UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

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U.S. Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, NE
Washington, D.C. 20002

Commissioners:

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C O N T E N T S

P R O C E E D I N G S

Introductory Remarks

JUDGE HINOJOSA: Good morning, ladies and gentlemen. On behalf of the United States Sentencing Commission, I would like to welcome you this morning to our public hearing with regards to certain guidelines and considerations that we are considering for this cycle, and we do appreciate everyone's presence, and I would like to certainly introduce the Commission.

You all probably know the Commission, but we have Commissioner Beryl Howell, Vice Chair Ruben Castillo, Vice Chair John Steer, Vice Chair Bill Sessions, and Ex-Officio Member Deborah Rhodes, as well as Commissioner Horowitz will join us shortly.

I realize that by coming here, you take time out from the things that you've got to do on a daily basis and that it is a sacrifice on your part, but I have to say that in my time here on the Commission, I have found the public hearings to be extremely helpful as well as the written documentation that is submitted with the testimony of individuals and the statements of individuals with regards to the public hearings. It is invaluable to the Commission and we appreciate your taking your time to do this.

We do have this morning a distinguished panel. We've got Mr. Richard D. Collins, who's with the National Association of Criminal Defense Lawyers, Mr. Donald

Klawiter, who's a partner at Morgan, Lewis & Bockius. He is the chair-elect of the Section of Antitrust Law with the American Bar Association, and we've got two strangers to the Commission next, Mr. Jim Felman, who's a partner at Kynes, Markman & Felman, and with the Practitioners Advisory Group, and Mr. Jon Sands, who is the Federal Defender with the District of Arizona.

And if you all don't mind, we'll go ahead and start with Mr. Collins, and the way we'll proceed is we'll have a statement from each one of you and then we'll open it up for questions and answers, if you all don't mind.

MR. COLLINS: Thank you very much. My name is Rick Collins, and I appear here on behalf of the National Association of Criminal Defense Lawyers. I appreciate the opportunity to speak --

JUDGE HINOJOSA: And how were you able to beat down Carmen Hernandez?

MR. COLLINS: She was delayed and late today, so here I am.

I'm going to speak on the issue specific to drug equivalency and dosage units as far as anabolic steroids. The basis for my testimony today is that I've had the opportunity to examine the anabolic steroid issue, use, abuse, and misuse from a variety of perspectives and a number of different contexts.

In the criminal justice context, I've represented

numerous persons, individuals, accused of anabolic steroid offenses, both state and federal violators. I believe I've probably handled more anabolic steroid criminal cases than any other lawyer, both traffickers and possessors, across the country.

I'm counsel to a number of non-profit associations, including several associations dealing with health and fitness, two that deal with dietary supplements, one that deals with the sport of professional body-building. I've worked with numerous physicians and doctors who use and prescribe anabolic steroids for medical purposes, either for antiaging or other purposes. I've lectured extensively to those doctors as well.

I've been involved in numerous cases involving athletes and sports-doping matters, where athletes have tested positive for the use of banned substances, either in NCAA sports, Olympic athletes, or professional ballplayers, and I've been involved with all of those.

So, I've seen steroid use and misuse and abuse from virtually all angles. I understand that Congress has issued a directive and it is my goal that whatever it is that this Commission decides that the decision is based on sort of a comprehensive view of all of the data and all of the perspectives with respect to anabolic steroids from a variety of sources and not just one perspective or one source.

I understand that the Department of Justice is recommending uniformity of the treatment of anabolic steroids with other Schedule 3 drugs, so that one tablet, oral tablet of anabolic steroids would be one dosage unit and one-half of one cubic centimeter, cubic centimeter being the same as a milliliter, cc or ml, same thing, would be a dosage unit, and there is a superficial appeal to the idea of sort of a cookie-cutter approach to making all Schedule 3 substances treated the same.

I believe, though, that it would be a terrible mistake to amend the guidelines purely for the purposes of convenience of counting and it would be a terrible mistake to amend the guidelines without a broad review of the equivalency issue with respect to anabolic steroids and I say equivalency in the full sense of the term, and I hope that my testimony is not the end of the issue, if you're inclined to move forward with an amendment to the guidelines, but that there'll be additional hearings and additional data collected by you with respect to the issue of equivalency.

What I would like to do today is raise 10 points which I think each of which bear upon the issue of equivalency or lack of equivalency, similarity or lack of similarity of steroids to the other Schedule 3 drugs, and in fact of steroids to all other drugs in the Controlled Substances Act.

I believe that these differences, these dissimilarities, these unequivalencies essentially undermine the argument of the Department of Justice and none of these points stands alone in a vacuum, and I submit all of them cumulatively to be taken together to paint a picture which I think should give great pause to the 1:1 equivalency calculation that's being submitted.

First issue, most fundamental, I guess, is chemistry, chemical difference. Steroids are the only hormone in the Schedule 3 list of drugs. In fact, they're the only hormone in the entire Controlled Substances Act. They are the only drug that is a controlled substance that each of us is in possession of as we sit here today.

Every man, woman, and child is not only in possession of this controlled substance and bear in mind that the possession of any amount of a controlled substance is a violation of the law, but we're actually endogenously manufacturing it as we sit here today. So, there's something very, very different essentially from a qualitative standpoint of anabolic steroids to virtually all other controlled substances.

All steroids are essentially permutations or analogs of testosterone which is the basic male sex hormone that is the one by which the legal definition of steroids is measured by.

Second. There's a substantial pharmacological

difference between anabolic steroids and all other Schedule 3 drugs and all other controlled substances. They are not stimulants. They are not depressants. They're not hallucinogens. They don't fit into the easy categories of other controlled substances. In fact, they're not taken for their psychoactive effect which is a very large difference from all the other controlled substances. They're taken for physical effects, and in fact the physical effects are what they are prescribed for on a medical basis.

So for example, patients with severe HIV wasting disorders who are very sick in the final stages of AIDS are prescribed steroids by their physicians, not to make them sick but to make them well, and steroids have an amazing rejuvenating effect upon people with advanced HIV wasting because steroids cause a synthesis of muscle growth and a recovery, allow the body to recover more quickly from stress.

There's also a difference, third difference is with respect to the potential for abuse and dependency, the addictive potential. I read through some of the -- all of the 500 pages of congressional transcripts that preceded the enactment of the 1990 law which first criminalized anabolic steroids, and I read through from the perspective of trying to find out what basis there was to classify them as having the kind of addictive potential that other controlled substances do.

The fact of the matter is, and I'm sure the Commission knows but many people are not aware, that the Food and Drug Administration sent a representative to Congress to testify with respect to anabolic steroids prior to them being added to the Controlled Substances Act and said don't do it, don't do it, they don't belong in there, they don't have the potential for abuse and dependency that would be necessary to schedule them.

The National Institute on Drug Abuse sent a representative who said the same thing. The American Medical Association sent also a representative who also testified don't schedule these as controlled substances. They don't belong in the Act in the first place, and perhaps most tellingly of all, the Drug Enforcement Administration also sent a representative who said this is not for us to deal with. This is not the kind of controlled substance, this is not the kind of substance that should be controlled in the Controlled Substances Act. There are other ways to deal with what are certainly societal problems with respect to the abuse of steroids, but this isn't the proper vehicle to do it because it doesn't fit the criteria for a controlled substance. Congress scheduled them, nevertheless.

There's also a difference, fourth difference as far as the societal harms or potential societal harms of anabolic steroids from the abuse of them. I believe it was

the District Attorney of San Diego who once said, somewhat of a famous quote, that nobody ever knocked over a liquor store to get anabolic steroids, and the idea is that steroids don't lead to the kind of societal harms that other drugs typically lead to: crime, stealing, crimes of violence.

In fact, if one were to look through all of the testimony that was presented to Congress, both prior to the 1990 law and prior to the 2004 law, the harm is with respect to the purity of sports. Almost exclusively the witnesses testified with respect to steroids in sports, particularly major league sports, Olympic sports, baseball, football, and the coercive effect that that has upon players who don't want to use steroids within sports and the spillover effect that it has on misguided teenagers who may seek to emulate the Jose Cansecos of the world. The hearings focused primarily on the ethical harms as opposed to the typical harms that we find in the criminal justice system that stem from drug abuse.

Another difference is the toxicity issue in terms of overdose. In terms of the potential for overdose from steroids, it's virtually non-existent. It's been pointed out by a number of physicians to me that even if you were to take a bottle of oral anabolic steroid pills, you'd probably have a really bad stomach ache. If you were to take a bottle of aspirin, you wouldn't wake up.

So, in terms of the potential for overdose, it's not there and that sort of lack of a ceiling will play into some of my other comments when we look at the quantities of steroids that can be taken by people who use them non-medically, given the fact that there is no overdose ceiling to limit the amount.

The sixth difference is as to the profile of users, and I can testify that I have spoken to, in detail, literally hundreds of anabolic steroid users, non-medical anabolic steroid users in the course of my professional practice. They are, contrary to what we would think from what we see on C-SPAN or what we read in the press, the majority of those people who call my office or come to me with legal questions, are neither teenagers nor multimillion dollar professional athletes.

If I were to describe the profile, it's males, typically, between 25 and 45 years of age, particularly health-conscious in all other respects, often follow very strict diets, a lot of training, going to the gym, regular exercise, typically non-smokers, typically gainfully employed, not the typical profile of a drug addict or drug abuser, who are using steroids not to cheat in a particular sport. In fact, most of them don't play any sports.

Most of them are using them purely for cosmetic reasons, and as misguided as it is to use any prescription drug, let alone a controlled substance, without a doctor's

monitoring and supervision, examination for possible contraindications, regular supervision for potential side effects, these are people who are using them, in my opinion, based on all of the people I've spoken to, for the same kind of motivation that drives people to seek botox, liposuction, breast augmentation, and other forms of medical technology that exists purely to improve appearance.

Seventh. Patterns of use and patterns of purchase. The patterns of purchase of people who use steroids non-medically, as I've examined it, is very different from the typical drug possessor's behavior, and I was a prosecutor for five years, prosecuting drug crimes and other crimes on behalf of the State of New York.

I've been a bread and butter criminal defense lawyer for a good part of my professional private practice career, also, and I have a pretty good sense of the typical drug abusers and these -- the people who abuse steroids or use steroids non-medically don't fall into that category.

They are people who typically will purchase steroids in large quantities to last a cycle of anticipated use, very different than the kind of drug user who wants crack, walks up to the corner, buys some crack, goes home, smokes it, gets high, goes back to the corner after the effects wear off to get some more. That is the antithesis of the typical steroid user. These are people who will buy large quantities often for a volume discount which are

meticulously planned out for a cycle of use spanning weeks, months, or longer, often in very elaborately-schemed dosage patterns, suing ancillary medications to either eliminate or ameliorate certain potential side effects that can arise.

The behavior very often is packrat behavior in terms of the quantities that are bought because they are people who are concerned that if supply were to run out for whatever reason, the anticipated cycle would be cut short and they're very meticulously planned.

Another difference is with respect to the quantities typically used and I have seen many cases, particularly in state court, where a search warrant is executed, a SWAT team goes in and finds what is described as a warehouse filled with steroids which, when one comes down to the actual quantities used, is in fact a personal use amount.

It's interesting that the quantity being suggested as a dosage unit for injectable steroids is a half of a milliliter. I can tell you that in all of my time in dealing with the people who use these drugs, I don't think I've ever met anyone who has ever injected a half of a milliliter of liquid. It is always more than that, invariably more than that.

So, it should also be recognized that in many of those cases, the quantity almost always causes a charge of possession with intent to sell. You know, all of the state

court cases that I've seen, state and federal cases, based on the fact that most law enforcement agencies are geared in terms of the harder drugs, the narcotics, so to speak, so when they see a hundred glassines of heroin or 300 tablets of Ecstasy, it's indicative that we've got a dealer on our hands. Finding a thousand tablets of steroids is in no way inconsistent with personal use of anabolic steroids.

