

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

Wednesday, March 15, 2006

United States Sentencing Commission
One Columbus Circle, NE
Washington, D.C. 20002

The hearing convened, pursuant to notice,
at 10:11 a.m.

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Chairman, U.S. Sentencing Commission

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P R O C E E D I N G S

[10:11 a.m.]

USSC PUBLIC HEARING PANEL I

CHAIRMAN HINOJOSA: As everyone is familiar, in January of 2006 the Commission actually proceeded to publish for comment in certain areas some potential amendments that the Commission was considering with regards to the guidelines.

In this post-Booker world the Commission continues to operate as it always has with regards to its responsibilities in several areas, including making any changes in responses to the sentencing to the Congress with regards to changes that the Commission itself is considering with regards to the Guideline Manual itself as well as directives from Congress with regards to those issues.

So that is the purpose of the hearings today, and we thank everyone who has agreed to take time from their busy schedule to come here and discuss some of the issues that have been proposed for public comment with regards to matters that the Commission is considering in certain--in several fields involving the guidelines.

Before we start that, there is someone in this

building who has made a decision that after 21 years of service, he has decided that it's time to finally enjoy life and spend more time with his family. And I want to say that the Commission is saddened by that decision because Leonidas Ralph Mecham has been with the Administrative Office of the Courts and has been running the Administrative Office of the Courts. He came in one year after the passage of the Sentencing Reform Act, which is the act that created the United States Sentencing Commission.

And I have known Mr. Mecham even before I became a member and Chair of the United States Sentencing Commission, and because of his service, dedication, and in the successful way that he has represented the judiciary as head of the Administrative Office of the Courts, we could not have made his decision to retire, let his decision to retire, without making some note of it on the part of the Commission itself.

Mr. Mecham, this Commission will very much miss your service and cooperation. As you know, we are an independent agency within the Federal Judiciary, and through the years there have been periods of time where, because of the Commission's role and the Judiciary's role, there are

differences sometimes of opinion with regard to some of the actions taken and by the Commission. But I will say that the Administrative Office has been very cooperative through the years in either expressing differences of opinion and/or in cooperating in areas where that has been important.

And I especially want to thank you for your counsel to me, as a member and Chair of this Commission, during the period of time that I have been here.

The Commission would like to present you with a certificate that says that. "This is presented to you for your dedicated service as Director of the Administrative Office of the United States Courts, and that the United States Sentencing Commission appreciates your dedicated service, commitment to excellence, and assistance to the United States Sentencing Commission over the years." And we would like to present this to you.

MR. MECHAM: Well, thank you.

(Applause.)

Thank you. Quick response: Your chairman is one of the outstanding human beings and judges in the Judiciary. I'm pleased he's got Judge Sessions and these other distinguished people here. They will leaven the loaf, and

I'm sure it will come out right even if you hear from Australian ambassadors today.

Thank you for the honor.

CHAIRMAN HINOJOSA: And we have something else.

MR. MECHAM: Oh, no. Is it possible?

CHAIRMAN HINOJOSA: Yes. Is it possible for you to pack some of the things you'll be taking out of the building? We have a briefcase that says "United States Sentencing Commission," and for you to walk out of this building in a happy fashion we hope you wear your United States Sentencing cap as you leave.

MR. MECHAM: Thank you so much.

(Applause.)

CHAIRMAN HINOJOSA: We don't allow people carrying this out of the building without security, so--(laughter)--now, you be careful with that.

MR. MECHAM: Thank you.

CHAIRMAN HINOJOSA: Thank you.

It is time for our first panel at this point, and we are very fortunate this morning to have on the first panel the Honorable Robert McCallum, who will soon be Ambassador to Australia, I understand--we're all very

jealous. He is the Associate Attorney General of the United States with the U.S. Department of Justice.

We have Mr. Richard Hertling, who is the principal Deputy Assistant Attorney General of the Office of Legal Policy with the U.S. Department of Justice.

And we have Ms. Jodi L. Avergun, who is Chief of Staff of the Office of the Administrator from the Drug Enforcement Administration of the U.S. Department of Justice.

Mr. McCallum, did you want to go first?

MR. McCALLUM: Please, Your Honor. Thank you very much for the invitation to be here. I have a very long way to go, Senate confirmation, before I would assume any responsibilities with the Department of State, so I'm very pleased to be here in my capacity with the Department of Justice.

I will address the attorney/client privilege issues that are facing the Commission, and Mr. Hertling will speak on firearms, and Ms. Avergun will address the steroid issue. And we all three appreciate the opportunity to be here and to address the Commission today.

As you know, the guidelines currently state, and

we believe that very clearly that the waiver of privilege is not a prerequisite to securing a reduction in sentence for cooperation except where necessary to provide timely and thorough disclosure of all known and pertinent information. And the Commission has now been asked to amend this language to provide that a waiver of privilege can never, never be considered in determining whether a business organization merits a downward departure, a reduction in sentence for cooperation.

Mr. Chairman, I've submitted a more lengthy statement for the record which sets out the Department's views in full; but what I would like to do in order to leave ample time for questions that members of the Commission might have is to confine myself to a few opening observations.

First, the Department and I find myself in the peculiar position of defending texts that the Department neither sought nor enforces. In 2003 and 2004 this Commission undertook a lengthy, considered, and deliberative process to amend the guidelines as they applied to organizational defendants, to corporation. At that time, as the final report of the Commission's Ad Hoc Committee makes

clear, the United States saw no need and the Department of Justice saw no need to reference privilege waivers in the guidelines. Rather, it was some of the very parties who are today seeking to amend the text who, two years ago, argued that it was indispensable that the text be amended then.

The guidelines, particularly as it applies to our corporate entities, provides a model for behavior. As has been noted elsewhere, the revisions of Section 8, the revision was designed to create incentives for business organizations to self-investigate, to self-report, and generally to create greater transparency and accountability. As currently written, the guidelines provide a roadmap for effective internal compliance activity. Frequent amendment, particularly amendments on short notice and with what we believe to be a very thin record, undermines this goal.

Second, the Government unqualifiedly opposes the proposed amendment. The proposed changes would be counterproductive to legitimate important law enforcement efforts. Section 8 of the Guidelines is intended to provoke greater compliance, greater self-examination and cooperation with law enforcement. Consideration of a corporation's voluntary sharing of information including privileged

material in certain limited circumstances is key to that regimen.

Corporations willing to cooperate by sharing privileged materials, if necessary to provide timely, complete, and accurate information should get credit for doing so just as individual defendants willing to cooperate with the Government gets such credit.

Yet, you have been asked not only to remove the offending text but to conclude that the waiver should never be considered in determining whether a corporation has been cooperative. Hence, a corporation in the sentencing phase admitting its guilt could assert entitlement for sentencing purposes to cooperation credit, a fact that it would no doubt tout in the press, while refusing to provide again the three elements of timely, complete, and fully accurate information deemed necessary by the prosecutors to identify all of the culpable individuals and all of their illegal acts.

This would undermine the Commission's efforts to develop greater transparency and ethical conduct by corporate management, and would further undermine the public's trust in our markets and business leaders; and we

would, respectfully, submit to this Commission that it should not be the law.

Third, it's been argued that the Department's position is one of routinely demanding waivers on the pain of prosecution, and this is simply not the case. The Department's own waiver requests are guided by the Thompson Memo issues by then Attorney General Larry D. Thompson--then Deputy Attorney General Larry D. Thompson in January of 2003, a memorandum on charging business organizations. Those rules, a prosecutor considering charging a business organization should consider a range of factors only one of which is cooperation.

And cooperation, in turn, comprises a number of elements, only one of which may be in certain limited circumstances a waiver of privileges. The Department's policies make clear that a waiver is not required to avoid indictment. Moreover, such waiver requests as the Department does make are limited. Waiver requests focus first, primarily, on factual work product such as witness summaries or raw notes rather than materials relating to an attorney's mental processes.

And rarely if ever is a waiver requested for

privileged materials concerning the advice given by attorneys during the investigation of alleged corporate wrongdoing that subsequently occurs, or during a pending advice regarding a pending department criminal investigation.

In 2004 the Ad Hoc Committee of this Commission surveyed the United States Attorney's Offices to determine itself the rate at which waivers were being requested, and the committee concluded that waiver requests occur at a low rate, quote: "Request for waiver is the exception rather than the rule." Since then, the only significant change in the Department's practice has been to clarify further restrictions on the circumstances in which a waiver may be sought.

In an October 2005 memorandum while I was serving as the Acting Deputy Attorney General, I directed each United States Attorney's office to develop written guidelines for governing this process. Those guidelines require the approval of either the United States Attorney, himself or herself, or other appropriate supervising attorneys before such a request can be made.

In the Department's experience, corporations are

represented by sophisticated corporate counsel, perfectly capable of evaluating the benefits of the disclosure to their client, i.e., the corporation. Sometimes they choose to do so; sometimes they choose not to do so. Moreover, corporate attorneys at not at all shy about complaining to the Department and to United States Attorneys about what they perceive to be overreaching tactics by Assistant United States Attorneys.

The Office of Professional Responsibility of the Department of Justice has not received a single complaint regarding prosecutorial misconduct and improperly demanding a waiver, and I know of no particular instance in which a complaint has been made to me, myself. Nothing introduced to this Commission demonstrates otherwise.

The testimony submitted in November, we submit, consists entirely of vague allegations lacking in the contextual details necessary to evaluate whether a purported waiver request was or was not proper. The surveys that corporate and defense counsel have submitted to the Commission admit themselves that they similarly lack a valid statistical significance and that they lack the detail necessary to appraise properly any particular instance of

alleged routine requests for waivers.

Fourth, the Commission has previously heard and rejected the arguments against ever allowing consideration of a waiver. Corporate executives first do not avoid compliance efforts with their lawyers based upon the potential that there might be a waiver request under certain limited circumstances at some point in the distant unknown future.

Wholly apart from any government investigation, corporate executive nowadays recognize that they owe to their shareholders a fiduciary obligation to know what's going on in the company, to investigate allegations of criminal wrongdoing, and to fix the problems. Most executives take this obligation seriously. They conduct internal compliance programs and, in fact, this Commission provides them with an incentive to do so by including compliance efforts as an element that can be considered in sentencing decisions.

Nor does the possibility of a waiver undo the privilege for corporation employees seeking to speak with corporate counsel. We hear that all the time. It ignores the fact that it's already the case that an employee's

discussions with corporation counsel are not privileged as to the employee; corporate counsel represents the corporation, the business, not the individual. And all corporate counsel that I know of who are competent are obliged to inform the employee of that fact at the start of any interview. Any privilege is the corporation's privilege, not the individual's privilege.

And whatever additional disincentive to talk that a future waiver by the corporation might provide to an employee already exists and is marginal at best that the Department prosecutors under limited circumstances might request that from the corporation, and the corporation agree to do it because it's in the corporation's best interest.

Finally, it's been argued that waivers increase a corporation's civil exposure, as waiver to the government waives the privilege as to all, including plaintiffs and civil class actions. And this is the element in the room that nobody seems to want to talk about. While little is said about this problem, I submit to you my suspicion that it is in fact foremost in the minds of corporation counsel, not sentencing.

We are not unmindful at the Department of Justice

of this concern, and, in fact, several fixes have been proposed. There have been bills introduced in the Congress to allow for, quote, "limited disclosures to regulators and to prosecutors."

Most significantly, now on the table is the Advisory Committee on the Federal Rules of Evidence. It is considering a federal evidence rule that would specifically allow limited disclosure to law enforcement privileged information and prevent its use in other contexts such as civil litigation. And we at the Department are watching this development with interest and, obviously, have members who sit on that Advisory Rule Committee.

I respectfully suggest that in the event that such a rule is adopted much of the opposition heard by the Commission to the current Commentary will dissipate. So, Mr. Chairman, the Department respectfully urges you to retain the text that you adopted two years ago, and we thank you for allowing us to be here, and I'll be happy to answer any questions that you have.

CHAIRMAN HINOJOSA: Mr. McCallum, thank you very much. The procedure we will follow is we will hear from Mr. Hertling and Ms. Avergun, and then we will go ahead and

proceed with the questions and answers.

Mr. Hertling.

MR. HERTLING: Thank you, Mr. Chairman. Members of the Commission, good morning. I appreciate the opportunity to appear today before you to provide the Department's views on the Commission's proposed changes to the guidelines relating to offenses involving firearms, even though I should have learned a long time ago never to give my friend, Beryl Howell, an opportunity to question me. I'm glad you didn't put me under oath.

CHAIRMAN HINOJOSA: We've all learned that.

MR. HERTLING: I would like also to start by thanking and acknowledging the courtesy and work of the Commission's fine staff for their work on preparing the proposal that the Commission published with respect to firearm sentences. My oral testimony will largely track my written submission, but I hope will be significantly shorter. I made strong efforts yesterday to pare it down.

I will begin and focus my testimony on the Commission's proposed amendment to Guideline Section 2K2.1 to provide enhancements for defendants who engage in legal firearms trafficking. The Department supports a significant

enhancement in the penalties applicable to illegal firearms trafficking and believes that such an increase in penalties would aid the Department's efforts to reduce gun crime. While gun crime is now at historically low levels, it still remains too high, especially if you're one of the victims of it.

Firearms trafficking is the illegal diversion of firearms out of lawful commerce. It is frequently the source of firearms used in violent crimes, especially those committed by gang members and drug dealers. A June 2000 report by the Bureau of Alcohol, Tobacco and Firearms explosives--although at the time it didn't have "explosives" in its name--found that fully one-half of ATF's trafficking investigations conducted between July 1996 and December 1998 involved at least one firearm recovered during the crime. Seventeen percent of these firearms were associated with a homicide or armed robbery.

The strong tie between traffic firearms and violent crimes underscores the great harm of firearms trafficking. The current guidelines, however, treat firearms trafficking in a way that neither recognizes the harm it causes nor deters sufficiently those who engage in

the activity. As a result firearms traffickers may often receive sentences that do not match the seriousness of the harm caused by their offenses.

Worse, such cases may simply not be prosecuted, particularly in certain urban districts, because the relatively low existing penalties do not wind up meriting the expenditure of scarce prosecutorial resources.

In deciding how to design enhancements for gun trafficking, it is important to recognize--for the Commission to recognize--that the great majority of gun trafficking schemes are carried out from transactions involving relatively small numbers of firearms.

Another point to recognize is that firearms traffickers are frequently persons without any criminal background, hence their ability to purchase, lawfully, from a licensed dealer undergoing cleared background check, and then transfer the weapon into the illegal black market.

Because the current guidelines base longer sentences for firearms offenders on the number of firearms involved or the criminal background of the offender, traffickers can often engage in schemes to transfer relatively small numbers of guns in the illegal firearms

market with little fear of a substantial penalty. And this is the case, even though by unlawfully supplying guns to several violent criminals, an individual trafficker can do more harm than a single unlawful possessor who may in fact be subject to higher penalties under the current guidelines.

In sum, to account for the fact that most firearms trafficking cases involve persons with no criminal history and relatively small numbers of guns, and to reflect the harm to public safety caused by firearms trafficking, the Department believes that a separate set of sentencing enhancements applicable to gun trafficking and based on the low numbers of firearms should be created. With higher penalties more trafficking cases can be investigated and prosecuted, and law enforcement will have a greater impact on illegal gun trafficking.

The Commission's proposal defines firearms trafficking as a firearm transfer that meets certain basic conditions. The Commission has sought comment on whether its definition should apply to a single firearm or to the transfer of more than one firearm. On this question the Department favors having the definition apply only to instances involving more than one firearm, and I'm happy to

elaborate that in response to any questions, if you wish.

The Commission has also sought comment on whether the transfer should be as consideration for anything of value or solely for pecuniary gain in order to qualify as a trafficking offense for the proposed enhancement. On this question the Department favors an approach providing a trafficking--includes transfer for anything of value such as drugs, and not simply for pecuniary gain.

The Department also supports the proposed provision clarifying that the trafficking enhancement applies to illegal transfer that are part of an unlawful scheme to divert firearms even if nothing of value was exchanged. The Department is concerned, however, that the proposal is both overbroad in some respects and underinclusive in one respect. On the overbreadth question, for example, the proposal does not require any showing that the defendant knew, had reason to believe, or was wilfully blind to the fact that the transfer would be to a person whose possession or receipt of the firearm would be unlawful, or who intended to use or dispose of the firearm unlawfully.

Under the Commission's proposed definition,

proving the existence of a trafficking offense, an offense that would fall within the proposed definition of trafficking, might be easier, but the Department notes that the definition leaves the potential for covering conduct that is broader than that which is generally regarded as firearms trafficking.

On the other hand, the Commission's proposed definition is underinclusive in that it covers only the transfer and not the receipt of a firearm, even when the recipient is part of the gun trafficking scheme. A person who receives a firearm as part of the trafficking scheme, but who has not yet had the opportunity himself or herself to transfer the firearm in furtherance of the scheme, should also be covered by the definition ultimately adopted by the Commission.

The Department believes that a substantial increase in sentences for firearms trafficking is justified, but only if the conduct covered by the trafficking definition is tailored to the trafficking conduct involved in unlawful schemes to divert firearms from unlawful commerce to facilitate the acquisition of firearms by prohibited persons and others for unlawful purposes.

The Department therefore recommends that the Commission consider revising its proposed definition of trafficking to cover only such conduct by defining trafficking in the manner provided in my written testimony. And I'm happy to go over the details of that again in response to any questions. But we do provide in my written testimony a specific proposal.

As far as the extent of any enhancement, the Commission's proposal for trafficking offenses is divided into two categories, and the first involving two to twenty-four firearms and the second twenty-five or more firearms. Because, as noted, most trafficking takes place from transactions involving small numbers of firearms, the Department believes that the enhancement should be further compressed by providing for additional incremental increases between two and twenty-five firearms. For example, increases could be made for cases involving two to seven guns, eight to fifteen, sixteen to twenty-four, and twenty-five or more, or some other similar formulation akin to the guidelines existing enhancements.

The Department believes the enhancement should be four levels for the lowest increment with an additional

two-level increase for each additional increment, with the higher increment having a ten-level enhancement. Together with the existing table of enhancements in Section 2K2.1 for the number of firearms involved in the offense, these new enhancements will provide an appropriate increase in punishment for offenses involving a gun trafficking scheme that meets the criteria set forth in whatever definition the Commission adopts.

I would also like to note that in light of the proposed enhancement for firearms trafficking, the Commission may wish to consider whether the application note under Section 2K2.1 regarding upward departures should be amended to provide that an upward department may be warranted when, in the cases in offense involving firearms trafficking, the number of traffick firearms exceeds twenty-five guns.

I would also like to express, briefly, the Department's support for the Commission's proposal to increase the enhancement from two to four levels for offenses involved in a firearm that had an altered or obliterated serial number. The Department also supports the Commission's proposal to create an upward departure based on

an offender's possession of a high-capacity semiautomatic firearm, even though it's no longer prohibited by law, per se. We believe that the potential for harm created by the criminal misuse for possession of a high-capacity semiautomatic firearm is significant.

The Department believes that the upward departure approach is preferable to an offense level approach in this case because of the fact that the statutes no longer criminalize possession, per se, of these source of weapons.

Very briefly, the Department supports the proposed amendment to Section 5K2.11 regarding lesser harms. The amendment would prohibit the use of the section in felon and possession cases, and we believe that the proposed change most accurately captures the purpose behind the lesser harms provision.

I know Judge Cassell is in the audience, and I know he disagrees with us on this question, but the Department believes that this amendment does more accurately reflect the congressional purpose in the felon and possession statutes.

The Department also supports the Commission's proposal to elevate the offense level for brandishing a

firearm during the commissions of another offense to the same level currently applied for otherwise using a firearm during the offense. And indeed, the Department believes that the proposal should be extended to other guidelines that address the brandishing question and the otherwise using issue as well during the commission of an offense.

Finally, with respect to the Commission's proposed remedy of a split among the Circuit Courts of Appeals in applying the in connection with requirement for possessing a firearm in burglary and drug cases, the Department supports the Commission's objective in seeking to remedy the circuit split, but we are still studying the options outlined by the Commission in its proposal, and we are not yet prepared to endorse any specific approach.

That concludes my oral testimony, and I, of course, would be happy to try to answer any of your questions.

CHAIRMAN HINOJOSA: Thank you, and we won't sic Ms. Howell on you until time for the questions and answers.

MR. HERTLING: Thank you, Judge.

CHAIRMAN HINOJOSA: Ms. Avergun.

MS. AVERGUN: Thank you, Your Honor. Mr.

Chairman, Members of the Commission, it is a pleasure to join you today to present the views of the Department of Justice on an issue of great importance, the appropriate sentencing guidelines for steroids. I don't know what this says about Commissioner Howell's taste in friends, but I do refer to and to count Ms. Howell as a former colleague and friend, and I look forward to hearing her questions and hopefully being able to answer them.

Before I begin, I would like to acknowledge the DEA team that has accompanied me here today and who has, together with your very fine staff, worked so hard on this issue to help achieve the right result. Deputy Assistant Administrator Tom Janovsky, who is in charge of our Office of Forensic Science, Special Agent Doug Coleman, and Senior Attorney Charlotte Meeks sitting between them of our Legal Instruction Section.

The Department strongly--

CHAIRMAN HINOJOSA: This Chair is only upset, since I am a dog lover, that you did not bring one of your excellent sniffer dogs.

(Laughter.)

MS. AVERGUN: I'll do that next time, Judge.

MR. HERTLING: And next time, Judge, I'll have ATF bring one of their bomb-sniffing dogs, too. Had I known--

MS. AVERGUN: The Department strongly urges the Commission the change the sentencing scheme for steroids to one that is consistent with the way in which all other Schedule 3 substances are sentenced; that is, to define a unit of steroids as one pill, or .5 milliliters of liquid as set forth by Option 2 of the Commission's proposed amendment. This option will ensure that the intent of Congress in enacting the Anabolic Steroids Act of 2004 and the earlier Controlled Substances Act of 1970 is met in a manner that is fair to litigants, yet also accomplishes deterrent effects in a manner consistent with the rest of the Controlled Substances Act and the drug sentencing provisions of the Sentencing Guidelines.

Your staff and the Department agree that the current distinction between steroids and all other Schedule 3 substances is unwarranted. Where we disagree is how to calculate a unit with the staff favoring a purity based analysis for arriving at the definition of a unit of steroids, and the Department of Justice seeking to define a unit of steroids by the quantity of pills or liquid

regardless of purity.

The Department's position comes down to two principles: consistency and complexity. Let me deal with consistency first. For every other Schedule 3 drug, as I've said, a unit is defined in terms of the quantity of the pill or liquid. In fact, that is the case with every drug except for four within the purview of the Controlled Substances Act. Since its passage in 1970, the Controlled Substances Act has established trafficking penalties based on weight of the mixture or substance containing the controlled substance. And the Supreme Court has affirmed this quantity-focused approach noting in Chapman v. United States that, and I quote:

"Congress adopted a market-oriented approach to punishing drug trafficking under which the total quantity of what is distributed rather than the amount of pure drug involved is used to determine the length of the sentence. Congress intended the penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found, cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level." End quote.

Option 1 is entirely inconsistent with the Supreme Court decision and with the intent of Congress in punishing drug trafficking.

And turning to complexity for a moment. As all involved in this process know, drug sentencing can get quite complex when we're dealing with the conversion of one type of drugs, marijuana. The mathematical complexity increases exponentially, especially to those who are math challenged like I am, when we enter the arena of Schedule 3 where we have to figure out how many units we are dealing with before we even get to converting those units to their equivalency in marijuana.

Option 1 will superimpose yet another layer of complexity, that of calculating the purity of a particular steroid, then weighing that pure drug to arrive at a 50 milligram equals one unit conversion. In order to support the staff's recommended change, DEA laboratories would have to initiate a comprehensive study project to validate methods used to quantitate samples of all expected combinations of steroids. This would entail a not insignificant shift in priorities from DEA's labs.

A purity analysis of itself is not a particularly

difficult thing for a lab to do; however, there are 59 separate steroids that the Anabolic Steroids Act made Schedule 3 controlled substances. Approximately 20 of the types listed in that statute are likely to show up in criminal cases. The accrediting body that credits the DEA labs requires that when determining purity for sentencing purposes, the labs must also calculate an uncertainty factor: In plain English, a percentage purity plus or minus some percent of uncertainty.

DEA has done a study of the approximate man hours it would take to arrive at an uncertainty factor for each steroid. Arriving at this uncertainty factor includes such tasks as obtaining or creating authenticated standard material against which to test. DEA might have to purchase or commission the creation of this standard material at a cost of tens of thousands of dollars. Then DEA lab specialists or chemists would have to perform analytical chemistry on the validated samples and prepare reports for those tests and then send those samples to each of the eight separate regional labs for their own analyses.

The DEA would then arrive at an estimative uncertainty after which DEA would then be required for each

drug to hire an outside expert, again at a significant cost, to validate this estimate of uncertainty that the labs have arrived at for each drug so analyzed--and remember, there are 20 that are likely to show up in criminal cases, 1,340 man hours or half a man year--1,340 hours or half a man year would be required. Multiply this by 20 drugs, a conservative number since there are 59 listed steroids. It would take two full-time chemists over two years to perform all of these analyses.

Redirecting a chemist's attention away from this work to perform these uncertainty analyses would have an impact on DEA's intelligence program that rely on purity analysis and, more importantly, for this body's purposes would likely have an impact on the time within which DEA chemists could process evidence for court. DEA has estimated that redirecting one chemist, who normally processes 32 exhibits per month, for just three and a half weeks would result in a delay in processing 26 exhibits a month.

