UNITED STATES SENTENCING COMMISSION

WASHINGTON, D.C.

PUBLIC HEARING

TUESDAY, MARCH 20, 2007

The Commission convened at the Thurgood Marshall Federal Judiciary Building, FJC Training Rooms A-C, Concourse Level, One Columbus Circle, N.E., Washington, D.C. at 9:00 a.m., JUDGE RICARDO H. HINOJOSA, Chair, presiding.

COMMISSION MEMBERS PRESENT:

JUDGE RUBEN CASTILLO

CHIEF JUDGE WILLIAM K. SESSIONS, III

JOHN R. STEER

DABNEY FRIEDRICH

MICHAEL E. HOROWITZ

BENTON J. CAMPBELL

PANELISTS PRESENT:

JONATHAN WROBLEWSKI, Acting Director
Office of Policy and Legislation
Criminal Division
United States Department of Justice

MIRIAM CONRAD, Federal Public Defender
District of Massachusetts, New Hampshire
and Rhode Island

ELISABETH ERVIN, Deputy Chief Probation Officer
Western District of North Carolina
Member, United States Sentencing Commission Probation
Officers Advisory Group

JOHN C. RICHTER, Chairman
Attorney General's Advisory Subcommittee on Sentencing
United States Attorney
Western District of Oklahoma
United States Department of Justice

PAUL ALMANZA, Deputy Chief
Department of Justice Criminal Division
Child Exploitation and Obscenity Section

JOE KOEHLER, Assistant United States Attorney
District of Arizona

JOHN MORTON, Deputy Chief
Department of Justice
Criminal Division, Domestic Security Section

JON M. SANDS
Federal Public and Community Defenders

AMY BARON-EVANS
Federal Public and Community Defenders

DAVID DEBOLD, Chair
United States Sentencing Commission Practitioners
Advisory Group

HON. REGGIE B. WALTON, Member
United States Judicial Conference
Committee on Criminal Law

ERIC E. STERLING, President
Criminal Justice Policy Foundation

PANELISTS PRESENT (Continued):

DEBORAH SMALL
Break the Chains

ANNE E. BLANCHARD
Federal Community and Public Defenders

MARY PRICE
Families Against Mandatory Minimums and Practitioners Advisory Group

STEPHEN SALTZBURG
American Bar Association

SHAWN T. DRISCOLL
American Trucking Association

PETER J. PANTUSO
American Bus Association

FREDERIC HIRSCH
Entertainment Software Association

I N D E X

ITEM

P R O C E E D I N G S

(9:00 a.m.)

CHAIR HINOJOSA: Groups and individuals who appear before the Commission at our public hearings and who work with the Commission know that it is even more difficult than it actually is. Because it is through comments from individuals from different background and different viewpoints that the Commission is better able to satisfy its statutory requirements with regards to promulgation and the amendment of guidelines. And so, we will say that not only the public statements that are made, but the written statements that are submitted, as well as the continued help that we have from so many comments from so many of today's participants, our job becomes easier from the standpoint of having enough input into the process and, therefore, facilitating the Commission's ability to comply with the statutory requirements.

This morning, we are going to start with panel on criminal history. We are very fortunate with today's panel, with this morning's panel, as we are with all the other panels that we do have, individuals who have great experience on the particular subject or subjects that they will be addressing.

We have Mr. Jonathan Wroblewski, who is the

Acting Director of the Office of Policy and Legislation in the Criminal Division of the U.S. Department of Justice. He has been a prosecutor with the Civil Rights Division of Department of Justice, where he investigated and prosecuted criminal civil rights cases in federal district courts throughout the United States. He has been a member of the faculty at National Law Center at GW University and its George Mason University School of Law.

Ms. Miriam Conrad is the Federal Public Defender for the District of Massachusetts, New Hampshire and Rhode Island. She joined the Boston Federal Public Defender's Office in 1992 as an Assistant Federal Public Defender. And her background and the expertise that she brings, she has tried cases charging everything from RICO murder to union corruption. In 2001, she received the Boston Bar Association's John G. Brooks Award for representation of indigent clients.

Elisabeth Ervin was appointed to be a U.S. Probation Officer for the Western District of North Carolina in September of 1991. She has worked as a U.S. Probation Officer from 1991 until 1995 and has been a sentencing guidelines specialist from '95 to the year 2000. Since 2000, Ms. Ervin has been a

Supervisory Probation Officer for the Asheville Pre-sentencing Pretrial Units and she has served as a district representative for a pro hac advisory group from 1995 until the year 2000.

So we thank you for being here. We'll start with Mr. Wroblewski and we'll go down the line. And then we will, hopefully, have some time for questions and answers.

MR. WROBLEWSKI: Chair Hinojosa, members of the Commission, thank you all very much for having me today. I appreciate the opportunity to be here and participate in this hearing. And it's a special treat to as a former employee, Commission employee, to be part of this hearing.

Also, if I may, I'd like to take this opportunity to thank the Commission and especially the staff for all the work that you do year in and year out putting together the data on federal sentencing.

One of the jobs of my office is to try to provide the leadership of the Criminal Division with information on what's happening in the federal criminal justice system. And to be perfectly frank, that job would be tremendously difficult without the Commission's data, data sets, resources on federal sentencing statistics. We know how much hard work goes

into that every year. We very much appreciate it and we also especially appreciate the work that the staff did this year in accelerating the release of the 2007 data sets. So thank you very much for that.

Now, to criminal history. We're going to be talking in the next 45 minutes or so about a variety of different aspects of criminal history. We want to leave you with two thoughts.

First, given the tremendous challenges the Commission, that the original Commission faced, and this Commission continues to face in writing criminal history rules, we think -- and these challenges are both technical challenges and policy challenges -- we think that criminal history guidelines do a very, very good job of creating a workable system that identifies those offenders who have the greater risks of recidivism, and then provide proportionately, progressively and proportionately increasing punishment as that risk increases. So, in a more simple way, if I may say it, we think the criminal history guidelines are doing a very good job at achieving the purposes of sentencing that were meant for them.

The second point we'd like to make is that in November at the Commission's Roundtables on Criminal History, there was a lot of discussion about excluding

additional offenses from the criminal history score. We think that before the Commission does that, we think it should be very confident that only if the criminal history, resulting criminal history score will better predict risk of recidivism, should additional offenses be excluded. The existing research suggests that that's not the case; that excluding more offenses will not improve the ability of criminal history score to identify those offenders who carry a greater risk of recidivism. But nonetheless, we think that additional research ought to be done and that only if that additional research and information shows that the criminal history score will improve by excluding, should such exclusion happen.

What I'd like to do for the next few minutes is just expand a little bit on each of these two points. First, the challenges facing the Commission, back when it was first putting together a criminal history score, this Commission, because it's a federal commission, needs to account, and needed back in 1986 and 1987 to account, for criminal history in all 50 states. It needed to account for 50 different criminal codes, 50 different sentencing systems, 50 different sets of corrections laws. It needed to account for thousands and thousands of different prosecution

offices and their charging and plea practices. And it also needed to account and take into the consideration the fact that there are significant data issues with criminal history, that the data sets, the criminal history data sets are often incomplete. Those were very, very significant technical challenges.

In addition, the Commission faced significant policy challenges. In particular, the Commission was charged, under the purposes of sentencing laid out in 3553, with trying to create a criminal history score that identified those offenders who carry a greater risk of recidivism. That is a very very difficult task.

In addition, it was charged with trying to provide additional punishment for offenders who commit additional crimes and despite their involvement with the criminal justice system, nonetheless commit more crimes. That's just punishment purpose of sentencing.

Now, given those challenges, what is our experience and what does the research show? The research shows and the experience shows this thing is workable. That remarkably, most probation officers, most prosecutors, most judges, most defense attorneys, in the vast, vast majority of cases, given all of these challenges, are able to calculate the criminal history

score readily and are able to use that score with offense level score to find an appropriate sentence.

Yes, there's litigation on the margins and we can talk about that some, I'm sure, over the next few minutes. But overall, in the vast majority of cases, the system is workable and the criminal history score is calculated and, remarkably, the criminal history score provides a good indicator of the risk of recidivism. And the best indicator for that is the Commission's own research of recidivism studies that it completed just a few years ago.

There is one graph that sticks out in my mind, and I'm sure that you're all aware of that, and that is that the stair step graph that shows for each additional criminal history point, the risk of recidivism increases. The Commission's research, which was extensive, and which I think has been praised by people on all sides of the spectrum, show that the criminal history score is a very, very good indicator of the risk of recidivism. Point by point, as the criminal history score increases, the risk of recidivism increases.

So again, the overall point of that is that while there are concerns that the margins, and we're not saying that the Commission should not add some

commentary and do other things to try to make the system more workable, overall, the system is very workable and the system does a very good job at achieving the purposes of sentencing, specifically, the incapacitative purpose of providing original prison sentences for those who create, those who have a greater risk of recidivism.

Now, let me talk about the second point a little bit. Again, back in the November during the roundtable discussions, there were many who suggested that additional offenses ought to be excluded from the criminal history score. And I suggest, and I suspect that my sister from Massachusetts will be recommending that to you today. I think that, and the Department believes, that in considering that, we should be guided and the Commission ought to be guided, again, by the purposes of sentencing and what the research shows.

The existing research suggests that excluding additional offenses will not make the criminal history score better at identifying those with higher risk of recidivism. And let me point to a couple of specifics.

The Commission did some additional research beyond the general recidivism studies that looked at certain low end criminal history scores. And what they found, what the Commissioner's research found, was that

those offenders who have a criminal history score of zero, but who nonetheless have some convictions that are currently excluded, that those exclusions actually do a very good job of identifying low risk, low recidivism risk offenders. In other words, the current exclusions seem to be working and seem to help identify those low risk offenders.

The research, though, also showed that those offenses that are not excluded and those offenders who have a criminal history point of one, rather than zero, do in fact have a significantly higher rate of recidivism. And we think before the Commission does anything to exclude additional offenses, whether that be minor offenses or through an expanded, related offenses definition, we think the Commission ought to be very confident that it is not making matters worse in terms of identifying those offenders with a higher risk of recidivism.

With that, I think I'll conclude and I'd be happy to answer any questions that you have.

CHAIR HINOJOSA: We'll turn to Mr. Wroblewski's sister, Ms. Conrad.

(Laughter.)

MS. CONRAD: That reminds me of clients when I was a state public defender who used to say, I didn't

know that prosecutor was your brother.

(Laughter.)

MS. CONRAD: Thank you so much for giving me the opportunity to be here. My name is Miriam Conrad, Federal Public Defender for Massachusetts, New Hampshire and Rhode Island.

And I think what I'm really, it really is such an incredible opportunity for me to be here after practicing criminal defense law in federal court for 15 years now, it makes me sort of think of the Commission as this book, as opposed to some people that we can actually talk to and share our views and our experiences with. So this is really a very special occasion for me.

I also bring to this occasion my experience as a state public defender and a sense of how things play out, not just in federal court based on individual criminal records, but also in state court in the hustle bustle of the busy state district courts where misdemeanors are frequently resolved rather quickly.

I'm going to focus my remarks on the two issues published for comment, one on minor offenses and second on related offenses and, primarily, on minor offenses.

It seems to me that as it currently stands,

the minor offenses under excludes certain types of convictions. The first area -- we have proposed two separate proposals in our letter to the Commission. The first proposal is to move all of the offenses listed in the first category, that is, those that are counted unless they resulted in a sentence of at least one year probation or 30 days in jail to the second category, that is, making all of those listed minor offenses excluded, regardless of what the sentence was.

In addition, and we have added a number of offenses to the list of excluded offenses and broadened the category that I think is particularly troubling, which is the category of motor vehicle offenses. As it currently stands, minor offenses lists driving on a suspended license. But there are certain common motor vehicle offenses that are not listed and that, for example, in Massachusetts anyway, in my experience, are counted. Such as, driving without insurance. It seems to me that driving without insurance is certainly no more serious, no more reflective of a risk of recidivism, than driving on a suspended license. The same is true of driving an unregistered motor vehicle.

Those offenses, currently, are not specifically excluded. And we are proposing whether, both in proposal one and in proposal two, that all

motor vehicle offenses be excluded regardless, except for -- excuse me, except for drunk driving or operating under the influence or by whatever name it's known in the particular jurisdiction. And that those be excluded regardless of the sentence that is imposed.

The second proposal that we have is a narrower proposal, if you will. And that is to move certain offenses to the second category, that is, those that are always excluded, regardless of the sentence that is imposed, including motor vehicle offenses but leaving a few we have proposed as our alternative; resisting arrest, false information to a police officer, the types of offenses that involve contact with the police, perhaps a failure to obey the police in some way. And leaving those as offenses that are counted, if they meet certain criteria.

With respect to the criteria that we would propose applying to those offenses, we would suggest narrowing the types of sentences that would result in counting. And this is where my experience, as a state public defender, I would suggest, comes in. As it now stands, the 4A1.2(c)(1) offenses are counted if they result in a sentence of probation of at least one year. In my experience, that is a default sentence. There essentially are very rarely sentences imposed of

probation of less than one year.

The alternative of 30 days imprisonment is one that sweeps into it situations where a defendant is financially unable to post bail and remains in jail, perhaps pending some other disposition, and winds up, the other case is dismissed, the Commonwealth -- the government, excuse me -- Commonwealth, I'm showing my Massachusetts background -- the prosecution can't go forward for whatever reason, it can't prove the case, it's dismissed, the defendant takes a time served sentence on the driving after suspension, for example. That conviction then, as it currently is written in 4A1.2(c), will count.

I think that changing the minimum sentence before one of those (c)(1) offenses will count to at least 60 days would better serve the purpose of capturing something that is truly a significant offense, perhaps a repeat offender or something of that nature.

Now why does all of this matter? Why are we tinkering with these 30 days versus 60 days probation versus not probation? Since, after all, we do have 4A1.3 and a judge can always depart downward, if the judge feels that the sentence is one, or that the criminal history is one that over represents the

defendant's actual risk of recidivism. The problem comes up in two contexts, primarily.

One is safety valve. And the second is career offender. Now, I realize career offender is something the commission will be taking up at a later date and we look forward to the opportunity to participate in that. But, for example, resisting arrest, at this point, in Massachusetts, is counted as a career offender predicate and can increase a defendant's criminal, excuse me, guideline range, five fold in part, and I'll get to this in a minute, because under Massachusetts law, it's punishable by more than one year. But the bigger problem comes up with the defendant who has, let's say operating after suspension, receives a sentence of one year's probation and is on that one year probation at the time of the instant federal offense. And that's it. That's the defendant's entire criminal history. That defendant will not be eligible for safety valve.

Operating on a suspended license, operating uninsured, for example, operating an unregistered motor vehicle, those are the types of offenses that tend to reflect certain economic conditions. For example, the defendant who is ordered to pay child support and/or has outstanding parking tickets or fines. And as a

result of not paying those fines or not making those support payments, has his or her license suspended. That person needs to continue to work to meet his or her financial obligations.

In areas, rural areas, for example, that do not have a very developed public transportation system, that person needs to drive to get to work. So you have a Catch-22 where the person cannot pay off the fines or make the obligations that they need to make without driving and by driving, they are committing an offense, and if they get even a term of one year probation, that is going to count under the guidelines.

It seems to me somewhat, you know listening to Mr. Wroblewski talk about the data as far as one criminal history point, I sit here and I think, well, you know, you could have one criminal history point because you got probation on a robbery or burglary case, or an aggravated assault, or possession of a weapon, or a drug offense. And that one point is going to be reflected the same in the criminal history score or even less than the defendant was convicted of driving on a suspended license and was on probation at the time the instant federal offense was committed. It seems to me somewhat that there's a disconnect between a defendant getting three points for operating on a

suspension and one point, let's say, for a more serious offense.

It seems to me the purpose of 4A1.2(c) is to capture those offenses that are significant in purposes of telling the sentencing judge who this particular person is. So, we would urge the commission if it does not move the offenses in (c)(1) to (c)(2), to at least raise the bar, if you will, to at least 60 days of imprisonment. And if probation is going to stay in there, which we urge that the Commission get rid of probation, that it be first of all supervised probation, as opposed to unsupervised probation and that it be a term of probation of more than one year. Because to say at least one year, essentially winds up sweeping almost every disposition.

And one of the problems with that as well is that he issue of diversionary dispositions, which a number of states, including Massachusetts, New York, Illinois, and Kentucky have. And this is really where the disparate treatments, the inequity, if you will, becomes particularly acute. Because in those jurisdictions where there are condition discharges or continuance without a finding, whatever the diversionary disposition is called, a defendant doesn't even get a guilty finding on his or her record. It is

essentially a term of unsupervised probation, although there can be conditions imposed as in the First Circuit's decision in the United States versus Fraser of community service and so forth, but the Judge has decided that this offense, given this defendant, and the circumstances, does not even warrant a guilty finding, a conviction appearing on the record.

In Massachusetts, at the end of the period of continuance without a finding, the charge is dismissed. It's essentially a nullity and yet, if that period of continuance without a finding or diversionary disposition is at least one year, which is again, the default, as things currently stand, the courts, including the First Circuit and the Second Circuit, and the Seventh Circuit, are counting those dispositions as if they were a term of probation of one year.

So the disconnect here is that the defendant who receives a continuance without a finding for one year and after that the charge is dismissed, the defendant stayed out of trouble, the charge is dismissed, that person gets a criminal history point under 4A1.2(c). But the defendant who received 15 days in jail or 20 days in jail, does not get a criminal history point. It seems to me that the disposition of a diversionary disposition, no matter the length,

should not be counted under 4A1.2 because it reflects a judgment by the sentencing court that this is not even something that should be reflected as a criminal conviction.

Another aspect of 4A1.2(c) that is very troubling to me and I'm sorry, I have somewhat of a bias here coming from Massachusetts in the peculiarity of our own sentencing system, but I think it's one that also occurs in Maryland and Pennsylvania and other districts nationwide, is the sentence at the outset of 4A1.2(c) that states that felony convictions are always counted. And felonies are defined in 4A1.20 as any sentence of more than one year.

In Massachusetts, misdemeanors, and this dates back to, I think, the early 1800s, misdemeanors are punishable by up to two and a half years. The dividing line in Massachusetts is not the length of the sentence, so much as the place of incarceration. We have something called a house of correction. A house of correction sentence cannot be more than two and a half years. A state prison sentence is only available for felonies. Put it another way, felonies are defined as anything that can be punished by a state prison sentence.

Now, I understand that one might say, well,

if the state legislature made the judgment that this offense was serious enough to warrant two and a half years, then that reflects a judgment that should somehow be duplicated in the guidelines. And I strenuously disagree with that for a number of reasons.

One reason is because, in Massachusetts, for example, a defendant is eligible for parole on a two and a half year house of corrections sentence after serving half of the time. So the length of the sentence does not necessarily reflect the amount of time that that defendant will serve on the sentence.

The other point is the consequences of a misdemeanor conviction are different in terms of loss of civil rights, right to vote, jury service, and so forth, as well as even use of the conviction for purposes of impeachment. In Massachusetts the rules dictate that even for an arrest, a police officer cannot arrest a suspect on a misdemeanor offense without a warrant, unless the offense was committed in the presence of a police officer and constituted a breach of the peace.

The point, without getting into the intricacies of Massachusetts criminal law, the point is that where the exact same conduct operating to endanger, for example, in Massachusetts, which is

essentially careless driving, is punishable by two and a half years. So a defendant is convicted of the same offense in Massachusetts as in let's say Rhode Island, receives the same disposition, but because the Massachusetts scheme allows up to two and a half years for a misdemeanor, that defendant potentially loses safety valve because of that first sentence in 4A1.2(c). And especially where the guidelines largely reflect a view that real offense conduct is what the sentencing judge and the what the guidelines are looking at, it seems to me inconsistent with that to have a system in which the fact that a particular state has chosen to set the maximum sentence, sometimes going back over 100 years, 150 years, does not reflect that that conduct is anymore serious than the conduct in a neighboring state. And it seems to me that getting rid of that first sentence is absolutely essential to eliminating an unwarranted disparity.

I understand that it is very difficult to write these guidelines in a way that takes into account the nuances and the intricacies of different states' criminal systems, but it seems to me that focusing on the conduct that is described in that list of minor offenses, as opposed to the sentence actually imposed or the label that is provided by the state in terms of

the length of the maximum sentence, I think there should be also some deference to the state in terms of if the nomination of an offense as a misdemeanor as opposed to a felony.

In addition, we would note that because different states have different parole eligibility and good time rules, we would urge the Commission, and we have set this forth in our second proposal, look to the term of the sentence that was actually served as opposed to the sentence imposed, because that more truly reflects what the sentencing judge in the state court intended to implement.

The second area with respect to minor offenses has to do with the language of offenses similar to them. We have proposed adding a number of offenses to the list of minor offenses, including, for example, fare evasion, panhandling, other offenses that are similar to the broad category of disorderly conduct. The problem with the current definition, well lack of definition, of similar to is that some courts have focused on the label and, therefore, you have offenses such as driving without insurance being counted, while driving on a suspended license isn't counted.

Fare evasion in urban areas and panhandling

is somewhat similar to disorderly conduct, but if it appears under a different statute, some judges are loath to discount that. And again, we have the problem of having certain offenses count in one jurisdiction and not in another.

There are other aspects of the second proposal, which include recentcy (ph.), that the offense be committed within three years of the instant offense, and also that offenses committed prior to age 18, if they fall under the minor offenses category, should not be counted.

I'm going to move on to the area of related offenses. And I just simply want to say with respect to related offenses that we would urge the Commission to adopt the definition of relevant set forth in the relevant conduct provisions of 1B1.3 with respect to defining what is a common scheme or plan for consistency's sake. And also, we would propose that the commission make it clear that a formal order of consolidation is not required before cases will be considered consolidated for sentencing or trial.

Many of the districts nationwide, many of the states, including Massachusetts, do not have such an animal as a formal order of consolidation. The fact of the matter is when cases are set down for the same day,

disposed of together, and there are other circumstances and factors that we have set forth in our letter regarding factors that a court can consider in determining whether or not cases have been consolidated for sentencing or trial, to make that determination.

In addition, we would suggest, and have suggested in our letter, that with respect to related cases, rather than focusing on the happenstance of an intervening arrest, that that language under the application note for related cases be changed to an intervening conviction. It seems to me that a defendant who commits an offense is convicted, sentenced, and then is released, or gets probation for example, and then commits a new offense, that that sequence of events is much more reflective of a heightened risk of recidivism than someone who is arrested repeatedly within a short period of time as part of a common course of conduct.

For example, someone who has a drug addiction and is charged several days in a row with possession of drugs, simple possession of drugs. So we would urge that after there's been court intervention in the form of a conviction and sentence that that is a more meaningful distinction than intervening arrest, which may also reflect, for example, police harassment of a

particular individual.

And, unless you have questions, I assume there will be later, thank you very much.

CHAIR HINOJOSA: Thank you Ms. Conrad. Ms. Ervin is the cousin who is often criticized in her price by both your brother and sister to your right, depending on what reports you write. It's your turn to say something.

MS. ERVIN: I was thinking the redheaded stepchild is a possibility here as well.

