clause.

3 It also sets forth the definition of  
4 drug trafficking offense that is somewhat  
5 different from the definition of controlled  
6 substance offense in 4B1.2.

7 The Commission's proposed amendment  
8 would revise the definitions of crime of violence  
9 and drug trafficking offense in Section 2L1.2 to  
10 make them more parallel with the definitions in  
11 4B1.2.

12 Under the proposed amendment the  
13 definitions in 2L1.2 would generally follow the  
14 proposed amended definitions in 4B1.2.

15 The Committee supports revising other  
16 guidelines to conform to the definitions used in  
17 the career offender guideline to reduce  
18 complexity and make the guidelines system more  
19 simple and workable.

20 Turning to retroactivity, finally,  
21 the Commission's public notice of these proposed

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1 amendments also requests comment regarding  
2 whether the proposed amendments should be applied  
3 retroactively to previously-sentenced  
4 defendants.

5 As we all know in recent years the  
6 Federal Judiciary has effectively managed several  
7 rounds of retroactivity stemming from guideline  
8 amendments to the Drug Quantity Table.

9 On each of these occasions the  
10 Committee, on behalf of the Judicial Conference,  
11 expressed support for retroactivity while also  
12 recommending that retroactivity be implemented  
13 in ways that minimize the burdens on the courts  
14 and maximize the effective re-entry of inmates.

15 In supporting retroactivity on these  
16 occasions the Committee was influenced by the  
17 fact that the Commission was able to identify  
18 eligible inmates and supply those names to each  
19 court.

20 The Committee also considered the  
21 relative ease in applying the new guidelines

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1 based on the available record. Probation  
2 Officers working with staff from the Federal  
3 Public Defenders Offices and the U.S. Attorney's  
4 Offices were able to recalculate the guidelines  
5 efficiently and without the need for any  
6 extensive reinvestigation.

7 Based on currently available data we  
8 recognize that it would be difficult to produce  
9 accurate estimates of the number of cases that  
10 would be impacted if these amendments under  
11 consideration are made retroactive.

12 The gauging of the workload impact on  
13 the courts would be an important consideration  
14 for the Committee.

15 Furthermore, regardless of the number  
16 of cases that might be involved we expect that  
17 retroactively applying the proposed amendments  
18 would be considerably more complex than the  
19 recent amendments to the Drug Quantity Table and  
20 would require more effort and resources.

21 Accordingly, the Committee would

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1 prefer to defer any recommendations about  
2 retroactivity until we have additional data from  
3 the Commission and can better assess the  
4 potential impact on the courts.

5 In conclusion, on behalf of the  
6 Criminal Law Committee, I thank the Sentencing  
7 Commission for providing the opportunity for us  
8 to comment on proposed changes to the Sentencing  
9 Guidelines definitions of crime of violence and  
10 related issues.

11 As we have in the past, the members  
12 of the Criminal Law Committee look forward to  
13 working with the Commission to ensure that our  
14 sentencing system avoids unnecessary  
15 complication and is consistent with the central  
16 tenets of the Sentencing Reform Act. Thank you  
17 very much.

18 CHAIR SARIS: Thank you. Judge  
19 Cardone?

20 HON. CARDONE: Well I want to thank  
21 you for giving me the opportunity to be here

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1 today. I also want to thank you for having me  
2 go second because really I hadn't -- I have  
3 nothing more to say.

4 But I am a Judge from the Western  
5 District of Texas. I have a big caseload so I  
6 tend to be a more practical person in looking at  
7 this and so as you saw from my statement I sort  
8 of focused on one area, which was the area of  
9 kidnapping.

10 Everything that Judge Keeley said, I  
11 don't disagree with anything. I like the  
12 changes. I think they help make it more clear,  
13 more uniform when you are applying it, especially  
14 when you have a big caseload and you are jumping  
15 from case to case and you are trying to figure  
16 out okay, is this under the Armed Career Criminal  
17 Act, is it a crime of violence as defined under  
18 the admissibility portion.

19 It becomes -- you are having to apply  
20 law all over the place. As you all well know the  
21 5th Circuit, I have received a number of

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1 decisions just on the issue of kidnapping, so  
2 when I saw the definition of kidnapping that  
3 raised a red flag with me.

4 As I explained to you in my statement  
5 the term "nefarious" I think is a very vague  
6 term. I think it's going to put us right back  
7 where we were under the residual clause with an  
8 attempt to try to define nefarious.

9 As I said in my statement my concern  
10 about nefarious is that I couldn't find it in  
11 Black's Law Dictionary and it's very rarely even  
12 referred to in statutes throughout the country.

13 So I feel that, and I recommended  
14 that, in order for consistency, in order to --  
15 kidnapping is such an amorphous crime anyway as  
16 you go from state to state, so my recommendation  
17 was to the Committee to follow the Model Penal  
18 Code.

19 In my statement I asked what are we  
20 trying to gain here and if we are trying to gain  
21 consistency, if we are trying to look at a way

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1 to encompass all of the states.

2 First of all, I just don't think you  
3 can, under kidnapping in particular, but I think  
4 it would go for all of the definitions.

5 I think the definitions are a huge  
6 help, but particularly when it comes to  
7 kidnapping, I'll give you an example, nefarious,  
8 as I state in my statement, means wicked,  
9 iniquitous, villainous, and despicable.

10 If we talk about things like parental  
11 abduction of children, in some states that's  
12 considered kidnapping and in other states they  
13 have a specific think called parental abduction.

14 To some people that would fall under  
15 the category of despicable or villainous. You  
16 know, I just really don't want to have to try to  
17 make those kinds of decisions, so I focused on  
18 kidnapping because I felt that was an area that  
19 I had a little bit of experience in.

20 I don't have a long statement because  
21 I prepared my written statement and I figured we

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1 had a limited amount of time so I wanted to give  
2 you the guys the opportunity to ask us whatever.

3 But in general as to all the other  
4 portions of it I am in support. I agree with  
5 Judge Keeley on her statements on behalf of the  
6 Committee.

7 I think retroactivity is a concern,  
8 especially when you have a huge caseload, and we  
9 are talking about going back and looking at  
10 definitions of these cases and all of the  
11 different statutes in 50 states and so I really  
12 would echo what she said about the concern about  
13 retroactivity. I am here for any questions.

14 CHAIR SARIS: Great. Do you want to  
15 ask questions?

16 VICE CHAIR BREYER: Well maybe make a  
17 statement. First of all, Judge Cardone, I  
18 appreciated your reference to nefarious. It's a  
19 word that I rather enjoyed using when I was a  
20 District Attorney 40 years ago, but it's a word  
21 that just means very different things to

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1 different people and I think that's an excellent  
2 example, the child abduction cases.

3 And, also, in California, as an  
4 example, kidnapping may be simply moving a person  
5 from one room to another. I think that it's  
6 extremely important and I know that the  
7 Commission is wrestling with this to try to  
8 establish some uniformity.

9 I mean that's really one of the basic  
10 purposes of the Sentencing Guidelines and to the  
11 extent that we can reduce ambiguities we are  
12 completely in favor of that and what you said  
13 today is very, very helpful.

14 Judge Keeley, I thought that that was  
15 also a very helpful presentation with the  
16 Criminal Law Committee.

17 The issue of retroactivity as far as  
18 I am concerned, speaking as one person, depends  
19 in large part on impact and I don't think we are  
20 at a point know where we can make a determination  
21 as to what would be the impact of any changes and

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1 I for one want to take a look at the impact  
2 because I see with the two of you and with 846  
3 of our colleagues dockets that if we decide that  
4 it should have a retroactivity impact it's got  
5 to be with such clarity that judges will find it  
6 relatively straightforward, as they did I think  
7 in the drugs minus two and the crack cocaine  
8 powder disparity, a relatively direct way to  
9 implement changes if that's what we are going to  
10 do.

11 Otherwise, it's a nightmare. Not  
12 only is it a nightmare but it creates a further  
13 disparity, a further disparity among the  
14 treatment of defendants and I think that that's,  
15 we should avoid that if we can.

16 So I found both statements very  
17 helpful, thank you.

18 CHAIR SARIS: I'll jump in then  
19 Commissioner Barkow. So one of the things we  
20 struggle with is if you knocked out the residual  
21 clause do you just leave the enumerated offenses

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1 as they are and let all the circuit precedence  
2 that flowed into construing them before govern  
3 or should we try to come up with a Model Penal  
4 Code, a statutory, some combination of those  
5 approaches to come up with a standard generic  
6 definition.

7 So I'd like that -- You would  
8 certainly want to go with the Model Penal Code,  
9 right, or another possibility would be going with  
10 the statutory definition in the U.S. Code, and I  
11 just, and the Criminal Law Committee didn't weigh  
12 in so much on how you would define them, all the  
13 different crimes.

14 HON. CARDONE: Oh, and let me -- Can  
15 I just clarify before Judge Keeley?

16 CHAIR SARIS: Yes.

17 HON. CARDONE: I looked at all the  
18 definitions of murder and arson and in general I  
19 think that those are well thought out and I don't  
20 say, I'm not a proponent of going to the Model  
21 Penal Code for all of those.

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1 I agree with Judge Keeley that I think  
2 they are very workable under the case law that  
3 we have today. I primarily focused on kidnapping  
4 because I just was, frankly I was taken aback, I  
5 am reading along and I go oh, my God, this is --

6 So the only reason that I focused on  
7 the Model Penal Code as to kidnapping was I find  
8 it to be the most workable because of the kind  
9 of statute that kidnapping is.

10 CHAIR SARIS: Let's say we went with  
11 the Model Penal Code for all predicates.

12 HON. CARDONE: Okay.

13 CHAIR SARIS: What would your life be  
14 like under the immigration law? Would it change  
15 a lot what's happening in the 5th Circuit? In  
16 other words, would you have to redo everything  
17 in terms of what's a predicate or not?

18 HON. CARDONE: I don't think so, but  
19 it does concern me a little bit because of the  
20 so many state statutes out there that are so  
21 varied when you are talking about some of the

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1 other offenses.

2 I like sort of the flexibility of your  
3 definitions because I think it helps to  
4 encompass, I mean I don't want to be varying all  
5 over the place when I look at statutes and what's  
6 happened in different states and I liked the  
7 definitions that you had for most of the other  
8 offenses.

9 CHAIR SARIS: Judge Keeley, what do  
10 you think, well at least from your practice, if  
11 not across the country, if we came up with a  
12 definition whether it's statutory, out of other  
13 parts of the Federal Code, or the Model Penal  
14 Code or the hybrid that actually staff put  
15 together, tried to do the best of the case law  
16 kind of thing, would that be good because it  
17 reduces disparity across the nation or would it  
18 make life very hard for a trial judge to start  
19 all over?

20 HON. KEELEY: Probably no trial judge  
21 thinks starting all over is a good thing in terms

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1 of the vast development of the case law that  
2 we've had over the years under the Guidelines.

3 What we would like to see, what I  
4 personally would like to see is congruency  
5 between, or the harmonization of the statute to  
6 our language and the Guidelines to make things  
7 as simple and as clear as they can be.

8 To the extent that that can occur, as  
9 I had commented in my prepared remarks, then  
10 we're looking at varying and departures under the  
11 Guidelines which are available to us.

12 But I don't think incorporating a  
13 whole new set of ideas for the definitions is  
14 necessarily a best practice here in these  
15 circumstances.

16 CHAIR SARIS: So you would rather  
17 have us just cut out the clause, enumerate the -  
18 -

19 HON. KEELEY: Right.

20 CHAIR SARIS: -- and then the circuit  
21 case law would be where it is?

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1 HON. KEELEY: Right. I think so.

2 COMMISSIONER BARKOW: So I have a  
3 question for each of you, the first one follows  
4 up on the kidnapping, and I was just curious,  
5 Judge Cardone, the Department of Justice  
6 recommended to us that we use the Federal  
7 standards and definitions for things and so I  
8 just was hoping I could read you the kidnapping  
9 one to see if you have a quick take on it, whether  
10 or not it would be better, worse, equivalent, to  
11 the Model Penal Code.

12 HON. CARDONE: Okay.

13 COMMISSIONER BARKOW: So they have  
14 kidnapping means "seizing, confining,  
15 inveigling, decoying, kidnapping, abducting, or  
16 carrying away and holding for ransom or reward  
17 or otherwise any person expect in the case of a  
18 minor by the parent thereof."

19 HON. CARDONE: Well I guess my  
20 concern is that as I stated in my statement I  
21 think that as I go out to analyze there are

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1 certain terms in there and one of them, I don't  
2 have it in front of me, but you said "or  
3 otherwise," I am not exactly sure how "or  
4 otherwise" is going to relate to the different  
5 terms of art, inveigling, decoying, et cetera,  
6 and so I would have a concern there.

7 And I think that when we are talking  
8 about a statewide interpretation we are trying  
9 to encompass as many issues as we can, parental  
10 kidnapping is one, but there is a lot of others.

11 I mean let's take the line between  
12 false imprisonment and kidnapping is so fine, I  
13 mean as Judge Breyer said, you know, moving a  
14 person from one room to another, I just think  
15 that the Model Penal Code for me at least tended  
16 to be very specific and yet gave enough  
17 flexibility to be able to encompass what really  
18 are crimes of violence.

19 I mean one of the things I said here  
20 is what are we trying to do here and we are trying  
21 to focus on crimes of violence and in looking at

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1 all of the different definitions I just kind of  
2 felt that that was one that would encompass most  
3 of the things that I would see.

4 COMMISSIONER BARKOW: That's really  
5 helpful, thank you. And if I could just ask a  
6 question to Judge Keeley which is on this  
7 question of classifying things as a felony for  
8 purposes of state law.

9 We've got another set of comments that  
10 had this idea that we use the same definition of  
11 felons that's in 18 U.S.C. 922(g)(1), the felon  
12 in possession of a firearm.

13 The way that statutory structure is  
14 they talk about a felony but then they say the  
15 crime punishable by imprisonment for a term  
16 exceeding one year just doesn't include any state  
17 offense by the laws of that state that is  
18 classified as a misdemeanor and punishable by a  
19 term of imprisonment of two years or less.

20 So it's kind of, it keeps the one year  
21 or more definition of felony, but just as for

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1 purposes of that definition we're not going to  
2 include anything classified by the state as a  
3 misdemeanor that has a punishment of two years  
4 or less.

5 And I just didn't know if that would  
6 take care of the uniformity problems because we'd  
7 be borrowing from another federal provision and  
8 maybe could even do it across the board if it  
9 worked, I don't know.

10 Or if your concerns are that even  
11 doing that would create that kind of variation  
12 that you are worried about.

13 HON. KEELEY: I think our Committee  
14 is concerned about variation in that regard.  
15 Obviously, this is within the Commission's  
16 discretion, but the theme you heard from me this  
17 morning is simple, concise, and to keep these as  
18 close to federal statutory language as possible,  
19 and that's not always possible, I am aware of  
20 that.

21 But I think there is a disparity

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1 aspect, too, incorporating state definitions and  
2 changing the one year provision. That would be  
3 somewhat problematic and as a District Judge, I  
4 think Judge Cardone would agree with this, trying  
5 to sift through various state laws, not your own,  
6 but those of the defendant and where the  
7 defendant was convicted, can become, or is  
8 challenging and often arduous.

9 So the attraction retaining the one  
10 year definition and not enlarging it to look at  
11 other, or at state definitions, was exactly that,  
12 keeping it as simple and as concise as possible.

13 COMMISSIONER FRIEDRICH: Judge  
14 Keeley, you've emphasized the importance of  
15 making the definitions between ACCA and the  
16 Guidelines, having them conform and the  
17 importance of that, and yet with respect to  
18 burglary --

19 HON. KEELEY: Yes.

20 COMMISSIONER FRIEDRICH: -- you are  
21 supporting the decisions restricted to burglary

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1 of a dwelling.

2 HON. KEELEY: Yes.

3 COMMISSIONER FRIEDRICH: And this is  
4 an issue the Commission struggled with mightily  
5 a few years ago in trying to resolve a circuit  
6 conflict and part of the problem was that --

7 CHAIR SARIS: A Commission conflict,  
8 okay.

9 COMMISSIONER FRIEDRICH: Yes.

10 CHAIR SARIS: We couldn't --

11 COMMISSIONER FRIEDRICH: Right. So  
12 the Supreme Court has interpreted ACCA to include  
13 all burglaries and you in your testimony said  
14 that Congress's considerations may have been  
15 different.

16 So I'm just interested in your thought  
17 process there. This was an issue we struggled  
18 with a lot on the Commission in large part because  
19 of the Supreme Court's interpretation of ACCA.

20 HON. KEELEY: Yes. Well we share  
21 your struggle on the Committee and I realize that

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1 my comments there might not have been as  
2 enlighteningly helpful as you might have wished.

3 But after a lot of discussion we  
4 concluded that burglaries only of dwellings on  
5 the list of enumerated offenses was simple and  
6 clear and that, as I commented, using variances  
7 and departures to take up the questions of the  
8 violence and other circumstances was adequate to  
9 handle the issue and the judges do that every  
10 day.

