

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING

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TUESDAY, MARCH 17, 2009
AND
WEDNESDAY, MARCH 18, 2009

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The public hearing convened in the Federal Judicial Center Training Rooms, in the Thurgood Marshall Building, 1 Columbus Circle, N.E., Washington, D.C. at 2:15 p.m. Tuesday, March 17 and 8:30 a.m. Wednesday, March 18, Ricardo H. Hinojosa, Acting Chair, presiding.

COMMISSIONERS PRESENT:

- RICARDO H. HINOJOSA, Acting Chair
- WILLIAM B. CARR, JR., Vice Chair
- RUBEN CASTILLO, Vice Chair
- WILLIAM K. SESSIONS, III, Vice Chair
- DABNEY L. FRIEDRICH, Commissioner
- BERYL A. HOWELL, Commissioner
- EDWARD F. REILLY, JR., Commissioner
- JONATHAN WROBLEWSKI, Commissioner

STAFF PRESENT:

- JUDITH W. SHEON, Staff

PANELISTS PRESENT:

MICHAEL DUBOSE, Chief, CCIPS, Criminal
Division, United States Department of
Justice

ERIC HANDY, Mid Atlantic Coast Representative,
Identity Theft Resource Center

JENNIFER COFFIN, National Sentencing Resource
Counsel, Federal Public and Community
Defenders

VINCENT WEAVER, Vice President, Security
Response, Symantec

SETH SCHOEN, Staff Technologist, Electronic
Frontier Foundation

JOSEPH E. KOEHLER, Assistant United States
Attorney, Deputy Chief, Criminal
Division Immigration Unit, United States
Attorney's Office, District of Arizona

LESLEY WHITCOMB FIERST, Associate, Womble
Carlyle Sandridge & Rice, PLLC, Federal
Public and Community Defenders

KAREN STAUSS, Managing Attorney and Policy
Counsel, Polaris Project

CHARLES SONG, West Coast Pro Bono Director,
Howrey LLP

SUZANNE FERREIRA, Supervising United States
Probation Officer for the Southern
District of Florida; Chair, Probation
Officers Advisory Group

CRAIG D. MAGAW, Deputy Assistant Director,
Office of Investigations, United States
Secret Service

DONNA LEE ELM, Federal Public Defender for the
Middle District of Florida, Federal
Public and Community Defenders

KENNETH H. LINN, Chairman, FedCURE, Citizens
United for Rehabilitation of Errants,
Federal Prison Chapter

MICHAEL J. PROUT, Assistant Director for
Judicial Security, Judicial Security
Division, United States Marshals Service

JON M. SANDS, Federal Public Defender for the
District of Arizona, Chair, Federal
Defender Sentencing Guidelines Committee

TODD A. BUSSERT, Co-Chair, Practitioners

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ERIK R. STEGMAN, Board of Directors, The
Nakwatsvewat Institute; Carry the Kettle
First Nation (Assiniboine)

MARIO J. SCALORA, Associate Professor of
Psychology, University of Nebraska
-Lincoln

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Adjourn

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

(2:28 p.m.)

ACTING CHAIR HINOJOSA: We'll go ahead and get started. First of all, I would like to welcome everyone to the public hearing of the United States Sentencing Commission with regards to the proposed list of possible guidelines and guideline amendments with regards to the 2008 - 2009 cycle. We do appreciate the fact that those of you who have testified have taken up your time to come here and share some thoughts with us.

I cannot emphasize how important the thoughts of the individuals who come to the public hearings are to the Commission with regards to our work and the year-long process of the guideline amendment process, as well as the promulgation of new guidelines. It is part of the process that we use with regards to our statutory mission and part of the process that we use within that mission to determine what guideline amendments and new guidelines should be promulgated under the

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1 3553 factors, as the statute requires us to
2 do.

3 And, again, on behalf of the
4 entire Commission, and I'll start from my
5 right to my left and introduce all the
6 commissioners whom I'm sure most of you know.
7 Mr. Jonathan Wroblewski is the ex officio
8 member representing the Attorney General. Ms.
9 Beryl Howell is a Commissioner. She practices
10 here in the District of Columbia. Mr. William
11 Carr, Jr., is a Vice Chair of the Commission.
12 He is our newest member of the Commission.
13 He's from Philadelphia.

14 We also have Vice Chair William
15 Sessions who will be coming in shortly. He is
16 still held up at judicial conference meetings.
17 Vice Chair and Judge Ruben Castillo from
18 Chicago, and Commissioner Dabney Friedrich
19 from here in the District of Columbia. And
20 Commissioner Ed Reilly, who is the ex officio
21 member who is the Chair of the Patrol
22 Commission.

23 Our first panel will be presenting

1 their views with regards to the Identity Theft
2 and Restitution Enforcement Act of 2008
3 issues that we put out for public comment.
4 The first member of the panel is Michael
5 DuBose who is the Chief -- did I get that
6 right?

7 MR. DUBOSE: Yes.

8 ACTING CHAIR HINOJOSA: Who is the
9 Chief of the Computer Crime and Intellectual
10 Property Section of the Criminal Division of
11 the Department of Justice. Previously, he has
12 served as Senior Counsel for Enforcement at
13 the Department of Treasury, and he has also
14 served as an Assistant U.S. Attorney in Maine
15 for seven years.

16 We also have Mr. Eric Handy. He
17 is a volunteer representative for the Identity
18 Theft Resource Center, assisting in educating
19 identity theft victims in the Washington, D.C.
20 area. He serves as a consulting manager with
21 a law firm here in D.C. with regards to their
22 federal security and privacy practice, and
23 they are based in Washington, D.C.

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1 We also have Ms. Jennifer Coffin
2 who is a Staff Attorney for National
3 Sentencing Resource Council of the Federal
4 Public and Community Defenders. Prior to
5 becoming a staff attorney with the Resource
6 Council office, she served as a Research and
7 Writing Specialist for the Office of the
8 Federal Public Defender for the Middle
9 District of Tennessee.

10 Mr. Vincent Weafer is a Vice
11 President for Symantec Security Response,
12 where he is responsible for advancing research
13 into new computer security threats and for
14 providing security content solutions. He is
15 also a co-author with regards to a book on
16 internet security.

17 We have Mr. Seth Schoen, who is a
18 Staff Technologist for the Electronic Frontier
19 Foundation where he assists other
20 technologists to understand technology -- I
21 might talk to you afterwards -- and technology
22 products and the civil liberty implications
23 related to the use of technology.

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1 Each one of the witnesses has been
2 told that they have seven minutes, and then
3 that would leave enough time for questions and
4 answers. We are starting a little bit late
5 because of the judicial conference, but we'll
6 go ahead and start with Mr. DuBose.

7 MR. DUBOSE: Thank you, Chairman
8 Hinojosa. Distinguished members of the
9 Commission, thank you for inviting the
10 Department of Justice to present testimony
11 today on the Identity Theft Restitution and
12 Enhancement Act of 2008. In light of the time
13 constraints, I will not try to address every
14 option or proposal that was set forth in the
15 Commission's proposed amendments published in
16 last January. Instead, I'll focus on a more
17 limited number of issues, recognizing that, as
18 customary, we'll be submitting a more detailed
19 letter in a few days.

20 Before addressing the specific
21 proposals, I would first like to describe how
22 the landscape of cybercrime and identity theft
23 has changed since this Commission last visited

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1 these issues in 2003. At that time, the
2 Commission cited data in its report to
3 Congress indicating that crime prosecuted
4 under 18 USC Section 1030 was "relatively
5 unsophisticated." Much has changed since
6 then. Cyber criminals and identity thieves
7 have become more sophisticated in concealing
8 their identities and locations from law
9 enforcement, often using proxy technologies to
10 route their communications through dummy
11 computers connected to the internet which
12 serve to mask the true origin of their
13 transmissions.

14 Moreover, in recent years,
15 investigators and prosecutors have been
16 fighting the rising threat of botnets, the
17 term used to describe networks of computers
18 infected by malicious software and highjacked
19 by hackers without the knowledge or consent of
20 their owners. Botnets can range in size from
21 thousands up to hundreds of thousands of
22 infected computers. Computers compromised in
23 this way can not only be used as proxies but

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1 also can be used to carry out so-called
2 fishing scams and also are used in numerous
3 denial-of-service attacks on targeted computer
4 systems.

5 In addition to increased
6 technological sophistication, one of the most
7 worrisome trends that we're also seeing is the
8 increased commercialization of cybercrime.
9 Theft of information is now big business.
10 Cyber criminals trafficking stolen information
11 employ a sophisticated division of labor that
12 spans the globe. The synergy between rapid
13 technological advancement and enormous
14 financial gain has resulted in an explosion in
15 cybercrime since the Commission last visited
16 this issue in 2003.

17 As Senator Leahy noted when the
18 Senate passed the ID Theft Act, the FTC
19 reported that identity theft was the fastest-
20 growing crime in 2008, affecting 10 million
21 Americans. Indeed, Consumer Reports recently
22 reported the United States experiences roughly
23 30 percent of all malicious cyber activity in

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1 the world and that Americans face a one-in-
2 four chance of becoming a victim of
3 cybercrime.

4 The ID Theft Act was passed in
5 response to this changing landscape. Seeking
6 to provide more effective prosecution of
7 identity theft and cybercrime offenses, the
8 Act directed the Sentencing Commission to
9 amend the guideline for these crimes "in order
10 to reflect the intent of Congress that such
11 penalties be increased in comparison to those
12 currently provided."

13 With that congressional intent in
14 mind, I would now like to turn to several of
15 the Commission's proposals that are of
16 particular, though not exclusive, interest to
17 the Department of Justice. First, the
18 Department of Justice strongly supports the
19 Commission's January proposal to amend
20 Application Note 8(b) to Section 2(b)1.1,
21 which provides that in a scheme involving
22 computers "the use of any software or
23 technology to conceal the identity or

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1 geographic location of the perpetrator
2 ordinarily indicates sophisticated means."

3 As I noted in my testimony last
4 November and in my opening today, there has
5 been a significant rise in the use of proxy
6 computers by cyber criminals to hide their
7 identities and evade prosecution. The
8 Commission's proposal uses technology-neutral
9 language to clarify that the use of proxies
10 should normally qualify as a sophisticated
11 means, thereby providing a more effective
12 deterrent to this conduct and encouraging
13 uniform sentencing treatment among all the
14 districts.

15 Next, I'd like to address the
16 Commission's response to the ID Theft Act's
17 concern over whether the guidelines adequately
18 address the loss resulting from the theft of
19 two specific types of information: first,
20 information that the victim retains but which
21 is copied by a defendant; and, second,
22 information that constitutes a trade secret or
23 other proprietary information. Of the two

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1 options put forth by the Commission for
2 comment, the Department strongly supports
3 option number two and not option one. First,
4 option two would amend Application Note 3(C)
5 to permit courts to consider the fair market
6 value of information where the information is
7 copied and where the owner is not, in fact,
8 deprived of its use.

9 Currently, the application note
10 refers only to property "taken or destroyed,"
11 thus leaving ambiguous whether the fair market
12 value of information that is merely copied may
13 be used to calculate loss. It's important to
14 remove this ambiguity because the theft of
15 information usually does involve copying of
16 the information, and its fair market value is
17 an appropriate measure of the seriousness of
18 the offense regardless of whether the owner is
19 actually deprived of its use or not.

20 Option two is also preferable
21 because its application is not limited only to
22 Section 1030 offenses, like option one is, but
23 rather applies to a broader cross-section of

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1 offenses and, in particular, trade secret
2 cases prosecuted under 18 USC Sections 1831
3 and 1832. Finally, option two is the better
4 of the two options because it gives courts
5 greater flexibility in calculating loss for
6 offenses involving the theft of information.
7 Whereas option one is limited to considering
8 only the reduction in value to the proprietary
9 information, option two permits courts to
10 consider fair market value, the cost of
11 development or the diminution in value to the
12 information that resulted from the offense.
13 This more flexible approach is also more in
14 line with existing precedent, as courts have
15 already used fair market value and development
16 costs when estimating loss in theft of
17 information cases.

18 I would next like to turn to the
19 Commission's request for comment on whether a
20 defendant's intent to cause damage and intent
21 to obtain personal information should be
22 disaggregated and considered separately from
23 other factors in Section 2(b)1.1, Subsection

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1 (b)15. We think they should. As it currently
2 is structured, Subsection (b)15 can result in
3 strikingly similar sentences for dissimilar
4 conduct. For instance, a hacker with the
5 intent to obtain information from an
6 individual's home computer would receive the
7 exact same two-level enhancement as one who
8 steals that information by hacking into a
9 computer that is part of a critical
10 infrastructure. Similarly, someone who
11 intentionally damages a military computer
12 would receive the same four-level increase as
13 one who damages a single home computer. And
14 an individual who accidentally causes a
15 substantial disruption to a critical
16 infrastructure computer receives the same six-
17 level enhancement as one who intentionally
18 does so.

19 The failure to account for these
20 differences in offense severity and
21 culpability frustrates the goal of
22 proportional and fair punishment. The
23 Department believes that this problem can be

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1 and should be fixed by simply separating the
2 factors in Section 2(b)1.1 (b)15 and allowing
3 them to apply independently and cumulatively
4 as the offense conduct dictates. Let me also
5 be clear, however, the Department does not
6 believe that the scope of Section 2(b)1.1
7 (b)15 should be expanded to apply to crimes
8 other than Section 1030 offenses.

9 Finally, I would like to respond
10 to the Commission's request for comment on
11 whether aggravated offense conduct involving
12 the disclosure of personal information is
13 adequately addressed by the guidelines. The
14 Department believes that the disclosure of
15 private information to the public almost
16 always increases the significance of the
17 original privacy invasion. As I hope my
18 testimony last November made clear, illegally
19 copying the medical records of Tammy Wynette
20 for one's personal interest without sharing
21 that information with anyone else is
22 qualitatively different than copying those
23 same records and selling them to a tabloid for

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1 national publication or posting those medical
2 records on the internet for all to see.

3 Accordingly, the Department
4 strongly supports adoption of a proposal that
5 would provide a two-level enhancement for
6 disclosures of personal information which the
7 defendant knew, intended, or had reason to
8 believe would cause a risk of substantial non-
9 monetary harm. For purposes of making this
10 determination, we believe the definition of
11 personal information in Application Note 13(a)
12 is sufficient.

13 This concludes my prepared
14 remarks. Thank you again for inviting the
15 Department to testify about these important
16 issues, and we remain ready to assist you in
17 any way going forward. Thank you.

18 ACTING CHAIR HINOJOSA: Thank you,
19 Mr. DuBose. Mr. Handy, sir?

20 MR. HANDY: Good afternoon,
21 everyone, Committee. It's a pleasure to be
22 here, first of all. It's an honor to be here
23 representing the Identity Theft Resource

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1 Center, first of all. And I just want to --
2 we're going to focus, for the most part, on
3 the scenarios, scenario A and scenario B.
4 Basically, scenario A was that the hacker
5 steals personal information from a computer
6 just because they can but has no intent on
7 using it. At that point, no one suffers a
8 loss. That's scenario A.

9 Scenario B is that the hacker
10 steals personal information from a computer
11 with the intent of selling or using it to
12 steal identities. Businesses suffer at a
13 loss, ID victims suffer a loss.

14 The question that was proposed for
15 us is should these be the same, or should they
16 be different? Our response is that these
17 should be the same, and this is the reason why
18 they should be the same, in our estimation.

19 Businesses must report all breach
20 notifications. Forty-four of the states have
21 breach notification laws, as most of us
22 probably know. And because of that, if
23 someone wants to breach any network that will

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1 be probably reported, has to be reported,
2 obviously, and exposures that have to be
3 reported. In that particular case, there is
4 a victim in that case. The victim is the
5 business. Even if nothing happens and, say,
6 supposedly no one's identity is breached,
7 there is still an issue because the
8 businesses, at that point, have to notify
9 everyone.

10 Now, let's take the VA situation a
11 couple of years ago where 26.5 million
12 people's identities were supposedly exposed
13 and you had to notify all those people. Just
14 think about the postage alone, how much it
15 costs just to send the postage to notify these
16 folks that they may have been breached and the
17 envelopes and so on and so on. Just looking
18 at the stamps alone, it's over \$10 million if
19 you add it up, but, yet, we don't have a
20 victim supposedly here in that situation.

21 So we beg to differ that there is
22 a victim in that particular situation.
23 There's all sort of business costs. Each

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1 record statistically, if you look at some of
2 the statistics, cost anywhere from \$182 to
3 \$128 to rectify if someone is breached.

4 Also, if you look at it, in a lot
5 of cases any identity theft worth its salt, in
6 a lot of cases they have Social Security
7 numbers, are not going to use them initially,
8 so it's going to appear that there is no
9 theft, obviously, at that point. But they're
10 going to wait until after the credit
11 monitoring services are given out, which is
12 another expense that businesses have to incur.
13 There's attorney fees, of course. There's
14 accounting issues. A lot of background costs
15 that we don't really associate sometimes with
16 breaches will come up for the businesses. So
17 this is very costly, especially in this day in
18 time of economics and the economy. We don't
19 want the businesses having to pay out these
20 kind of expenses unnecessarily.

21 Therefore, that's why we want both
22 of these measures, both of these sentences
23 should be the same in that particular case.

1 And they need to be within the enforcement
2 within the sentencing. It's just not enough
3 just to have a high sentence, but you also
4 need to enforce it in order for it to be
5 effective, in our viewpoint. But that's what
6 we are recommending.

7 Again, there's also a victim
8 potentially involved in this, as well. So
9 there's always going to be a business element
10 that's going to be a cost factor, but if there
11 is a breach and there it is exposure, and in
12 a lot of cases they're starting to come up to
13 be exposures. Look at the TJ Maxx situation
14 that came out. There were exposures there
15 that they ended up finding people actually
16 using those card datas.

17 Also, we have the criminals are
18 getting smarter, obviously. We all know that.
19 But the thing that's really scary is that
20 people are actually looking at the card
21 system, such as Heartland. Now, I'm sure some
22 of us in this room, I'm included, received a
23 letter about Heartland and that I could have

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1 potentially been one of those 560,000 people
2 that has been exposed. And I'm always getting
3 hit by these things for some reason. I never
4 win the lottery, I never win the raffles.
5 Even in my little league son's team I never
6 win those lottos, I never win those raffles.
7 I don't know why. But I always get hit with
8 these things.

9 So a lot of people are getting hit
10 with these things all the time, so we just
11 need to address it. And that's why we just
12 can't take this lightly. People need to think
13 twice before breaking into a network.

14 Now, let's look at the victim side
15 of it because we deal with the victims,
16 obviously, at the Identity Theft Resource
17 Center. And Nicole, who was supposed to be
18 here today but she, unfortunately, is not
19 feeling well, she's been dealing with identity
20 theft for eight years. I don't know if some
21 of you know her or not, eight or ten years
22 trying to fix the problem. And when her
23 imposter was caught, they still continued to

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1 hurt her even while in jail, even while on
2 probation because the sentencing wasn't really
3 anything that really bothered the person. So
4 we're really concerned with the sentencing
5 piece of this and make sure that people need
6 to think twice before they commit this sort of
7 crime because it will go far deeper than no
8 one getting hurt.

9 When I looked at this initially,
10 this scenario reminded me of the old middle
11 school science class project that you hear
12 sometimes where if the tree falls in the
13 forest no one hears it, no one is there, it
14 doesn't make a sound. In this case, if
15 someone breaks into a network but no harm is
16 done supposedly, who's your victim is the
17 question. And in this case, there is a
18 victim, and that is the business, at least;
19 and there may be even some other consumer
20 victims, as well, to address.

21 We also are concerned about
22 vigilante behavior out there where people are
23 going out and breaking into systems just to

1 prove that they can. And we still think
2 that's dangerous because, as I just mentioned
3 before, there's so many business costs that
4 kick in for the business when they have to
5 notify people, so much that's going to go into
6 this that we just want to make sure that that
7 is accounted for in that first scenario, that
8 there will be some costs, even if you don't
9 hear anything. And not to mention, we haven't
10 gotten to the point yet where we really know
11 what happens three or four years down the road
12 after all the prevention measures, after
13 people get lax again with prevention. What's
14 really happening out there with the criminals?

15 I've done some research on some
16 prospective identities of criminals, and they
17 hold that information, obviously, for long
18 periods of time because they know if they do
19 it right away it won't help. If you have a
20 Social Security number, you know it's better
21 to hold it because everyone is looking at
22 their credit monitoring and other materials.
23 Now, if you have a credit card, obviously you

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1 want to strike right away because that is a
2 limited function.

3 Bottom line is that both these
4 sentences should be the same. And because
5 these sentences will probably be complicated
6 anyway, there should be added measures to some
7 of the more severe cases. But I can't
8 underestimate, you know, I have a lot of
9 statistics to give you that I can give you
10 more, and you'll hear statistics the rest of
11 the day, but the thing that we know the most
12 is the victims. We hear the victims everyday,
13 and those victims' voices speak loud and clear
14 that this is a big problem that we all need to
15 address.

16 I'd like to thank everyone for
17 their time, and it's much appreciated. And
18 we'll answer questions later. Thank you very
19 much.

20 ACTING CHAIR HINOJOSA: Thank you,
21 Mr. Handy. Ms. Coffin?

22 MS. COFFIN: Judge Hinojosa and
23 members of the Commission, thank you very much

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1 for the opportunity to testify on behalf of
2 the Federal Public and Community Defenders.
3 I submitted lengthy written testimony
4 addressing in some detail a number of issues
5 relating to Congress' directive in Section 209
6 of the Identity Theft Enforcement and
7 Restitution Act of 2008. The Defenders firmly
8 believe that the guidelines are adequate and,
9 in some cases, greater than necessary for
10 offenses involving computers and identity
11 theft and that the Commission should not
12 increase punishment.

13 I would like to focus my comments
14 today on a couple of key areas that we believe
15 deserve special attention as the Commission
16 moves forward in responding to this directive.
17 First and perhaps most important is the
18 question of deterrence. The Commission has
19 proposed a number of changes to the
20 guidelines, each of which will have the effect
21 of increasing the recommended punishment for
22 offenses involving computers and the misuse of
23 identifying information. The Department of

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1 Justice, by and large, supports these
2 proposals and it sounds like has added a few
3 of its own on the apparent theory that
4 guideline ranges are not high enough. But no
5 one seems to be addressing, I mean really
6 addressing the fundamental aim of Congress'
7 directive, which is presumably why we're here
8 today.

9 Congress directed the Commission
10 to study the extent to which the guidelines
11 may or may not account for 13 specified
12 factors in the context of five statutes and
13 then in determining the appropriate guideline
14 range for these offenses to "create an
15 effective deterrent to computer crime and the
16 theft or misuse of personally-identifying
17 information." Thus, the very first question
18 that should be asked and answered with respect
19 to any proposed change is whether there is any
20 evidence that the change will make the
21 guideline a more effective deterrent. But no
22 one seems to be asking that question, let
23 alone answering it.

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1 We have pointed to substantial
2 evidence that increasing guideline ranges
3 would not be an effective deterrent to these
4 offenses. It is worth noting that the
5 original commission explicitly stated that it
6 turned to past practice because, quote, those
7 who subscribe to a philosophy of crime control
8 may acknowledge the lack of sufficient data
9 might make it difficult to determine exactly
10 the punishment that will best prevent that
11 crime. Since that time, the Commission has
12 never identified any evidence that might form
13 the basis for setting or increasing penalty
14 levels to better deter crime. In fact,
15 currently empirical research confirms that it
16 is the certainty of punishment, not its
17 severity, that deters crime.

18 For white collar offenders in
19 particular, the research shows no difference
20 in deterrence even between probation and
21 prison. Further, Commission data indicate
22 that the offenders to whom this directive is
23 aimed present a low risk of committing future

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1 crimes. Increasing punishment is, therefore,
2 not necessary to prevent future crimes of
3 these defendants.

4 We recognize that computer crimes
5 and identity theft are a problem and that
6 there may be challenges to law enforcement and
7 prevention, and we understand that many
8 believe that increasing punishment will deter
9 others from committing crimes. But the
10 Commission's mandate is not to make law
11 enforcement easier or to act on beliefs that
12 are unfounded by empirical research.

13 Congress created the Commission to
14 do what it cannot: to act as an independent
15 expert body to gather evidence and data and to
16 establish sentencing practices that will
17 reflect, to the extent practicable,
18 advancement and knowledge of human behavior as
19 it relates to the criminal justice process.
20 This is the Commission's primary organic
21 purpose.

22 Because the evidence indicates
23 that increasing punishment will not create an

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1 effective deterrent, the Commission should not
2 act on the erroneous assumption that it will.
3 This would be unsound policy. Instead, the
4 Commission should explain to Congress that
5 increasing punishment will not deter these
6 crimes and that their guideline ranges already
7 adequately take the 13 factors into account.
8 That's what the Commission was created to do,
9 and that's what the evidence supports.

10 The second large point I would
11 like to make is that the proposed amendments
12 would add complexity to the guidelines. As
13 the Commission recognizes, the guidelines are
14 not intended to capture every possible
15 permutation imaginable and only when the data
16 permits should it conclude that a factor is
17 not accurately accounted for. We are not
18 aware of any data that would support these
19 amendments. The Commission has announced a
20 long-term goal of simplifying the guidelines,
21 and these proposed amendments stray far from
22 that path.

23 Turning now to a few of the

1 specific factors, because I won't be able to
2 address them all, is, first, I would like to
3 address the treatment of victims in Section
4 2(b)1.1 and the question whether individuals
5 whose privacy has been violated or who suffer
6 some other non-monetary harm that cannot be
7 measured in terms of money should be treated
8 as victims or otherwise accounted for under
9 that guideline because, if they are so
10 treated, the guideline ranges for some,
11 perhaps many, will increase. We oppose such
12 a change.

13 Let me emphasize at the outset
14 that we do not mean to suggest that
15 individuals who commit computer crimes or
16 identity theft should not be punished or that
17 there's never a case involving circumstances
18 that are particularly egregious in regard to
19 non-monetary harm. Rather, we have seen no
20 data indicating that judges frequently impose
21 above-guideline sentences on the basis of
22 privacy violations or in order to impose
23 additional punishment for harms that cannot be

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1 measured in terms of money. And it's not
2 because courts don't have the tools to do
3 that. Application Note 19 invites upper
4 departure if the offense caused or risked
5 substantial non-monetary harm, and courts can,
6 otherwise, vary upward when appropriate. For
7 this reason alone the Commission should not
8 act to expand the definition of victim or
9 create a role that would increase punishment
10 based on a new measure expressed in terms
11 inevitably subject to challenge and litigation
12 and that would not advance the purpose of the
13 directive.

14 We, therefore, oppose any
15 amendment that would count as a victim or in
16 some other way provide for increased
17 punishment [for] any individual who
18 experiences lost time, such as time to restore
19 credit. Victims of crime typically spend time
20 dealing with the crime and its harms. That's
21 why it's a crime. That people spend time
22 resolving problems is intrinsic to the
23 offense. It does not aggravate it.

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1 In fact, I can personally report
2 to you that at the very moment that I was in
3 the final stages of preparing my testimony for
4 this hearing some unknown person or entity
5 used my bank check card number and my billing
6 address to purchase pornography on the
7 internet. It wasn't me, it was fraud. It
8 happened right when I was finishing this, but
9 when I saw the charge on my checking account
10 statement I made a few calls and got the
11 charge canceled and a credit was issued. It
12 took about 15 minutes, and I will not suffer
13 any monetary loss. But should my lost time of
14 15 minutes really translate into increased
15 punishment for the defendant? And what would
16 be the measure? And how would a judge
17 evaluate the reasonableness of the time I or
18 any other person spent?

19 Part of my 15 minutes was spent
20 interrogating my teenage son to make sure he
21 was not the criminal. And what purpose of
22 sentencing over and above prosecution in the
23 existing guideline ranges served by counting

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1 me as a victim?

2 The Commission has not said
3 exactly how it might count persons who were
4 fully reimbursed for their monetary loss but
5 who spent time resolving problems, but I would
6 say the rule that counts me as a victim runs
7 the risk of effectively counting every person
8 whose identifying information was obtained or
9 used. This could be just a few or it could be
10 millions. And we, as defense counsel, are
11 obligated to challenge the veracity of these
12 claims, potentially turning sentencing
13 proceedings into extensive mini-trials where
14 I would be cross-examined on my 15 minutes and
15 maybe about the internet habits of my teenage
16 son. Thank you.