I'd just like to start by thanking you all by allowing me to serve as the Fourth Circuit representative to the Probation Officers Advisory Group since 2000. It's been an amazing experience. I've met some wonderful people. The staff here has been tremendous and I thank you very much for this experience.

We had presented a position paper for each of you to review and a couple of the items I'll touch on here. The first one, obviously, is the minor offenses that are listed in 4A1.2(c)(1). In our discussions as a group, it has been amazing to me to see how many of the different districts count and don't count particular offenses within this category. And a particular example are the driving while suspended

violations.

In my area, that can quickly take somebody up to a category three or category four criminal history without any other convictions. In many of the other districts, from some of the other representatives, those never receive any points. And so we have seen tremendous disparity and this has been outlined in our position papers over the past years. It's routinely in our district that they will receive a year of probation or 30 days of active sentence and, as Miriam has also just said, that when these folks have one of these offenses, they are on probation at that point when they commit the instant drug offense, then they are not eligible for the safety valve and that's very clearly stated, even if a downward departure is granted for adequacy. That they are not able to have that benefit. And we just see that as a real disparity in application across the country.

Based on our discussions, what we looked at was removing just a portion of the offenses under (c)(1) and moving those to (c)(2). And those were the careless and reckless driving, the driving without a license, the fish and game violations which we see primarily in my areas and others where there are a lot of federal lands, leaving the scene of an accident, and

local ordinance violations. These are the ones that particularly troubling to us in that we were able to see disparity across the different circuits in our discussions.

Another issue, the related cases issue has been a problem for us and that's also been mentioned time and time again in our position papers. And this is producing more and more objections and what my judge likes to call mini trials at sentencing to try to determine what the correct response should be.

One thing from an application perspective that we're finding, it's becoming more and more difficult for us to obtain criminal records. The larger districts across the country now no longer provide probation investigators with collateral record checks. What they are doing is they are referring us to the county courthouses. So, we may be trying ourselves to go directly to a county courthouse in LA or in New York City to get records. And with the misdemeanor cases pretty much across the country being reduced to a five year shelf life, the only thing that's left on that would be the single computer entry. So this is becoming more and more difficult for us.

Even more difficult for us is something we were just talking about with the time served issue, to

try to go back to small jails or even large jails and get a time served when someone may have been in jail, out of jail, and back in, it's nearly impossible, if not completely impossible. And we would certainly urge that we not look at a time served or more as a sentence imposed issue.

Also in line with this too, it's also very difficult in not having the records to make the determination as far as intervening arrests go. We've laughed all along in talking about that section and the application note that at the end of the first sentence that says, if there are intervening arrests, stop. We'd like a flashing red light right there because so many practitioners still want to go to the second prong. They just don't stop at that point. And what we had suggested in our position paper this time is just removing the word "otherwise" and proceeding there with "if there was no intervening arrest" and then proceed to that prong. Because that has continued to raise issues for probation officers across the country.

The last two things that are also very problematic to us that we would like to see resolved and that would be circuit split between the functional versus the formal consolidation. This is something that we see as disparity in application based on what

each circuit has ruled and we would very much like to see that issue resolved as well.

And the last source of confusion for us are the multiple revocations on probation violations. This comes up also in the ability to obtain these records and also just in trying to make that determination if you've got consecutive sentences that were imposed in some of the various revocations that occurred.

But these are just some of the issues that we have discussed before. We very much are interested in the simplification of Chapter 4 and these are some of the ways that we think it would help us practitioners be able to achieve the results that the Commission would like.

CHAIR HINOJOSA: Who has got the first question for any member of the panel? I guess, I will.

I guess I'll start off with Ms. Conrad. You wisely pointed out that with regards to time that someone spends in prison, especially in the federal system where we have one-third of our defendants are non-citizens. And you know, when they get arrested for another crime, they don't make bond and so, therefore, they will usually get a sentence of imprisonment. And so that puts them in a different situation. But if we got rid of pretrial diversion or deferred adjudication,

I can see how some would be concerned that that is only available to a certain segment and type of defendant. That sometimes that's available to whoever has some kind of situation in the community where they might be able to make that argument, that they're entitled to that benefit. And would we be creating some kind of disparity by excluding that type of defendant that already has received some benefit with the ability to get that kind of disposition?

And it's really three questions, because this is something that we're all interested in. The other thing that I have observed through 24 years of reading pre-sentence reports under all types of sentencing systems is a lot of times the minor offenses tend to have been plea bargained. It's pretty rare that somebody just gets charged with resisting arrest, for example. That is, what ended up being the easiest plea bargain for everybody to get somebody to plead to and to be sentenced to. And so if we exclude some of these that, by themselves, might not seem the situation, should we then let 4A1.3 take care of that, or will that depend on the judge, as opposed to the guidance that a guideline gives?

And with regards to the second topic that you addressed, the issue of related conduct, should it

matter that it wasn't the same sentencing judge who did the sentencing on one day when it's clear that obviously, that they may have, you know, they all run concurrent, it's the same sentence, but they were just filed in different courts because of the filing system?

MS. CONRAD: Okay. Taking --

CHAIR HINOJOSA: And if any one of you also wants to then add something to it, especially Ms. Ervin, since you touched on some of these also.

MS. CONRAD: I think you make a very good point, Judge Hinojosa about the disparity as far as a continuance without a finding, or excuse me I'm confusing my Massachusetts lingo, or diversionary dispositions, I should says. I think that that same problem, however, is currently in play because the defendant who, in the 4A1.2(c)(1) offenses gets a fine, no probation, no time, but is financially able to pay a fine, that defendant's conviction is not going to count under 4A1.2(c). Obviously, there are, based on economic disparities, there is differing abilities across the board of someone to pay a fine. The person who can't pay a fine may wind up getting probation or going to jail and so forth.

So I think whatever line you draw, there are going to be some people on one side and some people on

the other side and there will be disparities. But it seems to me that the diversionary disposition is one where the court has made, the sentencing court has made a judgment that this offense does not count.

Now, I don't know. I'm trying to think back to my experience, for example, as a state public defender, whether non-citizens, which is an interesting source of disparity, would be sort of ineligible for a continuance without a finding. Now, I suppose, if they were deportable and were going to wind up remaining in jail awaiting deportation that may be a concern. But it seems to me that again, that may be an area in which a court could look at the continuance without a finding and/or look at circumstances, same thing with a plea bargain, and consider, although we'd obviously oppose it, an upward departure under 4A1.3. But that person would not become ineligible for the safety valve by virtue of the diversionary disposition.

The other aspect of this is by proposing either moving everything to 4A1.2(c)(2), essentially eliminating 4A1.2(c)(1), that would take care of that disparity in terms of the treatment, whether it's time served, diversionary disposition, fine and so forth.

The other aspect of this would be by increasing the length of sentence that sets the

threshold for adding a criminal history point. So, it seems to me and again, line drawing problem, but the 30 day sentence is one that is likely to be a time served disposition. A sentence of more than 60 days, I would suggest, is less likely to reflect the type of scenario that you describe, that is someone who is arrested, isn't bailable for whatever reason, and then gets time served. So, you would over capture fewer defendants than is currently in place, which is not to say that you would not continue to over capture some.

With respect to the plea bargaining point, it seems to me that that cuts both ways. In my experience, for example, sometimes things are over charged initially. And so the plea bargain is less a reflection of well, you know, I will let you plead to this, but we'll dismiss that, even though we know we can prove it.

But sometimes it's a we charged you with this, but we can't prove it. As you were describing the scenario, I thought back to many years ago as a state public defender and there was a big brawl at a party. And the police, you know, got a little out of hand, and the police charged everyone with assault and battery on a police officer but it was pretty clear that the police had been the aggressors.

And the judge called everybody. We're about to start this trial with five defendants. The judge called everybody up and said, is this basically a disorderly? That, you know, the police charged assault and battery on a police officer because they're concerned about their liability. Is this basically just a disorderly? And everyone, including the prosecutor, said yes. And he said, okay, we're going to treat it as a disorderly.

So, there are times when the prosecutor doesn't want to go forward because the prosecutor can't prove the more serious conduct that is charged. Again, it seems to me that that can be addressed in the form of 4A1.3, but the important point is not to take people out of safety valve eligibility for conduct that is truly minor. And the court, especially post-Booker can certainly assess whether the record as a whole reflects a more serious background or not. But with the safety valve, that's a bright line and the judge can't go below that, even if the judge things, obviously, that the conduct is less serious than what the criminal history score reflects.

And the final point about related cases, whether different judges in different jurisdictions, it seems to me that may partly be captured by common scheme or plan, where you have different dispositions

in different courts. I think then, even if it's different judges, you could look to certain factors as outlined in our letter, such as whether this was part of a plea bargain.

I had a case a number of years back, two robberies committed two days apart in two separate counties that are right next to -- I mean you could walk from one courthouse to the other or one of the crime scenes to the other. And at the time of sentencing, the prosecutor said, we are recommending, the defendant has pled guilty in Norfolk County, we are recommending that this sentence be served concurrently. And it was clear there had been coordination between the two prosecutor offices to make this a package, if you will. And I think that would reflect either a consolidation for sentencing or a common scheme or plan with respect to the underlying conduct. And again, going back to 1B1.3's definition for common scheme or plan, would help courts make that assessment.

I think that one thing that the courts need in making the assessment on related cases is more flexibility, more discretion, if you will, rather than the type of bright line rule that says, if there's a piece of paper that says they're consolidated, that's consolidated. If there's no piece of paper, that's

not. I think that creates disparity.

CHAIR HINOJOSA: Do either one of you want to say anything?

MR. WROBLEWSKI: Yes, I just want to comment on a couple of things. I think we're all products of our experience. I mean, there's no doubt about that. And I think in each of our experience we can find individual cases where perhaps the bright line rule seems like well, maybe that's not quite right. But I don't think we can, in trying to devise criminal history rules, rely on that. I think because, as I think your question suggests, Judge Hinojosa, I think as my sister and my cousin's testimony have suggested, there are tremendous complexities in the system. And yes, Massachusetts has one set of rules, and North Carolina has another set of rules, and Vermont has another set of rules, and we have to create a workable system that works with all of those rules. So I think we have to be driven by that reality.

And in addition, in response to some of the suggestions that Ms. Conrad made about, for example, increasing the threshold from 30 days to 60 days or excluding all kinds of other minor offenses, again, it may strike Ms. Conrad as true that a resisting arrest has nothing to do with recidivism. It may strike me

that that's wrong, that it may have something to do with recidivism. I think again, we have to be driven by the research. And the research is clear that the offenses that trigger one criminal history point are indicative of increased recidivism risk. That's the reality.

And if the Commission is going to seriously consider changing those thresholds to exclude more, I think the Commission ought to be confident that doing so is going to better serve the purposes of sentencing and increase the ability of the criminal history score to better identify those who have a higher risk of recidivism. And I suggest, that information is not available and there needs, at the very least, to be a whole lot more research and discussion about this.

CHAIR HINOJOSA: Vice Chair Steer?

COMMISSIONER STEER: I guess Mr. Wroblewski kind of hit upon a concern that I have. But let me try to ask the question this way.

Many of the states, in their criminal history score, give minor offenses lesser weight, the half point. Why shouldn't we consider going to a system that basically assigns say half a point to every prior sentence, unless we can see that it is not predictive of recidivism? And that way, we're being more, I

think, faithful to the goals and objectives of the criminal history score, but at the same time, it would be less likely that an individual's minor sentence would have deleterious consequences.

But speaking of the consequences, I really don't understand why the eligibility for the safety valve should drive what we do with respect to criminal history. I understand that we should be aware of the consequences, but Congress drew the line where it drew the line. And if there's a problem with the cliff effect of that, then it seems to me that the proper procedure is to ask Congress to address that, not for the Commission to go behind Congress and attempt to change the criminal history rules in order to make more defendants eligible for a safety valve than there already are.

You know, when the safety valve was designed, the Commission was asked to furnish data predicting its affect and we did so. And we predicted that somewhere in the mid-20 percent of the offenders would qualify for the safety valve. In actual fact, today, those who get at least a two level reduction, is now in the mid-30s. So it's already far broader than what we told Congress would be the case, based on a criminal history score that was then in place.

And you are urging the Commission to basically, it seems to me, have a backdoor way of broadening the eligibility for the safety valve. That's more of a comment, I guess than a question.

Let me return to my original thought. And you know, what about the idea of giving them less weight, but counting everything that's predictive?

MS. CONRAD: Well, I think the first question is what's predicted? Is operating on a suspended license predictive?

COMMISSIONER STEER: It may not be. I have some sympathy for the driving offenses.

MS. CONRAD: And --

CHAIR HINOJOSA: I hope that's not a confession.

MS. CONRAD: But you know, in an area where someone has to drive in order to maintain a job and maintain their financial obligations, it would be pretty easy for those half points to add up pretty quickly. And again, that gets me back to the safety valve point and I would like to address that comment.

Congress said, I believe, that it was available to anyone who had one criminal history point or less. Congress did not specify what offenses should result in what points or specify under what

circumstances an offense should be considered a criminal justice sentence for the purposes of adding the two levels that quickly elevate someone's criminal history score.

But the definition of how those points are counted and when those points are counted is squarely in the Commission's court. And I don't think that anything that Congress said dictates how those points should be calculated.

This is not, and if I gave that impression I want to correct it right now, this is not an effort to just make the safety valve available to more people. This is an effort to make sure that those people who are truly deserving of the safety valve are eligible for it. And to distinguish between the defendant who receives probation, let's say, or a time served sentence on a serious, even violent offense, and has one criminal history point, is distinguished from the defendant who simply couldn't pay his parking tickets and is driving on a suspended license while he's trying to meet his or her financial obligation.

So the question is not, and of course it would be helpful to have data, not just on what criminal history score is predictive of recidivism, but what types of offenses are predictive of recidivism.

But I think too, fail to distinguish between the least serious offenses that are practically, you know, an occupational hazard of someone who is struggling to make ends meet financially and meet their support or their financial obligation.

And someone who has been convicted of violent conduct, I think, is not really implementing frankly, the congressional intent in making safety valve available in the first place. I mean, certainly, I don't think Congress intended that someone who had multiple prior convictions for drug dealing should be eligible for safety valve. And that would be reflected in the criminal history score. But that is not to say that someone who had a couple of convictions or even diversionary dispositions for driving on a suspended license or driving while uninsured, should not be eligible for safety valve. Those are two very distinct offenders and I submit they should be treated differently.

CHAIR HINOJOSA: Vice Chair Sessions?

JUDGE SESSIONS: Well, I'd like to ask Jonathan a question. And first of all, I just want to say that I appreciate the fact that you recognize there are rules in Vermont and we are a state.

MR. WROBLEWSKI: I'll be careful when I go.

JUDGE SESSIONS: Absolutely. I think the point about what kind of offense is significant. But if I could ask you just to step back from the statistics and the research into the guidelines in general. We're in a post-Booker era. We have statistics which indicate clearly that the most frequently used ground for departure are overrepresentation arguments.

And let's face it, I mean I'm from a state that analyses suspended licenses, driving with suspended licenses and the most common ground for departure are departures based upon overrepresentation from these minor offenses. And so what essentially happens is somebody's charged with these minor offenses, they get a downward departure of one or two criminal history levels.

Now that, in the broader perspective, increases the frequency of departures, and to some extent, could be used in an environment like Washington D.C., in general, to suggest that judges are not following the guidelines. And to what extent would in fact our purposes here, and that is to advance the cause of a guideline system, be hurt by not eliminating some of the sources of downward departures?

MR. WROBLEWSKI: I have a couple of responses

to that. First is just my perspective of the numbers. I don't have a photographic memory of the sourcebook, but if my memory serves me right, there are somewhere less than 1500 downward departures for criminal history. And remember, criminal history is calculated in every single case. So it's in 70,000 cases.

So yes, there are a significant number of downward departures based on criminal history, as there are upward departures for criminal history. And I think the Commission should review application issues. I think it should resolve circuit splits relating to criminal history.

So I don't want to give you the impression that we're saying don't touch criminal history, it's perfect exactly the way it is, but at the same time, I think in doing so, it should be driven by the purposes of sentencing. I think that's what this Commission should be driven by and that's the gist of the testimony that I'm giving.

And I think that if there are ways to address those case where there are downward departures in a way that is consistent with the purposes of sentencing, you know, by all means, the Commission should do that. I'm just saying that based on what was published for public comment, based on the Commission's recidivism studies

to date, based on the testimony that I've heard today, it's my view that we're not there yet. We're not ready. I think there's more to do.

JUDGE SESSIONS: Don't you think, though, that the frequency of departure is, in fact, a statement from the practitioners in the field about criminal history? And in fact, as is reliable as statistics may be, isn't it a whole lot better for the Commission to be listening to people in the field, hearing what they say, as Ms. Ervin testified, and then responding? Because that, I mean that's the best source of information, it seems to me, more so than statistics. Do you disagree?

MR. WROBLEWSKI: I think the Commission should respond. That's why we're here. We're to provide input and that's why Ms. Conrad and Ms. Ervin are here to provide input, and yes, we think the Commission should respond. Yes.

CHAIR HINOJOSA: And I guess your point is, we need to see where these departures are, whether it is driving while license suspended or the recentcy one and two points that Ms. Ervin mentioned, or where are these departures coming from to better understand what the practitioners are telling us with regards to criminal history. I think that's --

MR. WROBLEWSKI: Yes, and the other way as well. Because again, the most frequent grounds for upward departures is that that criminal history under represents the defendant's culpability. So I think the reviews should continue and where appropriate, changes should be made.

CHAIR HINOJOSA: I guess we have time for one last question.

COMMISSIONER HOROWITZ: I'm going to just ask the panel on the comment the idea Commissioner Steer put forward about cutting through all of this and just counting, giving half a point to all sentences, all non-felony sentences. Any thoughts on that?

MS. ERVIN: From a practical application, that would be much simpler. And it would also address some of the disparity that we have talked about during our POAG meetings. There is, you know, routine sentences of 30 days or one year probation, as opposed to all the other districts that may have nothing for those.

The application, from a personal perspective, that would be a much easier way to do that.

MS. CONRAD: I think I already said what I have to say about that, but I think one additional problem is then if you add the two points from being

under a criminal justice sentence, you're right back to the same problem. So then the person has two and a half points for a driving on a suspended license. I mean, you know, that would certainly not be our preference if it were addressed that way. But I think if it were addressed that way, some consideration would have to be made to take away those provisions.

And you know, one point I wanted to make about that, again, is because it keeps going back to the safety valve, even a study of the departures is not going to capture those cases where someone is ineligible for safety valve by virtue of one of these prior offenses. Because by definition, when the minimum mandatory kicks in, there's not going to be a departure. So even that type of study would not capture all that information.

CHAIR HINOJOSA: I think the departure is still there, it just doesn't qualify you for the safety valve. I mean, it puts you in a different range, as far as the potential sentence, but there are departures on criminal history, even though you're not qualified for safety valve. It just puts you in a different range.

MS. CONRAD: It depends on whether or not guideline range is above the minimum mandatory or not.

The guideline range could be below the minimum mandatory without safety valve, or above or squarely in the middle. And if it's either squarely in the middle or above, excuse me, either squarely in the middle or below, you're not going to capture the departure because there can't be a departure.

CHAIR HINOJOSA: Well there can be, it just won't have an effect.

MS. CONRAD: No, right. I understand.

CHAIR HINOJOSA: I mean, nothing that to discuss.

MR. WROBLEWSKI: I assume that you mean half a point for all misdemeanor offenses that receive a sentence of less than 60 days. And you know, we'd be open to that. Again, I hate to sound like a broken record, but it depends whether that change is going to make the guidelines more effective or less. It makes it simpler, which is one of the goals. We want a workable system. And we want also a system that identifies the people with the greatest risk of recidivism. And so I think more needs to be, more needs to be found out about that, what the impact is.

CHAIR HINOJOSA: Thank you all very much. It's been very helpful.

The next panel is going to be addressing

proposed amendments for the 2007 cycle. And we've got Mr. John Richter, who is a U.S. Attorney for the Western District of Oklahoma and who is Chairman of the Attorney General's Advisory Subcommittee on Sentencing. In his time with the Department of Justice, he has served as Acting Assistant Attorney General for the Criminal Division. He has also been a former Ex Officio Commissioner of the U.S. Sentencing Commission and he began his legal career as a law clerk for a judge that did the hard work, a U.S. District Judge, Hon. Owen Forester with the Northern District of Georgia.

We've got Mr. Jon Sands, a fellow dog lover like myself, who is the Federal Public Defender for the District of Arizona. He is a prolific writer and probably because he was Editor-in-Chief of his law review at his law school. He clerked also for a judge, Hon. Mary Schroeder, who is the U.S. Court of Appeals for the Ninth Circuit and he worked briefly as an associate at a law firm. He has been an Assistant Federal Public Defender in 1987 and a consistent contributor to the work of this commission with his comments.

Ms. Amy Baron-Evans is a National Sentencing Resources Counselor to the Federal Public and Community

Defenders, where she represents the defenders' interest before the U.S. Sentencing Commission and develops sentencing policy and provides training and sentencing advocacy for the defenders across the country. She is a former co-chair if the NACDL Federal Sentencing Guidelines Committee and a former co-chair of the Practitioners Advisory Group for the U.S. Sentencing Commission.

Mr. David Debold is a present co-chair of the Sentencing Commission's Practitioners Advisory Group and he has worked in the Washington, D.C. office of Gibson, Dunn and Crutcher. He joined that firm in 2003. He practices in the litigation department and is a member of the firm's appellate and constitutional law, securities litigation, and business crimes and investigations practice groups. He also served as a law clerk to a judge, having clerked for Hon. Cornelia Kennedy, with the U.S. Court of Appeals for the Sixth Circuit.

And Mr. Richter, I believe that you have other individuals here who could help you in case the questioning got very tough. You've got, I believe, Mr. Almanza, as well as some other individuals with the Justice Department, including Joe Koehler and --

MR. RICHTER: John Morton.

CHAIR HINOJOSA: -- you have some other --

MR. RICHTER: Right.

CHAIR HINOJOSA: -- background help here. We'll start with you, sir.

MR. RICHTER: Right. Well, good morning, Chairman Hinojosa and members of the Commission. Thank you for allowing me the opportunity to come before you and testify. It's certainly a pleasure to see all of you again. I sort of enjoyed, I have enjoyed all my experiences with the Commission, which is why I was willing to be convinced to come to Washington again and appear today.

CHAIR HINOJOSA: Anything to get out of Oklahoma, I guess.

MR. RICHTER: And on that point, I did want to compliment particularly the Chairman, of Oklahoma Sooner Crimson and Cream in the latest guidelines.

CHAIR HINOJOSA: That was Harvard Crimson and Cream.

MR. RICHTER: But I will be addressing a few of the proposed issues in my remarks this morning. Obviously, there are a great deal more issues than time for comment. As you noted, like any smart United States Attorney, I've brought a number of experienced prosecutors who have got my back. And obviously, if

there are questions that I'm unable to answer satisfactorily, I hope you'll indulge me and let me call on some of them.