11 So we were -- that's where we came out  
12 on that.

13 COMMISSIONER PRYOR: I want to follow  
14 up to Commissioner Barkow's question. So the  
15 definition of felony, what she proposed was  
16 basically keeping the same definition of felony  
17 but tying it to, one, that's already in federal  
18 law --

19 HON. KEELEY: Yes.

20 COMMISSIONER PRYOR: -- which as I  
21 understand you said is something you would

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1 support, and the exception for a state  
2 misdemeanor that's punishable by a term of  
3 imprisonment of two years or less is in federal  
4 law.

5 HON. KEELEY: Yes.

6 COMMISSIONER PRYOR: And it would  
7 seem to me that would be a pretty mechanical  
8 thing to apply, not difficult. What is there  
9 about that that you find problematic?

10 HON. KEELEY: I agree it's  
11 applicable. You could apply it, Judge Pryor.  
12 Our Committee's view was more simple, more  
13 straightforward the definition the better for  
14 everyone.

15 I am aware that there are other  
16 definitions. It was our preference to keep it  
17 that way.

18 COMMISSIONER PRYOR: I mean because  
19 it seemed to me that the concern about disparity  
20 that you raised could go both ways.

21 HON. KEELEY: Yes.

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1                   COMMISSIONER PRYOR: Because it could  
2 just as easily be said that when you are including  
3 prior convictions that are, that fall within the  
4 federal definition of felony, you are over-  
5 inclusive when you are bringing in state crimes  
6 that some states classify as a misdemeanor that  
7 are punishable up to two years but in many cases  
8 do not result in terms of imprisonment anywhere  
9 near there.

10                   HON. KEELEY: Yes, I am aware.

11                   CHAIR SARIS: Mr. Wroblewski.

12                   COMMISSIONER WROBLEWSKI: Thank you,  
13 Judge. Judge Cardone, Judge Keeler, thank you  
14 both for your testimony. I read through them  
15 carefully, I found them both very, very helpful.

16                   Judge Cardone, I was intrigued by your  
17 testimony on the discussion of kidnapping and I  
18 went back and I read the three 5th Circuit cases  
19 on kidnapping and as I understand it they were  
20 evaluating kidnapping convictions in Tennessee,  
21 Oklahoma, and California, and they came to a

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1 split decision that one was a crime of violence  
2 and two were not a crime of violence.

3 And then the discussion we were having  
4 here about the definition, it strikes me that as  
5 long as we use the categorical approach that  
6 regardless of how we and the Commission define  
7 kidnapping you are going to continue to have this  
8 kind of haphazard decision making.

9 Some states will include kidnapping  
10 of a minor by a parent, others will not, and so  
11 the exact same conduct that might be committed  
12 in Oklahoma, California, and Tennessee that might  
13 result in precisely the same conviction for  
14 kidnapping will nonetheless be treated very  
15 differently as long as we use the categorical  
16 approach, and that's the concern that we have  
17 about the categorical approach.

18 It's less about the concern about the  
19 definition. I think reasonable minds can differ  
20 about whether it should include this or include  
21 that, but regardless of what we settle on as long

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1 as we use the categorical approach you are going  
2 to have tremendous inconsistency.

3 Number one, do you agree with that,  
4 and then second, for both of you, you both talked  
5 about the need for a fact-finding backup in your  
6 testimony.

7 You said, Judge Cardone, that the  
8 sentencing courts should be able to and can,  
9 using departures, correct for the oddities of the  
10 categorical approach, and, Judge Keeley, you said  
11 that in your testimony and you said it here.

12 Do either of you have any concerns  
13 about the ability of district court judges to  
14 evaluate the facts and whether they are  
15 appropriate, whether it's for a departure or for  
16 application, of these prior convictions?

17 Are there practical concerns about  
18 evaluating them or any kind of legal concerns?  
19 So those are the two questions.

20 HON. CARDONE: Well I definitely have  
21 a concern about evaluating the facts because I

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1 think it goes both ways.

2 As you know when you are in the  
3 courtroom and you have these defendants in front  
4 of you and when you are doing the categorical  
5 approach and you are looking at the crime and  
6 being very sort of what is this crime and does  
7 it fall within this category is very different  
8 than knowing the facts and when you get a PSR you  
9 have all the facts.

10 So if it's very heinous but somehow  
11 the categorical approach doesn't take you --

12 CHAIR SARIS: Nefarious?

13 HON. CARDONE: Very nefarious,  
14 exactly. But somehow the categorical approach  
15 doesn't get you there. You know, as a judge it's  
16 very difficult to sort of wipe out of your mind  
17 the facts, but that's what it calls for.

18 So, yes, of course, I have a concern,  
19 but I think, I don't know what's better than the  
20 categorical approach.

21 I just don't know any other way when

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1       you are talking about 50 states and the variety  
2       of statutes in the 50 states I don't know what  
3       other way we can do, what other thing we can do  
4       to try to make it uniform for every defendant  
5       when we are looking at it other than to say okay,  
6       is this that kind of crime of violence as defined  
7       by the Sentencing Commission and, you know, use  
8       the tools that we have to get there.

9                I just think -- I don't know any other  
10       way to get there, but I do have my concerns. I  
11       just think that we have to take each defendant  
12       as we see them and do the best we can to figure  
13       out if this is the kind of sentence that's going  
14       to deal with that person.

15               HON. KEELEY: So every day of the week  
16       a defendant comes before either Judge Cardone or  
17       me or all of my colleagues here who may have a  
18       criminal history category that looks rather  
19       benign, a one or a two.

20               But you look at what the charges were,  
21       you look at what the plea was, and maybe make a

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1 determination that that criminal history category  
2 under-represents the seriousness of the offenses  
3 and the potential for violence on the part of the  
4 defendant that you are sentencing and you  
5 consider a departure on that ground or you may  
6 look at a group of other factors, including  
7 criminal history, and determine whether a  
8 variance is in order because the criminal history  
9 category may over-represent the seriousness of  
10 the defendant's actual criminal history and  
11 particularly history for violence.

12 Now you asked about the practical  
13 concerns of evaluating the facts. How many of  
14 us has had a case in front of us where you can't  
15 find the criminal history from the state  
16 conviction?

17 You don't know what occurred at the  
18 state level and all you have in front of you is  
19 what the crime was and what the ultimate  
20 conviction was and you are looking at the  
21 categorical approach, the modified categorical

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1 approach, and you have to look at those elements.

2 That's certainly a guidance for us and  
3 it gives us the basis upon which to consider the  
4 case. It's often difficult to find not only the  
5 facts of the conviction, which the categorical  
6 approach would tell us not to look at, but the  
7 convictions themselves.

8 Now this is very interesting. You  
9 can have someone in front of you who should be,  
10 just by virtue of where the, what their  
11 incarceration history has been, a four or five,  
12 somewhere there.

13 But because the probation officer  
14 can't obtain any information from the state  
15 they're a one or maybe a two. This is a serious  
16 issue because you are looking at what's the  
17 possible impact on the community if this person  
18 is sentenced that way.

19 There is so many factors that come in  
20 to play when you are evaluating those facts and  
21 I believe that most sentencing, judges who

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1 sentence believe that simplicity is not  
2 necessarily naïveté.

3 Simplicity gives us very good  
4 guidelines and then we have the flexibility to  
5 confront the case that's in front of us and go  
6 from there with the tools we have for sentencing.

7 That's the point that I am trying to  
8 make here because we don't always get the perfect  
9 box of facts and criminal history. The probation  
10 officers cast wide nets but they often come back  
11 with very few fish.

12 CHAIR SARIS: So I just -- In the 2L  
13 in the immigration area if we switched it to the  
14 ACCA definition of just a burglary rather than  
15 burglary of a dwelling, which is currently in the  
16 Guidelines, in your experience what affect would  
17 that have in the immigration area?

18 HON. CARDONE: I am not sure I -- I  
19 am not exactly sure I understand the question as  
20 it pertains to the, why it would make that big  
21 of a difference or --

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1 CHAIR SARIS: Well could we get a lot  
2 more people -- Do you see a lot of burglaries  
3 that are not burglaries of dwellings where you'd  
4 get a plus 16?

5 HON. CARDONE: No, no. No, I don't.  
6 I see a lot -- If it's anything it's burglary of  
7 dwellings. I don't see a lot of other  
8 burglaries.

9 CHAIR SARIS: That's interesting.

10 COMMISSIONER PRYOR: What if it were  
11 burglary of an occupied dwelling?

12 HON. CARDONE: Of an unoccupied?

13 COMMISSIONER PRYOR: No, occupied.  
14 What if we limited the definition to an occupied  
15 dwelling?

16 HON. CARDONE: Well my understanding  
17 of the reason that it's dwelling is because when  
18 you go into a dwelling you just never know if  
19 it's going to be occupied or not.

20 And so I think it's trying to say what  
21 kind of a person is this that's going into a

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1 dwelling where, you know, you never know, you  
2 might find young children, whatever.

3 So I'm not so sure I take comfort in  
4 the idea that it's an unoccupied versus occupied.

5 COMMISSIONER WROBLEWSKI: How many  
6 of the cases that you've evaluated involving  
7 state burglary statutes, do you recall many or  
8 any that defined burglary with respect to  
9 occupation, whether the dwelling is occupied or  
10 not?

11 And, again, under the categorical  
12 approach it would be required because if it's not  
13 in the statute then it wouldn't count.

14 HON. CARDONE: Honestly, I don't  
15 recall a lot of the states, you know, this is  
16 just off the top of my head, but I don't recall  
17 a lot of states sort of drawing that line between  
18 occupied versus unoccupied.

19 I just don't make that -- I just don't  
20 see a huge difference between the two. I tend  
21 to think it's just defined as a, you know,

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1 dwelling.

2 VICE CHAIR BREYER: In the, in your  
3 District where you have a high number of illegal  
4 entry cases do you have any sense of whether the  
5 criminal history of those individuals reflects  
6 the fact that, one, they may be homeless, two,  
7 that they go into a house or into an area  
8 essentially as a trespass, as a place to stay or  
9 stop and so forth, yet they are charged with a  
10 burglary, do you have a sense of that, is that a  
11 large number or is that really an insignificant  
12 number?

13 HON. CARDONE: It's an insignificant  
14 number. Most of the people, obviously, that we  
15 see, I mean a lot of them are, you know, family  
16 reunification issues where they are trying to get  
17 back to wherever their family is in the United  
18 States or they, you know, are coming here to  
19 work.

20 It's very rare I see somebody who is  
21 homeless.

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1           CHAIR SARIS: One more thing on the  
2 definition of felony. I come from one of the  
3 states where the misdemeanor is punishable by up  
4 to 2-1/2 years, so I hear such strong complaints  
5 from judges who say I got a guy who is convicted  
6 of two misdemeanors, never did any jail time and  
7 suddenly he is a career offender.

8           So we are struggling with what to do  
9 with it, over-inclusive, under-inclusive, that  
10 kind of thing, and I think The Defender says  
11 there were eight such states, so it's not just  
12 limited to my state.

13           But the other issue that we have  
14 struggled with is the fact that states start  
15 reclassifying things from, how does it go, from  
16 felony to misdemeanor and from misdemeanor to  
17 felony, and it goes both ways.

18           And so I guess, I had never heard this  
19 term till I heard Judge Breyer speak, there's  
20 something called a wobbler in California, we call  
21 them birds who sing a certain way, but I guess

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1       there are crimes that are called wobblers in  
2       California.

3                   VICE CHAIR BREYER:       These are  
4       wobblers not warblers or --

5                   (Laughter.)

6                   CHAIR SARIS:    So I suppose that is it  
7       becomes, what, it's a misdemeanor and then it  
8       becomes a felony and --

9                   VICE CHAIR BREYER:   Well you have the  
10       case in California, you have a number of crimes  
11       in California that depending on the sentence  
12       that's given will be either a misdemeanor or a  
13       felony and you have assault cases, you have  
14       certain types of cases that are wobblers, go  
15       either way, then you have questions of how they  
16       are characterized at the time of sentencing and  
17       the time that they are plead.

18                   You also have issues as to what  
19       happens on a revocation and does a revocation or  
20       X then re-characterize the initial offense and  
21       if it does re-characterize the initial offense

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1 what does that mean.

2 What does that mean because after all  
3 the sentencing judge of the original offense said  
4 I think you ought to do 30 days, 60 days, 90  
5 days. Anyway, those are issues that we have.

6 CHAIR SARIS: And the other was we  
7 were at the National Conference, I mean Denise  
8 was with me in Alaska and we were all out there  
9 and we heard about all these states that were  
10 starting to reclassify downwards.

11 In other words, things that used to  
12 be felonies are now becoming misdemeanors. So  
13 as we think about this it's an issue of when do  
14 you make the decision or whether you just stick  
15 with the date of the sentencing and then allow  
16 it as a departure issue.

17 It's simplicity, you don't want to  
18 make it too complicated. On the other hand it  
19 is troubling and I didn't know if you had thoughts  
20 on that.

21 HON. KEELEY: Well, you know, you

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1 just have to go back to experience, what  
2 experience teaches us on the bench and I can only  
3 speak personally here, but becoming an expert on  
4 the law, felony and misdemeanor law of Michigan,  
5 California, North Carolina, the 4th Circuit  
6 jurisprudence of the last five years is, there  
7 is a plethora of discussion about North Carolina  
8 law and the modified categorical approach.

9 This complicates matters so  
10 tremendously and delayed sentencing often times  
11 for quite long periods of time while you are  
12 trying to find out just what is the law, what's  
13 going on, what actually happened, and at the end  
14 you can't because the information is not  
15 available.

16 My experience was shared across the  
17 Committee, this is why we came with the  
18 recommendation that we've made.

19 CHAIR SARIS: Thank you. Does  
20 anybody else have any other questions?

21 I want to thank you very much for

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1 coming in, difficult question, and we always want  
2 to hear from the Courts. Thank you.

3 HON. CARDONE: Thank you for inviting  
4 us.

5 HON. KEELEY: Thank you for inviting  
6 us.

7 CHAIR SARIS: All by yourself up  
8 here.

9 VICE CHAIR BREYER: Wow, that's  
10 brave.

11 MR. ZAUZMER: Intimidating, Your  
12 Honor.

13 CHAIR SARIS: You're all set?

14 MR. ZAUZMER: All set, Your Honor.

15 CHAIR SARIS: All right, well  
16 welcome. Next we'll hear from the Executive  
17 Branch and the witness is Robert Zauzmer who has  
18 become a regular testifier before the Commission  
19 on behalf of the Department of Justice.

20 He is the Appellate Chief in the  
21 United States Attorney's Office for the Eastern

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1 District of Pennsylvania. So welcome back. I  
2 want to -- We have about 30 minutes, and not for  
3 your statement, for the whole thing.

4 So I think at this point, do we have  
5 the little lights go off? Yes, okay, there we  
6 go. Thank you.

7 MR. ZAUZMER: Thank you very much,  
8 Your Honor. Members of the Commission, it's an  
9 honor, of course, to appear again before you and  
10 I appreciate the opportunity speak on behalf of  
11 the Department regarding this very important  
12 issue.

13 My initial statement, please cut me  
14 off when you are ready to ask questions, it may  
15 be a bit longer than five minutes, but I am an  
16 appellate advocate, I'll work in the answers and  
17 what I want to say at some point, but we have  
18 some important points to address.

19 Obviously what we are all here for is  
20 very clear, which is we want to target the  
21 appropriate people, the people who are the

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1 violent recidivists, but we don't want to over  
2 target and we want to make sure that these very  
3 significant penalties are reserved for the people  
4 who do tend to be recidivists and do tend to be  
5 violent recidivists.

6 And we want to make sure that the  
7 definitions are clear enough and applicable  
8 enough so that they can readily be applied across  
9 the country based on the statutes of all 50 states  
10 and make the work doable by all the judges and  
11 prosecutors and defense attorneys and probation  
12 officers.

13 The current system has not worked well  
14 and what I would mainly like to talk about this  
15 morning, and I am really happy to have the  
16 opportunity to do it, is the categorical  
17 approach.

18 The root of the problems in our view  
19 is not so much the definitions, but the  
20 application of this very inflexible, very odd  
21 approach, that is not good sentencing policy.

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1           With respect to the many questions the  
2 Commission has asked we have set forth our  
3 positions in our letter. We support the idea of  
4 eliminating the residual clause and making the  
5 Guidelines consistent with what the Supreme Court  
6 has determined with respect to ACCA.

7           We agree with the suggestion of  
8 defining enumerated offenses so that we have more  
9 uniformity across the country in what this  
10 Commission believes should be the predicate  
11 crimes of violence.

12           For similar reasons we agree that all  
13 definitions in the Guidelines should be  
14 consistent for ease of application, between 2L  
15 and 4B and the other places the crime of violence  
16 definitions appear in the Guidelines.