Another difference is as to the manner of acquisition and in my experience, the number 1 way that people are being arrested for anabolic steroids today are by purchasing them over the Internet, often from overseas websites. With a few clicks of a mouse and a keyboard, a person in Washington, New York, Maryland, can access a pharmacy in Thailand where the steroids are legal and can be sold and can order them, either by PayPal or by credit card, for them to be delivered by mail order and obviously since September 11th, the scrutiny of international mail packages has risen dramatically and the potential for these packages to be identified and a controlled delivery of the package to ensue has been ratcheted up, and I have seen many, many, many of these cases where a package is identified by Customs inspectors at a port of entry, an airport typically.

A determination is made to deliver that package under supervision of law enforcement agents with an agent dressed up as a mail carrier to the home of the designated recipient. Once that package is accepted, an anticipatory

warrant is executed. Ten to 15 agents enter the home, seize the computer or the evidence that's on it, seize all of the -- obviously the package and any other steroids that might be in the house, and this is significant because what I'm seeing in dealing with these cases is that the people being arrested are not the dealers. They're the users. They're the possessors.

The dealers are far away in another country, most of them, and I have dealt with some trafficking cases here in the United States, but not as many, not nearly as many as the usage situations, where the package comes in, it's apprehended, and that person, the end user, is the one who gets arrested.

I think it's critical to recognize that whatever is done by this Commission, that the effect is going to be primarily on the users, not on the dealers, and most of the users are charged in state court with -- in many states, it's mere possession is a felony, possession with intent to sell is a felony, and obviously under federal law, the importation is itself a felony. So, the end user is committing a felony and is facing punishment in federal court.

JUDGE HINOJOSA: Mr. Collins, if you don't mind just speeding it up a little bit or we're going to end up with no time for the rest.

MR. COLLINS: I'm sorry.

JUDGE HINOJOSA: I don't mean to be rude, but --

MR. COLLINS: I'm sorry. My final point is, and I think this is -- having read the Attorney General's Advisory Subcommittee submission on the point, one thing that I think is a really glaring omission from that report is the fact that what now constitutes the list of anabolic steroids, which went from 27 a few months ago to over 50, around 50, is that all the balance of these new substances were not criminal substances a few months ago. In fact, many of them were sold over the counter in GNCs and Nutrition Warehouses and Vitamin Shoppes across America as dietary supplements, and all of those products, the andro-type products, the nor-andro products, which were criminalized by the new law, obviously if somebody has a bottle in their house, they're now in possession of a federal controlled substance, to now take what was dietary supplements, punish them as controlled substances and now increase the punishments by 50 times which is essentially what 1:1 correspondence equivalency would do, I submit, would be a disservice and for all of those reasons, to come to a conclusion, it doesn't add up, so to speak.

JUDGE HINOJOSA: Thank you, sir.

Mr. Klawiter?

MR. KLAWITER: Thank you, Your Honor.

It's my great pleasure to be here today representing the Section of Antitrust Law of the American

Bar Association. The comments that we have submitted to the Commission, which I won't repeat in any detail here today, are the views of the Antitrust Section and not the views of the Board of Governors or the House of Delegates of the American Bar Association.

The Section of Antitrust Law is an organization of about 9,000 antitrust lawyers, a number of whom practice in this area of criminal cartel litigation and work closely with the Department of Justice in that area. Indeed, at one of our conferences a few years ago, Judge Castillo was one of our featured speakers dealing with exactly these difficult and murky issues of sentencing in an antitrust context.

I'd like to make basically three points today and then I'll try to do it very briefly. The first relates to the Section's view of enforcement of the antitrust laws through use of the criminal statutes.

The Section is a strong believer and a strong endorser of effective prosecution of hard-core violations of the antitrust laws. We talk in our comments about limiting antitrust criminal cases to the hardcore per se activities, such as price-fixing, bid-rigging, customer and territorial allegation.

The Antitrust Division has, through the use of its prosecutorial discretion, has done exactly that over the years and we applaud them for that and we believe that the

types of penalties that are at issue here today are the types of penalties that are designed specifically for that type of offense.

Looking at the strong and effective enforcement of the antitrust laws is a practice that goes back many, many years. For the last 10 years, the Antitrust Division has focused primarily on very large international cartel cases. They have had a tremendous record of success in those cases and the process in terms of both the detection and the prosecution of those cases and the effect of sentencing has, in our view, worked very effectively and has brought about literally a sea change in the way in which antitrust cases are prosecuted.

We believe that the Sentencing Commission should look at that as really a paradigm of effective criminal prosecution and, at least in terms of the major focus of it, should remain consistent with the program that has been in effect for the past 10 years.

The government has been effective at detection. They have brought about significant penalties, far more significant than anything we would have expected 10 years ago, and in that process, I think, have worked a system and a structure which is effective, which is working, and is not broken, and we believe that it should remain as really the focus of the criminal enforcement of the antitrust laws.

My second point is essentially that in

interpreting and in revising the sentencing guidelines for antitrust violations, the Commission should be faithful to the goals of sentencing in a white collar context and specifically in this kind of context.

First of all, we believe that the Commission should be consistent with the goals of 18 USC 3553A, essentially a sentence that is sufficient but not greater than necessary to achieve the goals of the process, and secondly, this Commission has been on record for many years, from the earliest days of the antitrust guidelines, as speaking to the best way in which sentencing of individuals should occur in the antitrust case.

In 2R1.1 Comment, Note 8, the Commission notes, "The most effective method to deter individuals from committing this crime is through the imposition of short sentences coupled with large fines."

That has been the view of the Commission for many years. We believe that it is a very effective and useful means for you to continue, and the concerns that we have really relate to the magnitude of the increases really at the lowest levels of the process, not through our process.

Essentially, our argument here is that while we endorse the increase in penalties and the Section of Antitrust Law has been on record as doing that, our concern is that there may be unintended consequences in at least some of the situations where individuals are sentenced in

antitrust cases.

In our comments, we detail these for you. I won't repeat in great detail any of that, except to state that antitrust cases are very difficult to prove, very difficult to detect. Even when the government, through its leniency program, which has been just enormously successful, has gotten a company and its individuals to be cooperative with it, it often needs more than one company, more than one individual because the evidence of these cases is very subtle, is very nuanced.

It essentially involves an agreement which might be an inferred agreement, an implied agreement. It does not necessarily involve a situation where people sit around the table and raise their hand and say I agree, I'm going to raise prices.

It is a much more subtle practice and what the Antitrust Division has done effectively is bring into the process a number of individuals from different companies representing different points of view, after getting its initial evidence, has turned many of those people through the use of the sentencing process that's in place now at the low end of the sentencing span and has gotten many of these people to cooperate fully, making it unnecessary at the end of the day for it to try many of these cases, making it unnecessary to spend millions and millions of dollars on the investigations.

The fact is by using the principle of the guidelines of the short sentences with large fines, what they have done in effect is brought about a situation where these cases are settled, very few of these cases are tried, and as we've seen in the last 10 years with the billions of dollars of fines and huge numbers of incarcerated individuals, both U.S. and foreign, they have been exceedingly successful.

The proposal of the Commission is an increase that would essentially double what would be the minimum term of incarceration of these cases. We have seen in recent times individuals who are cooperating serving jail sentences in the span of 12 to 18 months. These are the people that are helping the government to make their case. These are not the kingpins. These are not the top people. These are the people who are making the case for the government.

If we take those same individuals under the proposal and move them from a sentencing level of 13 which would be a 12-to-18-month incarceration period to a 17, as a starting point, which is a 24-to-30-month period, I think we'd chill to some extent the level of cooperation that those people are going to have. I think there are going to be more people who are going to sit back and say, you know, these cases are hard. This is an inference situation. It's going to be difficult for the government to prove it. Maybe I'll roll the dice. Maybe I'll try to beat this, whereas

today, I think they look at it on a cost-benefit analysis and actually will come in.

The more important area, I think, is the role of foreign defendants in these cases, and this is a very interesting subtlety of the antitrust area. With these international cartel cases, many of the defendants that have come into these cases have been foreign nationals, have been people who are living outside the United States, who are brought in the jurisdiction of the United States in large measure because their company does business here, but they, the kingpins or the participants in the conspiracy, live abroad.

Those individuals have -- and many of us in practice think that this is just a miraculous achievement of the Antitrust Division -- have come to the United States, have surrendered to the jurisdiction of the United States Government, have served a short jail sentence, and have gone about their business in France and Germany and Japan and everywhere else.

One concern with increasing the minimum sentence level is that if those individuals have the opportunity to sit it out, as many of them now do, even with, you know, a process which some of their colleagues in these businesses think reasonable, I think the possibility of getting more of that cooperation from those foreign nationals who have really been the key to the international cases is going to

be killed, is going to wane.

If somebody living in Germany has the option of coming to the United States for a very short sentence and getting about his business or then coming to the United States for a longer sentence, I think they may have a very different answer, based on what the guideline is today and what it would be under the proposal.

Just to put this in context, of the 48 largest cases, corporate fines, that the Antitrust Division has been able to get over the last 10 years, only six of those have been assessed against U.S. corporations. The other 42 have been assessed against foreign companies, a large number in Japan, a large number in Germany, a large number in Switzerland.

The fact is that the internationalization of these cases and the great ability of the Antitrust Division to get to these cases, I think, could be eroded, could be affected, in some serious way by essentially doubling the low end of the incarceration period.

In all other respects, the Section of Antitrust Law applauds increases in penalties. We think at the high end, there certainly is room and necessity for higher sentences. It is at this cooperation level that we are most concerned about unintended consequences that could come.

One final point is the bid-rigging point. The proposal essentially subsumes the one point for bid-rigging

into the four point increase that is proposed. We believe again that the majority of the major serious cases that the Antitrust Division prosecutes today are not big-rigging cases. They are price-fixing, customer-allocation cases.

Again, using as a proxy the 48 largest cases, five of those cases are bid-rigging cases. The remaining 43 are price-fixing, territorial-allocation, that sort of thing.

I think the proposal really overstates the importance and significance on an every-day basis in the antitrust world of bid-rigging. I think we should look at it in terms of, you know, if there is a bid-rigging situation, why not add an extra point, but don't subsume it in a situation where most of the cases, and again most of the major important cases that the government's going to have do not involve bid-rigging as it is defined in the guidelines.

With that, I will await further questions and am pleased to help in any way I can.

JUDGE HINOJOSA: Thank you, sir.

Mr. Felman?

MR. FELMAN: Thank you.

On behalf of the Practitioners Advisory Group, I wish to thank the Commission once again for taking the time to hear our views. We always appreciate that.

I'm here today on behalf of the group because I was on a conference call and when this topic of antitrust

came up, I somehow drew the short end of the stick and got assigned this topic and I know nothing about it.

So, I'm going to talk about it instead in terms of the Commission's amendment processes and use this as sort of an example of how in a post-Booker world the Commission might conduct its affairs, but before I do that, as a housekeeping matter, I do wish to acknowledge Amy Baron Evans who has stepped down as one our co-chairs and I think that on behalf of the PAG, we would like to thank her publicly for the hours of service that she put in on behalf of our group, and also we have today Greg Smith who is a partner with Sutherland, Asbil & Brennan here in Washington, D.C. He will be trying to fill Amy's large shoes. Sorry. Fashion statement and all. As our new co-chair, together with Mark Flanagan, who I think I saw come in.

So, in any event, I read Booker again and I reread the single sentence that Justice Breyer used to describe what he believes the role of this body is and what he said is, "The Sentencing Commission remains in place, "everybody was happy to read that line, "writing guidelines, collecting information about actual District Court sentencing decisions, undertaking research, and revising the guidelines accordingly."

He used the word "accordingly," and I think it's pretty clear that at least he and the other members of the majority of the Supreme Court believe that this body's role

is to utilize, at least to the extent possible, data about actual District Court sentencings and research in its guideline amendment processes.

The Chair recently testified before Congress that this body also takes into consideration the factors of 3553A in its amendment processes and therefore the work of this body is entitled to great weight by sentencing judges who look at the guidelines because they should have confidence that those factors have already been considered.

So, I think it's also important and has been important and I think the Commission already realizes that it's very important for this body to consider those factors as well in its amendment processes, and it led me to the question of is there any link between the two. Is there some way that we might use the data that we have to answer some of the questions about how we would go about analyzing those factors?

It may not be an easy process, and I'm just trying to take sort of a stab at it, and I think it's something that this body really ought to spend a little bit more time thinking about it. It's an important question, I think, and I think that it suggests maybe a little bit higher level of rigor in the manner in which this body documents its work product.