I certainly want to express on behalf of the Department, our thanks to the Commission. In particular, I echo Jonathan's comments in the earlier panel in thanking the staff. I know from my personal experience on the Commission, as well as in more recent work both at Roundtables on Criminal History and Simplification as well as in making use of the data that is collected regularly by the staff. They do tremendous work, significant work, hard work, and they also, I think, do a very good job of promoting informal and open dialogue amongst all the interested parties in the criminal justice system. And for that, they are due a great deal of thanks and recognition.

We certainly are at a unique time in the sentencing guidelines, in their history. And while we have suggested some possible legislative responses that might change the current paradigm, it's clear that we are in a time when we're waiting for the outcomes of Rita and Claiborne in order to determine where things are ultimately going to head when it comes to sentencing at the federal level. And in the meantime, of course, all of the data that is being collected is

very important for us to consider and inform our discussions.

In recognition of the priorities set by the Commission in this cycle, which is really focusing on larger systemic questions, as well as then responding to some issues that flow out of congressional action. We have limited all of our requests in this cycle particularly to respond to those congressional things and then really the things, pursue the things that we believe are in most dire need of change at present. And I'd like to highlight a few of those this morning.

First, on the topic of immigration. We have proposed significant changes to Section 2L1.2, which is the illegal reentry guideline. And we believe, in contrast to a lot of the other guidelines and the other topics that we're talking about, that this is in need of dire change. At present, the courts, probation offices, defense attorneys and prosecutors are expending vast amounts of time, time that we believe is unnecessary, parsing over words and statutory construction of state and local laws without a real benefit to the ultimate outcome in the sentencing of those cases.

In fiscal year 2006 alone, the courts handled over 17,000 immigration cases. That was virtually a

quarter of the federal docket. And we submit that the proposal that we are making here to revise 2L1.2 would allow us to have fair and predictable and appropriate sentences still for those sentences, but allow us to do it more efficiently and thereby allow us to more fully utilize our resources that have been given to us by Congress to enforce our immigration laws.

The simple reality is that 2L1.2 as currently drafted provides a significant barrier to our being able to do more in the field. We have proposed a number of options as embodied in Option Six and then the latest in Option Seven, and I want to emphasize that we are not favoring these options as a means to increase overall sentences in this for illegal reentry. Rather, we favor it as a means to achieve fair sentences more efficiently, which will, thereby allow us to prosecute more cases, allow the courts to handle cases more effectively, and presumably free up time also for probation offices and for defense counsel.

We originally have offered the potential triggers in Option Six as examples only and we recognize that there is a contingent of dialogue as to what would be appropriate in order to achieve our goals of increased simplicity in this area and essentially net neutrality.

We believe our Option Seven comes the closest at this point in terms of that net neutrality and what I mean, I mean in terms of the total number of defendants who would receive the particular adjustments to their base offense level.

So, at present our concern about 2L1.2 stems from the fact that we believe that we've got a lot of litigation that is unnecessary as a result of the categorical approach that is required by the Court's Taylor and Shepard decisions. And that litigation in these kinds of cases as the judges on this court recognize first hand, certainly places a significant strain on the courts, the on the probation offices, on the prosecution and on the defense. And it falls disproportionately on those offices who are least in the position to handle endless litigation in this context. We hope that this option is one that is, by making it simpler, will make in fact the system stronger and allow these cases to be moved more effectively. The reality is that in addition, the court decisions that arise in this context are replete with some counter-intuitive, if not capricious results. And I know that that's been detailed in prior testimony here. But it is something that certainly should concern us all in a criminal justice system.

As proposed Option Seven would essentially eliminate the categorical approach and in doing so would mean that we would be looking at length of sentence as the proxy, instead of the type of offense. This driving it based on that factor, certainly we must acknowledge there is no perfect proxy, but the reality is that the state sentencing regimes are not entirely uniform, but then again, how states label offenses is also not entirely uniform. And we believe that the length of sentence, as shown by the recidivism and criminal history study of this commission provides a far more objective and readily determined basis for increased defense level under 2L1.2, than the current categorical approach.

Let me also, so in answer to the question that I think is out there, which is should the Commission act now, as opposed to wait? We in the Department believe the answer is yes, you should. We need the relief now. The system needs the relief now and certainly, as the media has reported, there is a significant chance that nothing will happen on immigration legislation in this year and we will remain in the same position at the end of this cycle as we were at the end of last year.

Secondly, we believe that the proposals that

are there are consistent with a lot of the thinking that's gone on in Congress to date in terms of revising sentencing schemes in this area. And we would submit, therefore, that a delay in action would only prolong the unnecessary expenditure of resources across the board in a time when courts, defense counsel, federal public defenders, and prosecutors certainly face resource challenges.

Let me also then turn to sex offenses briefly. With regard to the sex offense, obviously, there's a lot proposed. The only thing I want to cover this morning is the issue of the failure to register that stems from the Adam Walsh Act.

In the federal system, we know that sex offenders are required to be notified that they must register. And this is happening not only while they are incarcerated, but the Adam Walsh Act certainly requires federal sex offenders to register now as a mandatory condition of probation, supervised release, and parole. So federal sex offenders certainly become aware of their registration obligations. With respect to non-federal sex offenders, almost all of the states at this point should be informing sex offenders concerning their registration obligations, as it is, and were doing so under prior law, the Jacob Wetterling

Act, sex offender act. And so it's important to recognize that we're not writing on a blank slate completely here.

It's also important to recognize that liability for failure to register under 2250(c), 18 U.S.C. 2250(c) is only going to occur in cases where a person knowingly fails to register. And I can tell you first hand, as we are beginning to grapple with these cases in the Western District of Oklahoma, that is a real issue and one that, therefore, makes us look carefully at the cases that we bring to delve into and determine our ability to prove those elements.

So we understand that essentially that part of the law requires a violation and can only be put, and will only be brought in circumstances where truly the government has the ability to prove beyond a reasonable doubt that the defendant violated a known registration obligation. And that's important to recognize as we consider what we're dealing with here.

I do want to also inform the Commission that we will, as a Department, be providing guidance to the states shortly regarding their, what states should be doing in order to notify sex offenders concerning the registration requirements and any which are new or different from what the individual states are doing.

But again, that's a bit far from the sentencing issues.

With regard to the specific proposal to create a new guideline in 2A3.5, the one point that we want to make explicitly clear, which is we believe that the current proposal, which would limit the specific offense characteristic to only an offense against -- to only sex offenses against a minor, needs to be reworked to include any offense against a minor. It's important to recognize that the congressional directive does not limit it to just sex offenses committed against a minor while a defendant was in an unregistered status, but uses just the term offenses, more generally.

And it's important to also recognize the context in which this comes up. Congress was concerned about sex offenders who are not registered. Why? Because we want to know where they are and we want to be able to account for them, and we therefore want to use that as a means to better protect our children and protect society from those who Congress has determined pose a significant risk.

While certainly the sex offense committed while a person is unregistered would be the most serious set of circumstances, there is a whole group of conduct that moves along a continuum towards the actual commission of a sex offense that should concern us.

And so we want to look at things like and be able, and believe the guidelines and congressional directive require the consideration of nonsexual assaults, kidnapping, drug distribution, and other offenses that may be indicia of an unregistered sex offender say attempting to groom an individual, a child, before ever reaching the point of actually committing another sex offense.

We also believe that the guideline in this area needs to be drafted in a manner that fully reflects the ten year statutory range provided. For example, if you were dealing with the sort of middle range criminal history category three, but a person who was required to register for a tier III offense, so therefore it was the most serious sex offense on the conviction, and who committed an offense against a minor while unregistered, we believe that is a significant, that person is deserving of significant punishment and should face a guideline range encompassing the 420 months prior to acceptance of responsibility. And so we make recommendations, therefore, to get, for that guideline to do that.

We also want to recognize that the special offense characteristics will take into account an offender who commits a sex offense that is not against

a minor while unregistered and our proposal covers that.

With regard to the voluntary attempt to correct a failure to register, the current proposal before the commission has two options and we favor one and oppose the other quite strongly. We start from the proposition that, simply put, unregistered sex offenders who commit offenses are precisely the reason why this law was passed and why we have registration requirements. And that it would be extraordinarily unjust to provide these offenders who victimize others again a reduction in sentence merely based on the fact that they attempted, unsuccessfully, to do something when they've done something far worse, committed additional criminal offenses.

And so we would recommend, therefore, the Option One, which takes into account and would not provide a windfall to defendants who have really done the worst of the worst, but can show that at some point they voluntarily attempted to correct their failure to register. And so what that would essentially yield is that under our suggestion, an aggravated offender such as the one whose registration was for a tier III offense and who committed an offense against a minor while unregistered would face a guideline sentence

encompassing the maximum statutory penalty, assuming a criminal history category of three.

At the other extreme, a criminal history category three offender whose registration was for a tier I offense, and who did not commit a qualifying offense, and who voluntarily attempted to correct his failure to register, would be at a level eight or facing 6 to 12 months or a level 10, 10 to 16 months.

And in the middle, then someone who was criminal history category three, an offender who did not commit a qualifying offense while unregistered, and whose registration was for a tier II, would then be at a level 14 before acceptance for 21 to 27 months.

What we believe is that this structure creates a sentencing scheme where aggravated offenders face serious and severe punishment, but also taking into account the less aggravated circumstances and mitigating circumstances in the appropriate cases. And certainly, in those circumstances where an offender has voluntarily attempted to correct their failure to register and also has remained law abiding during the period.

I also want to turn briefly to the proposed new guideline section 2A3.6. This is the aggravated offenses relating to registration as a sex offender.

We believe that this proposed guideline is very appropriate for section 2260(a) and as that section, statutory section, requires a ten year consecutive additional penalty to the underlying offense. However, we believe, as currently drafted, 2260(a) is not appropriate for section 2250(c) because that is drafted differently and creates a statutory scheme of not just merely a ten year consecutive sentence, but rather a broad range of between 50 and 30 years. And that, in essence, therefore, we believe the current proposal does not take into account the congressional determination to set a minimum and maximum term for section 2250 offenses.

We would suggest that in order to account for the significantly dissimilar penalties, that we preserve the current draft for purposes of section 2260(a) and then create a framework for section 2250(c) offenses that would appropriately provide for sentences, other than the minimum mandatory term of five years, but also would account for the range that goes up to 30.

Let me turn now briefly also then to the one area in the drug context and that is with regard to the new offense passed by Congress in 21 U.S.C. Section 860(a) as part of the Combat Meth Act, which was within

reauthorization of the U.S.A. PATRIOT Act. It provides a mandatory consecutive term of imprisonment of not more than 20 years for the manufacture, distribution, or possession with intent to distribute of methamphetamine on premises where a child resides or is present. There are several options here. We strongly support Option Two, which would provide a six level increase with a floor of 29 for a manufacturing offense and a three level increase with a floor of 15 in distribution cases where a minor is present or resides.

We believe that this option provides a tiered and measured response which properly punishes, at a significant level, offenders who manufacture methamphetamine in the presence of minors, while also then recognizing a lesser offense level for defendants who distribute methamphetamine on the premises.

As recognized by Congress in passing that statute, and as I can attest to firsthand, given the experience of Oklahoma with methamphetamine, the manufacturer of methamphetamine, particularly in the home where a child is present involves, inherently, an awful risk to a child. Children are not only exposed to toxic chemicals, these become essentially environmental cleanup sites, ultimately, but they're also left in a situation in which not only these

persons who are manufacturing, they are not only left with their parents who are manufacturing and often times using the methamphetamine, but all kinds of other individuals and strangers whose behavior, who come there for the drugs, and whose behavior, in and of itself, is corrosive to those children. The simple fact is that children in proximity to methamphetamine has an awful result for children, and in particularly the manufacturing aspect of it provides, inherently, a significant risk.

We believe that Option One, as presently proposed, which only would provide a two level increase in inadequate, in that it would fail to reflect the severity of the actual offense and, therefore, we would ask that if the Commission were to go in that direction in adopting an Option One, that we would request that the six level enhancement with a 30 floor be applicable also to distribution and the possession with intent to distribute and manufacture cases. This would yield, in our minds, meaningful sentences in this context.

Obviously, there are a lot of other issues that are being commented on today. We will be submitting a letter, as is customary, covering each of these topics and we certainly have welcomed the opportunity to meet with the staff in the run-up to

this and continue our informal discussions about the proper and appropriate guidelines that should govern the new statutes as well as changes that we're proposing.

So with that, I'll conclude my remarks this morning. Let me say again how much I appreciate the chance to appear before you and how much I appreciate your hard work and consideration of the Department's proposals. We certainly stand ready to continue to work with you in any way that we can. Thank you.

CHAIR HINOJOSA: Thank you, Mr. Richter. Mr. Sands?

MR. SANDS: Thank you, as always, for having the defense community here to comment and to discuss with you on the guidelines.

With me is Amy Baron-Evans, who will begin with the Adam Walsh and miscellaneous amendments. David Debold, who will be taking drugs and others, Anne Blanchard, later, will touch on crack. And I am going to address, briefly, immigration.

All three of us here, though, to follow up on the other panel, serve as our brother's keeper. And we will try to address certain aspects. And as always, we appreciate our work with the Commission staff.

2L1.2, which is the illegal reentry after

departure has bedeviled the Commission and practitioners for some time. It has become complicated, unwieldy and unfair. And this is a result, I believe, of its history in which the 16 level cliff was done without any analysis and without any real understanding of the impact it would have. It is, as we have said in the past, a Cassandra-like, the steepest cliff in the guidelines. And its unfairness has shadowed the history of thus amendment.

With this reentry guideline, we also have the facts of the fast track. This was something that was not mentioned by Mr. Richter, but close to 75 percent of the cases that are begin dealt with, reentries, are fast-tracked. And the process in this way is signaling to the Commission and to the community at large, that the sentences are too high.

You would not have such an extensive fast-track program, cutting sentences in half, unless the Department of Justice recognized that the sentences, without that fast track, are too steep. The Department of Justice is interested in fair sentences and we believe that the fast track is an indication that the Department recognizes the unfairness of the situation.

In the past years, and last year, there were various options. Options One through Six have left us

under-whelmed and we have responded with some criticisms of them. Option Seven, which comes out this year, is different. It is of interest. In that Option, the Commission is taking a bold step, a new step, toward looking at sentences imposed. We would argue it should be a sentence served, but that is a debate for another hearing.

With the sentence that is imposed by the state judge or federal judge, the Commission is recognizing that the court can be trusted, that judge is looking at the offense in front of her and is giving an appropriate sentence. It also gives the Commission a way of validating or understanding the plus 16. If you look at the plus 16 as 4 to 5 years, then maybe that should stand as a marker for what the previous or prior sentence should be.

With that said, we do have concerns with Option Seven. One is that some of the adjustments, a sentence of 12 months or more may capture or net too many. In many, if not most jurisdictions, we would argue that 12 months is a reflective sentence. It is a sentence that is just given for a variety of reasons. It may sound right. The person might have been unable to make a bond or bail, especially if you are dealing with indigent defendants, it may be a time served. So

it's one of those sentences that we think, if you're going to use it as a marker, it should be 13 months or more. This has the virtue of being consistent with Chapter 4 and with other measures that the Commission uses.

We are also concerned that the Commission, in Option Seven, is taking a step, but still looking over its shoulder with a categorical approach. In the Option Seven that the Commission has sent out, it has listed offenses, murder, sexual offense, which carries with it the categorical problems that Mr. Richter and the practitioners here have recognized. Once again, you'd be going back to look at the elements. Not all offenses are the same across the states. The Commission is to be commended for looking ahead to the sentence imposed and we would urge you to go all the way with that.

Our Option Eight comes forth and tries to deal with that by dispensing with the categorical approach in every offense except for terrorism and national security, which we then define according to the guidelines. Don't mix. Follow your convictions and follow the data.

Speaking of data, we are somewhat in the blind in that the Commission is still running the stats

on how Option Seven would affect the defendants. We have been working with the Commission staff. We have had some gleanings where it's going, but unless we know what the facts are and who it affects, we are in the blind and the Commission is in the blind. It is critical, and we all agree with this, that the options should punish the most culpable, that it should punish the ones that the Commission feels are the worst and not haphazardly bring in others.

We, with Option Seven, have conducted a survey of five districts, one in which the baseball team hasn't won a world series in 98 years, Tennessee, Massachusetts, several on the border including Texas, Southern and Western, and Arizona, and we're getting a mixed bag of results. There are some defendants who have seen a dramatic decrease from 51 months down to 24. But 25 to 39 percent of the lower level of defendants are seeing a sharp increase. So you are going from 6, 12 months or even less to all of a sudden 24 or around there. And this is because of some of the three sentences of 90 days or more.

So that is a real concern and that data needs to be parsed and to be examined. It's more important to get it right than to get it done fast. And this is a subject that we need to work with your staff and with

the Department on how does this affect? If the top just go down a little bit, but the bottom go up substantially, it may just even out as a four percent or a two percent, but you're affecting a far broader range and this is of concern.

In terms of documents, I testified last month. I will just reiterate that documents should not be equated with people, that documents are just not the same as an alien being smuggled in and the Commission should not go one-to-one ratio.

And finally, I must raise the case but dare not speak its name, which is Booker. The guidelines seems to be avoiding mentioning it or dealing with the advisory nature of the guidelines now. We would urge the Commission in its next guidelines, which I hope will be Yale Blue to deal with the advisory nature of the guidelines and to embrace Booker, which is to trust judges to be judges.

CHAIR HINOJOSA: Ms. Baron-Evans? Thank you, Mr. Sands.

MS. BARON-EVANS: Thank you, Judge. Commissioners, thank you for having us there today. I'm going to talk about the Adam Walsh Act and also say a couple of words about demonstrations at national cemeteries and internet gambling, if I have, if I can

get to it.

We have provided you with a letter in which we propose alternatives to what the Commission has published. We believe a number of the proposed amendments go beyond what Congress required and, in some ways, are contrary to what Congress said, with a result that is unwarranted severity and unwarranted complexity. This is a long and messy statute and we've explained that in detail and I'll try to hit the highlights here.

I do want to spend some time on the failure to register guideline because that has been most vexing. And we've proposed an alternative, two alternatives to the one that was published in January.

I do want to say that it's especially important to avoid unwarranted severity in the sex offense area. The guidelines already disproportionately impact Native Americans in this area. Several of the mandatory minimums in the Adam Walsh Act are just going to make things worse. 2241(c), 2250(c), 2260(a), you might look at these and, especially if you're a very law enforcement minded person, think that's great, lock them up forever. But remember, these are mostly Native Americans who are going to be impacted by these very severe mandatory

minimums and who are already prosecuted in federal court with the higher sentences, more than people of other races.

There's no evidence that sex offense sentences are too low. If anything, they're too high. And so we believe that the Commission should take a very sparing approach and not go further than Congress required.

Back to the failure to register guideline, the first question which we discussed also in February is how to implement directives one and two which tell the Commission to consider whether the defendant committed another sex offense or offense against a minor in connection with or during the period for which the person failed to register. The version published in January used an approach that would apply steep increases based on unconvicted offense, in quotation marks, we think that is an incorrect reading of the congressional language. As we've mentioned before and as we've and laid out in writing in our letter, Congress used the word committed and it used the word offense in the other criminal statutes, 2250(c) and 2260(a), where it's clearly referring to an offense of conviction. And in the Sex Offender Registration and Notification Act, it's talking about offenses of which

the defendant is convicted. The only rule of construction I know for when the same terms appear in the same statute is that they have the same meaning.

Besides that, though, you know, that's a formal analysis, as a matter of common sense, and I'm not aware of any time Congress has enacted a statute that says people should be punished based on an offense of which they were not convicted. You know, if someone can show me something like that, I'd be very interested to see it but I don't think Congress thinks in those terms. I haven't seen any evidence of it.

And if you just look at these directives and think what were they really thinking, especially in view of sort of the policy reasons behind this statute. They're thinking of an instance where somebody is convicted of a -- or arrested for a sex offense and the authorities go, aha, he was also required to register and he failed to do so. This is just the guy that we want to punish more. It's usually a guy, sometimes a woman I suppose. So --

CHAIR HINOJOSA: The data doesn't show that.

MS. BARON-EVANS: I would think not.

So we believe that, as a matter of common sense, what Congress had in mind was the situation where this person is going to be prosecuted at the same

time for the new sex offenses for the failure to register offense. We've proposed two options. One is Option One and the language that we've proposed is "If before sentencing the defendant is convicted of an offense that occurred during the failure to register status." And then we describe what types of offenses those would be. Under that option, the person could be convicted of, simultaneously in the same prosecution in federal court, in some other federal jurisdiction, if there was a venue problem, which there are venue problems in these cases because of the interstate travel issue, or in state court before the conviction in federal court for failure to register.

Our second option would implement the directives merely through the aggravated form of the offense. And that would allow or invite an upward departure if the crime of violence was also a sex offense as defined in the SORNA. We think this makes too, since most sex offenses will be crimes of violence. It's a reasonable interpretation of the statute.

We also think that the convicted -- there are a lot of practical difficulties. We've been talking about complexity and all these problems in the area of immigration. I think this would be even more complex

if you tried to use an offense, an un-convicted offense approach under these SOCs that add points for un-convicted offenses. The SORNA defines sex offenses as certain offenses under the law of any jurisdiction. States, tribes, foreign law, you name it. So what we would really have to have is not a category. There's not one definition. The judges would have to be trying to figure out what the elements of these offenses are. And believe me, this is -- there's all manner of different, you know this too, probably, from your own, the judges from your cases, all manner of different definitions, for different sex offenses in different states.

North Carolina actually makes it a crime to have bad thoughts about a child. Not in the presence of the child. The child doesn't have to know about it. And there are all kinds of different definitions for statutory rape, different age cut offs, etcetera. I don't know what elements are for tribal offenses or foreign offenses, but judges would be, and probation officers, would be in the position of trying to figure that out. That seems like a mess. A convicted offense approach removes that problem.

If you used an un-convicted offense approach and also retain this definition of minor which is

contrary to Congress's definition, it would allow circumvention of narrower definitions of minor, that is, the definition of a minor as an actual minor, that are required for conviction.

For example, you can't be convicted of an offense that involved an FBI agent posing as a minor or a minor that an FBI agent made up and told the defendant about by computer or phone, unless that offense exists as an attempt. So, for example, in the federal system, there's no such thing as attempt to sex traffic under 1591. There's just no such thing. So you will never see the fake minor situations in those cases. But, under the proposed guideline, at least the one that was published in January, a person could receive an SOC for attempted sex trafficking, even though there's no such offense.

There would be similar problems with definitions of child pornography which, of course, require a real minor for conviction, but under the guideline as written, that definition could be circumvented and SOC applied.

In general, like all of the un-convicted offenses in the guidelines an un-convicted approach here would create unwarranted disparity. A prosecutor could succeed in doubling or tripling the sentence by

proposing information in the pre-sentence report. Might be reliable, might not be reliable. It would all depend.

We had a very interesting case recently in Massachusetts, United States versus Quinn. And the reason it's interesting is because it sort of exposed something that happens all the time, but it exposed the problem because it happened in the same case. Two probation officers prepared two different pre-sentence reports for two defendants who were the only codefendants in the case. It was a drug case. It wasn't a large conspiracy. It was just the two of them and they were equals. And the one PSR figured out the sentence was 151 to 188 months and the other one said 37 to 46 months.