Moreover, introducing an uncertainty factor which could potentially affect a sentence is likely to engender litigation about the testing results which would delay

sentencing and perhaps impose additional costs for court-appointed experts and defense attorneys. All of these facts might easily lead to a decision by federal prosecutors, of whom I used to be one, to accept as few as possible steroid cases, and this is a significant concern for the Department.

Now, what ends is achieved by choosing this inconsistent and complex approach? None that we can see. There is extremely little difference in the resulting sentences whether we use Option 1 or Option 2. This fact is illustrated quite graphically on a chart that was attached in the recent package that was circulated last Friday by the staff. Out of the seven examples highlighted on the chart, Option 1 produced a base offense level that was two offense levels lower than Option 2 in two instances. In three instances, it produced an identical base offense level, and in two other instances it produced a base offense level that was lightly higher than Option 2.

In a guideline where all of the sentences are compressed within a very small range due to the Level 20 cap, these differences are minimal and often include overlapping sentences. For all of these reasons

demonstrating the complexity and lack of consistency of the proposed scheme, we urge the Commission to agree with us that there is no principled reason to choose Option 1. And if complexity and consistency were not persuasive enough, I'd like to highlight one final reason that Option 2 is the better option. And that is the reason discussed by the Food and Drug Administration in its comments to the proposed sentencing scheme.

According to the FDA, Option 1 proposes--poses, I'm sorry, a significant health risk if enacted. FDA has noted, we believe accurately, that a scheme that imposes a rebuttable presumption of the accuracy of steroid labeling will likely lead to false labeling for these potentially dangerous drugs, especially where, as I have detailed in my written testimony, many if not most of the illegal steroids in the United States come from foreign countries with no system of steroids controls.

This option creates an incentive for an unscrupulous dealer of illegal steroids to understate the purity of the drugs contained within the particular container or not to state what is in there at all, to minimize his risk of incarceration if caught. The

Commission should not choose an option that engenders this unacceptable health risk.

And let me just take a moment to discuss the health risks of illegal steroids, which I do detail in my written testimony. The dangers of illicit steroid abuse cannot be overstated. On this the staffers in the Department of Justice agree, and that is why Congress suggested and the staffers agree that the current steroids penalties are not sufficient serious. The long-term health risks associated with steroid abuse can be very serious and potentially life-threatening, and they include halting young adults' bone growth, elevated cholesterol levels, and cardiovascular weakening.

Steroid use can also cause uncontrollable outbursts of anger, frustration, or combativeness. Some steroid abusers get psychologically addicted to the drugs and often experience withdrawal symptoms when they stop. The most dangerous of the withdrawal systems is depression because it sometimes leads to suicide attempts, and we need only to hear about the very sad case of Taylor Hooton, whose case I discuss in my testimony, a bright young athlete who was told to use steroids to improve his performance so that

he could be on a varsity baseball team to know how deadly steroid use can be.

The details are very compelling of Taylor's case, and I won't go into them in the interest of time, but he did end up, after becoming addicted to steroids which his parents could not discern at all. He ended up committing suicide because of depression as a result of the steroid use.

In conclusion, the Department of Justice and the Commission staff agree that steroids pose significant dangers, and that in the words of your staff, the dichotomy between steroid sentencing and other Schedule 3 drugs is unwarranted. The staff has indicate that it is sympathetic to the increased time and cost that will result from its recommended option, although they had said in their papers that the team was, and I quote, "unable to assess the magnitude of this burden." I hope that my testimony has cleared up some of that and shed some light on what that magnitude entails.

Since there is no principled reason for imposing the additional costs and delays that will result from Option 1, and the difference in resulting sentences is minor, we

urge the Commissioners to selection Option 2 as the method by which the steroids guidelines are calculated.

Thank you so much for the opportunity to appear before you and to represent the Department of Justice. And I'd be pleased to answer your questions.

CHAIRMAN HINOJOSA: Thank you, Ms. Avergun. It is time for questions.

Vice Chair Steer.

VICE CHAIRMAN STEER: Let me just begin with Ms. Avergun. I do thank you very much for your testimony. It has been very helpful to me in understanding the complexities that would be involved in going to a purity-based system for steroids. But I'm still wondering what the Commission should say with respect to the nonstandard forms that are not in pill tablet or liquid form, the patches, the creams and so forth.

MS. AVERGUN: Actually, Commissioner Steer, there are very few steroids that are trafficked in that form. The cases that would result, we could probably figure out some way of weighing them, working closely with the DEA lab. But they would be the cause of so few cases that it's not really an issue that should take up much time. But we are

confident in the lab that we could come up with some weight-based approach to dealing with those drugs.

VICE CHAIRMAN STEER: Weight-based approach or the quantity--

MS. AVERGUN: The quantity.

VICE CHAIRMAN STEER: --of the steroids?

MS. AVERGUN: Yes, the quantity of the steroids counting the numbers. We would have to calculate that to some kind of analogous quantity.

VICE CHAIRMAN STEER: What would you think of a, you know, a hybrid approach that would basically take what the Department has recommended in terms of Option 2--

MS. AVERGUN: Um-hmm.

VICE CHAIRMAN STEER: --for these nonstandard forms, provide that the court can make a reasonable estimate of the quantity, but then establish an equivalence, say, 25 milligrams would equal one unit. That would basically punish on par the, you know, the nonstandard with the standard.

MS. AVERGUN: Just for those nonstandard--

VICE CHAIRMAN STEER: Just for the nonstandard.

MS. AVERGUN: --in a--(off mike)--that could not

be counted--

VICE CHAIRMAN STEER: Yes.

MS. AVERGUN: --I don't think that the Department would have a huge problem given if that were the exception. However, I would point out and remind you that, of course, it still would be inconsistent with the way all other Schedule 3's are treated. And since we are confident that we could analogize to some quantity-based approach, that would be our preferable option; but if there were to be some sort of compromise on gels, and patches, and creams, we could accept it.

CHAIRMAN HINOJOSA: Judge Castillo.

JUDGE CASTILLO: Well, let me just say I pretty much agree with all the testimony presented this morning, so you don't have to convince me. I just have a couple of questions for Mr. McCallum going back to the privilege issue.

You issued a memo from the Department of Justice. Are you attempting to set up some kind of national standards for waiver requests?

MR. McCALLUM: Your Honor, we believe that the national standards for waiver requests have already been set

in the Thompson Memo in terms of substance.

JUDGE CASTILLO: Um-hmm.

MR. McCALLUM: And that is the Thompson Memo focuses on the three critical elements: timeliness, completeness, and accuracy of the information provided. And it also focuses on there being a necessity for a waiver.

So the McCallum Memo, as it is now called and I'm not sure that it deserves to be called that, but the, quote, "McCallum Memo" is focused more on process. And in the testimony that I gave before the House Subcommittee, there was some concern about in 92 different districts 92 different standards. We don't have 92 different standards, we have one standards that Larry D. Thompson defined and former Deputy Attorney General Holder likewise defined in their memos.

What we do have, however, is the necessity of a process that may be different in the Southern District of New York, and the Northern District of Georgia, and the District of Montana because of the experience levels, the number of Assistant United States Attorneys that are in supervisory positions, the experience that they have with the cases.

So I think we do focus, at least in the McCallum Memo on the process, and that is: There should be a written process. It should be known to the defense bar, and there should be a second set of supervisory eyes that goes onto each request that is for a waiver of the work product privilege or the attorney/client privilege.

JUDGE CASTILLO: Just one quick follow-up question. I agree with you that this would be solved by an amendment to the Rules of Evidence that would adapt the 8th Circuit limited waiver position. Has the Department of Justice formally taken a position on a change to the Rules of Evidence?

MR. McCALLUM: We have not yet, Your Honor, and there I will admit to you are, as there are in all matters relating to the federal government, different views. Those that are on the civil side, if you will, of United States Attorneys offices and the Department of Justice may have one view as to the propriety of there being waiver to one is waiver to all versus the prosecutorial view.

And I will also admit to you, Your Honor, that some have taken the position that the current language in the initial draft of a amendment to the Rules of Evidence is

extraordinarily broad. It is not limited to criminal investigations or regulatory matters; it's relating to all privileges of every sort.

And so I think the devil is a little bit in the details, as it is always, and so we at the Department are going to work through that and work very closely with the Advisory Committee on the Rules of Evidence. But I anticipate that it will be a fairly lengthy and deliberate process because the draft will come out of the Committee. It will be then published, and there will be lots of public comment, and then there will be additional--I'll call them hearings or meetings of the Advisory Committee which various members of the public, and various members of the Committee, and various members of the Department of Justice make their views known.

So we'll see where that goes, but we're certainly willing and interested in working with the Committee to solve what I believe is the engine that's driving the concern.

JUDGE CASTILLO: Thank you.

CHAIRMAN HINOJOSA: Much anticipated, Ms. Howell, did you have your hand up?

COMMISSIONER HOWELL: I didn't, but I can--I'm glad--(Laughter)--I know that Bill had his hands up first.

CHAIRMAN HINOJOSA: I'm sorry. I haven't looked to my right yet.

COMMISSIONER HOWELL: But let me just follow up, since we're on the privilege issue. We had submitted to us at one of our last hearings where we addressed the attorney/client privilege issue, fairly anecdotal survey results. And now this coalition of groups--

MR. McCALLUM: Yes.

COMMISSIONER HOWELL: --has conducted a much more thorough, I think helpful survey for our purposes when we're evaluating what to do with our Commentary language.

One of the things that the survey still doesn't really give us any concrete evidence about is how often U.S. Attorneys of the Department of Justice are asking for blanket waivers of attorney/client work product privilege, and how often they're asking for incremental limited waivers for prosecutors to evaluate really what they're after, the scope of the criminal conduct, and the wrongdoers

And you said that you also conducted a survey

within the Department.

MR. McCALLUM: No, what I said was that the survey that has now been submitted by the business groups--

COMMISSIONER HOWELL: Okay.

MR. McCALLUM: --mentions very prominently in a footnote--if it's possible to mention something "prominently" in a footnote--but mentions in a footnote that the number of survey pieces that were sent out, a very low number that responded and then admits that it is not--I used the term "scientific" probably improperly--

COMMISSIONER HOWELL: Right.

MR. McCALLUM: --but that it is not statistically, or of valid statistic significance in what the survey came back with. And that was the point that I was making, that the evidence that we have right now is thin, very thin as to there being what was called at the House Subcommittee a "culture of waiver" that permeates the Department, permeates all of the United States Attorneys Offices.

COMMISSIONER HOWELL: Let me just--let me just ask you in terms of your experience when you've reviewed requests for--coming in from different offices or seeing circumstances where waiver requests have been made--or if

you've seen any of the written instructions that offices have adopted pursuant to your memo, has there been an instruction given that an incremental approach to requests for waiver should be--should be made so that the request for blanket waivers should be a rare as the Commission expected they would be when they added this language to the Commentary?

MR. McCALLUM: Well, let me answer the two issues: Number 1--or the two parts to that question. Number 1, is there a survey? I've been working with Bill Eide(ph), who is the Chair of the American Bar Association subcommittee that is looking at attorney/client privilege waivers, and they have submitted a proposed amendment to the Thompson Memorandum that we have been discussing and that we are currently scheduling a meeting with Bill and other members of the other interested groups--they're not all members of the task force--to discuss it.

So in part of that, we have been requesting from those groups and from Bill specific detailed studies on instances that one can really assess as to the propriety or impropriety of a request and specific number, so that we can

try and get our hands around that.

The second thing is that we have invited Bill and Jamie Conrad of another business group to address the United States Attorneys National Convention a year ago to alert them to the concerns of the business community. And they certainly did so. Then we received a letter signed by Former Attorney General Thornburg and various other individuals expressing a concern about, quote, "routine," end quote, requests for blanket waivers, which we do not believe occurs.

And, therefore, my memo was issued shortly thereafter--I believe it was August 2005 of their letter--and then in October of 2005 my memo to stress that there needs to be supervisory oversight of these requests and to emphasize that the Thompson Memorandum itself does provide what I will call a layered approach, like a peeling of different layers of an onion. First you want the names of the witnesses, you want what they consider to be relevant, documents on the other side, and you want a factual background study so that you can go out and do that.

But we're often faced with circumstances with which corporations say: We need a decision now. We are

under investigation, it's adversely affecting us internally. It's adversely affecting us in the public, and we want something immediate. And in order for prosecutors to feel comfortable with that, they may have to request the redacted witness interview notes or things of that nature.

So there is another level where there is not a, quote, "waiver of a privilege." And then they may, because of the inherently subjective nature of the prosecutorial decision, have to go to an additional level saying: We would like not attorney/client privilege contemporaneous advice with the alleged events, but we want your mental impressions of the witnesses and the backgrounds. We want some of your work product, because we don't feel like we can feel comfortable we have full and complete information.

And so it is a layered effect.

COMMISSIONER HOWELL: Would the Department be amenable if the Commission rather than deleting this language altogether, or deleting half of it, as we've been requested by some of the business groups, instead amended the language to--to make it clear that any requests for waiver is expected to be rare--although we do pretty clearly say that already--but that it should be on a limited

incremental basis?

MR. McCALLUM: Yes.

COMMISSIONER HOWELL: And only as necessary for the prosecutor to do what the prosecutor's after, identify the scope of the activity, identify the wrongdoers.

MR. McCALLUM: Well, our clear position is we think that there should be no amendment to the current rules because it is people accommodate to what is there, and the constant amendments perhaps send messages that aren't intended; that if you go back even to what originally was in effect before the 2004 amendment, it may be interpreted by some as a rejection, if you will, of the 2004--

COMMISSIONER HOWELL: But as you're considering amendments, the Thompson Memo perhaps we should--

MR. McCALLUM: Yeah.

COMMISSIONER HOWELL: --consider a similar kinds of parallel amendments to this Commentary language.

MR. McCALLUM: I think we at the Department would not embrace that because of the guarding, if you will, by the prosecutors of their discretion, and that there certainly is within the Thompson Memo now a layered approach.

And the other thing that I would suggest is that there is a very significant difference in the issues relating to charging and the issues relating to sentencing. With respect to charging, we will oftentimes find ourselves with a corporation that comes in and says: We did nothing wrong. We should not be indicted. We will provide you with witnesses, et cetera, et cetera, and the layered approach.

And if there are requests for waivers, one of the things that they say is, "That's exposing us to this civil liability, and we're innocent, and therefore we would be waiving things that could be utilized to, in effect, extort, just on a cost of defense and disruption basis, significant civil liability to the detriment of our shareholders."

In a sentencing context, which is what we're dealing with here, we have a guilt that is being accepted, and therefore the circumstances, i think, for a layered approach may be entirely different in that context.

So I guess my answer is it's already there, and I would consider carefully the different circumstances in the sentencing phase and what is required for cooperation as opposed to the initial decision on whether to indict or not.

CHAIRMAN HINOJOSA: Judge Sessions and then Mr.

Horowitz.

JUDGE SESSIONS: All right, Mr. Hertling, I apologize first that this is not Beryl Howell asking you the questions, and but just assume it is, and I'd like to focus just on the trafficking enhancement that you talked about and, in particular, the nature of the defendant, the type of defendant that you are trying to capture within that enhancement.

And I'll raise to you a concern that was expressed to us in writing from our probationer, Probation Officers Advisory Group. That is when you use the figure 2. You'll agree that over one is appropriate; when you use two as the threshold, it may very well be overbroad. And you've raised already concerns about overbroad.

And in particular you would be bringing those who are straw purchasers--oftentimes the probation officers refer to them as "the girlfriends"--I suppose as "the boyfriends" as well. But just the boyfriends or girlfriends who go off do a straw purchase for someone else. And if it happens to be two guns and all of a sudden they are drug traffickers and receive an enhancement, is that the kind of person that you are seeking to have covered

by this particular enhancement? Or do you see a distinction and perhaps offer some sort of language which would make that distinction a valid one?

MR. HERTLING: Judge, I think you focus on the difficult question of, how do we define gun trafficking? If you were--if you were talking and you used the common example, "the girlfriend" example, and just we, anecdotally from talking to ATF agents, it does much more often not tend to be the girlfriends.

JUDGE SESSIONS: But it can be the boyfriend as well.

MR. HERTLING: Yes.

JUDGE SESSIONS: And there's no--

MR. HERTLING: It came be.

JUDGE SESSIONS: But anyway, it's a friend, right?

MR. HERTLING: But we--yes.

JUDGE SESSIONS: Beforehand.

MR. HERTLING: The--the--the friend exception, that is generally not going to be the sort of activity that we are trying to get at. And it's one of the reasons why we propose having more than one, the threshold, even to fall within the definition of trafficking, because oftentimes you

will have that sort of circumstance where you have a prohibited person who knows he's prohibited; or also what may occur is somebody will come into a gun store not aware that he's prohibited be turned down during the background check, and then immediately show up with a friend who now is the purchaser of the firearm.

In those sorts of cases we're not trying to get at that situation through this enhancement; we're trying to get at the circumstance in which the friend or any other straw purchaser acquires guns and puts them into the legal stream of commerce, oftentimes winding up in the hands of gang members or drug dealers who otherwise cannot acquire them legally, and for whatever reason don't want to go to gun shows because gun shows are oftentimes, there is law enforcement presence there.

So it's a difficult question. We are proposing an enhancement that would not be mandatory. It would be left on a case-by-case basis for the sentencing judge to determine whether the fact meet the circumstance of trafficking. We agree one gun, in the girlfriend case or any other case, is not a satisfactory threshold, but we don't believe we ought to go beyond two or more guns

because, as I indicated, it is the law enforcement experience that trafficking typically occurs with small numbers of weapons.

Now, the small number may traffic--the same person may traffic two or three guns on multiple occasions and build up a fairly substantial tracking background, putting a lot of guns into illegal (ph) commerce. We just don't happen to arrest them until we catch them with two illegal handguns that they're both of which are going to be transferred.

So what we're trying to do is come up with a definition, and the Commission staff we know from our conversations with them, we're struggling with the exact same question: How do we get at the sort of activity that we are trying to provide more severe sentences for? What we're after are the people who divert guns out of lawful commerce so that they wind up ultimately in the hands of prohibited persons who will do illegal things with them.

JUDGE SESSIONS: I'm a little confused about the word "mandatory." You said they are not mandatory--

MR. HERTLING: Well--

JUDGE SESSIONS: Are you suggesting that the

enhancement would not be a mandatory enhancement?

MR. HERTLING: No, the enhancement would be mandatory, but we would structure it for how many guns were involved. And again, the sense that we have is that more than one firearm, it goes, if you will, to sort of the mens rea. One firearm the person may not really realize they're doing anything wrong. But there will be circumstances in which two firearms or above gives that indication. It's a tough line-drawing question, and, you know, I don't have more to tell you than that we think two or above is the accurate number, because we've seen plenty of cases in which individuals just come out with two guns.

JUDGE SESSIONS: So you appreciate the difference between a straw purchase. You appreciate the fact that a girlfriend or a boyfriend should not be treated the same as other traffickers; it's only a question of numbers of guns. Is that--

MR. HERTLING: Well, it depends. Again it's going to be fact-based. If the boyfriend or girlfriend can be engaged in trafficking, if the person--if the boyfriend walks in, the girlfriend is prohibited and comes in with the boyfriend or just sends the boyfriend into the store and

said, "Please buy me three handguns." The boyfriend buys three handguns and walks out, transfers them to--to the friend, there's a good chance that that friend is going to then use those firearms for an illicit purpose.

So we think--we do think sort of the magic number is one. If it's--if it's a friend just asking a friend to, you know, "I want a gun for protection," or whatever reason, "please get me one," that's not--that's not going to be trafficking. But we do think two or more evinces the prospect that those guns will wind up in the stream of unlawful firearms commerce.

And so that's--we agree, Judge, that this is the--this is the guts of the matter, if you will. The question is how we strike that balance. We think one is not sufficient; we think two or more is the right balance to strike. But it is--it is a fair question..

CHAIRMAN HINOJOSA: Commissioner Horowitz, we have time for one more question.

COMMISSIONER HOROWITZ: All right, thanks. I just want to follow up with Mr. McCallum.

On the discussion we had about--or the discussion that you've had about last week's congressional hearing--

MR. McCALLUM: Yes.

COMMISSIONER HOROWITZ: I wasn't there, I haven't read the transcript, but I gather there was some dialogue at the hearing about whether the Department would support removing the language entirely, going back to the status quo ante.

MR. McCALLUM: Of course.

COMMISSIONER HOROWITZ: And some indication of possibly support by the government for that position. I wanted to understand whether the Department opposed removal or supported it, and if it did oppose it, why?

MR. McCALLUM: We do oppose removal for the reasons that I have mentioned previously. We feel that constant changing sends the wrong message. I hope that what my testimony before the House Subcommittee indicated was that if the Commission decided to take action and felt that some sort of amendment was appropriate, that what our preference would be, would be go back to the status quo ante where it was simply not mentioned.

COMMISSIONER HOROWITZ: Um-hmm.

MR. McCALLUM: And we believe that, you know, we would continue to apply the principles set forth in the

Thompson Memo, but we are very much opposed to the portion of the amendment that would say that a waiver request would never be considered in determining cooperation.

COMMISSIONER HOROWITZ: And just on that point, in terms of the removal of the language, is it fair to say then that that's the overrid- -- are there any other concerns besides the message, the perception that it would give because, as you know, correctly in your testimony, the Department, obviously, opposed the language initially.

MR. McCALLUM: Yes.

COMMISSIONER HOROWITZ: Two years ago. In any event, so presumably back then the Department felt no language was better than any language.

MR. McCALLUM: That is correct at that particular point in time, but what we are suggesting is that because of the, what I will call the public debate--

COMMISSIONER HOROWITZ: Right.

MR. McCALLUM: --both with inside the American Bar Association, with inside the business community, and I've met with a number of representatives of various business entities with respect to the corporate counsel community that there is this concern. And therefore, we think that it

may, the amendment itself will send a message that their concern is validated; whereas the survey that's been provided--and I'm very pleased that members will be addressing the Commission on the survey later--the survey to my mind is extraordinarily thin in determining what some of the House Subcommittee members call the culture of attorney/client privilege waiver within the Department.

COMMISSIONER HOROWITZ: Thank you.

CHAIRMAN HINOJOSA: Okay, thank you all very much for taking your time from your schedules to come. It has been most informative, I think to the Commission with regards to the three issues that were covered by the three of you all. And we appreciate very much your patience with the Commission as far as the questions and very much your testimony both in writing and orally.

Thank you all very much.

MR. McCALLUM: Thank you, Your Honor.

CHAIRMAN HINOJOSA: And good luck with your appointment and nomination.

MR. McCALLUM: It's a long way to go to go through confirmation.

CHAIRMAN HINOJOSA: We'll all come visit you Down

Under.

(Whereupon, at 11:17 a.m., the panel concluded.)

USSC PUBLIC HEARING, PANEL II

[11:19 a.m.]

CHAIRMAN HINOJOSA: I would like to begin this next panel with their presentations and then we have a place for public comments. We have Judge Paul Cassell, who is here also as a professor of law at the University of Utah College of Law and also as a U.S. District Court, a judge in the U.S. District Court for the District of Utah.

We have Mr. Russell P. Butler, who is the Executive Director of the Maryland Crime Victims' Resource Center, Incorporated.

And we have Ms. Margaret Love, who is with the Criminal Justice Section of the American Bar Association.

I guess we'll start with Judge Cassell, since he's listed first here.

JUDGE CASSELL: All right. Thank you, Mr. Chairman and Members of the Commission. I'm pleased to be here today testifying as a law professor. As you know, I'm also the Chair of the Criminal Law Committee, and I look forward to joining Judge Hinojosa tomorrow over in the House Judiciary Committee Crime Subcommittee to talk about some Booker issues. So I wanted to express my thank to the

Commission, too, in that capacity for help on data and other things in putting together our testimony. We've been working very closely as the Criminal Law Committee with your Commission and appreciate all the good offices that your data people and others have extended to us.

But I'm here today speaking as a law professor, so I can speak my mind. I don't have to get any clearances or approvals, and in that capacity let me say very bluntly and directly to the Commission that after two years it is high time that we consider a new cover for the Sentencing Guidelines Manual. (Laughter.) Two years running is pretty--(off mike)--to have an orange one there.

CHAIRMAN HINOJOSA: If your team was as good as ours you might be able to make that comment.

COMMISSIONER HOROWITZ: This is one of those anti-majoritarian issues on the Commission that the Chair universally decides, and I just want the record to be clear on that as well.

JUDGE CASTILLO: Yeah, me, too. I lobbied for black and white since the White Sox did win, after waiting almost 100 years. But you can see how far that got, Judge Cassell.

JUDGE CASSELL: Well, I was going to propose to Chairman Hinojosa that maybe the crimson red of the University of Utah--

CHAIRMAN HINOJOSA: And I told you yesterday it would be the Harvard crimson red--(laughter)--if we did the crimson red.

JUDGE CASSELL: Well, hopefully, we can find a good color. Just for the record, 2001 was the last time red was used, so I think you'd be--it wouldn't be any risk of confusion on that--on that point.

But we're here today to talk about, at least to my mind, crime victims' rights. And the reason we're talking about that is that, at the end of 2004 Congress passed a Crime Victims' Rights Act which changed the way that victims are perceived and are to be treated in the federal criminal justice system. The Crime Victims' Rights Act guarantees crime victims the right to be reasonably heard throughout that process and to be treated with fairness. And with particular reference to sentencing, the sponsors of that measure indicated that victims were to be able to make sentencing recommendations and to be independent participants in the criminal justice process.