I think that when you send out an amendment, you probably ought to write a judicial opinion with it in which

the 3553A factors are explicitly addressed and discussed and the data that you have are at least to some degree discussed and the manner in which they connected to it.

I was struck by the Sensenbrenner bill and a part of it when I read it on Friday about how a district judge, in order to grant a departure, would have to hold an evidentiary hearing on the extent to which a disparity might arise from that particular sentencing. I thought about this sort of process that would be involved there and I sure wish Congress would have an evidentiary hearing before it raised penalties and they're not likely to, but I think it points us in the direction a little bit, if we're going to go to that much trouble for an individual case, if it's that important to consider the data for an individual case, what sort of searching, exploration of the data should we have before we casually double or triple all of the penalties for a particular category of offense and that is what this body appears poised to do.

So, I want to try to take a stab at what data might go with what factors and then, of course, the punch line would be to apply them here in the context of antitrust.

There are a number of the 3553A factors that talk about the nature of the offense, the severity of the offense, that basically what was the crime, and what level of punishment is necessary but not more than necessary to

reflect that, and I thought, well, how does that pass through in the data? How would we know?

At least if we start from the premise that judges matter and that judges who are on the front line watching cases, that we want to actually pay attention to what they think about offense severity when they sentence, it seems to me at least a couple of the data we might want to look at is what are the rates of upward departures, to what extent have judges found the existing severity levels simply inadequate to the purpose of what they believe to be a fair sentence?

So, I think we might want to look at that category. We might want to look at where within the range are the judges sentencing, and I guess the way I would look at it is if judges are struggling up against the top end of the range compared to other types of offenses -- obviously we know that sentences are often at the low end, so we're just talking about comparing them across different categories of offenses to see what the trends are -- if we see that the district judges are struggling a little bit more on the high end, it might be a suggestion that they think the guidelines are a little low.

By the same token, if they're pressed up against the bottom, it might suggest that perhaps the guideline range is too high and, God forbid, it might could be lowered a little bit. So, I think we might want to look at some of that data.

Recidivism is an important 3553A factor, the need to protect society from future criminal behavior of this defendant. I don't know whether this body keeps recidivism rates by offense category. It would be nice if it did, and I think that that might be an important thing to look at, but I don't know whether that data is available.

I do know that the Commission keeps data on criminal history by offense category and in its recidivism study, there seems to be at least some sort of correlation between recidivism rates and criminal history category. People who are first offenders tend not to recidivate at nearly the rate of people who are not first offenders because of whatever the reasons are and I'm sure they're complex, but it seems to be pretty well true.

So, we might want to look at criminal history. We also might want to look, generally speaking, at the age of categories of offenders. I think there's a direct tie between recidivism and age. Older people tend to get over their criminal ways and start to behave themselves a little better than younger people do and so we might be able to make some predictions about age.

There's also in the 3553A factors consideration of alternatives to incarceration.

What other options are there? What are the kinds of punishments available? We might want to look at the extent to which courts are fashioning other remedies. Are

they imposing higher fines? Are they imposing higher restitution? Are the courts finding other ways to address and arrive at what they think to be the most appropriate sentence?

Rehabilitation, at least as of today, is still in the statute. The need to provide the defendant with vocational and educational training. So, we might want to look and see what are the educational levels of these classes of defendants and I guess the premise there is that we can train them and help rehabilitate them in prison. Unfortunately, I think that there may not be data to show DOCs education rates are what we'd like them to be, but at least that might be one of the premises that's underlying the idea there of making that a factor. I'm not sure.

I think this Commission can also consider things that are not in 3553A. You're not limited to those factors. You might want to consider what are the trial rates. Is the department having to try a lot of these cases? What are the cooperation rates? I don't know whether I look at it quite the same way as the ABA does. I think that there's some sense in which the higher the penalty, the more people will want to cooperate, and so we might want to look and see is the department getting a satisfactory rate of cooperation, so that they can make their cases. What are the 5 K rates within that category?

These are some of the things that I think the

Commission may want to consider and it's just my first stab it and you all are in a much better position than I am to do this sort of thing, but I think you want to take some time and think a little bit about what are the categories of data that you collect and how might they relate to the 3553A factors and how might that help the Commission document its work product so that courts will have confidence giving substantial weight to that.

Turning to the antitrust data, I've looked at the years for which data is available, which is '95 to '02, and the Commission breaks its categories down into 31 different types of offenses and antitrust is one of them.

There has never been an upward departure from an antitrust sentence, ever. We have yet to find a case in which the District Court felt that the existing guideline range was inadequate to find the appropriate punishment. Out of the 31 categories of offenses, this is one of only two for which that statement can be made.

Where within the range are antitrust sentences? There are not many of these cases, so that may be part of what's explaining this. There's a 166 in these eight years. Only three of them involved a sentence in the top half of the range. Only three times out of the 166 cases over eight years has a judge decided that the appropriate sentence in that case was anywhere in the top half of the existing range. I think that is a striking statistic. It's less

than 2 percent and out of the 31 categories of offenses, it would rank antitrust as number 1 in the extent to which judges have found the lower half of the existing range to be the appropriate sentencing point.

What is the criminal history of antitrust offenders? Out of the 166 cases, there were four in which the person was not a criminal history category 1. This would rank antitrust first among all 31 offense categories in the degree to which offenders do not have any criminal history.

Antitrust offenders have either the highest or the second highest rates of fines and the highest rate of all 31 categories in which both fines and restitution are imposed. Antitrust offenders have the highest of all types of offense categories in levels of education.

Antitrust offenders are by far cooperating with the government, and I've found that data to be just striking because it wasn't just that antitrust was first every year in the percentage of substantial assistance motions. It was a question of how many percentage points by which this category of offense was first.

In 2002, for example, there were 5 K motions in 56 percent of the cases which was 27 percentage points higher than the next closest category. The government is not having any trouble getting people to flip and help them in their case with the penalty ranges at their present levels.

Antitrust offenders are, of course, the oldest of all defendants and again it's a question of like by how many percentage points and that varies by 25 percentage points to 45 percentage points for certain years in terms of the next closest category of age offender.

So, I would say that if you apply the data here to the 3553A factors in the manner in which I've suggested, this is going to be something that I think will be a difficulty for the Commission. Now, the Commission has been told by Congress to do this anyway and I realize that. The Congress, you know, has said we're tripling the stat max. The original version of this thing had a four-level upward adjustment to the BOL, but was persuaded to take that out, I'm sure with the understanding that the Commission was going to do nothing.

So, I realize you're sort of between a rock and a hard place. You've got the data on the one hand. You've got Congress on the other. You have to do something, and so the question is what?

I think that the easiest, quickest, obvious thing is to add some other levels to the top of the volume of commerce table and I would support that.

There isn't any reason to cut off the volume of commerce table at a particular point, if indeed it appears the Antitrust Division is routinely making cases that are above that point. There ought to be an incremental

punishment in the highest ranges and that seems to be what Congress signals, at least to a degree, when they raised the statutory maximum. What they're saying to you is that there are at least some of these cases that are worthy of higher punishments.

I would not see a need to raise the base offense level. I think the best argument I've heard on raising the base offense level is that you've got a floor of 12 in the fraud cases where there's sophisticated means and you want to make sure that -- well, I guess the presumption is that most of these antitrust cases would involve sophisticated means and so I suppose that there's at least an argument that if the Commission wanted to raise it from a 10 to a 12, it could cite the 3553A factor that deals with reducing disparity among different defendants and that might be an avenue for the Commission to pursue. That's a 50 percent increase in all penalties for all antitrust offenses, and, you know, I don't think it's warranted by the data. I also realize you've got a statute and you want to show that you're responsive to Congress's signals.

So, I think you can easily add levels at the top of the volume of commerce table. If you're going to raise the base offense level, I would suggest doing it only by two levels to make it parallel to the fraud sophisticated means level. I mean, this is not a new issue for the Commission and, as I put in the comments, the Commission explicitly

considered in 1991 what is the proper relationship between the base offense level in the antitrust guideline and the base offense level in the fraud guideline, and they talked about that explicitly in Amendment 377 and they made the judgment that a 10 versus a 6 is the appropriate balance there.

I haven't heard any explanation for why the '91 Commission got it wrong and that base offense level has not changed in the fraud guideline, except for this floor that was put in on sophisticated means.

So, I would vehemently suggest that there has not been any documented basis for any changes to the volume of commerce table within the table. If you're raising the base offense level by two levels, it's a 50 percent increase across the board on every penalty. If you start to go into the volume of commerce table and make changes there, too, you are really entering into some pretty unprecedented changes that the DOJ's table, which I was fortunate enough to be given a copy of sooner, I didn't see the comparison to the fraud table which I think is interesting, and I just haven't studied it enough, but, you know, there are occasions in there where there's an 11 level increase over existing levels. That's unprecedented, I think.

I can't remember an occasion, it may have happened, I can't remember an occasion in which the Commission has in one blow raised something by 11 levels.

You know, it's a quadrupling. You can't go back. I mean, it's very difficult to reduce penalties. There's been only a handful of occasions in our country's history where we've ever reduced the penalty for something.

So, my suggestion would be we proceed slow, do the least amount that you have to do to satisfy the Congress in light of this data, document it as well as you can so that it looks like there's been full consideration of as many of these factors as we can and a reconciling of them as best we can, and I think I've said everything I can say.

I'll be happy to answer questions. Thank you.

JUDGE HINOJOSA: Thank you.

Mr. Sands?

MR. SANDS: Thank you.

I'm Jon Sands. I'm testifying on behalf of the Federal Sentencing Guideline Committee.

Jim Felman said that PAG lost Amy Baron Evans. PAG's loss has been the Federal Defender's gain as she joins us with Ann Blanchard as sentencing resource counsel.

Jim Felman also said that he doesn't remember such a large jump as 11 levels. I think the immigration guidelines with the aggravated felon is 16 and the Commission knows the sorry history of that when it jumps that far.

My testimony will focus basically on the identity theft and I wish to make two quick points. One is that the

Sentencing Commission is an expert body. It is recognized as such by the courts, grudgingly by Congress, by practitioners and by academics. It is the body that should take on the problem of identity theft.

Unfortunately, Congress has enacted the 1028 which is the mandatory minimum which, as many recognize, is antithetical to the purpose of guidelines.

The mandatory minimum is a two-year one which has the effect of greatly increasing the penalties, the prison time, that offenders face who have been convicted under it. With that in mind, the Commission's view of not counting abuse of trust, 3B1.3, when the person is convicted of 1028, is a sound one.

What it does is it doesn't exacerbate the problems that are already there with the mandatory minimum. Mandatory minimum in this case will increase penalties in Zone A by 9 levels, in Zone B and C by 7 levels. We are talking steep cliffs.

It is piling on to use abuse of trust if a person is convicted of that. In most, if not all, cases, there would be that overlap. Identity theft has that patina of abuse of a trust. It's just not necessary.

My second point deals with the concurrence sentence. Congress recognized that it's in the discretion of the Commission to do guidelines or proposals for it. Judges should be trusted with this guided discretion. We

have railed against relevant conduct for a long time, but in this case, it is a mechanism for saying that if offenses fit in the definition of relevant conduct, common scheme, same purpose, same time frame, the sentences should run concurrent, or you will face a situation of people doing life sentences for four, five, six incidences of identity theft.

I have found in my time here that questions and answers are the most useful part of these hearings and so I will stop now.

JUDGE HINOJOSA: Thank you, sir.

Who's got the first question?

COMMISSIONER STEER: To go back to the left, if I could, and ask Mr. Collins. One of the models that this Commission has traditionally tried to use in setting drug trafficking penalties are quantities that are typically handled by traffickers at a certain level.

Since you've had some experience representing traffickers, as you indicated, could you help us there in ball parking, if you could, what are the quantities trafficked by the person in the U.S. -- you said some of them are in the U.S., domestic -- who deals with the customer, who purchases and has -- how many customers do they typically have and what quantities do they typically transact or handle at a particular time? Can you help us there at all?

MR. COLLINS: I can. I guess more typically than sort of the large -- there's maybe two categories. There's the smaller-time what might be called the dealer and the larger traffickers.