And Judge O'Toole, who is not a particular foe of the guidelines, as you might think some in Massachusetts are, but he said, and I think he's right, that he called this a structural problem within the guidelines relevant conduct rules because relevant conduct is applied or not, depending on how aggressively it is pursued. And he said that the scandal of the anomaly in this case is that it directly subverts the goal of avoiding unwarranted disparity.

It's a structural problem not only because

different probation officers and prosecutors and judges might pursue relevant conduct differently, but because it might be found, the same evidence could be credited or not by different courts. So that's another reason that we think that you should not use an un-convicted offense approach here.

The commission should also use Congress's definitions. In our proposal, Option One, we propose that you define minor just as Congress defined it in the SORNA, which is an individual who has not attained the age of 18. You could define an individual other than a minor as an individual who has attained the age of 18 or an FBI agent posing as a minor or a minor made up by an FBI agent.

And then, in our proposal, which is a compromise, we propose an eight-level enhancement for a sex offense against a real minor and a six-level enhancement for a sex offense against an individual other than a minor or for kidnapping or false imprisonment of a minor, but not if committed by a parent or guardian. I'm not sure if that was purposeful in the proposed amendment, but the SORNA excludes kidnapping and false imprisonment if committed by a parent or guardian and I'm not, the guidelines didn't seem to recognize that.

In response to issue for comment number two, the Commission should not interpret directive Two as meaning any nonsexual offense against a minor. In context, Congress surely meant a specified offense against a minor, which is a specific list of offenses at 42 U.S.C. 16919(7). It surely did not mean things like drug trafficking against a minor, although I don't think there's actually any such thing, but I don't think that it's at all a reasonable reading of directive two to say that it applies to just any old offense against a minor.

We don't think that the Commission should use a 28 or 24 level floor or that it should raise the increases to make sure that a lot of people get up to the stat max. There's -- this is, you know, a failure to register offense with the statutory maximum of ten years. There are lots of offenses with statutory maximum of ten years that are punished quite leniently, a whole list of them, including a new one, unauthorized release of fingerprint information, which would be subject to four to ten months.

The stat max is not a good barometer, I don't think, of offense seriousness or relative seriousness and the Commission has generally not followed that because anybody would notice that the statutory

maximums really are not, don't really measure, are not a good indicator of offense seriousness.

The eight-level increase alone triples the sentence. The government has many tools, if it wants to get a higher sentence in an individual case. It can charge a substantive offense. If there's federal jurisdiction, it can charge 2250(c) to get a five year mandatory minimum, consecutive minimum. It can charge 2260(a). It can ask for an upward variance. The Courts have gone sky high in some sex cases. I know the government likes to complain that judges have gone below the guidelines in sex cases, but they've gone sky high in sex cases, too.

I want to point out that although our recommendation includes the six and eight level increases, that's in the context of a guideline that also includes decreases for, according to the congressional directives. One, for a two level decrease, if the sentence served for the prior conviction was 13 months or less, which is based on directive four which tells the Commission to look at the seriousness of the prior, the offense that gave rise to the duty to register a two level increase, also under directive three if the defendant has had a clean record for ten years, there is a definition of this in

the SORNA, it's based on research showing that sex offenders, contrary to popular myth, do not re-offend at the same rate as regular offenders. And that treatment is actually quite effective. And so this clean record requirement would include completion of treatment.

I want to talk about a departure. I think that we, it's very -- well, I'll come back to the failure or the voluntary attempt to correct the failure to register. That's directive four. No, it's directive three. The purpose of this is obviously to encourage and reward registration. It recognizes that a defendant who tries to register is less culpable.

We've provided two cases to the staff which I hope you've seen in which defendants were turned away from the registry. One, in which the woman was told she wasn't required to register. Her probation officer insists she is. What will come of it, we don't know. It doesn't look like she really is. But, you know, there's this issue and it could turn into a case.

In the other case, this is a supervision violation, the guy is charged with failure to register. He is a Native American and lives in a shelter in a city out west or a town out west. He went into register, after he was released from prison and they

told him, well, we only do this on Tuesdays and you need an advance appointment. And so he left and made an appointment to come back next Tuesday and was arrested in the interim for failure to register.

Now, put that together with people who live on a reservation, maybe 50, hundreds of miles away, who have no transportation or telephones, and they have to make an advance appointment in Tuesdays. This is a problem. So there are many scenarios in which a person can attempt to correct a failure to register and be thwarted through no fault of their own.

We also proposed a downward departure of the defendant did not comply or attempt to comply with the requirement to register because of circumstances to which he did not intentionally contribute. This would cover situations that do not meet the affirmative defense, because remember, the affirmative defense requires uncontrollable circumstances that cease to exist and did not voluntarily attempt to correct the failure to register because of similar ongoing circumstances.

We've given you letters from state public defenders who have represented people in state court for years that describe a host of situations that would stand in the way of a person being able to register,

including mental health problems, inability to read, improper notice, and things of that nature.

Mr. Richter talked to you about the fact that when a person is released from BOP or sentenced right now, they're given notice, and they are given a form to sign, and they are registered. And that a lot of the states are doing this now. Well the deadline for the states to do this is not until July of 2008.

Congress recognized that for people who commit new sex offenses, notice and actually getting them registered by an appropriate official is really important. They devoted a whole section of the statute to that.

Now, we think, unwisely, Congress gave the Attorney General the authority to decide whether this law is retroactive. But, at the same time, Congress said, in addition to making that decision, you have to publish rules that take care of getting people notified and registered who do have old convictions. On February 28th, we see that the AG published an interim ruling in which they say that the law is retroactive, but we're not going to publish rules at this time telling anyone how they might get notice or get registered.

Keep in mind, people who got notice when

being released from BOP now or at their sentencing now, they're not the ones being prosecuted. The people being prosecuted are the people with old offenses. Now, people who have old offenses may not be required to register in their states. In fact, a lot of people are not required to register in their states because the offense which might be one of the types that SORNA requires registration for, is not a type that the state requires registration for. Or, they've already sort of, the registration period under state law has run, or the person has been removed from the duty to register all together by a state that has one of those risk assessment systems, which the federal system doesn't have.

We've given the staff a case in which the defendant was not required to register in the state of conviction, in any state that he moved to. He didn't believe that he was required to register. And he is being prosecuted under SORNA.

We've just learned of a new case in which the defendant was convicted in 1984 in a state which had no sex offender registry at the time. They did not -- when they finally did get a registry, it was not retroactive. He's never been notified of a duty to register under any law and he's being prosecuted.

So, the people being prosecuted are the ones who have not received notice and who have not been registered in compliance with the rules or with the statute that applies to everybody else. The affirmative defense does not take care of this. And I would also note that sometimes affirmative defenses don't work and the sentencing guidelines take account of those through a variety of means like the victim conduct departure, the lesser harms departure, coercion and duress, diminished capacity.

I'm going to, I think I'm way over time, aren't I? No? Yes? Okay.

CHAIR HINOJOSA: If you want to give us some time for questions, you might want to --

MS. BARON-EVANS: All right. I want to just say one thing, on the mandatory minimums. There are four new mandatory minimums that the staff has proposed putting into the guidelines. There are a lot of sort of more detailed things in our letter that I think should be addressed, but the most important thing is that the mandatory -- we recommend, just like the judicial conference, that the Commission not try to continue to incorporate mandatory minimums into the guidelines.

You asked in an issue for comment which of

four proposals would we vote for or would we recommend. And we say let 5G1.1(b) operate. There's a mechanism in the guidelines for mandatory minimums and it should be allowed to operate.

The guidelines that had been published and we did a lot of work reviewing cases that had been decided under these various statutes. Each of the guidelines for the mandatory minimums that have been published in January, end up at a level above the mandatory minimum in the standard case. We're not talking about an aggravated case, we're talking about a normal case, just by operation of SOCs that are inherent in these offenses. That shouldn't be. So we have proposed lower offense levels, if the Commission decides not to just let 5G1.1(b) operate.

We also urge the Commission to update the mandatory minimum report. This would be really helpful to the public and to Congress at this time. And one thing that occurs to me in that is how can the Commission compare mandatory minimums to good sentencing policy if mandatory minimums are incorporated in the guidelines for no reason except that they happen to be a mandatory minimum? So we recommend that the Commission stick with what it thinks is an appropriate sentence in the guidelines. And if

the mandatory minimum applies, it will trump through 5G1.1(b).

Thank you.

CHAIR HINOJOSA: Thank you, Ms. Baron-Evans. Mr. Debold?

MR. DEBOLD: Thank you Judge Hinojosa, members of the Commission. On behalf of my fellow co-chair, Todd Bussert and the other members of the Practitioners Advisory Group, it's always a pleasure to be able to offer our input to the Commission on proposed amendments.

My testimony today will be limited to five of the categories that we addressed I our two letters that we sent to the Commission earlier this month. Those categories are transportation, intellectual property, the PATRIOT Act, drugs, and the Telephone Records and Privacy Protection Act.

Before I begin with the first of these topics, I did want to make a general observation to sort of put my comments in some context. There's a common thread that runs through our recommendations and that is, that the Commission should keep in mind the need to simplify or at least to avoid making more complicated the guidelines in its amendment process.

As Mr. Sands mentioned a few minutes ago,

although the guidelines manual does not mention the affect of the Booker decision on the guidelines, we have suggested that the Commission put some reference to it in the manual, especially, if we are practitioners who are less experienced with the federal system so they can understand how the guidelines fit into the greater scheme of things.

But putting that point aside, after Booker, it's clear that the guidelines are advisory. They are one factor among several that the Court must take into consideration. And by constantly adding more and more factors for the court to consider and to assign a number to in the guideline application process, the Commission, over the years, has sometimes given a false sense of precision with the guidelines, especially with respect to how various factors might interrelate with one another in a way that the Commission may never have foreseen or intended.

So, with this in mind, we are proposing, as a general matter, that the guidelines manual become simpler and a number of our comments on the proposed amendments have that particular goal in mind. We think that this will better promote the dual and complimentary goals of treating like cases alike and avoiding the like treatment of cases that are not

alike.

Let me start with the transportation amendments. The Commission has asked for a comment on the appropriateness of a sentence enhancement for anybody was convicted either under 18 U.S.C. Sections 659 or 2311. And this was something that was suggested by Congress in a directive to the Commission.

The Commission has proposed two possible ways in which this suggestion could be carried out, if in fact it is appropriate. One of them is to make any conviction under either of these statutes eligible for or grounds for the enhancement under 2B1.1(b)(4), which applies now to defendants who are in the business of receiving and selling stolen property. The other proposed place for putting this enhancement is 2B1.1(b)(11), which currently is reserved for offenses that involved an organized scheme to steal vehicles or vehicle parts.

In short, the statutes that are proposed, that are mentioned here, especially Section 659, but also 2311 and the other statutes that are included in the Commission's request for comment, those are 2312 and 2313, are very broad statutes that reach conduct far beyond what the current enhancements are meant to apply to. 659 basically covers any theft from an

interstate shipment or any receipt or sale of such stolen property. There's nothing special about that offense that really distinguishes it from other types of theft offenses that would warrant giving it its own special two-level enhancement simply because the prosecutor has chosen that particular statute in order to pursue the defendant and charge him for federal criminal conduct.

The Commission has also asked a request for comment number one under the transportation guidelines whether section 2Q1.2, which deals with certain environmental offenses, is an adequate guideline in terms of penalties for a new offense of 49 U.S.C. Section 5124, which applies to the release of a hazardous material that causes bodily injury or death.

We submit that there is no need to enhance the penalties under 2Q2.1(sic). A conviction under that statute for somebody who engages in repetitive discharges would be eligible for a sentence, under the guidelines alone, of up to 71 months. Now a judge already has the authority, under the application notes, to depart upward, and obviously, has the Booker authority to vary from the guidelines. But the guidelines themselves specifically encourage an upward departure, if death or serious bodily injury results.

We are unaware of data showing that there are a significant number of case where this factor in fact is present. And in lines with the idea of trying to keep the guidelines simple, we think that extraordinary and unusual circumstances were a higher penalty might be warranted are exactly the types of situations where the court should vary from the guidelines, rather than trying to build something into the guideline system itself.

The final request for comment on transportation guidelines that I want to address is bribery that affects port security. This is request for comment number three.

We agree with the suggestion that this guideline, that the guideline applicable to this new offense should be 2C1.1, the general bribery guideline.

An enhancement in that guideline that would account for an intent to commit an act of terrorism, we think, would be the preferable approach to the other suggestion of making a cross reference to other guidelines. It would better ensure that the guidelines enhancement is based on conduct for which the defendant has been convicted and we also suggest that the commission give clear guidance that in that situation, 3A1.4, which is a chapter three enhancement for

offenses that are intended to promote terrorism, should not apply because it would simply be taking the same offense characteristic into account a second time.

The second topic I want to cover is intellectual property. The Commission is re-promulgating an emergency amendment and proposing possible changes to that guideline that were not in the emergency amendment and these go specifically to so-called anti-circumvention devices, which deal with, among other things, devices that allow somebody to access software that is otherwise digitally locked.

We believe that of the three options the second option is the simplest to apply and the one that should be adopted. It asks the court to determine the retail value of the infringing item, in order to determine the infringement amount.

The first option has simplicity to it, because it does call for a minimum offense level of 12, but we do not, at this point, see the data that indicate the extent to which these offenses are occurring, or the nature of the offenses in order to determine whether or not that type of offense level is appropriate. This seems like a good example of where when you have a new statute, that the judges should have the authority to determine what the appropriate,

whether the current guideline provision which provides a different base offense level is appropriate, provide the feedback to the Commission and then, if the Commission sees that the guideline is not adequately covering the conduct, then the Commission can make the change.

Option number three has within it an alternative measure of infringement amount which looks to the price a person legitimately using the device would have paid. The defenders, in their letter which we agree with, point out that there are a number of ways in which this will greatly complicate the process of determining the amount of loss. It's very hard to determine the surrounding circumstances that would have existed in a hypothetical situation in which a person who is an end user of the software would have legitimately acquired it. And so we discourage the Commission from taking that approach.

As for the issues for comment under that guideline, we believe that there should be a mention in the application notes, as the Commission asks about, that a downward departure may be appropriate in circumstances where the infringement amount, especially depending on how the Commission deals with the proposal I just mentioned, where the infringement amount

overstates the seriousness of the offense.

And we also support the deletion of what is basically a per se rule, that every time somebody is sentenced under this guideline and commits a particular form of the offense, that the special skill enhancement should apply. We think that the court should be applying that enhancement based on the facts and circumstances of the case and as your own comments note, or request for comments note, there has been a feedback from the field that special skill enhancements are not appropriate in every case under this guideline.

Next the terrorism or PATRIOT Act provisions. One of the provisions that the Commission has asked for comment on deals with the new narco-terrorism statute, which basically prohibits a person from engaging in conduct that is outlawed under section 841(a) of the drug statute, distribution or possession with intent to distribute for example, when knowing or intending directly or even indirectly that anything of pecuniary value would be provided to someone who has engaged in terrorist activity in the past. It covers broader conduct than that, but I wanted to emphasize that aspect of it.

We propose that the Commission, if it's going to make any change in this area, go with the second

option, which is to create a new offense guideline specific to this offense. That is consistent with the approach the Commission has taken on, for example, sale of drugs within 1,000 feet of a school, which has its own statutory provision, and ensures that the defendant is being sentenced for conduct of which the defendant was convicted.

We do not believe that there should be a categorical disqualification from eligibility for either the safety valve or for a lower sentence as a minor mitigating offender. There obviously can be circumstances as I just described the statute where somebody is acting with the knowledge that somebody who has committed a terrorist act sometime in the distant past, will be receiving some sort of pecuniary value indirectly from the drug offense. And we believe that because of the broad, very broad nature of the statute, that that should not categorically disqualify somebody from eligibility for those provisions.

On the border, tunnels, and passages provision in the request for comment number two, the only point I would like to make there is that the proposed four-level enhancement on top of any other offense level that applies to somebody who is convicted under section 554(c), that's using a tunnel to engage

in some other offense, such as unlawfully smuggling an alien into the United States, the four-level enhancement, we believe, could result in very severe sentences, disproportionate to the additional conduct of using a tunnel, rather than some other means for bringing an alien into the U.S., especially considering that the immigration offense levels can get very high, based on other specific offense characteristics. We believe that enhancement would be disproportionately high.

The Commission has also asked for comment, comment number one, on whether the punishment for smuggling offenses is adequate. And it notes that Congress has increased the statutory maximum for Section 545 and 549 of Title 18. I want to use this as sort of a general point, which is that sometimes Congress will raise a statutory maximum for reasons other than its indication that it believes that the offenses are more serious than had previously been thought to be the case. And this very well may be one of those situations.

There may be smuggling violations that will occur or that have been occurring in the past, that in the unusual and extraordinary circumstances, warrant a sentence that is higher than currently available under

the statute.

Without some data showing that judges have needed to exceed the current guidelines or have seen an inadequacy in the current guidelines and without any specific guidance from congress that it believes that the current offenses and the current punishments for those offenses are inadequate, we don't believe that that should be seen as an invitation to cause a general increase in the offense levels for people who commit those offenses.

The next topic I want to address is the drug guidelines. The smuggling methamphetamine into the U.S. using the facilitated entry program, we generally take the position there that the enhancement that the Commission has proposed, a two-level enhancement, is sufficient to take into account this factor, especially considering the fact that people who already import methamphetamine into the U.S. receive a two-level increase for that drug alone.

I'm going to skip again to the 860(a), 21 U.S.C. 860(a), which is the consecutive sentence for manufacturing or distributing or possessing with intent methamphetamine on premises where children are present or reside. The Commission is already aware that it has within the guidelines 2D1.1(b)(8)(c), which is a six-

level enhancement or a floor of level 30 for person s who manufacture methamphetamine in a manner that creates a substantial risk of harm to a minor or an incompetent. The question is, what should the commission do in light of the new statutory provision that provides for a consecutive sentence for that conduct and additional conduct?

We recommend Option number one which the Commission has proposed. It's a two-level enhancement where the person is convicted under 860(a) but the provision already in the guidelines is not met because it has not imposed a risk, a substantial risk of harm to a minor or incompetent.

We think the other proposals to do not focus on in the real harm that is being addressed here, which is the risk that comes with manufacturing or imminent manufacturing of methamphetamine on premises where a minor is present. And we especially feel that it would be inappropriate to have this enhancement for someone who possesses with intent to distribute methamphetamine on premises where a child is present. There's no reason to believe that that imposes any great risk that possession with intent to distribute other types of drugs, again, after the manufacturing process has been completed.

It would also be disproportionate under Option number two the punishments that the Commission already has for possession of drugs in a school zone, a two-level enhancement, using or possessing a firearm in connection with a drug trafficking offense, also a two-level enhancement, or distributing drugs in a juvenile detention facility, again, a two-level enhancement.

Moving to section 841(g), this is the provision that was added by the Adam Walsh Act which criminalizes use of the internet to distribute a so-called date rape drug to any person knowing or with reasonable cause to believe that the drug would be used in the commission of criminal sexual conduct or that the person is not an authorized purchaser of the drug. We have three observations, general observations about this provision.

First, to the extent that the statute applies to the distribution to someone who is unauthorized purchaser, it's hard to see why there should be an extra enhancement for that factor. Anybody who commits a violation of Section 841 is, by definition, distributing drugs to an unauthorized purchaser and it seems like that is already taken into account by the guidelines.

The real focus ought to be on whether the

person knows or intends for that drug to be used to commit criminal sexual conduct. It's also worth nothing that the commission already has a two-level enhancement where a drug is distributed through mass marketing by means over the internet. That's 2D1.1(b)(5).

Finally, although Section 841(g) increases the statutory maximum for ketamine in this limited circumstances, where it is distributed under the circumstances I just described, we do not believe that warrants an across the board increase in the offense levels for ketamine, basically removing the cap of offense level 20 from the table and going further up the drug quantity table with additional enhancements.

In our letter, we have a specific proposal for how to deal with this new statute, which would allow a one- level enhancement if the defendant had a reasonable cause to believe the drug would be used to commit criminal sexual conduct and a two-level enhancement if the defendant knew of it. This distinguishes the degrees of culpability, with an aim for greater consistency in the guidelines.

It also is worth noting that if somebody violates the statute, there is already a 3A1.1(b) enhancement, when the person is found to have used the

controlled substance to facilitate commission of a sexual offense and so it is more consistent with current provision. And as I mentioned before, there is already a two-level enhancement for use of the internet.

The final provision I want to address is the Telephone Records and Privacy Protection Act. We agree with the Commissions suggestion that the applicable guideline be 2H3.1, which is basically a trespass guideline. 2B1.1, the other proposal, does not fit as well with the harm that is caused by obtaining somebody's telephone records, which is, basically, an invasion of their privacy. The 2H3.1 takes that into account by having a higher base offense level to account for that non-pecuniary harm.

In the aggravated form, where there's an intent to commit or further the commission of another crime we believe, as we stated in our letter, that the Commission should require a conviction under subsections (d) or (e), especially because the court is required to impose an additional period of imprisonment when those circumstances are present, especially under subsection (e).

Finally on the same topic, we note in our letter that we were shown by the Commission staff a

proposal by the President's Task Force on Identity Theft to possibly expand the definition of victim in the fraud and theft guideline. We know that the Commission has not sought public comment on this and so we think it would be premature for the Commission to consider such a proposal. But we also note that this would greatly expand the definition of victims to include those who are as much as inconvenienced by the commission of a crime and could have untold consequences on the definition of victim, as the courts interpret the Crime Victims' Rights Act, which provides a number of substantive and procedural rights for crime victims and we believe it would be a good idea for the Commission to seek specific comment on this proposal, before going any further with that proposal.

Again, on behalf of the Practitioners Advisory Group, we are grateful for the opportunity to provide our input and I am available for questions.

CHAIR HINOJOSA: Thank you, Mr. Debold and we'll have time for, I guess, a limited number of questions. And I'm going to start with mine on immigration.

Whether it's immigration or any subject, I guess we all can agree that Congress is constitutionally empowered to make the decisions as to

what is a crime and what is not under federal law, as well as determine what the maximum punishments are. And the immigration guidelines, for those of us who have worked in the system for a long time, for example, with regards to the statutes themselves, we saw the maximum go from 2 years to 15 years to 20 years. And we presently have a statutory system of 2 years, and then 10 years if you have been deported or removed, etcetera, etcetera after having committed a felony, 20 years if it's after an aggravated felony. And as simple as Option Seven may seem, my question is, does that fit within the statutory scheme?

For example, just about every day, I hear from the defenders in the courtroom that aggravated felony needs to be alleged in the indictment, felony needs to be alleged in the indictment, which would, therefore, not do away with the categorical approach with regards to what the maximum are going to be because we still have to determine, under the law, as to whether you committed an aggravated felony or whether you committed a felony. And so we're not totally doing away with the -- we can't change the statute unless we're congress. And so we still have to make that determination with regards to what qualifies someone for a statutory maximum or the ten year

maximum, as opposed to the regular two year one.

And so the question is, does Option Seven, is it connected to the statute enough from the standpoint that we may have somebody who committed a felony, as opposed to somebody under the statute who committed an aggravated felony, be subjected to a much higher guideline range? And is that complying with the statutory scheme that Congress has decided as to how someone should be punished based on what they committed before they were deported or removed?