17 I would also like just to take a
18 moment to address the proposed amendment to
19 the definition of sophisticated means in
20 Section 2(b)1.1. I'm not [a] techie by any
21 stretch of the imagination. In fact, I expect
22 others speaking after me will be far better
23 able to explain the various uses and the

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1 prevalence of proxy computers and other types
2 of technology. But I know enough, being a
3 mother of that same teenage son who's in
4 college and whose nickname at our house is "IT
5 guy," to say that the proposed amendment to
6 the sophisticated means enhancement under
7 2(b)1.1 will absolutely sweep in conduct that
8 is not especially complex or especially
9 intricate. The Department would have us
10 believe that any technology or software to
11 hide identity or location meets that test, and
12 it is simply not true. The Commission should
13 resist the call to view advancing technology
14 in the execution or concealment of an offense
15 as a necessary indicator of increased
16 seriousness or increased culpability.

17 As one researcher put it in a
18 report on identity theft submitted to the
19 Department of Justice, the majority of
20 offenders engaged in these types of fraud use
21 relatively tried and true old scams simply
22 adapted to new technologies. And, again,
23 we're not aware of data showing that courts

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1 are unable to apply the enhancement in the
2 appropriate case.

3 But perhaps more troublesome, by
4 adopting the proposed amendment, the
5 Commission would create a wholesale
6 presumption in conflict with actual evidence.
7 It would effectively relieve the government of
8 proving the purportedly aggravating fact in
9 any given case and shift the burden to the
10 defendant to prove that the enhancement should
11 not be followed in this case because it
12 represents unsound policy. This is a reversal
13 of what citizens expect when a system deprives
14 us of our individual liberty.

15 I will end my comments with a
16 general observation. In the advisory
17 sentencing scheme repeatedly and insistently
18 described by the Supreme Court, a change to a
19 guideline that has [been] influenced or
20 directed by Congress without an independent
21 policy reason that is based on the
22 Commission's own institutional expertise is no
23 longer a defensible approach to developing

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1 sentencing policy. District courts are
2 increasingly recognizing their power and,
3 indeed, their obligation to reject guidelines
4 that are not empirically based. Without
5 empirical evidence to support the proposed
6 amendments, courts will disregard them. Thank
7 you very much.

8 ACTING CHAIR HINOJOSA: Mr.
9 Weafer?

10 MR. WEAFFER: Mr. Chairman, members
11 of the Commission, thank you for inviting me
12 here to testify on Identity Theft Enforcement
13 and Restitution Act of 2008. Let me explain
14 my background, my view of what I see in the
15 internet and the cyber landscape and then talk
16 a little bit about what happened in 2008 and
17 the last few years.

18 So Symantec, as a company,
19 provides products and solutions to all the way
20 from home users to large enterprises to
21 government entities. We see, we have a
22 sensors network around the world of about
23 40,000 sensors in about 180 countries. So it

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1 gives us a good view of the cyber threat
2 landscape and how it's evolved throughout the
3 many years. My own personal experience is
4 about 15 years watching the evolution of the
5 cyber threats from the old teenage hackers all
6 the way to the open-source communities'
7 evolution to the very sophisticated criminal
8 organizations that we see today running many
9 of these scams.

10 So in terms of cyber crime and how
11 we view it, we have a very broad definition
12 ourselves. We look at it and say that it's
13 defined as any act which are committed using
14 a computer software or hardware. Now, we look
15 at two different types. We look at class one,
16 which is really a single act, typically a
17 virus infection, a fishing attack or removal,
18 so the actual act typically is done in one
19 stage. Of course, the remediation, recovery
20 of your identity, could take hours, minutes,
21 years in some cases. And the second is type
22 two, which is really things like stalking,
23 blackmailing, continuous aggravators, types of

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1 actions upon the victim or person.

2 We look at the cyber threat
3 landscape, we published in a report looking at
4 the evolution over the last couple of years,
5 certainly starting about the late 90s onwards.
6 And some of the things we've seen will look as
7 if the volume and sophistication of threats we
8 see out there has significantly increased even
9 over the last 12 months. Sixty percent of all
10 viruses came out in the last 12 months alone.
11 So if you look and think of an escalation
12 chart, the vast majority of what we see today
13 actually has come up in the most recent past.

14 Now, why is that? There's
15 multiple reasons: the modularity of the code;
16 the open-source communities; the cheapness;
17 the availability; the communities, the web
18 forums, the online IRC channels which are
19 allowing people to get together, pick up these
20 tools and use them. And, of course, there's
21 the botnets which are frequently used as the
22 engines to deliver it around to end users.

23 We also see that while the

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1 majority of fishing or fraud attacks are
2 targeted towards financial information,
3 increasingly we're also seeing that social
4 networking sites are being targeted because
5 they're trusted communities. They're trusted
6 communities towards business professionals or
7 for teenagers or groups because attackers like
8 to be able to segment their market, much like
9 any business, and they like to know who
10 they're going after.

11 We also see the rise in botnets.
12 In fact, we can see, roughly, about [a] one-
13 third rise in botnet activity in 2008. And,
14 again, the botnets are kind of the engine we
15 constantly talk about. It generates a spam,
16 the fishing, the solicitations that the user
17 gets, which they can click on or go to web
18 sites, which, in turn, downloads to malware,
19 which, in turn, drives them towards other
20 crimes. So, again, these are areas where we
21 see a rapid increase in both volume, as well
22 as sophistication.

23 Last year, we did a report. We

1 looked at the underground economy. We decided
2 to look and see who's out there, what type of
3 services, what were they advertising, where
4 they are located, and what type of communities
5 are there. And as we went in there, we
6 noticed that -- and this was done in a report,
7 which is about a one-year period between July
8 2007 and end of June 2008, so a 12-month
9 period. And we went out and we started
10 looking at communities: what were they
11 advertising, who were the top advertisers, how
12 much were they trying to make, what was the
13 lowest and highest range in terms of
14 advertised goods. And we found during that
15 time, this was only a snapshot of what was out
16 there because, again, we're not seeing
17 everything, the total value of the advertised
18 goods and services was about \$276 million.

19 Now, it ranges, of course. Not
20 every goods and service is going to be bought
21 and sold. Not everything, of course, will be
22 trustworthy. If you actually delivered all
23 those identities and all those credit cards

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1 and all those bank accounts, the total value
2 is closer to \$6 to \$7 billion of what we were
3 looking at.

4 What we did find is that, even
5 though it was kind of an open source, there
6 were very organized groups. There was strong
7 evidence of organized crime and other entities
8 being involved in terms of organizing these
9 groups. There are definitely individuals who
10 are involved, loosely-linked individuals
11 coming in. And they're playing portions of
12 this cybercrime landscape or life cycle either
13 because they're getting involved in mules or
14 money laundering or creation of tools and
15 services. So there's a whole group of people
16 who have been kind of brought into this area,
17 but some are very organized and very targeted
18 of what they're looking for from all the way
19 to the very top end, which are targeting
20 towards governments or industries with these
21 so-called zero-day attacks, which are unpatch
22 attacks.

23 We also looked at who were the top

1 advertisers. In other words, were these just
2 randomly distributed across multiple people?
3 And we found that, in general, the top
4 advertisers constituted the bulk of what we
5 saw in terms of value and the amount of volume
6 of advertising that was going on there.

7 So these people generated top
8 advertisers about 70,000 distinct messages and
9 advertisements with about 44 million messages
10 going out. So think of messages being relay
11 chat channels, e-mail channels advertising
12 their business. So 44 million times they went
13 out there and about 70,000 advertisements.
14 And the total value of those goods was about
15 \$80 million for those top ten alone.

16 So it gives you an idea of how
17 it's consolidated into relatively small groups
18 of people first. And, of course, the types of
19 goods and services run the gauntlet from, of
20 course, bank accounts, credit card
21 information, but also tools, services, as well
22 as things you wouldn't normally think of, such
23 as travel services, other things which could

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1 be bartered and traded for knowledge or money.

2 Now, we believe that we've arrived
3 at an inflection point where the amount of bad
4 code or malicious code actually is out
5 producing the amount of good code that we see
6 on a daily basis. So when we look at users'
7 machines, we find that the vast majority of
8 new code coming on to unprotected systems is
9 actually malware, malicious code. So we do
10 need to make sure we're very clear in terms of
11 our laws and our sentencing towards this.

12 What we find, certainly on a
13 global basis, is that, today, we still find
14 too many countries where their definition of
15 cybercrime, where the laws associated with
16 cybercrime are ambiguous or non-existent, and
17 that's certainly a problem. Certainly, where
18 we see many, many of these players acting
19 around the world, consistency in laws and
20 having a model so that other countries can
21 look at is very important.

22 It's also important that we can
23 have laws which distinguish around behaviors

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1 and intent, rather than technologies. And we
2 do agree with this, which is technologies can
3 be used for good and bad. Certainly, some of
4 the technologies mentioned here are used in
5 common applications, so you've got to be very
6 careful what you're looking at, what the
7 behaviors and intent as you're looking at how
8 serious is the crime.

9 We definitely want to make sure
10 that we're still not relying on terrestrial
11 laws or ones which don't take into account the
12 virtuality of the internet and the ages coming
13 with this. We do think we count these with
14 limited deterrence, and, certainly, we're
15 seeing too many users which are being just
16 onslaught with new attacks coming on a daily
17 basis. So we do need to send out a strong
18 message there.

19 Self protection still remains the
20 first and last line of defense for most
21 people. Go out and put on credit monitoring,
22 go out and put on security software. So in
23 reality, they're not feeling they're getting

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1 a lot of support out there.

2 We do believe that a global model
3 is very important for us and that we need to
4 make sure that what we do here can be lifted
5 into other countries or used as models, so
6 they can also get the benefit from this
7 learning. Thank you.

8 ACTING CHAIR HINOJOSA: Thank you,
9 sir. Mr. Schoen?

10 MR. SCHOEN: I'm still waiting for
11 my microphone.

12 MR. WEAFFER: Keep the red button
13 up.

14 MR. SCHOEN: Thank you. Chairman
15 Hinojosa and members of the Commission, thank
16 you for the opportunity to testify today on
17 behalf of the Electronic Frontier Foundation.
18 I'm here, in particular, to testify about the
19 matter of the treatment of proxy servers and
20 similar technologies as sophisticated means by
21 the sentencing guidelines.

22 At the Electronic Frontier
23 Foundation, my title is Staff Technologist,

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1 and I've held this position for seven years.
2 I'm a computer programmer and not a lawyer,
3 and I do research on civil liberties
4 implications of technologies, and I try to
5 educate the public about the intersection of
6 technology and individual rights.

7 So this year the Commission has
8 been looking at computer proxies and similar
9 technology, as several previous witnesses have
10 mentioned. And we now have specific language.
11 The Commission has proposed this text, "In a
12 scheme involving computers, using any
13 technology or software to conceal the identity
14 or geographic location of the perpetrator
15 ordinarily indicates sophisticated means."

16 As I'll explain, EFF opposes this
17 amendment. In particular, we oppose this
18 amendment because we think that it's over-
19 broad and that it will sweep in a wide variety
20 of ordinary and non-sophisticated conduct and
21 technology.

22 These technologies that may have
23 the effect of concealing the identity or

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1 geographic location of an individual are
2 actually used routinely by a wide range of
3 people for a wide variety of purposes, most,
4 though not all of which, are unconnected to
5 criminality or criminal activity.

6 Technologies like computer proxies
7 may have the effect of concealing someone's
8 identity or location, but they don't
9 necessarily require technical sophistication
10 on the part of the user or indicate any
11 unusual expertise. They don't necessarily
12 contribute to avoiding detection, and they
13 don't necessarily indicate pre-meditation or
14 a commitment to a course of criminal conduct,
15 which might all be possible rationales for
16 imposing additional incarceration for this
17 behavior. Therefore, there's no reason to
18 consider the use of proxies and similar
19 technologies to be sophisticated as a general
20 rule or to create a general presumption that
21 the use of this technology is a sophisticated
22 activity. We do agree that the use of proxies
23 and similar technology might sometimes

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1 indicate sophisticated means, but we think
2 this is a case-by-case determination that can
3 best be made by a court.

4 So let me just talk briefly about
5 what a proxy is. And then I'll talk briefly
6 about a few reasons that people may use
7 proxies and who some of the people are who are
8 using proxies.

9 So we can make finer-grained
10 technical distinctions. And last year I was
11 a co-author of a book called "How to Bypass
12 Internet Censorship," which talks about one
13 application of computer proxies, particularly
14 in countries that have technical censorship of
15 the internet where the government actually
16 blocks certain materials and actually prevents
17 people from going to certain sites. And in
18 that book, we made finer-grained distinctions
19 based on the technology underlying proxies.
20 I think for our purposes today those
21 distinctions are not necessary. We can say
22 simply that proxies are computers or software
23 that act on behalf of someone else, on behalf

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1 of another computer, or on behalf of another
2 program, and they carry out a request.

3 So instead of communicating
4 directly, one computer can communicate via a
5 proxy. It sends a request to the proxy and
6 says, "Please do the following thing for me."
7 If the proxy has been configured to comply and
8 the user is authorized to use that proxy, then
9 the proxy will make the request on behalf of
10 the original user, on behalf of the original
11 computer, and then send back the results.

12 We made the comparison to the
13 children's game of telephone where children in
14 a line whisper something to each other and
15 then whisper a response back. Computers are
16 a little bit more precise and a little bit
17 more accurate than school children that way,
18 but the structure is similar. One person is
19 passing on a message, one computer is passing
20 on a message for someone else.

21 And the most common example of
22 this would be for web browsing where we have
23 proxies that download web pages on behalf of

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1 someone who is using the web. One consequence
2 of this is that the end user's computer and
3 the web server that hosts the web page that
4 they're interested in do not communicate
5 directly because the entire communication is
6 mediated by that proxy. So the other party to
7 the communication sees the request, sees the
8 activity as though it came from the proxy,
9 rather than from the original user's computer.
10 At the very least, this would create an extra
11 step in identifying the identity or location
12 of the user. Now, the proxy may or may not
13 have been designed to have that effect, but,
14 typically, it would have that effect because
15 it is another computer that's in the path,
16 another computer that's part of that process.
17 And the reasons that people might use these
18 technologies could be very various.

19 We've dealt with proxies quite a
20 bit. As I mentioned, I was a co-author of a
21 book about bypassing internet censorship. In
22 countries like Iran and Saudi Arabia and China
23 where governments use technical means to

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1 control access to certain information, people
2 often use proxies to circumvent these
3 restrictions. And that's one application, and
4 that's an application that we discuss quite a
5 bit, and we discussed several technologies
6 that can be used for that purpose.

7 We also previously funded the
8 development of a project called Tor which is
9 probably the most popular public proxy network
10 in the world. It's a privacy-enhancing
11 technology. I'm happy that the leader of the
12 Tor project, Roger Dingledine, is attending
13 this hearing today, and he said that he would
14 be happy to talk to any members of the
15 Commission or any staff who might like to
16 discuss that technology with him. And we're
17 still advising the Tor project on their
18 independent organization.

19 So I'd like to briefly look at
20 this question of whether proxies are
21 appropriately described as sophisticated and
22 whether the use of technology of this sort is
23 appropriately described as a sophisticated

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1 means under the sentencing guideline. So I
2 think the most important point to make in this
3 connection is that a user doesn't have to be
4 sophisticated in order to make use of a
5 sophisticated technology. In our modern
6 society, people use all sorts of things that
7 were a substantial engineering effort to
8 create like a car or like Microsoft Word,
9 which took engineers years and years of effort
10 to create, but they're often used by
11 teenagers. They're used, essentially, by
12 everyone in our modern society.

13 So we have this kind of one level
14 of disconnection between what was the
15 engineering work that went into making an
16 artifact and then what's the special skill,
17 what's the level of knowledge that the people
18 who are using it have. And I think it's clear
19 on reflection that people who are using
20 proxies generally are not very sophisticated.
21 This is an everyday technology. This is a
22 mainstream technology. This is a technology
23 that large numbers of people use without even

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1 being aware of it, without even knowing that
2 they're using a proxy in many cases.
3 And I have a few examples of that in my
4 prepared statement, and I'll try to get to a
5 few of them today.

6 Furthermore, proxies in general,
7 as far as technology goes, are not
8 particularly sophisticated. The concept of a
9 proxy, a computer that acts on behalf of
10 another computer, has been around for many
11 years, has been implemented many, many times
12 independently in a short time.

13 While I was preparing this
14 testimony, I decided to write a proxy myself
15 from scratch, and it took me five minutes and
16 15 lines of computer code, which is pretty
17 short as computer programs go. And it worked,
18 and I was able to browse the web through it.
19 I could have one computer over here sending
20 requests to my little proxy program, which
21 then repeated the request to the web server
22 that I was interested in accessing, and that
23 worked fine. So even from the engineering

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1 effort point of view, the proxy technologies
2 are not necessarily particularly complex.

3 There is kind of a continuum. The
4 Tor software that I mentioned earlier is quite
5 sophisticated. It was originally funded by
6 the Naval Research Laboratory. It involves
7 really Ph.D.-level research. But on the other
8 hand, some proxies are something that someone
9 could create in a few minutes just based on
10 the basic concept.

11 Nonetheless, Tor actually has over
12 100,000 regular users and a lot of evidence,
13 although most of it is necessarily anecdotal,
14 suggests that most of those users are not
15 sophisticated computer users. They're not
16 experts. They went to the Tor web site, they
17 followed some very simple steps that were very
18 straightforward, and then, like a car driver,
19 like someone writing a brief in Microsoft
20 Word, they were able to get the benefit of
21 this quite sophisticated technology without
22 having the expertise of their own. So Tor is
23 sophisticated technology, but its users

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1 generally are not sophisticated users.

2 So in the interest of time, I'd
3 just like to give three examples of reasons
4 that people may use proxies routinely that
5 don't necessarily reflect criminality or
6 criminal intent and where often the users may
7 not be aware that they're using proxies or, in
8 any case, have some entirely non-criminal
9 purpose for having done so. And in my
10 prepared statement, I have several other
11 examples.

12 One example is a corporate virtual
13 private network. So a lot of businesses set
14 up this technology called the VPN that will
15 allow someone who works for that corporation
16 to get remote access to the corporate network
17 when they're traveling or when they're at home
18 working from home instead of in the office.
19 And this is a secure encrypted technology that
20 produces the effect of making it as though the
21 end user's computer were inside the corporate
22 network, even though it's really somewhere
23 else. And then the user can get access to

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1 corporate resources. Often, they can actually
2 browse the internet and do other things
3 through that virtual private network. And,
4 again, the virtual private network acts much
5 like a proxy there. The communications are
6 all mediated through, routed through,
7 transmitted through that corporate network.

8 A lot of people have been issued
9 laptops by their employers that have this
10 technology already set up. They might not
11 even be aware of it. If they are aware of it,
12 it's typically one button that they have to
13 click and then, thanks to their corporate IT
14 department, all of their communications are
15 going through their employer's network. And
16 I think that the use of that technology would
17 be covered by the proposed amendment text as
18 written because, certainly, someone looking at
19 those communications would say, "Oh, they came
20 from this corporation," whereas, in fact, the
21 user who is ultimately responsible for them
22 was physically located somewhere else.

23 Another example is a library

1 proxy. So a lot of research libraries have
2 subscriptions to journals or services like
3 LexisNexis and commercial databases that are
4 limited to use by subscribers and by
5 subscribing institutions. Often, this
6 limitation is enforced by looking at which
7 computer network someone is coming from. So
8 the operator of LexisNexis or a journal would
9 say under this subscription this can only be
10 accessed from on campus. And so the library
11 then has the problem what if people want to
12 use it from off campus? And a very large
13 number of research universities have set up
14 proxies that can be used by any student at the
15 university, and it does conceal the location
16 or the identity of the user. It makes it look
17 as though they're on campus temporarily so
18 that they can use those resources that are
19 limited to subscription purposes.

20 Interestingly, I think that can be
21 so easy to set up that you could do it once
22 and then you could forget about it and you
23 could keep on using it. It's a very simple

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1 thing. And not only the computer science
2 majors use it, but also liberal arts and
3 humanities majors will use this to get access
4 to these academic resources from off campus.

5 And the final example would be the
6 use of proxies or virtual private networks to
7 protect individuals' privacy when they're
8 accessing the internet from, for example,
9 public networks that they don't trust. So one
10 example would be using a Wi-Fi network in a
11 café to access the internet from a laptop.

12 Now, an interesting fact about Wi-
13 Fi networks is that every other user on the
14 same Wi-Fi network can see all of the
15 communications that a person transmits. And
16 there's very simple, well, I don't know
17 whether I want to say whether that's
18 sophisticated means, but there is
19 straightforward, publically-available, freely-
20 available technology that would let people spy
21 on all of the communications of other Wi-Fi
22 users. And I've had this concern when I've
23 been in cafes or at conferences: is somebody

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1 sitting here with a laptop spying on my
2 communications? And a very common and an
3 increasingly common response to this is to use
4 virtual private networks and proxies.
5 Symantec is actually a well-known developer of
6 the virtual private networks that people may
7 use for this purpose so that their
8 communications are protected and can't be
9 intercepted by the other people on that
10 network. And so that's actually a use of
11 proxies and VPNs and the like that people make
12 to protect their privacy and protect
13 themselves against things like identity theft.
14 People will also use technology like Tor in
15 that situation.

16 And so, again, this is something
17 that they might set up once, and then they
18 say, "Okay, now I'm protected," and they
19 continue to use it on an ongoing basis. So
20 it's not necessarily a matter of getting up in
21 the morning and saying, "I'm going to figure
22 out how to use a proxy today." It could be
23 put into the computer's default settings and

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1 then take effect every time the person uses
2 the internet.

3 I think in the interest of time,
4 I'm going to stop there. I would refer the
5 Commission to my written statement which has
6 several other examples of reasons and
7 situations and purposes where people might use
8 proxies. I think the overall message is
9 proxies are a basic and widespread and
10 increasingly widespread part of our internet
11 infrastructure. They're used by a lot of
12 people for a lot of purposes everyday. They
13 can have applications that are criminal
14 applications. Criminals can use them.
15 Criminals can benefit from them. But the
16 majority of uses and the most typical uses are
17 non-criminal uses that are routine uses by
18 unsophisticated people.

19 So for those reasons, EFF opposes
20 a presumption that the use of technologies of
21 this sort would be considered sophisticated
22 means. Thank you very much.

23 ACTING CHAIR HINOJOSA: Thank you,

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1 Mr. Schoen. And I'll guess I'll start off
2 with the first question. Ms. Coffin, on
3 behalf of every person here who has ever dealt
4 with their credit card company or the power
5 company or the cable company, we congratulate
6 you on being able to get such quick results,
7 I have to say. Did you cancel the card or
8 what did --

9 MS. COFFIN: I did. It was a
10 phone call.

11 ACTING CHAIR HINOJOSA: It was one
12 phone call? You canceled the card. They
13 canceled the -- they didn't give you the 30-
14 day that everybody else gets or anything else?
15 I think we all should hire you. Obviously, if
16 it was 15 minutes, a sentencing court is going
17 to, if there is an allotment with regards to
18 your time, figure out what 15 minutes of your
19 time was as opposed to had it been over a 30-
20 day period or a 60-day period that you were
21 left in limbo with regards to your credit
22 card. And I assume that you had not used your
23 credit card to be in place with regards to any

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1 other payment where you had to call them and
2 cancel all the payments, as some of us do with
3 regards to automatic payment. And I assume
4 that was not affected by this card. So you
5 were lucky, and so my question is, let's say
6 it had been somebody else who didn't get the
7 luck of actually finding somebody within 15
8 minutes and [being] able to get [the card]
9 canceled immediately and the charges taken off
10 without going through the regular procedure.
11 It would not change your mind if somehow
12 somebody else was put through a lot more than
13 you were and that particular victim should be
14 treated exactly the same as you would be if it
15 only took you 15 minutes?

16 MS. COFFIN: It's not that my mind
17 needs to be changed. It's that I think that
18 the guideline already adequately accounts for
19 those unusual circumstances. In the written
20 testimony, I suggested that perhaps there
21 might be circumstances, the unusual
22 circumstances, if you go by the Federal Trade
23 Commission's report, that some ten percent of

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1 the 8 million people who have reported that
2 their identifying information has been
3 misused, that that would be an unusual group
4 of people and that if we do anything it should
5 be to sort of recognize that it's in the
6 egregious cases that a court might want to do
7 something different with the recommending
8 guideline --

9 ACTING CHAIR HINOJOSA: So I take
10 it you would not object to a departure
11 application note or something that would take
12 care of those cases or possibly an SOC that
13 would be applied in a smaller number of cases?

14 MS. COFFIN: If I had to choose, I
15 would choose the departure application,
16 obviously, because what happens I think is,
17 obviously, we're concerned with the adding
18 complexity to the guidelines when it's not
19 necessary because I think a judge, in a
20 situation where they're faced with someone, an
21 identifiable person who can come in and say
22 this completely upended my life and I was on
23 hold for many years, that's something a judge

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1 can take into account already. I'm not sure
2 that we even really need to do everything to
3 the guideline, but if you had to do something
4 we would prefer a departure provision.

5 ACTING CHAIR HINOJOSA: Who's got
6 -- Ms. Howell, let's start with you.

7 COMMISSIONER HOWELL: I have two
8 questions; and since the Chair started with
9 Ms. Coffin, I'll ask you this one, as well.
10 One of the things that you said quite strongly
11 and articulately is that in Section 209(a) of
12 the directive in the ID theft law, [] we were
13 supposed to focus on the 13 factors to create
14 an effective deterrent. But another part of
15 this directive specifically states that we are
16 supposed to reflect the intent of Congress
17 that such penalties be increased in comparison
18 to those currently provided by such
19 guidelines.

20 Now, it's taken from your comment
21 that we're supposed to ignore the specific
22 directive to increase the penalties compared
23 to those currently provided by the guidelines

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1 if we can't find empirical research to support
2 it. Is that the import of what you're saying
3 is that we should only look at empirical data
4 and forget the congressional explicit
5 directive to increase the penalties?

6 MS. COFFIN: Well, actually, what
7 I'm saying is that I understand that Congress
8 is sending the Commission somewhat mixed
9 signals in this directive. On the one hand,
10 you have a general inchoate statement from
11 Congress about its intent: that penalties
12 should be increased. On the other hand, you
13 have Congress giving you very specific
14 direction to study and do research on 13
15 factors, eight of which, by the way, the
16 Congress has already directed the Commission
17 to examine and it did. But what Congress is
18 saying is, ultimately, sending the message
19 that the Commission is being expected to act
20 as the independent body that does research.

21 And I also understand, of course,
22 that the Commission feels pressure to respond
23 to every little directive, and you've got two

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1 here that kind of go both ways. And so the
2 Commission sort of has a choice. What does it
3 do when it has these two forces coming at
4 them? And the question, of course, that has
5 to be asked and the judges will ask is: is the
6 guideline a reflection of your institutional
7 knowledge or is it just a reflection of a
8 congressional directive.

9 And of course, this is not a new
10 tension. This is something that the
11 Commission has been dealing with for a long
12 time. And I, personally, have done some
13 research on all of the directives, and I
14 understand that the Commission has in the past
15 not acted on directives and that's something
16 that can happen. And it can actually report
17 back to Congress and say, "We looked and we
18 did what you said and we decided that, in
19 order to actually satisfy your directive,
20 doing the job that we have been charged by you
21 to do, we cannot say that increasing penalties
22 will create an effective deterrent, and so
23 that's not what we're going to do."

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1 COMMISSIONER HOWELL: Usually, in
2 those circumstances, it's where the directive
3 has said review and, if appropriate, amend the
4 guidelines. And that's usually where we look
5 and we decide whether or not it's appropriate,
6 and we respond accordingly. That's a
7 different kind of directive than one that
8 specifically directs an increase in comparison
9 to those currently provided by such
10 guidelines. And it's for us to look at all
11 those different factors and decide which ones
12 we think, based on the factors and evaluation
13 of the empirical data, deserve an increase.

14 But this is a position of the
15 Federal Defender that goes far broader than
16 just this law and just this directive. And I
17 just wanted to be clear that it sounded as if
18 you were saying look only at the empirical
19 data and not at the specific explicit
20 statutory requirement that the Commission has
21 been given to increase some of the penalties
22 compared to current guidelines.