17           We do not agree with the suggestion  
18 regarding the definition of a felony to look to  
19 the State's designation because that, and I can  
20 explain more if you have questions about it,  
21 that's an invitation to disparity where similarly

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1       situated people who committed the same crimes  
2       would be treated differently.

3               But most importantly, like I said, I  
4       want to talk about the categorical approach  
5       because that's what creates such inconsistent and  
6       even bizarre results.

7               We can spend all the time in the world  
8       coming up with the best definition of what a  
9       crime of violence is and we will still have these  
10      very strange results once we go out and try to  
11      apply it to the different laws in all 50 states.

12              Judge Cardone, for example, spoke  
13      very eloquently and has written eloquently about  
14      the kidnapping problem. Well there are very  
15      brilliant minds on this Commission and on the  
16      staff of this Commission who can come up with the  
17      right definition of kidnapping.

18              But when we go then -- If we are  
19      limited to the categorical approach we are going  
20      to have a different result in Tennessee and  
21      Oklahoma and California and an untold number of

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1 other states because their statutes will not  
2 match up to that perfect definition we came up  
3 with.

4 It will be over-broad, it will be  
5 under-inclusive, it will be wrong, and that's the  
6 reason that we keep coming up with these odd  
7 outcomes.

8 In our letter we cite the example of  
9 robbery in my home state of Pennsylvania. As  
10 common a crime as we see in the records of violent  
11 recidivists, and this happens regularly, even  
12 weekly, where people come to me with cases in  
13 which we have committed armed serial robbers who  
14 have repeatedly been convicted of robbery under  
15 Pennsylvania law and in many instances it's now  
16 the case where it's determined they are not  
17 career offenders and they are not violent  
18 criminals under ACCA.

19 Why is that? It's simply because  
20 Pennsylvania has a robbery statute that has six  
21 subsections of which only a couple clearly apply

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1 to what you would call robbery.

2 But because of the practice of state  
3 District Attorneys in just listing every  
4 subsection and the practice of clerks in not  
5 specifying any further in the judgment what was  
6 the nature of the conviction, we have to concede  
7 in court that people who we know beyond any doubt  
8 are violent criminals are not simply because of  
9 the categorical approach and the various rules  
10 that apply to it.

11 This is wrong as a matter of  
12 sentencing policy. It was foisted on us because  
13 of ACCA and the Supreme Court's interpretation  
14 of ACCA.

15 But the Supreme Court was acting in a  
16 very different context with focusing on statutory  
17 and mandatory, maximum sentences, and it  
18 explained that one of the reasons it did this was  
19 because of the constitutional concerns that would  
20 apply that no longer apply to the advisory  
21 guidelines.

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1           Importantly, this Commission itself  
2           never expressly adopted the categorical approach.  
3           If you go back, and I know you have, and you look  
4           at the original Commission's work in 1987 and  
5           1988 it spoke of the conduct charged in the  
6           previous offense and that language is still there  
7           in the commentary to 4B1.2.

8           But after the Supreme Court decided  
9           in Taylor in 1990 the courts pretty much in  
10          lockstep decided we're going to apply the same  
11          categorical approach to the guidelines that apply  
12          to ACCA, this Commission never acted differently,  
13          and what we are left time after time is having  
14          to say that somebody who we know committed a  
15          violent crime did not.

16          What I am talking about are not  
17          isolated examples, this is something that happens  
18          consistently in state after state based on the  
19          vagaries of how the laws are created and the  
20          vagaries of what records are kept and how  
21          specific those records are.

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1           Judge Cardone moments ago asked, you  
2 know, what's the better way? We think there is  
3 a better way. The better way is let judges do  
4 what judges always do, which is evaluate the  
5 facts.

6           When we look at any other part of  
7 application of the Guideline manual we don't  
8 limit judges in these very odd specific ways to  
9 look at the particular elements of statutes.

10           We don't say, for example, in the loss  
11 calculation you should only use some verified,  
12 certified financial statement and if it's not  
13 there you can't find the loss number.

14           We let judges do what they do, which  
15 is consider all relevant evidence and make  
16 factual findings.

17           VICE CHAIR BREYER: Can I ask a  
18 question?

19           MR. ZAUZMER: Yes, sir.

20           VICE CHAIR BREYER: Because you used  
21 two different terms there, one is look at the

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1 facts and look at the elements and it's,  
2 obviously judges all the time look at the  
3 elements, I mean that's a legal issue and that's  
4 easy.

5 Looking at the facts can be easy, or  
6 not, depending on what facts a judge can look at.  
7 Are you suggesting that really we should go  
8 beyond what the charging documents are, and we're  
9 now looking at a crime that didn't occur in front  
10 of us, right?

11 MR. ZAUZMER: Right.

12 VICE CHAIR BREYER: We're now looking  
13 at something in the history and I thought that  
14 we are confined or constrained as to what  
15 documents we can look at.

16 An example would be we couldn't look  
17 at a police report or we have difficulty with  
18 police reports. Are you suggesting -- And in  
19 the police report will probably be at least one  
20 person's version of what the facts are.

21 So how do we do that? How do we just

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1 look at those facts --

2 MR. ZAUZMER: Well let me --

3 VICE CHAIR BREYER: -- if you can't  
4 look at a police report?

5 MR. ZAUZMER: Sure, if I may explain.  
6 First of all, we're not suggesting eliminating  
7 the categorical approach entirely. There is a  
8 place for it in those instances where the  
9 elements of a state offense happen to line up  
10 with the definitions that you define and that can  
11 be the end of the matter.

12 So it will not be a tremendous number  
13 of cases in which what we have called the conduct-  
14 based backup would come up. When it does what  
15 we are proposing, Your Honor, is that the  
16 evidence should be any reliable evidence.

17 The same that is considered, not just  
18 the police report, which probably wouldn't be  
19 sufficient to meet the government's burden, but  
20 whether there are witnesses or other things the  
21 government could produce, the government would

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1 have the burden by a preponderance of the  
2 evidence.

3 The reason -- When Your Honor says the  
4 premise that you have stated is we are limited  
5 in what we can look at it. The reason we are  
6 limited now is because of the Shepard decision.

7 But the Shepard decision, again, is  
8 based on ACCA and when we read Shepard we see  
9 that the reason the Supreme Court limited Courts  
10 to specific documents, specific judicial records,  
11 is because it worried that going further than  
12 that would offend Apprendi, but if we went  
13 further --

14 COMMISSIONER PRYOR: Well let's talk  
15 about that.

16 MR. ZAUZMER: Sure.

17 COMMISSIONER PRYOR: Okay. Because  
18 the Department's position for years, and one with  
19 which I have a lot of sympathy, is that we need  
20 to be simplifying the Guidelines, that we need  
21 to be moving toward a different model than this

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1 530-page monstrosity, okay.

2 I don't see how we do that with your  
3 approach. It seems to me that if we're going to  
4 simplify the Guidelines, if we're going to move  
5 toward a different model, we need to be concerned  
6 about the Apprendi implications of these prior  
7 conviction enhancements.

8 MR. ZAUZMER: Well, Your Honor, we  
9 believe we do have to simplify the Guidelines and  
10 the place for simplification with respect to  
11 crime of violence is in these definitions of  
12 enumerated offenses.

13 COMMISSIONER PRYOR: Aren't we going  
14 to have to say though with respect to all prior  
15 convictions that we have to be compliant with  
16 Apprendi?

17 MR. ZAUZMER: We don't, nor do we do  
18 that in any other aspect of the Guidelines. We  
19 --

20 COMMISSIONER PRYOR: You're talking  
21 about doing this by a preponderance of the

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1 evidence and you are talking about doing it with  
2 a fact-based inquiry, that's not going to be  
3 Apprendi compliant.

4 MR. ZAUZMER: It's not, but, again,  
5 Your Honor, nothing in the Guideline application  
6 currently is. Currently judges --

7 COMMISSIONER PRYOR: Current, yes, I  
8 know, I'm talking about something for the future.

9 COMMISSIONER FRIEDRICH: A  
10 presumptive system, for those of who are  
11 interested in that, would your proposal not run  
12 --

13 COMMISSIONER PRYOR: But the  
14 Department, that's what the Department was  
15 interested in.

16 MR. ZAUZMER: The Department has  
17 looked at number of things. I don't believe the  
18 Department has ever taken the position that  
19 Apprendi should apply to the Sentencing  
20 Guidelines.

21 In fact, that was the opposite of our

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1 position in the Booker litigation. Our position  
2 since Booker was decided, which has been affirmed  
3 by every Appellate Court, is that Guideline facts  
4 are found by a preponderance of the evidence  
5 based on reliable evidence that's submitted at  
6 sentencing.

7 Our view is still that that should be  
8 the correct approach at sentencing. But  
9 Apprendi, we abide by Booker, Apprendi does not  
10 apply to the Sentencing Guidelines so long as  
11 they are advisory and the court has the ability  
12 to vary within the statutory maximum sentence.

13 So what we are proposing with respect  
14 to crime of violence is the same, and the  
15 categorical approach, is the same as what courts  
16 are doing every single day with regard to every  
17 single other issue in this book.

18 COMMISSIONER BARKOW: Except for  
19 mandatory minimums. Can I just ask you a  
20 question?

21 MR. ZAUZMER: Sure.

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1                   COMMISSIONER BARKOW:    So you said we  
2                   should let judges do what they do, this is their  
3                   freedom to do it, they are very good at it, but  
4                   it seems inconsistent with the Department's  
5                   position that we need mandatory minimums in some  
6                   cases because that obviously constrains the  
7                   ability of judges.

8                   I see it as kind of the flipside of  
9                   this and so I am just a little curious why the  
10                  Department has one view with respect with man  
11                  mins and another with this one?

12                  MR. ZAUZMER:    Again, Commissioner, I  
13                  don't know that we do.    The mandatory minimums  
14                  come up in a narrow set of areas.    They exist and  
15                  they are important but they don't govern any more  
16                  than a fraction of sentencings that happen, and  
17                  that's a matter of course for Congress.

18                  COMMISSIONER BARKOW:    But you said  
19                  this would be a fraction, too, because you said  
20                  in most cases we'd be able to use the categorical  
21                  approach and it would just be the smaller subset

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1 that we do your conduct based.

2 MR. ZAUZMER: Right.

3 COMMISSIONER BARKOW: So, you know, I  
4 don't know we'd have to look at data to see how  
5 many, but it just seems as a theoretical matter  
6 there is a, we use categories of things in  
7 different places.

8 You know, when it's used in mandatory  
9 minimum context we know that's it's going to be  
10 over-broad but the Department has kind of weighed  
11 the pluses and minuses and come out and said  
12 look, we still want them.

13 And here, again, the categorical  
14 rule, it has its problems, it has its benefits,  
15 pluses and minuses, and I guess the logic of just  
16 let judges do what they do I have a little bit  
17 of a problem with the Department saying that when  
18 it does seem inconsistent with the way the  
19 Department views the mandatory minimum landscape  
20 where however many cases it's used the Department  
21 is still very much in favor of having them.

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1           MR. ZAUZMER: Well, Your Honor, there  
2           are very few areas, but they are important, where  
3           there are mandatory minimums. They come in the  
4           drug area based on quantity, 924(c), child  
5           pornography, those are the prominent ones.

6           The Department has stated that it, and  
7           they are an issue for Congress, of course, and  
8           what the Department has stated under this  
9           Administration in recent years is that we want  
10          to work with Congress to make sure that those  
11          mandatories are applied correctly and only in the  
12          areas in which they serve important purposes.

13          We have stated our position that we  
14          are willing to, we want to talk to Congress about  
15          lowering some of the mandatories where that may  
16          be appropriate, that's an issue for Congress.

17          In general though our view absolutely  
18          is not, and I hope I am not misunderstood on  
19          this, our view is not mandatory sentencing, that  
20          we want some code that lists a mandatory sentence  
21          for every offense and take away judicial

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1 discretion, that absolutely is not our position  
2 when you look at the broad landscape of federal  
3 sentencing.

4 COMMISSIONER BARKOW: Can I ask you  
5 one other question though. I guess I was, you  
6 know, it is worrying to hear Judge Keeley  
7 describe that you can't even get the state  
8 records that you need to do this, right, and it  
9 does seem like a big part of this is just that  
10 the records aren't there and I'm just --

11 Has the Department made any efforts  
12 to try to get Congress to redress that particular  
13 issue, you know, maybe with the way we use  
14 congressional grants or state funding as a  
15 condition of that that states do a better job  
16 with their recordkeeping?

17 Because it does seem to me no matter  
18 what we do, whatever rule we have, if we can't  
19 get information from the states about even the  
20 offenses of conviction the idea that we could go  
21 even further and get these facts, right, it's

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1 just going to lead us down that same path.

2 And so I am just -- In the bigger  
3 picture is the Department doing anything to try  
4 to improve that kind of record gathering?

5 MR. ZAUZMER: I personally don't know  
6 the answer to that. I think that's an  
7 outstanding idea and it's something I will  
8 definitely take back because I think it's a great  
9 idea.

10 Though realize that in looking at the  
11 near future, the next five, ten, 15 years, we are  
12 still dealing with the ramifications of what came  
13 before.

14 Where I have the problems every day  
15 is I have defendants who started their criminal  
16 career in 1990 and I am looking at records from  
17 that date forward and when I am getting beyond  
18 ten, 15, 20 years, the burden is on the government  
19 and it's the government that then fails to be  
20 able to prove what those convictions were because  
21 the recordkeeping is so poor.

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1                   VICE CHAIR BREYER: I'd like to go  
2 back if I can to Judge Pryor's observation  
3 because it does, I am not quite sure I clearly -  
4 - I understand your position.

5                   You say look, let the judges look at  
6 the facts, this is what they do all the time.  
7 And, again, I come back to -- In those cases  
8 where it's not clear from the Shepard documents  
9 that we can ascertain the facts what do you want  
10 us to do?

11                   Is it your position well, look, we can  
12 look beyond it because we can look at police  
13 reports, we can look at statements that are made  
14 outside of court and so forth. Do you think we  
15 can for this approach?

16                   MR. ZAUZMER: Yes, and I also think  
17 we could call witnesses. I think what we are  
18 asking is that the government be given the  
19 opportunity to prove by a preponderance of the  
20 evidence that someone committed a violent  
21 offense.

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1           CHAIR SARIS: But, you know, that's  
2 where -- If I can just jump in. It is different  
3 from what we do every day in a sentencing. I  
4 have been sentencing for 20 years.

5           When you make facts on how much drug  
6 quantity is or whether or not the financial fraud  
7 involved X, those are hard enough, but they are  
8 at least the instant offense that's in front of  
9 you I find it --

10           You know, I've been doing this for  
11 years and you go back to a domestic abuse  
12 situation and he said/she said and you're trying  
13 to untangle exactly what happened and then the  
14 probation office is flipping out because they  
15 can't find the records, it is different.

16           I mean it's hard to capture the full  
17 case without actually taking testimony or at  
18 least having major proffers from the police  
19 officers themselves rather than just a police  
20 report, it would expand.

21           MR. ZAUZMER: There would be cases in

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1       which it would expand it, but, Your Honor, what  
2       I see are cases that are not difficult and those  
3       are the cases in which the government would elect  
4       to try to show its burden.

5                What I see are the cases in which  
6       people are doing shootings and gunpoint robberies  
7       and assaults in which it is readily obvious from  
8       all of the records and all of the known facts.

9                So if I could just say one thing.  
10       There is no question that this would be a new  
11       area and new work, but what we are balancing here  
12       is we are balancing this against the unfairness  
13       that comes when similarly situated people are  
14       treated differently.

15               When that person who unquestionably  
16       committed a kidnapping in Tennessee gets a  
17       totally different sentence.

18               COMMISSIONER PRYOR:  Yes, but they're  
19       -- But with the paucity of evidence that's going  
20       to exist in lots of cases then you are going to  
21       have the same, you're going to have disparity.

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1           You're going to have cases where there  
2           were offenders who were in that position but you  
3           just can't prove it, too.

4           MR. ZAUZMER:   Absolutely, but we want  
5           the opportunity because we know --

6           COMMISSIONER PRYOR:   But there is  
7           disparity either way.

8           MR.    ZAUZMER:           Well there is  
9           disparity, Your Honor, I think with all respect  
10          in the enforcement of criminal law in what we can  
11          prove and what we can't prove and this would be  
12          another example of that.

13          But we want the opportunity because  
14          we have seen so many cases, and, again, this is  
15          not anecdotal, this is something that's happening  
16          in every district where because of the  
17          categorical approach, and it's happening even  
18          more now in the wake of Johnson.

19          I am working now on a petition where  
20          now we don't have the residual clause we  
21          basically only have the elements clause for ACCA,

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1 so now someone has presented to me a very strong  
2 argument that third-degree murder under  
3 Pennsylvania law, which is basically any murder  
4 other than premeditated, is not a crime of  
5 violence because of how Pennsylvania has  
6 interpreted it and how courts have interpreted  
7 the elements clause.