You know, is that pine, is that something that everybody would be comfortable with, knowing what the statutory scheme is and certainly with the defenders' situation that you argue every day in the courtroom that Almendarez-Torres is no longer the law and that it should be in the indictment which would, therefore, still require the court to do the categorical approach with regards to the aggravated felony?

And you know, the aggravated felony within the statute is easy to determine except for the crime of violence one. I'm not talking about the guideline definition of aggravated felony, I'm talking about the statutory definition.

And so does anybody have any pause or any

comments with regards to how we still have a statute that we're dealing with in the courtroom, as opposed to just the guidelines or whatever 3553(a) factors as a whole we're considering?

Ms. Baron-Evans can answer it, if she wants to.

MS. BARON-EVANS: I'll pass.

MR. SANDS: It's connected because what you're doing is, you're looking at the punishment that the former court has given for purposes of the punishment now. In terms of felony or aggravated felony, that has repercussions both in the immigration context and in the statutory max. A court can still decide, given the situation, that a defendant should have a variance or a sentence that is higher.

But in terms of punishment, the court is looking, in this situation, as to what the prior was in the past and framing it with plus 16 or the plus 12 and so forth.

CHAIR HINOJOSA: Well, I know that's what the court's doing, but does that comply with what the statute is suggesting? I'm not talking about the guidelines plus 16s or plus 12s or plus 8. I mean, we know what the statutory scheme is and we know what Congress intended.

So is that something that the guidelines should try to take into account other than just sentence imposed regardless of whether it was a felony or an aggravated felony or a misdemeanor in some situations with regards to where you have a two and a half year max?

MR. SANDS: Sometimes we have to call it the way we see it and Congress didn't know what it was doing in immigration. I mean, it's been a problem for a number of years. They have grafted things on. It’s not consistent. It's one of those statutes that has grown and so far, aggravated felony is encompassing prior convictions which are arguably less serious than felonies. So, the Commission should look at what the punishment should be for basically trespassing.

CHAIR HINOJOSA: Let me see if Mr. Richter can take a stab at this. Are you going to endorse the statement he made about Congress? No one on the Commission has endorsed it, but --

MR. RICHTER: Well, I think the circumstances that have changed since we originally, the guidelines were originally promulgated in this area is the Shepard and Taylor decisions. And those are truly what has made the administration in this area more challenging than was originally envisioned.

And since -- first of all, we would say that the Commission is not required, statutorily, to use the conviction of an aggravated felony per se, use those words, in order to fashion an enhancement. And so, and of course as I outlined, the burden is significant.

But unlike the guideline, the term aggravated felony in 1326(b)(2) actually doesn't affect sentences because almost all 2L1.2 offenders fall within the ten year sentence in subsection (b)(1) for non-aggravated felonies.

And so I think under, practically speaking, it's not a real issue at this time. I would say prospectively that, to the extent that prior congressional action is indicative of future congressional action and I say that, there's no guarantee there. But certainly Senate Bill 2611 recognized that problem and would have eliminated the aggravated felony provision from the statute.

So, we believe that that, that the Commission can go forward under Option Seven as is proposed. If you concluded otherwise, what we would suggest is that one of the possibilities then to consider is that you keep a present eight level increase for aggravated felony conviction by adding to subsection (d) of Option Six. But we can get into all those kind of details in

our work with the staff.

But I think the long and the short of it is is that practically speaking, that while we recognize that here is difference in the congressional language of the statute, as it plays out in these cases, it does not make a difference.

MR. SANDS: Mr. Richter is much more politic than I, but the Commission should not do policy to avoid a Supreme Court case of Shepard. It should do it for what's right, which is punish the more culpable and give courts guided discretion.

CHAIR HINOJOSA: Based on the congressionally passed statute?

MR. SANDS: Yes, by all means.

CHAIR HINOJOSA: Vice Chair Steer?

COMMISSIONER STEER: Question on the immigration, illegal entry, reentry proposal.

I have long been troubled by the theory or the purpose of this guideline or the lack of it. It seems to me that these offenders have already been punished for the previous offense or offenses for which they were deported. So when they reenter we must be, I would think, trying to figure out which among them are the greater threat to society for re-offending, not just trying to whack them again because the committed

the prior offense, but our scheme in this guideline.

And I like, overall, the direction that we're going in in Option Seven and eight does that. I mean, it basically says that the person who has had the more serious offense measured by the sentence is the one who is going to be in prison the longer.

The one thing it doesn't have, if it's about dangerousness, that it seems to me that it should have, is a way of differentiating between the person who is caught at the border coming back and the person who is caught sometime later while within, often after having been picked up for having committed another offense.

So shouldn't there be some enhancement in this guideline for committing another offense after you cross the border and come back that's not in there now?

MR. SANDS: To use your words, you're whacking them again, because you're going to get the --

COMMISSIONER STEER: But this time, you're whacking them for an offense committed. No, no, no, they may not have been convicted for it yet. I know that raises all the --

MR. SANDS: So we punish them?

COMMISSIONER STEER: But I would -- yes. I mean, we do that tin other guidelines, why not do it here?

MR. SANDS: Because it's wrong. I mean, we have argued against residuum conduct, but unless they have been convicted, I don't think courts should start saying, well, you were picked up and you may have been doing drugs and you may have been doing this, and they would have served that sentence state-wide.

If you start doing the border situation, then you're going to get into the disparity. What is the border? What is the functional equivalent of the border? Should you start drawing the line at Phoenix or at Albuquerque or Los Vegas? It becomes more difficult. A lot of them -- I think danger lays that way.

CHAIR HINOJOSA: Judge Castillo has a question then I have a very brief follow-up to the issue of the amount to time served. And I guess this is directed at defenders.

I often in the courtroom the argument when someone has received a higher sentence for a very similar or the same type of offense for somebody who got a much lower sentence, this person has already paid the price with regards to the commission of this offense and now you're going ahead and adding the same amount as you would for the someone who would maybe on the same day you're sentencing somebody who committed

the exact same offense, but because of the whole 50 jurisdictions that we have with the different states, received a much lower sentence for the same offense. Is that something you all have thought about or have considered, since you all make that argument in the courtroom?

MR. SANDS: We are trying to use the marker of, we would like to use the marker of sentence served. Because we think that's better than sentence imposed. It is a national system. It is an imperfect system. We believe the way this is going with Option Seven and Eight that the sentence imposed is better than the categorical approach now. And we can work with staff to deal with this.

MR. RICHTER: If I might? I think you know, first of all, the things that Jonathan Wroblewski indicated about criminal history and its predictorism on recidivism are important to recognize. Undoubtedly, there are circumstances. And the colleagues to my left are certainly going to indicate and come up with the circumstances in which some how the sentence seemed, for the underlying offense, seemed too wrong.

I would posit that there are also circumstances where the contrary is the case. And I can speak firsthand during my tenure as a state

prosecutor of many occasions where someone who was potentially deportable in any illegal status was given a far shorter sentence, under the assumption that they were going to be deported, rather than actually being treated as they might be treated if they were full citizens.

We can't unpack each and every one of these cases. What we have to do is look at reasonable predictors. And we would submit to you that the criminal history scheme that we've come up with under the guidelines is a very reasonable predictor and so, therefore, while certainly I would expect those able, creative arguments to be made in course, as you hear, I think at some level we have to recognize that those arguments exist in every single case, in potentially every single case in both directions.

The other side of it is to keep in mind that we still, of course, do have an upward departure for over representing criminal history that's available to be considered and to serve as that relief in the circumstances where it's inappropriate.

CHAIR HINOJOSA: Vice Chair Castillo?

JUDGE CASTILLO: Well, I hope we can overcome the Chair's statutory concerns because I think Options Seven and Eight are steps in the right direction and I

appreciate the Department of Justice taking the laboring the federal defenders' commenting so quickly on Option Eight.

I'm wondering, Mr. Richter, if you have any quick reaction to Option Eight, as it was amended off of your Option Seven?

MR. RICHTER: Again, we have looked at that option and, as I really understand the differences, it's tweaking it in order to essentially gain what we believe to be net neutrality in terms of the total number of defendants.

What we are looking for, again, we are not looking for a change in this guideline that makes it more severe against, in the illegal reentry context. We are not looking for one that makes it more lenient either. What we are looking for is a guideline that is easier for all parties to administer. And so, as I understand the difference between the two options, it's essentially being data driven in an attempt to find appropriate calibrations or triggers that would maintain that neutrality.

So, you know, we favor one that will achieve that end and my understanding is it's still in ongoing discussions as to whether, which ones of these, or whether some further tweaking of option is eight is

necessary to get that, get as close to that end.

CHAIR HINOJOSA: One follow-up on another issue. You're not going to be here, I don't think, this afternoon. We're going to hear about crack cocaine. Is there anything else you want to say, other than what you've submitted in writing on that issue?

MR. RICHTER: Not at this time, Judge.

CHAIR HINOJOSA: Okay. Vice Chair Sessions.

JUDGE SESSIONS: The distinction relates also to the categorical approach. You basically included sexual abuse, child sexual abuse, pornography, murder, obviously. And I think Mr. Sands was suggesting that that may create the same kind of issues that cause problems now.

MR. RICHTER: I think it's important to recognize that of the 8600 or so cases that really dealt with this particular guideline in the past fiscal year, the vast majority of them would have dealt with, used a categorical approach.

Under this new guideline as proposed, in the overwhelming circumstances, we wouldn't have to use categorical. And the ones that we put in there, are fallback situations, essentially to deal with the most serious offenses where in fact you have a situation truly in which for some reason the statute itself, or I

mean, the sentence itself somehow is woefully underrepresented. So that we see as sort of a fallback mechanism, but a fallback mechanism that would not be used in any great volume and so, therefore, we believe really the length of sentence would drive the overwhelming of the cases.

JUDGE SESSIONS: But don't you think the child sexual abuse may very result in litigation, trying to figure out how various state convictions, state statutes apply under that definition?

MR. RICHTER: If in fact that's the, if the prosecutor believed that it was necessary to make use of the criminal, of the sexual abuse categorical language in the guideline. The point I'm trying to make is that, under ordinary circumstances, if the individual had a prior conviction and the length of sentence was there, and assuming that it was serious, that sexual abuse conviction would have received a lengthy sentence anyway and likely would be much easier to administer.

And we've got to recognize the world in which we're operating, which is, in a very high volume circumstances in which the great institutional incentive is going to be to move with the length of sentence markers, rather than any categorical markers

because of the very intensive documentation that has to be garnered in order to do that. And so it would be the more extraordinary case where for some reason required it. But we see that and we have very carefully, therefore, limited it and gotten away from terms of crime of violence or drug trafficking that are some of the harder terms to define.

I think the short answer is, we don't really want the perfect to be the enemy of the good here.

MS. BARON-EVANS: Could I just --

JUDGE SESSIONS: Can I quote you on that one? That's a good quote. Can I get you --

MR. RICHTER: I didn't make it up, Judge.

JUDGE SESSIONS: I didn't think so.

CHAIR HINOJOSA: We have one time for your last comment here.

MS. BARON-EVANS: I just want to say, which is probably obvious anyway, that the way that the Department defined the offense of child sexual abuse would include statutory rape. I mean, basically, consensual sex between teenagers, even if it got no time.

So our proposal would be to reserve the 16 levels for offenses that received at least 48 months. And that would sort of, you know, more accurately

separate serious from non-serious offenses of any kind. I mean, murder is not going to be really murder unless it got over 48 months. Forcible rape, same thing.

CHAIR HINOJOSA: Thank you all very much.

(Whereupon the hearing went off the record at 11:54 a.m. and went back on the record at 11:55 a.m.)

CHAIR HINOJOSA: In front of us we have Judge Reggie B. Walton of the United States Judicial Conference. Judge Walton also has great experience having previously served as an Associate Judge of the Superior Court of the District of Columbia from 1981 to 1989 and then 1991 to 2001. In between 1989 and 1991, Judge Walton served as the Associate Director of the Office National Control Policy in the Executive Office of the President and as President George H. W. Bush's Senior White House Advisor for Crime.

Judge Walton, we certainly appreciate your time from your busy schedule to be here with us, to share your thoughts on behalf of yourself and the Criminal Law Committee and the Judicial Conference.

JUDGE WALTON: Good morning to all. Mr. Chairman, members of the Commission, it is a pleasure to have the opportunity to appear before you again to present the comments on behalf of the Criminal Law Committee.

I'm here to speak about one topic that I know is under consideration by the Commission and that is, the question of how the Commission should deal with the Adam Walsh Legislation and that aspect of the legislation that has created new mandatory minimums or increased existing mandatory minimums. My comments will be brief, so I'll leave time for questions, if you have any, and they're basically three-fold.

We, as a committee, did consider the four options that we know are on the table by the Commission and we received comments, I believe, from all of the committee members. And the uniform position is that the first three options are not favored by the committee and that we do, however, favor the fourth option with a minor alteration.

As you know, there has been an historical opposition on the part of the Judicial Conference to mandatory minimum sentences for a host of different reasons. And that is one of the reasons why we have a concern with the first three options that are on the table for the Commission.

We also believe that the mandatory minimum should not act as a mechanical reason to increase the base offense level, just because of the existence of the mandatory minimum. That's not to say, obviously,

that the Commission should not take into account what congress has decided in reference to mandatory minimums. That's, I think, an obligation that you must do.

However, having been involved, when I worked in the Executive Branch, with the development of legislation, as I'm sure all of you well know, there are a lot of reasons why legislation takes place and comes into being. And why it ends up being ultimately what it is that ultimately may not have anything to do, as it relates to the sentencing arena, with the issue of what is fair and just, as it relates to sentencing. There may be a host of political factors that come into play that will dictate how congress responds and takes action in reference to what a mandatory minimum should be.

And because of those interplays or things that come into play that impact on what congress does, we think that the Commission should make its own independent decision as to what an appropriate guideline sentence should be. You were created because of the expertise that you bring to the issue of sentencing and we would believe that it would be appropriate for you to make an independent assessment as to what you think an appropriate guideline sentence

should be, irrespective of what congress has said regarding the mandatory minimums.

Obviously, with mandatory minimums in place, the guideline process has taken that into account. And if there is a mandatory minimum, then the guidelines obviously provide that the mandatory minimum would trump whatever guideline exists and that mandatory minimum would have to be imposed.

The final reason why we have favor for the fourth option with a modification is that, as you know, there are many circumstances where judges need not impose the mandatory minimum. For example, even in this arena or this area of criminal offenses, there inevitably will be individuals who will provide cooperation to the government. And as a result of that, the government will make a recommendation to the sentencing judge for a reduced sentence, based upon the defendant having provided substantial cooperation. If judges know that the Commission has assessed this arena, it has made an informed decision as to what the guideline sentence should be, that will be very helpful to a judge like me, who frequently has to make the tough call as to what an appropriate sentence should be when the mandatory minimum need not be imposed, because of substantial cooperation.

I know judges struggle with, especially in my district where there is no set percentage reduction that's given to someone who has provided substantial assistance, and it basically is an individual decision that the judge has to make with recommendations, obviously made by the prosecution and the defense as to what an appropriate sentence is. And if we knew that the Commission had made an assessment as to what the sentencing guidelines should be irrespective of what the mandatory minimums are, that would be very helpful, I think, in our assessment as to what an appropriate sentence or a fair and just sentence should be, when we're not required to impose the mandatory minimum sentence.

So I believe that this issue, as all issues as it relates to sentencing, goes to the fundamental aspect of the criminal justice system and that is, what is fair and just. And I think that, at bottom, the Commission should make its own informed, intelligent decision as to what you think an appropriate guideline sentence is respective of what Congress has decided as to what the mandatory minimum should be, taking into account, obviously, what Congress has said in that respect.

The alternation that we would recommend in

reference to the fourth option is that we think, because Congress has made the decision to increase and provide new mandatory minimums in this area of law, that it is obviously appropriate for the Commission to reevaluate the existing guidelines and base offense levels that you've set and to make a determination, taking into account what Congress has said, in deciding whether those base offense level should remain as they are, or whether they should be increased, based upon your assessment as to the seriousness of the conduct that an individual has been charged with.

With that, if the Commission has any questions, I'd be glad to try and entertain them.

CHAIR HINOJOSA: I guess everybody's afraid of Your Judgeship.

JUDGE WALTON: I don't think so.

COMMISSIONER FRIEDRICH: I have one question.

CHAIR HINOJOSA: Commissioner Friedrich.

COMMISSIONER FRIEDRICH: I share your concerns about the tension between the mandatory minimums promulgated by Congress and the Sentencing Reform Act. And if I was looking at this issue in the first instance, some 20 years ago, I would view it somewhat differently, but the difficulty I have with the recommendation of the Conference is, don't we need

to consider the 20 years of practice of the Commission and Congress's acquiescence? So far as I'm aware, there hasn't been an occasion where the Commission has not pegged, in some way, the guidelines to the mandatory minimums in the drug context, the base offense levels are above mandatory minimum. Recently in the Protect Act, the Commission went below. In other context, they're within in the range.

Do we not need some sort of clear direction from Congress saying, although we've enacted these mandatory minimums, we're not implicitly telling the Commission to bump up, if that is what required of the guidelines? Just given that past practice?

JUDGE WALTON: Yes, I think obviously, consistency in approach is important, but I don't think it should necessarily trump what is right. And if the decision made years ago as to how this issue should be addressed was not the correct decision, I don't think that that mistake should be repeated.

I, as I say, appreciate the need to have consistency, but maybe this would be a first good start in reassessing whether that prior approach is appropriate.

As I say, it seems to me it is extremely important for us judges that we have some appreciation

from a body like yourself as to what a reasonable sentence is, if we are authorized by the circumstances to go below what the mandatory minimum sentence is. And if you have intelligently made an assessment as to what the appropriate guideline sentence should be, respective of what the mandatory minimum provides for, I think it would be very helpful to us and would bring uniformity, at least to some degree, to the sentencing scheme when judges are permitted to go below the mandatory minimum. Because as you know, I think statistic will show that by and large, judges do, even post-Booker, try and impose a sentence within the guideline absent circumstances that would otherwise justify some sentence outside of the guideline.

So I think that if you took this approach, it would help to provide greater uniformity and give guidance to judges as to what a reasonable and fair sentence is.

COMMISSIONER FRIEDRICH: And if we did take this approach, would the Conference, I assume support reconsidering whether that approach should be applied in other context?

JUDGE WALTON: I don't think I have permission to speak on behalf of the Conference in reference to that, but I would assume that that would

in fact be the position that the Conference would take.

CHAIR HINOJOSA: Vice Chair Steer?

COMMISSIONER STEER: Well, of course, the approach that you advise is essentially, in part, the Commission has provided guidance, for example, in the drug trafficking area of what the judge should do if freed from a mandatory minimum in a safety valve case. He can apply the mitigators that are available for acceptance of responsibility, mitigating role, mitigating role cap, the safety valve reduction, in the guideline and so forth. So, it provides a downward structures, does it not?

But it starts, basically, with a sentence, if there are no aggravating or mitigating factors in the case, then the sentence is basically commensurate with the mandatory minimum. So, that structure is there. Is it not?

JUDGE WALTON: In the area of the safety valve guideline, yes. I would say, yes, there is guidance that would assist judges.

But in the area of substantial cooperation, there isn't that same structure. And in my experience and knowledge, judges tend to be all over the map when substantial assistance comes into play. And again, I think there needs to be or should be some level of

uniformity throughout the country as to what judges are doing when that factor is in play.

COMMISSIONER STEER: Well I agree with you very much on that point. Unfortunately, I think you need to speak to your judicial colleagues on the Commission and convince them that they need to provide a structure for guiding substantial assistance below guideline sentences.

JUDGE WALTON: Well, I don't --

CHAIR HINOJOSA: Speaking on behalf of the Judges on the Commission, I will say that this particular issue in my work on the Commission has surprised me more than a lot of other issues, with regards to the view of some judges because by the very nature of, or maybe you disagree Judge, by the very nature of the fact that the government has filed a motion for cooperation and assistance departure, which is statutorily allowed and also within the guideline system, even under the Advisory Guideline system, that case has been totally set aside from every other case with regards to that particular individual being entitled to a disparity of a sentence.

But it depends on that particular case with regards to the level of cooperation, the kind of cooperation, the danger the person placed themselves

into, which would be very difficult because it's not the general type of case for someone to be able to say, this is what you do with regards to this particular case. I mean, that's why, at that point, and maybe those of us who have done sentencing without a guideline system, then realize this is where you would be without a guideline system, but you have to assess the level of cooperation and the type of cooperation. Not everyone does the same to merit the filing of the motion.

And so, therefore, there's a lot of independent judgment that has to be done with regards to that case, as opposed to just one set of guidelines that tells you, not knowing what kind of cooperation everybody has done or the level of danger they placed themselves into. And so I guess that's why sometimes when you hear that, you sort of wonder well, how can you do that without knowing each individual case.

JUDGE WALTON: I mean, I totally agree with everything that you've indicated. I had a sentencing this morning. And it was a tough sentencing for me because the government was recommending something, because of the level of cooperation this individual had provided, which I was very troubled about because I thought it was fairly lenient, what was being

recommended, in light of this individual's prior history. But he had provided cooperation that not only had placed him in danger, when he is deported back to his home country, he'll still be in danger because many of the individuals who he implicated, have been deported back to that same country. His life, while he's been detained for the period of time he's been in custody, has been a hell hole because it was known that he was providing cooperation.

So obviously, there are so many factors, as you say that come into play, when you're talking about the substantial cooperation issue, that I think it would be very difficult to pose guidelines that would provide the type of fairness that we're talking about. But if we did have what I'm talking about regarding this fourth option, it would at least give us some appreciation of what is a fair and just sentence in a given situation.

CHAIR HINOJOSA: Does anybody else have any other questions?

Judge, again, we thank you. You have come and contributed again on behalf of the Criminal Law Committee. We very much appreciate your time and certainly enjoy the working relationship that we have with the Criminal Law Committee and have had for many

many years. And the advice that you give us as well as the advice that we get from judges every day through their sentencing information that's sent to us is extremely helpful, obviously.

JUDGE WALTON: And I assume you've received --

CHAIR HINOJOSA: Yes, sir.

JUDGE WALTON: -- the written comments?

CHAIR HINOJOSA: Yes.

JUDGE WALTON: Thank you --

CHAIR HINOJOSA: Thank you.

JUDGE WALTON: -- for having me.

(Whereupon, the foregoing hearing recessed for lunch at 12:07 p.m.)

A F T E R N O O N S E S S I O N

(1:45 p.m.)

CHAIR HINOJOSA: Again, we thank you. And each of one you of you has contributed so much through the years to the Commission's work and we certainly appreciate everything that you do with regards to the Commissions' work.

We've got Ms. Deborah Small, who is the Executive Director of Break The Chains, an organization that seeks to build a national movement within communities of color against punitive drug policies.

Before assuming her position with Break The Chains, Ms. Small was Director of Public Policy for the Drug Policy Alliance, where she spoke regularly to the public and elected officials. And she has previously served as Legislative Director of the New York Civil Liberties Union.