23 I want to turn for a second to Mr.

1 Schoen's comments about proxy servers. I have
2 to say, after reading the Department of
3 Justice's testimony and EFF's testimony on
4 proxy servers, I had to go back to our
5 original proposal and look at it more closely
6 because I hear from the Department of Justice
7 that it supports our enhancement on the
8 sophisticated means enhancement, in part,
9 because it will provide more consistency
10 across the country in terms of use of proxy
11 servers in connection with different computer
12 crimes. I hear from EFF you think that it's
13 also, EFF prefers a case-by-case approach.

14 What our proposal essentially says
15 is that, you know, in a scheme involving
16 computers using any technology or software to
17 conceal the identity or geographic location of
18 the perpetrator, it ordinarily indicates
19 sophisticated means. So it's actually not a
20 directive to the court that they must apply
21 this enhancement or consider it sophisticated
22 means if there are proxy servers used. And so
23 I was interested to hear whether -- so I sort

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1 of view this "ordinarily indicates" as not a
2 directive to the court but, in fact, you know,
3 a requirement that they're going to have to
4 look to see on a case-by-case basis whether or
5 not an effort to conceal the identity or
6 geographic location either through proxy
7 servers or some other means is an indication
8 of sophisticated means.

9 So from DOJ's perspective, do you
10 think that this language is a specific
11 directive to the court that [the] use of any
12 proxy server is one example of hiding identity
13 or location [and] is going to necessarily
14 trigger a sophisticated means enhancement, or
15 do you think it's still going to require a
16 case-by-case analysis of the actual means used
17 to commit the offense?

18 MR. DUBOSE: I think it would
19 still require a case-by-case analysis.
20 Obviously, ordinarily, I think the use of the
21 term "ordinarily" gives strong guidance to the
22 courts. And I'd also kind of reiterate
23 because, actually, I agreed with very much of

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1 what the Electronic Frontier Foundation said
2 because we agree that, you know, just use of
3 proxy servers in and of itself is not illegal.

4 COMMISSIONER HOWELL: As do I. I
5 agree with that, as well.

6 MR. DUBOSE: But in the context of
7 this guideline, the way it's written is when
8 you're using that server, after having been
9 convicted of a crime and it's being used as
10 part of a scheme in that crime to hide your
11 identity from law enforcement, that is when,
12 in our view, it's not that it is, in and of
13 itself, a technologically sophisticated
14 software. It may or may not be, depending on
15 who designed it or whatnot. It's not even
16 that the user of that software is necessarily
17 technologically-sophisticated but, rather,
18 that the use of that software in the context
19 of the scheme or to the fraud that's using the
20 computer is the type of action or behavior
21 that's intended to be covered by the guideline
22 itself, which right now 2(b)1.1 (b)9 says if
23 the defendant relocated or participated in

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1 relocating a fraudulent scheme to another
2 jurisdiction to evade law enforcement or
3 regulatory officials or a substantial part of
4 a fraudulent scheme was committed from outside
5 the U.S. or the offense otherwise involves
6 sophisticated means increase by two levels.

7 What we would assert is that,
8 first, as Mr. Weafer I think testified that,
9 you know, what we also have seen where there
10 are a lot of countries where the computer
11 crime laws [are] inadequate or they are non-
12 existent, and those very often are the
13 jurisdictions where criminals are using proxy
14 servers so that they'll bounce, when I first
15 encountered this eight years ago trying cases,
16 we referred to them as bounce servers or
17 bounce boxes, not proxy servers, but same
18 function different name which is if they would
19 route their electronic communications to a box
20 in Russia it would then be transmitted back to
21 maybe, you know, a target computer in the U.S.
22 When you are investigating as law enforcement,
23 it looks like it's coming back to Russia and,

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1 you know, our law enforcement relations with
2 Russia are improving but they're not that
3 good. And for the most part, that's a black
4 hole for us when it comes to getting law
5 enforcement cooperation.

6 And so, you know, from a law
7 enforcement perspective, that's the equivalent
8 of placing your telecommunication fraud
9 company in another country, if not more so,
10 because it not only makes it difficult, it
11 makes it virtually impossible to gain
12 attribution in that crime. And that's what we
13 think really falls within the intent of this
14 guideline as sophisticated means.

15 COMMISSIONER CARR: Let me ask
16 something. Mr. Schoen, part of the tone of
17 your comments almost made it sound like you
18 were concerned that we were criminalizing the
19 use of proxies on their own, when, in fact,
20 you already have to be involved in a crime and
21 then the question is whether or not the use of
22 a proxy to conceal the identity or location of
23 the person committing a crime would trigger

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1 the presumption I think would be fair in terms
2 of the language of the proposal here.

3 Are you troubled if someone who is
4 committing a crime is using a proxy for the
5 purpose of avoiding detection of the person or
6 the person's location? In other words, it has
7 to be both. The proxy is being used, and you
8 were giving examples where someone might
9 forget they're using a proxy or might not know
10 that they're using a proxy. But if the
11 purpose is to conceal the defendant or the
12 defendant's location, does it trouble you less
13 that that would have a presumption of being a
14 sophisticated means?

15 MR. SCHOEN: Well, I'm not sure
16 from the proposed text whether it's meant to
17 require a purpose or intent rule. It says the
18 use of technology to conceal, and I don't know
19 whether that's meant to be read as with the
20 intent to conceal or with the effect of
21 concealing.

22 COMMISSIONER CARR: Okay. I
23 assume that the first would trouble you less

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1 than the second?

2 MR. SCHOEN: Yes, I think that's
3 correct. If we're looking at it under the
4 lens of sophistication, I'm still troubled by
5 that lens in this case, simply given what I
6 know about proxies and my experience with
7 them, just thinking in terms of the
8 sophistication of a person or the complexity
9 of the acts that they have to do because, as
10 my written testimony explains, I think that
11 the acts that people have to do are not
12 particularly necessarily complex.

13 COMMISSIONER CARR: Okay. But
14 given the kinds of things we've sometimes used
15 as enhancements, just like using offshore bank
16 accounts, they don't necessarily have to be
17 unbelievably sophisticated or unbelievably
18 inconvenient in order to trigger an
19 enhancement.

20 MR. SCHOEN: So I think that,
21 within that context, the reason that I gave
22 several of these examples was to point out
23 that someone might have their identity or

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1 location concealed by technology without
2 having a criminal intent to do so.

3 COMMISSIONER CARR: We've already
4 got a criminal intent if we're looking at this
5 enhancement. Then the question is whether
6 there's an added intention to conceal them.

7 MR. SCHOEN: Yes.

8 COMMISSIONER CARR: You need the
9 underlying crime, for starters.

10 MR. SCHOEN: Yes. I'm just saying
11 someone might have a computer, like a computer
12 issued by their work, that because of the way
13 it's set up with the virtual private network
14 they don't know --

15 COMMISSIONER CARR: Understood,
16 understood.

17 MR. SCHOEN: And then they may
18 commit a crime and have an intent to commit a
19 crime, but they didn't have the intent to hide
20 their location, even though it had the effect
21 of doing so.

22 COMMISSIONER CARR: Thank you.

23 Ms. Coffin, I don't know whether you're a

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1 harsh or skeptical enough interrogator of your
2 son that he might have been a victim here even
3 if you weren't, so I won't get into that.

4 MS. COFFIN: I was going to ask
5 what was Seth's computer proxy doing while I
6 was working on this.

7 COMMISSIONER CARR: As Commission
8 Howell said, you make an eloquent presentation
9 with respect to deterrence and what the
10 literature is out there in terms of what does
11 and doesn't deter. Even though most people
12 would assume there's a logic to harsh
13 penalties deterring conduct, I realize that
14 the literature may question or contradict
15 that.

16 But you do mention that certainty
17 of punishment is known to deter. We have
18 somewhat of a broad charter from Congress; it
19 might not be quite this broad. But should we
20 be paying any attention to ways in which
21 certainty of punishment could be enhanced in
22 this country, as opposed to just the level of
23 punishment?

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1 MS. COFFIN: I often wonder if
2 part of the Commission's charge is to think
3 about issues a little bit more broadly than
4 just how do we amend the guideline [this] very
5 amendment cycle, and I know that you do that.

6 COMMISSIONER CARR: And it
7 absolutely is.

8 MS. COFFIN: And it also occurs to
9 me that perhaps the Commission could do a
10 broad study of all of the literature and maybe
11 all of the issues related to identity theft
12 because there's a lot out there, and I know
13 because I had to travel through a lot of it
14 when I was thinking about this. It seems to
15 me like the Commission could, as part of its
16 approach to these kinds of issues, to put
17 together something for Congress or for law
18 enforcement to sort of explain that the
19 solution may not lie always in increasing
20 punishment and to maybe explain what other
21 ways, what other prevention mechanisms might
22 go into place. And that could be something
23 that could involve lots of different entities

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1 and how they go about doing it. And that, I
2 believe, is something that the Commission
3 could do and should do and would be a great
4 piece of information for how we go forward and
5 how we do this, yes.

6 COMMISSIONER WROBLEWSKI: Thank
7 you, Judge Hinojosa. First let me thank
8 everybody who's on the panel. We really
9 appreciate you all being here and
10 participating, and I think the discussion has
11 been very, very productive.

12 I've got one question for Ms.
13 Coffin and a question for Mr. DuBose and Mr.
14 Handy. Ms. Coffin, you've talked about the
15 need and the Supreme Court talked about the
16 need for empirical research, empirical
17 information to be the basis of the guideline
18 amendments and the guidelines generally. Do
19 you consider Mr. Schoen's testimony to be
20 empirical information?

21 MS. COFFIN: I consider his
22 testimony as supporting evidence, and I guess
23 you could put it as empirical information, to

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1 a certain degree, to support I think the very
2 simple proposition that the use of a proxy or
3 the use of technology like a proxy, even if it
4 is to conceal your identity or conceal your
5 geographic location, that that doesn't always
6 meet the test of the sophisticated means
7 enhancement. In other words, we kind of skip
8 over that part when we talk about it when we
9 say, "Well, if we're doing it to conceal
10 identity, then isn't that worse?" But the
11 Commission has already created enhancement
12 that says that to satisfy the test it has to
13 be especially complex or especially intricate
14 conduct. And in my experience, courts often
15 skip over that, too, and they go straight to
16 the examples and they forget to ask whether
17 the conduct actually meets that test.

18 So our concern, of course, is that
19 by putting the language in there the way it
20 is, and it will work in practice, like
21 presumption, unless you have someone who's
22 really ready to completely fight it and a
23 judge that's willing to listen. So that, yes,

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1 I think what you've gotten is, to a certain
2 degree, you've gotten some empirical evidence
3 that supports the conclusion that the proposed
4 language would sweep too broadly.

5 COMMISSIONER WROBLEWSKI: How
6 about Mr. Weafer's testimony? Is that
7 empirical information?

8 MS. COFFIN: About the prevalence
9 of cybercrime and the way that it's happening?

10 COMMISSIONER WROBLEWSKI: The
11 changing landscape over the number of years,
12 the number of attacks that have happened in
13 this year, the number of viruses this year
14 being more than any other time?

15 MS. COFFIN: I do think that's the
16 kind of evidence that the Commission could use
17 to put together or compile the kind of
18 information that Commissioner Carr was talking
19 about where we're saying okay, yes, things
20 have changed. Is the solution to increase
21 penalties? No.

22 COMMISSIONER WROBLEWSKI: And --

23 ACTING CHAIR HINOJOSA: Can I just

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1 interrupt you for a second? Because I think
2 it is important when one of the statements
3 made to us is that we shouldn't just pay
4 attention to directives. And I guess my
5 question is in the Sentencing Reform Act that
6 includes the enabling provisions for the
7 Commission, where is the portion that says
8 that the Commission is to rely solely on
9 empirical evidence and on nothing else, and
10 what do we mean by empirical evidence? I
11 guess that's the question that's coming from
12 some of us here. Where in the statute itself
13 does it say you are no longer to pay attention
14 to us in the future, even though we passed the
15 laws and including the Sentencing Reform Act,
16 and you are to base decisions based strictly
17 on empirical evidence and on nothing else and
18 that that becomes the overall role of the
19 Commission with regards to what we do?
20 Because what part of the statute says that
21 over anything else that we hear from either
22 Mr. Weafer or Mr. Schoen or the judges or the
23 defenders or the prosecutors or victims or

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1 anybody else who sends us comments and we go
2 through this cycle that is a long nine-month
3 to a year period to make decisions as to how
4 we fit into the 3553 factors? I guess that's
5 my question.

6 MS. COFFIN: I think I quoted to
7 you the part that I believe best captures the
8 idea that what the Commission's original core
9 organic purpose is to do which is to develop
10 sentencing policy that reflects the state of
11 human knowledge and human development as it
12 relates to the criminal justice system. And
13 it is true, and I'm not suggesting that the
14 Commission is not supposed to listen to
15 Congress or the Commission is not sometimes
16 under direct orders to take particular acts.

17 But in this particular case, I
18 think that the language of the directive is
19 not so mandatory that the Commission must act.
20 And so in that case, the question becomes what
21 in this new landscape that we have I think,
22 after the Supreme Court has just finished with
23 these five cases, the question for the

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1 Commission now is really an opportunity to do
2 what the Commission probably has really wanted
3 to do for quite some time, and it's felt
4 always under pressure to respond to
5 congressional directives. And I would suggest
6 that right now the Commission has an
7 opportunity and a directive on its table that
8 it can use to implement its institutional
9 expertise.

10 And I think, too, that that's
11 really what judges are looking for. Judges
12 are looking for guidance that will guide them
13 that they can say, yes, this comes from the
14 Commission who has done [a] study and has
15 looked at this and has taken testimony from
16 people and listened to everything and decided
17 that this is the correct course of action and
18 not look at a guideline and say, well,
19 Congress told them they expected sentences to
20 go up, and so they did. I think that it's a
21 tension, and I think, though, that that's the
22 ultimate choice that the Commission should
23 make.

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1 ACTING CHAIR HINOJOSA: Well, it's
2 a tension that you face in the courtroom,
3 tension that you face in the Sentencing
4 Commission, tension that Congress faces. It's
5 a tension with regards to the whole putting it
6 all together, but I think that this is
7 something that the Commission for years has
8 been doing, which is looking at the 3553
9 factors. And we do it differently than I do
10 as a judge in the courtroom who sentences
11 seven to eight-hundred people a year. I mean,
12 I have the sentencing hearing, and I look at
13 it as closely as I can, but it doesn't go over
14 the year period of what the Commission is
15 doing. And so what I take what the Commission
16 does in the courtroom is this is something
17 that went on over a period of years sometimes,
18 and they have used data, they have heard from
19 other people also, and then these are the
20 guidelines. And then, of course, I have to
21 decide what to do on an individual basis. And
22 I think that's the scheme that the Supreme
23 Court has set here.

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1 But it just gets back to the
2 point, and I appreciate the fact that you've
3 indicated that, yes, we should read the
4 directives and decide how mandatory they might
5 be or otherwise and that we should certainly
6 not ignore them and go ahead and visit and
7 look at them. And so I appreciate that.

8 MS. COFFIN: Well, if I could just
9 add one more thing. When you asked what kinds
10 of information the Commission should be
11 looking at, another very important piece of
12 information, also something that the
13 Commission uses all the time, is the feedback
14 from judges. They look at the departure
15 rates. They look at the rate at which courts
16 are feeling like a particular guideline is not
17 adequate. And I'm suggesting that, perhaps in
18 this circumstance and in all these amendments,
19 there is no indication that judges are feeling
20 like the guideline ranges currently in place
21 are inadequate. And that is feedback that the
22 Commission looks to and has historically
23 looked to as one of the pieces of data that it

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1 uses to decide whether to change a particular
2 sentencing policy.

3 ACTING CHAIR HINOJOSA: Does
4 anybody on my left have any questions? This
5 is the quiet side. Commissioner Reilly, we
6 congratulate you on the green.

7 COMMISSIONER REILLY: Thank you
8 very much.

9 ACTING CHAIR HINOJOSA: I
10 interrupted you.

11 COMMISSIONER WROBLEWSKI: I had
12 one more for Mr. Handy and Mr. DuBose. Is
13 there any -- and this will be quick. Is there
14 any empirical information about the cost to
15 victims? Ms. Coffin indicated her personal
16 experience. Has there been any research about
17 the cost to victims or the cost to people
18 whose information is stolen and there's no
19 monetary loss but there's time expended to
20 fix, whether it's get a new credit card, fix
21 credit, anything like that?

22 MR. HANDY: Well, I'll start with
23 this answer. There's definitely some studies.

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1 The Identity Theft Resource Center has done
2 quite a few studies. Every year we do a study
3 on that very fact because we have the victims
4 that call in. We have about a thousand or so
5 victims that will call in per year or so, and
6 we do a survey to find out what happened, how
7 they'd go through it, what stage are they in,
8 how long it takes those folks to complete.

9 Now, there are some statistics.
10 Unfortunately, I didn't memorize them or bring
11 them here today because I know we're talking
12 more business than victims, but there are
13 definitely some statistics. I'll try and
14 remember off the top of my head what the
15 latest, but it is very time-consuming when
16 this happens. Now, this is great for her.
17 Fifteen minutes is excellent obviously, but I
18 can tell you a hundred other stories where it
19 took months, years. Again, Nicole, who was
20 scheduled to speak here today, eight to ten
21 years still fighting. So that's more like
22 what I'm hearing. The 15 minutes is not the
23 norm for me, but I'm hearing months to correct

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1 some of these things.

2 Now, if you catch it early it
3 doesn't take long to fix it, and that's why
4 prevention is such a key. And if you catch it
5 early, like in this case here, it's not that
6 bad. The problem is people aren't checking
7 their credit reports, aren't doing the things
8 that they need to to protect themselves, and
9 then they find out eight months later that
10 they've been hit, and that's where the problem
11 starts because you have the thief going around
12 opening all kinds of accounts and creating
13 problems, and you're caught here and you're
14 trying to catch up, but they're still going.
15 And that's when you get the problem where it
16 takes eight to ten years to solve the problem.

17 ACTING CHAIR HINOJOSA: On behalf
18 of the Commission, thank you all.

19 COMMISSIONER CARR: To Mr. DuBose
20 -- I'm sorry. I think the ex officio from
21 your office asked you a question.

22 MR. DUBOSE: It wasn't a setup, I
23 promise. I agree with what Mr. Handy just

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1 said. Let me just say, you know, I don't want
2 to concede this point of deterrence first.
3 Our experience prosecuting these crimes is
4 that, actually, where we're seeing this kind
5 of massive commercialization of cybercrime,
6 particularly with respect to ID theft and data
7 breaches, it's very important that it not,
8 that the signal not go out to this community
9 that it's just a cost of doing business
10 because the business is really thriving, and
11 so small costs is not going to have much of a
12 deterrent impact.

13 And the other thing I would
14 mention is that, while these are global
15 networks, that it's actually a fairly small
16 community online and that word of sentences
17 travels very quickly. And this goes out, it's
18 not through the normal press, it's through IRC
19 chat, it's through forums and through other
20 means. So our experience is that sentences,
21 particularly sentences that result in real
22 prison time, have a dramatic effect and
23 deterrent effect on the community. It doesn't

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1 resolve the issue. Everyone doesn't pack up
2 and go away, but it really does have a ripple
3 effect that's much more significant than we
4 see in some other areas of crime.

5 In terms of the cost to victim, if
6 you take, as one of our proposals was that,
7 while we think that, generally, in terms of
8 the theft of types of information that it's
9 better to give courts flexibility in how to
10 assess the cost of that, whether it's fair
11 market value or development costs. But in
12 another kind of related class of cases, which
13 Congress recognizing ID Theft Act, one of the
14 reasons that they amended 1030(a)5 to remove
15 the requirement that you have to prove \$5,000
16 in damages to get a felony and instead now
17 it's just you have to show damage to ten or
18 more computers, one of the reasons they did
19 that was in recognition of these huge botnet
20 cases where you have thousands if not hundreds
21 of thousands of computers are infected by
22 malware, and it would be virtually impossible
23 to show all of the damage to those computers.

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1 In those cases, what we propose is
2 that, given that the reports are that even in
3 a fairly simple case where you have a malware
4 loader on your computer, what would it cost to
5 remove that malware? There are reports that
6 we've cited in our testimony ranging from \$180
7 to \$578 for removing that malware just as a
8 normal cost. We've actually proposed a much
9 more conservative figure as an alternative
10 minimum loss amount in those cases of \$50 per
11 computer, similar to the minimum loss amount
12 in credit card cases. Thank you.

13 ACTING CHAIR HINOJOSA: Thank you
14 all very much, and we certainly thank you for
15 your thoughts and your time. We'll go on to
16 the next panel.

17 The next panel is on the William
18 Wilberforce Trafficking Victims Protection
19 Reauthorization Act of 2008. We also thank
20 you for your presence here today. The first
21 one will be Mr. Joseph Koehler who is the
22 deputy -- did I get that correct?

23 MR. KOEHLER: That is correct.

1 ACTING CHAIR HINOJOSA: Who is the
2 Deputy Chief of the Criminal Divisions
3 Immigration Unit in the U.S. Attorney's Office
4 in the District of Arizona. He has served in
5 the criminal division since 1992 handling a
6 variety of cases, and he obviously specializes
7 with regards to issues on immigration law.

8 We also have Ms. Leslie Whitcomb
9 Fierst, who is an Associate in the Business
10 Litigation Group of the Northern Virginia
11 office of Womble, Carlyle, Sandridge & Rice.
12 Ms. Fierst previously served as an Assistant
13 Federal Public Defender in the District of
14 Maryland and, before that, in the Federal
15 Defender office in Charlotte, North Carolina.

16 We have Ms. Karen Stauss, who is a
17 Managing Attorney and Policy Counsel for the
18 Polaris Project where she manages the
19 project's legal services and policy advocacy
20 effort. She has represented human trafficking
21 victims in immigration-related applications,
22 and she has also worked in [the] Human Rights
23 Watch Field Office in the Republic of the

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1 Congo and has worked on human rights issue in
2 Nigeria and South Africa.

3 Last is Mr. Charles Song who is
4 the West Coast Pro Bono Manager for Howley LLP
5 where he leads that organization's pro bono
6 efforts throughout California and Salt Lake
7 City. Recently, he served as the Legal
8 Services Director of the Coalition to Abolish
9 Slavery and Trafficking and previously served
10 as a Human Rights Fellow and Staff Attorney at
11 the Center for Human Rights and Constitutional
12 Law.

13 We welcome each one of you, and
14 we'll start with Mr. Koehler. And the rules
15 are the same: seven minutes. This means two
16 minutes left, and that means it's over. I'm
17 apparently not very good about saying it's
18 over, but we'll rely on your good conscience.
19 Go ahead, sir.

20 MR. KOEHLER: Good afternoon, Mr.
21 Chairman, distinguished members of the
22 Commission. My name is Joseph Koehler.
23 Again, I'm the Deputy Chief in the Criminal

1 Division in the U.S. Attorney's Office in
2 Phoenix, Arizona. I appreciate the
3 opportunity to appear before the Sentencing
4 Commission on behalf of the Department of
5 Justice to discuss the important sentencing
6 issues related to the recently enacted
7 Trafficking Victims Protection Reauthorization
8 Act of 2008.

9 My testimony will focus on three
10 issues: first, the directive to the Commission
11 to review alien harboring guidelines where the
12 harboring is in furtherance of prostitution
13 and where the defendant is an organizer,
14 leader, manager, or supervisor of the criminal
15 activity; second, the guidelines applicable to
16 the new fraud and foreign labor contracting
17 offense; and, third, other sentencing
18 implications of the TVPRA. The Department
19 will also submit more detailed written
20 comments on these issues in response to the
21 proposed amendments and issues for comment
22 published in January in the Federal Register.

23 The sentencing issues raised by

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1 the Act are many and complex and deserve a
2 complete review by the Commission. We think
3 this review should include consultations with
4 victim and advocacy groups, prosecutors,
5 defense lawyers, and others, as well as a full
6 analysis of recent trafficking cases and
7 related immigration cases. Given the recency
8 of the enactment of the Act, we believe it may
9 be appropriate for the Commission to continue
10 work on the sentencing issues raised by the
11 Act and beyond the current amendment year with
12 a goal of completing implementing guidelines
13 in the next amendment cycle.

14 Alien harboring and furtherance of
15 prostitution. Section 222 of the TVPRA
16 directs the Commission to review the alien
17 harboring guidelines and amend them, if
18 appropriate, where the harboring is in
19 furtherance of prostitution and the defendant
20 is an organizer, leader, manager, or
21 supervisor. The guidelines at Sections
22 2(g)1.1 and 2(g)1.3 take an appropriately
23 graduated approach to prostitution-related

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1 offenses, applying different severity levels
2 to different prostitution-related crimes,
3 including interstate transportation for
4 prostitution, importation of aliens for
5 prostitution, sex trafficking of minors, and
6 sex trafficking by force, fraud, or coercion,
7 according to the level of harm involved and
8 the culpability of the offender.

9 The most egregious offenses, such
10 as those involving the use of force, fraud, or
11 coercion or the sexual exploitation of a minor
12 are appropriately sentenced at higher levels.
13 As the degree of coercion or the vulnerability
14 of the victim increases, so does the
15 applicable offense level. For example, in
16 United States v. Caretto, multiple defendants
17 pled guilty to recruiting young, uneducated
18 Mexican women and girls from impoverished
19 backgrounds, smuggling them into the United
20 States and forcing them to engage in
21 prostitution by threatening and beating them.
22 The traffickers in that case also controlled
23 their victims by holding the victims' children

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1 in Mexico. Three defendants were sentenced
2 to, respectively, 50, 50, and 25 years
3 imprisonment for multiple offenses of sex
4 trafficking. These cases carry a base offense
5 level of 34.

6 In contrast, cases involving
7 interstate transportation for prostitution in
8 violation of the Mann Act and importation of
9 adults for prostitution in violation of 8 US
10 Code Section 1328, which are not based on
11 proof of the use of force, fraud, or coercion,
12 carry a base offense level of 14 under Section
13 2(g)1.1. In these cases, the defendants often
14 recruit women into prostitution, facilitate
15 their travel and transportation, and profit
16 from their prostitution activities. Although
17 this conduct is deplorable, promoting
18 prostitution and exploiting vulnerable women
19 who have few economic alternatives, it does
20 not involve the use of force, fraud, or
21 coercion criminalized under the sex
22 trafficking statute, nor does it involve the
23 exploitation of minors. This conduct thus

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1 differs from the conduct that defines human
2 trafficking crimes.

3 Even further along the spectrum,
4 in contrast to the Mann Act and Section 1328
5 offenses, alien harboring crimes under 8 US
6 Code Section 1324 often involve sheltering or
7 concealing undocumented persons in locations
8 such as homes or businesses. Often, however,
9 unlike defendants convicted under the Mann Act
10 or international importation cases, alien
11 harboring defendants are not implicated in
12 facilitating interstate or international
13 travel for the specific purpose of
14 prostitution. This level of prostitution-
15 related criminal intent and the extensiveness
16 of the criminal conduct is, therefore, lower
17 than in many Mann Act or Section 1328
18 importation cases.

19 While the entire spectrum of these
20 federal commercial sex and immigration-related
21 offenses involve serious criminal conduct that
22 must be vigorously prosecuted and punished by
23 substantial sentences, an appropriate

1 sentencing scheme should recognize
2 distinctions between these different types of
3 offenses regarding the degree of criminal
4 intent and the extensiveness of the criminal
5 conduct at issue.

6 The graduated approach of the
7 current guidelines recognizes that, while all
8 forms of commercial sexual exploitation are
9 reprehensible and warrant significant
10 sentences, the more vulnerable the victims and
11 the more brutal the forms of physical and
12 psychological coercion, the more elevated the
13 offense level should be. The congressional
14 directive asks the Commission to reconsider
15 the alien harboring guideline, Section 201.1,
16 for offenses where the harboring is in
17 furtherance of prostitution and the defendant
18 is an organizer, leader, manager, or
19 supervisor. Alien harboring offense levels
20 begin at level 12, only two levels below the
21 level 14 applicable to some commercial sex
22 offenses, such as interstate transportation
23 for prostitution in violation of the Mann Act

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1 or importing an alien for immoral purposes.