8 When we see an argument like that, one  
9 that I can't commit right now, but that the  
10 government may have to concede, that's where we  
11 know this enterprise has gone off the rails and  
12 so we are balancing one problem against another.

13 COMMISSIONER FRIEDRICH: In the  
14 District Court Judge Keeley suggested that right  
15 now District Court judges in say the robbery  
16 cases that you talked about in Pennsylvania where  
17 you can prove these were armed robberies and yet  
18 they didn't qualify, is the government getting  
19 those documents and making arguments like you are  
20 talking about for purposes of departures or  
21 variances, is that happening now?

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1                   MR. ZAUZMER:    It happens but I can  
2                   tell you that it's very inconsistent as to when  
3                   judges will depart or not.  Most judges, in my  
4                   District I can speak of and I know in many others,  
5                   do not give upward departures or variances and  
6                   certainly nothing approaching the Career Offender  
7                   Guideline that would apply, so when we talk about  
8                   disparity there is enormous disparity in how that  
9                   plays out.

10                   We don't secure upward variances that  
11                   often on those grounds.

12                   COMMISSIONER FRIEDRICH:  Back to the  
13                   Apprendi point, would you agree that for those  
14                   of who would support a simplified and presumptive  
15                   system that your approach would run afoul  
16                   Apprendi if the guidelines were no longer  
17                   advisory?

18                   MR. ZAUZMER:  Oh, certainly.  If the  
19                   guidelines were not advisory it would run afoul  
20                   of that and so would every other application.  
21                   You know, we would have jury findings regarding

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1 everything in the Guidelines if Apprendi applied  
2 given the --

3 COMMISSIONER PRYOR: Not prior  
4 convictions you wouldn't.

5 MR. ZAUZMER: Not prior convictions,  
6 that's --

7 COMMISSIONER PRYOR: As long as you  
8 were compliant with --

9 MR. ZAUZMER: That's true. No, the -  
10 -

11 COMMISSIONER PRYOR: -- the  
12 categorical approach, right?

13 MR. ZAUZMER: Absolutely. And what I  
14 am suggesting is --

15 COMMISSIONER PRYOR: Which is what we  
16 are here talking about.

17 MR. ZAUZMER: Right. I am suggesting  
18 that if Apprendi applied to the Guidelines we'd  
19 have much bigger problems than what we are  
20 talking about today.

21 If the first majority opinion of

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1 Booker controlled --

2 COMMISSIONER PRYOR: That's what  
3 we're talking about, a very different manual.

4 MR. ZAUZMER: No, I understand, sir.  
5 Now one question that did come up is regarding  
6 the elements clause. My friends from the  
7 defenders I know have suggested that the elements  
8 clause takes care of this and we don't even need  
9 any enumerated offenses.

10 And I would invite you to look at the  
11 litigation that is happening around the country  
12 right now after Johnson in which defense lawyers,  
13 as they should, are now attacking all sorts of  
14 crimes that are indisputably violent crimes but  
15 saying that they don't satisfy the elements  
16 clause.

17 The most prominent one that the  
18 defenders are briefing I can tell you in every  
19 District is Hobbs Act robbery.

20 Hobbs Act robbery, the most commonly  
21 charged federal robbery offense, it's being

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1 argued is not a crime of violence under ACCA  
2 because it can be committed through a threat  
3 against property as well as a threat against the  
4 person and then you use the categorical approach,  
5 you go back and look at the charging documents  
6 and the judgment and you don't see that any  
7 distinction was made, if it's even a divisible  
8 statute to begin with.

9 COMMISSIONER PRYOR: Well that's a  
10 problem for Congress not for us.

11 MR. ZAUZMER: No, correct, but should  
12 this body adopt only an elements approach --

13 CHAIR SARIS: Can you just -- The  
14 Hobbs Act robbery is a federal offense?

15 MR. ZAUZMER: It is, it is. So if  
16 you have a defendant with a prior Hobbs Act --

17 CHAIR SARIS: A federal offense?

18 MR. ZAUZMER: Correct.

19 CHAIR SARIS: Well couldn't you get  
20 the modified Shepard documents to figure that  
21 out? In other words you're not, you don't have

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1 to plea colloquy the, generally, right, the  
2 prosecutor states all, everything, and then you  
3 say to the defendant is this true and the person  
4 says yes then you consider that, right?

5 VICE CHAIR BREYER: It isn't the real  
6 problem, not that, isn't the real problem, the  
7 state offense is, because the state offenses, and  
8 I will, well from my experience and I'm sure my  
9 colleagues would agree, I get the police reports  
10 in 20 percent of the cases.

11 I mean 80 percent of the cases you --  
12 Now we can't describe the, it says in the  
13 presentence report we can't describe the offense  
14 because we don't have a police report or we don't  
15 have enough information about it.

16 Now that's the majority of cases that  
17 we look at in terms of what happened, what  
18 happened. So if you don't have the categorical  
19 approach what are you left with?

20 And as I understand your solution to  
21 that is I'll tell you what we're left with, we're

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1 left with a hearing and at the hearing the United  
2 States Attorney has the option of trying to  
3 produce evidence which would satisfy the court.  
4 Maybe that's the answer.

5 MR. ZAUZMER: Well the other part of  
6 the answer is we still do have the categorical  
7 approach. As I said there are many offenses in  
8 which the elements will match up to the  
9 definitions that you adopt and we think it's a  
10 very good idea for this Commission just for that  
11 reason to define these enumerated offenses as you  
12 have endeavored so far and informed by all the  
13 comment that you are getting.

14 So we are not eliminating the  
15 categorical approach, but we want the option of  
16 a hearing for these cases that really result in  
17 inconsistent results.

18 CHAIR SARIS: Yes, yesterday, I'm not  
19 up on it, I'm sure you are far more up on it than  
20 I am, the Supreme Court argument on the word "as  
21 described in."

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1 MR. ZAUZMER: Yes.

2 CHAIR SARIS: I don't pretend to be  
3 an expert on it. So you had a very interesting  
4 suggestion, which is don't make up a new  
5 definition, just use the existing federal  
6 statutes and eliminate the interstate commerce  
7 nexus requirement "as described in."

8 Should we be waiting on doing that  
9 till we hear from the Supreme Court on what they  
10 think about that language?

11 MR. ZAUZMER: I don't think so. I  
12 don't have the exact words in front of me, but  
13 in preparing our suggestion and our submission  
14 we had that case in mind and we drafted the phrase  
15 in a manner that we believe satisfies any concern  
16 about that.

17 And now we are only suggesting federal  
18 definitions for consistency where they exist.  
19 There are still about half of the enumerated  
20 offenses that the Commission has proposed, that  
21 we have proposed, where there isn't a comparable

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1 federal definition and you would need your own  
2 definition.

3 But where we are using the federal  
4 definition we propose language and, of course,  
5 I'm sure you can improve it, that would just make  
6 clear this is the definition, we are not using  
7 the federal jurisdictional hooks, we're not using  
8 the other things that might appear in the  
9 statute.

10 CHAIR SARIS: So what if we adopted  
11 the federal statute for the, and then with the  
12 ones that don't have a federal statute just leave  
13 the existing case law where it is?

14 MR. ZAUZMER: You could certainly do  
15 that but I think that there are ways to improve  
16 on the case law and there are circuit conflicts  
17 out there that haven't been addressed regarding  
18 what the "generic" meaning of this Commission's  
19 enumerated offenses were.

20 CHAIR SARIS: And so those are the  
21 ones you would say fix?

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1           MR. ZAUZMER: Well I think if we are  
2 doing this once and for all to do it. I  
3 understand, I heard Your Honor's, you know,  
4 thoughtful question before to the previous panel  
5 about well if the judges have done all this work  
6 why don't we keep that.

7           But I think if we take the long view  
8 of sentencing, not just in the next couple of  
9 years, but for the next ten, 20 years and beyond,  
10 it's a helpful exercise to do this and do this  
11 right and not so much rely on the existing case  
12 law that we have where we know there are  
13 conflicts, we know there is uncertainty, we know  
14 there is some disparate results.

15           COMMISSIONER BARKOW: Can I ask you,  
16 with the using of the, I mean I wasn't -- In just  
17 trying to figure out which if you were going to  
18 have a uniform set of definitions trying to think  
19 about, you know, Model Penal Code versus federal  
20 versus something we make up on our own, what's  
21 the thinking behind using the federal definitions

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1 for things?

2 Because my initial reaction was the  
3 states don't really use the Federal Code as a  
4 model for anything. They are way more likely to  
5 have turned to the Model Penal Code.

6 And so we were just kind of  
7 anticipating where we are more likely to get  
8 overlap. I would have predicted it would have  
9 been the Model Penal Code, but I mean you must  
10 have a reason that you think the federal one  
11 would be the better uniform standard and I just  
12 kind of wanted to hear a little bit more about  
13 why.

14 MR. ZAUZMER: Sure. Well we  
15 suggested the federal definitions because they  
16 have been approved by Congress and because they  
17 have been litigated, there is case law regarding  
18 those areas as opposed to coming up with new  
19 definitions.

20 When we then go to the next step and  
21 say let's compare it to the all of the state

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1 statutes that are out there, that as opposed to  
2 the Model Penal Code, as opposed to other  
3 treatises, really there is no overlap at all  
4 among any of them. The statutes out there are  
5 just so different.

6 You know, Judge Breyer mentioned  
7 kidnapping of moving somebody from one room to  
8 another, that's what we are dealing with here,  
9 where you could take any single one of these  
10 crimes and then wade out into the state statutes  
11 and we just don't find any consistency.

12 So we think it's important to get the  
13 definitions right and I hope I am not heard to  
14 say that if the categorical approach stays around  
15 well who cares about the definitions.

16 We have to get the definitions right  
17 and then do the best we can in applying it. But  
18 we're going to be frustrated if we have these  
19 excellent new definitions that the Commission  
20 adopts and we then have to apply it categorically  
21 to state statutes.

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1                   COMMISSIONER BARKOW: Can I ask you  
2 one other question? On the communication of  
3 threats proposal that you had why, what's the  
4 Department's thinking including threats to injure  
5 somebody's reputation as a crime of violence?

6                   MR. ZAUZMER: Well the predicate that  
7 we have in that definition is that it has to be  
8 you are threatening violence in order to threaten  
9 reputation, so there always -- Violence has to  
10 be involved in all that.

11                   COMMISSIONER BARKOW: Okay. So you  
12 would read that's how this is interpreted?

13                   MR. ZAUZMER: Correct.

14                   COMMISSIONER BARKOW: It's always a  
15 threat of violence to --

16                   VICE CHAIR BREYER: So extortion has  
17 to be limited.

18                   COMMISSIONER BARKOW: Yes.

19                   VICE CHAIR BREYER: Because in  
20 California the definition of extortion, and I am  
21 sure as in other states as well, is the threat

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1 to take, you want to take property in exchange  
2 for not exposing a secret that would cause some,  
3 you know, discomfort to the victim.

4 COMMISSIONER BARKOW: Right.

5 MR. ZAUZMER: Right. Threatening  
6 reputation should not be a crime of violence if  
7 I say I am going to give some unpleasant fact  
8 about somebody.

9 VICE CHAIR BREYER: Right.

10 MR. ZAUZMER: Extortion though, yes.

11 VICE CHAIR BREYER: Otherwise you are  
12 outlawing all politics.

13 MR. ZAUZMER: Right, yes, and court  
14 argument, too, perhaps.

15 COMMISSIONER BARKOW: And that's  
16 clear from this? Because I didn't read this this  
17 way. This wasn't a, it's not an intuitive  
18 reading to say any threat of use of violence to  
19 threaten, like so you are threatening to  
20 threaten.

21 MR. ZAUZMER: Sorry, it probably

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1       could be worded better but I want to make clear  
2       that we think a threat of violence has to be  
3       involved.

4                   COMMISSIONER BARKOW:   Okay.

5                   MR. ZAUZMER:   But extortion, another  
6       great example of the inconsistency in state  
7       statutes that makes this such a frustrating  
8       exercise no matter what definition you have,  
9       starting with the federal definition, you know,  
10      which we limit in our proposal because it expands  
11      beyond violent conduct to other things.

12                  CHAIR SARIS:   And just going back to  
13      this whole issue of trying to get the most  
14      dangerous of the dangerous, and I think everyone  
15      would agree with that one, you know, making sure  
16      that career offenders get the appropriate  
17      punishment.

18                  But the question that I have is in  
19      these states you said you were against  
20      reclassifying felonies, so take the eight states  
21      where misdemeanors go very high and you've got

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1 two people who were, you know, if somebody is  
2 convicted of two predicates of misdemeanors, no  
3 jail time, maybe a barroom brawl or that kind of  
4 thing, and then suddenly they are career  
5 offenders, I'm trying to figure out how you would  
6 handle that.

7 In fact, in our District many of the  
8 prosecutors request a variance or a downward  
9 departure because it's so disproportionate and I  
10 notice in the immigration area they have a  
11 sentence imposed requirements so that you  
12 actually have to have gone to jail for a certain  
13 period of time.

14 How would you deal with it, to go back  
15 to Commissioner Wroblewski's comment, we really  
16 want to make sure that the truly violent people  
17 are the ones who get this?

18 MR. ZAUZMER: Well a variance is the  
19 right way to do it but I can tell you that in  
20 Pennsylvania where I live it's another one of  
21 those states and what Pennsylvania classifies as

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1 a misdemeanor are actually serious offenses and  
2 serious controlled substance offenses, and that's  
3 the problem with looking to state definitions.

4 So what happens is, for example, a  
5 controlled substance offense in Pennsylvania can  
6 be up to a five year mandatory, misdemeanors, not  
7 mandatory, misdemeanor, goes up to five years in  
8 Pennsylvania.

9 And so you can have somebody selling  
10 drugs in Scranton, Pennsylvania, and a few miles  
11 away in Binghamton, New York, it's a felony by  
12 any definition.

13 So the state in deciding to call  
14 something a misdemeanor they weren't thinking  
15 about our crime of violence definition here, they  
16 were just thinking about classifying for whatever  
17 reasons they had, but it will result in disparate  
18 treatment. We favor the current  
19 approach because it's consistent. Was the crime  
20 punishable by more than a year? That's a  
21 definition of seriousness that works from state

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1 to state so that you won't have somebody in one  
2 state say I did the same thing as him but that  
3 his state calls it a felony and mine doesn't.

4 CHAIR SARIS: But if we went back to  
5 the statutory definition in 922 -- (g)(1),  
6 whatever it is.

7 VICE CHAIR BREYER: Right, 2-year  
8 cap.

9 CHAIR SARIS: Which is the two years,  
10 maybe we're not wedded to two, maybe it should  
11 be three, maybe 2-1/2, I don't know what the  
12 right number is, but basically follow the  
13 statutory scheme that's already set up.

14 Obviously Congress was worried about  
15 that before and that would just be another way  
16 of doing it, or do the sentence imposed approach  
17 of the Immigration Act.

18 MR. ZAUZMER: So a couple of things  
19 there. It's in Section 921, is where the  
20 definition applies.

21 And it applies to the whole --

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1 CHAIR SARIS: I don't know where my  
2 code --

3 MR. ZAUZMER: Yes, I didn't have my  
4 code book either.

5 And it applies to the whole chapter  
6 so it's an important definition. That definitely  
7 is the second best option to what we have proposed  
8 because it's consistent, it's fair.

9 Time imposed we have suggested is not  
10 a good option and the reason is we talk about the  
11 difficulty of getting court records.

12 VICE CHAIR BREYER: Right.

13 MR. ZAUZMER: It is even more  
14 difficult to prove how long somebody actually  
15 served. We would actually be subpoenaing  
16 witnesses for that in some cases. And so --

17 CHAIR SARIS: So it's hard to --

18 MR. ZAUZMER: Exactly. And so this  
19 definition we think that -- We have always  
20 suggested that for crime of violence punishable  
21 by more than a year is sufficient to identify the

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1 right people, but if you like the Congressional  
2 definition we would favor that simply because it  
3 gives us the same important consistency that we  
4 need.

5 CHAIR SARIS: All right, thank you.  
6 Does anyone else have anything else?

7 Thank you very much.

8 MR. ZAUZMER: Thank you.

9 CHAIR SARIS: We'll take a 15-minute  
10 morning break. Thank you.

11 (Whereupon, the above-entitled matter  
12 went off the record at 10:37 a.m. and resumed at  
13 10:54 a.m.)

14 CHAIR SARIS: So our next panel -- Do  
15 we have, yes. Our next panel presents a view  
16 from the practitioners.

17 We're very pleased to have with us  
18 Molly Roth who is an assistant federal public  
19 defender for the Western District of Texas in San  
20 Antonio.

21 In 2008 and 2009, Ms. Roth worked in

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1 Washington, D.C., and as an attorney advisor to  
2 the Defender Services Office and as a visiting  
3 assistant federal public defender at the United  
4 States Sentencing Commission. Do you recognize  
5 the room?

6 MS. ROTH: I do.

7 (Laughter.)