Ms. Anne Blanchard is a Sentencing Resource Counsel to the Federal Public and Community Defenders. In that capacity, she and Ms. Baron-Evans, whom you heard from before, support the Federal Defender Guideline Committee and their advocacy before the U.S. Sentencing Commission, provide training in sentencing advocacy for both defenders and criminal justice act attorneys. And Ms. Blanchard has been a long-standing member of Federal Defenders Guidelines Committee, as well as the Sentencing Commission's Practitioner's Advisory Group.

Ms. Mary Price is Vice President and General Counsel of Families Against Mandatory Minimums, where she directs the FAMM Litigation Project and works on federal sentencing reform on capital hill and before the United States Sentencing Commission. She is a member of the American Bar Association's Corrections and Sentencing Committee and serves on the Practitioners Advisory Group to the Commission itself.

Stephen Saltzburg is, of course, the Wallace and Beverley Woodbury University Professor at the George Washington University Law School. In 1988 and '89, he served as Deputy Assistant Attorney General in the Criminal Division of the Department of Justice and in 1989 and 1990, actually was the Ex Officio representative on the U.S. Sentencing Commission. At that time, I guess the Commission did everything exactly right. And he serves as a member of the ABA House of Delegates for the Criminal Justice Section and is Chair-Elect of the Criminal Justice Section of the ABA.

And Mr. Eric Sterling, who I have been assured is on his way down, has been President of the Criminal Justice Policy Foundation, a nonprofit educational organization. He was counsel to the U.S. House of Representatives Committee on the judiciary from 1979 until 1989 and he serves as liaison for the Standing Committee on Substance Abuse of the American Bar Association and was Co-chair of Drug Policy Committee of the National Association of Criminal Defense Lawyers. And we will be glad to hear from his also, just as soon as he gets here.

We'll start with your, Mr. Saltzburg, Dr.

Saltzburg.

DR. SALTZBURG: Thank you Chairman Hinojosa, members of the Commission. I only have five minutes and I don't intend to repeat what we've said for the American Bar Association in the written statement. I think we've given you, rather carefully, on the position that we urge the Commission to take, but there are just three points that I would like to make. And these are the three that seem to me to be the most important.

First, and I say this wit some reluctance, knowing that you've spent the morning dealing with other issues. This is not, the issue of extraordinary and compelling release for some prisoners, is not the only thing on your plate, I realize that. But I plead guilty, along with you, to being part of a Commission that has basically never done what Congress asked the Commission to do. And that is, namely, to describe what should be considered extraordinary and compelling situations and to provide examples.

Basically the Commission has been AWOL on this for its entire history, including when I was the Ex Officio member. And it's a glaring omission. And one of the few times the Commission has ever allowed itself to sort of just throw up its hands and do

nothing. And I think this is an omission that needs to be fixed.

Last year, the Commission took a step at it, but step was a to basically say, if the Bureau of Prisons makes a motion, then that satisfies the section. It didn't provide any standards. It didn't provide guidance. And it didn't provide examples. All of those things Congress anticipated in 1984 and all of those things remain important today. That's my first point.

My second point is that with all due respect to Ben Campbell, whom I like a lot and does a great job for the Department here on the Commission, I don't agree with the position that the Department took in it's July letter to you of last year, which basically established two points above all, I think. There were others.

Number one, that for you to provide standards would be a sort of reinstate parole. Well, nobody here is asking you to reinstate parole. That's another debate that one could have, but it's not what Congress provided in 1984 when it continued preexisting law with respect to extraordinary and compelling circumstances of release. The ABA has given you a draft. We're not saying it's perfect, but it's a draft, of what a

standard, a set of standards might look like. And it's a far cry from letting lots of people go or providing for parole as a routine matter.

The other thing is, the Department has said that if you were to do anything, other than to ratify whatever the Bureau of Prisons does, that would be a dead letter. Well, there's no reason to believe that, given that Congress is sitting out there and at least making noise about oversight of the Department of Justice in ways that it hasn't undertaken for a long time.

If Congress chooses to engage in the kind of oversight some of think that it should, one of the issues Congress might look at is, a period in which Bureau of Prisons has basically narrowed the circumstances in which it will make motions. And narrowed in ways that seem inconsistent with the legislative history, at least, of the Sentencing Reform Act of 1984.

And therefore, if this Commission were to set standards, and the Bureau of Prisons were to adhere to its very limited policy of making motions, it's not necessarily a dead letter. It may very well be that the other branch of government, that is the Legislature, may actually get into the act and decide

to the change the statute, require the Commission to do something more, or in fact, require the Bureau of Prisons to adopt different policies. We have to see what will happen.

And finally the third point. The third point is that sometimes, amidst all of the statutory citations, all of the guideline references that we have in these materials. And I mean, you see a lot more of this than I do, sometimes I think that we lose sight of the fact that these are human beings that we're putting in prison. These are human beings who are being sentenced. And as Justice Kennedy said when he spoke to the American Bar Association in August of 2003, he said lawyers and judges are sometimes quick to forget something that this group and this Commission probably needs to remember most of all, and that is, when the gavel comes down and the judge pronounces sentence, that's not the end of the matter.

The end of the matter is that most of these people will come out of prison at some point. Most of these prisoners will go on with their lives. Many of these prisoners have families. So we're dealing with flesh and blood issues and when we talk about compelling and extraordinary circumstances, we talk about the situations that cry out for human beings to

look at what they're doing to other human beings.

And the American Bar Association believes and I firmly support this, that for more than 20 years, the Commission has done nothing with respect to the statutory or mandate, excuse me, that Congress imposed with respect to compelling and extraordinary circumstances. And it's high time, we think, that the Commission, despite its workload and the very important other issues that it's dealing with, just fill this gap and set standards, provide examples. And then let's see what happens with the Bureau of Prisons, whether they make motions and let's see what happens in the political arena, if they do not.

Thank you.

CHAIR HINOJOSA: Thank you Dr. Saltzburg. Ms. Price?

MS. PRICE: Thank you. I'm here actually speaking on behalf of not only Families Against Mandatory Minimums on this issue, but also the Practitioners Advisory Group and I did see if I could extend my time to ten minutes, but was unsuccessful. But I'll try and put it into five, at the minimum.

FAMM and the Practitioners Advisory Group really welcome the Commission's continued interest in this area. We've long championed the reading of the

Compassionate Release Statute, consistent with congressional intent that it be used not only for debilitating mental and medical health circumstances, but also for other, non-medical reasons.

Our concern was motivated by, among other things, the many stories certainly that we've heard at FAMM and I expect members of the Practitioner's Group as well, from prisoners and from family members and others about compelling circumstances that arose after sentencing that could not be accounted for by the judge, despite the nature of them.

So we, at FAMM, began to assist prisoners in their petitions were stunned to learn how seldom the director of the Bureau of Prisons brought the motions to sentencing court for sentence reductions. 18 U.S.C. 3582(c)(1)(A) talks about extraordinary and compelling reasons, but in practice, the Director moves for a reduction in a mere handful of cases. And those are only for terminal illness or debilitating circumstances.

FAMM and the Practitioners Group certainly agree with the Department that prisoners who are terminally ill or debilitated by illness, merit consideration for early release. However, there are other cases of extraordinary and compelling

circumstances that merit consideration as well, including but not limited to cases where the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death of the only other caretaker of minor children, leaving the children without care or where the defendant has provided significant assistance to any government entity that couldn't adequately be taken into account.

FAMM and PAG endorse the approach taken by the American Bar Association in its recommendations and draft policy.

We urge the Commission to take a generous view of the authority in 3582 and we do so because we believe that Congress intended that early release authority be broad, to include medical and non-medical cases. And we know that there are three clues that Congress has sent us about this.

The first, the Bureau's existing authority to seek early release dates from the 1976 Parole Commission and Reorganization Act. It permitted early release at any time upon motion by the Bureau. The Bureau of prisons then issued regulations in 1980 to effectuate 4205(g). Those rules provided that early release motions under the statute were to be brought "in particularly meritorious or unusual circumstances

which could not reasonably have been foreseen by the court at the time of sentencing, including if there is an extraordinary change in an inmate's personal or family situation or if an inmate becomes seriously ill."

The second clue is, when Congress in the Sentencing Reform Act eliminated parole and established determinative sentencing, it kept intact the court's ability, it's existing authority to reduce sentences for a range of reasons. This conclusion is supported by the legislative history, demonstrating that Congress embraced a broad view. For example, the Senate Judiciary Committee's report says, it is intended that the courts be able to address " the unusual case in which the defendant's circumstances are so changed, that it would be inequitable to continue confinement." And among those reasons were included cases of severe illness or cases where there were other extraordinary and compelling circumstances that would justify the release.

Had Congress wanted to limit the new law on prisoner's access to sentence reductions, it could have done so. It could have stated conditions in the Sentencing Reform Act and the statute or indicated it elsewhere in the legislative history and it didn't do

that.

The third clue is found in another part of the sentencing reform act and that's actually in 994t, the mandate that Professor Saltzburg was talking about. 994t is what we're talking about here today. The only limitation that the Sentencing Reform Act made to existing authority was to instruct you that rehabilitation alone would not constitute sufficiently extraordinary and compelling circumstances.

We think unwarranted restrictions on the early release mechanism will subvert congressional intent that courts be able to entertain early release motions for a variety of circumstances, provided they are extraordinary and compelling and reflect more than rehabilitation alone. And we're not the only people who believe this. The Department of Justice has long endorsed, at least on paper, a broad view of the sentence reduction motion, and certainly in its public regulations.

The Bureau of Prisons recognized that Congress intended to take a robust approach to the discretion given in the Sentencing Reform Act and it did so by spending, ten years after the Act, by operating under the same set of regulations that it published in 1980 to bring early release motions, i.e.,

whether there was an extraordinary and compelling circumstance not only affecting the prisoner's health, but also the prisoner's family and personal circumstances.

Second, the Bureau published new regulations in 1994 to include provisions applicable to inmates who were sentenced under the new law. The Bureau affirmed the existing policy in important respects and even added specific provisions talking about the two tracks that one would follow, if one was seeking compassionate release for medical versus non-medical circumstances.

Third, the Bureau of Prisons did not publish the 1994 Rule for Notice and Comment under the APA, because, it said, the revised rule imposes no additional burdens or restrictions on inmates, the Bureau finds good cause for exempting the provisions of the APA. The standards to evaluate the early release remain the same. Put another way, if the Bureau intended to eliminate extraordinary changes to a personal or family situation, this would represent a new restriction and thus, trigger the APA's notice and comment period. So those regulations remain on the books today.

I want to say one thing about the Department's letter. The Department of Justice warns

the Commission that to take a broad view of the early release authority would be akin to subverting congressional intent to establish determinative sentencing through the elimination of parole. But that will hardly, crafting a new policy statement that we think effectuates Congress's intent will hardly subvert the goals of the Sentencing Reform Act. In fact, we think it's the other way around. If we don't follow Congress's lead, that would be as subversion of the intent.

I think I'll stop there.

CHAIR HINOJOSA: Thanks Ms. Price.

MS. PRICE: Thank you.

CHAIR HINOJOSA: Ms. Blanchard?

MS. BLANCHARD: Thank you, Your Honor. I think we were going to, if we could, go out of order.

CHAIR HINOJOSA: Mr. Sterling or Ms. Small? Who wants to go next?

MR. STERLING: Judge, I'm happy to go. My name is Eric Sterling. I'm the President of the Criminal Justice Policy Foundation.

CHAIR HINOJOSA: I introduced you.

MR. STERLING: Great, then I will say no more.

CHAIR HINOJOSA: If you don't mind, we went

ahead and started. But we knew you were in the building, so I went ahead and did all the intros.

MR. STERLING: Thank you very much.

CHAIR HINOJOSA: And we do appreciate your being here, as well as everyone.

MR. STERLING: Thank you very much. I do not want to duplicate the many comments that you are receiving in response to your Federal Register request. You will -- I'm sure you have received many. You're going to be receiving from criminologists, and law professors, a letter signed by several hundred professors from around the country expressing their concern and their encouragement to the Commission to make changes in the crack cocaine and powder cocaine area.

What I wanted to address for you is essentially three things. One, I encourage you to have the political courage to confront the Congress over this issue. The drug issue is an area in which there has been a great deal of hyperbole and emotion. And it is important that people speak honestly and effectively about it. This Commission has been on the receiving end of a certain amount of abuse from the Congress in your 1995 recommendations. And I encourage you to nevertheless have the fortitude to go back into this

battle, taking the approach that, I think, you believe is right and that so much of the public thinks ought to be done.

With respect to these particular questions, the question of violence. It has troubled everyone about the question of crack cocaine. One of the things that we tend to do is of course, is to diminish the question of the powder cocaine violence that is racking Mexico and Colombia. There is nothing about the crack cocaine trade that is any more violent than the powder cocaine trade. Indeed, many many more people have lost their lives in Colombia and Mexico in law enforcement and in the government, dealing with the problem of the powder cocaine trade.

That brings me to the important point which is that the federal role in this area is the powder cocaine trade. Crack cocaine is made very close to the bottom of the retail market. And I would suggest that there should be no federal crack cocaine cases whatsoever. A crack cocaine case is an indication that it is a retail level case, not a high level case, and not an appropriate federal case. Perhaps in the 1950s or 1960s, before there were tens of thousands of narcotics officers at state and local law enforcement trained by what was then the federal bureau of

narcotics, it might have made sense for their to be a federal role at the retail level. But today, every state and local law enforcement agency of any size has specialized narcotics units and tens of thousands of officers are trained at state and local level.

The punishment capacity at the state and local level far exceeds the federal level. And so that if the federal cases are devoted at the retail level, those are not being done to stop the production and the supply of cocaine that keeps neighborhood crack houses in business that are so plaguing our cities. When the federal government doesn't do its job, then state and local law enforcement area carrying the burden. And when they complain and they say we want support, the support is not another DA agent by their side, the support is doing an effective job in the unique federal role of going after the international and national level traffic.

It is also, of course, said that crack cocaine has led to tremendous community disorganization. The problem, I think, with that analysis is that if you are looking to justify the current disproportionate punishments for crack cocaine and you look and say where is crack cocaine found? You find it in communities where there already is a long

history of social dysfunction and where there are many other independent variables leading to that. It is not simply crack cocaine that is the problem with the disorder in many American cities.

Elijah Anderson, an anthropologist and sociologist at the University of Pennsylvania, in his book Code of the Street, Decency, Violence and the Moral Life of the Inner City in 1999 looks back a century to the work of W. E. B. DuBois, who in his seminal work identified what he described as the submerged tent. Those who were largely characterized by irresponsibility, drinking, violence robbery, thievery and alienation. If we substituted cocaine use for drinking, we'd be describing a similar kind of problems that exists today.

Dr. Anderson identifies the profound economic changes that have taken place in American cities. There has been a key factor to only identify the particular drug that's involved is to find the result that you're looking for and not to look at the whole problem.

So my conclusion would be that the Commission should recommend the veto of federal crack cases, that we do away entirely with a separate type of crack cocaine penalty and that the triggers ought to be

raised to a metric ton for powder cocaine for the ten year offense and to a 100 to 150 kilos for the five year offense, in order to provide the proper guidance.

Congress had the right idea in 1986. That was focus on high level traffickers. They got the arithmetic wrong. It's time to correct the math.

CHAIR HINOJOSA: Thank you Mr. Sterling.

MR. STERLING: Thank you Mr. Chairman.

CHAIR HINOJOSA: Ms. Small?

MS. SMALL: Thank you very much. I'm very happy to be here this afternoon. Our organization, Break the Chains, focuses specifically on the impact of drug policies on communities of color. And I don't think that there's any other federal statute that has as disparate an impact on communities of color as the crack powder sentencing disparity.

Like my fellow panelists, I have no desire to repeat many of the important and great comments that have been made over the years around these issues. So I want to just focus on three main things that I know are both important to the Commission and will probably be important to Congress, too.

One is the issue that Eric just talked about, which is the issue of violence. But I want to talk about it from a slightly different place. So much of

the rhetoric and the comments, quite frankly, that have been made by law enforcement at these different hearing have focused on the importance of maintaining the statute because of what they claim to be the violence associated with the crack trade. And yet all of the recent studies and research have shown a significant diminution of violence specifically related to crack cocaine dealing.

I know that all of you have gotten testimony from the various treatment providers about the fact that there is nothing pharmacologically about crack that induces more violence that powder cocaine. And so that part to me has been well settled.

But the issue about the relationship between violence and what's happening in the community, I think we know a lot more about than we did in '86. And I was particularly struck by some of the testimony that was given by the criminologists in November who talked about the fact that young people, particularly African-American men in inner city communities have turned away from dealing crack, have turned away from using crack. In part, because of the violence, in part because of the way in which the drug has been stigmatized.

I think it's particularly perverse that at a time that you have people in the community turning away

from this drug and becoming involved with it less, that the penalties are still harsher than they are for other drugs and that we're not actually responding to what we see happening in the community.

The other thing that I think is really important is that he way in which these statutes have actually operated in communities has caused more harm than good. Because as a result of constantly taking away more mature people who may have been involved in drug markets and locking them up for long period of time, you're actually increasing the number of young people who are coming into drug markets and getting involved in them. And that, in and of itself, will make any activity more violent because of the propensity of young people to not have as much control over their behavior.

So at the same time that you're seeing the overall level of violence involved in the drug trade and particularly in the crack trade go down, the degree that it's still there, is directly related to the statutes that we have in place that actually encourage people to go out and recruit young people to engage in the drug trade. And recent studies have shown that the young men who actually end up dealing crack, are the people who come from the most distressed families, who

have the most amount of social deficit. So we're actually reinforcing a negative affect in communities and pushing people in directions that they definitely should not be going.

The other thing that I think that we have to talk about is the overall impact of what these sentences and this high incarceration rate is having to the very communities that politicians say that they're trying to protect with these laws. There have been many studies that have shown that having a high incarceration rate as you see in places like Baltimore, Washington, D.C., New York City, Los Angeles, as a result of the application of these laws has resulted in a criminogenic affect. When you have 20, 30, 40 percent of the men in a community cycling in and out of prison on a regular basis, that in and of itself has a destabilizing effect that in fact is worse than the destabilization that comes as a result of having active drug markets in that community.

And so I think it's really important that if the justification for maintaining this is that we're protecting communities, that you actually need to look to see what's happening in that community and if what people assert is happening is in fact true. And I would argue and I think that many of the studies would

show that the affect of these laws in communities of color, particularly inner-city African American communities, is that they cause more harm than good.

The final point that I want to make has to do with the issue of fundamental fairness. There have been lots of testimony about the disparate impact of these laws on African American defendants and the fact that they are more likely subject to the federal penalties than are similarly situated white crack users. But the thing I think that is different between 2002 and now is that we have seen the increase and advent of another drug that everyone agrees is as dangerous and as addictive as crack cocaine, which is methamphetamine, which has taken hold in many cities around the country, particularly small cities and rural areas. And yet the Congress, in its wisdom, has not chosen to respond to the increasing amount of methamphetamine abuse with the same type of jerconium (ph.) measures that it responded to crack. And I would say, in part, that that's because of a greater amount of understanding about the fact that we can't actually incarcerate our way out of these problems and that in fact, it works much better to provide treatment for people instead of incarceration. But I think that in light of that fact, and in light of the fact that it's

pretty much understood by both law enforcement, treatment, and public officials in all of these communities, that we're not talking about a drug that's significantly different in terms of its pharmacological impact, the way in which people use it, the rate at which they become addicted, and the affect of their addiction. For us to continue to maintain a totally different way of dealing with crack cocaine versus the way that we deal with methamphetamine, for me, is like the criminal justice equivalent of the decision to withhold treatment from syphilis infected black farmers when a cure was available and being provided to others.

We are providing to these rural communities the type of proactive positive policies that should be provided for inner-city communities of color. So I would urge this Commission to reinforce the recommendation that it made 1995 to recommend that the possession offense be repealed for simple possession of crack cocaine, that the penalties be made equal to the current penalties for powder cocaine and that we really begin looking at the way in which we're dealing with these issues overall.

And I would say that one other difference between the last few times you brought your recommendations and now is that there is different

leadership in the Congress. The head of the House Judiciary Committee, John Conyers, has been a long time advocate for the repeal of mandatory minimums in general and the crack-powder sentencing disparity in particular. I think he would welcome a recommendation from this Commission that would address at least part of those concerns that he has.

So I would urge you to give the same recommendation that you had in '95 and I think that you might end up seeing a very different result than the one that you saw then.

Thank you.

CHAIR HINOJOSA: Thank you, Ms. Small. Ms. Blanchard?

MS. BLANCHARD: Thank you, Judge.

Several years ago, Commissioner Castillo stood in front of a seminar of federal practitioners and said, with firmness and with resolve, that this commission will be judged, and should be judged, by how they deal with the disparity of crack cocaine, how they deal with this issue. It is unjust. It has been found to be unjust. It has no place in our sentencing scheme. It undermines the perception of justice and it's a black mark on our system. And that the Commission stands ready to do its part.

I recall, quite vividly, when he said this and I also recall when he said it and if you'll allow me to regress, I was eight months pregnant at the time and in the winter of 2002. And my son, Tommy, will turn six next month.

The good news is that this Commission is still after it, is still standing and putting this issue in play, has not let it slip to the background, has put it out there as your priority, had the hearing, is probably going to issue another report of some sort, I would imagine, summarizing the testimony, and is continuing to pursue this, looking for opportunities, looking for windows. And we know that.

You know, the not so good news, we all know, is that in the last six years, there's been hundreds and hundreds, perhaps hundreds of those hundreds of unjust sentences, of sentences that we all agree are too long because they're based on the hundred to one ratio which we all agree has not basis. No matter what ratio you would pick instead, the science and the policy and the Sentencing Commission's position based on that, based on the evidence, is that it's unjust.

So we turn now to taking action. And there may, hopefully, be another window of opportunity. And we all know that the inaction in terms of results is

not because this Commission has been inactive. You know, we know that there is more going on in this matter than just the Commission's will. We understand that. And yet, we've got to turn to solutions because we would hope, as you all would hope, that the day is coming very soon that there will be a solution.

So, we turn and we look to solutions. One of the proposals out there, which was proposed by the Commission in your 2002 report, was set forth in some detail and the defenders would submit that that is misguided, wrongheaded and takes us in the wrong direction.

You will recall that that solution, that fix to the crack problem, while it brought down the disparity, the ratio, I think in that report it was 1 to 20, but in any event, it corrected the ratio to the ratio that at that point there was consensus on. But what it also did is that it added, at least a half a dozen specific offense characteristics to 2D1.1, which would apply to every single drug offender, not just crack offenders, and can't help but have the affect of raising drug sentences.

And let's put that in perspective. You all know that since 1986, since the guidelines came into effect, sentences, overall, have doubled. Since that

time, drug sentences, in particular, have more than doubled. Now, people say mandatory minimums, what are you going to do? Well, your own studies where you can slice and dice and separate things out in a way that some of us don't quite understand, but we appreciate that they can do that, the finding is is that 25 percent of this increase in drug sentences, this more than doubling of drug sentences, 25 percent is because of a guideline increase not having to do with the mandatory minimum. Put another way, it has to do with the fact that the guidelines call for a sentence higher than the mandatory minimum. So that's 25 percent of this more than doubling is from that affect.