2 In a sense, this limited two-level
3 disparity placing alien harboring offense
4 levels slightly below the Mann Act and
5 importation offense levels further below the
6 sex trafficking offense levels is appropriate.
7 This is so, first, because convictions for
8 interstate transportation and importation for
9 prostitution involve not just knowledge but
10 specific deliberate intent to further
11 prostitution, while alien harboring
12 convictions require no such proof of specific
13 deliberate intent. Second, interstate
14 transportation and international importation
15 tend to involve more extensive and elaborate
16 criminal conduct than localized acts that
17 could constitute harboring, such as conduct on
18 the part of a landlord taking steps to conceal
19 undocumented tenants.

20 Thus, in the case of adults, the
21 current two-level disparity between alien
22 harboring and certain commercial sex offenses
23 is limited in magnitude and arguably

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1 appropriate. Nonetheless, alien harboring
2 that furthers prostitution involves increased
3 criminality, and so should receive additional
4 punishment, especially when the defendant
5 plays a role as an organizer, leader,
6 supervisor, or manager.

7 And I see my time is up. I look
8 forward to submitting additional comments
9 during questioning. Thank you.

10 ACTING CHAIR HINOJOSA: Thank you,
11 Mr. Koehler. Ms. Fierst?

12 MS. FIERST: Thank you. Thank you
13 again for the opportunity to appear here on
14 behalf of the Federal, Public and Community
15 Defenders on the TVPRA. The questions on
16 which the Commission has sought comment are,
17 first, whether the guidelines need to be
18 amended to ensure conformity between the
19 guidelines for alien harboring and those for
20 promoting a commercial sex act pursuant to the
21 congressional directive; second, whether the
22 two new offenses should be referred to
23 existing guidelines or to new guidelines; and,

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1 third, whether the guidelines should be
2 amended to accommodate the changes that the
3 Act made to existing offenses. I will focus
4 the majority of my comments today on the first
5 question.

6 Section 222(g) directs the
7 Commission to review and, if appropriate,
8 amend the sentencing guidelines and policy
9 statements applicable to persons convicted of
10 alien harboring to ensure conformity with the
11 sentencing guidelines applicable to persons
12 convicted of promoting a commercial sex act
13 if, first, the harboring was committed in
14 furtherance of prostitution; and, second, the
15 defendant to be sentenced is an organizer,
16 leader, manager, or supervisor of the criminal
17 activity. We believe no changes are necessary
18 or appropriate.

19 First, the guidelines already
20 sufficiently provide direction in the case of
21 a defendant fitting the hypothetical proposed
22 by Congress, a defendant who is involved in
23 alien harboring and prostitution at a

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1 supervisor or higher level. Second, a
2 defendant guilty of such conduct is not being
3 sentenced lightly under any current guideline,
4 nor is he being sentenced without his
5 involvement in prostitution and his level of
6 involvement being taken into consideration by
7 the existing guidelines and the sentencing
8 courts. Finally, the Commission does not
9 presently have reliable empirical data on
10 which to base any amendment. So we,
11 therefore, recommend that the Commission make
12 no changes to the guidelines in response to
13 the directive from Congress.

14 In our experience, alien harboring
15 and trafficking cases are infrequent and the
16 culpability of the defendants who are
17 prosecuted can vary dramatically with many
18 having relatively low culpability. We have
19 not seen any cases like that envisioned in the
20 directive: one, where the government has to
21 rely only on 8 USC Section 1324 to obtain a
22 conviction.

23 In fact, one of the reasons I'm

1 here today as the Federal Public and Community
2 Defender representative is because I happened
3 to have worked on an 8 USC 1324 and 18 USC
4 1591 case. In that case, my client was a
5 Mexican national living in suburban Maryland
6 and, after losing his job as a construction
7 worker, he began working as a driver for
8 Latina prostitutes. He fell in love with a
9 young Mexican prostitute who eventually came
10 to live with him. And, unfortunately, that
11 young woman happened to be 16 years old. He
12 was not a manager or an organizer of any
13 prostitution enterprise, and he was not
14 involved in bringing that girl or any other
15 non-citizens to the U.S. In that case, my
16 client was charged both with alien harboring
17 under Section 1324 and with harboring a minor
18 to commit a commercial sex act under Section
19 1591, and he pled guilty to and was sentenced
20 based on the 1591 violation.

21 Across the three statutes that
22 address alien harboring, the existing
23 guidelines more than sufficiently address the

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1 differing types and degrees of conduct that
2 the federal system seeks to punish. There are
3 three statutes which I've referred to sort of
4 informally that punish alien harboring, two in
5 the context of prostitution. We have 8 USC
6 Section 1324; 8 USC Section 1328, which
7 addresses alien importation for the purpose of
8 prostitution; and 18 USC Section 1591, alien
9 harboring for prostitution involving a minor
10 or with fraud or coercion.

11 The more serious sexual-in-nature
12 alien harboring conduct covered in Sections
13 1328 and 1591 call for higher statutory
14 maximums and mandatory minimums and are
15 directly referred already to 2(g)1.1 and
16 2(g)1.3. And so it looks to me, in thinking
17 a little bit more about a congressional
18 directive and comparing the hypothetical facts
19 in the congressional directive to the existing
20 laws and guidelines that what the
21 congressional directive is talking about is
22 not a defendant who you would be looking at
23 under Section 1328 where the prostitute was

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1 imported for that purpose and not a defendant
2 under Section 1591 where we're talking about
3 a minor being involved or a prostitute who
4 unwillingly or under coercion became involved.
5 But, in fact, it seems what we're talking
6 about is a pimp who is working with willing
7 undocumented prostitutes, and that we do not
8 believe is something that is appropriate for
9 either cross-references or specific offense
10 characteristics or any other changes to the
11 guidelines.

12 Indeed, in alien harboring cases
13 committed in furtherance of prostitution, the
14 case law shows that the government typically
15 charges these serious cases as violations of
16 Section 1328 or Section 1591 or both, meaning
17 that the vast majority of the serious cases
18 are already being sentenced under 2(g)1.1 and
19 2(g)1.3. If, for some reason, there were a
20 particularly egregious case that were to be
21 charged only as a Section 1324 case, again
22 which is hard to fathom since the case law
23 shows and supports that the government

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1 regularly charges and makes these cases as
2 Section 1328 cases or Section 1591 cases or
3 both, then the 2(l)1.1 specific offense
4 characteristics would dramatically drive up
5 the sentencing range anyway.

6 For instance, in a serious 1324
7 case under the congressional directive's
8 description, 2(l)1.1 contains several specific
9 offense characteristics, including for
10 coercion or threats, the number of aliens
11 involved, and for an aggravating role, which
12 could result in a sentencing range as high or
13 higher than those under 2(g)1.1 or 2(g)1.3.
14 So, again, if you don't have the fraud or
15 coercion and you don't have the number of
16 aliens to show a serious operation of which
17 the defendant is a manager or organizer, then
18 I really don't think this is a situation that
19 calls for any specific offense characteristics
20 or cross references or changes to the
21 guideline.

22 Given the severe sentences that
23 are already available under 2(l)1.1, again,

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1 there's really no reason for the Commission to
2 add cross references to this type of
3 hypothetical violation. Cross references
4 specifically tend to complicate the sentencing
5 calculation. They encourage punishment on the
6 cheap by allowing the government to charge the
7 easiest offense to prove but then punish the
8 defendant for a much more significant offense.
9 This is not only an anathema to our sense of
10 justice, as the Supreme Court recognized in
11 Blakely, but from a practice perspective it
12 makes a defense attorney's job very difficult
13 in that we're forced to explain to our
14 clients, many of whom we are still building
15 trust relationships, senses of trust, and
16 getting to know, often across language
17 barriers in these cases, why it is that
18 they're being charged with one offense but
19 will be sentenced for a much more serious
20 offense.

21 Cross references also open the
22 door to a lack of transparency in sentencing
23 because in some cases prosecutors and defense

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1 counsel may be forced to bargain around them.
2 They increase unwarranted sentencing
3 disparities, as well, because in some cases
4 they may not be applied.

5 I see the red light indicates that
6 I'm up; isn't that correct? All right. Well,
7 then I'll reserve the rest --

8 ACTING CHAIR HINOJOSA: You can
9 just go ahead and have a little bit more if
10 you need to finish.

11 MS. FIERST: Thank you. I
12 appreciate it. We simply do not yet know the
13 scope of the problem of alien harboring and
14 trafficking, especially in light of the new
15 Act's provision and amendments which makes the
16 addition of specific guideline amendments,
17 cross references, and offense characteristics
18 premature. We just lack empirical data at
19 this point to support the idea that the
20 current guidelines are inadequate to serve the
21 purposes of punishment, nor is there a reason
22 to add a specific offense characteristic at
23 this point, considering there are already nine

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1 specific offense characteristics under
2 2(1)1.1.

3 And I would just like to end with
4 a quote from the Commission's 15-year report,
5 "A sentencing system that attempts to account
6 for every conceivable offense and offender
7 characteristic relevant to sentencing could
8 quickly become unworkable. As the number and
9 complexity of decisions needed to apply the
10 guidelines increase, so do the resources
11 required for investigations in sentencing
12 hearings, as well as the risk that different
13 judges will apply the guidelines differently."
14 As I indicated, that quote is from the
15 Commission's 15-year report citing, in fact,
16 a 2001 article by Professor Ruback and
17 Commissioner Wroblewski. Thank you.

18 ACTING CHAIR HINOJOSA: Thank you,
19 ma'am. Ms. Stauss?

20 MS. STAUSS: Thank you very much,
21 Mr. Chairman and members of the Commission for
22 giving me the chance to speak today. And I
23 also congratulate you on the complexity of a

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1 code that, as a victim service provider
2 delving into it for the first time in-depth in
3 recent weeks, really, as a victim service
4 provider, helps us to think when we're
5 advocating for sentences that will do justice
6 in the cases of our clients that there are
7 many more steps beyond just advocating for the
8 statute to determine what justice actually
9 will be served.

10 I think on this first question
11 about the alien harboring, it would be helpful
12 to understand the context of how this
13 provision got into the TVPRA. The original
14 version of the TVPRA that passed the House of
15 Representatives included a provision that
16 essentially would have federalized all
17 pimping, regardless of whether there was
18 force, fraud, or coercion, in recognition by
19 those who supported it that many cases of
20 pimping it is very difficult to prove the
21 force, fraud, and coercion that occurs with a
22 crime and so that it would be better to punish
23 those all of those cases in recognition of the

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1 severe harm that, in most cases, accompanies
2 pimping.

3 Now, this version didn't pass, you
4 know, I think the Senate, and those who were
5 opposed to it really wanted to concentrate the
6 federal resources on those cases that were
7 human trafficking involving force, fraud, or
8 coercion. But I think it helps to understand
9 that context that the final result here with
10 this alien harboring provision was a
11 compromise that attempted to recognize those
12 cases where there was an inherent imbalance of
13 power between the victim, the prostituted
14 person and the pimp because the victim was in
15 a situation where they were undocumented, and
16 so there was almost inherently a balance of
17 power. And so it was a sort of compromise in
18 order to federalize some of those pimping
19 crimes or at least move in that direction.

20 I think harboring an undocumented
21 person in order to exploit that person in
22 prostitution is often committed simultaneous
23 with sex trafficking by force, fraud, or

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1 coercion. And proving the force or coercion
2 necessary to convict under the sex trafficking
3 crime is often very difficult; and, therefore,
4 sex traffickers are prosecuted very often
5 under other crimes, like this alien harboring
6 provision.

7 For example, in a series of raids
8 on Korean massage parlor-front brothels in the
9 Washington area, my organization identified
10 nearly half of the women on the premises as
11 victims of trafficking under the federal
12 definition that involves force, fraud, or
13 coercion. But in those cases, the U.S.
14 attorney was only able to achieve convictions
15 under other crimes. In some cases, this is
16 because the traffickers' exercise of control
17 and power is hidden in those cases. The
18 victims often tell us that they are very
19 unhappy, depressed, and traumatized because of
20 the continuous stream of unwanted commercial
21 sex with different men. And the traffickers
22 intentionally take advantage of the victims'
23 undocumented status and exploit their pre-

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1 existing fears of deportation and of
2 immigration agents. And so even without
3 voicing direct threats, traffickers do create
4 a coercive environment in which women feel
5 they have no choice but to continue in this
6 situation against their will. I mean, we do
7 believe that harboring could still reference
8 Section 2(1)1.1 but that a special offense
9 characteristic should be added adding two
10 points to the base 12 when the crime involves
11 organizing, leading, managing, or supervising
12 the prostitution.

13 I just want to make a comment
14 about a couple of the other items or issues
15 for comment: the financial benefit crime,
16 financial benefit from participating in a
17 venture that engages in violations of certain
18 of the trafficking and slavery offenses in
19 Chapter 77. We would support applying
20 guideline 2(h)4.1, and I think there's
21 precedent for applying the same guideline as
22 the underlying crime for this financial
23 benefit. There's already a financial benefit

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1 crime contained within Section 1591 that sex
2 trafficking of a minor or by force, fraud, or
3 coercion crime that was already on the books,
4 and that financial benefit crime applied the
5 same guideline as the underlying crime.

6 On the new crime, fraud and
7 foreign labor contracting, those who engage in
8 fraud and foreign labor contracting often are
9 knowingly the first link in a chain of human
10 trafficking, and so in that case would also
11 favor referencing 2(h)4.1, but we would be
12 comfortable with another guideline that would
13 allow significant punishment of fraud and
14 foreign labor contracting. This could
15 potentially include the guidelines referenced
16 by the Migrant and Seasonal Agricultural
17 Workers Protection Act with a fraud-related
18 special offense characteristic.

19 Just in closing, I wanted to note
20 also that the Chairman's explanatory statement
21 for the TVPRA characterized preying on mental
22 illness and drug use or addictions as a form
23 of coercion equivalent to human trafficking.

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1 And while this wasn't an issue for comment,
2 since I have a little bit more time I wanted
3 to recommend adding those factors as a special
4 offense characteristic similar to the concept
5 of an undocumented person having an inherent
6 power imbalance. The same applies when the
7 victim has a drug addiction, so we would
8 support adding that as a special offense
9 characteristic, as well. Thank you very much.

10 ACTING CHAIR HINOJOSA: Thank you,
11 Ms. Stauss. Mr. Song?

12 MR. SONG: Chairman Hinojosa and
13 distinguished members of the Committee, Happy
14 St. Patrick's Day. I see two of you got the
15 memo. I don't know about the rest of you, but
16 thank you for very much for the privilege to
17 testify --

18 ACTING CHAIR HINOJOSA: The rest
19 of us are relying on this.

20 MR. SONG: Oh, okay. We'll give
21 you credit for that. Thank you so much for
22 allowing me to testify today on behalf of the
23 hundreds of survivors of trafficking and their

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1 families that I've had the privilege of
2 representing over, I can't believe it but it's
3 been almost a decade now since I've been
4 representing trafficking victims. And I've
5 had the good fortune of representing
6 trafficking victims before the Trafficking
7 Victims Protection Act passed and after, so I
8 have a good sense of what things were like
9 prior to that act passing and what it's like
10 now that we have the Trafficking Victims
11 Protection Act and its numerous
12 reauthorizations and amendments.

13 In preparation for my testimony
14 today, I spoke to a few of my clients about
15 their thoughts about what kind of sentences
16 they would like to see. And just to give you
17 an idea of how important sentencing is in this
18 scheme of anti-trafficking work, I'd like to
19 share one story of one of my clients. Since
20 it is St. Patrick's Day, I'll call her Patty
21 just to give her an identity. Obviously, it's
22 a false identity. But Patty was trafficked to
23 the United States from Saudi Arabia by a Saudi

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1 princess, no less. She was brought to the
2 Massachusetts area. Some of you guys may have
3 heard about this case but I'm sure don't know
4 the identity of my client.

5 She was enslaved in a domestic
6 situation for a number of months before she
7 felt like she was physically in danger and
8 couldn't stand the situation anymore. In the
9 dead of winter in Massachusetts, I don't know
10 if any of you guys are from Massachusetts, she
11 fled the house with the clothes on her back
12 and shoes on her feet in the middle of the
13 night. She was able to make it to a diner or
14 restaurant and found good samaritans there
15 that were able to help her. And I don't know
16 how she was able to do this, but she was able
17 to travel through the country working and
18 surviving and then made it all the way out to
19 Los Angeles.

20 Several years later, she was
21 referred to me as a domestic violence victim
22 who may have had some trafficking issues in
23 the past. She was the victim of domestic

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1 violence in traveling through the country to
2 make it to Los Angeles. Anyway, she had
3 children in her home country at that time
4 still, and her trafficker had threatened, "If
5 you ever do anything, if you ever escape, if
6 you ever talk, I know where your children are,
7 I know where they live, I have access to them,
8 and I'm essentially going to hurt them or kill
9 them," and she took these threats very
10 carefully.

11 And, of course, one of the first
12 things she asks me and many of my clients ask
13 me is, "Can you guarantee the safety of my
14 family, of my children, or even myself?" and
15 I say, "Absolutely not. Nobody can do that."
16 But despite her fear and her concerns, she
17 said, "You know what? I'm going to do this
18 anyway," because when she escaped, she
19 believed that this trafficker was trafficking
20 other people or would traffic other people to
21 the United States and continue enslaving
22 people at her residences in the Massachusetts
23 area and decided to go through with it anyway.

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1 Anyway, so her report to law
2 enforcement, to authorities, led to an
3 investigation and prosecution. They did find
4 that this Saudi princess was trafficking other
5 people into the Massachusetts area in her
6 residences and, after investigations and
7 gathering evidence, there was a prosecution.
8 Ultimately, the princess plead to, you guessed
9 it, alien harboring and smuggling. You know,
10 unfortunately, she was only sentenced to, if
11 I remember correctly she had one of her houses
12 confiscated, she had six months house arrest
13 in one of her mansions, which was, I'm sure,
14 horrible, and then she was going to be
15 deported after that period. And then she was
16 also going to pay restitution in significant
17 amounts of money to my client and to some of
18 the other victims, but really just pocket
19 change to her.

20 When I told my client about the
21 sentence and about this payment, she had a
22 hard time breathing and started
23 hyperventilating, and I thought, you know, it

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1 must be because she's getting all this money
2 that she never imagined that she would ever
3 receive. But instead or rather it was because
4 she was so upset and so fearful about the
5 trafficker now being released to her home
6 country. And I still remember these words
7 vividly because she said, "That's exactly what
8 she told me was going to happen. She said if
9 I ever told police or reported to law
10 enforcement she said, "You know what? I'm
11 rich, I'm wealthy, I can buy my freedom," and
12 that's exactly what my client thought happened
13 in that case was that this person who had
14 trafficked her and enslaved her and others had
15 essentially purchased her freedom, and she was
16 devastated by this after risking her life and
17 her children's lives most importantly because
18 she didn't really care too much about her own
19 life but her children's lives.

20 And Karen took you back a little
21 bit about -- oh, I'm sorry. There's one thing
22 that I forgot to mention. And so at the very
23 end, I asked her, "Well, is there anything you

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1 want me to tell the Commission?" because I
2 told her about this hearing, and she said,
3 "Tell them that all we want is a little bit of
4 justice," that that's all they're asking for.

5 Karen took you through a little
6 bit about the history about the TVPRA, but I
7 wanted to go back a little bit further so that
8 you understand where the victims are coming
9 from and the reason behind this act and what's
10 happened in this act. And I apologize if
11 someone of you are familiar with the
12 Trafficking Victims Protection Act, but I feel
13 like it's so important to understand the
14 background to these criminal provisions so
15 that we can appropriately sentence criminals
16 who are convicted of these crimes because, as
17 you well know, if we don't have a sentence the
18 conviction is really worthless or very
19 ineffective if we don't have an appropriate
20 sentence.

21 But the TVPA is, essentially, an
22 act in response to the federal government or
23 CIA report that some of you guys may remember

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1 reporting that approximately 50,000 women and
2 children and men were trafficked into the
3 United States each year. That number has
4 since been downgraded to maybe 14,500. So,
5 anyway, my estimates are anywhere between
6 14,500 to 50,000 are still being trafficked
7 into the United States, and it's a number that
8 could increase because of the current economy.

9 But what was critical about the
10 Trafficking Victims Protection Act was that it
11 was an attempt to address human trafficking
12 holistically by protecting victims,
13 prosecuting traffickers, and preventing future
14 trafficking. And the sentencing guidelines,
15 although they also address the prosecution
16 part of that, the intent of the Trafficking
17 Victims Protection Act, I think they also go
18 a long way towards protecting the victims who
19 are enslaved but who also testify in some of
20 these situations, further endangering
21 themselves, in addition to assisting in
22 prosecuting themselves.

23 And the new criminal provisions in

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1 the Trafficking Victims Protection Act
2 dramatically improve the ability -- whoa. I
3 am over my time limit already. I totally
4 missed that. Anyway, I guess I'm the typical
5 lawyer that I like to talk, but I'll just
6 conclude because I have my recommendations in
7 my written statement. But I'll just conclude
8 by saying that I think the most important
9 thing that I'd like to express to you today on
10 behalf of my clients is that in addition to
11 being enslaved and trafficked in their
12 situations, they go through an incredible
13 ordeal and jeopardize not only their physical
14 and mental well being when they cooperate and
15 participate in that criminal prosecution but
16 also their families and also to just keep in
17 mind that all they're really looking for is a
18 little bit of justice. They're not expecting
19 a lot. Thank you very much.

20 ACTING CHAIR HINOJOSA:

21 Commissioner Howell?

22 COMMISSIONER HOWELL: The

23 Department of Justice has suggested with

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1 respect to another law, a recent law that
2 Congress passed involving the Child Soldiers
3 Accountability Act that the Commission
4 consider, it's a very intriguing idea,
5 consider, rather than doing sort of a
6 piecemeal approach to the Child Soldiers
7 Accountability Act, as well as the new
8 Trafficking Victims Act, that we take a
9 broader approach and perhaps consider a
10 guideline that specifically deals with human
11 rights crimes, these new offenses and these
12 laws, as well as other offenses that could be
13 grouped under a human rights guideline.

14 And I know that, Mr. Koehler, you
15 also talked about perhaps deferring some
16 judgments on the Trafficking Victims Act from
17 this amendment cycle to the next amendment
18 cycle. That would give us time to actually
19 consider this intriguing idea from the Justice
20 Department to do a human rights guideline.
21 I'm interested in the reaction of the victims
22 representatives, as well as the Federal
23 Defenders, about this idea of perhaps not

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1 acting right now on these amendments, even
2 though we have proposals to sort of respond to
3 the directives and put some of the new
4 offenses that have been created with referrals
5 to current guidelines, what your reaction is
6 to this other idea of creating a whole new
7 human rights guideline where we could direct
8 some of these new human trafficking victims
9 act offenses and address them in a more
10 holistic way. Could you just address that, if
11 you've had time to think about it, if you have
12 an opinion or not?

13 MS. STAUSS: I mean, I haven't had
14 time to think about it beyond the last minute
15 since you broached it to me for the first
16 time, but I guess my question would be what
17 qualifies as a human rights crime? Is it
18 because these crimes have some type of
19 international aspect? And I think,
20 oftentimes, we see things that happen in an
21 international connection violations of human
22 rights, but if it's in the U.S. it's civil
23 rights. What would define human rights

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1 crimes, as opposed to other crimes that also
2 often do involve human rights violations?

3 COMMISSIONER HOWELL: That was one
4 of the questions we have to address, defining
5 what would be appropriate under this human
6 rights guideline.

7 MR. SONG: My point of view is I
8 would agree with the DOJ on deferring to the
9 next amendment cycle because I think there are
10 very complicated, difficult issues to address
11 and having more time to -- I don't see it as
12 anything as absolutely urgent here in amending
13 the guidelines, so I would support that.

14 I think your idea of coming up
15 with human rights guidelines is actually
16 really interesting and fascinating. I would
17 love to look at that and study that to see if
18 that would be the best way to handle some of
19 these new crimes because, for example, the new
20 foreign labor fraud provision or crime and how
21 to reference that. I was speaking to some
22 people about, you know, well, what do you guys
23 think about how we should reference this, and

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1 we had the whole range from the fraud or theft
2 guidelines to the involuntary servitude,
3 bondage, or some kind of a combination, and
4 this is where [you] could come up with a
5 combination guideline because the foreign
6 labor fraud encompasses, you know, theft and
7 fraud from the very beginning. They're really
8 just committing fraud and stealing their money
9 up-front but then bringing them to the United
10 States, exploiting their labor, stealing their
11 labor if you want to look at it that way and
12 exploiting them. So it actually encompasses
13 both the theft and fraud and the labor worker
14 exploitation. So if we could get a guideline
15 that encompasses all of that, that would be
16 the ideal situation.

17 MS. FIERST: Again, just to wrap
18 up, we don't believe that any SOCs or cross
19 references are necessary to address the
20 congressional directive, which, again, just to
21 make our position clear, the congressional
22 directive suggested changes if the Commission
23 deems them appropriate. It was not a

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1 mandatory directive to the Commission. But in
2 any event, we believe that the Commission
3 should take more time to gather data and to
4 perform research to understand this issue a
5 little bit more broadly. And if that included
6 following up on the suggestions made in Mr.
7 Koehler's letter and the U.S. Attorney's
8 Office submission to the Commission, then that
9 would be appropriate; but we just don't
10 believe that that would be an appropriate
11 action to take at this time.

12 COMMISSIONER HOWELL: Well, I take
13 to heart some of the criticisms that you
14 raised, as a practitioner sitting in the
15 courtroom, about the difficulty of applying
16 cross references, the additions of SOCs, and
17 the kind of invitation to litigation that can
18 be, and some of the confusions. I think every
19 commissioner is really well aware of that,
20 which is part of the reason that perhaps
21 avoiding that and looking at a new human
22 rights guideline that would avoid some of the
23 cross references would more target

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1 appropriately some of these offenses is
2 something that, you know, I just really wanted
3 the reactions to how people would react to
4 that because it would avoid some of the
5 criticisms that you appropriately pointed out
6 about some of the proposals that we've
7 actually put out for comment.

8 Thank you all very much.

9 MR. KOEHLER: I had a brief
10 comment on the one issue, and I didn't get
11 this far in reading my testimony here. But
12 the foreign labor fraud new provision that's
13 in the statute, Section 1351, we mentioned in
14 our letter potentially looking at 2(h)4.2 or
15 2(h)4.1. There's also 2(h)1.1, violations of
16 individual rights, that might apply, and that
17 might also serve as a starting point for the
18 guideline that you were discussing that would
19 be more of a broader type of guideline. And
20 perhaps you could have adjustments in such a
21 guideline that would account for the number of
22 victims, as well as the type of conduct at
23 issue.

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1 But I don't think that that
2 particular guideline or that type of an
3 arrangement would fit better with harboring in
4 furtherance of prostitution better than the
5 harboring guideline would if you merely added
6 a two-level upward adjustment for harboring
7 that furthers adults prostitution or a four-
8 level upward adjustment that would involve
9 harboring that furthers child prostitution
10 when the person is an organizer, leader,
11 manager, or supervisor.

12 COMMISSIONER HOWELL: Thank you.

13 MR. KOEHLER: Thank you.

14 VICE CHAIR CASTILLO: I would be
15 interested, as part of this continued study in
16 this area, how the Commission could get a
17 handle on the deterrent value of increasing
18 penalties in this area and, in particular, how
19 do we go about protecting the family members
20 of victims who reside in other countries, and
21 that seems to be part of what is going on here
22 in terms of ensuring that the victims do serve
23 in these illegal manners in the United States.

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1 So any ideas or thoughts on that?

2 MR. KOEHLER: I assume you're
3 addressing me with that?

4 VICE CHAIR CASTILLO: Well, you
5 come to mind, Mr. Koehler.

6 MR. KOEHLER: Okay. In terms of
7 deterrence, I think deterrence is a very
8 difficult thing to measure in terms of the
9 sentencing guidelines, and I'm not sure there
10 is an appropriate way to measure it other than
11 looking at recidivism rates. But my thought
12 in terms of protecting the public is
13 incapacitation rather than deterrence, and
14 that's a factor that 3553 clearly encourages
15 both sentencing judges, as well as the
16 Commission, to consider when promulgating the
17 guidelines.