8 CHAIR SARIS: Also joining us today  
9 is Angela Campbell who is the co-founder of  
10 Dickey & Campbell Law Firm, PLC. Ms. Campbell  
11 is currently a voting member of the Practitioners  
12 Advisory Group to the United States Sentencing  
13 Commission. Thank you for all the work you do  
14 on that as well.

15 And the final member of this panel is  
16 Zachary Margulis-Ohnuma. Did I say that right?

17 MR. MARGULIS-OHNUMA: Yes.

18 CHAIR SARIS: Okay, who currently  
19 practices in federal and state court proceedings  
20 in the New York metropolitan area, including  
21 serving as member of the Criminal Justice Act

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1 panels for the Southern and Eastern District of  
2 New York. He is the current vice chair of the  
3 sentencing committee for the National Association  
4 of Criminal Defense Lawyers.

5 Welcome to all three of you. Ms.  
6 Roth, you may proceed.

7 MS. ROTH: Thank you. Judge Saris,  
8 Commissioners, thank you very much for giving us  
9 this opportunity and we join everyone who has  
10 spoken so far in applauding your proposal to  
11 remove the residual clause language. Thank you  
12 for that proposal.

13 We also strongly support the  
14 Commission's proposal to limit the consideration  
15 of prior convictions for offense level  
16 enhancements to felonies that are also classified  
17 as felonies under state law.

18 While we believe there might be more  
19 to be done in order to ensure that the Commission  
20 narrowly capture the most serious prior  
21 convictions, we sincerely appreciate the

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1 Commission's attentiveness to this issue and  
2 support the current proposal as a significant and  
3 positive step.

4 Double counting prior convictions,  
5 using them for both criminal history purposes and  
6 also instant offense seriousness purposes, is  
7 unduly complicated, often recognized as unjust  
8 by courts across the country, and does not serve  
9 the purposes of sentencing.

10 We know that it's often recognized as  
11 unjust by courts across the country because of  
12 your own data, and I just point to two, highlight  
13 two situations.

14 One is the career offender guideline  
15 in which the 2014 Commission data shows us that  
16 71.5 percent of folks facing the career offender  
17 enhancement were sentenced below the guidelines  
18 and 72.5 percent of individuals facing the 16-  
19 level guideline enhancement in illegal reentry  
20 cases were sentenced below the guidelines during  
21 this same time period.

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1           Double counting complicates the  
2 guidelines. There are currently several  
3 definitions of crime of violence in the  
4 guidelines applied to offense level increases in  
5 a variety of ways.

6           Our concern with the Commission's  
7 proposed list of enumerated offenses and their  
8 definitions is that we believe that they would  
9 add to, rather than subtract from, the  
10 complication and the confusion.

11           It would introduce new definitions  
12 not previously used in the guidelines or anywhere  
13 else and would spawn years of intense litigation,  
14 and you know that we will be intensely litigating  
15 on behalf of our clients, especially when the  
16 sentences for these enhancements so dramatically  
17 increase.

18           We have talked some today about  
19 efficiency, but we're interested in our clients'  
20 liberty and when their liberty is so threatened  
21 by extreme enhancements you know that we're going

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1 to be litigating, as is our duty in zealous  
2 advocacy.

3 The Commission's proposed definitions  
4 are also unduly broad and would not operate to  
5 better identify the serious offenses, but would  
6 instead sweep in even more of the less serious  
7 offenses.

8 This broad sweep could also raise ex  
9 post facto concerns in all of the situations  
10 where the new definitions include priors that did  
11 not previously count, for instance the California  
12 conviction of kidnapping.

13 Critical, in our opinion, is the human  
14 cost of double counting prior convictions and  
15 defining crime of violence too broadly, and we  
16 ask that you consider the situations of these  
17 clients.

18 I want to talk first about Jessie.  
19 Earlier this year he was convicted of illegal  
20 reentry after deportation after being pulled over  
21 for making an improper left turn.

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1           Jessie was one of the backbone  
2 laborers of our nation's vibrant construction  
3 industry. He and his wife provide for three  
4 children, all of whom are in public schools in  
5 Texas and involved in after-school athletics and  
6 doing well.

7           He was sentenced to time served, which  
8 was five and a half months, but his properly  
9 scored guideline range was 41 to 51 months. His  
10 properly scored guideline range was 41 to 51  
11 months based on a 17-year-old robbery conviction  
12 in Fort Bend County, Texas.

13           Jessie was sentenced to probation for  
14 this robbery, but in 2009 his probation was  
15 revoked for what the presentence report described  
16 as technical violations, failing to pay fines and  
17 things like that, and he was sentenced to four  
18 years.

19           Jessie's prior robbery conviction  
20 counted only because his original sentence was  
21 revoked 11 years after the crime occurred based

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1 on technical violations.

2           Jessie's case is also an example of  
3 robbery not being what the name describes.  
4 Unlike the Model Penal Code, which focuses on  
5 serious bodily injury or fear of such injury in  
6 defining robbery, Texas robbery has a broad  
7 definition that covers intentionally, knowingly,  
8 or recklessly causing bodily injury to another  
9 or knowingly threatening or placing another in  
10 fear of imminent bodily injury in the course of  
11 committing a theft with intent to obtain entry  
12 into or control of the property.

13           The actual conduct underlying this  
14 conviction was a low-level shoplifting at Wal-  
15 Mart. Jessie became frightened after exiting  
16 the store and pepper sprayed a plain clothes  
17 officer. Perhaps that's why Texas decided to  
18 charge him with robbery instead of misdemeanor  
19 shoplifting or misdemeanor assault.

20           Whatever the reason, Jessie did not  
21 commit a common law robbery, yet he was convicted

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1 of robbery in Texas, righteously under Texas  
2 statute. He would face the same 41- to 51-month  
3 range if we proceed with the Commission's  
4 proposed definition of robbery.

5 Andrew, on the other hand, is a client  
6 who would be more justly treated under the  
7 guidelines should the Commission amend its  
8 definition of felony.

9 He was convicted of possessing a  
10 firearm after sustaining a felony conviction. He  
11 had two prior possession with intent to  
12 distribute marijuana convictions, so his  
13 guidelines range was 92 to 115 months. However,  
14 these two prior convictions are misdemeanors in  
15 the convicting jurisdiction of Massachusetts.

16 For one, Andrew received a sentence  
17 of 314 days, which was deemed time served and  
18 ordered to run concurrently with another  
19 sentence.

20 Andrew was sentenced to probation for  
21 the second prior conviction but was sentenced to

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1       one year of prison after his probation was  
2       revoked.

3               Andrew's federal sentencing judge  
4       assessed 41 months of prison after determining  
5       that the offense level called for by the  
6       guidelines overstated the seriousness of the  
7       instant offense.

8               We urge the Commission to exclude  
9       statutory rape from its list of enumerated  
10      offenses.

11              Edwin, who had a six-year-old  
12      California conviction for statutory rape when  
13      immigration officials found him walking along a  
14      street intersection in Uvalde, Texas, was  
15      sentenced to 41 months for illegal reentry after  
16      deportation.

17              The statutory rape conviction was his  
18      only prior conviction and it was for having  
19      sexual relations with his 14-year-old girlfriend  
20      when he was 19. The couple had maintained their  
21      common law marriage and created two children when

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1 immigration arrested Edwin.

2 For statutory rape, he received a  
3 three-year probation sentence and a six-month  
4 jail term served through a work furlough. His  
5 sentence for illegal reentry after deportation  
6 was seven times that long.

7 Interestingly, the Tenth Circuit held  
8 Monday that Texas statutory rape is not a crime  
9 of violence under 4B1.2. That's U.S. versus  
10 Madrid.

11 If the Commission were to adopt its  
12 present proposal of enumerated offenses and their  
13 definitions without excluding statutory rape, it  
14 would be at odds with that Tenth Circuit case and  
15 make consensual conduct between two people who  
16 intend to and later do marry a crime of violence.

17 You know that we're asking that you  
18 consider to completely remove burglary from the  
19 list of enumerated offenses. Let me give you an  
20 example.

21 Michael was convicted last year of

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1 possession with intent to distribute 87.4 grams  
2 of methamphetamine. This placed him squarely at  
3 base offense level 26. Today it would place him  
4 squarely at base offense level 24. His role in  
5 this crime was to drive a bag of methamphetamine  
6 from one side of town to the other. However,  
7 the career offender enhancement elevated him to  
8 base offense level 34, moved his criminal history  
9 category from 4 to 6.

10 In 2007, Michael was convicted of  
11 unarmed burglary of a habitation in Texas. He  
12 was sentenced to eight years' probation but that  
13 was revoked and he was sentenced to five years'  
14 prison upon revocation.

15 This conviction, in combination with  
16 a stalking conviction, which involved texting  
17 another person and did not involve physical  
18 conduct, supported the career offender  
19 enhancement. His guidelines range was 188 to  
20 235 properly scored over our objection.

21 The court, citing Michael's history

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1 and characteristics and the nature of the instant  
2 federal offense, sentenced him instead to 96  
3 months.

4 Double counting prior convictions is  
5 unjust. We have a criminal history calculation  
6 that fully accounts for prior convictions. We  
7 know that we may be alone in saying this, but we  
8 join the Commission in working toward simplified  
9 guidelines that are consistently applied, in  
10 seeking just sentences, and in striving to reduce  
11 mass incarceration.

12 To these ends, we urge that the  
13 Commission take thoughtful and critical steps to  
14 ensure that only the most narrow group of truly  
15 serious, violent crimes against people receive  
16 offense level enhancements. The easiest way to  
17 accomplish that is to use the elements clause.  
18 Thank you.

19 CHAIR SARIS: Thank you.

20 MS. CAMPBELL: Judge Saris and  
21 members of the committee, on behalf of the

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1 Practitioners Advisory Group, we welcome the  
2 opportunity to comment on the proposed  
3 amendments.

4 We also agree that eliminating the  
5 residual clause is important and it appears that  
6 everyone is in agreement with that.

7 I do have some other comments,  
8 however, if the Commission is truly concerned  
9 about only punishing the most severe violent  
10 offenders.

11 We aren't talking about the right  
12 provision of the career offender guideline  
13 because we're still counting controlled  
14 substances offenses, and controlled substances  
15 offenses can still count as our priors and can  
16 still count in some states if they are  
17 misdemeanors.

18 The Commission's work in changing the  
19 definition of felony will resolve some of those  
20 problems but won't resolve all of them. It's  
21 still going to be a felony to sell marijuana in

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1 many states and that is still going to count as  
2 a prior conviction under career offender  
3 guidelines purposes to put people in prison for  
4 a very long time.

5 And so I think that while some of the  
6 work is beneficial, I think there's more work  
7 that could be done in relation to making sure  
8 we're only targeting the violent offenders.

9 That being said, in Iowa we do have  
10 a, we're one of the states that has a misdemeanor  
11 that's punishable by two years and the  
12 Commission's proposed definition and also my  
13 proposed definition, which referenced the felon  
14 in possession statute that Congress has passed,  
15 would fix the problem in Iowa, at least for those  
16 aggravated misdemeanors. In Iowa it's  
17 punishable by up to two years in prison for that  
18 last category of misdemeanors.

19 The other problem that you have,  
20 though, is that you can still have things like  
21 simple assault where there's no injury where it's

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1 a threat of harm or even a slapping or spitting  
2 or something that can become enhanced into a  
3 felony category because of the prior convictions  
4 within the state system or for other reasons that  
5 are not based on offense conduct.

6 What we as the Practitioners Advisory  
7 Group is urging is that the Commission take a  
8 more extensive study and more time in trying to  
9 decide whether or not certain offenses should be  
10 added to this guideline.

11 I think you'll notice that we didn't  
12 submit elements that we think should define the  
13 offenses and that's because you're writing a  
14 treatise. You're writing the Model Penal Code  
15 again and, frankly, it would take a long time to  
16 build consensus and to study what elements  
17 actually should be included in kidnapping, what  
18 elements should be included in robbery, what  
19 elements should be included in all of these  
20 offenses.

21 And in the meantime, while you're

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1 conducting that study, if that's the way that you  
2 go, simply eliminating the residual clause would  
3 fix the instant problem and the Commission could  
4 undertake that extensive study.

5 That being said, I think also there  
6 are problems within the proposed definitions that  
7 have a deeper root than just whether or not  
8 they're going to capture certain state  
9 convictions or not, and that deeper root is are  
10 we capturing the people we want to capture and  
11 what harm is it that we're trying to encompass?

12 At least from my perspective, the harm  
13 that we should be trying to encompass is  
14 intentional actions to hurt another person.

15 A lot of the definitions and the  
16 discussion involve recklessness. It is the PAG's  
17 position that recklessness is not something that  
18 should be punished by such extreme penalty  
19 enhancements as the career offender.

20 In addition, you should have some sort  
21 of injury requirement or intent to cause injury

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1 requirement for each of these offenses.

2 That would resolve many of these  
3 problems with whether or not you should count a  
4 burglary of a structure that's unoccupied.  
5 You're not trying to hurt somebody, you're not  
6 truly a violent person, you're not someone  
7 deserving of essentially a life sentence under  
8 the guidelines.

9 And so that's been the basis for our  
10 recommendations, that the Commission maybe take  
11 a step back, don't push through new definitions  
12 at least for the offenses, and take more time to  
13 reflect on what harm it is exactly that we're  
14 trying to prevent.

15 Currently, the career offender  
16 guideline will encompass most of these things.  
17 The current definition includes applying force  
18 to someone or threatening to have force against  
19 somebody.

20 That's going to encompass a large  
21 number of offenses and, in fact, will over-

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1 encompass offenses. It's going to include  
2 assaults. It's going to include threats of  
3 assaults. It's going to include when there's  
4 actual intentional harm to anybody. It's always  
5 going to include those because you will have  
6 included the force element. And so we would  
7 recommend that when deciding what offenses to  
8 count that we take more time.

9 We do think though, however, it is an  
10 important and reasonable step to take now to  
11 change the definition of felony now and we've set  
12 forth a proposal that matches one of the  
13 definitions that Congress has used and we would  
14 support additional changes to that. I think that  
15 while it fixes Iowa's problem, it's not going to  
16 fix, say, Massachusetts' problems, so thank you.

17 CHAIR SARIS: Thank you.

18 MR. MARGULIS-OHNUMA: Chair Saris,  
19 members of the Commission, thank you for inviting  
20 the National Association of Criminal Defense  
21 Lawyers to this important public meeting.

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1           We were founded in 1958 as a  
2 professional bar association. We represent  
3 something like 40,000 criminal defense lawyers  
4 across 90 state, provincial, and local affiliate  
5 organizations in 28 countries.

6           I myself am a life member of NACDL.  
7 I'm the vice chair of the NACDL's sentencing  
8 committee and I am in private practice in New  
9 York City. I sit on both the Eastern District  
10 and the Southern District of New York CJA panels.

11           And I, like all of our members, are  
12 at the front lines of interacting directly with  
13 the individuals who after they're out of the  
14 courtroom and even after they're out of prison  
15 are affected by the words that you all write.

16           Let me begin by stating the obvious.  
17 NACDL strongly supports the elimination of the  
18 residual clause from the guideline's definition  
19 of crime of violence.

20           We filed an amicus brief in the  
21 Johnson case because it had become clear by then

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1 that the nine or ten words, "otherwise involves  
2 conduct that presents a serious potential risk  
3 of physical injury to another," were not capable  
4 of being understood or applied in any consistent  
5 or meaningful way.

6 The use of those words to dramatically  
7 increase criminal liability therefore violated  
8 the due process clause of the Fifth Amendment of  
9 the Constitution.

10 As defense lawyers, our members know  
11 that our clients' lives and those of their  
12 families have been irreparably damaged by those  
13 mysterious words.

14 And I think I sense in the room a  
15 consensus that it's time to excise those from the  
16 Sentencing Guidelines as the Supreme Court has  
17 done from the Armed Career Criminal Act.

18 What I want to focus my short time on  
19 is the question of retroactivity. NACDL believes  
20 that that's probably the most important of the  
21 open questions in the proposal before the

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1 Commission and we strongly support retroactivity  
2 of the elimination of the residual clause in the  
3 definition.

4 Under the proposed amendments, I'm  
5 sorry, as the proposed amendment itself noted,  
6 the question of retroactivity raises three  
7 subsidiary questions in determining whether a new  
8 provision will be retroactive.

9 The Commission considers the purpose  
10 of the amendments, the magnitude of the change  
11 in the guideline range made by the amendments,  
12 and the difficulty of applying the amendment  
13 retroactively to determine an amended guideline  
14 range.

15 It's our view that each of these  
16 militates in favor of retroactivity of this  
17 change.

18 The retroactive application of the  
19 amendment is consistent with the purpose of the  
20 amendment, which is to ensure what ex officio  
21 Commissioner Wroblewski focused on, that the

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1 people who are repeatedly violent have large  
2 enhancements in their sentences, but only people  
3 who are repeatedly violent have those  
4 enhancements in their sentences and that that is  
5 done consistently with constitutional norms.