Now, with those points in mind, what I would urge the Commission to do is far more than its done in its current proposed policy statement, which would simply remind judges to follow the law on crime victims' rights. The victims field is today evolving because of the Crime Victims' Rights Act, and the Commission is in a position to exercise leadership on this area.

In particular, I would recommend four things to the Sentencing Commission:

First, I would recommend that you make specific changes in the guidelines manuals to integrate crime victims into the sentencing process. In federal sentencing today, de lingua franca is the guidelines calculation.

That is the starting point and indeed that is what the Commission has recommended should be the starting point for every sentencing hearing. It's almost a charade to say to victims: "We'll let you make sentencing recommendations," and not give them the basic information that everyone else in the courtroom has. What the guidelines calculation is, the information that underlies that calculation, and any issues that might be arriving because of that guideline calculation. Victims ought to

have access to that same information so that they can be a participant as Congress has directed in the sentencing process.

The sponsors of the Crime Victims' Rights Act believe that victims should be meaningful participants, and they will not be meaningful participants unless they're somehow integrated into the guidelines discussion.

Now, my testimony has some proposals on that. There are a variety of different ways of doing this. I would simply encourage the Commission to think about how to bring victims into the guidelines process, perhaps by giving them access to the presentence report, which seems to me to be the most direct way to accomplish that.

The second recommendation I would make to the Commission is that the Commission should recommend that Congress expand federal restitution statutes. And I realize that maybe I'm talking about something different here at this point than every other witness; every other witness seems to be focusing on particular issues in the Sentencing Guidelines Manual. But you are the United States Sentencing Commission, not the United States Guidelines Commission, and it seems to me it's important for this Commission to speak

to an important topic in criminal sentencing today, which is restitution.

Current federal law requires judges to fit restitution awards into specific narrow pigeonholes. It's got to be lost property, medical expenses, funeral expenses, lost income, expenses for traveling to the court proceedings. Those are the kinds of things that are covered by current federal law. There is no general authorization for judges to award restitution that's fair and appropriate under all the circumstances.

Now, the need for judges to fit awards into particular cubbyholes has led to a lot of litigation which I track on page 19 of my testimony. Let me give you just a couple of examples here of the problem that exists today:

In U.S. v. Reid there was an armed felon who was fleeing the police, crashed into a number of cars. District judge awards restitution to persons whose cars was damaged--or were damaged. The 9th Circuit reversed, saying that those victims were not victims of the crime of being a felon in possession and, therefore, the statute didn't authorize restitution.

Another case, Government Virgin Islands v. Davis.

There was a forgery and fraud directed against an estate of the victim. The estate's attorneys had to spend a considerable amount of time and money tracking down that fraud. District judge awards restitution, 3rd Circuit reverses. Why? These are consequential damages of a crime; current statute does not authorize the restitution award.

U.S. v. Alliance, a businessman endangers his employees by handling toxic waste. The district judge orders \$6 million in restitution because of the damage involved. 9th Circuit reverses. Why? Not because the award was unfair in any way but because the statute only authorizes restitution for Title 18 offenses and a few other narrow offenses.

There is simply no reason why any of those decisions should have come out the other way, and I'm not talking here about a matter of statutory construction; I'm simply talking about sound public policy. In each of those cases--and I collect some other examples--judges should have been given the power to award broad restitution. I propose redrafting the Federal Restitution Statute, and I have specific language on page 24 of my testimony to do the following:

Judges should be given broad authority to award any restitution that is just and proper under the circumstances.

Judges should be given the power to award restitution for consequential damages, including emotional distress damages.

Judges should have the power to award lost income restitution in homicide cases, and the coverage of our restitution statute should be extended to all federal offenses, not certain offenses in Title 18 and a few other crimes.

The third recommendation I would make to the Commission is that you should recommend to Congress that judges be given greater authority to prevent criminals from profiting from their crimes. There is an anti-profiteering provision in federal law today, 18 USC 3681. It's known as the Son of Sam law because it was patterned after the New York law that targeted the book deal that David Berkowitz, the Son of Sam, got after committing a number of heinous murders in New York.

In 1991, however, the U.S. Supreme Court in Simon & Shuster v. Members of the New York State Crime Victims

Board struck down the New York statute because it targeted First Amendment speech. And when the New York statute was invalidated, the federal statute effectively became invalidated as well.

What is needed to address the problem is greater authority for judges to order as a condition of supervised release, or as a condition of a term of imprisonment, that criminals not be able to profit from their crimes. This does not have any First Amendment problems, as the Supreme Judicial Court of Massachusetts explained in Commonwealth v. Powers, a 1995 decision. This would simply be a judge exercising his or her power to promote rehabilitation.

Now, I admit that under current law judges could impose such a condition of supervised release, but it seems to me current law is effective in three ways:

First, this is not a standard condition of release, and so the need to impose this sort of an order may simply escape the attention of probation officers and judges in many cases.

Second, the term of "supervised release" is too short to address the problem. Notorious crimes can sometimes have profitmaking potential for decades after the

event, and yet supervised release terms only extent for a matter of years.

And third, supervised release, of course, only addresses a situation where a criminal has been released. It is not clear the extent to which judges would have authority to prevent profiteering during a term of incarceration, and so the Commission should recommend corrective legislation on these points, and I have some proposals in my testimony.

I also would suggest to the Commission that you propose another type of--that you simply propose redrafting of the anti-profiteering statute. The problem with the current federal statute is it focuses on books and movie rights. It tracked the New York statute that was problematic.

What should be done is redrafting of the federal statute to forbid profiteering by defendants, and if there were done, there would be no First Amendment problem. The Arizona Court of Appeals in the case of Napolitano v. Gravano, a 2002 decision, upheld the broad Arizona statute because it didn't target First Amendment activities. That was the case involving Sonny, the Bull, Gravano. He got a

book deal for describing his life in the New York Mob. The money was forfeited. The Arizona Courts of Appeals said: Fine, because you haven't focused on First Amendment activity.

I would also recommend that the Commission propose to Congress a specific statute dealing with murderabilia. This is the situation where a notorious criminal markets things such as toenail clippings, or hair, autographed tee shirts and the like. An anti-profiteering statute of the type I just described might address that problem, but it seems to me to remove any doubt the Commission should propose to Congress a specific statute dealing with that issue. The statute should focus on serious crimes, federal offenses, cover criminals and their representatives and assignees. It should focus on tangible items rather than First Amendment activity, and I propose some language in my testimony along those lines.

My last recommendation is that the Congress should consider adding as an ex officio representative a crime victim's representative to this body. I know that Jim Fellman tomorrow is going to recommend that a defense representative to be added to this body ex officio. That

seems to me it may very well be a good suggestion. But a crime victims' representative, it seems to me, would be a good addition as well.

Now, one plausible response to this is that the Department of Justice, who as an ex officio member can speak up for crime victims, but it pains me to say this--and I notice that my friend Mike Elston is no longer here in the hearing--but I'm not sure that the Department of Justice is exercising appropriate leadership on crime victims' issues.

I asked the two representatives from the Department of Justice just a few moments ago if they knew whether the Department had taken a position on the Commission's proposed amendment dealing with Crime Victims' Rights. Neither of them knew whether the Department had even taken a position, much less what that position was.

To my knowledge, the Department has not publicly spoken on this issue, nor did they send a representative from its Office of Victims of Crime to speak on this subject. This is in spite of the fact that the Crime Victims' Rights Act has been on the books for a year and a half, and that the U.S. Sentencing Commission circulated its proposal on Crime Victims' Rights a number of months ago.

Now, it's interesting to compare the Department's lack of enthusiasm on crime victims' guidelines with the speed with which it acts to criticize judges. Monday afternoon this Commission released a massive data report on the effects of Booker, and Tuesday morning we heard from a representative of the Department in remarks to the Judicial Conference that the data showed judicial disparities that required the need for legislative action. Obviously, we'll have a chance to discuss that issue with representatives of the Department tomorrow.

But I would encourage the Department to act with the same dispatch and energy in addressing crime victims' rights as it does in deciding judicial decisions under the Sentencing Guidelines.

Thank you, Mr. Chairman, for the change to present those remarks.

CHAIRMAN HINOJOSA: Thank you, Judge Cassell.

Mr. Butler.

MR. BUTLER: Thank you, Mr. Chairman, Members of the Commission. I'm here on behalf of the Maryland Crime Victims' Resource Center. We are a group that supports the rights of crime victims, and our mission is to ensure that

victims of crime have comprehensive rights and services.

We believe that victim involvement in the Justice system is appropriate and makes the system better. Particularly in terms of this Commission's jurisdiction in sentencing, we believe that victims should have the ability, as Congress has intended, for victims to have a right to be heard, and that right to be heard should be a meaningful right to be heard.

As Judge Cassell mentioned a minute ago, we believe that access to the presentence investigation is at a minimum what should occur. Let me give you a couple of examples, one federal case which is actually a drug case, and then one state case to show you how this can occur.

The federal case that I recall is a drug case where the plea happened, and in the presentence investigation the probation officer made the recommendation that was provided to counsel, including myself, who was at that point representing the defendant, and the defendant objected to several factors.

The U.S. attorney, obviously, disagreed and came and proposed a solution if that we would waive our objection, they would find that the quantity of drugs was

actually less. And my client got a good deal; he accepted that deal. But it is clear, that is, those factors and what the probation officer says in there and what both the parties and perhaps the victims could say, could make a difference in what is a truthful sentence based on the facts that the court must determine.

The state case that I'm aware of is one that dealt with a continuing course of conduct where the age of the victim was significant, and if the course of conduct begun at the earlier age, it would be an enhancement based upon the low age of the victim, minor victim. And there was also an issue about victim injury and whether there was a physical injury or mental injury which would have caused additional points.

And the prosecutor and the defense attorney stipulated to those, but when they did the presentence investigation, it showed that the probation officer found that that case never went to court because the parties had stipulated to that, and the court never reached it. But if a victim would have been able to read that and show that the facts were incorrect or deceptive, the court could make the appropriate factual determination.

There are obviously very few cases in the federal system where there are actual victims. Obviously, most of them are not. We do not believe this would pose a burden on the court, and yet it would go to the truth and justice of the process.

The other issue that I would like to address is, as part of the sentencing process, we believe that it is very appropriate for the Commission in its guidelines worksheet to track victim involvement or noninvolvement. And the reason the statute not only requires that the court ensure that victims obtain these rights but also to record that on the record.

I've attached as part of my testimony a copy of the Maryland Sentencing Guidelines worksheet. I'd like to thank Dr. David Soule, who is here--he is the Executive Director of the Maryland Commission on Criminal Sentence and Policy--for providing this needed--some information including the worksheet to prevent to the Commission.

But we believe it is very appropriate, and what gets tracked is important, and we really don't know how often victims participate or not participate and the reasons why. And I think, specifically in terms of the sentencing

process, it makes wonderful sense that this Commission provide some accurate data for which we can track whether this Crime Victims' Rights Act that Congress passed is being enforced.

Just to conclude my oral remarks, and I would incorporate those specific recommendations I indicated in my written testimony, but as members of the bench, and I've taken pleas many times, you very well know what it means to make sure that the defendant has a proper waiver before entering a plea. Unfortunately, what we don't know in regards to victims' rights is what is required for a waiver of a victim's rights.

And that is very probably even more problematic when the victim is not present. And I think if the court is to deal with its obligation, the court has to take proactive positions in order to make sure what is fair to the victim is fair across to every victim. And so we encourage this Commission to take reasonable steps.

Obviously, the law is there; the court has an obligation to follow the law, but how the court needs to follow its obligations I'm not sure, and we believe that this Commission should give guidance to the federal

judiciary.

Thank you very much.

CHAIRMAN HINOJOSA: Thank you very much, Mr.

Butler.

Ms. Love, I think you're probably going to address another topic.

MS. LOVE: Another question, yes, sir. My name is Margaret Love. I'm a lawyer in private practice in Washington. I welcome this opportunity to testify before you on behalf of the American Bar Association concerning the proposed policy statement on reduction of term of imprisonment for extraordinary and compelling reasons under 18 U.S.C.3582(c)(1)(A).

I'm a Past-Chair of the ABA Criminal Justice Section, Committee on Corrections and Sentencing, currently am Consulting Director for the Commission on Effective Criminal Sanctions, the successor to the Justice Kennedy Commission.

Between 1990 and 1997 I served in the Justice Department as Pardon Attorney--(off mike)--United States.

We have submitted written testimony, and I will briefly summarize it. I do want to express our appreciation

at the outset for the Commission's willingness to tackle what are somewhat unfamiliar issues in a guidelines context. I believe this is the first time the Commission has proposed policy to implement this provision of the 1984 Act.

As the Act's only provision for reducing a sentence that has otherwise become final, it may be its best kept secret. The ABA strongly supports the adoption and utilization of sentence reduction mechanisms within the context of a determinate sentencing system to respond to those extraordinary changes in a prisoner's situation that may arise from time to time, sometimes many years after the sentence was imposed. The absence of an accessible mechanism for making mid-course corrections is a flaw in many determinate sentencing schemes that may result in great hardship and injustice.

For executive clemency, the historic remedy of last resort for cases of extraordinary need or desert cannot be relied upon in the current political climate.

Our written statement describes the text and legislative history of Section 3582(c)(1)(A), and the contours of the Commission's responsibility for establishing the policy for sentence reduction motions. The policy that

the Commission has proposed for comment seems generally unexceptionable as far as it goes, although we do question whether it's appropriate to import into this context a standard of dangerousness that was developed in the context of pretrial release.

We also urge the Commission to clarify that several reasons can be considered in combination to determine whether extraordinary and compelling reasons warrant release. But our principal concern with the proposed policy is that it does not specify the criteria for determining what constitute extraordinary and compelling reasons, and it does not give the list of specific examples that is required by 28 USC 994(T).

I will devote the remainder of my time to these issues. We believe that there are two primary criteria for identifying cases where a sentence reduction under 3582(c)(1)(A) may be appropriate. One derives [sic] from the Black Letter Directive that a court should consider the factors set forth in 4553(A) to the extent that they're applicable. The other is the caveat in the legislative history that a prisoner's circumstances must have fundamentally changed since sentencing.

The first criterion ties sentence reduction decisions to the factors considered in imposing the sentence in the first instance. The second makes clear that 3582(c)(1)(A) is not supposed to serve as a backdoor way for a court to revise a sentence that has been properly imposed. The court may act only if the prisoner's circumstances have fundamentally changed and only if asked to do so by the government. We do not believe it makes sense to require, categorically, as VOP presently does, that the change should not have been foreseeable to the court at the time of the sentencing.

For example, if a prisoner had a chronic illness at the time of sentencing that is likely to eventually disabling, the government ought to be able to bring the case back to court years later if, in fact, the disability materializes. Nor do we believe that the statute be restricted in its use to medical cases, a restriction that has no support in either the text or the legislative history.

Indeed, VOP's own regulations recognizes that sentence reduction may be sought for both, medical and nonmedical reasons, though its operating policy has been to

seek sentence reduction only where a prisoner is near death. As a matter of what may only be historical interest, VOP has not always followed such a restrictive policy in seeking extraordinary judicial sentence reduction.

Until 1994 VOP's program statement included compelling family circumstances as one situation warranting sentence reduction. And we cite in our testimony two district court cases in which VOP sought sentence reduction to remedy disparity among co-defendants and to recognize exceptional accomplishments while in prison. In both cases the VOP director informed the court that the statutory authority offered the Justice Department--and I'm quoting--"a faster means of accomplishing what previously it had sought through a recommendation for executive clemency."

I turn now to the specific examples of extraordinary and compelling reasons for warranting release. We offer the following suggestions in addition to terminal illness: An incapacitating injury or chronic illness that diminishes a prisoner's quality of life and public safety risk; old age coupled with infirmity; death or incapacitation of the only family members capable of caring for the prisoner's minor children; unwarranted disparity of

sentence among
co-defendants; changes in applicable law that are not made
retroactive; and unrewarded service to the government.

Any of these circumstances as well as
rehabilitation, which is specifically mentioned in 994(T) as
a basis for sentence reduction, could qualify if considered
in combination. Whether or not they will in fact justify
sentence reduction depends upon the government's opinion of
the equities of the case overall.

Unless the universal possible equitable grounds
for sentence reduction begin to seem vast and unmanageable,
threatening to undercut the core values of certainty and
finality in sentencing, it may be reassuring to remember
that the courts' jurisdiction in these cases is entirely
dependent upon the government's decision to file a motion.

We believe that the government can be counted on
to take a conservative course and recommend sentence
reduction to the court only where a prisoner's circumstances
are truly extraordinary and compelling. In this regard,
VOP's decision to move the court will necessarily be
informed not just by its perspective as jailer, but also by
the broader law enforcement perspective of the Justice

Department of which it is a part.

Because motions under 3582(c)(1)(A)(i) necessarily reflect the government's priorities and serve the government's interest, we would commend to the Commission the criteria for equitable reduction of sentence that the Department of Justice itself has identified in the U.S. Attorneys Manual as grounds for commutation of sentence. Particularly in light of the original clemency-related rationale for giving the court jurisdiction in this area, it seems appropriate that the circumstances I identified are sufficient. For the government to support presidential commutation of sentence should be deemed sufficient for the government to support judicial sentence reduction as well.

I want to close on a personal note. When I served as pardon attorney, I was frequently asked to advise on cases where fundamental changes in a prisoner situation made imprisonment seem both inappropriate and unjust. In the early 1990s the Deputy Attorney General decided to refer such cases to VOP for handling under 3582(c)(1)(A)(i) rather than commend them to the president for commutation of sentence, as such cases historically had been handled.

But VOP was hesitant to exercise its authority even where the United States Attorney did not object and even where the sentencing judge indicated an interest in receiving a motion. Indeed, I've seen cases in which a judge affirmatively asked for a motion to no avail.

In the years since I left the Department, VOP's reluctance to file sentence reduction motions has become institutionalized. In my opinion, the steps are not taken to encourage VOP to do its responsibilities more broadly, the court sentence reduction authority may atrophy just as the president's pardon power has atrophied.

It is likely, as Vice Chairman Steer has suggested in a 2001 Law Review article, that VOP's reluctance to invoke the court sentence reduction authority more frequently stems from the absence of codified standards and policy guidance from this Commission, as well as from VOP's modest view of its own role as turnkey.

We therefore urge the Commission to give explicit policy guidance in this area, to spell out the statutory criteria, and to give specific examples of situations warranting sentence reduction so that the statute can begin to function as the safety valve that Congress intended it to

be.

Thank you very much.

CHAIRMAN HINOJOSA: Thank you very much, Ms. Love.
We probably have time for a few questions.

Judge Castillo.

JUDGE CASTILLO: These two issues are long stamped. I think many on the Commission, including myself, are deeply sympathetic to, and I'm hopeful that we can get to all of this. It's not for lack of wanting to do that; it's more related to similar things that we covered in the prior panel as well as our return from the U.S./Mexican border dealing with immigration issues, as well as the fact that there is a House Judiciary hearing tomorrow on a report that just was released. It's the press of business that sometimes prevents us from getting to two important issues.

Ms. Love, I would suggest, because of all of that, that you not hesitate to send us very specific guideline language as to what you would propose, because I will see what we can do with that.

As to the issue of victims' rights, I find very helpful, Judge Cassell, the fact that you propose language that is guideline language. The one concern I have is

giving a victim and the victim's family, by definition, a full right and access to the PSR could, even though well-intentioned, cause all kinds of mischief as the victims feel, rightfully so, strongly about a lot of different issues. And, as you know, there's all kinds of confidential information in a PSR.

What's your reaction to that? I should say Professor Cassell.

JUDGE CASSELL: It seems to me what you could simply say is that the PSR is presumptively available to a crime victim, who requests it. I realize that that's going to narrow down. Most federal cases don't involve victims' issues; they're drug trafficking or firearms. In many of the victims' cases, the victims are not going to be requesting the information because they're not interested for one reason or another.

Now, in the small subset of cases where there is an expressed victim issue or interest, let's make it presumptively available unless someone--prosecution or defense--shows good cause to the judge for keeping it sealed and maybe let the victim be heard on that. It seems to me--I understand that there are cases where the PSR couldn't

go over, but my experiences, most of them could go over. And it's the exception where there's some specific information that should no be made available.

CHAIRMAN HINOJOSA: Judge Cassell, is it fair to say of our four recommendations to the Commission, three of them actually requires congressional action--

JUDGE CASTILLO: Yes.

CHAIRMAN HINOJOSA: --which you're asking that we recommend.

The fourth one, which is this issue of integrating the victims into the sentencing process with regards to the initial determination and calculation of the guidelines would actually require a change in the Federal Rules of Criminal Procedure from the standpoint of those are presently sealed and not available to anyone--

JUDGE CASTILLO: That's right.

CHAIRMAN HINOJOSA: --except the prosecution and the defense, and obviously the court. And so they all four require either congressional action and/or a change in the Federal Rules of Criminal Procedure.

JUDGE CASTILLO: There are, as, Commissioner, I'm sure is aware, proposed changes that are being circulated

for public comment in the Federal Rules of Criminal Procedure. What I'm somewhat concerned about is a finger-pointing situation: Is this your ball game? It is the rules of Criminal Procedure Committee ball game? Is it a Criminal Law Committee ball game? Is it a congressional ball game? It seems to me that the Commission is well situated to exercise leadership and say: We think the PSR should be made presumptively available to victims unless there's a good reason not to throw that out to the various groups and then have it move in that direction.

CHAIRMAN HINOJOSA: We probably have time for one more question. Judge Sessions.

JUDGE SESSIONS: You bring up consequential damages in the restitution arena, and now, including emotional damages. Now, doesn't that mean that the sentencing hearing will become a minitrial and a judge will then be put in the position of trying to assess the emotional damage that was done to a particular victim. It raises significant due process issues, but also is that--isn't that the natural consequence of what you're suggesting? We're going to have this major civil trial in regard to the emotional damages suffered by a victim.

JUDGE McCALLUM: I don't think so for a couple of reasons. First of all, there are several states that already do something like this, and the sky hasn't fallen in those states.

The other point is the judge already has to figure--

JUDGE SESSIONS: --just in case I'm traveling and I just look for the sky falling, if it happens.

JUDGE McCALLUM: I don't have the--I'll send you--we're working on a 50-state survey that would give you the law in all 50 states on it. Certainly, the majority view tracks the federal view, but there is a minority view which I think ought to be extended into federal law.

The other point is it seems to me a judge already has to figure out what the emotional damage is to a victim in terms of determining an appropriate sentence. I mean that is part--I mean the judge would be, in my mind, not being faithful to his or her duties to determine what the impact of the crime was if there wasn't some understanding of that.

I guess there's some questions of monetizing that or quantifying that, but once you have a feel for how much

damage is done, you know, I think at that point the judge would be able to--

JUDGE SESSIONS: Would a defendant be afforded the opportunity of conducting discovery to determine what the losses are of the victim, just as an example of how complex this could very well--this could become?

JUDGE McCALLUM: I don't think so for this reason. The defendant is entitled to conduct discovery already when, for example, the judge chooses to depart. I think there's a 5K2 departure for exceptional emotional damage. The judge might say, "There's exceptional emotional damage. I'm giving you an extra five years." If we let a judge depart upward to the extent of five years in prison for that sort of thing without discovery, certainly we can do the much lesser thing of saying, "And here's \$10,000 to compensate that as well."

CHAIRMAN HINOJOSA: Don't you think most judges, they would give notice if they were going to do that?

JUDGE McCALLUM: Yes.

CHAIRMAN HINOJOSA: And if the defense attorney

says, "Well, we would like to present some evidence on this,"--

JUDGE McCALLUM: Sure.

CHAIRMAN HINOJOSA: --don't you think most judges would do that, Judge?

JUDGE McCALLUM: Certainly. I think there's be an opportunity to be heard. This could be conducted through the--as it already is through the Probation Office. A lot of times in my experience defendants are willing to stipulate to a restitution amount so that they can simply move forward on the other issues. So I'm not sure that this would be some dramatic increase in time or energy by courts on these kinds of issues.

CHAIRMAN HINOJOSA: Commissioner Horowitz convinced me that we should let one more question.

COMMISSIONER HOROWITZ: Well, I think you asked just one more question then.

CHAIRMAN HINOJOSA: The Chair gets to do that like picking the color of the manual.

(Laughter.)

COMMISSIONER HOROWITZ: I'd just like to ask Mr. Butler a brief follow-up question in light of the discussion

we've had about disclosure and federal investigative--presentence investigative report. Does Maryland have any experience in that regard?

MR. BUTLER: Maryland's--as you can see from the worksheet--is very simple. It doesn't have the calculation of the factors, so, no. We do not really have that in Maryland, although I do recall that there is a list maybe in Judge Cassell's--

COMMISSIONER HOROWITZ: Yeah, I noticed there was in a footnote in Judge Cassell's for some of the states, and I notice Maryland wasn't, and I was curious if you've had any experience in disclosure.

MR. BUTLER: But I do think that even--even without disclosure of the presentence investigation, which I think is really critical in the federal system, I do think that the Commission can take many steps as I've outlined in my written testimony to make victims more involved without being a burden in the process.

COMMISSIONER HOROWITZ: Thanks.

CHAIRMAN HINOJOSA: Well, thank you all very much. Judge Cassell, of course, we know how busy you've been this week, and, Mr. Butler, we realize that you have a lot of

other things you could be doing today as well as Ms. Love. And we have benefitted from Judge Cassell and Ms. Love in the past, and I'm sure we'll continue to benefit from your input, Mr. Butler.