18 And when you're dealing with folks
19 who are playing a superior role in an alien-
20 smuggling enterprise and harboring enterprise
21 who are furthering prostitution, clearly those
22 people deserve incapacitation for a longer
23 period of time. And the same is true with

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1 folks who traffic obviously, which is why
2 those guidelines are so much higher in the
3 first place.

4 Incapacitating persons for longer
5 period of times certainly does not protect the
6 trafficking victim from action by a proxy for
7 the defendant. But at the same time it puts
8 the defendant out of commission for a longer
9 period of time and prevents them from re-
10 victimizing these people or victimizing new
11 people while they're incapacitated. So it has
12 value in that sense.

13 ACTING CHAIR HINOJOSA: Vice Chair
14 Sessions?

15 VICE CHAIR SESSIONS: Just to
16 follow up with a question that Ruben just
17 asked. I'm particularly asking practitioners.
18 The defenders have included in their
19 submissions a study, in fact a series of
20 studies, which indicate that recidivism rates
21 are affected, or deterrence, essentially, is
22 affected or impacted by the certainty of
23 punishment but not the length of punishment.

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1 In other words, once you get past a certain
2 period of time it doesn't make any difference
3 whether you give a sentence at that point or
4 far into the future.

5 And then the issue of deterrence,
6 you know, you're a practitioner, in
7 particular, Mr. Song, do you agree with that
8 concept, or is that something which is
9 disagreeable or you do not agree with?

10 MR. SONG: I've learned to agree
11 with the government, for the most part. Just
12 kidding. No, I do happen to agree with them
13 on this point, but also deterrence is so
14 incredibly difficult to measure and to see the
15 effectiveness, but I would agree that just
16 incapacitating certain traffickers is
17 extremely important. And I don't have the
18 studies to show that the length of sentence is
19 not as important, but I know that I'm involved
20 in a sex trafficking prosecution right now
21 where we're waiting for a number of defendants
22 who have been convicted on sex trafficking and
23 actually harboring, both charges. But I know

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1 that my clients are on pins and needles about
2 what the actual sentences are going to be, so
3 for them it's incredibly important.

4 But I'd also say that, and I don't
5 have any evidence and I certainly can't prove
6 this, but my experience with trafficking cases
7 has been some of these traffickers calculate
8 how much time they could possibly do for the
9 amount of money they can make. And, again, I
10 can't prove it. That's certainly my
11 disclaimer. But when you think about the
12 amount of money, especially in sex trafficking
13 cases, that you make on a daily basis
14 prostituting minor girls or adult women, they
15 make thousands of dollars a day. And I can't,
16 you know, prove it again, but I'm very
17 confident that a lot of these traffickers are
18 calculating, they're doing the math. They're
19 not stupid people. They're doing the math and
20 saying, "Okay, I can make X amount of money,
21 and I can possibly go to jail for X amount of
22 time. Well, you know what? That's like
23 working for three or four years and making

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1 hundreds of thousands of dollars or whatever
2 that I'm going to sock away in whatever
3 country so that nobody can access it even if
4 I do get caught and get convicted," etcetera.
5 But in some cases, like the Saudi princess
6 who's worth, I'm sure, quite a bit of money,
7 she did six months of house arrest and then
8 got deported for basically enslaving domestic
9 workers in her house for who knows how long
10 because we only caught her for a short period
11 of time.

12 So I would say I don't have the
13 evidence, but I believe that the length of the
14 sentence is incredibly important just for the
15 victims. Again, they're not asking that we
16 execute the traffickers or put them in jail
17 for the rest of their lives, but they're
18 asking for a little bit of justice, a little
19 bit of fairness. If you enslave me and other
20 people, it's only fair that you should be
21 incapacitated for a certain amount of time,
22 and I do believe, you know, just based on my
23 own experience, that the length of sentences

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1 does have an impact definitely on my clients,
2 on the victims, but I think on the traffickers
3 as well.

4 MS. FIERST: If I could actually
5 just add to that. With all respect for Mr.
6 Song's experience, I also have had my own
7 experience representing defendants in these
8 cases and defendants who are not originally
9 from this country in general, and my
10 experience often is that they are not very
11 familiar with, nor do they well understand the
12 laws of this country. They don't understand
13 mandatory minimum sentences, they don't
14 understand the length of sentences, they don't
15 understand enhancements, criminal history, and
16 many of the facets of the sentencing
17 guidelines, which, of course, practitioners
18 themselves have their own issues with. And so
19 while some of them may, in fact, take these
20 things into consideration when they're
21 committing their offenses, I know there's also
22 another segment of the population which does
23 not.

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1 And with respect to the types of
2 cases that Mr. Song is referring to, I don't
3 know the facts of his Patty case, although it
4 sounds to me from the facts of the case that
5 that will be a case where there would be an
6 increased base offense level because of
7 coercion and threats and there would be
8 additional enhancements based on the number of
9 people trafficked. But, again, I was not part
10 of that case, so I don't know how the sentence
11 ended up where it did. But, certainly, there
12 are very lengthy sentences and very
13 significant mandatory minimums that are
14 available in the egregious cases, in the cases
15 involving minors, in the cases involving large
16 numbers of people being trafficked into this
17 country, and there are already the SOCs and
18 the cross references and the mandatory
19 minimums available to make sure that those
20 people do receive significant punishment.

21 ACTING CHAIR HINOJOSA:

22 Commissioner Wroblewski?

23 COMMISSIONER WROBLEWSKI: Thank

1 you. And thank you all for coming and
2 testifying. First, Ms. Fierst, thank you so
3 much. There's nothing an author likes better
4 than to be quoted, and I look forward to
5 working with you and the other community and
6 public defenders on the rest of what was
7 discussed in that article, which was looking
8 at overall simplification of the guidelines
9 and reform and the presumptive nature of the
10 guidelines.

11 Ms. Stauss, I just want to sort of
12 bring this back for a second because we're
13 talking about trafficking cases and force
14 cases and coercion cases, and it seems to me
15 the one area that I think that we're talking
16 about perhaps amending this year is the
17 harboring guideline, the cases involving
18 harboring where that's the offense of
19 conviction, and there's the added aggravating
20 factor that the defendant was an organizer or
21 a leader in a prostitution scheme. Am I
22 right, Ms. Stauss, that all you're suggesting
23 there is going from a base offense level of 12

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1 to an offense of two more levels? You
2 suggested a two-level enhancement if the
3 person is an organizer or leader and there's
4 prostitution involved; is that what we're
5 talking about?

6 MS. STAUSS: I think, you know, my
7 understanding of the offense levels might not
8 be as deep, certainly, as those who are in the
9 criminal court everyday. But we definitely
10 are suggesting that, you know, and my written
11 testimony suggested that for us it's not that
12 important, and I think for many victims they
13 are not paying attention to, you know, the
14 name of the index of the sentence but, rather,
15 that there be an appropriate sentence.

16 So as I said in my written
17 testimony, whether we go with 2(1)1.1 and add
18 points to that or go to one of the other
19 offenses, the idea is that we support broadly
20 increasing the penalty in those cases where
21 the harboring is in furtherance of
22 prostitution with this understanding that,
23 while the description of the crime doesn't

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1 involve force, fraud, or coercion, that is the
2 reasoning for adding the increased penalty
3 because there is an inherent power imbalance
4 between the victim and the person harboring
5 when the victim is an undocumented alien.

6 COMMISSIONER WROBLEWSKI: Right.
7 But the result in that kind of case would not
8 be taking someone who would normally be
9 sentenced to seven years and adding another
10 two years. We're talking about someone who
11 might be sentenced to six months home
12 confinement and making it a split sentence in
13 the example that we're talking about, not that
14 there's a conviction for 1591 or other
15 trafficking sets, for just harboring.

16 ACTING CHAIR HINOJOSA: Well, what
17 this hypothetical ignores is that there would
18 have been an enhancement under Chapter 3 for
19 the role offense, so it wouldn't just be 12
20 plus 2. There would be a role enhancement of
21 up to four points possibly, depending on how
22 many people were involved. And so for someone
23 who's not familiar with the guidelines, it

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1 would be unfair to not indicate to them that
2 there is an increase for a role offense in
3 every case an enhancement that would apply in
4 any case where somebody is an organizer,
5 manager, supervisor, or leader. And then we
6 could have a specific offense characteristic
7 that would be plus two, but you're not just
8 stuck within that 1.1. There are some other
9 adjustments that would apply to somebody who
10 is an organizer, leader, manager, or
11 supervisor.

12 MS. STAUSS: Right. And our
13 understanding, in many of the cases that we
14 see that are difficult to bring as 1591 cases,
15 often there is some element of fraud and
16 understanding that there would also be an
17 addition of four points for fraud, and so with
18 the two points for the prostitution and the
19 four points for the fraud you get up to 18,
20 which was consistent with, I believe, the
21 2(g)1.1 with cases involving fraud also so
22 that we would be arriving at the end result.
23 And, you know, whether it's through 2(1)1.1 or

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1 2(g)1.1, I don't think --

2 ACTING CHAIR HINOJOSA: Your point
3 is you would like --

4 MS. STAUSS: -- one way or the
5 other.

6 ACTING CHAIR HINOJOSA: Your point
7 is you would like to see that taken into
8 account with regards to an increase in the
9 sentence?

10 MS. STAUSS: Right.

11 MS. FIERST: But if I might, if I
12 might just briefly, with respect to an
13 inherent imbalance of power, again with
14 respect to Ms. Stauss' experience, there are
15 times where there are willing participants in
16 the prostitution trade. We're talking here,
17 it seems to me --

18 ACTING CHAIR HINOJOSA: Well, it
19 depends on how you define willing in the sense
20 that some people are so desperate to come to
21 the United States that they would be willing
22 to subject themselves to something. You know,
23 having experience just like I do with regards

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1 to cases that are immigration cases, there's
2 different levels of willing participants.

3 MS. FIERST: Absolutely,
4 absolutely, your Honor. But keep in mind, of
5 course, that if this is somebody who is so
6 desperate to come to the United States that
7 they're willing to engage in prostitution,
8 then this is potentially a case that could be
9 charged under a 1328 where someone is imported
10 particularly for that purpose. If you have a
11 good prosecutor, they can prove fraud in a
12 case where there's an unwilling participant,
13 an inherent imbalance of power like Ms. Stauss
14 is talking about. You can prove fraud,
15 coercion, duress under any -- in other words,
16 we're not simply talking about fraud, we're
17 not simply talking about coercion, we're not
18 simply talking about threats. The possible
19 enhancement is broad, and so a prosecutor with
20 those facts where there is this inherent
21 imbalance of power that she's referring to
22 based on her experience could prove those
23 facts in a 1328 or a 1591 conviction. There

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1 are already enhancements, we believe, that
2 address these issues and with enhancements for
3 the number of aliens who are participating
4 under 2(1)1.1. You already can reach that
5 manager, organizer, or leader level
6 participant so that I do think that Mr. Song's
7 experience in the Patty case is really such an
8 outlier based on the facts that he's referring
9 to.

10 ACTING CHAIR HINOJOSA:
11 Commissioner --

12 MS. STAUSS: Sorry, I just wanted
13 to respond. Is that okay? The 1328 crime
14 requires an importation, a connection to the
15 importation of the person that I think very
16 often we're seeing is not the case. It's not
17 necessarily that the person experiences fraud
18 in their coming to the United States but that
19 they may experience fraud in the offering of
20 a position, if you will, in a brothel where
21 they're told that the conditions will be, you
22 know, that there may be particular conditions
23 and then the conditions are far worse than

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1 they're told, and they're desperate to get
2 out, but they don't feel that they're able to
3 get out.

4 ACTING CHAIR HINOJOSA:
5 Commissioner Friedrich?

6 COMMISSIONER FRIEDRICH: Yes. Mr.
7 Koehler, you suggested in the alien harboring
8 context adding a SOC to 2(l)1.1 for cases
9 where the defendant played an aggravated role.
10 Is that because you don't believe certain
11 defendants would qualify for an aggravated
12 role enhancement at a 3(b)1.1 where their
13 aggravated role was with respect to the
14 prostitution as opposed to the harboring? Is
15 that --

16 MR. KOEHLER: No. I'm talking
17 about any defendant who is convicted under
18 Section 1324 and to whom 2(l)1.1 applies and
19 who receives the 3(b)1.1 adjustment for being
20 a manager, organizer, leader, or supervisor in
21 the criminal activity, whether it's the
22 prostitution or the harboring offense. If
23 somebody is an organizer or leader of a

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1 harboring offense and the harboring involves
2 prostitution and this organizer or leader has
3 reason to know about it, they're responsible
4 for the conduct of their subordinates.
5 They're the people who are in a position to
6 stop that activity and either limit the
7 offense to harboring or disband it all
8 together. And so for that, they ought to be
9 held responsible in that position for the
10 harboring.

11 Doing so, you know, this is much
12 less than the trafficking that they're not
13 convicted of or the involuntary servitude that
14 they're not convicted of. The offense level
15 here is much lower in that sense. So it's
16 appropriate to impose an adjustment upward
17 from what is an ordinary harboring sentencing
18 guideline level to account for the
19 prostitution activity. And it's not just
20 important in terms of incapacitation, it's
21 also important in terms of promoting respect
22 for the law. You know, promoting respect for
23 the law is discussed in 3553(a) is not just

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1 about the respect of the law by a person who
2 might violate the law but by the person who
3 has been victimized by the person who violates
4 the law. Respect for the law among the public
5 is just as important in that sense, and this
6 would further that goal.

7 ACTING CHAIR HINOJOSA:
8 Commissioner Reilly?

9 COMMISSIONER REILLY: Since you
10 mentioned victims, I wanted to mention,
11 obviously, the emphasis that's been placed
12 over the last number of years about the
13 victims. I'm curious what your experience is
14 with regard to what the TVPA says that it
15 assures in terms of service, social services.
16 What is being provided? Are these people
17 being adequately taken care of in that regard,
18 the victims?

19 And the second part of the
20 question would be are those who are seeking a
21 safe harbor because they do fear for their
22 lives, where are we putting them?

23 MR. KOEHLER: I'm afraid I would

1 have to punt that one over to the folks --

2 COMMISSIONER REILLY: I mean, are
3 they being put in the victim witness program?

4 MR. KOEHLER: There are
5 trafficking victim provisions that enable
6 trafficking victims to get visas to come into
7 the United States, both T visas and U visas
8 for victims of certain types of crime. And so
9 that is a provision that, through
10 certification by the lead officer of a law
11 enforcement agency within the discretion of
12 CIS, those people can be given a visa to stay
13 in the United States. I think that Ms. Stauss
14 or Mr. Song might know more about the
15 specifics of how that would work than I would.

16 ACTING CHAIR HINOJOSA: Wouldn't
17 that be the exception rather than a rule in
18 all likelihood to get deported?

19 MS. STAUSS: Well, in order to
20 qualify for the T visa or the U visa, the
21 victim does also have to be willing and able
22 to participate in any investigation or
23 prosecution that's brought. I'm sure that

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1 Charles will weigh in here, too.

2 As far as the services that are
3 available for those who do agree to
4 participate in an investigation or a
5 prosecution, which is certainly not all of the
6 victims who are foreign nationals, there are
7 services available. We've been advocating
8 that they be for a longer term because, in
9 many cases, the services last for a certain
10 period of time that is not as long as it takes
11 for these survivors to oftentimes regain their
12 balance, especially when they're often coming
13 from situations of economic desperation, lack
14 of education.

15 I just want to make one other
16 point, though, that, while we've talked a lot
17 about the alien harboring, the issues for
18 comment today cover crimes that apply to all
19 victims of trafficking, not just foreign
20 nationals but also U.S. citizen victims of
21 trafficking, and that's an area where I think
22 we've been really remiss in providing services
23 to survivors where we don't have any special

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1 funding for specially-created programs to
2 serve U.S. citizen victims of trafficking.
3 And so that's something that many members of
4 the victim service community have also been
5 advocating for, in addition to lengthening the
6 amount of time and the availability of
7 assistance to foreign nationals.

8 MR. SONG: My short answer to your
9 question is almost. We provide quite a bit of
10 services to trafficking survivors in the
11 United States. I would actually say, and I
12 don't know, Karen, if you'd agree with me, but
13 I think we actually have the best trafficking
14 legislation in the world. We're always
15 consulting with other countries about things
16 that we can do. States have their own
17 trafficking legislation, but they can provide
18 housing, medical services, psychological
19 services.

20 I think one area where we are most
21 lacking right now are services, and I think,
22 Commissioner Castillo, I think you mentioned
23 this about the family members, protecting

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1 family members. I think where right now we're
2 most lacking in services or benefits to
3 survivors is to their family members back home
4 because, you know, my view is the only real
5 way to protect somebody's family members is to
6 get them over here as quickly as we can
7 because the longer they stay there, I mean we
8 can't have, you know, we can't trust other law
9 enforcement or government to protect them. We
10 can't expect ICE or FBI or the State
11 Department to protect them abroad.

12 The way I see it, from a victim's
13 perspective, is the only real way to protect
14 them is to get them over here as quickly as
15 possible, hopefully, definitely before trial
16 starts so that the defendants don't know who's
17 testifying and have more incentive to silence
18 them or obstruct justice. But, anyway, that
19 would be my comment to that question.

20 ACTING CHAIR HINOJOSA: Thank you
21 all very much. We certainly appreciate your
22 time and your contribution to our process
23 here.

1 Our next panel is entitled "Other
2 Guideline Amendments," which gives you a free-
3 for-all with regards to whatever you want to
4 discuss but not really. Our first panelist is
5 Ms. Suzanne Ferreira who is a Supervising U.S.
6 Probation Officer for the Southern District of
7 Florida, and she currently serves as a chair
8 and 11th Circuit Representative for the
9 Commissioners' Probation Officers Advisory
10 Group.

11 Mr. Craig Magaw is the Deputy
12 Assistant Director of the Office of
13 Investigation of the U.S. Secret Service. He
14 has had 22 years service with the Secret
15 Service, and he is a member of the Elite
16 Counter Assault Team and a member of the
17 Presidential Protection Division.

18 Ms. Donna Lee Elm is a Federal
19 Public Defender in the Middle District of
20 Florida. Previously, she served in the
21 Federal Defenders Office in Phoenix.

22 And Mr. Kenneth Linn is the
23 Chairman of the Federal Chapter of CURE, which

1 stands for Citizens for the Rehabilitation of
2 Errants. I hope you don't include us in that.
3 And you're also President and CEO of
4 Commonwealth Management Services Incorporated
5 in Florida.

6 And we'll start with Ms. Ferreira.

7 MS. FERREIRA: Good afternoon,
8 Judge Hinojosa and Commissioners. Thank you
9 for the opportunity to testify here today on
10 behalf of the Probation Officers Advisory
11 Group. I'm going to present the group's
12 comments as we have set forth in our position
13 paper, or at least as much as my seven minutes
14 will allow.

15 With regard to Identity Theft
16 Restitution and Enforcement Act, there were a
17 number of factors under consideration for
18 amendment. The level of sophistication and
19 planning involved in the offense, the group's
20 position of the proposed amendment at 2(b)1.1
21 includes language under the sophisticated
22 means definition regarding a scheme involving
23 computers to conceal the identity or

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1 geographic location of the perpetrator. The
2 group recommends this language should include
3 using computers to conceal not just the
4 perpetrator but the offense itself. It was
5 suggested that language similar to the
6 layering language in the money laundering
7 guideline might be appropriate.

8 The group also agreed the two-
9 level enhancement for sophisticated means is
10 sufficient to capture this factor and, in most
11 cases, the dollar amount of loss drives the
12 offense level. The floor of level 12, which
13 was instituted in 1998, is no longer
14 sufficient based upon the serious nature of
15 many of these offenses. The group agreed that
16 the floor should most likely be raised, but a
17 review of sentencing data related to the
18 frequency of the application of this floor
19 might be helpful in making that determination.
20 The group unanimously agreed the language at
21 3(b)1.3 should be changed to unequivocally
22 include a person who has self-trained computer
23 skills as one who has a special skill.

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1 With regard to the factor whether
2 the offense was committed for purpose of
3 commercial advantage or private financial
4 benefit, the current language at 2(b)1.1,
5 2(b)1.5, 2(b)2.3, 2(b)5.3, and 2(h)3.1
6 adequately addresses the factor described in
7 Section 209 B2 of the Act. There was some
8 concern raised, however, in some inconsistent
9 application and the retail value of low-
10 quality and high-quality fakes, specifically
11 with regard to offenses covered under 2(b)5.3,
12 copyright infringement offenses.

13 The next factor under
14 consideration is the potential and actual loss
15 resulting from the offense, including the
16 value of information obtained from a protected
17 computer, regardless of whether the owner was
18 deprived of the use of the information or the
19 information obtained constitutes a trade
20 secret or other proprietary information, the
21 cost the victim incurred developing or
22 compiling the information.

23 Regarding the proposed amendment

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1 at 2(b)1.1 Commentary Note 3, the group agreed
2 that option two was the better choice. The
3 first option was determined to be problematic
4 in terms of placing a value on proprietary
5 information.

6 Option two, on the other hand,
7 uses a dollar amount that is more likely to be
8 available from the victim. Overall, a broader
9 application is preferred as a better way of
10 determining harm.

11 With respect to the first and
12 second issues for comment regarding
13 information from a protected computer, we
14 concluded that, as currently written, the
15 guideline is not sufficient to capture loss.
16 If option two, as described previously, was
17 adopted, however, it would be sufficient in
18 conjunction with Application Note 19, which
19 outlines departures.

20 With regard to question three, the
21 group agreed that a victim who suffers
22 pecuniary harm but is immediately reimbursed
23 by a third party should be considered a victim

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1 for purposes of the SOC for the number of
2 victims, and their reimbursed losses should be
3 included in the dollar amounts under 2(b)1.1
4 (b)1. In addition, the group agreed that
5 victims with unidentified and/or non-pecuniary
6 harm are being overlooked in many cases.
7 Frequently, these individuals may not know
8 they were victimized. The investigation into
9 the illegal activity ceases before potential
10 victims are identified and sometimes even
11 notified. And other losses which may be
12 sustained or have yet to be sustained are not
13 captured.

14 The group would urge a more broad
15 definition of victim in order to better
16 capture the size or extent of the offense. A
17 special rule similar to that found at Section
18 2(b)1.1 Application Note 4 may be appropriate.
19 Where there is a theft of a large number of
20 credit card numbers or a databases access, the
21 potential victims may need to be more vigilant
22 in monitoring their credit, even if they did
23 not sustain any part of the actual loss.

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1 In sum, victims of crimes who did
2 not sustain a pecuniary harm oftentimes
3 sustain non-pecuniary harms that are not being
4 captured. In addition, the group unanimously
5 concluded that 3(b)1.3 should be amended to
6 unequivocally include a person who is an
7 officer, employee, or insider of a business
8 who participates in any offense involving
9 proprietary information and the employee had
10 access to that information.

11 With regard to the factor whether
12 the defendant acted with intent to cause
13 either physical or property harm in committing
14 the offense, the group concluded the factors
15 [are] adequately addressed by other
16 enhancements. With regard to the extent to
17 which the offense violated privacy rights, the
18 group declined to make a recommendation based
19 upon our negligible experience with these
20 kinds of offenses.

21 With regard to the factor the
22 effect of the offense upon the operations of
23 an agency of the United States government,

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1 state or local government, we agree that an
2 upward departure provision will adequately
3 address this factor and is the better option,
4 as the group agreed we rarely or never see
5 cases where this factor even applies.

6 With regard to the factor whether
7 the defendant's intent to cause damage or
8 intent to obtain personal information should
9 be disaggregated and considered separately
10 from other factors set forth in 2(b)1.1 (b)15,
11 the group agreed that the intent to cause
12 damage or intent to obtain information should
13 be disaggregated but not solely in the context
14 of 18 USC 1030 cases. Our experience has
15 shown that the government infrequently charges
16 under 18 USC 1030.

17 With regard to the factor whether
18 the term "victim" is used in 2(b)1.1 should
19 include individuals whose privacy was violated
20 as a result of the offense, in addition to
21 individuals who suffered monetary harm as a
22 result of the offense, the group agreed that
23 the term "victims" should include individuals

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1 who suffered non-pecuniary harm, as previously
2 recommended.

3 The group agreed that the
4 definition of reasonably foreseeable pecuniary
5 harm should not be amended to include the cost
6 to the victim of correcting or repairing the
7 harm incurred because it would be too
8 difficult to determine, would result in
9 inconsistent application, and would create
10 evidentiary issues which would complicate the
11 sentencing process.

12 With regard to whether the
13 defendant disclosed personal information
14 obtained during the commission of the offense,
15 the group agreed there should be an increase
16 of charged offenses other than 18 USC 1030 and
17 119 where personal information is made
18 publically available. Crimes involving
19 victims of identity theft should be punished
20 more harshly if the information was not just
21 obtained but otherwise disclosed. The
22 disclosure could be defined as made publically
23 available, as described at 2(h)3.1, Subsection

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1 (b) 2B.

2 With regard to the Ryan Haight
3 Online Pharmacy Consumer Protection Act of
4 2008, the group agreed that offenses involving
5 Schedule II substances are not adequately
6 addressed by the guidelines. It was the
7 consensus that the maximum base offense level
8 of 20 for offense involving Schedule III
9 should be eliminated entirely, and the offense
10 level increases should mirror those for
11 Schedule II substances. A base offense level
12 of 20 applies to 40,000 or more units. With
13 the advent of online pharmacies, the amount of
14 Schedule III substances involved in an offense
15 has oftentimes exceeded a million dosage
16 units. Even before online pharmacies, we were
17 seeing that level of dosage units in local
18 pharmacies in certain areas of the country.

19 With respect to Schedule IV and V
20 substances, the group does not have enough
21 experience with cases involving these
22 substances to render an opinion. Because of
23 the low threshold for Schedule III substances,

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1 many reach the maximum level for Schedule III
2 without even consideration of any Schedule IV
3 or V substances, and many of those types of
4 substances, including cough medicines, were
5 handled as civil licensing violations rather
6 than criminal prosecutions.

7 And the group also agreed that
8 offenses involving Schedule III hydrocodone
9 should not be treated differently than other
10 Schedule III substances. The group was
11 reluctant to recommend changes to the
12 guidelines based on the current popularity of
13 a substance. It seems that lifting the base
14 offense level threshold of 20 for Schedule III
15 would be the better approach and would obviate
16 revisiting the issue when the next Schedule
17 III substance achieves an alarming level of
18 abuse.

19 I see my time is up. I have
20 several more issues. It's presented in our
21 position paper. I can rely on that, if you'd
22 like.

23 ACTING CHAIR HINOJOSA: You can

1 finish, if you'd like.

2 MS. FERREIRA: Okay. The next
3 issue was the Drug Trafficking Vessel
4 Interdiction Act of 2009. The group reviews
5 the proposed amendments and agree that 2(b)1.1
6 (b)1B would adequately address the use of
7 submersible vessels. We consulted with
8 probation officers in the Middle District of
9 Florida, which is the only district known to
10 have had any involvement with these type of
11 cases. They agreed that using a new guideline
12 under 2(x)7.2 is preferable to using 2(x)5.1.
13 The use of [a] specific guideline is less
14 problematic than choosing an analogous
15 guideline which invariably leads to strong
16 disagreement.

17 In addition, the probation
18 officers in that district strongly urged the
19 Commission to consider using a higher base
20 offense level under 2(x)7.2. These particular
21 vessels are invariably used for drug
22 trafficking. The problem becomes when they
23 are scuttled. The evidence of drug

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1 trafficking is oftentimes lost. It's a very
2 dangerous situation for the U.S. Customs
3 agents to try and retrieve this evidence in
4 order to successfully prosecute the cases. So
5 they encourage the Commission to consider
6 using the new guideline with a high base
7 offense level that would incorporate the
8 factor that this is most likely used in a very
9 serious criminal enterprise and, in addition,
10 that some of the factors utilized or
11 recommended as departures would be more
12 appropriate as SOCs. The failure to heave to
13 and the attempt to scuttle the vessel, those
14 will invariably happen in every one of these
15 cases. So the officers who have had
16 experience with this recommended that those be
17 specific offense characteristics rather than
18 departures.

19 I have a lot more to go on. Do
20 you want me to continue or . . .

21 ACTING CHAIR HINOJOSA: You have a
22 lot more?

23 MS. FERREIRA: Well, you had a lot

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1 of issues this year. You kept us very busy.