So the guidelines have an affect greater than just the mandatory minimum, which of course, is what your research shows. So, that being said, I don't think there is any, from any corner of this debate, there is anyone that thinks drug sentences are just too low and we just need to get serious about our drug sentences. I just don't think that that's the perception out there. So we would implore you not to, in the name of correcting one injustice that has stood for over a decade, to create another, which is to raise drug sentences that do not need to be raised.

And we would agree that Commissioner Castillo

was right that this Commission will be judged by how it deals with this crack cocaine disparity. And that, the ending of that story has yet to be written. But you know, we, like the Commission, believe that it is one of those priorities that will not go away until it is resolved successfully.

Again though, we would ask you to fix what is broken and not do any harm to anything else, to just fix the ratio. And I think you.

CHAIR HINOJOSA: Thank you, Ms. Blanchard.

Is there a question? Vice Chair Steer.

COMMISSIONER STEER: I'd like to ask Professor, Dr. Saltzburg and Ms. Price about the extraordinary and compelling circumstances issue, which we often call compassionate release for shorthand. And I might preface that by saying that I find myself in a somewhat curious situation with respect to this issue for, shortly after coming on the Commission, I, for a number of years, urged the Commission to put the issue on its agenda because, given my past position, I was well aware of not having met this statutory charge and felt then and feel now that we need to address it.

But now, I am concerned that if we proceed as you two have recommended, that we may create an even bigger mess for the courts and that we will, I think,

likely have a whole slew of challenges from inmates who would seek to come under, to benefit from the Commission's expanded policy statement, if it goes along, just say hypothetically that we adopted the ABA proposal as is, even though the Bureau might not have made such a motion. And I just wonder if that is really a good thing. And I would offer this alternative way of proceeding for your comments.

It seems to me that there is enough interest on the part of good folks like you and the Commission that we ought to go back to Congress with some sort of a short report and lay out for the Congress the need for some clarification of this statutory charge and the way that they set it up in the Sentencing Reform Act, without perhaps thoroughly thinking through the way it is designed to work. Maybe it shouldn't be the Bureau of Prisons that is left to make the motion. Maybe there should be some other mechanism and maybe the Commission should go forward and outline the circumstances, but we need to have some clarification of the statute along those lines.

You know, Congress, itself, has created a relief mechanism for the worst of the worst, the three strikes and you're out. And they have created this, you know, less than a clear way to proceed with respect

to the other offenders. And it seems to me that there is an inconsistency and irrationality there that needs to be addressed.

So the bottom line is, why shouldn't we put this back in the hands of Congress, together go to Congress and see if we can get this clarified and then proceed, rather than create a mess in the courts or try to politically pressure the Department of Justice into broadening their policy?

DR. SALTZBURG: You want to go first?

MS. PRICE: Well, I think the courts are probably competent to deal with what I think probably won't be a -- maybe I'm not understanding your question, but Congress committed this task to the Commission knowing that what it was doing was making the provision of sentence reduction available on motion by the Bureau of Prisons.

COMMISSIONER STEEL: What I'm asking, don't you think it's highly likely that if the Commission were to do what you and Professor Saltzburg are urging and then adopt something like the ABA policy, that you would have -- if the Department of Justice stands pat, makes no change in their policy, makes no motions, you would have a whole slew of inmates out there who are going to try to benefit from that policy by going to

court on their own initiative and challenging the Department's policies?

DR. SALTZBURG: Commissioner Steer, I'd like to answer that, if I could. Before I do, I just want to say one thing, I think this is probably true for both of us, the fact that we're addressing one statute today doesn't mean that we don't share, as we do, I think, everything that's been said about the crack cocaine issue. And as you know, I testified in November for the ABA on that. And we mentioned in my testimony today that we don't back away from anything, it's just that this other issue is one that's been neglected.

The Department of Justice suggested in its July letter that there would be litigation, that prisoners, if in fact you did what the American Bar Association has recommended, there would be litigation. I think they're right about that. And I think you were right, Commissioner Steer. If I were looking at what normally happens, if you draft standards and you provide examples and the Bureau of Prisons does not make motions, people who feel as though they fit those examples will in fact sue. And they will claim that the Bureau of Prisons has failed to carry out its mandate and there will be litigation about that. Now, that's my belief and it's based on the fact that people

have a reason, actually, to want to bring these actions. They feel as though the Bureau of Prisons has narrowed, as Mary said, narrowed over time, the standards without actually really putting this out for comment and in a way that allows a full and fair discussion of it.

My belief is that if that happens and there are suits that Congress will in fact get into the act. It will look and decide, either by saying we're going to do nothing and let the courts work this out or, more likely, I think Congress will take another look at what actually ought to happen here.

I don't -- I can't say that the proposal that you make wouldn't work just as well, say as the American Bar Association proposal, but the concern I have, the concern I have is there is a statute out there. You've written about it. You're on the record. You've been great on this issue. And the Commission, for a long time, just has neglected the issue. It's true, Congress hasn't spoken to it in 23 years. And you can say, let's give Congress another chance, but the problem is getting Congress's attention.

I think it's easier to get their attention if there's a standard out there and people are beginning to say Bureau of Prisons is not meeting the standard.

It actually would provide the Department of Justice an opportunity, if you had a standard, to take a position. It might change its mind about the way in which this ought to work.

I mean, right now, they've adopted a policy, but you're unheard of on the issue. You have not been heard. If you actually have policy and we had a discussion with the Department, they might not make all the motions that one would like, but they might decide that some greater number of motions were in order. If not, and they wanted to adhere to the current policy, I'm pretty sure that that's more likely to get Congress's attention as a problem than it is to run up and say to Congress, hey, for 23 years we haven't done anything, now we're thinking of doing something, why don't you do it? I don't think they're as likely in that circumstance.

But we all know from the crack cocaine discussion that predicting what Congress will do or not is an uncertain business. And I don't claim to be able to prognosticate and say if you do what the American Bar Association recommends and Ms. Price recommends, that it will all work out, that Congress will then step in and Congress will fix it. I think it's just more likely that things will work out if you do it that way

than if we go to Congress and basically when Congress looks they say, well what's happened in 23 years? And the answer is nothing. And Congress will say, why should we do anything?

MS. PRICE: Can I just add one thing? I'm sorry.

DR. SALTZBURG: Sure.

MS. PRICE: I'd be dismayed if we tied ourselves in knots trying to figure out whether or not Congress would respond to what might be a load of litigation. I think the courts are competent to deal with it. And one of the ways that you can put Congress on notice that you are now responding to the directive of 994t, is by sending the proposal forward. I mean, Congress then gets a look at it. Congress gets to decide whether or not to approve or to let stand a proposed policy statement.

So, you know, I think now is the time to move forward. If in fact it turns out that this is just too much for the courts to bear, then yes, there might be some adjustment to be made, but you know, we don't know that, at this point.

CHAIR HINOJOSA: Dr. Saltsburg, I know you mentioned that this was a proposal and that you could understand if there might be some changes to the ABA

proposal. With regards to two of the suggestions, don't you think that there's a possibility that present law takes care of two of those?

The first one is, someone who provides extensive cooperation and assistance. We have rule 35 of the Federal Rules of Criminal Procedure. There is a one year time limit, but there are ways beyond the one year time limit, not the Bureau of Prisons, actually, just the government, the U.S. Attorney's Office, can go ahead and file a motion to reduce the sentence.

The other one that comes to mind with regards to the proposals is the one with regards to the change in the law. And there is present statutory directives to the Commission that any time, for example, a guideline is changed, which usually happens when there is a change with regards to the punishment level, that the Commission makes the determination as to whether we should be retroactive or not. And if it's retroactive, then the defendant can go ahead and file a motion before the Court.

So there's two ways already taking care of with regards to -- and so I guess you meant for us to look at these and then decide.

DR. SALTZBURG: Yes, if I could just briefly address them both. I think you're right. I'm not sure

exactly what Rule 35(b) fails to cover. I mean the people working with me believe that there are gaps. That there are people who provide cooperation and can't benefit from a 35(b) motion and what I could do, if the Commission were getting into this, ask them to give you examples. Because 35(b) does cover a lot of this. I think you're right about that.

And I think there's a little bit of, as I was going through our own policy recommendation, I had the same question in my mind, if I'm hearing you right, which is, if there's a determination that a change in the law should not be made retroactive. That seems to me a judgment that things should be left as they are for those who have already been sentenced. To use that as a factor, it causes me a little concern, too. I mean, it seems to me that it's like you're having it both ways.

And I think, as I said, this is a graph not meant to be chiseled in granite and not meant to be something that the American Bar Association will sort of fight about. It was meant to sort of say to the Commission, we know a lot of people come to you and say, do something. And then you say, what should we do? And it's all very general. We wanted to put some meat on the bones.

CHAIR HINOJOSA: Vice Chair Sessions?

JUDGE SESSIONS: I would like to ask a couple of questions on the crack. And I'd like to respond, at least a little bit to what Ms. Blanchard said to what we did in 2002.

The fact is, the Commission has been consistently suggesting that the disparity is different but there's a second part to the whole debate. And to say essentially that we had numerous factors which increased penalties in 2002, is just a little simplistic. The argument that has been made, I think fairly strongly and consistently, is that the sentencing policies should be focused less on drug quantity and more on those things which are most significant.

So, quite frankly, I took a strong position in regard to those particular factors so that you take out of crack cocaine policy the violence, which isn't necessarily associated with crack cocaine, and then you turn it into an enhancement. And then ultimately, perhaps sentencing policy in the United States would be less dependent upon drug quantity and more upon the social consequences of the behavior.

Now you may debate whether or not the penalties are too high, but as to the policy which led

to our recommendations in 2002, that was in part to reduce the penalties in crack cocaine, but also change the whole focus of drug sentencing, at least in part, from drug quantity to those social consequences of the behavior. Now, that's my speech. Now, do I have a question to follow that up? I guess, how do you respond to that? I mean, Ms. Blanchard has criticized us before and I have responded before. And I guess I'm interested to find out, you know, both of your reactions to that.

MS. BLANCHARD: Well we, as you know, the defenders, have been urging for quite some time that the drug guidelines are too quantity driven. We are all for targeting the punishment to the specific behavior that you're trying to punish and not just grabbing quantity because it's an easy measure, it's an easy objective measure and you can just use quantity. The cap was about and minor role was about that, tying it in.

Our objection to the 2002 proposals for the crack fix is that it included the increases for the targeted behavior, but it was not accompanied by a concomitant reduction in any of the quantity enhancement. In other words, it didn't reduce the table to then make up for the person who is going to

get whammed for the gun. The gun, people who commit violence should get greater time. The problem was, you had quantity, which we don't want to just be what governs a sentence. That was going to stay the same. But then on top of it, we were going to add the targeted behavior.

So we don't have a problem with the approach of targeting behavior and trying to capture more specifically the individuals and not paint with a broad brush stroke of quantity. I think the problem was that the overall affect of the proposal, even though the policy may have made good sense, the overall affect was just going to be to take what we had and add more on top and the affect had to be, you add six special offense characteristics and it has to go up. So that was the objection.

JUDGE SESSIONS: And at the same time, --

MS. BLANCHARD: And I'm sorry to be so critical.

JUDGE SESSIONS: -- in regards to the crack cocaine, we're going down fairly dramatically. Do you have a response to that?

MS. SMALL: Yes, I do. And I just want to say, it kind of dovetails on a statement that Ms. Blanchard made earlier on that I want to amplify and

also something that Eric Sterling said. And I think it has to do with what's the appropriate prevue for federal action on drugs versus state action on drugs. Because just looking at the issue of behavior for enhancements, whether you're talking about guns, whether you're talking about sales to children, or involving children, or gang related activity is only going to get you so far because most of that, as it relates to crack, is happening on the bottom level of the market. And from where I sit and from where we sit, that's really behavior that's more appropriate to be dealt with on a state and local level by state and local police, who can actually gauge whether or not they're talking about people whose activity is primarily street level or if they're actually connected to larger drug organizations.

It seems to me that if, that the best thing that we could do is get the feds out of the business of policing basic street level narcotics activity and have their focus be primarily on interrupting and disrupting major trafficking organizations. Now, if it turns out that in the course of doing those kinds of investigation they find that there are people who were involved with large numbers of weapons or other things, then that would be an appropriate basis for

enhancement.

But if you're just adding enhancement on to the federal policing of what's basically street level drug activity, then you're still going to basically be picking up the people who are on the very bottom level. Because it's the people on the bottom level who are required to carry guns, to enforce their positions. It’s not the middle men, it's not the higher men who were actually doing that. It's the people on the bottom who were the muscle and if what we're trying to do is get away from having our focus be primarily on the lower level people, then that's not a strategy that's really going to get you there.

CHAIR HINOJOSA: Vice Chair Castillo, sir.

JUDGE CASTILLO: Let me just say, I agree with everything my brother, Commissioner Sessions has said about our 2002 report. Having looked at it again, I still believe it was right then and I believe it's right now. The problem is, how we make any incremental progress since then. Because we have, at least I can say, I have been as frustrated as anyone else over the five year period.

Do you believe we're making progress with regard to this crack versus powder disparity debate? Do you believe we're even making progress today where,

for the first time, I think, the Department of Justice in writing says it may well very well may be appropriate to address the ratio, but they're saying over the next few months, versus having the Commission, apparently, vote on this next month.

So, do you believe we're making progress or is it the position of each of your organizations that this Commission should force the issue by voting on a proposal next month? That's what I'd like to know.

MS. BLANCHARD: Well, I too, am heartened by the, you know, and surprised to read the testimony of the Department and that there's clearly room in there for discussion and they're already having those discussions.

I don't know how you measure progress. I know there's tons of good faith. I know there's lots of good work. I don't, I just don't know how you would measure progress. I'm glad it's -- what I've said before, I'm glad you're pushing it on the priority list.

We, you know, in a perfect world, what the defenders would love is if you could do what you could do to reduce that 25 percent where the guidelines bump you over the mandatory minimums. When you, when the Commission long ago increased sentences according to

the guidelines more than the Congress even required from the strictest reading of what the Congress required, which we don't read that way and we don't find a foundation to read that way. But you know, putting that aside, there's still 25 percent, which is a lot of time, you know, when you look at it and especially over time.

CHAIR HINOJOSA: I suspect you're referring to the 15 year report. Right? Since, on the year that was based on, we've had the mitigating roles, the safety valve has taken a lot more affect. So I don't know that that's the appropriate number to be using with regards to the increase in penalties as to what this Commission has done with regards to the drug penalties. Because actually safety valve was extended past the statutory amount. The mitigating role cap has come into effect and the cap itself on the amount of drugs.

And so I know that that may have been in the 15 year report, but it stops at a certain point, perhaps before. And so it probably would be good to go ahead and update that information and see if that really is still true.

MS. BLANCHARD: Well, two things. I'm with my brother, Jonathan, that you know, I'd love to see

the numbers, because you know, the numbers are very telling.

But secondarily, we all know that where you pegged the offense levels was, and there's a fancier way to describe this, but was basically one higher than what it needed to be to be at the mandatory minimum. In other words, when you finally get the range, you don't necessarily get the mandatory minimum, you get slightly higher than that. And we cannot find --

CHAIR HINOJOSA: I don't' think we disagree with that issue. The only point is, you know, then you get acceptance and the safety valve and all that. And so I think it would be interesting to measure that with the mandatory minimum itself. And so, you know, there is a lot of discussion about do you go to that range, or do you go one lower to still cover the mandatory minimum?

MS. BLANCHARD: Right. The last thing I would say, and this opens a hornet's nest, but way we could measure progress and we all know that there's been a dramatic increase in the number of departures, or variances, or statutory sentences, however you want to measure it, sentences below the guideline range, properly calculated guideline range, for the crack cocaine disparity, by judges across the land, going

down to the mandatory minimum, but basically coming lower than the guideline sentence, finding that the Commission's setting of the guidelines for whatever reason, isn't what they want to follow, they're just going to come down to the mandatory minimum.

By the Commission choosing not to promulgate anything about Booker any guidance or anything, I think that doesn't -- that I don't think promotes progress in the sense that after Booker in an advisory system.

CHAIR HINOJOSA: Do you believe that judges don't read Booker and don't understand that we're in an advisory system?

MS. BLANCHARD: Oh, no, no, no. I believe I think they --

CHAIR HINOJOSA: Well, I think they have shown that they understand what Booker says. I mean, what -- I don't understand what this -- you know, the law is there. The judges know the law. The practitioners know the law. And so this is the Sentencing Commission.

MS. BLANCHARD: Yes, but the government walks in and says, Congress says 100 to 1. You can't do anything about it. Circuits have said that, as you all know. And the Commission knows better, just with respect to the guidelines. Not the five and the ten.

Not the mandatory minimums themselves. But the Commission made a choice about where to peg the guidelines with respect to those. And it is the guidelines that are now advisory.

And so I don't know which judge it was that wrote that there isn't some exception, you know, Booker exception to crack. You know, that should be applied the same way everything else should be applied. Yes, there is a Congressional directive, but there are for many, many, many laws. But it seems like with crack powder, judges are a lot more, many judges are a lot more fearful of going that way.

And you know, in the oral argument in Claiborne, the issue came up. Judge Ginsburg asked, are judges allowed to do this. And there was some back and forth about that, not that any of us think that the case is going to rise or fall on that.

But yes, I think judges read the case, but I think that there is a bit of a vacuum which could be helpful. And I would, and I think the defenders would think, could be progress in this area, if there were some guidance by the Commission about using Booker, like you're one, two, three step process, I think one of those steps could be using Booker.

CHAIR HINOJOSA: Ms. Small?

MS. SMALL: I want to make -- well, first off, I want to just say you know, I haven't testified here before and I'm a bit of a grassroots advocate. So, if my comments are very blunt, I apologize in advance. I haven't quite gotten the D.C. finesse yet.

CHAIR HINOJOSA: Well, you've prepared us.

MS. SMALL: Well and I say that because I think that there are a couple of really salient points related to the question that you asked. And that is this.

First of all, when Congress first passed -- to me these laws are a clear example of where Congress is out of touch, both politically, judicially, etcetera, with the rest of the country, for the most part. I think it's important to note that even though Congress passed these mandatory minimums and this crack-powder disparity in '86, that the majority of the states did not follow suit. That the majority of the problems that take place around drugs, take place on a state and local level and yet only 11 states out of the 50 chose to model their laws after the federal law, which tells me something. It should tell you something about whether or not people thought that this would be an efficacious way of going forward, number one.

Number two, in the recent years, you've seen

a real effort on a state and local level to change this. The fact that Connecticut got substantial report in both houses of its legislature to change its disparity law and it was only as a result of a threat of a governor's veto that they reached a compromise that didn't eliminate it completely, tells you something about the politics around this.

I think that one of the reasons that you got the statement you got from the Justice Department is because they're trying to play down the clock. It would be a lot easier for them to allow time to go by without a strong position coming from this Commission, without being confronted with it in the ways that they have before.

I think the fact that this Commission has held onto this issue, has repeatedly issued reports talking about the fact that these laws not only don't make sense, but that they actually cause more harm than good, has helped move the public debate about this.

The fact that there have been recent surveys and polls that have shown that the majority of Americans do not believe that mandatory minimums work and that you should actually give people the opportunity to have treatment before you lock them up for a long period of time tells me that on this particular issue, the

Congress is behind the people. I think the Congress knows that they're behind the people. I think that for lots of different reasons, they would rather see this get delayed than have to acknowledge that a major mistake was made. However, I think that it's your job, as well as it's our job to continue pressing forward and demanding that they act in a way that's just, in a way that's consistent with the facts and a way that's actually consistent with the will of the majority of the American people.

And the final thing that I want to say is that if you look in the overall public debate about drugs, you see a totally different climate and a totally different way of approaching this than you did even ten years ago. The number of programs that are focusing on addiction as a real problem, not just in inner-city communities, but for "regular middle American soccer mom communities" is telling you something about the way in which we perceive this problem.

There are enough Americans who have had an experience with people with drug and alcohol addiction that they realize that locking people up is not the way to address it. So I think we're on the cusp of a major shift in terms of the way that we approach drug policy

in this country. And quite frankly, I think that, given the recent history, that Congress will have to be brought kicking and screaming along. But I really do believe that we are in the midst of this change and to the degree that this Commission is going to be judged by the way it approaches this problem, I would like to see you all being the leaders who are helping to lead the way for Congress as opposed to cajoling them or hoping that they'll come along if you give them the right kinds of incentives.

And again, I apologize for the fact that my remarks may not be as judicious as they should be, but I think they're a statement that are fairly accurate.

CHAIR HINOJOSA: Your remarks certainly did not live up to their billing of insulting.

MR. STERLING: Your analysis about the importance of focusing on social consequences of behavior are correct. And it's very important. It would strike me that the criteria that I would suggest would be for a federal high level drug trafficking would be assassination of government officials in other countries as an aggravating factor, as witness intimidation, as bribery of central bankers, bribery of banks, corruption of military units, corruption of law enforcement agencies that, rather than focusing on

questions like use of children in the offense at the retail level, that we focus on the on the kinds of activity that the highest level of traffickers use to consolidate their power and make them much more dangerous and give the impunity to carry forward.

I think that with respect to Judge Castillo's question about where we are along a scale of progress, the Commission's work has been extremely important in advancing the progress, in advancing the discussion. The Commission's reports to the nation and to the Congress have been just invaluable resources for advocates, for journalists, for scholars to look at the issue and to understand it. So we are making, I think, a great deal of progress.

The question might be asked in some senses, where does political cover lie? Who can create political cover for who? The Commission has the potential, it seems to me, and I may be wrong on this, to create more political cover for the Congress, if it acts, that one of the ideas behind the creation of the Commission, you know, almost 25 years ago, was that this, the setting of sentences was a politically tricky maneuver. And that if we take it out of the political debates of the Congress, the potential for partisan attack and individual ambition and put it either in the

judicial conference or in the Commission, then it will be, in some way, insulated from that political realm.

And so the question then is, can that role of political cover be one that in the current climate both serves the needs of justice and serves the needs of coming up with the kinds of sentences that the judges across the country on the federal bench would like to see and would feel honored to be imposing?

CHAIR HINOJOSA: Is there any other question? Ms. Blanchard.

MS. BLANCHARD: I forgot to say that we also think that --

CHAIR HINOJOSA: You never forget anything.

MS. BLANCHARD: Oh, that's true, except this. We think that the issue covered by Mr. Saltzburg and Ms. Price is also very important but we obviously divided this up, have submitted written testimony, but wanted to just join them.

CHAIR HINOJOSA: Does anybody need to do any other cover with regards to stating what else you may have wanted to include here? If not, thank you all very much.

This is the time we were supposed to finish with the last panel, so we'll take about a three minute break before we start with the next panel.

(Whereupon the hearing went off the record at 2:58 p.m. and went back on the record at 3:02 p.m.)

CHAIR HINOJOSA: The next panel has been titled as industry representatives. Nobody has labeled them as captains of industry, however.

The first one is Mr. Shawn Driscoll, who is here today on behalf of the American Trucking Association. He began his career with Swift Transportation Company Incorporated in 2004 and holds the position of Assistant Director of Security. Mr. Driscoll actually had served in law enforcement prior to that for 24 years and retired from the Montana Highway Patrol Department and, obviously, has a lot of experience.