MR. BUTLER: Thank you very much.

MS. LOVE: Thank you very much.

CHAIRMAN HINOJOSA: And Vice Chair Steer has been kind enough to indicate that he could be willing to preside over the next panel since I need to be absent for a period of time during this particular panel.

VICE CHAIR STEER: Thank you.

(Whereupon, at 11:50 a.m., the panel concluded.)

USSC PUBLIC HEARING, PANEL III

[11:55 a.m.]

VICE CHAIR STEER: Well, we welcome Susan Hackett, who is Senior Vice President and General Counsel for the Association of Corporate Counsel.

And Mr. Kent Wicker is representing the National Association of Criminal and Defense Lawyers.

Do you all have a preference as to who will proceed first?

MR. WICKER: I would like to start, Your Honor.

VICE CHAIR STEER: You may.

MR. WICKER: Thank you for the opportunity to address you on this important point. My name is Kent, and I practice white collar criminal defense law and business litigation in Louisville, Kentucky. Before I went back into private practice, I was an Assistant United States Attorney in the Western District of Kentucky, and I prosecuted white collar and public corruption cases there, then later served as Criminal Chief and 1st Assistant. I also teach corporate and white collar criminal law at the University of Louisville School of Law.

I'm here on behalf of the National Association of

Criminal Defense Lawyers and our coalition partners who feel as strongly about the privilege waiver issue as I do; but, more particularly, I'm here on behalf of myself and my clients, and I want to relate to you some personal experience that I have had and the personal experiences of other lawyers that I have worked with over the past couple of years.

When I was a white collar prosecutor and supervisor of others, I often directed prosecution of corporations or executives who had done something that they believed to be taken on behalf of corporations. But as a prosecutor I don't know of any case in which we required the corporation to waive its attorney/client privilege as a condition to receiving consideration for acceptance of responsibility or reduction of culpability score.

We believed that if the company admitted what it did wrong and expressed contrition for its action, that met the standard that the guidelines required, and we treated corporations the same way that we treated individuals. If an individual came in and said what he did wrong, the citizen guidelines didn't require him to waive his attorney/client privilege merely to earn acceptability

points, and we didn't see any need to treat a corporation any different than we did an individual.

Now, we believe that the attorney/client privilege was an interest that was worth protecting. As much as I wanted to get a conviction in cases I prosecuted, I never required a defendant to give up his right to an attorney who would protect his rights and protect his confidences. In fact, I always thought that the better represented that a defendant was on the other side, the more confident I felt that justice would be done in that case. Ensuring a good confidential relationship between an attorney and his client is part of ensuring not only a meaningful right to counsel but a good result in the case.

As one of my fellow defense lawyers and former prosecutors told members of the Judiciary Committee just last week, an unreliable attorney/client relationship means that corporate employees will be less forthcoming and internal investigation will be less reliable, and both prosecutors and defense lawyers will be frustrated in their search for the truth.

Now, when I left the United States Attorney's Office in December 2002, I quickly learned a couple of

things. First of all, I didn't get my phone calls returned nearly as quickly as I had before.

And the second thing was that the landscape was changing for the attorney/client privilege. In a lot of the districts in which I found myself practicing now as a defense lawyer, it was becoming more and more common for the prosecutor to invite himself right into the middle of the attorney/client relationship.

Now, it's not easy for a lot of reasons to give a corporate client or an employee of a corporation the kind of defense he deserves and the kind of defense that our adversary system requires, and there are a lot of reasons for that. Juries think differently about these cases after Enron. They're expensive to defend, and the Government has a lot more resources on most of these cases. But without question in my mind, the demands of prosecutors to waive the privilege is now the biggest challenge to defending a white collar case, bar none.

In the corporate context it comes in a couple different scenarios. One is when a prosecutor demands that a company give up the produce of an internal investigation he's undertaken after a problem was detected, including

interviews with employees who may have criminal exposure--the kind of folks that I represent.

The other is when a prosecutor demands that a company disclose the advice that its attorneys gave employees before or during the activity in question. Let me give you a couple of real-life examples from my practice.

I was asked to represent an officer of a company in a federal investigation. Attorneys for the company and other officers met and exchanged drafts of a joint defense agreement and were ready to decide how we were going to go work together to find out what the facts were, until the company's lawyers met with the prosecutors.

After meeting with the prosecutors, they came back and refused to enter a joint defense agreement which would have allowed us to preserve the privilege while conducting the kind of investigation that we needed to do to defend our clients. But instead, as a necessary component of cooperation, the company waived their privilege, refused to let us interview company employees for a good amount of time, and made it difficult for counsel for the officers to obtain the documents that we needed to defend the case.

The attorneys for the company explained that they

were prevented from cooperating with us because they were afraid they wouldn't be able to avoid indictment or to obtain reduction for acceptance of responsibility or lack of culpability if they refused to waive the privilege.

Because of the government's insistence on annihilating the privilege that we had, my client and the other individuals were unable to forge a defense agreement and, consequently, frustrated in our ability to obtain the documents and the testimony that we needed to defend ourselves. And it's not enough to say that we'd eventually get this kind of material under the Rules of Criminal Procedure after my client was indicted, because for me defendants, like many of us if we were in that position, the harm done to our careers and our reputation would not be repaired by a not guilty verdict.

In a white collar case especially, it is essential to obtain the information necessary to prepare the defense when it's still possible to affect a prosecutor's charging decision. And our ability to support a defense was impeded by the prosecutors' insistence that the company waive the privilege.

In another example my client was the general

manager of a company accused of price-fixing, and early talks with the company, the Department of Justice relied on the Commentary in the Sentencing Guidelines to demand waiver of the attorney/client privilege of the company. My client was compelled to submit to an interview by company counsel on pain of discharge if he refused, and at the same time the company's lawyers made it clear to us that they would turn over the product of the interview.

Now, because of the compelled waiver of the privilege, my client was compelled to give us the protection that's really at the heart of the criminal justice system. His privilege under the Fifth Amendment. It's not enough to say that he could just give up his job and retain his Fifth Amendment rights, because this is a real person with a real family to support, and it's not a decision that he was able to make at that time.

Now, I don't believe it was the intent of the Sentencing Commission in its amendment to make it more difficult for the target of an investigation to assert Fifth Amendment rights, but that's one of the effects of the erosion of the attorney/client privilege in a corporate

context. And the Guidelines Commentary has contributed to it.

I also don't believe that it was the Sentencing Commission's intent to discourage executives in regulated industries from seeking legal advice, because I think most of us agree that involving lawyers in a decision-making process is a good thing. In fact, effective in compliance programs usually requires seeking legal advice at the appropriate times. But it's very clear to me that if an executive cannot be sure that his confidences will be protected by his lawyer, he's going to be considerably less likely to seek the advice in the first place.

And then finally, I don't believe that the Commission sought to enter any debate about joint defense agreements or to limit the ability of defense lawyers to obtain the information necessary to defend their clients. But it is an effect and unfortunate consequence of the Commission's amendments to the guidelines.

Now, the examples from my practice are not isolated, and Ms. Hackett is going to talk to you more about the survey. But the overwhelming of majorities of respondents to the survey and the overwhelming experience of

people that I've talked to tell us that they've experienced these kinds of compelled waivers in their cases, and they're becoming more and more common.

As one respondent wrote in the survey response:

"When I was a prosecutor, we recognized that big white collar cases are hard and that they should be. Now the attitude seems to have changed, and if the corporation doesn't partner with the government to prosecute individuals, the government views it as obstruction. This view is becoming part of the culture, having begun with the Thompson, Holder, and USSG pronouncements. It's simply wrong and should not happen in America."

More and more in my experience and the experience of my fellow practitioners, prosecutors are specifically citing the guidelines as a reason that the corporation must waive the privilege for its employees. In our survey our respondents told us that the sentencing guidelines were the second- most cited reason for requesting the waiver, behind only the Thompson and Holder Memorandum.

Now, the Commission's amendments are not the only reason for the erosion of privilege. The Thompson Memo and other Justice Department policy pronouncements certainly

carry their responsibility for it, but the guidelines give wind to the sails of the prosecutors who want to compel companies to waive their privilege.

And the difference now is very important. It's that before the amendments defense attorneys and corporate counsel could always look to impartial judges to decide whether a corporation in its conduct had evidence acceptance of responsibility or reduction of culpability score. And a company which pleaded guilty, gave an accounting of its conduct, and expressed remorse would be entitled to a reduction for acceptance of responsibility just like an individual who did the same things. If we didn't agree with the way the government viewed the matter, we could take it to the judge to decide.

But now the landscape's different. Now it's not nearly a Department policy but the guidelines themselves that are telling judges that the company which has not waived its privilege as not merited a reduction for acceptance of responsibility. And the fact has not been lost on prosecutors.

To argue that the guidelines have had no effect or a negligible one on the current climate is to argue against

the very relevance of the organizational guidelines themselves. All of us who practice in this area know that the guidelines are important at the beginning and the middle of the case, as well as at the end of the case, and you cannot be an effective representative and advocate for your client unless you fully take into effect how the guidelines are going to affect the case throughout the proceedings.

To summarize, the effects of the erosion of the privilege work on the adversary system and are as serious as the effect on individuals. Because of the erosion of the privilege, individuals are compelled to waive their rights under the Fifth Amendment; companies are compelled to stand in the way of their employees getting access to documents in interview necessary to their defense; individuals are discouraged from seeking legal advice to avoid compliance problems; and individuals cannot be candid as they would like to be without outside counsel conducting internal investigations.

The National Association of Criminal Defense Lawyers along with its coalition partners recommend that the Commission add language to the Commentary clarifying that cooperation only requires the disclosure of all pertinent

nonprivileged information known to the organization and delete the existing Commentary language beginning with, "unless such waiver is necessary."

In conclusion, we on the defense side of the bar continue to do battle with this issue in every case that it arises. And we're going to continue to assert to protect the attorney/client privilege just as we do all the other important rights and privileges of our clients. And the beauty of our adversary system is that it prevents these battles and even demands them.

All we ask is that the Sentencing Commission recognizes that the attorney/client privilege is not a luxury, not a bargaining chip, but an important right for our clients and for the adversary system itself.

Thank you, and I'll turn it over to Ms. Hackett.

VICE CHAIR STEER: Okay, Ms. Hackett, do you want to proceed?

MS. HACKETT: Thank you. Thank you for this opportunity to present the results of our newest survey to you on attorney/client privilege erosion in the corporate context.

My name is Susan Hackett, and I'm the Senior Vice

President and General Counsel at the Association of Corporation Counsel, but I am here today as a representative of the coalition to preserve the attorney/client privilege which is composed as the following organizations: The American Chemistry Council, The American Civil Liberties Union, The Association of Corporate Counsel, Business Civil Liberties, Inc., The Business Roundtable, The Financial Services Roundtable, Frontiers of Freedom, The National Association of Criminal Defense Lawyers, The National Association of Manufacturers, The National Defense Industrial Association, The Retail Industrial Leaders Association, The U.S. Chamber of Commerce, and The Washington Legal Foundation.

The American Bar Association has also expressed similar views to the United States Sentencing Commission regarding the importance of preserving the attorney/client privilege and work product doctrine and protecting them from federal government policies and practices that now seriously threaten to erode these fundamental rights.

Our coalition believes that the attorney/client privilege and the work product doctrine as applied in the corporate context are vital protections that serve society's

interests and protects clients' rights to counsel. The attorney/client privilege is fundamental to fairness and balance in our judicial system and essential to corporation compliance regimes. Without reliable privilege protections, executives and other employees will be discouraged from asking difficult questions or seeking guidance regarding the most sensitive situations and will be penalized for reporting problems they identify within the organization.

Without meaningful privilege protections lawyers are more likely to be excluded from operating in a preventive rather than a reactive manner within corporations. In today's complex business environment, it is increasingly important to encourage business executives and even line managers to regularly and without any hesitation engage their lawyers in open discussions about anything that concerns them in furtherance of ensuring the corporation's legal health. It is our belief that the attorney/client communication and confidentiality that fosters that communication are more important than ever and must be protected.

The coalitions' members have previously testified before this Commission on the Guidelines Chapter 8,

Commentary and Application Note 12 to Section 8C2.5, which bestows authority for lawyers in the Department of Justice to unilaterally determine in their discretion whether privilege waiver requests are appropriate or necessary in the corporate context. It is not our purpose today to repeat what's already been said. We believe the Commission already understands our positions well. Instead, my purpose in appearing before you today is, first, to commend you for your decision to consider retracting the privilege waiver language that concerns us in Chapter 8's Commentary.

We are fully aware that the Commission in drafting the current language did not intend to do harm to client's rights to counsel, and that they attempted to accommodate a number of constituencies' concerns.

Second, I appear before you to provide you with an overview of the survey results and the document that you requested, which has been provided to you in support of our contentions.

And third, I'm here today to reiterate our request that the Commission remove the clause, quote, "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information under the

organization," unquote, from the Guidelines Commentary and consider new language stating that privilege waivers are not appropriate for the Department of Justice to demand or consider.

I begin with a short summary of the results of the 2005 survey on privilege erosion in the corporation context which provided the first meaningful empirical data on privilege erosion issues. that survey confirmed our contention that companies faced with a potential investigation, prosecution or enforcement action, 1) are increasing in number to the point that waiver requests or expectations are considered routine; 2) have no meaningful ability to resist waiver expectations or demands however they are presented; 3) will face severe consequences if they do insist on exercising their privilege rights; and 4) suffered a significant and discernable chill in their lawyer/client relationships negatively impacting the lawyer's ability to work with clients to adopt, implement, monitor, and report on compliance initiatives that are poor to the company's legal health.

Upon presentation of these survey results in hearings before this Commission in November of 2005, several

commissioners, and the Department of Justice representative in particular, requested that we collect further information on the nature and frequency of corporate privilege waiver requests by the government. The coalition responded with a new survey instrument, and we are pleased to offer you the survey results here today.

Please note that these results are reported in detail in a survey document referenced previously and submitted to the Commission on March 1st. I believe you all have copies, and if not, there are additional copies in the back.

I'm happy at this point to skip some of my recitals about the respondent demographics, in the interest of time. I realize I'm standing in the precarious position of being between you and lunch, so I would simply refer you to the written copy of my statement, if you wish to, at your convenience, look more at the demographics.

Suffice it to say that the response to our survey was robust with more than 1200 responses and offered a meaningful sampling of in-house and outside counsel from a wide range of practice environments and industry.

Let's get directly to what I hope interests you

most, namely, what the respondents said. We encourage the Commission to particularly listen to the voices of corporate counsel and defense attorneys captured in the survey result document on several pages containing direct quotes which appear at the end of the document. These responses are but a portion of those penned in response to the open and the questions at the end of the survey which asked respondents to describe the waiver situations they're experienced.

I do not need to read these responses into the record for you to hear the respondents' outrage, or perhaps a more apt description or another description might be disbelief regarding government practices vis-a-vis the privilege. It really jumps off the pages. Respondents wrote time and again "prosecutorial abuses," their words, "coercion," their words, and inappropriate hijacking of court-governed doctrines that their clients were subjected to when privilege waiver discussions arose.

The comments detail stories about prosecutors demanding waiver of companies that are not even the target of the government in its investigation. They tell of prosecutors whose opening requests at their first meetings with counsel before any discussion of the facts or knowledge

of what the investigation into allegations might entail or uncover, or to demand privilege waivers as a condition of cooperation and as a requirement for any further conversation to continue.

Respondents wrote about how their clients were painted into a privilege waiver corner where they were told that of course they had choices: to waive or face criminal charges against the organization with entity threatening consequences--the suggestion being that if the company did waive, it wouldn't be charged at all.

And underlying all of these stories are concerns that these lawyers have regarding the damage done to their relationship with their clients as a result of this culture of waiver. Their concern that employees are no longer confident about including attorneys in business discussions or seeking legal advice when thorny problems arise. These are real voices.

There are hundreds of lawyers who personally witness waiver demands made by the government, and these are only a small number of the voices whom we happen to contact and hear back from. You cannot read these pages and conclude that waiver problems are nonexistent or rare.

Indeed, you must conclude, as did our respondents, that the government culture of waiver now exists, and that it infects a large number of government investigation and prosecutions.

What did respondents say in specific? These are a few highlights: Does a government culture of waiver exist? Yes. Almost 75 percent of both inside and outside counsel expressed agreement with 40 percent agreeing strongly with a statement that, quote, "A culture of waiver has evolved in which government agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney/client privilege or work product protections," unquote. Only one percent of inside counsel and 2.5 percent of outside counsel disagreed with that statement.

Second, the government expectation of waiver was confirmed. Of the respondents who confirmed that they or their clients had been subject to an investigation in the last five years, approximately 30 percent of in-house respondents and 51 percent of outside counsel respondents said that the government expected a waiver as a condition to engaging in bargaining, or to be eligible to receive more favorable or lenient treatment.

Waiver is a condition of cooperation. Fifty-two percent of in-house respondents and 59 percent of outside counsel respondents confirmed that they believed that there has been a marked increase in waiver requests as a condition of cooperation. And consistent with that finding, roughly half of all investigations for any other inquiry experienced by survey respondents resulted in a privilege waiver.

Further, and to refute the point often made that corporations are asked to waive but they volunteer to waive on their own, prosecutors typically request privilege waiver. It is rarely inferred by counsel. Of those who had been investigated, 55 percent of outside counsel responded that waiver of the attorney/client privilege was requested by enforcement officials either directly or indirectly.

Twenty-seven percent of in-house counsel confirmed this to be true. Sixty percent of in-house counsel who'd had experience with waiver requests responded "Not applicable" to this question, suggesting that they had not been present when privilege waivers were discussed. Only eight percent of outside counsel and three percent of in-house counsel responding to this survey said that

privilege waivers was inferred, as expected.

The sentencing guidelines are listed by respondents as among the top three reasons given for waiver demands. This Commission specifically asked us to find out if it was reasonable to assume that the Sentencing Guidelines language was in some part responsible for privilege waivers problems, rather, if it was somewhat of a hook upon which waiver requests are hung, or if our concerns should be better addressed to others who engage in privilege waivers discussions on a direct basis.

But the facts are in. Outside counsel indicated that the DOJ's internal policies such as the Thompson, Holder, McCallum Memorandum are cited most frequently when a reason for waiver is provided by a prosecutor or enforcement official. But the Sentencing Guidelines are cited second. In-house counsel placed the guidelines third behind the statement: A need for a quick and efficient resolution of the matter was proposed in the DOJ policies, respectively

Given that a number of other choices were presented, it's more than fair to conclude that respondents have been hearing about the guidelines from prosecutors quite regularly when discussions on waiver arise. And it's

likewise clear that the majority of waiver requests are coming from U.S. Attorneys for both in-house and outside counsel. the United States Attorneys offices were identified as the agency that most indicated an expectation of waiver.

In the interest of time, I will not further summarize the findings in my oral statement which are already discussed in greater detail in the written statement we've submitted. But please note that the written statement does include additional information about the types of attorney/client communications and work product doctrines--documents, rather--that are sought in waiver demands and further details the timing, and, if you will, the atmospherics of waiver demands made of corporations.

We also added a few questions with interesting answers on the experiences of corporations regarding government demands beyond waiver requests, which we think may interest you. These are issues related to corporate employees. Those questions include information on requests for the company not to advance legal expenses, even in the presence of state laws and corporate bylaw provisions which mandate indemnification; company experiences with

prosecutors who wish to control decisions related to joint defense agreements with targeted employees requests; requests that the company refuse to share requested documents with targeted employees, and demand that a company discharge an employee who would not consent to government interviews.

Taken together, these survey results present an unparalleled look into the role of waiver in the prosecutorial process that most of us hope we'll never experience, but which we now know is relatively commonplace for companies that have received notice that an allegation of wrongdoing has been made against them.

The movement toward a solution to these problems? Well, as you know, our coalition has petitioned this Commission to reconsider the privilege waiver language in the Commentary at USSG 8C2.5 Application Note 12. We believe that our submission of evidence from our surveys in 2005 and now in 2006 documents first that waiver demands are being made, routinely and inappropriately; 2nd, that waiver demands are being justified under the authority given through this provision of the Sentencing Guidelines; and 3rd, that

clients experiencing waiver demands are becoming less likely to consult their lawyers or include them in their daily decision-making as a result of the first and second reasons, all to the detriment of corporate compliance programs.

Accordingly, we requested a minimum that waiver clause in the Guidelines Commentary be removed and that the Commission consider inserting language instead that prohibits the DOJ from any consideration of privilege waivers, positive or negative, in charging or negotiating discussions and decisions.

Specifically, we've provided language in my written remarks that we'd suggest in amending the Guidelines, and I won't read it into the record at this point knowing you have it in writing.

We are hopeful that in light of the empirical information we've provided that you will favorably consider our request and proposed amendment to the Sentencing Guidelines, accordingly, in your 2006 amendment cycle. We believe that if we are able to remove the sources of waiver authority the Department relies upon, it will be possible to begin to argue more effectively for a changed, inappropriate prosecutorial policies and practices, and find a solution

that will help to restore the attorney/client privilege to its rightful position as every client's right.

My written testimony referenced the statements of Associate A.G. Robert McCallum. I understand that in his appearance before you this morning he retracted the statements that he made before the House Judiciary Subcommittee on crime terrorism and homeland security, which held hearings on March 7, 2006, at the coalition request on the privilege erosion issue. Mr. McCallum suggested at that time that the DOJ did not have any problems with removing the privilege waiver language from the Guidelines.

I would note to you that Mr. McCallum's comments before the Congress were made in an environment in which every member of the Committee from both sides of the aisles expressed rigorous support for the coalition's goals and were critical of the DOJ practices on waiver. The record on that hearing will soon be available, and we will be happy to forward it to you for your review so that this Commission can be advised of the Judiciary Committee's direction on this issue, and consider how you may also coordinate your amendment process with their current thinking.

I thank you for our time and attention to this

important matter and for your kind consideration of my comments. We're both happy to answer any questions you may have.

VICE CHAIR STEER: I want to thank you both for your testimony, and I want to thank all of the members of the coalition for conducting the survey and making available the results for us.

Questions?

COMMISSIONER HOWELL: I know a lot of people have other questions and comments that they want to make, but let me just ask you a simple question which is, do you think--is your objection to the waiver language and to any requests to, you know, a request from a prosecutor for a waiver of attorney/client privilege, you know--you know, exceptionless? I mean can--in other words, do you--do you--have you in your practice when you were a prosecutor within the coalition, are there circumstances when you think it is warranted for a prosecutor to request from a corporation a limited waiver of attorney/client privilege to see, for example, a report done by outside counsel and a report to an audit committee?

Do you think that there are circumstances where a

limited waiver of either work product or attorney/client privilege might be warranted and justified?

MR. WICKER: Let me speak to that first.

In--in--my only--the only circumstance that I believe that waiver would be warranted is in the circumstance in which a defendant asserts an advice of counsel defense. Clearly, he puts the advice of counsel at issue, the government is entitled to know what it is and whether the defendant meets the requirements for asserting that defense.

Other than that, I think we do more harm than good in allowing the government to get privileged reports, privileged conversations, privileged communications. I think it does more harm to the defendant and more harm to the system.

MS. HACKETT: I would add to that by suggesting a few comments. First of all, I think it's been relatively clear that the Department has had great success in past years in pursuing all kinds of criminal fraud or other kinds of corporate charges without demanding waiver, and that this change to demand waiver has been more recent in its work. And I'm really not sure why it is that we're in an environment now that's so different than the environment

before, or what has changed, if you will, in the words of Former Attorney General Dick Thornburg, who has testified before you that this was not something that in previous administrations had been a concern.

I think, more specifically, to the limited waiver issue, in a corporate context the limited waiver, while I understand that the government wishes to provide assurances that third parties to that limited waiver will not have access to the information, the waiver is still nonetheless present for purposes of the chill on the relationship between lawyer and client, because the client within the organization--trust me--is far more worried about the government's prosecution than they are about possible third-party suits further down the road.

In addition, it's clear that the courts right now are not in agreement on how to treat limited waiver. And in a number of cases that have been brought very specifically on this issue as to whether or not confidentiality agreements, crafted to protect a limited waiver between the corporation and the SEC or the DOJ, have not been accepted by other courts when a third-party defendant has requested access to that information.

So while we certainly don't agree that some kind of a codification, if you will, of limited waiver would solve any problems--indeed, as Kent's articulated it--it probably does more damage to the system, generally. Even in limited circumstances right now, it doesn't have the kind of application of security to the client that some might suggest it does.

JUDGE CASTILLO: Ms. Hackett, I also want to comment you for having your coalition undertake this survey, which I know is expensive and costly. I'm troubled by the results of your survey, and I want to know if you believe the so-called McCallum Memo from the Department of Justice is part of the solution or part of the problem at this point.

MS. HACKETT: Personally--and I don't know Mr. McCallum well--but everything I have seen of him leads me to believe that he is a man not only of great integrity but someone who was sincerely interested in this issue and in doing the right thing.

But I think the McCallum Memo, as it's called, has done more damage to this issue than good. I don't think that was the intention, quite honestly, when it was

originally sent out, but the message that it has sent, from what we are hearing, is that it is a message that suggests that every one of the 92 offices of the attorneys--of U.S. Attorneys--should have its own policy on privilege waiver issues and should simply report those policies back. It does not suggest that there is only one policy coming out of the Department of Justice; it suggests that that's a local decision.