2 ACTING CHAIR HINOJOSA: Just pick
3 the ones that you really want us to hear.

4 MS. FERREIRA: Okay. How about --

5 ACTING CHAIR HINOJOSA: Verbal
6 statements on rather than just the written
7 statements.

8 MS. FERREIRA: The William
9 Wilberforce Trafficking Victims Act.
10 Regarding the conformity between the
11 guidelines applicable to persons convicted of
12 alien smuggling and the guidelines applicable
13 to persons convicted of promoting a commercial
14 sex act, the group agreed a cross reference in
15 2(l)1.1 to 2(g)1.1 and 2(g)1.3 would
16 sufficiently address those concerns. It would
17 also provide conformity and ease of
18 application. Probation officers agreed that
19 a cross reference is a much easier
20 application.

21 With regard to how the aggravating
22 role factor for these types of offenses should
23 be incorporated, the group considered the

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1 option of creating an SOC but found that
2 problematic since aggravating role is not
3 normally addressed as an SOC. Alternatively,
4 the group suggested expanding the language in
5 2(g)1.1 in the Commentary Note 3 to include an
6 instruction for these types of offenses that
7 the organization may be considered otherwise
8 extensive for purposes of applying 3(b)1.1.
9 I think the concern there is it may be
10 difficult to prove the number of participants.
11 The group suggests adding a similar
12 application note to 2(g)1.3. As to whether
13 Appendix A should be amended to refer to the
14 new offenses under 18 USC 1593(a) and 1351,
15 the group agreed that any offense which can be
16 referenced in Appendix A to a specific
17 guideline provides more consistency and ease
18 in application.

19 With regard to commission of
20 offenses while on release, the group agreed
21 that the new language and additional examples
22 provided help to clarify the application note
23 without changing the substance of the rule.

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1 With regard to counterfeiting and bleach
2 notes, the group reviewed the proposed changes
3 at 2(b)5.1 and the application notes and
4 agreed the changes are clear, easily
5 understood, and should help resolve the issue.

6 That's it. I thank you for this
7 opportunity.

8 ACTING CHAIR HINOJOSA: Thank you.
9 Mr. Magaw?

10 MR. MAGAW: Good afternoon, Mr.
11 Chairman and distinguished members of the
12 Commission. On behalf of the men and women of
13 the Secret Service, it is my pleasure to speak
14 to you today to discuss the Commission's
15 proposed amendments to the sentencing
16 guidelines for offenses involving counterfeit
17 barrier obligations of the United States.

18 Counterfeiting of money is one of
19 the oldest crimes in history. At some periods
20 in history, it was considered treasonous and
21 even punishable by death. During the American
22 Revolution, the British counterfeited U.S.
23 currency in such large amounts that the

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1 currency soon became worthless. During the
2 Civil War, one-third to one-half of the
3 currency in circulation was counterfeit. As
4 a result, the Secret Service was established
5 in 1865 to suppress the widespread
6 counterfeiting of the nation's currency.

7 Over the past 144 years, our
8 mission has expanded to provide broader
9 protection of the U.S. financial systems by
10 investigating additional crimes, such as bank
11 fraud, identity theft, access device fraud,
12 computer fraud, and other cybercrimes.
13 However, the investigation of those who seek
14 to counterfeit U.S. currency still remains a
15 top priority for the Secret Service.

16 Counterfeit U.S. currency can be
17 produced using a variety of methods. One
18 method involves traditional printing process
19 such as offset printing, which is one of the
20 same methods used by the Bureau of Engraving
21 and Printing when producing genuine U.S.
22 currency.

23 Another method is a newer

1 technology-based process called digital
2 imaging. A counterfeiter who uses offset
3 method requires technical expertise in
4 printing and the ability to use specialized
5 equipment, such as a printing press, plates,
6 and negatives. This type of counterfeit
7 operation typically yields large quantities of
8 counterfeit notes and can only be accomplished
9 by a small number of sophisticated criminals.
10 However, the Secret Service has observed over
11 the last 15 years counterfeiters having
12 changed their primary method from
13 manufacturing to digital imaging. This newer
14 method of manufacturing requires only minimum
15 technical knowledge and access to scanners and
16 printers easily available at local retail
17 stores. Therefore, this shift to digital
18 imaging manufacturing has now enabled a larger
19 number of individuals to engage in criminal
20 behavior.

21 In recent years, the Treasury
22 Department has taken significant steps to
23 defeat the modern-day counterfeiter. In

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1 addition to the sophisticated printing
2 methods, the Treasury Department has
3 integrated new security features known as
4 "distinctive counterfeit deterrents." These
5 include watermarks, micro-printing, security
6 threats, different colored ink designed to
7 protect the integrity of our currency while
8 complicating the counterfeiting process. The
9 Secret Service continues to work to stay ahead
10 of modern counterfeiting operation through its
11 involvement in currency design process, and it
12 closely works with BEP, the Federal Reserve
13 Board, and the Treasury Department.

14 Today's counterfeiters are
15 changing their manufacturing methods to
16 incorporate the Treasury Department's distinct
17 counterfeiting deterrents and distinct paper
18 into their production methods to generate
19 highly-deceptive counterfeit notes. In one
20 such process, the counterfeiter takes a low-
21 denomination genuine U.S. note, usually a \$5
22 bill, removes the printed ink through a labor-
23 intense process commonly referred to as

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1 bleaching. This bleaching process creates a
2 blank note of genuine U.S. currency paper that
3 retains many of its distinctive counterfeit
4 deterrents.

5 The counterfeiter then transfers
6 an image of a higher denomination U.S. note,
7 usually from a \$100 bill, onto the bleached
8 genuine paper. Color printers are the most
9 common device used to transfer counterfeit
10 images to genuine bleached paper, but
11 counterfeiters can also accomplish this
12 through more traditional offset printing
13 methods. In either circumstances, the final
14 product is an extremely deceptive counterfeit
15 bill that blends the unique feel and features
16 of genuine notes with a counterfeit image.

17 The Secret Service has observed
18 that counterfeit notes produced on bleached
19 paper are both a domestic and international
20 concern. Counterfeiting operations based in
21 Columbia, Nigeria, Italy, North Korea have all
22 produced significant quantities of counterfeit
23 notes that were printed on bleached genuine

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1 U.S. currency. The use of genuine U.S.
2 currency paper and the production of
3 counterfeit obligations has presented some
4 unique issues regarding the current
5 counterfeit guidelines.

6 The current guidelines found at
7 2(b)5.1 appear somewhat ambiguous as to which
8 guideline applies when an individual is being
9 sentenced for counterfeiting activity related
10 to bleaching. As the Commission is aware,
11 several federal courts have resolved
12 differently the question of whether offenses
13 involving bleach notes should be sentenced
14 under 2(b)5.1 or 2(b)1.1. As a result, some
15 defendants convicted of bleach note
16 counterfeiting receive lower sentencings from
17 the courts than defendants convicted of less
18 sophisticated counterfeiting methods. The
19 proposed amendments should effectively respond
20 to the concerns expressed by federal judges
21 and members of Congress to provide much-needed
22 clarity in this area.

23 The Secret Service fully supports

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1 the proposed Sentencing Commission changes to
2 2(b)5.1. The Secret Service believes that
3 currency illegally produced on genuine U.S.
4 paper is counterfeit. Moreover, defendants
5 who bleach genuine U.S. currency paper
6 typically manufacture a highly-deceptive
7 counterfeit note that is easier to pass.
8 These counterfeiters rely on the distinctive
9 counterfeit deterrents and unique feel of
10 genuine U.S. currency paper to create
11 counterfeit currency that is often difficult
12 to detect and identify. As such, bleached
13 note counterfeiters should be subject to the
14 sentencing provisions governing counterfeit
15 offenses.

16 The Secret Service feels strongly
17 that individuals engaged in counterfeiting,
18 regardless of the method they choose, should
19 be treated with parity in sentencing.
20 Furthermore, the Secret Service feels the
21 potential increase in prison sentence under
22 the proposed amendment to 2(b)5.1 will present
23 not only a deterrent to those considering

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1 engaging in counterfeiting U.S. currency for
2 the first time but also for those already
3 previously convicted of counterfeiting
4 offenses who may undertake such criminal
5 activity at a later date. Therefore, the
6 Secret Service is pleased that the Commission
7 is considering the proposed amendment to the
8 counterfeiting sentencing guidelines.

9 Mr. Chairman, members of the
10 Commission, I appreciate your time today and
11 look forward to speaking to you [on] this
12 issue.

13 ACTING CHAIR HINOJOSA: Thank you,
14 Mr. Magaw. Ms. Elm?

15 MS. ELM: Thank you. Chairman
16 Hinojosa and Commission members, I am very
17 pleased that the Commission is taking an
18 interest in hearing from the District where
19 the boat cases are filed in the United States,
20 and I'm pleased that you recognize the
21 importance of knowing from the local district
22 what the facts are about these cases.

23 I am the Federal Defender in

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1 Tampa. Tampa is the only court where the
2 Department of Justice brings its boat
3 smuggling cases. They can bring them at any
4 court, but they do bring them in Tampa, so
5 we're very familiar with them.

6 I also want to note that I was a public
7 defender for 18 years in Arizona. Arizona is
8 one of the four states plagued with the border
9 tunnel issue, a matter that will become
10 important shortly.

11 Let me talk about the semi-
12 submersibles. They are manned usually by one
13 captain. His role is, essentially, he has the
14 GPS and once a day he gets a radio call where
15 he gets new coordinates and he proceeds. That
16 is, essentially, what he does. He will also
17 drive the ship.

18 There are usually three crew
19 members. One is a mechanic. The other two
20 are simply unskilled labor who will also drive
21 the ship spelling the captain. Those crew
22 members are usually paid only about \$5,000 to
23 \$10,000 for this very life-endangering trip

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1 that they take. They are generally poor
2 fishermen with family to support who live in
3 very bad financial situations and are
4 essentially mules being told where to go, what
5 to do, and how to take things.

6 The subs themselves or semi-
7 submersibles are very risky boats to take out
8 onto the ocean. They're constructed often of
9 fiberglass and wood. Recently, we've seen
10 some with steel. And they're often leaky.
11 They don't seal things well, and boats have
12 been known to go down even more frequently
13 than just what is reported by the Coast Guard.
14 And those people are lost. The Coast Guard is
15 not there to save them.

16 The technology that they have is
17 not sophisticated. What we see is a GPS, a
18 radio, an engine, you know, that runs the
19 screw. And it is very little else.

20 Last Friday in Tampa in a case, we
21 had a special agent of the Coast Guard testify
22 about what it's like in the submersibles, and
23 I will tell you some of the information he

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1 gave us, which is consistent with what we have
2 learned from our clients, and that is he
3 called it an arduous and dangerous journey.
4 The higher-ups exploit the crews knowing how
5 compelling the money would be. I echo
6 Chairman Hinojosa's comments that some people
7 are so desperate in their financial
8 situations, they're willing to undertake
9 things that are illegal, unpleasant, or
10 dangerous. And our individuals who we
11 represent are finding themselves in that
12 position, too.

13 There's very little air inside
14 these tin cans. There's usually only two
15 ventilation holes, and they don't necessarily
16 supply enough air for inside. Additionally,
17 they're not allowed out, they're generally not
18 supposed to be out of the boats, so they're
19 stuck in there for days.

20 The engine is inside. It is loud.
21 It is hot. It rattles around and sometimes
22 produces exhaust fumes that can be poisonous.
23 It also takes up some of the oxygen.

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1 So with all of this, plus the heat
2 of going through the tropical waters for days
3 and being stuck in there, it is a terrible
4 thing. And it also reeks. There is no
5 bathroom, no veritable pot. So this is what
6 they're traveling in. It's important to note
7 that the semi-submersibles are used to go
8 below the surface to try to avoid detection in
9 smuggling.

10 Now we come to the tunnels. The
11 tunnels are used to go below the surface to
12 try to avoid detection in smuggling. One by
13 land, the other by sea. Many tunnels run from
14 the United States into Mexico and are used to
15 move large quantities of contraband, like the
16 semi-submersibles. Those tunnels are believed
17 to have been financed because they cost
18 roughly a million dollars a piece, financed by
19 the drug cartels to move their stuff. They
20 are sophisticated. Many of them have
21 ventilation systems, phones, electricity and
22 lights. Some of them have tracks where they
23 can move with carts the drugs down. We have

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1 ones that are built so big that Humvees can
2 drive through them. These are rather
3 substantial productions underneath the earth.
4 And instead of having 60 to 100-foot boats
5 manufactured, we have one tunnel going into
6 San Diego that was discovered that was a half-
7 mile long. They're given names: the Grand,
8 the Taj Mahal. Those are descriptors we could
9 never apply to our semi-submersibles.

10 Prosecutions also in that statute
11 do not involve the mules. What it is aimed at
12 and what is being punished are the people who
13 fund these, the people who possess them on
14 their property, the people who build them.
15 That is what those go to. And those people
16 are higher up the food chain than, for
17 instance, our poor fishermen who are being
18 paid the \$5,000 to go aboard the boat and take
19 their turn.

20 We are very certain in the Federal
21 Defenders Office that you shouldn't look at
22 taking these submersibles and simply join them
23 into what is done with the Go Fast Boats, and

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1 there's five very good reasons. The first one
2 is that in the Go Fast prosecutions, which is
3 under the drug guideline, they have drugs.
4 In fact, we've been getting semi-submersibles,
5 as well as Go Fast Boats, with drugs on them,
6 and they've been prosecuted under the drug
7 statute for years.

8 If there's drugs, that's where
9 it's prosecuted, and that's appropriate.

10 In the semi-submersibles, that was
11 designed to catch the ones where there aren't
12 drugs. Either they don't have a load, they've
13 dropped it off. Theoretically, it could be
14 used for something else. At this time, we
15 don't know of any other use.

16 When we look at some of the other
17 things that make sense and that go into the
18 drug statute, there are three types of crimes
19 now I can identify where it's clear that drugs
20 are involved but you don't have drugs. Let me
21 start with paraphernalia. As opposed to
22 having the drugs, we know it's related to
23 drugs. We know it's indicative of drug use,

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1 but we don't have it. We have the same thing
2 when we get into the tunnels, and the tunnels,
3 I think, are most closely analogous.

4 We know we have drug trafficking
5 doing this, but if we don't catch the
6 smugglers at least we can prosecute the
7 tunnels. And we have the same thing going on
8 here. If you catch the submersible and don't
9 get any drugs, at least you have the
10 submersible because, at this point, we believe
11 that's what it's involved in.

12 Now, in those situations what do
13 we see as the sentencing policy that has been
14 followed, which is that we have a much lower
15 sentencing range. I see my time is almost up.
16 If I could finish this? We have a much lower
17 sentencing range. You have in the
18 paraphernalia, instead of drugs it can be a
19 base offense up to 38, we have paraphernalia
20 at a base offense of 12. The smuggling of
21 drugs 38, but tunnels is 16. The Go Fast
22 Boats or the submersibles with the drugs 38.
23 We propose the appropriate base offense level

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1 would be 14.

2 It is lower than what we would see
3 on the tunnels for several reasons. The
4 tunnels, in that case what was important was
5 the government prosecutes the organizers, the
6 builders, the financiers. They use more
7 involved construction, and they're, in fact,
8 harder to find. While tunnels deliver their
9 goods directly into the American public, the
10 Go Fast Boats aren't coming to America and
11 neither are the submersibles. While there has
12 been some instances of Go Fast, none of the
13 submersibles have been found within American
14 waters and, in fact, they're going usually to
15 Central America. Many sink, many are pirated.
16 And then the drugs themselves go from Central
17 America throughout the world. They don't
18 deliver directly. Moreover, the drug
19 guidelines 2(b)1.1 are based on having amounts
20 of drugs, which we don't have here, and offer
21 opportunities to reduce things, which we
22 wouldn't have with the submersibles, the
23 safety valve, the minor role, and things like

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1 that.

2 I was going to address the
3 congressional directive, but my time is past.
4 If you want to speak with me about that, I'd
5 assume that would be good.

6 It's a directive to consider, and
7 many directives to consider are overlooked
8 [and] are not enacted because there are
9 already scant guidelines that cover it. And
10 that applies to most of these, and that was in
11 my written testimony as to what things could
12 apply.

13 I do want to note that the one
14 thing that's important here, though, is, as to
15 organized crime, the idea of bumping it up for
16 being an organized crime. We know with the
17 complex tunnels, with the Go Fast, and with
18 the submersibles at this time that they are
19 being used by organized crime to move drugs.
20 That is inherent in why it's being
21 criminalized. So all of them, when you don't
22 distinguish between two different types of
23 people, there's no point in bumping one up if

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1 all cases are going to be there.

2 We have the other thing which is
3 that -- I lost my thought. If you enhance
4 with organized crime, right now we don't have
5 in the tunnels cases a minor role sort of
6 thing, and we have not had it in the boat
7 cases, as well.

8 Let me tell you about why my
9 district and, in particular, my Tampa in my
10 district is where all of the boat cases are
11 brought by the Department of Justice. There
12 may be some logical reasons to bring them from
13 the Pacific into us and from other parts of
14 the world, but we do know that in my district
15 and in the 11th Circuit the law is, and it is
16 being followed religiously with only the very
17 occasional exception, no minor role will be
18 given. The judges will treat it as we look
19 only at what's on the boat and what people are
20 doing on the boat, not the entire criminal
21 organization. And, therefore, since everyone
22 is taking turns driving the boat, they're all
23 equal. We have no minor role.

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1 If there was to be an organized
2 crime addition, we really have to make sure we
3 make clear that then we have to consider all
4 that and minor role has to be in there. And
5 if I could add one further thing, from the
6 defenders in Tampa, we would ask the
7 Commission to consider revisiting 2(d)1.1
8 minor role and in the comments adding some
9 real teeth to the fact that those things ought
10 to be considered in the role of the entire
11 thing so that we may not have the monopoly in
12 the future on the boat cases. And I thank you
13 so much for the extra time.

14 ACTING CHAIR HINOJOSA: Thank you,
15 Ms. Elm. Mr. Linn?

16 MR. LINN: Chairman Hinojosa,
17 Commissioners, good evening and Happy St.
18 Patrick's Day. On a day traditionally spent
19 consuming green beer, it appears the
20 Commission is fully functional.

21 The United States Sentencing
22 Commission was instrumental in the length of
23 stay changes that were codified for those

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1 sentenced for criminal activity that occurred
2 after November 1st, 1987. The result of the
3 elimination of parole and old law good time
4 and the de facto doubling of sentences has led
5 to the tripling of the federal inmate
6 population in little over 21 ½ years at a cost
7 of nearly a trillion dollars to the nation's
8 taxpayers for prisons, courts, prosecutions,
9 defense, and post-incarceration supervision.
10 The Federal Bureau of Prisons is now operating
11 at 137 percent of capacity with over 203,000
12 inmates. The BOP is now resorting to triple
13 bunking in cells designed for one inmate
14 because of the ramped overcrowding, and there
15 are stabbings and riots almost on a weekly or
16 bi-weekly basis. The federal prison system is
17 made up primarily of low-level drug dealers
18 with sentences that sometimes exceed that of
19 murderers and rapists at a cost of a minimum
20 of \$40,000 per inmate per year.

21 What looked like a good idea when
22 the Sentencing Reform Act of 1984 was
23 conceived has instead been an abject failure.

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1 It was disavowed many years ago by its primary
2 author Eric Sterling and many of those in the
3 criminal justice community have been calling
4 for change to the dismal consequences of an
5 overly harsh system of punishment that costs
6 more than the country can afford and extends
7 the length of stay for nearly all inmates to
8 an unjustified extreme.

9 Last summer, FedCURE was
10 privileged to be invited to a symposium put on
11 by this Commission. This symposium's title
12 was a welcome breath of fresh air, "Symposium
13 on Alternatives to Incarceration." At that
14 conference, speaker after speaker presented
15 treatises documenting evidence-proven ways to
16 deal with those already incarcerated,
17 including expanding good time, re-institution
18 of parole, and alternative plans to recidivism
19 for technical violations, all to reduce the
20 prison populations.

21 At the root of all recommendations
22 centering on reducing the prison population is
23 a conclusion that our current form and range

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1 of punishments are disproportionate to the
2 harm that has been inflicted. Moreover,
3 current efforts to punish those who commit
4 such crimes are not cost effective.

5 It was obvious to me long ago that
6 the states are way ahead of the feds in this
7 regard except for one small branch of the DOJ.
8 The National Institute of Corrections has an
9 ongoing endeavor called the Norval Morris
10 Project. It's calling for the halving of the
11 present population in federal prisons and the
12 halving of the federal post-incarceration
13 populace, as well. A paper by James Austin
14 explains hows and the whys and the wherefores
15 far better than I can, but rest assured that
16 this approach to alternatives to incarceration
17 and FedCURE's focus are one in the same.

18 The good news is that the
19 necessary reforms have either currently been
20 adopted in many states or were in use
21 previously, so the desired reduction is
22 readily achievable. It should also be noted
23 that changes are neither radical nor need to

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1 take a long time to implement. What is
2 required is relatively modest but steady
3 changes in current practices over a sustained
4 period of time. This is because relatively
5 small adjustments in key decision points will
6 have a large cumulative effect over a
7 relatively short period of time.

8 Recently, the Pew Center on the
9 States has argued that new supervision
10 strategies and technologies can help manage
11 more lower risk offenders safely outside of
12 prison at lower cost and with better results
13 than incarceration. Such efforts needs to be
14 strengthened, not scaled back at a time of
15 budget crisis, said Pew.

16 With all of these thoughts in
17 mind, FedCURE presented its suggestions to the
18 Commission for inclusion in their next cycle
19 of recommendations to Congress. Our
20 recommendations were not adopted. Apparently,
21 there's a difference of opinion as to whether
22 the Commission may have the statutory
23 authority to make the dramatic changes that

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1 are necessary to solve the present problem of
2 "length of stay."

3 Specifically, the Commission's proposed
4 recommendations to Congress for May 2009, as
5 they are presently specified, do not in any
6 way attack the back end of sentences already
7 set.

8 At this time, 1(b)113 of the
9 guidelines manual gives authority to the
10 Director of the BOP by its motion to seek
11 release of any inmate if the court finds
12 extraordinary and compelling reasons warrant
13 the reduction. FedCURE requested the manual
14 give authority to give that same director the
15 ability to inclusively seek earlier release by
16 a speed up of good time and an authority for
17 the Chairman of the United States Parole
18 Commission to give a second look to long-term
19 inmates who might be parolable under their
20 guidelines.

21 Admittedly, it's not an exact
22 comparison to match 1(b)113 with our proposed
23 1(b)114 and 1(b)115, but the Commission has

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1 only two options here. It can either continue
2 down its present path and let the BOP attempt
3 to build its way out of this incarceration
4 crisis and hope that Congress decides to
5 appropriate hundreds of billions of dollars to
6 undertake this foolish course of action; or it
7 can take a bold initiative and interpret
8 broadly so as to recognize very "extraordinary
9 circumstances" here that are included in the
10 statutory construction of 18 USC
11 3582 (c) (1) (A) .

12 The question here is one of
13 interpretation of the statute and a decision
14 as to what are extraordinary circumstances.
15 In short, it is the position of FedCURE that
16 it is unlikely this government or this
17 Commission will face anything more
18 extraordinary in order to justify the
19 intervention that is surely necessary. It is
20 all a matter of interpretation.

21 This is the reason why FedCURE
22 requested our presence on your agenda today.
23 We argue that the Commission has a unique

1 opportunity to do more than make minor
2 sentencing guideline changes for future
3 federal inmates. FedCURE feels that the
4 Commission was given a mandate by Congress to
5 make wholesale changes to the criminal justice
6 system when it deemed that extraordinary
7 circumstances demanded change. That is
8 exactly what FedCURE requests be done today
9 for the Commission's next recommendations to
10 Congress.

11 At the very least, if the
12 Commission feels their present mandate does
13 not include the steps necessary to attack the
14 back end of sentences, as well as the front
15 end, then we strenuously request that you go
16 to Congress and resolutely insist that such
17 authority be recognized and not let years go
18 by while this situation worsens.

19 Thank you for the opportunity to
20 make this presentation. My name is Kenny
21 Linn. I am the Chairman of FedCURE. FedCURE
22 stands for Citizens United for the
23 Rehabilitation of Errants. We represent over

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1 203,000 federal inmates and somewhere close to
2 a million of their family and loved ones.
3 Thank you again.

4 ACTING CHAIR HINOJOSA: Thank you,
5 Mr. Linn. Are there any questions?

6 COMMISSIONER CARR: Yes, I have a
7 question. Is your understanding of these
8 semi-submersibles consistent with what I think
9 we've been told by the Coast Guard, which is
10 that they frequently cost about a million
11 dollars each to build?

12 MS. ELM: Let me also say I have
13 brought with me the lawyer who's assigned to
14 our first submersible case under this. Adam
15 Tanenbaum is here in case you want to direct
16 it to him.

17 My understanding is that it's not
18 quite as much, that some of them are going
19 upward of a million but others are lower,
20 closer to \$500,000. They are somewhat
21 substantial, and, of course, the people who
22 are on it can't bankroll that.

23 COMMISSIONER CARR: But it does

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1 suggest that they're being used for an
2 expensive shipment of something?

3 MS. ELM: Yes, as are those fancy
4 tunnels and paraphernalia.

5 VICE CHAIR SESSIONS: Your
6 comments about use of the minor role reduction
7 in Tampa are interesting because when we were
8 in Atlanta just a short while ago we were told
9 that there is somewhat of a split among the
10 judges in Tampa as to whether or not they
11 apply minor role adjustments in cases like
12 what you suggest. It wasn't necessarily
13 related specifically to submersibles, but,
14 generally speaking, there is at least one
15 judge, if not more than one judge, who does
16 apply minor role adjustments; is that not
17 right?

18 MS. ELM: Here's my understanding
19 that we do have one judge who I believe
20 addressed you in Atlanta who has given minor
21 role some of the times, that this is --

22 VICE CHAIR SESSIONS: So that was
23 the one judge who admitted to using minor role

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1 adjustments in cases --

2 MS. ELM: And my understanding [is
3 that] he has done that. We had one other
4 judge I heard about in the last just little
5 while gave one minor role. So it may be that
6 we have sort of a loosening coming up, but it
7 still is very entrenched, and a number of our
8 judges are lockstep on this idea. We're very
9 concerned about that because, as a result,
10 we're flooded with the boat cases.

11 ACTING CHAIR HINOJOSA: Are there
12 any other questions? If not, thank you all
13 very much. We certainly appreciate you
14 waiting all afternoon. I do want to also, on
15 behalf of the Commission, note that Harriett
16 Galvin who is in the audience here is spending
17 her last day with us as the Assistant U.S.
18 Attorney who has done a stint here at the
19 Commission, and we thank her for her work.
20 She's from the Southern District of Florida.
21 She has received a lot of compliments from the
22 staff, and the Commission appreciates very
23 much her work here.

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1 We also have Molly Roth who is
2 present who is the Assistant Federal Public
3 Defender, but she'll be here through May
4 probably, and she's from the Western District
5 of Texas. And so we thank both of them very
6 much for their service and look forward to
7 continued input from them through the coming
8 years. Thank you all very much.

9 (Whereupon, the above-entitled
10 matter went off the record at 5:47
11 p.m. on March 17, 2009 and resumed
12 at 8:38 a.m. on March 18, 2009.)

13 ACTING CHAIR HINOJOSA: Good
14 morning. This morning represents a
15 continuation of our public hearing with
16 regards to the new guidelines and amendments
17 the Sentencing Commission is considering for
18 this amendment cycle. We have a distinguished
19 panel of five individuals who will be
20 addressing the Court Security Improvement Act
21 of 2007 and share their thoughts with regards
22 to what the Commission has published for
23 comment.

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1 We have Mr. Michael J. Prout who
2 is the Assistant Director for Judicial
3 Security in the Judicial Security Division of
4 the U.S. Marshals Service. Mr. Prout is the
5 principal advisor to the Director and Deputy
6 Director on all matters of personal,
7 technical, and physical security of the
8 federal judiciary.

9 We also have someone who we all
10 know, Jon Sands, who is the Federal Defender
11 for the District of Arizona. As we all know,
12 he is the Chair of the Federal Defender
13 Guidelines Committee and has served as special
14 counsel to the Commission. He is a newfound
15 fan of the University of Texas basketball
16 team.