The smaller-time dealers would be technically in violation of distribution laws, but would be more typically a situation where there were three or four individuals who collectively pooled their resources to acquire anabolic steroids typically by mail order. It arrives at the home of the one who gets designated to be the recipient of it and that quantity is then for the purposes of distributing to the others in the group.

That's the more typical dealing scenario because, as I've seen it, the majority of arrests are now based on mail order.

In situations where there was more of a large-scale trafficker, the profile of that individual is typically not within the sort of user community. It's more typically a person who is in it for the money and in that scenario, in the cases that I can think of now, there were other drugs that were also being trafficked.

In other words, the bigger-time steroid dealer who's in it for the money is typically also dealing other controlled substances and so the potential guideline penalties on that person would not be mitigated by the current equivalency of anabolic steroids. That person would

face whatever he was going to face for dealing OxyContin, which is sometimes what you'll see in a bigger trafficking kind of case, Valium, Ketamine, some barbiturates sometimes.

So that's the more typical large-scale dealer who are few and far between in the U.S. because of the ready accessibility of these products by international mail order and through the Internet.

JUDGE HINOJOSA: Jon?

MR. SANDS: The Commission has expressed concern over the years about using quantity and we have testified about how it could be a false marker. At some point, the Commission should start focusing on role as opposed to just looking at the amount.

COMMISSIONER SESSIONS: Mr. Collins, as a part of your statement, you indicated that there was very little violence associated with steroids.

MR. COLLINS: In terms of violent crime.

COMMISSIONER SESSIONS: In terms of violent crime. I'm going to ask you about a different part of that violence question because it reminds me of the crack or cocaine babies and those kinds of things that are going far afield here because we read that there is a tendency, in particular with young people who use steroids, that they become much more volatile and that they're prone to violence and irrational behavior, and, I mean, you're not a pharmacologist, I don't think, unless you took that in law

school.

MR. COLLINS: Psychology grad.

COMMISSIONER SESSIONS: To what extent is that not true?

MR. COLLINS: Well, I guess without going too far afield from my discipline, I guess I'd say don't believe everything you read in the media and sometimes you'll read things that are anecdotal in nature in terms of fairly isolated incidents that are represented to be the typical scenario when they're atypical.

One of the witnesses who testified before Congress, before the 1990 law was enacted, was a Dr. Charles Yesalis and he's generally regarded as the national or international expert on that point, on the point of psychological effects and steroids and teenagers.

His testimony, and I would invite you to call him or to seek input from him, but his testimony has essentially been that the idea of "roid" rage as sort of a typical psychotic steroid-induced behavior has been greatly exaggerated and that I think the quote that I've seen in his testimony was that if it exists, it exists in a very isolated number of cases.

Certainly in the teen context, teenagers have -- and again without going too far from my field, teenagers have wildly, you know, fluctuating hormone levels. In fact, the hormone levels of teenage boys have been found to be as

high as hardened steroid users in the way that they spike up in teen years which is one of the greatest reasons why teenagers should never be using steroids, is that essentially they're on them by nature of their endogenous testosterone production, okay, and maybe if we got that message --

COMMISSIONER SESSIONS: So, are you saying they're illegal?

MR. COLLINS: And certainly steroid use by teenagers is throwing gasoline on what's already a raging fire and that's obviously a problem and to the extent that, you know, the publicity surrounding some isolated situations where steroids may have played a role may have been the most important cause, may have been one of a matrix of factors which is probably the most likely.

To the extent that that gets a message to teens that, you know, it's inappropriate for their use, I think that's positive, but I would suggest that a witness like Charles Yesalis, Dr. Yesalis would be very instructive on the prevalence of steroid-induced aggressiveness.

There's another fellow named Dr. Jack Darkes, D-A-R-K-E-S, who's done some studies on the relationship between testosterone and aggression and there is some correlation between higher testosterone levels, even naturally, and aggressive behavior. Men who have higher testosterone levels tend to be more assertive, more

aggressive, more self-confident than men who have lower and that carries over, if you then bring in supplemental testosterone to essentially, you know, achieve the same end.

COMMISSIONER HOWELL: Well, Mr. Collins, I think one of the submissions to the Commission, you said you wanted to give us all food for thought and I think you have, as you can tell from the questions.

You commented in your written submissions as well as orally about defending some defendants in state court proceedings. You didn't give a direct answer to John's question about how much would constitute trafficking and so to sort of get to -- maybe perhaps another way to get at that number, putting aside the whole quantitative issues and using quantity as a measure of what the sentence should be, could you give us some insight as to how the federal regulation of anabolic steroids compares to different states?

Is the federal regulation harsher, more lenient? Are states, you know, generally, you know, taking a harsher stance against trafficking, and are there some state statutes where state legislatures have decided, you know, this amount of anabolic steroid pills or in liquid form in our evaluation constitutes trafficking?

MR. COLLINS: It's hard sort of to, you know, not duck your initial question. It's hard to give -- there's no real quantification that I could give you, like this amount

is for personal use, that amount is for trafficking.

Off the top of my head, I can think of a case in Georgia that I was involved in and a case in Arizona, both of which involved hundreds of thousands of tablets of anabolic steroids in large-scale trafficking. One was literally a warehouse of anabolic steroids, but other drugs were involved in that.

In terms of the states and the way they address it, it's really a crazy quilt of laws around the country. There are two states that have not scheduled anabolic steroids at all.

COMMISSIONER HOWELL: Do you know what those states are?

MR. COLLINS: Yes, it's Vermont and Alaska and Alaska now has a bill to address that issue.

JUDGE HINOJOSA: It's probably the cold weather.

MR. COLLINS: Federal land up there anyway. So, I guess the federal law mostly applies. But obviously in some states, the mere possession is a felony. In some states, possession is a misdemeanor. I know in Louisiana, which may be, I think, one of the last states to have it, mere possession of any amount, one tablet, is punishable by up to five years in prison with or without hard labor, so that's for any amount.

So, most of the states really don't quantify. They deal just with the issue of was it personal use or was

it possession with intent to sell and that becomes the dividing line and there's no magic number of what amount makes the difference. It really comes down to the whim of the local law enforcement agency or prosecutor who looks and says hmm, I see he's got 500 pills, let's hit him with an intent to sell charge and so that would be the more serious of the charges.

I see that all the time in many, many cases where it's certainly extremely consistent with personal use, notwithstanding there was a charge of intent to sell.

COMMISSIONER HOWELL: And with the different types of anabolic steroids that are out there, I mean, do the dosages vary, so that you really -- so 50 tablets in one kind of steroid, you know, would -- for the same effect, you would only take 20 of another?

MR. COLLINS: That's a great point, and, you know, there's a lot of points I could have brought up, but that certainly is an important point, and that is, that the whole concept of tablets and cc's is irrelevant completely to steroid use. It applies, I suppose, to controlled substances and for the sake of the sentencing guidelines and it may make sense, but for steroid users, they don't think in those terms.

It's essentially milligrams, which is a potency measurement as opposed to -- I mean, it doesn't matter whether it's a cc of oil or a hundred ccs of oil. It's

what's in it, what's the ingredient, what's the active ingredient in it. So, it's milligrams.

There are some tablets that are five milligrams. There are some tablets that are 50 milligrams. I think certainly if you change the guidelines, you wouldn't have any more five milligram tablets, you'd have 50 or 100 or 150 milligram tablets because that would be a way of getting, you know, more out there and not being punished as much, which I don't think is a very good thing because the higher the potency, obviously the more potential effects there would be and people who might use less would be almost forced to use more because of the larger size of the tablets.

COMMISSIONER HOWELL: Well, if the Commission decided not to do an equivalency, as the Justice Department has urged, between, you know, one gram of marijuana and one tablet, the unit-by-unit measure, and moved away from that quantitative approach in this area, which, as Mr. Sands points out, is something that imposes difficulties, but yet we still have congressional directive to deal with taking some action to deter trafficking and, you know, use of these anabolic steroids, what kind of more targeted approach do you think, you know, based on sports-doping professional, collegial or high school sports, you know, selling to kids, what kind of targeted approaches would you recommend or suggest to the Commission to think about to both address the

congressional directive which we must and do take seriously as well as the sort of struggle we have with the quantities and setting the penalty?

MR. COLLINS: Okay. In terms of the high-level sports stars, I'd have to give that some thought. It's interesting that what sort of sparked this whole criminalization of steroids back in 1990 was the 1988 positive for Ben Johnson in the Seoul Olympics. The fastest man alive was found to be doped up on steroids and that caused an international furor over steroids in sports, a bunch of hearings, and then ultimately Congress criminalizing anabolic steroids for everybody, not just the cheating athletes.

But yet in the 14 years since that law went into effect in February of 1991, I can't think of a single professional athlete ever who's been arrested for possession of anabolic steroids and yet that was essentially the target of the law.

So, in a sense, the law missed its target and wound up actually impacting upon all these people who are using it for appearance and are not cheating athletes. Somehow, I think there has to be some way of addressing and targeting that population. I'm not sure what it is.

With respect to teens, I think that's a little clearer. There are a number of states that now have pending bills to test teens, high school students for anabolic

steroids. I think that would certainly be a step in the right direction because not only would you identify potential steroid users who are teenagers, but you'd have a chilling effect on all of them because they never know when they're going to be tested. It's random testing. It's like an Olympic athlete. So, I think that would be a step in the right direction.

Certainly, those who sell to teens wilfully, knowingly selling a teenager is, I think, the gravamen of the harm. Other than the sports purity issue, where Jose Canseco or some other athlete uses steroids and hurts the records and we're now dealing with asterisks, other than that issue, it's really the teens, I think, that Congress was worried about, having read through the transcripts both of the hearings that took place recently and the ones back in the late '80s.

So, if there were penalties that could be or enhancements that could be attached to the wilful selling of anabolic steroids to teenagers, I think that is targeting the problem without sort of spilling over on to the other population that I've described.

JUDGE HINOJOSA: Jon?

MR. SANDS: Briefly. Wouldn't it make sense for us to use an asterisk in this sense and have a policy statement since judges that would deal with this in the post-Booker era will be sensitive to the problems and the

policy statement focusing on the factors that Mr. Collins has identified would be appropriate, would tell the judges to look at this and possibly have an upward variance or departure, and we could also say if it's from Thailand, we can bring in the antitrust and you could have a trifecta?

JUDGE HINOJOSA: I'm going to turn to a few questions on antitrust here. I guess we all remember our American History courses in grade school and high school as to why we have antitrust laws and the problems in our society that dealt with the passage of those laws, and so I'll start off with this question of what is your view as to the harm to society with regards to a violation of an antitrust law?

MR. KLAWITER: I think the harm is significant. I think it is great. Essentially, it deprives the consumer, the public, of free and open competition where they could obviously get better pricing, better quality, better terms. It also deprives other businessmen who are in similar industry of the opportunity to work on or deal on a level playing field.

I think those really go to -- are really the centerpiece of the economic policy of the country. The antitrust laws have been called the Magna Carta of free enterprise and I think they truly are. They are not a form of regulation. They are in fact the antithesis of regulation by either private means or others and the

opportunity there is to, you know, make sure that the consumer, the public and competition in general are protected and can deal freely in society.

MR. FELMAN: I guess I would answer that, since I'm not an antitrust expert, by saying compared to what? It seems to me that as bad as they are, they're not as bad as fraud or they're a variety of a fraud. You know, a fraud is an effort to sell you something different from what you're buying or some deliberately inferior product or some effort to take your money without giving you anything.

So, I have to say compared to what? Antitrust is certainly --

JUDGE HINOJOSA: Compared to itself was the question. I mean, we have this law. So, what is the damage to society, what is the harm to society when it's broken, and no comparison to anything else, but just --

MR. KLAWITER: Essentially, economic, which I guess would reduce people's --

JUDGE HINOJOSA: And I guess the number of victims can be a large number.

MR. KLAWITER: Yeah.

COMMISSIONER STEER: Isn't there essentially a theft, theft of a large number of purchasing?

MR. KLAWITER: I think in some cases, I guess that's right, where there's an inflated price that's resulted, basically it is. It's a sophisticated form of

theft.