And it also suggests that it simply report back; it doesn't give guidance as to what that policy should be. So my sense is that it has done more damage than it was intended to do in suggesting that this is now going to be not only a problem with the Department of Justice name but a problem of inconsistency potentially in any number of jurisdictions across the country.

And from a corporate environment standpoint, most organizations that are sophisticated organizations have operations in any number of jurisdictions. If they have to figure out now what the policies will be in any one of the jurisdictions in which they may be sued and in which they may have to sit down at some point with a prosecutor, that's an additional burden that doesn't do anything to solve the

problem. I think it makes it worse.

MR. ELSTON: What do you think is supposed to be in these policies? I mean I think it would have been helpful if you had been here when Mr. McCallum testified earlier today, because he made very clear that the policies the McCallum Memo refers to are about process and how requests for attorney/client waivers are made in the--(off mike)--nothing to do with the policy about why we would ask for them.

The policy is set forth very clearly in the Thompson Memorandum as to why the government would ask for them. So when you're talking about policy, you're talking about process, or are you talking about actual policies about what circumstances warrant a request for the waiver?

MS. HACKETT: Presumably, the policies themselves are determined by the Holder, Thompson Memorandum and the guidance that they provide, which we would suggest allows a great amount of discretion to local U.S. Attorneys' interpretation.

I think the McCallum Memo, you are correct, is more about the process as opposed to the policy itself, but even that in and of itself creates great difficulty when

it's presumed that those kinds of processes can be determined at the local level.

What we are hearing is that there is a tendency for local U.S. Attorneys to be able to unilaterally make decisions about when the waiver is appropriate and when it will be demanded, or how it will be suggested to clients that it's appropriate for them to give it. And the reason that concerns us is not only does it create uncertainty in the process and what we feel is an inappropriate abuse of what is a court-applied doctrine, not a DOJ applied doctrine.

But I think it also creates an environment where there is a sense that prosecutors can ask the company to do the work of the prosecution for them, which is not appropriate to the system. It suggests--

MR. ELSTON: Unless the company wants that.

MS. HACKETT: Yes, I have not yet encountered any company, even those who have waived the privileges, who have said that is what they preferred.

MR. ELSTON: Well, if they want the investigation to be concluded quickly in order to put it behind them, so they can get the bad news out in this quarter--

MS. HACKETT: Right.

MR. ELSTON: --or in this fiscal year, and they've pushed to have the investigation done more quickly and one of the responses is, "Well, we could if we had more information from you," why would that be illegitimate?

MS. HACKETT: My sense is that the information that is protected by the privilege is actually a very narrow slice of the kinds of information necessary to complete an investigation. And the idea that the government can't quickly complete an investigation without privilege waiver is, to me, just out of the realm of reality.

There is plenty of factual information available to the corporation, and corporations that make this kind of factual information available are fully cooperating. The suggestion that they're not cooperating or not facilitating the investigation unless they add this little bit more, which is the privilege, which deals only with that small slice of attorney/client communication or work product protected information is ludicrous.

MR. ELSTON: Well, I think people could disagree with you about that. Let me disabuse you of one other notion. I've read Mr. McCallum's testimony before the House

Committee, and I was here when he testified today, and he did not retract anything he said in front of the House. I think that there's been a misunderstanding of what he said in front of the House.

His position is the position that the government has taken consistently throughout this debate, which is the Commission should not do anything, should leave the language alone. But if the Commission is inclined to do something, at the most the government would be comfortable with them taking the language out and saying nothing about the waiver.

So I think that to the extent that people misunderstood that he said, I've read both. I've read what he said, I've been here when he testified. I think it would be unwise to suggest that he retracted what he said in front of the House. I think that would be inaccurate.

MS. HACKETT: I apologize if that's been taken in inappropriate light. It was the way I'd heard his comments and suggestion that the Department did not have problems with removal of the language on site, but I will certainly defer to you if you've read the record.

MR. ELSTON: If the Commission decides to do something, that's the course the government will be

comfortable with. The government's position is that the Commission should do nothing because there has been no evidence of it. And with all due respect to your survey, as I read it only about 15 percent of the people who were exposed to it even bothered to respond to it. So I'm not sure that it helps us all that much with any sort of statistical information about what's going on out there.

But I appreciate you coming here and taking with us today.

MS. HACKETT: I'd just note that for most statistical purposes, a 10 percent, nonetheless a 15 percent response rate is considered statistically meaningful of a sampling of this size. So while I'm sure it would have been nice to have heard back from more people, and we are not a survey professional organization, we feel reasonably confident that the results are robust enough for at least there to be the indication that we have some feedback from individuals, which is as much as I am able to bring you today.

MR. ELSTON: I feel reasonably confident that the people self-selected and the people who care about the issue responded; the people who care about the issue in the

communities that you were serving have one view on it. So that's my view of it. But thank you. Interesting.

VICE CHAIR STEER: Any further questions?

MR. HOROWITZ: Just let me ask, earlier Commissioner Howell asked the government panel about tweaking the current sentence as it currently exists by perhaps tightening the first half of the clause, but leaving the entire--the first half of the sentence but leaving the entire sentencing.

Obviously, your request to us has been to eliminate and delete from the "unless" to the period.

MS. HACKETT: Correct. But to add "nonprivileged" in a couple of sections previously.

MR. HOROWITZ: Right. And we've had some discussion today and, obviously previously, about just going back to the status quo ante, eliminating the sentence entirely. I don't know whether you're in a position to comment on this at this point, but I'm curious as to your view, assuming the Commission was not going to cut the sentence halfway, eliminating the "unless" to the period and make some of the other tweaks, but were thinking about either going to the status ante, or perhaps some variant of

what Commissioner Howell raised earlier.

Do you have any thoughts on those two possibilities and any preferences between the two, or any thoughts on the two?

MS. HACKETT: It's hard for me to comment on the variant without having had a chance to look at it. But certainly, if it was a choice between nothing and having the Commission go back to the status quo ante, we would prefer status quo ante.

MR. WICKER: And I agree. And I have to disagree with Mr. McCallum a little bit in his testimony, which was based on the premise that privilege waivers are rare across the country, because that's not been my experience and the experience of people that I've worked with over the past two years.

And, in fact more and more, prosecutors are asking for a privilege waiver in every case, and they're asking for a complete waiver of all information that's available to them. So, yes, going back to status quo ante would be better than the situation we have now.

VICE CHAIR STEER: Well, thank you both.

MS. HACKETT: Thank you.

VICE CHAIR STEER: We'll take a break for a working lunch and discuss the issues, and see some of you at 1:30, I think.

(Whereupon, at 12:36 p.m., the panel concluded.)

USSC PUBLIC HEARING, PANEL IV

[1:44 p.m.]

CHAIRMAN HINOJOSA: Okay, the Sentencing Commission is very happy this afternoon and very appreciative of the fact that we have two individuals from the Bureau of Prisons, the actual Director as well as--Mr. Harley G. Lappin as well as Mr. John Vanyur, who is here with him from the Bureau of Prisons. And we appreciate their taking their time from their busy schedules to actually share some thoughts with us and some information about the Bureau of Prisons.

As I indicated, one of the 3553(a) factors the courts and certainly the Commission consider with regards to sentences is the issue of rehabilitation with regards to individual defendants. And the individuals from the Bureau of Prisons, including the Director, have been nice enough to indicate that they would be willing to come and share some thoughts with us and some information.

Mr. Lappin.

MR. LAPPIN: Judge Hinojosa, it's a pleasure to be here and to meet with all of you and discuss the issues that are of mutual interest, I'm sure, of both the Commission and

the Bureau of Prisons. I thank you for allow John Vanyur to join me. John is the Assistant Director of Correctional Programs, and he and I together are going to cover a number of the issues that you asked us to discuss today.

What I think we'll do is just kind of give a brief overview and then open it up to all of you so that we make sure that we touch on those issues that are most important to you regarding recidivism and programs, and reentry initiatives in the Bureau of Prisons. But as you're well aware, we confine about 190,000 individuals in the federal prison system, and our mission is really twofold: 1) to provide a safe and secure environment for staff and inmates; and 2) to provide as many self-improvement programs for inmates as possible in hopes that they'll return to our communities less likely to re-offend and return to prison and less likely to victimize.

And, therefore, based on that second principle we really see reentry, which is consistent with the programs that we provide, inmates beginning on the first day of incarceration. And that's a philosophy I think that's important not only to reentry initiatives but programs as well. But again, certainly first and foremost is that

reentry begins upon their first day of incarceration. That kind of sets the tone for the direction we'd like them to go.

I've brought along a couple of handouts, and, John, if you don't mind providing them to them. One gives you a little overview of the Bureau and the other, I'll mention in just a moment, addresses some of the research we've done on the programs that we offer in the Bureau of Prisons.

But, as you well know, our inmate population is quite diverse. It's primarily made up of offenders convicted of drug offenses, firearms offenses, immigration offenses, and fraud offenses. About 40 percent, 48 percent of those offenders fall into, have violent histories in their background or in their current offense and, in a nutshell, we house beyond that. They're characterized, programwise, into two categories: those who are willing participants, and, as you can imagine, we have a large number of our inmates who are willing to participate in many of the programs we offer, and, unfortunately, a group of folks who are not as willing, still continue to resist, and those certainly continue to be a challenge for us, not only

during incarceration but, I'm sure, upon release and during supervision.

But for those inmates who are willing to participate in programs, it certainly serves us in two manners: 1) We house inmates more safely if they're productively occupied, and programs they participate in are a very important aspect of us keeping inmates productively occupied; and 2) we are seeing--our research indicates that those programs they participate in have an impact on recidivism, that we see fewer of them returning to prison, reoffending, if in fact they've participated in and completed some of our programs.

I'm going to break our programs down briefly into three areas: 1) work programs. We expect all inmates to work, and if they're medically able to work, they're assigned a work assignment and are expected to work at least five days a week in most cases. Some of them are part-time because they'll be involved in other programs--education, vocational training--which may take up some of that time applicable to work.

So there are institutional assignments--working in food service, working with

facilities and other things in support of the institution--and our largest work program overall is federal prison industry. And about 20 percent--18 to 20 percent--of our inmates work in our federal prison industry program. And again, these are factories that manufacture or provide services in a variety of methods from electronics, to textiles, to graphic arts, to call centers, to data entry. And again, it pays a little higher wage than inmates in an institution work assignment.

Our research reflects, just as I mentioned, that inmates who participate, who participate in federal prison industry up to six months are about 24 percent less likely to come back to prison and 14 percent more likely to get a job. The second chart I provided you gives you some specifics about how many inmates work in federal prison industry and what the research reflects regarding recidivism on each of the areas I'm going to mention.

The second area is education. And all of our long-term facilities--we operate a variety of facilities in the Bureau--the majority of them are general population facilities where inmates are going to serve the majority of their sentence. And in all of those facilities we offer an

array of education programs from GED to English as a second language, to parenting classes, wellness education, adult continuing education, library services, and other literacy opportunities. So all inmates who are in those facilities have access to a very wide array of programs.

The inmates who are in the jail--some of you are familiar with the MDCs and MCCs--there are limited programs available, given the fact those inmates are there, typically, short-term.

And then we have medical centers where inmates typically are sent for some type of medical care, again typically short-term, offer a number of education programs, but typically more on a short-term basis than the long-term.

Most inmates are obligated to participate in GED. In fact, either they do or they don't get as much good time, so there's great leverage there provided in the law that they pursue education to a certain degree. And also, if they don't accomplish a certain level of competency in education, then they're limited to how much money they can make in UNICOR and on institution assignments. So there's a lot of leverage to participate in these programs through the

course of an inmate's time serving a sentence. That's certainly good and helpful to us.

We're seeing fewer inmates come back to prison--about 60 percent--16 percent who complete GED and I think that's certainly a good indicator.

Vocational training is a third. All of our general population facilities again offer a variety of vocational trainings, everything from building trades to computer programs, some textile programs. So there's a variety of vocational programs available, more than I would take the time to mention.

Unfortunately, only about seven percent of the inmates participate. That's a bit discouraging, and we're looking at ways that we can leverage more inmates into vocational training because, as you'll see on the form I've provided you, about 33 percent fewer inmates return who get a VT certificate. And so we're certainly looking at ways to nudge more and more inmates into vocational trainings as they complete their sentence.

There are some specialty programs beyond the work, education, and literacy program or vocational training programs I've mentioned: drug treatment for one. We

offer--on a daily basis we've got about 5,300 inmates in the 500-hour drug treatment program. We're seeing very positive results from inmates who complete drug education and drug treatment, about 16 percent fewer recidivating, and 15 percent fewer relapsing in a three-year period. We're very encouraged by the results of that.

To kind of put a perspective how many inmates in all are involved, about 34 percent of our inmate population, we believe, requires drug treatment, either for alcohol or drugs. And of the 34 percent we have 92 percent volunteering to participate. Again, there's other reasons for that: Some of them get some time off their sentence--that's a big indicator. But there are many inmates who receive no other accommodations--time off their sentence, special housing preferences or anything, who completely participate on a voluntary basis. And again, we're seeing good results based on their participation in that program as well.

From what we've learned in drug treatment, we've actually created a number of other programs similar to drug treatment, pro-social type value programs, cognitives skills-based programs that don't deal quite as much with

drug and alcohol treatment but with decision-making, managing stress, and so on and so forth for inmates who struggle with many of the issues that many of our inmates struggle with but don't have as serious a drug or alcohol program [sic]. And we create those programs, residential programs in other facilities as well, and we're hoping to see as positive results in those as we have in drug treatment.

We've just recently initiated a life connections program, which is a faith-based residential treatment program for inmates who will, again, participate in many of the other education, VT and work programs, but the rest of their time is geared more towards learning more about their faith and other people's faith as part of their daily life.

With that, let me--let me turn it over to Mr. Vanyur, to John, to talk a little bit about inmate skills development and reentry, and then we can open it up to all of you for issues specific to your interests.

MR. VANYUR: Thank you. One of the areas that the Bureau of Prisons has struggled with for years is standardizing a way to assess the inmates' needs as they come into our system. If you go into a lot of state

departments of corrections, they'll have a centralized reception diagnostic center where the inmate is funneled in, worked up, if you will, given a standardized assessment and then shipped out to the facility that they're going to do their time. Given how far we're spread, geographically, and the cost of transportation--that's always been a dilemma for us, and so we're going to make a significant change that will take us a couple of years to get into place but will really revolutionize how we assess and program inmates in the future.

What we've done is through research and focus groups is we've identified the nine key skills inmates need to reenter their community, skills--cognitive skills, academic skills, light skills--and we've developed an assessment tool that once the inmate enters the system, we will assessment them on the various dimensions of these nine reentry skills, and that will indicate to us exactly where that inmate needs to program to get up to a certain level of competency in each of those reentry skills. So everything that he does and she does from the day they enter will be focused on those reentry skills.

That assessment will follow that inmate throughout their entire incarceration, and we will constantly update where their level of competency is in these critical skills and continue to program them in those skills that they're not sufficient at. That assessment will then follow them post incarceration, so if they're going over to Chairman Reilly in parole, or they're over in the United States Probation during supervised release, we'll be able to literally hand off their skills assessment that identifies the key areas that they need to work on, even post incarceration.

This is a major project for us. Everything will be automated, and everything will be standardized throughout every institution in the Bureau of Prisons, so we know that inmate's assessment, and it's consistent and stays with them.

There's been a lot of work with employers. The Bureau of Prisons has been very active now in having mock job fairs at most of its facilities. We actually bring in private sector employers, not that they're necessarily going to hire the inmates, but watch they put the inmates through typical interview processes as if they were going to be

hired, and coach the inmates on how they're to handle difficult questions like: What were you doing for the last seven years before you applied for this job? How do you answer a question like that? And how do you respond during a real job interview? That's really paid off well.

We now put the vast majority of our inmates through halfway houses, community correction centers which will now turn residential reentry centers. We contract out with over 200 providers nationwide to provide this sort of halfway-back program between prison and release into the community where the offender can spend anywhere from, typically, two to six months in a structured environment where they're given job skill training, taught how to use the transportation system in that particular location, how to seek a job in that particular location, how to sort of reconnect with their family at a local level. And in any given day we've got about 9,000 inmates that are in community correction centers nationwide. It has a very strong, positive impact and a high success rate.

Lastly, I'll mention that there's been a lot of work at different governmental levels on interagency collaboration. One of the things we found with inmates as

they return to the community is they're struck with a myriad of different government agencies they have to navigate. They have to navigate Housing and Urban Development. They've got to navigate Medicare/Medicaid system, sometimes the Veterans Administration, the Department of Labor, a whole number of different agencies, some at different governmental levels. And so many of the agencies with the Bureau of Prisons are now collaborating strongly to try to eventually get an inmate to a one-stop shop where that when they're released they'll understand and be able to navigate these various intergovernmental entities that they all need to succeed upon their release.

So there's been a lot of work in that area. You'll see something called the National Work Force Development Partnership, which is a formal structure that we bring these agencies together on.

And I think, Director, that's the main things I wanted to hit.

MR. LAPPIN: That's great, John, and I've also brought along and I'll share it with them another handout that describes some of the reentry programs in a little more detail than what we may have covered with you all, and a

little--a book just a general overview on the Bureau of Prisons.

But certainly enjoy working closely with you. You all have a huge impact in a number of ways on the Bureau of Prisons, and look forward to continuing that relationship. And, certainly, John and I would be more than happy to answer questions on any issue that you'd like to cover at this time.

CHAIRMAN HINOJOSA: I guess I have a question, Director Lappin. When you look at your statistics, it seems like 20-some percent of the defendants in federal prison are noncitizens of the United States, which is slightly lower than the number that actually goes through the system as far as sentencing. And I guess some of them receive shorter sentences so they don't really ever go into the actual Bureau of Prisons and may be placed in institutions close to the court itself, contracted out.

Is there a difference with regards to programs in whether they're eligible for some if you're a noncitizen. For example, the work program. Obviously, they're probably not in--there's no possibility of a halfway house treatment for

them. But the work program and the drug program for the noncitizens or any other program, are those different than for the citizen?

MR. LAPPIN: For the most part they are eligible--correct me if I'm wrong, John--to participate in just about any program that's offered to a U.S. citizen. And, in fact, we've got--just for the record, we've got 27 percent of our population are not U.S. citizens, about 50,000 inmates.

Realize that a lot of those, many of those inmates, about 18,000, are housed in private contract facilities. So there may be some variation between what you would see programwise in that private contract facility and what you see in one of our own federally-run institutions. But even at those facilities, they are pretty much eligible for the same programs.

There are sometimes some limitations on how high they can go in grade, paywise, given their status with an immigration detainer; but those are few--

MR. VANYUR: That's correct.

MR. LAPPIN: --issues.

MR. VANYUR: Federal prison industries, if you

have a deportation order, you're generally not going to be working in federal prison industries, But other treatment programs, educational programs, drug treatment, absolutely, everyone is welcomed to them.

CHAIRMAN HINOJOSA: And this may be a difficult program to use, or maybe you are doing something in this, some of the illegal entry convictions--

MR. LAPPIN: Um-hmm.

CHAIRMAN HINOJOSA: --are individuals who have resided in the United States for a large part of their lifetime, and they have been deported to their prior country--to their country of citizenship, which is a country that they may not be too familiar with as far as work abilities or family ties. Is there an effort--and I don't know if it's possible to identify those individuals--and then to do some kind of job training program that would facilitate their ability to make a living in this particular country as opposed to the reentry that occurs because of "I don't have a job and I have no way to get along in this country"?

MR. LAPPIN: There is some effort. We probably could do more in that regard. One thing that I think we are

doing is very much a positive is that the inmates are eligible to get a GED, but a GED is not recognized, for example, in Mexico. We've gone to the Mexican government, and they're working with us. And, in fact, many of the inmates now in our facilities can--and I don't know the formal term or title of the equivalent of the GED in Mexico--but a vast majority of these offenders are from Mexico. And so in many of our facilities, both private and those we operate federally, we now offer the equivalent of the Mexican GED in those institutions.

That's a huge, huge plus, because as soon as they leave and they can show a certificate from their country, it increases not only their--like their ability to get a job, but automatically it puts them into a higher pay range, because, as I understand it, Mexico pay is in part determined by how far you went in school. So you've got the primary and you've got secondary. And we offer both, so if the inmate gets a secondary certificate, that offers them even more money when they get back into Mexico.

We don't do that for every country we have represented in the federal prison system because there are many, many of them, and we don't have that relationship with

the government.

But we find that many of them, many of the skills programs, the vocational skills programs that we offer, they think are applicable to what work opportunities are in their country and are involved. Again, I'm disappointed that we don't have more inmates in vocational training.

So we're looking at works form. How do we leverage more inmates? And the primary reason is they can't make any money. They don't make money when they're in that vocational training. So we're looking at ways that we could appropriately repay them. And it's not going to be a lot of money, but in prison if you make, you know, nine to thirty-six cents and everything else is provided for, it adds up and they look for ways to earn as much as they can.

So we are looking at ways we can leverage more folks in there, but I still see a lot of these detainees or immigration violators participating in those programs and find that useful in their return to finding jobs and having opportunities in their country.

CHAIRMAN HINOJOSA: It may be difficult to assess, but one of their strengths, sometimes, is their bilingual ability and to steer them in the direction of either certain

type of jobs where bilingual--

MR. LAPPIN: Yes.

CHAIRMAN HINOJOSA: --ability becomes important would probably be helpful. But it's probably hard for you to be able to identify what job openings are maybe--

MR. LAPPIN: Correct.

CHAIRMAN HINOJOSA: --practical in regards to that. I've taken up--go ahead.

JUDGE SESSIONS: We're all aware that you've got fiscal difficulties, and I'm wondering as you look into the future whether all of these budgetary restraints are going to have impact upon the various programs you've just described and whether you're considering alternatives.

For instance, just for an example, the use of halfway houses as a correct place for judges to put persons sentenced in light of, as I recall, a Court of Appeals decision, and that, obviously, would save money for the Bureau of Prisons. And I'm wondering whether you've thought about those options or what you plan to do with a lack of money.

MR. LAPPIN: Yeah. Let me take--separate that into two questions. One applicable to the challenge we've

had fiscally over the last few years--and I appreciate you all recognizing that we know that others have faced similar challenges--we are pleased to say that for the most part we've been able to protect, even though we've eliminated 2,080 jobs so far in the Bureau of Prisons and about four or five hundred more to go, we've done well at protecting the program side of that.

Not to say that we've not--we've done away with some programs, some that we found were really too expensive for the few inmates that they provided services to, because we had a few vocational programs that only reached out and touched a few folks, and they were very expensive. And we're looking for programs that are more efficient and reach out and touch more people. A classroom full of computers teaching WordPerfect and other computer skills is far less expensive than some of the other more--let me think, I'm trying to think of a couple--not building trades, but we had some barber classes. We can only get a few folks in there, and it's very expensive to provide those services.

And we did do away, as you all know, with the comprehensive sanction center for our bootcamps in that we weren't seeing the results. But other than that, we've done

a great job of protecting many of the programs that we have available to inmates.

Longer term, again we continue to remain committed to providing most programs and are looking for every opportunity to do as efficiently as we can. Believe it or not, halfway houses sometimes cost us more than housing and--in one of our facilities because we have some individuals who land in those halfway needing more supervision than others, and as a result it increases the cost from the contractor.

So it's not always--you don't always find that it's cheaper to put them in a halfway house. In some cases it is and some cases it's not, so sometimes it's a wash.

The issue of offering the ability for judges to put them in there in advance is really more of a legal issue that has most recently been dealt with in the Department in that the Office of Legal Counsels determined that, as you well know, it's not a period of incarceration to put them in a halfway house in advance of a sentence that they believe, or it was intended for them to be incarcerated.

But you're right, we're still in the appeal process. I think it's going to take a little while for that

to work its way through to the end and we see where we land. But, John, you may know more about that than I do. I know there's still a number of cases awaiting a decision, and we'll just have to wait and see. In some districts that opportunity is available, but only in a few.

MR. VANYUR: I think where you'll see changes to programs is if the program is not related directly to those reentry skills I discussed before--

MR. LAPPIN: Yes.

MR. VANYUR: --and if there's not evidence to show that the program is effective, then that program is probably going to go away. Where in the past we may have designed a program because it sounded good or had face validity to it, so I think if you do see program reductions, it's going to be based on those two criteria.

MR. LAPPIN: And let me mention the halfway houses, too, because I get asked often, "Well, why don't you just put them in halfway houses for longer periods of time?" And in the past we've done that. What we have found is much beyond six months actually has a negative effect. You know, six months is actually--if they gave us complete authority in how long inmates could be in a halfway house at the end

of their sentence, more than likely we would seldom put in inmates for more than six months. We find it begins to have--it works against the inmate.

It tends to be more frustrated [sic]. we find them violating more often towards the end, you know, during longer periods in halfway houses, you know. So it's, you know, somewhere between two and six months is probably the appropriate target.

CHAIRMAN HINOJOSA: Vice Chair Steer.

VICE CHAIR STEER: I guess I'm wondering about a number of things that, if I ask you about them, they might put you on the spot with respect to policy issues. But I'm going to do it anyway, and--if you care to give any reaction.

Some of the statutory restrictions, to me, don't seem to make good sense. And one of them relates to the point you were just alluding to, how long you can spend in a halfway house at the end of the sentence. I believe the statute restricts you to not more than 10 percent of the sentence, so if you a short sentence where I would think an offender has, is more likely to benefit from halfway house placement and less likely to be a danger to the community,

you know. If you didn't have that 10 percent restriction, you could go up to six months.