6 Retroactive application of the  
7 amendment is consistent with the current broad-  
8 based and bipartisan movement to address the  
9 problem of mass incarceration in the United  
10 States.

11 In particular, retroactive  
12 elimination of the clause would parallel  
13 President Obama's clemency initiative, which is  
14 limited to non-violent, low-level federal inmates  
15 whose sentences would be lowered today by  
16 operation of law or policy.

17 Retroactivity would grant judges  
18 discretion to provide similar relief to those  
19 sentenced under the residual clause but whose  
20 conduct or actual criminal history may not have  
21 warranted the very high sentences that the clause

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1 triggers.

2 In that respect, I anticipate that if  
3 the amendment is made retroactive there will be  
4 a larger effect on people who were sentenced  
5 prior to Booker.

6 I don't have data to back that up but  
7 it seems to me before Booker there was no  
8 discretion for judges who may have been concerned  
9 that a crime of violence definition captured  
10 something that wasn't really a violent crime.

11 As my colleague noted, after Booker  
12 judges reluctantly apply the career offender  
13 enhancement. Seventy percent of the time they  
14 go underneath it, whereas before Booker they were  
15 far more constrained.

16 So those old sentences that are still  
17 being served and more than ten years old would  
18 get another look that's warranted if the  
19 amendment was made retroactive.

20 The magnitude of the effect on the  
21 guideline ranges will be substantial but

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1       experience shows that the effect on the actual  
2       sentences imposed, at least for those post-Booker  
3       sentences, will be less dramatic since so many  
4       of them fall outside the guideline range.

5               We submit that it won't be so  
6       difficult to apply the new guideline range. If  
7       the probation report is clear that a person has  
8       been sentenced under the residual clause as  
9       opposed to another clause of the crime of  
10      violence definition, then it's a mechanical  
11      exercise, but it's also in recalculating the  
12      sentence because it's simply excised.

13              The advantage of the rubric of 1D1.10  
14      that limits, it allows discretion for  
15      resentencing but it limits it to the new  
16      guideline, will give judges another look as  
17      they've had with the recent amendments to drugs  
18      to the individuals affected by the retroactive  
19      amendment in a way that will allow for individual  
20      assessments that I think has gone smoothly so far  
21      with those amendments, with the past amendments

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1 and would happen here too.

2 I don't see this as fundamentally more  
3 difficult than the retroactive application of the  
4 2007 Crack Cocaine Amendment or the 2010  
5 amendment if we're going to take the Fair  
6 Sentencing Act or last year's drugs minus two  
7 amendment.

8 CHAIR SARIS: You need to start  
9 wrapping up.

10 MR. MARGULIS-OHNUMA: Okay. My last  
11 point on retroactivity and then I will wrap up  
12 is that the impact of retroactivity has been  
13 shown by the Commission's own reports to not  
14 increase recidivism, to not raise a public safety  
15 issue.

16 And the experience with the, I think  
17 we can anticipate in these cases where people  
18 have already served long sentences where judges  
19 will have another look at individuals, we can  
20 also expect that it would not increase recidivism  
21 to make the amendment retroactive.

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1 I did have a word or two to say but  
2 I'll wait for questions about the government's  
3 proposal essentially doing away with the  
4 categorical approach, if the Commission wants to  
5 address that. It's not really on the agenda so  
6 I didn't include it in my prepared remarks.

7 CHAIR SARIS: Thank you. Questions?

8 VICE CHAIR BREYER: Well, I'd like to  
9 hear why not --

10 MR. MARGULIS-OHNUMA: Okay. Well, I  
11 think what they're saying, I mean, you've  
12 obviously picked up on the fact that their asking  
13 for basically three trials in one, right? We  
14 try the case and then we're going to try the two  
15 priors to see what, quote/unquote, "really  
16 happened," and they're asking to set aside the  
17 outcome of state convictions.

18 And those state conviction, I mean,  
19 that raises a comity issue I think because there  
20 should be respect for those state convictions and  
21 the meaning of those convictions, and those state

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1 convictions, they're a negotiated outcome. It's  
2 a proxy for what really happened.

3 The fact is a judge can't sit in the  
4 courtroom and ever know what really happened.  
5 They know what witnesses say and what defendants  
6 might say to oppose those witnesses, but having  
7 some sort of paper trial undermines the value of  
8 those state convictions.

9 Some state convictions overstate what  
10 a person actually really did because he didn't  
11 want to litigate it. Others understate it.

12 VICE CHAIR BREYER: Well, we accept  
13 that. How is that observation not inconsistent  
14 with your position on retroactivity, because when  
15 you point to examples of drugs minus 2 or  
16 crack/powder disparity, I found it was a very  
17 simple thing.

18 First of all, what was said. What  
19 was said about it is the sentence is too long.  
20 Sentence is too long and, therefore, it's going  
21 to be adjusted downward. Okay.

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1           And then the only reason that a judge  
2 might not go along with it is if any given case  
3 the judge didn't think it was too long. Well,  
4 that's a fairly straightforward, easy  
5 determination.

6           However, the determination that I  
7 think you're asking us to make in making it  
8 retroactive seems to me of a totally different  
9 exercise.

10           Now, after saying that, I would say,  
11 you know, there are certain issues as to  
12 retroactivity. By the way, the circuits are now  
13 debating that. It's right in front of the  
14 circuits so you're going to get all different  
15 decisions from all the different circuits.

16           And then you're going to run into a  
17 real problem of disparities, because what do you  
18 want us to do? You want us to admit -- Eleventh  
19 Circuit it's one thing and then Ninth Circuit,  
20 assuming they come out with a single decision,  
21 it's another thing.

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1           You know, you're going to have wide  
2           disparities across the country. Is that  
3           appropriate to start to then apply retroactivity  
4           retroactively?

5           MR. MARGULIS-OHNUMA: I'm suggesting  
6           to you that especially those pre-Booker  
7           sentences, they're also too long, that they're  
8           too long, that we know when we freed up judges  
9           to depart and there were things that weren't  
10          listed as crime of violence, where there was some  
11          ambiguity, they imposed shorter sentences and  
12          this is giving them a chance to do that across  
13          the board, so I don't see a disparity problem  
14          there at all.

15          CHAIR SARIS: The other thing that's  
16          just really interesting, there's about 75 percent  
17          of them, the instant offense was drug trafficking  
18          and that most of the predicates that, even your  
19          examples were drug trafficking and we've heard  
20          that time and time again, that you have two little  
21          drug priors and then a third little drug case and

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1 then it, but we haven't heard as much evidence  
2 on the violent side of the ledger, if you will,  
3 and we may get to the drug side next cycle.

4 Right now we're focusing on violent  
5 crimes and I don't know what you're seeing out  
6 there as to whether the injustices we've heard  
7 of really apply as much in the violent side.

8 MS. CAMPBELL: I can give you a good  
9 example. I had a gentleman that was convicted  
10 and was sentenced as a career offender and he had  
11 a prior conviction for eluding, which at the time  
12 was pre-Begay and was in the Eighth Circuit and  
13 he, that counted as a crime of violence.

14 CHAIR SARIS: What did you say?  
15 Looting?

16 MS. CAMPBELL: Eluding, running from  
17 the police. He didn't want to get caught.

18 CHAIR SARIS: I thought you were  
19 looting, you know, like -- Okay, okay, okay.

20 MS. CAMPBELL: Running from the  
21 police.

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1 CHAIR SARIS: Yes.

2 MS. CAMPBELL: And the second was an  
3 assault that didn't have an injury. Both of them  
4 were aggravated misdemeanors, meaning they were  
5 punishable by up to two years.

6 And he didn't do two years on them.  
7 They weren't considered that serious in the state  
8 system, which is why he was out. They didn't  
9 think he was that much of a danger and he hasn't  
10 ever hurt anyone, but yet he's sentenced as a  
11 career offender because he was selling drugs.

12 So you have the situation where when  
13 you combine the two you actually can have someone  
14 that has a drug offense, you know, one prior drug  
15 offense, a current drug offense, and then one  
16 assault perhaps or a bar fight or a, you know,  
17 it can be a number of things that you, burglary  
18 of a unoccupied dwelling, for example, that will  
19 drastically enhance what was already a very long  
20 sentence under the drug guidelines and it's  
21 doubling it.

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1                   And so those are the kinds of things,  
2                   I think it's the combination of the two. You're  
3                   never going to, it's very rare you're going to  
4                   have a violent offender that then has two violent  
5                   offenses that is under the career offender. I  
6                   think that's a small group.

7                   MS. ROTH:     All of our examples,  
8                   except Andrew, involved what were deemed to be  
9                   crimes of violence, but it's interesting. In  
10                  Michael's case that was a --

11                  CHAIR SARIS:   I just don't remember  
12                  their names.

13                  MS. ROTH:    I'm sorry.

14                  CHAIR SARIS:   He was the marijuana  
15                  person?

16                  MS. ROTH:    No, he was the person who  
17                  was facing the career offender enhancement after  
18                  transporting a bag of methamphetamine from one  
19                  side of town to the next.

20                  So it was a drug trafficking instant  
21                  offense, nonviolent, unarmed, and yet the crime

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1 of violence determination is how he fell under  
2 the career offender.

3 CHAIR SARIS: Can I ask you if we were  
4 to go with a very helpful suggestion, which is  
5 go back to the statute, the 921 and you exclude  
6 anything, where the state classifies as a  
7 misdemeanor, and it says in here up to two years,  
8 how many states does that help and how many does  
9 it not help? Because it helps Iowa. Doesn't  
10 help Pennsylvania or Massachusetts.

11 What would be the sweet spot number  
12 to capture what would be a fair -- Of those eight  
13 states, what are most of them doing?

14 MS. ROTH: I would need to spread out  
15 the statutes and classifications from the eight  
16 states to be able to answer that and I'm sure  
17 that we could do that for you quickly but I can't  
18 do that on the spot for you right now.

19 CHAIR SARIS: And do you know why  
20 Congress picked two years because, I mean, the  
21 impulse would be to, even hurts myself, but it

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1 would be to go with what Congress said too. I  
2 mean, that's the intellectually consistent  
3 approach to do it.

4 MS. ROTH: But it wouldn't help  
5 states -- And you've mentioned upcoming  
6 litigation which is why we favor your language,  
7 your proposed language minus the bracketed area,  
8 because it's flexible enough to account for what  
9 you're talking about.

10 I mean, as soon as we start getting  
11 into the minutiae of exactly what every state  
12 needs, we start becoming more complicated and  
13 losing track of the real issue, which is how do  
14 we draw the circle of these enhancements which  
15 are so significant around the narrow, small  
16 number of people that really should be  
17 encompassed by it?

18 COMMISSIONER BARKOW: Do we have a  
19 sense, though, of what Congress had in mind when  
20 it passed the two years? I mean, do we know if  
21 Congress did this kind of spreading out of the

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1 statutes and kind of looked or what the baseline  
2 was for where that exception came from? I don't  
3 know if you guys happen to know and if you don't  
4 that's obviously fine, but.

5 MS. CAMPBELL: I don't. I brought it  
6 up because I've had situations where people are  
7 sentenced under it where they're not felons for  
8 that statute but then they get the enhancement.

9 COMMISSIONER BARKOW: Can I ask  
10 another question?

11 CHAIR SARIS: Oh, sure.

12 COMMISSIONER BARKOW: So I wanted to  
13 ask you, Ms. Roth, why the defenders reject  
14 listing offenses with definitions. I just wanted  
15 to get a better sense of the rationale behind it.

16 I mean, is it kind of this path  
17 dependency idea that we have all this case law,  
18 we kind of have the existing structure of law  
19 there where we kind of know. Is it the specific  
20 ones we propose and so you'd really rather not  
21 have those because, you know, those aren't set

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1 in stone one way or another? Is it something  
2 else?

3 I just want the reason that you don't  
4 want them listed. I just wanted to hear a little  
5 bit more what the rationale was.

6 MS. ROTH: We think that they add to  
7 complexity instead of simplicity. We do think  
8 they're vague.

9 Let me just take the kidnapping  
10 example for a minute. I imagine that a lot of  
11 work went into that and it's very possible that  
12 a 50-state survey was done in compiling this  
13 definition of kidnapping.

14 But the fact of the matter is that  
15 this definition is vague. The word nefarious  
16 we've already discussed this morning, over-  
17 inclusive and would draw in not only every  
18 kidnapping statute in the country, very possibly  
19 including ones that have been deemed to not be  
20 crimes of violence, but also false imprisonment  
21 and other like statutes that are not kidnapping

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1 and so --

2 COMMISSIONER BARKOW: Let's say we  
3 went with a different, I guess, without kind of  
4 commenting on, are you just saying inevitably we  
5 will screw up no matter how much time we take  
6 and, therefore, we'll --

7 CHAIR SARIS: That's a legal term.

8 COMMISSIONER BARKOW: -- always have  
9 this example like a wobbler, or is it this --  
10 That's what I was trying to get at. Is it kind  
11 of looking at this list and not liking the list,  
12 or is it that the exercise of ever trying to  
13 create any definition is something that, as a  
14 matter of principle or legal argument, you don't  
15 think we could get?

16 So, yes, we could do the DOJ's  
17 proposal and look at federal offenses or we could  
18 go to the Model Penal Code, and I'm just trying  
19 to figure out why a world without definitions is  
20 better than one with one, assuming we can get  
21 them crafted in the right way after getting

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1 comment from people.

2 MS. ROTH: It is exceedingly  
3 difficult to come up with definitions that would  
4 be not vague and not over-inclusive, but  
5 certainly starting with 18 3550 9(c) minus the  
6 inchoate offenses, minus the 924<sup>©</sup> drug offenses,  
7 minus the residual clause is a good starting  
8 point because it is an already known definition  
9 that's part of our statute so that is an  
10 understandable way.

11 Remember, of course, that we're  
12 starting from the proposition that we shouldn't  
13 be doing this double counting in the first place.

14 COMMISSIONER BARKOW: But assuming  
15 that we think that Congress, you know, Congress  
16 has told us we need to double count. I mean, we  
17 have statutes that tell us Congress disagrees  
18 with that.

19 So assuming that we get, at least I'm  
20 speaking for me, you know, Congress says there  
21 are some people that fall into this bucket and

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1 as we try to define the people for that bucket  
2 I'm just trying to get a handle on how we can  
3 best do that.

4 And I just wonder without giving the  
5 definitions, is it that they'll, the definitions,  
6 you know, in ACCA are already okay without  
7 specifying things? I'm just trying to get a  
8 sense of what the down sides are to defining it  
9 versus the plus sides of kind of keeping it away.

10 MS. ROTH: Well, certainly the list  
11 of enumerated offenses in ACCA in 924(e) is much  
12 shorter than this list or than any list that  
13 currently exists in the guidelines of enumerated  
14 offenses. We don't think that this many need to  
15 be counted. We think this draws too wide of a  
16 net and brings in too many people.

17 COMMISSIONER PRYOR: What about  
18 murder? Think murder ought to be on there?

19 MS. ROTH: First-degree, premeditated  
20 murder?

21 COMMISSIONER PRYOR: Well, what if

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1       you murdered someone by poisoning?     Do you  
2       consider that a violent offender?

3                   MS. ROTH:   I think the circuit courts  
4       are currently debating that.

5                   COMMISSIONER PRYOR:     That doesn't  
6       really answer the question for me.

7                   MS. ROTH:   Well, and I don't know how  
8       I --

9                   COMMISSIONER PRYOR:   I mean, you see  
10      my concern?   I mean, I think reasonable people  
11      would agree murder ought to be in, murder.   I  
12      mean, there's a bigger debate about burglary  
13      versus burglary of a dwelling, occupied dwelling.

14                   There's a bigger debate about what you  
15      do with forcible sex offenses versus statutory  
16      rape, but how about the rape that uses a date  
17      rape drug?

18                   MS. ROTH:   Well, we would submit that  
19      if we're trying to capture the most violent  
20      persons,     then     the     definition     would     be  
21      intentional,   knowing   crimes   that   have

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1 intentional, substantial injury or death to real  
2 people. So, you know --

3 COMMISSIONER PRYOR: But you can see  
4 how an enumerated offense list that's broader  
5 than ACCA could make things easier for judges and  
6 bring in offenses that belong there, that fit  
7 that definition --

8 MS. ROTH: I can.

9 COMMISSIONER PRYOR: -- intentional  
10 and that involve either serious injury or death.

11 MS. ROTH: I can but I can also see  
12 the very wide net that is perhaps unintentionally  
13 cast, and Jessie's example with a robbery  
14 conviction in Texas is a very good one and not  
15 an unusual one.

16 COMMISSIONER PRYOR: The one who  
17 pepper sprayed the police officer?

18 MS. ROTH: Right.

19 VICE CHAIR BREYER: But wouldn't  
20 there have been a better way to approach it which  
21 would be, say, look, looking at the original

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1 offense, the judge in that case gave the person,  
2 I forget what he gave Jessie, 30, 60, 90 days and  
3 maybe I'm thinking of the wrong person.