MR. KLAWITER: I think the general context, and again I'm also a former prosecutor, so in the Antitrust Division and sort of having sat through that same view, theft, you know, stealing, fraud, and again it's not necessarily the single person that's affected, it is the broader, more amorphous group and that makes it a little more difficult, I think, for some people to understand, but I think at the end of the day, theft is a good word.

MR. FELMAN: It's also an extraordinarily complex area. The one antitrust area that I've -- a case that I had, I was representing the CEO of a group of hospitals and this fellow was about as pure as the driven snow as far as I could tell and the area of antitrust law in some contexts is extraordinarily complex.

Can a group of cardiologists talk to each other about a particular type of treatment? Would it be okay for them to also own a clinic?

We're talking about in some instances some extremely gray areas of the law, and the one thing that I guess I wish we had were some examples of actual cases involving individuals in which it appears that the existing guidelines sentence was inadequate and I've not seen that yet. Everything the Department of Justice has pointed to have been corporate prosecutions of large companies with huge fines.

What I have never read is show me a case in which there was an individual defendant and have some full understanding of what that defendant actually did and then look at the punishment that that person got under these guidelines and show me where it was inadequate. I haven't seen that yet.

JUDGE HINOJOSA: I guess the next question I have is both of you in your written materials make a big effort to talk about 3553A and Booker while at the same time we've got Congress and Congress wrote 3553A and Booker's just a decision of the United States Supreme Court indicating a problem with regards to a portion of the Sentencing Reform Act, but in the end, it's Congress's statute and Congress has raised the level from three years to 10 years, that more than tripled the amount of maximum possible punishment in the field, and I guess when you look at 3553A and it's easy to say, well, I'm going to look at all these factors and because this is an older, wealthier, more educated individual, some of these factors don't necessarily fit and therefore you shouldn't give too much weight to what we're trying to do.

My question is when you do have older, wealthier, more educated individuals, isn't the common sense approach to 3553A then -- wouldn't one say that the factors are not necessarily applicable to every single case, that you have to look at those factors and then determine with regards to

this particular type of defendant and this particular type of crime?

Obviously, we're not addressing necessarily educational requirements for somebody who's highly educated or rehabilitation for somebody that is probably not going to commit another crime. At that point, we start talking about deterrence, I suspect, or some of the other factors would be looked at in a different fashion.

I mean, isn't it true that when you look at these factors, they're not necessarily going to fit with regards to every particular defendant in the same way? I mean that that is the way that this will be looked at? I mean that you can't individually say with this particular defendant, because these are people who are older, they are wealthier, they are more educated, and you are going to hear individuals who will say, well, it's okay, if you're that type of individual, you just pay a higher fine, and is that really fair to the rest of us, and so these become very complicated, I guess, and they don't really fit into questions of, well, rehabilitation is not necessary for this individual, education not necessary, and so then you start thinking of the factors and do those deterrents, does deterrence become a bigger factor in a case like this?

MR. KLAWITER: I think the deterrence issue really goes to the fact that a period of incarceration is very effective, and the question is what should that -- how long

should that period of incarceration should be, and I think again from my experience in representing many of these individuals, the fact is if individual comes to this point, is either found guilty or enters into a plea, he is going to jail and this is, you know, as we see on TV with all the, you know, executives and all, the fact that they're going at all is a significant factor, and there are collateral effects to that.

Number 1. There will not be a recurrence of this conduct because in a world of Sarbanes-Oxley, in a world of corporate responsibility, that person isn't going to have a job after he's convicted of this. He is out of his company. He has come from the top pretty far down, and I think the deterrent effect that we have seen and one of the ways we've actually kind of gauged this is in looking at what other countries do in the competition antitrust area.

Countries that do not have a period of incarceration, and that's most of the world, there is much more of a cavalier attitude, that this is something where you can basically buy it off by paying a fine and you go about your business and do that.

The fact in the United States that there is a greater consequence, that you do have a period of incarceration, is very, very significant to the deterrence effect and I think is overwhelming at this point, and I think my point, and I think the point expressed, you know,

on behalf of the Section of Antitrust Law, is that we are saying that incarceration is a good thing.

We are questioning again at the early part of this process whether, you know, a doubling of the minimum sentence is called for or whether the system that's worked so far just continues with the idea that you have room at the top end of the range for the much more serious conduct, and I think that's what we're really speaking to, and we would endorse the view that there should be -- you know, having the range up to 10 years is very significant and very important and increases and enhances the deterrent, but at the lower end of the process, where most of these cases are fought out, we believe that there could be, you know, the effects that I talked about in terms of a reluctance to cooperate of the foreign cooperation eroding.

We don't know that, but the simple fact is in talking to clients who have gone through this process, those are the pressure points, those are the places where we see problems.

MR. SANDS: I think the parsimony principle comes into play here, which is pressure has to be sufficient but not greater than necessary, and antitrust seems to have called out for this, especially with statistics that Mr. Felman has given to the Commission.

This is an incredibly complex field in which the whole issues of loss and theft, as the Commission knows from

its fraud work, is hard to determine. A few cents for a large number or whatnot. So, we would urge the Commission to go slow and take small steps.

JUDGE HINOJOSA: I guess I'm going to do the final question since I'm the Chair. Okay. We'll get some more, but I'm going to have my final question, and I guess it's directed at you, Jim.

You made an impassioned plea for courts matter, judges matter, and so my question is, in your opinion, does Congress matter and if it does, how much should it matter, I mean, because they do write the law?

MR. FELMAN: There's a difficult question of balance of sentencing policy at the macro level versus sentencing policy at the micro level. The Congress obviously sets the macro policy, the big picture. This is the direction we want you to go in. We think antitrust cases are more serious than before. We're raising the statutory maximum penalty to 10 years. It's still half of what the statutory maximum for fraud is, which they raised to 20 years. So, they're not necessarily saying that it's as bad as fraud, but they're sending you that signal.

So, the role of Congress is at the macro level, to say we want to see these kinds of things increased. However, what Congress lacks is the ability to regulate in advance the rich detail of human nature and human existence that presents itself to people like you every day on the

micro level, and I don't think it's possible for the Congress.

They're never met any of my clients and they don't know exactly in advance why they did what they did or what their past history or life experiences has been, and I guess my perspective, and it's mine only, is that justice, achieving fairness for a particular individual's crime, is so rich in detail that it does not lend itself to being written down mechanically in advance, and so there has to be at least some balancing of discretion between the Congress setting the policy at the macro level and the judges who are actually forced to apply that law and have the duty to apply that law to individual people in the rich context of whatever it is that occurred in that particular instance.

There is no way that I could sit here and tell you that there's anything other than art involved to some degree in how you weigh the 3553A factors and which ones that you decide might carry weight above others in any particular instance. That's your job and not mine, and I guess my only suggestion is that whatever decisions you ultimately make, that you document them in as transparent and as thorough a manner as possible, so that everyone can see what it is that the judgments were, and if the Commission at this point believes that with respect to this class of rich fat guy defendants is just not as important to consider things like rehabilitation or vocational treatment or those sorts of

things, say so in the amendment.

Say we decided that those factors are just simply not that important to this class of people. We thought instead it was more important to reduce disparity among similarly-situated fraudsters. We thought it was more important that there be deterrence and just simply my plea is to say that when you're doing what you do so that a court faced with an individual can then weigh the judgments that this body has made, weigh the judgment that the Congress has made, and try to make some assessment about whether those judgments are fair in light of the particular matter that is before them and seem right to them under those particular facts of that particular case.

So, I don't have a result for you. I'm asking for, I guess, a process or an increased documentation of the Commission's work and judgment, so that we can all see what the judgment was and understand it and appreciate it.

JUDGE HINOJOSA: Michael?

COMMISSIONER HOROWITZ: Build on a question or a point that Mr. Sands made in the context of steroids, but let me ask it in the context of the antitrust guideline.

In addition to hearing complaints about using quantity on the drug side, we hear complaints about the use of dollar levels on the white collar side, and I think in both your submissions, you indicate concern about the volume of commerce table. Yet you both testified in your writings,

both supports building on that table to assess additional points and penalties.

Do you think the volume of commerce table, that is a good factor for us to use in evaluating relative culpability and relative harm, or are there other ideas, notions, statistics, factors that we should be thinking about in the antitrust context, because it's one of the only guidelines where there's one factor and one factor alone driving the penalties?

MR. KLAWITER: I think it is flawed in some ways. I mean, in many respects, it has been a proxy over the years simply because there is so little to use there and, indeed in our comments, we talk on the organizational side and we've made these statements before, that the 20 percent presumption is a problem because in some cases, it's going to be a lot lower, in some cases, it's going to be a lot higher, and we now have the technology and the ability to figure that out.

I think, and again I've given this thought, but I probably don't have a fully-baked thought at this stage, but the idea of looking at what the level of the overcharge is, if that can be determined and developed, is probably a lot more sensible way to look at the magnitude of the effect and impact because, I mean, one of the issues with volume of commerce, the volume of commerce can be a billion dollars, the overcharge can be, you know, a half of one percent or

less because, you know, one of the interesting things about these cases is most of the time, although these people, you know, kind of develop these schemes, they don't work.

I mean, they literally do not work, and it's almost stupid that they do it, but the fact is that if you have an overcharge level that you can articulate, and one of the things we've seen as the Antitrust Division in the last 10 years has gone to the international cartel case and they've had to use 3571 to determine these much higher fines over the statutory maximum, we've seen that there is data, there is economic learning by which you can figure out what the amount of that overcharge is and that's a very, very important thing to have out there, and I think it's much more critical to the overall process than just the straight volume of commerce. Here's how much I sold across the board to anyone and everyone.

So, in terms of thinking in the future and kind of working through some of these issues, I think it's going to be important to focus more on the actual overcharge, the harm, the actual harm that was done to people, and I think if we can figure out and we have a lot of basis to do that now, but figure out a way to put that into both the individual and the organizational side of things, it will provide for much more equitable and effective sentencing.

I think the volume of commerce table makes sense in the case that we're all probably sitting here imagining

of the person who actually owns the company in question, who's trying to make more money to put in their pocket as a result of ripping people off, and then it's really the same as the loss in a fraud context in which you're really trying to measure what harm did they cause to society, and I think if that's the heartland and that's what we're thinking about, then loss or volume of commerce affected is just about as good a proxy as I could come up with.

The difficulty is when you go outside the heartland to people who actually couldn't possibly make any money out of this if they tried and because either there's some mid-level manager who's just trying to make some call about some pricing decision or my client was the chairman of a non-profit hospital.

I mean, there just wasn't any possibility that he could make any money. His motives were to try to cut costs, to reduce the costs of health care, and so if they could do things together with other hospitals, it would allow them to achieve economies of scale which would allow them to cut costs, so they could lower the cost of health care, and there was no dispute, that their incentive was to try to provide the best quality of health care possible at the lowest cost possible, but antitrust law interferes there.

It essentially says you cannot do things together because we want competition in some areas and sometimes competition causes higher prices and so it is a very complex

area and there are going to be some scenarios in which the volume of commerce affected bears no resemblance to the person's culpability.

What you're trying to get to is what was their mental state. Was it really evil? Was it motivated by greed? Was it motivated by a desire to take advantage of other people or was it not? And so my problem with relying exclusively on the volume of commerce table, just as in the fraud table, is I'd follow the money. I'd say there's a huge difference between the person trying to personally gain and the person not, and that these guidelines are just inherently difficult in advance to write everything down in advance and so therefore I support the volume of commerce table approach for the heartland type of case, but there are going to be cases that are just simply outside that heartland to which this table is not going to help achieve justice.

MR. SANDS: Antitrust is a different animal, too. If the behavior is going to fraud, you can be sure that the prosecutors are going to bring fraud charges, wire charges, a variety of things. For the solely antitrust, I would echo the comments, that you have to look at the intent and really what you hope to achieve, punishment that is sufficient but not greater than necessary.

As Commissioner Block wrote years ago, a short term of imprisonment is quite effective, especially in this

field, and maybe restitution is more what you're looking at or maybe you want to take a corporate model and dangle a carrot of cooperation.

COMMISSIONER STEER: Sometimes comments provoke more of a comment than a question, I guess. I think this parsimony principle of which you make so much actually on its face may argue for higher penalties here because it says that the Congress intended for a body like the Commission and a judge individually to set a penalty that is sufficient to meet all of the purposes of sentencing.