I just wonder if--you know, it's not your final call to make policy, Congress has to do that, but that, it seems to me, is something that ought--is worthy of rethinking. I'm interested in your reaction to that.

The other thing has to do with these programs that are available. The drug program is the only one for which inmates get any time off, and, you know, yet your daily indicate that it's, you know, while it's, you know, has a significant aid in--against recidivism, it's probably the one that's at the bottom of the list. It's the work-related programs that are more effective.

So I just wonder if, you know, we ought not to be urging Congress to reconsider and grant, redo the good time credit instead of making it a flat 15 percent just for behaving and doing nothing; that it ought to be maybe a maximum of--I'll just throw out a number--20 percent: 10 percent for participating in programs and 10 percent for good time, and do away with the special status of the drug program, because

I've always thought that it has problems in that it treats those who can convince you they have a drug problem more generously than those who don't. And I don't think that's appropriate, and it's too generous of a credit, I think, a year off of the sentence.

But those are just my thoughts. Do you have any reaction to any of my comments?

MR. LAPPIN: I do. I mean there are some issues related to the--it's six months or 10 percent, whichever is less. And I won't argue that there are some cases that--that are shorter sentences to begin with that we believe, as, of course, professionals, would benefit from a little more time in a halfway house. And, in fact, we are limited somewhat based on that requirement.

But I'm also encouraged that we have raised this with the folks in the Department, and we're revisiting that to see what options we have to give a little more latitude, given the fact that we tend to know the individual at that point in time well, and that a recommendation beyond that should be given some consideration.

So I'm not going to say you're going to see this change, but I'm pleased to say that there's a debate,

there's a discussion ongoing within the Department as to that issue and the limitations it places on us for certain individuals who we might see benefiting from a little more time in a halfway house. But again, as I said before, beyond six months we think is unwise.

The other issue is on, you know, given we're seeing such a positive reaction from the inmates on residential drug treatment, which is what I think you're getting to, would that--could that not carry over to other programs that we've created that we see having a similar impact? And I'm encouraged to say that there's a discussion ongoing with the Department on that issue as well, that we have other residential programs that have similar requirements and expectations of those individuals, and whether or not we could consider offering, or should be not consider offering similar opportunities for those individuals, if they in fact successfully complete those programs.

So that discussion is ongoing as well. Would you--

MR. VANYUR: Yes, let me make two comments: One is there's also we've proposed some regulation changes to the year off for drug offenders, and it will be a sliding

scale of eligibility based on the length of your sentence. There's been some belief that we're getting gained, if you will, out of the year for guys that are really only doing a two-year sentence to start with. So we've got some proposed changes to sort of even that out a little bit, if you will.

The Bureau, actually, was not interested in pursuing time off for program participation, initially, because we wanted the inmate to be motivated internally to participate in that program without an external carrot. We've changed our minds on that because what we found with the yard (ph) that, is even though a certain percentage of the inmate population is entering residential drug treatment simply to get the time off, surprisingly, the program is so effective that they actually begin to buy in, even though the initial motivation was an external factor. They begin to be internally motivated, and so that has convinced us to now step back and look at life connections programs and other program and whether we ought to put that carrot out there, also.

MR. LAPPIN: And I think to our staff's credit, given their experience now, they've been able to weed out those inmates who are in there for reasons other than what

we would like them to be in there. If they're running a game on us, if they're just playing along with us and not being sincere, our staff has been very good at weeding those folks out and either limiting whether or not they can get time off based on their opinion of their success and commitment to the program or not.

And so I think we've become much better at that as we've been in drug treatment training or programs for about 15 years now.

CHAIRMAN HINOJOSA: Judge Castillo and then Commissioner Reilly.

JUDGE CASTILLO: Well, first of all let me thank you both. We want to continue our good relationship with the Bureau, and I'm going to impose on that a little bit by asking you, if you could, to come and in writing--you don't have to do it now--on the testimony of Margaret Love with regard to the issue of compassionate release which, you know, we've been grappling with over the last two years. She made some considerable proposals and now, if you could react to that, that would be helpful to us.

MR. LAPPIN: I'd be more than happy to do that in writing and realize that there's not much I can say right

now because there are some
proposals--

JUDGE CASTILLO: I understand.

MR. LAPPIN: --ongoing in the Department.

JUDGE CASTILLO: However you could get back to us
on that, I would appreciate it. Thank you.

MR. LAPPIN: More than happy to do so.

CHAIRMAN HINOJOSA: Commissioner Reilly.

COMMISSIONER REILLY: I want to thank the Director
and John Bolsonfitz (ph). The relationship that we've had
with them, parole commissioners and one that you don't often
see in government, and I want to publicly thank them for the
great cooperation they've given us.

But I guess I'm stepping back quite a ways in
history of my own relationship with corrections. And as you
look at the federal--as you look at the federal population
today and how that has evolved and changed in terms of type
of offenses, I guess one of the things that I'm thinking
that I'd like to ask on behalf of the Commissioners is as we
look at things that are mandated from Congress, and they
tell us that we have to do this or that and as we consider
changes we want to make, what do you sense is the impact on

you and your management of the institutions and so on, as it relates to changing population in terms of type of offenders?

Because we know that we have a great percentage of drug offenders now, and I'm even wondering if that change in type is having some impact in terms of the participation programs, vocational training and so on.

Because as I recall, going back a decade or so, there always used to be a pretty good participation in vocational training, so what's changed all that? I mean you indicate you're trying to find some incentives, but is it the quality of the offender that we're getting? And I say "quality" but the type of offender we're getting that's what's driving all of this? But what do we need to be cognizant about? Because the growth has been stupendous in the decade that I've been here in terms of population--

MR. LAPPIN: Right.

COMMISSIONER REILLY: --and in terms of numbers of institutions.

MR. LAPPIN: John and I both will probably take a shot at this, but you're right. I mean we've--not only has it grown and to kind of put it in perspective, in 1980 we

had 26,500 inmates, and in the next couple of weeks we'll hit about 190,000 inmates. And the inmate population has changed, and this started to evolve in the early '90s when we began to see a younger, more violent, more aggressive offender who was more gang-oriented and related, who was more willing to confront and push back, oftentimes not only with our employees but with the other inmates as well.

And that's real important to note because oftentimes well-run prison systems, part of that's due to the type of inmate you have in there and the code they live by. And to be quite honest with you, many of the older inmates came to us and said, "These are not inmates that we've dealt with in the past, the type of people we've dealt with."

And so we are presented with a challenge, and we have to change how we did and what we did. I don't know, though, that it's our lack of participation in vocational training, and that's really the only one that's at the lower end, is related to the type of inmate. Because my guess is if we go back 10, 15, 20 years, even then we're going to see that VT didn't have as much, as high a rate as other programs did.

Again, I think partly driven by the fact that inmates don't get paid for the time they spend in VT. Typically, they're all day five days a week, and it doesn't offer much opportunity for them to go out and get jobs from the institution elsewhere.

John, I don't know, what are your thoughts?

MR. VANYUR: The nature of the population has changed to a much more violent population. Now about 48 percent of our inmates have either a current or prior history of violence. And that's due to a number of reasons, one of which is probably the federalization of many prosecutions that used to be state prosecutions but now, with the advent of many task forces and so forth, and safe streets initiatives, those cases are now coming through the federal system which would, typically, be state, more violent offenders.

Of course, we took--we're now the State Department of Corrections, as you know, Chairman, for the District of Columbia. We are a state DOC for those 5,000 inmates. They're a very different type of inmate than the federal system typically had.

So when you look at what we're building and where

we're housing people, if you go back to the early '80s, you and I could name the five penitentiaries in the Bureau of Prisons, you know, quickly; now we couldn't name half of them because most of--many of our inmates now are up at the medium and high security level, where in the past we were Club Fed. It was white collar and some drug offenders, and that is certainly not the case now. And I'm sure that impacts a lot of statistics that you see.

CHAIRMAN HINOJOSA: Unless I hear otherwise, I think that was the last question. I hope we're not making you late, Director Lappin, to your next meeting--

MR. LAPPIN: I'm good.

CHAIRMAN HINOJOSA: --which I think you're going to be at 2:30. But this has been most informative and most helpful, and we thank you all very much.

MR. LAPPIN: Thank you for having us. I appreciate it.

CHAIRMAN HINOJOSA: We look forward to our continued good relationship which we have always had with you in the past.

MR. LAPPIN: Absolutely.

(Whereupon, at 2:24 p.m., the panel concluded.)

USSC PUBLIC HEARING, PANEL V

[2:25 p.m.]

CHAIRMAN HINOJOSA: The next panel has 20 minutes left. (Laughter.)

JUDGE CASTILLO: I want to put on the record that I'm going to have to leave at 2:45. Apparently, I need to explain that my absence does not reflect any opinion on whoever is speaking at that particular time. So I apologize in advance.

CHAIRMAN HINOJOSA: Well, at least--I mean I don't know that they're going to accept that explanation, but we understand. But he's writing questions for me to ask.

Our next panel again, each one of them has been extremely helpful through the years to the Sentencing Commission, and we appreciate them once again taking their time to be here. We have Mr. Jon Sands, who is the Federal Public Defender for the District of Arizona; Mr. John Rhodes is the Assistant Federal Public Defender for the District of Montana; and Ms. Kathleen Williams, who is the Federal Public Defender for the Southern District of Florida.

Ms. Sands, did you want to start first?

MR. SANDS: I think I'm going to pass it to Kathleen.

CHAIRMAN HINOJOSA: My left. Miss Kathleen Williams.

MS. WILLIAMS: Good afternoon. Thank you for having us here to talk to you about the proposed amendments. As Judge Hinojosa indicated, I am Kathleen Williams. I'm the Federal Defender for the Southern District of Florida and have been for 11 years. I'm the Chair of the Defender Services Advisory Group for the past five years.

I was Acting Federal Defender in the Middle District of Florida. I was Assistant United States Attorney for four years, narcotics and money laundering. I practice white collar criminal law at Morgan, Lewis & Bockius, and I tell you all this because I also want to advise you that I am no expert in the calculus and crafting of guidelines, but I am not uncredentialed in the federal justice system.

And to borrow from Judge Cassell's remarks previously today, I come to you not as The United States Guideline Commission but as The United States Sentencing Commission to discuss matters that the defender community considers to be of great import, particularly the

Commission's work under the focus perspective of The United States v. Booker.

I am not going to repeat or recite what I've sent forth in my documents. There are facts that bear repeating, however. The federal penal system, the population has skyrocketed; it is costing the United States public \$4 million a year to house these people. The Bureau of Prisons is 40 percent overcrowded and, quite frankly, they're not keeping up in terms of maintaining their inmate quality in terms of medical care and also the alternative programs that you just discussed with the Director. Sixty-five percent of those incarcerated are black or Hispanic, and almost the majority of those incarcerated are the clients of CJA and defender attorneys.

So the question is fairly clear to us in light of Booker and in light of reality of the penal system. Is there a need for increased sentencing and the overburdening of an already complicated system? And we think the answer is no.

We're not alone in that, as I've noted. The ABA agrees, the bipartisan Constitution Sentencing Project

agrees, Justice Kennedy agrees, and Justice Breyer has indicated as such. But more importantly, for your work your own data indicates this. The 15-Year Report and the very impressive Booker Report that came out on Monday tells you the following things: The severity of the sentence has not substantially changed over time; the average sentence post-Booker has not increased; the average downward departure has remained the same; the rate of imposition of incarceration has not decreased; and courts have granted probation at a lower rate after Booker than before.

The information is clear that the system is working, and there is no need in terms of fulfilling the purposes of sentencing to increase penalties. I was not in San Antonio or San Diego. I have heard that other witnesses have come forward to lament that the process is inefficient, that the process is time-consuming; but I do not know of any witness, including those who appeared before you today, who said the process is not working, that sentences are too lenient, and that the mechanism in place post-Booker is incapable of allowing judges to render fair and proportionate sentences.

In terms of the efficiency question, again Booker

answered that fairness and reliability in a healthy, vital, constitutional system is always going to take precedence over efficient and expediency. But again, the important--the important information that is present to this Commission is actually what hasn't been said. No one has said that the system post-Booker is incapable of addressing the problems that have come up.

I listened to Mr. Hertling earlier today, and he wanted to talk about striking a balance. The Advisory Guidelines in conjunction with the factors of 3553 would strike that balance. The proposal he sets forward I think would engender the complication which Judge Sessions had anticipated, the mere "girlfriend" scenario. Once enacted--

JUDGE SESSIONS: Or "boyfriend." Or "boyfriend."

MS. WILLIAMS: I beg your pardon, I don't want to be considered sexist--and "boyfriend."

Once enacted it is difficult to undo, and it tends to ratchet--ratchet expectations, penalties, and the system starts to feed on itself. I want to again borrow from Judge Cassell when he earlier talked about public policy. And I would ask you to take an overview of what this phenomenon does to the system and the process.

Judge Breyer had remarked in 1999 that complexity does not equal precision. Your 15-Year Report said the increased severity is not an end, it's a means. And we're still analyzing the data to see whether or not those ends have been accomplished.

These two remarks, observation, resonate with a related study on a different level and one--the gentleman from BOP just referenced moments ago--the federalization of crime. The ABA Commission on that headed by Ed Meese, who signed my appointment papers as United States Attorney, talked about the proliferation of criminal statutes and how that actually undermines real efforts to stop crime. When you predicate legislation on politically-charged or notorious matters, the solutions are actually illusory because the problem is not really being addressed.

Taylor Hooton, again discussed earlier, is a horrible, horrible story but it is not a sufficient predicate to alter an entire scheme. The tragedy of that young man does not equate to a crisis in sentencing with regard to steroids.

I ask if the Commission believes that it is

necessary to promulgate enhancements. I encourage you moderation, modest increases to comport with the principles of reasonableness and the mantra that comes to us post-Booker, "sufficient but not greater than necessary to realize principles of sentencing."

One other matter I wanted to discuss with you was the fact that Booker does not seem, despite the very impressive tone released on Monday, it has not had a predominant role in the work of the Commission thus far. Prior constitutional precedents have been incorporated into the guidelines, into the Commentary--Koon, Burns. Even the simple reiteration of the language contained in Booker on page 264, the district courts, while not bound to apply the guidelines, must consult those guidelines and take them into account when sentencing. That alone, I think, would go a long way toward encouraging courts to look toward the integrated solution that the Advisory Guidelines and the 3553 factors provide to them.

The enhancement for smuggling terrorists is, one hopes but I think the information we have establishes, rare. It will be a rare occurrence, but it is not something that needs to have enhanced penalties within the guidelines; it

is something that every district court judge is capable of assessing with the Advisory Guidelines and 3553 factors.

Finally, I wanted to bring up the topic of procedural fairness. Post-Booker/pre-Booker, if the Commission decides it will promulgate more severe penalties and enhancements, I think it's time that Chapter 6 be reexamined. In the wake of Blakely and Booker, the viability of the preponderance standard has come into debate in question, in dialogue, and I think that's appropriate, and I think it's good.

I take the language in tenor or Booker which talks about realizing the ideals of the Constitution in present criminal practice, and I juxtapose that against the standard argument given in civil case where an attorney explains what the burden of proof is. It's like a balancing test, and it's just a smidge this way or that. I think in light of the Supreme Court precedent that has been handed down to us over the last few years, I think those two are incompatible, and I think they're irreconcilable. And I would ask the court to move toward developing a standard that is more commensurate with the importance of the factual determination at issue before a judge than merely

preponderance, or in some instances indicia of reliability.

I would also point out that notice in discovery in a sentencing context is not uniform across the nation, and if the Commission were to be more forceful and to give more direction in that regard, mandating the exchange of information, that would also go a long way toward realizing the goals of fairness and certainty in the sentencing process.

I--I understand I'm not here as others to assist you in crafting the mechanism. I understand when I speak of the ideals of constitutional principles there is another backdrop. I am not blind to the political tensions that Judge Cassell alluded to earlier or the press of business that Judge Castillo mentioned.

I am also aware and I understand that there is an aversion to challenging the status quo. It is difficult for men and women who have dedicated their professional lives to a fair and just sentencing regime to embrace a case that actually questions it and has deemed it infirm. But I want to answer that in the following way:

Some may feel that this is like a car that has been traveling a straight and very steady path for some

time, and it feels as if it is going spinning out of control. We do not see that. The data doesn't establish that. There is no chaos. There are no skidmarks. But even if you do believe, or those perhaps a few blocks away may believe, that there is a lack of control in a post-Booker world, I'd like to remind them of what we all found in driving school: When you go and feel you are spinning out of control, never, never yank the wheel away in the other direction. It is instinctive, but it is contrary to the laws of centrifugal force which govern. You've got to steer into the spin for a while.

It may be a simplistic analogy, but in this journey we are governed by the Constitution, and I think it is important that the Commission embrace Booker and embrace its mandates, embrace its challenges, and it's only then I believe that we are going to be able to get on the right horse, the right path, and use all of the data from your report from the 15-Year Report and from we of the defense community have brought to you over the years about the operation of the guidelines.

Thank you again for having me. I'm looking forward to talking to you in a few minutes.

CHAIRMAN HINOJOSA: Thank you, Ms. Williams.

Mr. Rhodes.

MR. RHODES: Thank you, Judge Hinojosa and Members of the Commission.

Firearm prosecutions are a core part of the federal docket, but they highlight the regional differences in America about attitudes about guns. And just to throw out a factoid, according to our local television station in Missoula, over 90 percent of Montana households own guns.

When I returned from Washington after doing my TDY here to Missoula, I inherited a case being prosecuted--and these are undisputed facts--where my client was out hunting for shedded elk antlers with a friend. His friend was carrying a pistol, which is routine if you're in the mountains of Montana to protect yourself against wild animals. My client had a backpack, so the friend gave my client the pistol to put in his backpack, and he ended up being prosecuted for being a felon in possession.

And at the time I asked the Senior AUSA in Missoula, "Why are you prosecuting this case? I've never seen these cases prosecuted before."

And he said, "There's been a change in the prosecutorial policy." He said, "It used to be when the ATF referred a case to the United States Attorney's Office for prosecution, the AUSA reviewed it and basically picked out the bad apples out of the barrel and prosecuted those cases alone. But now, under the current U.S. Attorney's policy, if the case is referred from ATF to the AUSA, the AUSA has to prosecute the case."

And I make that point just to inform the Commission that whatever amendments are promulgated by it are going to be implemented and effectuated by DOJ. And at least in Montana they're going to be implemented indiscriminately. And this prosecutorial fact heightens the need for the Commission to make informed and deliberate decision-making.

I want to touch on five areas that we've delved into in much greater detail in our written submission. I want to talk about the expiration of the assault weapons ban, trafficking, the obliterated serial number enhancement, the circuit split regarding in connection with, and then finally touch upon the lesser harms departure.

Although I believe that it rarely set the base

offense level, the assault weapons ban provided immense benefit to the guidelines. It was precise and definite. The weapon at issue was easily identified, and it was either on the list or it was not on the list. It was largely indisputable.

Under the Commission's proposal to replace the assault weapons ban, this bright line is so smudged that rifles that are used at Boy Scout camps for target practice could be considered an aggravated firearm. Congress justified placing assault weapons with the bombs, machine guns, sawed-off shotguns, and silencers identified at 26 USC 5845 by studying those guns and differentiating the assault weapons from regular common hand and long guns.

The Commission should do the same. It should study the attributes and uses of firearms before it differentiates between them by creating a new base offense level based on a new class of guns. The current proposal to replace the assault weapons ban, the proposal is that a semiautomatic weapon capable of firing more than 15 rounds is an artificial distinction. It creates a dividing line between guns that are otherwise the same. In fact, many guns have a magazine capacity just below, right at, or right

above 15 rounds.

Moreover, it's not the gun that carries a magazine or rounds capacity, it's the magazine itself, and many guns can carry, the used (ph) detachable magazines, so you may have a magazine with 10 rounds, you may have a magazine with 15 rounds, all the way up in numbers. So there isn't a set round capacity for a gun, it's the magazine that has the round capacity.

So the proposal from the Commission creates a legal myth where a gun could have the capacity to carry a magazine with more than 15 rounds and therefore be treated the same as a bomb, a silencer, a sawed-off shotgun, yet that gun may never have been outfitted with the magazine that could carry more than 15 rounds.

More importantly, the firearms that may accept magazines with more than 15 rounds are part of ordinary life. They're used by regular Americans for recreational and hunting purposes, and the difference here is that bombs, sawed-off shotguns, silencers, machine guns, they aren't used by ordinary Americans.

I want to turn to the trafficking proposal. Under current law at 18 USC 1921(a)(21)(C), you don't have to have

a firearms license if you only make occasional sales exchange or purchases of firearms for a personal collection or for a hobby, or for selling your personal collection. In other words, a firearms license is only necessary if you're in the business of selling firearms.

In our written statements, we have cited to the Commission where Congress has defined what it means to be in the business of trafficking firearms. Incorporating that definition, that requirement "in the business of," into the definition of "trafficking" would ensure that the firearm guidelines are consistent with the firearm statutes. Our written testimony details that testimony for that consistency, and it gives the Commission an opportunity to follow Congress' lead.

Trafficking should punish gun traffickers, not someone who in an isolated situation decides to get rid of their guns or use them as exchange commodity, as regularly happens in places like Montana and throughout rural America. Indeed, without the "in the business of" requirement, an unlawful of firearms who got rid of their guns, in other words did the right thing and no longer possessed guns, could also be punished as a trafficker. In that regard, the

definition of trafficking should require that the gun be transferred to an unlawful possessor; otherwise, as I just said, it would regularly apply in rural America where people who shouldn't have guns, do the right thing, give them to somebody who it's okay for them to have guns, and then all of a sudden the person's not only punished as being a felon in possession, but they're being punished for trafficking even though they did exactly what the law wants them to do.

It doesn't make sense to increase the punishment for doing what the law wants. The definition of trafficking should not include receipt. Someone who receives something is not a trafficker; it's the distributor who is a trafficker, not the recipient. And as we know from child pornography, possession is receipt. So if trafficking is defined to include receipt, every possession case becomes a trafficking case, which gets to the number of guns that triggers--that could potentially trigger the trafficking enhancement.

The more elastic and expansive the definition of trafficking is, the higher the number of guns it should take to trigger the enhancement. Conversely, and better, the more tailored the definition is to what actually is

trafficking, that is that if it includes a requirement that the person be in the business of trafficking, omits receipt, and requires transfer to an unlawful possessor, the more the definition justifies a greater enhancement but also the definition doesn't require a number of guns.

And this gets to your question earlier, Judge Session [sic], if you require somebody to be in the business of before the trafficking enhancement applies, you don't even have to bother going to the number of guns.

Now, I want to comment briefly on DOJ's proposals to the Commission. First, as I said when the Judge inquired about the number of guns, we believe if there's an "in the business of" requirement, you don't even have to go there. Moreover, if there is an enhancement based on the number of guns, you run into a double counting problem because there already is an enhancement for the number of guns in the guidelines.

In terms of the written proposal submitted by DOJ, we were surprised that they want the trafficking enhancement to hinge, to be triggered by the requirement of the presence of an unlawful scheme. That begs the question, what is an unlawful scheme? If the Commission goes that route, you're

going to run into the aggravated felony problem that you have in illegal reentry guidelines because what's lawful in terms of transacting firearms in Montana, where there's far less regulation of firearms compared to what's lawful or unlawful in the District of Columbia, varies greatly. So what's an unlawful scheme in the District of Columbia may not be an unlawful scheme in Montana. So if you go the DOJ's route, you're going to run into the problem of reading regional disparity.

If the Commission would like, we will supplement our written proposals with further information about the problems with the unlawful scheme trigger.

I want to briefly comment on the serial number enhancements. Serial numbers are scanned or lasered into the metal of the gun. If the number is scratched out, the serial number can be recovered. A defaced serial number is not an obliterated serial number. Crime labs will tell you that they can frequently recover serial numbers that are not visible to the naked eye. Only where the number is grounded down to below the imprint, below the stamp, is the recovery of the serial number impossible, and even in those occasions, many times manufacturers are placing a second

hidden serial number on the gun.

So unless the Commission recrafts the obliterated serial number enhancement to apply only where the firearm is untraceable--in other words the serial number cannot be recovered or there's not a second hidden serial number--enhancement is and will continue to be applied where the serial number is identified. In other words, sentences are being enhanced where the harm warranting the enhancement isn't even present. And this all happens without a mens rea requirement.

I want to comment briefly on defining "in connection with." The Commission's aware there is a circuit split, but the Commission's also aware that overwhelmingly the circuit courts have followed the lead of the Supreme Court in the Smith decision and defined "in connection with" to mean facilitation. We urge the Commission to follow the lead of the overwhelming majority of circuits who were guided by the Supreme Court.

We also believe the potential to facilitate should not be part of the definition, but if it is, it needs to be narrowed because, theoretically, every gun has a potential to facilitate a crime. And for that reason the mere

coincidental presence of a firearm should not mean that the gun is used in connection with another felony offense.

Finally, the proposal to ban the lesser harm departure in firearms cases makes no sense in a post-Booker world. It basically makes the sentencing range mandatory for guideline purposes which raises constitutional challenges, and also it's disingenuous because it tells the district court, you cannot depart downward on this basis, whereas 3553(a)(1) tells the district court to look at the nature and circumstances of the offense in imposing a sentence. So this departure would not only have constitutional problems but banning it would create a complete disconnect between it and 3553(a)(1).