Mr. Peter J. Pantuso is President and Chief Executive Officer of the American Bus Association, North America's largest motor coach tour and travel association representing more than 65 percent of all private buses on the highways, as well as private travel related businesses. Mr. Pantuso serves on the U.S. Chamber of Commerce's Committee of 100 leading association executives, the Policy Committee of the American Society of Association Executives, and the Board of the Museum of Bus Transportation.

Mr. Frederic Hirsch, Frederic Rick Hirsch,

joined the Entertainment Software Association in April 2000 as Senior Vice President, Intellectual Property Enforcement to direct ESA's global enforcement efforts against the piracy of member company game software products. Mr. Hirsch has spent much of his professional career prior to this working for the Motion Picture Association and in a number of different capacities, most recently as senior vice president and director of the NPA's worldwide anti-piracy program.

So they all bring a lot of expertise to the subject that they will be talking about. And we will start with Mr. Driscoll.

MR. DRISCOLL: Mr. Chairman, members of the Commission, thank you for inviting me to testify on behalf of the American Trucking Association on the subject of the amendments to the Federal Sentencing Guidelines for convictions under 18 U.S.C. Section 659, or what I will refer to as cargo theft.

As mentioned, I am the Assistant Director of Security for Swift Transportation, the largest truckload carrier in the United States with 18,000 trucks. Prior to coming to Swift, I was a State Trooper with the Montana Highway Patrol where I rose to the rank of chief, before I left that agency.

I have previously submitted my written

testimony for inclusion into the record. I understand that you are considering several amendments relating to transportation but I will focus my testimony today on the proposal related to cargo theft.

The USA PATRIOT Act Improvement and Reauthorization Act of 2005 directs the Commission to review the Federal Sentencing Guidelines to determine whether sentencing enhancement is appropriate for a cargo theft offense. I'm here to tell you that it is and to, hopefully, explain why.

Trucks carry almost 70 percent of all domestic freight tonnage. The vast majority of manufacturers and retailers rely on trucks as their primary mode of transporting their goods, including essentials like food and clothing to the consumer. Cargo theft is an important issue to my company and to my colleagues in the trucking industry. While the numbers are imprecise, the FBI estimates the direct cost of cargo theft is between 15 and 30 billon dollars. It is a problem whose cost ripple throughout.

So, why am I here today on behalf of the trucking industry? We want to deter cargo theft. At Swift, we do a lot to deter cargo theft, including criminal background checks on our employees, facility securement, etcetera. Unfortunately, our efforts are

not 100 percent effective. Therefore, we need the assistance of federal resources to combat this crime.

We believe that providing sentencing guideline enhancements for convicted cargo thieves will have a multiplier affect on reducing this crime. I don't claim to be a criminologist, but the deterrent affect of enhanced sentences for cargo thieves seems obvious. Law enforcement, according to the Seaport Commission, believes that some former drug traffickers have switched to cargo theft for two reasons. One, because of high profit potential and probably the most important, because criminal sentences are much lower than those for drug offenses. I think that it is widely agreed that mandatory minimums and enhanced sentencing have deterred some drug trafficking and we believe it will do the same for cargo theft.

Before sentencing comes in to play, we need a conviction. We need cooperation between motor carriers, law enforcement and prosecutors. When we experience a theft, it is sometimes difficult for us to get law enforcement to act. Coming from a long career in law enforcement, I don't mean to criticize those in law enforcement. I understand why law enforcement is reluctant to pursue cargo theft cases. They believe prosecutors rarely prosecute these cases and that's

probably true. Prosecutors say that penalties associated with cargo theft do not justify the diversion of scarce resources. Enhanced sentencing for cargo theft will address these concerns.

I'd like to take a second to share one of our recent thefts that we had at Swift. We had a theft of clothing valued at approximately $150,000. Our own investigators identified a particular storefront that was selling the clothing. Since the theft occurred in one jurisdiction, the offloading occurred in another jurisdiction, the resale was yet in a third location, it took a week for a search warrant to be obtained and by then, all the clothing items had been sold. We did not get anything back. To date, nobody has been charged.

If federal law enforcement authorities had incentive to pursue these cases, enhanced sentencing being such an incentive, then that would most likely warrant -- we would have been able to obtain a search warrant more likely in a quicker manner. And I can illustrate many points when this has occurred in the past.

More and more frequently, these are not one time strikes that are committed upon us. The Seaport Commission noted that law enforcement believes that the

majority of cargo theft today is committed by organized criminal groups and that some of the proceeds from cargo theft are being diverted to fund other organized crime activities. Enhanced sentencing for cargo theft crimes would help in the broader fight against foreign and domestic organized criminal groups by cutting off profits that are currently obtainable with little risk.

For these reasons, ATA supports the Commission's proposed Option Two. ATA finds this option preferable to option one in terms of consistently generating a more robust sentence or penalty, which is our objective.

Mr. Chairman and members of the Commission, thank you for the opportunity to testify before you on this issue that impacts companies like mine and ultimately you, as the consumer of the goods and products we carry. The work this Commission is undertaking today is a significant positive step at the federal level towards defeating cargo theft. Thank you.

CHAIR HINOJOSA: Thank you, Mr. Driscoll. Mr. Pantuso, sir.

MR. PANTUSO: Thank you, Mr. Chairman, and thank you to the Commission for giving us, The Association, the opportunity to testify concerning the

proposed amendments to the Federal Sentencing Guidelines.

You will hear two themes throughout my testimony. First of all, a bus is a bus. And second of all, that the passengers are the same passengers as those on other modes, and deserve the same level of protection.

The American Bus Association, the other ABA, is the primary trade association representing the private, over the road bus industry. We've got approximately 3800 members engaged in all manners of transportation, travel and tourism. And as you pointed out, our members represent about 65 percent of all the coaches on the road and more than 1000 bus and tour companies.

As an industry, the private bus industry transports approximately 650 million people each and every year. A total that compares favorably to commercial airlines. Moreover, ABA links some 3,000 cities and communities throughout the U.S. as well as bus terminals, airports, seaports, and rail stations, as well their passengers.

Given the reach of the industry and their 650 million passengers, it is clear that security is our top priority. Since the attacks of 9/11 and the

enactment of the PATRIOT Act, the private bus industry has been heavily engaged in securing our passengers, our facilities and our terminals. Our interest in security is more than just academic. The plain fact is that buses and passengers have been targets around the world and a highjacked bus could be used as a vehicle-born improvised explosive device with, certainly, devastating impact.

Since 9/11 ABA's motor coach operators have endured numerous incidents in which persons have attempted to or have highjacked motor coaches while the coaches were in operation carrying passengers. One of the most horrifying was the takeover of a Greyhound bus one month after 9/11 by an individual in Tennessee. That incident resulted in the motor coach driver having his throat slit.

Congress shared our concern with bus security when it passed the PATRIOT Act. Section 1993 of Title 18 of the U.S. Code subsection (a) prescribes, whoever willfully wrecks, derails, sets fire to, disables mass transportation vehicles or ferry or interferes with, disables or incapacitates any dispatcher, driver, captain, or person while they are employed in dispatching, or operating, or maintaining a mass vehicle or ferry with intent to endanger and reckless

disregard, shall be fined and/or imprisoned.

To determine which transportation operations are included within Section 1993, Congress added that the PATRIOT Act definition of mass transportation shall include the school bus, charter bus, and sightseeing transportation, because these were specifically excluded from the definition which was transportation by a conveyance that provides regular and continuing general or special transportation service.

In 2005, the USA PATRIOT Improvement Reauthorization Act replaced the term public transportation with mass transportation. Thus, on its face, the definition of mass transportation, as the Sentencing Commission points out, is much broader than that of public transportation for the purpose of applying sentencing guidelines to criminal interference with transportation operations.

ABA, and its members are in favor of the broadest application of those sentencing guidelines to transportation operations, regardless of the type of bus service that's in play or that the passenger is on.

Therefore, responding directly to the question raised in paragraph four of page 35 of the draft guidelines, ABA believes that the guidelines should be used as a definition of mass transportation

and that the guidelines should make clear that mass transportation includes all bus service. If the Commission used the term public transportation rather than mass transportation, that action would have the effect of excluding most bus service.

Thus, since inner-city bus service is not specifically excluding from mass transportation's definition, Congress clearly meant to include these operations within the sphere of the sentencing guidelines. Obviously, Congress's intent was to cover all transportation operations for the public because a motor coach in inner-city scheduled service is identical to a motor coach engaged in charter operations, there's no logic to exclude separate types of bus service operations in the sentencing guidelines.

To hold that view, would require that Congress believed that for 55 people on a charter bus coming from D.C. to New York City should be protected, while those unprotected would be on a Greyhound bus with 55 passengers traveling between New York and D.C. ABA's members believe that the term mass transportation in all sentencing guidelines, again, should apply to all bus transportation operations.

Finally, we urge the Commission to recognize the importance of a federal focus on inner-city bus

incidents. Two of the three highjacking incidents that we know about more recently, the criminals were prosecuted under local law. And the third, the Greyhound incident in Tennessee, the assailant died in the bus wreck. But in the other cases, a county prosecutor without any help, cooperation, or coordination from federal law enforcement, took the case to trial, pled down the charges and got a conviction. So one might describe that as a successful prosecution.

However, what's at issue is the focus of federal law authorities on what is a federal crime involving specific modes of transportation. We think it's unfair to assume that a similar highjacking or an incident on an airline or a ferry or another commercial vehicle would be viewed as anything other than a federal crime and would be prosecuted by federal authorities. In that case, more attention would be paid to the crime, to its consequences, certainly to the passengers. The focus would be placed on, would be focused on the crime as a terrorist act.

With increased attention by the media and the public, attention could deter additional acts of that type. With additional focus by federal law enforcement officials, then we could better determine whether a

specific act fits into a crime pattern as a terrorist activity. More attention strengthens the idea that the transportation system is really one system, that protection of the public should not be determined based on the type of commercial vehicle the public was on, but all passengers deserve the same level of protection by the federal system.

The ABA would be happy to work this Commission. We're happy to work with Congress in future in making any adjustments to the PATRIOT Act and we look forward to answering any questions you might have. Thank you.

CHAIR HINOJOSA: Thank you, Mr. Pantuso.

Mr. Hirsch, sir?

MR. HIRSCH: Yes. Thank you, Mr. Chairman, and thank you other members of the Commission for the opportunity to comment on Amendment Five, which is the Intellectual Property Repromulgation.

The repromulgation amendment, the purpose of repromulgation is to address the adequacy of the guideline's definition of infringement amount to cover situations in where the item in which the defendant trafficked was not an infringing item, but rather was intended to facilitate infringement. This is a very timely opportunity to for the Commission to look at

this issue and to recommend the enhancements contained in the amendment. And I'll lay a bit of foundation for you as to our members' interest in this issue.

The Entertainment Software Association is the trade association representing the companies that publish interactive games on computers, on video game consoles, on handheld devices, and on the internet. Our members accounted for about 90 percent of the entertainment software sold in the United States last year. Our members invest a lot of money and time, millions of dollars and teams of people working on developing and creating video games. And sometimes working on one video game over two or threes. The video game industry is, to a large extent, and certainly at the developer level, is constituted of small to medium sized enterprises of sometimes as few as 20 people working for years on developing their games.

And unfortunately, all this work and all this effort has a very short commercial window in the video game marketplace. Most video games have very few months to make back their investment. And on average, a video game will generate 75 percent of the revenues of its lifetime in the first two months after release. So that video game window in the video game

marketplace is very short.

Due to the nature of game content, which is digital and therefore subject to abuse and copying, the game industry has invested heavily in technological protection measures to prevent infringement. Some are disk based and others are based in the device. And one of the more common ones is the one used in various console systems, which is an authentication system that is designed to prevent the playback of unauthorized disks or infringing disks on their systems.

Members have taken advantage of these systems. With new game console systems, new authentication systems are put in place. And Congress, in 1998, in enacting the DMCA, The Digital Millennium Copyright Act, recognized the importance of rewarding the investment in technological protection measures that were aimed at, in effect, preventing infringement.

Unfortunately, despite the DMCA and the sanctions that it provides, the game industry has suffered from continuous hacks and cracks of its authentication systems. And some of the more popular game consoles have been hacked very shortly.

Many of you, I'm sure, have read about or hopefully maybe even played the new Wii game console that was launched last November. And sure enough,

within three to four months after its release and launch, that system was hacked. So now we are seeing pirated versions of Wii games, which is the system launched by Nintendo in November. We are seeing copies of those circulating in markets all over the world, including the United States.

We looked at each of these circumventions as a challenge. Certainly, from the standpoint of our Association, our industry. These systems are hacked in the form of circumvention devices. The people who crack these systems develop these semiconductor chips. These are called modification chips and they come in all shapes and forms and generally, these work by people both in the United States and around the world, taking these chips and installing them inside the game consoles, cracking open the device, putting them in. And what they do is they effectively bypass the authentication system so that users of these chipped consoles can now play pirated games.

So our members have a great interest in this area because again, one of their big defenses against copyright infringement of these authentication systems are circumvented by these modification chips.

Prosecutors are experienced in working with federal prosecutors in prosecuting DMCA is that they

generally prefer to prosecute on the basis of infringement as opposed to a DMCA violation. Very often, the defendants who are found to be engaged in trafficking circumvention devices, are installing these devices in consoles, are also involved in other kinds of infringing activity. And invariably, prosecutors tend to focus more on the copyright infringement violation than the DMCA violation. The problem is is that what we are now starting to see is the pirate market has gotten wise to this and we are seeing a lot of businesses that exclusively modify consoles without engage in other infringing activity. Because their sense is is that this kind of activity is not going to be prosecuted or enforced.

So the Commission's examination of this issue is extremely timely because we are starting to see this trend and we think the enhancement proposed in the amendment could really help.

In looking over the three options that the Commission has put forth, we think that Option One works best for us. Option One provides for a two or more level enhancement to a minimum of 12 for anyone convicted in trafficking in devices used to circumvent a technological measure. We think that this is the simplest and most straightforward approach. It

recognizes, in fact, that each of the mod chips fosters a multitude of infringing activity because each mod chip induces the owner of the chipped console to go out and buy dozens of pirated games, as opposed to legitimate games. So actually each of these mod chips account for dozens of infringing acts.

We think that there is one modification that we would suggest for Option One in that it covers only Section 1201(b) violations of the DMCA, which is the provision that governs circumvention devices that circumvent copy controls. We think, because mod chips really work to modify the access and are really considered to be, the authentication systems on consoles are considered to be access controls, we think that we would like to see Option One expanded to cover violations of 1201(a)(2) or, frankly, all Section 1201 violations.

Option Two looks at the value of the circumvention device. The problem is is that most of these mod chips retail on the street at maybe $20 or $30, installed maybe $40. We think that that understates the significance of the offense because again, as I said before, each of these chips can result and foster hundreds of thousands -- well, hundreds of dollars, maybe even thousands in purchases of pirated

game software.

Option Three tries to address that issue, to some extent, by making it, by looking at infringement amount as the greater of the value of either the circumvention devices that the defendant was found to be trafficking in, or the number of circumvention devices multiplied by the price that a person legitimately using the device to access or make use of a copyrighted work would have paid. This really requires the judge to speculate and make an assessment as to the number of legitimate games that someone who has a chipped console would have purchased, but for the mod chip, if the mod chip hadn't existed. So, we think this is an extremely complex calculation and highly speculative. And we think a lot of judges are just going to end up understating the infringement amount as a result.

So we endorse the Commission's approach with Option One and urge them to expand that to cover violation of the access control provision in 1201(a)(2) in addition to 1201(b).

The Commission also asked for a comment on two other issues which I will offer up here. The first is whether it should provide a downward departure provision for cases in which the infringement amount

overstates the seriousness of the offense. Our experience is that that rarely, if ever, happens. And we believe that in most situations, if not all, judges already factored this into their determination of sentence.

The other issue on which the Commission sought comment was the application note four, which provides for an adjustment to be made under Section 3B1.3 in any case in which the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item.

We think, we see this note as applying, particularly in view of the note coming out of the or following on the enactment of the net act, we see this note applying to circumventions that apply to hackers or crackers who do the initial crack of the copy protection on games and put out unprotected versions, unprotected via technological protection measure, on the internet. And as a result, we see that encryption or de-encryption or circumvention requiring a high level of technical skills, a very sophisticated process to crack TPMs and, as a result, we would recommend that no change be made.

The people who engage in these kinds of cracks are responsible for much of the pirate game

product circulating not only on the internet, but in hard disk form in markets around the world. And we think that the application note four works very effectively to address this by describing this as an offense involving a special skill.

Thanks very much.

CHAIR HINOJOSA: Thank you, Mr. Hirsch. Any questions? Vice Chair Steer.

COMMISSIONER STEER: I have a question for Mr. Driscoll regarding the cargo theft issue. This morning the Commission heard testimony finding fault with both Option one and Option Two. I think the thrust of the criticism was that 18 U.S.C. Section 659 is a very broad statute that might, in some situations conceivably used to prosecute very small scale thefts of cargo that were sort of one time occurrences or whatever. I don't remember the words there were used to describe it.

But I'm wondering, as someone who has been interested in Option Two in particular, what you would think about a modification of Option Two that basically widen the enhancement to an organized cargo theft defense, similarly to the way that the enhancement now applies to the organized scheme to steal vehicles or vehicle parts. From what I know from attending your

cargo theft conference in San Antonio several years ago, you all would have no trouble helping law enforcement prove an organized cargo theft scheme in nearly all of the cases that you were concerned about. But I'd be interested in your reaction to that kind of a modification.

MR. DRISCOLL: I guess I would say that, I mean, clearly most of our thefts on the truckload carrier side is that there is some element of organized crime involved, depending on the level of sophistication. There are clearly groups that are actively involved in it. But really, almost, many of the thefts, I guess I would say, would have some level of sophistication or organization to them and so would very well meet that criteria.

I guess what I'd probably have to do is go back and meet with the ATA folks and we could provide you with some additional information directly to you on that.

COMMISSIONER STEER: Okay, thank you.

CHAIR HINOJOSA: Commissioner Campbell.

COMMISSIONER CAMPBELL: My question is for Mr. Hirsch. I'm interested, to some degree, in some of the things that you and the members of your organization have seen with regard to software piracy

or game piracy. The focus of your testimony was on chips. Is that right?

MR. HIRSCH: That's correct.

COMMISSIONER CAMPBELL: What is the typical, you know, can you give us a sense of how these chips are made, whether they are done sort of on an individual basis, how they're made available to others out there? You may some reference to these chips, for example, when discussing the amount of the infringement amount in Option Two and Option Three would understate the value of the infringement.

MR. HIRSCH: Right.

COMMISSIONER CAMPBELL: I'd like you to elaborate on that a little bit.

MR. HIRSCH: Sure. These chips, generally, are after the initial hack or crack of the system, where somebody has gone into a console and reverse engineered it and figured out how the authentication system works, they will then work on the design of a chip that is designed to bypass that authentication system, so that system, the game console, will play pirate games, as opposed to legitimate games.

Legitimate games have a code on it that effectively works as a handshake with a console system to make sure that -- the device will check to see that

this is a legitimate game and has the code it needs and, therefore, it will play. Normally, an infringing game that you would put in a device that hasn't been chipped, wouldn’t see that signal, wouldn't have that handshake and therefore, would not allow the game to play. These chips, in effect, bypass that authentication system so that it will allow the device to play, but is a pirate version of the game.

They are generally manufactured in Southeast Asia. We see these coming in a lot through Canada, Canada has no equivalent to the DMCA's prohibitions on circumvention devices, and very frequently marketed through internet sites. But very frequently, in what we're seeing is that there are a lot of retail establishments in the United States that are offering to install modification devices or sell you a console with it already mounted. We're seeing quite a lot on eBay, where in fact they will modify the system which allows it to play pirated games and will even load a bunch of pirated games into the hard disk of your console.

So we see it in all shapes and forms. Now, each one of these devices effectively unlocks the key for a console and in that way, and allows that console to play pirated games. We don't know how many pirated

games the owner of that chipped console then goes out and buys, but the guess is that over the lifetime of the game console, it could be anywhere from 30 to 50 to even more games. So, the $20 or $30 investment somebody makes in a mod chip can "save them" hundreds, if not thousands of dollars of purchases of legitimate games down the road.

COMMISSIONER CAMPBELL: So the mod chip is actually a physical device that --

MR. HIRSCH: It is, in fact. I'd be happy to pass these around so that you can see them.

COMMISSIONER CAMPBELL: This is different than other types of anti-circumvention devices where for pieces of software or things like that might be available on the internet. Is that right?

MR. HIRSCH: Yes.

CHAIR HINOJOSA: Are these for us to keep?

MR. HIRSCH: Excuse me? No, I'll need those back, thank you.

CHAIR HINOJOSA: Can you elaborate on which game system they apply to?

MR. HIRSCH: No, there are other systems out there. There are things that we call soft mods, which are in effect software approaches to bypassing these systems. They're not quite as common as physical

chips, but they do exist and they are more often pervade and exchange through downloads over the internet. But it's a bit more involved in terms of a process and a procedure to install that onto your counsel.

COMMISSIONER CAMPBELL: And I understand --

MR. HIRSCH: The --

COMMISSIONER CAMPBELL: I'm sorry. Go ahead.

MR. HIRSCH: So chipping is the more predominant. Chipping a machine is the more predominant form of circumvention.

COMMISSIONER CAMPBELL: And that's, the focus of what you're here, what you've been talking about, is really on games and game consoles.

MR. HIRSCH: That's correct.

COMMISSIONER CAMPBELL: This type of activity, I take it, can apply to other types of protected or copyrighted items, like DVDs and software and basically, anything else that's protected?

MR. HIRSCH: Right. All of those, all the different forms of digital media are going to have different kinds of protection measures that they use to protect them. Mod chips and the authentication systems that are used on consoles are specific to the game industry.

COMMISSIONER CAMPBELL: Okay, thanks.

CHAIR HINOJOSA: Commissioner Horowitz?

COMMISSIONER HOROWITZ: Just briefly to follow up on that.

Do the individuals trafficking, at least in your experience so far, the individuals trafficking in the anti-circumvention devices, are they selling the devices and then others are doing the altering and, if they're reselling systems, whether its game systems or other systems, or is it the person that is trafficking in anti-circumvention devices, doing their own work on these systems and then retailing them out themselves?

MR. HIRSCH: It's a little bit of both. I mean, we've seen certainly people who will buy wholesale from internet sites, usually based up in Canada, and then set up a business installing these chips into consoles in their garage to people who are actively out there serving as wholesalers distributing to other people who are engaged in retail operations.

CHAIR HINOJOSA: Does anybody have any other questions? If not, we thank you very much. I will say that your perspective has been extremely helpful and we appreciate the time that you have taken to be with us this afternoon and agreeing to be the last panel.

(Whereupon, at 3:36 p.m., the foregoing

public hearing was adjourned.)

CERTIFICATE

This is to certify that the attached proceeding before

UNITED STATES SENTENCING COMMISSION

PLACE: Washington, D.C.

DATE: March 20, 2007

was held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the recording accomplished at the hearing.

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Andrew Vogel, Court Reporter

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Kimberly J. Zogby, Transcriber