Here, Congress is the people's representatives and, Jim, they may not be in touch with the defendants, but I think they are, it's fair to say, in touch with the victims in cases like this. Congress has tripled the maximum penalties and indicated, I think pretty strongly, that the guideline penalties need to go up. That's echoing at least a principle of just punishment, it seems to me, and so the parsimony principle, would it not argue for a punishment that would be sufficient to achieve that purpose as well?

You can't just pick your purpose of punishment that you want to further. The court must consider all of them. The Commissioner must consider all of them. True?

MR. SANDS: Sure. But we are faced then with the whole prospect of what a heartland is. You have most of the cases at the low end and the few at the very, very high end.

A punishment in the middle achieves no purpose. Congress, by raising the maximum, might be saying or is probably saying that for those few egregious cases, the one or two --

COMMISSIONER STEER: There's no evidence of that, Jon.

MR. SANDS: But there's no --

COMMISSIONER STEER: That's speculation.

MR. SANDS: -- buttress, Commissioner. If the courts -- well, --

JUDGE HINOJOSA: Well, to Commissioner Steers' point, what Congress may be saying is yes, we know what the courts are doing, but we don't think that that's appropriate and so we're upping it to 10 years to send a message here, and we could sit here and discuss this the whole day long and still probably not reach an agreement because that's what we're trying to do, make a decision here as to what the courts are saying and some will say the courts are saying I identify with these defendants and I can understand what their claim is with regards to the fact that a small amount of time is very difficult for them and that it's a difficult punishment because of their standing in the community and they are of a higher educational level and all these other matters and yes, there will be some who argue, well, that's the kind of defendant that, in a situation where you have the ability to just make a decision as a court, is going to get a different type of viewpoint than someone who you

cannot identify with, and we've been through this through the years in the United States with regards to this discussion.

In fact, the first Commission actually upped the white collar crimes from the 10,000 cases or so that they studied because that was the view, that there was an easier way to identify with the potential harm or the punishment that has caused an individual who has a higher educational level and different background and that that was something that the Commission felt and others in the system felt had to be corrected and so you need to continue to consider all these factors, and like I said, we could probably sit here all day long and talk about this, but I do think we're going to have one final question and it goes to Commissioner Howell.

COMMISSIONER HOWELL: Okay. And this is going to be very brief, one very brief comment and a very brief question.

My comment is I really enjoyed reading your testimony, Mr. Felman, and I think that your testimony raised very interesting questions about the explanations that the Commission should offer post-Booker about, you know, addressing the 3553A factors and how we address those factors and provide explanations for what we're doing in that context, statutory context and tieing it to the statute. So, I just want to commend both of you for that.

My question goes to something that you didn't really address in your testimony on the antitrust guidelines, and I personally am quite sympathetic to the Justice Department's position of making a closer comparison between the fraud table and the antitrust table, and part of the reason that I read through your testimony thinking you might address this is that if there is a closer comparison, prosecutors won't have to sort of look to alternative fraud charges to bring, mail fraud, securities fraud, wire fraud, you know, all the whole litany of frauds, you know, as part of their charging decision, and stick closer to the antitrust, you know, charges and penalty structure if they don't, you know, feel that they should pick and choose for a higher penalty.

Do you see that in your practice, and do you think that that should be also something we should think about and how do you respond to bringing more equality between the two tables in order to avoid some prosecutorial picking and choosing between charges that might be available in antitrust cases?

MR. KLAWITER: I think we do see it in practice because there are situations where mail fraud or wire fraud is attached and in fact, when I was in the Antitrust Division and working in the front office where Mr. Hammond now works, I remember one time having 54 counts of mail fraud and wire fraud and one antitrust bid rig and figuring

all that out was quite interesting but quite effective, also.

My sense is that, you know, it's just going to vary, depending on what the offense is and what went on and I guess one concern I would have with establishing, you know, complete parody between the two tables --

COMMISSIONER HOWELL: Antitrust would still be lower.

MR. KLAWITER: Yeah. Antitrust would be lower or should be lower. Is, Number 1, in the appropriate circumstance, there is the opportunity to go to the fraud table and bring some fraud charges and do it that way and again that might be a little less elegant and a little more messy, but it's effective because I think in many of the cases, the intent of the Antitrust Division should be or is to strictly say this is an antitrust issue, we're doing only antitrust, and others, this is the antitrust with worse behavior or behavior that should be punished additionally by the actual fraud charges and I think leaving that balance there is not a bad thing because it gives a discretion to the government in bringing these cases and getting cooperation as well. I think there is some benefit to it.

COMMISSIONER HOWELL: But that also brings a sense of problem to us, though, in unwarranted sentencing disparities, based on a charging decision. So, anyway, I just was curious.

MR. FELMAN: The antitrust case that I worked on wasn't a fraud and couldn't have been charged as a fraud and shouldn't have been treated like a fraud and there are some cases that are like a fraud and if they are, they ought to charge it that way and so just simply stated, some cases are not frauds and some of them are, and I thank you for your comments about my testimony.

I should say that I realize probably what I've done is made a whole lot more work for the staff which reminds me to say that I also wanted to recognize Tim. I just heard that he was leaving you and also wanted to thank him on the record for his years of service with the Commission and the PAG's interactions with him have always been very positive.

Thank you.

JUDGE HINOJOSA: Thank you all very much, and we appreciate your time.

We'll go on to the next panel, who have been very patient. The next panel consists of two individuals, Scott Hammond, who's the Deputy Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice, and Robert McCampbell, who is the U.S. Attorney for the Western District of Oklahoma, and who is the Chair of the Attorney General Advisory Subcommittee on Sentencing.

Mr. Hammond, did you want to go first, sir?

MR. HAMMOND: Yes, please. Thank you.

JUDGE HINOJOSA: We do appreciate your patience.

MR. HAMMOND: Well, I was going to say that it is a great pleasure to be here, but going second and listening to all those great questions and not having a chance to jump in immediately, I gotta tell you was a little rough, but I'm really happy to have this opportunity to address you, to talk about the division's proposal to amend 2R1.1, and to talk about what we understand to be the intent of the legislation, the 2004 Act, raising the statutory maximums.

Let me begin by talking about what Chairman Sensenbrenner said when the House passed the legislation because I think it goes to one of the issues that this Commission obviously is concerned about in terms of do we just adjust at the top, do we adjust also at the bottom, you know, what was the intention of Congress, because you won't see anywhere in the legislative history a mention that they were specifically only interested in raising it at the top. That's not what was at work here.

What was at work here was exactly what Commissioner Howell was talking about, by closing the gap between antitrust and other white collar offenses, like fraud. So, Chairman Sensenbrenner said, in discussing the increased penalty provisions, that this should send an unmistakable message to those who consider violating the antitrust laws that if they are caught, they will spend much more time considering the consequences of their actions

within the confinement of their prison cells.

That message, I'm afraid, will not be received unless this Commission amends 2R1.1 along the lines requested in the department's proposal, and here's why. There are three components to the 2004 Act and these components, I submit to you, operate like a three-legged chair.

The first component was the detrebling provision. It provides an incentive for companies to come forward and cooperate and self-report. Qualifying amnesty applicants, as you know, have their treble damage exposure limited to single damages and it removes joint and several liability.

The second component was raising the statutory maximum fines tenfold, from 10 million to 100 million.

The third component, of course, was tripling the statutory maximum sentences for individuals from three years to 10 years or more than tripling.

It's clearly no coincidence that Congress teamed up this detrebling provision with the increases to the statutory maximum sentences and statutory maximum fines. Their strategy, their calculated carrot and stick strategy was designed to deter and punish antitrust offense.

Antitrust offense is now the first two components. The detrebling and the fines, they're self-effectuating. The Commission doesn't have to do anything for those two components to go into place. That is not the case, though,

with the third component, raising the statutory maximum sentences.

Now, I've been with the division for 17 years and I can state unequivocally that jail sentences, individual accountability and the threat of jail sentences, is clearly the greatest single deterrent to antitrust offenses, but you don't have to spend one day as an Antitrust Division prosecutor to know that that is true.

Now, I will concede, as Mr. Felman pointed out, that antitrust defendants are the most educated, the most wealthy, the highest stature defendants that you will find. If we're going to deter these defendants from victimizing American businesses and consumers, we're going to have to do it with lengthy jail sentences.

The short jail sentences that were put discussed in the commentary back in 1987 are not doing the job. Those short jail sentences that are mentioned in the commentary was a different time, a different age, when three years was the statutory maximum. If this three-legged chair, this 2004 Act, is going to stand, if it's going to work, we're going to have to implement the third component, the most important component of this deterrent package.

Now, I understand that in the ABA letter that Mr. Klawiter didn't emphasize it today, so I won't either, there was talk about more time, more hearings. We are greatly concerned about any delay in implementing this delay in

amending to our 1.1 because it's so essential to this deterrent package, but I would submit to you, with all due respect, that there are three things that Congress has found that this Commission can find that are unequivocal.

The first is that antitrust defendants are being undeterred. The current 2R1.1, as it stands now, is not sufficient to deter these crimes. Secondly, that there is an unjustifiable gap between the way currently 2R1.1 deals with antitrust offenses and how it punishes and deters antitrust offenses versus other white collar offenses, and third, that the antitrust offenses that we are prosecuting, detecting today are much more serious and egregious than was even imagined when the guidelines were promulgated in 1987.

Now, let me give you a few examples of why I say that. Let me begin with the first example. In the mid-1990s, we prosecuted a couple of ADM executives as well as their Asian competitors for fixing prices on a feed additive called lysine that is sold to farmers around the world. This cartel was so effective that the cartel members were able to sit in a hotel room and fix the price of lysine to every country around the world effective the very next day. Prices went up 70 percent in the first six months of the conspiracy and doubled over the course of the conspiracy.

Now, when Mr. Felman said earlier show me a case, show me a case, well, I didn't bring him a copy, but I did

bring for you seven copies and they're in the box right behind you, seven copies of FBI undercover tapes, highlights taken from that investigation, that will show you the lysine cartel at work.

There's also some written materials. I gave it to you both in a DVD format and in a VCR format because I would appreciate it if you had the time to take a look at it. I promise you, if you look at those tapes, you will see with your own eyes what I will try to communicate to you today, and that is, antitrust fraud, antitrust crimes are fraud. It is theft by well-dressed thieves.

Make no mistake about it, and you won't when you look at those tapes. I don't know Mr. Felman's defendant in the health care example at the time that he said he represented antitrust defendant. I do know we haven't prosecuted a health care criminal case in over 15 years. So, I don't know what the facts were in that case.

MR. FELMAN: He wasn't charged.

MR. HAMMOND: I'm quite certain about that, but the cases that we are charging and prosecuting are unmistakable fraud.

I mentioned back in the mid-1990s, and I mentioned that case because the 7th Circuit -- I just wanted to read to you how they characterized that case because it's also going to -- I want to follow up on upward departures and the need for greater sentences. This is how the 7th Circuit

addressed the facts of the ADM case.

"The facts involved in this case reflect an inexplicable lack of business ethics in an atmosphere of general lawlessness that infected the very heart of one of America's leading corporate citizens. Top executives at ADM and its Asian co-conspirators throughout the early '90s spied on each other, fabricated aliases and fronted organizations to hide their activities, hired prostitutes to gather information from competitors, lied, cheated, embezzled, extorted, and obstructed justice."

When that case was remanded back to the District Court and the District Court judge was instructed to apply aggravating adjustments to the role and offenses of the top ADM executives, they were sentenced to 33 and to 36 months for that conduct. Under the proposal that the department has made, those same defendants would, and I submit appropriately, be sentenced to incarceration periods of 57 and 63 months, only half still of the new statutory maximum.

Now, when that case was discovered in the '90s, mid '90s, it was unlike anything we had ever seen before. I mean, it was literally bigger, more serious, harmed more consumers, had a greater effect on U.S. commerce than any antitrust crime that we had ever seen.

I'm not going to sit here right now and tell you that it is commonplace for us to discover conduct like that since then, but there are numerous examples and I've

provided some of them in the written materials that I gave to you, numerous examples of international cartels affecting vitamins, D-RAM, graphite electrodes, chemicals, that have shared all of those brazen characteristics to this cartel, but have affected even greater volumes of commerce and had an even greater impact on consumers.