Equally important, banning departures based on a single case undermines the integrity of the guideline process. And it's the integrity of the guidelines process, especially in this day and age, and the need for informed and deliberate decision-making that should be the highest priority of the Commission as it considers changes to the firearms guidelines.

And again, as we emphasize in our written submission to the Commission, Congress has legislated

extensively in this area. It's provided the guidance and direction to the Commission and, if changes are going to be made, the Commission should be consistent with the statutes enacted by the Congress.

Thank you for considering our views, and we look forward to answering questions.

CHAIRMAN HINOJOSA: Thank you, Mr. Rhodes.

Mr. Sands.

MR. SANDS: Thank you. It's with pleasure to be in front of the Commission again and to see the Chairman in good health again. Since I've been with you so often, maybe you should just make me an assist the show (ph). We could sort of--

CHAIRMAN HINOJOSA: (Off mike)--the questions.

(Laughter.)

MR. SANDS: In dealing with that, the Commission, as recognized in Booker, is an expert body with expertise. It had to avoid anywhere (ph) for trying to deal with the headlines, or the hysteria, or policy by anecdote. Over the years we've seen people come in front of you, primarily DOJ, decrying this case or that case but the Commission has the benefit of its database, of the 60,000 cases that it has.

It has to resist changing policy, changing its course to deal with the one, two, or three cases. It must stay true to its expertise.

And in addition, the Commission over the years has seemed to have adopted an approach that has seen adjustment after adjustment; 700 amendments later, we are dealing with a very complex and complicated Sentencing Manual. As Kathy Williams said, "Complicated does not mean better or precise." It doesn't have to be something that Vince Young could take a test on, but it should be something.

JUDGE CASTILLO: Who's that?

CHAIRMAN HINOJOSA: (Off mike).

MR. SANDS: It was just an anecdote. An anecdote. Let's hit Mr. Young with a matrix. Or maybe not. Or make some better time.

CHAIRMAN HINOJOSA: I'm going to have the tests administered to you.

(Laughter.)

MR. SANDS: With pleasure. Getting back, dealing with the complications, it's reaching a point in which it is--it's reaching a point where it is too complicated, and that the Commission should take a step back and really think

about what the principles are, especially in 3553 and now and how it can adjust that, especially when there is this drumbeat of presumptive guidelines that we hear from others that we need to change the guidelines, the adjustments that you make or enhancements, but there is a hard bottom or mandatory that may come back to freeze it and to displace the flexibility that we have now under Booker.

Turning to just some examples, the obstruction amendment that the Commission has, 3C1.1, is a case where the amendment the Commission published and put forth in 581 should stay the course. It deals with the problem. This is the issue of whether preinvestigation conduct can be used as obstruction of justice. As the guidelines are now, it has to be when an investigation is ongoing, it's a bright line test, it works.

The courts have used it, have employed it, the circuits lit is really illusionary since the courts that found it did not use the amendment and did not use the specific language that the Commission asked for. This is an amendment whose time is not now. The Commission acted, and it should stay.

If the Commission does push forward the

circuit--the position in which it can be preinvestigation conduct that can trigger an obstructive justice, they're opening a box where courts will then be dealing with all sorts of conduct that could be termed nefarious only with hindsight. You have different approaches, and you have situations in which there will be a disparity that, we would argue, is unwarranted. There is a virtue in bright lines, and this isn't one.

An example of the CJ Affidavit, it's a situation in which it's not trying to prejudice an investigation; it's an allocation of resources. It's situations like that that come up so rarely and so unusual that the Commission should not act. It is not worth a policy change. In the deed, the person is better off with a CJA, or with a federal public defender.

Turning next to a trend that we see in the amendments, there are a number of cross-references. Cross-references have bedeviled the Commission in the past. It has led to concerns about uncharged conduct, standards of proof, and it is disturbing that so many of the amendments have references to these cross-references to other guidelines We would urge the Commission when face with this

to back away. This would advance the issue of due process, of fairness, and would focus once again on rather the conduct as the compromise between charge sentencing and real offense.

The trend with the Commission with these cross-references has been to adopt a real offense sentencing, and in that way the warnings of Blakely and the holding of Booker would come to a pass. We would ask the Commission not to install a different guideline for misdemeanors. A offense level 4 is sufficient to raise it to six for some misdemeanors, especially for the four that were listed, seems once again to be reaching out for those few cases for that unusual matter. A court facing those situations is fully capable of assessing the danger and the risk and sentencing appropriately. The Commission need not act there.

We were here when the Bureau of Prisons testified, and I must comment that there are things there that I've never heard. Arizona has a great many illegal aliens that are defendants. They are usually sentenced to periods of three to four years. Most of them serve sentences in the Southwest, especially California City.

They are not eligible for the 500-hour drug program; they are not eligible for a halfway house; they are not eligible for camps; they are not eligible for many vocational training programs; they're not eligible for UNICOR. So for the Bureau of Prisons to sit here and say that they can use the whole menu of programs has been, in my experience, simply not true. They have been put in special camps with a restricted ability to get training and vocation, and to deal with the drug problems that have bedeviled so many of them.

I know that BOP has been working with the Mexican Consulate in Arizona to give them some papers and to ease their way back into their country. I think more can be done with that rather than just shipping them, and they walk across the border where, unfortunately, so many of them just come back.

I also want to deal with the fact that the Department of Justice here asked you to raise the steroid penalties so that it would be worth their while to prosecute. This seems very strange that the Department of Justice is coming to you and saying make the penalties tougher so we would have an incentive. If the problem is

there, DOJ will prosecute.

And in ending, Judge Cassell brought up the issue of victims. In Arizona the Department of Justice and the U.S. Attorney's Office has a very extensive victim outreach program. It is a jurisdiction that has a great many Native Americans in very violent crime in which the stories are heart-rendering. The victims have a chance to come to sentencing, they are brought into the proceedings. We see their letters, they get a chance to address the court. It is a situation in which they're not shunted aside or treated as step-kids; they are brought into the process, and they have a role.

The Department of Justice has that responsibility, and they should shoulder it. For someone to say that the Commission should leave doubt that way shouldn't be the case. It's the Department of Justice's responsibility, and they should take it. They've done it in many districts and maybe that they could do a better job.

But if you in--if you empower victims, you're also running the risk of sewing a wild justice because so many of the victims in certain cases are not pure, that there are

situations in which victims' stories have to be tested. And John and I were talking about this, in Indian country are defendants pay for the funerals, and the pay costs. But in other cases, telemarketing or something else, some of the victims' claims can be said to be inflated. There may be situations in which, dare we say, that the restitution is not warranted or not to the A--A amounts.

Judges, probation officers, the Department of Justice is doing a fine job now in making sure that victims are compensated, are having restitution. It's working. The Commission does not need to go that route.

Thank you.

CHAIRMAN HINOJOSA: Thank you, Mr. Sands. Who's going to have the first question? And it's not going to be Coach Mack Brown.

JUDGE CASTILLO: I'll start out that I apologize to Ms. Williams for missing the first part of your testimony. I'm in the middle of a two-month trial, and I have to take care of a couple of matters.

But when you say we should embrace Booker, what opinion should we embrace, the remedial opinion or the merits opinion? Because as far as I'm concerned, the

Commission has fully embraced the remedial opinion that Judge Breyer controlled the outcome of, from what I can tell. The problem, I think, is the merits opinion which I think that issue is going to unfold over the next couple of months. What do you think we should do about that?

MS. WILLIAMS: Well, I mean I think the entirety of the decision must be viewed, implemented, and embraced in its entirety. I understand the practical nature of the dilemma you describe in terms of Justice Breyer setting out the how, the excision, the realignment from mandatory to advisory. But I think that the language of Booker One, as it's come to know, informs that decision, and while, when you say it may play out within the next few months, from the field? That is the sense that we had and the actually occasioned my response.

The idea either that if we pretend it's the same it will be the same, or if we wait it will go away--which is what my significant other does in interpersonal issues--not--not a full--

CHAIRMAN HINOJOSA: It works sometimes.

(Laughter.)

MS. WILLIAMS: Well, it does, but I'm wise to it

now.

Not a full acknowledgement that this is a very powerful, very important Supreme Court pronouncement about--about aligning the sentencing process with the Constitution. And while that may seem to be an almost impossible abstract, it is the mandate, and it is what we do and what we all aspire to. And I can't, in the day-to-day practicality of your work and your data collection I understand that Booker Two may have more, more resonance. But that data and that implementation cannot be done outside of the perspective of Booker One.

CHAIRMAN HINOJOSA: Well--

JUDGE CASTILLO: If I could just follow-up this one, because it seems to me that fully embracing Booker One--and I've been a defense attorney as well as a prosecutor--means the involvement of juries in sentencing decisions in no uncertain terms. And I'll open this up to reaction from all three of you: I see no good coming to any defendant in asking a jury to decide a sentencing factor after they have made whatever decision they made on the guilt or innocence. And, by definition, you wouldn't get the sentencing unless there's been a finding of guilt.

So with that provocative question, I'll throw it open.

MR. SANDS: Well, there are a number of things. First we realize that a number--most cases settle. If you are dealing with elements or with sentencing facts, the government will disclose more information.

JUDGE CASTILLO: Um-hmm.

MR. SANDS: That is an issue that you can deal with, and that goes go the disclosure process.

JUDGE CASTILLO: Is this what this all comes down to Mr. Sands? This--

MR. SANDS: The second is--

JUDGE CASTILLO: --discovery and disclosure of sentencing factors?

MR. SANDS: No. It is knowing what you're facing, is knowing what the facts are that you will be sentencing are. The cross-references that are a problem, that goes to Booker One. That goes to what are my charges? What am I facing? And that should color or should inform the amendments.

Second is--or third at this point--Booker Two has advisory, but the Commission can look at the 3553 factors

anew and say, is the sentence longer than necessary? Are these factors really, these enhancements that we see in the 700 amendments, are they really advancing the 3553 or are we trying to deal with that rogue case, or these three issues here? What are we trying to do?

And in the background there is Cunningham that is coming up in front of the court with the presumptive sentence, and Harris after that. Where is that going to lead? We only have to look at the immigration guidelines to see what trouble the guidelines can be in, in trying to appease the O.J. and Congress.

JUDGE CASTILLO: I'll give you--sorry.

CHAIRMAN HINOJOSA: Well, I don't know that I agree with calling that opinion Booker One and Booker Two. Read together it's one opinion, and there was a problem with regards to the application of the guidelines with regards to enhancements in the jury trial which was solved in the opinion by saying these are now advisory and everything else continues with regards to what the Commission is doing as well as considering all the 3553(a) factors. And now that you bring up the 3553(a) factors and no longer than necessary, I yet to see anybody who says no longer than

necessary to satisfy (a)(2), which is what the statute actually says. Those are the factors that the Commission as been directed to consider.

The others are restitution, considering the available sentences, avoiding disparity, you know, and the guidelines and the policy statements. And so there--or the criminal history in the commission of this offense. I mean to say that that is not considered by every judge and by ever Commissioner when you decide as to what the guidelines should be, you know, no one is going to ignore the fact that you don't want a longer sentence than necessary with regards to the punishment for the particular offense.

And, you know, the factors under (a)(2) are really all for the protection of the public except the fourth one, which is rehabilitation.

MR. SANDS: Right. But then we have situations, going back to immigration, in which you're having pluses 16 in--in enhancements with knowing that analysis. Or in cases here--

CHAIRMAN HINOJOSA: Well, I don't know that that's fair. You know, I wasn't on the Commission, but the analysis comes from the fact that the maximum punishment got

increased by Congress from two years to 20 years, which is tenfold. Because many of us remember being judges and/or practitioners when the maximum was two years, and then it was changed by Congress from two years to 10 years for a prior felony, to 20 years for a prior aggravated felony. That's a tenfold increase by Congress with regards to the maximum punishment.

MR. SANDS: But it's that type of discussion and the expertise of the Commission staff and the Commissioners that should come into play. Or even with steroids not having the Department of Justice come here and say raise it, so we would have an incentive to bring cases.

MR. RHODES: I have a specific response to that--oh, I'm sorry.

CHAIRMAN HINOJOSA: I don't know that that was exactly the argument. I'm not here to represent them, but the argument was these are so low that it's not cost-effective to even proceed with them because nothing happens. But I don't think it was raised so we can, just for the purpose of bringing more; this is in order to enforce these. But, you know, I guess this is a policy discussion I'm having with you all rather than--

MR. SANDS: Policy is good. Policy is--

VICE CHAIR STEER: And to respond to a congressional directive, although it's not a specific one, but it's a pretty clear message that the Commission needs to take a new look at the steroid penalties.

CHAIRMAN HINOJOSA: That is--there were some real questions over here, I think. We'll start with--

MR. HOROWITZ: I will ask them anyway.

(Laughter.)

Judge Sessions.

JUDGE SESSIONS: And this is--this relates to the trafficking guideline enhancements, Mr. Rhodes, that you talked about. You suggest language "in the business of," and, obviously, one of the concerns that we generally have here is to make sure that the process, the criminal justice process, does not get burdened down with very difficult fact-based decisions that have to be made by a court.

And one of the objections that has been made in regard to using that language is that it's very difficult to prove and to decide what "in the business of" means. And I guess I'd like you to respond to that particular concern that's been expressed.

MR. RHODES: Well, first, Your Honor, it's defined in the statutes. So Congress has been able to define it. It's also defined by the Commission in 2B1.1. I believe it's Application 05 with respect to someone who's in the business of being offense (ph). So these are the type of fact findings that are made by courts every day. I don't think it would be that difficult, and it would have the immense advantage of capturing firearm traffickers, the people that DOJ were here about this morning talking about not people that I represent, who exchange firearms as a commodity because they're poor and they have five shotguns but they don't have a pickup truck, so they trade the shotguns for the pickup truck. Those people are not gun traffickers.

But if the definition is defined overly broadly, too expansively, which I believe the current proposal in the Commission's proposed amendments is, then you're going to capture those people--which would be an example, Judge Castillo, where we'll go to trial on that issue, 'cause my client is not a gun trafficker.

Montanans understand that, and so I don't believe "in the business of" is something that courts are incapable

of wrestling with, particularly now when they're dealing with astronomical loss figures, which is a far harder factual determination in terms of determining the loss amount in fraud guidelines. I think it's pretty easy to determine who is the gun trafficker, who that is their livelihood, that's the purpose of what they're doing as opposed to someone who's merely using guns as a commodity because they have nothing else.

JUDGE SESSIONS: So your view of the two or more guns being the base for trafficking would cover situations in which you're just giving a gun to somebody else or two guns to somebody else as a commodity.

MR. RHODES: Selfishly, for my clients in Montana I am incredibly concerned that I'm going to have people captured by that who in no sense are gun traffickers. Yeah, I'm very concerned about that for people defending rural Americans.

MR. SANDS: It's most of them in Mississippi.

JUDGE CASTILLO: Let me just follow up on that. When you say you'll go to trial on that, what value is a trial? Are you saying that you'd go to trial where the jury decides if the enhancement applies?

MR. RHODES: Yes, I was responding to--

JUDGE CASTILLO: If you were to have a judge let you do that.

MR. RHODES: But I was responding to your specific question.

JUDGE CASTILLO: Which is not today's world.

MR. RHODES: But you were saying what defendant would ever want to go to trial?

JUDGE CASTILLO: Right, I understand, but I just want to understand what's going on now. If you would acknowledge, Mr. Rhodes, that the urban areas, meaning in the Bronx, New York; Brooklyn, New York; Chicago, Illinois; Washington, D.C.--I could keep on going--Miami, Florida have gun violence problems--not to leave out the District of Puerto Rico--how do we deal with those situations, are you telling me that your judges in Montana could not distinguish your situation of trading and give your defendants a break? Is that what you're saying?

MR. RHODES: First of all, I was referring, answering your hypothetical: if we did have juries determine--

JUDGE CASTILLO: You don't have to worry about the

hypothetical.

MR. RHODES: Yes. Our judges can differentiate between the cases that you see and the cases that we see. The problem is, if trafficking is defined overly expansively, then the court doesn't have that option. It makes the preponderance finding that the facts fit the definition promulgated by the Commission.

And we sat here this morning and heard what DOJ is concerned about. I assume it's what the judges in urban areas are concerned about, is people who are traffickers, who that is the purpose of what they are doing is moving guns through the stream of commerce, either for an intended bad purpose or something that would likely be a bad purpose. And I don't think anyone objects to punishing that behavior.

But if you capture along with that the rest of rural America, that's simply not fair.

CHAIRMAN HINOJOSA: Well, is it not the same for a commodity to say, "I'm giving you give guns for the truck"? I mean the end result is what will happen with the guns, and you're exchanging five guns for a truck as opposed to money? I mean I don't see the difference.

MR. RHODES: Well, that's where the recipient

should be someone who's an unlawful possessor. That's where they are "straw buyers."

CHAIRMAN HINOJOSA: And that's going to get prosecuted.

MR. RHODES: Right. And if you include unlawful recipient as part of the definition, you will capture the people who are using straws to make purchases; you won't capture someone who is merely accepting a rifle or a shotgun, which I'm sure has happened many times in Montana and probably hundreds of times today in the country.

CHAIRMAN HINOJOSA: It is probably happening.

JUDGE CASTILLO: Well, also, it's not too much to ask the government to shoulder that burden of proof that someone is "in the business of," and for a court to make that finding.

CHAIRMAN HINOJOSA: We have time for one or two more questions. Mr. Horowitz?

MR. HOROWITZ: In light of the time, I will pass--and I want the record to reflect that.

JUDGE SESSIONS: Could I just ask for a request? You offered to provide some information in regard unlawful scheme, and also I'd ask you to think about differentiating

this

particular--defining this particular problem. You've got one commissioner from Chicago.

MR. RHODES: Right.

JUDGE SESSIONS: And one from Vermont, and obviously different communities. How do you write something which satisfies the interests of both kinds of communities? Just to think about it.

MR. RHODES: Okay.

CHAIRMAN HINOJOSA: Does anybody else have any other questions?

(No response.)

CHAIRMAN HINOJOSA: Thank you all very much. It's always we appreciate your insight and your inputs, and you've done it quite a few times and at your expense and time, and we appreciate it very much.

MR. RHODES: Thank you.

(Whereupon, at 3:17 p.m., the panel concluded.)

USSC PUBLIC HEARING, PANEL VI

[3:18 p.m.]

VICE CHAIR STEER: Why don't we go ahead and get started. I'm sure he won't mind if we do that. What order do you prefer? Cathy, do you want to go first?

MS. SMITH: I'll start, unless you--

MS. BATTISTELLI: Do you want to start?

VICE CHAIR STEER: Is that okay?

MS. BATTISTELLI: Sure.

VICE CHAIR STEER: Greg, go ahead.

MS. SMITH: Thank you. Good afternoon. It's a pleasure to be here. My name is Greg Smith. I am a practicing attorney with the law firm of Sutherland, Abill & Brennan, and for the past two amendment cycles I've been Co-Chair of the Practitioners Advisory Group, which will be submitting its comments today.

Because I will soon be leaving private practice, I want to introduce you to David DeBold, who it looks like will be taking my position as Co-Chair of the Practitioners Advisory Group. He is a lawyer with Gibson, Dunn & Crutcher, and he has kindly agreed to be here today.

Because others have addressed other guidelines, I will primarily be addressing proposed amendments 3 through 10, and David will handle 11 through 14 on behalf of PAG.

This is a special time of year. Starting tomorrow sports aficionados and amateurs everywhere will be sneaking peeks of the latest news from ESPN wondering how their alma maters are going and hoping to hear about that first, last, second upset. But if you will forgive me, I don't get quite so primed for what some might call a different kind of March Madness. It, too, involves bracketing and scoring, sometimes the creation of a frenzied atmosphere and perhaps even an interesting selection process.

But instead of the joy of watching America's premier amateur athletes playing their hearts out for the top 65 college teams, this March Madness means that we must examine details of drafts, prepare lengthy written statements, and give, unfortunately, late afternoon testimony to a tired audience about what, this year, seems to be about 65 proposed new amendments to the Guidelines.

Now, respectfully, it doesn't have to be this way. Now, I'm not by any means suggesting that you go into what we alums of North Carolina used to call "the four corners."

You couldn't do that even if you wanted to. What you do is very important, and if I didn't think so, we wouldn't have worked so hard on our responses, and I also wouldn't be here testifying.

But I must say that those on the defense side, candidly, were genuinely surprised this year by both the number and the level of detail of the various amendments proposed by the Commission in the year after Booker. The latest proposal seemed to go far beyond what Congress directed, beyond the resolution if circuit splits, and indeed beyond what we usually see in most years.

The Commission, for example, appears to be on the verge of adopting changes to the immigration guidelines even while Congress is about to adopt broad immigration law changes of its own that will likely require the Commission to replot the same ground next year.

Similarly, you've initiated a look at whether the lesser harms departures should be eliminated for all felon and possession cases. Do you realize what this would mean? I mean I don't want to give you the extreme example, but then again I do. What it would mean, for example, is even on a defendant who had had a prior conviction at age 20 on a

felony tax charge, if he's later found in his home at age 75 with a gun in his closet because his grandchildren bought it for him for self-protection after his neighborhood became less safe, it means you can't give a downward departure for a lesser harm in that situation.

Responding, our concern, though, doesn't end with immigration and firearms charges. Now, a lot of you have made the comment you're about to ask the tough questions. I have a tough question of my own. I'm not sure of this, but I'm going to ask it anyway: Are there any guideline amendments this year being proposed to reduce sentences? Is there one? Excuse me if some of us feel sort of like Hostra, like we've been a little left out.

Responding to the Commission's 87 single-spaced pages of proposed guideline amendments and requests for comment this year, particularly on an expedited basis, has felt a little bit like handling a full-court press. There are certainly times when a press is needed, but, as Ms. Williams said, we do wonder if the Commission must look so hard for more and more creative increases, particularly when the Bureau of Prisons is 40 percent over capacity.

Turning to the specifics, since I've been talking about basketball I suppose it makes sense to start with Number 3, the emergency steroids amendment, or what I'll call the Commission's "fast break." Not a snowbird, mind you, since the Commission, commendably, deferred on steroids last year, but a fast break nevertheless. Given statistics showing that steroid use is down and, indeed, is approaching historic lows, why do we have this rush to judgment?

As we mentioned in our February 23rd letter, there can be no doubt that Congress has given this Commission full discretion in the area. PAG believes the Commission should address Congress' specific concerns about Youth and Sports through specific guideline--specific offense characteristic adjustment geared towards sports and youth rather than a generic base offense level increase.

Nowhere--I've looked at all legislative history and I'm sure you have--nowhere did Congress said [sic] that it felt that the ratios needed to go up by 20 times, or that all steroids penalties needed to be doubled or tripled across the board, even without any connection to sports or youth, which was the clear focus of this legislation.

Now, I know Ms. Avergun came in and talked about

the costs, for example, on a purity base system of having to establish that through DEA testing. She said it would cost tens of thousands of dollars. But when it costs \$23,000 a year to house each individual defendant each year, you shouldn't choose more punishment simply to lessen "the Athenson" (ph) and the Department's work load. And that's especially true given what you said in your 15-Year Report.

You said there, on page 50: "The weight of inactive ingredients mixed with the drug results in disparate sentences for offenders who sell the same number of doses." In the legislative history of the Steroids Act, it specifically talked about how they wanted to be sure that the Commission would establish proportional punishments. How does equating steroids across the board with Schedule 3 substances give proportional sentences?

Those steroids are of all different kinds. They why you didn't include them with Schedule 3 drugs before. At a minimum, it seems to me--at a minimum you have to at least give an out to the judges where if someone comes in with a steroid that is less dangerous or different than the others, that they have to have the ability to give a downward departure.

But, more importantly, I just don't know why you would multiply much like crack, instead of 50 times it would be 20 times here from a lot of these types of doses. Bumping everyone's base offense level to what is still going to be a five-year max, and up toward the top of that five-year max for more and more people will only lead to less proportionate sentences, and, frankly, less distinction between the people who do deal with sports offenders and do inflict our youth. The specific offense characteristics, in other words, will not create the kinds of distinctions you would want and the Congress was hoping for between the low-level people and the ones who were dealing with these two areas that they want to focus on: Youth and Sports.

Raising the offense--base offense level will only move more people up and have less distinction between the people who are dealing in the harms Congress was concerned about. In light of steroids less direct and societal harms we believe the Commission should take a conservative approach and either enact no base level increases at all, or at the very least the least punitive of the proposed alternatives, not Option 2, but 100 milligrams at the most.

And the mens rea requirement should also be added to all enhancements, and the Commission should enact a new specific offense reduction for body wasting, as we've requested.

I know that's a lot of steroids. Let me move on to the Transportation Act, or what I'll call "traveling." We call for the establishment of a new base offense level under the Transportation Act of five, under 2B1.1 for offenses like this one that have maximum penalties of five years. In other words, 2B1.1 has a base offense level of six unless it's a penalty--unless it's a crime that carries--has a 20-year max or more. If it goes from six to seven for 20-year maxes, why shouldn't it go from six down to five for offenses like this that are five years or less?

We also concur with the defenders' suggestion that, given the nature of this offense which really it's a delivery, failure to deliver goods. It's much like a contract dispute. At a minimum you ought to establish with this two-year max a situation in which the specific offense characteristic for loss amount is based on actual rather than an intended loss amount. In other words, the rule should be no harm, no foul.