17 We also have Mr. Todd Bussert who
18 is a criminal defense attorney in New Haven,
19 Connecticut. He is the former Associate
20 Director of Client Services for the National
21 Center on Institutions and Alternatives. He
22 is currently the co-chair of the Commission's
23 Practitioners Advisory Group which provides

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1 invaluable advice to the Commission.

2 We also have Mr. Eric R. Stegman
3 who currently manages the Communities of
4 Practice Program and assists with
5 communication strategy for the National
6 Congress of American Indians Policy Research
7 Center. He has assisted in the development of
8 the tribal criminal law and procedure
9 textbooks.

10 We also have Dr. Mario Scalora,
11 who is an Associate Professor of Psychology
12 with the Clinical Training and Law Psychology
13 Program at the University of Nebraska at
14 Lincoln where he conducts and supervises
15 research on various aspects of targeted
16 violence. He also currently serves as a
17 consultant to the threat assessment unit of
18 the U.S. Capitol Police.

19 Each one of them brings great
20 experience to the subject, and we look forward
21 to hearing their statements. We will start
22 with Mr. Prout. The rules are seven minutes
23 for each individual and then obviously

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1 questions and answers from the Commissioners.
2 There is a lighting system up there that gives
3 you a two-minute warning when it turns yellow.
4 If you're like me, you try to run the yellow
5 light, but when it turns red apparently the
6 time is up. So we'll start with Mr. Prout.

7 MR. PROUT: Chairman Hinojosa,
8 distinguished members of the Commission, thank
9 you for allowing me the opportunity to testify
10 on behalf of the U.S. Marshals Service. Today
11 I will address the issue of violations of 18
12 USC Section 115 and 119 that occur through the
13 use of the internet, as requested in Section
14 209 of the Court Security Improvement Act of
15 2007.

16 The Marshals Service views
17 inappropriate communications and threats made
18 via internet postings and blogs very
19 differently than those through other delivery
20 methods. Unlike a letter or an e-mail,
21 comments posted on an internet website have
22 the potential to be viewed by a countless
23 number of persons. Internet postings that are

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1 hypercritical and contain restricted personal
2 information of a protectee, such as their home
3 address or Social Security number, can create
4 a large number of potential threateners
5 virtually unknown to the Service. Such a
6 scenario can be extremely difficult to
7 accurately assess and can, therefore, lead to
8 the expenditure of an extraordinary amount of
9 resources to ensure the safety of our
10 protectees.

11 Internet threats should also be
12 differentiated from other types of public
13 forum events, such as radio, television, or a
14 speech made in a public setting. While these
15 forums can also reach a large unknown
16 audience, they're different in that they only
17 generally reach the audience that happens to
18 be listening or viewing them at that
19 particular moment, and they're done in a
20 public forum, which can easily become known to
21 law enforcement. The audience to an internet
22 threat can be multiplied exponentially, and
23 the blog or website may be completely unknown

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1 to law enforcement.

2 To guard against violating a
3 person's First Amendment rights to free
4 speech, the Marshals Service requires the
5 occurrence of a triggering event before a
6 protective investigation is initiated. In the
7 area of threat management, a triggering event
8 is the receipt of inappropriate communication
9 or a reasonable indication that a possible
10 threat exists.

11 However, one of the issues that
12 makes internet threats so insidious is that
13 others who hear or read this free speech may
14 interpret it differently. They may interpret
15 it as a call to violence or a threat of
16 violence and be influenced to act out
17 accordingly. If the threat on the internet is
18 also accompanied by restricted personal
19 information, it can assist in facilitating the
20 act of violence by identifying the location of
21 the protectee.

22 In the last five years,
23 inappropriate communications to Marshals

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1 Service protectees increased 89 percent.
2 Threats received via the internet, while
3 amounting to between 1 and 2 percent of the
4 total, have followed this trend. Going back
5 to 2006, inappropriate communications received
6 via the internet versus all inappropriate
7 communications received were as follows: in
8 2006, 12 internet cases from a total of 1,111
9 cases open; in 2007, 13 internet cases from a
10 total of 1,145 cases; in 2008, 15 internet
11 cases from a total of 1,278 cases; and in 2009
12 to date, 8 internet cases from a total of 478
13 new cases.

14 In the vast majority of these
15 internet cases, the threat or inappropriate
16 communication was directed at a single case-
17 specific victim, usually the presiding judge
18 in a particular case. In rare cases, the
19 threat made references to more than one judge
20 or to a prosecutor, case agent, or family
21 member. Internet cases do not necessarily
22 create volumes of victims. They do, however,
23 create volumes of potential threateners.

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1 I'd like to share with you a few
2 examples of recent cases involving threats
3 over the internet. In February 2009, a
4 federal judge heard a civil case where an
5 illegal alien sued a U.S. citizen for
6 violating their civil rights by detaining them
7 as they illegally entered the United States
8 through his property. The judge rejected a
9 motion to dismiss the case, and the case
10 proceeded to trial. One individual posted the
11 judge's home address on a blog, while a radio
12 talk show host announced the judge's chamber's
13 phone number. Many others responded with
14 comments on the blog that were threatening,
15 stating that the judge should be hung, shot,
16 or visited with other violent acts. The judge
17 received hundreds of phone calls to his
18 chambers, many of which were threatening and
19 inappropriate. As a result, a protective
20 detail was established on the judge until the
21 trial was completed and the public furor
22 receded.

23 In June 2008, a white supremacist

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1 radio talk show host released the home
2 addresses, telephone numbers, and work
3 addresses of two federal judges on his radio
4 broadcast and the show's website because he
5 did not like decisions they made pertaining to
6 immigration. He announced to his audience
7 that both judges were traitors to the United
8 States. He called for citizens to visit the
9 judges at home away from the protection of the
10 Marshals Service. He suggested face-to-face
11 confrontation as a method for airing
12 discontent with the rulings. He stated that
13 he can picture himself punching out these
14 judges, kicking them in the rib cage and the
15 head, and then challenging them on their
16 decisions while they lay on the ground. He
17 remarked that he would have a really good time
18 beating the judges and suggested that his
19 listeners would enjoy the activity, as well.

20 Clearly, his intention was not to
21 actually perform these acts himself but to
22 incite others to attack the judges. The radio
23 host's comments resulted in the establishment

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1 of protective details on both judges until the
2 host, after being interviewed by the Marshals
3 Service, retracted his comments on the air and
4 on the internet.

5 Ed and Elaine Brown are members of
6 the United States Constitution Rangers, an
7 anti-tax, anti-government organization
8 originally established in Arizona in 1977. In
9 January of 2007, the Browns were both
10 convicted in absentia after they stopped
11 attending their trial. They retreated to
12 their compound and refused to surrender to the
13 Marshals Service, creating a standoff which
14 lasted for seven months.

15 During this time, the Browns
16 themselves made no threats to any judicial or
17 law enforcement official other than to
18 proclaim their intention to defend themselves
19 with violence. However, one of their
20 supporters posted a letter on the internet
21 stating that the judge, U.S. attorney, and
22 various other officials should be hanged for
23 treason. This post initiated a long internet

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1 campaign of threats and inappropriate
2 communications directed at Marshals Service
3 protectees from the Brown supporters and other
4 anti-tax and anti-government groups, and the
5 activity resulted in protective details on
6 several judges and prosecutors for months.

7 Of tremendous concern to the
8 judiciary and others the Marshals Service
9 protects is the proliferation of personal
10 information on the internet. Our knowledge of
11 the planning of attacks on the judiciary shows
12 that approaching a protectee at their
13 residence is an advanced stage of planning.
14 A history of attacks against a judiciary has
15 shown that successful attacks all took place
16 at the judicial officer's residence. 18 USC
17 119, protection of individuals performing
18 certain official duties, makes it illegal to
19 intentionally release personal restricted
20 information with the intent to threaten,
21 intimidate, harm, or incite the commission of
22 a crime of violence to a covered person.

23 The Marshals Service is greatly

1 concerned about the use of the internet to
2 threaten and intimidate its protectees and
3 appreciates the opportunity to address the
4 Commission on this topic. The consideration
5 to increase penalties for violations such as
6 these is a valuable tool for the challenge
7 faced by the Marshals Service in its
8 protection of the judiciary.

9 That concludes my prepared
10 remarks. Let me say again how much I
11 appreciate the Commission's time and attention
12 of these important issues.

13 ACTING CHAIR HINOJOSA: Thank you
14 very much. Mr. Sands?

15 MR. SANDS: Judge Hinojosa and
16 members of the Commission, I'm honored to be
17 here yet again to discuss the sentencing
18 guidelines and the request of the Commission
19 that the federal defenders and community
20 organizations give their views.

21 I have worked over 20 years with
22 the guidelines, 15 years before the
23 Commission, and 10 years as Chair of the

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1 Federal Defenders Guidelines Sentencing Group.
2 In these times, we have appeared in front of
3 you urging the Commission to study and to look
4 at what the Commission is doing.

5 Almost four years ago to the day
6 when the Commission voted to increase
7 penalties for homicide and assault
8 convictions, Judge Sessions stated his concern
9 that in passing judgment based on numbers the
10 Commission looks to individual enhancements
11 that might require an increase. He noted that
12 nobody seems to consider the big picture or
13 the cumulative effect of all the little
14 decisions that the Commission makes. He
15 further noted that, as a result, the penalties
16 seem to continually grow based on apparently
17 legitimate reasons. If one looks at the
18 overall system, which is not known to be
19 particularly lenient, it is continuously
20 becoming more severe.

21 Recognizing that penalties
22 constantly get ratcheted up with the
23 interaction between legislation and the

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1 Commission's concern with proportionality,
2 Judge Sessions speaking at the hearing
3 emphasized that the Commission's duty is to
4 make independent judgments and that it is to
5 reflect upon the ultimate goal of 994 and
6 3553. We would urge the Commission to adopt
7 this as a guiding star in looking at this act
8 and in future acts. What is the purpose of
9 punishment? What is the Commission doing?
10 How is it affecting 3553 and 994?

11 Sentencing is more than just
12 raising two levels or four levels or putting
13 in comments. Is the sentencing addressing
14 what is meant as punishment? And this is more
15 coming before the Commission with anecdotes
16 about this case or that case. We all
17 recognize the terrible price that crime takes
18 the victims. But at the end of the day, what
19 are we doing? What are judges doing?

20 The Commission is in an important
21 place right now as an expert body. It has
22 developed the expertise and now has over 20
23 years of experience in sentencing and

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1 empirical data to look at what sentences
2 should be and where they are going. Thus, the
3 Commission, using its expertise, should look
4 at the dialogue that the judges have with the
5 Commission through actual sentences. What is
6 being done in particular cases? What do
7 trends show? What do social scientists report
8 in their studies? In this way, the
9 Commission, in looking at whether to increase
10 sentences or decrease sentences, has the best
11 ability and the best knowledge to act.

12 Frequently, law enforcement comes
13 in front of the Commission saying we need to
14 increase this, we need to increase that. It's
15 the crime of the day, the crime of the month.
16 But the Commission has to step back and say
17 where is this all going? Nowhere is this more
18 apparent than in those offenses that affect
19 Indians. And in the raising of the statutory
20 maximum for homicide and for assault, there's
21 a very real risk that the Commission in acting
22 could affect defendants that are over-
23 represented by Native Americans.

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1 Native Americans make [up] one
2 percent of defendants, yet they are over-
3 represented in violent crimes. The over-
4 representation is due to the fact of the
5 special relationship between federal
6 jurisdiction and the Indian tribes. Federal
7 jurisdiction on many reservations is the only
8 law enforcement. And as a result, many
9 offenses that would be treated in the state
10 jurisdiction or common law is brought into
11 federal court. As a result, Native Americans
12 feel the brunt of offenses that Congress or
13 others might not have thought would affect
14 them.

15 In assault cases or homicides,
16 this is not a case of extortion, this is not
17 a case of organized crime, this is not a case
18 of violent bank robberies. It's frequently
19 brother against brother, cousin against
20 cousin. There's alcohol abuse. There's
21 poverty. All of these things weigh against
22 the Commission acting without further study.
23 And toward this, we would urge the Commission

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1 to take advantage the way it has in the past
2 and form an ad hoc Indian study group. It was
3 done several years ago. This would bring the
4 stakeholders to one table: judges,
5 prosecutors, defense counsel, community
6 organizers, and members of the tribe to
7 discuss what is best for those offenses that
8 affect Indians. An ad hoc study group for
9 Native American crimes was successful. It
10 brought to the Commission recommendations
11 based on research and on empirical data, and
12 the Commission acted on several of them.

13 We would urge the Commission in
14 reviewing crimes that affect Native Americans
15 to take that path and to look at the special
16 study groups for other offenses, as well.
17 Thank you.

18 ACTING CHAIR HINOJOSA: Thank you,
19 Mr. Sands. Mr. Bussert?

20 MR. BUSSERT: Judge Hinojosa and
21 members of the Commission, my name is Todd
22 Bussert. I'm from a private practice in New
23 Haven, Connecticut. I've been invited here

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1 today to testify in my capacity as the Vice
2 Chair of the Practitioners Advisory Group on
3 behalf of Chair David Dubold of Gibson, Dunn
4 & Crutcher here in Washington and other
5 members of this steering advisory group. It's
6 always a pleasure to be invited to share our
7 views on proposed Commission actions. What
8 follows are our group's views concerning
9 proposed court security amendments upon which
10 we'll elaborate further in our written
11 comments to this and other proposed amendments
12 before the end of this public comment period.

13 As part of the Court Security Act
14 of 2007, Congress increased the maximum
15 statutory penalties for several offenses. The
16 Commission has asked whether the current
17 guidelines are adequate. The PAG believes
18 that they are and that increases in applicable
19 base offense levels are unnecessary.

20 Congress began work on what
21 eventually became this act in 2005. At that
22 time, bills were introduced in both chambers
23 that carried mandatory minimum penalties for

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1 most of these offenses, penalties that were
2 removed ultimately during the legislative
3 process. PAG believes that with Congress'
4 rejection of statutory mandatory minimums,
5 coupled with an absence of any directive to
6 increase guideline penalties, the Commission
7 should not assume that the increase in maximum
8 penalties signals a need for higher guideline.

9 The PAG is particularly concerned
10 about an increase in base offense levels that
11 would affect typical offenders in the name of
12 punishing what are perhaps best characterized
13 as the most egregious of cases. As the
14 Commission is well aware, the guidelines are
15 attended to address the heart of criminal
16 misconduct for defense categories such as
17 these that has accomplished the establishment
18 of base offense levels suitable to punish the
19 typical low-end offenders in appropriate
20 enhancements. When base offense levels are
21 shifted upward simply because Congress has
22 increased maximum allowable penalties for the
23 most serious offenses and offenders, the

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1 result is too often the ratcheting up of
2 guideline penalties that has been the subject
3 of so much criticism for the past two decades.

4 Viewed objectively, that is absent
5 a political prosecutorial prism, the
6 guidelines for these offenses that this
7 Commission has already considered and
8 promulgated are adequate and do not require
9 changes to accommodate or account for new
10 statutory maximums. The Act raises the
11 penalty for assaults resulting in serious
12 bodily injury or involving the use of
13 dangerous weapons from 20 to 30 years and for
14 assaults involving physical contact or intent
15 to commit another felony from 8 to 10 years.
16 Sentence calculations for these offenses are
17 referred to Guideline Section 2(a)2.2.

18 In 2007, the mean sentence for
19 non-sexual assault over all criminal history
20 categories was 39 months and the median was 30
21 months. Even criminal history category 6
22 offenders received sentences at multiples
23 below the former 20-year maximum,

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1 approximately 6.3 years on average. Such
2 empirical evidence counsels strongly against
3 any need to increase guideline ranges.
4 Indeed, of the 313 sentences for assaults in
5 2007, fewer than 6 percent were above the
6 guideline range, while approximately 12
7 percent were non-government sponsored
8 sentences below the range.

9 Importantly, Section 2(a)2.2
10 already recommends ranges at or approaching
11 the new statutory maximum for those who engage
12 in the most serious of conduct, especially
13 where the victim is a judicial or federal
14 official. For instance, a base offense level
15 of 14 with enhancements for conviction under
16 Section 115, more than minimal planning,
17 discharge of a firearm, serious bodily injury,
18 payment, and an official victim results in an
19 adjusted offense level of 36. This produces
20 a range of 188 to 235 months for first
21 offenders in ranges that exceed the statutory
22 maximum for those in criminal history category
23 5 or 6. In other words, the guidelines as

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1 currently written produce guideline ranges at
2 the statutory maximum. To the extent the
3 guideline range in a given case is not
4 sufficient to satisfy the purposes of
5 sentencing, courts remain free to depart
6 upward or impose a non-guideline sentence.

7 The statutory maximum for
8 voluntary manslaughter is also increased from
9 10 to 15 years. Under the current Section
10 2(a)1.3, the base offense level for such a
11 conviction is 29, which increases to 35 when
12 there's an official victim. Without any other
13 adjustments, for a category 1 offender, this
14 results in a range of 160 to 210 months. That
15 is a range that exceeds the new statutory
16 maximum. Accordingly, no further changes are
17 needed. In this regard, the PAG notes that
18 the Commission raised the base offense level
19 from 25 to 29 less than five years ago, and
20 there's no empirical evidence that establishes
21 or suggests that courts find level 29
22 insufficient.

23 Turning attention to official

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1 victims, the Commission has requested comment
2 on whether Guideline Section 3(a)1.2 addresses
3 adequately the circumstances of an official
4 victim. The PAG believes that it does. In
5 2004, the Commission increased this adjustment
6 from three to six levels for offenses against
7 a person motivated by the official status of
8 the victim. In all other circumstances, it is
9 a three-level enhancement; and, as an
10 appropriate point of comparison, Guideline
11 Section 3(a)1.1 provides a two-level
12 enhancement for vulnerable victims.

13 As touched upon during our
14 testimony last March, the PAG believes that
15 any further increase based solely on the
16 victim's status suggests, if not actually
17 establishes, a class system within the
18 guidelines where in the harm that may befall
19 judges, prosecutors, probation officers, and
20 other federal officials is treated far more
21 serious than that visited upon the average
22 citizen, that their lives and property are
23 somehow more worthy of protection. An example

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1 helps illustrate this disparate treatment.
2 Say you have a former assistant United States
3 attorney who, having seen the light, is now
4 toiling diligently as defense counsel. Six
5 months after entering private practice, this
6 capable young attorney has a client who,
7 following sentencing, becomes disenchanted not
8 only with the system but also with her,
9 notwithstanding the consensus of view that she
10 did a terrific job securing a favorable
11 disposition of her client.

12 Disgruntled client, who's been
13 permitted to surrender voluntarily, decides to
14 exact revenge before entering federal custody
15 by committing an offense of which counsel is
16 the victim. Under the current system, there's
17 no status-based enhancement for this former
18 prosecutor, nor should there be. But as
19 things already stand, there would be at least
20 a three- level and as much as a six-level
21 enhancement if the defendant's resentment had
22 instead been directed towards someone
23 maintaining an official court or other

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1 government position.

2 This difference in penalties is
3 sufficient to address the status issue and
4 congressional concern. There is no
5 justification to magnify it further. Indeed,
6 we have not heard or seen anything in the past
7 four years to suggest that courts are
8 dissatisfied with the level of added
9 punishment called for under Section 3(a)1.1.
10 It is a particularly sensitive matter and
11 unavoidably so for a government agency to
12 establish the appropriate sanctions for making
13 a government employee or victim of criminal
14 conduct. Prudence demands that any greater
15 differentiation and punishment due to official
16 status be based on credible documented
17 evidence tied directly to the need to be
18 addressed.

19 Finally, Section 209 of the Act,
20 which directs the Commission to review threats
21 that occur over the internet in violation of
22 18 USC Section 115 to determine whether and
23 how much the circumstances should aggravate

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1 the punishment, the PAG notes that this
2 language only requires a review, not a change,
3 and no change appears necessary. Using this
4 offense characteristic to enhance the base
5 offense level for defendants who threaten a
6 current or former federal official or her
7 family member is irrational, both logically
8 and factually.

9 Threats can be conveyed in any
10 number of ways. Among the most common would
11 seem to be in person, that is face to face, by
12 phone, by mail, and over the internet. Of
13 course, over the internet can have any number
14 of meanings, such as via e-mail, in a social
15 exchange group like Facebook, in the comments
16 section of a blog, or on one's personal
17 website, just to name a few. Yet, the most
18 aggravated of these is the in-person threat in
19 terms of its intrusiveness, imminence, and
20 opportunity for escalation. Likewise, anyone
21 who has received a harassing phone call in the
22 middle of the night can attest to how
23 disruptive and disconcerting it can be. And

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1 receipt of a letter informs the recipient that
2 the individual who made the threat knows where
3 he lives.

4 There are numerous difficulties in
5 seeking distinguished internet threats from
6 these types of threats. First, it can be
7 reasonably argued that someone who goes
8 through the deliberate steps of writing a
9 letter, addressing an envelope, applying a
10 stamp, and placing the letter in the mail is
11 more determined to communicate a threat than
12 someone who types out an e-mail and clicks
13 send. It's fair to say that all of us either
14 have written e-mails in the heat of the moment
15 that we later regret or have surely seen our
16 share of such e-mails on our office exchanges
17 or listservs. A form of communication that
18 engenders immediate, sometimes detached or
19 presumably anonymous responses does not, in
20 and of itself, require an added level of
21 punishment. To the contrary, it would seem to
22 compel a degree of understanding as to the
23 stressors that we're acting upon the

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1 individual.

2 The second problem is perhaps
3 probably relatable to generation gap.
4 Notwithstanding what has become the
5 omnipresent existence of electronic
6 communication in our society, there continues
7 to be a lag between the understanding and
8 appreciation for what computers, cell phones,
9 and the like mean to those aged 35 and
10 younger, as compared to the rest of us. It is
11 seen in areas ranging from the willingness to
12 abandon privacy by living openly via Facebook
13 to the demise of newspapers because young
14 people can find information freely available
15 online.

16 In other words, for a growing
17 number of Americans, electronic means of
18 communication are simply the norm. Without
19 more, this fundamental change in the way we
20 communicate is clearly not aggravating
21 relative to criminal misconduct.

22 In the same vein, it is notable
23 that, while the internet fosters an apparent

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1 sense of anonymity among many, the reality is
2 that the use of electronic means to
3 communicate make it easier for investigators
4 to identify and locate someone, certainly
5 easier than identifying the sender of a letter
6 with no return address. And, again, without
7 more, someone who attempts to conceal from
8 where an internet threat originates should be
9 treated no more severely than someone who does
10 the same using other forms of communication.
11 There is no legitimate basis to distinguish
12 one group of individuals from the other.

13 If anything, by increasing
14 punishment for those who use the internet to
15 convey threats, the Commission would reward
16 the use of other forms of communication with
17 greater risks. A clear example of this is the
18 number of anthrax-related safety precautions
19 taken in mail rooms throughout the country
20 shortly after September 11th, 2001.

21 The PAG believes that creating an
22 aggravating factor for the use of the internet
23 will cause courts to disregard the guidelines

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1 for reasons like those for which they have
2 increasingly rejected to congressionally
3 influence child pornography and drug
4 guidelines. The PAG, therefore, urges the
5 Commission to take no action in this regard.
6 Thank you.

7 ACTING CHAIR HINOJOSA: Thank you,
8 Mr. Bussert. Mr. Stegman?

9 MR. STEGMAN: Good morning,
10 Chairman Hinojosa and the distinguished
11 members of the Commission. Thank you for
12 giving me an opportunity to discuss the
13 proposed changes with you this morning. As an
14 initial note, I would just like to say that
15 I'm not testifying to you in my official
16 capacity today as an employee of the National
17 Congress of American Indians and that my
18 statements do not necessarily represent views
19 of NCAI.

20 There are three proposed
21 amendments in the 2009 proposed amendments to
22 the sentencing guidelines that will have
23 significant impacts on Indian country: one,

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1 the provisions governing an increase in the
2 maximum sentence for involuntarily
3 manslaughter from six to eight years under the
4 Court Security Improvement Act, which would
5 affect sentencing in Indian country DUI cases;
6 two, the provisions governing increases in the
7 maximum sentences for witness/victim tampering
8 and retaliation, which would have significant
9 impact in Indian country domestic violence and
10 child abuse cases; and, three, the provisions
11 governing an increase in the maximum sentence
12 for influencing, impeding, and retaliating
13 against federal officials, which would effect
14 conduct against BIA officers.

15 I've spent the last three years as
16 a researcher on a forthcoming National
17 Institute of Justice study on the
18 administration of justice in Indian country,
19 and one thing that's become very clear working
20 on that project and that's the
21 disproportionate relationship that tribal
22 citizens have with the federal system. Indian
23 tribes have a very unique relationship with

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1 the federal government, as you know,
2 especially as it relates to criminal
3 jurisdiction. Where most Americans typically
4 encounter the state system for crimes under
5 review today, tribal citizens are much more
6 frequently prosecuted under federal law and,
7 in many cases, being served by federal police
8 and probation officers. It is this frequency
9 and day-to-day relationship with the federal
10 system that warrants careful review of these
11 proposed guideline changes because they
12 disproportionately affect Indian country.

13 We were able to review the work of
14 the Native American Advisory Group in 2003
15 that Mr. Sands referenced and the 2003
16 testimony of Paul Charlton before this
17 Commission. The conclusions of the Advisory
18 Group and the testimony of Mr. Charlton bring
19 out two persisting concerns: one, a concern
20 that Native American defendants are treated
21 more harshly by the federal sentencing system
22 than they would be if they were prosecuted in
23 their respective states; and, two, that in

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1 states with higher sentences than in the
2 federal system the perception that real
3 injustice is suffered by many Indian and non-
4 Indian victims where the defendant gets a much
5 lower sentence than if he or she were
6 prosecuted under the state system.

7 While we were able to contact and
8 speak with the U.S. attorney and victims
9 advocates in Arizona where they conveyed full
10 support for these proposed amendments on
11 behalf of their victim population, we feel
12 that it is important to have more time to
13 contact and get feedback from the following:
14 the U.S. attorneys and victims advocates in
15 other states with large native populations;
16 tribal prosecutors and public defenders;
17 tribal domestic violence and child welfare
18 programs; the native MADD chapters, Mothers
19 Against Drunk Driving; the native victim
20 advisory groups; and the legal academic
21 community working on Indian country issues;
22 and, finally, native legal aid organizations.

23 The Indian country entities that

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1 we were able to contact report that they would
2 like more time to analyze the proposed
3 amendments and comparative laws and to review
4 available statistics and new information. We
5 understand that the notice and comment period
6 remain open until March 30th. However, we
7 also expect that it may be necessary to take
8 consideration of these amendments into our
9 next cycle.

10 Presently, there are two members
11 of the Victim Advisory Commission, one whom
12 I'm speaking on behalf of today, Pat
13 Sekaquaptewa, and the other, Monte Deer, who
14 have committed to following up with these
15 entities and seeking out more input. Thank
16 you very much for your time.

17 ACTING CHAIR HINOJOSA: Thank you,
18 Mr. Stegman. Dr. Scalora?

19 DR. SCALORA: Thank you.

20 Distinguished members of the Commission, I'm
21 Mario Scalora. I'm an Associate Professor of
22 Psychology at the University of Nebraska
23 Lincoln, and I have the privilege as serving

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1 as the consulting psychologist at a threat
2 assessment section of the U.S. Capitol Police.
3 I should state as a caveat up front that I am
4 not representing neither the University, nor
5 the United States Congress, nor the U.S.
6 Capitol Police. However, I can speak with
7 great certainty that many of the agencies I
8 work with are very much strongly in support of
9 any activity that would enhance the safety of
10 judicial officials and those who work with the
11 courts. I will not read my testimony to you
12 because I tend not to read out loud as well as
13 I speak out bullet points, but I do not mean
14 that to presume any informality, only respect
15 to the Commission.