Now, having just highlighted some of those international cases, I'd be remiss if I left you with the impression that we're only prosecuting international cases or that's where the harm is in antitrust crimes. Just this past week, we filed a 22-count indictment in the Northern District of California charging six companies and five individuals with defrauding the E-Rate Program.

The E-Rate Program is a program that is used to provide Internet access, telecommunications services, computer and telecommunications networks to disadvantaged schools and libraries.

There are 11 antitrust counts and there are 11 wire fraud and mail fraud counts. Okay. So, what we talked about, that Commissioner Howell was very concerned about.

Those counts and the conduct itself are intertwined. The harm that they cause is indistinguishable. The guideline calculations, though, for the antitrust and the mail and wire fraud is radically different. It makes no sense. It makes no sense. We've had a number of cases like this, where we have had fraud counts and antitrust counts

where it just isn't right that you have guideline calculations that are so disparate.

Let me give you even what I think is the most perverse example of this. In order to have a Sherman Act violation, you have to have an agreement. An attempt to fix prices or an attempt to rig bids is not a violation of the antitrust laws. It can, however, be a wire fraud violation or mail fraud violation, if you use the wires or the mails.

So, you can have a situation in which we would prosecute an attempt to fix prices that would result in two or three or four times greater jail sentences than if they had actually consummated the agreement, carried it out, and victimized the consumers. That's the situation that we have right now and that's exactly what Congress has tried to eliminate and tried to narrow through the Act to raise the statutory maximums.

Now, let me just say a few things about our proposal. I know you've got my written remarks on it, and I'd be happy to answer all your questions, but I wanted to point out a few things.

First of all, please be careful when doing the math with this, as I know you will be, but it can be confusing. Earlier, we heard about unprecedented 11 level adjustments, all right, under our proposal. Well, I guess what that's comparing to is under the old guidelines, if you began with a 10 and you added the highest adjustment of

seven points for commerce over 100 million, you got to 17.

We've suggested that the highest volume of commerce adjustment level should be at one billion. So, if you're going to compare a $101 million in commerce versus a $1.1 billion in commerce, well, I guess then that's an 11 level adjustment.

I would suggest, instead of doing that math, that you compare what we would have if you have more than 80 million but less than 160 and you want to compare that to more than 100 million, under the old guidelines, you would have a three level adjustment, not an 11 level adjustment, but a three level adjustment.

It's also a great exaggeration to suggest that all sentences are being doubled. That's not at all accurate. As you go through the table, particularly as you go with increasing volumes of commerce, you see you go from 100 percent the base offense level quickly to 66 percent to 50 percent to 33 percent. It varies over the scope of the table.

I would submit to you that this is a modest proposal that the division has made. Why do I say it's modest? Well, let's first look at the high end. In order to get to where Congress says we should be at a 10-year maximum for the most egregious conduct, you would have to have an antitrust conspiracy in which the defendant's participation alone, not the scope of the entire conspiracy,

but through the defendant's company's participation involved over $1 billion, and that still doesn't get you to the top.

You would still have to have a Chapter 3 adjustment like a role in the offense. If you were the ringleader, if you started it at 13 under our proposal and you added 15 because that defendant's participation involved over a billion dollars, and then you still added plus four for role in the offense, then you will get to 32 and then you will be in an offense range which will allow for the statutory maximum.

That same billion dollar conspiracy, a billion dollar conspiracy where the defendant accepts responsibility and gets a three level adjustment, can bring you under five years, half of the statutory maximum, less than half of the statutory maximum.

I say that this proposal is modest for another reason and again I'll draw your attention to the comparison. At $1 million, when you compare that with the $200,000 loss, our proposal provides 2R1.1 is still four levels below the comparable fraud provision.

When you get past that, for crimes involving more than $5 million of commerce, the gap is still six to eight levels difference. There still is a six to eight level difference between our proposal and the equivalent 2B1.1 loss provisions.

We are asking you to do what Congress has tried to

do which is narrow the gap between the way antitrust offenses and fraud offenses are treated under the law. We ask that you narrow that gap as to how they're treated under the guidelines.

I'm mindful of the fact that we've been running late, so I'm going to stop here and would certainly, after you've had a chance to hear from Mr. McCampbell or whenever you'd like, to welcome any questions that you have.

JUDGE HINOJOSA: Thank you, sir.

Mr. McCampbell?

MR. McCAMPBELL: Thank you.

At the outset, I have to observe that when Congress had their hearings on steroids a few weeks ago, Congress got to hear from the major league baseball players and it was very exciting and newsworthy and when it was done, the congressmen all wanted to get the autographs of the baseball players and all terribly glamorous and I understand that I will not be as glamorous as a professional athlete and I apologize in advance.

If it will make you feel better, I am willing to testify today that I have never used steroids, and I have built this body, it's been solely, solely through poor diet and staying away from weightlifting.

Seriously, when we saw the news coming out of the congressional hearings, they were all focused on the gossip of who was taking steroids and who wasn't, and they missed a

bigger point. The bigger point out there is the ordinary Americans, the very disturbing trends of the ordinary Americans that are using steroids in alarmingly-increasing numbers.

Congress reacted to that and they reacted a year ago in the Steroid Control Act of 2004, way before the baseball hearings, and they've invited this Commission to react, and I think this Commission should react.

Right now, we're sending, we as a criminal justice community, are sending a mixed message about steroids. Congress has said, yeah, these present a significant health risk. This is a serious crime. These are Schedule 3 drugs. On the other hand, the guidelines are saying no, we're going to treat them more leniently than the other Schedule 3s. In fact, we're going to treat them more leniently than the Schedule 4s, and I think this Commission should go ahead and act to rectify that and makes the definition of a unit the same for steroids as it is for the other Schedule 3 drugs.

Now, I understand that when you start looking at the pills and the dosages for steroids, we're not going to be able to hit it exactly on the mark, but the fact that the unit can't be hit exactly, that doesn't mean you should do nothing at all and it's not a reason to make a distinction with other Schedule 3s.

If you look at hydrocodone, for example, commonly abused Schedule 3 drug, there's different pills and

different strengths, but one pill counts as one. People who abuse hydrocodone would typically use multiple pills. Not every abuser would use the same number of pills, but one unit equals one.

The same thing ought to happen with steroids, and with steroids, we're not going to be able to get it precisely right. There's too many different kinds of steroids and as people are using them in stacking and cycling and pyramiding, different people at different times are going to be using different numbers of pills.

So, as the Commission did several years ago with Schedule 3s, you ought to define one pill or half a milliliter to be one unit.

Let's take just one minute to look at the numbers and see what that does for you. At the current levels, as we pointed out in the letter we submitted, at the current levels, the biggest seizure DEA had in 2003, the biggest steroid seizure came out at Level 8. Take away two points for acceptance of responsibility, that person is in Zone A. That was the biggest seizure they had that year.

Let's look at the converse. What if you go to the 1:1 ratio? If you look in the letter, DEA has listed the seizure statistics for 11 types of steroids. For 10 out of the 11, if you look at the column for the average seizure, the average seizures would come out at a 1:1 ratio, they'd still come out at Level 8.

Again, subtract two points for acceptance of responsibility and the average case is coming out in Zone A. So, you're not looking at a situation where we'd be filling the prisons with steroid distributors. However, it is the situation where you should rectify the situation we've got now which is where the penalties are dramatically too low.

I would agree with Mr. Collins that you're looking at a little bit different category of drug user. Steroid users are typically intelligent, typically goal-oriented, typically using steroids to essentially further a hobby. This Commission is presented then with a real opportunity. You can send that community a message that yes, there really is a significant health risk associated with these drugs and it really is dangerous.

You can also send that community a message of deterrence. If you want to be a steroid distributor, there are meaningful criminal justice sentences which would follow that and I think you could have a meaningful impact on the increasing trends in steroid use and steroid availability and I think you ought to accept Congress's invitation in that regard.

Let's turn to identity theft for just a couple of minutes. One of the proposals before you is to add an application note to Section 3B1.3 on abusing a position in order to misuse identification in the course of another crime, and I certainly approve of that application note and

hope that will be enacted.

Congress was, when they passed the Identity Theft Penalty Enhancement Act, they were specifically concerned with those defendants out there who are misusing their position. In addition to adding the application note, I'd ask you to add some examples to make it clear what the application note applies to.

A person who misuses their position in order to get identification information to be used, that person does not need to be the manager of the company or have some sort of special license. An ordinary employee who, by virtue of their position can misuse that information, should be the target of that enhancement.

We can think up examples to include, I hope you will include some examples. One starting point would be if you look at the House report that went along with that Act, and I've cited some examples from the House report in my written testimony, they tell you what they were thinking about, and it's employees. There was a guy at a health club who, when people give him the credit cards, he's running it through his skimmer to save the credit card numbers.

Another guy works in an automobile dealership and is able to come up with a name and a social security number. Another is a clerk at the Social Security Administration who's able to get some false social security cards. So, including examples would help courts in the application of

that guideline.

The next question is what do you do with the defendant who abuses their position and therefore gets the two point enhancement and is also charged with and convicted of aggravated identity theft? Is it double counting to do both? It is not double counting to do both.

If you look at the Identity Theft Penalty Enhancement Act, it's clear Congress was thinking of two different harms and there ought to be two different remedies for those two different harms. In my written testimony, I provide you with an example of where it could go either or or both.

Where both are present, both ought to be punished. Logically, I think that's true. Also, I think Congress has given us very specific guidance that that's what they're intending.

If you look at Section 1028(a)(b)(3), Congress talks about, well, what should the court do when they're figuring out the sentence on the predicate offense that supports the aggravated identity theft? When the court's figuring the sentence on the predicate offense, a court shall not in any way reduce the term duly imposed for such crime so as to compensate for or otherwise take into account any separate term to be imposed for aggravated identity theft, and so I think Congress has signaled this very clearly, that they're intending the aggravated identity

theft to be two years added on to whatever would have otherwise happened on the predicate offense.

Lastly, what do you do when there's more than one count of aggravated identity theft? I think that's one of the really interesting questions facing you today. Congress has said courts will need to use their discretion after having received guidance from the Commission and I think you ought to provide some very real guidance to courts in that regard.

With respect to the successive aggravated identity theft counts, they can run concurrently or partially concurrently or consecutively, so courts will have some room to exercise their discretion. One thing the Commission could do would be to make some sort of matrix or formula on exactly how you're going to figure that out, something like the multiple count grouping rules, that would tell courts here's exactly how you ought to do it when you've got more than one aggravated identity theft count at issue.

I'm not suggesting you go that far. Just as Congress, I think, very clearly instructed us what to do with the first aggravated identity theft count, it has to be consecutive. Congress has also said they want courts to have discretion when there's multiple aggravated identity theft counts, and so I don't think you should have a strict formula.

I do think you should give courts some guidance.

Of the hundreds of district judges out there across the United States, some are going to like consecutive sentences, some are going to like concurrent sentences, and the Commission ought to provide some real guidance on what kind of things should you look at.

In my written testimony, I suggest a list of factors that this Commission could offer as here's some of the things you ought to think about that would lead you to think that defendant should have some extra term of incarceration for the multiple identity theft, aggravated identity theft counts, things like if the two different crimes, if they're remote in time or remote in place or different group of co-conspirators are used, or totally unrelated predicate offenses, things that make you think they're so different that some additional term of imprisonment would be appropriate.

So, I do appreciate the opportunity to be here today. I do appreciate the opportunity to share my views, and I'd be glad to take any questions.

JUDGE HINOJOSA: Who's got the first question? Commissioner Sessions?

COMMISSIONER CASTILLO: I'd like to go back to Mr. Hammond, and I am very familiar with your ADM case out of Chicago, but I'm worried, and I wonder if you're worried, if there are going to be any unintended consequences of this potential raising of the penalties, such that you are going

to lose some cooperators. Are you concerned about that?

MR. HAMMOND: That's a possibility. I will tell you, though, that when the guidelines were first enacted, there were a lot of folks that said that that was going to -- folks weren't going to be -- it was going to make it -- we would have much more trials in antitrust cases and that didn't happen.