On Issue Number 7, Intelligent Reform and Terrorism Prevention Act, we once again believe that Option 1, or the Option 3 alternative requiring a conviction under Section 1324(a)(4) be required. We noted in our comments, and as the defenders did, the proposal is to increase the offense level if any one of three particular items is met. But the House of Representatives passed that in the disjunctive, and Congress rejected it. In 1324(a)(4) they said that this enhancement should apply only if all three of the criteria are met.

In other words--I know I'm talking about a lot of different things here--but, in other words, adopting--for the Commission to go forward with the options would enact the very same system that Congress rejected. We don't believe that that should happen. Going with either Option 1 or the Option 3 alternative requiring a conviction under Section 1324 would also obviate the need for the Commission to define the term "ongoing criminal--commercial organization."

Finally, we are also troubled by the use of hoax--by the cross-reference of hoaxes from 2A6.1 to M6.1. Again this is a generic approach rather than--that's dressed

up as an implementation change.

I have three more to go on false domain names, Item 8. There's a request--or there is a suggestion that if false domain names are used that the increase would be anywhere from one to four levels. We don't think it should be more than two levels in any event.

The Commission's steroids amendment, for example, suggests a two-level increase for masking, and we see some analogy between false domain names and the masking proposal that would tend to suggest that no more than two levels should be added here.

We also ask that consistent with the statute that the new amendment be amended to codify that the amendment should not be applied to misdemeanors or unless the underlying offense is furthered by the false domain name.

On the second to last, Number 9, Miscellaneous Laws, one of the miscellaneous laws is calling for a brand new generic catch-all guideline for Class A misdemeanors that are not handled elsewhere. We believe that the catch-all misdemeanor should start at level four, not six. I say that for a couple of reasons--first of all, these proverbial touch valves of the federal criminal justice

system are going to handle, cover the misdemeanors that nowhere else is covered--that are covered nowhere else, regulatory paperwork type offenses that constitute Class A offenses. We cite a number of analogous provisions that start at offense level four, and we think that these that haven't even been categorized in 20 years also ought to start at level four.

Starting at level four would also make, keep in place the situation in which there still would be some benefit to pleading guilty in the hopes of getting acceptance of responsibility. If you start at six, you're going to be up to the--well above the year, particularly with the two-level, others suggested, offense level specific offense characteristic, and there will be oftentimes no benefit to pleading guilty.

Finally, on Number 10, the application issues, we ask that the--we don't have an objection to moving the 2J1.7 to 3C1.3, but we do not understand why the Commentary is being eliminated. Some of the items in that Commentary, including the specific undisputed analysis that the law does not require any minimum term is explicably being omitted,

and we have some concerns that it would be misconstrued if it were to be eliminated.

Finally, on this there's, eliminating the Commentary would also eliminate the notice requirement. There's some suggestion that there's a circuit split on the notice requirement, that there are two different kinds of notice when we're talking about committing an offense while on release. One is presentencing notice and the other is prerelease notice. We acknowledge there's a circuit split on prerelease notice and that the court--the Commission may wish to clarify that.

But on presentencing notice when we're talking about another offense, surely we ought to get noticed before showing at the sentencing hearing that this enhancement is in play. And no circuit has ever held that a defendant is not entitled to that kind of notice. Once again, we ask that that be carried forward.

For what it's worth, PAG also joins the other defenders' other comments, and I know I've spoken for a while, so I'll pass it on to David.

CHAIRMAN HINOJOSA: Thank you, Mr. Smith.

MR. DEBOLD: Thank you, Chairman Hinojosa and

Members of the Commission. My name is David Debold. I thank you for the opportunity to appear here today on behalf of PAG, along with Greg Smith.

I joined PAG approximately two years ago shortly after joining the Gibson, Dunn law firm here in D.C. Before that for about 17 years I was an Assistant U.S. Attorney in Detroit, and I was that office's guideline specialist. I joined the office shortly before the guidelines were reborn, followed them through their difficult childhood, through adolescence, and I've had the pleasure of serving with the Sentencing Commission for a six-month detail in 1991 and have taken part in a number of training programs and conferences and seminars with the fine staff that you have here at the Commission.

I do appreciate the opportunity to offer the additional views of PAG on the guideline amendments. I want to talk first about the proposed amendment to the obstruction guideline. We echo the position that was referred to earlier today by other federal defenders that the proposal to expand the obstruction of justice guideline to include conduct that occurs preinvestigation and preprosecution in sentencing is not appropriate.

As John Sands mentioned, there was a 1998 amendment that the Commission adopted that resolved what was done to circuit conflict on whether pre- or post-investigation conduct was to be included. The Commission clearly stated that it should only be postinvestigation, and in our letter which Greg said you'll be receiving either today or tomorrow, we analyze the cases that are identified in that in the synopsis in the materials the Commission put out to point out that none of those cases which identified being on the side of the circuit split were--it should include free investigation conduct. It really analyzed that language on the 1998 amendment.

If anything, the Commission should be consistent here and state that the 1998 amendment is still in effect and that the investigative conduct--or post investigative conduct is where the line should be drawn.

There's a practical reason for drawing the line there as well. It's often very difficult to tell when the offense ends and when the obstruction begins. It may not be surprising to any of us that most criminals prefer not to get caught. Many of them actually take steps not to get caught when they're committing their crimes.

And so there are quite frequently situations where they will do things in the course of committing their offense, either in the middle of the offense, toward the end of the offense, or even at the beginning that would be considered obstructive conduct because it's designed to thwart an investigation.

Lulling letters during a mail fraud scheme, falsifying records or destroying records to cover up embezzlement, depending when in the course of a crime those are committed, different judges may conclude that they are obstruction; other judges may conclude that they are part of the original offense. There are multiple, multiple fact variations that could be discussed that fall into this situation, and there's no really clear way to distinguish between what constitutes obstruction or obstructive conduct and what constitutes the offense of conviction, or what is more part and parcel of the typical offense. The investigative line, there's a nice clear line that has worked well in practice, and we ask the Commission to retain it.

We also think that it is a bad idea to include an example in the obstruction guideline that would enhance,

that would save the enhancement applies if someone commits perjury in the course of a civil proceeding. The way the proposed amendments work in combination of the obstruction guideline right now, it appears that that enhancement would apply if somebody perjured him or herself in a civil proceeding, and it possibly obstructed the administration of justice in that civil proceeding rather than the investigation, prosecution, or sentencing of the criminal offense.

I'm not sure if that's what the Commission intended, but if it is, that would require the judge in the criminal case to be very heavily involved in trying to figure out what obstructed a separate proceeding beyond the one that the judge is presiding over.

We suggest some language in our letter that would resolve that problem and would make clear that if there is going to be any inclusion of a perjury in a noncriminal proceeding that the showing must be that the intent was to obstruct or impede the investigation, prosecution, or sentencing of the criminal case itself and not the separate unrelated--the separate civil or administrative proceeding.

As far as the attorney/client privilege, I'm not

going to say much about this because you've heard from other panelists before. I do want to make two points: One is I'm aware that the Commission cannot dictate what the Department of Justice attorneys will do, will consider, when deciding whether or not to prosecute a corporation or what kind of charges to bring.

What the Commission can control, what factors a judge will consider when deciding how to apply the culpability factors in the Commission's own Chapter 8. And what we are simply asking the Commission to do is return to the system that applies and has applied all along for individuals. When an individual is deciding whether to accept responsibility or cooperate by substantial assistance or even try to qualify for the safety valve, there is nothing in the guidelines that tells that individual that they must consider waiving their rights to attorney/client privilege or waiving work product protections. And those same rules ought to apply for corporations.

No one has ever suggested that conditioning the availability of those provisions for individuals should hinge on whether the individual is willing to waive their privilege for attorney/client communications or work

product.

Now, a defendant may on his own decide that he will give up those rights, will give up those privileges, but the Commission does not create a condition in the guidelines that makes the availability of those credits depend on whether they make that kind of a choice.

The second problem that we see with this current language is that it's very difficult to apply the requirement that the Commission has set forth in the--in the sentence at issue. Timely completed and an accurate provision of information, if a waiver is necessary for that, then the waiver must be had; however, most of these cases come up when an investigation comes--or a problem comes to the attention of corporate counsel. Usually, they find out about a problem at the corporation at or shortly before the time that it comes to the attention of the government. It is not easy to have a full amount of information in a short period of time.

And, more importantly, for purposes of how the guideline applies, the in-house counsel or the outside counsel has to ask a number of questions that simply cannot be answered: Does the government already have the

information that I know from a privileged communication?

If the government doesn't have that information, how soon will they be able to find it out on their own? If they find it out on their own in the next month, will that be considered timely in hindsight when we get to the sentencing stage of this case? It makes it very difficult for an attorney who is advising a client to make an intelligent decision about whether to waive the privilege and be able to take advantage of the sentencing guideline provision.

The victim rights proposed language, we have one minor suggestion with respect to the policy statement of the Commission has proposed adding. It certainly is appropriate to make reference to the language in 18 USC Sec.3771; however, the proposed amendment also makes a catch-all reference at the end of it to any other provision of federal law pertaining to the treatment of crime victims.

We know that the Commission to the criminal rules has recently recommended the publication of certain proposed amendments that would spell out the procedures for implementing the victims' rights that were created by the Crime Victims' Rights Act, and the Attorney General is

required to promulgate various regulations as well.

We think it would be wise for the Commission to focus in on the language of 3771 for now, and if it becomes appropriate based on other legislation, other laws, that expand the rights of crime victims, to then have more broad language at that point.

Finally, the release on the motion of the Bureau of Prisons, I have to confess despite being, as I said, a Sentencing Guidelines Specialist for 17 years in AUSA, I was only recently aware of the language that is in Section 3582(c) that allows the Bureau of Prisons to make the motion for reasons other than a person being over the age of 70 and having served 30 years as a three strikes defendant.

The extraordinary and compelling circumstances provision that is available and has been available for quite some time, in our view can become a useful, limited safety valve under the control of the Bureau of Prisons that would operate at the back end of the criminal justice system and take some of the pressure off in those rare circumstances where a sentence of imprisonment is imposing a hardship and where there are compelling circumstances to justify the early cessation of that sentence.

And as consistent with the language that has been in the Sentencing Reform Act since the 1984 Act, we encourage the Commission to go the next step in the next cycle and to consider some of the specific circumstances and factors that have been set forth previously, and that we would be happy in assisting the Commission in providing further ones for down the road.

Thank you very much.

CHAIRMAN HINOJOSA: Ms. Battistelli.

MS. BATTISTELLI: Good afternoon. Thank you for the opportunity to address you, and I would also on behalf of POAG like to thank you for the opportunity that you extend to us by coming to D.C. earlier in February to be able to meet and discuss some of these issues face to face. We are lucky to have the opportunity to be briefed by staff on some of these amendment issues prior to our meeting, which is valuable to us in our discussions.

Most of the time during our face-to-face discussions, we were able to bounce ideas off of each other and play devil's advocate on a couple of possibilities on how we initially interpreted the guideline, and then much to our surprise we end up changing our mind several times

during the course of the meeting in trying to determine what semantics are in play.

We responded to some of the amendments, not all of the proposals, that were presented, and we always take the approach of we're looking at these amendments from the probation officers' point of view of, do they present application difficulties? Will we be able to understand them? Or will the new practitioner be able to understand them? These are many times in our discussion that we, as experienced officers on POAG, have trouble understanding some of the suggested language, and then we try to determine how someone just coming on board with maybe a year's experience is going to try to interpret that language.

So that being said, we actually like the amendment process and are glad to see that you're marching forward and coming up with amendments, especially with the impact of addressing certiorari conflicts or some of the language. And we recognize that some of the issues on the table in this discussion are areas that we've raised as other concerns or that have been raised through training sessions or calls to the help line.

I'd like to start by saying I recognize that

you've spent time in San Diego and San Antonio on the immigration issue, so I really don't want to spend much time there because I know we did have members from probation officers that were--attended those sessions. And Phillip Munoz, who's on the immigration working group, is also on POAG, so he was able to brief us on the issues that were presented.

However, that being said, one of the issues that did raise with respect to the immigration issues was, had to do with the endangerment of minors. And from an application point of view, we found that it would be almost difficult to determine the age of a minor based on the status of their being illegal or whether they didn't have any documentation. So from that point of view we preferred the language a general term of "minor," rather than having the specific offense characteristics of either a two-level or a four-level similar to what we find, I think, in the child pornography guidelines.

I'd like to talk a little bit about the drug--the firearm guideline, and after listening to the last panel, I'm not sure I want to go down this road given the question about rural versus urban areas on the trafficking

definition. But that was an area of a big concern for our group, and, surprisingly, we had people from a rural state like myself, New Hampshire, and Philadelphia, which both viewed the current definition as being overly broad. And we are very concerned that we would be, if that definition was implemented, that you'd be capturing some people that we're not sure you intend to capture: the straw purchaser.

And one of the examples that we had both seen in my district and in Philadelphia were the cap, the situation where the girlfriend of a prohibited person goes in to buy the weapon and does it say on two occasions that girl could also be a domestic violence victim in this relationship, transfers the gun to the prohibited person, and the, if the government is unable to prove that that prohibited person transferred the gun to someone else, the girlfriend may end up receiving a higher sentence than the actual prohibited person. In our view that's not the right culpability, and that was a concern of ours given the general problem right now.

We do recognize that putting guns in the streets is a very dangerous situation, and that's obviously a concern for everyone on our group. However, we just think

that at some point we have to look at not capturing some of the lower-level people or having some added commentary, possibly, on how to address those situations.

The other concern we had about the trafficking definition has to do with the potential double-counting issue, which I believe the last panel just touched on, or they did in their paper. B1, I think now talks about if you have a certain number of weapons there are certain increases.

The trafficking definition also talks about if you're trafficking in firearms, we say between 2 and 24, you may get a two-level, 25 or more you get a four-level. It appears that may be a double-counting issue. It may be permissible double-counting, and if that's the case, we'd simply ask that you add a clarifying note in the Commentary to address that issue, because we can see that being raised in objections at sentencing hearings.

We believe that, from our experience, that the vast majority of guns that are being transferred are being done for drugs, so we would ask that you not use the definition for pecuniary gain; rather, we'd prefer that they were for anything of value just based on our--it's usually

for a small amount of crack or some type of drugs, and that's what they're being transferred to.

We ask that you resolve the issue of the in-connection--(off mike). And this was a part that we really struggled with in trying to come to some type of consensus on this. Options 1 and 2 with the mere presence of the firearm would seem to trigger that. The only concern we have there is that seems there might be some inconsistency between that language and the language in 2D which appears to limit it in, as the Commentary note, unless it's clearly probable that the weapon was connected with the offense. So we were thinking that you do implement Option 1 or 2 that maybe consider adding that type of language for that issue.

Option 3, we really did not like. That's the one consensus we came to. And again it's because of inconsistency. If you're charged with drugs and guns, if someone's arrested in their apartment and they're a convicted felon, and they're found with the weapon in the apartment and drugs in the apartment; if they're prosecuted under--and it's charged as a drug crime, more than likely they will get that two-level gun enhancement.

If mere presence is not enough for Option 3, then the question becomes, isn't that some inconsistency between the two guidelines, and that there should be some consistency there?

We also do not think it's needed to limit prohibiting downward departures for 5K2.1.11 (ph) cases involving prohibited felons. We think that that guideline the departures are not used very often, and they're used appropriately when they are. We believe in giving the judge's discretion in using those sentences.

With respect to steroids, many people in the group had very little experience in dealing with steroid cases. I think there were a handful of us who have ever dealt with the steroid issues. But one of our concerns is that right now we are still experiencing a problem in getting lab reports at all in general drug cases, whether it's crack, powder cocaine, marijuana. If they're prosecuting historical drug cases, or even if they have seized drugs, we're not getting lab reports.

So if the steroid amendment is passed and it's going to depend on lab reports, we feel that that's going to be problematic because the labs aren't set up for that, and we

won't be given access to it.

Our real concern with respect to steroids really had to do with the coaches. At this point in time, we recognize there's only one suggested increase for if a coach was involved, but we saw a big difference between someone coaching a high school athlete or collegiate athlete versus a professional athlete, and that we thought that at some point if you are going to have an increase for the coach, that really should be separated out where the high school and college coach of those students receive one level and be a higher level than those of a professional athlete.

A professional athlete is usually an adult who is able to make a more informed decision as to what they're doing to their body, whereas a younger person is not and it's possibly greater harm to their body.

With respect to the circuit conflict on obstruction of administration of justice, we found the language fairly confusing at this point in time, and we were concerned that you were then going to capture more behavior than what you may have intended. We thought that there should be some type of temporal component added, and I think it's similar to what defense counsel has said that make a

direction connection as it stands now to the offense of conviction.

The false--the one of the concerns that we also had is there was the inclusion of a false statement on a financial affidavit. We suggest you do not add that in the obstruction of justice. We found that there's no real direct correlation between lying on a financial form to obtain an attorney and the offense of conviction, and that there may be other remedies involved for the false financial statement.

The clerk's office right now at times when they have suspected of people lying on those are bringing them forward in magistrate cases, usually in prosecuting them or asking them for reimbursement. We feel that that's the more appropriate remedy.

The one other issue with respect--and it appeared under the firearms section--was the definition of "brandishing and otherwise used." We recognize that's a very difficult decision to make and, however, those two terms end up dealing, having probation officers having lengthy sentencing hearings at times and objection process in trying to make that determination as, which is it? Does

the gun have to be actually placed at someone's temple to have that be increased? Or is it just waving around?

One of the concerns we had is that we think there is a difference between waving a pipe around and potentially threatening someone versus waving a gun around and threatening them. But there's, in actuality, there's a greater harm that could happen by waving a gun around because it doesn't take much to wave a gun around and then point it at some one and shoot it, versus waving a pipe which you're had to be much closer to physical harm.

I know it's late in the day, so I think I'll rely on the paper for the rest of our comments, but if you have any questions, I'd be glad--

CHAIRMAN HINOJOSA: You've made all the points you wanted to make?

MS. BATTISTELLI: Yes.

CHAIRMAN HINOJOSA: I didn't want to but you short?

MS. BATTISTELLI: No, that's fine.

CHAIRMAN HINOJOSA: Okay, were you leaning forward like you had a question?

MR. ELSTON: I just want to pay attention to the

Chair who is going to--

(Laughter.)

CHAIRMAN HINOJOSA: And my speech is, does anybody have a question?

COMMISSIONER HOWELL: Could I just ask one question about obstruction conflict resolution, the circuit conflict resolution that the Commission's trying to resolve? And I understand your comments and think they're quite interesting about some of the difficulty that maybe an application, that having, you know, the clear line of the investigation started whenever that may be. Is it the filing of the subpoenas, the notice that you're able to give a subpoena? I'm not sure that that line is actually so clear.

I also think that, you know--and I haven't seen POAG's comments yet--but I just wonder if you could address some of the concerns that the Commission had that in some ways we're really just catching up with where Congress has been. I mean the data destruction crimes, the new crimes in Sarbanes-Oxley which make it absolutely clear that obstructive conduct that occurs, you know, long before a formal complaint's been filed or, you know, a formal, you

know, investigation, a formal subpoena has been issued.

You know, is, you know, part of what Congress has spoken in those new crimes and, you know--so I just wonder whether you deal with sort of the thrust of where Congress is going on looking at obstructive conduct and not requiring a formal proceeding to have started, or a formal investigation to have started to capture obstructive conduct?

MR. DEBOLD: Well, it's our understanding that, first of all, an investigation can begin without a formal issuance of a subpoena, obviously, or without a proceeding actually opening: say, a grand jury proceeding.

In our view, there are a couple of ways to deal with that problem. If the government believes that that conduct needs to be sanctioned, one is to bring--to bring a separate charge based on one of those underlying offenses that you said, that you say Congress has been promulgating.

The other is in the rare cases where you do have an unusual situation where you have preinvestigative conduct that is obstructive and is out of the ordinary--it's not their ordinary preinvestigation conduct, and the court is always able to depart or to take into account in the 3553(a)

factors--I'm not aware of data showing that there has been a large increase in this problem over the last few years where you have conduct that a large number of judges believe they're not able to do anything about because it's before that investigative line has been crossed. You know, they're not able to take into account either as a departure or now in post-Booker through one of those other--through an adjustment just to find the 3553(a) factors.

COMMISSIONER HOWELL: Well, except that we have the circuit complex where some courts are saying they're--(off mike).

(Simultaneous conversation.)

MR. DEBOLD: --In our letter we said--

COMMISSIONER HOWELL: --acknowledge it and--

MR. DEBOLD: The guideline was amended in 1998, and it clearly said one of our reasons for doing this is to clarify the temporal component, and it sets it out. The cases that are cited in the synopsis, one of them is from 1991. Two of them are from 1999 or '98, neither one of which mentions--one of which is not mentioned in the amendment at all; the other one mentions it but says: We don't have to decide it because, in fact, his conduct

continued past the beginning of the investigation.

And the final one was from, I think, 2003, and in that case again the court cited back to one of the other cases I've just mentioned and then some pre-1998 cases without acknowledging the 1998 amendment.

So I think, you know, maybe those cases are aberrations, and it may be worth reinforcing that this is the line that the Commission has drawn, and that would help bring those circuits back in line with the other circuits because of the further clarification in a 2006 amendment. But I think that's the way to deal with it rather than flipping back to a position that the Commission rejected eight years ago.

MS. BATTISTELLI: Could I add to that?

MR. DEBOLD: Sure.

MS. BATTISTELLI: I think the problem we have is in document cases it seems fairly easy to apply if someone's destroying documents because they're heard there's a ongoing investigation, and you can show some type of actual destruction of documents.

Our concern is that in other type of cases it might not be so clear-cut, and it would be much difficult to

apply, given, you know, if it's a drug deal, and how do you know that they know that the investigation is ongoing, and they've started destroying some of the evidence unless the police actually catch them or not?

The other thing is, I think, from officers' point of view that judges can take that into account in sentencing either within the range or now, under Booker, in sentencing outside the range if that type of conduct seems to exist.

VICE CHAIR STEER: I just was going to ask you, how would you feel about us putting in some commentary language that would leave this to upward departure consideration, since it is hard to define and exactly what you want?

MR. DEBOLD: In our letter, I think we make mention of the fact that one of the examples the Commission wants to add, or proposes adding, is a threat to a victim to not report an offense. And that, to us, seems like something out of the ordinary that creates a separate harm to the individual, that is clearly designed to prevent an investigation from ever occurring. And it may be worthwhile if the Commission, you know, thinks that that kind of guidance is needed to use that example as part of a

proposal, or as part of a suggestion to the court there may be circumstance where departure is warranted to account for this unusual circumstance.

MS. BATTISTELLI: I think probation offices would agree with that as well. They would be handled as a potential departure issue in those isolated cases, with some examples. I mean we're big on examples. We love examples when you suggest things. So that would help us.

CHAIRMAN HINOJOSA: Does anybody have any other question? (No response.)

I guess I'll ask one quick last one, Ms. Bottistelli, and that was with regards to the issue of the form requiring court-assisted--court-appointed counsel, which is signed under oath, and it is part of the case. And so why is it that you feel that that is not part of the case?

MS. BATTISTELLI: I--

CHAIRMAN HINOJOSA: Well, it affects the case in the sense that it requires a court-appointed attorney that is being paid by the taxpayer with regards to that particular case. In some cases, if that's the case, if you find out later that there was a

misstatement, because it may delay the case because you will have to go in and delve into this statement that's made under oath.

MS. BATTISTELLI: I think when we looked at that, lying on the form for court-appointed counsel, if we thought they were lying on the form because they were trying to hide assets which could impact restitution payments or their ability to pay a fine, I think most probation officers would apply it without a problem.

When it comes down to whether they're--it seems to me our discussion centered on whether that's a separate crime and whether it's a 1001 violation. If that's what has happened, then the government should be prosecuting that as such rather than giving it up as obstruction.

CHAIRMAN HINOJOSA: I think most judges and probation officers view that as important, as you indicated, as to whether the person could pay a fine or make restitution, and that is considered because you have been determined as not being able to even pay for an attorney, let alone the fine or the restitution. And so therefore--

MS. BATTISTELLI: Yes. And in respect to that, we would say that it should count as obstruction. But we--I

think what we were seeing there is that was the link we were missing and whether that is the connection.

If it's to determine the ability to pay a fine or restitution, then yes; if it was lying to receive a court-appointed counsel, quite frankly, most of the time we've got family members--for the federal offenders that we have with a court-appointed counsel, they're not necessarily lying; they're getting their families to come up with the money on another side, too.

And then that raises the whole other question as to how they're paying for their retained counsel afterwards.

But if there's that connection, we have no problem with it.

CHAIRMAN HINOJOSA: I wanted to ask the question because I wanted to hear your answer, but also because I thought it appropriate that you answer the last question since this is your last meeting as Chair of the Probation Officers Advisory Group. The whole time I have been on the Commission I have enjoyed your testimony and your help to the Commission, and I think that's true of every single one of the Commissioners. And we appreciate your service and

your help very much.

You have been fair in your comments, you have been open, and you have been sincere and certainly have shared your comments regardless of what you thought the Commission's view. And that is your job as an advisory group, and so we thank you very much.

MS. BATTISTELLI: Thank you.

CHAIRMAN HINOJOSA: And I have to say we all feel that the advice we get from the probation officers as well as the practitioners is always helpful. Thank you very much.

MR. SMITH: We thank you for your patience, especially so late in the day.

CHAIRMAN HINOJOSA: Well, we thank you for having awaited us, since we started late, and you all having waited for us.

MR. SMITH: Thank you.

(Whereupon, at 4:02 p.m., the hearing concluded.)