4 MS. ROTH: Five and a half months.

5 VICE CHAIR BREYER: What?

6 MS. ROTH: Five and a half months.

7 VICE CHAIR BREYER: Five and a half  
8 months, okay. He gave him five -- I saw exactly  
9 what you did, you pepper sprayed, you did this,  
10 you went into the store, you dah, dah, dah, dah,  
11 dah. I'm giving you five and a half months.  
12 That's what I think.

13 So later what happens to Jessie is  
14 that he doesn't complete his probation or  
15 whatever you want to call it successfully. You  
16 would characterize it as technical violations,  
17 but it could have been a drug sale. It could  
18 have been any number of things where we see what  
19 happens is you revoke probation and then you  
20 impose the sentence that you have under the law  
21 for the original offense. You haven't carried

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1       it out, whatever that is, whether it be statutory  
2       max.

3                   So what if we go back and look at what  
4       was the sentence that was imposed, some sentence  
5       originally as distinct from subsequently as a  
6       result of other conduct?

7                   MS. ROTH: That would be better. He  
8       would not have counted under 4(b) because it was  
9       a probatory sentence so, and the PSR was the one  
10      who described the violations as technical, Judge  
11      Breyer, so.

12                   But in any case, that would help, to  
13      not include time imposed upon revocation but just  
14      look at the original sentence.

15                   VICE CHAIR BREYER: So that's sort of  
16      different from the -- I know we've been talking  
17      about definitions, what's a robbery, what's this,  
18      what's that, can't we all agree, and maybe we  
19      can't. Maybe we can't, burglary being a good  
20      example.

21                   But what we can all agree on is what

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1 did the judge do. Because we know exactly what  
2 the judge did. The judge imposed six months,  
3 four months, three months, whatever it is, eight  
4 months, so isn't that a way to approach this  
5 problem?

6 MS. ROTH: Well, the interesting  
7 thing is to notice that in the career offender  
8 guideline 71-1/2 percent of judges sentenced  
9 people below the guidelines.

10 And so it seems that if the guidelines  
11 are our initial benchmark, we would not want that  
12 to be necessary. We would want the career  
13 offender enhancement, which is huge, to  
14 appropriately limit the number of very serious  
15 crimes that it includes.

16 CHAIR SARIS: Can I ask you on the  
17 retroactivity piece, drugs minus two was easy.  
18 It's an algorithm basically, unless somebody's a  
19 public safety risk and then you address that.

20 So in the First Circuit, for example,  
21 the First Circuit frequently said we're not sure

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1       whether this meets the elements clause test, but  
2       in any event, everyone can agree that it's a  
3       residual clause problem.

4               So let's say you knock out -- I don't  
5       know whether that's true across the circuits but  
6       that's how the -- so then you knock out the  
7       residual clause. You still have to go back and  
8       do the analysis with the elements.

9               And now let's assume you agree that  
10       because of the categorical approach you can't  
11       figure out whether it's an element. You still  
12       might, as a judge, might want to say, well, this  
13       arson, whatever it happens, you know, whatever  
14       it happens to be, in Massachusetts, say, assault  
15       and battery with a dangerous weapon may be  
16       reckless. So that's why it may not qualify, all  
17       right?

18               You still may want to think about that  
19       in terms of what kind of sentence you'd want to  
20       give, even if it doesn't qualify. It's just not  
21       as simple as the drugs.

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1                   MR. MARGULIS-OHNUMA:  It's true that  
2                   it may be hard to figure out which prong of the  
3                   crime of violence was used but that's the  
4                   vagueness we're trying to avoid by excising it,  
5                   right?  I mean, that's --

6                   CHAIR SARIS:  Right, but then you got  
7                   to come back --

8                   MR. MARGULIS-OHNUMA:  If we're not  
9                   even sure what he was sentenced under, I think  
10                  it deserves another look, especially if it's pre-  
11                  Booker.

12                  CHAIR SARIS:  I'm just saying on the  
13                  manageable piece, it's just a, it may be worth  
14                  it and because of the length of the sentences it  
15                  may well be worth it.  It's just more  
16                  complicated.

17                  MR. MARGULIS-OHNUMA:  Right, and it's  
18                  worth it also because there's far fewer, it  
19                  affects far, far fewer defendants than the  
20                  thousands of defendants who got resentenced  
21                  during the drugs minus two.

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1           I mean, these are much, much smaller  
2 numbers altogether, especially the pre-Booker  
3 ones. You know, a lot of them are still serving  
4 but there's not, I don't think you're going to  
5 see anything like the numbers for drugs.

6           CHAIR SARIS: So you would say, yes,  
7 it might be a lot tougher but the numbers are a  
8 lot smaller.

9           MR. MARGULIS-OHNUMA: The numbers are  
10 a lot smaller so the total burden is the same or  
11 less and the importance of it is even greater  
12 because the swings are so great.

13          CHAIR SARIS: That's interesting. Go  
14 ahead.

15          COMMISSIONER WROBLEWSKI: A couple  
16 of questions. First of all, are you certain the  
17 numbers are less, because I think there are a lot  
18 of, tens of thousands of career offenders who are  
19 in and so I think we need to look at those  
20 numbers.

21          CHAIR SARIS: We need to look at that,

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1       yes.

2                   MR. MARGULIS-OHNUMA:    But they would  
3       have to be career offenders under the residual  
4       clause, so if it was one of the --

5                   COMMISSIONER WROBLEWSKI:       Other  
6       clauses.

7                   MR.    MARGULIS-OHNUMA:       --    other  
8       clauses, not an issue.

9                   COMMISSIONER WROBLEWSKI:       I don't  
10      think we --

11                   MR. MARGULIS-OHNUMA:    I don't know.  
12      I'm not sure.

13                   COMMISSIONER WROBLEWSKI:       I don't  
14      think we know that number.

15                   VICE CHAIR BREYER:    How do you know  
16      that?

17                   MR. MARGULIS-OHNUMA:    Well, we know  
18      how many career offenders there were last year.

19                   VICE CHAIR BREYER:    Yes.

20                   MR. MARGULIS-OHNUMA:    So we know it's  
21      something less than, you know, 2,300 last year.

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1 CHAIR SARIS: Convictions and  
2 sentencing.

3 MR. MARGULIS-OHNUMA: That's right.

4 CHAIR SARIS: Not people in prison.

5 MR. MARGULIS-OHNUMA: But the  
6 equivalent numbers I'm sure must be much higher  
7 for drugs last year. I don't know, but it's in  
8 the tens of thousands.

9 COMMISSIONER WROBLEWSKI: That's  
10 probably true. If I could just, one question  
11 for Ms. Roth but before I mention that  
12 Commissioner Barkow mentioned about the double  
13 counting.

14 What you call double counting is, I  
15 think, what I would call counting criminal  
16 history or letting criminal history drive the  
17 offense rather than making incremental changes  
18 we do normally under the sentencing table.

19 And I think if we took your position  
20 and eliminated that, we not only would go  
21 contrary to Congress but we would go contrary to

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1 virtually every single state that has an habitual  
2 offender statute.

3 But my question for you has to do with  
4 Edwin, the statutory rape case. You mentioned  
5 the case United States versus Jonathan Madrid  
6 which was decided by the Tenth Circuit earlier  
7 this week.

8 Mr. Madrid was convicted of a statute  
9 in Texas. It was aggravated sexual assault and  
10 it was aggravated sexual assault because his  
11 victim was under the age of 14. His victim was  
12 9 years old. He committed a forcible rape  
13 against a 9-year-old.

14 The policy that we think is  
15 appropriate is to count the case of Mr. Madrid  
16 but not count the case of Edwin and we're trying  
17 to find a sensible way to do it. And if you look  
18 at our proposal in terms of the definition,  
19 you'll see how we try to do it.

20 The problem is that there are many,  
21 many states that say that there is no requirement

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1 that the government prove force when the victim  
2 is under a certain age. In Texas it's under the  
3 age, I believe, of 14.

4 And so under the categorical  
5 approach, whether there is a rape of a 9-year-  
6 old, a 6-year-old, a 3-year-old, forcible,  
7 whatever, if we have the categorical approach,  
8 that case will always be considered a non-violent  
9 crime.

10 What we're trying to do is find a  
11 policy that counts Mr. Madrid but doesn't count  
12 Edwin. Do you think that's a sensible policy  
13 and I don't know if you've had a chance to look  
14 and see the approach that we've taken that Mr.  
15 Zauzmer talked about. Is that a way to achieve  
16 that sensible policy?

17 MS. ROTH: Well, first the Tenth  
18 Circuit called the conviction statutory rape in  
19 its opinion and the Texas statute is the only way  
20 that someone can be convicted. So it was a  
21 statutory rape. And so I don't know that there

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1 would be a whole lot of difference between Mr.  
2 Madrid and Edwin.

3 COMMISSIONER WROBLEWSKI: And do you  
4 think it's sensible not to make that distinction  
5 between the two? I understand legally both are  
6 considered non-violent crimes because neither  
7 charge requires force to be proven by the  
8 government to get a conviction.

9 MS. ROTH: I don't know any good  
10 replacement for the categorical approach and we  
11 already, in federal court, spend so much time  
12 discussing someone's prior convictions that if  
13 we were to proceed with something like was  
14 suggested earlier, the back-up position I believe  
15 it's called, we would be having trials for prior  
16 convictions, in Jessie's case 17-year-old  
17 convictions, in federal court and I think that's  
18 unworkable and unfair.

19 And something that the government  
20 should know from its assistants is that when a  
21 plea agreement is reached in federal or state

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1 court, it's negotiated by parties who are  
2 supposed to know the case better than anyone  
3 else.

4 And doing something else other than  
5 the categorical approach in attempts to invade  
6 and discern what was decided at the time, facts  
7 we don't know about at all -- When I was looking  
8 at Justice Alito's dissent in Johnson and he was  
9 giving an example about a gang member hiding a  
10 gun inside his coat and walking in the direction  
11 of a rival gang member and clearly that's  
12 violent, I just involuntarily started writing  
13 notes in the margin.

14 Really? What if he actually had that  
15 gun there because somebody else was after him and  
16 he had gotten word of that and it was for self-  
17 defense? He didn't intend to look for anybody  
18 at all.

19 What if the prosecutor in that case  
20 had a government informant witness to that  
21 mitigating fact and didn't want to say it because

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1 he didn't want to reveal his informant?

2 So the defense attorney and the  
3 prosecutor agree on a resolution of that case  
4 that's a charge that's under what was originally  
5 brought. These are facts we could never discern  
6 and they're critical ones. I don't see something  
7 better than the categorical approach that would  
8 lead to justice.

9 COMMISSIONER WROBLEWSKI: And so the  
10 implication of that position is that in  
11 California, which defines burglary broadly, it  
12 doesn't define it with relation to a home, it  
13 doesn't even define it with relation to an  
14 unlawful entry, no matter what, that's always  
15 categorically going to be a non-violent crime.  
16 That's your position.

17 And in Texas, if you rape a child  
18 under the age of 14, it will always be a non-  
19 violent crime.

20 And in New York where you can commit  
21 a crime, a murder through something called

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1       depraved indifference, which I think you would  
2       say is roughly the equivalent of recklessness  
3       because that's one of the ways you can commit it,  
4       then all murders would be categorically non-  
5       violent crimes. That's the policy that I hear  
6       you advocating. Am I right about that?

7                   MS. ROTH:   Saying something does not  
8       fit within the net of narrowly drawn, most  
9       heinous crimes that deserve severe enhancements  
10      does not make an activity right. It is not as  
11      though we are saying that because murder doesn't  
12      fit within this definition, murder is right.

13                   We're talking here about the  
14      importance of narrowly drawing the definition so  
15      that only the most violent crimes are actually  
16      included.

17                   VICE CHAIR BREYER:   But, of course,  
18      that's -- The examples that Mr. Wroblewski gives  
19      are by any stretch very violent crimes so what  
20      he's saying is that -- and he knows you're not  
21      an advocate for violent crime or these crimes,

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1 but I think his question is a fair one.

2 So what do you do about that type of  
3 case, because isn't it under your argument that  
4 that kind of case will not be counted? Isn't  
5 that correct?

6 And so the government comes back and  
7 says, okay, but we want the opportunity of at  
8 least demonstrating to the judge that the 9-year-  
9 old was raped or that the gun was used or this  
10 or that and so forth. We want that opportunity  
11 to demonstrate to the judge that it is, that the  
12 prior case was a violent case and nobody would  
13 disagree it wasn't. What about that? Is that  
14 so complicated?

15 MS. ROTH: I think it's very  
16 complicated to add a back-up approach. Right  
17 now, in a circumstance like that, the government  
18 can request an upward variance and ask the court  
19 to consider certain factors if there is reliable  
20 evidence.

21 COMMISSIONER BARKOW: Do you see that

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1 often, any of you, in your practice? I mean, do  
2 you have examples where the government, because  
3 the government said it's pretty rare for that to  
4 occur and I'm just trying to get a sense of if  
5 we know how often when it is these cases, if it's  
6 California and it's burglary or it's Texas and  
7 it's the rape of a child, how often you see the  
8 judge go up. Do you have kind of a sense from  
9 your own practice experience?

10 MS. ROTH: Not often.

11 MS. CAMPBELL: It's not a question of  
12 going up. It's a question of whether or not they  
13 go down because the career offender guideline is  
14 so high.

15 COMMISSIONER BARKOW: But someone not  
16 in the career offender guideline because the  
17 categorical approach needs that -- The government  
18 is saying there are some people who aren't in the  
19 net who should be but they're not because we use  
20 a categorical approach.

21 And I'm just curious if you had people

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1       like that where the conviction is not eligible  
2       under career offender guideline but the judge  
3       says, you know what, I didn't meet this  
4       definition but separate and apart from that I'm  
5       going to vary upward because they should be and  
6       the only reason I can't do it is because of the  
7       categorical approach but there's all this other  
8       reliable evidence under the usual preponderance  
9       of the evidence standard that we have in the  
10      manual.

11               MS. ROTH:    Your statistics show us  
12      that that's not the case, that upward departures  
13      -- Let's just take the illegal reentry and the  
14      career offender guidelines.    Tiny, tiny, tiny  
15      numbers in the upward departure range.

16               COMMISSIONER BARKOW:   Why is that do  
17      you suppose?   I mean, is it because the cases  
18      are --

19               MS. CAMPBELL:    Because it's over-  
20      inclusive.

21               MS. ROTH:    Your definition captures

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1 everything already.

2 COMMISSIONER BARKOW: I mean, so  
3 maybe with the residual clause it wasn't  
4 necessary and so we don't know yet if they  
5 otherwise fall within it. Is it like we just  
6 won't know until, like now going forward we might  
7 have those examples.

8 MS. CAMPBELL: I can give you an  
9 example why this isn't going to work. If they're  
10 going to start trying to prove something that  
11 didn't count counts, we're going to start  
12 subpoenaing victims again to come in and testify  
13 again. You're not going to have finality of  
14 these violent crimes. I mean, you want that 14-  
15 year-old to come when she's 28 and testify again?  
16 That, to me, is not something you want to do.

17 CHAIR SARIS: Can I ask, how often is  
18 it that the modified Shepard approach doesn't  
19 answer the question?

20 In other words, you go to the plea  
21 colloquy and maybe a trial transcript or a motion

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1 to suppress or a presentence report, you know,  
2 the kind of things that you can look at under the  
3 Deschamps case. Is that answering most of the  
4 questions --

5 MS. CAMPBELL: Yes.

6 CHAIR SARIS: -- as to which clause  
7 it's under?

8 MS. CAMPBELL: And you can't rely on  
9 these other, we going to have an eyewitness from  
10 eight years ago?

11 MR. MARGULIS-OHNUMA: You can use  
12 proffer statements of the defendant.

13 COMMISSIONER WROBLEWSKI: It would  
14 be the government's burden and if the government  
15 couldn't meet the burden, either because they  
16 didn't want to call the child or because nobody  
17 -- That would be the end of it. It wouldn't  
18 count, okay? The judge couldn't apply it,  
19 period, end of story. And so all the usual  
20 things, just like when you have a 14-year-old at  
21 the trial level. There has to be a decision

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1       whether --

2                   MS. CAMPBELL: Part of me already is  
3       thinking, well, you know what I'm going to do as  
4       a defense attorney is I'm going to use your  
5       approach and I'm going to challenge convictions  
6       where he admitted the conduct but he really  
7       wasn't guilty. I'm going to call the victims,  
8       you know, the domestics or, you know --

9                   MS. ROTH: Well, we did that  
10       recently.

11                   (Simultaneous speaking.)

12                   CHAIR SARIS: I think just to get a  
13       sense of it. Are there other questions? Thank  
14       you very much. Very complicated area and it's  
15       useful to hear from people who are in the field.  
16       Thank you.

17                   Welcome, and I know we went a little  
18       bit over so we took too long a break I think. My  
19       fault.