16 I had the opportunity over the
17 last 15 years of looking at literally tens of
18 thousands of threats to government officials
19 at the state and local level. Many of the
20 individuals at the Capitol Police deal with,
21 I would say a minority, but easily 20 percent
22 overlap with the Judicial Branch. We
23 unfortunately share some of those individuals

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1 who are gifted in expressing their grievances
2 toward government officials. And there tend
3 to be some commonalities but also some aspects
4 of this that are evolving. One, we know that
5 threats toward any government official can not
6 only be rather taxing toward the official and
7 his or her family but also to the agencies
8 that have to spend a great deal of effort, as
9 Marshal Prout described in a few cases
10 earlier, in terms of the amount of energy it
11 takes to maintain and address and manage those
12 threats.

13 That being said, I would caution
14 that any focus on the use of the internet as
15 justification for enhancement be viewed almost
16 like a double-edge sword. In one respect, we
17 know that electronic communications have
18 exploded toward government agencies and, as a
19 result, the small numbers of those that cross
20 First Amendment protections into the realm for
21 vague or direct threats continue to grow. We
22 know, for example, as stated by one of my
23 colleagues here, that many of these activities

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1 are done by younger people. Frankly, they
2 type better with their thumbs. Two, they're
3 much more savvy about these issues. But even
4 with that, we do find that even folks of our
5 age group are still becoming more and more
6 internet savvy, but there is a
7 disproportionality related to age.

8 We also know that, for example, a
9 few years ago [inaudible] published a study
10 comparing e-mail and letter threats. We
11 consider these very different. We know that
12 e-mail threats tend to be much more impulsive
13 and, by themselves, tend not to result in a
14 direct action of harm toward a member. That
15 does not mean that we do not take every threat
16 seriously, and in some cases part of the
17 mitigation may be the result of the actions by
18 the agencies. Threat cases are very easy to
19 manage, frankly, because federal officials and
20 state officials have a few more tools at their
21 disposal to address the individual who uttered
22 the threat. But our experience has been that
23 it's very easy and I'm relieved to know it's

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1 not just professors and students but people
2 across the gamut can sometimes hit send
3 prematurely.

4 We also recognize, as pointed out
5 earlier, that there are a range of
6 communications that people express
7 electronically: response to news stories,
8 blogs, social networking sites, Twitter,
9 basically messaging services. Many of these
10 things can be very impulsively done, but they
11 can also be used as part of a campaign of
12 harassment where personal information
13 regarding the individual at focus could be put
14 out there at risk to that public official.

15 For our purposes with the Capitol
16 Police, we do not focus on a single modality.
17 We focus on a campaign of harassment or a
18 campaign of intimidation for that person, and
19 we find very often many of those people cross
20 modalities of contact. For example, we have
21 found people doing rap videos on Youtube, and
22 some of those rap videos, not all of them by
23 any means but some of them have been very

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1 threatening in nature. Those, by their very
2 nature, have not necessarily gone forward to
3 threatening activity, but individuals who've
4 posted Youtube entries have then gone on to
5 blogs, then posted e-mails, sent letters, made
6 phone calls. We have found ourselves to be
7 much more concerned about those individuals
8 because they display what we describe as an
9 intensity of effort. And, frankly, those are
10 the people we worry about.

11 And I would also caution that if
12 one is going to focus on the modality of how
13 threats are delivered, you're going to always
14 be behind the technology. Four or five years
15 ago, we were just trying to figure out e-mails
16 as they exploded after anthrax showed up at
17 Capitol Hill and other government buildings
18 and trying to figure out how to review those.
19 We are now dealing with the range of
20 electronic communications now and trying to
21 get our arms around all of those things, and
22 the sophistication and the variety at which
23 those are coming to us continues to evolve.

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1 And so if you are going to look at this, I
2 recommend you use a broad definition but focus
3 more on the nature of the behavior versus the
4 modality.

5 Second, there was some
6 consideration of whether the sender of threats
7 is acting on an individual capacity or is part
8 of a large group. I can appreciate why
9 members would be concerned about that and why
10 Congress might encourage that type of
11 scrutiny. As the Marshal described earlier,
12 there are specific groups that, frankly, have
13 become much more active in recent years with
14 regard to these activities.

15 We've noticed, though, some
16 changes in how these groups behave. These
17 groups have become much more decentralized
18 and, frankly, don't hold a lot of meetings
19 anymore. They use the internet as a
20 recruitment tool and a tool to incite members;
21 and, frankly, one could have an infinity for
22 a group, may never have, quote, "formal
23 membership," but can be encouraged and

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1 educated by a group through a variety of
2 electronic means and being able to, quote,
3 "tie" that person to a group can be extremely
4 difficult. And I think we see this with
5 transnational threat groups, as well as very
6 specific issue-oriented or domestic threat
7 groups. And if the Commission believes this
8 to be an important distinction, fine. I would
9 not hold my breath, with all due respect, that
10 you're going to get a lot here in that regard.

11 When I do training with front-line
12 officers, and I'll stop here, we do not ask
13 people for their al Qaida membership cards
14 when they show up on Capitol Hill. Membership
15 is a rather ubiquitous issue with many of
16 these groups. Thank you again for the
17 opportunity.

18 ACTING CHAIR HINOJOSA: Thank you,
19 Doctor. I'll open it up for questions.
20 Commissioner Carr?

21 COMMISSIONER CARR: Mr. Sands,
22 yesterday we heard from a staff attorney; a
23 lawyer in private practice; and one of your

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1 colleagues, the federal defender from the
2 Middle District of Florida, all of whom were
3 listed as speaking on behalf of the Federal
4 Public and Community Defenders. And I know
5 that you're Chair of the Federal Defenders
6 Sentencing Guidelines Committee. I'm trying
7 to find out for whom you all speak. When I
8 hear from someone from the Department of
9 Justice, I know that that is the Department of
10 Justice position, and I'm not going to hear
11 something different from some U.S. attorney
12 from Minnesota or California. And I'm just
13 trying to find out how broad and formal is the
14 representation of you and the others who speak
15 on behalf of the federal public and community
16 defenders.

17 MR. SANDS: The people that are
18 here speak on behalf of themselves. We don't
19 walk in lockstep as the Department, and we
20 believe in giving the Commission a wide
21 variety of views. Hopefully, everyone is
22 consistent.

23 COMMISSIONER CARR: Okay. But

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1 that's because you would anticipate sort of a
2 similarity of views but not because the
3 federal defenders across the country have been
4 canvassed and have agreed that anyone [is]
5 speaking with one voice?

6 MR. SANDS: That is correct. We
7 intend to try to channel things through the
8 Sentencing Committee. But, for example, if
9 the Commission wants to hear from someone who
10 actually does the submersible cases, it
11 doesn't make sense for someone from Nebraska
12 to do it. So that's why we bring those who
13 have the expertise.

14 COMMISSIONER CARR: Thank you.

15 ACTING CHAIR HINOJOSA: I guess
16 just a quick follow-up. If the Commission
17 were to invite a certain public defender in a
18 certain area, I know with the Justice
19 Department it works differently, would we be
20 able to do that, or do they have to get
21 permission from someone in order to come --
22 let's say the Commission had identified a
23 certain public defender who had expertise,

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1 would they have to ask permission from some
2 committee or someone else to be able to accept
3 the invitation?

4 MR. SANDS: I'm available at any
5 time, Chair. No. If the Commission reaches
6 out to a specific defender or an assistant
7 defender, then that's the Commission's
8 prerogative.

9 ACTING CHAIR HINOJOSA:
10 Commissioner Howell?

11 COMMISSIONER HOWELL: Yes. I just
12 wanted to explore what seems to be a little
13 bit of a difference of opinion on this panel,
14 which I think is fairly interesting and one of
15 the issues that the Commission is grappling
16 with. So I want to direct this to Mr. Prout.
17 To be honest, I sort of share Mr. Bussert's
18 and Dr. Scalora's sort of concern about ICE,
19 you know, focusing on internet communications
20 for some kind of particular enhancement when
21 it comes to threats. And I just wanted to
22 explore with you for a second the
23 differentiation that you make between internet

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1 postings either on blogs, websites, and so on,
2 and threats that are made over radio and TV.

3 From my perspective, I mean it
4 seems to me that the concern about not knowing
5 who the audience is who is listening is a far
6 more concern with radio threats or television
7 threats than internet threats where you can
8 actually see who's actually accessing a blog
9 or accessing a web site through logs of
10 originating IP addresses of people who are
11 visiting, people who post on blogs leave
12 digital footprints all over the place. So in
13 some ways it's a lot easier to track the
14 audience of internet postings in a variety of
15 fora than it is to figure out who's been
16 listening to a radio threat or a TV broadcast
17 threat.

18 So I was actually interested in
19 your view in your statement that the Marshals
20 take internet threats so much more seriously
21 than TV or radio threats. Could you explain
22 that a little bit more?

23 MR. PROUT: Yes, ma'am. Thank you

1 for the opportunity. My first comment on
2 that, as you spoke about television and radio,
3 was that there is regulation in television and
4 radio. If somebody incites violence or
5 threatens an individual over the television,
6 the FCC monitors this stuff, and there are
7 rules about it. That is not where the
8 dramatic challenge comes from. The dramatic
9 challenge comes from the incite and call to
10 violence that these individuals are making.

11 Our challenge over taking these
12 threats so seriously is our need to reverse
13 actually a cultural movement in that if one
14 individual manages through blog postings to
15 draw out hundreds of others to make phone
16 calls, to come out in person to visit judges
17 and prosecutors to have their say, and those
18 visits, those attempts, those endeavors are
19 recognizing a growing intensity of effort.
20 The intensity of effort may be by first a
21 collective, then we must draw down to figure
22 out who the individuals are that are actually
23 exercising this.

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1 The challenge over the threats of
2 the internet, at first, over investigation, I
3 recognize the conflict you see, we can
4 identify who makes postings when we're aware
5 of which would be millions of websites to go
6 to. But we can[not] identify who might be
7 called to violence based on those postings.
8 So that is where the extraordinary resources
9 wind up focusing on: the unknown.

10 The individuals that make those
11 postings are well aware that they may be
12 making a veiled or an individually to
13 themselves empty threat. They may never
14 follow up on their own statements on the
15 internet, on television, or radio. It is the
16 call to violence that incites others that is
17 the dramatic concern of the Marshals Service
18 and the Department of Justice.

19 VICE CHAIR CASTILLO: My personal
20 problem is what do we do with those
21 individuals that post personal residential
22 addresses without calling for an incitement of
23 violence but, nevertheless, posted in a way

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1 that it can get to somebody who has violence
2 in mind? And it seems to me that somebody who
3 makes a post like that has to accept a
4 responsibility for making that posting with
5 the chance that violence might come with that
6 because of the nature of the internet. And
7 I'm just wondering if you have any reaction to
8 that, especially Mr. Prout or Dr. Scalora. Do
9 you think that that is just off, or do you
10 think that it's acceptable for an organization
11 like ours to just attribute that type of
12 responsibility for those type of postings?
13 Because, ultimately, it's the posting of
14 personal information that I think leads to
15 violence. That's what we found out in
16 Chicago, in particular.

17 MR. PROUT: I'll defer to Dr.
18 Scalora. I definitely have comments on this,
19 but since I got to talk last I'll let him talk
20 first.

21 DR. SCALORA: And to be clear,
22 while I am always a little weary of focusing
23 on one modality, I do support the Marshals'

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1 concern about the use of the web or any
2 electronic communications as a means of
3 campaign of incitement. And I think those are
4 issues that are extremely difficult for
5 agencies to manage. And so to the degree that
6 the Commission were to look at this and find
7 strategies to address this, I think any type
8 of effort to incite I think would need to be
9 taken seriously. I think focusing on certain
10 types of technology I think is a challenging
11 way to go. That is not necessarily
12 disagreeing with the Marshals' concern about
13 how some of these things could go to audiences
14 we may not be able to track.

15 VICE CHAIR CASTILLO: But what
16 about no effort to incite but just a posting
17 of a personal residence? To me, it's almost
18 the equivalent of putting a gallon of gasoline
19 in front of somebody that could be a arsonist,
20 you know. It has a twisted potential to it.

21 DR. SCALORA: I agree, your Honor.
22 I think for us we tend to look at the context.
23 If, for example, hypothetically speaking, a

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1 government official was in a news story and
2 the subsequent blogs had a rather intense
3 spade of negative comments, frankly at most
4 public sites those would be filtered out. So
5 let's say we're going to a more private
6 website/blog that's encouraging these things.
7 I think an individual who just says here's
8 judge so-and-so's address, minus those issues
9 I think it would be a much harder thing to
10 suggest that they're somehow engaging in a
11 campaign of harassment, intimidation, or
12 whatever. I think that individual who happens
13 to say, "I don't know what should happen to
14 judge so-and-so, but, by the way, here's his
15 address," and this comes after several dozen
16 rather insidious comments, I think that
17 context is substantially different.

18 And I'm not a prosecutor and would
19 not even claim to know how they do their job.
20 I don't know if that's prosecutable or
21 provable. I think from a contextual point of
22 view, that is substantially different than
23 someone who puts it in more in isolation

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1 because I think, to use your example, someone
2 putting gasoline just out in the corner,
3 harder to argue. Someone doing it and you're
4 at an arsonist convention, I think it's an
5 easier call in that respect.

6 MR. PROUT: If I may follow-up,
7 personally, my opinion of what you describe
8 would be that person is dancing around the
9 law. They are putting that can of gasoline
10 out there allowing others to light it. And,
11 unfortunately, that is a tactic of these
12 individuals, of these groups, just put enough
13 information out there, it's just free speech.
14 If the Washington Post can put it out there,
15 why can't I? That exists. These individuals
16 are playing that.

17 Oftentimes, there is the inciters
18 and the little rabble-rousers behind them, and
19 that occurs. And those often differentiate
20 where we come in with inappropriate
21 communications versus threats. The release of
22 restricted personal information with the
23 intent to do harm is actually covered by the

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1 code, and we find it to be rather, you know,
2 somewhere in there is, usually looped, some
3 form of threat.

4 Releasing that information with
5 just dropping it out there we have to deal
6 with as an inappropriate communication, expend
7 the resource to determine, first protect to
8 figure out if it's going to result in some
9 hearing the call to violence by another
10 individual just by reading that address plus
11 other postings that may lead a person to a
12 collective thought. We have to expend the
13 extraordinary resources to determine if that
14 call to violence is going to come, and that
15 means risk management, mitigation, and
16 protection of all the potential individuals
17 involved: family members, the judiciary, the
18 prosecutors, or our own agents, depending on
19 the case.

20 MR. SANDS: But is it really worth
21 doing that complexity or having an SOC for
22 that? It could be an accidental. There was
23 an instance in Phoenix in which a public

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1 official owned property that was the subject
2 of some dispute. His name was placed
3 [inaudible] there a huge uproar because it was
4 Sheriff Joe Arpaio. Do we really want to deal
5 with that? Mistakes happen. And, again, this
6 is an area that a judge has the flexibility to
7 address.

8 VICE CHAIR CASTILLO: What I hear
9 both Mr. Sands and Mr. Bussert saying is it
10 doesn't need a uniform guideline change, but
11 a judge can use their upward departure
12 discretion for the isolated egregious cases.
13 Is that basically it?

14 MR. BUSSERT: I think it is, your
15 Honor. And part of the trouble I have, I
16 guess, in the Marshals' presentation is one of
17 the examples cited is someone goes on the
18 radio and says the judge lives here or
19 whomever lives here and then goes and posts on
20 the blog. Well, how do we distinguish if
21 someone acted where they heard it and what
22 caused them to act when we get into situations
23 where people broadcast, which they

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1 increasingly do, terrestrial radio via the
2 internet or they post transcripts, like Rush
3 Limbaugh does, on his radio broadcast and then
4 it's freely available?

5 What about situations like Michael
6 Phelps? You say things don't find a way on
7 the internet. They do. Michael Phelps was at
8 a party in South Carolina, and the next thing
9 you know is his photograph is shared with the
10 entire world. Things happen outside of the
11 world of the internet that perhaps there's no
12 intention they're going to find a way on there
13 but increasingly they do through Youtube and
14 all these other forms. And we're viewing this
15 in a very murky area in terms of trying to
16 punish what could be very much innocuous
17 behavior, and I think the doctor makes the
18 very interesting, I think, telling point to
19 focus on the behavior and not the modality,
20 and the people that are going to engage in
21 this behavior and the way that the Commission
22 would be concerned about are going to employ
23 a number of modalities. They're not going to

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1 simply be based on the internet or based in
2 the mail or whatever it may be. They're going
3 to use what's at their disposal.

4 ACTING CHAIR HINOJOSA: Doctor?

5 DR. SCALORA: Sir, if I may, I
6 understand the deep pain that recent events,
7 especially directed toward members of a
8 judiciary and their family, have caused in
9 terms of recent acts of violence. That being
10 said, I have looked at public officials across
11 different branches of government, particularly
12 on the legislative side, but at different
13 levels of government, and one of the things
14 I've also noticed is that sometimes the
15 protectees are their own worst enemy. And I
16 don't say this to be disrespectful or
17 flippant, but if I could find out a judge's
18 address by pulling out the white pages, some
19 of this is moot at some level. We're
20 expending a great deal of energy to protect
21 people who may not always be doing things to
22 protect themselves.

23 By no means am I suggesting they

1 are responsible for the things that are
2 happening to them, but some of this
3 information is not that difficult to find.
4 And I think if one was to truly be effective
5 in this regard, I do think punishment needs to
6 fit the crime, and I realize you're working at
7 this end of it. And I know federal
8 judiciaries have heightened concern and
9 sensitivity to these issues, but I think some
10 of these issues can also be addressed
11 substantially through preventive efforts by
12 not making some of this information as readily
13 available as it can be. Frankly, they would
14 have a harder time in Lincoln, Nebraska
15 finding my address than they would of some of
16 our judiciary, and I say that with deep
17 respect for our judiciary.

18 And so sometimes our efforts may
19 have to be directed elsewhere. Thank you.

20 ACTING CHAIR HINOJOSA: Go ahead.
21 And then Commissioner Wroblewski afterwards.

22 VICE CHAIR SESSIONS: Can I just
23 respond to that? I agree that we need to be

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1 much more preventive, but what really is the
2 concern is when somebody puts the address on
3 the internet or in the open public in the
4 context in which it is presented and the
5 implicit message is that there should be a
6 threat or should be taken as a threat. And,
7 you know, that's irrespective of whether you
8 could actually find the address in a telephone
9 book. I mean, that's actually the harm.
10 After all, we're talking about sentencing and
11 persons convicted of a crime, and it really is
12 that implicit intent to cause harm or create
13 reckless environments in which harm could
14 happen. I think that's a little different
15 than, you know, something that you could
16 prevent.

17 DR. SCALORA: No disagreement,
18 your Honor. My point is that we could create
19 a very elaborate and sophisticated strategy
20 that we could end up defeating ourselves with
21 not considering other things. And no argument
22 with your concern. I spent my life doing this
23 kind of research, consulting with agencies who

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1 try to prevent these things, so we're singing
2 from the same pew, sir.

3 MR. BUSSERT: Two points on that.
4 Again, I think, one, we have to have an
5 appreciation for technology and where we're
6 moving, not where we're coming from but where
7 we're moving. And if you look now in
8 retrospect at the child pornography guidelines
9 in particular, there's a two-level enhancement
10 for use of computers. In reality, in this day
11 and age, pretty much all of those cases happen
12 via computers. It's not an aggravating factor
13 in and of itself, yet the two-level
14 enhancement is still there. I think judges
15 are increasingly disagreeing with that.

16 And I think the second part is one
17 of deterrence, which is to suggest that some
18 esoteric kind of two-level bump in a
19 guidelines manual that a lot of attorneys
20 can't even understand, yet alone some person
21 who's kind of a rabble-rouser or has this in
22 their mind is going to be deterred in any
23 meaningful way. I think we're not really

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1 thinking in the larger picture, and I think
2 Mr. Sands spoke about this kind of looking at
3 the broader view in terms of where we're
4 going. A lot of this is talking about
5 preventative measures relative to punishments,
6 but what we're really talking about is an
7 enhanced punishment as some level of general
8 deterrence. The populations that I've heard
9 about, at least that we're referring to today,
10 don't seem like they're very rational people.

11 VICE CHAIR SESSIONS: Actually,
12 Mr. Sands said that I said that, that we
13 should be thinking about --

14 MR. BUSSERT: Yes, and it was a
15 very good point.

16 VICE CHAIR SESSIONS: Didn't you
17 say that?

18 MR. SANDS: Absolutely, Judge. We
19 should follow it.

20 COMMISSIONER WROBLEWSKI: Can I
21 follow up on that, if I could? And this is a
22 question for Jon. You mentioned at the
23 beginning of your testimony about the

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1 cumulative impact of individual enhancements
2 and the need for a systemic review of the
3 guidelines and severity levels.

4 One of your colleagues yesterday
5 also talked about the need to focus on
6 certainty of punishment as much or more than
7 the severity of punishment. We share many of
8 those concerns. And back in August, when we
9 sent the letter to the Commission on our
10 priorities, we asked the Commission to
11 undertake a systemic review of the guidelines.
12 And for that and for many other reasons, the
13 Commission has begun a process of reviewing
14 the guidelines as a whole. As you know, there
15 was a regional hearing in Atlanta.

16 What was disappointing, though, is
17 the colleagues of yours who testified at that
18 regional hearing suggested that no systemic
19 changes actually were necessary, that they
20 were suggesting that the Commission focus
21 crime by crime, individual crime one at a
22 time. And that was very disappointing, and it
23 seems inconsistent with what you're saying

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1 here. Could you address that? And am I
2 getting the wrong message?

3 MR. SANDS: Yes.

4 ACTING CHAIR HINOJOSA: It's
5 actually a regional hearing question, but I'll
6 let you go ahead and respond.

7 MR. SANDS: Well, part of the
8 regional hearings was the Commission asked for
9 line attorneys, for people who are in that
10 region addressing certain issues. We try to
11 address that. And this goes back to who the
12 Commission wants. The Commission has worked
13 with us, and we hope the Commission would
14 defer to us and work through us about who we
15 would pick, but we pick these people or we ask
16 them to testify to address issues that were
17 rising in that region and what they testify
18 to.

19 There are others that deal with it
20 on a national level that can deal with a
21 systemic change. Yesterday, Donna Elm talked
22 about how minor role is never given in Tampa.
23 It is an 11(c)1c stipulation in the District

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1 of Arizona for drug cases. So you see these
2 different things, so that's why you need a
3 sentencing research council and you need a
4 national view. And we'd be happy to work with
5 you on a systemic change. Trust us.

6 ACTING CHAIR HINOJOSA: One of the
7 comments that was made, and I think it was
8 you, Mr. Sands, about how we shouldn't rely on
9 any individual case. But it seems to me that
10 almost every, at least you all tend to give us
11 an individual case scenario with regards to
12 whenever you give a statement to the
13 Commission, as did the defenders yesterday and
14 the prosecutors do the same.

15 I guess my question is you
16 indicated that we shouldn't really listen to
17 that, and so my question is why do people
18 insist on doing that and what should we do
19 with that?

20 MR. SANDS: I didn't do it.

21 ACTING CHAIR HINOJOSA: Well, you
22 just did, I think, in response to one of the
23 questions --

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1 MR. SANDS: Sure. And that was in
2 a response --

3 ACTING CHAIR HINOJOSA: But it was
4 a specific case, and so --

5 MR. SANDS: It gives color. It
6 gives a way of looking at a specific
7 situation, but it doesn't replace 20 years of
8 data of trends, 20 years of research by the
9 doctor at the end of the table, or the
10 experience of a number of investigations that
11 the Marshal undertakes. So you have to look
12 at the whole thing. Policy should not be by
13 anecdote. Policy should not be by bias and --

14 ACTING CHAIR HINOJOSA: No, I'm
15 agreeing with that. I'm just saying that,
16 traditionally, from the defense bar we usually
17 hear that, as we do from others. And I'm not
18 disagreeing with what you're saying. I'm just
19 saying that we are subjected to that on a
20 pretty regular basis.

21 MR. SANDS: Well, they're good
22 stories, too, Judge.

23 ACTING CHAIR HINOJOSA: Yes, they

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1 are. But the point is then you don't really
2 know the background of each case.

3 COMMISSIONER HOWELL: Can I just
4 follow up a little bit with Mr. Sands? And
5 this is a continuation of the conversation
6 that I and some other Commissioners were
7 having with one of the federal public
8 defenders who testified yesterday specifically
9 focused on the Commission only taking steps to
10 respond to congressional directives if
11 empirical data, whatever that meant, and that
12 was an interesting exploration of discussion
13 yesterday, as well. And I just wanted to go
14 back to your opening comments, too, because
15 it's clearly a theme of the federal public
16 defenders right now where you said that the
17 Commission should only take action guided by
18 our seminal statutes, you know, 3553 and 994.
19 And you didn't leave much room for current
20 congressional actions, for example
21 congressional directives that we're grappling
22 with right now that explicitly direct the
23 Commission to increase penalties for certain

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1 crimes.

2 We don't view those kinds of
3 explicit congressional directives which are
4 different from other kinds of directives which
5 basically ask the Commission to review and
6 consider, if appropriate, in each guideline
7 changes. When Congress tells us specifically
8 and explicitly to increase penalties, we also
9 feel that that's a law we have to follow under
10 the guidance that we've [been] given. We've
11 been given in 3553 and 994 to follow the law.
12 And it just seems -- could you just explain
13 what the federal public defender view is about
14 how the Commission should deal with explicit
15 directives from Congress to increase penalties
16 in certain areas?

17 MR. SANDS: You have to look at
18 the interrelationship between the Commission
19 as an expert body charged with knowing about
20 sentencing and Congress that is acting. So if
21 Congress just gives a general directive, it is
22 one thing. If it's a specific directive
23 saying increase it by this level, then the

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1 Commission has to give that great deference.
2 So the Commission, as an independent agency,
3 can say, "Congress, you are wrong." It would
4 have to be an important and supported issue,
5 but the Commission should just not be a
6 skimmer for Congress, and the Commission has
7 never been that. And so Congress says
8 increase this penalty, then the Commission
9 should look at it, see if it's warranted, see
10 what increase might be there, and, if it feels
11 it is not, ask Congress to study it more or
12 ask Congress to reconsider. It's not bad to
13 have a dialogue.

14 VICE CHAIR CASTILLO: Before we
15 leave today, I do want to get back to the
16 issue of Native American Indians because I'm
17 very sensitive and I think this Commission is.
18 We've had an advisory group in the past. It
19 almost sounds like you're suggesting that we
20 should have a permanent advisory group. Other
21 than the three issues that are up this time,
22 we now have a victims advisory group. Are you
23 suggesting that we should have a permanent

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1 advisory group for Native American Indian
2 issues? That question I'm addressing to Mr.
3 Sands and Mr. Stegman.

4 MR. SANDS: I'll let Mr. Stegman
5 go first.

6 MR. STEGMAN: Well, I can say I
7 don't think it would be a terrible idea. I
8 think that these issues are going to continue
9 to come up on a regular basis. I mentioned
10 the NIJ study that's going to be coming out.
11 It's going to shed a lot of light. We're
12 looking at every arm of the criminal justice
13 process.

14 In Indian country, we're
15 interviewing federal, state, tribal, everyday
16 citizens on reservations. And issues come up
17 all the time about sentencing on a regular
18 basis, about what needs to happen. And, you
19 know, a lot of these issues are especially
20 difficult unless you have people really
21 speaking and advising from that situation.
22 You know, these are very tightknit
23 communities, very family-oriented, and a lot

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1 of times you end up affecting the victims just
2 as badly as you do the defendants with certain
3 sentencing decisions because, you know, we
4 mentioned domestic violence cases, child abuse
5 cases. They're all very much affected by
6 federal law.

7 And like I say, typically the
8 states and much more localized sort of
9 entities tend to deal with a lot of these
10 cases for non-Indians, but for Indians they're
11 very much interacting with the federal
12 agencies and the judiciary. So I definitely
13 think there would be a lot of value in it
14 because almost any of these criminal decisions
15 that come up under federal law are going to
16 always implicate tribes in a very different
17 way.

18 MR. SANDS: And as the Commission
19 might know, there's a major Indian crime bill
20 that will be introduced soon by Senator Dorgan
21 that will have a tremendous impact on federal
22 jurisdiction.

23 ACTING CHAIR HINOJOSA: Does

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1 anybody else have any questions? If not,
2 thank you all very much. We appreciate your
3 advice and counsel and appreciate your taking
4 your time to be here today.

5 (Whereupon, the above-entitled
6 matter was concluded at 9:46 a.m.)

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