Do I think that there's going to be an adjustment period? Probably, but at the division, we certainly agree that antitrust offenses should be treated commensurate with fraud offenses. We're prepared to carry that out, and I do think, while we may see more trials certainly for defendants who no longer would qualify because they don't provide timely and valuable cooperation, wouldn't qualify for downward departures, it is going to put a premium on our corporate leniency program which has completely changed the landscape of antitrust enforcement and is going to put a premium on trying to be the second person in the door and still try to qualify for downward departure.

So, we're going to get early cooperation and then we may at the end have to have more cases, but if that happens, we're certainly prepared for it. I don't think that anticipating this possible problem is a reason not to carry out the legislative intent.

JUDGE HINOJOSA: Commissioner Sessions?

COMMISSIONER SESSIONS: I'll defer to you.

COMMISSIONER STEER: You had your hand up.

COMMISSIONER SESSIONS: No. You go ahead.

COMMISSIONER STEER: I'd like to follow up with a question for Mr. Hammond. I take it in antitrust conspiracy cases, it is -- well, you can tell me the frequency, but you sometimes do have different roles for defendants. You do have aggravating defendants who have an aggravating role that you could prove. Sometimes you have obstruction of justice. I believe you alluded to that in the ADM case.

If that's true, wouldn't it make sense as a matter of guideline structure to have a guideline structure from top to bottom that allowed some room for those upward adjustments to work when you have very high volume of commerce cases? Your example, you know, only allowed for the aggravating role, assuming you got acceptance responsibility at the top dollar and didn't allow for, say, obstruction of justice.

I just wonder if we shouldn't allow for a little more room for all the typical enhancement to operate.

MR. HAMMOND: Our proposal has just missed the mark maybe by two levels, if that's your concern, because the Chapter 3 adjustments that we see in antitrust cases are role in the offense and occasionally obstruction. Frankly, we've been seeing more obstruction than we'd like recently, but we don't see -- I just want to mention this to you because I don't want there to be any misimpression.

Abuse of trust obviously is not a Chapter 3 adjustment. We've never invoked -- no antitrust defendant that I'm aware of has received an adjustment based on abuse of trust. I don't think it's applicable in the cases that we've brought.

So, to focus on the adjustments that you've mentioned, for the billion dollar plus conspirator who is the ringleader who also commits obstruction, we've now just gone two levels over what we would need, if we have all of those characteristics.

I would submit to you, though, for the $999 million price-fixer who is also a ringleader who is also obstructor of justice, I think we've just the mark and for someone at $500 million, we're now below it.

So, perhaps if we overshot the mark by two levels because we didn't allow for the possibility of every adjustment and then just reached the statutory maximum that way, I could see that, but I think there is -- I do think that that's -- I think we tried to set up a system that uses the statutory maximum only for the worse imaginable conduct.

COMMISSIONER STEER: However, you do have some criminal history.

MR. HAMMOND: No, I did hear Mr. Felman's testimony about a number of examples that apparently he pulled from your statistics. It is extremely rare. I'm surprised to hear that there were four examples. I could

only think of one. It doesn't happen in our cases. We just don't see it. So, you know, I would say it's fair to say that 99 percent of our individual defendants are in criminal category 1.

JUDGE HINOJOSA: Commissioner Sessions?

COMMISSIONER SESSIONS: The focus of your testimony, Mr. Hammond, is upon the big case. Certainly, the focus of the legislation was on the big case, no question about that, and I think the revision of your table that you're proposing suggests that in some ways.

Generally speaking, to get at big cases, you use enhancements because when you increase base offense levels, the people who are really being affected most directly are the small players, people at the under $400,000 currently or under a million dollars.

So, my question is your proposal suggests that you want Level 13 which is, of course, one level higher than sophisticated fraud. Isn't what you're really trying to do is get at the top end of the table to increase the penalty for serious offenders, and aren't you risking really impacting the low level defendants when in fact, as I understand it, you're not really even prosecuting the low end defendants?

MR. HAMMOND: Well, we are looking for an across-the-board recognition in the guidelines that antitrust offenses should be treated commensurate with fraud

offenses. So, even though this proposal doesn't achieve that, if you begin with that premise, you have to change not just the high end but the low end as well.

You pointed out, rightfully, understandably, that our offense level at 13 is very high. It's, as you pointed out, one point above the sophisticated means.

COMMISSIONER SESSIONS: My question is why are you picking that?

MR. HAMMOND: Well, for two reasons. I want to answer it just a little bit differently because I need to make a point here. We could step down the base offense level by creating volume of commerce adjustments below $1 million. I mean, we could do that. You could do that. We haven't proposed it for the reason you suggested, which is we're not bringing cases of that size. We refer matters like that to the State Attorney General's Offices. We don't in the federal courts bring cases like that.

I'm just very concerned about trying to compare -- when you compare our base offense level of 13 with fraud offense level of six or the sophisticated means of 12 because you have to look at the commerce that's being involved. If you wanted to step down the base offense level and then build in lower volume of commerce adjustments, you know, fraud begins at $7,000. That's the equivalent of -- or $5,000. That's the equivalent of $25,000 in volume-affected commerce.

By the time you get -- right? Okay. By the time you get to where we are or where the old guidelines were at $400,000, you would already be at offense level 14 under the guidelines, okay, because that would be a $50,000 fraud, is the equivalent of a -- excuse me -- a $70,000 fraud is the equivalent of a $350,000 antitrust case.

Well, a $70,000 fraud gives you six plus eight, I believe, and that brings you up to 14. So, I understand why you're sensitive to the fact that the base offense level is high. It works in the antitrust context because, first of all, what we're talking about is an equivalency or near equivalency with fraud offenses in which the fraud are still being treated more harshly but not quite as harsh and, secondly, because, as a matter of prosecutorial discretion, as a matter of limited resources here at the department, we are focusing on matters that involve more than $1 million in commerce.

You know, I don't approve investigations -- I don't make recommendations for the Assistant Attorney General to approve recommendations to investigate conduct that involves less commerce than that. We don't have the resources. We refer matters like that to State Attorney General's Offices.

So that's the best way I can answer your question. I hope I have.

COMMISSIONER SESSIONS: I just wonder if -- just

taking what you've said and going one step further, wouldn't it also be equally effective for your purposes to keep the base offense level at 12, go to the $1 million level, and, of course, we've been talking about simplification and perhaps use rather than one step, use a system of two steps, beginning at two, at one million, because that essentially would put you in the same exact spot that you're requesting, and it also would discourage people in the field from bringing the federal court cases that involve less than a million dollars. In other words, two birds with one stone. Two points rather than one.

I guess I'm interested to know how you feel about that.

MR. HAMMOND: I don't think I would be concerned about that proposal because again I know the kind of cases that we're going to be bringing and I know they involve more than $1 million worth of commerce, typically, and you've brought us to where we need to be for dealing with those types of conduct, and if you're concerned that one time somewhere down the road, I may be gone and the Antitrust Division may have different folks involved who are prosecuting offenses involving zero loss or less than $400,000 and inappropriately beginning at a higher offense level, this would be a way of dealing with it. I wouldn't have any trouble with that.

JUDGE HINOJOSA: Commissioner Horowitz?

COMMISSIONER HOROWITZ: Thanks. Commissioner Sessions just built on a question I was going to ask and I think my concern in looking at these proposals has been the notion of bumping the base offense level up to a 13 which sends the statement that every antitrust case is worthy of a jail sentence in the view of the Commission and from my looking at the manual, I believe the only non-violent offense that fits in that category is an obstruction of justice offense. We don't do that, as Commissioner Sessions just pointed out, even in the fraud context, where we start at a very low number and build up.

So that's my concern with saying let's start at 13. Even then, if you're not there some day and a different administration is there that wants to go start low, you're saying those cases are worthy of jail, and I looked at the statistics and you may have seen them as well that were shared by staff with us that showed actually a fair number of cases over the last few years, antitrust cases, that did not show any adjustment, any SOC, for loss amount.

I don't know whether that means that you are bringing cases that are below $400,000 or there's some other issue there, but it generated some concern. I was just trying to figure out how significant is 400,000 in commerce or a million in commerce and I appreciate your comment that you care about higher end. Just tried to dig around and figure out what is in today's world the levels of commerce

that we see and found some statistics on average sales per store, just to throw this out.

Average Starbucks store generates $750,000 in commerce each year, in sales each year. McDonald's is a million and a half. A Gap is $4 million. A Home Depot store is $44 million. So, you know, it raised concerns that said $400,000, that's -- I hate to say nothing, you know, but it's such a small number.

So, do you have a sense of why the statistics generated by the staff indicate that a fairly sizeable number of antitrust cases are not seeing increases for loss amount because I would expect that? Frankly, I was surprised when I saw those numbers because my understanding was as you said.

MR. HAMMOND: First of all, when you mentioned that Home Depot number, my checkbook pinched me with the amount of money I spent this past weekend.

COMMISSIONER HOROWITZ: 20 million of that?

MR. HAMMOND: Yeah. I am aware of those statistics, and I do have an answer for them and the answer is this. Basically, I saw what you looked at where it said, particularly in 1999 and 2000, I think it was, or it could have been 2000-2001, there was this uptick in the number of cases, up to, I think, 37 percent of the cases that we brought those years, of the defendants who were sentenced in those years did not receive volume of commerce adjustments.

Those defendants, nearly every one of those cases relates to a case -- well, two investigations that we had in Queens, New York, and Suffolk County, New York, that involved real estate foreclosure auction bid-rigging scheme that involved, I think, about 55 defendants.

So, we prosecuted 55 defendants. That year, it ended up being more than -- it was one big scheme and all of the defendants ended up pleading guilty. Their commerce was, for about 90 percent of them, was less than 400,000, and it completely skewed the stats for those years.

I went and looked. I would tell you this, and again I just want to restate this because I hope you'll consider it when I say what I'm about to say, in my position as director, certainly since 2000, and as deputy the past year, I do see every case that we bring and I can tell you that it's my belief that over the last, say, 10 years, more than 80 percent of our cases, certainly since 1993, when we began to really focus on national/international cases, over 80 percent of our cases would involve volume of commerce adjustment greater than 400,000.

I would say that, if you look at the last five years, it'd be over 90 percent in terms of the cases that we've brought. Certainly, if you take out -- if we're not talking about those 50 cases that we brought in 1999 that were sentenced later, and I can tell you I went and looked at this past year and 100 percent of the defendants who have

been sentenced this year, it's my understanding, received volume of commerce adjustments.

So, I understand your question and I saw the statistics and I hope I've answered your questions. I would unequivocally I believe that it's approaching 90 percent or greater of the cases that we bring. I can certainly tell you what my marching orders in terms of the cases we investigate and we are not -- unless there are federal funds involved and which we are the only entity who can bring the case and vindicate taxpayers, we turn down investigations that involve commerce of the size you've talked about, unless it involves my neighborhood Home Depot and then we're in trouble.

JUDGE HINOJOSA: Commissioner Howell?

COMMISSIONER HOWELL: Yes. Reference has been made a couple times this morning to a line in the background to 2R1.1 that says, "The Commission believes that the most effective method to deter individuals from committing this crime is through imposing short prison sentences coupled with large fines."

Should the Commission adopt something close to the Justice Department's recommended changes to this guideline, would we be giving a mixed message if we can keep this commentary line in 2R1.1, and do you have a recommendation about whether or not that line should be deleted?

MR. HAMMOND: I think it has to be. I mean, I

think, you know, when the statutory maximum for antitrust offenses was three years, when the Commission spoke of short jail sentences, it was talking, I would assume, about sentences that fell under three years.

Now that we have a 10-year statutory maximum, I clearly don't think that that commentary is consistent with the legislation and I hope it won't be consistent with what the Commission does with respect to 2R1.1.

I will tell you about, you know, the high fines. You know, we have seen statutory maximum fines raised tenfold twice now, from 1 to 10 million, now 10 million to 100 million, and we're trying our darndest with those fines, but it's not enough, you know. High fines are not enough. Short jail sentences are not enough. We need more, and I would urge you to change that commentary.

JUDGE HINOJOSA: There don't seem to be any other questions. We thank you all very much for your time, and we appreciate it, and the public hearing is over.

(Whereupon, at 11:36 a.m., the public hearing was concluded.)