20                   So at this point we are going to hear  
21       from the views from the field, from the probation

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1 department.

2 The first witness is Richard Bohlken,  
3 the chair of the Commission's Probation Officers  
4 Advisory Group. He has been a member of POAG,  
5 as we call it, since 2010. Mr. Bohlken is the  
6 assistant deputy chief probation officer in the  
7 District of New Mexico, and welcome back.

8 And the other witness on the panel is  
9 Michael Andrews who is the chair of the  
10 Commission's Victims Advisory Group. He's also  
11 the managing attorney for the D.C. Crime Victims  
12 Resource Center and assistant professor of the  
13 University of Maryland University College in the  
14 Public Safety Department.

15 Welcome to both of you. Thank you.

16 MR. BOHLKEN: First, I wanted to  
17 thank Judge Saris and all the Commissioners for  
18 the opportunity to be here today and to comment  
19 on this proposed amendment.

20 When POAG first learned about this  
21 proposed amendment, we reached out to

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1 representatives across the country and tried to  
2 solicit information and input from all 94  
3 districts.

4 And the overwhelming response that we  
5 received from across the country was positive and  
6 this was a move in a positive direction  
7 overwhelmingly.

8 Over the past several years, as you  
9 all know, POAG has written and commented on  
10 several occasions about trying to come up with  
11 one crime of violence definition in the  
12 guidelines and we feel that that's the move that  
13 this amendment makes.

14 We'd also encourage single  
15 definitions for other terms used in multiple  
16 guidelines as helpful also. This would reduce  
17 confusion and it maintains uniformity.

18 We like the fact that this amendment  
19 addresses the issues that have been raised with  
20 the residual clause in the Johnson case, and by  
21 eliminating the residual clause, we think that's

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1 a positive also.

2 We received positive feedback on the  
3 enumerated offense definitions in the application  
4 notes. We believe that the contemporary generic  
5 definitions will be helpful.

6 And the probation office, when using  
7 the categorical approach and the modified  
8 categorical approach, we already go to the Model  
9 Penal Code and things like that, so we saw these  
10 definitions as just putting them in the  
11 application notes and it would be useful to us.

12 We did receive a lot of feedback that  
13 the list didn't include some offenses that many  
14 across the country would like to see, such as  
15 aggravated fleeing from law enforcement officers,  
16 shooting at or from a motor vehicle, battery on  
17 a peace officer.

18 But we also acknowledge there will  
19 never be a perfect list that everyone agrees  
20 upon. That's just not something that can happen.

21 And I said during one of the breaks

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1 I've been to many round table discussions on this  
2 topic and I've been in rooms with a lot of smart  
3 people and if there was an easy answer to all of  
4 this the Commission would have already come up  
5 with it so I know how complicated it is.

6 So the list, we like the list. Maybe  
7 it could be a little better with a few additions  
8 but we know it'll never be perfect.

9 POAG struggled with reaching a  
10 consensus on two items within the amendment. The  
11 first was deciding between burglary of a dwelling  
12 and just burglary. We've had numerous meetings  
13 and discussions on this topic.

14 Some like the narrowness and the  
15 similarity of the burglary of a dwelling which  
16 is what we use now with most crime of violence  
17 definitions within the guidelines, while others  
18 like the broadness and uniformity of burglary  
19 with the approach that we take to the ACCA. So  
20 we couldn't come up with one consensus on that.

21 Secondly we split on the proposed

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1 changes to the requirements determining whether  
2 or not an offense was classified as a felony  
3 under state law.

4 Many believe that the definition  
5 should remain unchanged the way it's been right  
6 now where we look at the amount of imprisonment  
7 for the offense as whether or not it's going to  
8 be a misdemeanor or a felony under the  
9 guidelines. And this would avoid, those felt,  
10 would avoid unwarranted sentencing disparity  
11 amongst the different jurisdictions across the  
12 country.

13 And then on the other hand, others  
14 believe that the proposed change requiring the  
15 offense to be classified as a felony under state  
16 law would ease or simplify the application for  
17 them in a lot of cases.

18 One of the things that we did  
19 unanimously agree on was that should the change  
20 in requirements be implemented, we'd like the  
21 inclusion of the phrase "at the time the

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1 defendant was initially sentenced," because  
2 across different jurisdictions offenses change  
3 from initial sentencing to the time they complete  
4 a term of supervision.

5 In sum, this is a good and a needed  
6 amendment. As I said before, will it fix all  
7 the issues and make it simple to apply? No, it's  
8 still going to be a complicated process  
9 determining whether predicate offenses are crimes  
10 of violence, but it's definitely a move in the  
11 right direction so thank you.

12 CHAIR SARIS: Thank you. Mr.  
13 Andrews.

14 MR. ANDREWS: Thank you, Chairman  
15 Saris and the distinguished Commission. My name  
16 is Mike Andrews and I'm the chair of the Victims  
17 Advisory Group and I appreciate the opportunity  
18 to come and speak with you on behalf of the crime  
19 victims community.

20 I had an opportunity to speak to our  
21 panel as well and we have just some

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1 recommendations for the Commission to consider.

2 First, I think the group as a whole  
3 agrees that there needs to be a simplified and  
4 standardized approach to the definition that  
5 would provide clarity and consistency.

6 The group is also aware of the  
7 multiple different definitions of crime of  
8 violence and they're aware of that.

9 And I think the ultimate approach is  
10 to find some consistency where victims feel that  
11 the rules aren't changing depending on the type  
12 of crime that has been committed and which  
13 they're a victim of.

14 The VAG supports expanded definition  
15 of crime of violence. They propose three  
16 possibilities. One is the current element, so  
17 use, attempted use, threatened use of physical  
18 force against the person of another.

19 Of course, they also agree that that  
20 definition of itself may not catch all the  
21 different types of crime of violence and also

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1 agrees that an enumerated offense approach would  
2 also be consistent with some of the crimes that  
3 aren't part of that definition, such as rape,  
4 murder, terrorism, some of the things that were  
5 discussed in a previous panel.

6 The third which we discussed just  
7 before coming here and prior to submission of the  
8 testimony is the other circumstances where are  
9 not caught between the definition of crime of  
10 violence or the enumerated offenses but those  
11 will give the judge discretion to determine those  
12 relevant facts that could also consider crime of  
13 violence because we know that there is also  
14 situations where even the enumerated offenses  
15 don't really fall in the definition of what a  
16 traditional crime of violence would be and this  
17 way this would give victims a third opportunity  
18 to have the court make that determination.

19 The one part that there is a unanimous  
20 approach is if the Commission is to adopt a new  
21 definition of crime of violence is to have any

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1 type of retroactive application be perhaps taken  
2 out or not considered for the simple fact that  
3 relitigating any new application could induce  
4 further revictimization of victims and would  
5 cause further trauma.

6 Two definitions that the VAG did want  
7 to comment on was the murder definition. The  
8 VAG supports the proposed definition.

9 And the other one is the aggravated  
10 assault definition and, like my colleague here,  
11 I don't know how many different, I guess, special  
12 classifications you can come up with.

13 The VAG would add to the list, besides  
14 the ones that are already mentioned, athletic  
15 officials, military, clergy, or public officials.  
16 These are the folks that are often the most  
17 vulnerable victims to interface with the public  
18 the most and, of course, first responders would  
19 be included --

20 CHAIR SARIS: Did you say athletic?

21 MR. ANDREWS: Athletic officials.

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1 CHAIR SARIS: Helicopter parents or -  
2 -

3 (Laughter.)

4 MR. ANDREWS: Well, one of the  
5 members of the panel indicated that there was a  
6 horrific case in Utah which a family member was  
7 a soccer referee and was --

8 CHAIR SARIS: And a parent hit him?

9 MR. ANDREWS: Well, a player  
10 assaulted the referee.

11 CHAIR SARIS: Really?

12 MR. ANDREWS: Yes. It killed him  
13 actually.

14 CHAIR SARIS: And how frequent is  
15 that?

16 MR. ANDREWS: Probably infrequent but  
17 they said that, you know, there's an opportunity  
18 that, you know, it's something that's not really  
19 considered. That's kind of a rare example with  
20 the death but they were saying about other  
21 assaults that have happened with either hockey

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1 referees, soccer referees.

2 CHAIR SARIS: Really?

3 MR. ANDREWS: And then, of course, we  
4 just saw most recently in the state of Texas  
5 where there's assault on a football referee.

6 COMMISSIONER PRYOR: By two players.

7 MR. ANDREWS: By two players. I  
8 don't have the statistics. It was a --

9 COMMISSIONER PRYOR: They don't play  
10 football in Massachusetts.

11 (Simultaneous speaking.)

12 CHAIR SARIS: That's very  
13 interesting. So that was viewed as a common  
14 national problem.

15 MR. ANDREWS: Yes. They thought that  
16 when we were going through the extensive list,  
17 and it was exhaustive and I think, you know, we  
18 were just trying to pare it down and that was a  
19 consensus that they wanted me to bring up.  
20 Perhaps isn't on everybody's radar but it's  
21 something to consider.

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1 CHAIR SARIS: Well, thank you.

2 MR. ANDREWS: Thank you.

3 COMMISSIONER BARKOW: Can I ask you a  
4 question, Mr. Andrews? So the last panel when  
5 we were discussing this the issue was if we  
6 expanded our, went beyond the categorical  
7 approach and we did kind of take into account  
8 additional things, kind of like your number  
9 three, relevant facts the court could consider,  
10 there's this issue of whether it would mean  
11 bringing victims in to testify or having people  
12 come in.

13 I don't know if you have a sense of  
14 whether or not going beyond the categorical  
15 approach, whether we, because it seems like what  
16 you're saying with retroactivity is don't do that  
17 because it'll mean that the victims have to come  
18 in, relitigate uncertainty.

19 And I'm wondering if you have the same  
20 concerns if we were to expand and go beyond the  
21 categorical approach to include these other

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1 conduct-based things.

2 MR. ANDREWS: Yes, thank you.

3 Obviously I do have that concern but, you know,  
4 with that my clients definitely know that part  
5 of the criminal justice process is, you know, the  
6 right of testifying and the right for the  
7 accused.

8 So not a lot of my clients like to do  
9 that but they know that's part of the deal, but  
10 I would probably err on, you know, to shy away  
11 from any type of relitigating those issues.

12 VICE CHAIR BREYER: So, I mean,  
13 that's the trade-off that I see, is that on the  
14 one hand you have finality. You have whatever  
15 the sentence was at the time and there could be  
16 some closure by some victims as to the offense.

17 And then what we're suggesting now is  
18 that that closure, it's not really closure  
19 because we'll look at it all over again. If we  
20 go beyond the categorical approach, we'll look  
21 at it all over again.

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1           So I wonder, and maybe there's no  
2           general rule. Maybe some victims would say,  
3           well, I want to make sure that the sentence is,  
4           quote, "just," is appropriate to the  
5           circumstances.

6           And some people will say, well, I have  
7           closure on this and I have to move on with my  
8           life.

9           Is it that there are these two sort  
10          of slightly irreconcilable views of victims and  
11          we can't address both of them?

12          MR. ANDREWS: Yes. Oh, thank you.  
13          And that's exactly right. That's always an  
14          inherent conflict that I have with my clients  
15          especially when, you know, how much the  
16          government is asking them to participate in the  
17          criminal justice program.

18          And, you know, for most victims it's,  
19          you know, it's a unique situation. It's an  
20          environment they are very, you know, it's very  
21          strange to them.

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1                   And to ask them to rehash the incident  
2                   that happened to them the first time, let alone,  
3                   but then come back for a second or perhaps third  
4                   time is very debilitating and that's where you  
5                   see the I don't want any part of this. I just  
6                   want to move on.

7                   But as you indicated, yes, there is a  
8                   sense of justice as well because in the back of  
9                   the victim's mind is if I don't participate what  
10                  about the next victim or the next victim that  
11                  could possibly be in that situation.

12                  So, you know, I don't have an answer.  
13                  I'd like to find some middle ground there where  
14                  it would give a victim an opportunity or that  
15                  option.

16                  CHAIR SARIS: Or at least give them  
17                  notice that this is what's happening and --  
18                  right.

19                  MR. ANDREWS: You're exactly right,  
20                  Judge, is to give them that notice of the event  
21                  and then really engage them and see how much they

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1 want to participate and want to be, you know, an  
2 active victim.

3 CHAIR SARIS: Good point. Okay,  
4 thank you. I have one question for you. We  
5 heard from the government that a sentence imposed  
6 requirement which is in the immigration area but  
7 people have been proposing in terms of limiting  
8 the predicate so the sentence imposed being at  
9 least 13 months, various proposals, would be very  
10 hard to prove.

11 And from a probation point of view,  
12 you implemented on the immigration side. How  
13 hard is it to figure out actually what they, what  
14 time they spent?

15 MR. BOHLKEN: It's very difficult. I  
16 concur. It's still very challenging for us to  
17 obtain all the documents that we need to obtain  
18 from different jurisdictions.

19 And if we had to come up with a  
20 definitive amount of time someone actually  
21 served, we would also have to try to get records

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1 from detention centers, prisons, different things  
2 like that.

3 And then that brings into play  
4 sentence imposed and how much time someone  
5 actually does. Some jurisdictions give 50  
6 percent off for good time. Sometimes they do 80  
7 percent on violent crimes in different  
8 jurisdictions. So I think that would open it up  
9 to a lot more unwarranted disparity.

10 VICE CHAIR BREYER: Well, it comes up  
11 all the time in the immigration area, right,  
12 because it's right embedded in there so how big  
13 a deal is it in --

14 MR. BOHLKEN: Well, in the plus 16  
15 and the plus 12, it is sentence imposed and you  
16 just have to figure out if the sentence was  
17 imposed. You don't have to figure out exactly  
18 how much time they actually did.

19 CHAIR SARIS: So it would be I impose  
20 five years in jail and you don't have to figure  
21 out what the good time was, what the offsets were

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1 for detention centers or a state so that's why  
2 it's simple, is you word it that way.

3 MR. BOHLKEN: And the only difficulty  
4 see there would be what we have right now which  
5 is trying to track down all the necessary  
6 documents.

7 VICE CHAIR BREYER: Well, looking at  
8 the documents, I mean, one of my great concerns  
9 is that you can't get, and maybe for good reasons,  
10 but you can't get police reports on prior  
11 incidences. It's a very uneven thing.  
12 Sometimes they're there and I'd say most of the  
13 time they're not. Has that been a problem? Am  
14 I the only one having this problem or is it just  
15 nationwide?

16 MR. BOHLKEN: It is nationwide. Some  
17 jurisdictions are better than others. Some  
18 jurisdictions are better at record keeping than  
19 others.

20 Across the 94 districts in the United  
21 States probation office, different districts do,

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1 some do better collateral investigations for  
2 other districts while some maybe don't do as good  
3 of collateral investigation. So it's always an  
4 issue of tracking down the core documents and the  
5 police reports.

6 As you know, we don't rely through the  
7 categorical approach and modified categorical  
8 approach on the police reports at all, but it is  
9 good information to have because one of our  
10 functions is to try to give the sentencing judge  
11 all the information that we have about a  
12 predicate offense and in a lot of cases there are  
13 no police reports available.

14 CHAIR SARIS: Thank you. Does anyone  
15 have any other questions?

16 COMMISSIONER BARKOW: Yes, can I just  
17 ask, has probation tried to urge Congress to do  
18 something about making it more easy for you to  
19 obtain records of conviction?

20 So since we heard from the earlier  
21 panels and you're saying again, like, it just

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1       seems like we have this weird patchwork in the  
2       United States and Congress should have an  
3       interest in making sure that stops and that we  
4       are able to get from every state the convictions  
5       that are the backbone of this kind of a regime.

6               And I'm just kind of curious if, has  
7       probation ever made that point or, I'm just  
8       trying to, I want to alert Congress to the fact  
9       that this seems like a real problem, like that  
10      we should be able to get these records from people  
11      and I just wasn't sure if you knew of any effort  
12      to try to --

13             MR. BOHLKEN: I don't, but that would  
14      be something worthwhile to do because, like I  
15      said, it is different across -- Some  
16      jurisdictions, courts charge the United States  
17      probation office to make copies of actual records  
18      so it varies across the board.

19             COMMISSIONER BARKOW: Thank you.

20             CHAIR SARIS: Any other questions? I  
21      want to thank you very much for coming in --

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1 MR. ANDREWS: Thank you.

2 MR. BOHLKEN: Thank you.

3 CHAIR SARIS: -- sharing your  
4 thoughts. We care. Probation has been --- you  
5 always come in and it's terrific. That round  
6 table we had, was it last year where everyone --  
7 That was great. And the VAG, I mean,  
8 you always give us good feedback so thank you  
9 very much.

10 MR. ANDREWS: Thank you very much.

11 MR. BOHLKEN: Thank you, Your Honor.

12 (Whereupon, the above-entitled matter  
13 went off the record at 12:08 p.m.)

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